

1 December 17, 2020

2 Aaron Ford, Attorney General, 100 North Carson Street, Carson City, Nevada 89701-4717

3
4 re: Public Rights to use Public Streams and Rivers of Nevada

5 Dear Mr. Attorney General:

6
7 I, in a concerted effort with several members of the boating community here in Nevada, am
8 requesting a legal opinion from your office confirming that the public in Nevada may pursue
9 their lawful rights to enjoy **all** navigable rivers and streams within Nevada, even those running
10 across private land, without being turned away with misinformation from state government
11 officials and/or harassment from uneducated landowners and law enforcement officers; knowing
12 that Federal law supersedes State law on the designation of the term “navigable” and asking what
13 can be done to assure those rights? In short, we are asking for enforcement in protection of our
rights to paddle, fish, and otherwise recreate within the maximum high water line for **every river
or stream in Nevada that is navigable, per Federal law, perhaps by designating all navigable
rivers in Nevada, by Federal definition as navigable, with Nevada law.**

14 We in Nevada, have hundreds, if not thousands of paddling enthusiasts. The local Reno Kayaker
15 Meet Up Group has close to 400 members. Many whitewater river enthusiasts run Nevada rivers
16 that are not in the group. Thousands of our citizens tube and raft the Truckee River alone,
17 utilizing the 3 commercial guiding companies in operation. Sierra Adventures puts hundreds of
18 folks on the local runs each year. The Carson and Walker Rivers get used by many hundreds of
19 river runners and countless fishermen and people walking the banks for enjoyment. The East
20 Fork of the Carson, Markleeville to Gardnerville, host thousands coming from inside and outside
21 Nevada each floating season. Rivers like the Bruneau, Jarbidge and Owyhee get hundreds of
22 commercial river runners and thousands of private users each year. Rivers like the Humbolt,
23 Quinn, Reese, Walker also get usage every year. Nevada residents flock to our Nevada rivers,
24 especially during the spring and summer months, extending into fall.

25 State laws cannot deny public rights on the navigable rivers of the nation, due to the Commerce
26 Clause and the Supremacy Clause of the U.S. Constitution. Nevada has approximately 141,796
27 miles of river, but no designated wild & scenic rivers and only 4 designated navigable rivers by
28 the State. *Chapter 537 - Navigable Waters*

26 The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved
27 March 21, 1864), and under the constitutional principle of equality among the several states, the
28 title to the bed of the Carson River then passed to the State, if the river was navigable, and if the
bed had not already been disposed of by the United States. *United States v. Holt Bank, supra*,
270 U.S. at 55, 46 S. Ct. 197.

1 Most importantly and basic to the issue of title to the Carson River bed, the following statement
2 of the court in United States v. Holt Bank, *supra*, at 55-56, 46 S. Ct. at 199 must be fully
3 appreciated:

4 "Navigability, when asserted as the basis of a right arising under the Constitution of the United
5 States, is necessarily a question of federal law to be determined according to the general rule
6 recognized and applied in the federal courts. Brewer-Elliott Oil & Gas Co. v. United States,
7 *supra*, [260 U.S.] p. 87, [43 S. Ct. 60]. To treat the question as turning on the varying local rules
8 would give the Constitution a diversified operation where uniformity was intended."

9 To restate it, so that all states when admitted to the Union have equal standing a uniform federal
10 test to title of watercourse beds must be maintained. True it is that many states have adopted
11 varying and less stringent tests than the federal test in order to establish the right of public use in
12 certain watercourses. For example, in California it has been held in People v. Mack, 19 Cal. App.
13 3d 1040, 97 Cal. Rptr. 448, 454 (1971), that, "The streams of California are a vital recreational
14 resource of the state. The modern determinations of the California courts, as well as those of
15 several of the states, as to the test of navigability can well be restated as follows: Members of the
16 public have the right to navigate and to exercise the incidents of navigation in a lawful manner at
17 any point below high water mark on waters of this state which are capable of being navigated by
18 oar or motor propelled small craft." See also State, by Burnquist v. Bollenbach, 241 Minn. 103,
19 63 N.W.2d 278, 287 (1954). Reference to People v. Mack, *supra*, which reviews a substantial
20 number of state navigability cases, illustrates most forcefully that the state courts have not
21 striven for uniformity. **For this reason, those state cases are not authority for the**
22 **determination of state ownership of navigable watercourse beds. Said determination must**
23 **be made by reference to the uniform federal "navigability for title" test.**

24 That test is stated by the court in United States v. Holt Bank, *supra*, 270 U.S. at 56, 46 S. Ct. at
25 199.

26 In the United States, the public trust doctrine has traditionally been applied to commerce and
27 fishing in navigable waters. The states have held the navigable waters and the beds beneath them
28 in trust for the citizens and ensured that the public's ability to engage in navigation, commerce,
and fishing on those waters was protected. The state of Nevada has traditionally recognized the
public trust doctrine. In 1970, the Nevada Supreme Court declared that "[w]hen a territory is
endowed with statehood one of the many items its sovereignty includes is the grant from the
federal government of all navigable bodies of water within the particular territory, whether they
be rives, lakes or streams." State Eng'r v. Cowles Brothers, Inc., 86 Nev. 872, 874 (1970). In
2011, the same court formally adopted the public trust doctrine, noting that the doctrine was
rooted in Nevada's constitution, statutes, and the inherent limitations on the state's powers.
According to the court, "because the state holds such property in trust for the public's use, the
state is simply without power to dispose of public trust property when it is not in the public's
interest." Lawrence v. Clark Cty., 127 Nev. 390, 400 (2011).

1 Navigable Waters [Nevada] — In Nevada bodies of water are navigable if they are used, or are
2 susceptible of being used, in their ordinary condition as highways for commerce, over which
3 trade and travel are or may be conducted in the customary modes of trade and travel on water. In
4 Nevada, this test of navigability (*State of Nevada v. Julius Bunkowski, et al.*, 1972) held that the
5 Carson River was navigable, and therefore the State of Nevada owned its bed, as logs were
6 floated down the river from about 1860 to 1895 (the commerce requirement).

7 Nevada courts have held that streams are navigable if used or susceptible to being used at
8 regularly-occurring times as highways for commerce over which trade and travel are or may be
9 conducted in customary modes of travel on water. *State v. Bunkowski*, 503 P.2d 1231, 1234 (Nev.
10 1972). Nevada courts have applied the federal title test and found that streams that were
11 historically used to drive logs to market satisfy the federal title test. *Bunkowski*, *Id.* at 1233-36.
12 This test vests title to the beds underlying these waters in the state. *Bunkowski*, *Id.* at 1233.
13 Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or
14 portages, and a stream need not be open all year to be considered navigable. *Bunkowski*, *Id.* at
15 1235. Neither the courts nor the statutes in Nevada have addressed the issue of whether the
16 public trust exists in streams that are too small to pass the federal title or commerce test.

17 In *State v. Bunkowski*, 503 P.2d 1231, 1234 (Nev. 1972), the Supreme Court settled the matter of
18 the basic rights to river travel in any waterway in the state of Nevada:

19 “Navigability, when asserted as the basis of a right arising under the constitution of the
20 United States, is necessarily a question of federal law to be determined according to the
21 general rule recognized and applied in the federal courts.” *Brewer-Elliott Oil and Gas Co.*
22 *v. United States*, 2609 U.S. page 87, 43 S.Ct. 60; “to treat the question as turning on the
23 varying local rules would give the constitution a diversified operation where uniformity
24 was intended.” *State v. Bunkowski*, 503 P.2d 1231@1236.

25 The *Bunkowski* also settles the rights of the public to navigate upon the rivers and streams of
26 Nevada:

27 “Members of the public have the right to navigate and to exercise the incidence of
28 navigation in a lawful manner at any point below high water mark on waters of this state
which are keepable of being navigated by oar or motor propelled small craft.” *Bunkowski*
@503 P.2d @1236.

Therefore, individual landowners cannot assert private property rights over a river or stream
which is navigable in fact. For it has been held in a majority of cases that the States hold title to
the beds of navigable water courses in trust for the people of their respective states. *Bunkowski*
@1240 (additional citations ommitted).

In citing with favor, *State v. Hutchins*, 79 N.H. 132, 105 A.519, 523 (1919), *Bunkowski* made
clear the public’s right to public waters:

1 “... the court held that the public rights in public waters cannot be alienated or made
2 subject to easements except by legislative action: neither can the state’s right in public
3 waters be subscribed against nor can these rights be impaired by estoppel growing out of
4 a mere failure to object to encroachment.” *Bunkowski, Id at.*

5 Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or
6 portages, and a stream need not be open all year to be considered navigable. *State v*
7 *Bunkowski*@1233-36. Although Nevada legislature maintains a list of navigable waters, the list
8 is not exclusive and the issue of navigability remains a “judicial question”. *Bunkowski* 503 P.2d
9 @1238. In a navigable stream, the public right is paramount to even that of State Regulators.
10 *Weber v. Board of Harbor Commissioners*, 85 U.S. 57 (1973); *West Chicago Railroad Co. v.*
11 *Illinois*, 201 U.S. 506 (1906). Public participation in river use has dramatically increased by
12 canoes, kayaks, rafts, stand up paddle boards, and any other manner of water craft invention
13 entering the public imagination. It has been argued that such uses are not commerce, but merely
14 recreation. The federal courts have fully rejected this theory stating “to deny that this use is
15 commercial because it relates to the recreation industry is to employ too narrow a view of
16 commercial activities”. Thus confirming that the use of rivers for such recreational trips are
17 commercial. *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989). Even the potential for commercial
18 recreation confirms a public right to use without establishing previous commercial use. *David*
19 *Zinkie*, 53 F.E.R.C. p 61,029 (1990).

20 In the opinion of the Attorney General of Nevada, the State Engineer, irrigation districts, the
21 Division of State Lands, local counties through their district attorneys, and the United States
22 have the authority to seek removal of structures that may encroach upon the natural channel of a
23 navigable river. *Op. Att’y Gen. 80-11 (Nev. 1980)*. Further, cities, counties, public districts such
24 as irrigation districts and flood control districts, and the United States have the authority to
25 improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining
26 property.

27 Federal law already confirms that the rivers and creeks in al 50 states that are knee-deep and
28 deeper, and were physically navigable in the past for fur trade canoes or log drives, and are
physically navigable today for commercial raft, kayak, or canoe trips, are legally navigable for
Commerce Clause purposes, with no official designation or confirmation needed.

Federal law already confirms the ‘public navigational easement’ to navigate on these rivers in
small watercraft. Federal law already confirms that the ‘navigational easement’ is not restricted
to the surface of the water, but includes the right to walk along riverbanks to scout and portage
rapids, to walk above the high water line as needed when walking along the banks, and to fish
and fowl.

Federal law already confirms that private ownership of the beds and banks of these rivers and
creeks is “a bare technical title, always subject to public rights to use the stream” and it requires

1 state governments to permanently hold these rivers and creeks "in trust for the people of the
2 state, that they may enjoy the navigation of the waters, carry on commerce over them, and have
3 liberty of fishing therein, freed from the obstruction or interference of private parties." (*Scranton*
4 *v. Wheeler*, 179 U.S. 141 (1900). *Illinois Central v. Illinois*, 146 U.S. 387 (1892).)

5 Rivers in all states that were usable in the past for fur trade canoes or log and lumber drives, and
6 are usable today for commercial raft trips or kayak or canoe classes, are navigable for Commerce
7 Clause purposes under federal law. No further court confirmation is needed. Where state court
8 decisions conflict with current federal law, federal judges don't need to overturn them state by
9 state.

10 The facts are:

- 11 1. The river is navigable under federal law, for Commerce Clause purposes, because of its
12 historical and current usability. No official designation is needed, because rivers that are
13 navigable in fact are navigable in law.
- 14 2. Public rights on the river are not a "taking," because the river has been public since time
15 immemorial.
- 16 3. It is a federal crime to block the river with cables or fences, so the landowner is subject to
17 criminal prosecution at any time, as well as immense liability if a kayaker gets killed or injured
18 on his fence across the river. (33 U.S.C 403, obstruction of navigable waters.)
- 19 4. State courts don't have the authority to deny any of the above.

20 The U.S. Supreme Court has repeatedly ruled that "rivers that are navigable in fact are navigable
21 in law. If a river is physically navigable, it is legally navigable. No court or agency has to
22 designate it as such.

23 Public ownership of physically navigable rivers, including the land up to the ordinary high water
24 mark, pre-dates property deeds. What the property deed says or doesn't say about the river is
25 irrelevant.

26 Public ownership of physically navigable rivers is the same in all states. It's a U.S. Supreme
27 Court standard, and it includes those rivers that are physically navigable by canoe, kayak, and
28 raft.

Under the U.S. Constitution, state and local laws cannot deny public rights to use navigable
rivers. Federal law requires state governments to hold rivers "as a public trust for the benefit of
the whole community, to be freely used by all for navigation and fishery," "freed from the
obstruction or interference of private parties."

Rivers that are navigable in canoes, kayaks, or rafts are legally navigable under federal law, with
no official designation needed. Federal law confirms public rights to navigate these rivers
through private land, and walk on privately-owned gravel bars and riverbanks to scout rapids,

1 portage, fish, or simply to enjoy the river. The U.S. Supreme Court has confirmed that the
2 navigational easement on such rivers includes public rights to portage, walk along privately-
3 owned riverbanks, and engage in fishing and duck hunting, regardless of who owns the riverbed,
4 and that this easement must remain “freed from the obstruction or interference of private
5 parties.”.

6 There is a BIG difference throughout America between what Federal law says about rivers, and
7 the way rivers are used in practice. State governments that don't want to acknowledge federal
8 authority, reduce their own authority. The federal government and the 50 state governments have
9 often done very little to confirm the public's rights to their rivers. In practice, public rights are
10 routinely ignored, disregarded, and denied, on thousands of miles of rivers, by landowners, local
11 law enforcement personnel, and state and federal government agencies. The result has been
12 deaths and countless incidents of unnecessary confrontation, conflict, and violence.

13 One might think that getting river law applied in actual practice on Nevada rivers would be a
14 relatively quick and simple court procedure. But the legal system is ponderous, and there are
15 only a few attorneys and judges in the whole country who are familiar with river law. River
16 enthusiasts cannot feasibly sue government agencies or private entities to preserve rivers and
17 assure public access to rivers. Boaters cannot feasibly run rivers that are officially closed, and
18 then win their river access disputes in local courts. **And boaters don't need more court
19 victories anyway; public rights on rivers have been repeatedly confirmed by the highest
20 court in the nation, the U.S. Supreme Court.**

21 State governments do have authority to manage public uses of the water, fish, and other
22 resources in rivers, but they do not have the authority to deny overall public rights to navigate,
23 fish, fowl, and walk along the banks of the rivers in their state that are physically navigable. In
24 the last century, there have been thousands of disputes over river rights. Injury, threats, and even
25 deaths have occurred from people simply not knowing or understanding the law. River rights are
26 a serious issue.

27 Nevada's river disputes are not a legal problem, but a public education problem. Educating river
28 users of their rights; landowners, and law enforcement officials about the public's rights to use
physically navigable rivers and creeks under existing law is needed here in Nevada. Thus the
impetus of our letter.

Real life situations include:

Sam Essig, a very delightful and pleasant employee at Walker River State Recreation
Area, at no fault of her own, gave misinformation to one of our members: “The East
Walker is still non-navigable. The only open area on the East Walker River that can be
floated by the public is the 4-1/2 to 5 miles between the Squeeze Shoot and Riverbend
Campground at Pitchfork. Lobbyists and agencies are trying to change that so that boaters

1 can float all the way from Bridgeport to the Park. Non-navigable means there is private
2 land on both sides of the river; it means that you can't go on the river without everyone's
3 permission." **[Federal law is supreme:** Supremacy Clause, U.S. Constitution, Article
4 VI, Clause 2; **No official designation needed:** The Montello, 87 U.S. 430 (1874); **No**
5 **historical record needed:** United States v. Utah, 283 U.S. 64 (1931). United States v.
6 Appalachian Electric, 311 U.S. 377 (1940); **Right of the public supersedes private**
7 **ownership:** United States v. Cress, 243 U.S. 316 (1917).]

8 Tim from Wellington: "The park ranger at the new East Walker River State Recreation
9 Park told me the river was non-navigable upstream of Pitchfork due to the private
10 landowning ranches. The rancher had his barbed wire fencing stretched across the river
11 to keep his cattle in. Is it not an irony that the public is barred from their legal right to
12 navigate the entire river instead of just a portion, while the State allows the private
13 landowner to ignore the 'Clean Water Act', allowing his cattle to trample the banks of the
14 river and cross over?" **[Violation to allow cattle to trample:** Clean Water Act, 33 U.S.
15 Code 1251 Sec. 101(a)(7).]

16 Scott, a dedicated employee at Fort Churchill, gave the following advice to one of our
17 callers: "If you don't want confrontations, I suggest floating from Fort Churchill down to
18 Lake Lahontan because it is all state owned land." Scott's well-meaning advise
19 inadvertently restricted the nervous boater's desire and legal right to float the Carson
20 River section from Dayton to Fort Churchill. There are also manmade obstacles of
21 impassable rocks that can only be portaged and headgate across the entire river, called the
22 "drowning machine" on that stretch. **[State v. Bunkowski**, 503 P.2d 1231, 1234 (Nev.
23 1972); **Right of public to use waterway supersedes any claim of private ownership**":
24 United States v. Cress, 243 U.S. 316 (1917); **States cannot interfere with navigation:**
25 Gibbons v. Ogden, 22 U.S. 1 (124); **Navigable in fact are navigable in law:** The Daniel
26 Ball, 77 U.S. 557 (1870).]

27 Evelyn from Fallon: "We landed our canoes on an island midstream on the Dearborn
28 River in Montana to camp. A woman came to the water's edge and told us we should
move along before her husband came down because he would have a gun and would not
hesitate to use it. We also heard the same landowner had run over a group's rafts at the
public take out near the Missouri River. I hope we can avoid altercations like these in
Nevada." **[States are the guardians of free navigation:** Pollard v. Hagan, 44 U.S. 212
(1845).]

Bridget from Fallon, NV: "Lots of people float the Carson through Fallon on inner tubes.
It was a hot day and I told my kids to invite their friends, what a mistake. We ran into
barbed wire stretched across, bank to bank, that we didn't see until our tubes ran into it.
The tubes were caught and water was pushing our tubes under, flipping us all out into the
deep, moving water. I couldn't help the kids because I was in the middle of trying not to

1 drown! It was a real touch and go situation, but somehow we all came out
2 alive.” [*Landowner fences across rivers violate federal law: 33 U.S. Code 403; Push*
3 *down unauthorized fences: Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).*]

4 Sarah from Carson City: “My husband and I took a canoe from Dayton to Fort Churchill
5 on the Carson River. Our float was interrupted by an uncomfortable encounter with
6 either the landowner or an employee of his. From the bank the guy yelled at us that we
7 were on private property and to “get out of here”. What could we do, but keep going and
8 hope he wouldn’t do anything. We also had to portage the dreaded “drowning machine”
9 we had heard about, a headwall across the river that has to be portaged unless one enjoys
10 being sucked underwater by the turbulent sous hole it creates.” [*Without obstruction or*
11 *interference: Illinois Central v. Illinois, 146 U.S. 387 (1892); Public property of the*
12 *nation: United States v. Rands, 389 U.S. 121 (1967).*]

13 In summary, these incidents are the impetus behind our request for opinion asking, WHY DOES
14 NOT NEVADA, in order to avoid disputes; dangerous obstructions, and trespass citations from
15 uninformed law enforcement officials, align its State laws with Federal laws on the public’s right
16 to use our rivers in a lawful manner without interference so that the State can begin to educate
17 the public and its officials in charge? Boaters by law should be able to scout and portage
18 dangerous obstacles without fear of trespassing reprisals or servient landowner altercations. The
19 public should be afforded legal access points to navigable rivers. Many State agencies feel their
20 hands are tied. Please offer us an opinion on how you can help us to accomplish what the
21 Federal laws already provide the public, “Forever free: Northwest Ordinance of 1787, chapter 8,
22 1 Stat. 50.”

