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—

REPLY BRIEF OF PLAINTIFF, STATE OF NEBRASKA, TO IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

CASES CITED

CASES CITED—Continued

CASES CITED—Continued

CONSTITUTION CITED

STATUTE CITED

COMPACT CITED

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INTRODUCTORY STATEMENT

Plaintiff does not accept Defendant's statement of facts, interpretation of the cited cases, or analysis of the evidence by Iowa in her EXCEPTIONS TO SPECIAL MASTER'S REPORT. It would extend this Reply Brief unduly to attempt to comment upon every point. Lack of comment herein should not be construed to mean agreement or approval by Nebraska.

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SUMMARY OF ARGUMENT

Nebraska contends that the Iowa-Nebraska Boundary Compact of 1943 was adopted as a compromise between the two states in an attempt to settle and lay to rest all

of the problems which existed along the Iowa-Nebraska Boundary insofar as the states' interests were concerned. This Compact should be liberally construed so as to give meaningful effect to all of its provisions. The states, rather than determining their existing rights in and to the lands along the Missouri River by judicial proceedings, instead entered into a Compact to compromise and adjust these rights. They did so recognizing all of the uncertainty and confusion which existed with regard to both the establishment of land titles and location of the boundary along the 190 mile border between Nebraska and Iowa. Specific affirmative provisions were placed in the Compact to provide for the recognition of private titles by the states in Section 3, and limitations were placed upon the conduct of the states in Section 4. The Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated.

The Compact superseded the prior law and now governs not only the location of the boundary, but the obligations of the states to recognize private titles to lands along the Missouri River. If the language and purpose of the Compact is to be effectuated, Nebraska submits that a determination is necessary that Iowa cannot make claims of "title" to the bed and abandoned beds of the Missouri River, or to lands along the Missouri River, under her so-called common law. Nebraska also contends that although the Compact changed the jurisdictional line between the states to a fixed line, private property boundaries remained as before. 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. Claims to lands between private individuals resulting from movements of the Missouri River following the Compact should not be limited or abridged by the state line when the river moves from Nebraska into Iowa, and the Nebraska riparian owner should not be deprived by the Compact of his title to the bed of the Missouri River and his right to accretions to that bed and islands arising in that bed. Iowa must recognize all claims of titles good under the law of Nebraska and should not be able to invoke any common law doctrines which might have been in effect prior to the Compact. The Compact changed Iowa's common law and 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.

Iowa's contentions in her Exceptions are all directed either toward the prevention of a determination of the meaning and effect of the Compact by anyone other than her own officials or the creation again of all of the problems which existed in connection with the determination of boundaries along the Missouri River in 1943 but with solutions determined by Iowa's rules in disregard of the provisions of the Compact. Iowa would apply only Sections 1 and 2 of the Compact to establish the boundary and then necessarily rely upon presumptions and the present application of a common-law doctrine that Iowa "owns" the beds and abandoned beds of the Missouri

River which certain employees or officials of the State of Iowa may selectively choose. Iowa would now require landowners to establish the location of the Iowa-Nebraska boundary prior to the adoption of the Compact in 1943. This is exactly what the Compact was intended to avoid. Iowa has ignored the factual history leading up to the Compact and the conduct of the states at the time of and following the adoption of the Compact. She would put the entire burden upon the landowners of proving the location of a boundary which, because of past violent fluctuations of the Missouri River, she has admitted was "virtually impossible to describe".

She has also recognized that the 1943 compromise was necessary to re-define the location of the state's boundary because the new channel did not always follow the old river bed. Yet, Iowa now takes the position that there is a presumption that the boundary was in the Missouri River in 1943, and Iowa can now rely upon that presumption to establish that claims of titles good under the law of Nebraska at the time of the Compact must not be recognized by the State of Iowa. This is completely inconsistent with the Compact.

Iowa further takes the position that the statutes of limitation do not run against the sovereign. The result of this is that the passage of time has worked only to Iowa's benefit, and title and boundary problems which were completely settled as between private individuals may be raised by the State of Iowa at any time. Only Iowa benefits from the loss or destruction of records, death of witnesses and the passage of time. Iowa has

used and is using these arguments and the presumptions to enable her to acquire lands without the payment of compensation in violation of the Compact.

Many of Iowa's Exceptions are directed at the facts of formation of the Nottleman Island and Schemmel Island areas. Plaintiff in this Reply Brief has referred to several discrepancies in Iowa's categorization of the evidence and submits that the Master's findings concerning formation of those two areas in Nebraska, and the Nebraska and Iowa recognition of that fact, are amply supported by the evidence. However, Nebraska agrees with the Master that this burden of determining the location of the pre-Compact boundary is not necessary because the states avoided such a requirement by the Compact and Iowa agreed to recognize the titles to those areas. However, the extent of the evidence indicates the great burden and expense placed upon any landowner in having to establish the prior boundary and further emphasizes the fact that it is unjust and unfair to require such a determination under the Compact.

Iowa's interpretation results in the Compact having settled nothing except to create a vehicle for the establishment by Iowa of claims to title to lands, twenty years or more following the Compact. It would allow the discretionary application of such claims determined by individuals exercising judgment decisions inconsistently along the entire boundary.

Iowa argues that the Court should not decide this case because it lacks jurisdiction; her officials are not

bound by the Compact except they can utilize the boundary line established by it to assert jurisdiction; because Iowa has jurisdiction she now has "title"; and if anyone is to disprove Iowa's title he must establish the boundary between the states as it existed prior to the Compact, something which the two states attempted to avoid in 1943 as being practically impossible. The landowner is faced with impediments that Iowa is a sovereign and is immune from any statutes of limitation, and that there is a presumption that the Missouri River was the boundary in 1943, even though the Corps of Engineers may have placed the river entirely in Nebraska at that point by the digging of a canal in Nebraska prior to the Compact. Nebraska submits that the Compact could not possibly result in such injustice. The issues which Iowa is attempting to interject today were settled 28 years ago when the states agreed to adopt the Iowa-Nebraska Boundary Compact of 1943.

The Compact must be read to settle and lay to rest all of these problems, and Iowa should be restrained and enjoined from questioning or attacking titles to lands along the Missouri River. Any other determination leads to oppression, unfairness, injustice and absurd consequences; and as a practical matter, Iowa's position results in a government of men and not of laws along the Missouri River.

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REPLY TO EXCEPTION NO. I OF THE STATE OF IOWA

Iowa has again taken exception to the jurisdiction of this Court in its Exception No. I. When this case was first filed in July of 1964, Iowa at that time objected to the jurisdiction of this Court and the matter was briefed and argued on January 25, 1965. On February 1, 1965 the Court granted leave to file the bill of complaint and entered an order appointing a Special Master (379 U. S. 996). Nebraska certainly admits that the Court may inquire into its jurisdiction at any time, but contends that jurisdiction is clear in this case.

Iowa has stated on page 6 of her Exceptions that: "We find no specific findings of fact, rulings or recommendations by the Special Master relative to the aforesaid contentions (relating to jurisdiction), but it inheres in the Report that the Special Master recommends that the Court exercise its original jurisdiction in the case." Iowa has apparently overlooked the Master's statement on page 200 of his Report that ". . . the Supreme Court has jurisdiction to decide these issues: . . ." The Master has made it clear throughout the Report that Iowa is violating the Iowa-Nebraska Boundary Compact of 1943. Jurisdiction also inheres in the Special Master's findings that Iowa violated the Iowa-Nebraska Boundary Compact of 1943 by claiming ownership of Nottleman and Schemmel Islands (SMR 1), and this is so even under Iowa's theory that the issue is concerning where the boundary line between the two states was immediately prior to the effective date of the Boundary Compact (SMR 111). These statements, together with the Master's statement

at page 200, that "the Supreme Court has jurisdiction" could hardly be clearer.

The Iowa-Nebraska Boundary Compact of 1943 was entered into by the States of Iowa and Nebraska with the consent of the Congress of the United States under the authority of Article I, Section 10 of the Constitution of the United States which provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."

Article III, Sec. 2 of the Constitution of the United States provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."

As set forth in Section 1251, Title 28, U. S. C. A. (June 25, 1948), c. 646, 62 Stat. 927, Par. (a) (1):

> "(a) The Supreme Court shall have original and exclusive jurisdiction of '(1) all controversies between two or more states;' "

Mr. Justice Frankfurter described the nature and effect of a Compact in *West Virginia ex rel. Dyer v. Sims*, 341 U. S. 22 at 28, in the following language:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement

> solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies (*Hinderlider v. La Plata Co.*, 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

This Court has repeatedly accepted jurisdiction in matters involving disputes as to the location of the boundary between two states and the matter is so well settled that the jurisdictional question, if one can be said to exist, is seldom discussed in the Court's opinions. *Nebraska v. Iowa,* 143 U. S. 359, Decree at 145 U. S. 519; *Indiana v. Kentucky,* 136 U. S. 479; *Arkansas v. Tennessee,* 310 U. S. 563; *Michigan v. Wisconsin,* 270 U. S. 295; *Arkansas v. Tennessee,* 397 U. S. 88, Decree at 399 U. S. 219.

This Court has also recognized that the litigious solution is sometimes awkward and unsatisfactory and has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided by the Com-

pact clause. In *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 105-106, Mr. Justice Brandeis commented as follows:

> ". . . resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington v. Oregon,* 214 U. S. 205, 217, 218; *Minnesota v. Wisconsin,* 252 U. S. 273, 283. In *New York v. New Jersey,* 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

The states attempted to settle their boundary problems and differences in 1943 as has been discussed in Plaintiff's Brief in support of her exceptions. Although for many years the Compact apparently seemed to have accomplished its purpose, it now appears that it did not settle the dispute between Iowa and Nebraska as indicated by the evidence submitted in this case. Should the Court refuse to take jurisdiction now to consider the controversy which has developed over the meaning and enforcement of the Compact, it would certainly tend to discourage states from entering into agreements which have previously been encouraged by this Court. This was recognized at an early date in our history by Mr. Justice Baldwin in the case of *Rhode Island v. Massachu-*

setts, 12 Pet. 657, in which the Supreme Court took jurisdiction in a controversy over the boundary between Rhode Island and Massachusetts. The case included a contention that a line between the states had been previously agreed upon and the question of the validity and efficacy of prior agreements was brought into issue. Massachusetts objected to the jurisdiction of the Supreme Court. Mr. Justice Baldwin pointed out that, at the time of the adoption of the Constitution, there were existing controversies between eleven states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the Colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation'; no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being

the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger,* 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s.p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims v. Irvine,* 3 Dall. 425-54; and in *Marlatt v. Silk,* 11 Pet. 2, 18; *Burton v. Williams,* 3 Wheat. 529-33, &c.

"In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress, for its consent, its giving its consent, and the action of this court upon them; it is most manifest, that by universal consent and action, the words 'agreement' and 'compact', are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined, that compacts of boundary were excluded, because not expressly named; on the contrary they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes; especially, the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts; not to prevent the states from settling their own boundaries, so far as merely affected their

relations to each other; but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.

"Every reason which has led to this construction, applies with equal force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it

is known, that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

"There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded, that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement."

This Court also accepted jurisdiction of *Georgia v. South Carolina,* 257 U. S. 516, involving an interpretation of the Beaufort Convention establishing the boundary between those two states; *Massachusetts v. New York,* 271 U. S. 65, involving the Treaty of Hartford; and of *Kentucky v. Indiana,* 281 U. S. 163, involving interpretation of a contract between those states to build a bridge.

As the settlement of complex boundary problems by compact has been encouraged by the Court, it would only seem logical that any disagreement between the states concerning the meaning of such compacts should be decided by this Court in an action between the states as contracting parties.

