In The

Supreme Court of the United States

October Term, 1964

—o—

No. 17, Original

—o—

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

—o—

NEBRASKA'S REPLY TO IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER

—o—

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COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

CASES CITED

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INTRODUCTORY STATEMENT

Nebraska opposes Iowa's Exceptions to the Decree Recommended by the Special Master and respectfully submits that the Decree is in accord with the Opinion delivered by the Court herein on April 24, 1972.

Iowa did not take exception to the Opinion of the Court and Iowa did not file a Petition for Rehearing. She should not now be able to circumvent that Opinion by the Decree nor should she be allowed to circumvent Rule 58 of the Rules of the Supreme Court of the United States regarding rehearings. The *entire* Report of Special Master was considered by this Court and Iowa should not now be able to select certain sentences from the Report of Special Master in isolation and thereby change the meaning of the Opinion.

The Special Master recommended the proposed Decree after hearing and oral argument. Iowa's proposed Exceptions would change the opinion of the Court and in some instances would be completely contradictory to that opinion.

The Decree is, as nearly as possible, in the language of the Supreme Court. Attached hereto as Exhibit A is a copy of the Opinion delivered in this case on April 24, 1972 with references in the margin to the paragraphs of the Recommended Decree by the Special Master and with the supporting language underlined. References to the Opinion in this Reply shall be to the page of the Exhibit such as E-1.

Iowa apparently refuses to accept the language of this Court and particularly the determination that under Nebraska law the riparian owner along the Missouri River owned title to the bed on that owner's side of the main channel. Iowa's argument to the contrary was considered "frivolous" (See f. n. 3, E-7). The Court further clearly stated that a title "good in Nebraska" includes private titles to riparian lands that run to the thread of the contiguous stream (E-6 and E-7), and that under Section 3 of the Iowa-Nebraska Boundary Compact of 1943, Iowa was bound to recognize such titles which were "good in Nebraska" to be "good in" Iowa, and not to claim ownership in herself (E-5). These statements by the Court have been embodied in the Recommended Decree submitted by the Special Master. Iowa's Exceptions would change these principles and operate to deprive the Nebraska riparian owner of his title which had been good in Nebraska in direct contravention of the

Opinion and Section 3 of the Iowa-Nebraska Boundary Compact of 1943. It is clear from the Opinion that titles good in Nebraska shall be good in Iowa. The Compact recognized these titles. It did not take them away from the owner or divest the owner of them and transfer them to the State of Iowa.

Iowa's present position is typical of her conduct throughout these proceedings. First, Iowa refused to accept the Court's decision that it had jurisdiction in 1965, 379 U. S. 996, and she continued to argue that point for the next seven years. Then she refused to accept the clear legal principle that in Nebraska the riparian owner owns the bed of navigable streams and engaged in an argument which this Court found to be frivolous (f. n. 9, E-7). Now she has refused to accept the clear and unambiguous Opinion of this Court delivered on April 24, 1972.

Nebraska submits that the Decree should be entered as recommended by the Special Master. It is clear and unambiguous and decides the issues in the case. It may not decide them in the manner which either Nebraska or Iowa completely prefer, but it does set the issues to rest as decided by this Court.

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REPLY TO EXCEPTION I OF THE STATE OF IOWA

It is difficult to reply to Iowa's Exceptions without rearguing the entire case since Iowa's Exceptions would change the holding of the Court. When exceptions were

argued to the Report of Special Master, in some instances the exceptions were worded in different language from that of the Master and in others were to be taken in the total context. To take certain sentences or paragraphs out of the Master's Report now could be misleading in result. The opinion of the Court constituted a complete overview of the entire case and settled the issues in totality.

Iowa has stated that its Exception I is ". . . a direct quotation from the Special Master's Report at the top of page 193." However, Iowa failed to mention that this statement was qualified by language at the bottom of page 192 of the Report of Special Master to generally refer to "north of Omaha". Without this qualification, Iowa's statement is taken out of context. Nebraska would point out that there is no basis for a distinction between principles to be applied north and south of Omaha but the same principles must be applied along the entire river. This, the Opinion made very clear.

