Honorable Nevada Supreme Court Justices,

I am a Citizen of Nevada and have been since 1972. For that entire time I have been a paddler of rivers and lakes and virtually any body of water I can find. From very early on I was involved in teaching others to paddle, racing, promoting racing and being an advocate for rivers and the waters of Nevada. So in all those years I have spent many times addressing river usage issues, safety for rivers, hazards associated with rivers and dams and the rights of the public of Nevada to use our waters for recreation. As I am sure you know the numbers of folks that use our waters for recreation be it paddling, swimming, fishing, gathering food, sightseeing, relaxation, hunting or other enjoyments. Those numbers have gone up dramatically since our states population has exploded. One seldom saw kayaks or canoes on cars in the old days. Now it is a huge contribution to our states economic base.

So I have always been concerned about my rights and those of the rest of our citizens or travelers to access the waters of our state for whatever recreation they choose to enjoy on our Nevada Waters. Since you Justices are the top of the list when it comes to addressing OUR rights to OUR Waters I am writing to ask, beg, request, desire, question each of you with regards to the publics, my, your Rights to use this State of Nevada's Waters. After all these years of getting told NO YOU CANNOT PADDLE or RECREATE here, there or on that water or river. I have done LOTS of research on of State of Nevada Laws be they the State Constitution, Your rulings, US Supreme Court and other State Court rulings. I also have studied Nevada Water Law. I have talked to many State Departments, County, City and Governments Agencies about my concerns. Many times I have been successful and a number of times I have been snubbed or ignored. All these paths lead to Nevada's Supreme Court Justices as the last place to address the differences in what OUR Laws and Statutes say and what State and it's Agencies say.

Again, I am just one person but I feel that I represent any citizen or traveler thru our State who wishes to use OUR States Waters. So in what follows are numerous Nevada Constitutional Laws, State Water Laws, Court Rulings from You the Nevada Supreme Court, the US Supreme Court and those of other State Court Rulings.

So my basic question is are OUR State Waters, both Surface and Underground the property of this States Public. Our State Constitution, Nevada Water Laws and Federal Laws SAY they are the Publics. Before Statehood they belonged to the US. At Statehood the Public Trust Doctrine and our State Constitution said they belonged to the Public / State for the uses that the Public had including recreation. That was all of this States Waters above and below. You each must agree that is a fact in Nevada. Yet since some time after Statehood the Publics Rights to recreate and use all of this States Waters for our legal desires has been "Compromised". Virtually EVERY State in this Nation has laws saying that their Waters and Waterways are free of restrictions of usage by the public. That is not just interstate, intrastate of tidal waters but all waters. This is an application of hundreds of years of public rulings like the Magna Carta and other history of water also covered in the legal thoughts and rulings in following pages. Enclosed are numerous legal rulings all attest to the Publics Rights to this country's waters. So the framework for my questions to each of you is WHY? What happened that I and everybody else in this State can only LEGALLY Recreate on only 4 Rivers in Nevada. The Truckee, Carson, Virgin and Colorado Rivers. That is it! 4 Rivers I can use for recreation without in theory being

arrested, cited, intimidated, threatened or even shot at for using. And even on those rivers if someone owns land on both shores they can Legally place fences or barbed wire of other obstructions. Not exactly what was intended at Statehood. Yet virtually all of this States rivers, streams, and creeks do not allow legal public access. Somehow after Statehood and no Government Official has ever told me when or what Legal Decision was made that closed access to almost all of this States Publicly Owned Waters. As I said above Our State Constitution and Nevada Water Law all say every drop of water is the publics. Along with that right comes access. Typically up to Mean High Water for the Public to use as is the case on the Truckee, Carson, Virgin and Colorado. I questioned virtually all of our state agencies as you will see in the following pages and they ALL pointed to State Lands and the Term "Commerce " as what determines Navigability. And that was "Since Statehood" when both OUR States Constitution and again Nevada's Water Laws make NO MENTION of Commerce as determining what is Navigable or useable by the Public of Nevada. So my first Question of you the Supreme Court is when did our rights to our water get usurped in this way? What happened to the Public Trust Doctrine giving Nevada our rights to our water and Estoppel which say that right was first in line for all our waters. Many of this States Waters meet the Uniform Federal Test of Navigability. Listed below are sheets of our States Waters. Both each River and all of its upstream feeders, as well as Our Rivers that are Interstate Waterways which by Federal Rulings are Navigable in Fact.

So now if I may I will cover a number of examples of how this "Commerce Ruling at Statehood" is wrong for this State. I already mentioned Interstate and the Uniform Federal Test of Navigability, and many Court rulings. You also have made some rulings that assert Public Ownership of Our Waters. State Vs. Bunkowski was a big one where you ruled that the Carson and Truckee Rivers were Navigable due to floating logs down them for mining and other needs. Great but they also Floated Logs on the Walker River yet this was perhaps ignored probably due to irrigation, mining and other interests to usurp the rights of the Public on that drainage. State vs Bunkowski was good because your decision said that those waters and the land under its waters and the Land up to Mean High Water belonged to the State and Public. You also said that was true of other Nevada Waters. That was in the 1970's and maybe that is what changed the rights to being determined by Commerce. Now you have a Nevada State Park on the East Fork of the Walker River that is promoting paddling on a River that is Not Navigable in Nevada Law. And a strange twist for that is that a person can supposedly put in at the top of the State Park and paddle down to where there is Private Property where they MUST get out. Then travel to where the lower State Park is and then can paddle to the end of Park Property and must again get out. So from State Line up near Bridgeport California where above one can legally paddle the East Fork Walker to your State Park it is illegal to Paddle. And on all of the Walker River below Your State Park it is illegal to paddle or us the waters for any recreation where private property exists. No access to Mean High Water. Perfectly legal to put fences across the river. As for the West Fork Walker I present a Legal Document that says that even in California it is illegal to recreate yet California Law say it is legal till Stateline where again Nevada Laws usurps Federal and our own State Law to deny public usage.
We have numerous Interstate Rivers such as the Jarbidge, Bruneau, Owyhee, and Alamogosa Rivers that as soon as the reach our State Line they are Wild and Scenic. Not Navigable in our

State. The Jarbidge, Owyhee and Bruneau all have Commercial rafting on them. But again are NOT Navigable. Many folks paddle and recreate on our other Rivers and Streams and yet that activity is illegal due to our "Commerce at Statehood". Why can we NOT use Our Waters. USFWS and NDOW do stream restoration and fish stocking on over 400 waters in our State. Is that a form of Commerce?
The Clean Water Act say that any one wishing to do any projects on any of our waterways has to get a permit and each one of those water waterways is called Navigable by our Federal Government.
So I have also included many Federal and Other State Court Rulings. What Navigability laws are in our Adjoining States, a recent New Mexico Supreme Court Ruling for their Navigable Waters. Rulings that have since come down in our State regarding State Vs Bunkowski and its use in other legal cases. There is also Mineral County vs Lyon County where your court basically again ruled that the water in the Walker River belonged to far more than just the irrigators, cattle and mining interests.
Last is that much of this State is controlled by Federal Agencies like BLM, USFS and others. In talks with BLM and Forest Service I was told that they could NOT give information in Nevada regarding navigation of Our Waters due to our "Navigation determined by Commerce". They have a wonderful Book on Paddling all of the Bruneau, Jarbidge and Owyhee Rivers including many of their tributaries. You can buy it in Idaho and Oregon but not here.

So this is my intro letter to you. AS you will see I have worked hard to get you all of this information as well try to present it to each of you. I plan on delivering them to our Offices in Carson City. I seriously doubt that ANY of you will respond due to the Commerce Issue. But PLEASE at least respond that you got it and "Read" it. So what is my next step? Sue Nevada for their usurping of our most basic rights to Our Waters? I as a citizen cannot Question the Attorney General's Office. I tried last year. So is my path to file in a Federal Court for a Ruling with all of this existing Law Rulings? Get arrested and Fight it to the Nevada Supreme Court?

All of our Navigable Waters should be the Publics and have access to the Mean High Water Mark. That is what it was in 1864 when this state became a State. PLEASE RESPOND!

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June 9th 2022
Maybe it is time that Nevada joined the 21st Century. I cannot afford a high priced Attorney to do all of this. Please tell me my options to get what our State Constitution and Nevada Water Law say is RIGHT. Thanks for your time.

Nevada's Outdoor Recreation Economy Generates

$12.6 BILLION

IN ANNUAL CONSUMER SPENDING[1]

87,000

JOBS STATEWIDE

America's Outdoor Recreation Economy Generates

$887 BILLION

IN ANNUAL CONSUMER SPENDING

7.6 MILLION

AMERICAN JOBS

GET INVOLVED

1. Visit the OIA Advocacy Center at **outdoorindustry.org/advocacy** to learn more about the issues and actions affecting outdoor recreation.
2. Recognize outdoor recreation's role in creating healthy economies and healthy communities, and support policies that promote your outdoor recreation economy.
3. Go outside and enjoy the public lands and waters that are our nation's treasures. They belong to you.

OUTDOOR INDUSTRY ASSOCIATION

TOGETHER WE ARE A FORCE.

2580 55TH STREET
SUITE 101
BOULDER, CO 80301

OUTDOORINDUSTRY.ORG

These results report the economic contributions to the respective statewide economies from the outdoor recreation participants who reside within each congressional district. They do not represent the economic contributions that occur within any given district as a result of outdoor recreation.

[1] Estimates are based on where outdoor recreation participants reside, not where the activity or spending occurred. Totals for district data and state data may differ. Estimates do not include spending by international visitors, nor by those who do not participate in outdoor recreation.

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

Justification

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

Legal Precedent

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

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

"State v. Bunkowski, 1972" regarding the test of navigability of the State's rivers and streams and Shepherding citations regarding subsequent decisions are attached.

Dear Governor Sisolak, Attorney General Ford, and Department Directors and Administrators and Assistants:

We are asking that you each consider what we are supplying you in our plea for another view of Nevada's Waters. Our Nevada Laws say that ALL of the Surface Waters of Nevada belong TO THE STATE! That means as well to the Public of this State and Visitors as well. Yet in spite of Numerous Legal Rulings at both the National and State Level we do not have OUR WATERS Legally available for our citizens to use for recreation in any form. Be it hiking, fishing, gathering of food or furs, hunting, paddling, swimming and many more forms of recreation. How can this exist in 2021? Those Legal Rulings repeatedly agree that Nevada's Waters are indeed Navigable and therefore available for all forms of Recreation along the length of those Waterways up to the Mean High Water line of each Waterway. So how do we go about agreeing that the Laws and Legal Rulings of Nevada and the US Government favor the Publics Right to use those Waterways? The only way available to those of us seeking another view of this States Water is to get YOUR DEPARTMENTS to request a Legal Opinion of the Attorney Generals Office. I and others of the public have NO OTHER OPTION other than legislative. Nevada and US Law Rulings already say what the Law is so why should legislative, expensive and time consuming options be required?

Below We will explain many reasons why your agencies should make that request of the Attorney Generals Office for a new Legal View of our Waters and Waterways.

Again we will start with the fact that Nevada legally OWNS All the Surface Waters and Waterways of Nevada.

Nevada has many Interstate flowing Rivers and streams. The Carson, Truckee, Walker, Bruneau, Jarbidge, Owyhee, Virgin, Colorado, Amargosa, Quinn, Kings, Salmon Falls Creek and many more. Federal Laws say that ALL Interstate Waters Ways are Navigable in fact. Nevada has posted that only the Colorado, Virgin, Truckee and Carson Rivers are Navigable. Why? Commerce! The Carson and Truckee Rivers due to log floating for the mining needs. That ALSO occurred on the Walker River yet for other reasons that was denied Navigable Status. The Commerce issue comes from the time of Statehood for Nevada in 1864. Every other waterway in Nevada was denied a Navigable Status when in reality history says the opposite. The first white people to come to Nevada were fur hunters which is an Act of Commerce. There are still many folks who hunt fur bearing animals in Nevada. Just ask NDOW. The term Commerce also is used for hunting and gathering. What did all of our first pioneers do and the Native Americans ahead of them do for food? They were living by this states waters and finding anything they could to feed, clothe and house their families and livestock. So how is it that this was ignored when Statehood occurred? This would still be true today but for the fact that many of Nevada's Waterways cannot legally be accessed for those activities. Say What! History of Commerce denied.

So how will a State Wide acceptance of Navigability for our State Owned Waters benefit our State?

First and biggest is that the Lands adjoining Nevada's Legally Navigable Waters would be legally accessible to the public for all forms of recreation. (Except perhaps limits on hunting in some areas with the discharge of firearms limits). Both on the waters and above to the Mean High Water Line where the limit currently exists on the currently Navigable Rivers. State Lands would control those Waters and Lands. It would gain control of the riverbeds, waters and land to Mean High Water Line on ALL of Nevada's Waterways should you agree that they are in fact Navigable. A basic question to ask once that is considered is who will better care for those Riparian Lands and Waters? State Lands or

other land owners, interests, mining or others. State Lands does an excellent job now. It would create a far greater job for them but I am sure they would gladly accept that.

Others benefitting Navigable Status are several of Conservation and Natural Resources Departments. State Parks currently has a State Park on the East Fork Walker River. Where they are currently promoting paddling, hiking, fishing, and other forms of Recreation along the waterway there. YET it is not considered Navigable by Nevada. So what is the liability for Nevada should an incident such as a drowning occur at a River Park that is NOT Navigable? They are promoting the feasibility of paddling from the California State Line area of the East Fork Walker all the way to the current park location. Yet at the Park itself there are two sections that promote river use but there is a section of Private Property in between where again it is ILLEGAL to use the river and its shoreline by the public. I have recreated via kayak from near the State Line with California to the area of the Walker River State Park. It is very scenic and relatively easy but has several places where the river ends in vast thickets of brush due to small floods from side canyons. There is also a history of barbed wire fences. Several of which we encountered. Plus some rather dangerous drops through boulders and trees.