The length of the Missouri River along the Iowa-Nebraska boundary in 1941 was approximately 190 miles (R. Vol. XII, p. 1728). In 1890 this mileage had been

approximately 210 miles. Prior to 1943, the uncertain status of the boundary and questions of title to lands along the river was applicable to almost the entire length of the boundary. Had the states desired to locate the actual boundary in 1943 it would have obviously been extremely time consuming and expensive. This is particularly so not only in light of the many natural avulsions which had occurred along the Missouri River, but also because of the work of the United States Army Corps of Engineers in physically moving the river into a stabilized channel by the digging of numerous canals and the construction of dikes and revetments. Not only did the Corps cut through bank land in stabilizing the channel, but it also moved the river around islands and bars without washing them away.

As the Master mentioned, much of the evidence in this case concerned the factual history of two areas along the Missouri River. The Nottleman Island area extends approximately three miles along the river and the Schemmel Island area extends approximately two miles. This action was filed in July of 1964, and tried before the Special Master in 1969 so there were approximately five years following the filing of the case during which the parties engaged in extensive discovery and investigatory proceedings primarily involving just five miles of boundary. This is in addition to the independent investigation made prior to the filing of suit. The voluminous files, exhibits, depositions, interrogatories and other discovery proceedings, and the size of the record in this case, bear witness to the time, effort and expense necessary to making any such determination of the former boundary. Had

the states decided to make such a determination for its entire 190 mile length, they might have done so in 1943 but obviously the Compact was intended to avoid this result (SMR 65; see also Summary of Testimony of Victor M. Petersen in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 411-417; R. Vol. XIV, pp. 1872-1880; and Exhibit P-1057, R. Vol. XIV, p. 1879).

If the boundary problems were serious enough to be the subject of a compact in the first place, certainly the states have an interest in having the Compact complied with sufficient to require the exercise of jurisdiction by this Court. Iowa's statement that:

> "This case is a 'disputed boundary' case only in the sense that the location of the state boundary which existed prior to 1943 is in dispute" (Iowa's Exceptions, p. 8),

requires the determination of facts which the states attempted to avoid by the Compact. If Iowa's approach is correct, then the Compact becomes meaningless and the problems which existed in 1943 and were considered almost impossible of solution at that time, have just been postponed for an additional twenty or thirty years to such a time as Iowa can acquire the land by relying upon presumptions only, because the facts have become even more clouded and obscured by the passage of time.

Iowa has also made the statement on page 8 of her Exceptions that "Iowa does not seek to exercise sovereignty beyond her own borders or into Nebraska". However, this statement is not in accord with the facts. The

evidence clearly showed, and the Master found, that Iowa's survey of Nottleman Island extended approximately fifty feet into Nebraska (SMR 140) and Iowa's own expert witness, Dr. Lubsen, admitted that Iowa's survey was in error (R. Vol. XV, pp. 2199-2200, 2219-2220; see also R. Vol. IV, p. 451).

Iowa, in the aforementioned statement, also has conveniently avoided the fact that Iowa's descriptions of the boundaries of many of the areas which Iowa is claiming extend into Nebraska. Pursuant to agreement with Judge Pope, while he was Special Master, Iowa agreed to file a list of areas which she is claiming and Iowa furnished maps with these areas outlined (Exhibit P-2651, R. Vol. XII, p. 1656). In addition to Nottleman Island, her maps describing the areas claimed showed that 14 of the 32 areas extended across the Compact line into Nebraska (R. Vol. XII; Ex. P-2653, p. 1663; Ex. P-2654, p. 1674; Ex. P-2655, p. 1696; Ex. P-2663, p. 1712; Ex. P-2664, pp. 1714, 1716; Ex. P-2665, p. 1718; Ex. P-2666, p. 1721; Ex. P-2667, p. 1723). Although Iowa then attempted to justify these descriptions as "merely sketches" (R. Vol. XIII, p. 1813), there is no other way that Nebraska or anyone else is able to determine just what Iowa is claiming until Iowa has made and described her claim. Iowa should be judged not by what she *says* but by what she *does*.

The evidence clearly established serious discrepancies in the manner in which Iowa was surveying the boundary. Iowa's surveyor, Mr. Hart, used different and inconsistent methods in locating the Compact line, sometimes using straight lines of 500 foot chords to establish

his curve when the lines on the bank were also 500 foot chords and at other times adjusting his lines so that the length was different from the length of the chords along the bank. Obviously they had to be of a different length since it is impossible to have two parallel curves formed by straight chords in which the chords are of the same length (R. Vol. XV, p. 2217).

All of Iowa's claims extend to Iowa's concept of where the Compact line is, but the evidence shows that Iowa's methods of locating this Compact line on the ground have been improper, inconsistent and arbitrary. The Master also found that Iowa's traverses along the eastern side of both Nottleman and Schemmel Islands had no basis in fact. They followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The Nottleman Island traverse went through water, low swamp, and brush and across flat land (SMR 140). The Schemmel Island traverse went through an alfalfa field, across flat open ground, crossing a high bank at right angles, and across land with no depression or banks (SMR 163). The Master stated that these were apparently arbitrary determinations by Iowa's surveyor without justification in fact (SMR 163). He then added:

> "It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and arbitrary approach of her officials" (SMR 140 and 163).

Iowa's repeated statements that she is not claiming land to the west of the Compact line and that all of the land which she is claiming is "in Iowa" must be tested by the

facts and the evidence rather than by what Iowa says. Iowa's utilization of the purported Compact line as the western boundary of the areas she claims further emphasizes that she is relying upon Sections 1 and 2 of the Compact to establish her jurisdiction and her claim of title. But for the Compact, her claims and the problems of establishing her jurisdiction would have to be different.

Iowa has also suggested at page 7 of her Exceptions that the case must be of serious magnitude and fully and clearly proved. Nebraska submits that Iowa's conduct has jeopardized land titles in the entire Missouri River valley along the 190 mile boundary. The Iowa Conservation Commission published Part 1 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88)under date of January, 1961 and the case of *Tyson v. Iowa,* 283 F. 2d 802, was decided by the United States Court of Appeals, 8th Circuit on November 16, 1960. Immediately thereafter, Nebraska's legislature, which at that time met biennially, passed Legislative Resolution 38 (Ex. P-1006, R. Vol. XIV, p. 1944) on June 13, 1961 which requested the Board of Educational Lands and Funds to direct the State Surveyor ". . . to make or cause to be made such surveys as may be necessary or helpful in determining the boundary of this state where the same is formed by the Missouri River, or may be necessary or helpful in protecting the interests of this state or the citizens thereof from the direct or indirect claims of other states to lands along the Missouri River; and that such board undertake an aggressive program to obtain and file in its offices such maps, charts, surveys, records and other documents and materials as may be

essential or helpful in determining the boundary or titles to lands along such river, all within the limits of amounts appropriated therefore".

Then at its next session, the Legislature of the State of Nebraska passed Legislative Resolution 47 on May 28, 1963 (Ex. "Q" attached to the Complaint; Ex. P-1005, R. Vol. XIII, p. 1854) directing the Attorney General to examine into Iowa's actions and initiate any necessary original actions in the Supreme Court of the United States to insure compliance by Iowa officials with the 1943 Boundary Compact.

The evidence has also shown that both states have been concerned with the present problems relating to the boundary. Nebraska authorized boundary commissions in 1947 (Ex. P-2234, R. Vol. XIII, pp. 1854-1855); 1957 (Ex. P-2223, R. Vol. XIII, p. 1855 and Ex. P-2235, R. Vol. XIII, p. 1855) and 1959 (Ex. P-2340 and P-2233, R. Vol. XIII, p. 1855). (See pages 43 to 46 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER). In 1957 the Iowa Legislature created a special committee to confer with the Legislature of the State of Nebraska to make a study concerning the present boundary (Ex. P-2293, R. Vol. XIII, p. 1850; Ex. P-2294, R. Vol. XIII, p. 1849; Ex. P-2295, R. Vol. XIII, p. 1850 and Ex. P-2298, R. Vol. XIII, p. 1849). This act recognized that the Missouri River had been altered and in some instances the entire river "now flows through the State of Nebraska and Iowans do not have access to it except by going through parts of Nebraska".

A report of the Iowa Boundary Commission appears in the 1959 Journal of the House (Ex. P-2297, R. Vol.

XIII, p. 1850) and Journal of the Senate of the State of Iowa (Ex. P-2296, R. Vol. XIII, p. 1850) which report at that time stated ". . . at the present time approximately twenty-six (26) miles of the Missouri River lies west of the established Iowa-Nebraska boundary and wholly within the State of Nebraska whereas approximately thirteen (13) miles of the Missouri River lies wholly east of the Iowa-Nebraska boundary line and is within the boundaries of the State of Iowa, which involves several thousand acres of land". The report also recognized that the boundary as it now exists ". . . no longer, in many instances, follows the middle of the channel of the Missouri River but is wholly an intangible line which may be several hundred feet from the river, thus making it most difficult to ascertain the location of the line, without a survey, which causes difficulty in determining whether the Iowa or Nebraska laws apply in regard to law enforcement, title to real estate and other problems which may arise as to which state has jurisdiction . . ." (Ex. P-2297, R. Vol. XIII, p. 1850). (See also pages 46-56 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER discussing the evidence concerning the Iowa legislative and governmental history since the Compact).

Bills were proposed in the 1961 (Ex. P-2304, P-2299, R. Vol. XIII, pp. 1850-1851) and 1963 Iowa Legislatures to resolve the dispute between Iowa and Nebraska in regard to the boundary (Ex. P-2306, R. Vol. XIII, p. 1851). A REPORT OF SUBCOMMITTEE OF JUDICIARY 1 appears as a part of Ex. P-2306 which includes the statement:

> ". . . Ownership of land definitely established prior to changing of the channel would not be affected by changing state statutes, and the Conservation Commission could only acquire title to such land by purchase or condemnation. The right of the Conservation Commission of Iowa to develop such areas which were swamp or waste lands prior to the straightening and stabilizing of the Missouri river is indeed questionable because of the legal questions pointed out above. At least no one has pointed out to the sub-committee that this question has been legally determined . . ." (This report is extensively quoted on pages 51 to 53 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

Some of the statements in the report would seem to cast doubt upon the conduct of the Iowa State Conservation Commission in now asserting title to lands which had been established in private owners prior to the Compact.

The Iowa Governor's Advisory Committee sent a report to the Governor dated December 1, 1964 (Ex. P-2319, R. Vol. XIII, p. 1851) making certain recommendations including:

> "That the State of Iowa and the State of Nebraska shall file a friendly suit in the U. S. Supreme Court to establish guide lines to determine title of lands transferred in a boundary compact with reference to individual land owners and claims upon lands by states, and such other questions as the attorneys may desire". (This report is quoted extensively on pages 54 to 56, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

The Governor in his Address to the 1965 Iowa Legislature urged the Assembly ". . . to ratify the settlement

of the Iowa-Nebraska Boundary dispute recommended by the boundary committees of both states, in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development". (Ex. P-2319, R. Vol. XIII, p. 1850). He added:

> "The settlement of the Iowa-Nebraska Boundary dispute, recommended elsewhere in this message, will open up a vast potential area for wildlife and outdoor recreation in western Iowa" (Ex. P-2319, R. Vol. XIII, p. 1851).

In light of these statements and activities by the Legislatures of the two states, it is difficult to understand Iowa's position in her Exceptions that this case is not of serious magnitude. If the present problems are ever to be solved by a new compact, a determination must first be made of what the existing situation actually is and what effect the provisions of the Iowa-Nebraska Boundary Compact of 1943 had not only upon the boundary itself but also upon the lands adjacent to that new boundary.

There is in evidence no specific legislative sanction of Iowa's legal position in the defense of this case and from the statements of Iowa's Governor and the aforementioned activity of her Legislature, it appears that there may be some diversity of opinion within Iowa's own governmental branches. It is difficult to understand how Iowa can presently take the position that the Special Master is wrong when he stated in his Report that "both Nebraska and Iowa need a construction and an interpretation of the (Compact)" (Iowa's Exceptions, p. 10). There

is ample evidence supporting that statement and the Special Master's findings 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 state's boundary problems are ever to be solved" (SMR 78).

