

Supreme Court, U. S.
FILED

APR 20 1972

MICHAEL RODAK, JR., CLERK

No. 31, Original

In the Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES CONCERNING
THE DECREE

ERWIN N. GRISWOLD,

Solicitor General,

KENT FRIZZELL,

Assistant Attorney General,

WM. TERRY BRAY,

Assistant to the Solicitor General,

JOHN E. LINDSKOLD,

Attorney,

Department of Justice,

Washington, D.C. 20530.

I N D E X

| | Page |
|--------------------------------|------|
| Statement | 1 |
| Discussion | 5 |
| A. The Minerals Question | 5 |
| B. The Survey Question | 9 |
| C. A Proposed Decree | 11 |
| Conclusion | 12 |
| Appendix | 13 |

CITATIONS

Cases:

| | |
|-------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Arizona v. California</i> , 373 U.S. 546 | 7 |
| <i>Barney v. Keokuk</i> , 94 U.S. 324 | 6 |
| <i>Choctaw Nation v. Oklahoma</i> , 397 U.S. 620 | 7 |
| <i>Deseret Livestock Co. v. State</i> , 110 Utah 239, 171 P.2d 401 | 6 |
| <i>Hardin v. Jordan</i> , 140 U.S. 371 | 6 |
| <i>Illinois Central Railroad v. Chicago</i> , 176 U.S. 646 | 7 |
| <i>Martin v. Waddell</i> , 16 Pet. 367 | 6 |
| <i>Morton International, Inc. v. Southern Pacific Transp. Co.</i> , No. 12557, S. Ct. Utah, filed March 14, 1972 | 6 |
| <i>Pollard's Lessee v. Hagan</i> , 3 How. 212 | 6 |
| <i>Shively v. Bowlby</i> , 151 U.S. 1 | 6 |
| <i>United States v. Chandler-Dunbar Co.</i> , 229 U.S. 53 | 6, 7 |
| <i>United States v. Gerlach Live Stock Co.</i> , 339 U.S. 725 | 7 |
| <i>United States v. Oregon</i> , 295 U.S. 1 | 6 |

Cases—Continued

| | |
|------------------------------------------------------------------------------------------------------|-----------|
| <i>United States v. Rio Grande Irrigation Co.</i> , 174 U.S. 690----- | Page 6 |
| <i>United States v. State of Washington</i> , 294 F. 2d 830, certiorari denied, 369 U.S. 817----- | 6 |

Statutes:

| | |
|-----------------------------------------------------------------------------------|------|
| Act of June 3, 1966, 80 Stat. 192----- | 1, 2 |
| Section 1----- | 3 |
| Section 2----- | 2, 3 |
| Section 3----- | 3 |
| Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301, <i>et seq.</i> ----- | 7 |
| Section 2(a), 67 Stat. 29, 43 U.S.C. 1301(a)----- | 8 |
| Section 2(e), 67 Stat. 30, 43 U.S.C. 1301(e)----- | 8 |
| Section 3(a), 67 Stat. 30, 43 U.S.C. 1311(a)----- | 8 |
| Section 3(b)(1), 67 Stat. 30, 43 U.S.C. 1311(b)(1)----- | 8 |
| Utah Code Ann. 65-1-14, 65-1-15 (1953)----- | 6 |

Miscellaneous:

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------|------|
| 99 Cong. Rec. 3327-3334, 3348-3350, 4350, 4471 (1953)----- | 8, 9 |
| <i>Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13, etc.</i> , 83d Cong., 1st Sess. (1953)----- | 8 |
| H. Conf. Rep. No. 1540, 89th Cong., 2d Sess. (1966)----- | 9 |
| S. Rep. No. 1006, 89th Cong., 2d Sess. (1966)- | 5, 6 |

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES CONCERNING THE DECREE

STATEMENT

This original action was filed by the State of Utah¹ to quiet in it title to the bed of the Great Salt Lake. The initial question was whether at the time of Utah's admission to the Union (January 4, 1896) the Great Salt Lake was navigable. That question was referred to a Special Master, 394 U.S. 89, 96. After extensive hearings, the Special Master found that at the time in question the Great Salt Lake was navigable. This Court approved that finding and directed the parties "to address themselves to * * * [the Special Master's proposed] decree with the view of agreeing, if possi-

¹The litigation was brought pursuant to the Act of June 3, 1966, 80 Stat. 192.

ble, upon the issues which have now been settled by this litigation" (403 U.S. 9, 12-13). The parties have reached substantial agreement but have been unable to agree fully on the issues which remain and should be referred to a new Special Master.² In consequence the parties have submitted the matter to this Court, by means of Utah's motion of March 2, 1972, requesting the Court to enter a decree, to which the United States herein responds.

