No. 31, Original

In the Supreme Court of the United States

OCTOBER TERM, 1968

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES ON REPORT OF SPECIAL MASTER AND EXCEPTIONS THERETO BY MORTON INTERNATIONAL, INC.

ERWIN N. GRISWOLD,
Solicitor General,
CLYDE O. MARTZ,
Assistant Attorney General,
LOUIS F. CLAIBORNE,
Deputy Solicitor General,
DAVID R. WARNER,
MARTIN GREEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

330-983—68——1

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On October 28, 1968, the Special Master in this case filed with the Court his Report recommending that the State of Utah and the United States be granted leave to file their Stipulation of March 29, 1968, that the Motions for Leave to Intervene filed by Morton International, Inc. and Great Salt Lake Minerals and Chemicals Corporation be denied, and that the Court permit the State of Utah and the United States to proceed to litigate as between themselves which of them has superior title to the lands and minerals below the meander line of the Great Salt Lake. Morton

has filed exceptions to the Report.[1] The United States submits that those exceptions should be rejected and the recommendations of the Special Master approved.

STATEMENT

Although this original action is still at the threshold stage, some twenty printed documents have been filed, three hearings have been held before the Special Master, and the Court itself has entered six orders in the case.[2] What is more, in the almost two years since the Motion for Leave to File a Complaint was submitted, some of the parties and would-be parties have changed positions. Accordingly, in an attempt to simplify the Court's task in ruling on the initial Report of the Special Master without the necessity of studying all the previous filings, we shall here re-state the relevant facts and prior proceedings in summary form.

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[1] Great Salt Lake Minerals and Chemicals Corporation, in a *Memorandum* accompanying its *Motion for Leave to File Memorandum in Lieu of Exceptions to Report of Special Master*, states that it agrees with the conclusions of the Special Master, but that it should be permitted to intervene in the event this Court should strike the Stipulation between the State of Utah and the United States. We do not quarrel with this submission.

[2] See the list of "Relevant Docket Entries" appended to the Report of the Special Master, pp. 49–51, to which should be added the *Exceptions* filed by Morton on December 12, 1968, the *Memorandum* filed on the same date by Great Salt Lake Minerals & Chemicals Corp., and the *Brief* in support of the *Special Master's Report* filed by Utah on January 13, 1969. We note, however, that some of the dates shown on that list are rather deceptive. Thus, although both the *Memorandum for the United States* and the *Reply Memorandum for the United States* indicated as filed on February 20, 1968 (see Report, p. 50)

1. Beginning in the 1850's, various portions of the public lands adjoining the Great Salt Lake were surveyed, with a meander line approximating the shore of the Lake as it then existed. Although the level of the Great Salt Lake has fluctuated over the years, its general trend has been downward. As a result, the meander lines, drawn for the most part years ago, are in some places thousands of feet, and elsewhere several miles, inland of the present water line of the Great Salt Lake. Ownership of these relicted lands between the meander line and the water's edge (approximately 600,000 acres) is the principal subject matter of this controversy. Also at issue are the presently submerged lakebed and the brines and minerals in solution in the brines of the Lake. No acreage upland of the meander line is involved.

The State of Utah claims all these lands and minerals under the doctrine of *Pollard* v. *Hagan,* 3 How. 212, as part of the original bed of the Great Salt Lake,

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were formally filed with the Clerk of this Court on that date, the first was submitted to the Special Master and served in typewritten form in January and in printed form on February 5, while the second was submitted and served (in printed form) on February 7. So, also, the *Supplemental Memorandum for the United States and Stipulation* shown as filed on April 22, 1968 (Report, p. 51), was in fact submitted to the Special Master and served in March. Finally—presumably because they were never filed with the Clerk of the Court—the Report omits all notation of the government's *Response to Motion of Morton International, Inc. to Intervene as Defendant,* submitted and served on November 1, 1967, and of a substantial unprinted Memorandum submitted by the State of Utah on February 5, 1968.

The Court's orders in the case are reported at 387 U.S. 902, 388 U.S. 902, 389 U.S. 909, 390 U.S. 977, 391 U.S. 962, and 393 U.S. 921.

which it asserts is now, and was at the time of the State's admission to the Union in 1896, a navigable body of water. Independently of the navigability or non-navigability of the Lake, private patentees from the United States who own lots on the meander line claim the presently exposed acreage adjoining their lands under the common law doctrine of reliction. Invoking the same principle, the United States, as littoral owner, claims the balance of the "relicted" acreage—some 325,000 acres. See *State of Utah,* 70 I.D. 27 (1963). Moreover, wherever the water line was a substantial distance from the meander line at the time of the issuance of a patent, the United States claims the appurtenant relicted lands as the true littoral owner under the so-called *Basart* doctrine. See *Madison* v. *Basart,* 59 I.D. 415 (1957).[3] It is with respect to these *Basart* lands—alone of the exposed acreage—that the United States and the private landowners advance conflicting claims.[4] In addition, disputing the navigability of the Lake, the United States and some of its patentees have advanced claims to the presently submerged lands and minerals of the Lake.

