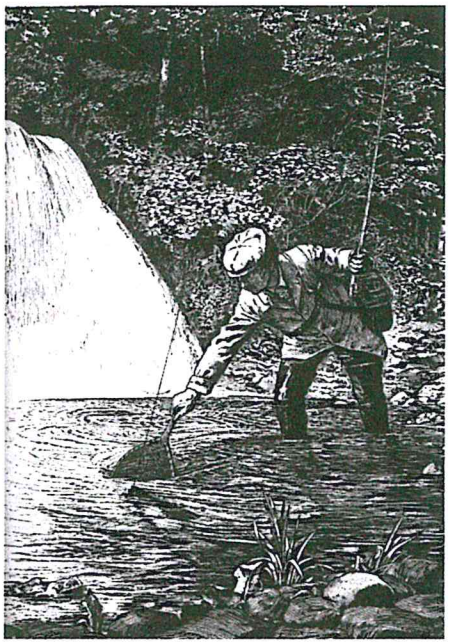
decisions were actually about, and what they actually concluded.

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.)

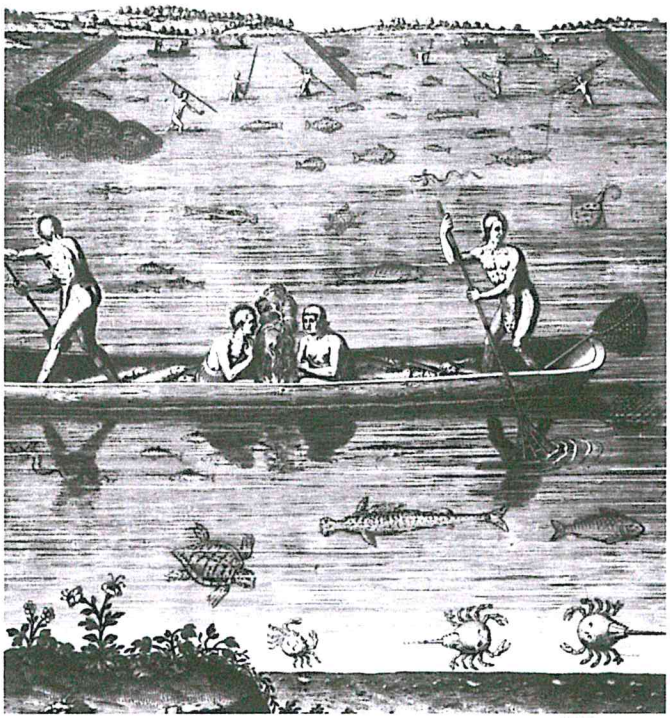
After citing the Law of Nature as the original basis for these public rights, the Court said, "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature, and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state,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

End of Document

Citing References (35)

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

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**9.** 37 Or. Op. Atty. Gen. 578, 578+ 37 Or. Op. Atty. Gen. 578, 578+ This opinion is issued in response to a question submitted by the Honorable Nancie Fadeley, State Representative. What effect will HB 3258 have upon public rights in navigable...	May 19, 1975	Administrative Decision		3 P.2d
Mentioned by	**10. Pellegrini v. State** 34 P.3d 519, 531 , Nev. CRIMINAL JUSTICE - Habeas Corpus. Statute imposing one-year limitations period on habeas petitions applies to successive petitions.	Nov. 15, 2001	Case		9 P.2d
Mentioned by	**11. CWC Fisheries, Inc. v. Bunker** 755 P.2d 1115, 1119 , Alaska Holder of state-granted patent in tidelands brought trespass claim against commercial fisherman. The Superior Court, Third Judicial District, Kenai, Charles K. Cranston, J.,...	June 03, 1988	Case		—
Mentioned by	**12. Arizona Center For Law In Public Interest v. Hassell** 837 P.2d 158, 167 , Ariz.App. Div. 1 Organizations and individuals brought action challenging validity of provisions of legislation substantially relinquishing state's interest in riverbed lands. Landowners who...	Sep. 10, 1991	Case		1 P.2d
Mentioned by	**13. Bott v. Commission of Natural Resources of State of Mich. Dept. of Natural Resources** 327 N.W.2d 838, 844+ , Mich. Owners of land on both sides of creek brought trespass action against riparian owners of land on lake, and State filed complaint against plaintiffs, alleging that their bridge...	Dec. 08, 1982	Case		3 P.2d
—	**14. Portage Necessity as Affecting Navigability of Waterway Under Nonenvironmental Federal Law** 3 A.L.R. Fed. 2d 375 When determining whether or not a particular body of water is navigable for federal purposes, courts generally impose a fact-sensitive "navigability-in-fact" test, while keeping in...	2005	ALR	—	—
—	**15. Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned** 6 A.L.R.4th 1030 This annotation collects and analyzes the cases, state and federal, determining or discussing public rights to engage in recreational boating, fishing, wading, or like activities...	1981	ALR	—	1 3 4 6 8 P.2d
—	**16. Title to beds of natural lakes or ponds** 112 A.L.R. 1108 The reported case for this annotation is Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).	1938	ALR	—	2 P.2d

Negative Treatment

There are no Negative Treatment results for this citation.

History

There are no History results for this citation.

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	—	—
—	**21. 96 Am. Jur. Proof of Facts 3d 263, Navigability Disputes Involving Non-Tidal Waters Above Private Lands** Am. Jur. Proof of Facts 3d This article discusses civil actions by landowners with respect to the public use of non tidal bodies of water, the beds and shores of which are privately owned, but which waters...	2020	Other Secondary Source	—	—
—	**22. CJS Navigable Waters s 13, § 13. Statutory declarations of navigability; government attitude and official acts** CJS Navigable Waters In some jurisdictions, statutes have been enacted declaring certain streams or other bodies of water to be navigable. According to some authority, a statutory declaration of...	2021	Other Secondary Source	—	8 P.2d
—	**23. CJS Navigable Waters s 100, § 100. What law governs ownership of land under navigable water** CJS Navigable Waters The ownership of the bed and banks of navigable waters within a state ordinarily is governed by state law, subject to the paramount power of the United States to ensure that such...	2021	Other Secondary Source	—	—