

PINE CABINET
No. 1 Room # 1.

L-141

July 12th, 1949

LaGloria Corporation
P. O. Box 779
Corpus Christi, Texas

RE M.L. 33152

Attn: Mr. S. A. Story, Jr.

Gentlemen:

With respect to your inquiry as to the definitions of the boundaries of your State Lease on the San Bernard River.

I can answer this only by giving you what information I have.

In the Spanish Archives at the General Land Office, Austin, Texas, Vol. 53, Pages 58 to 66, and in the translation thereof in Empresarios Contracts, Pages 375 to 379, both inclusive. This query and answer is referred to the Supreme Government's definition of a part of the Colonization Laws of August 18, 1824. Quote: "In regard to the 2nd point two things must be distinguished; the lands contiguous to the rivers, which are constantly covered by the waters of the same river or those which are absolutely inundated when great floods or inundations occur; in the first case it is beyond all doubts, that these lands which are permanently covered with water cannot compose any part of a league of land; but if only liable to occasional overflow, as is supposed in this 2nd case, it must be INCLUDED IN the lands adjudicated to the New Colonists, beginning the surveys from the natural margins of the river, when its waters are in the natural state; all that placed on the banks of the rivers, remains consequently subject to the reciprocal right of the alluvial in conformity with our laws". (Capitalization mine).

In my 42 years of actual surveying experience I have found a number of original corners of the early grants and abutting rivers. In every instance the original corner was found on top of the high bank, not at the waters edge nor at the top of the channel bank. See illustration.

In this particular area, but in Brazoria County, the original Cypress tree for the Gray and Moore Survey was found on the high bank of the San Bernard River. In Harris County, the original witness trees for the Northeast corner of the John Brown Jones were found on the high bank of the San Jacinto River. The same is true of the J. B. Stevenson.

In Chambers County the original corner and witness trees of the White Survey were found on the high bank of Turtle Bayou. These all come to my mind without reference to my earliest field books.

In the fourth paragraph above I quote "remains consequently subject to the reciprocal right of the alluvial". I take this to mean literally what it says - that the area within the high bank (See illustration No. 1) belongs to the alluvial or all persons, not to those solely whose grants abutted the stream.

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Wallace

It must be remembered that in the later 1700's and early 1800's there were very few traces or trails over Texas and Mexico; that the Spaniards were a seagoing race and were dependent largely on rivers for transportation inland, and that it was a necessity to have an area between the waters edge and top of bank for camping, searching for fuel and food. Therefore, to me it is clear that the alluvial ment the soil of the people - not of one individual; but was to the Colonist the same as our streets and highways are today, for use of all the people - not solely those whose properties abut thereupon.

The Spaniards were definite in their intentions to provide a common ground for the people, to-wit: In every grant set aside for a township there was always reserved a plaza, or place belonging to all of the people. Surely if this were done in town grants then the Spaniards must have been equally provident in protecting the main arteries of travel. (Law 6, Title 28, part 3 of the partidas declares that, rivers, harbors, and public highways belong to all persons in common).

Webster defines: "Bank, n (ME bank; ice. Bakki, a bank of a river, ridge; Dan. bakke, a hill).

1. A mound or pile of earth raised above the surrounding ground, either as a defense or for any other purpose.

2. Any steep acclivity rising from a river, lake etc; the side of a ravine, or the steep side of a hillock.

4. The ground bordering a water course whether steep or flat: as, the river overflowed its BANKS.

7-C. A deposit of ore or coal so situated that it can be worked by excavation above the water level.

The definitions clearly indicate that the banks of a stream are the sheer and/or sloping sides which confine the stream to its bed, therefore or conversely the bed of a stream is the area between the banks, banks being the area between the thread of the stream and the natural or normal land on the sides thereof.

It is common knowledge, and universal use, that a stream is not out of banks until it leaves the high banks and begins to overflow the lowlands or bottoms. See illustration No. 2.

