

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

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

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

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

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

31 **Real life situations include:**

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

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

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

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

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

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

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

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

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

23 Very Truly Yours,

24 Fred Atcheson, Esquire

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

26 Additional citations:

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

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

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

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

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

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

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

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

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

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

1 **Kayak and canoe classes on small, shallow, whitewater river are commerce:** Atlanta School of
2 Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).
3 **Fur traders used smaller rivers and creeks than those used today:** The American Fur Trade of the
4 Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.
5 **Ankle-deep creeks are legally navigable:** Natural Resources Defense Council v. Callaway, 392
6 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).
7 **Navigable in fact are navigable in law:** The Daniel Ball, 77 U.S. 557 (1870).
8 **No official designation needed:** The Montello, 87 U.S. 430 (1874).
9 **No historical record needed:** United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian
10 Electric, 311 U.S. 377 (1940).
11 **Recreational use shows past usability:** Appalachian Electric, 311 U.S. 377 (1940).
12 **Easement regardless of who owns the riverbed:** Montana v. United States, 450 U.S. 544 (1981).
13 **Right of the public supersedes private ownership:** United States v. Cress, 243 U.S. 316 (1917).
14 **Servitude includes easement:** Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861
15 (4th Cir.1984).
16 **Right to portage around obstructions:** The Montello, 87 U.S. 430 (1874)
17 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell,
18 41 U.S. 367 (1842).
19 **Walking along the banks:** The Montello , 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9
20 (1849).
21 **Landowner fences across rivers violate federal law:** 33 U.S. Code 403
22 **Push down unauthorized fences:** Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).
23 **Violation to allow cattle to trample:** Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).
24 **Walking across private land:** Northwest Ordinance of 1787, reenacted Aug. 7, 1789, chapter 8, 1
25 Stat. 50 confirming that the “carrying places” between navigable stretches of river must remain
26 “forever free” to the public, reaffirmed by the U.S. Supreme Court in The Montello, 87 U.S. 430
27 (18974) pg. 440, and Economy Light & Power, 256 U.S. 113 (1921) pp. 119-120. Illinois Central
28 Railroad Co. v. State of Illinois, 46 U.S. 387 (1892) (confirming that states can never “abdicate” their
duty to provide public access “freed from the obstruction or interference of private parties.”) Gion v.
Santa Cruz, 465 P.2d 50 (California 1970) (confirming state law “requiring municipalities to maintain
access to navigable waters” and “requiring the state to reserve convenient access to navigable waters.”)
Public access from bridges: Public Lands Access Association (PLAA) v. Board of Commissioners of
Madison County, 373 Montana 277, _P.3d_ (Jan.2014).
States cannot interfere with navigation: Gibbons v. Ogden, 22 U.S. 1 (124).
States are the guardians of free navigation: Pollard v. Hagan, 44 U.S. 212 (1845).
Paramount right of navigation: Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1842).
Public property of the nation: United States v. Rands, 389 U.S. 121 (1967).
Paramount power to maintain the public easement: Montana v. United States, 450 U.S. 544 (1981).
Answers are determined by federal law, not state law: Atlanta School of Kayaking v. Douglasville
County Water District, 81 F.Supp. 1469 (N.D.Ga.1997).
State law cannot alter federal definitions, because they are “necessarily a question of federal law.”:
United States v. Holt State Bank, 270 U.S. 49 (1926).
State definitions cannot deny the public easement: Weber v. Board of Harbor Commissioners, 895
U.S. 57 (1873).
State authority is subject to the public’s “paramount right of navigation.”: Hitchings v. Del Rio
Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
State becomes the owner of the beds of rivers: Martin v. Waddell, 41 U.S. 367 (1842); Pollard v.
Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
Private ownership cannot impair public easement: Illinois Central v. Illinois, 146 U.S. 387 (1892).

1 **Right of public to use waterway supersedes any claim of private ownership**: United States v. Cress, 243 U.S. 316 (1917).

2 **States can manage public use of rivers, for public health and safety, but they cannot deny**

3 **easement to use navigable rivers**: Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).

4 **States can never abdicate the public trust**: Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 138 (Ariz. App. 1991).

5 **Usable for commercial recreation are navigable**: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).

6 **Sports fishing and duck hunting**: Montana v. United States, 450 U.S. 544 (1981).

7 **Without obstruction or interference**: Illinois Central v. Illinois, 146 U.S. 387 (1892).

8 **Rivers navigable for Commerce Clause is defined by federal law, not state law**: United States v. Holt State Bank, 270 U.S. 49 (1926).

