

1950

## Provo City and State of Utah v. William M. Jacobsen, et al : Brief of Respondents

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

**PROVO CITY**, a Municipal Corporation,  
*Plaintiff and Appellant,*

**vs.**

**WILLIAM M. JACOBSEN**, et al.,  
*Defendants and Respondents,*

**STATE OF UTAH**,  
*Plaintiff in Intervention and Appellant,*

**vs.**

**WILLIAM M. JACOBSEN**, et al.,  
*Defendants and Respondents.*

Case No.  
7402

**RESPONDENTS' BRIEF**

**FILED**

FEB 9 1958 **B. VERNE McCULLOUGH, and  
CLIFFORD L. ASHTON,**

**Clerk, Supreme Court, Utah** *Attorneys for Respondents.*

# INDEX

	Page
STATEMENT OF FACTS . . . . .	1
ARGUMENT . . . . .	11
1. THE ADDITIONAL EVIDENCE HEARD BEFORE JUDGE HUNFORD IS INSUFFICIENT TO FORM A BASIS FOR A FINDING CONTRARY TO THE FINDINGS MADE BY JUDGE YOUNG AND REAFFIRMED BY JUDGE HUNFORD. . . . .	11
2. THE EVIDENCE SUBMITTED BY THE PLAINTIFFS IS SO COMPELLING AND CONTRADICTORY THAT IT SHOULD NOT BE RELIED UPON BY A COURT IN DETERMINING A BOUNDARY BETWEEN PLAINTIFFS AND DEFENDANTS. . . . .	16
3. THE GREAT WEIGHT OF THE EVIDENCE CONCLUSIVELY SHOWS THAT ALL THE LANDS IN QUESTION WERE ABOVE THE HIGH WATER MARK AS DEFINED BY THE COURT'S DECISION. . . . .	18
CONCLUSION . . . . .	22

## INDEX OF CASES

Provo City v. Jacobsen, et al., 111 Utah 39, 176 P. (2d) 130 . . . . .	12
Provo City v. Jacobsen, et al., (on rehearing) 111 Utah 68, 181 P. (2d) 213. 3, 13	13

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**RESPONDENTS' BRIEF**

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**STATEMENT OF FACTS**

Over eight years ago Provo City initiated an action to condemn lands occupied by the respondents. At the time the suit was brought respondents were admittedly in

possession. Immediately after the order of occupancy had been signed on December 17, 1941, the State of Utah intervened as a party plaintiff on the theory that the State holds the land condemned for an airport as trustee for the people of the State of Utah. After much litigation in the Fourth Judicial District Court of Utah County, the Honorable Dallas H. Young, who was then sitting as a District Court Judge, ruled on the legal questions raised by respondents' affirmative defenses, and held that these legal defenses did not constitute a valid claim of title against the State of Utah. However, after ruling against the respondents on the legal questions raised as to title, the District Court held as a matter of fact that the appellants, who have the burden of proof, had failed to make a case and that, therefore, the long standing possessory interest of the respondents should prevail.

This ruling of Judge Young was appealed to the Utah Supreme Court and on January 3, 1947, this Court, after due hearing, affirmed the judgment of the District Court judge and ruled that the respondents were the owners of the lands in question. One of the Justices, who was at that time a member of the Utah Supreme Court, dissented from the majority opinion. Thereafter a petition for re-hearing was filed and, without hearing, the court ruled on May 28, 1947, that its former decision "is therefore modified to conform with the views herein expressed and the case is remanded to the District Court to take further evidence if the parties so desire on the issues herein discussed but not previously determined, and from such evidence and the evidence already received, the court shall fix and determine the exact

location of high water mark as it was on these lands at the time Utah became a state, and therefrom fix a boundary line between the State and these defendants on that high water mark and quiet title of the lands of the respective parties." (111 Utah 71; 176 P. 2d 130.)

