LIBRARY
SUPREME COURT, U. S.

C 1

In the

Supreme Court of the United States

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF IOWA,

Defendant.

No. 17, Original

Washington, D. C.
March 29, 1972

Pages 1 thru 44

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NEBRASKA, Plaintiff,	:	
v.	:	No. 17, Original
STATE OF IOWA, Defendant.	:	

Washington, D. C.

Wednesday, March 29, 1972

The above-entitled matter came on for argument at 10:30 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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

MICHAEL MURRAY, ESQ., Special Assistant Attorney General of Iowa, 110 North Second Avenue, Logan, Iowa 51546, for the Defendant.

CONTENTS

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 17 Original, Nebraska against Iowa.

Mr. Moldenhauer.

ORAL ARGUMENT OF HOWARD H. MOLDENHAUER, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. MOLDENHAUER: Mr. Chief Justice, and may it please the Court:

This case involves Nebraska's contention that the State of Iowa has violated the Iowa-Nebraska Boundary Compact of 1943. In order properly to evaluate the contentions of the State of Nebraska, we feel it's essential that first we have to examine into the situation as it existed in 1943 and in prior years.

The case of Nebraska v. Iowa, decided in 1892, determined that originally the boundaries between the two states was the center of the main channel of the Missouri River. And the boundary moved with changes of the channel when these changes were gradual and imperceptible; but when they were sudden or by evulsion, then the boundary remained in the bed of the abandoned channel. These principles applied at that time both to state and private boundaries. There is no dispute that down through the years the Missouri River was very notorious for all of its periodic flooding and many natural changes, and it was common

knowledge that many times it had changed its course and it had physically dissevered lands from one state and left them on the opposite side of the river, and this created all kinds of problems in determining jurisdiction, titles, which schools children should go to, and taxation. And the legislative history of both states is replete with recognition of these problems, and the legislatures have boundary commissions from 1901 through 1943.

Commencing about 1934 on top of this already confused situation along the river, the U. S. Army Corps of Engineers set out to create a new and a stabilized channel for the Missouri River. This channel was supposed to be 700 feet wide and was prepared on the drawing boards. And then the Corps of Engineers, through the construction of dikes and revetments, set about to place the river in that channel. And, commencing in 1938, they also dug canals to physically place the river in the channel. These canals consisted in many cases initially of a ditch dug on dry land and then they pulled the plug at the top and allowed the water to go through and it scoured out through that dry land the new channel. At that time the Corps, when it moved the river, moved it around islands, around bar areas, and through bank area, and it created further confusion insofar as boundary problems were concerned. But the Corps, when it channelized the river, paid no attention to the boundary.

It was not concerned with this. It was concerned in confining the river and stopping the flooding and improving the navigation.

By 1943 the Corps had dredged canals at at least 11 locations, and Nebraska feels that the evidence shows at least 15 places, but that really is not important. There were several canals which they had dug. And in 1943, south of Omaha, the river was 99 percent in its design channel to the Nebraska border, and north of Omaha it was approximately 78 percent in the design channel. But this river work by the Corps had further compounded many of the title problems which existed.

In 1943, then, the states, under the assumption that the river was finally stabilized, entered into a compact to settle their boundary. At that time we think the facts are very significant, because at that time each state, and the Master so found, recognized that the shifts of the channel in the past had been so numerous and intricate that for practically all land adjacent to the river there was no conclusive determination of either state or private boundaries considered possible. They both recognized that in many places the boundary line was not located in the Missouri River and that these places had not been determined and were almost impossible of determination. And if a compromise couldn't be worked out and if they had to

make a determination of where the boundary had been fixed on dry land, it would be an extremely complicated and expensive process. At this time and prior to this time, the State of Iowa was making no claim to abandoned river beds or islands arising from the bed of the Missouri River. And under any common law claim of sovereign ownership. In 1932 they had purchased some land in an abandoned river bed in a well known evulsion with Lake Manawa south of Council Bluffs, Iowa. And they were not claiming islands which existed south of Omaha where the river had been entirely in the design channel since at least about 1938. There were abandoned channels and oxbows all up and down the Missouri River on both sides of the Missouri River, and Iowa had made no claim to these abandoned channels and oxbows on either side.

There was a case in 1938 in the Nebraska District Court, which was eventually decided by the United States Court of Appeals for the Eighth Circuit, called U. S. v. Flower, where the Court found an evulsion and Nebraska land on the Iowa side of the river, and Iowa was a party to that case at one time in the District Court, and then the Court allowed her to withdraw, she did, but she never came in and claimed that abandoned channel.

The Iowa Code during all this period required that the Secretary of State was the state land officer and would

maintain in separate tract books the areas of land which the state may now own or may hereafter own, so that there would be a separate record of the lands in state ownership. Iowa had no record of any state owned lands along the Missouri River or lands which she was to claim at a future date. The Iowa Code since 1923 had provided that the Conservation Commission would mark its boundaries in cases where the jurisdiction--or the boundaries of its jurisdiction with privately owned property.

And then in 1931 or '32, they added where the commission deems it feasible. But they had not marked boundaries along the river where the commission property supposedly commenced and where the landowners property limits were terminated.

