Outline for Navigable Waters to the Nevada Supreme Court Water Law Commission:

1. Letter from Supreme Court of Nevada Justice Lidia Stiglich
2. Letter sent to Justice Lidia Stiglich in response.
3. Letter to the Honorable Nevada Supreme Court Water Commission
4. Letter request for Legal Opinion to Verify All Nevada Waters as Navigable
5. Letter of response from Nevada Division of State Lands
6. Letter from State of Nevada Department of Wildlife
7. Letter sent to the Nevada Supreme Court Justices
8. Letter dated December 17, 2020 to Aaron Ford, Nevada Attorney General
9. Letter to numerous State Offices Dated January 14th, 2021
10. Public Trust Doctrine paper
11. Definition of Navigable Waters of the United States
12. State vs Bunkowski Carson River ruling 503 Nev. 623 1972
13. Other rulings related to State vs Bunkowski
14. Mineral County vs Lyon County rulings Brief
15. Mineral County vs Lyon County 136 Nev. Advanced Opinion 58 2020
16. US v Walker River Irr. Dist., 104 F. 2d 334 1939
17. New Mexico Supreme Court Ruling on Navigation of New Mexico's Waters 2022
18. American Whitewater: New Mexico Supreme Court Ruling 2022
19. Utah Supreme Court Ruling allows Public Waters Access Act to Stand 2023
20. Public Rights on Rivers
21. Title 33 Navigation and Navigable Waters
22. American Whitewater Nevada, California, Arizona, Idaho, Oregon, Utah Navigability Report
23. Citation from US 9th District Court on Walker River Navigability and another 104 F.2d 334 1939 other cases related.
24. 401 Certification Clean Water Act
25. Environmental opinions of Clean Water Act Rollback 2020
26. State Land Office Guide
27. Nevada Rivers Information
28. List of Rivers of Nevada
29. Letter regarding Paddling the Reese River David C Fiore MD
30. Letter from Rusty Bowman on several rivers and creeks paddled in Nevada
31. Letter from Michael Setlock of BLM on paddling Nevada Waters
32. Letter from Nasman Horn of USFS on various locations for paddling in Nevada
33. Letter from Martin Kramer of USFS on the Reese River
34. Letter from Michael McCampbell onto Humboldt and Quinn Rivers
35. Letter from Tipton Power on the Owyhee River
36. Letter from Seth Tonsmeire Regarding Commercial rafting and boating on the Owyhee River
37. Letter from Alan Reynolds regarding paddling the Owyhee, Jarbidge and Bruneau Rivers
38. Letter from Jason Gipson of Army Corps of Engineers on Rivers and Harbors Act and Clean Water Act
39. Salmon Falls Creek Paddling Overview
40. Letter from Fred Hill Atcheson regarding River Recreation in Nevada
41. Letter to Brett Mayer of ACA regarding Nevada Water Laws
42. Letter to Governor Sislolak et al
43. Another Navigable Waters Paper
44. Another Letter to Governor Sisolak
45. Letter from Charles Albright
46. Nevada's Outdoor Recreation Economy Impact
47. 33 CFR Part 328 EPA Revised Definition of "Waters of the United States" Rulings

SUPREME COURT OF NEVADA
LIDIA S. STIGLICH, JUSTICE
201 SOUTH CARSON STREET
CARSON CITY, NV 89701-4702
(775) 684-1530

August 10, 2022

Charles Albright
1408 Washington Street
Reno, NV 89503

Dear Mr. Albright:

Thank you for the informational packet you provided to my chambers in June regarding navigable public water rights in the state of Nevada. Your passion for recreational access to public waterways is apparent, and you have seen decades of change in Nevada, to be sure. Your packet includes my most recent water rights opinion in the case of Mineral County, so I assume you realize that this issue is one I take seriously, as I can see you do. Your frustration is understandable, and there are positive ways to institute change without getting arrested or hiring attorneys, in my opinion, so I encourage you to stay the course.

The Nevada Supreme Court commissioned a study of the adjudication of water law cases under ADKT 0576 in April 2021. I encourage you to provide this information to the commission regarding your public access concerns. Thank you again for your extensive research and commitment to recreational access for the public.

