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In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE
SPECIAL MASTER FILED OCTOBER 26, 1970, AND
BRIEF IN SUPPORT OF EXCEPTIONS

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STATE OF UTAH, PLAINTIFF

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UNITED STATES OF AMERICA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 26, 1970

Pursuant to the order of the Court,¹ the United States presents the following exceptions to the Report of the Special Master filed October 26, 1970:

I

With respect to the Conclusions of Law of the Special Master appearing at pages 50-52 of his Report:

¹ On October 26, 1970, the Court ordered: "The report of the Special Master is received and ordered filed. Exceptions, if any, with supporting briefs, shall be filed within sixty days." On December 21, 1970, the Court extended the time for filing the exceptions and supporting brief of the United States to and including January 8, 1971. The Report of the Special Master is referred to herein as "R".

1. The United States excepts to the declaration in Conclusion of Law 5 that the "test [for determining navigability] is one of fact regarding the capacity or susceptibility of the waters being used, as the need may arise, by the then customary modes of trade and travel for useful commerce" (R. 50).

2. The United States excepts to the ruling in Conclusion of Law 6 that the capacity of the Lake for useful commerce "may be shown by * * * (2) the physical characteristics of the body of water in question; * * * and (4) experimentation demonstrating capacity" (R. 50-51).

3. The United States excepts to the determination in Conclusion of Law 7 that the "use of boats by their owners to carry livestock back and forth from Antelope and Fremont Islands to the shores of Great Salt Lake in connection with their business operations, as well as the use of such boats to carry supplies to these islands, and the hauling of guano from Gunnison and Bird Islands to the shores of the Lake can be deemed to show the utility of the waters for commerce to the general public" (R. 51).

4. The United States excepts to the determination in Conclusion of Law 8 that the "use of boats for the construction and maintenance of railroad trestles and causeways across Great Salt Lake, for the exploration and scientific study of the Lake, and for police patrol activities and rescue operations constitute trade and travels in the customary modes of trade and travel on water" (R. 51).

5. The United States excepts to the determination in Conclusion of Law 9 that “[b]oating for purposes of recreation and pleasure when conducted on vessels of the size and character shown in the evidence is useful commerce within the meaning of navigability” (R. 51).

6. The United States excepts to the holding in Conclusion of Law 10 that the “fact that the body of water in question is not capable for use for navigation in interstate or foreign commerce will not defeat a State’s claim of title to the bed of that body of water” (R. 51).

7. The United States excepts to the ruling in Conclusion of Law 14 that “Great Salt Lake on the date of the State of Utah’s admission into the Union was navigable under the laws of the United States” (R. 52).

8. The United States excepts to the ruling in Conclusion of Law 15 that “[o]n January 4, 1896, title to the bed of Great Salt Lake vested in the State of Utah, and did not remain in the United States” (R. 52).

9. The United States excepts to the ruling in Conclusion of Law 16 that the “State of Utah is entitled to a decree by this Court quieting title to the bed of Great Salt Lake in itself as against the United States” (R. 52).

10. The United States excepts to the ruling in Conclusion of Law 17 that the “United States is not entitled to a decree quieting title to the bed of Great Salt Lake in itself as against the State of Utah” (R. 52).

11. The United States excepts to the ruling in Conclusion of Law 18 that the "State of Utah is not required to pay the United States for the land covered by Great Salt Lake and below the boundary line of the Lake's bed as of January 4, 1896" (R. 52).

II

With respect to the Findings of Fact of the Special Master appearing at pages 9-49 of his Report:

1. The United States excepts to the determination in Finding of Fact 31 that the "Great Salt Lake, as of January 4, 1896, was navigable within the meaning given to that word by the Federal courts for the purpose of determining a state's title to the bed of a body of water at statehood," (R. 29), inasmuch as it states a legal conclusion as to the "navigability" of the Lake at statehood.

2. The United States excepts to the determination in Finding of Fact 62 that "[w]hile commerce and trade, unless pleasure boating be considered as such, has not flourished on the Lake, this is so not because, as the Government contends, the drawbacks and obstacles are too formidable, but rather, as the State maintains, the need, strong enough to overcome them, has not arisen and commercial utilization on a large scale still awaits future improvements and demands" (R. 48-49).

III

The United States excepts to the Proposed Decree of the Special Master appearing at pages 53-54 of his Report, insofar as it grants the relief sought by the State of Utah and denies the relief sought by the United States.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

**BRIEF OF THE UNITED STATES IN SUPPORT OF EXCEPTIONS
TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 26, 1970**

REPORT OF THE SPECIAL MASTER

The Report of the Special Master was filed in this Court on October 26, 1970. On that same date, the Court ordered that exceptions to the Report, with supporting briefs, be filed within sixty days. On December 21, 1970, the Court extended the time for filing the exceptions and supporting brief of the United States to and including January 8, 1971. The Court has original jurisdiction.

QUESTIONS PRESENTED

1. Whether for the purpose of determining ownership of the bed of the Great Salt Lake, the Lake was navigable in fact as a highway of commerce at the time of Utah's admission to the Union.

