IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17 Original

STATE OF NEBRASKA, Plaintiff

v.

STATE OF IOWA, Defendant

REPORT OF SPECIAL MASTER

JOSEPH P. WILLSON
Senior District Judge
Special Master

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ISSUES TO BE DECIDED

I. *Has Iowa violated the "Iowa-Nebraska Boundary Compact of 1943?"*

(a) The Special Master reports findings and conclusions that Iowa has violated the Iowa-Nebraska Compact of 1943 by claiming ownership of Nottleman and Schemmel Islands.

II. *Where all land in controversy north of Omaha is located in the State of Iowa contiguous to the Missouri River, does the Nebraska law of accretion operate to create riparian rights within the territorial limits of Iowa?*

(a) The Special Master says No.

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I. PRELIMINARY STATEMENT

In support of its motion to file its complaint in this Court, Nebraska stated:

"The purpose of this litigation is to resolve the controversy between the Plaintiff, The State of Nebraska, and the Defendant, The State of Iowa, growing out of the actions of the State of Iowa in attempting to unilaterally abrogate the Iowa-Nebraska Boundary Compact of 1943 and in attempting to assert title to lands which prior to 1943 had been within the jurisdiction of the State of Nebraska and title to which had been in citizens of the State of Nebraska."

On March 18, 1963 the State of Iowa brought suit in the State Court of Mills County, Iowa, in a case captioned *State of Iowa, Plaintiff v. Darwin Merrit Babbit, et al.,* Equity No. 17433, which is recited in Paragraph XI in the complaint in this case and which case is still pending and in which Iowa seeks to quiet title in the sovereign State of Iowa to Nottleman Island.

Also, on March 26, 1963 the State of Iowa filed suit in the State Court of Fremont County, Iowa, captioned *State of Iowa, plaintiff v. Henry E. Schemmel, et al., defendants,* Equity No. 19765, in which Iowa sought and still seeks to quiet title in the State of Iowa to the island known as Schemmel Island.

These two suits and others brought by Iowa precipitated the instant litigation.

Nebraska contends that the titles to these two islands were "good in Nebraska" on the date of the 1943 Compact. These islands are now in Iowa but, says Nebraska, they are ceded lands under Section 2 of the Compact and, therefore, Iowa must recognize the private Nebraska titles, as provided in Section 3 of the Compact.

Nebraska says that Iowa should be enjoined from further prosecuting these two lawsuits. Iowa's response is that these two islands were formed on the Iowa side of the original boundary line and always have been in the State of Iowa, and that they are not lands ceded to Iowa under the Compact.

In addition to Nottleman and Schemmel Islands, Nebraska charges Iowa with wrongfully claiming 21 recreation land areas along the Missouri River based on

claims by Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Iowa's response to this charge by Nebraska is that Iowa claims to own 32 areas in Iowa and in the immediate vicinity of the Missouri River. Two areas she claims entirely by conveyance. Thirty of these she claims at least in part by application of her common law upon the facts as to how these 30 areas were formed. Eight of these 30 areas and part of a ninth came into existence prior to 1943. Twenty-one and part of the 22nd of these 30 areas have come into existence since 1943.

The land area claimed by Iowa totals over 14,000 acres. Nottleman Island alone contains 1550 acres, and Schemmel Island contains 550 acres. All the land involved herein is unquestionably worth several hundred thousand dollars. However, in deciding this case it is unnecessary to determine the value of any of this land.

II. PRETRIAL AND TRIAL

On April 26, 1965 The Honorable Walter L. Pope, Senior Judge, Court of Appeals for the Ninth Circuit, was appointed Special Master in this case in place of The Honorable J. Warren Madden, resigned. Judge Pope conducted extensive pretrial proceedings. He held conferences with counsel, directed depositions and further pleadings, and the submission of pretrial statements.

Nebraska's pretrial statement comprised 181 pages; Iowa's pretrial statement comprised some 279 pages. Thereafter, supplemental pretrial statements were filed by each state.

Due to ill health, Judge Pope resigned as Special Master in June 1968. The Court then appointed The Honorable Charles Vogel as Special Master, but he served only a brief period and resigned; and my appointment as Special Master in this case was made on October 21, 1968.

A pretrial conference was held of all counsel at Pittsburgh on January 22, 1969, and the trial of the case was fixed to commence on April 9, 1969 at Omaha.

Nebraska took 12 trial days to present its evidence, and Iowa's evidence was presented thereafter over a period of 12 trial days. A trial transcript of 3,720 pages was compiled. At pretrial counsel marked some 3,500 exhibits, but they estimate that only 800-900 exhibits were actually admitted in evidence at the trial. Thereafter each state prepared printed briefs and resumes' of evidence. Oral argument was held at Omaha beginning September 29, 1970 and continuing 4 days. At my suggestion during the course of the oral argument

counsel mentioned the exhibit numbers in support of the point then being made. The oral arguments have been printed and will be submitted with the exhibits.

It was noticed in Judge Pope's pretrial proceedings that he gave wide latitude to counsel with respect to the several contentions of each state. During the trial before me, I followed the admonition of the Court in *Virginia v. West Virginia,* 246 U.S. 565, 590. As each litigant is a sovereign state, it was my desire that both states be afforded full opportunity to be heard and that all propositions of law and fact as urged be given consideration. All evidence offered by each state was admitted and considered. However, presentation of the so-called "eyeball" cumulative testimony based upon the recollection of various elderly witnesses as to events and situations which they observed many years previously was to some extent discouraged.

It may be noted at this point also that contrary to litigation between private parties the lapse of time between the filing of this case and its termination has tended to allay excitement and tense feelings.

These states have had river boundary problems for over 100 years. The language in the address of Charles Warren, Esquire, entitled "THE SUPREME COURT AND DISPUTES BETWEEN STATES" at the College of William and Mary on Charter Day in 1940 is appropo. He said:

> "One important phase of all these suits is to be particularly noted, namely, that in many cases, the mere pendency of the suit in the Court for long periods of time has tended to allay interstate feelings and to bring about amicable settlement. Lapse of time is a great mollifier — that 'old common

arbitrator, Time,' as Shakespeare termed it. A chance to cool off is the frequent solution of many differences arising from irritation, anger, and unreason. Time, moreover, gives opportunity to establish the facts involved, and to make clear the real cause of the disagreement as distinguished from the ostensible factors in the suit. Time absorbed in the preparation and trial often develops the fact that parties are not so far apart as at the beginning they supposed. The Court has thoroughly realized this emollient influence; and, while not countenancing unnecessary delays; it has regarded suits between states as demanding grave circumspection in taking of successive steps both by counsel in trial and argument and by the Court itself in its rulings." (Bulletin of The College of William and Mary in Virginia, Vol. 34, No. 5 (June 1940) pp 1-34).

Counsel in this case have expressed their satisfaction that all possible factual evidence necessary to a decision in this case has been presented to the Special Master. It should be noticed also that able and experienced counsel representing these states have been indefatigable in searching out evidence and the applicable decisions. The states are well represented by their respective counsel. Their summaries of the evidence, their briefs, and their submission of proposed findings have resulted in clarifying and simplifying the complicated factual and legal issues.

As to the river area South of Omaha, Nebraska has two main grounds for relief:

FIRST: Its evidence was directed toward the contention that both Nottleman and Schemmel Islands were formed and arose on the west or Nebraska side of the Thalweg of the Missouri River. It contends this evidence shows that the main channel, which was the boundary line between the states, was east of the two islands on the date of the Compact.

SECOND: Nebraska contends that regardless of how land along navigable rivers may have formed, long acquiescence by one state in possession of territory by another is conclusive of the latter's sovereignty over that territory. Lapse of time is particularly significant in boundary and jurisdictional disputes and the state raising claims should not be benefited by its own delay in asserting those claims. Equitable principles support a determination that will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. The fact that officers and representatives of both states, as well as the inhabitants, recognized that both Nottleman Island and Schemmel Island were in Nebraska prior to the compact should be controlling that these were Nebraska lands.

It is believed that Nebraska's evidence as to Nottleman and Schemmel Islands epitomizes the river problems which arose prior to the 1943 Compact as to the river boundary south of Omaha. But that same evidence bears on the solution of the whole controversy. It is believed that a judicial determination of this controversy requires a careful examination of the pre 1943 history of the Missouri River.

* * * * * * * *

In their submissions as evidence, each state has presented a pre-1943 history of the Missouri River. Nebraska has summarized a general history of the boundary problems prior to 1943, incorporating therein the Corps of Engineers Reports prior to 1943 and concluding with the enactment of the Compact. The history and the Engineers Reports are accepted as findings, and in large part the Nebraska report follows:

III. GENERAL HISTORY OF THE IOWA-NEBRASKA BOUNDARY PROBLEMS AS SUBMITTED BY NEBRASKA

A. Original Boundary and Litigation Between Nebraska and Iowa

The State of Iowa was admitted into the Union in 1846 with its westerly boundary as the "middle of the main channel of the Missouri River . . ." (Ex. P-2601). The State of Nebraska was admitted into the Union in 1867 with its easterly boundary described as "the middle of the channel of the said Missouri River" (Ex. P-2602). Over the years, the Missouri River has been notorious for the many natural changes and periodic flooding which occurred on numerous occasions. The result has been the creation of an alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width, all of which has been part of the River from time to time. These changes have caused controversy and uncertainty all along the Iowa-Nebraska boundary.

In 1890 the State of Nebraska brought an original action in the Supreme Court of the United States against the State of Iowa to determine the boundary in the Carter Lake area. Although the Complaint (Ex. P-1722)

in that action refers specifically to Carter Lake, allegations were made by the State of Nebraska that the Missouri was a river of the first class, navigable by steamers of heavy tonnage, it flowed through lands of soft sand loam, and its banks were not protected by rocks or the roots of trees or other matter against the operation of the waters. Its current was rapid, flowing from five to ten miles an hour and its course was very circuitous, every few miles changing from one direction to another. The allegation was further made that the boundary or line dividing the States in the region described had never been settled, defined or established and people had settled in said lands and, because of the doubts excited by the disputes as to the boundary, defied the laws of both states.

Iowa answered in 1891 (Ex. P-1722) and, among other things, alleged:

> "Further answering, and by way of additional defense the defendant says that the Missouri river is a river of the first class; that the amount of water which flows down it is very large and varies greatly in amount; that within the limits and termini of the meander line described in the bill, it flows through a plain bounded by bluffs, which are four or five miles apart. The whole of the plain between said bluffs is composed of soft, friable, sandy loam, not protected against the action of the water and very easily susceptible thereto. It readily and rapidly yields to the force of the current and the banks formed of it afford a very slight resistance to the changes that the rapidly flowing river is constantly making. This plain is also level, being as low at the

base of the bluffs on either side as it is in the centre, and therefore the force of gravity does not help to confine the river to any certain part of it. The current of the Missouri river is very rapid, varying at different places and with the time of year, and the stage of the water from five to ten miles an hour. The river is subject to annually and semi-annually recurring freshets, usually occurring in June and April, popularly known as the 'June rises' and 'April rises' during which, for a few weeks, the amount of water flowing down the river is increased to many times its ordinary and usual volume and the river leaves its accustomed channel and spreads over a large part of the plain. During these freshets the process of change is very rapid, especially while the water is subsiding. While the water is up over the banks, it frequently cuts through the necks of bends, entirely forsaking its former channel, and while it is subsiding, it cuts away its bank on one side and builds them up on the other as rapidly as ten to one-hundred and fifty feet within twenty-four hours."

Iowa also alleged that the bed in which the Missouri River flowed during the periods of low water each year was altogether uncertain, and that its real bed was the whole of the plain before described, and "It is liable to flow in any portion of said plain, and has, in fact, within the memory of man, flowed over nearly every portion of it, except a few hundred acres in the north-western angle of the Iowa meander line, and, in view of the history and character of said river and plain, will probably do so again within as short a period.

Iowa then described the movement of the river in the area in controversy as follows:

"The changes were so rapid that the river frequently cut away one bank and added to the other over one hundred and fifty feet in a single day and one hundred feet in twelve hours, and they were therefore perceptible, appreciable, and measurable. Strips of territory hundreds of feet wide and containing many acres, which at the beginning of the freshet were covered by the waters of the river, would within a few weeks or days be filled with earth and soil, and at the subsidence of the waters at the end of this short period appear as dry ground. Large tracts of ground covering many acres in extent were cut away by the river in a few days, and the current would flow where these tracts had been, and later in the same year, the waters would rapidly recede, depositing earth, and the identical tracts would again become dry ground. At various points within the limits of the termini aforesaid, land which was on the Nebraska side of the river was cut away rapidly, and the current flowed where said land had been, and then during the next freshed (sic) the river changed its course, leaving the said land far removed from the new bed of the stream."

* * *

"And the defendant alleges that the changes and facts above set forth are characteristic of the Missouri river between the two States, and that similar phenoma (sic) have frequently taken place, and may, from the character and history of said river and plain, be expected to take place in the future."

Iowa then alleged an avulsion and that it claimed jurisdiction over the land, maintained government thereon, and collected taxes therefrom and had asserted its authority and sovereignty over the land involved since the State of Iowa was admitted into the Union. Most of these same allegations were incorporated by Iowa into a cross bill.

In its opinion in the case of *State of Nebraska v. State of Iowa,* 143 U.S. 186 (Ex. P-2603, the court found that in 1877 the river above Omaha suddenly cut through the neck of an ox-bow and made a new channel and this constituted an avulsion. Consequently, the center line of the old channel remained the boundary between the states. The court went further and held that the usual principles concerning the laws of accertion and avulsion were applicable to the Missouri River, notwithstanding the rapidity of the changes in the course of the channel. The court said that this was true not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states. The boundary line between Iowa and Nebraska remained a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream except in such places where the stream suddenly abandoned its old and sought a new bed as an avulsion.

The decree is then found at 145 U.S. 519 (Ex. P-2604) wherein the court described this fixed boundary line in the abandoned channel by metes and bounds. This is the well-known area of Carter Lake, Iowa, which borders Omaha on the right bank of the present Missouri River.

B. Nebraska Legislative History Prior to 1943

Following the decision in the first case of *Nebraska v. Iowa* and commencing in 1901, the legislative history of both Nebraska and Iowa is replete with references to attempts to settle the boundary problems between the two states. In 1901 the Nebraska legislature passed an act authorizing the Governor of the State of Nebraska to appoint three commissioners on behalf of the state to jointly meet with a like commission from the State of Iowa in agreeing upon a boundary line between the said states (Ex. P-1851). In 1903 the Nebraska legislature passed another act authorizing the Governor of Nebraska to appoint three commissioners on behalf of the state to act with a like commission from the State of Iowa in agreeing upon a boundary line between the states (Ex. P-1852). Again, in 1905, the Nebraska legislature adopted a resolution providing that the State of Nebraska would not claim title or ownership to lands then lying within the boundaries of the State of Iowa which have thereafter become within the boundaries of the State of Nebraska by virtue of the action of any commissions appointed by the states and ratified by the states (Ex. P-2301).

In 1913, the legislature of the State of Nebraska adopted an act providing for a boundary commission and the preamble states:

> "Whereas, the original boundary line between the states of Nebraska and Iowa along the river front of Douglas and Sarpy Counties in Nebraska, and Pottawattamie County in Iowa was changed by the great flood of 1881 so that a part of the original state of Iowa has for over thirty years been on the

west side of the present channel of the Missouri river and part of the state of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri river, and

Whereas, under the rule of law in the United States, the state boundary in such cases still follows the old channel of the river unless an agreement is made between the states for its change, and

Whereas, it is desirable for both Iowa and Nebraska that the boundary line between the states be made to conform with the natural boundary of the Missouri river, . . ."

The act then authorized the Governor of Nebraska to appoint three commissioners to act with a similar commission appointed by the State of Iowa to ascertain and report the facts relating to the boundary as far as it relates to Pottawattamie County and Douglas and Sarpy Counties (Ex. P-1853).

In 1915, the Nebraska legislature adopted a concurrent resolution again authorizing the Governor of Nebraska to appoint three commissioners to act in conjunction with a like commission from the State of Iowa, "this commission to remain in office until settlement is made between the states, and the proper boundary determined, or the commission is sooner dissolved by legal authority" (Ex. P-1854).

In 1919, the Thirty-seventh Session of the Nebraska legislature approved another concurrent resolution, again repeating the language about the great flood of 1881, but not mentioning any particular counties. The preamble states:

> "Whereas, the original boundary line between the States of Nebraska and Iowa along the river front of counties bordering on, or through which the Missouri river flows, was changed by the great flood of 1881 so that a part of the original State of Iowa has for over thirty years been on the west side of the present channel of the Missouri and part of the State of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri . . . ."

The Governor was authorized to appoint three commissioners to act with a similar commission appointed by Iowa and they were to report back relating to the boundary as the same relates to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri River flowed (Ex. P-1855).

In 1941, the Fifty-fifth Session of the Nebraska legislature passed an act to establish the boundary line in the center of the main channel of the Missiouri River, but excepting Carter Lake by referring to the original action of *Nebraska v. Iowa.* This act was captioned "RELATING TO IOWA—NEBRASKA BOUNDARY." (Ex. P-1856).

C. Iowa Legislative History Prior to 1943

In Iowa, in 1902, a bill authorizing the Governor to appoint a commission to meet with a like commission from the State of Nebraska to agree upon a boundary line and report to the Governor was introduced in the senate and referred to committee, but no further action was taken (Ex. P-1790, P-1791).

In 1913, a provision was adopted by the Iowa legislature for the appointment of a boundary commission to act in conjunction with the commission from adjoining states under certain circumstances (Ex. P-1803). Also, in 1913, Senate Joint Resolution 9 was introduced, which provided for the appointment of a commission to ascertain and report facts relating to the existing boundaries between Iowa and Nebraska and the resolution had almost identical language to the 1913 Nebraska Act, Ex. P-1853 (Ex. P-1793). It was reported unfavorably and indefinitely postponed.

In 1923 Iowa passed a bill providing that the Governor appoint a boundary commission consisting of three disinterested persons. This bill provided:

> "The boundary commission shall at once, upon its appointment, proceed to ascertain and report the facts relating to the existing boundary between the states of Iowa and Nebraska so far as the same relate to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri river flows, to report drafts of compacts or agreements to be entered into by the states in settlement of said boundary . . . ." (Emphasis supplied.)

There was also a specific provision that the boundary as it then existed between Council Bluffs and Omaha at the point known as Carter's Lake be preserved (Ex. P-1796).

In 1927, the Forty-Second General Assembly of Iowa passed a bill to make an appropriation to pay the expenses of the boundary commission commenced under the acts of the Fortieth General Assembly (Ex. P-1798, P-1799). In 1935, a bill passed the Senate of the

Forty-sixth General Assembly of the State of Iowa providing that the Governor shall appoint a boundary commission to act in conjunction with a similar commission appointed by the Governor of Nebraska to ascertain and report the facts relating to the existing boundaries between the States of Iowa and Nebraska "bordering on or through which the Missouri River flows" and to report drafts of compacts or agreements (Ex P-1804).

In 1937, a bill was introduced in the senate of the Forty-seventh General Asembly of Iowa for an act to establish the boundary line between the State of Iowa and State of Nebraska and the proposed bill included the following language:

> "* * * WHEREAS, there has for many years existed as between the State of Iowa and the State of Nebraska, a question as to the true and correct boundary line between said states; and
>
> **WHEREAS, it would be expensive and practically impossible, in view of the conditions as they now exist, to locate the original boundary line between the State of Iowa and the State of Nebraska, the same having been established 'according to Nicollet's map';** [Emphasis supplied by Special Master] and
>
> WHEREAS, much of the land under dispute, except the Carter Lake district, is the harbor for criminals and squatters and is without police protection and educational facilities; and
> Nicollet's map'; and
>
> WHEREAS, said lands remain unplatted and are not subject to taxation by either state; and

WHEREAS, the Executive Council of the state of Iowa, in the year 1935, acting under authorization duly given by the Legislation of the state of Iowa, appointed what was known as the Iowa Boundary Commission, which commission has heretofore made its final report; and

WHEREAS, said final report of said Iowa Boundary Commission indicates that the Missouri River channel is now relatively stabilized by work done under the direction and supervision of the United States Army engineers, and that a boundary based on the present main channel of the Missouri River would be, in all probability, fixed and permanent; and

WHEREAS, under the law, each state must agree to any new boundary wherever established; and

WHEREAS, said agreement, if any, between the state of Iowa and the state of Nebraska must be sanctioned by an Act of Congress;

NOW, THEREFORE . . ."

The act would have placed the boundary in the middle of the main channel of the Missouri River (Ex. P-1805). This proposal was referred to committee and no further action is shown.

In 1939, in the Journal of the Senate of the State of Iowa, reference is made to a proposal authorizing appointment of the Iowa-Nebraska Boundary Commission, which matter was deferred (Ex. P-1806). This is similar to the resolution passed in 1941 by the Iowa legislature providing that the Governor should at once appoint a boundary commission of three disinterested, competent persons to ascertain and report the facts re-

lating to the existing boundary between Iowa and adjoining states and to report drafts of compacts or agreements to be entered into in settlement of the boundary (Ex. P-1807).

D. References in Newspapers and Periodicals Prior to the Compact

In addition to this legislative recognition of the boundary problems, references to the problems caused by the wild and unpredictable movements of the Missouri River have appeared in various publications and newspaper articles. The *Iowa Journal of History and Politics,* Volume XXI, published by the State Historical Society of Iowa in 1923 contained an article captioned THE LEGISLATION OF THE FORTIETH GENERAL ASSEMBLY OF IOWA, which article contained the following:

> "The Missouri River has always been notorious for its meandering and there are tracts of land which are first on one side of the river and then on the other. The people who live there are sometimes uncertain whether they are inhabitants of Iowa or Nebraska, and so are the tax assessors. To settle the question, the Fortieth General Assembly created a Boundary Commission to draft a compact definitely locating the boundary between the two States. This compact is to be submitted to the Governors and General Assemblies of Iowa and Nebraska for approval." (Ex. P-2696).

An editorial appeared in the Des Moines, Iowa *Register* on December 22, 1925, with the caption WAR ON NEBRASKA. The editorial stated that some fifteen thousand acres of land were in dispute and a commis-

sion had been appointed to work out a basis of settlement. It then continued:

> ". . . About 2,000 acres of former Iowa land now form a part of Dakota County, Nebraska and a corresponding area of former Nebraska land is in Woodbury County, Iowa. Homan's Island, opposite Onawa is on the Nebraska side of the river but is part of Iowa and its residents vote in Iowa. The D. D. Boyd farm in Harrison country, is completely surrounded by Iowa land and it is five or six miles from the river, yet Mr. Boyd is a resident of Nebraska. About 5,000 acres of land south of Council Bluffs also are involved, and there is an island comprising some 2,000 acres off Fremont County, Iowa, which is noman's land.
>
> All this is due to changes in the Missouri river channel. That is one thing which it is impossible to regulate effectively. The channel is likely to continue to change, but the human nature of which we hear so much has worked out governmental institutions which provide for orderly settlements of all the difficulties involved. The very difficulties have been minimized thereby. No one in Iowa is going to get excited over an impending loss of state territory; no one in Nebraska is going to demand forceful retention of the domain the river has alienated. We shan't have war between Nebraska and Iowa . . ." (Ex. P-2500).

An article appeared in the Cedar Rapids, Iowa *Republican* dated January 2, 1927, entitled "FAIL TO FIX IOWA-NEBRASKA BOUNDARY". The article commences:

"The boundary commission appointed by Gov. John Hammill to investigate border disputes along the Missouri river, between Iowa and Nebraska, yesterday reported it had failed to reach an agreement on definite recommendations with the Nebraska commission appointed to make a similar investigation. (Ex. P-2690).

In 1927, an article by the Iowa Historian, Eric McKinnley Erickson, appeared in 25 *Iowa Journal of History and Politics,* 233, 235, which stated:

"This decision [Nebraska v. Iowa] settled for a time the boundary difficulties between Iowa and Nebraska, but the fickle Missouri River has refused to be bound by the Supreme Court decree. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion'. Where it has been possible to apply the decision awkward situations have resulted. For instance, East Omaha is legally in Iowa—in fact it is included in the corporation of Council Bluffs—yet it is located on the West side of the river in close proximity to Omaha, with which city its interests are much more closely united than with Council Bluffs." (Ex. P-2691).

* * *

The *Omaha World Herald* of November 20, 1940, had an ediorial entitled "Let's Fix the Boundary" in which the following statements were made:

"But between Nebraska and Iowa the boundary line is vague and irrational. Originally, that line followed the Missouri river. The river changed its course, but the lines stayed where it used to be. Now all up and down the river chunks of Iowa lie westward of it and pieces of Nebraska to the east.

Why don't we fix up this boundary line the way it ought to be? Army engineers have stabilized the river now so that it will not change course again. Nebraska and Iowa, two good neighbors, ought to get together and fix the boundary in the center of this stabilized river, and settle it once and for all.

Beginning in January, both Iowa and Nebraska will have republican governors. This strikes us as an admirable opportunity to do what both states for a long time have talked of doing. Governors Wilson and Griswold, are sponsoring the necessary legislation, can put an end to this business of children crossing the river to go to school; of Iowa land paying taxes in Nebraska and vice-versa; of some land going untaxed because nobody knows where it belongs." (Ex. P-1534).

On December 24, 1940, the *World Herald* had another article entitled "Action on the Boundary" which indicated that Attorney General Walter R. Johnson had started the ball rolling and discussed revision of the boundary with Iowa officials. The article then continued:

"All up and down the river there are tracts on one side which belong on the other. Tax problems, school problems and law enforcement problems result; and all could be solved by the simple expedient of fixing

the boundary where it ought to be—in the center of the now stabilized Missouri river." (Ex. P-1535).

In the *TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS,* Volume 107, 1942, an article appeared entitled MISSOURI RIVER SLOPE AND SEDIMENT by William Whipple, Jr. His name also appears on the A. P. maps of the Missouri River. In this paper, he states:

". . . The shifts of the river channel have been so numerous and intricate that at many points land known originally to have been in Iowa now lies on the Nebraska bank, and vice versa; and for practically all land adjacent to the river no conclusive determination of either state or private boundaries has been possible." (Vol. XIII, p. 1860).

E. Corps of Engineers Reports Prior to 1943

A very general history of the Missouri River can be found in the Annual Reports of the Chief of Engineers of the United States Army, printed by the United States Government Printing Office. These reports, or extracts from them, have been offered as Ex. P-2686 for the years 1877 through 1890, Ex. P-2689 for the years 1891 through 1919, Ex. P-2687 for the years 1920 through 1945 and Ex. P-2688 for the years 1946 through 1966. The first regulation works on the Missouri River by the Corps of Engineers were constructed at Nebraska City, Nebraska and Saint Joseph, Missouri, under the provisions of the River and Harbor Act of August 14, 1876. The first work at Nebraska City is described in the annual report of the Chief of Engineers of the U.S. Army for the year 1877. In discussing the proposed plan to change the direction of the current in the bend above

Nebraska City, restoring it as nearly as possible to an old channel, Major Chas. R. Suter set forth a proposal to induce large deposits of sand by gradually obstructing and slackening the current and forming bars which would force the channel to follow the line desired and said:

> ". . . In carrying out this idea, I rely greatly upon the well-known instability of regimen of the Missouri River and the great rapidity with which natural causes are known to produce great changes . . ."

The 1878 report also made reference to improvement at Nebraska City, Nebraska and Eastport, Iowa and said:

> "The object of this improvement is to change the position of the river channel, in order to restore the water-front of Nebraska City, and to check a severe bank erosion of the Iowa shore near Eastport."