Paragraph 11 of the Recommended Decree by the Special Master reiterates language found at page E-8 of the Opinion that claimants of title to areas formed since July 12, 1943 may also have the opportunity to show title "good in Nebraska" on the Compact date. This title includes the Nebraska riparian owner's title to the bed which was a title "good in Nebraska". Iowa still refuses to accept that principle and by subtle changes to the Decree, such as her proposed language in her Exception I, would nullify it.

In addition, Iowa's suggestion that her proposed statement is one of the rules to be derived from the case of *Tyson v. State of Iowa*, 283 F. 2d 802 (1960) could be misleading. The *Tyson* case will be discussed at a later point in this Reply.

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REPLY TO EXCEPTION II OF THE STATE OF IOWA

Iowa's proposed Exception II would completely change the effect of the Opinion. Iowa has suggested that ownership of the bed of the Missouri River after the Boundary Compact "is and has been" determined by Iowa law on the Iowa side of the new boundary. This is not, as Iowa has inferred, the language of the Special Master found at page 183 of his Report. The subtle addition of the words "is and has been" would lend retroactivity to any determination about the formation of lands and would operate to displace the Nebraska riparian owner's title which had been "good in Nebraska" and which, under Section 3 of the Compact, Iowa had agreed to respect.

Iowa's proposed language is inconsistent with other holdings in the Opinion and would create ambiguities leading to further litigation. It would nullify the plain holding of the Court that titles good in Nebraska shall be good in Iowa as to lands "ceded" as defined in the Opinion.

At page 6 of Iowa's Exceptions, she apparently has attempted to cast some doubt upon the nature of the

hearing held by the Special Master and his reasoning in preparing the Recommended Decree. Nebraska would point out that a full and fair hearing was held and the Recommended Decree is that of the Special Master. As such, and particularly considering that it is completely consistent with the Opinion of the Court, his recommendation should be given great weight.

Nebraska must also point out that it is not Nebraska which is attempting to relitigate any issues, but it is Iowa which is making this attempt. Iowa has refused to accept the clear language of the Court found in the Opinion at pages E-6 to E-7 and embodied in paragraph 7 of the Recommended Decree that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream. She continues to cling to her "frivolous" argument to the contrary (see Footnote 9, page E-7). The language of the Court could hardly be clearer. If such plain and clear language constitutes ambiguity in her eyes, then Iowa's motives would seem to become suspect.

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REPLY TO EXCEPTION III OF THE STATE OF IOWA

Iowa's Exception III has objected to paragraph 6 of the Recommended Decree. Nebraska would first point out that paragraph 6 is accurately reflective of the holding in the Opinion (see E-6 and f. n. 4 and f. n. 5 at E-4).

In addition, Iowa recommended the following paragraph to the Master:

"8. The State of Iowa does not own Nottleman Island and Schemmel Island. The proofs sufficed to establish title 'good in Nebraska' as of July 12, 1943, to Nottleman Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Darwin Merritt Babbitt, et al.*, Equity No. 17433 in the District Court for Mills County, Iowa, and to Schemmel Island which was the land involved in the case of *State of Iowa, Plaintiff v. Henry E. Schemmel, et al., Defendants,* Equity No. 19765 filed in the District Court of Fremont County, Iowa, on March 26, 1963, and that Nottleman Island and Schemmel Island formed before July 12, 1943."

The above language is identical to paragraph 6 of the Recommended Decree except Iowa had suggested the phrase "as of July 12, 1943" be inserted. Iowa should not now be entitled to question what was substantially her own recommendation.

In addition, Iowa is again suggesting that the Court ignore its statement at E-6 and E-7 that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream. Iowa has apparently refused to accept this clear statement by the Court.

