No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCEPTIONS OF MORTON INTERNATIONAL, INC. TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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CITATIONS

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EXCEPTIONS

MORTON INTERNATIONAL, INC., a Delaware corporation (hereinafter referred to as "Morton"), movant for intervention herein, excepts generally to the conclusions of law, opinion and recommendations contained in the Report of the Special Master filed with the Court on October 28, 1968, other than the Special Master's conclusion contained in Part IV of his Report that the complaint presents a case or controversy within the meaning of the Constitution of the United States, and in support of such exceptions Morton respectfully submits the following brief.

STATEMENT OF THE CASE

This is a civil action in which the State of Utah seeks a judicial determination to quiet title to certain lands and minerals therein situated below the surveyed meander line of the Great Salt Lake and an adjudication that the United States has no right, title or interest in or to those lands and

minerals. The action was instituted pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and the Act of June 3, 1966, 80 Stat. 192 (Public Law 89-441), as amended by Act of August 23, 1966 80 Stat. 349, which Act is set forth beginning at page 52 of the Special Master's Report. This action by the State of Utah was also authorized by an Act of the Utah State Legislature.[1]

On July 14, 1967 the United States filed its answer to the complaint, and on September 18, 1967 Morton filed its motion to intervene as a defendant and its proposed answer on the ground that it is a person who must be joined as a party to the action under the indispensable party doctrine. The proceedings thus far have been set forth in detail in Parts II and III and in the Appendix of the Special Master's Report and will not be restated here, except for such items as have particular significance to the issue of Morton's intervention.

Briefly summarized, the factual basis for Morton's motion to intervene as a person whose joinder is required under the indispensable party doctrine is as follows:

(1) Utah has alleged in its complaint that on January 4, 1896, the date on which the State was admitted to the Union, the Great Salt Lake was a navigable body of water and that therefore it is the owner of the absolute right to the bed of the Lake as delineated and determined by the official surveyed meander line. Utah has also alleged that it owns all of the minerals contained in the waters and bed of the Lake, and that it believes the United States claims to own approximately 436,000 acres of the bed of the Lake. The latter lands are generally identified on a map prepared

[1] Laws of Utah, 1966, 2d Spec. Sess. ch. 11.

by the Bureau of Land Management of the Department of Interior, a copy of which was appended to the complaint as Exhibit A.

(2) In its answer, the United States denied Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that the United States is the owner of all right, title and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is "to have these lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended." (Answer, p. 3)

(3) As shown on Exhibit A to the complaint, a part of the land claimed by the United States consists of exposed lands (hereinafter referred to as "relicted lands") situated between the present water's edge of the Lake and the surveyed meander line in those areas where the United States owns the land (hereinafter referred to as "uplands") situated above and adjacent to the meander line, and a part consists of relicted lands situated around the Lake where the uplands are owned by private persons. The former relicted lands are referred to as "Public Domain Reliction" and the latter are referred to as "PL Reliction under Basart"[2] on Exhibit A.

(4) The relicted lands claimed by Morton, shown in crosshatching on the following plat of survey, include a portion of the lands which, in this action, are being claimed both by Utah and the United States. To the extent that the United States' claims can presently be ascertained, that portion is shown in red on the following plat of survey.

