In The

Supreme Court of the United States

October Term, 1964

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No. 17, Original

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STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

—o—

PROPOSED FINDINGS SUBMITTED BY THE STATE OF NEBRASKA BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol Building
Lincoln, Nebraska 68509

HOWARD H. MOLDENHAUER
Special Assistant Attorney General of Nebraska
1000 Woodmen Tower
Omaha, Nebraska 68102

JOSEPH R. MOORE
Special Assistant Attorney General of Nebraska
1028 City National Bank Bldg.
Omaha, Nebraska 68102

Attorneys for Plaintiff.

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JURISDICTION

This is an action by the State of Nebraska to enforce the Iowa-Nebraska Boundary Compact of 1943 and constitutes a controversy between the two states within the jurisdiction of the Supreme Court of the United States under Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251(a) (1).

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EARLY HISTORY

The State of Iowa was admitted into the Union in 1846 with its westerly boundary as the "middle of the main channel of the Missouri River" and the State of Ne-

braska was admitted into the Union in 1867 with its easterly boundary described as "the middle of the channel of the said Missouri River, and following the meanderings thereof." Consequently, the original boundary between Iowa and Nebraska was a movable boundary which was the thalweg or middle of the main channel of the Missouri River.

In 1890 the State of Nebraska brought an original action in the Supreme Court of the United States against the State of Iowa to determine the boundary in the Carter Lake area adjacent to Omaha, Nebraska on the western, or right bank side of the Missouri River. The right and left banks of the Missouri River are determined by facing downstream.

Over the years, the Missouri River has been notorious for the many natural changes and periodic flooding which has occurred on numerous occasions. In its natural state, there were usually two annual floods, an April rise or flood and a June rise or flood. The result has been the creation of an alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width, all of which has been part of the bed of the Missouri River from time to time.

Because of the rapidity of the current of the Missouri River, the soft soil through which it flows, and its circuitous course, it was generally recognized in the 19th century that the river had frequently cut through the necks of bends, entirely forsaking its former channel and changing its course, leaving intervening land far removed from the new bed of the stream.

In *Nebraska v. Iowa,* 143 U. S. 186, decree at 145 U. S. 519, the Supreme Court found an avulsion leaving Carter Lake, Iowa on the right bank of the Missouri River adjacent to Omaha and this boundary was fixed in the abandoned channel by metes and bounds in the decree. The Court also held that the usual principles concerning the laws of accretion and avulsion were applicable to the Missouri River, notwithstanding the rapidity of the changes of the course of the channel. This was true not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states. The boundary between Iowa and Nebraska remained a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream except in such places where the stream suddenly abandoned its old and sought a new bed as an avulsion.

A comparison of the designed channel of the Missouri River of 1943 with the right bank as located in the original Nebraska survey of 1856-1857 is in evidence illustrating the fact that the Missouri River in many places is presently located several miles from its location when Nebraska was admitted into the Union. Such a comparison does not exclude the obviously many additional movements of the river in the interim. Examination of maps and aerial photographs of the Missouri River Valley between Iowa and Nebraska also shows many obvious cut-off lakes, areas scoured by the river, and abandoned channels throughout the flood plain on both sides of the river.

The historical evidence recognized these many changes and the fact that there were numerous areas stranded by these cut-offs on the opposite side of the river from the

state within whose jurisdiction they belonged. These many changes also created individual title problems as a clear chain of record title would have been almost impossible because of those many natural movements of the river. There was considerable testimony describing the cutting of the river and the huge chunks of land which were eaten away by its erosive action.

The total impact of these movements was aptly described in the TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS, Volume 107, 1942 in an article entitled MISSOURI RIVER SLOPE AND SEDIMENT as follows:

> "The shifts of the river channel have been so numerous and intricate that at many points land known originally to have been in Iowa now lies on the Nebraska bank, and vice versa; and for practically all land adjacent to the river no conclusive determination of either state or private boundaries has been possible."

Articles in newspapers and periodicals, including the *Iowa Journal of History and Politics* are in evidence dating from 1923 up until the time of the Iowa-Nebraska Boundary Compact indicating that it was generally recognized that the people who lived along the Missouri River were sometimes uncertain whether they were inhabitants of Iowa or Nebraska and so were the tax assessors. Border disputes were common and many sections of land were cut off from their rightful political jurisdiction. There were tax problems, school problems, and law enforcement problems resulting from the fact that it was generally believed that all up and down the river there were tracts on one side which were in the jurisdiction of the state on the other side.

What legislative history in Nebraska and Iowa is available indicates legislative concern and activity by boundary commissions of the two states between 1901 and 1943. In Nebraska there are references in the legislative journals to attempts to settle the boundary problems in the years 1901, 1903, 1905, 1913, 1915, 1919 and 1941. In Iowa there is legislative reference to the boundary problems or boundary commissions in 1902, 1913, 1923, 1927, 1937 and 1939. Additional activity of boundary commissions for other years is indicated by the various newspaper articles and statements in periodicals of the times. This general recognition and acceptance of the problems and uncertainty of the location of the boundary between Nebraska and Iowa is essential toward an understanding of the Iowa-Nebraska Boundary Compact of 1943 and what the states intended to accomplish by the Compact.

Extracts from Annual Reports of the Chief of Engineers of the United States Army commencing with the year 1877 were introduced and these reports also recognized many cut-offs of the Missouri River.

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WORK BY THE CORPS OF ENGINEERS

Superimposed upon the already confusing picture created by the natural changes of the Missouri River, is the activity of the United States Army Corps of Engineers in channelizing the river. The first regulation works on the Missouri River by the Corps of Engineers along the Iowa-Nebraska border were constructed at Nebraska City,

Nebraska under the provisions of the River and Harbor Act of August 14, 1876.

Originally, in addition to snag boat activities, the Corps engaged in construction along the river at selected places to prevent erosion of the banks and form good navigable waterfronts.

The 1912 River and Harbor Act authorized the Missouri River Stabilization and Navigation Project from the mouth to Kansas City to provide a channel not less than six feet deep. The 1927 River and Harbor Act extended the six foot channel project from Kansas City to Sioux City, Iowa.

Commencing in approximately 1934 the Corps of Engineers embarked upon a program to stabilize the entire length of the Missouri River along the Iowa-Nebraska boundary and confine it to a designed channel of 700 foot controlled width with a six foot deep navigable channel of 200 feet wide. The original design was prepared in Kansas City, Missouri in the Kansas City District. The Omaha District office was created in 1933 and its primary function was to install the regulating works on the Missouri River from Sioux City, Iowa to Rulo, Nebraska. The general condition of the Missouri River at that time was in its uncontrolled and natural state of a meandering river in an alluvial bed.

The Corps' proposed stabilized channel was originally designed by the Corps of Engineers without any reference to the boundary line between the two states. The design of the original channel below Omaha was completed in 1933 or 1934. The Corps commenced their work from stable

points of the bank where they would not expect bank erosion to cut behind the system such as at bluff contacts and the river had to be designed to go under certain bridges such as the Plattsmouth Bridge and the Nebraska City Bridge. The location of the designed channel below those points was all more or less dictated by the fact that the river had to be at a certain place up above.

The basic objective was to train the river into a series of easy, gentle, reverse curves or bends, utilizing centrifugal force to cause the water to flow smoothly along the outer or concave bank of the curve. At the crossings between successive curves, the objective was to prevent spreading, with consequent bar formation, and to concentrate the flow to provide and maintain desired depth over the crossing. Two general steps were usually involved in accomplishing the basic objective: first, to shape the river into the designed alignment; and second, to hold it in place.

Initially, the Corps attempted to control the river through dikes and revetments but commencing in 1936 they also utilized the dredging of pilot channels or canals. At times during the work there were numerous occasions where it was impossible to navigate the river until the channel had washed around the end of the dikes or the Corps had pulled piling so that navigation could travel through the dikes in many places. The Corps attempted to use the most economical as well as the fastest method of getting the river to its new location and dredged numerous canals along the Iowa-Nebraska border in order to place the river into the designed channel.

In the course of this construction, islands, bars, and bank areas were arbitrarily placed upon either side of the

river without regard to which state the areas had previously been in. In some cases islands or areas were bisected with part of the island left on the right bank and part on the left bank of the designed channel. The Annual Report of the Chief of the Corps of Engineers listed 11 pilot canals dredged during the year 1938 alone and the record is replete with testimony concerning canals and photographs taken by the Corps of many of these canals. There were at least 14 canals or cut-offs dredged by the Corps prior to 1943. These appear to be cases of true avulsions as in most instances the canals were dredged through land area with vegetation on both sides.

Initially, the Corps of Engineers did not condemn land taken by movement of the river but there has been a policy change and now if there is movement of the channel which actually requires some high ground, the Corps in most cases would purchase or condemn the land. In some instances the Corps has condemned an easement for the new channel and in a few instances they actually took the fee title to the land.

Many of the maps showing where these canals were actually dredged were destroyed because the Corps had no use for them. The Corps of Engineers is not primarily a record keeping organization and had no reason to keep such records.

There is substantial evidence in this case that the Corps' records do not give an adequate history of the movement of the Missouri River during the work by the Corps in placing the river into the designed channel for the purpose of determining the boundary between the states prior to commencement of this work. Many of the records have

been lost or destroyed, or are apparently inconsistent. These records such as reconnaissance surveys were not made for the purpose of determining the boundary and, when taken out of context, can be deceptive. This is illustrated by the evidence that the State of Iowa has asserted in some cases that the reconnaissance surveys were entitled to little or no weight whereas in other cases Iowa has relied upon these reconnaissance maps as showing the thalweg or boundary. The first navigation charts for the Missouri River were not made until after the Compact.

Iowa has also attempted to show that their expert witness, Mr. Huber, can place the thalweg on aerial photographs of various dates but the evidence has demonstrated that this is an impossibility and it is outside the expertise of anyone claiming familiarity with the Missouri River to place the thalweg on aerial photographs, reconnaissance surveys, and other maps of the Missouri River as the thalweg may have existed on dates in the past.

The court is satisfied from the evidence that no one knew where the boundary was located between Iowa and Nebraska in 1943 except at Carter Lake and that it is now impossible or almost impossible to actually make that determination without the expenditure of tremendous effort in time and money to attempt to reconstruct the past history. This is made all the more difficult by the great deal of time which has elapsed since the date of the Iowa-Nebraska Boundary Compact of 1943 and the fact that documents have been destroyed and witnesses have died. The evidence further established that neither state really cared in 1943 where the prior boundary had been and both states recognized that there were numerous places where the flowing

Missouri River no longer constituted the boundary between Iowa and Nebraska.

THE COMPACT: SITUATION AT THE TIME NEGOTIATED

An understanding of all of this history is essential if the Iowa-Nebraska Boundary Compact is to have any meaning. According to the 1943 Annual Report of the Chief of Engineers, the work between Rulo, Nebraska and Omaha, Nebraska was approximately 99% completed in 1943 and the work between Omaha, Nebraska and Sioux City, Iowa was approximately 78% completed.

Under the assumption that the channel of the Missouri River was then under control, the two states entered into the Iowa-Nebraska Boundary Compact of 1943. The original bill in the Iowa Legislature was passed by the Iowa House and Senate and sent to the governor of Iowa on April 8, 1943. It was approved by the Governor of Iowa on April 15, 1943 and then transmitted to the Clerk of the Nebraska Legislature and passed by the Legislature and signed by the governor of Nebraska on May 7, 1943.

The reported legislative history is very sketchy in the Journals of both states. From the evidence offered I find the following:

1. At the time the states negotiated the Iowa-Nebraska Boundary Compact of 1943 each state recognized that the shifts of the river channel, both in its natural state and as a result of the work of the Corps of Engineers, had

been so numerous and intricate that for practically all land adjacent to the Missouri River, no conclusive determination of either state or private boundaries was considered possible. This is applicable to the entire river boundary except for the boundary around Carter Lake, Iowa which had been definitely fixed by decree of the United States Supreme Court.

2. Both states recognized that the boundary was not located in the Missouri River at many places and that the boundary line in those places had not been determined and was almost impossible of determination.

3. Correspondence between certain county officials at the time establishes that, if a compromise could not be worked out, the determination of the fixed boundary where the river had moved by avulsion in any particular area would be extremely complicated and expensive.

4. The states intended by the Compact to settle all problems along the boundary arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the Missouri River.

5. At and immediately prior to the adoption of the Compact, the State of Iowa was making no claim to abandoned river beds or islands arising in the Missouri River under the state's common law claim of title to beds and abandoned beds of the Missouri River. South of Omaha the river had been almost completely confined to its designed channel and all land area or so-called islands remaining on the Iowa side were in existence during the negotiations for and adoption of the Compact. Iowa was making no claim to such islands at those times.

6. There were abandoned Missouri River channels and cut-off lakes or ox-bow remnants all along the Missouri River Valley and the State of Iowa had made no claim to these abandoned channels.

7. Although Iowa now claims that abandoned beds of the Missouri River and islands arising in Iowa's portion of the bed of the Missouri River have always belonged to the State of Iowa under her common law, Iowa in fact was not applying this doctrine along the Missouri River and the evidence is not persuasive that Iowa ever considered that she owned the specific islands and abandoned channels which are identified today. Any application of the principle by the State of Iowa at or prior to the time of the Compact amounted to nothing more than lip service to a principle without any application to the specific factual situations which existed. In this context, there is nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants.

8. The States of Iowa and Nebraska could have determined through action in the Supreme Court of the United States where the boundary was located in all disputed areas along the river but the states intended to avoid the necessity of such a determination by entering into a Compact which avoided that requirement, recognizing the existing situation along the Missouri River, and intending to settle all of the states' problems.

9. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest

all boundary and jurisdictional problems which existed between the states. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this determination of where the boundary was located prior to the Compact in order to preserve a claim of title.

10. The Iowa Code required the Secretary of State to keep records of all property pertaining to the State Land Office and that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "state-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was to claim at the present time and which are described in Part 1 of the Missouri River Planning Report of January, 1961.

11. The Iowa Code pertaining to the Iowa Conservation Commission has provided since 1923 that "The com-

mission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property'' and in 1931 the language ''when said commission deems it feasible and necessary'' was added. However, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in Part 1 of the Missouri River Planning Report of January, 1961 at the time of the Compact and has not marked the boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of the statutory requirements which would have required a record and the marking of such lands. Anyone inquiring of the State Land Office or the Iowa Conservation Commission in 1943 would have failed to find any claim of record to these so-called islands or abandoned channels along the Missouri River.

12. Both states agree that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

13. The testimony of the Iowa Conservation Commission officials made it clear that no one from the State was paying any attention to the islands and abandoned channels of the Missouri River at the time of the Compact and for more than a decade thereafter. The first interest expressed in these lands by the Iowa Conservation Com-

mission was not until the latter part of the 1950's. Prior to that time, the State was not interested in these areas and no official action had been taken. The first public record of Iowa's interest was not until after January 1, 1961 when the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report which shall be hereinafter referred to and when newspaper articles then related some of the contents of the Report.

14. The Compact did not consider areas separately and the only boundary area specifically referred to in the Compact was that around Carter Lake, Iowa which had been fixed by decree of the United States Supreme Court. All areas were treated generally with recognition to private titles to be given general application.

15. The states did not know where the boundary was located and they really did not care. They were not concerned about whether they were going to lose or gain anything. However, they did state that titles, liens, or mortgages good in one state would be good in the state in which the land was to lie following the Compact. This is a classic situation where the following language by Mr. Chief Justice Marshall in the case of *Handly's Lessee v. Anthony*, 5 Wheat. 374 is applicable:

> ". . . in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

16. The states clearly evidenced the fact that they did not care where the boundary was, but if an individual had what was then considered a good title, lien or mortgage, then the states must recognize and could not attack it. 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 such title, lien or mortgage arose.

17. 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.

18. At and immediately prior to the time the states entered into the Compact, there were land areas on the left bank side of the Compact line which were taxed in Nebraska. It was generally recognized by the local officials of each state and individuals in the vicinity that such areas were originally in Nebraska and were transferred to Iowa by the Compact, whether or not in fact such was possible of proof in a court of law.

19. Under Nebraska law a person may obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Under Iowa law a person must claim under "color of title" which requires some type of record title to commence the period of adverse possession. Consequently, at the time of the Compact, there may have been titles to lands East of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had title at the time

of the Compact under the Nebraska law of adverse possession.

20. The states by entering into the Compact, recognized that there was no presumption that prior movements of the Missouri River had been gradual and imperceptible and that there were many places where land would be ceded from one state to the other. This agreement, insofar as the position of the two states was concerned, negated any presumption at common law that prior movements had been gradual and imperceptible. The Compact recognized that in fact this was not the case.

