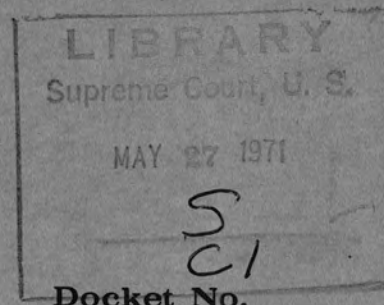


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

THE STATE OF UTAH,

Plaintiff

VS

THE UNITED STATES OF AMERICA,

Defendant

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

THE STATE OF UTAH,

Plaintiff

vs

THE UNITED STATES OF AMERICA,

Defendant

No. 31

The above-entitled matter came on for argument at
1:17 o'clock p.m. on Monday, April 26, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Defendant

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Salt Lake City, Utah 84114
On behalf of Plaintiff

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 31 Original: State of Utah against the United States.

Mr. Strauss you may proceed whenever you are ready.

ORAL ARGUMENT BY PETER STRAUSS, ESQ.

ON BEHALF OF DEFENDANT

MR. STRAUSS: Mr. Chief Justice and may it please the Court:

This is case in this Court's original jurisdiction which was brought by the State of Utah under the authority granted by the Congress to determine whether the United States or Utah, prior to a quit claim deed given by the United States had title to the lands lying below the meander line of the Great Salt Lake, which is a shallow and very salty body of water of some size, lying wholly within the State of Utah in its northern portion.

After a variety of procedural rulings which I need not remind the Court of, the case was referred to a Special Master, the Honorable J. Cullen Ganey to report to this Court on the issue of title. That issue has several aspects, and in the proceedings immediately at hand he has decided only one of those, which is whether the Great Salt Lake was a navigable body of water on the day when Utah became a

1 State, January 24, 1896. And the parties are fully agreed that
2 if the Great Salt Lake was not navigable on that date then the
3 United States continued its ownership of all the lands below
4 the meander line and in that situation further proceedings
5 will eventually be required to determine the fair market value
6 of the land which have subsequently been quit claimed to Utah
7 so that Utah may pay that value for the quit claim deeds.

8 If, on the other hand, the Great Salt Lake was
9 navigable on that day in January, 1896 then the lake bed passed
10 to Utah at that time, instantly, as part of the operation of the
11 principle of equal footing, or equality among the states and
12 there is no necessity for Utah to pay for lands which were
13 within the boundaries of the lake as they existed on that
14 day, save possibly for such lands as have been since relicted
15 by the recession of the lake from its shores.

16 And the issues were: the boundaries of the lake
17 were on January 4, 1896 and whether the United States continued
18 in title or obtained title to such lands as must have relicted
19 after that date again is an issue which is not before the
20 Court at this time and which would have to be decided in a
21 subsequent proceeding if the Court should rule for Utah in the
22 present proceedings.

23 And I might just very brief remark in that
24 connection that while the Report of the Special Master is in
25 some minor respect, possibly seems to rule on the reliction

1 issue on the one hand in conclusion of Law 18, or in the
2 proposed decree to state that if the lake was navigable Utah
3 obtained title to all lands within the meander line. I think
4 it is clear and that Counsel for Utah will agree, that the
5 issues are as I have stated.

6 The question of reliction remains open for future
7 decision and that if the lake was navigable on January 4th the
8 lands which Utah took at that time were the lands which were
9 under the lake waters at that time and not the lands that might
10 have happened to be within the meander line which had been
11 drawn at some earlier time.

12 Q Does this mean, Mr. Strauss, if Utah
13 should prevail here that the proposed decree of the Special
14 Master would not be proper?

15 A Well, I think that it's a question of
16 construction, indeed, whether the decree is inconsistent it's
17 susceptible to a reading that it's inconsistent with what I have
18 stated. This Court has always followed the practice in the
19 past of inviting proposals for decree after original cases.
20 And we have been assuming that it would do so in this case and
21 we can confront the question at that time.

22 Now, if I may turn to the issue which is here, as
23 I have said: the only issue is whether the Great Salt Lake was
24 navigable on the date when Utah became a state. There were
25 hearings in Salt Lake City before the Master, both oral

1 testimony and numerous documents were produced and on that
2 basis the Special Master has prepared a lengthy report in
3 which he concludes that the lake is navigable. And, while we
4 dispute that final conclusion I should make it clear, as I
5 think our brief does, that on the whole we acknowledge that the
6 report is correct in its statement of the facts. Strictly
7 speaking of the case we think the Master has done an excellent
8 job and don't mean by arguing legal points here to suggest
9 otherwise.

