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. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

a Past, present, or potential presence of interstate or foreign commerce;

b Physical capabilities for use by commerce as in paragraph (a) of this section; and

c Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

a ***Nature of commerce: type, means, and extent of use.*** The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

b ***Nature of commerce: interstate and intrastate.*** Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

a ***Existing improvements: artificial waterbodies.***

1 An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

2 The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see § 329.12(b) of this part).

3 Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a

private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) ***Non-existing improvements, past or potential.*** A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) ***Past use.*** A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) ***Future or potential use.*** Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) ***Jurisdiction over entire bed.*** Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) ***Upper limit of navigability.*** The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

a ***Ocean and coastal waters.*** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

1 ***Baseline defined.*** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

2 ***Shoreward limit of jurisdiction.*** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

b ***Bays and estuaries.*** Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

a ***Effect on determinations.*** Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

b ***Procedures of determination.*** A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

c ***Suggested format of report of findings:***

1 Name of waterbody:

2 Tributary to:

3 Physical characteristics:

i Type: (river, bay, slough, estuary, etc.)

ii Length:

iii Approximate discharge volumes: Maximum, Minimum, Mean:

iv Fall per mile:

v Extent of tidal influence:

vi Range between ordinary high and ordinary low water:

vii Description of improvements to navigation not listed in paragraph (c)(5) of this section:

4 Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

5 Authorized projects:

i Nature, condition and location of any improvements made under projects authorized by Congress:

ii Description of projects authorized but not constructed:

iii List of known survey documents or reports describing the waterbody:

6 Past or present interstate commerce:

i General types, extent, and period in time:

ii Documentation if necessary:

7 Potential use for interstate commerce, if applicable:

i If in natural condition:

ii If improved:

8 Nature of jurisdiction known to have been exercised by Federal agencies if any:

9 State or Federal court decisions relating to navigability of the waterbody, if any:

10 Remarks:

11 Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

a Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in section 329.14 of this part. The report of findings should then be forwarded to the division engineer on an expedited basis.

b Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ___ (River) (Bay) (Lake, etc.) is a navigable water of the United States from ___ to ___. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

c Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether

1 the waters are navigable waters of the United States or

2 If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

a Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

b It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

c Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

American Whitewater

Nevada Navigability Report

Summary

In Nevada, navigable streams are those capable of being used or that have been used for commerce, such as floating logs to market. These streams can be floated, and probably fished, recreationally. The right to portage obstructions is undecided in Nevada.

State Test of Navigability

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.[1)] 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.[2)] This test vests title to the beds underlying these waters in the state.[3)] 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.[4)] 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.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although the public trust applies at least to streams navigable under the federal title test and the navigation servitude to streams navigable under the federal commerce test, Nevada law has not defined the extent of the public trust or the navigation servitude. Navigable streams may be boated, and most likely waded and fished, but rights regarding portaging obstruction have not been decided.

Trespass is a misdemeanor that occurs when a person enters or remains upon the land of another after receiving a sufficient warning not to trespass.[5)] A landowner may provide "sufficient warning" by fencing the property or by following certain posting procedures set out in the trespass statute.[6)] While the term "fence" is defined in the statute to include "a wall, hedge, or chain link or wire mesh fence," the statute was amended in June 2007 to make clear that the term "fence" does not include a barbed wire barrier.[7)] It is prima facie evidence of trespass for anyone to be found on property which is posted or fenced in the manner described in the trespass statute "without lawful business with the owner or occupant of the property."[8)]

Miscellaneous

Several rivers in Nevada, including the Colorado River, the Virgin River, and the Carson River, have been declared to be

navigable to some degree by statute or by case law.[9]. Nevada courts have held that the list of navigable waters in the statutes is not exclusive, and that the issue of navigability is a "judicial question."[10]

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.[11] 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.[12]

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1) State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972).
2) Id. at 1233–36.
3) Id. at 1233.
4) Id. at 1235.
5) Nev. Rev. Stat. § 207.200 (2007).
6) , 7) , 8) Id.
9) The following rivers have been declared navigable under the federal title test in Nevada: (1) Colorado River by Nev. Rev. Stat. § 537.010 (2007); (2) Virgin River, including sources confluent above St. Thomas, by Nev. Rev. Stat. § 537.020 (2007); and (3) Carson River at Carson City by Bunkowski, 503 P.2d at 1236. A fourth body of water, Winnemucca Lake, was declared a navigable body of water by statute in 1921, Nev. Rev. Stat. § 537.030 (2007), but this lake is now entirely dry. The Nevada Supreme Court noted in Bunkowski that the United States Court of Appeals for the Ninth Circuit has held that Lake Tahoe is navigable. 503 P.2d at 1238 (citing Davis v. United States, 185 F.2d 938, 942–43 (9th Cir. 1950
10) Bunkowski, 503 P.2d at 1238.
11) Op. Att'y Gen. 80–11 (Nev. 1980).
12) Id.

American Whitewater

California Navigability Report

Summary

In California, if a stream can be floated for most of the year, then the public has the right to use the stream. The public may use the stream for recreational boating, fishing, swimming, hunting, etc. up to the high water mark.[1)]

State Test of Navigability

California courts have adopted a state test for determining which streams are subject to a public right of navigation. The waters subject to this right or "easement" include those waters that are navigable in fact at the present time by any watercraft, including small recreational or pleasure craft propelled by motor or by oar, such as canoes, rafts or kayaks. A number of cases have applied this test.[2)] California has rejected the common law rule that navigability is determined by whether the tide ebbs and flows.[3)]

To be considered navigable, the stream must be suitable for public use, which is determined on a case-by-case basis.[4)] The stream need not be navigable in fact for the entire year. A stream navigable in fact for most of the year should suffice.[5)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state acquired title to the navigable waters in its territory upon its admission to the union and the navigable waters and lands lying beneath them are held in trust for the benefit of the people.[6)] This includes all waters navigable in fact.[7)]

California's constitution allows the public to use all navigable waters in the state, and further directs the legislature to give the provision the most liberal construction.[8)] Regardless of whether the streambed of a river which is navigable in fact is public or privately owned, there is an easement for public navigation and the incidents of navigation; i.e. boating, fishing, swimming, hunting and other recreational uses.[9)] The easement exists up to the high water mark.[10)] This right includes the use of the bottom of navigable waters for anchoring, standing, or other purposes.[11)] The public easement, however, does

contexts, however, courts have suggested that an action which would otherwise constitute a trespass may be justified if prompted by the motive of preserving life or property, and if reasonably related to that purpose.[13)]

Courts are especially sensitive to infringements upon the public's constitutional rights under the guise of police power.[14)] The Attorney General found such an infringement when the state sought to prohibit the right to use navigable waters that

flowed over inundated privately-owned land adjacent to the navigable waterway.[15] In a landmark case, the same constitutional provision defeated a county ordinance that forbade rafting on a river because of the litter, pollution, and noise generated by the rafters. Although reasonable regulation was in order, use prohibition was not.[16] The California Attorney General, however, has opined that government may close navigable waterways to recreational boaters during an emergency, such as flood conditions, when such emergency rules and regulations are required to protect the safety of persons and property.[17]

There is no right to trespass across private property to access navigable waters.[18] Where a public road or bridge easement across private property intersects a waterway, however, lawful access to the waterway may be provided. For example, a kayaker was found innocent of trespass where the kayaker was carrying his boat from a county road across private land within the perimeter of the road easement to gain access to a navigable waterway.[19] In that case, the improved roadway narrowed where a bridge crossed the waterway; nevertheless, the kayaker's use of the entire road easement to access the waterway was reasonable. The County could have imposed or allowed reasonable restrictions on the use of the easement by the public but had not done so.[20]

Miscellaneous

Article I, section 25 of the California Constitution forbids the state from alienating land without reserving fishing rights in the public.

The state's subdivision map act (Government Code sections 66478.4 and 66478.5) requires that any subdivision development fronting on public waterways provide both (1) reasonable public access from a public highway to the bank of the waterway, and (2) dedication of a public easement along a portion of the waterway bordering on or lying within the subdivision. These rights are in addition to the existing public right to use a river below the high water line.[21]

See American Whitewater's letter [https://www.americanwhitewater.org/content/Document/view/documentid/571] regarding the Pit 4 Reservoir Closure for an example of how we have dealt with navigability issues on a project in California.

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1) Also see the article on California's Public Right to Float by Ronald W. Rogers available at http://www.americanwhitewater.org/archive/article/966 [https://www.americanwhitewater.org/archive/article/966].

2) Bohn v. Albertson, 107 Cal. App. 2d 738 (1951); People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045–1051 (1971); Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d 560 (1976); Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406 (1979); Kern River Public Access Committee v. City of Bakersfield, 170 Cal. App. 3d 1205 (1985). Additional cases, California Attorney General opinions, and related law reviews are listed in a letter from the Cal. Att'y Gen. to AWA, dated June 16, 1997 (on file with AWA).

3) Mack, 19 Cal. App. 3d at 1048.

4) Hitchings, 55 Cal. App. 3d at 570.

5) Id. at 571.

6) Colberg Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal. 2d 408, 416 (1967).

7) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997

8) Cal. Const. Article X, section 4.

9) Mack, 19 Cal. App. 3d at 1045–1051.

10) Id. at 1050.

