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In The

Supreme Court of the United States

October Term, 1964

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No. 17, Original

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STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

—o—

EXCEPTIONS OF THE STATE OF NEBRASKA TO THE REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

—o—

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EXCEPTIONS OF THE STATE OF NEBRASKA TO THE REPORT OF SPECIAL MASTER

Nebraska agrees with most of the findings of strict fact in the Report of Special Master and most of Nebraska's exceptions are directed either to the categorization of the issues and argument or to the relief recommended by the Master. In connection with the relief recommended, it is Nebraska's position that some of the relief recommended is proper, but is more limited than Nebraska is entitled to within the broader scope of Nebraska's contentions. Some explanation of the exceptions is necessary in order to avoid questions of semantics and in order that Nebraska's contentions be considered in the proper context. In the brief in support of the exceptions, Nebraska will further explain its contentions.

I.

EXCEPTIONS TO STATEMENTS CONCERNING JURISDICTION

The Master properly found that Iowa is in violation of the Iowa-Nebraska Boundary Compact of 1943 (SMR 1) and that this Court has jurisdiction (SMR 200). However, the Master has set forth in V of his Report the Statements by Iowa with regard to jurisdiction and if it should be deemed that the Master has adopted any of these statements then Nebraska excepts to any findings or conclusions that the main grounds for relief are based upon anything other than that Iowa is violating the Iowa-Nebraska Boundary Compact of 1943 and the consequences which necessarily flow from that agreement. Nebraska also excepts to any conclusions that Nebraska requests a declaratory judgment (SMR 108).

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II.

EXCEPTIONS TO FINDINGS OF FACT

Nebraska excepts to the following findings of fact to the extent indicated:

(1) Although the Master has set forth Iowa's position on pages 50 to 61, if it should be deemed that the Master has adopted any of these statements, then Nebraska excepts to any statements therein which are inconsistent with Nebraska's position. Nebraska contends that the Iowa-Nebraska Boundary Compact of 1943 was a contract which bound the State of Iowa, including her

legislative, executive, and judicial branches, and Iowa cannot unilaterally determine her obligations and duties arising from the Compact.

(2) The statements on page 174 of the Report:

> "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 . . ." (SMR 174).

Nebraska agrees with the final portion of the continuation of the above sentence ". . . but a decision of the Supreme Court of the United States interpreting the Compact is first needed" (SMR 174).

Nebraska further objects to any inference from the statement excepted to that it was necessary to present evidence "to establish even a title good in Nebraska" for other areas as the evidence does show many instances where the Missouri River was entirely within the State of Nebraska at the time of the Compact from which it necessarily follows that there were property rights and titles "good in Nebraska" on the left bank or Iowa side of the Missouri River prior to the Compact which Iowa must recognize, regardless of who the claimant might be.

(3) In XII, entitled AREAS NORTH OF OMAHA, the Master stated that he was in agreement with Iowa's views of the issues at the points in controversy "in general" and Nebraska excepts to the paragraph from Iowa's proposed findings quoted on page 181 of the Report which reads:

"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."

The evidence clearly establishes by the testimony of Iowa's own witnesses that the Iowa State Conservation Commission was paying no attention to the lands along the Missouri River and they were not considered "state owned areas". Mr. Schwob, Director of the Iowa State Conservation Commission from 1941 to 1946, testified that the islands along the Missouri River were not marked as owned by the state because "at that time nobody paid any attention" (R. Vol. XXII, p. 3225). He also testified:

"Q. Had the Iowa Conservation Commission done anything to determine or to mark these islands to show the people that they made claim to them?

A. I don't think they did at that time because there was no use of the river. Public use of the river was pretty nil because of the adverse conditions for fish and game. People didn't care about it and there were very few places of access to the river" (R. Vol. XXII, p. 3231).

* * *

"Q. Was there any effort after the Compact was entered into in 1943 to determine or identify lands the Conservation Commission might cover?

A. Not that I remember of because at that time, and before they got Fort Peck and these dams upriver, which were supposed to reduce the silt—I don't know whether it ever did or not; it did something about pollution—there was very little interest in the Missouri River, either by Nebraska or Iowa that I knew about" (R. Vol. XXII, pp. 3232-3233).

This was also confirmed by the testimony of Lloyd Bailey, Superintendent of Land Acquisition for the State Conservation Commission of Iowa, who testified that, for 10 or 12 years or more following the Compact, the State was not interested and no official action was taken (R. Vol. XVII, pp. 2625-2627). He testified that there were islands formed in the beds of the river and "Nobody had paid any attention to them until the channel became stabilized" (R. Vol. XVII, pp. 2625-2626). Mr. Bailey had commenced work with the Iowa Conservation Commission in 1936 and had become Chief of the Land Acquisition Section in 1958. When he took over his duties as head of that section he had been familiar with their record keeping prior to that time. He thought generally all of the activity by the Commission up and down the Missouri River and the big investigation to turn up lands that could be included in the 1961 Missouri River Planning Report started sometime after he took office in 1958 (R. Vol. XIX, pp. 2700, 2702, 2717). In determining lands which Iowa claimed, they made no investigation going back prior to the diversion of the waters into the new channel by the Corps of Engineers (R. Vol. XIX, p.

2715). Mr. Bailey was asked what records were kept of state-claimed lands just before he went into office as Chief of the Land Acquisition Section and answered "They were very poor along the Missouri River. There was little record of anything there in my office" (R. Vol. XIX, p. 2715). There were very few records in his office and there was no other office where an outsider could go to determine what lands were claimed by the State (R. Vol. XIX, p. 2716).

Nebraska also refers to the Master's finding number 10 at page 65 that Iowa had no official record of "state-owned land" held or claimed at the time of the Compact in spite of the requirement of the Iowa Code requiring the Secretary of State to keep records of all property pertaining to the State Land Office that the State then owned and the Master's finding number 11 on page 66 that, in spite of provisions in the Iowa Code, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in the Missouri River Planning Report, and at the time of the Compact Iowa was not making any claim to these lands and there was no record of such claim. The Master also made finding number 7 on page 64 of his Report that Iowa, in fact, was not applying her common law doctrine that Iowa owned the islands and abandoned beds of the Missouri River and any application of the principle by the State of Iowa at or prior to the Compact amounted to nothing more than lip service to a principle without any application to the specific factual situation which existed.

Nebraska excepts to Iowa's statements concerning Wilson Island and Nobles Lake. Even though Iowa has

suggested she was asserting ownership at Nobles Lake in the 1940's, the evidence offered to establish this by Iowa was a court decree of December 1, 1950 which indicates that Nobles Lake was cut off from the Missouri River and was a separate meandered lake in Iowa in 1858, which was 9 years prior to admission of Nebraska into the Union, and it has been a meandered lake ever since that date (Ex. D-1048, R. Vol. XXII, pp. 3220-3221). In addition, a letter from the Iowa Attorney General to the Governor of Iowa quoted at pages 101-102 of the Report clearly indicates that for many years the State did not "zealously protect its ownership of these islands" (R. Vol. XII, pp. 1863-1864).

The evidence and the findings which the Master specifically has adopted fail to substantiate Iowa's language quoted above.

(4) Any statements that the 1943 Compact discloses no terms, phrases, or language that can be construed as saying that Iowa repealed her historic common law when she adopted the Compact (SMR 180). The Master stated at page 178 that he was in agreement "in general" with Iowa's view of the issues at the points North of Omaha in controversy but the language is that of Iowa's counsel. The statements referred to are inconsistent with the finding that the common law changed the boundary from the movable navigable channel to a fixed line and this change abrogated the application of common law principles relating to a movable stream as the boundary between the states (SMR 78). Nebraska further contends that the Compact supersedes Iowa's common law and be-

came thereafter determinative of all rights to be recognized or established by it.

(5) Nebraska agrees with the statement of Iowa quoted by the Master concerning the factual history of how the land formed in the Tyson Bend area insofar as it goes (SMR 185-186) but would add that the evidence in connection with that area offered before the Master is conclusive, that when the river after the Compact moved out of the designed channel to the south and east into Iowa, the islands arose behind this movement, and when the Corps of Engineers placed the river back into the designed channel, it did so without washing away those islands (R. Vol. XXV, pp. 3659-3661). The states have no dispute as to the facts concerning formation but only as to the conclusions to be drawn from those facts. Nebraska excepts to any implications or statements in the finding that the holding in the case of *Tyson v. Iowa,* 283 F. 2d 802 is correct or that the river bed upon which these islands formed was "owned by the State of Iowa" by virtue of its common law. The latter statement is a conclusion which Nebraska contends is not warranted by the Compact and will be discussed in the brief. Had it not been for the Compact, the area would have belonged to the Nebraska riparian owner, and the Compact should not change that result.

(6) There is a printing error on page 39 of the Report and Section 3 should read:

> "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."