The Office of Outdoor Recreation has now been established by Governor Sisolak and how can a State Promote Outdoor Recreation in a State here it is illegal to use all by 4 waterways? ODNR Staff have been working on compiling locations for public use of trails, mountain bike trails, OHV trails and other ways of promoting on Internet Sites their usage. Yet they are unable to list anything to do with recreation of Non Navigable Waterways currently in this State. Again one has to ask why?

Would not Outdoor Recreation and Tourism and Cultural Affairs not benefit GREATLY from a new view of our States Resources? They are currently doing much to promote Tourism or our rural State Areas. Do you think that those rural areas might benefit from additional areas available to recreate and enjoy? Currently they cannot legally offer these areas for recreation due to our current view of the waters in those rural areas. Hamstringed is a word that comes to mind with the current view of this States Waterways.

Would not the State's Water Engineer and his Staff benefit from the legalization of all our State's Waterways. They after all oversee all of Nevada's Waters. How could it hurt their affairs?

Nevada's Department of Wildlife would greatly benefit from this new look at our State's Waterways. It would vastly improve the publics usage of our Waters with greater access. Again it is illegal currently to access all but 4 waterways in Nevada. Much is overlooked by them currently but still by Declaring ALL of Nevada's Waterways Legal they would have legal access to the Mean High Water Line on all of Nevadas Waterways. Not just for fishing but hunting (again with limits), fur gathering and paddling for recreation.

So there are other considerations. First is the thought of Commerce in this year 2021. Again US Law sees recreation as a form of Commerce. There are thousands of non motorized paddlers in this state. Just look on top of cars everywhere you drive. There are several rivers in our north State that already have COMMERCIAL Rafting on them. They are the Bruneau, Jarbidge and Owyhee. Yet Nevada still sees those Rivers as Non Navigable. There are numerous Guide Books including Bureau of Land Management printed books that describe those waters and are considered Navigable in fact. In conversations I have had with BLM, US Forest Service, US Fish and Wildlife and Bureau of Reclamation Officials they ALL legally cannot say that all but the current 4 Rivers are Navigable in fact. Amazing!!

US Fish and Wildlife as well as NDOW do rehabilitation and fishery management on many streams, creeks and rivers in this state. They are spend lots of tax payer monies on these projects to benefit the riparian habitat as well as benefit the public for fishing opportunities. Is this a form of Commerce? It certainly enhances opportunities for access to areas below Mean High Water Line on all of those State Waterways.

The US Congress has created many Laws that oversee the waters of our states. One of them is the Clean Waters Act. Over 400 Waterways in this State are or were under their oversight. Nevada has agreed legally to abide by this law. Each and every one of those Waterways is by FACT considered Legally Navigable by the US and in enforcement by the Army Corps of Engineers (ACE). ANY project that was too possibly in any way affect any of those 400 plus Waterways required a ACE permit with drawings, engineering and a printed plan to be approved. Again every one of those 400 plus Waterways was deemed Navigable in Fact and any possible disturbance to said Waterways required a permit to limit pollution of them and OUR waters. Since its passage of the Clean Water Act every permit issued to any project in Nevada was an acknowledgement of that Waterway as being in FACT Navigable. Surely this and other stated aspects listed above speaks as to why Nevada Departments must ask for an Attorney Generals Opinion on our Waters being indeed Navigable in fact.

I have in my possession many Guide Books, legal books and letters from other paddlers who have spent days paddling on our currently not considered Navigable Waters. Very glad to share them with any of you. Boxes and bags full of info that should be part of any discussion about our Waters and Navigability of them.

Another opportunity for Nevada with a change in Navigable Status for our States Waterways would be the possibility of having many of our States Waterways being declared Wild and Scenic on some of their sections. The Bruneau, Jarbidge, Owyhee and Amargosa have sections in other states that are Wild and Scenic. In a state that only has one National Park do you think it might benefit Tourism and Outdoor Recreation in Nevada to have a few Wild and Scenic Rivers? They cannot exist if they are Non Navigable as they are now. Remember it is 2021 NOT 1864.

I have much more that I could say that further supports our view of Nevada's Waters but I think I have covered enough. I would GLADLY meet with any of you that wish to entertain a positive view of our States future. My info will be listed below.

AS you and I both know our world has changed greatly with CoVid and the public closures of your Offices. I still intend to deliver this note along with some Legal Rulings that support our quest to get a 2021 view of Nevada's Waterways. Our Governor and many of you Departments are very challenged by CoVid and meeting folks like me from the public and there is also this latest challenge to our government that we all must live with now. I still will attempt to delivery this to each of your Offices and the addressed Officials. Your efforts to continue to do what needs to be done to manage our states needs are appreciated greatly. Especially those of our Governor. His job has become unimaginable.

So who am I the person writing all this? I am part of a greater group of paddling recreation seekers who see a bigger picture for Nevada's future. My name is Charles Albright and I have been paddling since childhood but especially kayak and canoeing since 1971. I moved to Nevada in 1972 and started exploring rivers and lakes then. Living in Carson and Tahoe at the time gave me access to the East Sierras and all of its creeks, rivers and lakes. I moved to Reno in 1976 and quickly began creating a paddling community there and nearby. I taught paddling for 21 years for free and taught thousands of folks the basics for well past that. I am the reason there is a White Water Park in Reno and by example

one in Sparks as well. It took our group 8 years of efforts to get it created. I have fought many battles with folks for river issues. I finally got Sierra Pacific Power to work with us for safety and signage at their dams and continue to work with TMWA for the benefit of river and shore users. One of SPPCO's Dams was ILLEAGLLY built with no permits what so ever at Chalk Bluff on the Truckee River. When they created a Low Head Dam which have killed hundreds of people across this country I raised a big stink and they had to come back in and "make it safer" but it still is a major hazard. I had "battles" with Reno PD who claimed they could remove paddlers and make law with regards to the river like they owned a "Legally Navigable River". We several times were confronted by officers who said we could not paddle that it was illegal. One time they kicked 4 friends off the river and loaded them in a paddy wagon and drove their shuttle for them. After a rather spirited conversation with the head officer that day I contacted many state and local officials like NDOW, Governor, AG's, County and Reno Officials and low and behold it was NO LONGER a problem. I put on races at Wingfield Park for years and still assist with the River Festival each Year. I have led hundreds of paddling trips on this states waterways. I was a founding member of One Truckee River and still work with Iris on many issues. I have led hundreds of River Clean ups on the Truckee River. I have been working for years to solve the issue of Homeless Camps along our River. I have a great working relationship with our Mayor, Parks Department and Fire Department. Reno Fire asked me to PLEASE assist with getting the many Homeless Camp issues solved. I have promoted several river paddles to take officials, news and others to witness the problem first hand from water level. I am also working with Grant Denton who is the official Homeless Liaison for Reno, Washoe and Sparks for the Homeless Issues. Grant has become a great friend and I am now working on getting him and his clean up crews more higher quality trash bags for their efforts to clean up the shoreline and river channel. There is much more but I will end with the facts that I have been a numerous US Teams, competed in Europe and Canada numerous times and also been a National Champion several times and finished in 4th place and 6th several times representing the US in International Competition. So I hope that you folks do not see me as some kind of Wacko. I want what will be best for our STATE and its PUBLIC!

Sincerely,

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I hope you folks have a view towards this states future that includes its waters.

December 17, 2020

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

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

Dear Mr. Attorney General:

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

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

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

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

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

"Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States, supra, [260 U.S.] p. 87, [43 S. Ct. 60]*. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."
To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in *People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 454 (1971)*, that, "The streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." See also State, by *Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278, 287 (1954)*. Reference to People v. Mack, supra, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. **For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal "navigability for title" test.**
That test is stated by the court in *United States v. Holt Bank, supra, 270 U.S. at 56, 46 S. Ct. at 199.*

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

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

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. *State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972)*. 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. *Bunkowski, Id. at 1233-36.* This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233.* Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable. *Bunkowski, Id. at 1235*. Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

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

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

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

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

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. *Op. Att'y Gen. 80-11 (Nev. 1980)*. Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real life situations include:

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

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

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

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

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

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

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

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

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

Very Truly Yours,
Fred Atcheson, Esquire
contact person: Charles Albright, tel. (775) 324-5102; email: cralbright@juno.com

Additional citations:
Federal law is supreme: Supremacy Clause, U.S. Constitution, Article VI, Clause 2.
Forever free: Northwest Ordinance of 1787, chapter 8, 1 Stat. 50.
U.S. Supreme Court regarding forever free public highways: The Montello, 87 U.S. 430 (1874).
Early fur-trading days: Economy Light & Power, 256 U.S. 113 (1921).
Floating out of logs: United States v. Appalachian Electric, 311 U.S. 377 (1940). (rivers are navigable even if they have been "out of use for a hundred years").
Use by recreation industry use is indeed commercial: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Small, shallow river in Florida: Goodman v. City of Crystal River, 669 F.Supp. 394 (M.D>Fla. 1987).
Shallow, rocky river in Maine: Swan Falls Corporation, 53 F.E.R.C. p 61,309 (1990).
Small, shallow river in Indiana: David Zinkie, 53 F.E.R.C. p 61,029 (1990).
Shallow, rocky river in New York: New York Sate Department of Conservation v. Federal Energy Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).

Kayak and canoe classes on small, shallow, whitewater river are commerce: Atlanta School of Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).
Fur traders used smaller rivers and creeks than those used today: The American Fur Trade of the Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.
Ankle-deep creeks are legally navigable: Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).
Navigable in fact are navigable in law: The Daniel Ball, 77 U.S. 557 (1870).
No official designation needed: The Montello, 87 U.S. 430 (1874).
No historical record needed: United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian Electric, 311 U.S. 377 (1940)
Recreational use shows past usability: Appalachian Electric, 311 U.S. 377 (1940).
Easement regardless of who owns the riverbed: Montana v. United States, 450 U.S. 544 (1981).
Right of the public supersedes private ownership: United States v. Cress, 243 U.S. 316 (1917).
Servitude includes easement: Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861 (4th Cir.1984).
Right to portage around obstructions: The Montello, 87 U.S. 430 (1874)
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).
Walking along the banks: The Montello , 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9 (1849).
Landowner fences across rivers violate federal law: 33 U.S. Code 403
Push down unauthorized fences: Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).
Violation to allow cattle to trample: Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).
Walking across private land: Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1 Stat. 50 confirming that the "carrying places" between navigable stretches of river must remain "forever free" to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430 (18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never "abdicate" their duty to provide public access "freed from the obstruction or interference of private parties.") Gion v. Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law "requiring municipalities to maintain access to navigable waters" and "requiring the state to reserve convenient access to navigable waters.")
Public access from bridges: Public Lands Access Association (PLAA) v. Board of Commissioners of Madison County, 373 Montana 277, _P.3d_(Jan.2014).
States cannot interfere with navigation: Gibbons v. Ogden, 22 U.S. 1 (124).
States are the guardians of free navigation: Pollard v. Hagan, 44 U.S. 212 (1845).
Paramount right of navigation: Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).
Public property of the nation: United States v. Rands, 389 U.S. 121 (1967).
Paramount power to maintain the public easement: Montana v. United States, 450 U.S. 544 (1981).
Answers are determined by federal law, not state law: Atlanta School of Kayaking v. Douglasville County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).
State law cannot alter federal definitions, because they are "necessarily a question of federal law.": United States v. Holt State Bank, 270 U.S. 49 (1926).
State definitions cannot deny the public easement: Weber v. Board of Harbor Commissioners, 895 U.S. 57 (1873).
State authority is subject to the public's "paramount right of navigation.": Hitchings v. Del Rio Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
State becomes the owner of the beds of rivers: Martin v. Waddell, 41 U.S. 367 (1842); Pollard v. Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
Private ownership cannot impair public easement: Illinois Central v. Illinois, 146 U.S. 387 (1892).

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

December 17, 2020

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

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

Dear Mr. Attorney General:

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

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

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

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

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

"Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States, supra, [260 U.S.] p. 87, [43 S. Ct. 60]*. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."
To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in *People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 454 (1971)*, that, "The streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." See also State, by *Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278, 287 (1954)*. Reference to People v. Mack, supra, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. **For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal "navigability for title" test.**
That test is stated by the court in *United States v. Holt Bank, supra, 270 U.S. at 56, 46 S. Ct. at 199.*

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

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

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. *State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972)*. 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. *Bunkowski, Id. at 1233-36.* This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233.* Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable. *Bunkowski, Id. at 1235*. Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

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

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

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

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

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. *Op. Att'y Gen. 80-11 (Nev. 1980)*. Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real life situations include:
Sam Essig, a very delightful and pleasant employee at Walker River State Recreation Area, at no fault of her own, gave misinformation to one of our members: "The East Walker is still non-navigable. The only open area on the East Walker River that can be floated by the public is the 4-1/2 to 5 miles between the Squeeze Shoot and Riverbend Campground at Pitchfork. Lobbyists and agencies are trying to change that so that boaters can float all the way from Bridgeport to the Park. Non-navigable means there is private land on both sides of the river; it means that you

can't go on the river without everyone's permission." Tim Weakley reported, "The rancher above the park has barbed stretched across the river to keep his cattle in." Is it not an irony that the public is barred from their legal right of river usage while the private landowner is guilty of allowing his cattle to trample the banks of the river and cross over? *Clean Water Act, 33 U.S.C. 1251 Sec. 101(a)(7) (confirming the national goal of preventing "nonpoint source pollution" from entering rivers, such as runoff from cattle.)*

Scott, a dedicated employee at Fort Churchill, gave the following advice to one of our callers: "If you don't want confrontations, I suggest floating from Fort Churchill down to Lake Lahontan because it is all state owned land." Scott's well-meaning advise inadvertently restricted the nervous boater's desire and legal right to float the Carson River section from Dayton to Fort Churchill. There are also manmade obstacles of impassable rocks that can only be portaged and headgate across the entire river, called the "drowning machine" on that stretch.

Evelyn Tschannen, canoeist of Fallon, "We landed our canoes on an island midstream on the Dearborn River in Montana to camp. A woman came to the water's edge and told us we should move along before her husband came down because he would have a gun and would not hesitate to use it."

