

AUG 14 1964

JOHN F. DAVIS, CLERK

In The
Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

**OPPOSITION TO MOTION FOR A TEMPORARY
RESTRAINING ORDER AND AFFIDAVIT
IN SUPPORT OF OPPOSITION**

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*To the Honorable Byron R. White, Justice for the
Eighth Judicial Circuit:*

NOW comes the State of Iowa, the Defendant in the above entitled matter, and in response to the Motion for a Temporary Restraining Order of the Plaintiff, State of Nebraska, expressly reserving the right to file a Brief In Opposition to the Motion For Leave to File Bill of Complaint, as provided in Rule 9 of the Rules of the Supreme Court, respectfully shows:

1. That the motion for temporary restraining order and the affidavit of John S. Redd, in support of the motion for a temporary restraining order, are based upon the allegation that the actions of the State of Iowa interfere with the quiet enjoyment of individuals owning or occupying lands allegedly ceded to Iowa by the State of Nebraska under the Iowa-Nebraska Boundary Compact of 1943. It is well established by the decisions that this Court will not entertain a pro-

ceeding on original jurisdiction by a state on behalf of its citizens or group of citizens, and not in the interest of the state itself. (*Mass. v. Mo.*, 60 S. Ct. 39, 308 U. S. 1, 84 L. Ed. 3; *Ark. v. Texas*, 74 S. Ct. 109, 346 U. S. 368, 98 L. Ed. 80.)

2. That the motion for temporary restraining order and the affidavit in support thereof fail to allege or set forth any facts showing immediate and irreparable injury, loss or damage to the State of Nebraska, nor to its citizens. Nor are there any facts or allegations to show that an emergency exists, and therefore there is no basis in fact or in law for the granting of the motion prayed.

3. That it is conceded by the State of Nebraska in paragraph X of its Bill of Complaint that the State of Iowa is the owner to the bed of all navigable streams within the State of Iowa to the high water mark, and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. That as owner of islands accreting to the beds of such navigable streams, the State of Iowa has not only the right, but the duty to protect and conserve these natural resources and the legal process instituted to adjudicate this ownership is a proper exercise of that duty. (*Smith v. Maryland*, 18 How. 71, 59 U. S. 71, 15 L. Ed. 269; *Iowa v. Ill.* 147 U. S. 1, 13 S. Ct. 239, 37 L. Ed. 55; *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428; *Cedar Rapids v. Marshall*, 199 Ia. 1262, 203 N.W. 932; *Tyson and Schroeder v. Iowa*, 283 Fed. Supp. 802.)

4. That in the event this Honorable Court should grant the motion as prayed by the State of Nebraska, the State of Iowa would be precluded from exercising its right and duty to protect its natural resources;

chaos and destruction could ensue upon state-owned lands in the Missouri River, and citizens of either state would be temporarily vested with a license to encroach and commit waste by the removal of our natural forests and natural resources; and a few citizens could and would utilize property belonging to the State of Iowa which is to be held in trust by the State of Iowa for all of its citizens. That to grant the temporary restraining order would be such a detriment and injury to the State of Iowa and to the public, that it would far outweigh the benefit to be reaped by the limited number of citizens of Nebraska for whom this motion is made, who will suffer no injury or loss, and accordingly the temporary restraining order should be denied.

5. That the State of Iowa, now and for many years, has regulated most of its state-owned lands along the Missouri River without the interference by the State of Nebraska, and in some cases to the mutual advantage and enjoyment of the citizens of the State of Iowa and the citizens of the State of Nebraska, and should be permitted to continue such regulation.

WHEREFORE, it is respectfully prayed that the motion requesting such extraordinary and unnecessary relief be denied.

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Des Moines, Iowa
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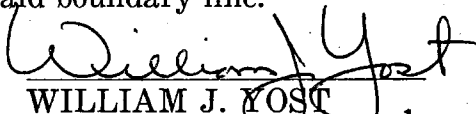
STATE OF IOWA, DEFENDANT,
—

State of Iowa)
) ss.
County of Polk)

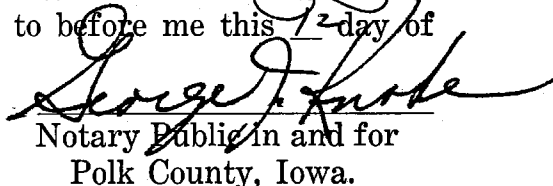
WILLIAM J. YOST, being first duly sworn, on oath
depose and says:

That he is an Assistant Attorney General for the State of Iowa and has been actively engaged in litigation involving state-owned lands in the State of Iowa along the Missouri River; that he is familiar with the case entitled *State of Iowa v. Henry E. Schemmel, et al.*, and is also familiar with the evidence in the possession of the State of Iowa, and that such evidence reflects that the property in question arose above the ordinary high water mark, as an island in the Missouri River on the left bank, or Iowa side of the boundary, prior to 1943, and that said property was in the State of Iowa before the 1943 Compact and still is; that several actions have been commenced by the State of Iowa to quiet title to certain lands lying within the State of Iowa in state courts involving citizens of the State of

Iowa, and on occasions, citizens of the State of Nebraska, and that the nature of these various actions vary in fact and law, and are incapable of being fully and finally commonly determined by a single determination in the Supreme Court of the United States or in any other forum; that the State of Iowa has been, in the past, involved as a defendant in several actions to quiet title to certain lands along the Missouri River within the State of Iowa, both in state and in federal courts, and the facts and issues in those cases varied from case to case, and were incapable of being commonly adjudicated by a single determination in the Supreme Court of the United States; that he is an attorney of record in the case entitled *State of Iowa, Plaintiff, v. Darwin Merritt Babbitt, et al., Defendants*, and is familiar with the evidence in the possession of the State of Iowa relating to the same, and that such evidence reflects that the property in question formed as an island in the Missouri River on the Iowa side of the boundary prior to 1943, and that ownership of said property was in the State of Iowa before the 1943 Compact and still is; that in all litigation instituted by the State of Iowa to quiet title to property in the Missouri River surveys are conducted by qualified land surveyors to ascertain the exact location of the 1943 boundary line, and in no instance has the State of Iowa attempted to transgress said boundary line.


WILLIAM J. YOST

Subscribed and sworn to before me this 7th day of
August, 1964.


Notary Public in and for
Polk County, Iowa.

PROOF OF SERVICE

I, Evan Hultman, Attorney General of the State of Iowa and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 12, 1964, I served a copy of the foregoing Opposition to Motion for Temporary Restraining Order and Affidavit, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska

such being their post office addresses.



EVAN HULTMAN
Attorney General
State of Iowa
State Capitol
Des Moines, Iowa