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THE COMPACT

The Iowa-Nebraska Boundary Compact as enacted by the State of Iowa provides:

IOWA-NEBRASKA BOUNDARY COMPACT

Ratification by Iowa Legislature

AN ACT

To Establish the Boundary Line Between Iowa and Nebraska by Agreement; to Cede to Nebraska and to Relinquish Jurisdiction Over Lands Now in Iowa but Lying Westerly of Said Boundary Line and Contiguous to Lands in Nebraska; to Provide that the Provisions of this Act Become Effective Upon the Enactment of a Similar and Reciprocal Law by Nebraska and the Approval of and Consent to the Compact Thereby Effected by the Congress of the United States of America and to Declare an Emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows:

Commencing at a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of the S. E. corner of said section, and running thence northwesterly to a point on the south line of lot 4 of section 10, in township 15 N., of range 13 E. of the sixth principal meridian 2,275 feet east of the S. W. corner of the N. W. ¼ of the S. E. ¼ of said section 10, thence northerly, to a point on the north line of lot 4 aforesaid, 2,068 feet east of the center line of said section 10; thence north, to a point on the north line of section 10, 2,068 feet east of the quarter section corner on the north line of said section 10; thence northerly, to a point 312 feet west of the S. E. corner of lot 1, in section 3, township 15 N., range 13 E., aforesaid; thence northerly, to a point on the section line between sections 2 and 3, 358 feet south of the quarter section corner on said line; thence northeasterly, to the center of the S. E. ¼ of the N. W. ¼ of section 2 aforesaid; thence east, to the center of the W. ½ of lot 5, otherwise described as the S. W. ¼ of the N. W. ¼ of section 1, in township 15, range 13, aforesaid; thence southeasterly, to a point on the south line of lot 5 aforesaid, 1,540 feet west of the center of section 1, last aforesaid; thence south 2,050 feet, to a point 1,540 feet west of the north and south open line through said section 1; thence southwesterly, to the S. W. corner of the N. E. ¼ of the S. W. ¼ of section 21, in township 75 N., range 44 W. of the fifth principal meridian; thence southeasterly, to a point 660 feet south of the N. E. corner of the N. W. ¼ of the N. E. ¼ of section 28, in township 75 N., range 44 W., aforesaid; and said line produced to the center of the channel of the Missouri river; thence up the middle of the

main channel of the Missouri river to a point opposite the middle of the main channel of the Big Sioux river.

Commencing again at the point of beginning first named, namely, a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of S. E. corner of said section, and running thence southeasterly to a point 660 feet east of the S. W. corner of the N. W. ¼ of the N. W. ¼ of section 28, in township 75 N., range 44 W. of the fifth principal meridian, and said line produced to the center of the channel of the Missouri river; thence down the middle of the main channel of the Missouri river to the northern boundary of the State of Missouri.

The said middle of the main channel of the Missouri river referred to in this act shall be 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 plain 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.

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.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

Sec. 6. Whereas an emergency exists, this act shall be in full force and effect, subject to conditions as hereinabove expressed from and after its publication in the Sioux City Journal, a newspaper published at Sioux City, Iowa, and in the Nonpareil, a newspaper published at Council Bluffs, Iowa.

(Signed) Henry W. Burma
Speaker of the House.

(Signed) Robert D. Blue
President of the Senate.

I hereby certify that this Bill originated in the House and is known as House File 437, Fiftieth General Assembly.

(Signed) A. C. Gustafson
Chief Clerk of the House.

Approved April 15th, 1943.

(Signed) Bourke B. Hickenlooper
Governor.

The Compact as enacted by the State of Nebraska is identical in terms except that it is reciprocal with the names of the states reversed. Section 5 is changed slightly to take into account that Iowa has enacted its act and Sections 6 and 7 pertaining to local state formalities have been changed.

The Compact must be read in its entirety since it is a unified document. Section 5 of the Compact as enacted by the State of Iowa made specific mention that the law enacted by Nebraska must contain identical provisions to those contained for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in Section 1 and also contain provisions identical with those contained in Sections 3 and 4 of the act but applying to lands ceded to Nebraska. Sections 3 and 4 were integral parts of the Compact and the Compact must not be construed in such a manner as to render them meaningless.

Section 1 fixes the boundary around Carter Lake, Iowa by metes and bounds in accordance with the decree of this court in the case of *Nebraska v. Iowa,* 143 U. S. 359, 145 U. S. 519 and provides that the remainder of the boundary shall be the middle of the main channel of the Missouri River which is further 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 plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska and identified by File Nos. AP-1 to 4 inclusive, dated Janu-

ary 30, 1940, and File Nos. AP-5 to 10 inclusive, dated March 29, 1940, which maps were then on file in the United States Engineer's Office in Omaha, Nebraska and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska. With regard to these provisions the court finds:

1. The AP maps or alluvial plain maps referred to in the Compact were dated approximately three years prior to the date when the Compact was adopted and below Omaha show the Missouri River confined to its designed channel. Above Omaha, much of the Missouri River is not yet confined to the designed channel and the designed channel at places bisects islands, bar area, and bank land.

2. A stamped notation appears on each of these maps indicating that the area covered by the Missouri River on the map was compiled from aerial photographs taken by the U. S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937, and 1938.

3. The overwhelming weight of the testimony is that these AP maps are analogous to a highway or road map and were prepared to facilitate the employees of the District Office and of the field office in driving to various locations along the river. They were primarily used for gaining access to various jobs which were under construction along the river and would be similar to a highway map. They were also described as "a glorified road map." They were not intended for any engineering results; they did not contain any distances, calls, angles or measure-

ments which would enable a surveyor to find the center of the designed channel on the ground. The information on the AP maps as to section lines and other information landward from the river is extremely inaccurate. There were areas where the features shown on the maps are at least one-quarter mile in error.

Several communications from the U. S. Army Corps of Engineers, Omaha District, have stated that the present state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain maps since they are too small a scale (1″ equal to 2,640′) and do not contain sufficient detail for a surveyor to accurately locate the boundary. At one time it was possible to locate the state boundary from their 1″ equal 400′ construction maps as the river alignment as shown on these maps conforms to the alignment as shown on the Alluvial Plain Maps. Since the present Boundary Compact was ratified, numerous channel realignments have been made and the basic 1″ equals 400′ tracings have been revised to show these realignments. Copies of 1″ equals 400′ maps which show the alignment in accordance with the alignment shown on the Alluvial Plain Maps were not retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the Corps' office.

The Alluvial Plain Maps on file with the offices of the Secretary of State of Nebraska and Iowa are of the scale of 1″ equals 5,280′. Other Alluvial Plain Maps on file with the Corps of Engineers are of the scale of 1″ equals 2,640′. Some of these have had material added to the maps which did not appear on the original AP maps of the scale of 1″ equals 5,280′ as on file with the Secre-

taries of State. However, these maps have the same date as the AP maps referred to in the Compact although there is no indication on the maps of the date or dates that the additional material was added. This is not atypical of many of the Corps photographs and maps relating to the Missouri River which have been altered or changed over the years. The Nebraska State Surveyor testified that his office, which was the only office in Nebraska which carries official land survey records, had no information on file when he became State Surveyor in 1960 which would help determine the location of the center of the designed channel as shown on the Alluvial Plain Maps.

The evidence and the testimony lead to the inescapable conclusion that the Compact was prepared in general language and adopted or fixed the new boundary in general terms 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.

The State of Iowa contends that the boundary can be located with preciseness through the utilization of other data and maps available from the Corps of Engineers. However, the Corps communications negate this claim and the evidence further shows that Iowa's surveyors have used different and inconsistent methods in locating the Compact line on the ground. In the Nottleman Island area, three surveyors, two employed by the State of Iowa and the Nebraska State Surveyor, located the Compact boundary in three different places. This results from the fact that data which does not appear on the AP maps must be utilized and each surveyor used different data in making his determinations. There is no official supporting data

available. However, both Iowa's and Nebraska's expert surveyors who testified admit that approximately the westerly 50 feet of the land claimed by the State of Iowa in the case of *State of Iowa v. Babbit, et al* is presently in the State of Nebraska and is west of the center line of the proposed channel of the Missouri River as established by the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact. This land is not within the jurisdiction of the Courts of the State of Iowa, is not owned by the State of Iowa, is within the jurisdiction of the State of Nebraska, and Iowa's attempt to quiet title to this land constitutes an encroachment upon the sovereignty and territory of the State of Nebraska. Nebraska does not contend that this in and of itself is determinative of this case but has raised the point to illustrate the practical problems if the Compact line is to be used as a line to determine boundaries of proprietary claims of the States.

The State of Iowa contends that the construction maps by the Corps of Engineers which are of a scale of 1″ equals 400′ contain adequate data to locate the Compact line but the testimony and the communications from the Corps of Engineers indicate that such information adequate to locate the Compact line throughout is not available and has not been retained by the Corps. Testimony also indicated that it is frustrating to obtain information from the Corps of Engineers as concerns their previous projects and the situation of the river at the time of the Alluvial Plain Maps. Documents and information might be available at one time and not be available at another. Information has been destroyed or lost and there was no reason for the Corps to be particularly interested in keeping their old records.

Attempts to obtain information from the Corps are time consuming and consequently expensive.

Although the Corps of Engineers has also informed the State of Iowa and its officials that the 1943 state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain Maps and that the 1″ equals 400′ construction maps have not been retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the office of the Corps of Engineers, the Iowa Conservation Commission and Attorney General's office have continued to assert that the boundary can be located from data obtained from the Corps of Engineers. Other branches of Iowa's government, such as Iowa's Governor's Advisory Committee on the Iowa-Nebraska Boundary have accepted this determination by the Corps of Engineers that it cannot be located from the construction maps.

Neither state contends that the gravamen of this action is the actual location of the Compact boundary at any particular point along the Missouri River. Nebraska has interjected the issue of the difficulty in finding the boundary as illustrative of the meaning and intent of the Compact as being indicative of the fact that neither state ever intended to conduct itself in such a manner that the location of the Compact boundary on the ground would be necessary to determine either State's property rights. The states assumed the boundary would be located in the middle of the Missouri without being concerned about its precise location there.

At the time the states entered into the Iowa-Nebraska Boundary Compact, it was generally believed that the Mis-

souri River had been stabilized in the designed channel or would be moved into the designed channel where the river would remain stabilized. During World War II, the activity by the Corps in maintaining the stabilization works was curtailed and the river escaped from the designed channel above Omaha and reverted to its wild natural state. This has resulted in a situation where both banks of the river are completely in Nebraska at the present time for approximately 21 miles between Omaha and Sioux City. Both banks of the river are entirely in Iowa for approximately 14 miles.

The present situation was described in the Iowa Governor's Advisory Committee Report dated December 1, 1964 as:

> ". . . industrial firms are faced with uncertain title and tax structures not knowing what state they are in, retarding the potential development of this area."

The record also makes reference to activity by both legislatures and recognition by the Iowa governor that the settlement of the Iowa-Nebraska Boundary dispute was recommended ". . . in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development." The Court finds that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved.

In those places where the Missouri River might still have been the boundary in 1943, the Compact changed the boundary from the movable navigable channel or thalweg

to a fixed line. The change abrogated the application of the common law principle relating to a movable navigable stream as the boundary between the states. The testimony and navigation charts have established that the navigable channel tends to follow the outside of the bends and was not coincident with a line midway between the banks except at those places where it crossed from one curve to the other. Consequently, land within the bed of the Missouri River, was "ceded" along the entire boundary.

Section 2

Section 2 of the Compact provides:

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

It is clear from the evidence that the states did not know what specific land areas actually were in Iowa but were on the western side of the Missouri River and this general language was used to make it clear that the new state boundary was to become effective and Iowa was to have no further jurisdictional claim to any areas to the west or on the right side of that boundary. By the same token, the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were "ceded" to the other state by this general language.

The word "cede" as used in the Compact must be read as a part of the whole document. The following principle is applicable:

> "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), p. 68.
>
> "Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), comment d, pp. 72, 73.

The cardinal rule of construction is that we seek to determine and to give effect to the intentions of the parties. In this case, it is clear as to what the parties had in mind. They intended to settle their differences and at that time the State of Iowa had raised no issue concerning its ownership of beds or abandoned beds of the Missouri River and the States clearly were desirous of avoiding expensive determinations as to where the river had previously moved by avulsion and as to the location of the pre-1943 boundary. They accepted the fact that it was not located in the river at many places and that it was almost impossible of determination.

> "Words and other conduct are interpreted in the light of all the circumstances, and *if the principal purpose of the parties is ascertainable it is given great weight.*" Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(1), p. 68. (Emphasis supplied.)

If effect can be given to the intention of the parties it should be done rather than exalt a "literal" reading of

the word "cede" as being applicable only to lands which it must be proven were in fact transferred, as the requirement of such proof was something which the States attempted to avoid and is inconsistent with the remainder of the Compact. A literal reading of the word "cede" in a restrictive manner would relegate the word to a higher status than the understanding and agreement of the parties themselves. Such a literal reading would result in the court's making a contract for the parties which they did not make. This possibility is explained by Professor Corbin:

> "The primary and ultimate purpose of the interpretation is to determine and make effective the *intention of the contracting parties.*" (Emphasis by the author.) * * *
>
> "No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge. * * *
>
> "When a court enforces a contract in accordance with an interpretation that seems 'plain and clear' to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is 'making a contract for the parties', one that they did not make.
>
> "No word or group of words in any language has an 'objective' meaning separate from and independent of its actual use by some person to convey his thought to another person." 3 Corbin on Contracts, 1964 PP., §572B.

Sections 3 and 4

Sections 3 and 4 of the Compact as adopted by the Iowa legislature provide:

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

"Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred." (Emphasis theirs.)

These two sections must be considered in light of the conditions as they existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony have established that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. This navigable channel, or what would be the "thalweg" or boundary if it should be assumed that there had been no prior avulsions, was not coincident with a line midway between the banks of the designed channel as established by Section 1 of the Compact as the Compact boundary, except at those places where the navigable channel crossed the center from one curve to another. Consequently, land within the bed of the Missouri River was "ceded" or transferred from one state to the other all along the entire boundary in addition to the land which

had been stranded on opposite sides of the river by the natural cut-offs and man-made canals or prior avulsions. The states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. The states desired to avoid the expense of determining these specific places and the states took the easier course of attempting to accomplish the general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states by agreement. The references to "titles, mortgages and other liens good in Nebraska" had to necessarily refer to all claims of title, mortgages, and other liens claimed to lands which were east of, or on the left bank side of, the Compact line as these were the same lands which the states were accepting as having been "ceded" or transferred.

There is no record of any determination of what suits or actions concerning said lands might be pending at the time of the Compact but the language authorizing them to be prosecuted to final judgment in Nebraska and requiring Iowa to afford such judgments full force and effect necessarily had to refer to any pending suits in the Nebraska courts which concerned lands which would be on the eastern or left bank side of the new Compact boundary. Any requirement which would impose a duty upon the individual claimants to establish which state the land was in prior to the Compact would be inconsistent with the intent and conduct of the states in avoiding that requirement.

Section 3 was intended to protect the rights of private property claimants against the claims by either state and is a broadly phrased clause which should be liberally construed to effect this purpose. As such, neither state should

be able to attack any private titles or claims emanating from the other state as of the date of the Compact.

The only parties to the Compact were the two states and individuals who were not parties to the Compact but who are effected by it should not be penalized by the State's conduct.

It was the intent of Section 3 to recognize and protect property rights which would necessarily be affected by the Compact by the mere determination of a fixed and definite boundary which, prior to the Compact had admittedly been vague, uncertain, indefinite, and almost impossible of determination.

Section 3 imposed an affirmative requirement upon the States and assurance to the other contracting state that titles, mortgages and other liens claimed under one state's jurisdiction would be recognized and good and valid under the jurisdiction of the state in which the property would lie after the Compact.

At the time of the Compact, the only conduct by either state which was affecting lands along the Missouri River was the taxation of these lands. The states recognized that there was a great deal of uncertainty in the taxation of the lands along the Missouri River, some areas being taxed in both states, some areas not being taxed in either state, and in several places lands being taxed by a state although they were located upon the opposite side of the Missouri River. Section 4 authorizes the state or its authorized governmental subdivisions or agencies to tax lands "ceded" for the current year and required that any liens or other rights accrued or accruing, including the right of collection, should be fully recognized and the

county treasurers of the counties affected were authorized to act as agents in carrying out the provisions of that section, provided that all liens or other rights accrued or accruing should be claimed or asserted within five years or be forever barred.

This section constituted a clear limitation upon claims by the State for tax purposes and these were the only claims which were being asserted by the states at that time. Since there was no determination of lands "ceded", this section obviously could only refer to areas against which taxes were levied at the time and constituted a recognition insofar as the states were concerned, that such areas on the opposite sides of the Missouri River which were being taxed by a state were considered as having been ceded as the term was used in the Compact. This is another recognition of the fact that all areas along the Missouri River, which after the Compact were definitely established as being located in one of the state's jurisdictions, were considered as having been ceded as that term was used in the general language of the Compact.

Section 4 provided a five year limitation for the assertion of rights of any liens or claims arising out of the taxation of the lands by the states or their authorized governmental subdivisions and agencies. This constituted a clear limitation upon such claims arising from the governmental authority of the states and complimented Section 3 which was a clear recognition of existing private claims. There is nothing in the Compact reserving the right of either state to make additional claims of title under any other doctrine of sovereignty. Nothing preserves to the states the right to make any further claims and, as the Compact

was intended to settle all problems along the border, it is to be construed to include all claims made by either state which might be asserted under any common law claim of sovereign ownership of beds or abandoned beds of the Missouri River, especially since Iowa had not claimed these areas theretofore.

The provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact since* 1925 by Zimmerman and Wendell, p. 32; *U. S. v. Bekins,* 304 U. S. 27; *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725; *Hinderlider v. LaPlata River & C. C. Ditch Co.,* 304 U. S. 92.

In the construction of agreements or compacts the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the Compact is relevant in determining the proper construction and the effect of the Compact as applicable to titles along the Missouri River. It is the substance of the agreement, as contradistinguished from its mere form, which is essential in order that a fair and just construction may be given to the agreement and the court must ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94. See also *In re Ross,* 140 U. S. 453.

