

ORIGINAL

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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1772

TITLE UTAH DIVISION OF STATE LANDS, Petitioner V.  
UNITED STATES, ET AL.

PLACE Washington, D. C.

DATE March 23, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 UTAH DIVISION OF STATE LANDS, :

4 Petitioner, :

5 v. :

No. 85-1772

6 UNITED STATES, ET AL. :

7 -----:

8 Washington, D.C.

9 Monday, March 23, 1987

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:01 a.m.

13 APPEARANCES:

14 DALLIN W. JENSEN, ESQ., Solicitor General of Utah, Salt  
15 Lake City, Utah; on behalf of petitioner.

16 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning in No. 85-1772, Utah Division of Lands against the United States, et al.

Mr. Jensen, you may proceed whenever you're ready.

ORAL ARGUMENT OF DALLIN W. JENSEN, ESQ.,  
ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the Court of Appeals for the Tenth Circuit.

It is an equal footing doctrine case and involves the ownership of the bed of Utah Lake.

Utah Lake is the largest fresh water lake in the State of Utah; has a surface area of approximately 150 square miles; is located in Utah County, which is roughly 40 miles south of Salt Lake City.

QUESTION: Is Provo on the lake?

MR. LARKIN: Yes, not right adjacent, but within a few miles, Your Honor.

Utah bases its claim of title on the equal footing doctrine.

One aspect of that doctrine is that states when they enter the Union receive the beds of the

1 navigable bodies of water within the states. These  
2 lands are held in trust by the United States pending  
3 statehood.

4 Thus, Utah asserts that when it entered the  
5 Union on January 4, 1896, it acquired the title to the  
6 bed.

7 The United States, on the other hand, while  
8 conceding navigability and admitting that ordinarily  
9 Utah would have received title at statehood, asserts  
10 that it, in fact, retained title when some seven years  
11 prior to statehood the bed was withdrawn and reserved as  
12 a reservoir site by the United Geologic Survey.

13 The Court below held for the United States and  
14 ruled that title did not pass to Utah at statehood.

15 The authority asserted for the 1889 withdrawal  
16 of the lake bed is an Act of Congress which was enacted  
17 in 1888. That act authorized the United States Geologic  
18 Survey to investigate the arid region of the United  
19 States to determine the extent to which it could be  
20 redeemed by irrigation. U.S.G.S. was authorized to  
21 select reservoir sites and segregate irrigable land in  
22 this arid region.

23 The Act provides that all lands selected as  
24 reservoir sites, canals, ditches, as well as the lands  
25 made susceptible of irrigation by such reservoirs.

1 canals, or ditches were reserved as property of the  
2 United States and not subject to entry, settlement, or  
3 occupation.

4 It is Utah's position that that act did not  
5 fall within the exception that this Court has recognized  
6 in order to defeat Utah's title.

7 As recently as 1981 in Montana v. United  
8 States, this Court summarized the rules that govern the  
9 exception; held that the United States may sometimes  
10 convey the bed of a navigable body of water prior to  
11 statehood if it is necessary to perform an international  
12 obligation or to satisfy a public exigency.

13 However, that intention to convey must be  
14 clearly and plainly expressed.

15 QUESTION: Mr. Jensen, do you think the public  
16 exigency requirement is anything more than a  
17 congressional policy? Do you think that's a  
18 constitutional requirement?

19 MR. JENSEN: I do, Your Honor, in the sense  
20 that in order to defeat state title, an exigency must be  
21 -- must exist.

22 I think that --

23 QUESTION: Well, I would have thought,  
24 perhaps, the only thing the Constitution, itself, would  
25 require is a public purpose appropriate to the territory

1 for the Federal Government to retain land as against the  
2 State.

3 MR. JENSEN: No. Our position that it -- that  
4 it requires more in order to defeat the constitutional  
5 entitlement that any appropriate public purpose is not  
6 enough, that it --

7 QUESTION: Where do you find that in the  
8 Constitution, the public exigency requirement?

9 MR. JENSEN: It is not in the Constitution,  
10 itself. It is in this Court's analysis of the  
11 constitutional requirements for the exception.

12 In other words, in Montana, the Court noted  
13 that an Indian reservation, for example, may be an  
14 appropriate public purpose. But unless it rises to the  
15 level of an exigency, that alone is not sufficient to  
16 defeat state title.

17 QUESTION: Do you think there is any  
18 difference at all when the Federal Government wants to  
19 keep it for itself as opposed to conveying it to a third  
20 party?

21 MR. JENSEN: Yes, I do, Your Honor.

22 The -- again, the exception that has been  
23 recognized is for the conveyance in the situation where  
24 the United States no longer has title at the date of  
25 statehood, and this, then, keys off the trust that the

1 United States is holding that land in trust for the  
2 States. And if it has it at statehood, it cannot just  
3 simply say, "We think we have a better use for it; we're  
4 going to withhold it from you."

5 QUESTION: So, in your view, there is no  
6 mechanism by which the Federal Government could retain  
7 land that, otherwise, would pass to the States under the  
8 equal footing doctrine.

9 MR. JENSEN: Not as we interpret this Court's  
10 decisions, there must be a conveyance.

11 We take an additional position that even if  
12 the --

13 QUESTION: Have we ever had an occasion to  
14 address the situation before, if when the Federal  
15 Government wants to keep something for itself?

16 MR. JENSEN: We think the Court has. In  
17 Montana, in Choctaw v. Oklahoma, and in the Holt State  
18 Bank case, each of those cases involved land --  
19 navigable waters that were within the boundaries of an  
20 Indian reservation.

21 And in each of those cases the Court did not  
22 allow the analysis to stop at the reservation stage. It  
23 moved on to see if there had been a conveyance. And if  
24 there had not been the conveyance, then State title  
25 vested. The only -- in Holt State Bank and in Montana,

1 the reservation clearly included the bed or clearly  
2 included the stream.

3 QUESTION: But General Jensen, all three of  
4 those cases involved the question of whether a  
5 conveyance to a third party was valid. They didn't  
6 involve this question.

7 There's no third party involved here whereas  
8 there was in all three of those cases. So I don't think  
9 you've really responded to Justice O'Connor.

10 MR. JENSEN: It certainly was not nearly as  
11 direct as it is here, Your Honor.

12 QUESTION: Well, it's a different situation.  
13 There it's a question in each of those cases is whether  
14 there had been a conveyance.

15 The problem we've got here is when there is  
16 not claim of a conveyance to a third party, is there a  
17 mechanism by which the United States can reserve  
18 property for its own use that will, in effect, survive  
19 the creation of a new state, and which I don't think we  
20 have addressed before, have we?

21 For example, is -- say they wanted to keep  
22 property in a military reservation; could they do this,  
23 or whether the United States could do that; West Point  
24 and the Hudson River or something or -- could they  
25 possibly have done that consistently with equal footing

1 doctrine?

2 MR. JENSEN: We -- we think not, Your Honor.

3 QUESTION: You think not?

4 MR. JENSEN: That they could not.

5 QUESTION: But there's -- you have no  
6 authority for that proposition?

7 MR. JENSEN: No. Beyond the analogies to the  
8 cases. And you say -- they're not -- they're not a  
9 square fit. But --

10 QUESTION: That's a real problem for D.C.  
11 statehood then, isn't it? I mean, the United States  
12 could not reserve sovereignty over the Capitol if D.C.  
13 should become a State? Why is that?

