2001

Solar Salt Company v. Southern Pacific Transportation Company : Brief of Respondent

Utah Supreme Court

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REME COURT OF THE STATE OF UTAH

SOLAR SALT COMPANY,
a corporation,
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Defendant-Respondent.

Case No. 14427

BRIEF OF RESPONDENT

Appeal from a Summary Judgment of the District Court of
Salt Lake County, State of Utah
Honorable Stewart M. Hanson, Sr., Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

SOLAR SALT COMPANY,
a corporation,
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Defendant-Respondent.

Case No. 14427

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action in which Solar Salt Company (hereinafter "Solar"), seeks damages and injunctive relief against Southern Pacific Transportation Company (hereinafter "Southern Pacific"), for changes in salt content and lake elevation in the Great Salt Lake, allegedly resulting from Southern Pacific's construction of a causeway across the Great Salt Lake.

DISPOSITION IN LOWER COURT

Based upon the pleadings, memoranda, other documents on file and the arguments of counsel, the lower Court, the Honorable Stewart M. Hanson, Sr., presiding, granted Southern Pacific's Motion for Summary Judgment, dismissing Solar's Complaint with prejudice.[1] (R. 99, 100.)

[1]Solar did not assert to the Court the Second Cause of Action of its Complaint, which was based upon a third-party beneficiary theory, and in effect, stipulated that that cause of action was without merit. (R. 88.)

RELIEF SOUGHT ON APPEAL

Appellant does not enunciate in its brief the relief which it seeks on appeal to this Court, but presumably, appellant seeks to have the judgment of the District Court reversed.

STATEMENT OF FACTS

While the factual statement in Solar's brief may be accepted as correct for the purpose of this appeal, its statement of facts is fragmentary; partially irrelevant and, therefore, misleading in certain major respects and must be supplemented. There is no issue as to any material fact. (Solar's Br., p. 4.)

First and foremost, Solar's business activities, concerned in this lawsuit, relate to the Great Salt Lake and involve the withdrawal of water from the Lake for the purpose of extracting salt (sodium chloride) therefrom. (R. 30-48). Solar's right to extract salt from the Great Salt Lake derives from a Royalty Agreement entered into with the State of Utah as of May 20, 1955.[2] (R. 17-20, 25, 26, 33-37.)

Solar complains of damage to its salt extraction operations due to diminution of salt content and higher Lake elevation, allegedly caused by Southern Pacific's causeway (R. 4) and contends that Southern Pacific should be held liable for such damages under various legal theories. (R. 5, 6.)

ISSUE PRESENTED

The controlling issue involved in this appeal is whether or not Judge Hanson, Sr., was correct in ruling, in effect, that Solar had no right to salt contained in the water of the Lake upon which to base its action for damages and injunctive relief against Southern Pacific.

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[2]Solar's omission of these fundamental facts is commented upon, *infra*, pp. 6-8.

ARGUMENT

POINT I.

SOLAR, AS A NON-EXCLUSIVE LICENSEE OF THE STATE OF UTAH, HAS NO COMPENSABLE CLAIM AGAINST SOUTHERN PACIFIC.

A. The History of the Litigation.

The foregoing portion of this brief relates only a small part of the history of this case as it fits into a larger history of Great Salt Lake cases involving several litigants.

The first case was brought by Morton International, Inc., in the Third District Court, Salt Lake County, Utah, on October 27, 1970.[3] Morton, like Solar, asserted rights to take salt from the Great Salt Lake based upon a certain royalty agreement which Morton had entered into with the State of Utah. Morton contended, like Solar, that the Southern Pacific's causeway was causing dilution of brines in the south arm of the Great Salt Lake, resulting in damages to Morton. Morton also sought an injunction to require modification of the causeway.

The District Court's summary judgment dismissing Morton's complaint was affirmed unanimously by this Court and that decision[4] established the controlling and guiding precedent for the subsequently filed cases. In arriving at its decision in the *Morton* case, this Court was offered assistance by both Solar and Hardy Salt Company, as friends of the Court, so that the Court would appreciate the scope of its decision and also be apprised of all of the legal theories that Morton

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[3]Other cases were filed by Sanders Brine Shrimp Company and Hardy Salt Company in November and December, 1970, respectively, and the present case, the last one, was filed December 31, 1970.

[4]*Morton International, Inc. v. Southern Pacific Transportation Company,* 27 U.2d 256, 495 P.2d 31 (1972), *cert. denied.* 409 U.S. 934 (1972).

might be entitled to recover under, whether or not Morton previously had explicitly asserted all of such theories.[5]

With the position and theories of the three complaining salt companies thus expressed to it, this Court held that:

> (Morton's) right to divert and precipitate the salt is a non-exclusive right, and that no matter what you call it . . . the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953, reserving to the State the salt in the water, to be sold by the state land board *only* upon a royalty basis[6]. . . .

And that notwithstanding conceded damage to Morton,

> [T]here is no compensable claim here because (Morton) has no exclusive right against the State or others to the salt or the water from which it is recovered. . . . 27 U.2d at 259.

Southern Pacific submits that the foregoing, clearcut ruling by this Court is applicable directly to Solar's claim in this action for damage to its salt extraction business and demonstrates the propriety of the District Court's judgment of dismissal.[7] Courts to which the other Great Salt Lake cases were submitted agree.

The cases brought by Hardy and Sanders[8] were consolidated for trial before Judge Willis W. Ritter. Further, those two cases were joined at the request of Morton-Norwich Products, Inc., successor to Morton, by a third case which Morton-Norwich filed in the United States District Court for the District of Utah, after this Court's decision in the original *Morton* case.[9]

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[5]*Ibid.*, 27 U.2d 256, 259, 260.

[6]The royalty agreement from which Morton's rights stemmed is the same form of royalty agreement underlying Solar's rights. 27 U.2d 259, 260 (R. 33-37.)

[7]Solar's attempt to extricate itself from the commonality of basic position that it shares with Morton and Hardy is discussed below.