These incidents are the impetus behind our request for opinion asking, CAN Nevada, in order to avoid disputes and uncomfortable confrontations with landowners, rid rivers of dangerous barbed wire fences and other manmade hazards across rivers, avoid landowner harassment from the banks of rivers and citations from uninformed law enforcement officials, provide the public access entries to navigable rivers, enable boaters to scout and portage dangerous obstacles without fear of trespassing reprisals? Can Nevada align State laws with Federal laws on the public's right to use our rivers in a lawful manner?

Very Truly Yours,
Fred Atcheson, Esquire
contact person: Charles Albright, tel. (775) 324-5102; email: cralbright@juno.com

Additional citations:
Federal law is supreme: Supremacy Clause, U.S. Constitution, Article VI, Clause 2.
Forever free: Northwest Ordinance of 1787, chapter 8, 1 Stat. 50.
U.S. Supreme Court regarding forever free public highways: The Montello, 87 U.S. 430 (1874).
Early fur-trading days: Economy Light & Power, 256 U.S. 113 (1921).
Floating out of logs: United States v. Appalachian Electric, 311 U.S. 377 (1940). (rivers are navigable even if they have been "out of use for a hundred years").
Use by recreation industry use is indeed commercial: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Small, shallow river in Florida: Goodman v. City of Crystal River, 669 F.Supp. 394 (M.D>Fla. 1987).

Shallow, rocky river in Maine: Swan Falls Corporation, 53 F.E.R.C. p 61,309 (1990).
Small, shallow river in Indiana: David Zinkie, 53 F.E.R.C. p 61,029 (1990).
Shallow, rocky river in New York: New York Sate Department of Conservation v. Federal Energy Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).
Kayak and canoe classes on small, shallow, whitewater river are commerce: Atlanta School of Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).
Fur traders used smaller rivers and creeks than those used today: The American Fur Trade of the Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.
Ankle-deep creeks are legally navigable: Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).
Navigable in fact are navigable in law: The Daniel Ball, 77 U.S. 557 (1870).
No official designation needed: The Montello, 87 U.S. 430 (1874).
No historical record needed: United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian Electric, 311 U.S. 377 (1940)
Recreational use shows past usability: Appalachian Electric (just cited)
Easement regardless of who owns the riverbed: Montana v. United States, 450 U.S. 544 (1981).
Right of the public supersedes private ownership: United States v. Cress, 243 U.S. 316 (1917).
Servitude includes easement: Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861 (4th Cir.1984).
Right to potage around obstructions: The Montello, 87 U.S. 430 (1874)
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).
Walking along the banks: The Montello , 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9 (1849).
Landowner fences across rivers violate federal law: 33 U.S. Code 403
Push down unauthorized fences: Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).
Violation to allow cattle to trample: Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).
Walking across private land: Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1 Stat. 50 confirming that the "carrying places" between navigable stretches of river must remain "forever free" to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430 (18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never "abdicate" their duty to provide public access "freed from the obstruction or interference of private parties.") Gion v. Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law "requiring municipalities to maintain access to navigable waters" and "requiring the state to reserve convenient access to navigable waters.")
Public access from bridges: Public Lands Access Association (PLAA) v. Board of Commissioners of Madison County, 373 Montana 277, _P.3d_(Jan.2014).
States cannot interfere with navigation: Gibbons v. Ogden, 22 U.S. 1 (124).
States are the guardians of free navigation: Pollard v. Hagan, 44 U.S. 212 (1845).
Paramount right of navigation: Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).
Public property of the nation: United States v. Rands, 389 U.S. 121 (1967).
Paramount power to maintain the public easement: Montana v. United States, 450 U.S. 544 (1981).
Answers are determined by federal law, not state law: Atlanta School of Kayaking v. Douglasville County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).
State law cannot alter federal definitions, because they are "necessarily a question of federal law.": United States v. Holt State Bank, 270 U.S. 49 (1926).
State definitions cannot deny the public easement: Weber v. Board of Harbor Commissioners, 895 U.S. 57 (1873).

State authority is subject to the public's "paramount right of navigation.": Hitchings v. Del Rio Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
State becomes the owner of the beds of rivers: Martin v. Waddell, 41 U.S. 367 (1842); Pollard v. Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
Private ownership cannot impair public easement: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Right of public to use waterway supersedes any claim of private ownership": United States v. Cress, 243 U.S. 316 (1917).
States can manage public use of rivers, for public health and safety, but they cannot deny easement to use navigable rivers: Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).
States can never abdicate the public trust: Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 138 (Ariz. App. 1991).
Usable for commercial recreation are navigable: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981).
Without obstruction or interference: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Rivers navigable for Commerce Clause is defined by federal law, not state law: United States v. Holt State Bank, 270 U.S. 49 (1926).
Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.
Rights to scout and portage: The Montello, 87 U.S. 430 (1874)
Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine 9 (1849).
Public trust for the benefit of the whole community: Martin v. Waddell, 41 U.S. 367 (1842).
Navigational easement: Montana v. United States, 450 U.S. 544 (1981) (confirming public rights to engage in sports fishing and duck hunting on shallow river with rapids).
State laws cannot deny public rights to use navigable rivers: Gibbons v. Ogden, 22 U.S. 1 (1824).
Freed from obstruction: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Crime to block public use of navigable rivers: 33 U.S. Code 403.
Public right to navigate and walk along beds and banks through private land: Scranton v. Wheeler, 179 U.S. 141 (1900).
Private ownership of the beds and banks of rivers is "always subject to public rights to use the stream.": United States v. Cress, 243 U.S. 316 (1917). ("the right of the public to use a waterway supersedes any claim of private ownership.")
Rights to fish and fowl: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S. 367 (1842).
Rivers are legally navigable if usable for canoeing: Economy Light v. United States, 256 U.S. 113 (1921).
If usable for kayaking: Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469 (N.D.Ga.1997).
For rafting: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir.1989).
For log drives: United States v. Appalachian Electric, 311 U.S. 377 (1940).
For lumber drives: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).
It is unlawful to block the public easement for "sports fishing and duck hunting.": Montana v. United States, 450 U.S. 544 (1981). Atlanta School of Kayaking (cited above) **(public rights to use rivers navigable in kayaks "are determined by federal law," not state law.)** Public trust: Martin v. Waddell, 41 U.S. 367 (1842).
violation to allow cattle to trample: Clean Water Act, 33 U.S.C. 1251 Sec. 101(a)(7) (confirming the national goal of preventing "nonpoint source pollution" from entering rivers, such as runoff from cattle.)

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Usable for commercial recreation are navigable: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981).
Without obstruction or interference: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Rivers navigable for Commerce Clause is defined by federal law, not state law: United States v. Holt State Bank, 270 U.S. 49 (1926).
Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.
Rights to scout and portage: The Montello, 87 U.S. 430 (1874)
Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine 9 (1849).
Public trust for the benefit of the whole community: Martin v. Waddell, 41 U.S. 367 (1842).
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Crime to block public use of navigable rivers: 33 U.S. Code 403.
Public right to navigate and walk along beds and banks through private land: Scranton v. Wheeler, 179 U.S. 141 (1900).
Private ownership of the beds and banks of rivers is "always subject to public rights to use the stream.": United States v. Cress, 243 U.S. 316 (1917). ("the right of the public to use a waterway supersedes any claim of private ownership.")
Rights to fish and fowl: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S. 367 (1842).
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For log drives: United States v. Appalachian Electric, 311 U.S. 377 (1940).
For lumber drives: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).
It **is unlawful to block the public easement for "sports fishing and duck hunting.**": Montana v. United States, 450 U.S. 544 (1981). Atlanta School of Kayaking (cited above) (**public rights to use rivers navigable in kayaks "are determined by federal law," not state law.**) Public trust: Martin v. Waddell, 41 U.S. 367 (1842).
violation to allow cattle to trample: Clean Water Act, 33 U.S.C. 1251 Sec. 101(a)(7) (confirming the national goal of preventing "nonpoint source pollution" from entering rivers, such as runoff from cattle.)

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

OPINION

ZENOFF, Chief Justice:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

.....

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment reversed.

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

NOTES

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

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

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

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

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

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)

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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

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

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.'

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Nevada Division of
STATE LANDS

STATE OF NEVADA
Department of Conservation & Natural Resources
Steve Sisolak, *Governor*
Bradley Crowell, *Director*
Charles Donohue, *Administrator*

February 3, 2021

Charles Albright
1408 Washington Street
Reno NV 89503

Re: Request for Legal Opinion to Verify All Nevada Waters as Navigable

Mr. Albright,

Thank you for your continued interest in promoting the use and enjoyment of Nevada's navigable waters.

Nevada asserts ownership of eight sovereign lands, per NAC 322.060. The term "navigable body of water" within NAC 322.060 is a legal term of art created by case law. As defined in NAC 322.060, "'Navigable body of water' means a body of water which is declared navigable pursuant to NRS 537.010, 537.020 or 537.030 or which is determined to have been navigable on the date on which Nevada was admitted into statehood, including, without limitation, the Carson River, the Colorado River, Lake Tahoe, the Truckee River, the Virgin River, Walker Lake, Washoe Lake and Winnemucca Lake."

The Walker River is currently not designated as a state sovereign land, so you are correct its bed and banks are currently considered private property. For the Walker River and other waters of the state to be determined state sovereign land, they must qualify as navigable in accordance with the case law. This includes establishing facts showing the physical condition of and the uses on the river as they were at statehood in 1864. This may include newspaper articles, letters, early photographs, and other historical evidence demonstrating the river was navigable in its natural and ordinary condition and was used or susceptible of being used as a highway for commerce in 1864. NAC 322.060 derives from Legislative action and state and federal case law applying these tests to the applicable facts for those eight bodies of water.

I appreciate the time you have invested in providing this information and our previous discussions on this issue.

Sincerely,

Charles Donohue

Charles Donohue
Administrator – State Land Registrar

Brian Sandoval
Governor

State of Nevada

DEPARTMENT OF WILDLIFE

6980 Sierra Center Parkway, Suite 120
Reno, Nevada 89511
(775) 688-1500 • Fax (775) 688-1595

TONY WASLEY
Director

BONNIE LONG
Deputy Director

JACK ROBB
Deputy Director

February 18, 2021

Charles Albright
1408 Washington Street
Reno, NV 89503

Dear Mr. Albright,

I am in receipt of your letter requesting an opinion from the Attorney General's office that all Nevada waterways be considered navigable.

Attached you will find a letter from the State Land Registrar's office addressing the same concern by another Nevada outdoor enthusiast.

Thank you for your continued interest in promoting the use and enjoyment of Nevada's navigable waters.

Sincerely,

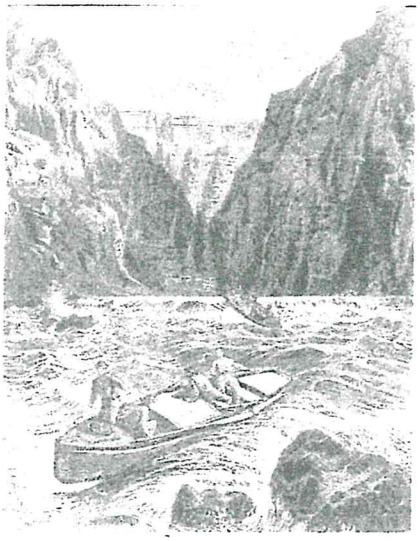
Tony Wasley

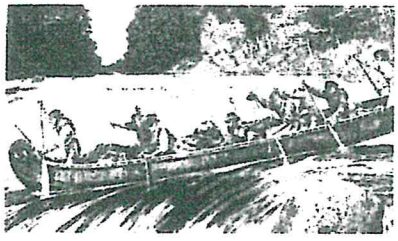
Tony Wasley
Director
Nevada Department of Wildlife
6980 Sierra Center Pkwy, Suite #120, Reno, NV 89511
775-688-1590

Public Rights on Rivers

Canoeing, kayaking, rafting, fishing, and fowling rights

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]

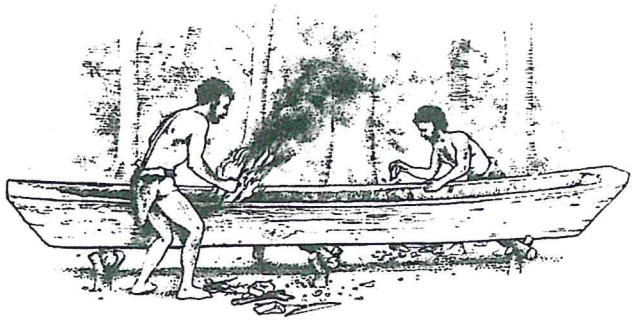
River law, like other areas of law, was not created in a vacuum. Instead, it developed in response to evolving human uses of rivers, and the legal disputes that arose in the course of those uses. Public rights on rivers today are based largely on historical uses of rivers. For example, the U.S. Supreme 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.

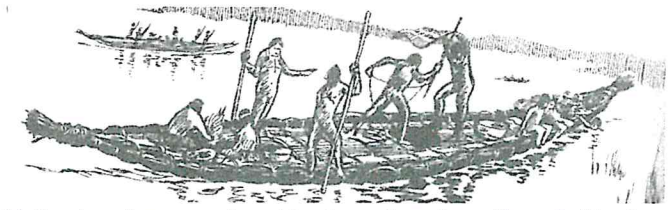
[5] **Oldest known dugout canoes:** *The History of the Ship* by Richard Woodman, Lyons Press 2002, page 11.

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.

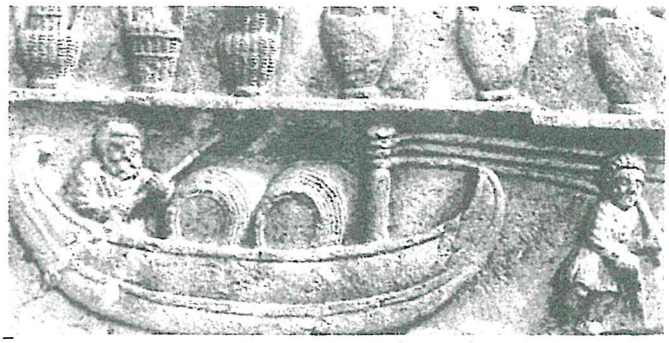
[12] **Ancient rafts using inflated animal skins:** *The History of the Ship* by Richard Woodman, Lyons Press 2002, page 12.