Again, the Master found, and we think properly, the states didn't know where the boundary was located and they didn't care, and neither state thought it was necessary in order to settle their problems to identify or pinpoint where the boundary was at any particular location. There were lands taxed in Nebraska which were on the Iowa side or the left bank side of the river as you look downstream. There were some lands on the right bank or Nebraska side which were recognizably in Iowa. Nebraskans were in possession and claiming many of these lands; and lands on the Nebraska side, Iowans were in possession and claiming.

And some of those possessions came from some claim of record title, others might have commenced just with open notorious adverse possession, which was possible under Nebraska law.

The two states entered into the compact in 1943 to settle all this chaos and confusion and, as the Master found, to accomplish the general purpose of settling and laying to rest the boundary and jurisdictional problems which existed between the states, and he found they intended to settle all of their problems arising from the indefinite nature of this boundary and from the work by the Corps in channelizing the boundary.

Following the compact and before we go into the terms of the compact, we think this is also significant, parties in possession on the left bank or Iowa side continued to exercise ownership without disturbance from the State of Iowa. In many instances, the land was placed on the tax rolls of the State of Iowa. Some plant land was placed in the government farm program, it was clear. Some of it was improved. In 1946, owners of one of the areas about which a great deal of evidence was introduced, Nottleman Island or Babbitt Island, by a lawsuit against the county officials to have it placed on the tax rolls.

Their attorney, Mr. Whitney Gehroland (?), who is presently with the Civil Aeronautics Board, nad notified the Attorney General's Office of the problem. They had

discussed it. And the court found that they claimed the land through Nebraska titles and issue of ownership, ordered Mills County, Iowa, to place it on the tax rolls, and it was taxed thereafter.

Q Mr. Moldenhauer, I suppose this compact means that this particular litigation is not a boundary dispute.

MR. MOLDENAUER: That's correct, Your Honor. This litigation is based on the compact itself and because Nebraska was a contracting party to the compact.

Q So, it's rather unusual as compared with--

MR. MOLDENHAUER: We think that it's highly unusual and there is very little precedent directly in point involving this situation. We think the facts here, Your Honor, are very unique and this case freely hinges on the facts as they exist.

Q In essence, this is a suit to enforce a compact.

MR. MOLDENHAUER: It is, Your Honor.

Q Which has been approved by Congress.

MR. MOLDENHAUER: That's correct, Your Honor. And I want to get into the terms of the compact after I get into a little bit of this--

Q And that, I take it, requires a construction of the compact, does it?

MR. MOLDENHAUER: Yes, sir, Your Honor, a construction or interpretation. Really it involves the same

thing. It's a question of what does the compact mean and what effect did it have. If we had not entered the compact we would not be here.

Q Nothing that you're requesting involves a dispute as to where the Iowa-Nebraska boundary is now.

MR. MOLDENHAUER: Your Honor, that is not the basis for the suit. It will come up that there may be a lot of uncertainty, but it's a part of the compact. We're not claiming it, though, as the basis for our appearance in this Court.

Q As a matter of fact, the lands about which this controversy swirls, they are conceded all to be in Iowa, are they not?

MR. MOLDENHAUER: Your Honor, they are conceded to be in Iowa now because of the compact and because the compact placed them there, and we think this is a very critical point. In any event, there were other instances after the compact where Iowa either disclaimed land in an abandoned channel and they did so in '56 in a lawsuit in the Winnebago Bend area where they disclaimed land, and in '59 in California Bend where the Corps dug another cutoff and Iowa appeared in a lawsuit and did not assert a title or was not successful in asserting title to an abandoned channel which existed.

Q One last question. The State of Nebraska is

here really, as has been suggested, attempting to enforce the compact.

MR. MOLDENHAUER: Yes, sir, Your Honor.

Q Are you also here as parens patriae?

MR. MOLDENHAUER: If so, it's just an incidental effect because this involves our 190-mile boundary. And we do contend that Iowa's conduct, which I will describe in a minute, puts in question and uncertainty all of the 190-mile boundary and really impedes development of the river front. But we are here because of the compact and what we agreed to.

Q If in fact Iowa had breached a provision of the compact, would Nebraska have a right of recision, have a remedy of recision?

MR. MOLDENHAUER: Your Honor, we thought about that. I've never seen any cases where a state was successful in rescinding a compact approved by Congress. And if that happened, we would have a far greater mess than we've got now and I don't know where we'd end up. We didn't think as a state we could ask for recision.

Q Then I gather your position is the remedy, if there has been a breach by Iowa, must be specific performance.

MR. MOLDENHAUER: It must be, Your Honor, and in the form of injunctive relief.

Q Whoever might obtain it and in whatever court,

I take it, it's conceded that federal law is to govern? If the compact is enforceable by somebody, the construction of the compact is a matter of federal--

MR. MOLDENHAUER: Yes, Your Honor, we feel it's only enforceable in this Court because it's an original action between the two states, and we don't think Iowa can make their own determination as to what her own commitment is.

Q Presumably an Iowa land holder could claim under the compact, could he not, if I was seeking a quiet title to his land and he claimed--

MR. MOLDENHAUER: Oh, yes, sir. It's not based on his citzenship. It is based upon what Iowa agreed to and what she agreed to recognize.

Q He could be a third-party beneficiary of the compact.

