No. 31, Original

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
SHIRO KASHIWA,
Assistant Attorney General,
PETER L. STRAUSS,
Assistant to the Solicitor General,
MARTIN GREEN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

49

INDEX

422-487—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE UNITED STATES

1. Utah has filed a brief which reargues matters in issue before the Special Master, but not put before this Court. The United States did not except to any of the Master's factual conclusions, as such. Only two of its exceptions were to findings which the Master styled "Findings of Fact," and in each instance the gravamen of the exception was that the finding embodied an erroneous application of governing law—that is, that the finding was one of mixed law and fact, in which the law had been misdefined or misapplied. Since we accept the Master's findings of fact as such, all the discussion of our brief is based upon those findings and has reference to them. Utah, on the other hand, seeks to reargue the transcript and record before the Master, presenting to this Court as it presented to

him an advocate's view of what the proof entailed.[1] Particularly since Utah has filed no exceptions to the Master's Report, but rather "fully supports" it (Br. 129), its effort to have this Court reassess the weight of the evidence and similar matters, Br. 34–48, is out of place. There are, of course, responses which can be made to the characterizations which Utah has sought to place upon the record. The United States' view of that record was contained in its brief before the Special Master, and in light of the nature of Utah's argument in this Court, sixty copies thereof have been filed as a supplement to this reply brief. We believe, however, that the Court need not involve itself in these matters, but may restrict its consideration to the facts as found by the Special Master.

2. The United States believes that the facts found by the Special Master require the conclusion that the Great Salt Lake was *not* navigable in fact on the date of Utah's statehood, because the geographical characteristics of the Lake presented substantial obstacles that made it not susceptible of being used, in its "ordinary conditions," as a highway for commerce, trade and travel. *The Daniel Ball,* 10 Wall. 557, 563. If, as the Master found, such obstacles to use exist, it is irrelevant that they might be overcome by the

[1] For example, compare pp. 22–26 of Utah's brief with its proposed findings of fact, pp. 47–51 of its brief before the Master; and the Appendix "Summary of Evidence" pp. A–1 to A–26 with pp. 15–41 of the brief before the Master. The "Facts Showing Useful Navigable Capacity of Great Salt Lake," Br. 56–58, are all based on Utah's view of the transcript rather than the Master's findings.

dredging of lengthy channels or the building of enormous piers. A waterway, to be navigable, must "be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means." *Harrison* v. *Fite,* 148 Fed. 781, 783–784; *United States* v. *Utah,* 283 U.S. 64, 87; *United States* v. *Holt State Bank,* 270 U.S. 49, 56. Thus, we have excepted to Finding of Fact 31, which finds the Lake navigable, and to Finding of Fact 62, which appears to consider legally relevant the fact that the serious obstacles to commercial navigation on the Lake might be overcome by improvements such as dredged harbors (Finding of Fact 63(a)) if a commercial need arose.

There can be no doubt that the Master found serious obstacles to use of the Lake as a highway of commerce in its "ordinary conditions." "The Lake has throughout its perimeter, except in a few places, unusually gentle inclining shores." (Finding of Fact 8, R. 13). "The shore for the most part has a slope of less than one foot in 1,000 feet. A rise of a few feet in the water level will inundate great areas of land surrounding it, and a similar drop will leave large areas uncovered." (Finding of Fact 11, R. 17). "Except for an area at the southeastern shore * * * the Lake is surrounded by stretches of salt flats, marshes or bogs, some of which are in places several miles in width." (Finding of Fact 18, R. 21; see also Finding of Fact 26, R. 27). "The gradual shelving of the basin and the softness of the shore surface make it unusually difficult to get boats from dry land into floatable water. To reach water five feet deep, one must move

out a mile or more from the water's edge." (Finding of Fact 26, R. 25). "Convenient locations for launching and landing of boats are not to be found on the Lake." (*Id.*, R. 26).

