No. 31, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF UTAH *Plaintiff,*

v.

UNITED STATES OF AMERICA *Defendant.*

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT (October 26, 1970), AND IN RESPONSE TO THE EXCEPTIONS FILED BY THE UNITED STATES (January 8, 1971)

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No. 31, Original

In the Supreme Court of the United States

October Term, 1970

STATE OF UTAH *Plaintiff,*

v.

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BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT (October 26, 1970), AND IN RESPONSE TO THE EXCEPTIONS FILED BY THE UNITED STATES (January 8, 1971)

I. NATURE AND STATUS OF LITIGATION

Four years ago (March 1, 1967) the State of Utah instituted this action to resolve a dispute between it and the United States as to the ownership of a belt of land (shorelands) around the Great Salt Lake. The United States claimed ownership by virtue of the common law doctrine of reliction; the State of Utah contended that the doctrine of reliction did not apply.

The question of "reliction" has not yet been reached in these proceedings. Utah's claim to the exposed lands around the Lake is premised on the navigability of the Lake, thus vesting title in Utah at the date of statehood (and as confirmed by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*). Thus, to claim ownership of the exposed belt of land, Utah alleged that the Lake was navigable. The United States neither admitted nor denied navigability of the Lake. In the Special Master's Report of October 28, 1968, concerning the early procedural aspects of this litigation, it was recommended that navigability be resolved to remove any later question concerning that issue. Neither party objected to that recommendation, and the Special Master's Report of that date was approved by this Court (394 U.S. 89).

Accordingly, hearings were held before the Special Master and evidence taken with respect to the navigability of the Lake. He has determined that the Lake was navigable at the date of Utah's statehood and that Utah thus obtained title to the bed, and has reported his recommended findings of fact and conclusions of law to the Court. The United States has filed exceptions and a brief in support of such exceptions. The State of Utah files this brief in support of the Special Master's Report and in answer to the exceptions of the United States.

The question of reliction will be adjudicated in future proceedings before the Special Master and this Court, assuming the present recommendations of the Special Master are adopted by the Court.

II. REPORT OF THE SPECIAL MASTER

Utah did not file any exceptions to the Report of the Special Master. The recommended findings of fact generally favor the State of Utah, and the conclusions of law and decree as proposed fully support Utah's position in this litigation.

The Special Master's Report deserves commendation for its thorough, precise and accurate evaluation of the facts, and for the lucid statement of the positions argued by the parties. On balance and considered in their entirety, the proposed findings of fact present a reasonably accurate and comprehensive picture of the Lake. Also, the Special Master's proposed findings of fact are based, not only on rather exhaustive evidence placed in the record, but also on his personal inspection trips of the Lake and its environs, in the company of counsel and with the approval of counsel, which included a boat trip on the lake, an inspection flight over and around the lake, and visits to the shore of the Lake by automobile. He specifically based his recommended findings on "his own observations of the Great Salt Lake and its environs," as well as the evidence (Report, page 9).

The purpose of the foregoing discussion is to emphasize the completeness of the Special Master's Report, and to caution against isolating any particular part of it without reference to the whole, and the evidence in support of it. Since the exceptions filed by the United States are very narrow in scope, Utah has not attempted, in this brief, to present a full evaluation of the evidence in the record. But such an evaluation is contained in two earlier briefs prepared by Utah for the use of the Special Master and filed with the Court. Since those briefs are for-

mally of record and are now available to the Court, occasional reference will be made in this brief to the parts of those earlier briefs that present a more comprehensive evaluation of the evidence, and the facts argued before the Special Master. Those two earlier briefs carry dates printed on their covers (August 1, 1969 and October 6, 1969), and are identified herein by such dates.

In this brief the Special Master's Report will be identified as Report or as "R.", followed by the appropriate page citation; the testimony of witnesses and proceedings in the hearings will be identified as Transcript or as "T.", followed by the page citation; and the exhibits will simply be identifed by the numbers assigned to them when they were introduced into evidence (including page numbers where appropriate).

Finally, there is appended to this brief a summary of the witnesses and their testimony and an identification of the exhibits and their nature or content. This appendix contains detailed references to the Transcript, not only with respect to the testimony of witnesses, but also with respect to the exhibits, to show the foundation testimony for the exhibits and the comments of counsel and the Special Master at the time such exhibits were placed in evidence. It is not suggested that it will be necessary for the Court to read all of the testimony or examine all of the exhibits. This appendix is intended to serve only as a convenient guide or reference for the Court in locating any particular evidence in which it might be interested.

III. QUESTIONS PRESENTED: A CLARIFICATION

At pages 7-8 of its brief, the United States sets forth the questions presented, as follows:

> 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.

Both of these questions, as stated by the United States, are misleading, and require clarification. To be sure, the United States is entitled to state any question it wishes, framed in any way it pleases. But the questions as above set forth are not the ones argued by the United States in its brief, and for that reason some clarification is useful before proceeding to argument.

With respect to the first question, it is stated that, as a factual matter, it must be determined whether the Lake "was navigable in fact as a highway of commerce" at the date of statehood. This is not so. The question is whether the Lake was *capable* of serving, or was *susceptible* of use as, a highway of commerce, and not whether it in fact was being so used on the date of statehood. The United States does not argue that the Lake had to be navigated at the date of statehood in order to qualify as a navigable body of water, but admits that a *susceptibility* of use, if practical and beneficial, is sufficient. Therefore, it is important to clarify the question in light of the argument. Utah does not intend to be tech-

nical, or to appear to be technical, in making this distinction; but, in view of the considerable evidence and argument with respect to commercial uses of the Lake, and what this shows or does not show with respect to the Lake's capacity at statehood, it is deemed important to make clear that no party contends that any actual commercial use at statehood need be shown.

With respect to the second question, it is stated that it must be determined whether the Lake "was navigable in law as a highway of interstate or foreign commerce." Again, this is misleading, for it sounds as if the question is one of fact, requiring a reference to the record to determine whether the Lake is physically connected with navigable waters in interstate commerce. That is not the question. The question, as actually argued by the United States, is one of law, *i.e.*, whether, for purposes of title, the waters in question must be navigable in interstate or foreign commerce. The difference between the two questions is significant. As a factual matter, there never was such an issue before the Special Master, and there are no findings specifically resolving such a question. As a procedural matter, the United States simply raised and "preserved" the legal question approximately four months after all of the evidence was in, realizing that such an argument required the over-ruling of prior decisions of this Court, and was properly a question, not for the Special Master, but for the Court itself. The United States has now argued that legal proposition in its brief supporting the exceptions it has filed. So the question is not whether, as a matter of fact, the Lake is connected with navigable waters in interstate or foreign commerce: but whether, as a matter of law, this Court should over-

rule its prior decisions and now impose the legal requirement that navigability, for purposes of state title, requires such a connection in interstate or foreign commerce.

The above "clarification" of the questions at issue may or may not be useful to the Court, but it has seemed to Utah that such questions did require a clearer perspective before proceeding to argue them.

IV. SUMMARY OF ARGUMENT

The Government has presented two questions for determination, one of fact and one of law. Point V. A. of this Brief responds to the factual question and Point V. B. responds to the legal question. They are summarized below.

A. *The Factual Question: Is the Great Salt Lake Navigable in Fact?*

1. *Identification of the Issue*

Everyone agrees that this question is to be measured and answered by the test set forth by this Court in *The Daniel Ball*, 77 U.S. 557 (1870), where it was said that waters:

> are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (77 U.S. at 563)

This language seems clear enough, but it is important to identify to what extent the precise issue here in

dispute is a question of fact or of law. The dispute is not with respect to the susceptibility of the Lake to support commerce. That is clearly conceded by the United States, as, for example, in the following exchange of remarks between the Special Master and Mr. Green (counsel for the Government) during the hearings:

> THE COURT: Well, let me understand you. Do you deny the quality of evidence which would show the susceptibility of the activity of the freight or commerce at the time of the admission of Utah as a state?
>
> MR. GREEN: Do we deny the what, your Honor?
>
> THE COURT: The susceptibility of it, deny any actual commerce on it. Suppose it was susceptible to trade and commerce at the inception of Utah to statehood?
>
> MR. GREEN: That, your Honor, we would concede right this minute that it's susceptible of having boats going over its surface, that it was in 1896 and it is now. (Transcript, p. 18)

Mr. Green went on to explain that the position of the Government was that the Lake, while having an obvious *physical* capacity, did not have a *useful* capacity for commerce. If Utah had denied that navigable waters must have a *useful* capacity for commerce, there then would have been a question of law as to whether such a criterion was part of the legal definition of navigability. But Utah did not and does not deny this. On the contrary, it is assumed that the waters must have a useful capacity, for it would seem that a "useless" capacity would be no capacity at all. The questions, then, are (1) what is a useful physical capacity, and (2) how is it to be determined.

2. *Useful Capacity for Commerce*

This Court has never given a detailed definition or description of useful capacity for commerce, but has, rather, simply reaffirmed the language of *The Daniel Ball* that the waters must be used, or must be susceptible of being used, in their ordinary condition, for the customary modes of trade and travel on water. In refusing to frame a more detailed definition of navigability, and in refusing to compare one navigable body of water with another, this Court has made clear that the determination is strictly one of fact, and that each case must be judged on its own facts:

> The Government invites a comparison with the conditions found to exist on the Rio Grande in New Mexico, and the Red River and the Arkansas River, above the mouth of the Grand River, in Oklahoma, which were held to be non-navigable, but the comparison does not aid the Government's contention. *Each determination as to navigability must stand on its own facts.* In each of the cases to which the Government refers it was found that the use of the stream for purposes of transportation was exceptional, being practicable only in times of temporary highwater. In the present instance, with respect to each of the sections of the rivers found to be navigable, the Master has determined upon adequate evidence that "its susceptibility of use as a highway for commerce was not confined to exceptional conditions or short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use as a highway for commerce." (*United States v. Utah*, 283 U.S. 64, 87 (1931)) (emphasis added)

It might be noted that, in the above case, the Court found a useful capacity for commerce where the waters

were located in remote areas, were not more than three feet deep, were beset with swift currents, floating debris, shifting sandbars, and similar impediments.

And it might be observed that in *United States v. Holt State Bank*, 270 U.S. 49 (1926), this Court found Mud Lake to be navigable, even though it had been drained and dry at the time evidence was taken. However, at the date of Minnesota's statehood, the Lake was from three to six feet deep and, despite serious impediments, could be usefully navigated. On the other hand, this Court in *United States v. Oregon*, 295 U.S. 1 (1935), found lakes not to have a useful capacity for commerce when the waters totally disappeared, or when the water averaged between one and two inches in depth, or where a lake was 1,400 acres in size with water of a "negligible" depth covering only 400 acres, and the remaining 1,000 acres being nothing but mud (295 U.S. at 16).

The above references simply indicate how this Court has viewed the individual facts of other cases in determining navigability, and they do not, of course, establish the navigability of the Great Salt Lake. That question must be determined with respect to the individual facts of this case.

3. *Development of the Evidence*

As the evidence was introduced before the Special Master, it became clear that the Great Salt Lake indeed had a useful capacity. Many witnesses were called and many successful and continuing uses were shown.

But one of the most impressive witnesses was Thomas T. Lundee, an engineer and naval architect, who

had over thirty years experience in design, operation, and use of marine craft, and who was familiar with navigable waters in many parts of the world, as well as in the United States. He had personally designed marine craft for use on the Great Salt Lake, and had personally observed their operation on the Lake. With respect to the "useful" capacity of the Lake, he testified that it was far more useful and economical than many other navigable waters. A summary of Mr. Lundee's testimony, with respect to the commercial usefulness of the Lake, appears at pages 29-33 of this brief.

The point here is not to argue the facts, but simply to emphasize that the Special Master's Findings were based on competent evidence.

4. *Position of the Government*

The Government, at pp. 24-25 of its Brief, has summarized its position in opposition to the Findings of the Special Master:

> 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.

5. The Conflict

Utah submits that the above characterization of the evidence by the United States is incorrect. On the contrary, the Special Master's Findings are fully supported by uncontroverted evidence in the record. The Government does not make a single reference to the evidence at any point in its Brief to support the statement quoted above. It is not enough for the Government to say in footnote 10 at page 25 of its Brief:

> 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.

The question, then, is to what extent does the evidence support the Special Master's "ultimate conclusion" of navigability? The Government has not shown where it does not. In Point V. A. Utah shows where it does.

B. *The Legal Question: Does Navigability for State Title Require a Navigable Capacity in Interstate Commerce?*

In 1842 this Court held that the original states became immediately and rightfully vested with all of the powers and prerogatives of ownership and control of navigable waters and their beds as had earlier been vested in the English Crown and Parliament (*Martin v. Waddell*, (16 Pet. 367, 416 (1842)). In 1845 this Court further held that the same ownership rights were vested in all states subsequently admitted into the Union, even though carved out of federal territory, because such a result was required to achieve constitutional equality

among the states (*Pollard v. Hagan*, 3 How. 212 (1845)). In 1851 the Court said that navigable waters in this country included all waters that could be navigated, and were not to be limited by the English rule that only tide waters were navigable (*The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1851)). In 1870 it was said that the test of navigability in law is simply one of navigability in fact; and that all waters navigable in fact, whether in interstate commerce or in intrastate commerce, are thus navigable in law (*The Daniel Ball*, 10 Wall. 557, 563 (1870)). In 1931 the Court held that state title must vest, as a matter of constitutional equal footing, even though the waters are only navigable intrastate, and where it was "undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce" (*United States v. Utah*, 283 U.S. 64, 75 (1931)).

The Government argues, in this proceeding, that this Court should now depart from the above principles, and overrule *United States v. Utah* and reject such other decisions of the Court as would seem to support the *United States v. Utah* holding. In so urging the Court, the Government advances no reasons to support such a course of action, other than it has a new argument founded on historical analysis which it wishes to present.

The Government's "new" argument is, in essence, nothing more than a request that this Court adopt the English test of navigability for intrastate waters (a test rejected in the *Genessee Chief* 120 years ago), and declare them to be non-navigable if they are not affected by the ebb and flow of the tide, thus denying title to the

states. This seems to be an anomalous suggestion, for it would be rare indeed for waters that were navigable only intrastate (no connection in interstate or foreign commerce) to be affected by the tides.

The State of Utah responds to the Government's argument in Point V. B. of this Brief, where it is pointed out, not only that such argument is neither new nor historically based, but that it would lead to illogical and absurd results, would seriously injure public and private interests, and would violate the requirement of constitutional equal footing among the states—and that this impact would be felt not only in this case, but with respect to every intrastate navigable body of water in every state. More specifically, Utah argues, among other things, that the Government's position is objectional because:

> The decisions of this Court are squarely against such a view;
>
> Congress has confirmed in the states title to the beds of all navigable waters, clearly foreclosing the Government's argument;
>
> Federal agencies, and the Department of Justice in this very action, have heretofore taken the opposite view from the one which the Government now argues;
>
> There is no historical or legal basis for the Government's argument;
>
> The Government's argument, if adopted, would lead to illogical, impractical and absurd results;
>
> Real estate titles and rules of property law would be confused and clouded;
>
> Public access to intrastate waters would be eliminated, and present public uses for naviga-

tion, fishing, recreation and esthetics would be barred;

The Government's argument would amount to a denial of constitutional equal footing among the states.

V. ARGUMENT

A. *THE GREAT SALT LAKE IS NAVIGABLE IN FACT*

This section of the argument responds to the Government's exceptions to the Special Master's Findings of Fact, and therefore carries the above caption, even though certain components of the argument contain legal as well as factual considerations.

1. *Exceptions Filed by United States*

At page 4 of its brief the Government states only two exceptions to the facts as found by the Special Master. They are phrased as follows:

> 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).

The first exception above quoted relates only to part of Finding of Fact 31, and is characterized by the United States, not as an objection to any facts as found and determined by the Special Master, but as an improper "legal conclusion as to the 'navigability' of the Lake at statehood." This view by the United States is ampliphied in note 10 at page 25 of its brief, where it is said that:

> 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.

The second exception taken by the United States, quoted above, is directed only to Finding of Fact 62, and does seem to state a direct objection to the Special Master's finding that the Lake is susceptible of commercial utilization on a large scale.

In essence, then, with respect to the facts, the United States has put in issue (1) the question as to what extent the determination of navigability for title purposes is a question of law, and (2) whether the Special Master erred as a matter of fact in finding that the Lake was susceptible of commercial utilization on a large scale. While these two questions overlap to some extent, Utah will respond to them in the order stated.

However, as a preliminary matter, it must be observed that the United States has cited no evidence to controvert any of the Special Master's findings. The

brief of the United States does not cite even one reference, for any purpose, to any exhibit, to any testimony, or other evidence in the record, but simply "argues" the Special Master's findings of fact. This is most unusual, for the United States to urge this Court to reject certain facts as found by the Special Master, without suggesting to the Court where any evidence might be found in the record to support such a rejection.

Perhaps this omission by the United States is explained, at least in part, in Section A. 4 of this brief, *infra*, where the nature and weight of the evidence is discussed. But for the present, Findings of Fact 31 and 62, as challenged by the United States, will be discussed.

2. *Finding of Fact No. 31 is Correct: The Great Salt Lake is Navigable as a Matter of Fact and Law*

It is true that a determination of navigability requires certain findings of fact as well as the application of law. The facts relate to the physical characteristics of the lake, and the legal conclusions result from determining whether those characteristics qualify the lake as being susceptible of commercial navigation. In other words, and as this Court has succinctly held, waters that are navigable in fact are navigable in law.

Actually, then, the only legal requirement for navigability is that the waters be navigable as a matter of fact. The parties have no quarrel with each other as to what the test of navigability is, as laid down by this Court. It is agreed (see United States' brief, page 16) that the applicable test was clearly stated in *The Daniel Ball,* 10 Wall. 557, 563 (1870):

> 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. * * *

Neither party suggests that the above test has been altered by this Court, but, on the contrary, agree that it has been consistently followed in all subsequent cases, including litigation involving title to the beds of navigable waters (see United States' brief, page 16).

The question, then, is what waters are navigable in fact? This requires a determination of the physical characteristics of the body of water in question. The United States suggests that the capacity for navigation must be practical and useful (United States' brief, pages 16-18). Utah does not contest this assertion. While it may be true that certain waters could have an unquestioned physical capacity to float water craft, and yet have such characteristics as to make such capacity completely impractical and useless, this Court has never so held. Further, any such speculation in that regard is neither useful nor relevant to the issue in this case, because the Great Salt Lake does have a physical capacity to support navigation that is useful and practical, capable of satisfying whatever needs have arisen in the past or might arise in the future. These are questions of fact, not law, and this Court has indicated the kinds of physical characteristics that suffice to qualify a body of water as navigable. A brief review of some of the more important cases is illuminating.

In *The Daniel Ball*, mentioned above and relied upon by both parties as being an accurate statement of the test applicable to the case at bar, this Court had no trouble finding navigability when:

> From the conceded facts . . . [The Grand River] is capable of bearing a steamer of one hundred and twenty three tons burden, laden with merchandise and passengers . . . a distance of forty miles.

And in *U.S. v. Holt State Bank*, 270 U.S. 49 (1926) (discussed by the Special Master in note 4 at page 5 of his Report) the dispute concerned title to a lake that had been drained and thus was dry at the time evidence was taken, but found by this Court to be navigable because at statehood the water was 3 to 6 feet deep, and could, despite numerous obstacles, support the "small boats of the period." Also, in *United States v. Utah*, 283 U.S. 64 (1931), the dispute concerned title to certain sections of river bed, and this Court found stretches to be navigable when the water did not exceed three feet in depth, consisted of rapid currents and floating debris, shifting sandbars, and other impediments to navigation, concluding:

> Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. (283 U.S. at 83).

But a review of such other decisions of this Court is really a digression from the issue at hand, since each case

is to be decided on its particular facts, (*United States v. Utah, supra*, 283 U.S. 64 at p. 87), and the Great Salt Lake has a capacity for navigation that is more useful, beneficial and practical than any prior case adjudicated by this Court in title disputes. The question, then, is what are the physical characteristics of this Lake that justify the Special Master's Finding of Fact 31 that it "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." In that very finding, appearing at page 29 of the Report, and immediately following the part quoted by the United States, the Special Master proceeds to list certain facts to support his determination of navigability:

> This finding is not based in whole or in part on the doctrine of judicial notice or the fact that the Lake has been meandered, but 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 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 substan-

> tially 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.

Of course, that part of Finding 31 quoted above has not been excepted to and is fully supported by the evidence. The temptation is to proceed to detail a number of additional facts favorable to navigation, as contained in the evidence and a number of other findings by the Special Master. But, since Utah recognizes that all of the findings must stand, except for Finding No. 62 and that part of Finding No. 31 that were the basis for exception by the United States, and since the United States has cited not one shred of evidence to dispute those two findings, it seems that such an effort would be more burdensome than useful to the Court.

3. *Finding of Fact No. 62 is Correct: The Great Salt Lake is Capable of Supporting Commerce on a Large Scale*

The United States disputes this Finding of the Special Master by arguing that the actual uses of the Lake do not show a useful capacity and the lake has impediments which discourage commercial operations. Again, the United States fails to suggest a single reference to the evidence to show why the Special Master's findings are not well founded. On the contrary, this finding is fully supported in the evidence. There has not been a time when the Lake has not fully satisfied the navigational demands placed upon it. For example, the Spe-

cial Master found a great number of navigational uses from the evidence introduced. That evidence can be summarized as follows:

> Great Salt Lake either has been or currently is being navigated for various purposes, including shipment of cattle, sheep, horses, buffalo, ores and minerals, fence posts, railroad ties, guano, commercial salt, decorative salt crystals and rocks, farm machinery, grain, household supplies and pump station supplies; and has also been navigated for the construction of a railroad trestle and causeway, recreation craft for paying passengers and for commercial hire or rental, private craft for recreation, scientific investigative purposes, railroad maintenance patrol, law enforcement patrol, rescue operations, and the harvest of brine shrimp.
>
> The early history of navigation on the Great Salt Lake is illustrated quite well in the compilation of historical materials contained in Exhibit P-8. This collection covers a period of time commencing more than forty years before statehood and continues for a number of years after statehood. The following references are cited with respect to different types of navigational uses, although many boats were used for several purposes, such as hauling passengers, ore, livestock and other products. The references include not only historical materials, but also testimony from live witnesses and the evidence contained within the various exhibits.
>
> a. *Livestock*, including cattle, sheep, horses and buffalo.
>
> Joseph S. Nelson, witness for plaintiff, T. 85-86, 89, 93-94, 96-97.
>
> Zillah Walker Manning, witness for plaintiff, T. 217-19, 221-22, 227-28.

