KeyCite Yellow Flag - Negative Treatment
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104 F.2d 334
Circuit Court of Appeals, Ninth Circuit.

UNITED STATES
v.
WALKER RIVER IRR. DIST. et al.

No. 8779.
|
June 5, 1939.
|
Rehearing Denied July 14, 1939.

Synopsis
Appeal from the District Court of the United States for the District of Nevada; A. F. St. Sure, Judge.

Suit by the United States of America against the Walker River Irrigation District and others to restrain the defendants from interfering with the natural flow of water of Walker river to the extent of 150 cubic feet per second to the Walker River Indian Reservation in Nevada. From an adverse decree, 11 F.Supp. 158, 14 F.Supp. 10, the plaintiff appeals.

Decree reversed, with directions.

West Headnotes (13)

[1] **Indians**
⚷Water Rights and Management

It was unnecessary for intention to reserve waters of Walker river for use of Indians on Walker River Indian Reservation to be evidenced by a treaty or agreement, but such an intention could be implied from statute or executive order setting apart the reservation.

3 Cases that cite this headnote

[2] **Water Law**
⚷Reserved Water Rights

The government has power to reserve waters of nonnavigable streams on public domain, and thus exempt them from subsequent appropriation by others.

1 Cases that cite this headnote

[3] **Water Law**
⚷Effect of state and local law, customs, and rules

Private rights in waters of nonnavigable streams on the public domain are measured by local customs, laws, and judicial decisions.

Cases that cite this headnote

[4] **Water Law**
⚷Effect of state and local law, customs, and rules

The statute providing for protection of vested rights to use of water recognized and acknowledged by local customs, laws, and court decisions was no more than a formal confirmation of local law and usage which had previously met with silent acquiescence on part of government. 43 U.S.C.A. § 661.

Cases that cite this headnote

[5] **Water Law**
⚷Waters reserved for purposes of Indian reservations in general

The claim of government that there had been an implied reservation of waters of Walker river for use of Indians on Walker River Indian

River Indian Reservation set aside in 1859 and Indians had been induced to make their homes on reservation and to engage in farming, there was an implied reservation of water from Walker river, to extent reasonably necessary to supply Indians' needs, prior to rights of settlors diverting water in upper valleys of river subsequent to 1859.

4 Cases that cite this headnote

[12] **Water Law**
⇐Quantity of Water Reserved

The area of irrigable land included in Indian reservation was not necessarily the criterion for measuring amount of water reserved by implication for use of Indians on reservation.

1 Cases that cite this headnote

[13] **Water Law**
⇐Quantity of Water Reserved

Where it appeared that 26.25 cubic feet of water per second from river would satisfy needs of government for Indian reservation for irrigation, government was entitled to that amount only during irrigation season and not to amount which it might demand from year to year not exceeding 150 second feet, since right to use larger amount would encourage waste or tend to induce it.

2 Cases that cite this headnote

Attorneys and Law Firms

*335 Carl McFarland, Asst. Atty. Gen., Charles E. Collett, Acting Asst. Atty. Gen., C. W. Leaphart and Roy W. Stoddard, Sp. Assts. to Atty. Gen., and William D. Donnelly, Oscar A. Provost, Thomas E. Harris, Clifford E. Fix, and Robert Koerner, Attys., Department of Justice, all of Washington, D.C., for the United States.

William M. Kearney, Edward F. Lunsford, Myron R. Adams, and Robert Taylor Adams, all of Reno, Nev., George L. Sanford, of Carson City, Nev., and William H. Metson, of San Francisco, Cal., for appellees.

Before GARRECHT, STEPHENS, and HEALY, Circuit Judges.

Opinion

HEALY, Circuit Judge.

The United States brought suit to restrain the appropriators of the waters of the Walker River and its tributaries from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second, to and upon the Walker River Indian Reservation in Nevada. The bill prayed that the plaintiff be adjudged to have a prior right to that quantity of water, that the relative rights in the stream be adjudicated, and that a water master be appointed to carry the decree into effect. After extended hearings before a special master, the court made findings and entered a decree adjudging the United States to be entitled to 22.93 second feet of water with priorities as of various dates, ranging from 1868 to 1886. From this decree the Government has appealed.

The factual background is fully developed in the opinions of the court below, 11 F.Supp. 158, 14 F.Supp. 10, and no more than a brief summary need be attempted here.

The Walker River Indian Reservation was set aside by departmental action on November 29, 1859 for the use of the Pahute tribe. The lands reserved lie about Walker Lake and on both borders of the lower reaches of the Walker River for a distance of thirty miles above the place where the stream empties into the lake. The total area, mostly rough or mountainous country, is in excess of 80,000 acres. The tillable lands reserved have an area of approximately 10,000 acres.

The Walker River is an unnavigable stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California. The lands along the stream are arid and incapable of producing crops without irrigation, for which purpose the river is the sole source of supply. The lands in the upper valleys were acquired by appellees or their predecessors under the public land laws of the United States, the earliest titles originating soon after the establishment of the reservation. During the period commencing with the year 1860 the

recognized by the laws of Spain or Mexico, or since given recognition in the public policy of the United States. The point of the argument, as we understand it, is that the members of the Pahute tribe had no rights which they might reserve, and none to surrender in exchange for those now claimed for them.

What the legal status of these aborigines may have been we need not stop to inquire. If it be assumed that they were mere sojourners in the abode of their ancestors, it still remains true that the national government was under compelling obligations to protect them. They are no less wards of the nation than are the tribes living elsewhere. In United States v. Kagama, 118 U.S. 375, 383, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, the court described the Indian communities as wholly dependent on the United States, owing no allegiance to the states and receiving from them no protection. 'From their very weakness and helplessness,' said the court, 'there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.' And see Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299.

[6] [7] (d) One further matter should have preliminary attention. Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; Alaska Pacific Fisheries v. United States, supra; United States v. Nez Perce County, 9 Cir., 95 F.2d 232. The rule has its basis in the obligation which the Government has assumed toward a dependent people. We see no reason why the same rule should not apply in the construction of executive orders. Compare McFadden v. Mountain View Mining & Milling Co., 9 Cir., 97 F. 670; Gibson v. Anderson, 9 Cir., 131 F. 39. Treaty provisions for the allotment of reserved lands invariably contemplate the ultimate passing of fee title to the individuals of the tribe; and the General Allotment *338 Act of February 8, 1887, 24 Stat. 388 was expressly made applicable to reservations created by acts of Congress or by executive order.[6] It was pointed out in the illuminating opinion of Attorney General (now Justice) Stone of May 12, 1924 (Opinions of Attorneys General, vol. 34, p. 171), that doubts whether the reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum or water power, have, as a practical matter, uniformly been resolved in favor of the Indians

We turn now to the circumstances under which the Walker River Indian Reservation was set aside. The files of the Interior Department bearing on this subject are voluminous. On November 26, 1859, F. Dodge, agent for the Indians in Utah Territory, of which Nevada was then a part, wrote the Commissioner of Indian Affairs suggesting that the northwest part of the valley of the Truckee River, including Pyramid Lake, and the northeast part of the valley of Walker's River, including the lake of the same, be reserved for the Indians of his agency. The localities and boundaries of the proposed reservations were indicated on an accompanying map. 'These,' stated the letter, 'are isolated spots, embracing large fisheries, surrounded by mountains and deserts, and will have the advantage of being their home from choice. '[7] The Commissioner of Indian Affairs thereupon wrote the Secretary of the Interior, calling his attention to Dodge's letter, and stating, among other things, 'the tracts selected by the Agent, embrace but a small portion of land suited for agricultural purposes, yet, it is believed that there will be a sufficiency for the sustenance of the Washoe and Pahute tribes of Indians, in connection with the fish which they may obtain from Pyramid and Walker Lakes, and with a view to secure suitable homes for these Indians where they can be protected from the encroachments of the whites, I have the honor to suggest that, with your concurrence, the subject may be laid before the President for his consideration, with a recommendation that the tracts of country indicated on the map may be set apart and reserved from sale or settlement, for Indian use.'

The Indian Commissioner on November 29, 1859 wrote the Commissioner of the General Land Office, suggesting the propriety and necessity of reserving these tracts for Indian use, and requesting that the Surveyor General of Utah Territory be directed to respect the reservations on the plats of survey when the public surveys should be extended over them, and that in the meantime the local land offices, as established, be instructed to respect the reservations on their books. On December 8 of the same year the Commissioner of the General Land Office wrote the Surveyor General in Salt Lake City, instructing him to reserve for Indian purposes the two tracts described and indicated on an enclosed map.

[8] [9] The Walker River reservation as originally defined was surveyed within a few years, and in 1874 President Grant issued an executive order setting the lands apart for the Pahute and other Indians residing thereon. The action taken in November, 1859 initiated the establishment of the Walker River Indian Reservation. The acts of the heads of departments are the acts of the executive. Wilcox v. Jackson, 13 Pet. 498, 513, 10 L.Ed. 264; Wolsey v. Chapman, 101 U.S. 755, 769, 25 L.Ed. 915. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; *339 Minnesota v. Hitchcock, 185 U.S. 373, 385, 389, 390, 22 S.Ct. 650, 46 L.Ed. 954. That this was true

continuous flow of 26.25 cubic feet of water per second, to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859, and enjoining the defendants from preventing or interfering with the natural flow of the described quantities of water in the channels of the stream and its tributaries to and upon the reservation.

All Citations

104 F.2d 334

Footnotes

1 Cf. Conrad Investment Co. v. United States, 9 Cir., 161 F. 829; United States v. Powers, 9 Cir., 94 F.2d 783, affirmed 59 S.Ct. 344, 83 L.Ed. 330; United States v. McIntire, 9 Cir., 101 F.2d 650.

2 The summary of the pleadings and facts as set out in the opinion of this court, 9 Cir., 143 F. 740, and of the Supreme Court, has led to misapprehension concerning the scope of the holding in Winters v. United States. It is assumed by appellees here that in the Winters case the Government had established its rights in the waters of Milk River by prior appropriation. An examination of the record in that case discloses the contrary. The affidavits and testimony before the court showed that in 1890 the Government installed a pump of the capacity of 100 miner's inches for pumping water from the stream for domestic and irrigation purposes. In 1893 another pump of 150 inches capacity was installed. It was not until 1898 that the Government began the construction of a canal for the diversion of the waters of the stream. Meanwhile, commencing with 1890, and prior to 1898, diversion dams and canals had been built by the settlers above, or by mutual companies which they organized, and large quantities of water had been appropriated and applied to beneficial use.

3 In Nevada it was held soon after statehood (1864) that where the right to the use of running water was based upon appropriation, and not upon ownership of the soil, the first appropriator had the superior right. Lobdell v. Simpson, 2 Nev. 274, 90 Am.Dec. 537. In 1885, in Jones v. Adams, 19 Nev. 78, 6 P. 442, 3 Am.St.Rep. 788, the common law rule of riparian rights was declared in applicable to conditions existing in the state. See, also, Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 P. 166, and United States v. Humboldt Lovelock Irrig. L. & P. Co., 9 Cir., 97 F.2d 38, 42, 43.

4 Section 9: 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed * * * .' 43 U.S.C.A. 661.

5 Cf. United States v. McGowan, 9 Cir., 89 F.2d 201, reversed, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410.

6 Allotments to individual Indians on the Walker River reservation were made in 1906 under the act of May 27, 1902, 32 Stat. 260 and the General Allotment Act.

7 Continuing, the agent observed that 'the Indians of my agency linger about the graves of their ancestors— 'but the game is gone', and now, the steady tread of the white man is upon them. The green valleys, too, once spotted with game 'are not theirs now.' Necessity make them barter the virtue of their companions as a commodity of the market and the bitter contemplation burns in their bosoms the stern reality of their fate. Driven by destitution they seek refuge in crime, and show themselves unsparing because they have been unspared.
'I sincerely hope that those asylums will be made for them, where they can be free from the influence of the 'White Brigands' who loiter about our great overland mail and emigrant routes— using them as their instruments to rob and plunder our citizens.'

8 Commencing with the act of March 3, 1863, 12 Stat. 774, 791, numerous appropriations were made for the Indian Service in the territory of Nevada, and later in the state, for 'presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life.'

News

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NEWS | 03.01.22

New Mexico Supreme Court Invalidates "Non-Navigable Rule," Voids Certificates To Close Public Water

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By BEN NEARY

NMWF Conservation Director

The New Mexico Supreme Court on Tuesday unanimously decided that a state game commission rule purporting to allow landowners to limit access to public waters is unconstitutional and void.

The court ruled in response to a legal challenge brought by the New Mexico Wildlife Federation, the Adobe Whitewater Club and the New Mexico Chapter of Backcountry Hunters & Anglers.

Santa Fe lawyers Gene Gallegos and Seth Cohen represented the groups at Tuesday's court hearing. They emphasized that the rule violates the New Mexico State Constitution's guarantee that the unappropriated waters of the state belong to the public.

In their arguments on Tuesday, Gallegos and Cohen pointed out that the New Mexico Supreme Court already addressed the issue of the public right to access the waters of the state in its 1945 landmark case, State ex rel. State Game Commission v. Red River Valley Co.

In the Red River case, the court concluded that the public — meaning anglers, boaters or others — may use streams and streambeds where they run through private property as long as the public doesn't trespass across private land to access the waters, or trespass from the stream onto private land. The court noted that under Indian, Spanish and Mexican law that governed New Mexico before statehood, everyone had the right to fish in streams.

Since the game commission rule went into effect in 2018, the commission has granted five applications from out-of-state landowners to certify waters as "non-navigable" on New Mexico waterways, including stretches of the Rio Chama and Pecos River. After securing the certifications, landowners have denied public access to the waters, in some instances placing fences across the rivers that prevent boating access.

After hearing arguments in the case on Tuesday, the supreme court justices took a short recess before returning to the courtroom to announce that they were unanimous in finding that the rule is unconstitutional and that the "non-navigable" certificates that the game commission had issued to landowners are void. The court will issue a written opinion spelling out its legal findings.

The state game commission voted late Tuesday afternoon to repeal the certification rule as a result of the court ruling.

Representatives of the groups that brought the legal challenge said they were heartened to see the court roll back the rule and stand up for public access:

"The decision by the New Mexico Supreme Court confirms what the New Mexico Wildlife Federation has been saying for years, that allowing private landowners to restrict public access through rivers where those rivers cross private land is a violation of a right reserved to us by our New Mexico State Constitution," said Jesse Deubel, executive director of the NMWF.

"The privatization of publicly owned natural resources seems to be an increasing threat across the West," Deubel said. "From access to public lands and waters to the increased push to privatize wildlife, these violations of the Public Trust Doctrine are unacceptable and cannot be tolerated."

Joel Gay, policy chair for NM Backcountry Hunters & Anglers, called the decision great news for anglers, boaters and others who use public waters in New Mexico. But he said it shouldn't be a surprise.

"In 1945 the Supreme Court said the same thing – that these waters throughout the state are for everyone to enjoy for recreational use," Gay said. "We don't know how that constitutional right got lost, but for decades we have been told otherwise. Our chapter thanks the Supreme Court for setting the record straight — again."

Scott Carpenter, president of the Adobe Whitewater Club, said New Mexico's rivers and streams are rare and precious resources that all New Mexicans are entitled to enjoy.

"This access is part of New Mexico's heritage," Carpenter said. "The New Mexico Supreme Court unanimously ruled today that the public has a long-standing constitutional right to recreational uses of these rivers and streams. That right includes contact with the streambed and banks that is incidental to recreational use of the water. The court ruled it is unconstitutional for private landowners to fence the public out."

Robert Levin, New Mexico state director of the American Canoe Association, said, "A handful of landowners do not have the exclusive right to the recreational and economic benefits of public streams flowing across private property. They cannot monopolize the public resource for their exclusive benefit."

Steve Harris, director of the New Mexico River Outfitters Association, said, "I'm thankful that the game commission rule will no longer be a barrier to our state's policy of developing a robust river-touring component to our outdoor recreation economy."

Sen. Martin Heinrich, D-N.M., issued a statement applauding the court ruling. He and former U.S. Sen Tom Udall had filed a "friend of the court" brief in support of overturning the commission rule.

"Today is a pretty exciting day in New Mexico history," Heinrich said. "Our state supreme court reaffirmed the constitutional rights of New Mexicans to their public waters. This is a huge victory for people who care about our history, our culture and our natural resources, and I want to thank everyone who made this possible to make sure that public waters stay in public hands."

Groups representing ranchers and landowners had intervened in the case to argue in support of the rule. Lawyer Jeremy Harrison represented the groups at Tuesday's hearing, saying that the public has a right to float on rivers and streams that cross private lands, if they can, but not to get out and recreate. He said the "incidental touching" of an oar on the streambed would be permitted.

Justice C. Shannon Bacon questioned Harrison about his position.

"What about a fly fisherman, walking down the stream, casting a fly — which people do in New Mexico pretty regularly?" Bacon asked. "Is incidental touching in your definition walking down the streambed that is now deemed private by application of this rule?"

Harrison replied that it was not. "At that point, your touching of the land is not incidental to your use of the waters," he said.

Bacon responded, "That's a stretch. If you can't walk on the streambed, and your use and enjoyment protected by the constitution – being your ability to fly fish – unless you can figure out how we can all walk on water – how is that not contrary to the public use and enjoyment of the public water?"

Harrison responded that the constitutional ownership of the water, and the use of the water, is not unlimited. "There's a balance here, because the right to own property is a fundamental protected right, guaranteed by the federal and state constitutions," he said.

Chief Justice Michael Vigil questioned Cohen about what constitutes a permissible recreational use.

Cohen responded that the public has to be engaged in a reasonable recreational use of the water. He said that carries with it the incidental right to touch the streambed and the bank.

"It's important also for the court to articulate what has necessarily been true throughout the course of New Mexico history, which is the public's constitutional right to make recreational use of the public waters includes the incidental right necessarily to touch the streambed and bank as necessarily to effectuate recreational use," Cohen said.

Aaron Wolf, lawyer for the game commission, said the current game commission has no intention of using the rule to certify more stretches of water. The commission last summer rejected five pending applications from landowners seeking to have waterways over their property declared non-navigable and closed to the public.

Gov. Michelle Lujan Grisham has removed two game commissioners since the beginning of her term. Both former commissioners, Joanna Prukop and Jeremy Vesbach, have said they believe the governor targeted them at least in part because they expressed opposition to granting landowner applications under the non-navigable rule. Some of the landowners have made campaign contributions to the governor.

Prukop was removed as commission chair in late 2019 after the commission voted to impose a moratorium on acting on pending applications.

Landowners later went to federal court and secured a court order forcing the commission to act on their applications. Vesbach led the commission's rejection last summer of the five pending applications. Lujan Grisham removed him from the commission early this year.

Prukop said Tuesday she felt absolutely vindicated about what she tried to do as commission chair by the court ruling.

"Today is a wonderful day for state constitutional law in New Mexico," Prukop said.

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From: **Hattie Johnson, American Whitewater** hattie@americanwhitewater.org
Subject: New Mexico Supreme Court Affirms Constitutional Right to Paddle Rivers!
Date: March 7, 2022 at 3:21 PM
To: Club Contact Sierra Nevada Whitewater Club cralbright@juno.com

AH

AMERICAN WHITEWATER

New Mexico Supreme Court Affirms Constitutional Right to Paddle State's Rivers and Streams

Club,

Last week in a very big win for river access, the New Mexico Supreme Court unanimously ruled that the State Constitution does not permit New Mexico's waterways to be "privatized" and sealed off from public access. The lead petitioner on the case, Adobe Whitewater Club (AWC), is an affiliate

Whitewater Club (AW), is an affiliate club of American Whitewater. AWC and co-petitioners from the New Mexico Wildlife Federation, and the Backcountry Hunters and Anglers New Mexico chapter, were represented in this case by Santa Fe based attorneys Gene Gallegos and Seth Cohen. AWC and AW, in addition to the New Mexico Rivers Outfitters Association and American Canoe Association are founding members of the New Mexico Paddlers Coalition, a group who has worked diligently on overturning this stream privatization effort since 2016.

After a one-hour hearing and 15 minutes of deliberation, Chief Justice Vigil announced that all five justices agreed the issue was of "great public interest," the Petitioners had standing, the Game Commission rule is unconstitutional, and all certificates issued to the privatizers are void. The Court issued a prohibitive writ of mandamus to the State Game Commission. The State Game Commission met in an emergency meeting immediately following the Court's decision and rescinded the offending privatization rule.

The five river privatization certificates voided had authorized landowners closure of boatable sections on the Upper Rio Chama and the Upper Pecos River. On March 2, 2022, the

Pecos River. On March 2, 2022, the Court issued this Order.

This Supreme Court decision affirmed New Mexican's constitutional right to paddle all of the state's rivers. The water in New Mexico's rivers and streams belongs to the public. The Court said rivers are not for the exclusive benefit of private landowners. Rivers and their public users have an easement.

"Paddlers are very pleased that the New Mexico Supreme Court ruled that New Mexico's rivers and streams are for the enjoyment of all. We look forward to removal of threatening signage and the hazardous river barricades that were erected to prevent travel down river," said Sherry Barrett, Chair of New Mexico Paddlers Coalition. "Our rivers and streams are the lifeblood of New Mexico and will continue to be enjoyed by all New Mexicans and visitors to our state."

"New Mexico's rivers and streams are rare and precious resources that all New Mexicans are entitled to enjoy," said Scott Carpenter, President of the Adobe Whitewater Club. "This access is part of New Mexico's heritage. The NM Supreme Court unanimously ruled that the public has a long-standing constitutional right to recreational uses of these rivers and streams. That right

of these rivers and streams. That right includes contact with the streambed and banks that is incidental to recreational use of the water. The court ruled it is unconstitutional for private landowners to fence the public out."

New Mexico's outdoor recreation economy supports 33,500 jobs and $1.2B of income. Today's decision ensures that the residents and visitors of New Mexico can access the rivers that provide those recreational opportunities. Paddlers from across the country travel to enjoy New Mexico's unique and beautiful rivers and we are happy to see that their rights to do so are being upheld.

"I'm thankful that the Game Commission rule will no longer be a barrier to our state's policy of developing a robust river touring component to our outdoor recreation economy." said Steve Harris, director of the New Mexico River Outfitters Association.

The paddling community recognizes and respects the rights of landowners to preclude trespass on private land bordering the river. We are dedicated to working with landowners to ensure all our natural resources are protected.

The New Mexico Paddlers Coalition's

mission is to protect and improve access to New Mexico's rivers and streams. To support our mission, we cooperate with individuals, government agencies, and other non-governmental organizations to promote river conservation; provide leadership in outdoor ethics and education; support stewardship initiatives; and promote safety.

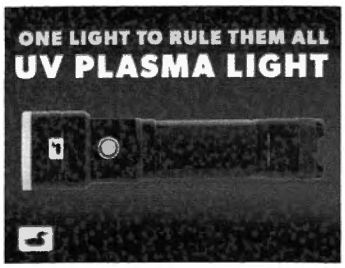
American Whitewater is thankful to the amazing lawyers, great partners, New Mexico Paddlers' Coalition, New Mexico paddling community at large and especially AWC members. We are so pleased to have won this most recent public stream access victory for all!

Sincerely,

Hattie Johnson

and the NM Paddlers Coalition and the entire team at American Whitewater

Utah Supreme Court Allows Public Waters Access Act to Stand



USAC
Utah Stream Access Coalition

From the Utah Stream Access Coalition:

Salt Lake City, Utah –

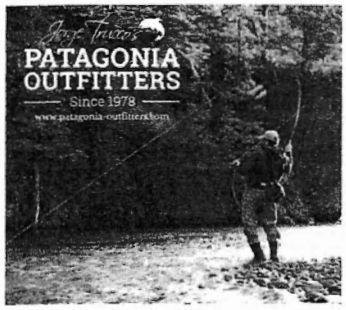
Today's decision by the Utah Supreme Court ends a thirteen-year effort by the Utah Stream Access Coalition (the "Coalition") to overturn the Public Waters Access Act of 2010 (the "PWAA") and restore public access to Utah's non-navigable rivers and streams. The Court ruled that the public's access to these waterways, which the PWAA took away, is not rooted in or protected by the Utah State Constitution. Accordingly, the PWAA will stand.

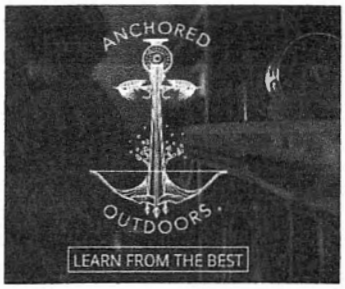
While the Coalition is disappointed in the decision, it remains steadfast and measured in its mission. Today's decision ends only one of several avenues by which the Coalition aims to restore public access to Utah's rivers and streams. It will continue its efforts to have the State identify navigable waterways and declare them open to public recreational use, as it did successfully on the upper Weber River in 2017. And the Coalition will continue to advocate for the repeal and/or amendment of the PWAA, which, contrary to its name, restricts the public's ability to recreate on over 2,700 miles of Utah's rivers and streams that comprise some 43% of Utah's fishable waterways.

In 2015, the Coalition convinced Utah's Third District Court that the uppermost 40 miles of the Weber River met the test of navigability based on evidence that the river was used for commercial purposes prior to Utah becoming a state. That ruling, which was affirmed by the Utah Supreme Court in 2017, means that the public has a right to use the beds and banks of the upper Weber River – and other navigable rivers in the State – for lawful recreational purposes, in perpetuity.

The Coalition is committed to the principle that the waters flowing in all of Utah's rivers and streams are owned by the public and therefore members of the public should have the right to make use of such waters for lawful recreational purposes, regardless of whether they are navigable or who holds title to the lands beneath them.

ENVIRONMENT FRESHWATER UTAH UTAH STREAM ACCESS COALITION





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Public Rights on Rivers

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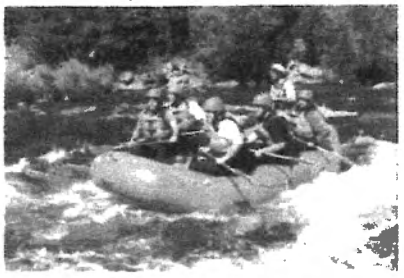
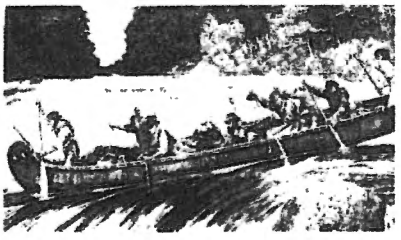
River conservation and water rights





National Organization for Rivers

Public Rights on Rivers

Second edition ♦ November 2013

Researched, compiled, and edited by the staff of the National Organization for Rivers, past and present.

The thoughtful comments of all those who reviewed earlier versions of this work are most gratefully acknowledged.

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Public Rights on Rivers

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Chapter One: The development of river law

What rights do you have to canoe, kayak, raft, fish, and duck hunt on rivers?

Can you canoe on rivers through private land in some states, but not in others? If you get out to push your canoe over a shallow spot, or carry it around a log jam, are you trespassing?

Can ranchers erect barbed-wire fences across rivers? Can a private fishing or hunting club keep you off their section of river?

If your property deed says that you own to the middle of a river, can you limit river users to the other half of the river?

Which rivers are legally navigable, and who decides which rivers qualify?

Can farmers divert almost all the water out of a river into irrigation ditches? Can they bulldoze along the shore of a river?

Can cities dump partly-treated sewage into rivers? Can industrial sites allow toxins lying on the ground to wash into the nearest river whenever it rains?

Can government agencies charge a fee for the right to run a river? Can they make you pay a government concessionaire in order to run a river, unless you obtain one of the few noncommercial permits that are available in a lottery?

The answers to these questions are matters of law, but they are not as simple as citing an act of Congress. There are U.S. Supreme Court decisions and state laws to consider.[1]

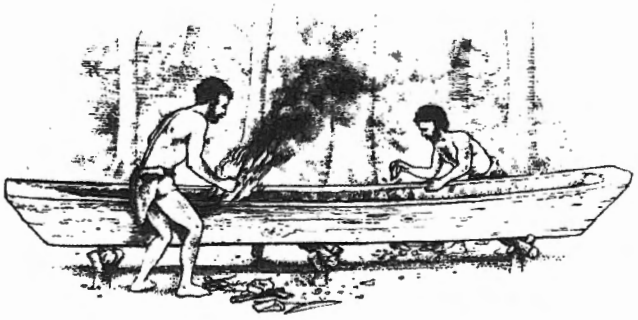
River law, like other areas of law, was not created in a vacuum. Instead, it developed in response to evolving human uses of rivers, and the legal disputes that arose in the course of those uses. Public rights on rivers today are based largely on historical uses of rivers. For example, the U.S. Supreme Court has held that even small, shallow rivers continue to be public rivers in today's world, if they were usable by fur traders in canoes centuries ago.[2] The Court has also confirmed that public rights on a river are largely a matter of the actual *facts* about the river.[3] Consequently, one must understand the *facts* about historical uses of rivers before coming to conclusions about the current state of the *law*. Mistaken views about the history of river use will lead to mistaken views about public rights on rivers today.

In other words, if you try to answer questions such as those posed above by citing statutes and court decisions from different eras of history, without an understanding of how rivers were actually used during those eras, you soon get into a mishmash of confusing, almost conflicting views. However, if you consider the history of human uses of rivers, and how the law developed in response to those uses, many of the seeming conflicts fall away, and the answers to such questions become clear.

