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ARLINGTON HOTEL
HOT SPRINGS, ARKANSAS

"UP THE RIVER WITHOUT A PADDLE"

- JAMES E. WEST

PARTNER IN DAILY, WEST, CORE & COFFMAN
LAW FIRM OF FORT SMITH. IMMEDIATE
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PAST-CHAIRMAN, SEBASTIAN COUNTY BAR
ASSOCIATION, THE ARKANSAS BAR FOUNDATION,
AND ABA EXECUTIVE COMMITTEE. AUTHOR OF
ARKANSAS STATUTES PROTECTING OWNERSHIP
OF MINERALS UNDER ARTIFICIALLY INUNDATED
LANDS. ASSOCIATE MEMBER, FORT SMITH
LANDMEN'S ASSOCIATION. HAS HELD THE
CHAIRMANSHIP OF NUMEROUS OTHER ABA
COMMITTEES AND MEETINGS, INCLUDING THE
OIL AND GAS INSTITUTE.

UP THE RIVER WITHOUT A PADDLE

Several months ago Spence Leamons asked me if I would make a talk during the 14th Annual Arkansas Oil & Gas Institute on the subject of "river problems". Having been exposed to several legal battles involving the Arkansas River, I naively agreed to undertake the task assigned to me. It was then, and only then, that I started getting the bad news.

First, I learned that I would be on the program on Saturday morning, a time when the playboys would still be in bed with hangovers; the non-playboys would be on their way home to mama; and the only people left would be the chairman and the final speaker.

I next learned that the program would include some excellent speakers who really know what they are talking about when it comes to mineral law. This reminds me of something my law school dean told me when I graduated from law school. He said, "Jim, you should read good books and you should associate with men and women who are much more intelligent than you are." He continued: "And you won't have any trouble finding them." I have fulfilled the Dean's request by reading Playboy and associating with the Fort Smith landmen.

My next move was to do some preliminary research, and I quickly found that three previous speakers at this institute have covered most of the problems relating to river law, and that a recent article in the Arkansas Law Review contains 22 pages of exhaustive coverage of the whole subject matter.

These presentations, in chronological order, were: Speech by James H. Pilkinton at the First Annual Arkansas Oil & Gas Institute on the subject "Problems of Accretion and Rights of Riparian Owners"; speech by Robert T. Jordan at the Fourth Annual Arkansas Oil & Gas Institute on the subject, "Problems of Mineral Ownership where Navigable Waters have been Artificially Created or Changed"; speech by Judge Richard Mobley at the Eighth Annual Arkansas Oil & Gas Institute on the subject "Some Legal Problems Caused by Artificial Control of Navigable Rivers in Arkansas". All of these talks have been published by Murphy Oil Corporation.

The Law Review article is by Professor John F. Grimes in 27 Ark. Law Review, pages 429-451, and his subject is "Lex Aquae Arkansas". I always wondered why I took Latin in prelaw, and now I know. I believe "Lex" means law and "Aquae" means water, so I suppose the title means "The Law of Water in Arkansas".

About the time I learned the subject had been so well covered, I received a telephone call from Colonel Ransick, Executive Direc-

tor of the Arkansas Bar Association, asking for the title of my proposed talk. I said, "Colonel, I'm up the river without a paddle," and that became the title for this talk.

Is there anyone in this audience who has never at any time in his life told a little white lie? Is there anyone in the audience who has never in his life taken some little something that did not belong to him? I just wanted to know what kind of audience I am speaking to. A bunch of liars and thieves.

Some of you will recall that several years ago I made a talk at this Institute on the subject of descent and distribution. At that time I told you something about my family history. Spence requested that I repeat the first part of my discussion. You will remember that I told you my grandfather was an old Indian fighter. My grandmother was an old Indian.

Charlie McRay heard that story and has repeated it all over the world. Incidentally, I knew it would be difficult to keep anyone's attention on a Saturday morning, so I asked several of the Fort Smith lawyers and landmen to give me stories which could be told to this group. Charlie McRay told me to tell you how I was selected to make this talk. Charlie said to tell you that I was selected because I was outstanding in my field. What Charlie meant was that I was out standing in the field when Spence came to ask me.