As Mr. Justice Stone stated in *Massachusetts v. New York,* 271 U. S. 65, 87:

> "In ascertaining that meaning, (of the Treaty of Hartford) not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J., in *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Wadell,* supra."

All parts of a treaty are to receive a reasonable construction with a view of giving a fair operation to the whole. *Sullivan v. Kidd,* 254 U. S. 433, 439. Narrow and restricted interpretations are not favored and treaties are to be liberally construed so as to effect the apparent intention of the parties. See *Nielsen v. Johnson,* 279 U. S. 47, *Jordan v. Tashiro,* 278 U. S. 123 and *In re Ross,* 140 U. S. 453, 475.

It is not unusual for a country, in ceding territory, to stipulate for the property of its inhabitants. *U. S. v. Chaves,* 159 U. S. 452, 457.

Nebraska contends that the Iowa-Nebraska Boundary Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The language stipulating for the property of the inhabitants should be liberally construed so as to effect the apparent intention of the parties to secure the people along the Missouri River in their rights and to give them protection from the states

in whose respective jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption. At that time Iowa was not contesting these property rights.

Any technical construction of the word "cede" in the Compact to require a land owner to now prove that his land was in fact transferred from one state to the other and which would also require this land owner to prove the location of the boundary prior to the adoption of the Compact is clearly inconsistent with the purpose, object and intent of the Compact and would be a restrictive reading which would destroy the purpose of the boundary compromise. It 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 owners, "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."

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NEBRASKA AND IOWA COMMON LAW

Under Nebraska law, title to the beds of navigable streams is in the riparian owner subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905). The Nebraska rule is based upon the

equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result. Under Nebraska law the Nebraska owner's right extends to islands, bar areas or beds which are on his side of the thread of the stream. However, the Nebraska owner's title to the bed is subject to the public easement of navigation.

The Iowa courts have followed the principle that the state owns title to the beds of all navigable streams within the State of Iowa to the high water mark and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. The leading case is *McManus v. Carmichael,* 3 Ia. 1 (1856).

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42 Iowa Law Review 58 entitled DETERMINATION OF RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION which discussed prior treatment by the Iowa courts of Missouri River lands and stated that the Iowa courts had vascillated in determining whether sand bars were islands or accretions to the high bank. The article suggested that if such sand bars in the Missouri River are deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, there had been no determination by the courts that the State of Iowa would have a right to such sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. The article indicated such claims may develop on

account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began and this article has been cited by the Iowa Supreme Court. See *State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135.

The State of Iowa, in the preparation of Part 1 of the Missouri River Planning Report, January, 1961, and in the prosecuting of quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact. Iowa has utilized Section 1 of the Compact to establish that the land is in Iowa and then proceeded to apply her common law. She has done this in complete disregard of the provisions of Sections 3 and 4 of the Compact and without considering what the effect would have been had the Compact not been adopted.

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CONDUCT OF THE STATE OF IOWA FOLLOWING THE COMPACT

Following the adoption of the Compact in 1943, individuals possessing land on the easterly or Iowa side of the Missouri River under Nebraska titles or claims continued in the peaceful use and enjoyment of their land without any claim of ownership by Iowa governmental authorities during the 1940's and 50's.

Much of this land had formerly been of little value,

consisting of scrub timber, willows, and heavy undergrowth and not immediately suited for farming or other productive use. A great deal of money and labor was spent by these owners in the clearing of this land and it has, through their efforts, become useful, productive land with values ranging from approximately $400 to $600 per acre.

Some lands were placed on the tax roles in the counties in Iowa adjacent to the Missouri River and taxes were assessed and collected on such lands.

In 1956, when the State of Iowa was joined as a defendant in an action to quiet title to land which included abandoned bed of the Missouri River as a result of an avulsion known to the State of Iowa, the State of Iowa acknowledged that it had no claim of ownership of the land which was an abandoned channel of the Missouri River located to the east of the Compact line.

The State of Iowa made no claim whatsoever to certain other lands which were abandoned channels of the Missouri River and the Iowa State Conservation Commission has even purchased land which was in abandoned channels from landowner claimants.

The Iowa State Conservation Commission first showed an interest in lands along the Missouri River when it was brought to their attention that people were occupying these lands in some instances and the decision was made by the Commission to find out what and where the public did "own" lands, based upon the Iowa doctrine of state ownership of beds or abandoned beds of the Missouri River. Generally all the activity by the Conservation Commission in connection with the Missouri River started about

1958. Mr. Lloyd Bailey, the Chief of the Land Acquisition Section of the Iowa Conservation Commission, testified that when he took that office in 1958 the records of state-claimed lands were very poor along the Missouri River and there was very little record of anything in that office. There was no other office where an outsider could go to determine what lands were claimed by the State. It was some time after he took office that the big investigation started to turn up lands that could be included as state-claimed lands in the 1961 Missouri River Planning Report.

A study was undertaken by the Iowa Conservation Commission and areas were selected and the decision to attempt to acquire title by quiet title proceedings was made in the Iowa Conservation Commission. People claiming such lands were not given an opportunity to be heard by the Commission in any official hearing.

Final decision as to whether or not the State Conservation Commission would claim areas selected as abandoned river channels or ox-bow lakes was to be with the Attorney General's office.

The determination of the ordinary high water mark by the State of Iowa to delineate the point from which its ownership of an abandoned channel or islands commenced was based on the location of the ordinary high water mark just prior to the diversion of the waters into the new channel by the Corps of Engineers. They made no investigation in going back of that for their present purposes. Consequently, any previous ordinary high water marks or abandoned channels of the Missouri River prior to this time were overlooked or ignored by the Commission.

Mr. Jerry Jauron testified that he was given special duty by the Conservation Commission as Missouri River Coordinator in 1958 and was assigned the task of making a survey and investigation of the entire stretch of the Missouri River which constitutes the western boundary of Iowa for the purpose of determining existence or non-existence of "state-owned lands." He would find areas and select them, research them primarily at the Corps of Engineers for their maps, pictures and photos and give this information to the Attorney General's office. This would then be discussed with the Attorney General's Office and representatives of the Commission and the effort culminated in the published Part 1 of the Missouri River Planning Report.

Four of the five areas south of Omaha claimed by the State of Iowa were extensively cleared and a portion of the fifth area had been cleared to a limited extent at the time the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report in January, 1961.

Most of the areas north of Omaha resulted from work done on the river by the Corps of Engineers after 1943. Where the Corps had redesigned the channel following the Compact, Iowa claimed the area which had just come into existence as the Corps moved the river as "state-owned land". This was claimed as abandoned river channel. Iowa also claimed all of the new bed of the channel lying east of the Compact line. The State of Iowa in its investigation did not examine county records or, if any examination was made, it was very little or nothing to speak of.

The project by the Commission to find the so-called state lands was commenced because of the redesigning of

the Missouri River from Council Bluffs to Sioux City by the Corps of Engineers. If Mr. Jauron rejected any area as a state-claimed area it was never brought to the attention of the Attorney General's Office or the Iowa Conservation Commission and the State made no claim to it.

The representatives of the Attorney General's Office and Conservation Commission rejected three or four areas out of an original approximately 25 areas which had been selected by Mr. Jauron. If Mr. Jauron had recommended in Des Moines that they did not want an area for some reason or other, it would not have received any consideration.

Mr. Jauron testified that the State of Iowa did not claim all river beds of the Missouri River valley and he could not explain why some of them are ignored and some of them are claimed. The evidence fails to show any consistency or logic in the selection of areas Iowa claims. If certain areas were under water the first time Mr. Jauron saw them, he would have claimed them for the State of Iowa.

Consequently, the areas claimed depended in part upon whether they were under water within the memory of the witness and in part upon whether the specific documents examined by Mr. Jauron happened to indicate an abandoned channel. However, many of the documents offered by the Plaintiff show the river in various areas and abandoned channels which were not claimed by the State of Iowa.

Mr. Jauron testified that in his mind there was absolutely no doubt that certain areas were old river beds

but no exhibits or witnesses who might state that they were old river beds existed. Consequently, whether or not the State would claim areas depends in part upon the remaining available evidence as of the present date and whether the individual researching such areas had done an extensive investigation.

When asked whether Iowa claimed lands on the west side of the 1943 Compact line as abandoned channels, Mr. Jauron testified that at the time they started, the Attorney General in charge instructed them to claim no lands on the other side of the boundary compact line. However, this policy was changed in another Attorney General's administration. Mr. Jauron testified that his answer would have to change three or four times because they changed attorney generals three or four times. The evidence shows that Iowa's conduct was determined by particular attitudes by the various Attorney Generals and not by any rule of law concerning the meaning or effect of the Compact.

Mr. Jauron did not know of any discussions concerning whether or not the lands selected as property of the State of Iowa were on the tax rolls. During the meetings to determine areas which the State claimed, if individuals lived on the areas or were occupying these lands, the Iowa officials automatically assumed that they were trespassers.

In the determination of the boundaries of the areas Iowa claimed, in some instances the Attorney General's Office instructed the surveyors as to what to survey. In other instances the evidence indicated that the Conservation Commission officials instructed the surveyor where to place his line. In some of the areas which Iowa claimed, there were high bank lines further to the East from where

Iowa was making claim and in both the Nottleman and Schemmel areas the eastern line of Iowa's traverse, which normally would have followed the ordinary high water mark, followed no such geographical feature but crossed water area, cultivated fields, and along level land with no bank or physical feature visible.

In one instance, two islands were bisected by canals with portions of the upstream and downstream islands being placed on the right bank as a result of the work of the Corps and the portions of the two islands which were placed on the left bank as the result of the construction silted together and became one area. Iowa is claiming that area as abandoned channel in the Planning Report but Iowa did not, at that time, claim the portions of the two islands which were placed in Nebraska.

Iowa claims other areas where the river was completely in Nebraska in 1943 because of prior avulsions. In at least two instances, the river then escaped from its designed channel and moved back to the East. Then the Corps placed it in the designed channel by subsequent canals. Iowa is claiming the area where the river escaped following 1943 as abandoned channel because that land "is in Iowa" as the state-line is defined by the Compact of 1943. Had it not been for the Compact, the land would be in Nebraska.

At Decatur, Nebraska, the Missouri River moved outside of its designed channel to the East following 1943 and a bridge was built upon dry land over the designed channel. The Corps then moved the river back under the bridge by the digging of a canal and the State of Iowa has claimed the area where the river was to the East as well as the

portion of the present designed channel where the river is now located which is in Iowa. Iowa has not claimed ownership of the bridge and has not exacted any tribute for a pipeline which crosses the area Iowa claims at that point.

In most places where the Missouri River is confined to the designed channel as described in the AP maps, the State of Iowa claims ownership of all that portion of the channel which is presently East of the Iowa-Nebraska Compact line. Iowa makes this claim even in those areas where the river had been entirely in Nebraska as the result of the construction of canals or natural avulsions prior to 1943. Iowa contends that when the new state line was established, under Iowa common law the State immediately became the owner of any part of the channel of the Missouri River or any abandoned channels of the Missouri River which were to the East of that Compact line, notwithstanding the fact that such areas, were in Nebraska up until the date of the Compact. Nebraska contends that the Compact requires Iowa to recognize Nebraska titles and this includes the title to the bed of the river which in many places was entirely in Nebraska claimants. Nebraska also contends that the Compact could not deprive individual proprietors of their vested riparian rights which includes the right to accretion and to abandoned beds in the case of avulsion. Nebraska further contends that when the states agreed to a new boundary they, in stipulating to recognize all titles along the Missouri River without necessity of determining where the former boundary had been, necessarily changed Iowa's common law in such a manner that the State of Iowa must recognize it has no further claim of ownership to the bed of the Missouri River but only has an easement

for the use of the public such as exists in Nebraska. Otherwise, owners are penalized by having to establish where the boundary was prior to 1943 in order to protect their vested rights, a requirement which the states avoided and attempted to obviate by entering into the Compact and providing safeguards to protect individual property rights.

Riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. *New Orleans v. U. S.,* 10 Pet. 662; *County of St. Clair v. Lovingston,* 23 Wall. 46 at 68-69; *Manry v. Robison,* 56 S. W. 2d 438 (Tex. 1932). Under the Compact, these property rights must be protected and the property owners were not deprived of their riparian rights by the Compact. Consequently, in those situations where there was a Nebraska title to the bed of the Missouri River, Iowa is bound by the Compact to recognize that Nebraska title and Iowa has no ownership claim thereto. In addition, when the river following the Compact moves, the Nebraska riparian owner retains his rights to accretion to the bank or bed, whichever the case may be, and his title is not to be terminated at the fixed Compact line.

Iowa argues that the lands along the Missouri River which Iowa claims as beds or abandoned beds are trust lands and the State of Iowa has a duty to claim them. Iowa has no explanation for the fact that Iowa went for years without claiming these areas except that her officials may have been derelict or she is not responsible for the acts of her former public officials. Iowa has no explanation for the fact that Iowa has not claimed other abandoned channels along the Missouri River or why Iowa waited so long after the Compact to make her claim. The evidence

indicates that Iowa was not interested in these lands until they became valuable land with an economic potential or recreational potential to the state. It is neither fair nor equitable for Iowa to delay as long as she has in claiming these areas and to ignore other such areas of like character along the Missouri River and now allow the state to selectively claim certain areas against individual land owners and particularly those claiming through Nebraska titles.

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PART 1 OF THE MISSOURI RIVER PLANNING REPORT

The Iowa State Conservation Commission published a document dated January 1, 1961 entitled PART 1 OF THE MISSOURI RIVER PLANNING REPORT, and it is this document which first publicly disclosed a concerted effort on the part of the Iowa State Conservation Commission to assert claims of title to lands along the Missouri River under the doctrine of state ownership to the beds and abandoned beds of the Missouri River. This report listed 25 potential recreation areas, of which 21 were based upon claims by the State of Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Of the other four areas, one was obtained by the state by purchase and three are highway access areas. All of the 21 areas claimed were immediately adjacent to the Missouri River. This report recognized that:

> "In years past the Missouri has been a fast running river, subject to regular flooding and often carrying heavy silt loads.

"The uncontrolled river moved about freely, cutting new channels, abandoning old, always adding to and subtracting from the shoreline on both banks."

It also recognized that:

"The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change."

The report further recognized that project development was hampered by the cloudy title to lands on the Iowa side of the state boundary and "a lack of knowledge of exact ownership lines also prevents the State of Iowa from acquiring lands needed for access to water or for other shore line development."

It also recognized previous avulsions along the Missouri River:

"The 1943 compromise became necessary because by that time a great deal of channel stabilization has been completed. Because the new channel did not always follow the old river bed it became necessary to redefine the location of the state's boundary."

It suggested that development of the Missouri River for recreational use would be expedited to a large degree if the state boundary is set as the center of the new channel. It considered the 21 areas and in most of them recognized and recommended that a quiet title action must be necessary. It then used such language as "If state is granted title", "if title is granted to State of Iowa" or if the

state "gains title" certain recommended actions should be taken.

The Planning Report recognized the many uncertainties along the Missouri River and even recognized the occupancy of other individuals because of the necessity for quiet title proceedings. The report further recognized the ownership problems which the State of Iowa might have. This indicated an uncertainty in the status of the law and that Iowa's claims had not been determined prior to this time.

Part 1 of the Missouri River Planning Report represents the present policy of the State of Iowa concerning acquisition of or proof of interest in lands referred to in the report.

This activity by the Iowa Conservation Commission along the Missouri River and the resulting Part 1 of the Missouri River Planning Report and Iowa motives are explained by a letter from the Attorney General of Iowa to the Governor of Iowa in 1964 which stated:

> "For many years of Iowa's history, the state did not zealously protect its ownership of these islands, particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding and of little value.
>
> "In recent years, U. S. Army Corps of Engineers works in the Missouri River Basin have changed this picture entirely. Channel stabilization work has made it so that the islands are no longer transitory. Upstream impoundments have made it so that they are no longer subject to frequent flooding. These areas now have substantial value to the people of Iowa, both monetary and in some cases, recreational."

The court finds that Iowa's interest in the lands is motivated by the fact that they have now become valuable farm land and there was a monetary interest if the state could obtain title to these lands without having to make payment by way of condemnation. The funds for financing the quiet title actions by the state were provided by tax monies. The State of Iowa really had little to lose and everything to gain if it could successfully quiet title to these areas as against those in possession. The Missouri River Planning Report and the Iowa Attorney General's Office have indulged in the assumption that the areas were state owned although the record indicates that they did not consider these areas state owned prior to the late 1950's when they initiated the program to quiet title to lands along the Missouri River.

Iowa, in the program outlined by its Planning Report and its subsequent activity in filing actions to quiet title to lands along the Missouri River, utilized Section 1 of the Compact to establish the boundary but has ignored Sections 3 and 4. In doing this, she has violated the Compact.

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THE CASE OF STATE OF IOWA v. BABBITT, ET AL.

On March 18, 1963 the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "State of Iowa, Plaintiff vs. Darwin Merrit Babbit, et al., Equity No. 17433" attempting to quiet title to the Nottleman Island land in Mills County, Iowa. This petition alleged that the State of Iowa was the absolute and unqualified owner of the land and that all

claims of the defendant were "spurious and wholly without right." The petition further alleged that ". . . one or more of the defendants have stated or published remarks to the effect that any attempt by any agent or employees of plaintiff to view, inspect or survey the subject real estate of this case, such agents and employees would be physically and violently stopped and prevented from so doing." The Petition gave no grounds as the basis for Iowa's contentions, merely alleging that Iowa was the absolute and unqualified owner.

