
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

TRANSCRIPT OF ORAL ARGUMENTS MADE
BEFORE HON. JOSEPH P. WILLSON,
SPECIAL MASTER

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ORAL ARGUMENT BY MR. HOWARD
H. MOLDENHAUER FOR THE PLAINTIFF,
STATE OF NEBRASKA

9:30 O'Clock A.M.,
September 29, 1970

THE COURT: Good morning everyone. I said hello to the counsel in my chambers a few minutes ago, and this is the time fixed for the oral arguments of counsel. I suggest that Nebraska proceed, take the time that they think necessary and proper, and afterwards we will hear from Iowa.

MR. MOLDENHAUER: May it please the Court, we plan to present this argument in the following order. We plan to start out with the history leading up to the Compact and review it fairly briefly in light of the extensive briefing that has been done.

We will begin with the Compact, then we plan to explain to the Court what we think it did, how we think it solved our problems, and discuss what our contentions are as to the Compact right at that time.

Then we plan to go into the Babbitt and Nottleman Island area more specifically and some of the documents and review to the Court those documents that, just exactly what the history was in that area, both as to how it formed and how the states treated the property.

And then we plan to go down to the Schemmel area and cover it. And then hit the other areas along the river, such as Winnebago Bend, the Flowers Island case and California Bend and Auldon Bar to show what Iowa's conduct has been pursuant to the Missouri River Planning Report in this last

decade and illustrate what we contend are the violations of the Compact by the State of Iowa.

Then we plan to take up in a little more detail at the very end the Court's questions which they raised in their Order, but we realize that some of those questions will probably come up during the argument as we get to them. But I think that once we discuss the facts it's a little easier to talk about the application of those facts, but whenever the Court has a question in connection with the question submitted it will be perfectly --

THE COURT: I think we'll get along better if I try to remain silent.

MR. MOLDENHAUER: Since there is such a mass of evidence concerning background of the Compact we just wanted to pick out a few selected illustrations which indicate, I take it, it's all right to walk around.

THE COURT: Oh, sure, sure.

MR. MOLDENHAUER: (continuing) which indicate that the situation along the Missouri River ever since the time that the States were admitted into the Union was tremendously uncertain, and that the movements of the river became a thing of common knowledge to both states and the people of all states.

In the first case which Nebraska and Iowa had filed back in 1890, between Nebraska and Iowa with regard to Carter Lake, there were allegations about the channels of the river, and Iowa itself alleged how the river frequently cuts through the necks of the bends forsaking its former channel and taking a new channel, and their own allegations indicated that this is typical of the entire river.

So way back in 1890 we have the first real recognition by both states formally and officially, at least, that there was this great uncertainty which existed.

And starting in 1901 in Nebraska, the Nebraska Legislature started adopting resolutions creating boundary commissions to settle the boundary, and in and about 1902 and thereafter, in Iowa there were many resolutions offered into the Legislature of Iowa and there were many resolutions adopted creating Boundary Commissions. During all this period we had discussions between the states.

Now there may be some contention that Carter Lake was the primary problem between the states at this time, but I'd like to point out that in 1913, for instance, the Iowa General Assembly adopted, or, a bill was introduced which referred to the fact that the Missouri River flowed through, bordered counties and flowed through some others, and it mentioned the great flood of 1881 which Carter Lake was cut off. But it also mentioned land in Pottawattamie County which was cut off and

bordering Douglas and Sarpy Counties. Now Douglas County and Pottawattamie County and Carter Lake, now Sarpy County is just south of here and in all probability this was Lake Manawa.

THE COURT: What you are reading, is there an exhibit number?

MR. MOLDENHAUER: This is the Exhibit P-1793 which is the 1913 from the Journal of the Senate.

THE COURT: I think as we go along if you'll mention those numbers, that that will help.

MR. MOLDENHAUER: Thank you. I'm just selecting these.

THE COURT: I know, that's all right.

MR. MOLDENHAUER: And in 1923 there was another bill which we have in Exhibit P-1796, in which the Boundary Commission or the bill was to enact and establish a Boundary Commission, to report drafts and compacts and agreements.

And I want to point out that there was a specific sentence in that bill that in presenting such compacts the Boundary Commission of the State of Iowa shall preserve the boundary line as it now exists between the states of Iowa and Nebraska,

between Council Bluffs and Omaha at Carter Lake. So here in '23, what we're trying to find out is the fact that they weren't just talking about Carter Lake and here they are talking about the entire remainder of the river in making the middle of the channel the boundary, but excepting Carter Lake because they know where the boundary is there, as it was determined by the Court in 1890.

Then in 1937 a bill was presented, Exhibit P-1805, to the Senate, it was not adopted but the bill in its "Whereas" clauses recognizes that it would be expensive and practically impossible in view of the conditions as they now exist to locate the original boundary between the state of Iowa and the state of Nebraska, recognizes that said lands remained unplatted and are not subject to taxation in either state, that there was a Boundary Commission in '35, and that the river was apparently and in all probability would be fixed and stabilized.

So again, it was proposed to put it in the middle of the river. But in that offered bill there was again recognition of all this uncertainty that existed along the river.

Back in 1923 in the Iowa Journal of History and Politics in Exhibit P-2696, which is published by the Iowa Historical Society, the statement was made the Missouri River has always been notorious for its meandering. There are tracts of land which are first on one side of the river and then on the other. The people who live there are sometimes

uncertain whether they are inhabitants of Iowa or Nebraska, and so are the tax assessors.

Another, in the Iowa Journal of History and Politics, Exhibit P-2691, the statement was made in 1927 that in the past thirty-five years since Iowa-Nebraska the river has changed its course so often it's proved impossible to apply the Court's decision in all cases, since it's difficult to determine whether the channel of the river has been changed by the law of accretion or the law of avulsion.

And then we have many newspaper articles over the years. P-2500 is an article in the Des Moines Register in 1925 entitled "War on Nebraska" which recognizes the fact that there are areas up and down the river which are left on each side, and it mentions a two thousand acre tract of Iowa which was in a part of Dakota County, Nebraska, it mentioned East Omaha, and it mentions the difficulties that have been caused by this change of channel between two states.

The same thing, an article in the March 4, 1935 Marshalltown paper, and these are Iowa newspapers, in which they discuss land which has been cut off, they mention Flowers Island and the problems there, areas up and down the river which have been cut off by the action of the river, and some of the problems which have followed.

In 1940 there was an article in the Omaha World-Herald about action on the boundary which

refers to negotiations between the two states for a boundary Compact, and it says in an editorial "all up and down the river there are tracts of land on one side which belong to the other, tax problems, school problems and law enforcement problems result, and all could be solved by the simple expedient of fixing the boundary where it ought to be, in the center of the stabilized channel," and that's Exhibit P-1535.

Another article on November 20, 1940, which is three years prior to the Compact, Exhibit P-1534 which says "But between Nebraska and Iowa the boundary line is vague and irrational. Originally that line followed the Missouri River. The river changed its course but the line stayed where it used to be. Now all up and down the river chunks of Iowa lie westward of it and pieces of Nebraska to the east."

So in this situation that we come up to 1943 at the time that the Iowa-Nebraska Boundary Compact had been adopted. Now we also have in evidence many, many extracts from the reports of the Corps of Engineers, which are quite voluminous but mention is made all through these reports of natural cutoff of the Missouri River. They don't always identify where they are, but back in the 1880's and '90's there is one mentioned between Omaha and Plattsmouth, there were, I think it was, three cutoffs in the last two or three years, without locating them.

So the point of all this is that it was generally known that the river had moved many times by avulsion and it cut across necks and found new channels. This can also be found in some of our reported cases. In our original case about 1907 of Kinkead versus Turgeon, which really established our water law, our Court said that this is general knowledge about how the Missouri River has moved around, and they cited language very similar to what the State of Iowa alleged in the case of Nebraska versus Iowa.

Then on top of this situation we had the Corps of Engineers in about 1934 coming in and designing a new channel which was superimposed upon this great history and movement of the river. And when the Corps came in they had dredged by 1943 approximately fifteen canals in which they cut areas off, they moved the river by dikes and revetments, they moved it in the practical and in the most economic and fastest manner they could to put it where they wanted it. In the testimony of both General Loper and Mr. Huber was, they put it there as fast and as economically as they could. They went around the area without washing it away, that's what they tried to do, they didn't set out to wash everything away as they moved the river. If they could put it into a chute which was over on the other side they channeled over that chute, if it met their plan.

But what the Corps did was superimpose this

design, starting out in bluffs and hard points and put the river in a series of curves so that they could control it and scour out a channel, a navigable channel, on the outside, and in doing this they decided where the river was going to go and then they set out and placed it there; so we had that situation which existed.

Now it further illustrates just some of the problems. We have Exhibits P-2173, in which Mr. Brown superimposed the 1943 designed channel on the original Nebraska government survey of about 1857, in those years, and this does not show where the river moved between those times as such, because the river could have moved all over the place. It just showed where the Nebraska right bank was at the time of the original survey and where the '43 channel is.

But the significant thing here is on this first sheet, for instance, the designed channel is about two miles over to the east of where it is in some of these places, and this runs for at least two miles north and south. Now during the years the river has moved across in here and in order to determine or trace the title to that property it could be described as accretion to the Nebraska Section 1, which is right here, all the way over, and if it got over here and moved back it could be accretion to Section 4, if it moved back here it could be called accretion to Section 5 or accretion to Section 6, or accretion to any of those half

sections or quarter-sections in between. So the descriptions may change.

Then if the river moved here, the officials might re-survey it, put it back on the tax records and give it a tax lot designation, which is entirely different than the original government section number. Or they might restore, as they call it, a government section, and they might extend a different section over here, if this section is twelve, well, this is another, they might go over to thirteen, so there is a confusing situation which exists in all these areas along the river.

And in here we show a movement of at least two miles east and west and two miles north and south, and who knows how that land is described without a tremendous search of the tax records. This same situation exists down here, there are some areas where the river has moved completely and just left a lot of land on one state or the other, perhaps it washed it away, perhaps it cut around it, but the point we'd like to make here is at the time of the Compact there was always uncertainty which was in existence as to how these titles were to be described and as to what the situation was with regard to them.

Again, merely to illustrate the situation that existed and the problems that existed, and so on, what the states had to face when they came to the Compact.

And one other point we have made right here

is that from the navigation charts which are, I think we put one page in evidence, we have a whole book here, P-2685, they also established that once the Corps designed the channel what it did was it followed the usual hydrological principles and followed the outside of the curve until it came down to the bottom of the curve and crossed over to the other side, followed the outside bend in that curve and then crossed over to the other. So they had the river in the design for practically its entire length with the channel on the outside of most of the bends.

Then in 1943 the states entered into the Iowa-Nebraska Boundary Compact, and what we contend they did were two things, three things really. First, they said "We don't know where the river is, we don't have any, we don't know what the boundary is, we don't have any idea where it's been in the past, and this is generally recognized in common knowledge, so let's draw a new line." And what they did was they said the river is stabilized and it's, and it should be in its designed channel, and, of course, here's the, here's where according to the navigation charts roughly the navigable channel would be, or the so-called thalweg, but they said "We're going to put a line right down the middle of it, and we're going to make that our boundary so "we know where it is and we're going to use the alluvial plain maps to do it. "

Now the maps that they selected were really now surveys, they weren't precise, they were just like road maps, and even then some of them were dated back in 1940; and on these maps the Corps had superimposed their designed channel but it wasn't necessarily even where the river was at that time, it shows it going through what was, through bank area or islands or bar areas, even on some of these maps which the Corps used, and it also shows certain cutoff. . . Here's an area where they obviously cut through and there's an area right here, this is Peterson Bend and this is California Bend, where they obviously cut through.

So the maps that they used recognized a super-imposed channel by the Corps which covered both shores, covered bar area, and wasn't necessarily right where the river was before they started the work.

Then too, these maps didn't have any calls, they didn't have anything which would enable a surveyor to lay out a line on the ground, and they had a notation that the area covered was compiled from aerial photographs taken by the U.S. Army Air Corps and field surveys made in 1939, the area landward from the river was controlled by uncontrolled, or, was compiled from uncontrolled mosaics of aerial photographs taken by the U.S. Department of Agriculture in 1936, '37 and '38, and that's Exhibit P-1770.

But the fact here is that the states didn't go

to a lot of effort to try and determine where the line was before and they didn't go to a lot of effort in taking the time, effort or money to survey a line, they said "We're going to do it the easiest way we can, we'll just put it out there in the middle of the river."

Now when they did that if the navigable channel was the boundary, they had to transfer land on both sides of the river and all along the line, because there was no place practically that this line which they established using the AP maps midway between the two banks coincided with what was the previous navigable channel, so they changed everything and all principles when they established that fixed line from what they have done before, and we say they did it in a convenient easy manner.

Now all the testimony is that, and Mr. Huber's testimony was that the Corps used it to find their way to various projects on the river, so these were more like a road map that they showed a few more roads than just a general map. That was the first thing that they did, but they didn't stop there.

Then the question came up, well, what do we do with properties which are going to end up in another state, and this is in the context of where they don't know where everything is, and they recognized that they don't know. So they said "We're going to cede -- Nebraska is going to cede everything on the east side of that line and Iowa cedes everything on the west side of that line to

Nebraska. " But then to protect the private owners, and the private owners are not a party, this is the state's contract, and although their contract is going to be binding on the private owners with regard to this jurisdictional line, we say that they can't take away a private owner's title because they deprive them of their due process of law, and so the states between themselves say "What about so and so's title down along the river?" And the answer is, "Well, we'll recognize those titles." So they put in a clause in Section 3 that titles, mortgages and liens good in Nebraska shall be good in Iowa as to any lands that Nebraska may cede to Iowa and any pending suits or actions concerning the said lands may be prosecuted to final judgment in Nebraska, and such judgments will be accorded full force and effect in Iowa.

Now they didn't ever identify specifically what was ceded, they just accepted the fact that "We're drawing a new line and we don't want to go back and make this determination." They could have done as the states of Missouri and Kansas did in the 1940's whereby they had an original action in the Supreme Court in '42 to '46, in that period, and they determined where the line was, and then they entered into an interstate boundary compact and they actually ceded the land which they determined.

But here they said they know it's a mess, "We

recognize the mess, it's always been, everybody recognizes that it's practically impossible to make these determinations, so we're going to recognize the private titles." And that includes pending lawsuits.

Now certainly if they were going to recognize pending lawsuits concerning titles of land then it would have to be implied that they would recognize lawsuits which had been decided concerning title of lands, and we have a couple of those. We have those in both the Schemmel and Nottleman situations.

Now they went ahead and said "All right, now what are the states doing?" Well, at that time we contend as we go through the evidence it will show that Iowa was not making any proprietary claims to areas along the river. The record shows that the river was in the designed channel south of Omaha in 1943 and prior, and it was, I forget the exact figure, seventy-five percent, or something in the channel north of Omaha. But all the areas south of Omaha were in existence because the river was confined to the designed channel. Iowa had never made any claim whatsoever to any of these, and we contend as we go through the evidence, of course, this will become obvious.

The Iowa Conservation officials themselves testified, Mr. Schwob, who was Director from about '41 to '46, said that they weren't interested in the river at that time, and the head of their

Land Acquisition Section, Mr. Bailey, testified that they weren't interested at that time, and listed the activities to determine what lands they might own didn't commence until About 1958.

So at this time when they entered the Compact there were no claims of title by the State of Iowa. Now there may be a general principle of law, but nothing has been applied to identify these areas, there are statutes in the State of Iowa which provide that the Secretary of State is the State Land Office and shall keep separately indexed all of the lands which Iowa owns, there is no record of any of these areas.

The Conservation Commission had a statute which provided that, although there was a little discretion there, that they should establish the boundary line between their state-owned land and private property; no boundary lines, no fences or no signs, no indication that they have made any claim whatsoever. The literature that we have referred to and some of the newspaper articles talk about tax problems, talks about private title problems, talks about school problems, but there is no indication that there are problems as a result of the State of Iowa coming in and claiming that it owns any of these areas under a sovereign claim.

And this is a part of, a part of their agreement; so they come to the next question "We have taken care of where the line is, we have taken care of the private titles, what do we do about the state's rights?" And so they added Section 4,

in which they said "Taxes for the current year can be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa, and any liens or rights accrued or otherwise 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 that section. "

And then they added another limitation on the states which said "provided that all liens or other rights accrued or accruing as aforesaid shall be claimed or asserted within five years after the act becomes effective or be forever barred. "

So what they did in that section we contend was protect those who had purchased the tax title in the state which was ceded and clarified what the local officials should do in regard to taxation of that land and then put a limitation on it, a limitation on themselves, that these claims have to be made under these rights within the five years or they are barred.

So we contend that there's three provisions; one draws a line, one requires the states to recognize these titles, and the other satisfies the state's claims or the tax claims which might have been asserted through the state officers and tells the treasurers that they are agents in carrying out that provision.

Now we contend that the Compact did all three

of these things and we just can't read the one and draw a new line and say all it did was establish a jurisdiction, because we feel that if there was inquiry to be made as to where the line had been previously that was the time that the states would have had to have made it, and when they determined to settle their boundary problems and avoid the necessity of making this determination, that they settled the boundary and laid all their problems to rest, and they thereby precluded themselves from taking a position with regard to any of these titles or with regard to any of these areas which would require the other state or any private property owner to come back in at some later date and determine where the boundary was in that area in the past.

In other words, we could have settled down and we could have decided where it was and then compacted, but we decided otherwise; and the Supreme Court has several times said that there are two ways for states to settle their problems; one, they have an original action, or, two, they do it by agreement, and when they do it by agreement it supersedes the situation and becomes the controlling law. And we think that the Compact is the law in this case and everything that flows after that has to hinge on the Compact as to what it authorized and what it didn't authorize.

Now following the Compact, and, we therefore, we don't feel that we should have to come in

and prove where the line was before the Compact, and we don't think that we should have to come in and show, had we had a lawsuit back in 1943, what the result would have been because we agreed to avoid that situation. And if that burden is placed upon us the Compact is completely nullified, and it didn't do anything that we intended it to.

Now another aspect of this is that we contend that the State of Iowa was the contracting party in this Compact, it agreed to recognize titles, liens and mortgages on land ceded without ever worrying about what that was applied to, and we don't think that they can come back and attack these titles at this late date, they didn't do it at the time, they didn't make any claim at the time, we don't think that their Attorney General or their Conservation Commission or their Governor or their administrative department can attack the titles and then use the excuse, "Well, our Courts will decide," because the Courts were bound by that Compact and the meaning of that Compact in Iowa just as the legislative and judicial branches were bound. This was very solemnly entered into by the legislatures and approved by Congress and it was and should be binding on these states.

So we don't think there's any answer to say "Well, our Courts will decide it," because the state here is a party, and not private individuals. We recognize that there may be private claims along that river, and that these private individuals after the Compact had a forum in which to litigate

their rights, but in those cases the state isn't taking an advocate's position, they are sitting there as an arbitrator and the determiner of disputes, and the parties in those cases can put in their own evidence and they are on an equal footing, because each party has the statutes of limitations, they have adverse possession, they have laches, they have estoppel, they have all the equitable defenses, and quiet title actions are equitable defenses. And when the State of Iowa comes in and says "We are the sovereign, we are not bound by any of the previous acts of our officials, because if we don't agree with them today they are unauthorized or illegal, we are not bound by taxation of the land even though we are taxing them today when we are quieting the title, we're not bound by anything that was done before the Compact as to recognition of these titles and we are not bound by anything after the Compact, even though perhaps our Conservation Commission has recognized that they didn't have "any claim to the land or though our Attorney General knew about it and didn't assert any claim." And then they come in and say "There are no laches, no estoppel, no equitable doctrines that run against us because we are the sovereign," they have put an impossible burden on that landowner, and in effect they have confiscated his land.

And they don't stop there, because when the land owner says "I have been paying taxes," and

asks them in interrogatories "Who is paying taxes?" and then they say "We don't have to go into that, you're trying to put an unauthorized burden on us," when he is asked "Have you looked at any Nebraska titles before the Compact?" They say "We don't have to look into that." And then when the titles are presented they say they're spurious or fictitious. When they find that there's somebody occupying an area that they think they now claim they say he's a squatter, he's a trespasser, and that's automatic, no hearing or no anything, whenever he comes up with a defense they knock it down with something that's unanswerable, "We are the sovereign, we can do no wrong."

And we can't feel that when we entered into the Compact, we can't believe that we placed our landowners in that situation.

They carry it another step, and we will discuss this later, they say that the presumptions are the river moved gradually. Well, if the presumption is that the channel of the river at any time is the boundary, if that's the presumption then the Compact didn't have to be adopted because the states obviously in light of all this history accepted the fact that there wasn't any presumption that the river was in the channel, they recognized that it had moved so many places, that they didn't know all the places where it had moved, they recognized we've got to do something else and draw a new boundary. They negated any presump-

tion to that effect that they would have as states at the time they entered into the Compact. But what they do is they do as in the Schemmel case, they say "We're going to start with a map which may show this area in the river. We own the bed, it's been in the river since this date that we start, the presumption is that the river was there gradually, and so it was always in Iowa, and we win. Now, landowners, you prove otherwise," and they can do this with two witnesses, as they did in the Schemmel case, one the man who ran the survey and the other, Mr. Huber, who testified in this case.

So then the landowner is left there, he's bewildered with this. What does he do because he's got all this history, years back, to have to try and negate what Iowa is relying on. And if he does it properly he's got to go back and determine if there were any avulsions in the past which left that boundary in a fixed place rather than the river, it's a tremendous burden because it may depend on witnesses long dead, and it may depend on records which are long lost; and the record is replete with examples of records here which have been lost or destroyed, and he's just about, because he has to come in and defend his title, is deprived of it, and we don't think that's fair.

Another incidence of this is that as soon as Iowa attacks that title that farmer can't borrow on his land, and we have records in the Babbitt

case where he tried to get loans and he couldn't. He has to find a lawyer and maybe he can't find the money to pay that lawyer, and if he does maybe he's going to give him a share of the land and he's going to lose half his land even if he wins the lawsuit, because the time and effort that goes into trying one of these cases is tremendous.

We don't think that we imposed that burden on the landowners. And under Iowa's present policy they can come in and justify it by saying "Well, this is trust land." Well, the record shows that it's never been considered trust land, the record shows that when these areas were in existence they didn't pay any attention to it, the record will show, and we'll go through the evidence where they are buying land in abandoned channels of the Missouri River which would be their own trust land, if they're correct, and the record shows that they are going into cases, situations where there's an abandoned channel and they are disclaiming title, it happened against certain landowners.

THE COURT: If I may interrupt a moment, I think, as I recall it, that Iowa's position is that the word "cede" is so important here, that in order for one piece of land to be ceded from one state to the other, Iowa contends as I understand it that you have to show it was formed on one side and then it went to the other under the Compact, isn't that right?

MR. MOLDENHAUER: Yes, sir, I think that, I understand that's their position.

THE COURT: You have a different interpretation of the word "ceded" than Iowa.

MR. MOLDENHAUER: Absolutely, because we think that the authorities say that these agreements should not be construed to lead to hardship, depression and unjust and absurd consequences, and that's what their construction does. We could have determined where it was, but we avoided it, and now we don't think that it's fair for them to say that "We're not going to determine today where that line is because it's too much expense, it's too uncertain; we're going to wait twenty years 'till nobody else can prove otherwise, and then we're going to take the position that that was it all the time."

And no land was ceded, and under their position they can go up and down the river and select areas they want and neglect areas they don't want; and the Court theoretically and hypothetically could determine one by one, that they own the entire river and no land is ceded. Now we finally, I think, convinced them where there were a few areas where there were avulsions, but they had gone beyond that and they are claiming land in those area.

Now which brings to another point, that they

have said that "Because we're a sovereign," and obviously we think that they're disregarding everything in the Compact except the line, they say "When the river moved over, and when we moved the line over here in the middle of the river, even though this might have been Nebraska," because the riparian owner's land title to the land would be in the thalweg as far as the limits of his title and the limits of the Iowa title, they say "As soon as the Compact is adopted, we, the State, pick it up here in the middle, because we're sovereign and because the State owns the beds. And then when the river, after the Compact, as it has done in the Tyson case, and as we think it has done in the Riley Williams case in the Decatur Bend that we'll get to, moves out this way, they say "You're stopped right here, friend because this is the state line, you can't accrete across a state line, and we pick up all this."

And at the same time they argue that these doctrines of riparian rights are equitable, and what the riparian owner stands to lose on the one hand, he stands to gain on the other by the movement. But they are saying that "you're cut off right here at the state line so you're limited to 350 feet, but if the river goes this way and cuts then that's riparian and there's no chance to use their land title." They're applying their prior doctrines without paying any attention to the Compact, and this is the bad part about it, it looks so easy when

the Court says, "Well, the land's in Iowa," ignoring why it's in Iowa, because of the line "The law of Iowa is the state owns the bed, this formed in Iowa, therefore, Iowa owns it;" but it ignores, and that's what the Court said in the Tyson case, but it ignores the fact that the only reason that's the line is because they agreed to it.

THE COURT: Well, this Court doesn't have to decide, or does it, as between private property owners, whether or not you can accrete across a line or not, does it?

MR. MOLDENHAUER: Not between private property owners, no.

THE COURT: That's what I'm talking about.

MR. MOLDENHAUER: No, sir, but what we contend is, we contend that when we adopted the boundary all we did was draw a new line, and we couldn't take away those rights because that would have been an unconstitutional enactment. We do think that the Court should decide in this instance what the rights of the State of Iowa are as a result thereof.

THE COURT: Yes.

MR. MOLDENHAUER: And that's all we care

about in any of these, and in the areas that we have gone into, we don't care if Schemmel owns it or Babbitt owns it, or Mrs. Simmons owns it or anybody, or the indians own it, all we care about is that Iowa has to respect these titles and also that Iowa doesn't have any claim to them, and that's the whole reason we are here.

Then following the Compact, Your Honor, we'd like to point out that generally there were no claims again made by any of these, made by Iowa in any of these specific areas until the late '50's. One of the first cases that they got into was the Tyson case, in '58 or '59, in there sometime, and their own Planning Report says this case will help determine what areas are state-owned, so they gave a little precedent there for their argument.

Let me repeat one more point. In 1943, putting ourselves back at that time, if there was a question as to where the state line was we were in the situation that came up in this Durfee-Duke case decided in 1963 in the U. S. Supreme Court, where the Nebraska Court held that land bordering on the Missouri, but on the Missouri side of the river, this piece of land over here, this being Missouri and this being Nebraska, they quieted title in Nebraska and got the parties before the Court, so they had personal jurisdiction, and the Nebraska Court says that formed in Nebraska.

Then the Missouri claimants came into the Missouri Court, and was transferred to the Federal

Court, and the Missouri Court says that "We find as a matter of fact that the land formed in Missouri."

Well, it went up to the U. S. Supreme Court, and the Supreme Court said "Since the parties are all before the Court, it's *res adjudicata*, but if the Missouri claimants had not entered into the Nebraska Courts and they had gotten quiet title, and if the Nebraska claimants hadn't entered into the Missouri Courts and they'd gotten quiet title, on the grounds that we would have been left in this unsettled situation, and as the Court suggested in that case the only way that you could solve your problem would be by original action and by compact, because those private cases weren't binding on the states. But that would have been the situation all the way up and down the river.

What we did when we drew this new line was we gave the individuals a forum to try their cases, but giving them that forum shouldn't deprive them of their title, and it shouldn't take it away, it shouldn't allow the state to take it away by applying what the state, what was contended was the state doctrine.

Now there is one other factor in this, we not only contend the facts are very clear that they hadn't claimed any of this, and we think that the evidence that they put in only shows one area that they really claimed which was Noble's Lake in one of the Court decrees which they offered, which was

a meandered lake, and as we mentioned in our reply brief this lake was cut off from the Missouri River about seven or eight years before Nebraska came into the Union, and was a meandered lake and Iowa has had some separate provisions with regard to meandered lakes. There weren't any of these other areas that they listed in their Planning Report that we are aware of that they had claimed.

Now possibly Wilson Island, which was the only other possible island, also they show in their minutes of their Conservation Commission had a deed from some people called the Petersons who they had been dealing with all up and down the river. So they may have had some other claim on Wilson Island besides their sovereign claim, we don't know, but the records clearly shows that none of these areas south of Omaha were being claimed and most of them north of Omaha.

And we have also shown, I don't know if this is proof, or it's just a fact, in 1956 this Law Review article came out in Iowa, in the Law Review which discussed bars and island formations in the Missouri River, and it said "In the past our Courts have been holding these accretions to the bank. And if the Court would ever decide that this is an island arising in the bed of the stream, the Conservation Commission might have a claim to it," and that Law Review article I believe said that prior to that time they hadn't been holding these areas created by the Corps work as accretions to the bed, but to the

bank. So somebody along the way got the idea that here's a theory whereby the state can acquire title to land, to quiet title to land, and this, after the Tyson case and during this period they made their investigation which wasn't until about 1958 of areas up and down the river.

And we contend that this was a very loose, pretty sloppy investigation, they took the Corps maps and they took the present river and they looked to see where an island was and said "Well, this one we'll go after," some they didn't go after. But they didn't go back as they should have if they were going to be consistent to when the states first came into the Union and they disregarded the numerous Ox Bow lakes that exist all along the river, and a look at our aerial photographs, in this whole list of aerial photographs we have offered show these areas which are obviously scourings, cut off lakes, and they exist all over the Missouri River valley.

They didn't go into these, and Mr. Jauron's testimony indicates that if an area was too far from the river they ignored it, they just picked specific areas and said "Now these are state-owned lands," and that's a conclusion on their part, and we contend that they didn't ever own it and that they never did have any claim to it.

And then they adopted or came out with, in January of '61 their Planning Report which is really the first really public indication of what they were

going to do, and we have cited this fairly extensively in our brief, and I only want to mention particularly one paragraph where they said "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank locations, and bars, et cetera, 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."

Here they are recognizing themselves that it's practically impossible. Now when they do that, when they say that, and when they recognize that it was this way back in '43, we don't think that it's fair for them to now make somebody prove what they recognized as impossible, particularly faced with all the burdens and presumptions which they're going to apply against that landowner.

Then through the Planning Report, there are all kinds of comments about "if the state gains title to this area," there is all kinds of recognition that even by them, that it may be uncertain. And not only that, but, although the Planning Report implies that these areas are sand, water and marsh, all the areas south of Omaha, except possibly State Line Island, have been cleared, and there are hundreds, and in some cases a few thousand acres of cleared farm land which they have included or

claimed to in the Planning Report. And we say that some of these claims, of course, are movements by the river after the Compact, and they are claiming those because the river after the Compact was in Iowa and they are not applying laws which would have been applicable if we hadn't had the Compact.

This came out in '61, and this started all the controversy, because the Planning Report also recognizes that in almost every single area, except I believe Rand Bar, and I'm not sure about Wilson Island, and not with regard to the access areas, to get to these areas, but it recognizes in all these areas claimed that they have to have a quiet title action; so it indicates that somebody is in there claiming the land and somebody has got to be in there other than the state or they wouldn't need to quiet the title.

What we say is what this report did was immediately cloud every title in the Missouri Valley, and it particularly recognizing how much the river moved around, and Iowa in its answers to interrogatories has said that they believe that the entire area from bluff to bluff on the Missouri was at one time a bed of the Missouri River.

So when the state comes in and says nothing runs against us, and no statute of limitations, that we can claim any beds or abandoned beds, and the whole area is an abandoned bed, they have opened up that whole valley to the claim by the State of

Iowa. Now just because today they don't select a certain area doesn't mean that they might not do it tomorrow, even when we have been in this case they have added a few areas to this list and they have admitted that in a few areas there were cutoffs and they are claiming in this cutoff area.

Now we think that what this report does really is recognize a valuable economic asset that the State of Iowa can acquire without compensating the owners, and we think that was in part what motivated this program. If I can find it here, the Governor wrote a letter to the -- the Attorney General wrote a letter to the Governor of Iowa right after this case was filed, and in this he implied that these lands were now of great value and in some cases had recreational value. Yes, he said, in 1964, in a letter from the Attorney General to the Governor, and it was right after we filed this lawsuit "For many years of Iowa's history the State did not zealously protect its ownership of these islands," assuming ownership but indicating that they didn't protect it, "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."

We contend that they didn't contest them because they didn't have any claim to them, they didn't know about any claim to them.

Then he mentions in recent years they stabilized

the channel, and then says that these areas now have substantial value to the people of Iowa, both monetary, and in some cases recreational. That's Exhibit, or, that's in the record, was read into the record of Volume 13, pages 1863 to 1864.

But here again we contend this is a recognition of some monetary value that they can get at without having to condemn as they would normally have to do. And since that time, of course, the record shows considerable negotiation between the states as to a new boundary, because the river has been moved by the Corps and they have cut about, if I recall correctly, a dozen canals since the Compact, so there are many areas where the river is not in that old designed channel. But even here, this is an indication, we contend, that the states feel that it's important that they get their boundary settled, and that this is their continuing problem.

THE COURT: What is the progress of that now, any progress since I was here a year ago?

MR. MOLDENHAUER: There is absolutely no progress, Your Honor, because of this lawsuit.

THE COURT: Well, I hope you're not going to blame that on me, are you?

MR. MOLDENHAUER: No, I think that I can speak from Nebraska's standpoint, on this question

of what happens if the lands are ceded and what protections they can build into those lands as against the State of Iowa is critical because there's no reason for Nebraska ever to enter into a new compact if the land that's put on the other side of the river is going to change that person's title, it just doesn't make sense at all.

And so this has to be clarified, and Iowa's own Governor's Advisory Boundary Committee recommended this back in 1964, that there be a lawsuit in this Court, friendly lawsuit, they called it, to decide some of these title problems. And the Governor of Iowa in his message back in 1965 recommended that this committee report be adopted in order to settle the problems and open up the Missouri River to development -- I'm paraphrasing that, I'm not quoting it, but that's in this material in P-2319.

So some of Iowa's officials, at least, although not their Conservation Commission or Attorney General's office, recognize the importance of this thing.

Now let me retrace one more point and then we'll get to Nottleman Island. We had one other witness and some other testimony, the County Surveyor of Sarpy County, Mr. Peterson, and we put in Document No. 1057, which involved correspondence between Mills County and Sarpy County back in 1941, again prior to the Compact, and Peterson in his correspondence with the County Attorney of Mills County discussed how it was al-

most impossible to lay out the boundary and how expensive it is, if they had to lay it out, and he testified as to what a tremendous effort it was, so there again a recognized area where everybody realized that it just wasn't practical to spend the money and the time and the effort trying to find where the boundary was.

Now from that, Your Honor, we'd like to go to some of these specific areas because we think in all these facts it points up several things. It points up the burden that is placed on that landowner --

THE COURT: We'll take fifteen minutes, the Court is recessed for fifteen minutes.

(Short recess at 10:45 o'clock a.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: An example, Your Honor, of what Iowa can do if their construction of the Compact is correct and what they think the Compact does is correct, is illustrated by the Nottleman situation or the case of the State of Iowa versus Babbitt, et al. This is referred to in the Planning Report, which is Exhibit P-2609 on page 42. And I point out first that there's a photograph on page 43 of Nottleman Island, it's obvious that there's a great area which is cleared here and which

is under cultivation, and subject to private claim.