2. Whether for such purpose the Lake was navigable in law as a highway of interstate or foreign commerce.

STATEMENT

This original action was filed by the State of Utah² to quiet in it title to the bed of the Great Salt Lake. The only question presently before this Court is whether at the time of Utah's admission to the Union (January 4, 1896) the Great Salt Lake was navigable, as Utah contends, or was nonnavigable, as the United States contends.³ That question was referred to a Special Master, 394 U.S. 89, 96, who held hearings concerning the question of navigability in fact and considered arguments directed to the conclusions to be drawn from the evidence presented. In those hearings, the United States reserved but did not argue the proposition that the Lake was non-navigable as a

² The litigation was brought pursuant to the Act of June 3, 1966, 80 Stat. 192. Pursuant to that statute, the United States quitclaimed to the State of Utah all its title and interest (with certain exceptions not here relevant) to the bed of the Great Salt Lake. Utah in turn is to pay the United States the value of the property so conveyed, unless it establishes that it, rather than the United States, was the rightful owner of the Lake bed prior to the conveyance from the United States; it is for this purpose that Utah initiated this action.

³ Should the United States prevail on this issue, this litigation would be ended, since the sole basis of Utah's claim is that the lands now in dispute were, at the relevant time, the bed of a *navigable* body of water and, as such, passed to Utah upon its statehood. On the other hand, if Utah prevails further proceedings will be necessary to determine other issues, notably whether the State has lost its original title by operation of the law of "reliction" to those portions of the former Lake bed which since have become exposed.

matter of law because it forms no part of a water route in interstate or foreign commerce. See pp. 29-34 *infra*. The Special Master has now prepared and filed with the Court his Report, to which the exceptions herein stated are directed.

The government's exceptions are principally to the Special Master's conclusions of law. We contend, as is more fully explained below, that the measure of navigability in fact for state title purposes is whether at the time of statehood the waterway was used or susceptible of being used, in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In general, we do not disagree with the Special Master's findings of the facts to which this test is to be applied.⁴ In summary, those findings indicate the following:

The Great Salt Lake is located entirely in the State of Utah (Finding of Fact 5, R. 10). In 1896, it had a maximum length of approximately 77 miles, a maximum width of 32.5 miles, and a maximum depth of about 30 feet (Finding of Fact 6, R. 10). The Lake is a drainage spot for a large area; it has no outlet, and as a result a high concentration of soluble solids (salts) exists (Findings of Fact 13 and 16, R. 18, 19). The tributary rivers flowing into the Lake do not provide a navigable water link with any other state or country (Finding of Fact 24, R. 24). Except in a few places, the Lake's shores and bed gently shelve at the

⁴ But see p. 4, *supra*.

rate of about one foot per thousand feet (Findings of Fact 8 and 11, R. 13, 17). The gradual shelving of the basin and the softness of the shore surface make it unusually difficult to get boats from dry land into floatable water—to reach water five feet deep, one must move out a mile or more from the water's edge (Finding of Fact 26(a), R. 25). The Lake's flat, barren, bleak, and treeless shores are ringed with great stretches of salt flats, salt marshes, and bogs, some of which are in places several miles in width (Finding of Fact 18, R. 20–21), and which make an approach to its shores by foot, horseback, or horsedrawn vehicle very difficult (Finding of Fact 27(a), R. 27). The Lake affords no convenient locations for launching or landing boats (Finding of Fact 26(d), R. 26). Although since 1850 there have been sizable settlements within several miles of the Lake (Finding of Fact 19, R. 21), in 1896 none of these population centers were within ten miles of the Lake's shore (Finding of Fact 28, R. 28). Except for Lakeside, a community of about fifty people who maintain the tracks of the Southern Pacific Railway over the Lake, even today there are no communities nearer than four miles to the Lake's water (Finding of Fact 56, R. 44–45). And though there have been boats on the Lake (Findings of Fact 36(a), 36(c), 38, 45, 46, 47, 48 and 49, R. 33–34, 35–36, 40–43), the boating uses of the Lake, not counting excursion trips, have been more of a private nature than by independent contractors for hire (Finding of Fact 51, R. 43). There is no evidence indicating that any regularly scheduled freight or pas-

senger service ever operated on the Lake (Finding of Fact 52, R. 44). The high salt concentration results in disagreeable salt spray from the waters of the Lake and in precipitation and encrustation of sodium sulphate in the Lake and on objects in the water, including boats (Findings of Fact 26 (f), (g), 35, and 39(a), R. 26-27, 32-33, 37-38).

The Special Master found that factors favoring travel on the Lake are that its level remains relatively constant and changes only gradually;⁵ water depths of 5 to 30 feet exist over wide areas; there are no underwater obstructions or floating obstacles; the surface is calm and no tides or strong currents are present; and the high salt concentration significantly increases the water's buoyancy and lowers its freezing point (Finding of Fact 25, R. 24). The Master also found that while commerce and trade have not flourished on the Lake, this is because a sufficient need for such use has not yet arisen; commercial utilization therefore still awaits future improvements and demands (Finding of Fact 62, R. 48-49). We except to this finding for the reasons stated later in our brief.

