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Land Accretion and Avulsion: The Battle of Blackbird Bend

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Land Accretion and Avulsion: 
The Battle of Blackbird Bend

I. INTRODUCTION

In 1854, a United States government treaty established a reservation for the Omaha Indian Tribe. The reservation included a peninsula on the Nebraska side of the Missouri River. As surveyed in 1867, the peninsula consisted of 3,000 acres and constituted only a small percentage of the total land reserved for the tribe north of Decatur, Nebraska.

Today, there is no peninsula. The Missouri has pushed west, shortening its long meander line. In 1975, the United States government and the Omaha Indian Tribe filed separate suits against the record title holders of 11,000 acres of land in Monona County, Iowa, which lie partially under the "same piece of sky" as the land reserved in 1854, and claimed that the Iowa land belongs to the Omaha Indian Tribe. Thus, the "Battle of Blackbird Bend" began.

1. The "Battle of Blackbird Bend" refers to three related suits in the United States District Court for the Northern District of Iowa involving land in the Blackbird Bend area of the Missouri River in Monona County, Iowa.

Two of the cases, United States v. Wilson and Omaha Indian Tribe v. Jackson, were consolidated in United States v. Wilson, 433 F. Supp. 57 (N.D. Iowa 1977); 433 F. Supp. 67 (N.D. Iowa 1977). The third case, Omaha Indian Tribe v. Agricultural & Indus. Inv. Co., No. C 75-4067 (N.D. Iowa, filed Oct. 6, 1975), is a suit by the tribe to quiet title to the same land involved in the earlier suits plus additional land in the Blackbird Bend area and two northerly bends. The three cases were at one time consolidated, but the court severed the third case from the first two, except as to the common land claimed.


3. T.H. Barrett Survey, General Land Office, (April, May 1867). The Omaha Indian Reservation consists of more than half of Thurston County, Nebraska.

4. See note 1 supra. Particularly in the third suit, Omaha Indian Tribe v. Agricultural & Indus. Inv. Co., No. C 75-4067 (N.D. Iowa, filed Oct. 6, 1975), the tribe claims more land than that lying under the same piece of sky as the land reserved in 1854. All suits claim that the land reserved for the tribe was cut off by avulsion or avulsions and that more property accreted to these avulsive chunks.

5. Blackbird Bend peninsula derived its name from Chief Blackbird of the Omaha Indian Tribe.
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This comment will focus on various legal principles related to river movement, particularly those which have found acceptance in Nebraska and Iowa. It will use the Blackbird Bend geographical and historical situation to illustrate these principles, and will analyze the United States District Court's resolution of the case in the Northern District of Iowa. Finally, this comment will explore the policies underlying the rules of accretion and avulsion and will propose the recognition of an effective form of adverse possession against the government.

II. PRINCIPLES OF RIVER MOVEMENT

A. Terms

Riparian land borders on streams and rivers. Changes in the meander of a stream or river can affect the riparian landowner's real estate rights and his rights to the stream water. The two major processes by which a river alters its meander are accretion and avulsion. The rights of riparian landowners may differ dras-

6. The term "riparian" comes from the Latin word ripa, meaning bank. In Roman times, rights of riparian landowners were governed by principles similar to those used today. See Hardin v. Jordan, 140 U.S. 371, 380 (1891).

7. Littoral land and rights pertain to the seashore and are governed by principles similar to those used for riparian land.

8. Courts have often confused these definitions by describing an avulsion as "sudden" or "violent" and accretion and erosion as "gradual" and "imperceptible." In Philadelphia Co. v. Stimson, 223 U.S. 605 (1912), the Supreme Court said: "It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place." Id. at 624. See also Valder v. Wallis, 196 Neb. 222, 224, 242 N.W.2d 112, 114 (1978); Jones v. Schmidt, 170 Neb. 351, 356, 102 N.W.2d 640, 645 (1960); Durfee v. Kelffer, 168 Neb. 272, 95 N.W.2d 618 (1959); Burket v. Krimlofski, 167 Neb. 45, 91 N.W.2d 57 (1958); Ziemba v. Zeller, 165 Neb. 419, 86 N.W.2d 190 (1957); Mercurio v. Duncan, 131 Neb. 767, 269 N.W. 901 (1936).

These adjectives used to describe accretion and avulsion are misleading because the process of erosion is often sudden and violent. As the Missouri erodes a bank, large chunks of soil, often containing trees,
tically depending upon whether the river adjacent to their property has moved by one process or the other.

For illustration, picture a river flowing with many bends, giving it a snake-like appearance. Due to centrifugal force, the water moving downstream pushes against the concave bank of each bend as silt is deposited on the convex bank. The downstream banks erode as accretion forms on the upstream banks. The meander of the river thereby changes, some landowners gaining property by accretion, and some losing property by erosion. This process of accretion is often referred to as accretion by alluvion. In some cases, may plunge into the river and be washed away. See Beck, supra note 7. Simply because a large chunk of soil is violently and suddenly detached from a bank does not mean that an avulsion has taken place. An avulsion requires that the piece of property remain intact and identifiable as the very property cut off from the bank, even though it is transferred to another bank or has acquired the status of an island. For a good discussion distinguishing accretion from avulsion, see Banks v. Chicago Mill & Lumber Co., 32 F. Supp. 232 (E.D. Ark. 1950). See also Nebraska v. Iowa, 143 U.S. 359 (1892); Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 N.E. 184 (1899); Coulthard v. Stevens, 84 Iowa 241, 50 N.W. 983 (1892); McCormack v. Miller, 239 Mo. 463, 144 S.W. 101 (1912); Benson v. Morrow, 61 Mo. 345 (1876).