It is submitted that the cases concerning jurisdiction cited by Iowa are not in point. The case of *Hawaii v. Standard Oil Company,* 301 F. Supp. 982, reversed at 431 F. 2d 1282 (cert. granted 401 U. S. 936), did not involve a Compact situation. Even the note in 39 Harvard Law Review 1085 cited by Iowa concludes with the statement, "On the whole, then, the method of settling interstate disputes by original suit in the Supreme Court must be regarded as subordinate to the other method provided in the Constitution, that of compacts".

Iowa has attempted to engage in another battle of words by contending that Nebraska did not "clearly prove" the facts, but the Special Master's findings that Iowa violated the Compact are certainly clear and convincing. A violation is a violation regardless of the descriptive words which might be added. The evidence is overwhelmingly in support of Nebraska's charges of violation of the Compact by the State of Iowa.

Iowa has also suggested that Nebraska should have established the number of citizens adversely affected by Iowa's claiming to own the thirty tracts of land along the boundary (Iowa's Exceptions, p. 10), but Nebraska would point out that Iowa's claims and conduct cloud the titles to all of the lands along the boundary. In fact, Iowa was asked by interrogatory:

> "Describe generally the location of all abandoned channels of the Missouri River presently located in Iowa to which the State of Iowa does not claim ownership".

The answer was:

> "We believe that the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the channel of the Missouri River, hence, the entire flood plain which is not presently occupied by the river may be termed abandoned channel, and this encompasses thousands of acres. There is no practical means of describing even generally the vast portion of the flood plain which Iowa does not claim to own" (R. Vol. XI, p. 1603).

If Iowa is claiming abandoned channels, but admits that the entire area has been at some time occupied by the river, then certainly her claims or the possibility that she may assert such claims at some indefinite time in the future, cloud the titles of all of these lands.

REPLY TO EXCEPTION NO. II OF THE STATE OF IOWA

The Special Master determined that the Iowa-Nebraska Boundary Compact of 1943 required Iowa to recognize that:

> ". . . under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, 'good in Nebraska', need not prove that his land was formed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact" (SMR 164, 173).

Iowa has taken exception to this proposition (Iowa's Exceptions, p. 13).

Iowa's position totally ignores the factual situation which existed in 1943 with regard to which the parties contracted. Iowa has not taken exception to the facts which the Master found concerning the pre-Compact history and the situation along the boundary at the time that the Compact was negotiated (SMR 62-69). The numbered findings 1 through 19 at pages 63-69 of the Master's Report have been referred to in Plaintiff's Brief in support of her Exceptions. These facts make it abundantly clear that the states recognized the boundary was not located in the Missouri River in many places and that the boundary line in those places had not been determined and was almost impossible of determination. They intended to settle all of their problems arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the river. Iowa was making no claim to abandoned river beds or islands under any common law claim of title to beds and abandoned beds of the Missouri River. There were abandoned Missouri River channels and cut-off lakes all along the Missouri River valley and Iowa was making no claim to these abandoned channels. There was nothing of record in the Iowa governmental agencies indicating claims to these areas in spite of requirements of the Iowa Code which would require the state to keep such records. Both states agreed that there was no record of lands actually transferred from one state to the other by the Compact and the states did not provide for the identification of such lands. The Iowa Conservation Commission

did not express any interest in these lands until the latter part of the 1950's. At the time of the Compact, and for more than a decade thereafter, Iowa was paying no attention to the islands and abandoned channels of the Missouri River. The Compact treated all areas generally with recognition to private titles to be given general application. The states really didn't care where the boundary was located but attempted to make a settlement which would lay to rest all of their problems. At that time, there were areas to the left bank side of the Compact line which were being taxed in Nebraska and the local officials of each state and individuals in the vicinity recognized that such areas were originally in Nebraska and were transferred by the Compact. Also, under Nebraska law, a person could obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Consequently, there may have been titles to lands east of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had good title under the Nebraska law of adverse possession.

Another important factor brought out by the evidence is that establishment of titles in the Missouri River valley, all of which Iowa has admitted has been abandoned channel at some time in the past, are subject of an entirely different and more complicated type of evidence than areas which are not affected by the river. These titles do not all flow from a patent but may start in some other manner. They could be described as accretions to any of several differently numbered sections, half sections, or quarter sections as the river moved. They also

could be described by the re-establishment of the original government sections, whether or not this was technically proper, or they might be described as tax lots.

There is in evidence a complete set of maps comparing the location of the designed channel of the Missouri River as referred to in the 1943 Boundary Compact with the original Nebraska government survey (Ex. P-2173, R. Vol. XIII, p. 1803). This exhibit shows the 1943 designed channel in many places several miles from where the river was located when Nebraska was admitted into the Union. Although this exhibit merely shows the difference in the location of the Missouri River between those two dates, it shows that the river moved several miles laterally in many places along its length. This exhibit does not show all of the movements of the river but only the net difference between the two dates, but even this is so substantial as to make the difficult title problems self evident. There is also in evidence a complete set of aerial photographs of the entire length of the Iowa-Nebraska boundary which shows numerous abandoned oxbow lakes and cut-off channels (R. Ex. P-2181, R. Vol. XIII, p. 1801). These movements of the river and the complex title and boundary problems were major reasons establishing the need for the Iowa-Nebraska Boundary Compact of 1943.

The Compact was not adopted in a vacuum but was making reference to an admittedly indefinite and confusing situation. The titles referred to were those in the Missouri River valley.

The Special Master properly took all of these factors into consideration in determining the meaning of the

Compact. In the construction of agreements or compacts, the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the Compact is relevant in determining the proper construction and effect of the Compact as applicable to titles along the Missouri River. In the case of *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94, the Court had before it the construction of a contract for the taking of water from a canal and Mr. Justice Bradley stated at pages 99-101:

> "The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. * * *
>
> "* * * And in making this inquiry we have a right to examine into the state of things existing at the time and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject matter of the agreement."

In determining the subject matter of the Boundary Compact and the titles which should be recognized, it is significant that the Compact was the result of years and years of controversy and uncertainty and a recognition of many cut-offs by the Missouri River, both natural and

man-made, leaving land of each state isolated on the other side. In referring to the construction of an Act of Congress, Mr. Justice Davis stated in *U. S. v. Union Pacific Railroad Co.,* 91 U. S. 72 at 79:

> ". . . The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 3 How. 24; *Preston v. Browder,* 1 Wheat. 120."

In *Sullivan v. Kidd,* 254 U. S. 433, a case involving the construction of a treaty between Great Britain and the United States relating to the tenure and disposition of real and personal property, the Court through Mr. Justice Day stated at page 439:

> "Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, 249."

In *Nielsen v. Johnson,* 279 U. S. 47, a Danish citizen died residing in Iowa, leaving as his sole heir his mother, a resident and citizen of Denmark. Iowa attempted to assess an inheritance tax against the estate and the administrator contended that the tax was void as in conflict with the treaty between the United States and Denmark. The Iowa Supreme Court upheld the statute fixing

the tax as not in conflict with the treaty. Mr. Justice Stone, in considering Iowa's contentions, stated at pages 51-52:

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro,* 278 U. S. 123; *Geofroy v. Riggs,* 133 U. S. 258, 271; *In re Ross,* 140 U. S. 453, 475; *Tucker v. Alexandroff,* 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle,* 265 U. S. 332; *Tucker v. Alexandroff, supra; Geofroy v. Riggs, supra,* and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton,* 3 Dall. 199; *Jordan v. Tashiro, supra;* cf. *Cheung Sum Shee v. Nagle,* 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re Ross, supra,* at 467; *United States v. Texas,* 162 U. S. 1, 23; *Kinkead v. United States,* 150 U. S. 483, 486; *Terrace v. Thompson,* 263 U. S. 197, 223.
>
> "The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its

> purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this Court in *Peterson v. Iowa, supra,* p. 174; and also to extend like protection to alien heirs of the noncitizen."

The Court, interpreting the language with "that liberality demanded for treaty provisions" reversed the Iowa Supreme Court's decision. See also *Factor v. Laubenheimer,* 290 U. S. 276 and *Jordan v. Tashiro,* 278 U. S. 123.

Nebraska contends that the Compact should be liberally construed to protect the rights of the individuals owning or claiming lands along the Missouri River because Sections 3 and 4 were obviously inserted for their benefit.

The Compact should not be restrictively construed to enlarge the rights of the states at the expense of the landowners who were not personally parties to the Compact.

Iowa would attempt to avoid any contractual commitments imposed upon her by the Compact by implying that the Compact was limited to the effect of being legislation (See p. 17, Iowa's Exceptions). However, the Courts have always recognized a distinction between reciprocal legislation of states and the contractual commitment imposed by a Compact. This distinction was mentioned by Mr. Chief Justice Hughes in the case of *Massachusetts v. Missouri,* 308 U. S. 1 at 16-17 where the Court stated:

> "But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. 1, § 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legislation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essential character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice."

Iowa should not be able to relegate the terms of the Compact to the status of mere state legislation. To do so would be to disregard the basic principles of Compact and Constitutional law which have existed in this nation since its founding.

In determining the meaning of such compacts and agreements, it is proper to look at the practical construction placed upon them by the parties. Want of assertion of power by those who presumably would be alert to exercise it is significant in determining whether such power was actually conferred. The State of Iowa delayed for almost twenty years in laying claim to the Schemmel and Babbitt lands (Nottleman Island) and in adopting her program of land acquisition along the Missouri River. An official of the Iowa State Conservation Commission as far back as 1951 stated by letter that Nottleman Island was not state property but belonged to some of the individ-

uals presently claiming it. The Iowa Attorney General's office had notice of these claims of the landowners both in 1947 and again in 1951.

The local governmental agencies recognized these titles and the lands were placed on the tax rolls following the Compact and were being taxed in Iowa. The County officials and taxing officials served in offices created by the statutes of the State of Iowa and their procedures are governed by Iowa statute. At the same time, there was nothing of record in any Iowa governmental agency, including those required by statute to keep records of public and state-owned lands, which indicated a claim by the State of Iowa to these lands; and in some specific situations where Iowa had notice that lands constituted former river beds or abandoned river beds, Iowa's officials failed to take any action to establish Iowa's claim. This course of conduct was consistent with an interpretation of the Compact that all titles along the Missouri River were originally intended to be protected and Iowa had no claim to those lands.

In the case of *Pigeon River Improvement, Slide & Boom Co. v. Cox,* 291 U. S. 138, the Court construed the Webster-Ashburton Treaty along the boundary between Minnesota and Canada and in doing so held it appropriate to look to the practical construction which had been placed upon the treaty. In *Choctaw Nation of Indians vs. U. S.,* 318 U. S. 423, the Court considered Indian treaties concerning the allotment of land to the Indians, and Mr. Justice Murphy said at pages 431-432:

> "* * * Of course, treaties are construed more liberally than private agreements, and to ascertain their

meaning we may look beyond the words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor v. Laubenheimer,* 290 U. S. 276, 294-295; *Cook v. United States,* 288 U. S. 102, 112."

The long lapse of time in pressing any claims by the State of Iowa or its Conservation Commission may be significant in determining whether there is any validity to these claims. Mr. Justice Frankfurter, in considering the power of the Federal Trade Commission, stated in *Federal Trade Commission v. Bunte Brothers, Inc.,* 312 U. S. 349 at 351-352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course can not evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315. * * *"

In *Sullivan v. Kidd,* 254 U. S. 433, 442 Mr. Justice Day stated:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."

Nebraska considers it significant that for many years following the Compact, Iowa made no claim to the areas listed in the Missouri River Planning Report with the possible exception of Wilson Island, but the evidence regarding the origination of Iowa's claim to Wilson Island is vague and inconclusive. Iowa did not offer evidence establishing or documenting her utilization of Wilson Island prior to the Planning Report or at the time of the Compact. Except for the discrepancies in her description of areas claimed, Iowa made no claim to any areas west of the Compact boundary either before or after the Compact. She apparently did change her position in 1965 after the filing of this action (R. Vol. XXIV, p. 3574), but the lawyer who had that idea is not with them any more (R. Vol. XXV, p. 3638).