Consequently, this chapter outlines the facts about historical uses of rivers, as well as the concurrent development of river law.

Ancient uses of rivers

People were boating on rivers long before recorded history. Archeological evidence suggests that primitive men were paddling small watercraft of some sort over 800,000 years ago, even before the ability to use language had fully developed.[4] Ancient peoples hollowed out logs to make **dugout canoes,** a technique still used in some places today. The oldest known dugout canoes still in existence, dating from about 8000 to 6300 B.C., were found in the Netherlands. Another canoe, from about 4000 B.C., was unearthed in the tomb of a Sumerian king near the Euphrates River.[5]



People have been making dugout canoes for thousands of years, using tools and fire to hollow out logs.

Dugout canoes can be heavy and hard to maneuver. Some ancient peoples found that by building a frame of wood, then covering it with animal skins or the bark of certain trees, they could make a much lighter canoe, more manueuverable on the water and easier to carry overland.

[1] **U.S. Supreme Court decisions,** and federal appeals court decisions, are available on the Internet at web sites such as **supremecourt.gov, openjurist.org** and **findlaw.com.** Most other decisions cited in this book can be viewed on the Internet by doing a search using the name and numbers of the case. The **footnotes** in this book are written to be clear to non-technical readers, rather than following traditional law journal formats. The **page numbers** for passages quoted from decisions are usually omitted, because they can be readily located with "Find" commands in today's digital world. The prefix **www** is usually omitted.

[2] **Rivers usable by fur traders in canoes:** *Economy Light & Power Co. v. United States,* 256 U.S. 113 (1921) (Regarding a shallow river, with "boulders and obstructions," used in "early fur-trading days," from about 1675 to 1825.)

[3] **Actual facts about a river:** *United States v. Utah,* 283 U.S. 64 (1931) ("Each determination as to navigability must stand on its own set of facts.")

[4] **Small watercraft over 800,000 years ago:** Based on findings in 2004 on the Indonesian island of Flores, by archeologists led by Michael Morwood. See humanorigins.si.edu/research/asian-research/hobbits and its bibliography.

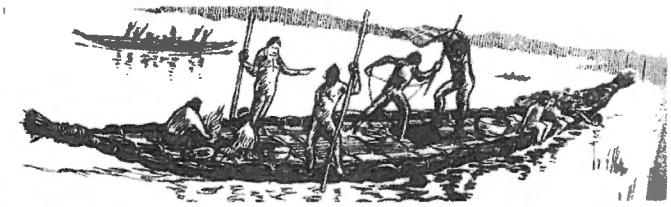
[5] **Oldest known dugout canoes:** *The History of the Ship* by Richard Woodman, Lyons Press 2002, page 11.

Since ancient times, canoes have been propelled with paddles, or by long poles pushing off the bottom in shallow water, or by rigging a small sail.

In northern regions, ancient peoples made **kayaks,** which are covered canoes in which the user is seated and uses a double-ended paddle. Archeologists have concluded that kayaks have been used for thousands of years in Asia, as well as across North America, from Alaska to the east coast of Canada, as well as in Greenland.[6] Evidence indicates that ancient peoples used kayaks and similar craft for fishing and fowling, and to migrate long distances. For example, the recent DNA sequencing of ancient human hair found in the permafrost in Greenland revealed that the hair came from a man of the Saqqaq culture, living around 4,000 years ago, and that the man's closest relatives were the Chukchis of eastern Siberia.[7]

Kayaks have been used in Asia and North America for many centuries, for fishing, fowling, and transportation.

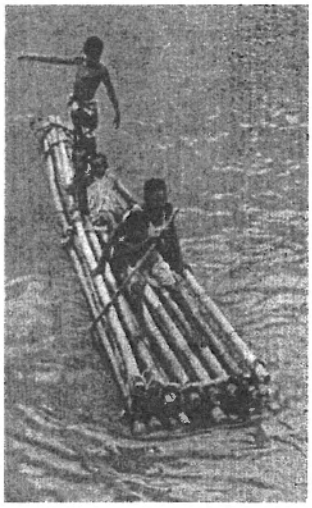
In temperate and tropical regions, ancient peoples made **reed boats,** a form of canoe consisting of reeds lashed together. (Also called *reed rafts,* since they consist of floating material lashed together, rather than an actual hull that keeps out water.) The oldest known remnants of a reed boat were found in 2002 in Kuwait. The boat was covered with *bitumen* (a kind of tar) from the oil-rich ground, to help waterproof it, and was about 7000 years old.[8] In ancient Egypt, reed boats were made of papyrus reeds, as depicted in paintings from about 4000 B.C.[9] They are still used today on Lake Tana in Ethiopia. The Bible says that when Moses was an infant, his mother set him afloat among the reeds along the edge of the Nile River in a miniature papyrus reed boat, coated with bitumen, to save him from a royal order that required the killing of Hebrew baby boys.[10] In pre-Columbian North America, reed boats were used on rivers in California that flow into San Francisco Bay, by several tribes collectively known as the Ohlone. Archeologists estimate that in Pre-Columbian times, more people lived in the San Francisco Bay area than in any other area of what is now the United States and Canada. Their primary source of food was fishing and fowling, using reed boats.[11] By 1900, reed boats were no longer used in the United States, but were still used for fishing in northern Mexico, as shown in black and white photographs from the time. Today, they are still used on Lake Titicaca in Bolivia, and along the coast of Peru.



Native Americans used reed boats on rivers in northern California.

In other places, ancient peoples lashed logs together to make **log rafts.** A log raft is quite heavy, and some groups found that by making a lighter wooden frame, then attaching several inflated animal skins to it, they could make a lighter and more maneuverable raft, more like the modern inflated river rafts used today. Various types of rafts were used in the ancient world. Some were propelled by oars, like a rowboat, while others were propelled by paddles, like a canoe.[12]

By the time the ancient civilizations arose, river boats were already well developed. Babylon flourished near the Tigris and Euphrates rivers, which were used for crop irrigation, transportation, and fishing. The pharaohs of ancient Egypt cruised the Nile on long, ornate vessels, rowed by teams of oarsmen, and the goods of the land were transported in a variety of boats along the river, using paddles, oars, and sails.[13]



Ancient raft designs are still in use in some places today, made from logs lashed together (the original **catamaran** in the ancient Tamil language) or inflated animal hides attached to a wood frame, somewhat like a modern inflated rubber raft with an oar frame.

[6] **Kayaks in use for thousands of years:** *Bones, Boats, and Bison: Archeology and the First Colonization of Western North America* by E. James Dixon, University of New Mexico Press 2000.

[7] **Kayaks used to migrate long distances:** "Ancient DNA set to rewrite human history" by Rex Dalton, *Nature* 465 (2010) page 148 (at nature.com.)

[8] **Reed boat in Kuwait:** "Report of Oldest Boat Hints at Early Trade Routes" by Andrew Lawler, *Science* Magazine, June 7, 2002, Vol. 296 no. 5574, page 1791.

[9] **Reed boats in Egypt about 4000 B.C.:** *Boats of the World: From the Stone Age to Medieval Times* by Sean McGrail, Oxford University Press 2004.

[10] **Moses in reed boat:** Exodus 2:3 (papyrus reeds often called *bulrushes.*)

[11] **Reed boats and large population in San Francisco Bay area:** *The Ohlone Way, Indian Life in the San Francisco-Monterey Bay Area* by Malcolm Margolin, illustrated by Michael Harney, Heyday Books, Berkeley 1978.

[12] **Ancient rafts using inflated animal skins:** *The History of the Ship* by Richard Woodman, Lyons Press 2002, page 12.

[13] **Ancient boats on rivers:** *Egyptian Boats and Ships* by Steve Vinson, Shire Publications 1994. Reconstructed ancient Egyptian boats are still on display at the Maritime Museum *(Museu de Marinha)* in Lisbon, among other places.

In ancient civilizations around the Mediterranean, loads of grain and barrels of wine were sent by river from farms and vineyards in higher country to cities downstream and along the coasts. Loads of ore, as well as stone and lumber for use as building materials, were also taken down rivers.

Boatmen used several methods to get their empty boats back upstream, against the current. In some stretches they rowed the boats, with six or more pairs of oars. In other stretches they propelled the boats upstream by pushing off the riverbed with long poles. At times they hoisted a small sail. (It may seem impractical to sail up a river, until one considers that on a number of rivers there is often an afternoon wind blowing upstream, coming inland from the ocean.)

Where the current was too swift for rowing, poling, or sailing, boats were pulled upstream using ropes from the bank, pulled by men, mules, or oxen. This process is known as **cordelling,** from the French word for a tow rope, *cordelle*. From today's perspective this may sound like too much work, until one considers the alternatives. In ancient times, roads were typically rough and rutted. In hilly areas they were steep and rocky. Carts and wagons, even if pulled by a team of oxen, could not carry large, heavy loads for long distances. Rivers, on the other hand, could be used to transport large, heavy loads for long distances downstream with relatively little effort. Having men, mules, or oxen pull the empty boats back upstream, after the cargo was delivered, was a small price to pay for this great transportation advantage.

An ancient Roman carving shows the process of towing a boat upstream, from the bank, known as **cordelling.**

Fishing in ancient times. Archaeologists have found widespread evidence that the people of ancient civilizations frequently fished in rivers. Fish typically release millions of eggs, so fish populations can usually recover quite readily from moderate fishing pressure. Therefore fish provided ancient people with a sustainable food supply.

Since ancient times, people have preserved fish by salting and drying them. Fish dried in this fashion are still sold in local markets in much of the world today. Of course, dried fish cannot match the flavor and tenderness of fresh fish. Before the advent of modern refrigeration, people living near the coasts could eat fresh fish from the ocean, while those living further inland could obtain fresh fish only from rivers. Consequently, rivers have been an important source of food since ancient times.

Fowling in ancient times. Rivers are typically frequented by ducks, geese, and other waterfowl. People have been fowling along rivers, to obtain food, since prehistoric times, using spears, arrows, snares, and other devices.

Rivers as boundaries. The practice of using rivers as boundaries is as old as mankind. Rivers have long served as boundaries between tribal groups, between individual farms, and even between nations.

As the water level rises and falls in a river flowing through fairly flat country, the edges of the river move outward and inward. Consequently, people discovered long ago that describing the boundary of a property as the *edge* of a river was problematic, because the location of the edge tends to be vague and transitory. They found that it was more useful to describe the boundary as being the line running down the *deepest part* of the river. Even at very low water levels, the remaining trickle of water still flows down the deepest part of the river channel, providing a fairly definite boundary line between the adjacent properties, and giving access to the water to the landowners on both sides of the river.

In Latin this line was called the *filum aquae,* literally "the line of the water." Early nordic languages called it the *thalweg* of the river, literally the "dale-way" (in the sense of the path taken by water down a dale or valley.) In English it is often called the *thread* of the river. It is still used as a property boundary in many places.

A *riparian* landowner is one who owns land along a river (from the Latin word *ripa,* meaning the bank of a river.) This refers to people who own land along one or both sides of a river. Ancient law reconciled private ownership of land along rivers with public rights to use the beds and banks of rivers, as discussed below.

River law in ancient times

The laws of ancient civilizations reflected the importance of boating, fishing and fowling on rivers in those centuries, as follows:

The Institutes of Justinian and the Laws of Nature. A foundational document in the law of western civilization is the *Corpus Juris Civilis,* ("The Body of Civil Law,") published under the direction of the Roman emperor Justinian in 534 A.D. Two of the parts of this lengthy document are the *Institutes* and the *Digest*.

Today, the massive doors at the entrance to the U.S. Supreme Court are sculpted with the image of Justinian proclaiming the *Institutes*. One literally "walks through the Institutes of Justinian" to enter the highest court in the land.

The legal scholars who compiled the *Institutes* explained that they had, in turn, "collected the whole ancient law" in their treatise, from civilizations that flourished many centuries earlier, including the civilizations of ancient Greece, Egypt, and previous civilizations.

Ancient law, as reflected in the *Institutes*, held that "running water" is "common to mankind," and that "all rivers and ports are public, hence the right of fishing in a port, or in rivers, is common to all men." (Sections 2.1.1 and 2.1.2.) It recognized public rights to boat and fish in rivers, using the banks as well as the water itself. (Section 2.1.4.)[14]

It held that these public rights on rivers are part of the *Laws of Nature* (also known as the *Law of Nature*, or *natural law*.) Ancient law viewed the Laws of Nature as being "established by divine providence," so that they "remain forever fixed and immutable." (Section 1.2.11.) In other words, ancient law viewed public boating and fishing rights on rivers as being granted to mankind by God (or the gods,) and therefore as not being revocable by human governments.

Ancient law also held that these rights are part of the *Law of Nations*, in the sense of being fundamental law common to all nations (not in the sense of being part of international law.)

Ancient law reconciled private ownership of the banks of rivers with public rights to use the banks. It said, "The public use of the banks of a river is part of the Law of Nations, just as is that of the river itself. All persons therefore are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons." (Section 2.1.4.) In other words, it affirmed a public *easement* to use the banks of rivers, even where the *ownership* of the banks was private.

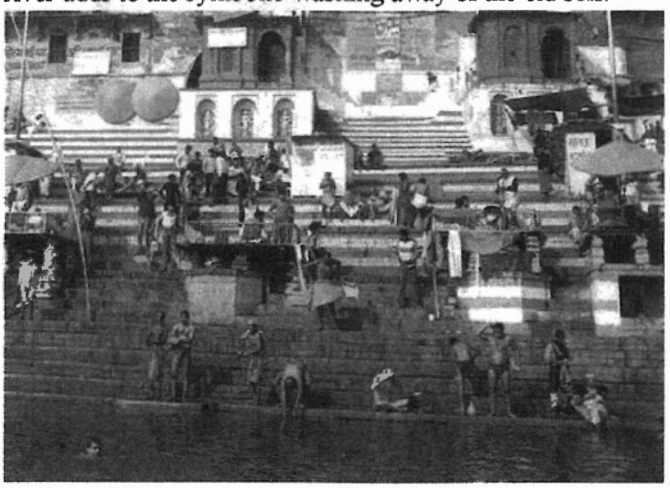
As reflected in the *Digest*, under ancient law it was "forbidden to do anything to a river or to its banks, or place anything thereon, that would impede navigation or use of the banks." (Section 43.12.1.) Construction along a river was permitted "only if no damage were done to navigation." (Section 43.12.1.15.)

Regarding the right to divert water from rivers, ancient law said, "Water may be led from a river, unless it makes the river less navigable." (Section 43.12.1.15.) Water was "not allowed to be withdrawn if it would cause injury" (in the legal sense) to other river users. (Sections 8.3.17 and 43.20.3.1.)

The right to travel. Since rivers served as important routes of travel in ancient times, the public right to travel is relevant to river law. The earliest known charter of human rights was issued by Cyrus the Great, ruler of Persia during the 500s B.C. His charter affirmed, among other things, that people have the right to "live in all regions" or "live where they want to."[15] Legal scholars consider this to be the earliest known confirmation of the right to travel.

Ancient law regarding the spiritual significance of rivers. The concept of separation of church and state is relatively recent in human history. In ancient times, the government and the predominant religion in society were often one and the same, so that principles of law rested on principles of religion. Therefore, to better understand the origins of river law, we must be aware of ancient views about the religious and spiritual significance of rivers.

Since prehistoric times, people have known that running water is generally cleaner than stagnant water, and that rivers bring life-giving water to plants, animals, and people. They have also noticed that rivers make a variety of natural, almost musical sounds. The oldest of the world's major religions, Hinduism, is said to have started when wise men stood on the banks of rivers in India, about 4,000 years ago, and sang songs that they considered to be "inspired by the breath of God." The Hindus and other ancient religions used rivers for baptism, and archaeologists and anthropologists agree that the practice of baptism is very old. It is likely that baptisms were conducted in rivers (rather than more convenient locations such as lakes,) because river water tends to be cleaner, and because the moving current of a river adds to the symbolic washing away of the old self.[16]



Hindus bathe daily in the Ganges River in northern India, as they have for thousands of years.

Later religions continued these views regarding water, as further discussed in Chapter Two. At this point, we can simply note that since ancient times people around the world have attached spiritual significance to water, flowing water, and rivers, and that this belief in the spiritual significance of rivers contributed to the view that public rights on rivers were granted to mankind by God (or the gods,) and therefore are not revocable by human governments, as discussed earlier. This in turn contributed to the legal view that running water is owned by the whole community, and that water rights are a temporary right to use a community resource, but are not actual ownership of the water. This

[14] **Institutes of Justinian:** Translated by John Baron Moyle, available as an e-book from Amazon Digital Services.

[15] **Cyrus the Great confirming the right to travel:** *Human Rights* by Prakash Talwar, Isha Books 2006. See also www.farsinet.com/cyrus.

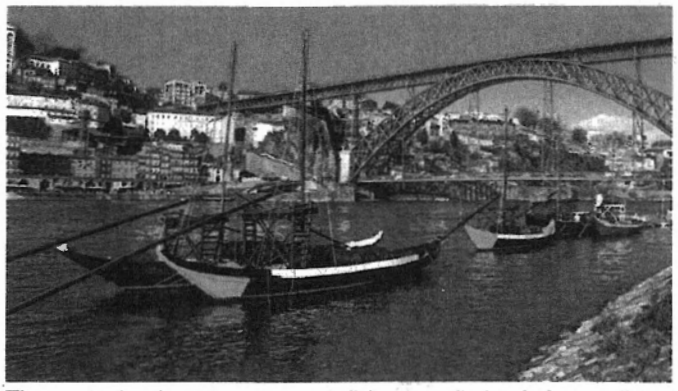
[16] **Hindu origins of baptism:** *The World's Religions: Our Great Wisdom Traditions* by Huston Smith, HarperOne 1991.

view continues today, as will be discussed in the following pages.

River uses during the development of Europe

In the centuries following the decline of the Roman empire, river use continued to be an important part of life in Europe. Large rivers such as the Rhine, the Danube, and the Thames, as well as countless smaller rivers, carried the products of the land to buyers elsewhere. As in earlier times, loads of grain and barrels of wine, as well as ore, stone, and lumber, were typically sent by river from sources upstream to cities and seaports downstream. As in earlier times, boatmen got their boats back upstream by rowing, poling, *cordelling*, or using a small sail when practical.

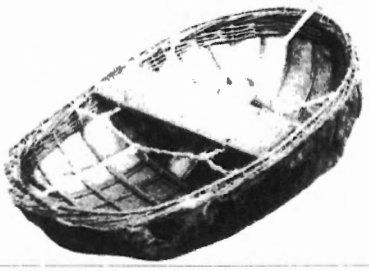
The practice of cordelling (described earlier) continued in parts of Europe into modern times. For example, for centuries numerous vineyards on the hillsides surrounding the Douro River in Portugal have grown the grapes used to make port wine. The new wine was traditionally carried down the river, though sizeable rapids, in barrels lashed to the decks of wooden rowboats called **rabelos,** to the city of Porto, which is near the mouth of the river at the Atlantic Ocean. There the wine, after further aging, was loaded onto ships and taken to buyers abroad, especially in England. The river boatmen, after delivering the barrels to Porto, *cordelled* the empty boats back up the river to await the next harvest. It was not until the 1930s that the industry switched to transporting the barrels from the vineyards to the coast by truck.[17]



The port wine industry used small boats called **rabelos** until the 1930s, to transport barrels of wine down the Douro River.

After the decline of the Roman empire, fishing on rivers also continued throughout Europe, as it had since ancient times. People fished from the banks of rivers as well as from small boats. The sport of fly fishing was already popular in Europe by the 1400s, and books were published about it in the 1400s and 1500s.[18]

In Wales, for centuries river fishermen have used small one-man boats called *coracles*, which consist of a wicker frame covered with leather, propelled by a paddle. A coracle is light enough for a fisherman to carry on his back.[19]



Welsh fishermen have used **coracles** for many centuries.

River law during the development of Europe

Ancient law regarding public rights on rivers continued into the laws of the emerging European nations.

In 1265, the government of **Spain** published *Las Siete Partidas*, a document that is considered to be a foundation of law in Spain and Latin America. Reflecting the *Institutes of Justinian* and other ancient law, it confirmed public boating and fishing rights on rivers. It said that rivers belong to all persons in common. Regarding the banks of rivers, it said, "Although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them."[20] This reaffirmed the principle of a public *easement* to use the banks of rivers, even where the *ownerhip* of the banks is private, as stated centuries earlier in the *Institutes of Justinian*, discussed above.

In **France,** a classic treatise on French Civil Law by Jean Domat, published in 1694, also reflected ancient law, saying that rivers, as well as "the banks of rivers," are "public things," which "do not appertain to any particular persons." Instead, "it is the sovereign who regulates the use of them."[21] By the 1800s, French law held that rivers were "inalienable" public property, meaning public property that could never be granted to private owners. The legal view was, "The sole purpose of the inalienability is to assure that the property will remain in public use or service. It follows that any voluntary alienation or dismemberment of the property is void, unless the property has ceased to be part of the public domain before it was alienated."[22]

In **England,** the public used rivers freely in ancient times. After the invasion of William the Conqueror in 1066, some rivers and their banks were fenced off by the Norman kings, for private use by the kings and noblemen. However, public boating and fishing rights were restored by the *Magna Carta* in 1215. This famous document limited the power of the kings, and required the kings to recognize

[17] **Wine transport by river in Portugal until the 1930s:** See www.ivp.pt.

[18] **Fly fishing books, 1400s and 1500s:** *The Treatyse of Fysshynge wyth an Angle* by Juliana Berners 1496 (England.) *The Little Treatise on Fishing* by Fernando Basurto 1539 (Spain.) *The Art of Angling* by William Samuel 1577 (England.) In *American Fly Fishing, A History* by Paul Schullery, Lyons&Burford 1987.

[19] **Coracles:** *Trout and Salmon Fishing in Wales* by George Agar Hansard 1923, re-published by Nabu Press 2010, page 145.

[20] **Every man has a right to use the privately-owned banks:** *Las Siete Partidas*, section 3.28.6 (S. Scott, translator and editor, 1931.)

[21] **French law in 1694:** *The Civil Law in its Natural Order* by Jean Domat 1694, page 150 (L. Cushing ed. 1850.)

[22] **French law in the 1800s:** *Droit Civil Francois* by Aubry and Rau 1838, Sec. 42.

public rights in a number of matters. Regarding rivers, it required the king to remove *kydells*, or *weirs*, (small dams intended to hold fish in one stretch of river,) from the rivers thoughout all England, so as to clear the streams for the free passage of fish as well as people.[23]

A well-known treatise on English common law was prepared about the year 1250, by the legal scholar Henry de Bracton. It affirmed public rights on rivers, citing the *Law of Nature* ("natural law") as the source of these public rights. It said, "By natural law these are common to all: running water, air, the sea, and the shores of the sea."[24] This echoed the *Institutes of Justinian* (as discussed earlier.)

In later centuries, English law continued to affirm both a "freedom of passage" and a "liberty of fishing" in rivers.[25]

By the 1600s, the legal view in England was that the beds and banks of rivers could be privately owned by the adjacent landowner, yet still be subject to two *servitudes*, one belonging to the king, and the other belonging to the people in general, thereby allowing public boating and fishing.[26] The law did not see these public rights on private land as being contradictory.[27] Note that this was different from the French legal view that the banks of rivers were necessarily public land, but it was essentially the same as the earlier Spanish view, reflected in *Las Siete Partidas*, (as well as the ancient view, reflected in the *Institutes of Justinian*,) that the banks must be open to public use, even where they are privately owned.

By the 1800s, the legal view in England was that the government held boating and fishing rights on rivers *in trust* for the use of the people.[28] This was essentially the same as the view that developed in the United States, as we will see later in this chapter.

River uses in ancient North America

Archeologists estimate that people have been living in the Americas for over ten thousand years. Archeological evidence indicates that humans lived and hunted wild game at Monte Verde (near present-day Puerto Montt, Chile,) about 14,000 years ago, and near present-day Clovis, New Mexico about 13,000 years ago.[29] Archeologists have long theorized that people migrated from Asia to North America by walking across the Bering Strait, when the level of the ocean was lower than it is today. However, there is increasing evidence that a number of people migrated from Asia to North America in kayaks or similar watercraft. The Inuit (Eskimo) people have long been capable of crossing the Bering Strait, and in fact the Yupik people still live on both sides of the strait. Explorers in the early 1900s found that among various tribes in Alaska, across Canada to Labrador, and in South America, in places where the ancient kayaking and fishing cultures appeared to have changed the least over time, details of the kayaks and paddles themselves were quite similar to those found in Asia, suggesting that prehistoric kayaking fishermen migrated from Asia to North America.[30]

The word *kayak*, usually viewed as an Eskimo word, appears to be derived from an earlier Turkish word, *kayik* or *qayiq*. (Turkish people first appeared in locations far to the east of modern-day Turkey, and a Turkish people, the Yakuts, still live in eastern Siberia.)[31] The Turkish word *kayik* also appears to be related to (or be the source of) the ancient Greek word for a small boat, *kaiki*, a word still used for small recreational boats among the Greek islands in the Mediterranean.[32]

People have been using kayaks for fishing, fowling, and transportation for thousands of years, in northern Asia, North America, and Greenland.

Today, among Spanish and Mayan speakers throughout Central America, the common word for a kayak or dugout canoe is *cayuco*, sounding much like *kayak*, *kayik*, and *kaiki*. Consequently, the term *kayak*, in its various forms, may be an ancient term, of nearly worldwide use, still used today.

[23] **Magna Carta:** The first *Magna Carta, The Great Charter of King John*, signed at Runnymede in 1215, chapter 33.

[24] **English law in 1250:** *On the Laws and Customs of England (De Legibus et Consuetudinibus Angliae)* by Henry de Bracton, Bk. I, ch. XII section 6, at 57 (Twiss ed. 1878).

[25] **English law in later centuries:** *Mare Clausum*, by Selden, Bk. II, ch. XXI, at 355 (Gent. Ed. 1663) ("As a freedom of passage, so also wee finde that a libertie of Fishing hath been obtained by Petition from the King of England.")

[26] **Public use of privately owned beds and banks:** *De Jure Maris* by Sir Matthew Hale, written in 1667 and published in 1786. ("The *jus privatum* that is acquired by the subject [the riparian landowner], either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and the arms of the sea are affected to public use.")

[27] **Public rights on private land along rivers:** *Lord Fitzwalter's Case*, [K.B. 1611] 1 Mod. 105, Eng. Rep. 766. (Not contradictory for the soil to be privately owned "and yet the river being common to all fishers.")

[28] **Rivers held in trust by the government for public use:** *A Treatise on the Law of Waters* by H. Woolrych, page 437 (2d ed. 1851).

[29] **People in the Americas 14,000 years ago:** For example, see *World Prehistory: A Brief Introduction* by Brian M. Fagan, Prentice Hall 2007.

[30] **Kayaks and paddles in Asia and North America:** *The Bark Canoes and Skin Boats of North America* by Edwin T. Adney and Howard I. Chapelle, Smithsonian Inst. 1964, page 195 (comparing kayaks and paddles in Asia and North America.)

[31] **Turkish for kayak:** "Starting from Greenland" at idiocentrism.com/kayak.htm.

[32] **Greek for kayak:** "The history of traditional Greek boats" by Maggie Makris, www.helium.com/items/1447035-greek-kaiki-boats-traditional-greek-boats.

A skeleton found along the Columbia River in 1996 (named "Kennewick man" after the nearby city of Kennewick, Washington) appears to be that of an *Ainu* man who lived about 9,000 years ago.[33] The *Ainu* or *Jomon* were an ancient people who lived in Japan before the Japanese. They used kayaks and similar craft to fish and hunt for seals and walruses. Isotope measurements of the skeleton, completed in 2012, indicate that the man most likely lived off a diet of marine mammals.[34] In view of his diet and background, and the long stretches of harsh terrain between Japan and Washington, it appears to be very unlikely that this Ainu man (or his ancestors) got to the Columbia River area by walking overland. It appears to be much more likely that he (or they) traveled along the coast of the Pacific by kayak or similar craft.[35]

Various pyramid-building civilizations flourished in North and Central America starting about 3,000 years ago, in the region stretching from what is now Illinois to what is now Panama. The pyramids they built were strikingly similar to those of ancient India and neighboring countries, suggesting migrations across the Pacific. The remains of these pyramids can still be seen at places such as Cahokia Mounds State Historic Site in Illinois, Chichen Itza in Mexico, Tikal in Guatemala, and several other locations. These ancient civilizations also built cities of stone, somewhat similar to those of ancient Greece and Rome.[36]

As in ancient Babylon and ancient Egypt, transportation by river played a key role in the development of these American civilizations. Numerous ancient records, illustrations, and archeological digs confirm that these civilizations used canoes and similar craft on rivers for trade and for fishing, and that fish were a principal source of food.[37] As archeologists have excavated ancient American ruins in any one location, they have often found various small items (such as jewelry and tools) that could only have come from other, distant civilizations. These findings show that there was trading over great distances between American civilizations.[38]

In the area that is now St. Augustine, Florida, Native Americans once fished, canoed, and built temples on small pyramids.