11) Bohn, 107 Cal. App. 2d at 749.
12) Op. Cal. Att'y Gen. SO 77-42 (February 1, 1978).
13) People v. Roberts, 47 Cal. 2d 374, 377 (1956).
14) Younger, 96 Cal. App. 3d at 406.
15) Op. Cal. Att'y Gen. 85-602 (October 10, 1985).
16) Younger, 96 Cal. App. 3d at 406-407.
17) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997).
18) Charpentier v. Von Geldern, 191 Cal. App. 3d 101, 110 (1987).
19) People v. Sweetser, 72 Cal. App. 3d 278 (1977).
20) Id.
21) Kern River Public Access Committee, 170 Cal. App. 3d at 1215.

American Whitewater

Arizona Navigability Report

Summary

The Arizona Navigable Stream Adjudication Commission ("ANSAC") has determined that, with the exception of the Colorado River, none of Arizona's watercourses is navigable. Ownership of the streambeds of non-navigable watercourses rests with either the federal government or private parties. Although the public likely enjoys recreational rights on waters above federally-owned streambeds, it has no such right to access waters above privately-owned streambeds.

State Test of Navigability

In 1992, the Arizona legislature established the ANSAC to conduct full evidentiary public hearings across the state to determine the navigability of each of Arizona's approximately 39,039 watercourses (of which about 2,241 are named) and to determine the public trust values of all watercourses that were navigable at statehood.

Arizona's test for navigability is codified at A.R.S. § 37-1101(5)) [http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/37/01101.htm&Title=37&DocType=ARS] and is based upon the "federal test" for navigability. Under this test, a watercourse is navigable if it: (1) was in existence on February 14, 1912; and (2) at that time, it was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Prior to 2001, the Arizona statute contained a number of presumptions and limitations that made it "almost impossible for an Arizona watercourse to be determined navigable."[1)] For instance, the statute required the navigability of a watercourse to be shown by "clear and convincing" evidence. In Defenders of Wildlife, the Arizona Court of Appeals declared certain provisions of the statute unconstitutional, finding that the restrictive presumptions and limitations conflicted with the federal test for navigability. Following the court's Defenders of Wildlife ruling, the legislature amended the statute in 2001 to reflect a less restrictive test of navigability, consistent with the federal test, and changed the burden of proof from the "clear and convincing" standard to the "preponderance of the evidence" standard.

Thus, the ANSAC now considers the following six criteria (in the order of greatest weight) as tending to demonstrate navigability

- Historical record of boating;
- Record of modern boating;
- Perennial stream flow (i.e., they do not flow only in direct response to precipitation);
- Dam located on the stream;
- Fish found in stream; and
- Special status (e.g., other water-related characteristics, including in-stream flow application

special status (e.g., other water related characteristics, including in stream flow application and/or permit, unique waters, wild and scenic, riparian, and preserve).[2)]

The ANSAC also considers the depth, width, and velocity of the water flow and compares these factors to the minimum standards required for different types of vessels, as well as the configuration of the channel and whether it contains rapids, boulders, or other obstacles.[3)]

Ownership of a streambed is determined by whether or not the streambed was navigable as of the date of statehood - February 14, 1912. Under Arizona's application of the "equal footing" doctrine, the state owns the bed of any watercourse that was navigable on the date of statehood. If the stream was not navigable on that date, then the owner of the streambed prior to the date of statehood retains title. Because the ANSAC has determined that all watercourses in Arizona - with the exception of the Colorado River - were non-navigable on the date of statehood,[4)] the state does not own the streambeds of any non-navigable watercourses. Thus, if the streambed was federal land prior to the date of statehood, the federal government would retain ownership. Alternatively, if the streambed had been previously patented by a private party or disposed of by the federal government, then the private party would retain title.

After the ANSAC issues its navigability determination for a particular watercourse, it must then publish a report describing the evidence considered, analytical methods used, and findings supporting its determination. Upon the publication of each report, there is a 180-day appeal period for the Arizona State Land Department ("SLD") and a 270-day appeal period for all other interested parties, during which time the ANSAC's determination may be appealed to the appropriate county superior court. Although the ANSAC has issued its initial navigability determinations for all watercourses in the state, it has yet to publish a number of supporting reports, including reports for some of the larger rivers, such as the Little Colorado, Puerco, Big Sandy, Bill Williams, Burro Creek, Santa Maria, Virgin, Agua Fria, Hassayampa, Gila, Upper Salt, and Verde Rivers.[5)] Thus, there remains an opportunity to appeal the ANSAC's determinations that these watercourses are non-navigable. The SLD's appeal of the ANSAC's determination that the Lower Salt River is non-navigable is pending before the Maricopa County Superior Court.

Extent of Public Rights in Navigable and Non-Navigable Rivers

On the Colorado River (and any other watercourses that may be found to be navigable by a court), the public has the right to boat, fish, and recreate.[6)]

The extent to which the public has rights in non-navigable watercourses depends upon the ownership of the streambed. For example, if the federal government has retained ownership, the public likely enjoys rights to boat, fish, wade, recreate, and portage. If, on the other hand, the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the owner's permission.

Miscellaneous

For additional information on the navigability of Arizona's watercourses, see the ANSAC website at: http://www.azstreambeds.com [http://www.azstreambeds.com/].

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1) Defenders of Wildlife v. Hull, 18 P.3d 722, 737 (Ariz. Ct. App. 2001) (slip op. at

http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf [http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf]).

2) See, e.g, ANSAC Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003) at 25-27.

3) Id. at 27.

4) For a list of ANSAC determinations, see: http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm]. ANSAC has noted in its final reports (see footnote 3 below) that the Colorado River was determined to be a navigable river long ago. The ANSAC notes that Arizona's watercourses typically have been used for irrigation, rather than navigation, given the state's arid or desert regions. Arizona includes parts of at least three of the four North American deserts.

5) See http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm] for the status of pending reports. ANSAC's final reports for small and minor watercourses in Yuma, Mohave, La Paz, Santa Cruz, and Cochise Counties can be found at: http://www.azstreambeds.com/docs/reports/reports.htm [http://www.azstreambeds.com/docs/reports/reports.htm].

6) "The Colorado River ... is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment." Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), vacated on other grounds, 419 P.2d 505 (Ariz. 1966).

American Whitewater

Idaho Navigability Report

Summary

Idaho has one of the most boater-friendly rights of passage in the nation. Streams that can be floated by a kayak in Idaho are open to the public for any recreational purpose. Boaters may lawfully scout within ordinary high-water marks and portage around obstructions so long as they return to the river at the first safe spot.

State Test of Navigability

Idaho has adopted a recreational boating test to determine which streams are navigable, and therefore subject to a public easement. Consequently, the public can use more streams in Idaho than just those streams that pass the federal navigability tests.[1)] For purposes of recreational use, Idaho statute defines navigable streams as "[a]ny stream which, in its natural state, during normal high water, will float cut timber having a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes."[2)] A list of streams considered to be navigable is also available from the Idaho Department of Water Resources.[3)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

Navigable streams are "highways for recreation."[4)] Recreational use of navigable streams is authorized "within the meander lines or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state shall be open to public use as a highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation - boating, swimming, fishing, hunting, and all recreational purposes."[5)] This statute passed shortly after a case in which Silver Creek in Blaine County was deemed navigable for all recreational purposes because it had been used for floating timber.[6)]

A more recent case highlights that the ordinary high-water mark may be open to interpretation. In the Sanders Beach case, the Idaho Supreme Court's findings as to the ordinary high-water mark eliminated public access to a beach that has been used by swimmers for a century.[7)]

Portaging over private land and around irrigation dams or other obstructions that interfere with the navigability of the stream is expressly permitted by statute.[8)] The boater must reenter the stream immediately below the obstruction at the nearest point where it is safe to do so.[9)]

Trespassing on property that is posted against trespassers with signs or painted fence posts, or where oral or written personal communication to leave the property is given by the owner or lessee, is a misdemeanor.[10)]

Miscellaneous

Legislative amendments passed in 1996 in response to agricultural, timber and mining interests limit the applicability of the public trust doctrine in Idaho. Specifically, the statute provides that land use and water management decisions are to be made without reference to the public trust. Although the statute does not directly impact the public's recreational use of streams, decisions that consistently put business interests first could negatively impact the public's ability to enjoy streams for recreational purposes over time.[11)]

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1) Idaho Code § 58-1201(a) (2006) (expressly recognizes that Idaho holds the beds of streams navigable under the federal title test in trust for the public). See Selkirk-Priest Basin Association, Inc. v. State, 899 P.2d 949 (Idaho 1995) for a recent application of the public trust doctrine for navigability purposes in Idaho, but note that this decision was before the legislative amendments discussed in the Miscellaneous section. See also Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes, 21 Idaho L. Rev. 275 (1985).

2), 4) Idaho Code § 36-1601(a) (2006).

3) The listing is included in the Attachments to 2007 Idaho Department of Water Resources Recreational Dredging Application. A copy is on file with AWA.

5) Idaho Code § 36-1601(b) (2006).

6) Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974).

7) City of Coeur D'Alene v. Michael L. and Jeannette G. Mackin, et al. and State Board of Land Commissioners, et al., 147 P.3d 75 (Idaho 2006). See also Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 17 P.3d 260 (Idaho 2000) for a discussion of the determination of the "ordinary high-water mark."

8), 9) Idaho Code § 36-1601 (2006).

10) Idaho Code § 18-7008 (2006).