10 We accept all the strictly factual findings made
11 in the report and have made exceptions only to findings of law
12 and to two of the findings of fact which in our view embody
13 essentially mixed questions of law and of fact.

14 We contend that the lake was not navigable for
15 two reasons: the first is that the lake presents such ob-
16 stacles to navigation in its natural state that it could never
17 be used as a channel of useful commerce and trade by water.
18 without improvements of an unusual extent being made.

19 And the second is that even if the lake were
20 navigable in fact, it lacks any connection in interstate
21 or foreign commerce or trade and for that reason should be
22 found not navigable in law.

23 Taking up the question of navigability in fact,
24 again, the parties are largely in agreement of what the under-
25 lying law is. The proper test was first stated by this Court

1 in the Daniel Ball in 10 Wall. And the Court said there that
2 waters are navigable in fact when they are used or are sus-
3 ceptible of being used in their ordinary condition as highways
4 for commerce over which trade and travel are or may be con-
5 ducted in the customary mode of trade and travel on the water.

6 And I think the Court will find that the
7 principal dispute here is what that word "susceptible" means.
8 perhaps some argument about the extent to which improvements
9 may occur without departing from ordinary conditions of water.
10 And what the Court meant when it said that they must be useful
11 as highways for commerce.

12 The Master did not find that the Great Salt Lake
13 was actually in use as a highway for commerce on January 4,
14 1896. He found only that it was capable or susceptible of such
15 use; not counting excursion trips which had been made, he
16 found the boating uses of the lake had been more of a private
17 nature rather than by individual contractors for hire. It's
18 Finding of Fact 51.

19 In Finding of Fact 52 he found no evidence to show
20 that there was ever any regularly scheduled freight or passen-
21 ger service operated on the lake.

22 So the question is whether it is reasonable to
23 believe that this lake in its ordinary and natural condition
24 could become a highway of commerce. The Master's report un-
25 folds a discussion of that question.

1 Q Did he find what the ordinary natural
2 condition was, Mr. Strauss? Is there a finding on that?

3 A He found that on that date that the lake
4 was approximately 77 miles long, taking its greatest length,
5 and about 33 miles wide. It exposed approximately 1500 square
6 miles of water to the sun; that its elevation -- there is
7 some confusion -- I think there is a typographical error at
8 one point, but I think it clearly found that its elevation of
9 statehood was 4201 feet, which would give it at its greatest
10 depth a depth of 30 feet, and average depth of 13 feet.

11 We have submitted to the Clerk and Counsel and
12 asked him to distribute to you a small map of the lake to which
13 I will be referring later on --

14 Q But what I was getting at is: what is
15 meant by body of water in "its natural state or condition," as
16 applied to this lake?

17 A Oh, well basically, and perhaps the
18 simplest way to answer it would be to refer to this Court's
19 decision in the Montello, which involved the Fox River. The
20 Fox River was a body of water which, as it existed in a nature
21 would transport boats of two-and-a-half foot depth down it for
22 a considerable distance, although there were some rapids and
23 riffles to be gone through. It had been improved by the time
24 the case got to this Court, questioning whether it was a navigable
25 waterway or not. And, in deciding whether it was a navigable

1 waterway the Court said: "We will not concern ourselves with
2 those improvements with those canals, ditches, locks, and so
3 forth, but rather with the river as it was when man found it:
4 unimproved, unexcavated, undredged, "and the issue was whether,
5 in those circumstances it could carry trade and commerce, and
6 the Court found that these boats of two-and-a-half foot depth
7 carrying substantial loads of lumber and other goods in fact,
8 frequently ran the river, engaging in commerce of a very sub-
9 stantial sort.

10 Q A lot of -- there are a few methods, I
11 gather, of traveling even in very shallow waters. I remember
12 down in the Everglades with these air-propelled boats --

13 A That's right, Mr. Justice Douglas.
14 Thankfully, again 1896 perhaps is helpful to us in that respect.
15 It is quite clear from the cases that the question of navigation
16 is with the means of navigation which were available at the
17 time, and I don't believe that an air boat would have been
18 available in 1896.

19 Q That's pretty well settled; is it?

20 A I believe it is. I think another appro-
21 priate response to that: of course one has today amphibious
22 trucks of enormous dimension and power craft and thelike. In
23 virtually no case which this Court has decided would not involve
24 a body of water which couldn't be navigated by one or another
25 of those facts. The United States versus Oregon, for example:

1 the waters in those lakes were in some places only inches deep.
2 Quite plainly one of these air boats could have navigated those
3 waters.

