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No. 31, Original

**In the Supreme Court of the
United States**

October Term, 1969

STATE OF UTAH

v.

Plaintiff,

UNITED STATES OF AMERICA

Defendant,

REPLY BRIEF OF THE STATE OF UTAH IN
SUPPORT OF THE NAVIGABILITY OF
THE GREAT SALT LAKE

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I. PRELIMINARY STATEMENT

Utah filed its Brief August 1, 1969 in support of the navigability of the Great Salt Lake. The United States filed its answering Brief September 15, 1969.

This Reply Brief by Utah will show the following:

A. Both Utah and the United States agree that the Great Salt Lake was physically capable of supporting commercial navigation on January 4, 1896, when Utah obtained statehood.

B. The United States Supreme Court has never required proof beyond physical susceptibility to naviga-

tion in order to prove navigability for purposes of state title to beds of lakes and streams. Implicit in the concept of physical capacity is the requirement that such *capacity* be useful—i.e., practical and feasible. Thus, if the capacity is intermittent, irregular or infrequent because of dry periods or seasons of low water, or because there are long periods of time when ice prevents use of the capacity, it is necessary to determine whether the physical capacity is sufficiently regular and dependable to be practical and useful for commerce. Likewise, if there are reefs, sandbars, rapids, floating debris, and other impediments to navigation, it is necessary to determine whether such impediments prevent the physical capacity from service as a practical and useful channel of commerce.

C. Utah and the United States disagree as to whether the physical capacity of the Great Salt Lake is a “useful” capacity for commercial navigation. Undeniably, the lake has had sufficient size and depth at all times during recorded history to serve as a “useful” highway of commerce, and is free of any obstacles to navigation such as rapids, ice, reefs, sandbars, floating debris, and similar impediments.

D. The United States claims, however, that the lake lacks a useful capacity for navigation because it has shallow shorelands and desolate environs which prevented any significant waterborne commerce at the date of statehood, and which makes any significant future commerce unlikely. The record fails to sustain the claim that the shorelands are an impediment to navigational uses or that the environs of the lake are desolate, but in fact shows the exact opposite. Further, and of funda-

mental importance, is the fact that the environs of the lake and conjecture as to future navigational needs (whether looking forward from the date of statehood or from the present time) is a totally inadmissible speculation. If the lake had a useful physical capacity for navigation at statehood, Utah is not to be denied title to the bed thereof. When, as, and if significant commercial needs arise, the lake will be there with its physical capacity to serve as a useful highway of commerce.

E. Evidence of actual navigational uses is not necessary to show navigability, but is most persuasive to show navigable capacity. The record contains evidence showing a great variety of navigational uses, but here again, the United States departs from the clear pronouncements of this Court by attempting to rule out many uses specifically approved by earlier decisions.

F. The attempt by the United States to advance a new and more burdensome test of navigability for determining title questions to the beds of lakes and streams, is, in substance and effect, an effort to deny to Utah its constitutional right to equal footing with other states upon its admission to the Union.

G. Even though the theories argued by the United States, as explained above, are contrary to law, there is no competent evidence in the record to support them.

II. FEDERAL TEST OF NAVIGABILITY

A. Physical Capacity

1. *The Law*

For the one hundred years last past the U. S. Supreme Court has made it clear that navigability is

proved either by showing that the body of water in question was navigated *or was susceptible of being navigated* at the date of statehood. If the body of water is shown to have a physical capacity to support commercial navigation, then nothing further need be shown. This is made clear in all of the relevant decisions by this Court, the principal ones of which are cited and discussed on pages 4-13 of Utah's Brief dated August 1, 1969.

United States v. Utah, 283 U.S. 64 (1939), is the most relevant case ever decided by this Court with respect to the issues now under review. There, as here, the dispute was between Utah and the United States as to whether Utah received title at statehood to the beds of certain rivers. The critical issue was the definition and application of the federal test of navigability. Mr. Chief Justice Hughes delivered a careful and well-reasoned opinion which disposes of all of the arguments which the United States has again raised in this proceeding. Since *United States v. Utah, supra*, is directly applicable to this proceeding, and since it is fully consistent with all other pronouncements of this Court, Utah will cite frequently, and in some instances at length, from that opinion. With respect to the specific question now being considered—physical factors that are to be considered in determining navigable capacity—the Court (at pages 77-81) found the waters described below to be navigable:

“In the present instance, the controversy relates only to the sections of the rivers which are described in the complaint, and the Master has limited his findings and conclusions as to navigability accordingly. The propriety of this course, in view of the physical characteristics of the streams, is apparent. Even where the navigability of a river, speaking generally, is a matter of com-

mon knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends. The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability, which the Master's report fully describes.

“The Green River has its source in the mountains of western Wyoming and has a total length of about 700 miles. After passing through a series of canyons, the rock walls of which are of great height, it enters the Green River valley in which the town of Green River, Utah, is situated, about 117 miles above the river's mouth. The drop in elevation between the town of Green River, Wyoming, and Green River, Utah, is from 6067 to 4046 feet,—2021 feet in 387 miles, causing many difficult and dangerous rapids. For the first 23 miles below the town of Green River, Utah, to the point where the San Rafael River enters from the west, the country is more or less open. From the mouth of the San Rafael River (approximately the beginning of the section to which the controversy relates) to the junction of the Green and Grand Rivers, there is a very gradual slope, there being a drop of 111 feet in the 94 miles. In this section the river flows through Labyrinth and Stillwater Canyons, the rock walls of which in many places rise almost vertically from the water's edge, and in other places are over a thousand feet apart, with heights of 600 to 1300 feet. The average width of the river is from 500 to 700 feet. In four or five places there are bottom lands along the side in the Canyons. The course of the river is tortuous, the distance (in this section) in a straight line being less than one-half that by the river. The Government main-

tains gauging stations to measure the depth, the velocity and the amount of discharge of water. On the Green River the gauge was located at or near the town of Green River, Utah. From these measurements the Master finds that the depth of the Green River ranged from between $1\frac{1}{2}$ and 3 feet for 53 days in the year to between 7 and 12 feet for 60 days, and that for 312 days in the year there was a depth of 3 feet or over. For 290 days in the year there was a discharge of over 2000 cubic feet per second, and, for 149 days, of over 4200 cubic feet per second.

“The Grand River rises in north-central Colorado and flows to its junction with the Green River in Utah, approximately about 423 miles. Its course is through a succession of long, narrow, fertile valleys, alternating with deep canyons, with walls, in places, of over 2,000 feet in height. There are many difficult and dangerous rapids. The total drop from Grand Junction, Colorado, to Castle Creek, Utah (where the section in controversy begins) is from 4,552 feet in elevation to 3,993 feet, a drop of 559 feet in 94 miles. From Castle Creek to the town of Moab, 14 miles, the slope averages 3.5 feet per miles, and there are slight rapids or riffles and rocks in the stream. At Moab there is an open valley, leaving which the Grand River flows $65\frac{1}{2}$ miles largely through rock canyons having walls 600 to 2,100 feet in height. The course of the Grand River in this section is slightly more tortuous than that of the Green River; the width of the river averages about 500 feet and the slope below Moab is only a little over 1 foot per mile. The Government's gauge was located at Cisco, about 17 miles above Castle Creek. From readings at that point the Master finds that the depths of the river vary from 2.9 to 3 feet for 16 days in the year to over 7 feet for 61 days, and that for 349 days in the year there is a depth of 3 feet or over. There is a discharge of over 2,000 cubic feet per second

for 351 days in the year, and for 169 days of over 4,200 cubic feet per second.

“The Master finds that on the Grand River, in the 79 miles between Castle Creek and the junction with the Green River, there is a stretch of about three miles out of the first fourteen miles between Castle Creek and Moab Bridge in which there are three small rapids, and that, in this stretch, the river is less susceptible of practical navigation for commercial purposes than in the remainder of the river. But the Master finds that, even in this three mile stretch, the river is susceptible of being used for the transportation of lumber rafts and that there has been in the past considerable use of the river for that purpose.