Attempts to settle by legislation this controversy between the State of Utah and the United States

[3] The several categories of claims are well explained in an illustrative diagram included in the Special Master's Report (p. 9). The areas indicated as (7) and (8) thereon constitute lands claimed by the United States under the *Basart* doctrine.

[4] The presently uncovered lands claimed by the United States below the meander line of the lake are identified on the map included at the end of this memorandum (the same map was attached to the Stipulation entered into by the United States and the State of Utah in March 1968).

resulted in the passage of the Act of June 3, 1966, Public Law 89–441 (80 Stat. 192).[5] Section 1 of the Act directed the Secretary of the Interior to complete the public land survey around the Great Salt Lake by closing the meander line "following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed areas." After that task was performed—as it has been—Section 2 directed the Secretary to convey to the State of Utah "all right, title, and interest of the United States in lands * * * lying below the meander line of the Great Salt Lake * * *." This was accomplished by a quitclaim deed executed June 15, 1967. Section 5 then required the State either to pay the fair market value of the lands conveyed to it, or to maintain an action in this Court "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 * * *," the United States consenting to be joined as a defendant to such an action. The State elected to initiate this action. See laws of Utah, 1966, 2d Spec. Sess., ch. 11.

2. On March 1, 1967, the Attorney General of the State of Utah filed in this Court a Motion for Leave to File a Complaint, and a Complaint (Report, pp. 57–68). The only defendant named in the complaint is the United States. On May 15, the Court granted the State of Utah's Motion for Leave to File (387 U.S.

[5] The full text of the Act is reproduced in the Appendix to the Special Master's Report, pp. 52–56.

902), and on June 12, appointed a Special Master (388 U.S. 902). On July 14, the United States filed an Answer to the State's complaint (Report, pp. 57–65). In September, Morton International, Inc., a Delaware corporation, filed a motion for Leave to Intervene as a defendant in the matter, together with a proposed Answer to the Complaint of the State of Utah, claiming certain lands and minerals below the meander line of the Great Salt Lake which both the United States and Utah claim to own. On October 23, the Court referred Morton's Motion to the Special Master (389 U.S. 909). Subsequently, on January 24 and February 19, 1968, Great Salt Lake Minerals & Chemicals Corporation, another Delaware corporation, filed alternative Motions to Intervene as Plaintiff or Defendant, and those motions were likewise referred to the Special Master (390 U.S. 977). Presumably, other similarly situated landowners—most of them citizens of Utah—would also seek to intervene if the pending motions were granted. It is this question of intervention which has provoked all the subsequent proceedings and which is now presented to the Court.

3. The State of Utah has consistently opposed these motions for intervention, maintaining that the applicants were not indispensable parties and that the doctrine of sovereign immunity precluded the filing of their claims as, in effect, unconsented suits against the State and the United States. In addition, Utah has argued against the intervention of the present applicants, foreign corporations, on the ground that similarly situated landowners who are citizens of the

State—whose joinder would logically follow—cannot be made parties to this action without ousting the Court's original jurisdiction.[6] The United States, on the contrary, initially suggested that all the littoral landowners claiming relicted lands (or portions of the lake bed) adversely to the United States were indispensable parties, and that neither sovereign immunity nor constitutional limitations on the original jurisdiction of the Court barred their intervention.[7] Upon the execution of a Stipulation (discussed below), however, the United States changed position and opposed the motions for intervention,[8] now viewing the applicants as neither indispensable nor necessary parties—albeit we never joined Utah in urging sovereign immunity or lack of original jurisdiction as a bar.

In March 1968, the United States and the State of Utah entered into a Stipulation (Report, pp. 69–72). By that declaration, Utah agreed to pay the United

[6] See *Brief of the State of Utah in Opposition to Motion by Morton International, Inc. for Leave to Intervene and Answer*, filed January 25, 1968, and *Brief of the State of Utah in Response to the Reply Briefs of the United States, the Reply Brief of Morton International, Inc., and the Motion and Brief to Intervene by Great Salt Lake Minerals and Chemicals Corporation*, filed February 24, 1968.

[7] See *Memorandum for the United States*, dated January, 1968; *Reply Memorandum for the United States*, dated February, 1968; and *Memorandum for the United States in Response to Motion and Amended Motion of Great Salt Lake Minerals and Chemical Corporation*, dated February, 1968. (As already noted, some of these documents were submitted to the Special Master on the dates indicated, but only later filed with the Clerk of the Court, see note 2, *supra*).