[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.

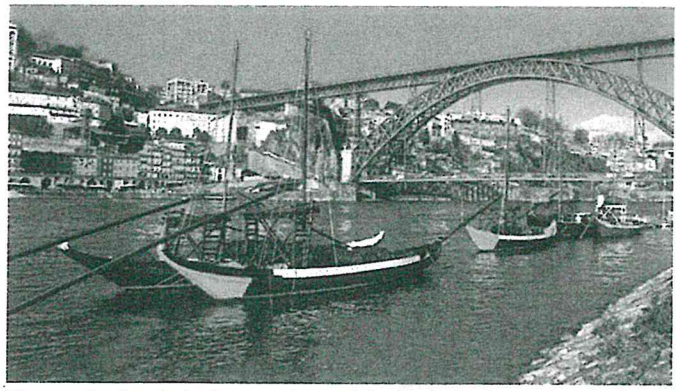
[16] **Hindu origins of baptism:** *The World's Religions: Our Great Wisdom Traditions* by Huston Smith, HarperOne 1991.

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.

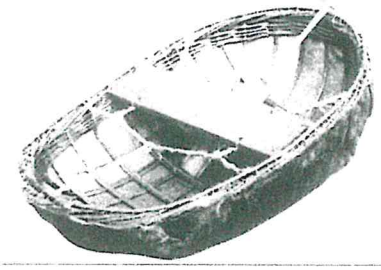
The practice of cordelling (described earlier) continued in parts of Europe into modern times. For example, for centuries numerous vineyards on the hillsides surrounding the Douro River in Portugal have grown the grapes used to make port wine. The new wine was traditionally carried down the river, though 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.)

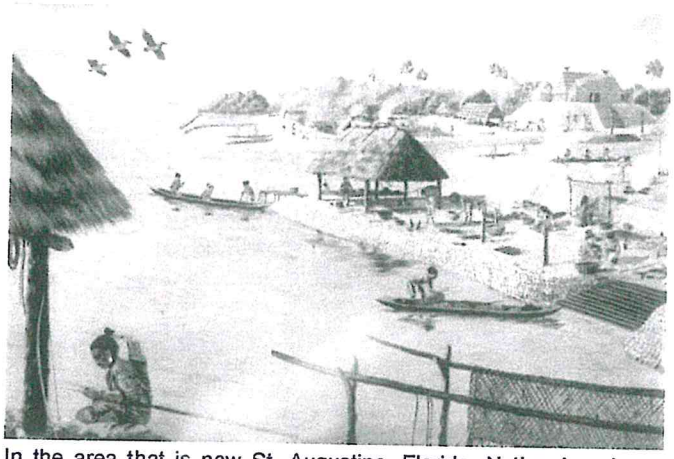
[31] **Turkish for kayak:** "Starting from Greenland" at idiocentrism.com/kayak.htm.

[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.

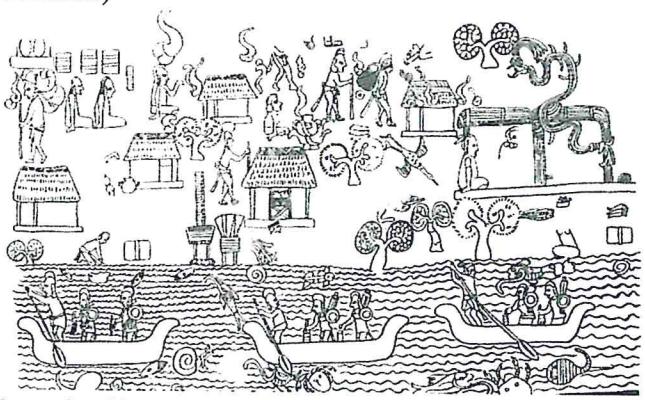
They also used kayaks for transportation. They put food, furs, other freight, and even their children inside these kayaks, then paddled them across cold, windy waters in relative safety.[43]

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]

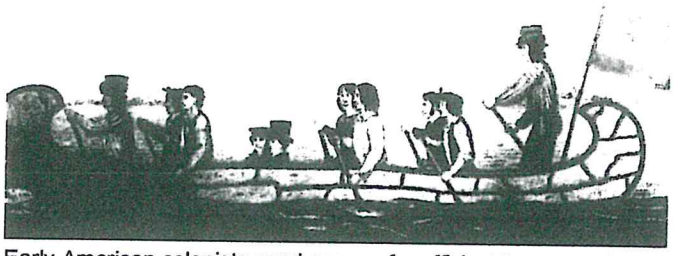
Colonial logging on rivers. Colonists often used rivers to transport lumber. They felled trees in the mountains, then cut them on the spot into shorter logs, then floated the logs down rivers to crews waiting at large eddies downstream, who pulled them out of the river and used them to build new settlements.

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 French-men 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]

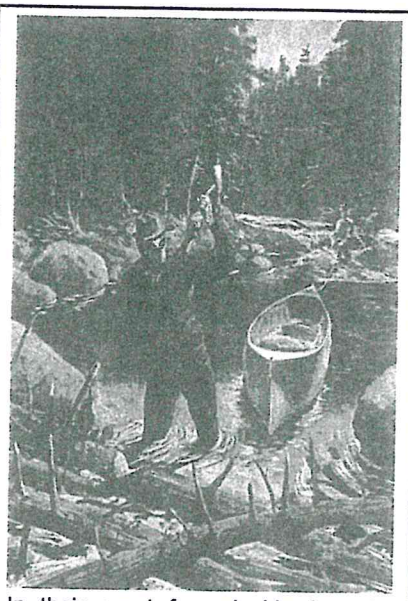
Today, novelists and movie makers often focus on conflict and warfare between native tribes and European settlers. Conflicts were indeed common in the 1800s, but during colonial times, in the 1600s and 1700s, traders usually found that the tribes were eager to trade furs for knives, tools, jewelry, and 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.

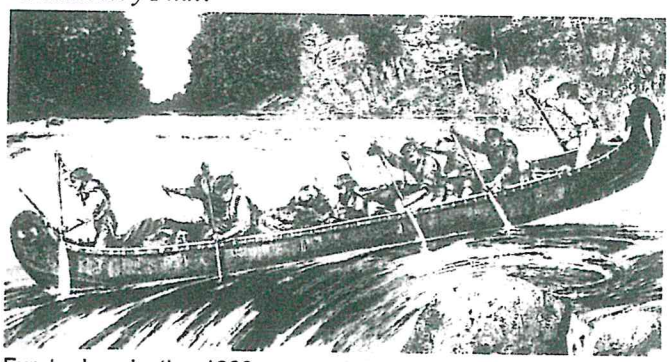
In other words, the Lewis and Clark expedition was not the initial human exploration of an untouched wilderness. Instead, it was an official fact-finding expedition, sent by the young U.S. government, to document the resources, and claim dominion, over lands that had already been occupied by tribes and 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]

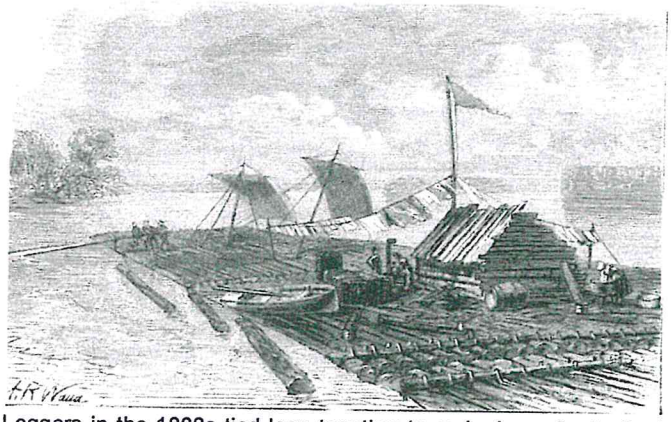
Canoes were the basic watercraft used in this commerce. As mentioned earlier, canoes were paddled upstream as well as downstream, and were carried around obstructions in rivers, as well as from one river to another.

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.



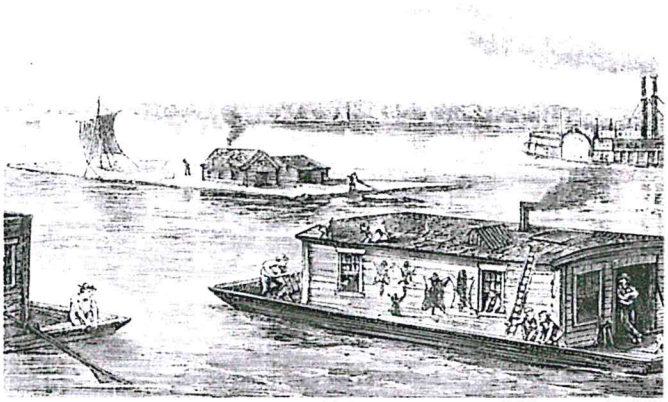
Loggers in the 1800s tied logs together to make log rafts, to float the logs down rivers to market, sometimes with cargo on top.

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]

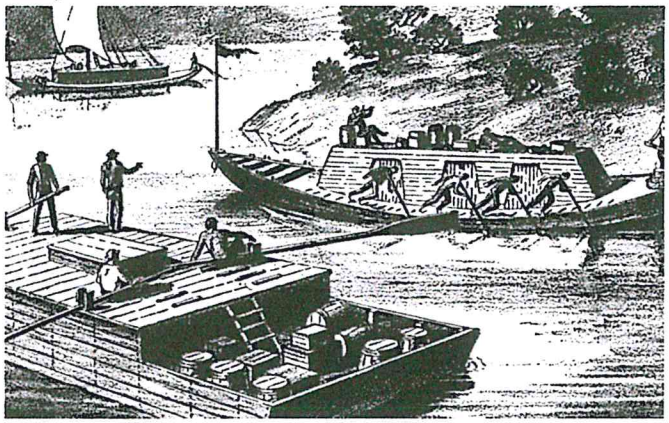


Flatboats, log rafts, steamboats, canoes, and other craft navigated American rivers through the 1800s.

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

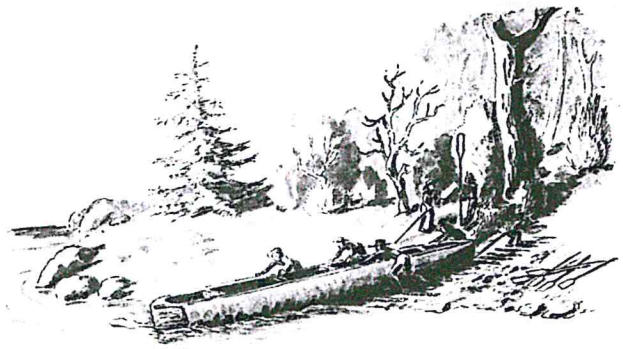
[74] **Fur trade during the 1800s:** *The American Fur Trade of the Far West* by Hiram Martin Chittenden, Stanford Univ. 1936-1954; Univ. Nebraska Press 1986.

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.

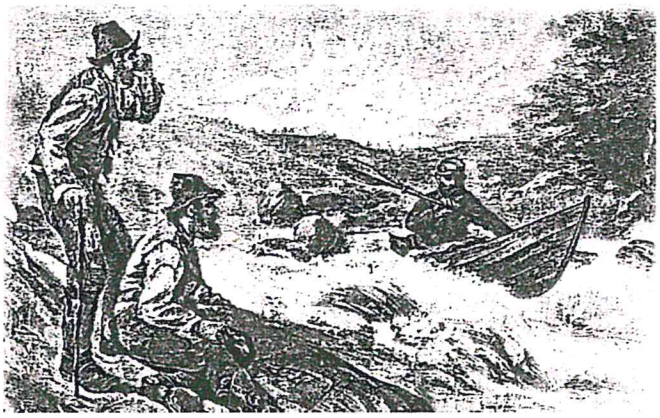


Fur traders in the 1800s carved dugout canoes from the trunk of a large tree, as people have done for thousands of years.

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.)

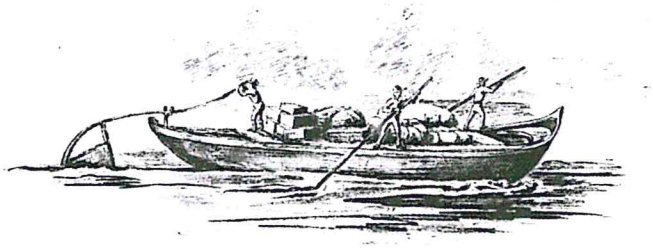
[76] **Large skin canoes:** "The Skin Canoes of the Great Plains and Rockies" by James A. Hanson, *The Museum of the Fur Trade Quarterly*, Vol 16 No 1, 1980.

[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]



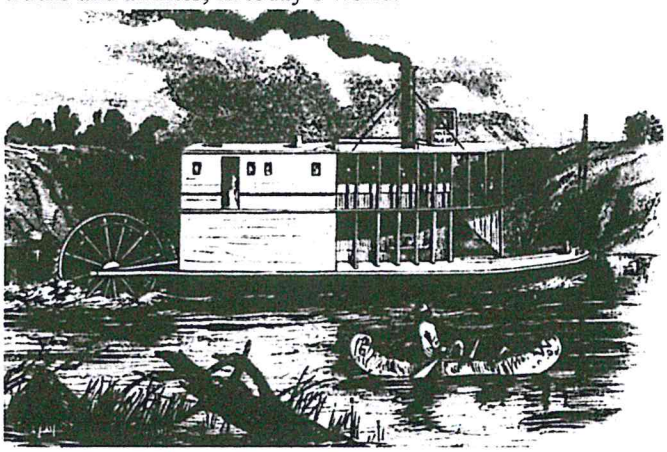
A keelboat with a large rudder, loaded with cargo.

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.

