

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

PHILLIPS PETROLEUM COMPANY AND
CINQUE BAMBINI PARTNERSHIP,

Petitioners

v.

MISSISSIPPI AND SAGA PETROLEUM,
U.S., INC.

No. 86-870

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WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 PHILLIPS PETROLEUM COMPANY AND x
4 CINQUE BAMBINI PARTNERSHIP, x
5 Petitioners, x
6 v. x No.86-870
7 MISSISSIPPI AND SAGA PETROLEUM, x
8 U.S., INC. x
9 -----x

10 Washington, D.C.

11 Monday, November 9, 1987

12 The above-entitled matter came on for oral argument
13 before the Supreme Court of the United States at 10:02 a.m.

14 APPEARANCES:

15 EUGENE GRESSMAN, ESQ., Newark, New Jersey, on behalf of
16 Petitioners.

17 KATHY D. JONES, ESQ., Special Assistant Attorney General of
18 Mississippi, Jackson, Mississippi, on behalf of the
19 Respondent.

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C O N T E N T S

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ORAL ARGUMENT OF

PAGE

EUGENE GRESSMAN, Esq.

on behalf of Petitioners

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MS. KATHY D. SONES, Esq.

on behalf of Respondents

16

EUGENE GRESSMAN, Esq.

on behalf of Petitioners -- Rebuttal

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1 PROCEEDINGS

2 CHIEF JUSTICE RHENQUIST: We will hear argument this
3 morning in No.86-870, Phillips Petroleum Company v. Mississippi
4 and Saga Petroleum. Mr. Gressman, you may proceed whenever you
5 are ready.

6 MR. GRESSMAN: Than you, Your Honor.

7 ORAL ARGUMENT OF EUGENE GRESSMAN

8 ON BEHALF OF PETITIONERS

9 MR. GRESSMAN: Mr. Chief Justice, and may it please
10 the Court:

11 This is an equal-footing case. It arises out of the
12 fact that Mississippi became a member of the Union in 1817 on
13 an equal footing with the original 13 states. The "equal
14 footing" doctrine in this context means that each new state
15 that enters the Union, like Mississippi, acquires sovereign
16 title from the United States to certain underwater lands to be
17 held in trust for the benefit of all the public.

18 Now, in this situation, and in an unbroken line of
19 decisions of this Court, dating back 145 years, to the case of
20 Martin v. Waddell, this Court has uniformly stated that the
21 sovereign title that attaches to a subsequently-admitted state,
22 relates only to lands beneath navigable waters that are usable
23 by the public for commercial purposes of navigation or other
24 commercial activities, such as fishing. This has been the
25 unbroken line of authority in this Court, that state

1 sovereignty equals title to lands under commercially navigable
2 streams, rivers and lakes. And by "navigable," this Court has
3 always meant "navigable in fact."

4 Now, it is our position that the decision below by
5 the Mississippi supreme court is diametrically opposed to this
6 long line of authority in this Court. For example, on page 10A
7 in the Opinion below, as it appears in the Appendix to the
8 Petition, the supreme court of Mississippi says that the top of
9 the page that, "It is our view that as a matter of federal law,
10 the United States granted to this State in 1817 all lands
11 subject to the ebb and flow of the tide and up to the then-mean
12 high water liable without regard to navigability."

13 Now that is incorrect; it is inconsistent; it is in
14 conflict with every decision that this Court has ever rendered.
15 He cites, for example, the court cites Illinois Central Rail
16 Road Company v. Illinois. One turns to that reference, that
17 citation to the Illinois Central case and we find the Court
18 announcing that "ownership by the crown -- and therefore, by
19 any sovereign State, of title to lands under waters, is founded
20 not upon the existence of tide over the lands, but upon the
21 fact that the waters are navigable."

22 QUESTION: Mr. Gressman, excuse me. Is it not
23 possible to read all of those cases as extending the doctrine
24 rather than limiting it; that is, as saying, "if waters are
25 navigable, the "trust" doctrine applies, whether or not the

1 oceans' ebb and flow extends to those waters." Is that
2 interpretation not -- although if the ebb and flow does extend
3 to the waters, the "trust" doctrine does extend to the waters,
4 the "trust" doctrine applies despite their non-navigability.
5 Is it not possible to interpret all of -- is there any of those
6 cases that would be inconsistent with such a theory? That is,
7 navigability is the extension of the "ebb and flow"
8 jurisdiction?

