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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S EXCEPTIONS TO REPORT OF SPECIAL MASTER AND BRIEF

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EXCEPTIONS TO REPORT OF SPECIAL MASTER

I.

NEVADA TAKES EXCEPTION TO THE SPECIAL MASTER'S FAILURE TO ADDRESS THE ISSUES OF (1) WHETHER CALIFORNIA AND NEVADA COULD, WITHOUT THE CONSENT OF CONGRESS, JOINTLY SURVEY, MARK ON THE GROUND, AND POST THEIR PREVIOUSLY UNSURVEYED BOUNDARY; AND (2) WHETHER THE CONSTITUTION VESTED IN THE UNITED STATES THE POWER TO RELOCATE THE

POSTED OBLIQUE BOUNDARY LINE AS SURVEYED BY VON SCHMIDT IN 1873 OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY IN 1893-99.

II.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT IN WHICH HIS RECOMMENDATION OF VON SCHMIDT'S 1872 SURVEY AS THE MERIDIONAL BOUNDARY AND THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY IS BASED UPON ACQUIESCENCE AND PRESCRIPTION BECAUSE ASSUMING, *ARGUENDO,* THAT THE JOINT-STATE HOUGHTON-IVES POSTED BOUNDARY WAS NOT THE OFFICIAL BOUNDARY, AND ASSUM ING, *ARGUENDO,* THAT THE UNITED STATES WAS AUTHORIZED BY THE CONSTITUTION TO RELOCATE THE OBLIQUE BOUNDARY FROM VON SCHMIDT'S SURVEY OF 1873 OVER TO THE SURVEY BY THE COAST & GEODETIC SURVEY IN 1899, THEN THE DOCTRINE OF ACQUIESCENCE AND PRESCRIPTION WOULD HAVE NO APPLICATION WHATSOEVER SINCE THE UNITED STATES WOULD HAVE BEEN AUTHORIZED BY THE CONSTITUTION TO ESTABLISH THE BOUNDARY AS AN INITIAL MATTER IN 1872 AND THEREAFTER RELOCATE A PORTION OF IT AND NOTHING WOULD BE REQUIRED OF EITHER STATE TO

VALIDATE AN EXERCISE BY THE UNITED STATES OF A POWER CONFERRED BY THE CONSTITUTION.

III.

NEVADA EXCEPTS TO THE SPECIAL MASTER'S RECOMMENDATION OF THE VON SCHMIDT SURVEY OF THE 120TH MERIDIAN AS THE MERIDIONAL LINE OF BOUNDARY BECAUSE:

A. HIS CONCLUSION THAT THE JOINT-STATE HOUGHTON-IVES SURVEY OF 1863-65 DID NOT ESTABLISH THE "TRUE AND ANCIENT BOUNDARY" BETWEEN CALIFORNIA AND NEVADA IS UNSUPPORTED BY THE EVIDENTIARY RECORD FOR THE FOLLOWING REASONS:

1. Although the Special Master recognized this Court's decisions approving inaccurately-surveyed boundaries being observed by two states, he rejected the Houghton-Ives Survey as being not a complete survey in the face of uncontradicted evidence that the Houghton-Ives Survey was a complete survey of the 120th Meridian between the 39th and 42nd Parallels.

2. The Special Master's conclusion that the General Land Office did not officially recognize the Houghton-Ives Survey is contrary to substantial and

uncontradicted evidence of recognition of, and acquiescence therein, by the Congress, the Secretary of Interior, the General Land Office, and the Census Bureau.

3. The Special Master failed to recognize the substantial and uncontradicted evidence that Houghton-Ives Survey was the first practical location of California's and Nevada's boundary and that the survey did not take effect "as an alienation of territory, but as a definition of the true and ancient boundary."

B. HIS CONCLUSION THAT THE UNITED STATES DID NOT, BY VON SCHMIDT'S SURVEY OF 1872-73, MOVE OR RELOCATE THE POSTED AND SUBSISTING BOUNDARY LINE BEING OBSERVED BY CALIFORNIA AND NEVADA SINCE 1863 IS UNSUPPORTED BY THE EVIDENTIARY RECORD FOR THE FOLLOWING REASONS:

1. The reasons urged under Exception No. III A.

2. Contrary to the Special Master's finding, the uncontradicted evidence shows the Von Schmidt Survey did take effect as "an alienation of territory" of Nevada and was not "a definition of the true and ancient boundary" in that

Nevada lost territorial sovereignty and jurisdiction over several hundred square miles of her territory.

3. The Special Master's conclusion that the purpose of the Von Schmidt Survey was to establish the boundary to resolve an inherent conflict in location of meridian is contrary to the uncontradicted and substantial evidence that there was no dispute between California and Nevada regarding their line of boundary.

IV.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT WHEREIN HE RECOMMENDS THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY BETWEEN CALIFORNIA AND NEVADA FOR THE FOLLOWING REASONS:

A. THE SPECIAL MASTER JUSTIFIES THE NECESSITY OF A RESURVEY OF THE OBLIQUE BOUNDARY BECAUSE VON SCHMIDT'S OBLIQUE SURVEY WAS NOT AN ACCURATE SURVEY, WHICH IS CONTRARY TO THE SPECIAL MASTER'S OWN RECOGNITION OF THE DECISIONS OF THIS COURT APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES.

THE SPECIAL MASTER'S CONCLUSION THAT THE VON SCHMIDT SURVEY, NOTWITHSTANDING EVIDENCE OF MANY INACCURACIES, WAS EFFECTIVE TO ESTABLISH THE NORTH-SOUTH MERIDIONAL LINE IS INCONSISTENT WITH THE SPECIAL MASTER'S CONCLUSION THAT VON SCHMIDT'S SURVEY DID NOT ESTABLISH THE OBLIQUE PORTION BECAUSE IT WAS NOT AN ACCURATE SURVEY AND THEREFORE WAS IN NEED OF A RESURVEY.

B. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THE COAST & GEODETIC SURVEY DID TAKE EFFECT AS "AN ALIENATION OF TERRITORY" OF BOTH CALIFORNIA AND NEVADA, AND THAT IT WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN THAT CALIFORNIA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 321 SQUARE MILES AND NEVADA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 65 SQUARE MILES.

V.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT IN WHICH HE CONCLUDES THAT "IN THE ESTABLISHMENT OF

NEVADA'S BOUNDARY IT WAS BELIEVED THAT THE 43RD MERIDIAN WEST FROM WASHINGTON AND THE 120TH MERIDIAN WEST FROM GREENWICH WERE THE SAME" BECAUSE IT IGNORES CONGRESS' OWN 1850 REPORT ON THE ESTABLISHMENT OF AN AMERICAN PRIME MERIDIAN.

VI.

NEVADA EXCEPTS TO THE SPECIAL MASTER'S REPORT FOR ITS FAILURE TO RECOMMEND A BOUNDARY LINE WHICH WOULD BE A FINAL LINE SINCE THE VON SCHMIDT MERIDIONAL LINE AND THE COAST & GEODETIC SURVEY OBLIQUE LINE WERE SURVEYED BY THE UNITED STATES IN THE ABSENCE OF ANY DISPUTE WHATSOEVER BETWEEN CALIFORNIA AND NEVADA OVER THEIR BOUNDARY AND, THERE FORE, IF THE SPECIAL MASTER'S CONCLUSION THAT THE UNITED STATES MAY RE-ESTABLISH A STATE'S BOUNDARY IN THE ABSENCE OF THE TWO STATES DISPUTING THE LOCATION OF THEIR BOUNDARY IS CONFIRMED BY THIS COURT, THE UNITED STATES IS FREE TO RE-ESTABLISH THE BOUNDARY ON ANOTHER LOCATION IN THE FUTURE; AND THERE WOULD BE GRAFTED ONTO THE CONSTITUTION A NEW MEANS OF CHANGING A STATE'S BOUNDARY, INDEPENDENT OF THE CONSTITUTION'S PRESENT REQUIREMENT THAT THERE BE A DISPUTED BOUNDARY RESOLVED UNDER THE COMPACT CLAUSE, OR

SETTLED BY A DECREE PURSUANT TO THIS COURT'S ORIGINAL JURISDICTION, THAT IS, THE EXECUTIVE OR CONGRESS WOULD BE EMPOWERED TO CHANGE A STATE'S BOUNDARY WHENEVER EITHER DEEMS SUCH DESIRABLE.

VII.