There are a number of streams in Texas where the actual water covered area shifts from place to place in the bed so that no one specified area could be ordinarily covered with water. To-wit: The San Jacinto River, above tidal effect, where the banks are well defined, the thread of the stream or the water covered area, in places only 20 feet wide, shifts first from one side to the other over an area of 200 to 300 feet, in this instance only the high or cut banks can define the stream.

On the Frio River, with a width of 300 to 400 feet between cut banks, the thread of the stream in places is not over 5 to 6 feet, as of this date it is against the right bank. The next big rain may, as I have seen it do, move the gravel bars and throw the thread in the center or against the left bank.

In each of these instances the channel of the river, or the thread of the river, shifts from time to time so that the actual channel could only be properly defined as between the high banks. Incidentally, the banks of the San Jacinto are sand and clay - of the Frio largely rock bluffs.

The decisions of the Texas courts are most vague in defining the beds of streams and segregating between public and private ownership.

1. In State vs. Bradford 121, Tex. 515, 50 S.W. (2) 1065. It was held that a patent crossing a stream did not divest the State of its title to the bed of the stream. (You will note that the decree says bed of the stream). This decree does not say thread of stream, no mention of water covered area. The problem here then is what constitutes the bed of a stream.

Article 5302 is a continuation of Sections 21 and 42 of an Act of the Republic of Texas passed December 14, 1837 (1 Gammel's Laws, pp. 1412-1418), and the rule which it prescribes has no application to a grant made earlier, unless there was then in effect a similar law or unless the statute is declaratory of a rule or policy of the civil law of Mexico! From this it can be seen that we should be governed by the Spanish law in our determination of what constitutes the bed of a stream.

In Manry vs. Robinson 122 Tex, 213, 232, 56 S. W. (2) 438, Chief Justice Cureton said: "Subject to the adoption of the common law we have ignored its rule that grants on streams above tide water carry title to the thread of the stream, and have continued to apply the civil law rule, of which the act of 1837 is an adoption, to the effect that the BEDS of streams there defined are the property of the state!" (my underscoring and caps.)

In Austin vs. Hall 93 Tex. 591-597, 57 S. W. 563, points out that the title to the beds of the streams remain in the sovereign.

In Motl vs. Boyd 286, S. W. p. 458:- Numerous definitions as to water and water courses are given. "Bed of Stream" is portion of soil alternately covered and left bare as it may decrease and diminish in water supply.

"Banks of Stream" or river are water washed and relative permanent elevations at outer lines of river beds, serving to separate bed from adjacent upland, to confine water within course. From this definition it is clear that all area between high cut banks is the bed of the stream.

In numerous cases of river bed surveys which I have made under State leases I have figured the area between top of high cut bank to top of high cut bank and if I am not badly misinformed the State has based their allowable on this area, - this being true, then the State on its leases has set out and defined what it claims to own in various localities.

The following references should be looked in to by your attorneys:

United States Supreme Court Reports 68 Law. Ed. U S. 263-265, pg. 1121.
United States Supreme Court Reports 67 Law. Ed. U. S. 260-262, pg. 433.
S. W. Reporter 2nd series Vol. 86, pg. 446-447
Graham vs. Knight Tex. 240 S.W. 981-983.
Barr vs. Spalding (D. C. Kentucky) 46F. (2nd) 798-800.
Maricopa County Municipal Water Conservation District No. 1 vs. Southwest Cotton Co. (Arizona) 4 p. (2nd) 396-376.
Howard vs. Ingersoll 54 U.S. (13 How) 381-427-428, 14 Law. Ed. 189.
Thomas vs. Hatch - 23 Fed. Cas. 946.
Alabama vs. Georgia 64 U.S. (23 How) 505-513-514, 16 Law. Ed. 556.
Gould on waters, 45, in Howard vs. Ingersoll 54 U.S. (13 How) 331-14 Law. Ed. 189.
Revised Civil Code Articles 455-457, Wemple vs. Eastham 90 So. 637, 638 - 150 Louisiana 247.
Words and Phrases - Permanent Edition Vol. 5, pages 105-106-107-108.