Based on these findings, the Special Master concludes that the Great Salt Lake was, at the date of its statehood and in its natural state, "navigable" for State title purposes (Finding of Fact 31 and Conclusion of Law 14, R. 29, 52). It would follow from that finding that title to the bed of the Great Salt Lake had vested in Utah at statehood and thus

⁵ But see Appendix B to the Master's report.

that Utah is not required to pay the United States any compensation for the latter's conveyance of the Lake bed to Utah pursuant to the Act of June 3, 1966 (Conclusions of Law 15, 18, and Proposed Decree, R. 52-54).

SUMMARY OF ARGUMENT

To prevail in this litigation, Utah must establish that at the time of its admission into the Union the Great Salt Lake, in its natural state, was "navigable in fact." For state title purposes, that phrase includes only lakes and rivers which "are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall. 557, 563. The Lake has not at any time actually been used for the relevant kind of commercial trade or travel. And it is not "susceptible" of commercial use in its ordinary condition; its shallowness, the extreme difficulty of access to it, its gradual shelving, the total desolation of its shoreline and surroundings, are physical features which preclude its use as a highway of commerce. The essentially undisputed facts, we submit, lead to the conclusion that at the time of Utah's statehood the Great Salt Lake was not navigable in fact.

We further submit that the Special Master gave undue weight to the physical capacity of the Lake to float commercial water craft. While this factor is essential, it is not of itself sufficient. The determinative issue is whether the waterway is, or is susceptible of

being, a highway of commerce. The physical features of the Lake and its environs preclude its use as a highway of commerce, even though commercial craft could float on the Lake. And the uses cited by the Master as showing commercial utilization of the Lake are not uses of the relevant kind and do not show practical usefulness of the Lake to the public as a commercial highway. Under the proper standards, the Lake was not navigable in fact at the pertinent time and the Master's contrary conclusion should not stand.

Nor is the Lake navigable in law, since it has no interstate or foreign connection and thus is not a channel of interstate or foreign commerce. At common law, only tidal waters were navigable. This principle was found to be unsuitable as applied to the great rivers and inland lakes of this country; accordingly, such waters were held to be navigable in law, if navigable in fact, even though above tide water. But in every instance—with but one exception of which we are aware—the “American” rule was invoked only with respect to the great waterways which constituted a part of a highway of interstate or foreign commerce. Indeed, this is an essential element of the navigability concept for federal admiralty and Commerce Clause purposes. We submit that for state title purposes, too, the extension of the common-law rule should be limited to waterways which are channels in interstate or foreign commerce, and that since the Great Salt Lake does not meet this requirement, it is not navigable in law.

ARGUMENT

I. GOVERNING LEGAL PRINCIPLES WITH RESPECT TO NAVIGABILITY IN FACT

Two propositions set the framework for the consideration of the navigability of the Great Salt Lake. The first is that the burden of proof is on the proponent of navigability—here, Utah. See *Harrison v. Fite*, 148 Fed. 781, 785 (C.A. 8); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F. Supp. 852, 867 (Ct. Cls.). The second proposition is that “[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.” *United States v. Holt Bank*, 270 U.S. 49, 55–56. See also *Brewer-Elliott Oil and Gas Co. v. United States*, 260 U.S. 77, 87; *United States v. Utah*, 283 U.S. 64, 75; *United States v. Oregon*, 295 U.S. 1, 14. It follows that the decisions of the Supreme Court of Utah taking judicial notice of the navigability of Great Salt Lake⁶ cannot be deemed to have established the Lake’s navigability for our purposes. The question is, rather, whether the State of Utah, in the recent proceedings before the Special Master, has succeeded in showing that Great Salt Lake is a navigable body of water according to the rules recognized and applied in federal courts.

At the outset, it is useful to restate how the issue of navigability arises in this case. Utah’s claim to the bed of the Great Salt Lake ultimately rests upon the proposition that these lands passed to the State upon

⁶ *Robinson v. Thomas*, 75 Utah 446, 286 Pac. 625; *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P. 2d 401.

its admission to the Union. This results, it is said, from the operation of the “equal footing” principle which, as construed in *Pollard’s Lessee v. Hagan*, 3 How. 212, and subsequent cases, requires that the newly admitted States be accorded the same property interest in submerged lands as was enjoyed by the thirteen original States as successors to the rights of the British Crown. The governing notion was that the principal highways of water commerce—which in England are the tidal rivers—ought to be treated as public assets, immune from the claims of private land-owners. The overriding reason for keeping the beds out of private ownership was—and is—to prevent interference with the free use of navigable waters as commercial highways. See *Barney v. Keokuk*, 94 U.S. 324, 338.

