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—

PLAINTIFF'S REPLY BRIEF BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

—o—

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INTRODUCTORY STATEMENT

Plaintiff does not accept Defendant's statement of facts, interpretation of the cited cases, or analysis of Nebraska's argument. Rather than meet or attempt to correct every misstatement in Iowa's Appendix or Brief, Plaintiff has collected certain representative inconsistencies which will be pointed out in this Reply Brief without purporting to cover all of the points which Plaintiff disagrees with.

Plaintiff will first consider certain inconsistencies between Iowa's statements and her actual conduct as shown by the evidence; limited reference will be made to the quality of Iowa's evidence relied upon and to Iowa's analysis of the cases and Plaintiff's position; and

then consideration will be given to the unfair and unjust consequences which would follow should Iowa be correct in her position.

References to Iowa's Brief, page number, and lines are abbreviated as follows (B., p. ....., l. .....). References to Iowa's Appendix may be abbreviated (A., p. ....., l. .....).

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I.

MISSTATEMENTS OF FACT AND INCONSISTENT ARGUMENTS BY THE STATE OF IOWA

Although not intending to point out all of the alleged misstatements of fact and misleading arguments by the State of Iowa in her Brief and Appendix, plaintiff would point out the following misleading or inaccurate statements and arguments by Iowa:

1. Recognition of Nebraska titles.

Iowa's Statements:

Iowa continues to make such statements as:

> "Iowa agrees that the Compact does not permit Iowa to own any *land ceded* by Nebraska to Iowa. Iowa cannot own any land which formed and came into existence in Nebraska anyway, whether ceded or not. Iowa claims only land which she believes to have formed in Iowa and became state owned by Iowa law." (B., p. 20, ll. 17-22.)
>
> "Titles to all ceded lands which were good in the ceding state would be good in the receiving state, and certainly, a Nebraskan's good legal title in

Nebraska to some land which was ceded became a good legal Iowa title after cession." (B. p. 35, ll. 20-24.)

"The Compact being part of the law of Iowa, any protection therein granted owners of the Nebraska land ceded to Iowa by the Compact, has been and will be recognized by the Courts of Iowa." (B., p. 71, ll. 13-16.)

"Iowa Courts and officials have always recognized the Compact terms." (B., p. 76, ll. 13-15.)

"Good titles to lands located within the territorial boundaries of Nebraska prior to the 1943 Boundary Compact, and under the Compact terms ceded to Iowa's jurisdiction, should be recognized by the State of Iowa and the Iowa Courts in accordance with the principles of law of the State of Nebraska as of the date of the Compact." (B., p. 77, ll. 16-21.)

". . . Iowa only desires property belonging to the people of Iowa." (B., p. 109, ll. 28-29.)

"Iowa seeks only what lands are rightfully hers, and this cannot be termed a taking of private property without compensation because we seek to take no private property from any private landowner." (B., p. 118, ll. 18-22.)

"Iowa does not disregard the Compact. She recognizes the *good* Nebraska titles which were held by private parties in Nebraska City Island, California Bend, Soldier Bend, Winnebago Bend, and Browers Bend." (B., p. 120, ll. 11-14.)

At the same time, Iowa states:

". . . Iowa believes there is clear, satisfactory and convincing evidence that the boundary was not in the river at the following locations:" (B., p. 12, ll. 4-7.)

* * *

3) *California Bend.* Iowa has always recognized that the dredging of the California Bend Canal in about 1938 was a true man-made avulsion. (B., p. 12, ll. 24-26.)

* * *

5) *Winnebago Bend.* The pre-Compact boundary was most certainly not in the river as the river was running in 1943. In *U. S. v. Flowers,* the Federal Court had held on (sic) in 1938, that there had been two avulsions at Winnebago Bend prior to 1938; that the first of these had stranded Iowa land on the Nebraska side of the river, and that the second had stranded Nebraska (Indian) land on the Iowa side of the river. Also, the Winnebago Bend Canal was dredged in about 1938. Again, the Special Master has no responsibility to determine in this case where the pre-Compact boundary in Winnebago Bend was; it suffices to say that it was not in the 1943 designed channel. (B., p. 13, ll. 1-13.)

* * *

6) *Bartlett-Pinhook Bend.* A canal had been dredged through an island in about 1938 and the river was running through the canal in 1943. This canal was probably a man-made avulsion. The question remains as to which state the island was in prior to 1938, and the Special Master has no duty to make that determination here." (B., p. 13, ll. 14-20.)

"Certainly, St. Mary's Cut-Off, DeSoto Bend Cut-Off, California Cut-Off and Peterson Cut-off were man-made avulsions." (B., p. 98, ll. 13-15.)

" . . . as evidence in the case at bar was rather clear and convincing, that the islands both above and below Rock Bluff Bend and Otoe Bend formed in Nebraska, and as previously stated, Iowa only desires property belonging to the people of Iowa." (B., p. 109, ll. 25-29.)

How and why these are misstatements or are inconsistent.

In spite of Iowa's repetition of sanctimonious statements about how she is recognizing the Compact and only wants land properly belonging to her, the evidence shows that Iowa is claiming land in California Bend by virtue of her sovereign right and Iowa is claiming land in Winnebago Bend under the same theory. Iowa on the one hand has admitted that there were "true avulsions" in both of these bends, which means that land had to have been ceded to Iowa and the river at the time of the Compact was entirely in Nebraska at both places, yet Iowa is claiming land in these two bends. How can she continue to assert that she recognizes good Nebraska titles in California Bend and Winnebago Bend when she is attacking them?

Iowa has stated that the evidence clearly shows that the island immediately below Rock Bluff Bend formed in Nebraska. The evidence shows that this island was referred to on the Corps of Engineer maps as Goose Island and the Corps of Engineers dredged a canal in 1937 cutting off the lower part of Goose Island. This downstream portion was placed on the East side of the designed channel by the canal and became a part of Auldon Bar which Iowa is claiming. This is the same canal referred to by Iowa as the Bartlett-Pinhook Bend Canal which she admits was "probably a man-made avulsion."

Consequently, Iowa is claiming land which she acknowledges was actually ceded in Winnebago Bend, California Bend, and at Auldon Bar even though she admits

that there were true avulsions prior to the Compact in all three of these areas.