Speaking of Spence, someone told me that a couple of years ago Spence was in another city visiting a man from Pure Oil Company and one from Humble Oil Company. The men took Spence to church with them, and in the middle of a prayer the preacher said: "God bless the Pure and the Humble." Instead of saying amen, Spence said: "And don't forget Stephens Production Company." I got that story from Justin Newman.

Here is one Spence Leamons gave me. A tool pusher had developed a terrible cold with laryngitis which made him whisper when he tried to talk. One of the roughnecks on his crew failed to report for work on the evening shift, so the tool pusher went to find a substitute. He knocked on a door and whispered "Lady, is your husband home?" She whispered back, "No, he isn't. Come on in."

This is a true story given to me by Tom Mueller. A few years ago Tom was attempting to buy a lease in a small community called Solgohachia in Conway County. When Tom went out to the property he found a small, one room shack. Tom knocked on the door and the man invited him in. There were only three things in the house. An old potbellied stove, which was used both for heating and cooking; one homemade chair; and an old army cot; and there were so many cracks in the house that snow was coming through the cracks and accumulating on the cot.

Tom gave the man his best sales pitch, but the man would not agree to sell Tom a lease. Tom finally said, "Why won't

you sell me a lease?" The man replied, "I just don't need the money". The sequel to the story is that Tom spent another half hour and finally got the lease.

This reminds me of another true story. Justin Newman was trying to get a lease from a man who wanted some sort of recommendation about Justin's character. Justin could not think of any mutual acquaintances, so he just said "Well, my mother thinks I am a fine fellow". The man laughed and gave Justin the lease.

Here is another true story. Several years ago Charles McRay and Justin Newman were working for the same pipeline. McRay's boss was the pipeline superintendent, and one day he discovered a large gathering tank which was running over, and it would cost several hundred dollars to clean the tank. The irresponsible roustabout was asleep in a pickup truck nearby. The superintendent wrote a note to the roustabout saying "As long as you are asleep you have a job, but when you wake up you are fired".

Most of us like to get credit for stories we make up, or other things we do, and this leads me to a story given to me by Bill Smith with Arkansas Western Gas Company. An eagle was getting ready to fly south for the winter, and a frog wanted to go along. The frog said, "Why don't you let me ride on your back?" The eagle replied that he would not be able to move his wings properly and this would not work. The frog then said, "Why don't you carry me with your feet." The eagle said his talons were too sharp and would cut the thin skin on the frog's back.

The frog then had a great idea. He said, "Why don't you carry a stick between your talons and I will hang on to the stick with my mouth." The eagle agreed that this should work fine, so they started on the trip south. As they flew along all the people below were watching and seemed to be very impressed with this accomplishment. One fellow yelled up and said, "Whose great idea was that?" The frog replied, "It was my-y-y-y-idea." (Simulate the start of a fall.)

I suppose the moral to that story is that it sometimes is not a good idea to talk about your great ideas.

I am so appreciative of the few of you who showed up this morning, that I'm going to try to keep this talk reasonably short and will trust you to read what is published at a later date if you are interested in legal citations.

For the rest of the morning, I will talk about some cases I have been involved in personally relating to navigable rivers, and along the way I will pass on a few more stories I obtained from my alleged friends.

Here is a plat of a small stretch of the Arkansas River east of Fort Smith. ⁽¹⁾ You may find it difficult to believe, but I have encountered most of the problems I am going to be talking about in this one stretch of the Arkansas River. All the riverbed in question is contained in good producing gas units.

For many centuries the old Arkansas River had been rolling along, adding a little land here, taking away a little there, and

1. See plat at page 21 for notes 1-13.

occasionally cutting a new channel. Then the Corps of Engineers decided it could do a much better job than nature in directing the future course of the river, so in 1962 the Corps cut a new channel for the river.⁽¹⁾ Not satisfied with this accomplishment the Corps next constructed a dam downstream and backed water over a large area of the abandoned river bed which had become or would have become a good bottom land.