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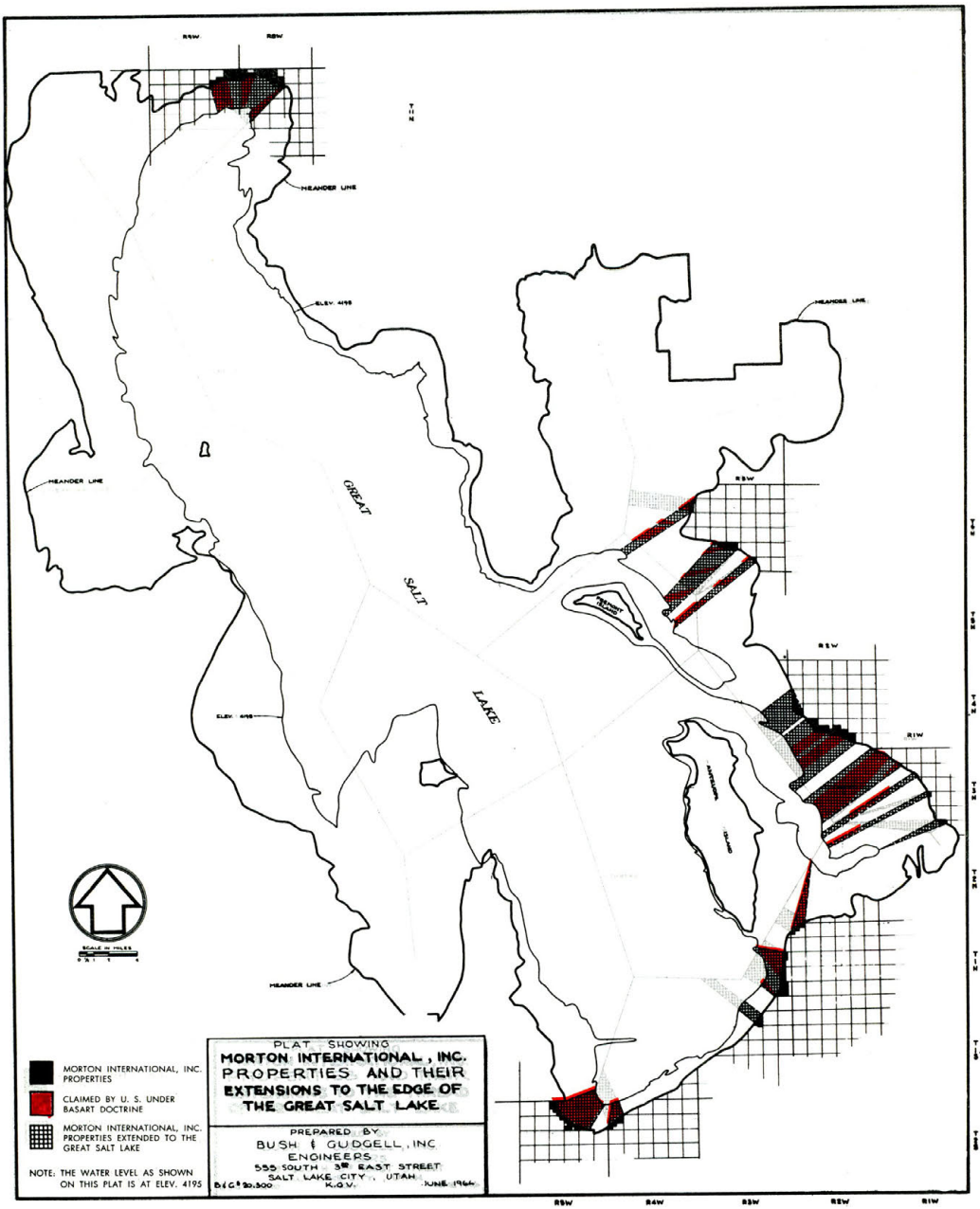
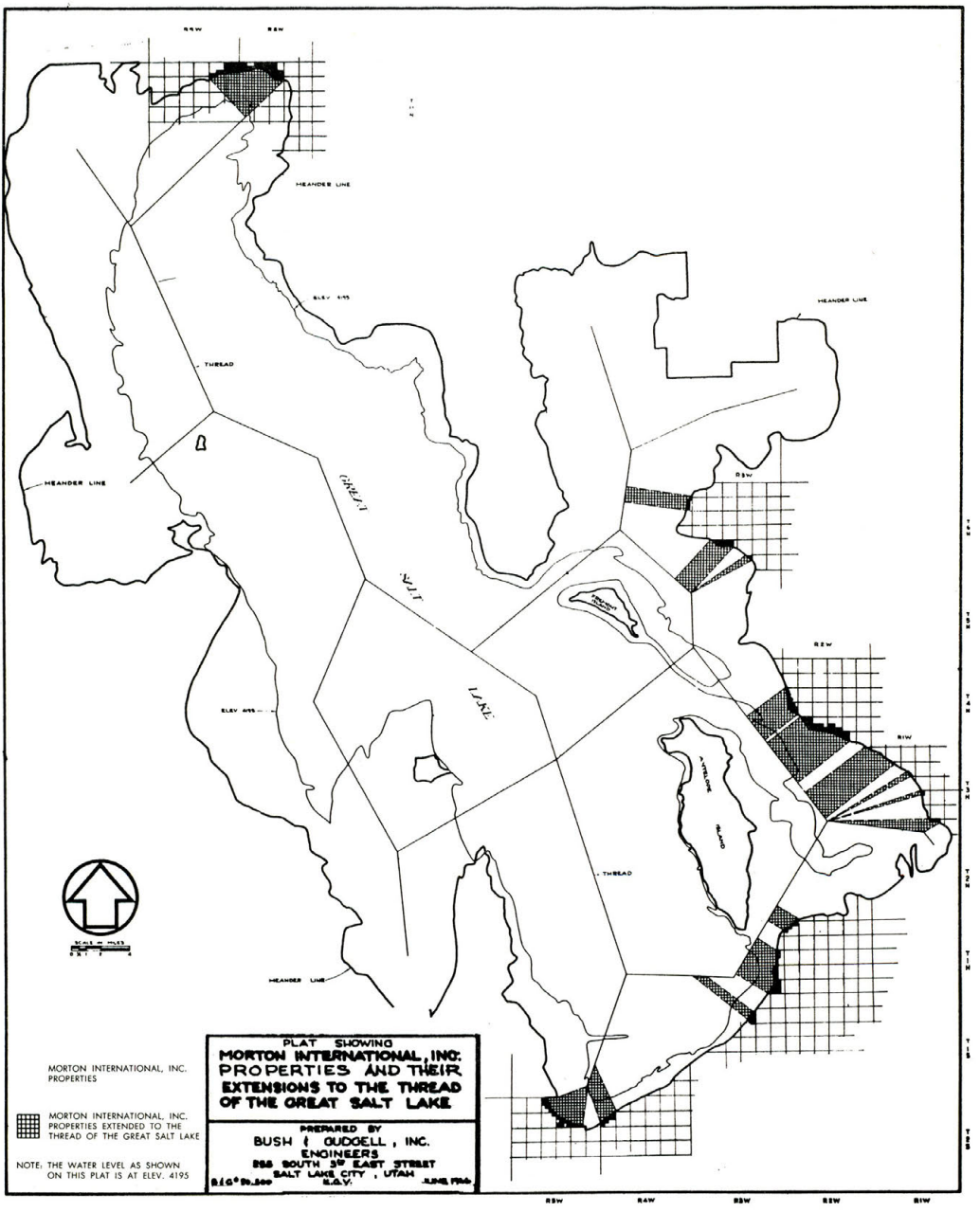
[2] "Basart" presumably refers to the theory of the administrative decision in *Madison* v. *Basart,* 59 I.D. 415 (1947).


R8W
R8W
T11N
MEANDER LINE
ELEV. 4195
MEANDER LINE
MEANDER LINE
GREAT
SALT
LAKE
R8W
R8W
R1W
ELEV. 4195
MEANDER LINE
SCALE IN MILES
0 1 2 4
MORTON INTERNATIONAL, INC. PROPERTIES
CLAIMED BY U. S. UNDER BASART DOCTRINE
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC.
PROPERTIES AND THEIR
EXTENSIONS TO THE EDGE OF
THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDGELL, INC
ENGINEERS
555 SOUTH 3RD EAST STREET
SALT LAKE CITY, UTAH
B&G # 20.500 K.G.V. JUNE 1966
R8W
R4W
R3W
R2W
R1W

(5) It is Morton's further claim that its title with respect to each tract extends to the thread of the Lake (the lands from the water's edge to the thread of the Lake are hereinafter referred to as "water covered lands"), and that therefore Morton also owns part of the brines and minerals in solution in the Lake. The survey projections delineating Morton's ownership to the various threads of the Lake are shown on the following plat of survey.


R9W
R8W
MEANDER LINE
ELEV. 4195
THREAD
MEANDER LINE
GREAT SALT LAKE
MEANDER LINE
R8W
R7W
ELEV. 4195
ANTELOPE ISLAND
THREAD
MEANDER LINE
R9W
R8W
R7W
R6W
R5W
R4W
R3W
R2W
R1W
MORTON INTERNATIONAL, INC. PROPERTIES
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE THREAD OF THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC. PROPERTIES AND THEIR EXTENSIONS TO THE THREAD OF THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDGELL, INC.
ENGINEERS
258 SOUTH 3RD EAST STREET
SALT LAKE CITY, UTAH
S.L.C.V.

(6) Utah has granted leases of relicted lands, *including relicted lands claimed by Morton and the United States,* to various private persons and has granted licenses and permits to said lessees for the extraction of minerals in solution in the waters of the Lake.[3]

Morton's claim of title to the relicted lands is based on its ownership of tracts of uplands, title to which it derived from the United States by virtue of mesne conveyances through patents granted by the United States under authority of Acts of Congress and through the Enabling Act approved July 16, 1894, 28 Stat. 107, which tracts are described and the patents and Acts of Congress are set forth in Exhibit I to Morton's proposed answer. These uplands are riparian to the Lake, and it is Morton's position that under Federal decisional law the grants contained in the government patents conveyed to Morton title to the tracts of relicted lands in front of these uplands.

