

**REPORT**  
OF THE  
DEMOINE RIVER IMPROVEMENT  
AND  
**NAVIGATION COMPANY.**

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OTTUMWA, NOV. 15, 1856.

*To His Excellency,*

JAMES W. GRIMES,

Governor of the State of Iowa.

SIR: The Des Moines Navigation and Railroad Company, beg here-with respectfully to present to you and through you to the General Assembly, the accompanying full exhibit of its affairs and financial condition.

In order to a correct understanding of the operations of the company, and a just appreciation of the causes, which have disappointed its expectations of a rapid completion of the work, it is necessary to give a brief narration of its history.

Almost from the first, it has had to encounter serious obstacles, which have not only embarrassed its most earnest efforts, but have impaired the confidence of the people, who not aware of the justifying circumstances have naturally attributed the results to inaction or bad faith.

The company was organized under the Laws of Iowa, May 6, 1854, and having purchased their rights from the parties who then held the contract from the State, on the 9th day of June, 1854, entered directly into a new contract with the State officers. With this contract which was published in the journal of the next Legislature you are doubtless familiar. It was based upon the public

assumption that the grant of Congress for the improvement of the river covered the unappropriated odd sections to the source of the river and comprised somewhat over a million of acres.

The State agreed to sell these lands to the company for \$1,300,000 to be expended upon the Improvement and in payment of the State debt then outstanding, the lands to be conveyed to the company, at the rate of 24,000 acres whenever the disbursements should reach \$30,000. The company at once adjusted and paid the State debt to the amount of over \$70,000, and immediately entered upon the necessary surveys of the river which were indispensable preliminaries to the active work of construction.

As early as the ensuing May, nearly half the work was prepared for "letting" and was put under contract.

At this point information was received that the General Assembly had passed an act in derogation of the title which had been agreed to be given to the company, and requiring that no patents should issue to the company except with a derogatory clause inserted. (Vide Sec. 8, of Chapter 153, page 224, Laws of 1854).

The immediate effect of this was to dishearten the friends of the enterprise, by the impression that the Legislative body was disposed to embarrass it; but this was passed over, in the belief, that as the work progressed, a more liberal feeling would prevail; and the construction was urged with as much vigor as the season admitted of. An unusually inclement winter retarded the work, though the surveys of the remaining portion of the river was continued to completion and the balance of the work was prepared for letting.

Early in the winter rumors became rife that the General Government intended to take the position that the grant did not extend beyond the Raccoon fork. Application was at once made to the General Land Office for the transfer of the remaining lands to the State, and the Commissioner of the General Land Office promptly responded that he held the grant as not extending above Fort Des Moines.

In the meantime the locks and dams to Fort Des Moines had been advertised for "letting." An immediate appeal was taken from the decision of the Commissioner to the Secretary of the Interior who sustained his subordinate, and thence an appeal was taken to the President of the United States, by whom the matter was referred to the Attorney General. Much delay followed,



**TREASURER'S REPORT.**

## EXHIBIT NO. 1

A. HUNT, TREASURER, in account with the Des Moines Navigation and Railroad Company.

1856	To Cash received to this date, on	
Nov. 15	account of subscription of	
	\$1,000,000 for Bonds, (balance	
	payable in installments when-	
	ever called for,).....	\$280,600 00
"	" To Cash received to this date, on	
	account of Stock subscribed,	168,075 00
"	" To Cash received to this date, from	
	the sale of lands in Iowa,...	7,619 06
"	" To Cash received to this date, for	
	installments on Bond & Stock	
	subscription, and for interest	
	on amounts loaned on call,	6,528 80
"	" To Cash in Stock issued to I. J.	\$462,822 86
	Speed, Jr., for relinquishing	
	his contract made with Henry	
	O'Reily, .....	50,000 00
"	" To cash in Stock allowed Bonney	
	& Whittlesey, for relinquish-	
	ing their contract made with	
	the State, for the Keosauqua	
	work, .....	5,000 00
"	" To cash allowed Jno. T. Clark,	
	for services, .....	1,000 00
		56,000 00
	<b>Total,</b>	<b>\$518,822 86</b>

A. HUNT, TREASURER, in account with the Des Moines Navigation  
and Railroad Company.

1856	By cash paid on account of State	
Nov. 15	Liabilities,.....	70,053 33
" "		
	By cash paid for construction	
	of Locks and Dams, for En-	
	gineering, for advances for	
	materials, not yet put into	
	the work, for lands, for loca-	
	tion of Locks and Dams, and	
	for salaries of Registers and	
	Commissioners,.....	290,860 86
		<u>360,914 19</u>
" "	By cash paid for salaries of offi-	
	cers of the company, office	
	expences and furniture, and	
	interest on Bonds of the Co.	20,133 85
" "	By cash allowed H. O'Riely, on	
	original purchase from him	
	by the Company, applied on	
	first instalment on his stock,	15,000 00
	This Stock, excepting 5 shares,	
	(on which \$5 per share has been	
	paid,) has all been sold by	
	O'Rielly.	
" "	By cash allowed I.I. Speed	
	for relinquishing his	
	contract made with	
	O'Rielly, applied on	
	Stock given Speed, \$50,000	
" "	By cash allowed Bonney	
	& Whittlesey, for re-	
	linquishing their con-	
	tract made with the	
	State, applied on Stock	
	given him,.....	5,000
" " "	By cash allowed Jno. T.	
	Clark for services, ap-	



A. HUNT, TREASURER, in account with the Desmoines Navigation and Railroad Company.

plied on Stock given him, .....	1,000	56,000 00	452,048 04
Cash on hand, Nov. 15, 1856,			\$66,774 82
			A. HUNT, Treasurer.

STATE OF NEW YORK, }  
CITY AND COUNTY OF NEW YORK. } s. s.

Alvah Hunt, Treasurer of Desmoines Navigation and Railroad Company, being duly sworn, deposes and says, that the foregoing statement is correct and true, as deponent verily believes.

A. HUNT.

Sworn to before me this 22nd day of November, 1856.

JOHN J. CHRISTIE, Com'r of Deeds.

RESOURCES.

Cash on hand, November 15th, 1856, as per statement rendered,.....	66,774 82
Balance due on Bond Subscription of \$1,000,000, on which \$280,600 has been paid, balance payable whenever called for,.....	719,400 00
197,997 83-100ths Acres of land held by the Company, unsold, at \$1 25 per acre,	247,497 29
	\$1,033,672 11

Amount of Bonds provided to  
be issued if necessary..... 1,000,000

Amount of Stock that may be  
issued hereafter,..... 1,000,000

\$2,000,000

A. HUNT, Treasurer.

NEW YORK, November 15th, 1856.

ABSTRACT of the estimated cost of the DES MOINES RIVER IMPROVEMENT, from its Mouth to Fort Des Moines.

LOCATIONS.	EXTRA BULKH'DS	EMBANK'T FOR GUARD BANK.	LOCK AND DAM, &C.	TOTAL.
Work below St Francisville, . .			\$75,000	
St. Francisville Work . .	\$4,200	\$7,00	49,100	
Belfast " . .	4,500	2,400	54,700	
Croton, Bonaparte & } Benton's Port }	"	"	25,000	
Plymouth " . .	"	"	37,000	
Keosauqua " . .	"	"	25,000	
Pittsburg " . .	4,200	700	49,200	
Litchfield " . .	4,200	700	49,500	
Orville " . .	4,200	2,300	51,500	
Jordan " . .	4,200	700	61,500	
Alpine " . .	4,200	6,000	48,000	
Wyley " . .	4,200	7,200	44,800	
Sugar Creek " . .	4,200	9,000	43,100	
Ottumwa " . .	"	8,400	32,300	
Camp " . .	3,700	6,000	43,700	
Bells " . .	4,200	2,400	51,700	
Johnson's Port " . .	4,200	3,000	53,500	
Neida " . .	4,200	6,000	42,700	
Rocky Ripple " . .	4,200	6,000	46,700	
Delashmuit " . .	4,200	3,600	51,100	
Bellefontaine " . .	4,200	9,600	42,900	
Coal Bank " . .	4,200	12,000	43,500	
George " . .	4,200	12,000	43,200	
Amsterdam " . .	4,200	12,000	48,500	
White Breast " . .	3,700	8,400	44,400	
Red Rock " . .	4,200	7,700	51,300	
Egg Bend " . .	4,200	19,200	55,500	
Bennington " . .	4,200	21,600	56,600	
Lafayette " . .	4,200	2,400	54,900	
Adelphi " . .	4,200	20,400	51,000	
Yellow Bank " . .	4,200	21,600	54,000	
Newcomer " . .	4,200	10,800	53,700	
Agency Prairie " . .	4,200	10,800	53,700	
Excavating Channel below } Lock, at Keosauqua and } Alpine . . . . . }			15,000	
	116,900	\$233,600	1,603,300	
Add for Engineering & con- } tingencies, 10 per cent. . }	11,690	23,360	160,330	
	128,590	\$256,960	1,773,630	2,149,180



OTTUMWA, NOVEMBER 19, 1856.