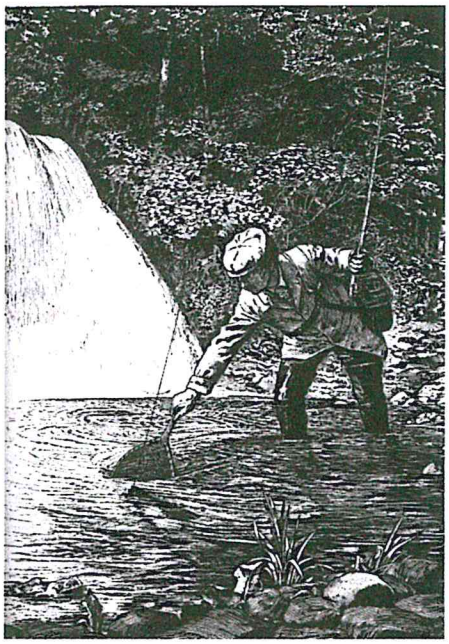
[82] **Grasshoppering:** Described in *Original Contributions to Western History* by Nolie Mumey and illus. by Inez Tatum, The Westerners 1952, page 209.

[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.)

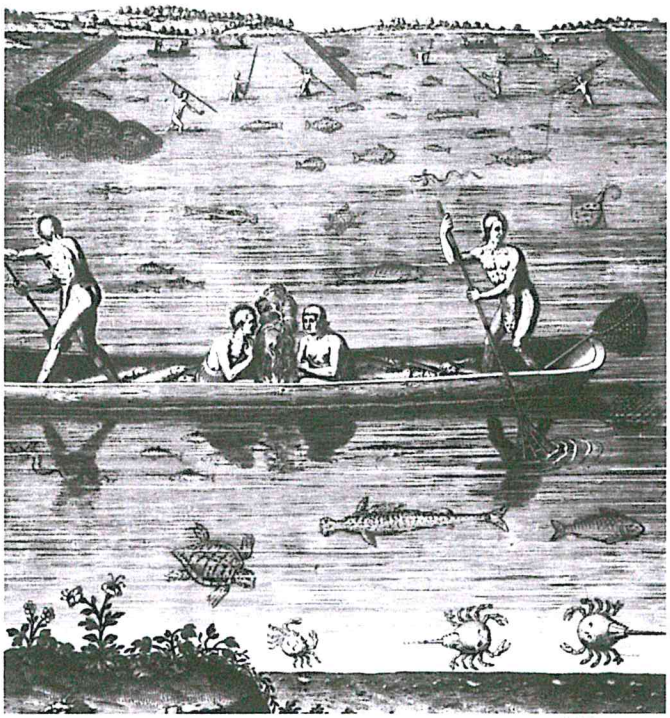
After citing the Law of Nature as the original basis for these public rights, the Court said, "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature, and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, 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.

88 Nev. 623
Supreme Court of Nevada.

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

No. 6799.
|
Nov. 29, 1972.
|
Rehearing Denied Dec. 22, 1972.

Synopsis

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

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

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

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

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

2 Cases that cite this headnote

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

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)1 Ownership and Control in General
405k2646 Ownership by State
405k2649 Rights incident to state's admission to Union in general
(Formerly 270k36(1) Navigable Waters)

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

1 Cases that cite this headnote

[3] **Water Law** ⇐ Specific waters

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2529 Specific waters
(Formerly 270k1(6) Navigable Waters)

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

2 Cases that cite this headnote

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

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

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

1 Cases that cite this headnote

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

Water Law ⇐ Power to grant

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

405XV(C)1 Ownership and Control in General
405k2646 Ownership by State
405k2647 In general
(Formerly 270k36(1) Navigable Waters)
405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2676 Power to grant
(Formerly 270k37(7) Navigable Waters)

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

1 Cases that cite this headnote

[6] **Water Law** ⇐ Power to grant

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2676 Power to grant
(Formerly 270k37(7) Navigable Waters)

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

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

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2685 Grant as incident to grant of riparian lands
(Formerly 270k37(7) Navigable Waters)

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

[8] **Water Law** ⇐ Specific waters

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2529 Specific waters
(Formerly 270k1(3) Navigable Waters)

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

2 Cases that cite this headnote

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

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(2) Particular state officers, agencies or proceedings
(Formerly 156k62(2))

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

2 Cases that cite this headnote

Attorneys and Law Firms

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

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

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

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

***625** OPINION

ZENOFF, Chief Justice:

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

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

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

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

The Attorney General of Nevada, on January 6, 1970, and the Nevada Legislative Counsel, on January 13, 1970, issued opinions that the Carson River is a navigable stream and that the State owns the river bottom thereof. Shortly thereafter the respondents commenced this declaratory relief action in the lower court seeking to clear the alleged cloud from their title. After that the parties stipulated, 'That as an historical fact, the Carson River was at one time used for the floating of logs and timber,' and, 'That the said Carson River is not now nor has it ever been used by cargo or passenger carrying vessels.'

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

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

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

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

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

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

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

'It is settled law in this country that lands underlying navagable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent ***628** creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. (Citations.) But, as was pointed out in Shively v. Bowlby, (152 U.S. 1,) 49, 57—58, 14 S.Ct. 548, 38 L.Ed. 331, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' See Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922); United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); ****1234** State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970); Utah v. United States, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971).

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

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

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

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

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

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

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

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

In the United States Supreme Court cases which discuss navigability, a distinction must be made, as suggested in R. Johnson & R. Austin, Jr., Recreation Rights and Titles to Beds on Western Lakes and Streams, 7 Nat.Res.J. 1, 15 (1967), *630 between 'navigability' for land title and 'navigability' for Federal Commerce Power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] As to the prestatehood federal patents, it is to be noted that there is no express reservation of title to the river bed, **1237 all described land is granted without reservation. In Wear v. Kansas, 245 U.S. 154, 38 S.Ct. 55, 62 L.Ed. 214 (1917), the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state supreme court took *633 judicial notice of the navigability of the river, refused to hear evidence thereon and held that the patent to land on a navigable steam did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Further, in Hardin v. Jordan, 140 U.S. 371, 384, 11 S.Ct. 808, 813, 35 L.Ed. 428 (1891), the court stated the applicable rule as to unrestricted patents in the following manner:

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment reversed.

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

All Citations

88 Nev. 623, 503 P.2d 1231

Footnotes

1 Carson City now comprises what was once Ormsby County.

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

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

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

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

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Citing References (35)

Treatment	Title	Date	Type	Depth	Headnote(s)
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Cited by	**3. Manning v. Nevada State Bd. of Accountancy** 673 P.2d 494, 495 , Nev. State Board of Accountancy filed complaint seeking an injunction to restrain individual from use of word "accountant" in his business. The First Judicial District Court, Carson...	Dec. 20, 1983	Case		9 P.2d
Cited by	**4. Neal v. Bently Nevada Corp.** 771 F.Supp. 1068, 1072 , D.Nev. Action was brought against landowner for injuries sustained when plaintiff swung from rubber hose tied to tree and dove into shallow part of river and sustained injuries. On...	July 12, 1991	Case		3 P.2d
Cited by	**5. Hodges Transp., Inc. v. State of Nev.** 562 F.Supp. 521, 523+ , D.Nev. Landowner sued State of Nevada to quiet title to bed of the Carson River and a dam on the river. On motion to dismiss, the District Court, Bruce R. Thompson, J., held that...	May 11, 1983	Case		5 P.2d
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Cited by	**8. 37 Or. Op. Atty. Gen. 1342, 1342** 37 Or. Op. Atty. Gen. 1342, 1342 This opinion is issued in response to a question presented by William S. Cox, Director, Division of State Lands. Can the Division of State Lands rely on the existence of log drives...	May 14, 1976	Administrative Decision		3 P.2d

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Treatment	Title	Date	Type	Depth	Headnote(s)
—	**17. Law of Water Rights and Resources s 8:12, § 8:12. Navigability for title: Federal versus state ownership—Federal test** Navigability for title is determined by a historic, backward looking test. Although there was some confusion about the source of the test, three Supreme Court cases between 1926...	2020	Other Secondary Source	—	3 P.2d
—	**18. Law of Water Rights and Resources s 8:14, § 8:14. Navigability for title: Federal versus state ownership—State definitions of navigability for post-patent disputes—Adoption of federal test** Most states have adopted the federal navigable in fact test to allocate titles. This test vests title to the beds underlying these waters in the state. These states are Arkansas,...	2020	Other Secondary Source	—	—
—	**19. State Environmental Law s 4:11, § 4:11. Navigability tests and private lands** Application of the federal title test does not completely determine which natural resources are subject to the public trust doctrine. Although that test determines whether a state...	2020	Other Secondary Source	—	1 P.2d
—	**20. Tiffany Real Property s 659, § 659. Tide waters—Powers of the state over submerged lands** Tide waters are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description. A body or stream of...	2020	Other Secondary Source	—	—
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—	**24.** CJS Navigable Waters s 127, § 127. Public grants of riparian land as conveying land under water CJS Navigable Waters Usually a public grant of land bounded by navigable water does not pass title to land under water, or, in other words, in the absence of a statute providing otherwise or language...	2021	Other Secondary Source	—	3 P.2d
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—	**32. NATRUAL RESOURCE DAMAGES: THE NEW FRONTIER OF ENVIRONMENTAL LITIGATION** 34 S. Tex. L. Rev. 521 , 578 I. Common Law Basis For Natural Resource Damages. 523 A. Public Trust Doctrine. 524 1. Development of the Public Trust Doctrine at the State Level. 525 2. Federal Recognition...	1993	Law Review	—	—
—	**33. LEGAL UNDERPINNINGS OF THE RIGHT TO FLOAT THROUGH PRIVATE PROPERTY IN COLORADO: A REPLY TO JOHN HILL** 5 U. Denv. Water L. Rev. 457 , 499+ I. Introduction. 457 II. Navigability. 459 A. Overview of Navigability. 459 B. The Navigational Servitude. 461 1. Traditional Federal Navigational Servitude. 461 2....	2002	Law Review	—	5 6 7 P.2d
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JUSTIA

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State v. Bunkowski

503 P.2d 1231 (1972)

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

No. 6799.

Supreme Court of Nevada.

November 29, 1972.

Rehearing Denied December 22, 1972.

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

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

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

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

OPINION

ZENOFF, Chief Justice:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

.....

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment reversed.

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

NOTES

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

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

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

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

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

From: **Charles** cralbright@juno.com
Subject: Fwd: Mail Not Delivered
Date: March 4, 2021 at 8:45 AM
To: Brett Mayer bmayer@americancanoe.org

The lower portion is what I found in Nevada's Water Law

> --- Enclosed is a copy of the message.
>
> From: Charles <cralbright@juno.com>
> Subject: **Fwd: Nevada Water Laws.**
> Date: February 17, 2021 at 1:49:31 PM PST
> To: aginfo@ag.nv.gov, sguyer@ag.nv.gov, Charles Albright <cralbright@juno.com>
>
> Thanks for your time and I hope that i will get a response to this letter/ email. What I present seems rather obvious to be law in Nevada.
>
> > Begin forwarded message:
> >
> > **From:** Charles <cralbright@juno.com>
> > **Subject: Nevada Water Laws.**
> > **Date:** February 17, 2021 at 1:03:21 PM PST
> > **To: Gregory I. Zunino Deputy Solicitor General**:
> >
> > Nevada Water Laws.
> >
> > TITLE 48 Water
> >
> > Chapters 532-to 538, Inclusive
> > Also Chapters 543 and 544
> >
> > Chapter 232
> > (State Department of Conservation and Natural Resources)
> >
> > NRS 232.005, 232.101 through 232.150
> >
> > ADJUDICATION, APPROPRIATION 533.010
> >
> > Under DEFINITIONS is:
> >
> > 533.020 "Stream System" Defined. As used in this chapter, "stream system" shall be interpreted as including any stream, together with its tributaries and all streams or bodies of water to which the same may be a tributary.
> > [47:140:1913; 1919 RL p. 3235; NCL 7932]
> >
> > Next up is:
> >
> > GENERAL PROVISIONS
> >
> > 533.025 WATER BELONGS TO PUBLIC.
> >
> > The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.
> > [1:140:1913; 1919 RL p. 3225; NCL 7890
> >
> > 533.030 APPROPRIATION FOR BENEFICIAL USE.
> >
> > 1. Subject to existing rights, all such water may be approbated for beneficial use as provided in this chapter and not otherwise.
> > 2. The use of water, from any stream systems provided in this chapter and from underground as provided in NRS 543.080, for any recreational purpose, is hereby declared to be a beneficial use.
> >
> > 533.035 BENEFICIAL USE; Basis, measure and limit of right to use.
> >
> > Beneficial use shall be the basis, the measure and the limit of the right to use the water.
> > [3:140:1913; RL p. 3225; NCL 7892]
> >
> > 533.040 WATER USED FOR BENEFICIAL PURPOSES TO REMAIN APPURTENANT TO PLACE OF USE
> >
> > 533.050 BENEFICIAL USE OF WATER DECLARED A PUBLIC USE; EMINENT DOMAIN.

533.085 VESTED RIGHTS TO WATER NOT IMPAIRED.

Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affectedly by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22 1913.

INTERSTATE WATERS; COMPACTS 538.600

ARTICLE XIII FISH, WILDLIFE, AND RECREATION

The use of waters for preservation, and protection, and enhancement of fish, wildlife, and recreation is nearby recognized as an inseparable part of the public interest in the use of the waters of Lake Tahoe, Truckee, Carson, Walker River Basins in both states, and is therefore beneficial.

All of the above cited sub sections of Nevada Water Laws ALL say that the Waters of Nevada Belong to the PUBLIC and their usage of those waters for RECREATION are legal and our right.

Nevada Division of
STATE LANDS

STATE OF NEVADA
Department of Conservation & Natural Resources
Steve Sisolak, *Governor*
Bradley Crowell, *Director*
Charles Donohue, *Administrator*

February 3, 2021

Charles Albright
1408 Washington Street
Reno NV 89503

Re: Request for Legal Opinion to Verify All Nevada Waters as Navigable

Mr. Albright,

Thank you for your continued interest in promoting the use and enjoyment of Nevada's navigable waters.

