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In The
Supreme Court of the United States

October Term, 1964

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No. 17, Original
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STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

— o —
**SUPPLEMENTAL BRIEF OF PLAINTIFF,
STATE OF NEBRASKA IN ANSWER TO NEW
POSITION TAKEN BY IOWA IN HER REPLY**
— o —

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I N D E X

	Pages
Introductory Statement	1
Iowa's New Position	1
Iowa's Previous Position	2
The Nebraska Law	7
Iowa's Alternative Proposition	14
Conclusion	14
Proof of Service	16

CASES CITED

Kinthead v. Turgeon, 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905)	7, 11, 12, 14
Krunwiede v. Rose, 177 Neb. 570, 129 N. W. 2d 491	12
Thies v. Platte Valley Public Power & Irrigation Dist., 137 Neb. 344, 289 N. W. 386, 387 (1939)	11

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INTRODUCTORY STATEMENT

Plaintiff, the State of Nebraska, files this Supplemental Brief in answer to propositions submitted by the State of Iowa in Iowa's Reply to Nebraska's Exceptions to Special Master's Report in which Iowa has taken a completely new and unexpected position from the position which she has taken consistently throughout this case. This brief is restricted to this new matter and change of position by the State of Iowa.

IOWA'S NEW POSITION

In DIVISION II of Iowa's Reply, Iowa has stated at pages 15-16:

“It is the position of Iowa that from the foregoing, it is apparent that the common law of the State of Nebraska did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property right to such bed until it was abandoned by the river. In the event this Court believes Iowa counsel has misinterpreted the doctrine set out in the *Kinkead* and *Ecklund* cases, supra, then Iowa submits the Nebraska court had no jurisdiction over the bed of the navigable waters of the Missouri River as title to some had never passed from the United States, as set out in *Yates v. Milwaukee*, supra.”

For the first time, in her argument and analysis of the common law of Nebraska, Iowa has taken the position that statements by the Nebraska courts concerning ownership of a riparian owner to the thread of navigable streams are dicta and the riparian owner acquired no property right to such bed until it was abandoned by the river. Iowa has then gone further and submitted alternatively that the Nebraska Court had no jurisdiction over the bed of the Missouri River as title had never passed from the United States.

The above propositions represent a complete change of position by the State of Iowa which is at variance with the pleadings and completely inconsistent with Iowa's position taken throughout this case.

IOWA'S PREVIOUS POSITION

In the Complaint, Plaintiff, State of Nebraska, alleged in Paragraph X at page 11:

“ . . . The Supreme Court of the State of Nebraska, beginning with the case of *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744 (1906) reversing 74 Neb. 573, 104 N. W. 1061 (1905) has followed the doctrine that the riparian owner owns to the thread of the channel of navigable streams in Nebraska subject to the public easement of navigation. . . .”

This averment was admitted by the State of Iowa in her Amended Answer and Counterclaim of Defendant, State of Iowa, to Complaint of Plaintiff, State of Nebraska, Paragraph X at page 2. The allegations of the Complaint and Iowa's Answer were read into evidence and are found in the Record at Vol. XIII, pp. 1838-1840.

The Special Master found at page 89 of his Report:

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

Iowa did not take exception to this finding.

In his Report, the Special Master set forth Iowa's statement concerning jurisdiction which included the following proposed findings submitted by the State of Iowa:

“ . . . Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. . . .” (SMR 51).

* * *

“The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and the beds of the navigable streams in Iowa were state-owned. *McManus v. Carmichael*, 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead v. Turgeon*, 74 Neb. 573, 104 N. W. 1061. . . .” (SMR 52).

* * *

“From the general statements hereinabove made concerning the internal title laws of the two states it will be seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and

when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. . . ." (SMR 54).

The Special Master did not adopt Iowa's statement but Iowa did set forth her position recognizing private ownership to the river beds under Nebraska law.

In Part 1 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) the following statement is made at page 4 under the heading "LAND AND WATER OWNERSHIP":

"Two basic problems of land and water ownership effect the development of the Missouri River for recreational use. One is the difference in state laws in Iowa and Nebraska effecting public ownership and, two, in Iowa, the matter of quieting title to lands believed to be state-owned.

IN NEBRASKA

"Nebraska law provides that the riparian owners have title to the bed of the river to the center of the channel or to the described boundary line, whichever the case may be. Thus, all lands in a proposed project area lying west of the Iowa boundary but east of the new channel are in Nebraska and owned by private owners and must be purchased if needed for project development. The question arises — can the state of Iowa own lands in another state?"