The basis of Morton's claim of title to the water covered lands and brines and minerals in solution is that, on the date of Utah's admission to statehood, the Lake was not navigable and, therefore, these water covered lands and

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[3] To protect its rights, Morton has filed suit against Utah and various of its officials and others in the United States District Court for the District of Utah (Civil No. C-127-66) alleging that Utah has taken and deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution. Utah filed an answer and counterclaim alleging, among other things, that "the United States owns or claims to own certain interests in the lands and other properties which plaintiff seeks to obtain by its amended complaint, and is therefore an indispensible [sic] party to this action," and that, since the United States has not been made a party to that action, the complaint should be dismissed. All further proceedings in said case have been stayed pending adjudication of the issues in this action.

brines and minerals are Morton's property under Federal decisional law.

The basis of the United States' claim under the so-called Basart doctrine to title to lands claimed by Morton is the administrative decision in *Madison* v. *Basart,* 59 I.D. 415 (1947), in which the Department of Interior ruled that, where a substantial accretion had formed between the meander line and the shore line of the Missouri River by the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

Despite Utah's theory of navigability set forth in the complaint, it is apparent, as is recognized in Utah's motion to file the complaint, that there are various other theories upon which Utah depends to support its claim to all or part of the property in dispute, *i.e.*:

> (a) the Lake could be held to be navigable and the "mean high water line" fixed substantially below the meander line resulting in a division of the relicted lands between Utah and the upland owners, or
>
> (b) the Lake could be held to be navigable and only relictions existing before statehood be held to be the property of the upland owners, or
>
> (c) the Lake could be held to be navigable with all relicted lands held to be owned by the upland owners to the water's edge wherever it may be from time to time.

Until the Stipulation was entered into by Utah and the United States on March 29, 1968 (See Appendix to Special Master's Report, pp. 67-72), the United States supported Morton's motion to intervene both in oral argument before the Special Master and in a memorandum filed with the

Court[4] on the ground that Morton's claim as an upland fee owner made it an indispensable party. The United States opposed the motion of Great Salt Lake Minerals & Chemicals Corporation ("M & C Corporation") to intervene as a party plaintiff on the ground that its motion was predicated on its interest as a lessee of Utah, which interest was identical to Utah's and adequately represented by Utah.[5]

In view of the United States' opposition to its intervention as a lessee of Utah, M & C Corporation on or about February 19, 1968 filed a Supplemental Motion to Intervene, in the alternative, as a defendant, predicated on its fee ownership of uplands. On February 21, 1968 the United States filed a memorandum in response to M & C Corporation's amended motion in which the United States stated that it did not oppose the intervention for the reason that, as a fee owner, M & C Corporation was in the same position as Morton, *i.e.*, an indispensable party.

Utah has opposed Morton's intervention (as well as M & C Corporation's) on the ground that Utah and the United States have not consented to be sued by Morton.[6]

Upon entering the Stipulation with Utah the United States has taken the position that Morton (and M & C Corporation) was no longer an indispensable party since the Stipulation had eliminated the need to litigate the issue of the United States' Basart claims, although the United

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[4] Transcript, February 9, 1968, pp. 27-29; Memorandum for the United States, January, 1968, pp. 4-6.

[5] Transcript, February 9, 1968, pp. 24-27.

[6] Contrary to the Special Master's statement, Utah never gave as a reason that it had not consented *to sue* Morton.

States acknowledged that Morton still had a sufficient interest to be joined as a permissive party.[7]

SUMMARY OF ARGUMENT

The recommendations of the Special Master in his Report are primarily based on the doctrine of sovereign immunity, *i.e.*, the lack of consent on the part of Utah *to sue* Morton. Specifically, the Special Master bases each of the following parts of his Report on the purported sovereign immunity of Utah:

> (1) His interpretation of Public Law 89-441 and his recommendation that, subject to the changes indicated, the Stipulation is valid and should be allowed to be filed. (Report, Part V)
>
> (2) His recommendation that Morton's motion to intervene be denied. (Report, Part VI)
>
> (3) His recommendation that Morton is not "indispensable" within the meaning of Rule 19(b) of the Federal Rules of Civil Procedure and that the Court should proceed to adjudicate the controversy in Morton's "compelled" absence. (Report, Part VII)

Since it is apparent from the Special Master's opinion that, were it not for the doctrine of sovereign immunity, Morton's motion to intervene should be granted, we will address ourselves first to this basic issue which has been a fruitful subject of litigation in this Court[8] and a topic

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[7] Transcript, April 26, 1968, pp. 130-131.

[8] *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419 (1793); *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *United States* v. *Clarke,* 33 U.S. (8 Pet.) 436 (1834); *Hill* v. *United States,* 50 U.S. (9 How.) 386 (1850); *Langford* v. *United States,* 101 U.S. 341 (1879); *United States* v. *Lee,* 106 U.S. 196 (1882); *Hans* v. *Louisiana,* 134 U.S. 1 (1890); *Kawananakoa* v. *Polyblank,* 205 U.S. 349 (1907); *United States* v. *Shaw,* 309 U.S. 495 (1940); *Larson* v. *Domestic & Foreign Commerce Corporation,* 337 U.S. 682 (1949); *Malone* v. *Bowdoin,* 369 U.S. 643 (1962).

for discussion by legal writers dating back to Bracton.[9] The doctrine, although frequently critized, is still applied in appropriate cases in this country, but the Special Master's application of it to this case is an unprecedented and unwarranted extension which the Court should not adopt. The foregoing will be shown by development of two points. First, under the common law sovereign immunity is not a bar to the intervention of Morton in this action. Second, by any reasonable construction Utah and the United States each has consented by statute to the intervention of interested persons, such as Morton, in this case.

If sovereign immunity is not applicable, the Special Master's reasoning, which supports his conclusions and recommendations set forth above, must fail and Morton's motion to intervene should be granted.

ARGUMENT

I. UNDER COMMON LAW SOVEREIGN IMMUNITY IS NO BAR TO MORTON'S INTERVENTION IN THIS CASE.

The question is whether a person whose joinder is required within the meaning of the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure shall be denied the right to intervene for lack of express statutory consent by one or more sovereigns who are parties to the action. We submit that the law is, and always has been, that he shall not be denied such right.