“The Colorado River, that is, treating the river as beginning at the junction of the Green and Grand Rivers, flows southwesterly and finally reaches the Gulf of California. The distance from the confluence of the Green and Grand Rivers in Utah to the Utah-Arizona boundary, is about 189 miles, the boundary being about 27 miles above the point known as Lees Ferry in Arizona. The table of distances gives the junction of the Green and the Grand Rivers as being 216.5 miles above Lees Ferry. The Master finds that the Colorado River is non-navigable from this junction down to the end of Cataract Canyon at Mile 176 above Lees Ferry. The State of Utah contests the finding of the Master with respect to the first 4.35 miles of this stretch of the river, that is, to a point 212.15 miles above Lees Ferry (a question to which we shall return in dealing with Utah's exceptions), where it is said that the first rapid or cataract of Cataract Canyon begins. But there is no controversy as to the non-navigability of the stream from this point through Cataract Canyon down to Mile 176 above Lees Ferry. Through this canyon, with rock walls from

1500 to 2700 feet in height, the river has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long series of high and dangerous rapids.

“The Master’s finding of navigability relates to the section of the river from Cataract Canyon to the Utah-Arizona boundary. At the end of Cataract Canyon (the end of the portion of it known as Dark Canyon), the country becomes more open, the river somewhat wider, and the canyon walls not over 600 feet in height, this stretch being known as Glen Canyon. Two rivers enter from the west, the Fremont and the Escalante, and one from the east, the San Juan. As the Colorado River approaches the Utah-Arizona boundary, the canyon walls increase in height and average 1300 to 1600 feet. There are various points at which bottom lands are cultivated in the river beds. The width of the river averages from 600 to 700 feet. Its slope through this section is gentle, being less than 2 feet per mile. As to the 90 miles of Glen Canyon, that is, from Mile 176 above Lees Ferry to the mouth of the San Juan River, the Master states that there are no gauging station figures of any discharge, flow and depth which are applicable, but the Master finds that as the waters of the Green and the Grand Rivers join and form the Colorado River, there must be a discharge of water in the Glen Canyon stretch equal to the combined discharge of the other two rivers and hence at all times sufficient water for navigation so far as discharge alone is concerned. As to depth, the Master finds that the Colorado River in this stretch should have a depth at least equal to that of the Green or the Grand River. Between the mouth of the San Juan River and the Utah-Arizona boundary, figures were obtained from the Lees Ferry gauging station from which it appears that the average depths range from between 3 and 4 feet for 17 days in the year to over 8 feet for 124 days

in the year, and that the discharge varies from less than 4000 cubic feet per second for 13 days in the year to over 6000 feet per second for 352 days in the year.”

2. *The Facts*

There has never been a case similar to the Great Salt Lake where navigability has been challenged in the face of such obvious physical capacity to support navigation. Contrast the waters above described with the Great Salt Lake. The lake at statehood had an undisputed length of 77 miles, a width of 32.5 miles, and a depth of 30 feet. (Exhibits P-3, P-4 and P-5).

The United States has clearly admitted the physical capacity of the Great Salt Lake to support commercial navigation. Representative of this recognition of physical capacity by the United States are the following:

a. In open court counsel for the United States admitted that the “Queen Mary” and other boats which cross the Atlantic Ocean could float on the Great Salt Lake and that almost any boat in the world could be used on the Great Salt Lake (T. 19, 280).

b. On page 36 of its Brief the United States proposes the following finding of Fact:

“9. The Lake is physically capable of supporting large boats, barges and similar craft currently in general use on bodies of water other than Great Salt Lake. (Tr. 202-208.)”

B. “*Useful*” *Physical Capacity*

1. *The Law*

If a body of water has sufficient size and depth to support meaningful commerce, but evidence is intro-

duced 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 capacity 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.

In *United States v. Utah, supra*, 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 north-

eastern 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 navigable 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 the 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 high-water 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.’

“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.' ”

Evaluating the impediments and obstacles to navigation on a “mud lake,” located entirely within the State of Minnesota, also in 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 voluminous 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. Sand bars 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).

2. The Facts

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:

a. *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).

b. *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 (T. 177-78).

c. *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).

d. *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 drew 13 feet of water when loaded with a tonnage equivalent to that carried by 90 railroad cars (T. 175-76), and the lake has never had a depth less than 20 feet (Exhibit P-2) (Official Government Hydrograph of Great Salt Lake).

e. *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).

f. *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).

g. *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. 18); 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).

This question of harbor construction is the only "impediment" to navigation which the United States has raised, and then only by reference to shallow shorelands which supposedly make access to the lake difficult. Even this was not raised as an issue at the hearing, but has been argued in the Government's brief from historical writings. And when counsel for the Government had an opportunity to cross-examine Mr. Lundee after he had testified to that exact issue, counsel declined to ask any questions on the subject. Further, there is nothing in the Army Corps of Engineer Report introduced by the Government (Exhibit D-4) that suggests that construction and improvement of harbor and access facilities would be unusually expensive or difficult, but simply that the demand for such facilities by pleasure craft would not justify the expenditure "at that time." Utah will comment upon the competence of the Government's "historical materials" and Corps of Engineers Report under Section III of this Brief.

h. *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).

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

j. *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, noticed 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).

k. *General Economy and Utility of Lake for Navigation*: To summarize this, Utah simply quotes the following excerpt from its Brief filed August 1, 1969 (at pages 26-27).

“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 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 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).''

C. *Relevance of Evidence of Actual Use*

1. *The Law*

As shown above, a useful physical capacity to support commercial navigation is all that is required to prove navigability for purposes of vesting title in Utah. There is no need whatsoever to show actual navigational uses. If there is a serious question as to physical capacity, then it is proper to show such capacity by actual use; or, in the absence of evidence of actual use, by experimentation to demonstrate that the capacity is there for such uses as can physically be accommodated.

Again, this has been made crystal clear by the Court on numerous occasions. In *United States v. Utah, supra*, the Court said at pages 81-83:

“The question thus comes to the use, and the susceptibility to use, for commerce of the sections of these rivers which the Master has found to be navigable.

“The United States, in support of its exceptions, stresses the absence of historical data showing the early navigation of these waters by Indians, fur traders, and early explorers, that is, uses of the sort to which this Court has had occasion to refer in considering the navigability of certain other streams. The Master has made an elaborate review of the history of the rivers from the year 1540 to 1869, and reaches the conclusion that neither ‘the limited historical facts put in evidence by the Government [nor] the more comprehensive investigation into the history of these regions’ tend to support the contention that the non-use of these rivers in this historical period ‘is weighty evidence that they were non-navigable in 1896 in fact and in law.’ The Master points out that the non-settlement of eastern Utah in these years, the fact that none of the trails to western Utah or to California were usable to advantage in connection with these rivers, and many other facts, are to be considered in connection with that of later use.

“Coming to the later period, that is, since 1869, the Master has set forth with much detail the actual navigation of the rivers with full description of the size and character of boats, and the circumstances of use. It appears that navigation began in 1869 with the expedition of Major John W. Powell down the Green and the Colorado Rivers, and this was followed by his second trip in 1871. It is said that there were no further attempts at navigation for seventeen years. There was a survey by Robert Brewster Stanton in 1889, and in the succeeding years there were a large number of enterprises, with boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations. Much of this evidence as to actual

navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the Master as being relevant upon the issue of the susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union.

“The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where ‘conditions of exploration and settlement’ explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the Court said, in *Packer v. Bird*, 137 U.S. 661, 667: ‘It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership either of the waters or soils under them.’” In *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122, 123, the Court quoted with approval the statement in *The Montello*, *supra*, that ‘the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.’

“It is true that the region through which the rivers flow is sparsely settled. The towns of Green River and Moab are small, and otherwise the country in the vicinity of the streams has but

few inhabitants. In view of past conditions, the Government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a State depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. 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."