*To the President of the Des Moines**Navigation and Rail Road Company:*

SIR: In accordance with your instructions, I have prepared an estimate of the cost of completing the slackwater navigation of the Des Moines River, from its mouth, on the Mississippi, to Fort Des Moines, (Raccoon Fork,) and herewith present the same:

The estimate contemplates improving the present channel of the river, from the Mississippi to St. Francisville, a distance of about twelve miles without locks. It is proposed to remove the snags and trees from the present bed of the river, and deepen the channel in several shoal places, by dredging and confining the water by means of wing dams, in its lower stages, to a narrow channel. From St. Francisville to Fort Des Moines, the estimate is based upon building locks and dams. The locks are estimated as stone locks, and the dams as timber and stone, with wooden abutments on the side of the river opposite the locks.

The present state of the work: Since the 1st of August we have had a party at work, with the proper tools and fixtures, clearing snags and trees from the channel of the river below St. Francisville; they have cleared a channel wide enough for the passage of steamboats from the Mississippi to near the Big Yellow Banks, a distance of about six miles, and we are now going on vigorously with the work beyond that point.

We have also built a most substantial Dredging Machine, which is at work excavating channels through the bars on the lower part of the river. It is intended to keep the snagging and dredging going on until the river is closed by ice. If the fall and winter are open, it is expected to clear the snags from the channel as far as St. Francisville, by the opening of navigation in the spring.

At St. Francisville the coffer-dam is built, and the excavation of the pit nearly completed. The water-sills of the lock are in, and the masonry started. A large amount of materials are now delivered, and the work is being prosecuted with vigor.

At Belfast, the 2d lock, the walls are now built above high-wa-

ter, and can be completed early next season. The work has been energetically prosecuted during the low water of this year.

At Croton, the 3d lock is now in working order, though it is one of the short locks, and will eventually have to be lengthened, and some additional work done to the dam.

At Farmington the 4th lock, the walls are built to nearly their full height, and there is stone enough prepared to furnish them.— It was expected to finish this lock this season, but owing to the sickness during the months of August, September and October, the contractors were not able to keep the requisite force at work to complete it. It can be finished early next season, and the dam can be built during the low water of next summer.

At Bonaparte, the 5th, and Benton's Fort, the 6th locks and dams are in navigable order, though the locks are short, and will eventually have to be lengthened, and the dams require some more work to complete them.

At Keosauqua, the 7th lock, the masonry is well started, and with proper energy on the part of the sub-contractors, the work can be completed and brought into use, by the time of the June rise of the river to this place.

At Pittsburg, the 8th lock, the coffer-dam is now in, but I have been unable to get any masonry laid this year.

At Litchfield, the 9th lock, the masonry is started, and it is hoped that it will be completed early next year.

At Orville, the 10th lock, the masonry is started, and it is hoped that it will be completed next year.

At Iowaville, or Jordan's, the 10th lock, we had to change the location of the lock a short distance, to get a good foundation. The masonry of the lock is started, and nearly all the materials for the lock are prepared, and it is expected to complete it early next season.

At Alpine, the 12th lock, the foundation for the lock is now about prepared, and the masonry can be started early in the spring.

At White Breast, the coffer-dam is in, and the foundation for the lock is nearly prepared.

Below Alpine a very large amount of materials is now prepared, and there will be no difficulty in procuring all the balance that will



be required to complete the work on this part of the line, during the coming winter.

The water in the river has been low this season, but the workmen have been very sickly. Some of the time more than one-half of our men, between St. Francisville and Ottumwa, have been sick at the same time, and for a short time nearly all the men were sick at once. This sickness has very materially retarded the work.

Respectfully Yours,

EDW. H. TRACY,  
Chief Engineer D. N. & R. R. Co.

## EXHIBIT NO. 3.

*Opinion of Attorney General in the matter of the Des Moines Grant, and the Order of the Secretary of the Interior.*

ATTORNEY GENERAL'S OFFICE,

May 29, 1856.

SIR: Your communication of the 7th ultimo referred to me certain questions which have arisen out of a grant of lands made by Congress to the State of Iowa for the improvement of the navigation of the river Des Moines in that State.

It appearing, on a cursory examination of the subject, that the State, and a company to which it had committed the construction of the contemplated works, are largely interested in the questions to be resolved, notice of the reference was given, and further examination suspended, in order that arguments might be submitted in behalf either of the State of Iowa or of said company. Those arguments came to hand on the 20th instant, since which day the matter has remained under advisement.

The history of the case exhibits a spectacle of vacillation and contradiction of opinion, on the part of the government, which it is humiliating to contemplate, and which constitutes all there is really embarrassing in the points now to be determined.

At the foundation is the act of Congress, the essential part of which is in the following words:

"That there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Racoon Fork, (so called,) in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, encumbered, or appropriated,) in a strip of five miles in width, on each side of said river, *to be selected within said Territory* by an agent or agents, to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

"SEC. 2. \* \* \* That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall pro-



gress; that is, the said Territory or State may sell so much of said land as shall produce the sum of thirty thousand dollars, and then the sales shall cease, until the governor of said Territory or State shall certify the fact to the President that one-half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended, and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

“SEC. 3. \* \* \* That the said river Des Moines shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through or along the same. \* \* \*

“SEC. 4. \* \* \* That whenever the Territory of Iowa shall be admitted into the Union as a State, the lands hereby granted for the above purpose shall be and become the property of said State, for the purpose contemplated in this act, and no other.” \* \* \*

This act originated in a bill introduced into the House of Representatives by the Hon. A. C. Dodge, delegate of the Territory of Iowa, referred to the Committee on Public Lands, and reported and passed substantially in the same words, in so far as regards the grant, as they now stand in the statute-book.

While the bill was pending before the committee, Mr. Dodge obtained from the Commissioner of Public Lands (Mr. Shields,) a report of the quantity of land which the grant would embrace; which he stated at 261,000 acres, expressly assuming that the range of land *proposed* to be granted was limited to the line “from its mouth to the Racoon Fork.” That report accompanied the report of the committee and was reasoned upon *therein*, as the basis of the bill which they presented to the House.

Notification of this act was made to the Governor of Iowa by the Commissioner of Public Lands soon after its passage, by letter, which assumed that the range of selection was limited as above stated, and transmitted plans in conformity therewith to guide the State in making selections. The agent proceeded to make the selections within the limits defined; and information to that effect

was communicated to the Commissioner by that agent and by the governor.

In all this series of acts there seemed to be ample contemporaneous exposition of the law.

A suggestion of doubt, whether the grant did not extend above the Racoon Fork, first appears in a letter from the Commissioner, (Mr. Young,) dated February 23, 1848; which doubt, however, as appears from a letter to him dated January 8, 1849, he had then ceased to entertain. Indeed, by proclamation of President Polk, under date of June 19, 1848, countersigned by the same Commissioner, the lands on the Des Moines, above the Racoon Fork, were brought into market with advertisement as usual in the State of Iowa; and a considerable quantity of land was entered, on sale or by pre-emption, or land warrants, which would have been covered by the grant if it extended above that fork.

In this stage of the case, the delegation of the State of Iowa in Congress, on the 8th of January, 1849, addressed a letter to the Secretary of the Treasury, to whose department the General Land Land Office then belonged, claiming that the State was entitled along the whole course of the Des Moines to its source, and requesting corresponding action on the part of the government.—To this letter the Secretary replied under date of March 2, 1849, expressing the opinion that the grant “extends on both sides of the river from its source to its mouth, but not into lands on the river in the State of Missouri;” and on the same day he communicated a copy of the letter, as his decision on the question, to the Commissioner of Public Lands.

And thus things stood when, immediately afterwards, the supervision of the public lands passed to the new Secretary of the Interior, Mr. Ewing.

Subsequently, a list of selections, made up in conformity with Mr. Walker's opinion, having been reported by the Commissioner to Mr. Ewing, for confirmation by the latter, he refused it, upon the conviction expressed by him, that the grant does not extend to the lands above Racoon Fork. He considered, as undoubtedly he might lawfully do, that Mr. Walker's opinion, not having been carried into effect, being an unexpected opinion merely, was open to revision. And he decided to suspend sales of the lands embra-



ced in the claim of the State, in order to leave opportunity to Congress to "extend the grant," if it should see fit.