However, despite the vast number of cases involving sovereign immunity, there are very few decisions which mention this precise question although most courts, includ-

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[9] Bracton, DE LEGIBUS ET CONSUETUDINES ANGLIAE (London, Twiss' ed. 1878).

ing this Court, have properly permitted the intervention.[10] The United States in this case has not asserted sovereign immunity as a bar to Morton's intervention for the reason stated by the Solicitor General during the course of his argument before the Special Master on February 9, 1968:

> "[Mr. Griswold] . . . Now, there is also the basis for which there is great support that, when a sovereign starts a suit to quiet title, it thereby consents to adverse claims."[11]

To explain the basis for permitting intervention in such cases it is necessary to examine the history of the doctrine of sovereign immunity and the status of the common law on the subject at the time of the adoption of the Constitution. The Court was confronted with the problem shortly after the Revolution in the famous case of *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419 (1793). This was an original action *in assumpsit* against the State of Georgia by a private citizen of the State of South Carolina. The Court held that such a suit could be maintained with four Justices rendering separate opinions in support thereof. Justices Jay, Blair and Cushing ruled that the constitutional grant of jurisdiction over controversies between a "state and a citizen of another state" permitted such a suit. Justice Wilson completely rejected the doctrine of sovereign immunity stating (2 U.S. at 454):

> "[T]o the Constitution of the United States the term sovereign, is totally unknown."

And continuing (2 U.S. at 457):

> "In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so

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[10] *Oklahoma* v. *Texas,* 258 U.S. 574 (1922); *Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936); *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950).

[11] Transcript, February 9, 1968, p. 34.

> degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states."

Both Chief Justice Jay and Justice Cushing raised the question of the right of a citizen to sue the United States, but neither attempted to provide an answer although the Chief Justice indicated his feelings on the subject stating (2 U.S. at 478):

> "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."

Justice Iredell wrote the only dissenting opinion with a scholarly examination of the development of the doctrine in England upon which he based his conclusion that sovereign immunity was part of the common law of the several states at the time of this country's independence. Justice Iredell's dissenting opinion, which since the adoption of the Eleventh Amendment has been held to represent *the law*,[12] concludes that the sovereign power with respect to granting or withholding consent to suit resides in the legislature, which consent had not been given by the Legislature of Georgia.

As the leading authority on the status of the common law relating to sovereign immunity, Justice Iredell's opin-

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[12] *United States* v. *Clarke, supra,* n. 8; *New Hampshire* v. *Louisiana,* 108 U.S. 76 (1883); *Hans* v. *Louisiana, supra,* n. 8; *Smith* v. *Reeves,* 178 U.S. 436 (1900); *Williams* v. *United States,* 289 U.S. 553 (1933).

ion has a direct bearing on the issue at hand. He states (2 U.S. at 434-435):

> "The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the states against which the suit is brought. Or, 2d. Principles of law common to all the states . . . .
>
> "But this point [the particular laws of the state against which the suit is brought], I conceive, it is unnecessary to determine, because I believe there is no doubt that neither in the state now in question, nor in any other in the union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a state, was in being either when the constitution was adopted, or at the time the judicial act was passed. Since that time an act of assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the legislature of the United States passed before.
>
> "The only principles of law, then, that can be regarded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed 'the common law' a law which I presume is the ground-work of the laws in every state of the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and, therefore, it is probable the common law in each, is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statue, which could occasion the least material difference, or have any partial

effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown."

Justice Iredell then proceeds to consider the English law on remedies against the King stating (2 U.S. at 439-440):

"The observations of Lord Somers [in *The Bankers Case,* 14 How. State Trials 1 (1700)], concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly by Lord C. Baron Comyns in his digest. I shall, therefore, extract some of them, as he appears to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case . . . .

"After citing many authorities, Lord Somers proceeds thus:—'By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent, or annuity, or other charge from the crown, whether it was a rent or annuity, originally granted by the King; or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases the remedy to come at it was by petition to the person of the King; and no other method can be shown to have been practiced at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. *I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case with the King in defense of his title, which otherwise would be defeated by finding the office.*'" (Emphasis added)

Thus, Judge Iredell states, on the authority of Lord Somers, at common law in England a person seeking to bring an action against the sovereign was limited to a Petition of Right since an ordinary writ did not lie against the King.[13] The nature of this remedy, developed during the reign of Edward I, is described by Professor Borchard:[14]

> "In the fourteenth Century there was as yet no notion that the king was not responsible for wrongs done his subjects or that he was infallible. On the contrary, the possibility of his doing wrong was freely admitted and an elaborate procedure devised by which the injured subject could invoke relief. The fact that this method of relief was often cumbersome, that it required the king's permission and was surrounded by various safeguards against undue royal burden, does not detract, it is believed, from its essentially legal nature. While it is true that the petition might be refused, thus giving it the color of a supplication for grace, the fact seems to be that petitions were not rejected or dismissed except for strictly legal reasons. Custom had enjoined upon the king the rule of law that a petition founded upon the violation of what practice had developed and characterized as a legal or vested right, should not go unredressed."

However, since the Petition of Right entailed a cumbersome and complicated procedure, another procedure was developed, not requiring consent, in certain cases involving the Crown's interests in real property. This remedy was known as traversing the King's title, which procedure developed by custom and later by statute.[15] A frequent method by which the King obtained title to the property

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[13] Holdsworth, *The History of Remedies Against the Crown,* 38 Law Quarterly Review 141, 143 (1922); Borchard, *Governmental Responsibility in Tort,* 36 Yale L. J. 1, 18 (1926).

[14] Borchard, *supra,* p. 27.

[15] 34 Edw. III, c. 14 (1360); 36 Edw. III, c. 13 (1362).

of his subjects was by holding an inquest upon the death of his tenant, on the lunacy of a subject or on the attainder of a subject for treason or felony, to determine what property that subject held. When the royal officer conducting the inquest found that the subject in question possessed certain property, the King seized it and was said to be entitled by office found. It then developed that a person claiming title to property, which was the subject of an inquest, could enter the proceeding to traverse the facts found by the office in order to show that the King was not entitled to the property or to show his own superior right *(monstrans de droit). The Sadlers' Case,* 4 Co. Rep. 54b, 76 Eng. Rep. 1012 (1588); Holdsworth, *The History of Remedies Against the Crown,* 38 Law Quarterly Review 141, 158 (1922); Borchard, *Governmental Responsibility in Tort,* 36 Yale L.J. 1, 29 (1926).