Respectfully,

Lidia S. Stiglich
Supreme Court Justice

Supreme Court of Nevada

Lidia S. Stiglich
201 South Carson Street
Carson City, Nevada
89701-4702

Dear Honorable Justice Stiglich;

I must admit that I was greatly surprised and oh so uplifted by your letter of August 10th. I had been trying again to get guidance with regard from the Clerk of the Supreme Court, the staff of the Supreme Court Library, the Nevada Bar, numerous attorneys of Civil, Water, anyone who would talk to me. And this was at local, Washoe, State and Federal levels just trying to get a foot in a door. Again, your letter might be my dream of no getting arrested, legal action at enormous costs, or just giving up and letting the situation that exists now continue when it is so blatantly wrong.

So I hope that I can indeed be accepted by your Water Law Commission to plead my legal case with all of my findings from Nevada Supreme Court Rulings to so many US Judicial Rulings that support my beliefs.

I could not help but notice the make up of the Commission and see that anything I submit will be met with great objection but I wish to do just that and hope that what our State Constitution and State Water Law say should prevail. It is hard to imagine that some Kayaker / River / Water Advocate can have this opportunity and I hope I can do my best and maybe get the Justices of the Nevada Supreme Court to make a history changing ruling to support the Publics Rights to this States Waters. Much like exists in virtually all of our States.

I had thought about listing my many battles / dealings with various levels of our government, utilities and all the positive rulings or changes that have happened but you do not need that. Suffice to say I have been busy and working on far more than just Navigation Law Wishes. All that I feel are or have been positive for our State. Thanks for your time. Bless you! Hugs too!

Sincerely Yours,

Charles Albright
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Reno, Nevada 89503
775-324-5102
cralbright@juno.com

Honorable Nevada Supreme Court Water Commission:

All of the included paperwork is legal, court tested, legal and historical access and water law from well back into human history.

But let's start with Nevada Water Law. The first statement in Nevada Water Law is that ALL OF ABOVE AND BELOW WATER IN NEVADA BELONGS TO THE PUBLIC!! That fact is sacrament to the PUBLICS RIGHT to those WATERS for any purpose. Be it drinking, swimming, fishing, any recreation, paddling, food gathering, hunting, relief from Nevada's heat or even ice skating in winter. There is so much more to this fact. Why is this BASIC TENANT OF NEVADA WATER LAW SO? Several reasons that all have been supported throughout human history as early as Byzantine Emperor Justinian, parts of the Magna Carta, US Supreme Court Rulings, Martin vs Waddle 1842, and the Public Trust Doctrine. So many more ancient rulings like "Right to Roam", Right of Way, Right of Public Access, Right of Public Access to the Wilderness, Navigable in Fact is Navigable in LAW and even at least two Nevada Supreme Court Rulings. Those being State vs Bunkowski and Mineral vs Lyon. Both in essence supported the PUBLICS RIGHT of the Water and shorelines. They are included in this package. When courts began to consider the Public Trust Doctrine the State has the duty as Trustee to hold all Navigable Waterways in trust for public benefit. The Public owns up to where the water usually ends. That is referred to the Mean High Water Mark. Which is the case with those waters currently Deemed Navigable in Nevada. Hence the adage "It is not trespassing as long as your feet are wet." Navigable waters are Common Highways and FREE Forever.

In Nevada for to me unknown reasons there are only Four Rivers that are Considered Navigable. The Truckee, Carson, Colorado and Virgin Rivers. The Truckee and Carson due to the fact that they floated timber down them yet the same is true of the Walker River but it has been excluded. No one has ever answered my question as to how "Commerce at Statehood" determines Navigation Law in Nevada. Just when in Nevada History was the basic tenant of Nevada Water Law usurped? There is NO MENTION of Commerce in Nevada Water Law that I could find. However there is plenty that asserts the Public Rights to our waters.

So let's get into Nevada State Water Law:

Under State Engineer: Section 532
Section 532.220 (4) As used in this section, "navigable river" means a river or stream that is used, or is susceptible of being used, in its ordinary condition for trade or travel in the customary modes of trade or travel on rivers and streams.

Under Adjudication, Appropriation: 533

Section 533.010: "Person" defined. As used in this chapter, "person" includes a corporation, an association, the United States, and the state as well as a natural person.