9 MR. GRESSMAN: No, Your Honor, I do not think that is
10 a fair reading of the Decisions of this Court. I do not think
11 that this Court has ever addressed a case before today where
12 all that you had were non-navigable waters plus a tidal
13 influence. In every case --

14 QUESTION: We have not addressed it either way: we
15 have not said "yes," and we have not said "no."

16 MR. GRESSMAN: That is true, but I think that if you
17 look at the purposes of the "public trust" doctrine, this Court
18 has consistently said that the purpose of the doctrine, the
19 purpose of the "equal footing" doctrine, is premised on the
20 public need to use the waters as navigable highways of
21 commerce, and that is the critical fact that justifies reading
22 the Decisions of this Court as meaning that, if you have a non-
23 navigable body of water that happens to be subject to tidal
24 influence, that kind of underwater land can never become part
25 of the public trust domain for the very reason that there is no

1 purpose served; there is no commercial navigability that is
2 possible. And therefore, the reason --

3 QUESTION: What do you do about the last ten feet of
4 the ocean, near the shore, which last ten feet are not
5 navigable? Does that mean that that portion is not subject to
6 --

7 MR. GRESSMAN: Certainly not, Your Honor.

8 QUESTION: And why is that?

9 MR. GRESSMAN: Every navigable body of water, be it
10 the ocean, the Mississippi River, or any other large body of
11 water, has at its shore, or at its edges, a non-navigable
12 shoreline.

13 QUESTION: Right, now, how do you know where the
14 ocean ends? Why is it not reasonable to say that the ocean
15 ends at the point where the ebb and flow stops?

16 MR. GRESSMAN: Because --

17 QUESTION: Once you have accepted the principle that
18 "navigability" is not the test -- as you just have -- you have
19 to decide where the ocean ends: why does it not end where the
20 ebb and flow start?

21 MR. GRESSMAN: There are various explanations of
22 that. That is a natural phenomenon, of course, and if the body
23 of water is subject to tidal influence, such as an ocean, one
24 can measure the extent of that navigable body of water by the
25 mean high water mark of the tide. That is not to say that you

1 are granting state ownership of the entire body of water
2 because of the tidal influence, because you are simply
3 measuring the inner boundary of that body of water by the tide.

4 At the same time, you see, this was part of the
5 confusion that grew out of the English experience where all
6 navigable rivers, due to the geography of England, were the
7 same as tidally-influenced waters: the tide ebbed and flowed
8 to the ends of most of the navigable rivers. And so it became
9 -- a synonymous expression of the royal ownership of the
10 navigable of the tidally-influenced waters of England.

11 But we found in this country that that kind of
12 reliance or reference to tidal influence certainly does not
13 explain how the state gets domain over fresh-water streams that
14 have no tidal influence. And it took a number of cases,
15 particularly the Genesee Chief case, which dealt with the
16 Admiralty jurisdiction, to dispel the notion that the critical
17 element with respect to the extent of federal admiralty
18 jurisdiction extended only to those rivers that were tidally
19 influenced. Another point, Your Honor --

20 QUESTION: Mr. Gressman, certainly Chief Justice
21 Taney's Opinion in Genesee Chief, as Justice Scalia says,
22 extends Admiralty jurisdiction to navigable waters that were
23 non-tidal, there is nothing indicating that all tidal waters
24 were not also included.

25 MR. GRESSMAN: As long as they were navigable.

1 QUESTION: Well, but I do not -- when you say that
2 Admiralty jurisdiction extends to "tidal waters," and then you
3 go on and say "even if they are not tidal, it extends to them
4 if they are navigable," I do not know if the necessary
5 inference is that the tidal waters which are not navigable are
6 excluded?

7 MR. GRESSMAN: Not necessarily, as long as they are
8 navigable. Take the Mississippi River, for example. And this
9 is the problem -- one of the problems that Genesee Chief was
10 talking about: you take the Mississippi River. Now, the
11 Mississippi River is navigable for 1,000 miles, but the tidal
12 influence is only for 30 miles up the river.

13 Now, if you were to say that the public domain or
14 Admiralty jurisdiction extends only for 30 miles, as long as
15 there is a tidal influence, that made it impossible to extend
16 Admiralty jurisdiction to the remaining navigable port --
17 freshwater portions, of the Mississippi River. And this is
18 intolerable.

19 QUESTION: The collision of the Genesee Chief took
20 place on Lake Ontario, I thought?

21 MR. GRESSMAN: Well, but I think that an example,
22 perhaps, is better shown -- I think he talked about examples of
23 various rivers in this country, like the Mississippi, but I
24 think that affords an example of what he was talking about.

25 Let me also add that what we are dealing with in this

1 case is not a navigable body of water that happens to have a
2 non-navigable shoreline. What we are talking about here is a
3 discrete, inland tributary that contributes fresh water from
4 the uplands and flows into a navigable body of water known as
5 the Jordan River. Now, it cannot be said that the "public
6 trust" doctrine was ever designed to extend public ownership up
7 into interior streams completely surrounded by private riparian
8 owners, streams that do not constitute part of the shoreline of
9 a navigable body of water.

10 I give an example of that from Justice Fields'
11 concurring Opinion in the Knight v. U.S. Land Association case,
12 where he pointed out that it would be absurd to suggest that
13 the Chesapeake Bay, which obviously is a navigable body of
14 water tidally-influenced, that you would consider as part of
15 Chesapeake Bay, the Potomac River as far up as the tide affects
16 the Potomac River, and it does affect the tide all the way up
17 to Washington, D.C.