(7) The language suggested by Iowa and included in the Report at page 49 that there had been canals dredged at "11 locations" by 1943 is inconsistent with the 1938 Corps of Engineers Annual Report adopted at page 35 listing 11 canals and additional canals at California Bend, Peterson Bend (SMR 36, 42), and St. Mary's Bend (SMR 42). The evidence also showed a canal prior to 1943 at Winnebago Bend. These canals are described in Plaintiff's Resume' of Evidence, pp. 418-420, 422-430. This would total at least fifteen canals dredged by the Corps of Engineers along the Iowa-Nebraska boundary in connection with its channel stabilization work prior to 1943, but the exact number is not critical since it was a substantial number, all of which constituted avulsions.

At page 182 of the Report, recognizing that the Master was using language of Iowa's counsel and was only in agreement "in general", if it should be deemed that the Master has adopted those statements then Nebraska excepts to the statement "Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few." Iowa's own proposed findings recognized eleven canals dug by the Corps of Engineers (SMR 49) and Nebraska's evidence shows at least fifteen man-made avulsions and the earlier references in evidence of the history of the river prior to the Compact indicate a number of avulsions as being recognized by both states and the Master so found in the Nottleman Island (SMR 137-138) and Schemmel cases (SMR 156, 159, 161-162). Consequently, the use of the words "relatively few" could be misleading.

(8) In failing to find that the states by entering into the Compact, recognized that there was no presumption that prior movements of the Missouri River had been gradual and imperceptible and that there were many places where land would be ceded from one state to the other; and this agreement, insofar as the position of the two states was concerned, negated any presumption at common law that prior movements had been gradual and imperceptible. The Compact recognized that in fact this was not the case. If the states had agreed that the boundary was in the Missouri River, there would have been no need for the Compact.

(9) The Master has set forth on pages 91 to 102 Nebraska's contentions concerning the conduct of the State of Iowa following the Compact and, if it should be determined that the Master did not adopt those findings then Nebraska takes exception to this failure to adopt such findings. These facts are documented in Plaintiff's Resume' of Evidence Before the Special Master.

(10) In failing to find in accordance with Nebraska's Proposed Findings submitted by the State of Nebraska before the Special Master commencing with THE OTHER AREAS SOUTH OF OMAHA on page 102 through page 123. These facts are documented in Plaintiff's Resume' of Evidence Before the Special Master.

(11) There is a printing error on page 161 of the Master's Report. Mr. Weakly was Nebraska's tree expert and his name was erroneously inserted indicating he may have been Iowa's tree expert.

(12) Another printing error appeared on page 141 of the Master's Report. The Master adopted the findings as submitted by Nebraska and the printer omitted approximately five lines. The Report should read:

> "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 in a State tax suit for the year 1905. The Schemmels at the time of the Compact had a direct chain of title tracing back to this Treasurer's Deed.
>
> "Over the years there were some Nebraska quiet title actions in 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" (Proposed Findings Submitted by the State of Nebraska, p. 80).

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III.

EXCEPTIONS TO RELIEF RECOMMENDED BY THE MASTER AND CATEGORIZATION OF THE ISSUES

Nebraska is basically in agreement with the recommendations of the Master as concerns the areas south of Omaha and the Nottleman Island or Babbitt Island areas and the Schemmel Island area and Nebraska agrees with the Master's recommendation at pages 174 and 175 that:

> "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 a defendant."

However, Nebraska's request for relief goes further than this and Nebraska takes exception to the Master's recommendations concerning the legal principles applicable to the areas north of Omaha because Nebraska's position is that, regardless of the common law of either state that may have existed at the time of the Compact, the governing principles concerning the boundary and property rights along the Missouri River following the Compact must be determined by the Compact itself and by what the states agreed to. Although numerous separate legal propositions have been discussed in the various briefs and oral arguments, these propositions have been incidental to the main argument of the State of Nebraska that Iowa is violating the Compact and they have been intended to either explain why the Compact has the meaning and effect advocated by Nebraska or to place the Compact in the meaningful context of the common law which existed at the time it was adopted. Nebraska then takes the position that following the Compact, it is the provisions of the Compact which are controlling as against the states because this is what the states agreed to. Nebraska does not wish to get bogged down in questions of semantics, but does feel it is critical that Nebraska's contentions be considered in the proper context at all times.

Nebraska's exceptions to the relief recommended by the Master or to the manner in which some of the issues are stated in the report are:

(1) Nebraska would phrase the question in a different manner than as stated by the Master under ISSUES TO BE DECIDED on page 1 of the Report in Proposition II which states "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?" The latter portion of that proposition, more precisely stated as contended by Nebraska, should be "are the titles to the bed of the Missouri River and the riparian rights of Nebraska owners which existed in Nebraska prior to the Compact repealed or taken away by the cession of the property to Iowa or by the change of the jurisdictional line to place the property within the territorial limits of Iowa?" This proposition should also include the question: "Did the Compact operate to change the boundaries of the private property owners from the thalweg or middle of the main channel of the Missouri River to the fixed Compact line?" It is Nebraska's contention that the states could not change the property lines of private individuals or take away vested riparian rights of private individuals without provision for compensation and it is Nebraska's further contention that the Compact clearly provides for recognition of private property rights by the states. There is nothing in the Compact indicating an intention to take away or divest the riparian owners of their rights. The question clearly is what was the effect of the Com-

pact upon the property claims which existed and which the states did not question and can Iowa now resurrect a "common law principle" which she had not been applying at the time of the Compact and for many years thereafter in a manner which would retroactively transform these areas into "state-owned areas". Nebraska contends that Iowa cannot, and that the two states by the Compact did not contract away private property rights but instead recognized them.

(2) The Master on page 173 of his Report rejected Iowa's proposed findings which were quoted commencing on page 165 through page 172 with the words "The other areas formed before 1943, besides Nottleman Island and Schemmel Island, . . ." Consequently, it is not necessary for Nebraska to take exception to any of that material.

Under Iowa's contentions, the Compact would have merely changed the common law rules concerning the state boundary and then left the Nebraska owners at the mercy of the State of Iowa, her so-called "common law" rule as to sovereign ownership of beds and abandoned beds of the Missouri River, and the whim and caprice of her various officials.

(3) Nebraska agrees with the Special Master's finding commencing with the bottom paragraph on page 174 and continuing through the end of page 175 that:

> "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."

if this Court should fail to grant Nebraska the broader relief requested as concerns the meaning and effect of the Compact. It is Nebraska's contention that these findings are proper within the context of the Compact, but are more restricted than the total relief which Nebraska is entitled to. Within that broader spectrum of relief requested by Nebraska, these findings are correct as far as they go. Nebraska excepts to the Master's recommendation on page 175 that Iowa is not foreclosed from contesting under the Nebraska law the private litigant's alleged Nebraska good title and that this very well may be a trial issue. Nebraska contends that Iowa is foreclosed from contesting the titles of private landowners along the Missouri River, because of the fact that the mere contesting of the title by the State of Iowa constitutes a violation of Iowa's agreement in the Compact that she would recognize the private Nebraska titles along the Missouri River as a part of the consideration for obtaining a new Compact line and the settlement of all the boundary problems without the necessity of having to determine where the prior boundary had been and the implications which would follow from such a determination. Iowa in contesting the titles is violating her solemn agreement made in 1943 that they would be good in Iowa.

(4) In XII, entitled AREAS NORTH OF OMAHA, the Master stated that he was in agreement with Iowa's views "in general", and Nebraska excepts to the Special Master's findings with respect to the areas north of

Omaha on pages 176 through 186 of his Report insofar as they are inconsistent with Nebraska's contentions as therein set forth. Nebraska particularly excepts to any conclusions that boundary lines between private individuals on the Missouri River were changed by the Compact because there is a clear recognition by the states in the Compact to respect private property claims, and the Master's recommendation would operate to take away riparian rights and vested property rights from the private landowners along the Missouri River without compensation and would constitute a taking without due process of law in violation of the 14th Amendment of the Constitution of the United States and the Constitutions of the States of Nebraska and Iowa.

Without limiting these exceptions, Nebraska further takes specific exception to the conclusion (stated in Iowa's words) that ". . . 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 the Nebraska law must stop at the boundary" (SMR 183).

Nebraska contends that the Compact is controlling along the boundary and titles "good in Nebraska" (including titles to the bed and vested riparian rights which are incident to the titles) are to be good in Iowa as "titles" or property rights because Iowa so agreed. Nebraska contends that just as Iowa changed her boundary by the Compact, she also changed her right to make any claim to the bed of the Missouri River and accretions to that bed on the Iowa side of the new Compact line because she agreed to recognize the titles to the bed of the Missouri River which had been good titles in Nebraska and the riparian rights to accretions to that bed which were a part of those Nebraska titles.