[8]n.3, *supra.*

[9]This attempted second-bite at the apple by Morton was based upon alleged violations of the federal Rivers and Harbors Act of 1899. 33 U.S.C. §401.

These three cases were tried on a single record with the plaintiffs relying to an extent upon the evidence offered by each other. At the close of plaintiffs' evidence, Southern Pacific moved the Court to dismiss all three complaints. After argument from all of the parties was heard, the Court granted the motion. The Court concluded that the decision of this Court in *Morton, supra,* was applicable and controlling, and that under the decision in *Erie v. Tomkins,*[10] the Court was bound by the decision of this Court. The Court also ruled that the Rivers and Harbors Act of 1899, *supra,* did not apply to the Great Salt Lake since it was a navigable body of water of the State of Uath, not a navigable body of water of the United States. That decision was appealed to the United States Court of Appeals for the Tenth Circuit, and affirmed unanimously.[11]

Before the Tenth Circuit, Hardy Salt Company repeated various legal theories argued to Judge Ritter as premises for distinguishing the nature of its position from that of Morton, in an attempt to allude the controlling, precedential effect of this Court's decision in the *Morton* case. The theories thus argued by Hardy included all of the theories asserted by Solar in this appeal[12] and previously raised before this Court in amicus briefs submitted by Hardy and Solar in the *Morton* case.[13] The Circuit Court considered all of those theories — nuisance, waste, pollution and interference with business interests — and rejected them. The Court held that they provided no basis for distinguishing one salt company's position from that of another, namely Morton.[14]

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[10]*Erie Railroad Company v. Tomkins,* 304 U.S. 64 (1938).

[11]*Hardy Salt Company v. Southern Pacific Transportation Company,* 501 F.2d 1156 (10th Cir. 1974), *cert. denied,* 419 U.S. 1033 (1974).

[12]Hardy Brief to the Tenth Circuit Court of Appeals, pp. 28-38. (Appendix A.)

[13]Brief of Solar Salt Company, Amicus Curiae, pp. 1-5, 8-10; Brief of Hardy Salt Company, Amicus Curiae, pp. 9-11, 18-24. (Appendix B.)

[14]501 F.2d 1161-65.

Reading through form to substance, the Court reasoned:

> The interference with business interests was the precise injury that Morton complained of in its State Court suit. And the rejection of such claims of interference with Morton's business was based upon the principle that only a nonexclusive right to extract salt existed under the royalty agreement and §65-1-15 of the Utah statutes providing for royalty agreements and the taking of salt. *We must agree that Hardy's rights can rise no higher since they come from the same basic source as those of Morton.* (Emphasis added.) 501 F.2d 1163-64.

B. Solar's Present Position.

As indicated above, Solar's Great Salt Lake complaint was the last of a series of complaints to be filed. The Solar case remained dormant, more or less, as the *Morton* case progressed to a final determination. Shortly after the *Morton* decision, Southern Pacific moved the District Court to enter a Summary Judgment, dismissing Solar's Complaint under the controlling precedent of this Court's decision in *Morton*. (R. 49-76.) Solar made no response to the motion at that time, and the case became dormant again while the Hardy, Sanders and Morton-Norwich cases were litigated actively.[15] Following the final determination of those cases, as described above, Southern Pacific supplemented the legal authorities in support of its motion;[16] Solar responded[17] and the judgment now appealed from was entered.

Taking a somewhat confusing, and perhaps extreme position, Solar apparently now is seeking reversal of the District Court's judgment upon the premise that the prior decisions in the *Morton* and *Hardy* cases are not controlling, persuasive precedents as to it.[18]

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[15]Solar's counsel also represented Sanders Brine Shrimp Company in these three cases which were consolidated for trial and appeal.

[16](R. 77-84.)

[17](R. 87-97.)

[18]Solar Brief, Points I and II. Points III through V of Solar's Brief also fall within its basic arguments stated in Points I and II.

The extreme position and length to which Solar extends itself in the attempt to establish a unique position as an extractor of salt from the Great Salt Lake is underscored in its statement of its position before this Court that:

> Solar, in this action, does not rely on contractual rights except to establish the value of its enterprise.[19]

This statement, of course, is a direct contradiction of Solar's sworn answers to interrogatories wherein Solar identified its Royalty Agreement and Lease Agreement with the State of Utah as a source of right underlying its complaint.[20] More important, however, is the conclusive legal impact which this statement has upon Solar's standing to maintain this action. The *only* right which Solar can have with regard to the salt in the Great Salt Lake must be obtained by contract with the State — its Royalty Agreement with the State. As this Court reasoned in Morton:

> '[T]he state as the owner of the beds of navigable bodies of water is entitled to all valuable minerals in or on them' . . . . (Morton's) right to divert and precipitate the salt is a non-exclusive right, and that no matter what you call it . . . the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953, reserving to the State, the salt in the water, to 'be sold by the state land board *only* upon a royalty basis.' 27 U.2d 258, 259.

Solar's abandonment of even the contractual right that it had to purchase the salt under its royalty agreement with the State, only adds further grounds in support of the validity and accuracy of the District Court's judgment of dismissal.

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[19]Solar Brief, p. 5.

[20](R. 24, 25, 30-37.) The contention in Solar's brief, p. 2., that its Statement of Facts is not controverted by its Answers to Interrogatories does not apply to its asserted legal standing to maintain the Complaint herein. In the latter posture, it attempts to use shifting sand in place of bed rock that it does not have for a foundation.

POINT II.

SOLAR'S FURTHER ARGUMENTS ARE UNGUIDED AND IRRELEVANT.

Solar's arguments concerning the non-applicability of the *Morton* and *Hardy* decisions to its theoretical assertions are answered largely in the foregoing sections of this brief. However, some limited response to certain abstract, observation-comments by Solar may be appropriate.