Then, immediately following the foregoing explanation, the Court emphasized that the question is simply one of physical capacity. This can be proved by showing (1) physical characteristics demonstrating capacity, *or* (2) use demonstrating capacity, *or* (3) experimentation demonstrating capacity. Thus, the Court continued at page 83:

"The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put."

2. *The Facts*

The State of Utah has consistently pointed out and adhered to the test of federal navigability as applied by the United States Supreme Court requiring only evi-

dence of capacity, with evidence of use being only illustrative of capacity. At the hearing, before any evidence was introduced, counsel for the State of Utah explained the position taken by the State of Utah and the nature and purport of the evidence to be introduced (T. 9-10):

“ . . . We will proceed to prove that the Great Salt Lake was a navigable body of water on January 4, 1896, when Utah became a state. With regard to the presentation of proof under this item, that the Great Salt Lake was a navigable body of water, Mr. Jensen will first introduce some exhibits which will show the physical characteristics of the lake at the date of statehood; its length, its width, its size, its depth, what the water level was on January 4, 1896. Then Mr. Ashton will show some of the early actual navigational uses of the lake beginning in the 1860's and perhaps before, and continuing through until relatively recent times of the 1930's, 1940's. Mr. Clyde will then show the recent and continuing uses of the lake for navigational purposes through the 1950's and up through and including to the present time. The State of Utah has not yet decided to what extent it will emphasize the current uses being made of the lake, realizing that the crucial point is January 4, 1896. And in moving to prove the navigational—or to show the navigational use that's been made of the lake, the State of Utah does not believe that that's essential in order to establish navigability. The State of Utah believes that the test of navigability is whether on January 4, 1896, the Great Salt Lake was reasonably susceptible to commercial navigation; that is, would it have served as a highway of commerce or useful commerce had the need then existed. And in proceeding to show actual navigational uses of the lake, the State of Utah recognizes that this is evidentiary to show susceptibility, but we do not believe that it's an essential cri-

terion of navigability to show actual commercial use of the lake. We think susceptibility of use is sufficient; we think that is the test. And we think that the navigational uses made of the lake is simply illustrative and proof that the lake in fact was susceptible to navigation and could have served as a useful channel to commerce."

Utah again emphasized this position at pages 13-14 of its Brief dated August 1, 1969. The only reason this background is repeated now is to make clear that Utah from the beginning has followed a consistent course, proving the physical capacity of the Great Salt Lake to support navigation at the date of statehood, and pointing out that no further showing was required. But Utah explained that it would proceed to illustrate the capacity of the lake by showing the variety, nature and type of vessels which had utilized such physical capacity, and in fact proceeded to show that boats ranging from tiny air boats to gigantic barges have utilized the physical capacity of the lake for commercial purposes with convenience and ease and that they did so whenever the need arose.

Those many uses are detailed at pages 14-45 of Utah's Brief dated August 1, 1969, and no useful purpose would be served by repeating that evidence here. It will suffice to mention that the United States has had difficulty discrediting these many uses. Thus, in an effort to argue the minimal actual use of the lake for navigation, the United States itemizes the various craft or types of use on the lake, finding it necessary to list 77 separate craft or uses (Brief, pp. 43-63). Covered within only one such item (Item No. 67, page 57), the United States includes the fleet of 39 boats, including some of the world's largest barges, used to construct the Southern Pacific Company's railroad causeway.

While Utah certainly does not accept the proposed Findings and Conclusions of the United States, the following selections therefrom show that the Government felt compelled to recognize the use of the lake as well as its capacity (Brief, pages 36-37):

“9. The Lake is physically capable of supporting large boats, barges and similar craft currently in general use on bodies of water other than Great Salt Lake. (Tr. 202-208.)”

...

“12. The activities engaged in by the vessels known to have been on the Lake since 1824 include: (1) transporting passengers, ore, fence posts, railroad ties and salt; (2) hauling livestock to and from Antelope and Fremont Islands as part of the operations of a ranch; (3) carrying guano as part of a company operation from Gunnison and Bird Islands to the mainland; (4) the harvesting of brine shrimp; (5) the construction and maintenance of railroad lines across the lake; (6) excursions; (7) the exploration and scientific study of the Lake; (8) private recreation and pleasure; and (9) rescue operations.”

Having been compelled, in light of the evidence, to propose the foregoing Findings of Fact, the United States then finds itself facing the necessity of trying to escape the impact of such facts. Thus, in its proposed Conclusions of Law, the Government finds it necessary to propose eight separate conclusions to rule out various types of navigational use. The Government totally ignores the plain fact that each use which it seeks to disqualify is certainly illustrative of capacity, and that uses of this type have specifically been approved by this Court as evidence of capacity.

Those proposed conclusions, numbered 8 through

15 and appearing at pages 39-40 of the Government's Brief, suggest that the Court ignore the following uses:

- No. 8. Transporting livestock and supplies by boat from Fremont and Antelope Island to the mainland should be ignored because the islands were owned or operated by "not more than five people or organizations. . . ."

Here the argument of the United States would seem to be that if one corporation transported livestock and supplies every day on barges over a period of one hundred years, that such evidence should be disregarded as showing navigable capacity because the one corporation would be "not more than five organizations."

- No. 9. Transporting guano from Gunnison and Bird Islands to the mainland should be ignored because only one boat was used for a period of only nine years, and this was fifty years after statehood.

Here the argument of the United States seems to be that the evidence is to be disregarded because only one boat was used, for only nine years, at a time approximately fifty years after statehood. Since the issue is navigable capacity at statehood, the United States would ignore the fact that during the nine years in question (1947-1955) the water level of the lake was never higher than at statehood (Ex. P-2), and that the boat was a 50 to 60 foot LCI that operated regularly on a round trip of 50 to 60 miles (T.13).

- No. 10. Transporting brine shrimp across the lake for processing and packaging for commercial sale should be ignored because this is "not trade and travel on

water in the customary modes of trade and travel on water."

In the view of the United States, the "Manhattan" icebreaker which traversed the Northwest passage to Prudhoe Bay, Alaska, could not transport oil through that passage as commercial transportation because it has not been customary to transport oil on icebreaker tankers.

- No. 11. Use of the lake by boats for the construction and maintenance of the Southern Pacific trestle and causeway should be ignored because this use is not the "customary trade and travel on water."

The United States does not seem to think that the use of some of the world's largest barges, with unusual ease and economy, has any relevance to the navigable capacity of the lake.

- No. 12 Transporting passengers for hire on commercial pleasure rides should be ignored, because the passengers return to the point of origin rather than disembark at some other part of the lake, and this is "not trade and travel on water in the customary modes. . . ."

According to the United States, if the "Queen Elizabeth" accommodated 1,000 passengers on a tour fifty miles up the lake and returned to the point of origin before disembarking passengers, this use would afford no evidence as to the navigable capacity of the lake.

- No. 13. The use of boats for exploration and scientific study of the lake should be ignored, because this does not constitute a customary mode of trade and travel on water.

Again, the United States would say that, without regard to the size of vessels involved, the frequency of their use, or the ease with which they can be used on essentially all parts of the lake, there still is no evidentiary indication of navigable capacity.

No. 14 The use of boats for recreation and pleasure sailing on the lake should be ignored because this is not a customary mode of trade or travel on water.

Again, the United States ignores the volume, extent, manner and ease with which the lake lends itself to this use, as having no relevance to the capacity of the lake to support navigation.

No. 15 The use of boats for police patrol and rescue should be ignored, because this is not a customary mode of trade or travel on water.

Again, the utility afforded by the lake to such travel and operations is deemed by the United States to be unrelated to the question as to whether the lake has a navigable capacity.