23 Very Truly Yours,

24 Fred Atcheson, Esquire

25 contact person: Charles Albright, tel. (775) 324-5102; email: cralbright@juno.com

26 Additional citations:

27 **Federal law is supreme:** Supremacy Clause, U.S. Constitution, Article VI, Clause 2.

28 **Forever free:** Northwest Ordinance of 1787, chapter 8, 1 Stat. 50.

U.S. Supreme Court regarding forever free public highways: *The Montello*, 87 U.S. 430 (1874).

Early fur-trading days: *Economy Light & Power*, 256 U.S. 113 (1921).

Floating out of logs: *United States v. Appalachian Electric*, 311 U.S. 377 (1940). (rivers are navigable
even if they have been “out of use for a hundred years”).

Use by recreation industry use is indeed commercial: *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir.
1989).

Small, shallow river in Florida: *Goodman v. City of Crystal River*, 669 F.Supp. 394 (M.D>Fla.
1987).

Shallow, rocky river in Maine: *Swan Falls Corporation*, 53 F.E.R.C. p 61,309 (1990).

Small, shallow river in Indiana: *David Zinkie*, 53 F.E.R.C. p 61,029 (1990).

Shallow, rocky river in New York: *New York Sate Department of Conservation v. Federal Energy*
Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).

1 **Kayak and canoe classes on small, shallow, whitewater river are commerce:** Atlanta School of
2 Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).

3 **Fur traders used smaller rivers and creeks than those used today:** The American Fur Trade of the
4 Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.

5 **Ankle-deep creeks are legally navigable:** Natural Resources Defense Council v. Callaway, 392
6 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).

7 **Navigable in fact are navigable in law:** The Daniel Ball, 77 U.S. 557 (1870).

8 **No official designation needed:** The Montello, 87 U.S. 430 (1874).

9 **No historical record needed:** United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian
10 Electric, 311 U.S. 377 (1940).

11 **Recreational use shows past usability:** Appalachian Electric, 311 U.S. 377 (1940).

12 **Easement regardless of who owns the riverbed:** Montana v. United States, 450 U.S. 544 (1981).

13 **Right of the public supersedes private ownership:** United States v. Cress, 243 U.S. 316 (1917).

14 **Servitude includes easement:** Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861
15 (4th Cir.1984).

16 **Right to portage around obstructions:** The Montello, 87 U.S. 430 (1874)

17 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell,
18 41 U.S. 367 (1842).

19 **Walking along the banks:** The Montello, 87 U.S. 430 (1874); Brown v. Dhadbourne, 31 Maine 9
20 (1849).

21 **Landowner fences across rivers violate federal law:** 33 U.S. Code 403

22 **Push down unauthorized fences:** Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).

23 **Violation to allow cattle to trample:** Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).

24 **Walking across private land:** Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1
25 Stat. 50 confirming that the "carrying places" between navigable stretches of river must remain
26 "forever free" to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430
27 (18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central
28 Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never "abdicate" their
duty to provide public access "freed from the obstruction or interference of private parties.") Gion v.
Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law "requiring municipalities to maintain
access to navigable waters" and "requiring the state to reserve convenient access to navigable waters.")

Public access from bridges: Public Lands Access Association (PLAA) v. Board of Commissioners of
Madison County, 373 Montana 277, _P.3d_ (Jan.2014).

States cannot interfere with navigation: Gibbons v. Ogden, 22 U.S. 1 (124).

States are the guardians of free navigation: Pollard v. Hagan, 44 U.S. 212 (1845).

Paramount right of navigation: Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).

Public property of the nation: United States v. Rands, 389 U.S. 121 (1967).

Paramount power to maintain the public easement: Montana v. United States, 450 U.S. 544 (1981).

Answers are determined by federal law, not state law: Atlanta School of Kayaking v. Douglasville
County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).

State law cannot alter federal definitions, because they are "necessarily a question of federal law.":
United States v. Holt State Bank, 270 U.S. 49 (1926).

State definitions cannot deny the public easement: Weber v. Board of Harbor Commissioners, 895
U.S. 57 (1873).

State authority is subject to the public's "paramount right of navigation.": Hitchings v. Del Rio
Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).

State becomes the owner of the beds of rivers: Martin v. Waddell, 41 U.S. 367 (1842); Pollard v.
Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).

Private ownership cannot impair public easement: Illinois Central v. Illinois, 146 U.S. 387 (1892).

1 **Right of public to use waterway supersedes any claim of private ownership": United States v.**
2 **Cress, 243 U.S. 316 (1917).**
3 **States can manage public use of rivers, for public health and safety, but they cannot deny**
4 **easement to use navigable rivers: Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).**
5 **States can never abdicate the public trust: Arizona Center for Law in the Public Interest v. Hassell,**
6 **837 P.2d 138 (Ariz. App. 1991).**
7 **Usable for commercial recreation are navigable: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).**
8 **Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981).**
9 **Without obstruction or interference: Illinois Central v. Illinois, 146 U.S. 387 (1892).**
10 **Rivers navigable for Commerce Clause is defined by federal law, not state law: United States v.**
11 **Holt State Bank, 270 U.S. 49 (1926).**
12 **Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.**
13 **Rights to scout and portage: The Montello, 87 U.S. 430 (1874)**
14 **Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine**
15 **9 (1849).**
16 **Public trust for the benefit of the whole community: Martin v. Waddell, 41 U.S. 367 (1842).**
17 **Navigational easement: Montana v. United States, 450 U.S. 544 (1981) (confirming public rights to**
18 **engage in sports fishing and duck hunting on shallow river with rapids).**
19 **State laws cannot deny public rights to use navigable rivers: Gibbons v. Ogden, 22 U.S. 1 (1824).**
20 **Crime to block public use of navigable rivers: 33 U.S. Code 403.**
21 **Public right to navigate and walk along beds and banks through private land: Scranton v. Wheeler,**
22 **179 U.S. 141 (1900).**
23 **Private ownership of the beds and banks of rivers is "always subject to public rights to use the**
24 **stream.": United States v. Cress, 243 U.S. 316 (1917). ("the right of the public to use a waterway**
25 **supersedes any claim of private ownership.")**
26 **Rights to fish and fowl: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S.**
27 **367 (1842).**
28 **Rivers are legally navigable if usable for canoeing: Economy Light v. United States, 256 U.S. 113**
(1921).
If usable for kayaking: Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469
(N.D.Ga.1997).
For rafting: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir.1989).
For log drives: United States v. Appalachian Electric, 311 U.S. 377 (1940).
For lumber drives: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).
It is unlawful to block the public easement for "sports fishing and duck hunting.": Montana v.
United States, 450 U.S. 544 (1981). Atlanta School of Kayaking (cited above) (public rights to use
rivers navigable in kayaks "are determined by federal law," not state law.) Public trust: Martin v.
Waddell, 41 U.S. 367 (1842).
violation to allow cattle to trample: Clean Water Act, 33 U.S.C. 1251 Sec. 101(a)(7) (confirming the
national goal of preventing "nonpoint source pollution" from entering rivers, such as runoff from
cattle.)

1 January 14, 2021

2 **To:** Aaron Ford, Attorney General, 100 North Carson Street, Carson City, Nevada 89701

3 **cc:** Steve Sisolak, Governor, 101 N. Carson Street, Carson City, Nevada 89701

4 **cc:** Bradley Crowell, Director, Jim Lawrence, Deputy Director, Dominique Etchegoyhen, Deputy
5 Director, Nevada Department of Conservation and Natural Resources, 901 S Stewart St, Carson
6 City, Nevada 89701

7 **cc:** Charlie Donohue, Administrator, Division of State Lands, 901 S. Stewart St., Carson City,
8 Nevada 89701

9 **cc:** Robert Mergell, Administrator, NV Division of State Parks, 901 S. Stewart St #5005, Carson
10 City, Nevada 89701

11 **cc:** Colin Robertson, Administrator, NV Division of Outdoor Recreation, 901 S Stewart St, Set.
12 1003, Carson City, Nevada 89701

13 **cc:** Adam Sullivan, Acting State Engineer, NV Division of Water Resources, 901 S Stewart St,
14 Suite 2002, Carson City, Nevada 89701

15 **cc:** Brenda Scolari, Director, NV Department of Tourism and Cultural Affairs, 401 N Carson St,
16 Carson City, Nevada 89701

17 **cc:** Tony Wasley, Director, Jack Robb, Deputy Director, Bonnie Long, Deputy Director, Nevada
18 Department of Wildlife, 901 S Stewart St, Carson City, Nevada 89701

19 **cc:** Kate Marshall, Lt. Governor, State Capitol Bldg., 101 N Carson St., Suite 2, Carson City,
20 Nevada 89701

21 **cc:** Greg Lovato, administrator NDEP, 901 S Stewart St, Suite 4001, Carson City, Nevada 89701

22 **cc:** John Busterud, administrator EPA region 9, 75 Hawthorne St, San Francisco, CA 94105

23 **re: Public Rights to use Public Streams and Rivers of Nevada**

24 Dear Mr. Attorney General:

25 I, in a concerted effort with several members of the boating community here in Nevada, am
26 requesting a legal opinion from your office confirming that the public in Nevada may pursue
27 their lawful rights to enjoy all navigable rivers and streams within Nevada, even those running
28 across private land, without being turned away with misinformation from state government
officials and/or harassment from uneducated landowners and law enforcement officers; knowing
that Federal law supersedes State law on the designation of the term "navigable" and asking what
can be done to assure those rights? In short, we are asking for enforcement in protection of our
rights to paddle, fish, and otherwise recreate within the mean high water line for every river or
stream in Nevada that is navigable, per Federal law, perhaps by designating all navigable
rivers in Nevada, by Federal definition as navigable, with Nevada law.

We in Nevada, have hundreds, if not thousands of paddling enthusiasts. The local Reno Kayaker
Meet Up Group has close to 400 members. Many whitewater river enthusiasts run Nevada rivers
that are not in the group. Thousands of our citizens tube and raft the Truckee River alone,

1 Nevada each floating season. Rivers like the Bruneau, Jarbidge and Owyhee get hundreds of
2 commercial river runners and thousands of private users each year. Rivers like the Humbolt,
3 Quinn, Reese, Walker also get usage every year. Nevada residents flock to our Nevada rivers,
4 especially during the spring and summer months, extending into fall.

5 State laws cannot deny public rights on the navigable rivers of the nation, due to the Commerce
6 Clause and the Supremacy Clause of the U.S. Constitution. Nevada has approximately 141,796
7 miles of river, but no designated wild & scenic rivers and only 4 designated navigable rivers by
8 the State. *Chapter 537 - Navigable Waters*

9 The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved
10 March 21, 1864), and under the constitutional principle of equality among the several states, the
11 title to the bed of the Carson River then passed to the State, if the river was navigable, and if the
12 bed had not already been disposed of by the United States. *United States v. Holt Bank, supra*,
13 *270 U.S. at 55, 46 S. Ct. 197.*

14 Most importantly and basic to the issue of title to the Carson River bed, the following statement
15 of the court in *United States v. Holt Bank, supra*, at 55-56, 46 S. Ct. at 199 must be fully
16 appreciated:

17 "Navigability, when asserted as the basis of a right arising under the Constitution of the United
18 States, is necessarily a question of federal law to be determined according to the general rule
19 recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States,*
20 *supra*, [260 U.S.] p. 87, [43 S. Ct. 60]. To treat the question as turning on the varying local rules
21 would give the Constitution a diversified operation where uniformity was intended."

22 To restate it, so that all states when admitted to the Union have equal standing a uniform federal
23 test to title of watercourse beds must be maintained. True it is that many states have adopted
24 varying and less stringent tests than the federal test in order to establish the right of public use in
25 certain watercourses. For example, in California it has been held in *People v. Mack*, 19 Cal. App.
26 3d 1040, 97 Cal. Rptr. 448, 454 (1971), that, "The streams of California are a vital recreational
27 resource of the state. The modern determinations of the California courts, as well as those of
28 several of the states, as to the test of navigability can well be restated as follows: Members of the
29 public have the right to navigate and to exercise the incidents of navigation in a lawful manner at
30 any point below high water mark on waters of this state which are capable of being navigated by
31 oar or motor propelled small craft." See also State, by *Burnquist v. Bollenbach*, 241 Minn. 103,
32 63 N.W.2d 278, 287 (1954). Reference to *People v. Mack*, *supra*, which reviews a substantial
33 number of state navigability cases, illustrates most forcefully that the state courts have not
34 striven for uniformity. For this reason, those state cases are not authority for the

determination of title to the bed of a navigable watercourse beds. Said determination must
be made by reference to the uniform federal "navigability for title" test.

That test is stated by the court in *United States v. Holt Bank, supra*, 270 U.S. at 56, 46 S. Ct. at
199.

1
2 In the United States, the public trust doctrine has traditionally been applied to commerce and
3 fishing in navigable waters. The states have held the navigable waters and the beds beneath them
4 in trust for the citizens and ensured that the public's ability to engage in navigation, commerce,
5 and fishing on those waters was protected. The state of Nevada has traditionally recognized the
6 public trust doctrine. In 1970, the Nevada Supreme Court declared that "[w]hen a territory is
7 endowed with statehood one of the many items its sovereignty includes is the grant from the
8 federal government of all navigable bodies of water within the particular territory, whether they
9 be rives, lakes or streams." State Eng'r v. Cowles Brothers, Inc., 86 Nev. 872, 874 (1970). In
10 2011, the same court formally adopted the public trust doctrine, noting that the doctrine was
11 rooted in Nevada's constitution, statutes, and the inherent limitations on the state's powers.
12 According to the court, "because the state holds such property in trust for the public's use, the
13 state is simply without power to dispose of public trust property when it is not in the public's
14 interest." Lawrence v. Clark Cty., 127 Nev. 390, 400 (2011).

15
16 Navigable Waters [Nevada] — In Nevada bodies of water are navigable if they are used, or are
17 susceptible of being used, in their ordinary condition as highways for commerce, over which
18 trade and travel are or may be conducted in the customary modes of trade and travel on water. In
19 Nevada, this test of navigability (State of Nevada v. Julius Bunkowski, et al., 1972) held that the
20 Carson River was navigable, and therefore the State of Nevada owned its bed, as logs were
21 floated down the river from about 1860 to 1895 (the commerce requirement).

22 Nevada courts have held that streams are navigable if used or susceptible to being used at
23 regularly-occurring times as highways for commerce over which trade and travel are or may be
24 conducted in customary modes of travel on water. State v. Bunkowski, 503 P.2d 1231, 1234 (Nev.
25 1972). Nevada courts have applied the federal title test and found that streams that were
26 historically used to drive logs to market satisfy the federal title test. Bunkowski, *Id.* at 1233-36.
27 This test vests title to the beds underlying these waters in the state. Bunkowski, *Id.* at 1233.
28 Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or
portages, and a stream need not be open all year to be considered navigable. Bunkowski, *Id.* at
1235. Neither the courts nor the statutes in Nevada have addressed the issue of whether the
public trust exists in streams that are too small to pass the federal title or commerce test.

In State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972), the Supreme Court settled the matter of
the basic rights to river travel in any waterway in the state of Nevada:

"Navigability, when asserted as the basis of a right arising under the constitution of the
United States, is necessarily a question of federal law to be determined according to the
general rule recognized and applied in the federal courts." Brewer-Elliot Oil and Gas Co.
v. United States, 2609 U.S. page 87, 43 S.Ct. 60; "to treat the question as turning on the
varying local rules would give the constitution a diversified operation where uniformity
was intended." State v. Bunkowski, 503 P.2d 1231@1236.

1
2 The Bunkowski also settles the rights of the public to navigate upon the rivers and streams of Nevada:

3 “Members of the public have the right to navigate and to exercise the incidence of
4 navigation in a lawful manner at any point below high water mark on waters of this state
5 which are keepable of being navigated by oar or motor propelled small craft.” Bunkowski
6 @503 P.2d @1236.

7 Therefore, individual landowners cannot assert private property rights over a river or stream
8 which is navigable in fact. For it has been held in a majority of cases that the States hold title to
9 the beds of navigable water courses in trust for the people of their respective states. Bunkowski
@1240 (additional citations omitted).

10 In citing with favor, State v. Hutchins, 79 N.H. 132, 105 A.519, 523 (1919), Bunkowski made
11 clear the public’s right to public waters:

12 “. . . the court held that the public rights in public waters cannot be alienated or made
13 subject to easements except by legislative action: neither can the state’s right in public
14 waters be subscribed against nor can these rights be impaired by estoppel growing out of
a mere failure to object to encroachment.” Bunkowski, *Id at*.

15 Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or
16 portages, and a stream need not be open all year to be considered navigable. State v
17 Bunkowski@1233-36. Although Nevada legislature maintains a list of navigable waters, the list
18 is not exclusive and the issue of navigability remains a “judicial question”. Bunkowski 503 P.2d
19 @1238. In a navigable stream, the public right is paramount to even that of State Regulators.
20 Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1973); West Chicago Railroad Co. v.
21 Illinois, 201 U.S. 506 (1906). Public participation in river use has dramatically increased by
22 canoes, kayaks, rafts, stand up paddle boards, and any other manner of water craft invention
23 entering the public imagination. It has been argued that such uses are not commerce, but merely
24 recreation. The federal courts have fully rejected this theory stating “to deny that this use is
25 commercial because it relates to the recreation industry is to employ too narrow a view of
commercial activities”. Thus confirming that the use of rivers for such recreational trips are
commercial. Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989). Even the potential for commercial
recreation confirms a public right to use without establishing previous commercial use. David
Zinkie, 53 F.E.R.C. p 61,029 (1990).

26 In the opinion of the Attorney General of Nevada, the State Engineer, irrigation districts, the
27 Division of State Lands, local counties through their district attorneys, and the United States
28 have the authority to seek removal of structures that may encroach upon the natural channel of a
navigable river. *Op. Att’y Gen. 80-11 (Nev. 1980)*. Further, cities, counties, public districts such
as irrigation districts and flood control districts, and the United States have the authority to

1 improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining
2 property.

3 Federal law already confirms that the rivers and creeks in al 50 states that are knee-deep and
4 deeper, and were physically navigable in the past for fur trade canoes or log drives, and are
5 physically navigable today for commercial raft, kayak, or canoe trips, are legally navigable for
6 Commerce Clause purposes, with no official designation or confirmation needed.

7 Federal law already confirms the 'public navigational easement' to navigate on these rivers in
8 small watercraft. Federal law already confirms that the 'navigational easement' is not restricted
9 to the surface of the water, but includes the right to walk along riverbanks to scout and portage
10 rapids, to walk above the high water line as needed when walking along the banks, and to fish
11 and fowl.