11) Idaho Code § 58-1203 (2006) (enacted through House Bill No. 794 of 1996). See Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine, 34 Idaho L. Rev. 91 (1997) for further background and analysis.

American Whitewater

Oregon Navigability Report

Summary

In Oregon, the public has a right to float, wade, and fish in navigable streams up to the ordinary high water mark. The public also has a right to float, fish, and swim in certain smaller non-navigable streams that have public use rights. The law, however, remains unclear as to whether the public can touch the streambed or banks of smaller non-navigable streams while floating.

State Test of Navigability

In Oregon, state-owned waterways generally are available to the public for any legal[1)] use, such as navigation, commerce, fisheries and recreation.[2)] Waterways are considered state-owned if they are title-navigable.[3)] A waterway is considered title-navigable if, at the time of statehood, the waterway in its natural and ordinary condition was capable of being used as a highway of commerce for trade and travel by a customary mode of water transportation.[4)] This test for title-navigability is based on federal law.

The Oregon State Land Board is authorized by statute to make determinations of title-navigability under the federal title test and has adopted several regulations concerning navigability determinations.[5)] The Oregon State Land Board also has compiled a list of streams that are navigable based on federal judicial decisions, State Land Board policy or rules, meandering characteristics, or tidal influences.[6)] However, the navigable status of many other streams in Oregon has not yet been decided.[7)] No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine, discussed below, for smaller waterways.

Another source of public rights to use waterways in Oregon derives from state common law definition of navigable waters and is referred to by the state as the "floatage easement" or "public use" doctrine. This doctrine gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress, even for recreational use, through the waters.[8)]

One case defined streams subject to public use for a passageway as those streams "capable of being commonly and generally useful for floating boats, rafts, logs, for any useful purpose of agriculture or trade."[9)] Another case concluded that such trade and commerce should include "the use of boats and vessels for the purposes of pleasure," or "for the purpose of fishing."[10)] Consequently, the public use doctrine extends beyond strict commerce for pecuniary benefit to include activities such as fishing and pleasure boating.[11)]

In 2005, the Oregon State Attorney General advised that public uses also extend to bathing, hunting, and other things

incidental to public use of water.[12] It would seem, therefore, that the capacity to float a kayak would qualify as a public use benefiting from the floatage easement.

The Oregon State Attorney General has opined that it "believe[s] it remains a valid basis for public use of certain waterways that meet the public use test developed in a series of Oregon Supreme Court decisions." [13]

Waterways are also state-owned if they are tidally-influenced.[14] A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. A tidally-influenced waterway is considered state-owned, even if it is not used or not susceptible of use for commerce.[15] Thus, the public also has a right to float, wade, fish, swim, and so forth, in tidally-influenced streams and rivers.

Extent of Public Rights in Navigable & Non-navigable Rivers

Oregon owns the beds of navigable rivers. The public has the right to boat, fish, swim, etc. in these rivers to the ordinary high water mark.[16] The ordinary high water mark is determined by "ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of a bed a characteristic mark distinct from that of the banks in respect to vegetation and the nature of the soil itself."[17]

In privately-owned river and stream-beds, which are subject to the public's floatage easement, the extent of public rights is still uncertain. The public clearly has the right to float these streams, but the courts have not confirmed that the floatage easement includes other rights incidental to boating, such as wading, fishing, and portaging that involve the use of privately-owned stream banks. One older case involving a river with a floatage easement allowed the attachment of a log boom to a privately-owned island because attachment was necessary to exercise the right of driving logs on the river and the impact was minimal.[18] Other cases indicate that "necessity" may be limited to a need to enter upon the land of a streambed owner to reclaim stranded property or by reason of avoiding danger.[19]

In contrast, entering upon an upland, when unnecessary, likely is a trespass.[20] It is unclear at this time whether portage or other activities incidental to kayaking are allowed on private property. In some instances, district attorneys have dismissed trespass cases that occur on rivers that have not been subject to a determination of navigability, although some individuals nonetheless have been arrested.[21]

Trespass in Oregon is entering on premises that are not open to the public.[22] Premises that are open to the public, by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances that would cause a reasonable person to believe that no permission to enter or remain is necessary.[23] While the public may not trespass upon a privately-owned upland, a streambed owner likewise may not construct a fence or other obstruction blocking travel along a waterway.[24]

Miscellaneous

In 2005, Senate Bill 1028 (SB1028) would have required comprehensive rules governing public rights to Oregon's waterways. In particular, section 5(1) of the bill expressly allowed travel by the public on upland property adjacent to the waterway for emergency use or to portage if the person takes the most reasonably direct and least intrusive path, as well

as taking reasonable steps to avoid damaging the property and to repair any damage the person may have caused to the property. Further, section 5(2) provided a defense to a charge of criminal trespass under OR 164.245, 164.255, or 164.265 that a person making recreational use of a class 1 waterway entered the property adjacent to a waterway for emergency use or to portage and complied with the requirements of section 5. Under section 5(3), a person using private property adjacent to a waterway for emergency use or to portage is liable for actual damage caused to the property.

SB1028 was heavily criticized by both landowners and public use advocates.[25] In particular, some public use advocates believed that certain provisions of the SB1028 actually eroded public use by allowing those uses to be regulated or restricted. The bill ultimately died in committee in August 2005. The full text of SB1028 can be found at http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf [http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf]

For further information, Oregon State maintains a detailed website detailing navigability issues. http://www.oregon.gov/DSL/NAV [https://www.oregon.gov/DSL/NAV]

Common Waters of Oregon is a membership-based, public benefit, nonprofit organization dedicated to preserving Oregon rivers as common highways and forever free. This organization maintains an informational website covering water use issues. http://www.oregonriverrights.com [http://www.oregonriverrights.com]

Updated and Reviewed January 22, 2018

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1) In general, any act that is illegal on land also is illegal on a pubic waterway. The State of Oregon provides a non-exclusive list of such acts. http://www.oregon.gov/DSL/NAV/yourrights.shtml [https://www.oregon.gov/DSL/NAV/yourrights.shtml]

2) 2005 WL 1079391 (Or.A.G.).

3) , 14) Phillips Petroleum Co. v. Mississippi, 484 US 469, 476, 108 S. Ct. 791, 98 L Ed.2d 877 (1988); United States v. Holt, 270 US at 56; 45 Op Atty. Gen 1 (1985).

4) 2005 WL 1079391 at 10.

5) Or. Rev. Stat. § 274.404 (1997). Or. Admin Rules § 141-121-0000 et seq. (1997). In addition, 37 Op. Or. Att'y Gen. 1342 (1976), the criteria for the federal navigability test are discussed.

6) http://www.oregon.gov/DSL/NAV/navigwaterways.shtml [https://www.oregon.gov/DSL/NAV/navigwaterways.shtml]

7) The State maintains a table showing the current status of the eight navigability study requests submitted to the Department since the legislation requiring such studies was passed in 1995. http://www.oregon.gov/DSL/NAV/studyrequests.shtml [https://www.oregon.gov/DSL/NAV/studyrequests.shtml]

8) The State maintains a list of Oregon waterways meeting the federal test of navigability for purposes of State ownership of the underlying submerged and submersible land. http://www.oregon.gov/DSL/NAV/cases.shtml [https://www.oregon.gov/DSL/NAV/cases.shtml]

9) Weise v. Smith, 3 Or. 445, 451 (1869).

10) Gulliams et al. v. Beaver Lake Club, 90 Or. 13, 27 (1918).

11) See also Luscher v. Reynolds et al., 153 Or. 625, 635 (1936).

12) 29 Op Atty Gen 296, 296-297 (1959); 29 Op Atty Gen 311, 312 (1959).

13) 2005 WL 1079391, 16-17 and 24 (Or.A.G.). Read full opinion at http://www.doj.state.or.us/releases/pdf/op_8281.pdf [http://www.doj.state.or.us/releases/pdf/op_8281.pdf]

15) Phillips at 478-81.

16) Memorandum entitled State Ownership of Navigable Waterways, issued by the Director of the Oregon Division of State Lands, May 24, 1996.

17) Op. Or. Att'y Gen. 7692 (December 8, 1978).
18) , 20) Weise at 451.
19) Lebanon Lumber Co. v. Leonard, 68 OR 147, 150 (1913).
21) Letters from David T. McDonald to Captain Lindsey Ball, Oregon State Police dated August 16, 1996, and September 26, 1996.
22) Or. Rev. Stat. § 164.245 (1997).
23) Or. Rev. Stat. § 164.205 (1997).
24) Guilliams at 27.
25) News article entitled Surf, Turf, Oppose Rivers Bill, Willamette Week Online, June 8, 2005.

American Whitewater

Utah Navigability Report

Summary

In Utah, the public owns the water and has the right to use any surface water for which legal access exists. The public has the right to use the surface water for recreation, including boating. Currently, Utah law is silent on whether streambeds of non-navigable waters can be used or touched by boaters.