18 He said, "it is absolutely absurd to say that the
19 Potomac River is a part of the shoreland, or the boundary, of
20 the Chesapeake Bay; that the tidal influence that is effected
21 on this independent river, or stream, must stand or fall on its
22 own navigability, not derivative from the body of water into
23 which it flows and is not -- certainly, does not constitute
24 part of the shorelands or the tidelands of the navigable
25 Chesapeake Bay."

1 And he said, "It was incredible that anybody should
2 suggest that." Yet that is exactly what the State of
3 Mississippi is claiming here: they are claiming that, because
4 this little, discrete, independent drainage stream that has no
5 more use, no more function than to drain the heavy excess
6 rainwater off the uplands, that because that has some tidal
7 influence, therefore that must be considered part of the public
8 domain, as if it were constituted some kind of a shoreland or a
9 tideland or a tidewater of some other concededly navigable body
10 of water.

11 The State of Mississippi has never revealed what
12 navigable body of water these little, discrete streams are a
13 part of. Are they a part of -- are they a tideland of the
14 Jordan River, or are they the tidelands of the Bay of St.
15 Louis? An inlet of the Gulf? Or are they the tideland of the
16 Gulf of Mexico, which is only five or six miles away? We do
17 not know.

18 QUESTION: Of course, Mr. Gressman, under their
19 theory it really does not matter, does it?

20 MR. GRESSMAN: Well, it does not matter except to say
21 that it is totally incorrect as a statement of the basis on
22 which you impose public trust dominion.

23 Public trust dominion, as this Court has said over
24 and over again, depends upon the navigability of the body of
25 water over which the state seeks this trust dominion. And now,

1 if it is a true tideland; if it is a shoreland; a mudflat; a
2 beach of a navigable body of water, that need not deter us
3 because that is simply a physical fact that most navigable
4 bodies of water do have non-navigable shorelands -- tidelands,
5 tidewaters -- however you want to describe them?

6 QUESTION: Mr. Gressman, the Submerged Lands Act, of
7 course, has language that your opponent suggests affects the
8 resolution of the problem: it says that all lands permanently
9 or periodically covered by tidal waters are included as lands
10 beneath navigable waters. Do you think that that has some
11 bearing on this case?

12 MR. GRESSMAN: No, Your Honor. The submerged land
13 act -- and this was fully explored, by the way in Justice
14 Rhenquist's Opinion in the State Land Board v. Corvallis
15 Company in footnote no.4 of that Opinion, at 429 at page 371
16 that the effect of the Submerged Lands Act merely was to
17 confirm the states' title to beds of navigable waters within
18 their boundaries as against the United States claims. And it
19 does not alter the scope or effect of the "equal footing"
20 doctrine.

21 And quoting from the Bonelli case, which in other
22 respects was overruled in Corvallis, quoting the Bonelli case,
23 this Court stated -- and I think this is a critical restatement
24 of the -- applicable law here: "A state cannot base its claims
25 to lands [that means underwater lands] that are unnecessary to

1 a navigational purpose."

2 Now, that means that the state can claim domain only
3 over those waters considered by and of themselves that are
4 necessary to serve as public highways of commerce a
5 navigational purpose -- a commercially navigational purpose.

6 And that is the whole history; that is the whole
7 meaning; that is the whole rationale -- for the "public trust"
8 doctrine, which has been incorporated into the "equal footing"
9 doctrine. And the Court below simply turns away from that long
10 history and states that lands -- that title: property title,
11 can be based solely upon the ebb and flow of the tide without
12 regard to navigability. That is just totally inconsistent with
13 this Court's long line of decisions. I do not know any case
14 that has ever said that you can base public title solely on the
15 basis of the ebb and flow of the tide.

16 QUESTION: Oh, no. I do not think it says you
17 cannot, either.

18 MR. GRESSMAN: Well, the inference is that if, from
19 the fact that, if public title, public trust title, is the
20 equivalent of navigability purposes, shall we say -- that
21 necessarily excludes from the public trust concept those waters
22 that are not suitable for commercial navigation. And that is
23 what this Court must have met in Illinois Central, and in other
24 repeated declarations when it said that, "tidal" depends not on
25 "ebb and flow of the tide," but on the "susceptibility to

1 commercial navigation." And that is the whole reason behind
2 the doctrine, that is, to preserve the highways of commerce.

3 QUESTION: But that was not the reason. That was not
4 the sole reason at common law, Mr. Gressman. There were all
5 sorts of things that attached -- in particular, fishing rights,
6 whether it was navigable or not -- the fishing rights in ebb
7 and flow waters belonged to the king, and not to private
8 owners.