Having attempted to exclude all of the foregoing navigational uses, the United States is still left with seven boats which hauled passengers and freight and which could not be eliminated through any of the eight separate distinctions suggested above. These boats and uses are supposedly distinguished for miscellaneous reasons summarized in proposed Conclusion of Law No. 16, at page 40 of the Government's brief. These pretended distinctions are rather meaningless, of questioned accuracy, and clearly do not relate to the question of

the navigable capacity of the Great Salt Lake. For example, the United States draws great comfort from the fact that the boats in question "were operating on the Lake at a time when the level of the Lake was much higher than it was at the date of Statehood, and much higher than it has ever been since again . . ." This is intended to mean, quite obviously, that the boats in question perhaps could not have operated successfully at the date of statehood when the water level of the lake was lower. There is absolutely no evidence to support such an inference, and, for obvious reason, the United States ignores the fact that when the water level of the lake was *five feet lower* than at statehood, the lake with ease and economy supported craft substantially larger than those mentioned by the United States, with the largest barges each hauling a per trip tonnage equivalent to that carried by 90 railroad cars.

The pronouncements of the Court do not agree with the Government's narrow view of customary trade and travel on water. In *The Montello*, 20 Wall. 430 (1874), the Court said, at pages 441-442:

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency

of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said,* ‘every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture’.”

In *United States v. Utah*, *supra*, the Court observed at page 76:

“... Navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on the absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.”

In keeping with this general pronouncement, the Court proceeded to review and approve evidence of a variety of uses, including a scientific expedition, a survey party, exploration, pleasure, carrying supplies, prospecting, and general surveying and mining operations. Consider the language of the Court at page 82:

“Coming to the later period, that is, since 1869, the Master has set forth with much detail the actual navigation of the rivers with full description of the size and character of boats, and the circumstances of use. It appears that navigation began in 1869 with the expedition of Major John W. Powell down the Green and Colorado Rivers, and this was followed by his second trip in 1871. It is said that there were no further attempts at navigation for seventeen years. There was a

survey by Robert Brewster Stanton in 1889, and in the succeeding years there were a large number of enterprises, with boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations. Much of this evidence as to actual navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the Master as being relevant upon the issue of the susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union."

Also in that case, as here, the Government argued that the uses were of a private rather than commercial nature:

"The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test."

So it is obvious that the uses which the Government would now reject, have been specifically approved by this Court. Utah wishes to emphasize once again that these uses are not *necessary* to show navigable capacity, but are *admissible* to prove such capacity. Under the evidence, navigable capacity was clearly shown by the length, width and depth of the lake, particularly in view of the absence of impediments or obstacles to navigation. Utah did not need to proceed further by experimentation or otherwise to demonstrate this obvious capacity. But since evidence showing many examples of *actual*

navigation for a variety of purposes was available, Utah simply introduced such evidence to illustrate the obvious capacity.

D. Propriety of Speculating as to Present or Future Navigational Needs

From the printed materials submitted into evidence by the United States (evaluated by Utah as to its usefulness in Section III of this Brief, *infra*), it is argued by the Government that the lake was not navigable at statehood, is not navigable now, and probably never will be navigable. This argument by the government is presented, in the main, by citing the historical excerpts as showing desolate, inaccessible, and shallow shorelands, and by citing population distribution and location as confirming the desolate, forbidding and useless nature of the lake so far as navigation is concerned.

The foregoing argument is totally erroneous as to both the law and the facts. The following observations are intended to illustrate the major legal and factual errors in that argument:

1. To the extent that it suggests the lake was not physically susceptible to navigation at statehood, it is contrary to the law, the facts and the Government's own admissions (See Section II A, above).

2. To the extent that it suggests the lake did not have a "useful" capacity for commercial navigation at statehood, it is contrary to both the law (Section II(B) (1), above) and the facts (Section II (B)(2), above).

3. To the extent that it suggests that there were no navigational uses of the lake at statehood, it is contrary

to the law (use is not required—Section II(A) and II(C), above), and contrary to the facts (actual navigation uses were and are being carried on—Section II(C), above).

4. To the extent it suggests that it is proper to speculate as to either a present or future need (viewed either from the date of statehood or the present time), it is contrary to the law and the facts (discussed in paragraph 5, below). Contrary to the law because, while factors such as population, transportation, industrialization, and related developments may be considered to explain limited use or non-use of a body of water with *doubtful physical capacity*, those factors are never indulged in to speculate as to *needs* for navigation on a body of water having conceded physical capacity. In *United States v. Utah, supra*, the Court considered various miscellaneous uses (at page 82):

“It appears that navigation began in 1869 with the expedition of Major John W. Powell down the Green and the Colorado Rivers, and this was followed by his second trip in 1871. It is said that there was no further attempts at navigation for seventeen years. There was a survey by Robert Brewster Stanton in 1889, and in the succeeding years there were a large number of enterprises, with boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations. Much of this evidence as to actual navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the Master *as being relevant upon the issue of the susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union.*” (emphasis added)

The above uses were considered in light of factors relating to exploration and development of the area, but only in connection with the issue of susceptibility to navigation (at page 82) :

“The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, *but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.*” (emphasis added)

But having found physical capacity, the Court conclusively presumed as a matter of law that the *possibility* of future needs and uses vested title in Utah—without speculating as to the relative probabilities or improbabilities of future needs:

“In view of past conditions, the Government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a State depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. *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. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put." (emphasis added)

The reasons for the above rule are sound. If one were to speculate as to why certain needs did not persist longer, or why there weren't even more extensive needs, endless conjecture could be pursued as to the impact of the completion of the transcontinental railroad in 1869 near the Great Salt Lake (Promontory, Utah) as affording an alternate means of transportation; or the completion of the Western Pacific railroad at the southern shore of the lake; or the completion of the Southern Pacific railroad at the northern end and then across the northern part of the lake; or the construction of Interstate Highway 15 near the eastern shore of the lake and the construction of Interstate Highway 80 near the southern shore of the lake, or, for that matter, the impact of jet air transportation of cargo (See, generally, Exhibit P-6). Further, the lack of communities, railroads or highways on the western shore of the lake might conversely make the lake the most feasible transportation access, should significant commercial development occur on that side of the lake. Where would speculation end? It is not difficult to see why such speculation has been ruled out

as having no bearing when the body of water has a physical capacity for navigation.

5. To the extent that the Government's argument suggests that the lake is barren and desolate with little prospect of future development, nothing could be further from the truth. While any consideration of these factors is wholly improper (paragraph 4, next preceding), we rebut the Government's assumptions, as follows:

(a) The many navigational uses of the lake at, before and after statehood—and today—are referred to in Section II(C), *supra*. That evidence shows that the lake has been navigated for a variety of purposes, including transporting cattle, sheep, horses, buffalo, ore and minerals, fence posts, railroad ties, guano, commercial salt, decorative salt crystals and rocks, farm and industrial machinery, household supplies, pump station supplies, construction projects, commercial recreation craft, private recreation craft, scientific craft, railroad maintenance patrol, law enforcement patrol, rescue operations, and brine shrimp harvest. (See Utah's Brief filed August 1, 1969, pp. 48-51 for citations to record.) Not all of the navigational uses have been continuous, but of the present navigational uses of the lake several have been continuous since the date of statehood, including the transportation of livestock, agricultural products, and household supplies to and from Fremont and Antelope Islands; the use of commercial recreation craft and private craft; and railroad maintenance patrol (since 1906). Other current uses, of more recent origin, include brine shrimp transportation, rescue operations, law enforcement patrol and scientific investigative craft.

(b) The prospect of future mineral and industrial development of the lake cannot be discounted, primarily in view of the fact that:

(1) Several large companies are planning or constructing industrial facilities for extraction of chemical minerals on the very shores of the lake (Exhibit P-31, pages 46-50, 104).