Even if the water level of the Lake were stable, such facts—viewed against a history of non-use for commercial transportation (Finding of Fact 52, R. 44) and the extensive settlement of the Lake's environs (Finding of Fact 19, R. 21)—would show that the Lake did not meet the test of *The Daniel Ball.* But the level is not stable; in addition to its unpredictable rise and fall over the long term (Findings of Fact 13, 33, R. 18, 31–32), it experiences an average annual rise and fall of almost two feet (Finding of Fact 15, R. 19). While this variation seems negligible in its vertical dimension, it means a difference of over one-third of a mile in the location of the shoreline because of the gradual slope. A 4,000 ft. pier built out into the Lake in 1893 (Finding of Fact 21, R. 23) has long been "a desolate spot several miles inland" (Finding of Fact 61(c), R. 48; see also Finding of Fact 37, R. 35). The harbor which housed the dredges and boats for construction of the Southern Pacific Causeway, on which the State so heavily relies, required a channel two and one-half miles long to reach deep water; this was one of only two harbors on the Lake (Finding of Fact 39, R. 37–38). When such enormous piers or channels are required to reach floatable waters, and these in turn may be rendered useless by the "unpredictability of the Lake's level and waterline" (Finding of Fact 61(c), R. 48), then

it is established in our view that the "natural and ordinary condition" of the Lake is not such that it "affords a channel for useful commerce," *United States* v. *Holt State Bank, supra,* 220 U.S. at 56, whatever the capacity of the deep water of the Lake to float marine craft.

This is not a case like the prior *Utah* case, *supra,* "where conditions of exploration and settlement explain the infrequency or limited nature of [commercial] use." 283 U.S. at 82. The area near the Lake was already settled at statehood, and has been heavily populated ever since; but "Commerce and trade * * * has not flourished on the Lake," and future utilization not only awaits future demands, but also requires "future improvements." (Finding of Fact 62, R. 48–49). In this respect, the Lake more closely resembles a part of the Red River which this Court found not navigable in *Oklahoma* v. *Texas,* 258 U.S. 574, 589–591. In this portion of the river, water depths varied from six inches to three feet; the river had been used for light transportation, but was abandoned when alternate modes of transportation were available, and the Court concluded that it had insufficient capacity in its "natural and ordinary condition" for any but exceptional use. Similar depths—shallower than those found navigable in the prior *Utah* case and *Holt State Bank*—usually extend over a half mile from the Lake's shores (Findings of Fact 11, 25, R. 17, 26). The fact that a ditch may be dug through these shallows to alleviate the difficulty does not make the Lake navigable. *Egan* v. *Hart,* 165 U.S. 188, 193; *Leovy* v.

United States, 177 U.S. 621, 629; see also *The Montello,* 20 Wall. 430, 440–442; *United States* v. *Cress,* 243 U.S. 316, 321.

A lake circumscribed by such shallows, whose boundaries vary widely with slight variations in water level, does not lend itself to "commerce of a substantial and permanent character." *Leovy, supra,* 177 U.S. at 632. Indeed, the Master did *not* find that the Lake was actually in use as a highway of commerce on the date Utah was admitted to statehood. He bases his conclusion solely on a finding that the Lake was "capable," or susceptible of such use (Finding of Fact 31, R. 29)—a finding which has not been borne out by experience in the seventy-five years of Utah's statehood and which is based in part on the erroneous view that the possibility of "future improvements" (Finding of Fact 62, R. 49) can contribute to navigability. While a number of boats have been used on the Lake, most were for brief periods of time and specific noncommercial purposes, such as construction of the railroad causeways; the number is slight in relation to the Lake's size, the population around it, and the time period involved.[2] "Not counting excursion trips, the

[2] Only seven of these boats could be thought to have been engaged in trade or travel in the customary mode of trade or travel on water; their trade was sporadic, their careers, short, and all disappeared from the Lake by 1888—well before Utah became a State and a time when the level of the Lake was substantially higher, and its shoreline more accessible, than it has been ever since. A complete listing and analysis of the boats on the Lake and their uses appears in the United States' brief before the Special Master, filed herewith, at pp. 10–20 and 43–64.

boating uses of the Lake have been more of a private nature rather than by independent contractors for hire" (Finding of Fact 51, R. 43). "There was no evidence to show that any regularly scheduled freight or passenger service operated on the Lake" (Finding of Fact 52, R. 44), again despite its extensive size, its mineral development, and the heavily populated areas near its shores. In these circumstances the susceptibility test of the prior *Utah* case does not apply.