In Solar's Statement of Facts,[21] recitation is made of its involvement in the salt extraction industry on the Great Salt Lake and the damage to its business in that regard. Solar then poses the issue to be resolved by this Court as "whether the law of Utah affords any relief to Solar in the fact situation stated." (Solar Br., p. 4.) Southern Pacific submits that that question is answered fully, and negatively, in the foregoing sections of this brief, insofar as Solar's facts and business are concerned. Solar, however, apparently would have the Court theorize on hypothetical situations not before it. Conceding that its own position provides no standing to sue, Solar conjectures:

> Dilution alone may not give rise to a cause of action, but it is a different matter to so change the lake that acquatic life is destroyed, recreational values are lost, and industrial water uses are impaired. (Solar Br., p. 7)

The record is devoid of any suggestion that Solar is involved with aquatic life in the Lake or recreational use of the Lake, and its case does not rest on marine biology or recreation. Solar's involvement with industrial use of the Lake to the extent that it extracts salt therefrom, is its case, and on that basis, Southern Pacific submits that the District Court properly dismissed Solar's complaint herein.

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[21] Solar Br., pp. 2-4.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 1976, I served two copies of the foregoing Brief of Respondent upon Plaintiff-Appellant, Solar Salt Company, by delivering two copies thereof to its attorney at the address indicated:

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
IN THE TENTH CIRCUIT

Nos. 73-1714, 73-1715, 73-1716

HARDY SALT COMPANY,
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Defendant-Appellee,
GREAT SALT LAKE MINERALS
& CHEMICALS CORPORATION,
Intervenor Defendant.

* * * *

SANDERS SHRIMP COMPANY,
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Defendant-Appellee.

* * * *

MORTON-NORWICH PRODUCTS, INC.
Plaintiff-Appellant,
vs.
SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
For the District of Utah, Central Division

BRIEF OF PLAINTIFF-APPELLANT
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Amendment is the preservation of his substantial right to redress by some effective procedure." *Gibbs* v. *Zimmerman,* 290 U. S. 326, 332 (1933).

POINT II.

THE COURT ERRED IN DISMISSING APPELLANT'S CLAIMS BECAUSE IRRESPECTIVE OF THE SPECIFIC WATER AND MINERAL RIGHTS GRANTED BY THE STATE OF UTAH, APPELLANT MAY OBTAIN INJUNCTIVE RELIEF OR DAMAGES FOR INJURY TO ITS BUSINESS AND ECONOMIC INTERESTS CAUSED BY ACTS OF THE APPELLEE.

A. Negligence and/or Other Tortious Acts in Violation of Law.

It is submitted that the Southern Pacific has no right or privilege to interfere with Hardy's economic and business interests. Hardy is entitled to have such economic and business interests protected against unreasonable or tortious interference by the Southern Pacific even if, arguendo, Hardy's rights are termed merely a non-exclusive "privilege" or "license." The aforesaid *Morton* decision certainly does not reach this issue.

For purposes of this argument, the facts as presented at trial by Hardy Salt must be accepted as true. Among other things, it must be accepted that the Southern Pacific knew that its total earth fill causeway likely would adversely affect the Great Salt Lake, so as to cause chemical changes and the transportation of salt from south to north of the fill. Also, it must be accepted that expenses for operation of Hardy's business are being seriously increased be-

cause of the action of the Southern Pacific in constructing and maintaining a fill causeway. In essence, facts were presented at trial to the effect that the fill causeway unreasonably interferes with the use and enjoyment by Hardy Salt of its facilities and property, thereby causing harm to economic interests and business of Hardy unreasonably and without justification.

Undue interference with legitimate economic and business interests of others is actionable. Prosser, *Handbook on the Law of Torts,* page 974.

The Utah Supreme Court recognized this principle in *Reese* v. *Qualtrough,* 48 Utah 23, 156 Pac. 956 (1916):

> "It is not necessary to multiply illustrations, which might well be done. *When one interferes with my grocery, livery, or fish business he interferes with my property; and when he destroys my business he destroys my property.*" (156 Pac. at 959, emphasis added.)

The case of *Maddox* v. *International Paper Co., et al.,* 47 F. Supp. 829, 105 F. Supp. 89, 203 F. 2d 88 (5th Cir. 1942) bears a relationship to the situation at bar. In that case plaintiff brought an action for damages to its business, which had been established on a bayou in 1923. Plaintiff's business consisted of "... renting boats, catching and selling commercial fish, renting camp houses, serving fish dinners. In short, (plaintiff) maintained and operated an up-to-date and clean commercial fishing camp and prospered in the business." (47 F. Supp. at 830.) The Court noted that in 1938, a predecessor of International Paper Co. erected a large pulp and paper mill "at a cost in excess of twelve

million dollars." In the course of operations, International Paper Co. dumped great amounts of waste water containing refuse into the river on which the plaintiff was relying for his business. The waste water which was being dumped into the river brought about a polluted situation causing death of fish and discoloration of the water. Plaintiff sued the defendant asserting that the act of one man which causes injury to another is compensable. The court held for plaintiff, and stated:

> Though we see no need of persuasive authority, as the Louisiana decisions are quite to the point, we find that action for damages to one's business caused by the pollution of a stream has been recognized by courts of other jurisdictions, . . .
>
> * * *
>
> The proof in this case is very consistent on the point that the plaintiff had a thriving prosperous business before the pollution of the stream, and after the pollution of the stream he had no business left and his manner of making a living was taken from him; therefore, the only question remaining in the case is the amount of damage to which the plaintiff is entitled. (47 F. Supp. 829, 831.)

In this case there was no discussion of water rights or fishing rights per se. Also, there was no emphasis upon public ownership of the fish. The Court's concern was that a business which had been developed over the years and which had thrived was being unreasonably interfered with by another business which has no license or right to so interfere. Since this interference caused economic hardship and intereference with economic interest, it was held to be actionable, and the plaintiff was allowed the relief sought.