The common law conceded to the English Crown only the beds of navigable *tidal* waters, which were of course arms of the sea, subject to the jurisdiction of the Admiralty, and arteries of foreign commerce. This equation of navigability with tidewater was early found ill-suited to the geography of America, and rejected, both as a restriction on the federal admiralty jurisdiction (see *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 454–459), and as a test of navigability for property purposes as well (*Barney v. Keokuk*, *supra*, 94 U.S. at 337–338). But the relationship to commercial use remained. Under the Federal law that emerged, only those waterways on which, in the words of *Genesee Chief*, “commerce is carried on between different states or nations,” were considered to be navigable.

The classic definition of navigable waters occurs in *The Daniel Ball*, 10 Wall. 557, 563:

Those waters must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * *

Although that was a case construing the commerce clause, the definition just quoted is almost invariably cited in both admiralty cases (*e.g.*, *In re Garnett*, 141 U.S. 1, 15), and cases involving State title (*e.g.*, *United States v. Utah*, *supra*, 283 U.S. at 76).

What *The Daniel Ball* teaches is that navigability in fact, in federal law, is more than ability to float a vessel. A body of water is navigable in fact only if, in its natural condition, it is useable as a "commercial highway."⁷ The last expression carries several relevant implications:

(1) That the movement is a purposeful aspect of the flow of goods or passengers from one point to another, rather than, say, the aimless cruising of pleasure boats or even the

⁷The "commercial highway" requirement in admiralty and commerce clause contexts embodies a legal as well as a factual element: the waters not only must be navigable in fact, but also must form part of a highway *in interstate or foreign commerce*. See *The Daniel Ball*, 10 Wallace 557, 563; *The Montello*, 11 Wall. 411, 415; *Moore v. American Transp. Co.*, 24 How. 1, 39; 33 U.S.C. 2.10-5(a). We argue below, pp. 29-34, that both elements must be satisfied for state title purposes, and that even if the Great Salt Lake meets all other tests, it is nonnavigable because it has no interstate or foreign link.

scheduled round trips of a sightseeing or excursion vessel;

(2) That the commerce involved is, at least potentially, of substantial volume and frequency;

(3) That the use of the body of water for transporting goods or people is practical, including, presumably, physical possibility and economic feasibility.

These characteristics have been listed as ingredients of navigability in all contexts. But, whatever the appropriateness of demanding so much to establish admiralty jurisdiction, or congressional power under the commerce clause, it is clear that these are the enduring criteria of navigability in connection with determining a state claim to the bed of an inland lake or river. Thus, a navigable body of water in this sense has been defined as a waterway which has "capacity for practical and beneficial use in commerce" (*Oklahoma v. Texas*, 258 U.S. 574, 591), or, more directly, "as a channel for useful commerce." *Brewer-Elliott Oil and Gas Co. v. United States*, *supra*, 260 U.S. at 86; *United States v. Holt Bank*, *supra*, 270 U.S. at 56; *United States v. Utah*, *supra*, 283 U.S. at 76. The matter is well stated in the landmark opinion in *Harrison v. Fite*, 148 Fed. 781, 783 (C.A. 8), approvingly cited by this Court in several decisions (*e.g.*, *Oklahoma v. Texas*, *supra*, 258 U.S. at 591; *United States v. Oregon*, *supra*, 295 U.S. 23):

To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable

floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. * * *

One aspect of the test of navigability is unique to the state title context: that is the *time* when the water course must be navigable. The time is *not* the present, as it is for the purpose of admiralty jurisdiction. See *The Robert W. Parsons*, 191 U.S. 17, 28. Nor may we follow the generous test applicable to the exercise of congressional powers under the commerce clause, which treats as subject to regulation waters which were once navigable but are no longer (*e.g.*, *Economy Light Co. v. United States*, 256 U.S. 113, 123-124), or which only recently have become passable (*e.g.*, *Philadelphia Light Co. v. Stimson*,

223 U.S. 605, 634–635), and also, streams which are not now, and never have been, navigable, but may become so in the future by improvements (*e.g.*, *United States v. Appalachian Power Co.*, 311 U.S. 377, 409; and see 33 U.S.C. 2.10–5).⁸ For the purpose of determining a state claim to water bottoms, the inquiry as to navigability is limited to the condition of the waters on the date of the State's admission to the Union; all else is irrelevant. *Shively v. Bowlby*, 152 U.S. 1, 18, 26; *Oklahoma v. Texas*, *supra*, 258 U.S. at 591, 594; *United States v. Utah*, *supra*, 283 U.S. at 75; *United States v. Oregon*, *supra*, 295 U.S. at 14; see *United States v. Appalachian Power Co.*, *supra*, 311 U.S. at 408.

An important corollary of the rule that navigability must be shown at statehood, not at some future time, is that the water course should be judged in its natural state. Future improvements that would remove obstacles to commerce or otherwise improve navigability are not relevant. *United States v. Oregon*, *supra*, 295 U.S. at 23; *Brewer-Elliott Oil and Gas Co. v. United States*, *supra*, 260 U.S. at 86; *Oklahoma v. Texas*, *supra*, 258 U.S. at 586, 588, 591.