Just as Iowa changed her prior law by agreeing to a new boundary, she also changed anything in her prior law which might conflict with her agreement to recognize the individual title claims to the beds of the Missouri River. The evidence shows that there were many places where the river was entirely within Nebraska because of either natural avulsions or canals dug by the Corps of Engineers, and in all of those places Iowa had no claim whatsoever prior to the Compact to ownership of the bed of the Missouri River. Nebraska contends that Iowa did not immediately acquire such a claim by the adoption of the Compact, and her agreement to recognize titles, liens and mortgages good in Nebraska precludes her from making those claims of ownership to the bed which she had agreed to recognize in others. The Nebraska riparian owners' claims are not thereafter based

upon the Nebraska common law, but are a claim of a property right granted to the individual owners which are vested property rights which Iowa agreed to recognize and must recognize. Obviously, Iowa law can thereafter become applicable in other respects, but not in the sense that it can divest these owners of their title without just compensation in accordance with constitutional guarantees and in accordance with the guarantees agreed to in the Compact.

Under all of the circumstances leading up to the adoption of the Compact, the State of Iowa by agreeing to recognize good Nebraska titles without excepting beds of the river and accretions to that bed, should not now be able to negate or circumvent her agreement by claiming that her common law provides otherwise. This is tantamount to Nebraska's taking the position that her boundary remained the movable thalweg or middle of the main channel under common law principles and that the Compact could not change that common law applicable to her boundary. Obviously, this was not the case.

(5) The State of Nebraska takes exception to the recommendation on page 190 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." insofar as it is inconsistent with Nebraska's argument herein, and to the statements on page 190 that:

> "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."

insofar as the findings might imply that these rights were or could be taken away from a property owner without just compensation. Nebraska further excepts to the statement on page 191 that there were no accretions in 1943 and the statement that "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."

This is not what the Compact said. It clearly stated that titles good in Nebraska would be good in Iowa. The Compact provided for the recognition of existing rights by Iowa—not the extinction of such rights or any *change* of *ownership*.

(6) Again without limiting Nebraska's broader exception in (5), Nebraska excepts to the first sentence of the recommended rule to be applicable north of Omaha at page 193 as follows:

> "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 Compact of 1943 being the line which shall determine in which state they formed."

insofar as it implies that the Compact did not alter or change the Iowa law. Nebraska concurs with the final statement on page 193 that "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.", insofar as that sentence goes. Nebraska further contends that the Nebraska or former Nebraska riparian landowner has retained and should retain his right to the bed and any accretions to the bed of the Missouri River on that owner's side of the thalweg without regard to the state in which the bed or islands arising in the bed may be located. Nebraska contends that the Compact only changed the jurisdictional line between the States but not the boundary of the property owners.

(7) Nebraska submits that the Master erred in failing to make the following additional recommendations:

(A) That Iowa no longer has title to the bed of the Missouri River following the Compact but Iowa has merely a public easement and the public right of navigation in the Missouri River.

(B) That property boundaries remained the thalweg of the Missouri River in spite of the fact that the Iowa-Nebraska Boundary Compact changed the jurisdictional boundary between the states to a fixed line. The Nebraska riparian owner continued to hold his title to the thalweg or middle of the main channel of the Missouri River and to own the

bed and accretions to that bed on his side of the thalweg regardless of whether located in Nebraska or Iowa.

(C) Should the Court fail to adopt proposition (A) above, then Nebraska submits that the following proposition should be adopted by this Court and the Master erred in failing to adopt this proposition:

> In those areas where there is a claim of a title good in Nebraska to land ceded to Iowa, Iowa has no claim at such places to the bed of the Missouri River or any beds arising in Iowa as a result of the movement of the Missouri River after the Compact, because the Nebraska riparian owners owned both banks and the bed prior to the Compact and Iowa agreed to recognize those titles by the Compact.

(D) That Iowa, by the Compact, contracted away any rights she may have had to contest titles along the Missouri River based upon any doctrine of sovereign ownership to the bed or abandoned beds of the Missouri River.

BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Nebraska generally agrees with almost all of the findings of strict fact which appear in the Report of Special Master. The Master accepted as findings the general history of the Iowa-Nebraska Boundary problems as sub-

mitted by Nebraska appearing on pages 9 through 49 of the Report. These findings emphasize that while the Missouri River was the natural boundary between Iowa and Nebraska, it was notorious for the many natural changes and periodic flooding, and all of the alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width has been part of the river from time to time. This created a great deal of uncertainty as to the location of the boundary which was recognized by the legislatures of the two states from 1901 until the adoption of the Iowa-Nebraska Boundary Compact in 1943. In addition to the Legislative history, the uncertainty of the boundary and the situs of lands along the river was a matter of common knowledge as indicated by the Corps of Engineer reports and the references in the newspapers and periodicals.

Superimposed upon the already confused situation was the fact that the U. S. Army Corps of Engineers, commencing in about 1934, engaged in a project to stabilize the channel of the Missouri River and to confine it to a channel of a designed width of 700 feet as determined by the Corps. In so doing, the Corps dredged at least fifteen canals along the Iowa-Nebraska border in addition to movement of the river by the construction of dikes and revetments.

Nebraska also endorses the findings of the Master with regard to the Iowa-Nebraska Boundary Compact of 1943 commencing on page 37 through page 43. Nebraska accepts the pre-1943 history of the Missouri River as submitted by Iowa with the minor exception that the evidence shows canals had been dredged in at least fifteen

locations instead of eleven as indicated by Iowa, but this is only a minor point of difference. Even Iowa recognized: "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" (SMR 47).

Nebraska further agrees with the Special Master's findings on the Pre-Compact history and Nebraska feels that the findings numbered 1 through 19 on pages 63 through 69 are extremely significant in determining the meaning and application of the Iowa-Nebraska Boundary Compact.

Nebraska endorses the findings commencing on pages 69 through 90. These deal with the Compact and its various provisions and the meaning of those provisions. These findings also indicate the present concern of the State of Iowa with the unsettled boundary problems resulting from the fact that stabilization work by the Corps following the Compact has placed approximately twenty-one miles of both banks of the river between Omaha and Sioux City entirely in Nebraska and approximately fourteen miles where both banks of the river are entirely in Iowa (SMR 77-78). The Master further found 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 (SMR 78).

Nebraska also concurs with the Master's findings concerning the Nebraska and Iowa common law at pages 89 and 90 and the statements concerning the conduct of the

State of Iowa following the Compact and adoption by the State of Iowa of Part 1 of the Missouri River Planning Report found on pages 91 through 102. Nebraska further agrees with the Special Master's findings on pages 109 through 111 including his statement of Iowa's position, without hereby agreeing to the correctness of Iowa's contentions as so stated. In addition, Nebraska agrees with the Master's statements on the issues of Nottleman and Schemmel Islands commencing at the middle of page 111 through page 163 of the Report. Nebraska further agrees with the Master's findings on pages 164 and 165 under paragraphs 1, 2 and 3 to where the Master commences to restate Iowa's contentions at the bottom of page 165, but Nebraska does not agree with the propriety of these contentions of Iowa.

Nebraska further is in agreement with the Master's comments concerning specific witnesses found on pages 195 through 197 and particularly with his final sentence on page 199 that:

> "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 another at the time they agreed upon the fixed boundary line in the Compact."

Nebraska further agrees with recommendations 1 and 2 on pages 200 to 201. However, Nebraska takes exception to finding 3 on page 201. Nebraska agrees with that part of the Master's finding in 4 on page 201 that the counterclaim of Iowa should be dismissed and excepts to the remainder of that finding. Nebraska further agrees with recommendation 5 of the Master on page 201.

This case has been extensively briefed and copies of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, PLAINTIFF'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER, and PLAINTIFF'S REPLY BRIEF BEFORE THE SPECIAL MASTER have been filed at the direction of the Master. Also filed with the Court are the TRANSCRIPT OF ORAL ARGUMENTS, Part 1 of the Missouri River Planning Report and the PROPOSED FINDINGS SUBMITTED BY THE STATE OF NEBRASKA BEFORE THE SPECIAL MASTER. These materials document the evidence and Nebraska's position. Any attempt to summarize these materials necessarily must omit many significant facts.

SUMMARY OF FACTS

Basically, the Master has found that 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. Iowa had no public record of "state-owned land" which Iowa claimed although Iowa's statutes provided for the keeping of such public records. Although there were abandoned Missouri River channels and cut-off lakes or oxbow lakes all along the Missouri River valley, the State of Iowa had made no claim to these abandoned channels and Iowa was not applying her common law doctrine of sup-

posed "state ownership" of beds and abandoned beds of the Missouri River or islands arising in the beds of the Missouri River in order to make claim to land areas along the river. Iowa showed no interest in the ownership of these lands.

Although the states could have determined by an original action in this Court where the location of the boundary was in 1943, they recognized this would be extremely complicated and expensive. By embarking upon the settlement of the problems by Compact, rather than by original action in the Supreme Court of the United States, the states intended to avoid the necessity of the determination of the prior boundary by entering into a compact which recognized the existing situation along the Missouri River and was intended to settle all of the states' problems.