Leon L. Imlay, witness for plaintiff, T. 70-71.

Exhibit P-8, pages 15, 16-A through 16-D, 17, 19, 32-A.

b. *Ore and Minerals.*

Exhibit P-8, pages 2-B, 4 (ore, bullion, coke, charcoal, coal), 16-A through 16-D, 18-A and 18-B (gold).

Exhibit P-8, pages 9, 10.

c. *Fence Posts and Railroad Ties.*

Exhibit P-8, pages 2-A, 15, 16-A through 16-D.

d. *Guano.*

Phil Dern, witness for plaintiff, T. 116-17, 123-24.

Leon L. Imlay, witness for plaintiff, T. 70-71.

Elmer Butler, witness for defendant, T. 262.

e. *Commercial Salt.*

Exhibit 8, pages 16-A through 16-D (special 75 foot salt transport barge).

f. *Decorative Salt Crystals and Rocks.*

John Clawson Silver, witness for plaintiff, T. 289.

g. *Farm and Industrial Machinery.*

Zillah Walker Manning, witness for plaintiff, T. 222.

Phil Dern, witness for plaintiff, T. 124.

h. *Grain.*

Zillah Walker Manning, witness for plaintiff, T. 223.

i. *Household Supplies.*

Exhibit P-8, page 32-A.

Zillah Walker Manning, witness for plaintiff, T. 220.

j. *Pump Station Supplies.*

Leon L. Imlay, witness for plaintiff, T. 68-69, 73.

k. *Construction of Railroad Trestle.*

Exhibit P-8, pages 2-C.
Exhibit P-9.
Exhibit P-10.
Exhibit P-12.
Exhibit P-13.

l. *Construction of Railroad Causeway.*

Thomas T. Lundee, witness for plaintiff, T. 166-210.

Exhibit P-20.
Exhibit P-21.
Exhibit P-22.
Exhibit P-23.
Exhibit P-29.

m. *Commercial Recreation Craft.*

Exhibit P-8, pages 2, 2-B, 3-5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 14-A, 20-22, 23-A through 23-D, 26-A through 26-D, 27, 28-30, 31, 32, 33, 34-A through 34-D.

Exhibit P-9.
Exhibit P-10.
Exhibit P-11.
Exhibit P-13.

Leon L. Imlay, witness for plaintiff, T. 62-68.

Joseph S. Nelson, witness for plaintiff, T. 83-92.

Claire Wilcox Noall, witness for plaintiff, T. 75-79.

Francis W. Kirkham, witness for plaintiff, T. 233-34.

Phil Dern, witness for plaintiff, T. 111-116, 119.

John Clawson Silver, witness for plaintiff, T. 287-91.

Reese F. Llewellyn, witness for plaintiff, T. 104-107.

Harold J. Tippetts, witness for plaintiff, T. 129-37.

n. *Private Craft for Recreation.*

Exhibit P-8, pp. 20-22, 23-A through 23-D, 24, 25, 26-A through 26-D, 27, 28-30, 31, 32-A through 34-D.

Exhibit P-11.

Exhibits P-26, P-27, P-28.

Leon L. Imlay, witness for plaintiff, T. 62-68.

Joseph S. Nelson, witness for plaintiff, T. 83-92.

Claire Wilcox Noall, witness for plaintiff, T. 75-79.

Phil Dern, witness for plaintiff, T. 111-116.

Reese F. Llewellyn, witness for plaintiff, T. 104-07.

Harold J. Tippetts, witness for plaintiff, T. 129-37.

o. *Craft for Scientific Purposes.*

William P. Hewitt, witness for plaintiff, T. 139-46.

Exhibit P-8, page 1, and T. 34.
Exhibit P-14.
Exhibit P-17.
Exhibits P-24, P-25.

p. *Railroad Maintenance Patrol.*

Exhibit P-19.

Golden O. Peterson, witness for plaintiff, T. 148-56.

Joseph S. Nelson, witness for plaintiff, T. 96.

q. *Law Enforcement Patrol.*

Reese F. Llewellyn, witness for plaintiff, T. 105-06.

Harold J. Tippetts, witness for plaintiff, T. 132, 134.

Exhibit P-18.

r. *Rescue Operations.*

Harold J. Tippetts, witness for plaintiff, T. 132.

Reese F. Llewellyn, witness for plaintiff, T. 105-06.

s. *Brine Shrimp Harvest.*

Gail Sanders, witness for plaintiff, T. 157-64.

From this rather exhaustive evidence, the Special Master found nineteen different categories of use, as set forth in Findings 48 and 49, as follows (R. 42-43):

> 48. Water craft were identified in the evidence as having been used for transporting or hauling the following over the Lake:
>
> (a) Passengers and workmen;
>
> (b) Livestock such as cattle, sheep, horses and

buffalo to and from Antelope and Fremont Islands;

(c) Grain;

(d) Lumber in the form of fence posts, cedar posts, railroad ties and telephone poles;

(e) Household supplies, flagstone, farm machinery, pump-station supplies;

(f) Material for the construction of the railroad trestles and causeways;

(g) Guano from Gunnison and Bird Islands to the mainland;

(h) Brine shrimp and brine-shrimp eggs;

(i) Ores, minerals and salt;

(j) Salt crystals and rocks; and

(k) Wild birds for Hogle Zoo.

49. The remaining identified craft were used for the following purposes:

(a) Exploration (3) and survey (2) of the Lake;

(b) Scientific investgation (5) and study of the Lake;

(c) Excursions (15), recreation (11), purely pleasure (3), and musical entertainment;

(d) Railroad maintenance and patrol of the trestle and causeway (4);

(e) Law enforcement patrol;

(f) Rescue operations;

(g) Harvest of brine shrimp and brine-shrimp eggs (4), and

(h) Publicity.

The Special Master further found that the foregoing navigational uses were accomplished with at least twenty three different types of boats (Finding of Fact 47, R. 42):

> 47. *Type of boats on the Lake*: The following are the types of water craft mentioned in the evidence as having sailed on the Lake: (a) Rowboat, (b) bull boat, (c) scow, (d) skiff, (e) frigate, (f) sailboat, (g) sloop, (h) yawl, (i) schooner, (j) steamer or steamboat, (sternwheel and sidewheel), (k) catamaran, (l) dory, (m) launch, (n) yacht, (o) DUKW or "duck," (p) Chris-Craft, (q) LCI, (r) airboat, (s) tugboat, (t) barge (deck, anchor, dump and pile driving), (u) float boat, (v) dredge, and (w) jet boat.

Of course, Findings 47, 48 and 49 are not in dispute (nor are any of the other Findings, except 31 and 62). But this illustrates the difficulty in the position taken by the United States, when it argues "facts" in the abstract without reference to the evidence. A great deal of evidence was placed before the Special Master. He did a meticulous and thorough job in analyzing the evidence and preparing comprehensive and detailed Findings of Fact. When the United States discusses these findings without regard to the factual basis in the record, it is impossible to join direct issue with the United States.

As a further example of this, the United States introduced absolutely no evidence directly related to the issue of navigability (this is explained in more detail in section A. 4, next following), but primarily introduced early writings by people who were not discussing navigability but from which inferences, interpretations, and conclusions would have to be drawn at this late date concerning difficulties or impediments attending navigation.

In contrast, Utah introduced direct evidence as to navigability, including 16 live witnesses and numerous exhibits. Again, more will be said about this in the next section of this brief, and the only point of significance at this juncture is that the evidence does contain direct, persuasive and uncontroverted evidence that the lake is free from serious impediments to navigation.

Consider, for example, the testimony of Thomas T. Lundee, an international expert on navigation who personally designed and supervised the operation on the Great Salt Lake of some of the world's largest barges in the 1950's. He testified that the Lake, rather than having impediments to navigation, was particularly adapted to economic, practical and useful commerce because it had no currents or tides, the water did not freeze (permitting operation day and night, winter and summer), the salt content gave the water 20% more buoyancy (permitting a 20% greater payload), dock and harbor facilities were easy to construct and maintain, and dredging was inexpensive because the shores contained very little rock, and that the winds and salty brines created no particular problems. Mr. Lundee's testimony was summarized in Utah's brief dated August 1, 1969 at pages 24-28, containing references to the transcript, as follows:

> *Thomas T. Lundee*, called as a witness for plaintiff, testified that:
>
> a. He is a consulting engineer and naval architect, licensed by the State of California, and owns his own consulting company with offices in San Francisco (T. 166-67); he has designed many small barges; large barges, off-shore drill rigs, bulk carriers, tug boats, and dredges (T.

167-68); he has obtained about 15 patents for marine equipment design, including one for the "push-tow" process for large barges designed by him for use on Great Salt Lake (T. 169); and, generally, has designed marine craft for over 30 years, is familiar with barge design, operation and use, and is familiar with navigable waters, including navigable waters of the United States (T. 169).

b. He was engaged by Morrison-Knudson Company and International Engineers to design barges and tug boats for use on Great Salt Lake to construct a rock fill causeway across the lake for Southern Pacific Company (T. 170); he studied the waters of the lake, finding them to contain about 20% more salt than ocean water, thus resulting in a 20% "bonus" in carrying capacity of barges and other craft because the greater buoyancy resulted in a shallower draft (T. 171-72); and he discovered that the heavier salt concentration prevented the water from freezing, thus permitting year round barging operations (T. 172, 177), and that such salt concentration presented no serious problems of corrosion, operation or maintenance (T. 173-74, 177).

c. Thirty nine boats were acquired at a cost of about $7,000,000.00 (T. 176) for use on the Great Salt Lake causeway construction (T. 173); including barges and equipment designed specifically for that particular job (T. 169, 175); and that the boats consisted of:

(1) Six large dump barges 250 feet long, 55 feet wide, and 12 1/3 feet deep, each capable of carrying a per trip tonnage load equal to 90 railroad cars with a draft of 13 feet (T. 175-76);

(2) Six 1,000 horsepower tow boats to push the dump barges;

(3) Five deck barges 178 feet long, 48 feet wide, and 10 feet high, with a per trip carrying capacity of 1,600 tons each;

(4) Two 600 horsepower twin-screw tour boats;

(5) Three 220 horsepower tug boats;

(6) Two dredges;

(7) Fifteen miscellaneous boats, including dredge tenders, anchor scows, anchor barges, pile driving barges, crew boats and scows (T. 176, Exhibit P-21).

d. The thirty nine boats were used on the Great Salt Lake for about two years, from early 1957 to 1959 (T. 177), completing a job that cost about $49,000,000.00 and required the removal and placing of 41,000,000 cubic yards (over 70,000,000 tons) of fill, with over 90% of the fill being placed by barges as the only feasible means of hauling and placing such fill (T. 178-79); the tonnage of fill hauled by the barges was "vastly cheaper" than that part of the fill actually hauled by trucks and railroad cars (less than 10%) (T. 179).

e. The Great Salt Lake was particularly economical for navigation, because:

(1) The water did not freeze in winter and the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. 177);

(2) The harbor, dredged at Little Valley near Promontory Point, was 400 feet wide and 1,500 feet long, and was unusually inexpensive because it was clay with very little rock (T. 181); due to lack of currents and tides in the lake, the harbor did not silt or fill and during the two years of continual use no further dredging, cleaning or main-

tenance was required (T. 182-84); and, in general, the cost of harbor construction and maintenance on the Great Salt Lake was "appreciably less" than on other inland waterways customarily used for navigation (T. 184).

(3) The greater buoyancy of the waters of the Great Salt Lake made navigation more economical than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171); the dump barges that operated fully loaded on Great Salt Lake with a 13 foot draft would have required a 15½ foot draft on the Mississippi River, and since that river has a 9 foot governing channel, could only have operated there with a partial load (T. 175-76); all barges in commercial use in 1896 when Utah obtained statehood could have successfully navigated on the Great Salt Lake (T. 207-08); and barges in common use today, such as grain barges, cement barges, petroleum barges and all other commercial barges shown in a publication entitled "Commercial Transportation on the Inland Waterways," published by the Society of Naval Architects and Marine Engineers (Exhibit P-22), could operate fully loaded on the Great Salt Lake (T. 206).

f. Additionally, Mr. Lundee stated that:

(1) After completion of the causeway on Great Salt Lake, the barges and other craft were in good condition and were sold at favorable prices for use elsewhere in the world (some, loaded with smaller craft, were towed across the Atlantic for use in Portugal) (T. 173-74).

(2) It would be necessary to use boats to drill

for oil or gas underneath the bed of the Great Salt Lake (T. 210).

(3) If the need should arise, the railroad trestle and causeway could be modified at reasonable cost to accommodate larger commercial vessels, probably by constructing draw bridges or swing bridges (T. 206-07).

A motion picture, which was made during the construction of the causeway, was introduced in evidence as Exhibit P-23, showing the actual navigation of the lake by the large barges and numerous smaller craft described in Mr. Lundee's testimony. These barges traversed the entire width of the lake, summer and winter, during a period when the lake was approximately four feet lower than it was at statehood. Some of these barges were among the largest in the world at that time—250 feet long and 55 feet wide—with a capacity to carry a tonnage equivalent to 90 railroad cars each trip. This evidence was offered not only to show commercial navigation, but also to show that the lake was susceptible of navigation in 1896 when it was four feet higher than it was when these barges successfully operated on it. While this film shows the physical capacity of the lake, more significant is the ease, efficiency and economy with which the lake satisfied the demand placed upon it during the construction of the causeway. (T. 172-184). The testimony of Mr. Lundee, as summarized above, is adopted in a number of the Special Master's Findings of Fact, and the Special Master rejected no part of the testimony of Mr. Lundee.

In the main, counsel for the United States elected not to cross-examine Mr. Lundee about the presence or

absence of impediments to navigation, or whether the lake was useful, practical or beneficial as a highway of commerce, but elected, instead, to avoid that confrontation, and seek reference to historical materials that were written without reference to the issue of navigability. But now, the United States does not even cite or make reference to those historical writings to dispute any of the facts found by the Special Master.

4. *Nature and Weight of Evidence*

The State of Utah seeks neither to compliment itself on the evidence it introduced into the record, nor to discredit the United States for the evidence it placed in the record. But, in view of the way the United States has generalized as to facts and findings in its brief, without any reference to the actual evidence, a brief review of the nature and weight of the evidence is both necessary and proper.

The Special Master made some references to the nature and extent of the evidence. At page 6 of his Report, he observed:

> The State of Utah has offered evidence to show physical capacity of the Lake to support navigation as of the date of Statehood. It did not stop there. To illustrate this capacity it also has shown the variety of vessels which have sailed on the Lake, both before and after the critical date, and the purposes for which they were put when the need arose.

In response to this evidence by Utah, the Special Master observes that the United States argues that a body of water may be unsuited to navigation from the

beginning because of unfavorable physical characteristics, supporting this argument:

> *by citing excerpts from writings* describing the shallow shorelands, the sailing difficulties encountered from the high brine concentration of the Lake, the desolateness and inaccessibility of its shores, and by citing population, location and distribution as confirming the useless nature of the Lake so far as commerce is concerned. (Report, page 7, emphasis added)

The Special Master then observed that Utah argued that:

> . . . speculation as to the relative probabilities or improbabilities of the present or future need for useful commerce is not to be indulged in, when the waterway has conceded physical capacity, and that factors such as geographical setting, accessability, population density and distribution, transportation facilities, degree of industrialization and related developments in the neighborhood of the waterway may only be considered to explain limited use or non-use where that body of water has doubtful physical capacity; that if significant commercial needs arise, the Lake will be there with its physical capacity to serve as a useful highway of commerce. *Nevertheless, the State of Utah has offered evidence which it believes will demonstrate that a judgment to the effect that there is little or no prospect of any future need or useful commerce on the Lake is furtherest from the truth.* (Report pages 7-8, emphasis added)

Again, with respect to this identical point, the Special Master observes at page 30 of his Report:

> . . . the State of Utah has offered a great deal of testimony and many exhibits to forestall a finding for which the Government contends.

The above excerpts from the Special Master's Report with regard to the evidence are intended to show only that the Master correctly stated the positions contended for by the parties and the scope and character of evidence placed before him. That evidence, as already indicated, is summarized in an Appendix to this brief.

Turning now to a specific review of the evidence in the record, it is believed that the Court will be assisted by a summary of the kind and type of evidence from which the Special Master made his Findings of Fact. As stated earlier, the Findings are specific and complete, and based on rather extensive evidence. But not all of the evidence was of equal weight or merit. In fact, the United States did not introduce one shred of competent evidence with respect to the navigability of the Great Salt Lake at the date of statehood.

The United States called only one live witness, Elmer Butler, an employee of the United States Geological Survey, and then totally ignored his testimony except for an attempt to impeach one of his answers given on cross-examination (Government's brief before the Special Master, p. 71). Beyond that, the United States simply introduced four exhibits, consisting of two maps, a collection of excerpts from historical materials, and a report by the U. S. Army Corps of Engineers relating to the feasibility of improving or building a new boat harbor on the Great Salt Lake.

Actually, with respect to the relevant observations in the Corps Report, Item 00 (Survey Report for Navigation) of Exhibit D-4, concludes that (1) the lake was navigable (page 12); that it had been navigated for "commercial operations" (page 10); that the proposed

harbor would require only "nominal maintenance" (pages 11-12); that the "lake is particularly attractive to tourists because of its picturesque desert surroundings" (page 6); and that "lands below the Burgess meander line as well as the lake itself belong to the State of Utah" (page 3)—and these are part of the final determinations of the Corps of Army Engineers, after its hearings were held and the investigation completed.

The witnesses called by Utah were well informed and highly qualified with respect to the matters about which they testified. The witnesses who had knowledge of the early use of the lake for navigation were as follows:

(1) Zillah Walker Manning was born in 1891, five years before statehood, and lived on Antelope Island from the time of her birth until 12 years of age, while her father was superintendent of livestock and ranching on the island. Accordingly, she had reliable first-hand remembrances of navigational uses of the lake related to the shipment of livestock, general supplies, farm machinery and farm products. (T. 217 *et seq.*)

(2) Leon L. Imlay, born three years prior to statehood, lived near the Great Salt Lake, visited the lake near the date of statehood as a paying passenger on an excursion boat, and from 1893 through 1939 frequently traveled along the southern shore of the lake, observing vessels on the lake. For eleven years, beginning in 1928, he was engaged by the Royal Crystal Salt Company to manage a pump station on the lake, and had a clear recollection of the operation he supervised to carry crew men, gasoline and general supplies by boat to and from the pump station, and he obviously had an excellent op-

portunity to observe other boating activities. (T. 61 *et seq.*)

(3) Joseph S. Nelson, a lawyer who was born one year after statehood, was employed by the Saltair Resort at the age of ten years because his father was president and general manager of that resort. He had an excellent opportunity to observe, and a clear recollection of, the commercial excursion vessels and the livestock barge operations on the lake. (T. 83 *et seq.*)

(4) Claire Wilcox Noall was born four years prior to statehood, was a college graduate with advanced study in writing and historical work, had been a neighbor of Captain Davis for a number of years, and on several occasions had taken trips on his excursion vessels. Her observations and recollections are significant in light of the fact that Captain Davis operated vessels on the lake for fifty years and there are numerous references in the record of his navigation of the lake. (T. 75 *et seq.*)

(5) Francis W. Kirkham was born nine years before statehood, was a paying passenger on excursion vessels on the lake prior to and after statehood, and had graduated from the University of Michigan, obtained his law degree from the University of Utah, and his Ph.D. from the University of California at Berkeley. (T. 233 *et seq.*)

With respect to the various types of navigation of the lake in more recent years, Utah called the following witnesses:

(1) Phil Dern, 49 years of age, who, with his father before him, had operated a commercial resort with commercial pleasure boats on the Great Salt Lake from

1934 through 1968, and in 1969 obtained a boat concession at Antelope Island State Park. As such, he observed the general boating activity on the lake, including other commercial excursion vessels, and including the commercial shipment of guano from islands of the lake to the mainland. (T. 111 *et seq.*)

(2) John Clawson Silver, who since 1963 has operated a concession for commercial boat rides on the Great Salt Lake, and who at the time of the hearing had established his own Silver Sands Resort and was planning to expand his commercial boating operation, including the purchase of a boat 100 to 200 feet long for commercial passenger service. (T. 287 *et seq.*)

(3) Reese F. Llewellyn, a member of the Utah State Bar, who from 1935 through 1943 operated a patrol boat (25 to 30 feet long) on the lake for law enforcement and rescue purposes, as part of his duties at that time for the Salt Lake County Sheriff. Since this patrol and rescue operation was continuous during the summer months, he had an excellent opportunity to observe the lake during patrol, and often noticed 75 to 100 boats on the lake at a single time, in addition to 40 to 50 boats moored at the Salt Lake County Harbor and other excursion and rental boats at Sunset and Black Rock Beaches. (T. 103 *et seq.*)

(4) Harold J. Tippets, an employee of the Division of Parks and Recreation of the State of Utah and Director of the Great Salt Lake Authority, was familiar with the development of Antelope Island State Park, and explained that the park had planned marina facilities for 200 boats, ranging in size to 45-foot craft at an estimated cost of $445,000. (T. 129 *et seq.*)