Another case which demonstrates this point is *Bay State Lobster Company, Inc.* v. *Perini Corp.*, 355 Mass. 794, 245 N. E. 2d 759 (1969). Plaintiff had a lobster business wherein he relied on the water in a bay being of a certain nature and quality. Defendant was involved in dredging operations and had secured permission to undertake such. The dredging operations interfered with plaintiff's business by adversely disturbing and affecting the bay waters. The court held for plaintiff, declaring that: "A license does not constitute a defense to an action for negligence." (245 N. E. at 760.) Accord: *West Muncie Strawboard Company* v. *Slack,* 164 Ind. 21, 72 N. E. 878 (1904); *Tutwiler Coal Company* v. *Nicols,* 145 Ala. 666, 39 So. 762 (1905); *Hodges* v. *Pine Products Company,* 135 Ga. 134, 68 S. E. 1107 (1910); *Carson* v. *Hercules Powder Company,* 240 Ala. 887, 402 S. W. 2d 640 (1966).

B. Public Nuisance — Pollution and Obstruction in Violation of Law.

The Southern Pacific has no right or privilege to alter the Great Salt Lake so as to cause injury resulting therefrom. It is submitted that the chemical alterations being caused by the Southern Pacific causeway, including dilution of the brines, violates the Utah anti-pollution statute and such violation is actionable by Hardy Salt Company. Also, the damming effect of the causeway violates Utah's anti-obstruction statute and is likewise actionable. The Utah Code provides:

> Pollution means such contamination, *or other alteration of the physical, chemical or biological properties, of any waters of the state* or such dis-

> charge of any liquid, gaseous or solid substance into any waters of the state as will create a nuisance *or render such waters harmful or detrimental* or injurious to public health, safety or welfare, or to domestic, commercial, *industrial,* agricultural, recreational, *or other legitimate beneficial uses,* or to livestock, wild animals, birds, fish or other aquatic life. Section 73-14-2(a), U.C.A. (Emphasis added.)
>
> * * *
>
> *It shall be unlawful for any person to cause pollution as defined in Section* 73-14-2(a) of any waters of the state or to place or cause to be placed any waste in location where they will cause pollution of any waters of the state. *Any such action is hereby declared to be a public nuisance.* Section 73-14-5, U.C.A. (Emphasis added.)

Utah statutory law also denominates obstructions as a public nuisance:

> A *public nuisance* is a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either:
>
> * * *
>
> (3) *Unlawfully interferes with, obstructs or tends to obstruct,* or renders dangerous for passage, *any lake,* stream, canal or basin, or any public park, square, street or highway. (Emphasis added.) (Section 76-43-3, U.C.A.)

Southern Pacific is polluting the Great Salt Lake as defined by statute, and Hardy is suffering great damage as a proximate result thereof. Southern Pacific has no license, privilege, right or otherwise to do so. These issues were not raised in pleadings of Morton Salt in the heretofore referred to state court case, were not discussed in the

Briefs, and were not argued before the Utah Supreme Court in the said *Morton* decision.

Hardy Salt has suffered special harm by reason of Southern Pacific's "nuisance," including violation of the aforesaid statutes. Protection afforded plaintiff is akin to that set forth in a well-reasoned line of cases throughout the country concerning fish and fishing businesses.

In the case of *Columbia River Fishermen's Protective Union* v. *City of St. Helens,* 160 Ore. 654, 87 P. 2d 195, (1939), plaintiffs filed suit to restrain defendants from polluting certain rivers. Oregon statutory law prohibited the pollution of streams and public rivers of the state causing destruction of fish life. The Oregon court recognized that ownership of the fish before being taken was in the State of Oregon, pointing out that the suit was not brought for the purpose of obtaining the fish, but to protect the right of fishermen to pursue their vocation of fishing. Plaintiffs, having a special interest to protect, were granted standing to sue, the court stating:

> To delete the fish from the Columbia and Willamette Rivers is to *prevent the plaintiffs from pursuing their vocations and earning their livelihood fishing with gill nets in the portions of the river where they have been accustomed to fish.* (87 P. 2d at 197, emphasis added.)
>
> * * *
>
> There is a vital distinction between the rights of plaintiffs, *who are accustomed to fishing in the river and have a license to do so,* and the rights of other citizens of the state, who never fish in the river and do not intend to and are interested only in a general way in the benefit the state receives

> by the prosecution of a valuable industry . . . (87 P. 2d at 197, emphasis added.)

(By analogy, Hardy Salt in the instant action is in the position of plaintiffs, with a special interest to protect based in part upon an unquestioned state granted right to extract salt, as compared with the rights of other citizens who might complain about the alteration and "pollution" of the Great Salt Lake as constituting a public nuisance.)

In *Hampton* v. *North Carolina Pulp Co.*, 223 N. C. 535, 27 S. E. 2d 538 (1943), the court adopted a similar posture. An action was brought by the plaintiff to recover damages for injury to his business and fishery on the Roanoke River, alleging that defendant was liable for the improper act of discharging noxious or deleterious substances from its pulp plant into the river, thus causing "pollution." Plaintiff owned certain lands adjacent to the waters of the river, as does Hardy to the Lake, and for more than 25 years was involved in the business of commercially taking and distributing fish. The gravamen of plaintiff's complaint was that pollution caused by defendant's dumping was ". . . inimical to the fish inhabiting said waters, to such an extent and in such volume and quantity as *to interfere with the free and long established passage,* migration and habit of said fish from the ocean on their way to the spawning grounds in the upper reaches of the Roanoke River, and *past the properties of the plaintiff, thus to a large extent destroying the fish and diverting said migratory pilgrimage, so as to seriously damage the business of the plaintiff and the profit from the use of his premises.*" (27 S. E. 2d at 539, emphasis added.)

Holding that plaintiff had standing to sue, the court stated:

> *The law will not permit a substantial injury to the person or property of another by a nuisance,* though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right. *The personal right involved here is the security of an established business.* (27 S. E. 2d at 545, emphasis added.)
>
> Accord: *Carson* v. *Hercules Powder Co.,* 240 Ark. 887, 402 S. W. 2d 640 (1966); *J. H. Miles & Co.,* v. *McLean Contracting Co.,* 180 F. 2d 789 (4th Cir. 1950).