Mr. Ewing's decision is dated April 6th, 1850, and an appeal was taken therefrom to the President, (General Taylor.) He referred the question to the Attorney General, (Mr. Johnson,) who, in his opinion dated July 19th, 1850, came to the conclusion that the grant applied to the lands above the Racoon Fork. (Opinions, ed. 1851, p. 2149.)

It does not appear that this opinion was acted on, so as to dispose of the question: for, in a paper addressed by the Commissioner of Public Lands (Mr. Butterfield) to the President, dated September 26th, 1850, the opinion of Mr. Johnson is reviewed, and objections to its conclusions are submitted; and thus the question remained open at the accession of the next President, (Mr. Fillmore).

During the administration, the first material step in the business consists of a reference of the case to the Attorney General, (Mr. Crittenden,) followed by an opinion of the latter, dated December 3d, 1850, to the effect that the questions involved were not of a nature to call for or justify the present interposition of the President of the United States, they being appropriate only to the jurisdiction of the Secretary of the Interior. (Opinions, Farnham's ed., vol. v, p. 275.)

It would appear from this conclusion, that Mr. Crittenden did not become aware that the matter was regularly before the President on appeal from the decision of the Secretary of the Interior.

Thus, the papers went back to the Interior Department, and the Secretary (Mr. Stuart) referred the subject to the Attorney General, (Mr. Crittenden,) requesting his official opinion on these points, namely: 1. The effect of Mr. Walker's letter; 2. That of Mr. Johnson's opinion; and 3. The true construction of the disputed grant.

Mr. Crittenden, by letter of June 30th, 1851, replied, that, in his opinion, the letter of Mr. Walker was not an act done, but an opinion expressed, and, therefore, had no binding effect on his successors; that the opinion of Attorney General Johnson was but advisory, having no compulsory effect on the Secretary to whom it was addressed; and that the grant, in his judgment, was limited

## APPENDIX.

to the lands below Racoon Fork. (Opinions, Farnham's ed., vol. v, p. 390).

On the 26th of the same July, Mr. Stuart communicated Mr. Crittenden's opinion to the Commissioner, with expression of concurrence in its conclusions, but permitting Mr. Ewing's order to withhold the lands from market to continue in force "until the end of the approaching session of Congress."

But, on the 26th of October, he again addressed the Commissioner on the subject, and directed the selections of the State, above Racoon Fork, to be reported for his approval, assigning the following reasons :

"I have considered and carefully reviewed my decision of the 26th of July, last, and, in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country ; and although my own opinions as to the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and, also, in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contented for by the State, I am willing to recognise the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary." \*

It would appear from this that Mr. Stuart was overruled ; for he expressly says that his own opinion of the law remains unchanged, and the reasons which he gives for acting against the law, as he understands it, and as expounded by Attorney General Crittenden, are not satisfactory, and would equally well apply to any other controverted subject before the Department.

However this may be, here was a decision ; and in conformity with it, three lists were made out at the Land Office, namely :

List No. 1. "Showing the tracts falling within the limits of the Des Moines grant above Racoon Forks of the Des Moines river, so far as the surveys have extended, under the decision of the Secre-



tary of the Treasury of 2d March, 1849, that such grant extended to the north boundary of the State."

List No. 2. Showing tracts disposed of within those limits, in the interval between the date of one of the previous orders limiting the grant and one of those extending it above the forks.

List No. 3. Showing the vacant lands subject to the claim of the State.

To the latter Mr. Stuart appended the following order:

"DEPARTMENT OF THE INTERIOR,

"October 30, 1851.

"The selections embraced in the within list (No 3) are hereby approved in accordance with the views expressed in my letter of the 29th inst. to the Commissioner of the General Land Office, subject to any rights which may have existed at the time the selections were made known at the land office by the agents of the State; it being expressly understood that this approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of, prior to the receipt by the local land officers of the letter of the Commissioner of the General Land Office, communicating the decision of Mr. Secretary Walker to the effect that the grant extended above the Racoon Fork.

"ALEX'R H. H. STUART,

"Secretary."

Continuing to act on the same premises of judgment, the Land Office, it seems, reported another list to you, in the following terms:

"A list showing the vacant lands in the odd numbered sections above the Racoon Forks, and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of the 8th of August, 1846, as construed by the Secretary of the Treasury in his letter of the 2d March, 1849, and of the Secretary of the Interior of the 29th of October, 1851, which have not heretofore been approved."

Which list you approved in these words:

"DEPARTMENT OF THE INTERIOR,

"December 17, 1853."

"The selections in the within list are hereby approved to the

State of Iowa, under the act of 8th August, 1846, without prejudice to the rights, if any there be, of other parties.

• "R. McCLELLAND,  
"Secretary."

It is true, as stated in your communication to me, your attention was not called to the general question involved; but still the act was done.

To the administrative history of the case, as thus presented, certain collateral facts are now to be added, in order to the full understanding of all its relations.

Of lands included within the grant, the amount selected and approved is 321,000 acres, *below* the Fork.

Proceeding above it, we at length come to two confluents of the Des Moines. One of them, in a map before me is denominated the "East fork of the Des Moines." This stream flows out of the lake situated on the line which divides the Territory of Minnesota from the State of Iowa, and the stream itself is wholly within that State. The other confluent has its origin far up in the Territory of Minnesota, at a distance of say eighty-five miles north of the dividing line; and this also on the same map, bears the name of "Des Moines."

In a map before me, published in 1844, and founded on Nickollett's, the main river is called "Keosagna or Des Moines," only to a point just above the Racoon Fork, beyond which it is called the river of the Sioux. This may serve to explain the phraseology of the act, and to justify the original construction placed on the grant by the government.

Of lands embraced in the claim of the State, and within its limits, the quantity above the Racoon Fork is 560,000 acres, of which 260,347 acres have already been passed over to the State by Mr. Stuart and by yourself, leaving less than 300,000 acres now in controversy between the United States and the State, within the limits of the State.

Add to this an estimated quantity of 272,000 acres on the west branch of the Des Moines, north of the line of Iowa and in Minnesota.

The Des Moines, it may be further added, according to a statement before me made up at the Land Office, can scarcely be con-



sidered as a navigable river in the upper part of its course above the Racoon Fork.

On these facts, you present the following questions, namely :

1. Whether the decision of Mr. Stuart and the consequent action of the Department down to the present time are conclusive in favor of the claim of the State of Iowa?

2. Whether, if it be an open question, the grant extends, in my opinion, above the Racoon Fork?

3. Whether it is to be considered as reaching into the Territory of Minnesota?

I proceed to state such views as occur to me on the whole subject to be applied afterwards to the particular questions which you propound.

I suppose it must be conceded that an opinion of the Attorney General is not conclusive, that is, it is not compulsory on the President, or even on a head of department.

It is inconvenient, however, to have conflict of opinion between the Attorney General and a head of Department; and that inconvenience is placed in the strongest light by the facts of this case where the affirmative opinion of one Attorney General went disregarded by one Secretary, and a negative opinion of another Attorney General by the succeeding Secretary. There could be no more flagrant example of confusion of opinion and action.

A Secretary, undoubtedly, is entitled to have and to act upon his conscientious opinion of a question, even after he has taken the opinion of the Attorney General; but the interests of parties and the credit of the government require decision; and it would seem that any such conflict of opinion between the Secretary asking, and the Attorney General giving official advice, should be referred at once to their common superior, the President, in order that the particular question of administration itself may receive the authoritative decision of the executive department.— That did not happen in this case in either of its stages; and thus all the embarrassment of contradicting opinions and acts, with the uncertainty of present duty which they create, are transmitted to you for determination.

Is it necessary, now, for me to weigh the reasons of Mr. Crittenden against the reasons assigned by Mr. Johnson, and conclude

which of them shall be overruled by me? That would be an unwelcome task. It must be admitted on the mass of argument before me, that there are two sides to the question of the true legal intendment of the act of Congress. At the same time, it is due to frankness to say, that, if constrained to judge between them, the inclinations of my mind would be to the side accepted by Mr. Crittenden, because the language of the statute admits of such construction, and because, on a retrospect of the history of the case, it is impossible for me to doubt as to the actual intentions of Congress. That is, if the question were one of new impression, the tendency of my judgment would be to say that the grant is limited to the line of the improvements, namely, the river Des Moines below the Racoon Fork.

But it is not a question of new impression. Nay, it has passed beyond opinion into action, and at this point of time it is more material to consider what has been done than what has been thought on the subject matter. I wish, if possible, to find something firm to stand upon in what has been done.

In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did in this respect with deliberation, what you did without the questions involved being suggested to you, was, in each case, done by the competent legal authority, and binds the government. One Secretary has no more lawful power to undo a thing lawfully done by his predecessor, in a matter of grant than in a matter of account; no more right, where a settlement is in favor of a third party, than where it is in favor of the United States. When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony. (Mr. Crittenden's Opinion of December 28, 1852, MS.; see also *Bank of Metropolis vs. The United States*, xv Peters, p. 400; *Ex parte Randolph*, ii Brocken., p. 470).