The Court in stating its opinion in the re-hearing proceeding said:

"The three justices who concurred in the original prevailing opinion are now all of the members of the court who participated in that decision who are still members of the court, therefore they are the only ones who are participating in this decision. We still adhere to the law therein announced to the effect that the state owns the lake bed as it was at the time when Utah became a state; that the boundary line between its lands and the privately owned property is the high water mark *as it is marked on the land, and that the finding of the trial court that there was a shore line marked on the land running from the old Provo Resort to Will Peay's cabin is supported by a preponderance of the evidence and is binding on the parties to this action.*"

The Court, however, did feel that the boundary of the land to the east of the old shore line from the Resort to Will Peay's cabin was not established and that the trial court, after hearing evidence, should attempt to establish it.

Beginning on the 24th day of May, 1948, Judge William Stanley Dunford heard testimony and received exhibits produced and introduced by the appellants in their attempt to establish a high water mark. The theory on which they attempted to establish this fact was on the basis of testimony

given by Dr. George H. Hansen, who was a professor of geology at the B. Y. U. (Tr. 3). Dr. Hansen's testimony related to geological formations which he was able to identify in the vicinity of Lincoln Beach at the south end of Utah Lake, where the formation is apparently hard and resistant (Tr. 4). The evidence was related, for the most part, to plaintiffs' Exhibit BB, which is a rough profile drawing of the geological formations which he refers to. The appellants have pointed out in their brief that Dr. Hansen identified a point which, in his opinion, was the most recent high water mark of the lake (Tr. 141, Plaintiffs' Exhibit BB). A full reading of Dr. Hansen's testimony, however, will reveal that point "B" is purely an academic choosing of a point which is conveniently called "high water mark" and that point "B" is entirely unrelated by any concrete evidence to an actual high water mark as interpreted by this Court's decision as it existed January 4, 1896.

On cross examination the Doctor stated that the terrace formed from "E" to "D" shown on Exhibit BB took thousands of years to form; that the terrace from "D" to "C" took thousands of years to form; and that the terrace from "C" to "B" represents thousands of years in geological time (Tr. 31, 32). The Doctor also admitted that it was impossible to relate either point "B" or point "D" to the actual water level of Utah Lake at the time of statehood (Tr. 32). In fact, the Doctor further admitted on cross examination that terraces could have been formed below point "A" and even the present level of the lake prior to or at the time of statehood, and that such terraces would have been obliterated by the action of water (Tr. 33).

The Doctor interestingly admitted on cross examination that he was acquainted with the artificial obstruction at Jordan Narrows and testified that such an obstruction has a tendency to artificially raise the elevation of the lake and prevent the lake, in its normal process of evolution, from diminishing and decreasing in size to its ultimate point of natural elimination (Tr. 35). It was interesting to note from the Doctor's testimony that the point "B" which is relied upon by appellants as their "present" high water mark, coincides with the approximate elevation of meander line, which proposed boundary has already been rejected by both the District Court and this Court on appeal (Tr. 36).

The Doctor, while being unable to relate point "B" to any specific historical or even geological time, admitted that terraces similar to those formed between "E" and "D" and between "C" and "B" could have been formed under the present elevation of the lake and have been obliterated by later encroachments of water. The only difference upon which the Doctor insists is that the terraces which may have been obliterated would have to be smaller than those formed between "E" and "D" and "C" and "B". However, he admits that terraces which took hundreds of years to form could have been small enough to have been obliterated (Tr. 36, 37).

The Doctor was even unable in his testimony to state whether the terrace formed between "E" and "D" was formed before "C" and "B", or vice versa, and also unable to tell whether terraces formed below "A", which may have been obliterated, were formed either before "E" and "D"



or "C" and "B", or vice versa. In other words, the geologist quite honestly was unable to relate any of these terraces in point of time to January 4, 1896, or to any other approximate date or historical era.

On continued cross examination Dr. Hansen identified on respondents' proposed Exhibit 8-B an old meander stream which he was able to trace over two-thirds of the way south across the property (Tr. 64). He further stated that these meanders are typical meanders which are associated with the delta of Utah Lake, and that *"delta is ordinarily that part of the land near a river which is very rich and very useful for farming purposes."* (Note that the high water mark urged by appellants is above and beyond all of this very rich and very useful farm land) (Tr. 68). The Doctor admitted that even in 1927 when Utah Lake flooded some of the best farming land in Utah County, the water did not reach the elevation of point "B", and that he knew of no time within his own knowledge when the water of Utah Lake had reached that high an elevation (Tr. 69).