If it is assumed that Iowa's officials were carrying out their duties in administering lands which the state owned, then their failure to claim these lands is certainly consistent with Nebraska's position that Iowa actually had no claim to such areas under the Compact. Statements by Iowa's officials have been referred to in Plaintiff's Exceptions indicating that the Conservation Commission was paying no attention to these lands along the Missouri River. Iowa has attempted to gloss over these facts by citing certain general language from court cases, but the State of Iowa and the Iowa State Conservation Commission officials were not applying any doctrine of state ownership to these specific areas. The Planning Report recognizes that quiet title actions are necessary in almost every area referred to in the Report except those acquired by purchase (Ex. P-2609, R. Vol. I, p. 87-88). The Master's findings that Iowa was not asserting her

ownership claims in 1943 are amply supported by the evidence and by the testimony of Iowa's own officials. Nebraska supports the Master's conclusion that the Compact should be liberally construed so as to leave individuals occupying or claiming river lands secure in their property rights as recognized immediately prior to adoption of the Compact (SMR 88).

Not only did Iowa fail to claim abandoned river channels in the known avulsion of the Flowers Island case, but also as late as 1956 acknowledged that she had no claim of ownership of what was an abandoned channel in that same area in the case of *Kirk v. Wilcox* (R. Vol. XII, p. 1684; Ex. P-2339, R. Vol. XIII, p. 1684; see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363). Iowa also failed or refused to claim abandoned channel of the Missouri River in the Walter Pegg area (see PLAINTIFF'S RESUME' OF EVIDENCE, pp. 389-392). She failed to claim land in the abandoned channel around Nebraska City Island which resulted from a cut-off in the 1880's (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 409-411; Ex. P-2689, R. Vol. XIII, p. 1843), and Iowa even purchased some of the land in this abandoned channel which appeared on some of the early Missouri River Commission maps as "River Bed of 1881" (Ex. P-2689, R. Vol. XIII, p. 1843; Ex. D-1159-ABC, R. Vol. XVII, p. 2537 and testimony of Mr. Jauron, R. Vol. XXV, pp. 3653-3658).

The record also shows that Iowa disclaimed ownership of approximately 5,000 acres of land in Harrison County, Iowa, which had originally formed as an island in the bed of the Missouri River and was originally described

as Kirk Bar (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 363-382). Iowa, through its Attorney General and Assistant Attorney General, entered disclaimers to Kirk Bar in 1965 (Ex. P-1755, R. Vol. X, p. 1409) and disclaimed other portions of the area in 1963 (Ex. P-1761, R. Vol. X, p. 1411). This land had not been on the Iowa tax rolls from at least 1949 through December 19, 1967, the date of the deposition of L. C. Myrland, Monona County, Iowa Assessor. Consequently, at the same time that Iowa was claiming the Babbitt and Schemmel areas which she was taxing south of Omaha, she was disclaiming thousands of untaxed acres of former river bed in Harrison County, Iowa. Certainly the law, and the application of the law, should be the same whether it be in Fremont County or Harrison County, Iowa and it should be administered in the same manner all along the boundary.

In 1932, prior to the Compact, Iowa had purchased land in the abandoned river bed of Lake Manawa which is a lake immediately south of Council Bluffs, Iowa (Ex. P-2678, R. Vol. XII, p. 1771; PLAINTIFF'S RESUME', pp. 427-428). This lake formed as the result of a cut-off of the Missouri River which occurred in 1881 constituting another well recognized avulsion. However, Iowa evidently deemed it necessary in the 1930's to purchase some of that abandoned channel, and she did not at that time attempt to obtain it without payment of compensation under any common law doctrines.

In addition, Iowa's inconsistent application of its so-called "law" is illustrated by the testimony of Mr. Lloyd P. Bailey, Superintendant of Land Acquisition

for the Iowa State Conservation Commission. Mr. Bailey was referred to Ex. P-2667 (R. Vol. XII, p. 1723) a Corps of Engineer map which showed the California Bend area, and identified an area which looked like an old river bed considerably to the east of the area in California Bend which Iowa is presently claiming. Although he testified his department now claims former abandoned river channels more than just a year or two old if the evidence is still available, they weren't making any claim to it. He stated:

> "They possibly would have a claim to it, sir, but they aren't claiming it." (R. Vol. XIX, p. 2712).

The Report of the Missouri River Commission for 1890 contains a series of maps under the title MISSOURI RIVER COMMISSION LOCATION OF BORINGS IN THE VICINITY OF BLAIR, NEB., surveyed 1883 by Geo. S. Morison and one of these maps shows the ox-bow area and written in this area are the words "CUT-OFF 1881". (Ex. P-2686, R. Vol. XIII, p. 1843). This cut-off appears as a water and marsh area on the 1947 Corps of Engineer tri-color map (Ex. P-2667, R. Vol. XII, p. 1723) and is located approximately two or three miles east of the present designed channel of the river at various points. This was an easterly bend which cut off area which remained on the Iowa side of the river, but Iowa has made no claim to any abandoned river bed or channel in that 1881 cut-off. In addition, in California Bend, where the Corps of Engineers dredged a canal through Nebraska land prior to the Compact (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 396-405), Iowa failed to claim land in the

abandoned channel resulting from the cut-off dug by the Corps in 1939 (Ex. P-2716, R. Vol. XXVI, p. 3707).

Most of the areas which Iowa eventually claimed were selected by Mr. Jauron, who was given special duty by the Iowa Conservation Commission as Missouri River Coordinator in 1958. His testimony established that personal decisions were made by either himself or individuals in the Attorney General's office concerning whether or not abandoned river beds were ignored or claimed (R. Vol. XXIV, p. 3577). It did make a difference if he found an abandoned river bed whether the river bed was wet or dry, and he didn't believe that he picked out any "dry river beds the year round." (R. Vol. XXIV, p. 3577). He had every reason to believe that at one time the river was in certain areas which were old river ox-bows which were not claimed (R. Vol. XXV, pp. 3599-3600) and Mr. Jauron said the determining factor of the legal department was whether or not they could ever place the river in that location by exhibits (R. Vol. XXV, p. 3600). He testified:

> "Personally, in my mind there's absolutely no doubt that they're old river beds, but to find any exhibits that says they are or any witnesses that says they are, they don't exist." (R. Vol. XXV, p. 3619).

If Mr. Jauron did not suggest an area that Iowa should claim, they did not consider it (Vol. XXIV, p. 3570-3571). If an area was submitted to the Attorney General's office for consideration and the attorney threw the area out, "that was it." (R. Vol. XXV, p. 3642).

From all of this evidence and the testimony of Iowa's Conservation Commission officials, Mr. Schwob and Mr.

Bailey, cited in the Exceptions of the State of Nebraska (Nebraska's Exceptions pp. 4-6) and other references to Iowa's conduct concerning these lands in said Exceptions and Brief, there is ample evidence to support the Master's findings that Iowa was not asserting her ownership claims along the river at the time of the Compact or prior thereto. Obviously, the Iowa State Conservation Commission and Attorney General's office would be in serious trouble with the Iowa citizenry if they actually claimed all of the Missouri River valley along the 190 mile boundary. By carefully selecting areas which she claims, Iowa can acquire them one by one, attacking titles of land owners claiming through Nebraska claims, but disclaiming as against any large Iowa landowners. Nebraska contends that any rule which allows Iowa to selectively pick and choose the areas which she now claims and to disregard others leaves the entire Missouri River valley subject to a rule of men and not of law.

Another incongruous result of Iowa's arguments is illustrated by the situation at Goose Island and Auldon Bar immediately to the south of the Nottleman Island land. The evidence concerning this area is discussed on pages 405 to 409 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. It clearly establishes that there were originally two islands in the Missouri River and the Corps of Engineers dredged a canal through the southern part of Goose Island and through the northern part of the island immediately downstream. The southern part of Goose Island and the northern part of the downstream island presently appear as one island or one land mass described as Auldon Bar

which is "in Iowa" as a result of the Compact. The northern part of Goose Island is in Nebraska and the southern part of the downstream island is also in Nebraska as a result of the Compact. In determining Iowa's claim to Auldon Bar, Mr. Jauron made no attempt to determine where the main channel of the river was prior to the construction by the Corps of Engineers in that area (R. Vol. XXV, p. 3637). This points up the fact that it was the design of the Corps of Engineers determining which side of the river lands would be placed upon and then the adoption of the Compact which have ultimately determined which lands Iowa is claiming. Had the Corps reversed the channel and placed the islands above and below Nottleman Island on the east side of the river and Nottleman Island itself on the west side of the river, there would have been no attack upon Mr. Babbitt's title or that of the other owners of Nottleman Island, but the owners of those islands above and below would have been in jeopardy. The same would be true for the Schemmel land. This is such an unjust result that the position of the State of Iowa can hardly be tenable.

Not only did Iowa fail to make any claim prior to the Compact to abandoned channels to the west of the Missouri River which were ceded to Nebraska by the Compact, but following the Compact Iowa made no claim to these abandoned channels or islands placed to the west of the 1943 designed channel. Even if she had any such claim, a state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and holds such land as a subject and not as a sovereign. See *Georgia v. Chattanooga,* 264 U. S. 472; and

State v. City of Hudson, 231 Minn. 127, 42 N. W. 2d 546. Consequently, Iowa would have lost any rights which she had by her failure to assert claims to those lands to the west. The owners of the northern half of Goose Island and the southern half of the island to the south are free of burdensome claims by the State of Iowa whereas the owners of the portions of those islands which were placed in Iowa are subject to such burdens. This, again, appears to be unjust and unfair.

Iowa's complete disregard of the language of the Compact also becomes apparent when she continues to fall back upon the common law presumptions that the prior river movements have been gradual and imperceptible so as to constitute movements by accretion and not by avulsion. Iowa has again misstated the facts when she states at page 21 that as of July 12, 1943 the Missouri River was flowing in the designed channel along the entire length of the boundary. The testimony and evidence really showed that 2,000 feet of the river were not in the designed channel in 1943 (R. Vol. XII, p. 1658).

The maps upon which the Compact was based were all dated approximately three years prior to the Compact and show the designed channel north of Omaha going through islands, bar, and bank land at various places. In spite of this and in spite of the evidence concerning the fifteen canals dredged by the Corps and recognition of other areas having been cut-off by the Missouri River, Iowa still wants to rely upon the common law presumptions that all of the prior movements of the Missouri River were gradual and imperceptible. This presumption can only work to Iowa's benefit because of the passage of

time, loss of witnesses and destruction of records, if the burden is placed upon a landowner to determine that the river moved in some other manner. The unfairness of this approach is illustrated in the case of *State of Iowa v. Schemmel* where Iowa called only two witnesses, one a surveyor and the other Mr. Huber who also testified before the Special Master and whose testimony will be referred to later (R. Vol. XXIV, pp. 3581-3582). Iowa's counsel, in his opening statement to the District Court of Fremont County, Iowa, stated:

> "We expect the Court will be satisfied that there was no avulsion to cause the state boundary to be any place other than the thalweg in this particular area.
>
> "In the first instance, we are simply going to rely on a presumption concerning avulsions. Perhaps the Court is acquainted with the fact that one claiming an avulsion has the burden of proving; and therefore, we have no proof except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least." (Ex. P-1658, R. Vol. XIII, p. 1864).

Yet, at the same time, Iowa had knowledge that the Corps of Engineers had dug a canal to place the river into the designed channel adjacent to Schemmel Island on the west. There are in evidence the following interrogatories to Defendant and Defendant, State of Iowa's answers:

> "Interrogatory 233, 'Was a canal dug by the United States Army Corps of Engineers in the year 1938 in the vicinity of Otoe Bend and the land involved in the case of Iowa versus Schemmel?'
>
> " 'Answer. Yes.'

"Interrogatory 235, 'If the answer to Interrogatory No. 233 was 'Yes,' state in which state the canal was dug.