In spite of the fact she admits there were some avulsions, Iowa has taken the position that in those places where the Missouri River is presently confined to the stabilized channel as it appears on the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact, the State claims ownership of the entire bed east of the middle of the main channel as used in the Compact. (Interrogatory No. 164, pp. 440-441 of Plaintiff's Resume'.) Iowa's own statements and conduct indicate that, even under the theory which she argues, she violates the Compact and her continued statements to the contrary constitute a gross state hypocrisy which should not be allowed to continue. The state must be honest.

2. Nebraska owners' riparian rights.

Iowa's Statements:

Iowa has made the following statements concerning the Nebraska riparian owners' rights:

> "Under Iowa's construction of the compact, no Nebraska riparian owner was deprived of any vested property right, and owners of land formerly in Nebraska, now ceded to Iowa, still become the owners of any accretions to such lands which have formed since the compact, or which may later form." (B., p. 31, ll. 28-30 and p. 32, ll. 1-4.)

> "Both (cited cases) simply hold that a riparian owner is entitled to his accretions, and with this we do not disagree. This is the law of both Nebraska and Iowa." (B., p. 34, ll. 22-25.)

"Plaintiff is stating that Nebraska riparian owners prior to the Compact had an expectancy in accretion and reliction. That this expectancy was a vested right under Nebraska law. The pre-Compact boundary was a moving boundary, always following the thalweg as it moved. The state boundary since the Compact is a fixed, permanent boundary. The Nebraska riparian owners' rights before the Compact were limited, by the state boundary, and they are still limited by the state boundary. Any vested right to accretion, reliction or to bed of the stream East of the fixed boundary must be determined by Iowa law, now, the same as it was prior to the Compact." (B., p. 32, ll. 5-16.)

"In other words, Nebraska contends that the thalweg still remains the private boundary. Iowa can't believe that any such result was intended by the two states when they entered into the Compact." (B., p. 35, ll. 7-10.)

How and why these are misstatements or are inconsistent.

Although Iowa continues to insist that she is recognizing Nebraska titles and Nebraska riparian rights, she has again engaged in doubletalk and misleading statements because she also has taken the position that the Nebraska riparian owners' rights are cut off at the state line. The only reason that Nebraska riparian owners' rights prior to the Compact were limited by the state boundary was because the state boundary and the property boundary were the same. Both were the movable thalweg or main channel of the Missouri River. When one moved the other necessarily moved and following an avulsion, both would have become fixed at the same place. However, the Compact changed the state boundary to a fixed line which was not synonymous to the thalweg.

Following the Compact, the property line and the state line no longer coincided. Under both the provisions of the Compact and general principles of constitutional law, this changing of the state line could not deprive a private owner of his property line. Otherwise, he has been deprived of his property without due process of law.

In the *Tyson* case (described at pages 393-396 of Plaintiff's Resume'), Iowa took the position that the Nebraska owner could not accrete across the state line into Iowa, but the evidence clearly established that the land formed as accretion to the right bank side of the main channel. Whether this land area formed as an accretion to the Nebraska riparian owners' bed or bank is immaterial, since the Nebraska riparian owner owns the bed to the middle of the main channel or thalweg. Because it happened to form on the Iowa side of the Compact line (but on the right bank side of the thalweg) the Nebraska land owners were clearly deprived of property which otherwise would have been theirs had it not been for the Compact because the Court applied the "Iowa law" that the state owned the bed and the land was "in Iowa". Nebraska contends that the result in the case of *State of Iowa v. Tyson,* is a classic example of violation of the Compact and deprivation of the Nebraska riparian owners' vested property rights without compensation under the guise of "Iowa law".

Obviously under Iowa's construction, the Nebraska riparian owner would be deprived of his right to accretions to the bed and to any accretions which might extend to the East of the fixed Compact boundary.

3. Acts and diligence of public officials.

Iowa's Statements:

Iowa has made the following statements concerning the acts of its previous public officials and the state's diligence in ascertaining "state-owned" areas:

> "It is unconscionable to think that the responsible officials of Iowa in 1943 were utterly derelict in their duty to protect the public interest." (B., p. 80, ll. 1-3.)

> "Insofar as the opinion of a State Conservation official that the Nottleman Island area was not claimed by Iowa in 1951, or not listed as State-owned lands by those having a duty to list them as such, it has been long-established and accepted that neither a County, State or Federal government can be bound by the acts of its officers when they depart from the requirements of the law." (B., p. 96, ll. 10-16.)

> "Iowa submits it has always protected its land titles whenever they have been attacked, and whenever adverse claims became apparent, such as occupancy and conversion to private use." (B., p. 97, ll. 12-15.)

> "We find no other case (than *Krimflofski*) in which a State or a Federal court has held that wild, natural lands can be adversely possessed by using it for hunting and fishing, and especially where the state holds it for the use of its citizens as a hunting and fishing preserve, as does Iowa, with no evidence that Iowa was aware of the claimed adverse occupancy." (B., p. 108, ll. 24-30.)

> "Iowa has always been interested in the areas to which it holds title, whether they be abandoned channels filled with water, sand dunes, and pot holes, islands of little value or islands of substantial value. The Iowa Conservation Commission by its very nature and purpose is and always has been vitally in-

terested in all wild, natural and undisturbed areas in the State without regard to their commercial or agricultural value." (B., p. 118, ll. 29-30; p. 119, ll. 1-6.)

How and why these are misstatements or are inconsistent.

On the other hand, Iowa in its answers to interrogatories in the *Babbitt* case stated it had:

". . . made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area (Nottleman Island) adversely to plaintiff (Iowa) and plaintiff (Iowa) should not be required to make an investigation concerning possession merely for the purpose of answering interrogatories." (See Answer 4 at page 80 of Plaintiff's Resume'.)

Iowa also stated in answers to interrogatories in the *Babbitt* case:

"Plaintiff, (Iowa) deeming the entire matter of possession to be irrelevant and immaterial, has no information as to how long the various tracts in the area have been cultivated or by whom this has been done, nor any exact descriptions of the tracts cultivated by different parties." (See Answer 6, at page 82 of Plaintiff's Resume'.)