Courts have also confused the terms “island” and “sandbar.” See Beck, supra note 7, at 463-64 n.158. Most courts agree that every piece of soil protruding above the surface of the water is not an island. Dartmouth College v. Rose, 257 Iowa 533, 133 N.W.2d 687 (1965). A degree of permanence is required. Courts may look to its size, whether it is continually dry or only dry in periods of reduced flow, witness testimony concerning its permanence, and vegetation. See Mather v. State, 200 N.W.2d 498 (Iowa 1972). The distinction between islands and sandbars is significant because an island is subject to independent ownership, while a sandbar is part of the riverbed. See Payne v. Hall, 192 Iowa 780, 185 N.W. 912 (1921); Fowler v. Wood, 73 Kan. 511, 85 P. 763 (1908); State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945). The owner of an island is the owner of all accretions to the island and continues to be the owner of all such property even if the island moves downstream or becomes attached to the shoreline. Burket v. Krimlofski, 167 Neb. 45, 91 N.W.2d 57 (1958). Because this distinction can be crucial, clear definitions of island and sandbar are needed. The most objective and easily determined criterion is the vegetation on the land involved. A piece of property which contains secondary tree growth demonstrates its permanence and its resistance to high water flow without the need for lay testimony on permanence or expert testimony on highwater marks. For the Missouri and similar rivers, the courts should define “island” as a body of land surrounded by water and containing substantial vegetation including trees.

9. Alluvion is the wash or flow of water against a bank or shore as in a flood. Alluvion brings alluvium deposits. Alluvium deposits consist of soil, sand and rock.

A river carries three types of foreign matter; (1) matter in solution such as dissolved minerals, (2) matter in suspension such as clay and light sand, and (3) bedload such as heavy sand and gravel.
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where silt does not accrete to a river bank, but rather the old river bed is exposed after movement of the stream, the term "reliction" is used. Reliction usually gives rise to the same legal consequences as accretion by alluvion. When land accretes to the property of a riparian landowner, the accreted land is his. However, he also runs the risk that his land will erode and be lost to him. Therefore, in the Blackbird Bend situation, those holding record title to the Iowa property asserted that the land claimed by the Indians accreted to the Iowa banks.

Re-emergence is a doctrine which has been used in a few states to alter the normal legal results of accretion. When a landowner's property has been eroded completely but later "re-emerges," by way of accretion or reliction, some courts may allow him to claim the re-emerged land if it is readily identifiable. Neither Nebraska


Where the state owns the bed of a stream, it may assert a right to an exposed river bed as against the right of the adjacent landowner. However, a state has no right to such land under federal law. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). See also Lundquist, Artificial Additions to Riparian Land: Extending the Doctrine of Accretion, 14 ARIZ. L. REV. 315 (1972).

11. Accretion to riparian land is divided among landowners by drawing a line from each landowner's boundary the shortest distance to the river or stream. By this method, each landowner retains the same percentage of riverfront, compared to his neighbors, as he owned before. In Nebraska, the county surveyors are responsible for measuring accretions to property every five years for tax purposes. NEB. REV. STAT. § 77-1306.01 (Reissue 1976).

12. Brief for Defendants at 1-47.

13. Of the seven states abutting the Missouri River the only two which have indicated acceptance of the doctrine of re-emergence are the Dakotas. See Peery v. Erling, 132 N.W.2d 889 (N.D. 1965); Erickson v. Horlyk, 48 S.D. 544, 205 N.W. 613 (1925); Allard v. Curran, 41 S.D. 73, 168 N.W. 761 (1918).

14. Re-emergence has been accepted by very few states. See Annot., 8 A.L.R. 640 (1920), supp. 41 A.L.R. 395 (1926). By "readily identifiable," courts require that the land be recognizable by natural landmarks or measurable by metes and bounds. 8 A.L.R. at 642.

15. Wemmer v. Young, 167 Neb. 495, 93 N.W.2d 837 (1958) states:

If by gradual erosion a river becomes the boundary of land, the owner thereof is a riparian owner and is entitled to all accretion thereof. If by the process of accretion and reliction the water of a stream gradually recedes, changes the channel of the stream, and leaves the land dry that was previously submerged by water, the land becomes the property of the riparian owner. The erosion of a river which cuts entirely across riparian land and into the land of an adjoining owner operates to destroy the title of him whose land was originally riparian and he may not reassert his title if the river reverses its traverse wanderings and new land is formed within what
nor Iowa\textsuperscript{16} accepts the re-emergence doctrine.

Under principles of avulsion, the same river might erode a part of the bank of a bend so thoroughly that the river would cut through completely to the next bend. Such was the case when Carter Lake, Iowa, was moved west of the Missouri.\textsuperscript{17} When a river moves by this process of avulsion, the ownership of the land cut off by the river remains the same.\textsuperscript{18} Therefore, in the Blackbird Bend dispute, the Indian Tribe and the government asserted that the land on the Iowa bank was transferred across the Missouri by way of avulsions.\textsuperscript{19} Because an avulsion is much more unusual than the constant process of accretion and erosion, accretion usually is presumed by courts rather than avulsion.\textsuperscript{20}

The principles of accretion and avulsion become more complex when the river is a "braided" channel, with sandbars, islands and chutes.\textsuperscript{21} This complexity is compounded when the braided channel

\begin{itemize}
\item were his original boundaries.
\end{itemize}

\textit{Id.} at 514, 93 N.W.2d at 848. \textit{Wemmer} is also notable for its detailed discussion of the value of lay and expert testimony.