14 QUESTION: Well, all you're talking about, Mr.  
15 Jensen, is the bed of navigable rivers, isn't it?

16 MR. JENSEN: That's right.

17 QUESTION: Which -- that's what the equal  
18 footing doctrine --

19 MR. JENSEN: Right.

20 QUESTION: -- applies to, not to lands --

21 MR. JENSEN: That's right.

22 QUESTION: -- in general.

23 MR. JENSEN: We're not -- we're not reaching  
24 other public lands. We realize that the United States  
25 has those and can do with them as it --

1 QUESTION: But the question is whether, say  
2 they have a naval base on the Anacostia River or  
3 something like that, could the United States reserve  
4 title to the Anacostia River, if it created a State for  
5 the D.C., assuming the river is within the boundary of  
6 the District. I don't know whether it is or not.

7 MR. JENSEN: No. We think it could not.

8 QUESTION: It could not?

9 MR. JENSEN: It could not do that.

10 And in response to Justice Scalia's case, no.

11 We think it we could avoid it because the  
12 Capitol is not on the bed of a navigable river.

13 Certainly as to the land within D.C., they  
14 could -- the United States can do as it sees fit.

15 QUESTION: Would reserving sovereignty, as  
16 opposed to just title over the bed of a navigable river  
17 be any different from reserving sovereignty over any  
18 other chunk of land as far as the equal footing doctrine  
19 is concerned in principle. I mean, if there's some  
20 constitutional obstacle to the Government's doing that,  
21 then why would --

22 MR. JENSEN: Well --

23 QUESTION: I don't understand what's magic  
24 about the bed of a river --

25 MR. JENSEN: Okay. The --

1 QUESTION: --as opposed to the Capitol, for  
2 example.

3 MR. JENSEN: The Court in Montana stated that  
4 the reason, at least one reason, is that because the  
5 control of property underlying navigable waters is so  
6 strongly identified with sovereign power of government,  
7 then it will only be held that it will be conveyed for  
8 the exigency situation.

9 And I think that then goes back to the  
10 original concept that the thirteen Colonies acquired the  
11 beds of navigable streams as part of their entitlement  
12 under the Revolution.

13 QUESTION: But General Jensen, supposing we go  
14 back to the beginning and ask what, say Massachusetts  
15 joining the Union, and supposing one of the beds of the  
16 river had been conveyed by a monarch, an English monarch  
17 before when they set up the Colony, would he have had to  
18 do it for any special reason or maybe just gave it to a  
19 friend because he wanted to give him a little patronage?  
20 Could he have taken that out of the --

21 MR. JENSEN: The -- as we understand the law  
22 there, those lands were held in trust for the public for  
23 public purposes: navigation, boating, fishing, and  
24 related type uses. And that --

25 So, no, the Crown could not have just simply

1 given it to his -- could not have given it to his  
2 friend. That was a -- held in public trust.

3 QUESTION: The lands in the Colonies were?

4 MR. JENSEN: That's right.

5 And so when the States succeeded to that  
6 title, they, likewise, not only got the land, but they  
7 got the responsibility under the public trust.

8 And the States are limited in what they can do  
9 with those lands. They can do some things, but they're  
10 still impressed with the public trust. And that is why,  
11 I think, this Court has been very cautious in the  
12 situations where it has allowed the State title to be  
13 defeated because it is so identified with the sovereign  
14 power of State government.

15 QUESTION: But we have allowed it to be  
16 defeated in one instance?

17 MR. JENSEN: Yes. In --

18 QUESTION: And what makes that different?

19 MR. JENSEN: In the Choctaw case, the Court  
20 concluded that there had, in fact, been a conveyance for  
21 the benefit of a third party, namely the Indian tribe,  
22 not just a reservation, but the tribe ended up with a  
23 title interest in the property, and, likewise, concluded  
24 that in that circumstance, there was a exigency that  
25 needed to be satisfied.

1 QUESTION: Now why does that have anything to  
2 do with the -- with the rationale for the constitutional  
3 prohibition that you just described? I mean, given the  
4 reason for the constitutional prohibition, why should it  
5 make any difference whether you've conveyed it to a  
6 third party, or you want to keep it for the United  
7 States?

8 In fact, I would think you're better off  
9 keeping it for the federal sovereign than giving it to  
10 some selfishly interested third party.

11 MR. JENSEN: The -- the reason is, again as we  
12 see it, simply goes back to the constitutional nature of  
13 the doctrine: that the State is entitled to it as part  
14 of its sovereignty; that the opportunity to defeat that  
15 should be very narrow and very limited. And that is why  
16 the Court has characterized the ownership by the United  
17 States as "in trust."

18 And if the United States is able within a  
19 fairly wide spectrum to say, "Well, we don't see why  
20 Utah needs the bed of this stream or this lake. We  
21 think we have a better purpose for it," then the trust  
22 really loses its sanctity and, in the end, the equal  
23 footing doctrine -- States that are coming in under the  
24 new and defined doctrine would be somewhat less than the  
25 States that are already in.

1 I mean, obviously, the State would prefer no  
2 exception. But we realize there is one.

3 We believe here that the United States is  
4 arguing for a much more expanded exception because, not  
5 only do we have the problem with the ability to do it,  
6 we say that even if the Court were to allow this -- were  
7 to allow the United States to do this conceptually, this  
8 reservation doesn't satisfy the criteria that the Court  
9 has staked out.

10 In other words, the Act here, it was broad,  
11 general. It referred to the arid region of the United  
12 States. There was no reference to Utah Lake  
13 specifically, no reference to sovereign lands generally,  
14 certainly no conveyance in the Act and none authorized.

15 We submit that, in this situation, even if the  
16 Court were to consider expanding the rule, that this  
17 reservation falls way short of what should be required.

18 QUESTION: Well, the -- there -- the -- there  
19 was designation of Utah Lake, wasn't there?

20 MR. JENSEN: Yes. The -- not in the Act.

21 QUESTION: No, I understand, but there was a  
22 designation?

23 MR. JENSEN: Yes. The United States Geologic  
24 Survey designated the Act, or designated the --

25 QUESTION: Well, what does the Act say, and

1 when did the Act say that it would be reserved? When  
2 there was a designation which was reported to Congress?

3 MR. JENSEN: The Act states that "All lands  
4 made susceptible of irrigation by the reservoirs, and  
5 the reservoirs are hereby reserved from sale."

6 QUESTION: When?

7 MR. JENSEN: That's -- I assume that when the  
8 designation is made that it is then reserved.

9 QUESTION: Well, how do they make the  
10 designation? Reporting it to Congress?

11 MR. JENSEN: It doesn't say.

12 QUESTION: Well, was there later congressional  
13 action?

14 MR. JENSEN: The United States says the  
15 Congress later ratified it, but after the U.S.G.S.  
16 reserved it by the administrative act. And we don't  
17 deny that they specifically focused on Utah Lake.