The landowner claimants testified that no one from the State of Iowa discussed Iowa's claim with them prior to the filing of this law suit.

The State of Iowa, in Answers to Interrogatories, claimed that its ownership was not based on any acts or instruments, taking the position that the land area formed as accretion to the state-owned bed of the river. Iowa made no investigation concerning exactly who was in possession of the disputed area adversely to them and Iowa claimed that she should not be required to make an investigation concerning possession. The state also claimed that the matter of possession is irrelevant and immaterial. Iowa further claimed that defendants' possession was irrelevant as the land was in the public domain and not subject to being adversely possessed by private parties or persons. Iowa had no information as to how long the various tracts in the area had been cultivated or by whom this had been done. Iowa had never filed anything in the office of the Mills County Recorder of Deeds asserting its claim.

Iowa stated that the State Conservation Commission was not a party in interest in any capacity in the litigation

but also stated that the Iowa State Conservation Commission was the political subdivision or department of the state possessing the power, authority and duty of managing and controlling the area involved in the litigation "if it be determined that same is owned by plaintiff."

Iowa denied that the land was at any time in the State of Nebraska and denied that the State Conservation Commission had ever relinquished claim to the land. She further denied that the land was subject to the provisions of the 1943 Boundary Compact. Iowa asserted that the collection of taxes was irrelevant and immaterial "because any taxes which any of the defendants (landowners) may have paid to plaintiff (Iowa) on the land involved in this case were infinitesimal". Iowa said the matter only became material if the defendants elected to plead some affirmative defense based thereon and that it was an illegal, improper and unauthorized attempt by the landowners to shift the burden of proof from themselves to the state on an issue which was not then an issue in the case and which, if it became an issue, placed the burden of proof on the landowners. Iowa further took the position that the State should not be subjected to the burden of researching, investigating and proving the facts concerning taxation unless and until some burden was cast upon the state by pleading and proof offered by the landowners. The only persons which Iowa listed as having information or knowledge concerning the formation of the land were R. L. Huber, formerly of the U. S. Army Corps of Engineers, by reason of having studied books, records, maps and photographs; Gerald J. Jauron, employee of the plaintiff who had studied maps and records; and Ivan Windenberg,

an employee of the State of Iowa, who surveyed the area. Iowa presumed there were residents who had some information but did not interview the persons prior to their filing of the suit.

Iowa also took the position that the instruments through which the defendants claimed title were "spurious, fictitious instruments" and of no force or effect in Iowa.

Although the evidence is that in 1946 the Iowa Attorney General's office had knowledge of a law suit against the officials of Mills County to have the landowners' Nebraska titles placed on record in Iowa, Iowa took the position in 1963 it was not a party to the action and "had no notice or knowledge thereof."

The evidence has established that at the time Iowa filed the law suit against the owners of Nottleman Island, the state officials disregarded all matters of record concerning the land, all matters of possession by the landowners, the payment of taxes by the landowners upon the land, and all eye witness knowledge concerning formation of the land. They took the position that the State was not required to make any further investigation into these matters and that the instruments of record were "spurious and fictitious" instruments.

The extent of Iowa's knowledge or investigation appeared to be the mere study of certain selected records, maps, and documents from the Corps and an examination of the records of Mills County, Iowa to obtain names of possible parties defendant, with some limited investigation into the records of the Secretary of State in Des Moines and the Mills County ASC office and in the Mills County

Courthouse. The Nebraska records were completely ignored and when the Nebraska titles were raised, Iowa arbitrarily took the position that they were invalid. As in the Schemmel case, this is another situation where Iowa merely filed a quiet title action against the landowners without investigation of their titles and where Iowa has attempted to shift the tremendous burden of tracing and proving the past history of this land to the individual farmers, ignoring everything that has happened in connection with the land except certain assumed facts or conclusions by a few officials or employees of the State of Iowa concerning its formation.

Mr. Babbitt first received notice that Iowa might be claiming his land when a friend called him from Council Bluffs, Iowa and told him about an article in the Council Bluffs newspaper of February 19, 1961 entitled "Missouri River Could Become A 'Playground' ". This article referred to the areas mentioned in the Missouri River Planning Report. The very fact that Iowa announced that they were claiming the title to the land made it impossible for Babbitt to borrow money on his land in order to finance his agricultural operations. He was twice refused loans because in the opinion of the financial institutions or their counsel, the State of Iowa's claim clouded the title. When Mr. Babbitt spoke with the Assistant Attorney General of Iowa concerning their claims and their plans he received a letter dated November 22, 1961 which stated that it was impossible to give him an absolute definite answer to his questions at that time but that he might assume for the present that the State of Iowa through the State Conservation Commission did in fact claim title to so much of the

property as was physically located within the State of Iowa.

The mere claim of title by the State of Iowa constitutes a hardship upon the farmer as he can no longer borrow funds or use his land as he might if his title were good. The State of Iowa by merely making a claim to the land clouds the title and is in violation of Section 3 of the Compact requiring it to recognize titles which had been good in Nebraska.

Nebraska Exercises of Jurisdiction Prior to the Compact

The Nottleman Island or Babbitt Island area was surveyed by the Cass County, Nebraska surveyor as a separate island on August 18-25, 1933 and the survey was filed in the office of the Register of Deeds of Cass County, Nebraska as well as the office of the Cass County Surveyor. The tax records of Cass County, Nebraska show that the island area was surveyed and reported to the County Assessor for assessment on September 7, 1933. The island was taxed in Nebraska as a part of Rock Bluff Precinct, Nebraska from 1933 up until the adoption of the Compact. In 1952 the property was removed from the Nebraska tax records by the Board of County Commissioners of Cass County, Nebraska for and after the year 1943 upon recommendation of the Cass County Attorney who at that time stated that his independent investigation revealed that under the Nebraska-Iowa Compact of 1943, this island became a part of the State of Iowa and was then taxed in the State of Iowa.

A considerable volume of evidence was introduced by plaintiff showing that individuals who lived on Nottleman's Island in the 1930's filed personal property tax returns in the State of Nebraska, registered their motor vehicles in the State of Nebraska, and sent their children to school in the State of Nebraska as Nebraska residents and without the payment of tuition. Testimony indicated that parents of two of these children inquired in Iowa whether they should send their children there but were informed that they could not. The school records of Cass County kept pursuant to Nebraska statute showed the children from families which lived on the island in attendance at the Rock Bluff school during the years 1935 through 1938. Three children attended school in Nebraska, two from the family of Ernest L. Shipley and one from the family of Cleo Baker. A child of the Ernest Shipleys was born on the island in 1936 and the birth certificate was filed with the State of Nebraska, Department of Health, Division of Vital Statistics and there was a Certificate of Death filed with the Division of Vital Statistics of the Nebraska Department of Health showing the death of a daughter of Ernest Shipley in 1935 while the Shipleys lived on Nottleman Island. One of these witnesses, Mrs. Ruth Dooley, first stayed on Nottleman Island in 1929 when she spent the whole summer there with her uncle and grandparents. The evidence shows that from 1929 until the adoption of the Iowa-Nebraska Boundary Compact of 1943, Nebraska residents were farming the island and during most of that period Nebraska residents lived upon the island. The two witnesses who had lived upon the island testified that they considered themselves citizens of Nebraska and the other people on the island considered that they were residents of

Nebraska; this was common knowledge in the Rock Bluff area that these people were considered Nebraska citizens. This was fairly common knowledge in the whole Rock Bluff and Plattsmouth vicinity.

There is in evidence a considerable volume of records substantiating these facts which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago. The passage of time, death of witnesses, and loss or destruction of any of these records would obviously prejudice the landowner claimants in an action of this nature brought by the State of Iowa.

None of the witnesses who testified concerning the actual formation of Nottleman Island or the movements of the Missouri River in that area testified that it was Iowa land or considered to be in the State of Iowa prior to the Compact whereas several witnesses from Nebraska indicated that Nottleman Island was considered to be a part of the State of Nebraska prior to the Compact.

The records of the office of the Register of Deeds of Cass County, Nebraska show deeds as having been recorded in the 1930's conveying portions of the island in Nebraska. One of these deeds carried the recitation that it was to supplement a conveyance made in November, 1928, which conveyance was in writing and properly signed, witnessed and acknowledged but never filed for record.

The Nebraska courts also exercised jurisdiction over Nottleman Island.

In 1940 an action to quiet title to the north half of Nottleman Island was filed in the District Court of Cass County, Nebraska captioned *Harvey Shipley, et al, v. Frank G. Hull, et al.* This was a quiet title action with publication of notice in a legal newspaper in Nebraska which was contested by a Nebraska riparian owner who alleged that the lands were accretion to his lands and were attached to his lands as accretions until the government engineers changed the channel in the Missouri River so that the channel cut off a large portion of said accretion. The court entered two decrees in the case, one quieting title as against certain defendants on August 1, 1940 and the other quieting title to the remaining defendants on June 19, 1941. The court found that the plaintiffs had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the land for more than 10 years and quieted title in the plaintiffs. A finding in the decree indicated that the island had been in private possession since 1926. This case was tried in the District Court of Cass County, Nebraska which is a court of general jurisdiction in Nebraska.

The south half of Nottleman's Island was included within the property of the Estate of John H. Nottleman, deceased which was probated in the County Court of Cass County, Nebraska, the Nebraska Court of probate jurisdiction. The County Court records show that John Nottleman died on March 31, 1940 and this part of Cass County, Nebraska was described by Nebraska description in the inventory as being property of the estate. The estate rented this island land to Mr. D. M. Babbitt. The administrator then filed a Petition in the District Court of Cass County,

Nebraska for a license to sell the real estate, alleging that the deceased had died "seized and possessed" of the land on Nottleman's Island and praying for authority to sell it. The District Court entered an Order to Show Cause ordering that all persons interested in the Estate of John Nottleman appear to show cause, if any, why license should not be granted to sell the real estate and there was publication for three successive weeks in the Plattsmouth Journal, a Nebraska legal newspaper, in 1940. There is also a Notice of Sale published for three consecutive weeks in January of 1941 and the land was sold to J. L. Jones and D. M. Babbitt. The sale was confirmed and the executor was ordered by the court to deliver a deed to the purchasers. An Administrator's Deed from the administrator to J. L. Jones and D. M. Babbitt was filed on February 13, 1941 in the office of the Register of Deeds of Cass County, Nebraska conveying the south half of Nottleman's Island by Nebraska description as Nebraska land.

There were many Nebraska public records offered and a large volume of testimony which established that at the time of the Iowa-Nebraska Boundary Compact and for a considerable period prior thereto, the State of Nebraska exercised jurisdiction over Nottleman Island and there were no exercises by the State of Iowa of jurisdiction over the island. Had the two states investigated the status of Nottleman Island at that time they could have come to no other conclusion than that it was considered to be a part of the State of Nebraska and following the change in channel by the Corps of Engineers was considered as being within the category of "ceded" lands or lands transferred to Iowa by the Compact.

Ownership and Possession of Nottleman Island

Individuals have exercised all the rights and obligations of ownership and possession of Nottleman Island from 1929 to the present, a period of over 40 years and there is evidence that there was an individual in possession of the island from 1926 to 1929. Consequently, there were individuals in possession of the land for at least 35 years before the State of Iowa filed a quiet title action in the District Court of Mills County, Iowa making claim to the land.

Mr. D. M. Babbitt obtained his claim of record to the property through his purchase along with a Mr. Jones of the property through the administrator's sale in the District Court of Cass County, Nebraska. On February 13, 1941, the same date as his deed, Mr. Babbitt filed a mortgage to J. L. Jones with the Register of Deeds of Cass County, Nebraska. This mortgage was outstanding at the time of the Iowa-Nebraska Boundary Compact and was satisfied by Mr. Babbitt in 1949. It was a mortgage entitled to be recognized by the State of Iowa under the terms of Section 3 of the Compact.

The owners of the north one-half of the island all claimed their record title through the quiet title proceedings in the District Court of Cass County, Nebraska in the case of *Shipley v. Hull;* and Margaret T. O'Brien claimed through the Treasurer's Deed from the County Treasurer of Cass County, Nebraska which was filed on January 3, 1945 and through a subsequent warranty deed from Katherine Julia O'Brien, one of the plaintiffs in the case of *Shipley v. Hull.*

William and Mason Watts had obtained a deed in 1937 to the northeast portion of the island and were parties to

the quiet title action of *Shipley v. Hull.* Harvey Shipley conveyed the lower portion of the north one-half of the island to George Troop who later conveyed it to Lee A. Sargent and it has been in the Sargent family since 1953.

There was considerable testimony to illustrate the open, public and notorious occupation and use of the land by the landowners. People lived on the island, it was fenced, had houses upon it, had been cleared extensively, had general farming facilities such as feed lots, loading chutes, hog pastures, and was sowed with crops such as alfalfa, soy beans and corn. There was a farm sale on the island in 1956 advertised in Nebraska and Iowa newspapers. The land was taxed in Nebraska up to the time of the Compact and was taxed in Iowa following a lawsuit brought by the individuals in 1946. There were articles in the Omaha Sunday World Herald in 1954 and 1955 with photographs of the Babbitts with reference made to either the clearing of the island or the crops taken from the island. Mr. Babbitt testified that he put every dollar he ever made after his living expenses into this farm to make a good farm of it. He also put an Inland steel bin on the island which was mortgaged to the Commodity Credit Corporation. He obtained a storage bin loan and in his dealings with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service and with the Commodity Credit Corporation, those governmental agencies raised no question as to his title. The farm was leased for part of the time and Mr. Babbitt had the property surveyed and the survey filed of record in Mills County. The individuals had filed affidavits of possession in Iowa pursuant to the advice of their attorneys. Mr. Babbitt's land presently has about 620 acres of crop land.

Over 400 acres were cleared between 1944 and 1957 at a cost of at least $100 an acre, not including the burning and reburning and discing. The Babbitts hired 20 or 25 people at one time or another to assist with the clearing. The land was posted with "no trespassing" signs by Babbitt and by the Deputy Sheriff or Sheriff. The State of Iowa Conservation Commission or any agency of the State of Iowa never posted any signs around Nottleman Island designating it as Iowa state land.

The Troop land which was approximately 370 acres had about 70 acres cleared in 1945 and Troop farmed there. In 1953 he sold the land to Lee Sargent who died in 1957 and since then the land has been farmed by Sargent's sons. The Sargents farm around 355 acres on Nottleman Island and there is some land which they have not cleared as yet.

When the Sargents obtained the property there was approximately 80 acres cleared and in the three year period from 1953 to 1956 they cleared about 300 acres. They have had crops on the island every year since 1953 barring 1967 when everything was lost in a summer flood. The land was mortgaged by the Sargents to the Travelers Insurance Company who accepted the Sargents' title. Steel grain bins have been built on the property. In Mr. Merrill Sargent's opinion, the land would bring $600 or $700 an acre for most of the 350 acres. There is an additional 40 acres which has not been cleared which is worth $200 or $300 per acre.

The northwest corner of the island is owned by Mrs. Margaret T. O'Brien, the widow of an attorney. This property was conveyed in 1939 to Katherine Julia O'Brien, her sister-in-law. Mrs. O'Brien had received a tax deed from the County Treasurer of Cass County, Nebraska in 1945

and testified that her husband, who was an attorney, had represented her. The O'Briens have claimed land on Nottleman's Island from shortly after the deed in 1939. 200 acres have been cleared at a cost of at least $10,000, according to her records. This was done by a corporation from Des Moines, Iowa and some by an individual from the area. The land is presently farmed and has been leased since about 1950 or 1952. Her share of the crop for one of the years prior to her testimony amounted to about $8,000 under the crop sharing arrangement.

The northwest corner was originally acquired by Albert Mason Watts and William Watts who purchased it from Harvey Shipley in 1937 in Cass County, Nebraska. They paid taxes on this land in Nebraska for several years and then were participants in the suit in Iowa to have the land transferred and placed on the Iowa tax books. William Watts passed away and the property passed to Mason Watts. It was appraised by the Iowa State Inheritance Tax appraisers and an inheritance tax was paid to the State of Iowa. The land has been fenced and posted against trespassers. There are 238 or 240 acres which belonged to the Watts with about 79 acres cleared. It is farmed by a tenant who has been renting it for two or three years. The previous year, Mr. Watts' share of the crops was a little better than $2,000.

There is no question from the evidence but that the individuals were exercising all of the incidents of ownership and possession of the property without interference from the State of Iowa and are presently still in complete control of the land. This was a matter of public notoriety in both Cass County, Nebraska and Mills County, Iowa and was accepted by the local Iowa officials. It was also

accepted by the Iowa State Inheritance Tax authorities and the officials of the Iowa Conservation Commission in 1951.

All of the individuals paid taxes in Iowa continuously from 1947 until the present date, which total taxes over the years through 1966 were in excess of $27,000. Those taxes have been increased in recent years since 1966. Even while the State was attempting to quiet title to the land, the County officials of Mills County were collecting taxes under the threat of tax sale if they were not paid.

The area is no longer an island but can be reached by a road leading to the island across the abandoned channel on the east. An appraiser testified that in his opinion the Nottleman Island tracts had a value of $607,900 as of December 29, 1967 and since that time the trend with regard to values of land of this character had been upward. He appraised some of the land as being worth approximately $500 per acre.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the occupants. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. The Iowa Attorney General's office had notice of the status of the land in 1946 and 1951 and the Iowa Conservation Commission disclaimed any claim to the island and accepted the fact that it was the private property of the occupants in 1951.