Mr. Schwob, director of the Iowa State Conservation Commission from 1941 to 1946, testified that the islands along the Missouri River were not marked as owned by the state because "at that time nobody paid any attention." (Vol. XXII, p. 3225). He also testified:

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

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

This was also confirmed by the testimony of Lloyd Bailey, Superintendent of Land Acquisition for the State Conservation Commission of Iowa, who testified that, for 10 or 12 years or more following the Compact, the State wasn't interested and no official action had been taken. Mr. Bailey also testified the Secretary of State was the State Land Officer or Commissioner in Iowa and the list of lands up and down the Missouri River claimed by the State of Iowa was not on file in the Office of the Secretary of State. He thought generally all the activity up and down the Missouri River started about 1958. The evidence shows the lands were not posted by the Conservation Commission and, even in July of 1964 when the Commission decided to post certain areas, Mr. Jauron was admonished "to proceed slowly" and to work closely with the Attorney General's office in the matter. (Pages 73-74 of Iowa's Appendix.)

The Iowa Conservation Commission minutes abstracted at page 70 of Iowa's Appendix indicate Mr. Eaton, an attorney, appeared in 1959 before the Commission to urge them to retain a full-time attorney and do whatever was necessary to have ownership of areas along the Missouri River determined.

The record fails to identify the areas in the Planning Report as having been claimed by Iowa at the time

of the Compact and even though Iowa has suggested she was asserting ownership at Noble's Lake in 1944, the court Decree of December 1, 1950, offered by Iowa indicates that Noble's Lake was cut off from the Missouri River and was a separate meandered lake in Iowa in 1858, which was 9 years prior to admission of Nebraska into the Union, and has been a meandered lake ever since (Exhibit D-1048).

The evidence clearly shows that the Attorney General of Iowa, Robert Larson, presently a judge on the Iowa Supreme Court, had notice of the Nottleman Island situation both in 1947 and again in 1950. Also, the Mills County Attorney and Auditor had informed a Deputy Iowa Attorney General about the situation in 1946 and had requested an opinion.

Although Iowa inaccurately states on page 89 of its Brief that Mr. Beckman, who was Chief of the Fish and Game Division ". . . wrote a letter in 1951, without the knowledge or consent of the Commission or any member thereof or any other responsible official of Iowa, stating that Iowa didn't own Nottleman Island . . .", the record is clear that Mr. Beckman was directed to write the letter by the Director of the Iowa State Conservation Commission whose position was a statutory one created by the Code of Iowa, Section 107.11, who directed the contents of the letter.

If Iowa is correct in its statements that its officials were always diligent in protecting Iowa's "land titles", then why should it not be assumed that all of her officials from the time of the Compact up until Iowa in-

itiated its land-acquisition program as outlined in the Missouri River Planning Report of 1961 were diligent in their duties when they recognized that the state had no claim to the areas shown in the Planning Report. Why should it not be assumed that Mr. Beckman, Mr. Stiles, the Director of the Iowa Conservation Commission, and all the other Iowa officials from the Governor and Attorney General on down were performing their duty and that they had asserted title to the only areas which the state had any legitimate claim to?

Iowa has also attempted to disclaim responsibility for the acts of all of its Mills and Fremont County officials as well as of its state taxing agencies. Plaintiff would point out that Section 4 of the Compact specifically provided that the county treasurers of the counties affected should act as agents in carrying out the provisions of that section which had to do with taxation of lands ceded. The county treasurers recognized these lands were ceded and then proceeded to tax both Nottleman Island and Schemmel Island in Iowa following the Compact. Section 4 of the Compact also required that Iowa recognize any Nebraska tax liens or other rights accrued or accruing within five years of the Compact and Katherine O'Brien was recipient of a tax deed issued by Cass County, Nebraska in 1945 which the Iowa Mills County Treasurer, under Section 4, was obligated to recognize as agent for the State of Iowa under authority of Section 4 of the Compact. In addition, plaintiff would again point out that the Iowa county officials are created by the statutes of the State of Iowa and the

County Attorney of Mills County is a statutory official. The State of Iowa is apparently disclaiming responsibility for the acts of all of its county officials in the six counties bordering the Missouri River and for its Attorney Generals and Conservation Commissioners and Governors during the decade immediately following the Compact.

It might be asked whether the State of Iowa is now responsible for the actions of Mr. Murray, former Attorney General Scalise, and Assistant Attorney General Scism, who disclaimed ownership of land in the Peterson-Lakin cases in Blackbird Bend. Does the State of Iowa disclaim responsibility for the action of George West, Assistant Attorney General of Iowa, who on behalf of the State of Iowa in the *Kirk v. Wilcox* case in 1956, admitted private ownership "as accretion land" of what was abandoned channel adjoining Flower's Island. Does the State of Iowa disclaim responsibility for the statements of its counsel in this case? At some later date are we to again be subjected to the argument that the present Iowa officials are not responsible for their actions?

Iowa must admit that no Iowa governmental agency at the time of the Compact showed any record of the areas listed in the Planning Report as "state owned lands", river beds, or abandoned river beds as required by her own law. Iowa would certainly like to forget these facts or ignore them but her statutory officials responsible for ascertaining what lands belonged to the

State of Iowa determined at that time that she had no claim to Nottleman Island or Schemmel Island or any of these other areas. Plaintiff would suggest that the officials in 1943 and the Legislature were not derelict but that they were performing their duties properly by not claiming these areas which were not "state-owned lands." For years after the Compact her state officials were performing their duties in not claiming these lands until certain individuals in the Attorney General's office and Conservation Commission embarked upon the aggressive program of land acquisition embodied in the Missouri River Planning Report of 1961.

Iowa has attempted in its Brief commencing at page 53 to disregard all of the conduct of the two states with regard to the Nottleman and Schemmel areas. However, Iowa should not be able to ignore the factual situation which existed immediately prior to the Compact as the States entered into the Compact in the context which existed in 1943 and prior. Iowa also should not be able to ignore conduct following the Compact which was consistent with the fact that these areas were ceded to Iowa by Nebraska under the Compact. These facts show how the parties conducted themselves at the time that they were negotiating and entering into the agreement to settle the boundary problems. Iowa should not be allowed to completely disregard these facts. Plaintiff submits it is inconceivable that conduct such as Iowa is asserting today was ever anticipated by the states in 1943 as being possible or sanctioned by the Compact.

4. So-called "trust lands."

Iowa's Statements:

Iowa has continued to argue that these specific areas in the Planning Report are "trust lands". She has stated:

> "What word or phrase in the Compact requires that Iowa disclaim all of her trust lands in the Missouri Bottoms?" (B., p. 71, ll. 1-3.)
>
> "Iowa has not ignored her trust lands along the Missouri River." (B., p. 118, ll. 12-13.)
>
> "Iowa is not only justified, but she is obligated as trustee for the people to preserve state ownership of her public lands." (B., p. 118, ll. 23-25.)