There is a serious doubt in the writer's mind that any revised Civil Code, can or could effect the rights of the sovereign and its citizens in, on or to the laws in effect at the date of titles issued prior thereto.

The waters of the San Bernard River in which you are interested about colony grants and it occurs to me that the laws in effect at the date of the titles would govern.

In view of the various decisions in the many studied, the conflicting descriptions given in the various cases, I do not feel competent to pass on what constitutes the bed of a stream. However, I do feel that in all fairness that the State should have the area between the top of the high cut banks within which the stream or flow is confined during normal (if there be such) flow, flooding conditions due to excessive rains, extreme drought periods and which high banks contain the water and cause the stream not to leave or get out of banks.

Nature, over thousands of years, has created the streams and their banks as natural drainage. The banks to confine the water during either unusual high water or extremely low water. Certainly man, with a few casual observations, cannot hope to compete with a problem that the forces of nature and the elements have been many thousands of years in solving.

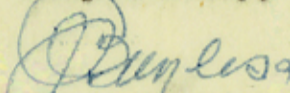
A drainage ditch is designed to carry off a determined amount of water when the ditch is full between the excavated banks, the same is true of a irrigation canal. Can there be any difference in the purpose of the area between the high banks of a stream as fixed by nature, the diameter of a sewer pipe, the excavated area in a drainage ditch of the out and built up banks of a canal. Nature has provided the streams - man the sewers, ditches and canals - but all with the same purpose, to carry a prescribed volume of water.

An engineer takes the area to be drained, the rainfall over a long period of years, the amount of run-off and designs a ditch or canal with a sufficient grade to carry off the calculated volume of water, so as to satisfy these contributory facts and conditions.

In the formation of stream, banks of streams, etc. nature over a period of hundreds of years has adequately performed that which man attempts to do, basing his design on short periods of time and inadequate experience.

In determining the area of your State Lease on the San Bernard River, according to my survey, I find there is an area of 275.02 acres from top of high cut bank to top of high cut bank.