These civilizations built cities and towns at strategic points along rivers. Today, the Cahokia Mounds are large earthen mounds, located a few miles east of St. Louis, Missouri. However, from about 700 to 1400 A.D., they were stone-faced pyramids, in a city of perhaps 10,000 to 20,000 people, located on a bend in the Mississippi River, just downstream from its confluence with the Missouri. This was an ideal location for a capital of commerce, carried by canoes, covering a large region in what is now the midwestern United States.[39]

River law in ancient North America

Based on ample acheological evidence, it is clear that transportation and trade using canoes on rivers, and fishing on rivers, were common practices among the ancient North American civilizations, in what is now the United States, Mexico, and Central America. It is clear that these civilizations had already been using canoes and similar craft on rivers, for transportation, trade and fishing, for thousands of years before the arrival of Europeans.

In other words, at the time that the *Institutes of Justinian* were being published in the Roman empire (regarding ancient law that confirmed public rights to use rivers in the civilizations around the Mediterranean,) the same sorts of public rights on rivers had also long been confirmed by law and custom among the civilizations of North America.[40]

Today, there are still a few "windows" into the canoeing and fishing lifestyle of ancient North America. For example, the *Kuna* people still maintain their traditional homeland, *Kuna Yala*, and their own nearly-autonomous government, within the nation of Panama. Their homeland includes the San Blas Islands in the Caribbean, and the adjacent section of the mainland coast, up to the Continental Divide (which is not far from the ocean in that area.) They still use the same type of dugout canoes, for fishing and transportation, as were used in ancient America (and were used throughout

[33] **Kennewick Man:** *The First Americans: The Pleistocene Colonization of the New World,* Nina G. Jablonski, Editor, Univ. of California Press 2002, page 105.

[34] **Isotope measurements:** By Douglas Owsley, mnh.si.edu/kennewickman.

[35] **Kennewick man came by kayak:** *In the Wake of the Jomon, Stone Age Mariners and a Voyage across the Pacific* by Jon Turk, International Marine McGraw-Hill, 2005 (likely that Ainu people kayaked along the coast rather than walking overland, Japan to Alaska, based on research and modern-day trips.)

[36] **Pyramids and cities of stone:** *Ancient Maya: The Rise and Fall of a Rainforest Civilization* by Arthur Demarest, Cambridge University Press 2005.

[37] **Trade and fishing on rivers in ancient America:** *Archeology of Ancient Mexico and Central America: An Encyclopedia,* edited by Susan T. Evans and David L. Webster, Routledge 2000, page 115 (Ancient Mayan city of *Cerros*, next to present-day Corozal in Belize, controlled trade routes on the Rio Hondo and New River, from Yucatán to Petén. The ancient city, now in ruins, is surrounded by a stone-lined canal, where traders in canoes loaded and unloaded cargo.)

[38] **Trading over great distances:** Note striking similarities between the jewelry and pottery designs of North American tribes such as the Navajo and South American tribes such as the Mapuche in Chile. The items traded between North and South America in ancient times may not have been carried the whole way by the same traders, but could well have been taken in several stages by different traders. In any event, there was definitely trading between civilizations.

[39] **Cahokia Mounds:** See the well-illustrated web site at cahokiamounds.org.

[40] **Public rights on rivers in ancient America:** "Aztec and Maya Law: An Online Exhibit and Bibliography," Tarlton Law Library, University of Texas. (tarlton.law.utexas.edu/ exhibits/Aztec/index.html.)

much of the ancient world on other continents.) They paddle up and down the rivers of their region, as well as from island to island along the coast. They use the same sorts of pointed paddles as those that were used by ancient kayakers in Asia, but are not typically seen elsewhere. Today, they are astute traders, setting an annual tribal-wide price for their coconuts, which they trade to factories in nearby Colombia for use in foods and cosmetics. It is evident that this trading tradition among American tribes originated in ancient times.[41]

Dugout canoes are still used today by the Kuna people in Panama.

Ironically, the *Kuna* territory lies scarcely fifty miles from the Panama Canal, the modern "crossroads of the world," where large ships carry trade between the Atlantic and the Pacific, and where North America and South America meet. This modern "crossroads of the world" is very near the place where America's ancient culture, which involved trading by canoe, still thrives today, essentially unchanged.

The European discovery of America

It is likely that the first Europeans to see the coasts of North America were Norse explorers. Shortly after the year 1000 A.D. they made several voyages from Norway to the east coast of what is now Canada. As they anchored their sailing ships in sheltered bays along the coast, they were met by native tribal people paddling kayaks. At first the explorers traded peacefully with the natives, but soon there were misunderstandings and fighting. The explorers returned to Europe and reported their findings, but in those days most Europeans apparently regarded the reports as exagerration or fiction, or as not relevant to daily life.[42]

These and subsequent explorers reported that the native people made their kayaks by building frames of sticks or animal bone, then covering them with the skins of seals or other animals. They used these kayaks when fishing, and also to hunt, using spears or traps, for seals and other animals. They used the fur of these animals for clothing, and the meat for food.

They also used kayaks for transportation. They put food, furs, other freight, and even their children inside these kayaks, then paddled them across cold, windy waters in relative safety.[43]

As mentioned earlier, it appears that native peoples in North America had already been living in this manner, using kayaks and other types of canoes, for thousands of years before the Norse explorers arrived.

Of course, the more publicized European discovery of America was nearly 500 years later, when Christopher Columbus and his crew sailed in 1492 from Spain to what is now the Bahamas. On these islands they found native *Taino* people paddling small boats, calling them by a term that the Spanish explorers transliterated as *canoa*, from which English and other European languages got the word *canoe*.[44]

Miscommunication was common between natives and European explorers, so the Spanish explorers may have been hearing a local variation of the word *cayuco*, which in turn appears to be a variation of *kayak*, *kayik*, and *kaiki*, as noted earlier. Consequently, the two modern words *canoe* and *kayak* may have come from the same ancient root word, which was similar in numerous places around the world.

In 1502, on a later voyage continuing further south, Columbus encountered a large Mayan trading canoe along the coast of what is now Honduras. The canoe was carrying goods such as jade, salt, cotton, and cacao beans. (*Cacao* is a Mayan word, adopted in Europe as *cocoa*.) This was the first known contact between the European and Mayan civilizations (and the first known European experience with chocolate.)[45]

The ancient Maya used canoes for transport, fishing, and trading.

In 1520, a Spanish military expedition led by Hernán Cortés conquered the capital of the Aztec civilization, in what is now Mexico. The capital was located on an island, surrounded by a shallow lake routinely used by canoes, in the area that is now Mexico City. Remnants of the ancient lake are still visited by tourists, in small, flower-decorated

[41] **Kuna life and trading:** *The Art of Being Kuna: Layers of Meaning Among the Kuna of Panama* by Mari Lyn Salvador, University of Washington Press 1997.

[42] **Norse explorers around 1000:** *The European Discovery of America, The Northern Voyages* by Samuel Eliot Morison, Oxford University Press 1971, pg. 53.

[43] **Ancient kayak uses:** *Nanook of the North* by Robert Flaherty, Windmill Books 1971, based on a film from the 1920s showing Eskimo families who were still living in the ancient manner at that time.

[44] **Natives found by Columbus:** *The Tainos: Rise and Decline of the People Who Greeted Columbus* by Irving Rouse, Yale University Press 1993.

[45] **Mayan trading canoes:** "The Mayan Navigators," mayadiscovery.com/ing/history/navigators.htm. "The Maya and Cacao," authenticmaya.com/cacao.htm.

boats, at the present-day Xochimilco gardens - on the outskirts of Mexico City.[46]

During these same years, Spanish explorers in the tropical regions of Central and South America found the natives making log rafts for use on rivers from the lightweight wood of a certain tropical tree. In Spanish, a raft is a *balsa*, so they called this wood *balsa* wood. (Today, it is typically used to make model airplanes.)[47]

The first major European exploration of what is now the United States was in 1538, when the Spanish explorer Hernando DeSoto landed in Florida, with 620 men and 223 horses, and made a military-style overland expedition through what is now Florida, Georgia, Alabama, Mississippi, Arkansas, and Louisiana. When the expedition reached the banks of the Mississippi River, thousands of natives (who had heard of the coming invasion) were massed along the opposite shore. Natives in full war regalia repeatedly paddled past the expedition's camp in brightly-painted war canoes, shooting volleys of arrows. The expedition later crossed the river, and continued further west, but many men died, and the survivors returned home in tatters. DeSoto himself died, and his crew "buried" his body by putting it in a hollow log and sending it down the Mississippi.[48]

In 1576, an expedition from England, led by Martin Forbisher, sailed to the east coast of what is now Canada, visiting some of the same areas that the previously-mentioned Norse explorers had seen nearly six centuries earlier. Again, the explorers were met by natives in kayaks, as the earlier Norse explorers had been. Again, at first the explorers traded peacefully with the natives, but later there were disputes and fighting. This time, however, the explorers captured a native and his kayak, and took him back to England. There, this displaced man demonstrated his kayaking, fishing, and fowling skills in various public performances. His performances were then portrayed by English artists in pictures, which were published in books distributed in England and other European countries at that time.[49]

Fishing along the banks of rivers was customary in colonial and early American times.

River uses in colonial America

Colonial fishing. The first colonists in what is now Virginia and neighboring states, during the 1600s, survived largely on fish and game until they could grow and harvest crops. Fish were plentiful in rivers and the ocean. Native tribesmen showed them how to fish successfully, which allowed the colonists to survive.[50]

Later, printed advertisements in Europe, designed to attract additional colonists to America, portrayed fish as being quite plentiful in America, and canoes as being a common and convenient way to catch them. In those times there were devastating famines in parts of Britain, Ireland, and elsewhere in Europe. People feared starving to death. The promise of plentiful fish was a powerful draw for people to emigrate from Europe to America.[51]

In later generations, when colonists were less concerned about mere survival, fishing for sport became common. In Philadelphia, there were at least five different fishing clubs by 1750, and books had been published about fly fishing techniques.[52]

Colonial canoeing on rivers. As colonists moved inland, they found that much of the land was thickly forested and nearly impassable.[53] In many areas, rivers were the only practical routes of transportation. Again, the natives showed them how to use canoes, which could be paddled both upstream and downstream, and could be carried around obstructions in rivers. Canoeing on rivers became a key element in the westward movement of settlers.[54]

Colonial logging on rivers. Colonists often used rivers to transport lumber. They felled trees in the mountains, then cut them on the spot into shorter logs, then floated the logs down rivers to crews waiting at large eddies downstream, who pulled them out of the river and used them to build new settlements.

They even used small creeks to transport logs. They would stockpile the logs along a creek during the low-water months, then send them downstream when the time of high water arrived. Note that rapids and waterfalls were not much of an obstacle for colonial loggers. They simply ran the logs down the rapids and over the waterfalls, then retrieved them from eddies further downstream.[55]

Colonial fur trading. When European colonists arrived in America, native tribes had already been trading in furs for several thousand years, typically transporting them in canoes on rivers. The colonists simply linked this existing commerce to European markets. French entrepreneurs

[46] **Cortés and the Aztecs:** *The Spanish Invasion of Mexico, 1519-1521* by Charles M. Robinson, Osprey Publishing 2004.

[47] **Balsa wood:** *Spanish Word Histories and Mysteries* by the Editors of the American Heritage Dictionaries, Houghton Mifflin Harcourt 2007, page 23.

[48] **DeSoto on the Mississippi:** *Tales of the Mississippi* by Ray Samuel, Leonard Huber, and Warren Ogden, Pelican Publishing, Gretna, 1955 and 2000, pg 2 to 9.

[49] **Native kayaker taken to England:** *The European Discovery of America, The Northern Voyages* by Samuel Eliot Morison, Oxford Univ. Press 1971, page 142.

[50] **Fishing by first colonists:** *Ocean Planet* by Peter Benchley and Judith Gradwohl, Harry N. Abrams Publishers/Smithsonian Institution 1995, page 163.

[51] **Plentiful fish as a draw for emigration:** *Ocean Planet* (just cited) page 164.

[52] **Colonial fly fishing books:** *The Compleat Angler* by Izaak Walton 1676. *The Art of Angling* by Richard Brookes 1740.

[53] **Thickly-forested land:** *The Loggers* by Richard L. Williams, Time-Life Books 1976, page 28.

[54] **Colonial canoeing on rivers:** *The Rivermen* by Paul O'Neil, Time-Life Books 1975, page 19.

[55] **Logging on rivers with rapids and falls:** *The Loggers* (just cited) page 104.

started the shipping of American furs to Europe around 1600, followed by English and American traders. Fur traders traveled by canoe on rivers, taking small manufactured goods such as knives, tools, beads, and mirrors to native tribes, where they traded these items for the furs of beaver, buffalo, and other animals. Then they transported the furs in canoes on rivers back to cities, where they fetched good prices. Most of the furs were then loaded on ships bound for Europe, where they were made into hats and coats for buyers in London and Paris and other cities. From about 1600 to the mid-1800s, furs were in high demand both in colonial American cities and in Europe, and fur trading was an important American industry.[56]

Early American colonists used canoes for efficient transportation.

A French "mountain man" was called a *coureur de bois*, literally a "runner of the woods," while a fur trader was called a *voyageur*, because the trade involved long-distance "voyages" on water, by canoe. The fur traders carried or *portaged* their canoes and furs overland between rivers when necessary to complete a route. (To *portage* means to "carry" in French.)

French fur traders founded Montreal in 1642. In 1673, French explorer Louis Jolliet and Jacques Marquette, a priest, led a long expedition from Montreal south. (For comparison, note that this was when Louis XIV was expanding the palace of Versailles back in France, and Dutch forces were retaking New York from British forces.) The expedition consisted of only seven men—five Frenchmen and two Algonquin tribesmen. They made the entire trip in two birch-bark canoes. From Montreal, they paddled along the shores of the Great Lakes, then upstream on the Fox River, a river that flows into Lake Michigan. Then they portaged (carried) their canoes across the local divide, to the headwaters of a small river that flows into the Mississippi, and paddled downstream hundreds of mile to what is now the state of Mississippi. They had numerous peaceful interactions with the native tribes, even though they were visiting some of the same areas where many men had died while fighting the natives on the earlier DeSoto expedition. They then paddled the canoes hundreds of miles back *up* the Mississippi, and home to Montreal, all without losing a single man.[57]

They traveled by canoe in the same manner as typical French-Canadian fur traders of the time. To modern readers, paddling a canoe upstream for hundreds of miles may sound nearly impossible, but native tribesmen had already been doing it for thousands of years. A lifetime of paddling made it more feasible for these people, but it also turns out that rivers in relatively flat country, such as most of the Mississippi, make nearly continuous bends. One ancient technique was to paddle up the eddy on the inside of a bend in the river, then ferry across the river, then paddle up the eddy on the inside of the next bend. In this manner, much of the paddling time was spent with little or no opposing current, and sometimes there was even a helpful upstream current in the eddy. Another technique, where the bends of the river were particularly close together, was to portage the canoe across the "isthmus" at the narrowest point between bends, then paddle *downstream* to the next narrow isthmus, then repeat the process, thereby making an overall trip *up* the river, even though the paddling itself was a series of *downstream* segments, interspersed with portages.

Montreal became the largest collection point for the northeastern fur trade, since it was located near the confluence of the St. Lawrence and Ottawa rivers, downstream from the Great Lakes and a short distance from the Atlantic. French fur traders also founded New Orleans in 1718. It became the main export city for the midwestern fur trade, since it was located near the mouth of the Mississippi River. They founded St. Louis in 1764, and it became the main collection point for the western fur trade, since it was located near the confluence of the Mississippi and the Missouri rivers. Note that St. Louis is just a few miles from where the canoe trading and pyramid-building city at Cahokia Mounds had flourished centuries earlier.

By the time the American colonies declared their independence from Britain in 1776, French fur traders were already in full operation in what is now the midwestern and western United States. Today, their legacy lives on in place names such as Coeur d'Alene, Idaho, and the Cache la Poudre River, in Colorado.[58]

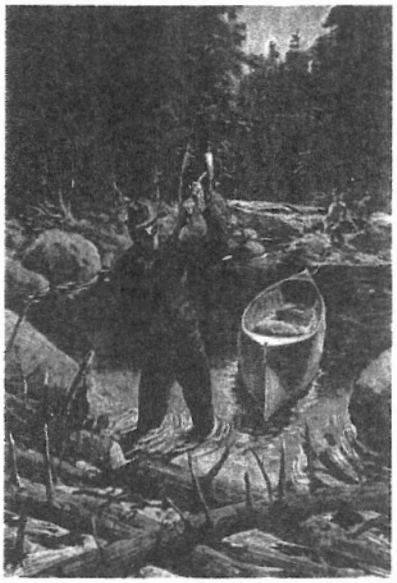
Today, novelists and movie makers often focus on conflict and warfare between native tribes and European settlers. Conflicts were indeed common in the 1800s, but during colonial times, in the 1600s and 1700s, traders usually found that the tribes were eager to trade furs for knives, tools, jewelry, and so on. Trading relationships were therefore valued by both the tribes and the European traders. Both tribesmen and traders considered it desireable for trader men to marry tribal women, and there were numerous such marriages, producing numerous children who were half tribal and half European.

[56] **European-American fur trading:** *The Forts of New France in Northeast America 1600-1763* by René Chartrand and Brian Delf, Osprey Publishing 2008.

[57] **Marquette and Jolliett expedition:** See vivid illustrations in *Marquette & Jolliet: Quest for the Mississippi* by Alexander Zelenyj, Crabtree Publishing 2006.

[58] **French fur trade:** *French Fur Traders & Voyageurs in the American West* edited by LeRoy R. Hafen, Univ. of Nebraska Press 1965 and A.H. Clark 1995.

Note that these two centuries of peaceful trading, during the 1600s and 1700s, were simply a continuation of the trading tradition that had already flourished for thousands of years among various North American tribes and civilizations, in places stretching from Illinois to Panama, as mentioned earlier.



In their quest for valuable furs, fur traders hacked through logjams and lined canoes through rapids.

River law in colonial America

Colonial governments consistently affirmed public boating and fishing rights. In 1641, the Massachusetts Bay Colony adopted the *Massachusetts Declaration of Fundamental Liberties,* which affirmed public rights to fish and fowl on the "great ponds" (lakes in that area,) along with the freedom to walk through uncultivated private land to do so.[59] Laws of the colony of Pennsylvania, enacted from 1700 to 1768, prohibited weirs that would block the movement of fish on rivers, and confirmed public rights to fish on rivers.[60] Note that these colonial laws reflected similar provisions in *Magna Carta,* which had been signed into law about five centuries earlier, as discussed previously.

In colonial times, people living inland from the coastal cities were dispersed, and they had few commercial food sources. There were no paved highways, and no trucks bringing food to local grocery stores. Canoeing, fishing, and fowling on rivers were important methods of obtaining food, and were a part of everyday life for many people.

Colonial views regarding public rights to use rivers were influenced by the pre-existing customs and legal views of the tribes. (As noted above, relationships between tribes and colonists were generally positive.) The general view was that canoeing, fishing, and fowling on rivers were an important part of life, and that public rights to do these things were undeniable. Conequently, the law during colonial times confirmed public rights to canoe, fish, and fowl on rivers.

Founding principles of American river law

Laws of Nature. The founding fathers of the United States reaffirmed the overall premise of ancient law that the *Laws of Nature* are the source of human rights and liberties. The Declaration of Independence says that people "are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."[61] This echoed the ancient view, as expressed in documents such as the *Institutes of Justinian,* that public rights and freedoms are granted by God (or the gods,) and therefore cannot be revoked by human governments, so that they are unalienable (now spelled *inalienable.*) It should be noted that many Americans fought and died in the Revolutionary War to uphold these public rights and freedoms, and to protect them from future encroachment.[62]

The Commerce Clause. After winning independence from Britain, the states functioned for several years as a confederation of independent countries. It was not until 1787 that delegates from the various states met to draft the U.S. Constitution. A strong motivation for calling the Constitutional Convention was the need for an overall policy regarding commerce, which had become chaotic as states set up import duties and other impediments to interstate trade, in an effort to collect revenues and protect business for their own citizens. Consequently, there were few objections to the adoption of the "Commerce Clause" of the Constitution, which empowered Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[63] The main commerce with the Indian tribes at that time was the *fur trade,* which was already centuries old, as discussed earlier. The fur trade was an important source of much-needed cash for the fledgling United States, since furs fetched good prices from buyers in London and Paris, as noted earlier. The fur trade was borne mainly by canoes on rivers. In effect, the Commerce Clause asserted national authority over navigation on rivers in canoes and similar craft. In subsequent decades, the Commerce Clause was to play a key role in the development of river law (and Constitutional law) in the United States, as discussed later herein.

Rivers navigable in canoes shall be "forever free." In the very first Act of Congress, Congress addressed the status of rivers in U.S. territory west of the original thirteen colonies, saying, "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax,

[59] **Public rights in the Massachusetts Bay Colony:** *Inhabitants of W. Roxbury v. Stoddard,* 89 Mass. 158 (1863).

[60] **Public rights in the Pennsylvania colony:** Cited in *Carson v. Blazer,* 2 Binn. 475, 4 Am. Dec. 463, pages 474-476 (Pa 1810).

[61] **Endowed by their Creator:** Declaration of Independence, first paragraph.

[62] **Public rights and the Revolutionary War:** See discussion by the U.S. Supreme Court in *Martin v. Waddell,* 41 U.S. 367 (1842) page 414 (discussed later herein.) See also *A People's History of the United States,* by Howard Zinn, Harper Collins 1980, page 78.

[63] **Adoption of the Commerce Clause:** U.S. Constitution, Article I, section 8, clause 3, as discussed in *The Oxford Companion to the Supreme Court of the United States* edited by Kermit L. Hall, Oxford University Press 1992.

impost, or duty therefor."[64] In 1796, in a law governing territory that would become future states, Congress again declared that "all the navigable rivers, creeks, and waters" within the territory "shall be deemed to be and remain public highways."[65]

Fur traders traveled upstream to trap beaver and other animals that lived along small creeks in the mountains. Then they took the furs back downstream to distant buyers.

At that time, the common types of watercraft on rivers were canoes and other small, human-powered craft, used in the fur trade and for other transportation, as noted earlier. A canoe is about the heaviest watercraft that can be reasonably *carried* overland from one river to the next, and such carrying (or *portaging*) was a common practice in the fur trade. Therefore these laws about "navigable rivers" and "creeks," and "the carrying places between the same" refer to navigation *in canoes*, not in larger craft. (Steamboats and motorboats had not been invented yet.)

Describing the rivers in question as the tributaries of "the Mississippi and St. Lawrence" may at first seem like an odd limitation, until one considers that this description covered virtually all of the rivers flowing in the territory that was claimed by the United States at that time (as well as a number of rivers in lands that were claimed by France and Spain.)

These Acts of Congress have not been repealed. The U.S. Supreme Court has repeatedly cited them as being a fundamental source of public rights on rivers in the United States today.[66]

The Lewis and Clark expedition. In 1803 Congress made the Louisiana Purchase from France, buying the vast region that is now the Midwest. The next year Congress funded the Lewis and Clark expedition, to officially explore this vast area by canoe, as well as additional lands further west to the Pacific. President Thomas Jefferson (who had previously written the Declaration of Independence) personally planned the expedition, and appointed Lewis and Clark to lead it. (Indeed, there is evidence that Jefferson had secretly planned the expedition even before the Louisiana Purchase, when the lands to be explored were still claimed by the French.) The fur trade was an important source of foreign cash for the young nation, as noted earlier, and part of the motivation for the Lewis and Clark expedition was to ensure that rivers used in the fur trade would remain open to U.S. traders, who competed for trading routes (and "market share") with French Canadian traders.[67]

The Lewis and Clark expedition traveled across North America by canoe, meeting tribes that carved elaborate dugout canoes.

It may be difficult for modern readers to comprehend the demand for furs in Europe in the early 1800s, and the resulting importance of the fur trade in those times, in what is now the Midwest. Fur trade historian Hiram Chittenden explains, "For forty years [after the Louisiana Purchase] the people of the United States were at a loss to know what to do with their new possession. It was not yet needed for settlement... The single attraction that it offered in a commercial way was its wealth of furs, the gathering of which became, and for a long time remained, the only business of importance in this entire region."[68]

The Lewis and Clark expedition also hoped to find a canoe route to the Pacific Ocean, hopefully with only a short portage over the Continental Divide—perhaps not much longer than the portage between a tributary of the St. Lawrence, and a tributary of the Mississippi, that had been used by the Jolliet and Marquette expedition over a century earlier, and had been in frequent use since then.

After departing from St. Louis, the expedition canoed upstream along the Missouri River, using the various techniques to go upstream as described earlier. Then they continued up smaller tributaries. Then they carried their canoes and gear over the Continental Divide, (which turned

[64] **"Forever free:"** *Northwest Ordinance of 1787*, reenacted Aug. 7, 1789, chapter 8, 1 Stat. 50.

[65] **"Remain public highways:"** Act of May 18, 1796, chapter 29, section 9, 1 Stat. 464, 468.

[66] **U.S. Supreme Court regarding rivers being "forever free" and remaining "public highways:"** *The Montello*, 87 U.S. 430 (1874) page 440. *Economy Light & Power*, 256 U.S. 113 (1921) pages 119 and 120.

[67] **Fur trade as a motive for the Lewis and Clark expedition:** *The Journals of Lewis and Clark*, ed. by Bernard DeVoto, Houghton Mifflin 1953, pgs. xxv and 89.

[68] **Fur trade was the only business of importance:** *The American Fur Trade of the Far West* by Hiram Martin Chittenden, Stanford University 1936 and 1954, also University of Nebraska Press 1986, in two volumes, over 900 pages.

out to be long and arduous,) and canoed down small rivers to join the Columbia River, and onward to the Pacific Ocean. Near the mouth of the Columbia, they built log cabins and spent the winter. When warm weather returned, they canoed and portaged their way back to St. Louis, along roughly the same route. Throughout the expedition they collected many specimens of plants and animals, and they made official contact with numerous tribes along the way (informing the skeptical tribes that they were now under the dominion of the new U.S. government.)

As they canoed down the Missouri on the final leg of their trip back to St. Louis, they met no less than eleven parties of fur traders headed upstream.[69] As noted earlier, French fur traders had already been operating in much of that area for over a century, and tribes had been canoeing and trading on these rivers for many centuries before that.

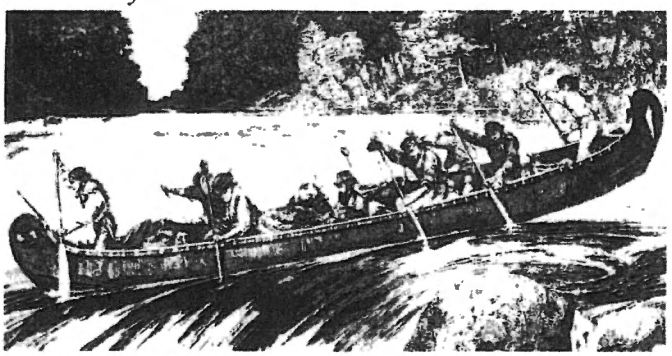
In other words, the Lewis and Clark expedition was not the initial human exploration of an untouched wilderness. Instead, it was an official fact-finding expedition, sent by the young U.S. government, to document the resources, and claim dominion, over lands that had already been occupied by tribes and pyramid-building civilizations for thousands of years. The laws and customs of these tribes and civilizations had long confirmed public rights to trade and travel on rivers by canoe, and to fish and fowl on rivers, as noted earlier. The laws of the new U.S. government essentially reaffirmed those ancient rights, although U.S. law based them on European principles such as the *Laws of Nature* and the *Institutes of Justinian,* rather than on Native American custom or Mayan codices. Either way (European or American) the net result was about the same—public rights on rivers were confirmed.

River uses in the early 1800s

It so happens that one can start from a point in western Pennsylvania, less than 200 miles from the Atlantic Ocean, and travel entirely by river to numerous points throughout the Midwest, and even to Montana. In the early 1800s, rivers provided both an important means for settlers to travel west, and also a means for them to earn a living once they got there. They could sell the products of their farms, and the surrounding forests, to commercial boatmen, who took these products by river to buyers in cities such as Cincinnati, St. Louis, Memphis, and New Orleans. From New Orleans, products were taken in ocean-going ships to buyers on the Atlantic coast and in Europe.[70]

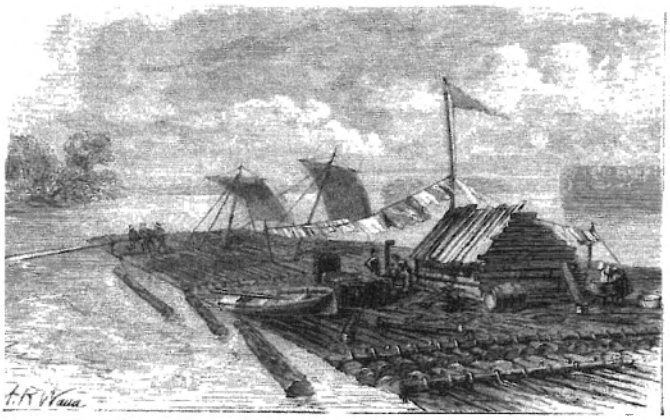
Canoes were the basic watercraft used in this commerce. As mentioned earlier, canoes were paddled upstream as well as downstream, and were carried around obstructions in rivers, as well as from one river to another.

Another basic watercraft at that time was a **log raft.** These were loaded with furs, dried meat, grain, coal, metal ore, and other raw materials, then steered downstream with long sweep oars. These heavy rafts made a one-way trip, and the logs themselves were sold as lumber at their destination. For some traders, the logs themselves were the main product, while the cargo carried on top was almost incidental. A number of historic houses in New Orleans, still standing today, were made of wood that came from Minnesota, transported down the Mississippi in the form of log rafts during the 1800s. Log rafts such as these were key elements in the classic American novels *Tom Sawyer* and *Huckleberry Finn*.