However, Iowa has also described some of her exhibits as:

> "Set of translucent overlays showing in green the areas along the river which Iowa claims to own; also showing by cross-hatching where Iowa's claims of ownership are buttressed by Court Decrees or conveyances." (A., p. 62, ll. 19-25.)

How and why these are misstatements or are inconsistent.

Immediately many questions come to mind if these are in fact trust lands. If Iowa owns the land and has title as trustee, why must she "buttress" her claim by other conveyances?

The evidence shows Iowa had no record of these areas along the river at the time of the Compact and for many years thereafter. What trustee does not have an inventory of the assets of its trust?

If these are trust lands, then how can Iowa justify disclaiming abandoned river bed in the Flowers Island area in the case of *Kirk v. Wilcox?* How can she justify disclaiming the abandoned river bed in the Peterson-Lakin area of Blackbird Bend or Kirk Bar and in the Walter Pegg area? How does she justify purchasing land in the Iowa half of the abandoned channel around Nebraska City Island? How can one of her attorneys represent a private land owner against another private land owner in a quiet title action to land in abandoned channel in California Bend as is the situation in the case of *Coulthard v. Simmons?* How can one of the State's attorneys make the decision that the State is not interested in the abandoned channel in the Walter Pegg area and represent Mr. Pegg? How does Iowa justify not claiming the abandoned channels in California Bend resulting from the avulsions occurring prior to the Compact?

The state must be honest.

5. Identification or location of the boundary.

Iowa's Statements:

Iowa counsel continues to insist that the boundary can be located on the ground at any point and is identifiable, stating:

> "Iowa submits that the boundary line can be located and is identifiable, . . . that it is entirely possible to determine whether disputed land is ceded land, or land that was always in one state or the other, or was land that came into being subsequent to 1943 in one state or the other." (B., p. 71, ll. 17-18, 21-25.)

> "The entire record in this case abidingly establishes by more than a preponderance of evidence that the Compact boundary line *can be located.*" (Emphasis theirs.) (B., p. 7, ll. 1-3.)
>
> "The evidence is clear that either State can locate the Compact line with all the certainty that any reasonable person would require, . . ." (B., p. 62, ll. 25-27.)

However, Iowa also has finally admitted that her surveyor made an error in the Babbitt case:

> "Admitted, that in the Rock Bluff Bend area the Iowa surveyor did not take into account the narrowing of the channel by the U. S. Corps of Engineers after the date of the Compact, and its formal claim was 50 feet in error, but this was in the flowing stream." (B., p. 62, ll. 20-25.)

How and why these are misstatements or are inconsistent.

Iowa should not be allowed to excuse any errors on the grounds that they existed "in the flowing stream". Were it not for the fact that these areas at some time may have been in the flowing stream of the Missouri River, Iowa would have had no claim whatsoever to them. On the one hand she justifies her claims by the fact that they are river bed and on the other hand, when in error, she minimizes the error on the basis that it is only in that river bed.

The evidence has clearly demonstrated that Iowa's surveyor, Mr. Windenburg, could not locate the Compact boundary in the Nottleman Island area; three surveyors (Mr. Windenburg, Mr. Brown, and Professor Lubsen) all disagreed as to location of the Compact line there; and Mr. Windenburg's surveys also do not follow any geo-

graphic feature along the eastern side of the Babbitt and Schemmel traverses. 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.

The Corps of Engineer letters to the Nebraska State Surveyor, Nebraska State Senator Syas, Mr. Jauron, and the Governor's Advisory Committee on the Iowa-Nebraska Boundary all stated that the present state boundary between Iowa and Nebraska cannot be located throughout from maps in the Corps' files. (See pages 54-55 and 431-433 of Plaintiff's Resume'.) Mr. Huber drafted the letter which was sent to Mr. Jauron.

Even Mr. Hart, who claimed he could locate the boundary but whose methods varied, testified that it was "not something that could not be resolved between the surveyors on the ground", indicating room for disagreement. The testimony concerning the Peterson-Lakin land at Blackbird Bend or Kirk Bar also indicated that the Iowa State Conservation Commission line did not go through the "slough in the abandoned channel" and did not have a geographic basis consistent with Iowa's theories. All of the evidence shows that, although Iowa continues to repeat that her surveyors can find the boundary lines and the bank lines, what the state apparently

really means is that her surveyors can find the line which Iowa desires, whether or not there is any basis for that line in fact.

The testimony really illustrates that the Compact used general language and adopted the boundary in general terms in a context in which determination of the line on the ground was never anticipated and where Iowa was making no proprietary claims to property, such as they are making today, which might require a survey on the ground. The Compact was adopted in general terms to provide a general result, with no anticipation that either state would use it as a property line or require that it be located with the preciseness required for property surveys.

With regard to Iowa's present statement that it is entirely possible to determine whether disputed land is ceded land, Plaintiff would point out that this is inconsistent with the statement in Part 1 of the Missouri River Planning Report (which Iowa has stated is the present policy of the Iowa State Conservation Commission) quoted at page 60 of Plaintiff's Resume' and repeated:

> "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.*" (Emphasis supplied.)

In addition, the Legislative history and newspapers, publications, and periodicals which recognized for many years prior to the Compact that there was a real question as to the true and correct boundary line between

the states and that for practically all land adjacent to the river no conclusive determination of either state or private boundaries had been possible, indicate the states considered the problem insurmountable and so they avoided those determinations by the agreement. In light of this, how can the State of Iowa now say that it is possible to determine whether disputed land is ceded land? The state must be honest.

6. The situation as to Iowa's "ownership" of the areas.

Iowa's Statements:

Iowa would infer that there has been no doubt concerning her ownership of the areas in dispute and that Nebraska's position would cause ownership problems along the Missouri River:

> ". . . Nebraska's proposed construction would reopen myriad title questions along both sides of the boundary, which have long been considered as laid at rest, . . ." (B., p. 75, ll. 20-23.)

> ". . . adoption of Nebraska's proposed construction would be like firing the starting gun for a race, the racers being all private parties desiring to own some river land, the prizes being the thousands of acres along the river not now in private possession or taxed, and the millions of losers would be the general public, including generations yet unborn." (B., p. 75, ll. 26-30 and p. 76, ll. 1-2.)