[8] See *Supplemental Memorandum for the United States*, submitted with the Stipulation in March, 1968.

States for any lands and minerals conveyed under Public Law 89–441 with respect to which it is unable to establish its own superior title—without requiring the United States to prove its title as against other claimants. The Stipulation purported to foreclose decision of any other question (¶ 1, Report, p. 69), specifically removing from controversy the so-called *Basart* lands (the only exposed acreage claimed by the United States which private landowners also claimed) by providing that, so far as the sovereigns were concerned in settling their dispute, they would follow the result with respect to other relicted lands (¶¶ 4 and 5, Report, p. 70), and also avoiding determination of any conflicting claims in the present lakebed and minerals of the Lake as between the United States and private claimants by providing that Utah will pay the United States for *all* the resources of the Lake without requiring proof of title if the State's own claim fails (¶ 3, Report, pp. 69–70). Finally, it was expressly provided that "In no event shall the judgment herein be taken as adjudicating or affecting the title of persons or corporations claiming lands (uncovered or submerged), brines or minerals below the meander line of the Great Salt Lake, whether those which the United States claims to have owned prior to June 15, 1967, or others" (¶ 6, Report, p. 71). In our view, this narrowing of the lawsuit rendered the intervention of private landowners claiming adversely to the United States both unnecessary and inappropriate, and we so advised the Special Master.

As we have already noted, by his Report submitted October 10, 1968, and ordered filed October 28 (see 393 U.S. 921), the Special Master has recommended that the Stipulation be filed (with one minor modification) [9] and that the motions to intervene be denied. Although differing as to some of their reasons, both the United States and the State of Utah support the Special Master's disposition. Great Salt Lake Minerals & Chemicals Corporation has, in effect, acquiesced in his recommendations, while Morton has filed the Exceptions now before the Court.

ARGUMENT

Constitutional limitations on the original jurisdiction of the Court aside, the outer boundaries of this lawsuit are fixed by Public Law 89–441. That Act is the sole basis for this action against the United States, which otherwise would be barred by the principle of sovereign immunity. Any adjudication beyond what is necessary to achieve the purposes of the Act would be unauthorized as overstepping the limited consent to suit which only Congress could grant. Cf. *United States* v. *Sherwood,* 312 U.S. 584, 586; *Dale-*

[9] By paragraph 2 of the Stipulation the United States sought to defer the decision whether it could properly claim to have owned and conveyed to the State on June 15, 1967, the presently submerged lands underlying the lake and the brines and minerals in the lake, and Utah sought to reserve the right to object to adjudication of interests below the present water line in this case (see Report, pp. 69–70). The Special Master ruled that the United States *must* contest the State's claims to the resources of the Lake in this action (see Report, pp. 23–27). Both Utah and the United States have now acquiesced in that amendment of their Stipulation.

hite v. *United States,* 346 U.S. 15, 30. Accordingly, it is important, at the outset, to focus on the text and objective of Public Law 89–441.

The scheme of the Act is significant. With exceptions not relevant here, the United States was required at all events to relinquish to the State all its claims below the meander line of the Great Salt Lake (§ 2, Report, p. 69). Thereupon, the State could voluntarily pay the price fixed by the Secretary of the Interior as representing the value of lands and minerals which the United States asserts it owned before the conveyance, or it could "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" (§ 5, Report, pp. 54–55). In short, the congressional solution to the longstanding controversy between the two sovereigns over the area once encompassed by the Lake was to quiet the State's title to the disputed acreage against the United States, subject to a later payment which could be litigated here.

Very plainly, Public Law 89–441 was not intended to provide a forum for the adjudication of *all* disputes over lands and minerals below the meander line of the Lake. Had Utah chosen to pay without litigation, there would be no arguable basis for Morton or any other littoral landowner to invoke the Act as a predicate for judicially clearing its title—whether against the State or the United States.[10] Nor does the action

[10] Unless Utah were a party, no such action would lie in this Court, since it is the presence of the State—not the presence

authorized automatically offer all claimants an opportunity to test their claims. It is only "the right, title and interest of the United States" (before the conveyance to the State) that may be adjudicated. The private landowners cannot seize this occasion to settle their disputes with the State, whether the State is willing or not. Interests asserted in lands claimed by the State but not by the United States are wholly irrelevant to the only purpose for which this suit was sanctioned—to determine which lands and minerals, if any, Utah in fact acquired by conveyance from the United States and must pay for.