18 QUESTION: How do you know they did it?

19 MR. JENSEN: We don't think they legally did  
20 it, but factually --

21 QUESTION: Well, is there some record that  
22 they did it?

23 MR. JENSEN: Yes, there is.

24 QUESTION: Have you ever seen it? Have you  
25 ever seen it?

1 MR. JENSEN: It's in the Joint Appendix, yes.  
2 It is a --

3 QUESTION: They just got it in their own  
4 files; is that it?

5 MR. JENSEN: No. What they did is they -- the  
6 U.S.G.S. Director sent a letter to the Department of  
7 Interior saying, "I think Utah Lake would be a good  
8 reservoir site; I think you ought to withdraw it and  
9 reserve it."

10 QUESTION: Well, what about the claimed later--

11 MR. JENSEN: Okay. Then what happened is  
12 U.S.G.S. filed its annual reports with Congress after  
13 that. And the 1888 Act was repealed in 1890. But the  
14 Repealer preserved the reservoir sites already  
15 withdrawn.

16 And the Respondents argue that by filing that  
17 report, those reports, and the fact that Congress, even  
18 though it repealed the Act, preserved the existing  
19 sites, that that is a congressional ratification that is  
20 sufficient to take them the rest of the way.

21 QUESTION: And don't you think that Congress  
22 knew which ones had been designated?

23 MR. JENSEN: No. Well, excuse me, Your Honor.  
24 I -- I think, again, for the -- for the  
25 States' constitutional entitlement to be defeated, that

1 it requires more than just the filing of the reports  
2 with Congress and no further expression.

3 The 1890 Act did not say a word about Utah  
4 Lake. It did not say a word about sovereign lands. In  
5 fact, it --

6 QUESTION: This is your alternative argument  
7 because under your first argument, it wouldn't make any  
8 difference if Congress had --

9 MR. JENSEN: No. Well --

10 QUESTION: -- It had specifically purported to  
11 reserve it?

12 MR. JENSEN: That's right.

13 And, of course, we argue if they had -- if the  
14 Respondents had no power in first instance to do it, the  
15 fact that they did it and reported it to Congress --

16 QUESTION: But you say there wasn't really a  
17 reservation anyway?

18 MR. JENSEN: That's right. That that was not  
19 sufficient to--

20 QUESTION: Doesn't make it clear enough?

21 MR. JENSEN: Doesn't make it clear enough;  
22 that we're entitled to more; that we ought to have -- we  
23 ought to know when those sovereign entitlements are  
24 defeated; and that this three-step process the United  
25 States argues is not enough to do that.

1 And finally, although we've touched on the  
2 exigency, we feel and submit that there was no exigency  
3 involving Utah Lake.

4 The Lower Court found the facilitation of  
5 irrigation a public purpose motivated by a public  
6 exigency.

7 The Respondents argue that even less is  
8 required, that all that is necessary is a appropriate  
9 public purpose.

10 But again, as I have stated, this Court in  
11 Montana said that "No. You must have the exigency or  
12 you cannot defeat State title."

13 The -- we believe the legislative history of  
14 the 1888 Act demonstrates that the problem that Congress  
15 was addressing was a problem on the public domain; that  
16 the public land law such as Desert Land Act being abused  
17 by speculators who were acquiring these reservoir sites  
18 and irrigable lands and, thereby, thwarting the the  
19 settlement of the West as Congress had originally  
20 intended.

21 QUESTION: Well, did the Statehood Act  
22 indicate that the State wasn't going to get any title --  
23 any title to lands that had been reserved by the Federal  
24 Government?

25 MR. JENSEN: There is some language in Utah's

1 Enabling Act dealing with Federal reservations. Your  
2 Honor, that -- there's nothing in there that addresses --

3 QUESTION: Well, what does it say?

4 MR. JENSEN: I --

5 QUESTION: Well, that's all right.

6 MR. JENSEN: I apologize. I simply --

7 QUESTION: Well, Counsel, doesn't it say in  
8 the Utah Enabling Act that it excepts out other  
9 reservations of any character? Isn't that the language?

10 MR. JENSEN: That is essentially what it is,  
11 Your Honor.

12 QUESTION: And the Government argues this is a  
13 reservation?

14 MR. JENSEN: That is -- that is true, but  
15 again, I think that addressed the typical type  
16 reservation, the Indian reservation, the military  
17 reservation. It did not address an administrative  
18 withdrawal of the lake bed, that the -- the taking of  
19 the lake bed was done by the simple administrative  
20 withdrawal. And we don't think it falls within the  
21 parameters of that -- that document, the Enabling Act.

22 Further, with respect to the exigency, we  
23 submit that, as far as any of the public land law abuses  
24 that were occurring, Utah Lake could not have been part  
25 of that problem.

1 Utah Lake was not subject to settlement,  
2 entry, or occupation under the public land laws. It was  
3 being held in trust for the State. The United States  
4 had recognized as much when it segregated the Lake by  
5 survey of the meander of the Lake starting in 1856 and  
6 ending, essentially, in 1878, ten years prior to the  
7 passage of the 1888 Act.

8 Further, the bed was, or -- was, and is  
9 water-covered. Settlers could not simply have gotten in  
10 to settle it, enter it, or occupy it.

11 And finally, if it is true that the purpose of  
12 the 1888 Act was to facilitate irrigation, water  
13 development in the West, Utah Lake was already  
14 fulfilling --

15 QUESTION: May I ask you another question, Mr.  
16 Jensen?

17 Supposing that before Utah became a State, the  
18 United States realized there would be vast mineral  
19 resources under this lake or other riverbeds and decided  
20 to lease them out to private developers or convey them  
21 -- to sell them to private developers, would it be your  
22 position that -- and there's no public exigency; they  
23 just thought it would be a good way to make some money  
24 -- would that conveyance be valid or invalid?

25 MR. JENSEN: No, not in our view, Your Honor.

1 QUESTION: They could not have done that?

2 MR. JENSEN: They could not have done that  
3 because of the trust.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Jensen.

7 We'll hear now from you, Mr. Kneedler.

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER

9 ON BEHALF OF THE RESPONDENT

10 MR. KNEEDLER: Thank you, Mr. Chief Justice,  
11 and may it please the Court:

12 Utah Lake was formally selected as a reservoir  
13 site in 1889 by John Wesley Powell who was then the  
14 Director of the United States Geological Survey. And  
15 that selection was made to the -- pursuant to the Sundry  
16 Appropriations Act of 1888, which Mr. Jensen has  
17 discussed, which responded to a perception by Congress  
18 that there was a serious threat pending to the future  
19 irrigation of the lands in the arid region.

20 The record in this case unequivocally  
21 establishes that the Geological Survey selection of Utah  
22 Lake included the lake bed.

23 The Tenth Annual Report of the Geological  
24 Survey, which was formally transmitted to Congress, said  
25 that the reservation included the lands covered or

1 overflowed by the lake as well as those bordering on  
2 it.

3 And the Eleventh Annual Report referred to the  
4 selection as including not only the bed, but the  
5 lowlands around it, and described that selection by  
6 sections that specifically included the bed of the lake.

7 QUESTION: You say that this was responding to  
8 -- to the concern that the irrigation needs of the area  
9 would not be met.

10 That concern was not that water from the lake  
11 was going to be used, was it? That concern was simply  
12 that dry land which was available for reservoirs was  
13 being bought up by land speculators?