In their recommended action they say "It's believed that this island as well as the others from here on south are state-owned, and therefore the title to these islands must be quieted in the courts in the name of the State of Iowa. In the event that the title is quieted in the name of the state, parks could be used for recreation purposes. "

And then they say that they should plan once title is quieted, and they show the area as 1,550 acres. It's a very substantial area, and what the record shows is that Iowa filed the case of Iowa versus Babbitt in 1963 in the Iowa Courts, and all they did was allege that they had title and the land belonged to Iowa and they didn't give the landowner any other indications of what their claim might be.

They did add an allegation that they requested the right to view, inspect and survey the subject real estate because they had been informed that such agents and employees would be physically and violently stopped and prevented in so doing unless they had a Court order authorizing them to survey it. It is obvious that somebody else is in possession of Nottleman Island at the time that they filed the suit.

Then when the landowners filed interrogatories finding out what Iowa's claim was based upon, they said "It isn't based on any happening or instrument, we own title to all beds the river has ever occupied in Iowa, and this was part of the bed, and so there-

fore we own it." And then they were asked whether they were in possession, and they said, "Well, we haven't made any investigation concerning exactly who is in possession because adverse possession can't run against the state." This although at the same time in their brief they made several statements that they were so diligent about protecting their claims.

Then they said that these people can't have any claim of adverse possession against them because they don't have color of title under Iowa law, and they say the burden of pleading and proving adverse possession rests with the defendants is an improper attempt to shift the burden on to the plaintiffs.

I want to make it very clear that we are not trying their adverse possession as such, we are not arguing adverse possession as against the state in this case, what we are pointing out is that these people had title, they'd exercised all the incidents that flow from title, and there isn't anybody else, a private person, subject to the defenses, and equitable defenses, among private people, who had any chance of taking that title away from them, they just had title. And all these acts and incidents show not only that Iowa never made any claim to this area, and didn't ever assert any claim to it, but also that nobody else did either. These people had a good recognized title.

Again, in their interrogatories, when they ask whether they have any deed or abstract or instru-

ment corroborating or confirming Iowa's title, they say, no we're just relying on their sovereign rights, in effect.

There was nothing recorded showing this title, and as soon as the Iowa people raised their deeds, Iowa says "Well, these are spurious and fictitious and have no force or effect against us because the land was never in the state of Iowa."

So they are here again where all they have to do is, just about start with the '47 map, and this is after the Corps work, and show an area out here, a little channel of water on both sides, and the main channel on one side and the little channel on the other side, and say "That's an island, it's in the bed, the land's in Iowa, we own it, and now you establish all the evidence and you prove otherwise because all the burdens are on you."

When they were asked if they had collected taxes, they say "It's irrelevant and immaterial," and the defendants have to plead an affirmative defense, and this is again an attempt to shift the burden, we don't have any duty to look into that.

And when they were asked if they had looked into the Nebraska titles, they say, "no", and when they were asked what witnesses they have to establish how this island formed, they list Mr. Huber, they list Mr. Jauron, they list the surveyor who surveyed the island, Mr. Windenberg, and that's it. They don't have anybody else, or they talk about if there are any other eye witnesses "There may be

some, we haven't gone into it," or "if their eye witnesses' testimony differs with any documents we have, why then obviously it isn't entitled to any significance or to any weight."

They were asked if the State of Iowa had ever disclaimed any ownership interest in this area, and they said, they mentioned the lawsuits in the District Courts of Mills County, but they said they didn't have any notice or any knowledge of them, although the evidence will show that their Attorney General did have knowledge of that lawsuit.

So here they are again, and they also, under the testimony admit that they didn't even talk to the landowners, all the landowners said nobody came to them from the Iowa Conservation Commission and the State of Iowa, and said "We'd like to go into how you claim your title." They just got sued, and there they are. Now this is entirely different from how landowners were treated in other places, where Iowa came in and settled with them and even bought their land without also looking into the past history.

Now we plan to go into these documents which really show how Nottleman Island formed and show how the states treated it. Again we would like to make it clear that we don't think that we should be, under the Compact, forced to meet this burden how it formed; but if the Compact means what Iowa says it does, and you do have to come back now

twenty years later or thirty years later and show how it formed, we think the evidence establishes that it was in Nebraska and it was actually physically transferred to Iowa.

But we think in having to do it today, we've been deprived of what we thought we agreed to back in 1943. And my colleague, Mr. Moore, informed me that I misspoke, that I really meant to say that there's no reason for Nebraska to enter into a Compact rather than the State of Iowa.

Now starting out, Your Honor, and I hope to go through these about as quickly as I can pointing out the highlights. The Nottleman Island's traverse, which, I don't know where the best place is to do this, I can do it here on your bench.

THE COURT: That's all right.

MR. MOLDENHAUER: The traverse is P-1691, and the original Government survey which was the 1852 bank line for Iowa and the 1856 bank line for Nebraska, if you place them together, shows the river really along the very west side of where the Nottleman Island area is located.

Another thing that this original Government survey as is tied together shows is that the section numbers on the Iowa and Nebraska sides are different and that the section lines don't coincide, so if you extend them over you run into problems and this, as the evidence shows, creates real

problems.

That's the very first map that we have, and that's the official Government survey. Then we go to 1879 when there was a Corps of Engineers survey, Exhibit P-716, and when we place the Nottleman traverse on this we see that that river has started to cut over and develop a little bend at the northwestern part, and move over into the State of Nebraska, or, into the State of Iowa. And we see an accretionary area building up on the Nebraska side and originally called Tobacco Island, which is building down, it's almost down Rock Bluff, and it's building down into the area, which was later occupied by Nottleman Island.

The next survey by the Corps of Engineers was in 1890 by the Missouri River Commission, and here we see quite an accretionary mass. The river's moved a little bit, but not a lot, over towards the Iowa side.

This Tobacco Island accretionary mass is built up and extends even way down below Rock Bluff Point, almost to Calumet Point, and we see the river again moving over towards into Iowa.

Now there's a little island right here that we'd like to point out, because Mr. Huber, when he drew his thalweg, he went around this side of the island, and we'll see later the Corps of Engineers thalweg which was measured in 1890 goes around that side of the island. That's the 1890 situation with this accretionary mass starting to build up and building

up on the Nebraska side.

The next survey we found was in 1895 by Seth Dean, the County Surveyor of Mills County, and Dean was instructed to survey this by the County Commissioners; and his survey shows the original Iowa government survey and it shows the river having cut over into just a little bit, quite a ways into Section 19 and 18 and 30, and here is his line where the, which Willis Brown prepared from the field notes from the Seth Dean map showing his survey as of 1895.

Now Mr. Brown is going to get the instructions which are a part of the record which instructed Mr. Dean to make that survey, and there's a comment there I want to make, but I guess I can just point out that he was instructed to determine whether there were any islands in the Missouri River subject to taxation, and he found no such islands, so we got the river moving over that way.

Now at this point -- at that point, Your Honor, I'd like to jump to the 1926 map, because it shows the Corps of Engineers thalweg which Mr. Huber testified was actually sounded as it exists on the Missouri River, and it's this line right here. Now we go to P-726, and this is the first map where we found this Corps thalweg presented, the '23 map shows the bank line, the '26 map shows the thalweg. And I'd like to call your particular attention to Tree No. 259, which is, the "X" is right below the "t" in the tree on 726, which our tree man, Mr. Weakly,

says commenced to grow in 1900.

We'd like to point out to the Court too that when this '26 map with the thalweg is placed upon the 1890 map, the thalweg runs right along that Iowa bank, right along the Iowa bank, and it fits very well within the channel of the river. Tree 259 is just to the Nebraska side of that thalweg. What we think all this shows is if it's assumed that Mr. Weakly is correct, the river was moving into Iowa and this tree started to grow on the Nebraska side behind this movement from the '95 survey to the Seth Dean survey shows that it continued to move over. And, incidentally --

THE COURT: Those exhibits show the build-up of the island on the Nebraska side?

MR. MOLDENHAUER: Yes, sir, that's exactly it, and we think that there's physical evidence which is the tree itself which also confirms this build up. I guess that this is the map which Mr. Huber made where he went around, his thalweg went around the wrong side, ours went right around that bank, and it was in this area where that tree was.

Then the same thing is corroborated by these atlases, which we don't think they're precise, we don't think they're maps that are precise surveys, but the '91 survey shows the original line, which shows the river having cut into Sections 18, Sec-

tion 19, and shows some of these areas.

The 1910 survey shows that part of this Mickey Fulton 80 was cut away, the river is over here, Section 20, your Section 20, so the river is cut over here at this point and it's moved over here into Section 17, it's continued to move over to Iowa.

THE COURT: Is that because generally speaking that's on the outside of the bend, do you contend to think that or not, or moves where it cuts into Iowa?

MR. MOLDENHAUER: Well, I think that well could be, because this area started building up, and it doesn't develop a bend as it does in the Schemmel case, but it is eroding that way. And another reason is too we've got Queen Hill over here and we've got Rock Bluff, which are very hard points, and the river isn't going to erode that way because that's where those rocks quarries were.

Then when we put P-1691 on P-737, which is the atlas, we see that the whole island area is, almost all of it is riverward from where the Iowa bank runs as is shown in that atlas, but, again, that atlas is a general map which is really helpful in determining who lived there and whose area was cut away.

In 1926, before that -- the next map we found

then was Exhibit P-720 which is a U.S. Agricultural Survey Map. A 1920 soil survey, which was printed in 1923, and when the island is placed on this map it shows -- and there's no island but there's the bank line showing, it shows a distinct bend which would be at the northern part at least around what is the east side of Nottleman Island. This was in 1920. And there is a line here which the index says is the state line, but as we have indicated at the trial we didn't offer it to show the state line because we don't think that it's competent for any single map maker to establish the state line in this kind of a situation.

But this is a good place to point out that if that were in fact the state line the Nottleman Island area would be in Nebraska. In the Schemmel case there's a 1905 U.S. Geological survey, which also purports to show the state line, which if conclusive would put that Schemmel area, the Iowa Chute area, in Iowa, but we don't contend there either that they were qualified to do it.

Now if you are allowed, as Iowa has been in the past, to try these cases one by one without any continuity, you could come into this case and say that state line doesn't mean anything, and there's some law that says that really they weren't competent or the surveyors aren't competent to just set the state line like this, that's what this whole case could be about.

Then they can go down to the Schemmel case

and say, "a-ha, here's the state line, it's running over there." Now unless you can tie these things together and have some consistency it just shows an unfair burden or advantage that can be taken of the landowner. Anyway there's the 1920 soil survey which is consistent with this river cutting and moving over towards the east.

The next map we found which -- here's the soil survey -- which was of great significance was the Seth Dean survey of 1922. And this also illustrates how difficult it is to find some of this evidence. In the first place we found a newspaper article that indicated that there had been a survey back in 1922, and from that newspaper article after a lot of search we went to the Mills County Auditor's office and found in a Ditch Book 3 a record of the river cutting into Iowa and the record of construction of some dikes and revetments pursuant to at that time Iowa's laws.

And this Auditor's record which is an official record in Mills County includes a report to the County Commissioners of Seth Dean, who described how the east bank was meandered and he talked about his 1895 survey. And then he said "These lines are shown on the map," which was attached as Exhibit B, and he said "I find that between the years of 1851 and 1895 the river carried away about 1,140 acres of land, and that since the official survey of 1895 there has been 1,296 acres more taken, making a total of 2,436 acres."

THE COURT: And in Mills County?

MR. MOLDENHAUER: In Mills County, yes, sir. And then they go into a rather elaborate detail about where the river can cut and how it can cut; and we submit that if these section lines are all matched up it shows that this river is cutting right where the map shows it's cutting into Iowa Sections 8, and 17 and 20 and 29. This is where the problem is, this is many, many pages here of proposals for the structures and then the contract with Woods Brothers, and the whole thing is documented here in their county records which shows this tremendous cutting of land.

Then the record shows that pursuant to these plans Woods Brothers went ahead and constructed the revetments and they had a lawsuit then, Dashner versus Woods Brothers Construction Company, which went up to the Iowa Supreme Court.

And, of course, although that lawsuit dealt with really could they properly tax these individuals for the protection works, the Court therein in its opinion recognized and started out with a discussion of the vagaries and the meanders of the Missouri River, said that the Legislature of Iowa took notice of that fact, and enacted their drainage law in order to provide for the construction of these levees, and recognized this situation, and then they held, of course, that the assessment was

proper.

But when it came to finding this document, we didn't find Exhibit P-722 in the Auditor's office, as it said, we went up to the District Court, thinking it might be there, we didn't find it there. We went to the Iowa Supreme Court and we found that they didn't have those exhibits any more, and then we went up to the Iowa Supreme Court's library and went through the briefs of the case, and, sure enough, here was the document together with the testimony for foundation, and that kind of thing, which I think we also have here as a summary, we haven't offered it as testimony. I suppose today it would all be hearsay, but again it's completely consistent with this river cutting, it just establishes everything that they did. But it's an example that if you don't have the time and the resources and the effort to keep digging and digging and digging, then you just don't find these documents, and this is almost conclusive of what happened back at that time.

Now when Nottleman Island is placed on this exhibit, on P-722, it appears to be out in this large bar area. Now another point we should make is that at no time up until the present time really was Nottleman Island exactly like that, it's going to be in the river and the river is going to change, parts of it are going to appear and disappear.

And what this Seth Dean map shows in '22 is a large accretionary area over on the Nebraska

side, and it shows the bank lines which have moved over. It does show what you might call a chute over there by Rock Bluff. But the Missouri River is around this bend on the Iowa side.

THE COURT: On the outer bank, the east bank of the river?

MR. MOLDENHAUER: This is his bank --

THE COURT: Yes..

MR. MOLDENHAUER: Of what he calls the Missouri River, on this side. Now this looks like a chute or water through here, and we have a little bit through here.

The next significant map is the 1923 Corps of Engineers map, and first I'd point out that the '23 map shows retards having been constructed along the Iowa side. It shows the left bank of 1890 and the right bank of 1890. It doesn't show any thalweg yet; and it shows an area referred to as Tobacco Island of 1890 in dotted lines, that's Exhibit P-724.

THE COURT: Whose map is that again?

MR. MOLDENHAUER: This is the United States Army Corps of Engineers map of '23.

Now the problem with the Corps records are

that you just about don't find any surveys from the 1890 map up until '23, so, there's a big gap in there as far as the Corps of Engineers is concerned.

But the significant thing about this '23 map is that when we place the '22 map, or the Seth Dean map, on top of P-724, the '23 map, we now see that it looks like the river has cut through what was this large mass on the Seth Dean map, and was on the Nebraska side of the river, and has left a substantial island. Now we have conflicting testimony as to where the main channel was in all this time, but here is the Seth Dean island and here is the river running to the northwest of it, and here is where we contend this accretionary mass that had built up, if it was cut off, was cut off. There is a lot of conflicting testimony as to how much of the channel was on the east side. This is the first map.

The other thing that I would like to point out is that if Iowa would start in their lawsuit with this '23 map, which we have to admit shows that the Corps of Engineers at least at this time has the river running around the west side of it, they'd say that's an island in the channel of the Missouri River on the Iowa side, we own it, and it was always in Iowa.

But when you look at it in comparison with these other maps it does show that this accretionary mass built up and cutoff. Now this is sub-

stantiated again by the tree study, because when we place these trees first on the island in the Seth Dean map they appear on this area, on this island area, right here, which was, which is a part of the area on the Seth Dean island and is a part of the area which is now on the left bank side of where they put the river in the 1923 Corps map. But these trees are here and the Corps map is '23.

Now, Nebraska's expert, Mr. Weakly, established Tree No. 259 as starting to grow in 1900; but Iowa's experts, Mr. Benseid, started it in '22, and the river cut through in '23. So even under his testimony the tree would have been growing there and not cutoff when that river moved through. Their other expert, McGinnis, said in about '23.

On Tree No. 1106, which is on the same area which was on the Nebraska side in '22, and if the Corps of Engineers map is right ended up on the Iowa side when it cut through.

1106, Mr. Weakly said at 1913 to '15; Dr. Benseid said again in 1922, which was before the river would have cut through in '23. And McGinnis said in '22 and '23; so all the tree experts put those trees there and established those trees there at about or just a little before, two out of the three put it before the river cut through.

So we claim if there was an avulsion, that that's the first one, and that one left Nebraska land, and the land which had been Nebraska land

over there on the Iowa side of the river. And that area from these maps never thereafter washed away, and, of course, the trees are there to indicate it didn't.

We have some pictures of the size of these trees, maybe you have seen them.

THE COURT: Yes. It's amazing how experts can disagree.

MR. MOLDENHAUER: In this case, you see, they, the two out of the three, one of Iowa's gets it '22, and the other '23. Of course, we show the island there in '26, but at this time they put the Rock Bluff bend designation around the Iowa side, or the east side. Our trees, we line them up, go right here on this heavy part which is shown as trees and in that island area.

In '28 we still have that area there, but this time they put the Rock Bluff bend designation on the Nebraska side, the tree areas are still in existence.

THE COURT: What was that last map?

MR. MOLDENHAUER: This is 1928 by the Corps of Engineers, and there's something very interesting here too.

The river has cut considerably over into the Iowa side. We show the '26 bank, what would be

the '26 bank here; by '28 we've got this area over here down below on the southeastern side. We had some witnesses, of course, who testified about cutting down below, and it did cut down below at a later date.

Then we have the 1930 Corps map which shows the river quite spread out, again the Corps of Engineers, with a lot of water around it, the willows area or tree area is still there.

And then, of course, the Corps came in and put their structures on the Iowa side, or the left bank side, and put the river back over on the Nebraska side where it is today in its designed channel.

And the next Corps map which shows that, of course, is the AP map which, Exhibit P-732, which shows the structures, still a considerable amount of water area over on the left side of the island which structures are all in at the time of the AP map. But the area of the tree area, is still in existence. But once that island formed, we contend, on the Nebraska side, it's part of this accretionary mass, and it didn't thereafter ever wash away, although it changed sizes and changed shapes at times. We think that this is corroborated by the testimony of our witnesses. Mr. and Mrs. Eyler testified in about 1908 or '09 that they had a house here on the Iowa side and they had to move away by the 4th of July because the river was cutting that house away. And the bar which they

drove in the ground, or stake which Mr. Brown marked, was in Section 20 over on the east side of where the present island is.

Bruce Connor who lived there all during those years testified that this is the road, that they came down this road, which the Eylers, to get to the Eylers place or the Haffke place, because he lived there in 1905 or '06.

Mase Watts, who lived there all his life, in that area, testified that this point, which is a little bit to the east of the middle Section 20 on the line between Section 17 and 20, was the furthest east the river ever got.

On the Nebraska side we had Jim Lipert testify, who lived above the township line here, that he and Taylor Cuthrell in the late '20's waded across what was a chute on the Nebraska side with their wives and children. And there's a picture here, they are standing right on the bank of the main present channel of the river and Nottleman Island is across on the other side.

We had Mason Watts testify that his family had moved down to this area which is just east of Nottleman Island, he had to move away in 1905 because they were afraid that the river was going to cut in. This is over on the east of Nottleman's Island. The Eyler bar is placed right about here, and he said it didn't cut that far at that time, but they moved away in, according to the deed, about 1905.

And then, of course, we had the testimony of several witnesses on the Iowa side, or, yes, on the Iowa side, who testified with reference to P-721, an enlargement of the Seth Dean survey of 1922, about how the river had cut further into all these areas. These were people who lived there, they were all consistent in their testimony, and they were farmers whose own lands were being attacked and being cut away.

We had some testimony also as to where the boats went on another Seth Dean map, P-2624. Captain Neuhauser, who testified about how when he came up the river in 1915 they started up the west side of what is now Nottleman Island, they couldn't get up as far as Rock Bluff Point, they had to back down, and then they went around the east side. This was a river boat captain, he had been one since he first started on the river in 1912 until he retired from the Corps in about '58. And he testified that later on when he came up, I think it was in '22 or '23 he went around the east side, and about 1930 again he went around the east side, I don't remember the exact dates. But each time he came up he was around that east side. He testified how the water was flat and shallow over on the west side -- Mr. Shamberg -- he went on the east side each time that Mr. Neuhauser came up until the Corps shut off that east side and moved the channel around.

THE COURT: When would you say they started that work?

MR. MOLDENHAUER: They started that work in '34, and --

THE COURT: Oh, just generally, did they finish by '38?

MR. MOLDENHAUER: Yes, I'm sure it was finished by '38. In about '36 or '37 they might have had those structures completed.

I believe there was testimony that after '35 they had difficulty, I know that there was testimony that they had difficulty holding those dikes because the water was deep over there and they had to pull some of the dikes, and now and then they went through on that east side until they got those dikes replaced, because that was the best water.

But it was from '34 to '38, and I'm sure that you can tell from these other maps that it was about '36 or '37. But in doing so, of course, they didn't ever wash away that intervening area.

Now we just happened to have here Iowa's Exhibit D-1112, which are some of these reconnaissance soundings which they offered, but we just wanted to offer this to show how the soundings go right into Rock Bluff; obviously it can't be the main channel.

I would just comment then, we have the plead-

ings in the Supreme Court record, or parts of the brief in the Dashner versus Woods Brothers case where they did all that river work, but it's here in evidence, it's P-623 and P-1080. It all corroborates everything that we have contended.

Now Iowa had a few exhibits, we just comment briefly on some of their photographs. First I should indicate that all of the, several of the witnesses testified that on the Nebraska side when the river was high it was water, when the river was normal they could wade across it, but when the boats came up they went around the east side, the cutting was on the east side, the swift water was on the east side, and the deep water was on the east side. This was confirmed not only by Captain Neuhauser but also by Mr. Gregory who was also a boat captain, who piloted a boat for the Corps of Engineers about 1930 or '32, and he went up, tried to get up that west side but he couldn't make it, and he had to go into Rock Bluff and phone the office in Kansas City and explain to them that he had to go up the east side, and he went around on the east side.

Again, there's a great deal of corroboration that there might have been flat water over there, there might have been shallow water, but there was never any navigable water or the main channel, and the navigable water was over on the east side.

Iowa offered Exhibit D-732, which is a Cole picture supposedly taken in 1912, and D-733, but

we think these are perfectly consistent with that testimony. They show a bunch of ladies sitting out in a boat but there isn't any current there that's taking them anywhere, and there is bar or island on the other side, and we don't think that's inconsistent with the testimony that Nebraska submitted.

The same way with D-733.

THE COURT: It's amazing the number of people in those boats, you know it, and how they're dressed.

MR. MOLDENHAUER: The ladies in the trees, you notice that there's a boat out in the water --

THE COURT: That's the old man's picture, the fellow that had the first car.

MR. MOLDENHAUER: Yes. And observe the ladies just sitting out in the boat.

THE COURT: He was obviously a ladies man too, he had seven ladies out there with him at that picnic, with one automobile.

MR. MOLDENHAUER: My point is that this is not inconsistent with what Nebraska submitted. We have a Range exhibit, Range 3D-740, but

we only mention this goes to the part of the caliber of some of Iowa's witnesses where it shows supposedly the river and what he called the sandbar, what he called the shadow, which is obviously a sandbar, and if it were a shadow from Queen Hill as he indicated, those trees would have had to have been about four or five hundred feet high.

And this may be an opportune time to point out that 1952 photo of Nottleman Island area just showing what the river could look like in flood time, and that's after the channel has been stabilized, and there's more water over, way over towards the east than there is on Nottleman Island.

THE COURT: What year was that?

MR. MOLDENHAUER: That's '52. But the interesting thing is that all the water that's over towards the west of the levy is 11, and not on the island proper. So there were times when people could take pictures quite a ways from the river and show the water.

Now the aerial photographs also show just what we have contended, and they show as of 1930, this is the 1930 Corps aerial photograph, P-440, the island with area cleared on it, already in 1930, there's a good sized area which has been cleared on that island. We'll go into this with the other evidence.

And P 445 which we got from the National Archives shows a substantial area of island where they had put the dikes in at the upstream end. It really goes -- this would be the upstream end here, there's still bars out in the river in the designed channel on what was then the Nebraska side of the island as of 1938, and in the downstream end, so here's where they put those structures. Here again where they shut it off, but there's a lot of, there's still areas that they are trying to clear away as channel.

Here's another 1938 photo showing the island, the structures are in and here we show two building sites, the river's through here but it's still sort of choked with bars. Up at the northwestern part of the island we show building sites which are in the '38 photo, and there's cleared areas which are visible. Now these pictures came from the National Archives.

And here's one in 1941 which shows Tree 259 and Tree 1106 which Iowa's experts said '23, ours said 1900 a little later than that, but before 1923 so the high part of the island was almost all cleared by 1941, which is still two years before the Compact, and there was still a little bit of it, there's still a chute, there's still water running over there on the Iowa side.

And then we have a 1959 photograph, P-449, which shows the island area, King Hill and Rock Bluff are down below, it shows it almost all cleared

except for this portion of the trees, and you could still see where the old channel was but the island is a part of the mainland for all practical purposes and is now farmable, and you can almost --

THE COURT: When you introduced those wasn't Mr. Brown explaining what they showed?

MR. MOLDENHAUER: I think we, I think these all went in with Mr. Brown's testimony.

THE COURT: Yes.

MR. MOLDENHAUER: And I think they probably show up in the summary that way. But it's a little difficult to get him to point out some of those things when you're arguing, he just points out what's there.

P-450 is a '59 photograph of the whole island, and it shows how big it is and it shows how much has been cleared, and we should point out that trees have been lumbered off this island, there was testimony about all the trees taken off, and all that possibly could have been physical evidence if it hadn't have been destroyed in the process of preparing the island for cultivation and for productive agricultural pursuits. But, here again if the landowner is required to come back in and prove something as of back in 1943, a lot of that evidence has been destroyed in addition to what-

ever witnesses may have passed away, and, well, there are maps you can't find, I know Mr. Jauron testified when he talked about what areas he was finding, that he didn't find any maps showing the river over there, or he said that in a couple of places there was a cutoff over there but he couldn't find any maps showing it as river bed.

Well, that shouldn't be the criteria, whether Iowa can claim land, whether or not they can find maps; the question is was the river there or not.

And it's just, as far as they are concerned, where we get the evidence, once we got the evidence, then we have got the presumptions and everything else to go with it.

That takes care of maps, pictures and some of that early testimony which we brushed over, but we have gone over it pretty thoroughly in our Appendix.

But we contend that these people were good solid people who had reason to be there, who knew why they were there and who actually talked knowledgeably and did have knowledge of what happened.

Now as far as Nebraska is concerned, we'd first like to point out that as this accretionary area built up on the Nebraska side, we don't have any separate maps which show Nottleman Island as such until we get to 1933, but what we do show is an accretionary area over there, part of which is where the designed channel is today.

First, on the original survey there was a little nubbin of an island, then on the County Court records there is another island, larger island extended down, but that isn't to say that this wasn't part of Nebraska because on the descriptions, any description of riparian land includes the accretionary land, whether it's separately surveyed or not. But the first separate survey that we find of Nottleman Island was the Fitch survey, who was County Surveyor of Cass County which is where Plattsmouth is the County seat, in 1933, and he surveyed this high bar area and put Harvey Shipley, designated Harvey Shipley's area and John Nottleman's area, and this was recorded in the County Surveyor's office, and they also recorded it in the Register of Deeds or the County Clerk's office where all our title documents are recorded in Nebraska.

On the Register of Deeds --

THE COURT: Just suppose that somebody reads this, your paper here today, that's Cass County, Nebraska, what is the name of the city that you're talking about?

MR. MOLDENHAUER: Plattsmouth is the County seat, Mills County, is the Iowa county. That first Fitch survey is P-2345, and then P-735 is a copy of the one which was filed with the Register of Deeds, and this shows tax lots and

designations of the area as tax lots.

THE COURT: That one?

MR. MOLDENHAUER: Well, it's the Fitch survey of '33, I'm not sure whether this was recorded in '33 with the Register of Deeds or in '35 -- yes, I think it will show as we -- that the tax records show it was placed on their tax records and says "Surveyed by Robert Fitch and reported to the County Assessor for assessment September 7, 1933." So we have that map recorded in two places in Cass County.

THE COURT: What do you show the acreage to be then, do you know?

MR. MOLDENHAUER: Yes, he breaks it down into high bar and low bar, and he shows John Nottleman 162.1 acres of high bar and 218 acres approximately of what would be low bar.

He shows Harvey Shipley who had the north half as 162.1 acres of high bar and 414 acres approximately of low bar.

And, of course, on his map Exhibit P-735 he shows a building site on John Nottleman's side and he shows the Shipley home just above the fence line and he shows the division fence, the Shipley home is shown as here, the building site is shown as here.

Then at some date they have added that William Watts has this Lot 2 up in the northeast corner and we'll go into the Watts deed, of course. But this even shows people living on the island as of that time.

Then we had considerable testimony that this island was inhabited, and we had Mr. and Mrs. Dooley who lived on the island. Mrs. Dooley was a Shipley, and she first went over there, I think it was in 1930 with her uncle Harvey and her grandparents when they were living there, and spent the summer. She was married in 1934 and lived over there in '34 and '35, and came off a year and went back on.

And Harvey Shipley lived on the island during the '30's; Ernest Shipley lived on the island during the '30's. While Ernest Shipley lived there we have records of the pupils enrolled in school, and show that Erma Jean Shipley went to school in Rock Bluff and Georgie Shipley went to school in Rock Bluff.

And I point out that these records with the Superintendent of Schools are required by statute in the Nebraska school laws, according to the records to be filed, so this was in accordance with the regular Nebraska exercise of jurisdiction over this area. And Mrs. Dooley testified that there was no tuition which was charged these people when they went to school in Nebraska. She even testified that they had gone over to inquire into Iowa

but the school officials there said they couldn't go to school over there.

Then we also had, while the Shipleys were living on the island, the birth certificate of Elaine Joy Shipley, December 3, 1936, which Mr. Dooley testified the birth occurred on the island and Mrs. Dooley recalled that this was the child that was born there. That's Exhibit P-526, which was recorded with the Vital Statistics Department in Lincoln, in Nebraska.

There was a death certificate showing that Eleanore C. Shipley died on December 16, 1935; the witnesses did not testify that they could recall this occurring on the island, but they did testify that it occurred while the Shipleys were living on the island, and that's as close as we can tie that down. It shows the death of whooping cough.

Then we had some, and there are several school records there, they also show that Donnie Paul Baker was going to school at Rock Bluff while his parents, Toad Baker and Mrs. Baker lived on the island. Mrs. Baker delivered the Shipley girl, but she did not testify.

And we have motor vehicle registration certificates in Nebraska showing that during all this time the Shipleys, or, not during all this time, but at selected points during this time, the Shipleys and the Bakers had automobiles all registered in Nebraska, part of which indicates as the testimony shows that all these people considered themselves

as Nebraskans. There wasn't ever any thought that they were Iowans.

Then we also had personal property tax schedules filed in Nebraska while some of the people lived on the island. Again they are sketchy, but it's a little hard to find all these records, and, I should point out that although each one of these documents, you can go through them very quickly, they take a great deal of time and effort to find out and discover, because they are in different offices, and they are in different books and they are in the attics and in basements, and it's tremendously time-consuming.

THE COURT: I think that's what made Mr. Brown sigh so much when he got on the witness stand.

MR. MOLDENHAUER: The personal property tax schedules do indicate that they had mowers and hay rakes and farming on the island and agriculture, so going through the items, they were living there. And I might point out at this time that Nebraska only had property tax, real and personal, and no income and sales tax.

Then on the real property records they first show the island going on the tax rolls in 1933 on the sheets which are for 1930 through 1933, and almost all of the Nottleman Island area goes on, the indication or notation is made on P548-3

as to owner Harvey Shipley the north half, Nottleman Island, Missouri River, and listing the acreage; and John Nottleman the south half of Nottleman Island, and Missouri River, and listing the acreage.

And then these property tax records carry right on up until the time of the Compact, and they also add the Wattses, when the Wattses purchased their property, and I think that they add Mrs. O'Brien when she acquired hers, and then when Jones and Babbitt picked up the property in about 1941 in the estate sale they had Jones and Babbitt as owners of those areas.

And there's one other thing that we would mention while we are on these tax records, on Exhibit P-548.1, for example, the name Walter Gochenour is shown as having this area which extends, is part of what we have called Tobacco Island, which is extended downstream on the Nebraska side and the designed channel just cuts through that part of the area now. I mentioned Walter Gochenour because two witnesses suggested that Nottleman Island was called Gochenour Island. Jim Lipert on the Nebraska side, Patte Powles who had lived there all his life on the Iowa side and said that that island had been there for many years, and said that, when asked if that ever had a name, he said he thought it was named "Gochenour's Island".

Now we'll see in 1941 that Mr. Gochenour

came in when a quiet title action was instituted and claimed this island, and I'll go through that when I get to it, but I am mentioning this now because it does show that Gochenour has some of that land just upstream at the northwest part of Nottleman Island.

And then we have in connection with the real estate tax records, document P-474, a letter from Richard C. Peck, Cass County Attorney, to the Cass County Assessor, in which he states in 1952, August 20 "An independent investigation reveals that under the Nebraska-Iowa Compact of 1943 this island became a part of the State of Iowa and is presently taxed in that state." And then he gives his opinion that it should be removed from the Cass County tax rolls, and the Board of County Commissioners of Cass County removed it from the Cass County tax rolls for and after the year 1943. That was when Mr. Babbitt attempted to have the land removed from the Nebraska tax rolls, and as he testified, they told him that they'd remove it once he could satisfy them that it was being taxed in the State of Iowa.

Your Honor, that concludes these documents we have brought in. We plan to go briefly over some more of these documents which we have organized in the other room.

THE COURT: On Nottleman Island?

MR. MOLDENHAUER: Continue that on Nottleman Island, or we can --

THE COURT: Yes, we can recess. I want to say as we go along here. one reason I brought my law clerk with me was that I hope that he can get these exhibits back to Erie, so these that you put in, and so on, that's why I wanted the record to show what page number, and so on, so if you'll keep those available so that we can take them with us.

We'll recess until 1:30.

(Hearing recessed at 12:10 o'clock p.m.)

1:30 O'CLOCK P.M.
TUESDAY
SEPTEMBER 29, 1970

* * *

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: May it please the Court, with respect still to the Nottleman Island area, we'd first like to call the attention of the Court to Exhibit P-458, which is a deed filed in the Register of Deeds of Cass County, Nebraska in 1939 from Herb Church to Harvey Shipley, and the deed covers land on Nottleman Island east of

Rock Bluff called Queen Hill, which was surveyed by Fitch. It mentions the Fitch survey, and it says that, in the deed, that this deed is to supplement a conveyance to the same real estate by Herbert Church, single, to Harvey Shipley, November, 1928, before Perry Graves, Justice of the Peace of Cass County.

And we have some testimony that people were living on the island in 1930, but that's the first separate conveyance of land on Nottleman Island that we found.

And then we have a quit claim deed from Harvey Shipley to William Watts, which covers the northeast corner of the island, and that's the Watts land, Mason Watts who testified is still in possession of it today, that's P-460.

THE COURT: What is the date of that?

MR. MOLDENHAUER: This deed was filed in the Register of Deeds, Cass County, Nebraska, April 10, 1937, and it was dated April 10th.

Then there's Exhibit P-459, which is a deed from Harvey Shipley to Katherine Julia O'Brien filed 4 December 1939, and that covers the land on the northwestern part of the island.