9 MR. GRESSMAN: No, Your Honor, the English common
10 law, going back as far as 1604, in the River Banne case -- and
11 that has never been questioned in subsequent cases as far as I
12 know -- stated that there is a clear distinction between a
13 navigable water and a non-navigable stream. And that the king
14 owns and controls the navigable waters, but the non-navigable
15 waters are subject to private riparian ownership, and that has
16 been the history of the common law in this country.

17 QUESTION: Even if the tide reaches them?

18 MR. GRESSMAN: I would say "yes, if it is not
19 navigable by virtue of the tide reaching them."

20 QUESTION: But if you read Chief Justice Taney's
21 Opinion in Genesee Chief, you get the impression that at least
22 that Court thought that navigability and tidal characters were
23 coterminous in England.

24 MR. GRESSMAN: Well, they were because of the
25 peculiar geography of England -- such a small country that all

1 this was set forth, explained not only in Genesee Chief, but
2 down through the years and Illinois Central repeats this
3 history again --

4 QUESTION: But then you never would get a situation
5 in England where the river was navigable but non-tidal, or
6 tidal but non-navigable.

7 MR. GRESSMAN: Possibly not, but that was -- that
8 situation did not exist in this country. I mean, it was an
9 entirely different situation, because here, as I used in the
10 Mississippi River example. You have a certain portion of it
11 that is both tidal and navigable. Whereas above the tidal
12 influence, you have waters that are not subject to the tide.

13 QUESTION: Yes, but what I am uncertain about is how
14 good an authority your River Banne case in England is in 1604?
15 Which simply is applying the "public trust" doctrine in England
16 where the two were really coterminous?

17 MR. GRESSMAN: Well, even in England, I suppose there
18 are little streams -- discrete little streams -- tributaries,
19 that are not navigable. I mean, that is the way Nature is. I
20 mean, they can -- Nature makes these large, navigable bodies of
21 water by having a series of discrete, little streams and
22 rivers. And that reference appears in a lot of the early
23 common law cases, that it is these discrete, little streams and
24 rivers that do not pass through the control of the Crown, but
25 they are reserved for the private riparian landowner, and that

1 has been the history in this country.

2 The little streams that run through farmlands, or
3 somebody's back yard; a little creek -- that is not subject to
4 state control. And if it just happens to have -- unless it
5 rises to the level of navigability.

6 Navigability is the one criterion that is
7 consistently referred to as the test of the "public trust"
8 doctrine.

9 I wish to reserve the rest of my time for rebuttal.

10 CHIEF JUSTICE RHENQUIST: Thank you, Mr. Gressman.

11 We will hear now from you, Ms. Sones.

12 ORAL ARGUMENT OF KATHY D. SONES, ESQ.

13 ON BEHALF OF RESPONDENT

14 MS. SONES: Mr. Chief Justice and may it please the
15 Court:

16 The case, as Mr. Gressman stated, is one of the
17 "equal footing" doctrine and the limits of each state's public
18 trust, the question can be answered when we review these two
19 doctrines together. Each new state upon entering the Union did
20 so on an equal footing with the original 13 states and received
21 all lands that were subject to the ebb and flow of tide
22 regardless of the navigability of the water. Each new state
23 could define the nature of her boundaries and the physical
24 extent of the public trust lands, as the original 13 states
25 did. Each of the original 13 recognized a public trust

1 interest to shorelands that were subject to the ebb and flow of
2 the tide and then defined the extent of the public trust
3 shorelands either judicially or legislatively.

4 The State of Mississippi's main concern is to
5 preserve the ownership of the lands in question for the use and
6 benefit of the public and this, by necessity, included the
7 development of mineral resources. The ownership of the
8 properties in question remained unchallenged until these leases
9 were issued on these state waters for oil and gas purposes. At
10 that time, the individuals who owned the lands adjacent to
11 these tidelands sought to take these tidelands from
12 Mississippi's public trust lands. The State then proceeded to
13 defend its title in these lands, and this case is significant
14 not only to Mississippi, but to all states which have a
15 coastline. This case can potentially impact thousands of acres
16 nationwide where states have relied upon their theories of what
17 they owned in their public trust lands.

18 QUESTION: Well, Ms. Sones, I guess the --
19 Petitioners here had been paying taxes on these lands all these
20 years on the assumption they owned them?

21 MS. SONES: Your Honor, the lower court ruled on the
22 issue that the payment of taxes was not at issue in this case
23 simply because --

24 QUESTION: That may be, but is it not correct? I
25 mean, the assumption of everyone had been that the lands had

1 been owned by the Petitioners for the years since Statehood and
2 before?

3 MS. SONES: Justice O'Connor, it is true that the
4 Petitioners allege that they had paid taxes on the lands in
5 question, but the State's --

6 QUESTION: Well, and they held some titles that
7 purported to cover the lands in question?

8 MS. SONES: The title which they had were quitclaim
9 deeds -- in the nature of quitclaim deeds, by Acts of Congress.

10 QUESTION: And they had paid taxes on it and that was
11 the common assumption until the State issued the mineral
12 leases? Is that right?