On cross examination the Doctor stated as follows (Tr. 72) :

"Q. So relying on your own knowledge, Doctor, and without the assistance of any historical material or any hearsay material whatever, you don't know how many years it has been since the water reached point "B"?

"A. No, not exact years, no."

At page 73 the Doctor said:

"Q. And the life history of lakes in America is a gradually receding line?

"A. In Western America?

"Q. That's right.

"A. That's right.

"Q. Doctor, I want to be sure of one thing: Then the only information you can give us about these recent times is from this geological structure which took, as you said, thousands of years to create?

"A. Long periods of time.

"Q. And whether or not the water was between A and B or below A in recent times, you don't know except of your actual observation?

"A. That's right.

"Q. And you have never observed it as high as Point B?

"A. Well, so far as I recall it has never been to Point B since I have been here."

At page 74 of the transcript appears the following:

"Q. Well, in geological time would you give us your best judgment as to when the terrace C and B was formed?

"A. I should think several thousand years could well be involved. Let me say, we visualize when the lake stood at this here (indicating), you maybe had something like this, and since that time all this below our dotted line has been carried away and in the process of carrying it away.

"Q. Now, Provo City, Doctor, is located on one of these areas between terraces, isn't it, on what you call Provo Bench?

"A. Yes, Provo City would be, without knowing exactly, maybe about the equivalent of "E", maybe a little lower than that."

At page 82 of the transcript the following appears:

"Q. But you did find definite evidence that the lake at sometime was much lower than it is now?

"A. Well, that's all right, yes.

"Q. And over a long period of time?

"A. Yes, over a considerable period, I would say, probably many years, probably not a thousand, all depends \* \* \*"

(This fact was determined by digging pits in the bed of the lake which revealed evidence of sand deposits intersticed between layers of silt indicating old lake levels below present lake levels.)

The appellants called J. Neil Murdock, who is a regional geologist for the Bureau of Reclamation. His testimony, geologically speaking, supported and corroborated the geological testimony given by Dr. Hansen. The witness, Murdock, stated on cross examination that by high water mark he did not mean water lines that would change the vegetation; he meant geological structures which took thousands of years to form (Tr. 53, 54).

At page 56 of the record the witness Murdock on cross examination said:

"Q. Do you know when it was that the lake stood in between those points in the cycle represented by C and B? Do you know what portion of the cycle that the wave action made the terrace at C and B?

"A. It stood between those points at many different times in the cycle. It fluctuated between B and C many times.

"Q. Let me get this straight. Between A and B, you said it would take hundreds and thousands of years to make this geological structure, didn't you?

"A. Yes.

"Q. And the lake is clear down to the bottom of A now?

"A. That doesn't mean it didn't go back to B, and maybe to C.

"Q. In other words, you think the lake after it got down to this point here could have been up to B or up to C?

"A. It undoubtedly did.

"Q. Is there any evidence for that? Do you have any evidence for that fact, or are you just guessing at it?

"A. (No answer by the witness)."

At page 59 of the transcript the witness said:

"Q. So that the lake can fluctuate not only below A but above A without finding any geological evidence for it, can't it?

"A. That's right.

"Q. Especially if it does it within a period of one hundred years; is that correct?

"A. Less than one hundred years, I would say.

"Q. And the same thing could occur between B and C without leaving geological recording in the rocks or the formation of this lake terrace?

"A. A short time high water mark, say between ten and fifty years, shouldn't leave any mark between B and C. Is that your question?

"Q. That's right.

"A. That's right.

"Q. So that the lake could stay there for fifty years, and if it moved down or moved back, covered it all, all the geological recordings would be gone, wouldn't they, of the water marks that had been there for fifty years?

"A. The fifty-year marks would be gone, but the thousand-year marks would still remain."

Dr. Hansen was recalled later during the hearing to establish formations other than the one designated as "B" on Exhibit "BB". These were identified as possible "high water marks."

One of these "notches" was designated as "A-1". The other was designated as "A-2." Both are identified on Exhibit "BB" (T. 141). On cross examination the real nature of the notches appeared. The doctor admitted that the two notches were two of several that existed between A and B (T. 143). His reason for choosing A-1 and A-2 does not appear too clear, except that they seemed to him "the most important of the lot."