> "Title to many of the areas claimed by Iowa as State trust lands are not in dispute: some have been obtained by purchase: some have been decided by courts of competent jurisdiction (both for and

against the state): and others are being challenged in courts of competent jurisdiction." (B., p. 77, ll. 29-31 and p. 78, ll. 1-3.)

How and why these are misstatements or are inconsistent.

The evidence shows just the opposite. It is Iowa's position which has opened up a Pandora's box of problems. Almost the entire area along the river had been occupied and claimed and the Iowa Planning Report has recognized this fact. In almost every area referred to in the Missouri River Planning Report the recommendation is made to quiet title to lands. This is a clear indication that someone else is claiming the title other than Iowa. In addition, many of the aerial photographs show areas cleared and farmed and this is particularly true of the areas south of Omaha where the river has been stabilized since 1943 and prior. It is Iowa's conduct which is opening up all of the problems which had apparently been settled and laid to rest until Iowa adopted her new position. In fact, there is no indication from the evidence that there would be a race for these lands, but the evidence all shows that someone else has already laid claim to them. The race is only by the State of Iowa to acquire lands to which it previously has made no claim.

In Iowa's final statement quoted above, Iowa has said that title to many of the areas claimed by Iowa as trust lands are not in dispute, but she then immediately makes the inconsistent statement that some of these areas have been obtained by purchase, some have been decided by courts of competent jurisdiction, and others

are being challenged in courts of competent jurisdiction. Almost every one of these parcels was claimed by a private citizen. The fact that settlements were made by individuals with Iowa under the club of a law suit, in which the State of Iowa could exert all of its state resources and assert its sovereign immunities as defenses, does not make the settlement fair.

7. Iowa's use of presumptions.

Iowa has attempted to rely on several presumptions which, although possibly applicable in a non-Compact situation where only the common law is to be considered, completely ignore the effect of the Compact. Reliance upon these presumptions in cases by the State to quiet title to lands along the Missouri River illustrates the complete unfairness and injustice that Iowa is perpetrating. Iowa argues on the one hand that it was presumed that the boundary was the middle of the Missouri River, but on the other hand she then seems to concede at page 12 of her Brief that there is "clear, satisfactory and convincing evidence that the boundary was not on the river" at six listed locations, including four locations where she is presently claiming land under her "sovereign rights."

The mass of evidence has indicated that it was generally recognized at the time of the Compact that the river did not constitute the boundary in many locations and there were areas all up and down the river where land of one state was isolated on the other side of the river. Iowa's argument completely disregards this his-

tory and even disregards the statement 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 locations, sandbars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side." In light of this, how can Iowa now rely upon a presumption that the boundary was in the "middle of the Missouri River" (B., p. 15, ll. 13-17). If the boundary was already in the Missouri River Channel, then why the need for a Compact? The agreement itself certainly changed any presumptions and the effect of such presumptions insofar as Iowa is concerned.

Iowa's statement at page 117 of her Brief that because Nottleman Island and Schemmel Island were on the East side of Missouri River in 1943 just before the Compact, they were presumedly in Iowa, is indicative of her approach, and Nebraska contends this is evidence of the fact that Iowa is utilizing the Compact to aid it in claiming lands. Nebraska submits it is not fair for Iowa to now rely upon the presumption, especially when she knew otherwise and when it was of public record at the time of the Compact that there were at least a dozen canals which had been dredged by the Corps of Engineers in the channelizing of the Missouri River and there was a general historical recognition of many natural cut-offs of the Missouri River. This Corps work superimposed upon an already confusing situation, only emphasized why the states did not consider it feasible to attempt to locate the pre-Compact Boundary.

What Iowa has done is recognized in her Planning Report that it was "virtually impossible" to describe the state boundary or determine land ownership and has then attempted to make this determination by merely establishing the existence of an area with a chute or some water to the East of it. Iowa then relies upon the presumptions, and places the burden on the landowner to prove something which the State has recognized is "virtually impossible" to determine. In light of the evidence, how can Iowa now attempt to place the burden entirely on the landowner to prove something which she agrees was "virtually impossible" 27 years ago at the time of the Compact? The state must be honest. She should not be able to wait 20 or 25 years while witnesses die, records are destroyed, and memories fail by passage of time and then place that burden upon any individual while arguing that none of the normal equitable limitations run against her because she is the sovereign.

8. Settlement by a boundary commission or the legislatures.

Iowa's Statements:

Iowa states that the settlement of this dispute is a political matter to be determined by the Boundary Commission. She has stated:

> "If omissions were made in the 1943 Compact, Iowa submits that they can only be supplied by another Compact between the two states, negotiations for which are already underway. It is a political matter, not a judicial matter." (B., p. 87, ll. 29-30, p. 88, ll. 1-3.)

How and why these are misstatements or are inconsistent.

Iowa's suggestion that negotiations for a Compact are already under way ignores her own report of the Governor's Advisory Committee on the Iowa-Nebraska Boundary which recommended, on December 1, 1964:

> "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." (See pp. 55-56, Plaintiff's Appendix.)

The Governor in his Address to the Iowa Legislature in 1965 recommended the settlement of the Iowa-Nebraska boundary dispute as suggested by the Boundary Committees.

In light of the fact that Iowa's own Boundary Committee and Governor recommended a law suit to establish guide lines, how can the State of Iowa now represent that this is a matter for the Boundary Committees? How can the State of Iowa suggest that negotiations are under way when the Nebraska Legislature authorized and sanctioned this law suit by resolution?

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II.

THE QUALITY OF IOWA'S EVIDENCE.

Since an extensive summary of Iowa's evidence together with appropriate comments has already been

made in Plaintiff's Resume', Plaintiff will make the following limited comments concerning the quality of Iowa's evidence as relied upon in her Brief and Appendix. Nebraska does not accept Iowa's categorizations of the evidence or her arguments as to what this evidence shows. Nebraska would take issue with the accuracy of many of Iowa's statements which are too numerous to consider in this Brief. As is the case with her other arguments, Iowa has a facility for looking at certain facts and then stating that they are something else.

Iowa has said at page 39, lines 8-11 of its Brief, that:

> "Every Court which ever confronted a problem such as the Court here confronts has relied most heavily on the Corps of Engineers' maps and records to determine the true history of the area involved."