The position of Hardy Salt is similar to that of the plaintiffs in the aforesaid cases. Hardy Salt acquired lands adjacent to the Great Salt Lake and in reliance thereon Hardy Salt and its predecessors have built and maintained a salt business for years. The location of Hardy's land and business is crucial not only from the standpoint of the operation of precipitating salt per se, but the ready availability of different forms of transportation and the accessibility to markets. Hardy's rights pre-date construction of the causeway and the granting of an "easement" to the Southern Pacific with respect thereto. Most decidedly, Southern Pacific's position is distinguishable from that of other salt operations. Other salt companies have a *right* to precipitate and take salt; Southern Pacific does not.

A public nuisance also exists under Utah statutory law where an unlawful obstruction has been created on a public

lake. The dam-like effect of the causeway is such an unlawful obstruction, and as such also constitutes a public nuisance in violation of Utah's anti-obstruction statute.

C. Private Nuisance.

The Utah Code provides:

> Anything which is injurious to health, or indecent, or offensive to the senses, or an *obstruction to the free use of property,* so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by *any person whose property is injuriously affected,* or whose personal enjoyment is lessened by nuisance; and by the judgment the nuisance may be enjoined or (abated), and damages may also be recovered. (U.C.A. 1953 78-38-1 — Emphasis added.)

Appellant's business and economic interests and use of real property are entitled to protection under this statute. Hardy's property and rights are "injuriously affected" by the Southern Pacific causeway. The *Morton* decision does not refer to private nuisance in general, nor the aforesaid statutory nuisance specifically.

D. Waste.

By construction of its fill causeway the Southern Pacific has created a phenomena which is causing the waste and drainage of a valuable resource. Assuming as true the factual evidence presented at trial by Hardy, millions of tons of salt are being carried to the north end of the lake and being precipitated there in such a way that recovery of this resource is difficult or impossible. In any event, sodium chloride is being "wasted" as to Hardy and other salt ex-

tractors dependent upon brine waters south of the causeway.

Waste has been defined as "the violation of an obligation to treat *the premises in such a manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act.*" (93 C.J.S. 560. Emphasis added.) As stated in Tiffany:

> Generally speaking, the person in possession is required, in the course of his utilization of the land, the making or causing physical changes thereon and therein, to do so in such a way as not unreasonably to injure one who has a right or possibility of future possession. A failure to comply with this requirement is what ordinarily constitutes waste. Tiffany, *The Law of Real Property,* 3rd Ed., Vol. II, p. 629.

It is submitted that Hardy Salt, by reason of its property rights set forth in its Royalty Agreement in combination with its water rights, and by reason of its economic interests otherwise, has a right to complain of waste. In addition, Hardy is well within the category of those who may complain of waste under Utah statutory law:

> If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, *any person aggrieved by the waste* may bring an action against him therefor, in which action there may be a judgment for treble damages. 78-38-2 U.C.A. 1953.

Unquestionably, Hardy is *a person aggrieved* and is entitled to maintain action for the waste of this valuable

resource which would not be so wasted "but for" the construction of the fill causeway by the Southern Pacific Transportation Company. This issue of waste was not raised in the *Morton* case, the Southern Pacific objected to its consideration, and the *Morton* decision does not cover it.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF UTAH

MORTON INTERNATIONAL, INC.,
a corporation, *Plaintiff-Appellant,*

vs.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
a corporation, *Defendant-Respondent.*

Case No.
12557

BRIEF OF SOLAR SALT COMPANY, AMICUS CURIAE

Appeal from a Summary Judgment of the District Court
of Salt Lake County, State of Utah
Honorable D. Frank Wilkins, Presiding

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MORTON INTERNATIONAL, INC.,
a corporation, *Plaintiff-Appellant,*

vs.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
a corporation, *Defendant-Respondent.*

Case No.
12557

BRIEF OF SOLAR SALT COMPANY, AMICUS CURIAE

NATURE OF AMICUS CURIAE INTEREST

Solar Salt Company, herein called "Solar" is engaged in business enterprise of the same nature (although on somewhat different legal foundations) as the enterprise the appellant seeks to protect by the instant litigation. Solar has major investment in plant on the south shore of Great Salt Lake by which lake brines are transported from the lake and dehydrated for recovery of the sodium chloride content. Solar in part relies, for its rights to transport the waters and harvest the salt, upon contracts with and grants from the State of Utah including a "royalty agreement" which is of the same genre as the royalty agreement in evidence here.

Solar has the same concern as appellant about the respondent's having caused the migration of billions of tons of sodium chloride to that part of the lake north of the causeway and the waste of that salt by its deposit on the lake bed there. Solar has experienced increasing difficulty and expense in producing salt from the south lake brines as they become more and more dilute, and Solar has commenced suit to compel respondent to provide a remedy.

ISSUE OF CONCERN TO SOLAR

The issue to which this brief is addressed is this:

> "Does an owner of land adjacent to Great Salt Lake who enters into a royalty agreement with the State of the kind here in evidence and who, in reliance on that agreement, makes capital investments and develops a profitable business enterprise have standing to sue a third party who drains and wastes the resource to which the agreement relates?"

ARGUMENT

POINT I

THE RIGHTS GRANTED BY THE ROYALTY AGREEMENT ARE SUFFICIENT TO SUPPORT AN ACTION FOR WASTE, AND THE COMPLAINT STATES SUCH ACTION

Respondent, throughout its oral and written arguments, has adopted the concept that the dissolved salts and suspended solids in Great Salt Lake brines are a part of the realty. According to respondent, own-

ership of the resource which concerns us here is entailed in ownership of the lakebed. At page 6 of its brief, respondent says:

> "That the State of Utah owns the salt and other minerals contained in the water of the lake is unquestionable. Under the established constitutional principle of equality of the states, title to the beds of all streams and lakes which were navigable at the time of Utah's statehood passed to the State."