Fur traders in the 1800s canoed on rivers with rapids in their search for valuable furs, which were sold in America and Europe.

Another common boat was a **flatboat**, a boat made of thick wood boards, consisting of a flat bottom and sides. Often a roof was added over part of the boat. These wooden barges were lighter and more maneuverable than log rafts, and they provided somewhat safer transport for cargo, livestock, and passengers. Like log rafts, they were typically used for a one-way trip downstream, then sold at their destination for lumber.



Loggers in the 1800s tied logs together to make log rafts, to float the logs down rivers to market, sometimes with cargo on top.

A **mackinaw** was a long, narrow flatboat with some curvature at the ends, to make it faster and more maneuverable. With a crew of four at the oars, and a fifth man handling the rudder (which was a long sweep oar,) these boats could cover over 100 miles a day when going downstream.[71]

Also common were **keelboats,** which were wooden boats made with a rounded hull and a keel, more like the boats

[69] **Met fur trade parties:** *Journals of Lewis and Clark* (just cited) pgs. 467 to 478.
[70] **Settlers, river use:** *The Rivermen* by Paul O'Neil, Time-Life Books 1975, p. 20.
[71] **Log rafts, flatboats, and mackinaws:** *Western Rivermen, 1793-1861* by Michael Allen, Louisiana State University Press 1990.

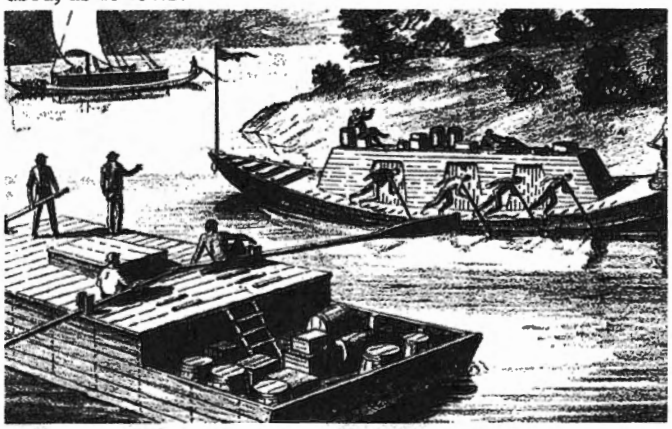
typically used on the ocean at the time. Keelboats were faster and more maneuverable than flatboats and mackinaws, and were designed for multiple trips. On the trip downstream they often carried heavy raw materials, similar to flatboats and rafts. On the trip upstream, they carried lighter, more valuable manufactured items, such as guns and tools, which were readily sold to frontier settlers. They moved upstream in four ways, briefly mentioned earlier: First, by men, mules, or oxen pulling them with a rope from the bank, called *cordelling*. Second, by men pushing off the bottom of the river with poles, while walking along the deck of the boat from bow to stern. Third, by rowing, with anywhere from four to twelve pairs of oars. Fourth, by hoisting a sail, to take advantage of common upstream winds in the afternoon. Often two or more of these methods were used at the same time. These methods had been used in Europe and elsewhere since ancient times, as discussed earlier.[72]

Flatboats, log rafts, steamboats, canoes, and other craft navigated American rivers through the 1800s.

To modern readers, these methods of moving upstream sound too slow and arduous, but as noted earlier, it was simply not feasible to transport large loads on the bumpy, rutted roads of those times. There were very few paved roads until the early 1900s. Note that the heavier loads moved *downstream*, from the interior of the country to the coast. Only the lighter loads moved upstream.

Modern readers may also wonder how perishable merchandise was preserved on these long river voyages. The meat was dried, and the furs were tanned. These and similar products were then compressed into bundles and tightly wrapped with protective leather covers. The presses used to make these bundles can still be seen at various "living history" sites in the Midwest and the West.[73] The resulting bundles could withstand rain, sun, dust storms, and other rigors during their long journey to distant buyers. If the vessel sank in the river, these bundles would float, so with luck they could be recovered from an eddy somewhere downstream.

The fur trade in the early 1800s. During the early 1800s the western fur trade grew quite large, as fur trading companies based in St. Louis hired numerous teams of men to head up the Missouri and its tributaries and acquire large quantities of furs from tribes.[74] Various watercraft were used, as follows:



In the foreground, a flat boat heads downstream with a sweep oar as a rudder. In the middle ground, men push off the bottom with long poles to propel a keel boat upstream. In the background, another keel boat catches some helpful wind.

Bull boats. Throughout the Midwest, early fur traders found the native tribes using *bull boats*. These consisted of a frame made of flexible branches, then covered with the hide of a bull buffalo. They were often built along the banks of a river, then used for a one-way trip down the river carrying furs and other products. Fur traders copied this technique, also making bull boats and using them to float their furs down rivers for long distances.

A frame of flexible branches, covered with the hide of a bull buffalo, made a bullboat.

Bull boats were quite similar to *coracles*, the rounded boats which had been used for fishing in Wales for centuries, as mentioned earlier. The great similarity between these two watercraft fueled the widespread belief, now discredited, that Welsh explorers in the 1100s, led by Prince Madoc, settled in the Midwest, and that their descendants

[72] **Keelboats:** *The Keelboat Age on Western Waters* by Leland D. Baldwin, University of Pittsburgh Press 1980.

[73] **Presses used to make bundles:** See the photo of the "pelt press" at sangres.com/colorado/national-parks/bents.htm

[74] **Fur trade during the 1800s:** *The American Fur Trade of the Far West* by Hiram Martin Chittenden, Stanford Univ. 1936-1954; Univ. Nebraska Press 1986.

were the members of the Mandan tribe (whose skin color was lighter than that of other tribes.)[75]

Some fur traders made "giant bullboats," large **skin canoes,** 25 to 30 feet long. A framework of willow poles was lashed together, then covered with buffalo hides sewn together, and the seams were sealed with buffalo tallow and ashes.[76]

Dugout canoes were also common in the fur trade at this time. They were typically carved from the trunk of a large cottonwood tree. They were usually about two inches thick at the bottom, and one inch thick at the rim, and they had solid partitions of wood inside, as bulwarks. They were usually propelled by two men paddling forward, and a third man steering by means of a long paddle trailing from the stern. In other words, they were essentially the same as the dugout canoes that had been used on many of the same rivers, and on other continents, for thousands of years previously.

Two dugout canoes fastened together, a short distance apart from each other, and decked over with rough planks, made a catamaran-like boat that the voyageurs called a **pirogue** (a French word for a small boat.) Large pirogues were about thirty to forty feet in length, and six to eight feet wide. They were steered by an oarsman who stood in the stern and used a sweep oar. To go upstream, they were propelled by oars, or towed by a line from shore, typically covering ten to fifteen miles a day. They covered more miles when going downstream, with the help of the current. A square sail was also used when feasible.

Fur traders in the 1800s carved dugout canoes from the trunk of a large tree, as people have done for thousands of years.

The voyageurs also used a type of **log raft** which they called a **bateau** (a French word for a boat.) Built of cottonwood logs, this heavy and rather unwieldy craft was typically ten to twelve feet wide and fifty to seventy feet long. A bateau was usually equipped with sweep oars, poles, lines, and sometimes a sail.[77]

Traders in this region also used **keelboats,** which were typically *cordelled* upstream by some thirty or forty voyageurs walking along the bank, as explained earlier.

A traveler in the 1830s described this assortment of river activity, writing an account of his trip through what is now Montana. He wrote that near the confluence of the Flathead and Bitterroot rivers, "we found a party of young half-breeds, who had returned from their fall hunt, and brought in their furs for delivery." (Note that the "half-breeds" would have been the sons of fur trader men and their tribal wives, bringing furs for delivery to a fur trader.) He also reported that nearby there was "quite a village of Indians," where "most of the families have light canoes, with which they glide about on the river, and gather roots and berries." Later he saw canoes carrying "whole families and their baggage down the stream with surprising velocity." He noted that the canoes "were managed by the squaws, who, with their paddles, direct their course with great steadiness, astonishing rapidity, and apparent ease and dexterity." Later he saw groups of fur traders on the Bitterroot River. "A long line of Mackinaw boats, loaded with furs and peltries, were proceeding down the river, the whole surface of which was covered [with mackinaws, canoes, and similar watercraft.]"[78]

Kayaks were used during the 1800s by natives and prospectors.

Kayaks were also used during these years on rivers, and in the commercial hunting of sea otters—which was yet another component of the fur trade—along the Pacific coast, from California to Alaska, from the late 1700s to the 1840s. Sea otters have the thickest fur of any animal, and these valuable furs came to be known as "soft gold," fetching high prices in markets ranging from China to London. Native tribesmen had been hunting sea otters in small quantities for

[75] **Welsh coracles and Mandan bull boats:** *Prince Madoc, founder of Clark County, Indiana* by Dana Olson, self-published 1987, and "Madoc" at madoc1170.com (these accounts are generally discredited by historians.)

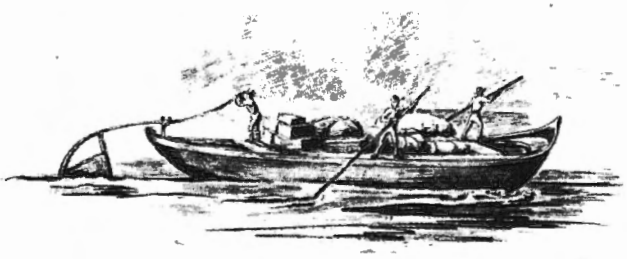
[76] **Large skin canoes:** "The Skin Canoes of the Great Plains and Rockies" by James A. Hanson, *The Museum of the Fur Trade Quarterly,* Vol 16 No 1, 1980.

[77] **Dugout canoes, pirogues, bateaux:** See descriptions and illustrations in *Original Contributions to Western History* ed. by Nolie Mumey and illus. by Inez Tatum, The Westerners 1952, pages 180-187. Also *West of the River* by Dorothy Gardiner, Thomas Crowell Company 1941, pages 34-35.

[78] **Eye-witness account of river traffic:** *Life in the Rocky Mountains, A Diary of Wanderings on the sources of the Rivers Missouri, Columbia, and Colorado, 1830-1835* by Warren Angus Ferris, reprinted 1983 by The Old West Publ. Co.

centuries. Russian entrepreneurs started acquiring these furs from the natives in the late 1700s, then founded Fort Ross, California, in 1812, as a base for hunting sea otters. The sea otter population soon shrank due to over-hunting, and the Russians left Fort Ross in 1842. Their legacy lives on in the name of the Russian River in California, which reaches the coast near Fort Ross, and is a popular canoeing and kayaking river today.[79]

As noted earlier, relations between European fur traders and native tribes were generally peaceful in colonial times, but as more Europeans poured into tribal areas during the 1800s, tensions increased. Greater use of alcohol as a trade item added to the conflicts and fighting. Some fur companies hired their own crews of trappers to gather furs, thereby cutting the tribes out of the deal, which the tribes greatly resented. Finally, the growing competition for land and resources led to actual warfare.[80]



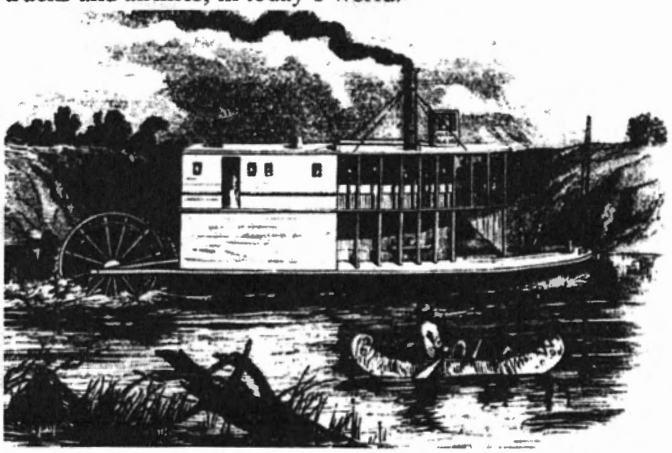
A keelboat with a large rudder, loaded with cargo.

The steamboat era. In 1812, the first American steamboat went by river downstream from Pittsburgh to New Orleans. It then operated on the Mississippi River, between New Orleans and Natchez, Mississippi, for less than two years, until it hit a *snag* in the river and sank. Snags are fallen trees, half buried in the riverbed. Their branches break off and leave sharp stumps sticking up toward the surface of the water. If a steamboat hit a large snag, it was likely to sink, so snags were a fundamental problem for early steamboats, preventing widespread use. It was not until 1829 that the first "snag boat" was built, a sort of "catamaran steamboat" that could straddle a snag then hoist it up on deck with a crane. Through the 1830s, the federal government paid for snag boats to clear snags on the Mississippi and other rivers. Steamboats then became more common on rivers in the 1840s. They traveled up the Missouri River as far as Montana, and went up numerous smaller rivers.[81]

On these smaller rivers, steamboats often got stuck on sandbars. To free themselves, they used a system of timbers and cables, winched by their engines. This process was called *grasshoppering* because it resembled a giant grasshopper.[82]

Steamboats became a major form of long-distance public transportation, for passengers and freight, in the mid-1800s. Although novels and movies typically dramatize the role of covered wagons in the settlement of the Midwest and the West, historians estimate that in reality, more settlers came west on steamboats, and other smaller boats, than in covered wagons.[83]

Even during their heyday, steamboats did not replace canoes, log rafts, flatboats, and keelboats on rivers. The fur trade was still active, using canoes, throughout the steamboat era. Logs were still typically taken down rivers in the form of log rafts, not as freight on steamboats. Flatboats and keelboats still hauled heavy loads, doing so more economically than steamboats. Steamboats were mainly for passengers and lighter freight that needed to get to their destinations more quickly, at a higher cost. The situation was somewhat analogous to the difference between highway trucks and airlines, in today's world.



Some steamboats were large and ornate, but others were small and practical. They frequently ran aground but quickly backed off.

The development of river law in the early 1800s

River law in the U.S. was shaped by U.S. Supreme Court decisions from the early 1800s to the present, which in turn were influenced by certain state supreme court decisions. The following discussion of these decisions is lengthy, because these decisions are the foundation of public rights on rivers today. Readers who want to more quickly proceed to actual answers about current public rights on rivers (including which rivers are navigable in which senses) can skim over the following discussion and proceed to Chapters Three and Four. However, the answers in those chapters necessarily refer back to the following landmark court decisions. In addition, readers who must respond to the claims of lawyers who oppose public rights on rivers will find that it becomes necessary to know what the following

[79] **Kayaks and fur trade:** "History of the Russian Settlement at Fort Ross, California," at parks.sonoma.net/rosshist.html

[80] **Fur trade and warfare in the 1800s:** *The Fur Trade of the American West, 1807-1840* by David J. Wishart, University of Nebraska Press 1979 and 1992.

[81] **Snag boats and steamboat history:** *Tales of the Mississippi* by Samuel, Huber and Ogden, Pelican Publishing, Gretna, 1955 and 2000, pages 25-53.

[82] **Grasshoppering:** Described in *Original Contributions to Western History* by Nolie Mumey and illus. by Inez Tatum, The Westerners 1952, page 209.

[83] **Settlers coming west by steamboat and other smaller boats:** *The Rivermen* by Paul O'Neill, Time-Life Books 1975.

decisions were actually about, and what they actually concluded.

1821, *Arnold v. Mundy*, public fishing rights and the Public Trust Doctrine.[84] This New Jersey Supreme Court decision strongly influenced later decisions by the U.S. Supreme Court. The owner of land near the mouth of the Raritan River had staked off an area of submerged land under shallow water, adjacent to the land he owned on the shore, and had attempted to exclude the public from fishing or harvesting oysters in this area of shallow water. He traced his claim back to an original grant from the king of England (a "crown grant.")

The Court upheld public rights to fish in that area, including harvesting oysters off the bottom, citing three fundamental sources for these public rights: "The law of nature, which is the only true foundation of all social rights," as well as "the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe," and finally "the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard."

Fishing on rivers was popular in America throughout the 1800s.

Summarizing the history of the issue, the Court said that public rights on rivers had been "a great principle of the common law" in England since "ancient times," and although some medieval kings had encroached upon these "common rights," Magna Carta was "nothing but a restoration of common right." The Court said that the landowner's attempt to deny public rights to fish in these waters, and to harvest oysters off the bottom of the water, was tantamount to claiming that "Magna Carta was a farce."

Today, legal scholars cite this decision as "the foundational public trust decision in the United States."[85] It was the beginning, in the United States, of the *Public Trust Doctrine*, a doctrine of law holding that waterways are held in trust by the government for public use. Its actual origins, in England and the ancient Mediterranean civilizations, were many centuries older, as the Court itself explained (and as discussed earlier herein.)

1824, *Gibbons v. Ogden*, federal jurisdiction over river traffic within one state.[86] As mentioned earlier, when delegates met to draft the U.S. Constitution, interstate trade had become chaotic, as various states imposed import duties on goods entering their state, so their was little controversy about the *Commerce Clause* of the Constitution, which granted federal authority over commerce among the states and with native tribes. For decades thereafter, however, the prevailing legal view was that states should govern most industry and commerce, not the federal government.

Steamboats were the first widespread mechanized transportation in America. They played a fundamental role in the gradual transformation of the U. S. economy from a collection of local economies, involving agriculture and local manufacturing, to a national economy, involving large-scale manufacturing and interstate movement of merchandise. They continuously transported people and goods from state to state. Consequently, steamboat operations raised basic constitutional questions about the proper roles of state and federal authority over the developing interstate economy.

Gibbons v. Ogden, decided during the early years of the steamboat era, was the first U.S. Supreme Court decision to apply the Commerce Clause to a dispute involving state versus federal authority. The State Legislature of New York, in an effort to induce a steamboat company owned by Mr. Ogden to operate in New York, had granted his company the exclusive right to operate steamboats within the state. Mr. Gibbons later started competing with Ogden, also operating steamboats within the state. Ogden then sued to prevent Gibbons from operating. Ogden argued that federal jurisdiction should not apply in the matter, since both steamboat operations were operating entirely within one state, without crossing state lines.

The U.S. Supreme Court disagreed, holding that the state government's exclusive grant to Ogden was "repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce," rather than the states. The Court said, "The power of regulating commerce extends to the regulation of navigation. The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State."

This decision confirmed federal jurisdiction over traffic on rivers, including traffic that did not cross state lines. It

[84] ***Arnold v. Mundy***, 6 N.J.L. 1, 10 Am. Dec. 356 (1821). See at: fas-history.rutgers.edu/clemens/NJLaw/arnold1821.html.

[85] **Foundational public trust decision:** Described as such in *Water and Water Rights*, 1990 Ed. Updated 2001, section 29.01.

[86] ***Gibbons v. Ogden***, 22 U.S. 1 (1824).

was also instrumental in later confirming federal jurisdiction over other commercial and industrial activities, unrelated to rivers, including commercial activities that did not cross state lines.

In subsequent years, rivers that were subject to this federal jurisdiction, under the Commerce Clause of the Constitution, came to be called *navigable for Commerce Clause purposes*.

In other words, *Gibbons v. Ogden* was a landmark decision not just in river law, but in overall Constitutional law. It established the principle that navigation is a national concern, not a matter of state by state discretion. The steamboats and flatboats of that era have now been largely replaced by other river craft such as rafts and kayaks, but the principle that state governments cannot restrict navigation remains the same.

1842, *Martin v. Waddell,* confirmation of the Public Trust Doctrine.[87] The facts in this case were quite similar to those in the New Jersey case of *Arnold v. Mundy*, discussed above: A waterfront landowner sought to prevent the public from harvesting oysters off the bottom of the shallow water adjacent to his private land, near the mouth of the Raritan River. As in the earlier case, the landowner claimed that his private ownership of these lands could be traced back to an original grant from the king of England (a "crown grant.")

Citing *Arnold v. Mundy*, the U.S. Supreme Court confirmed public rights to fish and harvest oysters off the bottom. The Court quoted, with approval, a passage from the English legal treatise *De Jure Maris*, written in 1667 (cited earlier herein) which said, "the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary." (A *piscary* is a "fishing place.")

The Court said, "the shores, and rivers and bays and arms of the sea, and the land under them," were "held by the king as a public trust," and therefore they continue to be "held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish."

The Court also explained, "It is a matter of history, that the Stuarts, to encourage emigration, introduced into these colonies the broadest principles of British liberty. The fundamental constitutions of New York show this. The people have always appealed to Magna Carta as the foundation of American as well as British liberty."

The Court then discussed customs in the thirteen colonies that originally formed the United States, saying, "In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters, for the same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." (A "stake" was used to hold a boat in position in shallow water while fishing or harvesting oysters.)

After citing the Law of Nature as the original basis for these public rights, the Court said, "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature, and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people."

Therefore, the Court concluded, it was of fundamental importance to uphold and maintain the public's "liberty" to boat and fish in shallow waters, such as the waters at issue in this case, adjacent to private land.

This principle that these permanent public rights are held by the state, "as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery," is the principle underlying the Public Trust Doctrine of law.

Regarding the Court's reference to "the Stuarts," the Stuart kings ruled England and Scotland through much of the 1600s and 1700s, during the era when the American colonies were established and populated with emigrants from Britain and elsewhere. These kings encouraged people to emigrate to the colonies, in order to expand the British empire and facilitate the extraction and transport of additional natural resources to Britain. Going to America as a colonist was a fundamental, permanent decision—few colonists ever returned home. It was also a life-threatening decision, due to the perils of the voyage itself and subsequent life on the frontier. Therefore it is appropriate to review what people in Europe heard about canoeing, fishing, and other uses of rivers in America during the 200 years of the colonial era, and how this influenced the difficult decision to emigrate. Many of them had seen pictures (or actual performances) of kayaking, fishing, and duck-hunting skills by tribal Americans, such as the tribal man brought to England in 1576 (noted earlier.) Many had also seen pictures, (such as the one reproduced herein, first published in 1590,) showing natives fishing in what is now North Carolina, surrounded by plentiful fish. Many had read reports from explorers such as Jolliet and Marquette, describing their canoe expedition from Montreal to Mississippi in 1673, and their peaceful contacts with native tribes. Many of them had seen furs, gathered by tribesmen in America, then sold to fur traders and brought to Europe.

[87] ***Martin v. Waddell,*** 41 U.S. 367 (1842).

A picture first published in 1590, showing natives fishing in what is now North Carolina, with plentiful fish. Such pictures were distributed in Europe to encourage people to colonize America.

In sum, people in Europe knew that in America fish and fowl, and fur-bearing animals, were plentiful, and that a common way to catch and transport this bounty was by canoe or kayak. They generally knew that there was a lot of thickly forested land in the interior of America, and that many settlers got around by canoe, and built homes and towns from logs that had been transported down creeks and rivers. Most colonists were aware of these things, to some degree, before they made the decision to go to America. For many colonists, opportunities to freely canoe, fish, hunt, and homestead new land, (in areas where transportation by canoe was common,) were a key part of the reason that they made the fundamental, life-changing decision to board a ship bound for America.

At the time of this Supreme Court decision, in 1842, the justices likely would have had fathers, grandfathers, or other relatives who immigrated to America, and who may have fought in the American Revolution. The hardships of emigration, and the fundamental importance of public rights to fish, fowl, and travel on rivers, would have been very real to them. This explains the passage in the decision about the Stuart kings encouraging emigration by ensuring "liberty," and the Court's conclusion that colonists "could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world... if the land under the water at their very doors" were later treated as private property.

Ownership of the land under the water: Note that the Court addressed both the matter of public *access* to the water and the land under the water, and also the matter of *ownership* of the land under the water. In England the legal view had been that the *king* owned such land, subject to public use, but in America, the Court said, "When the revolution 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, subject only to the rights since surrendered by the Constitution to the general government."

In other words, the Court held that the land under navigable waters is owned by each state, and is held in trust by the state government for public boating and fishing. In subsequent years, rivers on which this principle applied came to be known as *navigable for title purposes*. (*Title* in this sense means *ownership*.) On such rivers, the bed of the river is typically owned by the state, not by the adjacent private landowner.

Today, the land along rivers that is under water, (all or part of the year) is often called the *submerged and submersible land*. The land that is above the level of the water (at least when the river is at "ordinary" levels) is called the *upland*.

Crown grants: Regarding the landowner's claim that his right to exclude the public could be traced back to an original "crown grant" from the king of England, the Court said, "The great principles of British liberty must be considered as accompanying this royal charter, and it must be construed accordingly." (The "royal charter" is the "crown grant.") The Court said that since rivers are "held by the king for the public benefit," a crown grant cannot turn them over to private control.

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Displaying title 33, up to date as of 1/09/2023. Title 33 was last amended 1/09/2023.

Title 33 - Navigation and Navigable Waters
Chapter II - Corps of Engineers, Department of the Army, Department of Defense

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PART 329 - DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Authority: 33 U.S.C. 401 *et seq.*

Source: 51 FR 41251, Nov. 13, 1986, unless otherwise noted.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General 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. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

a Past, present, or potential presence of interstate or foreign commerce;

b Physical capabilities for use by commerce as in paragraph (a) of this section; and

c Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

a ***Nature of commerce: type, means, and extent of use.*** The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

b ***Nature of commerce: interstate and intrastate.*** Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

a ***Existing improvements: artificial waterbodies.***

1 An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

2 The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see § 329.12(b) of this part).

3 Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a

private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

b *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

a *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

b *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

a *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

2 Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

b *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

a *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

1 *Baseline defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

2 *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

b *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

a *Effect on determinations.* Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

b *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

c *Suggested format of report of findings:*

1 Name of waterbody:

2 Tributary to:

3 Physical characteristics:

i Type: (river, bay, slough, estuary, etc.)

ii Length:

iii Approximate discharge volumes: Maximum, Minimum, Mean:

iv Fall per mile:

v Extent of tidal influence:

vi Range between ordinary high and ordinary low water:

vii Description of improvements to navigation not listed in paragraph (c)(5) of this section:

4 Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

5 Authorized projects:

i Nature, condition and location of any improvements made under projects authorized by Congress:

ii Description of projects authorized but not constructed:

iii List of known survey documents or reports describing the waterbody:

6 Past or present interstate commerce:

i General types, extent, and period in time:

ii Documentation if necessary:

7 Potential use for interstate commerce, if applicable:

i If in natural condition:

ii If improved:

8 Nature of jurisdiction known to have been exercised by Federal agencies if any:

9 State or Federal court decisions relating to navigability of the waterbody, if any:

10 Remarks:

11 Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

a Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in section 329.14 of this part. The report of findings should then be forwarded to the division engineer on an expedited basis.

b Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ___ (River) (Bay) (Lake, etc.) is a navigable water of the United States from ___ to ___. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

c Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether

1 the waters are navigable waters of the United States or

2 If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

a Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

b It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

c Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

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Nevada Navigability Report

Summary

In Nevada, navigable streams are those capable of being used or that have been used for commerce, such as floating logs to market. These streams can be floated, and probably fished, recreationally. The right to portage obstructions is undecided in Nevada.

State Test of Navigability

Nevada courts have held that streams are navigable if used or susceptible to being used at regularly-occurring times as highways for commerce over which trade and travel are or may be conducted in customary modes of travel on water.[1)] Nevada courts have applied the federal title test and found that streams that were historically used to drive logs to market satisfy the federal title test.[2)] This test vests title to the beds underlying these waters in the state.[3)] 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.[4)] 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.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although the public trust applies at least to streams navigable under the federal title test and the navigation servitude to streams navigable under the federal commerce test, Nevada law has not defined the extent of the public trust or the navigation servitude. Navigable streams may be boated, and most likely waded and fished, but rights regarding portaging obstruction have not been decided.

Trespass is a misdemeanor that occurs when a person enters or remains upon the land of another after receiving a sufficient warning not to trespass.[5)] A landowner may provide "sufficient warning" by fencing the property or by following certain posting procedures set out in the trespass statute.[6)] While the term "fence" is defined in the statute to include "a wall, hedge, or chain link or wire mesh fence," the statute was amended in June 2007 to make clear that the term "fence" does not include a barbed wire barrier.[7)] It is prima facie evidence of trespass for anyone to be found on property which is posted or fenced in the manner described in the trespass statute "without lawful business with the owner or occupant of the property."[8)]

Miscellaneous

Several rivers in Nevada, including the Colorado River, the Virgin River, and the Carson River, have been declared to be

navigable to some degree by statute or by case law.[9]. Nevada courts have held that the list of navigable waters in the statutes is not exclusive, and that the issue of navigability is a "judicial question."[10]

In the opinion of the Attorney General of Nevada, the State Engineer, irrigation districts, the Division of State Lands, local counties through their district attorneys, and the United States have the authority to seek removal of structures that may encroach upon the natural channel of a navigable river.[11] Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining property.[12]

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1) State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972).
2) Id. at 1233-36.
3) Id. at 1233.
4) Id. at 1235.
5) Nev. Rev. Stat. § 207.200 (2007).
6), 7), 8) Id.
9) The following rivers have been declared navigable under the federal title test in Nevada: (1) Colorado River by Nev. Rev. Stat. § 537.010 (2007); (2) Virgin River, including sources confluent above St. Thomas, by Nev. Rev. Stat. § 537.020 (2007); and (3) Carson River at Carson City by Bunkowski, 503 P.2d at 1236. A fourth body of water, Winnemucca Lake, was declared a navigable body of water by statute in 1921, Nev. Rev. Stat. § 537.030 (2007), but this lake is now entirely dry. The Nevada Supreme Court noted in Bunkowski that the United States Court of Appeals for the Ninth Circuit has held that Lake Tahoe is navigable. 503 P.2d at 1238 (citing Davis v. United States, 185 F.2d 938, 942-43 (9th Cir. 1950
10) Bunkowski, 503 P.2d at 1238.
11) Op. Att'y Gen. 80-11 (Nev. 1980).
12) Id.