12 Federal law already confirms that private ownership of the beds and banks of these rivers and
13 creeks is "a bare technical title, always subject to public rights to use the stream" and it requires
14 state governments to permanently hold these rivers and creeks "in trust for the people of the
15 state, that they may enjoy the navigation of the waters, carry on commerce over them, and have
16 liberty of fishing therein, freed from the obstruction or interference of private parties." (*Scranton*
17 *v. Wheeler*, 179 U.S. 141 (1900). *Illinois Central v. Illinois*, 146 U.S. 387 (1892).)

18 Rivers in all states that were usable in the past for fur trade canoes or log and lumber drives, and
19 are usable today for commercial raft trips or kayak or canoe classes, are navigable for Commerce
20 Clause purposes under federal law. No further court confirmation is needed. Where state court
21 decisions conflict with current federal law, federal judges don't need to overturn them state by
22 state.

23 The facts are:

- 24 1. The river is navigable under federal law, for Commerce Clause purposes, because of its
25 historical and current usability. No official designation is needed, because rivers that are
26 navigable in fact are navigable in law.
- 27 2. Public rights on the river are not a "taking," because the river has been public since time
28 immemorial.
3. It is a federal crime to block the river with cables or fences, so the landowner is subject to
criminal prosecution at any time, as well as immense liability if a kayaker gets killed or injured
on his fence across the river. (33 U.S.C 403, obstruction of navigable waters.)
4. State courts don't have the authority to deny any of the above.

The U.S. Supreme Court has repeatedly ruled that "rivers that are navigable in fact are navigable
in law. If a river is physically navigable, it is legally navigable. No court or agency has to
designate it as such.

1 Public ownership of physically navigable rivers, including the land up to the ordinary high water
2 mark, pre-dates property deeds. What the property deed says or doesn't say about the river is
3 irrelevant.

4 Public ownership of physically navigable rivers is the same in all states. It's a U.S. Supreme
5 Court standard, and it includes those rivers that are physically navigable by canoe, kayak, and
6 raft.

7 Under the U.S. Constitution, state and local laws cannot deny public rights to use navigable
8 rivers. Federal law requires state governments to hold rivers "as a public trust for the benefit of
9 the whole community, to be freely used by all for navigation and fishery," "freed from the
obstruction or interference of private parties."

10 Rivers that are navigable in canoes, kayaks, or rafts are legally navigable under federal law, with
11 no official designation needed. Federal law confirms public rights to navigate these rivers
12 through private land, and walk on privately-owned gravel bars and riverbanks to scout rapids,
13 portage, fish, or simply to enjoy the river. The U.S. Supreme Court has confirmed that the
14 navigational easement on such rivers includes public rights to portage, walk along privately-
15 owned riverbanks, and engage in fishing and duck hunting, regardless of who owns the riverbed,
and that this easement must remain "freed from the obstruction or interference of private
parties."

16 There is a BIG difference throughout America between what Federal law says about rivers, and
17 the way rivers are used in practice. State governments that don't want to acknowledge federal
18 authority, reduce their own authority. The federal government and the 50 state governments have
19 often done very little to confirm the public's rights to their rivers. In practice, public rights are
20 routinely ignored, disregarded, and denied, on thousands of miles of rivers, by landowners, local
21 law enforcement personnel, and state and federal government agencies. The result has been
deaths and countless incidents of unnecessary confrontation, conflict, and violence.

22 One might think that getting river law applied in actual practice on Nevada rivers would be a
23 relatively quick and simple court procedure. But the legal system is ponderous, and there are
24 only a few attorneys and judges in the whole country who are familiar with river law. River
25 enthusiasts cannot feasibly sue government agencies or private entities to preserve rivers and
26 assure public access to rivers. Boaters cannot feasibly run rivers that are officially closed, and
27 then win their river access disputes in local courts. **And boaters don't need more court
victories anyway; public rights on rivers have been repeatedly confirmed by the highest
court in the nation, the U.S. Supreme Court.**

28 State governments do have authority to manage public uses of the water, fish, and other
resources in rivers, but they do not have the authority to deny overall public rights to navigate,
fish, fowl, and walk along the banks of the rivers in their state that are physically navigable. In

1 the last century, there have been thousands of disputes over river rights. Injury, threats, and even
2 deaths have occurred from people simply not knowing or understanding the law. River rights are
3 a serious issue.

4 Nevada's river disputes are not a legal problem, but a public education problem. Educating river
5 users of their rights; landowners, and law enforcement officials about the public's rights to use
6 physically navigable rivers and creeks under existing law is needed here in Nevada. Thus the
7 impetus of our letter.

8 **Real life situations include:**

9 —Sam Essig, a very delightful and pleasant employee at Walker River State Recreation
10 Area, at no fault of her own, gave misinformation to one of our members: "The East
11 Walker is still non-navigable. The only open area on the East Walker River that can be
12 floated by the public is the 4-1/2 to 5 miles between the Squeeze Shoot and Riverbend
13 Campground at Pitchfork. Lobbyists and agencies are trying to change that so that boaters
14 can float all the way from Bridgeport to the Park. Non-navigable means there is private
15 land on both sides of the river; it means that you can't go on the river without everyone's
16 permission." **[Federal law is supreme:** Supremacy Clause, U.S. Constitution, Article
17 VI, Clause 2; **No official designation needed:** *The Montello*, 87 U.S. 430 (1874); **No
18 historical record needed:** *United States v. Utah*, 283 U.S. 64 (1931). *United States v.*
19 *Appalachian Electric*, 311 U.S. 377 (1940); **Right of the public supersedes private
20 ownership:** *United States v. Cress*, 243 U.S. 316 (1917).]

21 —Tim from Wellington: "The park ranger at the new East Walker River State Recreation
22 Park told me the river was non-navigable upstream of Pitchfork due to the private
23 landowning ranches. The rancher had his barbed wire fencing stretched across the river
24 to keep his cattle in. Is it not an irony that the public is barred from their legal right to
25 navigate the entire river instead of just a portion, while the State allows the private
26 landowner to ignore the 'Clean Water Act', allowing his cattle to trample the banks of the
27 river and cross over?" **[Violation to allow cattle to trample:** *Clean Water Act*, 33 U.S.
28 *Code 1251 Sec. 101(a)(7).*]

—Scott, an employee at Fort Churchill, gave the following advice to one of our callers:
"If you don't want confrontations, I suggest floating from Fort Churchill down to Lake
Lahontan because it is all state owned land." Scott's well-meaning advise inadvertently
restricted the nervous boater's desire and legal right to float the Carson River section
from Dayton to Fort Churchill. There are also manmade obstacles of impassable rocks
that can only be portaged and headgate across the entire river, called the "drowning
machine" on that stretch. **[State v. Bunkowski**, 503 P.2d 1231, 1234 (Nev. 1972); **Right
of public to use waterway supersedes any claim of private ownership**": *United States v.*
Cress, 243 U.S. 316 (1917); **States cannot interfere with navigation:** *Gibbons v. Ogden*,

1 22 U.S. 1 (124); *Navigable in fact are navigable in law: The Daniel Ball*, 77 U.S. 557
2 (1870).]

3 —Evelyn, a canoe enthusiast from Fallon: “We landed our canoes on an island midstream
4 on the Dearborn River in Montana to camp. A woman came to the water’s edge and told
5 us we should move along before her husband came down because he would have a gun
6 and would not hesitate to use it. We also heard the same landowner had run over a
7 group’s rafts at the public take out near the Missouri River. I hope we can avoid
8 altercations like these in Nevada.” [*States are the guardians of free navigation: Pollard*
9 *v. Hagan*, 44 U.S. 212 (1845).]

10 —Bridget, teacher and mother from Fallon, NV: “Lots of people float the Carson through
11 Fallon on inner tubes. It was a hot day and I told my kids to invite their friends, what a
12 mistake. We ran into barbed wire stretched across, bank to bank, that we didn’t see until
13 our tubes ran into it. The tubes were caught and water was pushing our tubes under,
14 flipping us all out into the deep, moving water. I couldn’t help the kids because I was in
15 the middle of trying not to drown! It was a real touch and go situation, but somehow we
16 all came out alive.” [*Landowner fences across rivers violate federal law: 33 U.S. Code*
17 *403; Push down unauthorized fences: Elder v. Delcour*, 269 S.W.2d 17 (Missouri 1954).]

18 —Sarah, canoe enthusiast from Carson City: “My husband and I took a canoe from
19 Dayton to Fort Churchill on the Carson River. Our float was interrupted by an
20 uncomfortable encounter with either the landowner or an employee of his. From the
21 bank the guy yelled at us that we were on private property and to “get out of here”. What
22 could we do, but keep going and hope he wouldn’t do anything. We also had to portage
23 the dreaded “drowning machine” we had heard about, a headwall across the river that has
24 to be portaged unless one enjoys being sucked underwater by the turbulent sous hole it
25 creates.” [*Without obstruction or interference: Illinois Central v. Illinois*, 146 U.S. 387
26 (1892); *Public property of the nation: United States v. Rands*, 389 U.S. 121 (1967).]

27 In summary, these incidents are the impetus behind our request for opinion asking, WHY DOES
28 NOT NEVADA, in order to avoid disputes; dangerous obstructions, and trespass citations from
uninformed law enforcement officials, align its State laws with Federal laws on the public’s right
to use our rivers in a lawful manner without interference so that the State can begin to educate
the public and its officials in charge? Boaters by law should be able to scout and portage
dangerous obstacles without fear of trespassing reprisals or servient landowner altercations. The
public should be afforded legal access points to navigable rivers. Many State agencies feel their
hands are tied. Please offer us an opinion on how you can help us to accomplish what the
Federal laws already provide the public, “**Forever free**: Northwest Ordinance of 1787, chapter 8,
1 Stat. 50.”

Very Truly Yours,

1 Fred Atcheson, Esquire

2 contact person: Charles Albright, tel. (775) 324-5102; email: cralbright@juno.com

3 Additional citations:

4 **Federal law is supreme:** Supremacy Clause, U.S. Constitution, Article VI, Clause 2.

5 **Forever free:** Northwest Ordinance of 1787, chapter 8, 1 Stat. 50.

6 **U.S. Supreme Court regarding forever free public highways:** The Montello, 87 U.S. 430 (1874).

7 **Early fur-trading days:** Economy Light & Power, 256 U.S. 113 (1921).

8 **Floating out of logs:** United States v. Appalachian Electric, 311 U.S. 377 (1940). (rivers are navigable even if they have been "out of use for a hundred years").

9 **Use by recreation industry use is indeed commercial:** Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).

10 **Small, shallow river in Florida:** Goodman v. City of Crystal River, 669 F.Supp. 394 (M.D>Fla. 1987).

11 **Shallow, rocky river in Maine:** Swan Falls Corporation, 53 F.E.R.C. p 61,309 (1990).

12 **Small, shallow river in Indiana:** David Zinkie, 53 F.E.R.C. p 61,029 (1990).

13 **Shallow, rocky river in New York:** New York Sate Department of Conservation v. Federal Energy Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).

14 **Kayak and canoe classes on small, shallow, whitewater river are commerce:** Atlanta School of Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).

15 **Fur traders used smaller rivers and creeks than those used today:** The American Fur Trade of the Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.

16 **Ankle-deep creeks are legally navigable:** Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).

17 **Navigable in fact are navigable in law:** The Daniel Ball, 77 U.S. 557 (1870).

18 **No official designation needed:** The Montello, 87 U.S. 430 (1874).

19 **No historical record needed:** United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian Electric, 311 U.S. 377 (1940)

20 **Recreational use shows past usability:** Appalachian Electric, 311 U.S. 377 (1940).

21 **Easement regardless of who owns the riverbed:** Montana v. United States, 450 U.S. 544 (1981).

22 **Right of the public supersedes private ownership:** United States v. Cress, 243 U.S. 316 (1917).

23 **Servitude includes easement:** Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861 (4th Cir.1984).

24 **Right to portage around obstructions:** The Montello, 87 U.S. 430 (1874)

25 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).

26 **Walking along the banks:** The Montello, 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9 (1849).

27 **Landowner fences across rivers violate federal law:** 33 U.S. Code 403

28 **Push down unauthorized fences:** Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).

Violation to allow cattle to trample: Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).

Walking across private land: Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1 Stat. 50 confirming that the "carrying places" between navigable stretches of river must remain

"forever free" to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430

(18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central

Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never "abdicate" their duty to provide public access "freed from the obstruction or interference of private parties.") Gion v.

1 Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law “requiring municipalities to maintain
 2 access to navigable waters” and “requiring the state to reserve convenient access to navigable waters.”)
 3 **Public access from bridges:** Public Lands Access Association (PLAA) v. Board of Commissioners of
Madison County, 373 Montana 277, _P.3d_ (Jan.2014).
 4 **States cannot interfere with navigation:** Gibbons v. Ogden, 22 U.S. 1 (1824).
 5 **States are the guardians of free navigation:** Pollard v. Hagan, 44 U.S. 212 (1845).
 6 **Paramount right of navigation:** Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).
 7 **Public property of the nation:** United States v. Rands, 389 U.S. 121 (1967).
 8 **Paramount power to maintain the public easement:** Montana v. United States, 450 U.S. 544 (1981).
 9 **Answers are determined by federal law, not state law:** Atlanta School of Kayaking v. Douglasville
County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).
 10 **State law cannot alter federal definitions, because they are “necessarily a question of federal law.”:**
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 12 **State definitions cannot deny the public easement:** Weber v. Board of Harbor Commissioners, 85
 13 U.S. 57 (1873).
 14 **State authority is subject to the public’s “paramount right of navigation.”:** Hitchings v. Del Rio
 15 Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
 16 **State becomes the owner of the beds of rivers:** Martin v. Waddell, 41 U.S. 367 (1842); Pollard v.
 17 Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
 18 **Private ownership cannot impair public easement:** Illinois Central v. Illinois, 146 U.S. 387 (1892).
 19 **Right of public to use waterway supersedes any claim of private ownership”:** United States v.
 20 Cress, 243 U.S. 316 (1917).
 21 **States can manage public use of rivers, for public health and safety, but they cannot deny**
 22 **easement to use navigable rivers:** Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).
 23 **States can never abdicate the public trust:** Arizona Center for Law in the Public Interest v. Hassell,
 24 837 P.2d 138 (Ariz. App. 1991).
 25 **Usable for commercial recreation are navigable:** Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
 26 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981).
 27 **Without obstruction or interference:** Illinois Central v. Illinois, 146 U.S. 387 (1892).
 28 **Rivers navigable for Commerce Clause is defined by federal law, not state law:** United States v.
Holt State Bank, 270 U.S. 49 (1926).
Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.
Rights to scout and portage: The Montello, 87 U.S. 430 (1874)
Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine
 9 (1849).
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Navigational easement: Montana v. United States, 450 U.S. 544 (1981) (confirming public rights to
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 179 U.S. 141 (1900).
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 367 (1842).
Rivers are legally navigable if usable for canoeing: Economy Light v. United States, 256 U.S. 113
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1 If usable for kayaking: Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469
2 (N.D.Ga.1997).
3 For rafting: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir.1989).
4 For log drives: United States v. Appalachian Electric, 311 U.S. 377 (1940).
5 For lumber drives: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).
6 It is unlawful to block the public easement for "sports fishing and duck hunting.": Montana v.
7 United States, 450 U.S. 544 (1981). Atlanta School of Kayaking (cited above) (public rights to use
8 rivers navigable in kayaks "are determined by federal law," not state law.) Public trust: Martin v.
9 Waddell, 41 U.S. 367 (1842).
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Public trust doctrine

The **public trust doctrine** is the principle that the sovereign holds in trust for public use some resources such as shoreline between the high and low tide lines, regardless of private property ownership.^[1]

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Origins

The ancient laws of the Byzantine Emperor Justinian held that the sea, the shores of the sea, the air and running water were common to everyone.^[2] The seashore, later defined as waters affected by the ebb and flow of the tides could not be appropriated for private use and was open to all. This principle became the law in England as well. Centuries later, Magna Carta further strengthened public rights. At the insistence of English nobles, fishing weirs which obstructed free navigation were to be removed from rivers.

These rights were further strengthened by later laws in England and subsequently became part of the common law of the United States. The Supreme Court first accepted the public trust doctrine in *Martin v. Waddell's Lessee* in 1842, confirming it several decades later in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In the latter case the Illinois Legislature had granted an enormous portion of the Chicago harbor to the Illinois Central Railroad. A subsequent legislature sought to revoke the grant, claiming that original grant should not have been permitted in the first place. The court held that common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters (except in the case of very small portions of land which would have no effect on free access or navigation).

The public trust applies to both waters influenced by the tides and waters that are navigable in fact. The public trust also applies to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.

Application

This doctrine has been primarily significant in two areas: land access and use, and natural resource law.

Access to ocean and ponds

The doctrine is most often invoked in connection with access to the seashore. In the United States, the law differs among the fifty states but in general limits the rights of ocean front property owners to exclude the public below the mean high tide line.

Massachusetts and Maine (which share a common legal heritage) recognize private property ownership to the mean low tide line—but allow public access to the seashore between the low and high tide lines for "fishing, fowling and navigation," traditional rights going back to the Colonial Ordinance of 1647.^[3] Maine's Supreme Court in 2011 expanded the public trust doctrine by concluding fishing, fowling and navigation are not an exclusive list; the court allowed the general public to cross private shoreline for scuba diving.^[4]

The public trust doctrine also finds expression in the Great Pond law, a traditional right codified in case law and statutes in Massachusetts, Maine, and New Hampshire.^[5] The state is said to own the land below the low water mark under great ponds (ponds over ten acres), and the public retains in effect an access easement over unimproved private property for uses such as fishing, cutting ice, and hunting.^[6]

In Oregon, a 1967 "Beach Bill" affirmed the state's public trust doctrine, and the right of the public to have access to the seashore virtually everywhere between the low and high tide marks. In California the situation is more complicated: private landowners often try to block traditional public beach access, which can result in protracted litigation.^[7] Freshwater use rights have also been subject to litigation in California, under the public trust doctrine.^[8]

Natural resources

The doctrine has also been used to provide public access across and provide for continued public interest in those areas where land beneath tidally influenced waters has been filled. In some cases, the uses of that land have been limited (to transportation, for instance) and in others, there has been provision for public access across them.

The doctrine has been employed to assert public interest in oil resources discovered on tidally influenced lands (Mississippi, California) and has also been used to prevent the private ownership of fish stocks and crustacean beds.

In most states in the United States, lakes and navigable-in-fact streams are maintained for drinking and recreation purposes under a public-trust doctrine.