4 Q Of course here the Master very clearly
5 found that as of the date of statehood, January 1896, the lake
6 was physically capable of being used in its ordinary condition
7 as a highway for floating and affording passage to watercraft
8 in the manner over which trade and travel was or might be
9 conducted in the customary modes of travel on water at that
10 time.

11 A That is correct. He did.

12 Q And he went on to say that the areas of
13 the lake that are that sufficient for that purpose were not
14 narrow or short channels; they were several miles wide, exten-
15 ding substantially through the length and width of the lake,
16 uncovered an area of more than a thousand square miles; and
17 that a vessel could have traveled from one tip of the lake
18 the whole length of it, virtually on a straight line.

19 A I think it might be appropriate at this
20 time to refer to this map which I asked the Clerk to distri-
21 bute. The thick black outline, the thick line running around
22 the periphery of the lake is the 4200-foot line. It's a contour
23 map. It's approximately -- slightly less -- but approximately
24 the level that the lake was at statehood.

25 This thick blue line was approximately at the

1 level that the lake is today; again, somewhat less. The white
2 areas, then, between the blue line and the black line are
3 areas which have been exposed. There is a -- since the time
4 of statehood there is five-foot vertical difference involved
5 between those two lines.

6 So that I think one can say that the waters to
7 which the Master was referring in the passage which you have
8 read are the waters within the blue line and it can be seen
9 that indeed those waters do run virtually from the northern tip
10 of the lake to virtually the southern tip of the lake.

11 I think it can also be seen, however, that along
12 the eastern and western shores of the lake, as the Master also
13 specifically found, in particular behind Stansbury Island and
14 Carrington Island in the lower left and in the whole of the
15 Bear River Bay and the Farmington Bay are on the right. But
16 there is a very wide expanse of land which has been exposed.

17 Now, to give you some notion of the extent of
18 land, while the vertical scale here is five feet between the
19 lines, the horizontal scale is eight feet to the inch, or each
20 one-eighth of an inch represents one mile in horizontal dimen-
21 sion. I think the Court will see that there are considerable
22 extents of land exposed around the edge where that horizontal
23 scale is a quarter of an inch or greater or in other words:
24 where something on the order of -- take something on the order
25 of only a two-foot difference in depth over the course of a

1 mile of horizontal difference.

2 And this is basically where the United States
3 arguments in the case rest. It's true one can go from one
4 carefully selected point on the lake to another carefully
5 selected point on the lake, but this is a lake and not a river.
6 With rivers one is only concerned with traveling the length of
7 the river. Crossing the river is never a very great concern
8 so far as navigability is an issue and has never been at issue
9 in this Court's cases. But we don't think a lake is very
10 useful for commerce when you can't get out of the lake to any-
11 place else and when you can only visit only one or two places
12 upon its shores.

13 That, in essence, is the contention of the United
14 States here.

15 Q Well, does it have to be "very useful" for
16 commerce in order to be navigable?

17 A It has to be substantially useful. There
18 has to be a practical and a permanent capacity for commerce.

19 Q That's a little different from being very
20 useful for commerce; isn't it?

21 A I think it comes well within the bounds
22 of the United States' argument in this case.

23 Q And --

24 A In its natural condition there is a capa-
25 city for commerce only between that point on the southern shore

1 that point at the northern tip and a few of the islands.

2 Now, in a lake, an enormous body of water of this
3 sort it seems to me that is not sufficient to establish
4 navigability. Of course any boat could float on the waters of
5 this lake if one could once get it there, but the issue under
6 this Court's cases is whether anyone would have wished to put
7 a boat there for commercial purposes.

8 In the cases the Court has dealt with previously,
9 with some minor exceptions in the prior Utah decision is one
10 of them. The Court has been concerned with the great web of
11 rivers and lakes which makes up the Mississippi Valley and the
12 watershed of the Great Lakes. And there really has been no
13 question but that if a body of water connected into those bodies
14 it would have been useful and would have been used.

15 Now, there have been decisions such as the prior
16 Utah decision which involved segments of water, disconnected
17 segments of water and considered whether or not they were
18 navigable but I should point out there that those bodies of
19 water were in remote and unexplored situations. Settlements
20 had not grown up. In essence, commercial use had not begun.