MR. MOLDENHAUER: Yes, sir, they definitely could be a third-party beneficiary. We do think that the facts in this case have pretty clearly shown, though, that he cannot effectively defend himself or protect himself, because this river moved across three or four miles. He didn't have a chain of title like I have at my house where I've had one piece of property for 60 years. It could be accretion at one time to this section or this section or this section or this section as the river moved over. As it went back, they

could re-establish the sections; they could call it accretion to this section, and the river could be clear over here and there could be three or four sections described as accretion to this one, or it could be placed on as tax lots. It's a tremendously complicated--

Q If you're right on the compact, he can raise that same point in his own litigation and say that Iowa has no right to go back here, before 1943.

MR. MOLDENHAUER: He can raise it, yes, Your Honor. The problem is they have not effectively been able to raise it in the past. There is an Iowa decision which says, for instance, in the Dartmouth College case, that compact had no effect on private titles, but we think we can show it did have an effect upon private titles.

In 1961, Iowa came out with a Missouri River planning report, and I believe the Master forwarded copies to this Court, which was the first document where they publicly announced a policy of claiming lands on the river, and there is in evidence how they selected these areas. There is no investigation of any Nebraska titles. They didn't talk to the landowners, they assumed anybody in possession was a trespasser; if somebody raised a Nebraska title, they automatically called it a spurious and fictitious title. And all of a sudden, all these farmers who had had this land since '63, were farming it, found they were under

attack by the State of Iowa; they couldn't borrow on their land, which in part made their operation tremendously difficult, and they couldn't understand the situation they had been placed in.

Now, going back to the compact which was a compromise, first it was an agreement between the two states, and Iowa bound herself in this compact. The first section established the boundary, and it established it in the middle of this main channel as it appeared on the Corps of Engineer maps. This made the boundary a fixed line. It changed the boundary between the states from a movable boundary in every case to a fixed line down the geographic center.

In most instances that navigable channel where the river was still the boundary, it followed the outside of the bends. It had crossed back and forth as it flowed down the river. So that what the compact did was change the location of that boundary, and it changed it to a fixed line. So, it changed the state's rights.

One of the issues is, Did this change the private riparian owners' rights. And we don't think that by changing our state line we change the line of the private owners, because we think that their line should have stayed the same; we didn't take away their right, which was a vested propery right.

Q You'd have a just compensation problem, I take it.

MR. MOLDENHAUER: Absolutely, but there has been no provision for compensation under anything that Iowa has done. She has done it supposedly under common law. And this is the basis for a planning report, that in Iowa the common law provides the state owns the beds of navigable rivers. In Nebraska the principle has always been that the state has a public easement for navigation, but the riparian owner owns it, and this includes accretion to the bed of that river.

But Section 1 changed the situation all along the boundary. So land in a very strict technical sense was transferred back and forth all along that river. Then in Section 2, of course, they recognize the lands on each side were ceded, and the really operative language is Sections 3 and 4.

In Section 3 they said basically titles, mortgages and other means good in Nebraska shall be good in Iowa. As to lands, Nebraska shall cede to Iowa. Any pending suits can be prosecuted in the final judgment. Iowa says, "Oh, yes, you've got to prove it was good in Nebraska before we have to recognize the title."

Our contention is, "Iowa, you agreed in a context where you were making no claims. You agreed in a context

where you recognized the uncertain situation. You agreed in a context where you didn't want to find the boundary, you wanted to avoid it." And the compact should be construed as the Master read it, to cover all lands in the situation which existed along the river in 1943, because that's what they were referring to.

Q But Iowa's promise referred to ceded lands.

MR. MOLDENHAUER: It says as to lands--shall be good in Iowa as to any lands Nebraska may cede to Iowa.

Q The ceded lands you think are those Nebraska would have recognized before 1943?

MR. MOLDENHAUER: Yes, sir, without the necessity of determining where the boundary actually was.

Q Without the necessity of proving whether Nebraska was right or not in recognizing--

MR. MOLDENHAUER: Right, Your Honor, because everybody recognized the confused situation and the difficulty of determining where the actual boundary was.

Q You say if a party, for instance, had a proper chain of title under Nebraska law and presented that to the Iowa courts, Iowa should recognize it?

MR. MOLDENHAUER: Yes, sir, Your Honor, recognizing again that that proper chain of title may consist of some possessory rights or what some people might call paper title because you don't have a paper title.

So, we don't feel that Iowa can conduct herself because she agreed that they're good, but then she'd come in and attack them. And we say this is binding on her courts, on her legislative and executive branches. So, she can't say we're going to go into our courts, because her courts are also bound by what her commitment was. That is one basic proposition.

Section 3, we feel, was language of recognition of a situation in private title. Then the states added Section 4, which said that taxes for the current year can be levied on lands ceded to the other state for one year, and that any rights under those taxes accrued or accruing would be asserted in five years or be forever barred, and the states would stop taxing across the river. So, four, we feel, was a limitation on what the states can do. Three was a recognition of private rights, and the states looked at this and said, "Now we've solved our problem. We have no more problems. We're through." And we think that this compact has to be construed literally to effectuate the intention for which it was adopted, and that was settle all the problems.

We agree with the Master's finding that in any action by a landowner or by Iowa along the river, that the landowner should not have to prove where the boundary was beforehand. If he raises some Nebraska title, Iowa should

have to recognize it. The evidence is clear that Iowa didn't even inquire. And when the titles were raised, she has said they're spurious and fictitious. We go a little further and contend that Iowa shouldn't be able to raise all these problems, that we ought to be placed in the situation we were in 1943 and for at least 15 years thereafter before Iowa started asserting these claims. And if that means that Iowa has to recognize the Nebraska owners' titles to the bed and Iowa has an easement for public navigation as Nebraska has or as all the public has, she hasn't been deprived of anything.