We conclude that the Lake was not susceptible of use as a channel for useful commerce in its "ordinary conditions"[3] at Utah's statehood. In any event, the Master applied an erroneous test to the evidence in considering the possibility of "future improvements" and discounting the history of actual disuse as a channel of commerce and trade. Even if the United States were not entitled to judgment on the present findings, it would be entitled to have the evidence reconsidered in accordance with a proper view of the law applicable to the case.

3. The United States' second argument is that this Court should reconsider its unexplained holding in the prior *Utah* decision that title to the beds of intrastate as well as interstate waters passes to the States on statehood if the waters are navigable in fact. Utah devotes the great bulk of its brief to this

[3] It should be clear that the United States has never conceded this issue, as Utah claims at p. 8 of its brief. We have consistently acknowledged that large boats could float in the central deep waters of the Lake, but deny for the reasons set out above and in our main brief that this suffices to show the susceptibility of the Lake to support commerce.

422-487—71——2

contention, but in our view substantially misstates the issues and the underlying law.

a. The United States preserved the issue. At the outset of the hearing, in language which Utah has quoted but not chosen to italicize, Utah Br. 109, counsel for the United States stated:

> If that test [that it has to be interstate] 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. * * *

The reason for not insisting was that, in light of this Court's prior *Utah* decision, the Master had no authority to adopt that rule. Utah now suggests that it might have introduced evidence of the Lake's interstate navigability; but it would hardly have omitted such proof in showing intrastate navigability, and fails to suggest what the evidence might be. Compare Exh. P–32, p. 33.

b. Utah asserts that "the original states certainly had proprietary ownership of the beds of their navigable intrastate waters," Br. 127, and then argues on the basis of the equal footing doctrine that it too must be afforded that right.

If Utah is advisedly speaking of *proprietary* ownership, the doctrine of equality among the states has no application. At the formation of the Union, the original states had proprietary ownership of all vacant lands within their boundaries. But it could not be suggested that, for this reason, the equal footing doc-

trine entitled new states as they were formed to assume proprietorship of all their vacant lands, which until then had been held by the United States. The United States' proprietary interests in those lands continued. Similarly, while the original states may have had proprietary ownership of the *vacant* beds of fresh water navigable and non-navigable streams—and we show below that title to river-beds and lake-beds generally passed with title to riparian lands in the original states—it does not at all follow that the equal footing doctrine entitled new states to assume a proprietary interest in the beds of their navigable and non-navigable streams; those rights remained with the proprietor of the adjoining lands, which most often was the United States.

But Utah may be asserting that the original states had *sovereign* rights in the beds of their navigable intrastate waters. If this were true, then the equal footing doctrine would entitle Utah to similar rights in its waters—and that is the root of our argument. For Utah is entitled as a matter of inherent sovereign right to neither more nor less than the original states possessed in such right when they formed the Union. Utah Br. 86–89. And the original states had no sovereign interest in the beds of their navigable intrastate waters, unless such an interest was created by statute.

The common law at the time recognized sovereign ownership of underwater lands only in bodies of water affected by the tides. *The Steamboat Thomas Jefferson,* 10 Wheat. 428. Such bodies, if navigable, were necessarily interstate waters, permitting commerce to other states and to foreign nations to be carried upon them.