Prior to the action of the Corps of Engineers the River on its own had cut a new channel,⁽²⁾ leaving an island known in the area as Towhead Island.⁽³⁾ My clients, who owned most of the land on the south side of the river, had been losing land to the river east of Towhead Island but had been gaining land toward the north. The large area owned by my clients was known as Arbuckle Island, because of a slough separating it from the mainland.⁽⁴⁾

The first legal question presented is the ownership of the minerals under Towhead Island. This Island had been a part of Arbuckle Island, owned by my clients, and was severed by a natural avulsion of the river. An avulsion is a sudden change in the river as opposed to an accretion, which is a gradual change. Since Towhead Island had originally been a part of Arbuckle Island, and since it became an island because of an avulsive change of the river, the title to Towhead Island, including the minerals, remained in my clients. This point of law is so well established that no one even questioned it.

The next question was the ownership of the surface and minerals in that part of Arbuckle Island lying north of the new chan-

nel of the Arkansas River.⁽⁵⁾ This was caused by a manmade, avulsive action, so it was clear that my clients still owned the part of Arbuckle Island lying north of the new channel, and no one ever questioned this point, except as to a small parcel which I will discuss in a moment.

Not so simple was the question of the ownership of the minerals under the new, artificial, manmade channel of the river. As most of you know, in Arkansas the State owns the minerals in and under the river bed up to the ordinary high water mark. But did the State acquire title to the new river bed which was caused by an avulsion? This matter was presented to United States Judge John E. Miller as a part of a condemnation proceeding involving the area in question, and Judge Miller ruled that my clients retained the ownership of the minerals under the new channel.

At the time the new river channel was opened in the fall of 1962, the old river bed became nonnavigable and a question arose concerning the ownership of the abandoned river bed.⁽⁶⁾ Owners on both sides of the river acquired purported deeds from the State Land Commissioner, many of said deeds completely overlapping each other. The first lawsuit filed was one by an owner on the north side of the river whose predecessor in title at one time had owned 80 acres, all lying on the north side of the river, but by the fall of 1962 only 30 acres was left of the original 80 acres.⁽⁷⁾ The remaining acreage was either in the river or on the south side of the river, being a part of accretions to Arbuckle Island. That owner contended for ownership of everything

contained within the original boundary of the 80 acre call, and in the alternative contended that the boundary between that land and the land of my clients would be the geographic center of the abandoned river bed, while I contended that the boundary was the thalweg or thread of the river, which is the deepest part of the river. In the event you are wondering why I made this contention, by some coincidence the thread of the river was very close to the north bank, which would give my clients most of the abandoned river bed in this area. The trial judge, Chancellor Richard Mobley, ruled against my clients, finding that the boundary between the riparian owner on the north and my clients on the south was the geographic center of the abandoned river bed. Not only did he make this ruling, but while the case was on appeal he made a speech to this Institute giving the reasons for his decision. He recognized, however, that there might be some question about his decision, because in his talk to this group he said that his decision "is either the law of this State, or it may be used as a basis of the dissenting opinion."

Not only did the Arkansas Supreme Court reverse Judge Mobley, but the decision was unanimous, so there was no dissenting opinion. That case, which is cited in my written paper, established that the State lost its title as soon as the old river bed became nonnavigable and that the boundary between the riparian owners was the thread or deepest part of the old river bed, thereby giving my clients most of the abandoned river bed.

The next lawsuit was one brought by Arkansas Western Gas Company as an interpleader suit to determine the title to that part of the abandoned river bed included in the McVey Unit. That case presented three issues. The first issue was whether a large area in the abandoned river bed was still a sandbar at the time the new channel was opened, or whether it had become an island.⁽⁸⁾ The second issue was whether the thread of the river ran on the north side or the south side of the sandbar or island. A third issue was whether landowners on the north side of the river had lost their land by avulsion, and therefore had not lost their title to the part taken away by avulsion.