13 MS. SONES: That was their assumption.

14 QUESTION: Well, is that right?

15 QUESTION: She is asking just a fact.

16 MS. SONES: It is correct, Your Honor.

17 QUESTION: Yes, thank you.

18 MS. SONES: One fundamental principle of law that we
19 are concerned with here --

20 QUESTION: It is a long time -- it is over 150 years
21 that they have been paying taxes, is it not?

22 MS. SONES: Your Honor, we would assert that the
23 payment of taxes on these lands really did not affect what
24 ownership that the State had in these properties.

25 QUESTION: Yes, but the State of Mississippi or its

1 subordinate municipalities gladly accepted the payment of
2 taxes?

3 MS. SONES: The municipality, even though it may have
4 accepted payment of taxes on these properties, the lower court
5 ruled that this issue did not resolve the question as to the
6 title.

7 QUESTION: I know what the lower court ruled, but the
8 fact is there. And you cannot overcome it, can you, as a
9 factual matter? If you prevail in this case, I suppose those
10 taxes will no longer be paid.

11 MS. SONES: On these 42 acres, they would not be.

12 QUESTION: Well, do you not suppose that if we were
13 to Affirm, there would be additional lands that are now in
14 private hands, or use, that Mississippi would in the future
15 claim as part of its public trust? I suppose that we would not
16 expect the State of Mississippi to stop with these 42 acres.
17 Undoubtedly there would be other lands in the State that
18 Mississippi would extend its claims to, if we were to Affirm?

19 MS. SONES: Your Honor, this is not a new issue in the
20 State of Mississippi. The State has always claimed --

21 QUESTION: But is that correct?

22 MS. SONES: Your Honor, there would be other lands
23 that are affected by this.

24 QUESTION: Yes? How much land do you suppose, in
25 all?

1 MS. SONES: The State of Mississippi currently has at
2 least around 600 acres that are tidally-influenced. We do not
3 suggest that this would change any rights of ownership that
4 these people have in them. These are lands which the State
5 claims by virtue of the ebb and flow of the tide. We only have
6 the one other case that is at issue with this one, where the
7 same issue is involved. So as far as we know, the stability of
8 titles will remain as they are with the exception of the one
9 other case that we have.

10 QUESTION: Ms. Sones, with respect to the 42 acres
11 that are in dispute here, would taxes paid on that as a
12 separate parcel, so that a separate tax payment was made for
13 lands entirely subject to tidal influence, or was it just a
14 part of a larger parcel?

15 MS. SONES: These lands were not issued separately.
16 They were all one big parcel. The parcel that Petitioners own
17 would have been in the nature of 640 acres, more or less, and
18 they would have paid taxes on the whole amount, without any
19 exceptions to this.

20 QUESTION: And now 42 acres of that 640 are being
21 disputed by the State?

22 MS. SONES: Yes, Your Honor.

23 QUESTION: And the State did accept the money as a
24 tax payment, did not understand that it was tendered to
25 purchase the property, did it not?

1 MS. SONES: No, Your Honor, these were donation
2 claims where the Petitioners actually got their property. To
3 determine the property rights of states and of individuals in
4 the Public Trust area, we must look to the law of this nation
5 as it existed in 1817 when Mississippi came into Statehood.
6 Mississippi came into Statehood on an equal footing with the
7 other states, and title to the lands which the federal
8 sovereign held in trust vested in Mississippi at that time.

9 The public trust was created and funded and title to
10 these lands in the trust became the property of Mississippi.
11 Mississippi adopted the common law of England which divided
12 lands into three categories. Lord Hale in De Jure Maris,
13 stated that there were fresh water streams, the seabed, and
14 tidal waters. The tidewaters at page 378 included, "arms and
15 creeks of the sea so far as the ebb and flow of the tide, as
16 well as the foreshore between the high water mark and the low
17 water mark."

18 In reliance upon the English common law, 14 states
19 use the main high tide line in determining their line of
20 ownership. Some states use the low water line; and other
21 states -- the other coastal states -- use some variation of the
22 main high tide line. These compilations can be found in a 1960
23 report that Colonel Gee made to the American Society of Civil
24 Engineers. As the Coastal States' amicus brief indicates,
25 there is no uniformity in the law as to what each state has

1 done with the lands under its public trust. The lead case in
2 this area is that of Shively v. Bowlby, an 1892 case which
3 discussed at great length what the common law of England
4 purported to do.

5 The test asserted by Petitioners is that of a
6 "navigability-in-fact" standard, something that was added once
7 the propellered Genesee Chief case was handed down. And this
8 was to give the Western interior states public trust lands
9 which they did not have since they did not have a coastline.