State Test of Navigability

Utah law has not adopted a state test of navigability. The streambeds of navigable waters under the federal title test are held in trust for the public by the state.[1)] However, all waters of the state are the property of the public, including water in non-navigable streams that do not pass the federal tests of navigability. The public's right to use the water is subject only to the existing rights of appropriators to the beneficial use of the water.[2)] This provides the public with rights to recreate on streams that do not pass the federal tests of navigability, i.e., non-navigable waters.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although navigability is the standard used to determine title to water beds, it does not establish the extent of Utah's interests in the waters of the state.[3)] The state regulates the water as trustee for the benefit of the people.[4)] This is exemplified in state policy, which recognizes a public interest in the use of the state waters for recreational purposes by requiring that recreational uses be considered by the State Engineer before he approves an application for appropriation[5)] or permits the relocation of a stream.[6)]

A corollary to the rule that all waters of the state are the property of the public is the rule that where there is public access to a body of water, there is a public easement over the water, regardless of who owns the water, and the public is not trespassing when upon such waters.[7)] The public easement includes the right to use the water to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water.[8)] But the public easement is not well defined, and the Utah Supreme Court has expressly not answered the question of whether the easement includes use of the streambed.[9)] Thus, although the Utah Supreme Court seems to be following Wyoming's generous rule of permitting incidental contact, Utah law remains unclear as to whether a boater, floating down a stream whose beds are privately owned, is trespassing if his paddle strikes a rock in the streambed.

Perhaps Utah will be inclined to follow the rule in neighboring Wyoming, another appropriation state, but the answer cannot be predicted with any accuracy. One strong argument in favor of allowing incidental use of privately-owned streambeds is that the public owns the water and, therefore, has a stronger right than that provided by a navigational servitude. Not allowing incidental use of the streambed would render the public's ownership of water less valuable. The

right of portage in non-navigable rivers is an open question in Utah as well.

Miscellaneous

Entry upon property that is posted, fenced, or after personal communication that the property is private is a trespass infraction.[10)]

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1) Utah Div. of State lands v. United States, 482 U.S. 193 (1987).
2) J.J.N.P Co. v. Division of Wildlife Resources, 655 P.2d 1133, 1136 (Utah 1982).
3) United States v. State of Utah, 283 U.S. 64 (1931
4) Id. Public ownership of water is founded on principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all people and the state must therefore assume responsibility of allocating use of water. See also Tanner v. Bacon, 103 Utah 494, 516, 136 P.2d 957, 966-967 (1943).
5) Utah Code 73-3-8(1)(e).
6) Utah Code 73-3-29(4)(a)(ii).
7) J.J.N.P Co., 665 P.2d at 1137.
8) Id. at 1136. See also Day v. Armstrong, Wyo., 362 P.2d 137 (1961); Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974). See also Colman v. Utah State Land Bd., 795 P.2d 622 (1990).
9) Id. at 1137.
10) Utah Stat. § 76-6-206 (1997).

AMERICAN Whitewater

American Whitewater
Washington Navigability Report

Summary

In Washington, the public has a right to use streams that are capable of floating a "bolt of shingles" during high flows. While a bolt of shingles is not large, this test does eliminate some smaller streams capable of being floated in a kayak. Washington does not recognize a right to portage across private land.

State Test of Navigability

Washington generally uses the federal test of navigability to determine all navigable waters within the state because the state owns the beds of all navigable rivers.[1)] Navigable waters include only such waters capable of navigation for general commercial purposes.[2)] Commercial purposes include floating shingle bolts[3)] down the river, but do not include "every small creek in which a fishing skiff or gunning canoe can be made to float at high water."[4)] A stream that had only been used for transportation by small boats for pleasure was determined to be non-navigable.[5)] Since shingle bolts are smaller than saw logs, the required capacity of the water under Washington's test is somewhere between the log test and the recreational boating test.

Washington courts have interpreted this test fairly liberally in other ways. For instance, the Washington Supreme Court has held that the quality of navigability of a watercourse need not be continuous, but the seasons of navigability must occur regularly and be of sufficient duration to serve a useful purpose for commercial intercourse.[6)] Under this test, streams in their natural state, capable of floating shingle bolts after heavy rains and during the spring freshets, are

navigable streams.[7] The term "natural state" precludes streams that only can be made floatable by artificial means.[8] Natural obstructions or portages apparently do not destroy navigability.[9] Historical evidence of use of a stream for commercial transport purposes is persuasive evidence that the stream is navigable if the stream is in the same condition that it was in during the days of commercial use.[10] In addition, navigability is not destroyed by disuse.[11]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The public has the right to fish in navigable streams up to the high water mark, and presumably also has the right to wade because the state owns the stream bed.[12] The public has no rights in non-navigable streams, and the owner of a non-navigable stream can fence the stream.[13]

Washington does not recognize a right of portage. The Washington Supreme Court overruled a lower court's finding that log drivers could go upon privately-owned banks of navigable streams to free logjams.[14] The court held that the log driver "must confine himself and his operations to the highway itself – the bed of the stream, until the land owner consents to the use of the banks . . . . The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided."[15]

Miscellaneous

Criminal trespass on private property occurs when a person trespasses and the land is posted or notice is given in some other manner.[16]

Washington State recognizes sections of the following rivers as whitewater river sections: Green, Klickitat, Methow, Sauk, Skagit, Suiattle, Tieton, Skykomish, Wenatchee, White Salmon.[17] In addition, Washington recognizes all sections of rivers with at least one class III rapid or greater, as described in the American Whitewater Affiliation's whitewater safety code, as whitewater river sections.[18]

The State Scenic River system was established to recognize that many rivers

possess outstanding natural, scenic, historic, ecological, and recreational values of present and future benefit to the public, and that a need exists to protect and preserve the natural character of such rivers and to fulfill other conservation purposes.[19] Rivers within the State Scenic River system include specified sections of the Skykomish, Beckler, Tye, and Little Spokane.[20] Declaration of a Green River Gorge Conservation Area[21] and Yakima River Conservation Area[22] recognize a need to conserve these areas for the recreational needs of the region.

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1) Kemp v. Putnam, 288 P.2d 837, 839 (Wash. 1955), overruled on other grounds by Save a Valuable Environment v. City of Bothell, 576 P. 2d 401 (Wash. 1978). See also Wash. Const. Art. XVII, § 1. The federal title test is the test that determines which beds to which states retained title at statehood.

2) 10) , Kemp, 288 P.2d at 839.

3) Monroe Mill Co. v. Menzel, 77 P. 813, 815 (Wash. 1904). A shingle bolt is a bundle of wooden shingles.

4) Griffith v. Holman, 63 P. 239, 241 (Wash. 1900), citing Rowe v. Granite Bridge Corp., 21 Pick. 344 (38 Mass. 344 (Mass. 1838).

5) Griffith, 63 P. at 240.

6) Kemp, 288 P.2d at 840.

7) Kemp, 288 P.2d at 840, citing Monroe Mill Co., 77 P. at 815.

8) Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 131 P. 220, 222 (Wash. 1913).

9) Kemp, 288 P.2d at 840, citing favorably New York ex rel. Erie R. Co. v. State Tax Com., 266 A.D. 452 (N.Y. App. Div. 1943).

11) Id. at 841.

12) Id. See also Monroe Mill Co., 77 P. at 816.

13) Griffith, 63 P. at 244.

14) Monroe Mill Co., 77 P. at 816.

15) Id. See also Sumner Lumber & Shingle Co., 131 P. at 223.

16) Wash. Rev. Code § 9A.52.010 (2007).
17) Wash. Rev. Code § 79A.60.470 (2007).
18) Wash. Rev. Code § 79A.60.495 (2007).
19) Wash. Rev. Code § 79A.55.005 (2007).
20) Wash. Rev. Code § 79A.55.070 (2007).
21) Wash. Rev. Code § 79A.05.700 (2007).
22) Wash. Rev. Code § 79A.05.750 (2007).

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Joyce Harley-Friestad

From: Joyce Harley-Friestad
Sent: Friday, January 25, 2019 1:44 PM
To: 'Charles'
Subject: RE: Hello again.. I came by your offices yesterday the 11th of January.

Here is the citation from the 9th Circuit:

"The Walker River is an unnavigable stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California." *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 335 (9th Cir. 1939)

Joyce Harley Friestad
Administrative Assistant IV
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
(775)684-1100
JHarleyFriestad@ag.nv.gov

From: Charles <cralbright@juno.com>
Sent: Saturday, January 12, 2019 3:41 PM
To: AGINFO <aginfo@ag.nv.gov>
Subject: Hello again.. I came by your offices yesterday the 11th of January.

Hello Attorney General's Office, as it says above I came by your offices in Carson City yesterday twice in hope of meeting someone to discuss Navigability on Rivers in the State of Nevada. I had meetings with several other agencies in Carson City as well. They included in order of visits: State Water Resources, State Parks, Tourism Commission, Your AG offices, Secretary of State, Lieutenant Governor, Governor, Law and Archives Library, Supreme Court Library, your AG office again and then Tourism Commission again. I cannot think of another state where I could possibly have a discussion with that many Departments in one day. All in all I had great responses to my questions at each location and found folks very open to discussing my questions. I was unable to really talk to anyone in your offices but was told that folks from the Las Vegas office would reply to a previous email which is fine by me. IF at all possible I would very much like to just sit down as I was able to do at every other Department I visited and discuss my concerns and get hopefully answers.