There is nothing in the Opinion which states that a Nebraska riparian owner's ownership of river bed before the Compact, to which there was a title good in Nebraska, floated out from under that landowner and into the State of Iowa, without compensation, thus depriving the landowner of his property, by the fact that the area was placed in Iowa by the Iowa-Nebraska Compact of 1943.

Nebraska would further mention that Exhibits D-1044-A and D-427 referred to by Iowa were discredited by the evidence, but Nebraska does not feel it should be necessary to have to go back into the original issues argued in the case.

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REPLY TO EXCEPTION IV OF THE STATE OF IOWA

Iowa has stated that paragraph 11 of the Recommended Decree is "inaccurate, misleading and subject to misinterpretation." However, paragraph 11 represents what the Court said in its Opinion (E-8). Again, it appears that Iowa is arguing with the holding of the Court and is attempting to change that holding by the Decree.

At page 9 of her Exceptions, Iowa is apparently again attempting to interject a requirement that a private claimant of land must prove when and how the land formed, and this is a requirement which clearly was negated by the Court in other parts of the Opinion when the Court held that it was not necessary to prove the location of the *original* boundary (E-6).

There are many complicated factual situations existing along the Missouri River and this, in large part, was one of the major reasons for the adoption of the Compact. The difficulty in tracing the factual history of areas was clearly illustrated by the mass of evidence in this case directed toward the formation of the Nottleman and Schemmel Island areas. The Court found that all of this was not necessary and the Compact did not place this burden upon the landowner (E-6).

In her statements on page 10 of Iowa's Exceptions, Iowa has again ignored the fact that the riparian owner in Nebraska owned the bed and this includes island and bar areas arising in that bed. This was a part of his title which Iowa agreed would be good under Section 3 of the Compact. Iowa is attempting to provide a requirement that an area "existed" and this definitional problem is fraught with litigious possibilities. When the area was in Nebraska, it was immaterial whether it was bar, island or bed since it all belonged to the riparian owner. Iowa's suggested rule would lead to further controversy, litigation, and possible injustice. There are thousands of acres of land along the approximately 190 mile border which could be affected by this holding and Iowa's language would allow her to obtain large areas to which she otherwise has no right and over which she has not exercised any incidents of ownership, in direct violation of her solemn agreement in the Compact that such titles would be good in Iowa.

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REPLY TO EXCEPTION V OF THE STATE OF IOWA

Iowa has also objected to Paragraph 12 of the Recommended Decree even though that language is almost identical to that in the Opinion (E-9).

Iowa apparently would like to go back into the *Tyson* case and extract certain language from it. The evidence in this case is clear that Iowa has previously relied upon the *Tyson v. Iowa* case as holding that a Nebraska riparian owner could not accrete across the state line into

Iowa (See pp. 382-389 of Plaintiff's Resume' of Evidence Before the Special Master, Honorable Joseph P. Willson and p. 34 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) quoted at p. 69 of Plaintiff's Resume'). The holding of the Court in this case is certainly clear that a Nebraska riparian owner may have accretions to his land which cross the boundary into Iowa if they are formations which, under Iowa law, meet the tests of accretion. The *Tyson* case did not involve any question of a claim of a title good in Nebraska to land ceded to Iowa and should not be extended beyond what it properly held. The Decree should make it clear that Iowa cannot continue to miscite the *Tyson* case for a principle which is not accurately reflective of the holding as Iowa has done in the *Riley Williams* case at Middle Decatur Bend. (See Plaintiff's Resume' of Evidence Before the Special Master, pp. 382-389).

Iowa's statement on page 12 of her Exceptions that "it could even be argued that Paragraph 12 has no application at all because it is a basic tenet in the common law concerning accretions that there is no such thing as moving accretions" is completely incomprehensible and again raises some question as to Iowa's willingness to abide by the Opinion. The proposition in Paragraph 12 of the Proposed Decree as recommended by the Special Master is very clear, and it is difficult to conceive of any *bona fide* questions as to its applicability or meaning.