If the acts of Mr Stuart and yourself, in this respect, had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would have had their remedy at law. But what you have *done* is final as respects the United States.



But have you erred in continuing to follow the line of action which your predecessor had prescribed, and which the Commissioner of Public Lands assumed<sup>d</sup> as settled, in presenting to you for approval lists made out on the premises of the subsisting decision of Mr. Stuart? And if you erred (inadvertently) in thus approving selections made by the State above the Racoon Fork, shall you now stop and change the rule of action which Mr. Stuart had prescribed to the Commissioner? The answer to these questions is not included in the preceding conclusion. It is one thing to undo an act done, and quite another to cease to persevere in a previous line of action as to acts of a continuous nature.

It might with much plausibility be argued, that, while Mr. Walker's order was an opinion merely, and did not bind Mr. Ewing, so what Mr. Stuart did, though final as to lands actually approved, was but a precedent, when a new list comes up, and may be rejected by you as a precedent, though it cannot be reversed or annulled as an act; that the disposition of the particular lands made by him is irrevocable, but the principle on which he did it is open to re-examination, as respects any other lands in the same right claimed by the State; and that, in executing the same law, you are to execute it according to your own understanding of its force and effect.

That may be so. And yet the contingency is not exactly of the application of a precedent to a new case. For the grant to Iowa is one thing, although it be composed of parts, or of new sets of parcels appertaining to the general whole. Mr. Stuart decided to adopt the opinion of Mr. Walker, which carried the grant above the Racoon Fork; and he proceeded to execute, and did execute, that decision in part. And the true question is of the completion of execution by you of what had been partially executed by Mr. Stuart.

I think it must be a clear case of manifest illegality in the work commenced and half executed by one Secretary to justify the abandonment of it by his successor. Is the present such a case of palpable violation of law? That cannot be pretended in face of the opinions of Mr. Walker and Mr. Johnson, and the administrative acquiescence in those opinions on the part of Mr. Stuart. In my judgment it is not for the good of the public service, while it is

prejudicial, and sometimes grossly unjust to private interests concerned, for the executive to break off things half done, because of mere *doubts* of the legality of the decisions upon which commencement was made, or even the belief that, upon better reflection at the outset, a different decision would have been rendered. To indulge in such oscillation of action, under the influence of ordinary causes of perturbation, is not seemly on the part of the government.

In the present case of lands above the Racoon Fork claimable by the State within its limits, twenty-sixth fifty-sixth parts, nearly half, the United States have already recognized as belonging to the State. I think you may, if you choose, well consider that a determination of the question proper to be acquiesced in by you as a settled fact of administration.

But this conclusion is placed by me on the ground only of a decision by Mr. Stuart, proper to be accepted by his successor as constituting final action of the government.

It has been suggested in argument that inferences in favor of the present claim of the State may be deduced from a clause in the recent act making a grant of lands to the State of Iowa to aid in the construction of certain railroads in that State. (May 16, 1856.) The words are :

“That any and all lands heretofore reserved to the United States by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.”

This provision is rather doubtfully worded. I suppose it intends to enact that the alternate sections reserved to the United States for the sake of augmented sale-value, in case of any previous grants to the State for State objects, shall continue to be so reserved now, and shall not be taken as part of the lands subject to present grant to the State; and if the title still remains in the United States, the



right of way is to be passed upon by the President of the United States.

Such an act of the President would apply still more distinctly to any case of actual continuing reservation to the United States for the uses of the United States.

Concluding, at any rate, that the general object is to protect the rights of the United States in any such case, if it exists, it is urged that such a provision would have been superfluous, had not the Des Moines grant extended above the Racoon Fork.

Well, suppose a construction which makes it superfluous; what then? There are very many superfluous provisions in the statutes. Of course, no very cogent argument can be derived from that consideration.

Moreover, if it were expressly said in the provision that the Des Moines grant was intended, still it would only operate as enactment *ex majori cantela*, to guard against interferences in case the present controversy should be determined in favor of the State.

But the argument errs in supposing that no other grants of land have been made to the State of Iowa for the purpose of aiding in objects of internal improvements, or for any other purpose whatever. Various other grants of land have, from time to time, been made to the State. (See, *exempli gratia*, v Stat. at Large, pp. 453, 455; *ibid.*, pp. 789, 790; vi Stat. at Large, p. 810).

In a word, Congress, by this provision, said: "We have already made several grants of land to Iowa for one purpose or another, which may or may not have been located, and we do not design by this act to undertake to do what, indeed, we could not do if we would—that is, divert those grants from their lawful destination for the use of railroads on account of which the present new grants are made to the State."

On the whole, therefore, it seems to me that this provision does not serve, in any way, to change the premises of the question, or the conclusions founded on those premises.

Remains the question, on which of the two upper confluent of the Des Moines, the eastern or western, the land is to be taken. I conceive that point to be absolutely determined by the premises of my conclusions.

Mr. Walker's decision, as we have seen, was, that the grant ex-

tends "on both sides of the river from its source to its mouth, but not into lands on the river in the State of Missouri."

Now, the language of the act is explicit, granting to Iowa the alternate sections "in a strip of five miles in width *on each side of said river*" Des Moines; and the improvement is, in the equally explicit terms of the act, "from its *mouth* to the Racoon Fork."— But, while carrying the grant above the Racoon Fork to the "source" of the Des Moines, where the improvement does not reach, he lops it off below, along the line of improvement, by excluding "lands on the river in the State of Missouri." The explanation of which is, that, for the last twenty-five miles of its course, the river Des Moines is the dividing line between the States of Missouri and Iowa. Missouri enjoys, directly, all the benefits of the improvement of the navigation of the river; but no lands in Missouri are to be comprehended in the grant, notwithstanding its terms are of lands *on each side* of the river, for the obvious and sufficient reason that the act contains no provisions adequate to enable Iowa to take, hold, and manage lands in the State of Missouri.

I conceive that the considerations which induced Mr. Walker to diminish, by construction, the scope of selection for twenty-five miles on one side of the river below the Racoon Fork, show that in extending the grant above to the "source" of the Des Moines, he intended to confine it within the limits of the State of Iowa.

Such was the understanding of the subject which guided the action of Mr. Stuart; the lists which he approved expressly referring to the limit of the *north boundary* of the State. And that is the utmost point to which, in my judgment, you can lawfully go, in case you acquiesce in, and accept as a rule for yourself, the opinion of Mr. Walker and the action of Mr. Stuart.

They, unquestionably, had before them the maps of the State, in which the eastern branch of the Des Moines was alone depicted, taking its rise in a lake on the boundary line of Minnesota. If they had knowledge of any western branch of greater or less length, they treated the eastern branch as the true Des Moines.

I think they must have done so, because they could not have done otherwise. Mr. Walker did not say, and could not have said, that the grant extends into Minnesota. If he had apprehended any such consequence of deciding that the grant extends above the Ra-



coon Fork, he could not have made this decision, but must have referred the State, as Mr. Ewing afterwards did, to Congress. That is plainly to be inferred from the consideration that the act of Congress cannot be executed, if it be so construed as to assume that the grant extends into Minnesota. It contains no provisions, in virtue of which one State is to hold public domain within the limits of another State, or inchoate State.

Impressed by the force of this consideration, Mr. Walker excluded from the purview of the grant the land on one side of the river, for the length of twenty-five miles, though plainly comprehended by the *letter* of the act.

Of course it availed nothing to say, that, when the grant was made, the part of Minnesota affected was included in the limits of the State of Iowa, and, that therefore the *letter* of the law extends the grant beyond the northern line of the State. So, also, the letter of the law comprehends lands in Missouri. But the letter of the law in the former case, as well as in the latter, must yield to the legal objection, that without apt language of enactment to that express effect, it cannot be inferred from other words of enactment that a grant of lands to one State extends into another State, (including in each phrase inchoate States).

Moreover, we are not dealing with the import of the grant on its face, or as construed while Iowa was a Territory and included in a part of the present Minnesota.

If we go back to that day, we find the grant construed, and accepted on both sides, as not extending above the Racoon Fork, and of course not involving any possible question of the upper course of the Des Moines. If we now stood there, at that point of time, my decision in the case would be precisely the reverse of what is now in effect, though precisely the same in form and tenure, that is, to accept as final the previous action of the Executive, (including President Polk's proclamation,) which limited the grant to the Racoon Fork. I should be the more fortified in such a conclusion, because the maxim *stare decisis* would then have applied to the case without qualification or doubt; and also, because, if the naked question of the construction of the statute were before me, as it would then have been, my judgment would have been satisfied with the construction put upon it in that early stage of the case by the United States, and not objected to by the State.