Most of the area in the sandbar or island had originally been on the north side of the river, in private ownership, and the prior owners were claiming that the island had re-emerged within their original boundaries. The riparian owners on the north and my clients, who were riparian owners on the south, contended that the area was merely a sandbar, with us contending that the thread of the river ran on the north side of the sandbar and with the owners on the north claiming that the thread of the river ran on the south side of the sandbar.

Under Arkansas Law, if an area was once in private ownership; then becomes a part of the riverbed; and later re-emerges as an island, the original private owners regain title to the part of the island within their original boundaries. If an

island emerges in a part of the river which has never been in private ownership, the State of Arkansas acquires title to the island. If an area is still a sandbar, having no permanent character, it is still a part of the riverbed.

Chancellor Warren O. Kimbrough of Fort Smith ruled that the area was still a sandbar at the time the old riverbed became non-navigable; that the owners on the North had not lost their land by avulsion; and that the thread of the river was near the North Bank. The effect of this ruling was to give our clients title to most of the abandoned riverbed, all of which was contained in producing gas units. That decision was affirmed by the Arkansas Supreme Court.

Another issue was submitted to the Court in the Whitlow case. Before the change in the river, Mr. Charles Earl owned an overriding royalty interest derived from an oil and gas lease from the State of Arkansas, and another company had a lease from the riparian owners on the South. Judge Kimbrough ruled that the change in the mineral ownership from the State of Arkansas to the riparian owners did not cause a change in the oil and gas leasehold ownership, and that the riparian owners took their title subject to the existing oil and gas lease which had been obtained from the State of Arkansas and the overriding royalty interest derived from that lease. No appeal was taken from that decision.

As a result of the two decisions of the Arkansas Supreme Court, the remaining riparian owners on opposite sides of the river were able to agree upon the boundary between them with reference to the remainder of the abandoned riverbed, and it was not necessary to have a third lawsuit. ⁽⁹⁾

As a matter of general interest, I might note that our clients were not eager to have all this litigation, and they had offered to settle with the riparian owners on the North on the basis of each taking title to an undivided one-half interest in the abandoned riverbed. Only one small group of owners on the North accepted our settlement proposal, and they are the only ones who received more than a small strip of the abandoned riverbed at the conclusion of the litigation.

Another interesting thing happened in connection with this abandoned riverbed. In all instances the abandoned riverbed was divided on the basis of extensions of property lines of the riparian owners. On the North side of the river, the riparian owners simply extended their East and West property lines South to the thread of the river.⁽¹⁰⁾ On the Southside, the riparian owners extended their property lines, with one extension being in a Northwesterly direction (demonstrate with plat).⁽¹¹⁾ The legal method in Arkansas of dividing accretions, which would also apply to the division of an abandoned riverbed, is to draw the lines in such a way as to give each riparian owner a prorata part of the new boundary. Here is an example of the correct way to divide accretions. (Show example). (See plat at page 22).

However, it has been my experience that in most instances the riparian owners simply extend their property lines rather than attempting a prorata division of accretions. (Show example).

Within a few years after the opening of the new channel, the Corps of Engineers constructed a dam at Ozark which created a lake encompassing most of the abandoned riverbed. There are some old Arkansas cases holding that the State can acquire title to the river or lake bed by adverse possession by maintaining a lake for seven years. State Ex Rel. Thompson v. Parker, 132 Ark. 316, 200 S.W. 1014; Five Lakes Outing Club, Inc. v. Horseshoe Lake Protective Association, 226 Ark. 136, 288 S.W.2d 942. A few years earlier there had been some fear that this rule of adverse possession might give the State of Arkansas title to the minerals under the new lakes which were being constructed by the Corps of Engineers on the Arkansas River. To be certain this would not happen for some of my clients, I prepared an Act providing that the State of Arkansas would not acquire title to artificially inundated minerals, and this Act was adopted by the General Assembly of the State of Arkansas, now appearing as Section 10-1010 et seq. of the Arkansas Statutes. As a result of that law, the State cannot acquire title to the minerals under that part of the abandoned riverbed which is now under the lake caused by the Ozark dam.