10 Shively, in summarizing the original 13 states law,
11 made it clear that there was no uniformity in what each state
12 had done with the lands under its tidewaters within its
13 borders, but clearly stated at page 341, "each state has dealt
14 with these lands according to its own views of justice and
15 policy, reserving its own controls over such lands as it
16 considered for the best interest of the public. Great caution
17 is necessary in applying precedents in one state to cases
18 arising in another."

19 Mississippi has always used the "ebb and flow" rule,
20 and employed it to the parcels here in question. All of these
21 parcels, these 42 acres, have daily tidal influence and are
22 truly "arms and creeks of the sea," as discussed in the
23 treatise discussed by Lord Hale. Every navigable waterway has
24 certain areas which are not navigable in fact, as Justice
25 Scalia indicated. There would be some areas close to the

1 shore; there would be estuaries which would not be navigable --
2 even on a fresh water river, there would be areas near the
3 river bank which would not actually be navigable, but this does
4 not take away the definition of a navigable waterway.

5 The law looks for certainty, and there is certainty
6 to the main high tide line which Mississippi uses. By taking
7 the main high tide line, a finite line is established by the
8 use of surveying instruments, by the use of tidal datums over
9 an 18.6 year period; and to use any other rule in our State to
10 determine where the ownership of the State lands ends, just
11 would not be consistent with the public trust lands in the
12 decisions of our State.

13 QUESTION: Let us not exaggerate it too much: there
14 is a certain amount of -- a degree of uncertainty, in the
15 "tidelands" rule as well. I mean, to determine how far up a
16 river the tide actually ebbs and flows -- I assume it
17 diminishes little by little until there is finally one molecule
18 of water that moves up and down. That is not a very easy thing
19 to calculate, is it?

20 MS. SONES: It is not an easy thing to calculate,
21 Justice Scalia, but it can be done. It is something that the
22 National Ocean Survey does by the use of tidal datums by gauges
23 they place in the water, and these -- the actual boundaries of
24 the main high tide line can be established by the use of these
25 gauges and by the use of photogrammetry, which is the use of

1 taking aerial photographs and actually marking out where the
2 tide line would be established, and this is done by a metes and
3 bounds description. It is a finite description of how far the
4 tidal influence reaches.

5 This is done over a period actually over 18.5 years
6 for the tidal epic, but this is something that can be done by
7 watching the gauge rise and fall every day, and they take the
8 mean high tide line of all the high tides and the low tides
9 together.

10 QUESTION: May I ask you a question -- excuse me?
11 We are talking about in this case tributaries to the Jordan
12 River, is that right?

13 MS. SONES: These are tributaries on the east bank of
14 the Jordan River -- I am sorry, the west bank of the Jordan
15 River, and this land is bounded on the south by Bayou LaCroix,
16 which is a navigable, in-fact, waterway.

17 QUESTION: Now, is the Jordan River a fresh-water
18 river or a salt-water river?

19 MS. SONES: The Jordan River is salt-water river.

20 QUESTION: And are the tributaries also salt-water?

21 MS. SONES: These tributaries are also salt-water.
22 They, like any other waterway, also have fresh water that comes
23 into them by drainage -- you know, every time it rains you have
24 a runoff. And so, at times, these rivers may in fact, be more
25 fresh-water than salt-water.

1 QUESTION: To the extent they contribute anything to
2 the Jordan River, are they not fresh?

3 MS. SONES: They are salt-water as -- at times they
4 would be fresh-water.

5 QUESTION: To the extent they contribute water to the
6 Jordan River, are they not entirely fresh?

7 MS. SONES: To the extent they contribute to it, the
8 Jordan River backs up into these tributaries.

9 QUESTION: So that it is the effect of the backup
10 that raises the level. Well, would it not be possible that a
11 tributary that your rule would apply to would be made up
12 entirely of fresh water? And just have the tidal influence
13 raise the level of the water somewhat by reason of the backup?

14 MS. SONES: It is possible that they could be mostly
15 fresh water, if you go for a long period of time without any
16 rain, then the salinity content of any of these areas would be
17 very high. These would be times --

18 QUESTION: Well, I suppose in that case, they
19 probably would not get much influence from the tide, either,
20 would they?

21 MS. SONES: Well, the tide would not change, since it
22 is coming in from the Gulf of Mexico. The tidal influence
23 would always be the same. It is the amount of the fresh water,
24 the actual runoff from the rain that would make a difference.

25 QUESTION: What is the purpose -- and your opponent

1 argues that the purpose of the "public trust" doctrine should
2 be kept in mine, and it focuses on discrete bodies of water
3 that can be named either as "bays," and so-forth -- what is the
4 purpose of the "public trust" doctrine as to what we are
5 talking about in this case?

6 MS. SONES: The "public trust" doctrine is used in
7 Mississippi and the Record indicated what interest the public
8 actually has in this land. There were testimony of at least
9 seven witnesses who indicated that they had fished in these
10 waters, in these 42 acres. They had fished for some salt water
11 fish, including flounder and bluegill and catfish, and these
12 areas were used by the public at least for 50 years, by one
13 witness.