533.020: "Stream System" defined. As used in this chapter, "stream system" shall be interpreted as including any stream, together with its tributaries and all streams or bodies of water to which the same may be a tributary.
533.025: Water belongs to the public. The water of all sources of water supply within the boundaries of the state whether above or below the surface, belongs to the public.
533.030: Appropriation for beneficial use. (2) The use of water, from any stream as provided in this chapter and from underground water as provided in NRS 543.040, for any recreational purpose, is hereby declared to be a beneficial use.
533.035: Beneficial use: Basis, measure and limit of right to use. Beneficial use shall be the basis, measure and the limit of the right to the use of water.
533.050: Beneficial use of water declared a public use; eminent domain.

Under Underground Water and Wells: 534

Section 534.020: Underground waters belong to the public: subject to appropriation for beneficial use: declaration of legislative intent.

Under Navigable Waters 537

Section 537.010: Colorado River declared navigable: title to lands below high water mark held by state.
537.020: Virgin River declared navigable: title to lands below high water mark held by state.

Under Interstate Waters: Compacts 538

Section 538.530 Article IX: Fish and Wildlife and Recreation: (A) In the exercise of the powers and functions conferred on the Commission, it shall be the policy of the Commission to prepare and review plans for the development and application of measures for the preventing damage to and enhancing the fish and wildlife and recreational resources of the Columbia River Basin and to cooperate with all agencies charged with the responsibility for protecting and fostering these resources.

Under Interstate Waters; Compacts 538

Section 538.600 Article XIII Fish, Wildlife, and Recreation: The use of waters for preservation, protection, enhancement of fish, wildlife, and recreation is hereby recognized as an inseparable part of the public interest in the use of the waters of Lake Tahoe, Truckee, Carson and Walker River Basins in both states, and is therefore beneficial.
Article XIV Non consumptive Use: Each State may use water for non consumptive purposes, including but not limited to flood control, recreation, fishery and wildlife maintenance and enhancement, and hydroelectric power generation, provided that such uses result in no discernable reduction in the water allocated to the other state.

Constitution of the State of Nevada

Section Article 1. Inalienable Rights. All men are by Nature free and equal and have certain inalienable rights among which are to those of enjoying and defending life and liberty; Acquiring. Possessing, and Protecting property and pursuing and obtaining and liabilities. safety and happiness.
Article 1 Section 1; Saving existing rights; That no inconvenience may arise by reason of a change from a Territorial to a permanent State Government, it is declared that all rights....., shall continue as if no change had taken place; and all process which may issue under the Authority of the Territory of Nevada, previous to its admission into the Union as one of the United States shall be valid as if issued in the name of the State of Nevada.
Article 17 Section: 2 Territorial laws to remain in force.

It should be noted that there is NO MENTION of Commerce determining waters and navigation or their usage in either Nevada Water Law or the State Constitution. At the time of Statehood for Nevada the Waters of this State were used for many purposes. With Native Americans they lived by water sources and got much of their drink, food, fish, meat, pelts, edible plants and medicines from this States Surface waters and waterways. The first white visitors to Nevada were hunting the many fur bearing animals of this state and again most were found by sources of water. SO claiming that "Commerce" did not exist on our waterways is total unacceptable in any legal argument. Those hunters were also getting much of their water needs, food, fish, edible plants just as the Native Americans were. Our states first settlers were as one would expect also living by our surface waters and doing exactly what the Indians and trappers were doing. So there is a great history of legal decisions that say that this behavior is Commerce at its basic level of human existence. Find water find food find recreation.
More Landmark rulings are enclosed but here are some more.

So with these legal points and the many more enclosed in the rest of these pages it is in excusable that any claims of private property in any way under water or along shorelines to the many waters and waterways of this state to deny access to our State of Nevada's Waters as well as their shorelines which is the fact on all of our so called Navigable Rivers.

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

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

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

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

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

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

Thank you for your attention to this matter.

Sincerely,

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

Nevada Division of
STATE LANDS

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

February 3, 2021

Charles Albright
1408 Washington Street
Reno NV 89503

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

Mr. Albright,

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

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

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

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

Sincerely,

Charles Donohue

Charles Donohue
Administrator – State Land Registrar

Brian Sandoval
Governor

State of Nevada

DEPARTMENT OF WILDLIFE

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

TONY WASLEY
Director

BONNIE LONG
Deputy Director

JACK ROBB
Deputy Director

February 18, 2021

Charles Albright
1408 Washington Street
Reno, NV 89503

Dear Mr. Albright,

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

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

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

Sincerely,

Tony Wasley

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

Honorable Nevada Supreme Court Justices,

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

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

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

So my basic question is are OUR State Waters, both Surface and Underground the property of this States Public. Our State Constitution, Nevada Water Laws and Federal Laws SAY they are the Publics. Before Statehood they belonged to the US. At Statehood the Public Trust Doctrine and our State Constitution said they belonged to the Public / State for the uses that the Public had including recreation. That was all of this States Waters above and below. You each must agree that is a fact in Nevada. Yet since some time after Statehood the Publics Rights to recreate and use all of this States Waters for our legal desires has been "Compromised".