Respectfully,



J. S. Boyles, C. E.

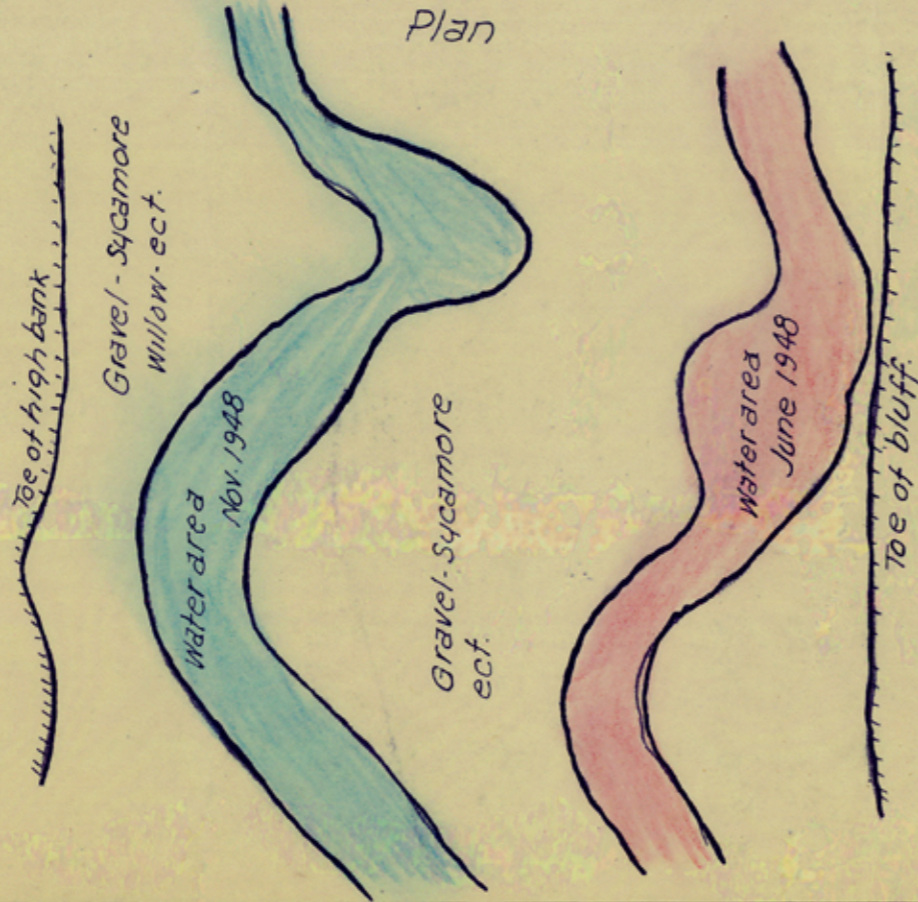
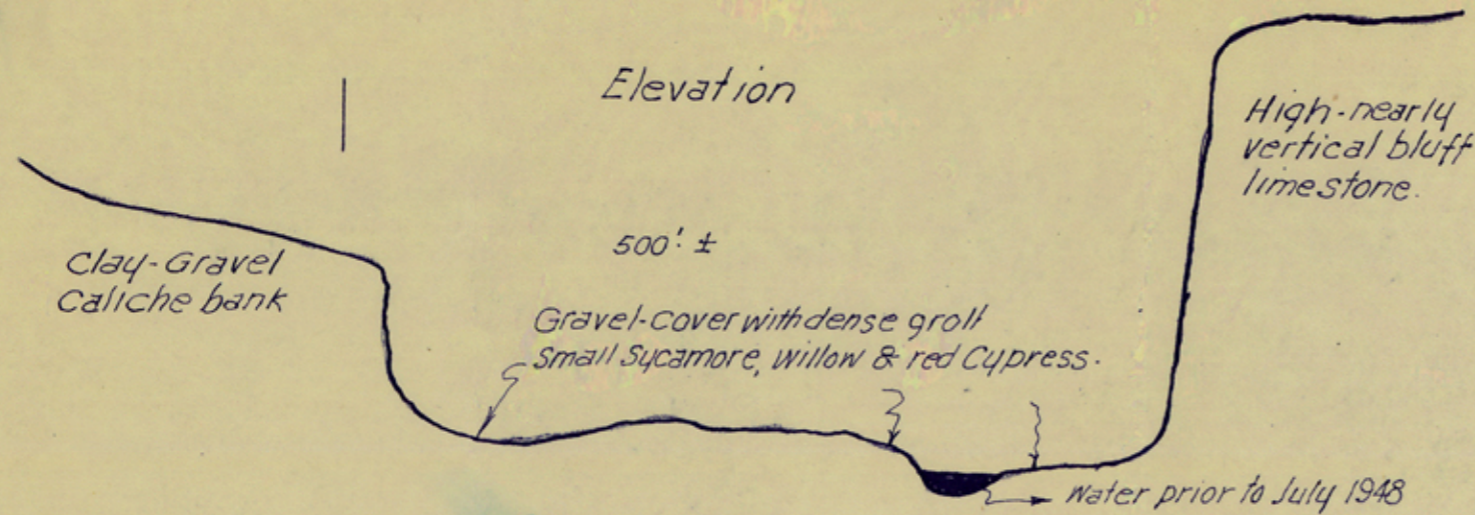
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CENTRAL LAND OFFICE