21 The Court was very careful in those cases to say
22 that it was reaching its conclusion about navigability in part
23 because the nonuse of the waterway for commercial purposes could
24 be explained by the absence of people; by the absence of develop-
25 ment. We don't have any such explanation here. There were

1 200,000 people in the immediate vicinity of this lake on the
2 date of statehood. There are 500,000 people in the immediate
3 vicinity of this lake today and yet it is not used for com-
4 merce. It cannot be used for commerce without improvements of
5 such a massive scope as to make it clear that in its natural
6 and ordinary condition it is not susceptible of commercial
7 use.

8 In these areas we have been talking about --

9 Q It is being heavily polluted --

10 A It is being heavily polluted. I certainly
11 agree with that.

12 Q Well, this is on the premise of what --
13 Findings 45, which deal with harvesting of brine shrimp and
14 -- which deal with the chemical compounds and the commercial
15 work that goes on in that connection. Those do not show any
16 commercial usage?

17 A Those show commercial use in the same
18 sense and one commercially uses a mine, or a -- I don't think
19 they show a commercial use in the transportation sense; no.

20 Q Does it have to be transportation?

21 A I believe so.

22 Q Where do we find that?

23 A I believe it comes from the Court's
24 decisions in the Genessee Chief and --

25 Q Transportation for others for hire. Is

1 that -- that's really what you are arguing; isn't it?

2 A That is essentially --

3 Q -- a common carrier.

4 A I won't say that I don't think that it
5 would -- I wouldn't want to but I would have to take that
6 argument to a complete extreme. But I do think, again, that
7 on historical views these lands or these waters, rather, were
8 important, because they provided a means for goods and people
9 to get place to place in a way which would otherwise not be
10 -- there would otherwise be no convenient way. The Great Salt
11 Lake provides no such facility.

12 Now, the Court in --

13 Q So that I am very clear, assume that
14 an island in the lake that had a very valuable mineral deposit
15 on it and the only way to get to the island was by boat and the
16 only way to get the minerals out was by boat and the lake was
17 perfectly equipped to sustain that kind of transportation.

18 A Right.

19 Q The minerals came from the island onto the
20 barge straight to an interstate railroad car on the beach.
21 Is that navigability?

22 A I think not.

23 Q Well, why not?

24 A Well, I would have to take it down to,
25 I suppose, what may be a somewhat more prosaic description.

1 One may also imagine an island which is being used for farming
2 purposes, as there are on this lake, which is surrounded by a
3 body of water which is not navigable, let us say, if you are
4 thinking about boats passing from the top of the river on down
5 to some port in the bottom part and yet the family that farms
6 on the island has to get out there and they have a boat to do
7 it and they row out and they row back.

8 Q And I gather, they bring their produce
9 out.

10 A Bring their produce out and back; of
11 course they do.

12 Q Well, isn't that -- that certainly is a
13 commercial use of the water and it's being used for transpor-
14 tation of goods being taken to market.

15 A It is being used for transportation of
16 goods being taken to market but I do feel that the Court's
17 cases have been concerned with commercial use in a broader
18 sense -- it might so well as be a marsh, be a swamp, be one of
19 these areas which is passable only by air boat. The Court has
20 in the past dealt with situations of such marginal navigability
21 and it seems to me that as in the Utah case, they have always
22 been careful to be sure. Such instances were taken as evidence
23 that the lake might be susceptible of commercial use but
24 one looked to see whether ultimately it would become a public
25 highway, not a private road.

1 Q Well, what about a river that is a highway
2 for getting logs to market.

3 A Yes.

4 Q Does that make it navigable?

5 A I'm not entirely sure of this, but I will
6 say that there are certainly cases which have held that that
7 was one use that would show --

8 Q Well, if they, there was a valuable stand
9 of timber on this island in the lake and they floated the logs
10 over it would be all right?

11 A No; no; it's a very fine distinction but
12 it really comes to the point that the individual has a choice
13 about what means of transportation he is going to employ and
14 here is a body of water and he chooses the body of water be-
15 cause it is convenient.

16 In United States versus Holt State Bank, for
17 example, one had a lake three to six feet deep and the Court
18 quite carefully observed that there weren't many people to use
19 this lake, but really waterways were being established for most
20 means of going from place to place. It wasn't that the
21 waterway was an obstacle naturally in its path which somehow
22 had to be surmounted. Of course^{if}/the fact that the waterway is
23 there and has to be gotten past in order to mine the island or
24 do the farming is sufficient to establish that it is navigable,
25 why, then, we are out of Court and the Report of the Master

1 Q Well, you said, I think earlier, that
2 there has to be proof of a broader -- in what sense were you
3 using the word "broader?"