(2) Many minerals are either known or their presence is indicated under or near the lake, including the possibility of oil and gas beneath the lake bed, and the known presence of lead, oolite sands, dolomite, limestone, argonite, and phosphate near the southern and western shores of the lake; with many areas under lease and some under production. (T.296-99)

(3) The area west of the lake, though essentially unexplored, is believed to have a considerable mineral potential (T.296-99).

(c) The present and prospective public recreational and tourist uses of the lake are substantial, and certainly negate the Government's view that the lake is an abandoned, useless, inaccessible and forlorn body of water. The reverse is true. Few bodies of water have the variety of uses and appeals as does the Great Salt Lake. The lake serves as a vital link in the Pacific Flyway for waterfowl, affording resting and feeding habitat for birds that migrate into Canada and Mexico, and as far away as the Soviet Union (Exhibit P-31, pages 50-60), and affording 5,000,000 days use per year by waterfowl and marsh related birds (T. 214). There are 80,000 acres

of man-developed waterfowl habitat and an additional 80,000 acres of additional natural waterfowl habitat. The lake affords excellent waterfowl hunting to numerous private duck clubs and public marsh areas (Exhibit P-31, pages 50-60). The bird life on the lake, exclusive of waterfowl, is a national tourist attraction (Exhibit P-30). Although occurring after the hearing and not in the record, the Court may note that a national television network presented a nationwide telecast one half-hour in length devoted exclusively to the bird life on the islands of the Great Salt Lake, as part of a series entitled "Animal World." The variety of recreational and tourist interests other than general tourism, hunting and bird study, includes the resort beaches, the present Utah State Park on the northern end of Antelope Island for boating, swimming, and sightseeing; the proposed federal National Monument on Antelope Island to show, among other things, the history of Lake Bonneville and its geological stages (Exhibit P-31, pages 50-69, T.111-21, 287-91, 129-37, 212-14).

In summary, far from being desolate and foreboding, the Great Salt Lake presents a variety of present navigational uses, and, beyond that, presents a great potential for mineral, industrial, tourist, and recreational development which could result in any number of additional navigational uses.

As emphasized earlier, this speculation is not at all proper, and these comments have simply been made to correct the impression which the United States created by picturing the lake as barren and inaccessible, for the fact is that the lake has many actual and poten-

tial navigational uses, and few bodies of water could match the Great Salt Lake in its general appeal to the public.

E. Navigability as a Constitutional Concept in Title Adjudication.

The United States has seemed to view the federal test of navigability as if it were a doctrine freely to be modified from time to time, ignoring the constitutional problems encountered in any such change or modification. Illustrative of this approach by the Government is not only its attempt to deviate from the established federal test as explained in the foregoing sections of this Brief, but by the announced intention of the Government to ask the Court to overrule prior decisions. Counsel for the United States thus argues that a state should receive title only to the beds of navigable waters of the United States and not to the beds of navigable waters of a state. Counsel for the United States admits that this proposition has been clearly rejected by the United States Supreme Court, and the issue is preserved so that when the Report of the Special Master is before the Court, the United States can urge for reconsideration and overruling of the present law:

“ If the matter were open, we might invoke that limitation here, since the Great Salt Lake has no navigable connection beyond Utah. However because we read the opinions in *United States v. Utah*, supra, 283 U. S. at 75, and *United States v. Oregon*, supra, 295 U. S. at 14, as foreclosing the argument, at this juncture, we merely preserve the point in the event it seems appropriate to urge reconsideration of the *Utah* and *Oregon*

decisions when the Special Master's report is before the Court." (Brief, page 6)

The United States apparently fails to realize that the federal test of navigability for purposes of vesting title in the states to navigable lakes and streams is a constitutional concept developed and designed for the purpose of according to every state equal footing with all of the other states admitted into the Union. The thirteen original states held title in both a sovereign and proprietary capacity to the beds of navigable lakes and rivers, and they retained that title when they formed the federal Union, and all other states since admitted into the Union have been entitled to the same sovereign and proprietary rights in beds of navigable lakes and streams as the original thirteen states. *Martin v. Wadell*, 41 U. S. (16 Pet.) 367 (1842); *Pollard v. Hagan*, 44 U. S. (3 How.) 212 (1845); *Shively v. Bowlbey*, 152 U. S. 1 (1894); *United States v. Holt State Bank*, 270 U. S. 49 (1926); and *United States v. Utah*, 283 U. S. 64 (1931).

There has been no case decided by the United States Supreme Court where any state has been denied title to navigable lakes and streams within its borders, and the question of navigability has always been satisfied by a showing of a physical capacity to support navigation. Utah recognizes and respects the consistency with which the United States Supreme Court has considered the question of navigability for the purpose of vesting title in the states to the beds of all navigable lakes and streams within their borders, and further appreciates the need to preserve that concept intact. An enlargement or expansion of the test of navigability would deny to

Utah its constitutional right to equal footing with all other states who have had their title questions adjudicated in the past, and would likewise prejudice other states who in the future litigate title questions to navigable lakes and streams. If Utah is now to be held to a higher or more difficult standard it would be denied equal footing with other states who received title under the present rule. The federal test of navigability has been and must continue to be preserved to insure continued equality and equal footing among the various states.

F. Judicial Notice or Summary Recognition of Navigability

Without repeating again the law and the facts with respect to the navigability of the Great Salt Lake, Utah suggests now, as it did at the hearing (T.9), that the Court may properly notice or at least summarily recognize the navigability of the lake.

The Utah Supreme Court, applying the federal test of navigability, has on two occasions taken judicial notice of its navigability. In *Robinson v. Thomas*, 75 Utah 446, 286 Pac. 625 (1930) the court said:

“ . . . It is not alleged in the Complaint, nor was evidence given to show, that Great Salt Lake was a navigable body of water. We, however, take judicial notice that the lake is about eighty miles long and from twenty to forty miles wide and is navigable or susceptible of navigation. . . . ” Accord: *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d. 401 (1946).

While Utah does not suggest that the above cases are binding on this Court, it is noteworthy that the physical susceptibility of the lake to support navigation is common knowledge to anyone familiar with the size and depth of the lake.

This Court has indicated that judicial notice may be taken of the navigability of waters when the navigable capacity is general knowledge. For example, in *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 697 (1899), this Court said:

“In *Wood v. Fowler*, 26 Kansas, 682-687, the Supreme Court of that State said: ‘Indeed, it would seem absurd to require evidence as to that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet, within the limits of any State the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge and take judicial notice thereof’.

“It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge.”

III. NATURE AND COMPARATIVE WEIGHT OF EVIDENCE

It is important to evaluate the evidence introduced into the record, and to compare the evidence relied upon by the State of Utah and the United States. In so doing,

it will become obvious that the United States has not introduced and does not rely upon one shred of competent evidence relating to the navigable capacity 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 (Brief, 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 the 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.

(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 travelled 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 opportunity to observe other boating activities.

(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.

(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.

(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.

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.

(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.

(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.

(4) Harold J. Tippetts, 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.

(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.

(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.

(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 en-

gaged 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 shrimp 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.

(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.

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 Mineralogical 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.

(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.

(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.

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 resorts, 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 of 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.

In its Brief the Government 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 16 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 foundation 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 cannot 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 it 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 emphasised:

The evidence bearing on this question is voluminous and in some respects conflicting. 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.”

The United States did not question or object to this stated limitation. With respect to the historical excerpts, they may be used 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 pre-

vented the lake from having a navigable capacity at the date of statehood. The historical materials, as introduced both by Utah and 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 specifically raises the objections of irrelevancy and immateriality for any use or attempted use of these materials and further objects to anything in the nature of opinions, assumptions or conclusions by the writers, or others. In raising these objections, Utah wishes to point out once more that there is no meaningful evidence in those written materials introduced by the United States which would be excluded by these stated objections. No part of those materials even discussed the question as to whether the lake was navigable or non-navigable, and not one writer or author of those materials would have been qualified in any event, by education or experience, to testify as to navigability.

