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**

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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



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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