There were areas where the river was entirely in Nebraska at the time of the compact. And in those areas, many of which the states did not want to determine, our contention is that the entire bed was in Nebraska; and when Iowa said titles good in Nebraska shall be good in Iowa, she is recognizing the title to the bed. She didn't accept it. Iowa's position now is, "We own the entire bed because it's in Iowa."

Another issue which has come up was originally decided by the United States Court of Appeals for the Eighth Circuit, I think in November of 1960, in which another situation where there is no question about the facts occurred. The river was in the design channel. It moved out into Iowa; land built up behind it. And the Corps

of Engineers placed it back in the design channel. This case involved between twelve and thirteen thousand dollars of damages, condemnation by the Corps of Engineers for placing the river back in the design channel or the boundary.

The Court of Appeals for the Eighth Circuit said that the land is in Iowa; Iowa owns the bed; therefore, Iowa owns it. And the Nebraska riparian owner was deprived of his ownership. Iowa has used that principle in order to make her claim to all lands north of Omaha. Our position is this, that when we intended to settle this thing we didn't change the private property owners' boundary. It should have stayed the same, because we couldn't divest them of their property rights without due process of law and without compensation.

Had it not been for the compact, when that river moved into Iowa, the Nebraska riparian owners' rights, which extended to the thalweg or thread of the stream, moved with it because that's a private property boundary matter and it moved over. And when the court put it back without washing away the intervening islands, it was an evulsion which left that private property boundary remaining over into Iowa, and the Nebraska riparian owner should have had preserved to him his right to his accretions. If it is read otherwise, then we say that that Nebraska riparian owner has been deprived of his property without due process of law.

It's very easy to say the land is in Iowa; therefore, Iowa law applies; therefore, Iowa owns it. But the fact is what would the parties agree to, and we say Iowa law is what the compact provides, requiring Iowa to recognize private rights. And we say that it would have to say in the Tyson case but for the compact the boundary would have been clear over into Iowa. The states avoided the necessity of worrying about that as between themselves. But they shouldn't be able to deprive the riparian owner of his rights because of their agreement.

Q Nebraska as a proprietor of land isn't involved in this dispute at all.

MR. MOLDENHAUER: No, sir, Your Honor. We are here because we didn't just agree to a new boundary. If we had Section 1 and said here's the boundary and stopped, it might be a different situation. But we said no. We have three and four here where you, Iowa, have to engage in certain conduct to assure us that we're getting what we bargained for, and we agree to do the same thing for you. Iowa has to rely on Section 1 to show the lands in Iowa. That's the only way she can do it. And she does rely on Section 1. So, she is relying in part upon that compact to establish jurisdiction. Then she says, "Jurisdiction establishes our title because we're in Iowa and we own the bed."

Q So, the basis for the bringing of your suit

here is the original jurisdiction of this Court, isn't it? There is nothing added to that jurisdiction by the provision for interstate compacts, so far as the jurisdiction is concerned.

MR. MOLDENHAUER: The jurisdiction is because we entered into the compact pursuant to authority of the Constitution, and this is an action regarding that compact. When the states came into the union, they gave up their right to solve their problems any other way. And when we do it by compact, this is the proper place to tell us what that compact means and what conduct is proper pursuant to it.

Q Would you say then that this Court has original jurisdiction, should exercise original jurisdiction, on every single claim that might be made under an interstate compact?

MR. MOLDENHAUER: I think essentially as between the states, yes, because I think if they can't--we're involved in this specific one--but if they can't, there is no place else where they can go to solve their problems. And if they can't solve their problems somewhere, there is no incentive to enter into compacts at all. And this Court has often suggested courts try to settle their problems by entering into a compact. This is what we did. We think it settled our problems, and we think the Court should tell the State of Iowa and everyone that this is how it settled it

and this is what you can do pursuant to it.

Q But the jurisdiction of this Court rests on the fact that the parties are two sovereign states, not on the fact that it's a controversy about a compact.

MR. MOLDENHAUER: Oh, no. It rests on the fact the parties aretwo sovereign states, and they entered into an agreement pursuant to the Constitution and consent of Congress.

Q But whether or not they had, we would have exclusive and original jurisdiction in this lawsuit because it is a lawsuit between two states, whether the substance of the lawsuit grows out of an interstate compact or grows out of a common law nuisance or whatever.

MR. MOLDENHAUER: Essentially correct, Your Honor, but it has to be a controversy.

Q It has to be a controversy.

MR. MOLDENHAUER: That's correct.

Q And it has to be a case or controversy, and you say it's a case or controversy because your contractual rights for which you gave consideration are at issue here.

MR. MOLDENHAUER: That's correct, Your Honor. That's correct.

Q Mr. Moldenhauer, how do you distinguish this case from the old Dakota, North Carolina bond case, where in effect South Dakota gave consideration for the North Carolina

bond, sued on it, and this Court declined to exercise jurisdiction because it said that South Dakota was basically suing on behalf of its residents, even though it had the nominal title to the bond.

MR. MOLDENHAUER: Your Honor, that may be that the nominal title may be the distinction; in this case it involved our boundary which has always been a matter of state interest, and when the states were admitted into the union, controversy as to boundary and agreements as to boundary were in existence and traditional and historical.