Accepting this analysis, arguendo, we submit that the complaint herein effectively states a cause of action for waste. The complaint alleges that respondent, legally occupying Great Salt Lake bed for causeway construction and operation purposes, has so constructed and operated that facility as to cause the lake's sodium chloride to migrate to the north of the causeway, precipitate on the north bed in quantities conservatively measured in millions of tons and thereby be lost as an economically recoverable resource. The analogy to the standard textbook illustration of waste (where a tenant with less than a fee simple interest destroys the timber on the land) could scarcely be clearer. Waste is "the violation of an obligation to treat the premises in such a manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act." (93 CJS 560)

Tiffany (The Law of Real Property, Third Edition, Volume 2, page 629) analyses the tort of waste as follows:

> "generally speaking, the person in possession is required, in the course of his utilization of the land, and in making or causing physical changes thereon and therein, to do so in such a way as not unreasonably to injure one who has a right or possibility of future possession. A failure to comply with this requirement is what ordinarily constitutes waste. Waste has been defined as" "an unreasonable or improper, use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury." "

It is noteworthy that one kind of right to which the law, according to Tiffany, affords protection is a "possibility of future possession," and appellant has, under the least favorable interpretation of its royalty agreement, a possibility of possessing sodium chloride, a part of the reality. The term "possibility of future possession" is, of course, subject to interpretation, and the courts, when left to their own devices, have seldom if ever found anything less than a classic future interest to qualify. Utah courts are not, however, left to their own devices. There is a specific statutory pronouncement on the subject. Section 78-38-2, UCA 1953, as amended, reads as follows:

> "If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, *any person aggrieved* by the waste may bring an action against him therefor, in which action there may be a judgment for treble damages."

The statute does not require that the interest of the "person aggrieved" fall in any category of real property estates. We believe this court will be fully briefed as to the nature of the estate appellant may properly claim under the royalty agreement alone or as supplemented by water rights appellant has established by appropriation or riparian ownership. Whatever determination on the point this court may make, it can hardly be contended that the removal and waste of the resource which the salt companies have spent millions to get into position to recover is not a true source of aggrievement to them.

POINT II

EVEN IF THE CONDUCT OF RESPONDENT DID NOT CONSTITUTE THE COMMISSION OF WASTE, APPELLANT HAS STATUS TO SUE FOR RESPONDENT'S UNREASONABLE INTERFERENCE WITH AN ECONOMIC INTEREST.

The allegations of the complaint herein are (and they must be taken to be true) that appellant has made heavy investment in plant and personnel to realize the advantages of an agreement with the State of Utah and rights otherwise acquired to recover sodium chloride from Great Salt Lake brines. Appellant has in fact profitably engaged in a salt extraction business since before Utah's statehood. Respondent has acted to cause a high percentage of the salt (which would otherwise have been contained in the brines at appellant's point of intake) to migrate away from appellant's plant and to be lost to appellant.

Maddox v. Internatioanl Paper Company, 47 F. Supp. 829, 105 F. Supp. 89, 203 F. 2nd 88; *West Muncie Strawboard Company v. Slack,* 164 Ind. 21, 72 NE 879; *Tutwiler Coal Company v. Nichols,* 145 Ala. 666, 39 So. 762; *Hodges v. Pine Product Company,* 135 Ga. 134; *Bay State Lobster Co., Inc., vs. Perini Corp.,* 245 NE 2d 759; *Carson v. Hercules Powder Company,* 402 SW 2nd 640 (Arkansas, 1966); *J. H. Miles & Company v. McLean Contracting Co.,* 180 F 2nd 789 (4th Circuit, Virginia, 1950).

In none of these cases was it contended that the plaintiff owned the fish in the water or enjoyed a more formidable estate in the watercourse than a mere license. The "property" protected was an economic interest, a reasonable expectancy of profit from the utilization of a natural resource if it were left in its natural state. The defendant in each case interferred with the natural condition of the waters, and the plaintiff recovered for loss of profit.

POINT III

WITHOUT REFERENCE TO ANY PRESENT OR FUTURE INTEREST OR ESTATE APPELLANT MAY HAVE IN THE LAND (I.E. THE LAKE BED AND THE SALTS DISSOLVED OR SUSPENDED IN THE LAKE WATERS) RESPONDENT HAS A DUTY TO UTILIZE LAKE BED IN ITS POSSESSION SO AS NOT TO INJURE NEIGHBORING LANDS INCLUDING APPELLANT'S.

The complaint herein alleges that respondent has utilized lake bed land in such a way as to injure appellant's land neighboring the lake. The injury is in-

herent in the facts that (1) the lake waters no longer circulate in their natural fashion and are held at an artificially high level on or near appellant's land and (2) the waters are changed from their natural quality.

This court needs no introduction to the concept that there are restrictions upon one's mode of utilizing land in his possession which exist in favor of occupants of neighboring land. We would refer the court, however, to the discussion beginning at page 98, Tiffany, Real Property, Third Edition, Volume 3.

Many of the cases which established the concept involved offensive noise or odor. By far the most numerous, however, are the cases which involve a defendant's interference with water or water courses as they flow through his land, so that the plaintiff, a riparian owner, finds the water to which his land is adjacent to be diminished in quantity or quality for his purposes. In those jurisdictions where riparian rights are fully recognized, there can be no question as to the actionable character of such conduct. The cases are collected in the West Digest System, Key 64 et seq., water and water courses.

The issue of consequence here is not whether conduct of the kind complained of is actionable where riparian doctrine is judicially adopted, but whether a riparian landowner, under the water law of Utah, has any right to complain because the water course his land adjoins has been changed so as to impart less value to the riparian land.

It is certainly true that riparian land ownership entails less interest in the adjacent water under Utah law than under the common law. In essence, the Utah courts and legislature have adopted the concept that beneficial use is the basis, the measure and the limit of all rights to water. Any common law doctrine which is inconsistent with that concept is not recognized. The seminal case on the subject is Stowell v. Johnson, 7 U 215, 26 Pac. 260.