14 MR. KNEEDLER: Well, there was -- the general  
15 concern was that there would -- that there would be  
16 impediments to development of reservoir sites for  
17 reclamation. Those included --

18 QUESTION: Because of the homestead laws that  
19 allowed people to acquire -- to acquire land; right?

20 MR. KNEEDLER: Well, not -- not necessarily,  
21 not necessarily.

22 There could --

23 For instance, in this particular case,  
24 although that -- that was -- that was certainly part of  
25 it.

1 But in this particular case, it -- it soon  
2 became apparent immediately after this lake bed was  
3 selected that rather than raising the lake which would  
4 be typically true of the natural reservoir, the best  
5 thing to do would be to lower it because so much water  
6 was being lost to evaporation.

7 So the lowering of the lake would -- would  
8 expose some of the lake bed in this case, and that would  
9 invite settlers onto the exposed lake bed which, of  
10 course, could implicate the very purposes of -- of the  
11 specific purpose that you're mentioning, under the  
12 preventing of monopolization or impediments to the  
13 development by having private entries on the land.

14 QUESTION: Now, wait. I don't understand  
15 that. Once you say you want to lower the lake bed, then  
16 you're saying you don't need the lake bed as a reservoir.

17 MR. KNEEDLER: No, but --

18 QUESTION: So why do you care if people settle  
19 it?

20 MR. KNEEDLER: Well, we describe in our -- in  
21 our brief in this case that even though the lake was to  
22 be lowered for its average or normal level, there would  
23 be flood periods during which the level of the lake  
24 would rise, not only to its average level, but would  
25 rise above that.

1 And if that was a part of the normal operation  
2 of the reservoir for irrigation purposes, it would flood  
3 out some of the lands on which settlers had entered.

4 That would require, perhaps, the payment of  
5 compensation to the settlers who had moved onto the land  
6 and established farms there, just like the maintenance  
7 of any other reservoir system that periodically floods a  
8 landowner's property would create problems for the  
9 Government and require the payment of compensation.

10 And it was avoiding -- avoiding the payment of  
11 compensation was one of the specific purposes, not just  
12 monopolization, but preventing --

13 QUESTION: But the lowering of the level of  
14 the lake and raising were to be accomplished by dams?

15 MR. KNEEDLER: Yes. There was a proposal to  
16 -- partly --

17 Subsequently, its development -- the plans  
18 that provided for diking off portions of Utah Lake,  
19 Provo Bay north of Utah and Goshen Bay in the southern  
20 portion of the lake, would be diked off so that that  
21 land would be essentially drained which, again, would  
22 expose both of those areas to possible settlement and  
23 monopolization and the other impediments that applied  
24 anywhere else in the Reclamation Project.

25 QUESTION: Would the lake ever be completely

1 empty?

2 MR. KNEEDLER: No, the lake would never be --

3 QUESTION: So you wouldn't have had to reserve  
4 the whole thing for that purpose.

5 MR. KNEEDLER: Well, but it --

6 QUESTION: -- You'd just, at least,--

7 MR. KNEEDLER: Well, at the time -- at the  
8 time that the -- at the time the Act was passed,  
9 Congress was acting against an urgent situation. It  
10 didn't know the details at every particular reservoir  
11 site.

12 Mr. Jensen, I think, is not correct to say  
13 that this was an administrative withdrawal. Congress,  
14 itself, mandated the withdrawal in the Act itself.  
15 Congress said all suitable sites for reservoirs are  
16 hereby henceforth reserved.

17 And that was interpreted by the Attorney  
18 General to mean as of the date of passage.

19 That suggests that Congress perceived a  
20 serious problem that if it postponed the study of each  
21 individual reservoir to find out precisely how much land  
22 was needed, it could all be gone.

23 So Congress thought it was imperative to  
24 reserve the land now and not wait for the delay of  
25 possible administrative --

1 QUESTION: But no particular reservoir site  
2 was withdrawn by the Act of Congress. It remained for  
3 -- to be designated by the Secretary.

4 MR. KNEEDLER: Well, Congress could not  
5 practicably identify each potential reservoir site in  
6 the West, and, therefore, it relied on the Geological  
7 Survey to identify the sites for it.

8 QUESTION: What about -- what about settlers  
9 who occupied some later designated sites after the  
10 Statute was passed but before the designation?

11 MR. KNEEDLER: Those entries were invalid, and  
12 that was the interpretation of the Act given by the  
13 Attorney General, given by the implementing instructions  
14 of the -- of the General Land Office. And the  
15 memorandum explaining those instructions is included in  
16 the debates on the 1890 Act. Congress was aware of that  
17 interpretation of the 1890 Act.

18 The purpose was to put everyone on notice as  
19 of the date of the passage to the Act that if you going  
20 to enter onto an area that might be used for a reservoir  
21 that you're being -- it's subject to being overridden by  
22 the selection of the area for a reservoir site.

23 I would also --

24 QUESTION: Is it your position, Mr. Kneedler,  
25 that the Government doesn't need any particular reason

1 to reserve land in the territory, that if it wants to  
2 reserve it, that's -- that's its privilege?

3 MR. KNEEDLER: We have not gone to that extent.

4 What we do believe is that -- that, at the  
5 most, all that would be necessary is -- is this test to  
6 which Justice O'Connor just referred, that there has --  
7 that there would be -- as long as the reservation is for  
8 a public purpose appropriate to the purposes for which  
9 the United States holds the territory, which is the test  
10 the Court described in Shively versus Bowlby and is  
11 repeated in the -- in the, I think, everyone of its  
12 equal footing doctrine cases since then.

13 QUESTION: Well, supposing that when Minnesota  
14 was admitted to the Union, the United States decided  
15 that it probably had some good use for the bed of the  
16 Mississippi River as it flowed through Minnesota, and so  
17 it reserved that bed. Now, so long as there is a  
18 related government purpose, is that a good reservation?

19 MR. KNEEDLER: Well, it would -- it would -- I  
20 think it -- there has to be a specific federal purpose  
21 for it.

22 I think what Congress cannot do is say, We --  
23 just a bare desire to defeat the passage of the land to  
24 the State is not sufficient.

25 But the -- but the origins of the equal

1 footing doctrine suggest this distinction.

2 What -- what the Court was saying in Pollard's  
3 Lessee, which is the case in which the Court first  
4 announced this, is that what the United States has held  
5 to hold in trust for the States is the municipal  
6 sovereignty over the lands, not the federal sovereignty.

7 So when a new State is created, what passes to  
8 the State is the municipal sovereignty, the ability to  
9 deal with that land --

10 QUESTION: Well --

11 MR. KNEEDLER: -- as a State.

12 QUESTION: Now Pollard's Lessee says a lot  
13 more than that.

14 Let me read you a section from it that says:  
15 "Then to Alabama belong the navigable waters and soils  
16 under them in controversy in this case, subject to  
17 rights surrendered by the Constitution to the United  
18 States; and no compact that might be made between her  
19 and the United States could diminish or enlarge these  
20 rights."

21 That's not just talking about sovereignty.  
22 That's talking about land --

23 MR. KNEEDLER: Yes. No, I understand that,  
24 but -- but title -- the title to the land is an aspect  
25 of the -- of the State sovereignty because of the public

1 trust doctrine that Mr. Jensen referred to.

2 The -- the use devoting navigable waters to  
3 public purposes is an essential aspect of the public  
4 trust for the lands. And that is deemed to be so  
5 central that the lands are not ordinarily held to have  
6 been conveyed to private parties.