(5) Thomas T. Lundee was an engineer and naval architect with over thirty years experience in design, operation and use of commercial marine craft, and was familiar with navigable waters in many parts of the world as well as the United States. He had designed craft ranging from various barges to bulk carriers, including tug boats, dredges and off-shore drill rigs, and had obtained approximately 15 patents for such designs. He personally designed part of the craft used for the $49,000,000 causeway project on the lake, and had personally observed that operation with respect to the navigability of the lake and the ease and economy with which craft could be operated in the lake, and the ease and economy with which harbor facilities could be constructed and maintained. Since Mr. Lundee observed the successful operation of some of the world's largest barges on the Great Salt Lake, he had excellent personal information with respect to the susceptibility of the lake to navigation by large craft capable of hauling substantial tonnage. (T. 166 *et seq.*)

(6) Golden O. Peterson was Assistant Bridges and Buildings supervisor for the Southern Pacific Company, had been assigned to duty on the lake from 1942 to the time of the trial, and was familiar with the patrol operations on the lake with the 28-foot steel boats used to inspect the trestle and causeway, and had an excellent opportunity from first-hand observation to be familiar with the navigational aspects of the lake, since the patrol excursions were performed each week throughout the year, each and every year, and prior to 1959 the patrol trips to inspect the trestle were made daily. Mr. Peterson obviously was well qualified to testify with respect to the

operation of rather small craft (25-foot steel boats) on the lake in every kind of weather during all parts of the year. (T. 148 *et seq.*)

(7) Gail Sanders was president of the Sanders Brine Shrimp Company, currently engaged in brine shrimp operations on the Great Salt Lake and had been so engaged since 1953. His company is presently processing and transporting brine shrimp for commercial fish food to various parts of the world. He was personally familiar with the navigability of the lake by a number of relatively small craft, used for the purpose of collecting and harvesting brine shrimp and brine shimp eggs, and transporting the same by these boats across the lake to the processing plant. He obviously had excellent personal knowledge of the operation of small boats for commercial purposes on all parts of the lake. (T. 157 *et seq.*)

(8) William Paxton Hewitt, Director of the Utah Geological and Mineralogical Survey and professor of geology at the University of Utah, was in charge of operating a fleet of boats for scientific purposes on the lake, including a 42-foot steel research vessel. Dr. Hewitt had excellent personal knowledge of the physical characteristics of the lake and testified concerning a number of scientific uses of the lake performed by various organizations and institutions, including various departments of the United States government. (T. 139 *et seq.*)

With respect to existing and potential mineral development of the lake, the following witnesses were called:

(1) William Paxton Hewitt, mentioned immediately above, Director of the Utah Geological and Miner-

alogical Survey and a professor of geology at the University of Utah, was expertly qualified to testify and did testify, to certain commercial deposits of minerals near the lake. (T. 146 *et seq.*)

(2) Helmut H. Doelling, economic geologist at the University of Utah and employed by the Utah Geological and Mineralogical Survey, and who had obtained his Ph.D. in geology by writing his doctorate thesis on the geology of the area west of the Great Salt Lake, was expertly qualified to testify and did testify, to numerous mineral deposits near the south, west, and north shores of the lake, and mentioned other mineral deposits that were not now commercial but may well become commercial in the future, and stated generally that there is a considerable unexplored mineral potential in the area northwest of the lake. (T. 293 *et seq.*)

(3) Donald G. Prince, an employee of the Division of State Lands and of the State of Utah, testified with respect to the official State records of leasing of lake bed lands for oil and gas, pointing out that approximately 600,000 acres had been leased during the 15 years he had been employed by the State of Utah, and further pointing out that several major oil companies still hold substantial acreages under lease on the lake. (T. 127-8)

Aside from the witnesses mentioned above who testified with respect to the various commercial, scientific and recreational navigational uses of the lake, and with respect to the resort, beaches, parks, and other tourist facilities, Utah also called a witness to testify to the bird life on the lake:

John Nagel testified that for seven years he had

been in charge of waterfowl management for the Division of Fish and Game of the State of Utah. He had excellent personal information with respect to the large areas of developed and natural waterfowl habitat and the great number of waterfowl and marsh related birds, as well as other birds on islands of the lake which created a national tourist appeal. (T. 212-14)

The foregoing summary has simply been for the purpose of characterizing the kind of testimony in the record, not for the purpose of reciting specific facts or justifying findings that are not controverted. But not one word of the testimony of the above witnesses was controverted or impeached during the hearings, and a rather comprehensive canvass of the testimony of these witnesses, along with specific references to the transcript for each item of testimony, appears at pages 15-33 of Utah's brief dated August 1, 1969.

By contrast, the United States cites absolutely *no* evidence by anyone who was a witness at the hearing, under oath, and subject to cross-examination. Utah, on the other hand, called live witnesses who were put under oath, who testified to facts within their personal knowledge, and who were available for the Government to cross-examine. Further, Utah introduced 40 exhibits, most of which were (1) either prepared from or copies of reliable official records relating to the lake and compiled by the Utah Geological and Mineralogical Survey and the United States Geological Survey, or (2) photographs (including motion picture), boat designs, drawings and specifications, and other physical illustrations where the accuracy thereof was within the personal knowledge of the witnesses who testified as to the foun-

dation for such exhibits, or (3) documents and publications relating to the lake, qualified as to admissibility by personal knowledge of witnesses as to the accuracy of such publications.

If the "evidence" introduced by the Government can be accorded any weight, it certainly could not be equated with the direct, first-hand knowledge of Utah's live witnesses as represented by their testimony and the exhibits introduced through them. This Court has underscored the necessity of giving controlling weight to the testimony of live witnesses as opposed to written accounts of early writers or others who are not under oath or subject to cross-examination. Thus, in *Missouri v. Kentucky,* 11 Wall. 395, 410 (1870), the Court gave the following admonition:

> But it is said, the maps of the early explorers of the river and the reports of travellers, prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements—not sworn to—of travellers and explorers, when living witnesses testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?

Fifty-two years later, in *Oklahoma v. Texas,* 258 U.S. 574, 586-87 (1922), this Court again emphasized:

> The evidence bearing on this question is voluminous and in some respects conflicting. A large part of it deals directly with the physical characteristics of the river, comes from informed sources and is well in point. A small part consists of statements found in early publications, and repeated in some later ones, to the effect that the river is navigable for great distances—some of them exceeding its entire length. These statements originated at a time when there were no reliable data on the subject, and were subsequently accepted and repeated without much concern for their accuracy. Of course, they and their repetition must yield to the actual situation as learned in recent years. The evidence also discloses an occasional tendency to emphasize the exceptional conditions in times of temporary high water and to disregard the ordinary conditions prevailing throughout the greater part of the year. With this explanatory comment, we turn to the facts which we think the evidence establishes when it is all duly considered.

Perhaps some review would be helpful as to the method by which the historical extracts and other written materials were introduced into evidence. Counsel for Utah and counsel for the United States desired to simplify the procedural aspects of the hearing as much as feasible, and agreed that either side could place written materials into evidence and the other side would simply reserve all objections, except for the early historical materials, and as to the latter materials the objection of hearsay would be waived when the writer had direct first-hand knowledge of facts, and all other objections would be reserved. This was explained by counsel for Utah:

> If the Court please, the evidence that I will introduce relates to usage of the lake, both before and after statehood. It will refer to all types of

> usage, recreation, commercial, and otherwise. I have talked with counsel of the Government and I think they are content that we put that evidence in documentary form in, reserving their right to object to it ultimately in argument, that is as to its materiality and relevancy. We have escaped the ancient document rule because most of this is ancient document by the stipulation. (T. 30-31).

Further, when counsel for the United States proposed to introduce historical excerpts, counsel for the State of Utah further clarified the limitation on such material:

> And as far as his [Mr. Martin Green, counsel for the United States] excerpts and written materials are concerned, your Honor, we do not intend to try to slow down the process of those being submitted into evidence nor do we intend to try to prevent that from being submitted into evidence in the record. We think the only thing that is relevant would be those extracts which would relate to the susceptibility of the lake for navigation as of the date of statehood, and anything that would go beyond that, of course, when the particular material is focused on we would have maybe any number of objections. We would object specifically to anything that will be in the form of an opinion or a conclusion as distinguished from the writers speaking of first-hand knowledge from experience about the lake. We will also probably object and point out that none of the people who have written any of these materials were ever talking about the susceptibility of the lake to navigation. They would have to be inferences that will be drawn by people reading it at this late date. (T. 270)

The United States did not question or object to this stated limitation. With respect to the historical excerpts, they could properly be used only when the writer had

first-hand knowledge of *facts* about which he was writing. If the early surveyors had difficulty navigating boats to the very edge of the water to survey a meander line, those actual difficulties can be cited because the writers had first-hand knowledge of their experiences. Even here, of course, the weight of such evidence would be far inferior to contradictory evidence by a live witness under oath and subject to cross-examination.

But, it is quite another thing, and wholly inadmissible, to attempt to use that material to argue that shallow waters around certain areas of the lake prevented the lake from having a navigable capacity at the date of statehood. The historical materials, whether introduced by Utah or by the United States, are properly to be used only to show the actual uses which were made, or were not made, of the lake, and the actual ease or difficulty with which these uses were accomplished.

In pointing out the limitations on the use of these materials, Utah emphasizes that there is no meaningful evidence in those written materials introduced by the United States. No part of those materials even discussed the question as to whether the lake was navigable or nonnavigable, and not one writer or author of those materials would have been qualified in any event, by education or experience, to testify as an expert as to navigability.

Since the lake at the date of the hearing on navigability (May, 1969) was essentially the same as it was at statehood (except for the fact that it was approximately 4 feet deeper at statehood), either party was free to call experts on navigation who could familiarize themselves with the lake and testify to its navigable capacity,

and the usefulness of that capacity. Utah elected to call such a witness, Thomas T. Lundee, who not only was an international expert on navigation but who in fact had personal knowledge of the use of large barges and other craft on the Great Salt Lake, and was familiar with the construction and maintenance of dock and harbor facilities on the lake. Lundee testified that the lake was susceptible to commercial navigation and would have been at statehood. The United States elected not to call any expert witnesses to discuss the navigability of the lake, but elected, rather, to rely on historical materials from which it could argue that the lake lacked a useful capacity for navigation because of shallow shorelands, adverse weather, etc.

This contrast in evidence has an even greater impact when it is pointed out that Lundee said that weather was no problem, and the lake could be and in fact was navigated day in and day out twelve months a year, and that the shallow shorelands created no impediment to navigation because channels could be excavated with ease and required a minimum of maintenance. The United States not only called no witness to challenge the testimony of Lundee, but it declined to cross-examine him with respect to adverse weather or shallow shorelands; and relied, instead, on searching for "rebutting" evidence in the historical extracts.

5. *Summary*

a. *Preface*

It seems absurd, in a way, that navigability should require this kind of emphasis with respect to the Great Salt Lake. Aside from the Great Lakes, it is the largest

lake in the United States of America (Finding of Fact No. 6, R. 10). It is the largest lake in the Western Hemisphere not connected to an ocean (Exhibit P-32, p. 120). Its waters were thirty feet deep at statehood, which was a depth ten times greater than the rivers in *United States v. Utah*, and three to five times as deep as the waters in *United States v. Holt State Bank*. Counsel for the United States has admitted that the "Queen Mary" and almost any boat in the world could be used on the lake (T. 19, 280). At statehood, the lake had a navigable length of more than seventy miles, with a navigable surface area of over 1,000 square miles. It has always satisfied, and is now satisfying, all commercial navigational demands that have ever been placed upon it.

The lake has no serious impediments to navigation, but, on the contrary, has economically, feasibly and profitably supported some of the largest commercial barge operations in the world as of the 1950's. Commerce does not flourish there now because there are other methods of transportation to handle the needs, but there are many navigational uses still being made of the lake, including such uses as transporting livestock and harvesting brine shrimp. The future commercial demands that may be made of the lake are unknown, but the prospects are certainly there, as shown by the Special Master's findings of valuable minerals around the lake, prospects of oil and gas beneath the lake, valuable minerals in the brines in the lake, recreational attractions from the salt water and scenic features (with a State Park in progress and a National Park in promise), and a multitude of other attractions (including waterfowl habitat and hunting, bird watching, scientific study, and others).

The evidence is in the record. It cannot be fully detailed here. The Special Master has made a creditable set of findings from it. The Court's attention is invited to the testimony and exhibits. No competent evidence in the record disputes any Finding of Fact of the Special Master, and it simply is inaccurate for the United States to say that the Great Salt Lake does not have a useful and beneficial capacity to support waterborne commerce. Nor is there any reference to any part of the evidence by the United States to show why such useful capacity is not there.

And, as a collateral note, it must again be emphasized that the evidence in the record, complete as it may be, is not the entire source of the Special Master's information. He traversed the lake by boat, he visited its shores by car, and he observed it by air in a low level inspection flight. Thus, as a preface to the Findings of Fact, the Special Master observes at page 9 of his Report:

> From the evidence presented to him *and from his own observations of the Great Salt Lake and its environs*, in the company of counsel for both parties, the Special Master respectfully suggests the following findings of fact may be found: . . . (emphasis added)

But his Findings are not dependent, in any way, on his personal inspection and observations, since such Findings are otherwise fully documented in the record. As a summary of the relevant law and applicable facts, it is useful to consider the following statements of this Court.

b. *The Law as to "Useful" Navigable Capacity*

If a body of water has sufficient size and depth to support meaningful commerce, but evidence is introduced to show that the availability for use is irregular, intermittent or undependable, or impeded by serious obstacles to navigation (reefs, rapids, and similar difficulties or hazards), then the Court must proceed to determine whether the physical capacity is "useful." The determination is whether the physical capicity is sufficiently regular and dependable for practical use, and whether it is economically feasible to navigate in light of the impediments and obstacles that are present.

United States v. Utah, supra, is the most specific pronouncement of this Court, and deserves to be quoted at some length for a complete insight into the impediments and obstacles there discussed. Thus, at pages 84-87, the Court discussed the following impediments and concluded that the waters had a useful navigable capacity:

> The controversy as to navigability is largely with respect to impediments to navigation in the portions of the rivers found by the Master to be navigable, and as to these impediments there is much testimony and a sharp conflict in inferences and argument. The Government describes these impediments as being logs and debris, ice, floods, rapids, and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers produce a succession of shifting sand bars, shallow depths, and instability of channel.
>
> The Master states that while there is testimony that in floods and periods of high water these rivers carry a considerable quantity of logs and

driftwood, the evidence as to actual trips made by witnesses discloses little danger thereby incurred except in the case of paddle-wheel boats. The Master's finding, which the evidence supports, is that this condition does not constitute a serious obstacle to navigation. With respect to ice, it is sufficient to say, as the Master finds, that ice periods on these rivers do not prevail in every winter and that they are shorter than on most of the rivers in the northern and northeastern States of the country. As to floods, it appears that there are months of extreme high water caused by the melting of snows in the mountains and also local floods of short duration caused by rain-storms. From the testimony of the witnesses who have actually boated on these rivers, the Master is unable to find that this element of variation in flow, or of rapidity of variation, has constituted any marked impediment to the operation of boats except possibly in one or two instances. In relation to rapids, riffles, rapid water and velocity of current, the Master uses the classifications of an engineer presented by the Government and finds that in the portions of the Green River involved in this suit there are no rapids, riffles or rapid water, and that the slope of the bed is only a little over one foot per mile; that there is a stretch on the Grand River (above Moab Bridge) where there are three small rapids, already mentioned, and also two and one-half miles of rapid water, but that this is a stretch of only six miles in all and is not characteristic of the whole section of the Grand River here in controversy. It appears that neither the current nor the velocity of the Green and Grand Rivers impedes navigation to any great extent except in the days of extreme or sudden flood, and that motor boats of proper construction, power and draft can navigate upstream without trouble, so far as current or velocity alone is concerned. The slope of the section of the Colorado River which the Master has found to be nav-

igable is for the most part slight, as already stated; there are four drops in elevation which may be called small rapids, but it appears that these do not ordinarily make necessary any portage of boat or cargo.

The principal impediment to navigation is found in shifting sandbars. As the rivers carry large amounts of fine silt, sandbars of various types are formed. The Master's report deals with this matter at length. Referring to the Green and Grand Rivers, the Master states that the most constant type of sandbar forms on the sides of the rivers on the convex curves or inside of the bends; that changes in discharge and in velocity, and floods caused by sudden heavy rains, may affect the size, shape and height of these side sandbars, but, in general, after the spring highwater has receded, these sandbars have constant and fixed locations. There is a second type of bar which forms at the mouth of tributary streams, creeks or washes, usually at times of sudden floods caused by heavy summer rains, and these generally are of short duration. A third type consists of what is termed "crossing bars" which are formed below the places where the rivers cross from one side to the other in following the curves or bends; wherever these crossing bars occur there is generally more or less difficulty in ascertaining the course of the channel, as the stream may divide into several channels, or it may distribute itself over the full length of the bar so as greatly to lessen the depth of the water from that prevailing in the well-defined channels which follow the bends. There are frequent and sudden variations in these bars resulting in changes in the course of the channel. The bed of the Colorado River above the mouth of the San Juan is found to be more gravelly than that of the Green and Grand Rivers. There are, however, long high side-bars of sand and gravel on which placer mining has been done and also a few sandbars or bottoms which have

been cultivated. Crossing bars occur, but not as frequently as on the Green and Grand Rivers, and they cause less trouble. After the recession of the water at the end of the high water season, the channel remains more or less stable during the rest of the year, although there are temporary changes. In general the channel is less shifting than on the Green and Grand Rivers, and the river is less tortuous.

Recognizing the difficulties which are thus created, the Master is plainly right in his conclusion that the mere fact of the presence of such sandbars causing impediments to navigation does not make a river non-navigable. It is sufficient to refer to the well-known conditions on the Missouri River and the Mississippi River. The presence of sandbars must be taken in connection with other factors making for navigability. In *The Montello, supra,* the Court said [p. 443]: 'Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sandbars.

Evaluating the impediments and obstacles to navigation on "Mud Lake," located entirely within the State of Minnesota, where the controversy was a title dispute between the United States and the successor in interest of the State, and where the outcome rested on the issue of navigability, this Court observed:

The evidence set forth in the record is volu-

minous and in some respects conflicting. When the conflicts are resolved according to familiar rules we think the facts shown are as follows: In its natural and ordinary condition the lake was from three to six feet deep. When meandered in 1892 and when first known by some of the witnesses it was an open body of clear water. Mud River traversed it in such way that it might well be characterized as an enlarged section of that stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud River after passing through the lake connected at Thief River with a navigable route extending westward to the Red River of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud River from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. Sandbars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided by keeping the boats in the deeper parts or channels. Some years after the lake was meandered, vegetation such as grows in water got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season, but offered little interference at other times. Gasoline motor boats were used in surveying and marking the line of the intended ditch through the lake and the ditch was excavated with floating dredges.

> Our conclusion is that the evidence requires a finding that the lake was navigable within the approved rule before stated. From this it follows that no prejudice resulted from the recognition below of the local rule respecting navigability. *United States v. Holt State Bank*, 270 U.S. 49, 56-57 (1926).

c. *Facts Showing Useful Navigable Cacapity of Great Salt Lake*

Contrast the adjudicated useful navigable capacity of the rivers discussed above, and that of Mud Lake (drained and dry at the time of the trial), with that of the Great Salt Lake:

(1) *As to ice*: There is no ice, since the salt content of the water prevents freezing, and the lake can be navigated every day of the year (T. 177).

(2) *As to weather*: Adverse weather does not present obstacles to navigation, and the lake in fact has been navigated by a marine fleet (including some of the world's largest barges) day and night, winter and summer, twelve months a year, and these barges were in actual use on the lake when the water level was approximately four feet lower than it was at statehood. (T. 177-78).

(3) *As to depth*: The lake at statehood had a depth of 30 feet and a reasonably level bed or bottom extending essentially the entire length of the lake (Exhibits P-3, P-4, and P-5).

(4) *As to Intermittent Dry Periods or Times of Shallow Water*: While the lake level fluctuates, there never has been a day in the lake's recorded history, either

before or after statehood, when the lake would not have supported large barges and other commercial craft. The large barges, which were used on the lake for about two years in the 1950's were 250 feet long and 55 feet wide and drew 13 feet of water when loaded with a tonnage equivalent to that carried by 90 railroad cars (T. 175-76) (Motion Picture P-23). The lake has never had a depth less than 20 feet (Exhibit P-2) (Official Government Hydrograph of Great Salt Lake).

(5) *As to Buoyancy*: The salt content of the water gives a buoyancy greater than fresh water or ocean water, creating a 20% greater carrying capacity at an equivalent draft (T. 171-72).

(6) *As to Maintenance of Craft*: The salt content of the water does not corrode vessels or create any serious problem of operation or maintenance, or otherwise create an obstacle to navigation (T. 173-74, 177).

(7) *Dredging and Harbor Construction and Maintenance*: Dredging for construction of harbor channels and facilities is no problem. In fact, the harbor dredged by Morrison-Knudson at Little Valley near Promontory Point was 400 feet wide and 1,500 feet long, and was unusually inexpensive to excavate because it was clay with very little rock (T. 181); and due to lack of currents and tides there was no silting or filling in the channel or harbor, and no cleaning or maintenance was required (T. 182-84).

(8) *Rapids, Tides and Currents*: There are no rapids, currents or tides on the lake (other than "wind tides"), and, as already pointed out, this fact reduces the cost of maintaining harbor facilities (T. 182-84).

(9) *Sandbars, Reefs, Floating Debris*: There is no evidence that such factors are, or ever have been, an impediment to navigation on the lake.

(10) *Improvements for Navigation*: There is no need for improvements for navigation on the lake, such as the obstructions and barriers discussed in *The Montello*, 20 Wall. 430 (1874), or the clearing or removal of floating sandbars on the Mississippi and Missouri, noted by the Court in *United States v. Utah, supra*, at page 86. The only improvement that may be required on the Great Salt Lake would be additional harbor facilities, depending on the commercial need to be satisfied, and this type improvement, as pointed out above, is cheaper to construct and less expensive to maintain than on most other navigable waters (T. 181-84).