NEVADA TAKES FURTHER EXCEPTION TO THE FIRST RECOMMENDATION IN THAT IT IS UNCLEAR WHETHER: (1) THE SPECIAL MASTER IS RECOMMENDING A CONNECTION MADE BY HIM OF VON SCHMIDT'S MERIDIONAL LINE WITH AN EXTENSION OF THE COAST & GEODETIC OBLIQUE LINE AT A 39TH PARALLEL WHICH IS NOT THE 39TH PARALLEL AS LOCATED BY VON SCHMIDT NOR THE 39TH PARALLEL AS LOCATED BY THE COAST & GEODETIC SURVEY, IN WHICH CASE THE SPECIAL MASTER HAS MADE THE CONNECTION FOR THE PARTY STATES "AT A POINT APPROXIMATELY AT SUCH INTERSECTION" AND THEREFORE HIS SUGGESTED COURSE OF ACTION IN HIS SECOND RECOMMENDATION IS UNNECESSARY; OR (2) WHETHER THE SPECIAL MASTER HAS RECOMMENDED AN OBLIQUE LINE FROM THE POINT OF CONNECTION WITH VON SCHMIDT'S 39TH PARALLEL, OR A CONNECTION WITH THE COAST & GEODETIC'S 39TH PARALLEL, AND IF THE LATTER, THEN IT IS AN OBLIQUE LINE WHICH HAS NEVER BEEN SURVEYED AND WOULD NOT

INTERSECT THE COAST & GEODETIC OBLIQUE LINE UNTIL IT REACHED THE COLORADO RIVER.

VIII.

NEVADA TAKES EXCEPTION TO THE SPECIAL MASTER'S THIRD AND SEVENTH RECOMMENDATIONS TO THE EXTENT THAT BOTH RECOMMENDATIONS MAY BE READ AS IMPLYING THAT THERE IS A NEED TO MARK EITHER OF THE RECOMMENDED LINES ON THE GROUND BECAUSE NEVADA BELIEVES THE LINES ARE ADEQUATELY MARKED NOW AND THE EXPENSE OF ANY RETRACEMENT, MARKING OR POSTING, SHOULD BE BORNE BY THE UNITED STATES SINCE THE UNITED STATES CAUSED BOTH LINES TO BE SURVEYED.

ARGUMENT

I.

THE SPECIAL MASTER SHOULD HAVE ADDRESSED THE ISSUES OF (1) WHETHER CALIFORNIA AND NEVADA COULD, WITHOUT THE CONSENT OF CONGRESS, JOINTLY SURVEY, MARK ON THE GROUND, AND POST THEIR UNSURVEYED BOUNDARY; AND (2) WHETHER THE CONSTITUTION VESTS IN THE UNITED STATES THE POWER TO RELOCATE THE POSTED OBLIQUE BOUNDARY LINE AS SURVEYED BY VON SCHMIDT IN 1873 OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY IN 1893-99.

From the beginning of this litigation Nevada has insisted that this is a boundary case of first impression. California and Nevada were peacefully observing a boundary which both had jointly surveyed and marked in 1863 in settlement of a dispute over its location, which had culminated in a pitched battle with loss of life and wounded. This happy state of settled boundary was abruptly changed in 1872-73 by the unilateral actions of the United States in moving the boundary over to the line of Von Schmidt's Survey.

Nevada has contended this was a taking of a part of her territory and placing it within California and that such was neither sanctioned by the Constitution then, nor "constitutionalized" by the passage of time.

Nevada therefore sought to raise an issue which would establish whether the joint-state survey had any constitutional basis, and whether an unconstitutional taking of Nevada's territory did occur. That issue as raised: "Does the Constitution permit two states jointly to mark on the ground, as an initial matter, the line of their common boundary prescribed by Congress and adopt the joint line as their boundary?" (Nev. Ans. Br. p. 62).

Nevada also argued alternatively that if the joint-state survey did not establish the line of boundary, then the United States established the boundary by either having set Major's and Lieut. Ives' terminal points, or by Von Schmidt's Survey on the ground of the entire boundary. The United States thereafter relocated the line of oblique boundary from Von Schmidt's 1873 line over to the line surveyed in 1899 by the U. S. Coast & Geodetic survey, and Nevada contended that this relocation was an unconstitutional exchange of significant territory of California and Nevada and raised the issue of whether the Constitution authorized the United States to relocate Von Schmidt's oblique line then marking the boundary between the states.

California consistently avoided coming to grips with both issues. Instead, in her opening brief California sought to persuade the Special Master to view this as a typical case of boundry dispute to be resolved by the doctrine of acquiescence and prescription so often applied by this Court in past boundary disputes—ignoring the distinguishing feature that in no previous case has this Court addressed the question of whether

the United States could unilaterally move the posted boundary line being observed by two states.

California, in her Reply Brief, shifted to new ground and argued that the joint-state Houghton-Ives Line and Von Schmidt's oblique line were "defective and uncertain and thus not permanently established."[1]

It seems California has succeeded even beyond her expectations for the Special Master declined to venture onto this ground of whether a state can "constitutionalize" by her acquiescence an usurped power. The Special Master adopted both of California's positions: (1) that this is a simple boundary dispute calling for application of the doctrine of acquiescence and prescription; and (2) that the Houghton-Ives and Von Schmidt oblique surveys were not accurate nor complete and therefore are to be disregarded.

As will be seen from the argument under Exception II, if the Special Master had addressed these initial issues raised by Nevada, then regardless of his conclusions thereon, it would not have been necessary for the Special Master to rely upon acquiescence and prescription for his recommended line of boundary. The Special Master therefore has needlessly, and wrongly, applied the doctrine of acquiescence and prescription far beyond its application by this Court in the past.

As traditionally applied, acquiescence has had as its

[1]California's argument, and the Special Master's agreement therewith, do however have the merit of inherently conceding that the Federal Government would not have any authority to move or relocate a state boundary which has been marked, posted and established on the ground.

underpinnings a claim of right, a color of title, in the disputing states. This assertion of right was first announced in *Rhode Island v. Massachusetts,* 12 Pet. (37 U.S.), at 733, wherein it was held: "[T]he only question is, to which the territory belongs. This must depend on the right by which each state claims, the territory in question." Careful analysis of later cases of disputed boundary similarly disclose that in each the doctrine of long acquiescence by another state has been applied when the state's possession was under a claim of right or color of title.

California's supposed claim of right in the case *sub judice* is the unconstitutional gift of Nevada's territory by the United States. California has never asserted under any claim of right. It was and still is the United States which asserts and maintains the Von Schmidt meridional line and the Coast & Geodetic oblique line as the boundary between the two states. California's claim of right or color of title to the disputed land is only as good as the title in her donor, the United States. *Mayor of New Orleans v. United States,* 10 Pet. (35 U.S.) 662, at 731. There is no constitutional authority by which the United States could acquire the title, municipal sovereignty and jurisdiction over the territory of a state after its coming into the Union sufficient to divest the state of her sovereignty and jurisdiction. *Pollard v. Hagan,* 3 How. (44 U.S.) 212, 223.

II.

THE SPECIAL MASTER WRONGLY BASED HIS RECOMMENDED BOUNDARY LINE UPON

ACQUIESCENCE AND PRESCRIPTION BECAUSE ASSUMING, *ARGUENDO,* THAT THE JOINT-STATE SURVEY DID NOT ESTABLISH THE OFFICIAL BOUNDARY, AND ASSUMING, *ARGUENDO,* THAT THE UNITED STATES WAS AUTHORIZED BY THE CONSTITUTION TO RELOCATE THE OBLIQUE BOUNDARY OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY, THEN ACQUIESCENCE AND PRESCRIPTION WOULD HAVE NO APPLICATION SINCE THE UNITED STATES WOULD HAVE ESTABLISHED THE BOUNDARY AS AN INITIAL MATTER IN 1872-73 AND THEREAFTER RELOCATE THE OBLIQUE PORTION, AND NOTHING WOULD BE REQUIRED OF EITHER STATE TO VALIDATE AN EXERCISE BY THE UNITED STATES OF A POWER CONFERRED BY THE CONSTITUTION.

If the Special Master had addressed these two issues raised by Nevada, supra, p. 11, and assuming, *arguendo,* that he would have found that the two states did not have constitutional authority to establish on the ground the boundary between them, then the Special Master would have laid the predicate for the constitutional necessity that the United States establish the boundary.

Instead, the Special Master concluded that the Houghton-Ives Survey was not a complete survey and not officially recognized by the General Land Office. The Special Master then concluded that the purpose of Von Schmidt's Survey was not to move the posted

boundary, but its purpose was to resolve a conflict in the 120th Meridian's location even though the then posted boundary was in fact physically moved over to the line of Von Schmidt's Survey.