It would be stating too much to say that the remedies of traverse and *monstrans de droit,* as such, existed in the colonies prior to the Revolution. Their significance, however, lies in the fact that Justice Iredell, on the authority of Lord Somers, considers them to be exceptions to the common law requirement of sovereign consent where a person seeks to enter a proceeding, instituted by the sovereign, as a *defendant* to defend his title rather than suing the sovereign as plaintiff. The terms "plaintiff" and "defendant" are obviously used to merely identify which party has brought the action, and the term "interplead in the case" is used by Lord Somers to describe what we now refer to as intervention.

We submit that the right of a person to intervene to defend his title to property in an action brought by a sovereign is a part of the common law of the states and a part of the decisional law of the United States. The Eleventh Amendment was hurriedly adopted after *Chisholm* v. *Georgia*

to prevent the states from being sued on their obligations in Federal courts, but did not change the common law on the subject of sovereign immunity. *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821). It was early decided by the Court that a defendant had a right of recoupment to offset a claim in an action brought against him by the United States. *United States* v. *MacDaniel,* 32 U.S. (7 Pet.) 1 (1833); *United States* v. *Ringgold,* 33 U.S. (8 Pet.) 150 (1834). Subsequently, this Court held in *The Siren,* 74 U.S. (7 Wall.) 152 (1869), that sovereign immunity was no bar to the assertion of a maritime lien against a vessel, which had been seized by the United States as a prize of war, in an action instituted by the United States in the prize court, stating (74 U.S. at 154):

> "But although direct suits cannot be maintained against the United States, nor against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."[16]

Although this Court has held many times that there are no exceptions to the doctrine that a sovereign is immune

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[16] The fact that this case was *in rem* clearly had no bearing on the question of sovereign immunity, contrary to the Special Master's thesis that actions *in rem* are an exception to the rule. (Report, p. 33)

from *direct* suit without its consent,[17] the rule in these

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[17] *United States* v. *Clarke, supra,* n. 8; *The Siren,* 74 U.S. (7 Wall.) 152 (1869); *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47 (1944).

The following cases cited by the Special Master in his Report at page 33 to show that there are certain types of actions where the consent of a sovereign is not a prerequisite to intervention do not support this thesis.

Krippendorf v. *Hyde,* 110 U.S. 276 (1884). An action by creditors to attach debtor's property in the hands of a third party. This third party, whose presence would destroy the Federal court's diversity jurisdiction, attempted to intervene in the action to protect his interest in the attached property. The Court indicated that, in order to prevent the abuse of process (the third party had no adequate legal remedy in the state courts), his intervention would be allowed as his claim would be merely ancillary to the original suit. No sovereign was a party to this action, so consequently the question of immunity from suit or consent was not raised.

Stewart v. *Dunham,* 115 U.S. 61 (1885). An action by creditors to set aside a conveyance of merchandise by their debtor. The action was removed from a state court and Federal jurisdiction based on diversity. After removal additional creditors were allowed to enter the action, and their citizenship would have destroyed diversity if they had joined before removal. The Court held that the lower Federal court had acquired jurisdiction lawfully at the time of removal, so the introduction later of additional creditors did not oust the Court of jurisdiction as this joinder was ancillary to the jurisdiction acquired over the original parties. Neither the United States nor any state was a party to this action, and the question of sovereign immunity or consent was never raised.

Texas v. *Florida,* 306 U.S. 398 (1939). An original action in the nature of a bill of interpleader by the State of Texas against the States of Florida, New York, and Massachusetts and against several individuals to determine the true domicile of a decedent due to rival claims by those four states for death taxes. There was no attempt by any person to intervene in this action, and no mention was made by the Court of either sovereign immunity or consent to be sued.

(continued on next page)

decisions has not been applied to the intervention of an interested party in a case such as this. *Oklahoma* v. *Texas,* 258 U.S. 574 (1922), was a suit in equity brought in this Court by the State of Oklahoma against the State of Texas to settle a dispute over their common boundary along the Red River and over title to the river bed. The United States intervened claiming title to the river bed as against both states. The disputed area contained valuable oil and

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New Jersey v. *New York,* 345 U.S. 369 (1953). An original action by the State of New Jersey against the State of New York and New York City for injunctive relief against diversion of waters of the Delaware River. The Commonwealth of Pennsylvania petitioned for leave to intervene *pro interesse suo,* and it was granted. This action was initiated in 1929 and a decree was rendered in 1931 enjoining the defendants from diverting more than a prescribed amount of water from the river. This decree also stated that any of the parties to this action could apply for further relief at any time with regard to the subject matter in controversy. In 1952 the City of New York applied for such additional relief. New Jersey and Pennsylvania filed answers opposing such relief, and the matter was referred to a Special Master. In December of 1952 the City of Philadelphia filed a motion for leave to intervene. This Court stated that it was unnecessary to decide whether Philadelphia's intervention was in violation of the Eleventh Amendment. It was indicated that, if Philadelphia were allowed to intervene, there would be other cities along the Delaware River that would also insist upon a right to intervene. The Supreme Court stressed that its original jurisdiction should not be expanded to the dimensions of an ordinary class action, when the interest of a member of that class who desires to intervene is already properly represented by his state which is a party to the action. In order to allow such an intervention the intervenor must show some compelling interest in his own right, apart from his interest in a class with all other citizens of the state. Philadelphia could not show such an interest, and, consequently, its motion for leave to intervene was denied. The Court does not discuss sovereign immunity or consent *vis-a-vis* intervention.

Oklahoma v. *Texas, supra,* n. 10. This case is discussed above.

gas bearing strata and the situation evidently became chaotic. In the Court's words "it developed . . . that possession of parts of the bed was being taken and held by intimidation and force; that in suits for injunction the courts of both states were assuming jurisdiction over the same areas; that armed conflicts between rival aspirants for the oil and gas had been but narrowly adverted and still were imminent; that the militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia of Oklahoma called for a like purpose. . . ." (258 U.S. at 579-580)

In these circumstances to preserve public tranquility and prevent waste the United States, Oklahoma and Texas agreed to the appointment of a receiver by the Court to administer the area pending adjudication of title. Thereafter, numerous private parties claiming title to portions of the disputed property were permitted by this Court to intervene, many of which claims "conflict one with another *and all are in conflict with the claims of one or more of the three principal litigants.*" (258 U.S. at 581; emphasis added) These claimants were obviously indispensable parties, and there was no statutory consent on the part of any of the sovereigns to their intervention. Their right to intervene without consent was assumed by the Court. Contrary to the Special Master's assertion on page 33 of his Report, this was not an action *in rem* but a suit to quiet title just as this suit is. A quiet title action is characterized as being *quasi in rem*,[18] but, in any event, the type of action, whether *in personam, in rem* or *quasi in rem,* clearly has no bearing on the issue of sovereign immunity. *The Siren, supra.*

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[18] *Prudential Ins. Co. of America* v. *Zimmerer,* 66 F. Supp. 492 (D.C. Neb 1946); *Humble Oil and Refining Co.* v. *Sun Oil Co.,* 191 F.2d 705 (5th Cir 1951); 74 C.J.S. *Quieting Title* § 7 (1951).