(11) *General Economy and Utility of Lake for Navigation*: To emphasize this, Utah simply refers to the testimony of Thomas T. Lundee, a national and international expert on navigation, whose testimony is summarized on pages 29-33 of this brief, *supra*.

d. *A Final Note*

The Special Master's determination of navigability is founded on uncontroverted evidence such as above summarized. It is not very useful to the Court for the Government to argue that a body of water must have a useful capacity for commercial navigation. That is quite beside the point. The point is that it is incumbent upon the Government to show where the *evidence* reveals a lack of useful capacity, so impressive as to justify a rejection of the Special Master's findings of fact. The above summary shows that no navigational problems

arise from ice, adverse weather, shallow or fluctuating waters, water craft maintenance, dredging, harbor construction or maintenance, tides or currents, rapids, sandbars, reefs, floating debris, or otherwise. And that improvements for navigation are not necessary, but that in fact the general economy and utility of the Lake's waters for navigation are above that of most other navigable waters. Now where, in the evidence, are these facts to be disputed? Where is the witness? Where is the testimony? *Where is there one sentence, or one word, of competent evidence in the record, that speaks to the issue of navigability, that says the Lake does not have a useful capacity to support commerce?*

Nor is it useful for the Government to say that the Lake does not lead anywhere, that it only accommodates pleasure uses by those who wish to go upon the Lake and return to the point of origin. Indeed, the Lake has supported, and now supports, a good deal of private and commercial pleasure craft (history has it, whether apocryphal or not, that General Garfield was cruising on the Great Salt Lake in the steamship City of Corinne, when he reached his decision to run for the presidency, and that was the reason why the ship was promptly rechristened the General Garfield). But the idea expressed by the Government that the Lake has no point of origin and no point of destination is incorrect.

The Special Master has found that the navigable area of the Lake extends "substantially through the length and width of the Lake," thus covering "an area of more than 1,000 square miles," and that 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 Sands Beach is now located, at the southern edge" (77 miles). (Special Master's Report, Finding No. 31(d), at p. 29)

There were in fact a number of points of origin and destination. The Special Master found from uncontroverted evidence, in Finding No. 48 at pages 42-43 of his Report, that water craft were used on the Lake to haul passengers, workmen, livestock (including cattle, sheep, horses and buffalo), grain, lumber (fence posts, cedar posts, railroad ties, telephone poles), household supplies, flagstone, farm machinery, pump-station supplies, material for the construction of the railroad trestles and causeways, guano, brine shrimp, brine eggs, ores, minerals, salt, salt crystals, rocks, and wild birds for Hogle Zoo. The Finding goes on to detail many other important uses of the Lake not requiring transportation of material and supplies.

But the point is this, the Special Master has found (as itemized above) some twenty-five different *types* of navigational uses for the purpose of transporting a great variety of cargo. Does this suggest that there were no points of origin and destination? Could anyone argue, for example, that the railroad ties, the ores and minerals, or the guano simply went for a pleasure ride on the Lake and then returned to the point of origin? In truth, there are as many points of origin and destination on the Lake as there are needs for them. And, as the Special Master has found, several of those uses exist today. Again, the relevant query is, where in the evidence can the Government turn to show that the Lake has not accommodated all of the points of origin and points of destination needed for the variety of cargo transported on the Lake?

B. NAVIGABILITY FOR TITLE DOES NOT REQUIRE INTERSTATE OR FOREIGN COMMERCE

1. *Preface*

a. The Issue

The Government has argued that before Utah can be vested with title to the bed of the Great Salt Lake, it must be shown that, at the date of Utah's admission to the Union, the Lake (1) was navigable in fact and (2) formed part of a highway in interstate or foreign commerce (Point IV of Government's Brief, pp. 29-34).

Heretofore, this Court has clearly and expressly said that, for state title purposes, the waters need only be navigable in fact, and has squarely held that they need not be navigable in interstate or foreign commerce. Thus, in *United States v. Utah,* 283 U.S. 64, 75 (1931), Mr. Chief Justice Hughes, speaking for a unanimous Court, said:

> In accordance with the constitutional principle of the equality of the States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States. The question of navigability is thus determinative of the controversy,and that is a federal question. *This is so, although it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah.* (emphasis added)

The Government admits that the above holding of this Court is squarely against the argument it now advances, but suggests that, since the Court has never before heard the argument now presented by the Government, there has been no "clear-cut answer to this question" (Government's Brief, p. 30).

The above holding could hardly be clearer. Legal scholars have thought the Court's answer was clear enough. For example, Johnson and Austin, in discussing the federal test of navigability for purposes of state title, observed that there was some lack of clarity as to how the test would be applied to certain small, remote and inaccessible lakes, but declared that:

> One aspect of the title navigability test is clear —the waters need not be navigable in interstate commerce; intrastate navigability is sufficient. In *United States v. Utah* the Court said that it was "undisputed" that certain of the waters in question were navigable only within the State of Utah, yet held them navigable for title. (*Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 Natural Resources Journal 1, 20 (1967)).

The decisions of this Court, embracing the position set forth in *United States v. Utah,* were also rather clear to counsel for the Government in the present litigation. In the proceedings before the Special Master, the Government not only acknowledged that the Special Master was "foreclosed" by such decisions from adopting the argument of the Government, but agreed during the hearings when evidence was received that *United States v. Utah* was the correct rule to be applied in this case. It was some months after these hearings that the Government said it wished to "preserve" such an argument

for presentation to the Court in the hope that the Court might "reconsider" its earlier decisions. The Special Master summarizes this in note 5, at page 7 of this Report:

> . . . the United States reads the opinions of *United States v. Utah,* 283 U.S. 64, 75 (1931) and *United States v. Oregon,* 295 U.S. 1, 14 (1935), as foreclosing this argument at this juncture and merely preserves the point "in the event it seems appropriate to urge reconsideration of those decisions when the Special Master's report is before the Honorable Court." See Brief of the United States with respect to the Navigability of the Great Salt Lake, p. 9.

The Special Master, also reading *United States v. Utah* and *United States v. Oregon* as decisive on the question, declared:

> 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. (Special Master's Report, Conclusion of Law No. 10, page 51)

The Government has now decided to request the Court to reconsider its earlier decisions. Specifically, as justification for its suggestion that the Court should overrule *United States v. Utah,* the Government says that "a historical analysis" supports its argument (Government's Brief, p. 30). This seems to suggest that this Court inadvertently went awry at an earlier day, but might now, upon a closer look at history, rechart its course on questions of state title to the beds of navigable waters. Such a suggestion would be inaccurate because this Court, with the utmost care and precision, and

mindful of the needs of this nation, molded the present law to accommodate state and federal interests, protect public and private needs, and to achieve constitutional equality among the states.

b. The Related Legal Principles

Before proceeding to discuss those cases, it might be useful to summarize some of the basic principles therein set forth, and thus obtain a preview of the reasons for the federal rule recognizing state title to the beds of all navigable waters:

> 1. In England, the government (Crown and Parliament) owned and exercised control of all navigable waters, including the beds thereof, to protect public uses of the waters, such as fishing and navigation. There, the only navigable waters of consequence were affected by the ebb and flow of the tide, and that became the test of navigability in that country.
>
> 2. In this country, it was recognized that many rivers and lakes were navigable even though not affected by the tides, and so this Court declared that the English test of navigability would do a disservice if followed here, and declared that the test in the United States would be whether the waters were navigable in fact, without regard to whether they were affected by the tide. This Court observed that such a test,though different in definition, was designed to serve the same purpose of protecting the public uses of navigable waters. This was said to be so because, under the English test, all navigable waters of any significance were included within the definition of navigability there used; and here, under the test of navigability in fact, the inland as well as tidal navigable waters would be included. Thus, in both England and the United States,

the navigable waters susceptible to public use would be publicly owned and protected for public use.

3. The thirteen colonies (the original states) succeeded to the ownership and control of the beds of all waters navigable in fact and located within their borders, and, upon creating the Federal Union, delegated to it admiralty and maritime jurisdiction and the power to regulate interstate and foreign commerce. But this in no way transferred to the United States any *title or proprietary ownership interest* in the beds of such waters —it simply subjected state ownership and control to certain Federal *jurisdictional and regulatory* powers over those waters that were navigable in interstate or foreign commerce (consistently referred to by this Court as "navigable waters of the United States").

4. As subsequent states were admitted into the Union, they received the same proprietary and sovereign rights in the beds of all navigable waters within their borders as held by the thirteen original states. This ownership was an aspect of state sovereignty necessary for the protection of public uses of such waters, and was constitutionally compelled to accord to each state equal sovereign rights and equal footing with all other states. Of course, the ownership so acquired by each state was subject to the paramount power in Congress to *regulate* interstate and foreign commerce on those waters that were navigable for that purpose.

5. Thus, to recap, title to the beds of *all* navigable waters are owned by the states; and, as to such waters:

i. Those that are navigable in interstate or foreign commerce are subject to certain *jurisdictional* and *regulatory* powers of Congress; and,
ii. Those that are navigable only in internal,

intrastate commerce are subject to the regulatory powers of the states, but are not subject to federal admiralty or maritime jurisdiction and are not "navigable waters of the United States" for purposes of commerce clause jurisdiction. (Of course, Congress could regulate commerce on intrastate waters to the extent that such commerce "affected" interstate commerce, but this would not make such waters part of the "navigable waters of the United States" and would have nothing to do with bed title questions. See Section V.B.2 of this Brief, *infra.*)

c. This Court's Clear Rejection of the Government's "Historical" Analysis

In asking this Court to overrule *United States v. Utah,* and likewise to depart from its other decisions with similar language, the Government, as has been stated, can suggest only two reasons: (1) that there has been no "clear-cut" answer to its present argument, and (2) that there is some "historical" basis for such an argument.

Both of these statements are in error. This Court has repeatedly given "clear-cut" answers that leave no doubt that interstate navigation is not necessary for state title, and has made equally clear that there is no historical basis for such an assertion. The Government's historical argument is founded on, and is entirely dependent upon, the survival in this country of the English common law concept that navigability must be measured by the ebb and flow of the tide. Thus, the Government argues that if the English test of navigability can be viewed as having been adopted in this country, then those waters not affected by the tides are not navigable

and the states have no title to their beds. The Government does admit that the English test has been rejected by this Court so clearly, and so many times, with respect to interstate navigable waters (where there is federal regulatory power), that the states do own the beds of such waters.

But the Government contends that, until 1931 (*United States v. Utah, supra*) this Court had not specifically held that the English test was to be rejected with respect to intrastate navigable waters; and that this Court thus is not required to overrule any of its decisions prior to that date.

But what the Government fails to comprehend is that the English tidal test of navigability was rejected —totally, completely, and for all purposes—by this Court in 1851 (*The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1851)). The very reason given by the Court for rejecting the English test was that such a test would exclude the inland waters of this country that were navigable but not affected by tides. Thus, this Court—carefully, knowingly and deliberately—rejected the English test in its entirety:

> The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the constitution was adopted, was confined to the ebb and flow of the tide.
>
> Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If

it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters. (12 How. at 454-55)

* * *

If there were no waters in the United States which *are public, as contradistinguished from private,* except where there is tide, then unquestionably here as well as in England, tide water must be the limits of admiralty power. (12 How. at 455) (emphasis added)

* * *

It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in

> the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce of the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day. (12 How. at 456)

The Court proceeded to discuss *Waring v. Clarke*, 5 How. 441 (1848), where the Court had followed the tidal test of navigability, and which involved a collision on the Mississippi River. The difficult question for admiralty jurisdiction was whether the tide flowed as high on the River as the point of the accident. The Court in *Genessee Chief* said that the *Waring* case:

> showed the unreasonableness of giving a construction to the constitution which would measure the jurisdiction of the admiralty by the tide. For if such be the construction, then a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary as well as unjust, and would make the constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant. (12 How. at 456-57)

This Court thus concluded:

> It is evident that a definition that would at this day limit public rivers in this country to tide water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the constitution of the United States. (12 How. at 457)

During the 121 years since the *Genessee Chief* was decided, this Court has on numerous occasions decided cases involving questions of navigability. But in each such instance the Court has viewed the *Genessee Chief* as a complete rejection of the English tidal test of navigability. Typical is the language of *The Daniel Ball,* where it was expressly declared that:

> Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of water. (10 Wall. at 563)

In no instance has the Court suggested, even remotely, that any aspect of the English test is applicable to any of the navigable waters of this country.

Thus, in a nutshell, the Government need look no further than the *Genessee Chief* to find a very "clear-cut" rejection of its argument that the English tidal test survives in this country to measure the navigability of intrastate waters. And, as subsequent decisions of this Court are examined, in the next section of this Brief, it

will be seen that the thing which survived the decision of the *Genessee Chief* was—not any vestige of the English test—but the integrity of every word used by this Court in rejecting that test.

So, it does not make any sense for the Government now to argue that it would have been justifiable from a historical standpoint for this Court to have preserved the English test of navigability to apply to *intrastate* waters—with the somewhat paradoxical result that they will be navigable if affected by the tide. The fact that the Government must urge this Court now to reject its earlier decisions is, standing alone, a dissuading factor against accepting that argument. But, beyond that, the very sound reasons which compelled this Court to decide those cases as it did, were, and still are, very persuasive factors in defense of those decisions.

The State of Utah will now proceed to show, not only that the Government's "historical" argument would produce a misconceived mixture of ownership rights versus regulatory powers, but that it has absolutely no basis in law or logic, would create serious constitutional questions of equal footing among the states, and would be inimical to public and private interests in every state.

2. *Earlier Decision of This Court*

The Government assumes as a fact that this Court was unaware of the impact of its earlier decisions, and argues only that, historically, it could have been possible for this Court to have elected another course of action. Whereas, in reality, the Court carefully considered the utility of alternative choices, and wisely extended public protection to all waters adapted to public use.

These cases can best be presented with some discussion and some extracts from the opinions.

The first definitive statement with respect to the test of navigability in this country is ordinarily considered to be *The Thomas Jefferson,* 10 Wheat. 428 (1825), where the Court applied the English test of the ebb and flow of the tide in deciding that the admiralty and maritime jurisdiction of the United States did not extend to those portions of a river not affected by the tide.

The next significant case to arise relating to navigability was the first to be concerned with state title to the beds of navigable waters. In *Martin v. Waddell,* 16 Pet. 367, 416 (1842), the Court, speaking with specific reference to New Jersey as one of the original states, said that all of the original states became immediately and rightfully vested with all of the powers and prerogatives of ownership and control of navigable waters and their beds as had earlier been vested in the English Crown and Parliament.

It was only three years later, in *Pollard v. Hagan,* 3 How. 212 (1845), that the Court made clear that Alabama, not an original state but one created from federal territory, was, as a matter of constitutional equality with the original states, entitled to the same ownership rights, sovereignty and jurisdiction of navigable waters within its borders as the original states. Thus, at page 229, the Court concluded:

> to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that

might be made between her and the United States could diminish or enlarge these rights.

By 1845 it was clear that the original states, as well as states subsequently admitted to the Union, succeeded to full sovereign and proprietary ownership and control of the navigable waters within their borders, subject only to "the rights surrendered by the constitution to the United States." There was no other qualification or limitation. But the English test of navigability, as measured by the ebb and flow of the tide, had not yet been rejected by the Court.

That rejection was not long in coming, because, only six years later, this Court decided *The Propeller Genessee Chief v. Fitzhugh,* 12 How. 443 (1851), involving a question as to admiralty and maritime jurisdiction. There, the Court went to great lengths to examine the English test of the ebb and flow of the tide, and explained how such a test in this country would be totally unsuited to our needs, because of the many inland navigable waters not affected by the tides. The English test of navigability was rejected and the *Thomas Jefferson* overruled, with the declaration that all navigable waters of the United States, whether affected by the tide or not, are navigable for purposes of federal admiralty and maritime jurisdiction.

In rejecting the English test, the Court pointed out that such a test really had been intended to include all navigable waters in England, and thus was no different in principal or purpose from the Courts' new declaration that *all public waters* in this country must be determined navigable:

> In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to navigable waters. (12 How. at 455)

As a collateral observation, in *Economy Light and Power Company v. United States,* 256 U.S. 113, 120 (1921), the Court discussed the Northwest Ordinance of 1787 as it related to the concept of navigability, and said:

> There can be no doubt that the waters of the Chicago-Desplaines-Illinois route "and the carrying places between the same" constituted one of the routes of commerce intended by the Ordinance, and the subsequent acts referred to, to be maintained as common highways. It did not make them navigable in law unless they were navigable in fact, *but declared the public rights therein so far as they were navigable in fact; and it is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation* more than 80 years before this court decided *The Daniel Ball,* 10 Wall. 557, 563, and more than 60 years before *The Propeller Genessee Chief v. Fitzhugh,* 12 How. 443, 455. (emphasis added)

The Northwest Ordinance is not of present interest, nor is the exact date at which the English tidal test of navigability was rejected in this country. However, as

this Court said, it is "curious and interesting" that the "inappropriateness of the tidal test" was recognized by the Confederation at such an early date.

By 1851 it was beyond question that the states, original as well as those subsequently admitted, owned title to the beds of all navigable waters within their borders; that such ownership was subject to such jurisdiction and regulation as had been granted to the United States by the Constitution; and that navigable waters in this country were not to be measured or limited by the ebb and flow of the tide. But it was not entirely clear what the substitute test of navigability would be or how it would be applied. Those questions were answered definitively 19 years later when this Court, in *The Daniel Ball*, 10 Wall. 557, 563 (1870), declared:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, *or any test at all of the navigability of waters.* There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. *Those rivers 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 condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (emphasis added).

Navigability-in-fact was thus declared to be the test to determine navigability in law. The language quoted above has been cited innumerable times, by this Court as well as lower federal courts and state courts, as the test of navigability in this country. But that language, important as it may be, has not been cited any more often than the language of the Court that immediately followed:

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, *in contradistinction from the navigable waters of the States,* when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (10 Wall. at 563) (emphasis added)

The Court thus ruled that all waters that are navigable in fact are navigable in law, and again emphasized that, of such waters, those that are navigable in interstate or foreign commerce are "navigable waters of the United States" for purposes of federal regulation and jurisdiction, but that navigable waters not so connected are "navigable waters of the States."

Further, in that very term of Court, another case arose requiring consideration of the distinction between the navigable waters of the United States and the navigable waters of the states. In *The Montello,* 11

Wall. 411 (1870), the Court was required to determine whether the Fox River was a navigable water of the United States, so as to support admiralty and maritime jurisdiction. The Court felt that it could take judicial notice of the navigability of the river in Wisconsin, but that it could not take judicial notice of its navigable connection in interstate commerce so as to give jurisdiction to the United States:

> We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States. Since this case was presented we have examined, with some care, such geographies and histories of Wisconsin as we could obtain from the library of Congress, to ascertain, if possible, the real character of Fox River, and to render the fiction of the law, as to our supposed knowledge of the navigable streams in that State, a reality in this case; but from such examination we are still in doubt whether Fox River has any such connection with other waters as to form with them a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters such a highway. If it form such a highway, the case presented is directly within the ruling made in the case of the steamer *Daniel Ball*, decided at the present term. If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, *and is only navigable between different places within the State, then it is not a navigable water of the United States, but only*

> *a navigable water of the State, and the acts of Congress, to which reference is made in the libel, for the enrolment and license of vessels, have no application. Those acts only require such enrolment and license for vessels employed upon the navigable waters of the United States.* (11 Wall. at 414-15) (emphasis added)

The Montello was remanded for evidence to determine whether the Fox River had a navigable connection in interstate and foreign commerce, and again reached this Court four years later (20 Wall. 430 (1874)). The Court concluded from the evidence that the Fox River was navigable in fact, and that it was a navigable water of the United States, subjecting it to "governmental regulation":

> From what has been said, it follows that Fox River is within the rule prescribed by this court in order to determine whether a river is a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce, in the only mode in which commerce could be conducted, before the navigation of the river was improved. Since this was done, the valuable trade prosecuted on the river, by the agency of steam, has become of national importance. And, emptying, as it does, into Green Bay, it forms a continued highway for interstate commerce. (20 Wall. at 443)
>
> * * *
>
> It results from these views that steamboats navigating the waters of the Fox River *are subject to governmental regulation.* (20 Wall. at 445) (emphasis added)

Only two years after the *Montello* decision, this Court decided *Barney v. Keokuk,* 94 U.S. 324 (1876),

which involved a state title question concerning the bed of a navigable river (Mississippi). The Court confirmed the earlier state title pronouncements of *Martin v. Waddell* and *Pollard v. Hagan*, pointing out that earlier uncertaintites with respect to the English tidal test of navigability had caused some confusion in state property rules, but leaving no doubt that state title included the beds of *all* navigable waters, and in no way was to be limited by the ebb and flow of the tide:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 id. 471. These cases related to tidewater, it is true; *but they enunciate principles which are equally applicable to all navigable waters.* And since this court, in the case of *The Genesee Chief*, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of

> the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amendable to the admiralty jurisdiction, *there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.* The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. (94 U.S. at 338) (emphasis added)

With the foregoing cases, this Court had jelled the basic principles to be applied with respect to the navigability of waters in the United States. The English test of navigabiliity was not suited to this country, and had been rejected in favor of the test of navigability in fact, designed to include all navigable waters, whether tidal or inland, and whether interstate or intrastate.

The above principles were very sound, and well adapted to the needs of this country. The public interest in navigation and fishing was protected by vesting the states with title to the waters and soils under them. The original states acquired sovereign and proprietary rights in the beds of the navigable waters within their borders, and states subsequently admitted to the Union, as a matter of constitutional equal footing, were accorded equal rights. And these rights were subject to the regulatory and jurisdictional powers conferred upon the United States by the Constitution. The law, as thus

evolved and clarified by this Court, had carefully been designed to protect the constitutional rights and interests of the states as well as the Federal Government, and public and private needs were well served by the respective governmental rights and functions.

During the 100 years since those decisions, a considerable number of additional cases have been decided by this Court. But they all have been consistent with the principles earlier laid down and discussed above. Some of the more important, and more frequently cited, cases include: *Packer v. Bird,* 137 U.S. 661 (1891); *United States v. Rio Grande Irrig. Co.,* 174 U.S. 690 (1898); *United States v. Cress,* 243 U.S. 316 (1917); *Economy Light & Power Co. v. U.S.,* 256 U.S. 113 (1921); *Brewer-Elliott Oil and Gas Company v. United States,* 260 U.S. 77 (1922); *United States v. Holt State Bank,* 270 U.S. 49 (1926); *United States v. Utah,* 283 U.S. 64 (1931); and *United States v. Oregon,* 295 U.S. 1 (1935).