In some countries, the public trust doctrine has been applied to provide environmental protection to natural resources in order to uphold human rights.^[9] A recent study also demonstrated that public trust doctrines are transnationalizing.^[10]

See also

- Prescriptive easement
- Freedom to roam
- *Illinois Central Railroad Co. v. Illinois*
- *Juliana v. United States*
- *M. C. Mehta v. Kamal Nath*
- *National Audubon Society v. Superior Court*
- Public trust
- Public good
- Public space
- Public property
- Right of way

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- [Mono Lake Committee website \(http://www.monolake.org\)](http://www.monolake.org)
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Retrieved from "https://en.wikipedia.org/w/index.php?title=Public_trust_doctrine&oldid=1117183254"

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Definition: “Navigable waters of the United States are *those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.*”

Justification

- Nevada has many Interstate rivers and streams, including the Carson, Truckee, Walker, Bruneau, Jarbidge, Owyhee, Virgin, Colorado, Amargosa, Quinn, Kings, Salmon Falls Creek and many more. The Walker, Carson and Truckee Rivers and their tributaries were used to float logs down into the valley to support mining. The Carson and Truckee are determined ‘navigable’, the Walker is not.
- The Owyhee, Jarbidge and Bruneau Rivers have commercial rafting operations on them.
- Indigenous people lived along the river systems, gathered food, hunted and fished.
- The first settlers in this area travelled along the waterways and were fur trappers. It’s reasonable to assume ‘commerce’ occurred among groups that lived nearby and used the river systems for travel and food. Historical accounts from the Humboldt River system document native people trading fish for supplies with the settlers. Before the dam was built in Idaho, there were large runs of salmon on Salmon Falls Creek. The salmon were caught and sold on Salmon Falls Creek.
- Water from almost every river, stream, and creek in Nevada has been diverted for agriculture, which is ‘commerce’. Waterways have also been dug up for gravel for road construction and other commercial uses.
- Animal trapping for fur-bearing animals still occurs along Nevada waterways, including for sale. The Nevada Department of Wildlife issues these licenses.
- The Nevada Department of Wildlife has hatchery operations, stocks rivers and streams with fish, and sells fishing licenses for fishermen to fish on all Nevada rivers and streams. They also sell boating licenses for use on Nevada’s lakes and rivers. That’s commerce.

Legal Precedent

Public trust doctrine: In the United States, the public trust doctrine has traditionally been applied to commerce and fishing in navigable waters. The states have held the navigable waters and the beds beneath them in trust for the citizens and ensured that the public’s ability to engage in navigation, commerce, and fishing on those waters was protected. The state of Nevada has traditionally recognized the public trust doctrine. In 1970, the Nevada Supreme Court declared that “[w]hen a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams.” *State Eng’r v. Cowles Brothers, Inc.*, 86 Nev. 872, 874 (1970). In 2011, the same court formally adopted the public trust doctrine, noting that the doctrine was rooted in Nevada’s constitution, statutes, and the inherent limitations on the state’s powers. According to the court, “because the state holds such property in trust for the public’s use, the state is simply without power to dispose of public trust property when it is not in the public’s interest.” *Lawrence v. Clark Cty.*, 127 Nev. 390, 400 (2011). 2

A copy of the letter from Fred Atcheson, Esquire, to Aaron Ford, Nevada Attorney General, regarding “Public Rights to use Public Streams and Rivers of Nevada” is included. This document contains the information for legal precedent and a list of cited legal documents.

“**State v. Bunkowski, 1972**” regarding the test of navigability of the State’s rivers and streams and Shepherd citations regarding subsequent decisions are attached.

JUSTIA

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State v. Bunkowski

503 P.2d 1231 (1972)

STATE of Nevada, Appellant, v. Julius BUNKOWSKI et al., Respondents, Trout Unlimited, Amicus Curiae, Carson Water Subconservancy District, Amicus Curiae.

No. 6799.

Supreme Court of Nevada.

November 29, 1972.

Rehearing Denied December 22, 1972.

Robert List, Atty. Gen., Michael L. Melner, and Arthur J. Bayer, Jr., Deputy Attys. Gen., Carson City, for appellant.

Laxalt, Berry & Allison, Stokes & Eck, Carson City, for respondents.

Breen, Young, Whitehead & Hoy, Reno, and Reno & Judd, Denver, Colo., for amicus curiae.

Guild, Hagen & Clark, Reno, for amicus curiae.

OPINION

ZENOFF, Chief Justice:

This is a land title action brought to remove the State's claim of ownership from certain described property owned by respondents.

Julius Bunkowski and David Lantry are the owners of 946 acres of land in Carson *1232 City and Lyon County, of which, in 40 acre parcels, 840 acres are traversed by the Carson River. Seven hundred seventy-seven acres were sold to the Brunswick Development Corporation for development and retrieval of mineralization existing in and about the river bed. The land owned by respondents devolve from ten federal and state patents. Three federal patents were issued prior to Nevada's statehood, the remaining five federal and two state patents were issued subsequent to statehood.

The Carson River is a natural water course having two branches or forks through which water flows every month of the year. The East Fork of the Carson and the tributaries thereof rise from rains, melting snows and springs in the Sierra Nevada Mountains near the town of Markleeville, Alpine County, California, whence they flow in a generally northerly direction into Douglas County, Nevada, through Carson Valley to a point in Carson Valley near Walley's Hot Springs where they join with the waters of the West Fork of the Carson River forming the main stream known as the Carson River. The West Fork and its tributaries similarly originate in Alpine County, California, in the vicinity of Hope Valley, whence the flow in a general northerly direction through Woodfords, California, into Douglas County and join with the East Fork of the Carson River. From Walley's Hot Springs the Carson flows in a general northeasterly direction through Douglas, Carson City, Storey and Churchill Counties, Nevada, in which latter county in the natural state the waters of the Carson flow into the Carson Sink and disappear. The entire water course exceeds 100 miles in length.

The lands in question owned by the respondents and traversed by the Carson lie within the Brunswick Canyon area northeast of Carson City and are adjacent to a three to four mile stretch of the river.

The Attorney General of Nevada, on January 6, 1970, and the Nevada Legislative Counsel, on January 13, 1970, issued opinions that the Carson River is a navigable stream and that the State owns the river bottom thereof. Shortly thereafter the respondents commenced this declaratory relief action in the lower court seeking to clear the alleged cloud from their title. After that the

parties stipulated, "That as an historical fact, the Carson River was at one time used for the floating of logs and timber," and, "That the said Carson River is not now nor has it ever been used by cargo or passenger carrying vessels."

All the evidence was heard before a Special Master. Pertinent to the issue before us the evidence showed that the patents from which respondents' title originates made no exception, reservation or exclusion for the portion of the channel lying within the bed of the Carson River. The lands in question have been carried on the tax rolls of Carson City^[1] and Lyon County without exclusion of the river bed and taxes have been paid on the total land within the patent calls.

As to the physical condition of the river and its uses the evidence in the main was confined to the early history of the Carson near the time when Nevada became a state (October 31, 1864). Although considerable impediments to commercial use of the river existed, such as willows, sand bars and lack of water, the early history revealed that the river was used by loggers to float logs and timber from the headwaters of the Carson in Alpine County, California, to saw mills near Virginia City. The first log drive occurred in the spring of 1861 and was in the nature of an experiment. Thereafter a group of men procured a franchise from the Legislature of the Territory of Nevada to improve the channel of the Carson River and to float logs down the river. Laws of Nevada Territory 100-01 (1861). Subsequently great quantities of saw logs and cordwood were brought down the Carson to fuel and supply the well-known mining operation and bonanza at Virginia City, Nevada. As described *1233 by one witness, the log drives were accomplished in the following manner: "They had to go up into the mountains [in Alpine County] and cut the logs and either drag them or float them on the small streams until they reached the main stream. Then they were floated down the [Carson] river to the entrance of the Carson Valley at Young's Crossing and there they had a [chain] boom and they held the logs in great numbers at that point until ... conditions would be right in the river so that they could float them down."

The log drives continued from the early 1860's for thirty-five years when the loggers found it too expensive to bring the large saw logs from the mountain slopes to the streams forcing them to move to other areas. The floating down of cordwood continued on for a number of years.

Except for the log drives and some dredging for gravel and various aggregates the evidence showed that there has been no other type of commercial activity in the sense of water trade on the Carson River.

The Master, after reviewing the evidence, proceeded to make his finding, viz: "That said Carson River is not in fact or in law now a navigable stream, nor was it in fact or in law a navigable stream

on the 31st day of October, 1864, such as to vest title to the stream bed or any portion thereof in the State of Nevada." The lower court adopted the conclusion of the Master and entered its judgment and decree, from which judgment this appeal has been taken.

The principal question in this appeal is whether the State has a valid claim to the bed of the Carson River as it flows across respondents' land. Other subsidiary issues must also be discussed, but first we will set out the appropriate test to resolve the primary issue.

1. In determining the title ownership of lands underlying waters within a state the courts must apply the uniform federal test of navigability, although various state tests of navigability, to be discussed below, exist. The United States Supreme Court stated in *United States v. Holt Bank*, 270 U.S. 49, 54-55, 46 S. Ct. 197, 198, 70 L. Ed. 465 (1926):

"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. [Citations.] But, as was pointed out in *Shively v. Bowlby*, [152 U.S. 1,] 49, 57-58, 14 S. Ct. 548, 38 L. Ed. 331, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." See *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922); *United States v. Utah*, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); *United States v. Oregon*, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935); *State Engineer v. Cowles Bros., Inc.*, 86 *1234 Nev. 872, 478 P.2d 159 (1970); *Utah v. United States*, 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971).

The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved

March 21, 1864), and under the constitutional principle of equality among the several states, the title to the bed of the Carson River then passed to the State, if the river was navigable, and if the bed had not already been disposed of by the United States. *United States v. Holt Bank*, supra, 270 U.S. at 55, 46 S. Ct. 197.

Most importantly and basic to the issue of title to the Carson River bed, the following statement of the court in *United States v. Holt Bank*, supra, at 55-56, 46 S. Ct. at 199 must be fully appreciated:

"Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States*, supra, [260 U.S.] p. 87, [43 S. Ct. 60]. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."

To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 454 (1971), that, "The streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." See also *State, by Burnquist v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278, 287 (1954). Reference to *People v. Mack*, supra, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal "navigability for title" test.

That test is stated by the court in *United States v. Holt Bank*, supra, 270 U.S. at 56, 46 S. Ct. at 199.

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does

not depend on the particular mode in which such use is or may be had whether by steamboats, sailing vessels or flatboats nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello*, 20 Wall. 430, 439, 22 L. Ed. 391; *United States v. Cress*, 243 U.S. 316, 323, 37 S. Ct. 380, 61 L. Ed. 746; *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121, 41 S. Ct. 409, 65 L. Ed. 847; *Oklahoma v. Texas*, 258 U.S. 574, 586, 42 S. Ct. 406, 66 L. Ed. 771; *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, [260 U.S.] p. 86, (43 S.Ct. 60)."

Considering briefly the evidence adduced before the Master, it appears that the log drivers encountered difficulty in conducting *1235 their drives because of the irregular flow and unchannelized nature of the river in the Carson Valley. Respondents contend that these impediments to commercial use preclude a holding of navigability. As will be shown, that is not the case.

In the United States Supreme Court cases which discuss navigability, a distinction must be made, as suggested in *R. Johnson & R. Austin, Jr., Recreation Rights and Titles to Beds on Western Lakes and Streams*, 7 Nat.Res.J. 1, 15 (1967), between "navigability" for land title and "navigability" for Federal Commerce Power.

A. For the Commerce Test, the court held that impediments to commercial use, such as those noted above, do not destroy navigability. For example, in *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 122, 41 S. Ct. at 412, where the issue concerned a dam to be built on the Desplaines River in Illinois the court stated: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water ..."

In *The Montello*, 20 Wall. [87 U.S.] 430, 441-442, 22 L. Ed. 391 (1874), it was said:

"The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessel, it could not be treated as a public highway. The capacity of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural

state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." (Emphasis added.)

In another Federal Commerce case, *United States v. Appalachian Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940), the court stated in the course of its opinion (at 405-410, 61 S.Ct. at 298-300):

"It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs;[2] that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The test as to navigability must take these variations into consideration.

.....

"To appraise the evidence of navigability or the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary conditions' refers to volume of water, the gradient and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

.....

"In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

"Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of *1236 years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." (Emphasis added.)

Applying the above rules to the facts stated above, it would appear that neither the impediments to navigation existing in the Carson nor the improvements in aid of navigation would preclude a finding of navigability under federal commerce power.

B. The Title Test. In addition to the commerce test a further condition to title navigability was made in *United States v. Oregon*, supra, 295 U.S. at 23, 55 S. Ct. 610, that the watercourse must be

geographically situated so that it may be useful for commerce. See also *State v. Bollenbach*, supra, 241 Minn. 103, 63 N.W.2d at 289. This condition is met here.[3]

Although no Supreme Court case has expressly based its decision of title navigability on the capacity of a stream to float out logs, the emphasized portions of the quotation from *The Montello* and *Appalachian Power* leads us to believe that in the setting of this case navigability for title has been established. Log driving was the first and apparently only important commercial use of the Carson.[4] The river was fortuitously and ideally located geographically for this use. The Carson River was and is navigable.[5]

2. Do the state courts have jurisdiction to apply the federal navigability test?

No case has been found which holds that there is exclusive federal jurisdiction to determine title navigability. The federal "question" appearing in the cases refers to the uniform federal "test" which is not used in the jurisdictional sense, *State of South Carolina ex rel. Maybank v. South Carolina E. & Gas Co.*, 41 F. Supp. 111 (E.D.S.C. 1941), but, on the contrary, has been applied by both state and federal courts to determine title to submerged lands. One of the best state cases applying the federal title test is *State, by Burnquist v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278 (1954). For a compilation of state court decisions applying the federal test see Appendix to R. *Johnson & R. Austin, Jr.*, supra, 7 Nat.Res.J. 1, 52 (1967). Although the Carson is an interstate watercourse, this action only relates to a portion of it lying solely within this court's jurisdiction.

3. Next we must consider the effect of the federal and state patents. Respondents claim title through ten patents; of these, two are state patents issued after statehood, eight are federal patents of which three were issued prior to statehood.

As to the prestatehood federal patents, it is to be noted that there is no express reservation of title to the river bed, *1237 all described land is granted without reservation. In *Wear v. Kansas*, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917), the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state supreme court took judicial notice of the navigability of the river, refused to hear evidence thereon and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Further, in *Hardin v. Jordan*, 140 U.S. 371, 384, 11 S. Ct. 808, 813, 35 L. Ed. 428 (1891), the court stated the applicable rule as to unrestricted patents in the following manner:

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

Therefore, by application of this rule we are free to construe the unrestricted federal and state patents by the same criterion. Considering the prestatehood federal patents, the following statement in *United States v. Oregon*, *supra*, 295 U.S. at 14, 55 S. Ct. at 615, seems appropriate:

"Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts v. New York*, 271 U.S. 65, 89, 46 S. Ct. 357, 70 L. Ed. 838. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the states passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

There is nothing in the record or to our knowledge which would rebut the presumption that the federal government held the subject lands in trust for the State of Nevada.

After statehood, the river being navigable and the bed thereof owned by the state, the federal government did not have control over the bed, and it would appear obvious that the federal patents conveyed none of the submerged lands.

As to the state patents, again, without reservation, it is clear that the State owned the land to do with as it might. "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect..." *United States v. Holt Bank*, *supra*, 270 U.S. at 54, 46 S. Ct. at 198.

It has been held, in what appears to be a majority of cases, that the states hold title to the beds of navigable watercourses in trust for the people of their respective states. *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821, 822-823, 112 A.L.R. 1104 (1937); Annot. Title to beds of natural lakes and ponds, 112 A.L.R. 1108 (1938); *Menzer v. Village of Elkhart Lake*, 51 Wis.2d 70, 186 N.W.2d 290 (1971); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473 (1970). Title to navigable water beds are normally inalienable. *Miami Corporation*

v. State, 186 La. 784, 173 So. 315 (1936). In *Alameda Conservation Association v. City of Alameda*, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1968), it was held that while the state owns land under bays, such lands can be transferred by the state free of trust upon proper legislative determination, citing *People v. California Fish Co.*, 166 Cal. 576, *1238 138 P. 79 (1913). See *Marks v. Whitney*, 6 Cal. 3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971). No such express legislative determination has been revealed here, consequently, the State, as sovereign, did not grant away the public land of the river bed.

4. Respondents assert in their answering brief that the list of legislative declared navigable waters in NRS Chapter 537 is exclusive and that since the Carson does not there appear, it is not navigable. First, as to the question of navigability, this court held in *State Engineer v. Cowles Bros., Inc.*, 86 Nev. 872, 876, 478 P.2d 159 (1970), that the issue of navigability is a judicial question, the "statement in the statutes therefore served no purpose." Accord, *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 453 (1971). Second, Chapter 537 is not a complete list as it omits Lake Tahoe which was held navigable in *Davis v. United States*, 185 F.2d 938, 942-943 (9th Cir.1950).

5. For not asserting its ownership of the Carson River bed earlier respondents contend that the State is now estopped to claim title thereto.

"The doctrine of estoppel should not be lightly invoked against the state. It will not be applied against it in its ... sovereign capacity." Annot., *Applicability of doctrine of estoppel against government and its governmental agencies*, 114 A.L.R. 2d 344 (1948). In *State v. Hutchins*, 79 N.H. 132, 105 A. 519, 523 (1919), the court held that the public rights in public waters cannot be alienated or made subject to easements except by legislative action; neither can the state's right in public waters be prescribed against nor can these rights be impaired by an estoppel growing out of a mere failure to object to encroachment. See *State v. George C. Stafford & Sons*, 99 N.H. 92, 105 A.2d 569, 573 (1954).

The State holds the subject lands in trust for public use.

Judgment reversed.

BATJER, MOWBRAY, THOMPSON, and GUNDERSON, JJ., concur.

NOTES

[1] Carson City now comprises what was once Ormsby County.

[2] This court recognized the floating of logs and timber as commerce in *Shoemaker v. Hatch*, 13 Nev. 261, 267 (1878). See also *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 228 N.W. 144 (1929).

[3] In one title case, *United States v. Utah*, 283 U.S. 64, 84, 51 S. Ct. 438, 444, 75 L. Ed. 844 (1931), the court quieted title in Utah to certain portions of the beds of the Green, Colorado and San Juan Rivers within the State of Utah, despite assertions that impediments to commercial use such as "logs and debris, ice, floods, rapids, and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers, produce a succession of shifting sand bars, shallow depths, and instability of channel," would preclude a finding of title navigability.

[4] Reference is made to a booklet entitled, "ALONG COMSTOCK TRAILS FEATURING THE CARSON RIVER MILLS AND THE VIRGINIA & TRUCKEE RAILROAD," by Dave Basso, found in the Carson City Library, N, F847, C6, B3, c. 2. This publication features a series of early Nevada pictures of several quartz mills along the Carson River built in the 1860's and 1870's. Very evident in the picture is the ample supply of water in the Carson River.

[5] Technically the evidence presented to the Master established that the northern terminus of the log drives was the Russell Mill at Empire which is upstream from the property in question. We will assume for the purposes of this decision that the logs would have continued to float downstream if they were not restrained at the mill.

88 Nev. 623
Supreme Court of Nevada.

STATE of Nevada, Appellant,
v.
Julius BUNKOWSKI et al., Respondents,
Trout Unlimited, Amicus Curiae,
Carson Water Subconservancy
District, Amicus Curiae.

No. 6799.

Nov. 29, 1972.

Rehearing Denied Dec. 22, 1972.