The record and reported cases also indicate that Iowa has relied heavily upon the testimony of Mr. Huber and upon his ability to draw a line indicating the "thalweg" on aerial photographs and reconnaissance, hydrographic and other maps prepared by the Corps. It is the improper use of such maps and documents by Iowa which has created a gross unfairness to the land owner. The testimony and record amply demonstrates that Iowa has attacked the reliability of the reconnaissance maps as shown at pages 483 and 484 of Plaintiff's Resume' in which Iowa has stated that the Courts in other court cases should give little or no weight to the reconnaissance maps and that aerial photographs demonstrate the unreliability of certain reconnaissance sketches. There was also testimony by General Loper and

Stewart Smith concerning how these maps were made as well as testimony by Mr. Huber in the *Tyson* case in 1960, when he was testifying on behalf of the State of Iowa, in which he described how the reconnaissance maps were made and agreed that it was "kind of an old fashioned way of establishing a record." (See pages 471-474 of Plaintiff's Resume'.) Mr. Huber testified in that case and in this that "you can't determine the depth of water from an aerial photograph."

The record has amply demonstrated that, in spite of his and Iowa's insistance to the contrary, Mr. Huber cannot accurately place the "thalweg" as it would have existed at various times in the past on these Corps documents. He cannot even do it consistently. After testifying that it was easier for him to locate the "thalweg" on a hydrographic map than on aerial photographs and other maps and, if he were wrong in placing the "thalweg" on a hydrograph, he would be more likely to be wrong in placing it on an aerial photograph, Mr. Huber proceeded to place his "thalweg" on the 1931 Corps hydrograph in a different location than he did when testifying in the Schemmel case in the District Court of Fremont County, Iowa in 1964. This is demonstrated by Iowa's Exhibit D-291-A found at Otoe-16 of Iowa's Appendix in which his 1969 "thalweg" can be seen to the East of a bar immediately above the letter "B" in the word "Bend" near the lower portion of the map and his 1964 "thalweg" can be seen to the West of that same bar. Mr. Huber testified there was 1,100 feet maximum distance between the two lines. He was in error in placing the thalweg on a 1930 aerial photograph where he again

located it in a different position than he did in the Schemmel case and he misplaced the thalweg on the 1890 Corps of Engineer map in the Queen Hill vicinity, running his thalweg to the West of the island just above mile 627.9 on Ex. D-605-A (Nottleman - 6 of Iowa's Appendix) whereas a comparison of the 1890 map with other Corps maps locating that thalweg showed it to the East of the same island and along the left bank. The record is replete with examples of errors and inconsistencies in Mr. Huber's testimony from one case to another, yet he has been one of Iowa's principal witnesses in its various quiet title actions.

Iowa relies only upon those Corps records which support her particular position which she may be taking in a specific case, and the evidence shows that Iowa has also been able to obtain ample testimony that such records are inaccurate or unreliable when it meets her purposes in other cases. Such a situation should not be allowed to continue, and no farmer's title should be tested by such standards. The State of Iowa must be consistent. The State of Iowa must be honest.

Another often used witness by Iowa, Mr. Jauron, testified as a witness in a case in 1962 or 1963 that Nottleman Island formed some time in the early 30's, based on his observation of the age of the vegetation on Nottleman Island, whereas by deposition in 1966 he testified he had made no attempt to age the trees at Nottleman Island and he had made no attempt, up to the time of that deposition, to estimate when it came into existence by observation. (See pages 518-520 of Plaintiff's Resume'.) In the present case he testified under direct examination that the earliest

date Nottleman Island could have formed was 1918 and attempted to justify his earlier testimony by the fact he had found a 1926 Corps aerial photograph showing the island. Any situation which permits such a variance in testimony by state officials is unconscionable.

The unreliability of the placement of Nottleman and Schemmel Islands on various Corps documents by Mr. Bartleman is also illustrated by a comparison of Exhibit D-1036-A at Nottlemna - 16 of Iowa's Appendix where the upstream point of the 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.

On Exhibit D-291-A which is found at Otoe - 16 of Iowa's Appendix most of an island marked "Willows" in the northeast corner is included as a part of Schemmel Island whereas on Exhibit D-427 found at Otoe - 18 only approximately the lower one-half of that same "Willows" area above Dike 601.9 is included within Bartleman's location of Schemmel Island. A comparison of his placement of the island on Exhibit D-1093-A found at Otoe - 6 and Exhibit D-1092-A found at Otoe - 12 of Iowa's Appendix shows his section corner common to Sections 10, 11, 14 and 15 in different places on the two exhibits. If the North-South section line is extended to the North it intersects a cultivated field or cleared area on Exhibit D-1092-A whereas when extended to the North on Exhibit D-1093-A

the section line would just come to the western edge of that same cultivated field. These are only a few examples of the unreliability of this type of evidence.

There is also conflict between some of Iowa's present positions and the testimony of her witnesses. For instance, Iowa has stated at page 58 of her Brief that Otoe Island "didn't exist before 1936." However, Iowa's witness, Albert Propp testified that John Hilger and Walt Williams built a shack on the island in about 1918 (see pages 146-147 of Iowa's Appendix). He also testified that it began to form as an island in the 20's (page 144 of Iowa's Appendix). Iowa's witness, Otto Hinze testified the island has been there anywhere from 1915 on up to the present date. (See p. 137, Iowa's Appendix.) Iowa's witness, James Givens also testified " . . . there was some pretty good-sized trees" on Schemmel Island in 1936. (See p. 33, Iowa's Appendix.) Thus, Iowa's offered testimony as to when the island commenced to form is in conflict with Iowa counsel's contention that the island formed as a result of the Corps work (p. 41 of Iowa's Appendix) and that it didn't exist before 1936 (B., p. 58, ll. 26-27).

Reference to the qualifications of Iowa's witnesses and their lack of familiarity with the areas or subject matter, and to her "expert testimony" has been made in Plaintiff's Appendix. Plaintiff would only add here that even Iowa's witnesses who testified concerning the age of trees on Schemmel Island admit that two trees on the island started their growth prior to the dredging of the Otoe Canal. Dr. Bensend and Dr. McGinnis testified that both Tree Numbers 1220 and 1210 commenced their growth in 1936 or 1937. (Pages 199-200, Iowa's Appen-

dix.) These two trees were located on what was the west side of the river and were cut off by the Otoe Canal and placed upon the east side of the river by the canal. Consequently, even from Iowa's own offered testimony concerning the trees, there can be no dispute that the Corps moved the river from the East to the West into the Otoe Canal by other than mere "pushing" and they did not wash away the intervening land.