Then in 1940 we have a quiet title action in the District Court of Cass County, Nebraska, which is captioned Harvey Shipley, William Watts, Mason Watts and Katherine Julia O'Brien versus

Frank Hull, and others, and this was filed in our District Court of Cass County, which is our Court of general jurisdiction, and it was a quiet title action joining riparian owners, including Walter Gochenour, the Gouchenour that we referred to when we went through the tax records, and James Warga and some Fitchhorns, and the Plattsmouth State Bank, and others. And in this case the allegation was made that these people had been in uninterrupted, continuous and notorious, peaceable and adverse and exclusive possession for more than ten years.

I think the allegation was also made that Herb Church through whom they claimed had been in possession for that period of time. The Court went ahead and published notice and went through all the procedures and quieted title to the north half of Nottleman Island to these landowners. The Wattses still claim it, although Bill Watts is dead; Katherine O'Brien still claims it, and we have, of course, conveyances of the middle of the island. But this was a regular quiet title action.

We point out to the Court that Walter Gochenour came into this case, filed an answer, and in the answer he alleged that this area had built up to his accretion land in the Missouri River and that the Corps of Engineers had changed the channel and cut this land off. So Gochenour was claiming part of that.

The Court found that the plaintiffs had been in

open, notorious possession, in other words, they satisfied the Nebraska adverse possession laws, and the Court awarded the land, quieted title in the plaintiffs, and the position was taken in this case that the river had been east of this island and was placed over to the west by the Corps of Engineers work.

But here we have a quiet title action giving in Nebraska complete title to these private land-owners.

THE COURT: Iowa was not a party?

MR. MOLDENHAUER: Iowa was not a party to that.

THE COURT: Was this a trial court judgment?

MR. MOLDENHAUER: Yes, this is in the District Trial Court, it was not appealed.

And the Court also found, incidentally, that Herb Church had been in actual, notorious possession in November of 1928 for at least two years, which would put Church on the island in about 1926. This is fairly consistent with the other evidence that we have in the other documents and the aerial photographs.

Then in 1940, on April 30th, there was filed a petition for probate in the estate of John F.

Nottleman, who died on March 31, 1940, and the inventory, this was filed in the County Court of Cass County, which is our Court of Probate jurisdiction, and the inventory shows included in this area is the south half of Nottleman Island. The north half had the quiet title action. And this was a complete estate proceedings, and the administrator, of course, it lists the ferry boat under the property, it lists the stacker, and it lists some other equipment, it even lists some wild turkeys over on the island, or apparently on the island.

The administrator sold some old machinery and two old tractors, which the application says was almost junk, to D. M. Babbitt, Sandy Babbitt, one of the defendants in the Nottleman Island case, and they listed received of " Jones and Babbitt, sale of island and personal property thereon. "

And the administrator went into the County Court and got approval to go to the District Court to sell real estate, because we have to sell our real estate out of the District Court, the Court of general jurisdiction. The probate proceedings are P-464 and P-463. We have the petition in the District Court of Cass County, where, of course, they allege the ownership, and this is an asset of the estate.

We have an order to show cause why it shouldn't be sold, and we have a publication and we have an order authorizing the administrator to sell this

area at public sale. The sale is confirmed on the 6th of February, 1941, and the land was sold to J. L. Jones and D. M. Babbitt, and that's Exhibit P-463.

An administrator's deed was given to Jones and Babbitt in Exhibit P-469, which was in 1941, and this was recorded with the Register of Deeds of Cass County. So here we have the claim of Babbitt, who is not a squatter and who bought it at a Court sale in Nebraska.

And then there's also a mortgage from Babbitt to Jones, filed on February 13, 1941, for a thousand dollars, and that's Exhibit P-465. But we point out that here is a mortgage in existence at the time of the Compact which was later satisfied, and we think the mortgage was good, we don't think that the Compact rendered that mortgage null.

Then there is a release from J. L. and Pearl Jones to D. M. Babbitt, Exhibit P-466, filed April 1, 1949, with the County Recorder in Iowa, in Mills County, Iowa, releasing the Babbitt mortgage.

Then we have as another indicia of title a County Treasurer's tax deed from Ruth Patton, County Treasurer, to Margaret T. O'Brien, which was filed with the Register of Deeds of Cass County, Nebraska on January 3, 1945. And this deed states that it was at a public sale of real estate for non-payment of taxes made in the County

of Cass on the 21st of November, 1942, at which these lots which are designated as being on Nottleman's Island were conveyed.

Just roughly it looks like about 180 or 185 acres, and it's that part in the northwest corner of Nottleman's Island.

Here is a deed for taxes which we claim is protected and recognized by Section 4 of the Compact, which had to do with the asserting of claims and tax claims within the five year period following the Compact. This was for taxes in Nebraska in '42, the deed was issued in 1945, because they'd have to wait for certain periods after the taxes become delinquent and after they buy them in order to give the people the right to redeem. So here's a tax deed which we say Section 4 was intended to protect.

Then we have a deed from Katherine O'Brien to Margaret O'Brien, filed on March 24, 1947 with the Iowa County Recorder. There is a deed from -- that's Exhibit P-60 and 69 -- there is a deed from Shipley to Troop of September, 1945, in which Shipley conveyed this middle portion of the island to Troop. Watts is here, O'Brien's here, and Babbitt down here, and Babbitt down here, and then there's a deed from Troop to Sargent in 1953 in which Troop conveyed the middle of the island to Sargent.

THE COURT: They were all recorded in

Nebraska?

MR. MOLDENHAUER: No, these later ones, the Troop to Sargent was an Iowa deed filed after the Compact.

THE COURT: Yes.

MR. MOLDENHAUER: And Shipley to Troop is filed in Iowa.

But this brings us to the Iowa situation which starts with Exhibit P-1670, a page from the general index to lands in Mills County from the Mills County recorder's office, which shows an entry with Katherine Julia O'Brien as grantor and Margaret T. O'Brien as grantee, date of filing March 22, 1946.

But then over in "where recorded" there's a notation "Not recorded. Accretions, tax lots, one Section 10, one Section 3," and way over on the right they have the section number which says Cass County, Nebraska. Now it says "Also returned 3-25-46", which is the occasion that the O'Briens tried to record their Nebraska deed over in Iowa. And this precipitated the problems of getting this land on the tax rolls and recognized by the State of Iowa.

Now preliminary to that when this deed was filed Louis Scott Robinson testified that he was the County Auditor of Mills County, and he testi-

fied about the problem of putting this land on the tax rolls because they had nothing on their rolls which indicated where this land was. So he wrote the General Land Office on April 25th of 1946, and his letter discusses that in 1943, the Legislatures of the two states passed the act establishing the center of the channel of the Missouri as the boundary line, and then he said "Due to this boundary change Mills County, Iowa, has acquired a certain area of land of approximately 1,500 acres. This piece of land formerly of Cass County, Nebraska, known as Nottleman's Island, carries the township and range designations of Nebraska. Now that this area is part of Iowa we are faced with the problem of setting it up for assessment and taxation," and he asked them how he should set this up. And then there was a reply from the General Land Office.

But Mr. Robinson testified that he had a difficult time trying to find this out, that they went to all of the counties up and down the river on the Iowa side and didn't find any satisfactory solutions; and then he testified that he and the County Attorney, Mr. Byington, had gone to Des Moines and talked to the Attorney General's office and submitted a written request for an opinion as to what to do. They had gone over to the County Court House in Plattsmouth in Cass County, and found that this land had been taxed in Nebraska, and they had been up to the Corps of Engineers offices, but

he said that they didn't have any solution as to how they should conduct themselves and treat these lands.

And then he went into the service, and that was the last that he knew about it. So the next step is that these people went to Mr. Whitney Gilliland, who was presently a member of the Aeronautics Board, and who had been a District Judge in Iowa, and who was a lawyer practicing in Glenwood, and they asked him to get these titles recorded for him, and they filed an action in the District Court in Mills County, Iowa on November 23, 1946, which is the case of William Watts, Mason Watts, Harvey Shipley and Margaret T. O'Brien, J. L. Jones, D. M. Babbitt, and George F. and Mary Troop versus Donald Strand, County Auditor of Mills County, Iowa, Hattie Brown, County Recorder of Mills County, Iowa, and Mills County, Iowa, and they allege these various indicia of ownership which we discussed from the State of Nebraska, and they asked for an order requiring them to record and place these instruments of record in Mills County.

Well, the County Attorney of Iowa answered on behalf of these defendants, and I would like to point out right here that under Iowa statutes, the County Attorney is subject to the supervision of the Iowa Attorney General and represents the state and county in local actions. The state was not named as a party. The County Attorney is a

branch although he's in an independent statutory position of the Attorney General's office, and the County Attorney alleged in his answer, which was filed on November 25, 1948, that "These defendants further state to the Court that they have been advised by their attorney, Woodford R. Byington, County Attorney of Mills County, Iowa, that on May 6, 1946 he wrote 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 records, and so far has not received any opinion. "

So here is notice again to the Attorney General's office of the State of Iowa as to what the situation was. And Mr. Byington said that he had never did hear of them responding with any opinion; but he said that he and Mr. -- I mean, Mr. Robinson said that they hadn't, but he said that he and Mr. Byington had delivered this personally to a Deputy Attorney General in Des Moines.

Then the Court entered its decree and ordered that land to be recorded on the tax rolls and on the rolls of Iowa, and the Clerk of the District Court on January 6, 1947 indicated that he delivered to the County Auditor a true and correct copy of the decree. The decree was entered January 6, 1947, and filed with the County Recorder's office of the State of Iowa, is Exhibit P-1075, which is a map of Nottleman Island showing Lot 1, 2, 3, 5 and 6, and

I think it's a 19-- they are located on, I believe it was a 1945, 1945 dated Corps of Engineers map, placing these areas of Nottleman Island of record in the State of Iowa.

THE COURT: Is there anything in that case to show any reluctance on the part of the county officials not to file those documents on account of any claim of the State of Iowa or anything of that kind?

MR. MOLDENHAUER: No, sir; I believe that the answer admitted these people's ownership, but raised the point that they didn't know how to record it. Well, they didn't possess sufficient knowledge to admit or deny the allegations about the plaintiffs indicia of ownership which were the deeds and titles and things.

But they don't raise any, they don't raise any point that the State might have an interest of any kind. The allegations were made that prior to the Compact, the tracts of real estate were located in Cass County, Nebraska, as paragraph 6, and Iowa admits that paragraph. And paragraph 7 alleged that because the real estate does not lie within the limits of any section surveyed and designated within the State of Iowa, uncertainty has arisen as to the manner and method of indexing, and they admit that paragraph.

Again, Mr. Gilliland testified that he had no

idea that there could be any claim by the State of Iowa, as their attorney, and there was testimony that the witnesses were informed then about this decree and were relying on their attorneys.

The decree then is of record filed March 3, 1947, and is recorded in the Surveyor's record, that's Exhibit P-1074. There were two pages to that is all.

Then in 1950 the problem came up where an individual had requested of the Iowa State Conservation Commission a conveyance to Nottleman Island as an island, and Mr. Gilliland testified that he was approached by a member of the Iowa Conservation Commission who had been looking at the records in Mills County, and they had sent him down to see Mr. Gilliland, and pursuant to this he contacted the Iowa Attorney General's office and he testified that he asked them what to do about it and they said go to see the Conservation Commission.

And so Mr. Gilliland wrote a letter, which was Gilliland Deposition Exhibit 2, on March 20th of 1950, explaining how Nottleman Island came into existence and how the main channel had been on the east side of it, and he also testified in his deposition that he had personal knowledge of the area going back as far as about 1917. That letter was sent to the Iowa Conservation Commission. He mentioned the Compact and he mentioned the lawsuit, and he said "I don't think this is a case

of occupying claimants, I think it's a case of straight-outright ownership." Now that letter shows a copy having been sent to Honorable Robert Larson, Attorney General of Iowa, a copy to the County Auditor of Glenwood, and one to William Watts of Pacific Junction.

And then Mr. Gilliland wrote Gilliland Deposition No. 3, which is a letter to the Honorable Robert Larson, Attorney General, on March 20, 1950, in which he indicated the enclosed letter, and he said "We thought you should be advised as to the situation because we presume that you are advisers to the Conservation Commission and we know that you are to the State Executive Council." There's notice here to the Attorney General's office of the State of Iowa.

Then the reply by Ray Beckman, Chief of the Division of Fish and Game, went to Mr. William Mead of Percival, in which he said "Please be advised that the island that you refer to is not state property. The information we have is that this island belongs to the four parties as follows: William Watts, Margaret O'Brien, M. Babbitt and Jones and Babbitt;" and Mr. Beckman testified that he was instructed to write that letter by the Director of the Iowa State Conservation Commission, who is also a statutory officer of the State of Iowa. His position is created by their statutes. A copy was sent to Gilliland and Thomas, and they acknowledged it.

So here again the Conservation Commission had knowledge of a situation, apparently looked into it, and their Director of, the Chief of the Division of Fish and Game answered the letter at the instance of the Director, indicating that they didn't have any claim to it.

Then we have some other activity by the State of Iowa, in fact, it might be inferred that if many of these people had approached the Conservation Commission at that time they would not have made any claim because they weren't making claims to any lands.

Lee Sargent passed away in Iowa, and the final report in his probate was filed on March 29, 1958, and the Sargent portion of Nottleman Island was included in the description and in their inventory, and they paid an inheritance tax to the State Tax Commission of Iowa, it's a small amount of \$153, but they paid that tax on August 21, 1957 on the whole estate which included this area.

Then Mr. Babbitt had a lawsuit against the -- which is captioned Exhibit P-471, in which he brought suit in Iowa against L. E. Edwards, R. W. Mansfield and Warren Honeyman as members of the County Board of Review of Mills County, which is a statutory board, and Harry Markel, County Assessor of Mills County, in which he attempted to have his taxes reduced, alleged that he was the owner of the real estate and described it. The defendants admitted those allegations, and the Court

found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law, and that decree, the District Court of Iowa for Mills County filed in 1961, on November 30th. That's this area that is described on their tax plats. That's the case where Mr. Jauron testified that from the vegetation on the island that he determined that it started to form in the early '30's.

Then Bill Watts passed away on August 7, 1964 in Iowa, and his estate was probated there, and the interest of Mason Watts who was a joint tenant on the island then with Bill was included as a part of the inventory.

THE COURT: What does that record show as to why Jauron was called as a witness in that case, what was his --

MR. MOLDENHAUER: The record does not show, it just shows his testimony. I can say off the record that Mr. Babbitt wanted to put him under oath, and that's why he called him, I have been told that, but I, there's nothing that I see in the record.

THE COURT: What, as to value or description?

MR. MOLDENHAUER: Well, I think they raised

the question of whether of Iowa was claiming the land in the testimony at that time, that's just recollection.

But the land in the Watts estate, that undivided interest of John William Watts or Bill Watts, was estimated, I believe, at \$10,000, and there was an inheritance tax paid to the State of Iowa in that case, and I believe that receipt is --

THE COURT: Who was that again?

MR. MOLDENHAUER: Well, this is Bill Watts' estate, the northwest corner.

THE COURT: Yes.

MR. MOLDENHAUER: And he passed away on August 7, 1964. The inheritance, the order for approving the final report, was on 30 October 1967, and I think that we have a receipt from the Iowa State Tax Commissioner here, filed October 12, '67, in the amount of 566 and sixty-seven hundredths dollars as payment of inheritance tax, signed by the State Tax Commission, by, by someone who was counsel for the Inheritance Tax Department. There's another state agency which isn't questioning the title.

Then the testimony is as far as the property tax status is concerned that this land went on the tax rolls in 1947, and we have certified excerpts

prepared by the Mills County Treasurer of all the areas on Nottleman Island, starting with 1947 and carrying through May 22, 1967, when the certificate was obtained, showing payment of taxes on all the land by these private individuals on Nottleman Island.

I think the record indicated that the total was something like twenty-seven or twenty-eight thousand dollars at that time. But the important thing is that they are still assessing and collecting taxes, and I think we should point out this again was a tremendous amount of work to obtain because it's extracts on all these different legal descriptions for all these different years, for all of these different people. But the process of taxation is really several steps, it has to be assessed by the assessors, the tax has to be levied, it has to be collected by the Treasurer, it could be sold for delinquent taxes, it could be redeemed so it could involve the County Attorney, it involves several steps by all these officials, it just isn't a simple thing of collection.

We have in the record the tax plats which shows, which just shows, just shows them and followed them and see what was included in as tax.

Then in 19-- back in, on December 31, 1949, we have a document, Exhibit P-1664, which shows that George Troop's land was sold for taxes to Bonnie Powles, and he had to redeem it December 31 of '49, way back then.

We have a notice of expiration of taxes served on Babbitt, P-84, back in 1963. We have an indication of payment and redemption of taxes, Exhibit P-2613, where this totals \$4,101.69 for land sold in 1960, he did that in 1963, in October.

We have drainage tax receipts, which is another Iowa operation. It's paid to the Treasurer but it's a drainage tax district, they are just another area of government, and without mentioning all of them we have many, many tax receipts here and statements. We have assessment rolls, and, incidentally, on the assessment rolls I think there's mention that the landowners are required to list according to Iowa statutes their place, list all their property which they own. These refer to the Iowa statutes and all the authority of all these officials is derived from the Iowa law, and they are performing their duties supposedly in pursuance of Iowa law when they engage in this taxation.

Then we have a '63 newspaper article which, Exhibit P-510, in 1965, correction, showing Babbitt's land listed as delinquent for property purposes, and if he doesn't come in and redeem his taxes it's going to be sold. So even during this case one branch of local state government is threatening to take his land if he doesn't pay his taxes, and the other branch, or the other, the state government itself, is threatening to take it away.

THE COURT: What is its status now?

MR. MOLDENHAUER: The last thing that happened was that he paid under protest, December 1968, and I had a -- P-2614, so he paid them up, and I think that came out, it was over \$5,000, that's for the delinquent taxes for the year 1964.

That takes care of the taxation, but all the parties testified that they had been paying taxes and are paying taxes up until the present time. We might mention too that, of course, when this is raised Iowa immediately says, I think they did in the Babbitt case, that these taxes are too small, that we're not bound by this action anyway, so that this is all irrelevant. But we think it is significant. I think they told Mr. Babbitt in answers to interrogatories that this was an attempt to cast an unfair burden of proof on them.

Then we have, moving now from some of these acts of conduct by the State of Iowa, we wanted to mention some of the other documents which indicate that people were exercising ownership in open and notorious possession of the Nottleman Island land. And this is relevant not, we're not arguing adverse possession for these people, but this is all indicative of the fact that they had title, they were there, nobody was contesting it, they were doing everything that any landowner can do under as good a title as any landowner ever had.

We had a bunch of photographs from Mrs.

Mathis, 1763A through N, who lived there in about '46 or '47 on the island. It shows Mr. Babbitt hunting rabbits and raising pigs, and farm operations, and that sort of thing, taken way back in the '40's. P-1850 is a cabin which they had on the island in the early 1950's.

There were several articles in newspapers which are about as open and notorious notice as you can get. Exhibit P-487, dated February 7, '54, shows the land being cleared on the island, it shows Bill Babbitt measuring a tree trunk which had been felled, which was thirty-six inches wide, and it shows them clearing land with a cutter blade in the Omaha World-Herald, which has wide circulation in all of Nebraska and southwest Iowa.

There are also photographs taken at the same time of some of these same things. It shows open operation here, and while the Babbitts are doing this, I think there was testimony as to how many people they employed, so there were a lot of people involved in this operation and there was just a lot of notice as to what was going on.

And then Mr. Babbitt filed the Fitch survey over in Iowa on September 30, 1955, Exhibit P-1076, so here again notice, record notice, in 1955 by a landowner of that survey, and anybody going to the Court House records and looking at that area supposedly could find that.

A newspaper article in the World-Herald showing Mr. Babbitt with some soy beans grown

on the island, October 2, 1955, with an article, and it looks like it's on the front page of their second section.

THE COURT: He looks a little younger than he does today.

MR. MOLDENHAUER: He claims he looks as young now.

THE COURT: Okay.

MR. MOLDENHAUER: Then Mr. Babbitt had a farm sale in 1956, and this was widely advertised, and this indicates a mile west of Pacific Junction and halfway between Plattsmouth and Glenwood, but here again it shows wide knowledge and the things that he's selling are 326 head of livestock and farm machinery and all this type of thing, which is over on the island, that's Exhibit P-2236, which is in the Glenwood, Iowa Opinion Tribune of November 29, 1956. The same thing in Exhibit P-2237, it was advertised in the Plattsmouth Semi-Weekly Journal, on December 3, 1956, and underneath his "big farm sale" it says "Farm known as Babbitt's Island."

What's interesting is all the machinery and all the livestock, and Mr. Babbitt testified as to a lot of livestock. Then there was the same --

THE COURT: Does it say that in this one?

MR. MOLDENHAUER: No, I don't think it does, but --

THE COURT: He testified that it was on the island, is that it?

MR. MOLDENHAUER: Yes; and on this one he says "Farm known as Babbitt's Island" in the ad itself.

Exhibit P-1849 is an ad in the Omaha World-Herald in connection with this same sale, it's a very poor copy, it's dated December 2, of '56. Here again there's little excuse for anybody at all familiar with the area not having knowledge that they are out there and they are conducting operations.

And then Mr. Babbitt entered into a fence line agreement in 1956 which was filed February 6, 1956 in Iowa with the Recorder, with Good, in which he agreed to the fence line or boundary agreement on the east side of this island. That's shown here as being in that area. But the instrument was January 31, 1956, Exhibit P-1073. This again was record notice to everybody.

The Sargents in 1957 in connection with their father's estate entered into a mortgage with the Travelers Insurance Company, it included land on the island, and it included other land too, but I

think the total consideration was, oh, something like \$110,000. This was filed of record. So here again at least the insurance company recognized that property as mortgagor, or, mortgagee. And the Sargents filed an affidavit of possession on June 12, 1957 in accordance with, as Mr. Sargent testified, on the instructions of their attorney.

Now this again -- I don't purport to be knowledgeable in Iowa property law, but it cites Section 614.17 of the 1954 Code of Iowa, and this is their marketable title type of procedure whereby if they file the affidavit and it's not contested the landowner clears his title. It's in accordance again with their statute, and I don't want to argue whether that's binding on the state or not, but the fact is what they have done is cleared their title as far as any private claimant is concerned, no private claimant can really come in and question it.

Mr. Babbitt had the area surveyed in Exhibit P-1077, and this was filed, the instrument was dated December 11, '59 and filed December 14, '59, filed in Iowa showing the survey of his land.

He had his property in the agricultural program and he got a farm bin, and he mortgaged to the Commodity Credit Corporation that bin and the land it was on on Nottleman Island for \$6,164; so here again in the farm program they were recognizing his title, that's Exhibit P-486.

Then the real hooker came along, because he testified that he found out about the Iowa claim to his land in the newspaper article which came out after the Planning Report, nobody talked to him, but somebody called him and said that they made this claim in the newspapers, which listed these areas.

So he tried to get a loan after that, and we've got Exhibit P-475, which is a letter from the South Omaha Production Credit Corporation of October 20, 1961, in which they say "Although your present loan is of a reasonable size in comparison to your financial position, we cannot see our way clear to actually base the loan on the 640 acres of real estate. The State of Iowa apparently claims an interest in this land and in our opinion this clouds the title. If our attorneys were satisfied that you own an absolutely clear title you have no problem in meeting your needs. As it now stands we cannot do more than offer a loan which is based entirely on chattel property."

And then I think he testified, too, that he tried to obtain a loan and couldn't.

On November 22nd of '61 he wrote the Attorney General as to the situation, and the -- Mr. John M. Creger, Assistant Attorney General, answered by letter of November 22, '61, Exhibit P-1775, in which he said "Although it's impossible to give an absolutely definite answer to your questions at this time for a number of reasons, I think that you may

definitely assume for the present, atleast, that the State of Iowa through the State Conservation Commission does, in fact, claim title to so much of the above property "as is physically located within the State of Iowa, and intends to commence action." Here again he isn't getting an absolutely definite answer.

THE COURT: It says through the State Conservation Commission?

MR. MOLDENHAUER: Yes, sir, that's what it says.

THE COURT: The basis of the claim.

MR. MOLDENHAUER: Well, it's very interesting, because in the interrogatories which we have quoted in our appendix, they were asked if the State Conservation Commission had any interest in the action, and their answer was "No," but that if once it was determined they owned it they would then administer it.

THE COURT: Yes.

MR. MOLDENHAUER: I don't know where they got the basis for their "No" answer, but it's one of the many, what we consider inconsistencies. And then he also tried to get a loan from

Metropolitan Life Insurance, and we have a copy, P-476, from lawyers in Harlan, Iowa, who answered, and they start out "You have asked me why the Metropolitan Life Insurance Co. has been unwilling to make a loan on your property secured by the real estate," they quote pages 42 and 43 of the Planning Report, and the lawyer says "It's my opinion that the Metropolitan Life Insurance Company cannot safely make you a loan upon this tract until the claim of the State of Iowa is disposed of in your favor." Now he didn't have the second page of that letter. But this really demonstrates what the State of Iowa can do to an owner and the position that they can strap him in, because if they agreed that the titles were any good, once they attack them they cloud that title, and it's no longer good until that cloud is lifted. And that landowner is effectively deprived of many things which he could otherwise do in connection with that land. But a mere attack --

THE COURT: Does that proposition you're talking about right now entitle Nebraska to say to the Supreme Court of the United States to enforce the Compact?

MR. MOLDENHAUER: Yes, sir.

THE COURT: Or is that a private proposition?

MR. MOLDENHAUER: No, because we would never have entered into the Compact if we hadn't been assured that our people were going to be fairly treated over there, we wouldn't have entered into it at all, it's got to be why that language is there, and Iowa put the same kind of language in, and not only that but when they referred the Compact to us they had an additional section which says that not only will the terms of the Nebraska Act be the same as Section 1 and 2, which set up the boundary, but it will also be identical to Sections 3 and 4, so they put specific emphasis --

THE COURT: Well, you're saying then, aren't you, that Nebraska has the right to insist that Iowa adhere to the proposition that a title good in Nebraska is good in Iowa, is that it?

MR. MOLDENHAUER: Yes, sir.

THE COURT: And when they do this they are not, they're violating that, and therefore the Court has to enforce that, abide by the Compact, and this is one of the things that you have got to abide by.

MR. MOLDENHAUER: Yes, sir, that's right, it goes beyond that because we think that when we get through that it really goes so far as to say

"Iowa, you can't come in and attack these titles, because once you attack this man's title you have clouded it, and you're attacking a title that you agreed would be good, and you can't attack it because if you do you put all these unfair burdens on him, you make him go through this mass of evidence, you sit back and you deprive, you can effectively take away his land."

THE COURT: Yes, but that's a pretty large order to say that to Iowa, and then some fellow down the line, some county official or somebody, or somebody comes along and says, here, we're going to do this, maybe it isn't the administration of the State of Iowa. Don't you have to go at it piecemeal and say that this is --

MR. MOLDENHAUER: No, because when we decided to enter into the Compact we didn't go at it piecemeal, we said we're not going to make these determinations. We could have, it would have cost us, we could have gone through all this. but we said, no, and you're going to have to recognize the titles. Now I don't know what that means unless it's recognize everything that's there, because they weren't making any claim here. And otherwise, if you go back now and make them determine that, I don't know what the Compact did.

THE COURT: Well, I understand that's --

MR. MOLDENHAUER: That's our argument, and I think the state itself agreed it was good, the state didn't say "We're going to let you" --

THE COURT: What I'm discussing here now, what I'm discussing here now is the possible decree for the Supreme Court to say --

MR. MOLDENHAUER: Yes, sir.

THE COURT: (Continuing) the language of it, what the Special Master shall recommend shall be the order.

MR. MOLDENHAUER: Right, and we think -- we think when we get through, we'll go through this again, because we'll have these other illustrations.

THE COURT: All right.

MR. MOLDENHAUER: But we think at this time what that Compact did was recognize effectively that Iowa had no more than Nebraska did, and that's an easement or a public right to use the stream which is what they were exercising then, and that they didn't, they weren't deprived of anything because they didn't have anything.

They had recognized that the river was in Nebraska many places where they had no claim whatsoever, and what Iowa's got today is the right to use that stream for the public just as Nebraska has, but they don't have any right to assert title to that bed or area, because as soon as they do that they force that landowner to come in and prove where the boundary was before the Compact, and we agreed that that didn't have to be done, and we agreed that that title would be protected.

And we think that this is fair, we don't think that they're deprived of anything because they aren't as a practical matter deprived of anything, and that way reads the Compact to settle the problems instead of creating a controversy, because what they have done by taking this approach now is twenty years later clouding everything up and down the river. And we think that their conduct which we will go into later on shows that they are picking and choosing areas and they are not consistent, and under their theory they don't have to be consistent.

THE COURT: Well, under that proposition wouldn't it be sufficient to tell the Courts of the State of Iowa that the Compact supersedes your common law, period, and stop there?

MR. MOLDENHAUER: Your Honor, with most people that's probably true, but they come

in now and say that "We're not claiming ceded land," and we're going to show tomorrow that they are claiming ceded land, they can still talk out of both sides of their mouth, and we can't -- and they do it, and we can't understand how. And that's the bad part of all of this, they stand here with their sanctimonious statements, saying "We're obeying the Compact," and when we look at the facts they are not, and any decree which allows them to say this or which gives them another excuse may not be adequate.

THE COURT: All right, go ahead.

MR. MOLDENHAUER: Then we have got an affidavit of possession filed by Babbitt, September 16th of '63, on the advice of his attorney, and an affidavit of possession filed by Mrs. O'Brien on the 2nd of June of '64.

And we have had a few -- those are P-1698 and P-1072 -- a few pictures, P-616 through P-621, really which are just to show this isn't just a sandbar, Babbitt's got some bins there, good corn, good high corn, in fact, and this is valuable farm land that they are coming in and trying to take.

Now that, Your Honor, pretty much summarizes the documents, showing the occupancy and what's going on, but it's a wealth of material and it's material that anybody, if they want to spend

enough time, should find. But we think now too that the testimony of the witnesses corroborated this evidence.

Floyd Fulton by deposition, lived down in this area, and he testified how back in between 1897 and 1908 there was a chute over on the other side, and an island out there, and his father used to do a lot of fishing, and the main river was over on this side, and he testified how they moved away in 1908 and the river was only thirty-three steps from their house, but when they moved there in 1900 or 1901 it was a half a mile away, testimony of cutting away back when he was young, true, but he lived there.

The Eylers, as we mentioned, testified about the Hafke place cutting away in March of 1909, and that was up in this area, and they were there, that's something that somebody never forgets, and they talk about the force of the river up against that Iowa bank, which has to put it over there. Then the house later cut in.

Bruce Connor who lived there during all those years, had lived on the Hafke place in 1905, he worked for Woods Brothers in 1921, he said everybody regarded, or, he talked about how again specific areas cut away on that Iowa side, all over on the eastern part of Nottleman Island.

Whitney Gilliland, a member of the CAB, his first recollection was 1917, testified that everybody regarded this as part of Nebraska up until the

Compact.

Patte Powles who was eighty and whose parents lived down at the south part of Nottleman's Island, and had lived in Mills County all his life testified about the island being on the Nebraska side. And his brother Swede Powles owned this land right here, he said that across the river was this Gochenour's Island, and he testified how this was when it started forming over the years, over on the west side.

Genevieve and Luther Johnson testified when they lived down near the south end between 1926 and 1945 how the river cut away, and these are all people who lived there. They testified too how there was a boat tied up on the Iowa side and how they'd come and eat at the Johnson's and so did the Johnsons .

On the Nebraska side we had Jim Lipert, who in the '20's walked over there. We had Albert Warga, who said that in 1913, and the Wargas lived up in here in 1913, the river was about a mile east of Queen Hill, and he was out there hunting ducks at the time of that cyclone on Easter day, and everybody who was alive at that time still remembers that.

We had another witness in the early '20's, said that when he came here that this was just slough. The Liperts walked across this, several witnesses talked about this slough at times but water was there on the Nebraska side. As far as

living on the island, of course, we had Mrs. Dooley who testified that there were times when "We waded across to the island." Mason Watts said the same thing.

We had Ed Dooley testify who lived on the island, and all those people, we think, had every reason to be there and were knowledgeable.

We think by the same token that Iowa's witnesses were casual, that they really weren't there, they had no reason to be there. They might have hunted and fished there now and then, but they didn't ever, there wasn't any real reason for them to be there or to remember these things.

We had Mr. Babbitt testify about how he took possession of that island and he got his first crop in '41 and '42 when they first started clearing, and all the time and effort and money that went into clearing. Mrs. O'Brien, the lawyer's widow, who was relying on a part of that island for her retirement income, the Sargents testifying about how good this land was and how they cleared it, all of this mass of work which went into this island all the time that these people lived here, and it's all pretty well detailed.

THE COURT: How do you characterize that type of evidence, I know that you have been calling it prescriptive with reference to adverse possession and all that sort of thing, how are we going to call that, now you've got documentary evidence,

and so on, or is there any way of doing that?

MR. MOLDENHAUER: I don't know. It's just this, it's evidence of ownership, it's evidence of title, I think it's evidence of even where the boundary was because everybody recognized this fact.

If we were talking about the time of the Compact and if we were at common law it might be evidence of acquiescence and prescription as between states. There you might have the question of how much time intervened and whether it was long enough.

But the fact is that in '43 when we entered into the Compact it cuts things off, and they not only recognized all this as Nebraska, but after the Compact they recognized it as going on the rolls of Iowa, so we add another twenty, twenty-seven years onto this general recognition.

Yes -- Mr. Moore called my attention to the fact that somewhere I had it under the proposed rules of evidence for the Federal District Courts a recitation and knowledge in the vicinity as to boundary is admissible evidence. That has not been adopted but they are considering it.

THE COURT: I'm just trying to get some nomenclature on the record.

MR. MOLDENHAUER: In part it's evidence

of general reputation as to boundary, in part it's evidence that they own it, that they were there and that there weren't any adverse claims.

Now I should mention the witness Red Jones who testified that he logged 240,000 board feet off the Babbitt land, and he took 150,000 feet off the Sargent land and 46,000 feet off the Watts land and 20,000 feet off the O'Brien land, so there was about a two year period there when Red Jones was in logging. And it's hard to think that Iowa was in possession at the time that all this logging was going on. So we've got no question about the title, it's there, and if anybody ever had a good title in Nebraska before the Compact these people did, particularly when they got through the quiet title action. We think that they had a title good in Nebraska and they had a title good in Iowa until somebody in the State decided to attack.

Your Honor, that covers the Nottleman situation and we're ready to move to Schemmel Island and get those documents, and it would be very opportune for a short recess.

THE COURT: All right, you can get the documents out, we can have a recess for fifteen minutes.

(Short recess at 2:20 o'clock p.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: Moving now, Your Honor, to Schemmel Island or Otoe Bend Island, we first mention at page 48 of the Missouri River Planning Report Otoe Bend Island was shown.

It shows a large cleared area and is described as 550 acres of land. We would mention that the description describes it as "side of new channel" in Iowa. And they use that side of new channel designation almost all the way through the Planning Report, and, of course, title, the recommendation is made to quiet title in the name of the state, and then the statement "If title is granted in the State of Iowa then plan to use these islands. No further recommendations are made because of the possibility of a long time before the title is quieted, and, of course, plans should be determined then based on need."

Pointing out again that it's obvious from the photograph that there's someone here, someone here made it valuable into agriculture, and there's a necessity by Iowa to quiet the title.