Nevada asserts ownership of eight sovereign lands, per NAC 322.060. The term "navigable body of water" within NAC 322.060 is a legal term of art created by case law. As defined in NAC 322.060, "'Navigable body of water' means a body of water which is declared navigable pursuant to NRS 537.010, 537.020 or 537.030 or which is determined to have been navigable on the date on which Nevada was admitted into statehood, including, without limitation, the Carson River, the Colorado River, Lake Tahoe, the Truckee River, the Virgin River, Walker Lake, Washoe Lake and Winnemucca Lake."

The Walker River is currently not designated as a state sovereign land, so you are correct its bed and banks are currently considered private property. For the Walker River and other waters of the state to be determined state sovereign land, they must qualify as navigable in accordance with the case law. This includes establishing facts showing the physical condition of and the uses on the river as they were at statehood in 1864. This may include newspaper articles, letters, early photographs, and other historical evidence demonstrating the river was navigable in its natural and ordinary condition and was used or susceptible of being used as a highway for commerce in 1864. NAC 322.060 derives from Legislative action and state and federal case law applying these tests to the applicable facts for those eight bodies of water.

I appreciate the time you have invested in providing this information and our previous discussions on this issue.

Sincerely,

Charles Donohue

Charles Donohue
Administrator – State Land Registrar

January 14, 2021

To: Aaron Ford, Attorney General, 100 North Carson Street, Carson City, Nevada 89701
cc: Steve Sisolak, Governor, 101 N. Carson Street, Carson City, Nevada 89701
cc: Bradley Crowell, Director, Jim Lawrence, Deputy Director, Dominique Etchegoyhen, Deputy Director, Nevada Department of Conservation and Natural Resources, 901 S Stewart St, Carson City, Nevada 89701
cc: Charlie Donohue, Administrator, Division of State Lands, 901 S. Stewart St., Carson City, Nevada 89701
cc: Robert Mergell, Administrator, NV Division of State Parks, 901 S. Stewart St #5005, Carson City, Nevada 89701
cc: Colin Robertson, Administrator, NV Division of Outdoor Recreation, 901 S Stewart St, Set. 1003, Carson City, Nevada 89701
cc: Adam Sullivan, Acting State Engineer, NV Division of Water Resources, 901 S Stewart St, Suite 2002, Carson City, Nevada 89701
cc: Brenda Scolari, Director, NV Department of Tourism and Cultural Affairs, 401 N Carson St, Carson City, Nevada 89701
cc: Tony Wasley, Director, Jack Robb, Deputy Director, Bonnie Long, Deputy Director, Nevada Department of Wildlife, 901 S Stewart St, Carson City, Nevada 89701
cc: Kate Marshall, Lt. Governor, State Capitol Bldg., 101 N Carson St., Suite 2, Carson City, Nevada 89701
cc: Greg Lovato, administrator NDEP, 901 S Stewart St, Suite 4001, Carson City, Nevada 89701
cc. John Busterud, administrator EPA region 9, 75 Hawthorne St, San Francisco, CA 94105

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

Dear Mr. Attorney General:

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

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

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

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

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

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

"Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co. v. United States, supra, [260 U.S.] p. 87, [43 S. Ct. 60].* To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended."
To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in *People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 454 (1971)*, that, "The streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." See also State, by *Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278, 287 (1954)*. Reference to People v. Mack, supra, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. **For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal "navigability for title" test.**
That test is stated by the court in *United States v. Holt Bank, supra, 270 U.S. at 56, 46 S. Ct. at 199.*

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

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

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. *State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972)*. 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. *Bunkowski, Id. at 1233-36.* This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233.* Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable. *Bunkowski, Id. at 1235*. Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

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

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

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

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

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. *Op. Att'y Gen. 80-11 (Nev. 1980).* Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real life situations include:

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

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

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

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

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

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

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

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

Very Truly Yours,

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

Additional citations:
Federal law is supreme: Supremacy Clause, U.S. Constitution, Article VI, Clause 2.
Forever free: Northwest Ordinance of 1787, chapter 8, 1 Stat. 50.
U.S. Supreme Court regarding forever free public highways: The Montello, 87 U.S. 430 (1874).
Early fur-trading days: Economy Light & Power, 256 U.S. 113 (1921).
Floating out of logs: United States v. Appalachian Electric, 311 U.S. 377 (1940). (rivers are navigable even if they have been "out of use for a hundred years").
Use by recreation industry use is indeed commercial: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Small, shallow river in Florida: Goodman v. City of Crystal River, 669 F.Supp. 394 (M.D>Fla. 1987).
Shallow, rocky river in Maine: Swan Falls Corporation, 53 F.E.R.C. p 61,309 (1990).
Small, shallow river in Indiana: David Zinkie, 53 F.E.R.C. p 61,029 (1990).
Shallow, rocky river in New York: New York Sate Department of Conservation v. Federal Energy Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).
Kayak and canoe classes on small, shallow, whitewater river are commerce: Atlanta School of Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).
Fur traders used smaller rivers and creeks than those used today: The American Fur Trade of the Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.
Ankle-deep creeks are legally navigable: Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).
Navigable in fact are navigable in law: The Daniel Ball, 77 U.S. 557 (1870).
No official designation needed: The Montello, 87 U.S. 430 (1874).
No historical record needed: United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian Electric, 311 U.S. 377 (1940)
Recreational use shows past usability: Appalachian Electric, 311 U.S. 377 (1940).
Easement regardless of who owns the riverbed: Montana v. United States, 450 U.S. 544 (1981).
Right of the public supersedes private ownership: United States v. Cress, 243 U.S. 316 (1917).
Servitude includes easement: Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861 (4th Cir.1984).
Right to portage around obstructions: The Montello, 87 U.S. 430 (1874)
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).
Walking along the banks: The Montello , 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9 (1849).
Landowner fences across rivers violate federal law: 33 U.S. Code 403
Push down unauthorized fences: Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).
Violation to allow cattle to trample: Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).
Walking across private land: Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1 Stat. 50 confirming that the "carrying places" between navigable stretches of river must remain "forever free" to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430 (18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never "abdicate" their duty to provide public access "freed from the obstruction or interference of private parties.") Gion v.

Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law "requiring municipalities to maintain access to navigable waters" and "requiring the state to reserve convenient access to navigable waters.")
Public access from bridges: Public Lands Access Association (PLAA) v. Board of Commissioners of Madison County, 373 Montana 277, _P.3d_(Jan.2014).
States cannot interfere with navigation: Gibbons v. Ogden, 22 U.S. 1 (124).
States are the guardians of free navigation: Pollard v. Hagan, 44 U.S. 212 (1845).
Paramount right of navigation: Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).
Public property of the nation: United States v. Rands, 389 U.S. 121 (1967).
Paramount power to maintain the public easement: Montana v. United States, 450 U.S. 544 (1981).
Answers are determined by federal law, not state law: Atlanta School of Kayaking v. Douglasville County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).
State law cannot alter federal definitions, because they are "necessarily a question of federal law.": United States v. Holt State Bank, 270 U.S. 49 (1926).
State definitions cannot deny the public easement: Weber v. Board of Harbor Commissioners, 895 U.S. 57 (1873).
State authority is subject to the public's "paramount right of navigation.": Hitchings v. Del Rio Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
State becomes the owner of the beds of rivers: Martin v. Waddell, 41 U.S. 367 (1842); Pollard v. Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
Private ownership cannot impair public easement: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Right of public to use waterway supersedes any claim of private ownership": United States v. Cress, 243 U.S. 316 (1917).
States can manage public use of rivers, for public health and safety, but they cannot deny easement to use navigable rivers: Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).
States can never abdicate the public trust: Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 138 (Ariz. App. 1991).
Usable for commercial recreation are navigable: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981).
Without obstruction or interference: Illinois Central v. Illinois, 146 U.S. 387 (1892).
Rivers navigable for Commerce Clause is defined by federal law, not state law: United States v. Holt State Bank, 270 U.S. 49 (1926).
Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.
Rights to scout and portage: The Montello, 87 U.S. 430 (1874)
Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine 9 (1849).
Public trust for the benefit of the whole community: Martin v. Waddell, 41 U.S. 367 (1842).
Navigational easement: Montana v. United States, 450 U.S. 544 (1981) (confirming public rights to engage in sports fishing and duck hunting on shallow river with rapids).
State laws cannot deny public rights to use navigable rivers: Gibbons v. Ogden, 22 U.S. 1 (1824).
Crime to block public use of navigable rivers: 33 U.S. Code 403.
Public right to navigate and walk along beds and banks through private land: Scranton v. Wheeler, 179 U.S. 141 (1900).
Private ownership of the beds and banks of rivers is "always subject to public rights to use the stream.": United States v. Cress, 243 U.S. 316 (1917). ("the right of the public to use a waterway supersedes any claim of private ownership.")
Rights to fish and fowl: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S. 367 (1842).
Rivers are legally navigable if usable for canoeing: Economy Light v. United States, 256 U.S. 113 (1921).

If usable for kayaking: Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469 (N.D.Ga.1997).
For rafting: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir.1989).
For log drives: United States v. Appalachian Electric, 311 U.S. 377 (1940).
For lumber drives: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).
It is unlawful to block the public easement for "sports fishing and duck hunting.": Montana v. United States, 450 U.S. 544 (1981). Atlanta School of Kayaking (cited above) (**public rights to use rivers navigable in kayaks "are determined by federal law," not state law.**) Public trust: Martin v. Waddell, 41 U.S. 367 (1842).
violation to allow cattle to trample: Clean Water Act, 33 U.S.C. 1251 Sec. 101(a)(7) (confirming the national goal of preventing "nonpoint source pollution" from entering rivers, such as runoff from cattle.)

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
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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
Salmon Falls Creek HW: Jarbidge Mtns Term: Snake, Columbia, Pacific Ocean	Shoshone Cottonwood Trout Meadow Jakes SF Salmon Falls NF Salmon Falls	Cedar Cow Dry Canyon Cottonwood Camp Sun Wilson Bear	 Knoll Poll Chimney Shack
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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		
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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

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)*
    - Owyhee River
      - 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

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- 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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02/08/21 LB

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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."

The Nevada Independent is a 501(c)3 nonprofit news organization. We are committed to transparency and disclose all our donors. The following people or entities mentioned in this article are financial supporters of our work:

- *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.

Dear Governor Sisolak, Attorney General Ford, and Department Directors and Administrators and Assistants, et al:

Under this cover letter please find:

1) Our pro bono attorney's request to the Attorney General for an opinion "confirming that the public...may pursue their lawful rights to enjoy all navigable rivers and streams within Nevada...." consistent with Federal and Nevada State Law
2) A copy of "State v. Bunkowski, 1972" regarding test of navigability of the State's rivers and streams
3) Shepherding citations of "State v. Bunkowski, 1972" regarding subsequent decisions

In spite of Numerous Legal Rulings at both the National and State Level we do not have OUR WATERS Legally available for our citizens to use for recreation in any form. Be it hiking, fishing, gathering of food or furs, hunting, paddling, swimming and many more forms of recreation.

Those Legal Rulings repeatedly agree that Nevada's Waters are indeed Navigable and therefore available for all forms of Recreation along the length of those Waterways up to the Mean High Water line of each Waterway. How do we go about agreeing that the Laws and Legal Rulings of Nevada and the US Government favor the Public's Right to use those Waterways? The only way available to those of us seeking another view of this States Water is to get your departments to request a Legal Opinion of the Attorney General's Office. I and others of the public have no other optionother than legislative. Nevada and US Law Rulings already say what the Law is so why should legislative, or other expensive and time consuming options be required?

Below We will explain many reasons why your agencies should make that request of the Attorney General's Office for a new Legal View of our Waters and Waterways.

Again we will start with the fact that Nevada legally OWNS All the Surface Waters and Waterways of Nevada.

Nevada has many Interstate flowing Rivers and streams. The Carson, Truckee, Walker, Bruneau, Jarbidge, Owyhee, Virgin, Colorado, Amargosa, Quinn, Kings, Salmon Falls Creek and many more. Federal Laws say that ALL Interstate Waters Ways are Navigable. Nevada has posted that only the Colorado, Virgin, Truckee and Carson Rivers are Navigable. Why? Commerce! The Carson and Truckee Rivers due to log floating for the mining needs. That also occurred on the Walker River yet for other reasons that was denied Navigable Status. The Commerce issue comes from the time of Statehood for Nevada in 1864. Every other waterway in Nevada was denied a Navigable Status when in reality history says the opposite. The first white people to come to Nevada were fur hunters which is an Act of Commerce. There are still many folks who hunt fur bearing animals in Nevada. Just ask NDOW. The term Commerce also is used for hunting and gathering. What did all of our first pioneers do and the Native Americans ahead of them do for food? They were living by this state's waters and finding anything they could to feed, clothe and house their families and livestock. So how is it that this was ignored when Statehood occurred? This would still be true today but for the fact that many of Nevada's Waterways cannot legally be accessed for those activities. Say What! History of Commerce denied.

So how will a State Wide acceptance of Navigability for our State Owned Waters benefit our State?

First and biggest is that the Lands adjoining Nevada's Legally Navigable Waters would be legally accessible to the public for all forms of recreation. (Except perhaps limits on hunting in some areas with the discharge of firearms limits). Both on the waters and above to the Mean High Water Line where the limit currently exists on the currently Navigable Rivers. State Lands would control those Waters and Lands. It would gain control of the riverbeds, waters and land to Mean High Water Line on ALL of Nevada's Waterways should you agree that they are in fact Navigable. A basic question to ask once that is considered is who will better care for those Riparian Lands and Waters? State Lands or other land owners, interests, mining or others. State Lands does an excellent job now. It would create a far greater job for them but I am sure they would gladly accept that.

Others benefitting Navigable Status are several of Conservation and Natural Resources Departments. State Parks currently has a State Park on the East Fork Walker River. Where they are currently promoting paddling, hiking, fishing, and other forms of Recreation along the waterway there. YET it is not considered Navigable by Nevada.