To be sure, a number of other cases touch upon or apply the legal principles under review, but they are of lesser importance, contribute nothing that is critical to the present discussion, and are less frequently cited by this Court in its subsequent opinions.

It is advisable, however, to return briefly to the decisions in *United States v. Utah* and *United States v. Oregon,* for, while those cases announced no new principles, it does seem that *United States v. Utah* was the first case where the facts before the Court clearly required a *holding* that navigability for title did not require any connection with interstate or foreign commerce. But the principle was already well established,

and the Court, when applying it in *United States v. Utah,* did not suggest that it was applying new law, but, rather, that it was applying a well recognized concept; and counsel for the parties (including the United States) did not deny the propriety, accuracy or soundness of the Court's application of the rule:

> The controversy is with respect to certain facts, and the sufficiency of the basis of fact for a finding of navigability, *rather than in relation to the general principles of law that are applicable.* (283 U.S. at page 75) (emphasis added)

Then, immediately following the above language, the Court recited the uncontroverted principles of law, which were:

> In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States. The question of navigability is thus determinative of the controversy, and that is a federal question. (283 U.S. at page 75)

The above language is an excellent and accurate summary of the earlier decisions of this Court. So is the language that followed:

> This is so, although *it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah.* (283 U.S. at page 75) (emphasis added)

Title was found to be in Utah. This holding contains the essence of the many cases recognizing the difference

between the federal *regulatory power* over "navigable waters of the United States" and state ownership of the beds of *all navigable waters.*

No one reasonably can question the validity or the soundness of the above pronouncements in *United States v. Utah.* By 1851 it had clearly been established in the *Genessee Chief* that in this country all navigable waters, whether or not affected by the tide, were deemed to be navigable in law; by 1870 the *Daniel Ball* held that the measure to test navigability in law was navigability in fact, and that all waters being used, or susceptible of being used, as highways of trade or travel were navigable in law; and, by 1876, *Barney v. Keokuk* confirmed that, for state title purposes, the beds to all navigable waters, wherever situated within the state, were owned by the state.

It may be true that this Court had to wait until 1931, in its decision in *United States v. Utah,* to apply, as an actual *holding,* its long standing and oft-repeated dicta that navigability for title does not require the waters to form a chain in interstate or foreign commerce. But it is not accurate to suggest that the Court was then applying a new concept. That concept was rooted at least a century earlier, and had been embraced in a number of opinions, without the slightest question, qualification or criticism.

And two years after the *United States v. Utah* decision, the Court in *United States v. Oregon,* 295 U.S. 1 (1934), again recited the same principle—not because it was necessary to a consideration of the non-navigable waters there involved, but because, through repeated

recognition and application, the principle seemed to be second nature to state title questions:

> Since the effect upon the title to such lands [beneath navigable waters] is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, *even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.* (*citing United States v. Holt State Bank,* 270 U.S. 49, 55, 56; *United States v. Utah, supra* 75; *Brewer-Elliott Oil Co. v. United States,* 260 U.S. 77, 87. (Emphasis added) (295 U.S. at page 14)

3. *Congressional Recognition and Confirmation of State Title*

Utah's title to the bed of the Great Salt Lake vested on January 4, 1896, when Utah became a state, by virtue of the concept of constitutional equal footing among the states. This was more than 57 years prior to the confirmation of Utah's title by the Submerged Lands Act. However, the Government suggests, at page 34 of its Brief, that the Submerged Lands Act of 1953 "ratified" this Court's holding in *Barney v. Keokuk,* but that Act can be construed to apply only to the navigable waters of the United States, and not as a confirmation of "title to beds underlying *intrastate* waters." The Government seems to suggest that the Act's use of the phrase "laws of the United States", as the test of navigability, should somehow be construed to mean the "navigable waters of the United States."

Nothing could be further from the true meaning of that act.

In the following discussion concerning the language of the Submerged Lands Act, and the decisions of this Court, the legal principles of primary relevance are:

> The test of navigability is a federal question, and is to be determined under the "Constitution and laws of the United States." This test is stated to be that all waters that are navigable in fact are navigable in law. The waters meeting this test fall into two categories:
>
> a. Those navigable waters over which the United States has regulatory powers, consistently refered to as the "navigable waters of the United States," and,
>
> b. Those navigable waters that are navigable only in intrastate commerce, consistently referred to as the "navigable waters of the states."

The exact language set forth above to describe the class of waters involved, or the test of navigability to be applied, is important. With this in mind, it will become crystal clear that the language in the Submerged Lands Act referring to waters that are navigable "under the laws of the United States," means not the the "navigable waters of the United States" over which there is Federal regulatory power, but those waters that are navigable in fact under the Federal test of navigability, arising as a "federal question" under the "Constitution and laws of the United States." The difference is that the former includes only one class of navigable waters, whereas the latter includes all waters that meet the federal test of navigability under the laws of the United States. It is believed that the following dis-

cussion will show, beyond question, that the above statements are correct.

a. Background of the Submerged Lands Act

The Submerged Lands Act was passed in response to decisions issued by this Court in what popularly are referred to as the submerged lands cases: *United States v. California,* 332 U.S. 19 (1947); *United States v. Louisiana,* 339 U.S. 699 (1950); and *United States v. Texas,* 339 U.S. 707 (1950). All three cases involved the question as to whether the States owned the bed of the marginal sea (the seabed located below the tidelands). So far as relevant here, the *California* case (the first to be decided) represented a claim by the State that, since the:

> original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal footing" with the original states, California at that time became vested with title to all such lands. (322 U.S. at 23)

The Court rejected California's argument, pointing out that the original states had not claimed any part of the bed of the marginal sea, but only the beds of navigable waters located within the boundaries of the states (these waters were termed "inland waters" and included tidelands as well as navigable waters not affected by the tides). Since the original states did not claim or assert dominion over the bed of the marginal sea, the Court reasoned that California could claim no such ownership under the equal footing doctrine. The

Court went on to point out that it was the Federal Government, after the Union was formed, that first staked out a claim to the marginal sea and exercised dominion over it, and further justified its holding by detailing the national interests that were critically involved in the marginal sea around the nation's coastline.

The *Louisiana* case, decided three years later, involved a similar claim by the State of Louisiana, and the Court rejected the arguments of the State, viewing its decision in the *California* case as dispositive of the question.

But the *Texas* case, decided at the same time as the *Louisiana* case, presented a somewhat different problem. Texas, as a Republic prior to statehood, had owned, both in a sovereign and proprietary capacity, the bed of the marginal sea in the Gulf of Mexico (at least to the extent of three statute miles from the shore). Thus, Texas did not claim title by virtue of the equal footing doctrine, but by prior ownership and possession, asserting that, after statehood, such ownership was subject only to the regulatory and jurisdictional powers conferred on the United States by the Constitution. It was the Government who invoked the equal footing doctrine in the *Texas* case, pointing out that if Texas owned such seabed, it would be in a better position than the other states who did not own the seabed. The Court adopted the argument of the Government, holding that the equal footing doctrine cut both ways, and declaring that Texas could not have an ownership interest in the bed of the marginal sea when the other states had no such ownership:

> The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she became a sister State on an "equal footing" with all other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States. (339 U.S. at 717-18)

The submerged lands cases are history in the sense that Congress responded by passing the Act of May 22, 1953 (67 Stat. 29, 43 U.S.C. 1301 *et seq.*) vesting the coastal states with title to the bed of the marginal sea (three geographical miles distant from the coastline of each such state). But the submerged lands cases were fully consistent with the prior decisions of this Court relating to navigability for purposes of state title. The Court simply pointed out that the original states had never owned any part of the seabed, and as a matter of constitutional equal footing, no state could claim such seabed; and, indeed, in the case of Texas, it was neces-

sary to take away such ownership in order to preserve constitutional equal footing.

It can easily be shown that the submerged lands cases, in discussing the reasons why the states did not own the bed of the marginal sea, did reaffirm state ownership of tidelands and inland navigable waters. In fact, in the *Texas* case, this Court cited *United States v. Oregon, supra,* as the best summary of the basis for state title to the beds of inland navigable waters (339 U.S. at 716-17), and quoted at length from the very paragraph in that decision where the Court had said state title was vested:

> even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce. (295 U.S. at 14)

In the *California* case the Court explained that one justification for state title to the beds of inland navigable waters was that local and state interests were there involved, and that a corresponding justification for national control of the marginal seabed was that national interests were involved. Thus:

> If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights to the states for inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying seaward in the three-mile belt. (332 U.S. at 36)

Or, again, as it was the belief that national interests compelled national rights in the sea bed, so it was the:

> belief that local interests are so predominant as constitutionally to require state dominion over

> lands *under its land-locked navigable waters* . . . (332 U.S. at 34)

With this series of cases decided, Congress passed the Submerged Lands Act, vesting title in the coastal states to the bed of a three-mile belt of the marginal sea, and confirming the already existing title in the states to the beds of inland navigable waters. In Section 1311 (a), Congress said:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources are, subject to the provisions hereof recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof; . . .

This language is comprehensive in its apparent attempt to lay to rest any possible question as to state ownership of the beds of navigable waters (although no question had arisen clouding state ownership of *inland* navigable waters). With respect to the beds of such inland navigable waters, Section 1301 (a) contained the definition:

> all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable *under the laws of the United States at the time such State became a member of the Union*, or acquired sovereignty over such lands and waters thereafter, up to ordinary high water mark as heretofore or here-

> after modified by accretion, erosion, and reliction; . . . (emphasis added)

There is nothing in the Act to suggest that it would not apply to intrastate navigable waters. On the contrary, the language of the Act is very clear that it does apply to *all* navigable waters within the states.

When the very act that authorized this litigation was before Congress (Great Salt Lake Lands Act, Act of June 3, 1966, 80 Stat. 192), the Department of the Interior, through its Under Secretary John A. Carver, Jr., told the Senate Subcommittee on Public Lands that the Great Salt Lake unquestionably was included within the coverage of the Submerged Lands Act (Exhibit P-31, p. 126). Of course, no question was raised as to whether the Great Salt Lake was connected in interstate navigation, or whether it had to be, since it was assumed that *all* navigable waters were included within the terms of the Submerged Lands Act. The discussion concerned only the lands exposed around the edge of the Lake, and not to the water covered bed of the Lake, and the question was whether the exposed lands were a part of the state-owned bed or whether they had attached as relictions to the federally-owned uplands. And, at pages 129-30 of the same Exhibit, Senator Bible thought it might be wise to "confirm" those exposed lands in Utah, pointing out that the Submerged Lands Act had sought to cover every possible contingency in confirming in the states the entire beds of all navigable waters:

> *Senator Bible*: A question has arisen as to the use of the term "confirm" in the bill under consideration. The committee counsel has pointed out to me that in the parent legislation, which

> made clear that the lands under navigable waters was to belong to the State, uses the same term. I read from the provision of that act, section 1311 [reading the language of that section as quoted above] and so on. I think, however, in reading the entire paragraph, that what we have here is the lawyers' excessive use of language *to make certain that every possible contingency has been covered.*
>
> *Mr. Carver*: I would agree. (emphasis added)

b. The "Laws of the United States"

The views of Under Secretary Carver and Senator Bible might not be too important. But what is important is that the Congress, in defining navigable waters in the Submerged Lands Act, used exactly the same words that this Court had used in numerous opinions for at least 83 years prior to passage of the Act.

It was in 1870 that this Court decided *The Daniel Ball,* accepted by everyone as the leading case setting forth the definition of navigability and declaring that waters are navigable in law if they are navigable in fact:

> And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (77 U.S. at 563)

That is the test of navigability to which Congress referred. And the language that immediately followed in *The Daniel Ball* went on to explain that navigable waters consisted of two categories: (1) those that were the navigable waters of the United States because they were connected in interstate commerce and thus subject

to federal regulatory powers; and (2) those that were not, and thus were the navigable waters of the states:

> *And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States,* when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (77 U.S. at 563) (emphasis added)

That distinction could not be expressed in any clearer language, and it has repeatedly been followed by this Court. The important observation is that only those waters over which Congress has regulatory power are designated as the "navigable waters of the United States." But, with respect to quite a different question, *i.e.,* whether federal law or state law should control the legal test of navigability, it has been clearly stated by this Court that it is a federal question under the Constitution and *laws of the United States.* This obviously was the reason why Congress used that exact phrase to define navigability in the Submerged Lands Act. And the federal test is the "navigability-in-fact" of the waters.

To illustrate specifically:

(1) In *The Propeller Genessee Chief v. Fitzhugh, supra,* where this Court rejected the English tidal test of navigability, one question was the meaning intended by the framers of the Constitution in their use of the phrase "admiralty and maritime jurisdiction" in Article III, Section 2. If it was intended to be limited to tidal

waters, as was the case in England, then such jurisdiction would be constitutionally limited to such waters. The Court held that it was not to be so limited.

(2) In *The Daniel Ball, supra,* this Court further defined navigable waters by saying they are navigable in law if they are navigable in fact. These cases, and this test of navigability, arose as a result of the constitutional question as to the meaning of admiralty and maritime jurisdiction, and with respect to federal statutes implementing such jurisdiction. The test of navigability was therefore one that had to be determined *under the Constitution and laws of the United States.* But the test so declared was simply one of navigability in fact, which the Court in *The Daniel Ball* said applied to the navigable waters of the United States *and* the navigable waters of the states.

(3) In *Barney v. Keokuk, supra,* the Court applied that test to state title questions, saying that:

> there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters [as were navigable in fact]. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. (94 U.S. at 338)

(4) Subsequent cases have clearly confirmed, with reference to state title questions, that navigability is to be determined under the Constitution and *laws of the United States,* and that determination is simply whether the waters are navigable in fact. Briefly:

(a) In *United States v. Holt State Bank, supra,* the Court said:

> The rule *long since approved* by this Court in applying the Constitution and *laws of the United States* is that streams or lakes *which are navigable in fact must be regarded as navigable in law;* . . . (270 U.S. at 56) (emphasis added)

(b) In *United States v. Utah, supra,* where it was undisputed that only intrastate navigable waters were involved, and where title to such beds were vested in Utah, the Court quoted with approval from *Holt State Bank*:

> The rule long since approved by this Court in applying the Constitution and *laws of the United States* is that streams or lakes which are navigable in fact must be regarded as navigable in law; . . . (283 U.S. at 76) (emphasis added)

(c) In *United States v. Oregon, supra,* the Court applied the same rule, and said it was to apply:

> even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce. (295 U.S. at 14)

The United States was a party to each of the three cases cited above, and each case involved the same question of state title that is now before the Court in this litigation.

Now, returning to the Submerged Lands Act, it is obvious that this Court had repeatedly made three concepts clear: (1) The question of navigability must be determined under the "laws of the United States", and that, under that test, all waters are navigable in law if they are navigable in fact, including those waters that are navigable in interstate commerce as well as those that are navigable only in intrastate commerce;

(2) those waters that are navigable in interstate commerce are the "navigable waters of the United States" for purposes of federal regulation and jurisdiction; and (3) with respect to title to the beds of navigable waters, any question of interstate navigation is wholly irrelevant (since that question relates only to federal regulatory powers).

Thus, with this background, Congress enacted the Submerged Lands Act to "confirm" *title* in the states to the beds of all waters that were:

> navigable *under the laws of the United States* at the time such State became a member of the Union . . . (Section 1301 (a) (1)) (emphasis added)

The above language is too clear to admit of doubt. Congress adopted verbatim this Court's repeated declarations that state title, dependent upon navigability in fact, is to be measured by the laws of the United States and not by local tests. Congress must be presumed to have been aware, particularly in view of the history of the Submerged Lands Act, of the many pronouncements of this Court using that language, and Congress further must have been aware of the precise holding in *United States v. Utah,* decided twenty-two years before passage of the Act, declaring that navigability would be determined by "the laws of the United States" (283 U.S. at 76) and that, under that test, the intrastate waters in question were navigable, and title to the bed belonged to Utah. The language of the Act is even more conclusive in its reference to the date of statehood, a critical date to be considered in determining navigability in fact for state title—but having nothing what-

soever to do with measuring federal jurisdiction of navigable waters in interstate commerce.

The Special Master, in determining that title to the bed of the Lake vested in Utah at the date of statehood, applied the exact test of navigability and used the exact language earlier expressed by this Court in declaring the legal test of navigability for state title, and by Congress in confirming state title. This is revealed in Conclusions of Law 10 and 14:

> 10. 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. (Special Master's Report, p. 51) (emphasis added)
>
> * * *
>
> 14. 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.* (Special Master's Report, p. 52) (emphasis added)

It is believed that the Submerged Lands Act is clear beyond question, as the foregoing discussion illustrates. It now seems appropriate to turn to the six cases cited by the United States, to see what authority it has marshalled in support of its contention.

c. The Cases Cited by the Government

The first case mentioned by the Government, and the only one that was decided by this Court, is *The Montello,* 20 Wall. 430 (1874). This case has been discussed at length in section V.B.2. of this Brief, *supra,* and need not be dwelled upon at length here. Suffice to

say that there is nothing in that case to support the Government's argument, since the case simply examined whether the Fox River was navigable in interstate commerce to subject it "to governmental regulation" (20 Wall. at 445). And, in fact, in the first hearing before this Court in that case, it was clearly stated that navigable waters included intrastate waters as well as the navigable waters of the United States:

> If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, *then it is not a navigable water of the United States, but only a navigable water of the State,* and the acts of Congress, to which reference is made in the lible, for the enrollment and license of vessels, have no application. (11 Wall. at 415)

Far from supporting the suggestion of the Government, the *Montello* is squarely in accord with the other decisions of this Court. The Government cited no other decisions of this Court. But it did cite one decision of the Utah Territorial Supreme Court and four federal district court cases.

The Utah case, *Poynter v. Chipman,* 8 Utah 442, 32 Pac. 690 (1893), was decided three years prior to Utah's statehood. It is difficult to fathom what the Government sees in this case to support its position, since there was no discussion of interstate commerce or intrastate waters. The territorial court did say, perhaps mistakenly, that Utah Lake (far different from the Great Salt Lake) was not navigable, relying upon the English test of navigability. There, the conflict was between,

on one hand, the plaintiff who was a succesor in interest of a patentee of the United States who received title to certain upland bordering on the surveyed meander line of Utah Lake, and, on the other hand, a private person who, without claim of title, assumed occupancy of certain exposed land situated between the meander line and the water's edge of Utah Lake. The action was brought in ejectment, and the dispute centered upon the ownership of the land lying between the patented upland and the water's edge. Discussing the English test of navigability by the ebb and flow of the tide, the territorial court said the Lake was not navigable. While this *dictum* was wrong, since the court did not read the earlier decisions of this Court very carefully, the result was correct, because the claim of the successor in interest of a federal patentee (color of title) against the claim of a trespasser (no color of title) was sustained. The State of Utah had not then been created, and the case discussed nothing of even remote relevance to the Submerged Lands Act. But there are more cogent observations. Surely, Utah territorial decisions do not aid in the construction of the Submerged Lands Act. Or, even if it could be conceived that they were revelant, it is then significant that the *Poynter* was was overruled by the Utah Supreme court in 1927 (*State v. Rolio*, 71 Utah 91, 262 Pac. 987 (1927)). The overruling was not by express identification of Poynter, but was clear beyond doubt. And, lest there be a quibble here about such an unimportant matter, perhaps a reference to independent views will be helpful. A well-respected title lawyer has written:

> For over forty years, title examiners have relied on a Utah Supreme Court decision which ap-

> parently had established authoritatively that the doctrine of accretion and reliction was not extant as to the beds of navigable waters in Utah. [The decision referred to was set forth in a footnote, which recited: 41. State v. Rolio, 71 Utah 91, 262 P. 987 (1927), *Rev'g sub silentio . . . Poynter* v. Chipman, 8 Utah 442, 32 P. 690) (1893).] See Shearer, *Federal Land Grants to the States: An Advocate's Dream; A Title Examiner's Nightmare,* 14 Rocky Mountain Mineral Law Institute, 193-94 (1968).

Needless to say, *Poynter* isn't much help to the Government here. Nor are the other four cases which the Government cites. They are all admiralty and maritime jurisdiction cases arising from boating accidents on navigable waters of the states, and not of the United States, and the federal district courts dismissed the complaints on jurisdictional grounds. It seems rather fruitless to discuss federal district court decisions here, in light of the clear holdings of this Court, but, since these cases were all of the remaining "authority" mustered by the Government to supports its argument, it is necessary to refer briefly to each of those cases. In so doing, it will be seen that they all correctly followed this Court's guidance, and offer nothing to support the Government's very tenuous and totally unfounded suggestion that the Submerged Lands Act does not apply to intrastate navigable waters.