The 1878 report also contained the statement:

> "The survey made last year at this locality [Omaha, Nebraska and Council Bluffs, Iowa] showed that, owing to a recently formed cut-off, the banks of the river near Council Bluffs and Omaha were being eroded with very great rapidity, and that much valuable property, including the railroad-bridge over the Missouri at Omaha, was threatened with destruction. A plan and estimate were submitted for the protection of the exposed bank near Omaha, where the threatened and actual damage was the greatest."

Attached to the 1878 report is a map of the Missouri River in the vicinity of Nebraska City made from sur-

veys under the direction of Major Charles R. Suter in December, '76 & January, 1877 which shows Eastport Bend and the river going considerably away from Nebraska City and coming back towards Nebraska City from the East. It also shows Frazier's Island at attached to the Nebraska shore by accretion and the main channel is shown on the outside of a bend east of the island. Nebraska City Island is attached by accretion to the Nebraska side at that time. With reference to that work at Nebraska City is found the following:

> "We built out to a distance of 758 feet from shore, and, to judge from the heavy cutting of the bank and the bars opposite, it seems plausible to assert that with a dike of 1,200 feet the channel would have been turned into the slough on the Nebraska side."

* * *

Another map is attached to the 1879 report showing Nebraska City Island as accretion to the Nebraska shore and various shore lines on the Iowa side of the bend with the river considerably to the east of its present location.

There are miscellaneous references to cut-offs and shifting channels in these reports. In the report of 1880 (Ex. P-2686) Chas. R. Suter, states with reference to the situation between Omaha and Plattsmouth:

> "The situation in brief is this: The portion of the Missouri River under consideration is extremely tortuous and has a heavy slope, averaging 8/10 of a foot to a mile. The banks are very unstable and are subject to great erosion, the results of which is an excessive width of water way, with ever-shifting channels and small navigable depth. The incessant

erosion on the narrow necks between bends has already caused two cut-offs, one at Omaha and another at Saint Mary's, a few miles about the mouth of the Platte; and several others may be soon expected if measures are not taken to prevent them. The effect of cut-offs is to greatly increase bank erosion in the neighborhood and to impair the navigation over considerable distances. It is also desirable that a stable regimen be established through this stretch of river, as any changes here would have a very prejudicial effect upon the works of improvements now in progress at Omaha, above, and Nebraska City, below."

In the report for 1881 (Ex. P-2686) the Assistant Engineer at Brownville, Nebraska stated:

"That portion of the reach between Otoe City and Peru was in 1867 and 1869 the scene of two remarkable cut-offs. The first was the more southerly and produced the greater effects, shortening the river by about 14 miles. The concentrated slope has been gradually distributed in both directions, but the slope above and below this cut-off is still excessive, from Peru to Brownville 1.1 feet per mile.

I am indebted to Captain Carey who was the pilot of the first boat passing up the cut-off, viz., Colorado, for the following information: "The neck was very narrow for a distance of 1000 feet, during a longtime previous to the cut-off. Think it must have given way almost simultaneously throughout that distance. The cut-off occurred in the night. Left Peru the morning after the cut-off occurred. Knew nothing of the cut-off having taken place, and

noticed nothing unusual until off the former neck. The cut-off had the appearance of a low reef or wier. Succeeded in passing up by following a slackwater chute on the east side. The current above the cut-off was very strong all the way to Nebraska City, the boat making only about one-third ordinary headway. One boat was sunk by the cut-off and another, after having traversed the old bend, was forced through the cut-off on attempting to pass it. One week after the cut-off took place, no difference in current above and below the cut-off was noticed.'

The second cut-off was merely a cut-off of the old neck, and forming Hog-thief Island. It is noticeable that the river now runs in the channel east of Hog-thief Island in a direction opposite to that in which it ran before the cut-off took place. Had this second cut-off occurred prior to the date of the first one, it is probable but that one cut-off would have occurred, leaving the river in a much better condition than it now is. The second cut-off must have had little, if any, effect on the slope as the channel length was not thereby changed appreciably."

This is the area immediately below the Schemmel land and appears on Ex. P-211, which is the 1890 Corps of Engineers map showing the area from Nebraska City south to McKissock's Island.

* * *

In the 1889 report reference is made to the "old river-bed at the head of Nebraska City Island" and accompanying the 1889 Annual Report, is a map showing the designation "old river bed" going around the left side of "Nebraska City Island."

In the 1890 report appears a list of steamers plying the Missouri River enrolled at the Port of Omaha, Nebraska, during the year 1889. Thirteen steamers are listed with managing owners from Nebraska, the Dakotas, Iowa and Minnesota. Also, in this 1890 report is a series of maps under the title MISSOURI RIVER COMMISSION LOCATION OF BORINGS IN THE VICINITY OF BLAIR, NEB., SURVEYED 1883 BY GEO. S. MORISON, and one of these maps shows an oxbow area a considerable distance from the river just northeast of Blair and written in this area are the words "CUT-OFF 1881". This cut-off of 1881 shown in Ex. P-2686 is in the California Bend area and shows an old abandoned river bed considerably to the east, and the old Soldier River used to come in at the top and in the middle of Iowa Section 35. This same area is shown as a water and marsh area on the 1947 Corps of Engineer tri-color map (Ex. P-2667), and will be referred to later in the brief.

There is another map showing the old river bed around Nebraska City Island with the river next to the bluffs on the Nebraska side.

Exhibit P-1619, entitled Call for a Missouri River Improvement Convention at Kansas City, Missouri, on December 15, and 16, 1891, is a report by the Commercial Club of Kansas City and includes remarks by S. H. Younge, Division Engineer. Although he stated that his remarks referred to the reach extending from the mouth to Kansas City, he also said they were applicable in a general way to the whole portion of the river known as the sandy river which extends about 2,000 miles above its mouth. He mentioned the fact that one hundred and forty-six thousand acres lie between the high water

banks of the river between the bluffs from Kansas City to the mouth. The other five hundred thousand acres which were not river bed proper, were liable, sooner or later, to be washed away by the river unless the river is restrained by properly designed and constructed improvement works. He said:

> "There is probably not a square foot of land anywhere between the river bluffs that has not been accupied over and over again by the river in its meanderings."

Mr. Younge also mentioned that the width of the river below Kansas City between its high water banks varied from nine hundred to seven thousand feet with the low water widths varing from four hundred to two thousand feet. He discussed river structures and new land which would be made eventually and built up by improving the river as well as the safety of the additional land between the bluffs. He mentioned the land adjacent to the river which then had an average value of $25.00 per acre would be worth $75.00 to $100.00 per acre. He did state that he had not made an extended study of the reach between Kansas City and Sioux City, but the remarks he made in regard to the increased value of land, and the other benefits to be derived applied with equal force to the river between Kansas City and Sioux City.

In the 1891 annual report of the Missouri River Commission the following reference is made:

> "Soon after the passage of the appropriation act of September 19, 1890, the Commission decided on making a new shore-line survey of the river from Sioux City to the mouth. Since the topographic

survey of 1878 and 1879 was made, numerous and important changes in shore line have occurred; so that the published maps of that survey have become quite unreliable as to the present shore line. . . ."

A map appears as a part of the report showing the "OLD RIVER BED" around the eastern side of Nebraska City Island with the river back against the bluffs along the Nebraska side. Reference is also made to the fleet at Nebraska City.

The 1893 report contains commerce statistics and shows enrolled at Omaha thirteen boats in 1889, ten boats in 1890, twelve boats in 1891 and eleven boats in 1892.

The 1895 report contains the following:

". . . The natural channels on the Missouri are tortuous and exceedingly unstable, constantly shifting in position and difficult to run by boats of any size, and it is quite safe to say that the delays incident to these features are quite as much of a detriment to profitable navigation as any lack of depth of water . . ."

The reports also make several references to cutoffs which occurred along the Missouri-Kansas border.

The 1898 report contains additional history of the Nebraska City situation and an attached map again shows the river on the Nebraska side of Nebraska City Island, the location of dikes constructed by the Corps, and the old "RIVER BED OF 1881" around the eastern side of Nebraska City Island.

The 1901 report contains further reference to several cut-offs in recent years above Sioux City causing a large amount of erosion on the banks opposite Sioux City.

The Missouri River Commission ceased existence in 1902 and the 1902 report is its last annual report. It refers to the fact that there were some three hundred steamboats lying embedded in the sand of the river. It also stated that there were forty-two merchant steam vessels engaged in trade on the Missouri River below Sioux City which receive yearly inspections by the United States Inspector of Steam Vessels, and in addition fourteen or more gasoline boats.

The 1903 annual report of the Chief of Engineers commences:

> "The Missouri River has been navigated by steamboats since 1819; first boat to Council Bluffs, 1819; first to mouth of Yellowstone, 1832; first to head of navigation, 1859. . . .
>
> Government work on the river in the matter of removal of snags began as early as 1838 and continued thereafter, under annual appropriations (for the most part made jointly for the Ohio, Mississippi, Missouri, and sometimes the Arkansas Rivers) with occasional intermissions, for the next forty years. Prior to 1878 one or two small appropriations had been made for general improvement, but it was with the act of June 18 of the latter year that appropriations began on a large scale."

In 1904, reference is made to the falling off of commerce on the lower river, but an increase on the upper river. In 1905 is found the following:

> "St. Marys Bend, below Omaha, Neb.—By request of Congressman, Walter I. Smith, of Council Bluffs, Iowa, an examination was made of the river in the vicinity of St. Marys Bend in company with State Senator Shirley Gilliland, and Seth Dean, County Surveyor of Mills County, with a view of permitting a cut-off to be made through the sandbar on the right bank, to relieve the erosion of the left bank."

The 1913 annual report states that the existing project providing for a six foot channel between Kansas City and the mouth was adopted by Congress on July 25, 1912. It reiterates that government work on the removal of snags began in 1838 and a project for the river from Sioux City to the mouth was adopted in 1884 and in 1890 the project was modified to provide for systematic improvement of the first reach, from Jefferson City to the mouth. It stated that the results of the expenditures at separate localities have been beneficial locally by protecting the banks and forming good navigable water fronts and incidentally preserving private property from the ravages of the river, but has given little, if any, encouragement to navigation.

The 1915 report states that, during the past decade, a snag boat had operated regularly during a portion of each season on the part of the river between Kansas City and Sioux City; and mention is made in the 1916 report of a small boat line in operation be-

tween Omaha and Decatur, Nebraska and water transportation between Kansas City and Omaha initited in the spring of 1916 by small towboats.

In the 1919 report the statement is made that at Hamburg, Iowa, left bank, about mile 597:

> "A land improvement company set six current retards equidistant along 6,600 feet of bank at a cost of $8,292. These are floating log gratings 100 feet in length, anchored to concrete piling jetted below the river bed."

Ex. P-2687 contains the Annual Reports of the Chief of Engineers from 1920 through 1945. The 1920 Report states that the width of the river from Kansas City to the mouth in its original condition varied from five hundred feet to over one mile and the river shifted in location and destroyed many acres of valuable bottom land. The section from Kansas City to Sioux City was similar to the section below Kansas City and, before improvement, the river was navigable throughout this entire section. The first regulation work is stated as having been constructed at Saint Joseph and Nebraska City under the provisions of the River and Harbor Act of August 14, 1876. In the 1921 report, in the vicinity of the Missouri-Iowa state line at mile 597 a system of eleven retards is shown as having been constructed for bank improvement consisting of eight hundred and seventy linear feet at a cost of $30,563.38. This is at the lower end of the Schemmel land and, in fact, the testimony was that the most northerly revetment along the Iowa bank appearing on the 1923 Corps of Engineer map was approximately 1,600 feet north of Hamburg Landing Road whereas the bottom part of

Iowa's traverse of the Schemmel land which Iowa is claiming extends to within 1,000 feet of the Hamburg Landing Road.

During the years the reports often refer to a considerable amount of private construction along the river. Reference is also made to the fact that in the autumn of 1924 the Western Barge Line operated its steamer *Decatur* with cargo box barge between Sioux City and Omaha, but withdrew at the end of the season upon finding commercial boating unremunerative.

The 1934 report for the fiscal year ended June 30, 1934 shows work at Frazer-Otoe Bend and the 1935 report shows work at Frazers and Otoe Bends and Work at Tobacco and Rock Bluff Bends. From 1936 on, many entries give some general indication of the amount of work done on the Missouri River along the Iowa-Nebraska border. There are many references to dredging and canals. In the 1938 report, pilot canals are shown at Glovers Point Bend, mile 778.2; Papillion Bend, mile 638.8; Plattsmouth Bend, mile 637.1; Civil Bend, mile 616.7; Otoe Bend, improve existing canal, mile 601.3; Hamburg Bend, improve existing canal, mile 597.3; Hamburg Bend, 596.7 Omadi Bend, mile 796.6; Browers Bend, mile 788.2; Omaha Mission Bend, mile 764.3; and Little Sioux Reach, mile 725.1.

The 1938 report also makes reference to, ". . . one earth filled dam to divert the channel. . . ." in addition, it states:

> ". . . the cost of channel surveys made during the year *to determine results accomplished by the various works* was $25,281.20. . . ." (Emphasis supplied.)

The 1939 report refers to completion of two cut-offs at California Bend and at Peterson Bend and refers to three channel cut-offs having been effected under the existing project. The Chief of Engineers recommended adoption of a project for the Missouri River between Sioux City and the mouth so as to provide for a channel of 9 foot depth and width not less than 300 feet,

> "... to be obtained by revetment of banks, construction of permeable dikes to contract and stabilize the water way, cut-offs to eliminate long bends, closing of minor channels, removal of snags, and dredging as required...."

The 1940 report, in its summary of work done, includes:

> "... effecting three channel cut-offs, and removal of 49,641,454 cubic yards of material dredged from the channel to obtain project depth and width."

The 1941 report mentions Civil Bend Pilot Canal then under construction, and the 1942 report also mentions excavation at the Civil Bend Pilot Canal and nose protection at Omadi Bend Pilot Canal and Browers Bend Pilot Canal. It also shows work done at Rock Bluff — Frazers Bend and Otoe Bend and Tobacco Bend.

The 1943 report states that the work between Rulo and Omaha was approximately 99% completed and between Omaha and Sioux City approximately 78% completed.

F. The Iowa-Nebraska Boundary Compact of 1943

An article appeared in the *Omaha World Herald* of February 24, 1943 entitled "Offer Another Boundary Bill". This article states:

> "The Iowa attorney general's office has prepared a bill calling for establishment of the boundary between Nebraska and Iowa conforming, in the main, to the channel of the Missouri river.
>
> Attorney General John M. Rankin said the changing course of the river has left 12,500 acres of Nebraska land east of, and 6,700 acres of Iowa land west of the present channel."

The article states the bill would give Nebraska jurisdiction of all land west of the channel except the town of Carter Lake and would give Iowa jurisdiction over land on the east side of the channel. It continued:

> "The attorney general said considerable difficulty has been experienced in one Iowa consolidated school district whose boundaries include 800 or 900 acres west of the present channel."

The original bill in the Iowa legislature in 1943 to establish the boundary compact was offered as House File 437, dated February 26, 1943 (Ex. P-1618). It was similar to the Iowa-Nebraska Compact as finally agreed upon except that the original bill excepted the boundary line established and declared to be such in a judgment or decree entered in the Supreme Court of the United States and the bill identified the case of *Nebraska v. Iowa.* Attached to this bill is an explanation which states:

"This measure is intended to fix the boundary line between Iowa and Nebraska now that the channel of the Missouri river is under control. It will be observed that this measure retains the Carter Lake territory in Iowa.

Making the present channel of the Missouri river the boundary line will tend to simplify the question of jurisdiction over territory now in dispute."

The Journal of the House of the Fiftieth General Assembly, State of Iowa, 1943, shows an amendment was filed which specifically excepted Carter Lake from the agreement by metes and bounds description and which added the language of the compact presently found in the last paragraph of Sec. 1 which identifies the middle of the main channel as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, and shown on the alluvial plain maps (Ex. P-1548). The bill was then passed by the House on April 6, 1943 (Ex. P-1548), passed by the senate, and shown as signed by the President of the Senate on April 8, 1943 (P-1549) and sent to the Governor of Iowa on April 8.

The Nebraska Legislative Journal for the 102nd day, dated May 27, 1943, has a letter from B. B. Hickenlooper, Governor of the State of Iowa, dated May 25, 1943, to the Clerk of House of Representatives of Nebraska enclosing a certified photostatic copy of House File 437, Acts of the Iowa Fiftieth General Assembly (P-1547, P-2303) and the Iowa-Nebraska Boundary Compact was adopted by the Nebraska legislature with

the addition of Section 6 which repealed a 1941 proposed boundary compact bill and Section 7 which is the emergency clause (P-2302). It was passed by the legislature and signed by the Governor on May 7, 1943 (Ex. P-1008, P-1547).

The Compact as adopted by the State of Iowa appears as Exhibit "A" attached to the Complaint and was offered as Exhibit P-2605. After establishing the middle of the main channel as the boundary and identifying it as being the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, as shown on the alluvial plain maps of the Missouri River which were then on file in the United States Engineers' Office at Omaha and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska, the Compact then provided:

> "Sec. 2. The State of Iowa hereby cedes to the state of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> Sec. 3. Titles, mortgages, and other liens good in Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall

be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5 The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska."

It should be noted Sec. 5 of the Iowa bill specifically required that Nebraska's Act should contain provisions identical with those contained in the Iowa bill for the cession of lands lying easterly of said boundary line ". . . and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to land ceded to Nebraska."

The Nebraska act appears as Exhibit "B" of the Complaint (Ex. P-2606) and the bill was offered as Exhibit P-2302.

In the United States Congress Senate Calendar No. 401, Report 388, 78th Congress, First Session and the

Report No. 551 of the House of Representatives are the following comments referring to the Compact:

> "The purpose of the bill is to give the consent of Congress to the compact entered into by the States of Iowa and Nebraska establishing the boundary between Iowa and Nebraska.
>
> Congressman Howard H. Buffett, of Nebraska, author of the Bill, has advised the committee—
>
> If adopted this measure will settle a large number of jurisdictional disputes which have arisen over a long period of time. The States of Iowa and Nebraska, after lengthy negotiations, have entered into a compact satisfactory to both states. The measure, so far as I have been able to ascertain, is not controversial. The Honorable Ben F. Jensen and the Honorable Charles B. Hoeven, representing the affected Iowa districts and the Honorable Karl Stefan and the Honorable Carl T. Curtis, representing, along with myself, the Nebraska districts affected, have all expressed their approval of H. R. 2794 as well as the compact which it approves.
>
> Consent of Congress to the compact is required by reason of that part of Section 10, Article 1 of the Constitution which provides:
>
> 'No state shall, without the consent of Congress * * * enter into any agreement or compact with another State'." (Ex. P-1012, P-1015).

The A. P. maps as filed with the Secretary of the State of Nebraska were offered as Exhibit P-1770 and are of the scale of one inch equals one mile and show that they were filed with Frank Marsh on April 2, 1941.

These maps do not show all of the agricultural levees which appear on later A. P. maps and each of them has a stamped note in the corner:

> "Note: The area covered by the Missouri River on this map was compiled from aerial photographs taken by the U.S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the U.S. Department of Agriculture in 1936, 1937, and 1938."

They are dated January 30, 1940, and March 29, 1940, and all are shown as submitted by Wm. Whipple, 1st Lt. Corps of Engineers. There are no calls or distances given. The dikes on the A.P. maps are not all numbered. The designed channel is traced on the maps and, particularly north of Omaha, this design is shown as running through all kinds of bar and dry land area. Several cut-off lakes are shown. On A.P.—5 California Bend is clearly shown as a cut-off and at the top of the map Peterson Cut-off is shown, although neither of these is so labeled. This is also true of St. Mary's Cut-off on A.P.—8. Nottleman Island is shown on A. P. 8 and on A. P.—9 the river can be seen running through what was the bottom part of Goose Island and the top part of a lower island and this area later becomes what Iowa now describes as Auldon Bar. The Schemmel land appears on A. P.—10. It is particularly noteworthy that, at the very end of the long dike extending from the Iowa shore to the middle of Schemmel Island there is a trail dike extending downstream, and at the end of this trail dike there appears to be a clump of trees. This will be discussed later as land which was cut off by the con-

struction of the Otoe Canal by the Corps of Engineers. The Iowa Chute is also shown considerably to the east of the Schemmel land. Mule Slough can be seen on A. P. —9 immediately east of Nebraska City. There is no other identification of where Nebraska City Island may have been on this map.

These Alluvial Plain Maps will be discussed elsewhere. Suffice it to say at this time that they are obviously only general maps and are completely inadequate as surveys. It is impossible to lay out a line on the ground based upon the data in these maps and it is obviously impossible to determine the center of the designed channel as established by the Corps of Engineers from the information on these maps. It is also apparent from these maps that the river is shown in several places in other than the designed channel where designed channel is shown as going through land, bank, island or bar which on the A. P. Maps is dry ground. The maps also show the designed channel in a series of curves and they show many islands and bar areas on both sides of the designed channel.

* * * * * * *

In her proposed findings, Iowa also presented a pre-Compact history of the Missouri River which is likewise adopted as a finding and which follows:

IV. Pre-1943 History of the Missouri River as Submitted by Iowa

The first recorded navigation of that part of the Missouri River which now constitutes part of the western border of Iowa and the eastern border of Nebraska was by the Lewis and Clark Expedition during the first decade of the 19th Century. The annals of that expedition are available for all to read. Reading them, one must

be filled with admiration at the bravery, perserverance and will of those hardy men. Probably the chief adversary the expedition had to fight was the river itself.

The channel was clogged with snags; when the river was at low stage, numerous sand bars appeared or lay just beneath the surface; it was difficult to select a channel among the snags and bars which would be navigable; the course of the river was tortuous and meandering; note is made that in one day, near where the cities of Onawa, Iowa, and Decatur, Nebraska, are now located, the expedition traversed a great loop of the river and arrived at night-fall little more than a mile from their starting point of the morning.

In 1846, Iowa was admitted to statehood with part of its western boundary (between the Iowa-Missouri boundary thence upstream to the mouth of the Big Sioux River near Sioux City, Iowa) described as the "middle of the main channel of the Missouri River", and in 1867, Nebraska was admitted with its eastern boundary described similarly. Thus, the two states came to be contiguous along an approximate 200 mile segment of the Missouri River.

Since rivers are natural boundaries, many rivers have become the boundaries between many of the states of the Union. These boundaries became the subject of considerable litigation, from which "the rule of the thalweg" evolved. "The rule of the thalweg" may be succinctly described as follows: Whenever a boundary, public or private, is defined as the "middle" of a stream, the word "middle" shall mean "thalweg". Generally, the term "thalweg" refers to the deepest part of the stream, which is generally the navigable channel. Two excep-

tions to the rule of the thalweg have been generally recognized: First, whenever the thalweg of a stream suddenly shifts by the process known as "avulsion" from one side of a tract of land to the other, the boundary remains in the former and now abandoned channel, and does not move to the new channel. Second, whenever a stream is deep enough to be navigable in more than one place, and is in fact navigated along some course which is not the deepest, the thalweg and the boundary shall be the "boat track". But, both in fact and in law, it is considered that movements of the thalweg are usually and commonly by the process known as "accretion", which is the gradual process of the water washing away one bank and building new land behind its movement, and the boundary was considered to move as the thalweg moved in this manner.

The Iowa-Nebraska boundary would be governed by the rule of the thalweg, with its exceptions, modifications and refinements, until July 12, 1943.

The two states engaged in litigation one time before the instant case concerning a segment of their common boundary. The case was *Nebraska v. Iowa,* 143 U.S. 186, decree at 145 U.S. 519. The case involved a segment of the river near the Iowa town of Carter Lake, which is northeasterly a short distance from Omaha, Nebraska, then and now on the west side of the Missouri River. This Court applied the rule of the thalweg in that case, found that the town of Carter Lake had been cut off from Iowa by an avulsion, and that it was therefore in Iowa although west of the river. The Carter Lake locale is not one of the disputed areas in the present case.

Many locations up and down the Iowa-Nebraska boundary have been the subject of litigation in the state courts of both states and in the federal courts of original jurisdiction in both states, but these cases usually concerned the ownership of land as distinguished from location of the state boundary.

It seems that the business of commercial navigation has had two flowerings on the Missouri River, and that a third flowering of navigation is now taking place. First, there was considerable freighting on the river before the Civil War, ended by the Civil War when the War Department expropriated nearly all the river boats for use as troop transports, gun boats and material carriers on the Mississippi and other rivers where the fighting was going on. After the Civil War, a second flowering of river navigation occurred, which was ended when the railroads reached the area in the latter years of the 19th century. River transportation was so hazardous, uncertain and expensive that the steamers were unable to compete pricewise with the rails. Steamboating on the Missouri River remained in the doldrums until, in about 1952, the U. S. Army Corps of Engineers was able to assure a navigable channel to Omaha and Sioux City during about eight months each year.

Neither Iowa nor Nebraska appears to have paid much attention, as sovereign entities, to their common boundary along the Missouri River until about 1902, when there seems to have been a recognition by some citizens and officials in both states that the boundary was unsatisfactory and that a new one should be fixed and established. Negotiations for a new boundary went forward in a rather desultory manner until the mid-

1930's. The reason why the boundary had become unsatisfactory was that its precise location at many places had become doubtful and uncertain; this doubt and uncertainty was a handicap and hindrance in matters of law enforcement, taxation, and land ownership.

Prior to about 1930, the U. S. Army Corps of Engineers had been concentrating its efforts to develop the Missouri River for navigation and flood control on that reach of the river from its mouth near St. Louis upstream to Kansas City. In the late 1920's, the Corps began to receive authorizations and appropriations to develop the river upstream from Kansas City to Sioux City, Iowa. Planning went forward immediately and actual construction commenced in about 1933.

The Corps of Engineers found the same type Missouri River which Lewis and Clark had encountered more than a century before. It was wild, wide, sinuous, shallow, and choked with sand bars and snags. It was almost useless for commercial navigation. It usually flooded the valley regularly in April when spring came to Nebraska, Iowa, Minnesota and the Dakotas, and again in June when snow in the Rocky Mountains melted, and usually several more times each year from summer and fall rains.

The Corps had surveyed the entire river from Kansas City to Sioux City in 1923. They had caused aerial photographs of this entire reach to be taken in the winter of 1925-1926 and maps had been made from these photographs. The same was done in 1928 and again in 1930. The Corps apparently found that mapping from aerial photos was not sufficiently accurate for their purposes, so in 1931 and 1932, the river was again surveyed;

in this survey, elevations of land along the river were noted, topography was noted, the channels were sounded and depths of water noted, and control lines were laid out on each side so that dikes and other improvements could be located with surveying accuracy.

Corps personnel who worked on the design and construction of the project were witnesses before me. From this testimony and from the documents, maps and photographs in evidence, I ascertain that the Corps design and plan was to narrow and confine the river into one channel, 700 feet wide, which would be a series of curves or bends alternately from one side to the other. Within the 700 foot wide channel, they proposed to maintain a navigation channel with a minimum depth of six feet.

The precise alignment of the "'designed channel" was dictated by a number of factors: For instance, the river had to pass under all existing bridges. In addition to bridges, there were "hard points", "bluff contacts" and cities and towns which it was desirable that the channel be close or contiguous to. Then there was an optimum degree of curvature to be attained as nearly as possible. Lengthy straight reaches were to be avoided. Economy dictated that the existing natural channel be utilized to the greatest extent possible.

At the outset, the river was trained to go into the desired curves by means of pile dikes, some of which were called "lead-off structures", some were called "baffles", and some were called "revetments". Work to cause the river to flow into a particular designed bend would generally commence at the upstream end of the bend. First, a lead-off structure would be built just upstream from the upper end of the designed bend, this so that the

river would not flank the structures later to be built in the bend; the lead-off structure was parallel to the designed channel. Then, downstream from the lead-off structure, a series of baffles were built out from the shore to force the river to curve in the desired direction. Finally, revetments were usually built on the outside of the bends to contain the river to a designed width of 700 feet.