7 And the United States is held not to have to  
8 be able to act like a State in a State, that that's up  
9 to the State to decide how those lands shall be used to  
10 the extent that that's within the power of the State to  
11 do so.

12 But there is in Pollard's Lessee, itself, the  
13 Court made clear that all of these States' right  
14 acquired under the equal footing doctrine are  
15 subordinate in certain or -- in appropriate  
16 circumstances to where Congress acts pursuant to its  
17 enumerated powers under the -- under the Constitution.

18 And one of those enumerated powers is the  
19 power to acquire property for a federal purpose.

20 That can be done in the State, not just in a  
21 territory.

22 I think this is an important --

23 QUESTION: But it could be -- it's done by  
24 condemnation.

25 MR. KNEEDLER: It's done -- it's done by

1 condemnation. All that is necessary in those  
2 circumstances is for there to be a public use to which  
3 the property will be devoted.

4 And this Court in Hawaii Housing Authority  
5 said the public use standard is essentially co-terminous  
6 with the Government's police powers. And as long as the  
7 acquisition of the property is necessary to furnish  
8 further an appropriate governmental purpose, that that  
9 satisfies the public use requirement.

10 QUESTION: So the United States could then, if  
11 it felt it had a use for the land under the Mississippi  
12 River in Minnesota, reserve that at the time of  
13 statehood?

14 MR. KNEEDLER: Yes. For a federal purpose,  
15 not simply -- not simply to keep bare title and defeat  
16 the State's title. It has to be for a specific federal  
17 governmental purpose pursuant to Congress' enumerated  
18 powers.

19 QUESTION: But if it wants to grow hydroponic  
20 vegetables in the Mississippi River, it can do that?

21 MR. KNEEDLER: Well, yes, assuming that what  
22 -- assuming that that or anything else would be within  
23 the scope of Congress's -- Congress's enumerated powers.

24 And I -- I'd like to point out that in -- in  
25 Pollard's Lessee, itself, at two places, on page 221 and

1 224, the Court made clear that it was referring to lands  
2 that were not reserved or appropriated to another  
3 purpose.

4 The lands that were being discussed in that  
5 case were unappropriated lands, the public domain, the  
6 sort of lands that the -- that the Court held Congress  
7 was holding -- the United States was holding in trust to  
8 turn over to the State as part of that State's receipt  
9 of sovereignty.

10 But it was not -- It was not discussing lands  
11 that had been previously reserved or appropriated for  
12 other purposes.

13 QUESTION: Mr. Kneedler, how do you  
14 distinguish an Indian reservation, reservation of lands  
15 to be used by Indians for federal purposes?

16 MR. KNEEDLER: Well, that is something of a  
17 hybrid. It can be viewed as a conveyance of the -- of  
18 the beneficial title. But it's also a reservation in  
19 the normal sense --

20 QUESTION: You reserve for the Indian uses  
21 just as you reserved in this case for reservoir uses --

22 MR. KNEEDLER: That's right.

23 QUESTION: -- and in one case, you would  
24 concede that that reservation wouldn't defeat the  
25 State's title since Montana holds that, I guess.

1 MR. KNEEDLER: No, no. Montana -- what  
2 Montana -- all Montana holds is that there was -- that  
3 the document setting aside the land did not specifically  
4 refer to the -- to the riverbed.

5 QUESTION: That there was no conveyance to the  
6 Indians. But it's certainly clear there was an Indian  
7 reservation.

8  
9 MR. KNEEDLER: But there was never a  
10 reservation --

11  
12 QUESTION: And nevertheless, the title was in  
13 the State. Why wasn't the title in the Federal  
14 Government --

15 MR. KNEEDLER: The way the Court described it  
16 in Montana the same way that it described it in Holt  
17 State Bank, that there was a reservation in a general  
18 sort of way --

19  
20 QUESTION: Right.

21 MR. KNEEDLER: --to allow the Indians to  
22 continue to occupy the land that they had always  
23 occupied.

24 There was no specific mention, unlike here, of  
25 the bed of the navigable water.

1           And what the -- what the Court held in Montana  
2 is what -- what the Court relied upon was the absence of  
3 a specific designation of the riverbed as withholding  
4 the -- or as reserving that bed to the United States in  
5 trust for the tribe.

6           It wasn't just that there wasn't a  
7 conveyance. The vehicle of conveyance was the  
8 reservation. So there was not a specific reservation of  
9 the lake bed.

10          QUESTION: The key to your case is a specific  
11 identification of the bed of the lake as having been  
12 reserved?

13          MR. KNEEDLER: Yes. And that is exactly what  
14 the Court said, I think, in Montana: That it is  
15 necessary for it to appear in clear and special words,  
16 the intent has to be clear.

17          But where the intent is clear, and here it is,  
18 then -- then this is just like the Choctaw case.

19          QUESTION: Well, it's clear only after John  
20 Wesley Powell's designation, right?

21          You know, you just spread a map of the western  
22 United States in front of me and the 1888 Statute, I  
23 wouldn't have picked out Utah Lake, would you?

24          MR. KNEEDLER: Well, as -- as a suitable -- as  
25 a suitable reservoir site, I may -- I may well have. It

1 was well known at the time that natural reservoirs were  
2 -- were -- would be one of the important sources of  
3 irrigation under the Reclamation Project.

4 QUESTION: Well, let's say I find it less than  
5 clear.

6 Would -- does it become clear with John Wesley  
7 Powell's designation the next year?

8 MR. KNEEDLER: That is --

9 QUESTION: Unless you're absolutely -- unless  
10 there's been a court test, and you know that he hasn't  
11 gone beyond the -- what are appropriate reservoir sites?

12 MR. KNEEDLER: Well, the -- this -- this is a  
13 standard problem of delegation is, is John Wesley  
14 Powell's selection within the scope of the statutory --

15 QUESTION: Well, that's right. And I'm saying  
16 when -- when the specification that you acknowledge must  
17 be made is made by delegated authority, can it ever  
18 clear enough to overcome the equal footing doctrine?

19 QUESTION: Well, I don't think the  
20 Constitution requires that Congress specify in an act,  
21 itself, rather than addressing a general category in  
22 delegating it to the -- to executive officials as it  
23 does any other responsibility to make appropriate  
24 reservations.

25 This is -- this is typically necessary with

1 respect to the administration of public lands.

2 Congress cannot act like the landlord with  
3 respect to decisions about all the land that is in  
4 federal ownership.

5 It has to turn this over to the expert  
6 agencies.

7 And in this case, it was -- it was turning it  
8 over to the person it knew to be the premier expert with  
9 respect to irrigation of arid land.

10 QUESTION: Well, I guess the question is  
11 whether something more should be required if it's to  
12 defeat the State's acquisition of this title which  
13 normally is expected to transfer to the State at  
14 statehood.

15 MR. KNEEDLER: Do you mean more in the nature  
16 of specificity?

17 QUESTION: Yes.

18 MR. KNEEDLER: Well, here, I think --

19 QUESTION: The Congress, itself, has to take a  
20 look at it and say, "Yes, we really do mean to keep  
21 title in ourselves to this property."

22 MR. KNEEDLER: Well --

23 QUESTION: It, otherwise, would go to the  
24 State.

25 MR. KNEEDLER: Well, assuming that that is

1 necessary, I think that is met here by virtue of the  
2 subsequent actions.