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 and was done in the context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands which were in existence and which Iowa now claims. Express conditions were included in the Compact 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 had no records of lands actually transferred from one state to the other by the Compact and did not provide for the identification of such lands. They did not know where the prior boundary had been located and they really did not care because they were not

concerned whether they were going to lose or gain anything. They were desirous of settling all controversy. They treated all areas generally with recognition to private titles to be given general application (SMR 63-69, 47).

In this context, the states entered into the Iowa-Nebraska Boundary Compact of 1943 in order to settle and lay to rest all of their boundary problems. This Compact is quoted at pages 69 through 71 of the Report of Special Master. Section 1 designated a new fixed boundary by referring to the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office and shown on alluvial plain maps filed with the Secretaries of States of Iowa and Nebraska. These maps were very general maps analogous to a highway or road map and 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. They were extremely inaccurate and the Corps of Engineers has stated that it is not possible today to locate the boundary on the ground throughout from any maps on file in the Corps' office (SMR 72-75). Section 2 of the Compact then provided that each state ceded to the other state and relinquished jurisdiction over all lands lying on the opposite side of said boundary and contiguous to lands in the other state.

The states did not stop here, however. They then specifically added sections 3 and 4 which, as adopted by Iowa, are repeated as follows:

"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."

Section 5 as adopted by Iowa then reads:

"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."

Prior to the Compact the boundary had been the middle of the navigable channel of the Missouri River or the thalweg, subject to the usual rules of accretion and

avulsion applicable to such a movable boundary, *Nebraska v. Iowa,* 143 U. S. 359. Following a sudden change of the river by avulsion, the boundary then became fixed in the abandoned channel. *Nebraska v. Iowa,* 143 U. S. 359; *Missouri v. Nebraska,* 196 U. S. 23; *Arkansas v. Tennessee,* 397 U. S. 88. Obviously, the boundary had become fixed in various abandoned channels along the Missouri River because of the natural avulsions and cutoffs of the Missouri River as well as the channel stabilization work by the Corps of Engineers during which they dredged well over a dozen canals to divert the river into the designed channel. These canals also constituted avulsions fixing the boundary someplace other than the river. None of these had been identified in actions between the states except at Carter Lake, Iowa, which is an area of Iowa on the Nebraska side of the river in close proximity to Omaha, Nebraska, *Nebraska v. Iowa,* 143 U. S. 359.

It was generally recognized that these shifts had been so numerous and intricate that no conclusive determination of the boundary was considered possible. However, even in those places where the navigable channel of the Missouri River did constitute the boundary, the adoption of the new Compact line necessarily operated to change that boundary along the entire length of the Missouri River because the testimony and navigation charts established that the navigable channel tends to follow the outside of bends and was not in the geographical center of the designed channel as described in the Compact (SMR 78-79). Land within the bed of the Missouri River necessarily was "ceded" along the entire boundary (SMR 79). The change in the boundary line abrogated the applica-

tion of the common law principles relating to a movable navigable stream as the boundary between the states (SMR 78, 82-83).

The Master further correctly found that the states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska in many places and desired to avoid the expense of determining these specific places so they 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 (SMR 83). 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, the Master correctly found that neither state should be able to attack any private title or claims emanating from the other state as of the date of the Compact (SMR 84). Section 4 constituted a clear limitation upon the claims by the states for tax purposes, which were the only claims which were being asserted by the states at that time (SMR 85).

Nebraska agrees with the Master's findings that the provisions of the Compact became the law of the contracting states and state statutes or laws which conflict with the 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 (SMR 86),

and Nebraska agrees with the rules of construction referred to in the Master's discussion of the Compact from pages 69 to 89.

Following the Compact, individuals possessing land on the Iowa side of the river continued in the peaceful use and enjoyment of their land without interference by the State of Iowa during the 1940's and 1950's. This is supported by the testimony of Mr. Schwob and Mr. Bailey referred to in the Exceptions, supra. In the latter part of the 1950's the State of Iowa commenced investigations in an attempt to claim lands under a so-called principle that the State of Iowa was the owner of the bed and all abandoned beds of the Missouri River and islands which had arisen within the bed of the Missouri River. The first official public knowledge of this position by the State of Iowa was found in the publication of a document dated January 1, 1961, entitled PART 1 of the Missouri River Planning Report (SMR 99; Ex. P-2609, R. Vol. I, p. 87-88) which listed twenty-one areas which Iowa was claiming under its "common law". This Report was discussed at pages 99-102 of the Master's Report and recognized the virtual impossibility of describing the state boundary or to determine ownership on the Iowa side because of the past frequent fluctuations of the river (SMR 100; Ex. 2609, p. 4, R. Vol. I, pp. 87-88). Iowa had not been interested in making these claims previously, but this new interest was motivated because the areas had now become of substantial value, both monetary and in some cases recreational (SMR 101-102; R. Vol. XII, pp. 1863-1864).

The evidence is clear that in the determination of

these areas which Iowa claims, Iowa utilized Section 1 of the Compact to establish the location of the boundary and that the land on the eastern side of that boundary was "in Iowa", and then Iowa proceeded to apply her "common law" (SMR 90) in a manner which would award Iowa title to the land. The evidence is also clear that, in the selection of the areas claimed, Iowa did not examine county records to determine claims of titles which must be recognized by the Compact.

However, Iowa did not claim all abandoned channels in the Missouri River valley (SMR 94-95, R. Vol. XI, pp. 1602-1603). She disclaimed some and purchased land in others. (This evidence is summarized with references to the Record in PLAINTIFF'S RESUME OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363; 363-382; 409-411; and 427-428.) The evidence fails to show any consistency or logic in the selection of the areas Iowa claims. The policy of the Attorney General's administration changed three or four times because Iowa changed Attorneys General three or four times (SMR 95; R. Vol. XXIV, p. 3571). The evidence showed that Iowa's conduct was determined by particular attitudes by the various Attorneys General and not by any rule of law concerning the meaning or effect of the Compact (SMR 95-96; R. Vol. XXIV, p. 3571).

Iowa also takes the position that it now owns the entire bed of the Missouri River located on the east or left bank side of the Compact line because that bed is now "in Iowa" and Iowa is claiming the areas where the river escaped following 1943 as abandoned channel because that land "is in Iowa". This ignores the fact that

the Nebraska riparian owner owned the bed of the Missouri River on his side of the thalweg under a line of cases commencing with *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 and he owns any islands arising in the bed on his side of the thalweg. *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782. (This case was decided in 1946 after the Compact but is consistent with the principles of riparian ownership of the bed.) It also overlooks the fact that there were many places along the Missouri River where the river was entirely in Nebraska prior to the Compact, and consequently title to the entire bed of the Missouri River and both banks was necessarily in Nebraska riparian owners, subject to the public easement for navigation. Such areas according to the evidence are at Lake Manawa, Winnebago Bend, California Bend, Nebraska City Island, as well as in the Nottleman Island and Schemmel areas, in addition to the many other places where the Corps dug canals in Nebraska in order to channelize the river and such other areas which had not been ascertained by the states where the river had previously moved into Nebraska by natural avulsions. This evidence is referred to in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

Extensive evidence was offered concerning Iowa's conduct with regard to the Nottleman Island and Schemmel areas and the factual history of those two areas (SMR 112-163). This evidence is illustrative of Iowa's conduct and the ignoring by Iowa of all individual rights and anything inconsistent with Iowa's position. It further graphically illustrates that the mere claim of title by the State of Iowa constitutes a hardship upon the farmer

and clouds his title in violation of Section 3 of the Compact requiring Iowa to recognize titles which had been good in Nebraska (SMR 116). The evidence further illustrates that Iowa has taxed the Nottleman and Schemmel areas, and, in the Nottleman area, the Attorney General's office had knowledge of the private claims through Nebraska titles both in 1946 and 1951 and the Iowa Conservation Commission specifically disclaimed ownership of the Nottleman Island area in 1951. On at least two occasions, Nottleman Island lands had been included in inheritance tax determinations in the State of Iowa and the County Treasurer of Fremont County, Iowa, had issued tax deeds to the Schemmel area in 1954. This evidence is summarized by the Master and is overwhelming in showing the recognition of the private ownership and the prior Nebraska titles.

Iowa proceeded to file law suits against the Nottleman and Schemmel areas under the theory that Iowa owned the land as accretion to the state-owned bed of the Missouri River and it was not affected by the Compact. In the Schemmel case, which commenced trial in 1964, Iowa put in only a minimum of evidence to show formation of the land and no pre-1943 avulsions, and Iowa relied upon the presumption against avulsions, thus placing the entire burden of showing the history of the land and the location of the boundary prior to 1943 upon the defendants (SMR 152-153). This placed a tremendous burden upon the landowner to prove the Pre-Compact Boundary and ignored all the history which is described in the Master's Findings.