After the work had gone forward by the above methods for about four years, several canals were dredged in locations where the river had not moved into the designed channel with alacrity deemed desirable by the Corps of Engineers.

By 1943 the Corps of Engineers reported that the project was 99% complete below Omaha and 78% complete between Omaha and Sioux City. The river was entirely within the designed channel except for three segments, totaling about 2000 feet in length, where it was not entirely within the design. The entire project had been accomplished by the pile dike method, except canals had been dredged at 11 locations.

* * * * * * *

Iowa has submitted to the Special Master for use in drafting this Report a statement on jurisdiction. Nebraska contends that this Court's Order entered on February 1, 1965 granting her motion to file the complaint in the instant case settles the issue of jurisdiction of this Court to hear this controversy. Iowa on the other hand takes a contra position.

V. Jurisdiction — Statement by Iowa

Nebraska asserts that this Court's jurisdiction to hear and determine this matter arises from Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251 (a) (1). She further asserts that the matter of jurisdiction has heretofore been settled and adjudicated by this Court's prior order wherein her motion for leave to file her Complaint was sustained and Iowa's resistance to said motion was overruled.

Iowa, on the other hand, asserts that this Court must examine its jurisdiction at all stages of the case and, if at any stage it appears that there is no justiciable controversy between the states, or that Nebraska has no real interest in the controversy which would entitle her to maintain the action, the case should be dismissed.

Although Nebraska offered evidence tending to show that the boundary fixed and established by the 1943 Boundary Compact is described in such a manner that it may now be difficult or impossible to precisely locate it in the water or on the ground today, she seeks no relief in this case arising from such fact. In other words, location of today's boundary line between the two states, being the boundary line fixed by the 1943 Compact, is not an issue in this case. In any event, having heard and considered the evidence concerning location of the boundary line fixed by the Compact, your Special Master believes and finds that said boundary line can be located accurately today at all points where accurate location may be required, although diligent effort may be required in order to do so.

The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact. One might ask: Why should this question of where the pre-1943 boundary line was be a matter of importance to the two states now, some 28 years later? Briefly stated, the matter is of importance because on this question of where the pre-1943 boundary line was, hangs the ownership of a number of tracts of land along and in the vicinity of the boundary. Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. This Court has consistently held that each state may have and apply within its own borders whatever system of land title laws she may see fit. As stated in *Arkansas v. Tennessee,* 246 U.S. 158, at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Citing cases.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (Citing cases.) and Tennessee, while extending riparian ownership upon nav-

igable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, (Citing cases.) may, in the case of an avulsion followed by a drying up of the old channel of the river recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.,* 119 Tenn. 47, 104 S.W. 437. But these dispositions are in each case limited by the interstate boundary line from where otherwise it should be located."

The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and that the beds of the navigable streams in Iowa were state-owned. *McManus v. Carmichael,* 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead v. Turgeon,* 74 Neb. 573, 104 N.W. 1061. (2) It has been the law of Nebraska from very early in her history that title to land may be acquired by adverse possession as a result of ten years of open, peaceable and notorious possession, even though the possessor entered upon the land as a trespasser. In Iowa, on the other hand, the law is and for many years has been that title cannot be gained by adverse possession unless the possessor entered upon

the land and possessed it with claim of right or color of title.

In the beginning, the Iowa-Nebraka boundary was the middle (or thalweg) of the Missouri River from a point opposite the mouth of the Big Sioux River near Sioux City, Iowa, thence downstream to a point where the middle or thalweg was intersected by the Iowa-Missouri boundary line near the town of Hamburg, Iowa. Movements and changes of the boundary prior to 1943 were governed by the "Rule of the Thalweg" as promulgated by this Court and many state courts, including the state courts of both states. Generally stated, the "Rule of the Thalweg" was and is that wherever a boundary is described as the "middle" of a river, the term "middle" shall mean the "deepest part" or "navigation channel"; whenever the thalweg moved by the gradual process of "accretion", the boundary moved with it; but whenever the thalweg shifted from one channel to another by a sudden "avulsion", the boundary did not move to the new thalweg, and the boundary remained in the abandoned channel.

In prior litigation between the two states (*Nebraska v. Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396) it was determined that an avulsion had occurred in the vicinity of Omaha, Nebraska, and Carter Lake, Iowa, whereby the thalweg suddenly shifted from a channel to the west of the town of Carter Lake, Iowa, to a new channel east of the town, with the result that Carter Lake, Iowa, remained in Iowa and did not become part of Nebraska even though it was and still is west of the Missouri River. Special provision in the 1943 Boundary Compact preserved Carter Lake's status as being in

Iowa, and there is no issue in this case concerning Carter Lake or any land in that immediate vicinity.

Carter Lake is the only site along the boundary where it had been judicially determined in litigation between the two states that there had been an avulsion so that the boundary was not the thalweg of the river in and prior to 1943.

From the general statements hereinabove made concerning the internal title laws of the two states it will be seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska, its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. In some of the Nebraska cases, ownership of river lands was determined by application of the

Nebraska law of adverse possession. *Burkett v. Krimlofski,* 167 Neb. 45, 91 N.W.2d. 57.

There has also been much litigation in the state courts of Iowa concerning ownership of river lands. The Iowa courts have generally held that accretion land which forms contiguous to the riparian shore of a private riparian landowner becomes property of such riparian owner; the state loses its title to that spot under the sky which was formerly river bed but which is now covered by the private riparian landowner's accretions; the state gains title to the new riverbed in Iowa. If the bed of a navigable river becomes abandoned by an avulsion, property boundaries remain unchanged so that the state continues to own the abandoned bed to the ordinary high water mark. If a island arises from the state owned bed of a navigable river in Iowa, it is considered to be in the nature of an accretion to the state-owned bed and the island is therefore state-owned. *Holman v. Hodges,* 112 Iowa 714, 84 N.W. 950. *Payne v. Hall,* 192 Iowa 780, 185 N.W. 912; *Iowa v. Raymond,* 254 Iowa 828, 119 N.W.2d 135.

During the pre-trial phase of this case, it was established that the State of Iowa now claims to own some thirty-two tracts along the boundary. All of these tracts are presently in Iowa. Some of these tracts are land; some are sand bar; some are marsh; some are still inundated by Missouri River water; some are a mixture of land, sand bar, marsh and land under water. Some of these tracts formed and came into existence in their present forms before 1943 and some since 1943. She claims some of them by operation of the Iowa law of state ownership of navigable river beds, islands and

abandoned channels; some of them by exchange with various individuals; some of them by purchase from various individuals; some of them by quiet title decrees; and some of them by a mixture or combination of theories or claims. In addition to the 32 specific tracts, she claims to own all that part of the bed of the present day Missouri River which is in Iowa.

The State of Nebraska does not claim to own any of these tracts. The State of Nebraska claims to own nothing by operation of her common law because, as pointed out above, her law provides no basis for any such claims of ownership.

There is not any tract or parcel of land, river bed, marsh or abandoned river bed which the State of Iowa claims to own and which the State of Nebraska also claims to own. Nebraska's complaint is limited to the proposition that Iowa violates the 1943 Boundary Compact by claiming to own tracts which were *privately* owned in Nebraska prior to 1943 and tracts which have formed since 1943 in such manner that they became privately owned. Nebraska brought and seeks to maintain the instant case on behalf of these private parties; she claims power to do so because she was a signator to the Compact; her claim of power is under the doctrine commonly known as "parens patriae".

Iowa asserts that Nebraska has no real or present interest in the controversy; that Nebraska is not the "real party in interest"; that necessary elements for "parens patriae" are absent; and that her action, the instant case, should therefore be dismissed and denied. Since all tracts which Iowa claims to own are admittedly in Iowa, and Nebraska doesn't claim to own any of them,

Nebraska's territorial integrity is not threatened, Nebraska's tax base is not threatened; it is clear that Nebraska's right to maintain and prosecute the instant case does in truth and in fact depend upon the doctrine of "parens patriae" alone.

A succinct but accurate review of the "parens patriae" doctrine was written by Chief Judge Pence of the United States District Court of Hawaii in the recent case of *State of Hawaii v. Standard Oil Company,* (1969) 301 F. Supp. 982. (Opinion on appeal at 431 F.2d 1282). Judge Pence's conclusions concerning parens patriae (which were undisturbed on appeal) were that, where a state seeks to maintain an action in its parens patriae capacity, two prerequisites must be met: (1) The facts must show that the state has an interest independent of and apart from the titles of her citizens, and (2) The facts must show that a substantial portion of its inhabitants are adversely affected by the challenged acts of the defendant.

The evidence here clearly demonstrates that the State of Nebraska has no interest in this case independent of and apart from the titles of her citizens.

Nebraska made no proof as to the number of private parties who are or may be claiming to own the 32 tracts which Iowa claims to own along the boundary. Suffice to say that this number can only be an infinitesimal fraction of the population of Nebraska, and the people of Nebraska generally have no real interest in this matter.

After an obviously thorough search by good and diligent counsel for Nebraska, no case or precedent has been cited to this Special Master wherein a state has ever attempted to prosecute an original action in this

Court against a sister state under the facts and circumstances which are here shown to exist. In all of the many cases heretofore wherein two states have contested in this Court concerning a boundary, both states have had a clear, present and real interest in the matter. Always, in cases heretofore, the contest has been concerning where the disputed boundary *is,* not where the boundary *was* in some prior time.

Operating against Nebraska throughout this case was the rule stated by Mr. Justice Roberts in *Colorado v. Kansas,* 320 U.S. 383, at page 393:

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. * * *"

The conclusion is inescapable that Nebraska has failed to establish either of the prerequisites restated by Judge Pence from prior authorities cited in his opinion.

Another objection to this Court's exercising original jurisdiction in the case at bar is raised by Iowa: There is no evidence that Iowa has ever advanced its claim of ownership to any tract by forcibly dispossessing any adverse claimant; rather, the evidence is that at all locations where there were or are disputed claims, she has simply sought resolution of such disputes in the courts of competent jurisdiction. Usually the court of com-

petent jurisdiction was the Iowa District Court of the County in which the tract was situated (since all tracts claimed by Iowa are now in Iowa) but on three occasions, the issue has arisen in the Federal District Courts of Iowa in eminent domain cases where the United States, at the behest of the Corps of Engineers, was seeking to obtain right-of-way for Missouri River improvement projects. The cases in state courts have generally been Quiet Title cases, sometimes commenced by the State of Iowa as Plaintiff, sometimes commenced by others against her which she has defended, and in one case at least, she has intervened in a case pending between private parties.

On the question of whether or not Iowa has violated the 1943 Boundary Compact hangs the answer as to whether or not Nebraska has tendered to this Court a justiciable controversy over which this Court should exercise its original jurisdiction. Iowa says, at this point, that since the evidence discloses only that she has sought to have her claims determined in courts of competent jurisdiction, Nebraska has failed to prove violation of the Compact by Iowa, because such conduct by Iowa though proved and admitted does not constitute violation.

Indeed, it seems to me that this Court or any court should be very cautious about enjoining any party from prosecuting or defending any action in any court of competent jurisdiction which would involve valuable rights to real estate claimed or owned by such party. Free access to the courts is a basic principle of our system.

Nebraska seeks to buttress her claim for such an injunction against Iowa by asserting that it is not fair for Iowa to litigate these matters in her own state courts, the implication being that the Iowa courts are or may be biased where the state is a party. Nebraska further asserts that it is unfair and inequitable for Iowa, with her great resources for investigation and research, to be permitted to use those resources against the individual adverse claimants. Nebraska further asserts that the Iowa law, as promulgated by her courts, is unfair and inequitable to the adverse claimants of these river areas which Iowa claims to own; Nebraska particularly complains about application of the Iowa rule that there is a presumption in favor of accretion and against avulsion which can only be overcome by clear, satisfactory and convincing evidence of avulsion.

Let it be said first that there is no evidence of bias in the state courts of Iowa where the State of Iowa has been a party claiming to own river land. Two cases involving ownership of river land have reached the Iowa Supreme Court for decision: *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135; and *Dartmouth College v. Rose, et al., State of Iowa, Intervenor,* 257 Iowa 533, 133 N.W.2d 687. In the*Raymond* case, Iowa's title to the disputed area was quieted; in the *Dartmouth College* case, Iowa's claim to the disputed area was rejected. A third case involving ownership of a river area with Iowa as a claimant reached appellate court, namely: *Tyson v. Iowa,* 283 F.2d 802; the Court of Appeals for the Eighth Circuit held that Iowa was entitled to the damages for taking of an easement across a disputed area and it inhered in the decision that Iowa was the owner of the area in dispute.

The above mentioned cases were not re-tried before me in the instant case, but some evidence of the underlying facts in them was introduced before me. Suffice to say that there is no evidence of bias on the part of any of the courts involved, and there is no evidence tending to indicate that the three results were anything other than fair, equitable and correct.

It has never been held that a party cannot pursue his legal or equitable rights or remedies in courts of competent jurisdiction merely because that party may have more financial and manpower resources at his command than the opposing party. If this were the rule, all of our states, and the United States itself, and many large corporations would be barred from the courts most of the time.

Whether or not the courts of Iowa have been applying proper rules to determine ownership of river lands admittedly within her own borders is not for this Court to say because, as hereinabove pointed out, the several states are each and all entitled to apply their own title laws within their own borders, subject only to the requirement that such laws be constitutional.

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VI. SPECIAL MASTER'S FINDINGS ON PRE-COMPACT HISTORY

A. Situation at the Time Negotiated

In this report the Special Master has set forth the pre-1943 history of the Missouri River in considerable detail. An understanding of the river history is essential in the construction of the Iowa-Nebraska Boundary Compact of 1943. It is to be emphasized there is no substantial dispute whatsoever between the states as to the history of the river or as to the problems which were created by the characteristics of the river. According to the 1943 Annual Report of the Chief of Engineers, the work between Rulo, Nebraska and Omaha, Nebraska was approximately 99% completed in 1943 and the work between Omaha, Nebraska and Sioux City, Iowa was approximately 78% completed.

Under the assumption that the channel of the Missouri River was then under control, the two states entered into the Iowa-Nebraska Boundary Compact of 1943. The original bill in the Iowa Legislature was passed by the Iowa House and Senate and sent to the governor of Iowa on April 8, 1943. It was approved by the Governor of Iowa on April 15, 1943 and then transmitted to the Clerk of the Nebraska Legislature and passed by the Legislature and signed by the governor of Nebraska on May 7, 1943.

The reported legislative history is very sketchy in the Journals of both states. From the evidence offered I find the following:

1. At the time the states negotiated the Iowa-Nebraska Boundary Compact of 1943 each state recognized that the shifts of the river channel, both in its natural state and as a result of the work of the Corps of Engineers, had been so numerous and intricate that for practically all land adjacent to the Missouri River, no conclusive determination of either state or private boundaries was considered possible. This is applicable to the entire river boundary except for the boundary around Carter Lake, Iowa which had been definitely fixed by decree of the United States Supreme Court.

2. Both states recognized that the boundary was not located in the Missouri River at many places and that the boundary line in those places had not been determined and was almost impossible of determination.

3. Correspondence between certain county officials at the time establishes that, if a compromise could not be worked out, the determination of the fixed boundary where the river had moved by avulsion in any particular area would be extremely complicated and expensive.

4. The states intended by the Compact to settle all problems along the boundary arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the Missouri River.

5. At and immediately prior to the adoption of the Compact, the State of Iowa was making no claim to abandoned river beds or islands arising in the Missouri River under the state's common law claim of title to beds and abandoned beds of the Missouri River. South of Omaha the river had been almost completely confined to

its designed channel and all land area or so-called islands remaining on the Iowa side were in existence during the negotiations for and adoption of the Compact. Iowa was making no claim to such islands at those times.

6. There were abandoned Missouri River channels and cut-off lakes or ox-bow remnants all along the Missouri River Valley and the State of Iowa had made no claim to these abandoned channels.

7. Although Iowa now claims that abandoned beds of the Missouri River and islands arising in Iowa's portion of the bed of the Missouri River have always belonged to the State of Iowa under her common law, Iowa in fact was not applying this doctrine along the Missouri River and the evidence is not persuasive that Iowa ever considered that she owned the specific islands and abandoned channels which are identified today. Any application of the principle by the State of Iowa at or prior to the time of the Compact amounted to nothing more than lip service to a principal without any application to the specific factual situation which existed. In this context, there is nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants.

8. The States of Iowa and Nebraska could have determined through action in the Supreme Court of the United States where the boundary was located in all disputed areas along the river but the states intended to avoid the necessity of such a determination by entering

into a Compact which avoided that requirement, recognizing the existing situation along the Missouri River, and intending to settle all of the states' problems.

9. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this determination of where the boundary was located prior to the Compact in order to preserve a claim of title.

10. The Iowa Code required the Secretary of State to keep records of all property pertaining to the State Land Office and that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "state-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was to claim

at the present time and which are described in Part 1 of the Missouri River Planning Report of January, 1961.

11. The Iowa Code pertaining to the Iowa Conservation Commission has provided since 1923 that "The commission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property" and in 1931 the language "when said commission deems it feasible and necessary" was added. However, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in Part 1 of the Missouri River Planning Report of January, 1961 at the time of the Compact and has not marked the boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of the statutory requirements which would have required a record and the marking of such lands. Anyone inquiring of the State Land Office or the Iowa Conservation Commission in 1943 would have failed to find any claim of record to these so-called islands or abandoned channels along the Missouri River.

12. Both states agree that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

13. The testimony of the Iowa Conservation Commission officials made it clear that no one from the

State was paying any attention to the islands, and abandoned channels of the Missouri River at the time of the Compact and for more than a decade thereafter. The first interest expressed in these lands by the Iowa Conservation Commission was not until the latter part of the 1950's. Prior to that time, the State was not interested in these areas and no official action had been taken. The first public record of Iowa's interest was not until after January 1, 1961 when the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report which shall be hereinafter referred to and when newspaper articles then related some of the contents of the Report.

14. The Compact did not consider areas separately and the only boundary area specifically referred to in the Compact was that around Carter Lake, Iowa which had been fixed by decree of the United States Supreme Court. All areas were treated generally with recognition to private titles to be given general application.

15. The states did not know where the boundary was located and they really did not care. They were not concerned about whether they were going to lose or gain anything. However, they did state that titles, liens, or mortgages good in one state would be good in the state in which the land was to lie following the Compact. This is a classic situation where the following language by Mr. Chief Justice Marshall in the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374 is applicable:

> ". . . in great questions which concern the boundaries of states, where great natural boundaries

> are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

16. The states clearly evidenced the fact that they did not care where the boundary was, but if an individual had what was then considered a good title, lien or mortgage, then the states must recognize and could not attack it. The states relinquished by the Compact the right to question any title, lien or mortgage on the grounds that the land to which it applied was not within the jurisdiction of the state through which such title, lien or mortgage arose.

17. The states made no attempt to determine what private title claims existed along the Missouri River but intended to recognize all private claims as against the states without further investigation.

18. At and immediately prior to the time the states entered into the Compact, there were land areas on the left bank side of the Compact line which were taxed in Nebraska. It was generally recognized by the local officials of each state and individuals in the vicinity that such areas were originally in Nebraska and were transferred to Iowa by the Compact, whether or not in fact such was possible of proof in a court of law.

19. Under Nebraska law a person may obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Under Iowa law a person must claim under

"color of title" which requires some type of record title to commence the period of adverse possession. Consequently, at the time of the Compact, there may have been titles to lands East of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had title at the time of the Compact under the Nebraska law of adverse possession.

* * * * * * * *

(B) Text of the Compact—In Part

The Iowa-Nebraska Boundary Compact as enacted by the State of Iowa provides:

IOWA-NEBRASKA BOUNDARY COMPACT
Ratification by Iowa Legislature

AN ACT

To Establish the Boundary Line Between Iowa and Nebraska by Agreement; to Cede to Nebraska and to Relinquish Jurisdiction Over Lands Now in Iowa but Lying Westerly of Said Boundary Line and Contiguous to Lands in Nebraska; to Provide that the Provisions of this Act Become Effective Upon the Enactment of a Similar and Reciprocal Law by Nebraska and the Approval of and Consent to the Compact Thereby Effected by the Congress of the United States of America and to Declare an Emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and

the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows: [Then follows a metes and bounds description of the Carter Lake area which is deleted.]

The text of the Compact then continues:

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska.

Sec. 2 The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa

and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

Sec. 6. [This Section contains a statement that an emergency exists and the signatures to the Compact, and is deleted.]

* * *

The Compact as enacted by the State of Nebraska is identical in terms except that it is reciprocal with the names of the states reversed. Section 5 is changed slightly to take into account that Iowa has enacted its act and Sections 6 and 7 pertaining to local state formalities have been changed.

The Compact must be read in its entirety since it is a unified document. Section 5 of the Compact as

enacted by the State of Iowa made specific mention that the law enacted by Nebraska must contain identical provisions to those contained for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in Section 1 and also contain provisions identical with those contained in Sections 3 and 4 of the act but applying to lands ceded to Nebraska. Sections 3 and 4 were integral parts of the Compact and the Compact must not be construed in such a manner as to render them meaningless.

Section 1 fixes the boundary around Carter Lake, Iowa by metes and bounds in accordance with the decree of this court in the case of *Nebraska v. Iowa,* 143 U. S. 359, 145 U. S. 519 and provides that the remainder of the boundary shall be the middle of the main channel of the Missouri River which is further defined as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska and identified by File Nos. AP-1 to 4 inclusive, dated January 30, 1940, and File Nos. AP-5 to 10 inclusive, dated March 29, 1940, which maps were then on file in the United States Engineer's Office in Omaha, Nebraska and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska. With regard to these provisions the Special Master finds:

1. The AP maps or alluvial plain maps referred to in the Compact were dated approximately three years prior to the date when the Compact was adopted and below Omaha show the Missouri River confined to

its designed channel. Above Omaha, much of the Missouri River is not yet confined to the designed channel and the designed channel at places bisects islands, bar area, and bank land.

2. A stamped notation appears on each of these maps indicating that the area covered by the Missouri River on the map was compiled from aerial photographs taken by the U. S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937, and 1938.

3. The overwhelming weight of the testimony is that these AP maps are analogous to a highway or road map and were prepared to facilitate the employees of the District Office and of the field office in driving to various locations along the river. They were primarily used for gaining access to various jobs which were under construction along the river and would be similar to a highway map. They were also described as "a glorified road map." They were not intended for any engineering results; they did not contain any distances, calls, angles or measurements which would enable a surveyor to find the center of the designed channel on the ground. The information on the AP maps as to section lines and other information landward from the river is extremely inaccurate. There were areas where the features shown on the maps are at least one-quarter mile in error.

Several communications from the U. S. Army Corps of Engineers, Omaha District, have stated that the present state boundary between Iowa and Nebraska

cannot be located throughout on the ground from the Alluvial Plain maps since they are too small a scale (1″ equal to 2,640′) and do not contain sufficient detail for a surveyor to accurately locate the boundary. At one time it was possible to locate the state boundary from their 1″ equal to 400′ construction maps as the river alignment as shown on these maps conforms to the alignment as shown on the Alluvial Plain Maps. Since the present Boundary Compact was ratified, numerous channel realignments have been made and the basic 1″ equals 400′ tracings have been revised to show these realignments. Copies of 1″ equals 400′ maps which show the alignment in accordance with the alignment shown on the Alluvial Plain Maps were not retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the Corps' office.

The Alluvial Plain Maps on file with the offices of the Secretary of State of Nebraska and Iowa are of the scale of 1″ equals 5,280′. Other Alluvial Plain Maps on file with the Corps of Engineers are of the scale of 1″ equals 2,640′. Some of these have had material added to the maps which did not appear on the original AP maps of the scale of 1″ equals 5,280′ as on file with the Secretaries of State. However, these maps have the same date as the AP maps referred to in the Compact although there is no indication on the maps of the date or dates that the additional material was added. This is not atypical of many of the Corps photographs and maps relating to the Missouri River which have been altered or changed over the years. The Nebraska State Surveyor testified that his office, which was the only office in Nebraska which carries official land survey

records, had no information on file when he became State Surveyor in 1960 which would help determine the location of the center of the designed channel as shown on the Alluvial Plain Maps.

The evidence and the testimony lead to the inescapeable conclusion that the Compact was prepared in general language and adopted or fixed the new boundary in general terms with no anticipation that either state would use it as a property line or require that it be located with the preciseness required for property surveys.

The State of Iowa contends that the boundary can be located with preciseness through the utilization of other data and maps available from the Corps of Engineers. However, the Corps communications negate this claim and the evidence further shows that Iowa's surveyors have used different and inconsistent methods in locating the Compact line on the ground. In the Nottleman Island area, three surveyors, two employed by the State of Iowa and the Nebraska State Surveyor located the Compact boundary in three different places. This results from the fact that data which does not appear on the AP maps must be utilized and each surveyor used different data in making his determinations. There is no official supporting data available. However, both Iowa's and Nebraska's expert surveyors who testified admit that approximately the westerly 50 feet of the land claimed by the State of Iowa in the case of *State of Iowa v. Babbit, et al* is presently in the State of Nebraska and is west of the center line of the proposed channel of the Missouri River as established by the alluvial plain maps referred to in the Iowa-

Nebraska Boundary Compact. This land is not within the jurisdiction of the Courts of the State of Iowa, is not owned by the State of Iowa, is within the jurisdiction of the State of Nebraska, and Iowa's attempt to quiet title to this land constitutes an encroachment upon the sovereignty and territory of the State of Nebraska. Nebraska does not contend that this in and of itself is determinative of this case but has raised the point to illustrate the practical problems if the Compact line is to be used as a line to determine boundaries of proprietary claims of the States.

The State of Iowa contends that the construction maps by the Corps of Engineers which are of a scale of 1″ equals 400′ contain adequate data to locate the Compact line but the testimony and the communications from the Corps of Engineers indicate that such information adequate to locate the Compact line throughout is not available and has not been retained by the Corps. Testimony also indicated that it is frustrating to obtain information from the Corps of Engineers as concerns their previous projects and the situations of the river at the time of the Alluvial Plain Maps. Documents and information might be available at one time and not be available at another. Information has been destroyed or lost and there was no reason for the Corps to be particularly interested in keeping their old records. Attempts to obtain information from the Corps are time consuming and consequently expensive.

Although the Corps of Engineers has also informed the State of Iowa and its officials that the 1943 state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain Maps and that the 1″ equals 400′ construction maps have not

been retained and it is not posible to locate the boundary on the ground throughout from any maps on file in the office of the Corps of Engineers, the Iowa Conservation Commission and Attorney General's office have continued to assert that the boundary can be located from data obtained from the Corps of Engineers. Other branches of Iowa's government, such as Iowa's Governor's Advisory Committee on the Iowa-Nebraska Boundary have accepted this determination by the Corps of Engineers that it cannot be located from the construction maps.

Neither state contends that the gravamen of this action is the actual location of the Compact boundary at any particular point along the Missouri River. Nebraska has interjected the issue of the difficulty in finding the boundary as illustrative of the meaning and intent of the Compact as being indicative of the fact that neither state ever intended to conduct itself in such a manner that the location of the Compact boundary on the ground would be necessary to determine either State's property rights. The states assumed the boundary would be located in the middle of the Missouri without being concerned about its precise location there.