If the Special Master is correct in his conclusion that the United States did establish the boundary by authority of Von Schmidt's Survey, then the Special Master must have been of the opinion that the United States established it pursuant to some constitutional power. However, the Special Master fails to set forth in his Report that the action of Congress in authorizing the survey performed by Von Schmidt was in pursuance of constitutional authority. Assuming, *arguendo,* that the Von Schmidt Survey was a constitutional survey, then it follows that whether California or Nevada consented thereto, or by their inaction or acquiescence therein, matters not one whit. The actions of the United States, if constitutional, would have been complete and effective in 1872 when exercised. Nothing would have been required of either state to render action taken under the Constitution efficacious—least of all, the consent or lengthy acquiescence of the two states—the consent of the required number of states having been given at the Constitution's adoption in 1789.

It is the same with the relocation by the United States of the oblique boundary from Von Schmidt's oblique line to the line surveyed in 1893-99 by the Coast & Geodetic Survey. If this relocation were done pursuant to constitutional warrant, then it was effective and established the new oblique boundary when

done. Again, nothing was required of either California or Nevada to validate the exercise of a constitutional power by the United States.

The Supreme Court long ago rejected any notion of a supposed power in a single State to alter the Constitution by conferring an absent power. Chief Justice Marshall in rebutting a similar argument advanced in *McCulloch vs. Maryland,* 4 Wheat. (17 U.S.) 316,429, emphatically declared:

> These powers [of the United States] are not given by the people of a single state. They are given by the people of the United States . . . Consequently, the people of a single state cannot confer a sovereignty which will extend over [the people of the United States] . . . because it is the usurpation of a power which the people of a single state cannot give.

Also, in *Pollard v. Hagan,* supra, at 223, this Court denied any power in a state to confer upon Congress a municipal jurisdiction over her territory. This Court said in *Pennsylvania v. Wheeling Bridge Co.,* 18 How. (59 U.S.) 421, at 433, that an interstate compact clearly did not operate as a restriction upon the power of Congress to regulate commerce as "Otherwise, Congress and two states would possess the power to modify and alter the Constitution itself." Further, in *Coyle v. Smith,* 221 U.S. 559, at 567, it was held that a state could not agree to conditions of admission or otherwise the power of Congress would be enlarged.

Yet, having laid the predicate for constitutionalizing Von Schmidt's Survey, the Special Master does not do so, but rather, embraces the doctrine of

acquiescence and prescription as justification for recommending Von Schmidt's Survey of the 120th Meridian and the Coast & Geodetic Survey's oblique line.

Nevada understands the Special Master's Report as saying that it matters not under what authority or lack of authority the United States surveys states' boundaries; that it is sufficient that the states' inaction and acquiescence validates it. Nevada submits that this is a frightful premise and portends ill for the Constitution if extended to the limits of an assumed logic.

Therefore, if the Von Schmidt Survey and the Coast & Geodetic survey were done in accordance with the Constitution, then the consent of a state or her acquiescence through silence and passage of time is of no consequence. But, if the Von Schmidt and Coast & Geodetic surveys were conducted without constitutional authority, then neither Nevada's nor California's acquiescence therein could constitutionalize them. *McCulloch v. Maryland, Pollard v. Hagan, Pennsylvania v. Wheeling Bridge Co., Coyle v. Smith,* supra.

Nevada respectfully urges this Court, if it is disposed to decree Von Schmidt's location of the 120th Meridian as California and Nevada's Meridional Boundary, as the Special Master recommends, that the Court clearly set forth in the Decree the constitutional basis for it being decreed the Meridional Boundary, that is, that the United States through Congress was empowered under the Constitution to establish the boundary in 1872–73 and negate any pretension that the United States' conduct of Von Schmidt's Survey is today efficacious because of Nevada's and California's inaction and acquiescence therein. Similarly, if the Court is disposed to adopt the Special Master's recommendation of the Coast & Geodetic Survey's oblique line, then the Decree

should clearly indicate that the Coast & Geodetic Survey was performed pursuant to some constitutional power.

III.

THE SPECIAL MASTER'S RECOMMENDATION OF VON SCHMIDT'S SURVEY OF THE 120TH MERIDIAN AS THE MERIDIONAL BOUNDARY SHOULD NOT BE ACCEPTED BECAUSE:

A. HIS CONCLUSION THAT THE JOINT-STATE HOUGHTON-IVES SURVEY OF 1863-65 DID NOT ESTABLISH THE "TRUE AND ANCIENT BOUNDARY" BETWEEN CALIFORNIA AND NEVADA IS NOT SUPPORTED BY THE EVIDENCE FOR THE FOLLOWING REASONS:

1. ALTHOUGH THE SPECIAL MASTER RECOGNIZED THIS COURT'S DECISIONS APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES, HE REJECTED THE HOUGHTON-IVES SURVEY AS NOT BEING A COMPLETE SURVEY IN THE FACE OF UNCONTRADICTED EVIDENCE THAT THE HOUGHTON-IVES SURVEY WAS A COMPLETE SURVEY OF THE 120TH MERIDIAN BETWEEN THE 39TH AND 42ND PARALLELS.

The Special Master summarily dismissed the 1863-65 joint-state Houghton-Ives Survey as "never a complete survey" (Report, p. 46). Presumably, the Special Master's conclusion rests upon the fact that the joint-state survey never extended to the 35th Parallel at the Colorado River. It should be noted that at

the time of the survey, Nevada's boundary with California did not extend to the Colorado River but extended only to the 37th Parallel (Exhibits 21, M). Indeed, the Special Master ignored evidence that Lawson acted as a commissioner for both states when he extended the Houghton-Ives Line an additional 73 miles to a point near the 37th Parallel (Exhibits 64, DDD, plate after p. 266).

In any event, the Special Master overlooked the obvious, that is, the Houghton-Ives Survey was a complete survey of the 120th Meridian from the 39th Parallel in Lake Tahoe north to the Oregon Line at the 42nd Parallel. It is difficult for Nevada to comprehend the Special Master's treatment of the Houghton-Ives Survey as not complete when he is not similarly troubled by the fact that the Coast & Geodetic Survey was not complete in the sense that it was not a complete survey of the entire boundary north to the 42nd Parallel but terminated at the 39th Parallel in Lake Tahoe.

2. THE SPECIAL MASTER'S CONCLUSION THAT THE GENERAL LAND OFFICE DID NOT OFFICIALLY RECOGNIZE THE HOUGHTON-IVES LINE IS CONTRARY TO SUBSTANTIAL AND UNCONTRADICTED EVIDENCE OF RECOGNITION AND ADOPTION OF THE HOUGHTON-IVES SURVEY BY THE CONGRESS, THE SECRETARY OF INTERIOR, THE GENERAL LAND OFFICE AND THE CENSUS BUREAU.

The Special Master's conclusion that the General Land Office did not officially recognize the joint-state surveyed line not only has no support in the record

but is contrary to substantial evidence that the United States Government recognized the Houghton-Ives Line to the fullest extent possible.

One of the main reasons which prompted California's Governor Leland Stanford to seek a joint-survey was to establish whether the important mining town of Aurora was in California or Nevada (Exhibit 59). As the Special Master noted Aurora was found to lie within Nevada. (Report, p. 19). But the Special Master stopped here. He did not comment on the many instances of recognition by the United States of the Houghton-Ives Line.

The following instances of recognition are in evidence. In June of 1868 Congress recognized Aurora to be within Nevada by declaring Aurora to be the seat of the General Land Office for the Nevada Surveying District (Exhibit MM). The United States Surveyor General for California requested the Governors of California and the Nevada Territory for data on the Houghton-Ives Survey and maps of it in order to adopt the work and close the public surveys thereon (Exhibits 90, 91, FFF). The General Land Office actually surveyed public lands along the Houghton-Ives Line and closed the public surveys thereon, both along the meridional and oblique portions (Exhibits Series FFFF illustrating closures of six townships north of Lake Tahoe). The United States, by its Secretary of Interior, "clear-listed" and conveyed to Nevada and California thousands of acres in reliance upon the Houghton-Ives Boundary Line (Exhibits 236, 237, 238, EEEE Series). The United States patented lands to private settlers with reference to Houghton-Ives

Boundary Line (Exhibit FFFF Series, BLM Historical Index Sheets). The General Land Office prepared annual official maps to accompany the Secretary of Interior's annual reports to Congress which showed closure of the public lands surveys, townships, and standard parallels on the Houghton-Ives Boundary Line (Exhibits ZZZZ, AAAAA).