American Whitewater

California Navigability Report

Summary

In California, if a stream can be floated for most of the year, then the public has the right to use the stream. The public may use the stream for recreational boating, fishing, swimming, hunting, etc. up to the high water mark.[1)]

State Test of Navigability

California courts have adopted a state test for determining which streams are subject to a public right of navigation. The waters subject to this right or "easement" include those waters that are navigable in fact at the present time by any watercraft, including small recreational or pleasure craft propelled by motor or by oar, such as canoes, rafts or kayaks. A number of cases have applied this test.[2)] California has rejected the common law rule that navigability is determined by whether the tide ebbs and flows.[3)]

To be considered navigable, the stream must be suitable for public use, which is determined on a case-by-case basis.[4)] The stream need not be navigable in fact for the entire year. A stream navigable in fact for most of the year should suffice.[5)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state acquired title to the navigable waters in its territory upon its admission to the union and the navigable waters and lands lying beneath them are held in trust for the benefit of the people.[6)] This includes all waters navigable in fact.[7)]

California's constitution allows the public to use all navigable waters in the state, and further directs the legislature to give the provision the most liberal construction.[8)] Regardless of whether the streambed of a river which is navigable in fact is public or privately owned, there is an easement for public navigation and the incidents of navigation; i.e. boating, fishing, swimming, hunting and other recreational uses.[9)] The easement exists up to the high water mark.[10)] This right includes the use of the bottom of navigable waters for anchoring, standing, or other purposes.[11)] The public easement, however, does

contexts, however, courts have suggested that an action which would otherwise constitute a trespass may be justified if prompted by the motive of preserving life or property, and if reasonably related to that purpose.[13)]

Courts are especially sensitive to infringements upon the public's constitutional rights under the guise of police power.[14)] The Attorney General found such an infringement when the state sought to prohibit the right to use navigable waters that

flowed over inundated privately-owned land adjacent to the navigable waterway.[15] In a landmark case, the same constitutional provision defeated a county ordinance that forbade rafting on a river because of the litter, pollution, and noise generated by the rafters. Although reasonable regulation was in order, use prohibition was not.[16] The California Attorney General, however, has opined that government may close navigable waterways to recreational boaters during an emergency, such as flood conditions, when such emergency rules and regulations are required to protect the safety of persons and property.[17]

There is no right to trespass across private property to access navigable waters.[18] Where a public road or bridge easement across private property intersects a waterway, however, lawful access to the waterway may be provided. For example, a kayaker was found innocent of trespass where the kayaker was carrying his boat from a county road across private land within the perimeter of the road easement to gain access to a navigable waterway.[19] In that case, the improved roadway narrowed where a bridge crossed the waterway; nevertheless, the kayaker's use of the entire road easement to access the waterway was reasonable. The County could have imposed or allowed reasonable restrictions on the use of the easement by the public but had not done so.[20]

Miscellaneous

Article I, section 25 of the California Constitution forbids the state from alienating land without reserving fishing rights in the public.

The state's subdivision map act (Government Code sections 66478.4 and 66478.5) requires that any subdivision development fronting on public waterways provide both (1) reasonable public access from a public highway to the bank of the waterway, and (2) dedication of a public easement along a portion of the waterway bordering on or lying within the subdivision. These rights are in addition to the existing public right to use a river below the high water line.[21]

See American Whitewater's letter [https://www.americanwhitewater.org/content/Document/view/documentid/571] regarding the Pit 4 Reservoir Closure for an example of how we have dealt with navigability issues on a project in California.

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1) Also see the article on California's Public Right to Float by Ronald W. Rogers available at http://www.americanwhitewater.org/archive/article/966 [https://www.americanwhitewater.org/archive/article/966].

2) Bohn v. Albertson, 107 Cal. App. 2d 738 (1951); People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045–1051 (1971); Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d 560 (1976); Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406 (1979); Kern River Public Access Committee v. City of Bakersfield, 170 Cal. App. 3d 1205 (1985). Additional cases, California Attorney General opinions, and related law reviews are listed in a letter from the Cal. Att'y Gen. to AWA, dated June 16, 1997 (on file with AWA).

3) Mack, 19 Cal. App. 3d at 1048.

4) Hitchings, 55 Cal. App. 3d at 570.

5) Id. at 571.

6) Colberg Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal. 2d 408, 416 (1967).

7) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997

8) Cal. Const. Article X, section 4.

9) Mack, 19 Cal. App. 3d at 1045–1051.

10) Id. at 1050.

11) Bohn, 107 Cal. App. 2d at 749.
12) Op. Cal. Att'y Gen. SO 77-42 (February 1, 1978).
13) People v. Roberts, 47 Cal. 2d 374, 377 (1956).
14) Younger, 96 Cal. App. 3d at 406.
15) Op. Cal. Att'y Gen. 85-602 (October 10, 1985).
16) Younger, 96 Cal. App. 3d at 406-407.
17) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997).
18) Charpentier v. Von Geldern, 191 Cal. App. 3d 101, 110 (1987).
19) People v. Sweetser, 72 Cal. App. 3d 278 (1977).
20) Id.
21) Kern River Public Access Committee, 170 Cal. App. 3d at 1215.

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American Whitewater

Arizona Navigability Report

Summary

The Arizona Navigable Stream Adjudication Commission ("ANSAC") has determined that, with the exception of the Colorado River, none of Arizona's watercourses is navigable. Ownership of the streambeds of non-navigable watercourses rests with either the federal government or private parties. Although the public likely enjoys recreational rights on waters above federally-owned streambeds, it has no such right to access waters above privately-owned streambeds.

State Test of Navigability

In 1992, the Arizona legislature established the ANSAC to conduct full evidentiary public hearings across the state to determine the navigability of each of Arizona's approximately 39,039 watercourses (of which about 2,241 are named) and to determine the public trust values of all watercourses that were navigable at statehood.

Arizona's test for navigability is codified at A.R.S. § 37-1101(5)) [http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/37/01101.htm&Title=37&DocType=ARS] and is based upon the "federal test" for navigability. Under this test, a watercourse is navigable if it: (1) was in existence on February 14, 1912; and (2) at that time, it was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Prior to 2001, the Arizona statute contained a number of presumptions and limitations that made it "almost impossible for an Arizona watercourse to be determined navigable."[1)] For instance, the statute required the navigability of a watercourse to be shown by "clear and convincing" evidence. In Defenders of Wildlife, the Arizona Court of Appeals declared certain provisions of the statute unconstitutional, finding that the restrictive presumptions and limitations conflicted with the federal test for navigability. Following the court's Defenders of Wildlife ruling, the legislature amended the statute in 2001 to reflect a less restrictive test of navigability, consistent with the federal test, and changed the burden of proof from the "clear and convincing" standard to the "preponderance of the evidence" standard.

Thus, the ANSAC now considers the following six criteria (in the order of greatest weight) as tending to demonstrate navigability

- Historical record of boating;
- Record of modern boating;
- Perennial stream flow (i.e., they do not flow only in direct response to precipitation);
- Dam located on the stream;
- Fish found in stream; and
- Special status (e.g., other water-related characteristics, including in-stream flow application

special status (e.g., other water related characteristics, including in stream flow application

and/or permit, unique waters, wild and scenic, riparian, and preserve).[2)]

The ANSAC also considers the depth, width, and velocity of the water flow and compares these factors to the minimum standards required for different types of vessels, as well as the configuration of the channel and whether it contains rapids, boulders, or other obstacles.[3)]

Ownership of a streambed is determined by whether or not the streambed was navigable as of the date of statehood - February 14, 1912. Under Arizona's application of the "equal footing" doctrine, the state owns the bed of any watercourse that was navigable on the date of statehood. If the stream was not navigable on that date, then the owner of the streambed prior to the date of statehood retains title. Because the ANSAC has determined that all watercourses in Arizona - with the exception of the Colorado River - were non-navigable on the date of statehood,[4)] the state does not own the streambeds of any non-navigable watercourses. Thus, if the streambed was federal land prior to the date of statehood, the federal government would retain ownership. Alternatively, if the streambed had been previously patented by a private party or disposed of by the federal government, then the private party would retain title.

After the ANSAC issues its navigability determination for a particular watercourse, it must then publish a report describing the evidence considered, analytical methods used, and findings supporting its determination. Upon the publication of each report, there is a 180-day appeal period for the Arizona State Land Department ("SLD") and a 270-day appeal period for all other interested parties, during which time the ANSAC's determination may be appealed to the appropriate county superior court. Although the ANSAC has issued its initial navigability determinations for all watercourses in the state, it has yet to publish a number of supporting reports, including reports for some of the larger rivers, such as the Little Colorado, Puerco, Big Sandy, Bill Williams, Burro Creek, Santa Maria, Virgin, Agua Fria, Hassayampa, Gila, Upper Salt, and Verde Rivers.[5)] Thus, there remains an opportunity to appeal the ANSAC's determinations that these watercourses are non-navigable. The SLD's appeal of the ANSAC's determination that the Lower Salt River is non-navigable is pending before the Maricopa County Superior Court.

Extent of Public Rights in Navigable and Non-Navigable Rivers

On the Colorado River (and any other watercourses that may be found to be navigable by a court), the public has the right to boat, fish, and recreate.[6)]

The extent to which the public has rights in non-navigable watercourses depends upon the ownership of the streambed. For example, if the federal government has retained ownership, the public likely enjoys rights to boat, fish, wade, recreate, and portage. If, on the other hand, the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the owner's permission.

Miscellaneous

For additional information on the navigability of Arizona's watercourses, see the ANSAC website at: http://www.azstreambeds.com [http://www.azstreambeds.com/].

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1) Defenders of Wildlife v. Hull, 18 P.3d 722, 737 (Ariz. Ct. App. 2001) (slip op. at

http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf [http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf]).

2) See, e.g, ANSAC Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003) at 25-27.

3) Id. at 27.

4) For a list of ANSAC determinations, see: http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm]. ANSAC has noted in its final reports (see footnote 3 below) that the Colorado River was determined to be a navigable river long ago. The ANSAC notes that Arizona's watercourses typically have been used for irrigation, rather than navigation, given the state's arid or desert regions. Arizona includes parts of at least three of the four North American deserts.

5) See http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm] for the status of pending reports. ANSAC's final reports for small and minor watercourses in Yuma, Mohave, La Paz, Santa Cruz, and Cochise Counties can be found at: http://www.azstreambeds.com/docs/reports/reports.htm [http://www.azstreambeds.com/docs/reports/reports.htm].

6) "The Colorado River ... is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment." Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), vacated on other grounds, 419 P.2d 505 (Ariz. 1966).

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American Whitewater

Idaho Navigability Report

Summary

Idaho has one of the most boater-friendly rights of passage in the nation. Streams that can be floated by a kayak in Idaho are open to the public for any recreational purpose. Boaters may lawfully scout within ordinary high-water marks and portage around obstructions so long as they return to the river at the first safe spot.

State Test of Navigability

Idaho has adopted a recreational boating test to determine which streams are navigable, and therefore subject to a public easement. Consequently, the public can use more streams in Idaho than just those streams that pass the federal navigability tests.[1)] For purposes of recreational use, Idaho statute defines navigable streams as "[a]ny stream which, in its natural state, during normal high water, will float cut timber having a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes."[2)] A list of streams considered to be navigable is also available from the Idaho Department of Water Resources.[3)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

Navigable streams are "highways for recreation."[4)] Recreational use of navigable streams is authorized "within the meander lines or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state shall be open to public use as a highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation - boating, swimming, fishing, hunting, and all recreational purposes."[5)] This statute passed shortly after a case in which Silver Creek in Blaine County was deemed navigable for all recreational purposes because it had been used for floating timber.[6)]

A more recent case highlights that the ordinary high-water mark may be open to interpretation. In the Sanders Beach case, the Idaho Supreme Court's findings as to the ordinary high-water mark eliminated public access to a beach that has been used by swimmers for a century.[7)]

Portaging over private land and around irrigation dams or other obstructions that interfere with the navigability of the stream is expressly permitted by statute.[8)] The boater must reenter the stream immediately below the obstruction at the nearest point where it is safe to do so.[9)]

Trespassing on property that is posted against trespassers with signs or painted fence posts, or where oral or written personal communication to leave the property is given by the owner or lessee, is a misdemeanor.[10)]

Miscellaneous

Legislative amendments passed in 1996 in response to agricultural, timber and mining interests limit the applicability of the public trust doctrine in Idaho. Specifically, the statute provides that land use and water management decisions are to be made without reference to the public trust. Although the statute does not directly impact the public's recreational use of streams, decisions that consistently put business interests first could negatively impact the public's ability to enjoy streams for recreational purposes over time.[11)]

[1)] Idaho Code § 58-1201(a) (2006) (expressly recognizes that Idaho holds the beds of streams navigable under the federal title test in trust for the public). See Selkirk-Priest Basin Association, Inc. v. State, 899 P.2d 949 (Idaho 1995) for a recent application of the public trust doctrine for navigability purposes in Idaho, but note that this decision was before the legislative amendments discussed in the Miscellaneous section. See also Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes, 21 Idaho L. Rev. 275 (1985).

[2)], [4)] Idaho Code § 36-1601(a) (2006).

[3)] The listing is included in the Attachments to 2007 Idaho Department of Water Resources Recreational Dredging Application. A copy is on file with AWA.

[5)] Idaho Code § 36-1601(b) (2006).

[6)] Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974).

[7)] City of Coeur D'Alene v. Michael L. and Jeannette G. Mackin, et al. and State Board of Land Commissioners, et al., 147 P.3d 75 (Idaho 2006). See also Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 17 P.3d 260 (Idaho 2000) for a discussion of the determination of the "ordinary high-water mark."

[8)], [9)] Idaho Code § 36-1601 (2006).

[10)] Idaho Code § 18-7008 (2006).

[11)] Idaho Code § 58-1203 (2006) (enacted through House Bill No. 794 of 1996). See Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine, 34 Idaho L. Rev. 91 (1997) for further background and analysis.

American Whitewater

Oregon Navigability Report

Summary

In Oregon, the public has a right to float, wade, and fish in navigable streams up to the ordinary high water mark. The public also has a right to float, fish, and swim in certain smaller non-navigable streams that have public use rights. The law, however, remains unclear as to whether the public can touch the streambed or banks of smaller non-navigable streams while floating.

State Test of Navigability

In Oregon, state-owned waterways generally are available to the public for any legal[1)] use, such as navigation, commerce, fisheries and recreation.[2)] Waterways are considered state-owned if they are title-navigable.[3)] A waterway is considered title-navigable if, at the time of statehood, the waterway in its natural and ordinary condition was capable of being used as a highway of commerce for trade and travel by a customary mode of water transportation.[4)] This test for title-navigability is based on federal law.

The Oregon State Land Board is authorized by statute to make determinations of title-navigability under the federal title test and has adopted several regulations concerning navigability determinations.[5)] The Oregon State Land Board also has compiled a list of streams that are navigable based on federal judicial decisions, State Land Board policy or rules, meandering characteristics, or tidal influences.[6)] However, the navigable status of many other streams in Oregon has not yet been decided.[7)] No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine, discussed below, for smaller waterways.

Another source of public rights to use waterways in Oregon derives from state common law definition of navigable waters and is referred to by the state as the "floatage easement" or "public use" doctrine. This doctrine gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress, even for recreational use, through the waters.[8)]

One case defined streams subject to public use for a passageway as those streams "capable of being commonly and generally useful for floating boats, rafts, logs, for any useful purpose of agriculture or trade."[9)] Another case concluded that such trade and commerce should include "the use of boats and vessels for the purposes of pleasure," or "for the purpose of fishing."[10)] Consequently, the public use doctrine extends beyond strict commerce for pecuniary benefit to include activities such as fishing and pleasure boating.[11)]

In 2005, the Oregon State Attorney General advised that public uses also extend to bathing, hunting, and other things

incidental to public use of water.[12] It would seem, therefore, that the capacity to float a kayak would qualify as a public use benefiting from the floatage easement.

The Oregon State Attorney General has opined that it "believe[s] it remains a valid basis for public use of certain waterways that meet the public use test developed in a series of Oregon Supreme Court decisions." [13]

Waterways are also state-owned if they are tidally-influenced.[14] A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. A tidally-influenced waterway is considered state-owned, even if it is not used or not susceptible of use for commerce.[15] Thus, the public also has a right to float, wade, fish, swim, and so forth, in tidally-influenced streams and rivers.

Extent of Public Rights in Navigable & Non-navigable Rivers

Oregon owns the beds of navigable rivers. The public has the right to boat, fish, swim, etc. in these rivers to the ordinary high water mark.[16] The ordinary high water mark is determined by "ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of a bed a characteristic mark distinct from that of the banks in respect to vegetation and the nature of the soil itself."[17]

In privately-owned river and stream-beds, which are subject to the public's floatage easement, the extent of public rights is still uncertain. The public clearly has the right to float these streams, but the courts have not confirmed that the floatage easement includes other rights incidental to boating, such as wading, fishing, and portaging that involve the use of privately-owned stream banks. One older case involving a river with a floatage easement allowed the attachment of a log boom to a privately-owned island because attachment was necessary to exercise the right of driving logs on the river and the impact was minimal.[18] Other cases indicate that "necessity" may be limited to a need to enter upon the land of a streambed owner to reclaim stranded property or by reason of avoiding danger.[19]

In contrast, entering upon an upland, when unnecessary, likely is a trespass.[20] It is unclear at this time whether portage or other activities incidental to kayaking are allowed on private property. In some instances, district attorneys have dismissed trespass cases that occur on rivers that have not been subject to a determination of navigability, although some individuals nonetheless have been arrested.[21]

Trespass in Oregon is entering on premises that are not open to the public.[22] Premises that are open to the public, by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances that would cause a reasonable person to believe that no permission to enter or remain is necessary.[23] While the public may not trespass upon a privately-owned upland, a streambed owner likewise may not construct a fence or other obstruction blocking travel along a waterway.[24]

Miscellaneous

In 2005, Senate Bill 1028 (SB1028) would have required comprehensive rules governing public rights to Oregon's waterways. In particular, section 5(1) of the bill expressly allowed travel by the public on upland property adjacent to the waterway for emergency use or to portage if the person takes the most reasonably direct and least intrusive path, as well

as taking reasonable steps to avoid damaging the property and to repair any damage the person may have caused to the property. Further, section 5(2) provided a defense to a charge of criminal trespass under OR 164.245, 164.255, or 164.265 that a person making recreational use of a class 1 waterway entered the property adjacent to a waterway for emergency use or to portage and complied with the requirements of section 5. Under section 5(3), a person using private property adjacent to a waterway for emergency use or to portage is liable for actual damage caused to the property.

SB1028 was heavily criticized by both landowners and public use advocates.[25)] In particular, some public use advocates believed that certain provisions of the SB1028 actually eroded public use by allowing those uses to be regulated or restricted. The bill ultimately died in committee in August 2005. The full text of SB1028 can be found at http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf [http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf]

For further information, Oregon State maintains a detailed website detailing navigability issues. http://www.oregon.gov/DSL/NAV [https://www.oregon.gov/DSL/NAV]

Common Waters of Oregon is a membership-based, public benefit, nonprofit organization dedicated to preserving Oregon rivers as common highways and forever free. This organization maintains an informational website covering water use issues. http://www.oregonriverrights.com [http://www.oregonriverrights.com]

Updated and Reviewed January 22, 2018

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1) In general, any act that is illegal on land also is illegal on a pubic waterway. The State of Oregon provides a non-exclusive list of such acts. http://www.oregon.gov/DSL/NAV/yourrights.shtml [https://www.oregon.gov/DSL/NAV/yourrights.shtml]

2) 2005 WL 1079391 (Or.A.G.).

3) , 14) Phillips Petroleum Co. v. Mississippi, 484 US 469, 476, 108 S. Ct. 791, 98 L Ed.2d 877 (1988); United States v. Holt, 270 US at 56; 45 Op Atty. Gen 1 (1985).

4) 2005 WL 1079391 at 10.

5) Or. Rev. Stat. § 274.404 (1997). Or. Admin Rules § 141-121-0000 et seq. (1997). In addition, 37 Op. Or. Att'y Gen. 1342 (1976), the criteria for the federal navigability test are discussed.

6) http://www.oregon.gov/DSL/NAV/navigwaterways.shtml [https://www.oregon.gov/DSL/NAV/navigwaterways.shtml]

7) The State maintains a table showing the current status of the eight navigability study requests submitted to the Department since the legislation requiring such studies was passed in 1995. http://www.oregon.gov/DSL/NAV/studyrequests.shtml [https://www.oregon.gov/DSL/NAV/studyrequests.shtml]

8) The State maintains a list of Oregon waterways meeting the federal test of navigability for purposes of State ownership of the underlying submerged and submersible land. http://www.oregon.gov/DSL/NAV/cases.shtml [https://www.oregon.gov/DSL/NAV/cases.shtml]

9) Weise v. Smith, 3 Or. 445, 451 (1869).

10) Gulliams et al. v. Beaver Lake Club, 90 Or. 13, 27 (1918).

11) See also Luscher v. Reynolds et al., 153 Or. 625, 635 (1936).

12) 29 Op Atty Gen 296, 296-297 (1959); 29 Op Atty Gen 311, 312 (1959).

13) 2005 WL 1079391, 16-17 and 24 (Or.A.G.). Read full opinion at http://www.doj.state.or.us/releases/pdf/op_8281.pdf [http://www.doj.state.or.us/releases/pdf/op_8281.pdf]

15) Phillips at 478-81.

16) Memorandum entitled State Ownership of Navigable Waterways, issued by the Director of the Oregon Division of State Lands, May 24, 1996.

[17] Op. Or. Att'y Gen. 7692 (December 8, 1978).
[18], [20] Weise at 451.
[19] Lebanon Lumber Co. v. Leonard, 68 OR 147, 150 (1913).
[21] Letters from David T. McDonald to Captain Lindsey Ball, Oregon State Police dated August 16, 1996, and September 26, 1996.
[22] Or. Rev. Stat. § 164.245 (1997).
[23] Or. Rev. Stat. § 164.205 (1997).
[24] Guilliams at 27.
[25] News article entitled Surf, Turf, Oppose Rivers Bill, Willamette Week Online, June 8, 2005.

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Utah Navigability Report

Summary

In Utah, the public owns the water and has the right to use any surface water for which legal access exists. The public has the right to use the surface water for recreation, including boating. Currently, Utah law is silent on whether streambeds of non-navigable waters can be used or touched by boaters.

State Test of Navigability

Utah law has not adopted a state test of navigability. The streambeds of navigable waters under the federal title test are held in trust for the public by the state.[1)] However, all waters of the state are the property of the public, including water in non-navigable streams that do not pass the federal tests of navigability. The public's right to use the water is subject only to the existing rights of appropriators to the beneficial use of the water.[2)] This provides the public with rights to recreate on streams that do not pass the federal tests of navigability, i.e., non-navigable waters.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although navigability is the standard used to determine title to water beds, it does not establish the extent of Utah's interests in the waters of the state.[3)] The state regulates the water as trustee for the benefit of the people.[4)] This is exemplified in state policy, which recognizes a public interest in the use of the state waters for recreational purposes by requiring that recreational uses be considered by the State Engineer before he approves an application for appropriation[5)] or permits the relocation of a stream.[6)]

A corollary to the rule that all waters of the state are the property of the public is the rule that where there is public access to a body of water, there is a public easement over the water, regardless of who owns the water, and the public is not trespassing when upon such waters.[7)] The public easement includes the right to use the water to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water.[8)] But the public easement is not well defined, and the Utah Supreme Court has expressly not answered the question of whether the easement includes use of the streambed.[9)] Thus, although the Utah Supreme Court seems to be following Wyoming's generous rule of permitting incidental contact, Utah law remains unclear as to whether a boater, floating down a stream whose beds are privately owned, is trespassing if his paddle strikes a rock in the streambed.

Perhaps Utah will be inclined to follow the rule in neighboring Wyoming, another appropriation state, but the answer cannot be predicted with any accuracy. One strong argument in favor of allowing incidental use of privately-owned streambeds is that the public owns the water and, therefore, has a stronger right than that provided by a navigational servitude. Not allowing incidental use of the streambed would render the public's ownership of water less valuable. The

right of portage in non-navigable rivers is an open question in Utah as well.

Miscellaneous

Entry upon property that is posted, fenced, or after personal communication that the property is private is a trespass infraction.[10)]

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1) Utah Div. of State lands v. United States, 482 U.S. 193 (1987).
2) J.J.N.P Co. v. Division of Wildlife Resources, 655 P.2d 1133, 1136 (Utah 1982).
3) United States v. State of Utah, 283 U.S. 64 (1931
4) Id. Public ownership of water is founded on principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all people and the state must therefore assume responsibility of allocating use of water. See also Tanner v. Bacon, 103 Utah 494, 516, 136 P.2d 957, 966-967 (1943).
5) Utah Code 73-3-8(1)(e).
6) Utah Code 73-3-29(4)(a)(ii).
7) J.J.N.P Co., 665 P.2d at 1137.
8) Id. at 1136. See also Day v. Armstrong, Wyo., 362 P.2d 137 (1961); Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974). See also Colman v. Utah State Land Bd., 795 P.2d 622 (1990).
9) Id. at 1137.
10) Utah Stat. § 76-6-206 (1997).

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Washington Navigability Report

Summary

In Washington, the public has a right to use streams that are capable of floating a "bolt of shingles" during high flows. While a bolt of shingles is not large, this test does eliminate some smaller streams capable of being floated in a kayak. Washington does not recognize a right to portage across private land.

State Test of Navigability

Washington generally uses the federal test of navigability to determine all navigable waters within the state because the state owns the beds of all navigable rivers.[1)] Navigable waters include only such waters capable of navigation for general commercial purposes.[2)] Commercial purposes include floating shingle bolts[3)] down the river, but do not include "every small creek in which a fishing skiff or gunning canoe can be made to float at high water."[4)] A stream that had only been used for transportation by small boats for pleasure was determined to be non-navigable.[5)] Since shingle bolts are smaller than saw logs, the required capacity of the water under Washington's test is somewhere between the log test and the recreational boating test.

Washington courts have interpreted this test fairly liberally in other ways. For instance, the Washington Supreme Court has held that the quality of navigability of a watercourse need not be continuous, but the seasons of navigability must occur regularly and be of sufficient duration to serve a useful purpose for commercial intercourse.[6)] Under this test, streams in their natural state, capable of floating shingle bolts after heavy rains and during the spring freshets, are

navigable streams.[7] The term "natural state" precludes streams that only can be made floatable by artificial means.[8] Natural obstructions or portages apparently do not destroy navigability.[9] Historical evidence of use of a stream for commercial transport purposes is persuasive evidence that the stream is navigable if the stream is in the same condition that it was in during the days of commercial use.[10] In addition, navigability is not destroyed by disuse.[11]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The public has the right to fish in navigable streams up to the high water mark, and presumably also has the right to wade because the state owns the stream bed.[12] The public has no rights in non-navigable streams, and the owner of a non-navigable stream can fence the stream.[13]

Washington does not recognize a right of portage. The Washington Supreme Court overruled a lower court's finding that log drivers could go upon privately-owned banks of navigable streams to free logjams.[14] The court held that the log driver "must confine himself and his operations to the highway itself – the bed of the stream, until the land owner consents to the use of the banks . . . . The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided."[15]

Miscellaneous

Criminal trespass on private property occurs when a person trespasses and the land is posted or notice is given in some other manner.[16]

Washington State recognizes sections of the following rivers as whitewater river sections: Green, Klickitat, Methow, Sauk, Skagit, Suiattle, Tieton, Skykomish, Wenatchee, White Salmon.[17] In addition, Washington recognizes all sections of rivers with at least one class III rapid or greater, as described in the American Whitewater Affiliation's whitewater safety code, as whitewater river sections.[18]

The State Scenic River system was established to recognize that many rivers

possess outstanding natural, scenic, historic, ecological, and recreational values of present and future benefit to the public, and that a need exists to protect and preserve the natural character of such rivers and to fulfill other conservation purposes.[19] Rivers within the State Scenic River system include specified sections of the Skykomish, Beckler, Tye, and Little Spokane.[20] Declaration of a Green River Gorge Conservation Area[21] and Yakima River Conservation Area[22] recognize a need to conserve these areas for the recreational needs of the region.

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1) Kemp v. Putnam, 288 P.2d 837, 839 (Wash. 1955), overruled on other grounds by Save a Valuable Environment v. City of Bothell, 576 P. 2d 401 (Wash. 1978). See also Wash. Const. Art. XVII, § 1. The federal title test is the test that determines which beds to which states retained title at statehood.

2) , **10)** Kemp, 288 P.2d at 839.

3) Monroe Mill Co. v. Menzel, 77 P. 813, 815 (Wash. 1904). A shingle bolt is a bundle of wooden shingles.

4) Griffith v. Holman, 63 P. 239, 241 (Wash. 1900), citing Rowe v. Granite Bridge Corp., 21 Pick. 344 (38 Mass. 344 (Mass. 1838).

5) Griffith, 63 P. at 240.