Virtually EVERY State in this Nation has laws saying that their Waters and Waterways are free of restrictions of usage by the public. That is not just interstate, intrastate of tidal waters but all waters. This is an application of hundreds of years of public rulings like the Magna Carta and other history of water also covered in the legal thoughts and rulings in following pages.

Enclosed are numerous legal rulings all attest to the Publics Rights to this country's waters. So the framework for my questions to each of you is WHY? What happened that I and everybody else in this State can only LEGALLY Recreate on only 4 Rivers in Nevada. The Truckee, Carson, Virgin and Colorado Rivers. That is it! 4 Rivers I can use for recreation without in theory being

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

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

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

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

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

Charles Albright
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Reno, Nevada 89503
775-324-5102 H
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cralbright@juno.com
June 9th 2022
Maybe it is time that Nevada joined the 21st Century. I cannot afford a high priced Attorney to do all of this. Please tell me my options to get what our State Constitution and Nevada Water Law say is RIGHT. Thanks for your time.

December 17, 2020

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

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

Dear Mr. Attorney General:

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

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

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

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

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

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

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

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

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

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

Nevada courts have held that streams are navigable if used or susceptible to being used at regularly-occurring times as highways for commerce over which trade and travel are or may be conducted in customary modes of travel on water. *State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972)*. Nevada courts have applied the federal title test and found that streams that were historically used to drive logs to market satisfy the federal title test. *Bunkowski, Id. at 1233-36.* This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233.* Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable. *Bunkowski, Id. at 1235*. Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real life situations include:

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

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

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

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

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

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

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

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

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

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

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

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

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

January 14, 2021

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

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

Dear Mr. Attorney General:

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

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

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

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

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

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

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

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

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

Nevada courts have held that streams are navigable if used or susceptible to being used at regularly-occurring times as highways for commerce over which trade and travel are or may be conducted in customary modes of travel on water. *State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972)*. Nevada courts have applied the federal title test and found that streams that were historically used to drive logs to market satisfy the federal title test. *Bunkowski, Id. at 1233-36.* This test vests title to the beds underlying these waters in the state. *Bunkowski, Id. at 1233.* Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable. *Bunkowski, Id. at 1235*. Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

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

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

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

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

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

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

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

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

In the opinion of the Attorney General of Nevada, the State Engineer, irrigation districts, the Division of State Lands, local counties through their district attorneys, and the United States have the authority to seek removal of structures that may encroach upon the natural channel of a navigable river. *Op. Att'y Gen. 80-11 (Nev. 1980).* Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real life situations include:

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

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

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

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

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

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

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

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

Very Truly Yours,

Fred Atcheson, Esquire
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Additional citations:
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Right to portage around obstructions: The Montello, 87 U.S. 430 (1874)
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981); Martin v. Waddell, 41 U.S. 367 (1842).
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Landowner fences across rivers violate federal law: 33 U.S. Code 403
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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.

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Right of public to use waterway supersedes any claim of private ownership": United States v. Cress, 243 U.S. 316 (1917).
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Usable for commercial recreation are navigable: Alaska v. Ahtna, 891 F.2d 1401 (9th Cir. 1989).
Sports fishing and duck hunting: Montana v. United States, 450 U.S. 544 (1981).
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Rivers navigable for Commerce Clause is defined by federal law, not state law: United States v. Holt State Bank, 270 U.S. 49 (1926).
Landowner fences across rivers violate federal law: 33 U.S.C. 403, obstruction of navigable waters.
Rights to scout and portage: The Montello, 87 U.S. 430 (1874)
Walking above high water line: The Montello, 87 U.S. 430 (1874); Brown v. Chadbourne, 31 Maine 9 (1849).
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State laws cannot deny public rights to use navigable rivers: Gibbons v. Ogden, 22 U.S. 1 (1824).
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Public right to navigate and walk along beds and banks through private land: Scranton v. Wheeler, 179 U.S. 141 (1900).
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Rights to fish and fowl: Montana v. United States, 450 U.S. 544 (1981) Martin v. Waddell, 41 U.S. 367 (1842).
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For 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.)