THE SPECIAL MASTER'S RECOMMENDATIONS

This general summary of many of the facts is necessary to place Nebraska's argument in its proper context. The Master found that the areas which Iowa claimed south of Omaha were in existence in 1943 at the time of the Compact (SMR 63-64) and generally the areas north of Omaha which Iowa now claims are claimed as a result of movements of the river following the Compact (SMR 192). The Master basically recommended two general principles of law:

> (1) 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 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 (SMR 174-175).
>
> (2) 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 Compact 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 (SMR 193).

Nebraska agrees with recommendation No. (1) above insofar as it goes, although contending that the principle should be broader. Nebraska disagrees with the first sentence of proposition (2) above, which constitutes Nebraska's basic exception to the Master's findings.

Nebraska further agrees with the Master's recommendations 1, 2, and 5 on pages 200-201 concerning the Nottleman and Schemmel Island areas.

SUMMARY OF ARGUMENT

The Iowa-Nebraska Boundary Compact of 1943 was a contract which is binding upon both states. At the time it was adopted, both states recognized the uncertainty of the location of the natural boundary because of the many natural and man-made movements of the Missouri River, and the contracting states recognized that such a determination was almost impossible of ascertainment. Consequently, they attempted to settle all controversy by eliminating the necessity of locating the prior boundary. They did so by establishing a fixed line as the new boundary which changed the boundary along the length of the Missouri River from the former main channel of the Missouri River or from various abandoned channels which were generally recognized as existing but which the states did not deem it necessary to locate. The two states foreclosed inquiry by each other as to the location of the Pre-Compact boundary at the time they entered into the Compact. As a condition for this change, the states agreed to recognize titles and property interests recognized in the other state. They did this fully realizing the uncertain title situation and acknowledging they had no interest in determining what lands would be actually transferred. They accepted the fact that all titles along the river would be recognized by the other state. There were abandoned channels all along the Missouri River and the State of Iowa was making no claim

to these abandoned channels and Iowa was not claiming land areas as islands or abandoned beds under any claim of sovereign right under the common law in 1943 or for many years thereafter.

The states adopted the Compact in general terms with a view to public convenience and the avoidance of controversy. They intended to recognize all titles as against the states without further investigation. They 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 state must recognize and could not attack it. They had no record of land ceded; they did not know where the boundary had been located; and they did not care. The State of Iowa was not claiming these lands and there was no record of any such claim in spite of statutory requirements in Iowa requiring such records and the marking of such lands which the state claimed. It was the purpose and the intent of the states in adopting the Compact to lay to rest questions involving the historic location of the boundary and the manner in which bottom lands came into being. It is, therefore, a violation of the Compact for either state to make a claim of ownership which requires an individual or the other state to litigate the question of the precise location of the boundary at the time of the adoption of the Compact or the formation of land by the actions of the river. Neither state should now be allowed to place the burden on individual farmers and land owners of establishing something which the two states themselves recognized was practically impossible.

If the language, purpose and intent of the Compact is to be effectuated, Iowa must now be required to live up to her commitment to recognize all titles along the Missouri River and she should be restrained from attacking titles under any common law claim of sovereign title to the bed and abandoned beds of the Missouri River. Those Nebraska titles which Iowa agreed to recognize as good included the ownership of the bed of the Missouri River, subject to the public easement for navigation, and the right to accretions and islands arising in that bed. A determination is necessary that the Compact changed and supersedes any so called "common law" doctrines in Iowa which are inconsistent with Iowa's agreement to recognize these vested property rights. This is necessary in order to permit riparian owners from having their property taken away by Iowa without compensation, in violation of Iowa's agreement. Nebraska could not constitutionally legislate such rights out of existence and could not do so by the Compact. Iowa must recognize that the determination of sovereignty pursuant to the Compact cannot operate to divest a riparian owner of his property boundary or his riparian right to the bed and accretions to the bed of the Missouri River. As a party to the Compact, Nebraska is entitled to such a determination by this Court.

ARGUMENT

Nebraska has brought this action as a party to the Compact. It is Nebraska's position that the Compact was a complete document and Iowa cannot enforce only Section 1 with regard to location of the boundary and

disregard Sections 3 and 4 which were a part of the total consideration for the Compact. The questions raised are to be decided not by the common law or courts of either state, but by the Compact itself. *Marlatt's Lessee v. Silk,* 11 Pet. 1; *Green v. Biddle,* 8 Wheat. 1; *Fletcher v. Peck,* 6 Cranch 87, 136; *West Virginia ex rel. Dyer v. Sims,* 341 U. S. 22. The Master properly recognized that 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. (SMR 86 and cases therein cited.) Consequently, the basis of jurisdiction in this case is because it is an action between signatory states which are parties to the Compact and not on any exclusive theory of *parens patriae* as suggested by Iowa, and the statements of Iowa's contentions concerning *parens patriae* in *State of Hawaii v. Standard Oil Company,* 301 F. Supp. 982 (SMR 56-58) are not in point.

The Master not only found a violation of the Compact by the State of Iowa, but also found 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" (SMR 78). Iowa should not be allowed to avoid her contractual obligations created by the Compact by the argument of jurisdictional issues which are not relevant to this case. In fact, in an action brought by certain truckers against the Iowa Reciprocity Board to enforce the terms of an interstate motor carriers compact, the State of Iowa recently took the position that only the signatory states can raise the compact is-

sue. *General Expressways, Inc. v. Iowa Reciprocity Board,* — Iowa —, 163 N. W. 2d 413, 417, 426. Now Iowa inconsistently takes the position that even the signatory states themselves cannot raise the Compact issue.

Just as the Compact superseded the prior law and now governs the location of the boundary between the states, Nebraska contends that it also requires that Iowa recognize the private claims to title to all those lands along the Missouri River which were admittedly in an uncertain status, because Iowa agreed that all of these titles would be good. Nebraska contends that this recognition included all vested rights which were a part of those titles because Iowa pledged in the Compact to respect them. When Iowa agreed that the titles shall be good in Iowa she thereby waived, relinquished, and contracted away any rights she had to attack those titles. Iowa should not be able to take the position, as she has, that the Compact only established the state line to give her jurisdiction so that she can ignore or attack the Nebraska titles which she agreed "shall be good".

The two states were concerned that the benefits secured by the Compact to the private owners of both states should be equal and reciprocal—that their titles would be good regardless of jurisdiction and that their vested riparian rights, which were part and parcel of their titles, would remain in full force. The Compact should not be construed as giving the State of Iowa the power of destroying vested rights of Nebraska owners when she in apparent good faith pledged to respect them. Iowa should not be able to resurrect a new application of her common law principles to enable her to clearly

subvert her commitment under the contract to recognize Nebraska titles and property rights.

The tremendous burden placed upon the landowner by Iowa's arbitrary conduct in attacking the titles is illustrated by the Master's findings at pages 112 through 163 of his Report. From these findings, Nebraska contends that it follows that Iowa cannot make a claim of title based upon her common law doctrine of sovereign ownership of the beds of navigable streams and thereby require a landowner to prove where the boundary was prior to 1943, and in this respect the Master's recommendations are certainly correct.

Iowa has suggested that "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" (SMR 171).

Nebraska contends that to place this burden on Nebraska at this late date of establishing where the boundary was prior to 1943 is to require Nebraska to do something which both states agreed was not necessary when they adopted the Compact. By placing the burden on someone else to determine where the Pre-Compact boundary was, the Compact is thereby construed in such a man-

ner as to render Sections 3 and 4 meaningless. The great object of the Compact was to settle all these matters and lay them to rest and the language of Chief Justice Marshall in the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384, is certainly applicable:

> " . . . but 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" (SMR 67-68).

The Master did find that the States relinquished by the Compact the right to question any title on the grounds that the land was not within the jurisdiction of Nebraska (SMR 68, par. 16) and at this late date neither state should now be able to require someone else to make the determination of where the Boundary was located prior to the Compact in order to preserve a claim of title (SMR 65, par. 9). This finding is in agreement with Nebraska's position.

It should also be remembered that there were places along the Missouri River in addition to Nottleman and Schemmel Islands where the River was entirely within the State of Nebraska (see evidence relating to Winnebago Bend and California Bend, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363; 396-405) (SMR 97), because of avulsions prior to 1943, and title to the entire bed was in a Nebraska riparian owner. When Iowa agreed that titles would be good in Iowa, certainly she did not except the

title to the bed, and there would have been many places along the boundary where Iowa had no claim to the bed. There is nothing in the Compact that indicates that Iowa was to deprive the riparian owner of that right to the bed. In fact, everything indicates Iowa's agreement to recognize that title. By agreeing that such titles were good in a context where Iowa also agreed that it was not necessary to determine where the boundary was, she precluded herself from thereafter asserting title to the bed of the Missouri River. This must follow from the Compact and Iowa's conduct in failing to make any such claim for several years following the Compact because, as the Master found, the mere questioning of the title by Iowa constitutes a burden upon the landowner (SMR 133). It can amount to confiscation because Iowa can exert the entire resources of the state against a landowner merely to obtain a legal principle which will assist her to acquire other areas.