6) Kemp, 288 P.2d at 840.

7) Kemp, 288 P.2d at 840, citing Monroe Mill Co., 77 P. at 815.

8) Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 131 P. 220, 222 (Wash. 1913).

9) Kemp, 288 P.2d at 840, citing favorably New York ex rel. Erie R. Co. v. State Tax Com., 266 A.D. 452 (N.Y. App. Div. 1943).

11) Id. at 841.

12) Id. See also Monroe Mill Co., 77 P. at 816.

13) Griffith, 63 P. at 244.

14) Monroe Mill Co., 77 P. at 816.

15) Id. See also Sumner Lumber & Shingle Co., 131 P. at 223.

16) Wash. Rev. Code § 9A.52.010 (2007).
17) Wash. Rev. Code § 79A.60.470 (2007).
18) Wash. Rev. Code § 79A.60.495 (2007).
19) Wash. Rev. Code § 79A.55.005 (2007).
20) Wash. Rev. Code § 79A.55.070 (2007).
21) Wash. Rev. Code § 79A.05.700 (2007).
22) Wash. Rev. Code § 79A.05.750 (2007).

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Joyce Harley-Friestad

From: Joyce Harley-Friestad
Sent: Friday, January 25, 2019 1:44 PM
To: 'Charles'
Subject: RE: Hello again.. I came by your offices yesterday the 11th of January.

Here is the citation from the 9th Circuit:

"The Walker River is an unnavigable stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California." *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 335 (9th Cir. 1939)

Joyce Harley Friestad
Administrative Assistant IV
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
(775)684-1100
JHarleyFriestad@ag.nv.gov

From: Charles <cralbright@juno.com>
Sent: Saturday, January 12, 2019 3:41 PM
To: AGINFO <aginfo@ag.nv.gov>
Subject: Hello again.. I came by your offices yesterday the 11th of January.

Hello Attorney General's Office, as it says above I came by your offices in Carson City yesterday twice in hope of meeting someone to discuss Navigability on Rivers in the State of Nevada. I had meetings with several other agencies in Carson City as well. They included in order of visits: State Water Resources, State Parks, Tourism Commission, Your AG offices, Secretary of State, Lieutenant Governor, Governor, Law and Archives Library, Supreme Court Library, your AG office again and then Tourism Commission again. I cannot think of another state where I could possibly have a discussion with that many Departments in one day. All in all I had great responses to my questions at each location and found folks very open to discussing my questions. I was unable to really talk to anyone in your offices but was told that folks from the Las Vegas office would reply to a previous email which is fine by me. IF at all possible I would very much like to just sit down as I was able to do at every other Department I visited and discuss my concerns and get hopefully answers.

I had brought with me assessments of all the States neighboring Nevada as well as Nevada for application of Navigability for rivers and waterways in each state. I have several concerns about just how you apply the title of

Navigable to rivers in this state. Standard rules unfortunately do not apply. The Bruneau, Jarbidge and Owyhee all start in our state and have been paddled for generations now. There are hordes of books that list them as rivers that are great to navigate and they ALL flow to the Snake River then the Columbia and then the Pacific Ocean. Yet according to our state they are not Navigable. They all meet US Law definition as rivers that flow to the ocean BUT this fact is not recognized by Nevada. There are many other rivers that exist in this state that again have been paddled for years when in runoff season or when rains raise flow levels to allow navigation by folks desiring a unique experience. Those are the Quinn River, Marys River, Kings River, Reese River and the Walker River with both its East and West Forks. The Sierra Club paddled and floated the Quinn River for years from easy put ins to out on the Black Rock Playa. The Kings I have heard has been paddled in high water in years previously. The Marys has also been paddled many times even though getting to a put in on private property is hard. I understand that it is an incredible 900 foot deep basalt canyon in areas. The Reese also has been paddled for generations by folks looking for a unique experience in this state. I have several friends who have spent many days paddling it to its terminus in the Humbolt River. It has also been paddled by adventurous folks where it descends from the Toiyabe's south of Austin. The Walker is another river that is written up for paddling various sections in many guide books. I myself have paddled on the West Fork from Levitt meadows all the way to Yerington. I have done paddles above Bridgeport Reservoir, on the reservoir and from the dam all the way to your current East Fork Walker River State Park. I have also paddled on Webber Reservoir and Walker Lake. Yet each one of these gems for recreation is not considered NAVIGABLE! How can a river that is written up in many guide books and considered legally navigable in California NOT be navigable in Nevada? How can a State Park promote paddling on several sections of their new park and yet have a State Park not be legally navigable? I would be glad to share MANY books that I have that are printed material says that many of these rivers in our state are navigable?

So I am still looking for an answer to my questions. I am sure you will claim that at the time of Statehood they were not considered navigable. Logs may not have been floated on them to create some form of commerce. Well dear Attorney General's Office, a lot has changed in our dear state of Nevada since statehood. Maybe looking at Navigation from a 2019 perspective could reveal another form of thought about what creates navigation in this day and age. Ask yourselves this: what other thoughts about a state and it relation to it business and citizens has changed in over 150 years?

I sincerely hope that Our new Attorney General will be shown a copy of this email. I beg that chance to be hard by the real powers that be in this state. I would even be glad to take him paddling at our new State Park sea he can figure it out for himself. Thank yo for your time on this matter. I hope that it actually leads to a opportunity to be heard about navigation and not just considered a quack by your office.

Charles Albright
1408 Washington Street
Reno, Nevada 89503
cralbright@juno.com
775-324-5102 H

775-453-5403 C

Thanks again for listening to my request perhaps beside eyes I might get the attention of some ears.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Washington Water Power Company, F.E.R.C., December 9, 1980

104 F.2d 334
Circuit Court of Appeals, Ninth Circuit.

UNITED STATES
v.
WALKER RIVER IRR. DIST. et al.

No. 8779.
|
June 5, 1939.
|
Rehearing Denied July 14, 1939.

Synopsis
Appeal from the District Court of the United States for the District of Nevada; A. F. St. Sure, Judge.

Suit by the United States of America against the Walker River Irrigation District and others to restrain the defendants from interfering with the natural flow of water of Walker river to the extent of 150 cubic feet per second to the Walker River Indian Reservation in Nevada. From an adverse decree, 11 F.Supp. 158, 14 F.Supp. 10, the plaintiff appeals.

Decree reversed, with directions.

West Headnotes (13)

[1] **Indians**
Water Rights and Management

It was unnecessary for intention to reserve waters of Walker river for use of Indians on Walker River Indian Reservation to be evidenced by a treaty or agreement, but such an intention could be implied from statute or executive order setting apart the reservation.

3 Cases that cite this headnote

[2] **Water Law**
Reserved Water Rights

The government has power to reserve waters of nonnavigable streams on public domain, and thus exempt them from subsequent appropriation by others.

1 Cases that cite this headnote

[3] **Water Law**
Effect of state and local law, customs, and rules

Private rights in waters of nonnavigable streams on the public domain are measured by local customs, laws, and judicial decisions.

Cases that cite this headnote

[4] **Water Law**
Effect of state and local law, customs, and rules

The statute providing for protection of vested rights to use of water recognized and acknowledged by local customs, laws, and court decisions was no more than a formal confirmation of local law and usage which had previously met with silent acquiescence on part of government. 43 U.S.C.A. § 661.

Cases that cite this headnote

[5] **Water Law**
Waters reserved for purposes of Indian reservations in general

The claim of government that there had been an implied reservation of waters of Walker river for use of Indians on Walker River Indian

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Reservation could not be defeated on ground that territory acquired by Treaty of Guadalupe Hidalgo was not "Indian country," and that therefore tribe on reservation had no rights which they might reserve and none to surrender in exchange for water rights. Treaty of Guadalupe Hidalgo, 9 Stat. 922.

5 Cases that cite this headnote

[6] **Indians**
Construction and operation

Treaties with Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards.

3 Cases that cite this headnote

[7] **Indians**
Water Rights and Management

The rule that treaties with Indians and statutes disposing of property for their benefit are to be given liberal interpretation favorable to Indians would be applied in determining whether there was an implied reservation of waters for use of Indians in executive orders relating to creation of Walker River Indian Reservation.

5 Cases that cite this headnote

[8] **Administrative Law and Procedure**
Subordinates; representation of superior authority
Public Employment
Ministerial officers
United States
Ministerial officers

The acts of the heads of the departments of the United States government are the acts of the executive.

2 Cases that cite this headnote

[9] **Indians**
Water Rights and Management

Where Indian commissioner in 1859 had written Commissioner of General Land Office suggesting necessity of reserving land for Indians, Land Office Commissioner pursuant to request had written to Surveyor General of territory instructing him to reserve for Indian purposes lands described, and reservation was surveyed within a few years, executive order in 1874 setting the lands apart for Indians merely gave formal sanction to an accomplished fact, as respects date of implied reservation of water for use of Indians.

4 Cases that cite this headnote

[10] **Water Law**
Waters reserved for purposes of Indian reservations in general

The conduct of government in permitting and encouraging settlement along upper reaches of Walker river and the expense incurred by settlers in reclaiming their lands in that area did not estop government from thereafter claiming that there had been a prior implied reservation of waters of the stream for use of Indians occupying reservation below at time of settlement in the upper valleys. 43 U.S.C.A. § 321 et seq.

1 Cases that cite this headnote

[11] **Water Law**
Waters reserved for purposes of Indian reservations in general

Where there had been a gradual growth of practice of farming and irrigation on Walker

River Indian Reservation set aside in 1859 and Indians had been induced to make their homes on reservation and to engage in farming, there was an implied reservation of water from Walker river, to extent reasonably necessary to supply Indians' needs, prior to rights of settlors diverting water in upper valleys of river subsequent to 1859.

4 Cases that cite this headnote

[12] **Water Law**
Quantity of Water Reserved

The area of irrigable land included in Indian reservation was not necessarily the criterion for measuring amount of water reserved by implication for use of Indians on reservation.

1 Cases that cite this headnote

[13] **Water Law**
Quantity of Water Reserved

Where it appeared that 26.25 cubic feet of water per second from river would satisfy needs of government for Indian reservation for irrigation, government was entitled to that amount only during irrigation season and not to amount which it might demand from year to year not exceeding 150 second feet, since right to use larger amount would encourage waste or tend to induce it.

2 Cases that cite this headnote

Attorneys and Law Firms

*335 Carl McFarland, Asst. Atty. Gen., Charles E. Collett, Acting Asst. Atty. Gen., C. W. Leaphart and Roy W. Stoddard, Sp. Assts. to Atty. Gen., and William D. Donnelly, Oscar A. Provost, Thomas E. Harris, Clifford E. Fix, and Robert Koerner, Attys., Department of Justice, all of Washington, D.C., for the United States.

William M. Kearney, Edward F. Lunsford, Myron R. Adams, and Robert Taylor Adams, all of Reno, Nev., George L. Sanford, of Carson City, Nev., and William H. Metson, of San Francisco, Cal., for appellees.

Before GARRECHT, STEPHENS, and HEALY, Circuit Judges.

Opinion

HEALY, Circuit Judge.

The United States brought suit to restrain the appropriators of the waters of the Walker River and its tributaries from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second, to and upon the Walker River Indian Reservation in Nevada. The bill prayed that the plaintiff be adjudged to have a prior right to that quantity of water, that the relative rights in the stream be adjudicated, and that a water master be appointed to carry the decree into effect. After extended hearings before a special master, the court made findings and entered a decree adjudging the United States to be entitled to 22.93 second feet of water with priorities as of various dates, ranging from 1868 to 1886. From this decree the Government has appealed.

The factual background is fully developed in the opinions of the court below, 11 F.Supp. 158, 14 F.Supp. 10, and no more than a brief summary need be attempted here.

The Walker River Indian Reservation was set aside by departmental action on November 29, 1859 for the use of the Pahute tribe. The lands reserved lie about Walker Lake and on both borders of the lower reaches of the Walker River for a distance of thirty miles above the place where the stream empties into the lake. The total area, mostly rough or mountainous country, is in excess of 80,000 acres. The tillable lands reserved have an area of approximately 10,000 acres.

The Walker River is an unnavigable stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California. The lands along the stream are arid and incapable of producing crops without irrigation, for which purpose the river is the sole source of supply. The lands in the upper valleys were acquired by appellees or their predecessors under the public land laws of the United States, the earliest titles originating soon after the establishment of the reservation. During the period commencing with the year 1860 the

settlers diverted the water of the stream for irrigation purposes, and the present owners claim priorities based on these appropriations.

The claim of the Government, asserted on behalf of the Indians living on the reservation, is that, to the extent necessary to supply the irrigable lands, the waters of the stream were reserved. The trial court decided that the waters were not reserved and that the rights of the United States to their use, like the rights of other diverters, are to be measured and adjudged in accordance with the local laws and customs governing appropriation. Hence the rights decreed to the Government are made to date from the time of actual diversion and use.

When the lands were set apart for Indian purposes there was no express reservation of the flow of the stream; but it is the position of the Government that there was an implied reservation of the water. The contention is bottomed on the holding ***336** to this effect in Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340,[1] in what is claimed to be a cognate situation. The trial court thought Winters v. United States distinguishable, as being based on an agreement or treaty with the Indians. Here there was no treaty. It said that at the time the Walker River reservation was set apart the Pahutes were at war with the whites, hence no agreement between them and the Government was possible.

[1] (a) In the Winters case, as in this, the basic question for determination was one of intent— whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved.[2] We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved. As said by the court in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 41, 63 L.Ed. 138, in speaking of an analogous intent— whether an Indian reservation created by an act of Congress embraced only the uplands or included as well adjacent waters— 'it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created— the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

[1] [2] (b) The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. Winters v. United States, supra, 207 U.S.page 577, 28 S.Ct. 207, 52 L.Ed. 340. The question is merely whether in this instance the power was exercised. If it was, the appellees are in no position to claim paramount rights in the stream, since their appropriations were all later than 1859.

[3] [4] It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356.[3] The act of July 26, 1866, 14 Stat. 251, 253,[4] was ***337** no more than a formal confirmation of local law and usage which had theretofore met with silent acquiescence on the part of the national government. Broder v. Natoma Water Co., 101 U.S. 274, 276, 25 L.Ed. 790; California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U.S.pages 154, 155, 55 S.Ct. 725, 79 L.Ed. 1356. But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes

In United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136, it was said that although this power of changing the common law rule as to streams within its borders undoubtedly belongs in each state, yet two limitations must be recognized: first, that, in the absence of specific authority from Congress, a state cannot destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. The statement of these limitations has been many times repeated in later decisions, notably in California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U.S.page 159, 55 S.Ct. 725, 79 L.Ed. 1356. In the Desert Land Act, Act of March 3, 1877, 19 Stat. 377, 43 U.S.C.A. 321 et seq., the dedication of nonnavigable waters to the use of the public was expressly made subject to existing rights. And we need not consider the policy exemplified in the Reclamation Act of 1902, 32 Stat. 388, which directed the Reclamation Service to proceed in conformity with the state laws.

[5] (c) Appellees attempt to distinguish Winters v. United States on another ground. They say that, unlike the national domain elsewhere, the territory acquired by the treaty of Guadalupe Hidalgo, 9 Stat. 922, is not 'Indian country',[5] and no right of occupancy in the Indians was

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recognized by the laws of Spain or Mexico, or since given recognition in the public policy of the United States. The point of the argument, as we understand it, is that the members of the Pahute tribe had no rights which they might reserve, and none to surrender in exchange for those now claimed for them.

What the legal status of these aborigines may have been we need not stop to inquire. If it be assumed that they were mere sojourners in the abode of their ancestors, it still remains true that the national government was under compelling obligations to protect them. They are no less wards of the nation than are the tribes living elsewhere. In United States v. Kagama, 118 U.S. 375, 383, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, the court described the Indian communities as wholly dependent on the United States, owing no allegiance to the states and receiving from them no protection. 'From their very weakness and helplessness,' said the court, 'there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.' And see Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299.

[6] [7] (d) One further matter should have preliminary attention. Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; Alaska Pacific Fisheries v. United States, supra; United States v. Nez Perce County, 9 Cir., 95 F.2d 232. The rule has its basis in the obligation which the Government has assumed toward a dependent people. We see no reason why the same rule should not apply in the construction of executive orders. Compare McFadden v. Mountain View Mining & Milling Co., 9 Cir., 97 F. 670; Gibson v. Anderson, 9 Cir., 131 F. 39. Treaty provisions for the allotment of reserved lands invariably contemplate the ultimate passing of fee title to the individuals of the tribe; and the General Allotment ***338** Act of February 8, 1887, 24 Stat. 388 was expressly made applicable to reservations created by acts of Congress or by executive order.[6] It was pointed out in the illuminating opinion of Attorney General (now Justice) Stone of May 12, 1924 (Opinions of Attorneys General, vol. 34, p. 171), that doubts whether the reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum or water power, have, as a practical matter, uniformly been resolved in favor of the Indians

We turn now to the circumstances under which the Walker River Indian Reservation was set aside. The files of the Interior Department bearing on this subject are voluminous. On November 26, 1859, F. Dodge, agent for the Indians in Utah Territory, of which Nevada was then a part, wrote the Commissioner of Indian Affairs suggesting that the northwest part of the valley of the Truckee River, including Pyramid Lake, and the northeast part of the valley of Walker's River, including the lake of the same, be reserved for the Indians of his agency. The localities and boundaries of the proposed reservations were indicated on an accompanying map. 'These,' stated the letter, 'are isolated spots, embracing large fisheries, surrounded by mountains and deserts, and will have the advantage of being their home from choice. '[7] The Commissioner of Indian Affairs thereupon wrote the Secretary of the Interior, calling his attention to Dodge's letter, and stating, among other things, 'the tracts selected by the Agent, embrace but a small portion of land suited for agricultural purposes, yet, it is believed that there will be a sufficiency for the sustenance of the Washoe and Pahute tribes of Indians, in connection with the fish which they may obtain from Pyramid and Walker Lakes, and with a view to secure suitable homes for these Indians where they can be protected from the encroachments of the whites, I have the honor to suggest that, with your concurrence, the subject may be laid before the President for his consideration, with a recommendation that the tracts of country indicated on the map may be set apart and reserved from sale or settlement, for Indian use.'

The Indian Commissioner on November 29, 1859 wrote the Commissioner of the General Land Office, suggesting the propriety and necessity of reserving these tracts for Indian use, and requesting that the Surveyor General of Utah Territory be directed to respect the reservations on the plats of survey when the public surveys should be extended over them, and that in the meantime the local land offices, as established, be instructed to respect the reservations on their books. On December 8 of the same year the Commissioner of the General Land Office wrote the Surveyor General in Salt Lake City, instructing him to reserve for Indian purposes the two tracts described and indicated on an enclosed map.

[8] [9] The Walker River reservation as originally defined was surveyed within a few years, and in 1874 President Grant issued an executive order setting the lands apart for the Pahute and other Indians residing thereon. The action taken in November, 1859 initiated the establishment of the Walker River Indian Reservation. The acts of the heads of departments are the acts of the executive. Wilcox v. Jackson, 13 Pet. 498, 513, 10 L.Ed. 264; Wolsey v. Chapman, 101 U.S. 755, 769, 25 L.Ed. 915. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; ***339** Minnesota v. Hitchcock, 185 U.S. 373, 385, 389, 390, 22 S.Ct. 650, 46 L.Ed. 954. That this was true

of the Pyramid Lake reservation, created at the same time and in the same manner as that on the Walker River, was formally determined by the Department of the Interior in Central Pacific Ry. Co., 45 L.D. 502.

Cultivation of portions of the reservation was early commenced and water for irrigation purposes diverted from the stream. It appears from the files of the Department that not only was the Government desirous of having the Indians learn the arts of husbandry, but that the Indians themselves, who had taken refuge in substantial numbers on the lands reserved, were eager to cultivate the soil and produce crops.[8] The gradual but substantial growth of the practice of farming and irrigation on the reservation is shown in the findings of the trial court. /[9]

The Comstock Lode was discovered in 1859, and Nevada abruptly ceased to be a 'mere highway for gold seekers on the way to California.' Miners and adventurers of all sorts swarmed into the territory.[10] The promptness with which the suggestions of Indian Agent Dodge were carried out shows that the Department realized the urgency of the problems confronting the Indian population.[11] It required little foresight to anticipate the speedy settlement by the whites of the valleys of the Walker River and the consequent diversion of the waters of the stream which actually took place. The necessity of having a water supply if any crops were to be produced on the reservation was known to the Department. It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive. It could not but be realized that the Indians, unskilled in the art of farming, would necessarily make slow progress, and in any race for the actual appropriation of the stream this backward people would inevitably be left at the barrier. The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by settlers above

[10] Appellees point to the heavy expense of reclaiming their lands and to the conduct of the Government in permitting and encouraging settlement, particularly the acquisition of title under the Desert Land Act of 1877. They urge on these grounds that the Government is estopped to question the priority of their appropriations. Similar arguments were made unavailingly in Winters v. United States.[12] Compare Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791; Cramer v. United States, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622. The settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below

[11] [12] We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of ***340** the Indians. There remains for decision the question as to the quantity to which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience.

[13] As appears from the finding summarized in footnote 9, about 1,900 acres were in cultivation as early as 1886. At the time of the trial the cultivated area had not substantially increased. According to the allegations of the bill the amount of land then irrigated was about 2,000 acres. The number of Indians living on the reservation has never been large. In 1866 there was a population of about 600, and about 800 in 1875. There are now living there approximately 500 Indians. 96 individual Indians are farming parts of 140 allotments of 20 acres each and 96 allotments have homes on them.

The report of the master states that 'the number of Indians is not increasing and it has not been shown that there is the necessity or demand for the cultivation of a larger area than 2100 acres.' For the purpose of irrigating that quantity of land the master was of the opinion that 26.25 second feet of water, measured at the point of diversion, is sufficient. While the latter estimate is somewhat out of line with what was determined to be the duty of water on other parts of the stream, the Government has not questioned the estimate, but rather seems to approve of the master's proposed finding so far as it went. We are constrained to accept this estimate as a fair measure of the needs of the Government as demonstrated by seventy years' experience.

Appellant's counsel suggest a decree limiting the quantity of water for reservation purposes to the amount, not exceeding 150 second feet, which the Government may demand from year to year at the commencement of the season. That a decree of this sort would tend greatly to depreciate the value of the water rights of the upstream owners, and to make impossible any intelligent program of farming, is obvious. So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it.

The decree is reversed with directions to enter a decree adjudging the United States to be entitled to the

continuous flow of 26.25 cubic feet of water per second, to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859, and enjoining the defendants from preventing or interfering with the natural flow of the described quantities of water in the channels of the stream and its tributaries to and upon the reservation.

All Citations

104 F.2d 334

Footnotes

1 Cf. Conrad Investment Co. v. United States, 9 Cir., 161 F. 829; United States v. Powers, 9 Cir., 94 F.2d 783, affirmed 59 S.Ct. 344, 83 L.Ed. 330; United States v. McIntire, 9 Cir., 101 F.2d 650.

2 The summary of the pleadings and facts as set out in the opinion of this court, 9 Cir., 143 F. 740, and of the Supreme Court, has led to misapprehension concerning the scope of the holding in Winters v. United States. It is assumed by appellees here that in the Winters case the Government had established its rights in the waters of Milk River by prior appropriation. An examination of the record in that case discloses the contrary. The affidavits and testimony before the court showed that in 1890 the Government installed a pump of the capacity of 100 miner's inches for pumping water from the stream for domestic and irrigation purposes. In 1893 another pump of 150 inches capacity was installed. It was not until 1898 that the Government began the construction of a canal for the diversion of the waters of the stream. Meanwhile, commencing with 1890, and prior to 1898, diversion dams and canals had been built by the settlers above, or by mutual companies which they organized, and large quantities of water had been appropriated and applied to beneficial use.

3 In Nevada it was held soon after statehood (1864) that where the right to the use of running water was based upon appropriation, and not upon ownership of the soil, the first appropriator had the superior right. Lobdell v. Simpson, 2 Nev. 274, 90 Am.Dec. 537. In 1885, in Jones v. Adams, 19 Nev. 78, 6 P. 442, 3 Am.St.Rep. 788, the common law rule of riparian rights was declared in applicable to conditions existing in the state. See, also, Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 P. 166, and United States v. Humboldt Lovelock Irrig. L. & P. Co., 9 Cir., 97 F.2d 38, 42, 43.

4 Section 9: 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed * * * .' 43 U.S.C.A. 661.

5 Cf. United States v. McGowan, 9 Cir., 89 F.2d 201, reversed, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410.

6 Allotments to individual Indians on the Walker River reservation were made in 1906 under the act of May 27, 1902, 32 Stat. 260 and the General Allotment Act.

7 Continuing, the agent observed that 'the Indians of my agency linger about the graves of their ancestors— 'but the game is gone', and now, the steady tread of the white man is upon them. The green valleys, too, once spotted with game 'are not theirs now.' Necessity make them barter the virtue of their companions as a commodity of the market and the bitter contemplation burns in their bosoms the stern reality of their fate. Driven by destitution they seek refuge in crime, and show themselves unsparing because they have been unspared.
'I sincerely hope that those asylums will be made for them, where they can be free from the influence of the 'White Brigands' who loiter about our great overland mail and emigrant routes— using them as their instruments to rob and plunder our citizens.'

8 Commencing with the act of March 3, 1863, 12 Stat. 774, 791, numerous appropriations were made for the Indian Service in the territory of Nevada, and later in the state, for 'presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life.'

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9 The finding is that water from the Walker River was diverted and used beneficially upon the reservation as follows:

Priority	Cubic Feet Per Second	Acres
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

10 In 1860 the population of Nevada was 6,857. The mining rush increased it to 42,491 by 1870. Encyclopedia Britannica, 'Nevada', vol. 16, p. 269.

11 Under instructions from Washington the local Indian agent gave public notice of the reservation of these areas for Indian purposes, and citizens of the territory were required to refrain from trespassing.

12 In the briefs of appellants filed in this court in that case, 9 Cir., 148 F. 684, attention was called to Sec. 3 of the act of Congress ratifying the agreement with the Ft. Belknap Indians, 25 Stat. 133, expressly declaring 'That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry * * * and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands.'

End of Document

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DCNR Office Closure Due To COVID-19

DCNR office buildings are currently closed to the public until further notice, but we remain open for tele-business. The NDEP main phone number is (775) 687-4670.

CLICK HERE FOR UPDATES ON NDEP'S FACILITIES, PROCESS CHANGES, AND RESPONSE INITIATIVES. SURROUNDING THE COVID-19 PANDEMIC.

401 Certification

Clean Water Act (CWA) Section 401 — Water Quality Certification

Activities requiring a federal permit must "certify" that the proposed work will not violate state water quality standards.

Clean Water Act USC 33 1341—Section 401(a)(1) - "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the ***navigable waters***, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate .... that any such **discharge will comply** with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title...."

Quick Links:

- EPA Clean Water Act
- Clean Water Act, Section 401 Certification
- Clean Water Act, Section 404
- U.S. Army Corps Sacramento District Regulatory Program
- Nevada 401 Water Quality Certification Status for current Nationwide Permits
- State Authority and Public Notices

Most projects requiring State certification fall into two broad Federal program categories:

1. Activities requiring a Federal permit to allow discharges of dredged or fill material to waters of the United States, including oceans, lakes, streams, wetlands, and other water bodies. These permits are issued by the U.S. Army Corps of Engineers (Corps) under CWA Section 404. **Activity examples include but are not limited to sediment dredging or gravel mining, channelization, levee construction, filling wetlands for development, culvert installation and river restoration.**
2. Projects involving construction of hydroelectric dams, power plants, and other facilities requiring Federal Energy Regulatory Commission (FERC) licenses.

The State may respond to this type of application in three ways:

1. Waiver - Under Federal law the State may waive its certification authority if it takes no action on an application within a "reasonable time" not to exceed one year. For Section 404 permit projects, the Corps has defined "reasonable time" to be 60 calendar days, starting with receipt of a complete application by the State, but may extend this period up to one year on a case-by-case basis. Waivers carry no conditions, and are, in some ways, equivalent to certification without conditions.
2. Certification - Certification is based on a finding that the proposed Section 404 discharge will comply with all pertinent water quality standards. In order to allow certification, special conditions may be required by the State in order to remove or mitigate potential impacts to water quality standards. Such conditions must ultimately be included in the Federal Section 404 permit.

3. Denial - The State has the option to deny certification if it is unable to find that the project will comply with water quality standards or other applicable requirements. If a project is denied certification, a Section 404 permit for it cannot be issued by the Federal government. In some instances denial is necessary due to failure by the applicant to meet a procedural requirement or the ability to meet water quality standards. Once the deficiency is addressed, the application for water quality certification may be reconsidered.

The application is provided below in two file formats, these **are not** online forms:

- Application — 401 Water Quality Certification (Word Format)
- Application — 401 Water Quality Certification
- Guidance for 401 Applications (How to fill out the application)

Applications and attachments can be submitted via email to: Birgit Widegren- bwidegren [at] ndep.nv.gov

An application for 401 certification of a Section 404 activity should include:

- Contact Information and Project Description
- Map which clearly identifies waterbodies that will be impacted by activity
- Best Management Practices (BMPs) that will control erosion and sediment
- Amount of fill to be discharged, dredge removed or linear feet of channel impacted
- Electronic photos of project site
- NDEP 401 Application Addendum*

***New Federal Rules and Regulations become effective September 11, 2020 that impact the 401 Water Quality Certification Process**

Pursuant to new Federal Rules and Regulations effective September 11, 2020 that address the 401 Water Quality Certification process, additional information is required to be submitted to the Nevada Division of Environmental Protection.