This Court in *Louisiana v. Mississippi,* 202 U.S. 1, placed great reliance, when rejecting Mississippi's claim of boundary, upon Louisiana's selection, and approval by the General Land Office, of the public lands:

> "The lands in these townships were surveyed by the government * * * as being in and forming a part of the state of Louisiana. By the swamp land grants * * * the United States granted to [Louisiana] the swamp and overflowed lands within [her] respective limits, * * * Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. * * *
>
> "[T]hese lands were approved to Louisiana by the Commissioner of the General Land Office * * * as forming part of that state, and they were subsequently patented, sold, and conveyed to various individuals, the chain of title extending from 1852 * * *.
>
> "When, as we have said, Louisiana, in the year 1852, selected these and other lands within her state limits as inuring to her under the swamp land grants, the General Land Office, on May 6, 1852, recognized the correctness of the claim to the lands and approved and patented them to her as a state." (at pp. 54-56)

Other acts of recognition by United States includes the Ninth Census in 1870 which reported the Town of Crystal Peak, which lay west of Verdi, to be within Nevada (Exhibit LL). The United States Army Engineers, through the setting of a stone monument in 1868 on the Houghton-Ives Boundary Line by Lt. Col. R. S. Williamson, recognized that line as the boundary (Exhibits 123, 124, S, p. 14) (Uzes' Testimony, Tr. p. 75). In 1872, George Davidson of the United States Coast Survey used the Houghton-Ives and Williamson stone monuments as triangulation points in determining his location of the 120th Meridian and Davidson did not set a monument to mark his determination of the 120th Meridian. (Exhibits 118 through 125) (Uzes' Testimony, Tr. pp. 75, 76).

Further, at the time of Nevada's admission into the Union, the Houghton-Ives line had been adopted by statute by California as her eastern boundary with the Nevada Territory. Knowledge by Congress of the boundaries of a state upon admission may be reasonably presumed. *Virginia v. Tennessee,* 148 U.S. 503, 521. There is a Congressional purpose to adopt whatever boundary a Territory had immediately prior to its admission as a state, *New Mexico v. Colorado,* 267 U.S. 30, where it was held the location of the boundary was fixed by the event of admission in accordance with a survey of the 37th Parallel which had therefore been made, even though it might not have been a correct survey.

Needless to say, when viewed against this array of actual recognition and adoption by the United States Government of the Houghton-Ives Survey as the

boundary line between California and Nevada, the Special Master's finding of no official recognition by the General Land Office is lacking any support in the record. On the contrary, the evidence clearly supports a finding that the United States did give the joint-state Houghton-Ives Line official recognition as the legal boundary between California and Nevada.

3. THE SPECIAL MASTER FAILED TO RECOGNIZE THE SUBSTANTIAL AND UNCONTRADICTED EVIDENCE THAT THE HOUGHTON-IVES SURVEY WAS THE FIRST PRACTICAL LOCATION OF CALIFORNIA'S AND NEVADA'S BOUNDARY, AND THAT THE SURVEY DID NOT TAKE EFFECT "AS AN ALIENATION OF TERRITORY, BUT AS A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY."

The Special Master's conclusion that neither the Von Schmidt or the Coast & Geodetic Surveys effected an alienation of the territory of either state (Report, p. 47) shows clearly that the Special Master overlooked substantial evidence that the Hougton-Ives survey was the first "practical location" on the ground of the disputed boundary, and being marked for the first time, neither California nor Nevada gained or lost any territory. *Virginia v. Tennessee.* supra, 520.

If the Special Master's conclusion can be read as proceeding from an undisclosed finding that the Houghton-Ives survey did take effect as an alienation of territory but failed for lack of consent of Congress, then surely the United States' actions just recounted amply demonstrate an affirmative recognition by the

United States of the joint-state boundary survey. Congress may give the required consent both impliedly and subsequently. *Virginia v. Tennessee,* supra, p. 522. Nor could Congress have lawfully withdrawn its consent thus impliedly given. See *Tobin v. United States,* 306 F.2d 270, at 274, where the court reasoned that "*** a line marking the boundary between two states initially drawn by such states acting pursuant to an interstate compact, could hardly be erased at some later date by Congress' enactment of hindsight legislation purporting to repeal its consent by which such boundary was initially determined."

B. THE CONCLUSION THAT THE UNITED STATES DID NOT, BY VON SCHMIDT'S SURVEY, MOVE OR RELOCATE THE POSTED AND SUBSISTING BOUNDARY LINE BEING OBSERVED BY CALIFORNIA AND NEVADA SINCE 1863 IS NOT SUPPORTED BY THE EVIDENCE FOR THE FOLLOWING REASONS:

1. FOR ALL OF THE REASONS SET FORTH IN THE ARGUMENT UNDER III A.

2. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THE VON SCHMIDT SURVEY DID TAKE EFFECT AS AN "ALIENATION OF TERRITORY" OF NEVADA AND WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN THAT NEVADA LOST SOVEREIGNTY AND JURISDICTION OVER SEVERAL HUNDRED SQUARE MILES OF HER TERRITORY.

The Special Master's conclusion that Von Schmidt's Survey did not alienate the territory of either California or Nevada (Report, p. 47) is not supported by any evidence. The Special Master only obliquely refers to the background and events which gave rise to the joint-state survey (Report, p. 45, footnote 20). As noted, these events led to armed conflict with loss of life and wounded—an event unparalleled in the history of boundary disputes to come before this Court. Nevada submits that exposure to this background is essential to a determination of whether California and Nevada marked "their true and ancient boundary", theretofore undefined, on the ground. *Rhode Island v. Massachusetts,* supra, at 734; *Virginia v. Tennessee,* supra, at 522.

Fourteen years after California's admission in 1849, her eastern boundary was uncertain, ill-defined and unknown on the ground. The eastern limits of her territory was a concern of nearly every legislature (Exhibits 42 through 52, 60, 61, 80, 81, 82). Fremont's 1848 map (Exhibit 193) used by the 1849 Constitutional Convention depicted Lake Bonpland (Tahoe) lying entirely west of the 120th Meridian. The first indication that California's eastern boundary lay somewhere in the Lake Tahoe basin came in 1856 when George Goddard determined that the point of intersection of the 120th Meridian at the 39th Parallel fell within Lake Bigler's (Tahoe's) waters and that Carson Valley was in Utah Territory (Exhibit 78).

In 1862 the Nevada Territory was organized and

populous settlements grew along the areas of supposed boundary—a farming and ranching community in Honey Lake Valley and the important mining district of Aurora. Dispute over Aurora's location led to both state and territorial legislatures designating Aurora as the county seat of a county organized by each. Delegates from Aurora were seated in both legislatures. Settlers in Honey Lake Valley were unsure of whether they were under the jurisdiction of California or Nevada. Factions asserting competing jurisdiction finally clashed in armed conflict at Susanville in Honey Lake Valley. A truce was declared and the matter of disputed jurisdiction referred to Governor Stanford and Acting Governor Clemmons. Stanford's emissary met with Clemmons, and Stanford's account of that meeting in his report to the California legislature on the many difficulties experienced with Nevada over the boundary's location, caused the legislature to direct a survey of California's eastern boundary and to invite Nevada to appoint a commissioner to accompany and participate in the survey (Exhibits 54 through 59). The joint-survey marked the 120th Meridian and also surveyed some 103 miles along the oblique line. Lawson surveyed an additional 73 miles along the oblique line as a commissioner for both states, supra, page 19. Thus, 176 miles were surveyed and monumented to within a few miles of the termination of Nevada's boundary with California at the 37th Parallel.

The limits of either state being unknown, the Houghton-Ives Survey did not "cut off an important and valuable portion" of either state and therefore the

political power of California and Nevada was not enlarged. *Virginia v. Tennessee,* supra, p. 520–21. The Houghton-Ives Survey did "simply serve to mark and define that which actually existed before, but was undefined and unmarked." *Virginia v. Tennessee,* supra, p. 520. The Houghton-Ives Line had no effect upon the political influence of either state as neither gained or lost territory. The respective limits of each state was marked and defined on the ground for the first time with the intent that each state would then know the line up to which her jurisdiction could be asserted.