The first case cited, *In re Madsen's Petition,* 187 F. Supp. 411 (N.D.N.Y. (1960)), arose from a boating accident that occurred on Lake Pleasant in the State of New York. The question was whether certain limitations on liability as provided in pertinent federal statutes relating to admiralty and maritime jurisdiction

should apply to the navigable waters in question. The court held that such statutes did not apply, since they were applicable only to the navigable waters of the United States, and Lake Pleasant was an intrastate navigable water:

> The oft-quoted definition of navigable waters of the United States, which, *under our system of dual sovereignty,* is the underlying essential for federal jurisdiction in maritime matters is contained in the Daniel Ball, 1870, 10 Wall. 557-563, 19 L. Ed. 999: "And they constitute navigable waters of the United States within the meaning of the acts of Congress, *in contradistinction from the navigable waters of the States,* when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water". (187 F. Supp. at 413-14) (emphasis added)

The district court thus correctly recognized and applied this Court's holdings, ruling that the regulatory powers of the United States are confined to the navigable waters of the United States, and that Lake Pleasant, as an intrastate navigable body of water of New York, was simply a navigable water of that State subject to state regulation. Similar to this Court in the submerged lands case, the district court emphasized the local needs for state regulation of intrastate navigable waters:

> It is an important problem for this District Court, which has within its geographical area of twenty-nine counties myriad interior lakes of New York State. Pleasure boating, now within the means of the average person, is on the increase in each of

> these lakes, and inevitably, in my judgment, as highway accidents multiplied from the ownership and use of more automobiles, so will the small pleasure boat accidents. (187 F. Supp. at 412)

The other three cases are similar, and can be handled with greater brevity. In *Shogry v. Lewis,* 225 F. Supp. 741 (W.D. Pa. 1964), a boating accident had occurred on Lake Chautauqua in New York State, and the question was whether the Lake was a navigable water of the United States for purposes of admiralty jurisdiction. The district court said there was no federal jurisdiction because:

> Lake Chautauqua is a landlocked lake in the sense that it is not connected with any other navigable water which would permit commerce originating on the lake to pass into any other state or foreign country. (225 F. Supp. at 742)

The court then proceeded to quote the same language from *The Daniel Ball* as did the court in *Madsen's Petition,* distinguishing the navigable waters of the United States from the navigable waters of the states, and concluding:

> In the instant case it is certain that the waters of Lake Chautauqua do not "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." (225 F. Supp. at 743)

Marine Office of America v. Manion, 241 F. Supp. 621 (D. Mass. 1965), was an admiralty action arising from a boat accident on Lake Winnipesaukee in New

Hampshire, and was dismissed for lack of jurisdiction because the Lake was not a navigable water of the United States. The court observed that the parties agreed that the *Daniel Ball* applied to determine those waters which were the navigable waters of the United States, and concluded that:

> From an affidavit of the respondent it appears that Lake Winnipesaukee is located entirely within the State of New Hampshire, and that it is landlocked in that it is not connected with any other navigable water which would permit commerce to move interstate. Similar inland lakes have been held to be without the admiralty and maritime jurisdiction of the United States. (citing cases) (241 F. Supp. at 622)

The last case cited by the Government for the present proposition is *In re Builders Supply Co.*, 278 F. Supp. 254 (N.D. Ia. 1968). This case, as in the other district court cases discussed above, involved a boating accident on a small landlocked lake (Clear Lake in Iowa), and the court, quoting the same language from *The Daniel Ball* as had the other federal district court cases, concluded that the lake was not a navigable water of the United States.

The Government did not cite *The Robert W. Parsons,* 191 U.S. 17 (1903), which at least is a decision by this Court setting forth the same admiralty jurisdiction statements as the four district court cases cited by the Government. There, the court said that a contract for boat repairs was subject to federal admiralty jurisdiction, and that certain statutes of the State of New York (providing for *in rem* proceedings to enforce a lien for repairs) were inapplicable. The Court ob-

served that *The Thomas Jefferson,* 10 Wheat. 428, had originally applied the tidal test of navigability, but that:

> It [The Thomas Jefferson] was, however, flatly overruled in The Gennessee Chief, 12 How. 443, and the modern doctrine established, to which this court has consistently and invariably adhered, that not the ebb and flow of the tide, but the actual navigability of the waters is the test of jurisdiction. (191 U.S. at 26)

The Court then quoted the popular language of *The Daniel Ball* as to the distinction between navigable waters of the United States and the navigable waters of the United States and the navigable waters of the states, and concluded that the waters in question were navigable in interstate commerce, and therefore the navigable waters of the United States, but that:

> It is not intended here to intimate that if the waters, though navigable, are wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the State of New York, they are to be considered as navigable waters of the United States. (citing cases) (191 U.S. at 28)

To support its argument in reference to the Submerged Lands Act, the Government cited one decision of this Court (*The Montello*), one decision of the territorial court of Utah, and four federal district court cases relating to admiralty. *The Montello* said the reverse of that intimated by the Government, the Utah territorial decision was overruled in 1927, and the four federal district court decisions do nothing except correctly limit federal admiralty jurisdiction to the navigable waters of the United States. None of the cases

involved state title questions. None even has *dicta,* let alone a holding, relevant to the Government's argument.

There is not one word in any of the five cases cited by the Government that suggests that states do not receive title to the beds of their intrastate navigable waters, or that the test of navigability *under the laws of the United States* means anything other than what this Court has said it means, and as used by Congress in confirming title in the states. Further, as will be shown in the two sections next succeeding, the above explanation of the Submerged Lands Act is in accord with the understanding and practices of federal agencies, and is the very view earlier adopted by the Government in this action.

But Utah's title to the bed of the Great Salt Lake vested on January 4, 1896, when Utah became a state, by virtue of the concept of constitutional equal footing among the states, and that was more than fifty-seven years prior to the "confirmation" of Utah's title by the Submerged Lands Act.

4. *Federal Administrative Recognition*

It is realized that title to real property owned by the United States will not be encumbered or divested through unauthorized acts of federal administrative officials, and the Special Master was clearly correct in his recommended Conclusion of Law No. 13, at page 52 of his Report, when he said:

> . . . the United States should not be estopped from opposing the State of Utah's claim of title and asserting title in itself.

But it is significant that the federal agencies having

operational or legal responsibilities in connection with navigable waters have consistently recognized the rules of this Court, understanding that state title is not dependent on the waters being connected in interstate commerce. The brief references that follow, then, are not presented to argue estoppel, but only to show that federal agencies have recognized the clarity of this Court's holdings:

a. *Department of the Interior*:

(1) Through its Under Secretary John A. Carver, Jr., in his testimony before Congress and as cited in Section V.B.3 of this Brief, *supra.*

(2) Through its Bureau of Reclamation by recognizing title to the bed of the Great Salt Lake to be in Utah, and purchasing a part thereof for a reclamation reservoir (See Finding of Fact No. 40 at page 39 of the Special Master's Report).

(3) Through its Bureau of Sports Fisheries and Wildlife, by reviewing and approving title in Utah to parts of the bed of the Lake to be used in developing waterfowl areas with Federal participating funds (See Findings 40 and 41 at pages 38-40 of the Special Master's Report).

b. *Army Corps of Engineers*: Through its investigation and report on the Great Salt Lake, introduced by the Government in this case as Exhibit D-4, Item 00, entitled "Survey Report for Navigation" and where it is stated that the lake was navigable (p. 12), but only in intrastate rather than interstate commerce, and the "lands below the Burgess meander line as well as the lake itself belong to the State of Utah" (p. 3).

c. *Department of Justice*: In the Land and Natural Resources Division Journal, published by the U.S. Department of Justice, Vol .6, No. 9 (October 1968), the lead article is entitled "The Source of State Ownership of the Beds of Nontidal Navigable Waters," and, having argued that states did not necessarily own title to the beds of navigable waters before *Barney v. Keokuk,* concludes that the matter is moot because the Submerged Lands Act confirmed state ownership of *all* nontidal navigable bodies of water (pp. 376-77).

The foregoing conduct and expressions of legal views on the part of officers and lawyers of the United States is relatively unimportant. It certainly does not estop, preclude, or bind the United States, and Utah does not rely on it for that purpose. It simply shows, however, that the United States, through its agents and agencies, has clearly recognized and consistently followed this Court's decisions that state title to the beds of navigable waters is not dependent upon a connection in interstate or foreign commerce.

5. *Agreement by Counsel in this Case that Interstate Navigability Not Required*

In May, 1969, hearings were held to take evidence as to the navigability of the Great Salt Lake. At that time it was important to have the Special Master adopt a definition of navigability, so that evidence could be evaluated to determine its relevance to the test adopted. During the proceedings in open Court, it was agreed by counsel for both parties that navigability in interstate commerce was not a part of the test, and that the test to be followed in this case was the one set forth in *The Daniel Ball,* as applied in *United States v. Utah.*

Perhaps the exact exchange of comments before the Special Master will be most illustrative. (See, generally, T. 10-23).

Mr. Richard L. Dewsnup, counsel for the State of Utah, explained the State's view that susceptibility to navigation was the proper test, but that the State would also show actual uses to demonstrate susceptibility to use (T. 10). Mr. Martin Green, speaking for the United States, responded:

> MR. GREEN: (Continuing) - - with respect to what Mr. Dewsnup has said and especially with respect to the very important issue as to what constitutes navigability.
>
> THE COURT: Yes. Let's define our terms. As I understand the State, they said susceptibility was really the test rather than actual commercial navigation.
>
> MR. GREEN: Yes. Your Honor, I believe the State will rely heavily on the susceptibility on the lake to use for commerce. (T. 11)

Mr. Green then proceeded to explain what has now become the Government's "historical" argument, but conceded that such analysis was without merit in view of *Barney v. Keokuk* and the Submerged Lands Act:

> MR. GREEN: . . . So in Barney v. Keokuk the Court used the other criteria for navigability to determine the state's title. There was this confusion. And this confusion has been perpetuated and is probably *too well too much a part of the law now for us to say here that only the beds of tidal waters belong to the states. We're not saying that here and furthermore, we can't say that because in* 1953 *the Submerged Lands Act was passed and it said that the states are entitled*

to the beds of their non-tidal waters, but if they were navigable under the laws of the United States when the states came into the Union. *So we have to look to see what is navigable under the laws of the United States.*

We assume that the state will not insist on the test used in admiralty cases because *to be subject to admiralty jurisdiction a body of water has to be a water of the United States, that is it has to be interstate.* If that test was used in the Great Salt Lake, we would win right away, because Great Salt Lake is entirely within one state. We assume—We don't insist upon that criteria, however, your Honor, but we would like it if your Honor would accept it. *But we assume that what is navigable under the laws of the United States then must be what in those cases involving the exercise by the United States of its powers under the Commerce Clause of the Constitution — as is decided to being navigable. And the case that is most often quoted and is quoted hundreds of times as to what constitutes navigability is the Daniel Ball. And I would just like to read the one sentence in this decision which defines, for all practical purposes navigability. "Waters are navigable in fact when they are used or susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel upon water."* (T. 15-16) (emphasis added)

Mr. Green thus conceded that the United States did not rely upon the interstate navigation requirement, but, on the contrary, the Government's view of the phrase "laws of the United States" in the Submerged Lands Act was that it meant the test of navigability in fact as set forth in *The Daniel Ball.*

After Mr. Green concluded his opening remarks to the Special Master, the State of Utah inquired whether the position stated by the Government was firm as a basis for presentation of evidence; Mr. Green responded, and the following exchange took place:

> MR. GREEN: . . . we wish only in response to the State's opening statement to indicate what we consider as relevant for proving navigability from the State's point—from any point of view.
>
> * * *
>
> MR. DEWSNUP: So that we'll know what we're proving, does the United States deny that the Great Salt Lake was physically susceptible of supporting commercial navigation at statehood?
>
> MR. GREEN: Your Honor, in our Answer we have answered the allegation of complaint—we have said we have no information or belief at this time, which is tantamount to a denial.
>
> THE COURT: I think if they would admit that, they would admit the core of your case—*if it was susceptible to navigation by virtue of the fact it was capable of indulging in commercial activity at the time of admission to statehood—then Utah proved its case, wouldn't you say so?*
>
> MR. GREEN: *I certainly would, your Honor.* (T. 21-22) (emphasis supplied)

Thus, after a further exchange of comments, it was clear that counsel for the parties were in agreement that the test of navigability as defined in *The Daniel Ball* and applied in *United States v. Holt State Bank* and *United States v. Utah* was the appropriate legal test, but that each case had to be decided on its own facts. (T. 22-23)

This is somewhat significant, in view of the fact that in *United States v. Utah* this Court said, and held, that:

> The rule long since approved by this Court in applying the Constitution and *laws of the United States* is that streams or lakes which are navigable in fact must be regarded as navigable in law; (283 U.S. at 76)

and that, if the waters were thus navigable, then the beds would be (and were held to be) owned by the State, even though:

> it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce, and the question is whether they are navigable waters of the State of Utah. (283 U.S. at 75)

The position of the Government, as reflected by the discussion and agreement between counsel quoted above, was collaterally confirmed in a memorandum filed with the Special Master by the Government on May 19, 1969 (see pages 13-14).

Both Utah and the Government rested their cases on May 20, 1969, after all of the evidence was admitted. The Special Master requested briefs to be filed. In its brief, the Government for the first time indicated that it might change the legal position it had committed itself to in the hearings, and, rather than rely on *United States v. Utah,* ask the Court to overrule it.

But this "notice" came four months after the hearings to take evidence had closed. The Special Master proceeded to make his findings from the evidence in the

record, and since navigability in interstate commerce was not an issue, there was no evidence relevant thereto.

Thus, in Finding No. 12 at page 17 of his Report, the Special Master stated that:

> . . . even though there is evidence that vessels sailed from the Bear River to the Lake, and up the Jordan River from the Lake, there is no evidence upon which to base a finding that vessels could travel on water between the Lake and its affluents to any place outside the State of Utah since 1824. (Finding No. 24, page 24, Special Master's Report).

However, in accordance with this Court's earlier decisions, the Special Master correctly concluded that it was not necessary to determine whether the Lake was navigable in interstate commerce, because:

> 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. (Special Master's Report, Conclusion of Law No. 10, page 51).

Congress by special statute authorized this litigation. Utah commenced the action. The interests of the United States were represented by the Department of Justice and the Solicitor General. More than two years after the action had been filed, hearings were held to take evidence. The parties agreed to and acknowledged the correct legal test of navigability—and evidence was taken accordingly. Then, months after the hearings were concluded, the Government indicated that it might want to reframe the legal criteria for navigability.

If this were an appeal, the Government would be foreclosed from reversing its legal position. But in origi-

nal actions, the procedural rules are very unclear. Since the Government did not make any request whatsoever of the Special Master—it simply signalled its intention, after the trial, of adopting a new theory if it seemed necessary—the Special Master did not respond to that notice.

If the Government is not now foreclosed from arguing an inconsistent legal theory, the foregoing discussion at least shows that the very argument which the Government now makes was evaluated by the Government in this action (and was the subject of a memorandum by the Government to the Special Master). And the Government concluded—on its own initiative and as part of the record in this case—that such an argument was wholly without merit and could not be asserted. The Government is now asserting it.

6. *No Historical Basis*

As observed several times above, the single reason advanced by the Government, in urging this Court to depart from its prior decisions, is that there is a "historical" basis to the argument. This is totally inaccurate, unless one adopts a strange view of history.

The Government's historical analysis is not history at all, but is better characterized as a very technical measuring of the facts in each case to see how much the Court's language can be disregarded as unnecessary to the decision. While it often is useful, and sometimes necessary, to separate the holding from the dictum in a particular case, such a practice loses its usefulness if it confuses the judicial rules being laid down. To illustrate, the Government's "historical" argument seems to run along this line:

a. If a judicial decision is contrary to any principle of the common law, then only so much of that common law principle should be rejected as is absolutely necessary under the facts of the case.

b. In England, the test of navigability was measured by the tide, and the same test should thus apply in this country.

c. In 1851 when this Court decided *The Propeller Genessee Chief*, it was said that the English test was being rejected, but this language should be disregarded as too broad, and the case should be limited to admirality jurisdiction matters.

Similarly, the Government would argue that the clear pronouncements of the Court in 1870, in both *The Daniel Ball* and *The Montello*, should be taken, not for the principles they set fourth, but only for what they might have meant if strictly confined to admiralty and maritime jurisdiction. And the same would be argued with respect to *Barney v. Keokuk* in 1876, where there was a clear application of the navigability-in-fact test to state title questions. This should not be viewed, says the Government, as the true rule, since the Mississippi River there involved could be navigated interstate, and the Court could have limited its language so as to apply only to such interstate navigable waters. Had such a limitation been expressed, the Government would conclude that *intrastate navigable waters* would not be navigable *under the English test* of navigability, and states would not have title.

Thus, the Government's historical argument is based on the assumption that the English test of navigability should be presumed to exist here except insofar as it has

actually been eroded by the Government's view of the facts before the Court in its decisions. Hence, if it can be shown that the Court *could have avoided* saying that the English test of navigability was rejected with respect to this country's intrastate navigable waters, then it is possible to say that the English test still applies to such waters—and they are not navigable, under the English test, unless they are affected by the ebb and flow of the tide. So, the Government concludes, from a historical standpoint, it can be said that the intrastate navigable waters in this country are not navigable waters at all—because the English test says so. So states don't get title to the beds of such waters.

But even that tortuous historical route finally fails. The Government admits that the end of the trail came in 1931, when, in *United States v. Utah, supra,* the Court clearly and expressly held that states get title to the beds of navigable intrastate waters. The Court had said as much many times before, but in the *Utah* case there is no way that the facts can be separated from the express holding—it was undisputed that the waters were navigable intrastate only.

Thus, the Government suggests that its historical analysis can bring the Court up to 1931 without requiring it to overrule any prior cases—by just distinguishing them. But from 1931, when history failed, the Government admits that, for its argument to be adopted, this Court must "reconsider" its decisions in the *Utah* and *Oregon* cases.

Utah reads history a different way. The English test of navigability was adequate to serve the needs of that island, but it was totally unsuited to this vast coun-

try where navigable waters stretch for many hundreds of miles without being affected by the tides. A different test was required—and a different test was announced.

This Court did not "erode" the English test of navigability—it rejected it in its entirety. *The Genessee Chief* and *The Daniel Ball* made clear the compelling reasons for the rejection.

Consequently, since the express rejection of the English test of navigability by this Court in 1851, the English test has not been consulted by this Court, or by lower federal courts or state courts for that matter, to determine navigability questions. When the English test has been mentioned in these decisions, it has only been to observe that such test had been completely rejected by this Court as ill-suited to this country.

History does afford a parallel example in the development of the western United States. This great arid region found that the English common law doctrine of riparian rights would totally frustrate economic development in agriculture, mining, and industry. This was so because the riparian doctrine required the water to be kept in the stream, or at least in the watershed, and after use to be returned to the stream.

The American West required waters to be diverted from the streams—often taken many miles from the watershed—for beneficial uses in irrigation, mining, milling, and manufacturing. So the common law of riparian rights was simply ignored by the early farmers and miners, and when conflicts reached the courts, the courts rejected riparian rights in favor of a completely new and different regime of water rights—commonly known as the law of appropriation.

Congress recognized the necessity of rejecting riparian rights in favor of appropriation, and passed statutes in 1866, 1870, and 1877 giving federal consent to the appropriation customs and practices in the West. This Court discussed the history of the law of appropriation in the West and the early federal statutes in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

The above reference to the law of appropriation is totally irrelevant to the issues in this case, but it is a valid historical example showing that the law must be adapted to the geographical needs of the country. It was exactly this kind of need that lead this Court to reject, in total, the English test of navigability. This, Utah submits, is the true historical significance of the demise in this country of the English test of navigability.

7. Illogical and Impractical

In England, there were only two classes of water—navigable and non-navigable. The Crown owned the beds of navigable waters and the beds of non-navigable waters were privately owned. In this country, while a new test of navigability was adopted, there were still only two classes of water—navigable and non-navigable. As successors to the English Crown, the states own the beds of all navigable waters within their borders, and the beds of non-navigable waters are owned by adjacent proprietors. These ownership concepts are clear, and are not to be confused with Federal *regulatory* powers, which extend to all waters that are navigable in interstate or foreign commerce.

The argument proposed by the United States would

now create, for the first time, a third class of waters for the purpose of bed ownership: intrastate navigable waters. Curiously, with respect to the relative governmental responsibilities of the national and state governments, the following anomaly would result from the Government's argument:

a. The United States, having no regulatory powers over intrastate navigable waters, would own their beds and shores;

b. The states, having the governmental responsibility of regulating the public use of intrastate navigable waters, would have no ownership rights in the beds or shores.

Would the states be required to get Federal permits before they would be allowed to discharge their sovereign duty to regulate and protect navigation and other public uses of this "federal property"?

Or would it be that the beds of navigable intrastate waters would be treated as non-navigable waters, so that the beds would be privately owned by the upland proprietors? If so, must the states then get permission from these private persons before it can regulate intrastate commerce?

The United States claims ownership, as against the State of Utah, to the bed of the Great Salt Lake because it is an intrastate navigable body of water. But as against private persons owning land adjacent to the Lake, it is likely that the Government would argue that they have no ownership rights in the bed of the lake because such private rights attach only to the beds of non-navigable lakes. Thus, the result of the Government's argument would be this: Utah should now be denied title to the bed

of the Great Salt Lake because it is not navigable under the English test of the ebb and flow of the tide; but, as to private riparian owners, they should be denied any rights in the bed because the Lake is navigable in intrastate commerce. Hence, Utah would lose title to the bed of the Lake because it is not navigable under the English law—the riparian owners would not get title because the Lake is navigable in intrastate commerce under American law. Who has title? Apparently for reasons too obscure to grasp, it would be the United States.

The anomalous results identified above only scratch the surface. As other examples:

a. What ownership interests do the original thirteen states have in the beds of their intrastate navigable waters? If such states do not own the beds, do private riparians own the beds? Or does the United States, and, if so, on what theory? Do the original states have a greater or different ownership interest in intrastate navigable waters than the states subsequently admitted? Do they have different governmental rights or duties to regulate and protect public uses on such waters?

b. Once the mixture is made to confuse *state ownership* of the beds of navigable waters with *federal regulatory* powers over waters that are navigable in interstate commerce, the confusion compounds itself. Who owns title to the beds of navigable stretches of a river on a navigable interstate stream, but where the navigable segments are wholly intrastate? (This was the *United States v. Utah* fact situation, and it is a bit unclear how the Government would now say that case should have been resolved). Who would own the beds of waters that were navigable at statehood in interstate commerce, but

> now are dry (*Holt State Bank* fact situation)? Who owns the beds of waters that are not and never have been navigable, either in interstate or intrastate commerce, but may be made navigable by artificial improvements? What happens to the title to the bed when improvements are made and the waters become navigable in intrastate commerce? Interstate commerce? Who owns title to the beds of waters that were not navigable at statehood, but have since become navigable from "natural" causes? In interstate commerce? Intrastate commerce?