Indeed, it is arguable that because the Act in terms authorizes only "the State" to institute an action against the United States, no other claimant may appear to challenge the title of the United States—especially since it is expressly stated that "the provisions of this Act shall not affect * * * 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 [the] meander line [of the Great Salt Lake]" (§ 2, Report, p. 52). That, however, seems to us too grudging a reading of the legislation, and one that would defeat

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of the United States—that brings the case within the original jurisdiction of the Court. In light of the Eleventh Amendment and the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, the landowners could join Utah as a defendant in a federal court only if the State had consented. Even assuming that hurdle were overcome, joinder of the United States as a defendant—the only predicate for federal jurisdiction—would seem to encounter the bar of sovereign immunity which Public Law 89–441 lowers only for the benefit of the State if it chooses to initiate an action here.

its purpose, so long as Utah itself is free to contest the ownership of the United States, and its obligation to make payment, by setting up (at least alternatively) the title of a private claimant. In that situation, if the claims of private landowners (notably to the *Basart* lands) were to be adjudicated (as against the United States), those landowners must, we believe, be viewed as indispensable parties, or, at least, as "necessary" parties whose joinder should be effected unless it would oust the Court's jurisdiction (which is not the case in our view). See Rule 19, F.R.Civ.P. It was on this premise that we initially supported the intervention of Morton and M & C Corporation and suggested the joinder of the other littoral landowners claiming lands or minerals also claimed by the United States.[11]

As it turned out, however, our premise was mistaken. Utah insists that it never sought by this action to quiet its own title below the meander line of the Lake except as against the United States and that it never intended to require the United States to establish its title against all claimants, but was always ready to acknowledge federal ownership (before the recent

[11] Under our present submission, it is unnecessary to resolve the question whether joinder of the littoral landowners (or those of them who are citizens of Utah) would oust the Court's original jurisdiction. So, also, if the Stipulation is accepted, it is no longer necessary to decide whether the Eleventh Amendment or principles of sovereign immunity bar the landowners from challenging Utah's title, since the State had now made it clear that it does not seek an adjudication quieting its title against all claimants. Nevertheless, since these questions will recur if the Court disapproves the Stipulation, we reprint in an Appendix (*infra*, pp. 23–29) our earlier submission on these points (with only slight editing).

conveyance) of the lands claimed by the United States, and to pay for them, if it failed to prove the State's superior title. Whether or not this is a correct construction of the Complaint originally filed, the State has now formally declared its intention so to confine the issue by executing the Stipulation of March 1968. The consequence, we believe, is that the intervention of the private landowners claiming adversely to the United States is no longer necessary or appropriate, if, indeed, it is permissible in the prevailing circumstances.

Thus, it is apparent that the question of the validity of the Stipulation is critical. We discuss that matter first, and then elaborate our conclusion that, in light of the Stipulation, the proposed interventions ought not be allowed.

A. THE STIPULATION IS VALID AND EFFECTIVE

If this were an ordinary lawsuit in any other court, we do not suppose anyone would question the power of the only two parties to limit the issues between them by stipulation. As we understand the Exceptions filed, Morton argues that the present Stipulation is unauthorized (1) because—unlike conventional litigation—the scope of this legal action is controlled by a special Act of Congress, and (2) because—unlike a lawyer for a private client—the Solicitor General cannot, without an express congressional mandate, bargain away a property claim of the United States. We submit that neither objection is well taken.

1. The first challenge to the Stipulation is that it avoids an adjudication of the title of the United States to the lands it claims under the *Basart* doc-

trine, the State of Utah having undertaken, without further contest, to pay for the conveyance of those lands if it should fail to establish its superior title to the other relicted acreage claimed by the United States (see Stipulation, ¶ 4, Report, p. 70),[12] and the United States having agreed to disclaim payment for these lands if it should not prevail as to the balance of the exposed lands disputed between the two sovereigns (see ¶ 5, Report, p. 70). This, Morton argues, is inconsistent with Public Law 89–441 which, it is said, "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" (Exceptions, p. 35).

The short answer is that the Act which authorizes this action imposes no such inflexible requirement. Nothing in the text of the statute compels the State to contest *all* the claims of the United States, or none. Nor would such an all-or-nothing rule be consistent with the scheme of the Act. Public Law 89–441 explicitly provides for payment without any contest whatever. Solely for the State's benefit, sovereign immunity is waived and a judicial forum is afforded to permit Utah to challenge the federal claims before paying, if it chooses. In this situation, it seems ob-

[12] Now that the United States has been required to claim the presently submerged lakebed and the minerals of the Lake, the same objection presumably applies to ¶ 3 of the Stipulation (Report, pp 69–70), whereby Utah undertakes, without further contest, to pay for all relicted lands claimed by the United States (including the *Basart* acreage) if the State should fail to establish its superior title to the present lakebed.

vious that the State was left free to contest so much or so little as it thought proper.