WIKIPEDIA

Public trust doctrine

The **public trust doctrine** is the principle that the sovereign holds in trust for public use some resources such as shoreline between the high and low tide lines, regardless of private property ownership.[1]

Contents

Origins

The ancient laws of the Byzantine Emperor Justinian held that the sea, the shores of the sea, the air and running water were common to everyone.[2] The seashore, later defined as waters affected by the ebb and flow of the tides could not be appropriated for private use and was open to all. This principle became the law in England as well. Centuries later, *Magna Carta* further strengthened public rights. At the insistence of English nobles, fishing weirs which obstructed free navigation were to be removed from rivers.

These rights were further strengthened by later laws in England and subsequently became part of the common law of the United States. The Supreme Court first accepted the public trust doctrine in *Martin v. Waddell's Lessee* in 1842, confirming it several decades later in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In the latter case the Illinois Legislature had granted an enormous portion of the Chicago harbor to the Illinois Central Railroad. A subsequent legislature sought to revoke the grant, claiming that original grant should not have been permitted in the first place. The court held that common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters (except in the case of very small portions of land which would have no effect on free access or navigation).

The public trust applies to both waters influenced by the tides and waters that are navigable in fact. The public trust also applies to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.

Application

This doctrine has been primarily significant in two areas: land access and use, and natural resource law.

Access to ocean and ponds

The doctrine is most often invoked in connection with access to the seashore. In the United States, the law differs among the fifty states but in general limits the rights of ocean front property owners to exclude the public below the mean high tide line.

Massachusetts and Maine (which share a common legal heritage) recognize private property ownership to the mean low tide line—but allow public access to the seashore between the low and high tide lines for "fishing, fowling and navigation," traditional rights going back to the Colonial Ordinance of 1647.[3] Maine's Supreme Court in 2011 expanded the public trust doctrine by concluding fishing, fowling and navigation are not an exclusive list; the court allowed the general public to cross private shoreline for scuba diving.[4]

The public trust doctrine also finds expression in the Great Pond law, a traditional right codified in case law and statutes in Massachusetts, Maine, and New Hampshire.[5] The state is said to own the land below the low water mark under great ponds (ponds over ten acres), and the public retains in effect an access easement over unimproved private property for uses such as fishing, cutting ice, and hunting.[6]

In Oregon, a 1967 "Beach Bill" affirmed the state's public trust doctrine, and the right of the public to have access to the seashore virtually everywhere between the low and high tide marks. In California the situation is more complicated: private landowners often try to block traditional public beach access, which can result in protracted litigation.[7] Freshwater use rights have also been subject to litigation in California, under the public trust doctrine.[8]

Natural resources

The doctrine has also been used to provide public access across and provide for continued public interest in those areas where land beneath tidally influenced waters has been filled. In some cases, the uses of that land have been limited (to transportation, for instance) and in others, there has been provision for public access across them.

The doctrine has been employed to assert public interest in oil resources discovered on tidally influenced lands (Mississippi, California) and has also been used to prevent the private ownership of fish stocks and crustacean beds.

In most states in the United States, lakes and navigable-in-fact streams are maintained for drinking and recreation purposes under a public-trust doctrine.

In some countries, the public trust doctrine has been applied to provide environmental protection to natural resources in order to uphold human rights.[9] A recent study also demonstrated that public trust doctrines are transnationalizing.[10]

See also

- Prescriptive easement
- Freedom to roam
- *Illinois Central Railroad Co. v. Illinois*
- *Juliana v. United States*
- *M. C. Mehta v. Kamal Nath*
- *National Audubon Society v. Superior Court*
- Public trust
- Public good
- Public space
- Public property
- Right of way

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

Justification

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

Legal Precedent

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

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

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

State v. Bunkowski

503 P.2d 1231 (1972)

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

No. 6799.

Supreme Court of Nevada.

November 29, 1972.

Rehearing Denied December 22, 1972.

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

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

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

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

OPINION

ZENOFF, Chief Justice:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

.....

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment reversed.

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

NOTES

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

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

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

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

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