The foregoing questions are designed to show that a fantastic array of illogical and confusing situations would result from adopting the Government's argument. Bed title questions are now clear. Federal regulatory and jurisdictional powers are equally clear. They should remain so. The preceeding discussion raises the importance of the security of property titles, but that will be discussed in the next section of this Brief.

8. *Confusion of Land Titles*

There is little point in mentioning to this Court the obvious undesirability of uprooting long standing rules of property law. State title to the beds of all navigable waters has been an unquestioned fact for nearly a century. *Barney v. Keokuk* observed in 1876 that there had been some title uncertainty among the states, and that the states should resolve them in whatever way they deemed most appropriate under their local rules of real property law.

In the century since *Barney v. Keokuk*, property rights have vested, capital investments have been made,

and improvements have been constructed on the strength of such titles.

No useful purpose would be served by detailing the early state court litigation in Utah that served to jell the local rules of property with respect to lakebed lands, and how titles have been cleared in reliance on those rules. It would not be useful because it is apparent that the same situation exists in every state, with literally thousands of intrastate navigable waters. Surely, there can be no doubt that the Government's argument, if adopted by this Court, would create a virtual crisis, on a national scale, by the clouds that would be cast on real property titles.

This Court certainly was mindful of these concerns when it rejected the English test of navigability in *The Propeller Genessee Chief v. Fitzhugh*, 12 How. 443 (1851):

> The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb

> no rights of property nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.

And this Court was equally aware of the same problem in *Barney v. Keokuk*, 94 U.S. 324 (1876), when it applied the *Genessee Chief* and the *Daniel Ball* test of navigability to state title questions:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 id. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee*

> *Chief,* 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject.

9. *Denial of Public Use of Intrastate Navigable Waters*

There is no need to cite any social or economic studies to show that public recreational use of lakes and streams is increasing rapidly. The need for effective state regulation is obvious. As the federal district court said in *In re Madsen's Petition,* 187 F. Supp. 411, 412, (N.D. N.Y. 1960):

> Pleasure boating, now within the means of the average person, is on the increase in each of these ("myriad") lakes, and inevitably, in my judgment, as highway accidents multiplied from the ownership and use of more automobiles, so will the small pleasure boat accidents.

The Great Salt Lake, characterized by the Government as forlorn and desolate, has always had boating, swimming and recreational uses, with private uses and commercial resorts in operation and a new state park be-

ing constructed with a marina to accommodate 200 boats (See, *e.g.*, Findings 38 and 53, at pp. 35-36, 53 of the Special Master's Report).

But the extent of public use on the Great Salt Lake is not the point of present concern. The point that is critical is the public right of access to these waters, shores and banks for recreational purposes. Such rights of access as now exist are founded upon state ownership of the waters and beds, which is viewed as an ownership in trust for the benefit of the public.

To be sure, the states would have police power authority over waters in which they had no ownership rights, just as they now do over non-navigable waters. But the police power does not give public rights of access over private property—unless such access rights are taken by eminent domain and just compensation paid. Therefore, if the Government's argument in this case were to be adopted, all navigable intrastate waters would become, in effect, non-navigable lakes without public rights of use.

The Government argues that intrastate navigable waters should be placed in the same category as the English non-tidal waters. Thus the Government, at page 32 of its Brief, cites *Johnson v. O'Neill*, 105 Law Times Rep. 587, 597 (House of Lords, 1911), and that case did truly hold, consistent with English law, that:

> At the outset of his judgment Ross, J. states two propositions of law. They are these: (1) The Crown is not of common right entitled to the soil of waters of an inland non-tidal lake. (2) *No right can exist in the public to fish in the waters of an inland non-tidal lake.* These propositions were accepted by the Court of Appeal.

> They were only faintly questioned at the Bar. Speaking for myself, I heard no argument tending in the slightest degree to shake their authority. I think that they are incontrovertible. I may add that in my opinion *there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea.* In this country one and the same law applies to inland non-tidal waters whatever the size of the water space may be. (emphasis added)

True enough, that is the English law, but it hardly commends itself to this country. The public demand for water recreation use today confirms this Court's wisdom long ago when it foresaw, in *Genessee Chief* and *Daniel Ball*, a rule better suited to the needs of this nation.

The incredible result of the Government's argument would come at a time when the states are attempting to take full measure of their public trust and property rights in such waters and beds to meet the public recreational demand. The traditional public uses of navigation and fishing are being expanded to include swimming, water skiing, skin diving, spear fishing, pleasure boating, and other recreational and esthetic uses. Many recent articles have catalogued the many ways in which the states are trying to meet this burgeoning demand. See for example, Johnson and Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 Nat. Res. J. 1 (1967); Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, 1 Waters and Water Rights, ch. 3 at 210 *et seq.* (Clark ed. 1967); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. Law Rev. 471 (1970); Sax, *Water Law Planning and Policy*, at 95-96 (Bobbs-Merrill 1968); Waite, *Public*

Rights to Use and Have Access to Navigable Waters, 1958 Wis. L. Rev. 335; Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 Wis L. Rev. 542; *Munro, Public v. Private: The Status of Lakes*, 10 Buffalo L. Rev. 459 (1961); Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 Wash. L. Rev. 580 (1960); Note, 5 U. Fla. L. Rev. 166 (1952); Comment, 12 Wyo. L. J. 167 (1958); Comment, 3 S. D. L. Rev. 109 (1958); Maloney & Plager, *Florida Lakes: Problems in a Water Paradise*, 13 U. Fla. L. Rev. 1 (1960); Comment, 12 Iowa L. Rev. 411 (1927).

To repeat, the public rights of access to and upon intrastate navigable waters, including use of the shores and banks, derives from state *ownership*—not state police power. That ownership, in turn, is founded upon the navigability of the waters at statehood. For the Government now to argue that intrastate navigable waters are not navigable for state title, is to urge the destruction of the very foundation of public rights of use—not only navigation and fishing, but recreation and esthetic as well.

10. *Denial of Equal Footing*

The equal footing concept has been fully discussed in the foregoing material and need not be repeated here. The decisions of this Court in *Martin v. Waddell, Pollard v. Hagan, Barney v. Keokuk*, and *United States v. Utah*, all *supra*, leave no doubt about the application and scope of the equal footing doctrine.

And, in *United States v. Texas, supra*, it was emphasized that, while equal footing does not mean economic equality among the states, the proprietary owner-

ship of the beds of navigable waters is so closely connected with the sovereign aspects of state regulation, that it would be a denial of equal footing to the other states if Texas retained any proprietary ownership in the bed of the marginal sea (See Section V. B. 3 of this Brief, *supra*).

The original states certainly had proprietary ownership of the beds of their navigable intrastate waters. And they have, as all subsequently admitted states have, exercised dominion and control over such waters and beds. Examples are found in the federal district court cases cited by the Government in this litigation: Lakes Pleasant and Chautauqua in New York; Lake Winnipesaukee in New Hampshire, and Clear Lake in Iowa. Innumerable instances could be cited.

But the problem is this: Does New York, as an original state, own the beds of Lake Pleasant and Lake Chautauqua? They are intrastate navigable waters of that state. There are two possibilities under the Government's argument:

> a. The original states must be deprived of title to the beds of their intrastate navigable waters (as was Texas to the bed of the marginal sea) to preserve equal footing among the states; or
>
> b. The original states may keep title to the beds of their intrastate navigable waters, in which event all states subsequently admitted to the Union occupy a status of lesser—not equal—footing.

Thus, to adopt the argument of the Government, this Court would be required not only to reject its earlier decisions, but would encounter a very serious constitu-

tional question of enormous magnitude: The equality of the states.

11. *Summary*

The purpose of this section is not to re-argue the material presented above, but merely to identify the points that have been made. Responding to the Government's argument that states do not own title to the beds of their intrastate navigable waters, Utah has shown that:

a. The decisions of this Court are squarely against such a view;

b. Congress has confirmed title to the beds of all navigable waters, clearly foreclosing the Government's argument;

c. Federal agencies, and the Department of Justice in this very action have heretofore taken the opposite view from the one which the Government now argues;

d. There is no historical or legal basis for the Government's argument;

e. The Government's argument, if adopted, would lead to illogical, impractical and absurd results;

f. Real estate titles and rules of property law would be confused and clouded;

g. Public access to intrastate waters would be eliminated, and present public uses for navigation, fishing, recreation and esthetics would be barred;

h. The Government's argument would amount to a denial of constitutional equal footing among the states.

The foregoing arguments are applicable, not only to the Great Salt Lake, but to every navigable intrastate lake or stream in each of the fifty states.

VI. CONCLUSION

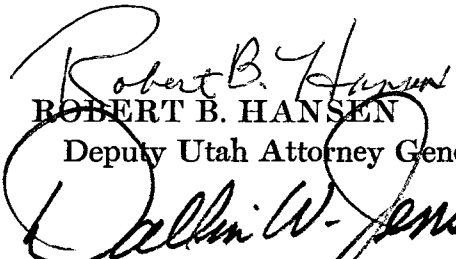
Utah fully supports the Special Master's Report, both with respect to the Findings of Fact and Conclusions of Law as recommended to this Court. For the Government to prevail, this Court would be required either (1) to upset the Special Master's findings which are based on uncontroverted evidence, or (2) to overrule its prior decisions on state title to the beds of navigable waters.

This case is of critical importance, not only to Utah, but to all states having intrastate navigable waters. Since all states have such waters, it is apparent that an adverse decision here would operate with equally unfortunate consequences upon all of the other states. But Utah has not asked other states to file briefs in this action to support Utah's position. The issues are clear, the Court certainly is aware of the interests of the states and the impact of its decision, and there seemed to be no point in causing the Court to be flooded with unnecessary briefs.

Utah respectfully urges the Court to adopt and approve the Findings of Fact, Conclusions of Law, and Decree as proposed by the Special Master.

Respectfully submitted,

VERNON B. ROMNEY
Utah Attorney General



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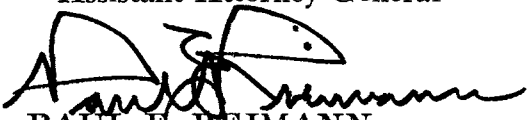

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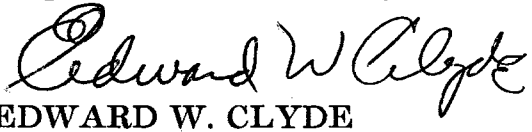

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March 9, 1971

VII. APPENDIX: SUMMARY OF EVIDENCE

A. SUMMARY OF TESTIMONY

1. *Zilliah Walker Manning*, called as a witness for plaintiff, testified that:

   a. She was born in 1891, five years before statehood, in Farmington, Utah, just east of Great Salt Lake (.T 217); her family lived on Antelope Island at the time of her birth and she lived on Antelope Island until she was 12 years old, during which time her father was superintendent of livestock on the island (T. 217-18).

   b. While on the island (until over 12 years of age) she remembered livestock always moved to and from the island and mainland "on a flat bottom boat" (T. 219); and that her family would get their supplies from Farmington by boat (T. 220). She identified herself on a picture taken on the island and marked as Exhibit P-39, and admitted into evidence as Page 32-A of Exhibit P-8, taken when she was 11 years old (1902) (T. 220); she also identified a picture of a boat that would frequently carry about 40 head of cattle and buffalo, and was powered by sail from the island to Farmington and back (T. 221-22, Exhibit P-8, page 32-A).

   c. She remembered that a harvester, requiring 12 horses to pull it, was taken to the island by boat (T. 222); and that grain raised on the island was shipped by boat, "lots of times," and that the boat operated about twice a week in the summertime and once a month in the winter (T. 223).

d. She remembered when her father went by boat to Salt Lake City and stayed two extra days to celebrate Utah's statehood, and he brought her a chrysanthemum, which she still has (T. 223-24).

e. She knew a Mr. George Frarey, who made his living with a boat by taking people around the lake, from Antelope Island (T. 225).

f. On cross-examination, she explained that White and Sons owned the cattle boat used by her father (T. 227); and that a Mr. Backman owned a boat which he used to ship other ranchers' sheep from Wenner's Island (Fremont Island) to Syracuse (T. 228) in Davis County (Exhibit P-1).

2. *Leon L. Imlay,* called as a witness for plaintiff, testified that:

a. He was born in 1893, three years prior to statehood, at Grantsville, Utah, near the southern shore of the Great Salt Lake (T. 61) and lived there until 1939 (T. 66).

b. His first recollection of visiting the Great Salt Lake was in 1898, when he was nearly five years of age, at which time he went to Garfield Beach with his parents, where he rode as a passenger on an excursion boat similar to the one pictured at page 10 of Exhibit P-8 (T. 62-63). He was able to fix the exact year of that first visit because his mother was pregnant with a child which was delivered August 15, 1898, which was shortly after the boat trip (T. 64). He also recalled that at that early age he had his hair in long ringlets, and had a vivid recollection of some passengers referring to him as a "beautiful young lady" (T. 65).

c. Many times thereafter he went to the Garfield Beach for similar boat excursion rides (T. 63).

d. He first visited Saltair Resort when he was about 15 years of age (12 years after statehood) (T. 68), and remembered Saltair Beach as pictured

on page 13 of Exhibit P-8 and Saltair Resort as pictured on page 14 of Exhibit P-8 (T. 67-68). During that first visit to Saltair, he observed "many" boats, representing "everything you could think of," and including sailboats, rowboats and powerboats (T. 68).

e. He lived at Grantsville for approximately 46 years (1893-1939) and during that time made frequent trips to Salt Lake City, traveling on a road that passed within 300 yards of the Great Salt Lake; during these trips he saw many sailboats, rowboats and power driven boats of various sizes on the Great Salt Lake; he observed these boats as far out on the Lake as the center; and he often counted the boats that could be seen, and sometimes he counted more than 50 boats, which were operating out of Garfield Beach (T. 66-67).

f. Beginning in 1928, as an employee of the Royal Crystal Salt Company, he was assigned the responsibility of operating the pump station owned by that company and located near Saltair Resort, and used to pump lake brines to evaporation ponds for production of commercial salt; he was in charge of the pump station for about 11 years, or until 1939; during this period he visited the pump station one or two days each week, the pump station being located in water about 8 feet deep; during these visits he would see a number of boats, ranging in size from "tiny" boats to large power boats; and, in fact, he and his crew always had to use boats to operate the pump station, carrying crewmen, gasoline for the pump, fresh water and general supplies (T. 68-69, 73).

g. He also visited Gunnison Island "with Charles Stoddard on his sheep barge," and "observed where there had been operation of moving guano from the island for fertilizer," and the only way to transport guano from the island was by boat (T. 70-71).

3. *Joseph S. Nelson*, called as a witness for plaintiff, testified that:

   a. He is a lawyer, was born in 1897 (one year after statehood), and began working at the Saltair Resort when ten years of age because his father was president and manager of the resort; and he remembered Saltair as pictured at pages 13 and 14 of Exhibit P-8 (T. 83-84).

   b. He said Saltair had a regular boat harbor and a beach (T. 89); that part of his job was to collect fees for the rental of boats on the lake; that Saltair Beach operated a commercial excursion boat called the "Alice Ann," named after his sister (T. 85); he remembered "many" other commercial boats for hire, including the "Vista" and the "Irene" (T. 87-89); and said Saltair entertained as many as 10,000 bathers a day and 4,000 dancers at night (T. 87).

   c. He remembered a boat harbor at Sunset Beach (T. 92) and a boat harbor at Garfield Beach owned by Salt Lake County, identifying Exhibit P-11 as a picture of one part of that harbor and showing his brother's boathouse; he thought the picture was taken during the 1930's (T. 91-92).

   d. He remembered livestock barging operations on the lake, including a boat named the "Ruth" owned by John Dooley "that was a commercial boat used for hauling cattle back and forth from the place they were raised and taken off Antelope Island"; and that the owners of the livestock arranged to transport "their cattle and sheep in boats, big barges to Saltair" (T. 85-86), and that the barges would each hold over 50 head of cattle (T. 89); that the livestock were shipped from Antelope Island to a railhead at Saltair, where they were unloaded from the barges into chutes and then shipped by rail (T. 85-86); and that he observed this livestock barging operation each year between 1914 and 1920 (T. 93-94).

e. On cross-examination, he explained that the "Ruth" was actually in the nature of a tug boat used to tow livestock barges (T. 96); that he knew of other livestock barging operations from Antelope Island to a Davis County boat dock, but wasn't familiar with the details (T. 97); that the boats used for rental and commercial excursions held from two passengers to fifty or more (T. 94-95); and that Southern Pacific owned a big 50 horsepower boat called the "E. W. Marsh" which was used to patrol the Lucin Cutoff trestle (T. 96).

4. *Claire Wilcox Noall*, called as a witness for plaintiff, testified that:

a. She was born in 1892, 4 years prior to statehood, in Salt Lake City, Utah; received a B.A. Degree from the University of Utah and completed the M.A. Degree requirements in creative writing; and has done considerable historical work and had experience as a photographer (T. 75).

b. She was a neighbor of Captain Davis, and had "several boating experiences" with him on the Great Salt Lake (T. 75); and she specifically remembered taking overnight excursions on the "Cambria," owned by Captain Davis, between the years of 1904 and 1906, when the Lucin Cutoff trestle was being constructed (T. 76); on the overnight excursions 20 to 24 people were on the boat, and 20 to 30 people were on the boat during daily excursions (T. 77); and after Captain Davis discontinued operating boats, his son took commercial excursions on the Great Salt Lake (T. 78).

c. Before she was 8 years of age she went to Saltair, and remembered it "exactly" as shown on pages 12 and 14 of Exhibit P-8, and remembered seeing boats at Saltair (T. 78-79).

5. *Francis W. Kirkham,* called as a witness for plaintiff, testified that:

   a. He was born in 1877, nine years before Utah's statehood; was familiar with the boating activities at Garfield Beach before statehood; was a paying passenger on the excursion boat pictured on page 12 of Exhibit P-8; and the first such trip that he took was before 1896 (T. 233-35).

   b. Dr. Kirkham's educational background included and A.B. Degree from the University of Michigan, an LL.B. Degree from the University of Utah, and a Ph.D. from the University of California at Brekeley (T. 233).

6. *Phil Dern,* called as a witness for plaintiff, testified that:

   a. He is 49 years of age; his father operated Sunset Beach from 1934 until his death in 1957, and prior to 1934 had operated Black Rock Beach; and since 1957 he (Phil Dern) has operated Sunset Beach (T. 111).

   b. Every year from 1934 to the present time Sunset Beach has operated boats for hire, usually on a concession basis whereby Sunset Beach receives a percentage of the gross income from boat rides and rentals, which percentage now approximates $10,000.00 per year (T. 112); the average boat would carry 12 to 15 passengers, although the present concessionaire (John Silver) also uses several larger amphibious "army ducks" (T. 113).

   c. He operated a 28 foot Chris-Craft for about 5 years after World War II; Donald Newhouse, a concessionaire, operated a 42 foot twin engine diesel which carried about 35 commercial passengers and operated on a full time basis from the middle of May to the end of September of each year (T. 113-14); and his present boat rides are typically from 20 to 30 minutes to accommo-

date the time schedule of Greyline Motor Tours passengers, although other passengers can, and do, take excursions any place on the lake (T. 116, 121).

d. He now has been awarded a contract by the Utah Park and Recreation Commission to operate boats on Antelope Island State Park at the north end of Antelope Island; and this will require the installation of a floating dock and related boating facilities, the sale of gas and oil to boaters, and boat rides for hire (T. 114-15, 119).

e. He personally observed commercial shipment of guano from Bird Island by a company which used a 50 to 60 foot LCI landing craft, loading the guano with a tractor with a front end loader, and shipping it approximately 25 to 30 miles from Bird Island to the Salt Lake County Boat Harbor; the guano company operated on a regular basis each year from about 1947 to 1955, a period of "eight or nine years" (T. 116-17, 123-24).

7. *John Clawson Silver,* called as a witness for plaintiff, testified that:

a. Since 1963 he has operated the Silver Sands Beach on the Great Salt Lake for commercial boat rides, and during that time his income from boat passengers has increased from $8,000.00 to $30,000.00 per year (T. 287-88).

b. He operates eight "army ducks" and a launch, with each boat carrying 30 to 35 paying customers per trip; he has operated a 36 foot Chris-Craft on the lake for 13 years for business promotional purposes; and he is now considering purchasing a boat 100 to 200 feet long for commercial passenger service (T. 289-91).

c. He has operated several barges to ship salt crystals and rock from Antelope Island and Stansbury Island to the mainland; these products were

not offered for sale but were used for decorative purposes in his commercial appliance store (T. 289).

8. *Reese F. Llewellyn,* called as a witness for plaintiff, testified that:

   a. He is a claims agent and special agent of D & RG Railroad; a member of the Utah State Bar, and previously worked for Salt Lake County Sheriff's office from 1935 to 1943 (T. 103).

   b. His duties as a deputy sheriff took him to Sunset Beach and Black Rock Beach and he identified Exhibit P-11 as part of the Salt Lake County Boat Harbor, built as "a big 'T' shaped boat harbor" (T. 104).

   c. The Salt Lake County Sheriff operated a tug-like boat, 25 to 30 feet long, with a cabin and powered by a diesel motor under the deck which was used for law enforcement patrol and rescue, operating continuously during summer months, over substantial areas of the Lake (T. 105-06).

   d. He frequently observed between 40 and 50 boats moored at the Salt Lake County Boat Harbor, and as many as 75 to 100 additional boats out on the lake. Also, other excursion and rental boats were at Sunset and Black Rock Beaches. These observations were made while he was serving on the lake as a deputy sheriff from 1935 to 1943 (T. 106-07).