\textbf{16.} Payne v. Hall, 192 Iowa 760, 185 N.W. 912 (1921) states:

\begin{quote}
It also appears to be the law that, where the lands of a riparian owner have been slowly and gradually eroded by a navigable stream, and the river has usurped and taken up the location of said land, the riparian owner of the land at the newly formed river bank becomes entitled to the accretions that may thereafter be formed against said bank, even though they should extend over the same territory where lands of a former riparian owner had been located before the erosion took place. For example, if A is a riparian owner upon a navigable stream, and B owns land remote therefrom, and by erosion the river cuts away all of the lands belonging to A, and leaves B as the riparian owner on the newly formed bank of the stream, and thereafter the river slowly retires from this situation and places accretions against the newly formed bank, said accretions will belong to the riparian owner B, even though they extend over the very space formerly occupied by the riparian owner A.
\end{quote}

\textit{Id.} at 784, 185 N.W. at 915. \textit{See also} Wilcox v. Pinney, 250 Iowa 1378, 98 N.W.2d 720 (1959) (the record owner of 850 acres of land lost title when the Missouri River submerged his lands, even though the land reappeared within 10 years and was readily identifiable by metes and bounds).

\textbf{17.} If the river abandons a piece of its old channel in the process of avulsion, the water-filled channel becomes an "ox-bow" lake.


\textbf{20.} Dartmouth College v. Rose, 257 Iowa 533, 133 N.W.2d 687 (1965); Bone v. May, 208 Iowa 1094, 225 N.W. 367 (1929); Kitteridge v. Ritter, 172 Iowa 55, 151 N.W. 1097 (1915).

\textbf{21.} A chute is a narrow channel of water flowing from an upstream section of a river into a downstream section. When accumulation of al-
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is on the Iowa-Nebraska border, because the laws of the states differ on the issue of ownership of the river bed. In Nebraska, the riparian owner owns the river bed adjacent to his land to the thread of the stream,\(^2\) or the "thalweg."\(^3\) But, in Iowa, the state owns the bed of the stream to the thalweg\(^4\) and, therefore, claims any islands rising on the eastern half of the Missouri.\(^5\)

B. The Value of Evidence

Because the rights of riparian owners may differ drastically depending upon whether a river alters its course by accretion or avulsion, the question of how to prove accretion or avulsion becomes of paramount importance. To prove that the land in question was created by one process or the other, an attorney may need to introduce evidence of vegetation, soil composition, and elevation. Charts and maps are persuasive when available, and some weight may be given lay testimony. However, because potamology\(^6\) is a complex science, courts have begun to find expert testimony by hydrologists to be most persuasive.\(^7\) A party who wants to prove that land in

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\(^{22}\) Nebraska v. Iowa, 406 U.S. 117, 125 (1972).
\(^{23}\) The term "thalweg" means thread of the stream, or more precisely, the deepest point in the bed of the river; therefore, the thalweg will be the last point in the river to run dry.
\(^{24}\) 406 U.S. at 126.
\(^{25}\) Dartmouth College v. Rose, 257 Iowa 533, 133 N.W.2d 687 (1965); Solomon v. City of Sioux City, 243 Iowa 634, 51 N.W.2d 472 (1952).
\(^{26}\) Potamology is the study of rivers, from the Greek "potamos," meaning river.

A United States Supreme Court case, a Nebraska case, and an Iowa case illustrate the value of the right evidence.

In Mississippi v. Arkansas, 415 U.S. 289 (1974), the two states sought to fix their boundary line by determining jurisdiction over a dry bed of the Mississippi River and an area known as "Luna Bar." The United States Supreme Court set the boundary line where Mississippi proposed, supporting the conclusions of a Special Master's report and finding that "Luna Bar" had been formed by sandbar accretion rather than avulsion from the Arkansas bank.

First, Mississippi presented a prima facie case for accretion through expert testimony, physical evidence and charts. The experts demonstrated that, according to principles of hydraulics, an avulsion could
question arose by accretion will seek to prove that: (1) the land is of comparatively low elevation, (2) vegetation or tree growth is

not have formed Luna Bar. They also noted a total absence of any known historical reference to an avulsion in the area. In addition, Mississippi presented expert testimony and physical evidence of: (1) the tree growth on Luna Bar, consisting predominantly of pioneer trees such as willows, (2) soil compositions including deep borings, (3) elevation records showing Luna Bar to be 12 feet below the Arkansas River banks, (4) the absence of levees on Luna Bar, and (5) charts of 1882 and 1894 showing "Luna Bar as a dry sandbar with no vegetation." Id. at 293-94. According to the Supreme Court, this evidence provided Mississippi with a prima facie case that Luna Bar had emerged by way of accretion. Id. at 294. The court gave particular weight to the expert testimony presented by Mississippi, and to historical charts and documents. It regarded physical evidence as corroboration for Mississippi's experts and as an indicator of which experts presented the best theories: "[There was] pertinent and persuasive testimony . . . from expert witnesses for Mississippi. The latter are the witnesses that the Special Master credited, as do we, in the evaluation of the conflicting testimony." Id. at 292.

Justice Douglas, dissenting, found the Arkansas evidence of avulsion more persuasive. Douglas gave particular weight to lay witnesses used by Arkansas, and to the theory that the Mississippi had returned to its old, dry channel, cutting off Luna Bar. Id. at 298. He was impressed by soil borings and by three ancient cypress stumps found on Luna Bar:

No one has a historical recorded account of what happened. Mississippi made its case by use of experts who testified as to how the Mississippi River usually performs. . . . Never did the experts know of an instance where avulsion had worked the way Arkansas claims.

. . . The experts of Mississippi state a plausible explanation that bolsters the theory of accretion. But the countrymen with their physical evidence convince me that the Mississippi River acted in an unprecedented way. . . .

Id. at 295, 298 (Douglas, J., dissenting). The majority had discredited the "stump" evidence, concluding that the stumps had been washed onto the bar by floods, as indicated by moss on the roots. Id. at 293.