The boundary having thus been marked jointly for the first time and recognized by the United States, supra, pp. 20–22, it follows that any change thereafter in its location would alienate the territory of one or both states. This is precisely what occurred when the boundary was reset over to the line of Von Schmidt's Survey. Lands once in Nevada but which the Special Master now recommends be placed in California is ample proof of the alienation effected by the posting of Von Schmidt's Survey as the new boundary. Indeed, no clearer proof of alienation is there than the effect of a decree of the Houghton-Ives Line as the true boundary for such would remove or obviate the necessity for preserving the sancity of private titles and the selections of the public lands patented in reference to the joint-state survey of 1863–65.

3. THE SPECIAL MASTER'S CONCLUSION THAT THE PURPOSE OF THE VON SCHMIDT SURVEY WAS TO ESTABLISH THE BOUNDARY TO

RESOLVE AN INHERENT CONFLICT IN LOCATION OF MERIDIAN IS CONTRARY TO THE UNCONTRADICTED AND SUBSTANTIAL EVIDENCE THAT THERE WAS NO DISPUTE BETWEEN CALIFORNIA AND NEVADA REGARDING THEIR LINE OF BOUNDARY.

The Special Master noted that there was a conflict in location of the 120th Meridian at the 42nd Parallel as marked by Houghton-Ives, and as marked five years later by Major when beginning his survey of the California-Oregon Boundary to the Pacific. (Report, pp. 21, 22). The Special Master, while characterizing this as an "inherent conflict" in locations of meridian (Report, pp. 46, 47), equates this conflict as a disputed location of meridian in need of settlement.

There was no dispute between California and Nevada as to the location of the 120th Meridian because both states had previously marked it on the ground and were contented with it. Moreover, the Houghton-Ives Survey was the only location of the 120th Meridian on the ground between the 42nd and 39th Parallels. At the very most, there was only an expression of concern by the United States Surveyor General of California to the General Land Office in Washington over Major having begun his survey of California's north boundary some two miles and thirty chains west of Houghton-Ives' location. (Exhibits 101, TTT).

Thus, it was the concern of United States officials, not a dispute between California and Nevada, which led to Von Schmidt's Survey. Even assuming that there was a dispute between the two states, it could

not have been settled then by the unilateral action of the United States anymore than it can today. Instead, a dispute would have been settled by agreement under the Compact Clause or by invoking the original jurisdiction of this Court and obtaining a decree of boundary.

Notwithstanding this total absence of dispute between California and Nevada, the United States was not satisfied and sent Von Schmidt who surveyed a different location of the 120th Meridian. Obviously, such unilateral action by the United States does not satisfy the constitutional requirement of changing state boundaries under the Compact Clause or by decree of this Court. Therefore, The Special Master's justification for Von Schmidt's Survey to settle a conflict of meridians is without any evidentiary support if he means to imply that there was, as between California and Nevada, a disputed location of meridians in need of settlement.

IV.

THE SPECIAL MASTER'S RECOMMENDATION OF THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY SHOULD NOT BE ACCEPTED BECAUSE:

A. THE SPECIAL MASTER JUSTIFIES THE NECESSITY OF A RESURVEY OF THE OBLIQUE BOUNDARY BECAUSE VON SCHMIDT'S OBLIQUE SURVEY WAS NOT AN ACCURATE SURVEY, WHICH IS CONTRARY TO THE SPECIAL MASTER'S OWN

RECOGNITION OF THE DECISIONS OF THIS COURT APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES; AND

THE SPECIAL MASTER'S CONCLUSION THAT VON SCHMIDT'S SURVEY, NOTWITHSTANDING MANY INACCURACIES, WAS EFFECTIVE TO ESTABLISH THE MERIDIONAL LINE IS INCONSISTENT WITH HIS CONCLUSION THAT VON SCHMIDT'S SURVEY DID NOT ESTABLISH THE OBLIQUE PORTION BECAUSE IT WAS NOT AN ACCURATE SURVEY.

The Special Master is critical of Von Schmidt's oblique survey because it stopped short of being corrected back to Lake Tahoe. But Von Schmidt's contract and special instructions did not require that he correct back to the lake (Exhibits 133, VVV). Although the Special Master recognizes evidence of errors in Von Schmidt's location of the 120th Meridian (Report, p. 28) and recognizes the General Land Office's strong criticism of the accuracy of Von Schmidt's meridional survey (Report, p. 27), the Special Master does not fault the meridional portion of Von Schmidt's Survey.

The evidence shows that the entire Von Schmidt Survey was not any more perfect or correct than any previous or subsequent surveys. Indeed, Von Schmidt's oblique line is inaccurate only because his meridional line is 1609 west of the geodetic meridian according to Grunsky-Minto's survey (Exhibits 161,

S); some 1727 feet west of the geodetic meridian according to the Coast & Geodetic Survey of 1899 (Report, p. 28); and approximately 1250 feet west of the geodetic meridian according to the National Geodetic Survey conducted in 1978. (Exhibit 239). Nor do these inaccuracies matter as this Court has approved many inaccurately-surveyed lines which two states had been observing and has decreed the same as the true boundary. The Special Master indeed recognizes this rule (Report, p. 40) but applies it selectively and inconsistently. He concludes that Von Schmidt's oblique line was in need of re-surveying because it was inaccurate and did not establish the oblique boundary while he concludes Von Schmidt's meridional survey, though not accurate, did define and establish the true boundary.

Nevada submits that these inconsistencies of the Special Master undermine his recommended lines. Either the Von Schmidt Survey, despite its inaccuracies, established the entire boundary line or it did not establish any of it. If consistency is to be our guide in such an important matter as the boundary between two states, then the Special Master should have recommended the entire Von Schmidt Survey as the true boundary from Oregon to the Colorado River. Nevada submits that if Von Schmidt's oblique survey did not establish the oblique boundary because of inaccuracies, then neither did his survey of the 120th Meridian establish the meridional boundary because the Special Master recognized its inaccuracy. The Special Master should therefore have recommended the Houghton-Ives Survey since it was the only other

survey of the 120th Meridian, in combination with his recommendation of the Coast & Geodetic oblique line.

To be sure, this double standard accorded Von Schmidt's meridional survey *vis a vis* his oblique survey is the only way of validating the status quo out of moral considerations of displacement and disturbance of boundary lines upon residents on either side of the Special Master's recomended lines. If so, these same moral considerations were equally applicable to residents of Nevada and California displaced in 1872, 1873 and 1899 when the United States disturbed the posted boundary between the peoples of each state. As noted, supra, p. 27, it is only because a decree of Von Schmidt's meridional survey and the Coast & Geodetic oblique survey that problems of land titles of present day occupants arise by virtue of displacement of their predecessors in interest from Nevada into California in 1872, 1873 and 1899. Moreover, California residents east of the Sierra Crest have long yearned to be Nevada residents and California has refused their requests for a plebiscite to express this preference (Exhibit 40).

B. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THAT THE COAST & GEODETIC SURVEY DID TAKE EFFECT AS "AN ALIENATION OF TERRITORY" OF BOTH CALIFORNIA AND NEVADA, AND THAT IT WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN

THAT CALIFORNIA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 321 SQUARE MILES AND NEVADA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 65 SQUARE MILES.

If the joint-state Houghton-Ives Survey did not establish the true boundary between California and Nevada, then the United States was free to survey and mark their boundary. Von Schmidt's Survey was marked and posted on the ground by imposing iron monuments, stone monuments, and by cut granite monuments removed from the Houghton-Ives boundary line. Von Schmidt's oblique survey was the posted boundary in the field until 1899 when the Coast & Geodetic Survey marked and posted its oblique line as the boundary. The Special Master does note that the Coast & Geodetic Survey resulted in California losing to Nevada 321 square miles of her territory and Nevada losing 65 square miles to California (Report, p. 28). Since a loss of political jurisdiction and influence by each state over significant territory did occur, then according to *Virginia v. Tennessee,* supra, p. 521-22, the Coast & Geodetic Survey did not, contrary to the Special Master's finding, take effect as a definition of the true and ancient boundary, but took effect as "an alienation of territory."

This view of the Special Master that California and Nevada had no defined oblique boundary until 1899 is unsupported by the evidence. Despite the Special Master's conclusion that there was no definitive approval by the General Land Office of Von

Schmidt's oblique survey, the evidence clearly shows that the Commissioner of the General Land Office instructed U.S. Surveyors General in California and Nevada to respect the new survey in issuing patents and in conducting and closing the public survey lines thereon.[2] More importantly, these instructions did not distinguish as to Von Schmidt's meridional survey or his oblique survey, and neither were the U.S. Surveyors General instructed to observe the meridional survey but disregard the oblique survey. No less than twenty-two California exhibits are in evidence of correspondence and instructions between General Land Office officials and U.S. Surveyors General in the field to observe Von Schmidt's entire survey and directing compliance therewith. (Exhibits 109 through 113, 138, 210 through 215, 217, 218 through 231). The General Land Office also approved Von Schmidt's map of his oblique survey (Exhibit KKKK). And, as if more were required to indicate the United States' recognition of the entire Von Schmidt Survey, the General Land Office continued to recognize Von Schmidt's oblique line until 1928 when it was directed by the Secretary of Interior to begin reclosure of public land surveys on an 83-mile segment of the Coast & Geodetic survey (Exhibit NN).