This does not necessarily mean that all common law doctrine related to lakes, streams and water courses has been rejected. Utah cases still talk about reliction and accretion, and Utah claims to own the beds of navigable lakes and streams on a common law sovereignty theory. On occasion, Utah cases have recognized that riparian principles can have application where the appropriation and riparian concepts are not at war. In Whitmore v. Salt Lake City, 89 U. 387, the court referred to a repudiation of riparian rights "in the main." In Kano v. Arcon Corporation, 7 U 2d 431, the defendant upstream user was required to deposit the water appropriated by the plaintiff downstream user in the natural channel at the boundary of plaintiff's land. The court there talked about "the easement one has in a natural stream leading to his property conveying appropriated water."

The message of the Utah cases is that riparian owners will not be permitted to assert any rights by reason of riparian ownership which will in any way

In the Supreme Court of the State of Utah

MORTON INTERNATIONAL, INC., a corporation, *Plaintiff-Appellant,*

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, *Defendant-Respondent.*

Case No. 12557

BRIEF OF HARDY SALT COMPANY, AMICUS CURIAE

Appeal from a Summary Judgment of the District Court of Salt Lake County, Utah
Honorable D. Frank Wilkins, Presiding

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the Royalty Agreement as postulated in the premise of the Southern Pacific argument, Morton has an exclusive quantitative property interest in water, the property from which salt is "mined" or precipitated. The exclusivity of interest is established by the State in combining the right to salt (Royalty Agreement) with appropriation of the water. With the union of its water rights and Royalty Agreement, Morton became entitled to a *quantum* of water, i.e., the amount placed to beneficial use in order to extract salt as such is found in the *natural* state of the water.

2. Morton is entitled to protection from interference by the Southern Pacific with the natural quality of its water rights.

Besides a right in priority and quantity, an appropriator of water is entitled to the water in its *natural state,* thus having a right in the constancy of *quality* as related to beneficial use of the water. *Salt Lake City v. Boundary Springs Water Users Association,* 2 Utah 2d 141, 144, 290 P.2d 453 (1954), *Crane v. Winsor,* 2 Utah 248, 253, (1878), *Rocky Ford Irrigation Company, et al. v. Kents Lake Reservoir Company, et al.,* 104 Utah 202, 135 P.2d 108 (1943), *The Utah Law of Water Rights,* Wells A. Hutchins, Dallin W. Jensen, Oct. 1965, p. 45.

Concern for such a vested right in the quality of water as related to its beneficial use is emphasized by

the Utah Supreme Court in the *Rocky Ford Irrigation* case, *supra*:

> The power company is in somewhat the same position. It contends that it will suffer substantial damage to its equipment unless the proposed reservoir is so constructed that it will not empty silt and debris into the stream at times *when the stream would otherwise be free from such foreign matter,* i.e., during low water period. It does not appear what type of dam Kents Lake proposes to build. It may contemplate a type of construction which will filter the water or otherwise retain the debris. As pointed out by the California Supreme Court in Wright v. Best, 19 Cal. 2d 368, 121 P.2d 702, 709, "an appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity, *and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights.* Any material deterioration of the quality of the stream by subsequent appropriators *or others without superior rights* entitles him to both injunctive and legal relief." (135 P.2d at 114) (Emphasis added.)

This case underscores the right of a senior appropriator to bring action against not only junior appropriators but *others* who have interfered with the *quality* of water rights. Quality of water means quality defined not by an abstract definition, but as quality relates to the beneficial use of the water for which an appropriation is made.

The right to have water in its natural state is emphasized further by the Utah Supreme Court in holding that an appropriator is entitled to have the water flow in a natural channel:

> An appropriator of the waters of a natural stream flowing through the public domain acquires an easement over the lands through which the stream flows for the flow of the water to his point of diversion, as it was wont to flow when he first made the appropriation. This right is also acquired as against the subsequent purchasers of the lands from the United States and their grantees. It therefore follows that an appropriator has the implied authority to do all that is necessary to secure the enjoyment of such an easement. He therefore has the right to go upon the lands after they have become private and remove obstructions from the bed of the stream, so as to permit the water to continue its flow in its original channel to the head of his ditch. *Tripp v. Bagley, et al.*, 74 Utah 57, 276 Pac. 912 (1928) (Citing 2 Kinney on Irrigation (2d ed.) Section 991, p. 1751.) (276 P. 912, 919)

The Southern Pacific is interfering with the natural circulation pattern of the Great Salt Lake and all the streams flowing into it by creating and maintaining a dam in the form of the causeway. This dam, in turn, is adversely affecting the quality of waters in several particulars, including dilution of the salt content within waters south of the causeway.

> According to this finding (the construction most favorable to plaintiff of which is susceptible) the railroad company granted nothing more than a license to the plaintiff to mine coal from the land, and did not grant plaintiff any property in the coal until it had mined it. As long as the coal remained in place, it was the property of the railroad company. . . . The plaintiff could not recover damages on the theory that it had title to the coal. *No doubt, as was said in Baker v. Hart, supra, the act of the defendants was an infringement of plaintiff's rights, for which it could recover damages as it in fact sustained; but it proved none.* (120 Pac. 715, 718) (Emphasis added.)

While the two cases above quoted cannot be said to be directly applicable to the Great Salt Lake because of the unique nature of rights granted to salt extractors, they do demonstrate that the legal effect of rights granted, rather than nomenclature, is of paramount significance.

It is submitted that Morton has property interests, whatever such interests might be "labelled" or "categorized," which are cognizable in law and are entitled to protection.

POINT II.

SOUTHERN PACIFIC HAS NO RIGHT OR PRIVILEGE TO INTERFERE WITH MORTON'S ECONOMIC INTERESTS.

As argued supra, Morton has property interests which are entitled to protection. Legal rights and remedies to achieve such protection extend not just to the value of the property per se, but to all consequences stemming from interference with such property interests.

It is submitted that even without demonstrating a property interest per se, Morton would be and is entitled to have its economic interests protected against unreasonable interference with said interests. Morton has developed an extensive business for the extraction of salt, and even if the carrying on of such business to precipitate is a mere "privilege" (which, as argued supra, it certainly is not), Morton is entitled to have its business interests protected.