In the Schemmel case again statements were made that they hadn't interviewed the landowners or discussed it with the landowners the fact that they were going to quiet the title, they treated them just as shabbily as they did Babbitt by moving in and claiming the land immediately without giving them any consideration. Here again in the Schemmel case the record shows that they only called two witnesses, they called Mr. Windenberg, their sur-

veyor, and they called Mr. Huber who testified in that case, and also in this case, with many variances.

They only started out with the history in the middle '20's, and then they relied on the presumption and they specifically stated that there had been no avulsions in the area and they were going to rely on the presumptions, which means that they particularly ignored all the prior history of the Schemmel area which we claim is quite important. Here again to trace this prior history is a tremendous burden and a great deal of effort for any individual to have to sustain.

Exhibit P-208 is the government tie survey with the original Nebraska survey and the original Iowa survey, and it shows an island originally surveyed in the State of Nebraska because it has the Nebraska section numbers on it. The very northwestern tip of Schemmle Island overlaps that island, but we are not claiming that that is still in existence.

THE COURT: On this, going just back just a minute, I notice it says here on this Planning Report "Note old channel location separating island from mainland." First we look at the right side for a mile -- is this the line here that you're talking about, that's been mentioned, is this it here, do you think?

MR. MOLDENHAUER: When they say "Note old channel" - -

THE COURT: Yes, are they talking about this?

MR. MOLDENHAUER: Yes, sir, I'm sure that it is, here's where the river is.

THE COURT: What is this?

MR. MOLDENHAUER: I don't think so, I think there's the levee there, I think that's the levee, and you may recall from that testimony how they built that levee up. I think that they were referring to that channel because in all of these instances where they selected an area they apparently took an area which showed some old chute or channel over there between that place and the river in order to establish that this arose in the bed of the stream.

THE COURT: All right.

MR. MOLDENHAUER: Although there are many of those such chutes in existence between, and, land, between that and the river where they didn't come in between.

Originally we see that much of the Schemmel land in the original government survey would have

been over in Iowa in Section 15, the major part of it is in Iowa Section 15, of course the lower part of the traverse is way over towards the east.

The next map is the 1879 Corps of Engineers map. On the 1879 map when Schemmel Island is placed upon it you can see a couple things. There's a -- what was the island on the original government survey or Frazier's Island is now a part of the bank and the bend is moving toward the east and developing towards the east in rather a pronounced bend. We have Sidney -- the Sidney Landing is marked there later, but the river, -- Frazier's Island was in the river, and now this whole area has been attached to the Nebraska shore as accretion and the river has moved over towards the east, towards Iowa.

The next map then is the 1890 Corps of Engineer's map, and when the present Schemmel location is placed upon that map we see that at least the western two-thirds or maybe more of the area is located on the Nebraska accretion area which is identified in part as Frazier's Island, and there's also an area which looks like a depression or some kind of a possible dry chute which runs right along the western, just inside the western part of the island, but this bend is developed considerably over towards the east again, and Sidney Landing, which is here, was marked on that '79 map demonstrating at that point that it moved over down in this area.

This is a little bit more complicated, Your Honor. Then the next survey which Nebraska discovered was in 1895, Pierce Survey, and this was a survey that's Exhibit P-213. We also have in evidence Exhibit P-137, which is a document showing that this survey was recorded in the Otoe County Clerk's office, and Mr. Brown testified that it was generally referred to as the Pierce Survey. He was County Surveyor at that time, and the document indicates that it was to collect taxes levied for the year 1895.

Now this survey Mr. Brown testified was apparently quite accurate because the land designations are broken down into hundredths of acres, and this was recorded in 1895 in the Otoe County Clerk's office.

We take the Pierce Survey and place it on the 1890 survey, and the Pierce Survey only shows the right bank or the Nebraska bank. We see the river has moved, this is to the right bank now, the river is here somewhere, we don't know exactly where, but it's again, this bend is moving towards the east and it's moving downstream a little bit. There's a little knob there at the upstream end, but Pierce put all this area, which on the '90 survey appeared as Frazier's Island, over on the bank, just about over to where Sidney Landing is on the '90 map were placed on the Nebraska tax rolls and included in his 1895 survey. What we contend this shows is a progressive, orderly de-

velopment of the bend to the east and downstream, which is consistent with everything the Corps of Engineers studies and theories.

We also have an exhibit, P-370, which is a map of the Missouri River by the Corps of Engineers in December '76 and January 1877, showing this pronounced bend, this came out of the Corps of Engineers reports, showing the pronounced bend and Frazier Island. Also interestingly the Nebraska City Island with the river going around the east side and a slough going around this side, and we'll talk about the Nebraska City Island later. This again became a cutoff, and it can be seen in comparison with the '79 and '90 maps, between those two periods of time it cut off.

P-211 is the '90 map, and up here we see that the river cut through leaving Nebraska City Island, and all of this Eastport Bend they have, and down here is where we contend that Iowa purchased land which was on the other side of the channel, and the Corps of Engineers reports indicate that there was a slough here and the river cut through.

Now this map, the '93 map, also shows McKissick Island which was the subject of the case of Missouri versus Nebraska back in 1903 or 1905, where the Court held an avulsion here, in fact, I think it was described in the Corps of Engineer's reports very graphically, and the boundary runs around the outside of that bend and there's land on the Missouri side which is a part of Nebraska

and has been since that time.

So above and below we had easterly developing bends, both of which cut off.

Then we also have Exhibit P-2627, which is again from official Corps of Engineer's documents, this was obtained from the Nebraska State Historical Society in the reports of the Missouri River Commission from July 1, 1885 to June 30, 1887. I went through all of the reports of the Corps of Engineers offices and did not find this particular report, but it was in the Nebraska State Historical Society.

And this map shows the development of the eastern bend, but it does more than that, it shows how much more land is referred to as having been cut. And the comment is made "Cut M to N," which is in the Schemmel area, from 1879 to 1886, 1,002 acres, indicating that that land was cut away as that river moved to the east.

THE COURT: Now what period of time?

MR. MOLDENHAUER: Cut M, here's N, from 1879 to 1886, 1,002 acres. It has other areas where it shows how much it has cut, which we contend indicates that it moved gradually washing everything away. Now on the attached exhibit the Schemmel area has been placed by Mr. Brown, and again showing the eastward development of that bend and that large meander which was developed

there, which is not too dissimilar from what happened up above and what happened down below.

And then we have a survey which we found in Iowa, Exhibit P-172, which is referred to as the Gagnebin Survey, obtained from the Auditor's office in Fremont County, which shows the original bank line of the Missouri River, the meander of December of 1884, which is down the middle of Section 14, and then a measurement of 1888, which is still a little bit to the west of the Iowa chute, and we see a road at some later time called the Given's Road which was imposed on this, again on the Iowa side, showing that various stages of the bank line although they're not, as we contend, it moved to the east.

You see the Schemmel land is in 15 and 14 is pretty much to the east of where the Schemmel area is today.

Then, Your Honor, we refer to Exhibit P-176 and 177, which are from the Journal of the Iowa Board of Supervisors for April 2, 1889, and here they resolved that part of the taxes against the south half, against certain lands be reduced for the year 1888, part of the same having gone into the Missouri River, and point out that this is east of the Schemmel, of where the Schemmel area is located, Iowa documents indicating the recognition of this movement of the river to the east.

Exhibit P-372 is a plat of Washington Township in 1891, showing a large easterly bend, Iowa Sect-

tion 15 where the Schemmel area now is, is to the west of that bend. It just gets into the corner of the John Foster 80 acres, which is just to the west of the M. U. Payne place. The Payne school has been circled by Mr. Brown.

This is just another plat book, but it shows where it is, or where they, it shows the large bend. And then we had a newspaper clipping from the Nebraska City News of April 16, 1897, Exhibit P-200, which stated that about four miles northwest of Hamburg near the railroad is the Payne school house. The river is three-quarters of a mile west of the road at this point. And then it talks about the flooding at the John Payne levy. The three-quarters of the mile as shown by the index map west of the Payne school is just about in the location of where the configuration known as the Iowa Chute is, that was dated 1897.

THE COURT: You contend that the Iowa, the river was in the Iowa Chute at that time?

MR. MOLDENHAUER: Our witnesses, Your Honor, put the river in the Iowa Chute in 1899 and 1900. Cliff Cochran testified that a boat was tied up right there west of Propps, I think something like three hundred yards or three hundred feet west of Propps. And Frank Duncan testified that he lived right here on Givens Place, in Section 10, from 1896 to 1900, and in 1899 his mother

took him right down the road, it's here, these buildings, right down the road and he stood there, and Mr. Brown placed a stake, and he said that the boats came right up from the south and went toward the west, the first boat he ever saw in his life, and Mr. Duncan moved away from there in 1900, although he was still in the same general area but he said he never forgot that. And the only time that he lived in that area was 1896 to 1900.

THE COURT: I remember my first automobile, how about you?

MR. MOLDENHAUER: We discovered it, nobody had any idea, nobody dreamed that he'd ever lived over there until somebody just talking to him on the street one day, I guess he was talking to Mr. Schemmel, he said that he'd lived over there, he moved away in 1900.

Cal Taylor, who was eighty-eight or eighty-nine years old, when we took his deposition, had Mr. Brown place a stake right there on that chute west of the Propps, and testified the river was there when he was a pretty good sized boy, but he would not commit himself as to what date it was.

Mr. Taylor's dead, Mr. Cochran's dead, Mr. Duncan has had serious heart trouble, and they may be the only three witnesses left alive who remember that, so it's one of those problems

that exist.

Well, we may have these a little bit out of order, but I'm trying to move through this as as fast as I can.

Then Exhibit P-174 is a resolution from the County Board of Supervisors, Fremont County, Iowa, August 1, 1905, "Resolved that the County Auditor be and is instructed to redeem from tax sale for the years '93 and '94 the following described land for the reason of wrongful assessment and the name may not be the owner.

"And for the further reason that at that time said lands had mostly washed into the Missouri River and should not have been assessed for taxation." And that area is shown in Section 14 which is again just to the west of the Iowa Chute. This is in '93 and '94, so the river is right in here. Iowa's witness Ruhe contends that it was coming back, but the tax documents indicate that it was still moving in the '90's over to that Iowa Chute, position.

Then we have several documents in the Fremont County, Iowa record book. Record Book No. 1, delinquent real estate tax list of Iowa, showing land described as being in the river. And its first few documents are very sketchy and spotty over the original Schemmel Island area.

But in 1900 we get the Auditor's record of tax sales which shows the 77 acre tract. This is in Iowa again, with 57 acres listed as in the river,

which is right -- here is the Iowa Chute, there's just about that 20 acre difference over here which would be east of the Iowa Chute, and the 57 acres is about the same amount of land that is west of the Iowa Chute, this is in 1900. That's P-150 and P-151.

And we have another indication of land being in the river, I think this is 1900, and the sale to J. J. Cook, but there are 40 acres shown as in the river which is in this northeast corner of 14.

Then we have here an 1899 entry in the record of sales of real estate of Fremont County, the east 77 acres, the west half, it says east but it has to mean the west 77, the west half of the northwest quarter, showing it as 57 acres in the river out of that 77 acre tract, and the Iowa Chute runs right through it, this is 1900, and this is from the, again, from the Fremont County Courthouse. J. J. Cook is shown as having bought this little piece over here in 1900.

And then we have another page 24 from the record of sales of real estate of Fremont County, 57 acres in the river, sold to J. J. Cook, and I think that's, that's 1901, showing that same piece of land over there, so at the time that we contend this area, and that's Exhibit P-160, that the river was over there in the Iowa Chute the tax records are indicating as of 1900 and 1901 that that's where it is.

THE COURT: What is the significance of that now?

MR. MOLDENHAUER: Well, all we're establishing here, now we really get, Your Honor, to how the river got back. We contend that this corroborates how the river moved over towards the east and the fact that it was there. Now we've got to get into our argument how it got back over towards the Nebraska side.

But all these things substantiate, number one, that Professor Ruhe was wrong in his conclusion the river had started to retreat back, because these documents show it moving over, and the tax documents show that in 1900 it was there where our witnesses said it was. We've got to get it back admittedly.

But normally when the river moved, as Dr. Gilliland testified, the main channel would be on the outside of that bend, and Frank Duncan put the main channel right there because of the course the boat took, cutting away that land.

THE COURT: You contend that there's avulsion there?

MR. MOLDENHAUER: We are contending that there's avulsion there between 1900 and 1905.

Now we have P-2389, which is also compiled from the Treasurer's plat book. It shows the bank

of the river over in the northwest corner of Section 13, here's Section 14, Schemmel Island is mostly in 15. It shows various banks all during the years, not dated, again confirming that that's where the bank of the river was.

And we have pages from an ancient Treasurer's plat book, P-171, or, P-166 through P-171, from which those entries were taken.

Again, tremendous search through all kinds of dusty old records to try and find what existed there at one time.

Going back just to a brief mention of the Duncan rebar where Mr. Duncan saw the river in 1900, or 1899, I believe it is, it is right here, right along the Iowa Chute, right south of the Givens' house. There's a picture of Mr. Brown and Mr. Duncan looking up the Iowa Chute. This is just a picture of the railroad tracks and the houses, he talked about two houses which were north of the railroad track. This is looking down the railroad tracks and looking south from the north. The Taylor rebar was put right here along the edge of the chute and the Propps' place was right here.

And here, before we go further, is a '65 snapshot looking down that Iowa Chute in 1965, showing some water still standing there at that time in that area. There is not flowing water there, but part of it, it just indicates the depression that still exists there.

Now to further point out, Your Honor, that the

river was not, that the Iowa Chute is further to the east of the '90 bank line, and Professor Ruhe testified if he was wrong in that regard then his conclusions and other conclusions would be wrong. We would like to put P-212, which is the 1890 overlay on the tri-color map, and we have lined up the railroad tracks here, the state line here, but we'd like to compare the Iowa Chute which on the tri-color has been outlined in red with this 1890 bank and point out as we mentioned in the brief the exact distances, but the 1890 bank intersects the section line of 14 and 23. But the Iowa Chute is over here along that section line between 14 and 23, and intersects the line between 13 and 24, a considerable distance to the east here.

There's a little bit of a distance right about the Propps' buildings where the Iowa Chute is to the east of the 1890 bank, and if you measure it at right angles to the Payne farmstead there's a considerable distance between the Iowa Chute and the 1890 bank.

And we would also point out that there is no feature on the 1890 bank showing the Iowa Chute, so it had to have moved further east as we will be able to see that feature afterwards. And, of course, Ruhe placed this as his easternmost bank and called that the Iowa Chute. The river continued to move east and downstream up until our next map of 1905.

THE COURT: Is there an avulsion here be-

tween here and here?

MR. MOLDENHAUER: No, sir, when -- this river --

THE COURT: Gradually?

MR. MOLDENHAUER: Still moving gradually to the east, because it's cutting away that outside --

THE COURT: No avulsion yet?

MR. MOLDENHAUER: No avulsion yet.

THE COURT: All right.

MR. MOLDENHAUER: Now, Your Honor, we'd like to commence with Exhibit P-234, which is our outline of the group of trees, and place it on the 1895 Pierce Survey, which is P-213 and show Tree No. 230 in Section 33, which is on the Nebraska side.

Our expert Professor Weakly placed that tree's growth commencing in 1895. Iowa's experts placed it as 1903; but in 1895 we show it on this bank.

We also at this time, with reference to the tree, would like to point out Exhibit P-381, which shows the tree standing, and mention that this tree, as was testified, was standing all by itself. The only reason that it was there is that it was along the

property line or a fence line, I'm not sure that there was a fence there, but it's right along the property line, and it's the only one in that vicinity. And Exhibit P-382 shows Mr. Weakly with one of Mr. Brown's assistants who surveyed it with the slab. But this was the only tree standing there, isolated, in that particular place, all the rest of them had been cleared.

And then the next map which we have is the 1905 U.S. Geological Survey, which is the first map which places the river back to the west again. And this map shows the river running back through what is Nebraska Section 32. Here was the '95 right bank line, here is where we contend, any way the tree is lined up properly, but here is where we contend that the river cut back without destroying the tree, and this is what constitutes the physical evidence that there was an avulsion between 1900, where the witnesses placed it over there, and 1905 when it cut back through this bend.

I'd like to point out one further thing, and that is take the 1905 survey P-215 and place it on P-212, which is the 1890 survey.

THE COURT: What evidence do we have of a quick cutting being an avulsion?

MR. MOLDENHAUER: Well, we have the evidence, Your Honor, that the tree was never washed away, and then I finally go into Professor

Gilliland's testimony as to the behavior of the river and the bends and how this is so consistent with what has happened in these areas. I would like to point out here that when the 1905 overlay is placed on the 1890 overlay, that the northern part of the river cut right through where that same opening was, which is apparently this chute over on the Nebraska side. Now it's straightened out a little bit, moved a little bit more to the east, but the opening came right down through that what appears to be a depression.

I'd like to also call the Court's attention at this time to the case of Arkansas versus Tennessee, where they found a classic case of avulsion, and just mention the map which appeared with the Supreme Court opinion showing the Ike Chute, the remarkable similarity between that chute and what we have as the Iowa Chute, and the Court found a classic case of avulsion cut back.

We had Dr. Gilliland's testimony, the geologist, and I'll just refer to these Exhibits P-24 and 23, showing the successive bank lines, and P-24 and 22, again showing these movements of the bank lines, and our P-235A and 236A, which show the bend and show the river running through that bend.

Now Dr. Gilliland used as illustrations for his discussion of the development of this bend certain documents which were taken from basic geologic textbooks. One showed Moss Island, which was

the subject of a Supreme Court opinion, and they show these cutoff channels and they illustrated how the river cuts and how the channel trends towards the outside of the bend and how areas of deposition build up behind it, and this is what we contend was the natural formation in Otoe Bend up until this time.

These illustrations were taken from the laboratory study by the U.S. Waterways Experiment Station of the Mississippi River Commission, and our Corps of Engineers and War Department studies, the discussion about how they build up and establish the point bar, and the river can cut across that point bar, and we think confirmed, and Dr. Gilliland testified, that it was confirmed by all the basic standard geologic principles, and certainly by the study and by the type of thing that the Corps of Engineers relied upon in putting the river in a stabilized channel, because that channel is on the outside of the bends and scours out, and the illustration showed the turbulence on the outside of the bends and the maximum velocity.

And we think that his testimony that there was no other natural way that this river could have come back is what actually happened and is certainly corroborated by our 1895 tree, and is corroborated by these geological principles that he testified to.

We don't think that any of their expert testimony countered that, but we think that Dr. Ruhe's

maps and some of his thesis were shown to be in error, what Dr. Ruhe considered to be a chute in the Missouri River in his study was a borrow area where they built the levee. Professor Gilliland said a study of these soils would not corroborate or confirm anything because they're easily erodible being in the plain, and leveling, agriculture, levees, and dikes, rain and wind could change that contour. We think that all the facts in that area support this thesis that in 18 -- between 1900 and 1905 there was a avulsion cutting off this area and leaving the abandoned channel in the Iowa Chute, which was the last place where the water flowed.

THE COURT: You contend that that would leave the land all in Nebraska?

MR. MOLDENHAUER: Right, that would leave the entire river, Your Honor, in Nebraska from that time on, and no matter what the Corps of Engineers did, the whole bed, both sides, were in Nebraska.

Now we think that we had a second avulsion. I might comment here that there was a Payne-Hall case in Iowa, which Iowa has offered. It's above this area, upstream, and there's really nothing inconsistent with it in the sense that as the river moves downstream and enlarges its bend eastward and downstream it could build up land up

above, it could build up on the other bank, and we don't think that there's anything inconsistent although we weren't parties to that case and none of the people below were parties. That's our first contention as far as the first avulsion which we contend was a natural avulsion as far as that area in the river is concerned.

I might also mention that Drs. Bense and McGinnis place that tree in 1903, the first map we get back is 1905, our testimony really put the river in the Iowa Chute in 1900, but they don't really, the cut could have taken place between 1903 and 1905. At some stage, though, we can go back to, it's not logical to have moved back gradually, no matter how they try to present evidence that this wasn't a meandering stream, it was a meandering stream, and they called Dr. Brush, who cited Leopold, I think that a meander ratio of 01.5 was a meandering stream, and Ruhe found it was 1.7, or, more than 1.5. You can come up with all the theory that you want that it's different down here, but it isn't, it ignores the cutoff above and ignores the cutoff down below, and it ignores all the Corps of Engineers writings and all of the Corps of Engineers theories and principles.

Now going on from that 1905 what we contend is the 1905 avulsion, and we recognize that it's tremendously difficult to establish, but we're trying, but we're forced to try and trace the his-

tory here, and we're trying to establish something that goes back for fifty-five or sixty years. But we think that this evidence is as good as anything that can be found, and is better than much evidence where they found avulsions.

We have several other recognitions by the State of Iowa that this was the Missouri River bank and the abandoned Missouri River bank, and this is in their old documents too, but I should comment there's no map that we found that shows the river right there in the Iowa Chute. The last, 1905 one, shows it back, and the '95 one shows the bank line. But we haven't anywhere found any map that puts it there, the testimony puts it there, and if somebody were looking for a map I would almost defy them to find it.

THE COURT: Why couldn't it be said that it's all over the place and that that was the left bank line?

MR. MOLDENHAUER: Because our testimony is that the boats came up here and around, which would make it the boat channel, because it is completely consistent with the theory, as a river moves and develops and meanders, that it is eroding and cutting on the outside of the bend, and this is where the turbulence is and this is where your best water is, because something has to erode, and the force --

THE COURT: Why can't the river go on the right bank on the Nebraska side and be way over to the left of where it is right now, I mean, ten or twelve miles wide instead of --

MR. MOLDENHAUER: Well, we know, Your Honor, that it isn't west of where the '95 Pierce Survey is because that's our right bank, so we know that it's confined to that specific, and we know that the main channel is cutting like this, because this has been a tremendous cutting, a thousand and one acres up until 1888, or whatever it is, it isn't just a little trickle or chute cutting, but it's the force of the river which is moving over, and this land as we'll show goes on the tax rolls in Nebraska if I'm not mistaken.

Now we have Exhibit P-196, which is a resolution establishing the Knox Drainage District of June 11, 1909. This is in Iowa, it's dated, a resolution of the Board of Supervisors filed December 9, 1908, and subsequently amended. This resolution makes reference to the levee on the east bank of the Missouri River, thence northerly up said levee, and that levee, of course, is the Iowa Chute, now it refers to, at that time, as the levee upon the east bank. Here's the Schemmel area roughly over here.

The testimony of some of the witnesses was, I think it was Mr. Garrison, that the water was still flowing for a time up until 1909 or '10, and

after they did something up here or dozed it in, or something, water was in --or, wait, maybe at some time in that period the water stopped flowing in the Iowa Chute, but there was testimony that there was continually water in there for ten or twelve years after 1900, which is the natural result in this kind of situation. But we contend that's the last place that that water flowed.

And, of course, the testimony was that this chute started at the Missouri River and ended at the Missouri River.

Then we have Exhibit P-1765, which is a photographic reproduction of the Knox Drainage District filed September 2, 1920 in Iowa, showing it running right along the Iowa Chute, and I believe that we will come to a document which describes what that is.

Exhibit P-1707 is an official road map of Fremont County by the State Highway Commission, which shows a pronounced bend. We don't contend that the river was there in 1914, but we contend this is another recognition by another Iowa agency that this bank constitutes the limits of Fremont County, Iowa. And they have sketched in here a little road, it looks like somebody sketched that in, but this also is a Highway Commission map, the significant thing, though, showing that big bend which was recognized. And this is on file in the Fremont County Courthouse.

Exhibit P-1766 is filed with the Auditor of

Fremont County, Missouri Valley Drainage District No. 1, filed February 5, 1923, and the description of the boundaries of that District goes "thence west to the high bank of the Missouri River, and thence north along said high bank," and this is the area right along the Iowa Chute, again going north along the high bank.

Now I think that there's one other significant thing here, and that is that at some times Iowa claims from the high bank to the thread of the stream. This is still recognized as the high bank back then, but no claim by the State of Iowa to any abandoned channel which is west of the Iowa Chute.

We have Exhibit P-198, which is an Engineers Report dated November 14, 1922, recorded in Ditch Record No. 5 in Fremont County. This also runs along the, goes thence west to the high bank of the Missouri River, and thence said, and thence along said high bank, which is right along the Iowa Chute. Mr. Brown didn't draw it because the description just said along a high bank, but then the description picks up here again and goes on around the District. But they are still recognizing that as the high bank and they are recognizing that limitation.

And then we have Exhibit P-1768, and another map which is in the Missouri Valley Drainage District No. 1 drawer in the office of the Fremont County Auditor, a map of Election District No. 3, which again goes along the Iowa Chute. And this

describes it as "in a southeasterly direction following a meander of the abandoned Missouri River bank through the west half of the southwest quarter of Section 12." So they are referring to this as the meander of the abandoned Missouri River bank, which is right along the east side of the Iowa Chute.

THE COURT: What is that date?

MR. MOLDENHAUER: That's dated the 4th day of May, 1931, and the map shows 1931 without a month or day, that's Election District No. 3 of Missouri Valley Drainage District No. 1 of Fremont County, Iowa.

Now the next map that we have of the Schemmel area is 1923, and this is a Corps of Engineers map, so we have that void between 1890 in the Corps records and 1923.

Since this gets us to the, almost a separate section of this, Your Honor, could I have about five minutes?

THE COURT: All right, we'll take ten minutes.

(Short recess at 3:30 o'clock p.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: Your Honor, now as I mentioned we move to the 1923 and subsequent maps --

if I said 1943, Mr. Reporter, I meant 1923.

From this stage until the time the Corps of Engineers commenced their work we contend that it doesn't really make any difference where the river was because Iowa has taken the position there were no avulsions whatsoever in this area.

So what we contend is critical and we're willing to accept that fact that any movements of the river between 1923 and 1934 when the Corps started their work were the typical usual gradual movements washing everything away, and would be considered analogous to movements by accretion.

Now, we first contend though that by now the river is entirely in Nebraska, so it doesn't make any difference; but beyond that, assuming for the purposes of argument and for the purposes of showing how difficult it is to prove what happened in any area, but also showing for the purposes that even if it was the boundary is still in the river, there was an avulsion by the Corps work, it would be proper to go right to '34 when the Corps started to work, at which time when we get to it we'll discuss the testimony that indicates the river was against the east bank.

So these maps which were in between were really from our standpoint are just of background or historical information, but we carry the river through in 1923, which is the first Corps map following '95, we can't deny that there's some bars

out there, but the island out there may encroach a tiny bit on the Nebraska bank here, but in 1923 that area is located in the general Missouri River area.

The thing we might point out, however, is even on this 1923 map there are retards which Woods Brothers Construction Company, according to the Corps reports, placed over here by Hamburg where the river was cutting, right in here, and they show up first, here's the state line and here the retards over on the east side, that's on Exhibit P-220.

Going to 1926, and putting P-233 on P-223, again the river bank area is on both sides and the island is there, or, where the island is located is out in the Missouri River.

There's also a 1926 series of aerial photographs showing the Iowa Chute, showing a wide river at that time.

THE COURT: Give me the month and year that that was taken, that aerial.

MR. MOLDENHAUER: Yes, sir. The map was a revision from airplane photographs of November 21 and December 14, 1926, so it's in the wintertime, and there's ice, there's sand, and if there were ice and blow sand on top of the ice it would be pretty hard to tell what was underneath, it's a difficult thing to maybe tell, in fact --

THE COURT: It looks wide anyway.

MR. MOLDENHAUER: Yes, sir, in fact, on the Nottleman Island area to which the defendant offered a photograph on, the same thing, here's Nottleman Island, the Corps map puts the Missouri River designation there, but it's difficult to read because of the winter conditions taken at the same time. Unless you have the ability to place the thalweg on there when you weren't there for another ten years, but we don't think that we have that ability.

Then we come to the 1930 Corps map, and when Exhibit P-233 is placed on 226 the river here is, the island area is in the river, but it's very close to what is bar area and didn't reproduce very well, over on the Nebraska side.

The northwest part is right close to what is the high bank on the Nebraska side. This is shown a little clearer because it didn't print when Mr. Brown made the overlay, but it's shown a little clearer on the actual map as bar area or accretion area, it shows up, which did not reproduce very well in the overlay. It shows up better on P-225.

And on the map for the bottom half, 1930, it also shows bars and things out there in the river. Wait a minute, I have to backtrack, let me correct myself, Your Honor.

Exhibit P-226 is 1928, the one I just showed

is 1928 instead of 1930.

THE COURT: All right.

MR. MOLDENHAUER: Which takes us to 1930 in Exhibit P-229, which has that accretion area and the map we showed was 1930. There is area which on the map shows up as a part of Nebraska, attached somewhat to the Nebraska bank, which is over on the northwest corner of the island.

Now some of Mr. Weakly's trees appear very, very close to this area right here. In fact, if we take Mr. Weakly's tree map and we place it on the 19-- on the island in the 1930 map, it shows some of his trees, 1115, 30, 40 over close to that Nebraska side, and I'll talk about that later, it shows it very close to this bar area in the river, and very frankly it's just close, very close.

And this, Your Honor, gets us to the time that they started construction of the Corps of Engineers control works in 1934. There weren't any maps immediately prior to '34, such as in '33. Iowa offered a map in '30-'32 there was a lot of controversy about in testimony.

But in 1934, just before the construction started, several of the witnesses testified that the river was over on the east bank. General Loper, who is with the Corps of Engineers and was District Engineer at that time, said it was, when they asked what was out there, said it was what they

called a high bar, had vegetation on it. And he said that the river in that area although one long bend, not one straight reach, as Iowa would imply, but he testified it was a long bend, and he said it trended towards the east side. And General Loper's testimony would indicate that it was over there towards the east side, although he did recognize chutes and subsidiary channels further to the west.

Toot James, the fisherman, said that Schemmel Island was originally west of this channel, and as he knew it and as he learned it, he was down there two or three times a week fishing. He said that before the Corps had started their work, he was down there fishing many times, from Nebraska City, and that's how he made his living.

Many of the witnesses testified that there was something there which they considered as Schemmel Island during this period. Even Iowa's witnesses, Albert Propp and Otto Hinze, did recognize something there. Many of these witnesses placed it out there, but we'd like to point out that in this time there isn't any doubt that the river was moving around a lot, and there wasn't any physical island that looks like Schemmel Island today, but there had to be things there, several of the witnesses testified there was an island there with a cabin on it. What it looked like was a little difficult, but you can't necessarily take a map, or these maps, and place them on top of each other and say, well, this area was a high nucleus which you have on

Nottleman Island, on Nottleman Island you've got a firm circle there.

Schemmel Island is out there in the bed, but we want to point out too that the Nebraska owner owns the bed, and he owns accretion to the bed, so all it has to be is on the Nebraska side in the thalweg of the navigable channel.

Toot James talked about the island out there; Loper said that there were several channels with the major thrust being on the east, which is another expression that he used.

At the time that they started the work in '34 Loper said the principal water was going down the Iowa side, although there were subsidiary channels through the bar. James, the fisherman, said the deepest water was at Hamburg Landing before the Corps of Engineers started their river work and was right against the Iowa bank. He said the whole river in that area was the deepest, that's where the water was, the deep water, and that's where his fishing was.

THE COURT: Is he the fellow that had the first outboard motor?

MR. MOLDENHAUER: I believe that that might be somebody else, but James was the fisherman.

THE COURT: Yes.

MR. MOLDENHAUER: And he was asked if there was a channel on the Iowa side, and he said, "Well, there should be because that's where all the boats went through." And he said even after the Corps started to work the boats went through there because they couldn't get around on the outside of the dikes over on the western side. And he was asked if he observed the progression of the work as they drove the dikes from the west to the east, and he said "I was going down through there two or three times a week."

Glenn Doyle worked for the Corps of Engineers and testified the water was running along the Iowa shore and it was about twelve feet deep because somebody had died there and they fished him out of twelve, or, somebody had drowned there and they fished him out of twelve feet of water.

Fred Walker said he first saw boats on the river in about '33, and when they came up past Hamburg Landing he lived about a half a mile from Hamburg Landing, they'd throw him a tow and they'd pull him up the island, they'd tow him up around the east side of that island, and the main channel was over there on the east side and that's where all these boats went.

And all these witnesses recognized that the Corps moved the river over into Nebraska. So we contend at the start of the river work, which is at that next critical date, that that main channel was right over there on the Iowa side.

Then General Loper testified that that design called for the making of three bends out of that one long bend, so they had to get the river over toward the Iowa side where the Schemmel area is, and the Court asked if those original maps showed the elimination of the east channel, and he said the original maps showed where the east channel was, and where the new channel was to be, and they showed the elimination of that eastern channel, which we contend is along this area.

The witnesses, again, that the plaintiff called worked in the area and were familiar with it, they weren't office people, they were field people. We've got then, of course, the construction of the Otoe Canal. We contend that the movement of the dikes and the construction of the Otoe Canal constituted one effort and one major effort in which they moved that river over into the encroachment upon the Nebraska bank, and that the Otoe Canal was dug on the Nebraska bank.

Now we just point out in the project and index maps which showed the status of the projects as of September 30, 1934. The 1934 one is Exhibit P-410, and it shows the dikes which have been constructed in the dark line, the proposed in the dotted line, but proposed 601.9, the long dike, encroaches over on the Nebraska bank, and they are building revetment over here, which is over on the Nebraska bank. They have already put in these upper dikes.

In '35, Exhibit P-411, the same area shows with the revetment on the Nebraska bank, more water really going through those dikes than around the outside. We -- there was testimony during the trial by Mr. Huber that in the Otoe Bend area more water went through the dikes at times than went around the outside. There was testimony by some of the people there that the boats could not go around the outside, there was, we think that when that water was going through the dikes, the dike system, wherever it was, they were blocking it off and then they waited and all of a sudden the main, the navigable water, ended up outside the dikes, that this constituted an avulsion, because they didn't move the river over gradually.

And then Mr. -- General Loper and Mr. Huber, both recognized, that when they went out in that area they didn't wash away everything, if there was a bar or an island they went around it, if there was a subsidiary chute they could direct the river into they did, to move it over into another area. . They didn't say "We're going to wash everything away," but "we're going to get there the easiest way possible."

The 1936 index map, P-699, also shows some of these encroachments which they were going to make over on the Nebraska bank, and if there's a channel there it's a pretty tiny one.

And at that same time we have a 1936 aerial photograph, P-2641 and P-248, which shows where

that encroachment area is that we saw, that's the same feature opposite 601.9. It looks like there's a hole through that dike, and it looks like there's water running through there, and there's some siltation right above it, and there's certainly more water in that area where that, what we call the hole in the dike is, than there is around the outside, with a substantial bar area there. It's a little bit enlarged here, but it's very close to that east bank.

Then we have '37 aerial photographs by the Corps, P-250 and P-2642 which also show that area over here, around the end of 601.9, there's quite a tree area right here at the end of the trail dike, 601.9A, shows where the structures are on the Iowa side and eventually the canal was cut down through here. I think that was 1937, and General Loper testified as to the difficulties they had of getting the river moved over in that area. It kept wanting to cut back to the Iowa side. There's this, for instance, shows --

THE COURT: Wasn't he the one that, didn't he say the object anyway was to get it away from the cutting on the Iowa side, that was one of the big purposes, along there, somebody said that?

MR. MOLDENHAUER: Yes, now that might have been James.

THE COURT: What cutting there was, was on the Iowa side?

MR. MOLDENHAUER: I don't recall that he was the one who said that.