In the Nebraska case of Wemmer v. Young, 167 Neb. 495, 93 N.W.2d 837 (1958), the plaintiff sought to quiet title to land by the Platte River. The defendants asserted that the land in question had eroded away, making their land riparian, and then had re-emerged by way of accretion. Because Nebraska does not recognize a doctrine of re-emergence, the defendants claimed ownership to the accretion and maintained possession of the land for 40 years. Id. at 499, 93 N.W.2d at 839. Plaintiff denied that the land to which he claimed title had ever eroded away to the defendants' boundary. In determining the extent of the erosion and accretion, the Nebraska Supreme Court examined maps and aerial photographs, but gave particular attention to lay and expert testimony. Lay witnesses were several elderly residents of the vicinity who told personal recollections of the movement of the high bank of the Platte. The chief expert witness was an educated and experienced forester who calculated the age of the property
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comparatively recent or "pioneer" in nature, as are small willows, (3) soil borings indicate the presence of alluvium soil to a greater depth than in surrounding land, and (4) the land in question lies downstream from older property—upstream from the main flow of water—because river flow is likely to be slower near the downstream side of land, including islands, and will, therefore, deposit more alluvium on the downstream side. In contrast, a party seeking to prove that land was displaced by avulsion will attempt to demonstrate that: (1) the land is higher in elevation than other land which is known to have arisen by accretion, (2) tree growth, stumps, and man-made structures or markers are older than those on nearby land which arose by accretion, (3) soil borings indicate a bedrock base or other soil base inconsistent with accretion, (4) maps and other historical records indicate that a chute existed behind the land, or that islands with tree growth were periodically charted in the channel. Both parties would probably have expert witnesses interpret physical evidence, and might have lay witnesses present personal recollections. The presumption usually would favor the party seeking to prove accretion, because avulsion is rarer and a party whose land is severed from the shore by avulsion is expected to maintain possession of the land, or at least keep a record of its change in form.

C. Artificial Influence

Much modern accretion and avulsion is caused by artificial means. A landowner whose property is affected by artificially

in question by counting the rings on cottonwood trees. Id. at 505-07, 93 N.W.2d at 844-45. It was this lay and expert testimony which helped the court determine what land had grown by accretion, when the accretion had occurred, and therefore, how the property should be apportioned between the parties.

In Mather v. State, 200 N.W.2d 499 (Iowa 1972), an action was brought to settle ownership of accretion land caused by pile dikes driven by the Army Corps of Engineers between a state-owned island and the privately owned shoreline. The Iowa Supreme Court found aerial and ground photographs most persuasive in reaching its conclusion in favor of the state. The court also relied on expert and lay witnesses and on willow cross-sections which indicated the age and permanence of the government-owned island. Id. at 501-02.

induced river movement is subject to the same legal consequences as he would be if nature had caused the change. \textsuperscript{29} On the Nebraska-Iowa border, revetments, \textsuperscript{30} dikes, \textsuperscript{31} and abatis \textsuperscript{32} were built by the Army Corps of Engineers in the early 1940’s to harness, narrow, and deepen the Missouri. In 1943, Nebraska and Iowa assumed that the Corps had the river permanently harnessed, and agreed that their border would no longer change with the flow of the Missouri, but would remain constant at the 1943 channel. \textsuperscript{33} Unfortunately, both states neglected to inform the Army Corps of Engineers of their need for a 1943 map of the river channel, so no official survey or map was made. In addition, with the progress of World War II, the Corps had more pressing tasks to perform than the stabilization of the Missouri. Because of the lack of stabilization, the river broke loose from the 1943 channel. Today, however, the river is stable and not likely to change its course further.

Those whose lands which were disturbed by the rechanneling of the Missouri, gained or lost property according to common law principles of accretion and avulsion, just as if the changes had been caused by nature. This principle was reaffirmed by the United States Supreme Court as recently as 1973 in \textit{Bonelli Cattle Co. v.}
In Bonelli, the cattle company lost property when the Colorado River slowly moved to the east. Under Arizona law, the state claimed the river bed. Later, by artificial rechanneling, the river was pushed back to the west, and the cattle company re-claimed the land abandoned by the river. Although the Arizona Supreme Court held that the dry bed still belonged to the state, the United States Supreme Court held that it was the Cattle Com-pany's property as a riparian owner. Among the Supreme Court's reasons was the principle that artificially induced river movement gives rise to the same legal results as movement caused by nature.

III. BLACKBIRD BEND

A. What Law Applies?

The rules pertaining to accretion and avulsion have evolved through common law. But the common law of each state, and of the federal government as well, may differ on the question of what results apply to given situations. In the Blackbird Bend case, the Omaha Indian Tribe, the federal government acting as trustee for the tribe, and certain possessors of land in a state adjacent to the tribal reservation were major parties to the land dispute. What common law should have applied?

Before Erie Railroad v. Tompkins, it generally was believed that no federal common law existed. However, since 1938, federal common law has been recognized and expanded. It is to be applied in any case where there is an overriding interest in the need for a uniform rule of decision or where the controversy touches the basic interests of federalism. One year after Erie, the state common law v. federal common law question was applied by the United States Supreme Court to a case involving Indian land. In

34. 414 U.S. 313 (1973).
35. Id. at 327. See also Lundquist, supra note 28.
36. In the Blackbird Bend case, the district court determined that the com-mon law of Nebraska applied. United States v. Wilson, 433 F. Supp. 57, 62 (N.D. Iowa 1977). If the court had applied the common law of Iowa or the United States instead, it would have followed the reasoning of a different line of cases, but the result would probably have been the same, because the common law of Nebraska, Iowa, and the United States are similar on issues relating to river movement.
37. The Omaha Indian Tribe viewed the federal government as an adver-sary. Therefore, the tribe employed its own attorneys and reserved the right to cross-examine government witnesses.
38. 304 U.S. 64 (1938).
41. Id. at 103.
Board of County Commissioners v. United States, the United States brought suit as an Indian's guardian against a Kansas county to recover property taxes illegally collected on the Indian's tax-exempt land. The Court held that federal law, rather than Kansas law applied. This was true even though no federal statute controlled the question, because the origin of the right to be enforced was an Indian treaty. The Court noted: "[W]hatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas."