CONCLUSION

Nebraska submits that all of the issues in this case have been clearly decided by the Opinion and are accurately reflected in the Recommended Decree by the Special Master. The Decree is in accord with the Opinion, but it would not be if Iowa's proposed Exceptions were adopted. Iowa has just refused to accept what the Court decided. Iowa should not be allowed to change the effect of the Opinion by a selectively drafted Decree which does not reflect the holding of that Opinion. This is particularly pertinent since Iowa failed to file any Motion for Rehearing following delivery of the Opinion.

If Iowa is allowed to extract language from the Report of Special Master, in all fairness Nebraska should also have the opportunity of going behind the Opinion to recommend other more restrictive language in the Report such as that Iowa has violated the Compact of 1943 by claiming Nottleman and Schemmel Islands; that the states relinquished by the Compact the right to question any title, lien or mortgage on the grounds that the land to which it applied was not within the jurisdiction of the state through which said title, lien or mortgage arose; that there was no record of land ceded by the Compact; that the land within the bed of the Missouri River was ceded along the entire boundary; that it is almost impossible to locate the boundary throughout from the A. P. maps; that some of Iowa's traverses are arbitrary and have no basis in fact; that when a litigant shows a title supportable under Nebraska law, Iowa should not be able to defend on the ground that no person can claim adversely against the sovereign State

of Iowa, and the presumption that accretion is favored over avulsion should not have application in such situation; that the credibility of Iowa's principal witnesses may have been influenced or may be suspect; that the states made no attempt to determine what private title claims existed along the Missouri River, but intended to recognize all private claims as against the states without further investigation; and other such statements which might be found in the Report of Special Master. Nebraska submits that this is not proper procedure and that such statements are not a proper part of the Decree any more than are the suggested changes set forth by Iowa in her Exceptions.

This case has been fully argued and decided and should not be reopened at this stage of the proceedings. Nebraska respectfully submits that the Recommended Decree of Special Master should be entered herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 11, 1972, I served a copy of NEBRASKA'S REPLY TO IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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Senior United States District Judge

208 United States Court House
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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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EXHIBIT A

SUPREME COURT OF THE UNITED STATES

No. 17, Orig.

State of Nebraska, Plaintiff,
v.
State of Iowa.

On Exceptions to Report of Special Master.

[April 24, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Both Iowa and Nebraska filed Exceptions to the Report submitted by the Special Master in this original action brought by Nebraska against Iowa for construction and enforcement of the Iowa-Nebraska Boundary Compact of 1943.[1]

The Missouri River is the boundary between the two States. In 1892, in another suit brought by Nebraska against Iowa, this Court held that the boundary line in

Decree, Par. 1

[1] Iowa Code Ann. Vol. I, p. 85; Iowa Acts 1943 (50 G. A.), c. 306; Nebraska Laws 1943, c. 130; Act July 12, 1943, 57 Stat. 494.

Leave to file the action was granted in 1965. 379 U. S. 876 (1964); 379 U. S. 996 (1965). There have been successive Special Masters. See 380 U. S. 968 (1965); 392 U. S. 918 (1968); 393 U. S. 910 (1968). Senior Judge Joseph P. Willson completed the case after extensive hearings and filed his Report on November 9, 1971. 404 U. S. 933 (1971). The Exceptions of the States were orally argued before this Court on March 29, 1972.

Iowa's Exception I renews the objection to the Court's jurisdiction that was overruled when leave to file was granted. We overrule the Exception. "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." *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28 (1951); Constitution Art. III, § 2; 28 U. S. C. § 1251.