At least one court has stated the rationale for permitting the intervention of interested parties without statutory consent. *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950), involved an action by the United States to quiet title to waters wholly within California against a lessee of the State of California which was diverting a portion of the water for irrigation purposes. California moved to intervene as owner of the water, the denial of which motion was reversed by the court of appeals stating (180 F.2d at 602):

> "The Government also makes the contention that this is a suit against the Government and, there being no statute authorizing it, the Court does not have jurisdiction. The short answer to that is that the Government chose the forum in which it is seeking to quiet title to the water. The State is asserting an interest in the subject matter as absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. This is a sufficient interest in the subject matter to entitle it to be heard, just as if the State were joined by the United States originally as a defendant."

In the widely-quoted case, *Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936), the court, reversing the decree in a quiet title action, directed the trial court to permit the intervention of the States of Washingon and Oregon on the ground that the order denying intervention deprived these states of any effective remedy for the adjudication of title because the United States had not consented to a subsequent suit against it. Clearly, these courts, without discussing the issue further, are applying the exception to the requirement of sovereign consent under the common law as Lord Somers and Justice Iredell stated it to be, *i.e.,* the right to come in "in the nature of a defendant . . . in defense of his title."

Utah has adopted the common law of England,[19] and there is no Utah decision which supports the Special Master's conclusions with respect to sovereign immunity in this case. Indeed, the Utah Supreme Court has recently stated in *Nestman* v. *South Davis County Water Improvement Dist.*, 16 Utah 2d 198, 201, 398 P. 2d 203, 204 (1965):

> "We have no disposition nor desire to extend it [sovereign immunity] any further than its already established application."

The doctrine is not a popular one, to say the least, and it has been found obnoxious to the principles of justice by many authorities.[20] This Court has more recently recognized that the doctrine is in disfavor[21] and that there exists a trend toward relaxing its rigors wherever possible.[22] If this Court adopts the Special Master's conclusions, it would be a step in the opposite direction for no justifiable purpose.

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[19] Utah Code Annotated, Section 68-3-1. "The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

[20] *Chisholm* v. *Georgia, supra,* n. 8; *United States* v. *Lee, supra,* n. 8; Laski, *The Responsibility of the State in England,* 32 Harv. L.R. 447 (1919); Borchard, *supra,* n. 13 at 798-807; *Kennecott Copper Corporation* v. *State Tax Commission,* 327 U.S. 573, 580 (1946) (Justice Frankfurter, dissenting); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 La. L.R. 476, 492-494 (1953).

[21] *Davis* v. *Pringle,* 268 U.S. 315 (1925); *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U.S. 381 (1939); *Federal Housing Administration* v. *Burr,* 309 U.S. 242 (1940); *National City Bank of New York* v. *Republic of China,* 348 U.S. 356 (1955).

[22] *United States v. Shaw, supra,* n. 8.

II. UTAH AND THE UNITED STATES HAVE CONSENTED BY STATUTE TO MORTON'S INTERVENTION.

Assuming, *arguendo,* that statutory consent is required for Morton's intervention, Utah has consented by virtue of Section 78-11-9, Utah Code Annotated. This statute provides:

> "*State of Utah party defendant in certain suits*—Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought *in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto,* or to foreclose mortgages or other liens thereon *or to determine any adverse claim thereon,* or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. It shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof." (Emphasis added)

Utah argued that Section 78-11-9 has been repealed by implication by the Utah Governmental Immunity Act, Sections 63-30-1, *et seq.,* Utah Code Annotated, effective July 1, 1966. The Special Master, while conceding the correctness of Morton's argument that Section 78-11-9 has not been repealed, states that it is not applicable on the basis that "In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such." (Report,

p. 37) The Special Master thus adheres to the formalistic approach, which he uses in labeling actions *in personam* or *in rem,* in determining a party's rights by whether he is designated *plaintiff* or *defendant.* He then reasons that, since the title of the statute uses the term *defendant* when referring to Utah, it necessarily excludes prosecuting of adverse claims against Utah in any action in which Utah appears as plaintiff. This reasoning completely ignores the text of the statute which has no such limitation and speaks in terms of Utah being named "a party" in any pending or subsequent action for the recovery of property or "to determine any adverse claim thereon."

Such reliance on form over substance in the designation of a party has been rejected by this Court. *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902); *Ford Motor Company* v. *Department of Treasury of Indiana,* 323 U.S. 459 (1945). In *Ford Motor Company,* this Court stated (323 U.S. at 464):

> "We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

Utah supports this view stating (Brief in Opposition to Morton's Motion, p. 4):

> "It makes no difference that Morton in *form* seeks simply to intervene as a defendant and to merely 'answer' the complaint of the State of Utah when in truth and fact the real substance of the answer proposed by Morton is a denial of the title claimed by the State of Utah and a claim by Morton of ownership in itself to the same lands. The nature of Morton as a party must be determined by the essential nature and effect of the position Morton occupies in the proceeding, rather than by the formal designation of Morton as a defendant."

The United States has taken a similar position.[23]

Actually, there is no support in any authority which we have been able to locate for the Special Master's opinion that Morton's intervention is barred because Utah has not consented *to sue* Morton. This reasoning would, of course, negate the requirements of joinder as determined by this Court under the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure in actions brought by sovereigns. In such a case, if the sovereign does not see fit to join an interested person whose joinder would ordinarily be required, the only course left for the Court is to decide whether to proceed without him on the ground that the sovereign's interests are paramount, as the Special Master urges here, or to dismiss the action. *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968). On what basis, either historically or in the interest of justice, can the doctrine of sovereign immunity be stretched to achieve the foregoing result? To state the question is to answer it—there is none.