In the 1930's, the philosophy of the United States Court of Appeals for the Eighth Circuit was in accord with the County Commissioners case. In United States v. First National Bank of Decatur, the United States brought suit for the Omaha Indian Tribe against the bank which had purchased lands formerly belonging to the tribe. The Missouri had moved west, making the bank's lands riparian and washing away the Indian lands. Then, the river moved east and the bank claimed the accreted lands. The court noted that Nebraska law did not recognize the doctrine of re-emergence, but held that federal law applied. The court examined the federal government's intent in making the original conveyance to the tribe, and held that the accreted lands should belong to the tribe. It stressed federal policy rather than federal statutes, treaties, or any doctrine of re-emergence recognized in federal common law.

The United States Supreme Court appeared to waiver from its stance in 1943, when it applied state law to an issue of Indian land rights. In United States v. Oklahoma Gas & Electric Co., the United States brought suit to enjoin an Oklahoma utility from maintaining its pole line along a highway crossing allotted Indian land. The utility based its right on a license from the state highway commission, which was granted pursuant to authority from the Secretary of Interior. A federal statute had granted the secretary the right to permit local authorities to build highways through Indian lands "in accordance with the laws of the State or Territory in which the lands are situated." The secretary contended that permission to build a highway did not constitute permission to build

42. 308 U.S. 343 (1939).
43. Id. at 349-50.
44. Id.
45. 56 F.2d 634 (8th Cir. 1931).
46. Id. at 635.
47. 318 U.S. 206 (1943).
48. Id. at 208.
49. Id.
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a utility pole, but the Court ruled that the statutory language indicated that the question was to be answered by reference to state law, absent any governing administrative ruling, statute or dominating congressional policy to the contrary. The court also stated:

It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies.50

However, in 1967, the United States Supreme Court seemed to return to its original 1939 philosophy in Hughes v. Washington.51 In Hughes the Court determined that federal law, rather than state law, governed questions of ownership of accretions to oceanfront property conveyed by the United States prior to statehood. The Court held that the owner of upland littoral property was entitled to accretion notwithstanding the Washington State Constitution to the contrary. The Court's rationale was based on the fact that title to the littoral property could be traced back to a federal grant; therefore, federal statutes should apply.52 Hughes struck fear in the hearts of commentators who believed that accretion is a matter which affects states in various ways and which may be regulated better on a state-by-state basis.53 The commentators particularly feared the effects the case could have on property west of the Mississippi, because original title to virtually all such property could be traced to federal land grants.54 However, since 1967, the Hughes doctrine has not been expanded to govern riparian accretion.

In 1970, the United States Court of Appeals for the Eighth Circuit was again faced with a dispute over riparian land claimed by Indians. The court skirted the conflicting Supreme Court case law by holding that "general rules of law" and not federal Indian land policy were to be applied. In Fontenelle v. Omaha Tribe,55 riparian landowners in Iowa brought action to quiet title to land formed after 1867 by the receding of the Missouri from its east meander

50. Id. at 209-10 (footnote omitted).
52. Id. at 292.
55. 430 F.2d 143 (8th Cir. 1970).
line. The defendant was the Omaha Indian Tribe whose land had washed away. Common law rules of accretion were applied and the title was quieted in the Iowa riparian owners. The court did not distinguish between federal and state common law relating to river movement, nor did it say which law it had applied. However, by stating that "general rules of law" and not federal Indian land policies were controlling, the court avoided relying on either Oklahoma Gas or Hughes, and indicated that the common law rules of accretion and avulsion were the same in federal and state cases relating to riparian land.

Therefore, in the Blackbird Bend case, arguments were possible both for the application of federal common law and for the application of Iowa common law. If one were to assert that federal common law should be used, one would argue that: (1) Board of County Commissioners, First National Bank of Decatur, and Hughes were controlling, (2) the origin of the Omaha Indians' claim lay in the federal treaty and statute which gave grounds for the suit, (3) the United States government itself had asserted an interest in the land, and (4) there was an overriding federal interest in a uniform rule because the controversy touched the basic interests of federalism. If one were to argue that Iowa common law should apply, one would claim that: (1) Oklahoma Gas and Fontenelle were controlling, (2) there was no overriding federal interest in a uniform rule, nor did the controversy touch the basic interests of federalism, and (3) the question of accretion or avulsion did not involve a question of interpretation of federal law.

The United States District Court for the Northern District of Iowa determined that the law of Nebraska applied to the Blackbird Bend case. Judge Bogue relied most heavily on the 1972 Supreme

56. Id. at 146.
57. See note 36 supra. In reaching this conclusion, the court noted that state law generally governs title disputes to land within the state. United States v. Wilson, 433 F. Supp. 57, 59 (N.D. Iowa 1977). See Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Mason v. United States, 260 U.S. 545 (1923); Joy v. City of St. Louis, 201 U.S. 332 (1906). It also noted that the fact that the United States is trustee for a tribe does not make federal law controlling in a dispute regarding the tribe. United States v. Wilson, 433 F. Supp. at 61. See generally United States v. Little Lake Misere Land Co., 412 U.S. 590 (1973); Mason v. United States, 260 U.S. 545 (1923). The court dismissed the holding of Hughes v. Washington, 389 U.S. 290 (1967), as confined to its facts and not applicable to riparian cases. United States v. Wilson, 433 F. Supp. at 61. The court indicated that most cases dealing with land disputes in which Indian tribes have been parties have been decided on the basis of state law. Id. See Francis v. Francis, 203 U.S. 233 (1906); Herron v. Choctaw
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Court case of *Nebraska v. Iowa*, in which the Court determined that on the Nebraska-Iowa border, disputes regarding the title to land formed after 1943 would be governed by Iowa law unless the claimants could show good title under Nebraska law as of the 1943 Compact date. By adopting this unique rule of *Nebraska v. Iowa*, Bogue accepted the dictum in that case to the effect that the present Blackbird Bend area had been formed after 1943, and he implied that the title the Indians had to prove must relate back to the 1854 treaty and must be valid under Nebraska law. In his findings of fact, however, Bogue recognized that the Blackbird Bend area had been formed in the late 1800's and early 1900's.