This Court twice pointed out that no more than three of the original States (Pennsylvania, Virginia and North Carolina) denied riparian owners their common-law right to the beds of navigable, non-tidal waterways. *Shively* v. *Bowlby,* 152 U.S. 1, 31; *Hardin* v. *Jordan,* 140 U.S. 371, 393 *et seq.* Massachusetts, which early passed a statute reserving the beds of *unappropriated* "great ponds" in common, Lawes and Libertyes of Massachusetts (Cambridge, 1660), p. 50, reprinted in Massachusetts Colonial Laws (Boston, 1889), p. 170, continued in the absence of statute to recognize private ownership of the beds of non-tidal, navigable streams, subject only to a right of passage. *Brosnan* v. *Gage,* 240 Mass. 113, 118. Similarly, public ownership of a river-bed in Pennsylvania depended on a prior declaration of its navigable status; where a grant or sale of the river-bed had been made before it was declared a public highway, the private ownership rights controlled. *Coovert* v. *O'Connor,* 8 Watts (Pa.) 470. Although Utah asserts the contrary (Br. 127), New York has always followed the common law rule of riparian ownership, subject to public rights of access and passage, save where specific exceptions were made. *Fulton L., H. & P. Co.* v. *State of N.Y.*, 200 N.Y. 400, 412–414.

As set out in our main brief, the public lands of the United States may be divested from it only as authorized by Congress or required by the Constitution. We do not believe Congress has acted in this case. And if the original states did not own the beds of their fresh-water rivers and lakes as a matter of inherent sovereignty, then the Constitution does not

require the United States to give up its ownership of similar underwater lands in order to give new states "equal footing." Like the dry lands which surrounded them, such lands would remain in the public ownership of the United States. To hold the contrary is to take the step which this Court refused in *United States* v. *Texas,* 339 U.S. 707, and to confer on the new states rights which the original states never enjoyed.

c. So far as lands underlying navigable waters of the United States—*i.e.,* waters forming part of a channel of interstate or foreign commerce—are concerned, application of the equal footing doctrine was required if only to promote uniform treatment of the lands underlying waters subject to federal regulatory jurisdiction. The initial expansion of the navigability concept occurred in the setting of federal maritime and commercial jurisdiction. In a land of great, interconnected rivers and lakes, it appeared to be unwarranted to base distinctions governing federal power on the extent of the tide's influence. *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 433; *The Daniel Ball,* 10 Wall. 557. The Court easily made the transition to the proposition that ownership of the beds of waters "amenable to the admiralty jurisdiction," even though not tidal, "properly belongs to the States by their inherent sovereignty," *Barney* v. *Keokuk,* 94 U.S. 324, 338, albeit without considering that no such claim had been made by the original states. The result was that the consequences of federal navigability were uniform; the beds of all federally navigable waterways belonged, by inherent right, to the states.

No such uniformity was promoted, however, by the unexplained extension of that holding in the prior *Utah* case to lands which are not interconnected as part of a highway of interstate or foreign commerce. At least since the demise of *Swift* v. *Tyson* (*Erie R. Co.* v. *Tompkins,* 304 U.S. 64), the federal definition of what constitutes state navigable waters has become surplusage for all purposes other than the possible transfer of federal lands under the *Utah* rule. There are very few such waterways of any size. From the national perspective, the ownership of the beds of these bodies of water is a matter of indifference for any regulatory purpose; by definition, these bodies are not interconnected with routes of national or international trade subject to federal authority or protection, and the great insights of *The Daniel Ball* and *The Genesee Chief* do not apply. On the other hand, the *Utah* rule quite possibly promotes dispute, rather than quiet, on title issues. There are many smaller bodies of water, or portions thereof, which are arguably "susceptible" of use as a channel of intrastate commerce within the very permissive standards of the *Utah* holding. Separating title to the bed from title to the shores of such bodies is questionable public policy as well as unwarranted, as has been seen, by the equal footing doctrine.