Synopsis

Declaratory judgment action by property owners to remove alleged cloud on title. The First Judicial District Court, Carson City, Frank B. Gregory, J., entered judgment and decree for plaintiffs, based on findings of fact, conclusions of law, and decisions of special master. The State appealed. The Supreme Court, Zenoff, C.J., held that Carson River which had been used to float logs and which was ideally located geographically for such use was 'navigable' under federal standard for determining title to river bed.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Water Law** ➡ Title and rights held in public trust

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2519 Title and rights held in public trust
(Formerly 270k1(3) Navigable Waters)

In determining title ownership of lands underlying waters within state, courts must apply uniform federal test of navigability.

2 Cases that cite this headnote

[2] **Water Law** ➡ Rights incident to state's admission to Union in general

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)1 Ownership and Control in General
405k2646 Ownership by State
405k2649 Rights incident to state's admission to Union in general

(Formerly 270k36(1) Navigable Waters)

Title to bed of Carson River passed to state when state was admitted into Union, if river was navigable, and if river bed had not already been disposed of by United States.

1 Cases that cite this headnote

[3] **Water Law** ➡ Specific waters

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2529 Specific waters

(Formerly 270k1(6) Navigable Waters)

Carson River which had been used to float logs and which was ideally located geographically for such use was "navigable" under federal standard for determining title to river bed.

2 Cases that cite this headnote

[4] **Water Law** ➡ Title and rights held in public trust

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2519 Title and rights held in public trust
(Formerly 270k1(3) Navigable Waters)

State courts have jurisdiction to apply federal navigability test in determining title to river bed.

1 Cases that cite this headnote

[5] **Water Law** ➡ Ownership by State

Water Law ➡ Power to grant

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water

405XV(C)1 Ownership and Control in General

405k2646 Ownership by State

405k2647 In general

(Formerly 270k36(1) Navigable Waters)

405 Water Law

405XV Navigable Waters

405XV(C) Lands Under Water

405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities

405k2676 Power to grant

(Formerly 270k37(7) Navigable Waters)

Federal patents to lands traversed by navigable river, granted before Nevada became state, did not convey title to river bed, even though there was no express reservation of title thereto; title to such lands passed to state upon admission to statehood.

1 Cases that cite this headnote

[6] **Water Law** ➡ Power to grant

405 Water Law

405XV Navigable Waters

405XV(C) Lands Under Water

405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities

405k2676 Power to grant

(Formerly 270k37(7) Navigable Waters)

Federal patents granted after Nevada was admitted to statehood did not convey bed of navigable river; after statehood federal government did not have control over river bed.

[7] **Water Law** ➡ Grant as incident to grant of riparian lands

405 Water Law

405XV Navigable Waters

405XV(C) Lands Under Water

405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities

405k2685 Grant as incident to grant of riparian lands

(Formerly 270k37(7) Navigable Waters)

State patents to lands traversed by navigable river did not convey title to river bed, although patents were without reservation.

[8] **Water Law** ➡ Specific waters

405 Water Law

405XV Navigable Waters

405XV(A) In General

405k2516 Navigability in General

405k2529 Specific waters

(Formerly 270k1(3) Navigable Waters)

Fact that Carson River was not included in statutory list of navigable waters was not determinative of whether river was navigable. N.R.S. 537.010 et seq.

2 Cases that cite this headnote

[9] **Estoppel** ➡ Particular state officers, agencies or proceedings

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.2 States and United States

156k62.2(2) Particular state officers, agencies or proceedings

(Formerly 156k62(2))

Failure of state to assert its claim of ownership of river bed at earlier time did not estop state from asserting claim.

2 Cases that cite this headnote

Attorneys and Law Firms

***624 **1231** Robert List, Atty. Gen., Michael L. Melner, and Arthur J. Bayer, Jr., Deputy Attys. Gen., Carson City, for appellant.

Laxalt, Berry & Allison, Stockes & Eck, Carson City, for respondents.

Breen, Young, Whitehead & Hoy, Reno, and Reno & Judd, Denver, Colo., for amicus curiae.

Guild, Hagen & Clark, Reno, for amicus curiae.

***625 OPINION**

ZENOFF, Chief Justice:

This is a land title action brought to remove the State's claim of ownership from certain described property owned by respondents.

Julius Bunkowski and David Lantry are the owners of 946 acres of land in Carson **1232 City and Lyon County, of which, in 40 acre parcels, 840 acres are traversed by the Carson River. Seven hundred seventy-seven acres were sold to the Brunswick Development Corporation for development and retrieval of mineralization existing in and about the river bed. The land owned by respondents devolve from ten federal and state patents. Three federal patents were issued prior to Nevada's statehood, the remaining five federal and two state patents were issued subsequent to statehood.

The Carson River is a natural water course having two branches or forks through which water flows every month of the year. The East Fork of the Carson and the tributaries thereof rise from rains, melting snows and springs in the Sierra Nevada Mountains near the town of Markleeville, Alpine County, California, whence they flow in a generally northerly direction into Douglas County, Nevada, through Carson Valley to a point in Carson Valley near Walley's Hot Springs where they join with the waters of the West Fork of the Carson River forming the main stream known as the Carson River. The West Fork and its tributaries similarly originate in Alpine County, California, in the vicinity of Hope Valley, whence the flow in a general northerly direction through Woodfords, California, into Douglas County and join with the East Fork of the Carson River. From Walley's Hot Springs the Carson flows in a general northeasterly direction through Douglas, Carson City, Storey and Churchill Counties, Nevada, in which latter county in the natural state the waters of the Carson flow into the Carson Sink and disappear. The entire water course exceeds 100 miles in length.

The lands in question owned by the respondents and traversed by the Carson lie within the Brunswick Canyon area *626 northeast of Carson City and are adjacent to a three to four mile stretch of the river.

The Attorney General of Nevada, on January 6, 1970, and the Nevada Legislative Counsel, on January 13, 1970, issued opinions that the Carson River is a navigable stream and that the State owns the river bottom thereof. Shortly thereafter the respondents commenced this declaratory relief action in the lower court seeking to clear the alleged cloud from their title. After that the parties stipulated, 'That as an historical fact, the Carson River was at one time used for the floating of logs and

timber,' and, 'That the said Carson River is not now nor has it ever been used by cargo or passenger carrying vessels.'

All the evidence was heard before a Special Master. Pertinent to the issue before us the evidence showed that the patents from which respondents' title originates made no exception, reservation or exclusion for the portion of the channel lying within the bed of the Carson River. The lands in question have been carried on the tax rolls of Carson City¹ and Lyon County without exclusion of the river bed and taxes have been paid on the total land within the patent calls.

As to the physical condition of the river and its uses the evidence in the main was confined to the early history of the Carson near the time when Nevada became a state (October 31, 1864). Although considerable impediments to commercial use of the river existed, such as willows, sand bars and lack of water, the early history revealed that the river was used by loggers to float logs and timber from the headwaters of the Carson in Alpine County, California, to saw mills near Virginia City. The first log drive occurred in the spring of 1861 and was in the nature of an experiment. Thereafter a group of men procured a franchise from the Legislature of the Territory of Nevada to improve the channel of the Carson River and to float logs down the river. Laws of Nevada Territory 100—01 (1861). Subsequently great quantities of saw logs and cordwood were brought down the Carson to fuel and supply the well-known mining operation and bonanza at Virginia City, Nevada. As described **1233 by one witness, the log drives were accomplished in the following manner: 'They had to go up into the mountains (in Alpine County) and cut the logs and either drag them or float them on the small streams until they reached the main stream. Then they were floated down the (Carson) river to the entrance of the Carson Valley at Young's Crossing and there they had a (chain) boom and they held the *627 logs in great numbers at that point until . . . conditions would be right in the river so that they could float them down.'

The log drives continued from the early 1860's for thirty-five years when the loggers found it too expensive to bring the large saw logs from the mountain slopes to the streams forcing them to move to other areas. The floating down of cordwood continued on for a number of years.

Except for the log drives and some dredging for gravel and various aggregates the evidence showed that there has been no other type of commercial activity in the sense of water trade on the Carson River.

The Master, after reviewing the evidence, proceeded to make his finding, viz: 'That said Carson River is not in fact or in law now a navigable stream, nor was it in fact or in law a navigable stream on the 31st day of October, 1864, such as to vest title to the stream bed or any portion thereof in the State of Nevada.' The lower court adopted the conclusion of the Master and entered its judgment and decree, from which judgment this appeal has been taken.

The principal question in this appeal is whether the State has a valid claim to the bed of the Carson River as it flows across respondents' land. Other subsidiary issues must also be discussed, but first we will set out the appropriate test to resolve the primary issue.

[1] 1. In determining the title ownership of lands underlying waters within a state the courts must apply the uniform federal test of navigability, although various state tests of navigability, to be discussed below, exist. The United States Supreme Court stated in ¹ United States v. Holt Bank, 270 U.S. 49, 54—55, 46 S.Ct. 197, 198, 70 L.Ed. 465 (1926):

'It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent *628 creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. (Citations.) But, as was pointed out in ² Shively v. Bowlby, (152 U.S. 1,) 49, 57—58, ³ 14 S.Ct. 548, 38 L.Ed. 331, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during

the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' See ⁴ Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922); ⁵ United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); ⁶ United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); ⁷ ****1234** State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970); ⁸ Utah v. United States, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971).

[2] The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved March 21, 1864), and under the constitutional principle of equality among the several states, the title to the bed of the Carson River then passed to the State, if the river was navigable, and if the bed had not already been disposed of by the United ⁹ States. United States v. Holt Bank, supra, 270 U.S. at 55, 46 S.Ct. 197.

Most importantly and basic to the issue of title to the Carson River bed, the following statement of the court in ¹⁰ United States v. Holt Bank, supra, at 55—56, 46 S.Ct. at 199 must be fully appreciated:

'Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.

¹¹ Brewer-Elliott Oil & Gas Co. v. United States, supra, (260 U.S.) p. 87, (43 S.Ct. 60). To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended.'

To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in *People v. Mack*, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448, 454 (1971), that, 'The *629 streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at

any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft.' See also *State*, by *Burnquist v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278, 287 (1954). Reference to *People v. Mack*, *supra*, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal 'navigability for title' test.

That test is stated by the court in *United States v. Holt Bank*, *supra*, 270 U.S. at 56, 46 S.Ct. at 199.

'The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. The *Montello*, 20 Wall. 430, 439, 22 L.Ed. 391; *United States v. Cress*, 243 U.S. 316, 323, 37 S.Ct. 380, 61 L.Ed. 746; *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121, 41 S.Ct. 409, 65 L.Ed. 847; *Oklahoma v. Texas*, 258 U.S. 574, 586, 42 S.Ct. 406, 66 L.Ed. 771; *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, (260 U.S.) p. 86, (43 S.Ct. 60).'

Considering briefly the evidence adduced before the Master, it appears that the log drivers encountered difficulty in conducting ****1235** their drives because of the irregular flow and unchanneled nature of the river in the Carson Valley. Respondents contend that these impediments to commercial use preclude a holding of navigability. As will be shown, that is not the case.

In the United States Supreme Court cases which discuss navigability, a distinction must be made, as suggested in *R. Johnson & R. Austin, Jr., Recreation Rights and Titles to Beds on Western Lakes and Streams*, 7 Nat.Res.J. 1, 15 (1967),

***630** between 'navigability' for land title and 'navigability' for Federal Commerce Power.

'A. For the Commerce Test, the court held that impediments to commercial use, such as those noted above, do not destroy navigability. For example, in *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 122, 41 S.Ct. at 412, where the issue concerned a dam to be built on the Desplaines River in Illinois the court stated: 'Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water . . .'

In the *Montello*, 20 Wall. (87 U.S.) 430, 441—442, 22 L.Ed. 391 (1874), it was said:

'The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

'It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessel, it could not be treated as a public highway. The capacity of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.' (Emphasis added.)

In another Federal Commerce case, *United States v. Appalachian Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940), the court stated in the course of its opinion (at 405—410, 61 S.Ct. at 298—300):

'It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs;² that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The test as to navigability must take these variations into consideration.

'To appraise the evidence of navigability or the natural condition only of the waterway is erroneous. Its availability

for *631 navigation must also be considered. 'Natural and ordinary conditions' refers to volume of water, the gradient and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

'In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

'Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of **1236 years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.' (Emphasis added.)

Applying the above rules to the facts stated above, it would appear that neither the impediments to navigation existing in the Carson nor the improvements in aid of navigation would preclude a finding of navigability under federal commerce power.

B. The Title Test. In addition to the commerce test a further condition to title navigability was made in  United States v. Oregon, supra, 295 U.S. at 23, 55 S.Ct. 610, that the watercourse must be geographically situated so that it may be useful for commerce. See also State v. Bollenbach, supra, 241 Minn. 103, 63 N.W.2d at 289. This condition is met here.³

[3] Although no Supreme Court case has expressly based its decision of title navigability on the capacity of a stream to float out logs, the emphasized portions of the quotation from The Montello and Appalachian Power leads us to believe that in the setting of this case navigability for title has been established. *632 Log driving was the first and apparently only important commercial use of the Carson.⁴ The river was fortuitously and ideally located geographically for this use. The Carson River was and is navigable.⁵

[4] 2. Do the state courts have jurisdiction to apply the federal navigability test?

No case has been found which holds that there is exclusive federal jurisdiction to determine title navigability. The federal

'question' appearing in the cases refers to the uniform federal 'test' which is not used in the jurisdictional sense, State of South Carolina ex rel. Maybank v. South Carolina E. & Gas Co., 41 F.Supp. 111 (E.D.S.C. 1941), but, on the contrary, has been applied by both state and federal courts to determine title to submerged lands. One of the best state cases applying the federal title test is State, by Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). For a compilation of state court decisions applying the federal test see Appendix to R. Johnson & R. Austin, Jr., supra, 7 Nat.Res.J. 1, 52 (1967). Although the Carson is an interstate watercourse, this action only relates to a portion of it lying solely within this court's jurisdiction.

3. Next we must consider the effect of the federal and state patents. Respondents claim title through ten patents; of these, two are state patents issued after statehood, eight are federal patents of which three were issued prior to statehood.

[5] As to the prestatehood federal patents, it is to be noted that there is no express reservation of title to the river bed, **1237 all described land is granted without reservation.

In  Wear v. Kansas, 245 U.S. 154, 38 S.Ct. 55, 62 L.Ed. 214 (1917), the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state supreme court took *633 judicial notice of the navigability of the river, refused to hear evidence thereon and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Further, in  Hardin v. Jordan, 140 U.S. 371, 384, 11 S.Ct. 808, 813, 35 L.Ed. 428 (1891), the court stated the applicable rule as to unrestricted patents in the following manner:

'We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.'

Therefore, by application of this rule we are free to construe the unrestricted federal and state patents by the same criterion. Considering the prestatehood federal patents, the following statement in  United States v. Oregon, supra, 295 U.S. at 14, 55 S.Ct. at 615, seems appropriate:

'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts v. New York*, 271 U.S. 65, 89, 46 S.Ct. 357, 70 L.Ed. 838. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the states passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'

There is nothing in the record or to our knowledge which would rebut the presumption that the federal government held the subject lands in trust for the State of Nevada.

[6] After statehood, the river being navigable and the bed thereof owned by the state, the federal government did not have control over the bed, and it would appear obvious that the federal patents conveyed none of the submerged lands.

[7] As to the state patents, again, without reservation, it is clear that the State owned the land to do with as it might. 'It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign *634 capacity and may be used and disposed of as it may elect . . .'

 *United States v. Holt Bank*, supra, 270 U.S. at 54, 46 S.Ct. at 198.

It has been held, in what appears to be a majority of cases, that the states hold title to the beds of navigable watercourses in trust for the people of their respective states. *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821, 822—823, 112 A.L.R. 1104 (1937); *Annot. Title to beds of natural lakes and ponds*, 112 A.L.R. 1108 (1938); *Menzer v. Village of Elkhart Lake*, 51 Wis.2d 70, 186 N.W.2d 290 (1971); *City of Long Beach v. Mansell*, 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423 (1970); *J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473 (1970). Title to navigable water beds are normally inalienable. *Miami Corporation v. State*, 186 La. 784, 173 So. 315 (1936).

In  *Alameda Conservation Association v. City of Alameda*, 264 Cal.App.2d 284, 70 Cal.Rptr. 264 (1968), it was held that while the state owns land under bays, such lands can be transferred by the state free of trust upon proper legislative

determination, citing ****1238** *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913). See *Marks v. Whitney*, 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374 (1971). No such express legislative determination has been revealed here, consequently, the State, as sovereign, did not grant away the public land of the river bed.

[8] 4. Respondents assert in their answering brief that the list of legislative declared navigable waters in NRS Chapter 537 is exclusive and that since the Carson does not there appear, it is not navigable. First, as to the question of navigability, this court held in  *State Engineer v. Cowles Bros., Inc.*, 86 Nev. 872, 876, 478 P.2d 159 (1970), that the issue of navigability is a judicial question, the 'statement in the statutes therefore served no purpose.' Accord, *People v. Mack*, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448, 453 (1971). Second, Chapter 537 is not a complete list as it omits Lake Tahoe which was held navigable in *Davis v. United States*, 185 F.2d 938, 942—943 (9th Cir. 1950).

[9] 5. For not asserting its ownership of the Carson River bed earlier respondents contend that the State is now estopped to claim title thereto.

'The doctrine of estoppel should not be lightly invoked against the state. It will not be applied against it in its . . . not be applied against it in its . . . of doctrine of estoppel against government and its governmental agencies, 114 A.L.R.2d 344 (1948) 114 A.L.R.2d 344 (1948). In *State v. Hutchins*, 79 N.H. 132, 105 A. 519, 523 (1919), the court held that the public rights in public *635 waters cannot be alienated or made subject to easements except by legislative action; neither can the state's right in public waters be prescribed against nor can these rights be impaired by an estoppel growing out of a mere failure to object to encroachment. See  *State v. George C. Stafford & Sons*, 99 N.H. 92, 105 A.2d 569, 573 (1954).

The State holds the subject lands in trust for public use.

Judgment reversed.

BATJER, MOWBRAY, THOMPSON, and GUNDERSON, JJ., concur.

All Citations

88 Nev. 623, 503 P.2d 1231

Footnotes

- 1 Carson City now comprises what was once Ormsby County.
- 2 This court recognized the floating of logs and timber as commerce in  Shoemaker v. Hatch, 13 Nev. 261, 267 (1878). See also Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N.W. 144 (1929).
- 3 In one title case,  United States v. Utah, 283 U.S. 64, 84, 51 S.Ct. 438, 444, 75 L.Ed. 844 (1931), the court quieted title in Utah to certain portions of the beds of the Green, Colorado and San Juan Rivers within the State of Utah, despite assertions that impediments to commercial use such as 'logs and debris, ice, floods, rapids, and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers, produce a succession of shifting sand bars, shallow depths, and instability of channel,' would preclude a finding of title navigability.
- 4 Reference is made to a booklet entitled, 'ALONG COMSTOCK TRAILS FEATURING THE CARSON RIVER MILLS AND THE VIRGINIA & TRUCKEE RAILROAD,' by Dave Basso, found in the Carson City Library, N, F847, C6, B3, c. 2. This publication features a series of early Nevada pictures of several quartz mills along the Carson River built in the 1860's and 1870's. Very evident in the picture is the ample supply of water in the Carson River.
- 5 Technically the evidence presented to the Master established that the northern terminus of the log drives was the Russell Mill at Empire which is upstream from the property in question. We will assume for the purposes of this decision that the logs would have continued to float downstream if they were not restrained at the mill.