Decree, Par. 1

the river at Carter Lake, Iowa, was to be located according to the principle that the boundary "is a varying line" so far as affected by "changes of diminution and accretion in the mere washing of the waters of the stream," but not where the river is shifted by avulsion: "By this selection of a new channel the boundary was not changed, and it remained as it was prior to avulsion, the centre line of the old channel; . . . unless the waters of the river returned to their former bed, [such centre line] became a fixed and invarying boundary, no matter what might be the changes of the river in this new channel." *Nebraska* v. *Iowa,* 143 U. S. 359, 370 (1892); the decree is at 145 U. S. 519 (1892). The Compact adopts this line at Carter Lake, and for the rest of the boundary fixes the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plan maps of the Missouri river from Sioux City, Iowa to Rulo, Nebraska and identified by file numbers AP–1 to 4 inclusive, dated January 30, 1940, and file numbers AP–5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska." The "proposed stabilized channel" refers to a project begun in the early 1930's by the United States Army Corps of Engineers to tame the river along its entire length by containing it within a designed channel. The work was partially completed by 1943, but had been suspended when World War II intervened. When work resumed in 1948, the channel was partly redesigned, and by 1959 the river had been confined in the new designed channel.

The States determined in 1943 to agree by compact upon a permanent location of the boundary line when experience showed that ". . . the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1892]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the Court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion.'" Erickson, 25 Iowa J. of Hist. and Pol. 233, 235 (1927). The Special Master found, on ample evidence, and we adopt his findings, that by 1943 the shifts of the river channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it would be practically impossible to locate the original boundary line.[2] Decree, Par. 1 Decree, Par. 2

The fixing of the permanent boundary by Compact resulted in some riparian lands in each State being located within the other State. This created the problem of the effect to be given by the new State to titles, mortgages, and other liens that had arisen under the laws of the other State. Sections 2 and 3 of the Compact were designed to solve this problem.[3] Under § 2 each State "cedes" to the other State "and relinquishes jurisdiction over" all Decree, Par. 4

[2] Report, pp. 63, 65, 67, 68, 80.

[3] Each State Legislature adopted a statute to evidence its agreement to the Compact. Sections 2 and 3 of each statute create obligations reciprocated by the other State in §§ 2 and 3 of its statute. In the Iowa statute the sections are:

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

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

Decree, Par. 4

such lands now located within the Compact boundary of the other. Under § 3, "titles, mortgages and other liens" affecting such lands "good in" the ceding State "shall be good in" the other State.

The instant dispute between the States arose when Iowa in 1963 claimed state ownership of some 30 separate areas of land, water, marsh, or mixture of the three wholly on the Iowa side of the Compact boundary. Eight and part of a ninth such areas were formed before 1943. Twenty-one and part of a 22d were formed after 1943.[4] Iowa's claim was based on Iowa common law that private titles to riparian lands run only to the ordinary high water mark on navigable streams and that the State is the owner of the beds of all navigable streams within the State and is also the owner of any islands that may form therein. *McManus* v. *Carmichael*, 3 Iowa 1 (1856); *Holman* v. *Hodges*, 112 Iowa 714, 84 N. W. 950 (1901). The areas formed before 1943 lie south of Omaha and those formed after 1943 lie north of Omaha. Two of the pre-1943 areas are Nottleman Island and Schemmel Island. Each is the subject of an action to quiet title brought by Iowa in Iowa courts.[5] The defense in each case is that there

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Decree, Par. 6

[4] The areas formed before 1943 are Nottleman Island, Schemmel Island, St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. Report, pp. 106, 165.

The areas formed since 1943 are Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monoria Bend, Monoria Bend, Blackherd Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Report, p. 107.

[5] On March 18, 1963, Iowa filed in the District Court for Mills County "*State of Iowa, Plaintiff* v. *Darwin Merrit Babbit et al.*, Equity No. 17433" to quiet title to Nottleman Island. On March 26,

exist "titles . . . good in Nebraska" to the islands that, under § 3 of the Compact, Iowa obligated itself to recognize to be "good in Iowa" as against any claim of Iowa under its doctrine of state ownership.