The Special Master's observation that neither California nor Nevada adopted Von Schmidt's Survey by statute (Report, p. 27) is indicative of a failure to perceive that under the Constitution the United States,

[2]The Special Master incorrectly notes that the two states were required to close the public lines along Von Schmidt's surveyed boundary line (Report, p. 28).

when setting a state's boundary not previously defined on the ground, does so pursuant to a constitutional power and not by consent of the states. Assuming, *arguendo,* a constitutional necessity for each state's statutory recognition, California's belated repeal in 1978 of the Houghton-Ives Line and adoption of Von Schmidt's meridional survey is insufficient to establish Von Schmidt's meridian as the boundary since Nevada still recognizes by statute the 1863 Houghton-Ives Line.

Further, having faulted the Houghton-Ives Survey for not being a complete survey, the Special Master then throws out the very portion of Von Schmidt's Survey which made it a complete, indeed, the only complete survey of the entire California-Nevada Boundary.

The Special Master next concludes that the Coast & Geodetic survey was "an attempt to resolve disputes as to the true boundary." Once again, there is a total lack of evidence tending to show that California and Nevada had a dispute over the location of Von Schmidt's oblique line. The evidence merely shows that California in time came to be disenchanted with Von Schmidt's oblique line of boundary and inveigled United States officials and Congress to have the oblique portion resurveyed for reasons not altogether unsuspect (Nev. Ans. Br. pp. 135–136). There have been only two disputes between California and Nevada over their boundary—the first in 1863 which resulted in its being marked for the first time, and the present original proceeding.

The Special Master again confuses dissatisfaction

by California and federal officials alone as being disputes between two sovereign states. If the Special Master is correct in his view that mere dissatisfaction by a single state or by federal officials or by Congress, is a sufficient basis to move a joint-state boundary, then there is no reason why the boundary between California and Nevada could not be moved again by a unilateral survey by the United States.

V.

THE SPECIAL MASTER'S CONCLUSION THAT "IN THE ESTABLISHMENT OF NEVADA'S BOUNDARY IT WAS BELIEVED THAT THE 43RD MERIDIAN WEST FROM WASHINGTON AND THE 120TH MERIDIAN WEST FROM GREENWICH WERE THE SAME" IGNORES CONGRESS' OWN REPORT ON THE AMERICAN PRIME MERIDIAN.

The 43rd Meridian west from Washington is of interest to Nevada if this Court should decide a new meridional survey is necessary, in which event, Nevada has counterclaimed for a boundary along the 43rd Meridian which has never been located on the ground.

Nevada is therefore disturbed by the Special Master's failure in his discussion of the matter (Report, pp. 6, 7, fn. 3) to ascertain the intent of Congress. Moreover, the Special Master relies on the author of a tourist's guide to early Nevada and on statements of Nevada surveyors general made long after statehood.

It should be first observed that the source of Nevada's western meridional boundary in terms of a

meridian west from Washington is not the Nevada Constitution. It was prescribed by Congress in Nevada's Enabling Act (Exhibit M). Further, the Special Master's conclusion ignores a report adopted by the Congress which was the basis for the act of September 27, 1850 in which Congress declared that the Washington Meridian would be used for all future astronomic purposes while retaining the Greenwich Meridian for nautical uses. This report (Exhibit J) was made by a special committee of the American Association for the Advancement of Science appointed at the request of the Secretary of Navy to review the feasibility of establishing an American Prime Meridian in place of the Greenwich Meridian. This report repeatedly comments on the then existing knowledge that a degree of Greenwich Meridian would not coincide with a degree of Washington Meridian, but that the Washington Meridian expressed in terms of Greenwich Meridian would always be 77° plus 3 or 4 seconds. (Exhibit J, pp. 4, 5, 20, 26, 34, 37 and 50). This report was debated in Congress and ordered printed (Exhibit I).

Congress then was aware that longitudes measured from Greenwich and Washington would not be congruent and that a Washington Meridian would be west of a Greenwich Meridian. By prescribing Nevada's meridional boundaries measured from the Washington Meridian, Congress was abiding by its 1850 statute requiring use of the Washington Meridian. If Congress wanted to retain a Greenwich Meridian for Nevada, it could easily have expressed Nevada's eastern and western boundaries in terms of

the Greenwich Meridian. Congress twice has extended Nevada's eastern boundary—to the 38th Meridian West from Washington and later to the 37th Meridian. Nevada's eastern boundary was surveyed on a Washington Meridian (Exhibit TTT, pp. 50, 51). Moreover, all the western states' numbered meridional boundaries have been laid out on the ground using the Washington Meridian.

If the Special Master's conclusion that it was believed the 43rd and 120th were one and the same, then similar logic compels the conclusion that Nevada's eastern boundary is 114° West from Greenwich and extends some two and three-quarters miles easterly into what is now the State of Utah. Nevada submits that it is the intent of Congress which is controlling in this matter, and not the surmise of an itinerant tourist guide author and later persons who had no intimate knowledge of why Congress prescribed Nevada's boundary on a Washington Meridian.

VI.

THE SPECIAL MASTER HAS NOT RECOMMENDED A BOUNDARY LINE WHICH WOULD BE A FINAL LINE SINCE BOTH RECOMMENDED LINES WERE SURVEYED BY THE UNITED STATES IN THE ABSENCE OF DISPUTE BETWEEN CALIFORNIA AND NEVADA, AND IF THE SPECIAL MASTER'S CONCLUSION THAT THE UNITED STATES MAY MOVE A STATE'S BOUNDARY IN THE ABSENCE OF TWO STATES DISPUTING THEIR BOUNDARY IS CONFIRMED, THEN THE

UNITED STATES MAY ESTABLISH THE BOUNDARY ON ANOTHER LOCATION; AND THERE WOULD BE GRAFTED ONTO THE CONSTITUTION A NEW MEANS OF CHANGING A STATE'S BOUNDARY, INDEPENDENT OF THE CONSTITUTION'S PRESENT REQUIREMENT OF A DISPUTED BOUNDARY TO BE RESOLVED UNDER THE COMPACT CLAUSE OR BY DECREE PURSUANT TO THIS COURT'S ORIGINAL JURISDICTION.

The surveys recommended by the Special Master were performed by the United States in the absence of any dispute between California and Nevada over the location of their meridional or oblique line of boundary—on this the evidence is clear. Although the unilateral conduct of the United States may be overlooked or ignored, it can not be explained or justified on constitutional grounds.

Nevada, having had territory carved from her western limits on three occasions by the United States, and having a common boundary with four other states, takes a strict view of the requirements of the Constitution in the matter of changing a state's boundary. Nevada understands the decisions of this Court stand for the oft-enunciated proposition that actions of the Executive or the Congress are to be taken pursuant to power conferred by the Constitution. The Special Master characterizes Nevada's argument that the United States cannot constitutionally move a state boundary once set and that a state's acquiescence by inaction cannot constitutionalize it as a "rather novel question." (Report, p. 45).

The Special Master inferentially recognized the principle of a state's inability to acquiesce in an unconstitutional act, but he declined to pursue this line of inquiry because there were no federal cases applying it. (Report, p. 46). Assuming the absence of federal decisions were reason to overlook its potential application here, the Special Master misconstrued the purpose for which Nevada stated that no federal cases had been found. Nevada made this statement not as to a state's inability to acquiesce in an unconstitutional act, but made it in regard to her argument that long acquiescence cannot legalize an usurped power. (Nevada's Ans. Brief, pp. 89, 89a). Nevada cited several decisions of this Court to the effect a state cannot directly act with another state or with the United States to confer non-existent power or alter the constitution. These same decisions are cited, supra, page 16. And if a state cannot do it directly, clearly a state may not by her inaction and silence indirectly confer the absent power. The Special Master nonetheless bases his recommended line of boundary upon the states' factual acquiescence.

