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SUPREME COURT, U. S.  
WASHINGTON, D. C. 20543

In the

# Supreme Court of the United States

State Of Utah,

Plaintiff,

v.

United States,

Defendant.

No. 31 Original

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF UTAH,

Plaintiff,

v.

UNITED STATES,

Defendant.  
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No. 31, Original

Washington, D. C.,

Tuesday, December 17, 1974.

The above-entitled matter came on for argument at  
2:15 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANNY JULIAN BOGGS, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.  
20530; on behalf of the Defendant.

RICHARD L. DEWSNUP, ESQ., Special Assistant Attorney  
General of Utah, 236 State Capitol Building,  
Salt Lake City, Utah 84114; on behalf of the  
Plaintiff.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 31, Original, State of Utah against the United States.

Mr. Boggs, you may proceed when you're ready.

ORAL ARGUMENT OF DANNY JULIAN BOGGS, ESQ.,

ON BEHALF OF THE DEFENDANT

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

This original case is here on exceptions to the report of the Special Master in the reliction phase of the continuing litigation between Utah and the United States over the ownership of land in the vicinity of the Great Salt Lake.

This litigation was authorized by the Great Salt Lake Lands Act of 1965. Pursuant to that Act, the United States, in 1967, quitclaimed to Utah all of its interests other than mineral rights within the surveyed meanderline of the Great Salt Lake.

That line generally, though not invariably, runs on land that has been above the Lake level for fifty years or more.

Utah was to pay for the land that the United States stated that it owned, or to litigate the United States title in an original action in this Court. Utah chose to litigate.

In the first stage of this litigation, this Court



held that the Great Salt Lake was navigable and that Utah thus acquired title to its bed at Statehood in 1896.

This settled the question of ownership of the land that was still under water at the time of the deed in 1967. That area is the inner, lighter-shaded area on Defendant's Exhibit 2, the map shown in the back of the Special Master's report.

We are today concerned essentially with the area between the level of the Lake at Statehood and the level of the Lake as of the date of the quitclaim deed. That land is the middle darker band shown --

QUESTION: Let us find that map, you've got several exhibits here.

MR. BOGGS: Yes, sir. Defendant's Exhibit 2 is about the third exhibit from the back of the set of exhibits.

QUESTION: Is this it?

MR. BOGGS: Yes, Mr. Justice Stewart, that is the map.

We are today discussing essentially the title to approximately the inner, the middle darker colored band on Exhibit 2.

QUESTION: Incidentally, Mr. Boggs, are the parties now in agreement as to the two errors that were mentioned in the Special Master's report, the Statehood level --

MR. BOGGS: The 4200.2 against 4200.8 --

QUESTION: Yes.

MR. BOGGS: -- and the 396,000 against 325,000.

QUESTION: That's correct.

MR. BOGGS: Yes, sir, I believe that we both in our briefs stated that we were in agreement with the facts as we each stated them.

QUESTION: So that that is out of the case at this point?

MR. BOGGS: Yes, sir.

QUESTION: Mr. Boggs, you say that we're discussing the inner darker band --

MR. BOGGS: The middle.

QUESTION: That's assuming that all of the circumferences of the Lake were claimed by the United States, though, isn't it? Which I would assume --

MR. BOGGS: Yes, sir, you're right. Your Honor is correct that we're discussing specifically those areas in which the United States is the upland owner, across that middle band.

The United States contends that by operation of the doctrine of reliction, as consistently recognized by this Court, the lake bed which Utah owned receded as the lake receded, and to the extent that it was the upland owner, the property interests of the United States extended down to the new water level at the date of the quitclaim deed.

Utah, on the other hand, contends that the measure of what it received in 1896 was absolutely fixed as of that date, and has not altered by any change in the waters of the lake.

The basic question is thus whether the boundary between the lake bed, undisputably owned by Utah, and the upland, undisputably owned by the United States, is to have been measured in 1967 with relation to the actual water level in 1967, because the boundary is an ambulatory one, or whether that boundary should have been measured with respect to where the water stood at Statehood or even earlier in the Nineteenth Century.

I would note that once it is decided as which date is the date on which the line is to be fixed, an exact line must be determined which may or may not require further litigation.

Thus the outer lighter colored band on the map would be the land between the lake at Statehood and the surveyed meanderline. Whereas Utah contends that at Statehood it gained everything out to the meanderline, the United States would contend that even if the date was fixed at Statehood, that was fixed at about the lake level at that date, that outer band is not in consideration in the litigation today.

Today, as I said, we are concerned with the applica-

tion of the doctrine of reliction to the circumstances of the movements of the water of the Great Salt Lake.

To first state that doctrine, I would give you the -- what this Court said in Bonelli last term, and which the Special Master quoted, that the general law of reliction is that the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along that shore.

And in light of that I would look at the physical facts of the movement along the lake, which are undisputed. The exhibits and the report of the Special Master demonstrate that the waters of the Great Salt Lake do rise and fall, and, as they do, considerable areas of shore are exposed or covered.

Now, one major component of this movement is the change caused by the passing of the seasons, which can be seen on any of the exhibits that the Master has inserted, showing the levels of the lake. Every winter and spring there is a rise, as precipitation and snow-melt increase, and every summer and fall there is a decline because of less moisture and more evaporation.

This seasonal change, of course, the parties all agree, does not change the boundary; not because it may be so rapid or large as to be visible or perceptible, but simply because it is a seasonal change, as shown by cases we've cited

at pages 15 and 16 of our brief, and Utah at pages 67 and 68 of their brief.