The Special Master agrees, at page 34 of the Report, with the positions taken by Morton and the United States[24]

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[23] (Solicitor General Griswold) "As far as I see it, it is irrelevant and immaterial whether they [Great Salt Lake Minerals & Chemicals Corporation] seek to intervene as a plaintiff or a defendant. They can be aligned as it fits the situation and the alignment can be changed if the circumstances change, and I don't see that affects the jurisdiction at all." (Transcript, February 9, 1968, pp. 81-2)

[24] "Section 5 of the Act provides that the State of Utah 'may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States' in the lands below the meander line of the Lake. The purpose of this determination is to fix the liability, if any, of the State toward the United States for these lands which are to be relinquished to the State. Yet, if there are other claimants,

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that under the provisions of Public Law 89-441 the United States has consented to the joinder of other defendants since Section 5(b) of the Act provides that:

> "Consent is given to join the United States as *a* defendant in this action." (Emphasis added)

He does, however, qualify this by stating that, if Morton's motion is interpreted as also seeking leave to file a cross-claim against the United States, it should be denied for it would be suing the United States without "Constitutional authority." The basis for this is that the prayer for relief in Morton's answer states that the United States is without any right or title to the relicted lands and bed of the Lake claimed by Morton. Obviously, however, Morton is defending its title against the Basart claims of the United States, which it clearly has the right to do. It would, indeed, be difficult for a person to defend his title unless he could challenge the title of the person claiming against him.

III. MORTON'S JOINDER AS A PARTY IS REQUIRED UNDER RULE 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Under the respective claims and prayers for relief in the complaint and answer each party is seeking an adjudication quieting title in it to the lands, brines and minerals

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besides Utah, it is obvious that the title of the United States cannot be determined without adjudicating those claims as well. Nor is the United States entitled to payment for the lands if the true owners are the private claimants. Thus, it seems plain that the object of the suit will be frustrated unless all claims adverse to the United States are now adjudicated. In these circumstances, we submit the jurisdictional act must be construed as permitting, by necessary implication, the assertion and disposition of all claims of ownership with respect to the lands disputed between the State and the United States." (Reply Memorandum for the United States, pp. 4-5)

described in Section 2 of Public Law 89-441.[25] Assuming, for the moment, that the Stipulation between the United States and Utah is valid and will be carried out by the parties, the fact remains that the United States and Utah each claims lands, brines and minerals which are also claimed by Morton, and in order to determine the right, title and interest of the United States in the lands conveyed pursuant to the Act, the Court will have to determine whether Morton or the United States owns the lands, brines and minerals in dispute between them. Only after this is accomplished will the Secretary of Interior be able to comply with Section 5(b) of the Act to determine the fair market value of the lands and minerals conveyed.

The Stipulation does not alter either party's claims to the subject matter in dispute and, apart from its invalidity as shown in Point IV, the Stipulation is merely an agreement between counsel for the parties, not binding on Morton, as to how they will proceed during the course of the litigation. This agreement could be rescinded at any time by mutual consent of the parties.

Since title to property claimed by Morton will be adjudicated by the Court as between Utah and the United States, Morton is a person who "shall" be joined as a party, if feasible, under Rule 19(a)[26] and whose intervention is

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[25] ". . . all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake . . . ."

[26] "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined

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required under Rule 24(a).[27] This Court developed the indispensable party doctrine in a long line of decisions which established the criteria for determining when an absent person must be joined if an action is to proceed.[28] The rule was set forth in the leading case of *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1855), as follows (58 U.S. at 139):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that

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as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

[27] "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[28] *Barney* v. *Baltimore,* 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead,* 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean,* 97 U.S. 423 (1878); *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Washington* v. *United States, supra,* n. 10; *McShan* v. *Sherrill,* 283 F.2d 462 (9th Cir. 1960); *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 (1961).

> interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

We do not understand the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* to change this rule, but, on the contrary, it clearly adheres to it. The Court did reverse the court of appeals for not using a pragmatic approach in determining whether an absent person must be joined as a party. It adopted the standards set forth in Rule 19(a) relating to the interest of the outsider, *i.e.* (88 S. Ct. at 738):

> "[T]he Court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter."

Applying this criterion to Dutcher, the outsider, the Court stated (88 S. Ct. at 737):

> "We may assume, at the outset, that Dutcher falls within the category or [sic] persons who, under §(a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him."

Applying Rule 19(a) to Morton:

(1) In Morton's absence complete relief cannot be accorded among those already parties. Obviously, the validity of the Basart claims cannot be adjudicated in Morton's absence, otherwise the United States and Utah would not

have resorted to the device of the Stipulation in an attempt to avoid this issue.

(2) Morton claims a *direct* interest in the subject matter of the action as follows:

(a) The Basart lands.

(b) The submerged lands, *all of which* are claimed by both Utah and the United States.

(c) Brines and minerals in solution, *all of which* are claimed by both Utah and the United States. We are aware of no case in which title to the brines or minerals in solution in a non-navigable body of water has been allocated among the riparian owners, and this complex problem is one which the Court may well have to resolve. In any event, no such decision should be made without the participation of all claimants thereto. *California* v. *United States, supra.*

(d) Revenues collected by Utah from leases and mineral extraction licenses granted by Utah with respect to property claimed by Morton, the disposition of which proceeds will be determined by this litigation pursuant to Section 6 of Public Law 89-441 which provides:

> "If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title and interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest."

(3) The disposition of the action in Morton's absence will, as a practical matter, impair or impede Morton's ability to protect that interest. An adjudication of title in Morton's absence, although not technically binding on Morton, will affect Morton's interest by placing a cloud on

its title which it, in all probability, could not remove. *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936). Referring again to the *Provident* case, Dutcher had not sought to intervene prior to trial and it was not until the matter had gone to judgment and appeal, after years of litigation, that the court of appeals dismissed for lack of an indispensable party. In this case, which is in its initial stages, it is apparent that property, whether land, brine, minerals or money, claimed by Morton will be disposed of as a result of the Court's decree, regardless of whether or not the Stipulation can be carried out. Accordingly the disclaimer in Section 6 of the Stipulation as to the effect of a judgment on the title of third parties claiming lands, brines or minerals is meaningless. Pursuant to Section 3 of Public Law 89-441, the United States has expressly reserved all mineral rights, except as to brines and minerals in solution, in the lands conveyed to Utah under Section 2 and this includes the Basart lands. In any suit brought by Morton against Utah, assuming consent on the part of Utah, to test the title to the Basart lands, the United States, due to this reservation, would be required to be joined and it could not be joined without its consent. Thus, any attempt by Morton to litigate its title would undoubtedly be fruitless.