If the recommended lines are to be constitutionalized because of either state's factual acquiescence, then nothing will stand in the way of the United States, whenever it choses, to resurvey and relocate the boundary line.[3] And the state which loses territory to the other may either acquiesce therein, or perhaps question the right of the United States to move it

[3]The opportunity to do so may arise as early as 1983 when the United States will readjust geodetic grid control for latitude and longitude from 1927 Datum (Landrum's Test., Transcript, pp. 338, 339).

by seeking injunctive relief against performance of the resurvey or against movement of subsisting boundary monuments. Of course, such proceeding for injunctive relief would raise the very same question already presented here and which should be addressed and answered now, that is, whether the United States can willy-nilly relocate posted boundary lines being observed by two states.

That the United States may be able to relocate the boundary in the future prompts the suggestion that the United States will not be bound by the decree of boundary herein. If the United States would not be bound, then it should be made a party or participate in these proceedings to determine the lawful boundary. *Florida v. Georgia,* 17 How. (58 U.S.) 478, 495.

Nevada is troubled, as any proponent or scholar of the Constitution would be, by the principle which, if the Special Master's basis for his recommended lines is sustained, will emerge—states may agree to the destruction or emasculation of their right and standing under the Constitution. Truly, then, usurped power will wear the cloak of constitutionality—acquiescence having ascended to a pre-eminence never before attained and heretofore rejected by this Court, supra, p. 16.

Further, the prospect of the United States being able to move, unless somehow restrained by a state, two states' subsisting boundary will add to the Constitution a new method of changing a state's boundary. Presently, there must be a dispute between the states

over their boundary's location. The disputed boundary may only be changed to a new location by Compact with approval of Congress, or if unable to agree, by invoking the original jurisdiction of this Court for a decree of boundary. *Poole v. Fleeger,* 11 Pet. (36 U.S.) 185; *Hinderlider v. La Plata River Co.,* supra. In *Rhode Island v. Massachusetts,* supra, this Court declared at pp. 726–27:

> There can be but two tribunals under the Constitution who can act on the boundries of states, *the legislative or the judicial power,* the former is limited, in express terms, to assent or dissent, where a compact or agreement *is referred to them* by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. (Emphasis added)

The foregoing holding purposely omits the executive power and requires that the states initiate the change by referring a compact to Congress. Congress may not make compacts between states. *Kansas v. Colorado,* 206 U.S. 46, at 97. But the foregoing holding in *Rhode Island v. Massachusetts* will become empty words if the United States is permitted to move states' boundaries in the absence of the states disputing their boundary.

The dispositive question to be answered in the case *sub judice,* indeed, to be faced, is did the Federal government act under a power granted it by the Constitution when it moved the posted boundary between California and Nevada? If it did so act in 1872–73 and in 1899, then the case *sub judice* will rest upon the

holding that the actions of the United States in moving the agreed boundary was in pursuance of constitutional authority. On the other hand, if these actions of the Federal government were not authorized by the Constitution, then they cannot become constitutional by mere silence and efflux of time, regardless of its length.

VII.

IT IS UNCLEAR FROM THE FIRST RECOMMENDATION WHETHER THE SPECIAL MASTER IS RECOMMENDING A CONNECTION OF VON SCHMIDT'S MERIDIONAL LINE WITH A PROLONGATION OF THE COAST & GEODETIC OBLIQUE LINE AT A POINT WHICH IS NOT THE 39TH PARALLEL AS LOCATED BY VON SCHMIDT OR THE COAST & GEODETIC SURVEY, IN WHICH CASE THE SPECIAL MASTER HAS MADE THE CONNECTION FOR THE PARTY STATES "AT A POINT APPROXIMATELY AT SUCH INTERSECTION"; AND THEREFORE, HIS SUGGESTED COURSE OF ACTION IN THE SECOND RECOMMENDATION IS UNNECESSARY; OR WHETHER HE HAS RECOMMENDED AN OBLIQUE LINE FROM THE POINT OF CONNECTION OF VON SCHMIDT'S MERIDIONAL LINE WITH HIS 39TH PARALLEL, OR A CONNECTION WITH THE 39TH PARALLEL AS LOCATED BY THE COAST & GEODETIC SURVEY; AND IF HE HAS RECOMMENDED THE LATTER, THEN IT IS AN OBLIQUE LINE WHICH HAS NEVER BEEN

SURVEYED AND WOULD NOT INTERSECT THE COAST & GEODETIC SURVEY UNTIL IT REACHED THE COLORADO RIVER.

Von Schmidt's point of intersection of his 120th meridional line with his location of the 39th Parallel (at point A on Exhibit A, Appendix) lies south and west of the termination of the Coast & Geodetic Survey's oblique line at its location of the 39th Parallel (at point B on Exhibit A). Therefore, Von Schmidt's meridional line does not intersect the Coast & Geodetic Survey's oblique line. But a prolongation of the Coast & Geodetic Survey northwesterly from point B will intersect Von Schmidt's meridional line at point C on Exhibit A.

The Special Master recommends the 120th Meridian "as marked and determined by Von Schmidt to the point in Lake Tahoe where such north-south line[4] intersects the 39th Parallel * * * and continuing from such point on a straight line known as the * * * [Coast & Geodetic Oblique]". The Special Master fails to indicate whose location of the 39th Parallel he means. The Special Master has connected the two lines at point C on a parallel north of both Von Schmidt's and the Coast & Geodetic's 39th parallels. This must be so because if the Special Master has connected Von Schmidt's meridional line with the 39th Parallel as located by the Coast & Geodetic Survey at point C1 on Exhibit A or with Von Schmidt's own 39th Parallel at point A, then he has not connected with terminal

[4]Von Schmidt's meridional line is not on a true south meridian but veers to the west as it proceeds southerly from Verdi.

point B of the Coast & Geodetic Oblique. He would have connected Von Schmidt's meridional line either (1) with an oblique line at point C1 never surveyed and which would not intersect the Coast & Geodetic's oblique line until it reached the Colorado River; or (2) has connected with Von Schmidt's own oblique line at Point A.

If the Special Master is recommending his connection of Von Schmidt's meridional line with a prolongation of the Coast & Geodetic oblique line, then the course of action recommended by the Special Master in his second recommendation is not necessary. If this Court is disposed to adopt the boundary lines recommended by the Special Master, then in that event, Nevada would be agreeable to accepting the connection made by the Special Master of Von Schmidt's meridional line with the Coast & Geodetic Survey oblique line as depicted on Exhibit B, Appendix; provided, that said point of intersection will be referenced to and adduced from: (1) a ranged prolongation in a southerly direction of Von Schmidt's location of the 120th Meridian from Point D on the north shore to Point E on the south shore of Lake Tahoe as depicted on Exhibit B; (2) with a ranged prolongation in a northwesterly direction of the Coast & Geodetic Oblique line from Point F at the southeast shore to Point G on the western shore of Lake Tahoe as depicted on Exhibit B.

VIII.

TO THE EXTENT THAT THE SPECIAL MASTER'S THIRD AND SEVENTH RECOMMENDATIONS

MAY BE READ AS IMPLYING A NEED TO MARK EITHER OF HIS RECOMMENDED LINES ON THE GROUND, SUCH REMARKING IS UNNECESSARY AS BOTH LINES ARE ADEQUATELY MARKED NOW, AND THE EXPENSE OF ANY SUCH REMARKING, IF DEEMED NECESSARY, SHOULD BE BORNE BY THE UNITED STATES.

These two recommendations of the Special Master may be read as inferring a need to resurvey and remark his recommended lines. Should this Court adopt the Special Master's recommended lines, Nevada sees no need to resurvey or remark them as both are sufficiently marked and posted on the ground. Further, if such resurvey and remarking were necessary, then the cost thereof should be borne by the United States since it was dissatisfied with the joint-state line and caused the recommended lines to be surveyed and marked and does presently maintain these surveys as the boundary between California and Nevada.

CONCLUSION

The Court should decline to adopt the boundary lines recommended by the Special Master because the recommendations are contrary to the evidence and to the decisions of this Court and are needlessly based on the doctrine of acquiescence and prescription. The decree of boundary herein should be based upon

power in the United States and not upon acquiescence and prescription.

California and Nevada constitutionally established their boundary in 1863–65 by their joint survey and the Houghton-Ives Survey should be decreed the boundary herein. Such a decree should also provide for a survey from the Houghton-Ives terminal point on the oblique to the 1961–66 Compacts point at the Colorado River. A decree of the joint-state surveyed line will least disturb rights and titles derived from the many grants of the United States and by the two states in reliance upon the joint-surveyed boundary line of 1863.