The doctor did not attempt to say when the two notches had been formed. He did admit that they could have been formed a thousand years before (T. 144), and that other notches below the water could likewise have been formed thousands of years before (T. 144). At no time did the doctor pretend to say that any of the notches were related to 1896. In fact he was unable to relate any notch to any particular time, or in fact to say whether one notch was formed before or after another.

The only testimony given by the doctor relating to the lands in question appears at page 149 and following where he states that the formation along the shore line where the lands in question are located is alluvium—soft material (T. 149), and that high water going over such alluvium would tend to obliterate any shore markings and level out land adjacent thereto (T. 150). The doctor further indicated that the contour elevations existing prior to high water going over a soft bank would be changed (T. 153).

Mr. Glen A. Wright, a civil engineer, testified that he ran levels corresponding to the formations identified by Hansen. Point "B" has an elevation of 4490.21 (T. 156).

"A-1" has an elevation of 4488.95 and "A-2" has an elevation of 4489.67 (T. 157).

He attempted to relate these elevations to the lands in question. (Note that not only had there been at least two floodings of this entire area since Statehood, the present area is completely changed by the construction of cement runways entailing grading and deposits of tons of gravel and basic materials.) He related his elevations to Exhibit "AA".

Mr. Jacobs was called to re-identify Exhibit 5-MC, on which he identified contours as high as 4491 feet above sea level (T. 125). The amazing thing about this exhibit is that it was introduced by defendants to impeach the testimony given by Mr. Jacobs at the original trial where he had stated under oath that the elevations shown on 5-MC were erroneous and therefore disregarded (Original record R. 508).

Mr. Jacobs at the original trial identified Exhibit "J" which is a copy of Exhibit "I". The blue portion of the map indicates the witnesses's graphic conception of the area covered by water when Utah Lake reaches compromise elevation of 4488.95 (Original R. 313). The blue area completely covers the old shore line which this Court adjudicated existed at the time of Statehood. Also this entire area is below the elevations of point "B", "A-1" and "A-2" now claimed by plaintiffs as "high water marks."

## ARGUMENT

### 1. THE ADDITIONAL EVIDENCE HEARD BEFORE JUDGE DUNFORD IS INSUFFICIENT TO FORM

A BASIS FOR A FINDING CONTRARY TO THE FINDING MADE BY JUDGE YOUNG AND REAFFIRMED BY JUDGE DUNFORD.

The hypothetical "water marks" designated as "B", "A-1", and "A-2" by Dr. Hansen, as determined by bench marks, notches, and niches, cannot properly be identified as the "high water mark" identified by this Court wherein at page 44 of its original opinion in this case, (*Provo City v. Jacobsen et al.*, 111 Utah 39, 176 P. (2d) 130) the Court said:

"'High water mark' means what that term indicates—a mark on the land impressed on the soil by covering it for sufficient length of time so that it is deprived of vegetation and its value for agricultural purposes."

The Court then found that the *great weight* of the evidence showed that there was no "high water mark" on any of the lands of defendants. The Court said:

"Such a finding is in accord with the great weight of the evidence. Many witnesses testified that at the time Utah became a state and prior thereto, trees, grass and other vegetation grew thereon, cattle were pastured there and part of it was under cultivation. In addition thereto there was undisputable evidence that about 1887 the old Provo Resort was built near the northwest corner of these lands and a railroad built to this resort; that trees and grass were planted and grew around the resort from the time it was built until after the time of statehood; that Will Peay built his cabin near the southwest corner of these lands in 1892 and lived there during the summer months for several years

thereafter; that artesian wells were drilled both at the resort and near the cabin. These facts point unmistakably to the fact that this land was not made useless for agricultural purposes even though the high water did for a short period most years cover the land, and they support by a preponderance of the evidence the finding that these lands were above the high water mark."

On petition for rehearing this Court did not change its original opinion as to what constituted a "high water mark." (Provo City v. Jacobson et al., 111 Utah 68, 181 P. (2d) 213.) And on the basis of the evidence and its former opinion reaffirmed its findings that there was an old shore line from Will Peay's cabin to the old resort. It did, however, send the case back for further evidence as to where the "water mark" was east and south of the old shore line.