Citing References (35)

Treatment	Title	Date	Type	Depth	Headnote(s)
Examined by	1. Lawrence v. Clark County 254 P.3d 606, 610+ , Nev. REAL PROPERTY - Water. Remand was necessary to determine whether land sought to be transferred was subject to public trust doctrine.	July 07, 2011	Case		1 2 8 P.2d
Cited by	2. Mineral County v. Lyon County 473 P.3d 418, 424+ , Nev. ENVIRONMENTAL LAW — Wetlands. The public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.	Sep. 17, 2020	Case		8 P.2d
Cited by	3. Manning v. Nevada State Bd. of Accountancy 673 P.2d 494, 495 , Nev. State Board of Accountancy filed complaint seeking an injunction to restrain individual from use of word "accountant" in his business. The First Judicial District Court, Carson...	Dec. 20, 1983	Case		9 P.2d
Cited by	4. Neal v. Bently Nevada Corp. 771 F.Supp. 1068, 1072 , D.Nev. Action was brought against landowner for injuries sustained when plaintiff swung from rubber hose tied to tree and dove into shallow part of river and sustained injuries. On...	July 12, 1991	Case		3 P.2d
Cited by	5. Hodges Transp., Inc. v. State of Nev. 562 F.Supp. 521, 523+ , D.Nev. Landowner sued State of Nevada to quiet title to bed of the Carson River and a dam on the river. On motion to dismiss, the District Court, Bruce R. Thompson, J., held that...	May 11, 1983	Case		5 P.2d
Cited by	6. Hitchings v. Del Rio Woods Recreation & Park Dist. 127 Cal.Rptr. 830, 834+ , Cal.App. 1 Dist. Action was brought to establish right to free and unobstructed navigation of portion of the Russian River. The Superior Court, Sonoma County, Vernon Stoll, J., declared the river...	Feb. 23, 1976	Case		4 P.2d
Cited by	7. Mr. Roland Westergard 1980 Nev. Op. Atty. Gen. 56, 56 Navigable River—The State Engineer, irrigation districts, the Division of State Lands, the individual counties, and the United States all have the authority to seek removal of...	Apr. 08, 1980	Administrative Decision		3 P.2d
Cited by	8. 37 Or. Op. Atty. Gen. 1342, 1342 37 Or. Op. Atty. Gen. 1342, 1342 This opinion is issued in response to a question presented by William S. Cox, Director, Division of State Lands. Can the Division of State Lands rely on the existence of log drives...	May 14, 1976	Administrative Decision		3 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	9. 37 Or. Op. Atty. Gen. 578, 578+ 37 Or. Op. Atty. Gen. 578, 578+ This opinion is issued in response to a question submitted by the Honorable Nancie Fadeley, State Representative. What effect will HB 3258 have upon public rights in navigable...	May 19, 1975	Administrative Decision		3 P.2d
Mentioned by	10. Pellegrini v. State 34 P.3d 519, 531 , Nev. CRIMINAL JUSTICE - Habeas Corpus. Statute imposing one-year limitations period on habeas petitions applies to successive petitions.	Nov. 15, 2001	Case		9 P.2d
Mentioned by	11. CWC Fisheries, Inc. v. Bunker 755 P.2d 1115, 1119 , Alaska Holder of state-granted patent in tidelands brought trespass claim against commercial fisherman. The Superior Court, Third Judicial District, Kenai, Charles K. Cranston, J.,...	June 03, 1988	Case		—
Mentioned by	12. Arizona Center For Law In Public Interest v. Hassell 837 P.2d 158, 167 , Ariz.App. Div. 1 Organizations and individuals brought action challenging validity of provisions of legislation substantially relinquishing state's interest in riverbed lands. Landowners who...	Sep. 10, 1991	Case		1 P.2d
Mentioned by	13. Bott v. Commission of Natural Resources of State of Mich. Dept. of Natural Resources 327 N.W.2d 838, 844+ , Mich. Owners of land on both sides of creek brought trespass action against riparian owners of land on lake, and State filed complaint against plaintiffs, alleging that their bridge...	Dec. 08, 1982	Case		3 P.2d
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—	15. Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned 6 A.L.R.4th 1030 This annotation collects and analyzes the cases, state and federal, determining or discussing public rights to engage in recreational boating, fishing, wading, or like activities...	1981	ALR	—	1 3 4 6 8 P.2d
—	16. Title to beds of natural lakes or ponds 112 A.L.R. 1108 The reported case for this annotation is Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).	1938	ALR	—	2 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	17. Law of Water Rights and Resources s 8:12, § 8:12. Navigability for title: Federal versus state ownership—Federal test Navigability for title is determined by a historic, backward looking test. Although there was some confusion about the source of the test, three Supreme Court cases between 1926...	2020	Other Secondary Source	—	3 P.2d
—	18. Law of Water Rights and Resources s 8:14, § 8:14. Navigability for title: Federal versus state ownership—State definitions of navigability for post-patent disputes—Adoption of federal test Most states have adopted the federal navigable in fact test to allocate titles. This test vests title to the beds underlying these waters in the state. These states are Arkansas,...	2020	Other Secondary Source	—	—
—	19. State Environmental Law s 4:11, § 4:11. Navigability tests and private lands Application of the federal title test does not completely determine which natural resources are subject to the public trust doctrine. Although that test determines whether a state...	2020	Other Secondary Source	—	1 P.2d
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Treatment	Title	Date	Type	Depth	Headnote(s)
—	24. CJS Navigable Waters s 127, § 127. Public grants of riparian land as conveying land under water CJS Navigable Waters Usually a public grant of land bounded by navigable water does not pass title to land under water, or, in other words, in the absence of a statute providing otherwise or language...	2021	Other Secondary Source	—	3 P.2d
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—	30. 13 Nev. L.J. 290, LAWRENCE V. CLARK COUNTY AND NEVADA'S PUBLIC TRUST DOCTRINE: RECONSIDERING WATER RIGHTS IN THE DESERT 13 Nev. L.J. 290 , 297+ Aridity, and aridity alone, makes the various Wests one. The distinctive western plants and animals, the hard clarity (before power plants and metropolitan traffic altered it) of...	2012	Law Review	—	7 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	31. A RIVER RUNS TO IT: CAN THE PUBLIC TRUST DOCTRINE SAVE WALKER LAKE? 44 Santa Clara L. Rev. 831 , 860+ While traveling through Nevada, Mark Twain observed many curious waterways. He noted, There are several rivers in Nevada, and they all have this mysterious fate. They end in...	2004	Law Review	—	3 4 P.2d
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—	34. ADAPTING TO CLIMATE CHANGE: THE POTENTIAL ROLE OF STATE COMMON-LAW PUBLIC TRUST DOCTRINES 34 Vt. L. Rev. 781 , 853 Climate change is already altering historical expectations regarding water supply and aquatic ecosystems. In turn, changes in water supply may call into question the continued...	2010	Law Review	—	3 P.2d
—	35. THE PUBLIC TRUST DOCTRINE: DOES THE COAST REALLY BELONG TO EVERYONE? A. Breadth of Modern Doctrine is Immense B. Historical Roots of Public Trust Doctrine A. New Public Trust Uses B. The Problem of Competing Public Trust Uses C. Land Now Subject to...	1988	Other Secondary Source	—	—

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Mineral County v. Lyon County

Justia Opinion Summary

The Supreme Court answered in the negative a question certified to it by the Ninth Circuit Court of Appeals, holding that the public trust doctrine does not permit the reallocation of rights already adjudicated and settled under the doctrine of prior appropriation.

This litigation stemmed from Mineral County's intervention in longstanding litigation over water rights in the Walker River Basin to protect and restore Walker Lake. Here, the Supreme Court was asked for the first time to consider whether the public trust doctrine permits reallocating water rights previously settled under Nevada's prior appropriation doctrine. The Supreme Court held that the doctrine, as implemented through the state's water statutes, does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.

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130 NEV., ADVANCE OPINION

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER
LAKE WORKING GROUP,
Appellants,
vs.
LYON COUNTY; CENTENNIAL
LIVESTOCK; BRIDGEPORT
RANCHERS; SCHROEDER GROUP;
WALKER RIVER IRRIGATION
DISTRICT; STATE OF NEVADA
DEPARTMENT OF WILDLIFE; AND
COUNTY OF MONO, CALIFORNIA,
Respondents.

No. 75917

FILED

SEP 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY _____
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Certified questions under NRAP 5 concerning Nevada's public trust doctrine. United States Court of Appeals for the Ninth Circuit; A. Wallace Tashima, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges.

Question answered.

Simeon M. Herskovits, El Prado, New Mexico; Sean A. Rowe, District Attorney, Mineral County,
for Appellants Mineral County and Walker Lake Working Group.

Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, Bryan L. Stockton, Senior Deputy Attorney General, and Tori N. Sundheim, Deputy Attorney General, Carson City,
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Supreme Court
of
Nevada

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20-342410

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Woodburn & Wedge and Gordon H. DePaoli, Dale E. Ferguson, and Domenico R. DePaoli, Reno,
for Respondent Walker River Irrigation District.

Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,
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Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California, for Amici Curiae Churchill County, City of Fallon, and Truckee-Carson Irrigation District.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER
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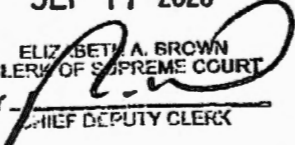
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Taggart & Taggart, Ltd., and Paul G. Taggart and David H. Rigdon, Carson City, for Amici Curiae Nevada Farm Bureau Federation, Nevada Cattlemen's Association, Lyon County Farm Bureau, and Elko County Farm Bureau.

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Blanchard, Krasner & French and Steven M. Silva, Reno, for Amicus Curiae Pacific Legal Foundation.

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BEFORE THE COURT EN BANC.¹

OPINION

By the Court, STIGLICH, J.:

In *Lawrence v. Clark County*, we adopted the public trust doctrine, which generally establishes that a state holds its navigable waterways in trust for the public. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). We are asked for the first time to consider whether the doctrine

¹The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

permits reallocating water rights previously settled under Nevada's prior appropriation doctrine.

The Ninth Circuit Court of Appeals certified two questions to this court. The first question, as we rephrased it, asks: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" The second question asks: "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?"

We conclude that the public trust doctrine as implemented through our state's comprehensive water statutes does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation. In doing so, we reaffirm that the public trust doctrine applies in Nevada and clarify that the doctrine applies to all waters within the state, including those previously allocated under prior appropriation. We further hold that the state's statutory water scheme is consistent with the public trust doctrine by requiring the State Engineer to consider the public interest when allocating and administering water rights. But in recognizing the significance of finality in water rights, our Legislature has expressly prohibited reallocating adjudicated water rights that have not been otherwise abandoned or forfeited in accordance with the state's water statutes. Accordingly, we answer the first question as reworded in the negative, and we need not consider the second.

FACTS AND PROCEDURAL HISTORY²

The current litigation arises from appellant Mineral County's intervention in long-running litigation over the water rights in the Walker River Basin to protect and restore Walker Lake.

Walker River Basin and Walker Lake's decline

The Walker River Basin covers about 4,000 square miles, stretching northeast from its origins in the Sierra Nevada mountain range in California to its terminus, Walker Lake in Nevada. Approximately one quarter of the Basin lies in California, and California accounts for a majority of the precipitation and surface water flow into the Basin. The vast majority of the water is consumed and lost through evaporation across the border in Nevada.

Walker Lake is approximately 13 miles long, 5 miles wide, and 90 feet deep. However, its size and volume have shrunk significantly since they were first measured in 1882. By 1996, Walker Lake retained just 50 percent of its 1882 surface area and 28 percent of its 1882 volume. Today, Walker Lake suffers from high concentrations of total dissolved solids, such that it has high salt content, low oxygen content, and high temperatures. While the cause of the decline is attributable to multiple factors, including declining precipitation levels and natural lake recession over time, it is clear that upstream appropriations play at least some role. The decline of Walker Lake, according to appellants, has threatened the shelter of migratory birds

²The following facts are from the Ninth Circuit's certification order, given that this court's review is limited to those facts. See *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012).

and proven inhospitable to fish species such that much of the lake's fishing industry has been eliminated.

Litigation over water rights in Walker River Basin

Litigation over the Walker River Basin began in 1902 when a cattle and land company sued another to enjoin it from interfering with the company's use of the Walker River in Nevada. *See Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910). That litigation ended in 1919 with a final decree from the United States District Court for the District of Nevada. *See Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 240, 20 P.3d 800, 803 (2001).

In 1924, the United States brought a case in the United States District Court for the District of Nevada to establish water rights for the Walker Lake Paiute Tribe (the Tribe). The case resulted in the Walker River Decree (the Decree) in 1936, which adjudicated the water rights of various claimants under the doctrine of prior appropriation. *See United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10, 11 (D. Nev. 1936). The Decree also created the Walker River Commission and the United States Board of Water Commissioners. *See Mineral Cty.*, 117 Nev. at 240, 20 P.3d at 804. The United States District Court for the District of Nevada has maintained jurisdiction over the Decree since.

In 1987, the Tribe intervened in this litigation to establish procedures to change allocations of water rights subject to the Decree. That motion was granted, and since then, the Nevada State Engineer reviews all change applications under the Decree in Nevada in accordance with the state's water statutes, subject to the federal district court's review. In 1991, the Tribe sought recognition of additional water rights under the implied federal reserved water right.

Mineral County's intervention

In 1994, Mineral County moved to intervene to modify the Decree to ensure minimum flows into Walker Lake. It noted the decline of Walker Lake and its impact on Mineral County's economy. The amended complaint sought an allocation of minimum flows of 127,000 acre/feet per year to Walker Lake under the "doctrine of maintenance of the public trust." The United States District Court for the District of Nevada granted Mineral County's intervention in 2013.³ Appellant Walker Lake Working Group also supports Mineral County's position but was a defendant in the lower court case as a rights holder under the Decree.

In 2015, the United States District Court for the District of Nevada dismissed Mineral County's amended complaint in intervention, concluding that (1) Mineral County lacked standing to assert a *parens patriae* theory; (2) the public trust doctrine could only prospectively prevent granting appropriative rights, and any retroactive application of the public trust doctrine would constitute a taking requiring just compensation; (3) under the political question doctrine, the court lacked authority to effectuate a taking; and (4) Walker Lake is not part of the Walker River Basin.

Mineral County and the Walker Lake Working Group appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit determined that

³During the pendency of the motion for intervention, appellants filed a writ petition with this court seeking to enjoin the State and the Department of Conservation and Natural Resources from granting additional water rights from Walker River and challenging their previous allocations as violations of the public trust. We dismissed the writ petition because the United States District Court for the District of Nevada was the proper forum as the decree court monitoring Walker River. *See Mineral Cty.*, 117 Nev. at 245-46, 20 P.3d at 807.

Mineral County had standing to assert its public trust claim. In a concurrent case, it determined that Walker Lake is within the Walker River Basin. *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 605-06 (9th Cir. 2018). However, whether Mineral County could seek minimum flows depended on whether the public trust doctrine permits reallocating rights previously settled under prior appropriation. The Ninth Circuit certified two questions to our court, and we accepted both questions.

DISCUSSION

In determining whether the public trust doctrine permits reallocating rights adjudicated and settled under the doctrine of prior appropriation, we first discuss the tenets of each doctrine. We then discuss Nevada's statutory water scheme, which we conclude already embraces both of these doctrines.

Prior appropriation doctrine in Nevada

Like most western states, Nevada is a prior appropriation state. The prior appropriation doctrine grants “[a]n appropriative right [that] ‘may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.’” *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 13 (4th ed. 1986)). In *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866), we formally recognized the prior appropriation doctrine in Nevada. Decades later, we affirmed that the doctrine of prior appropriation was the prevailing doctrine in Nevada. *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 322 (1889); see also *Jones v. Adams*, 19 Nev. 78, 84-86, 6 P. 442, 445-46 (1885)

(noting that the common-law doctrine of riparian rights was not suitable for the conditions in Nevada).

The public trust doctrine in Nevada

The public trust doctrine establishes that the state holds its navigable waterways and lands thereunder in trust for the public. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The doctrine generally acts as a restraint on the state in alienating public trust resources. *Id.* at 453. It is an ancient principle originating from Roman law, which provided that “[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.” *The Institutes of Justinian*, Lib. II, Tit. I, § 1, at 158 (Thomas Collett Sandars trans., Callaghan & Co., 1st Am. ed. 1876). From this origin, it was adopted by the common-law courts of England. *See Shively v. Bowlby*, 152 U.S. 1, 11 (1894) (“By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King.”).

The public trust doctrine was first recognized in the United States in *Martin v. Waddell*, 41 U.S. 367 (1842). In *Martin*, the United States Supreme Court noted that “when the [r]evolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use” *Id.* at 410. Then in the seminal case of *Illinois Central Railroad*, the United States Supreme Court explained that when states were admitted into the United States on an “equal footing” with the original states, they were granted title to the navigable waters and the lands covered by those waters. 146 U.S. at 434-35. The states thus held title to these areas “in trust for the people of the State” to be enjoyed for

navigation, fishing, and commerce freed from the obstruction of private parties. *Id.* at 452.

Nevada has historically embraced public trust principles. In *State Engineer v. Cowles Brothers, Inc.*, we recognized that “[w]hen a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams.” 86 Nev. 872, 874, 478 P.2d 159, 160 (1970). In *State v. Bunkowski*, we reaffirmed the principles of state ownership of navigable waters and the beds underneath in determining that the Carson River was “navigable” and therefore belonged to the State in trust for public use. 88 Nev. 623, 633-34, 503 P.2d 1231, 1237 (1972). In a concurrence in *Mineral County v. State, Department of Conservation*, Justice Rose eloquently explained the role of the public trust doctrine in Nevada water law:

This court has itself recognized that this public ownership of water is the “most fundamental tenet of Nevada water law.” Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times “forms the outer boundaries of permissible government action with respect to public trust resources.” In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring) (internal footnotes omitted) (internal citations omitted).

Ten years later, in *Lawrence v. Clark County*, we expressly adopted the public trust doctrine in Nevada. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). In doing so, we explained that sources of Nevada’s public

trust doctrine derived not only from common law, but from Nevada's Constitution, its statutes, and the inherent limitations on the state's sovereignty. *Id.* at 398, 254 P.3d at 612.

Particularly, Article 8, Section 9 of the Nevada Constitution, the gift clause, provides that "[t]he State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." We noted that this clause limits the Legislature's ability to dispose of the public's resources, "at the core of which lays the principle that the state acts only as a fiduciary for the public when disposing of the public's valuable property." *Lawrence*, 127 Nev. at 399, 254 P.3d at 612. "[T]he public trust doctrine, like the gift clause, requires the state to serve as trustee for public resources." *Id.*

Moreover, we noted that the Legislature effectively codified the principles behind the public trust doctrine through NRS 321.0005 and NRS 533.025. Specifically, the Legislature has declared that state lands "must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes." NRS 321.0005(1). Regarding water, the Legislature has declared that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025. Thus, "[b]oth provisions recognize that the public land and water of this state do not belong to the state to use for any purpose, but only for those purposes that comport with the public's interest in the particular property, exemplifying the fiduciary principles at the heart of the public trust doctrine." *Lawrence*, 127 Nev. at 400, 254 P.3d at 613.