At the time the states entered into the Iowa-Nebraska Boundary Compact, it was generally believed that the Missouri River had been stabilized in the designed channel or would be moved into the designed channel where the river would remain stabilized. During World War II, the activity by the Corps in maintaining the stabilization works was curtailed and the river escaped from the designed channel above Omaha and reverted to its wild natural state. This has resulted in a situation where both banks of the river are com-

pletely in Nebraska at the present time for approximately 21 miles between Omaha and Sioux City. Both banks of the river are entirely in Iowa for approximately 14 miles.

The present situation was described in the Iowa Governor's Advisory Committee Report dated December 1, 1964 as:

> ". . . industrial firms are faced with uncertain title and tax structures not knowing what state they are in, retarding the potential development of this area."

The record also makes reference to activity by both legislatures and recognition by the Iowa governor that the settlement of the Iowa-Nebraska Boundary dispute was recommended ". . . in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development." The Special Master finds that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved.

In those places where the Missouri River might still have beeen the boundary in 1943, the Compact changed the boundary from the movable navigable channel or thalweg to a fixed line. The change abrogated the application of the common law principle relating to a movable navigable stream as the boundary between the states. The testimony and navigation charts have established that the navigable channel tends to follow the outside of the bends and was not coincident with a line midway between the banks except at those places where

it crossed from one curve to the other. Consequently, land within the bed of the Missouri River, was "ceded" along the entire boundary.

(a) COMPACT: SECTION 2

Section 2 of the Compact provides:

> "The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa."

It is clear from the evidence that the states did not know what specific land areas actually were in Iowa but were in the western side of the Missouri River and this general language was used to make it clear that the new state boundary was to become effective and Iowa was to have no further jurisdictional claim to any areas to the west or on the right side of that boundary. By the same token, the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were "ceded" to the other state by this general language.

The word "cede" as used in the Compact must be read as a part of the whole document. The following principle is applicable:

> "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement of the Law Sec-

ond, Contracts, Tentative Draft No. 5, §228(2), p. 68.

"Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), comment d, pp. 72, 73.

The cardinal rule of construction is that we seek to determine and to give effect to the intentions of the parties. In this case, it is clear as to what the parties had in mind. They intended to settle their differences and at that time the State of Iowa had raised no issue concerning its ownership of beds or abandoned beds of the Missouri River and the States clearly were desirous of avoiding expensive determinations as to where the river had previously moved by avulsion and as to the location of the pre-1943 boundary. They accepted the fact that it was not located in the river at many places and that it was almost impossible of determination.

"Words and other conduct are interpreted in the light of all the circumstances, and *if the principal purpose of the parties is ascertainable it is given great weight.*" Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(1), p. 68. (Emphasis supplied.)

If effect can be given to the intention of the parties it should be done rather than exalt a "literal" reading of

the word "cede" as being applicable only to lands which it must be proven were in fact transferred, as the requirement of such proof was something which the States attempted to avoid and is inconsistent with the remainder of the Compact. A literal reading of the word "cede" in a restrictive manner would relegate the word to a higher status than the understanding and agreement of the parties themselves. Such a literal reading would result in the court's making a contract for the parties which they did not make. This possibility is explained by Professor Corbin:

> "The primary and ultimate purpose of the interpretation is to determine and make effective the *intention of the contracting parties.*" (Emphasis by the author.) * * *
>
> "No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge. * * *
>
> "When a court enforces a contract in accordance with an interpretation that seems 'plain and clear' to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is 'making a contract for the parties', one that they did not make.
>
> "No word or group of words in any language has an 'objective' meaning separate from and independent of its actual use by some person to convey his thought to another person." 3 Corbin on Contracts, 1964 PP., §572B.

(b) COMPACT: SECTIONS 3 AND 4

Sections 3 and 4 of the Compact as adopted by the Iowa legislature provide:

> "Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> "Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred." (Emphasis theirs.)

These two sections must be considered in light of the conditions as they existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony have established that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. This navigable channel, or what would be the "thalweg" or boundary if it should be as-

sumed that there had been no prior avulsions, was not coincident with a line midway between the banks of the designed channel as established by Section 1 of the Compact as the Compact boundary, except at those places where the navigable channel crossed the center from one curve to another. Consequently land within the bed of the Missouri River was "ceded" or transferred from one state to the other all along the entire boundary in addition to the land which had been stranded on opposite sides of the river by the natural cut-offs and man-made canals or prior avulsions. The states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. The states desired to avoid the expense of determining these specific places and the states took the easier course of attempting to accomplish the general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states by agreement. The references to "titles, mortgages and other liens good in Nebraska" had to necessarily refer to all claims of title, mortgages, and other liens claimed to lands which were east of, or on the left bank side of, the Compact line as these were the same lands which the states were accepting as having been "ceded" or transferred.

There is no record of any determination of what suits or actions concerning said lands might be pending at the time of the Compact but the language authorizing them to be prosecuted to final judgment in Nebraska and requiring Iowa to afford such judgments full force and effect necessarily had to refer to any pending suits in the Nebraska courts which concerned lands which would be on the eastern or left bank side of the new Compact boundary. Any requirement which would im-

pose a duty upon the individual claimants to establish which state the land was in prior to the Compact would be inconsistent with the intent and conduct of the states in avoiding that requirement.

Section 3 was intended to protect the rights of private property claimants against the claims by either state and is a broadly phrased clause which should be liberally construed to effect this purpose. As such, neither state should be able to attack any private titles or claims emanating from the other state as of the date of the Compact.

The only parties to the Compact were the two states and individuals who were not parties to the Compact but who are effected by it should not be penalized by the State's conduct.

It was the intent of Section 3 to recognize and protect property rights which would necessarily be affected by the Compact by the mere determination of a fixed and definite boundary which, prior to the Compact had admittedly been vague, uncertain, indefinite, and almost impossible of determination.

Section 3 imposed an affirmative requirement upon the States and assurance to the other contracting state that titles, mortgages and other liens claimed under one state's jurisdiction would be recognized and good and valid under the jurisdiction of the state in which the property would lie after the Compact.

At the time of the Compact, the main conduct by either state which was affecting lands along the Missouri River was the taxation of these lands. The states recog-

nized that there was a great deal of uncertainty in the taxation of the lands along the Missouri River, some areas being taxed in both states, some areas not being taxed in either state, and in several places lands being taxed by a state although they were located upon the opposite side of the Missouri River. Section 4 authorizes the state or its authorized governmental subdivisions or agencies to tax lands "ceded" for the current year and required that any liens or other rights accrued or accruing, including the right of collection, should be fully recognized and the county treasurers of the counties affected were authorized to act as agents in carrying out the provisions of that section, provided that all liens or other rights accrued or accruing should be claimed or asserted within five years or be forever barred.

This section constituted a clear limitation upon claims by the State for tax purposes and these were the only claims which were being asserted by the states at that time. Since there was no determination of lands "ceded", this section obviously could only refer to areas against which taxes were levied at the time and constituted a recognition insofar as the states were concerned, that such areas on the opposite sides of the Missouri River which were being taxed by a state were considered as having been ceded as the term was used in the Compact. This is another recognition of the fact that all areas along the Missouri River, which after the Compact were definitely established as being located in one of the state's jurisdictions, were considered as having been ceded as that term was used in the general language of the Compact.

Section 4 provided a five year limitation for the assertion of rights of any liens or claims arising out of taxation of the lands by the states or their authorized governmental subdivisions and agencies. This constituted a clear limitation upon such claims arising from the governmental authority of the states and complimented Section 3 which was a clear recognition of existing private claims. There is nothing in the Compact reserving the right of either state to make additional claims of title under any other doctrine of sovereignty. Nothing preserves to the states the right to make any further claims and, as the Compact was intended to settle all problems along the border, it is to be construed to include all claims made by either state which might be asserted under any common law claim of sovereign ownership of beds or abandonded beds of the Missouri River, especially since Iowa had not claimed these areas theretofore.

The provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact since* 1925 by Zimmerman and Wendell, p. 32; *U. S. v. Bekins,* 304 U. S. 27; *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725; *Hinderlider v. LaPlata River & C. C. Ditch Co.,* 304 U. S. 92.

In the construction of agreements or compacts the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was

made. The history leading up to the Compact is relevant in determining the proper construction and the effect of the Compact as applicable to titles along the Missouri River. It is the substance of the agreement, as contra-distinguished from its mere form, which is essential in order that a fair and just construction may be given to the agreement and the court must ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94. See also *In re Ross,* 140 U. S. 453.

As Mr. Justice Stone stated in *Massachusetts v. New York,* 271 U. S. 65, 87:

> "In ascertaining that meaning, (of the Treaty of Hartford) not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J. in *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Wadell,* supra."

All parts of a treaty are to receive a reasonable construction with a view of giving a fair operation to the whole. *Sullivan v. Kidd,* 254 U. S. 433, 439. Narrow and restricted interpretations are not favored and

treaties are to be liberally construed so as to effect the apparent intention of the parties. See *Nielsen v. Johnson,* 279 U. S. 47, *Jordan v. Tashiro,* 278 U. S. 123 and *In re Ross,* 140 U. S. 453, 475.

It is not unusual for a country, in ceding territory, to stipulate for the property of its inhabitants. *U. S. v. Chaves,* 159 U. S. 452, 457.

Nebraska contends that the Iowa-Nebraska Boundary Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The language stipulating for the property of the inhabitants should be liberally construed so as to effect the apparent intention of the parties to secure the people along the Missouri River in their rights and to give them protection from the states in whose respective jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption. At that time Iowa was not contesting these property rights.

Any technical construction of the word "cede" in the Compact to require a land owner to now prove that his land was in fact transferred from one state to the other and which would also require this land owner to prove the location of the boundary prior to the adoption of the Compact is clearly inconsistent with the purpose, object and intent of the Compact and would be a restrictive reading which would destroy the purpose of the boundary compromise. It would be placing a burden upon the land owner which the states themselves refused

to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, "we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your expense even though we know it is impossible."

(C) Nebraska and Iowa Common Law

Under Nebraska law, title to the beds of navigable streams is in the riparian owner subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905). The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result. Under Nebraska law the Nebraska owner's right extends to islands, bar areas or beds which are on his side of the thread of the stream. However, the Nebraska owner's title to the bed is subject to the public easement of navigation.

The Iowa courts have followed the principle that the state owns title to the beds 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. The leading case is *McManus v. Carmichael,* 3 Ia. 1 (1856).

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42 Iowa Law Review 58 entitled DETERMINATION OF

RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION which discussed prior treatment by the Iowa courts of Missouri River lands and stated that the Iowa courts had vascillated in determining whether sand bars were islands or accretions to the high bank. The article suggested that if such sand bars in the Missouri River are deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, there had been no determination by the courts that the State of Iowa would have a right to such sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. The article indicated such claims may develop on account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began and this article has been cited by the Iowa Supreme Court. See *State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135.

The State of Iowa, in the preparation of Part 1 of the Missouri River Planning Report, January, 1961, and in the prosecuting of quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River. Iowa has utilized Section 1 of the Compact to establish that the land is in Iowa and then proceeded to apply her common law.

* * * * * * * *

VII. CONDUCT OF THE STATE OF IOWA FOLLOWING THE COMPACT AS ALLEGED BY NEBRASKA

Following the adoption of the Compact in 1943, individuals possessing land on the easterly or Iowa side of the Missouri River under Nebraska titles or claims continued in the peaceful use and enjoyment of their land without any claim of ownership by Iowa governmental authorities during the 1940's and 50's.

Much of this land had formerly been of little value, consisting of scrub timber, willows, and heavy undergrowth and not immediately suited for farming or other productive use. A great deal of money and labor was spent by these owners in the clearing of this land and it has, through their efforts, become useful, productive land with values ranging from approximately $400 to $600 per acre.

Some lands were placed on the tax roles in the counties in Iowa adjacent to the Missouri River and taxes were assessed and collected on such lands.

In 1956, when the State of Iowa was joined as a defendant in an action to quiet title to land which included abandoned bed of the Missouri River, as a result of an avulsion known to the State of Iowa, the State of Iowa acknowledged that it had no claim of ownership of the land which was an abandoned channel of the Missouri River located to the east of the Compact line.

The State of Iowa made no claim whatsoever to certain other lands which were abandoned channels of the Missouri River and the Iowa State Conservation

Commission has even purchased land which was in abandoned channels from landowner claimants.

The Iowa State Conservation Commission first showed an interest in lands along the Missouri River when it was brought to their attention that people were occupying these lands in some instances and the decision was made by the Commission to find out what and where the public did "own" lands, based upon the Iowa doctrine of state ownership of beds or abandoned beds of the Missouri River. Generally all the activity by the Conservation Commission in connection with the Missouri River started about 1958. Mr. Lloyd Bailey, the Chief of the Land Acquisition Section of the Iowa Conservation Commission, testified that when he took that office in 1958 the records of state-claimed lands were very poor along the Missouri River and there was very little record of anything in that office. There was no other office where an outsider could go to determine what lands were claimed by the State. It was some time after he took office that the big investigation started to turn up lands that could be included as state-claimed lands in the 1961 Missouri River Planning Report.

A study was undertaken by the Iowa Conservation Commission and areas were selected and the decision to attempt to acquire title by quiet title proceedings was made in the Iowa Conservation Commission. People claiming such lands were not given an opportunity to be heard by the Commission in any official hearing.

Final decision as to whether or not the State Conservation Commission would claim areas selected as

abandoned river channels or ox-bow lakes was to be with the Attorney General's office.

The determination of the ordinary high water mark by the State of Iowa to delineate the point from which its ownership of an abandoned channel or islands commenced was based on the location of the ordinary high water mark just prior to the diversion of the waters into the new channel by the Corps of Engineers. They made no investigation in going back of that for their present purposes. Consequently, any previous ordinary high water marks or abandoned channels of the Missouri River prior to this time were overlooked or ignored by the Commission.

Mr. Jerry Jauron testified that he was given special duty by the Conservation Commission as Missouri River Coordinator in 1958 and was assigned the task of making a survey and investigation of the entire stretch of the Missouri River which constitutes the western boundary of Iowa for the purpose of determining existence or nonexistence of "state-owned lands." He would find areas and select them, research them primarily at the Corps of Engineers for their maps, pictures and photos and give this information to the Attorney General's office. This would then be discussed with the Attorney General's Office and representatives of the Commission and the effort culminated in the published Part 1 of the Missouri River Planning Report.

Four of the five areas south of Omaha claimed by the State of Iowa were extensively cleared and a portion of the fifth area had been cleared to a limited extent at the time the Iowa Conservation Commission

published Part 1 of the Missouri River Planning Report in January, 1961.

Most of the areas north of Omaha resulted from work done on the river by the Corps of Engineers after 1943. Where the Corps had redesigned the channel following the Compact, Iowa claimed the area which had just come into existence as the Corps moved the river as "state-owned land". This was claimed as abandoned river channel. Iowa also claimed all of the new bed of the channel lying east of the Compact line. The State of Iowa in its investigation did not examine county records or, if any examination was made, it was very little or nothing to speak of.

The project by the Commission to find the so-called state lands was commenced because of the redesigning of the Missouri River from Council Bluffs to Sioux City by the Corps of Engineers. If Mr. Jauron rejected any area as a state-claimed area it was never brought to the attention of the Attorney General's Office or the Iowa Conservation Commission and the State made no claim to it.

The representatives of the Attorney General's Office and Conservation Commission rejected three or four areas out of an original approximately 25 areas which had been selected by Mr. Jauron. If Mr. Jauron had recommended in Des Moines that they did not want an area for some reason or other, it would not have received any consideration.

Mr. Jauron testified that the State of Iowa did not claim all river beds of the Missouri River valley and he could not explain why some of them are ignored and some of them are claimed. The evidence fails to

show any consistency or logic in the selection of areas Iowa claims. If certain areas were under water the first time Mr. Jauron saw them, he would have claimed them for the State of Iowa.

Consequently, the areas claimed depended in part upon whether they were under water within the memory of the witness and in part upon whether the specific documents examined by Mr. Jauron happened to indicate an abandoned channel. However, many of the documents offered by the Plaintiff show the river in various areas and abandoned channels which were not claimed by the State of Iowa.

Mr. Jauron testified that in his mind there was absolutely no doubt that certain areas were old river beds but no exhibits or witnesses who might state that they were old river beds existed. Consequently, whether or not the State would claim areas depends in part upon the remaining available evidence as of the present date and whether the individual researching such areas had done an extensive investigation.

When asked whether Iowa claimed lands on the west side of the 1943 Compact line as abandoned channels, Mr. Jauron testified that at the time they started, the Attorney General in charge instructed them to claim no lands on the other side of the boundary compact line. However, this policy was changed in another Attorney General's administration. Mr. Jauron testified that his answer would have to change three or four times because they changed attorney generals three or four times. The evidence shows that Iowa's conduct was determined by particular attitudes by the various

Attorney Generals and not by any rule of law concerning the meaning or effect of the Compact.

Mr. Jauron did not know of any discussions concerning whether or not the lands selected as property of the State of Iowa were on the tax rolls. During the meetings to determine areas which the State claimed, if individuals lived on the areas or were occupying these lands, the Iowa officials automatically assumed that they were trespassers.

In the determination of the boundaries of the areas Iowa claimed, in some instances the Attorney General's Office instructed the surveyors as to what to survey. In other instances the evidence indicated that the Conservation Commission officials instructed the surveyor where to place his line. In some of the areas which Iowa claimed, there were bank lines further to the East from where Iowa was making claim and in both the Nottleman and Schemmel areas the eastern line of Iowa's traverse, which normally would have followed the ordinary high water mark, followed no such geographical feature but crossed water area, cultivated fields, and along level land with no bank or physical feature visible.

In one instance, two islands were bisected by canals with portions of the upstream and downstream islands being placed on the right bank as a result of the work of the Corps and the portions of the two islands which were placed on the left bank as the result of the construction silted together and became one area. Iowa is claiming that area as abandoned channel in the Planning Report but Iowa did not, at that time, claim the portions of the two islands which were placed in Nebraska.

Iowa claims other areas where the river was completely in Nebraska in 1943 because of prior avulsions. In at least two instances, the river then escaped from its designed channel and moved back to the East. Then the Corps placed it in the designated channel by subsequent canals. Iowa is claiming the area where the river escaped following 1943 as abandoned channel because that land "is in Iowa" as the state-line is defined by the Compact of 1943. Had it not been for the Compact, the land would be in Nebraska.

At Decatur, Nebraska, the Missouri River moved outside of its designed channel to the East following 1943 and a bridge was built upon dry land over the designed channel. The Corps then moved the river back under the bridge by the digging of a canal and the State of Iowa has claimed the area where the river was to the East as well as the portion of the present designed channel where the river is now located which is in Iowa. Iowa has not claimed ownership of the bridge and has not exacted any tribute for a pipeline which crosses the area Iowa claims at that point.

In most places where the Missouri River is confined to the designated channel as described in the AP maps, the State of Iowa claims ownership of all that portion of the channel which is presently East of the Iowa-Nebraska Compact line. Iowa makes this claim even in those areas where the river had been entirely in Nebraska as the result of the construction of canals or natural avulsions prior to 1943. Iowa contends that when the new state line was established, under Iowa common law the State immediately became the owner of any part of the channel of the Missouri River or any abandoned chan-

nels of the Missouri River which were to the East of that Compact line, notwithstanding the fact that such areas, were in Nebraska up until the date of the Compact. Nebraska contends that the Compact requires Iowa to recognize Nebraska titles and this includes the title to the bed of the river which in many places was entirely in Nebraska claimants. Nebraska also contends that the Compact could not deprive individual proprietors of their vested riparian rights which includes the right to accretion and to abandoned beds in the case of avulsion. Nebraska further contends that when the states agreed to a new boundary they, in stipulating to recognize all titles along the Missouri River without necessity of determining where the former boundary had been, necessarily changed Iowa's common law in such a manner that the State of Iowa must recognize it has no further claim of ownership to the bed of the Missouri River but only has an easement for the use of the public such as exists in Nebraska. Otherwise, owners are penalized by having to establish where the boundary was prior to 1943 in order to protect their vested rights, a requirement which the states avoided and attempted to obviate by entering into the Compact and providing safeguards to protect individual property rights.

Iowa argues that the lands along the Missouri River which Iowa claims as beds or abandoned beds are trust lands and the State of Iowa has a duty to claim them. Iowa has no explanation for the fact that Iowa went for years without claiming these areas except that her officials may have been derelict or she is not responsible for the acts of her former public officials. Iowa has no explanation for the fact that Iowa has not claimed other abandoned channels along the Missouri River or why

Iowa waited so long after the Compact to make her claim. The evidence indicates that Iowa was not interested in these lands until they became valuable land with an economic potential or recreational potential to the state. It is neither fair nor equitable for Iowa to delay as long as she has in claiming these areas and to ignore other such areas of like character along the Missouri River and now allow the state to selectively claim certain areas against individual land owners and particularly those claiming through Nebraska titles.

(A) Part 1 of the Missouri River Planning Report

The Iowa State Conservation Commission published a document dated January 1, 1961 entitled PART 1 OF THE MISSOURI RIVER PLANNING REPORT, and it is this document which first publicly disclosed a concerted effort on the part of the Iowa State Conservation Commission to assert claims of title to lands along the Missouri River under the doctrine of state ownership to the beds and abandoned beds of the Missouri River. This report listed 25 potential recreation areas, of which 21 were based upon claims by the State of Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Of the other four areas, one was obtained by the state by purchase and three are highway access areas. All of the 21 areas claimed were immediately adjacent to the Missouri River. This report recognized that:

> "In years past the Missouri has been a fast running river, subject to regular flooding and often carrying heavy silt loads.

"The uncontrolled river moved about freely, cutting new channels, abandoning old, always adding to and subtracting from the shoreline on both banks."

It also recognized that:

"The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change."

The report further recognized that project development was hampered by the cloudy title to lands on the Iowa side of the state boundary and "a lack of knowledge of exact ownership lines also prevents the State of Iowa from acquiring lands needed for access to water or for other shore line developments."

It also recognized previous avulsions along the Missouri River:

"The 1943 compromise became necessary because by that time a great deal of channel stabilization has been completed. Because the new channel did not always follow the old river bed it became necessary to re-define the location of the state's boundary."

It suggested that development of the Missouri River for recreational use would be expedited to a large degree if the state boundary is set as the center of the new channel. It considered the 21 areas and in most of them recognized and recommended that a quiet title action

must be necessary. It then used such language as "If state is granted title", "if title is granted to State of Iowa" or if the state "gains title" certain recommended actions should be taken.

The Planning Report recognized the many uncertainties along the Missouri River and even recognized the occupancy of other individuals because of the necessity for quiet title proceedings. The report further recognized the ownership problems which the State of Iowa might have. This indicated an uncertainty in the status of the law and that Iowa's claims had not been determined prior to this time.

Part 1 of the Missouri River Planning Report represents the present policy of the State of Iowa concerning acquisition of or proof of interest in lands referred to in the report.

This activity by the Iowa Conservation Commission along the Missouri River and the resulting Part 1 of the Missouri River Planning Report and Iowa motives are explained by a letter from the Attorney General of Iowa to the Governor of Iowa in 1964 which stated:

> "For many years of Iowa's history, the state did not zealously protect its ownership of these islands, particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding and of little value.
>
> "In recent years, U. S. Army Corps of Engineers works in the Missouri River Basin have changed this picture entirely. Channel stabilization work has made it so that the islands are no longer transitory.

Upstream impoundments have made it so that they are no longer subject to frequent flooding. These areas now have substantial value to the people of Iowa, both monetary and in some cases, recreational."

(B) Iowa's Statement of the Post-1943 History of the Missouri River

Before the Kansas City-Sioux City navigation, bank stabilization and flood control was completed, the country became involved in World War II. During the war, the Corps of Engineers turned its attention, manpower and resources almost entirely to prosecution of projects which were directly concerned with the war.

Fort Peck Dam had been constructed on the Missouri River in Montana. But other upstream dams, later to be known as Garrison Dam, Oahe Dam, Big Bend Dam, Ft. Randall Dam and Gavin Point Dam, in North and South Dakota had not been constructed. Therefore, control of river stages had not been achieved and floods continued.

During and for a time after the war, the river ravaged the bank stabilization structures which the Corps had installed along the river between Kansas City and Sioux City. Below Boyer Bend, which is about 22 miles upstream from Omaha, although the structures were damaged, the river remained in the designed channel. Upstream from Boyer Bend to Sioux City, the river reverted to the wild, escaping from the designed channel in many places.

The most disastrous flood in history occurred in early 1952. (The great flood of 1881 still holds the

record for having produced the highest river stage, but the 1952 flood far exceeded it in terms of dollar damages.)

Later in 1952, after the flood, the last of the Dakota dams was closed (Gavins Point Dam) and nothing comparable to the 1952 flood has occurred since, although minor flooding of lands near the river still occurs as a result of ice jams and local heavy rainfall.

At about the time that the Corps was gaining control over river stages by the upstream dams, they also began giving their attention to repairing the damage to their navigation channel downstream from Sioux City. Downstream from Boyer Bend, because the river had not escaped from the 1943 designed channel, the Corps elected to simply repair and restore the structures so as to stabilize the channel in the same designed channel which had been designed in 1943. Therefore, from Boyer Bend downstream to the Iowa-Missouri state boundary, the mileage today is about 84 miles as it was in 1943, and the Nebraska-Iowa boundary line is still entirely in the river now as it was then, except only at Carter Lake.

Upstream from Boyer Bend to Sioux City, a distance of about 97 river miles, the Corps found it impractical to restore the river to the "state line designed channel" in its entirety. Some segments were restored to the former design, but a new designed channel was laid out for many other segments. This is demonstrated by the fact that mileage from Boyer Bend to Sioux City was approximately 109 miles by following the center line of the 1943 designed channel which is the state boundary, whereas it is now only 97 miles by follow-

ing the present river. The Corps explains the change of design between Boyer Bend and Sioux City on two bases: (1) It would have been excessively expensive to restore the river to the old design in its entirety. (2) It was felt that some of the bends in the old design were too sharp and that the river should be generally less curvaceous.

About 50 miles of the river between Boyer Bend and Sioux City is in the same channel as was designed for it in 1943; in other words the state boundary is still in the river today for these 50 miles. For a total of about 29 miles in 12 segments, the present river is entirely in Nebraska; at these 12 locations, there is land subject to the sovereignty of Nebraska situated east of the river. For a total of about 18 miles in eight segments, the present river is entirely in Iowa; at these eight locations, there is land subject to the sovereignty of Iowa situated west of the river. For a distance of about 29 miles in 12 segments, the state boundary is not in the river and is to the east of the river. For a distance of about 18 miles in eight segments, the state boundary is west of the river.

I recite these statistics to show the total effect of what the river did and what the Corps did to the river, after 1943, as regards the state boundary now being substantially different from the Missouri River between Boyer Bend and Sioux City.

The new design for the stabilized channel between Boyer Bend and Sioux City did not emerge from the drawing boards of the Corps of Engineers' offices at Omaha until about 1955. Until then, nobody knew where it would be; nobody knew what lands then ex-

isting would be destroyed to make way for the river; nobody knew what areas then in the river would become abandoned channel; nobody knew what construction methods the Corps would employ to move the river from wherever it then was to wherever the Corps might want it to be. Actual construction to place the river in the new design in 1948 at isolated spots was completed in 1960.

When the river reverted to its wild natural condition between Boyer Bend and Sioux City, it washed away lands and created new lands. Then, when the Corps stabilized it to the newly designed channel, they caused it to wash away lands and create new lands. Fresh questions arose as to the ownership of these newly formed areas, some of which are lakes, some of which are marshes, some of which are bars or islands, and some of which are land.