In addition to completion of the Nevada Division of Environmental Protection's Clean Water Act §401 Water Quality Certification Application Form and pertinent attachments, the Project Proponent must also complete and submit the **NDEP 401 Application Addendum** found above.

The new federal rules and regulations further require the applicant to request a **Pre-Filing Meeting** at least 30 days prior to submittal of the application and pertinent attachments, including the Addendum. Although conducting a Pre-Filing meeting is optional, requesting a Pre-Filing Meeting is required by the new federal rules and regulations.

For more information contact:

Nevada Division of Environmental Protection
Bureau of Water Quality Planning
901 South Stewart Street, Suite 4001
Carson City, Nevada 89701-5249
Birgit Widegren, Environmental Scientist IV
775-687-9550 bwidegren [at] ndep.nv.gov

US Army Corps of Engineers
Nevada Northern Office
300 Booth Street, Room 3060
Reno, Nevada 89509
775-784-5304

US Army Corps of Engineers
Nevada Southern Office

ENVIRONMENTALISTS SEE REGULATORY, FUNDING GAPS AMID CLEAN WATER ACT ROLLBACK

DANIEL ROTHBERG

JUNE 14TH, 2020 - 2:00AM

Hiking near a snow-speckled mountain on a late spring day, it's not hard to find water running through a narrow stream. Come back several months later, and that stream might be empty.

In Nevada, most waterways work this way. Roughly 90 percent of the state's streams are intermittent or ephemeral, running at only certain times of the year in response to snowmelt or precipitation, according to data compiled by the Nevada Division of Environmental Protection (NDEP).

It's a fact throughout the West, from Arizona to New Mexico. Many streams are seasonal.

Scientists say these streams, despite running irregularly, are important for ecosystem health in arid areas. They connect waterways, replenish groundwater supplies and support wildlife. That's one reason many environmentalists are concerned about a Clean Water Act rollback, set to go into effect later this month, that would exclude most of these streams from federal protection.

In 1972, Congress passed the Clean Water Act, giving the federal government the authority to protect and regulate water. But for years, states, activists and industry have argued over its scope. And the new rule offers a narrower interpretation of

the federal government's role.

Although the Clean Water Act will still protect heavily used waterways in Nevada, including the Colorado River and the Truckee River, it excludes many wetlands and most seasonal streams.

As a result, the rule has set off a flurry of legal challenges from environmental groups. And in recent months, several Democrat-led Western states, including Colorado, California and New Mexico, have sued the Trump administration to challenge the final rule.

Nevada has not joined those suits. In comments submitted last year, NDEP described it as a "considerable improvement" over the Obama-era rule it replaced. Still, state regulators say they are evaluating the new rule's total effect, and they expect to have to adjust existing permitting programs. They argue any gaps in protecting water quality will be addressed under state law.

But several environmental groups say it is too early to tell.

Joro Walker, a lawyer with the Western Resource Advocates, questions whether Western states have the enforcement resources to enforce the rules as the federal government steps back.

"The practical aspect of this is incredibly important," said Walker, who works in the Mountain West. "If the state is not equipped, having great law doesn't really matter if you can't enforce it."

The regulatory gap

As the state's environmental agency, NDEP is responsible for enforcing the state's water quality standards. Jennifer Carr, the agency's deputy director, said that the division is still mapping out how many streams and wetlands would lose federal

protection under the Clean Water Act.

Whatever the volume, the state expects to assume more regulatory responsibility.

"We have all the authorities in place that are needed to permit any sort of discharge activity in the state of Nevada, whether it's federally jurisdictional or not," Carr said in an interview.

Like many states, Nevada has a permit program for maintaining water quality when developers seek to discharge water into streams or groundwater. But when it comes to modes of development that seek to dredge and fill wetlands protected under the Clean Water Act, the permitting process is done with the U.S. Army Corps of Engineers. That is expected to change.

"The fine points of whether or not a specific existing program needs a little bit of enhancement or refinement is one of the things that we're working through at this point in time," Carr added.

The new rule redefines which wetlands are protected under the federal law. With more wetlands eliminated from federal jurisdiction, it's likely that the state would have to issue more permits on its own. Carr said it is "one of the real, more specific examples" where the agency might need to adjust an existing program for developers applying for a state "Working in Waterways permit."

Regulators do not process many Clean Water Act wetland permits each year, Carr said. Over the past 12 years, she said the state has worked on about 16 wetland permits and five spring permits. She also noted that the majority of discharge permits, issued under the Clean Water Act over the past 12 years, have been for waters that remain protected under the new rule.

In other cases, the new rule calls into question whether even some larger rivers fall under the Clean Water Act. As part of the rulemaking, the Trump administration

approved a more narrow federal definition of what the Clean Water Act protects as Waters of the United States, or WOTUS.

The rule does not include all interstate waters. Instead, it ties protection to whether a waterway was traditionally navigable for commerce. This issue could leave the Walker River, which rises in northern California and runs through western Nevada, without federal protection, Carr said.

State regulators, she added, are "looking very closely at the Walker River and what its ultimate jurisdictional status might be," but Carr noted that it would still be protected under state law.

With a more narrow WOTUS definition, environmentalists are concerned about shifting much of the responsibility for protecting water quality to state agencies, with often limited resources.

"If you're Nevada and all of the sudden 99 percent of streams, rivers and washes are [not] protected, that's a huge assumption of responsibility that you're going to have to undertake," said Brett Hartl, government affairs director for the Center for Biological Diversity.

In many cases, federal funding for state-led compliance is tied to the amount of water, within a state boundary, that is protected by the Clean Water Act. As federal protection is removed for mapped streams, wetlands and other rivers, it could translate to less federal funding.

Carr said NDEP has raised this concern with EPA, which has said that it will keep funding stable in the short-term. She said the state agency will be working with EPA on the long-term formula.

Where pollution comes from

The state regularly evaluates the conditions of federally-protected waters in a triennial report. That document examines whether protected waters meet the standards of "beneficial use" for aquatic life, fish consumption, irrigation, municipal supply, recreation and livestock watering.

In the most recent assessment, published in April, NDEP concluded that only about 30 percent of roughly 700 waterbodies met that threshold. NDEP reported that there was "insufficient" data to draw conclusions about 34 percent of the waterbodies examined. And about 35 percent of waters were not meeting the standards established for at least one of the potential uses.

The public review, however, only provides a snapshot of water quality in the state. It focuses on Nevada's heavily used rivers. But the report does not include information for ephemeral and intermittent streams, which account for about 90 percent of the state's waterways.

And of the waterbodies assessed, the report assessed about 43 percent of year-round streams, 69 percent of lakes and reservoirs and about 41 percent of fresh wetlands.

Across the state, the leading cause of impaired water is elevated phosphorus levels, which can be caused by fertilizers, agriculture, stormwater and the disposal of home items.

Phosphorus accounts for about 21 percent of impaired water. Temperature accounts for another roughly 13 percent, what NDEP said could result from the destruction of shaded vegetation around a waterway.

The majority of impaired waters — about 57 percent — failed to meet standards set out for the protection of aquatic life. About 16 percent do not meet standards for recreations with contact.

Table ES-2. Number and Percentage of Impairments by Beneficial Use

Beneficial Use Code	Beneficial Use	No. of Impairments by Beneficial Use*	% of Total Impairments by Beneficial Use
AQL	Protection of Aquatic Life	391	57.2%
FC	Fish Consumption (Hg)	40	5.8%
IRR	Irrigation	50	7.3%
MDS	Municipal/Domestic Supply	83	12.1%
RWC	Recreation with Contact	109	15.9%
WLS	Watering of Livestock	11	1.6%

* Note: There may be multiple impairments per waterbody for each beneficial use, so the total number of impairments is ***not*** the same as the total number of impaired waterbodies.

A table in NDEP's triennial report. (Nevada Division of Environmental Protection)

This pollution is not always a result of direct discharges into streams. Many of the impairments noted in the report stem from what is known as nonpoint source pollution.

That type of pollution arises when indirect sources, such as runoff or rainfall pick up chemicals and nutrients, carrying them to a lake or a river. That makes nonpoint source pollution often challenging to regulate.

"It's a big issue," said Paul Comba, chief of NDEP's Bureau of Water Quality Planning.

Comba said the state has worked on addressing nonpoint source pollution through streambank restoration, moving cattle to specific access points and educating the general public. The state has also developed 55 site-specific plans, approved by the EPA, that establish a maximum level of pollutants that can be discharged to a river or lake and still meet water quality standards.

The state is also working to update it's antidegradation standards, which require

waterways to be protected in accordance with their natural quality, even if it is above beneficial use standards.

But resources are limited.

"Significant time and funding are needed to address impaired waters; this means that the pace of developing [maximum pollutant levels], watershed management plans, and alternative approaches may be slowed by staffing and budget constraints," the report said.

The ongoing legal battle

Pollution only tells one side of the story.

Development — filling wetlands or paving over small streams — can also degrade waterways. That's why many environmental groups want to see wetlands and small streams, especially in Nevada, to be explicitly included in a broad definition of what the Clean Water Act protects.

Hartl, with the Center for Biological Diversity, notes that it has long been difficult to determine whether or not an ephemeral or intermittent stream fell under protection of the Clean Water Act.

"No one knows the answer until someone decides to pave over it," he said.

For years, activists, politicians and the courts have argued over the scope of the Clean Water Act, specifically where the state's jurisdiction begins and federal jurisdiction ends.

In 2015, the Obama administration broadened the scope of the Clean Water Act, applying it to wetlands and seasonal streams. The move came in response to significant confusion over a 2006 Supreme Court case that produced no majority opinion and five separate opinions.

The Obama administration's rule started a new round of criticism and litigation, including from then-Gov. Brian Sandoval and Attorney General Adam Laxalt. Joining 12 other states, Laxalt sued, arguing that the Obama rule was an example of "unreasonable federal overreach."

After Trump was elected, he began the process of repealing and replacing the 2015 rule. Where Obama's rulemaking relied on Justice Anthony Kennedy's interpretation of the law, the Trump administration turned to a much narrower interpretation written by Justice Antonin Scalia.

Since the final rule was released in April, environmental groups and more than a dozen states have sued the Trump administration, kickstarting what is likely to be another round of lawsuits and court guidance. One of the litigants is Environment America, which has a Nevada chapter.

Levi Kamolnick, state director for Environment Nevada, said that water does not abide by state borders. He worries lax regulation of seasonal streams in one state could affect Nevada. For that reason, Kamolnick said seasonal streams should be protected by the federal government.

According to an EPA analysis completed in 2009, about 27,000 Nevadans were served by drinking water systems that relied on intermittent, ephemeral or headwater streams, he added.

"We absolutely think that the Trump Dirty Water Rule runs counter to the intent of the Clean Water Act," Kamolnick said. "We believe strongly that any moves to exclude non-permanent water sources [from federal protection] is detrimental to the health of Nevadans."

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- *Center for Biological Diversity - $100.00*

Nevada state officials stand by as EPA withdraws Clean Water protections

By **Brian Bahouth** - September 15, 2019

Conservation groups say seasonal wetlands in arid states like Nevada are likely to lose federal protections by repealing the Waters of the United States rule. (Ken_Lund)

Carson City – The Trump administration announced on Thursday the withdrawal of Obama-era anti-pollution protections for smaller streams, known as the Waters of the United States (WOTUS) rule – and in Nevada, state officials are not denouncing the move.

Listen to an audio report.

00:00 00:00

Nevada Attorney General Aaron Ford's statement says, "At this time, Nevada believes it would be in its best interest to remain under the pre-2015 WOTUS rule."

Scott Edwards, with the nonprofit Food & Water Watch, says states are free to raise their standards above the federal level – and thinks Nevada is too close to the mining industry.

"The whole Southwest mining industry is not well regulated by the state governments,"

Edwards charges. "A lot of the challenges to the Obama 2015 WOTUS rule were coming out of southwestern mining states, who didn't like what they claimed was the overreach of the Obama rule."

Several years ago, former Attorney General Adam Laxalt joined a dozen other states in suing the EPA to get the WOTUS rule overturned.

Neither Ford's office nor the Nevada Department of Environmental Protection would comment on the current status of that lawsuit, but NDEP said it is in agreement with Ford that Nevada is "better off" under the pre-2015 rules.

The 2015 rule made smaller waterways and seasonal streams subject to Clean Water Act protections.

Edwards claims that Trump's replacement rule will imperil the country's water supply and allow developers, industrial farming operations and mining concerns to pollute smaller waterways.

"Under an analysis of the Trump WOTUS rule, over half of the wetlands in this country will have protections stripped away from them," he adds.

During the public comment period, the EPA was deluged with pleas to keep the Obama-era rule. But the agency scrapped it anyway, and is expected to issue a less-restrictive set of rules later this year.

Nevada Division of
STATE LANDS

MENU

State Land Office

State Land Office

Agency Lands

The State Land Office functions as the real estate agency for a number of state agencies. Our current land portfolio consists of over 300,000 acres. Under statutory authority, we hold title to state lands and interests in state lands, such as easements and water rights. This agency acquires land needed for state use, whether it's land for a new DMV, a veteran's facility or a state park.

We work with our federal and local agency partners as well as willing

Contact Information

Ellery Stahler
Deputy Administrator

Contact

Information

private sellers to acquire land to help us achieve our mission to conserve, protect, manage and enhance the state's natural resources. We also dispose of land when directed by a legislative action or when a property no longer meets the need of a managing agency.

One of the main roles of the State Land Office involves authorizing uses of state land. We are experts in issuing permits, easements and licenses to use state land and routinely review applications for commercial, agricultural and recreational uses. We are always happy to review an application prior to submission to answer any questions you may have about our process.

We have an extensive collection of records associated with state land, and can assist with researching land patent information upon request. If you need a copy of a document or a map, we can provide that for a nominal fee.

Sovereign Lands

Upon statehood in 1864, title to the bed and banks of navigable water bodies passed from the federal government to the new state. It's important to note that there are currently a limited number of sovereign lands that the state claims; not all of Nevada's lakes and rivers are considered state owned. Here's a list of state owned sovereign lands:

Lake Tahoe, Truckee River, Carson River, Colorado River, Walker Lake, Washoe Lake, Winnemucca Lake, and the Virgin River

The state owns the bed and banks of these bodies of water, generally to the ordinary and permanent high water mark. Our ownership typically doesn't extend to wetlands, tributaries or flood overflow areas. Any use or disturbance of sovereign land needs to be authorized by this agency. Structures like piers, buoys, irrigation diversions, and bridges need authorizations and are subject to an annual use fee. If a dredging project or aquatic invasive species removal is planned, we can issue a short term authorization for these

uses. In order to obtain authorization, please review our authorizations and permitting page and submit the appropriate application to our office.

School Trust Land

Pursuant to the Enabling Act of 1802 from the federal government, Nevada was originally granted sections 16 and 36 in each township (totaling approximately 3.9 million acres), to be taken when the land was surveyed. However, surveys were slow to be completed, and the state suggested a different approach and received approval for a land exchange from Congress.

In 1880, the state exchanged its remaining grant lands for 2 million acres of land to be selected by the state in any location where federal lands were available. The state then went on to sell these "state selection" lands, depositing revenues into the Permanent School Fund. By the early 1900's, only a few parcels of land remained.

In 1926, the state once again requested and received approval from Congress to exchange the remaining lands for a like number of replacement acres. After returning to the federal government 30,000 acres of low potential land, the state was basically given a "credit" of 30,000 acres of federal land that could be acquired for the benefit of the trust. Most of these "exchange" lands were selected, sold, and the proceeds were deposited in the fund.

Currently the state holds about 3,000 acres of school trust lands concentrated in Washoe County, Carson City, Nye County and Clark County. These lands are considered assets to the trust and must be managed to generate revenue for the School Fund.

Persuant to NRS 387, the State Treasurer is the legal custodian of all securities in which the moneys of the State Permanent School Fund are invested.

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SISTER AGENCIES

Department of Conservation and Natural Resources

Division of Forestry

Division of State Parks

Division of Water Resources

Natural Heritage Program

State Historic Preservation Office

Nevada Division of Environmental Protection

DISCLAIMER

State Lands makes every effort to ensure that information posted on this website is up-to-date, accurate, and reflects the officially promulgated documents. While we try to keep the information timely and accurate, we make no expressed or implied guarantees. We will correct errors as they are brought to our attention.

Nevada Rivers

02/08/21 LB

Interstate Rivers

Colorado River Watershed
Colorado River – International Water terminates in the Sea of Cortez
Virgin River & Tributaries (Muddy River, Meadow Valley Wash)

Columbia River Watershed – Snake River to Columbia terminates in the Pacific Ocean
Owyhee River, Bruneau River, Salmon Falls Creek, plus tributaries

Great Basin Watershed
Truckee River terminates in Pyramid Lake
Carson River terminates in the Carson Sink (Stillwater)
Walker River terminates in Walker Lake

From	To	Main	Plus Tributaries
CA	NV	Smoke Creek	Rush
		Truckee River	Dog, Sunrise
NV	CA	Truckee River	Bronco, Gray
CA	NV	WF Carson River	
		EF Carson River	
NV	CA	EF Carson River	Bryant
CA	NV	WF Walker	Desert,
		EF Walker	Rough, Bodie
NV	CA	Amargosa (Intermittent)	
OR NV	NV OR	Twelvemile	 Horse
OR	NV	Quinn	Kings, McDermitt, Sage
NV	ID	Owyhee	SF Owyhee, Little Owyhee
NV	ID	Bruneau	Sheep, Jarbidge River, Buck, Pole, Flat, Deer
NV ID	ID NV	Salmon Falls Creek	NF Salmon Falls Shoshone, Chimney, Wilson, Shack, Bear
ID NV UT	NV UT NV	Goose	Piney, Trout, Jay Hardesty, Pole
NV	UT	Thousand Springs Creek	
NV	UT	Snake Creek, Big Wash, Lexington	
UT NV	NV UT	Beaver Dam Wash	
UT	NV	Virgin River	
AZ NV	NV CA	Colorado River	

Major Rivers	1st Tributary	2nd Tributary	3rd Tributary
Humboldt River 290 miles HW: Jarbidge Mtns Term: Humboldt Sink	Bishop Creek Trout Blasingame	Burnt	
	Mary's River	West Mary's River EF Mary's River Short Chimney T Hanks Hot Springs	 Currant Conner's
HW: East Humboldt Mtns	Starr Creek	Boulder, Herder	Ackler, Deering
	Winter Creek		
HW: Ruby Mtns	Lamoille Creek	Secret John Day Rabbit	Soldier
HW: Independence Mtns	NF Humboldt River	Peterson McAfee Fourmile Forman Pie Beaver	 Walker, Dell Gance Cabin
HW: Ruby Mtns	SF Humboldt River	Tenmile Dixie Huntington	Spring Willow Cottonwood Smith, McCutcheon, Gilbert, Corral
HW: Independence Mtns	Susie Creek		
HW: Independence Mtns	Maggie Creek	Simon Cottonwood Jack Spring N Haskell Beaver	
HW: Cortez, Simpson Park, Sulphur Spring Range	Pine Creek	Trout Horse	
HW: Sheep Creek Range	Rock Creek	Willow	Nelson
HW: Santa Rosa Mtns	Little Humboldt River	Martin SF Little Humboldt NF Little Humboldt	 Duck Stocks Groundhog Cottonwood
HW: Toiyabe Mtns	Reese River	Indian Stewart Clear Marysville Washington Big	

Truckee River 121 miles HW: Sierra NV Mtns Term: Pyramid Lake	Gray Bronco Sunrise Dog Hunter		
	Steamboat	Evans Thomas Whites Galena Browns Winters Ophir Franktown Musgrove McEwen	Jones
Carson River 131 miles HW: Sierra NV Mtns Term: Carson Sink	West Carson River East Carson River Clear Creek	Bryant Indian	
Walker River 152 miles HW: Sierra NV Mtns Term: Walker Lake	West Walker River East Walker River	Desert Sweetwater Rough	Green Bodie
Colorado River **1,450 miles** HW: Rocky Mtns (CO) Term: Sea of Cortez Virgin River HW: Colorado Plateau Meadow Valley Wash HW: Wilson Creek Range Muddy River HW: Warm Springs Beaver Dam Wash HW: Clover Mtns Las Vegas Wash HW: Spring Mtns	Virgin River Muddy River Las Vegas Wash	Beaver Dam Wash Meadow Valley Wash Cold Deer	Camp Valley Clover

Rivers in NW NV			
Twelvemile HW: Warner Mtns (CA) Term: Greaser Res (OR)	NF Twelvemile (CA, OR) Fifteenmile (CA) Horse		
Quinn River HW: Trout Cr Mtns (OR) Santa Rosa Mtns Term: Black Rock Desert	McDermitt Kings EF Quinn Leonard	Sage	
Thousand Creek HW: Idaho Canyon Range Term: Continental Lake	Virgin Big Spring Rincon		
Mahogany Creek HW: Black Rock Range Term: Summit Lake	Pole		
Wall Canyon Creek HW: Badger Mtns	Cottonwood		
High Rock Creek HW: Massacre Range Term: High Rock Lake	Little High Rock Willow Mahogany		
Mud Meadow Creek HW: Black Roch Range Term: Mud Meadow Res.	Soldier Slumgullion Fly		
Smoke Creek HW: Cherry Mtn (CA) Term: Smoke Creek Desert	Rush Creek		
Rivers in NE NV			
Owyhee River HW: Tuscarora Mtns, Wild Horse Range Term: Snake, Columbia, Pacific Ocean	SF Owyhee Skull Fawn Slaughterhouse California Haystack Van Duzer Allegheny Badger Beaver Hendricks Penrod Deep Jacks, Clear, Hanks	Little Owyhee Bull Run Wilson Deep Big Cottonwood Cyn Hot Niagra Burns Harrington Taylor's Canon Indian Miller	Willow

Bruneau River HW: Bruneau Plateau & Jarbidge Mts Term: Snake, Columbia, Pacific Ocean	Sheep Jarbidge Deep McDonald Meadow Copper Seventysix Annie Willow	Merritt EF Jarbidge Buck Deer Bear Pine	Robinson
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Goose Creek HW: Trout Cr Mtn (ID) Term: Little Goose Creek Reservoir (ID)	Piney Little Goose Spring Trout Jay Hardesty Bluff	 Fall Pole	
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Rivers in Central NV			
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Duck Creek HW: Schell Creek Range Term: Goshute Lake	Berry		
Steptoe Creek HW: Schell Creek Range Term: Steptoe Slough	Cave		
Illipah Creek HW: White Pine Range Term: Illipah Reservoir	Cottonwood		
White River HW: White Pine Range Term: Nesbitt Lake	Ellison Sunnyside Big Spring Wash		
Hot Creek HW: Hot Creek Range Term: Echo Canyon Reservoir	Fish Lake Valley Moore's Station Wash Tybo Twin Springs Slough		
Rivers in Southern NV			
Pahranagat Creek HW: Ash & Crystal Springs Term: Pahranagat Lake			
Amargosa River HW: Pahute Mesa Term: Death Valley (CA) Intermittent	Carson Slough (Ash Meadows)		

WIKIPEDIA

List of rivers of Nevada

List of rivers in Nevada (U.S. state).

Contents

By drainage basin
- Great Basin
- Pacific Ocean
  - Columbia watershed
  - Colorado watershed

Alphabetically

See also

External links

References

By drainage basin

This list is arranged by drainage basin, with respective tributaries indented under each larger stream's name.

Great Basin

- Amargosa River
- Carson River
- Humboldt River
  - Little Humboldt River
  - Reese River
  - South Fork Humboldt River
    - Huntington Creek
  - North Fork Humboldt River
  - Marys River
- Quinn River
  - Kings River
- Thousand Springs Creek
- Truckee River
- Walker River

- East Walker River
- West Walker River

Pacific Ocean

Columbia watershed

- *Columbia River (OR)*
  - *Snake River (ID)*
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      - South Fork Owyhee River
        - Little Owyhee River
    - Bruneau River
      - Jarbidge River
    - Salmon Falls Creek

Colorado watershed

- Colorado River
  - Muddy River
    - Meadow Valley Wash
    - White River
  - Virgin River

Alphabetically

- Amargosa River
- Bruneau River
- Carson River
- Colorado River
- East Walker River
- Humboldt River
- Huntington Creek
- Jarbidge River
- Kings River
- Little Humboldt River
- Little Owyhee River
- Marys River
- Meadow Valley Wash

- Muddy River
- North Fork Humboldt River
- Owyhee River
- Quinn River
- Reese River
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- South Fork Humboldt River
- South Fork Owyhee River
- Thousand Springs Creek
- Tongue Wash
- Truckee River
- Virgin River
- Walker River
- West Walker River
- White River

See also

- List of Lake Tahoe inflow streams
- List of rivers in the Great Basin
- List of rivers of the United States

External links

- Nevada Streamflow Data from the USGS (http://waterdata.usgs.gov/nv/nwis/current/?type=flow)

References

- USGS Geographic Names Information Service (http://geonames.usgs.gov/pls/gnispublic/)
- USGS Hydrologic Unit Map - State of Nevada (1974)

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Nevada Rivers

02/08/21 LB

Interstate Rivers

Colorado River Watershed
Colorado River – International Water terminates in the Sea of Cortez
Virgin River & Tributaries (Muddy River, Meadow Valley Wash)

Columbia River Watershed – Snake River to Columbia terminates in the Pacific Ocean
Owyhee River, Bruneau River, Salmon Falls Creek, plus tributaries

Great Basin Watershed
Truckee River terminates in Pyramid Lake
Carson River terminates in the Carson Sink (Stillwater)
Walker River terminates in Walker Lake

From	To	Main	Plus Tributaries
CA	NV	Smoke Creek	Rush
		Truckee River	Dog, Sunrise
NV	CA	Truckee River	Bronco, Gray
CA	NV	WF Carson River	
		EF Carson River	
NV	CA	EF Carson River	Bryant
CA	NV	WF Walker	Desert,
		EF Walker	Rough, Bodie
NV	CA	Amargosa (Intermittent)	
OR NV	NV OR	Twelvemile	 Horse
OR	NV	Quinn	Kings, McDermitt, Sage
NV	ID	Owyhee	SF Owyhee, Little Owyhee
NV	ID	Bruneau	Sheep, Jarbidge River, Buck, Pole, Flat, Deer
NV ID	ID NV	Salmon Falls Creek	NF Salmon Falls Shoshone, Chimney, Wilson, Shack, Bear
ID NV UT	NV UT NV	Goose	Piney, Trout, Jay Hardesty, Pole
NV	UT	Thousand Springs Creek	
NV	UT	Snake Creek, Big Wash, Lexington	
UT NV	NV UT	Beaver Dam Wash	
UT	NV	Virgin River	
AZ NV	NV CA	Colorado River	

Major Rivers	1st Tributary	2nd Tributary	3rd Tributary
Humboldt River 290 miles HW: Jarbidge Mtns Term: Humboldt Sink	Bishop Creek Trout Blasingame	Burnt	
	Mary's River	West Mary's River EF Mary's River Short Chimney T Hanks Hot Springs	 Currant Conner's
HW: East Humboldt Mtns	Starr Creek	Boulder, Herder	Ackler, Deering
	Winter Creek		
HW: Ruby Mtns	Lamoille Creek	Secret John Day Rabbit	Soldier
HW: Independence Mtns	NF Humboldt River	Peterson McAfee Fourmile Forman Pie Beaver	 Walker, Dell Gance Cabin
HW: Ruby Mtns	SF Humboldt River	Tenmile Dixie Huntington	Spring Willow Cottonwood Smith, McCutcheon, Gilbert, Corral
HW: Independence Mtns	Susie Creek		
HW: Independence Mtns	Maggie Creek	Simon Cottonwood Jack Spring N Haskell Beaver	
HW: Cortez, Simpson Park, Sulphur Spring Range	Pine Creek	Trout Horse	
HW: Sheep Creek Range	Rock Creek	Willow	Nelson
HW: Santa Rosa Mtns	Little Humboldt River	Martin SF Little Humboldt NF Little Humboldt	 Duck Stocks Groundhog Cottonwood
HW: Toiyabe Mtns	Reese River	Indian Stewart Clear Marysville Washington Big	

Truckee River 121 miles HW: Sierra NV Mtns Term: Pyramid Lake	Gray Bronco Sunrise Dog Hunter		
	Steamboat	Evans Thomas Whites Galena Browns Winters Ophir Franktown Musgrove McEwen	Jones
Carson River 131 miles HW: Sierra NV Mtns Term: Carson Sink	West Carson River East Carson River Clear Creek	Bryant Indian	
Walker River 152 miles HW: Sierra NV Mtns Term: Walker Lake	West Walker River East Walker River	Desert Sweetwater Rough	Green Bodie
Colorado River **1,450 miles** HW: Rocky Mtns (CO) Term: Sea of Cortez Virgin River HW: Colorado Plateau Meadow Valley Wash HW: Wilson Creek Range Muddy River HW: Warm Springs Beaver Dam Wash HW: Clover Mtns Las Vegas Wash HW: Spring Mtns	Virgin River Muddy River Las Vegas Wash	Beaver Dam Wash Meadow Valley Wash Cold Deer	Camp Valley Clover

Rivers in NW NV			
Twelvemile HW: Warner Mtns (CA) Term: Greaser Res (OR)	NF Twelvemile (CA, OR) Fifteenmile (CA) Horse		
Quinn River HW: Trout Cr Mtns (OR) Santa Rosa Mtns Term: Black Rock Desert	McDermitt Kings EF Quinn Leonard	Sage	
Thousand Creek HW: Idaho Canyon Range Term: Continental Lake	Virgin Big Spring Rincon		
Mahogany Creek HW: Black Rock Range Term: Summit Lake	Pole		
Wall Canyon Creek HW: Badger Mtns	Cottonwood		
High Rock Creek HW: Massacre Range Term: High Rock Lake	Little High Rock Willow Mahogany		
Mud Meadow Creek HW: Black Roch Range Term: Mud Meadow Res.	Soldier Slumgullion Fly		
Smoke Creek HW: Cherry Mtn (CA) Term: Smoke Creek Desert	Rush Creek		
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From: **David Fiore** mtndaddy@gmail.com
Subject: Re: Reese River Letter. Get others to write as well if you can. I also need letter about other rivers that they think are not navigable
Date: March 12, 2019 at 2:11 AM
To: **Charles** cralbright@juno.com

how's

To Whom it May Concern:

I am writing to you to inform you of the wonderful experience I had kayaking the upper Reese River. Yes, we boated (navigated) the Reese River! A group of four of us decided to find a river in Nevada that we had not kayaked before and which would provide us with wonderful scenery and good rapids. We picked the Reese River and hiked our kayaks in to the river and proceeded to run the river. It was a delightful experience and demonstrates that the river is indeed "navigable".