A brief review of the history of this litigation is needed to understand its present status and the issues now presented. The Act of June 3, 1966 (80 Stat. 192) directs the United States to convey to the State of Utah all its title and interest, with certain enumerated exceptions, in the bed of the Great Salt Lake and in the brines of the Lake and the minerals associated therewith. Utah in turn is to convey to the United States all its title and interest in federally-owned uplands and to pay the United States the value of the property which the United States conveyed to it, unless it establishes that it, rather than the United States, was the rightful owner of such property. It was for this purpose that Utah initiated this action.

On June 15, 1967, pursuant to the 1966 Act, the United States quitclaimed to Utah the "lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake * * *" (Section 2 of the Act, 80 Stat. 192). The conveyance excepted

² Judge Ganey, the previous Special Master in this case, died in February 1972.

lands within two designated federal conservation projects, and reserved to the United States "all minerals, except brines and minerals in solution in the brines, or precipitated or extracted therefrom in whatever Federal lands there may be below the meander line" of the Lake (Sections 2 and 3 of the Act, 80 Stat. 192). The Act prescribed that the meander line for purposes of the conveyance should be determined by using existing public land surveys of the meander line around the Lake and closing any gaps by "following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed area" (Section 1 of the Act, 80 Stat. 192). The necessary surveying to close the line was completed in accordance with this direction prior to the conveyance.

As a result of the foregoing, Utah now owns the lands below the meander line and the brines and their minerals, subject to the exceptions and reservation indicated. This will not be affected by the outcome of the instant litigation, in which the only issue is whether the United States owned, so that Utah must pay for, any of the property conveyed by the United States.

The parties agree that by reason of the determination that the Lake was navigable at statehood (January 4, 1896), Utah owned the bed of the Lake on that date. The United States believes that there are three basic questions yet to be determined: (1) whether the United States owned any of the minerals below the meander line or in the brines (the minerals ques-

tion);³ (2) whether the doctrine of reliction vested in the United States any of the bed of the Lake which Utah acquired by reason of statehood (the reliction question); and (3) whether the lands within the surveyed meander line, and thus conveyed to Utah, included any federally-owned uplands above the bed of the Lake at statehood (the survey question). The United States proposed to Utah that all three questions should be preserved in the decree to be entered by this Court and, because further hearings, evidence and findings would probably be needed on these questions, that the Court should refer them to a Special Master.

Utah agrees that the reliction question remains to be adjudicated and should be referred to a Special Master (Utah Motion 4, 6, 23). As to the survey question, Utah “has no objection” to consideration of this issue by the Special Master if he determines “that it is necessary or useful * * * to resolve the reliction question,” but does not want the Master to consider this matter if the evidence indicates that it “would be moot” (*id.* at 6). Finally, Utah contends that resolution of the minerals question, so far as the question is involved in this litigation, follows directly from this Court’s determination that the Great Salt Lake was navigable (*id.* at 4–7, 11–16).

³ During discussions regarding the decree, the United States separated the minerals question into three components (minerals in the shorelands, minerals in the bed of the Lake, and minerals in the brines), as pointed out in Utah’s motion (pp. 4–5). The statement of the question in the text embodies all three components. We deal with each component separately in the Discussion, *infra*, pp. 5–9.

DISCUSSION

Both parties agree that the decree should preserve the reliction question and should refer that issue to a Special Master. Similarly, there is no basic disagreement regarding the survey question, although the parties apparently disagree on whether that question should be separately stated in the decree and referred to the Master.

The major controversy concerns the minerals question. Because this question is of central importance to this litigation, the United States concluded that a judicial determination of it, rather than agreement between the parties with respect to it, is needed. Heretofore we believed that this matter should also be referred to the Master; it is our view upon further consideration, however, that the question may be resolved by the Court at this time without further proceedings before the Master.

A. The Minerals Question. The United States conveyed to Utah any interest it had in the bed and brines of the Great Salt Lake and the minerals associated with the brines. These items have substantial value, both present and potential. See S. Rep. No. 1006, 89th Cong., 2d Sess., p. 3 (1966). Under the 1966 Act, Utah must pay the United States the value of any interest that the United States owned in these items at the time of the conveyance. Whether the United States owned any interest therein involves only legal issues, and hence it is appropriate for the Court to determine this question now.

1. This Court's decision of June 7, 1971, sustained the Master's finding that the Great Salt Lake was

navigable at statehood, but it did not define the property rights which this gave Utah. In cases not involving federal claims, the proprietorship rights in the bed of a navigable lake “are governed by the local laws” of the State in which the lake is situated. *Shively v. Bowlby*, 152 U.S. 1, 40. This ordinarily means that title to the lakebed is either in the State or in the riparian owner, depending on state law. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 60; *Shively v. Bowlby*, *supra*; see also *Hardin v. Jordan*, 140 U.S. 371; *Barney v. Keokuk*, 94 U.S. 324; *Pollard’s Lessee v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367. Under Utah law, it is settled that the State itself owns the bed of navigable bodies of water, as well as the minerals in the bed or in the waters covering it. See Utah Code Ann. 65-1-14, 65-1-15 (1953); *Morton International, Inc. v. Southern Pacific Transp. Co.*, No. 12557, S. Ct., Utah, filed March 14, 1972; *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P. 2d 401.