Q But there is no dispute here as to the boundary between Nebraska and Iowa.

MR. MOLDENHAUER: Because we agreed to where it was.

Q It might very well be, if you can't get what you bargained for.

MR. MOLDENHAUER: That's right. If we can't get what we bargained for, although Nebraska--

Q You'll be up here with an original boundary line suit.

MR. MOLDENHAUER: Although Nebraska would never bear arms, I don't know about the farmers here.

Q Has there been any real dispute as to the present boundary between the State of Nebraska and the State of Iowa under this compact?

MR. MOLDENHAUER: There is a real question of where it is, because the documents they used in defining it were so general that they didn't have sufficient data to allow a surveyor to lay it on the ground. That is not why we're here though. That's another aid in construction, Your Honor, that they used a very general agreement to generally settle, because they didn't lay it out on the ground, they didn't have--they used some maps that are like road maps almost.

Q Did we argue these matters before?

MR. MOLDENHAUER: We argued everything, Your Honor.

Q You argued as to whether there was a case or controversy here?

MR. MOLDENHAUER: Yes, sir, and we had a two-hour argument and we went through--

Q That was back in '65.

MR. MOLDENHAUER: '65. We went through the whole thing.

Q And we granted leave to file.

MR. MOLDENHAUER: And you granted leave to file. in one week. In fact, Your Honor, at that time I made the comment--and I'll never forget it--Mr. Justice Brennan said, "Isn't this an action to enforce the compact?" I said, "Yes, Your Honor, maybe I ought to say that and sit down," and he looked at me and said, "Maybe you ought to." But we

had to give you the full picture because we did not want to mislead this Court. And I don't think we did mislead them. We feel that it is necessary to settle this because there are approximately 47 miles at the present time where the boundary--where the river is not located in the boundary, it has moved out north of Omaha, and unless we find out what we agreed to in 1943, it's almost going to prevent another agreement which is necessary, and the present situation we feel impedes the development of lands along the Missouri River and it really results in a government of men and not of laws along the Missouri River.

Your Honor, I wish to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Moldenhauer.

Mr. Murray, you may proceed.

ORAL ARGUMENT OF MICHAEL MURRAY, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. MURRAY: Mr. Chief Justice, and may it please the Court:

I want to rearrange the order of my remarks a bit due to the line of questions which the Court has just been asking Mr. Moldenhauer. It is Iowa's position that this is not a proper case for this Court to exercise its original jurisdiction.

Q You'll tell us I assume very early why that bridge wasn't crossed in 1965.

MR. MURRAY: It's our understanding, Your Honor, that whether or not a permission is given to file a complaint is dealt with usually in sort of a pro forma manner, and that if there is any reason why the complaint should be permitted to be filed, this Court will permit it. But that it still remains for the complainant to prove his case. And we feel that this Court, as any other court, should examine its jurisdiction at all stages.

Q Of course, the jurisdiction is open at all times to attack, Mr. Murray, but not having been here in 1965, I don't have the benefit of the arguments that were made.

MR. MURRAY: I wasn't here either, Your Honor.

Q From what was said, this case was not perfunctorily treated. Full arguments were had, and a great deal of time was devoted to it.

MR. MURRAY: We still feel, may it please the Court, that Nebraska had the burden of proving facts whereby she was entitled to an exercise of the Court's original jurisdiction, and we feel that now she has had her opportunity to prove those facts and we feel that she failed.

Q Of course, you will go right ahead and make your argument to demonstrate that, Mr. Murray.

MR. MURRAY: There are three basic things that we feel Nebraska failed to prove. The first thing we feel that she failed to prove was that Iowa violated the compact. And basically we feel that she failed to prove that because the proof is that what we have done is engage in litigation in a court of competent jurisdiction concerning the ownership of several of these areas. We didn't send out the National Guard or the Corps of Game Wardens or the Highway Patrol to move these people off these islands or off these abandoned channels. All we did was engage as litigation in this litigation, sometimes as plaintiff, sometimes as defendant, sometimes as an intervener, in the Iowa courts, of course, because these areas which the state claims to own are all in Iowa, and we simply don't feel that that was violation of the compact.

Secondly, we feel that they haven't proved a justiciable controversy between these two states. They failed to prove that because Nebraska has no real abd present interest in this matter. Some of her citizens do. Some citizens of Iowa do. Some non-residents of both states do. But Nebraska has no interest. She doesn't claim to own any of these areas which Iowa now claims to own. That was established by interrogatories, in answers to interrogatories, early in the pre-trial phases of the case.

It is for these reasons, for the reason that she

failed in her proof, that we feel that this Court should not exercise its powers of original jurisdiction in this case.

Q Let's assume for the moment that it were admitted and perfectly clear that Iowa was breaching the contract. You would still make the same argument here as far as disability was concerned, that Nebraska, since it has no proprietary interest, stands to gain no dollars and cents, has no justiciable interest in enforcing the terms of the compact which it entered into with Iowa.

MR. MURRAY: And has not brought herself within the rules of parens patriae.

Q Yes. That just the fact that it contracted with Iowa is not enough.

MR. MURRAY: That's right.

Q That a contracting party doesn't automatically have standing to enforce the contract, even though he gave consideration for it.

MR. MURRAY: That's right.