Incidentally, the State of Arkansas conceded from the beginning that it lost all title to the abandoned riverbed as soon

as the new channel was opened. One of the leasehold owners, through inadvertence, continued to pay royalties to the State for several years before the error was discovered, but the State repaid the money upon learning of the error.

The United States has acquired some of the cut-off land and the abandoned riverbed in fee, except for the minerals, and has acquired a perpetual flowage easement on the remainder of the cut-off land and the abandoned riverbed. A trial will be held later this month to determine the fair market value of the surface of this property.

When the new channel was first opened, water still ran through the deepest part of the old channel because of a large creek, known in the vicinity as Frog Bayou Creek, which entered the old channel of the river to the West of the large sandbar.⁽¹²⁾ If the Ozark Dam had not been built, the deepest part of the abandoned riverbed would have become a non-navigable stream, being an extension of Frog Bayou Creek. In that event the rules applicable to non-navigable streams would have applied to that Creek. Generally speaking, the State of Arkansas has no interest in the beds of non-navigable streams, and such beds are owned by the riparian owners, with the owners having title to the thread of the stream.

There is another issue of law which we litigated a few miles downstream, and I can use this plat to demonstrate that issue. Suppose the minerals had been severed with reference to Arbuckle Island, with my clients owning the severed minerals and with John

Doe owning the surface. As I have mentioned previously, there had been substantial accretions to the North part of Arbuckle Island, and it would be necessary to determine whether the minerals under those accretions were owned by my clients, the severed mineral owners, or by John Doe, the surface owner.⁽¹³⁾ I have been involved in two lawsuits presenting this issue. The first time the case was settled with the surface owner taking one-third of the minerals and the severed mineral owner taking two thirds. The second case was tried in the Chancery Court, and my clients, the severed mineral owners, prevailed. No appeal was taken from that decision, so we still are not certain what the Arkansas Supreme Court would hold with reference to this issue.

Upstream a few miles in Oklahoma, I have been in and out of some litigation involving the ownership of the present bed of the Arkansas River, as well as the ownership of the former bed of the river. The United States Supreme Court held that the Indian Nations, rather than the State of Oklahoma, owned the riverbed, and the case is still being litigated between the competing Indian Nations. The issues in that case ultimately may be decided by Congress.

At this time I will tell you a few more stories I collected, and then I will conclude by summarizing the legal issues we have discussed.

John Brown is proud of the fact that he is a graduate of Texas A & M. A few years ago John's doctor told him to run ten miles a day to improve his love life. After two weeks John phoned

the doctor to say he had been following instructions. The doctor inquired, "Has it helped you?". "I don't know", replied John, "I'm 140 miles from home".

I must admit I have had a few problems of my own. A while back I was appointed to represent a Defendant in a criminal case. They were in the process of selecting the jury. One of the jurors pointed and said, "Judge, I can't serve on this case. One look at the Defendant convinces me he's guilty." The Judge replied, "That's not the Defendant. That's Mr. West."

On another occasion I was representing an elderly black man. The Judge asked the man, "Are you the Defendant in this case?". The black man replied, "No, suh-I's got me a lawyer to do my defendin'. I's the gentleman what stole the chickens."

Once I was having a heated argument with opposing counsel and he finally told me to go to the devil. I said, "Judge, did you hear what he said?" The Judge answer, "You don't have to worry Mr. West. I've looked up the law and you don't have to go."

There is one landman in Fort Smith who drinks a little. I will call him John Doe to save embarrassment. On one occasion John was attending a party on the sixth floor of the hotel and fell out the window. Fortunately, he hit an awning, which slowed his fall, and he ended up flat on his back on the sidewalk. A croud gathered quickly and someone asked, "What happened?" John staggered to his feet and said, "I don't know. I just got here".

On another occasion, John had been attending a landman's picnic over in Crawford County at the ranch of Tom Mueller and Jack Shields, and the next day John was telling me about his trip back home. He said as he was driving home that night he heard a sound, bumpity, bumpity, bumpity. He asked me, "What do you think it was?" I answered, "A flat tire". He said, "You're right". Then he said he started driving again and pretty soon he heard this sound, "Bumpity, bumpity, bumpity". He asked me, "What do you think it was?" I answered, "Another flat tire". He said, "No, I changed the wrong tire".