Although these principles control title questions where a federal claim is not involved, the same rules do not apply where the United States is a claimant. The federal government’s rights with respect to land ownership or conveyances made by it involve federal questions, to be determined by reference to federal law. See *United States v. Oregon*, 295 U.S. 1, 14, 26-28; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; *United States v. State of Washington*, 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817; see also *Utah v. United States*, *supra*, 403 U.S. at 10; S. Rep. No. 1006, *supra*, at pp. 11-12, 17. The Court’s recent decision herein made clear that under federal

law Utah owns “the original bed of the Great Salt Lake * * * [because] the lake was navigable * * * at the time of Utah’s admission” (403 U.S. at 10).

The authorities are inconclusive concerning the general federal law on the question here—whether despite the Lake’s navigability, the United States still owned any of the minerals in the bed of the Lake or in its brines prior to the conveyance to Utah. The federal rule regarding minerals in the bed itself has not, so far as we can ascertain, been judicially defined. Such authority as there is, however, suggests that the owner of the bed also owns the minerals in the bed. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620; *Illinois Central Railroad v. Chicago*, 176 U.S. 646, 660.

Ownership of the minerals in the brines presents a more difficult question. Water itself has long been considered a thing “common to all and property of none” (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744), which is not “capable of private ownership” (*United States v. Chandler-Dunbar Co.*, *supra*, 229 U.S. at 69). Water rights are inherently sovereign rights in the first instance, subject to such private uses as the sovereign permits. As between the parties here—the United States and Utah—the federal rights, as defined by federal law, ordinarily would be paramount. It is plausible that under federal law not only the water, but also the minerals in it would be subject to exclusive federal control. Cf. *Arizona v. California*, 373 U.S. 546.

2. These questions apparently need not be resolved in this case, however, because of the Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. 1301 *et seq.*). By

that statute the federal government, with certain exceptions not pertinent here, “released and relinquished” to the respective states “all right, title, and interest of the United States” with respect to all “lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters * * *” (Section 3(a) and (b)(1) of the Act, 67 Stat. 30, 43 U.S.C. 1311(a) and (b)(1)). The term “lands beneath navigable waters” means all lands within a State “which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union * * *” (Section 2(a) of the Act, 67 Stat. 29, 43 U.S.C. 1301(a)). “Natural resources” are defined as “includ[ing], without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life * * *” (Section 2(e) of the Act, 67 Stat. 30, 43 U.S.C. 1301(e)).

The Court has now decided that the Great Salt Lake was a navigable, non-tidal body of water at Utah’s statehood. Thus, the Submerged Lands Act explicitly vested in Utah the bed of the Lake and all natural resources in the bed or in its waters, which by definition include “oil, gas, and all other minerals.” The congressional hearings and debates seem to indicate that the Act conferred on the State ownership of minerals dissolved in the waters as well as situated in the bed. See, *e.g.*, *Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13, etc.*, 83d Cong., 1st Sess., p. 871 (1953); 99 Cong. Rec.

3327-3334, 3348-3350, 4350, 4471 (1953). Although we can present no substantial argument to refute Utah's claim that under the Submerged Lands Act it, rather than the United States, owned the minerals in question prior to the conveyance, we think that the issue should be decided by this Court.⁴

B. The Survey Question. The meander line used for the conveyance to Utah was based on existing surveys establishing the mean high water mark of the Lake. These surveys were actually made over several different periods of time. The level of the Lake, and thus its mean high water mark, at the times the surveys were made fluctuated sharply. As a consequence there are significant discrepancies in the elevation of the surveyed meander line around the Lake. Indeed, this was noted during the course of the congressional deliberations concerning the 1966 Act. See H. Conf. Rep. No. 1540, 89th Cong., 2d Sess., p. 5 (1966).

The "equal footing" principle under which Utah claims ownership of the bed of the Great Salt Lake entitled it only to the bed of the Lake as it existed on the date of statehood, January 4, 1896. There was no survey made of the Lake bed on that date, however. And, since the surveys of the Lake bed on which the conveyance was based occurred at different times and under varying circumstances, the line used for the

⁴ We agree with Utah (Utah Motion 4-5, 7, 16-18) that there are no questions concerning minerals apart from those discussed above. If the United States owned any minerals in the property that it quitclaimed to Utah—for example, as a result of the application of the reliction doctrine to exposed shorelands, or because some of the lands conveyed were outside the bed of the Lake—it reserved them. See the discussion at pp. 2-3, *supra*.

conveyance may not accurately depict what Utah obtained at statehood—the bed of the Lake at that time.