Outdoor Recreation and Tourism and Cultural Affairs would benefit GREATLY from a new view of our States Resources. They are currently doing much to promote Tourism of our rural State Areas. Do you think that those rural areas might benefit from additional areas available to recreate and enjoy? Currently they cannot legally offer these areas for recreation due to our current view of the waters in those rural areas. Hamstrung is a word that comes to mind with the current view of this State's Waterways.

Would not the State's Water Engineer and his Staff benefit from the legalization of all our State's Waterways. They after all oversee all of Nevada's Waters. How could it hurt their affairs?

Nevada's Department of Wildlife would greatly benefit from this new look at our State's Waterways. It would vastly improve the public's usage of our Waters with greater access. Again it is illegal currently to access all but 4 waterways in Nevada. Much is overlooked by them currently but still by Declaring ALL of Nevada's Waterways Legal they would have legal access to the Mean High Water Line on all of Nevada's Waterways. Not just for fishing but hunting (again with limits), fur gathering and paddling for recreation.

US Fish and Wildlife as well as NDOW do rehabilitation and fishery management on many streams, creeks and rivers in this state. They spend lots of taxpayer monies on these projects to benefit the riparian habitat as well as benefit the public for licensed fishing opportunities. That's a form of Commerce. It certainly enhances opportunities for access to areas below Mean High Water Line on all of those State Waterways.

The US Congress has created many Laws that oversee the waters of our states. One of them is the Clean Waters Act. Over 400 Waterways in this State are or were under their oversight. Nevada has agreed legally to abide by this law. Each and every one of those Waterways is by FACT considered Legally Navigable by the US and in enforcement by the

Army Corps of Engineers (ACE). ANY project that was too possibly in any way to affect any of those 400 plus Waterways required a ACE permit with drawings, engineering and a printed plan to be approved. Again every one of those 400 plus Waterways was deemed Navigable in Fact and any possible disturbance to said Waterways required a permit to limit pollution of them and OUR waters. Since its passage of the Clean Water Act every permit issued to any project in Nevada was an acknowledgement of that Waterway as being in FACT Navigable. Surely this and other stated aspects listed above speaks as to why Nevada Departments must ask for an Attorney General's Opinion on our Waters being indeed Navigable in fact.

Another opportunity for Nevada with a change in Navigable Status for our States Waterways would be the possibility of having many of our States Waterways being declared Wild and Scenic on some of their sections. The Bruneau, Jarbidge, Owyhee and Amargosa have sections in other states that are Wild and Scenic. In a state that only has one National Park do you think it might benefit Tourism and Outdoor Recreation in Nevada to have a few Wild and Scenic Rivers? They cannot exist if they are Non Navigable as they are now. Remember it is 2021 NOT 1864.

I have much more that I could say that further supports our view of Nevada's Waters but I think I have covered enough. I would GLADLY meet with any of you that wish to entertain a positive view of our States future. My info will be listed below.

AS you and I both know our world has changed greatly with CoVid and the public closures of your Offices. I still intend to deliver this note along with some Legal Rulings that support our quest to get a 2021 view of Nevada's Waterways. Our Governor and many of you Departments are very challenged by CoVid and meeting folks like me from the public and there is also this latest challenge to our government that we all must live with now. I still will attempt to deliver this to each of your Offices and the addressed Officials. Your efforts to continue to do what needs to be done to manage our states needs are appreciated greatly. Especially those of our Governor. His job has become unimaginable.

So who am I the person writing all this? My name is Charles Albright and I have been paddling since childhood but especially kayak and canoeing since 1971.

- I am part of a greater group of paddling recreation seekers who see a bigger picture for Nevada's future. I moved to Nevada in 1972 and started exploring rivers and lakes then. Living in Carson and Tahoe at the time gave me access to the East Sierras and all of its creeks, rivers and lakes. I moved to Reno in 1976 and quickly began creating a paddling community there and nearby.
- I taught paddling for 21 years for free and taught thousands of folks the basics for well past that.
- I am the reason there is a White Water Park in Reno and by example one in Sparks as well. It took our group 8 years of efforts to get it created.
- I have fought many battles with folks for river issues. I finally got Sierra Pacific Power to work with us for safety and signage at their dams and continue to work with TMWA for the benefit of river and shore users.
- One of SPPCO's Dams was illegally built with no permits whatsoever at Chalk Bluff on the Truckee River.They created a Low Head Dam, an insafe design which has killed hundreds of people across this country. I raised a big stink and they had to come back in and "make it safer" but it still is a major hazard.

- I had "battles" with Reno PD who claimed they could remove paddlers and make law with regards to the river like they owned a "Legally Navigable River". We several times were confronted by officers who said we could not paddle that it was illegal. One time they kicked 4 friends off the river and loaded them in a paddy wagon and drove their shuttle for them. After a rather spirited conversation with the head officer that day I contacted many state and local officials like NDOW, Governor, AG's, County and Reno Officials and low and behold it was NO LONGER a problem.
- I have put on races at Wingfield Park for years and still assist with the River Festival each Year. I have led hundreds of paddling trips on this state's waterways.
- I was a founding member of One Truckee River and still work with Iris on many issues.
- I have led hundreds of River Clean ups on the Truckee River.
- I have been working for years to solve the issue of Homeless Camps along our River. I have a great working relationship with our Mayor, Parks Department and Fire Department. Reno Fire asked me to PLEASE assist with getting the many Homeless Camp issues solved. I have promoted several river paddles to take officials, news and others to witness the problem first hand from water level. I am also working with Grant Denton who is the official Homeless Liaison for Reno, Washoe and Sparks for the Homeless Issues. Grant has become a great friend and I am now working on getting him and his clean up crews more higher quality trash bags for their efforts to clean up the shoreline and river channel.
- There is much more but I will end with the facts that I have been on numerous US Teams, competed in Europe and Canada numerous times and also been a National Champion several times and finished in 4th place and 6th several times representing the US in International Competition.

So I hope that you folks do not see me as some kind of Wacko. We all want what is best for our STATE and its PUBLIC!

Sincerely,

Charles Albright
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cralbright4@gmail.com
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Subject: **Request for Legal Opinion to Verify All Nevada Waters as Navigable**

The purpose of this letter is to request the State of Nevada's governing agencies and the Attorney General's Office review and rectify the classification of all the waters in Nevada as Navigable.

Over the past 48 years, I have been researching, and attempting to recreate on, Nevada's 400+ waterways. I was shocked to discover only the Truckee, Carson, Colorado and Virgin Rivers were considered navigable, and therefore, accessible to the public. Why aren't all waterways in Nevada considered Navigable, legally 'State Land' below the high water mark, and available for public use? They should be.

1. There is legal precedent defining all Nevada's rivers and streams as 'navigable', including historic and current use for commerce. Most notably "State vs Bunkowski 1972" regarding the test of navigability of the State's rivers and streams. Detailed legal references and justifications are attached.

2. The State of Nevada, its governing agencies and its citizens would greatly benefit from rectifying the status of Nevada's waters as navigable. Benefits include: accessibility for recreation, fishing, hunting, monitoring and sampling, as well as other environmental, wildlife and habitat related activities. A complete list of benefits is attached.

At its core, this is about the public's right to access public waterways, held in trust by public entities, specifically, the State of Nevada.

Thank you for your attention to this matter.

Sincerely,

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

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

Justification

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

Legal Precedent

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

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

"State v. Bunkowski, 1972" regarding the test of navigability of the State's rivers and streams and Shepherding citations regarding subsequent decisions are attached.

Subject: **Request for Legal Opinion to Verify All Nevada Waters as Navigable**

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Sincerely,

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775-324-5102 H
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Benefits to the State of Nevada

Access

- The public would have access to all waterways below the high water mark.
- State employees doing water quality and species sampling and surveys would have access to all waterways below the high water mark.

Recreation & Tourism

- The public could freely wade, float, boat, fish and hunt 'within' the waterway and along adjacent public lands.
- Commercial rafting and kayaking tours could occur on more sections of more rivers.
- Nevada State Parks could promote river access and use. For example, Walker River State Park would benefit from having the entire length of the Walker River, from the California/Nevada border to Walker Lake State Park and beyond, possibly to Walker Lake, be accessible for boating and fishing.
- The potential for rivers in Nevada to be designated 'Wild and Scenic". The Bruneau, Jarbidge, Owyhee and Amargosa Rivers have sections in other States that are designated "Wild and Scenic", adding the Nevada sections would be a great opportunity.
- Tourism offices could expand advertisement of recreational opportunities on the rivers and streams of Nevada.

Administrative Consistency

- The State of Nevada owns all the surface waters and waterways except on Tribal lands. The land beneath the 'high water mark' is owned only on waters identified as 'navigable', which is currently only the Colorado, Carson, Truckee and Virgin Rivers. Nevada State Lands as well as other Divisions within the Department of Conservation and Natural Resources, Department of Wildlife and the Department of Transportation would benefit from having all Nevada rivers and streams owned and managed consistently.
- All waters in Nevada would fall under the same State and Federal regulations, the Clean Water Act in particular.

JUSTIA

Receive free daily summaries of new opinions from the Supreme Court of Nevada.

Mineral County v. Lyon County

Justia Opinion Summary

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

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

Read more

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136 Nev., Advance Opinion 52

136 Nev., Advance Opinion 50

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 75917

FILED

SEP 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

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

Question answered.

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

Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, Bryan L. Stockton, Senior Deputy Attorney General, and Tori N. Sundheim, Deputy Attorney General, Carson City,
for Respondent State of Nevada Department of Wildlife.

Best, Best & Krieger LLP and Roderick E. Walston, Walnut Creek, California; Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stephen B. Rye, District Attorney, Lyon County,
for Respondent Lyon County.

SUPREME COURT
OF
NEVADA

(O) 1947A

20-34246

Best, Best & Krieger LLP and Roderick E. Walston, Walnut Creek, California; Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno,
for Respondent Centennial Livestock.

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

Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,
for Respondent Schroeder Group.

Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stacey Simon, County Counsel, and Jason Thomas Canger, Deputy County Counsel, Mono County, California,
for Respondent County of Mono, California.

Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, and James N. Bolotin, Senior Deputy Attorney General, Carson City,
for Amicus Curiae Nevada State Engineer.

Benson Law Nevada and Kevin Benson, Carson City; Xavier Becerra,

Attorney General, and Nhu Q. Nguyen, Deputy Attorney General, Sacramento, California,
for Amicus Curiae State of California.

Jason D. Woodbury, District Attorney, Carson City; Taggart & Taggart, Ltd., and Paul G. Taggart and Timothy D. O'Connor, Carson City,
for Amicus Curiae Carson City.

Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California,
for Amici Curiae Churchill County, City of Fallon, and Truckee-Carson Irrigation District.

136 Nev., Advance Opinion 58

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 75917

FILED

SEP 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

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

Question answered.

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20-34246

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Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,
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Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; John D. Echeverria, South Royalton, Vermont; Robert Johnston, Carson City,
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Taggart & Taggart, Ltd., and Paul G. Taggart and David H. Rigdon, Carson City,
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Parsons Behle & Latimer and Gregory H. Morrison, Reno,
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Blanchard, Krasner & French and Steven M. Silva, Reno,
for Amicus Curiae Pacific Legal Foundation.

Simons Hall Johnston PC and Brad M. Johnston, Yerington,
for Amici Curiae Peri & Sons Farms, Inc., Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Jason Corporation, and Frade Ranches, Inc.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, STIGLICH, J.:

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

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

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

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

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

FACTS AND PROCEDURAL HISTORY[2]

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

Walker River Basin and Walker Lake's decline

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

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

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

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

Litigation over water rights in Walker River Basin

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

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

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

Mineral County's intervention

In 1994, Mineral County moved to intervene to modify the Decree to ensure minimum flows into Walker Lake. It noted the decline of Walker Lake and its impact on Mineral County's economy. The amended complaint sought an allocation of minimum flows of 127,000 acre/feet per year to Walker Lake under the "doctrine of maintenance of the public trust." The United States District Court for the District of Nevada granted Mineral County's intervention in 2013.[3] Appellant Walker Lake Working Group also supports Mineral County's position but was a defendant in the lower court case as a rights holder under the Decree.

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

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

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

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

DISCUSSION

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

Prior appropriation doctrine in Nevada

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

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

The public trust doctrine in Nevada

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nevada's water statutes satisfy Lawrence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second certified question

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

CONCLUSION

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

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

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

_____, J.
Stiglich

We concur:

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Cadish

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

I.

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

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

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

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

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

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

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

II.

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

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

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

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

A.

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

III.

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

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

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

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

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

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

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

***

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

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

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

Pickering, C.J.
Pickering

I concur:

Silver, J.
Silver

Introduction to the Navigability Toolkit©

AW's Mission

American Whitewater's mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely.

AW's Access Policy

American Whitewater seeks to ensure rights of public access to rivers and streams for recreational use by human-powered watercraft including kayaks, canoes, and rafts.

Introduction

River access has been a controversial issue since Roman times. Modern laws on navigability are still influenced by the Institutes of Justinian, ancient English judicial opinions, the Northwest Ordinance, the obscure "equal footing" doctrine, and theories enunciated by the Supreme Court in 1870 in the case of The Daniel Ball.

River use and the controversies surrounding river use have been changing steadily over the past 25 years. Fishing, digging for clams in the streambed, building docks, piloting barges, and floating logs downstream, are no longer the sole focus of navigability law, precedent, or conflict. We have observed a sea change in public and legal opinion establishing recreational use and the public's enjoyment of rivers for floating, sport fishing, kayaking, and canoeing as the basis for modern navigability law.

In the context of whitewater sports, advances in equipment, technique, and skills have been arriving at an exponential rate. Boaters are now organizing regular competitions on river segments such as the Gore Canyon on the Colorado, Great Falls on the Potomac, and the North Fork of the Payette in Idaho which, as recently as 15 years ago, were viewed as cascades of almost impossible difficulty.