9 **Landowner fences across rivers violate federal law**: 33 U.S.C. 403, obstruction of navigable waters.

10 **Rights to scout and portage**: The Montello, 87 U.S. 430 (1874)

11 **Walking above high water line**: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine 9 (1849).

12 **Public trust for the benefit of the whole community**: Martin v. Waddell, 41 U.S. 367 (1842).

13 **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).

14 **State laws cannot deny public rights to use navigable rivers**: Gibbons v. Ogden, 22 U.S. 1 (1824).

15 **Crime to block public use of navigable rivers**: 33 U.S. Code 403.

16 **Public right to navigate and walk along beds and banks through private land**: Scranton v. Wheeler, 179 U.S. 141 (1900).

17 **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.”)

18 **Rights to fish and fowl**: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S. 367 (1842).

19 **Rivers are legally navigable if usable for canoeing**: Economy Light v. United States, 256 U.S. 113 (1921).

20 **If usable for kayaking**: Atlanta School of Kayaking v. Douglasville County, 981 F.Supp. 1469 (N.D.Ga.1997).

21 **For rafting**: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir.1989).

22 **For log drives**: United States v. Appalachian Electric, 311 U.S. 377 (1940).

23 **For lumber drives**: Puget Sound Power v. FERC, 644 F.2d 785 (9th Cir.1981).

24 **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).

25 **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.)

26

27

28

1 December 17, 2020

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

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

5 Dear Mr. Attorney General:

6
7 I, in a concerted effort with several members of the boating community here in Nevada, am
8 requesting a legal opinion from your office confirming that the public in Nevada may pursue
9 their lawful rights to enjoy **all** navigable rivers and streams within Nevada, even those running
10 across private land, without being turned away with misinformation from state government
11 officials and/or harassment from uneducated landowners and law enforcement officers; knowing
12 that Federal law supersedes State law on the designation of the term “navigable” and asking what
13 can be done to assure those rights? In short, we are asking for enforcement in protection of our
14 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.**

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

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

29 The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved
30 March 21, 1864), and under the constitutional principle of equality among the several states, the
31 title to the bed of the Carson River then passed to the State, if the river was navigable, and if the
32 bed had not already been disposed of by the United States. *United States v. Holt Bank, supra,*
33 *270 U.S. at 55, 46 S. Ct. 197.*

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

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

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

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

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

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

6 Nevada courts have held that streams are navigable if used or susceptible to being used at
7 regularly-occurring times as highways for commerce over which trade and travel are or may be
8 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
9 historically used to drive logs to market satisfy the federal title test. *Bunkowski, Id. at 1233-36*.
10 This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233*.
11 Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or
12 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
13 public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

28 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 omitted).

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

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

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

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

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

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

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

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

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

10 The facts are:

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

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

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

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

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

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

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

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

11 One might think that getting river law applied in actual practice on Nevada rivers would be a
12 relatively quick and simple court procedure. But the legal system is ponderous, and there are
13 only a few attorneys and judges in the whole country who are familiar with river law. River
14 enthusiasts cannot feasibly sue government agencies or private entities to preserve rivers and
15 assure public access to rivers. Boaters cannot feasibly run rivers that are officially closed, and
16 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.**

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

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

25 Real life situations include:

26 Sam Essig, a very delightful and pleasant employee at Walker River State Recreation Area, at no
27 fault of her own, gave misinformation to one of our members: “The East Walker is still non-
28 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

1 can't go on the river without everyone's permission." Tim Weakley reported, "The rancher
2 above the park has barbed stretched across the river to keep his cattle in." Is it not an irony that
3 the public is barred from their legal right of river usage while the private landowner is guilty of
4 allowing his cattle to trample the banks of the river and cross over? *Clean Water Act, 33 U.S.C.*
5 *1251 Sec. 101(a)(7) (confirming the national goal of preventing "nonpoint source pollution"*
from entering rivers, such as runoff from cattle.)