I had brought with me assessments of all the States neighboring Nevada as well as Nevada for application of Navigability for rivers and waterways in each state. I have several concerns about just how you apply the title of

Navigable to rivers in this state. Standard rules unfortunately do not apply. The Bruneau, Jarbidge and Owyhee all start in our state and have been paddled for generations now. There are hordes of books that list them as rivers that are great to navigate and they ALL flow to the Snake River then the Columbia and then the Pacific Ocean. Yet according to our state they are not Navigable. They all meet US Law definition as rivers that flow to the ocean BUT this fact is not recognized by Nevada. There are many other rivers that exist in this state that again have been paddled for years when in runoff season or when rains raise flow levels to allow navigation by folks desiring a unique experience. Those are the Quinn River, Marys River, Kings River, Reese River and the Walker River with both its East and West Forks. The Sierra Club paddled and floated the Quinn River for years from easy put ins to out on the Black Rock Playa. The Kings I have heard has been paddled in high water in years previously. The Marys has also been paddled many times even though getting to a put in on private property is hard. I understand that it is an incredible 900 foot deep basalt canyon in areas. The Reese also has been paddled for generations by folks looking for a unique experience in this state. I have several friends who have spent many days paddling it to its terminus in the Humbolt River. It has also been paddled by adventurous folks where it descends from the Toiyabe's south of Austin. The Walker is another river that is written up for paddling various sections in many guide books. I myself have paddled on the West Fork from Levitt meadows all the way to Yerington. I have done paddles above Bridgeport Reservoir, on the reservoir and from the dam all the way to your current East Fork Walker River State Park. I have also paddled on Webber Reservoir and Walker Lake. Yet each one of these gems for recreation is not considered NAVIGABLE! How can a river that is written up in many guide books and considered legally navigable in California NOT be navigable in Nevada? How can a State Park promote paddling on several sections of their new park and yet have a State Park not be legally navigable? I would be glad to share MANY books that I have that are printed material says that many of these rivers in our state are navigable?

So I am still looking for an answer to my questions. I am sure you will claim that at the time of Statehood they were not considered navigable. Logs may not have been floated on them to create some form of commerce. Well dear Attorney General's Office, a lot has changed in our dear state of Nevada since statehood. Maybe looking at Navigation from a 2019 perspective could reveal another form of thought about what creates navigation in this day and age. Ask yourselves this: what other thoughts about a state and it relation to it business and citizens has changed in over 150 years?

I sincerely hope that Our new Attorney General will be shown a copy of this email. I beg that chance to be hard by the real powers that be in this state. I would even be glad to take him paddling at our new State Park sea he can figure it out for himself. Thank yo for your time on this matter. I hope that it actually leads to a opportunity to be heard about navigation and not just considered a quack by your office.

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

775-453-5403 C

Thanks again for listening to my request perhaps beside eyes I might get the attention of some ears.

104 F.2d 334
Circuit Court of Appeals, Ninth Circuit.

UNITED STATES
v.
WALKER RIVER IRR. DIST. et al.

No. 8779.
|
June 5, 1939.
|
Rehearing Denied July 14, 1939.

Synopsis
Appeal from the District Court of the United States for the District of Nevada; A. F. St. Sure, Judge.

Suit by the United States of America against the Walker River Irrigation District and others to restrain the defendants from interfering with the natural flow of water of Walker river to the extent of 150 cubic feet per second to the Walker River Indian Reservation in Nevada. From an adverse decree, 11 F.Supp. 158, 14 F.Supp. 10, the plaintiff appeals.

Decree reversed, with directions.

West Headnotes (13)

[1] **Indians**
⇨Water Rights and Management

It was unnecessary for intention to reserve waters of Walker river for use of Indians on Walker River Indian Reservation to be evidenced by a treaty or agreement, but such an intention could be implied from statute or executive order setting apart the reservation.

3 Cases that cite this headnote

[2] **Water Law**
⇨Reserved Water Rights

The government has power to reserve waters of nonnavigable streams on public domain, and thus exempt them from subsequent appropriation by others.

1 Cases that cite this headnote

[3] **Water Law**
⇨Effect of state and local law, customs, and rules

Private rights in waters of nonnavigable streams on the public domain are measured by local customs, laws, and judicial decisions.

Cases that cite this headnote

[4] **Water Law**
⇨Effect of state and local law, customs, and rules

The statute providing for protection of vested rights to use of water recognized and acknowledged by local customs, laws, and court decisions was no more than a formal confirmation of local law and usage which had previously met with silent acquiescence on part of government. 43 U.S.C.A. § 661.

Cases that cite this headnote

[5] **Water Law**
⇨Waters reserved for purposes of Indian reservations in general

The claim of government that there had been an implied reservation of waters of Walker river for use of Indians on Walker River Indian

Reservation could not be defeated on ground that territory acquired by Treaty of Guadalupe Hidalgo was not "Indian country," and that therefore tribe on reservation had no rights which they might reserve and none to surrender in exchange for water rights. Treaty of Guadalupe Hidalgo, 9 Stat. 922.

5 Cases that cite this headnote

[6] **Indians**
Construction and operation

Treaties with Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards.

3 Cases that cite this headnote

[7] **Indians**
Water Rights and Management

The rule that treaties with Indians and statutes disposing of property for their benefit are to be given liberal interpretation favorable to Indians would be applied in determining whether there was an implied reservation of waters for use of Indians in executive orders relating to creation of Walker River Indian Reservation.

5 Cases that cite this headnote

[8] **Administrative Law and Procedure**
Subordinates; representation of superior authority
Public Employment
Ministerial officers
United States
Ministerial officers

The acts of the heads of the departments of the United States government are the acts of the executive.

2 Cases that cite this headnote

[9] **Indians**
Water Rights and Management

Where Indian commissioner in 1859 had written Commissioner of General Land Office suggesting necessity of reserving land for Indians, Land Office Commissioner pursuant to request had written to Surveyor General of territory instructing him to reserve for Indian purposes lands described, and reservation was surveyed within a few years, executive order in 1874 setting the lands apart for Indians merely gave formal sanction to an accomplished fact, as respects date of implied reservation of water for use of Indians.

4 Cases that cite this headnote

[10] **Water Law**
Waters reserved for purposes of Indian reservations in general

The conduct of government in permitting and encouraging settlement along upper reaches of Walker river and the expense incurred by settlers in reclaiming their lands in that area did not estop government from thereafter claiming that there had been a prior implied reservation of waters of the stream for use of Indians occupying reservation below at time of settlement in the upper valleys. 43 U.S.C.A. § 321 et seq.

1 Cases that cite this headnote

[11] **Water Law**
Waters reserved for purposes of Indian reservations in general

Where there had been a gradual growth of practice of farming and irrigation on Walker

River Indian Reservation set aside in 1859 and Indians had been induced to make their homes on reservation and to engage in farming, there was an implied reservation of water from Walker river, to extent reasonably necessary to supply Indians' needs, prior to rights of settlors diverting water in upper valleys of river subsequent to 1859.

4 Cases that cite this headnote

[12] **Water Law**
Quantity of Water Reserved

The area of irrigable land included in Indian reservation was not necessarily the criterion for measuring amount of water reserved by implication for use of Indians on reservation.

1 Cases that cite this headnote

[13] **Water Law**
Quantity of Water Reserved

Where it appeared that 26.25 cubic feet of water per second from river would satisfy needs of government for Indian reservation for irrigation, government was entitled to that amount only during irrigation season and not to amount which it might demand from year to year not exceeding 150 second feet, since right to use larger amount would encourage waste or tend to induce it.

2 Cases that cite this headnote

Attorneys and Law Firms

*335 Carl McFarland, Asst. Atty. Gen., Charles E. Collett, Acting Asst. Atty. Gen., C. W. Leaphart and Roy W. Stoddard, Sp. Assts. to Atty. Gen., and William D. Donnelly, Oscar A. Provost, Thomas E. Harris, Clifford E. Fix, and Robert Koerner, Attys., Department of Justice, all of Washington, D.C., for the United States.

William M. Kearney, Edward F. Lunsford, Myron R. Adams, and Robert Taylor Adams, all of Reno, Nev., George L. Sanford, of Carson City, Nev., and William H. Metson, of San Francisco, Cal., for appellees.

Before GARRECHT, STEPHENS, and HEALY, Circuit Judges.

Opinion

HEALY, Circuit Judge.

The United States brought suit to restrain the appropriators of the waters of the Walker River and its tributaries from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second, to and upon the Walker River Indian Reservation in Nevada. The bill prayed that the plaintiff be adjudged to have a prior right to that quantity of water, that the relative rights in the stream be adjudicated, and that a water master be appointed to carry the decree into effect. After extended hearings before a special master, the court made findings and entered a decree adjudging the United States to be entitled to 22.93 second feet of water with priorities as of various dates, ranging from 1868 to 1886. From this decree the Government has appealed.

The factual background is fully developed in the opinions of the court below, 11 F.Supp. 158, 14 F.Supp. 10, and no more than a brief summary need be attempted here.

The Walker River Indian Reservation was set aside by departmental action on November 29, 1859 for the use of the Pahute tribe. The lands reserved lie about Walker Lake and on both borders of the lower reaches of the Walker River for a distance of thirty miles above the place where the stream empties into the lake. The total area, mostly rough or mountainous country, is in excess of 80,000 acres. The tillable lands reserved have an area of approximately 10,000 acres.

The Walker River is an unnavigable stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California. The lands along the stream are arid and incapable of producing crops without irrigation, for which purpose the river is the sole source of supply. The lands in the upper valleys were acquired by appellees or their predecessors under the public land laws of the United States, the earliest titles originating soon after the establishment of the reservation. During the period commencing with the year 1860 the

settlers diverted the water of the stream for irrigation purposes, and the present owners claim priorities based on these appropriations.