Certainly, Utah could have determined to contest the *Basart* claims of the United States, since, unless the federal title were established, it might ultimately be required to relinquish those lands to private owners, or pay their value a second time. But we cannot appreciate why Utah should not be free to forego that challenge. Some of the littoral landowners are understandably disappointed that the *Basart* claims—which have now inured to Utah—should not be finally adjudicated. Yet, Public Law 89–441 was not enacted for their benefit and the State might have forestalled all judicial proceedings had it chosen to pay voluntarily. In sum, as the Special Master concluded (Report, p. 45), the applicants for intervention have no cause to complain since they are "in no wise worse off now than before this action was instituted."

2. The suggestion that the Solicitor General is acting "beyond [his] power" in purporting to "relinquish Federal rights in lands without compensation" (Exceptions, p. 37) merits little discussion.

Morton's charge is predicated on Paragraph 5 of the Stipulation (Report, p. 70), already adverted to, by which the United States agrees to forego payment for the *Basart* lands if Utah should succeed in establishing its superior title to the other uncovered lands below the meander line (designated "public domain reliction lands"). We so agreed because it seems to us that the consequence follows inexorably. If we are correct in this, then, of course, there is no "give-

away" of federal lands, but merely a harmless concession that night follows day.

The legal situation is as follows: Utah has no basis whatever for any claim below the meander line (whether presently submerged or exposed lands) unless the Lake was navigable on the date of statehood in 1896. Recognizing this, the State has agreed to forego further contest if it is unable to prevail with respect to the present lakebed and minerals of the Lake (Stipulation, ¶ 3, Report, pp. 69–70). The converse does not hold true, however: even though Utah succeeds in its claim to the present lakebed, that does not automatically establish its title to the uncovered lands below the meander line. To this extent, Morton is quite correct in stating that "this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability" (Exceptions, p. 37). The remaining question (assuming the Lake is held navigable) is whether (as the United States and Morton contend) the gradually uncovered lands inured to the littoral landowners under the doctrine of reliction—which of course applies on navigable bodies of water (*e.g., Jones* v. *Johnston,* 18 How. 150, 156; and see *Hughes* v. *Washington,* 389 U.S. 290, 293). If that inurement occurred, Utah lost all the uncovered lands as they became exposed.[13] On the other hand, if Utah owned the lakebed and the doc-

[13] Of course, with respect to the *Basart* lands, a question remains as to whether they inured to the United States or to the private patentees. But that is the issue Utah is willing to leave undecided in this action by agreeing to pay the United States for any lands as to which it cannot establish its own title. See *supra*, pp. 8, 13–14.

trine of reliction is not operative, then the United States acquired nothing by virtue of the recession of the Lake—whether *Basart* lands or other uncovered acreage. That is what the challenged provision of the Stipulation recognizes.

Morton has sought to introduce a complicating factor by suggesting that the Court may ultimately find that the meander line on which the Stipulation is based does not accurately represent the edge of the lake on the date of statehood and may hold that Utah is entitled only to the presently exposed lands below the 1896 high water line. The result, it is said, would be to partition both the *Basart* lands and the remaining uncovered lands claimed by the United States between the two sovereigns. We do not appreciate the difficulty.

At the outset, it must be said that Morton's hypothesis is somewhat far-fetched. Moreover, whatever limitations there may be on the powers of the Solicitor General to "relinquish Federal rights in lands," there can be little doubt that he would not be overstepping his authority to conduct litigation for the government in this Court (see 5 U.S.C. 309; 28 C.F.R. 0.20) if he were to join in a stipulation accepting the meander line indicated on maps of the area as representing the bank of the Great Salt Lake in 1896.

Even assuming, however, that the true 1896 line becomes relevant and is judicially established at some distance below the meander line, no insuperable problem is presented. Indeed, the fair import of the Stipulation entered into between Utah and the United

States is simply that, for purposes of this case and the State's obligation to make payment, the lands claimed by the United States under the *Basart* doctrine shall be treated as though they were in the identical posture of the other exposed lands claimed by the United States. Thus, if it were held that the United States acquired the uncovered lands claimed as "public domain reliction" to the 1896 edge of the Lake, but no further, it would follow, under the Stipulation, that the United States must be deemed to have also acquired the lands claimed under *Basart* to the same point only. On the side of the United States, this result involves no concession whatever: as a matter of law, if the inurement of the exposed former lakebed to the upland owner stopped in 1896, then the United States acquired nothing by reliction below that line, whatever the theory under which it claims to be the upland owner.