Conduct of the State of Iowa Following the Compact; Recognition of the Titles to Nottleman Island

On March 22, 1946 Mrs. O'Brien attempted to file a deed, conveying a portion of Nottleman Island to her, with

the Mills County, Iowa, Recorder's Office. The Recorder's records show the deed was not recorded and was returned to the O'Briens.

Mr. Lewis S. Robinson, County Auditor of Mills County, Iowa in March of 1946, testified that the Recorder did not have any place to record the O'Brien deed and the Recorder returned it to the Auditor's Office because she had no record books in which she had this area designated. The description on the deed carried section, range, and township designations which were not Iowa descriptions but which were Nebraska descriptions. Mr. Robinson then contacted the Mills County Attorney and the two of them made a detailed study of how the matter should be handled. They first went to the Clerk's Office in Cass County, Nebraska and found that this same piece of land was carried on their real estate rolls. They then visited the area Corps of Engineers Office in Omaha to see how the land was described and from there went to other Iowa river county officials and found that these officials had the same problems and had found no solution for them. The Mills County Attorney then wrote a request to the Attorney General of the State of Iowa requesting an opinion and Mr. Robinson and the Mills County Attorney went in person to Des Moines and talked to a Deputy Attorney General of Iowa and left the question with him. The witness never heard of any answer to that question. He substantiated that there was a great deal of confusion concerning treatment of these lands along the river.

Mr. Robinson then wrote the General Land Office in Washington by letter dated April 25, 1946 and explained that due to the change brought about by the 1943 state

legislatures, Mills County, Iowa had acquired a certain area of land of approximately 1,500 acres which was formerly of Cass County, Nebraska and was known as "Nottleman's Island." His letter commenced with the following:

> "In 1943 the Legislatures of the two States of Iowa and Nebraska passed an act establishing the center of the channel of the Missouri River as the boundary line between the two states. This was done because the river had changed its course in previous years putting lands of each state on either side of the river adjoining lands of the other state."

His letter pointed out that Nebraska township and section lines will not join with Iowa lines when projected, and he inquired as to how the land should be identified. His letter also stated that counties other than his had similar difficulties but none they had contacted had arrived at any satisfactory solution. The reply from the Department of the Interior General Land Office recognized that the Compact transferred the jurisdiction from Nebraska to Iowa but did not affect the ownership of the land and suggested that the land descriptions used in disposing of the lands would be appropriate for the purpose of assessment and taxation.

In 1946 some of the owners of the land on Nottleman Island contacted Mr. Whitney Gillilland because they wanted the official records of Mills County, Iowa to show their title and ownership. They had sought to record their title papers with the Mills County officials and had been refused the right to have them recorded. Mr. Gillilland was an experienced Iowa attorney, having previously to 1946 served for a period of time on the District Bench in southwestern Iowa, a court of general jurisdiction in Iowa. In 1946 he would have been in the general practice of law at Glenwood,

Iowa for a period of about 17 years. He has been a member of the Civil Aeronautics Board since 1959 and has had other governmental positions such as Chairman of the Foreign Claims Settlement Commission of the United States, Chairman of the War Claims Commission and Assistant to the Secretary of Agriculture. Mr. Gillilland made a personal examination of the tract books in the County Auditor's office and determined that there were no descriptions for the area. He prepared a lawsuit filed in the District Court of Mills County, Iowa with the Watts, Shipley, O'Brien, Babbitt, and Troops as plaintiffs and the County Auditor, County Recorder, and Mills County, Iowa as defendants. The petition was filed in November, 1946 and alleged the facts concerning the derivation of the titles of the various plaintiffs through the Nebraska quiet title action, administrator's sale and county treasurer's tax deed. The petition alleged that prior to the Boundary Compact the tracts were located in Cass County, Nebraska and were transferred to and became a part of Mills County, Iowa by the statutes which created the Compact. It alleged that uncertainty had arisen as to the manner and method of indexing the lands and that the owners were entitled to have these instruments recorded in the office of the County Recorder. An answer was filed by the County Attorney for Mills County, Iowa which admitted the Compact and that the land was acquired by the change of boundary and further alleged that on May 6, 1946 the County Attorney had written to the Attorney General of the State of Iowa for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes and in setting up the necessary plats and transfer and he had not received any opinion. The decree was filed on January 6, 1947 in

which the court found the allegations and statements of the Petition were true and the plaintiffs were entitled to the relief prayed for. The court further found ownership of the land in the plaintiffs and ordered the Clerk of the Court to file a copy of the plat in the Plat Book and Index Book and other books referred to under the applicable statutes of the Code of Iowa. Mr. Gillilland testified that the landowners were actually physically in possession of the land in 1946 and it was open and notorious and neither the landowners nor he, as their attorney, had any idea that the State of Iowa had any claim to Nottleman's Island in 1946.

In 1950 an Iowa State Conservation Commission employee living in Glenwood, Iowa, came to see him and told him that the Conservation Commission had an application before it to purchase the land. The employee had searched the records and the county officers had referred him to Mr. Gillilland. A few days later Mr. Gillilland was in Des Moines and talked to the Iowa Attorney General, Robert Larson, who is presently a member of the Iowa Supreme Court, about the matter. The Iowa Attorney General suggested that Mr. Gillilland write the Iowa Conservation Commission concerning the matter and Mr. Gillilland did so by letter of March 20, 1950.

Mr. Ray W. Beckman, Chief of the Fish and Game Division of the Iowa Conservation Commission testified that he remembered this letter and he answered it on April 19, 1950 stating:

> "Please be advised that the island you referred to is not State property. The information we have is that this island belongs to four parties as follows:

Wm. Watts	M. Babbitt
Margaret O'Brien	Jones & Babbitt''

Mr. Beckman testified that as Chief of the Fish and Game Division he was responsible among other things for all the lands that were under the supervision of the Fish and Game Department. He remembered being handed the letter by the Director of the Iowa Conservation Commission and testified that he was instructed to make that answer by the Director. The office of Director is a statutory office under the Iowa Code.

This answer was then related to the owners and they relied upon it pursuant to the advice of their attorney, Mr. Gillilland.

The Babbitt land was subject of another lawsuit filed in the District Court of Iowa in and for Mills County on June 8, 1961 when Mr. Babbitt brought suit against the members of the County Board of Review of Mills County, Iowa and the County Assessor of Mills County, Iowa, alleging that he was the owner of real estate on the island which had been assessed for taxation but that the assessment was unjust and excessive and that his taxes should be lowered. The Mills County Attorney filed an answer admitting the ownership by Mr. Babbitt and the court entered a judgment and decree on November 30, 1961 in which it found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law.

When Lee Sargent died in 1957, the Nottleman Island land was included within his estate and the Iowa State Tax Commission assessed an inheritance tax upon the estate including the valuation of this land, and an inheritance tax

was paid to the State of Iowa. William Watts died in the 1960's and the land was included within his estate and assessed for Inheritance Tax purposes and a tax was paid to the Iowa State Tax Commission on the estate.

Mr. Watts further testified that at one time Mr. Stiles, head of the Conservation Department, was visiting them and the Watts brothers tried to sell the land to Iowa for practically nothing or give it to Iowa if they would make a game preserve out of it, but Stiles refused to have any part of it and wanted nothing to do with it.

The record clearly indicates a complete acceptance by the local officials of Mills County, Iowa and recognition by the Iowa Attorney General's office and Conservation Commission in the late 1940's and early 1950's that Iowa had no claim to the land and that there were titles good in Nebraska which were good in Iowa pursuant to Section 3 of the Compact. It is neither fair nor equitable for Iowa to now change its position and claim title in light of these past recognitions and the continuous period of taxation of the land by the Iowa officials. (See *United States Gypsum Co. v. Greif Bros. Cooperage Corp.,,* 389 F. (2d) 252 (8th Cir. 1968).

Regardless of how land along navigable rivers may have formed, there is another well established principle applicable to the boundary between states. The land may become a part of a state as a result of long and continuous exercise by that state of sovereignty and jurisdiction over the land with the acquiescence of the other state. The principle of prescription and acquiescence has as its primary object and underlying basis "the creation of stability of order" and "there is no controversy in which this great

principle may be applied with greater justice and propriety than in the case of disputed boundary." *Arkansas v. Tennessee,* 310 U. S. 563. See also *Indiana v. Kentucky,* 136 U. S. 479, *Rhode Island v. Massachusetts,* 4 How. 591, *Michigan v. Wisconsin,* 270 U. S. 295, *Maryland v. West Virginia,* 217 U. S. 1, *Virginia v. Tennessee,* 148 U. S. 503, and *Louisiana v. Mississippi,* 202 U. S. 1.

Another significant concept in the consideration of cases involving boundary disputes is the recognition by public officials and inhabitants of the location of the boundary. See *Minnesota v. Wisconsin,* 252 U. S. 273, *Handly's Lessee v. Anthony,* 5 Wheat. 374.

The history of taxation by two states in respect to a disputed area is also of substantial weight in indicating acquiescence by one of the states in the boundary line restricting her jurisdiction. *Vermont v. New Hampshire,* 289 U. S. 593.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants in the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was in Nebraska prior to the Compact. Iowa's acquiescence for an additional 20 years following the Compact and Iowa's taxation of the land supports this conclusion.

Nebraska contends that Iowa disregarded all of this evidence and that Iowa should not be able to bring an action

requiring the landowner to establish his title by making this showing. The individual defense of such a case by a landowner places a tremendous expense upon him. This includes the difficulties of searching out records and land marks which may have been destroyed by the passage of time and of obtaining witnesses to facts or occurrences in years long past. As the court said in *Rhode Island v. Massachusetts,* 4 How. 591, 639:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

This statment has been cited several times in boundary cases. If there is to be any stability of order along the Missouri River, the Compact must be construed in such manner as to prevent the State of Iowa from contesting the title of landowners such as in the Babbitt and Schemmel cases and all other areas which were in existence at the time of the Compact. This is certainly consistent with the intent of the Compact and effectuates its purpose.

History of the Movements of the River in the Nottleman Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Nottleman Island or Babbitt Island area

must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how the land actually formed or in what jurisdiction it formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union the Missouri River was originally in approximately the same position which it presently occupies in the Nottleman Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. Behind this movement, an island originally platted as Nebraska land which was immediately north of the area involved and referred to on early Corps' maps as Tobacco Island, began to enlarge both to the east and downstream on the Nebraska side of the river.

A study of the original government surveys and maps from the U. S. Army Corps of Engineers and Missouri River Commission document this eastward movement. It is further substantiated by an 1895 survey by the County Surveyor of Mills County and a 1920 Soil Survey.

Several witnesses who lived along the Missouri River on the Iowa side and were familiar with it testified concerning the movements of the river to the east at various times commencing shortly after 1900. Some of them had

to move away from the river because it was cutting toward them and houses and farms were cut into the river on the Iowa side.

Records dated September 25, 1922 in the Mills County, Iowa Auditor's office indicate that from 1851 to 1895 the river carried away about 1,140 acres of land in Mills County and that since 1895 there had been 1,296 acres more taken making a total of 2,436 acres taken by the river by September 25, 1922. As a result of the concern on the Iowa side, a river protection district was established pursuant to the Iowa statutes and retards were constructed on the Iowa side commencing in about 1922 or 1923 to attempt to halt this cutting of the river. According to a comparison of the 1922 map prepared in connection with this Missouri River Protection District and a 1923 Corps of Engineer map, between 1922 and 1923 the river cut through the accretion area which had been on the Nebraska side and following 1923 the various maps indicate a distinct island with water on both sides.

Testimony by Mr. Harry Weakly, Nebraska's tree expert or dendrochronologist, verified that trees which commenced growing on what was the Nebraska accretion area remained on the island after a channel of the Missouri River had cut back to the west upstream between 1922 and 1923 leaving the island as a substantial land area. Mr. Weakly testified that one tree on the island commenced to grow in 1900. This tree was located to the west of the 1890 thalweg which appears on the Missouri River Commission and Corps of Engineer's maps. Even one of Iowa's experts who testified as to the age of the trees on the island, though differing in count from Mr. Weakly, stated

that two of the trees commenced to grow on the island prior to 1923.

Witnesses who lived in the Rock Bluff area on the Nebraska side also testified concerning how the river had cut to the east and how, at various times the river bank was considerably to the east of its original location with chutes on the Nebraska side which at times would be dry. People could wade to the Nottleman Island area across some of the shallow water at times. Captain Otto Neuhauser of Kansas City testified that he had been on boats on the Missouri River ever since 1910 and made his first trip as far as the Rock Bluff area in a river boat in 1915. He was a pilot on the Missouri River from 1913 until 1957 and the first time that he came up the Missouri River he described the water on the west side of Nottleman Island as quite wide and shallow and he could not bring his boat up it. Consequently, he had to go around the east or left bank side of the Nottleman Island area where the main channel flowed. He verified that the main channel was also on that east side when he worked for a construction company in 1921 placing retards and again in 1931 when working for the Corps the main navigable channel was on the left or east side of Nottleman Island. Workers for the Corps of Engineers including a steersman on one of the Corps boats, who was also a boat pilot, testified that before the Corps of Engineers commenced their river work, the main channel was on the east side.

Witnesses called by the State of Iowa to attempt to counter this mass of evidence indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity and only casual acquaintance with the situation there. Some

of the witnesses called by Iowa recognized the river had moved considerably to the east and also were somewhat familiar with the cutting of the river towards the east into Iowa. No witnesses, however, testified that the island formed in Iowa or was considered as in Iowa prior to the Compact.

The evidence shows that from the time of the original Nebraska survey in 1857, the Missouri River had moved to the east in the Rock Bluff area more than one mile and the island formed in Nebraska. The Corps of Engineers' channel stabilization work placed the main channel to the west of the island, and the Iowa-Nebraska boundary at the time of the Compact was in the abandoned channel approximately a mile east of the Compact line.

Movement of the Missouri River by the Corps of Engineers Into the Designed Channel

Commencing in about 1934 the U. S. Army Corps of Engineers began work in the Nottleman Island area. Testimony of several knowledgeable witnesses familiar with the vicinity or who worked for the Corps of Engineers established that the main channel was on the east of Nottleman Island with a subsidiary channel to the west of Nottleman Island. The Corps commenced work at Plattsmouth and came downstream, shutting off the channel on the west side of the island to the north of Nottleman Island. The designed channel was to come under the Plattsmouth Bridge and then go around the east side of the island north of Nottleman Island, swing back and come around the west side of Nottleman Island, and then start around the east side of an island immediately downstream which was bisected by a canal and the river was then brought back to

the west and continued in its design of sinuous reverse curves. In that whole stretch of river the maps showed divergent channels on the east and west sides of various islands and the Corps at Nottleman Island reversed the main channel from what it previously had been.

The Corps commenced driving the dikes on the east side at the upstream end of Nottleman Island in order to divert the channel to the west. The Corps had some difficulty in holding these dikes and in the spring of 1935 the river came down the west side of the upstream island and cut through the old channel on the east of Nottleman Island, washing out the dikes, with 25 to 30 feet of water going through. The channel was finally successfully transferred from the east side to the west side of Nottleman's Island in around 1938. During this river work by the Corps Nottleman's Island remained as an island and did not disappear. Even in 1938 there was testimony by workers from the Corps that they had to place rock along the dikes on the east side and even at that time, although the dikes were in place, there was more water running along the east side of Nottleman Island than on the west side which was the designed channel. The Corps maps from 1937 to 1941 called the island "Noddleman Island".

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Nottleman Island to the west side into the designed channel, thereby creating an avulsion. The Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary be-

tween Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The east abandoned channel carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Nottleman Island in addition to being admittedly by the State of Iowa in error on the western side in that it extends approximately 50 feet into Nebraska across the Compact Boundary between the two states, also had no basis in fact along the eastern side of Nottleman Island and, as in the Schemmel case, it followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The traverse goes through water, low swamp, and brush and across flat land. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

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THE SCHEMMEL ISLAND AREA

Nebraska Exercises of Jurisdiction Prior to Compact

Commencing in 1895, Nebraska assumed jurisdiction of all of the land in the Schemmel area and exercised jurisdiction continuously until the Iowa-Nebraska Boundary Compact of 1943.

In 1895 the Otoe County Commissioners ordered lands added to the tax rolls of Otoe County, Nebraska which included the Schemmel area as accretions to Nebraska surveyed by the Otoe County Surveyor. Generally, the land was taxed in Nebraska continuously from 1895 through 1943, a period of 49 tax years. A few discrepancies in the records were explained by the testimony. The tax records for each year taken from the records of the Otoe County Treasurer's office offered by Plaintiff illustrate the tremendous amount of work and difficulty in tracing the tax history of land along the Missouri River. This is obviously a tremendous burden and is expensive and time consuming.

In 1908 a Treasurer's Deed from the County Treasurer of Otoe County, Nebraska was filed for record in the office of the Register of Deeds of Otoe County which was issued pursuant to public sale of the real estate under a decree of the District Court of Otoe County, Nebraska in a State tax suit for the year 1905. The Schemmels at the time of the Compact had a direct chain of title tracing back to this Treasurer's Deed.

Over the years there were some Nebraska quiet title actions in the District Court of Otoe County, Nebraska quieting title to some of the land which is included within the description of the Schemmel land. There were also some conveyances of the land recorded with the Register of Deeds of Otoe County, Nebraska.