While, at that time, the idea of acquiescing in the thing decided, would have confined the grant to the Des Moines below the Racoon Fork, the same idea requires that the grant, though carried by your predecessor above the Racoon Fork, should yet be confined within the limits of the State of Iowa. That is the decision, whose authority is invoked as controlling you, and which, if you accept at all, you accept on the FINAL decision of the whole matter.

If you throw up the decision of Mr. Stuart, founded on Mr. Walker's opinion, if you come to the conclusion that that is not to be acquiesced in as final administrative action; if you go behind it, then you come at once, *per saltum*, to the state of the question as it stood anterior to the 2d of March, 1849. At that point we shall have all the arguments of Mr. Attorney General Johnson in favor of the finality of the executive action to counsel acquiescence in the then existing practical construction of the law. If, passing over this consideration, we proceed to reason about the meaning of the law, we do not have the advantage of the elaborate arguments on that point which have since been officially presented by Mr. Johnson and also by Mr. Attorney General Crittenden; but all those arguments would possibly occur to us, and we might be the more easily brought to the same conclusion with the latter, by fresher contemporaneous knowledge of the legislative history of the act of Congress.

In fine, after the most mature reflection, it seems to me that only two tenable alternatives present themselves in the case; one, to stand on the action of Mr. Walker and Mr. Stuart, not as legal doctrine, but as decision; and the other, rejecting all the intermediate vascillations of opinion, to go back to the original action, and stand on that as decision, not as legal doctrine. Either of these conclusions would be perfectly advisable, according to the rules of law; for if it be unlawful to go behind executive decisions, then the last decision in the case was a violation of law and should be rejected because of its illegality. I have hesitated much on the question whether that be not the true view of the subject; but, for reasons already suggested, have come to the conclusion, on the whole, to advise you to stand on the last decision, which gives to the State the lands along the course of the Des Moines up to the northern boundary of the State. There is a collateral consideration which has weight with me. It is discreditable to the government



that its views of a law, and its consequent action, should be shifting about like a weather vane, as they have done in this case. I wish, if it be possible, to stop that. I think the alternative lines of duty, either of which you may lawfully pursue, and beyond which there is no other apparently lawful course, indicate the means of producing the desirable result of now concluding the subject, in so far as regards the Executive.

I advise, therefore, that you propose to the State of Iowa and its assigns, to acquiesce in and accept the decision of Mr. Stuart as final, and to approve selections accordingly, provided the State or its assigns will themselves agree to acquiesce in and accept that decision as final. If they refuse to treat that decision as final, they cannot expect you to do so. They should be bound if you are. If they consent to enter into satisfactory stipulations of contract to that effect, you can with safety award to them the residue of the claim, up to the northern boundary of the State.

If they decline this proposition, then it is clear, in my opinion, that you are completely discharged from any obligation to act on the premises of Mr. Walker and Mr. Stuart. Nay, it becomes impossible for you to do so; for the very supposition of this alternative is, that the State of Iowa denies the finality of the decision; that is, denies that, so far as regards her, it is a decision; and if not a decision for her, then it is not one for the United States.

In that event you are forcibly thrown back on the first decision of the government—that from which Mr. Walker departed—and must, in my opinion, absolutely refuse to approve any more selections above the Racoon Fork; the effect of which would probably be to remit the parties to Congress, which alone has full power to cut the Gordian knot in which the subject has been tangled up, by reason of the inexplicitness of the original act of Congress, and the uncertainties regarding its meaning, which have embarrassed the action of the successive administrators of the government.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,

*Secretary of the Interior.*

GENERAL LAND OFFICE, }  
November 17, 1856. }

I, THOMAS A. HENDRICKS, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal explication of the original on file in this office.

In testimony whereof, I have hereunto subscribed my name, and

L. S. caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

THOS. A. HENDRICKS,  
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR, }  
June 9th, 1856. }

SIR—I return, herewith, the papers in reference to the grant for the improvement of the Des Moines river, which accompanied your report of the 24th of March, and enclose therewith, several letters and arguments which have been received here since the date of your report.

Having submitted the subject to the Attorney General for his opinion upon the questions involved, I enclose a copy of such opinion, furnished me under date of the 29th ult.; and, also, a letter under date of the 5th inst., from Hon. Reverdy Johnson (Attorney for the claimants under the grant) in regard to the conditions upon which the subsequent approvals, up to the limits of the State of Iowa, are recommended by the Attorney General to be made.

In the subsequent action upon selections not yet approved, I have concluded to be governed by the advice of the Attorney General, as contained in the paragraph near the close of such opinion, beginning with the words: "I advise, therefore, that you propose to the State of Iowa, and its assigns," and ending with "you can with safety award to them the residue of the claim up to the northern boundary of the State."

It will be perceived from the endorsement on Mr. Johnson's letter, above referred to, that he has undertaken to procure the assent of the State, and its assigns, to the conditions referred to, so that



the necessity is obviated of any direct proposition to that effect on the part of the Department, but no further action will be taken until the parties are heard from on this point.

In the certificate of approval, hereafter prepared for my signature on any lists submitted, the fact should be stated, that the approval being based upon the prior action of the Department, and upon the ground that the grant is to be confined to the northern boundary of the State of Iowa, the acceptance by the State and its assigns would be considered an acquiescence on their part in this limit, and an abandonment of all claim beyond it, as it is upon this base alone, I can feel justified in yielding my assent to the claim preferred.

Should the assent of the parties be given in writing, the certificate of approval will be so varied from the language above, as to conform to that state of facts, but without losing sight of the real groundwork of my assent to the approval.

Respectfully Your Obed't Servant,

R. McCLELLAND,

Secretary.

To Hon. THOS. A. HENDRICKS,

Commissioner of the General Land Office.

## EXHIBIT NO. 4.

—  
***Contracts of the Des Moines Navigation and Rail  
 Road Company.***  
 —

*Articles of agreement made and entered into this ninth day of June, 1854, by and between the Des Moines Navigation and Railroad Company, (a corporation formed under the laws of the State of Iowa), party of the first part, and the State of Iowa, by Josiah H. Bonney, Commissioner of the Des Moines River Improvement, by and with the consent and approval of Uriah Biggs and George G. Wright, Assistant Commissioner in the State of Iowa, for and in behalf of said State of Iowa, party of the second part,*

WITNESSETH :

That whereas the Commissioners before named have heretofore entered into an agreement with Henry O'Reilly, bearing date the 17th day of December, eighteen hundred and fifth-three, and an additional and explanatory agreement dated April, 18th, 1854, for the completion of the Des Moines river improvement; and which said agreements, contracts, and all rights of said Henry O'Reilly, by and with the consent and approval of both parties thereto, have been assigned and transferred to, and for the benefit of the Des Moines Navigation and Railroad Company; and in pursuance of a stipulation of the said party of the second part, made simultaneously with said agreements, and to carry the same fully into effect:

The said parties, for the purpose of simplifying and more fully explaining the said contracts and agreements, the said Des Moines Navigation and Railroad Company, of the first part, and the said Josiah H. Bonney, Commissioner, with the consent and approval of Uriah Biggs and George G. Wright, Assistant Commissioners, of the second part, hereby enter into the following agreement;

*First.* The said party of the first part, doth hereby covenant and agree, to and with the party of the second part, for considerations hereinafter named, to make and finish the Des Moines river improvement, from the Mississippi river to Racoon Forks, on said Des Moines river. The said improvement to be made according to the plan and specification of the engineer of said improvement heretofore made and determined upon, as to style, character and quali-



ty of work, from the town of St. Francisville, on said river to said Racoon Forks, except that the said party of the first part may improve the style and character of the work, and enlarge the size of the locks, as hereinafter provided; and so far as relates to the said work below the said town of St. Francisville, the same shall be done and completed upon such plan as may be determined upon by the engineer employed on said work, in connection with Wm. J. McAlpine, late State Engineer of the State of New York, as consulting engineer, or such other consulting engineer as the said party of the first part shall select for that purpose; provided that all said work shall be done and completed in a substantial manner, so as to secure the navigation of said river to the fullest extent, and for the longest period each year, practicable; and provided further, that the said party of the first part shall not be required to expend below the said town of St. Francisville, in said improvement, more than the sum of three hundred thousand dollars; and provided also that during the progress of the work the said party of the first part, their successors, or representatives, by and with the consent of the engineer in charge of the work, may alter or change the style and character of the work, or locations of either of the locks, dams, or canals, or all of them, or any part thereof; Provided no change shall be made authorizing an inferior kind of work, or the use of less valuable materials, or lessening the capacity of said locks, or of any piece of canal necessary for the use of any of said locks, or diminishing in usefulness or value the said general improvement; and in case of any disagreement between the engineer in charge of said work and the party of the first part or their successors, in reference to the proposed sites, or locations, or modes of constructing the locks, dams, or otherwise, the matters of difference shall be submitted for arbitration to a consulting engineer, or other person to be agreed upon by both parties to this contract, whose decision upon the points submitted shall be conclusive upon all parties.