B. THE STIPULATION MAKES THE JOINDER OF THE PROPOSED INTERVENORS UNNECESSARY AND INAPPROPRIATE

What has already been said sufficiently elaborates our view that the Stipulation entered into between the United States and Utah so substantially changes the case as it affects the would-be intervenors that, although once indispensable parties, they are no longer necessary or even appropriate parties.

The critical fact, we repeat, is that—under the Stipulation—there will be no adjudication, directly or indirectly, of the claims of the private landowners which are adverse to the United States, because the

United States is no longer required to establish a clear title. Specifically, the dispute between the United States and its patentees as to the validity and applicability of the *Basart* doctrine will remain where it was, wholly unaffected by the judgment here; and so will the possible conflict—in the event the Lake is held non-navigable—between the claim of the United States to *all* the presently submerged lands and minerals of the Lake and the claims of the private landowners to portions of the lakebed and appurtenant resources opposite their exposed lands. It was these matters—and these alone—that seemed to require the joinder of the private landowners when Utah was free to advance their claims against the title of the United States. Those issues having passed out of the case, the would-be intervenors, we submit, are neither indispensable nor necessary parties to this action. See Rule 19, F.R. Civ. P.[14]

It follows that none of the littoral landowners (including Morton) may intervene of right—especially in light of the Special Master's conclusion (Report, p. 45) that their limited interest will be adequately represented by the United States. See Rule 24(a), F.R. Civ. P. The only remaining question is whether, as a matter of discretion, Morton and any other similarly situated applicant, ought to be permitted to in-

[14] The would-be intervenors, of course, cannot properly invoke the provision of Rule 19(a) characterizing as a necessary party one whose claimed interest, if left unadjudicated, would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." That provision was included for the benefit of the existing party exposed to possible double liability—here Utah—and presumably may be waived.

tervene because their claims include questions of law or fact common to the main action, *i.e.*, the questions whether the Lake is navigable and whether the common law doctrine of reliction applies to the gradually exposed lands below the meander line. See Rule 24(b), F.R. Civ. P.

1. Insofar as the applicants for intervention are attempting to assert claims against the United States which Utah itself is not invoking, the complaints are presumably impermissible as unconsented suits against the sovereign. It may seem an anomaly that we said otherwise when we understood Utah to be putting the United States to the proof of its title against all—as it was entitled to do. But there is no contradiction. We believe Congress consented to a suit in which Utah might require us to establish ownership and might challenge our title by setting up its own superior title or that of third person. If Utah stood on the title of Morton in resisting payment to the United States, it is reasonable to suppose the statute which permitted that was also meant to permit Morton to come in and speak for itself. But the waiver of sovereign immunity goes only to such issues, if any, as Utah chooses to bring into court. And, just as Morton could not initiate this action under Public Law 89–441 had Utah chosen to pay without litigation, so, now, we submit Morton cannot litigate issues which Utah has chosen to remove from this lawsuit.

2. The other aspect of Morton's proposed intervention is presumably its interest to support the position of the United States that the Lake is non-

navigable, and, failing on that issue, that the exposed acreage below the meander line inured to upland owners. If this were a different lawsuit in another court, intervention for this limited purpose might be appropriate. In the prevailing circumstances, however, we suggest it is not.

We note, first, that Morton is only one of some 120 similarly situated landowners. If Morton were permitted to intervene, even-handed dealing obviously would forbid excluding the other patentees, if they wished to participate. Unless it is necessary, the joinder of so many parties is of course undesirable.

Moreover, the application of a single Utah citizen landowner would present an issue as to the original jurisdiction of this Court. That is, of course, a constitutional question which ought not be unnecessarily pressed. While we believe the Court's jurisdiction would not be ousted (see Appendix, *infra,* pp. 23–27), we must acknowledge the difficulty of the issue, especially in light of the Special Master's conclusion at odds with ours (Report, p. 31).

Finally, it is relevant that the case is pending in this Court. While the Federal Rules of Civil Procedure apply here in principle (see Rule 9(2) of the Rules of the Court), the original jurisdiction of this Court is used sparingly and, of necessity, this Court cannot be as hospitable to all claims as the district courts. Cf. *Georgia* v. *Pennsylvania,* 324 U.S. 439, 464. We suggest that the Court's discretion might appropriately be exercised to confine the present action to the original parties.

CONCLUSION

For the reasons stated, the Stipulation of March 1968, entered into between the United States and the State of Utah, should be permitted to be filed and the Motions to Intervene submitted by Morton International, Inc. and Great Salt Lake Minerals and Chemicals Corporation should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Deputy Solicitor General.
DAVID R. WARNER,
MARTIN GREEN,
Attorneys.

JANUARY 1969.