In just this same way, an observer or a gauge on a river would note the rise of floodwaters seasonally, or on an ocean would note extraordinary tides at certain astronomical seasons. These, too, would not cause a change in the legal boundary.

Another component of the change is caused by the temporary factors that may come and go in the course of a day or a few days. These are shown on Exhibit P-16, which is not reproduced in the Master's report, but is simply a gauge, a continuous recording of the movements of the lake over the period of a month.

And that exhibit and the testimony show that these changes are almost exclusively caused by a wind or atmospheric disturbance, which pushes down or pushes up the lake in one end and then, by a so-called sarch<sup>?</sup> effect the lake oscillates back and forth, just as if you slosh a bathtub, it will slosh back and forth with diminishing vigor, rising and falling at the ends until it begins to stabilize.

But this, too, is a temporary occurrence.

But finally and most profoundly, the water level is changed by the effects of climate over many years. Land that is exposed or covered may stay that way for decades.



For example, when the Lake recently rose above 4201 feet above sea level, it covered land that had been dry since before 1930. And when the Lake went down in the early 1960's, land was exposed which had never been uncovered in historical time.

We submit that it is these long-term effects only which vary the legal boundary. These changes are exactly analogous to the changes on wandering rivers, such as the Missouri or Mississippi, with which this Court has many times dealt.

There a river may move gradually in one direction for some years, and then reverse itself and return to its previous location or even beyond. But, of course, all during that movement, the river itself may be rising and falling, covering and uncovering land due to floods and droughts and temporary phenomena.

And yet in each of these cases the doctrine of reliction has always been applied.

I would note that a similar contention to Utah's here was made in the case of the Missouri River, and the Court's reply we cite on page 17 of our brief, stating that "It is contended, however, that the doctrine of accretion has no application to the Missouri River, on account of the rapid and great changes constantly going on."

But "our conclusions are that, notwithstanding the

rapidity of the changes ... the law of accretion controls."

QUESTION: Well, wasn't what the Court was addressing itself to the contention of the parties that along the Missouri River great big pieces of the bank would slough off, and, you know, you could physically see them go?

MR. BOGGS: Well, Your Honor, I think that that was -- that was certainly the aspect that was before them, and the Court, in dealing with that, said that you have to -- if the falling off of the bank in that instance is a result of essentially a seasonal flood, that that itself does not change the ordinary rule, that despite the fact that the river may move rapidly, if taking the situation as a whole you can say that there's been a gradual or imperceptible movement, when you say here it is, and, so many years later, here it is, that reliction will still apply.

I would turn now to the specific --

QUESTION: Before you do, Mr. Boggs, and maybe you've answered this --

MR. BOGGS: Yes, sir?

QUESTION: These concepts of accretion and reliction and, on the other hand, of evulsion are well known, of course, to the law of rivers, where the river is a boundary, either a State boundary or a boundary of somebody's property, in private property disputes. Are there any cases until this one involving lakes?

MR. BOGGS: I believe of the Supreme Court cases that this may be -- this may be the only one. There are certainly numerous State court cases, which refer to lakes; and of course the same rules have been applied on an ocean, which is yet a third situation, such as Hughes vs. Washington, which this Court decided some six or seven years ago.

The statement has been continually made through all of these cases that the law as to accretion and as to reliction is essentially the same.

QUESTION: Yes, but hasn't it always been --

MR. BOGGS: Well, reliction is normally what's being talked of with regard to a lake, but as the water rises and falls, accretion generally relates to new land actually being deposited by the movement of a river or an ocean or, conceivably, even a lake if you had a heavily silted lake, for instance.

QUESTION: The Bonelli case involved --

MR. BOGGS: That was -- Bonelli involved the Colorado River, which --

QUESTION: -- a river. Are there any federal cases involving a lake?

Any Great Lakes cases, I wonder, of --

MR. BOGGS: I'm -- I couldn't say. I know that certainly it's my impression that the dunes on the Great Lakes are built up, cut away, but I can't -- can't recall a

specific --

QUESTION: That's my impression, too. I remember Hughes v. Washington, involving the Pacific Ocean.

MR. BOGGS: I can't call a specific case to your attention at the moment.

QUESTION: Really, your typical regimen in an accretion case in a river is quite different from what the evidence shows here about Great Salt Lake, isn't it? Where you have erosion on one side of a bank and deposit on the opposite side, until finally the thing becomes more and more noticeable, and then you ultimately get a cutoff of an oxbow bend.

MR. BOGGS: Well, you may or may not get that cutoff. There are many cases which we cite in our brief where the river moves one way, and then it simply moves back the other way. So that you get that kind of a movement, which we feel is quite analogous to what has happened here.

QUESTION: Well, one case that has applied the doctrine of reliction to a lake, I guess, is the decision of the Supreme Court of Utah in the Hardy case, applying it to Great Salt Lake.

Or said it wasn't applicable.

MR. BOGGS: Right. They stated that. If we look at Utah cases, this was briefed fairly thoroughly before the Special Master, and then because of this Court's decision in

Bonelli, the federal common law controlled; we have really not considered it extensively since then.

But my recollection of the Utah cases before Hardy, which include cases on lakes, such as Utah Lake, which is also a very flat lake, indicate that they seem to -- that on Utah Lake it may have some application.

And the earlier Utah cases would indicate that there may have been application even on the Great Salt Lake.