If the Court holds that California and Nevada did not jointly establish the constitutional line of boundary in 1863–65, then the entire Von Schmidt Line, being the first and only survey by the United States of the entire California-Nevada boundary, should be decreed the boundary line. Such a decree should be premised on a determination that the United States had constitutional authority to establish initially the California-Nevada boundary by Von Schmidt's Survey of 1872–73; and that the oblique portion of Von Schmidt's Line, then being the posted line of boundary between the two states, could not thereafter have been moved to a new location unless it were then dis-

puted by the two states and settled then pursuant to the Compact clause or by decree of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James H. Thompson, Special Deputy Attorney General, and one of Defendant's counsel herein, hereby certify that on the 12th day of December, 1979, I mailed by first class mail, postage prepaid, a copy of Defendant, State of Nevada's Exceptions to Report of Special Master and Brief, to each of the following:

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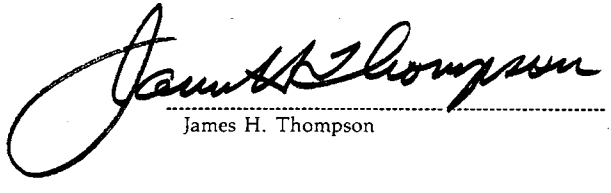

James H. Thompson

APPENDIX

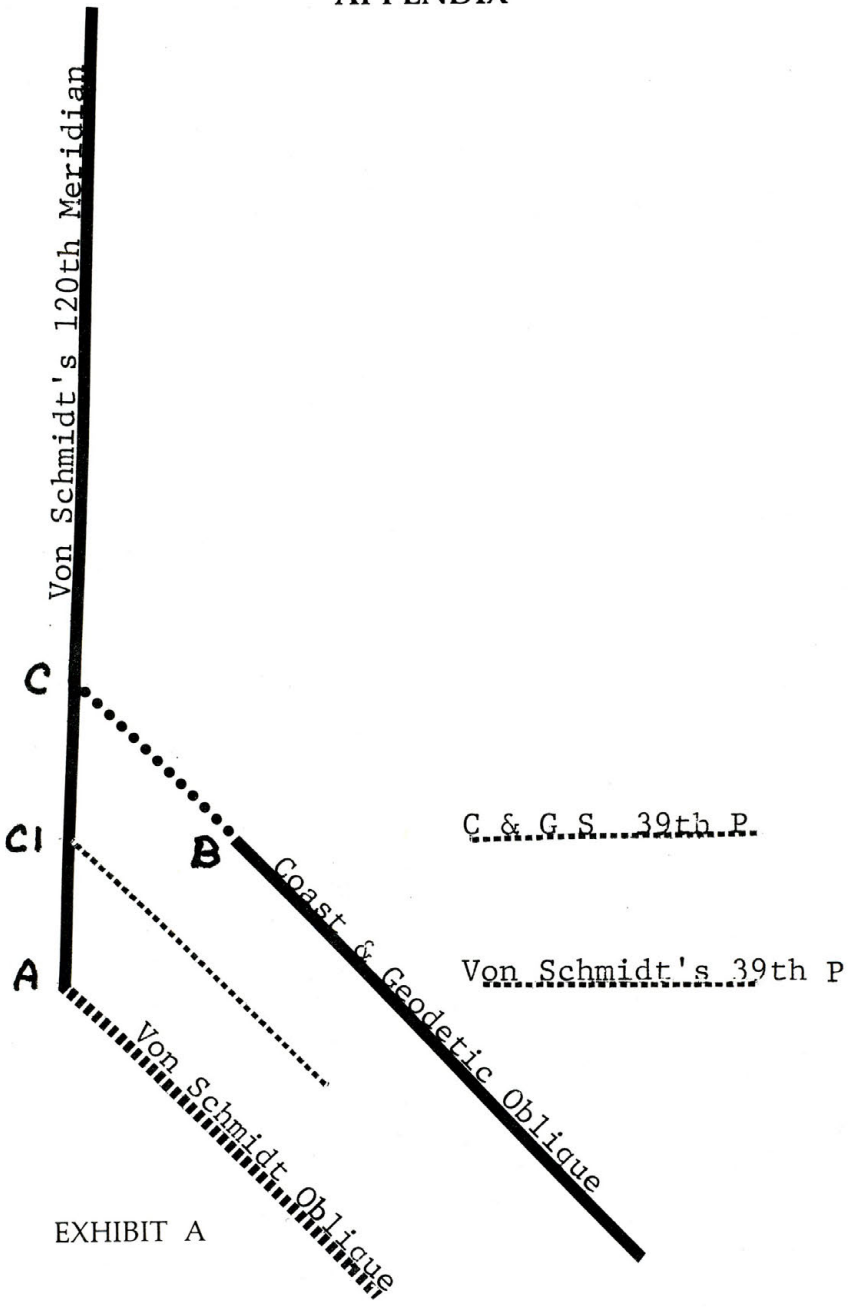

EXHIBIT A

APPENDIX

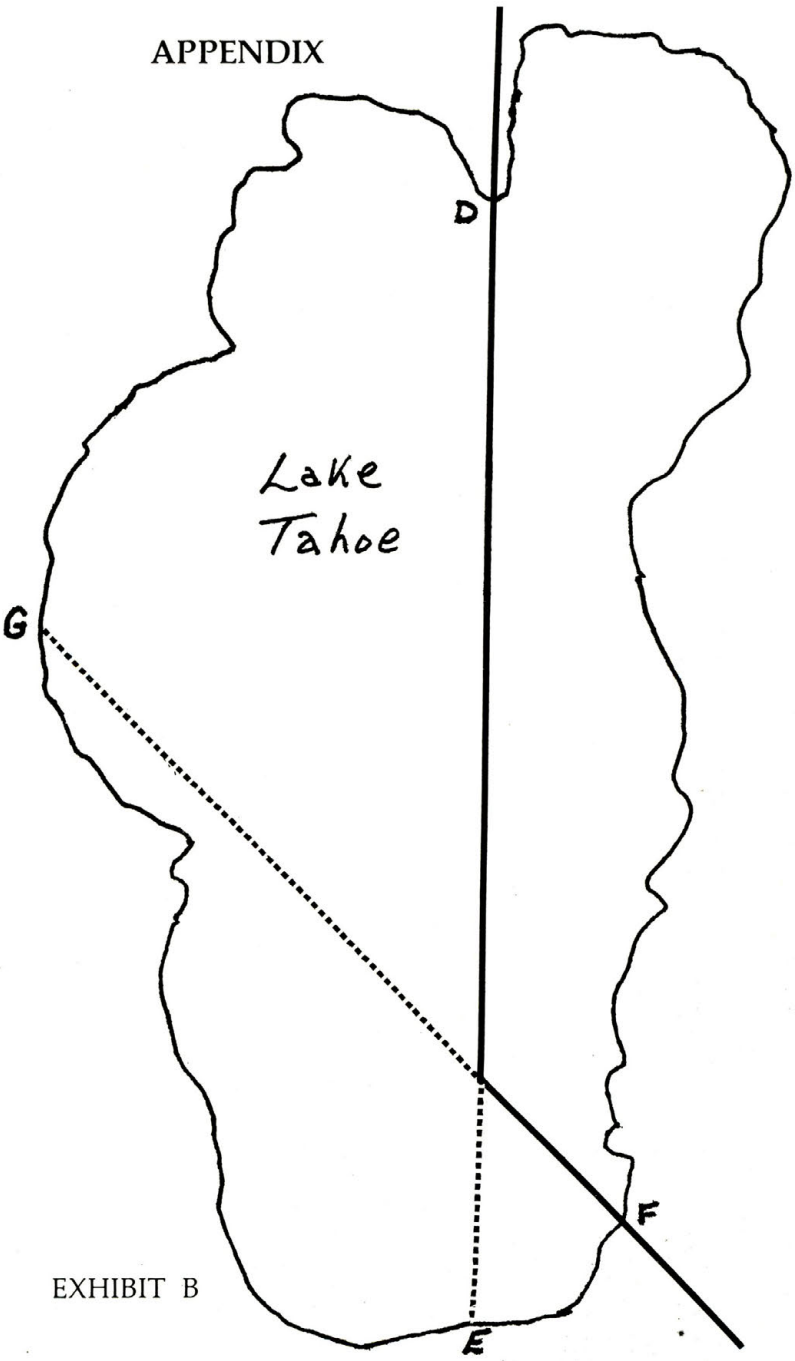

EXHIBIT B