Then we get to 1938, which was the year that they dug the Otoe Canal. And I want to say first that this is just the problem we ran into, the first time we went to the Corps of Engineers and asked them for documents about the Otoe Canal, they said, everybody we talked to, said they'd never dug a canal down there. And we had witnesses who said they had, and we looked and we looked and we looked, and we finally found some photographs and we finally found some indication that they had, but the head of the Channel Stabilization Section and the gentleman who we thought most familiar with the record said that they didn't ever dig a canal there.

But it just illustrates the problems that we had, and Mr. Brown testified of course that at times he'd go to the Corps and ask for documents and they'd be there, and a month later, or some-time later he'd go to the Corps and the documents wouldn't be there.

In 1938 they dug the canal, and Exhibit P-413, the 1938 project and index map, has a notation of Otoe Bend Canal mile 601.3, and mentions the work order and the removal of 107,263 cubic yards of earth by leased dredge, started May 6, 1938

and completed June 10, 1938. And this Otoe Bend Canal is shown around the outside of dike 601.8 and down to 600.6 on the '38 project and index map. It also shows a clump of trees right at the end of 601.9A which we contend was cut over from the Nebraska side, or land and tree area, also this area also appears on the AP maps which we based our Compact on.

I'd also mention while we have this that down below there's an Upper Hamburg, or Hamburg Bend Canal, also cutting some land off from this long area here which was on the Nebraska side. Some of that land is now on State Line Island, which is the area immediately below Schemmel Island that Iowa is claiming in its planning report. There was another canal down below, the land on the east side would have ended up as part of State Line Island, and that part Iowa is also claiming as having always, I suppose, been in Iowa.

But this shows the location of the canal, and this brings us to the ground level photographs which establish this canal. Now Stewart Smith, the surveyor, testified that when they went to that place where they dredged the canal they took a truck and then they walked to the site where they were staking the canal.

THE COURT: Where do you say the canal is on this exhibit? I notice the big, the river part, says Otoe Bend, then we've got a small --

MR. MOLDENHAUER: The river is in the canal.

THE COURT: Yes.

MR. MOLDENHAUER: And the canal ran from right about the end of 601.9 here a mile towards Hamburg Landing down to about here, and ran right along here.

And Mr. Smith said when they staked it they walked to the site, and there wasn't any water over there, and they walked from the Nebraska bank. So that was a part of the Nebraska bank, and Iowa in interrogatories when asked if a canal was dug, said "Yes," and when asked in what state it was dug, said "Nebraska." So it's hard to dispute that that canal was dug completely in Nebraska.

Now on this tri-color, P-1036, Mr. Smith located the top of the canal as just about at the end of 601.9, and the lower part of the canal right here. Several witnesses testified that the canal was about a mile long which would take it further down to about 601.6A, but this was the area where they dredged the canal.

And, of course, the canal is in the designed channel. This is a '47 map, there's water down through here in '47, so in '47 that doesn't show how it looked like in '38. But at that time the testimony was that they walked out here when they staked it, and the ground level photographs substantiate the

fact that this canal was dug through ground and there was vegetation on both sides.

THE COURT: Where is the northern part of the island, of Schemmel?

MR. MOLDENHAUER: This is the northern part of Schemmel Island, or, this is the '47 picture, the Schemmel area is right through here.

THE COURT: But this canal is just opposite the --

MR. MOLDENHAUER: The canal is through the south half or the southwest part. And cut land, left land on both sides. Now when Mr. Schemmel gets his title he gets title to both sides of the canal, and the evidence will show that the title that he got in Nebraska was recognized on the Nebraska side, the same title, the same indicia of ownership.

Now the ground level photos, which are someplace else in the Corps, you find the maps somewhere, you find your aerial photos somewhere and you find your ground levels somewhere, once you find out whether or not they exist. P-2636 shows the canal in 5-21-38, and it shows land on both sides and the spoil and vegetation. P-2630 and P-2684A, P-2638 show all work on this canal, and they show a substantial area of trees over here on the part that was cut off.

P-2635 is a view upstream looking at a tree area, I think it's upstream of all this spoil on the land, but again they're using a dragline here which is a land operated vehicle.

Then we show mile 601.3, and on Exhibit P-2633, the canal, but what's important is there's substantial vegetation on both sides with a pretty deep ditch through the canal at that time.

P-2628 again shows vegetation on both sides, and it's widening out, it's two months later than the previous picture.

P-2629 shows vegetation on both sides, it shows the dredge there. P-2632, vegetation on both sides. P-2631 shows quite a little clump of trees on the part that was cut off and left on the Iowa side. Now we'll go into our maps and we contend that it was in this area that two of Mr. Weakly's trees were cut down which he indicated started growing in about 1933.

The Iowa experts showed they started growing in 1937, but that was even prior to the Otoe canal, and this picture pretty much substantiates Mr. Weakly's findings because those trees could very well have been five or six years old at the time.

THE COURT: They are taller trees than what the others look like.

MR. MOLDENHAUER: And here on P-2634 we see the canal. This is the area to the left, a

large tree area, which is cut off, it's looking downstream, and that is under any supposed landowner's definition a substantial area.

THE COURT: A lot of air pollution there from those steam operated outfits.

MR. MOLDENHAUER: Now plaintiff also offered some ground level photographs and I call the Court's attention to, these are all in the book P-2637, to photo No. 290, which is dike No. 601.9A.

THE COURT: I remember that.

MR. MOLDENHAUER: That's the one going, this is headed right for this large area of trees, the picture is 7-28-37. This is some of what they cut off, but it shows them headed right straight for what is the Nebraska bank, and it's all trees on both sides.

Then we point out at pictures 300 and 301, which is at the upstream end. Picture 301 is dike 602.7, the Nebraska bank, where there is bank, water and bar which they are driving across and water over on the other side. They are not always pushing water on the outside.

Here again on picture 300 there's bank, water and bar, this is up at the top part, upstream end of Schemmel Island. But illustrative of the fact

that they are not always been washing everything away as they do their work.

And here again we have picture 602.9, which is the dike right here at the top of Schemmel Island, on which we have on picture 318 the bank work, a gap in the dike, and then they are starting to lay their mat out on the bar. So that they are working out there without cutting off that channel or what-have-you as they go across. And here again we've got the same kind of situation in 602.9 on picture 320, we've got the bank, we've got the start of the dikes, we've got, they laid mat out on the bar, and then they've got a driver out beyond that, beyond the bar in the water, so we've got bank, water, bar, mat and the driver, and they are driving piling outside, they didn't drive it, just starting to go all the way.

Again to counter any argument that all the Corps did was push the river gradually, because obviously that isn't the way they worked.

In 1939 we see the river on the project and index map P-414 in the designed channel. There's still a little bar out there in the word "bend" but it's in the channel, quite a channel running around the east side of it still, and clumps of trees, we see a little clump at the bottom of 601.9A, just above where 601.9A takes off from 601.9.

But at this stage from here on the river is pretty well confined to the designed channel, this area down below is all solid, of course, this was

cut off by the Otoe Canal.

We have an aerial photograph, P-255, which shows the Otoe Canal downstream, a large area of trees up here at the end of 601.9, a large area of trees down at the lower end of the canal which were cut through by the canal. It even shows boats here and it shows a hole in this lower dike, and this channel around here and this channel on the east is where we contend is the last place the water flowed after they finished this process of moving the river, and under Arkansas versus Tennessee would, if the river had been the boundary, then have been the boundary.

Another photo D-1108, I think this is a Corps photo of the same year showing the river quite a bit in the canal and still spread out over quite an area, but showing the tree areas at the upper and lower ends which we contend were Nebraska land which were cut off.

And then while we're at it we'll refer back to the alluvial plain maps upon which the Compact was based and point out the same tree area at the lower end of 601.9A, which appears on the Compact map. On the left bank, what is then the left bank of the designed channel, but which we contend was the area which was cut off, and that's this area right here. So the very maps which we used on the Compact showed this area, a part, or portion anyway.

And then we have Exhibit P-231, which is the

AP map, here's this area here, and when we take the overlay of the trees, here's Schemmel Island, there is a channel on the east side, and when we place this overlay in the various trees on the 1940 AP map, tree No. 1220 and 1210 are right in that clump, which was cut off by the canal.

And Mr. Weakly stated that tree No. 1220 began to grow in 1932. Iowa's witness Bensend, in '36, and Iowa's witness McGinnis, in '36 or '37, so even they admit that the vegetation started in that area before the Otoe Canal was dug. All the tree experts recognized that.

On tree No. 1210, which is also in that clump, Weakly said 1932, Bensend '36 and McGinnis '36-37; so again the witnesses recognized that that was cut off by the Otoe Canal or was growing before the river was moved over, and the river when it moved over did not undermine the soil and destroy those trees.

On tree No. 11, which is up here and very close to what we considered the '30 bank on the 1930 map, Weakly said '36, Bensend '42 and McGinnis '42 or '43, but according to Weakly this would have started before the Corps moved the river around that area and moved it over into Nebraska.

1115, Weakly said 1930, Bensend '40 and McGinnis '39 or '40. Tree 1130, I think Weakly said -- I have a discrepancy -- but it was before 1934, Bensend '42 and McGinnis '42 or '43.

Tree 1140, Weakly said '32. Tree 1150 Weakly said '33. On each of those latter ones Bensend and McGinnis had it in the 1940's, '41 or '42.

But we contend that all of this evidence shows they didn't wash everything away as they moved that river over. And then, of course, the last place that the water flowed was around the east side.

Carrying the island on up then to its formation, there's a 19 -- complete formation how it looks today, there's a Exhibit P-256, which is a 1960 aerial photograph, which points up the large land area and the area that was cleared by the Schemmels by 1960, which was before Iowa filed any action against it.

It shows where the borrow area was when they dug, when they put up the levee, and you can see the haul roads which Mr. Barrett testified to. The Schemmel buildings which are on the east side of the levee up in the corner which incidentally are claimed by the same indicia of ownership as Schemmels' claim on everything else. And an area over here near the bank where the trees were taken. What it shows is a great deal of vegetation destroyed, the trees which were cut down were the only two or three trees standing over along the bank, there are practically no more trees over there in that location, the ones that we think conclusively proved the Otoe Canal cut off Nebraska land.

The area north of that is area that the Givens claim, the riparian owners north and east of the Schemmels, and we point out that some of this area is as much a character as river bed as Schemmel's land is, if Schemmel land is. But the State of Iowa has never made any claim to any of that.

Of course, the Propp farm is in the Iowa Chute, and is over here and obviously there's been river movement just from the aerial photograph.

THE COURT: Does Givens claim any of this area?

MR. MOLDENHAUER: This is the area that Givens is claiming and Iowa has never made any claim to. I think there was testimony about that trickle, I think that trickle was, perhaps is this blue line here. Of course, Iowa has never claimed anything as against Propp.

And then we have a '66 photo, and as I recall, this is Exhibit P-2647, this is the most recent photo to date that we have, and as I recall this red area was in alfalfa. This shows there is a road, here are the Schemmel buildings, there's a road out to the island, there's still remnants of the channel over there on the east side of the last place water flowed. There's a building on the island, and it's practically all cleared and there's a road across the center.

Now backtracking a little bit to the exercises of jurisdiction by Nebraska over this land in addition to what we have referred to, we find back in 1895, the Clerk of the Otoe County who was in charge of the records, added accretions to the tax list, and that is the original Frazier's Island area, and the area which goes over just about to the bank of the Pierce Survey, this top part will go on next year.

We also should point out that Frazier's Island, original Frazier's Island, originally was divided into all little tiny kinds of timber lots. So if you have to go back and want to try and trace the title to that area, it's a tremendous job because those are little 10 acre small tracts, and if you have to trace it, it is a terrific job.

Now originally the river was here, this was the Nebraska bank, this was in Nebraska, but in 1895 it went on the tax rolls pursuant to the Pierce Survey.

Then in 1905 we have a decree in the District Court of Otoe County, Nebraska, our Court of general jurisdiction, captioned State of Nebraska, Plaintiff, versus the several parcels of land hereinafter described, which refers to some of the area which is in that Pierce Survey.

In 1907 -- that was Exhibit P-138 -- the land added to the Otoe County tax rolls was P-133 -- in 1907 in the Register of Deeds office of Otoe County there's a Treasurer's deed from F.M. Cook,

County Treasurer, to H. H. Hanks, filed for record December 14, 1908, which recites that at a public sale in the state tax suit for the year 1905 held in Otoe County on the 8th and 13th days of November, the following described real estate was sold, and it includes accretions in 32 and it includes area which goes over to the Pierce Survey and the lower half about of Schemmel Island. That Treasurer's deed went to H. H. Hanks. So again 1905 after the USGS map would have shown the river back over in here, there's a sale to this area that was put on in 1895.

There's a warranty deed then from Howard Huston Henks to George Ward, filed for record October 29, 1918, and then a deed from George -- that's P-1529 -- and then a deed from George Ward, a widower, to Dan Hill and Henry Schemmel, Exhibit P-192 which was filed in Otoe County on the 29th of January 1938, and it was filed in Iowa on the 22nd of August, 1939, again record notice on both sides of the river, and Mr. Schemmel testified he filed it over there so that there would be record notice of his claim to that area.

And that is the deed describing the land as in Otoe County.

Exhibit P-192 or 192A, I think, is a copy of that deed -- yes, it's the same deed, it covers Section 29 of Township 8. This is the north part of 29, here's Nebraska 30, 29 would be on this side.

Then there is a quit claim deed January 11,

1938 between George Ward and Dan Hill and Henry Schemmel land in Section 32, which is this major part of the island, and that was recorded also in the Fremont County Recorder's office on the 22nd of August, 1939, describes the land, of course, as Nebraska land.

Then there's also a warranty deed from Almond and Cynthia Engelman to Dan Hill and Henry Schemmel, filed for record September 13, 1939, to the Missouri River island and accretions of land thereto within and including the south half of 32 and other land, which includes the south part of Schemmel Island, including part which was cut off by that Otoe Canal.

Now the Schemmels got land on the Nebraska side and on the Iowa side, and some of the Court decrees will show there that this title was good, but it comes from the same indicia of ownership for the whole piece.

Then in 1939 an action was filed in the District Court of Otoe County, Nebraska, called Charles G. Zimmerer versus Dan Hill, Mildred Hill, his wife, Henry Schemmel, Lucille Schemmel, his wife, and a lot of other people to quiet title to land on the Nebraska side of the river. And the defendants Henry Schemmel and Dan Hill answered and cross-petitioned, and they alleged they were owners of certain land on the island and the Court quieted title, finding that, well, quieted title to Hill and Schemmel and also finding that they had the right.

of-way of ingress and egress to certain portions of the area. This decree, I think, was dated, was filed May 28, 1941, and is Exhibit P-189. The area shown is the area covering, including a large part of Section 32.

THE COURT: Is that a friendly suit or is that an adverse suit?

MR. MOLDENHAUER: This one looks quite adverse, although whether it went to trial I'm not sure, it was set for hearing and it was heard on May 28, 1941, and evidently they reached a stipulation, but --

THE COURT: You say that was a good title in Nebraska, it should be recognized?

MR. MOLDENHAUER: That was a good title, and not only should be recognized in Nebraska, but the fact that the later Nebraska Courts recognized it is an indication that it was good in Nebraska. Iowa offered a decree, I think we'll get to it, where they recognized the Schemmel hunting and fishing rights in a quiet title action in the 1960's, '67 or '68, which goes back to this, and some of the Schemmel conveyances.

And then there was an action Martha Higgins versus Dan Hill, Mildred Hill, his wife, Henry Schemmel and Lucille Schemmel, and others, in

Nebraska, filed July 12, 1939, to quiet title to some of this property. And the Court entered a decree on the 28th of May, 1941 quieting title to Hill and Schemmel, and this just covers really the southern part of the traverse, of the Iowa traverse, and land on the Nebraska side. There were two quiet title actions involving Hill and Schemmel in which their title was recognized.

Then Hill died, then there was a decree in the Hill estate which we put in evidence, and Mr. Schemmel testified that he got deeds from the heirs of Hill and he also got deeds from some of the other Nebraska riparian owners which are not in evidence.

In 1943, on May 29th, Dan Hill and Henry Schemmel and their wives gave a deed to Charles Tyson and David Tyson to some of this land which they had acquired in 1938.

Then we get to the Otoe County Court decrees offered by Iowa, D-708, in which, in the case in the District Court of Otoe County Forest Binder versus Carl H. Schimke and Clorine Schimke, in which the decree was filed on January 15, 1965. And David Tyson is mentioned in this case; and the Court further ordered, on January 15, 1965, that the right and license to hunt and fish on Section 32, Township 8 North, Range 15, east of the 6th P. M., Otoe County, reserved by defendant Schemmel in a deed referred to, described in the findings, is declared, determined and established

to be valid and subsisting in defendants Henry D. Schemmel, Douglas Schemmel and Robert Schemmel, their families and their guests accompanying them. So they quieted title in Binder against all defendants subject to Schemmel's right to hunt and fish, so they are still recognizing rights which the Schemmels reserved when they conveyed that land on the Nebraska side, so we think this pretty well establishes that they had a title good in Nebraska because it has been recognized in Nebraska.

We have Exhibit P-2224, which Mr. Brown prepared, showing the area in the northeast part of Iowa Section 15 which the Schemmels claim and the Schemmels' buildings are right in this corner, but which is east of the Iowa traverse, and the Schemmels claimed that land east of the traverse, they claimed the land which was cut off by the canal but left on the Nebraska side west of the traverse. They've got no attack on their title here and no attack on their title here, and it just doesn't seem -- it seems incongruous that somebody is going to take the middle right out of their title. But that's the result that would happen if Iowa is correct in what it's doing.

We also have Exhibit P-188, which is Yearsley versus Gipple a quiet title action which is on the Nebraska riparian side and just really gets close to where the island was, but again the Corps moved that river over into this area of the corner

section of 31. That's in 1920 -- oh, I'm sorry, it goes further and it includes other area which is presently located where the island is and includes part of the area that was cut off. That's 1920.

Again there are other areas described, but the one just referred to overlaps considerably on the island.

Then there is a quiet title Joy A. Larson versus William Ivers, also in our District Court. The decree is dated November 25, 1922, it's Exhibit P-187, which quieted title to what was the original Frazier Island description and accretions which overlap on the northwest part of what was the Schemmel Island.

In 1939 Mr. Schemmel sent Exhibit P-163 to the Register of Deeds of Fremont County, in which he notified them that this land was on the Iowa side of the river, and it was filed on the 22nd of August, 1939. He said "during the Government river improvement program of 1933 to 1939 the Missouri River has been changed by levee and dikes so that this land will be on the Iowa side of the river," but notice to Iowa officials of what his contentions are. That notice was on record when the Compact was entered into and when Iowa agreed to recognize Nebraska titles.

Then we have a deed from, another deed from George Ward to Dan Hill and Henry Schemmel in 1938, but this certificate indicates that the deed was recorded in Iowa on the 22nd of August, 1939,

Exhibit P-193; so Mr. Schemmel was doing what he could to put on record over in Iowa his Nebraska claim.

The decree Zimmerer versus Hill quiet title, Exhibit P-194, was filed in Iowa on the 25th of August, 1941, so at the time the Compact was entered into Mr. Schemmel's quiet title decree in Nebraska had been of record for two years.

Mr. Schemmel in 1941 sent a letter to the County Recorder of Fremont County, Iowa, which he said was returned, and was then filed for record on March 1, 1956, in which he mentioned the land had been assessed in Otoe County since 1895 and due to the changing of the Missouri River by the construction of pile dikes, dredging and revetment works by the U.S. Government Corps of Engineers a large part of the island will be on the Iowa side of the river. Again notifying them that some of that land had been moved over to the Iowa side.

We have the tax records, Your Honor, a few tax sale deeds, and we'll be through with Schemmel, do you want to conclude that this evening?

THE COURT: All right.

MR. MOLDENHAUER: Now, Your Honor, going to the tax records of Otoe County in this tax book, Mr. Brown has placed on here the lands placed on the tax rolls. 1895 shows the original

island and a major portion of the Schemmel area over to the Pierce Survey. The rest of it comes on in 1896, and he's listed the parties, and all this study meant going into all these tax books and researching every single piece of land, and each year shows a different date, so it's a tremendous amount of effort. There are a few discrepancies, going through the books, but there was some testimony, I think, that, Section 29 ends up as Section 19, another section, but they have added the acres on so it appears that this land was taxed in Nebraska during all this period, and we contend that almost the whole area was on the tax rolls from '95 up to the present time, up until '43.

THE COURT: There has been no significant break in that assessment for taxation during that period, is there?

MR. MOLDENHAUER: There was a section which was misdescribed, and I think the testimony indicated that land either in 19 was added on to 29, or vice versa, because a number of acres in that other section were way over what was in the section, or the quarter section, and so it appeared that there was a . . . 29 we find shows up in 19, and I think Mr. Brown testified to that effect.

But this area all in 32 is almost unbroken, and here it's back on again, so it bobbed back and forth, but the fact is as we attempted to show when

we went through those first maps that the status of these areas along the river has been very, has been somewhat difficult to establish because of the many movements. The fact is still that it was there -- here's where 29, in this area I think the testimony was it also was up in 19.

There's no land in 33, but those acres which are in here are added onto 32, so the whole thing comes out to more than the normal 640 acres. Here again 29 would be up in 32, you see here 29 is shown as 19, and here he's marked it what he's indicated as shown as 19. But that carries the history of the Nebraska taxation up until 1943 from 1895.

In Iowa, Your Honor, Mr. Schemmel testified that in 19 -- about, I think it was '47, but it might have been '49, the Auditor -- no, it must have been '47, the Treasurer and the Auditor of the Iowa counties, Mr. Van Syoc and Mr. Cowden came over to Otoe County to look into their real estate records because they said that there had been a case in Mills County which required them to put some land on the tax rolls, and they wondered where it was and he said he was in the Treasurer's office and he referred them over to the Clerk. And then in 1949 that land went on the tax rolls.

Now Mr. Schemmel testified that he -- in Iowa -- he testified that he let some of it go for taxes in, I believe in '50, and bought it back because they had different descriptions, had Iowa

descriptions, and his land was originally Nebraska descriptions, and he was a little upset about it and he wanted to get it clarified that this was the area he was claiming. Then the land was sold for taxes and the Treasurer on the 2nd of August, 1955 issued a tax deed in Fremont County testifying that the lands were situated in Fremont County and were subject to taxation for the year 1950, whereas the taxes assessed remained due and unpaid, and the County Treasurer on the 3rd of December of 1951 by virtue of the authority in him vested by law at regular sale sold it at public sale. So that there are tax deeds to various of these areas in 1955, and we got these Exhibits P-1553, P-185, P-186.

Now here again that sale was pursuant to Iowa statutory procedure, and the Iowa statutes cover the effect of tax deeds pretty thoroughly. And one of the, I know that Iowa may attack it by saying it's an illegal tax, but the fact is that the Iowa statutes say that a tax deed carries the title, carries "all the estate of the former owner and the land conveyed subject to all restrictive covenants resulting from prior conveyances in the chain of title of the former owner and all the right, title, interest and claim of the state and county thereto."

So the Treasurer has the authority under the law when they give a tax deed to convey the title of the State of Iowa. Now we don't want to argue Iowa tax law and that's proper, but the fact is that

if they contend that they are not bound by any of these acts, a tax deed will carry the title of the state and county, and the Treasurer is doing all this pursuant to the state law.

And then, of course, the Schemmels testified that they paid taxes up until the present time and rather than offer all those tax records we just offered the tax receipts for '68 paid in '69, Exhibit P-2643, and as I recall the taxes for that year were just under twelve hundred dollars, \$1,180. I haven't added them up.

But that completes the factual history of the Schemmel area, and I think in the morning we can go into a little bit of the ownership incidence of the Schemmels, then take the areas in the rest of the river, and we should be through shortly after noon.

THE COURT: All right, what time do you want to start?

MR. MOLDENHAUER: 9:30 would be fine.

THE COURT: All right, we'll start at 9:30, I'm here at your service, I live across the street now.

(Thereupon, at 4:40 o'clock p.m., the hearing in the above entitled matter was recessed until 9:30 o'clock a.m. the following Monday, Wednesday,

September 30, 1970.)

(Whereupon, at 9:30 o'clock a.m., Wednesday, September 30, 1970, the hearing in the above entitled cause was resumed, and the following proceedings were had and done, to-wit:)

9:30 O'CLOCK A.M.,
WEDNESDAY
SEPTEMBER 30, 1970

* * *

THE COURT: Good morning, gentlemen. Well, I guess we're ready when you're ready.

MR. MOLDENHAUER: May it please the Court, we have a few more comments with regard to the Schemmel area, and then we'll be in a position to move on to other areas.

We make the comment that there was testimony by Winifred Rhoades about the taxation of the land, how Section 15, which is the major portion of the island, was off the tax rolls in 1881-1887, and from 1883 to 1933 there were no books, and then she testified that a little piece up in 15 went on between '43 and '48, and then '49 and '50 and thereafter, it was on the tax rolls. It first went on in unnamed parties and then to the Schemmels. So they have been paying taxes on the island, I think

it can be said since 1949 and it was not taxed in Iowa before the Compact.

Iowa did offer some tax records for 1934, '5 and '6 and '43, showing that some of the land between the Iowa Chute and Schemmel Island went on the tax rolls, so there was a period which it was evidently on the tax rolls of both states, but all the time up to '43, of course, Nebraska continued to have the area over to the Pierce Survey on its tax rolls.

And I just point out in that connection that Mr. Bartleman testified in connection with Exhibits P-1200A, 1201A, 1202A and 1203A that there were some areas shown on the tax rolls of 29 acre tracts which he put on his maps as showing 80 acres, and a 50 acre tract that he put on as 160 acres, and a 19.3 acre tract he put on his maps as 40 acres, so there's quite a bit of discrepancy between what they actually show and what Bartleman's maps show as to Iowa's tax maps.

But again it was generally recognized when the Compact was entered into that there were areas that were taxed in both states. This was at least as to this part over here evidently the case at about the time of the Compact.

Moving just briefly to the Schemmel occupancy and possession, in 1938 or '39 the Schemmels went over on the land, and Mr. Schemmel testified that they put No Trespassing signs up in '39 and planted Reed canary grass. Bob Schemmel

testified that there were No Trespassing signs in the '40's. Cecil McAlexander who did a lot of dozing testified that there were No Trespassing signs in the '50's. Doug Schemmel testified that the land has been in the farm program since 1957 with one small exception. They had leased it over the years. In 1947 they brought Paul Womack to clear over to see if he could clear the island, but he said this chute was too much of a channel and he wasn't about to cross that chute.

But he did, which is what is shown as the chute here, what we contend was the remnants of the main channel, but he did help clear the island later.

Now Mr. Schemmel testified that they had a garden on the island in around '53 or '54, and they got their first crop in about 1956. They first cleared some land over on the east, and there were some Corps of Engineers photographs, Exhibits P-2639, and P-2640, looking across at the island showing where they had girdled the trees on that west side by 1957, but what it shows is a great deal of vegetation still there on the island, a lot of dead trees and the tremendous amount of work that it takes to clear that area as well as possibly destroying evidence which might have, physical evidence, which might have helped them later in a case like this.

So there isn't any question but what the Schemmels were there, exercising all the owner-

ship rights over the area and using the area as it could best be used.

I might mention in that connection that there's a statement in Iowa's brief about the Krimlofsky case, and that was the only case that they could find in Nebraska which said that use of land for hunting and fishing by people could constitute evidence of adverse possession. But under our adverse possession law all you need is adverse possession and all you have to do is utilize the land for the best purposes for which it is then suited. And if at a certain time it is not suitable for agriculture, if you utilize it for what it's suited for, that can be evidence of adverse possession and although the Schemmels we claim had title, they were there and putting in Reed canary grass, from the early days they had signs up all through the period, and they were excluding trespassers and they were exercising exclusive control over the area. And, of course, this has continued up until the present time.

Just briefly then, going back into the character of the witnesses which the plaintiff called in this area. Lewis Martin was the gentleman who was the first to have the motor boat. He had lived on Frazier Island, which is right up in here, since about 1923, and he's lived there all his life, over forty years. He also worked on the dredge on the canal, and testified about that canal being about a mile long.

Toot James, the fisherman, was also an oiler on a dragline in this canal. Here were two people that we e down there all the time. Glen Doyle, who talked about laying the mats during 1934 across from Yearsley land which is the Schemmel Island area, was there working on the river all during 1934, and Fred Walker, who lived near Hamburg Landing, also was familiar with the river and had been towed up this side with the boats.

Now all these people and Stew Smith, who was a surveyor, testified that he walked to the place where they laid out the canal -- so all these people we feel were very familiar with the area and they lived there and they knew about it. They all put the major water and the main channel over on the east side before that work started.

I'd like to straighten out a little bit General Loper's statements, because I believe he said on cross examination when he was shown the 1931 map by the defendant State of Iowa that on that map he first said it looked like the river was trending to the west. Then he corrected it and said he used the wrong word, he said the better expression as shown on the '31 map was that the river was actually located closer to the Nebraska bank than the east bank. But he said that map didn't show the condition in '34, and he was very careful to state that that map didn't show anything that he had personal familiarity with.

Then he said before the work started when he

first got there that the principal water was going down the Iowa side, and he said below the place where the two channels came together, below Frazier Island; and that other channel came right around here like this.

He said there were several channels in there with the major thrust of these being to the east, and he said that there was a, to the west of that major thrust there was a high bar which had vegetation and it was quite a substantial piece of land in there.

So we think all of this testimony put the main channel over here. We might mention that Mr. James also testified that he knew Joe Crumes who he had seen several times take boats up this east side, and Crumes had died a week before the trial, just illustrative of how your evidence and your boat people can pass away and disappear.

So we think all of this shows that even if the river had been the boundary during the period during which the Corps of Engineers were working, the Corps moved it by an avulsion into the designed channel, the last place that water flowed is shown by this '47 map over here. There's testimony as to subsidiary channels to the island, and everything else, this is the place, the last place that it flowed, and where, if the river was the actual boundary and we had to prove where it was before the Compact, we would contend that it was in that eastern channel shown on the '47 tri-color.

There was also some testimony, of course, by John Olson, an appraiser, that as of '67 in his opinion Nottleman Island's value was \$607,300, and Schemmel area \$180,500, so there's a substantial piece of valuable land involved in both these cases.

That concludes the comments which we make right now as to these two areas, we may get back to these in general argument as to what Iowa's general conduct is, but for now we want to go to other areas in the river where Iowa has conducted themselves in what we consider is to be a violation of the Compact, and also where they have conducted themselves in what we consider to be inconsistent methods and what we think these other areas also show is that under their present interpretation or construction of the Compact there's a completely unjust and inequitable result which we couldn't have contracted for.

We didn't contract with regard to one area or two areas, that Compact covered the entire main channel, the entire channel of the Missouri River where it constituted a boundary between the two states. And we don't think it's fair to just, now go back, as Iowa has done and pick out certain areas, and say, well, the Compact doesn't apply here, and it doesn't apply here, but it may have applied up there.

The first area we'd like to discuss is mentioned in the Planning Report as Winnebago Bend, found

at page 18 of the Planning Report.

And this is an area, the Flower Island area, where the Planning Report says the area is now a part of Iowa and will lie entirely on the east side of the new channel. We point out that every reference in the Planning Report always mentions that the land is now in Iowa, which we think is very significant because the lands that they tried to quiet title to are all the lands that are in Iowa, the fact that it's in Iowa because of the boundary is a significant thing. And, of course, the suggestion is made that they quiet title to the 1,050 acres as shown above, and if title is quieted they can continue some of their other action.

Also on the map they say, on the right-hand page 19, location of Winnebago Bend in relation to newly designed channel. This is the Flowers Island area where Iowa in their brief apparently recognized avulsion, and we'd like to show the Court how they are claiming land which was in this previous avulsion and which was ceded land.

We have in evidence, Your Honor, a record of the Flowers Island case, Exhibit P-2661, which was decided by the Eighth Circuit Court of Appeals in 1939, I believe, and this is just from memory, that the case was originally filed by the United States Government in about 1934, but it was filed by the United States of America trustee and guardian for the Winnebago Tribe of Indians, plaintiff, versus Wilbur Flower, et al, defendants, and it

alleged that there was land belonging to the tribe which received its grant as Nebraska land which was on the Iowa side of the river.

This was a very heavily contested case, and in the case the State of Iowa came in and intervened, and in their petition for intervention they, in the District Court of the United States in and for the District of Nebraska, Attorney General John H. Mitchell was the Attorney General, and they alleged that all of this land was in the State of Iowa and also said in paragraph 6 that in order to protect its rights as a sovereign in and over territory belonging to it and to save and protect its rights to assess and collect taxes on said lands as aforesaid, the intervenor desires to intervene and adopt certain paragraphs of the defendant Flower's answers.

One of those paragraphs which was adopted in the answer of defendants Wilbur Flower and the State Bank of Winnebago and Ernest J. Smith, was paragraph 11, and in paragraph 11 it was alleged, answering paragraph 10 of the bill of complaint, "these answering defendants admit that the Missouri River has by avulsion abandoned its channel and formed a new channel at numerous places throughout its course, which is a common characteristic of said river, that these answering defendants specifically deny at the time alleged in paragraph of said bill the river by avulsion had formed a channel which now constituted the western boundary

of the land in controversy. "

I would like to point out that back at this time, which was about 1937, the Iowa Attorney General's office admitted that there were numerous avulsions along the Missouri River, which is a little bit, I think, in their brief in this case, that they denied that there were many avulsions or several avulsions or something, but here again it's a recognition of the general characteristics of the river.

Then the Court filed a memorandum concerning this intervention of the State of Iowa, and in it they indicated that the record showed that there had been an avulsion here, but the State of Iowa didn't have any interest because the sovereignty of Iowa may extend to the Nebraska boundary and any boundary conflict can only be determined in the Supreme Court. But the Court went on and said, "As I view the testimony there is proof that part of the river bed was abandoned by the river and it has been shown that at least some part thereof belongs to the State of Iowa and the State would be entitled to contest the apportionment of such abandoned river bed. Accordingly, unless the State elects to amend within twenty days its intervention will stand dismissed. "

The Court first put the State of Iowa on notice that there had been an avulsion here and there might be abandoned river bed. Well then, the State of Iowa came in on October 29th of '37 and filed a petition to withdraw, signed by their At-

torney General and their Assistant Attorney General. And the Court on October 9th entered its special findings of fact and conclusions of law.

Now the Court in the Flowers Island case found that there had been an avulsion and that Iowa did not appear and did not make any claim to any abandoned river bed -- in this Flowers Island case the Court found that there were two avulsions and in the decree of the Eighth Circuit which affirmed the lower Court, I point out paragraph 15, I want to show the Court where this was, here is Exhibit P-2661A, in which Mr. Brown outlined the area which that decree, in black, awarded to the Indian tribe as their Nebraska land, this is the area in black.

Now what the Court -- this area here is the area that the State of Iowa is claiming -- what the Court did was it said that sometime between 1870 and 1879 an avulsion changed the channel from its location on the northerly boundary of fractional Sections 31 and 32, and thereafter the river ran in almost a straight line from east to west for about two miles from the east line of Section 4, which is right here -- across Sections 4, 5 and 6, so the river was running this way, and what happened was an avulsion, and by this avulsion the boundary between Iowa and Nebraska south of the tribe's fractional township in the southern boundary of the tribal lands in such fractional township were left unchanged along the center line of the river channel

as it was before the avulsion.