QUESTION: Well, you say that because of Bonelli, you haven't looked further into this Hardy case. But I would have thought the source of federal common law, if that be what governs here, is presumably the decisions of other courts that may have addressed the same problem.

Here you have a finding by the Special Master that the Great Salt Lake is unique, and a conclusion by the State court having jurisdiction over that lake, that because of that fact reliction doesn't apply.

I would think in formulation of federal common law, we would pay a great deal of attention to that Hardy case.

MR. BOGGS: Well, Your Honor, we would submit, and I believe we, in our brief before the Special Master, argued that even, that time, we said, If you want to consider Hardy, that the quote uniqueness, which is really the underlying supposition of the Utah argument, is based upon these temporary and seasonal fluctuations; that this is where we get into the



whole mathematical controversy over how gradual or perceptible it has been, but that simply because, during the course of a seasonal rise and fall, or during the course of a storm, the lake moves rapidly in one direction or another, that this is not a unique factor, this is not something that is not seen on rivers -- and Mr. Justice Stewart mentioned the Great Lakes; certainly the Great Lakes even have the same kind of ?  
such effect, where the wind piles up the water at one end and then it oscillates back and forth.

So, while we recognize that that case exists, we believe that it suffers from the same flaws as the doctrine as a whole.

QUESTION: Do you think reliction -- would you call it reliction if suddenly all the waters that run into, all the streams that run into the Great Salt Lake were diverted, --

MR. BOGGS: Well, Your Honor, that would --

QUESTION: -- and then the lake just hasn't any more water running into it, and it just dries up.

MR. BOGGS: Well, Your Honor, that would --

QUESTION: Is that reliction?

MR. BOGGS: That would either be -- several things that would apply there: one is that in certain of the cases the question of whether a change has been natural or not, has been held to be significant. In Bonelli, the Court held

that it was not.

But certainly if the -- particularly, as I think there's a line or two in Bonelli that mentions that if the drying up of the lake by diverting the tributaries was caused by one of the parties with that specific intention, that that would certainly be a factor as to whether or not it should apply.

QUESTION: Well, I just -- how about it now, would it be reliction or not?

MR. BOGGS: Well, you know, we would have to look at exactly what the circumstances are. Certainly there are various cases that hold when you simply drain a lake for the purpose of doing something else with it, and perhaps are going to turn it back, that that is not a reliction, that's long-year mining. And certainly, as I said, if the United States were to turn it off for the purpose of gaining that water, it would not be a reliction.

But if, as perhaps people thought in 1963, the lake simply dried up completely, I think we would have to state that that was a reliction.

Certainly the Great Salt Lake has been drying up for, let us say, some ten thousand years, and if we were not to say that reliction applied, I don't know why Utah should not claim it all the way back to ancient Lake Bonneville. If the boundary is not an ambulatory one but a fixed one, --

QUESTION: But Utah hasn't been in existence that long, that's the best reason.

MR. BOGGS: Well, as Utah notes, however, they claim the water back to before where it was in 1896, back to the meanderline, which is the first time men started drawing those lines.

I would turn now to the specific components required for the operation of the doctrine of reliction, and to examine how they apply to the facts of the Great Salt Lake.

The key element in the past, perhaps before Bonelli, has certainly been that the movement in the water's edge is not sudden or violent, but gradual. This is stated in various holdings of this Court, such as Philadelphia Company vs. Stimson, stating that the title would be fixed and would remain the same when there is a change that is sudden or violent or visible, in a word an evulsion.

Now, here all parties agree that no evulsion has taken place. And as we have noted in our brief, there are normally, when you see the water at one place today and another place twenty years later, there is a presumption that it has moved by a reliction or an accretion.

QUESTION: Now, I realize that presumption lies in the cases of accretion, but do the cases support you in saying that there's the same sort of presumption where you're

arguing for reliction?

MR. BOGGS: The case, in that sense, if there are -- the question is, is there a specific lake case that would hold that, I don't believe so. The doctrines have generally been spoken of together and have not been differentiated in that way.

Now, the briefs discuss at some length the question of just what movement should be measured, and whether that movement is imperceptible. And I am prepared to discuss that further, if you wish. But we would note that in Bonelli this Court cast considerable doubt upon the necessity even for literal imperceptibility.

The Court in Bonelli noted the interests and policies behind reliction, saying that a riparian owner has an expectancy and an interest in remaining riparian to his land. And that, since he might lose the use of his land when the water rises, so he should gain the land that would be exposed when the water falls.

And in Bonelli the Court found those policies so strong that it held that a riparian owner was entitled to remain riparian, even though the land actually -- the water actually moved perceptibly.

Thus, the Master's statement that he could not find the movements of the lake to be imperceptible does not necessarily defeat the application of the doctrine of reliction

after Bonelli.

In any event, as we essentially -- the same answer we would give to the Hardy Salt question; the examples given by the Master at pages 17 to 20 of his report about these great fluctuations, each example that he speaks of are essentially the seasonal and daily changes that we spoke of. Now, we concede that during a seasonal rise or during a storm you can look at the water's edge and you may be able to see it move. But certainly in the course of a Missouri River flood or a Bay of Fundy spring tide, the effect on the shore lands would be equally visible and perhaps even more dramatic than these changes on the Great Salt Lake.