3 First -- first, I'd like to point out though  
4 that prior -- prior to the passage of the 1888 Act, John  
5 Wesley Powell had prepared his famous report on the --  
6 on the lands of the arid region in which he specifically  
7 proposed Utah Lake as a reservoir site and suggested,  
8 for the first time, that reservoir sites be selected and  
9 set aside to prevent inhibitions to development.

10 So when Congress passed the 1888 Act which was  
11 drafted by John Wesley Powell, it had every reason to  
12 expect that he was going to select Utah Lake, and, in  
13 fact, he did it right away.

14 So this is about as close a nexus with respect  
15 to the selection of --

16 QUESTION: How many other sites were selected  
17 while that act was in effect, and in how many States?

18 MR. KNEEDLER: The Interior Department does  
19 not have complete figures on this. The -- the -- what  
20 happened is the selections were filed in the Land  
21 Offices in the various States, and there is -- there is,  
22 as far as I've been able to ascertain, no comprehensive  
23 list of how many were selected.

24 As of now, I am informed that they have  
25 records of approximately 40 selections. But we don't

1 know whether any of them involve lands under navigable  
2 waters.

3 QUESTION: And in how many States?

4 MR. KNEEDLER: I think it was five. Several  
5 of those were clearly in States admitted to the Union  
6 before 1888; California -- there were a number in  
7 California; there were a number in Colorado.

8 So the category of cases affected by the  
9 precise issue in this case under this Act is quite  
10 small. And we don't know of -- now of another case.

11 But I would like to continue with the  
12 statutory --

13 QUESTION: What about those other designations  
14 that we don't know even about that are floating out  
15 there in Land Offices somewhere? Were they designated  
16 with sufficient specificity, too, by the 1888 Act?

17 MR. KNEEDLER: They were reserved if --  
18 whatever was designated --

19 QUESTION: Suppose -- suppose we have another  
20 case that comes up involving one of those other sites  
21 that you don't even know about yet that's out there in  
22 some Land Office; has that been designated specifically  
23 enough by Congress to -- to overcome the usual  
24 application of the -- the equal footing doctrine?

25 MR. KNEEDLER: Well, the primary source for

1 what was designated, and there could have been others,  
2 but if we confine it to the category that -- that the  
3 Geological Survey selected and formally reported to  
4 Congress, that is a matter of public record, not just in  
5 the Land Office.

6 The Geological Survey reported to Congress  
7 what land had been selected by section by section in the  
8 case of Utah Lake.

9 The Congress then in 1890 held extensive  
10 hearings, oversight hearings, on the selection of  
11 irrigation sites.

12 And as we point out in our brief, there were  
13 sessions in Utah at which the use of Utah Lake as a  
14 reservoir site was specifically discussed. And we point  
15 out one of them in footnote 16 of our brief at which the  
16 Chairman of the Senate Committee responsible for those  
17 hearings specifically referred to the reservation of  
18 Utah Lake and specifically did so with addressing the  
19 problems of the 1888 Act.

20 It was pointed out that -- it was pointed  
21 during these hearings before Congress, before the 1890  
22 Act was passed, that the level of the lake was receding,  
23 that people were moving onto the land; and that this had  
24 created some problems. And the Chairman says: "Within  
25 the last year, there has been a reservation of any land

1 needed for that purpose. And the Government will survey  
2 such land and set it apart; otherwise, there will not be  
3 a disposition to crowd upon and settle on the land." He  
4 was responding specifically to that problem in saying,  
5 "We've taken care of that by reserving that."

6 But also -- we also cite in our brief a  
7 passage during the floor debates on the 1890 Act when  
8 Senator -- this is at page 9146 of 21 Congressional  
9 Record -- Senator Sanders said: "I hold it my hand the  
10 Tenth Annual Report of the United States Geological  
11 Survey to the Secretary of the Interior for 1888 and  
12 1889, which contains, I believe, all of the information  
13 of a public character with reference to reservoir and  
14 canal sites heretofore selected or surveyed."

15 That Tenth Annual Report includes the bed of  
16 Utah Lake.

17 So this is an -- and then Congress passed the  
18 1890 Act and said: "Any reservoir sites heretofore  
19 selected are retained as property of the United States  
20 until otherwise provided by law."

21 QUESTION: Well then, if there some sites that  
22 are unknown, it was selections after that Report was  
23 filed?

24 MR. KNEEDLER: There might have been some. As  
25 far as we know, the Geological Survey reported to

1 Congress all of the selections during any particular  
2 year.

3 QUESTION: Up until that date?

4 MR. KNEEDLER: Up until 1890. So at least,  
5 with respect to reservoir sites prior to 1890, in  
6 response --

7 QUESTION: When was the Act repealed?

8 MR. KNEEDLER: The Act -- the authorization  
9 for selection of arid lands was repealed in 1890. There  
10 was still authority to select reservoir sites, as I read  
11 the 1890 Act because it does refer to reservoir sites  
12 "hereafter selected."

13 But with respect to the ones previously  
14 selected, it's clear that Congress had the information  
15 before it and ratified those.

16 So although Congress didn't say Utah Lake in  
17 the Statute, it did say "Reservoir sites heretofore  
18 selected."

19 It knew specifically that Utah Lake was such a  
20 site.

21 And it held several days of hearings in Salt  
22 Lake City with witnesses who drew irrigation water from  
23 Utah Lake, and it knew quite well what the situation was  
24 there.

25 And Congress then revisited the 1888 Act in

1 1891 and 1897 as we explain in our brief, again  
2 tailoring the operation of that Act to make sure that  
3 the reservoir sites selected did not overreach.

4 But it never rescinded by law, as it was  
5 required, these reservation sites.

6 QUESTION: Mr. Kneedler, may we ask you.

7 Assume that we agree with you on the  
8 specificity that they clearly intended to reserve it for  
9 this particular purpose, what -- how would the purpose,  
10 the federal purpose be compromised or defeated by  
11 adopting the fundamental argument your opponent makes  
12 that it just simply passes to the State, and if the  
13 Government, the Federal Government needs it back,  
14 they've got to condemn it? How would that have hurt the  
15 federal purpose underlying this whole program?

16 MR. KNEEDLER: Well, that was one of the  
17 specific purposes underlying the 1888 Act, was to put  
18 the Federal Government in a position where it was going  
19 to have to condemn land in order to carry out the  
20 Reclamation Project.

21 What it was afraid of was that settlers would  
22 move on there, and in order -- if you had to flood the  
23 land, you'd have to buy out the settler, or if you had  
24 to put in a canal or a dam.

25 QUESTION: Well, all that goes to that's why

1 you needed the reservation and needed to be able --  
2 needed to be able to keep settlers off.

3 But I don't understand how that really  
4 responds to the constitutional argument your opponent  
5 makes that that could still all be accomplished by  
6 having the title to the bed of lake vested in the State  
7 at the time that it became a State.

8 MR. KNEEDLER: Well, in this case, it's  
9 important to distinguish the powers of the United States  
10 after statehood and prior to statehood.

11 QUESTION: I understand.

12 MR. KNEEDLER: But there's no doubt that after  
13 statehood, it could condemn the land if it had passed to  
14 the State.