With regard to this Report, the State of Iowa was asked by interrogatory:

“Interrogatory No. 20: Does Part I of the Missouri River Planning Report of the State Conservation Commission of January 1961 represent the present policy of the State of Iowa or any branch thereof concerning acquisition of or proof of interest in lands referred to in such report?” (R. Vol. XI, p. 1593).

The answer by Iowa was:

“Yes. We believe that a fair and reasonable construction and interpretation of Part I of the Missouri River Planning Report constitutes a fair statement of Iowa's present policy, but this is not to say that the construction and interpretation placed thereon by Nebraska constitutes any fair statement of Iowa's present policy. Nebraska construes and interprets the document as a statement that Iowa intends to acquire all sites mentioned therein by court action which it construes to be in the nature of ‘land grabs’, but Iowa points out that this is no fair construction or interpretation of the document because in truth and in fact Iowa proposes in the document to acquire many of the sites mentioned therein by purchase or exchange” (R. Vol. XI, p. 1593).

In addition, throughout the argument before the Special Master, Iowa's counsel recognized the fact that the Nebraska riparian owner owned to the thread of the stream. As was stated by Mr. Walker at page 498, Volume II, of the Transcript of Oral Arguments Made Before Hon. Joseph P. Willson, Special Master:

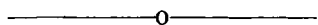
“You see, the thalweg was the boundary before, and the Nebraska riparian owner owned out to the thalweg, and Iowa owned from the thalweg to the high shore line . . .”

Mr. Murray stated at page 488 of the Oral Argument:

“But once again, basically we feel the Court’s decision is to say that Iowa did remain the owner of its river bed in Iowa; Nebraskans did remain the owners of their river bed in Nebraska, and so be it.”

In Iowa’s Exceptions to Special Master’s Report, the statement is made at page 3:

“Nebraska is among the states which elected to have for her common law that private titles to riparian lands would run to the thread of the contiguous stream. *Kinhead v. Turgeon*, 74 Neb. 580, 104 N. W. 106 (1906).”



THE NEBRASKA LAW

Immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 the law of Nebraska was, and remains, that title to the beds of navigable streams is in the riparian owners subject to the public easement of navigation, each owner owning to the thread of the stream. This right includes ownership of the bed, islands or bar areas arising in that bed, and abandoned bed. The leading case is *Kinhead v. Turgeon*, 74 Neb. 580, 109 N. W. 744, reversing 74 Neb. 573, 104 N. W. 1061. This was an ejectment action and involved abandoned channel of the Missouri River. However, in the decision by the Commissioner, 74 Neb. 573, 104 N. W. 1061 (1905), the Commissioner recognized that:

“. . . Plaintiff’s claim to the land rests solely on the doctrine that the riparian owner of lands bordering on the Missouri river takes to the middle thread of the stream, notwithstanding the fact of its navigability. . . . ”

The Commissioner's decision was vacated by the Supreme Court of Nebraska at 74 Neb. 580, 109 N. W. 744 and the Court stated at 109 N. W. 746-747:

"... In passing upon the applicability of the common law to our conditions in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of Nebraska have been in occupancy of the west bank of the Missouri River. The first settlement of the territory was along the Missouri River and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge of which the court will take judicial notice that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream and be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically severed from the state of Nebraska and conjoined to Dakota, Iowa, or Missouri. See *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. These processes have been going on for 50 years.

During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto and, as fast as it became subject to useful purposes, reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the State of Nebraska that the common law is applicable to the conditions along the Missouri River and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. . . .”

The Court said that at some points on the boundary of Nebraska, the then present channel of the river was removed to a distance of more than a mile from where it was thirty years previously. It also noted a number of “cut-off lakes” occupying abandoned river beds along the Missouri River and that the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public has lost nothing by the change of channel. The Court then stated at 109 N. W. 747-748:

“ . . . As was said long ago by Ulpian: ‘In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, neverthe-

less, to be public, because it is impossible that the channel of a public river should not be public. (D.3. 12. l. 7)'' Ware's Roman Water Law, 34 § 22. To hold otherwise in case of a stream of the characteristics of the Missouri River might well lead, by way of repeated changes of the river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel nearby by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class. When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public

has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road and its right and privilege to pass over the old reverts to the abutting owners, and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed.”

The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result.

Kinkead v. Turgeon has been cited numerous times in Nebraska and constitutes the law of Nebraska.

Many of the Nebraska decisions do involve nonnavigable streams such as *Thies v. Platte Valley Public Power & Irrigation Dist.*, 137 Neb. 344, 289 N. W. 386, 387 (1939), involving an action for damages including damage to accretion lands in the old riverbed along the North Platte River wherein the court stated:

“Defendant contends that plaintiff was in no event entitled to recover for the damages to that portion of his leasehold that consisted of accretion lands in the old riverbed, for the reason that all property interests in such lands must be held to be subservient to the use of the bed of the river for public purposes. The state does not hold title to the riverbeds in Nebraska. *Kinkead v. Turgeon*, 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744, 748. Such riverbeds are

as effectually the subject of private ownership as other property except that, in the case of navigable streams, there is an easement for public navigation. . . .”