Thus, the controversy between the States in this case centers around the proper construction of their Compact. The Special Master's Findings and Conclusions generally favor Nebraska's position on the merits of the controversy over the areas that formed before July 12, 1943, and Iowa's exceptions are addressed to them. On the other hand, the Findings and Conclusions favor Iowa's position on the merits of the controversy over the areas that formed after July 12, 1943, and Nebraska's exceptions are primarily addressed to them. We overrule all exceptions, save two of Nebraska addressed to printing errors in the Report,[6] save as we sustain, *infra*, Iowa's Exceptions IV and V insofar as the Special Master recommended that an injunction issue, and save as mentioned in n. 8, *infra*.

The Special Master construed the word "cedes" in § 2 as meant by the States to describe all areas formed before July 12, 1943, regardless of their location with reference to the original boundary, whose "titles, mortgages and other liens" were, at the date of the Compact, "good in" the ceding State, and ruled that, under § 3, the other State is bound to recognize such "titles, mortgages and other liens" to be "good in" its State, and not to claim ownership in itself. Iowa urges, in its Exceptions

Decree, Par. 4

1963, Iowa filed in the District Court of Fremont County "*State of Iowa, Plaintiff* v. *Henry E. Schemmel, et al., Defendants,* Equity No. 19765" to quiet title to Schemmel Island. Proceedings in the actions have been suspended pending our decision.

[6] Exceptions of the State of Nebraska, No. 6, p. 8, and No. 12, p. 11. Iowa concedes that the Exceptions are well taken. Iowa Reply, pp. 5, 7. The errors will be deemed corrected as suggested by the Exceptions.

II and III, that this construction is erroneous and that §§ 2 and 3 should be construed as relating only to areas
Decree, Par. 5 formed before July 12, 1943, that can be proved by clear, satisfactory, and convincing evidence to have been on the Nebraska side of the *original* boundary before the Compact fixed the permanent boundary. We overrule Iowa's Exceptions. Iowa's construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the *original* boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary. That, said the Special Master, and we agree, ". . . would be placing a burden upon the land owner which the States themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owner 'we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your expense even though we know it is impossible.' " [7]

Decree, Par. 6 Iowa's Exceptions IV and V concern the Special Master's findings that the State of Iowa does not own Nottleman Island and Schemmel Island. The Special Master found that the proofs sufficed to establish title "good in Nebraska" to Nottleman Island and Schemmel Island, but did not suffice to prove title "good in Nebraska" to the other areas claimed by Iowa that were
Decree, Par. 7 formed before 1943.[8] He found, and we agree, that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from

[7] Report, pp. 88–89.

[8] Report, p. 174. The Special Master found, alternatively, that if his construction of §§ 2 and 3 was not accepted, nevertheless the landowners met the burden of proving that Nottleman and Schemmel Islands were actually on the Nebraska side of the original boundary. Since we agree with the Special Master's construction, we consider no exceptions addressed to those findings.

Iowa law, run to the thread of the contiguous stream. *Kirkead* v. *Turgeon*, 74 Neb. 580, 104 N. W. 1061 (1906).[9] He found further that titles "good in Nebraska" embrace titles obtained by 10 years' open, notorious, and adverse possession under claim of right without any requirement of a record title; under Iowa law, a claim must be under "color of title," requiring some type of record title to commence the period of adverse possession.[10] Decree, Par. 7 Decree, Par. 8

The Special Master recommended that as to areas formed before July 12, 1943, §§ 2 and 3 should be construed as limiting the State of Iowa to contesting with private litigants in state or federal courts the question whether the private claimants can prove title "good in Nebraska," and when private litigants prove such title, as obliging Iowa not to interpose Iowa's doctrine of state ownership as defeating such title.[11] We agree and to that extent overrule Iowa's Exceptions IV and V. As to Nottleman Island and Schemmel Island, however, the Special Master recommended that, in addition to a judgment that titles "good in Nebraska" have been proved as to those islands, so that Iowa is precluded from claiming title thereto under its doctrine of state ownership, this Court should enjoin the State of Iowa, its Decree, Par. 9 Decree, Par. 10

[9] In Iowa's Reply, filed January 19, 1972, Iowa for the first time in this protracted litigation retracts her concession, made often and throughout the proceedings, that *Kirkead* established this principle of Nebraska law. In her Reply, pp. 15–16, Iowa contends 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 to such bed until it was abandoned by the river." Our reading of the Nebraska cases satisfies us that the argument is frivolous.