One night John got into a fight and the fellow managed to cut John in several places and bruise him up pretty badly. When John got home he was afraid he would wake his wife up so he was very quiet when he entered the house and slipped into the bathroom. He got a lot of adhesive tape to bandage his wounds. He then slipped into bed without waking his wife. He thought he had got away with it, but the next morning his wife asked him why he had been out drinking again last night. He said, "How did you know I was out drinking last night?" She answered, "I saw all the bandages on the bathroom mirror."

Another time we were getting ready to play gin rummy and John drove to the store, which was only three blocks away, to get some cards. It was about two hours before he returned and I asked him what had been the trouble. He said he ran out of gas. I said, "How could you run out of gas when you just filled it up this morning?" He said, "Oh, the gas must have spilled out when the car rolled over."

Let's attempt to summarize the legal issues we have been discussing.

1. The State of Arkansas owns title to the riverbed, including the minerals, to the ordinary high water mark, which is the point at which permanent vegetation starts. For a definition of ordinary high water mark, see Hayes v. State, 254 Ark. 680, 496 S.W.2d 372.

2. Land gradually added to a riparian owner's existing land is called an accretion, and the riparian owner gains title to the new land. When land lines are altered by the movement of a stream, there is a strong presumption that the movement occurred by gradual erosion and accretion rather than by avulsion. Pannell v. Earls, 252 Ark. 385, 483 S.W.2d 440. At least one Chancery Court has held that if the minerals had been severed from the surface prior to the formation of the accretions, the severed mineral owner would own the minerals under the accretions.

3. If an avulsion occurs, either manmade or artificial, causing a new channel of the river and leaving land on the other side of the new channel, the owners of the land on the other side of the new channel retain their ownership. Goforth v. Wilson, 208 Ark. 35, 184 S.W.2d 814. There is some question concerning the ownership of the minerals under the new channel, but at least one Court has held that the landowner retains the minerals under the new channel, and this result might also flow from the Statute providing that the State does not acquire title to artificially inundated minerals. Section 10-1010 et seq., Arkansas Statutes.

4. If an island emerges in a part of the river which has never been in private ownership, the State of Arkansas acquires title to the island. Section 10-601, Arkansas Statutes. If an island re-emerges within the boundaries of a former private owner, such private owner regains title to that part of the island within the private owner's original boundaries. Section 10-202, et seq., Arkansas Statutes; Ward v. Harwood, 239 Ark. 71, 387 S.W.2d 318; Garrison Furniture Company, et al v. Southern Enterprises, et al, 245 Ark. 927, 436 S.W.2d 278.

5. If a riparian owner loses all of his or her land to the river, and later accretions to adjoining land move back over the same area, the original riparian owner does not regain any title, and such accretions are owned by the riparian owner to whose land the accretions have attached. Wallace v. Driver, 61 Ark. 429.

6. When a navigable river becomes non-navigable, the State of Arkansas loses its title and the riparian owners take to the old thread of the river, which becomes the boundary between them. Gill, et al v. Porter, 248 Ark. 140, 450 S.W.306.

7. The State of Arkansas does not acquire title by adverse possession to artificially inundated lands. Section 10-1010 et seq., Arkansas Statutes.

8. Accretions are supposed to be divided upon a pro rata basis as between riparian owners, but in practice most divisions are made by extending existing boundaries of riparian owners to the