*Second.* The said party of the first part further agrees to, and with the party of the second part, to complete all said work from the river Mississippi to said Racoon Forks, on or before the 1st day of July, 1858; and in like maner undertakes and covenants to complete at least one-fourth part of said work each and every year, commencing on the first day of July, 1854.

*Third.* The said party of the first part doth further covenant and agree with the said party of the second part, to pay and discharge any and all debts of every kind and description, outstanding against the said Des Moines river improvement, on the 23d day of December last, within ninety days from the date of this contract, provided that the whole amount of said debts shall not exceed the sum of sixty thousand dollars, and to meet and discharge said liabilities, the said Des Moines Navigation and Railroad Company have deposited with and paid over to the said Josiah H. Bonney, Commissioner, the sum of fifty-five thousand dollars; and it is hereby agreed that the said party of the first part, shall have, and is hereby entitled to all moneys due and owing to the said improvement, from the general government, and all claims and demands against the said general government, and all sums of money due from any other source, as also all sums of money now in the hands of said register, or that were in his hands on the 17th day of December last, or that may have been received by him, or have been in his hands on account of said improvement, at any time since the said 17th day of December, 1853; and the said sums of money in the said register's hands, on the said 17th day of December, or that may have been in his hands at any time since, may be applied to the payment of any portion of the above-named debts, or for any debts incurred since the 17th day of December, in prosecuting the said improvement, and shall be, by the said register, accounted for, to the said Des Moines Navigation and Railroad Company.

*Fourth.* All claims by mill owners or other persons, for damages, or rights of way, or other necessary privileges, in the prosecution of said work, as well as all other claims for damages, shall be settled for by the said party of the first part, and on such terms as they may deem best; and the title to all such rights of way so procured, shall be taken and vest in the State of Iowa, subject to the right of the party of the first part therein, as in this contract, mentioned; and all work now progressing under contracts existing on the said seventeenth day of December last, at the dams and locks at Belfast, Farmington, and Keosauqua, shall progress and be carried on under and according to the terms of the respective contracts then existing in relation thereto, if the said contractors shall so elect, and shall be paid for, by the said party of the first part, on the estimates made by the engineer from time to time.



*Fifth.* The said party of the first part doth hereby further agree and covenant, that the salaries of the commissioner and register of said improvement, and the salaries of the engineer, and such assistants as may be required in the prosecution of said work, shall by them be paid from time to time, as the same shall become due and payable; provided that the salaries of the commissioner and register of said improvement shall not be greater than that now fixed by law, and the salaries of the engineer and assistants shall be such as may be agreed upon by said commissioner, by and with the advice and consent of the party of the first part.

*Sixth.* The said party of the first part, further agrees and covenants, that in all cases where bona fide settlement was made on any of the said lands belonging to said improvement, which were unsurveyed on the 24th day of January, 1853, the settlers on said lands so unsurveyed, shall have the right to purchase at any time within one year, after said lands are surveyed, their said lands, under the rules and regulations established by the Commissioner and Register, at the rate of one dollar and twenty-five cents per acre; but no such settler or claimant shall be entitled so to purchase more than one hundred and sixty acres.

*Seventh.* The said improvement shall be prosecuted in such manner as not to unnecessarily impede the navigation of said river, during the construction of said work; but in all cases the locks shall be constructed and finished, so as to allow the passage of boats and other water crafts, before any material obstructions shall be created by the erection of dams.

*Eighth.* The said party of the second part, on their part, hereby covenant and agree, with the said party of the first part, to sell and convey to the said party of the first part, in manner, and upon the terms hereinafter provided, all of the lands donated to the State of Iowa, for the improvement of the Des Moines River, by act of Congress, of August 8th, 1846, which the said party of the second part, had not sold up to the 23d day of December, 1853; for which said lands, the said party of the first part covenants and agrees, in manner and form, as fixed by this agreement, to pay the sum of thirteen hundred thousand dollars.

*Ninth.* The said party of the second part, hereby transfer and assign to, and hereby invest in, the said party of the first part, any and all stone, timber, and all other materials of every kind and description, belonging to said improvement, now remaining along the line of said work, or elsewhere, and hereby give said party of the first part, full power and authority to use and control the same as they may deem proper, in connection with said improvement.

*Tenth.* The said party of the second part, further covenants and agrees, that the parties of the first part, their successors and assigns, shall, from the date hereof, have full possession and control of all locks and dams now completed, and shall from time to time, as each lock and dam is completed, have the control and possession thereof; and when the whole work is completed, shall have the entire and exclusive possession and control thereof, for forty years from the first day of July, 1858, and shall from this date have the right to control and receive as herein provided, all tolls and water rents, accruing from said improvement, and to make such contract, or contracts, or agreements, and fix such rates in relation thereto, as they may deem proper: Provided always, that this grant of said tolls and water rents, is made subject to the following express conditions:

1st. That the tolls to be taken and received by the said party of the first part, shall in no event exceed the rate of tolls allowed and chargeable on the Monongahela improvement in the State of Pennsylvania, on the 5th day of February, 1851.

2d. All contracts now outstanding, between the Commissioner and Register, or either of them, with reference to the water rents, with any individual or individuals, shall be carried out by the said party of the first part. And nothing herein contained shall be so construed as to interfere with said contracts; but the money arising therefrom shall belong to, and become the property of the said party of the first part, in the same manner as all other water rents, as fixed by this contract.

3d. All moneys arising from said tolls and water rents, on the entire work, after deducting the necessary contingent expenses attending the superintendence of the locks, and the collection of said rents and tolls, and the repairs of said works during the time fixed for the completion of said works, shall be reported to the Register



of the Des Moines river improvement, semi-annually, and shall be expended by the said parties of the first part, in said improvement; but such sums shall not be taken into the estimates upon which lands are to be transferred to the party of the first part, but shall constitute a portion of the one million three hundred thousand dollars, to be expended by the party of the first part, and of the aggregate sum expended by the party of the first part in said improvement.

4th. At the expiration of said forty years, the said works shall revert to, and become the property of the State of Iowa, and shall be in ordinary repair for their respective uses.

*Eleventh.* The said party of the second part, hereby covenants and agrees, that whenever the said party of the first part shall have done work to the amount of thirty thousand dollars, according to estimates to be made by the acting engineer, under the scale of prices fixed in this contract, the said party of the second part, or the then proper agent or officer, or officers of the State, shall transfer and convey to the said party of the first, or to the then Register of said improvement, or such other person as the party of the first part may direct, an amount in value of the lands belonging to said improvement, valued at one dollar and twenty-five cents per acre, to the amount of said thirty thousand dollars, deducting fifteen per cent, and so on, in the same manner, on each estimate of thirty thousand dollars, until work shall be done to the amount of thirteen hundred thousand dollars, if so much land shall remain unsold, from and after the said 23d day of December, A. D. 1853, or until said work shall be completed. And upon the expenditure of said thirteen hundred thousand dollars, or the completion of said works, all of said lands remaining unconveyed, if any, shall be transferred and conveyed to the said party of the first part, or their assigns, or to such person or persons as they shall direct. And all moneys paid by the party of the first part, to the Register of the Des Moines river improvement, or to the Commissioner thereof, in payment of the liabilities resulting from the former prosecution of the work, by the State of Iowa, shall, without requiring any estimate to be made thereof by the engineer, be deemed to be a portion of the sums expended in the said improvement, by the said party of the first part. And the said Register shall convey to the party of the first part, or such person or

persons as they shall designate, a quantity of land estimated at one dollar and twenty-five cents per acre, equal to the amount of cash thus paid; and the said sums, thus paid, shall form part of the thirteen hundred thousand dollars mentioned in this contract.

*Twelfth.* For the purpose of determining the lands which the said party of the first part, shall have the right to select on estimates made, as contemplated by the last section, it is agreed that within a reasonable time after concluding this contract, the said party of the first part, shall have all the unsold lands in this contract mentioned, divided into three classes, according to value, and thereafter they shall take one third of such amounts as they may, from time to time, be entitled to, from each class. And for all moneys expended until such classification, they shall have the right to take said lands, as they remain unsold, commencing with the lands lowest down on the river, making no distinction in quality or value. And for the purpose of classifying said lands, unless a Commissioner is mutually agreed upon, each party may choose or select a Commissioner, who shall mutually agree upon such classification. And in case of disagreement, the said two Commissioners shall select a third, and the decision of a majority shall be conclusive. The expenses of said Commission shall be defrayed by the party of the first part; and the records of such classification duly certified by the said Commissioners, or a majority of them, shall be filed with the Register of the Des Moines improvement, for reference by, and government of, both parties under this contract.—The River Land Office, for the sale of lands belonging to the Des Moines improvement, having in accordance with the contract with Henry O'Rielly, heretofore referred to, been closed on the 23d day of December last, the said office shall remain closed for the entry or sale of lands, excepting by the direction of the party of the first part.