In the Riley Williams or Middle Decatur Bend case which is discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, at pages 382-389, the amount of $2,070 as proceeds of a condemnation by the Corps of Engineers for an easement in which to place the Missouri River was at issue (R. Vol. XII, pp. 1759-1760). Iowa claimed the land under its sovereign doctrines and based upon the principle that "there can be no extension of accretion lines across a fixed and established State boundary line and into the State of Iowa from the State of Nebraska." (Ex. P-2693 (R. Vol. XIV, p. 1942) quoted at pages 384-386 of Plaintiff's Resume'). Iowa informed the judge in that case that her

evidence would take 2 to 3 weeks for the trial of the case (R. Vol. XIV, p. 1761) and the landowner's attorney testified that they could not afford to try the case under any circumstances because, even if the landowner won, he would lose from a monetary standpoint because the legal and surveying expenses and fees would cost more than the amount of the award (R. Vol. XIV, pp. 1761-1762). Iowa's position was stated in a letter from Iowa's Attorney to the United States District Attorney dated October 7, 1960, which said:

> "This case is of considerable importance to the State of Iowa for a number of reasons: First of all, it is one of a series of cases which the State has determined to litigate until there is some final answer. Secondly, although that portion of Tract 103E situated in the State of Iowa contains only 22.84 acres, you will see by looking at the plat that there is considerable more land, both above and below Tract 103E which the State claims to own. The decision in the pending case will probably, as a practical matter, determine ownership of the additional land also. I do not seek to argue our case to you in this letter, but I wanted you to know the general nature of the State's position so that you will know what to expect whenever trial of the title question is reached." (Ex. P-2694, R. Vol. XIV, p. 1943, quoted in PLAINTIFF'S RESUME', pp. 384-386).

This factual situation clearly illustrates the disadvantage of the small landowner involved in a title fight against the State of Iowa and how Iowa can pick and choose her cases in order to establish a precedent to help her take advantage of landowners in other areas. Consequently, in order to assure Nebraska that Iowa is living up to her commitment that she would recognize Nebras-

ka's titles, Iowa should not be able to claim title to any area on the Iowa side of the Compact line or the present bed of the Missouri River, because by placing the burden on someone else to prove the facts and history, Iowa thereby has avoided what she agreed to in the Compact.

The Master stated with reference to Part 1 of the Missouri River Planning Report of January, 1961, which was the report in which the State of Iowa first publicly set forth the areas which Iowa claimed title to under her common law doctrine of sovereign ownership: "Unquestionably Iowa's publication of this report changed the status quo along the river and is in itself a history of the boundary problems." (See enclosure letter of September, 1971 accompanying the Report of Special Master to the Honorable E. Robert Seaver, Clerk, United States Supreme Court.) This is also implicit in the Report of the Master although not as succinctly stated.

The Master recognized at pages 89 and 90 of his Findings that an article appeared in the Iowa Law Review in 1955 which discussed rights to real property along the Missouri River in connection with the river stabilization work of the Corps of Engneers and stated that the Iowa courts had vascillated in determining whether the formation of certain types of areas along the Missouri River were islands or accretions to the high bank. The article suggested that if such sandbars be deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, the article stated that there had been no determination by the courts that the State of Iowa would have the right to such sandbars 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. It was following this article that Iowa's activities to attempt to discover and claim "state-owned" lands began (SMR 90).

Nebraska contends that Iowa's policy as adopted or reflected in the Planning Report of 1961 reflects a sudden change in the application of the Iowa law which was completely unpredictable in light of the history of the Compact and Iowa's conduct for approximately 17 or 18 years thereafter; and that Iowa would ever take such a position did not conform to reasonable expectations of the States when they entered into the Compact or for many years thereafter. Iowa's change of position is somewhat similar to the conduct of the State of Washington in the case of *Hughes v. Washington,* 389 U. S. 290, in which the State of Washington claimed ownership of the accretion gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood, contending that the State's constitution adopted in 1889, as interpreted by its Supreme Court, denied the owner of ocean-front property in the State any further rights and accretions that might in the future be formed between their property and the ocean. Although the question hinged upon the issue of whether the right to future accretions which existed under federal law in 1889 was abolished by the provisions of the Washington Constitution, and the question was decided on the basis of federal law, the majority opinion recognized some of the problems which had been created by the State of Washington by the sudden change in the

application of its law. Mr. Justice Black at 389 U. S. 293-294:

> "This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In *Jones v. Johnston,* 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair v. Lovingston,* 23 Wall. 46 (1874); *Jefferis v. East Omaha Land Co.,* 134 U. S. 178 (1890), and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, *and continually vulnerable to harassing litigation challenging the location of the original water lines.* While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland, this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens v. Arnold,* 262 U. S. 266, 269-270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean" (Emphasis ours.)

In the concurring opinion, Mr. Justice Stewart stated at 389 U. S. 294-298:

> "I fully agree that the extent of the 1866 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.
>
> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. *Joy v. St. Louis,* 201 U. S. 332, 342. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a fed-

eral grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 236-241.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors—including Mrs. Hughes—a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "[l]ittoral rights of upland owners were terminated." 67 Wash. 2d 799, 816, 410 P. 2d 20, 29. Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest v. City Bank Co.*, 321 U. S. 36, 42-43. Cf. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95. The Washington court insisted that its decision was "not startling." 67 Wash. 2d 799, 814, 410 P. 2d 20, 28. What is at issue here is the accuracy of that characterization.

The state court rested its result upon *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The *Eisenbach* court declined to resolve the accretions question presented here. This question was resolved in 1946, in *Ghione v. State*, 26 Wash. 2d 635, 175 P. 2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in *Ghione* and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its *Ghione* decision, the Washington Supreme Court reached a different conclusion. The state court in

this case sought to distinguish *Ghione:* The water there involved was part of a river. But the *Ghione* court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash. 2d 635, 645, 175 P. 2d 955, 961. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.* Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

Although the facts in the *Hughes* case are clearly distinguishable, the conduct of the State of Iowa leads to the same injustices as would have resulted from the State of Washington's conduct. With regard to areas

existing in 1943 which after the Compact were clearly in Iowa, Iowa's position would place every title in the Missouri River Valley "vulnerable to harassing litigation challenging the location" of the boundary as of some earlier date. In our situation selected areas along the Missouri River which the former Nebraska land owners had every reason to regard as theirs were all of a sudden under attack by the State of Iowa on the theory that they always belonged to the State of Iowa or under the theory that since the lands are now "in Iowa" the Iowa common law provides for state ownership and therefore they belong to Iowa. This completely disregards Iowa's commitment in the Compact to recognize Nebraska titles as good in Iowa.

The problems north of Omaha are illustrated by two factual situations which are in evidence. At page 97 of the Master's Report reference is made to at least two instances where the river was completely in Nebraska in 1943 because of prior avulsions and the river then escaped from its designed channel and moved back to the east. The Corps placed it in the designed channel by subsequent canals and 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. One of these situations is Winnebago Bend discussed at pages 349 through 362 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER in which the exhibits and testimony are summarized. The other is California Bend discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 396

through 405. In both situations there were other abandoned channels to the east of these areas which Iowa officials had made no claim to. The river was entirely in Nebraska at both places and the land which Iowa is presently claiming would have been in Nebraska had it not been for the Compact. The movements of the river all took place within areas which were ceded to Iowa by the Compact and Nebraska contends that Iowa must recognize the good Nebraska titles to the entire bed and both banks of the Missouri River because she agreed to this in Section 3.

The other type of situation about which evidence was introduced is the Tyson Bend case. This area is shown on pages 34 and 35 of Part 1 of the Missouri River Planning Report (Exhibit 2609, R. Vol. I, pp. 87-88) and is referred to by the Master at pages 187 and 188 of his Report with excerpts from Iowa's discussion at pages 181 through 186 of the Report. The factual situation is discussed on pages 393 through 396 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. Page 34 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) has the comment under "Recommended Action":

> "It was in this area that the question of whether or not a Nebraska landowner can accrete across a state line arose. The case was tried in Federal District Court and the owner ruled against. The case was appealed to the Circuit Court of Appeals. The lower court's decision was upheld."

The photographs in the Planning Report show the state line and an island or bar on the left bank side and then water before the mainland is reached on the Iowa

side. According to the Planning Report, the Tyson area consisted of 1,100 acres, of which 75 acres were water, 250 acres land, 275 acres of mud and marsh, and 500 acres of sand dunes.