The claim of the Government, asserted on behalf of the Indians living on the reservation, is that, to the extent necessary to supply the irrigable lands, the waters of the stream were reserved. The trial court decided that the waters were not reserved and that the rights of the United States to their use, like the rights of other diverters, are to be measured and adjudged in accordance with the local laws and customs governing appropriation. Hence the rights decreed to the Government are made to date from the time of actual diversion and use.

When the lands were set apart for Indian purposes there was no express reservation of the flow of the stream; but it is the position of the Government that there was an implied reservation of the water. The contention is bottomed on the holding *336 to this effect in Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340,[1] in what is claimed to be a cognate situation. The trial court thought Winters v. United States distinguishable, as being based on an agreement or treaty with the Indians. Here there was no treaty. It said that at the time the Walker River reservation was set apart the Pahutes were at war with the whites, hence no agreement between them and the Government was possible.

[1] (a) In the Winters case, as in this, the basic question for determination was one of intent— whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved.[2] We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved. As said by the court in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 41, 63 L.Ed. 138, in speaking of an analogous intent— whether an Indian reservation created by an act of Congress embraced only the uplands or included as well adjacent waters— 'it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created— the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

[1] [2] (b) The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. Winters v. United States, supra, 207 U.S.page 577, 28 S.Ct. 207, 52 L.Ed. 340. The question is merely whether in this instance the power was exercised. If it was, the appellees are in no position to claim paramount rights in the stream, since their appropriations were all later than 1859.

[3] [4] It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356.[3] The act of July 26, 1866, 14 Stat. 251, 253,[4] was *337 no more than a formal confirmation of local law and usage which had theretofore met with silent acquiescence on the part of the national government. Broder v. Natoma Water Co., 101 U.S. 274, 276, 25 L.Ed. 790; California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U.S.pages 154, 155, 55 S.Ct. 725, 79 L.Ed. 1356. But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes

In United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136, it was said that although this power of changing the common law rule as to streams within its borders undoubtedly belongs in each state, yet two limitations must be recognized: first, that, in the absence of specific authority from Congress, a state cannot destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. The statement of these limitations has been many times repeated in later decisions, notably in California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U.S.page 159, 55 S.Ct. 725, 79 L.Ed. 1356. In the Desert Land Act, Act of March 3, 1877, 19 Stat. 377, 43 U.S.C.A. 321 et seq., the dedication of nonnavigable waters to the use of the public was expressly made subject to existing rights. And we need not consider the policy exemplified in the Reclamation Act of 1902, 32 Stat. 388, which directed the Reclamation Service to proceed in conformity with the state laws.

[5] (c) Appellees attempt to distinguish Winters v. United States on another ground. They say that, unlike the national domain elsewhere, the territory acquired by the treaty of Guadalupe Hidalgo, 9 Stat. 922, is not 'Indian country',[5] and no right of occupancy in the Indians was

recognized by the laws of Spain or Mexico, or since given recognition in the public policy of the United States. The point of the argument, as we understand it, is that the members of the Pahute tribe had no rights which they might reserve, and none to surrender in exchange for those now claimed for them.

What the legal status of these aborigines may have been we need not stop to inquire. If it be assumed that they were mere sojourners in the abode of their ancestors, it still remains true that the national government was under compelling obligations to protect them. They are no less wards of the nation than are the tribes living elsewhere. In United States v. Kagama, 118 U.S. 375, 383, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, the court described the Indian communities as wholly dependent on the United States, owing no allegiance to the states and receiving from them no protection. 'From their very weakness and helplessness,' said the court, 'there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.' And see Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299.

[6] [7] (d) One further matter should have preliminary attention. Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; Alaska Pacific Fisheries v. United States, supra; United States v. Nez Perce County, 9 Cir., 95 F.2d 232. The rule has its basis in the obligation which the Government has assumed toward a dependent people. We see no reason why the same rule should not apply in the construction of executive orders. Compare McFadden v. Mountain View Mining & Milling Co., 9 Cir., 97 F. 670; Gibson v. Anderson, 9 Cir., 131 F. 39. Treaty provisions for the allotment of reserved lands invariably contemplate the ultimate passing of fee title to the individuals of the tribe; and the General Allotment ***338** Act of February 8, 1887, 24 Stat. 388 was expressly made applicable to reservations created by acts of Congress or by executive order.[6] It was pointed out in the illuminating opinion of Attorney General (now Justice) Stone of May 12, 1924 (Opinions of Attorneys General, vol. 34, p. 171), that doubts whether the reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum or water power, have, as a practical matter, uniformly been resolved in favor of the Indians

We turn now to the circumstances under which the Walker River Indian Reservation was set aside. The files of the Interior Department bearing on this subject are voluminous. On November 26, 1859, F. Dodge, agent for the Indians in Utah Territory, of which Nevada was then a part, wrote the Commissioner of Indian Affairs suggesting that the northwest part of the valley of the Truckee River, including Pyramid Lake, and the northeast part of the valley of Walker's River, including the lake of the same, be reserved for the Indians of his agency. The localities and boundaries of the proposed reservations were indicated on an accompanying map. 'These,' stated the letter, 'are isolated spots, embracing large fisheries, surrounded by mountains and deserts, and will have the advantage of being their home from choice. '[7] The Commissioner of Indian Affairs thereupon wrote the Secretary of the Interior, calling his attention to Dodge's letter, and stating, among other things, 'the tracts selected by the Agent, embrace but a small portion of land suited for agricultural purposes, yet, it is believed that there will be a sufficiency for the sustenance of the Washoe and Pahute tribes of Indians, in connection with the fish which they may obtain from Pyramid and Walker Lakes, and with a view to secure suitable homes for these Indians where they can be protected from the encroachments of the whites, I have the honor to suggest that, with your concurrence, the subject may be laid before the President for his consideration, with a recommendation that the tracts of country indicated on the map may be set apart and reserved from sale or settlement, for Indian use.'

The Indian Commissioner on November 29, 1859 wrote the Commissioner of the General Land Office, suggesting the propriety and necessity of reserving these tracts for Indian use, and requesting that the Surveyor General of Utah Territory be directed to respect the reservations on the plats of survey when the public surveys should be extended over them, and that in the meantime the local land offices, as established, be instructed to respect the reservations on their books. On December 8 of the same year the Commissioner of the General Land Office wrote the Surveyor General in Salt Lake City, instructing him to reserve for Indian purposes the two tracts described and indicated on an enclosed map.

[8] [9] The Walker River reservation as originally defined was surveyed within a few years, and in 1874 President Grant issued an executive order setting the lands apart for the Pahute and other Indians residing thereon. The action taken in November, 1859 initiated the establishment of the Walker River Indian Reservation. The acts of the heads of departments are the acts of the executive. Wilcox v. Jackson, 13 Pet. 498, 513, 10 L.Ed. 264; Wolsey v. Chapman, 101 U.S. 755, 769, 25 L.Ed. 915. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; ***339** Minnesota v. Hitchcock, 185 U.S. 373, 385, 389, 390, 22 S.Ct. 650, 46 L.Ed. 954. That this was true

of the Pyramid Lake reservation, created at the same time and in the same manner as that on the Walker River, was formally determined by the Department of the Interior in Central Pacific Ry. Co., 45 L.D. 502.

Cultivation of portions of the reservation was early commenced and water for irrigation purposes diverted from the stream. It appears from the files of the Department that not only was the Government desirous of having the Indians learn the arts of husbandry, but that the Indians themselves, who had taken refuge in substantial numbers on the lands reserved, were eager to cultivate the soil and produce crops.[8] The gradual but substantial growth of the practice of farming and irrigation on the reservation is shown in the findings of the trial court. /[9]

The Comstock Lode was discovered in 1859, and Nevada abruptly ceased to be a 'mere highway for gold seekers on the way to California.' Miners and adventurers of all sorts swarmed into the territory.[10] The promptness with which the suggestions of Indian Agent Dodge were carried out shows that the Department realized the urgency of the problems confronting the Indian population.[11] It required little foresight to anticipate the speedy settlement by the whites of the valleys of the Walker River and the consequent diversion of the waters of the stream which actually took place. The necessity of having a water supply if any crops were to be produced on the reservation was known to the Department. It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive. It could not but be realized that the Indians, unskilled in the art of farming, would necessarily make slow progress, and in any race for the actual appropriation of the stream this backward people would inevitably be left at the barrier. The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by settlers above

[10] Appellees point to the heavy expense of reclaiming their lands and to the conduct of the Government in permitting and encouraging settlement, particularly the acquisition of title under the Desert Land Act of 1877. They urge on these grounds that the Government is estopped to question the priority of their appropriations. Similar arguments were made unavailingly in Winters v. United States.[12] Compare Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791; Cramer v. United States, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622. The settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below

[11] [12] We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of *340 the Indians. There remains for decision the question as to the quantity to which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience.

[13] As appears from the finding summarized in footnote 9, about 1,900 acres were in cultivation as early as 1886. At the time of the trial the cultivated area had not substantially increased. According to the allegations of the bill the amount of land then irrigated was about 2,000 acres. The number of Indians living on the reservation has never been large. In 1866 there was a population of about 600, and about 800 in 1875. There are now living there approximately 500 Indians. 96 individual Indians are farming parts of 140 allotments of 20 acres each and 96 allotments have homes on them.