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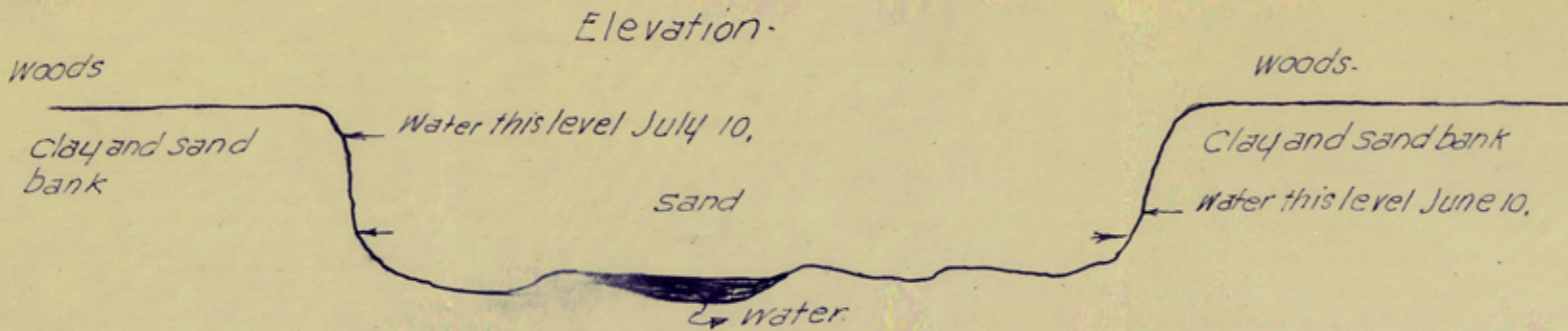
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Red. water area to June 1948
 Blue - water area after July 1948.
 The problem is to locate the bed of stream.

Typical Example
 Frio River, Real Co, Texas - 5 miles
 South of Leakey. West Texas.

Illustration 4
 La Gloria Report
 Dec. 2, 1948.



Water June 1- Red
 Water June 15, Blue
 Water July 15, Green.

The problem is to locate the bed of stream.

Typical Example.
 San Jacinto River, Harris Co. Texas.
 At Highway Crossing North of Humble.

Illustration 3
 La Gloria report.
 Dec. 2, 1948

GENERAL LAND OFFICE

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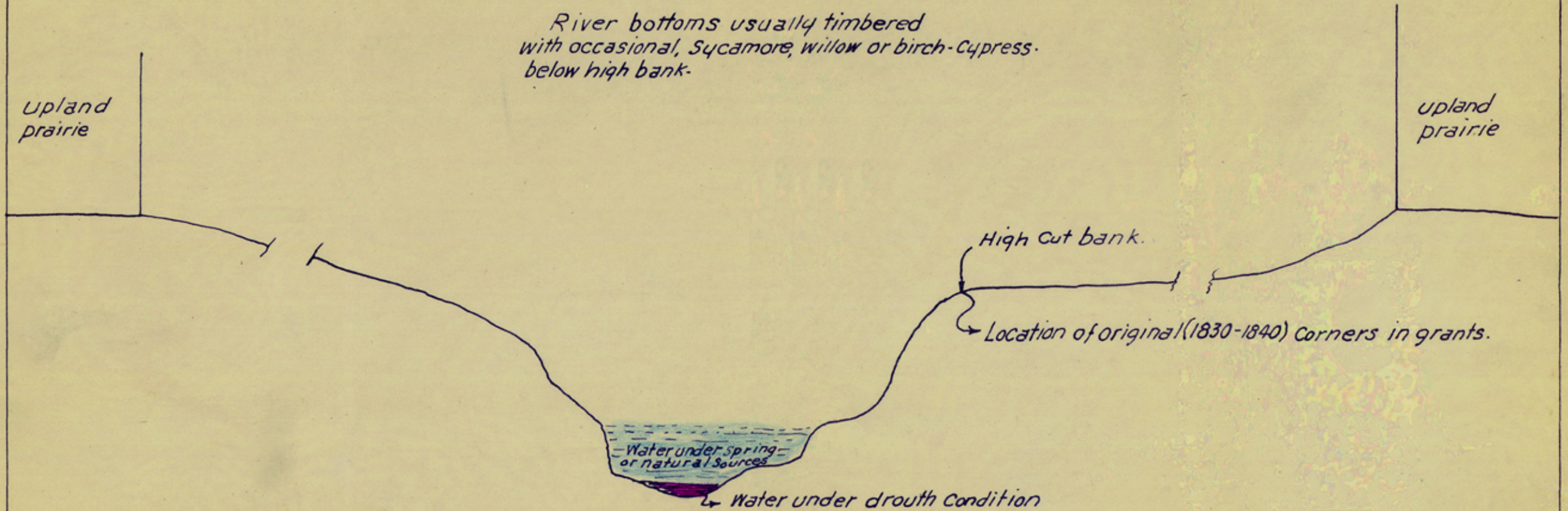
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River bottoms usually timbered
with occasional, Sycamore, willow or birch-Cypress.
below high bank.

upland
prairie

upland
prairie



Note.