Despite this, the United States relies upon these materials to support assertions that the lake has had a limited use, has shallow and forbidding shorelands, and has limited population settlement on the western shores. These assertions are, of course, contrary to the competent evidence in the record, but the point under discussion is the comparative weight and value of the evidence. 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. 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.

The single reference by the United States which was in fact concerned with the navigability of the lake was a statement made in 1946 by Thomas C. Adams, at a Corps of Engineers hearing, and one made by him in

1965 before the Senate Subcommittee on Public Lands when the Great Salt Lake Lands Bill (S.B. 265) was pending in Congress (Brief, pp. 29, 32). Utah does not deny that the statements attributed to Thomas Adams were made by him, but it is noteworthy to observe that:

1. Thomas Adams was not a witness at the hearing held to determine the navigability of the Great Salt Lake, and when the statements were made, he was not under oath and was not subject to cross-examination.

2. Thomas Adams, had he been a witness and under oath, might not have qualified as an expert to testify as to the extent to which the shorelands were an impediment to commercial navigation, but only as to his actual observations of the physical appearance and characteristics of the shorelands. Thomas Adams was a consulting civil engineer and surveyor, but was generally familiar with the Great Salt Lake and had served as commodore of the Great Salt Lake Yacht Club. Apparently concerned about the lack of qualification of Adams as an expert, the United States has sought to "qualify" him by citing a reference written by Dale L. Morgan in 1946 wherein Thomas Adams reportedly had "an unequalled fund of information about the lake which he has been at pains to place at my disposal." (Brief, page 29).

3. Even though the out-of-court statements of Thomas Adams cannot be accorded any material weight, it is illuminating to examine what Mr. Adams actually said at the informal hearing held twenty years ago by the Corps of Engineers (Wednesday, July 10, 1946, at 2:00 p.m.). The United States quoted Adams as saying the lake had a barrier of shorelands which prevented the launching of boats (Brief, page 29). Mr. Adams at that

time (1946, one year after Dale L. Morgan referred to Adams' "unequaled fund of information about the lake") actually stated the following views about the lake:

As to the public demand for boats on the lake:

"The population gathered around the south shore of Great Salt Lake is about 250,000 indicating a probable desire for the operation of as many as 1,000 boats say from 20 feet to 50 or 75 feet in length on the Great Salt Lake, provided proper facilities to care for them and use them exists. Just before the war from 75 to 100 boats of the class mentioned, that is to say, larger than outboard motor and rowboats, were using the existing harbor for extended periods each year." (Exhibit D-4, Item QQ, pages 12-13).

As to the navigability of the lake:

"Great Salt Lake has a navigable area of more than 1,000 square miles and a shoreline of more than 500 miles. Excluding the boundary lakes of the nation it is the second largest lake in the United States. In the past a number of boats notable for their size, have used the lake. Several have been more than 100 feet in length and one was about 200 feet long, . . ." (Exhibit D-4, Item QQ, page 13).

"We believe that it is appropriate that your Corps bring this within your field and your handling inasmuch as Great Salt Lake is a navigational resource of large magnitude and your organization is so capable and widely distinguished in such matters and designated to represent our Government in connection with it." (Exhibit D-4, Item QQ, pages 15-16).

As to the need for commercial uses on the lake:

"It is reasonable to suppose that the majority of boats on the lake will be personally owned pleasure craft, but if boats can be properly har-

bored there will be commercial traffic, both charter and scheduled craft and those for industrial purposes. Livestock owners have been obliged to use boats in their operations in the past and will need to do so again. It is difficult to appraise future boat operation for industrial purposes, but the presence of large quantities of economic minerals in and around the lake suggest a substantial future need for, and benefit from, boat operation. (Exhibit D-4, Item QQ, page 13).

As to the difficulty of launching boats:

“ . . . the lake has few natural landings or harbors, none of them are accessible to the settled areas east and southeast of the lake, and the expense of building a suitable harbor has been too great for local financing.” (Exhibit D-4, Item QQ, page 13).

As to adverse weather on the lake:

“The number of stormy days, is not large, and the winds are sufficiently dependable for the satisfactory operation of sailboats.” (Exhibit D-4, Item QQ, page 14).

As to ice in winter:

“Great Salt Lake offers some unusual advantages to boat operators. One is the opportunity to boat throughout the year. October and November are the best cruising months and there are many good boating days for cabin boats, or even in open boats in December and January. Another advantage is the opportunity to stay afloat throughout the year without fear of ice or of bottom fouling. This reduces considerable the trouble and expense of boat operations.” (Exhibit D-4, Item QQ, pages 14-15).

As to maintenance problems on boats:

“I have two small boats which have been in the lake continuously summer and winter for about

5 years and the bottoms of both are in good condition, the paint is intact and good and has never been replaced." (Exhibit D-4, Item QQ, page 15).

What can be said about the testimony of Thomas Adams in 1946? Simply that he was appearing for the purpose of encouraging the Corps of Army Engineers to improve a harbor facility on the Great Salt Lake, and so he reported the Great Salt Lake as having a navigable area of over 1,000 square miles, a need for 1,000 private craft ranging in size from 20 feet to 75 feet in length, a need for commercial and industrial vessels to accommodate industrial and mineral development, ideal weather conditions with no ice, a minimum of maintenance problems — but since the hearing was to encourage the Federal Government to construct a harbor, he said the lake had shallow shorelands with "few" natural harbors, and thus the need for the Government to construct or improve one.

However, by 1965 Thomas Adams' personal circumstances changed. He was engaged by private landowners to oppose Utah's claim of title to the bed of Great Salt Lake, such landowners having claims to "reliction" land around the lake or to segmented sections of the bed if the lake should be determined to be non-navigable; and Adams became Secretary of their "Great Salt Lake Lands Association" which was formed to press such claims (Exhibit P-31, page 92). Retained to represent this organization, he freely admitted that he had been engaged by them to make the statement questioning navigability which the United States relies on so heavily that it devotes approximately one-half of the Conclusion of its Brief to quoting his remarks (Exhibit P-31, page 135). Thomas Adams, with his "un-

equaled fund of information about the lake", thought in 1946 that the lake was navigable, with considerable commercial and industrial navigational needs — until he was retained by private interests to question the navigability of the lake.

Utah submits that the statements of Thomas Adams are not competent evidence, and does not rely upon his statements to show navigability or commercial and industrial needs for navigation. Utah further recognizes that ordinarily there would be no justification to dwell at this length on statements made by a person who was not a witness. But the United States produced no competent evidence at the hearing, advancing only one witness (Elmer Butler) whose testimony seemed to be relevant to nothing in favor of the United States and whose testimony apparently has now been ignored by the United States; and then relying solely on extracts from printed materials. As Utah has pointed out, not one single excerpt from any of those materials was even directed to the question of the navigability of the lake, with the lone exception of the statements made by Thomas Adams. For this reason, Utah has considered it advisable to point out what the statements of Mr. Adams really amount to (even though he was not a witness at the hearing).

In sum, the United States had no evidence whatsoever on navigability, other than (1) out-of-court declarations by persons who were not witnesses, not under oath and not subject to cross-examination; and, worse still, (2) such "declarations" were not even remotely concerned with navigable capacity (except for Thomas Adams, whose statements have already been evaluated).

It would seem to have been far more direct, and at least competent evidence, for the United States to engage at least one expert to examine the lake and to testify as to whether it had a navigable capacity, to bring that witness into court, put him under oath, and make him available for cross-examination . . . as did Utah!