Iowa's witness was asked if he agreed with statements made by counsel for the State of Iowa in the case of *Dartmouth College v. Rose,* 257 Iowa 533, 133 N. W. 2d 687, describing how the land formed in the *Tyson* case. This statement read:

> "The facts were that prior to 1946 the main and only channel of the river was the designed channel which was west of the area in dispute in that case. The Iowa-Nebraska boundary was the center of said channel by reason of the 1943 Compact.
>
> "In 1946, 1947 and 1948 the main channel left its designed channel and gradually moved southeasterly, washing away all of the land then existing in the disputed area. In 1947 or 1948, two small sandbars appeared in the disputed area behind this southeasterly movement of the main channel, with the main channel flowing to the east of them and with water still flowing to the west of them in the designed channel. Vegetation appeared on the sandbars in 1948 indicating that they were above ordinary high water mark and had attained the status of islands.
>
> "Later in 1948, the Corps of Engineers repaired some of their dikes in the area so as to again place the main channel in its designed channel to the west of the islands. The islands were not destroyed by this movement.
>
> "In the spring of 1949 the main channel again escaped from the designed channel and moved to the channel east of the islands. This movement of the main channel in the spring of 1949 was also accomplished without destroying the islands.

"Water continued to flow through the designed channel until the 1952 flood, during which it became filled with silt and sand. The main channel continued to flow through the channel east of the islands until about 1959 when the Corps of Engineers again repaired their dikes so as to again place it in the designed channel. The 1959 movement was also accomplished without destroying the islands" (R. Vol. XXV, pp. 3659-3661).

Mr. Jauron, Iowa's Missouri River Co-ordinator, agreed with all of that statement except whether the '43 Compact line was filled with silt and sand by the 1952 flood (R. Vol. XXV, p. 3661).

The case was decided by the United States Court of Appeals, Eighth Circuit, and is found at 283 Fed. 2d 802 (1960). The Court of Appeals for the Eighth Circuit based its opinion on the fact that all of the land involved arose "in Iowa". This is a situation where had it not been for the Compact establishing a fixed line between Nebraska and Iowa, the result would necessarily have been different. If there had been no Boundary Compact, when the river moved out of the channel towards the south and east, or into Iowa, the boundary would have moved with the river and the islands forming behind this movement would have been on the Nebraska side of the river and part of the Nebraska riparian owner's lands. Then when the river was placed back to the northwest without washing away those lands, there would have been an avulsion leaving the islands in Nebraska although on the left bank of the river and leaving the boundary in the abandoned channel to the southeast. These islands would have remained the property of the Nebraska riparian owner.

The State of Iowa in the Tyson case used the fixed State Compact line as the commencement of its ownership, ignoring the fact that before the Compact the Nebraska riparian owner owned the bed to the middle of the main channel and any island or bar areas in that bed. Thus the Tysons lost 1,100 acres of what otherwise would have been theirs. In the Planning Report, Iowa's Conservation Commission said, "This action will help in declaring islands to be state-owned" (P. 4 of Exhibit P-2609, R. Vol. I, pp. 87-88).

Although it is easy to make the statement that the Compact has no effect upon private titles, it can readily be seen that by merely applying "Iowa law" the Nebraska riparian owner has been deprived of his property rights whenever the river moves to the east following the Compact. If this is the situation, then his title has been severely impaired. Nebraska reasserts its contention that riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. In *County of St. Clair v. Lovingston,* 23 Wall. 46, 68-69 the Court said:

> ". . . The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. . . ."

In *Yates v. Milwaukee,* 10 Wall. 497, 504, the Court recognized with regard to the right of a riparian owner as asserted by the Supreme Court of Wisconsin to construct docks or landing places for goods or passengers that:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection of the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

Although the Master stated at page 190 of his Report that:

> "The Nebraska Supreme Court always had, and still has, the power to change the Nebraska doctrine of private ownership of riverbeds. 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.",

Nebraska contends that the state cannot take such vested property rights away without compensating the owner. The applicable principle is as set forth in *Fall River Valley Irrigation District v. Mt. Shasta Power Corporation,* 202 Cal. 56, 259 P. 444, 449, 56 A. L. R. 264, which involved the concept of riparian rights and the appropriation of waters, where the California Supreme Court said:

> ". . . No question can arise as to the power of the Legislature to modify or abrogate a rule of common law. The question is: Can any such change af-

> fect previously vested rights of property owners? We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing in view of the provision of sections 13 and 14 of article I of the state Constitution and the Fourteenth Amendment to the Constitution of the United States."

The Nebraska Supreme Court in the case of *Clark v. Cambridge Irrig. & Improv. Co.,* 45 Neb. 798, 64 N. W. 239, held a statute declaring that the use of running water in all streams of over 20 feet in width might be acquired by appropriation, invalid as a constitutional invasion of private rights since, under the common law rule which prevailed in Nebraska at the time of adoption of the statute, every riparian owner, as an incident to his estate, was entitled to the natural flow of the water of running streams through his lands undiminished in quantity and unimpaired in quality, with the exception of the right of all to reasonable use for the ordinary purposes of life. The original right arose under the common law.

There have also been cases where the legislatures have attempted to declare non-navigable streams navigable, and the Courts have held this invalid as depriving the riparian owner of his rights because of the difference in rights which follows from such a change. In *Murray v. Preston,* 106 Ky. 561, 50 S. W. 1095, 1096, in considering such an act and its effect upon the right of a riparian owner to place water gaps across a stream, the Court of Appeals of Kentucky stated:

"The first question is, what is the effect of the act of the legislature declaring this creek a navigable stream? The constitution of the state forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of the owners of the adjoining lands. If it was the private property of appellant, within the boundary of his land, the legislature could not devest him of his rights by simply calling it a navigable stream, when it was not one in fact. The rule on this subject is thus stated in Cooley on Constitutional Limitations (side page 591): 'The question, what is a navigable stream? would seem to be a mixed question of law and fact; and, though it is said that the legislature of the state may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the legislature cannot make it so by simple declaration, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.'"

See also *Bigelow v. Draper,* 6 N. D. 152; *Walker and Fulton v. Board of Public Works,* 16 Ohio 540; *People v. Economy Light & Power Co.,* 241 Ill. 290, 89 N. E. 760 (writ of error dismissed 234 U. S. 497).

In *Allison v. Davidson,* — Tenn. —, 39 S. W. 905, 909, an act providing that all persons might float logs and lumber on all streams and rivers in the state, on giving bond and security to protect the owners of milldams from loss or damage, was held to be unconstitu-

tional insofar as it applied to a non-navigable stream. The Court considered the problem as follows:

> ". . . The bed of this stream, as well as the use of the water, it being nonnavigable, belonged to the riparian proprietors. This being so, it results, as a matter of course, that these proprietors cannot be deprived of the beneficial as well as the exclusive use of their property, without their assent, for the benefit of private individuals, and the legislature cannot, by any act it can pass, legally authorize any such deprivation. It is to be remembered that this act of 1883 does not pretend to declare all the streams in this state navigable, and therefore we are not called upon to discuss the question of the power of the legislature to declare what is or what is not a navigable water course in this state. If a stream, however, is in fact nonnavigable, it is not a public way; and the writer is of opinion that it is not competent for the legislature, by any enactment, to make it one, and thus to take private property for public use without compensation. City of Grand Rapids v. Powers, (Mich.) 50 N. W. 661; People v. Elk River Mill & Lumber Co., (Cal.) 40 Pac. 531; Morgan v. King, (N. Y.) 91 Am. Dec. 58; Irwin v. Brown, supra. * * * The constitution forbids the taking of private property except for public use, and that upon the payment of a fair and just compensation for it. * * * The right to the beds of nonnavigable streams, and to the uninterrupted flow of their waters, are as much property rights of the riparian proprietors as is the ownership of a farm; and, if the latter is protected by the constitution, the former are, and to the same extent. To hold otherwise, it seems to us, would be to permit the erection of a legislative battering ram, to batter down and demolish utterly one of the most sacred bulwarks of the constitution, designed to protect rights of private property. . . ."

If the legislatures cannot take away the riparian owner's right to the bed of the Missouri River and accretions arising in that bed by legislation, they certainly could not do so by compact which would change the state line and the property line of the riparian owner. The legislature cannot divest the owner of his rights by simply providing that in the future "Iowa law" will apply since the result is to deprive him of his property if the Compact provisions are ignored. It not only takes away his ownership of the bed, but also deprives him of his right to accretions to that bed and it works a change in his property line which limits the right to additions to his land when the river moves to the east, but leaves him subject to great loss of land when the river moves to the west. But the Compact is now the law of Iowa and must be applied by Iowa. Iowa must recognize this change in her so-called "common law" effected by the Compact.