4 A A substantial or permanent commercial use
5 for the transportation --

6 Q Well, is this a matter of degree, or a
7 matter of what, general variety of uses or what?

8 A To be sure it's a matter of degree.

9 Q Of degree?

10 A That's right. Again, I would say that in
11 this particular circumstance the fact that it is a lake and not
12 a river seems to us to be of some significance. One has to
13 deal with the whole of the circumference and not simply a
14 matter of length of travel.

15 There is another issue of degree that is involved
16 here, and that is the question of dredging harbors or building
17 piers. One couldn't deny that in every harbor there must be
18 some dredging done; there must be some piers built, but in
19 substantial areas of the shore of this lake. The pier would
20 have to be miles long just to be sure of having one foot of
21 water at one end and dry land at the other end.

22 And when it comes to building improvements of that
23 kind I think one can say that the waterway in its natural
24 condition is not usable.

25 Q Mr. Strauss, the Great Lakes but they are

1 considered rather good for navigation.

2 A And they are. They have cities employing
3 millions; they have countless boats plying their shores. The
4 United States sought to make an offer of proof in the proceed-
5 ings before the Master of commerce on other inland lakes in
6 this country, an offer of proof which was refused.

7 Q Well, wouldn't the Great Lakes be
8 navigable even if they were not, in fact, a boat being used
9 on it?

10 A Of course.

11 Q Because it's susceptible, capable of
12 bearing navigation; isn't that the test?

13 A It is susceptible and capable of bearing
14 navigation, but in the sense that one may expect that naviga-
15 tion to be there, that it has some permanent and substantial
16 use, as this Court has put it. The Great Lakes Shores do not
17 change by one or two miles every season. They do not change
18 by four or five miles over the course of eight years in time,
19 as the lakes of the Great Salt Lake do. It is possible to
20 build permanent improvements there of a very much lesser extent
21 that enables one to use it. There is a much greater extent of
22 shoreline, much greater distance that one can go.

23 Mr. Strauss, do you question the accuracy of the
24 Master's Finding 48 and 49 on pages 42 and 43 of his report?

25 A We have not set it --

1 Q Showing more than a dozen or so of
2 uses of transportation on the lake?

3 A No. We do explain those issues in the
4 brief before the Special Master which is now before this Court
5 and I think the Court will find that many of them occurred
6 during periods of time when the lake was much higher than it
7 is now --

8 Q Well, it was much higher than it is now
9 in 1896 when it became a state and that's the critical time,
10 isn't it?

11 A It was much higher than it was in 1896.

12 Q No; higher in 1896 than it is now.

13 A That's right; excuse me. I misspoke.
14 The boats were used at a time when it was higher than it was
15 in 1896, was that I meant to say. Excuse me.

16 Q Well, you have the testimony of that
17 woman: Zillah somebody, who was born before statehood and grew
18 up on Antelope Island until she was 12 years old and of course
19 the people couldn't have lived and worked on Antelope Island
20 unless the lake was navigable; could they?

21 A They couldn't have lived and worked on
22 Antelope Island unless they could get from the island to the
23 shore. The fact that they --

24 Q With their produce --

25 A With their produce; that's right.

1 Q With their livestock.

2 A With their livestock. It may be that
3 what we are suggesting in some respects, to go back to the
4 Utah case, the prior Utah case; the Court held that part of
5 the Colorado River was navigable and part of the Colorado
6 River was not navigable. It is perhaps a harder operation to
7 do with a lake than it is to do with a river, but it seems to
8 us that the quality of the shores of this lake along the
9 eastern side and along the western side and Bear River Bay are
10 there are those areas which are so shoaled and have been so
11 shoaled for such a long period of time that one may say at
12 least there that there is no susceptibility of use for
13 navigation in the natural sense.

14 I would like to reserve the rest of my time for
15 rebuttal so I will leave our second argument --

16 MR. CHIEF JUSTICE BURGER: Very well.

17 Mr. Jensen.

18 ORAL ARGUMENT BY DALLIN W. JENSEN, ESQ.

19 ON BEHALF OF PLAINTIFF

20 MR. JENSEN: Mr. Chief Justice and may it please
21 the Court:

22 I would first like to state that Utah does agree
23 that the issue of relection is not before the Court at this
24 time; that the question is one of navigability.