Dr. Hansen's testimony relates to geological time and epochs. His point "B" took thousands of years to form (T. 31-32). It is in reality a small bench mark, and is entirely unrelated in time to statehood or any other historical period. The point may have been established thousands of years ago. Furthermore, other similar points have been established on higher and lower elevations, and it is impossible for Dr. Hansen to relate one or the other to any particular time. His testimony that "B" took thousands of years to form does not even establish that its formation took place in any particular era, but simply that it took thousands of years to form.



If this sort of evidence is probative to prove "high water mark" at statehood then any bench mark in Utah County could be considered.

It will be noted that the elevation of "B", 4490.21, is 1.26 feet above compromise elevation. 1.48 feet above compromise is the elevation shown on Exhibit "E", which elevation was rejected by the trial court in plaintiff's second effort to make a case. This elevation was also referred to by this Court at page 43, *supra*, and was rejected as based on a hypothetical graph average.

The elevation "A-1" referred to by Dr. Hansen is oddly the exact elevation of compromise. Compromise elevation was never considered a high water mark. It was a point agreed upon by the land owners and the canal companies. In exchange for a consideration the land owners agreed that in high water the canal companies could back water on *their land* to a fixed point without being subject to damages.

The fact that one of the notches designated "A-1" was chosen means very little. The "notch" is, like "B", unrelated in time to 1896 or any other period. The notch could have been formed before "B" or after "B", and could have been formed before or after notches which are both higher and lower than "B" (T. 144).

The notch designated as "A-2" has an elevation of 4489.67 (T. 157). It is subject to all the objections attaching to "B" and "A-1". It is unrelated in time, and it is anyone's guess as to whether it was formed 10,000 or more years ago, or whether it was formed 300 years ago. In any event, it took 100 or so years to form (T. 143-5).

How could Judge Dunford conscientiously relate these elevations to lands that had been fenced and occupied by defendants for years prior to statehood?

There is another objection inherent in the elevations submitted by plaintiffs. The elevations at "B", "A-1" and "A-2" are indicated by notches, niches, wave marks, and bench marks at Lincoln Beach, where, according to the testimony, the formation is hard and resistant. Presumably, this resistant beach is in approximately the same condition, geologically, as it was in 1896. This is not true of the lands condemned. The evidence is beyond dispute that high water has gone over the entire area on at least two occasions. This area, according to Dr. Hansen, is made up of soft material. At pages 149-50 of the transcript the witness stated that high water over the formation of the lands in question would "tend to obliterate your shoreline markings." And at another point he indicated that the material washed from the shoreline would spread over the adjacent ground and make major changes in the contour elevations.

Since the lands have been condemned the entire area has been graded and tons of material have been hauled in and utilized in the construction of runways. It therefore is beyond dispute that the effect of flooding and construction has changed the elevation and contour markings of the lands in question radically since 1896. This being so, how can the elevations taken at Lincoln Beach be related to the condemned lands? And if they were related they would follow a hypothetical line over nearly level grade. It would be impossible for a surveyor to find any

mark to which he could correlate the elevation on the grade in question. His line could vary a mile and still run along the same elevation?

2. THE EVIDENCE SUBMITTED BY THE PLAINTIFFS IS SO CONFLICTING AND CONTRADICTORY THAT IT SHOULD NOT BE RELIED UPON BY A COURT IN DETERMINING A BOUNDARY BETWEEN PLAINTIFFS AND DEFENDANTS.

When the case first came to trial plaintiffs proceeded on the theory that the old 1856 meander line established their boundary. Both the District Court and this Court ruled against them on this question. Next they tried the theory of hypothetical water levels related to land levels. This elevation was established as 1.48 feet above compromise. Again they were ruled against by this Court and the District Court. In their third attempt they relied on old notes of Doremus and testimony of witnesses who placed all the land under water at a time when a steam locomotive made daily trips across the ground to and from the old resort and Provo City. Both the District Court and this Court found against plaintiff on this issue, which for purpose of identification can be called the compromise elevation theory.

The hearing in Provo in 1948 added nothing, unless the Court wants to rely on the academic niches, notches, and bench marks on Lincoln Beach. Judge Dunford did not accept them.