Plaintiff submits that the quality of Iowa's evidence is inadequate to justify Iowa's conduct or her position, and the State of Iowa should not be able to take advantage of such evidence to attack private titles.

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III.

IOWA'S ANALYSIS OF THE CASES AND OF PLAINTIFF'S POSITION.

Plaintiff does not accept Iowa's analysis of the cases cited and plaintiff does not accept Iowa's paraphrasing of plaintiff's arguments or positions. Plaintiff's statements in her Brief and Appendix speak for themselves and will not be repeated here.

For example, Iowa has attempted to add a new requirement to the law of avulsion by inserting the words "substantial body of identifiable land", defining "substantial" by her own stadnards. It is submitted that the cases do not turn upon that point, and Iowa is now attempting to impose an additional requirement in order to justify her conduct. Even though disagreeing with Defendant's contention, Plaintiff would point out that both

Nottleman Island and Otoe Island are substantial bodies of land.

Iowa has cited the case of *Louisiana v. Mississippi,* (Number 14, Original) at page 41 of her Brief, and, although the reported opinion at 348 U. S. 24 does not detail the factual situation, it was completely different from ours. In that case, as indicated by the Special Master's Opinion, the Corps of Engineers did construction work upstream from the area affected and all of the movements of the thalweg downstream at the place in litigation were under the water and there was no evidence that the thalweg moved around any land area. In addition, this case was decided under the common law in the absence of a compact. The recent case of *Arkansas v. Tennessee,* 397 U. S. 88, Decree at 26 L. Ed. 2d 537, mentioned by Iowa, recognized a "classic example" of an avulsion and the map attached to the opinion shows the Court located the boundary in a chute with a configuration which is remarkably similar to the Iowa Chute in the Schemmel case. The Court affirmed common law principles which Plaintiff has argued were applicable prior to the Compact. The Special Master's opinion in the case of *Illinois v. Missouri,* No. 18 Original, Sup. Ct. U. S. (1969 Term), also recognized a natural avulsion and Judge Johnsen suggested that the conditions of "long possession" and "long acquiescence" supporting a state's claim to territory are entitled to variances which exist in the circumstances of individual situations and a shorter length of time might be appropriate today than has been described in some of the cases. In the old days when lines of communication and transportation

were not as advanced, it is more understandable that areas might be unknown or ignored, but in this century where we have such modern and rapid transportation and communication, and where the taxing officials are supposedly more diligent and have aerial photographs, maps, cadastral maps, and complete descriptions of their counties, it is more difficult for the states to excuse their failure to exercise jurisdiction over or tax lands, especially where they are required to do so by law. That case was also decided under the common law and, of course, the Nebraska-Iowa situation is different because the states settled their problems by contract in 1943 which distinguishes our case from the above three cases.

Iowa would attempt to avoid any contractual commitments imposed upon her by the Compact by arguing that the Compact only had the effect of being legislation. 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 legis-

> lation 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.

Plaintiff disagrees with so many of Iowa's statements concerning interpretation of the cases and her restatements of Nebraska's arguments, that it would extend this Brief unduly to attempt to comment upon every point. Lack of comment here should not be construed to mean agreement or approval.

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IV.

CONSEQUENCES OF IOWA'S ARGUMENT.

Iowa's argument necessarily leads to the following consequences:

1. The only effective section of the Compact would be Section 1 establishing the new boundary and Iowa would require a judicial determination, 27 years or more later, of what areas were "ceded", a fact which the evidence shows was considered by the States to be virtually impossible at the time the Compact was entered into.

2. The entire burden of establishing this fact is placed upon individual land owners as Iowa can rely upon certain presumptions.

3. In those areas where records have been destroyed or witnesses are no longer available, the land owner is in a hopeless position and left where he cannot possibly rebut the presumption of gradual movement of the river because of Iowa's long delay in taking her present position.

4. The Compact settled nothing except to place areas within Iowa's jurisdiction where Iowa can attempt to claim them using "Iowa law".

5. A few Iowa 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 Nebraska records.

6. 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.

7. The language of the Compact that "titles, mortgages, and other liens good in Nebraska shall be good in Iowa" and the provisions for recognition of tax liens would be meaningless. All determinations would be made in the Iowa Courts in an action in which the State of Iowa, the contracting party agreeing to respect the title, is attacking the title and knew when she entered into the Compact that it was "virtually impossible" to prove where the pre-Compact boundary was.

8. Rights in the State of Iowa would be created in specific areas along the river at a time more than 20 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.

9. Iowa can litigate the title to a small area of land in a situation such that the cost of the land owner's attorneys fees would exceed the value of the land in order to obtain a principle which would assist her in acquiring title to other areas along the river.

10. There would be a government of men and not of laws along the Missouri River.

11. Iowa can buy land in abandoned channels along the river from certain privileged land owners and yet claim the title to abandoned channels against other non-privileged land owners.

12. Iowa can use certain evidence such as Corps of Engineers soundings and aerial photographs in support of her position where they are favorable in certain cases and yet can attack those same soundings and aerial photographs as being unreliable in other cases where such documents do not support her position.

13. Iowa can disregard the fact that there had been many natural avulsions and the Corps of Engineers had dug numerous canals along the Missouri River and the States contracted in light of this.

14. Iowa can disregard quiet title actions in Nebraska which had been decided prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

15. Iowa can continue to state on the one hand that she recognizes title to lands ceded and on the other hand she can claim such lands, as she is doing by her own admission in California Bend, Winnebago Bend, and in Bartlett-Pinhook Bend at Auldon Bar. Nebraska contends she is also making this same unjustified claim to Nottleman Island and Schemmel Island and other areas in violation of the Compact.

16. Iowa can claim lands in court actions in her own courts even though those lands are being taxed by the Iowa county officials, by the State's own Inheritance Tax officials, and even though the Iowa Conservation Commission and Attorney General's office had knowledge of such lands as far back as 1946 and 1950, at which time they recognized the private titles.

17. Iowa can survey the lines to the lands which she claims without using any basis in fact for such lines and she can unilaterally establish where the state line is, using inconsistent methods which would give different answers if applied to the same area.

18. Iowa can claim lands which have been on the Iowa tax rolls for over 20 years and at the same time not claim or disclaim titles to lands adjacent to the Missouri River which were at one time a part of the bed of the Missouri River, which were not on the Iowa tax rolls during any of that 20 year period.