Brazos River,	Highway 90,	between Sealy and Brookshire	it is 8 miles across bottoms- upland to upland.
Trinity River,	"	"	Dayton and Liberty " " 5 to 6 " " " "
San Jacinto "	"	"	Sheldon and Crosby " " 5+ " " " "

Illustration No. 1.
Dec. 2, 1948

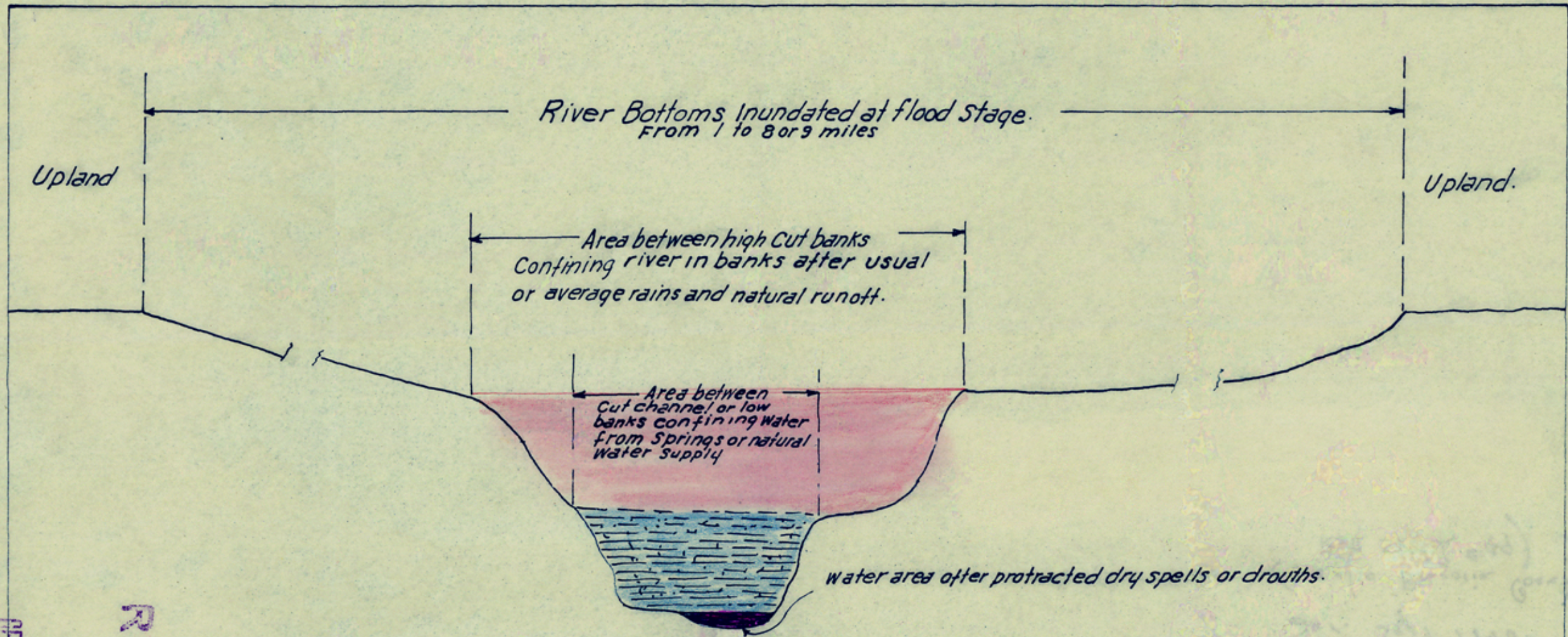
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Illustration No. 2.
Dec. 2, 1948.

La Gloria Report.