The decision by the federal district court surprised all parties to the Blackbird Bend suit, as the government and Indians were arguing for the application of federal common law, and the record title holders were urging the application of Iowa common law.

The choice of law was significant in one respect—its allocation of the burden of persuasion. Iowa cases expressly state that accretion will be presumed over avulsion. Nebraska cases do not stress this presumption, but place the burden of persuasion on one who seeks to quiet title. Under Nebraska law, both the Indians and the record title holders had the burden of persuasion in their respective claims to quiet title. As the court noted, federal law, Iowa law, and Nebraska law are so similar regarding accretion and avulsion that the application of any of the three would have led to the same substantive result.

**B. The Facts**

All sides to the Blackbird Bend litigation presented maps, aerial photographs, and expert witnesses who interpreted the maps, photos and other physical evidence.

The evidence presented showed the following sequence of events. In 1867, the time of the first official survey after the 1854 grant, the Blackbird Bend peninsula stretched east about three miles, pok-
ing a long finger of land into Iowa's western border. 65 By 1879, however, only a stub was left of the long finger of land. The Missouri in the Blackbird Bend area was a braided channel with sandbars, and apparently one small island where the finger tip had been. 66 In 1890, the Missouri at Blackbird Bend was still a braided channel, with large sandbars, but the river had pushed farther west. Under the "piece of sky" where the fingertip had been now lay soil almost one mile across, attached to the Iowa bank. 67 In 1923, the area where the 1867 finger lay was almost entirely in Iowa. 68 By 1937, the finger which once was west of the Missouri lay entirely in Iowa, under willows and scattered timber. 69

The secret of how the land of Blackbird Bend disappeared, or was transported, lay in the braided channel of the late 1800's and early 1900's. Were islands, cut off from the western bank, accepting accretion as the river moved to the west? Or was the Blackbird Bend land eroded completely, with mere sandbars, not subject to ownership, appearing in the river, and soil accreting to the eastern banks?

The court determined that the most persuasive evidence showed that the land allocated to the Indians had been eroded and washed away, while the land subject to litigation had been formed by accretion to riparian land on the Iowa side of the river. 70 The series of maps drawn in the late 1800's and early 1900's, as interpreted by expert witnesses, were given particular weight. In addition, the court considered lay testimony, supporting documents such as letters of the period describing the erosion of the Nebraska banks, and physical evidence such as soil borings and tree cuttings.

C. The Effect of the Court's Decision

The Blackbird Bend case received wide publicity in the regional media. 71 The media's account of the case, however, did not stress the court's opinion as much as a brief prefatory letter written by Bogue to the parties. In this letter, Bogue stated:

A pathetic aspect of this case is that the Omaha Indian Tribe

66. Missouri River Commission Map (June 16-26 1879).
68. Army Corps of Engineers, United States Map (Sept. 1923).
69. Army Corps of Engineers, United States Reconnaissance Map (Nov. 2, 1937).
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has been deprived of land it once owned by the actions of the Missouri River and the laws of accretion. This Court feels constrained to state at this time its distaste for such laws of avulsion and accretion which have brought about this seemingly unfair situation. The Barrett Survey area was reserved for the Tribe and was described as being bounded on three sides by the Missouri [sic] River. The description should have been established by degrees of longitude and latitude or some other permanent type of description and should have remained the property of the Tribe for evermore no matter whether it was under water or divided in whole or in part by water, and no matter how it got that way. The law as it now exists should be changed. The wild unpredictable movements of this river have caused great loss and hardship and attendant litigation for years to countless people, both Indian and non-Indian.

The least that should be done at this point is for the Congress to reimburse the Tribe for its loss. If this Court had the power to order such payment, you can rest assured it would be done.72

Judge Bogue's letter evokes several questions of policy regarding river movement and Indian lands: (1) Are the historical rules of accretion and avulsion justified; (2) Should transfers of riparian land—especially when the government acts as transferor—be made with reference to metes and bounds or latitudinal and longitudinal degrees instead of by reference to river boundaries; (3) Should a statute of limitations or estoppel apply to claims made by governments or Indian tribes to lands held by good faith purchasers; (4) Should the federal government reimburse an Indian tribe when its land is diminished by erosion?

1. The Policy of Accretion Law

As noted, the rules of accretion and avulsion have remained generally consistent since Roman days.73 What policies have led courts to favor rules of accretion and avulsion over a standard of re-emergence for 2,000 years?

The major policy reason appears to be economic. Rules of accretion and avulsion help to insure that land will be put to its highest and best use. Because land accretes slowly to a river bank, the farmer to whose land it accretes will have easiest access to the newly formed land. He can use, care for, and farm new soil more conveniently along with his other property than can a farmer across the river whose land has begun to erode. This economic rationale is especially valid when applied to land bordering a river the size


73. See note 6 supra.
of the Missouri. In addition, by the time a large amount of land has accreted to one bank or another, a new generation of farmers would be tilling the soil—possibly new purchasers of the property who had not relied on possessing the land that had been eroded.

A second policy supporting rules of accretion and avulsion relates to the land's riparian status. Land bordering on a body of water may be more valuable than other property because of its irrigation, transportation, or recreational potential. If a purchaser of riparian land is deprived of access to the water when a strip of land accretes to his shore, his use of his land may be altered and the value of his property substantially reduced.

A third reason supporting existing rules of accretion and avulsion is the difference in state law regarding ownership of river beds. A change to a standard of re-emergence would necessitate a change in state laws, such as Iowa's, which give title to the bed of the river, and any islands arising from the bed, to the state.