We were delighted to find that the Reese River provided some fun class 2 rapids which at higher water would be class 3. Unfortunately there were fences along the way that were very dangerous and should be removed.

I hope you consider this experience and do not deem the Reese River "non-navigable".

Sincerely,

David C Fiore, MD

On Sun, Mar 3, 2019 at 8:13 AM Charles <cralbright@juno.com> wrote:
More, BLM and USFS and USFWS cannot give opinions on Navigation in Nevada due to the Hatch Law. Another reason to hate Utah that says all government employees cannot make options when asked. That was driven home very much at BLM.

> On Mar 3, 2019, at 7:26 AM, David Fiore <mtndaddy@gmail.com> wrote:
>
> I'll put it on letterhead, sign, scan and send it to you. (if you have details like when we did it and where we put in and took out, please send)
>
> To Whom it May Concern:
>
> I am writing to you to inform you of the wonderful experience I had kayaking the upper Reese River. Yes, we boated (navigated) the Reese River! A group of four of us decided to find a river in Nevada that we had not kayaked before and which would provide us with wonderful scenery and good rapids. We picked the Reese River and hiked our kayaks in to the river and proceeded to run the river. It was a delightful experience and demonstrates that the river is indeed "navigable".
>
> I hope you consider this experience and do not deem the Reese River "non-navigable".
>
> Sincerely,
>
> David C Fiore, MD
>
> On Thu, Feb 28, 2019 at 7:46 PM Charles <cralbright@juno.com> wrote:
> SEE above
>
> ---
>
> Drink 1 Cup Before Bed, Watch Your Body Fat Melt Like Crazy
> mayserve-magestor.com
> http://thirdpartyoffers.juno.com/TGL3131/5c78aaf09a0092aee1b03st03vuc

To whom it may concern,

I have been kayaking since 1992, with an emphasis on multi-day day trips in the Western US. Since 1996, I have paddled the waterways of the Bruneau drainage extensively. Nearly all of the water in these rivers originate in Northern Nevada. Some of these rivers are in designated wilderness areas. The entire drainage is a national treasure offering some of the best and most unique backcountry whitewater kayaking adventures in the Continental US. The beauty, wildness, and solitude are second to none.

Geologic wonders, these canyons also hold significant evidence of past human use, prehistorically as well as historically, and are home to deer, elk, big horn sheep, cougar, and many other species. Some of these rivers have been kayaked since the early 70s and are well documented. Others are more recent discoveries. A few sections have yet to be paddled but are certainly navigable. The area has left such an impression on me that I plan to paddle there as long as I am physically able. The following is a brief description of the navigable sections:

Salmon Falls Creek: Paddled several times at various water levels. Class 1 and 2. 14 miles. Launch 3 miles south of Jackpot, Nevada at the rest stop where Highway 93 crosses creek. Most do it one day. Others do it in two. Excellent introduction to overnight river trips for kids. There are miles of the creek above this that are navigable as well.

East Fork Jarbidge: Paddled once in June 2006, 200 CFS. Two day trip. Class 3, 4, and 5. Hiked in 6 miles to the put-in, beginning at the Slide Creek Trailhead just south of Pole Creek Ranger Station in northern Nevada. Launched at the confluence of Slide Creek and East Fork Jarbidge. Kayaked 6 miles to Robinson Hole. Grant Amaral, author of "Idaho, the Whitewater State", paddled the remaining 6 miles to Murphy Hotsprings the week after at half the flow. Dropping in to sub alpine from a high desert environment, then floating out in to a desert canyon makes this one of the most ecologically diverse and unique river trips I have done. There is a nice hot spring to soak in along the way.

West Fork Jarbidge: Beginning below the town of Jarbidge, Nevada and ending at the confluence of the East Fork Jarbidge, this is the only roadside run on the list. 12 miles of class 3 and 4 at medium flows.

Jarbidge: Paddled many times at various water levels. Beginning at the confluence of the East and West Forks of the Jarbidge, it is 30 miles to confluence of the West Fork Bruneau. Most continue through the Bruneau for a 72 mile trip. 3-4 days. Class 3, 4, and 5. Deep, narrow, pristine, and surprisingly lush, this is one of the most idyllic river canyons in the Nation. Well documented.

West Fork Bruneau: Paddled many times at various water levels. Beginning at Rowland, Nevada, it is 30 miles to the confluence of the Jarbidge. Most continue through the Bruneau for a 72 mile trip. 3-4 days. Class 4 and 5. Riddled in history, this canyon has several old homesteads along the way and has at least three marked graves near the river: Two homesteaders and one kayaker from a trip in 1974 ("Never Turn Back" by Ron Watters). One of the most remote river trips in the Lower 48, this canyon also has the highest concentration of good camp sites of any river I have paddled. It has the most cows and fences I have encountered as well. Given the fences are in flux year to year, the paddler is always guessing what they may find and where. To date, I have heard of 7 kayakers who have gotten hung up in various barbed wire fences crossing the river. I have witnessed one. Fortunately, no one has drowned as a result. The wire is hard to see amongst the willows and or the dim light caused by

shadows. This poses a significant threat to kayakers.

Bruneau: Paddled many times at various water levels. Beginning at the confluence of the Jarbidge and West Fork of the Bruneau, it is 42 miles to the take-out. Class 3 and 4. This is one of the most iconic river canyons in the Western US. Well documented. There is a hot spring to soak in at the put-in for those doing just the Bruneau or those coming out of the Jarbidge or West Fork rivers.

Sheep Creek: Paddled many times at various water levels. Beginning where the Rowland Road crosses Sheep Creek, it is 31 miles to the confluence of the Bruneau and another 30 miles to the take-out. Class 3, 4, and 5. The tightest, most pristine, and spectacular canyon in the drainage with vertical canyon walls rising 400-800 out of the water. Before the canyon closes in, there is an interesting homestead. There are several barbed wire fences in the upper several miles. Hidden in the willows, they pose a significant danger to kayakers. On the Nevada side, there are miles of navigable water above this put-in with historical homesteads.

Mary's Creek: Paddled once, May 2005. 4 miles to the confluence of Sheep Creek. Class 4. Combined with Sheep Creek for 3 day trip. With enough water, the streambed is steep and rocky enough that Mary's would offer the most continuous whitewater in the drainage. On the Nevada side, there are historical homesteads and miles of navigable water above this put-in.

East Fork Bruneau (Clover Creek): Paddled once, spring of 1998. Put in at Winter Camp and paddled 9 miles to the confluence of the Bruneau, then 20 miles on the Bruneau. 2 days. Class 4 and 5. Sections above have reportedly been paddled.

Sincerely,

Rusty Bowman

648 Falls Ave West

Twin Falls, Idaho

83301

www.earthenexposure.com

From: **Setlock, Michael** msetlock@blm.gov
Subject: Paddling near Elko
Date: March 25, 2019 at 4:00 PM
To: Charles cralbright@juno.com

Hi Chris,

I have attached a float guide for the Owyhee, Bruneau and Jarbridge. You can contact the offices in the guide for more information. We have the South Fork of the Owyhee here in the Elko Do and this is also provided in the guide.

You can paddle the Humboldt either the mainstem that runs along I-80 or the South Fork which comes out of South Fork State Park/Reservoir. It is recommended that you run the section in the canyon due to some grazing fences that go across the river near just after the South Fork Res. This section is just upstream of where the SF dumps into the main Humboldt River and is about 8-10 miles long. If you have a map or on google you can put in off of Bullion Road outside of Elko then take out off of Bullion Road again before you get to Maggie Creek Ranch.

Salmon Falls Creek can also be run, not sure about Marys River. Have not heard of too many people paddling Marys River.

Below is a link for Salmon Falls Creek on the NV side for the ID side you can contact the Burley Field Office in ID.

https://paddling.com/paddle/trips/salmon-falls-creek-idaho/?lat=42.0781&lng=-114.7145&zoom=10

Hope you have fun out there and be safe,

Mike Setlock
Outdoor Recreation Planner
BLM Tuscarora Field Office
3900 East Idaho Street
Elko, NV, 89801
Office: 775-753-0212
msetlock@blm.gov

From: **Horn, Naaman - FS** nhorn@fs.fed.us
Subject: RE: Jeremy Evans, Recreation Officer, Mountain City, Ruby Mountains, Jarbidge, Elko, Wells Ranger District
Date: March 25, 2019 at 10:28 AM
To: Charles cralbright@juno.com

Hello Charles,
Here is the information I got back from the Bridgeport Ranger District.

I do not know of a comprehensive inventory or survey of fences along the river. From my limited knowledge I know that there were fences that crossed the West Walker in Pickel Meadow. At one point there was a heavy cable which was strung over the river and had a passable visual barrier for livestock that hung down to the water from that cable. I do not believe it is still in use nor has it been maintained. That cable was in also in Pickel Meadow.
There was at least one fence that crossed the river at the downstream end of Rosaschi Ranch on the East Walker but that was wiped out by flooding two to three years ago.
I could not speak to any of the private lands along the river and would imagine that there are some fences that may cross both forks in the valley bottoms on private lands.
There may be some more along the newly established Walker River State Recreation Area at Nine Mile and Flying M Ranches but we did not keep any data on those. The Nevada State Parks might have some of that information available.
The only other entity that I know of which may have some knowledge on that might be the Walker River Irrigation District. I do not know if they keep or collect any of that data though.
The only other place that I can think of that may impact a paddle is at Sonora Bridge, on the West Walker. The MWTC has completed analysis for some poles that they were going to install on either side of the river to be able to run a rope bridge over the river. I do not know the timing of when they would be using that but the bridge should come down when not in use.
As for places to access there are quite a few along both the East Walker and West Walker, none that I know of are established for that purpose though.
I think the best resource to find access points would be Google Earth.

Any specific information that could be provided about the fences that were encountered in the past could be useful to us. If there are fences that still cross which are Forest Service owned I would like to know.

I hope this helps.

-----Original Message-----
From: Charles [mailto:cralbright@juno.com]
Sent: Friday, March 22, 2019 4:13 PM
To: Horn, Naaman - FS <nhorn@fs.fed.us>
Subject: Jeremy Evans, Recreation Officer, Mountain City, Ruby Mountains, Jarbidge, Elko, Wells Ranger District

Hello Mr. Evans. You have one hell of a big district to ask questions of. So I guess I should get started. Hope you had some time for me.

Rubys Area:

I have been a life long paddler of canoes and kayaks and have spent many years in Nevada doing rivers and creeks here. I have also traveled much of the state and know many folks who have paddled in your district. I with this being a big water year was going to try to spend much of my spring and early summer out in your district looking for rivers and creeks in your huge district. So some of my paddling goals are in the Rubys and creeks or rivers such as the Humbolt that I would like to ask about. They offer many drainages that potentially could be flowing off both the east and west sides. So where might I find and access some of these creeks and rivers in your Ruby District? AND do you have any issues with me paddling them? Is there bridges or roads nearby where we can hike in and do sections of creeks such as Lamoille or the S.F. Humbolt? Will I have to worry about fences, low bridges, irrigation diversions or other hazards? Will there be issues with parking vehicles for access or egress? Any wildlife to look for or unique geology or locations? Do you have any concerns about our paddling these areas? Have you heard of others doing what I am asking about?

Jarbdige Area:

So I also plan on doing some paddling in the Jarbidge, Bruneau, Marys area. I was also told by a NDOW Official that Cottonwood Creek that drains the east side of the Jarbidge area is boatable and Salmon Falls Creek which it flows into have in the past been paddled. Any recommendations for access to that area? And is there other creeks on the east side that may or have been paddled in the past? As for the Jarbidge It has several forks in your Humbolt NF, can you recommend access sites for them and as before any hazards to worry about? Again any issues with parking for access or egress? Wildlife we might encounter, unique locations or other enjoyable sites? As asked before is there any concerns for safety such as fences, low bridges, other hazards? Does your staff have any concerns regarding our being there and paddling? Have you heard of others paddling these rivers and creeks?

Marys River:

Definitely on my radar as I have heard many great things about it and its canyon. So could you please suggest points of access and egress? Safety issues as asked above? Again. wildlife, unique locations or other pluses to see? Does your staff have any concerns? Have you heard of others paddling this river. My neighbor who is retired NDOW said that otters and been found on both the Humbolt and Marys and that to study them they used canoes to do the study. Any issues with parking at either put ins or take outs?

Bruneau:

As with the Jarbidge the Bruneau has several forks and side creeks that I have heard are boatable. Do you have any recommendations of locations for access and egress? As before and hazards like fences, low bridges or others? Do you have any issues with paddlers accessing those forks and creeks? There are also some creeks like Beaver Creek and the N.F. Humbolt that flow south of the Humbolt NF in the Bruneau area. Is there any paddling to be had in that area as well? Again possible sites for access and egress. Again any issues with parking at put ins or take outs? Have you ever heard of any other paddlers in these areas. Any other waters that might offer a enjoyable paddle?

Owyhee River and its Forks:

By maps it looks like most of the Owyhee River lays outside of your Humbolt NF. But a small stretch of it has a headwater in the west side of the Humbolt NF. Have you or others been in that area and know if there is any opportunity to recreate there? Any other creeks or even the Little N.F. of the Humbolt that flow off the Santa Rosa's and that section of Humbolt NF? Years ago I spent a good amount of time exploring that section and was working in the McDermitt area with a number of native americans who took me several places that were unique on their reservation. A great time in my life.

Humbolt River and its forks and tributaries:

So as with all the previous areas addressed: I realized that the main body of the Humbolt River is NOT in your district but have you got any information on where it might be accessed? Hazards? Wildlife? I had heard that back in the 1980's there was a downriver race on the Humbolt River and several times I considered coming out that way to compete. One can only assume that since white people got here that hey have paddled on Nevada's flowing waters for recreation and fishing and hunting. I am also very sure that the original native americans must have also spent time and much of their hunting and gathering along our waterways like the Reese and Marys. For a state that is considered to be mostly desert and devoid of water there must have been many folks who enjoyed our seldom seen and used rivers and creeks.

So last question besides all the ones above is are there other creeks and rivers in the districts that you over see that might offer a unique opportunity in a wet year like this?

You are lucky to oversee such a huge area. It must take a lot of work to address the whole NF. So THANK YOU for your time on this. I hope that you and your staff are doing well. I hope to hear from you soon. Again, Thanks for your time on my questions.

Sincerely yours,

Charles Albright
1408 Washington Street
Reno, Nevada 89503
774-324-5102
cralbright@juno.com

On a side note I believe there was a Marc Anderson who worked out of the Elko NF Office for many years. Ever hear of him? His brother Jayson was a best friend and I really enjoyed his parents. I looked him up back in the 1970's or so. Way back when. Thanks for your time.

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From: **Kramer, Martin - FS** martinkramer@fs.fed.us
Subject: RE: Questions for Martin Kramer of the Austin / Tonopah Ranger District
Date: March 25, 2019 at 10:09 AM
To: cralbright@juno.com
Cc: Horn, Naaman - FS nhorn@fs.fed.us

Charles,
In response to your questions. I would suggest that you get ahold of BLM Battle Mountain. The only place I think you MAY be able to get in to Reese River is on the North Side of highway 50 on BLM, where your friends went before. There is really nothing on the South end deep enough that you could get in nonetheless paddle in, even with all of the expected water. Reese River on the South end is more like a creek to be honest. Not much there. Hope this helps in some way.

-----Original Message-----
From: Horn, Naaman - FS
Sent: Friday, March 22, 2019 1:38 PM
To: Kramer, Martin - FS <martinkramer@fs.fed.us>
Subject: FW: Questions for Martin Kramer of the Austin / Tonopah Ranger District

Hello Martin,
Could you respond to the below email?
Thanks,
Naaman

-----Original Message-----
From: Charles [mailto:cralbright@juno.com]
Sent: Friday, March 22, 2019 1:35 PM
To: Horn, Naaman - FS <nhorn@fs.fed.us>
Subject: Questions for Martin Kramer of the Austin / Tonopah Ranger District

Hello Mr. Kramer, I am contacting you about possible paddling opportunities on the Reese River in the Toiyabe Humbolt NF. I had several friend who came out years ago and paddled the headwaters of the Reese and much of it course towards Battle Mountain. Others I have had discussions with have paddled the Reese River as well. This being a wet, snowy year there should be water to again explore what the Reese has for recreation on it waters. So my questions are where might I best access the river in your Ranger District? I assume that as long as I stay on NF Roads and hike if needed to the river I can legally access and paddle the river. Do you have any recommended locations for put in or take outs? I assume that there are various places where roads cross the river or get nearby. What sort of hazards might I encounter? Fences? Low Bridges? Strainers? What might i encounter as far as wildlife along the course of the river? Others have told me that they have paddled in good water years all the way to Battle Mountain. Have you ever heard of other paddlers doing sections of the river from its headwaters to Battle Mountain?

As for access is it safe to park at bridges along its way? Is there any worries about locals or people who might think I am trespassing? We will probably use a motorcycle for shuttles to get cars. Any other thoughts for our desire?

Thank for your time on this issue. Hope all is well for you and your staff. I have spent plenty of time out your way exploring in the past.

Last question: Any other creeks or lakes in your district that can be paddled?

Sad News For Meghan Markle And Prince Harry track.volutrk.com http://thirdpartyoffers.juno.com/TGL3131/5c9546f8e410c46f831ebst03vuc

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From: **McCampbell, Michael** mmccampbell@blm.gov
Subject: Fwd: [EXTERNAL] Re: WInnemucca District BLM rivers
Date: March 25, 2019 at 9:30 AM
To: cralbright@juno.com

Hello Charles,

I've done some canoeing in the area and can make a few recommendations. The Humboldt River is good to float on in the spring until the water gets too low- usually the end of June or sometime in July. Downstream of Winnemucca there are several good access points next to bridges near Mill City and Imlay and there are just a couple dams near Winnemucca that need portage. I highly recommend day or multiday trips between Winnemucca Rye Patch Reservoir. Upstream of Winnemucca there are two good access points near the Valmey powerplant, two near Golconda, and one in Battle Mountain, but there are a lot of dams, low bridges and fences to go around. A few years ago I floated from Battle Mountain to Winnemucca in five days and had an average of 3 portages per day. From the river I've seen beaver, muskrats, deer, pheasants, owls, families of ducks and geese, lots of curlews, raptors, and one carp, but I've never tried fishing. The only place I've ever seen other floaters is in Winnemucca between the 795 Bridge and the river park on Bridge Street.

I have a friend who kayaks the Quinn River near Orovada in the spring when the water is high. I'm not sure on where to access that river as most of the surrounding land is private agriculture fields. Downstream of Orovada only has enough water to float in extremely high water years.

I've had good success canoe fishing at Bilk Creek Reservoir near Denio. The reservoirs Mike mentioned are good floating and fishing locations, but except for Rye Patch I rarely see any boats out there. I might be able to find information on other waters of interest, but these are the only ones I've had experience with.

Michael

--------- Forwarded message ---------
From: **Kizorek, Michael** <mkizorek@blm.gov>
Date: Fri, Mar 22, 2019 at 10:02 AM
Subject: Fwd: [EXTERNAL] Re: WInnemucca District BLM rivers
To: Michael McCampbell <mmccampbell@blm.gov>

Michael can you help with any of this gentlemen's questions?

Thanks!
--------- Forwarded message ---------
From: **Charles** <cralbright@juno.com>
Date: Thu, Mar 21, 2019 at 5:25 PM
Subject: [EXTERNAL] Re: WInnemucca District BLM rivers
To: Kizorek, Michael <mkizorek@blm.gov>

I had two other questions. Have you heard of others enjoying the paddles on the rivers I asked about? I am sure that over the years that there has been generations of folks that thought it would be nice and a great adventure to paddle the rivers I asked about. Also what sort of wildlife might we encounter out there. Any tips on what to expect? Again Thanks for your help. Fishing? Any real fish to catch?

> On Mar 21, 2019, at 2:16 PM, Kizorek, Michael <mkizorek@blm.gov> wrote:
>
> Charles,
>
> Other than the Humboldt, most of the "Rivers" on the maps in our district are more like creeks. The only other one that might get large enough to paddle is Martin Creek near Paradise Valley? We do have several small reservoirs to offer if you wanted to go that route? I would suggest Blue Lake, Knott Creek and Onion Reservoirs in the Pine Forrest area. Chimny Reservoir near Paradise Valley and Rye Patch Reservoir along the Humboldt River (between Lovelock and Winnemucca).
>
> Good luck, have fun, and let us know if you need anything else!
>
> --
> Michael R Kizorek
> Outdoor Recreation Planner
> Humboldt River Field Office
> Winnemucca District Office
> 775-623-1706

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of the Interior, Bureau of Land Management.

--
Michael R Kizorek
Outdoor Recreation Planner
Humboldt River Field Office
Winnemucca District Office
775-623-1706

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--
Michael McCampbell
Natural Resources Specialist
U.S. Bureau of Land Management
Humboldt River Field Office
office ph: 775-623-1722
mmccampbell@blm.gov

From: **Tipton Power** tiptonpower@gmail.com
Subject: Re: Nevada's Rivers and Navigation Law.
Date: March 25, 2019 at 8:35 AM
To: Charles cralbright@juno.com

Hi Charles. I would be happy to write something up about the stretches of Owyhee in Nevada I have been on. I will also pass this on to some other folks I know that may be able to contribute as well. Thanks.
-Tipton Power

On Wed, Mar 20, 2019 at 11:50 AM Charles <cralbright@juno.com> wrote:
Grant Amaral suggested contacting you.

So I am Charles Albright a paddler from Reno who is trying to "reform" Navigation Law in Nevada. The Truckee, Carson, Colorado and Virgin Rivers are considered navigable in Nevada. Every other river is not yet each has had years even generations of usage by native americans first and settlers after that. I am trying to get folks that have recreated on Nevada rivers to send me letters or emails about the trips on those rivers to prove that they are Indeed Navigable. So if you have paddled any of Nevada's Rivers other than the 4 above I would greatly appreciate it. If you know others who might assist with my quest please pass this on.

I can be reached at

1408 Washington Street
Reno NV 89503
775-324-5102 H

Thanks for any help you might lend me. Grant implied that you are based in the Owyhee, Bruneau, Jarbidge area for your paddling. So I am looking for folks who have done those rivers as well as Salmon Falls Creek, Cottonwood Creek, Mary's River, Humbolt, Quinn and Kings as well as any others . Happy Paddling! Great winter so far.

---

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worldhealthlabs.com
http://thirdpartyoffers.juno.com/TGL3131/5c928b51ce2e2b51293fst01vuc

From: **Seth Tonsmeire** seth@wildernessriver.com
Subject: Desert River Trips
Date: March 9, 2019 at 8:34 AM
To: cralbright@juno.com
Cc: Remi Keller remi@wildernessriver.com

Hi Charles,

Thanks for reaching out about trips on the Owyhee and Jarbidge Bruneau. We can do trips on the South Fork Owyhee on the Nevada sections. The East Fork in Idaho is our first choice for the upper Owyhee though. The scenery and experience is little better in my opinion on the East Fork. We normally start our upper trips at Garat Crossing, just below the Duck Valley reservation.

Do you have a particular section you are looking to float? Are you a solo traveler or have some friends or family interested too?

This spring looks like it should be a good season for desert rivers! We just posted an Owyhee article, The Owyhee: Desert River, Desert Stories which is a pretty fun read and some of our 2019 offerings are listed at the bottom.

Let me know what you are interested in or if you have any specific questions about our trips.

Best Regards,

Seth Tonsmeire

Wilderness River Outfitters
www.wildernessriver.com

office: 208.756.3959
cell: 406.579.8677

From: **Charles** cralbright@juno.com
Subject: Re: Nevada's Non Navigable Rivers issue
Date: March 10, 2019 at 5:11 PM
To: Alan Reynolds alrey@cox.net

If you wish to send a note to me I will turn it into the AG's office with the rest of the letters. Maybe just say you have paddled those rivers as fact, do not mention they were not in Nevada. That should help. Hope all is well for you. We did the Truckee Town Run to Boca today and about a mile or so from the take out we found a hunting dog in the river where it could not get out due to snow. It was very hypothermic. They put it on a SUP and paddled it out to Boca then took it to the Humane Society in Truckee. It should survive but that was one lucky dog! The day started with a small amount of sun the winds and snow. Nice to hear from you.

On Mar 10, 2019, at 4:30 PM, Alan Reynolds <alrey@cox.net> wrote:

Hi Charlie, thanks for doing this. I have done the three forks of the Owyhee, the Jarbidge and the WF Bruneau and have had great runs on each, they are all in Idaho (and Oregon). I don't have any good input for the Nevada side. We are dealing with Wild and Scenic river designations on the Salmon/Challis forest and having to deal with Custer county rednecks (lockin up workin rivers) but it is usually worth it. Anything else I can do? Alan

On 3/8/2019 11:05 AM, Charles wrote:

Hi Guys, hopé all is well for you 3. So I am trying to push two projects for paddlers. First is a proposal to inventory all the possible sites in Nevada where a person could use a non motorized paddle craft, i.e. a SUP, canoe, kayak, raft, tube to enjoy a pond, marsh, lake, river and anything related. (Maybe the TCID canal from Derby Dam to Fallon). I am going to eh State Legislature on the 12th to push that project.

Next is my continued desire to have the state of Nevada recognize that Rivers like the Owhyee, Bruneau, Jarbidge, Quinn, Reese, Humbolt, Marys, Kings and whatever else there is. SO what I am asking is that folks PLEASE take the time to write a letter to me regarding ANY runs that they have done on the above rivers or others in this state. So you three have spent lots of time running around this state with your jobs and travels and I know that all of you have done runs on rivers that Nevada declares non navigable. Please write me with a report for each river run you have done. What you did, when, flows, the experience, hazards, fences, irate land owners, whatever. I plan to give a massive dose of Federal Navigation Laws, State Navigation Laws, letters, history, photos, BLM, USFS, USFWS, NDOW, State Parks, State Lands and more to the new State Attorney General and ask of a legal opinion with regards to Navigable Rivers in Nevada. He can just make a legal opinion instead for the hassle that a legislative big would create. IF you know others who also have paddled river runs please ask them to submit a letter as well. The Owyhee, Jarbidge, Bruneau, Quinn, Walker, Salmon Falls Creek and I believe the Kings are ALL interstate Rivers. Interstate Navigation Laws should apply to them. BLM, USFS, USFWS and Army Corps all have their hands tied in that they say you can recreate on them but they cannot declare them Navigable when Nevada says they are not.

So please get me some letters if you can.

Charles Albright
1408 Washington Street
Reno. NV 89503

Thanks hope you all can help. Lets Make Nevada's Rivers OURS!

I copied a few others as well.

Oncologists Are Freaking Out Over True Cause of Cancer
tracking.nmhfiles.com
http://thirdpartyoffers.juno.com/TGL3131/5c82aefa951082ef652acst04vuc

From: **Gipson, Jason A CIV USARMY CESPK (USA)** Jason.A.Gipson@usace.army.mil
Subject: Rivers and Harbors Act and Clean Water Act Jurisdiction Information
Date: February 12, 2021 at 11:31 AM
To: cralbright@juno.com

Sir,

Here are links to our website that provide information you requested regarding potential jurisdiction/oversight/authority of rivers in Nevada under the Corps Regulatory program, Section 10 of the Rivers and Harbor Act and Section 404 of the Clean Water Act. Please let me know if you have any further questions.

https://www.spk.usace.army.mil/Missions/Regulatory/

https://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/Navigable-Waters-of-the-US/

Let us know how we're doing. Please complete the survey at:
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

Jason Gipson
Chief, Nevada-Utah Regulatory Section
533 West 2600 South, Suite 150
Bountiful, Utah 84010

Ph: 801-295-8380 x 8314
Cell: 801-725-1275

In response to COVID-19, Regulatory Division staff are teleworking from home or other approved location. We will do our best to administer the Regulatory Program in an effective and efficient manner. Priority will be given to health and safety activities and essential infrastructure. Action on your permit application or other request may be delayed during this emergency. We appreciate your patience over the next several weeks.