And I can't cite you to a case for it. As far as I know, this is the first case--Mr. Moldenhauer says it's a peculiar case--this is the first case that ever came before the Court where this sort of situation exists, and I don't believe, as far as I know, at least, there isn't any prior case on the point.

It's perfectly true that the State of Iowa does

assert in this case and in these cases in state court where we think the issues should be decided that we do own the bed of the Missouri River insofar as that bed is in Iowa. And we do assert that we own certain islands, not all islands, but certain islands which have formed over that bed, specifically the islands which have formed in Iowa over that bed. If they formed in Nebraska, we agree that we do not own them.

Also we claim to own certain abandoned channels of the river in Iowa but not all of them. And the reason for this is that it is the law of Iowa that the state doesn't remain the owner of all abandoned channels. I think a fair statement of the law of Iowa is that that we only own abandoned channels which were abandoned by an evulsion. And wherever an abandoned channel was abandoned by the process of accretion, by the process of land forming to the shore from a private riparian owner, then the private riparian owner owns that land as accretion to his riparian shore.

The Iowa rules I think are best summarized in the case of Holman v. Hodges in 1901 by the Iowa Supreme Court Justice Ladd, which is cited in our brief, and the reasons for them are fully discussed in that opinion. This has been the law of Iowa consistently since 1856, ten years after we were admitted to statehood. The court in Iowa has never deviated. And there are a number of cases at least since

1943 where the Iowa court has said that this is still the law of Iowa. Iowa owns the bed; Iowa owns accretions to the bed; Iowa owns abandoned channels which were abandoned by evulsion.

Now, Nebraska claims in this case that we signed away our right to claim ownership of anything along the Missouri River by operation of that common law when we entered into the 1943 boundary compact. This is the equivalent of saying that the 1943 boundary compact repealed the law, repealed the common law of Iowa, insofar as it would apply to the Missouri River.

We deny that that happened as a result of the compact. And the first reason that I would mention for our denial is that the compact simply doesn't say that. And it doesn't say anything like that. And, in a sense, it says just the opposite of that. When Nebraska proposes that the compact repealed the Iowa common law along the river, she recognizes her responsibility to propose something to fill the void which would then be left. She proposes then that Nebraska common law should take over and apply on both sides of the river. That's diametrically opposed to what the compact said, because Section 2 says that the State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all land now in Nebraska but lying easterly of said boundary, and thexewas a reciprocal session in the

Iowa enactment of the compact. By this language we think Nebraska said to Iowa, "Nevermore will our sovereignty or our jurisdiction or our land title laws extend east of the boundary and into Iowa." Contrary to what Nebraska--

Q Mr. Murray, the consequence of your approach is then that the bed of the river in those parts ceded were actually vested in the State of Iowa.

MR. MURRAY: Yes, sir.

Q Whereas before it has been owned by a Nebraska riparian owner subject to--

MR. MURRAY: We don't really agree that it was owned by the Nebraska riparian owner. We deny that the Nebraska riparian owner had any vested title to it under Nebraska law, prior to the compact.

Q Then where would you say title was in that position? It wasn't Iowa's land, was it?

MR. MURRAY: Oh, no, no, no.

Q It didn't belong to the State of Nebraska, did it?

MR. MURRAY: No. What I am saying is as far as we were concerned at least it was a property of the Nebraska owner, but what I am saying is he had no vested title to it.

Q Will you enlarge on that a little bit, because I don't know what kind of a title a farmer has if it isn't a vested title in the context we're talking about. Do you

mean by that it must be to the hazards of the moving of the river just because it happens to be located near the bank of a river? Is that the--

MR. MURRAY: I didn't quite understand that question.

Q I am trying to get at what kind of title you think the farmer has to this land if it isn't a vested title.

MR. MURRAY: Nebraska made her election to become one of those states wherein the beds of her navigable rivers are privately owned. In the 1906 case of Kinkead v. Turgeon, Kinkead v. Turgeon does say the Nebraska riparian owner owns to the thread of the stream. The only trouble with Kinkead is that it didn't involve ownership of any bed of any navigable river. Kinkead involved accretions which had arisen and were in existence at the time of the case. Therefore, we say that when the Nebraska court said in Nebraska our landowners shall own to the thread of the stream, that that was dictum because the case didn't involve ownership of the bed of the streams.

Q But if you're trying to find out what Nebraska law is, the next best thing to a holding of the Supreme Court of Nebraska would be dictums of the Supreme Court of Nebraska.

MR. MURRAY: That's right. We think that--let me say one more thing. First of all, we have cited all the

Nebraska cases in our exceptions to the Special Master's report which could possibly be construed as creating a vested right in the landowner to the bed of the stream. And there is no case in Nebraska which involves the bed of a navigable stream. Every case in which any remark has been made about this is our law, private ownership to the thread, has involved either accretions in being or it has involved the Platte River which is a non-navigable stream. So, we say that all the statements the Nebraska court has ever made about it are in the nature of dicta, and we agree dicta perhaps creates the law of Nebraska but it doesn't create vested rights which the Nebraska unicameral couldn't change, and it's our position in this case that when the Nebraska unicameral ceded to Iowa everything east of the new boundary, then it was she, it was the unicameral, that was changing the law that would be applicable to those areas, and they were saying hereafter the law of Iowa shall apply to them.