Now, the second factor on which the Master relied was whether the changes in the lake were reasonably permanent. A close reading of his conclusions of law, in fact, I think indicates that this was the bedrock of his decision, because he first stated that the federal common law or reliction does generally apply, and then stated that the question of ownership of the lands in question -- and I quote -- "depends on whether the exposure of the land referred to, either by a perceptible or a gradual and imperceptible process" -- thus, perhaps, taking account of this change in Bonelli; continue the quotation -- "constituted a reasonably permanent or stable addition to the riparian land."

And this foundation of the Master's report, we



contend, is simply not the law.

Certainly none of this Court's cases over the past century and more have indicated that there can be no reliction or accretion if the body of water under consideration may reverse its course.

In fact, many of those cases concern bodies of water that were known for wandering back and forth, such as the Mississippi and Missouri Rivers.

We cite also a number of State cases concerning these rivers --

QUESTION: What happens when they -- if you are right on when the bottom of the Salt Lake becomes uncovered, as reliction, then what happens when it's covered it for another twenty years?

MR. BOGGS: Well, in just the same way that when the river moves, when the lake goes back up, as it has at the present time, Utah, as the owner of the lake bed, just as the owner of the river bed, its ownership may then --

QUESTION: Well, then, you pay them back -- what -- they would have paid you in this case?

MR. BOGGS: Well, Your Honor, I was going to cover that in a section on equities toward the end, but I'll handle it right now.

Certainly I think that at the bottom --

QUESTION: You're asking them to pay you for this

land now, as though you owned it.

MR. BOGGS: At the bottom, the real difficulty --

QUESTION: Especially when it's now covered.

MR. BOGGS: At the bottom, the real difficulty the United States has with this case I think is not a legal one, it's the equitable position that we're asking them to pay for land that's now under water.

But that's simply --

QUESTION: And may be under water for quite a while, for all you know.

MR. BOGGS: We don't know. That's exactly the point. It's -- we passed deed in 1967, it's just exactly the same as if I'm a riverbed owner, a rivershore owner, and I'm worried about the river, just as Utah was worried about the lake, and I buy the land on the other side of the river from the other owner, I contract to pay him for it, and in the passage of time the river starts moving over there, and, lo and behold, I've got no --

QUESTION: Well, that's all right, but you had another condition in your deed. We'll have to decide who owns it first.

MR. BOGGS: That's correct. But I'm saying --

QUESTION: Well, that's a rather big difference.

MR. BOGGS: Well, but, Your Honor, the question of who owns it, we submit, cannot turn on what, on the specific

of what's happened to the lake since then.

QUESTION: Well, it is, it is, but you're relying on reliction.

MR. BOGGS: We're relying on reliction as to the question of what was passed by that deed in --

QUESTION: And if it had relicted more, you would be relying on it?

MR. BOGGS: No, Your Hon or, if it had relicted more, that's exactly the opposite; that's exactly the point. If the lake had gone further down, we could not have asked Utah to pay for that land.

QUESTION: Because?

MR. BOGGS: Because they would have already owned it in 1967, as a result of this Court's decision on the navigability issue.

And that's what it -- the water went up and, you might say, Utah lost its gamble. They're being asked to pay for land that's now under water.

If the water had gone down, the United States would have lost the gamble, Utah would --

QUESTION: So Utah made a better bargain than you did.

MR. BOGGS: Well, Utah -- now, another point on the equity is that Utah has the opportunity, of course, simply to renounce the Act, not pay for it, and then they'll own it

under the doctrine of reliction.

What they have been contending for here is a sort of a both-ways test, when the water is up we feel that they want reliction to apply, and when the water is down they don't.

Because, as another example of this, Your Honor, they contend throughout that they have great interest in the land on the edge, marshlands and this sort of thing, and yet, under their contention, when the water goes up, whether above Statehood or above the meanderline, we have this controversy; but when it goes above the 1896 level, then Utah does not own those edge lands. Utah's boundary, by their contention, is exactly fixed and there they are left with an area in the middle of the lake, and the upland owners, such as the United States and private parties, own all of those edge lands.

And that's the reason that we believe that here, just as in all the other cases that have applied reliction, that that is the basis for having an ambulatory boundary rather than a fixed boundary.

We recognize that there are certain problems that an ambulatory boundary causes here. The Court noted similar problems in Louisiana vs. Texas, with a three-mile limit. But we would submit, and I think this is the basis of all of our arguments, that the fixed boundary causes even more

problems, that for periods of decades and even longer, Utah, who is supposed to control the lake, would find that large areas of the lake were out of his control, and perhaps for equal periods the riparian owner, who has an interest in remaining riparian, would find the lake to be miles from him and it would remain there for thirty years.

This is really the difference between the problems that are caused by the seasonal fluctuations and the fact that the long-run fluctuations of the lake are far greater, that you do have this seasonal fluctuation, but it will be over here one year and it will stay there, and then twenty or thirty years later, before it may ever come back; or it may never come back.

I would -- if there are no other questions, I would --

QUESTION: Yes, I have a question, Mr. Boggs.

MR. BOGGS: Certainly.

QUESTION: Utah, in its brief, on page 96, suggested a change in the first paragraph of the decree. Your reply brief came in just a day or two ago, but I -- and I haven't read it thoroughly, but I don't believe it answers that suggestion. Do you have any comment to make about that?

MR. BOGGS: Your Honor, we -- it's my understanding from the other people concerned with this other litigation that we are -- would not be greatly distressed with theirs.



We feel that our suggestion is in accordance with the previous decrees.