APPENDIX

I

THE JOINDER TO THIS ACTION OF CITIZENS OF UTAH AS PARTIES DEFENDANT WOULD NOT DIVEST THIS COURT OF ITS JURISDICTION OVER THE CASE

In its present posture, this case is one initiated by the State of Utah against the United States as sole defendant. The United States having waived its sovereign immunity, no one contests that such an action is within the original jurisdiction of this Court. It is suggested, however, that the joinder of citizens of Utah as additional defendants would oust the Court's jurisdiction. We think not.

The question is ultimately ruled by the first two paragraphs of Section 2 of Article III of the Constitution, which provide as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Excerpting what seems relevant here, we find that "[t]he judicial Power shall extend * * * to Controversies to which the United States shall be a Party," and that in "all Cases * * in which a State shall be Party, the supreme Court shall have original Jurisdiction." Reading "all cases" to mean "all cases before mentioned," we immediately reach the conclusion that the present action is within the Court's original jurisdiction.

It is not apparent how that jurisdiction can be defeated by the joinder of other parties. Certainly, Article III does not restrict federal jurisdiction premised on the presence of the United States as "a party" to the situation in which it is sole plaintiff or sole defendant. See, *e.g.*, 28 U.S.C. 1347. Nor does the Court's original jurisdiction of such an action depend upon the State's being the only party on the other side. See *e.g.*, *United States* v. *West Virginia*, 295 U.S. 463, 470–471.

What, then, is the obstacle? Is there some overriding principle, albeit not expressed in Article III, that no federal court, or at least this Court, can ever entertain a case, otherwise within its jurisdiction, because the contest is in part between a State and its own citizens? Plainly, the judicial power of the United States is not defeated on that account. To be sure, it has been settled since *Hans* v. *Louisiana*, 134 U.S. 1, that a citizen could not sue his State in the

federal courts without its consent. But that is because of the principle of sovereign immunity, reflected in the Eleventh Amendment. Indeed, such a suit on a federal claim is within the jurisdiction of the United States courts if the State has consented. See *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 186, and cases cited. And while a State rarely chooses the federal forum to sue her own citizens, the removal cases demonstrate that there is no bar to such an action in the United States courts if a federal question is presented. *E.g., Georgia* v. *Rachel,* 384 U.S. 780.

Plainly, the judicial power of the United States extends to a suit, otherwise within federal jurisdiction, in which a State and its citizens are opponents. Given that starting point, it would be difficult to rationalize a rule that absolutely prohibited this Court, unlike other courts, to entertain such an action originally, although the case was otherwise within its original jurisdiction. We submit no such rule prevails.

To be sure, it has been held that this Court cannot entertain an original action presenting only local law issues brought by a State against some of its own citizens and citizens of another State. See *California* v. *Southern Pacific Co.,* 157 U.S. 229, 257, 258, 261; *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 246–247; *Louisiana* v. *Cummins,* 314 U.S. 577. But that is presumably because such a case is beyond the jurisdiction of *any* federal court, on the view that the provision of Article III extending the judicial power of the United States to controversies "between a State and Citizens of another State," like the next clause, requires complete diversity. Cf. *Strawbridge* v. *Curtiss,* 3 Cranch 267.

There remains a troublesome *dictum* in *Southern Pacific, supra,* 157 U.S. at 261, and the uncritical alternative holdings in *New Mexico* v. *Lane,* 243 U.S.

52, 58, and *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 163–165.

Southern Pacific was an original action brought by the State of California in this Court to establish its title to certain lands below the line of ordinary high tide of San Francisco Bay, claimed by the Southern Pacific Company under a grant from the City of Oakland. Having determined that the City of Oakland and the Oakland Water Front Company were indispensable parties to the litigation, the Court concluded it did not have original jurisdiction of the case because it was one between the State of California on the one hand and the citizen of another State and citizens of California on the other. Insofar as that holding merely reflects the "total diversity" principle to which we have previously adverted, the ruling is wholly irrelevant here. But, although it appears no federal question was presented, the Court went on to observe (*id.* at 261–262):

> * * * we are not called on to consider * * * whether any Federal question is involved, since the original jurisdiction of this court in cases between a State and citizens of another State rests upon the character of the parties and not at all upon the nature of the case.
>
> If, by virtue, of the *subject-matter, a case* comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States.
>
> It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court, *Marbury* v. *Madison,* 1 Cranch, 137, 173, 174, and no attempt to do so

> is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jursdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. [Emphasis supplied.]