But one question which had always been present as regards areas farmed prior to 1943 had been eliminated by the 1943 Iowa-Nebraska Boundary Compact. As regards areas formed before 1943, there was nearly always a question as to whether they formed in Iowa or Nebraska, because the pre-1943 state boundary was a moving line, governed by the rule of the thalweg. The 1943 Boundary Compact had created a fixed state boundary line which remained at the center line of the state line channel as that channel had been designed in 1943, and as that channel was produced on certain maps on file in the office of the Secretaries of State of both states, and the post-1943 boundary has not moved with movements of the channel and is not governed by the rule of the thalweg. There may be and are questions as to who may own some of these areas which have

formed since 1943; but there can be no question as to which state they formed in; they formed in the state in which they now are located.

It is Iowa's position that ownership of all areas which have formed since 1943 in Iowa must be determined by Iowa law and that the proper forum to make these determinations is the Iowa courts. Nebraska denies both of these propositions and the issues thus existing between the parties will be dealt with in a later division of this Report.

As a result of events that have transpired along the river, both before and after 1943, the State of Iowa presently claims to own some 32 separate areas of land, water, marsh or mixture of the tress. During the trial of this case, these areas were referred to by names as follows (from Sioux City downstream): Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Winnebago Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decature Bend, Louisville Bend, Blencoe Bend, Deer Island, Little Sioux Bend, Ballard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, California Bend, Rand Access, Rand Bar, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Two of the above listed areas are claimed by Iowa entirely by conveyance and not by operation of her law, and I therefore eliminate these two areas from the instant discussion; the areas thus eliminated are Rand Access and Rand Bar.

Eight of the 30 remaining areas formed before 1943; they are: Deer Island, Wilson Island, St. Mary's

Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Twenty-one areas have formed since 1943; they are: Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Iowa's claim of ownership at Winnebago Bend includes purchased land, land and water area formed before 1943, and land and water area formed since 1943. All 30 of the areas are in Iowa, undisputedly, because all are east of the boundary fixed and established by the 1943 Boundary Compact.

I am satisfied from the evidence adduced before me that each of the 30 areas along the river which Iowa claims to own by operation of its comon law has its own individual history. Although some areas have points of similarity, it cannot be said that there is any typical set of facts common to any or all of them.

As previously mentioned, the immediate proximate cause for Nebraska's commencement of the present case appears to have been the filing by Iowa of two quiet title cases in 1963: In one, Iowa claimed ownership of Nottleman Island in Mills County; the case is entitled *State of Iowa v. Babbitt, et al.,* in the Iowa District Court for Mills County. In the other, Iowa claimed ownership of Schemmel Island in Fremont County; the case is entitled *State of Iowa v. Schemmel, et al.,* in the Iowa District Court for Fremont County. These cases are still pending, further proceedings in

them having been suspended until there is a final decision in the case at bar.

It is Nebraska's claim that Iowa violates the solemn commitment she made in the 1943 Boundary Compact by commencing and prosecuting these two cases because, Nebraska says, both Nottleman Island and Schemmel Island were in Nebraska prior to 1943, both were ceded to Iowa by operation of the Compact, and Iowa promised to recognize as good all titles to ceded lands which were good in Nebraska. I shall deal with the problems relating to Nottleman Island and Schemmel Island in later divisions of this Report.

Then, Nebraska wishes the Court to proceed, on the basis of evidence adduced relative to Nottleman and Schemmel Islands and on the basis of limited and incomplete evidence adduced relative to other areas, to pronounce what might be termed a declaratory judgment and issue permanent injunctions which would lay down rules and prevent or severely inhibit Iowa's future conduct as regards all areas she claims to own in the vicinity of the river. This portion of the case I will also deal with in another division of this Report.

Since 1943, because numerous segments of the boundary line fixed and established by the 1943 Boundary Compact are no longer in the Missouri River, the two states have commenced new negotiations for another new boundary compact. No new agreement has yet been reached. Nothing concerning this proposed new compact is at issue in this case because it is well recognized that power to make a new compact rests exclusively with the two states, subject only to Congressional approval.

* * * * * * *

THE SPECIAL MASTER ACCEPTS IOWA'S POST 1943 FACTUAL HISTORY AS RECITED HEREIN.

Comment: During the course of the trial while receiving evidence as to the formation of Nottleman and Schemmel Islands and their exact location in 1943, I became satisfied that neither state nor The United States Government at any time were interested in the thalweg of the river. During the 15 years or so previous to 1943, the Engineers were engaged in stabilization work. During this period there was no commercial boat channel as that term is defined in many river decisions, notably *Iowa v. Illinois,* 147 U.S. 1. The problem of the Engineers was to create a main channel, not to locate one. They were concerned because the river was wild and untamed. The United States Engineers, as do most government departments, publicize their activities. Two documents have application in this case. The first is a brochure, **"MISSOURI RIVER, BANK STABILIZATION AND NAVIGATION PROJECTS,** SIOUX CITY TO THE MOUTH, 1960." This brochure shows photographs of the structural types used to stabilize and to control the river. Some 60 of these brochures will be forwarded to the Court with this Report. From my observation during 2 days spent in a U. S. Engineers inspection boat on the river, and from shoreline observations, the Special Master is of the opinion that the Engineers are to be commended in the excellent management and control of the Missouri River from Sioux City to Rullo, Nebraska. The U.S. Army Engineers by their stabilization work have shortened the river by 72 miles from Sioux City to the mouth of the river at St. Louis. The river was 804 miles long in 1890. The 1960 measurements show the river to be 732 miles long. The photographs introduced

into evidence in this case, many in color, illustrate the uncontrolled and the controlled sections of the river at a number of the points in controversy in this case. The second is a leaflet entitled, "**NAVIGATION PROJECTS UNDER WAY,** MISSOURI RIVER STABILIZATION AND NAVIGATION PROJECT, (1968)." The first sentence reads:

> "The unimproved Missouri River was a wild, unpredictable stream, many-channeled and meandering, virtually useless for commercial navigation, and a constant threat to any improvements along its banks."

It seems appropriate at this point to mention again the great professional skill of counsel for each of these states in their discovery of evidence which was presented at trial and in their preparation of summaries of the evidence and written briefs on the applicable law. Finally, at my suggestion for my convenience in the preparation of this Report, each state has submitted proposed findings for use in the Report. The presentation of these post-trial documents is of inestimable value to the decision in this case.

Nebraska in her proposed findings has carefully summarized the evidence which was introduced relative to Notleman Island and Schemmel Island. Nebraska's counsel were well aware of the lawsuits filed by Iowa in her state courts claiming ownership of these two islands. Iowa's claim of ownership of these two islands based on her common law is, of course, the nub of this whole controversy. Iowa's position in this respect bears repeating. She says at page 3 of her proposed findings:

> "The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact."

Iowa says this matter is of importance because on this question of where the pre-1943 Compact line was hangs the ownership of Nottleman and Schemmel Islands. Although Nebraska contends that she is not bound to prove the pre-1943 boundary line was east of these two islands and thus in Nebraska and ceded to Iowa under the Compact, she did assume that burden and claims to have met that burden by the fair preponderance of the evidence.

The Special Master finds for Nebraska on the issue of Nottleman and Schemmel Islands.

Her findings as submitted are, therefore, adopted and made a part of this Report. Those findings cover p. 51 et seq. to p. 102 of the proposed findings submitted by Nebraska. As will be indicated in my recommendations, it is the view of the Special Master that these findings are unnecessary to the correct decision in this controversy, as in my view the case should be decided on the construction of the Compact. But because the main contention of Iowa is as stated above that the real issue is where the boundary line between the two states was immediately prior to July 12, 1943, and this issue was tried and is the basis for the admission of hundreds of exhibits and in large part the reason for the extensive record, these findings are made in the event the Court disagrees with the construction of the Compact as suggested by the Special Master.

VIII. NOTTLEMAN ISLAND — THE CASE OF STATE OF IOWA v. BABBITT, ET AL.

On March 18, 1963 the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "State of Iowa, Plaintiff v. Darvin Merrit Babbit, et al., Equity No. 17433" attempting to quiet title to the Nottleman Island land in Mills County, Iowa. This petition alleged that the State of Iowa was the absolute and unqualified owner of the land and that all claims of the defendant were "spurious and wholly without right." The petition further alleged that ". . . one or more of the defendants have stated or published remarks to the effect that any attempt by any agent or employees of plaintiff to view, inspect or survey the subject real estate of this case, such agents and employees would be physically and violently stopped and prevented from so doing." The Petition gave no grounds as the basis for Iowa's contentions, merely alleging that Iowa was the absolute and unqualified owner.

The landowner claimants testified that no one from the State of Iowa discussed Iowa's claim with them prior to the filing of this law suit.

The State of Iowa, in Answers to Interrogatories, claimed that its ownership was not based on any acts or instruments, taking the position that the land area formed as accretion to the state-owned bed of the river. Iowa made no investigation concerning exactly who was in possession of the disputed area adversely to them and Iowa claimed that she should not be required to make an investigation concerning possession. The state also claimed that the matter of possession is irrelevant and immaterial. Iowa further claimed that defendants' pos-

session was irrelevant as the land was in the public domain and not subject to being adversely possessed by private parties or persons. Iowa had no information as to how long the various tracts in the area had been cultivated or by whom this had been done. Iowa had never filed anything in the office of the Mills County Recorder of Deeds asserting its claim.

Iowa stated that the State Conservation Commission was not a party in interest in any capacity in the litigation but also stated that the Iowa State Conservation Commission was the political subdivision or department of the state possessing the power, authority and duty of managing and controlling the area involved in the litigation "if it be determined that same is owned by plaintiff."

Iowa denied that the land was at any time in the State of Nebraska and denied that the State Conservation Commission had ever relinquished claim to the land. She further denied that the land was subject to the provisions of the 1943 Boundary Compact. Iowa asserted that the collection of taxes was irrelevant and immaterial "because any taxes which any of the defendants (landowners) may have paid to plaintiff (Iowa) on the land involved in this case were infinitesimal". Iowa said the matter only became material if the defendants elected to plead some affirmative defense based thereon and that it was an illegal, improper and unauthorized attempt by the landowners to shift the burden of proof from themselves to the state on an issue which was not then an issue in the case and which, if it became an issue, placed the burden of proof on the landowners. Iowa further took the position that the State should not

be subject to the burden of researching, investigating and proving the facts concerning taxation unless and until some burden was cast upon the state by pleading and proof offered by the landowners. The only persons which Iowa listed as having information or knowledge concerning the formation of the land were R. L. Huber, formerly of the U. S. Army Corps of Engineers, by reason of having studied books, records, maps and photographs; Gerald J. Jauron, employee of the plaintiff who had studied maps and records; and Ivan Windenberg, an employee of the State of Iowa, who surveyed the area. Iowa presumed there were residents who had some information but did not interview the persons prior to their filing of the suit.

Iowa also took the position that the instruments through which the defendants claimed title were "spurious, fictitious instruments" and of no force or effect in Iowa.

Although the evidence is that in 1946 the Iowa Attorney General's office had knowledge of a law suit against the officials of Mills County to have the landowners' Nebraska titles placed on record in Iowa, Iowa took the position in 1963 it was not a party to the action and "had no notice or knowledge thereof."

The evidence has established that at the time Iowa filed the law suit against the owners of Nottleman Island, the state officials disregarded all matters of record concerning the land, all matters of possession by the landowners, the payment of taxes by the landowners upon the land, and all eye witness knowledge concerning formation of the land. They took the position that the State was not required to make any further investiga-

tion into these matters and that the instruments of record were "spurious and fictitious" instruments.

The extent of Iowa's knowledge or investigation appeared to be the mere study of certain selected records, maps, and documents from the Corps and an examination of the records of Mills County, Iowa to obtain names of possible parties defendant, with some limited investigation into the records of the Secretary of State in Des Moines and the Mills County ASC office and in the Mills County Courthouse. The Nebraska records were completely ignored and when the Nebraska titles were raised, Iowa arbitrarily took the position that they were invalid. As in the Schemmel case, this is another situation where Iowa merely filed a quiet title action against the landowners without investigation of their titles and where Iowa has attempted to shift the tremendous burden of tracing and proving the past history of this land to the individual farmers, ignoring everything that has happened in connection with the land except certain assumed facts or conclusions by a few officials or employees of the State of Iowa concerning its formation.

Mr. Babbitt first received notice that Iowa might be claiming his land when a friend called him from Council Bluffs, Iowa and told him about an article in the Council Bluffs newspaper of February 19, 1961 entitled "Missouri River Could Become A 'Playground' ". This article referred to the areas mentioned in the Missouri River Planning Report. The very fact that Iowa announced that they were claiming the title to the land made it impossible for Babbitt to borrow money on his land in order to finance his agricultural operations. He was twice refused loans because in the opinion of the finan-

cial institutions or their counsel, the State of Iowa's claim clouded the title. When Mr. Babbitt spoke with the Assistant Attorney General of Iowa concerning their claims and their plans he received a letter dated November 2, 1961 which stated that it was impossible to give him an absolute definite answer to his questions at that time but that he might assume for the present that the State of Iowa through the State Conservation Commission did in fact claim title to so much of the property as was physically located within the State of Iowa.

The mere claim of title by the State of Iowa constitutes a hardship upon the farmer as he can no longer borrow funds or use his land as he might if his title were good. The State of Iowa by merely making a claim to the land clouds the title and is in violation of Section 3 of the Compact requiring it to recognize titles which had been good in Nebraska.

(A) Nebraska Exercises of Jurisdiction Prior to the Compact

The Nottleman Island or Babbitt Island area was surveyed by the Cass County, Nebraska surveyor as a separate island on August 18-25, 1933 and the survey was filed in the office of the Register of Deeds of Cass County, Nebraska as well as the office of the Cass County Surveyor. The tax records of Cass County, Nebraska show that the island area was surveyed and reported to the County Assessor for assessment on September 7, 1933. The island was taxed in Nebraska as part of Rock Bluff Precinct, Nebraska from 1933 up until the adoption of the Compact. In 1952 the property was removed from the Nebraska tax records by the

Board of County Commissioners of Cass County, Nebraska for and after the year 1943 upon recommendation of the Cass County Attorney who at that time stated that his independent investigation revealed that under the Nebraska-Iowa Compact of 1943, this island became a part of the State of Iowa and was then taxed in the State of Iowa.

A considerable volume of evidence was introduced by plaintiff showing that individuals who lived on Nottleman's Island in the 1930's filed personal property tax returns in the State of Nebraska, registered their motor vehicles in the State of Nebraska, and sent their chldren to school in the State of Nebraska as Nebraska residents and without the payment of tuition. Testimony indicated that parents of two of these children inquired in Iowa whether they should send their children there but were informed that they could not. The school records of Cass County kept pursuant to Nebraska statute showed the children from families which lived on the island in attendance at the Rock Bluff school during the years 1935 through 1938. Three children attended school in Nebraska, two from the family of Ernest L. Shipley and one from the family of Cleo Baker. A child of the Ernest Shipleys was born on the island in 1936 and the birth certificate was filed with the State of Nebraska, Department of Health, Division of Vital Statistics and there was a Certificate of Death filed with the Division of Vital Statistics of the Nebraska Department of Health showing the death of a daughter of Ernest Shipley in 1935 while the Shipleys lived on Nottleman Island. One of these witnesses, Mrs. Ruth Dooley, first stayed on Nottleman Island in 1929 when she spent the whole summer there with her uncle and grandparents. The

evidence shows that from 1929 until the adoption of the Iowa-Nebraska Boundary Compact of 1943, Nebraska residents were farming the island and during most of that period Nebraska residents lived upon the island. The two witnesses who had lived upon the island testified that they considered themselves citizens of Nebraska and the other people on the island considered that they were residents of Nebraska; this was common knowledge in the Rock Bluff area that these people were considered Nebraska citizens. This was fairly common knowledge in the whole Rock Bluff and Plattsmouth vicinity.

There is in evidence a considerable volume of records substantiating these facts which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago. The passage of time, death of witnesses, and loss or destruction of any of these records would obviously prejudice the landowner claimants in an action of this nature brought by the State of Iowa.

None of the witnesses who testified concerning the actual formation of Nottleman Island or the movements of the Missouri River in that area testified that it was Iowa land or considered to be in the State of Iowa prior to the Compact whereas several witnesses from Nebraska indicated that Nottleman Island was considered to be a part of the State of Nebraska prior to the Compact.

The records of the office of the Register of Deeds of Cass County, Nebraska show deeds as having been re-

corded in the 1930's conveying portions of the island in Nebraska. One of these deeds carried the recitation that it was to supplement a conveyance made in November, 1928, which conveyance was in writing and properly signed, witnessed and acknowledged but never filed for record.

The Nebraska courts also exercised jurisdiction over Nottleman Island.

In 1940 an action to quiet title to the north half of Nottleman Island was filed in the District Court of Cass County, Nebraska captioned *Harvey Shipley, et al, v. Frank G. Hull, et al.* This was a quiet title action with publication of notice in a legal newspaper in Nebraska which was contested by a Nebraska riparian owner who alleged that the lands were accretion to his lands and were attached to his lands as accretions until the government engineers changed the channel in the Missouri River so that the channel cut off a large portion of said accretion. The court entered two decrees in the case, one quieting title as against certain defendants on August 1, 1940 and the other quieting title to the remaining defendants on June 19, 1941. The court found that the plaintiffs had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the land for more than 10 years and quieted title in the plaintiffs. A finding in the decree indicated that the island had been in private possession since 1926. This case was tried in the District Court of Cass County, Nebraska which is a court of general jurisdiction in Nebraska.

The south half of Nottleman's Island was included within the property of the Estate of John H. Nottleman,

deceased which was probated in the County Court of Cass County, Nebraska, the Nebraska Court of probate jurisdiction. The County Court records show that John Nottleman died on March 31, 1940 and this part of Cass County, Nebraska was described by Nebraska description in the inventory as being property of the estate. The estate rented this island land to Mr. D. M. Babbitt. The administrator then filed a Petition in the District Court of Cass County, Nebraska for a license to sell the real estate, alleging that the deceased had died "seized and possessed" of the land on Nottleman's Island and praying for authority to sell it. The District Court entered an Order to Show Cause ordering that all persons interested in the Estate of John Nottleman appear to show cause, if any, why license should not be granted to sell the real estate and there was publication for three successive weeks in the Plattsmouth Journal, a Nebraska legal newspaper, in 1940. There is also a Notice of Sale published for three consecutive weeks in January of 1941 and the land was sold to J. L. Jones and D. M. Babbitt. The sale was confirmed and the executor was ordered by the court to deliver a deed to the purchasers. An Administrator's Deed from the administrator to J. L. Jones and D. M. Babbitt was filed on February 13, 1941 in the office of the Register of Deeds of Cass County, Nebraska conveying the south half of Nottleman's Island by Nebraska description as Nebraska land.

There were many Nebraska public records offered and a large volume of testimony which established that at the time of the Iowa-Nebraska Boundary Compact and for a considerable period prior thereto, the State of Nebraska exercised jurisdiction over Nottleman Island and there were no exercises by the State of Iowa of

jurisdiction over the island. Had the two states investigated the status of Nottleman Island at that time they could have come to no other conclusion than that it was considered to be a part of the State of Nebraska and following the change in channel by the Corps of Engineers was considered as being within the category of "ceded" lands or lands transferred to Iowa by the Compact.

(B) Ownership and Possession of Nottleman Island

Individuals have exercised all the rights and obligations of ownership and possession of Nottleman Island from 1929 to the present, a period of over 40 years and there is evidence that there was an individual in possesson of the island from 1926 to 1929. Consequently, there were individuals in posession of the land for at least 35 years before the State of Iowa filed a quiet title action in the District Court of Mills County, Iowa making claim to the land.

Mr. D. M. Babbitt obtained his claim of record to the property through his purchase along with a Mr. Jones of the property through the administrator's sale in the District Court of Cass County, Nebraska. On February 13, 1941, the same date as his deed, Mr. Babbitt filed a mortgage to J. L. Jones with the Register of Deeds of Cass County, Nebraska. This mortgage was outstanding at the time of the Iowa-Nebraska Boundary Compact and was satisfied by Mr. Babbitt in 1949. It was a mortgage entitled to be recognized by the State of Iowa under the terms of Section 3 of the Compact.

The owners of the north one-half of the island all claimed their record title through the quiet title pro-

ceedings in the District Court of Cass County, Nebraska in the case of *Shipley v. Hull;* and Margaret T. O'Brien claimed through the Treasurer's Deed from the County Treasurer of Cass County, Nebraska which was filed on January 3, 1945 and through a subsequent warranty deed from Katherine Julia O'Brien, one of the plaintiffs in the case of *Shipley v. Hull.*

William and Mason Watts had obtained a deed in 1937 to the northeast portion of the island and were parties to the quiet title action of *Shipley v. Hull.* Harvey Shipley conveyed the lower portion of the north one-half of the island to George Troop who later conveyed it to Lee A. Sargent and it has been in the Sargent family since 1953.

There was considerable testimony to illustrate the open, public and notorious occupation and use of the land by the landowners. People lived on the island, it was fenced, had houses upon it, had been cleared extensively, had general farming facilities such as feed lots, loading chutes, hog pastures, and was sowed with crops such as alfalfa, soy beans and corn. There was a farm sale on the island in 1956 advertised in Nebraska and Iowa newspapers. The land was taxed in Nebraska up to the time of the Compact and was taxed in Iowa following a lawsuit brought by the individuals in 1946. There were articles in the Omaha Sunday World Herald in 1954 and 1955 with photographs of the Babbitts with reference made to either the clearing of the island or the crops taken from the island. Mr. Babbitt testified that he put every dollar he ever made after his living expenses into this farm to make a good farm of it. He also put an Inland steel bin on the island which was mortgaged to

the Commodity Credit Corporation. He obtained a storage bin loan and in his dealings with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service and with the Commodity Credit Corporation, those governmental agencies raised no question as to his title. The farm was leased for part of the time and Mr. Babbitt had the property surveyed and the survey filed of record in Mills County. The individuals had filed affidavits of possession in Iowa pursuant to the advice of the attorneys. Mr. Babbitt's land presently has about 620 acres of crop land. Over 400 acres were cleared between 1944 and 1957 at a cost of at least $100 an acre, not including the burning and reburning and discing. The Babbitts hired 20 or 25 people at one time or another to assist with the clearing. The land was posted with "no trespassing" signs by Babbtt and by the Deputy Sheriff or Sheriff. The State of Iowa Conservation Commission or any agency of the State of Iowa never posted any signs around Nottleman Island designating it as Iowa state land.

The Troop land which was approximately 370 acres had about 70 acres cleared in 1945 and Troop farmed there. In 1953 he sold the land to Lee Sargent who died in 1957 and since then the land has been farmed by Sargent's sons. The Sargents farm around 355 acres on Nottleman Island and there is some land which they have not cleared as yet.

When the Sargents obtained the property there was approximately 80 acres cleared and in the three year period from 1953 to 1956 they cleared about 300 acres. They have had crops on the island every year since 1953 barring 1967 when everything was lost in a summer

flood. The land was mortgaged by the Sargents to the Travelers Insurance Company who accepted the Sargents' title. Steel grain bins have been built on the property. In Mr. Merrill Sargent's opinion, the land would bring $600 or $700 an acre for most of the 350 acres. There is an additional 40 acres which has not been cleared which is worth $200 or $300 per acre.

The northwest corner of the island is owned by Mrs. Margaret T. O'Brien, the widow of an attorney. This property was conveyed in 1939 to Katherine Julia O'Brien, her sister-in-law. Mrs. O'Brien had received a tax deed from the County Treasurer of Cass County, Nebraska in 1945 and testified that her husband, who was an attorney, had represented her. The O'Briens have claimed land on Nottleman's Island from shortly after the deed in 1939. 200 acres have been cleared at a cost of at least $10,000, according to her records. This was done by a corporation from Des Moines, Iowa and some by an individual from the area. The land is presently farmed and has been leased since about 1950 or 1952. Her share of the crop for one of the years prior to her testimony amounted to about $8,000 under the crop sharing arrangement.

The northwest corner was originally acquired by Albert Mason Watts and William Watts who purchased it from Harvey Shipley in 1937 in Cass County, Nebraska. They paid taxes on this land in Nebraska for several years and then were participants in the suit in Iowa to have the land transferred and placed on the Iowa tax books. William Watts passed away and the property passed to Mason Watts. It was appraised by the Iowa State Inheritance Tax appraisers and an in-

heritance tax was paid to the State of Iowa. The land has been fenced and posted against trespassers. There are 238 or 240 acres which belonged to the Watts with about 79 acres cleared. It is farmed by a tenant who has been renting it for two or three years. The previous year, Mr. Watts' share of the crops was a little better than $2,000.

There is no question from the evidence but that the individuals were exercising all of the incidents of ownership and possession of the property without interference from the State of Iowa and are presently still in complete control of the land. This was a matter of public notoriety in both Cass County, Nebraska and Mills County, Iowa and was accepted by the local Iowa officials. It was also accepted by the Iowa State Inheritance Tax authorities and the officials of the Iowa Conservation Commission in 1951.

All of the individuals paid taxes in Iowa continuously from 1947 until the present date, which total taxes over the years through 1966 were in excess of $27,000. Those taxes have been increased in recent years since 1966. Even while the State was attempting to quiet title to the land, the County officials of Mills County were collecting taxes under the threat of tax sale if they were not paid.

The area is no longer an island but can be reached by a road leading to the island across the abandoned channel on the east. An appraiser testified that in his opinion the Nottleman Island tracts had a value of $607,900 as of December 29, 1967 and since that time the trend with regard to values of land of this character

had been upward. He appraised some of the land as being worth approximately $500 per acre.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the occupants. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. The Iowa Attorney General's office had notice of the status of the land in 1946 and 1951 and the Iowa Conservation Commission disclaimed any claim to the island and accepted the fact that it was the private property of the occupants in 1951.

(C) Conduct of the State of Iowa Following the Compact; Recognition of the Titles to Nottleman Island

On march 22, 1946 Mrs. O'Brien attempted to file a deed, conveying a portion of Nottleman Island to her, with the Mills County, Iowa, Recorder's Office. The Recorder's records show the deed was not recorded and was returned to the O'Briens.

Mr. Lewis S. Robinson, County Auditor of Mills County, Iowa in March of 1946, testified that the Recorder did not have any place to record the O'Brien deed and the Recorder returned it to the Auditor's Office because she had no record books in which she had this area designated. The description on the deed carried section, range, and township designations which were not Iowa descriptions but which were Nebraska descriptions. Mr. Robinson then contacted the Mills County Attorney and the two of them made a detailed study of how the matter should be handled. They first went to the Clerk's Office

in Cass County, Nebraska and found that this same piece of land was carried on their real estate rolls. They then visited the area Corps of Engineers Office in Omaha to see how the land was described and from there went to other Iowa river county officials and found that these officials had the same problems and had found no solution for them. The Mills County Attorney then wrote a request to the Attorney General of the State of Iowa requesting an opinion and Mr. Robinson and the Mills County Attorney went in person to Des Moines and talked to a Deputy Attorney General of Iowa and left the question with him. The witness never heard of any answer to that question. He substantiated that there was a great deal of confusion concerning treatment of these lands along the river.

Mr. Robinson then wrote the General Land Office in Washington by letter dated April 25, 1946 and explained that due to the change brought about by the 1943 state legislatures, Mills County, Iowa had acquired a certain area of land of approximately 1,500 acres which was formerly of Cass County, Nebraska and was known as "Nottleman's Island." His letter commenced with the following:

> "In 1943 the Legislatures of the two States of Iowa and Nebraska passed an act establishing the center of the channel of the Missouri River as the boundary line between the two states. This was done because the river had changed its course in previous years putting lands of each state on either side of the river adjoining lands of the other state."