So it says that there was an avulsion here leaving this, where the river left this, and left their boundary here, and at the time of said avulsion some original Iowa land was left intact in said fractional Sections 31 and 32 in Woodbury County.

So what the Court says as far as the first avulsion is concerned is that this land here was cut over on the Nebraska side of the river, and the Court in finding that this was the southern boundary of the Indian lands, this area along the, along that quarter, or eighth section line there along 32 and 33, was the boundary of the Indian lands because of that 1879 avulsion.

Then the Court later found that there was an avulsion, the river still flowed around this way, and there was an avulsion which cut this area off and left this part as Nebraska land. The reason this is the line the Court found is because this was along the avulsion in 1870 to 1879.

Am I clear?

THE COURT: Quite clear.

MR. MOLDENHAUER: But that is to remove any confusion as to that early avulsion and point out something else, that there would be if there had been an avulsion here, abandoned river bed right along this line on the Iowa side of the line.

THE COURT: Do you agree with that decision?

MR. MOLDENHAUER: With this decision?

THE COURT: The Flower case, it practically decided it in other words, considering the present situation?

MR. MOLDENHAUER: Our evidence in this case, which was by Mr. Leo Peterson, testified, and who did the survey for the Government, that he could find no evidence of this earlier avulsion although he heard people discuss it. .

I find it difficult to, in my own mind, justify the lines which appear here, but --

THE COURT: It's hard to read the decision, to come to that conclusion.

MR. MOLDENHAUER: Yes, I have to say very frankly that I believe that the Court entered sort of a compromise decision in this case. But the fact is that when the decision was entered there was a public recognition at least that there was abandoned channel in here and that there was abandoned channel around this side, because there had been an avulsion cutting back original Nebraska land.

Now in support of this, of course, our evidence

by Mr. Peterson shows, and I have here Exhibit 9 Peterson, the original Nebraska land which was cut off, and this was the original Nebraska land from the Beaman Survey, which he has outlined in red, we have this full crescent here, but he found circled in green two bearing trees which were part of the original Nebraska survey by surveyor Beaman in 1875. So he found the original land, and, of course, he had some very interesting affidavits which are in the record about how some people were supposedly on this land when it cut off. Those affidavits, I think said about 1912, the Court found the avulsion was about 1916 or sometime.

But, again, the fact that this original tree was there indicates that that land didn't wash away. And he testified that along this area where the red was, there was a bank and this ground is really the high ground, so the river might have gotten to here but didn't wash away that crescent. And, of course, the Court recognized this in the Flowers Island case and drew the Indians' line as outlined by Mr. Brown.

THE COURT: Any private owners involved in this case?

MR. MOLDENHAUER: Now the mandate from the Circuit Court, I believe, was amended slightly to except a -- and piece in this area, I think it was

80 acres, because the Indians didn't claim it, and I think they allege that they didn't claim it, but that was still, had been Indian land and was a part of the, the Indians I believe had disposed of it, and weren't claiming title to it, but it was still in that part that was cut off from Nebraska, or that was a part of what was the Nebraska original land plus accretions as the river moved over here. There is still a pronounced chute, as Mr. Peterson found, an outside chute around the island.

THE COURT: What is on that now, what is on this area now?

MR. MOLDENHAUER: Well, Mr. Brown testified that, well, we have an aerial photograph, he testified that he found some of those original caps that Mr. Peterson had placed and some of those caps were, I think, in a farmyard. On some of them they were covered with sand, and I think we'll get to an aerial photograph here which shows a little bit of the character of it.

What really happened, you see, Your Honor, is that after they dug a canal in 1939, '38 or '39, the river got out after the Compact and went back in here, and there's a lake here, but not again washing away what was the original Nebraska land.

And Iowa is claiming everything that has been outlined in green on this map and identified as Tract No. 5A as Iowa land because it's the bed of

the channel, but the fact is when this river moved back out it didn't ever wash away Nebraska land that it was to the east of it.

THE COURT: Who else claimed that land besides Iowa?

MR. MOLDENHAUER: The Indians, as I understand it, the Winnebago Indian tribe, claims it.

And our contention, of course, is that once this avulsion was established the whole -- and we're going to show another canal -- the whole Missouri River is in Nebraska before the Compact, so this whole area was ceded clear over to here. Now it doesn't make any difference that Mr. Peterson's Survey was made in about 1927 and the area was surveyed in, or, the case came down in 1938 or '39, because even at that time the river hadn't ever washed away what the Court found was original Nebraska land, it never got back over here.

And Mr. Brown testified that he went up during trial and he identified on Exhibit P-2655 the caps which, or many of the caps, which Mr. Peterson had set in his 1927 survey; and he had pictures of the caps and he testified that the caps were facing south as they were when he worked for the General Land office back in between 1930 and '35.

THE COURT: What puzzles me on this particular tract is, for instance, in speaking of the other two islands, we talked of what was ceded, and then we have been talking about where it was formed, and we are talking about these recognition by the citizens, state government, both sides of the river, and so on; and that Nebraska says "Well, Iowa wasn't living up to the terms of the Compact, Sections 3 and 4, see."

MR. MOLDENHAUER: Yes, sir.

THE COURT: These people were being deprived, that shows, that tends to prove your case. Iowa claims the land against these people who have a paper title, and all of this other evidence in their favor.

MR. MOLDENHAUER: Yes, sir.

THE COURT: We don't have that here, do we?

MR. MOLDENHAUER: What we have here, Your Honor --

THE COURT: In other words you're not fighting anybody else's battle here?

MR. MOLDENHAUER: No, and we're not

there. What we have here is ceded land.

THE COURT: Actual ceded land.

MR. MOLDENHAUER: Land which was established by the '38 Court case, to which Iowa was a party until it withdrew, as being Nebraska land left over on the Iowa side of the river, so this is ceded.

THE COURT: And you're just saying now --

MR. MOLDENHAUER: And we're saying now the river is entirely in Nebraska at that area, and when the river moves around after that, particularly if it never washes away the Nebraska land to the east, that whole bed is in a riparian owner, we don't care whether it's in the Indians or somebody else. And so Iowa -- it's an illustration --

THE COURT: It's just an unjust claim by Iowa?

MR. MOLDENHAUER: That's right, it's an illustration that when we entered into the Compact with the river in the channel, and let me now show the Court a picture, Exhibit P-1878, which is a 1939 photograph of Winnebago Bend, where you can still see the outline of that crescent-shaped area which never washed away, and the canal which

the Corps of Engineers dug, where Mr. Brown wrote in red "canal", moving the river further into Nebraska. So there's another avulsion moving it over here into what is the designed channel.

And then, of course, when the states -- this shows up on the Project and Index map, and I think it may even show up on the AP map.

THE COURT: You know, I had some thought, I think people sometimes think that judges sit in a vacuum and don't think about anything, kind of accuse judges of that from time to time, they accuse them of being, having a lack of intellect, and that they don't use what they do have, you see.

Now, so it occurred to me that this case really divides itself into two parts, we're talking about below the river and below Omaha, and then we're talking about above Omaha.

Supposing the case was presented to the Supreme Court in a report involving what we talked about yesterday and up until today, see; and the Court decided in your favor, Nebraska's favor, Nebraska prevails. Would there be any serious dispute about these other people, about these other parties up north?

You know I'm trying to make it easier for the Court, and maybe myself, because, just put this in mind, you see, they lay down the rule, the trouble is here we don't know what the rules are here, with finality, we haven't had an inter-

pretation of the Compact.

MR. MOLDENHAUER: That's correct.

THE COURT: Everybody has their own idea about it, but if we had an interpretation of the Compact as to what it means, and the Court found, as you contend, both on the facts and on the recognition testimony and all that sort of thing that Iowa has got to back away from those two islands, that the law is that the Compact superseded Iowa's common law, the river bed law, and all that sort of thing. And in most cases that I have seen Special Master's Report, he says to the Court, the Special Master usually does, "I recommend that there be a survey," you see, we've got the law now from the report, and the Court approves it, and they send somebody out and it's usually supervised by the Special Master, and they make the survey, that's what most cases are, Judge Johnson's case is that way, I think Judge Nordbye's case is that way.

And if we submit it to the Court on this basis, if we could tell the Court that by agreement we wouldn't have any trouble among the three of us, you and I and the two states, except some of the northern part, we got the south part settled and we got the rules, it would make it a little bit easier for everybody, wouldn't it?

MR. MOLDENHAUER: It all depends on their conduct, Your Honor.

THE COURT: What I mean, you're agreeable?

MR. MOLDENHAUER: On their conduct, I say, if the Court finds that they don't have any title in this present bed and they have an easement, that would clarify the whole situation, and if the public has the right to use it but they don't have that proprietary title in the bed, because they can't put that burden on the landowner --

THE COURT: Well, why not -- couldn't that be decided on the evidence that we have talked about today, through the last two days, I just toss that in for convenience, see. The Court, after all, the Supreme Court is busy and I got lots of time, but I don't --

MR. MOLDENHAUER: Well, Your Honor, if --

THE COURT: I'd rather play golf than monkey around with all these islands up there.

MR. MOLDENHAUER: Your Honor, if the decision hinges on Schemmel and Babbitt, on where the land formed, and that the determination has to be made where the land formed before the

conclusion can be reached that Iowa can or cannot claim it, then that doesn't solve anything, in fact --

THE COURT: No, I don't mean to submit it on that basis, submit it on everything, but on these two islands, your whole contention which I think has a lot, has a great deal of merit.

MR. MOLDENHAUER: That would be --

THE COURT: Except, for the Court to tell the states, well, for instance, to make it just coldly, "Iowa, you're wrong, you see, you've got to give way," and then the law is that that recognition testimony, you don't have that recognition testimony up north, or do you?

MR. MOLDENHAUER: We haven't even gone into it because we're illustrating again where they're claiming land because of the Compact.

THE COURT: That isn't going to help us up north, is it?

MR. MOLDENHAUER: No, that kind of testimony.

THE COURT: But it's very valuable to you, as I understand it, for the two islands here, and if the Court says that's good testimony, that's good

evidence, that's persuasive, that it's controlling perhaps, if we can't find the boundary any other way, that's controlling; and so you prevail on those two things. What is there to argue about up above Omaha, I just toss that in.

MR. MOLDENHAUER: Well, as long as the result is, Your Honor, that it's clear that because the state --

THE COURT: Well, if you lose out, if you lose out entirely, what is there to argue about?

MR. MOLDENHAUER: Well, if we lose out they can continue their present program.

THE COURT: That's what I mean, so what's the use of arguing about that up north?

MR. MOLDENHAUER: Well, we think what it illustrates is, you see, we've had all the statements about how they are abiding by the Compact, of course, maybe they think they are by their interpretation, but these areas show where there was clearly ceded land. The reason that they're claiming this --

THE COURT: Now listen, don't misunderstand me, I don't mean to foreclose you from making this argument and making that record that

you started to make, you see, but if the report would indicate to the Court that the settlement of this in Nebraska's favor settles the whole dispute so far as any real, any real controversy that the Supreme Court has to decide --

MR. MOLDENHAUER: I think, Your Honor, it could be worded so that it could. There's another controversy that we want to emphasize, of course, and that's the question of accreting across state lines where they have contended when we set the boundary at a fixed line, they also set the private boundaries in a fixed line.

THE COURT: I just wanted you to think about this, and it occurred to me before I got here, and then again yesterday and again this morning, that you have to prevail, for you to prevail in the whole case you have to prevail in the Schemmel and Nettleman Islands.

MR. MOLDENHAUER : That's right, and we have to prevail --

THE COURT: And you have tried your case on that basis, presented it, generally speaking.

MR. MOLDENHAUER: Generally speaking we have concentrated on those two areas, because we only had seven years, or six years.

THE COURT: What?

MR. MOLDENHAUER: We only had six years so we could only concentrate on the two areas.

But a decree could be reached with regard to those areas that would resolve everything and we wouldn't have to go into it.

But we want to know what they are doing under the Compact and we think that some of the things that they are doing --

THE COURT: Well, you could say, couldn't we, I don't know, we might have to revise this thing and we'll have to agree on language, we might say that the same situation prevails, that is, Iowa is making claims up there based on its common law that if, that if Iowa's contention is correct it's entitled to the land, no real dispute. But if the dispute here is in general terms, if they decide it, which they would like to do, if I understand it.

MR. MOLDENHAUER: That's right, I think they want a doctrine that will settle everything.

THE COURT: Yes, they want to get it settled now, this time.

MR. MOLDENHAUER: I think that that can

be done, but if it's done on the basis that the only reason that Nebraska wins is that because they have to come back and prove where the boundary line was before '43, we think that we lose because that still allows Iowa to go in and make any other private person prove where the boundary line was before the Compact, and we think that we contracted away that possibility when we decided to settle the boundary without determining where it was and by recognizing the titles.

THE COURT: Well, without binding Iowa, that what we're saying is isn't that their real contention?

MR. MOLDENHAUER: Yes, sir, I have no doubt their contention is that we have -- that somebody else has to prove now that the land was ceded, was transferred to one state's sovereignty.

THE COURT: Yes, I think that's right.

MR. MOLDENHAUER: Yes, and I understand that is their argument.

THE COURT: Now the Court is going to say to one of these states "You're incorrect," aren't they?

MR. MOLDENAUER: That's right.

THE COURT: I mean, you're all lawyers here, you know somebody is going to win this case and somebody is going to lose it probably, unless we can agree on a compromise, and it's not that friendly a lawsuit.

Go ahead, I just put that out in the hopes that we might before it's over get together on something of that kind and present it to the Court on the basis of not having the Court review -- how many pieces are there?

MR. MOLDENHAUER: Well, what we have got here as examples are eight or nine, but they are going to point out some things that are also applicable in Schemmel and Babbitt which aren't --

THE COURT: Well, that's all right, I just toss that out for what it's worth at the time being.

MR. MOLDENHAUER: But here in the '39 Project and Index maps, P-414, we see the canal that the Corps dug through Winnebago Bend when they placed it in the designed channel, this is the same canal that shows up on the photograph.

THE COURT: Yes.

MR. MOLDENHAUER: And I believe that it

shows up on the AP maps as such, that the river is in there, in that design through the canal. So what we think we have shown there are two avulsions moving it further into Nebraska, and -- well, we'll disregard the AP map.

Well, first, we'll go then to the case of Kirk versus Wilcox, which was filed in the District Court of Iowa in and for Woodbury County, Exhibit P-2339, in 1956, on July 20th, and joined as defendants were the State of Iowa and Woodbury County in a quiet title action.

And the State of Iowa came in, and first, it was alleged that they had an interest in this action in that the east-west center line of Section 28, which is shown here as the north boundary of the Indian land in the Flowers Island case, herein referred to is the boundary line between the State of Iowa and the State of Nebraska, and the location and establishment of said center line affects the jurisdiction of the State of Iowa and the State of Iowa may also be interested in the determination of the western boundary line of the accretions claimed by the plaintiff.

And the Kirk v. Wilcox area has been outlined here in red and designated by Mr. Brown.

We point out that it adjoins the north line of the Indian land in the Flowers Island case, so it goes right to the line, and when this line would have been determined by the Federal Court there would have had to have been abandoned channel on

this side, the Iowa half of the abandoned channel, wherever that was, the Nebraska part being over here.

The State of Iowa, and it came into that case and first after entering, I think it was, a general denial for lack of information, appeared and the decree was entered on November 20, 1956, and the Court said that "the defendants having filed answer herein denying the plaintiff's petition because of lack of knowledge and information now admits that by reason of information since obtained that the plaintiffs are the owners of the real estate described in the plaintiff's petition as accretion land."

It shows that Iowa appeared by its Assistant Attorney General, George West. So here in '56 where there's known abandoned channel we point out that Iowa has made no claim, again making it very questionable whether abandoned channel is any kind of so-called trust land. This is before they started their land, immediately before they started their land acquisition program.

THE COURT: Maybe they had a different Attorney General then, did they?

MR. MOLDENHAUER: Yes, I guess they did, and I know there's been testimony they changed Attorneys General.

THE COURT: Mike was representing them over there, wasn't he, were you in that case?

MR. MURRAY: That's just about the time I started.

MR. WALKER: He wasn't in that case.

THE COURT: Hewasn't, I notice he was in quite a few of them afterwards.

MR. MOLDENHAUER: Either that or the law of Woodbury and Mills County is different from the law of Otoe County.

THE COURT: Can the state be sued in Iowa in the County Court?

MR. MOLDENHAUER: This is District Court for quiet title, I think, isn't there a special statutory provision that authorizes the state?

MR. WALKER: Well, they can under several instances, one of them is a quiet title action.

THE COURT: Oh, I see.

MR. MOLDENHAUER: Then I'd also mention the case of Wilcox v. Pinney, Exhibit 2338, only because it's a quiet title action to the area

right above that, and if the abandoned channel went up to here, Wilcox and Pinney, although they did not join the State of Iowa, quieted title to this area clear over to the river, and we've also offered the Iowa Supreme Court -- I'm not sure that we have, but the Iowa Supreme Court decree in 98 Northwest Second 720 shows the clear chute here, and the, portion of the accretion is from the chute over to the Missouri River, it's the same area just north of the Flowers Island land.

And the Court found in this case, which was in 1959, and, incidentally, decided by the Honorable Chief Justice Robert Larson, who was also the Attorney General at the time of the Nottleman Island inquiry with the state, that this was accretion land although the higher land was riverward from this chute, and that there was a chute still here. A very interesting case when you look at how they considered the land formed and how they applied their law back in '59.

And then the last thing that we would point out in this area is Iowa's Exhibit D-1152, and the attached overlays in which they show an area which they purchased from Grosvenor, and they offered two deeds from Ray Grosvenor to the Iowa Conservation Commission, one shows the consideration of \$3,000, another a consideration of \$2,000.

And the thing here we'd like to show the Court is the area that they purchased extends into this

lower part of fractional Section 32, a little bit where 33 would be, which we contend is about where the abandoned channel was that was abandoned by that early avulsion which the Court found which left Iowa land over on the Nebraska side. So we think here it looks like they bought land again in a former abandoned channel.

Again, questioning very seriously whether they treat their so-called trust lands similarly in the various parts of the State of Iowa.

We had one other document then, Your Honor, with regard to this Flowers Island area which is somewhat significant. In 1961 as I mentioned the testimony is that the river got back out of the designed channel in that Flowers Island area, came back like this.

In 1961 the United States in the District Court for the District of Nebraska on March 1 filed a condemnation action, Exhibit P-2684, to condemn land in that channel so they could put the river back in the designed channel.

It illustrates a couple of things, number one, it illustrates --

THE COURT: What is that case?

MR. MOLDENHAUER: It's United States of America, Plaintiff, versus 90.18 acres of land more or less situated in Thurston County, State of Nebraska, Winnebago Tribe of Sioux Indians,

the Tribal Council, and others, Civil No. 414L.

And they filed, although we did not offer it, I think they filed a similar action in Iowa for what was the Iowa half of the abandoned channel because of the Compact, really, still all in Nebraska, we contend.

But they condemned -- it shows two things, one when they put it in here in '38 or '39, they did not condemn, and they did not condemn in the Otoe Bend Canal. And as the Court may recall Mr. Huber said that at some stage they changed their policy about condemning lands. But here again it indicates back before the Compact they didn't pay that much attention to how they got the land. And then --

THECOURT: You're talking about the Government?

MR. MOLDENHAUER: The Federal Government, yes, sir, when they designed the channel.

THE COURT: In other words, you're saying that in the river there prior to this '43 when they wanted to dig a canal they didn't pay any attention to who owned the land or anything like that?

MR. MOLDENHAUER: That's right, they just went up and did the work. And here they condemned as they did in many cases, an ease-

ment to excavate and dredge and put spoiled matter in order to put the canal in there, but they didn't take the fee, but they condemned the easement.

And then the Corps placed the river back over in the canal, and what Iowa we think is claiming is that area where the river was when it got out. So, claiming that here's the State of Iowa, here's the state line, this land's in Iowa, Iowa owns the bed, this is all river bed, and we own it. So, but, without the Compact the line would be over in here, and they'd have no claim whatsoever.

Now, I think they show here, it says State of Iowa by deed, but I think the area they show is the east part of the designed channel and that canal was where they might have gotten the proceeds in the condemnation on the Iowa side.

But again the fact that the Indians didn't fight over that 300 foot strip, all it really means is that it might not have been worth fighting over.

This is the situation where in a normal case if you had two people arguing over a title they'd have to take into account the value of the land and what their attorneys' fees would be in the costs of preparing the case and what evidence was available and what the possession and ownership and incidents of title were. But the State of Iowa didn't have to worry about that. We'll illustrate that a little later. They can attack title just to obtain precedent if they care to, just because other land

someplace else along the river might be involved.

The next area we'd like to treat lightly is the Peterson-Lakin area and Blackbird Bend, and this is Exhibit P-2663. The tri-color shows where Mr. Brown has placed Nos. 10 and No. 9, which are the areas that the State of Iowa is claiming. We point out this very pronounced easterly developed bend, we point out the 1890 thalweg through this area.

Now on Myrland Exhibit 1, Mr. Myrland, who was the Assessor for Monona County, testified that the high bank was this red line, which is initialed with "LCM", he testified that at the time the deposition was taken, it was either '67 or '68, all this land riverward had not been on the tax rolls, and they were just working on putting it on.

Jack Virtue who did a survey for the State of Iowa, placed his high bank along the red one except for the green area over in Section 33, and so we have a high bank of the river clear back here, land never, never assessed for taxation.

Now Virtue also put a bank line here on this green line which he initialed with a "J. V." and another bank line here. So Virtue shows three, and really four, bank lines in the vicinity, indicating that you can go out in these areas and you might find several bank lines, and what lands Iowa claims may just depend on which bank line they choose. The bank of the Missouri River really is clear over here where it's in the designed

channel.

Now we had the testimony of Bertha Kirk that Joe Kirk put this cabin on, that's the shed, and here's the cabin and that when he constructed that cabin on the island there was water all around the island and this was sort of sand bar and low willows and that type of thing. And she said they went over to a boat to that area where the cabins are, the cabin site was circled right here in 1915, Joe Kirk had passed away, and that was about the year that the cabin was built, and the cabin has still survived, so it didn't ever wash away since that time. . It was sandy then and a little willows.

We also took the deposition of Merle Cutler, who identified this cabin, and he testified about how there was water in this old chute that came around which followed the high bank around, and it was knee deep and moving, back in 1925 and 1926. And he said he had been clear around this area in a boat some years ago.

In about '34 Kirk built a levee across about a mile west of the cabin and shut the water off. Then Dale Blankenhorn testified, and he was on the County Board, and evidently the land went on the tax rolls finally in '69, that he had hunted over in what he called an ox bow lake. It showed a lot of water in these locations with the bank, and he testified that how the water was deeper on the outside of that bank.

Mr. Brown went up and took some pictures, and he shows his son with the bank, the pictures are identified on this other map as to where they were taken. Where he took the pictures are identified on Exhibit P-2663.

And, for instance, this was looking southeast, P-2709 at this location, but his son is holding, I think it was a nine-foot pole, so it shows how high that bank is. The same bank here, tremendously high bank, and a high bank here, and it's difficult to believe that this accreted to the bank with that kind of ox bow configuration and that much water that the river moved gradually out of that location plastering all this area up against the bank, that's a tremendous bank.

Now we contend that this area is as much an abandoned channel as any other area along the river, and Iowa, if they are consistent in their theory, and if the law is the same up there in Monona County, and if this was trust land, would be claiming that area; but the fact is that they didn't claim it, they disclaimed it, and rather than go through all of these documents which are in evidence as to the contracts in which Mr. Peterson and Mr. Laking obtained the land from Mrs. Kirk, they did obtain conveyances, I think the consideration was something like 120 or \$125,000, so it was a substantial amount.

But when they filed quiet title actions then in 1964, the State of Iowa came in and filed disclaimers.

Exhibit P-1755 and 1757, and there may be another, there's one other exhibit I think that, in which they disclaim.

Now the next area that we would move to is the Riley Williams area in Decatur Bend. In that case the United States filed a condemnation action on 6-28-60, in the U. S. District Court for the Northern District of Iowa. And this was the area where Mr. P. M. Moodie testified that he was attorney for Mr. Riley Williams, and how the Corps of Engineers had listed Mr. Williams as the owner of this land and that they had worked out a settlement, and I believe the terms of the settlement were about \$2,000, just slightly over \$2,000.

The area in question is shown on the map which is attached to the complaint, the map is P-2695, and we show Nebraska land here, the area they are taking, 103E, 2E and 1E, and then the state line which is on the lower right-hand part of that bend, so the area being taken in Iowa is this little piece here. The state line is shown running through the channel which the Corps proposes to take an easement for and their river bank is shown to the right bank of the river is the other boundary, so one side of this that the Corps is taking is the state line, they show as the state line, and the other side is the right bank of the river.

We don't know, I don't know how the state can start picking up land at the state line if this is the

right bank. We didn't have a fixed boundary, I don't know the factual situations enough, but it's hard to conceive of a situation where they start picking up land at the state boundary and the bank is further over towards the east. And it shows there that there's a little tiny piece of land, but there's a lot of land further upstream.

Then in this action the State of Iowa intervened and claimed the proceeds shown here, I believe it's \$2,070, which is the amount that would be involved, and the State of Iowa in their resistance to motion, the Corps had entered into an agreement for judgment with Riley Williams, as Mr. Moodie testified to, and in their resistance to motion which the State of Iowa came in and filed, Mr. Murray and Mr. Erbe and Mr. Gritton's names appear on the resistance --

THE COURT: What was that again now, in Nebraska or Iowa?

MR. MOLDENHAUER: This is in Iowa. The U.S. District Court for the Northern District of Iowa. You see this part, all the Nebraska area, was condemned in Nebraska, and there wasn't this problem. We're talking now about the Iowa side, and the Iowa Federal Court.

And they alleged they had no knowledge or information as to why or under what theory or under what facts Riley Williams and Norman Jean

Williams claimed any interest in that tract; they stated that Iowa claims it because it is either a part of the bed of the Missouri River, being below the ordinary high water mark of the river, or because same is accretion to the state owned bed of the river.

The fact is that the Corps, if it were below the ordinary high water mark probably wouldn't have had to condemn it.

Further concerning said issue this defendant, Iowa, states that if Riley J. Williams and Norma Jean Williams are Nebraska riparian landowners claiming to own tract 103 Iowa, Middle Decatur Bend, as accretion to their Nebraska lands, such claim of ownership has no validity, because under the law there can be no extension of accretion lines across a fixed and established state boundary line and into the State of Iowa from the State of Nebraska.

Then they go on and say that this is under consideration in what is the Tyson case in the Eighth Circuit Court of Appeals, and in view of the fact that that was under issue they ask the Court that the quiet title question be continued until the Tyson case is decided. Again, the Tyson case going to constitute precedent for them in this situation.

Then we offered in evidence as a part of this document a letter from Michael Murray on October 7, 1960 to the United States District Attorney in

Sioux City, in re this case. And Mr. Murray says "Perhaps you are wondering what the theory of the State of Iowa is in this matter and what a trial as to title might involve.

"Tract 103E Middle Decatur Bend, is a tract of land on the west side of the main channel of the Missouri River, but it is in Iowa because it is east of the state line established by 1943 Compact.

"We believe that the tract is accretion land, that is, it is land that has been created in relatively recent times by action of the river. I do not know how or why it is alleged in the complaint that Riley J. Williams and Norma Jean Williams own it, but I suspect that they are alleged to be the owners because they probably own the upland Nebraska land immediately west of it. And their claim to the tract in Iowa would be based on the theory that it is accretion to the Nebraska holdings.

"It may be that Riley Williams and Norma Jean Williams claim the tract on the basis that they own record title to it from the Government going back to the early days."

And then he says that if it's based on record title it's of no validity. But then he goes on to say that "The State claims that if Riley J. and Norma Jean Williams claim the land as accretion to the Nebraska holdings; such claim is invalid because as a matter of law there can be no accretion across a fixed state boundary line from Nebraska

into Iowa."

And then they go on and mention Judge Hicklin's ruling in the Tyson case. And then he says "This case is of considerable importance," this \$2,070 case for that little tiny piece of land. "It's of considerable importance to the State of Iowa for a number of reasons.

"First of all it's one of a series of cases which the State has determined to litigate until there is some final answer. Secondly, although that portion of Tract 103E situated in Iowa contains only 22.84 acres, you will see by looking at the plat that there is considerable more land both above and below Tract 103E which the State claims to own.

"The decision in the pending case will probably as a practical matter determine ownership of the additional land also. I do not seek to argue our case with you in this letter, but I wanted you to know the general nature of the State's position."

So what we say they are doing here is that they are picking a little area of \$2,070, and a few acres, and attacking it with all the resources that the state can muster. Mr. Moodie testified that at the pre-trial conference they were informed by Iowa counsel that Iowa's evidence would take either two or three weeks, it was either two or three, and that the attorneys' fees for Federal Court, their minimum fee schedule was \$150 a day, he had to have Iowa counsel, and that they

couldn't afford to try title to the land, the survey would cost them at a minimum of \$300. And they just decided based upon that, that they couldn't afford to fight the case.

Now this illustrates, we think, that to give the landowner a forum to try his title isn't an adequate remedy in this kind of a situation, because Iowa has all the resources, they can try a case because of precedent, once they obtain a precedent then they are free to go after other people and they can pick a little spot, they can pick a little fellow to gain this precedent, and we think this illustrates the disadvantage that the landowner is in if Iowa's interpretation of the Compact is anywhere near correct.

THE COURT: Do you say as of now as between private and landowner, bordering lands on the Compact line, didn't the land accrete across the state line as far as they are concerned?

MR. MOLDENHAUER: Yes, I think it has to, because otherwise we have changed --

THE COURT: We're not talking about the state, we're talking about the private --

MR. MOLDENHAUER: Right, that was the rule before, wherever that boundary was, and we don't think that we can change their boundary,

because if we change their boundary we're changing their vested property rights.

So there's no reason why they can't continue to accrete one way or the other, they may have to establish their title in the forum of the other state, but that shouldn't deprive them --

THE COURT: If they would be taxed in the other state, they would be taxed in two states.

MR. MOLDENHAUER: Yes, sir, that's correct. But that is consistent with all the doctrine of riparian rights that what you stand to have taken away from you, you have to stand added to you, and that's the whole theory.

THE COURT: That wasn't changed by the Compact, that's private law.

MR. MOLDENHAUER: No, we take the position that we could not have changed it, not constitutionally.

The next little area we'd like to mention is in Washington County, the testimony to which Bob Utman testified by deposition. Mr. Stewart Smith, the County Surveyor of Washington County, identified Exhibit P-1625 as a cadastral survey showing where the 1943 center of the designed channel was and how the river had been moved over into Nebraska so that the east bank of the

designed channel is now in Nebraska, the west bank is in Nebraska, this is after the Compact.

There's an area of Nebraska land on the Iowa side of the river which was placed upon the Nebraska tax rolls by Mr. Murray on behalf of Walter Pegg.

Now we also would point out Exhibit P-928, where Bob Utman testified by deposition, he lived right here, he's Walter Pegg's son-in-law, and how this green line on the aerial photograph was a dike line, the blue line was a bank line, and we have this same area depicted here.

Then there's this area in black which is in Nebraska, which was placed on the tax rolls in Washington County on behalf of Mr. Pegg.

So there is here, he testified there was a bank here, there was not running water along it, but there is here a bank, and there is here an abandoned channel and there is here a situation where he also testified that Mr. Jauron and Mr. Murray had hunted or were familiar with it, and Mr. Murray had told Mr. Pegg that the State of Iowa wasn't interested in that land.

Here again we say if this is trust land it has never been treated as trust land, and the whole thing we just think points up that individuals under Iowa's theory make the decision whether Iowa owns it or not. They draw that conclusion, they draw the conclusion whether it was ceded or not, and this is all individuals within the government

who are making the decision.

If the State of Iowa had filed suit for that 350 foot strip of abandoned channel, I have no doubt that they would have acquired it, but they didn't, and they indicated that they weren't interested.

So it's really as much the officials who make the decision that determines what the result is.

THE COURT: Well, according to you that's a breach of their trust then.

MR. MOLDENHAUER: If it's a trust it's certainly a breach, but -- I, of course, we don't, we don't think they ever had a trust.

Then the next area we'd like to mention, of course, is the Tyson Bend case which was decided in the Eighth Circuit, and the important thing about it is that Iowa said in its Planning Report, under Land and Water Ownership, that, in discussing the Tyson Bend case "This action will help in declaring islands to be state-owned." So here's another case where we contend that the State of Iowa has set a precedent, and, of course, they mentioned the Tyson Bend case in the Riley Williams case.

But in that case, which Mr. Jauron testified in our case, he was familiar with, he agreed with language of the Iowa counsel in their briefs in the Dartmouth College case as to how that island formed. And, again, it's an example of where Iowa's title

started at the state line, and the Court may be familiar with it.

THE COURT: I read it a couple times, I read it again last week. I thought maybe you might be discussing it, that's why I read it.

MR. MOLDENHAUER: And what happened was, and this is just a rough sketch, but the river was here, and here would be the center of the designed channel. The river moved south and east, and Mr. Ja uron testified, and the facts of the case indicate, some little islands built up behind this movement and got down in here, and then the Corps put it back into the designed channel. That might have moved back there a couple times. But Iowa stated, and Mr. Ja uron agreed, that they never did wash this area away which built up behind the movement of the river. Had it not been for the Compact, Tyson's land, whose property line would be the thread, wherever that is, would follow it as it moved south and east, and as land built up behind it this would be part of Tyson's accretion.

Now it might be accretion of his bed, it might not be necessarily accretion to his bank, as in the Kirk bar area there might be a big bank up there with a chute of some kind, but he gets accretion to the bed. And the only reason that the land is in Iowa is because of the '43 Compact making it a

fixed line. When the Corps put it back around here without destroying the island, -- there would have been an avulsion and the boundary would have been over here at common law in this abandoned channel. So the only reason -- and then the Court follows reasoning which on the face of it looks very logical, they say, well, really, it's a little confusing, whether they say "We're not cutting off your title at the state line," but they say "We really don't know," the trial judge said that, we don't really think he meant it, "All we have to determine is that the land formed in Iowa."

THE COURT: Didn't the Court say that the land formed on the Iowa side in the river rather than accretion?

MR. MOLDENHAUER: But it formed in Iowa.

THE COURT: That's what I mean.

MR. MOLDENHAUER: But I don't think that it said it formed, well, I don't think it formed on the Iowa side of the main channel, it formed in Iowa, and it formed in Iowa because of this.

THE COURT: Because of the Compact?

MR. MOLDENHAUER: Yes. And Mr. Jauron testified, I think he testified in the Tyson case,

and he testified in our case, that this is how it moved, and Iowa in its brief said this is how it moved.

Now whether the Court said, no matter what the Court said how it formed, Iowa is still saying it moved this way with the land building up behind it. But the Court seems to in its logic say, the land's in Iowa, and in Iowa the State owns the bed, this is in Iowa so it belongs to the State, but it ignores --

THE COURT: The Court applied the Iowa common law.

MR. MOLDENHAUER: Pardon me.

THE COURT: The Court applied the Iowa common law.

MR. MOLDENHAUER: Yes, sir, and I'm not, I don't fault them, because I think there were \$12,000 in condemnation proceeds at issue here, I don't know what lawyers could come in for \$12,000 and try what the Compact means. And if you isolate it, it's impossible to tell what the Compact means, if you take these isolated situations.