d. The many consequences which the State supposes will follow from an overruling of the prior *Utah* decision are illusory. Rights of navigation and access would continue to be assured by the common-law easements which were and are the sole basis of state authority in most of the original states, and in the

many other states which follow the common-law rule and have conferred on riparian owners the title received from the United States upon statehood. See, *e.g.*, *Barney* v. *Keokuk, supra*; *Adams* v. *Pease*, 2 Conn. 481, 483–485. It is no more impractical for the states to control navigation over lands owned by the United States in its proprietary capacity than it is for the United States to exercise similar control over navigation on interstate waters, whose beds may be owned by the states. Since the underwater lands are not reserved as a matter of inherent sovereign right, a sale of the riparian lands would carry them with it or not according to the form of the sale, without regard to any doctrine of implied reservation. Against the possibility that overruling *Utah* might unsettle title on the few large bodies of intrastate navigable water must be balanced the uncertainty that would result in the probably greater number of bodies where navigability could be in dispute under the *Utah* rule. Again, we note that Utah's distress appears to be based on a faulty premise: the United States could not deny title to underwater lands which it had held in a purely proprietary capacity, if the form of sale of adjoining riparian lands was such as would ordinarily carry those lands with it; and except as to the largest bodies of water, in most states title to underwater lands passes into private hands whenever riparian lands are sold.

The governing consideration, in our view, is as Utah itself has stated. The State received from the United States at statehood only those underwater lands which corresponded to lands the original states possessed as

a matter of inherent sovereign right. The doctrine of equality among states entitled it to neither less nor more. And the original states' sovereign interest was limited to lands under waters affected by the tides or, at the very most, under waters which were a part of the great national system of commerce and trade.

e. There remains the question whether passage of the Submerged Lands Act has mooted the issue. That Act confirms in state ownership only those waters which are navigable "under the laws of the United States," and the question is whether, as we have asserted, Congress thus limited its action to the navigable waters of the United States, over which it frequently exercises its regulatory authority by the passage of national statutes, or whether it meant the phrase to encompass all waters navigable at common law, interstate or intrastate, under the test of *The Daniel Ball.*

The legislative history is not fully conclusive on the point. The House and Senate Reports on the Act reflect apprehension that this Court's ruling in *United States* v. *California,* 332 U.S. 19, might lead to an overruling of *Barney* v. *Keokuk* or *Pollard* v. *Hagan,* 3 How. 212, and a purpose to prevent any such development by confirming existing state title. *E.g.,* S. Rep. No. 133, 83d Cong., 1st Sess. 6–7 (1953); H. Rep. No. 215, 83 Cong., 1st Sess. 15 (1953). A Senate Minority Report, in particular, appears to have felt the legislation would also confirm the prior *Utah* decision, since it specifically mentions the Colorado River in that State. S. Rep. No. 133, *supra,* Pt. 2, at 18–19. And a letter written by the then Solicitor General, Philip

Perlman, in opposition to the grant of offshore lands, attached to the minority report as an appendix, assures that the government had no claims to inland navigable waters; the letter did not discriminate between intrastate and interstate navigability. *Id.* at 19–20; 21; 117; 119. While there was unanimity between the majority and minority reports on the desirability of confirming existing state title, however, it is also clear that Congress wished to bring about that confirmation on the assumption that title to the lands was in fact a matter of state right. There was no purpose to grant additional lands to the states in cases where, in Congress' view, the Constitution did not require it. And the reports do not focus particularly on the *Utah* principle as correct, or the subject of ratification by the Act.

The language of the statute itself is plausibly interpreted as referring to the concept with which Congress was most intimately familiar—the navigable waterways over which it possessed regulatory authority and to which the admiralty jurisdiction applied. If, as we have shown, the decision in the prior *Utah* case resulted from a misapplication of the equal footing principle, the language should be so interpreted in this case, and that decision should be overruled.

For these reasons and the reasons set forth in our principal brief, the Report of the Special Master should be revised, the Great Salt Lake should be found not to have been navigable on the date of Utah's admission to the Union, and judgment should be entered in favor of the United States; or else the

case should be remanded to the Master for reconsideration in accordance with this Court's opinion.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

MARTIN GREEN,
Attorney.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971