His letter pointed out that Nebraska township and section lines will not join with Iowa lines when projected,

and he inquired as to how the land should be identified. His letter also stated that counties other than his had similar difficulties but none they had contacted had arrived at any satisfactory solution. The reply from the Department of the Interior General Land Office recognized that the Compact transferred the jurisdiction from Nebraska to Iowa but did not affect the ownership of the land and suggested that the land descriptions used in disposing of the lands would be appropriate for the purpose of assessment and taxation.

In 1946 some of the owners of the land on Nottleman Island contacted Mr. Whitney Gillilland because they wanted the official records of Mills County, Iowa to show their title and ownership. They had sought to record their title papers with the Mills County officials and had been refused the right to have them recorded. Mr. Gillilland was an experienced Iowa attorney, having previously to 1946 served for a period of time on the District Bench in southwestern Iowa, a court of general jurisdiction in Iowa. In 1946 he would have been in the general practice of law at Glenwood, Iowa for a period of about 17 years. He has been a member of the Civil Aeronautics Board since 1959 and has had other governmental positions such as Chairman of the Foreign Claims Settlement Commission of the United States, Chairman of the War Claims Commission and Assistant to the Secretary of Agriculture. Mr. Gillilland made a personal examination of the tract books in the County Auditor's office and determined that there were no descriptions for the area. He prepared a lawsuit filed in the District Court of Mills County, Iowa with the Watts, Shipley, O'Brien, Babbitt, and Troops as plaintiffs and

the County Auditor, County Recorder, and Mills County, Iowa as defendants. The petition was filed in November, 1946 and alleged the facts concerning the derivation of the titles of the various plaintiffs through the Nebraska quiet title action, administrator's sale and county treasurer's tax deed. The petition alleged that prior to the Boundary Compact the tracts were located in Cass County, Nebraska and were transferred to and became a part of Mills County, Iowa by the statutes which created the Compact. It alleged that uncertainty had arisen as to the manner and method of indexing the lands and that the owners were entitled to have these instruments recorded in the office of the County Recorder. An answer was filed by the County Attorney for Mills County, Iowa which admitted the Compact and that the land was acquired by the change of boundary and further alleged that on May 6, 1946 the County Attorney had written to the Attorney General of the State of Iowa for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes and in setting up the necessary plats and transfers and he had not received any opinion. The decree was filed on January 6, 1947 in which the court found the allegations and statements of the Petition were true and the plaintiffs were entitled to the relief prayed for. The court further found ownership of the land in the plaintiffs and ordered the Clerk of the Court to file a copy of the plat in the Plat Book and Index Book and other books referred to under the applicable statutes of the Code of Iowa. Mr. Gillilland testified that the landowners were actually physically in possession of the land in 1946 and it was open and notorious and neither the landowners nor he, as their attorney, had any idea that

the State of Iowa had any claim to Nottleman's Island in 1946.

In 1950 an Iowa State Conservation Commission employee living in Glenwood, Iowa, came to see him and told him that the Conservation Commission had an application before it to purchase the land. The employee had searched the records and the county officers had referred him to Mr. Gillilland. A few days later Mr. Gillilland was in Des Moines and talked to the Iowa Attorney General, Robert Larson, who is presently a member of the Iowa Supreme Court, about the matter. The Iowa Attorney General suggested that Mr. Gillilland write the Iowa Conservation Commission concerning the matter and Mr. Gillilland did so by letter of March 20, 1950.

Mr. Ray W. Beckman, Chief of the Fish and Game Division of the Iowa Conservation Commission testified that he remembered this letter and he answered it on April 19, 1950 stating:

> "Please be advised that the island you referred to is not State property. The information we have is that this island belongs to four parties as follows:
> Wm. Watts M. Babbitt
> Margaret O'Brien Jones & Babbitt"

Mr. Beckman testified that as Chief of the Fish and Game Division he was responsible among other things for all the lands that were under the supervision of the Fish and Game Department. He remembered being handed the letter by the Director of the Iowa Conservation Commission and testified that he was instructed to make that answer by the Director. The office of Director is a statutory office under the Iowa Code.

This answer was then related to the owners and they relied upon it pursuant to the advice of their attorney, Mr. Gillilland.

The Babbitt land was subject to another lawsuit filed in the District Court of Iowa in and for Mills County on June 8, 1961 when Mr. Babbitt brought suit against the members of the County Board of Review of Mills County, Iowa and the County Assessor of Mills County, Iowa, alleging that he was the owner of real estate on the island which had been assessed for taxation but that the assessment was unjust and excessive and that his taxes should be lowered. The Mill County Attorney filed an answer admitting the ownership of Mr. Babbitt and the court entered a judgment and decree on November 30, 1961 in which it found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law.

When Lee Sargent died in 1957, the Nottleman Island land was included within his estate and the Iowa State Tax Commission assessed an inheritance tax upon the estate including the valuation of this land, and an inheritance tax was paid to the State of Iowa. William Watts died in the 1960's and the land was included within his estate and assessed for Inheritance Tax purposes and a tax was paid to the Iowa State Tax Commission on the estate.

Mr. Watts further testified that at one time Mr. Stiles, head of the Conservation Department, was visiting them and the Watts brothers tried to sell the land to Iowa for practically nothing or give it to Iowa if they would make a game preserve out of it, but Stiles refused to have any part of it and wanted nothing to do with it.

The record clearly indicates a complete acceptance by the local officials of Mills County, Iowa and recognition by the Iowa Attorney General's office and Conservation Commission in the late 1940's and early 1950's that Iowa had no claim to the land and that there were titles good in Nebraska which were good in Iowa pursuant to Section 3 of the Compact. It is neither fair nor equitable for Iowa to change its position and claim title in light of these past recognitions and the continuous period of taxation of the land by the Iowa officals. (See *United States Gypsum Co. v. Grief Bros. Cooperage Corp.,* 389 F. (2d) 252 (8th Cir. 1968).

Regardless of how land along navigable rivers may have formed, there is another well established principle applicable to the boundary between states. The land may become a part of a state as a result of long and continuous exercise by that state of sovereignty and jurisdiction over the land with the acquiescence of the other state. The principle of prescription and acquiescence has as its primary object and underlying basis "the creation of stability of order" and "there is no controversy in which this great principle may be applied with greater justice and propriety than in the case of disputed boundary." *Arkansas v. Tennessee,* 310 U. S. 563. See also *Indiana v. Tennessee,* 310 U. S. 563. See also *Indiana v. Kentucky,* 136 U. S. 479, *Rhode Island v. Massachusetts,* 4 How. 591, *Michigan v. Wisconsin,* 270 U. S. 295, *Maryland v. West Virginia,* 217 U. S. 1, *Virginia v. Tennessee,* 148 U.S. 503, and *Louisiana v. Mississippi,* 202 U. S. 1.

Another significant concept in the consideration of cases involving boundary disputes is the recognition by public officials and inhabitants of the location of the

boundary. See *Minnesota v. Wisconsin,* 252 U. S. 273, *Handly's Lessee v. Anthony,* 5 Wheat. 374.

The history of taxation by two states in respect to a disputed area is also of substantial weight in indicating acquiescence by one of the states in the boundary line restricting her jurisdiction. *Vermont v. New Hampshire,* 289 U. S. 593.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants in the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was in Nebraska prior to the Compact. Iowa's acquiescense for an additional 20 years following the Compact and Iowa's taxation of the land supports this conclusion.

Nebraska contends that Iowa disregarded all of this evidence and that Iowa should not be able to bring an action requiring the landowner to establish his title by making this showing. The individual defense of such a case by a landowner places a tremendous expense upon him. This includes the difficulties of searching out records and landmarks which may have been destroyed by the passage of time and of obtaining witnesses to facts or occurrences in years long past. As the court said in *Rhode Island v. Massachusetts,* 4 How. 591, 639:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

This statement has been cited several times in boundary cases. If there is to be any stability of order along the Missouri River, the Compact must be construed in such manner as to prevent the State of Iowa from contesting the title of landowners such as in the Babbitt and Schemmel cases and all other areas which were in existence at the time of the Compact. This is certainly consistent with the intent of the Compact and effectuates its purpose.

(D) History of the Movements of the River in the Nottleman Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Nottleman Island or Babbitt Island area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how the land actually formed or in what jurisdiction it formed, the court makes the following findings of fact concerning

information of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union the Missouri River was originally in approximately the same position which it presently occupies in the Nottleman Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. Behind this movement, an island originally platted as Nebraska land which was immediately north of the area involved and referred to on early Corps' maps as Tobacco Island, began to enlarge both to the east and downstream on the Nebraska side of the river.

A study of the original government surveys and maps from the U. S. Army Corps of Engineers and Missouri River Commission document this eastward movement. It is further substantiated by an 1895 survey by the County Surveyor of Mills County and a 1920 Soil Survey.

Several witnesses who lived along the Missouri River on the Iowa side and were familiar with it testified concerning the movements of the river to the east at various times commencing shortly after 1900. Some of them had to move away from the river because it was cutting toward them and houses and farms were cut into the river on the Iowa side.

Records dated September 25, 1922 in the Mills County, Iowa Auditor's office indicate that from 1851 to 1895 the river carried away about 1,140 acres of land in

Mills County and that since 1895 there had been 1,296 acres more taken making a total of 2,436 acres taken by the river by September 25, 1922. As a result of the concern on the Iowa side, a river protection district was established pursuant to the Iowa statutes and retards were constructed on the Iowa side commencing in about 1922 or 1923 to attempt to halt this cutting of the river. According to a comparison of the 1922 map prepared in connection with this Missouri River Protection District and a 1923 Corps of Engineer map, between 1922 and 1923 the river cut through the accretion area which had been on the Nebraska side and following 1923 the various maps indicate a distinct island with water on both sides.

Testimony by Mr. Harry Weakly, Nebraska's tree expert or dendrochronologist, verified that trees which commenced growing on what was the Nebraska accretion area remained on the island after a channel of the Missouri River had cut back to the west upstream between 1922 and 1923 leaving the island as a substantial land area. Mr. Weakly testified that one tree on the island commenced to grow in 1900. This tree was located to the west of the 1890 thalweg which appears on the Missouri River Commission and Corps of Engineer's maps. Even one of Iowa's experts who testified as to the age of the trees on the island, though differing in count from Mr. Weakly, stated that two of the trees commenced to grow on the island prior to 1923.

Witnesses who lived in the Rock Bluff area on the Nebraska side also testified concerning how the river had cut to the east and how, at various times the river bank was considerably to the east of its original location with chutes on the Nebraska side which at times

would be dry. People could wade to the Nottleman Island area across some of the shallow water at times. Captain Otto Neuhauser of Kansas City testified that he had been on boats on the Missouri River ever since 1910 and made his first trip as far as the Rock Bluff area in a river boat in 1915. He was a pilot on the Missouri River from 1913 until 1957 and the first time that he came up the Missouri River he described the water on the west side of Nottleman Island as quite wide and shallow and he could not bring his boat up it. Consequently, he had to go around the east or left bank side of the Nottleman Island area where the main channel flowed. He verified that the main channel was also on that east side when he worked for a construction company in 1921 placing retards and again in 1931 when working for the Corps the main navigable channel was on the left or east side of Nottleman Island. Workers for the Corps of Engineers including a steersman on one of the Corps boats, who was also a boat pilot, testified that before the Corps of Engineers commenced their river work, the main channel was on the east side.

Witnesses called by the State of Iowa to attempt to counter this mass of evidence indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity and only casual acquaintance with the situation there. Some of the witnesses called by Iowa recognized the river had moved considerably to the east and also were somewhat familiar with the cutting of the river towards the east into Iowa. No witnesses, however, testified that the island formed in Iowa or was considered as in Iowa prior to the Compact.

The evidence shows that from the time of the original Nebraska survey in 1857, the Missouri River had

moved to the east in the Rock Bluff area more than one mile and the island formed in Nebraska. The Corps of Engineers' channel stabilization work placed the main channel to the west of the island, and the Iowa-Nebraska boundary at the time of the Compact was in the abandoned channel approximately a mile east of the Compact line.

(E) Movement of the Missouri River by the Corps of Engineers Into the Designed Channel

Commencing in about 1934 the U. S. Army Corps of Engineers began work in the Nottleman Island area. Testimony of several knowledgeable witnesses familiar with the vicinity or who worked for the Corps of Engineers established that the main channel was on the east of Nottleman Island with a subsidiary channel to the west of Nottleman Island. The Corps commenced work at Plattsmouth and came downstream, shutting off the channel on the west side of the island to the north of Nottleman Island. The designed channel was to come under the Plattsmouth Bridge and then go around the east side of the island north of Nottleman Island, swing back and come around the west side of Nottleman Island, and then start around the east side of an island immediately downstream which was bisected by a canal and the river was then brought back to the west and continued in its design of sinuous reverse curves. In that whole stretch of river the maps showed divergent channels on the east and west sides of various islands and the Corps at Nottleman Island reversed the main channel from what it previously had been.

The Corps commenced driving the dikes on the east side at the upstream end of Nottleman Island in order

to divert the channel to the west. The Corps had some difficulty in holding these dikes and in the spring of 1935 the river came down the west side of the upstream island and cut through the old channel on the east of Nottleman Island, washing out the dikes, with 25 to 30 feet of water going through. The channel was finally successfully transferred from the east side to the west side of Nottleman's Island in around 1938. During this river work by the Corps Nottleman's Island remained as an island and did not disappear. Even in 1938 there was testimony by workers from the Corps that they had to place rock along the dikes on the east side and even at that time, although the dikes were in place, there was more water running along the east side of Nottleman Island than on the west side which was the designed channel. The Corps maps from 1937 to 1941 called the island "Noddleman Island".

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Nottleman Island to the west side into the designed channel, thereby creating an avulsion. The Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The east abandoned channel carried flowing water for several years and eventually

ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Nottleman Island in addition to being admittedly by the State of Iowa in error on the western side in that it extends approximately 50 feet into Nebraska across the Compact Boundary between the two states, also had no basis in fact along the eastern side of Nottleman Island and, as in the Schemmel case, it followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The traverse goes through water, low swamp, and brush and across flat land. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

IX. THE SCHEMMEL ISLAND AREA

(A) Nebraska Exercises of Jurisdiction Prior to Compact

Commencing in 1895, Nebraska assumed jurisdiction of all of the land in the Schemmel area and exercised jurisdiction continuously until the Iowa - Nebraska Boundary Compact of 1943.

In 1895 the Otoe County Commissioners ordered lands added to the tax rolls of Otoe County, Nebraska which included the Schemmel area as accretions to Nebraska surveyed by the Otoe County Surveyor. Generally, the land was taxed in Nebraska continuously from 1895 through 1943, a period of 49 tax years. A few discrepancies in the records were explained by the testimony. The tax records for each year taken from the records of the Otoe County Treasurer's office offered by Plaintiff illustrate the tremendous amount of work and difficulty in tracing the tax history of land along the Missouri River. This is obviously a tremendous burden and is expensive and time consuming.

In 1908 a Treasurer's Deed from the County Treasurer of Otoe County, Nebraska was filed for record in the office of the Register of Deeds of Otoe County which was issued pursuant to public sale of the real estate under a decree of the District Court of Otoe County, Nebraska quieting title to some of the land which is included within the description of the Schemmel land. There were also some conveyances of the land recorded with the Register of Deeds of Otoe County, Nebraska.

Henry Schemmel's initial claim to the land arose from a tax sale certificate in Otoe County and from

three deeds dated January 11, 1938. These deeds completed a chain of title to the Schemmels tracing back to the 1908 Treasurer's Deed. Mr. Schemmel originally acquired the land in partnership with a Dan Hill, but the Schemmels later acquired the Hill interest. These deeds were recorded with the Register of Deeds of Otoe County, Nebraska in 1938 and were filed of record with the Recorder of Fremont County, Iowa in 1939. Consequently, record notice was given in both states prior to the Compact of the conveyance of this land as Nebraska land and of the Nebraska title.

Mr. Henry Schemmel is and has been a Nebraska resident in the Nebraska City area since 1934.

At about the same time that Mr. Schemmel filed his deeds in Iowa, he wrote a letter in 1939 to the Fremont County, Iowa officials advising them that some of his land was now on the Iowa side of the canal dredged by the Corps of Engineers in Otoe Bend. This letter was recorded with the Fremont County, Iowa Recorder on August 22, 1939 and the letter stated that the Federal Government Improvement Program from 1933 to 1939 had changed the Missouri River by levees and dikes so that this land would be on the Iowa side of the river but was Otoe County land.

There were two quiet title actions in the Otoe County, Nebraska District Court, which is a court of general jurisdiction in Nebraska, quieting title to a large portion of the Schemmel land and the quiet title decrees were entered on May 28, 1941. After these decrees were entered, Mr. Schemmel notified the Fremont County, Iowa officials of that fact by a letter originally sent on June 5 or 6, 1941 and returned without recording. Mr. Schem-

mel later recorded the letter on March 1, 1956 in the Fremont County Recorder's Office. The letter stated that due to the changing of the Missouri River by the construction of pile dikes, dredging and revetment works by the United States Government Corps of Engineers, a large part of what is presently called Schemmel Island would be on the Iowa side of the main channel of the Missouri River. One of the quiet title decrees was filed by Mr. Schemmel with the office of the County Recorder of Fremont County, Iowa on August 25, 1941.

At the time of the Iowa-Nebraska Boundary Compact, there was a title to the Schemmel land which was good in Nebraska as recognized by the Nebraska court decrees and notice of the Nebraska title was on record in Fremont County, Iowa with Iowa's proper recording officials.

The Schemmel land was bisected by the Otoe Canal dug by the Corps of Engineers in 1938, and Mr. Schemmel's title to the land which remained on the right bank or Nebraska bank of the Missouri River following the Compact has subsequently been recognized in Nebraska by private individuals and by the Nebraska courts. Mr. Schemmel's claim of title to the land on both sides of the Missouri River, some of which became located in Iowa as a result of the Compact, emanated from the same Nebraska deeds, actions, and indicia of ownership. Some of this land is to the east of the land Iowa claims, but Iowa has made no claim to this area.

No witness testified that the Schemmel Island area had been in Iowa prior to the Compact whereas several of the Nebraska witnesses testified as to how the land was severed from Nebraska by the canal dug in Ne-

braska and the Nebraska witnesses recognized this area as originally being in Nebraska.

(B) Conduct of State of Iowa Prior to Compact With Reference to Schemmel Island

The records of the County officials of Fremont County, Iowa substantiate that the Missouri River moved easterly up until immediately prior to 1905 and that the geographical feature known in the area as the "Iowa Chute" marks the abandoned channel of the Missouri River. In the Schemmel area, the Iowa chute is located approximately two miles east in some places of where the designed channel of the Missouri River is today. Records from the Fremont County Treasurer's office and the Journal of Board of Supervisors of Fremont County, Iowa which were offered by Plaintiff for years between 1866 and 1905 show a progressive history of removal of portions of what previously had been Iowa land in the Schemmel area from the Iowa tax rolls as the river moved to the east into the location of the Iowa chute. The tax records of Fremont County, Iowa reflect that in 1899 and 1901 the Missouri River was located in the Iowa chute. This was confirmed by plaintiff's eye witnesses.

The Fremont County records establishing the Knox Drainage District in 1909 found in the Fremont County Courthouse establish the boundary of the district as a levee along the east bank of the Missouri River, which coincides with the location of the Iowa chute.

An Iowa State Highway Commission Official Map of Fremont County, Iowa filed on February 14, 1914 in the office of the Fremont County Auditor also shows the

Missouri River with the left or Iowa bank being located in the general configuration and location of the Iowa chute. This constituted another recognition by Iowa officials that the river had been located there and that the left or east bank represented the limits of Fremont County, Iowa.

Other records on file with the Auditor of Fremont County recognized the bank along the Iowa chute as being the high bank of the Missouri River and as the abandoned Missouri River bank and the limits of the drainage districts. These records are dated 1920, 1922, 1923 and 1931. Even in 1931 the Fremont County officials recognized the Iowa chute as being the abandoned Missouri River bank. The major portion of Schemmel Island is described as section 15-67-43 in Iowa and the Iowa tax records indicate that no part of Section 15 is found on the Iowa tax rolls after 1880. During most of these years no tax books were found but the tax records indicate that there was no listing of this section in 1881, 1882, 1884, 1885, 1887, and in 1934, 1935 and 1936, which records were available. Consequently, the Iowa tax records did not show taxation of the Schemmel land at and prior to the Iowa-Nebraska Boundary Compact and Iowa was exercising no incidents of jurisdiction over that area at and immediately prior to the Compact.

None of the Schemmel Island area was on the Iowa tax rolls in the 1930's or 1940's up until the time of the Iowa-Nebraska Boundary Compact.

The evidence does show that some of the area east of Schemmel Island and west of the Iowa Chute did appear on the Iowa tax rolls commencing in approximately

1934 and from 1934 to 1943 this area was on the tax rolls of both states. However, the Iowa records failed to show the systematic taxation and exercise of jurisdiction over the area to the east of the Schemmel land between it and the Iowa chute as is shown by an examination of the Nebraska records, and the Iowa records show no taxation or exercise of jurisdiction by Iowa over the Schemmel land.

Testimony of witnesses called by Iowa and residing on the Iowa side of the river recognized that the Iowa Chute was abandoned bed of the Missouri River.

It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River.

At the time of the Iowa-Nebraska Boundary Compact of 1943 the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island. The State of Iowa was making no ownership claims to Schemmel Island and the State of Iowa was exercising no incidents of possession of Schemmel Island.

(C) Ownership and Possession of Schemmel Island

The Schemmel family (reference to the Schemmel family includes Dan Hill who initially purchased the land with Henry Schemmel but whose interest was subsequently conveyed to the Schemmels) have exercised all the rights and obligations of ownership and possession of the land from 1938 to the present, a period of approximately 33 years to the present date and approximately 25 years before the State of Iowa filed a quiet title ac-

tion in the District Court of Fremont County, Iowa making claim to the land.

The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale and 1908 Otoe County Treasurer's Deed and approximately a year previously had purchased a tax sale certificate in Nebraska to the land. In 1939 "no trespassing" signs were posted and much of the land was seeded to grass.

Mr. Schemmel made his Nebraska title of record in Iowa in 1939 by recording various documents including deeds and by notifying county officials of Fremont County, Iowa by letter stating ownership to this Nebraska land which had been placed on the east side of the Missouri River by the work of the Corps of Engineers.

In 1941 Mr. Schemmel and the Schemmel family had their title quieted by two Nebraska quiet title actions, and a Nebraska quiet title decree to some of the land was filed of record in Fremont County, Iowa and Mr. Schemmel again notified the Fremont County officials by letter of his ownership and that the land was in Nebraska. The Iowa officials took no action to counter this claim that it was Nebraska land.

Fremont County, Iowa officials were on record notice at and prior to the Compact of 1943 that there was a good Nebraska title claimed to the Schemmel area. There was no record claim whatsoever by the State of Iowa to the Schemmel land.

The Schemmels paid taxes in Nebraska from 1938 through the adoption of the Iowa-Nebraska Boundary Compact of 1943 and were paying taxes in Nebraska

when the Compact was adopted. No such taxes were being levied at that time in Iowa.

In 1939 none of the land on the Iowa side was under cultivation but in the years previously, someone had been farming the land on the Nebraska side of the area which Henry Schemmel acquired and which remained in Nebraska after the dredging of the Otoe Bend Canal. From 1939 until 1943 the Schemmels seeded the island to grass and south of that put down a well and put in a tent which washed away in the first flood. In 1943 Mr. Schemmel went into the service and his partner took care of the real estate; and when Mr. Schemmel returned he found that the land on the left side of the present channel was in the State of Iowa by virtue of the 1943 Boundary Compact. He asked the Auditor of Fremont County in Sidney to place the property on the tax records so that the Schemmels could pay taxes in Iowa. Sometime after January of 1947, the County Auditor and County Treasurer of Fremont County, Iowa came to the Otoe County, Nebraska Courthouse to consider the transfer of the land and told Mr. Schemmel that there had been a court action in Mills County, Iowa and that they were required to put the land on the tax books. Mr. Schemmel, who at that time was Otoe County Treasurer, referred them to the Clerk's office to check the plats and verify the location of the land. After that, the land was placed on the Iowa tax records and Mr. Schemmel and Mr. Hill commenced paying taxes in Iowa in 1949.

The land was placed on the Iowa tax rolls under Iowa description. Consequently, following the Compact, the Fremont County, Iowa officials recognized after in-

vestigation that the land had been ceded to Iowa from Nebraska.

The Schemmels continued to post the land with no trespassing signs in the 1940's and also continued the seeding of the area with grass. Since placing the first "no trespassing" signs in 1939, the Schemmels have continuously excluded trespassers and no one other than the Schemmels or their tenants have ever been in possession. The Iowa Conservation Commission has never put up signs around the land.

The Schemmels contacted a contractor in 1948 concerning the clearing of trees and vegetation from the island so that it could be farmed but the east channel was still quite active at that time and a decision was made to wait.

Because the Auditor of Fremont County, Iowa had given the land a different description from the Nebraska surveys and because Mr. Schemmel wanted to obtain title with an Iowa description for the same land in order to clarify and establish the rightful ownership in case he should decide to sell or mortgage the property, he allowed the land to be sold at Iowa tax sale on advice of his counsel. He then purchased the land at tax sale and assigned the tax certificate to his daughter and tax deeds were issued to her. Three tax deeds are in evidence dated November 2, 1955 from the Fremont County Treasurer to Mary Leah Persons conveying the greater portion of Schemmel Island. These deeds were issued by the treasurer by virtue of the authority in him vested by law and indicated that the land had been sold at regular sale at public sale. This sale was made pursuant

to Iowa statutes which provide that the title conveyed includes "all the right, title, interest, and claim of the state and county thereto." (Sec. 448.3, Code of Iowa).

Mr. Schemmel had a garden on the island in approximately 1954 and the first clearing of the island was done in 1955 to 1956. The first crop was grown on the island in 1956. The land has now been almost completely cleared, leveled and a levee constructed, making it valuable and highly productive farm land.

From 1957 to approximately 1965 the land was rented out by the Schemmels to various tenants and since approximately 1965 the Schemmels have farmed it themselves. On the main island today there is presently around 400 to 450 acres in cultivation. In 1968 the corn yield averaged 105 bushels to the acre of corn and 40 bushels to the acre of beans. The Schemmels have had the land in the government farm program since 1957 with the exception of one year.

The Schemmels started building corn cribs in 1957 on the land immediately to the east of the island on the protected side of the levee and from then until about 1962 they were either building cribs, quonsets, or round bins. The Schemmels have stored and sealed grain in those cribs since commencing in 1957.

The Schemmels have paid real estate taxes on the land since 1949 in Iowa. Iowa has also taxed and assessed the Schemmel buildings.

The Schemmels spent approximately $50,000 to $60,000 in clearing the land. Their 1968 taxes to the State of Iowa were approximately $1,200.

The area is no longer an island but the Schemmels have a crossing across what was the old channel so that they can drive to the island.

The clearing, picking up of sticks, girdling of trees and discing the land to get it ready for production would cost approximately $200 an acre. This land is now valuable and productive farmland with some of it worth approximately $400 per acre or more and the Schemmel land was appraised at $180,500 as of December 1, 1967. Some of the witnesses also testified to their opinion of the value of the land which was higher than the appraiser's.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the Schemmels. Iowa had been placed on notice by filing in her Recorder's office in 1939, four years prior to the Compact, of the Schemmel family claim under a Nebraska title to the land. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. Then in 1963 Iowa filed an action to quiet title to the land in the District Court of Fremont County Iowa, almost 20 years following the Compact. From 1949 up to the present, the Schemmels have paid real estate taxes in Iowa and are paying them at the present time even though Iowa is making a claim that Iowa is the owner of this land.