2. Uses of Metes and Bounds

What if the land reserved for the Omaha Indian Tribe in 1854 had been described by latitudinal and longitudinal marks or by metes and bounds? Cases dealing with riparian land described by metes and bounds hold that the policies behind rules of accretion outweigh any advantages of allowing the riparian land to be transferred by metes and bounds.

In Choctaw & Chicasaw Nations v. Cox, the Indian tribes sold land to the defendants. The land, although bordering on a river, was described by metes and bounds. The Indian tribes claimed rights to the land accreted, claiming that the boundary was the legal description and not the river. The court rejected the Indians' claims, holding that even though the land was described by metes and bounds, the actual boundary was the river: "It is well settled law that a conveyance of lands bordered by a river and intended to be riparian, though the river boundary is described by metes and bounds, as here, carries with it all accreted lands."

Although the Choctaw case is the most similar to the Blackbird Bend situation, it does rely on considerable support from earlier decisions, which hold that lands conveyed by metes and bounds

74. 251 F.2d 733 (10th Cir. 1958).
75. Id. at 735.
76. Stone v. McFarlin, 249 F.2d 54 (10th Cir. 1957); Littlefield v. Nelson, 246 F.2d 956 (10th Cir. 1957); Braddock v. Wilkins, 182 Okla. 5, 75 P.2d 1139 (1938). See also De Long v. Olsen, 63 Neb. 327, 88 N.W. 512 (1901).
or lot numbers, yet bordering on rivers, have the rivers as their true boundaries.

These cases indicate that even if the land reserved by the government for the Omaha Indian Tribe had been described by metes and bounds or latitudinal and longitudinal degrees, the land should still be considered riparian because it bordered on the river at the time the grant was made.

In addition, even if the doctrine of re-emergence had been accepted by the court, it would have been of little help to the Indians, because the doctrine of re-emergence is not applied across a body of water. "Where a river is a boundary, and there is no avulsion, a landowner can never cross the river to claim an accretion on the other side."77

3. Statutes of Limitations and Estoppel

An individual cannot gain property through adverse possession against the government.78 In many cases, such as in the Blackbird Bend dispute, where the government is acting as trustee under treaty or is acting to preserve national and state parks or resources, such a rule may be justified.79 However, in many other instances where a government holds title in its proprietary rather than governmental capacity, the rule is not justified.80 In still other cases, the government may have delayed action for so long after receiving notice of the private possession of government prop-

77. Anderson-Tully Co. v. Tingle, 166 F.2d 224, 228-29 (5th Cir. 1948).
79. Where the federal, or a state government or a municipality, acts under a treaty or acts to preserve parks, forests, or natural resources, the public interest demands that such properties be protected from adverse possession. In addition, such lands may be so extensive that the government may not receive adequate notice that an adverse possessor is laying claim to a part of the property.
80. One example of land held in a proprietary capacity by the state government is section 16 of every township in Nebraska, held by the state for the benefit of public schools. Such land is to be used for public school grounds, or invested with proceeds used for the benefit of public schools. See State v. Matzen, 197 Neb. 592, 250 N.W.2d 232 (1977). In Matzen, the state claimed title to a "kidney-shaped" island separated by a chute from section 16 of a township near the Missouri. The defendant contended, among other things, that the state owned section 16 in its proprietary capacity and should be subjected to claims of adverse possession. The Nebraska Supreme Court found for the defendants, but on the grounds that the land had arisen as an island and as accretion to the island, rather than having been formed by accretion to section 16. The court did not consider the issue of adverse possession.
erty that it would be unjust for the government to claim title to the land.

In tort cases, a government is often held to the same standards applied to individuals and corporations if it is acting in its proprietary rather than governmental capacity. Although sovereign immunity from the statute of limitations has not disappeared in cases of adverse possession, the statute should run against the government where it holds title in its proprietary capacity for investment purposes.

For example, in the tort case of Stadler v. Curtis Gas, Inc., the decedent was injured in a gas explosion caused by a defective valve on a water heater. The heater was in the decedent's residence, leased from a defendant, the University of Nebraska Board of Regents. Because the Board of Regents was acting in a nongovernmental proprietary capacity, the Nebraska Supreme Court held that the Board was not entitled to immunity.

Similarly, in Sorensen v. Chimney Rock Public Power District, the Nebraska Supreme Court held the Power District liable for retaining electrical equipment without rendering full compensation to the seller:

[W]hen a state, by itself or through its corporate creations embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling.

Iowa has also recognized the dual role played by governments, and may hold them to different standards depending upon which role they are performing.

In cases of estoppel, most courts hold that government property cannot be lost by acquiescence of employees of the government, and that the United States is neither bound nor estopped by the

81. 182 Neb. 6, 151 N.W.2d 915 (1967).
82. 138 Neb. 350, 293 N.W. 121 (1940).
83. Id. at 354, 293 N.W. at 123.
84. State v. F.W. Fitch Co., 236 Iowa 208, 17 N.W.2d 380 (1945). "There is a distinction between sovereign immunity from suit and sovereign immunity from liability. The latter exists when the sovereign is engaged in a governmental function." Id. at 215, 17 N.W.2d at 384 (quoting from Manion v. State Highway Comm'r, 303 Mich. 1, 19, 5 N.W.2d 527, 528, cert. denied, 317 U.S. 677 (1942)).
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acts of its officers. However, estoppel has been applied against governments in limited circumstances.