Apparently since the brief of Utah was submitted, that Tenth Circuit decision has come in, and I believe it was essentially adverse to the United States, or at least made no -- made no use of our argument concerning the words "such as".

But we have no strong feelings in either direction on that.

QUESTION: Thank you.

QUESTION: Well, except for these differences that divide you, would it be feasible for you to agree as to on a decree, --

MR. BOGGS: Well, Your Honor, the problem --

QUESTION: I mean, if some of their suggestions you will buy --

MR. BOGGS: Oh, well, --

QUESTION: -- so that we wouldn't have to decide which one of you -- make some decision.

MR. BOGGS: It touches on this single point, which is whether or not we say "such as" --

QUESTION: I thought there were two or three matters that you thought that --

MR. BOGGS: No, there are two -- there are two total --

QUESTION: -- either the Special Master was in error or --

MR. BOGGS: There are two totally technical points that we agree on, and that was the first question asked, I believe.

This point on the "such as", I believe it's possible to work out.

QUESTION: Well then, -- all right.

Well, can't you do that?

MR. BOGGS: Well, we will certainly try.

I'd reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Dewsnup.

ORAL ARGUMENT OF RICHARD L. DEWSNUP, ESQ.,

ON BEHALF OF THE PLAINTIFF

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

MR. CHIEF JUSTICE BURGER: Before you proceed, let me suggest that if you gentlemen find some area of common ground, literally and figuratively, you'll let us know promptly, won't you?

MR. DEWSNUP: We will. I would like a little clearer picture as to exactly what we might be expected to do in that regard, so far as making some interim report back to the Court. I'm not too clear on that.

MR. CHIEF JUSTICE BURGER: Well, I'm -- at least speaking for myself, I'm not too clear, either. But if you two gentlemen can't be clear on it, then no one can.

MR. DEWSNUP: Well, let me spend just one second at the beginning with respect to the words "such as".

We, Utah certainly doesn't want to be technical with regard to a couple of words. As we pointed out in our brief, and, incidentally, the Tenth Circuit case was decided and this Court denied cert two or three weeks ago in that case; but Amoco Oil Company is really ready to drill offshore drilling in the Great Salt Lake now, and the Army Corps of Engineers contend, has contended that Amoco cannot go ahead pursuant to the authority it has from the State of Utah, because, under the Rivers and Harbors Act, they have jurisdiction, they have to apply and go through the environmental study, et cetera.

Well, that hassle never was before the court before, and the argument made in the Tenth Circuit was this Court's insertion by its own initiative of the words "such as" was an adjudication of the regulatory authority the United States applied to the Great Salt Lake, as a navigable water of the United States.

Now, that, as our brief points out, and I think the brief has enough of a background; that is why we did not want a couple of innocent-looking words to create all kinds of

problems with the actual physical administration and development and management of the lake.

Now, this -- and so, as far as I'm concerned, on the words "such as", if the government does not insist on putting them in, we would like to have them out; and if we can agree on that now, then we've agreed on all three changes suggested in the latter part of our brief, in the event the Court looks upon Special Master Fahy's decree as one that might be entered here.

This case is rather unusual in that the parties really do not disagree on the legal principles of reliction, as they may be stated and as they developed at common law, and as they appear to be reflected in the federal cases that have applied the doctrine. And we really don't differ with respect to the facts.

The real difference is which facts are relevant to this case, and whether or not these facts would seem to satisfy the doctrine of reliction.

Now, the thing that seemed to impress the Special Master the most, and I think through his discussion, his findings, his conclusions, that he mentioned more than a dozen times the unique, unusual circumstances of the Great Salt Lake that simply cause the doctrine of reliction not to fit.

And the reason for that, as the Master points out,

is this briny residue of the ancient Lake Bonneville, the Great Salt Lake is in the bottom of a very flat basin. The shores are virtually horizontal. It has no outlet, as most lakes have some kind of tributaries flowing in and some kind of outlet, and they serve to be self-regulating.

Well, the Great Salt Lake isn't. You put water in it, it's like putting water in a glass; the only way it's going to leave is by evaporation.

And because of the very flat shorelands, any water that comes in, until it evaporates out, it causes the water to move out almost horizontally, and then, as the water evaporates, it moves back in almost horizontally; rather than a body of water would if it had reasonably steep shores.

And so because of those very unusual characteristics, the Special Master continued to characterize them as unique; he just could not find, on the evidence presented, that there had been any gradual imperceptible or reasonably permanent process which had created new uplands, as distinguished from the part of the bed of the lake that was subject to inundation from time to time.

QUESTION: Are these inlets, these streams coming in, all from the mountains?

MR. DEWSNUP: They are all from the mountains --

QUESTION: The mountains of --

MR. DEWSNUP: -- some distance removed; when the streams get next to the lake for a period of miles or ten, twenty, thirty or forty miles, they might meander slowly across relatively flat terrain. Even though the headwaters would be in the mountainous regions, the Wasatch Range.

QUESTION: And precipitation has a good deal to do with it, doesn't it?

MR. DEWSNUP: Yes. As Mr. Arnow, of the United States Geological Survey, explained at some length, and I think it's summarized at some extent in the brief, the winds, the temperature, the salinity of the waters, the gradient of the shores, all of these things intermixed to cause the lake continuously to fluctuate.

It's virtually impossible to have a moment when the total inflow exactly equals total evaporation. You just don't get that moment in time. And so however gradually in volume the lake is either going up or going down, and that movement is greatly exaggerated by the relatively flat shorelands, the extremely flat shorelands.