These new elevations are simply a rehash of plaintiff's old theories, now repudiated. Point "B" is an approximation

of 1.48 relied on in plaintiff's second case in chief, which elevation also approaches meander line, also repudiated. Point "A-1" is exactly compromise elevation, also repudiated by the Courts in plaintiff's third try. Point "A-2" is a compromise between both elevations.

It is in attempting to relate these elevations to the condemned lands that plaintiffs have introduced conflicting testimony. Exhibit "J" prepared in the office of Elmer Jacobs purports to show the north half of the property. It is a copy of Exhibit "I". The blue portion on the map represents the witness's conception of where the water of Utah Lake stands when the water reaches compromise elevation. It will be noted that this blue area completely covers the "old shore line" which is established by the opinion of this Court. Therefore, according to Exhibit "J", the old shore line is below 4488.95? If this is true, the elevations introduced relating to "B", "A-1", and "A-2" are entirely incompetent, and immaterial, as all these elevations are as high or higher than 4488.95. Elevations higher than 4488.95, if "J" is correct, would be contra to the res judicata decision of this Court that an old shore line existed along the west side of the property.

Exhibit "5-MC" introduced by Jacobs to support his conclusions illustrated on Exhibit "J" revealed a very interesting fact. On the reverse side of the exhibit were elevations on the identical ground four feet higher than those on the face of the exhibit. Mr. Jacobs said these elevations were erroneous. At that time they conflicted with his theory that the lands in question were all practically below compromise elevation.

At the rehearing and trial before Judge Dunford in 1948 Jacobs did an amazing thing. This Court had clearly stated that there was an old shore line from the resort to Will Peay's cabin. This necessarily raised the shore line above compromise elevation. Therefore Exhibit "J" had no further use. In order therefore to relate the elevations at "B," "A-1" and "A-2" to the lands in question, it was necessary to have land higher than compromise elevation. Mr. Jacobs got these higher elevations from the back of "5-MC". These elevations are almost four feet higher than the elevations on the front side, and these lower elevations are the ones he vouched for at the first trial. The ones on the back, which he now relies on, were at that time repudiated by him! Certainly defendant's rights should not be based on such conflicting evidence.

### 3. THE GREAT WEIGHT OF THE EVIDENCE CONCLUSIVELY SHOWS THAT ALL THE LANDS IN QUESTION WERE ABOVE THE HIGH WATER MARK AS DEFINED BY THE COURT'S DECISION.

As herein indicated the Court said that "high water mark" means a mark so impressed that it has deprived the land of "vegetation and its value for agricultural purposes."

The great weight of the evidence clearly shows that this land was not only fit for agricultural purposes, but was used for agricultural purposes before and after statehood, and up to the date of the occupation order.

Plaintiff's witness Dr. Hansen, stated at page 64 of the transcript that he recognized on Exhibit "8-B" the mark-

ings of an old meander stream on the property, and that it was typical of meanders which are associated with the delta of Utah Lake, and that *"delta is ordinarily that part of the land near a river which is very rich and very useful for farming purposes."*

The defendants produced 11 witnesses. Two of them were surveyors. Mr. Stewart, who is at present U. S. Registrar of the Utah Land Office, surveyed the lands and platted them as shown by Exhibit "12-MC". This map delineated the lands as well as he was able to do so in 1923.

Mr. Parley Peay (R. 702-255), Mrs. Ruth Farrer (R. 757-843), Mr. William Peay (R. 867-992), Heber A. Knudsen (R. 1006-1114), Reed Knudsen (R. 1127-1181), Hugh Ross (R. 1184-1228), and William Jacobsen (R. 1273-1358) all testified to actual observations of the lands in question before and after statehood. (Their testimony is abstracted at length from page 13 to page 34 of defendants' brief heretofore filed with this court, and references are made therein to the record wherein their written testimony appears.)

The testimony of these witnesses who played, worked, and lived on the property shows the following:

Immediately north of the west edge of the property there was a large resort. This resort consisted of a dance hall, bath houses, ice house, bowery, saloon, laticed booths, and pavilion. It was located in a setting of grass and large cottonwood trees. These trees were approximately two feet in diameter. In this setting were three flowing wells.