This is not to say that actual use of the river or

⁸ To the extent the commerce clause confers authority over waters tributary to navigable waters, or which could be made navigable only by improvement, it is no longer tied to the "ordinary conditions" language of *The Daniel Ball*, *supra*. But the potential for exercise by the federal government of jurisdiction over an interstate stream or tributary under the commerce clause does not result in the vesting in the State of title to the bed of that stream. Cf. *Oklahoma v. Texas*, *supra*; and pp. 22, 31 and n. 14, *infra*.

lake as an artery of commerce at the date of the State's admission is essential. As said in *United States v. Utah, supra*, 283 U.S. at 82, "where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." Thus, one may judge navigability by assuming a natural development of the area and considering whether the stream or lake, given its geographic setting, its dimensions and direction, will likely become a commercial highway. But the potential of a water course as an artery of commerce may appear lacking from the beginning, despite its ability to float a large vessel. And subsequent history will often be relevant to ratify that judgment.

II. THE GREAT SALT LAKE IS NOT NAVIGABLE IN FACT

The Special Master's findings, we submit, will not support a conclusion that the Great Salt Lake, at the time of Utah's admission to the Union in 1896, was navigable in fact—a phrase encompassing only those waters which "are used, or are susceptible of being used, *in their ordinary conditions*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball, supra*, 10 Wall. at 563 (emphasis added). The Special Master found that various types of boats had used the Lake in pursuit of various activities, both before and after statehood (Findings of Fact 47 and 48, R. 42-43). But

the activities did not involve use of the Lake "as highways for commerce." Instead, as the Special Master concluded (Finding of Fact 51, R. 43), "the boating uses of the Lake have been more of a private nature rather than by independent contractors for hire."⁹ And these uses are not sufficient to determine the question here in issue—whether the lake is navigable in fact.

Of course, the Lake might nevertheless be deemed navigable if, at statehood, it was "susceptible" of commercial use. In this regard, the feasibility of future artificial improvements to the water course—or indeed, the predictability of natural changes—is *not* to be taken into account in assessing navigability for the purpose of a state claim to submerged lands. The controlling principle is that actual navigation at statehood need not be shown if the water course, in its then state, was susceptible of commercial navigation but

⁹ The Master qualifies this finding by "[n]ot counting excursion trips." Excursion uses were quite properly excluded from consideration. To be a highway of trade and travel, a body of water ought to lead somewhere, and lend itself to being used by traffic to get from one end to the other. A boat which ventures forth on a 2,000 square mile body of water for a brief period of time, and then, without having in the interim discharged freight or passengers, returns to the place from which it started, cannot be said to have been engaged in "useful commerce", or to have demonstrated the Lake's "useful capacity as a public highway of transportation." If the existence on a body of water of excursion boats, or any boats hired for pleasure, could be construed to establish the navigability of that body of water, then the lake in the Public Garden in Boston, plied regularly in the summer by a fleet of small boats, would be a navigable body of water, as would countless other small ponds in parks throughout the country.

was not yet so used because of prevailing "conditions of exploration and settlement." *United States v. Utah, supra*, 283 U.S. at 82.

At the outset, exception must be taken to the Master's Finding of Fact 62 (R. 48-49): "While commerce and trade, unless pleasure boating be considered as such, has not flourished on the Lake, this is so not because, as the Government contends, the drawbacks and obstacles are too formidable, but rather, as the State maintains, *the need, strong enough to overcome them*, has not arisen and commercial utilization on a large scale still awaits *future improvements and demands*." (Emphasis added.) This assertion does not serve to demonstrate the Lake's navigability, since even admittedly non-navigable waterways can be commercially utilized, given the "demand" and "future improvements." This finding, rather, shows that commercial use of the Lake has not occurred because of existing obstacles; and practically viewed, these obstacles even now preclude use of the Lake as a highway for commerce, and did so at the time of statehood.

Moreover, it is doubtful if the "susceptibility" rule is applicable here at all. The Lake was discovered (1824-1825) more than 70 years before the date of Utah's statehood (Finding of Fact 1, R. 9) and settlement of the area had largely occurred by that time (Finding of Fact 19, R. 21). In such circumstances, it is plain that the limited use of the Lake before and at the time of statehood cannot be attributed to the undeveloped character of the area. And the history of the Lake since 1896 sufficiently shows that time has not

turned it into a useful commercial highway. The fact is that the Great Salt Lake is not now and has never been "susceptible" of filling that role.

In any event, we submit that under the facts as found by the Master the Great Salt Lake is not "susceptible" to use as a highway of commerce. Undoubtedly, it is the physical situation of the Lake which is chiefly responsible for the insignificant use made of the Lake over the last 145 years. The Lake is a residue of an ancient sea, and occupies a shallow depression in the otherwise remarkably flat plain which once was the bed of that sea. It is the drain for a great area, the Lake itself having no outlet. When the surface of the Lake is at 4,195 feet above sea level, the maximum depth of the Lake is about 25 feet; the *average* depth of the Lake, however, because of the gradual slope of its shores, is much less. Thus, all around that portion of this great flat basin covered by the waters of the Lake stretch huge expanses of smooth, flat, salt-impregnated lands not covered by the waters of the Lake. And the flatness and shallowness of this closed basin (that is, a basin without an outlet) make the shores of the lake extraordinarily desolate, and access to the Lake extremely difficult—conditions which existed at the time of statehood and for many years before.