" 'Answer. Nebraska.' " (R. Vol. VII, p. 927)

The evidence clearly shows that the states recognized the fact that the boundary was not in the Missouri River at many places and such places were very difficult of determination, and this constituted a reason for the Boundary Compact. This agreement certainly destroyed, by contract, any presumption that the boundary was in the river. If Iowa can still rely upon such a presumption, by merely waiting until evidence has been lost, destroyed or disappeared, Iowa can assure that she will be successful in these law suits. Such a situation is completely unfair and inequitable and Nebraska contends could not possibly be the result of the Compact.

Nebraska submits that the Compact is clear and convincing that titles which were recognized as good in Nebraska were to be recognized as good in Iowa, and when considered in the context in which the Compact was adopted, requires that Iowa recognize all of these titles emanating from Nebraska without regard to the actual location of the pre-1943 boundary. The states could have decided to enter into an original action in this Court to determine the location of the boundary all along the 190 mile length but obviously this would have been time-consuming and expensive. Iowa's position would now require that these determinations be made, thus recreating the uncertainty which existed in 1943 but compounding the problems of the land owners because of the passage of an additional 20 to 30 years.

Iowa's reliance upon the presumption also is inconsistent with the recognition in Part 1 of the Missouri River Planning Report that:

> "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side . . ."

This Report constitutes the present policy of the State of Iowa (R. Vol. XI, p. 1593).

The Compact changed the boundary; it also had to change the presumptions and the common law. Iowa has asked the Court to hold that the parties now have to prove what they agreed they did not want to do or have to do in 1943. If the states did not want to take the time and expense of determining the boundary in 1943, why should they be able to require private landowners to prove this pre-1943 Boundary because of the change in Iowa's conduct?

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REPLY TO EXCEPTION NO. III OF THE STATE OF IOWA

Iowa also excepted to that portion of the Master's proposed rule 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." (Iowa's Exceptions, p. 25).

Here, again, Iowa is ignoring the agreement which she entered into in 1943. Her position seems to be that all that the two states did was draw a new line so that she could claim title because she thereafter had jurisdiction. Obviously, this was not the case, because Sections 3 and 4 were added as integral parts of the agreement and the Iowa Act, which was adopted first, insisted in Section 5 that the Nebraska Act must contain provisions identical with those contained in Sections 3 and 4 but applying to lands ceded to Nebraska. Today, Iowa would effectively ignore Sections 3 and 4.

The case of *U. S. v. Chaves,* 159 U. S. 452, involved claims to certain lands in New Mexico under a claimed Mexican land grant with the original grant papers having subsequently been lost. The United States denied that such a grant was ever made. The Court of Private Land Claims which had adjudged the title of the claim to be good and valid had been established by an Act which provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States and that the Court was to settle and determine the question of the validity of title and boundaries of the grant or claim according to the law of nations, the stipulations of the treaty between the United States and Mexico, and the laws and ordinances of the government from which it is alleged to have been derived. Mr. Justice Shiras, in delivering the opinion of the Court, stated at page 457:

> "The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of

the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson v. Poindexter,* 12 Wheat. 530, 535; *United States v. Arredondo,* 6 Pet. 691, 712; *United States v. Ritchie,* 17 How. 525.

"We adopt the language of Chief Justice Marshall, in the case of *United States v. Percheman,* 7 Pet. 51, 86, as follows: 'It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Sections 3 and 4 were included for a purpose which the Master properly found was to secure the people along the Missouri River in their rights and to give them protection from the states in whose jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact was intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption, at which time Iowa was not contesting these property rights (SMR 88).

Iowa's approach and her zeal to acquire lands without compensation is again illustrated at page 25 of her

Exceptions where she complains that such a rule would bar Iowa from "asserting that the sovereign State of Iowa cannot lose its title as a result of adverse possession by a private individual." If Iowa is correct, then there is no statute of limitations along the Missouri River and at some time in the future, Iowa can assert claims to lands in the entire Missouri River valley, which Iowa has admitted have been at one time or another the bed of the Missouri River.

Iowa also wants to now assert her ownership under a common law claim of title to beds and abandoned beds but the evidence has clearly shown that she has not done this consistently. It is the application of the law by Iowa's officials and the fact that individuals have been determining how it is to be applied which, in part, has created such unfairness and injustice in the Missouri River valley. Iowa has no excuse or justification for her failure to claim lands in certain abandoned channels along the Missouri River or for her disclaiming certain areas which were islands arising in the Missouri River. The areas which Iowa selected to claim were based upon judgment by individuals in the Conservation Commission and from the Attorney General's office. The evidence has shown how inadequately the Schemmel and Nottleman Island areas were researched and how Iowa did not investigate the county records or even talk to the landowner claimants before filing suit. Some of Mr. Jauron's investigation is described in more detail in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pages 510-530.

With the admitted uncertain status of boundaries and land titles in the Missouri River valley, anyone can create a question concerning how land areas were formed. However, in most instances the statutes of limitation or equitable defenses will have decided the question as between private individuals because, as to those areas in existence in 1943, more than 27 years have passed since the Compact. However, if Iowa is to be immune from such defenses which are applicable against private individuals, as she has contended in her Exceptions, then by merely waiting until the evidence is destroyed or obscured by the passage of time and relying upon the common law presumptions, she can effectively deprive the landowner of his ability to defend his claim. However, at the same time, Iowa must rely upon the Compact boundary to establish her jurisdiction and, once she has established this jurisdiction, she uses the jurisdiction to create her claim of title. Nebraska submits that this is completely unfair, inequitable, and leads to such oppressive and unjust consequences, that the Compact should not be read to allow such a result.

Although Iowa has stated at page 16 of her Exceptions that:

> "His finding that Iowa was not asserting her ownership claims in 1943 and prior is clearly erroneous.",

she has apparently retreated from that position at page 28 where she states:

> "We can understand why the Special Master might feel that the State of Iowa was not doing enough in and prior to 1943 to assert, protect, de-

> fend and develop her state owned areas. But the record made before the Special Master clearly establishes that it was erroneous for him to find that Iowa was doing nothing."

The Master found with regard to Iowa's claims to abandoned beds and islands arising in the Missouri River under common law, that:

> "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 principal (sic) without any application to the specific factual situation which existed . . ." (SMR 64).

In addition, even though Iowa contends that she was following her common law doctrines, all the evidence indicates that she was not claiming any of the areas in the Planning Report south of Omaha which were in existence in 1943 so she was not applying her doctrine to these areas. Iowa's application of her common law doctrines based upon the judgment, whim or caprice of her officials has resulted in such tremendous injustice to the farmers along the boundary.

The Master examined all of the evidence and observed the witnesses, and Iowa is grasping for straws when she attempts to show that she was making claims at the time of the Compact or for more than a decade thereafter similar to those made in Part I of the Missouri River Planning Report. Nebraska submits that Sections 3 and 4 were included in the report to prevent Iowa from taking such a position and perpetrating such a great injustice against the former Nebraska landowners.

Iowa has attempted to justify her lack of action on the grounds ". . . that said lands and the river itself

were so unstable that protection and development were impossible'' (Iowa's Exceptions, p. 29). However, it should be pointed out that the landowners did develop and occupy these lands. Nebraskans had lived upon and farmed Nottleman Island from 1929 up until the time of the Compact and the Schemmels had protected their ownership of the area and were doing so at the time of the Compact. The river was almost completely stabilized south of Omaha in 1943 and these areas were in existence but with no claim being made by Iowa. According to an article in 42 Iowa Law Review 58 (SMR 89) the Iowa Courts had made no determination that the State of Iowa would have a right to 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. The article indicated such claims may develop on account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began (SMR 89-90). The evidence established that Iowa's claims were motivated by the fact that Iowa finally recognized that the lands were of substantial monetary value (SMR 101-102; R. Vol. XIII, pp. 1863-1864).

Nebraska would again point out that there were many obvious abandoned channels or ox-bow lakes several miles from the Missouri River and these areas were developed by private individuals prior to 1943 with no claim having been made by the State of Iowa. It simply is not

true that protection and development of many of these abandoned channels was impossible.

Nebraska does not dispute the fact that the areas were subject to flooding and the Missouri River was unstable prior to the construction work by the Corps, but this did not stop development of the Missouri River valley by individuals. Iowa's excuse for her inaction is flimsy and after the fact. Her conduct in 1943 and for approximately 18 years thereafter is more consistent with the fact that she had no claim to these specific areas.

Certainly if Iowa had been taking the position in 1943 that the areas which she claims in 1961 as described in the Planning Report were owned by Iowa because they were located in Iowa, it is obvious that Nebraska never would have agreed to a new boundary line which could result in Iowa's obtaining title to these areas as against the Nebraska claimants. In fact, the Master found that there was nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants (SMR 64).

Iowa has also attempted to justify her conduct by arguing that her "laws" must have equal application to all lands within her boundaries. However, she has overlooked entirely the fact that her boundary to the east, which is the middle of the main channel of the Mississippi River, is now entirely different from her boundary to the west, which was changed by the Compact. This

Compact is specific in requiring Iowa to recognize titles and in proscribing Iowa's conduct. There is no question but what Iowa can limit herself in the exercise of her powers. As was stated by Mr. Chief Justice Hughes in *U. S. v. Bekins*, 304 U. S. 27, at 51-52:

> "* * * It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. 1 Oppenheim, International Law, 5th ed. §§ 493, 494; 2 Hyde, International Law, § 489; *Perry v. United States*, 294 U. S. 330, 353; *Steward Mach. Co. v. Davis*, 301 U. S. 548, 597. The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const. Art. 1, § 10, subd. 3; Poole v. Fleeger, 11 Pet. 185, 209; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Hinderlider v. La Plata River & C. C. Ditch Co., post 92. * * *"

Nebraska submits that the law of Iowa is what the Compact determines it to be, not what Iowa officials and Iowa Courts might declare it to be without regard to the Compact. Her commitment to Nebraska was contractual in nature and was binding not only upon her legislature but upon her executive and judicial branches as well.

There is nothing "implied" about the mandate to the State of Iowa in Sections 3 and 4 of the Compact. It is expressly stated and, when considered in the context in which adopted, the Compact had to supersede Iowa's common law and require that she recognize Nebraska titles to the bed of the Missouri River, and bars and islands arising in the bed as well as titles to those areas in existence which she was not claiming.

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REPLY TO EXCEPTION NO. IV OF THE STATE OF IOWA

Iowa, in taking exception to that part of the Special Master's Report where he adjudges that the State of Iowa does not own Nottleman Island and recommends that Iowa be enjoined from claiming it, has suggested that Nebraska selected the two areas along the river as to which she would adduce detailed evidence to establish private ownership, where the evidence is the strongest (Iowa's Exceptions, p. 33). It must be pointed out that Iowa selected the areas which she was claiming and Iowa filed the quiet title actions in the Iowa state courts. The Schemmel trial commenced in the District Court of Fremont County, Iowa in July of 1964 just a few days after Nebraska filed her Complaint. It was Iowa which was pushing the case to trial and Nebraska had no control over Iowa's conduct.

Although Nebraska contends that the evidence has conclusively established in both the Nottleman Island and Schemmel Island areas that there were titles good in Nebraska at the time of the Compact which Iowa must

recognize, it took diligent effort by the Nebraska State Surveyor's office and Nebraska counsel extending over a period commencing in 1963, prior to the filing of the case in 1964, through trial of the case in 1969 in order to collect the evidence establishing the factual history in the Nottleman and Schemmel Island areas. The Master found that such a study is time consuming and expensive (SMR 118, 155). However, in the California Bend area (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 396-405) and in the Winnebago Bend or Flowers Island area (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363), the evidence which is still available from the records of the Corps of Engineers and the public records are such that proof that the river was entirely in Nebraska at the time of the Compact and that Iowa is now claiming "ceded land" in those two areas can be established by much fewer documents than was required in the Schemmel and Babbitt cases. In addition, the dredging of canals entirely in Nebraska by the Corps of Engineers in both places and the fact that the case of *United States of America, Trustee and Guardian for the Winnebago Tribe of Indians, Plaintiff v. Wilbur Flower, et al.,* had been decided in the United States District Court, District of Nebraska, Omaha Division in 1937 (Ex. P-2661, R. Vol. XII, p. 1677) provided evidence of avulsions prior to the Compact leaving the river entirely in Nebraska without the necessity of the long historical study required in the Nottleman Island and Schemmel Island cases. Iowa was a party to the case of *U. S. v. Flower* for a time and she necessarily had to have been aware of the determination

in that case (Ex. P-2661, R. Vol. XII, p. 1677; see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363). That case was appealed to the Circuit Court of Appeals, 8th Circuit, which entered an opinion captioned *United States v. Flower, et al.*, 108 F. 2d 298 (December 27, 1939). In 1938 at California Bend, the Corps condemned an easement in Nebraska in which to place the designed channel (Ex. P-2670, R. Vol. XII, p. 1724; see also PLAINTIFF'S RESUME', pp. 396-405). Iowa's statements concerning the selection of the Nottleman Island and Schemmel Island areas about which extensive evidence was offered are completely without foundation.