9. *Harold J. Tippetts,* called as a witness for plaintiff, testified that:

   a. He is employed by the Division of Parks and Recreation of the State of Utah and previously served as the Director of the Great Salt Lake Authority (T. 129).

   b. The Division of Parks and Recreation has created and is developing Antelope Island State

Park at the north end of Antelope Island, encompassing 2,000 acres of land; the park is connected to the mainland by a recently constructed causeway fill road 7½ miles in length at a cost to date in excess of $750,000.00 (T. 129-30, 137); a boat ramp is to be constructed at the park and $445,000.00 has been planned for marina facilities (.T 130-31); there will be permanent berths for 200 boats, ranging in size from small canoes to 45 foot craft (T. 135, Exhibit P-16). The major boating travel probably will be from the southern part of the lake to the park, traveling west of Antelope Island, but such travel could cover the major portion of the lake (T. 132); and there will be a boat concessionaire at the park (T. 131-32).

c. Senate Bill 25 is now pending in the U.S. Congress to establish a Great Salt Lake National Monument on Antelope Island (T. 130, Exhibit P-15); the National Park Service estimated that the Utah State Park on Antelope Island would attract 300,000 visitors the first year during the 5 year development period, and would attract in excess of 840,000 vistors per year by the end of such development period (T. 31).

d. The State of Utah, Salt Lake County and Hill Air Force Base own and operate rescue craft on the lake (T. 132).

10. *Thomas T. Lundee,* called as a witness for plaintiff, testified that:

a. He is a consulting engineer and naval architect. licensed by the State of California, and owns his own consulting company with offices in San Francisco (T. 166-67); he has designed many small barges, large barges, off-shore drill rigs, bulk carriers, tug boats, and dredges (T. 167-68); he has obtained about 15 patents for marine equipment design, including one for the "push-tow" process for large barges designed by him

for use on Great Salt Lake (T. 169); and, generally, has designed marine craft for over 30 years, is familiar with barge design, operation and use, and is familiar with navigable waters, including navigable waters of the United States (T. 169).

b. He was engaged by Morrison-Knudson Company and International Engineers to design barges and tug boats for use on Great Salt Lake to construct a rock fill causeway across the lake for Southern Pacific Company (T. 170); he studied the waters of the lake, finding them to contain about 20% more salt than ocean water, thus resulting in a 20% "bonus" in carrying capacity of barges and other craft because the greater buoyancy resulted in a shallower draft (T. 171-72); and he discovered that the heavier salt concentration prevented the water from freezing, thus permitting year around barging operations (T. 172, 177), and that such salt concentration presented no serious problems of corrosion, operation or maintenance (T. 173-74, 177).

c. Thirty nine boats were acquired at a cost of about $7,000,000.00 (T. 176) for use on the Great Salt Lake causeway construction (T. 173); including barges and equipment designed specifically for that particular job (T. 169, 175); and that the boats consisted of:

(1) Six large dump barges 250 feet long, 55 feet wide, and 12 1/3 feet deep, each capable of carrying a per trip tonnage load equal to 90 railroad cars, with a draft of 13 feet (T. 175-76);

(2) Six 1,000 horsepower tow boats to push the dump barges;

(3) Five deck barges 178 feet long, 48 feet wide, and 10 feet high, with a per trip carrying capacity of 1,600 tons each;

(4) Two 600 horsepower twin-screw tour boats;

(5) Three 220 horsepower tug boats;

(6) Two dredges;

(7) Fifteen miscellaneous boats, including dredge tenders, anchor scows, anchor barges, pile driving barges, crew boats and scows (T. 176, Exhibit P-21).

d. The thirty nine boats were used on the Great Salt Lake for about two years from early 1957 to 1959 (T. 177), completing a job that cost about $49,000,000.00 and required the removal and placing of 41,000,000 cubic yards (over 70,000,000 tons) of fill, with over 90% of the fill being placed by barges as the only feasible means of hauling and placing such fill (T. 178-79); the tonnage of fill hauled by the barges was "vastly cheaper" than that part of the fill actually hauled by trucks and railroad cars (less than 10%) (T. 179).

e. The Great Salt Lake was particularly economical for navigation, because:

(1) The water did not freeze in winter and the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. 172, 177);

(2) The harbor, dredged at Little Valley near Promontory Point, was 400 feet wide and 1,500 feet long, and was unusually in expensive because it was clay with very little rock (T. 181); due to lack of currents and tides in the lake, the harbor did not silt or fill and during the two years of continual use no further dredging, cleaning or maintenance was required (T. 182-84); and, in general, the cost of harbor construction and maintenance on the Great Salt Lake was "appreciably less" than on other inland

waterways customarily used for navigation (T. 184).

(3) The greater buoyancy of the waters of the Great Salt Lake made navigation more economical than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171); the dump barges that operated fully loaded on Great Salt Lake with a 13 foot draft would have required a 15½ foot draft on the Mississippi River, and since that river has a 9 foot governing channel, could only have operated there with a partial loal (T. 175-76); all barges in commercial use in 1896 when Utah obtained statehood could have successfully navigated on the Great Salt Lake (T. 207-08); and barges in common use today, such as grain barges, cement barges, petroleum barges and all other commercial barges shown in a publication entitled "Commercial Transportation on the Inland Waterways," published by the So-society of Naval Architects and Marine Engineers (Exhibit P-22), could operate fully loaded on the Great Salt Lake (T. 206).

f. Additionally, Mr. Lundee stated that:

(1) After completion of the causeway on Great Salt Lake, the barges and other craft were in good condition and were sold at favorable prices for use elsewhere in the world (same, loaded with smaller craft, were towed across the Atlantic Ocean for use in Portugal) (T. 173-74).

(2) It would be necessary to use boats to drill for oil or gas underneath the bed of the Great Salt Lake (T. 210).

(3) If the need should arise, the railroad trestle and causeway could be modified at reasonable cost to accommodate larger commer-

cial vessels, probably by constructing draw bridges or swing bridges (T. 206-07).

11. *Golden O. Peterson,* called as a witness for plaintiff, testified that:

    a. He is employed by the Southern Pacific Company, owner of the railroad trestle and causeway across Great Salt Lake; he was first assigned to duty on the lake in 1942, and in 1956 was promoted to his present position as Assistant Bridges and Buildings Supervisor (T. 148-49).

    b. Since 1956, he has used boats each week on the lake to inspect the trestle for safety; and prior to the construction of the causeway the boat patrol trips to inspect the trestle were made daily (T. 150); the boats now used for inspection and patrol include three 28 foot steel boats with 12 foot beams (Exhibits P-19 and P-20, T. 150-52) and one 25 foot steel boat (T. 153); the trestle is about 12 miles long and a round trip on patrol takes about 5 hours (T. 150-51); the 25 foot boat can go through the trestle and the causeway culverts at all times; but when the lake level is high the 28 foot boats sometimes have trouble with vertical clearance in the causeway culverts, and when the water is low the 28 foot boats sometimes have difficulty with lateral clearance when passing through the trestle (T. 153-56).

12. *Gail Sanders,* called as a witness for plaintiff, testified that:

    a. He is president of the Sanders Brine Shrimp Company; has been engaged in brine shrimp operations on the Great Salt Lake since 1953; and he and his brother are employed on a full time basis by the business (T. 157).

    b. Most brine shrimp are harvested near Antelope Island and require the use of boats, both for

harvesting and transporting; shrimp eggs are blown to the shore and ordinarily harvested with special equipment on a four wheel drive vehicle (T. 158-59, 163); the shrimp and eggs are sold for tropical fish food, and the eggs are vacuum packed in cans and the shrimp frozen in plastic bags and shipped all over the world (T. 160, 163); eggs usually represent the majority harvest, but conditions vary and this is not always so (T. 163-64); the largest annual harvest of eggs was 200,000 pounds (T. 161) and the largest annual harvest of shrimp was 90,000 pounds (T. 162), and they pay the Utah Division of Fish and Game a royalty of about $5,000.00 per year (T. 160).

c. The company uses three air boats 18 feet long and 6 feet wide (each capable of carrying about 1,200 pounds of adult shrimp) (T. 158-59); other boats have been used in the past, but the air boats are preferable because they can operate any depth of water (T. 158).

13. *William Paxton Hewitt,* called as a witness for plaintiff, testified that:

a. He is Director of the Utah Geological and Mineralogical Survey (UGMS) and Professor of Geology at the University of Utah (T. 139).

b. The UMGS operates a fleet of five boats on the Great Salt Lake, including three amphibious ducks, a 21 foot motor dory, and a 42 foot steel research vessel with a 13 foot beam (T. 139-40, 145, Exhibits P-14, P-24 and P-25); these boats are used for scientific investigations on the lake, and the only way this can be done is through the use of boats (T. 140); the investigative work includes study of the chemical characteristics of, and variations in, the brines (T. 140), and study of the bottom sediments to determine the required support structures for oil exploration drilling and possible mineral ex-

traction from bed sediments (T. 141); other investigative studies have been performed by private organizations (Exhibit P-17, T. 142) by renting the large UGMS boat for $550.00 per day, by the U. S. Army Corps of Engineers for a national defense mapping program in 1968 (T. 143), and both the Water Resources Division and the Topographic Division of the United States Geological Survey use the UGMS craft for scientific work (T. 146); during 1969 the University of Wisconsin will use the UGMS craft to perform seismic work on the lake, in cooperation with the UGMS and the Department of Geophysics at the University of Utah (T. 145); and Hogel Zoo uses UGMS craft each year to obtain birds from the lake islands for trades and exchanges with other zoos (T. 145-46).

c. The UGMS craft navigate all parts of the lake, both north and south of the railroad causeway (T. 143); and the studies being conducted now, and in progress since 1965, and projected to continue indefinitely (T. 141-42).

d. There are commercial deposits of lithic sand or lime sand, which is used as a flux in smelting operations, on the south shore of the lake, on the west side of the lake, and to the northwest of Stansbury Island (T. 146).

14. *Donald G. Prince,* called as a witness for plaintiff, testified that:

He has been employed for 15 years last past by the Division of State Lands, State of Utah; that there has been constant leasing of the bed of the Great Salt Lake for oil and gas during these 15 years, such leases covering about 600,000 acres; the State always charges a lease rental fee; the lessees have been and are major oil companies; leases are still outstanding; several wells have been drilled; but no wells are

currently in the process of being drilled (T. 127-28).

15. *John Nagel,* called as a witness for plaintiff, testified that:

He is in charge of waterfowl management for the Division of Fish and Game of the State of Utah, and has been so associated for seven years (T. 212); there are 80,000 acres of developed waterfowl habitat and an additional 80,000 acres of natural waterfowl habitat on the Great Salt Lake, plus habitat for many additional birds (T. 214); there are 5,000,000 days use per year of the lake by waterfowl and marsh related birds (T. 214).

16. *Helmut H. Doelling,* called as a witness for plaintiff, testified that:

a. He is an economic geologist at the University of Utah, employed by the Utah Geological and Mineralogical Survey, with a Ph.D. in geology (T. 293-94); his thesis for his doctorate was on the geology of an area west of the Great Salt Lake (T. 294).

b. There are valuable lead deposits near the lake, known as the Monarch Mine (T. 296); large commercial oolite sand deposits near Lakeside (T. 296) and north of the railroad causeway (T. 297); and "very pure, very good" deposits of dolomite and limestone all through the area west of the lake (T. 297); ragonite deposits in Grassy Mountains and Cedar Mountains near the lake (T. 297, 303); low grade, but potentially commercial, phostatic beds west of the Terrace Mountains (T. 298); deposits of metals, dolomite, limestone and building stone in Newfoundland Mountains and Silver Island near the lake (T. 298); and, in general, there is considerable unexplored mineral potential northwest of the Great Salt Lake (T. 299).

17. *Elmer Butler,* called as a witness for defendant, testified that:

a. He was born in Grantsville, Utah, near the Great Salt Lake, and is presently employed by the Water Resources Division of the United States Geological Survey (T. 246).

b. In connection with his employment, he participated in a water resources survey of some of the tributaries to the Great Salt Lake; this study was performed in April, 1964, when the lake was about 6.8 feet lower than at statehood and about 3 feet lower than at the time of the hearing in May, 1969 (T. 247, 257-58); during his trip along the lake in 1964 he observed large areas of shoreland as "stretches of sand, marshy areas," and particularly in those place "where the lake had been" (T. 250); and "large areas of flats — some places its mud and salt beds" (T. 251); and, in general, that the area west of the lake was very sparsely populated (T. 247-54).

c. He also testified that he was familiar with the lake and was aware of the dolomite deposits near the lake which were shipped to the Geneva Plant of U. S. Steel for use as a flux, and that he worked at the dolomite mine as a boy (T. 261); that he was aware of "very valuable deposits" of dolomite sands on Stansbury Island which could only be shipped by boat during high cycles of the lake level (T. 262); that he was aware of valuable guano deposits shipped from Gunnison Island and Hat Island (T. 262); and knew the livestock on Fremont Island could only be shipped by boat "or helicopter" and that the livestock on Antelope Island, during high water levels, could only be shipped by boat (T. 263-64).

B. SUMMARY OF EXHIBITS

Exhibit No.

P-1 U.S.G.S. map showing Great Salt Lake and surrounding area (T. 26).

P-2 U.S.G.S. hydrograph showing gage readings of level of Great Salt Lake from 1850 to present time (T. 27).

P-3 Diagram showing lake as it existed at statehood on January 4, 1896, including length, width, depth contours, and perimeter (T. 27).

P-4 Diagram showing longitudinal section of lake as to depth and variation in bed (T. 28).

P-5 Diagram showing longitudinal line illustrated in Exhibit P-4, and to be correlated with this exhibit (T. 28).

P-6 Early reconnaissance map of Great Salt Lake (1849-50) (T. 31).

P-7 Early 1871 mining map showing lake and location of General Connor's steamship routes on the lake (T. 32).

P-8 Historical Materials, as follows (T. 30-60):

Page 1	Use of boats in the early survery of Great Salt Lake in 1843 by John G. Fremont.
Page 2	Newspaper accounts in 1854 of launching of ship "The Timely Gull" and in 1855 of availability of sailboat "Deseret" for excursions "on reasonable terms."
Page 2-A	Account of large shipment of railroad ties on lake in 1869.
Page 2-B	Account of late 1860's and early 1870's where steamboats

shipped "great quantities of ore" from south end of lake to northeast part of lake, and excursion boats capable of carrying 300 passengers.

Page 2-C — Pictures of "Lucin" as now located in San Francisco harbar, but built for and used on Great Salt Lake in construction of Lucin Cutoff trestle by Southern Pacific Company in 1906.

Pages 3-5 — Newspaper advertisements in 1875 and 1876 promoting commercial passenger service on ship "General Garfield." The advertisements also reflect the variety and volume of commercial shipments, *e.g.*, on page 4: "On and after August 1st the regular rates on Ore, Bullion, Coke, Charcoal and Coal will be $2.15 per ton between Salt Lake City and Halfway House in car lots of not less than 12,000 lbs. loaded and unloaded by the company, and $2.00 per ton when not loaded or unloaded by the company. Freight for the west will be received on weekdays only from 7 a.m. to 10 a.m. and forwarded the same day, while that received from 10 a.m. to 6 p.m. will be forwarded the next day. For any further information concerning freight, apply to J. N. Pike, Gen'l Freight Agent, G. W. Thatcher, Gen'l Passenger

	Agent, H. P. Kimball, Gen'l Superintendent."
Page 6	Newspaper advertisement in 1877 reporting resort activities, including row boats and sail boats.
Page 7	Newspaper advertisement and sketch of "grand opening" of Garfield Beach in 1887.
Page 8	Newspaper advertisement of resort activities at Garfield Beach - including boating - in 1896, the year of Utah's statehood.
Page 9	Photographs of steamship "General Garfield" and shipping dock on the Great Salt Lake.
Page 10	Photographs of "General Garfield" on Great Salt Lake.
Page 11	Photographs of boats at Garfield Beach.
Page 12	Photographs of "General Garfield" and Saltair, the latter being constructed in 1893, three years before Utah's statehood in 1896.
Page 13	Photographs of Saltair and Garfield Beach .
Page 14	Photographs of Saltair.
Page 14-A	Photographs of Saltair in about 1909 and Black Rock in about 1900.
Page 15	Extract from publication discussing sheep, cattle, horses,

cedar posts and buffalo being shipped on lake in 1870's.

Pages 16-A thru 16-D — Account of shipment of sheep (300 head per boat load), cattle, ore, salt, cedar posts (3,000 on top deck — using several boats, including "Lady of the Lake," a flat boat for cattle, and a 75 foot salt transport boat—and shipping much cargo to a railhead in Davis County.

Page 17 — Reference to "City of Corinne" carrying 400 sheep per load, and a picture of the Miller Brothers' boat.

Pages 18-A and 18-B — Extract from compilation by Kate Carter, identifying and discussing several of the important early boats used on Great Salt Lake, and explaining that at one point the shipment of gold ore was a commercial incentive in addition to passengers and other freight.

Page 19 — Agreement whereby Central Pacific Railway Company in 1903 paid $2,500.00 to owner of Fremont Island as compensation for interference with navigation rights by construction of railroad trestle across lake from Ogden to Lucin.

Pages 20-22 — Extracts from Journal of Captain David L. Davis, who for fifty years (beginning in

1868) continually operated commercial and pleasure boats on the lake.

Pages 23-A thru 23-D — Excerpts from an article written by Mr. and Mrs. Stephen L. Richards about navigation experiences of Captain Davis on the Great Salt Lake.

Page 24 — Copy of Constitution of The Salt Lake Yacht Club.

Page 25 — Copy of certificate of membership in Salt Lake Yacht Club, signed by Captain Davis in 1874.

Pages 26-A thru 26-D — Various newspaper accounts in 1870's and 1880's showing illustrative commercial and recreational boating activities on the lake.

Page 27 — Newspaper account April 20, 1926 of the death of Captain David L. Davis, ending "50 year Lake voyaging."

Pages 28-30 — Pictures of boat referred to in Journal of Captain Davis.

Page 31 — Account of Captain Edwin G. Brown and his many boating activities on the lake prior to his death in 1937, including heading the Salt Lake Yacht Club, which then "owned over forty craft on Great Salt Lake."

Page 32 — Photographs of Great Salt Lake boats and dock facilities.

Page 32-A — Photograph of boat used to haul supplies, cattle and buffalo from Antelope Island to mainland near date of statehood, and picture of Zillah Walker Manning, a witness (see T. 220-22).

Page 33 — Newspaper advertisement listing "moonlight boating" by Saltair Resort in 1909.

Pages 34-A thru 34-D — Newspaper accounts in 1909 of various boats and boating activities on the Great Salt Lake.

P-9 — Photograph of steamboat "Promontory" (T. 60).

P-10 — Specifications for ship (Promontory" (T. 60).

P-11 — Photograph of Salt Lake County Boat Harbor (T. 60).

P-12 — Photograph of scow driver (derrick on a boat on lake) (T. 109).

P-13 — Publication of Brotherhood of Engineers' Monthly Journal, discussing construction of Lucin Cutoff trestle, and use of fleet of boats consisting of seven tug boats, sternwheel steamer, numerous small boats, and nine gasoline launches, each capable of carrying from 15 to 35 persons "for a sail on the lake." (T. 109).

P-14 — Publication showing photographs of boats of Utah Geological Survey currently in use on the lake (T. 144).

P-15 — Copy of Senate Bill 25 introduced in the 91st Congress to create Antelope Island Na-

tional Monument on Great Salt Lake (T. 130).

P-16 Map prepared by National Park Service with respect to congressional hearings on S.B. 25, and showing facilities of Antelope Island State Park on Great Salt Lake (T. 136).

P-17 Copy of lease agreement showing rental of Utah Geological Survey boat for scientific purposes at the rate of $550.00 per day (T. 142).

P-18 Copy of Utah statutes creating Great Salt Lake Authority and Utah Park and Recreation Commission, and assigning jurisdiction over lake and boating activities. (T. 138).

P-19 Drawings and specifications of patrol boats currently in use by Southern Pacific Company on Great Salt Lake (T. 150).

P-20 Album of photographs of barges, tugboats, other craft and operations during construction of railroad causeway on Great Salt Lake (T. 185).

P-21 Pamphlet of specifications of barges and marine craft used in construction of railroad causeway on lake (T. 189).

P-22 Article on Commercial Transportation on the Inland Waterways, showing commercial barges in common use today that could successfully navigate Great Salt Lake (T. 205).

P-23 Motion picture with sound track showing barge and marine operation during construction of railroad causeway (T. 204).

P-24, 25 Photographs of 42 foot steel boat of Utah Geological Survey, as used for scientific purposes (T. 211).

P-26-28 Photographs of sailboats during 1968 sailboat regatta on Great Salt Lake (T. 211).

P-29 Photograph of present appearance of Little Valley boat harbor and dock area, having been constructed for use during railroad causeway project (T. 211).

P-30 Publication on Bird Life of Great Salt Lake by William H. Behle (T. 213).

P-31 Copy, Senate Hearings on S.B. 265 (Great Salt Lake Lands Act) (T. 237).

P-32 Copy, House Hearings on H.R. 1791 (Great Salt Lake Lands Act) (T. 237).

P-33 Copy, House Committee Report on H.R. 1791 (Great Salt Lake Lands Act) (T. 237).

P-34 Copy, Senate Committee Report on S.B. 265 (Great Salt Lake Lands Act) (T. 237).

P-35 Copy, Utah Senate Bill 8, accepting federal conditions of Great Salt Lake Lands Act (T. 237).

P-36, 37 Copy, documents showing federal recognition of state ownership of waterfowl areas located on lake bed lands (T. 238).

P-38 Documents relating to Willard Bay impoundment as part of Weber Basin Project, showing purchase by the United States from the State of Utah of portion of lake bed lands (T. 238).

P-39 Copy, Utah statute and U.S. statute relating to Bear River Bird Refuge, showing mutual recognition by U.S. Congress and Utah Legislature that Great Salt Lake was navigable (T. 242).

P-40 Contract showing present mining and removal of lime sand for flux from Stansbury Island on Great Salt Lake (T. 285).

D-1 Map of Antelope Island and southern part of Great Salt Lake (T. 30).

D-2 Map of Great Salt Lake, published by U.M. G.S. (T. 245).

D-3 Historical Materials relating to boating on Great Salt Lake (T. 268).

D-4 Report by U.S. Army Corps of Engineers concerning feasibility of building new boat harbor on Great Salt Lake (T. 281).

CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing Brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; by mailing the same, air mail postage prepaid, this 5th day of March, 1971, all in accordance with the Rules of this Court.

VERNON B. ROMNEY
Utah Attorney General