15 Here we're talking about whether the land  
16 passed to the State at all, and --

17 QUESTION: Correct.

18 MR. KNEEDLER: -- at the time that this --

19 QUESTION: And what I'm asking is, supposing  
20 it did pass to the State, how would that defeat the  
21 program that motivated the reservation in the first  
22 place?

23 MR. KNEEDLER: Well, Congress could acquire  
24 the land. But again, one of the purposes of the  
25 reservation was to avoid having to pay for the land.

1                   QUESTION: Well, but why is it different from  
2 an Indian reservation? I'm asking in terms of the equal  
3 footing. Why really do you need a different analysis  
4 than in the Indian reservation case just because they're  
5 more specific here? Why can't the Federal Government,  
6 even though the title to the Montana River, or whatever  
7 it is, is in the State, it still, the Federal Government  
8 can still control all the -- what happens in the Indian  
9 reservation, why couldn't -- can't they still control  
10 what happens in Utah Lake even if the State owns the bed  
11 of the lake? That's what I don't quite follow.

12                   MR. KNEEDLER: They might be able -- they  
13 might be able to build a project. The Congress made a  
14 judgment that it wanted to retain in federal ownership  
15 and control these projects. It didn't know --

16                   QUESTION: Well, they wanted to prevent other  
17 people -- well, I'm sorry.

18                   MR. KNEEDLER: It didn't know quite how it was  
19 going to develop these lands. It didn't know if it was  
20 going to develop -- if Congress was going to provide for  
21 the United States to develop them, which is, in fact,  
22 what happened under the Reclamation Act of 1902, or  
23 whether it would open them to private -- private  
24 development.

25                   And in the 1897 Act, Congress overturned --

1 that we discuss in our brief -- Congress overturned an  
2 administrative interpretation and opened up all of these  
3 reservoir sites to private individuals and corporations.  
4 And, at the same time, said a State can come in and  
5 occupy one of those sites, too.

6 QUESTION: Maybe -- maybe I'm very dense here,  
7 but I still don't understand why if they want to keep  
8 private development out of the lake, why can't they do  
9 that, notwithstanding the fact that the title to the bed  
10 of the lake might be in the State?

11 I don't understand why there's --

12 MR. KNEEDLER: Private development -- there  
13 could be two problems.

14 One of them, if the Federal Government needed  
15 to acquire the land from the State, it would have to pay  
16 the State.

17 QUESTION: But they don't -- all they want to  
18 do is do is prevent private owners from developing the  
19 land, and their power over the navigable lake is  
20 sufficient to enable them to do that even though the  
21 State owns the bed of the lake.

22 MR. KNEEDLER: Well, it may not have been so  
23 clear.

24 First of all, the State could have granted --

25 QUESTION: Well, it's clear now, isn't it?

1 MR. KNEEDLER: I think it is -- I think it is  
2 clear now under the Marsh case that was cited in the --  
3 that we cite in our brief where the Tenth Circuit  
4 sustained the power of the Corps of Engineers to  
5 regulate dredge and fill operations.

6 But there could be constitutional problems  
7 there, too.

8 If the State conveyed away the bed of the lake  
9 to a private person, which it could do if it got title  
10 under the equal footing doctrine, you would then have a  
11 private person who owns land in the bed of the lake, if  
12 the lake bed was exposed, we would --

13 QUESTION: Just like the conveying away the  
14 bed of a river on an Indian reservation.

15 I would think the -- the party acquiring title  
16 would realize it's an unusual piece of property as to  
17 which there would be some federal interest.

18 MR. KNEEDLER: It may be.

19 But in this particular case, it may not be so  
20 unusual if the lake bed receded and the State-owned land  
21 was exposed. The State could turn it over to private  
22 parties. It may not be subject to entry under the  
23 federal laws, but the State could turn it over to  
24 private parties who could then enter upon it and create  
25 problems.

1 I should point out that disputes over the  
2 ownership of bordering lands were -- was also a serious  
3 problem at Utah Lake.

4 John Wesley Powell testified at these hearings  
5 in 1890, and we cited in a footnote in our brief in the  
6 Eleventh Annual Report.

7 He said that there had been a dispute between  
8 those who wanted to raise the lake and lower the lake  
9 because of the people who had moved onto the boundary  
10 area.

11 And the Mormon Church moved in and settled the  
12 dispute, worked out the dispute between the two groups  
13 of landowners.

14 So here we have a -- already previous  
15 experience with respect to the problems that can be  
16 created by private ownership of land in an area where  
17 the water recedes and then is raised and is lowered.

18 And that's precisely the sort of inhibitions  
19 to development that Congress was concerned about in the  
20 1888 Act.

21 QUESTION: Well, Mr. Kneedler, in most  
22 instances, wouldn't the Federal Government in any event  
23 retain its navigation servitude?

24 MR. KNEEDLER: It would retain its navigation  
25 servitude, but I -- but that -- it's not clear how far

1 that would go with respect to the operation of a  
2 reclamation project.

3 And it's also -- this is also an entirely  
4 intrastate navigable body of water. It's not clear that  
5 Congress's navigational servitude would give it the  
6 authority in this -- in this situation.

7 But I think the point to recognize is that at  
8 the time Congress decided to first freeze property in  
9 federal ownership and retain it there for development  
10 and irrigation of the arid west, it had complete  
11 sovereignty --

12 QUESTION: Your suggestion is that for the  
13 Government's navigational servitude to apply, the  
14 navigable water has to move from one State to another?

15 MR. KNEEDLER: Well, it depends. It -- It --  
16 I think I'm -- I -- I take that back. I think I'm  
17 thinking of Constructions of the Rivers and Harbors Act  
18 rather than the -- rather than the constitutional  
19 limitation.

20 Under the commerce power, Congress could  
21 control the water, but it would not necessarily give it  
22 the authority to control the land.

23 And that is -- that was what Congress was  
24 focusing on when it reserved the reservoir sites in this  
25 situation.

1           Going back to the point of Congress's power to  
2 do this, because I think the statutory authorization is  
3 clear, we submit it would be anomalous for Congress to  
4 be able to provide for the disposition of land  
5 underlying navigable waters to a private party as the  
6 States concede Congress can do and as the Court held in  
7 the Choctaw case and has said in Shively versus Bowiby  
8 and other cases.

9           In that situation -- and not to be able to  
10 retain the land in public ownership because when land is  
11 granted to a public party, it is separated from  
12 sovereignty in the words of this Court.

13           And both the State and the Federal Government  
14 lose whatever power they have to control the use of that  
15 land to the extent that power derives from ownership of  
16 the bed.

17           By contrast where the land is retained in  
18 federal ownership, the Federal Government can act both  
19 with reference to the special federal purpose that gave  
20 rise to the reservation in the first place and protect  
21 the interest in the use of the navigable waters in the  
22 same way as a public trust.

23           So the reasons for presuming against a  
24 conveyance to a private party of land underlying  
25 navigable waters apply with far less force in the

1 situation where Congress has reserved the lands to a  
2 public use.

3 Congress can condemn lands in a state. But at  
4 the time it acquired this land, there wasn't a state.  
5 It owned the property. The United States owned the  
6 property. It could acquire it. It was essentially  
7 acquiring it from itself. It was disposing of the land  
8 to the extent it owned it as a public domain and  
9 acquiring it.