Nebraska will comment concerning Iowa's statements about the date of formation of Schemmel Island in the next section of this brief. Insofar as the date of formation of Nottleman Island, Iowa has overlooked the fact that there were trees found on Nottleman Island to the west of the 1890 thalweg according to the 1890 Missouri River Commission map (Ex. P-718, R. Vol. IV, p. 346) which commenced growth in 1900, 1919, and 1913 (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 142-147; Ex. P-726, R. Vol. III, p. 361; SMR 136). The Master, commencing at page 134 of his Report, has summarized the history of the movement of the river in the Nottleman Island area and the record amply supports these findings.

At pages 33-34 of Iowa's Exceptions, Iowa referred to certain statements of the Special Master from the bench in an attempt to show lack of decision upon the part of the Master with regard to the amount of evidence adduced

to establish that Nottleman Island formed in Nebraska. Nebraska would point out that careful analysis of the statements referred to by Iowa in the Transcript of Oral Arguments are not in the nature of holdings at all but are in the nature of discussion and are designed to bring out argument and clarify positions and facts. In addition, all that Nebraska would have had to do was establish that the boundary was to the east or left bank side of Nottleman and Schemmel Islands in order to prove that the land formed in Nebraska. There would have been no necessity to locate the actual line as the location of the former line may be more complicated than the determination of which state the land formed in. It is the Master's findings which constitute his decision. It is unfair to him to attempt to impeach these findings by citing comment from the bench during argument which may well have been intended only to elicit discussion and the position of the parties.

No matter how the Master characterized the evidence, he found the facts establishing that Iowa violated the Compact in both the Nottleman Island and Schemmel Island areas and there is no equivocation in his adoption of these findings. In fact, at page 118 of his Report he mentioned that "There is in evidence a considerable volume of records substantiating these facts (Nebraska exercises of jurisdiction prior to the Compact) which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago." (SMR 118). At page 133 he found that the evidence " . . . would seem to be conclusive that this was in Nebraska prior to the

Compact''. (SMR 133). A similar statement was made with regard to the Schemmel land (SMR 155).

The Master's findings of fact concerning Nottleman and Schemmel Islands on pages 112 through 163 are unqualified if it is necessary for the Court to reach those findings.

Iowa has suggested at page 35 of her Exceptions that it is undisputed that the main channel was west of Nottleman Island in 1943. In and of itself, this statement is meaningless because the evidence shows that the reason the river was west of Nottleman Island at that date was because the Corps of Engineers stabilized the channel and placed the river there. The work of the Corps in moving the river from the east side to the west side of Nottleman's Island is described by the Master in his findings at pages 138 to 140 and the evidence and testimony is summarized in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 134 to 142. Iowa would overlook completely that the Corps of Engineers transferred the channel of the Missouri River from the east side to the west side of Nottelman Island without washing away the island. This constituted an avulsion and the Iowa-Nebraska boundary immediately prior to the adoption of the Compact remained in the east abandoned channel of the Missouri River (SMR 139).

Nebraska submits that the precise location of that abandoned channel is not critical since the entire island was in Nebraska immediately prior to the adoption of the Compact. The only countering argument which Iowa has is the presumption favoring accretion as against avul-

sion. This presumption was clearly and conclusively rebutted by the mass of evidence and the Master further recognized that Iowa's witnesses had only a casual acquaintance with the situation and indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity (SMR 137).

Iowa is again in error at page 36 of her Exceptions when she has suggested that there is no evidence that Mr. Fitch, Cass County, Nebraska County Surveyor, surveyed the island in 1933 in his official capacity. Plaintiff would point out that this survey bears the legend "R. D. Fitch, Jr. Co. Surveyor" and the survey was filed of record in the Office of the Register of Deeds of Cass County, Nebraska (Ex. P-735, R. Vol. III, p. 409) and was also recorded in the County Surveyor's Office of Cass County, Nebraska (Ex. P-2345, Vol. IV, p. 431).

The land was separately taxed in Nebraska in 1934 following this survey, but this is not to say that it was not included as accretion to Nebraska bank lands at prior dates under the descriptions of those riparian sections. Iowa claims that the period of exercise of dominion by Nebraska was too brief and there was no evidence of knowledge on the part of the State of Iowa or its officials that Nebraska was exercising dominion in any manner. The critical facts are that, at and prior to the Compact, the Nottleman Island area had been occupied by Nebraskans; this occupancy was adequately documented of record in Nebraska; it was common knowledge in the Rock Bluff area and Plattsmouth vicinity that the residents of Nottleman Island were considered Nebraska citizens; none of the witnesses who testified concerning formation testified

that it was Iowa land or considered to be in the State of Iowa prior to the compact (SMR 118); and there were deeds of record in the Office of the Register of Deeds of Cass County, Nebraska (SMR 118-119). In addition, there was a quiet title action in the District Court of Cass County, Nebraska in 1940 quieting title to the north half of Nottleman Island (SMR 119; Ex. P-462, R. Vol. III, p. 415). The south half of the island was included within the Estate of John Nottleman and within the property probated in the County Court of Cass County, Nebraska and was sold at public sale pursuant to proceedings in the District Court of Cass County, Nebraska in 1941 (SMR 119-120; Ex. P-463, R. Vol. I, p. 50). THERE WERE TITLES TO NOTTLEMAN ISLAND WHICH WERE GOOD IN NEBRASKA AT THE TIME ADOPTION OF THE COMPACT. They were documented by the public records but Iowa apparently has ignored all of these public records.

Nebraska suggests it is highly significant that Iowa contracted in light of the existing situation concerning land titles when she entered into the Compact and she recognized and agreed to respect this situation. In addition, Iowa's officials were not taxing the land or asserting any exercises of jurisdiction over it (SMR 120-121) and there was testimony that the Iowa school officials would not let children living on the island go to school in Iowa (R. Vol. VI, p. 794; SMR 117). This was the type of situation which was in existence when the two states agreed to recognize titles good in Nebraska. As the Master found, had the states investigated the status of Nottleman Island at that time, they could have come to no other conclusion

than that it was considered to be a part of the State of Nebraska and was considered as being within the category of "ceded" lands transferred to Iowa by the Compact (SMR 121).

In addition, Iowa appropriately glosses over the fact that officials of her Conservation Commission specifically disclaimed any ownership of the island in 1951 (SMR 130; Gillilland Deposition Ex. 5, R. Vol. I, p. 127; Ex. B-3, R. Vol. I, p. 156). Iowa's Attorney General had notice of the situation at Nottleman Island in 1946 (R. Vol. II, pp. 255-257; Gillilland Deposition, Ex. 1, R. Vol. I, p. 121) and again in 1951 (R. Vol. 124, pp. 124-125). The owners successfully brought a lawsuit requiring that the land be placed on the tax rolls in Iowa in 1946 in an action against the county officials in the District Court of Fremont County, Iowa (Gillilland Deposition, Ex. 1, R. Vol. I, p. 121), and in 1961 Mr. Babbitt brought an action attempting to have his real estate taxes lowered and the District Court of Fremont County, Iowa, again found that Mr. Babbitt had title (Ex. P-171, R. Vol. I, p. 71).

All of the evidence following 1943 shows that the Iowa county officials as well as the Iowa State Tax Commission, in levying inheritance taxes upon owners of portions of Nottleman Island who died following the Compact, recognized the private ownership claims. The land was being taxed in Iowa at the time of the suit at the same time that the State of Iowa was attempting to take it away from the private owners. All the facts establish just plain recognition of the owners' titles by Iowa.

Iowa also has suggested that there were no valuable improvements placed upon Nottleman Island but Nebraska

would point out that the land had been cleared at considerable expense and made valuable farm land, and Mr. Babbitt built good lots and fences, loading chutes and made hog pastures upon it (R. Vol. I, p. 59). Babbitt also put an Inland Steel Bin on the island and mortgaged it to the Commodity Credit Corporation (Ex. P-486, R. Vol. I, p. 81). At one time, he had a cabin on the land (Ex. P-1850, R. Vol. II, p. 240). Mr. Babbitt testified that after what it had taken for living expenses: "I put every dollar I ever made in this farm to make a good farm of it." (R. Vol. I, p. 76).

Iowa suggests at page 39 that the issue of ownership as between the private owners and the State of Iowa is an issue properly triable in the state courts of Iowa, that being the state in which the island is located. This completely disregards Iowa's agreement in the Compact to recognize the ownership and the fact that the only reason that Iowa can take the position that the land is "in Iowa" is because the Compact placed it there. Obviously, Iowa wants to try these cases in her own courts by her own rules in total disregard of her contractual commitment. Iowa would overlook the fact that her courts are bound by the Compact just as much as her executive and legislative branches are bound.

REPLY TO EXCEPTION NO. V OF THE STATE OF IOWA

Defendant excepted to that part of the report wherein the Master adjudged that the State of Iowa does not own Schemmel Island and recommending that Iowa be

enjoined from claiming Schemmel Island (Iowa's Exceptions, p. 41). There are evidently printing errors in Iowa's statement of Nebraska's position on page 41 of Iowa's Exceptions and it does not accurately reflect that position. There is little doubt, as Iowa says, that the facts of the formation of Nottleman and Schemmel Islands are different. However, all of Iowa's discussion concerning the date of commencement of formation of Schemmel Island overlooks completely the fact that the river was entirely in Nebraska at all times following 1905. The Master found that the Missouri River had developed an easterly bend and by 1900, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today (SMR 156). Between 1900 and 1905, the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the river. This movement constituted an avulsion, leaving the Iowa-Nebraska State boundary in the abandoned channel described as the Iowa Chute until 1943 (SMR 156). The Master found that there was physical evidence in support of this avulsion by the location of a tree which commenced growing in 1895 on the Nebraska or right bank (SMR 157). This tree survived the movement of the river to the west, thus providing physical evidence that the river had not moved back gradually or by accretion.

In the case of *McCafferty v. Young,* 144 Mont. 385, 397 P. 2d 96, 99-100, the Court considered the evidence of trees in determining an avulsion and said:

"While it is true, as counsel for defendant contends, that it is presumed that changes in river banks are due to accretion rather than avulsion (Wyckoff v. Mayfield, 130 Ore. 687, 280 P. 340), that rule does not apply where there is evidence of avulsive change. We think the evidence showing the age of trees lying between the former channel and the new channel precludes any conclusion that the lateral migration of the river was slow and imperceptible. The witness Hamre, who was the Helena National Forest Supervisor, testified that the trees lying on the land between the two channels were 70 to 80 years in age and still growing. Had the lateral migration of the river been gradual the soil supporting the roots would have been eroded and the trees would have been washed out. Instead, this physical evidence demonstrates that those trees have remained strong since at least 1880 or 1890. The question is one of fact, and the trial judge found there had been an avulsive change. We feel there is ample and credible evidence to support that finding, and, therefore, it will not be disturbed. Rumsey v. Spratt, 79 Mont. 158, 255 P. 5."