25 Utah further agrees that in order for the Great

1 Salt Lake to be found navigable on January 4, 1896, it must
2 have been navigable in its natural and ordinary condition.
3 We submit that the Master so found. We disagree with the
4 United States in the interpretation of this language of sus-
5 ceptibility.

6 We believe it to be clear from the Court's language
7 in United States against Holt State Bank, United States versus
8 Utah, that actual use at statehood is not required; it is a
9 capacity for use. We believe we have showed a great deal more
10 than a naked physical capacity, but we believe that that is
11 all that was necessary; that is: does the body of water have
12 sufficient length, width, depth. Is it dependable; is it there
13 year-in, year-out, all seasons of the year. Could it be used
14 if the needs arises.

15 In fact, in the Holt State Bank case the evidence
16 was that Mud Lake, as it was called, only enjoyed a very
17 limited historical use and that at the time of trial was
18 drained and dry. It had absolutely no future. Consequently,
19 any discussion as to what the future may hold as far as a
20 build-up of a commerce, with boats going everywhere on the lake
21 at various points is simply irrelevant.

22 Title either vested on January 4, 1896 in Utah or
23 it didn't. It hasn't been floating waiting for experience to
24 show what the traffic will be on the lake; this is why the
25 Court reviewed, correctly so, the very definitive test of

1 susceptibility.

2 Secondly, we believe that of course the actual
3 uses demonstrate this susceptibility very well. The Master
4 found a variety of uses. He found a great many different
5 kinds of boats had been used on the lake, both before and
6 after statehood. It's true some were used for pleasure but
7 it's also true some were used in business.

8 And again, in United States versus Utah, this
9 Court said that no matter what the use it is still relevant to
10 show the susceptibility. The United States in the earlier
11 case made the very argument it's making here, that while too
12 many of these uses are private in nature as opposed to being
13 paid for. This Court rejected that argument.

14 Turning to the argument that there is no access
15 to the lake; that it is too difficult to get to so that the
16 otherwise usable capacity is made useless, I would first refer
17 to the map which Counsel submitted to the Court and point out
18 that the Special Master found that Antelope Island had been
19 continuously inhabited since 1848 and the witness which was
20 spoken of earlier, Zillah Walker Manning, testified that she
21 was born on that island in the early 1890s and lived there and
22 that her testimony was that boats were used to transport live-
23 stock, household supplies, grain, farm equipment. This is
24 across the very area which the United States says it's too
25 shallow to navigate and that you can't get your boat to the

1 shore, off from the shore.

2 The same is true of Fremont Island. It has
3 sustained a viable livestock industry. Further, as has already
4 been noted, there are a number of places on the lake where the
5 bed is steep. We don't deny that there are some pretty flat
6 shore there; that there are some bogs, but again we don't
7 believe unlimited capacity is a requirement that you have to be
8 able to get in at every spot.

9 Again, in United States versus Utah this Court
10 observed that these 65 miles of the Colorado River which it
11 found to be navigable flowed through Rock Canyon for a large
12 extent that had walls from 600 to 1200 feet in height. In the
13 Mud Lake case the Court concluded that that lake was navigable
14 even though sand bars prevented the unrestricted use of the
15 lake.

16 And here the Special Master found that the shallow
17 waters which are around the shore could easily be avoided by
18 keeping into the navigable channels which he had found extended
19 substantially throughout the length and breadth of the lake.
20 The point is that if someone needs to build here, build a
21 harbor, there are some good spots to build them. This is not
22 the type of artificial construction which takes a case out of
23 the navigability for tidal purposes and puts it under the
24 Commerce Clause definition. We're not required to dredge the
25 channel or do a lot of improvements there; it's just simply

1 harbor access.

2 The Master found that there are very few natural
3 harbors in the world and the one witness, in fact the only
4 witness who was an expert in navigation, Mr. Thomas Lundy,
5 testified that he was familiar with many of the navigable
6 waters of the United States as well as other parts of the world
7 and there was only one natural harbor. Mr. Lundy was
8 associated on the Great Salt Lake for a period of two years,
9 where he was involved in the design, construction and opera-
10 tion of a fleet of 39 boats and barges that were used to place
11 causeway fill across the lake. And as a part of that project
12 it was necessary to construct a harbor on the west side of the
13 Promontory Mountains.