[10] Report, pp. 68–69. Claimants to titles to areas of Nottleman Island rested at least in part on the Nebraska law of adverse possession. Report 121–126.

[11] Report, pp. 174–175.

officers, agents, and servants from further prosecution of
Decree, Par. 10 the cases now pending in the Iowa courts.[12] We see no reason for an injunction at this stage. We are confident that the State of Iowa will abide by our adoption of the Special Master's conclusion that in any proceeding between a private litigant and the State of Iowa in which a claim of title good under the law of Nebraska is proved, the State of Iowa shall not invoke its common law doctrine of state ownership as defeating such title. Iowa's Exceptions IV and V are therefore sustained insofar as the Special Master recommended that an injunction issue.

Nebraska's basic Exception is to the Findings and Conclusion of the Special Master that ownership of areas that have formed since July 12, 1943, should be determined under the law of the State in which they formed, the boundary fixed by the Compact being the line that determines in which State they formed.[13] This pertains to the 21 areas and part of a 22d that lie north of Omaha. See n. 4, *supra*.

Decree, Par. 11 Although the Special Master recommended, and we agree, that claimants of title to these areas as against Iowa may also have the opportunity to show title "good in Nebraska" on the Compact date, July 12, 1943,[14] Nebraska offered no proofs to support such a claim as to any of the areas. Nebraska does contend, however, that any accretions to Nebraska riparian lands that cross the Compact boundary line into Iowa, caused when the river moves gradually and imperceptibly, should be declared to accrue to the Nebraska riparian owner under Nebraska law, since under Nebraska law the boundary of the Nebraska owner moves with the thalweg or main navigable channel, regardless of which State the move-

[12] Report, p. 201; see n. 5, *supra*.
[13] Report, p. 193.
[14] Report, p. 192.

ment is in. The Special Master rejected that contention. We agree that the contention is without merit for the reasons stated in *Tyson* v. *State of Iowa*, 283 F. 2d 802 (1960). That was a condemnation action by the United States in which the question was the ownership of an island at Tyson Bend, one of the areas north of Omaha to which Iowa claims ownership. See n. 4, *supra*. The island had formed between the designed channel and a main channel created when the river escaped from the designed channel between 1943 and 1948. The island had then become connected to the Nebraska shore when the designed channel filled with sediment after a 1952 flood. The Corps of Engineers determined to dredge a canal in the designed channel to place the river back in the designed channel. Condemnation of an easement on the island was necessary to carry the project forward, and the question of ownership of the island had to be settled to determine who was entitled to compensation. The Tyson claimants claimed the land as an accretion to Nebraska land or river beds belonging to them. The State of Iowa claimed it as an island formed over the state-owned river bed in Iowa under the Iowa doctrine of state ownership. The Court of Appeals for the Eighth Circuit held that the ownership of the island should be determined by the law of the State in which the land was situated, that is, by the law of Iowa, since the island was on the Iowa side of the Compact boundary. The Court of Appeals expressly rejected the same contention urged upon us by Nebraska, holding, in agreement with the District Court in the case, that "the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa." 283 F. 2d, at 811. Hence, whether the Nebraska riparian owner has title to the accretions that cross the boundary into Iowa is determined by Iowa law. Nebraska argues that *Tyson* was

Decree, Par. 12

wrongly decided. We do not agree. *Tyson* is consistent with what the Court said in *Arkansas* v. *Tennessee,* 246 U. S. 158, 175 (1918):

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

The States may submit a proposed decree in accord with this opinion. If the States cannot agree, the Special Master is requested, after appropriate hearing, to prepare and submit a recommended decree.

It is so ordered.