In addition, the earlier movements of the Missouri River were analyzed and discussed by Nebraska's expert geologist, Dr. William Gilliland, who the Master described as "an eminent and well qualified expert in the field of geology" (SMR 157). Dr. Gilliland testified that the river could not have moved back from the east to the west in any manner other than by an avulsive change (R. Vol. XI, p. 1557). His explanation, as the Master properly found, is consistent with the theories utilized by the Corps of Engineers in their construction work along the river and is consistent with the basic geological data submitted (SMR 159). There was also eye witness testimony that in 1911 or 1912 the river made a

natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide (SMR 159, R. Vol. VIII, p. 1062). At all times from 1905 until the adoption of the Compact, the Missouri River was entirely within the State of Nebraska.

The Corps of Engineers dug a canal in the designed channel at Otoe Bend in 1938 which Iowa admitted was dug in the State of Nebraska. Photographs are in evidence showing the area and trees which were cut off by this canal, and the testimony by one of the surveyors who worked on the canal was that when it was staked out, they walked to the area from the Nebraska side and did not cross any water (SMR 161, R. Vol. IX, p. 1163). This tree area which was cut off from the right bank by the canal appears on the left bank of the designed channel on the Alluvial Plain maps referred to in the Compact (Ex. P-230, R. Vol. VII, p. 914). This canal bisected land acquired by Henry Schemmel and resulted in Mr. Schemmel's owning land on both sides of the Missouri River. The designed channel of the Missouri River is now located where the canal was dug (see PLAINTIFF'S RESUME' pp. 255-318). Even if the canal had been dredged within the low banks it would have constituted an avulsion (see *Uhlhorn v. U. S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 385 U. S. 1026). This canal, however, did not seem to deter Iowa from claiming title to Mr. Schemmel's land in reliance upon the presumption that the movement of the Missouri River into the designed channel in Otoe Bend had been gradual and imperceptible. It is incredible that this type of conduct could be sanctioned under the terms

of the Compact requiring Iowa to recognize titles good in Nebraska.

Iowa has attempted to infer that the evidence establishes that the Schemmel title was not "good" coming from Nebraska but Iowa completely ignored the fact that the Schemmels were parties to two quiet title actions involving their land in the District Court of Otoe County, Nebraska prior to the Compact which confirmed their title (Ex. P-190, R. Vol. IX, p. 1247 and Ex. P-189, R. Vol. IX, p. 1243). Mr. Schemmel filed one of these decrees in the Office of the County Recorder of Fremont County, Iowa on August 25, 1941 (Ex. P-194, R. Vol. IX, p. 1250). These facts are summarized and described on pages 318 to 341 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. AT THE TIME OF ADOPTION OF THE COMPACT, THE SCHEMMELS HAD A TITLE WHICH WAS GOOD IN NEBRASKA AS RECOGNIZED BY THE NEBRASKA COURT DECREES AND NOTICE OF THIS WAS ON RECORD IN FREMONT COUNTY, IOWA. Plaintiff would point out that Mr. Schemmel holds title to land which is to the east of the area which Iowa is claiming, through the same deeds, quiet title actions, and indicia of ownership through which he claimed the land which remained to the west of the Missouri River following the digging of the Otoe Canal. Iowa has never made any claim to this land to the east and adjacent to Schemmel Island. The fact that Mr. Schemmel had a title "good in Nebraska" is also established by Iowa's evidence (Ex. D-708, R. Vol. XVII, p. 2541), which is a Court decree in a quiet title action in Nebraska after

the Compact regarding land on the west side of the Missouri River which Mr. Schemmel had sold and to which he had reserved hunting rights. The Court in that decree recognized Mr. Schemmel's reservation of hunting rights. It is submitted that, just as in the Babbitt or Nottleman Island case, the Schemmels had as good a title as anyone had in the Missouri River valley at the time of the Compact emanating from Nebraska.

Iowa placed the Schemmel land on the tax rolls in 1949, tax deeds were issued by the County Treasurer's office of Fremont County, Iowa in 1954 pursuant to the Iowa statutory provisions regarding such sales, and the taxes just on the real estate in the year 1968 payable in 1969 were $1,183.06 (Ex. P-2643, R. Vol. IX, p. 1240). At the time that Iowa's local officials were taxing the property, the State of Iowa was attempting to take it away without compensation. As the Master found, it is unjust and inequitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land always belonged to the State of Iowa in this type of situation (see *United States Gypsum Co. v. Grief Bros. Cooperage Corp.*, 389 F. 2d 253 8th Cir., 1968, SMR 151-152). In addition, the Schemmel's exercised exclusive possession of the land and cleared it at considerable expense, thus making it valuable farm land. The cost of such clearing today would approximate $200 per acre (R. Vol. XIII, pp. 1125-1137).

Iowa also has ignored the fact that the Ward deeds to the Schemmels conveyed land on both sides of the Missouri River in 1938 and the Schemmels thereafter owned both banks and the entire bed under Nebraska law. The

fact that Iowa has made no claim to the Schemmel land adjacent to and east of Schemmel Island which the Schemmels have owned and exclusively possessed from 1938 up until the present date further substantiates the validity of the Ward deeds.

Plaintiff would also point out that Iowa had made no investigation of the Schemmel title before filing of suit and her officials had not even talked to the Schemmels concerning their claims. Although Iowa may say that she recognizes good Nebraska titles, the facts are that she never investigated to determine whether any Nebraska titles existed.

Iowa has further misdescribed the evidence concerning the exercises of jurisdiction over the area prior to the Compact. Iowa's statement that there was ". . . clear evidence that all local officials and all local residents considered that the boundary was not in the Iowa Chute after the river moved westward from the Iowa Chute prior to 1905" simply is not true. The evidence is clear that all local officials and local residents considered that the Iowa Chute *was* the abandoned bed of the Missouri River. This chute is approximately one mile and three-quarters to the east of the present Missouri River and is marked upon the map of the area found at Appendix B on the last page of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

The early Iowa records indicating eastward movement of the Missouri River and the abandoned channel in the Iowa Chute are referred to and summarized on pages 242 to 251 of PLAINTIFF'S RESUME' OF EVI-

DENCE BEFORE THE SPECIAL MASTER and show numerous entries in the records of the County Courthouse of Fremont County, Iowa, documenting the eastward movement of the river to the Iowa Chute and that the river was in the Iowa Chute in 1900. This was further corroborated by Nebraska's witnesses, Frank Duncan (R. Vol. VIII, p. 1025) and Cliff Cockerham (R. Vol. VIII, p. 1031). Following the avulsion which occurred between 1900 and 1905, the Iowa maps and records had continued to recognize that the east bank of the Missouri River was along the Iowa Chute and constituted the abandoned Missouri River bank (see pages 247-251, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER); Resolution Establishing the Knox Drainage District dated June 11, 1909 (Ex. P-196, R. Vol. VII, p. 893); Iowa State Highway Commission Official Map of Fremont County, Iowa filed February 14, 1914 (Ex. P-1707, R. Vol. XIV, p. 1944); Plat entitled Knox Drainage Ditch Outline of District and Location of Ditch, filed September 2, 1920 (Ex. P-1765, R. Vol. VII, p. 895); Engineers' Report dated November 14, 1922 entitled KNOX-PLUM DRAINAGE DISTRICT (Ex. P-198, R. Vol. VII, p. 896); proceedings of the Missouri Valley Drainage District No. 1, Election District No. 3, November 24, 1922 (Ex. P-1767, R. Vol. VII, p. 898); Map of Missouri Valley Drainage District No. 1 filed February 5, 1923 (Ex. P-1766, R. Vol. VII, p. 898); Ditch Record Book No. 5 showing resolution of the Missouri Valley Drainage District No. 1, Election District No. 3 passed on May 4, 1931 (Ex. P-1768, R. Vol. VII, p. 900). All of these aforementioned documents were of record in the Fremont County, Iowa Courthouse, and reflected conduct of state or county

subdivisions or agencies recognizing the Iowa Chute as the boundary. Each of these maps or records shows the Iowa Chute as the western boundary of Iowa.

Iowa's taxing officials, after having taken the land off the tax rolls as the river moved east up until 1900, did not tax the Schemmel land from that time up until 1949, when the Schemmel land was placed upon the tax rolls by the Fremont County, Iowa Auditor and Treasurer following the Compact. The history of this taxation by Iowa is found at pages 341-344 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. Although the testimony of the Fremont County Treasurer indicated that many of the tax records had been destroyed, they were not all destroyed as was suggested by Iowa in her Exceptions. Iowa's categorization of the tax evidence and that they were all lost or destroyed is simply not accurate and is disproved by the evidence. There were records showing the Iowa land being taken off the tax rolls as the river moved eastward.

All of the testimony recognized that the Iowa Chute was the abandoned channel of the Missouri River and there is no testimony to the contrary. Iowa's own witness, Mr. Hinze, so testified (R. Vol. XXI, pp. 3104-3106 quoted at page 241, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER). Iowa's witness, Mr. Givens, when asked about the Iowa Chute stated:

> "If it involves the Iowa Chute, it would be the old river bed" (R. Vol. XXII, p. 3161).

Yet, Iowa has never made any claim to this old river bed in the Iowa Chute (see also R. Vol. XXI, p. 3078).

The Master correctly found that:

> "It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River" (SMR 146).

He further found that at the time of the Compact in 1943, the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island and the State of Iowa was making no ownership claims to Schemmel Island and was exercising no incidents of possession (SMR 146). There was absolutely no testimony by any Iowa residents or officials that the land west of the Iowa Chute was considered as being in Iowa prior to the Compact. Mr. Propp did not testify that he paid taxes on the land in Iowa and Mr. Givens made no reference to the payment of taxes in Iowa prior to 1943. Iowa's other witnesses, Oscar Hayes (R. Vol. XXII, pp. 3170-3186), Frank Starr (R. Vol. XXII, pp. 3186-3195), and Lon Baker (R. Vol. XXII, pp. 3195-3205), did not testify that the land was being taxed in Iowa or was in Iowa.

At the same time, Nebraska placed the lands on the tax rolls in 1895 and 1896 and it was taxed in Nebraska continuously up until the time of the Iowa-Nebraska Boundary Compact (Ex. P-1 to P-125, R. Vol. VII, p. 888). There were quiet title actions in Nebraska to the lands and again the Master found that Nebraska was exercising jurisdiction over this land up until the time of the Compact. This evidence is summarized at pages 251 to 254 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

There is some evidence that some of the land to the east of the Schemmel land but to the west of the Iowa Chute was on the tax rolls of both states for a brief period prior to the Compact, but this was only a portion of that land, did not involve Schemmel Island, and Iowa's evidence shows that some of this area was on the tax rolls in Iowa only in the years 1934, 1935 and 1936 (R. Vol. XVIII, pp. 2572-2573), with no records from 1937 through 1942.

Iowa's maps prepared by Mr. Bartleman which are attached to her tax records were admittedly in error and were completely discredited (R. Vol. XVIII, pp. 2602-2603).

Iowa is wrong in her statement that all maps from 1905 to date designate all of the land east of the river at Otoe Bend as being in "Iowa". This statement disregards the Iowa records and 1914 Iowa Highway map previously referred to. The 1929 Shannon map (Ex. D-272, R. Vol. XXII, p. 3207) was not officially filed of record in either Nebraska or Iowa. The 1905 U. S. Geological Survey map did show a line in the Missouri River purportedly designated as the state line (Ex. P-219, R. Vol. VII, p. 884), but there was also a 1922 soil survey map showing the boundary line in the Missouri River which would have placed Nottleman Island in Nebraska (Ex. P-719, R. Vol. III, p. 349) which Iowa has failed to mention. Iowa attempts to utilize such map designations when they are consistent with her position but ignore them when it may suit her purposes. Plaintiff's evidence established that the state lines placed upon U. S. Geological Survey maps are often in error (R. Vol.

XII, p. 1663) and only constitute the conclusion of some map maker. The maps which Iowa has referred to are only isolated instances and it is the mass of evidence establishing that Schemmel Island formed entirely in Nebraska and was so recognized by both states, which is persuasive.

Nebraska submits that the evidence clearly establishes that Nebraska was exercising jurisdiction over the Schemmel Island area prior to the Compact and Iowa was not exercising any jurisdiction or any claim of ownership to the area.