Finally, we noted that the public trust doctrine also derives from inherent limitations on a state's sovereign powers, as recognized by the United States Supreme Court in *Illinois Central Railroad* in establishing that:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 U.S. at 453. Thus, in *Lawrence*, we explained that "because the state holds such property in trust for the public's use, the state is simply without power to dispose of public trust property when it is not in the public's interest." 127 Nev. at 400, 254 P.3d at 613.

While we note that the parties here do not dispute whether the public trust doctrine applies in Nevada, they dispute (1) whether such doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, and (2) whether such doctrine applies to nonnavigable waters, navigable waters only, or no water at all.

The public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation

Appellants ask this court to explicitly recognize that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right. We explicitly recognize so.

Since our state's admission to the Union, the state's constitution and inherent limitations on state sovereignty have restricted the state's ability to dispose of public trust resources such as navigable

waters and the lands thereunder. *See Nev. Const. art. 8, § 9; Ill. Cent. R.R.*, 146 U.S. at 453. Thus, when the state declared that all water within the state belonged to the public, all waters, whether navigable or nonnavigable, within the state were subject to this limitation on the state's discretion to dispose of public trust resources. *Cf. NRS 533.025*. These inherent limitations applied prior to our court's express adoption of the doctrine in *Lawrence*. The public trust doctrine therefore applies to water rights allocated before and subsequent to our opinion in *Lawrence*.

The public trust doctrine applies to all waters within the state, whether navigable or nonnavigable

Appellants and their amici ask this court to recognize that the public trust doctrine encompasses nonnavigable waters, while respondents and their amici argue, alternatively, that the doctrine either applies only to navigable waters or no water at all. Given the confusion over the *res* of the public trust doctrine, we clarify that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.⁴ *See id.* To limit the public trust doctrine to only navigable waterways and the lands below would ignore the fact that flowing water that feeds into the navigable waters is allocated along the way. As stated by Justice Rose,

[A]lthough the original scope of the public trust reached only navigable water, the trust has evolved

⁴The dissent errs in contending that this clarification unnecessarily expands the scope of the public trust doctrine. The Legislature recognized that "[t]he water of all sources" is subject to the public trust doctrine. *See NRS 533.025*. The waters of the Basin include nonnavigable tributaries that feed into the navigable Walker Lake, and, as the dissent recognizes, nonnavigable tributaries feeding navigable waters must fall within the scope of the doctrine to prevent the harm of their diversion. Moreover, the parties dispute the scope of the doctrine, warranting this clarification.

to encompass non-navigable tributaries that feed navigable bodies of water. This extension of the doctrine is natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated.

Mineral Cty., 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (internal footnote omitted). To permit the state, as owner of all water within its borders, to freely allocate nonnavigable waters to the detriment of navigable waters held for the public trust would permit the state to evade its fiduciary duties regarding public trust property. This, the state cannot do.

We therefore reaffirm that the public trust doctrine applies in Nevada. We also clarify that it applies to rights previously settled under prior appropriation and clarify that the doctrine applies to all waters in the state and the lands submerged beneath navigable waters.

Nevada's water statutes are consistent with the public trust doctrine

Although we recognize that the public trust doctrine applies to prior appropriated rights and that the doctrine has always inhered in Nevada's water law, we hold that Nevada's comprehensive water statutes are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*. See 127 Nev. at 405, 254 P.3d at 616.

Nevada's statutes regulating water use require the State Engineer to consider the public interest in allocating water rights

The Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada. Much of Nevada's water laws were rewritten and codified in 1913, bringing all of the state's surface waters and artesian groundwater

under state ownership and regulation by the State Engineer.⁵ 1913 Nev. Stat., ch. 140, §§ 1, 18, 20, at 192, 195, 196. In bringing all of the state's water under comprehensive regulation, the Legislature declared that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

Nevada's water statutes embrace prior appropriation as a fundamental principle. Water rights are given "subject to existing rights," NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).

The other fundamental principle that the water statutes embrace is beneficial use. Specifically, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035; *see also* NRS 533.030(1) (providing that "all water may be appropriated for beneficial use" subject to existing rights and other limitations provided in the water statutory scheme). Beneficial use is declared "a public use," NRS 533.050, and by statute includes uses such as irrigation, power, municipal supply, domestic use, mining, livestock watering, and storage, NRS 533.340. In 1969, "any recreational purpose," which includes fishing and wildlife habitations, was additionally deemed a beneficial use. NRS 533.030(2); *see* 1969 Nev. Stat., ch. 111, § 1, at 141 (amending NRS 533.030); *State v. Morros*, 104 Nev. 709, 716-17, 766 P.2d 263, 268 (1988) (citing Hearing on A.B. 278 Before the Senate Federal, State & Local Governments Comm., 55th Leg. Sess. (Nev., March 7, 1969)). NRS 533.023 was added in

⁵The State Engineer was then granted jurisdiction over all underground waters in the state in 1939. 1939 Nev. Stat., ch. 178, § 1, at 274.

1989 to define “[w]ildlife purposes” to include “the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats.” See 1989 Nev. Stat., ch. 741, § 1, at 1733. Accordingly, beneficial use underpins Nevada’s water statutes, and the Legislature has continued to delineate and expand on which uses are considered public uses in Nevada.

To ensure that water is being used beneficially and for public use, Nevada’s water law charges the State Engineer with approving and rejecting applications. See NRS 533.325 (requiring that anyone who wishes to appropriate water or change its diversion apply to the State Engineer for a permit). The State Engineer has identified 13 guidelines, including beneficial use, in determining what constitutes the public interest. See *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 746-47, 918 P.2d 697, 698-99 (1996). In considering whether to approve or reject applications, the State Engineer must consider whether the proposed action is “environmentally sound” and “an appropriate long-term use which will not unduly limit the future growth and development in the basin” for groundwater applications, NRS 533.370(3)(c)-(d), and must reject any permit applications detrimental to the public interest, NRS 533.370(2). In these ways, Nevada’s water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest. These considerations are consistent with the public trust doctrine.

Appellants argue, however, that the statutory scheme does not ensure that the state is fulfilling its continuous public trust duties. They maintain that the statutory scheme does not place an affirmative fiduciary

duty on the state to assure that public trust resources are available for future generations. We disagree.

First, the statutes constrain water usage to uses that are necessary and terminate water rights when water is not used beneficially, thereby ensuring against waste. See NRS 533.045 ("When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this State except at such times as the water is required for a beneficial purpose."); NRS 533.060(1) ("Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes The balance of the water not so appropriated must be allowed to flow in the natural stream . . . and must not be considered as having been appropriated thereby."); NRS 534.090 (recognizing forfeiture for nonuse of groundwater for five consecutive years). Second, the statute recognizes that water rights may be abandoned. See NRS 533.060 (regarding surface water rights); NRS 534.090 (regarding groundwater rights). Finally, the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of public welfare, which includes curtailing groundwater rights during water supply shortages. NRS 534.120. In these ways, Nevada's water statutes protect against wasteful use and incorporate mechanisms for limiting water rights when water resources are depleted. The statutory scheme therefore sufficiently places an affirmative duty on the State Engineer to maintain public trust resources.⁶

⁶Insofar as the dissent contends that our opinion provides no remedy should the State Engineer abuse its office or misallocate public resources, it

Nevada's water statutes satisfy Lawrence

In *Lawrence*, we adopted a three-part test to determine whether the dispensation of public trust property is valid. 127 Nev. at 405, 254 P.3d at 616. Specifically, we stated that courts must consider “(1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.’” *Id.* (quoting *Ariz. Ctr. for Law v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991)). In considering the third prong, courts must evaluate the following factors:

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, *i.e.* commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

Id. at 406, 254 P.3d at 616 (alteration in original) (internal quotation marks omitted). Furthermore, “when the Legislature has found that a given

is mistaken. The certified questions do not ask the court to settle the matter of judicial review of the State Engineer’s actions, and we reject any contention that such actions are per se exempt from judicial review. *See, e.g.*, NRS 533.450 (providing for judicial review of State Engineer orders and decisions); *Pyramid Lake Paiute Tribe of Indians*, 112 Nev. at 762, 918 P.2d at 709 (Springer, J., dissenting) (reasoning that the State Engineer erred in failing to adequately consider the public trust in the allocated resource).

dispensation is in the public's interest, it will be afforded deference." *Id.* at 406, 254 P.3d at 617. Hence, public interest and benefit remain paramount.

Respondents argue that Nevada's statutory water scheme satisfies the requirements to transfer public trust property under *Lawrence*, and we agree. First, the statutes permit the State Engineer only to grant permits that are based on beneficial use, which the Legislature has declared a public use. See NRS 533.035; NRS 533.050. Water allocations under the statutes are thus dispensed only for a public purpose. See *Lawrence*, 127 Nev. at 405, 254 P.3d at 616.

Second, the state receives fair consideration in allocating water for beneficial use, satisfying *Lawrence's* second requirement. See *id.* When water is allocated for purposes such as irrigation, power, municipal supply, mining, storage, or recreation, residents in the state are able to grow or purchase food and receive drinking water, electricity, and other resources. Farmers and miners are able to grow their industries, which in turn boosts the state's economy. See, e.g., Nev. Dep't of Agric., *Economic Analysis of the Food and Agriculture Sector in Nevada 2019*, at 3 (2018) (noting that "Nevada's food [and] agriculture sector contributed \$1.3 billion to the state's economy in 2017"); Nev. Dep't of Taxation, Div. of Local Gov't Servs., *2018-2019 Net Proceeds of Minerals Bulletin 9* (2019) (indicating that Nevada's mining industry contributed approximately \$55.8 million in state taxes in 2018). Nevada's prosperity and progress was dependent on the early mining and agricultural industries, which was contingent on the allocation of water based on beneficial use. See, e.g., *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940) ("Courts appreciate the necessity of requiring that water be beneficially used, because of its importance to the agricultural industry of the state."); *Reno Smelting, Milling & Reduction*

Works, 20 Nev. at 275, 21 P. at 319 (“And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the pacific states and territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle” (internal quotation marks omitted)).

Finally, the dispensation of water under the state’s statutory scheme satisfies *Lawrence*’s final requirement that the dispensation “maintain the trust for the use and enjoyment of present and future generations.” See 127 Nev. at 405, 254 P.3d at 616. As previously discussed, the state’s water statutes limit water allocations to those that are put to beneficial use, see NRS 533.060, require the State Engineer to reject permits that are unnecessary or detrimental to the public interest, see NRS 533.370(2), and limit water rights when water resources are short, abandoned, or being wasted, see NRS 534.090; NRS 534.120. Mechanisms are thus in place to ensure the preservation of water for the future. As the state’s statutory water scheme reflects *Lawrence*’s requirements, we reject appellants’ contention that the statutes effect an abdication of the state’s continuous public trust duties.

We therefore hold that Nevada’s comprehensive water statutes are consistent with the public trust doctrine.⁷

⁷The dissent errs in construing this opinion as holding that relevant provisions in NRS Chapter 533 supplant the public trust doctrine. Rather, the provisions we address here represent the Legislature’s efforts to guide the doctrine’s application. And as we conclude that they comport with

The state's water statutes recognize the importance of finality in water rights and therefore do not permit reallocation of adjudicated water rights

As part of Nevada's comprehensive water statutes, which we conclude adhere to the public trust doctrine, the Legislature enacted NRS 533.185 to establish a judicial decree regarding a water right permit. Regarding those judicial decrees, NRS 533.210(1) provides that:

The decree entered by the court, as provided by NRS 533.185, *shall be final and shall be conclusive* upon all persons and rights lawfully embraced within the adjudication; but the State Engineer or any party or adjudicated claimant upon any stream or stream system affected by such decree may, at any time within 3 years from the entry thereof, apply to the court for a modification of the decree

(Emphasis added.) NRS 533.0245 then prohibits the State Engineer from carrying out his or her duty "in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court."

Respondents argue that the plain language of Nevada's water law statutes prohibit reallocating adjudicated water rights, and we agree. "When the language of a statute is plain and unambiguous, [this] court should give that language its ordinary meaning and not go beyond it." See *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). NRS 533.210 expressly provides that decreed water rights "shall" be final and conclusive. See *Nat. Res. Def. Council, Inc. v. Perry*, 940

Lawrence's test, this opinion retains the distinction between the relevant statutes and the public trust doctrine, with which they must comply.

We caution against the view that an allocation necessarily comports with the public trust doctrine because it meets the statutory requirements. Apart from the statutory scheme, individual dispensations must comport with *Lawrence's* requirements.

F.3d 1072, 1078 (9th Cir. 2019) (“The word ‘will,’ like the word ‘shall,’ is a mandatory term, unless something about the context in which the word is used indicates otherwise.” (internal citation omitted)). The statutes also provide an explicit exception wherein a decree could be modified only within three years, NRS 533.210, and the State Engineer is expressly prohibited from allocating water in a manner that conflicts with such finality, NRS 533.0245. The statutory water scheme in Nevada therefore expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision.

We note that such recognition of finality is vital in arid states like Nevada. In *Arizona v. California*, the United States Supreme Court recognized that “[c]ertainty of rights is particularly important with respect to water rights in the Western United States,” and “[t]he doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights.” 460 U.S. 605, 620 (1983); see *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1050 (9th Cir. 1993) (“Participants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments.”). Municipal, social, and economic institutions rely on the finality of water rights for long-term planning and capital investments. Likewise, agricultural and mining industries rely on the finality of water for capital and output, which derivatively impacts other businesses and influences the prosperity of the state. To permit reallocation would create uncertainties for future development in Nevada and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine.

Appellants argue, however, that a right is not exempt from regulation to protect the public welfare simply because it has vested or been adjudicated. Moreover, they argue that water rights are not absolute, but rather relative and usufructuary. We agree that water rights are subject to regulation for the public welfare and are characterized by relative, nonownership rights. See *Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842 (recognizing water right as a “inchoate usufructuary right” and that rights holders do not own or acquire title to water); *Town of Eureka v. Office of the State Eng’r*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992) (“Water rights are subject to regulation under the police power as is necessary for the general welfare.”); *In re Manse Spring*, 60 Nev. at 287, 108 P.2d at 315 (noting the state has the right to prescribe how water may be used); *Usufruct*, *Black’s Law Dictionary* (11th ed. 2019) (“A right for a certain period to use and enjoy the fruits of another’s property without damaging or diminishing it.”). Nonetheless, this does not necessarily mean that water rights can be reallocated under the public trust doctrine. Rather, it means that rights holders must continually use water beneficially or lose those rights. We therefore hold that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.⁸

⁸The dissent mistakenly contends that the matter of reallocation lies beyond the scope of the certified questions and that rephrasing the first question was thus misguided. The underlying dispute involves demands for overappropriated resources that require determining whether water rights may be reallocated from current rights holders. Mineral County sought an annual allocation of minimum flows of 127,000 acre/feet, and, as stated by the Ninth Circuit, its complaint sought to “reopen and modify the final Decree.” The Basin does not appear able to meet the county’s needs without

We recognize the tragic decline of Walker Lake.⁹ But while we are sympathetic to the plight of Walker Lake and the resulting negative impacts on the wildlife, resources, and economy in Mineral County, we cannot use the public trust doctrine as a tool to uproot an entire water system, particularly where finality is firmly rooted in our statutes. We cannot read into the statutes any authority to permit reallocation when the Legislature has already declared that adjudicated water rights are final, nor can we substitute our own policy judgments for the Legislature's.¹⁰

abrogating the rights of more senior right holders. The county's request would therefore require reallocating water rights. The Ninth Circuit recognized as much in its Amended Certification Order stating, "[T]he remaining issue—whether the Walker River Decree can be amended to allow for certain minimum flows of water to reach Walker Lake—depends on whether the public trust doctrine applies to rights previously adjudicated and settled under the doctrine of prior appropriation and *permits alteration of prior allocations*." (Emphasis added.) Rephrasing the certified question thus served to "streamline [the questions certified] in order to best resolve the legal issues presented." *In re Fontainebleau Las Vegas Holdings*, 128 Nev. at 571-72, 289 P.3d at 1209.

⁹Mark Twain once observed regarding Walker Lake and other lakes in Nevada, "Water is always flowing into them; none is ever seen to flow out of them, and yet they remain always level full, neither receding nor overflowing." Mark Twain, *Roughing It*, ch. XX (Project Gutenberg 2006) (ebook) (1872). Unfortunately, this is no longer the case, and our state's water is now more precious than ever.

¹⁰While we recognize that the dissent would urge that we adopt a model more freely permitting reconsideration of prior allocations, such as that discussed in *National Audubon Society v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983), we decline to diminish the stability of prior allocations and detract from the simultaneous operation of both prior appropriation and the public trust doctrine, *see Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring).

Second certified question

Because we hold that the public trust doctrine does not permit reallocation, we need not address the second certified question, which asks: "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?" Without reallocation, no rights are abrogated and no takings issue is implicated.

CONCLUSION

Nevada's statutory scheme already incorporates the public trust doctrine, giving force to constitutional and inherent limitations on state sovereignty that protect the public interest in the waters of the state, both navigable or nonnavigable, as well as the lands underneath navigable waters. To allow the state to otherwise allocate waters without due regard for the public trust would permit the state to evade its fiduciary duties, and this we cannot sanction.

In implementing the public trust doctrine, our state's water rights statutes forbid reallocating adjudicated water rights. The public has an interest in the effective use of public trust resources. This requires that allocations of water rights have certainty and finality so that rights holders may effectively direct water usage to its beneficial use, without undue uncertainty or waste. Our state's application of the public trust doctrine thus protects the waters of Nevada in order to maintain them in trust for the use and enjoyment of present and future generations.

In response to the first certified question, as reworded, we answer that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. Because we answer the first question in the negative, we need not address the second certified question.

Stiglich, J.
Stiglich

We concur:

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Cadish, J.
Cadish

PICKERING, C.J., with whom SILVER, J., agrees, concurring in part and dissenting in part:

I.

The certified question from the Ninth Circuit is: "Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Because this court's answer to such a question is only appropriate where it "may be determinative of the cause then pending in the certifying court," NRAP 5, we must accept and address the question in the limited context in which it arises. *See Peone v. Regulus Stud Mills, Inc.*, 744 P.2d 102, 103 (Idaho 1987) (cautioning against deciding extraneous matters that "would result in an advisory opinion on a question not certified"). Here, the question arises from an appeal from a district court order granting a motion to dismiss, on the basis that the public trust doctrine gives Mineral County no claim upon which relief might be granted in respect to its prayer that the Walker River Basin decree court adopt measures to protect Walker Lake water levels. Given this procedural context, the majority opinion should have been limited to addressing whether the public trust doctrine applies to, and to what extent it may be determinative of, Mineral County's request for consideration of the health of Walker Lake in the administration of the waters in the Basin.

Instead, the majority rephrases the Ninth Circuit's question to ask: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Majority op. at 5. Thus rephrased, the question effectively asks whether the public trust doctrine allows the Walker River Decree Court to revoke senior adjudicated upstream rights. But, as Mineral

County argues, it does not seek creation of a super-senior water right to override those already adjudicated and settled in the underlying case. Rather, consistent with the relevant procedural posture, Mineral County seeks a range of relief aimed at facilitating the Walker River Decree Court's fulfillment of this state's public trust duty with respect to the precious natural resource that is Walker Lake. As Mineral County explains, an order granting it the relief sought in its complaint-in-intervention could take a number of different forms.