In view of the foregoing, the Special Master's statement, at page 45 of his Report, that Morton's "sole interest in the subject matter of this action is a common question of law and fact" is plainly incorrect. The Special Master does recognize, however, that Morton, unless permitted to intervene in this action, "has no forum . . . to litigate those questions of law and fact," but he qualifies this by the clause *"absent the interference of either sovereign with Morton's quiet enjoyment of the relicted land fronting its uplands."*

(Emphasis added) We do not understand what the Special Master means by this qualifying statement, unless it is intended to buttress his subsequent statement that "In any event, Morton is in no wise worse off now than before this action was instituted." Of course such is not the case, and furthermore Morton's "quiet enjoyment of the relicted land" is being interfered with since Utah has taken and leased these lands to other private parties, which leases are sanctioned by the United States pursuant to Section 6 of Public Law 89-441.

Since Morton's joinder will not deprive the Court of jurisdiction of the subject matter of the action, contrary to the Special Master's opinion, because the doctrine of sovereign immunity does not apply, its joinder is required under Rule 19(a) and it has a right to intervene pursuant to Rule 24(a). If, however, the Court should find that Morton's joinder is not feasible, we submit that it would not be equitable and in good conscience to proceed with the litigation merely because the parties are sovereigns and Morton is a private person, as urged by the Special Master. In such event, the action should be dismissed or, in the alternative, Utah be granted leave to amend its complaint naming Morton and other interested private persons defendants as well as the United States.

IV. MORTON'S INTERVENTION IS REQUIRED UNDER PUBLIC LAW 89-441 AND THE STIPULATION IS INVALID.

The Special Master's interpretation of Public Law 89-441 in Part V of his Report is premised primarily on the sovereign immunity of Utah. From this premise thereafter everything falls in sequence like a line of dominoes, *i.e.*, the Stipulation is valid under the Act, by reason of the

Stipulation Morton's rights are no longer being affected and therefore Morton is not an indispensable party. Essentially, it is the Special Master's view that it must be assumed that Congress was aware that interested private persons could not be joined without the consent of Utah and so the Act must be construed to permit only an adjudication of part of the property in dispute. The statutory language, however, is plain and unambiguous and there is no need for such tortuous construction since, as we have pointed out, the doctrine of sovereign immunity is not applicable. Even if the doctrine were applicable, no such construction would be necessary since Utah is perfectly free to sue Morton and any other interested persons in addition to the United States.

Section 2 of the Act in pertinent part provides:

> "Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah *all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State,* as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: *Provided, however,* That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, ..." (Emphasis added)

The United States having quitclaimed all its right, title and interest in the lands, brines and minerals, Utah is given an option under Section 5 to elect whether to pay the fair market value thereof as determined by the Secre-

tary, pursuant to subsection 5(a), or pursuant to subsection 5(b):

> "[The State] may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act *as may be found by the court* to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void." (Emphasis added)

Thus, the Act requires a judicial determination of all that the United States claims to own in lands, brines and minerals lying below the meander line of the Lake which have been conveyed to Utah, including the Basart claims. If, in fact, it is held that the United States had no title to the Basart lands but that these lands are owned by others such as Morton, these lands are not covered by the conveyance and Utah need not pay for them. Since Congress did not consent to an adjudication of only a portion of the United States' title claims, this Court cannot exercise jurisdiction over the limited action contemplated by the Stipulation.[29] *United States* v. *Clarke,* 33 U.S. (8 Pet.) 436 (1834).

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[29] This was the position taken by the United States prior to the Stipulation at the hearing before the Special Master on February 9, 1968:

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The proviso in Section 2 of the Act is stressed by the Special Master as indicating an intention on the part of Congress to exclude private persons from the litigation, but actually the converse is true. The Special Master is in error when he states that the proviso provides "that a decision of this Court or any other action taken pursuant to the Act shall have no direct bearing on the valid existing rights of third persons." (Report, p. 21) Actually, the proviso merely states explicitly what Congress could not do in any event. Congress cannot merely by legislative action impair a person's property rights since this would be a deprivation of property "without due process of law" prohibited by the Fifth Amendment. *Union Pacific Railroad Co.* v. *United States,* 99 U.S. 700 (1879); *Choate* v. *Trapp,* 224 U.S. 665 (1911). Furthermore, if the Act could be construed as denying a person the right to protect the validity of his title or his property interest through intervention, it would undoubtedly be unconstitutional. This litigation was authorized under the Act "to secure judicial determination of the right, title and interest of the United States" in the property in dispute. Since part of the property in dispute is claimed by private persons, which

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MR GRISWOLD: "As I have thought about this problem over the last two weeks, there have been times when it seems to me that a solution might be if Utah would be willing to amend its bill so as to make it applicable only as to such areas of land, and it might have to specify them by metes and bounds, which might be an enormous task, only as to such land as to which there was no other claim, thus narrowing the case to the areas which are vast, where the sole issue is between the United States and the State of Utah. And that would eliminate all questions of other, or indispensable, parties.

"But I am afraid that that just wouldn't comply with the Statute as Congress has enacted it." (Transcript, February 9, 1968, p. 29)

claims both Utah and the United States assert are invalid, such persons must of necessity be permitted to intervene or their interests and rights *will* be affected contrary to the proviso of Section 2.

The Stipulation is also invalid in that the agreements to convey and the conveyances provided for are beyond the power of the Solicitor General. The Solicitor General, pursuant to the Stipulation, has agreed:

> "5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as 'public domain reliction lands,' the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership, prior to June 15, 1967, of the uncovered lands indicated on the attached map as 'public land reliction under *Basart,*' and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441."

In other words, the Solicitor General is agreeing, purportedly on behalf of the United States, that the United States will convey the Basart lands to Utah without compensation if Utah should sucessfully show that it has title to "public domain reliction lands." There is nothing in the Act, however, which can possibly be construed to delegate to the Solicitor General (or to anyone else in the Executive Branch of the Government) the authority to make such an agreement, nor to relinquish Federal rights in lands without compensation unless and until such lands have been determined by the Court, pursuant to the Act, not to have been owned by the United States.

As we have previously pointed out, this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability. If, for example, the

Lake is held to be navigable and the "mean high water line" is fixed by the Court substantially below the meander line, it will result in a division of the relicted lands, both public domain reliction and Basart, between Utah and the upland owners. In such case, the Basart lands coveyed by the United States to Utah for nothing pursuant to the Stipulation would have significant value.

Accordingly, the agreement to relinquish Federal rights is invalid and the conveyance of such lands would be void. As stated by this Court in *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority."

CONCLUSION

For the reasons set forth in support of its exceptions to the Special Master's Report, Morton submits that its motion to intervene should be granted.

Respectfully submitted,

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December, 1968.

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Exceptions to Report of Special Master and Supporting Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114; and Raymond T. Senior, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by having the same delivered to their respective offices, in accordance with Rule 33 of the Rules of this Court.

FRANK A. WOLLAEGER
Counsel for Morton International, Inc.