The information which we now have indicates that in fact this is so. The level of the Lake at statehood was 4200.2 feet above sealevel (Report of the Special Master filed October 26, 1970, Finding of Fact 31). One of the existing surveys used for the conveyance was made in 1886, when the Lake was approximately 6.5 feet higher than its level at statehood (*id.*, App. B). Because the Lake's shores and bed gently shelf, fluctuations in the level of the Lake result in the covering and uncovering of large areas of land (*id.*, Finding of Fact 11). Our preliminary calculations indicate that the higher Lake level when the 1886 survey was made inundated in the area where this survey was performed more than 60,000 acres that were not covered by the Lake at the time of statehood. This would mean that the surveyed meander line on which the conveyance to Utah was based included a significant amount of property which was above the Lake bed on the date of statehood, and which Utah thus did not own by reason of its admission to the Union. It appears that the United States has an interest in much of this additional property. Under the 1966 Act, Utah must pay to the United States the value of whatever federal rights there were in this property that were conveyed to it. We submit that this matter should be referred to a Special Master as a separate issue so that we may have an opportunity to establish these facts and present our contentions.

Utah opposes making a separate referral to the Master on this matter, suggesting that instead it

should be considered only for purposes of resolving the reliction issue. It hopes to show that after statehood the Lake level rose above the surveyed meander line, and asserts that if this is so “any reliction claims of the Government necessarily will be based on recession of the waters after that date, and the boundary of the Lake at Statehood will be wholly moot” (Utah Motion 6). But the position we set forth above is based on a claim completely independent of the reliction question. This is made clear by the fact that Utah has contended (and presumably still contends) that the reliction doctrine does not apply in this case. Under this view the survey question would of course remain and be quite important. While we agree that the determination of the reliction issue may make the survey question moot—for example, if it is decided that by reason of reliction the United States owned to the water’s edge on the date of the conveyance—that cannot be foretold now. We think that the survey question should be separately referred to the Master for consideration to whatever extent further proceedings indicate is required.

C. *A Proposed Decree.* We have set forth a Proposed Decree in the Appendix, *infra*. In large measure it is the same as the decree proposed by Utah (Utah Motion App. A) since there is no disagreement concerning the reliction question and since we believe it likely that the Court will decide the mineral question in Utah’s favor. A paragraph dealing separately with the survey question, along the lines discussed above, has been added. We submit that this decree should now be entered by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Proposed Decree set forth in the Appendix hereto should be entered.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

JOHN E. LINDSKOLD,
Attorney.

APRIL 1972.

APPENDIX

In the Supreme Court of the United States

No. 31, Original

STATE OF UTAH, PLAINTIFF,

vs.

UNITED STATES OF AMERICA

DECREE

It is ordered, adjudged and decreed that:

1. The United States of America, its departments and agencies are enjoined, subject to any regulations which the Congress may impose, such as in the interest of navigation or pollution control, from asserting against the State of Utah any claim of right, title and interest:

(a) to the bed of the Great Salt Lake lying below the water's edge of Great Salt Lake on June 15, 1967,* with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project;

(b) to the natural resources and living organisms in or beneath the bed of the Great Salt Lake as delineated in (a) above; and

*The date of the deed from the United States to Utah.

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the lands, including any minerals, delineated in 1. above of this decree.

3. The basic question yet to be determined in this case is whether prior to June 15, 1967, the claimed doctrine of reliction applies and, if so, does the doctrine of reliction vest in the United States, and thus divest the State of Utah, of any right, title or interest to any or all of the exposed shorelands situated between the water's edge on June 15, 1967, and the meander line of the Great Salt Lake as duly surveyed prior to or in accordance with Section 1 of the Act of June 3, 1966, 80 Stat. 192. A Special Master will be appointed by the Court to hold such hearings, take such evidence and conduct such proceedings as he deems appropriate and, in due course, to report his recommendations to the Court.

4. There also remains the question whether the lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with Section 1 of the Act of June 3, 1966, 80 Stat. 192), and thus conveyed to the State of Utah, included any federally-owned uplands above the bed of the Lake on the date of statehood (January 4, 1896) which the United States still owned prior to the conveyance to Utah. The Special Master appointed by the Court as provided in 3. above will also be directed to hold such hearings, take such evidence and conduct such proceedings with respect to this question as he deems appropriate in light of his determinations with respect to the issues referred to him in 3. above and, in due

course, to report his recommendations to the Court.

5. The prayer of the United States of America in its answer to the State of Utah's Complaint that this Court "confirm, declare and establish that the United States is the owner of all right, title and interest in all lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended," is denied.