Iowa acquiesced in the Schemmels' claim of title by making no claim on behalf of the state within a reasonable period of time following the Compact, and by her taxation of the land and the general recognition of the Schemmel possession and title. It is unjust and in-

equitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land has always belonged to the State of Iowa in this type of situation. (See *United States Gypsum Co. v. Grief Bros. Cooperage Corp.*, 389 F. (2d) 253 (8th Cir., 1968).

(D) The Case of the State of Iowa v. Henry E. Schemmel, et al.

On March 26, 1963 the State of Iowa filed a petition in the District Court of Iowa in and for Fremont County, captioned "*State of Iowa v. Henry E. Schemmel, et al.*, defendants, Equity No. 19765." This petition merely alleged that Iowa was the absolute and unqualified owner in fee simple of the real estate described consisting of approximately 660.944 acres and that all other claims to the real estate were wholly without merit or right. There was nothing else in the petition to indicate the theory under which the State of Iowa was claiming the land.

Prior to the filing of this quiet title action no official from the State of Iowa had discussed the claim with the Schemmels and no one had inquired of the Schemmels as to what the basis of their claim to the property was. When the defendants claimed that the State of Iowa was in violation of the Iowa-Nebraska Boundary Compact of 1943 in failing to recognize the Schemmels' title and rights to the land under Nebraska law, the State of Iowa denied that the land in controversy was ever located within the State of Nebraska. Iowa then alleged that the land formed in Iowa and has been in Iowa continuously since it came into existence and alleged that the common law of Nebraska is irrelevant and immaterial to any issue in the case. Trial was commenced

and Iowa called only two witnesses, the surveyor who made the traverse around the Schemmel area for the State of Iowa and Mr. Raymond Huber, a former employee of the Corps of Engineers. Iowa only traced the history of the river back into the 1920's ignored all previous history of the river, and relied upon the presumption concerning avulsions and that all previous movements of the river had been gradual or by accretion. Iowa placed the burden on proving an avulsion upon the defendants or land owners and had no proof, "except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least."

Consequently, Iowa put in only a minimum of evidence and placed the entire burden of showing the history of the land upon the defendants. Iowa did this apparently knowing that the Corps of Engineers had dug a canal in Nebraska during the time that the Corps was moving the channel into its design in the Otoe Bend area.

Iowa took the position that she had physical possession of the land. Iowa interviewed no persons concerning the formation of the land prior to the filing of the suit. She had no discussions concerning formation of the land with any of the defendants named in the action. The only persons having knowledge of the relevant facts concerning the formation of the land where members of the Attorney General's office, Mr. Huber and Mr. Gerald Jauron, a Conservation Commission employee. Iowa had not pursued any investigation with any individuals who purported to have some recollection of the Otoe Bend of Schemmel Island area running back to the 1930's because it was the state's opinion that relevant

facts were "all fully, clearly and indisputedly established by the available records, maps, plats and photographs inspected with investigation and study of the area itself. Any other evidence based on human recollection as to the matter would be clearly cumulative, or if in conflict with the documentary proof would be unworthy of belief."

Iowa made no investigation into the records of the Register of Deeds of Otoe County, Nebraska or the records of the District Court of Otoe County, Nebraska prior to the filing of its case against the Schemmels. Her officials did investigate the records of Fremont County, Iowa to obtain names of possible parties defendant and their only other investigation was in maps, plats and photographs of the Corps of Engineers office in Omaha and the Secretary of State's office in Des Moines and the Fremont County A.S.C. Office and the Fremont County Courthouse. The mass of evidence offered in this case concerning Nebraska titles and exercise of jurisdiction prior to the Compact was ignored, as was Iowa's taxation of the land and the general recognition in the area of the Schemmel title. As in the Babbitt case, Iowa utilized Section 1 of the Compact to establish that the land was in Iowa, but she completely ignored Section 3 of the Compact regarding private titles.

The same principles of acquiescence, prescription, and general recognition of boundary applicable to the Babbitt land and the Nottleman Island area are also applicable to the Schemmel land. The exercise of jurisdiction by the State of Nebraska by having surveyed the land, taxed the realty, quieted title, Nebraska conveyances and the fact that the inhabitants of the area all considered it to be in Nebraska, coupled with a complete

lack of exercise of any jurisdiction over the area by the State of Iowa together with concurrent removal of the land from the tax rolls from the State of Iowa and recognition by the State of Iowa of the abandoned Missouri River channel in the Iowa chute to the east of the Schemmel property, would seem to be conclusive that this was Nebraska land prior to the Compact. The taxation of the land by the State of Iowa, issuance of Treasurer's tax deeds, and recognition by the county officials and Iowa inhabitants following the Compact substantiate the fact that it was Nebraska land ceded to Iowa under the terms of the Compact. Just as in the Babbitt case, the State of Nebraska asserts that the burden placed upon the Schemmels to have to establish this history is unconscionable and they should not be subjected to this type of attack by the State of Iowa. The tremendous mass of evidence substantiating these exercises of jurisdiction and recognition over the years was obviously extremely difficult to obtain, expensive, and time consuming because of the long passage of time. Obviously, it is extremely difficult in 1969 to find eye witnesses who can place the location of the Missouri River in 1900. Iowa should not be allowed to make claims which place this burden on an individual landowner in this type of situation.

(E) History of the Movements of the River in the Schemmel Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Schemmel area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Com-

pact and the State of Iowa must recognize that title regardless of how or where the land actually formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact.

The evidence shows that when Nebraska was admitted into the Union, the Missouri River was originally in approximately the same position which it presently occupies in the Schemmel Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. The evidence consisting of many old maps, surveys, Corps of Engineer records and the county records in Otoe County, Nebraska and Fremont County, Iowa, all substantiate that the river developed a pronounced easterly bend following admission of the two states into the Union. In the development of this bend the land was cut away on the Iowa side and accretions were added to the Nebraska right bank. By the turn of the century, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today.

Between 1900 and 1905 the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the Missouri River. This movement constituted an avulsion, leaving the Iowa-Nebraska State Boundary in the abandoned channel described as the Iowa Chute until 1943.

Physical evidence in support of this avulsion can be found by the location of a tree which Nebraska's expert testified commenced to grow in the year 1895. The location of this tree was on the Nebraska or right bank according to the 1895 Pierce Survey by the Otoe County Surveyor pursuant to direction by the Otoe County, Nebraska Board of Supervisors. This was a cottonwood tree growing on the Nebraska bank while the river was to the east, the tree survived the movement of the river to the west which shows the land in the bend was cut off. Had the lateral migration of the river been gradual, the soil supporting the roots of the tree would have been eroded and the tree would have been washed away. Instead, the tree remained strong and growing up until the time of this lawsuit when it was cut down in 1965. Iowa's expert witness, Ruhe, stated that the river could have moved across the place where this tree was located without destroying the tree. There is some dispute among the experts, as Iowa's tree experts testified that the tree commenced to grow in approximately 1903, but even this merely narrows the period of time in which the avulsion occurred to between 1903 and 1905.

This movement of the Missouri River across the bend was described by Nebraska's expert geologist, Dr. William Gillilland, an eminent and well qualified expert in the field of geology, as typical of a meandering stream. Dr. Gillilland explained that the Missouri River in this particular area moved in the same fashion that typical meandering streams moved, basically by erosion on the outer portion of the meander causing a shifting of the meander towards the outside with simultaneous deposition on the inside of the bend on the point bar. Dr. Gillilland used several maps and comparisons to demon-

strate the movement of the river and testified that the only possible way that it would have come back from its 1895 position to the position in 1905 was through an avulsive change by means of a neck cut-off or chute cut-off. He knew of no other manner by which the river could have moved from its indicated 1895 location to its indicated 1905 location other than by an avulsive change.

Dr. Gillilland explained how when the river goes around a bend, the distance between the top of the bend and the bottom of the bend is shorter across the bend although the elevation is the same so there would be a steeper path across the bend than around the bend. Because of the steeper path the water would flow more rapidly and more rapidly flowing water erodes more easily. Consequently, in a time of high water it is not unusual to find the water flowing through the shorter path across the neck of the bend or along a chute through the bend. Such water tends to flow more rapidly and erode away a new channel. The 1905 channel flowed through a natural chute or slough across the accretion area or point bar as observed on the 1890 map.

Dr. Gillilland's testimony was based upon a two-fold analysis:

(1) A succession of maps showing a succession of positions of the river and

(2) Confirmation by the experimental and other empirical data typifying this as a typical meander consistent with the movement of meanders in other areas.

The avulsive change caused the river to flow in an area considerably west of the maximum eastward location of the river, leaving part of the land which had been built up on the Nebraska point bar, or accreted to the

point bar, exposed. The 1895 tree was growing on this area. In all subsequent maps, the river has not extended as far east as it did in the most easterly position prior to 1905. It also did not extend as far east as the 1895 tree. Schemmel Island is located in the area that was a point bar in Nebraska prior to the avulsive action.

Although Iowa had expert testimony tending to attempt to establish that the river moved gradually to the west from its position in the Iowa Chute, the evidence completely discredited this position.

Dr. Gillilland's explanation is consistent with the theory utilized by the Corps of Engineers in their construction works along the river and is consistent with basic geological data submitted. His expert testimony is entitled to great weight. This avulsion, leaving the boundary in the abandoned channel of the Iowa Chute, has a remarkable similarity to the "Ike Chute" and the classic example of an avulsion described in the case of *Arkansas v. Tennessee,* 397 U. S. 88, Decree at 26 L. Ed. 2d 537.

The Iowa Chute was generally recognized as abandoned channel of the Missouri River both by witnesses and records in the Fremont County, Iowa courthouse.

There was also eye witness testimony that in 1911 or 1912 the river made a natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide. This constituted another avulsion consistent with the principles explained by Dr. Gillilland, placing the entire river further into Nebraska.

The Iowa Chute marks the thread of the abandoned channel of the Missouri River which marked the bound-

ary between Iowa and Nebraska immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

It should also be noted that most of the land between the Schemmel area and the Iowa Chute has been cleared of trees and the 1895 tree discovered by the plaintiff is the only tree in that vicinity and was located on a fence line or property line. Otherwise, it, too, might have been destroyed and the physical evidence helpful to the establishment of the Schemmels' claim might easily have been destroyed merely because of the passage of time.

(F) Movement of the Missouri River by the Corps of Engineers and the Otoe Bend Canal

An avulsion of the Missouri River to the west occurred in the Schemmel area as a result of the construction work by the Corps of Engineers between the years 1934 and 1938.

In 1934, the Corps of Engineers commenced work in the Schemmel area to place the river in a designed channel of 700 feet. Immediately prior to commencement of the work the principal flow of water or the main thrust of the water and the path which the boats used was along the east or left bank. Pile dikes were driven from the east bank across water and then across land and bar area. The Corps experienced some difficulty in diverting the water due to an easterly tendency of the flow. Because of this difficulty, the Corps was required to dig the Otoe Bend Canal in 1938 in order to place the river in the designed location. This canal was dug through Nebraska bank and bar land and was approximately one

mile long. The State of Iowa admits that the canal was dug entirely in Nebraska.

The evidence shows that the river was placed considerably to the west of its 1934 location and around a substantial piece of land with vegetation upon it. This is substantiated not only by the testimony but also by ground level photographs taken in 1938 by the Corps of Engineers. It is further substantiated by the findings of Nebraska's dendrochronologist. Even Iowa's tree expert, Mr. Weakly, recognized that trees had commenced to grow on some of the land prior to the dredging of the canal and these trees were not destroyed by the movement of the river to the west around that land area. One of the surveyors who helped to lay out the canal said that they walked to the area from the Nebraska side and did not cross any water.

Some of Nebraska's witnesses were highly familiar with the area and had worked on the site for the Corps of Engineers, both in the construction of the dikes and in the dredging of the canal. Nebraska's witnesses lived close to the area and were familiar with the river. Iowa's witnesses were more casual witnesses and not as familiar with the river and the river work as were those of Nebraska.

By 1939 all structures were completed and the river has remained in the designed channel continuously to the present day. Following the completion of the work a channel flowed around the east side of Schemmel Island along the former left bank and this is the last place that water continued to flow. I find that, had the boundary not already been located in the Iowa Chute as the result of a prior avulsion, and had the river been the boundary

at the time the Corps of Engineers commenced their work, this construction activity of the Corps and the dredging of the canal constituted an avulsion which would have left the boundary between Iowa and Nebraska in this abandoned channel to the east of Schemmel Island.

It should be noted that there is some Schemmel land to the east of this abandoned channel which is owned by the Schemmels as the result of their Nebraska titles and the same indicia of ownership through which they claim the island, and the State of Iowa does not now claim and has never claimed this land. The Schemmels are in peaceful possession of the land to the east of Schemmel Island. Iowa has never claimed abandoned bed in the Iowa chute or between Schemmel Island and the Iowa Chute.

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Schemmel Island to the west side into the designed channel, thereby creating an avulsion. If it should be determined that the Iowa Chute was not the boundary between Iowa and Nebraska, then the Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 would have remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation

under Nebraska law. The abandoned channel on the east side of Schemmel Island carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Schemmel Island has no basis in fact along the eastern side of Schemmel Island. It followed no geographical feature marking the left bank ordinary high water mark as alleged by the State of Iowa. The traverse goes through an alfalfa field, across flat open ground, crossing a high bank at right angles, and across land with no depressions or banks. Just as in the *Babbitt* case, the eastern line is apparently an arbitrary determination by Iowa's surveyor without justification in fact. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

* * * * * *

X. WHAT RELIEF IS NEBRASKA ENTITLED — AREAS SOUTH OF OMAHA

Nebraska's Contentions:

1. At the outset it is to be emphasized that the Special Master's construction of the Compact is that, under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, "good in Nebraska," need not prove that his land was formed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact. This construction is in accord with Nebraska's main contention.

2. Nebraska also contends, and the Special Master has agreed, that as to Nottleman Island and Schemmel Island the fair preponderance of the evidence is that the old boundary line, that is the main channel of the river, was east of the islands at the time they formed in the river.

Iowa disagrees with the construction of the Compact given by the Special Master. She has consistently and strenuously contended that the Compact language requires that in order for land to be "ceded" from Nebraska to Iowa it must now, 28 years later, [as to all the 30 tracts on the river claimed to be owned by Iowa] be shown that they formed on the Nebraska or the west side of the original boundary line, and if not Iowa may claim them under her common law doctrines. This contention of Iowa is herewith overruled.

(The Special Master in his recommendations will suggest that the State of Iowa be enjoined from further prosecuting the Nottleman Island and the Schemmel Is-

land quiet title actions mentioned in the first page of this Report.)

3. The other areas south of Omaha which formed before 1943.

Nebraska's contention with respect to these areas is that the evidence has established that the Missouri River was located in the designed channel south of Omaha in 1943 and the Missouri River has remained in the designated channel ever since that time. All of the areas listed in Part 1 of the Missouri River Planning Report south of Omaha were in existence at the time of the Compact and no evidence has been introduced establishing that Iowa was claiming any of these areas at the time of the Compact and up until the Planning Report of 1961.

Most of these areas had been cleared by 1961 and were in the possession of private individuals. These are large and valuable areas. Nebraska contends that Iowa under her common law doctrines claims 8 of these areas as state owned by Iowa in her capacity as a sovereign state.

The Special Master believes it appropriate that Iowa's contentions with respect to these 8 areas be set forth in this Report. Iowa has requested the Special Master to find and conclude as follows:

A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island, are referred to in this record as St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. I will not describe in detail the location of these other areas at

this point in my Report; locations are shown on maps which are in evidence; and a series of aerial and ground level photographs taken by the witness Gerald J. Jauron are in evidence showing the general nature of them. Neither Nebraska nor Iowa attempted or purported to adduce in evidence before me all of the facts and history concerning the formation of these other areas. Only enough evidence was adduced before me concerning them to provide a very general knowledge of where they are and when and how they formed.

An action to establish and quiet Iowa's title to Deer Island was commenced and prosecuted to completion in the District Court of Harrison County, Iowa, in which said court held and decreed that Deer Island is property of the State of Iowa. This decision was affirmed on appeal to the Iowa Supreme Court in the case entitled *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135. The District Court Decree is dated October 20, 1959, and the Supreme Court Opinion is dated January 15, 1963. It appears to me that the ownership of Deer Island is no longer open to question because the judicial determination made in *State of Iowa v. Raymond, et al.,* was a finality.

It appears from the record made before me that Iowa has been in open, peaceable, notorious and adverse possession of Wilson Island for more than ten years and that she has made valuable improvements thereon to enable public enjoyment of the island. It therefore appears that the ownership of Wilson Island is no longer open to question.

This leaves us with five areas formed before 1943 to which my remarks now to be made may have some application, namely: St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and Winnebago Bend.

Concerning areas which formed before 1943, Nebraska asks this Court to (1) prevent Iowa from questioning titles flowing from Nebraska, (2) declare that by entering into the 1943 Boundary Compact, Iowa waived, relinquished and contracted away any claim to islands, bars or other land areas which had not been recorded as state owned in the Iowa General Land Office, (3) enjoin Iowa from applying the presumption in favor of accretion and against avulsion so as to cast the burden on an adverse claimant to prove that any land now in Iowa was ceded to Iowa by the Compact, (4) declare an irrebuttable presumption that land now in Iowa over which Nebraska exercised jurisdiction in 1943 is ceded land, and (5) declare that wherever the Corps of Engineers have moved the thalweg of the river, such moving had the legal effect of an avulsion, and did not move any boundary.

Nebraska's prayer No. (1) for relief is entirely too broad; it goes beyond the terms of the Compact; it would foreclose Iowa from litigating questions which she would have the right to litigate. Iowa agreed in the Compact that "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa - - -". This is the agreement Iowa should be bound and held to, and which she says she is willing to be bound and held to. But this Court should not bar or foreclose Iowa

from questioning whether or not purported titles flowing from Nebraska were "good titles" and Iowa should not be barred or foreclosed from questioning whether or not the particular tract is "ceded land". Therefore, it is my recommendation that Nebraska's proposition No. (1) above be rejected.

Concerning Nebraska's proposition (2) above, it is my opinion and recommendation that said proposition be rejected because recordation of state owned lands in the Iowa General Land Office was a purely ministerial requirement, and the people of Iowa should not be deprived of their public lands simply because some official failed to perform a ministerial act. I would point out, also, that in 1943 and prior, it was a practical impossibility for Iowa to keep an accurate record of her state owned lands along the Missouri River because of the wild and restless nature of the river. It was not mere dereliction of duty that Iowa officials in 1943 and prior, were not keeping a number of survey crews on station along the river to accurately survey, chart and record all movements of the channel and all land formations then being created or washed away.

As I understand Nebraska's proposition (3) above, she does not ask this Court to strike down the long recognized and well established presumption in favor of accretion and against avulsion. What she does ask is that the State of Iowa be barred from having the use or benefit of said presumption in litigation concerning the ownership of Missouri River lands. This Court and the courts of numerous states have recognized and employed the presumption in many

accretion cases. See Report of Special Master Marvin Jones in *Louisiana v. Mississippi,* No. 14 Original, Oct. Term 1962; Report of Special Master Harvey M. Johnsen in *Illinois v. Missouri,* No. 18 Original, Oct. Term 1969; *Arkansas v. Tennessee,* 246 U.S. 158; *Nebraska v. Iowa,* 143 U.S. 359; *Jeffries v. East Omaha Land Co.,* 131 U.S. 178; *County of St. Clair v. Lovingston,* 23 Wall. 46; *Shopleigh v. United Farms,* 100 Fed. 287; *Plummer v. Marshall,* 59 Tex. Civ. App. 650, 126 S.W. 1162;*Municipal Liquidation v. Tench,* (Florida) 153 So. 728; *Gubser v. Town,* 202 Ore. 55, 273 P.2d 430; *Wyckoff v. Mayfield,* 130 Ore. 687, 280 Pac. Rep. 340; *Bouvier v. Stricklett,* 40 Neb. 793, 59 N.W. 550; *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097. The presumption favoring accretion and against avulsion and the presumption favoring the permanency of boundaries, which are very similar, and which produce the same result, are too deeply rooted in our law to now be uprooted. Nebraska argues that these presumptions are unfair and inequitable, but this argument is not well taken.

I perceive no reason why the State of Iowa should be deprived of the use and benefit of these presumptions in litigation when they are operating in her favor. It would be a most unusual rule of evidence if it were to operate or not operate depending solely upon which party is claiming it. There is no terminology in the Compact which could possibly be construed as a repealer or partial repealer of the presumptions. I recommend that the presumptions be left unimpaired to benefit whomsoever they may benefit in litigation concerning ownership of lands in the vicinity of the Missouri River.

Nebraska's proposition (4) above would create an irrebuttable presumption where none has existed in the law heretofore and it is my opinion that no such new presumption should be now created. The evidence before me in the instant case demonstrates that the facts surrounding the formation of each of the nine areas which were formed before 1943 and the facts of Nebraska's purported exercises of jurisdiction over them prior to 1943 are different; each of the nine sites must be judged upon its own facts; this Court should not attempt to lay down any broad irrebuttable presumption to control all cases such as Nebraska proposes.

Nebraska's proposition (5) above is contrary to all case law on the subject heretofore. So far as I have been able to discover, the general and universal rule has been that when the thalweg of a stream moves, the boundary moves with it if the thalweg movement was by accretion, but the boundary does not move with it if the thalweg movement was by avulsion, and this is true regardless of whether the thalweg movement was caused by the forces of nature or by the forces of some third party man-made endeavor. The law of Nebraska is contrary to Nebraska's proposition (5). *Burkett v. Krimlofski,* 167 Neb. 45, 91 N.W.2d 57. The law of Iowa is to the contrary of Nebraska's proposition (5). *Solomon v. Sioux City,* 243 Iowa 634, 51 N.W.2d 472. This Court has adopted and followed the general rule that whether the movement was natural or affected by artificial means is immaterial. *County of St. Clair v. Lovingston,* 23 Wall. 46, 23 L.Ed. 59. *Louisiana v. Mississippi,* No. 14 Original, Oct. Term 1962, 384 U.S. 24, 16 L.Ed. 330, 86 Ct. 1250.

There is reason and equity behind the general rule; there is no good reason to discard it and adopt Nebraska's proposal.

Summarizing my opinions and conclusions concerning the disputed areas which formed before 1943: (1) In prior Divisions hereof, I have stated my findings and conclusions concerning Nottleman Island and Schemmel Island. (2) Iowa's ownership of Deer Island and Wilson Island has been settled and determined and nothing herein should be construed so as to reopen any question concerning the ownership of them. (3) Nebraska should be awarded some specified time after final determination of this phase of this case in which to elect whether or not she desires to adduce additional evidence bearing upon whether or not the areas which Iowa claims to own at St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and the part of Winnebago Bend which existed before 1943, or any part of them, were in Nebraska by the facts of their formation or by recognition in and prior to 1943 and whether or not there were good titles in Nebraska to said areas, or any part of them, which Iowa bound herself by the Compact to recognize. (4) The presumption favoring accretion and against avulsion and the presumption favoring permanency of boundaries should apply in making determinations as to where the pre-1943 state boundary was. (5) The rule that the pre-1943 boundary moved with the thalweg when the thalweg moved by accretion but that it did not move when the thalweg moved by avulsion, should apply in making all determinations of where the pre-1943 state boundary line was. (6) Iowa should not be enjoined from questioning all titles flowing from Ne-

braska. (7) Iowa should not be enjoined from claiming lands which were not recorded as being state owned in the Iowa General Land Office prior to 1943. (8) The usual and ordinary rules of prescription, acquiescence and recognition should apply in determining what lands were ceded and what lands were not by operation of the 1943 Boundary Compact.

* * * * * * *

XI. SPECIAL MASTER'S CONCLUSION WITH RESPECT TO AREAS SOUTH OF OMAHA WHICH FORMED BEFORE 1943

On areas south of Omaha other than Nottleman and Schemmel Islands, the construction of the Compact in accordance with Nebraska's first contention above decides all issues necessary for this Court to reach in this controversy. We are not deciding a better title proposition as between private claimants to a parcel of land. But any title existing in 1943 supportable under Nebraska title law to land contiguous to the river must be recognized by Iowa, applying the general principles as hereinbefore mentioned. All along the Missouri River, the Nebraska and the Iowa State Courts, and the United States District Courts, and the Court of Appeals of the Eighth Circuit are well aware of the principle of the law of accretion. In *Nebraska v. Iowa,* p. 370, the Supreme Court said:

> ". . . [T]he law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States."

However, both states and the trial courts in each state and in the Eighth Circuit need a decision from the Supreme Court on the interpretation and meaning of the language of the Compact. They can then decide the fact issues between private owners and the State of Iowa and apply the authoritative law.

The Special Master rejects Iowa's proposed findings as set forth in pages 53 et seq. under,

"A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island. . . ."

By this rejection no inference is to be held that the Special Master affirms all Nebraska's claims for relief. For instance there are several owners to the land comprising Nottleman and Schemmel Islands. There may be other private claimants to those lands or to the areas south of Omaha formed before and after 1943 other than the State of Iowa. What the Special Master has decided is that against Iowa, because of the Compact, the owners of Nottleman Island and of Schemmel Island have a title "good in Nebraska." Iowa is the only entity barred from contesting those titles.

This ruling may have application to all the areas contiguous to the river as it flows between Nebraska and Iowa. But other than Nottleman and Schemmel Islands there was insufficient evidence presented to me to establish even a title good in Nebraska under the Compact. In the event Iowa claims areas south of Omaha which were in existence on July 12, 1943 other than Nottleman and Schemmel Islands, the state courts and The United States District Courts can make these determinations, but a decision of the Supreme Court of The United States interpreting the Compact is first needed.

It is my view as Special Master that the following rule will suffice not only as to all areas in dispute south of Omaha, but also as to several areas in dispute north of Omaha. The rule should read:

In any proceeding between a private litigant and the State of Iowa involving a claim of title good under the law of Nebraska, alleged to have been

ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its common law doctrines either as a plaintiff or as a defendant.

In the application of the foregoing rule, it should only be necessary for the trial court to examine a private litigant's claim of title in the first instance. If under any aspect of Nebraska law as it existed in 1943, the litigant shows a title supportable under Nebraska law, then Iowa should not be able to overwhelm such a title by invoking its several common law doctrines. For instance, restricted to such a fact situation, Iowa should not be able to defend on the ground that no person can claim adversely against the sovereign State of Iowa. A 10 year possession title under Nebraska law would prevail over Iowa's common law ownership of the beds, and abandoned beds and islands in the area under investigation. Also, the presumption that accretion is favored over avulsion should not have application in such a situation. But it should be understood that Iowa is not foreclosed from contesting under Nebraska law the private litigant's alleged Nebraska good title. To emphasize again the private litigant must show a title "good in Nebraska." This very well may be a trial issue. As in ejectment the private litigant may prevail on the strength of his good Nebraska title because it is a title Iowa agreed to recognize.

* * * * * * * *

XII. AREAS NORTH OF OMAHA

It is remembered at this point that Nebraska as a sovereign state claims no land. She seeks merely to enforce the terms of the Compact. Iowa claims to own 21 areas and part of a twenty-second area, which had formed since 1943, north of Omaha, contiguous to the river. Again both states agreed that the Compact is not a conveyance of land, but merely a transfer of jurisdiction, and that all private property rights were preserved. But the sticky problem north of Omaha arises because of Nebraska's contention as follows:

> Although the Compact made a fixed state line for the boundary between Iowa and Nebraska, it did not change private ownership boundaries. The Nebraska riparian owner, owning title to the bed of the Missouri River, was not deprived of this title by the Compact and when the river moves gradually and imperceptibly or by accretion, the boundary of the Nebraska riparian owner still moves with the thalweg or main navigable channel, regardless of which state the movement is in. The Nebraska riparian owner's title is not cut off or limited by the fixed state line between Iowa and Nebraska but his title can extend into Iowa. Iowa cannot, under its common law, claim title to the bed or abandoned bed or islands arising in the bed of the Missouri River adjacent to or between the thalweg and the Nebraska title or claim, whether such claim extends from the right or left bank.