Indeed, present circumstances illustrate how well the Lake's encircling bogs, marshes, and flats fend off intruders. Except for a town (Lakeside) inhabited only to maintain railroad tracks in the area, there are no settlements or communities of any kind immedi-

ately bordering on the Lake. In fact—and again with the exception of Lakeside—there are absolutely no communities at all anywhere near the western and northern shores of the Lake. And even along the southern and eastern shores of the Lake, there are no settlements immediately adjacent to the water: all of the centers of habitation here are separated from the Lake by from four to twenty miles of bogs, marshes, and flats.

It is unusually difficult to get boats from dry land across the boggy marshes into floatable water. This is but one aspect, although in this case a very important aspect, of the general inaccessibility of the Lake resulting from the flatness and gradual shelving of the basin in which it is located. And in consequence of the physical situation of the Lake—its being in a closed basin, without an outlet—the level of the Lake is subject to marked, although gradual, fluctuation. Since the basin in which the Lake is located is so flat, the fluctuations in the level of the Lake result in the covering or uncovering of large areas of lands, a condition which further thwarts use of the Lake.

In fine: the shallowness of the Lake, the difficulty of access to it, the great distances from the far water line of the Lake to depths capable of floating a boat, the inhospitable nature of the great bogs, marshes, and salt flats surrounding the Lake, the desolateness of the immediate environs of the Lake, are physical features of the Lake which negative its susceptibility to use as a highway of commerce; these physical features, coupled with the facts that there are no communities

along the shores of the Lake, and that in the 145 years that people have been living near the Lake, it has been but sparsely used, there having been no true commercial use of the Lake at any time; all this compels the conclusion that the Lake, as a matter of fact, was not navigable at the time of the admission of Utah into the Union.

III. EXCEPTIONS TO THE MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE LAKE'S NAVIGABILITY IN FACT

The Master declares (Conclusion of Law 5, R. 50) that the "test [for determining navigability] is one of fact regarding the capacity or susceptibility of the waters in their natural state, or ordinary condition, of being used, as the need may arise, by the then customary modes of trade and travel for useful commerce."¹⁰ Next it is said that "capacity" for navigability may be shown by actual use at the critical time; physical characteristics of the body of water; actual uses at any time, if such uses could have been conducted at the critical time on the Lake in its natural state; and experimentation (Conclusion of Law 6, R. 50-51). The Lake's physical capacity to carry water transportation is detailed in Finding of Fact 31, R. 29, and we concede that indeed commercial water craft could *float* on the Lake. Actual commercial utilization of the

¹⁰ We submit that while the setting against which "navigability" is to be assayed certainly involves fact finding, yet the ultimate conclusion whether the facts as found show "navigability" presents a question of law. Finding of Fact 31, accordingly, is more properly treated as a conclusion of law.

Lake is found in the use of boats by their owners to carry livestock and supplies to and from islands in the Lake and to haul guano from other islands (Conclusion of Law 7, R. 51); the use of boats for construction and maintenance of railroad trestles and causeways, for exploration and scientific study, and for police patrol and rescue activities (Conclusion of Law 8, R. 51); and recreational and pleasure boating (Conclusion of Law 9, R. 51). From this it is concluded that Great Salt Lake was "navigable" at the date of statehood (Finding of Fact 31, R. 29; Conclusion of Law 14, R. 52). And it thus follows that the bed of the Lake is owned by Utah (Conclusions of Law 15-18, R. 52). The Master's proposed decree (R. 53-54) accordingly grants Utah the relief it seeks.

In his statement and application of the "test" of navigability in fact, the Master has placed undue reliance on the physical *capacity* of the Lake to float commercial water craft.¹¹ While surely significant, this factor is by no means controlling; rather the appropriate measure is whether the waterway is, or in its natural state is susceptible of being, a highway of commerce. And this measure is satisfied only when: (1) the "commerce" on the waterway involves (or, in the water-

¹¹ Thus in Finding of Fact 31, R. 29, the Master states that his finding that the Lake was "navigable" at statehood is based on the following:

"(a) On January 4, 1896, the Lake was 30.2 feet deep or 4200.2 feet above sea level.

"(b) As of that date, the Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over

way's natural state, is capable of involving) the flow of goods and passengers from one point to another; (2) that commerce is, at least potentially, of substantial volume and frequency; and (3) the use of the waterway for such commerce is practical, so as to be both physically possible and economically feasible.

The hauling of livestock, supplies, and guano to and from the Lake's islands is not commercial use of the relevant kind. The boats used here belonged to the owners of the livestock or the guano; thus the hauling was done, not by a carrier for the purpose of making money by the act of carriage, but by a person or organization whose business was ranching or production of guano and for whom the carriage was only one step in an operation centering on the use of the Lake, not as a highway for trade and travel in their customary modes on water, but as an obstacle to be crossed. In other words, the business of the boats was ranching or guano production, not carrying waterborne freight;

which trade and travel was or might be conducted in the customary modes of travel on water at that time.