CONCLUSION

A. Posture of Proceeding

While the real issue in this litigation is the ownership of the exposed lands around the Great Salt Lake, it must initially be determined that the Lake is navigable, in order to vest title in the State of Utah, and then to consider whether the common law doctrine of reliction has divested Utah of title to the bed and shorelands of the Lake. The fact of navigability was thought by Utah to be obvious, and even the United States did not deny or dispute it, but simply reserved the right to decide whether navigability should be resisted, at that time under the pressure of private parties who wanted to intervene and contest navigability. The issue of navigability was actually inserted into this proceeding by the Special Master, who stated in his Report to the Court that the United States should not be left free to question navigability at a later date. Utah supported the proposition of the Special Master that the question of navigability should be finally settled now, including any argument or ramifications flowing from that determination, and stated such position in its Brief to the Court in support of the Special Master's Report on the questions of intervention. However, Utah said then, re-

peated at the hearing on navigability, and emphasized in its Brief in support of navigability, that the question of navigability was simply an initial and preliminary issue in Utah's proof of title.

Utah pointed out at the hearing on navigability that there were issues as to equitable estoppel and compromise and settlement between Utah and the United States, as reviewed in Utah's Brief on navigability, which could vest title in Utah even if the present question of navigability should be resolved against Utah. The evidence in support of those contentions is in the record, and if the Lake is held to be navigable, such arguments are moot. To argue them now, and detail the evidence in support thereof, would make the briefs and arguments unduly complex and lengthy. If the lake is navigable, they need never be pressed further. If the lake, for some reason, is found not navigable, then Utah will proceed to present such arguments and the evidence in support thereof. But, for the time being, the only question to be considered is whether the Great Salt Lake was navigable on January 4, 1896, when Utah obtained statehood.

B. Summary as to Navigability

As each state is admitted to the Union, it receives title to the beds of its navigable lakes and streams, to place it on an equal footing with the thirteen original states. To provide this equality of right, it is necessary that the legal tests for establishing whether or not a body of water is navigable remain constant. A changing rule would deny the very equality of right which is the basis for the rule.

Again and again the United States Supreme Court

has said that the crucial question is the susceptibility at the date of statehood of the particular river or lake in its natural condition for use as a highway of commerce. This capacity may be shown (1) by evidence of physical characteristics, (2) by experimentation, or (3) by the actual uses to which the body of water has been put both before and after statehood. *United States v. Utah*, 283 U.S. 64, 82-83 (1931).

The physical characteristics of Great Salt Lake are not in dispute, and in and of themselves demonstrate that the lake is now, was at statehood, and throughout each day of recorded history has been, susceptible of being used in its natural condition as a highway of commerce. The United States does not deny that the lake is physically capable of sustaining commercial navigation, but dwells on the fact that the water near the shoreline in most areas is relatively shallow, and presents an impediment to navigation. But the evidence shows, without dispute, that harbors can be constructed with unusual ease and economy.

Further, the United States endeavored to describe the lake as a barren wasteland, which will never be used. Utah does not believe that this is an issue to be tried or decided. Even so, Utah offered evidence of very substantial past and present navigational uses, recreational and tourist developments, and the potential for developing chemicals and minerals. One witness, Helmut Doelling (R. 293), who completed his doctor's thesis on the geology of the lands north and west of the lake, said that the area is largely unexplored. He saw great quantities of materials which he thought may have substantial future commercial value, but it is useless to speculate on

what the future centuries will bring, for no one can know. No doubt, this is at least one of the reasons why the Supreme Court has never required any state to prove when or if a navigable body of water will be used as a highway of commerce.

Utah has proved that the Great Salt Lake was navigable on January 4, 1896 when Utah obtained statehood. Indeed, Utah proved a good deal more than that, in order to respond to arguments and contentions advanced by the United States which were contrary to the rulings of this Court. But Utah pointed out at the hearing that such additional evidence was illustrative and gratuitous, and not necessary to prove navigability.

Utah respectfully requests the Special Master to adopt the proposed Findings and Conclusions as presented in its Brief dated August 1, 1969.

Respectfully submitted,




VERNON B. ROMNEY


Utah Attorney General

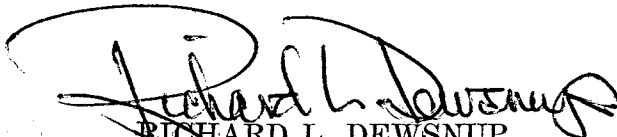


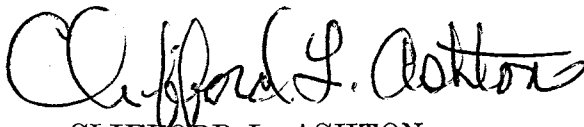
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Oct. 6, 1969

APPENDIX A

RESPONSE TO APPENDIX 5
OF THE GOVERNMENT'S BRIEF

The United States has included as Appendix 5 of its Brief a commentary on the evidence summarized in Utah's Brief of August 1, 1969. A careful reading of that Appendix shows that the items discussed are relatively insignificant, and the discussion proves to be more argumentative than factual. The evidence showing the clear susceptibility of the lake to navigation has not been commented upon by the United States.

Nevertheless, Utah will now briefly respond to the comments of the United States.

Item 1. The Government questions whether Zillah Walker Manning, one of Utah's witnesses, testified that grain was shipped twice a week in the summertime and once a month in the winter, or merely "lots of times." This is argumentative, but Utah believes the record fairly supports the summary made by Utah (Brief of August 1, 1969, pages 15-17, and T. 222-23).

Item 2. The Government questions neither the reliability of the testimony of Leon L. Imlay, one of Utah's witnesses, nor the accuracy of Utah's summary showing the use of boats to transport men and supplies to the pump station. The Government simply points out that salt marketed was shipped by rail — a point never in dispute. The point made was that boats were used to haul employees and supplies in connection with a commercial salt industry. This Court has approved evidence showing use of boats to "carry passengers and supplies in connection with prospecting, surveying and mining

operations.” (*United States v. Utah*, 283 U. S. 64, 82 (1931)).

Item 3. The Government questions neither the reliability nor the accuracy of the summary of the testimony of Francis W. Kirkham, to the effect that he was a paying passenger on commercial excursion vessels near and before statehood, but points out that he never went to the lake for other purposes. Utah does not fathom the significance of this comment, since this Court has received and approved evidence of commercial passenger excursions (*United States v. Utah, supra*).

Item 4. The Government claims there is a “minor inaccuracy” in the summary of the testimony of two of Utah’s witnesses, Phil Dern and John Silver, with respect to the operation of Sunset Beach in 1968 and 1969. The Government says that “the beach did not open in 1968,” citing T. 114, line 13, where Mr. Dern said “The last year we didn’t open.” While this is a very insignificant point, the fact is that Sunset Beach was open and operating during 1968. Mr. Dern testified that he, and his father before him, operated Sunset Beach continuously from 1934 until the present time (T. 111, lines 15-24); that boats had been there “every year” (T. 112, lines 13-16); that Salt Lake County had announced that it was going to take over and operate Sunset Beach by July 1, 1969, and so Dern did not open the “last year” (meaning 1969, the last and most recent resort season in progress at the date of the hearing); and so he applied for and received a concession to operate boats at Antelope Island State Park (T. 114-115).

Item 5. Here the United States questions whether

rescue craft presently “are” or “will be” on the lake, admitting that rescue craft “have been” on the lake. The point is, *when* someone needs to be rescued, the rescue craft are on call and the lake can be navigated for such rescue operations.

Item 6. The United States does not challenge the testimony of Thomas T. Lundee, who testified that the water did not freeze in winter, but has sought to present “rebutting” evidence from Utah’s Exhibit 8, containing an historical account where Captain Davis wrote that one of his boats was caught in an ice flow on the lake, and, without food for two days, he melted some ice for drinking water and it “was so salty, it made me vomit.” The Government further quotes an historical account where Christopher Layton, while transporting “a load of fat sheep to Salt Lake for mutton,” encountered floating ice from the mouths of the Bear River and Jordan River, and they were unable to navigate for forty-eight hours, until a wind drove the ice away and the remainder of the trip was accomplished without difficulty.