But again it clearly points out two things; number one, the Compact started Iowa's rights, and it if hadn't have been for the Compact the re-

sults would have been otherwise. And again they can use the \$12,000 case to establish precedent, and they indicated that in the Planning Report, and then they can go downstream to the Schemmel area or the Babbitt area, which are quite valuable, and apply that precedent or argue that precedent.

THE COURT: This they talked too, they are still in that case, until this issue came up after the Compact too, the Iowa --

MR. MOLDENHAUER: Yes, sir, this came up after the Compact.

THE COURT: That doesn't make any difference, I mean, the land arose.

MR. MOLDENHAUER: Yes, sir.

THE COURT: No matter how it arose.

MR. MOLDENHAUER: Right.

THE COURT: After '43.

MR. MOLDENHAUER: Yes, I think about '48 or so.

But the Compact had an effect on it.

THE COURT: Yes, I know that.

MR. MOLDENHAUER: Your Honor, this is an opportune time for a short break.

THE COURT: All right, fifteen minutes.

(Short recess at 10:40 o'clock a.m.)

THE COURT: All right, gentlemen.

MR. MOLDENHAUER: Your Honor, to continue this hasty ride down the river.

On page 29 of Part 1 of the Planning Report there is an area shown which Iowa is claiming, which is Upper Decatur Bend, page 28 and 29, and there was some testimony about that dry land bridge, which can be seen in the photograph, and how the river moved out of the designed channel, they build the bridge on dry land, and then the Corps dredged and put it back under the designed channel. Iowa is claiming all of that area there where the river got out after the 1943 Compact.

And you can see quite a substantial land area in between that wasn't cut off when they put the river back in the designed channel. Just another interesting inconsistency in their theory, because if you speculate the bridge was over the river bed, that they own that half of the bridge because they all of a sudden acquired title to the property the bridge was on, their theory just doesn't, as I'd like to say, hold water.

THE COURT: Hold Missouri water -- who built the bridge?

MR. MOLDENHAUER: I think it was the Bridge Commission, but I don't know, I don't know.

There's also a pipe line across that bridge.

Now one other small item, Iowa filed a list of areas in this case, and I know they claim now this was only a generally a rough list, but Mr. Brown placed these areas on the Tri-color maps, and I'd like to point out just one area particularly, which is on Exhibit 17 of the list of areas that Iowa filed in their pleadings in this case, Exhibit 2651, which shows what they call their Exhibit 17, with the top of it being near the Little Sioux River where the Little Sioux River comes into the Missouri River.

And Mr. Brown said the tri-colors are the same scale as these underlying maps of 1964, what I call U-2 maps or photographs, and they fit right on top because of the same scale, and Mr. Brown's area 17, much of it appears on the Nebraska side of the 1943 channel. Again, right near where the Little Sioux River -- he didn't carry the line, but the land area right near where the Little Sioux River come into the Missouri.

However, and there are many areas where Mr. Brown showed the area as extending over into Nebraska, here is the 1943 Compact line, right

here. And the Little Sioux River is the identifying point, and this particular exhibit is Mr. Brown's area 17. Now many of his areas showed Iowa's line when you put them right on top as going over the '43 designed channel into Nebraska.

But I would point out that Iowa's exhibit which shows this same area, Exhibit D-1154, shows the upstream part as being considerably south of where the Little Sioux River comes into the Missouri, so they are a good half a mile, there's a good half a mile discrepancy between where their upstream end is and Little Sioux Bend on D-1154 series, and where it is on their list.

Again when somebody points to a map and says "This is what we are claiming", that's one thing, but when they go out on the ground and say "here's where that line is," it's something else.

The next area which we'd like to take up is California Bend. California Bend is another area where the State of Iowa in its answer brief recognized an avulsion, and that land was ceded. But it's another area where we contend Iowa is claiming ceded land.

On pages 36 and 37 of the Missouri River Planning Report they refer to the bend, and under "Recommended Action," they state "The title to this land should be quieted probably under the principle of abandoned channel ownership." What that pictures shows is California Bend, the white bar in the river in the designed channel.

Now referring the Court --

THE COURT: What's the claim here, this part of it?

MR. MOLDENHAUER: No, they are claiming this whole area, the whole water area.

THE COURT: The whole area, to the bank?

MR. MOLDENHAUER: Yes, sir, including this water area which we contend was cut off when they put it back in the designed channel by another canal in '58 or '59.

Here on Mr. Brown's Exhibit P-2667, he has shown area No. 22, which is the area which Iowa is claiming. I would point out the 1890 thalweg going considerably to the east of this area.

And then I'd refer the Court to an Exhibit P-2686, from the Corps of Engineers reports for the year 1890; and the testimony was, I believe, that --

THE COURT: Who made this map, again?

MR. MOLDENHAUER: This is Mr. Brown's map, this is a 1946-47 tri-color map from the Corps of Engineers, which is an accurate survey from all the surveyors indications.

There was testimony either by Mr. Jauron or

Mr. Bailey about whether Iowa claimed any other abandoned channels in this area, and they said, no, and they were pointed out this ox bow configuration over in 35-36 in Section 4. But they said they had never made any claim to that area.

Now referring the Court to the official reports of the, this would have been the Missouri River Commission, I think, because it's 1890, or the annual report of the Chief of Engineers for 1890, published by the Government Printing Office. I'd like to point out an area shown as Cut-Off 1881. Here we have Iowa Section 33, 34, here is 35, right here, and here is Section 36, which we, which shows up to be the water area cutting down through the southwest half about of 36, and this area is described as the Cut-Off of 1881.

Then the channel is shown as going through, that's this area right here is shown, this would have cut off down to here, and run through here.

THE COURT: Where is the pre-compact boundary, natural boundary, the middle of the old river, the old bar?

MR. MOLDENHAUER: Well, if this cutoff were an avulsion why, it would be clear over around here, and then it cut off down to here. But before the Corps started their work, the boundary would be about down around here.

THE COURT: The last boundary would be here?

MR. MOLDENHAUER: It's around here, Your Honor. We'll get into those pictures.

THE COURT: Yes.

MR. MOLDENHAUER: This area here which includes area 22 was cut off in '38 when they put the canal in, and it was cut off. I want to point out this early avulsion because here's an official Corps of Engineers map which mentions it but no claim by the State of Iowa since 1881 for that trust land over there, several miles now from the river, at least, one, two, three, three or four miles from the river.

The State of Iowa has filed a quiet title action against Harrison County, Clifford Simmons, William Coulthard, and a lot of other people, Exhibit P-2672 is the original notice of their quiet title to the land in California Bend. This was filed by, on May 10, 1965, signed by Lawrence Scalise, Attorney General, and Robert Scism, Assistant Attorney General, and Sewell Allen as attorneys for Plaintiff.

And that area is shown on Mr. Brown's on the map that Mr. Brown identified as P-1521. Then there's in evidence Exhibit P-2670, which is the, an action in the United States District Court for the Nebraska District, Omaha Division which was a condemnation to condemn an easement across the land in California Bend. And attached to this action is Exhibit P-2669, which shows the tracts which the Corps is condemning, it shows the

river before 1938, and the designed channel where they're going to cut it through this Washington County land. It's designated as the California Bend Pilot Canal.

Those same maps -- and they're asking for an easement to excavate and maintain a channel approximately nine hundred feet in width across the point of land at California Bend of the Missouri River in Washington County. And let's see if I can find the date that that was filed -- it's Civil Action No. 10.

THE COURT: Washington County is Nebraska?

MR. MOLDENHAUER: Washington County is Nebraska.

There was an order of immediate possession entered on the 7th of November, 1938, and attached to that case too, Your Honor, are maps which show the plats and show the area which they're, which the Corps is acquiring the easement through.

THE COURT: That's not a published opinion, is it?

MR. MOLDENHAUER: No, sir, no, this is just in our District Court.

Then there was a lis pendens filed in Washington County, Nebraska, Exhibit P-2671 on Novem-

ber 8, 1938 with regard to that case.

Then we have several photographs, P-2428, 29 and 30, P-2427, 2426, 25 and 24, which show the canal in California Bend, and they are dated in 1939. There's, I should start at the other end -- December 29, 1938 shows a completed section of the canal; December 29, 1938 showing the canal, and other pictures with the canal in the wintertime.

And then we get to P-2430, which shows on April 1, 1939 the opening of the California Bend Canal. And it shows a, it shows them taking out the land there, P-2431, and the bucket in P-2432, and it shows the water rushing through on 2428 and 2429. Again illustrating the type of thing that happened when they pulled that plug in the canals. But again, a pronounced avulsion, and at that time no doubt whatsoever that the land was in Washington County, leaving the river in the designed channel again at the time of the '43 Compact and leaving what would have been in '38 abandoned river bed in California Bend, which might again be --

THE COURT: Well, isn't it, it seems to me, maybe I'm incorrect, but let me discuss this business, when we discuss this business north of Omaha, and so on, that it's clearer where the river was prior to the Compact up there than it is down at the southern part?

MR. MOLDENHAUER: No, I don't think it's

any clearer, Your Honor, no, sir. When we went through those original maps, as you will recall, showing the difference between the 1857 Nebraska bank and the '43 designed channel, there's a great deal of difference all the way through. And going through the tri-colors you'll see the '90 thalweg in all sorts of areas other than where the designed channel is.

In going through the '64 book of aerial photographs we put in you can see all these areas which at one time or other have been the channel of the Missouri River. It was just as undecided all the way from the Missouri line up to the South Dakota line.

Then here's a photograph of the California Bend canal after it is completed, showing the P-2434, showing the land area cut off. Here's a P-2433, which is again this area, and it shows what was the old channel.

Then we call the Court's attention to Exhibit P-2380, which is a 1938 aerial photograph of California cutoff prior to the time that they dug the canal, and they dug it through that open ground.

Then following the time the river got in the designed channel the testimony was that it again got out of the designed channel and cut its way back towards Iowa. Oh, here's a '41 of California Bend where it shows the cutoff, and it shows the river in the designed channel, and there's the '39, again showing the same situation.

In 1956 we have an aerial photograph which is P-2421. It shows the river out of the designed channel and having moved back easterly in the California Bend area. Now Mr. Brown has on P-2668, which is combination of two aerial photographs obtained from the National Archives of this same area showing the 1956 river as it appears on this map, so this is shown in red.

This is the 1938 map prior to the canal, so here is how it looks in '38. Here is where they put the canal, and here's where it got back out in '56.

But I point out that this river bed here is not the same as it was back in '38, although you couldn't tell it, if you just looked at the two pictures separately it would be pretty hard to identify where anything is.

Then we have a 1959 aerial photograph, Exhibit P-921, which shows where the Corps dug another canal prior to '59, I think it was in '58 the testimony indicated, but I don't recall exactly, showing that they put the river back in the designed channel through a canal and left this area which was outlined in red and showing where the abandoned channel is.

Now where Iowa is claiming is all this area from the present designed channel, which became river bed and it was left as river bed, and which was river bed at that time.

So here again we claim that this area was all

ceded, this area Iowa is claiming includes the land which was ceded by the Compact. It includes all this area in here that was ceded by the Compact.

THE COURT: What's incorrect on that contention then, on Iowa's contention?

MR. MOLDENHAUER: When the canal was cut in 1938 the entire river was placed in Nebraska, and there was, assuming that we didn't have any previous cutoffs, the abandoned channel would have been the old river bed and the line would have been a fixed line over to the east, and there would be Nebraska land on the Iowa side of the river.

When the river moved out after this it was still in Nebraska, both banks, and it never washed this part away, so it never did get back, particularly in the downstream area to the old channel, it never again became a movable boundary, so this land has always been ceded.

Now in all fairness to the Court, before the Compact, I think the law is if you have an abandoned channel because of an avulsion and the river gets back into the abandoned channel, it may again become, if it moves, if it erodes back in, I think it may again become a movable boundary.

But in this case we have changed all these principles by fixing a fixed line and by changing the rules that were applicable, and the river particularly on the downstream portion never did

get back into its old channel.

THE COURT: Nebraska itself isn't claiming that land?

MR. MOLDENHAUER: No, they are landowners. Iowa has filed a quiet title action against the landowners to what we say is ceded land.

THE COURT: But you say that there are people, that there are private owners that own that land, and Iowa is claiming that land?

MR. MOLDENHAUER: Yes, sir, and they admit that there was a true avulsion here, but they say that they don't want any ceded land. But again it's an indication we think that their title is protected, we think even, you see, even if it did get back into the channel over here, the canal which cut this off in '58 is another avulsion; so they don't have any claim of this as abandoned river bed, but apparently their claim is, here's the designed channel, the land is in Iowa, therefore we claim the land.

Now it gets a little more interesting to show the situation that these poor landowners can find themselves in. Here's, well here's a picture of California Cutoff, May 13, '64, looking up this way which shows still quite a little water area in here, but land area, it looks like a great place to hunt

ducks.

Here's a picture too of 17 September '56, showing that it had not yet cut through that bar.

Now Mr. Brown also prepared Exhibit P-2717, which shows an area described as Lot 5, completely on the Nebraska bank in 1930, and that is the same as this white configuration here. And what happened to Lot 5 is that all this area silted in here so the bank in '56 was right here, you can't really tell where that whole bed was. Iowa never claimed this bed. The bank is over here, and so this much is out in the river, and the red line through here which show what Iowa claimed, so Iowa would be claiming that north half of the lot we described as Lot 5, which was a ceded lot. I don't think it was ceded under Lot 5. I think that's an Iowa designation.

But then in 1959 the Chicago, Northwestern Railway filed an action against Clifford Simmons, his wife, and several other people, including the State of Iowa, to quiet title to certain area for the railroad, which includes, which goes up to this, to about that '56 line, all this area in here. It includes the abandoned channel from the '38 cutoff, and the State of Iowa, at first, and, they alleged, I believe, that this was a gradual addition, but a gradual shifting to the west of the channel of the Missouri River and gradual addition of lands by extension of the shores of the Iowa or left bank to the west to a point where the river was located in 1940, which became by virtue of the Iowa-Nebraska

compromise acts the boundary between the states. This was the landowners.

And the State of Iowa filed an appearance and motion for additional time to plead, Norman A. Erbe, Attorney General, and James H. Gritton, and they alleged at that time, this is July 22, 1959, "The State of Iowa has reason to believe that it, claims by title and interest a large section of this area, but that due to the nature of the claim of the State of Iowa the exact boundaries thereof are difficult to ascertain, and that it may be necessary for a complete survey of the area to be made prior to the filing of answer by the State of Iowa."

Then there's a notice here setting the motion down for hearing and an indication by the Clerk that there's no indication in the Court records whatever happened to that hearing.

But on August 24, 1959 there was a judgment and decree filed, and it quieted title in this area. It is shown as approved as to form, James H. Gritton, Assistant Attorney General. Now here again, in '59, when somebody was quieting title to some of Iowa's trust land which they have been so diligent in protecting all these years, there was no claim, they quieted the title.

Then we come to Exhibit P-2718, which is February 16, 1968, the case of Coulthard versus Clifford Simmons and Helen Simmons, and in this case Mr. Coulthard claiming as title in this area, filed an allegation "that during the 1930's and '40's

the U. S. Army Corps of Engineers worked on the Missouri River along the western border of Harrison County, Iowa to place and confine said river within a stabilized channel, which said Corps of Engineers had designed for it.

"That as partly result of said work by the Corps of Engineers and partly as a result of natural forces the left bank of the Missouri River was moved and pressed back in a northwesterly direction so that accretion land formed in the southerly portion of the former location of said Lot 5, Section 12-78-46, said accretion land being in all that portion of the former location of said Lot 5, which is included within the description of real estate set forth in our Exhibit A. "

And Mr. Brown has drawn a map showing the area involved here that was -- is that the area, Willis, that the railroad quieted title to, which --

MR. BROWN: It says right on there.

MR. MOLDENHAUER: Well, the red line is Coulthard versus Simmons on this map, showing that they are claiming that south half of Lot 5 as accretion land, and the petition was signed by Michael Murray as attorney for the Coulthards.

Here again an individual decision that what is obviously abandoned river bed is accretion land. And here is Mrs. Simmons claiming this Lot 5, the State of Iowa is claiming the north half because

it's river bed under their sovereign rights, and Coulthard is claiming the south half which was ceded as a part of accretion to the Iowa shore. Now she's in an impossible situation, and if she has an arrangement of half of the land on the north side with her attorney, and then half of her land with the other attorney on the south side, she can win the case and lose the whole piece. We don't really care who owns it, but we do care that Iowa is in here claiming what was ceded land and making the determination that this was abandoned channel or accretion to the bank. And somebody from the State of Iowa made that determination; by making that determination the local officials, the officials of Iowa, can really determine the result.

We have a deed from the Northwestern Railroad to Coulthard which carried that through. Here again, what we contend is a classic case of injustice which we don't think the Compact is ever intended or did authorize.

The next area which we'd like to mention is Lake Manawa, which is now in Pottawattamie County, Iowa, it's just south of Omaha, and from the Top of the World dining room you can look over and see it. This is the area that we have already had some reference to in the early Corps of Engineers reports, it was cut off in either about 1879 or '81, and this is now completely in Iowa because of the Compact. It's shown on Exhibit P-2676.

Then plaintiff has offered in evidence Exhibit P-2678, which is a quit claim deed from the Omaha and Council Bluffs Railway to the State of Iowa, but, prior to that, plaintiff has offered Exhibit P-2677, which is an action between the Omaha, Council Bluffs and Suburban Railway versus James P. Christensen, County Treasurer of Pottawattamie County, in which they alleged that this land was original Nebraska land and they obtained a decree, which I believe found to that effect and restrained the Treasurer from taxing their land.

They found that the Missouri River then was and ever since has been a navigable stream constituting the boundary between the states of Iowa and Nebraska, and after the survey of the land as being in the State of Nebraska up until about 1881, the Missouri River continued to change its course by gradually and imperceptibly washing away the lands above described, and the river continued in its process of erosion.

Then in the year 1881 the Court found that it suddenly changed its channel, cutting a new channel. I believe that was about the same time that the Carter Lake avulsion occurred. This was dated, or filed, the petition was filed November 29, 1915.

Then on P-2678 we found a deed from the Omaha and Council Bluffs Railway and Bridge Company to the State of Iowa, which conveyed land on the, really the north part of Lake Manawa,

up here, and specifically excepted riparian rights.

Here is another area where the river would have been entirely in Nebraska at the time of the Compact, and the Compact, we contend, would not have then given Iowa title to that bed of the stream.

And just one more exhibit with regard to Lake Manawa, or, with regard to the uncertain area, Exhibit P-1774, shows not only Lake Manawa with a notation "State line by decree of Court 1900 A. D.," which Mr. Brown had never found. But also a very uncertain and unsettled part of the river just above where it enters into the Missouri River; also it showing old St. Mary's in 1909 and 1913 river bed, pointing up the uncertainty of the whole situation.

The next area, Your Honor, is St. Mary's Bend where the Corps dug a canal in 1938, and we point out on Exhibit D-1158 the land that Iowa's claiming in St. Mary's Bend. The cutoff was in '38, they are claiming all of the old abandoned river bed.

THE COURT: Is that above Plattsmouth -- or, Rock Bluff?

MR. MOLDENHAUER: Yes, sir, Rock Bluff is here, Plattsmouth is right here, and it's just above it.

We have several photographs showing the dredging of the canal, are the same type of typical

canal photograph, aerial photograph before they dug it, and an aerial photograph after they dug it, showing St. Mary's cutoff in 1938.

And then we have a 1941 photograph of P-2392, showing it completed, and the abandoned channel.

The thing that I want to point out here is that although Iowa has raised the case of Sarpy County versus Leineman, here's Clark's Lake above here, and there's a lot of abandoned river bed which extends considerably south of there; what they are claiming is just the entire abandoned channel.

But I think it illustrates again what they claim, which is all the abandoned channel plus the present half of the channel where the Corps dredged their canal. The photographs are similar to the other canal.

THE COURT: All right.

MR. MOLDENHAUER: And the next area we want to consider is the Goose Island or Auldon Bar situation. The Auldon Bar appears on page 44 right after Nottleman Island, on page 44 of the Missouri River Planning Report. And the recommended action, "the basic action here is to quiet title, if the title is quieted in the name of the state, then future plans can be made for development for recreational uses. No further action is recommended at this time."

And then it shows 650 acres of land and a hun-

dred acres of water and a considerable amount of Auldon Bar Island is under cultivation and has been cleared. Again they have described it as side of new channel-Iowa, and they always describe these areas as the side of the new channel.

And the Court may recall that Iowa said in its brief that it was quite clear that the islands above and below Nottleman Island and Schemmel Island formed in Nebraska. We'd like to point out that immediately below Nottleman Island, and we're looking at Exhibit P-2680, is the island Goose Island, and the majority of Goose Island appears on the tri-color Exhibit P-2681, which dovetails right in.

Auldon Bar is immediately below Goose Island, and Mr. Brown has designated it as his area No. 27, which Iowa is claiming. But it appears as one island, there's still substantial water in the '47 map around the east side.

I might mention that all the tri-colors just show the '47 situation. I think on the Planning Report that it may not show much of a chute over there any more.

Now we call the Court's attention to Exhibit D-1159 and the attached overlays which shows Iowa's No. 29 Auldon Bar which they are claiming in the green area here, and also shows these island formations above and below and shows Auldon Bar at this time of the AP maps as two islands, one upstream and one downstream; and islands below

that and part of islands above that.

This part just above the northerly Auldon Bar Island is Goose Island, and the lower part is the island which ended up on the Nebraska side and is below Auldon Bar.

The Corps of Engineers dug a canal in Bartlett Bend-Van Horn's Bend, which is the upper bend, and we have photographs dated 12-1-37, P-2510 and P-2509 of October 13th of 1937, showing the Bartlett Bend Canal. The canal was dredged, cutting off the lower part of Goose Island and the upper part of what is later to become known as Auldon Bar.

And in 1938 Project and Index Map, Exhibit P-413, mention is made of the Pin Hook Bend canal and the Bartlett Bend dredging, and they show the Bartlett Bend dredging, cutting off that lower half of the Goose Island, and the Pin Hook dredging and canal, cutting off the north half of the lower island, which is called on that map Auldon Bar, and then there are statistics as to the amount of dredging work which they did; this is the 1938 map.

The 1937 map shows the proposed channel coming through that island, but it hasn't been dredged yet. And on P-412 it showed where the proposed channel is going to come through Goose Island, and then cut back through and make that bend through the lower island. That was '37 and '38; and we have Exhibit P-2506 and 2507, pictures of May 5, 1938 and 10-28-37, showing the canal

and substantial land area on both sides.

There's an aerial photograph of P-2372, which shows Bartlett Bend in 1937 by the Corps of Engineers, and it shows substantial land area both on the lower part of Goose Island and the upper part of the lower area of Auldon Bar.

And we have P-2377, the Bartlett Bend of 1938, showing the lower part of Goose Island, and the downstream picture P-2376, showing the lower part of the island below that. And they are all now on the, Mr. Brown has put in red the designed channel, and these areas show up on the Iowa side.

THE COURT: We had no landowner testimony on these islands?

MR. MOLDENHAUER: No, we did not, Your Honor. We have a '39 aerial photograph P-1880, which now shows it as a land mass, and shows the same areas cut off from the other upstream and downstream islands.

And then in P-415 the Project and Index Map, we again show it as one area on what is, at that time, the east side of the designed channel. Now this is a situation where Iowa has again in their Brief, I think, admitted avulsion, but they have also and they have admitted that the island below Nettleman Island, or at least the evidence shows formed in Nebraska, but part of that land was left on the Iowa side, and Iowa is claiming it. They

are claiming two areas as Auldon Bar, the other parts of each area which ended up in Nebraska because of the Compact and they have made no claim for those areas.

And what we contend is this really, if the river had cut around the other way and left Goose Island on this side and Auldon Bar, left Goose Island on the Iowa side, and Auldon Bar on the Nebraska side, and the lower islands on the Iowa side, they would be in claiming what was left in Iowa.

And again we contend they are using the Compact as a vehicle in order with which to enable them to make a claim to lands and obtain lands.

THE COURT: Against the private title owner?

MR. MOLDENHAUER: Yes, sir, against the private title.

THE COURT: Yes, you have to add that.

MR. MOLDENHAUER: Oh, I thought that was assumed; we as a state don't make any private claim.

THE COURT: I know, but it may be that some of that land nobody claims, Iowa isn't claiming that, if that exists.

MR. MOLDENHAUER: Well, the Planning Report indicates that they have to quiet title and they filed an action.

THE COURT: All right.

MR. MOLDENHAUER: The Planning Report doesn't say that they filed a quiet title action, but in all these cases, Your Honor, they recommend a quiet title and --

THE COURT: That may be because they didn't know at that time.

MR. MOLDENHAUER: Well, the record indicates that they never inquired. But there's no evidence that these areas aren't claimed; the fact is that everybody's moved in and claimed it. If there's -- there isn't going to be any race by the landowners to pick up land along there because there's already somebody there; the only race we contend is by the State of Iowa.

Now the next area we'd like to mention is the one just above the, the next area is in Nebraska City Island, and the Court may recall that we pointed out on the 1879 and the 1890 Corps maps that the river was around Eastport Bend just above Nebraska City. Iowa on their Exhibit D-1159 is shown where they purchased land from the Wurteles, it's right below the bridge at Nebraska City and

goes to the edge of this area here, which we contend is another indication of abandoned, where they purchased some of their trust land which was in abandoned channel. There is a map in the Corps of Engineers reports again of 1890 which shows the designation Old River Bed, and it shows this same feature which we contend is Mule Slough, and they purchased their land right here in the old river bed.

MR. WALKER: What area is that, Howard?

MR. MOLDENHAUER: This is --

THE COURT: Nebraska City.

MR. MOLDENHAUER: It's just at Nebraska City and it isn't designated an area.

MR. WALKER: We didn't claim it.

MR. MOLDENHAUER: You purchased it from Wurtele, it's that Mule Slough area just across from Nebraska City.

THE COURT: I'd take that to be -- off the record --

(Off the record discussion.)

MR. MOLDENHAUER: That may be so, Your

Honor, and we sort of think that a state should be somewhat consistent about it in their treatment of the people.

Then just downstream from Nebraska City we would again like to point out on Exhibit P-2638 what looks like an island area in Section 4 above the Schemmel land, and it looks on the 1947 tri-color as much an island as Schemmel's looks like an island, with water from the river running all the way round it.

And one of these aerial photographs of P-246, which is the '30 aerial showing bar area there, and the aerial photograph P-2703, showing again this island area with water all around it, dated 1938. This shows up on the Project and Index Maps too and it looks as much like an island as Schemmel's does. Mr. Jauron testified that that's the area where some attorney instructed them not to take it and he on cross examination claimed that some sounding map of 1931 showed water over to the west side of it, but in 1930 it shows up as a bar area.

THE COURT: Well, that's never been the subject of any quiet title action'.

MR. MOLDENHAUER: Never been the subject of any quiet title action, we haven't researched it, but it's just that Iowa never claimed it.

Another area where somebody decided that they

weren't going to claim it, and very easily by making that decision determined that some landowner is in peaceable and quiet possession.

Now we have some general photographs which we just show the Court without, I think that we have seen so many canals that you don't have to go through the rest of them, but all of these show canals being dug, being dredged many places along the river bank, consistent with our argument that they had moved that river and everybody recognized that they moved it.

THE COURT: The Engineers all have to do work, you know, they don't get anywhere unless they are out working.

MR. MOLDENHAUER: Now, Your Honor, we are headed for a convenient breaking point for us as far as our presentation is concerned.

THE COURT: Well now, let's see, you have covered up to, what is your next --

MR. MOLDENHAUER: What we have left is some general treatment of Iowa's traverses and surveys.

THE COURT: You have discussed your exhibits?

MR. MOLDENHAUER: We have discussed all the exhibits except these few here, and then we'll go into a summary of argument again and discuss the points which you raised, and we'll be through.

THE COURT: You want to recess now until 1:30, you want to recess now?

MR. MOLDENHAUER: I would prefer to recess until 1:30, we'll be done easily this afternoon.

THE COURT: By about what time, 3 o'clock, an hour and a half?

MR. MOLDENHAUER: I hope so..

THE COURT: We'll recess until 1:30.

(Thereupon, at 11:50 o'clock a.m., the hearing in the above entitled cause was recessed until 1:30 o'clock p.m. of the same day.)

1:30 O'CLOCK P.M.
WEDNESDAY
SEPTEMBER 30, 1970

* * *

THE COURT: All right, sir.

MR. MOLDENHAUER: May it please the Court,

we'd just like to point out a few other documents, particularly in connection with surveying the Compact line.

I'd like to make it very clear that when we have stated that the AP maps were general maps, and that it's almost impossible to locate the Compact line, and the plaintiff has offered evidence from the Corps of Engineers, we can't seem to find the documents right now, but several letters in which the Corps of Engineers has taken a position all along that the inch equals 400 foot construction maps were not retained, which showed the original line of the river. And that it's impossible to locate the boundary on the ground throughout from the maps now in the Corps files.

We think that that is significant for one particular reason, we're not asking this Court to find the boundary in any particular place, but we think -- insofar as the Compact line is concerned -- but we think that it's significant because the states when they entered into this agreement took these general maps and did it in a context in which it was never anticipated that a state would come in and use those maps to survey out a property line.

It's one thing to say that the boundary is out there in the middle of the river for jurisdictional purposes, because some state can obviously take jurisdiction in their fish and game problems and that type of thing, and it's another thing to say, here is the line, and then refer to such general maps,

and fifty feet in a property situation is a little bit different from fifty feet in a jurisdictional situation. It could be far more significant, far more important to the individuals which are involved as far as the property is concerned.

But they used this general line, they didn't survey the boundary as they could have done if they'd wanted to really do this thing in great detail, and they said --

THE COURT: It occurs to me that they did do it around Carter's Lake.

MR. MOLDENHAUER: They did do it around Carter's Lake.

THE COURT: They knew how to do it if they wanted to do it.

MR. MOLDENHAUER: That's right, they knew how.

THE COURT: Is that any significance that they used a surveyor's line to fix points, the exact locations that they were interested in at the time?

MR. MOLDENHAUER: At Carter's Lake?

THE COURT: Yes, at Carter's Lake. Then left the rest of it generally, does that have any sig-

nificance, or doesn't it?

MR. MOLDENHAUER: Well, I -- Carter Lake was surveyed because of the Court decree, and they had it there. Now Carter Lake was always a political issue --

THE COURT: Well, aside from that problem, when was it surveyed, when was that survey made that's found in the Compact?

MR. MOLDENHAUER: Well, it was never surveyed in the Compact, the Carter Lake survey was the result of the 1892 case.

THE COURT: Yes.

MR. MOLDENHAUER: And I think that was of record in the Court decree at least of 1895, I believe it was.

THE COURT: Wasn't that put in the Compact?

MR. MOLDENHAUER: That was excepted from the Compact, yes, sir, they came down, they came to the Carter Lake and excepted it and went on down the river, so above and below they took the middle of the channel as it appeared on the AP maps.

THE COURT: In other words they knew what the line was around Carter Lake.

MR. MOLDENHAUER: Yes, sir, that's the one place they knew.

THE COURT: They knew that was a surveyed line?

MR. MOLDENHAUER: Right.

THE COURT: Because the Court had directed that after the final decree at Omaha, Nebraska?

MR. MOLDENHAUER: Yes, sir, so there was no dispute there. In all the rest of the area there were disputes, and they didn't really know where it was.

THE COURT: Well, what I'm getting at, if they wanted to settle the dispute at the time of the Compact they might have used the same system that was used by the Supreme Court that very often directed the Commissioner have that surveyed.

MR. MOLDENHAUER: Yes, sir.

THE COURT: Come back with the survey and we'll adopt it. They didn't bother to do that in this case.

MR. MOLDENHAUER: That's right.

THE COURT: Does that have any significance?

MR. MOLDENHAUER: I think so, I think it has great significance, because they could have gone to the Supreme Court and said "We're going to settle our differences by original action," and have the Court decide where the lines are. They took the other method, the Compact method, which is a settlement, not a determination, and once they decided to settle it then they changed the entire relationship. I think that's very significant.

And we just wanted to point out and remind the Court in this regard, Exhibit P-746, which showed the line around Nottleman's Island where three surveyors all surveyed a different line. Of course, we allege that Iowa's traverse went fifty feet approximately into Nebraska. Mr. Brown's and Professor Lubsen's line is here, the west one is the -- or, the east one and the west one is Windenburg.

THE COURT: I remember that.

MR. MOLDENHAUER: From which they described their traverse in the petition. When they get down near the bottom, they coincide here, and when they get down to the bottom Professor Lubsen goes even closer to Iowa, and Mr. Brown is in the middle, and the Iowa surveyor's line is

closer to Nebraska.

And Mr. Brown testified that one of the problems was this dike sticking out here, so a judgment decision had to be made. But here were three surveyors who located a different line. We think that it's significant in a way because Iowa keeps coming back to the contention that anybody can locate the state line, or any surveyor can, and the evidence doesn't bear that out.

Now, and, again, when they locate it, it's a rather unilateral determination, and they determine it any way they want to.

In this regard we have mentioned that their surveyor, Mr. Hart, who is now deceased, who did many surveys for the state, at one time surveyed his line using 500-foot chords. This was evident on D-1207, which is just an example; his line is 500-foot chords, but no relationship really to what the bank line is, it's still the 500-foot chords, where we have longer chords on the bank, chords of varying lengths, they haven't, they show the lengths, but they haven't written what the length is.

But this was his method, particularly on this survey of Tieville, Decatur Bend, July 15, 1963, he used a different method on Exhibit D-1209, in which his state line chords are of varying lengths, 460.61, 467.45, and parallel the chords which make the Compact line. Only to point out that both methods can't be right because they're inconsistent, and I don't know how many times you can be a little

bit wrong, particularly a state, and particularly in a situation like this. Now they demonstrated that same degree of imprecision in their surveys, in the Nottleman Island situation, and Mr. Brown placed in evidence several photographs where he showed where their lines went through water right down through the middle of standing water, it didn't go along bank lines, it went across fields and that type of thing. Those Exhibits P-428 and then P-417 through P-423 are on-site pictures.

In the Schemmel situation we had the same thing, he had a little map, P-383, and on Iowa's traverse which they claim was their ordinary high water mark, they go across fields where there's no physical feature whatsoever, alfalfa fields, near water area but, in this one, for instance, he's looking right at the line. There is a bank quite a bit over here to the right side, but there's no consistency in what they are doing. Again, which we think indicates that maybe they may not know for sure, but somebody is telling them where to go without any logical or legal basis or any consistent basis.

Now just a brief comment on some of Iowa evidence, and very briefly. We would mention that Mr. Huber, who has been one of their principal witnesses in all these cases, put the so-called thalweg or the middle of the main channel on a 1930 aerial photograph D-1092. In the Schemmel case, 1964, where this green line is --

well, correction -- where the black line is, and in this case he put it where the green line is, two different places on the same photograph.

He did the same, he made the same type of mistake, on the 1931 map of the Corps of Engineers, the Otoe Bend area, making an eleven hundred foot error in where he placed the thalweg between 1964 and in 1969, this is D-291A, the green line being where he placed it in '69 as of the date of the map, the red line where he placed it in 1964, and the Schemmel case in Fremont County in Sidney, Iowa, being the red line back in 1964.

THE COURT: What was his background, was he a trained engineer?