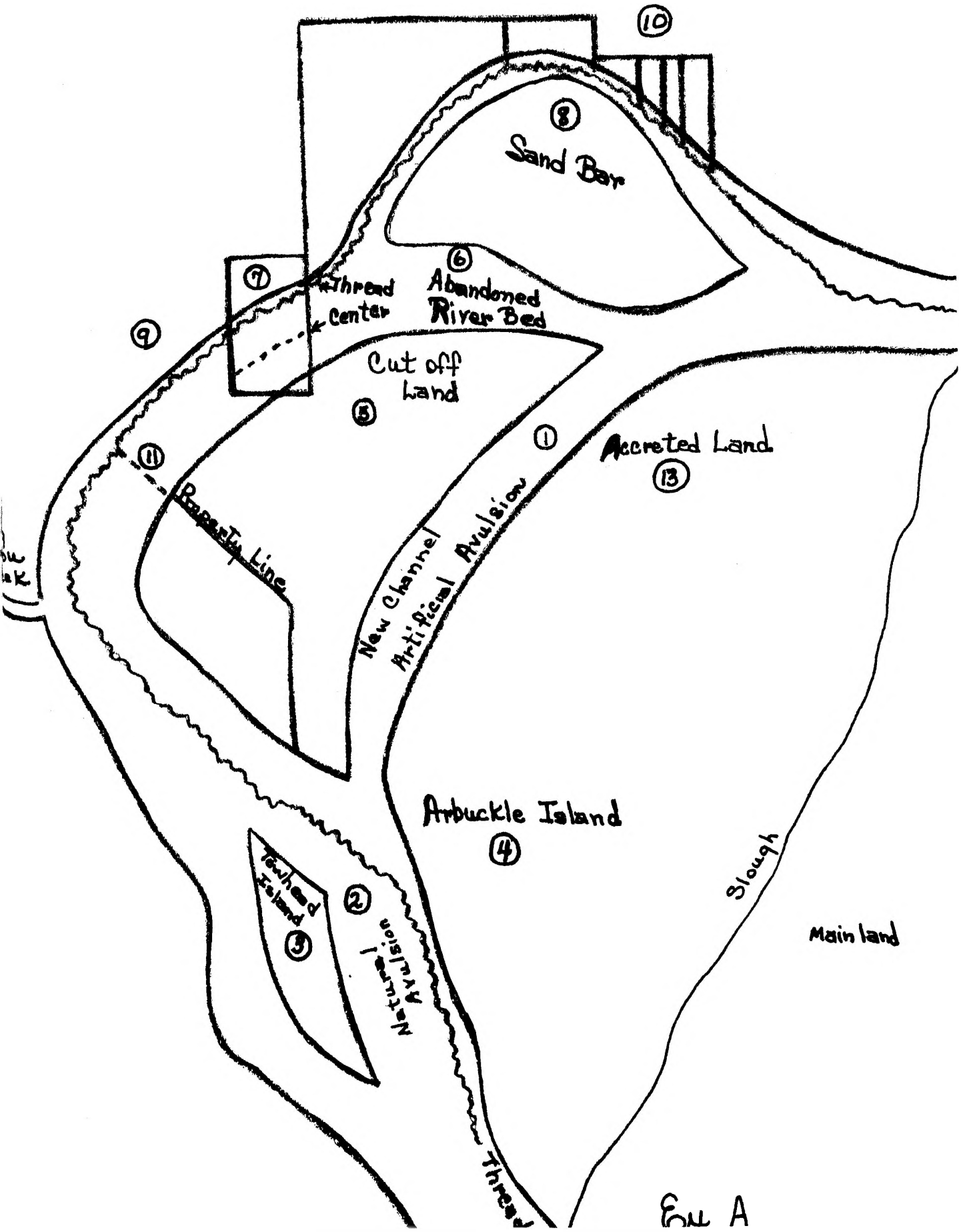
thread of the river. Bass v. Farrell, 236 Ark. 782, 370 S.W.2d 54; Note, 6 Arkansas Law Review 68.