14 He testified that rather than being an impediment
15 that the lake was unusually susceptible in this regard because
16 it was easy; it was inexpensive to construct a harbor because
17 of the clay sediment which made up the bed; the lack of bedrock
18 that -- I think it mentions that the harbor was 400 by 1500
19 feet.

20 He further testified that they had absolutely no
21 maintenance problems. The reason for this, he said, is that
22 the lake has no currents so you don't get the sediments moving
23 back in like you do on most river systems and like you do in
24 the harbors in San Francisco Bay.

25 Again on access: the Special Master found that

1 a number of piers and docking facilities existed at various
2 point on the southern shore and on the eastern shore of the
3 lake.

4 Q Any at the time of statehood?

5 A Prior to the time of statehood.

6 Now, Saltair was built in 1893. The evidence
7 specifically was that it was used for commercial excursions,
8 pleasure boats for commercial excursions and that at times the
9 livestock on Antelope Island was shipped to the pier at Salt-
10 air.

11 Q Is Saltair where they used to have the
12 amusement park --

13 A Yes, sir. Saltair is the old pavillon
14 where they had the dance hall out over the lake and where the
15 lake probably got primarily known for its ability for people to
16 get in and float around and I think its fame for that came from
17 Saltair, which was built at that time.

18 Q Was anybody -- can anybody swim in the
19 lake any more?

20 A Yes. There are three beaches on the lake
21 now. They are open; they operate, again, commercial excur-
22 sions out on the lake. They are swimming in it. The state
23 park is building a state park on Antelope Island on the north
24 tip and in fact, is constructing a 200-boat marina there.

25 So, then the brine shrimp industry will not

1 compare with the commerce on the Great Lakes, it's there.
2 The livestock industry is still there. Scientific investiga-
3 tion is going on. There is evidence in the record that there
4 is minerals west of the lake under the possibility of blowing
5 gas under the lake(?) minerals and brines in solution. The
6 waterfowl areas, so to characterize the lake as a desolate,
7 forlorn pond of water just simply is not so.

8 We believe the lake does have a great future. In
9 fact it's just moving into that phase: the pleasure boating
10 and the access that will be needed for that will be very impor-
11 tant.

12 The Government's argument that the lake may be
13 partially navigable, this is the first time we've heard it.
14 It was not advanced below. It's not part of the Master's
15 Report. It was never presented to him and we submit the lake
16 is either navigable or isn't and the fact that it has some
17 shallow areas does not mean that you carve out those portions;
18 it just means that they may be somewhat of an impediment but
19 they are not great enough to destroy the navigable capacity of
20 the lake.

21 Q You mean that by reason of the procedure
22 of access now we are bound to hold that the lake is fully
23 navigable and is not partially navigable?

24 A Well, it seems to us that that is so.
25 There was never an issue on this. There was never any

1 evidence toward it, partial navigability as opposed to full
2 navigability, and we, of course, submit that it's fully
3 navigable.

4 Q Well, I suppose the Atlantic Ocean is not
5 navigable in certain spots when you get into --

6 A I would think so. You take the rocky
7 cliffs and so forth. That's why we say we don't believe you
8 have to have unlimited access to a body water to make it
9 navigable, to get a boat in at every spot. It simply has to be
10 useful. I think this is the term the Court has used, and
11 practical.

12 We think the lake lends itself to that.

13 Q What's the draft of a ship like the Queen
14 Mary; do you know? Thirty feet?

15 A Probably; the barges which were used to
16 place the causeway had dimensions of 250 feet in length, 50
17 feet in the width, had a carrying capacity equivalent to 90
18 railroad cars and drew 12 and a half feet of water on the lake.

19 Q Twelve-and-a-half.

20 A Of course --

21 Q Is that the depth -- at the time of state-
22 hood it was 30 feet; wasn't it?

23 A Right.

24 Q So, from one end of the lake to the other
25 were great widths of channels.

1 A Yes --

2 Q Like the Master has found.

3 A -- the Master said they extended substan-
4 tially throughout the length and the width of the lake.

5 Q But I mean, wide channels, as well.

6 A Yes; the center channel is very wide,
7 many, many miles wide. It's not a channel like a river; it's
8 much, much wider than that.

9 Q Is there a current -- with respect to
10 navigability where the issue was state ownership of the river
11 bottom or the lake bottom and where the issue is navigability
12 for the purposes of Congressional power?

13 A Yes; there is no question about that.

14 Q There is a different rule?

15 A You bet. The Commerce Clause definition
16 is that if it's either navigable or can be made navigable.
17 That is if you got a river and maybe it's got a lot of sand
18 bars in it but you can take your dredges in and clean them out
19 why you have then got a navigable channel.