"(c) If the need should have arisen on January 4, 1896, the Lake could have floated and afforded passage to large boats, barges and similar craft currently in general use on inland navigable bodies of water in the United States.

"(d) The areas of the Lake which had a depth sufficient for the purposes in sub-paragraphs (b) and (c) above were not narrow or short channels, but were several miles wide, extending substantially through the length and width of the Lake, and covered an area of more than 1,000 square miles. A vessel could have traveled almost in a straight line from Monument Point located on the northwestern tip of the Lake to a point, where Silver Sand Beach is now located, at the southern edge."

the boats were sustained on the Lake from the proceeds of the ranching or guano production operation, not from their profits as carriers.

This may, perhaps, be deemed an unimportant distinction; it could be argued that whether a boat used to haul stock is owned by the rancher himself, or by some party whose business it is to haul stock, makes no difference. But there is, we suggest, a critical distinction. The actual situation is that the carriage described served the needs only of the limited number of people who owned the business operations, in connection with which such carriage was conducted. The Lake is an obstacle which, perforce, they must overcome. This, we submit, hardly demonstrates that the Lake has a practical usefulness to the public as a commercial highway.

Likewise, the fleets of boats which twice came on the Lake, not to engage in trade or travel, but to construct a railroad trestle and a solid landfill causeway across its waters, do not show practical usefulness. While on the Lake, these vessels were not instruments of commerce in the customary modes of trade or travel on water; they were construction equipment. After their work was completed, the steamboats, tugboats, and barges, aside from a few craft which continued to be used for regular inspection checks of the trestle and causeway, all left the Lake, for there was no traffic or other activity on the Lake requiring their presence.

The boats engaged in exploration or scientific study of the Lake are no more indicative or probative of

the utility of the Lake for trade or travel than are the Apollo expeditions to the moon proof of the existence today of interplanetary commerce. And of course the police patrol and rescue activities do not involve "commerce." Boating for recreational and pleasure purposes is similarly inapposite, since such uses do not involve trade or travel in the sense here pertinent.¹²

The actual uses cited by the Master are thus insufficient to show that the Great Salt Lake was navigable in fact on the date of Utah's admission to the Union. As we have shown, at that time the Lake was not, in its natural state, susceptible to practical commercial use. We thus contend that, measured by the proper yardstick, the Lake cannot be said to have been navigable in fact at the critical time, and the Master's conclusion to the contrary should not stand.

IV. THE GREAT SALT LAKE IS NOT NAVIGABLE IN LAW FOR STATE TITLE PURPOSES BECAUSE IT HAS NO INTERSTATE OR FOREIGN CONNECTION

The test of navigability for purposes of federal admiralty jurisdiction and commerce regulation embodies two elements: the waterway must be navigable in fact; and it must also form a part of a highway in interstate or foreign commerce. Our contention, which is supported by historical analysis, is that the same dual test must be satisfied for state title purposes. Thus even if the Great Salt Lake were found navigable in fact, it is

¹² The same would apply equally to excursion craft, if such are within the uses described in Conclusion of Law 9, R. 51. But see n. 9, *supra*.

not navigable in law because it has no interstate or foreign connection.

We have found no decision of this Court holding that in the state title area the interstate or foreign highway requirement also must be satisfied. Indeed, there are suggestions, by way of dicta, in several of the Court's opinions that this requirement need not be met to establish navigability for state title purposes (*e.g.*, *United States v. Oregon*, *supra*, 295 U.S. at 14); and in one instance the Court sustained state title to portions of the bed of an interstate river system which were navigable-in-fact only intrastate, although without discussion of the question here raised (*United States v. Utah*, *supra*, 283 U.S. at 75). But because in our view the Court has not provided a clear-cut answer to this question, and because a historical analysis supports the argument here advanced, we submit that the interstate or foreign highway requirement applies with equal force to the state title area and must be met before a waterway may be deemed "navigable" for that purpose.¹³ In view of our argument on this point, we except to the Special Master's ruling in Conclusion of Law 10 (R. 51) that navigability for state title purposes may be established even though the waterway in question "is not capable for use for navigation in interstate or foreign commerce."

¹³ We reserved and did not urge this point before the Special Master (Brief of the United States With Respect to the Navigability of the Great Salt Lake, p. 9) because of our judgment that only this Court should be requested to consider this issue in view of the opinions in *United States v. Oregon*, *supra*, and *United States v. Utah*, *supra*.

To begin with, the Great Salt Lake lies entirely within the State of Utah (Finding of Fact 5, R. 10). And the Lake has no navigable connection beyond Utah; although one of its tributaries, the Bear River, flows through Wyoming and Idaho before reaching the Lake, and vessels have traveled from the Lake a short way up and down the Bear, yet this stream does not provide water passage to any point outside Utah (Findings of Fact 12 and 24, R. 17, 24.¹⁴ Since the territorial boundaries were never less extensive than the present state boundaries, these conditions have existed throughout the known history of the Lake. Thus if the rule which we here assert is applicable for State title purposes, the undisputed facts preclude a finding that the Lake was “navigable” at the time of statehood.