I would like to mention a few of the practical or analytical errors, we think and the Master thought, the government had fallen into, in the analysis of its case.

When the government says the only practical argument against it, against the government's case, is that the lands are water-covered now; that just simply isn't true.



For one thing, the government chooses to ignore the actual water movements. This basic hydrograph, which appears as the first attachment to the Master's report, Exhibit P-4, shows the basic annual movements of the lake from 1850 to 1973, when the hearings were held.

And, incidentally, when the lake was first viewed in 1850, it was at the same elevation, almost exactly, as it was in 1973, although the variations through year-to-year and month-to-month and over the long-term are rather remarkable; but, in any event, the government ignores the actual water level, the actual water movement of the rate of water movement, and computes an average annual stage of the lake by computing the level or stage of the lake one year as it would compare with the preceding year. Which serves to remove the daily, weekly, monthly, seasonal fluctuation.

Now, the parties agree that daily, weekly, seasonal fluctuations do not result in a change of boundary by reliction, but the government then goes to compute the rate of movement of the water by reference to its averages, which have nothing at all to do with the actual rate of movement of the water.

And the government calculates that the water moves at a speed of 1.5 inches per hour on the average all the way around the lake, and 15 inches per hour in its most rapid rate of speed. But that just simply isn't so.

And the government would have to acknowledge that isn't so as well, because they base their calculation not on the water movement itself but upon assumed levels or stages of the lake.

A second analytical error is the government's failure to consider in computing its average movement, the Special Master made a special note of this, and the pictures throughout the brief, the black-and-white pictures, I think illustrate, generally the lands are very, very level, but where the mountains come out into the lake there are variations in the gradient, which would have a direct impact on the rate of movement of the water, where the land is very flat. The lake comes up, the water moves over that much more rapidly than where a mountain comes down at a 45-degree angle into the lake.

Another error in the government's calculation, it based its rapid imperceptible criterion argument on a 350-mile contour line, which is situated within the lands now in dispute. But that 350-mile line is the surveyed meanderline that the parties used as a basis for exchanging a quitclaim deed.

To illustrate that problem very briefly, we're talking about an inland lower elevation line that is substantial shorter than the surveyed meanderline that might have a distance of approximately 350 miles.

Now, that mathematical calculation might not be terribly serious. The government contends that even if it is off fifty miles in the estimate, that the rate of movement of the water is still gradual and imperceptible if it can use its averaging technique to compute a rate of movement of the water.

And let me emphasize in this regard that Judge Fahy, Special Master Fahy was not overly impressed with the rapid actual movement of the water. It will move perhaps several inches per second in the flattest area. His conclusion was that while that water movement does not change boundaries, when you're talking about reliction and the change in boundaries by the doctrine of reliction, you simply cannot ignore the water movements.

For purpose of telling where the water is and where it goes, and whether or not the shorelands you're talking about have been exposed with some kind of reasonable permanence, or some kind of stability, so that if you're going to cause changes in real estate titles, you don't have to do it every day or every week.

And so that was the emphasis that the Special Master placed on the water movement.

QUESTION: Well, that was partly because there were such sharp changes within even a 24-hour period --

MR. DEWSNUP: Yes.

QUESTION: I noticed that he makes the observation that on June 6, the water level rose and fell ten times, but the lake level for that day averaged a stable level, but then from the end of the day on June 5 to the beginning of June 6, the water dropped more than two feet. And the wind apparently accounted for that.

MR. DEWSNUP: Well, not necessarily. I think that those calculations --

QUESTION: That's in your book.

MR. DEWSNUP: -- were based on some exhibits that we prepared and introduced, which were not necessarily the wind tide days. Mr. Arnow identified certain days as being definitely wind tides, and those figures there were based on what appeared to be reasonably average days from the June 1967 hydrograph.

What the Special Master did, he noted the variations and the dramatic fluctuations over long-term periods, intermediate periods, and short-term periods, and then said, While this actual water movement does not necessarily result in a change -- does not result in a change by reliction, still we cannot ignore the fluctuations, dramatic as they are, and their impact on these flat shorelands, in deciding whether or not the common law has evolved a doctrine that really applies to the Great Salt Lake.

The plain and simple fact, in the Master's view, was

that we just don't have another body of water in Anglo-American jurisprudence like the Great Salt Lake.

QUESTION: Well, I suppose the difference between May and October in one particular year could be a great deal different than the difference between May 1960 and May 1970.

MR. DEWSNUP: Yes, that's true.

I would like to make a couple of comments with respect to what we have called the government's shooting boundary, and the government has said in its reply brief that it is not a shooting boundary; but I'm not able to tell how the government would calculate its boundary, based upon its averages; that the doctrine of reliction and accretion developed, as by small and imperceptible degrees, little by little, gradually, either deposits would form and form fast land, as in accretion, or the water would gradually and imperceptibly change, so that the stage in the body of water had changed.

And the annual fluctuations of the lake from its average high-water to average high-water in the following year would not expose this newly created land or newly exposed land, and a new watermark, ordinary high-water mark would form.

And then you have land formed either by accretion or reliction.

But the government seems to suggest that it would take the average annual readings of a particular year, and

having computed that average, that that level would then be assigned for January 1 of the following calendar year, and that would be the boundary separating the reliction land from the State-owned bed of the lake.

Then there is some suggestion that maybe you could take intermediate readings at periods shorter than a year.