14 Another witness stated that the mouths of the little
15 bayous were fished because the fish would come out with the
16 tide. These also were used by the public for hurricane
17 protection of their vessels. When a hurricane was coming in,
18 everybody would take their boat in and hide them in some of
19 these estuaries that are in question. They were used for
20 loading dock -- well, there was a loading dock adjacent to one
21 of these parcels where actually one of them was used to haul
22 paper wood and pulpwood across these waters.

23 The parcels were designated in the Record as a "small
24 bayou, a bayou, an inlet, a bayou with several tributaries, and
25 as a channel." But all of these waterways connected to a

1 navigable, in-fact, waterway: the Bayou LaCroix or the Jordan
2 River. So they are all actually "creeks of the sea." They are
3 "arms or creeks of the sea." They are important estuaries in
4 that their fish and other aquatic life that grow and prosper,
5 the waters with their underlying soils have historically
6 belonged to the people of the State of Mississippi.

7 QUESTION: Ms. Sones, if the decision below was
8 correct, that the public trust land extends even to discrete,
9 separate, small tributary streams, conveying fresh water into a
10 tidally-influenced area, apparently, according to the brief of
11 the American Land Title Association as amicus, if that is
12 correct, there are literally millions of landowners throughout
13 the United States who would be divested of their property
14 contrary to the understanding and expectation of those owners
15 and the title insurance company that have insured their title
16 through the years. Is that a concern that we should we should
17 have in viewing this decision?: Because it would extend, of
18 course, beyond the boundaries of Mississippi.

19 MS. SONES: It is a factor, but not one that we feel
20 is something that would actually change land titles. For the
21 states that have been using "ebb and flow" as the test of
22 ownership, there would be no change in the title -- the title,
23 to tidally-influenced waters. Their assertion is that it would
24 impact on titles, but in Mississippi, this has always been the
25 law that we use the "ebb and flow" test. Because of this, we

1 do not feel that it will disrupt titles in our State or others,
2 as they have indicated.

3 QUESTION: How deep are these bayous? Are they as
4 deep as the one in Louisiana?

5 MS. SONES: These bayous -- some of them. Some of
6 these bayous are --

7 QUESTION: That is pretty deep.

8 MS. SONES: -- are I would say anywhere from two feet
9 to four feet on up to 15 feet -- the Jordan River itself is
10 about 30 feet deep, and it is commercially navigable.

11 QUESTION: But some small bayous are also deep?

12 MS. SONES: And some of these are also deep,
13 particularly when the tide comes in. They are bayous just like
14 Louisiana's bayous.

15 MS. SONES: The Submerged Lands act of 1953, which
16 was discussed earlier, we feel confirms the State's title in
17 tidally-influenced waters to the main high tide line. We do
18 not assert that this changes any title that the State has.
19 This is just a confirmation of what Mississippi already had in
20 its tidally-influenced waters. There additionally were
21 instances in the Record which show that a 14 foot flatbottom
22 boat could get in on these waterways and actually navigate on
23 them. These were people who came in to fish and to swim or to
24 bathe. These were uses that the public has made of these areas,
25 and if the public is deprived of these areas, we are -- this

1 will undermine an important right that they feel they have in
2 these 42 acres.

3 We are looking to make sure that our land, as we have
4 established it, the main high tide line, is used in this case,
5 because the public needs to know where the definition of the
6 boundary is. This is something that they have always thought
7 they had by virtue of the fact that testimony had revealed that
8 they had gone up in these waterways and they have used it for
9 all sorts of purposes, particularly fishing.

10 The test asserted by Petitioners, the "navigable-in-
11 fact" test, was a test that was applied to interior waterways.
12 Now, because these two waterways which we have in question
13 here, the Jordan River is a "navigable-in-fact" waterway; the
14 Bayou LaCroix on the south boundary, is also navigable. They
15 do not assert any particular way to define where the cutoff
16 will be. We would have to employ some other arbitrary rule on
17 these waterways to take them out of the public domain, such as
18 the quantity of tonnage, or the depth of the waterway, or
19 perhaps the type of vessel that could navigate on the
20 waterways.

21 QUESTION: And anyway for some tributaries further up
22 the Mississippi, are you not -- or is the Mississippi tidal --
23 throughout the State?

24 MS. SONES: The Mississippi River, as Mr. Gressman
25 indicated, is tidally-influenced up about 30 miles.

1 QUESTION: So above that you are going to confront
2 this same problem anyway. It is not as though you are coming
3 out the way you want as to -- would avoid the necessity of
4 determining where a navigable river ends, and how much of a
5 tributary to a navigable river is part of the navigable river,
6 that is still going to be a problem, is it not?