In this connection Nebraska also says:

> Riparian rights are vested property rights of which an owner cannot be deprived without the

payment of just compensation. The Nebraska owner preserved his riparian rights in the bed of the Missouri River and these rights were not taken away by the transfer of jurisdiction to Iowa.

Nebraska finds support for these propositions as to riparian rights. In *New Orleans v. U.S.,* 10 Pet. 662 and *County of St. Clair v. Lovingston,* 23 Wall. 46, the Supreme Court of the United States held that the future right to alluvion is a *vested right* which is an inherent and essential attribute of the original property. The Court said at 23 Wall. 68-69:

> "The question here under consideration is not a new one in this court. In *New Orleans v. U.S.,* it was said: 'The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain.' "

In polite but firm language, Nebraska has contended before me that the decision in *Tyson v. State of Iowa,* 283 F.2d 802, decided in 1960 by the Court of Appeals of the Eighth Circuit is wrong. By that decision, says Nebraska, the Tysons were deprived of their vested property rights without just compensation, i.e., the accretions to their Nebraska-owned riparian land. But as the Special Master looks at this decision it appears to me that Nebraska's quarrel is with the facts found by

the district court and affirmed by the court of appeals. The law of this case is clear and is a precedent for most of the legal problems which may arise relative to Iowa's claim to the areas north of Omaha. It seems to the Special Master that many of the authoritative decisions, as to saying that the right to alluvion and the consequent accretions is vested, are decisions involving movable water boundaries. North of Omaha we are discussing the fixed Compact boundary line. As to these areas the river is in the State of Iowa. In general the Special Master is in agreement with Iowa's view of the issues at these points in this controversy. However, it should be noticed that the language is that of Iowa's counsel. Iowa's discussion follows, [Excerpts from pp. 59-62 and 66-70 of Iowa's proposed findings]:

B. Having discussed the areas which were in existence prior to 1943, we now have remaining for discussion the 21 areas (and part of a 22nd area) which Iowa claims to own and which have formed since 1943. There is no question as to where the state boundary line was when these areas came into existence because, in 1943, the two states had fixed and established the boundary as an unmoving line, to wit: the center line of a designed channel as shown on certain maps. All the areas now under discussion are now in Iowa; hence it follows that they formed in Iowa. I should note that Iowa does not claim to own all areas which she considers to be state owned by reason of Iowa law and the facts surrounding their formation.

All of the areas formed since 1943 are upstream from Boyer Bend, which is approximately 21 river miles upstream from Omaha, Nebraska, and Council Bluffs,

Iowa. The reason why there are no areas formed since 1943 downstream from Boyer Bend is that the river did not escape from the 1943 designed channel at any point in those approximate 84 miles. Hence, below Boyer Bend, the river has not washed away any land, created any new river bed, created any new land, or abandoned any channels since 1943. As I have hereinbefore noted, however, in the approximate 97 miles from Boyer Bend to Sioux City, the river escaped from the 1943 designed channel at numerous places after 1943. In doing this, the river washed away substantial bodies of land along both banks, created new river bed, created new land, and abandoned its channel at many places. Then when the Corps of Engineers re-designed the stabilized channel and placed the river in it, lands were washed away, more new river bed was created, more new land was created, and more channel was abandoned. These things happened on both sides of the Iowa-Nebraska Boundary but we are presently concerned with only the Iowa side because the 21 areas and part of a 22nd which Iowa claims to own are all on the Iowa side.

Concerning these areas which have formed in Iowa, east of the Compact boundary, since 1943, Nebraska asks this Court to declare and adjudge that the State of Iowa owns none of them because. (1) by operation of the Compact, Iowa's common law of state ownership of river beds, abandoned river beds and islands no longer applies to the Missouri River, (2) by operation of the Compact, Iowa waived, relinquished and contracted away all claims to land ownership in the vicinity of the Missouri River, (3) Nebraska riparian landowners retained precisely the same accretion rights in Iowa, after cession of their lands and river beds to Iowa by opera-

tion of the 1943 Compact, which they previously had when their lands and river beds were in Nebraska, and (4) private property boundaries along the river remained at the thalweg of the stream after the 1943 Compact, the same as they had been prior to 1943, and said private boundaries remained moving boundaries with later movements of the thalweg.

The sum total effect of Nebraska's propositions (1) and (2) above, were they to be adopted, would be to extinguish utterly all of Iowa's claims of land ownership, river bed ownership, and abandoned channel ownership in the vicinity of the Missouri River, and this would be a very simplistic and final ending to the present case. But my most careful and prudent reading of the 1943 Boundary Compact discloses no terms, phrases or language which can be construed as saying that Iowa repealed her historic common law when she adopted the Compact. And although Nebraska has tried strenuously to adduce evidence concerning the circumstances surrounding negotiations leading up to the Compact, circumstances surrounding adoption of the Compact, and circumstances which have transpired since the Compact which would entitle or command this Court to so construe the Compact, she has failed.

Iowa continues at page 61:

The reasons which impel me to reach the above conclusion are many and varied. I mention some of them, not necessarily in their order of importance. First, I search the Compact in vain for any language, phrases or terms which could possibly be construed or interpreted as saying that Iowa was repealing or changing her historic doctrine concerning state ownership of navig-

able river beds, abandoned river beds, and islands, or that Iowa was excluding the Missouri River from that doctrine's application. I search the record of negotiations leading up to adoption of the Compact in vain for any evidenc that it was Iowa's intention or Nebraska's expectation that there would be any change in Iowa's common law doctrine. I search the evidence concerning Iowa's conduct after the Compact in vain for anything indicating that Iowa was unilaterally interpreting the Compact as a repealer or partial repealer of her common law doctrine.

As a matter of fact, the evidence before me discloses that on two separate occasions in 1939 and 1942, the Iowa Conservation Commission refused to sell Wilson Island; that in 1944, Iowa was causing a survey to be made of "Nobles Lake", a state owned oxbow lake then about a half mile from the Missouri River; that in 1947, Iowa was in court to enjoin the draining of Nobles Lake by a local drainage district; that during the 1940's and 1950's, the Iowa Conservation Commission was almost continuously studying and considering what best use the state owned areas along the Missouri River could be put to.

Next, my conclusion expressed above is in accord with the law of the Eighth Circuit as delineated in *Tyson v. Iowa,* 283 F.2d 902, and with the law of Iowa as delineated in *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135, and numerous other cases decided in the Iowa Supreme Court since 1943. It inheres in *Tyson* and in *Raymond* and in numerous other decisions that the Iowa common law doctrine was unchanged and not repealed in whole or in part by the 1943 Boundary Compact, and I see no valid criticism of these decisions.

For detailed discussions of the Iowa doctrine and its applications, in addition to the two cases cited above, see *McManus v. Carmichael,* 3 Iowa 1; *Holman v. Hodges,* 112 Iowa 714, 84 N.W. 950; *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097; *Payne v. Hall,* 192 Iowa 780, 185 N.W. 912; *Bigelow v. Herrink,* 200 Iowa 830, 205 N.W. 531; *Solomon v. Sioux City,* 243 Iowa 634, 51 N.W.2d 471; *Wilcox v. Pinney,* 250 Iowa 1378, 98 N.W.2d 720; *Dartmouth College v. Rose,* 257 Iowa 533, 133 N.W. 2d 687.

Iowa continues at page 66:

At several places along the river, the 1943 Iowa-Nebraska Boundary Compact had the effect of changing the state boundary substantially. These places were the places where there had been avulsions prior to 1943 so that the pre-1943 boundary was not in the river; it had been left in some abandoned channel as a result of the prior avulsion. I make no attempt here to itemize where these places were, or may have been, because the evidence before me is incomplete as to many places, and from my limited information, I cannot determine where there may have been pre-1943 avulsions and where not. Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few.

Iowa continues at page 66:

. . . . By the Compact, Nebraska ceded to Iowa jurisdiction and sovereignty over all land east of the new boundary. She gave up and surrendered to Iowa all jurisdiction and sovereignty she may have formerly had over the lands east of the boundary. She said in effect that Nebraska law would no longer apply east of the boundary. Nebraska should now be held and bound by

it. Nebraska should not be permitted to project the operation of her law beyond the agreed line, and Iowa cannot project the operation of her law into Nebraska.

It is my opinion and conclusion that both Iowa and Nebraska intended when they entered into the 1943 Boundary Compact that henceforth and after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law. In other words, good titles to Nebraska lands which Iowa agreed to recognize as good in Iowa became good Iowa titles; they did not become good Nebraska titles in Iowa. And good Iowa titles to lands ceded to Nebraska became good Nebraska titles, not good Iowa titles in Nebraska. Iowa is still entitled to have her law that the state owns the beds of all navigable rivers in the state and that private land titles terminate at the ordinary high water mark. Nebraska is entitled to have her law that private land titles shall extend to the thalweg. But the law of Iowa must stop at the boundary and Nebraska law must stop at the boundary.

This conclusion is in accord with the general rule that no state may extend or project the application of its laws beyond its own borders, and in matters of land titles, lex loci must be the controlling rule. Mr. Justice Johnson stated the rule in *Hawkins v. Barney,* 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190, as follows:

> "* * * the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."

The Court's comments at 30 U.S. page 300, are particularly apropos to the case at bar:

> "* * * It can scarcely be supported, that Kentucky would have consented to accept a limited, crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented, of a soverign state governed by the laws of another soverign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as only to make the limitation act of Virginia perpetual and unrepeable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate."

More recently, see *Arkansas v. Tennessee,* 246 U.S. 158, at page 175, where this Court stated:

"How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar (sic) doctrine that it is for the States to establish for themselves such rules of property as they deem expedient . . . ."

Nebraska's propositions (3) and (4) were dealt with directly in the *Tyson* case, which I have hereinbefore mentioned. This case is important, it is the law of the 8th Circuit, and it warrants detailed discussion because, if I were to adopt Nebraska's said propositions, I would be disavowing and overruling it. The case is cited as *Tyson v. Iowa,* (1960) 283 F.2d 802.

The land in Tyson Bend which later became the subject of controversy began to form in 1948. The Missouri River had been in the designed channel in 1943, but between 1943 and 1948, the river escaped from the designed channel by washing away the left bank stabilizing structures and the land along the left bank. That is to say, the left bank moved into Iowa. The state boundary remained at the center line of the designed channel per 1943 Boundary Compact. After the left bank had moved a mile or thereabouts into Iowa, an island arose from the bed between the designed channel and the main channel. The island arose in Iowa. It was an island because when it arose and for several years thereafter, waters of the river continued to flow around both sides of it, the main channel flowing to the east of it and water continuing to flow through the designed channel to the west of it. In the 1952 flood, the designed channel was filled with sediment and the island was con-

nected to the Nebraska shore. In 1958, the Corps of Engineers had determined to place the river back into the designed channel at Tyson Bend and to accomplish this by dredging a canal in the designed channel and then diverting the river through the canal. Eminent Domain proceedings were commenced to condemn an easement on the island so that spoil from the dredge could be cast upon it. The issue litigated was who was entitled to the compensation for the taking and this turned upon who was the owner of the island.

Three parties or sets of parties laid claim to ownership of Tyson Island. The State of Iowa claimed it as an island formed over the state owned river bed in Iowa under the Iowa doctrine of state ownership. The Harrop claimants claimed it because they held the old Iowa titles to the land which had existed in that spot under the sky before the river began its escape eastward from the designed channel. The Tyson claimants claimed it as an accretion to Nebraska land or river beds belonging to them.

The decision in District Court was for Iowa and this was affirmed on appeal. The Harrop claim was rejected because the lands they once owned had been entirely washed away. (One Roy M. Harrop, at my first hearing in Omaha, sought to inject the Harrop claim in this case by petition to intervene. This was denied.) The Tyson claim was rejected because the island had not arisen as an accretion to any land or river bed owned by them. Iowa was adjudged owner of the island and entitled to the compensation because the island had arisen from the state owned river bed in Iowa.

* * * * * * * *

XIII. SPECIAL MASTER'S DISCUSSION AND CONCLUSION

As the Special Master understands Nebraska's criticism of the *Tyson* decision, it is [p. 212 of Nebraska's oral argument] that before the Compact the Tyson east line would follow the state boundary line as it moved south and east. The washing away of land would uncover accretion lands to Tysons' Nebraska bank. When the Engineers "put it back around here without destroying the island, this — there would have been an avulsion and the boundary would have been over here at common law in this abandoned channel." As the Special Master sees it, this case involves the problem of whether Tysons' vested rights were cut off at the state boundary. Iowa got the proceeds of the condemnation because the abandoned bed was in the State of Iowa.

The Court of Appeals in *Tyson* said at page 811:

> "We have held that the court's judgment is entitled to be affirmed upon the basis of the court's determination that the origin of the land in controversy was independent islands formed in the bed of the Missouri River, belonging to the State of Iowa and that the additional land formed as an accretion to such island. Such determination is decisive of these appeals."

But it seems to the Special Master that in this Compact boundary line problem which is before this Court the language used by Judge Van Oosterhout, even if dictum, must be declared to be the law of this case. He said:

"[16] Lastly, Tysons claim the court erred in stating the Nebraska land owners could acquire no accretion

rights to their banks across the fixed state boundary. We have considerable doubt whether the court intended by such statement to say more than that Iowa law controls since all the land in controversy is located in Iowa[3] *and that the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa. So limited, the court's view would coincide with our view of the law.*"

But as both states agree that the Compact was not a conveyance of any kind, Nebraska says that under her law a private property owner has a vested right to his accretions, and the Supreme Court in this case should now declare that the Nebraska riparian owners vested riparian rights continue within the territorial limits of Iowa. The Special Master disagrees. In *Arkansas v. Tennessee,* 246 U.S. 158, 175, the Court held:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. [Citing cases].
>
> " . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

Going back to Iowa and Nebraska, each state announced for itself, via its Supreme Court, which riparian rule it would follow. Iowa chose her rule in *Mc-*

Manus v. Carmichael in 1856, 10 years after she was admitted to the Union. Nebraska in *Kinkead v. Turgeon,* 109 N.W. 744 (1906), announced her common law rule, 50 years after she was admitted to the Union. In the opinion she recognized that she had announced a rule of law different than the rule of Iowa. The opinion mentions: "There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question." [p. 744], but concludes [p. 748]:

> "In several instances the courts of a state lying upon the one side of one of our great rivers holds and enforces the rule of the common law, and on the other side of the same river the courts of a sister state declare that the riparian owner only takes to high-water or low-water mark, as the case may be. On the whole matter, we deem it best to let well enough alone and adhere to the custom and policy of this state since its earliest settlement."

In *Kinkead,* the Nebraska Court recognized her decision was in conflict with the Iowa rule announced 50 years earlier. It cannot be supposed that she expected Iowa would abrogate her rule in order to accommodate her rule to Nebraska's. Neither could she expect that Nebraska law could be enforced by Iowa within her own territorial limits.

In Judge Van Oosterhout's opinion in *Tyson,* p. 811, FN. 3, he mentions:

> "3. Both Iowa and Nebraska recognize the right of a riparian owner to accretions forming against his river bank. However, in Nebraska, unlike Iowa, the riparian owner in the state owns the river bed

> to the thread of the stream. Thies v. Platte Valley Public Power & Irr. Dist., 137 Neb. 344, 289 N.W. 386, 387. Such difference in law distinctly affects ownership of islands forming in the river bed . . . ."

It is the belief of the Special Master that Iowa and Nebraska can both live by and profit by an announcement by the Supreme Court of The United States that the land laws of each respective state terminate at the fixed Compact line. Any accretion by a Nebraska property owner across that line must be under the law of Iowa. I am in agreement with Iowa's counsel that the rule of the common law is a living law, always subject to change. The Nebraska Supreme Court always had and still has the power to change the Nebraska doctrine of private ownership of river beds. Also the Nebraska Legislature had and still has the power to change, modify or repeal the common law of Nebraska as it might deem right, proper and necessary. Counsel for Iowa have cited *Western Pac. Ry. Co. v. Southern Pac. Co.,* 151 F.Rep. 376, 399, where the subject of vested rights to accretions is discussed. It is there held that the right to future possible accretion can be divested by legislative action. Mr. Murray for Iowa also says the Michigan Supreme Court reversed itself on a very similar matter in *Hilt v. Weber,* 252 Mich. 198, 233 N.W. 159, (1930). The court had previously held in *Kavanaugh v. Baird,* 241 Mich. 240, 217 N.W. 2, (1928) and in a long line of similar cases, that the true boundaries of lands riparian to the Great Lakes were the meander lines of the lands as surveyed by the government when Michigan was admitted to statehood. In *Hilt v. Weber,* the court specifically overruled the *Kavanaugh* cases, and held that the true boundary is the water mark. In the first paragraph of

his dissent, Justice Wiert pointed out that the result of this turnabout was to divest a "vested public trust" but only one other justice joined in the dissent.

At this point we are discussing areas north of Omaha which were formed since 1943 by the changes in the river either natural or by the Engineers. In 1943 these were expectant or contingent accretions. Iowa is claiming these areas not in 1943, but in 1961 and thereafter. So far as we know there were no accretions in 1943.

I am in agreement also with Iowa's final proposition on this subject that it is a proper construction of the Compact that it was an exercise of the Nebraska Legislature's power to change and modify the common law to be applicable to all lands and river beds being ceded to Iowa. The Nebraska Legislature was saying in effect that whereas these lands and river beds which had formerly been owned per the common law of Nebraska shall henceforth be owned per the common law of Iowa.

The Special Master has heretofore concluded in this case that a title good in Nebraska on land existing in 1943 contiguous to the river is now a title good in Iowa. However, that parcel of land when ceded to Iowa is subject to the real property laws of Iowa. It is only the title which Iowa must recognize under the Compact and which takes precedence over her common law doctrines. This principle applies all along the 192 miles of river between the two states. But on the 116 miles north of Omaha both states are in substantial agreement with the following situation north of Omaha as stated by Nebraska, [pp. 103-104 of Nebraska's proposed findings.]:

"Considerable evidence has been offered concerning other areas along the Missouri River. Generally, the areas which Iowa claims north of Omaha, Nebraska are claimed as result of natural movements of the Missouri River in escaping the designed channel following 1943 and river work by the Corps of Engineers in either moving the designed channel or placing the river back into the designed channel. Since 1943 the Corps of Engineers has redesigned much of the channel north of Omaha and from maps offered by the Plaintiff, it appears that both banks of the Missouri River of 1965 were wholly out of the 1943 designed channel and within the State of Nebraska for approximately 21 miles and both banks were completely out of the 1943 designed channel and in the State of Iowa for approximately 14 miles. In addition, there are places north of Omaha where just a portion of the Missouri River, but not both banks, is located outside of the confines of the 1943 designed channel."

It is conceivable, of course, that a private person may contend that he has a title supportable under Nebraska law on land existing north of Omaha on the Compact date, July 12, 1943. If so, his title is to be afforded the same recognition as given to Nottleman and Schemmel Islands with no requirement that the land be pinpointed as having formed in Nebraska.

But generally, north of Omaha, the rule to be applied is that proposed by Iowa which the Special Master herewith adopts and which is:

Ownership of areas which have formed since July 12, 1943 shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Company of 1943 being the line which shall determine in which state they formed. However, neither a Nebraska riparian landowner nor an Iowa riparian landowner shall be barred from owning accretions which may form to his land in one state and extend across the fixed boundary into the other state.

* * *

WITNESSES

The Special Master has not believed it necessary to review in detail the testimony of the 95 witnesses whom he heard either in person or by deposition. It is a case in which the decision must be based upon the overall picture developed by consideration of all the testimony and the documentary evidence. However, the testimony of several witnesses deserves some comment.

1. Lester F. Faber

This man directed the preparation of and published Part I of the Missouri River Planning Report of January 1961. He directed the investigation which uncovered the bonanza which Iowa received as a result of the control of the Missouri River by the U. S. Corps of Engineers. His testimony and the Report support Nebraska's position that Iowa made no public claim to the areas in dispute until 1960, some 17 years after the Compact. The Report says:

> "For the past several months the Conservation Commission has been studying the possibilities for development of thousands of acres of marsh, water and islands along the 192 miles of the Missouri as it passes the western border of this state."

From his deposition and the report, it is apparent that Mr. Faber was probably the first Iowa official to develop the thesis that the lands which emerged on the Iowa side of the Compact line could be claimed by Iowa under her common law doctrine of ownership of the river bed and abandoned beds, etcetera.

During 1960 Mr. Faber was Director of Planning and Coordination with the Iowa Conservation Commission, which by Iowa law had jurisdiction over meandered streams. (p. 4, Planning Report). This same Commission had disclaimed ownership in Iowa of Nottleman and Schemmel Islands.

2. Gerald J. Jauron

During the course of the trial at Omaha, Mr. Jauron testified as to many aspects of this case. From 1946 he was Game Warden in 2 counties on the river north of Omaha, but in 1958 when the investigation started he was assigned to patrol the entire river from Sioux City to the Missouri line, and in 1962 his title was Coordinator of Missouri River activities which required him to investigate and report concerning state-owned lands on the river. He knew the river. He was the "bird dog" under Mr. Faber in developing the claims which Iowa published in the Report. In the many lawsuits which were tried in the state and Federal courts relating to Iowa's claims, Mr. Jauron was the chief Iowa witness. He is undoubtedly a credible man, but it must be recognized that at the same time he was promoting Iowa's cause in his capacity as investigator. His credibility was influenced by his long time employment with Iowa and by his belief that the Iowa cause is right.

3. Willis L. Brown

This man is the Nebraska state surveyor. His office is in charge of all public lands of Nebraska. He is custodian of the records of surveys of Nebraska, including the original government surveys. He was the "bird dog" for Nebraska in locating the witnesses and documents

which counsel used in building up the evidence in this case. He is regarded as a truthful and credible witness. He was knowledgeable on his subject, and his opinions were largely based upon what various charts, maps, meridian lines, range lines, and property lines revealed. He had examined records both in Nebraska and in Iowa and especially the records of the Corps of Engineers.

4. Whitney Gillilland

This witness is now and has been a member of the Civil Aeronautics Board in Washington since 1959. Prior to 1943 the witness had been in the general practice of law in Iowa and had served for a period of time as a judge in an Iowa county court. The substance of his testimony before the Special Master was that he represented the owners of Nottleman Island and others, and the Iowa Conservation Commission had informed him that Iowa had no claim to the lands making up Nottleman Island. The testimony of this witness is credible and establishes the attitude of the responsible Iowa officials with regard to Iowa's lack of claiming ownership either of Nottleman or Schemmel Island areas until the Planning Report was published. In the meantime the conclusion is that Iowa during the intervening years was recognizing the titles "good in Nebraska."

5. General Herbert B. Loper

He came to the Omaha District Office of The United States Engineers in 1934 and was soon in charge of that office with the function of installing the regulating works on the Missouri River from Sioux City to Rullo. The river was in its normal or wild and natural state — "a meandering river in an alluvial bed." He testified

generally as to the design of the new channel and the construction and control of the river which was accomplished by the Engineers. But it is a fair inference from consideration of all his testimony that the Engineers were not at any time interested in the thalweg of the river insofar as the boundary was concerned. They did their construction work without regard to ownership of the banks on either side of the river until after 1943.

6. Raymond L. Huber

This man was a long-time employee of the U.S. Army Engineers at Omaha. He is not a licensed professional engineer. He has been a civil servant of The U. S. Government. Unquestionably he knows the river and the method of construction of the pile dikes, stone dikes, revetments and other methods used to control the river and to stabilize the channel. But again it is clear from this man that the Engineers were not concerned with the mid-channel boundary line between the 2 states during the 1930's and early 1940's. The Engineers were concerned, however, with the deep water and the speed of the current at various points. Mr. Huber has been a witness for Iowa and for practically all of Iowa's litigation in the courts of both states and in the federal courts. Before me he appeared to favor Iowa's interest, and his views as to the mid-channel boundary line are suspect.

7. WITNESSES GENERALLY ON RIVER CONDITIONS

Many witnesses were called by each state to testify as to their recollections of past events such as the river cutting away into Iowa; the location of chutes; the location of islands and bars; the size and growth of willows and cottonwood trees; and especially fishermen and hunters were asked their recollection as to the mid point of the channel. This testimony was interesting, but in sum total of very little weight. In the first place under all the evidence, the river location changed from year to year, from month to month, and as Iowa's counsel said, even from day to day. In *Holman v. Hodges,* 84 N.W. 950, 952 1901), the Supreme Court of Iowa said:

> "In that sense title to land bordering the Missouri river may be said to be movable, for no one at night may safely predict what will be his boundary line the next morning."

The witnesses for both states who testified concerning the pre-1943 Compact history of the river and the general conditions which led to the Compact, and who testified generally as to post Compact history and river conditions, were in substantial agreement. The major differences and contradictions between the witnesses and the evidence of each of the states related to the formation of the two islands, Nottleman and Schemmel, and the location when formed, and the various surveys and maps which were used and offered to prove the river boundary line at various times in the past. The presentation of this type of evidence resulted in the large record made in this case. But it is the view of the Special Master that this type of evidence has but

little significance in the construction of the meaning of the Compact. It is my view that neither state thought it necessary to identify or pinpoint the exact location of any land being ceded from one state to the other at the time they agreed upon the fixed boundary line in the Compact.

XIV. SUMMARY AND RECOMMENDATIONS

Both Nebraska and Iowa need a construction and an interpretation of the Iowa-Nebraska Boundary Compact of 1943 with respect to 3 main issues, and that the Supreme Court has jurisdiction to decide these issues:

1. Nebraska's contention that under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, "good in Nebraska," need not prove that his land formed and existed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact, as land ceded by Nebraska to Iowa.

   (a) It is the recommendation of the Special Master that this contention of Nebraska be upheld.

2. Whether the findings and conclusions of the Special Master are to be affirmed with respect to his finding that Nottleman and Schemmel Islands formed and existed on the west or Nebraska side of the pre-1943, mid-channel boundary, and are thus to be recognized by Iowa under Sections 2 and 3 of the Compact, as land ceded by Nebraska to Iowa?

   (a) The Special Master recommends affirmance.

   (In the event that the Court approves Nebraska's contention under *1* above and thus the construction of the Compact is that land

on which there is a title good in Nebraska need not be pinpointed as having formed in Nebraska to be ceded to Iowa—then *2* above, that is, the Special Master's finding that Nottleman and Schemmel Islands formed on the Nebraska side of the pre-1943 boundary is not necessary to be passed upon, as Nebraska prevails on the issue of these two islands under the construction given the Compact in *1* above.)

3. North of Omaha, on land formed since July 12, 1943 and situate in the State of Iowa, east of the fixed Compact line, contiguous to the Missouri River, the Nebraska law of accretion does not operate to create riparian rights within the territorial limits of Iowa.

4. It having been held in No. 3 that the Nebraska law of accretion does not operate to create riparian rights within Iowa, the counterclaim of Iowa is dismissed.

If Nebraska prevails on either 1 or 2, or both, then it is recommended:

5. That the State of Iowa, its officers, agents and servants, be enjoined from further prosecution in the cases of *State of Iowa v. Darwin Merrit Babbit,* Equity No. 17433, and *State of Iowa v. Henry E. Schemmel,* Equity No. 19765.

The Special Master suggests that the states be invited to submit a proposed decree with respect to the issues settled by this litigation.

Respectfully submitted,

JOSEPH P. WILLSON
Senior District Judge
Special Master