Meanwhile, rivers are seeing more use and riverside lands are becoming more developed. America has more dams and diversions, more timber and mining operations, and more homes being built along riverbanks as ranches and farms are carved up in the nation's seemingly inexorable slide towards urbanization and suburbanization than ever before.

With more recreationists on the river, more projects for power generation, irrigation, flood control, and drinking water supply, and more people using streamside lands for everything and anything, the possibilities of conflict continue to grow. To make matters worse, the litigious inclinations of the American public show no signs of abating and people are seeking dramatic legislative and legal solutions.

Confusion over the rights and obligations of boaters versus the rights and obligations of landowners and other river users is matched by the uncertainly about the proper role of government river managing agencies. How responsible should public agencies be for the safety of those who undertake risk-taking recreational activities on public lands? What rules are

needed to protect rivers and riverine areas from environmental damage? What agency policies are best to ensure fairness between competing use groups? Who should pay for facilities and services to make river access possible? What if sightseers and hikers as well as river runners use these facilities? What obligations do water project developers have to make amends for the loss of recreational opportunities when dams are built or licensed by the government? These difficult public policy issues affect the opportunities of whitewater boaters to pursue their sport.

American Whitewater has prepared this Toolkit to help clarify some of the rights of the public to access and use the rivers and streams in the fifty states and Puerto Rico. We hope that the information in this handbook will serve as a starting point for educating the reader on navigability law in general and will contribute to a reduction of conflicts, leading to a better and more enjoyable relationship among river users, managers, landowners, and others with an interest in these resources.

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Content

Federal Title Test & Navigability Report©

DESCRIPTION OF FEDERAL NAVIGABILITY LAW, THE FEDERAL TITLE TEST, & THE IMPORTANCE OF THE DANIEL BALL

Federal navigability law is used to designate federal waters as navigable. If a body of water does not meet these requirements it can still be declared navigable under state law through a state test, but Congress may not regulate it under the powers of the Commerce Clause of the Constitution.

The federal definition of "navigable" waters determines title to the beds underlying streams and lakes. If water was "navigable" under the federal test at the time of statehood, title to the bed of the stream or lake passed to the state upon admission into the Union.

The Daniel Ball is an important Supreme Court case dealing with navigability. It set precedent in three major areas:[1]

1. A river is regarded as a "public navigable river" if it is susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of travel and trade on water.

2. A river that is navigable in fact is navigable in law.

3. The test of navigability, as applied to "navigable waters," is the capability of being used for useful purposes of navigation, of trade and travel in the usual & ordinary modes, and not the extent and manner of such use.

The federal tests of navigability for determining title and defining Congress's power differ slightly. Both determine whether the body of water was navigable in fact as of the date a state came into the Union, not the time the determination was made. However, the natural & ordinary condition of the body of water at statehood determines navigability for title; whereas, the turning issue for commerce clause and congressional management purposes is determined by whether the body of water could be made navigable by reasonable artificial improvements.[2]

[1] The Daniel Ball, 77 U.S. 557 (1870).

[2] United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

Legal Representation, Navigability Toolkit©

IMPORTANCE OF PROPER LEGAL REPRESENTATION

This Navigability Toolkit is intended to serve as a starting point on navigability law. The Toolkit serves as an educational tool, trying to explain in simple terms the public's rights to access and float rivers and streams. It is by no means the final authority in each state on this topic. It is intended to merely act as a springboard for further research of the law.

Though this toolkit was constructed with properly cited authority and clarifies the public's rights in navigable and non-navigable rivers, it is not a definitive source for many reasons. One is that the "law" is always changing, and therefore all of this information will need to be reconfirmed prior to going to any court. Additionally, this resource does not replace proper legal representation because a local attorney, besides having a background in the local law, will have an understanding of how the local community applies and reacts to navigability issues. This would include relationships with the court system, police, and possibly politicians who may be able to have an impact on a pending situation.

Another aspect to consider is tact. When confronted with a landowner or public officer (police/park service) it can at times be frustrating at best to try to explain the laws of navigability and the right to float through someone's property once legally on a navigable river. However, having an understanding about where it is and is not appropriate to assert navigability rights may save a bit of hassle in the future.

Most importantly though, the impact one case can have on subsequent cases is great, and therefore it is important not to create a restrictive legal precedent. A case should be looked at not only from the perspective of the party going to trial, but also with foresight as to its possible effects on boaters, fishermen, and other recreationists that may desire access to the same area in the future. Most of the time it is therefore helpful to have capable legal counsel when addressing any issue in a court of law.

American Whitewater and local paddling clubs may be able to help boaters find adequate legal counsel regarding navigability questions. If you are interested in volunteering [https://www.americanwhitewater.org/content/Volunteer_view_] your legal assistance or donating to AW [https://www.americanwhitewater.org/content/Store/?crn=199&rn=328&action=show_detail], we would appreciate your assistance.

Feel free to contact American Whitewater with any questions, concerns, comments or updates.

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Glossary for Navigability Report©

Allodial: from allodium - an estate held indefinitely or for potentially indefinite duration.

Appropriated: to be set apart for or assign to a particular purpose or use.

Boatable: capable of being floated by recreational craft.

Dispositive: from disposition - a final settlement or determination.

Floatage: the act of floating; often refers to transport of commercial goods.

Impoundment: obstruction, e.g. dam.

Laws of the Partidas: the prior existing Spanish laws that the New Mexico Constitution is based on.

Riparian: relating to the bank of a natural watercourse.

Riverine: relating to a river.

Silviculture: a branch of forestry dealing with the development and care of forests.

Subaqueous: underwater.

Trotline: a comparatively short setline used near shore or along streams.

Setline: a long heavy fishing line to which several hooks are attached in series.

Usufructuary: from usufruct - a right to use and enjoy another's property without damaging or diminishing the property.

Watercourse: natural or manmade channel through which water flows.

Authors & Methodology Navigability Toolkit©

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- Jay Kenney, AW Board Member and CO Attorney
- Jason Robertson, Former AW Access Director
- Curt Fish, AW Volunteer and DC/ME Attorney
- Rich Hoffman, Former AW Access Director
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2007 SECOND EDITION RESEARCHERS AND AUTHORS

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RESEARCH METHODS

The authors of this document researched materials from Federal and State case law and statutes from all 50 states. The information in the First Edition was collected between 1997 and 2000, and Shephardized prior to publication. Researchers collected the information from law libraries, on-line legal services, and attorneys in the field. This material was updated as appropriate.

In 2007 a team of attorneys at Morgan, Lewis & Bockius LLP reviewed the entire Navigability Toolkit to assure that it is accurate and up to date. The team updated each state with recent court cases and provided editing for all 50 states. They also added a new analysis for Puerto Rico. We are deeply appreciative of this significant donation of legal assistance! In the fall of 2007 we published the Second Edition of the Navigability Toolkit based on the work of the great team at Morgan, Lewis & Bockius LLP

Far too many people to thank individually volunteered their time and energy on this project, for which American Whitewater is sincerely grateful.

We hope to keep the Toolkit as current as possible, and we encourage submissions of relevant cases to AW staff.

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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NEW MEXICO WILDLIFE FEDERATION

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Benefits to the State of Nevada

Access

- The public would have access to all waterways below the high water mark.
- State employees doing water quality and species sampling and surveys would have access to all waterways below the high water mark.

Recreation & Tourism

- The public could freely wade, float, boat, fish and hunt 'within' the waterway and along adjacent public lands.
- Commercial rafting and kayaking tours could occur on more sections of more rivers.
- Nevada State Parks could promote river access and use. For example, Walker River State Park would benefit from having the entire length of the Walker River, from the California/Nevada border to Walker Lake State Park and beyond, possibly to Walker Lake, be accessible for boating and fishing.
- The potential for rivers in Nevada to be designated 'Wild and Scenic". The Bruneau, Jarbidge, Owyhee and Amargosa Rivers have sections in other States that are designated "Wild and Scenic", adding the Nevada sections would be a great opportunity.
- Tourism offices could expand advertisement of recreational opportunities on the rivers and streams of Nevada.

Administrative Consistency

- The State of Nevada owns all the surface waters and waterways except on Tribal lands. The land beneath the 'high water mark' is owned only on waters identified as 'navigable', which is currently only the Colorado, Carson, Truckee and Virgin Rivers. Nevada State Lands as well as other Divisions within the Department of Conservation and Natural Resources, Department of Wildlife and the Department of Transportation would benefit from having all Nevada rivers and streams owned and managed consistently.
- All waters in Nevada would fall under the same State and Federal regulations, the Clean Water Act in particular.

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

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 (AWC), 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

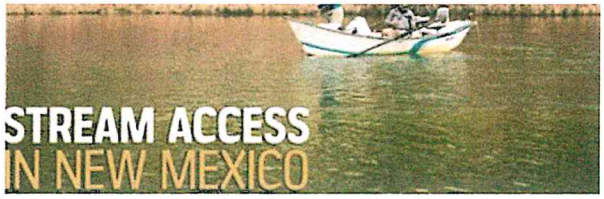
mission is to protect and improve access to New Mexico's rivers and streams. To support our mission, we cooperate with individuals, government agencies, and other non-governmental organizations to promote river conservation; provide leadership in outdoor ethics and education; support stewardship initiatives;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



For more on stream access in NM watch this film from the New Mexico Wildlife Federation

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My Community Involvement

- Part of a greater group of paddling recreation seekers who see a bigger picture for Nevada's future. I moved to Nevada in 1972 and started exploring rivers and lakes then. Living in Carson and Tahoe at the time gave me access to the East Sierras and all of its creeks, rivers and lakes. I moved to Reno in 1976 and quickly began creating a paddling community there and nearby.
- Founding member of One Truckee River, a collaborative group that put together the One Truckee River Management Plan adopted by the City of Reno in 2016.
- Instrumental in the creation of the White Water Park in Reno. Our group spent 8 years on this effort. It was the example used for the creation of the Sparks Water Park.
- Taught safe paddling at Reno, Sparks and other local area pools for over 21 years, for free, to thousands of people.
- Led hundreds of paddling trips on Nevada's waterways.
- Facilitate the local White Water Group and manage the local Reno Kayakers Meetup Group, which has around 400 members.
- Active advocate and activist for safe rivers. Worked with Sierra Pacific Power to get signage for safety at their dams and continue to work with Truckee Meadows Water Authority (TMWA) for the benefit of river and shore users. For example, the Chalk Bluff Dam on the Truckee River, built by Sierra Pacific was a low head dam, which is an unsafe design for kayakers and has killed hundreds of people across the county. I was instrumental in the retrofit to make the dam safer for kayakers.
- Raising awareness on the Truckee River for allowable river use by kayakers. In the past, the Reno Police Department incorrectly assumed kayakers were not allowed on the river through town and would require kayakers to exit the river. Those misunderstandings have been resolved and kayakers can now enjoy the full length of the River.
- Led River Cleanups on the Truckee River for many years with hundreds of volunteers.
- Assist with the Reno River Festival and organize races at Wingfield Park.
- Working to help solve the issue of Homeless Camps along the Truckee River. I have a great working relationship with the Reno Mayor, Parks Department and Fire Department as well as the Community Liaison.
- Competed on numerous US Kayak Teams in the US, Europe and Canada, including being a National Champion several times and finishing in 4th place and 6th several times, representing the US in International Competition.

Fred Hill Atcheson

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September 30th, 2020

AARON FORD
Nevada State Attorney General

Carson City, Nevada

Subject: A public right to use rivers and streams in Nevada

Dear General Ford:

I am writing this letter in the capacity of a citizen and not for any purpose relative to litigation even though I am a licensed attorney in Nevada and have been for over 44 years. I am an active paddle boater as are many of my friends and associates. Since I am an attorney they have asked me to get involved in an analysis of the right of the public to both access and use the rivers of Nevada for recreation purposes and to request a legal opinion from your office confirming those rights.

I was recently made aware that there are only four rivers in Nevada which have a "navigable" designation: the Colorado, Virgin, Carson, and Truckee. These rivers can be accessed and used by leisure boaters and government agencies also have jurisdiction such as: the U.S. Fish and Wildlife Service, the Department of Transportation and other necessary agencies. We, in the environmentally friendly community of boaters, believe the same "navgibility" status as is accorded the above named four rivers be accorded to all other rivers in Nevada. We believe established law bends toward confirming a public right to use rivers as part of our constitutional fabric and civic legacy and believe simple economics also favors this result.

We are only asking for the right to paddle, fish, and recreate within the maximum high water line for each river or stream in Nevada. We are not requesting a right to use the land along side or under the river; therefore, we are asking the State to acknowledge the right to use the rivers as a conveyance but not the land through which it flows. A right for the general public. What could be more justified than the ubiquitous use, without consumption, of water coming from the heavens? It is also economically advantageous. The push of the baby boomer, millennial, Y2K, and otherwise health conscious groups to avoid obesity and other crushing problems have resulted in a huge upswing in seeking vigorous outside vacations and adventures. The thirst to get out in nature has always been with humans. To deny or damage our right to seek and use nature or to give to specific members of the public the right to exclude public access to our rivers also denies economic opportunity to those who live in the commercial centers surrounding these public river assets. Boaters spend on restaurants, bars, gas, chips in a can, and ice cream, usually in the boonies; spending where outside money is most needed. We must now

establish a clear right to use these assets so boaters of all types along with their fisherman friends can go into these rivers without fear of being subject to capricious behavior by citizens who believe they have the right to deny access to the use of the river within the channel above defined.

Enough preaching, now for the legal underpinning. The term "navigable" is controlled by the definition of "use" under the common meaning. If a river is usable by a canoe or other small craft it is navigable under the law and becomes a public river or highway. The Daniel Ball, 77 U.S. 557 (1870). If a Nevada river is usable, no matter what mode of commerce is conducted, it is navigable in fact and law. In a navigable stream the public right is paramount to even that of state regulators. Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1873); West Chicago Railroad Co. V. Illinois, 201 U.S. 506 (1906).

Rivers usable in recreational watercraft are navigable and this rule applies the canoes, kayaks, rafts, stand up paddle boards and other watercraft.

Best regards,

Fred Hill Atcheson