State ownership of lands underlying waterways within their boundaries derives from the sovereign rights of the English Crown, to which the States succeeded, directly in the case of the original thirteen States, *Martin v. Waddell*, 16 Pet. 367, 410, 416, and under the equal-footing principle in the case of subsequently-admitted States, *Pollard's Lessee v. Hagan*, *supra*. Under English common law principles, the Crown owned only the beds of *tidal* waters—that is, waters within the ebb and flow of the ocean's tides. The governing precept was that the principal highways of water commerce should be treated as public assets and

¹⁴ We note that the Bear might nonetheless be subject to regulation for commerce clause purposes if it were found that improvements could render it navigable interstate. See pp. 18-19, and n. 8.

immune from private ownership, so as to prevent interference with free use of those waters as commercial highways. But even though a waterway was substantial in size and plainly susceptible to commercial use, at common law its bed was not subject to public ownership by the Crown if it was non-tidal. See *Hardin v. Jordan*, 140 U.S. 371, 391–392; *Johnston v. O'Neill*, 105 Law Times Rep. 587, 597 (House of Lords, 1911).

The common-law rule that only tidal waters could be navigable—irrespective of navigability in fact—was both stated as and held to be the applicable rule for American law purposes in all early cases. *E.g.*, *The Steamboat Orleans*, 11 Pet. 175, 182–183; *The Steamboat Thomas Jefferson*, 10 Wheat. 428. This Court soon concluded, however, that public control and ownership of the great rivers and inland lakes in this country was essential to effect the policy behind the common-law rule—to protect free use and public regulation of these waterways as commercial highways. See *Barney v. Keokuk*, *supra*, 94 U.S. at 337–338; *The Propeller Genesee Chief v. Fitzhugh*, *supra*, 12 How. at 454–459. But this admitted departure from the commonlaw rule was, until the *Utah* case, sanctioned only for the nation's great rivers and inland seas, which plainly constitute channels of interstate or foreign commerce and with respect to which the reasons undergirding the common-law rule are equally applicable. See *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435–436; *The Propeller Genesee Chief v. Fitzhugh*, *supra*, 12 How. at 453–454; *The Montello*, 11 Wall. 411, 415.

Because Utah was a public land state, the federal

government originally held title to all lands within the territory, including the beds of both navigable and non-navigable waters. Most of this land was held in the government's proprietary capacity. Only land which the equal footing doctrine identified as an incident of state sovereignty, by analogy to the succession of the original states to the title of the Crown, was held "in trust" against the eventuality of Utah's admission to the Union as a state. *Pollard's Lessee v. Hagan, supra*; *Shively v. Bowlby, supra*, 152 U.S. at 26-28. All other lands remained in the federal government, unless expressly granted to the State by statute. For, except for what the equal footing doctrine required, they could not be made to pass by judicial construction. The Constitution reserves to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, Sec. 3, Cl. 2.

The title of the Crown, however, was limited to navigable, *tidal* waters. The strictest observance of the equal footing clause would have limited the title of new states to similar waters. In fact, despite an initial insistence that the extension of federal commerce and admiralty authority to inland waters was made because property rights were *not* involved, *The Propeller Genesee Chief v. Fitzhugh, supra*, 12 How. at 458, the Court extended the doctrine of state ownership to all waters navigable under the early commerce and admiralty test—that is, to all navigable waterways which constituted part of an interstate highway of commerce. *Barney v. Keokuk, supra*, 94 U.S. at 338.

There is no need to consider whether that holding was mistaken, since Congress subsequently ratified it by passage of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* In line with the original doctrine, however, that Act recognizes state title only to the beds of those bodies of water which were “navigable *under the laws of the United States* at the time such State became a member of the Union.” 43 U.S.C. 1301(a) and 1311 (emphasis added). It recognizes no title to beds underlying *intrastate* waters, not navigable “under the laws of the United States.” See *The Montello*, *supra*; *Poynter v. Chipman*, 32 Pac. 690 (Sup. Ct. of Utah, 1893); *In re Madsen’s Petition*, 187 F.Supp. 411 (N.D. N.Y.); *Shogry v. Lewis*, 225 F.Supp. 741 (W.D. Pa.); *Marine Office of America v. Manion*, 241 F.Supp. 621 (D. Mass.); *In re Builders Supply Co.*, 278 F.Supp. 254 (N.D. Ia). Title to the beds of bodies of water not navigable “under the laws of the United States”—i.e., which are not part of a highway of interstate or foreign commerce—did not pass from the United States to new states by reason of the equal footing doctrine. Since there is no other basis on which it might have passed, title to such lands, including the bed of the Great Salt Lake, remained in the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that on the date of Utah’s statehood the Great Salt was not “navigable”, either in law or in fact, and that therefore appropriate modifications should be

made in the relevant Findings of Fact and Conclusions of Law and in the Proposed Decree contained in the Special Master's Report.

Respectfully submitted.

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