I'm holding up what is Exhibit, Plaintiff's Exhibit 13, which the Special Master did not attach to his report. And maybe I will not be able to illustrate this too well, but each one of these, about an inch and a half horizontal distant sections --

QUESTION: You'll have to hold that a little bit higher for us.

MR. DEWSNUP: Will you hold this?

-- is a one-year period of time. Let me let the government see this.

If we take, for example, the year 1968, then this follows the water level during the period 1968. If you take an average water level for the year 1968, and use that as January 1 for 1969, then the minute you assess your contour line as the boundary, it's water-covered. And it's going to remain water-covered for practically the entire year of 1969, and in some cases, one, two, three, nearly four feet in vertical elevation, which will mean about 200,000 acres of the water-covered bed of the lake, would, under the government's



view of the doctrine of reliction, be the reliction boundary line.

And, you see, if you follow these through from year to year, in every year when the lake is on the rise as it has been in recent years, the government's view of the doctrine of reliction, each January 1 you're going to be placing the reliction boundary line underneath the water. And it's going to stay under the water for most of the year.

Now, that's about as diametrically opposed to the common law concept of reliction as it could be.

Another practical aspect that isn't of any great legal consequence is that these lands are of no particular value to upland riparian owners. It's not the typical case where someone needs to warf-out or needs access to the water for the typical riparian purposes.

We have included in our brief the black-and-white pictures which show the lands in dispute in various places around the lake.

The colored pictures, which are in Exhibit P-6, were taken when the water level had just about exactly inundated or covered the lands in dispute. And I'm sure these pictures won't convey much from this distance, but if the Court cares to look at Exhibit P-6 and note the shorelands immediately upland from the lands in dispute, we would see

these so-called riparian uplands, or the claimed riparian uplands, that would be claiming the relict lands in dispute or the lands in dispute the government claims are reliction.

The only point here, as you go through all of these pictures, you see these flat mud flats, boggy marshlands, that have no practical value except to the State of Utah, in connection with the development of the mineral resources of the lake, and other State programs on the lake, and the typical case where there would be compelling needs to protect riparian or upland access to the lake, or to confer, quote, "reliction lands on upland owners", simply are not present in this case.

QUESTION: May I ask you about that Exhibit 6?

MR. DEWSNUP: Yes, sir.

QUESTION: Much of the land in dispute is now under water?

MR. DEWSNUP: All of the land in dispute practically was under water at the time of the hearings.

QUESTION: Well now, what are those pictures? Those, I think you said, would show that is not some exposed lands in dispute?

MR. DEWSNUP: This exhibit has 22 black-and-white pictures which show the land now in dispute. These are --

QUESTION: Exposed? Exposed land?

MR. DEWSNUP: Yes. Yes. This was most, not all of the land, but a good part of it; these were taken in the late fall of 1972, and the colored picture --

QUESTION: And the hearing was when?

MR. DEWSNUP: February of 1973.

QUESTION: And were they still exposed in '73?

MR. DEWSNUP: No. By February of '73, the lands were within about one-tenth of a foot of being fully covered, and within a few weeks after the hearing they were fully covered.

QUESTION: Then, looking at these, we're not looking at the situation as it was at the time of the hearing?

MR. DEWSNUP: You will if you look at the colored pictures, because they were taken three or four days before the hearing.

QUESTION: I see.

MR. DEWSNUP: If you look at the black-and-white pictures, they were taken six months earlier, and the lake was a couple of feet lower at that time, and did expose many of the lands in dispute.

QUESTION: Was that difference seasonal, or long-run?

MR. DEWSNUP: Well, it was a seasonal -- from low in the fall to -- the lake is now climbing. As a matter of fact, the lake, as of the first of December, was almost back to

4200. It fell during the summer, and as of December 1 was 4199.35.

QUESTION: And the consequence of that as to the lands in dispute being under water is that they are more than ever under water; is that right, on December 1?

MR. DEWSNUP: I think so. Yes. It just showed that we've taken a dip, and for a while during the summer part of these lands were exposed. They're virtually all water covered now. They certainly will be within another couple of months. Again, this is the seasonal fluctuation.

One of the -- moving on to another item, and that is what I briefly alluded to before, with regard to the stability of real estate titles: Special Master Fahy put a good deal of emphasis on that.

The evidence showed that almost all of the lake bed and shorelands area had been leased by the State of Utah to American Oil Company, and I've already indicated that there are processes to drill.

Now, whether oil and gas will be discovered there or not, this illustrates the kind of problem if there had to be an accounting for the mineral ownership of the overlying land owners, the riparian owners, the United States and private parties, will own down to the bed of the Great Salt Lake, wherever that line might be.

But if we had a boundary that was moving each day

or each month, or even each year, I still don't know what the government's theory is as to how its boundary would move on a month-to-month basis or whether it's a January 1 to January 1.

But it would be almost an impossible prospect to try to calculate where your boundary was moving with respect to any underground oil pool, by having a surface boundary running back and forth.

The State of Utah had control over mineral development there. The State might want to produce oil and gas only during the wintertime, when the water level was at the highest, which would expand the underground oil pool, and then not produce during the summer when the lake would withdraw.

I would like to note briefly that the government does have the burden of proof in this case, even though it's a defendant. Utah made its proof. This Court concluded that the lake was navigable. Utah did, at Statehood, get title to the land now in dispute.

In this phase of the proceeding the United States is trying to divest Utah of lands that this Court has held in this case belong to the State of Utah.