For example, the government may be estopped from claiming land or water rights where facts cannot be ascertained with certainty, many years have elapsed, and it has failed to take action to enforce its claim. In *United States v. Big Bend Transit Co.*, a corporation spent more than $250,000 in reliance on grants of water rights, and the United States was, therefore, estopped from questioning the validity of the corporation’s claim to the water and land involved. In *Indiana v. Milk*, the state sued to recover possession of approximately 3,000 acres of land. The court held that “[h]aving induced the defendants by repeatedly recognizing the validity of [their title] . . . to alter their position by investing their money in that title, the state cannot now, in fairness, allow or assert its invalidity.” In *United States v. Property on Pinto Island*, the federal government commenced condemnation proceedings against defendant owners of land on the island. Facts regarding the land’s historical boundaries were difficult to discern. The court held that because the government asserted no claim to any part of the land from 1859 to 1933, and that because the defendant’s predecessors in title began reclaiming and improving the property in 1906, the government was estopped from asserting a claim of title or ownership to the reclaimed land.

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86. This has also been held to include implied acquiescence to improvements made on land. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).


88. For example, in a government suit to set aside patents to land, 40 years had elapsed and the defendant had substantially improved the land. The court applied estoppel against the government and held: “[W]hen the government seeks its rights at the hands of a court, equity requires that the rights of others, as well, should be protected.” *United States v. Stinson*, 125 F. 907, 910 (7th Cir. 1903). See also *Massaglia v. Commissioner*, 266 F.2d 258 (10th Cir. 1961); *California State Bd. of Equal. v. Coast Radio Prods.*, 228 F.2d 520 (9th Cir. 1955); *Knetsch v. United States*, 348 F.2d 932 (Ct. Cl. 1965); *United States v. Fox Lake State Bank*, 225 F. Supp. 723 (N.D. Ill. 1963).

89. 42 F. Supp. 459, 474-75 (E.D. Wash. 1941).

90. 11 F. 389 (C.C.D. Ind. 1882).

91. Id. at 397.


93. Id. at 102.
Probably most similar to the Blackbird Bend situation is *Iowa v. Carr*, in which an avulsion occurred on government land adjacent to the Missouri River. The government made no claim to the land for more than twenty-six years. During that time, the private landowners and their predecessors in title had been in possession of the land, paid taxes on it, and made valuable improvements. The court held that the state was estopped from asserting a claim to the land. Although the Blackbird Bend case involved a claim by the federal government instead of a state, it should be noted that the United States Court of Appeals for the Eighth Circuit has indicated that the United States government may be subject to the same standards of estoppel that can be used against state governments.

These tort and estoppel cases demonstrate that adverse possession against the government may not be totally invalid. Exceptions should be made when the government acts in its proprietary capacity or when many years have elapsed and the government has failed to assert its claim to the property after receiving notice of the claim of a private party.

In addition to theories of tort and estoppel, an economic analysis may come into play when a government claims land which a private party has possessed and improved for the statutory term of adverse possession. The public's interest in preserving government property may be outweighed by the public's interest in seeing that land is put to its most productive or long-term beneficial use.

4. **Reimbursing the Loser**

An owner of property along an unharnessed river is a gambler. His land may increase or diminish without reference to his efforts.

When the Omaha Indians signed the treaty of 1854, it is unlikely that they were familiar with the white man's law of river movement. Because the federal government had an interest in seeing that the Indians had enough property to farm, new grants were allotted to individual Indians whose property had washed away.

94. 191 F. 257 (8th Cir. 1911).
95. Id. at 270.
96. Goldstein v. United States, 227 F.2d 1, 4 (8th Cir. 1955) (dictum).
97. See note 2 *supra*.
98. One of the federal government's major purposes in establishing the reservation was to change the Indians from hunters into farmers. Treaty with the Omahas, March 16, 1854, *supra* note 2.
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The same philosophy that led the federal government to reimburse individual Indians with new land could be used to reimburse the tribe for its losses—probably in money rather than land. However, the Omaha Indian Tribe was not really a "loser" to the river's force of erosion. In fact, the Omaha Indian Tribe's reservation is larger than it was in 1854, due to natural and artificial accretion along the Missouri banks.100

IV. CONCLUSION

Although the rechanneling of the Missouri and Mississippi indicates that disputes over riparian property beside those two rivers will decline, there are twenty-six other rivers in Nebraska101 and Iowa,102 along with numerous streams and creeks, which wind unharnessed across fertile and valuable land. As farmland prices soar, litigation over riparian property may include disputes over smaller portions of land.103 More than ever, therefore, it is important that the rights of landowners, against their neighbors and against the government, be made clear.

The Battle of Blackbird Bend was fought by farmers and Indians with the modern weapons of attorneys and evidence. The opinion that emerged at the end of the battle was basically a determination of facts—a ruling that the Missouri had changed course by accretion and not avulsion in this instance. The issues that the court did not need to resolve to reach its decision—particularly a limitation on the number of years a government can wait before asserting a claim to land—are not likely to lie dormant for long.104

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100. See surveys cited in notes 3, 66-69 supra.
101. Rivers within the Nebraska boundaries include the Big Blue, Elkhorn, Loup, Middle Loup, Niobrara, North Loup, North Platte, Platte, Republican, South Loup, South Platte, and White.
102. Rivers within the Iowa boundaries include the Big Sioux, Chariton, Des Moines (south), Des Moines (west), Floyd, Grand, Iowa, Nishnabotna, Nodaway, Raccoon, Shellrock, Skunk, Turkey, and Wapsipinicon.
103. Most suits involving accretion and avulsion are settled by adverse possession if between private parties. However, when the state or federal government is a party, issues of accretion and avulsion become crucial.
104. In Maine, 10,000,000 acres have been claimed by the Passamaquoddy Tribe and the Penobscot Nation. In New York, 300,000 acres in the center of the state have been claimed by the Oneida Tribe. In Massachusetts, 22,000 acres have been claimed by the Wampanoag Tribe. In Rhode Island, 3,200 acres have been claimed by the Narraganset Tribe. In Connecticut, 1,300 acres have been claimed by the Schaghticoke Tribe and 1,000 acres by the Western Pequot Tribe. In South Carolina, 144,000 acres have been claimed by the Catawba Tribe. For discussion of these pending suits, see U.S. News & World Report, April 4, 1977, at 53.