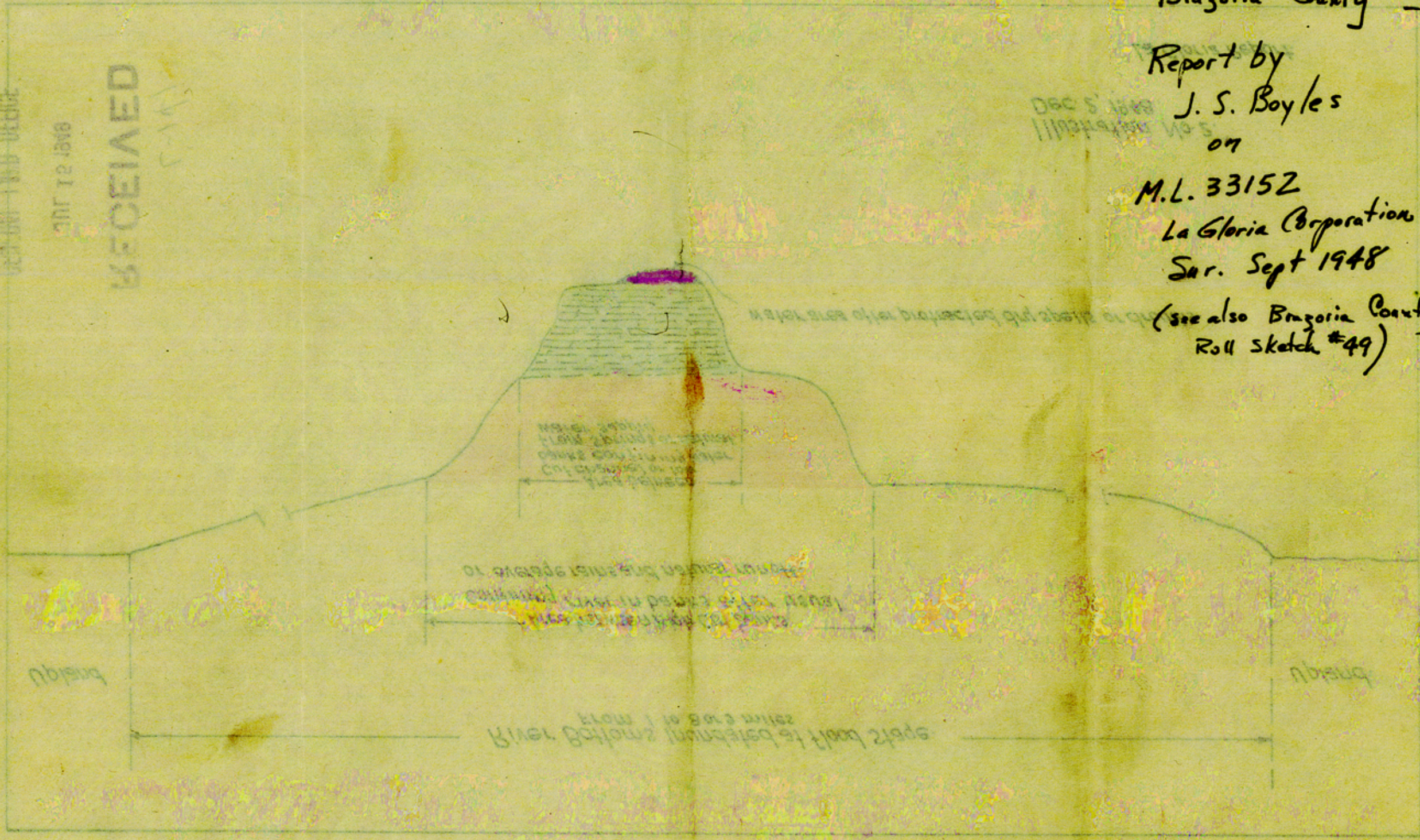
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Blazoria County #43

Report by
J. S. Boyles
on

M.L. 33152
La Gloria Corporation
Sur. Sept 1948

(see also Blazoria County
Roll sketch #49)



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