The report of the master states that 'the number of Indians is not increasing and it has not been shown that there is the necessity or demand for the cultivation of a larger area than 2100 acres.' For the purpose of irrigating that quantity of land the master was of the opinion that 26.25 second feet of water, measured at the point of diversion, is sufficient. While the latter estimate is somewhat out of line with what was determined to be the duty of water on other parts of the stream, the Government has not questioned the estimate, but rather seems to approve of the master's proposed finding so far as it went. We are constrained to accept this estimate as a fair measure of the needs of the Government as demonstrated by seventy years' experience.

Appellant's counsel suggest a decree limiting the quantity of water for reservation purposes to the amount, not exceeding 150 second feet, which the Government may demand from year to year at the commencement of the season. That a decree of this sort would tend greatly to depreciate the value of the water rights of the upstream owners, and to make impossible any intelligent program of farming, is obvious. So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it.

The decree is reversed with directions to enter a decree adjudging the United States to be entitled to the

continuous flow of 26.25 cubic feet of water per second, to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859, and enjoining the defendants from preventing or interfering with the natural flow of the described quantities of water in the channels of the stream and its tributaries to and upon the reservation.

All Citations

104 F.2d 334

Footnotes

1 Cf. Conrad Investment Co. v. United States, 9 Cir., 161 F. 829; United States v. Powers, 9 Cir., 94 F.2d 783, affirmed 59 S.Ct. 344, 83 L.Ed. 330; United States v. McIntire, 9 Cir., 101 F.2d 650.

2 The summary of the pleadings and facts as set out in the opinion of this court, 9 Cir., 143 F. 740, and of the Supreme Court, has led to misapprehension concerning the scope of the holding in Winters v. United States. It is assumed by appellees here that in the Winters case the Government had established its rights in the waters of Milk River by prior appropriation. An examination of the record in that case discloses the contrary. The affidavits and testimony before the court showed that in 1890 the Government installed a pump of the capacity of 100 miner's inches for pumping water from the stream for domestic and irrigation purposes. In 1893 another pump of 150 inches capacity was installed. It was not until 1898 that the Government began the construction of a canal for the diversion of the waters of the stream. Meanwhile, commencing with 1890, and prior to 1898, diversion dams and canals had been built by the settlers above, or by mutual companies which they organized, and large quantities of water had been appropriated and applied to beneficial use.

3 In Nevada it was held soon after statehood (1864) that where the right to the use of running water was based upon appropriation, and not upon ownership of the soil, the first appropriator had the superior right. Lobdell v. Simpson, 2 Nev. 274, 90 Am.Dec. 537. In 1885, in Jones v. Adams, 19 Nev. 78, 6 P. 442, 3 Am.St.Rep. 788, the common law rule of riparian rights was declared in applicable to conditions existing in the state. See, also, Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 P. 166, and United States v. Humboldt Lovelock Irrig. L. & P. Co., 9 Cir., 97 F.2d 38, 42, 43.

4 Section 9: 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed * * * .' 43 U.S.C.A. 661.

5 Cf. United States v. McGowan, 9 Cir., 89 F.2d 201, reversed, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410.

6 Allotments to individual Indians on the Walker River reservation were made in 1906 under the act of May 27, 1902, 32 Stat. 260 and the General Allotment Act.

7 Continuing, the agent observed that 'the Indians of my agency linger about the graves of their ancestors— 'but the game is gone', and now, the steady tread of the white man is upon them. The green valleys, too, once spotted with game 'are not theirs now.' Necessity make them barter the virtue of their companions as a commodity of the market and the bitter contemplation burns in their bosoms the stern reality of their fate. Driven by destitution they seek refuge in crime, and show themselves unsparing because they have been unspared.
'I sincerely hope that those asylums will be made for them, where they can be free from the influence of the 'White Brigands' who loiter about our great overland mail and emigrant routes— using them as their instruments to rob and plunder our citizens.'

8 Commencing with the act of March 3, 1863, 12 Stat. 774, 791, numerous appropriations were made for the Indian Service in the territory of Nevada, and later in the state, for 'presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life.'

9 The finding is that water from the Walker River was diverted and used beneficially upon the reservation as follows:

Priority	Cubic Feet Per Second	Acres
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

10 In 1860 the population of Nevada was 6,857. The mining rush increased it to 42,491 by 1870. Encyclopedia Britannica, 'Nevada', vol. 16, p. 269.

11 Under instructions from Washington the local Indian agent gave public notice of the reservation of these areas for Indian purposes, and citizens of the territory were required to refrain from trespassing.

12 In the briefs of appellants filed in this court in that case, 9 Cir., 148 F. 684, attention was called to Sec. 3 of the act of Congress ratifying the agreement with the Ft. Belknap Indians, 25 Stat. 133, expressly declaring 'That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry * * * and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands.'

End of Document

401 Certification

Clean Water Act (CWA) Section 401 — Water Quality Certification

Activities requiring a federal permit must "certify" that the proposed work will not violate state water quality standards.

Clean Water Act USC 33 1341—Section 401(a)(1) - "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the ***navigable waters,*** shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate .... that any such **discharge will comply** with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title...."

Quick Links:

- EPA Clean Water Act
- Clean Water Act, Section 401 Certification
- Clean Water Act, Section 404
- U.S. Army Corps Sacramento District Regulatory Program
- Nevada 401 Water Quality Certification Status for current Nationwide Permits
- State Authority and Public Notices

Most projects requiring State certification fall into two broad Federal program categories:

1. Activities requiring a Federal permit to allow discharges of dredged or fill material to waters of the United States, including oceans, lakes, streams, wetlands, and other water bodies. These permits are issued by the U.S. Army Corps of Engineers (Corps) under CWA Section 404. **Activity examples include but are not limited to sediment dredging or gravel mining, channelization, levee construction, filling wetlands for development, culvert installation and river restoration.**
2. Projects involving construction of hydroelectric dams, power plants, and other facilities requiring Federal Energy Regulatory Commission (FERC) licenses.

The State may respond to this type of application in three ways:

1. Waiver - Under Federal law the State may waive its certification authority if it takes no action on an application within a "reasonable time" not to exceed one year. For Section 404 permit projects, the Corps has defined "reasonable time" to be 60 calendar days, starting with receipt of a complete application by the State, but may extend this period up to one year on a case-by-case basis. Waivers carry no conditions, and are, in some ways, equivalent to certification without conditions.
2. Certification - Certification is based on a finding that the proposed Section 404 discharge will comply with all pertinent water quality standards. In order to allow certification, special conditions may be required by the State in order to remove or mitigate potential impacts to water quality standards. Such conditions must ultimately be included in the Federal Section 404 permit.

3. Denial – The State has the option to deny certification if it is unable to find that the project will comply with water quality standards or other applicable requirements. If a project is denied certification, a Section 404 permit for it cannot be issued by the Federal government. In some instances denial is necessary due to failure by the applicant to meet a procedural requirement or the ability to meet water quality standards. Once the deficiency is addressed, the application for water quality certification may be reconsidered.

The application is provided below in two file formats, these are not online forms:

- Application — 401 Water Quality Certification (Word Format)
- Application — 401 Water Quality Certification
- Guidance for 401 Applications (How to fill out the application)

Applications and attachments can be submitted via email to: Birgit Widegren- bwidegren [at] ndep.nv.gov

An application for 401 certification of a Section 404 activity should include:

- Contact Information and Project Description
- Map which clearly identifies waterbodies that will be impacted by activity
- Best Management Practices (BMPs) that will control erosion and sediment
- Amount of fill to be discharged, dredge removed or linear feet of channel impacted
- Electronic photos of project site
- NDEP 401 Application Addendum*

***New Federal Rules and Regulations become effective September 11, 2020 that impact the 401 Water Quality Certification Process**

Pursuant to new Federal Rules and Regulations effective September 11, 2020 that address the 401 Water Quality Certification process, additional information is required to be submitted to the Nevada Division of Environmental Protection.

In addition to completion of the Nevada Division of Environmental Protection's Clean Water Act §401 Water Quality Certification Application Form and pertinent attachments, the Project Proponent must also complete and submit the **NDEP 401 Application Addendum** found above.

The new federal rules and regulations further require the applicant to request a **Pre-Filing Meeting** at least 30 days prior to submittal of the application and pertinent attachments, including the Addendum. Although conducting a Pre-Filing meeting is optional, requesting a Pre-Filing Meeting is required by the new federal rules and regulations.

For more information contact:

Nevada Division of Environmental Protection
Bureau of Water Quality Planning
901 South Stewart Street, Suite 4001
Carson City, Nevada 89701-5249
Birgit Widegren, Environmental Scientist IV
775-687-9550 bwidegren [at] ndep.nv.gov

US Army Corps of Engineers
Nevada Northern Office
300 Booth Street, Room 3060
Reno, Nevada 89509
775-784-5304

US Army Corps of Engineers
Nevada Southern Office

ENVIRONMENTALISTS SEE REGULATORY, FUNDING GAPS AMID CLEAN WATER ACT ROLLBACK

DANIEL ROTHBERG

JUNE 14TH, 2020 - 2:00AM

Hiking near a snow-speckled mountain on a late spring day, it's not hard to find water running through a narrow stream. Come back several months later, and that stream might be empty.

In Nevada, most waterways work this way. Roughly 90 percent of the state's streams are intermittent or ephemeral, running at only certain times of the year in response to snowmelt or precipitation, according to data compiled by the Nevada Division of Environmental Protection (NDEP).