The court went on to cite language from *Kinhead v. Turgeon* and then continued at page 388:

“The title of an abutting owner to the accretions to such land is similarly absolute. *Conkey v. Knudsen*, 135 Neb. 890, 284 N. W. 737. It follows that under section 21, article I of our Constitution, an interest in accretion lands, like other property, cannot be taken or damaged for public use without just compensation.”

In 1964 in the case of *Krumwiede v. Rose*, 177 Neb. 570, 129 N. W. 2d 491, a case involving claims to ownership of an island formed by accretion between the eastern and western “high banks” of the Missouri River, the Supreme Court of Nebraska said:

“It makes no difference whether the land began as a sandbar island in a main stream or whether it was all formed by accretion to the mainland or by both processes joining. If, as in *Burket v. Krimlofski* supra, there is another owner of the island, then the ownership is split to the thread of the chute in which the accretion is taking place to both the island and the mainland. Who owned Omi Island at the time of its origin? In Nebraska the rule as to ownership on the bottom of the river including islands formed by accretion to the thread of the channel is the same, whether the stream is navigable or non-navigable. The only difference is that in case of a navigable stream, such as the Missouri River, it is subject to the superior easement of navigation. This basic decision was reached in *Kinhead v. Turgeon*, on rehearing, 74 Neb. 580, 109 N. W. 744, 7 L. R. A.,

N. S., 316, 13 Ann. Cas. 43, 121 Am. St. Rep. 740. The exact application to the case at bar is the holding in *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647, where it is said: ‘All states do not agree as to the ownership of land along navigable streams like the Missouri River. In Nebraska this court, after the rehearing in the case of *Kinkead v. Turgeon*, 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 13 Ann. Cas. 43, *held that riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such stream owns only to the shore line*, *Haight v. City of Keokuk* (1856), 4 Iowa, 199; *Payne v. Hall*, 192 Iowa 780, 185 N. W. 912. So that if an island occurs in the Missouri River on the Iowa side of the thread of the stream, *it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner.*’ (Emphasis supplied.)

“An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands. *Ohm v. Clear Creek Drainage Dist.*, 153 Neb. 428, 45 N. W. 2d 117; *Haney v. Hewitt*, 105 Neb. 746, 181 N. W. 861; *Higgins v. Adelson*, 131 Neb. 820, 270 N. W. 502; *Briard v. Hashberger*, 107 Neb. 199, 185 N. W. 430; *Burket v. Krimlofski*, *supra*.” (Emphasis by the Court.)

The Nebraska cases either stating or reaffirming these propositions are so numerous that further citation would merely burden the record. Although Iowa has taken the position that these statements are dicta, the fact is that there is no question under the law of Nebraska

but that the riparian owner "owns" to the thread of the stream and such riverbeds, islands, or bar areas are as effectively the subject of private ownership as other property, except that, in the case of navigable streams, there is an easement for public navigation. The Nebraska courts have never waived from this position since *Kinkead v. Turgeon*, supra.

Consequently, cases involving beds or islands in the beds of nonnavigable streams in Nebraska are also applicable to navigable streams insofar as the ownership is concerned, except that there is merely the added qualification that there is an easement for public navigation on the navigable streams.

IOWA'S ALTERNATIVE PROPOSITION

Nebraska submits that Iowa's alternative proposition that title to the bed of the Missouri River had not passed to the states constitutes another last minute change of position by Iowa and has no basis. The result of this argument by Iowa leads to the inescapable conclusion that Iowa would have no claims whatsoever to the bed of the Missouri River. Further comment is not deemed necessary.

CONCLUSION

This change of position by the State of Iowa in her Reply is typical of her ability to argue to meet the expedencies of the moment without regard to the conse

quences or effect of her argument. Nebraska submits that Iowa has now misstated the Nebraska law concerning ownership of the bed of navigable streams. In addition, if Iowa's alternative proposition that title to the bed of the waters of the Missouri River "had never passed from the United States" then the result of this argument is that Iowa does not have any claim to the bed of the Missouri River either. If Iowa's argument depends upon either of the two propositions which she has submitted at pages 15-16 of her Reply, then Nebraska must necessarily prevail.

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 28, 1972, I served a copy of the foregoing SUPPLEMENTAL BRIEF OF PLAINTIFF, STATE OF NEBRASKA IN ANSWER TO NEW POSITION TAKEN BY IOWA IN HER REPLY 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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