Nebraska says that the unicameral couldn't do that because these landowners had vested rights in the bed of the river. We say no, they had no vested rights, and, therefore, the Supreme Court of Nebraska could have changed their common law concerning ownership of their river beds, they never have, but they could have. And the legislature possessed the power to change the Nebraska law. And, insofar as it's applicable to lands east of the boundary, that's precisely

what the unicameral did.

The Special Master agreed with us on this proposition, and at page 193 of his report he sets out his proposed rule for determining ownership of lands which have formed since the compact since 1943. And, by the way, to give you some idea of what's involved here, Iowa now claims to own approximately 30 areas up and down the river between Sioux City and the Missouri state line. Approximately eight of these areas were in existence at the time the compact was entered into, and the remaining 22 areas have come into existence since the compact.

Mr. Moldenhauer mentioned that one case has gone as far as the Eighth Circuit concerning the ownership of one of these tracts of land, a tract of land which is now involved here and included in the 30 areas which Iowa claims to own. And this case was entitled in Circuit Court Tyson v. Iowa, decided in 1960.

Mr. Moldenhauer has very roughly but correctly related the facts of Tyson. After 1943 the river escaped from the design channel which was west of the area, the area being in Iowa. It escaped by washing away its left bank stabilizing structures, and ultimately the left bank moved approximately a mile and a half into Iowa. In the meantime, the right bank or the Nebraska bank remained stationary. When the river acquired a width of a mile and a half, of

course it became shallow and an island arose on the Iowa side of the boundary but west of the thalweg of the river. In other words, on the Nebraska side of the thalweg but on the Iowa side of the boundary.

Both the District Court and Judge Hickland and the Circuit Court held that the island belonged to Iowa because it had arisen over and as an accretion to the state-owned bed of the river.

Nebraska recognizes in this case that if they are to have their construction of the compact and if they are going to have their way, the Tyson decision must be overruled or at least disavowed. The Special Master considered that proposition very carefully and concluded that the Tyson case was right, the law of the Tyson case was valid, and that it should not be overruled and disavowed. It's about that simple. And the law which comes out of the Tyson case, as far as we're concerned, is about this, that Tyson's right to accrete by Nebraska law was limited to the state boundary, and he cannot, could not, before the compact and cannot since the compact accrete by Nebraska law into Iowa.

Secondly, if Tyson were to accrete into Iowa, he could only do so under Iowa law. There is a possibility that a Nebraska landowner could accrete into Iowa under Iowa law, because Iowa recognizes that the private riparian owner

becomes the owner of accretions which form to his high bank. The thing that Iowa law denies is that a private riparian owner of any state, either state, can accrete under the water. Nebraska lets the man accrete under the water, because his boundary and by Nebraska law is the thalweg, and wherever the thalweg goes there goes his boundary. But not by Iowa law. It inheres in the Tyson decision that the common law of Iowa which has been in effect since 1856 is still in effect.

It inheres in Iowa, in Tyson, that it wasn't repealed by the compact. And it inheres in the decision that Iowa didn't sign away her rights to claim ownership of lands, riverbeds, and so forth, by its operation.

Actually the Tyson case simply follows a long line of cases by this Court of which Arkansas v. Tennessee is an example. There have been several Arkansas-Tennessee cases. The one I refer to is 246 U. S. 158. The Special Master quotes from that decision at page 188 of his report. So, the law that came out of Tyson isn't anything new; it's the same law that this Court has been applying for years.

Also I might mention that in order for Nebraska to have her way about this case, the case of State of Iowa v. Raymond by the Iowa Supreme Court in 1963, would have to be overruled and disavowed.

Q Was the compact pleaded in that case?

MR. MURRAY: No. But it inheres in the case that the Iowa common law is the Iowa common law.

Q It may be that--do you think that if Nebraska is right on the construction of the contract--let's assume the Special Master is right on his construction and your exception is overruled, would the provision of the compact be a defense in a suit like the case you just mentioned?

MR. MURRAY: No, I don't think so.

Q You don't.

MR. MURRAY: I'm not sure I understand the question, Your Honor.

Q You don't think the individual landowners have any rights to claim under the compact?

MR. MURRAY: Oh, sure they do. I'm sorry if I--

Q Let's assume that the Master is right on his construction of the compact.

MR. MURRAY: Yes.

Q Then would Iowa lose its suits against these individual landowners?

MR. MURRAY: No. Just some of them.

Q Has the compact ever been raised in any of these Iowa suits in court? Have compact rights ever been asserted by private landowners?

MR. MURRAY: Tyson's secondary position, I would say, in the Tyson case, was that the compact didn't affect

his rights.

Q So, in a manner of speaking he was raising the compact, but it was in a negative manner. Should the compact be available to him?

MR. MURRAY: It's available to everybody that has an interest in those rivex lands and the ownership of them.

Q If the Special Master is right in his construction of the compact, if you were the lawyer for Tyson, wouldn't you plead it?

MR. MURRAY: Yes. But I'd get beat because Tyson never did have any right to accrete into Iowa and the compact doesn't create that right in him either.

Q Well, the Master held that.

MR. MURRAY: Yes.

Q The Master agrees with you in that respect.

MR. MURRAY: And that's the part of the Master's report that we do not accept to.

Q But Nebraska does.

MR. MURRAY: Nebraska accepts to that.