10 It doesn't have to condemn land it already  
11 owns. It doesn't have to pay for lands it already  
12 owns. And so it acquired it at that time as federal  
13 property. And because it was federal property under the  
14 supremacy clause and as reflected in Section 6 of the  
15 Utah Enabling Act that Justice O'Connor referred to,  
16 that land was reserved in federal ownership and was not  
17 among the corpus of unappropriated lands on which the  
18 equal footing doctrine operates.

19 Equal footing --

20 QUESTION: Mr. Kneedler, I suppose -- I  
21 suppose that normally when there's a reservation from  
22 the public domain, it really just is withdrawing it from  
23 settlement or development or withdraws it from the  
24 operation of the Homestead Act --

25 MR. KNEEDLER: Well, there can be -- there can

1 be withdrawals; there can be reservations.

2 Sometimes a withdrawal as in Midwest Oil may  
3 just be preventing someone from settling upon it.

4 But you can also have a reservation devoted  
5 toward a particular federal purpose.

6 QUESTION: Well, how do we know -- how do we  
7 know that the reservation that was -- that Congress  
8 authorized here was meant to be a reservation as against  
9 the equal footing doctrine -- as against State claims,  
10 to withdraw it from the operation of the equal footing  
11 doctrine --

12 MR. KNEEDLER: Because --

13 QUESTION: Rather than just what the normal  
14 meaning of reservation would be?

15 MR. KNEEDLER: As I was explaining to Justice  
16 Stevens, I think the purposes of the Act require that it  
17 be applied to the -- it's a lot like Block versus North  
18 Dakota in this sense. The purposes of the comprehensive  
19 Act require that it be applied to potential claims by  
20 the State and people claiming through the State.

21 QUESTION: So State ownership of the lake  
22 bottom might be inconsistent with this development --

23 MR. KNEEDLER: Yes.

24 QUESTION: -- as a reclamation project?

25 MR. KNEEDLER: That's correct.

1 And the one guide we do know in the Utah  
2 Enabling Act, Congress made clear that lands that were  
3 included within any reservation of whatever nature,  
4 which would include these reservations, were not subject  
5 to the grants of school sections and indemnity  
6 selections under the Utah Enabling Act.

7 And the equal footing transfer of  
8 unappropriated lands to a state is a grant; it's a  
9 constitutional grant.

10 But it -- but so we think it's consistent with  
11 the relationship of the States upon entry into the Union  
12 that what they succeed to are unappropriated lands under  
13 the -- under the navigable waters, but they don't  
14 succeed to lands that have been taken into federal  
15 ownership any more than they would the United States  
16 Capitol Building that had been taken into federal  
17 ownership.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 Kneeder.

21 Mr. Jensen, do you have anything more?

22 MR. JENSEN: A few brief remarks, Your Honor.  
23 ORAL ARGUMENT OF DALLIN W. JENSEN, ESQ.,  
24 ON BEHALF OF THE PETITIONER - REBUTTAL  
25 MR. JENSEN: With respect to the federal

1 concern about potential settlers crowding down around  
2 the edge of Utah Lake, we do not think that was a  
3 problem. The lake bed was being held in trust. And, in  
4 fact, it could not have been -- was not opened to  
5 settlement and entry under the public land laws.

6 And ten years prior to the 1888 Act, the  
7 United States recognized the navigability of the lake.  
8 It surveyed it, segregated it from the public domain, so  
9 that all of the sales of property were down to the  
10 surveyed meander line. And I think that simply is not a  
11 justifiable argument that the settlers would encroach  
12 upon the lake bed.

13 QUESTION: Are you saying the -- it was  
14 already being reserved?

15 MR. JENSEN: Well, yes. It had already been --

16 QUESTION: And this reservation couldn't  
17 possibly have applied to Utah Lake?

18 MR. JENSEN: That's right.

19 QUESTION: And so it's no reservation at all?

20 MR. JENSEN: Well, that's right as it purports  
21 to withdraw the bed, or reserve the bed to the Federal  
22 Government. It had already been reserved for Utah.

23 QUESTION: I don't understand that. Run that  
24 by again, will you?

25 MR. JENSEN: Okay.

1 First of all, it's reserved by the public  
2 trust. In other words, they hold it for the State as  
3 part of the public trust obligation.

4 Now, we take the position they wouldn't have  
5 had to survey it in order to satisfy and make sure we  
6 got it.

7 But what we say is that one of the things the  
8 Federal Government does, and did at that time throughout  
9 the West, is when they -- when there was these navigable  
10 bodies of water, in order to preserve them, they were  
11 surveyed.

12 That survey is a line that approximates the  
13 ordinary high-water mark which is the boundary of the  
14 bed and the upland owner.

15 And then when the Federal Government sells the  
16 unoccupied public domain, those sales come down to that  
17 surveyed meander line, so that the person that buys, he  
18 gets a metes and bounds description, but he doesn't get  
19 anything below that.

20 And so what we say is that by surveying it ten  
21 years prior to the 1888 Act, they had already recognized  
22 its navigability, its -- that Utah was entitled to it,  
23 and they defined the boundaries.

24 QUESTION: But then the United States says  
25 that after that, it was -- it was taken out of the trust

1 essentially by the -- by the United States itself.

2 MR. JENSEN: That's right. And -- but --

3 QUESTION: Mr. Jensen, do you take the  
4 position that the State could convey good title to land  
5 within the boundary?

6 MR. JENSEN: To a limited extent. And that  
7 would be that our obligation is to maintain the bed in  
8 such a way that the public trust is not impaired.

9 We believe that we could --

10 QUESTION: Could you sell it to somebody who  
11 wanted to dig a mine on it specifically?

12 MR. JENSEN: I question that. We think that  
13 we could --

14 QUESTION: Well, in some States -- some States  
15 have given to the landowners on each side of the -- of  
16 the navigable river title to the riverbed that they got  
17 under the equal footing doctrine.

18 MR. JENSEN: And some of them are being sued  
19 over it.

20 We think we can issue permits, say for a dock  
21 or a wharf, that sort of thing --

22 QUESTION: Or oil lease?

23 MR. JENSEN: -- and if it doesn't impair the  
24 public trust, but we could not just turn around and sell  
25 the bed of Utah Lake willy-nilly just to, you know,

1 refurbish the State coffers. We do not believe that we  
2 can do that.

3 QUESTION: Because of the federal reservation?

4 MR. JENSEN: No, because of the -- that the  
5 State holds it in trust, not because of --

6 QUESTION: Oh, I see, you're -- because of  
7 your own trust obligation?

8 MR. JENSEN: Our own trust, and maybe we've  
9 made that a little confusing.

10 But the State holds it in trust, once we get  
11 it.

12 It is not like the rest of our land; it is a  
13 special category. And it is impressed with the public  
14 trust.

15 Just a word about Montana as it relates to the  
16 specificity that has been talked about here and the 1888  
17 Act.

18 We submit that if the United States could not  
19 defeat Montana's title under those facts, that the 1888  
20 Act should not be allowed to defeat Utah's here.

21 My time is up.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
23 Jensen.

24 The case is submitted.

25 (Whereupon, at 10:25 a.m., the case in the

1 above-entitled matter was submitted.)  
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CERTIFICATION

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#85-1772 - UTAH DIVISION OF STATE LANDS, Petitioner V.

UNITED STATES, ET AL.

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BY Paul A. Richardson

(REPORTER)