Iowa's discussion of some of the evidence even results in the impeachment by Iowa of her own witnesses. Dr. Ruhe, called by Iowa as an expert witness, predicated his entire testimony upon the fact that the Missouri River had reached its easternmost location prior to 1890 and had started to recede to the west by 1890. He testified that a bank position shown on the 1890 map and the Iowa Chute were in the same position and that if he was mistaken in that assumption, everything else which he had said would also be in error (R. Vol. XIX, p. 2804 quoted in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, p. 492). The evidence shows that he was mistaken and the Iowa Chute was to the east of that 1890 bank position. Iowa has now admitted in her Exceptions that the Missouri River was in the Iowa Chute in 1895 (Iowa's Exceptions, p. 44). At pages 41-42 of her Exceptions, Iowa has again impeached Dr. Ruhe by stating her evidence tends to fix the year 1936 as the year in which formation of Schemmel Island commenced, but Dr. Ruhe testified that there

were four areas of Schemmel Island shown on the 1930 aerial photograph (R. Vol. XIX, pp. 2794-2795).

Other discrepancies between the testimony of Dr. Ruhe and Dr. Fenton and the facts are discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 49 through 502. These include a 3,200 foot error in one of their traverses (Ex. D-1221, R. Vol. XX, pp. 2894-2895). Dr. Ruhe described a chute identified as Chute No. 7 as having been formed by the Missouri River (R. Vol. XIX, pp. 2820-2821) but Plaintiff established in rebuttal through Mr. Hiley J. Barrett, Jr., that this had been a borrow area from which he had taken dirt in order to construct an agricultural levy in 1948 (see 1960 Agricultural aerial photograph, Ex. P-256, and Mr. Barrett's testimony, R. Vol. XXVI, pp. 3673-3679). Dr. Ruhe identified a scarp east of the Schemmel land identified as Red 10 (Ex. D-1221, R. Vol. XX, p. 2840) but the Nebraska State Surveyor ran a profile across that location (Ex. P-2704, R. Vol. XXVI, p. 3688; R. Vol. XXVI, p. 3683) which clearly established that there was no such scarp. Dr. Ruhe further testified that all scarps he found faced to the west and if any scarps were to be found facing east it might change his conclusions (R. Vol. XIX, pp. 2819-2820). The Nebraska State Surveyor on his profile found a scarp which did face to the east (Ex. P-2705, R. Vol. XXVII, p. 3688; R. Vol. XXVI, p. 3685). This evidence is discussed in PLAINTIFF'S RESUME', pp. 489-502.

Iowa has referred to the testimony of Dr. Brush, who Iowa called as an expert witness (Iowa's Exceptions, p. 45). His entire testimony was based upon the

premise that the Missouri River at Otoe Bend was not a "typical meandering stream" and that the character of the Missouri River south of the entrance of the Platte River was different from other areas. However, Dr. Brush admitted during the course of his testimony that it was based upon the Ruhe-Fenton Report. This is the same report which was discredited completely by the evidence. He admitted that the Missouri River had a sinuousity ratio in the easterly bend containing the Schemmel area in 1895 in excess of the minimum required for the definition of a meandering stream (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 502-503, for discussion of Dr. Brush's testimony), and that there had been cutoffs in the easterly bends above and below the easterly bend containing the Schemmel area (R. Vol. XX, p. 2956). He agreed with the statement from the Report to the Committee on Rivers and Harbors of February 5, 1934:

> "Cutoffs in the Missouri River are most frequent in the broad sections of the alluvial valley while in the narrow sections the changes consist of the bodily downstream movements of series of bends with less frequent cutoffs. Cutoffs therefore have been very common in the middle river from Sioux City, Iowa, to Kansas City, Missouri. Numerous horseshoe lakes in this part of the river valley are the remains of old river beds" (R. Vol. XX, pp. 2947-2948).

Iowa has attempted to argue that the Iowa case of *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912, is authority for what happened factually in the Schemmel area

(Ex. D-747, R. Vol. XIX, p. 2731). However, Nebraska would point out that the land involved in the *Payne v. Hall* case appeared in part as an island on the left bank to the north of the main channel of the river according to the 1890 Missouri River Commission Map (Ex. P-211, R. Vol. VII, p. 860) and formed consistent with the development of the easterly bend in the Schemmel area which was downstream.

Iowa has suggested that the evidence taken in its most favorable light for Nebraska establishes that Schemmel Island commenced forming in 1932 although she states that her evidence tends to fix 1936 as the year in which formation began. This statement would again seem to impeach Iowa's own witnesses. Albert Propp testified that it began to form as an island in the early '20's (R. Vol. XXI, p. 3059) and:

> "The first people that I knew of that was on the island was a couple of fellows built a shack over there. It was back in about 1918 or along in there. There was John Hilger and Walt Williams . . ." (R. Vol. XXI, p. 3062).

Iowa's witness, James Givens, testified that there were some pretty good sized trees on the island in 1936 (R. Vol. XXII, p. 3148), and Iowa's witness, Otto Hinze, testified that "Anywhere from 1915 on up to present date, that island has been there until the Government cut the chute off" (R. Vol. XXI, p. 3088). Of course, the evidence shows that the river was entirely in Nebraska when these events were taking place but Plaintiff only makes these references to indicate the inconsistencies between some of the evidence which Iowa offered and her present position.

Plaintiff would also point out the unreliability of the placement of Nottleman and Schemmel Islands on various Corps documents by Iowa's witness, Mr. Bartleman. This is illustrated by a comparison of Exhibit D-1036-A at Nottleman-16 of Iowa's Appendix where the upstream part of Nottleman Island is found on Mile 630 and the lower part of the island is far above King Hill or Calumet Point, which is not shown on the exhibit, with Exhibit D-605-A at Nottleman-6 of Iowa's Appendix, which shows the lower part of Bartleman's Nottleman Island extending downstream below the northern part of Calumet Point. The upper portion of the island on Exhibit D-605-A is well below Mile 630. All of Bartleman's exhibits were impeached as unreliable and he admitted that his placement on maps of the areas being taxed in Iowa prior to 1943 were not accurate (R. Vol. XVIII, pp. 2602-2603).

The injustice of a reading of the Compact so that Iowa can require a landowner to prove the factual history and prior movements of the Missouri River is pointed out by Iowa's use of Mr. Raymond L. Huber who had worked with the Corps of Engineers from 1926 until 1963 when he retired. Iowa used him as a principal witness in each of the cases which Iowa tried (*State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135, 138; *Dartmouth College v. Rose,* 257 Iowa 533, 133 N. W. 2d 687, 691; *Tyson v. Iowa,* 283 F. 2d 802, 810; R. Vol. XXIV, pp. 3520-3521, 3581; R. Vol. XXIV, pp. 3414-3415). This witness also testified in the Schemmel case in the District Court of Fremont County, Iowa in 1964 (R. Vol. XXIV, p. 3581, p. 3415) and the variances be-

tween his testimony in 1964 and 1969 are summarized in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pages 468 through 482. After first indicating in response to a question from the Special Master that there was no navigable channel of the Missouri River in 1931, Mr. Huber later had no hesitancy in drawing in the navigable channel on maps or aerial photographs. He supposedly placed the deepest thread of the stream in the Otoe Bend area on a July 16 to July 23, 1931 hydrographic survey (Ex. D-291-A, R. Vol. XVIII, p. 2586) but he placed this so called "thalweg" in a different place on the same hydrographic survey in the Schemmel case in 1964 (R. Vol. XVIII, pp. 3372-3374). This exhibit shows the "thalweg" he drew in 1964 1,100 feet from that same "thalweg" which he drew in 1969. He drew the thalweg in different places on aerial photographs taken in 1930 in the two trials (Ex. D-1092, R. Vol. XXII, p. 3214). He also was clearly shown to be in error in placing his "deepest thread of the Missouri River" on an 1890 Missouri River Commission map (Ex. D-605-A, R. Vol. XVIII, p. 2551; R. Vol. XXIV, pp. 3408-3410). This is described in PLAINTIFF'S RESUME' OF EVIDENCE.

He testified before the Special Master in 1969 that the entrance of the Platte River into the Missouri River influenced the stream downstream as far as the Schemmel area, but in 1964 he testified that the Platte River outlet into the Missouri had no significance in the Schemmel case (R. Vol. XXIV, pp. 3413-3414, quoted at pp. 481-482, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

The Special Master said of Mr. Huber:

> "Mr. Huber has been a witness for Iowa and for practically all of Iowa's litigation in the courts of both states and in the federal courts. Before me he appeared to favor Iowa's interest, and his views as to the mid-channel boundary line are suspect" (SMR 197).

The Master viewed all of the witnesses and observed their demeanor and his findings concerning the credibility of these witnesses should be given great weight. However, Mr. Huber's ability to change his testimony as to the same facts illustrates the great injustice done to a private landowner when the State of Iowa can place the burden upon him to prove the location of the Missouri River at any time in the past and how certain lands may have formed. No state should take advantage of an individual in a situation such as this and the Compact should not be interpreted in such a manner as to allow such an unjust result. No person's title along the Missouri River should be subject to determination by this type of testimony of such a transitory nature, yet this is exactly what Iowa is attempting to accomplish.

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CONCLUSION

Nebraska would reiterate that Iowa completely disregards the history of the Compact, its purpose, and her conduct at and prior to the Compact. She further would disregard her conduct following the Compact.

The Compact necessarily changed the rights of the states which might have existed under their common law

and Iowa should now be bound by her agreement that not only was a new boundary created, but all private titles would be recognized without the necessity of determining where the state boundary had been previously. There is no rational consistency in any of Iowa's conduct as she argues evidence and fact to meet her fancy in individual situations to achieve only one result which is a declaration of ownership in the State of Iowa with no requirement for compensation to the landowners. If Iowa is correct, then the Compact settled nothing except to place areas within Iowa's jurisdiction so that Iowa could then claim them using her so-called "common law". A few officials can continue to pick and choose the various areas which the state claims without regard to the factual history of their formation and without inquiry into prior Nebraska records. Iowa can at any time in the future assert claims to other areas along the Missouri River which she has never laid claim to before, even though these areas may have been claimed by individuals for many years. Rights would be created in the State of Iowa in areas along the river at a time more than twenty years following the adoption of the Compact whereas, at the time of the Compact, in 1943, Iowa made no claim to these specific individual lands, did not have them of record in her General Land Office as required by her statutes, and had not marked the boundaries as also required by her statutes. Iowa can litigate the title to a small area of land in a situation such that the cost

of the landowners' attorneys' fees would exceed the value of the land in order to obtain a principal which would assist her in acquiring title to other areas along the river. Iowa can disregard the fact that there had been many natural avulsions and canals dug along the Missouri River. She can claim lands in her own courts even though those lands are being taxed by the Iowa County officials, and she can disclaim lands which are not being taxed by her County officials. She can survey lines without using any basis in fact for such boundaries, and she can unilaterally establish where the state line is, using inconsistent methods which would give different locations if applied to the same area. Titles to all lands in the Missouri River would be clouded by the fact that Iowa might at some later date claim title based upon her sovereign right to beds or abandoned beds of the Missouri River and based upon her position that no equitable defense is applicable against her. The Compact would have the effect of divesting the former Nebraska landowners of vested ownership rights without compensation and farmers all along the Missouri River who have cleared, cultivated, fertilized and developed the land and paid taxes upon it in Iowa will lose their farms without payment. Plaintiff submits that the Compact should not be construed in such a manner as to result in such injustice.

Plaintiff further submits that the evidence is clear and convincing that Nottleman Island and Schemmel Is-

land formed in Nebraska prior to the Compact and Iowa is obligated to recognize the titles to those areas by the Compact.

Nebraska respectfully renews her request for a determination that Iowa should be restrained and enjoined from making claims of title to lands along the Missouri River under any claim of common law sovereign ownership of the beds or abandoned beds of the Missouri River and for such other relief as is requested in Plaintiff's 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 January 19, 1972, I served a copy of the foregoing REPLY BRIEF OF PLAINTIFF, STATE OF NEBRASKA, TO IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT 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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