Although we do not understand the rationale of the opinion, this ruling seems to have been followed uncritically in support of alternative holdings in *New Mexico* v. *Lane,* 243 U.S. 52, 58, and *Texas* v. *Inter-State Commerce Commission,* 258 U.S. 158, 163. At all events, however, there is no reason to apply that rule in this case. Even accepting, which we do not, the proposition that the Court's original jurisdiction of a *federal question case* to which a State is a party is defeated by joinder of citizens of that State as adverse parties, that rule need not be extended to govern this case. Indeed, here, an independent ground of federal jurisdiction is the presence of the United States as a party, and nothing in any decision suggests that the Court may not entertain such a case when a State is a party merely because citizens of that State are parties on the other side. On the contrary, the rationale of *United States* v. *Texas,* 143 U.S. 621, would oppose that result. And see *Oklahoma* v. *Texas,* 258 U.S. 574.

II

NEITHER THE ELEVENTH AMENDMENT NOR THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE ASSERTION OF PRIVATE CLAIMS TO LANDS WITH RESPECT TO WHICH THE STATE IS SEEKING TO QUIET ITS OWN TITLE

The Eleventh Amendment prevents any federal court from entertaining an unconsented suit against a State by citizens of another State, even on a federal claim *Louisiana* v. *Jumel,* 107 U.S. 711. And like principles of sovereign immunity insulate a State from being compelled to answer a suit brought by its own citizens in federal court. *Hans* v. *Louisiana,* 134 U.S. 1. On the other hand, if the State has consented, the federal courts are competent to adjudicate a claim, otherwise within federal jurisdiction, filed against the State by its own citizens or citizens of another State. See *Parden* v. *Terminal Co.,* 377 U.S. 184, 186, and cases cited. Accordingly, the question on this branch of the case is whether Utah may fairly be deemed to have waived its sovereign immunity so as to permit a suit against it by private citizens with respect to the lands claimed by it in the present suit.

In our view, the State's action in asserting title to the disputed lands and submitting that question for adjudication constitutes consent to the determination of any adverse claim with respect to the same *res.* It is elementary that he who asks judgment in his favor submits himself to the risk of an adjudication in favor of his opponent. Even sovereigns are not exempt from this principle. See *United States* v. *The Thekla,* 266 U.S. 328, 339–340. To be sure, a suit to collect a money judgment does not waive sovereign immunity with respect to a counterclaim for a greater sum. *United States* v. *Shaw,* 309 U.S. 495. But when

a sovereign invokes the aid of the courts to settle its claim to a certain asset, it must be taken to have consented that opposing claims to the same asset should be entertained. *Clark* v. *Barnard,* 108 U.S. 436, 447–448. That is obvious in the case of the named defendant. *E.g., United States* v. *Louisiana,* 363 U.S. 1, 84. Nor is it apparent why the principle does not apply to intervening claimants, especially if they are indispensable parties. Cf. *Gunter* v. *Atlantic Coast Line,* 200 U.S. 273.

In sum, we believe neither the Eleventh Amendment nor any rule of sovereign immunity prevents the Court from entertaining the claims of Morton International or other private parties insofar as they assert ownership to the lands which Utah has chosen to place in litigation by praying that its own title thereto be quieted. We accordingly conclude that all of the private claimants should be allowed to intervene to assert their title as against the State with respect to the acreage also claimed by both Utah and the United States. On the other hand, we note that the Court need not resolve disputes between the State and private claimants *with respect to lands disclaimed by the United States* in order to fulfill the objective of the Great Salt Lake Lands Act. Indeed, the Act authorizes the present suit only to determine the extent of the *federal* lands in the area so as to fix the amount due the United States by Utah upon their transfer to the State. For that purpose, it is unnecessary to settle the State's title to lands which are adversely claimed by other persons, but not by the United States. And the United States is of course a disinterested bystander with respect to that controversy.

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U.S. DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

THE GREAT SALT LAKE

SCALE IN FEET

SCALE IN MILES

40,000-foot grid based on Utah coordinate system, North Zone.

LEGEND

- PUBLIC DOMAIN RELICTION (P.D.)
- P.L. RELICTION UNDER BASART (B.)
- PROTRACTED SCHOOL SECTIONS (PSS.)
- PRIVATE LANDS
- THALWEG LINE
- MEDIAN LINE
- PARTITION LINE
- WATER ELEV. 11/14/1966 = 4193.3'
- WATER ELEV. 1/4/1896 = 4200.8'

NOTE:
Elevation of the lake at date applicable to Basart Decision is indicated by a change of direction in the line pattern.

Public Domain Reliction	325,574 Acres
P.L. Reliction under Basart	108,780 "
Protracted School Sections	16,504 "
TOTAL	450,858 Acres

This map was prepared by the Utah State Office in compliance with Washington Office memorandum 9180.1 (713.a) dated December 9, 1966, as provided under Public Law 89-441.

T.8N., R.2W.

See Supplemental Land Office Status Plats