For purposes of the appeal, the facts as alleged by Morton must be accepted as true. In this regard, it is alleged that the effectiveness of the operations of Morton Salt is being seriously diminished and impaired because of the action of the Southern Pacific in constructing and maintaining a fill causeway. It is further alleged that the causeway unreasonably interferes with the use and enjoyment by Morton of its facilities, thereby increasing the costs of Morton's economic activity without justification.

Undue interference with legitimate economic interests of others is actionable, as in the expectations of profit therefrom:

> Upon this foundation, a rather formidable body of law has been erected which in general has followed along the lines of interference with contract. It has been said that "in a civilized community which recognizes the right of the private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it;" and that since a large part of what is most valuable in modern life depends upon "probable expectancies," as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference. Prosser, *Handbook on the Law of Torts,* p. 974.

The case of *Maddox v. International Paper Co., et al.,* 47 F. Supp. 829, 105 F. Supp. 89, 203 F.2d 88 (1942) bears a relationship to the situation at bar. In that case plaintiff brought an action for damages to its business, which had been established on a bayou in 1923. The Court commented that "His business was renting boats, catching and selling commercial fish, renting camp houses, serving fish dinners. In short, he maintained and operated an up-to-date and clean commercial fishing camp and prospered in the business." (47 F. Supp. at 830) In 1938, a predecessor to International Paper Co. erected a large pulp and paper mill "at a cost in excess of twelve million dollars." In the course of operations, International Paper Co. dumped great amounts of waste water containing refuse into the river on which the plaintiff was relying for his business. The waste water which

was being dumped into the river brought about a polluted situation causing death of fish and discoloration of the water. Plaintiff sued the defendant asserting that the act of one man which causes injury to another is compensable. The court held for plaintiff, and stated:

> Though we see no need of persuasive authority, as the Louisiana decisions are quite to the point, we find that action for damages to one's business caused by the pollution of a stream has been recognized by courts of other jurisdictions, . . .
>
> * * *
>
> The proof in this case is very consistent on the point that the plaintiff had a thriving prosperous business before the pollution of the stream, and after the pollution of the stream he had no business left and his manner of making a living was taken from him; therefore, the only question remaining in the case is the amount of damage to which the plaintiff is entitled. (47 F. Supp. 829, 831.)

In this case there was no discussion of water rights or fishing rights per se. Also, there was no emphasis upon public ownership of the fish. The court's concern was that a business which had been developed over the years and which had thrived was being unreasonably interfered with by another business which had no license or right to so interfere. Since this interference caused economic hardship and interference with economic in-

terest, it was held to be actionable, and the plaintiff was allowed the relief sought.

Another case which demonstrates this point is *Bay State Lobster Company, Inc. v. Perini Corp.*, 245 N.E. 2d 759. In that case, plaintiff had a lobster business wherein he relied on the water in a bay being of a certain nature and quality. Defendant was involved in dredging operations and had secured permission to undertake such. The dredging operations interfered with plaintiff's business by adversely disturbing and affecting the bay waters. The court held for plaintiff, declaring that: "A license does not constitute a defense to an action for negligence." (245 N.E. at 760) Accord: *West Muncie Strawboard Company v. Slack,* 164 Ind. 21, 72 N.E. 878; *Tutwiler Coal Company v. Nicols,* 145 Ala. 666, 39 So. 762; *Hodges v. Pine Product Company,* 135 Ga. 134; *Carson v. Hercules Powder Company,* 402 S.W. 2d 640 (1966); *J. H. Miles & Company v. McLean Contracting Co.*, 180 F.2d 789 (1950).

The Southern Pacific has no license, lease, appropriation or other affirmative right with respect to the waters of the Great Salt Lake. It has no license, lease or other right with respect to the salt in the Great Salt Lake. The Southern Pacific has only an easement to construct and maintain a causeway. Its agreement with the State of Utah does not give the Southern Pacific license, permission or otherwise negligently to construct a cause-

way, to construct a causeway which causes a nuisance, or otherwise to impair the rights of others in the use and enjoyment of their property. The Southern Pacific certainly has no license or privilege to construct a causeway which interferes with the economic interest of those having prior rights.

POINT III

THE PRESENT FILL CAUSEWAY OF THE SOUTHERN PACIFIC IS CAUSING WASTE OF A VALUABLE RESOURCE.

By construction of its fill causeway the Southern Pacific has created a phenomena which is causing the waste and drainage of a valuable resource. Assuming as true the factual allegations of Morton, millions of tons of salt are being carried to the north end of the lake and being precipitated there in such a way that recovery of this resource is difficult or impossible. In any event, sodium chloride is being "wasted" as to Morton and other salt extractors dependent upon brine water south of the causeway.

Waste has been defined as "the violation of an obligation to treat the premises in such a manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act." (93 C.J.S. 560) As stated in Tiffany:

> Generally speaking, the person in possession is required, in the course of his utilization of the land, and making or causing physical changes thereon and therein, to do so in such a way as not unreasonably to injure one who has a right or possibility of future possession. A failure to comply with this requirement is what ordinarily constitutes waste. Tiffany, *The Law of Real Property,* 3rd Ed., Vol. II, p. 629.

It is submitted that Morton Salt, by reason of its property rights set forth in its Royalty Agreement in combination with its water rights, and by reason of its economic interests otherwise has a right to complain of waste. In addition, however, Morton has express statutory standing to complain of such waste. The Utah legislature has broadened the category of those who may complain of waste:

> If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, *any person aggrieved by the waste may bring an action against him therefor,* in which action there may be a judgment for treble damages. 78-38-2 U.C.A. 1953 (Emphasis added.)

Unquestionably, Morton is *a person aggrieved* and is entitled to maintain action for the waste of this valuable resource which would not be so wasted "but for" the construction of the fill causeway by the Southern Pacific Transportation Company.