Utah assumes that the United States is not serious in presenting these historical excerpts to suggest that the lake is not navigable by reason of ice, since the record shows that Captain Davis continued to navigate the lake for approximately 50 years, and that Christopher Layton, despite his forty-eight hour difficulty, successfully transported his load of fat sheep across the lake. More fundamental, however, is the contrast of these accounts with Thomas Lundee, Utah’s expert at the trial, who the United States declined to cross-examine with respect to ice formations, even though he had testified that there was no ice in the winter or at any other time.

Item 7. Like the preceding item, the Government seeks to rebut the testimony of Mr. Lundee by citing an historical account saying that the buoyancy of the water was so great that boats rode high in the water and some boats became top-heavy, encountering some difficulty in adverse weather. Again, the United States declined to cross-examine Mr. Lundee with respect to his testimony that the buoyancy created a twenty percent bonus in load capacity and made navigability much more economical on the Great Salt Lake than elsewhere.

Item 8. The Government does not dispute the testimony Gail Sanders, one of Utah's witnesses, to the effect that the boats used by his brine shrimp company, have been and are operating on the lake, and the air boats are preferable because they can operate in any depth of water. The Government simply wishes to "clarify" that the air boats are preferable because of their ability to operate in shallow water, fearing that the inference might be drawn that air boats are preferable because they require deep water. If any such inference could have been drawn, Utah is happy to confirm that the preference for the air boats is because they can successfully operate on 100% of the surface of the lake, including very shallow depths where the shrimp must be harvested.

Item 9. The comment by the United States under this item is the only reference made by the United States anywhere in its Brief to the testimony of the lone witness called by the Government, and this amounts to nothing more than an effort by the Government to impeach the testimony of its own witness — something which it would not have been permitted to do at the trial. The

United States wishes to point out that the word "expect" was used in the question put to Elmer Butler on cross-examination, and somehow should be viewed as the testimony of Utah's counsel, rather than the testimony of the Government's witness. The exact exchange was as follows, as it appears at page 262 of the transcript:

"Q. And if the water in its foreseeable cycles, or not its foreseeable cycles but in its expected cycles, reaches a point as it did when Captain Stansbury was here so that the island again is isolated and becomes an island, the only way of getting those deposits [dolomite] off the island would be by boat, isn't that correct?

A. That is correct.

Q. And that could very well happen in the future?

A. It could."

Item 10. All the Government wishes to argue here, is that the steamship routes on the lake shown by the 1871 mining map (Exhibit P-7) does not make clear the nature and extent of the steamship use of such routes.

Item 11. The Government refers to Page 2-A of Exhibit P-8, where Utah referred to large shipments of railroad ties on the lake, and contends that the word "shipments" should be singular because the particular account refers to one shipment only. This is argumentative and Utah believes that the account cited fairly referred to a considerable number of shipments, although the particular account does refer to a single purpose. There were "several thousand ties" which were shipped "a distance of about 30 miles" from Saltair to Farming-

ton on "a large raft." Utah suggests that the entire account on Page 2-A of Exhibit P-8 be examined.

Item 12. The Government again presents an argumentative claim in an attempt to question whether the steamboat, *City of Corinne*, actually hauled great quantities of ore. The Government suggests that something less than great quantities of ore were actually transported across the lake. Utah believes page 2-B of Exhibit P-8 fairly supports the summary cited and invites examination of the exhibit to resolve any differing interpretations between Utah and the United States.

Item 13. This item relates to a quotation of newspaper advertisements which appears at pages 3-5 of Exhibit P-8. It is true, as the Government points out, that the phrase "car lots" appearing in the advertisement was printed in Utah's Brief as simply "lots." This error, if it has any significance, was an inadvertent error which occurred during the printing of the Brief. The other point raised by the Government is the location of Halfway House with respect to Lake Point. While there probably is not any significance in this regard, it does appear that the record is not clear in identifying the places quoted in the advertisement. The Government draws a number of inferences from the advertisement as to where freight might be loaded and might be unloaded from the train. Utah simply invites an examination of the advertisement quoted, as well as the other advertisements appearing at pages 3 through 5 of Exhibit P-8. Any inferences reasonably to be drawn should be drawn directly from those advertisements, since there is no testimony in the record further clarifying that material.

Item 14. The Government here claims that the photograph appearing at the bottom of page 9, Exhibit P-8, does not show the steamship "General Garfield" at the shipping dock at Halfway House near Lake Point. This may well be an error on the part of Utah, even though, contrary to the Government's claim that there is no reference anywhere in evidence which would put the site depicted in the photograph at Halfway House, the record does show that the only explanation of page 9 was at page 37 of the transcript, where counsel for Utah explained:

"Page 9, your Honor, is a picture of the General Garfield, and I think it identifies itself. That is, if you look closely, you can see, I think, on that picture the General Garfield at the site. And later I will have a witness, your Honor, who will identify where that boat was located. It is in fact located, if Counsel doesn't object, at the Garfield Boat Landing. The picture below is at Lake Point showing the Halfway House and the Garfield steamer with the stacks off. The documents show that the stacks were removed from the Garfield and it was made into a boat that was propelled simply from the back, I guess, with a gasoline motor."

If the statement in the transcript above quoted is inaccurate, as it may be, the degree of inaccuracy is not clarified from the record. Be that as it may, Utah believes there is little merit in engaging in further speculation, since there is really little materiality to this dispute with respect to the issue of the capacity of the Great Salt Lake to support meaningful navigation.

Item 15. The Government does not contest the accuracy of the evidence cited showing the present mining

activity on Stansbury Island, but points out that "at the present time" the island is not really an island but a peninsula. This is true. The only point made by Utah is that the particular mining activity, coupled with the other mining activities and potential mineral development discussed, shows the possibility, if not the probability, of significant future mineral and industrial development around the lake.

Item 16. The United States correctly points out that the hydrograph, Exhibit P-2, shows the levels of the Great Salt Lake as determined from gage readings from 1850 to the present time. Utah, as the result of a typographical error, referred to that exhibit as covering the period from 1950 to the present time." The Government also correctly points out that one of its four exhibits, Exhibit D-2, was prepared by the Utah Geological and Mineralogical Survey rather than the United States Geological Survey (in point of immaterial fact, the exhibit was *prepared* by Dr. Eardley of the University of Utah and *published* by the Utah Geological and Mineralogical Survey).

Utah believes that there is nothing in the foregoing discussion which has any significance with respect to the important evidence in the record legitimately related to the navigability of the Great Salt Lake. Therefore, Utah does not wish to highlight the foregoing items so as to suggest that those few minor matters are important when contrasted with the critical, wholly uncontroverted, evidence as set forth and summarized in Utah's Brief dated August 1, 1969.

Utah could further rebut by competent evidence the historical references relied on by the United States in

its Brief, but it is believed that this is effectively handled in section III of this Brief, discussing the nature and comparative weight of the evidence. There are a number of errors in the assumptions drawn by counsel for the United States as to what the evidence shows, but these are not sufficiently important to the issue of navigability so as to justify further extending the arguments with respect with such conclusions. But as an example of the type of error referred to here, is the conclusion of counsel for the United States that Antelope Island was purchased by the State of Utah for a State Park, clearly implying that there will no longer be a need to continue shipping livestock from the island to the mainland. This is not true. Only the northern tip of Antelope Island, consisting of 2,000 acres, was purchased by the State of Utah (T. 129), and the great majority of the island is still privately owned and used for livestock operation, although there presently is pending in Congress a bill whereby the federal government would acquire the balance of the island for a national monument (T. 130, Exhibit P. 15).

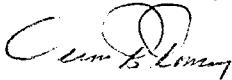
Utah certainly does not challenge the good faith of counsel for the United States with respect to any matter or claim presented in its Brief, but believes counsel for the United States in each and every respect has acted in good faith, even though the matters discussed above are viewed by Utah as not having any material bearing on the issue of navigability.

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 delivering the same this 6th day October, 1969, all in accordance with the Rules of this Court.

VERNON B. ROMNEY

Utah Attorney General

A handwritten signature in cursive script, appearing to read "Vernon B. Romney", written in dark ink.