As such, if there are any evidentiary failings anywhere, which prevent any more definitive findings than the Master has made, the United States has the burden of proving the elements of reliction.

QUESTION: What's your answer to the government's

contention that there's a presumption that a change in boundary occurred by reliction?

MR. DEWSNUP: I think that's wholly irrelevant. The government makes that statement in its brief, and it cites, I think, an Arizona Law Review article. That Law Review article, in turn, cites a Colorado State case, which simply says if you've got a dispute and the question is whether the water moves so rapidly you have an evulsion, or whether it's an accretion; that the accretion will be presumed unless an evulsion is proved.

But an evulsion has never been an issue in this case, and I think it's just wholly irrelevant to the Great Salt Lake.

A question was raised, incidentally, as to whether or not any other cases, lake cases, have arisen; and Mr. Justice White was asking whether the Salt Lake went dry.

Well, United States v. Holt Bank -- Holt State Bank, the mud lake did go dry in Minnesota, and there the issue was not one of reliction or accretion specifically, it was not raised, but title was sustained in the State, as against claims from upland patentees of the United States, as I recall.

QUESTION: What lake was drained?

MR. DEWSNUP: It was drained for the purpose of permanent agricultural pursuit.



A lot of title questions have arisen on lakes, but I'm not aware of any federal reliction accretion question.

I would like to mention before my time is fully up, the State law aspect.

After this Court decided Bonelli Cattle Company, which, incidentally, was a year ago today, on December 17 last year, the State of Utah had contended that State law applied since the effect of any decision here would be divesting the State of Utah of land that undeniably was owned by the State through a common law doctrine. After Bonelli, however, the State of Utah advised the Master that, in light of Bonelli, we thought that we could not urge the Master to decide this case based on State law; but we left our foot in the door in the event, if, for any reason, the Master should decide or this Court should decide these unusual and unique features of the Great Salt Lake are reliction lands under federal rules of property law, then this would be an ideal case for barring State law for the purpose of resolving the Great Salt Lake question, because the Hardy Salt case made it abundantly clear what State law is.

The State of Utah has managed and administered these lands in dispute since Statehood. The federal government had no inkling that it even wanted to make a claim of these lands until 1961 -- I think it was 1961. In any event, the

public programs and pursuits and interests of the State of Utah, the State owns the bed of the lake, the minerals in solution, the minerals under the bed of the lake, in part because of the litigation in this case; and, barring State law in this case would not necessarily set a precedent for barring State law in other similar cases, because of the very unique --

QUESTION: You said the State owns the minerals under -- beneath the bed?

MR. DEWSNUP: Yes, Your Honor.

QUESTION: Wasn't there some reservation in the United States of minerals? If so, what was it?

MR. DEWSNUP: There was -- there was a reservation in the deed that the United States gave to the State of Utah, and the State of Utah does not claim that by virtue of any conveyance from the United States.

When the State obtained the bed of the lake at Statehood, by virtue of the equal footing doctrine, it got the bed and the minerals contained within the bed.

And this Court adjudicated that in the earlier navigation route.

QUESTION: So the reservation, then, --

MR. DEWSNUP: Would have no effect. They reserved minerals in something they didn't own any part of.

I don't want to leave the impression that I think

these lands would be reliction lands under federal law. We think they very clearly are not. Special Master Fahy felt compelled to apply federal law in light of Bonelli, and he did.

We think he decided it correctly. He considered a great many exhibits, other evidence beyond what he has attached to his report. And with the three minor corrections we discussed at the beginning, the State of Utah respectfully requests that in all other respects the Special Master's report, conclusions, finding and decree, be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further? You have about two minutes, Mr. Boggs.

REBUTTAL ARGUMENT OF DANNY JULIAN BOGGS, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. BOGGS: Yes. Very briefly I would address myself to the question that Utah has raised with regard to the management, they say, of these valuable mineral interests.

Now, it's interesting that on the one hand they say that the riparian owners have -- that these lands really aren't very valuable, that they have no interest in them; and on the other hand they wish to continue to own them in essentially a proprietary capacity.

We believe this implicates the doctrine that this Court brought up in the Bonelli case, which was, in Bonelli, the lands we believe were valuable, they were good for recreation, for farming, and so forth. But they were not related to the purposes for which the State had been given the bed of the lake in the first place: navigation and related purposes.

So that while Utah has a public interest in the sense that the State would like to own property generally, just as in Bonelli, we feel that it does not have the kind of public benefit for navigation and other purposes that would make the doctrine of reliction apply.

Finally, we would point out that, just as in the Tidelands case, where if oil lies half inside, half outside the three-mile limit, there may be a problem. That was exactly the purpose of the Great Salt Lake Lands Act.

If Utah accepts the Act, then there will be a permanent fixed boundary, hopefully above the level of the lake.

But the fact that there was a problem requiring legislative solution, that is, Utah ran to Congress and wanted them to pass an Act to keep them from being hurt when the lake declined, does not keep the doctrine of reliction from basically being applicable.

The charge that we have all through here, if you took that kind of a daily chart, annual chart, on seasonal and

temporary movements, we believe that similar charts could be shown on many other bodies of water.

We believe that the basic principles of reliction, which apply to give an ambulatory boundary rather than a fixed boundary, should apply here, and that the solution is the solution that Congress gave by the passage of the Great Salt Lake Lands Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:12 o'clock, p.m., the case in the above-entitled matter was submitted.]

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