*Thirteenth.* It is understood and agreed between the said parties, that in the conveyance of land as contemplated by this contract, all moneys advanced by said parties of the first part, for salaries and pay of officers, or agents, or servants, for rights of way, damages to mill owners, and other matters not covered by actual work done on the improvement, shall be included in making estimates; but the moneys that were in the hands of the Register, on the 17th



day of December last, and the value of the materials on hand (which shall be used), shall not be included for estimates.

*Fourteenth.* And it is also agreed and covenanted, between the parties hereto, that the following shall be the prices for the different items of work mentioned, upon which the engineer is to make his estimates, and by which the parties are to be governed in the conveyance of land, and other purposes contemplated by this agreement; adding twenty per centum to the aggregate amount of all estimates, to cover all contingencies, to wit:

Preparing lock foundation, \$3,000.

Masonry in Lock walls, \$5 per perch.

Masonry in side walls, \$3,50 per perch.

Hydraulic cement, \$3 per barrél.

Lock gates and all fixtures, \$2,500.

Square timber, 14 cents per foot.

Oak plank, \$2,25 per hundred feet, board measure.

Crib-filling in dams and abutments, \$1 per perch.

Stone protection rip-rap, \$1,15 per perch.

Embankments around locks, 20 cents per yard.

Excavation on canals, when the dirt is wasted, 20 cents per yard; when the dirt is used in embankments, 15 cents per yard for the excavation, and 15 cents per yard for the embankment.

Excavation of rock under water, \$2 per perch.

Excavation of rock above water, \$1 per perch.

Iron bolts, spikes, and other irons, 8 cents per pound.

Round timber, 11 cents per foot.

Excavations for foundations, 40 cents per yard and all other items not embraced and enumerated above, shall be rated according to the estimate of the engineer in charge; and the engineer or engineers in charge of said works, shall, from time to time, as shall be found convenient, be appointed by the joint assent of both parties hereto.

*Fifteenth.* All the work on said improvement, during the progress thereof, shall be and remain under the general supervision of the Board of Public Works and engineer, except as herein modified; and all work, as far as practicable, shall be so conducted as

to perfect the navigation in a continuous line, from the mouth of the river upwards, to Fort Des Moines.

*Sixteenth.* That, for the purpose of providing more effectually for securing the improvement of the Des Moines river, to the greatest practicable extent, and at the earliest practicable period, the party of the first part shall have the right to such tolls and water-rents as they can collect on the river above Fort Des Moines, for a similar period to that provided for the use of the river below Fort Des Moines, under this contract; provided, they shall, within eight years, at their own expense, improve the river, so as to render it navigable for boats of at least two hundred tons burthen, to the Lizzard Forks, or Fort Dodge, or such other point above Fort Des Moines as they may find it practicable; provided further, that no higher average of tolls shall be charged on vessels or rafts, or articles transported, than the maximum allowed on the section of the river between the *Mississippi River and Fort Des Moines*; and, provided also that at the end of said period in this section first named, the improvement on said upper region of the river, above Fort Des Moines, shall be surrendered to and become the property of the people of the State of Iowa, upon the payment to the party of the first part, or their successors, of such sum as the said improvement may be worth at the time, as determined by appraisers, to be mutually agreed upon.

*Seventeenth.* The same right which is now, or may hereafter be given by law, to this said Board of Public Works, to condemn lands in procuring right of way for the location of dams, locks, water-power, and canals, shall be, and is hereby given to the party of the first part; and in procuring the same, they may, if necessary, use the name of the said Board of Public Works, or that of the State; and the Board shall assist therein, in accordance with the general spirit of the contract.

*Eighteenth.* The said party of the first part, hereby covenant and agree, that the State shall not be liable to them in this contract, but will look alone to the funds belonging to, and arising from the said improvement, for compensation as hereinbefore mentioned; and the said party of the second part does hereby agree, that if the indebtedness named in the third section of this contract, shall exceed



the sum of sixty thousand dollars, the time for the use of said improvement by the said company, shall be extended one year beyond the time named in the tenth section of this contract, to-wit: the first day of July, in the year 1899, (eighteen hundred and ninety-nine.)

*Nineteenth.* The fifteen per cent. raised in the conveyance of land by section eleventh, of this contract, shall be esteemed and taken as a part of the thirteen hundred thousand dollars, agreed to be paid by the said party of the first part, in this agreement.

In witness whereof, the party of the first part, by their President and Secretary, have hereunto subscribed their names and placed their corporate seal, and the party of the second part, by the Commissioners aforesaid, have also affixed their names and seals, the day and year aforesaid.

.....  
 : Official Seal :  
 : of the De Moine :  
 : Navigation and :  
 : R. R. Company. :  
 .....

ORVILLE CLARK,  
 President.

HENRY O'RIELLY,  
 Secretary of De Moine Navigation  
 and R. R. Company.

JOSIAH H. BONNEY, [L. s.]  
 Commissioner of De Moine River Improvement.

URIAH BIGGS, [L. s.]  
 GEORGE G. WRIGHT, [L. s.]

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 G.

#### SUPPLEMENTARY AGREEMENT.

WHEREAS, by the foregoing agreement, bearing date the 9th day of June, instant, the Des Moines Navigation and Railroad Company, of the one part, and the State of Iowa, by Josiah H. Bonney, Commissioner of the Des Moines River Improvement, by and with the consent and approval of Uriah Biggs and George G. Wright, Assistant Commissioners of the said improvement, of the other part, have contracted and provided for the completion of the said improvement, from the mouth of said Des Moines River to the Racon Fork, on the terms and according to the plans and specifications in the said contract provided; and it being deemed desirable

to enlarge the said locks and capacity of such canals as may be built in the prosecuting said improvement, under said agreement:

Now, therefore, this additional and supplementary agreement,

*Witnesseth:*

That the said Des Moines Navigation and Railroad Company, of the first part, for and in consideration of the covenants herein contained, do covenant and agree with the State of Iowa, by the Commissioner and Assistant Commissioners, hereinbefore mentioned, to build the said locks provided to be built in the said agreement of the ninth of June, instant, two hundred feet long, in the same proportion that the present locks and plans provide for their being one hundred and seventy-five feet long; and that they shall be so constructed as to secure four and one half feet of water, on the lower mitre sill, and to secure a navigation of at least four and a half feet of water. And the canals shall be so constructed as to give at least four and a half feet of water, with suitable dimensions for boats or vessels navigating the same, with such depth of water at the locks and in the canals; and in all other respects, the said work is to be done under and in pursuance of the terms and conditions of the said contract of the ninth of June, instant.

And the said party of the second part, the said State of Iowa, by the Commissioner and Assistant Commissioners, aforesaid, do covenant and agree with the party of the first part, that the said party of the first part, shall have and enjoy the said work, its use, rights and privileges, its tolls, water-rents, and franchises, for the term of sixty years, from the first day of July, 1858, fully and absolutely, as is provided in the said agreement of the ninth of June, instant, for forty years; and on the same terms therein provided; saving and excepting that, from and after the first day of July, (1913,) one thousand nine hundred and thirteen, until the first day of July, (1918,) one thousand, nine hundred and eighteen, the said party of the first part, shall pay into the Treasury of the State of Iowa, seven per centum of the nett amount of the tolls and water-rents received on the said improvement, from the said Racoon Fork to the mouth of the said Des Moines River, after deducting all expenses of repairs, superintendence and other proper charges.

In witness whereof, the said party of the first part, by their President and Secretary have hereunto subscribed their names, and af-



fixed their corporate seal; and the party of the second part, by the Commissioners aforesaid, have subscribed their names and affixed their seals, this ninth day of June, "1854," (one thousand, eight hundred and fifty-four.)

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 : Official Seal :  
 : of the De Moines :  
 : Navigation and :  
 : R. R. Company. :  
 .....

ORVILLE CLARK,  
 President.  
 HENRY O'RIELLY,  
 Secretary of De Moine Navigation  
 and Railroad Company.  
 JOSIAH H. BONNEY, [L. s.]  
 Commissioner, &c.  
 URIAH BIGGS, [L. s.]  
 GEORGE G. WRIGHT, [L. s.]

—  
 H.

(SUPPLEMENTARY AGREEMENT.)