Such an order might involve, without limitation: (1) a change in how surplus waters are managed in wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency improvements with a requirement that water saved thereby be released to [Walker Lake]; (3) curtailment of the most speculative junior rights on the system; (4) a mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan to reduce consumptive water use in the Basin as was done by the [State Engineer] in Diamond Valley.

Mineral County further represents that the Walker Basin Restoration Program (WBRP) has acquired by purchase half of the water rights needed to fulfill Walker Lake's demand, but that WBRP is facing obstruction by the federal water master and exorbitant charges, such that not one drop of the purchased water has reached Walker Lake. If proven, these allegations—which we should assume are true for purposes of answering the Ninth Circuit's certified question, *see Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012) (in reviewing an order granting a motion to dismiss, the Ninth Circuit accepts “all factual allegations in the complaint as true”)—support directives by the Walker

River Decree Court to the water master to facilitate delivery to Walker Lake of the water purchased for it without further delay and expense.

Notably, none of these remedial measures would require a "reallocation of rights," as framed by the majority. And thus, as a threshold matter, I cannot agree that NRAP 5 authorizes the court to rephrase and then answer a question the underlying case does not present—the revocation of vested water rights is not at issue, and this court need not answer whether the public trust doctrine can effect the same.

II.

But there is another, more substantive problem with the revised question the majority asks itself: As revised, the question suggests an all-or-nothing approach that is fundamentally inconsistent with the public trust doctrine. Nevada's appropriative water rights system and the public trust doctrine developed independently of each other. The goal is to balance them and their competing values, not set them on a collision course.

[B]oth the public trust doctrine and the [prior appropriation] system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.

Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723-24 (Cal. 1983). Just as the system of prior appropriation "may be necessary for efficient use of water despite unavoidable harm to public trust values, . . . an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust

interests.” *Id.* at 728. The rephrased question misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine.

A.

I begin with the points on which the majority and I agree—this court has previously made plain that the public trust doctrine inheres in Nevada law. *Lawrence v. Clark Cty.*, 127 Nev. 390, 398, 254 P.3d 606, 612 (2011); see *Mineral Cty. v. State, Dep’t of Conservation & Nat. Res.*, 117 Nev. 235, 247, 20 P.3d 800, 808 (2001) (Rose, J., concurring). The doctrine stems from “the most fundamental tenet of Nevada water law,” *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)—that is, public ownership of this state’s water sources—because, necessarily correspondent to this public ownership is the state’s fiduciary obligation “to protect the people’s common heritage of streams, lakes, marshlands and tidelands,” *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (quoting *Audubon*, 658 P.2d at 723-24); see also *Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (Wyo. 1900) (“There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the state.”). I likewise concur with the majority that these doctrinal principles are founded in Nevada’s Constitution and “inherent from inseverable restraints on the state’s sovereign power.” *Lawrence*, 127 Nev. at 398, 254 P.3d at 612; majority op. at 26.

But from there the majority and I part company. Citing Justice Rose’s limited statement that the public trust encompasses both navigable water and “non-navigable tributaries that feed navigable bodies of water,” *Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (citing

Audubon, 658 P.2d at 721) (concluding that “the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries”), the majority proceeds to “clarify that the public trust doctrine applies to *all waters of the state, whether navigable or nonnavigable*, and to the lands underneath navigable waters.” Majority op. at 14 & n.4 (emphases added). This “clarification” marks a significant expansion of the public trust doctrine—one that increases the conflict the majority posits between the public trust doctrine and Nevada’s prior appropriation system. While the principle is consistent with doctrine emerging in a few jurisdictions, see *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (holding that the “public trust doctrine applies to all water resources without exception or distinction”); *Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (holding that “all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public”), it is not universally adopted, see, e.g., *Audubon*, 658 P.2d at 721 n.19; *Parks*, 676 N.W.2d at 839-41 (collecting cases). See also Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 Ky. L.J. 1, 14 (2020) (discussing variability among western states with regard to waters covered by the public trust doctrine). But here, the question of expanding the public trust doctrine to reach all water without regard to navigability is not presented: No one disputes, for purposes of deciding the certified questions in this case, that Walker River and Walker Lake encompass navigable waters, fed by nonnavigable surface tributaries. We could meaningfully answer the ultimate question—even as framed by the majority—by simply assuming the navigability of waters in the Basin for purposes of traditional public trust doctrine analysis. *Figueroa-Beltran v. United States*, 136 Nev., Adv.

Op. 45, 467 P.3d 615 (2020) (noting that when deciding certified questions, the court “accept[s] the facts as stated in the certification order and its attachments”) (quoting *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014)); see *Audubon*, 658 P.2d at 721 n.19 (declining to “consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to nonnavigable streams” where the facts did not require it to do so).

B.

Having recast the certified question, and then expanded the reach of the public trust doctrine beyond the call of that question to reach all waters, even groundwaters not connected to navigable waterways, the majority then subsumes the public trust doctrine in a handful of sections in NRS Chapter 533. Majority op. at 21 & n.7. According to the majority, and based on those sections, the Legislature has reposed in the State Engineer the entirety of this state’s fiduciary duties to protect and conserve all of Nevada’s water sources under the public trust doctrine. *Id.* at 17-18. And under such an approach, so long as the State Engineer executes his discretionary statutory obligations under NRS Chapter 533, see *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019) (noting generally that the State Engineer’s discretionary decisions are reviewed deferentially), there is no remedy or action to be taken to protect from the irreversible depletion of this state’s most precious natural resource. But this view fundamentally misapprehends the public trust doctrine and its constitutional and sovereign dimensions. See *Regalia*, 108 Ky. L.J. at 20 (noting that the doctrine “is emblematic of fundamental constitutional principles embedded in American democracy”).

To begin, the Nevada Constitution expressly limits the Legislature's ability to freely dispose of public resources. *See Nev. Const. art. 8, § 9* (prohibiting the gift or loan of public property). And this court has made plain that any legislative action that purports to convey property held in trust for the public is therefore subject to judicial review. *Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13 (citing *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999)); *see also Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 166-68 (Ariz. Ct. App. 1991). Thus, even assuming that NRS Chapter 533 comports with the public trust doctrine, the doctrine's judicial check would be necessary; the mere existence of water source regulations does not ensure the Legislature's and the State Engineer's compliance with the same. *See Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13. Put differently, "[j]ust as private trustees are judicially accountable to their beneficiaries for dispositions of the res, . . . so the legislative and executive branches are judicially accountable for their dispositions of the public trust." *Hassell*, 837 P.2d at 169 (internal citations omitted).

Moreover, it is a well-established principle of separation of powers that a legislature cannot "grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Accordingly, it cannot be that with the enactment of NRS Chapter 533, the Legislature effectively delegated to an administrative officer its own public trust obligations and the judiciary's responsibility to police constitutional and sovereign limits on the Legislature's own authority. *San Carlos Apache Tribe*, 972 P.2d at 199 (stating that a legislature cannot "by legislation destroy the constitutional limits on its authority" or "order the courts to make the [public trust] doctrine inapplicable to . . . any proceedings"

governing water rights); *Hassell*, 837 P.2d at 166-68 (basing its decision on the separation-of-powers doctrine and a constitutional gift clause nearly identical to Nevada's). As this court stated in *Lawrence*, "[t]he public trust doctrine is . . . not simply common law easily abrogated by legislation." 127 Nev. at 401, 254 P.3d at 613. Rather, it is an "inabrogable attribute of statehood itself." *Hassell*, 837 P.2d at 168; *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (noting that a state cannot abdicate its duties under the public trust doctrine).

The majority does not tackle these principles head-on, instead attempting a sleight of hand. NRS Chapter 533, the majority argues, has functionally replaced the public trust doctrine because its provisions are "consistent with" the public trust doctrine and "satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*." Majority op. at 15. The majority further attempts to misdirect that the values the public trust doctrine protects are totally commensurate with the "public interest" as considered in NRS Chapter 533. *See id.* at 21 n.7. In so doing, the majority equates the concepts in error—an appropriation could conceivably be in the public interest while still resulting in unavoidable and unjustified harm to public trust values. *See Audubon*, 658 P.2d at 728. For example, while it could theoretically be in the public interest to allocate water rights to facilitate cattle grazing, increase herd size, and ultimately reduce the price of beef for dinner, if done without regard to the deleterious impacts of unsustainable watering and grazing on Nevada's natural resources, such action could also be entirely inconsistent with public trust principles.

In any case, while it is true that the cited water statutes and public trust doctrine may share and even promote the same core principles, this shared purpose alone “do[es] not override the public trust doctrine or render it superfluous.” *Water Use Permit Applications*, 9 P.3d at 445. To the contrary, the public trust doctrine, enforced by a separate and independent judiciary, is one intentionally endowed with flexibility—to consider a multitude of needs and impacts, to encompass more and different protections over this state’s water sources, to check the actions by legislative and executive actors for absolute compliance with their fiduciary obligations—that those limited statutory sections cited lack. *See Kootenai*, 671 P.2d at 1095 (noting that “mere compliance by [the State Engineer] with [its] legislative authority is not sufficient to determine if [its] actions comport with the requirements of the public trust doctrine”); *see also* Rebecca LaGrandeur Harms, *Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes*, 39 *Environs: Envtl. L. & Pol’y J.*, 97, 113 (2015) (recognizing the “unique utility of the public trust doctrine in its original common law form”—“common law doctrine has been able to expand to cover more natural resources and public uses”).

Perhaps even more concerning is that the rigid statutory protections the majority would endow with sovereign state functions can be repealed, *see Audubon*, 658 P.2d at 728 n.27 (noting same concern); what of this storied doctrine then? I cannot fathom relocating this long-standing limitation on sovereign authority, *see Regalia*, 108 Ky. L.J. at 28 (discussing purpose of doctrine), to such shaky ground. No doubt the public trust doctrine may “inform [the] interpretation [of NRS Chapter 533], define its permissible ‘outer limits,’ and justify its existence.” *Water Use Permit*

Applications, 9 P.3d at 445. But it cannot be that this state's affirmative fiduciary obligations over certain water sources—obligations supervised by the judiciary and founded on a century of common law, inherent sovereign authority, and the state constitution—are entirely subsumed by a handful of statutes governing the specific duties of an administrative agent.

Indeed, that the public trust doctrine exists as one part of an integrated system of water law that also includes NRS Chapter 533 is the only logical outcome—as Mineral County stated so aptly in its reply brief, the “[i]nclusion of a provision in statutory law does not ensure execution of that provision in satisfaction of the State’s public trust duties.” And that principle is well-illustrated here. The public trust doctrine demands that some responsible state entity take action to preserve the public value of Walker Lake, yet all parties recognize its continuing decline despite the State Engineer’s statutory obligations. The doctrine does not permit the Walker River Decree Court to simply stand by and watch the ruination of public resources, but what enforcement avenue has the majority left here? Simply put, if the doctrine does not empower the Walker River Decree Court’s independent supervision of the State Engineer’s management of rights in Basin waters, it is illusory; the majority’s recognition of its history and scope, mere lip service.

Unsurprisingly then, and as many cases cited above suggest, courts in other states have held that the public trust doctrine is one part of an integrated system of water laws, which system also includes, in part, a statutory system of appropriative water rights. *See, e.g., Audubon*, 658 P.2d at 732; *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2004) (aligning South Dakota’s jurisprudence with other jurisdictions’). And despite the interconnectedness of the doctrine and appropriative systems, these foreign

courts have still recognized that the public trust doctrine exists “independently of any statutory [water source] protections supplied by the legislature.” See *Water Use Permit Applications*, 9 P.3d at 444 (collecting cases); see also *Kootenai*, 671 P.2d at 1094; *Hassell*, 837 P.2d at 168; *Cooper*, 676 N.W.2d at 838 (collecting cases).

This court has repeatedly reaffirmed that Nevada looks to the water law of its western sister states to interpret and understand its own. See *Happy Creek*, 135 Nev. at 304, 448 P.3d at 1109. And indeed, this court reviewed and previously approved of the reasoning in some of those cases cited above. *Mineral Cty.*, 117 Nev. at 247 & nn.4-5, 20 P.3d at 808 & nn.4-5 (Rose, J., concurring) (discussing and favorably citing *Audubon*); *Lawrence*, 127 Nev. at 405-06, 254 P.3d at 616 (favorably citing the reasoning in *Hassell*). This court should not easily set aside such analysis, *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (stating that, generally, this court “will not overturn [precedent] absent compelling reasons for so doing”), or the well-reasoned decisions underlying the same. But the majority makes no attempt to explain how the principles enunciated in *Audubon*, *Hassell*, and *Kootenai* have become inapplicable in the years since we first highlighted them, citing *Audubon* and *Hassell* only in passing and omitting any mention of *Kootenai*.

C.

Setting aside these considerations of sovereign responsibilities, separation of powers, and stare decisis, the majority points to the importance of “finality” in water-rights determinations. In fact, the majority implicitly holds that this principle outweighs every other already mentioned, to require the merger of the public trust doctrine and NRS Chapter 533. The majority relies on a United States Supreme Court

decision involving California and Arizona for its proposition that the necessity of finality of water rights supersedes the effective application of an inseverable constitutional restraint on state power. Majority op. at 23 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). But the precedent of both those states, cited and discussed above, establishes that the public trust doctrine exists independently of their respective state water statutes, and even despite the importance of finality. *Hassell*, 837 P.2d at 169 (noting that “[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary” (quoting *Kootenai*, 671 P.2d at 1092)); *Audubon*, 658 P.2d at 723 (recognizing the “continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust”).

The posited dichotomy is thus a false one. Crediting Mineral County’s position with respect to the public trust doctrine does not require that the decree court revoke senior adjudicated Walker Basin water rights. It bears repeating: Mineral County names several approaches that would better protect the value of Walker Lake *without disturbing vested rights or impinging on principles of finality*. It is not now this court’s responsibility—or the Ninth Circuit’s—to determine whether Mineral County can prevail across the board on its claims and obtain all the relief it seeks. See *Skilstaf*, 669 F.3d at 1014 (holding that, in reviewing an appeal from an order granting a motion to dismiss, the reviewing court accepts as true the nonmoving party’s allegations). But, if Mineral County can demonstrate that conservation of Walker Lake would be enhanced by using these measures, and that the administration of the Basin contrary to those

objectives contravenes the public trust doctrine, it is entitled to proceed. In any case, and as established, the Walker River Decree Court cannot simply ignore its obligations under the doctrine because in application the facts are complicated. *See Ill. Cent. R.*, 146 U.S. at 453 (“The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

Bearing all this in mind, I do not deem trivial the concerns of Basin rights holders regarding finality, or deny that their reliance on prior allocations of Basin waters may be substantial. To the contrary, such concerns should enter into any reexamination of authorized diversions in the Basin undertaken by the Walker River Decree Court according to the public trust doctrine. *See Audubon*, 658 P.2d at 729. But, under our system of water rights, a prior appropriation is never permanent—even vested rights are granted only to the extent their holders do not over-appropriate or waste water. *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). Accordingly, the existence of such appropriations cannot be said to entirely preclude the Walker River Decree Court from addressing public trust concerns. *See id.* (“It is clear that some responsible body ought to reconsider the allocation of the waters of the . . . Basin. No vested rights bar such consideration.”) (footnote omitted).

III.

Based on the discussion offered above, I would answer the Ninth Circuit’s first question as follows: The public trust doctrine is one part of Nevada’s integrated system of water laws, and assuming the truth of the facts presented, the doctrine protects Walker Lake from harm caused by diversions of Basin waters, whatever the cause, and that this interest must

be cast into the balance in managing the Walker River Basin, even though doing so may impinge on historical practices in utilizing vested water rights. I recognize that my response to the Ninth Circuit's first question begs an answer to its second question, which the majority declined to answer—namely, “If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a ‘taking’ under the Nevada Constitution requiring payment of just compensation?”

In *Audubon*, the California Supreme Court offered the definitive discussion of the delicate balance an independently supervised public trust doctrine helps strike in an integrated system of water law. See *Audubon*, 658 P.2d at 727. With regard to the powers of the legislature and authorized executive agency, the California court noted that they necessarily have “the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.” *Audubon*, 658 P.2d at 727. Indeed, the court admitted that “[t]he population and economy of [a] state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.” *Id.* But weighing against these economic considerations is the truth, demonstrable even by the precipitous decline of Walker Lake, that “an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests.” *Id.* at 728. Thus, the public trust doctrine requires that the state affirmatively reassess the availability of water resources, as necessary to protect the public interest,

“in light of current knowledge or . . . current needs,” *id.*, and demand feasible accommodations as necessary.

In this case, Mineral County represents that the objectives of the public trust reassessment may be achieved in any one of several different ways. But importantly, whatever solution the Walker River Decree Court ultimately adopts, it would not demand the creation of a new and superior water right that would upset the prior “allocation of rights” and require a complete restructuring of Nevada water law, as framed by the majority. As discussed above, the limited factual record before this court indicates that the Basin waters are publicly held navigable or nonnavigable surface water tributaries, such that any holders of usufructuary rights in the waters acquired them subject to the public trust in the first instance. *See Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring); *cf. Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842 (“Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.”). Even the vested water rights at issue are only worth the maximum amount of water available for allocation in the Basin, which water source, according to the record before this court, is held in public trust. Thus, while enforcement of the doctrine could potentially alter the amount of Basin water available for private use—as Mineral County points out, just as “any other natural constraint on the already variable availability of water to supply private appropriations”—it does not effect a reallocation of vested water rights. *Audubon*, 658 P.2d at 723 (stating that “while [a rights holder] may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes”).

Accordingly, even to the extent the Walker River Decree Court would act to protect Walker Lake pursuant to the doctrine by limiting the availability of Basin waters, it would not divest anyone of any legal title they previously held. *Id.* (“Except for those rare instances in which a grantee may acquire a right to use former trust property free of restrictions, the grantee holds subject to the trust”); see also Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Env'tl. L. Rev. 649, 650-51 (2010) (stating that “[c]ourts applying [this] doctrine demand all feasible accommodations to preserve and protect trust assets, but they do not attempt to eliminate private property. In fact, virtually all applications of the public trust doctrine leave possession of private property unchanged” and collecting cases (internal footnote omitted)).

The answer to the Ninth Circuit’s second question then, is that enforcement of the public trust doctrine here does not result in a “reallocation of water rights,” much less implicate the constitutional takings doctrine.

In sum, “[t]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state” *Kootenai*, 671 P.2d at 1094 (quoting *Audubon*, 658 P.2d at 723-24). And, as the majority recognizes, the duty in question arises from constitutional sources and inherent sovereign authority to protect the interests of “present generations [and] those to come.” *Hassell*, 837 P.2d at 169. Moreover, “[t]he check and balance of judicial review” are essential components of the state’s fiduciary duties, particularly where water resources are concerned, “provid[ing] a level of protection against

improvident dissipation of an irreplaceable res." *Id.* I therefore cannot agree that the Legislature can implicitly bestow these responsibilities on an executive agent, eliminating any judicial oversight. Even apart from this, Mineral County does not request a "reallocation of rights," only that the existing decree be managed in accordance with long-standing principles.

Accordingly, while I concur in part, I otherwise respectfully dissent.

Pickering C.J.
Pickering

I concur:

Silver J.
Silver