MR. MOLDENHAUER: He was the head of the Missouri River -- I think he had two years of education, and then he started in the Kansas City office in about '32 or so.

THE COURT: As a clerk?

MR. MOLDENHAUER: Yes, sir, draftsman.

But the thing we'd like to point out is that no landowner's title should be subject to the type of evidence which can vary over the years, the same evidence, there ought to be some kind of rule of law in this kind of situation.

We have mentioned, of course, some of Mr.

Bartleman's drawings, and we mentioned in the reply brief, and in our Appendix, that some of them were obviously off, and it's not necessarily a criticism of Mr. Bartleman because it's very difficult to place these present areas in the various situations. But we contend that you shouldn't be that sloppy either if somebody's title is going to hinge upon where this area may be located along these various documents. It takes a great deal of effort and it's expensive, and it should be done right, particularly when the state is attacking the title.

Then one more thing, one more exhibit, Exhibit P-2181, which we'd like to show the Court before we begin to go back to the Compact, is the 1964 aerial photographs of the Missouri River, which again point out the character, they start at the Dakota City side upstream, and again point out as of 1964 the character of the Missouri River valley north of Omaha, and the chutes and the depressions and the scourings and the ox bows which exist all up and down the river and which are really a matter of general knowledge to anybody who is at all familiar with the Missouri River valley, a recognition before the Compact, just from the physical features of the many changes of the river.

This was the Winnebago Bend situation that when the Court asked what it looks like today, and this is what it would have looked like in 1964, so there is quite an area out there, at least, but, again,

we've got so many ox bows and so many different indications of where the Missouri River has been. Here is Lake Quinnebaugh on the Nebraska side, and I believe Mr. Brown testified that he found Iowa descriptions on filings in Nebraska to the Lake Quinnebaugh area, but here was an ox bow over towards the Nebraska side, and here's an ox bow right there, and all the area north of Omaha obviously has been scoured out by the river at various times.

Here's a Horseshoe Lake, here's a bend here, this is De Soto cutoff where they put a canal, here's the California bend area with those scourings. Another ox box in Washington County.

THE COURT: These are Engineers photos?

MR. MOLDENHAUER: These are Engineer photos, we call them U-2 photos, they were taken at a high level because they cover quite a lot of territory, but the big thing they do here is Lake Manawa and Omaha and Council Bluffs, and here's Carter Lake, but it's so obvious from looking at these where that, how that river is just scouring out areas all across the valley and it's done it both above and below Omaha. There isn't that kind of distinction, or hardly any distinction when you get to looking at the maps and the features and the topography. Of course, this was the existing situation when the states entered into the Compact.

One other comment on the reconnaissance maps, of course, we have put into the record Iowa's contentions in certain cases that they are inaccurate. There was quite a little testimony as to these reconnaissance maps that were brought in by Mr. Loper, by Stewart Smith, as to how general they were and how inaccurate they were, so we won't comment any more at that point.

That concludes -- just one more comment on the evidence I'd like to make, and that is that there was an indication in Iowa's brief that when Mr. Schwob testified, the Director of the Iowa Conservation Commission in '42 to '46, there was reference to a twenty-five year plan, and I want to point out to the Court that there is no such twenty-five year conservation plan in the evidence -- I have the exhibits here, it is not related at all to the Planning Report, and there should be no inference that the twenty-five year plan in 1933 is the Planning Report. I would be happy to give Iowa what areas they claim in that report, if they'd say hands off of the rest of them.

THE COURT: That might be an area of agreement.

MR. MOLDENHAUER: This, Your Honor, gets us back to where we started, and we're through discussing the various exhibits.

I'd like to make some general observations

first before taking up the points that the Court --

THE COURT: I just put those in there to see --

MR. MOLDENHAUER: Well, we're not afraid to meet them at all.

THE COURT: No, I just wanted to hear what you had to say about those features.

MR. MOLDENHAUER: First I'd like to make just a general comment because we've really never gone into this, I don't know how important it is, but it's background, how the states got this diversion of title and easement law.

Originally the common law, as I read the cases at least, and this is just a general summary in England the rivers that were affected by the ebb and flow of the tide belonged to the King, and the rivers that weren't were considered non-navigable and the public had the easement, or, the highway use, but the title was in the riparian owners.

In England, the situation, they didn't have the rivers like we have in America, because the country is much smaller, and the Thames, for instance, was influenced by that tide.

In America when the problem came up some of the states said, well, the test of navigability is whether they are affected by the ebb and flow of the

tide. If they are it's navigable, and the state holds the title; if they are not it's non-navigable.

Other states said, "No, we don't accept that as a fair test in the United States because our country is so much bigger, and we have larger rivers, and we have rivers which are navigable, in fact, and if the river is navigable in fact we're going to hold that the state holds title to the bed on the navigable streams."

So we got this divergence of doctrine; but what I think it was really intended to do was to provide the public with the access and the use of the waters; and the reason that they had them was because were waterways. When the river moved this idea that they keep the old and pick up the new doesn't, is a little bit incongruous because they do pick up the new because it is the waterway, and that's the reason they have got it, the fact there's land where it was is just an incident of that movement.

So I think that the significant thing as far as the use of rivers is concerned is always that it's been that the use of those rivers have been assured to the public. I don't know of any other state except Michigan, and we mentioned that one Michigan case, which have ever tried to use the movement of the river as an acquisition type program.

And, of course, with the Missouri River we have got a little bit of a different situation because on that river besides all the natural cutoffs, the

Corps came in and superimposed the channel for its entire length, and they engaged in structures and canals along the entire length.

And in most of the earlier cases on accretion and avulsion, and that sort of thing, there may have been a structure in one place or upstream, but there were no other rivers until they did this to the Missouri in the United States where they channelized that whole river. And we think this is significant because again everybody recognized that they had done this on the Missouri and everybody recognized that besides the natural movements there were these many man-made movements which existed.

And so in 1943 when the states admitted that they didn't know where the boundary was Iowa at that time didn't have title to the bed in any, in these places, because they never did determine where the bed was, whether it was in Iowa or in Nebraska. And when the Legislatures settled that boundary, the Iowa bill, House File 437, which was subsequently amended in plaintiff's identification, P-1618, said "this measure is intended to fix the boundary line between Iowa and Nebraska now that the channel of the Missouri River is under control. It will be observed that this measure retains the Carter Lake territory in Iowa. Making the present channel of the Missouri River the boundary line will tend to simplify the question of jurisdiction over territory now in dispute." Recognizing

jurisdictional problems over territory in dispute.

And in the House of Representatives in their report Exhibit P-1012, put the same language in the Senate, the language is found "If adopted this measure will settle a large number of jurisdictional disputes which have risen over a long period of time. The States of Iowa and Nebraska after lengthy negotiations have entered into a Compact satisfactory to both states." Again a recognition of the disputes, the jurisdictional disputes, that existed.

And we'd like to point out here that Iowa's title depends upon its jurisdiction. And back in '43 they settled all their jurisdictional disputes and they shouldn't now be able to come in and utilize that same jurisdiction which was supposedly settled to establish their title.

And we think, of course, when they entered into this Compact without investigating at all as to where the land was, and putting in other provisions to protect titles, that they cannot come back and question where that line was beforehand. We don't think Iowa really loses anything because she didn't have it in the past as a state.

And when we entered into the Compact we didn't just say "Here's the line," and we didn't say "We're recognizing that this middle of the A P maps is the boundary, or has always been the boundary."

And some of the early cases talk about the boun-

dary settlement as recognizing this as the time-honored boundary. Here we recognized that it wasn't the boundary, and we recognized that we changed the boundary, and we recognized that we changed it almost its entire length. We did it when Iowa admits and Nebraska admits that there's no public record of lands ceded, and any determination since that time has to just be based on study or possible speculation because the states have not recognized it, and we just ceded all the land that existed on the other side.

We did it in a situation where the state, particularly of Iowa, had obligations to have of record its claims and hadn't fulfilled those obligations. We did it with the fact that these Nebraska titles were in existence, whether or not properly in existence, they were in existence at the time that the states contracted, and everything they contracted to was in light of that fact that existed at that time.

And the result in 1943 should be the same as the result today and should be the same as the result twenty years from now, it shouldn't make a difference what the evidence was in '43 or what the evidence is today or what the evidence is twenty years from now.

In the cases which have been decided recently, like Judge Johnsen's Illinois-Missouri case, or the Arkansas-Tennessee case, they were distinguished from this one because they didn't have a compact, and they were strictly trying to find the line, and

we say that when we adopted the Compact, the Compact became the law of the Missouri River valley as far as the states are concerned and it bound us.

So from there on the common law isn't in force any more, but it's what the Compact provided. And we had a lot of discussion of what the situation might be if the common law were still in effect, and it's important as background material to show what had happened up to that time, but we think that the Compact superseded all this, and now our rights are to be determined by it. Going to the Court's points in its order directing oral argument, we agree with the excerpt from Judge Van Oosterhout in the Tyson versus Iowa case about the movements of the river, of course, we don't agree with the opinion in that case, but again --

THE COURT: Well, he did say in that opinion that when you had a compact it changed the rules, he did say that, didn't he?

MR. MOLDENHAUER: He said as a result in 1943 a Compact was entered into between the states of Iowa and Nebraska and approved by the Congress, which fixed and specifically designated the permanent boundary line between the states. I don't think that opinion goes any further than that as I recall.

THE COURT: Well, he was talking at the very

end of his opinion, as a general rule -- have you got that opinion there?

MR. MOLDENHAUER: I have it in the other room.

THE COURT: He says Compact disputes don't go by the old law, is what he said.

MR. MOLDENHAUER: Well, I have it in the other room, Your Honor, I don't have it here.

THE COURT: I think he said that.

MR. MOLDENHAUER: But we agree with his statement of the description of the movements of the Missouri River.

THE COURT: Yes.

MR. MOLDENHAUER: And, of course, we agree that below Omaha it was in the channel and above Omaha, approximately seventy-eight percent because, in the channel, because that's what the Corps report says and we don't have any other criteria for judging it.

We agree that it's tremendously difficult to identify the boundary in any place, because of the evidence and the time problems that have elapsed since these movements of the river. But, of

course, we feel that in the Nottleman and Schemmel areas that we have shown that those areas formed physically and in fact and through physical evidence as well as testimony on the Nebraska side of the main channel of the Missouri River, so we think they formed in Nebraska. But we admit certainly there are many places where there is a lack of substantial evidence.

THE COURT: Well, one way a Court might look at this case on that score would be to say "Well, it's a tie," you know, pretty even, as to where, as to what that testimony shows. But the recognition testimony, as we were discussing it, and so on, puts it on your side.

What's wrong with that decision?

MR. MOLDENHAUER: Your Honor --

THE COURT: What would be wrong with that decision, it's practically, we can discuss it and talk about it, and talk about the boundary and all the evidence showed it here and there and the other way, well, what's the difference, the recognition testimony is that it was Nebraska land?

MR. MOLDENHAUER: The only problem with that, Your Honor, is that that requires, that allows the State of Iowa by making the claim, that it would require for somebody else to prove what

state it was in prior to the Compact, and then they are allowing, and then they are setting up a requirement which can in the light of all these situations, we think, defeat the other party's remedy, because they are saying "Although we admitted that the boundary was impractical or almost impossible of determination, and that was one of the reasons we compromised, we could now wait twenty years and go back and make you prove where it was before the Compact." And if so, the Compact didn't do anything except put some land in Iowa where certain people would be subject to Iowa's jurisdiction and Iowa's laws, without any remedy, and they couldn't raise any jurisdictional question.

So any time that Iowa can force the people to come back in and prove where it was they are deprived of what we agreed on, because when they said we agreed that titles good in Nebraska are good in Iowa, they didn't say --

THE COURT: Well, what are you saying, that I've got to find that in order to find for Nebraska, that I must find that the channel was on the east side of the island?

MR. MOLDENHAUER: No, we would, we say that we think that we have shown that and that could be a subsidiary finding, but the primary thrust of our argument is we agreed that we wouldn't have to

go through this kind of procedure.

THE COURT: I understand, I'm saying that supposing I reviewed both sides of the evidence as to where the channel was, east or west side of those two islands, I'd say I don't know, I can't find out, I can't make a determination; but the other evidence persuades the Court that it's ceded land because of the title evidence, and all that sort of thing.

MR. MOLDENHAUER: As far as that area is concerned, that would solve that area, it doesn't solve our overall problem, except, and I'm separating them, because our first thrust is the Compact says you can't do this Iowa, and when you say you recognize titles, you agree you won't attack them, because if you say that this is a good title you can't come in and cloud that title, because then it's not a good title any more.

And you yourself have contracted, and you have agreed, so when you agree it's good, you can't attack it.

But that point, if that burden is established, would solve the problem of the difficulty of proving the line. We don't just rely on one thing, we --

THE COURT: Yes, I know, I understand you, but we have to talk about it when it was done.

MR. MOLDENHAUER: Right; and it it gets back to the burden must be met by the person who files the lawsuit, the fact is that Nebraska is in this lawsuit because of Iowa's conduct, because of what Iowa is doing. Iowa meets its burden in its own courts by doing as they did in the Schemmel case by relying on the presumption of gradual movement, and they say, as Mr. Murray said in his opening statement in the Schemmel case, Exhibit P-1658, that they just expect to trace the land back to the early '30's or into the '20's, and rely on the presumptions in the first instance, which puts the burden on somebody else. And if you can rely on those presumptions, and if the presumptions that they rely on are applicable it is almost conclusive in depriving that individual of his land.

The bad part about this whole thing is that giving the individual his day in Court, in the Iowa Courts, doesn't provide him the normal relief, because of the presumptions and because of the original Compact, the contract which was entered into which was supposed to protect him, and because of what they can do now, because they couldn't do this without the Compact, they'd have a big jurisdictional dispute.

Insofar as the second question about, is the Nebraska evidence of adverse possession or prescription sufficient on which to base a decision; we think in this case it is, but that would require again going back and considering the facts as of '43, or,

as if we had to prove what was ceded.

In the Schemmel area since 1895 we'd exercised jurisdiction, and in the Babbitt area it was a little, it was shorter than that, there isn't any doubt about that, but the fact is that in '43 when we transferred it, we didn't cut it off, Iowa continued to recognize it for another, now twenty-seven years.

In some of the older cases the period did run for a long time, it ran eighty or ninety or a hundred years, but as Judge Johnsen pointed out in the Missouri versus Illinois case any doctrine should be subject to the conditions of the times, and in this situation we've got far more communications and we have far more knowledge than they had back in the 1800's, when it was maybe a few days to the county seat or county line. Here you can travel all over the county in one day.

Insofar as the Compact superseding Iowa's common law and changing the rights, which the State of Iowa had, we contend that it did and we contend that this should really decide the case, because there's no way, if Iowa is allowed to prove, require somebody else to prove how land formed they have to go back then and establish where it was before the Compact. And again we say when we entered into the Compact and agreed to settle it, we settled the question of whether or not any state could come in and require proof by that other party as to where it was.

We didn't say when we entered into the Compact "We're going to draw a new line, period." We could have done that, but we didn't do that, and we didn't say "This is the line we have always had," we said "this is a new line." And when we said the titles are going to be good, we didn't say we are going to wait twenty years, and now we, the State, are going to attack your title. Or we didn't say "If you present a title, we can just say it's spurious and fictitious," and disregard it.

We said "We recognize it", and the state recognizes it. I think that's a duty that the Attorney General's office and the Conservation Commission and the Courts and the Governor have to accept. So we think they changed the entire law, and the only really logical way to enforce it is a holding that the most the State of Iowa has is an easement and the use of the bed of the Missouri River just like the public has in Nebraska.

And if Iowa wants land they can acquire it by condemnation, they can acquire it by gift, and they can purchase it; but they shouldn't come in now, at this stage, and be able to rely on any sovereign claim. They were never asserting it at the time of the Compact; if they had it's inconceivable, I think, that the State of Nebraska would have said, "Okay, we'll put this land in your state so you can serve your documents."

THE COURT: What are you saying, are you

saying that I must recommend that all the way up and down the river, the whole 187 miles?

MR. MOLDENHAUER: That's what we -- yes, sir, Your Honor, we say that that's the only way that these people can be assured of the protections which the Compact gave them, because if Iowa can come in and say "You have to prove your title now," and put all these burdens on them and do that maybe when there's just a little tiny bit of land involved, less land than the attorney's fees would be, they are using that sovereign claim of ownership which follows their jurisdiction, in a way that was never ever anticipated, we say, by the Compact.

And we don't think that the Compact can be read to lead to that result because the practical effect is the deprivation of their land. This is the way it's worked out, and all these acts of conduct along the river have only flowed from Iowa's ability to contest where the line was before the Compact, or from Iowa's ability to say the line was presumed to be in the river because that's where it is. They have required that other party to prove otherwise, and they have done it when evidence has been destroyed, witnesses have died, there's a tremendous burden to obtain this sort of thing.

And in their own Planning Report they recognized that this boundary was almost impossible to ascertain; so they are saying that "We realize

that you can't tell where it is, but we're going to attack you anyway, and now you prove otherwise," and they contracted in the situation in which they recognized that it was almost impossible to determine.

THE COURT: Well, it isn't necessary to do that except in cases where somebody contended that there was a good title in Nebraska prior to the Compact, you see what I mean?

MR. MOLDENHAUER: Yes, I see what you mean.

THE COURT: What's the difference if, just assume there's several errors on the east side of the present line that have been there, swamp land, in and out, and so on, and nobody's really claimed it, isn't it Iowa's land now?

MR. MOLDENHAUER: Well --

THE COURT: Under their common law, and nobody else is disturbing it and nobody else is claiming it?

MR. MOLDENHAUER: If you go back and assume that it was always, originally in Iowa and you make a determination --

THE COURT: Well, you're saying for instance, that somebody is claiming all the land on the east side of the river.

MR. MOLDENHAUER: As a practical matter that's the effect, every area that we --

THE COURT: Well, we haven't covered every mile of that river on the east side.

MR. MOLDENHAUER: No, no, we haven't.

THE COURT: So I'm just saying that suppose we assume, for discussion only, that there are areas there that nobody's on, Iowa perhaps doesn't know about it, doesn't know anything, hasn't done anything about it, duck hunters are on it, and goose hunters, and all that sort of thing, and do I have to say, do I have to say from Rulo to Yankton that Iowa must give up on the east half of the channel it's common law right to the bed?

MR. MOLDENHAUER: I think it follows, because otherwise --

THE COURT: When it seems to me that I'm talking about, we're talking about title good in Nebraska must be recognized by Iowa, that's the extent of it, isn't it, Iowa doesn't have to recognize anything else?

MR. MOLDENHAUER: Well --

THE COURT: Do we have to do away with our whole law or just the law that conflicts with --

MR. MOLDENAUER: Well, the only problem with this, Your Honor, is that somebody comes in and says, "Here's a title that's good in Nebraska," and if Iowa can attack that title, as they do, just say it's spurious and fictitious, then they are stuck with their lawsuit again, and Iowa is attacking them, and Iowa has been doing that, they haven't paid any attention to Nebraska titles, they haven't even looked into them.

I can't question that if Iowa was exercising ownership rights over property in '43 that she's entitled to it.

THE COURT: Is it too much of a hardship on a landowner to say "Here, I quieted title in Nebraska on this piece of property, and now it's on the Iowa side, and under the Compact," and under that situation when you prove your -- you always have to prove your title someplace, don't you?

MR. MOLDENHAUER: That's right, but if you have to prove your title based on the jurisdiction --

THE COURT: Well, he comes in and says "I have got a title good in Nebraska," the way Nottle-

man and Schemmels have done, and if I say that's good, why then, it's good, okay, Iowa has got to recognize it, that's all I need to say there.

Or if I was sitting on a Federal Court case, in the Whitney case, you see, I'd say under so-and-so; but is it too much of a hardship on any landowner just to say to him "You prove your title good in Nebraska and Iowa had to recognize it under the Compact," go that far, in other words, do I have to go as far as you are discussing, the Court doesn't want to go any further than it has to, that's what I'm --

MR. MOLDENHAUER: Well, what I want to point out, if you go that far, that's much preferable to what we have, but if you go that far, then we are still saying that Iowa's individuals can ignore areas, pick up other areas, and there's no law along the river, it's only anybody can attack your title, and we get back to the fact they agreed it was good, they agreed that they wouldn't attack it, I don't know what else, when you agree something's good what it means, it means that you are accepting it as good, and when they attack it in Court they are not accepting it as good.

THE COURT: Well, you have got to show that something's good first.

MR. MOLDENHAUER: Well, that's what they

are saying, but they could have made that determination in '43, they could have said "We're going to find out where the good titles are, and then we'll recognize them."

They said, "No, we're going to recognize them all on this side of the line," because otherwise they had to --

THE COURT: I don't know as we understand each other, Mr. Moldenhauer, at the moment. What I'm trying to get at is I shouldn't recommend to the Court --

MR. MOLDENHAUER: I understand.

THE COURT: (continuing) to issue a judgment on a matter that's really not in dispute, go any further, you know, they never decide things until they have to, see.

MR. MOLDENHAUER: No, I understand that.

THE COURT: And if we have these series of titles, and so on, and which you say are ceded lands, and because they are good Nebraska titles, but there may be, I don't know about this, but there may be other areas that Iowa, that Iowa can assert its common law, right up to the center of the river because nobody else is claiming it; what's wrong with that?

MR. MOLDENHAUER: If we knew where those areas were it would be easy. But, you see, we decided in '43 --

THE COURT: It's pretty well decided now, aren't they, the claims are pretty well filed by now?

MR. MOLDENHAUER: Well, I think, I thought they had listed the areas they were claiming, but they kept the door open to claim anything else in the future.

THE COURT: Well, go ahead.

MR. MOLDENHAUER: But the problem is applying the rule in a fair way, and the problems of applying the rule so that somebody else doesn't have to prove something that we agreed was good back in 1943.

Because now we're saying, "Okay, friend, we recognize your title today, but you're going to have to come in and prove it twenty years from now," and he didn't have to do it back in '43 because he had it. If then he has to prove where the state line is, that's something else. If he could just come in and prove, and show a title in Nebraska.

THE COURT: That's what I'm talking about.

MR. MOLDENHAUER: He might be protected except that he's been subjected to an attack in the Iowa Courts.

And here again we didn't say when we entered into the Compact that you can attack all these titles, they said they were good, and I think it follows that they're not going to attack them because otherwise we don't have any protection to them at all.

THE COURT: Okay, go ahead.

MR. MOLDENHAUER: But that point is much better than the lawless situation that we think exists over there today.

In your question 5 as to whether this case is to be decided giving effect to the general rule that plaintiff must fail unless its case is proved by a fair preponderance of the evidence, relating to Nebraska evidence that the two islands formed on the Nebraska side of the old boundary. First, we contend that the burden has been met, but, secondly, we contend that if the criteria is that that line has to be established before the Compact, Iowa still violated it because they are forcing us to do something that we agreed we didn't have to do. So we say the answer to that question really is, no, that that burden should not have to be met now as to where the boundary was, otherwise we might as well have had original action in 1943 when there

was more evidence available and more witnesses and more documents.

With regard to the Court's proposition about the navigable channel, and the comment that there's no satisfactory evidence of commercial navigation prior to '43, I think we should comment that there is evidence of navigation throughout the years on the Missouri River, but during the '30's and '20's there's every indication that there was very little navigation. There are some commerce reports in the record --

THE COURT: What I meant was, now we are discussing here a little difference between navigability as such, I have held that streams are navigable in various cases between landowners; but what we are talking about whether or not it's navigable to the extent that we can find the thalweg, the boat tracks, the way they do in the lower Mississippi, and all that, you know, Illinois versus Iowa on their argument on their bridges. They fixed the boundary way over on one side, and so on; we don't have that kind of evidence, do we, of that kind of a navigability?

MR. MOLDENHAUER: Well, we have some testimony as to where the boats went, we have some testimony as to where the river was cutting, and the heavy water, and that kind of thing; we don't have navigation charts until after the Compact.

But the Courts have never failed to find a boundary in a dispute between states for lack of evidence.

THE COURT: Because they start out, they say it's navigable, that's why.

MR. MOLDENHAUER: That's right.

THE COURT: They say it's navigable, period.

MR. MOLDENHAUER: And three other cases, Nebraska versus Iowa and Missouri versus Nebraska and Kansas versus Missouri, on the Missouri River where they all found a navigable channel somewhere, through the evidence available. But that gets to this proposition of exercising jurisdiction, long acquiescence, and this sort of thing.

The important thing here we think is the facts pretty clearly show that from our standpoint the length of time could be argued, but the fact is that the states recognized that situation when they entered into the Compact. It was there and they can't say we entered into a Compact in '43 in light of facts which exist in '60 or in '65 or in '69, we have to look back at what they did at the time.

And at the time Iowa wasn't making any claims. And there's no evidence that they were making any claims, there's some references in the Conservation Commission minutes, but they admit that

there was no record of lands they claimed, the Conservation officials admitted that they didn't pay any attention to them, they hadn't raised this issue; and if we go back to '43, if Iowa had been claiming specific areas, we have to look at what the states would have done, whether they ever would have settled it, and they certainly never, Nebraska would never have settled with them in such a way that Iowa at any future date could attack the areas in dispute, or attack titles in the areas in dispute. And they recognized that areas were in dispute all up and down the river, and they didn't want to have to go back and determine where they were. Either that, or they might have entered into the same Compact because the language in this Compact we think still should protect those titles, that's what it was put in there for was to protect the titles.

Iowa's approach depends on so many conclusions. It depends first on the conclusion that the land was not ceded, it depends on the conclusion that these were islands in the bed of the stream, it depends on the conclusion that that bed was in Iowa at the time of the Compact, and a conclusion that this is not an accretion to either bank. And somebody is going up and down the river making determinations as to what they are going to attack and what they aren't, and as we pointed out, they can do this to gain a principle of law to go against somebody else, they've got a, it's a

government of men and not laws up and down that river, because they just go after whoever they want to, and the burden they impose on them is tremendous and it's almost insurmountable.

If we have to come back now and make a factual determination of every place that was ceded. Then we say that we have really sold our people down the river when we entered into that Compact.

Your Honor, my colleague, Mr. Moore, points out that this riparian land all along the river, there are no facts showing that there isn't land that is not being claimed by individual people, but that if there is any dispute along that river that that land should belong to the riparian owners, and the riparian owners are on a parity when placed against each other, but they are not, nobody can fight the State of Iowa. They don't have the resources, they don't have the immunities that Iowa claims, and they don't have any presumptions in their favor.

THE COURT: Well, you know, I don't know as the Supreme Court is going to say that, I don't know, I don't know, that's part of my job to say that, whether to make them -- you know, these cases, as you know, these cases go to the Supreme Court on a report, and somewhere in that report the troublesome thing comes when you have to make a recommendation, come to a judgment, make a judgment. John Kennedy says, "Make a judgment." That's what I'm commencing to -- you fellows have

had this case for seven years and I have had it for a year and a half or so, and you are more familiar with it and all that; but now I've got to say, make up my mind what the report is going to be.

You know, in so many of these cases if there's any chance to affirm the report I think the Court usually does it, but I'm loathe to go beyond the, in the recommendation, what I should to settle a dispute between sovereign states, see, to say something there that they're really not arguing about, you see.

MR. MOLDENHAUER: We understand that, Your Honor.

THE COURT: Yes, so I don't know as I should say, maybe I should just say, well, Iowa's riparian rights now are the same as Nebraska's, but I don't know what -- why would I say that?

MR. MOLDENHAUER: Well, we first have the Compact with --

THE COURT: Well, I know, but --

MR. MOLDENHAUER: You have to give meaning to the whole thing, and if we just say that Iowa can come in here and attack all these things, we're only giving meaning to number one, which draws

the line; we're not giving meaning --

THE COURT: In other words, you're saying, as I understand you, to fulfill a complete Compact and all its terms, and so on, there should be a rule that Iowa's common law to the ownership from the high water bank to the center of the river is just abdicated that they have a navigable right, they have the same public right as everybody else does, change the common law of Iowa on that subject, is that right?

MR. MOLDENHAUER: Yes, Your Honor, because that's the only way that you can --

THE COURT: That would give justice to everybody?

MR. MOLDENHAUER: To everybody and all the provisions of the Compact; it's easy to say the land's in Iowa; but the only reason that we can say that is because of the Compact, no other reason. And then we get rid of this problem of stopping the accretions at the state line which they have raised. If they hadn't taken the approach that they have taken we might not have to take this stand; but we get back to how do we keep Iowa --

THE COURT: How do we do that, if we do that doesn't that permit accretion to cross the state

line?

MR. MOLDENHAUER: Yes, sir, and we think that that should be the decision and the holding in this case.

THE COURT: All right.

MR. MOLDENHAUER: We don't think there's any other way that we can give effect to the whole agreement, and in all the early cases on boundary disputes there's talk about settling things.

THE COURT: Oh, I think the Court wants to settle it.

MR. MOLDENHAUER: And this is the only way that we can settle it.

THE COURT: They want to settle it with finality.

MR. MOLDENHAUER: And we thought we settled it with finality in 1943, and this would affirm the fact that we did settle it with finality. And we think it's consistent with all these broad principles, which we won't argue, because they're principles, this is a unique situation, there isn't another case that comes close to it, and there isn't another compact on this type of situation which comes close to it. We think that rule would

settle this and would accomplish its intended purpose.

THE COURT: All right.

MR. MOLDENHAUER: Mr. Moore has raised another point, Your Honor, that we're probably going to be confronted with this question, that there's a super title in Iowa to certain lands, but the fact is that all we've got is the Nebraska riparian owner's title, and we've got to have, there is all along the river where the Nebraska riparian owner owns on the Iowa side, and we've got to have areas all along the river previously undetermined by any Court that the bed of the stream was entirely in Nebraska prior to the Compact.

So if we now let Iowa take advantage of any presumption that this was otherwise, we have deprived that Nebraska owner of his title, and we think the Compact should be read to recognize that title. And the only way we can do it is either have a conclusive presumption or a presumption that the land was ceded, which would put the entire burden on Iowa to prove where the line was.

THE COURT: What about, we know what the law is down river in other states, down the Mississippi, down the Missouri and Kansas, all down through there, what the law is on the river.

MR. MOLDENHAUER: I know in Missouri, because we have been negotiating with them, the state owned the bed, but they turned it over to their school districts or public schools.

THE COURT: Well, that's that St. Louis case.

MR. MOLDENHAUER: There was a case there, but I know that it's interesting in State Line Island, which is right on the line between Iowa and Missouri, Iowa's claiming the top half of the state-owned bed, but the bottom half, I think the title has been quieted in Missouri, and the state made no claim to it.

I don't think that they have those problems there, because I don't think that they have been -- I don't know, but I don't think that they have been claiming areas like the State of Iowa has. I don't think that anybody along the Missouri River, has come in and claimed areas as Iowa has because of the Corps of Engineers work.

And, of course, Missouri and Kansas, before they entered into their Compact, determined where the line was, and said "Now we're going to cede you this, and you cede us that, and we know just exactly what we are talking about." But they went through the Supreme Court processes of an original action intentionally before they entered into the Compact, and we, of course, obviously --

THE COURT: They entered into the Compact afterward?

MR. MOLDENHAUER: Yes, afterwards, so they knew what they were referring to; but we didn't do that, we said we're, we don't know what we're referring to as being ceded, but we're going to wrap it up by a new line and recognizing titles.

So just in summary we submit that, a solution which solves the problem, gives the people what we contracted them to have, and gives the State of Nebraska the benefit of its bargain would be to hold that the states have an easement, a public easement, for the right of use of navigation on the Missouri River, and not title, and cannot assert title based on a jurisdictional claim after the Compact.

THE COURT: Now one final thing, as far as I am concerned. Of course, the Supreme Court permitted you to file this complaint, is that right?

MR. MOLDENHAUER: Yes, sir, yes, sir.

THE COURT: And do you think the question of jurisdiction in the Court as to whether it's a proper case for the Court, you know, one of the contentions of Iowa, is that it shouldn't be here anyway, no matter what you say, an argument about title

only.

Do you think that's been met here, do I have to say anything about it, or do you think that the permission by the Supreme Court of the filing of the lawsuit is sufficient, or what?

MR. MOLDENHAUER: Your Honor, when we filed this Iowa resisted it, we had a full argument on the 25th of January of 1965, and as I recall the 1st of February, which was the next Monday, the Court came down with its ruling accepting jurisdiction.

The one mistake we made in this case was not having that argument reported. I think that it is apparent, it's obvious, that when states enter into a Compact one state can try and enforce that Compact against the other state, and I don't think that there's any jurisdictional problem at all, I think the problem only gets to solving the problem, and if we don't have a claim under the Compact, that's one thing, if we do then I think it should be determined, one way or the other.

I don't think that there's any jurisdictional problem at all, because the Court has always recognized jurisdiction in Compact cases. Now there is a distinction, when Iowa talks about that this is the law of Iowa, the Compact, and we mentioned in that Massachusetts, Missouri case, there's a distinction between two states just adopting legislation which is similar, because there they can

construe their own statutes and they can amend them and they can change them and they can repeal them; but that's not the situation here. They entered into a contractual commitment to us, and because we thought that Sections 3 and 4 were important enough to go into the Compact we should be able to enforce them, because we can't say that you can only enforce Section 1 of the Compact and not Sections 3 and 4, it's a total document, and it ought to have total meaning, and it should be enforced in such a way that it will be applied today the same as it was then. The problem is --

THE COURT: You don't think that's a serious issue then, do you?

MR. MOLDENHAUER: I don't think so, I don't think it's a serious issue at all, I think this, if the Court held no jurisdiction it would do serious violence to all the compacts in the United States, and the Supreme Court has often suggested that the parties settle their differences by compact; and nobody is going to settle here, at least, if they can't enforce it in some form.

That completes our argument, Your Honor, I don't want to represent we have covered everything, but with the briefs, and everything.

THE COURT: Well, I'm not critical that you ought to do more, put it that way.

Well, now, lets see, you have your, before Iowa starts, my law clerk is here and we expect to take these matters back to Erie.

I'll say frankly, I'm going to do the work that I have to do in the Erie chambers, I have two chambers so far, I don't know how long I'll have them, one in Erie and one in Pittsburg.

Will you be ready in the morning, do you want to say anything today?

MR. WALKER: Well, it's up to the Court, I don't like to just fill in time on the evidence, when you asked Mr. Brown about these, I am not prepared to talk on the evidence, because we had our exhibits sorted that we were going to use, and they have been intermingled.

THE COURT: Well, no, I think that we ought to have a break so that you can start fresh in the way that you want to start in the morning.

MR. MURRAY: I'd say let's wait, let's work on the exhibits and assemble our exhibits, and we can start in the morning.

THE COURT: That's what I mean, I suggest

that. Will you take two days or one day, sometimes the defense doesn't take quite as long?

MR. WALKER: Your Honor, I have never been able to talk all day even though sometimes I have been accused of talking too much.

THE COURT: Well, in other words, what do you want to do, you think that you'll finish in one day?

MR. WALKER: Probably not a day, and probably not two days either.

THE COURT: Well, maybe we can have a conference among all of us, say, Friday noon or Friday morning, if you finish in time.

MR. MOORE: We might need time for a scorching rebuttal.

THE COURT: I suppose, yes, I suppose. I don't whether you'd think of that or not, but I suppose you would.

We' ll meet again in the morning at 9:30.

(Thereupon, at 2:30 o'clock p.m., the hearing in the above entitled cause was recessed until 9:30 o'clock a.m., the following morning, October 1, 1970.)