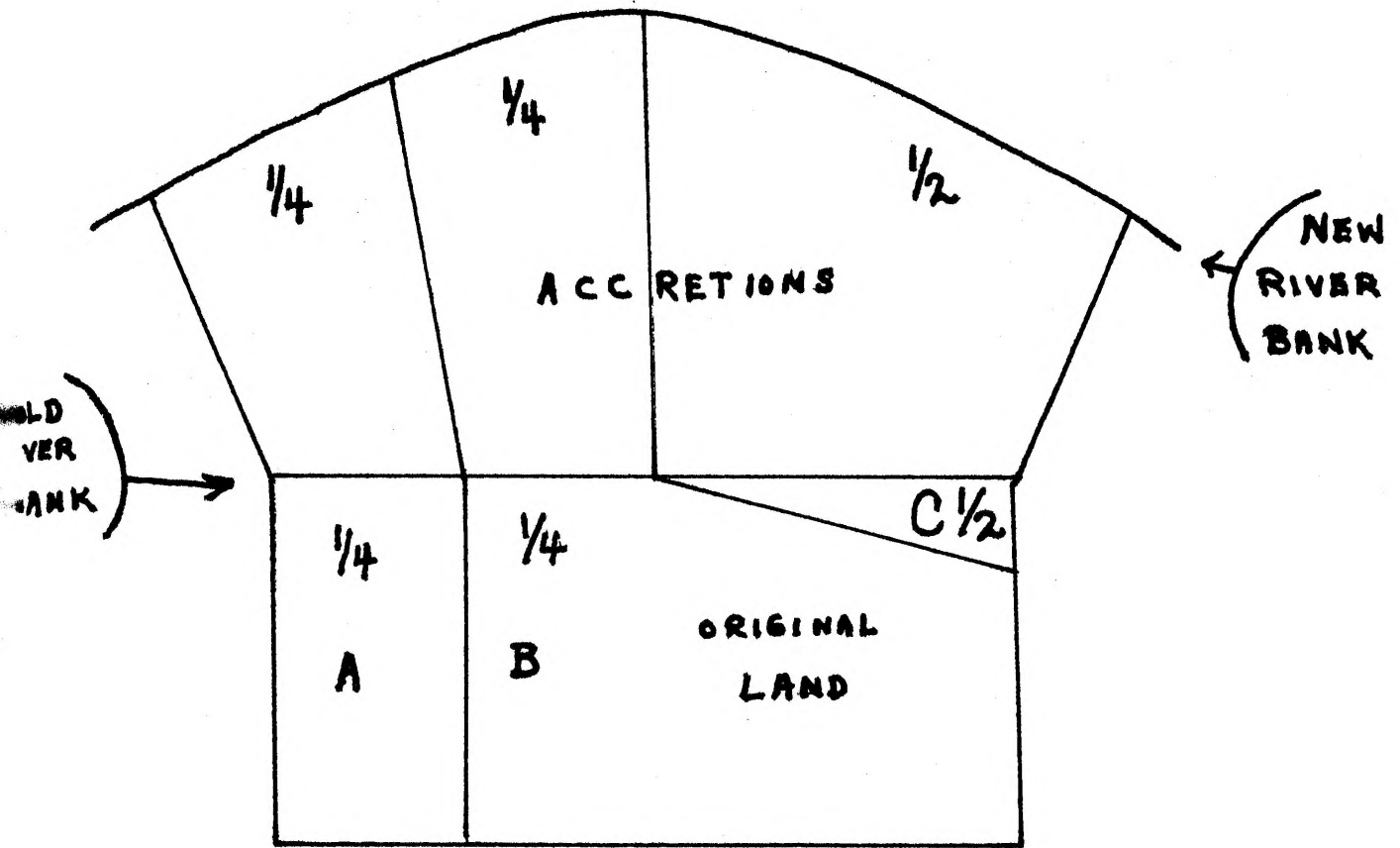
9. The State of Arkansas has no ownership in the bed of a non-navigable stream, and the boundary between the riparian owners is the thread of the stream. J. B. Council, et ux v. Lewis Clark, et al, 246 Ark. 1110, 441 S.W.2d 472; Gill v. Hedgecock, 207 Ark. 1079, 184 S.W.2d 262.

10. A sandbar is a part of the bed of the river and does not become an island until it has a permanent character. Porter, et al, v. Arkansas Western Gas Company, et al, 252 Ark. 958, 482 S.W.2d 598.

11. A person attempting to travel through the legal rapids, technical whirlpools, intricate shoals, and other legal and non-legal hazards of a navigable stream may well feel that he or she is up the creek without a paddle.

James E. West





Ex. B