Henry Schemmel's initial claim to the land arose from a tax sale certificate in Otoe County and from three deeds dated January 11, 1938. These deeds completed a chain of title to the Schemmels tracing back to the 1908 Treas-

urer's Deed. Mr. Schemmel originally acquired the land in partnership with a Dan Hill, but the Schemmels later acquired the Hill interest. These deeds were recorded with the Register of Deeds of Otoe County, Nebraska in 1938 and were filed of record with the Recorder of Fremont County, Iowa in 1939. Consequently, record notice was given in both states prior to the Compact of the conveyance of this land as Nebraska land and of the Nebraska title.

Mr. Henry Schemmel is and has been a Nebraska resident in the Nebraska City area since 1934.

At about the same time that Mr. Schemmel filed his deeds in Iowa, he wrote a letter in 1939 to the Fremont County, Iowa officials advising them that some of his land was now on the Iowa side of the canal dredged by the Corps of Engineers in Otoe Bend. This letter was recorded with the Fremont County, Iowa Recorder on August 22, 1939 and the letter stated that the Federal Government Improvement Program from 1933 to 1939 had changed the Missouri River by levees and dikes so that this land would be on the Iowa side of the river but was Otoe County land.

There were two quiet title actions in the Otoe County, Nebraska District Court, which is a court of general jurisdiction in Nebraska, quieting title to a large portion of the Schemmel land and the quiet title decrees were entered on May 28, 1941. After these decrees were entered, Mr. Schemmel notified the Fremont County, Iowa officials of that fact by a letter originally sent on June 5 or 6, 1941 and returned without recording. Mr. Schemmel later recorded the letter on March 1, 1956 in the Fremont County Recorder's Office. The letter stated that due to the chang-

ing of the Missouri River by the construction of pile dikes, dredging and revetment works by the United States Government Corps of Engineers, a large part of what is presently called Schemmel Island would be on the Iowa side of the main channel of the Missouri River. One of the quiet title decrees was filed by Mr. Schemmel with the office of the County Recorder of Fremont County, Iowa on August 25, 1941.

At the time of the Iowa-Nebraska Boundary Compact, there was a title to the Schemmel land which was good in Nebraska as recognized by the Nebraska court decrees and notice of this Nebraska title was on record in Fremont County, Iowa with Iowa's proper recording officials.

The Schemmel land was bisected by the Otoe Canal dug by the Corps of Engineers in 1938, and Mr. Schemmel's title to the land which remained on the right bank or Nebraska bank of the Missouri River following the Compact has subsequently been recognized in Nebraska by private individuals and by the Nebraska courts. Mr. Schemmel's claim of title to the land on both sides of the Missouri River, some of which became located in Iowa as a result of the Compact, emanated from the same Nebraska deeds, actions, and indicia of ownership. Some of this land is to the east of the land Iowa claims, but Iowa has made no claim to this area.

No witness testified that the Schemmel Island area had been in Iowa prior to the Compact whereas several of the Nebraska witnesses testified as to how the land was severed from Nebraska by the canal dug in Nebraska and the Nebraska witnesses recognized this area as originally being in Nebraska.

Conduct of State of Iowa Prior to Compact With Reference to Schemmel Island

The records of the County officials of Fremont County, Iowa substantiate that the Missouri River moved easterly up until immediately prior to 1905 and that the geographical feature known in the area as the "Iowa Chute" marks the abandoned channel of the Missouri River. In the Schemmel area, the Iowa chute is located approximately two miles east in some places of where the designed channel of the Missouri River is today. Records from the Fremont County Treasurer's office and the Journal of Board of Supervisors of Fremont County, Iowa which were offered by Plaintiff for years between 1866 and 1905 show a progressive history of removal of portions of what previously had been Iowa land in the Schemmel area from the Iowa tax rolls as the river moved to the east into the location of the Iowa chute. The tax records of Fremont County, Iowa reflect that in 1899 and 1901 the Missouri River was located in the Iowa chute. This was confirmed by plaintiff's eye witnesses.

The Fremont County records establishing the Knox Drainage District in 1909 found in the Fremont County Courthouse establish the boundary of the district as a levee along the east bank of the Missouri River, which coincides with the location of the Iowa chute.

An Iowa State Highway Commission Official Map of Fremont County, Iowa filed on February 14, 1914 in the office of the Fremont County Auditor also shows the Missouri River with the left or Iowa bank being located in the general configuration and location of the Iowa chute. This constituted another recognition by Iowa officials that

the river had been located there and that the left or east bank represented the limits of Fremont County, Iowa.

Other records on file with the Auditor of Fremont County recognized the bank along the Iowa chute as being the high bank of the Missouri River and as the abandoned Missouri River bank and the limits of the drainage districts. These records are dated 1920, 1922, 1923 and 1931. Even in 1931 the Fremont County officials recognized the Iowa chute as being the abandoned Missouri River bank. The major portion of Schemmel Island is described as section 15-67-43 in Iowa and the Iowa tax records indicate that no part of Section 15 is found on the Iowa tax rolls after 1880. During most of these years no tax books were found but the tax records indicate that there was no listing of this section in 1881, 1882, 1884, 1885, 1887, and in 1934, 1935, and 1936, which records were available. Consequently, the Iowa tax records did not show taxation of the Schemmel land at and prior to the Iowa-Nebraska Boundary Compact and Iowa was exercising no incidents of jurisdiction over that area at and immediately prior to the Compact.

None of the Schemmel Island area was on the Iowa tax rolls in the 1930's or 1940's up until the time of the Iowa-Nebraska Boundary Compact.

The evidence does show that some of the area east of Schemmel Island and west of the Iowa Chute did appear on the Iowa tax rolls commencing in approximately 1934 and from 1934 to 1943 this area was on the tax rolls of both states. However, the Iowa records failed to show the systematic taxation and exercise of jurisdiction over the area to the east of the Schemmel land between it and the Iowa

chute as is shown by an examination of the Nebraska records, and the Iowa records show no taxation or exercise of jurisdiction by Iowa over the Schemmel land.

Testimony of witnesses called by Iowa and residing on the Iowa side of the river recognized that the Iowa Chute was abandoned bed of the Missouri River.

It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River.

At the time of the Iowa-Nebraska Boundary Compact of 1943 the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island. The State of Iowa was making no ownership claims to Schemmel Island and the State of Iowa was exercising no incidents of possession of Schemmel Island.

Ownership and Possession of Schemmel Island

The Schemmel family (reference to the Schemmel family includes Dan Hill who initially purchased the land with Henry Schemmel but whose interest was subsequently conveyed to the Schemmels) have exercised all the rights and obligations of ownership and possession of the land from 1938 to the present, a period of approximately 33 years to the present date and approximately 25 years before the State of Iowa filed a quiet title action in the District Court of Fremont County, Iowa making claim to the land.

The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale

and 1908 Otoe County Treasurer's Deed and approximately a year previously had purchased a tax sale certificate in Nebraska to the land. In 1939 "no trespassing" signs were posted and much of the land was seeded to grass.

Mr. Schemmel made his Nebraska title of record in Iowa in 1939 by recording various documents including deeds and by notifying county officials of Fremont County, Iowa by letter stating ownership to this Nebraska land which had been placed on the east side of the Missouri River by the work of the Corps of Engineers.

In 1941 Mr. Schemmel and the Schemmel family had their title quieted by two Nebraska quiet title actions, and a Nebraska quiet title decree to some of the land was filed of record in Fremont County, Iowa and Mr. Schemmel again notified the Fremont County officials by letter of his ownership and that the land was in Nebraska. The Iowa officials took no action to counter this claim that it was Nebraska land.

Fremont County, Iowa officials were on record notice at and prior to the Compact of 1943 that there was a good Nebraska title claimed to the Schemmel area. There was no record claim whatsoever by the State of Iowa to the Schemmel land.

The Schemmels paid taxes in Nebraska from 1938 through the adoption of the Iowa-Nebraska Boundary Compact of 1943 and were paying taxes in Nebraska when the Compact was adopted. No such taxes were being levied at that time in Iowa.

In 1939 none of the land on the Iowa side was under cultivation but in the years previously, someone had been

farming the land on the Nebraska side of the area which Henry Schemmel acquired and which remained in Nebraska after the dredging of the Otoe Bend Canal. From 1939 until 1943 the Schemmels seeded the island to grass and south of that put down a well and put in a tent which washed away in the first flood. In 1943 Mr. Schemmel went into the service and his partner took care of the real estate; and when Mr. Schemmel returned he found that the land on the left side of the present channel was in the State of Iowa by virtue of the 1943 Boundary Compact. He asked the Auditor of Fremont County in Sidney to place the property on the tax records so that the Schemmels could pay taxes in Iowa. Sometime after January of 1947, the County Auditor and County Treasurer of Fremont County, Iowa came to the Otoe County, Nebraska Courthouse to consider the transfer of the land and told Mr. Schemmel that there had been a court action in Mills County, Iowa and that they were required to put the land on the tax books. Mr. Schemmel, who at that time was Otoe County Treasurer, referred them to the Clerk's office to check the plats and verify the location of the land. After that, the land was placed on the Iowa tax records and Mr. Schemmel and Mr. Hill commenced paying taxes in Iowa in 1949.

The land was placed on the Iowa tax rolls under Iowa description. Consequently, following the Compact, the Fremont County, Iowa officials recognized after investigation that the land had been ceded to Iowa from Nebraska.

The Schemmels continued to post the land with no trespassing signs in the 1940's and also continued the seeding of the area with grass. Since placing the first "no trespassing" signs in 1939, the Schemmels have continu-

ously excluded trespassers and no one other than the Schemmels or their tenants have ever been in possession. The Iowa Conservation Commission has never put up signs around the land.

The Schemmels contacted a contractor in 1948 concerning the clearing of trees and vegetation from the island so that it could be farmed but the east channel was still quite active at that time and a decision was made to wait.

Because the Auditor of Fremont County, Iowa had given the land a different description from the Nebraska surveys and because Mr. Schemmel wanted to obtain title with an Iowa description for the same land in order to clarify and establish the rightful ownership in case he should decide to sell or mortgage the property, he allowed the land to be sold at Iowa tax sale on advice of his counsel. He then purchased the land at tax sale and assigned the tax certificate to his daughter and tax deeds were issued to her. Three tax deeds are in evidence dated November 2, 1955 from the Fremont County Treasurer to Mary Leah Persons conveying the greater portion of Schemmel Island. These deeds were issued by the treasurer by virtue of the authority in him vested by law and indicated that the land had been sold at regular sale at public sale. This sale was made pursuant to Iowa statutes which provide that the title conveyed includes "all the right, title, interest, and claim of the state and county thereto." (Sec. 448.3, Code of Iowa).

Mr. Schemmel had a garden on the island in approximately 1954 and the first clearing of the island was done in 1955 to 1956. The first crop was grown on the island

in 1956. The land has now been almost completely cleared, leveled and a levee constructed, making it valuable and highly productive farm land.

From 1957 to approximately 1965 the land was rented out by the Schemmels to various tenants and since approximately 1965 the Schemmels have farmed it themselves. On the main island today there is presently around 400 to 450 acres in cultivation. In 1968 the corn yield averaged 105 bushels to the acre of corn and 40 bushels to the acre of beans. The Schemmels have had the land in the government farm program since 1957 with the exception of one year.

The Schemmels started building corn cribs in 1957 on the land immediately to the east of the island on the protected side of the levee and from then until about 1962 they were either building cribs, quonsets, or round bins. The Schemmels have stored and sealed grain in those cribs since commencing in 1957.

The Schemmels have paid real estate taxes on the land since 1949 in Iowa. Iowa has also taxed and assessed the Schemmel buildings.

The Schemmels spent approximately $50,000 to $60,000 in clearing the land. Their 1968 taxes to the State of Iowa were approximately $1,200.

The area is no longer an island but the Schemmels have a crossing across what was the old channel so that they can drive to the island.

The clearing, picking up of sticks, girdling of trees and discing the land to get it ready for production would

cost approximately $200 an acre. This land is now valuable and productive farmland with some of it worth approximately $400 per acre or more and the Schemmel land was appraised at $180,500 as of December 1, 1967. Some of the witnesses also testified to their opinion of the value of the land which was higher than the appraiser's.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the Schemmels. Iowa had been placed on notice by filings in her Recorder's office in 1939, four years prior to the Compact, of the Schemmel family claim under a Nebraska title to the land. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. Then in 1963 Iowa filed an action to quiet title to the land in the District Court of Fremont County, Iowa, almost 20 years following the Compact. From 1949 up to the present, the Schemmels have paid real estate taxes in Iowa and are paying them at the present time even though Iowa is making a claim that Iowa is the owner of this land.

Iowa acquiesced in the Schemmels' claim of title by making no claim on behalf of the state within a reasonable period of time following the Compact, and by her taxation of the land and the general recognition of the Schemmel possession and title. It is unjust and inequitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land has always belonged to the State of Iowa in this type of situation. (See *United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F. (2d) 253 (8th Cir., 1968).

The Case of the State of Iowa v. Henry E. Schemmel, et al.

On March 26, 1963 the State of Iowa filed a petition in the District Court of Iowa in and for Fremont County, captioned "*State of Iowa v. Henry E. Schemmel, et al.*, defendants, Equity No. 19765." This petition merely alleged that Iowa was the absolute and unqualified owner in fee simple of the real estate described consisting of approximately 660.944 acres and that all other claims to the real estate were wholly without merit or right. There was nothing else in the petition to indicate the theory under which the State of Iowa was claiming the land.

Prior to the filing of this quiet title action no official from the State of Iowa had discussed the claim with the Schemmels and no one had inquired of the Schemmels as to what the basis of their claim to the property was. When the defendants claimed that the State of Iowa was in violation of the Iowa-Nebraska Boundary Compact of 1943 in failing to recognize the Schemmels' title and rights to the land under Nebraska law, the State of Iowa denied that the land in controversy was ever located within the State of Nebraska. Iowa then alleged that the land formed in Iowa and has been in Iowa continuously since it came into existence and alleged that the common law of Nebraska is irrelevant and immaterial to any issue in the case. Trial was commenced and Iowa called only two witnesses, the surveyor who made the traverse around the Schemmel area for the State of Iowa and Mr. Raymond Huber, a former employee of the Corps of Engineers. Iowa only traced the history of the river back into the 1920's, ignored all previous history of the river, and relied upon the presumption concerning avulsions and that all previous movements of the river had been gradual or by accretion. Iowa

placed the burden of proving an avulsion upon the defendants or land owners and had no proof, "except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least."

Consequently, Iowa put in only a minimum of evidence and placed the entire burden of showing the history of the land upon the defendants. Iowa did this apparently knowing that the Corps of Engineers had dug a canal in Nebraska during the time that the Corps was moving the channel into its design in the Otoe Bend area.

Iowa took the position that she had physical possession of the land. Iowa interviewed no persons concerning the formation of the land prior to the filing of the suit. She had no discussions concerning formation of the land with any of the defendants named in the action. The only persons having knowledge of the relevant facts concerning the formation of the land where members of the Attorney General's office, Mr. Huber and Mr. Gerald Jauron, a Conservation Commission employee. Iowa had not pursued any investigation with any individuals who purported to have some recollection of the Otoe Bend or Schemmel Island area running back to the 1930's because it was the state's opinion that relevant facts were "all fully, clearly and indisputedly established by the available records, maps, plats and photographs inspected with investigation and study of the area itself. Any other evidence based on human recollection as to the matter would be clearly cumulative, or if in conflict with the documentary proof would be unworthy of belief."

Iowa made no investigation into the records of the Register of Deeds of Otoe County, Nebraska or the records

of the District Court of Otoe County, Nebraska prior to the filing of its case against the Schemmels. Her officials did investigate the records of Fremont County, Iowa to obtain names of possible parties defendant and their only other investigation was in maps, plats and photographs of the Corps of Engineers office in Omaha and the Secretary of State's office in Des Moines and the Fremont County A.S.C. Office and the Fremont County Courthouse. The mass of evidence offered in this case concerning Nebraska titles and exercise of jurisdiction prior to the Compact was ignored, as was Iowa's taxation of the land and the general recognition in the area of the Schemmel title. As in the Babbitt case, Iowa utilized Section 1 of the Compact to establish that the land was in Iowa, but she completely ignored Section 3 of the Compact regarding private titles.

The same principles of acquiescence, prescription, and general recognition of boundary applicable to the Babbitt land and the Nottleman Island area are also applicable to the Schemmel land. The exercises of jurisdiction by the State of Nebraska by having surveyed the land, taxed the realty, quieted title, Nebraska conveyances and the fact that the inhabitants of the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa together with concurrent removal of the land from the tax rolls from the State of Iowa and recognition by the State of Iowa of the abandoned Missouri River channel in the Iowa chute to the east of the Schemmel property, would seem to be conclusive that this was Nebraska land prior to the Compact. The taxation of the land by the State of Iowa, issuance of Treasurer's tax deeds, and recognition by the county officials and Iowa inhabitants following the Com-

pact substantiate the fact that it was Nebraska land ceded to Iowa under the terms of the Compact. Just as in the Babbitt case, the State of Nebraska asserts that the burden placed upon the Schemmels to have to establish this history is unconscionable and they should not be subjected to this type of attack by the State of Iowa. The tremendous mass of evidence substantiating these exercises of jurisdiction and recognition over the years was obviously extremely difficult to obtain, expensive, and time consuming because of the long passage of time. Obviously, it is extremely difficult in 1969 to find eye witnesses who can place the location of the Missouri River in 1900. Iowa should not be allowed to make claims which place this burden on an individual landowner in this type of situation.