In consequence of a misapprehension which has mutually existed by and between the Commissioner and Assistant Commissioners of the Des Moines improvement of the one part, and the Des Moines Navigation and Railroad Company, of the other part, in reference to the amount of unsold lands, belonging to said improvement, situate below Fort Dodge, or the Lizard Forks, and the agreement between the State of Iowa, (by said Commissioner and Assistant Commissioners;) and said Des Moines Navigation and Railroad Company, bearing date the ninth day of June, 1854, for the improvement of the Des Moines River, were made and executed under such misapprehension of the amount of said lands;

Now, therefore, this agreement witnesseth that, in consideration as aforesaid, and of one dollar to the party of the first part paid, the receipt whereof is hereby acknowledged, and to secure the objects of said agreement of the ninth of June, 1854, the State of Iowa, by the said Commissioner, Josiah H. Bonney, and the Assistant Commissioners, in behalf of the State of Iowa, party of the first part, does hereby expressly covenant and agree to and with the said Des Moines Navigation and Railroad Company, party of the second part, that, in case the said party of the second part shall do and make the said work of the said improvement as contemplated and

provided by the supplemental contract or agreement, of the ninth day of June, 1854, that the said party of the first part shall have the full and absolute right to and use of the said work, the lands connected therewith as road-way, and appurtenance, the franchises water-rents, tolls, and appurtenances to all of said work absolutely, for the full end and term of seventy-five years, from the first day of July, 1858, as full as is provided in the said first or principal agreement of the ninth day of June, 1854, for the term of forty years. And it is also agreed, that the said party of the second part shall have the right to build in connection with any dams they may make, any bridge or bridges across and over the said Des Moines River, and with proper legal authority or consent, demand and receive tolls for crossing the same.

In witness whereof the said State of Iowa, by its Commissioners aforesaid, and the said Des Moines Navigation and Railroad Company, by their president and secretary, have hereto subscribed their names and affixed the corporate seal of said company, this 29th day of June, 1854.

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 : Seal of the De :  
 : Moine Navigation :  
 : and R. R. Com- :  
 : pany. :  
 : .....

ORVILLE CKARK,  
 President.

HENRY O'RIEDLY,  
 Secretary.

JOSIAH H. BONNEY, [L. s.]  
 Commissioner Des Moines River Improvement.

URIAH BIGGS, [L. s.]  
 Assistant Commissioner.



## DESMOINES NAV. AND RAIL ROAD CO.

Supplemental Contracts, of Sept. 27 and Dec. 5, 1855.

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WHEREAS, it is deemed advisable by the parties to the agreement of the 27th September, to wit: The Desmoine Navigation and Railroad Company, and the State of Iowa, by their Commissioner, and Assistant Commissioners, to lay the masonry of the locks of the Desmoines River Improvement with quick lime mortar, at such seasons of the year as the weather and other circumstances will allow, and also to define more particularly the style, character and quality of the masonry of the said locks:

Now, therefore, it is mutually agreed, that the said Desmoines Navigation and Railroad Company, parties of the first part, shall be, and are hereby authorized to lay up the whole, or any portion of the locks of the said Improvement, with quick lime mortar, or grout, in the interior of the walls, provided the face stone of the same shall be pointed with hydraulic cement, and in such case the timber and plank facing of the chambers of the locks provided to be used by the said contract of the 27th of September, 1855, may be omitted.

The masonry of the locks shall be composed of sound, well-shaped, and durable stone, laid up with quick lime mortar, and pointed with hydraulic cement, in a workman-like manner, so as to produce firm, compact and durable work. The walls shall be formed of stone, which shall have their several dimensions not less than the following, to wit; Four feet area of bed, six inches thick, two and two-thirds feet length, and one and one-half feet width. They shall be properly quarried with smooth, level, and parallel beds, and when the natural beds of the stone do not afford such surfaces, they shall be dressed or pointed off. The stone forming the facing of the chambers shall be scabbled to close, compact joints, on the face,

and shall be bevelled up to regular lines; the walls shall be laid up with stone, as before mentioned, and the intermediate spaces shall be filled up with smaller stones and spalls, so as to make close, compact, strong and durable work. The main stones shall be laid in the form of headers and stretchers, so as to tie and bind the work in the best manner. The tops of the whole shall be coped with cut stone, not less than nine inches thick and four feet long, and of sufficient width to allow not less than two stones to cover the wall, so arranged that they shall break joints not less than one foot past each other. The coping stones shall be tied together by iron clamps, let into the stone and well bedded.

And the State of Iowa, by their Commissioner, and Assistant Commissioners, do hereby agree that the price for the masonry upon which the engineer is to make his estimates to determine the amount of land which is to be conveyed, and for other purposes, as provided in the 14th Section of the contract made on the 9th day of June, 1854, shall be at the rate of four dollars and seventy-five cents per perch, for the masonry laid in quick lime and mortar, instead of five dollars, as provided in said contract, adding to the said price the twenty per centum to cover contingencies therein, as provided in said 14th section.

In witness whereof, the party of the first part, by their President and Secretary, have hereunto subscribed their names, and placed the corporate seal of the said Desmoine Navigation and Railroad Company; and the party of the second part, by their Commissioners aforesaid, have also affixed their names and seals. this fifth day of December, 1855.

The Desmoines Navigation and Railroad Company, by

W. C. JOHNSON, *President,*

A. HUNT, *Secretary.*

WM. MCKAY, *Commissioner,*

URIAH BIGGS, *Assistant Com.*

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WHEREAS, from a personal examination by the Commissioners and Engineers, of the present condition and progress of the works on the Desmoines River Improvement, now in the hands of the sub-contractors, with a view to hasten the completion thereof, and



to bring into use at the earliest moment practicable, the entire length of the said Improvement, from the Mississippi River to Fort Desmoines; and

Whereas, by the failure of the contractors for manufacturing hydraulic cement for the works of the said Improvement, it is, at this late season of the year, found to be impracticable to procure a suitable quality of such cement, for the masonry of the locks, in consequence of which the works of said Improvement will be unavoidably delayed in their completion.

Now, therefore, it is mutually agreed by, and between the Desmoines Navigation and Railroad Company, of the first part, and the State of Iowa, by Wm. McKay, Commissioner, and Uriah Biggs and George G. Wright, Assistant Commissioners, for, and in behalf of said State of Iowa, of the second part, that the said party of the first part shall be, and are hereby authorized to construct the locks of the said Improvement in the following manner, to wit:

The masonry, or so much thereof as may be deemed advisable, by the engineer, shall be laid up without the use of hydraulic cement, but there shall be built in the said walls, wells extending from the bottom to the top thereof, in such manner, that, at any time after the completion of the same, the said walls may be grouted in a thorough and water tight manner:

And for the purpose of rendering the said walls water-tight, before they shall be grouted through the wells above described, the said walls shall be faced with timber and plank of suitable quality, and properly secured to the masonry.

*And the said party of the first part, do hereby, for themselves and successors, engage, and obligate, that they, from time to time, and as often as may be necessary, will renew all of the said works which may be of a temporary character, and ultimately reconstruct the same, and deliver the same to the State, upon the plans, and in the manner and style defined by the present existing contract.*

And the said party of the first part, further agree to proceed with the whole work from the Mississippi River to Fort Desmoines, and complete the same as rapidly as the same can be constructed, so that the whole work shall be brought into use for its entire



length, at the earliest day practicable, and by the first day of July 1858.

And the said party, of the second part, do hereby agree, that the 14th Section of the existing contract of the 9th day of June, 1854, shall be, and is hereby modified in the following manner, to wit:

The price for masonry in lock walls, upon which the engineer is to make his estimates, to determine the amount of land to be conveyed, and for other purposes, as provided in said contract, shall be at the rate of three dollars and seventy cents per perch, instead of five dollars per perch, as before provided; and for the timber used in the facing of the said walls of masonry, at the rate of twenty-five cents per cubic foot; and for the plank used for the said facing, thirty dollars per thousand feet board measure, for Oak and Black Walnut, and fifty dollars for White Pine, adding to the said prices the twenty per centum to cover the contingencies thereon, as provided in the said 14th Section.

And it is further mutually agreed, that any thing in the contract of 9th June, 1854, or any other contracts heretofore made between the parties hereto, contrary to, or inconsistent with this agreement is hereby accordingly modified, so as to agree herewith, and to be controlled hereby.

In witness whereof, the party of the first part, by their President and Secretary, have hereunto subscribed their names and placed their corporate seal; and the party of the second part, by the Commissioners aforesaid, have also affixed their names and seals, this 27th day of September, 1855, at the city of Fort Desmoines.

Signed,

WM. C. JOHNSON, *President,*

WM. MCKAY, }  
URIAH BIGGS, } *Com., D. R. I.*