North of the east edge of the property was an old race track. Running south of the race track across the lands of

defendants and connecting Provo City with the resort was a railroad track along which a steam locomotive made daily trips during the resort season, which, parenthetically, is the high water season. Running approximately parallel to the track was a road.

Running south from the resort to Will Peay's cabin (shown on Exhibit "12-MC") was an old shore line marked by a steep bank. This shore line was considerably west of the "present shore line" shown on Exhibit "12-MC". (The testimony of the witnesses varied somewhat as to how far west it was from the "present shore line." At the resort area the distance varies from  $\frac{1}{2}$  block to 40 rods; at the monument area the distance is given as 10 rods to 600 feet; and at Will Peay's cabin the minimum is 10 rods west and 15 rods south with a maximum of 50 rods west and 20 rods south.) The minimum distance given by the witnesses extends the west shore lines well beyond the west boundary of the lands condemned.

Along this old shore line were large cottonwood trees. They extended from the resort to the cabin. These trees were uprooted and washed away in the high water of 1922. This same high water cut away the old shore line and washed it back to the point designated as the "present shore line" shown on "12-MC."

Running east of Will Peay's cabin was an old channel. It bordered the southern edge of the property shown on "12-MC." All the land one and a half miles east of Will Peay's cabin and north of the old channel was dry from 1887 to 1903. This fact was affirmed by every witness who

was on the land from 1887 till after statehood. (Will Peay, Parley Peay, and Hugh Ross 1887 to 1903, and others immediately before and after statehood.) Mr. Hugh Ross, who was not an interested party, testified that from 1887 until 1903 there was no water east of the Will Peay cabin area for a distance of a mile and a half. All the other eye witnesses called by defendants corroborated Mr. Ross.

Meandering south from the north edge of the property was a stream known as dry creek. (Note that the remnants of this stream are still present in the aerial photograph referred to Dr. Hansen's attention, Ex. 8-B.) It meandered along the entire length from north to south and emptied into Provo Bay. It was estimated that this meandering stream had a depth of from 3 to 8 feet. From 1887 until after statehood, crops were grown on the land and cattle pastured all the way south to the old channel. In 1887 the soldiers from Fort Douglas encamped for the summer along the west shore line.

These facts were testified to by men who grew up as boys on the property. Most of them reached manhood before statehood. These witnesses swam in dry creek, and in the lake. As small boys they left their clothes at the monument and waded into the waters of the lake for a swim. They herded cows on the property, and one of them, on the very day of statehood made a dollar by looking for a lost cow down by the old channel. These same witnesses rode horseback along the shoreline, skated on the lake in the winter, fished and hunted. One of them built the cabin, known as Will Peay's cabin, and even drilled a well at that point. Mr. Ross drove a steam locomotive across the property and



to the resort daily for many years. He hunted and fished, and knew the property as one would who had worked and played on it for a good part of his life. *These witnesses all testified that all the lands in question were dry, cultivated, fenced, and improved both before and after statehood.*

For years the title has been recognized in defendants. They have been taxed, money has been loaned, mortgages have been recorded, lawyers have given opinions passing title, and in short everyone has assumed that defendants were the record owners. Two District Court judges in the instant case have believed their testimony and have found in their favor.

## CONCLUSION

This brief is supplemental to the original brief filed by defendants in which the evidence is documented and referred to in detail. No attempt has been made in this brief to cite additional law, and no attempt was made at the additional trial to introduce new facts. The evidence introduced by plaintiffs did not convince Judge Dunford, and we submit will not convince this Court that the testimony of a score of eye witnesses should be nullified by graphs, notches, niches, and bench marks, academic in their nature, and unrelated by time or place to the lands in question as they existed at statehood; nor do we believe any amount of theorizing can place railroads, race tracks, large trees, cabins, farms, army encampments, meandering streams, grazing cattle, shore lines, playing children and working men and women under the waters of a hypothetical lake; nor do we believe any amount of moralizing will justify this Court,

after nine years of litigation, in reversing the findings on a question of fact concurred in by two District Judges who heard the evidence and saw the witnesses, and who are supported by the great weight of the evidence. We respectfully submit that there is ample evidence to sustain their findings.

Respectfully submitted,

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