20 But, the navigability of for tidal purposes is its
21 natural, ordinary condition; that is the language of this
22 Court. And we don't contend for the more generous test and
23 never had and the Master didn't find -- finding of fact 31
24 says in its ordinary condition. And in his preface to the
25 findings he said it must be navigable in its natural state and

1 future improvements are not to be taken into account.

2 Q What is the case that is closest to this
3 for tidal purposes?

4 A I think there are two very close; the
5 Mud Lake case or the Holt State Bank case is lake and it did
6 not have anywhere near the size of the Great Salt Lake.

7 Q And then the former Utah case.

8 A And the former Utah case --

9 Q You are going to likely --

10 A Yes. On the Government's interstate
11 argument we believe that the former Utah case is conclusive
12 on --

13 Q Well, it all is a question of navigability
14 on the parts of --

15 A Right.

16 Q Even though it was a river or parts of
17 rivers.

18 A Right. The -- it was undisputed that the
19 parts of the Colorado and Green Rivers which were found to be
20 navigable were navigable only intrastate, only within the
21 boundaries of the State of Utah, but --

22 Q And that there were many impediments.

23 A Many impediments: flooding at times caused
24 problems; there was debris and ice during times of the year.
25 And the most serious impediment, the shift in sand bars that

1 would cause the water to spread out, lose its depths and in
2 that case the evidence was that a good portion of the year the
3 water was only three feet deep, much, much less deep than the
4 waters of the Great Salt Lake, and still navigable. And that
5 again, the shifting sand bars caused the channel to divide
6 and shift around.

7 But, nevertheless, the water was found to be
8 navigable. In fact, and again, as I was saying, the Court
9 said that in the Equal Footing Doctrine, because they were
10 navigable in fact, they were Utah's property. And it was
11 clear that the Court was not announcing or applying a new con-
12 cept or a new doctrine. This principle was already well
13 established by prior statements of this Court.

14 Utah further suggests on the question of inter-
15 state navigability, the argument of the United States on Inter-
16 state navigability, that wherever doubts may have existed be-
17 fore, they were removed by the passage of the Submerged Lands
18 Act. The legislative history of that act makes it very clear
19 that Congress was confirming and ratifying title in the states
20 to inland waters which were intrastate and which were navigable,
21 in fact.

22 So, in summary, Utah would submit that the report,
23 the findings of the Special Master are fully supported by the
24 facts of the case; that he did apply the correct rules of law,
25 correct rationale of prior decisions of this Court, and that

1 his report and decree should be sustained.

2 Thank you.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
4 Jensen.

5 Mr. Strauss.

6 REBUTTAL ARGUMENT BY PETER L. STRAUSS, ESQ.

7 ON BEHALF OF DEFENDANT

8 MR. STRAUSS: I would like to state very briefly
9 that while it's evident that this is, at the best, a close
10 case for the United States, still I think the Great Salt Lake
11 is distinguishable. It's a matter of proportion, from the
12 Atlantic Ocean and some similar systems. This is a lake which
13 is only 80 miles in its maximum dimension and to use it in
14 most place you must build a pier or dig a channel that is a
15 mile and a half or two-and-a-half miles long, then I suggest
16 that that is sufficient to show that the lake is not useful in
17 its ordinary condition, as a highway of commerce.

18 The passage in the Utah case to which counsel
19 referred, which did make reference to private uses, went on to
20 say that it did so because conditions of exploration and settle-
21 ment explain the infrequency or limited nature of the use.
22 Well, now the Great Salt Lake has no such excuse. It was well
23 settled at the time; it is well-settled not. It has never had
24 any permanent for the transportation of goods or passengers
25 from place to place except in those few situations where it was

1 rendered absolutely necessary by the geography of the situa-
2 tion. Transportation on the lake has never been a matter of
3 choice.

4 If I may, just one technical matter, if it please
5 the Court: my search of the records revealed that you have no
6 copy of the transcript. This is our copy of the transcript,
7 which I believe is unmarked and which I will leave with the
8 Clerk.

9 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strauss.
10 The Clerk will see that it's returned to you.

11 MR. STRAUSS: Thank you.

12 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strauss;
13 thank you, Mr. Jensen. The case is submitted.

14 (Whereupon, at 2:35 o'clock p.m. the argument in
15 the above-entitled matter was concluded)