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

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

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

23 Very Truly Yours,

24 Fred Atcheson, Esquire

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

26 Additional citations:

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

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

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

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

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

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

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

1 **Shallow, rocky river in Maine:** Swan Falls Corporation, 53 F.E.R.C. p 61,309 (1990).
2 **Small, shallow river in Indiana:** David Zinkie, 53 F.E.R.C. p 61,029 (1990).
3 **Shallow, rocky river in New York:** New York Sate Department of Conservation v. Federal Energy
4 Regulatory Commission and Niagara Mohawk Power Corporation, 954 F.2d 56 (2d Cir. 1992).
5 **Kayak and canoe classes on small, shallow, whitewater river are commerce:** Atlanta School of
6 Kayaking v. Douglasville County Water District, 981 F. Supp. 1469 (N.D.Ga 1997).
7 **Fur traders used smaller rivers and creeks than those used today:** The American Fur Trade of the
8 Far West by Hiram Martin Chittenden, Stanford University Press 1936 and 1954, page 762.
9 **Ankle-deep creeks are legally navigable:** Natural Resources Defense Council v. Callaway, 392
10 F.Supp. 685 (D.D.C. 1975) (regarding scope of federal navigability, 33 U.S.C. 1251-1387).
11 **Navigable in fact are navigable in law:** The Daniel Ball, 77 U.S. 557 (1870).
12 **No official designation needed:** The Montello, 87 U.S. 430 (1874).
13 **No historical record needed:** United States v. Utah, 283 U.S. 64 (1931). United States v. Appalachian
14 Electric, 311 U.S. 377 (1940)
15 **Recreational use shows past usability:** Appalachian Electric (just cited)
16 **Easement regardless of who owns the riverbed:** Montana v. United States, 450 U.S. 544 (1981).
17 **Right of the public supersedes private ownership:** United States v. Cress, 243 U.S. 316 (1917).
18 **Servitude includes easement:** Loving v. Alexander, 548 F. Supp. 1079 (W.D.Va.1982), 745 F.2d 861
19 (4th Cir.1984).
20 **Right to potage around obstructions:** The Montello, 87 U.S. 430 (1874)
21 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell,
22 41 U.S. 367 (1842).
23 **Walking along the banks:** The Montello , 87 U.S. 430 (1874).; Brown v. Dhadbourne, 31 Maine 9
24 (1849).
25 **Landowner fences across rivers violate federal law:** 33 U.S. Code 403
26 **Push down unauthorized fences:** Elder v. Delcour, 269 S.W.2d 17 (Missouri 1954).
27 **Violation to allow cattle to trample:** Clean Water Act, 33 U.S. Code 1251 Sec. 101(a)(7).
28 **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).

1 **State authority is subject to the public's "paramount right of navigation.":** Hitchings v. Del Rio
2 Woods Recreation & Park District, 55 Cal. App 3d560, 127 Cal. Rptr. 830 (1st Dist. 1976).
3 **State becomes the owner of the beds of rivers:** Martin v. Waddell, 41 U.S. 367 (1842); Pollard v.
4 Hagan, 44 U.S. 212 (1845). PPL Montana v. Montana, 565 U.S., docket 10-218 (2012).
5 **Private ownership cannot impair public easement:** Illinois Central v. Illinois, 146 U.S. 387 (1892).
6 **Right of public to use waterway supersedes any claim of private ownership":** United States v.
7 Cress, 243 U.S. 316 (1917).
8 **States can manage public use of rivers, for public health and safety, but they cannot deny**
9 **easement to use navigable rivers:** Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).
10 **States can never abdicate the public trust:** Arizona Center for Law in the Public Interest v. Hassell,
11 837 P.2d 138 (Ariz. App. 1991).
12 **Usable for commercial recreation are navigable:** Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
13 **Sports fishing and duck hunting:** Montana v. United States, 450 U.S. 544 (1981).
14 **Without obstruction or interference:** Illinois Central v. Illinois, 146 U.S. 387 (1892).
15 **Rivers navigable for Commerce Clause is defined by federal law, not state law:** United States v.
16 Holt State Bank, 270 U.S. 49 (1926).
17 **Landowner fences across rivers violate federal law:** 33 U.S.C. 403, obstruction of navigable waters.
18 **Rights to scout and portage:** The Montello, 87 U.S. 430 (1874)
19 **Walking above high water line:** The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine
20 9 (1849).
21 **Public trust for the benefit of the whole community:** Martin v. Waddell, 41 U.S. 367 (1842).
22 **Navigational easement:** Montana v. United States, 450 U.S. 544 (1981) (confirming public rights to
23 engage in sports fishing and duck hunting on shallow river with rapids).
24 **State laws cannot deny public rights to use navigable rivers:** Gibbons v. Ogden, 22 U.S. 1 (1824).
25 **Freed from obstruction:** Illinois Central v. Illinois, 146 U.S. 387 (1892).
26 **Crime to block public use of navigable rivers:** 33 U.S. Code 403.
27 **Public right to navigate and walk along beds and banks through private land:** Scranton v. Wheeler,
28 179 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.)