History of the Movements of the River in the Schemmel Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Schemmel area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how or where the land actually formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union, the Missouri River was originally in ap-

proximately the same position which it presently occupies in the Schemmel Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. The evidence consisting of many old maps, surveys, Corps of Engineer records and the county records in Otoe County, Nebraska and Fremont County, Iowa all substantiate that the river developed a pronounced easterly bend following admission of the two states into the Union. In the development of this bend the land was cut away on the Iowa side and accretions were added to the Nebraska right bank. By the turn of the century, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today.

Between 1900 and 1905 the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the Missouri River. This movement constituted an avulsion, leaving the Iowa-Nebraska State Boundary in the abandoned channel described as the Iowa Chute until 1943.

Physical evidence in support of this avulsion can be found by the location of a tree which Nebraska's expert testified commenced to grow in the year 1895. The location of this tree was on the Nebraska or right bank according to the 1895 Pierce Survey by the Otoe County Surveyor pursuant to direction by the Otoe County, Nebraska Board of Supervisors. This was a cottonwood tree growing on the Nebraska bank while the river was to the east, the

tree survived the movement of the river to the west which shows the land in the bend was cut off. Had the lateral migration of the river been gradual, the soil supporting the roots of the tree would have been eroded and the tree would have been washed away. Instead, the tree remained strong and growing up until the time of this lawsuit when it was cut down in 1965. Iowa's expert witness, Ruhe, stated that the river could have moved across the place where this tree was located without destroying the tree. There is some dispute among the experts, as Iowa's tree experts testified that the tree commenced to grow in approximately 1903, but even this merely narrows the period of time in which the avulsion occurred to between 1903 and 1905.

This movement of the Missouri River across the bend was described by Nebraska's expert geologist, Dr. William Gilliland, an eminent and well qualified expert in the field of geology, as typical of a meandering stream. Dr. Gilliland explained that the Missouri River in this particular area moved in the same fashion that typical meandering streams moved, basically by erosion on the outer portion of the meander causing a shifting of the meander towards the outside with simultaneous deposition on the inside of the bend on the point bar. Dr. Gilliland used several maps and comparisons to demonstrate the movement of the river and testified that the only possible way that it could have come back from its 1895 position to the position in 1905 was through an avulsive change by means of a neck cut-off or chute cut-off. He knew of no other manner by which the river could have moved from its indicated 1895 location to its indicated 1905 location other than by an avulsive change.

Dr. Gilliland explained how when the river goes around a bend, the distance between the top of the bend and the bottom of the bend is shorter across the bend although the elevation is the same so there would be a steeper path across the bend than around the bend. Because of the steeper path the water would flow more rapidly and more rapidly flowing water erodes more easily. Consequently, in a time of high water it is not unusual to find the water flowing through the shorter path across the neck of the bend or along a chute through the bend. Such water tends to flow more rapidly and erode away a new channel. The 1905 channel flowed through a natural chute or slough across the accretion area or point bar as observed on the 1890 map.

Dr. Gilliland's testimony was based upon a two-fold analysis:

(1) A succession of maps showing a succession of positions of the river and

(2) Confirmation by the experimental and other empirical data typifying this as a typical meander consistent with the movement of meanders in other areas.

The avulsive change caused the river to flow in an area considerably west of the maximum eastward location of the river, leaving part of the land which had been built up on the Nebraska point bar, or accreted to the point bar, exposed. The 1895 tree was growing on this area. In all subsequent maps, the river has not extended as far east as it did in the most easterly position prior to 1905. It also did not extend as far east as the 1895 tree. Schemmel Island is located in the area that was a point bar in Nebraska prior to the avulsive action.

Although Iowa had expert testimony tending to attempt to establish that the river moved gradually to the west from its position in the Iowa Chute, the evidence completely discredited this position.

Dr. Gilliland's explanation is consistent with the theory utilized by the Corps of Engineers in their construction works along the river and is consistent with basic geological data submitted. His expert testimony is entitled to great weight. This avulsion, leaving the boundary in the abandoned channel of the Iowa Chute, has a remarkable similarity to the "Ike Chute" and the classic example of an avulsion described in the case of *Arkansas v. Tennessee,* 397 U. S. 88, Decree at 26 L. Ed. 2d 537.

The Iowa Chute was generally recognized as abandoned channel of the Missouri River both by witnesses and records in the Fremont County, Iowa courthouse.

There was also eye witness testimony that in 1911 or 1912 the river made a natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide. This constituted another avulsion consistent with the principles explained by Dr. Gilliland, placing the entire river further into Nebraska.

The Iowa Chute marks the thread of the abandoned channel of the Missouri River which marked the boundary between Iowa and Nebraska immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

It should also be noted that most of the land between the Schemmel area and the Iowa Chute has been cleared of trees and the 1895 tree discovered by the plaintiff is the only tree in that vicinity and was located on a fence

line or property line. Otherwise, it, too, might have been destroyed and the physical evidence helpful to the establishment of the Schemmels' claim might easily have been destroyed merely because of the passage of time.

Movement of the Missouri River by the Corps of Engineers and the Otoe Bend Canal

An avulsion of the Missouri River to the west occurred in the Schemmel area as a result of the construction work by the Corps of Engineers between the years 1934 and 1938.

In 1934, the Corps of Engineers commenced work in the Schemmel area to place the river in a designed channel of 700 feet. Immediately prior to commencement of the work the principal flow of water or the main thrust of the water and the path which the boats used was along the east or left bank. Pile dikes were driven from the east bank across water and then across land and bar area. The Corps experienced some difficulty in diverting the water due to an easterly tendency of the flow. Because of this difficulty, the Corps was required to dig the Otoe Bend Canal in 1938 in order to place the river in the designed location. This canal was dug through Nebraska bank and bar land and was approximately one mile long. The State of Iowa admits that the canal was dug entirely in Nebraska.

The evidence shows that the river was placed considerably to the west of its 1934 location and around a substantial piece of land with vegetation upon it. This is substantiated not only by the testimony but also by ground level photographs taken in 1938 by the Corps of Engineers. It is further substantiated by the findings of Mr. Weakly,

Nebraska's dendrochronologist. Even Iowa's tree expert recognized that trees had commenced to grow on some of the land prior to the dredging of the canal and these trees were not destroyed by the movement of the river to the west around that land area. One of the surveyors who helped to lay out the canal said that they walked to the area from the Nebraska side and did not cross any water.

Some of Nebraska's witnesses were highly familiar with the area and had worked on the site for the Corps of Engineers, both in the construction of the dikes and in the dredging of the canal. Nebraska's witnesses lived close to the area and were familiar with the river. Iowa's witnesses were more casual witnesses and not as familiar with the river and the river work as were those of Nebraska.

By 1939 all structures were completed and the river has remained in the designed channel continuously to the present day. Following the completion of the work a channel flowed around the east side of Schemmel Island along the former left bank and this is the last place that water continued to flow. I find that, had the boundary not already been located in the Iowa Chute as the result of a prior avulsion, and had the river been the boundary at the time the Corps of Engineers commenced their work, this construction activity of the Corps and the dredging of the canal constituted an avulsion which would have left the boundary between Iowa and Nebraska in this abandoned channel to the east of Schemmel Island.

It should be noted that there is some Schemmel land to the east of this abandoned channel which is owned by the Schemmels as the result of their Nebraska titles and

the same indicia of ownership through which they claim the island, and the State of Iowa does not now claim and has never claimed this land. The Schemmels are in peaceful possession of the land to the east of Schemmel Island. Iowa has never claimed abandoned bed in the Iowa chute or between Schemmel Island and the Iowa Chute.

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Schemmel Island to the west side into the designed channel, thereby creating an avulsion. If it should be determined that the Iowa Chute was not the boundary between Iowa and Nebraska, then the Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 would have remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The abandoned channel on the east side of Schemmel Island carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Schemmel Island had no basis in fact along the eastern side of Schemmel Island. It followed no geographical feature marking the left bank ordinary high water mark as alleged by the State of Iowa. The traverse goes through an alfalfa field, across flat open

ground, crossing a high bank at right angles, and across land with no depressions or banks. Just as in the *Babbitt* case, the eastern line is apparently an arbitrary determination by Iowa's surveyor without justification in fact. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

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THE OTHER AREAS SOUTH OF OMAHA

The evidence has established that the Missouri River was located in the designed channel south of Omaha in 1943 and the Missouri River has remained in the designed channel ever since that time. All of the areas listed in Part 1 of the Missouri River Planning Report south of Omaha were in existence at the time of the Compact and no evidence has been introduced establishing that Iowa was claiming any of these areas at the time of the Compact and up until the Planning Report of 1961.

Most of these areas had been cleared by 1961 and were in the possession of private individuals. These are large and valuable areas.

The evidence has established that one of these areas is the combination of two separate islands which were bisected by canals dug by the Corps of Engineers in 1937 and 1938 and the two islands grew together until they now appear as one contiguous area. Iowa is only claiming the portion of those two islands which were placed in Iowa by the Compact. Iowa has made no claim to the portions

of the two islands which remained in Nebraska following the Compact.

The evidence has further established two early avulsions prior to 1900 south of Omaha where Iowa has never made any claim to the abandoned channels of the Missouri River and where Iowa has purchased land from individual claimants in such areas. The State of Iowa purchased part of Lake Manawa from the Nebraska owner by deed filed January 23, 1932 which was prior to the Compact. The other purchase by the State of Iowa was of land in the abandoned river bed around Nebraska City Island.

Following 1943 Iowa knew where the state line was located and yet Iowa failed to make any claim to these areas south of Omaha until the Missouri River Planning Report of 1961. She waited until many of these areas were made rich and valuable farm lands before making any claim. It is neither fair nor equitable to allow Iowa to make any claim to any of these areas south of Omaha, whether listed in the Missouri River Planning Report or not, under the circumstances of this case.

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THE AREAS NORTH OF OMAHA AND MOVEMENTS OF THE RIVER FOLLOWING THE COMPACT

Considerable evidence has been offered concerning other areas along the Missouri River. Generally, the areas which Iowa claims north of Omaha, Nebraska are claimed as a result of natural movements of the Missouri River in escaping the designed channel following 1943 and river

work by the Corps of Engineers in either moving the designed channel or placing the river back into the designed channel. Since 1943 the Corps of Engineers has redesigned much of the channel north of Omaha and from maps offered by the Plaintiff, it appears that both banks of the Missouri River of 1965 were wholly out of the 1943 designed channel and within the State of Nebraska for approximately 21 miles and both banks were completely out of the 1943 designed channel and in the State of Iowa for approximately 14 miles. In addition, there are places north of Omaha where just a portion of the Missouri River, but not both banks, is located outside of the confines of the 1943 designed channel.

The evidence shows the situation north of Omaha resulting from prior movements of the Missouri River to be even more indefinite and confusing than south of Omaha. There are many abandoned channels and ox-bow lakes and other physical features indicating locations of the river in the past and the maps in evidence and comparisons of various channels show many movements of the river. Iowa was making no claim to these abandoned channels at and prior to the adoption of the Compact. As late as 1956, Iowa disclaimed any interest in what was abandoned river bed in a quiet title action brought by individual landowners in an Iowa court. Even at the present date, Iowa has been selective as to which abandoned channels or areas she is claiming.

Iowa contends that upon the adoption of the Iowa-Nebraska Boundary Compact, Iowa's common law concerning title of the state to beds and abandoned beds of the Missouri River immediately came into operation to

establish Iowa title to the bed of the Missouri River to the east of the Compact line. Iowa takes this position regardless of whether that bed had been in Iowa or Nebraska prior to the adoption of the Compact.

The evidence has established two situations, Winnebago and California Bends, where, because of previous natural avulsions or the dredging of canals by the U. S. Army Corps of Engineers prior to 1943, the entire bed of the Missouri River was moved into the State of Nebraska by avulsions. Nebraska contends that this entire bed and both banks of the Missouri River were in Nebraska immediately prior to adoption of the Compact and, when Iowa agreed to recognize Nebraska titles in the Compact, she was bound to recognize private ownership of the bed and both banks of the Missouri River and Iowa did not acquire title by the moving of the boundary to the Compact line in the designed channel. In these two instances, the river following the Compact moved out of the 1943 designed channel and into Iowa but did not reach the pre-1943 location or abandoned channel, and after this movement the Corps of Engineers again dredged canals in the location of the 1943 designed channel and placed the river back into the 1943 designed channel, again by avulsive action. Iowa is claiming, by virtue of its sovereign right, all of the area to the east of the 1943 Compact line which was covered by waters of the Missouri River following the Compact including those areas inundated as the river moved to the east. However, in both of these areas Iowa has not and is not claiming the abandoned beds of the Missouri River as a result of the avulsions prior to 1943. In Winnebago Bend, in 1937, Iowa was aware of abandoned

channel because the State of Iowa appeared and intervened in the case of *United States of America, Trustee and Guardian for the Winnebago Tribe of Indians, Plaintiff v. Wilbur Flower, et. al.,* in the United States District Court, District of Nebraska, Omaha Division. At that time Iowa only intervened ". . . in order to protect its rights as a sovereign in and over a territory belonging to it, and to save and protect its rights to assess and collect taxes on said lands . . ." Iowa then withdrew, but the case established an avulsion which necessarily placed a portion of the Missouri River entirely in the State of Nebraska, leaving abandoned channel on the left bank side of the Missouri River. Iowa made no claim to that abandoned channel prior to the Compact and when some of that abandoned channel became the subject of a quiet title action in Iowa in 1956 in the case of *Kirk v. Wilcox,* in the District Court of Iowa, the State of Iowa admitted that the individuals were the owners of the real estate as accretion land.

In California Bend, an action to quiet title to land in the abandoned channel was filed in 1959 and the State of Iowa failed to assert any claim by the state as sovereign to this area. An official of the Iowa Conservation Commission testified that Iowa might have a claim to other abandoned channels in the California Bend area, but so far they have not made any such claim.

Nebraska contends that the river was entirely in Nebraska at the time of the Compact in these places and the title to the bed was in the Nebraska riparian owners on both sides. This was a vested riparian right which the Compact could not take away from the landowners merely by the transfer of jurisdiction. Nebraska contends that

following the Compact the riparian owners continued to own the bed of the Missouri River subject only to the public easement for navigation and use under Nebraska law. Iowa had no claim to such bed and could not assert any claim to that bed or to future beds of the Missouri River in that area since they all belong to the riparian owners. Had it not been for the Compact, the entire bed of the Missouri River would have been entirely in Nebraska at both these places. Iowa cannot by the Compact and the mere changing of the jurisdictional line obtain a title from the Nebraska property owners.

In both of these areas, the pre-1943 boundary was obviously and knowingly considerably to the east of the 1943 Compact line and the Missouri flowed entirely in Nebraska. However, Iowa disregarded completely the pre-1943 line and the Nebraska titles and riparian rights in order to make a claim under her common law. Iowa's claim is dependent upon the fact the land is "in Iowa", but it overlooks the fact that the only reason the land is in Iowa is because the Compact placed it there. Had there been no Compact, Iowa could have made no claim because the land would have been in Nebraska.

The Compact was intended to protect property owners from such an attack yet Iowa boldly asserts her claim of title in situations where she knew that at the time of the Compact the land was entirely in Nebraska. Such an unfair situation cannot continue.

In another situation considered in the evidence, the parties are in substantial agreement as to the facts. In the Tyson Bend area north of Omaha, prior to 1946 the main and only channel of the river was the designed chan-

nel which was west of the area in dispute. The Iowa-Nebraska Boundary was the center of said channel by reason of the 1943 Compact. In 1946, 1947 and 1948 the main channel left its designed channel and gradually moved southeasterly, washing away all of the land then existing in the disputed area. In 1947 or 1948, two small sandbars appeared in the disputed area behind this southeasterly movement of the main channel, with the main channel flowing to the east of them with water still flowing to the west of them in the designed channel. Vegetation appeared on the sandbars in 1948 indicating that they were above ordinary high water mark and had attained the status of islands. Later in 1948, the Corps of Engineers repaired some of their dikes in the area so as to again place the main channel in its designed channel to the west of the islands. The islands were not destroyed by this movement.

In the spring of 1949 the main channel again escaped from the designed channel and moved to the channel east of the islands. This movement of the main channel in the spring of 1949 was also accomplished without destroying the islands.

The main channel continued to flow through the channel east of the islands until about 1959 when the Corps of Engineers repaired their dikes so as to again place it in the designed channel. The 1959 movement was also accomplished without destroying the islands.

In this situation, Iowa has taken the position that Iowa law concerning state ownership of the bed of the Missouri River applies to all of that area which is east of the 1943 Compact line. Iowa further has taken the position that the Nebraska riparian owner in this type of situation can-

not accrete across the state line and that his title terminates at the state line. Iowa contends that as a matter of law there cannot be accretion across a fixed State boundary line from Nebraska into Iowa.

Nebraska contends that this is a situation where had it not been for the Boundary Compact establishing a fixed line between Nebraska and Iowa the result would necessarily be that when the river moved out of the channel towards the south and east or into Iowa, the boundary would have moved with the river and the islands or riverbed forming behind this movement would have been on the Nebraska side of the main channel of the river and part of the Nebraska riparian owners' lands. Then when the river was placed back to the northwest in the designed channel without washing away those lands, there would have been an avulsion leaving the islands or land area in Nebraska although on the left bank of the river. These islands would have remained the property of the Nebraska riparian owner.