19. Iowa can disregard the fact that lands may have been taxed in Nebraska for years prior to the Compact and occupied by Nebraskans, and she can ignore all of those incidents of possession and ownership which may have existed in Nebraska prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

20. Iowa can overlook the fact that the inhabitants of the area and the local officials considered lands to have been in Nebraska until the Compact and recognized that those lands were ceded to Iowa by the Compact.

21. Individual property boundaries of Nebraska owners would have been changed without compensation to a fixed line instead of the "middle of the main channel" or thalweg of the Missouri River which was a movable boundary.

22. Individual land owners in Nebraska are deprived of their riparian rights and the right to accretions, either to the bank or to the bed, when the river moves into the State of Iowa. The most a Nebraska owner could gain by accretion would be 350 feet whereas he could lose his entire farm.

23. Titles to all lands in the Missouri River Valley are clouded by the fact that Iowa might at some later date claim title to lands based upon her sovereign rights to beds or abandoned beds of the Missouri River and based upon her position that no equitable defenses apply against her. This is especially so since Iowa has stated she believes 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."

24. There could be a mad rush for additional lands along the Missouri River by the Iowa Conservation Commission.

25. Iowa can continue to hold as a threat over the heads of all of the land owners in the Missouri River Valley the possibility that at some future date she may claim other areas as abandoned river beds, relying on the presumptions, and also taking the position that she is not responsible for any of the previous contrary acts of her public officials and that none of the equitable defenses apply against the State.

26. The provisions of the Compact would be considered as only having the effect of a statute and no longer creating any contractual obligations between the states. Such doctrine would shatter the precedents under the cases and the Constitution of the United States and have far reaching consequences upon all interstate compacts in the United States.

27. The Compact would have the effect of subjecting Nebraska titles to "Iowa law", divesting them of certain vested ownership rights without compensation.

28. The Compact would have created a situation where Iowa could delay for over 20 years any claims she might have until all contrary evidence has disappeared and the presumptions act as a conclusive rule of law in her favor.

29. Iowa can rely upon witnesses to establish the "thalweg" as of any date even though such witnesses might locate this "thalweg" at different places on the

same exhibits while testifying under oath in 1964 and again testifying under oath in 1969.

30. The State of Iowa can rely upon certain reconnaissance photographs where they help Iowa's cause and attack those same documents as being unreliable in situations where they may be inconsistent with Iowa's position. The State of Iowa thus has no accountability to be consistent in its approach.

31. The State of Iowa can rely upon the presumption of gradual movement of the Missouri River even though the State knows about canals having been dug in Nebraska by the Corps of Engineers prior to the Compact at the very location in issue.

32. Iowa can continue to disclaim land areas where owned by Iowa lawyers or rich Iowa land owners, even though those lands have never been taxed in Iowa and were former beds of the Missouri River.

33. Under Iowa's practice, there would be no contractual commitment on the part of the State of Iowa under the Iowa-Nebraska Boundary Compact to recognize titles good in Nebraska and the effect of the Compact would have been to establish Iowa's right to litigate title to the areas in her courts, utilizing Section 1 of the Compact only and applying so-called "Iowa law" which divests the former Nebraska land owners of a vested interest.

34. Iowa can admit avulsions in areas such as California Bend and Winnebago Bend, recognizing that such areas were ceded, and still claim lands in those ceded

areas based upon her alleged sovereign right to the title to beds and abandoned beds of navigable streams.

35. Iowa would not be responsible for the actions over the years of her previous Attorney Generals, State Conservation Commissions, and all of her county officials, whose positions were created by state law and whose duties and responsibilities are established by state law.

36. Iowa can continue to locate the boundary under any method she determines without regard to whether it is a correct method or is consistent with other methods used by her.

37. Iowa can take advantage of the acquisition of land whenever the river moves to the east into Iowa and can terminate the Nebraska riparian owner's right to bed and accretion at the state line solely because this became a fixed line by the 1943 Compact.

38. Iowa can disregard the situation which existed at the time of the Compact and impose a different situation upon the Compact language which was not anticipated or in existence when the parties contracted.

39. Land owners are penalized for not having spent time, energy and money to prove their title in the Iowa Courts immediately after the Compact in order to establish what both states and Congress had agreed in 1943 in unequivocal terms belonged to these land owners.

40. Iowa can take the position in some cases that it has no right to give up "trust lands" whereas in other

cases it can disclaim such lands of similar character.

41. Iowa can claim that all Nebraska titles and indicia of ownership arise from "spurious, fictitious instruments."

42. By the decision to question a landowner's title, in her own courts, Iowa can deprive him of his land because of the economic burden, time, expense, presumptions, "Iowa law" and sovereign immunities which the State imposes upon him.

43. Farmers all along the Missour River who have cleared, cultivated, fertilized and developed the land and paid taxes upon it in Iowa will lose their farms without compensation.

Plaintiff submits that the Compact should not be construed in such a manner as to result in such oppression, unfairness, injustice, and absurd consequences.

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CONCLUSION

Nebraska submits the evidence shows Iowa's entire land acquisition program is motivated by nothing more than her economic self interest and an attempt to obtain as much land as possible without compensating the landowner. 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.

Iowa then attempts to justify such conduct by statements as the one at page 85, lines 25-26, of her Brief, "Nebraska would foreclose inquiry; Iowa would inquire, and has done so." How does Iowa justify the fact that she did not inquire back before she entered into the Compact and how does she justify waiting for 20 years after the Compact before making inquiry? Iowa continues to disregard the history of the Compact, its purpose, and her conduct at and prior to the time the Compact was entered into. The two States foreclosed inquiry by each other as to the location of the pre-Compact boundary at the time they entered into the Compact, recognizing such determination was almost impossible. It was the purpose and the intent of the States in adopting the Compact to lay to rest questions involving the historic location of the boundary and the manner in which bottom lands came into being and it is, therefore, a violation of the Compact for either State to make a claim of ownership which requires an individual or the other State to litigate the question of the precise location of the boundary at the time of the adoption of the Compact or the formation of land by the action of the river. 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.

In addition to these contentions, Nebraska submits that the evidence clearly and convincingly establishes that both Nottleman Island and Schemmel Island formed in Nebraska, and the landowners had good Nebraska titles prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

Plaintiff respectfully renews its request for relief previously made.

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 September 14, 1970, I served a copy of the foregoing Plaintiff's Reply Brief Before the Special Master, Honorable Joseph P. Willson, by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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