Nebraska contends that it could not take away the riparian owners' right to the bed of the stream or to accretions arising in that bed without payment of just compensation because of the requirements of the 14th Amendment to the Constitution of the United States. Such action would also violate Section 21 of Article I of the Constitution of the State of Nebraska which provides: "The property of no person shall be taken or damaged for public use without just compensation therefore." The comparable provision in the Constitution of the State of Iowa, Article I, Sec. 18 provides:

> "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as

> the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

Nebraska would emphasize that these principles are an aid in determining the true meaning of the Compact insofar as applicable to the lands along the Missouri River. The law which is applicable is what follows from the agreement entered into between the parties which is to be distinguished from what may have been the governing principles previously under Iowa's so-called "common law".

Iowa agreed to recognize private titles in the Compact at a time when she was making no claim similar to the claims which she is making now to the beds of the Missouri River. She did not question these titles, or assert her alleged rights for 20 years thereafter. The Master further found that 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 of islands or abandoned beds of the Missouri River then in existence as against private title claimants (SMR 64). There also were abandoned Missouri River channels and cut-off lakes all along the Missouri River valley and the State of Iowa had made no claim to these abandoned channels. Suddenly, approximately 20 years later, Iowa wants to emphasize her "common law" so as to disregard what Nebraska contends she agreed to in 1943. Just as the states could change their common law boundary, Nebraska contends that the Compact controls and requires Iowa to recognize these property rights and this

changes her common law. If the states cannot change their common law by compact, the entire purpose of the Compact is defeated and becomes meaningless.

This is not a question of crippled sovereignty or the freezing of legal principles applicable. But it is a question of recognizing within the constitutional requirements, private property rights which can only be taken away pursuant to constitutional safeguards and guarantees of adequate compensation.

In *Hilt v. Weber,* 252 Mich. 198, 233 N. W. 159, 167, mentioned by the Master at page 190 of his Report, the Michigan Supreme Court considered state ownership of land between the meander line and Lake Michigan. Prior Michigan cases described as the Kavanaugh cases had indicated that the riparian owners' title went to the meander line along the Great Lakes and the title outside this meander line, subject to the rights of navigation, was held in trust by the state for the use of its citizens. The Kavanaugh cases had abrogated a rule of property in force in Michigan. The Michigan court recognized the harm that could result from taking sound language and wresting it from its proper setting and applying it to a different situation. The court recognized that the right to acquisitions to land, through accession or reliction, is one of the riparian rights. The court indicated that the Kavanaugh cases enumerated principles at variance with settled authority and said:

> "* * * The rules they stated are not as old as the rules they abrogated. When to that are added the considerations that they operated to take the title of private persons to land and transfer it to

> the state, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.
>
> "With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the Kavanaugh doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the state and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The state should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest."

The court went on to recognize that riparian rights are property, for the taking or destruction of which compensation must be made by the state. The previous Michigan decisions holding that riparian owners along the Great Lakes owned only to the meander line were overruled.

In like manner, Nebraska contends that Iowa must be honest with its citizens and with owners claiming through Nebraska titles prior to the Compact and Iowa's

purposes do not justify the taking of this private property without compensation.

The injustice resulting from any situation where the State of Iowa can attack private property owners is illustrated not only by the *Tyson v. Iowa* case in which only $12,680.00 was involved, but also by the Riley Williams case previously referred to in which only $2,070 was involved.

The Williams case graphically illustrates the disadvantages of the small landowner involved in a title fight with the State of Iowa and how the State of Iowa can pick and choose its defendants and situations in order to establish precedent which will assist her in making claim to many other areas along the Missouri River. The Corps of Engineer condemnation map in evidence indicates that Iowa was claiming area between the Nebraska state line and the right bank (west bank) of the Missouri River which had moved into Iowa (Ex. P-2695, R. Vol. XIV, pp. 1942). Consequently, Iowa is claiming the state line as the basis for commencement of her ownership and it is a revolutionary doctrine if a state can now accrete to a fixed state line.

In selecting lands to claim, 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 (SMR 84). When the landowner raised a claim of his Nebraska title which Iowa agreed to recognize by the Compact, Iowa immediately took the position that his claims arose through "spurious and fictitious instruments" (SMR 114-115), and, in Iowa's investigation, where it appeared that someone else was claiming the

land other than the State of Iowa, her officials automatically assumed that they were trespassers and had no right to be there (R. Vol. XXV, pp. 3628-3629). In addition, in the Schemmel case the State of Iowa disregarded all Nebraska records concerning these lands (SMR 154), interviewed no persons concerning formation of the land prior to the filing of suit (SMR 153) and did not discuss claims with any of the Schemmels (SMR 152). This was also true in the Nottleman Island case (SMR 112, 114, 115). In its lawsuits, Iowa puts in a minimum of evidence and then relies on the common law presumption that the river had arrived in the 1943 channel by accretion and not avulsion (SMR 153). Iowa has taken the position that if taxes are paid on the land, this is irrelevant and immaterial (SMR 113). The evidence is clear that in both the Nottleman Island and Schemmel Island areas 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 (SMR 114, 153-154).

The Master further found that the volume of records substantiating all of these facts concerning formation and history of the land 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

(SMR 118). The Record is also replete with evidence that many of the records of the Corps of Engineers have been lost or destroyed (SMR 76), and many of them are misleading. This can be illustrated by the fact that Iowa has taken the position in different cases where Iowa was claiming land along the Missouri River that certain types of Corps' maps are correct in situations where they benefit Iowa but are incorrect or not trustworthy in situations where they might damage Iowa's claim (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 482-484; R. Vol. XVIII, p. 2663; R. Vol. XVIII, p. 2666).

All of this has operated to fully substantiate the Master's findings that the mere claim of title by the State of Iowa constitutes a hardship on the farmer; and 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 her to recognize titles which had been good in Nebraska (SMR 116). If there is to be any stability of order along the Missouri River, the Compact must be construed in such a 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 (SMR 134). Any other construction leads to oppression, injustice and absurd consequences, and such application should be avoided if at all possible. *U. S. v. Kirby,* 7 Wall. 482; *Carlisle v. United States,* 16 Wall. 147. The consequences of

Iowa's arguments are listed on pages 35 through 43 of Plaintiff's Reply Brief before the Special Master.

Because Iowa agreed to recognize titles in the Missouri River valley, this is not a case where Iowa is entitled to have all matters litigated in her courts as if she had no contractual commitment, and the filing of such a suit and the burdens consequent thereto constitutes not only a violation of the Compact but also a deprivation of the landowner's property without due process of law. In *St. Germain Irrigating Co. v. Hawthorn Ditch Co.*, 32 S. D. 260, 143 N. W. 124, 127 (S. D., 1913), the South Dakota Supreme Court considered a statute providing that when a suit was instituted to determine water rights, the State Engineer must make a complete hydrographic survey of the stream system, the cost of which would be apportioned among the parties taking water from the stream, and the Court held that this statute deprived the riparian owner or lawful appropriator who had used no more water than he was entitled to of his property by imposing burdensome costs and expenses upon him. The Court said:

> "It is also contended that section 16 is void as tending to deprive individuals of property rights and property, by way of costs and expenses, without due process of law. We are also of the opinion that this contention is well taken. This section among other things provides that, when a suit to determine water rights has been filed, the court shall by order direct the State Engineer to make a complete hydrographic survey of said stream system, and that the costs and expenses thereof be apportioned pro rata among all the parties taking waters from said stream in proportion to the amount of water allotted

to each. It is a matter of common knowledge that there are many streams in this state, including the stream in question, where it would take many thousands of dollars to make such a survey. A riparian or other lawful appropriator lawfully using no more of the waters of said stream than justly entitled to could not be required without his consent to pay any portion of such expense without being deprived of his property without due process of law. Simply the filing of such a suit is not sufficient authority to so deprive him of his property. Such a procedure could only result in a fat benefit to some civil engineer."

Nebraska submits that simply the filing of these unjust lawsuits deprives the riparian owner of his property in violation of Iowa's solemn agreement in the Compact that such titles would be recognized as good by Iowa.

CONCLUSION

Nebraska is deeply appreciative of the thought and effort devoted by the Special Master to the Report, and Nebraska is generally in agreement with his findings of fact. Nebraska's objections to the Report primarily go to the extent and type of relief recommended.

If the Iowa-Nebraska Boundary Compact of 1943 is to have any meaning, and if there is to be any stability of order and certainty of land titles along the Iowa-Nebraska Boundary, Nebraska submits that not only must Iowa be restrained from further prosecution of *Iowa v. Babbitt* and *Iowa v. Schemmel* and such similar actions, but also principles should be stated by this Court that the Iowa-Nebraska Boundary Compact of 1943 supersedes Iowa's common law and requires that Iowa recognize

private land titles to islands and beds in and along the Missouri River and riparian rights without regard to where the boundary was located prior to 1943 and uneffected by the new jurisdictional line.

Nebraska respectfully requests the additional relief described in her exceptions to the Report of Special Master.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 20, 1971, I served a copy of the foregoing Exceptions of the State of Nebraska to the Report of Special Master and Brief in Support Thereof by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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such being their post office addresses, and that all parties required to be served have been served.

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