The State of Iowa is using the fixed Compact line as the commencement of its ownership, ignoring the fact that the Nebraska riparian owner owns the bed to the middle of the main channel and owns any islands or bar areas in that bed.

Iowa cannot by the subterfuge of contending that because the land is in Iowa, Iowa common law applies, deprive the riparian owner of his property rights whenever the river moves to the east of the Compact line. To so hold would result in the deprivation of vested property rights of the Nebraska owners. It does not follow that because both banks of the Missouri River are now in Iowa, that

Iowa owns the entire bed. The Compact was not intended to deprive property owners of such rights and could not do so without violating their rights without due process of law.

In another instance, in Middle Decatur Bend or the Riley J. Williams case, following the Compact, the river moved out of the designed channel to the east and into Iowa. The United States Army Corps of Engineers condemned land for a perpetual easement in which to maintain channel improvement works and the State of Iowa made claim to the proceeds of this condemnation of the land from the state line to the right bank of the Missouri River which was then located in Iowa. Consequently, Iowa is claiming from the state line, which was the 1943 Boundary, to the right bank of the Missouri River. Iowa claims that the Nebraska riparian owner cannot accrete across the state line into Iowa. In this situation, Iowa is using the Compact line to terminate the riparian right of the Nebraska owner and to commence Iowa's claim of title to land described by Iowa counsel as accretion. This accretion had to be to the Nebraska riparian owner's land as it is on the right bank of the Missouri River. Iowa is again using the Compact to deprive the Nebraska riparian owner of a vested property right and to take his property without compensation. If the Compact had never been enacted, Iowa would obviously have had no claim because this land would have been in Nebraska.

In this situation, the compensation which Iowa is claiming from the Corps of Engineers and against the Nebraska riparian owner amounts to only $2,070 and Iowa counsel informed the district court in that condemnation

case which is presently pending, that they had sufficient evidence to present to take between two and three weeks for trial of the case. The attorney for the landowner testified that the landowner could not afford to try the case because under any circumstances, if the landowner won he would still lose from a monetary standpoint because of attorneys' fees, surveyors' fees, and expense which would be more than the amount of the award. Iowa also took the position that, although there was only a small amount involved, the decision in the Riley Williams case would probably, as a practical matter, determine ownership of considerably more land which the State of Iowa claims to own both above and below this particular tract. This is a clear illustration of how Iowa can afford to use its economic resources against small landowners to obtain a legal precedent to enable her to further violate the Compact.

This evidence illustrates the unfairness precipitated by a mere decision by the State of Iowa to attack a landowner's title in the Iowa courts. The assumption that the defense of such an action will generally assure ample vindication of the landowner's rights guaranteed by the Compact is inadequate in these cases.

All of the evidence has shown that it is practically impossible to locate the pre-1943 boundary between Nebraska and Iowa except at Carter Lake, Iowa where the line was definitely determined by decree of the United States Supreme Court. This is the only line that was specifically identified in the Compact because it was the one area where a binding determination had been made upon both states. The State of Iowa recognized prior to the Compact

that the Missouri River had by avulsion abandoned its channel and formed a new channel at numerous places throughout its course, which is a common characteristic of the river. The court is satisfied that, except at Carter Lake, neither state knew where the boundary was at the time of the Compact and both states intended to enter into an agreement which recognized that situation and would avoid any requirement of finding that pre-1943 boundary. Otherwise, they could have entered into an original action in the Supreme Court of the United States to make such a finding but this would have been extremely time consuming and expensive. The Compact was adopted with a clear intent to recognize Nebraska owners' riparian titles and rights.

In those places where the river was in fact entirely in Nebraska prior to the Compact, Iowa had no claim whatsoever to the bed of the Missouri River. It could not acquire such title by the movement of the State line by agreement between the states. Since neither state knew where the river was entirely in Nebraska, but accepted the fact that this was so in numerous places, and since the burden and expense of having to prove such condition should not be placed upon the landowner because the states and not the landowners entered into the Compact of 1943, the only fair and equitable manner in which the Nebraska riparian owner can be protected is to hold that Iowa cannot make any claim to the beds or abandoned beds of the Missouri River or the present bed of the Missouri River under its common law. This also follows because the former state boundary and the Compact boundary were different for almost the entire length along the border between Iowa and Nebraska.

Under Nebraska law, when a riparian owner owns property along a navigable stream his title extends to the thread or middle of the main channel of that stream and this principle is applicable under the common law to Nebraska riparian owners along the Missouri River. Iowa contends that by changing the boundary between the states to a fixed line, that this changed private property boundaries and limited the Nebraska riparian owner's title to the state line. Nebraska contends that private property boundaries could not have been changed from a movable boundary to the fixed state line by the Compact without compensation to the landowners. Any such change would deprive them of their property without due process of law. Nebraska contends that the boundary of the private property owners continues to extend to the thread of the main channel of the Missouri River regardless of whether it coincided with the state boundary and the proprietary boundary would continue to move as the thread moved. The court finds that the private property boundaries were not changed by the Compact and the Nebraska riparian owners rights are not limited or cut off by the Compact line. The Nebraska riparian owner's property boundary has continued to remain a movable boundary in spite of the fact that the states have changed their boundary from the movable boundary to a fixed line. A Nebraska riparian owner can accrete into Iowa and he retains his ownership of the river bed and any accretions to that bed even though such bed may now be in Iowa.

In any situation where the river had moved previously by avulsion from Iowa into Nebraska or in any situation following the Compact where the river moved into Iowa,

the most area which Iowa would be entitled to claim would be only that portion of the abandoned channel which is to the east or left bank side of the former thalweg and Iowa under no circumstances would be entitled to claim the entire abandoned bed. The evidence shows that there are situations where Iowa has claimed all of the abandoned bed east of the Compact line and there is no justification for this type of claim.

Following the Compact, when the river moves into Nebraska, Iowa can make no sovereign claim to any area on the Nebraska side of the Compact line. See *New Mexico v. Texas*, 275 U. S. 279.

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GENERAL

The issues which Iowa is attempting to interject today concerning how land formed at various places were settled by the Compact entered into over 27 years ago. Iowa should not now be able to raise those questions of where the pre-1943 boundary was as, by entering into the Compact, she elected to settle any rights dependent upon such question by the recognition of private titles and the adoption of a new boundary which both states would thereafter recognize as the jurisdictional line.

Iowa recognized the fact that they could not find the pre-1943 state boundary when she entered into the Compact and she also recognized that neither state ever intended to find it. Iowa cannot make a claim to any area along the Missouri River without having previously established where the pre-1943 boundary was, but this is a pre-

requisite which is inconsistent with the intent of the States in entering into the Compact. Iowa contracted away any claims which hinge upon the location of the pre-Compact boundary.

The Compact negated any presumption that the state line was in the 1943 Missouri River channel or that the river had moved gradually by normal processes of accretion and reliction into that position. The Compact recognized the fact that the boundary was not located in the Missouri River at numerous places and that neither state knew exactly where the boundary was. Had the presumption been true and the Missouri River moved gradually into the 1943 location, there would have been no need for Sections 3 and 4 of the Compact and no need for the Compact itself.

Iowa has violated the Compact in numerous situations by claiming land where Nebraska has proved that such land was in fact ceded or transferred by Nebraska to Iowa. Iowa should not be allowed to continue in such violation and Iowa also should not be allowed to take advantage of the passage of time, death of witnesses, and destruction of evidence in order to claim other areas where it may be in fact impossible to prove the pre-1943 boundary. Iowa under the Compact should not at this time be able to question whether land formed in Nebraska or Iowa. Any requirement imposed by the State of Iowa which would make it necessary for a landowner to prove the pre-1943 boundary in order to protect his title deprives the landowner of the benefits of Sections 3 and 4 of the Compact and constitutes a violation of the Compact by the State of Iowa.

The evidence shows that Iowa is claiming all river bed area to the east of the Compact line resulting from natural movements of the river to the east following 1943 or by construction works along the river by the Corps of Engineers. Iowa claims both the actual bed of the river and any abandoned river beds. In order to do this, Iowa has had to rely upon the Iowa common law and the fact that the land was "in Iowa." This disregards the question of where the land would have been if the states had not entered into the Compact.

The State of Nebraska contends that the Compact is a contract and as such is binding upon the Iowa legislative, executive and judicial branches. Nebraska contends that one branch of Iowa government such as the Attorney General's office and the Iowa Conservation Commission cannot institute actions in Iowa's courts to determine whether the Compact applied to any particular area and whether the protections of Sections 3 and 4 were applicable to such area. Nebraska argues that Iowa cannot be judge in its own case to determine what the Compact means.

The Compact bound the State of Iowa to recognize the titles which have been good in Nebraska and Iowa could not attack these titles under the terms of the Compact. Iowa could not attack these titles under the terms of the Compact when it was adopted and certainly she cannot do so after failing to act so long a time since the Compact.

Iowa, in its preparation of Part 1 of the Missouri River Planning Report, January, 1961, and claiming lands described therein under its common law, utilized Section 1 of the Compact to determine that the land areas were in

Iowa and violated the Iowa-Nebraska Compact by disregarding the provisions of Sections 3 and 4. Iowa also violated the Iowa-Nebraska Boundary Compact in filing the actions of *State of Iowa v. Babbitt* and *State of Iowa v. Schemmel.* The exercises of jurisdiction prior to the Compact by Nebraska over Nottleman Island and the Schemmel land, together with Iowa's recognition that the land was ceded by exercising governmental authority and control over the land in a sovereign capacity following the Compact and by Iowa's failure to exercise proprietary incidents of ownership, are conclusive that the land was within the category of lands ceded by Nebraska to Iowa by the Compact. Iowa has no right to attack these titles and is in violation of the Compact by doing so. Iowa is ordered to dismiss both of these actions with prejudice and to make no further claim by virtue of Iowa's common law to those areas. Iowa has no claim to any areas south of Omaha which were in existence at the time of the Compact but which Iowa failed to claim until the Planning Report.

All of the areas downstream from Omaha, Nebraska listed in Part 1 of the Missouri River Planning Report of 1961, and any areas in existence in 1943 that Iowa subsequently may claim, come within the category of lands ceded by Nebraska to Iowa as Iowa had expressed or made no claim to such lands for at least 17 years following the Iowa-Nebraska Compact although the lands were in existence at the time the Compact was entered into. Iowa now has no right to attack any of these titles.

Although the Compact made a fixed state line for the boundary between Iowa and Nebraska, it did not change private ownership boundaries. The Nebraska riparian

owner, owning title to the bed of the Missouri River, was not deprived of this title by the Compact and when the river moves gradually and imperceptibly or by accretion, the boundary of the Nebraska riparian owner still moves with the thalweg or main navigable channel, regardless of which state the movement is in. The Nebraska riparian owner's title is not cut off or limited by the fixed state line between Iowa and Nebraska but his title can extend into Iowa. Iowa cannot, under its common law, claim title to the bed or abandoned bed or islands arising in the bed of the Missouri River adjacent to or between the thalweg and the Nebraska title or claim, whether such claim extends from the right or left bank.

The evidence has established at least 14 canals dredged or dug by the Corps of Engineers in their river work along the Missouri River and there is in evidence a recognition of numerous cut-offs by natural movements of the Missouri River prior to the Compact. However, the evidence has also established the extremely difficult problem of locating the canals as the Corps records may or may not have been kept showing the location of the canals and many of these maps have been destroyed. The historical documents in evidence recognizing numerous natural cut-offs or avulsions along the Missouri River also do not always locate where these avulsions occurred. Nebraska contends that since these facts were known to the states when the Compact was negotiated and since the states acceped the numerous cut-offs or avulsions and contracted in such manner that neither state desired to have such avulsions located, no party should now be required to establish where these avulsions in fact occurred. The evidence has conclusively established that neither state knew where the

boundary was and neither state intended to locate the pre-Compact boundary.

Iowa has argued that the digging of canals may have not constituted an avulsion because there was not a "substantial area" of land cut off by the canal or because canals may have been dug completely in Iowa. However, under Iowa's argument, a factual determination would now be necessary as to where the location of the pre-1943 boundary was located or the facts concerning the amount of land severed and the states contracted away this right by entering into the Compact.

Any position by the State of Iowa which requires a finding of fact as to the pre-1943 boundary or a finding of fact concerning whether or not there had been an avulsion in any particular area places the landowner in an almost impossible situation because of the difficulties of proof in large part created by Iowa's delay and the passage of time.

Either the Compact must be read in such manner as to give Iowa the means to claim thousands and thousands of acres of land along the Missouri River which Iowa previously had made no claim to or it precludes Iowa from making any such claims. Because the Compact was intended to settle all problems along the Nebraska-Iowa border and to protect the private titles of individuals, it must be read in such manner as to preclude Iowa from making such claims or attacking such titles.

The evidence has established several avulsions either by natural movements of the Missouri River or by the digging of canals by the Corps of Engineers, leaving the river

entirely in Nebraska prior to 1943. In those situations the entire bed of the river being in Nebraska at the time of the Compact, the east half of the bed of the river as well as land on the left bank was "ceded" to Iowa by the Compact. Iowa has no claim whatsoever to the title to the bed of the river in those places and Iowa has no claim to additional bed or new beds resulting from the movements of the Missouri River following the Compact in those places. Iowa must recognize the Nebraska landowner's common law title to the bed of the stream in those places.

The Compact must be read in such a manner that the landowners along the Missouri River are protected in their titles and claims. By entering into the Compact, Iowa foreclosed herself from raising the claim that the land was never in Nebraska or was not in Nebraska at the time the alleged title or Nebraska claim came into existence.

If the Court should determine that Iowa can claim lands along the Missouri River, then before Iowa can make any claim to lands along the Missouri River based upon any common law claim, the burden is upon Iowa to conclusively establish and prove the following:

(1) That there have been no avulsions of the Missouri River or canals dug in the vicinity. This is an affirmative burden which Iowa must bear, and Iowa cannot rely upon any presumption that prior movements of the Missouri River were gradual.

(2) That there were no Nebraska titles or Nebraska claims of title to the land as of 1943 when the Compact was entered into. If a landowner's claim allegedly flows from a Nebraska title or a possessory right commencing in

Nebraska prior to the date of the Compact, Iowa must accept that title. Iowa must recognize that there may not be any record of that title but that the claim could flow from an adverse possession commenced by a Nebraskan prior to 1943 under the Nebraska common law test and without any requirement of "color of title" under Iowa law.

(3) That the records of the Nebraska county offices show that the land was not carried upon the tax rolls in the Nebraska county prior to the Compact, no court actions affecting or purporting to affect the land were of record in Nebraska, that there were no Nebraska deeds or conveyances of the land, and that there is no evidence indicating exercise of jurisdiction over the land by the Nebraska county or the State of Nebraska prior to the Compact.

(4) That Iowa had not taxed such land or the Iowa counties have not taxed such land following the Compact and that the State of Iowa and its officials have not recognized private ownership or titles to such land. If there were any law suits in the State of Iowa in which the Iowa courts have recognized individual titles, Iowa is precluded from attacking the titles to those lands.

(5) As to lands existent in 1943, that the legal description of the land appeared on the Iowa official records available to the public at the time of the Compact, such as the Iowa General Land Office, as state-owned land, and that the Iowa Conservation Commission had marked the boundaries of the land to identify Iowa's claim to the public. Iowa cannot rely upon the nebulous claim that she always "owned" the land because it was an island or abandoned bed of the Missouri River or that she was in posses-

sion of it by the fact that the land was in the public domain, without objective evidence that the specific area had been identified and public claim made by the state so that it was public knowledge in the area that the State was claiming to own the land to the exclusion of all other claimants and anyone searching the public records would discover the land claimed by Iowa identified by its legal description.

In any action by the State of Iowa claiming the common law right to beds or abandoned beds of the Missouri River, Iowa cannot as a prerequisite to its claim, require any other individual to establish the location of the Iowa-Nebraska Boundary prior to the adoption of the Compact in 1943. There is no presumption the pre-1943 boundary location was within the 1943 bed of the Missouri River or that prior movements of the Missouri River had been gradual and imperceptible.

The evidence has proven that the mere attack of a landowner's title by Iowa clouds this title and prevents the landowner from utilizing that land as he would if he had a good title. The evidence has further proven that Iowa, in using state funds to attack the titles, can disregard the value of the land involved and spend more money on attorney's fees and investigation and expert witnesses than the value of the land, in order to obtain a legal precedent to assist Iowa in claiming title to other lands. The costs to the landowner in defending such an action may be more than the value of the land itself so Iowa can use the threat of a quiet title action as a lever to either induce a settlement by the landowner at a much lower value than the land is worth or force an abandonment of the lands by

the landowner because it is not economically feasible for him to defend the action. In order to adequately protect the landowner claiming title to land to which there was a Nebraska title which Iowa agreed to recognize in the Compact, Iowa must indemnify the landowner for all of his attorney's fees, costs of the action, and damages as a result of Iowa's wrongful claim, if Iowa fails to meet these burdens.

Respectfully submitted,

STATE OF NEBRASKA, *Plaintiff*,

By:

CLARENCE A. H. MEYER

Attorney General of Nebraska

State Capitol Building
Lincoln, Nebraska 68509

HOWARD H. MOLDENHAUER

Special Assistant Attorney General of Nebraska

1000 Woodmen Tower
Omaha, Nebraska 68102

JOSEPH R. MOORE

Special Assistant Attorney General of Nebraska

1028 City National Bank Bldg.
Omaha, Nebraska 68102

Attorneys for Plaintiff