7 MS. SONES: It is our contention that where you have
8 a "navigable-in-fact" waterway, you will always have some areas
9 that you cannot navigate over. It might be a few inches toward
10 the shoreline, but if you had determined that it was navigable-
11 in-fact waterway --

12 QUESTION: I understand that, but are you going to
13 answer my question?

14 MS. SONES: I am sorry, Your Honor?

15 QUESTION: My question is, the confusing difficulty
16 you were just referring to, cannot be totally eliminated even
17 if we come out the way you want us to on this case. It is
18 still going to be necessary to determine with respect to
19 navigable rivers that are above the tidal level where the
20 navigable river ends. That is still going to be a problem is
21 it not?

22 MS. SONES: That is still going to be a problem, but
23 that is a different type of law employed for fresh water as
24 opposed to tidally-influenced waters. We would assert that the
25 "ebb and flow" rule would be dispositive of this case because

1 we are using it to mean "high tide line" as our definition of
2 State boundaries.

3 We respectfully request that Mississippi be allowed
4 to continue our stewardship of the public trust domain over all
5 lands that are tidally-influenced up to the line of the main
6 high tide, and to protect our investment in the future of our
7 State's public lands.

8 QUESTION: May I ask one other question before you
9 sit down? When I was asking you before about the fresh water
10 and the salt water, you indicated that some of these
11 tributaries were used for fishing. I think your opponent's
12 brief said that some of them had also been used for things like
13 cattle grazing and normal pursuits that would not be associated
14 normally with the "public trust" doctrine. Is that correct as
15 a matter of fact?

16 MS. SONES: There was a witness who testified in the
17 lower court that he had cattle that he saw at times would graze
18 down to some of these areas in question, and also the Jordan
19 River, which is primarily a salt water river, but you would
20 find this on any waterway that also flows from the Gulf of
21 Mexico or any other salt water body where at certain times of
22 the year, if you had a lot of rain, the cattle could come down
23 there and graze, but at other times the salinity content would
24 be so high that it would be impossible for them to drink out of
25 that water.

1 He also further stated in his testimony that there
2 were wells and other ponds on the land itself for the cattle to
3 graze. You know, this was just at odd times that the cattle
4 could graze from these waters.

5 QUESTION: Thank you.

6 CHIEF JUSTICE RHENQUIST: Thank you, Ms. Sones.

7 Mr. Gressman, you have three minutes remaining.

8 MR. GRESSMAN: Thank you, Your Honor.

9 I would just say immediately that neither the Jordan
10 River nor these little tributaries are primarily salt-water in
11 content. There is a very low salinity rate, and they are
12 basically carrying fresh water either from the uplands or
13 further back up the Jordan River area.

14 But in any event, I would certainly state in further
15 confirmation of Justice O'Connor's query about the impact of an
16 affirmance of this decision upon the many landowners who have
17 for generations thought that they had title to the little
18 streams and rivers that run through their property.

19 And by the way, Lord Hale, who Ms. Sones quoted, also
20 said, among other things, that "there are little rivers which
21 are private forming no part of the King's Highways."

22 Again, I reiterate, that the king's highways -- the
23 public highways today, are devoted --- are there for the
24 purpose of carrying on the commercial activities of the public,
25 be it navigation, or fishing or whatever. And when Ms. Sones

1 refers to the fact that there was an occasional fisherman
2 engaging in fishing operations, he was not doing that as a
3 commercial operation; and in any event, our problem is not what
4 some lonely fisherman may do today, it is what was the purpose?
5 Was there a commercial navigability purpose to these lands in
6 1817? Because that is where the federal question begins and
7 ends, and we are concerned only with whether these lands,
8 underwater lands, were commercially navigable in 1817 at the
9 time of Statehood? And what has happened thereafter is of no
10 consequence in determining that federal question.

11 Now, with respect to the impact of this: there are
12 untold numbers of landowners in Mississippi whose title to non-
13 navigable, little streams running through their property will
14 be put in jeopardy. More than that, there are before this
15 court in the form of amicus curiae all twenty-two coastal
16 states. Upon the Affirmance of the Mississippi court doctrine
17 --

18 CHIEF JUSTICE RHENQUIST: Your time has expired, Mr.
19 Gressman.

20 MR. GRESSMAN: Yes, they would be --

21 CHIEF JUSTICE RHENQUIST: The case is submitted.

22 MR. GRESSMAN: The case is submitted, right, Your
23 Honor. Thank you very much.

24 [Whereupon at 10:55 a.m. the case in the above-
25 entitled matter was submitted.]

REPORTER'S CERTIFICATE

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2
3 DOCKET NUMBER: 86-870

4 CASE TITLE: PHILLIPS PETROLEUM COMPANY AND CINQUE BAMBINI
5 PARTNERSHIP v. MISSISSIPPI AND SAGA PETROLEUM, U.S., INC.
6 HEARING DATE: November 9, 1987

7 LOCATION: Washington, D.C.

8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 Supreme Court of the United States.
12 and that this is a true and accurate transcript of the case.

13 Date: November 9, 1987

14
15
16 *Margaret Aaley*
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