My time is almost up, and I haven't gotten even to our exception, which is to the Special Master's proposed rule for determination of ownership of the areas which had formed prior to 1943 and which were in existence at that time. We feel the Master is wrong about that rule because

he--

MR. CHIEF JUSTICE BURGER: We'll extend you about three more minutes and enlarge your friend's time accordingly. We have taken up a good deal of your time. So, you proceed another three minutes.

MR. MURRAY: Thank you, Your Honor. The effect of the Special Master's rule for the pre-1943 areas is to destroy utterly the law which we have always known as the law of boundaries or as the law of accretion. And he supplants another law in place of it. Into the ash can under the Special Master's proposed rule for the pre-1943 areas goes the presumption in favor of accretion and against evulsion. Under the Special Master's rule, Iowa would be deprived of the benefit of that presumption which this Court recognizes and as far as I know every court that ever had an opportunity recognizes.

He destroys the presumption in favor of the permanency of boundaries which this Court utilized in the former case of Nebraska v. Iowa. And what this Court said in substance, what is more natural when people are dividing land to use a river as a boundary.

Q That's the same thing as the presumption in favor of accretion.

MR. MURRAY: Practically the same. The result is the same, yes.

What happens under the Special Master's rule to the proposition that a state is suing another state for violation of anything, it must prove her case by clear and convincing evidence. It's gone and what happens to the rule that any presumption must be overcome by clear and convincing evidence? The Special Master's rule simply wipes out all those things which we have thought for years were the law of accretion and the law of boundaries and puts the thing entirely on one basis as to the areas for prior to 1943, and that basis is, Was there a title in Nebraska to it as of 1943?

My time is up and I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Murray.

Mr. Moldenhauer, that will give you seven minutes, if you think you need it.

REBUTTAL BY MR. MOLDENHAUER

MR. MOLDENHAUER: May it please the Court:

One thing that we think it's important to analyze is a fact which apparently Iowa has overlooked, and that is that when they entered into the compact, they changed the laws along the river to a fixed boundary. All the previous riparian laws were based upon the fact that when a person is subject to having his property taken away by movement of the river, he is subject to having it added to, as the river goes the other way, and that is the rationale for all of those

arguments. There isn't going to be any decision which says you can't accrete across a state line, and usually where you have a movable boundary because a movable boundary is the same for the states as it is for the private riparian owners. But now we've changed the situation. We entered into a compact with a fixed line, and I think that requires an analysis then; is the rationale still there?

Iowa cites all these early common law cases and says this has always been the common law. And we don't dispute that. In those situations there were presumptions; we can't dispute that. But we can say we sat down in '43 and superimposed a new situation by contract and this changed everything and required re-examination.

Iowa likes to use the presumption that the river moved gradually into its location and would argue from that that, therefore, in 1943 the river was the boundary. But the Master's findings negate that fact. And the facts and all the mass of evidence in this case negates that fact. And if the presumption was that that was the boundary, we don't need a boundary compact. We recognized it wasn't the boundary, and the Master so specifically found. Iowa utilizes presumptions in this manner, and she did so in the Schemmel case which started trial in 1964, and then trial has been postponed until the decision in this case. But she offered evidence with two witnesses in the Schemmel case and

rested. And I think we've quoted it in the brief somewhere, counsel stated originally that initially they were going to rely on the presumption of gradual movement of the river into its present location. So, anything on the eastern or left bank side would be in Iowa.

At the same time in interrogatories in this case Iowa admitted that she ruled that a canal was dug in Nebraska in 1938 in that location, and yet she is relying on the presumptions, and the evidence in this case, in the Schemmel case, shows a canal a mile long, placing the river in the design channel along with other movements by dikes and revetments in the Schemmel area. But Iowa, by being able to utilize the presumption puts that tremendous burden on the landowner of coming back in and having to establish how the river got there in the past. This means old documents, old witnesses, evidence is gone; it has been lost or destroyed; and the Corps of Engineers itself was not a record-keeping body, and many of its records were thrown away. So, it puts the landowner, if he's going to rebut that presumption, in an extremely difficult position and an extremely expensive position. A tremdnous amount of time and effort has been spent in getting evidence in this case. Very few farmers could afford that type of litigation or defense of that type of litigation. We say when Iowa said in the compact that titles will be good, and again we have

to determine which ones. But when she says they're good, that doesn't mean that we're going to put you now, landowner, over in Iowa and although she admits they're good, she can attack your title at any time and put that tremendous burden upon you to rebut all the presumptions and come in and establish that you've got a good title. We don't think that we sent our citizens over there to give them a forum which changes the jurisdiction and from the change in jurisdiction a change of ownership followed.

When Iowa said titles good in Nebraska will be good in Iowa, we said had to apply to the bed also and both sides, because there were many places where both sides of that bed were in Nebraska. She didn't say, "We're going to accept that title and take the title of the bed." So, by saying Iowa law applies, Iowa law is that Iowa owns the bed; it's negating completely Iowa's agreement that the title to that part, good in Nebraska, would be good in Iowa.

Let me conclude then by saying that Nebraska is here as a contracting party with a right to enforce the compact. Iowa apparently only wants to enforce Section 1 of the compact. But we say that if only Section 1 is valid, then we have lost the complete consideration for the remainder of our bargain. We feel that the compact should be read in the manner in which it was intended in 1943 and where great object can be seen it should be effectuated, and that

was to settle and lay to rest all of these problems which existed along the Missouri River. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:34 o'clock a.m. the case was submitted.]

- - -