It's a fact throughout the West, from Arizona to New Mexico. Many streams are seasonal.

Scientists say these streams, despite running irregularly, are important for ecosystem health in arid areas. They connect waterways, replenish groundwater supplies and support wildlife. That's one reason many environmentalists are concerned about a Clean Water Act rollback, set to go into effect later this month, that would exclude most of these streams from federal protection.

In 1972, Congress passed the Clean Water Act, giving the federal government the authority to protect and regulate water. But for years, states, activists and industry have argued over its scope. And the new rule offers a narrower interpretation of

the federal government's role.

Although the Clean Water Act will still protect heavily used waterways in Nevada, including the Colorado River and the Truckee River, it excludes many wetlands and most seasonal streams.

As a result, the rule has set off a flurry of legal challenges from environmental groups. And in recent months, several Democrat-led Western states, including Colorado, California and New Mexico, have sued the Trump administration to challenge the final rule.

Nevada has not joined those suits. In comments submitted last year, NDEP described it as a "considerable improvement" over the Obama-era rule it replaced. Still, state regulators say they are evaluating the new rule's total effect, and they expect to have to adjust existing permitting programs. They argue any gaps in protecting water quality will be addressed under state law.

But several environmental groups say it is too early to tell.

Joro Walker, a lawyer with the Western Resource Advocates, questions whether Western states have the enforcement resources to enforce the rules as the federal government steps back.

"The practical aspect of this is incredibly important," said Walker, who works in the Mountain West. "If the state is not equipped, having great law doesn't really matter if you can't enforce it."

The regulatory gap

As the state's environmental agency, NDEP is responsible for enforcing the state's water quality standards. Jennifer Carr, the agency's deputy director, said that the division is still mapping out how many streams and wetlands would lose federal

protection under the Clean Water Act.

Whatever the volume, the state expects to assume more regulatory responsibility.

"We have all the authorities in place that are needed to permit any sort of discharge activity in the state of Nevada, whether it's federally jurisdictional or not," Carr said in an interview.

Like many states, Nevada has a permit program for maintaining water quality when developers seek to discharge water into streams or groundwater. But when it comes to modes of development that seek to dredge and fill wetlands protected under the Clean Water Act, the permitting process is done with the U.S. Army Corps of Engineers. That is expected to change.

"The fine points of whether or not a specific existing program needs a little bit of enhancement or refinement is one of the things that we're working through at this point in time," Carr added.

The new rule redefines which wetlands are protected under the federal law. With more wetlands eliminated from federal jurisdiction, it's likely that the state would have to issue more permits on its own. Carr said it is "one of the real, more specific examples" where the agency might need to adjust an existing program for developers applying for a state "Working in Waterways permit."

Regulators do not process many Clean Water Act wetland permits each year, Carr said. Over the past 12 years, she said the state has worked on about 16 wetland permits and five spring permits. She also noted that the majority of discharge permits, issued under the Clean Water Act over the past 12 years, have been for waters that remain protected under the new rule.

In other cases, the new rule calls into question whether even some larger rivers fall under the Clean Water Act. As part of the rulemaking, the Trump administration

approved a more narrow federal definition of what the Clean Water Act protects as Waters of the United States, or WOTUS.

The rule does not include all interstate waters. Instead, it ties protection to whether a waterway was traditionally navigable for commerce. This issue could leave the Walker River, which rises in northern California and runs through western Nevada, without federal protection, Carr said.

State regulators, she added, are "looking very closely at the Walker River and what its ultimate jurisdictional status might be," but Carr noted that it would still be protected under state law.

With a more narrow WOTUS definition, environmentalists are concerned about shifting much of the responsibility for protecting water quality to state agencies, with often limited resources.

"If you're Nevada and all of the sudden 99 percent of streams, rivers and washes are [not] protected, that's a huge assumption of responsibility that you're going to have to undertake," said Brett Hartl, government affairs director for the Center for Biological Diversity.

In many cases, federal funding for state-led compliance is tied to the amount of water, within a state boundary, that is protected by the Clean Water Act. As federal protection is removed for mapped streams, wetlands and other rivers, it could translate to less federal funding.

Carr said NDEP has raised this concern with EPA, which has said that it will keep funding stable in the short-term. She said the state agency will be working with EPA on the long-term formula.

Where pollution comes from

The state regularly evaluates the conditions of federally-protected waters in a triennial report. That document examines whether protected waters meet the standards of "beneficial use" for aquatic life, fish consumption, irrigation, municipal supply, recreation and livestock watering.

In the most recent assessment, published in April, NDEP concluded that only about 30 percent of roughly 700 waterbodies met that threshold. NDEP reported that there was "insufficient" data to draw conclusions about 34 percent of the waterbodies examined. And about 35 percent of waters were not meeting the standards established for at least one of the potential uses.

The public review, however, only provides a snapshot of water quality in the state. It focuses on Nevada's heavily used rivers. But the report does not include information for ephemeral and intermittent streams, which account for about 90 percent of the state's waterways.

And of the waterbodies assessed, the report assessed about 43 percent of year-round streams, 69 percent of lakes and reservoirs and about 41 percent of fresh wetlands.

Across the state, the leading cause of impaired water is elevated phosphorus levels, which can be caused by fertilizers, agriculture, stormwater and the disposal of home items.

Phosphorus accounts for about 21 percent of impaired water. Temperature accounts for another roughly 13 percent, what NDEP said could result from the destruction of shaded vegetation around a waterway.

The majority of impaired waters — about 57 percent — failed to meet standards set out for the protection of aquatic life. About 16 percent do not meet standards for recreations with contact.

Table ES-2. Number and Percentage of Impairments by Beneficial Use

Beneficial Use Code	Beneficial Use	No. of Impairments by Beneficial Use*	% of Total Impairments by Beneficial Use
AQL	Protection of Aquatic Life	391	57.2%
FC	Fish Consumption (Hg)	40	5.8%
IRR	Irrigation	50	7.3%
MDS	Municipal/Domestic Supply	83	12.1%
RWC	Recreation with Contact	109	15.9%
WLS	Watering of Livestock	11	1.6%

* Note: There may be multiple impairments per waterbody for each beneficial use, so the total number of impairments is ***not*** the same as the total number of impaired waterbodies.

A table in NDEP's triennial report. (Nevada Division of Environmental Protection)

This pollution is not always a result of direct discharges into streams. Many of the impairments noted in the report stem from what is known as nonpoint source pollution.

That type of pollution arises when indirect sources, such as runoff or rainfall pick up chemicals and nutrients, carrying them to a lake or a river. That makes nonpoint source pollution often challenging to regulate.

"It's a big issue," said Paul Comba, chief of NDEP's Bureau of Water Quality Planning.

Comba said the state has worked on addressing nonpoint source pollution through streambank restoration, moving cattle to specific access points and educating the general public. The state has also developed 55 site-specific plans, approved by the EPA, that establish a maximum level of pollutants that can be discharged to a river or lake and still meet water quality standards.

The state is also working to update it's antidegradation standards, which require

waterways to be protected in accordance with their natural quality, even if it is above beneficial use standards.

But resources are limited.

"Significant time and funding are needed to address impaired waters; this means that the pace of developing [maximum pollutant levels], watershed management plans, and alternative approaches may be slowed by staffing and budget constraints," the report said.

The ongoing legal battle

Pollution only tells one side of the story.

Development — filling wetlands or paving over small streams — can also degrade waterways. That's why many environmental groups want to see wetlands and small streams, especially in Nevada, to be explicitly included in a broad definition of what the Clean Water Act protects.

Hartl, with the Center for Biological Diversity, notes that it has long been difficult to determine whether or not an ephemeral or intermittent stream fell under protection of the Clean Water Act.

"No one knows the answer until someone decides to pave over it," he said.

For years, activists, politicians and the courts have argued over the scope of the Clean Water Act, specifically where the state's jurisdiction begins and federal jurisdiction ends.

In 2015, the Obama administration broadened the scope of the Clean Water Act, applying it to wetlands and seasonal streams. The move came in response to significant confusion over a 2006 Supreme Court case that produced no majority opinion and five separate opinions.

The Obama administration's rule started a new round of criticism and litigation, including from then-Gov. Brian Sandoval and Attorney General Adam Laxalt. Joining 12 other states, Laxalt sued, arguing that the Obama rule was an example of "unreasonable federal overreach."

After Trump was elected, he began the process of repealing and replacing the 2015 rule. Where Obama's rulemaking relied on Justice Anthony Kennedy's interpretation of the law, the Trump administration turned to a much narrower interpretation written by Justice Antonin Scalia.

Since the final rule was released in April, environmental groups and more than a dozen states have sued the Trump administration, kickstarting what is likely to be another round of lawsuits and court guidance. One of the litigants is Environment America, which has a Nevada chapter.

Levi Kamolnick, state director for Environment Nevada, said that water does not abide by state borders. He worries lax regulation of seasonal streams in one state could affect Nevada. For that reason, Kamolnick said seasonal streams should be protected by the federal government.

According to an EPA analysis completed in 2009, about 27,000 Nevadans were served by drinking water systems that relied on intermittent, ephemeral or headwater streams, he added.

"We absolutely think that the Trump Dirty Water Rule runs counter to the intent of the Clean Water Act," Kamolnick said. "We believe strongly that any moves to exclude non-permanent water sources [from federal protection] is detrimental to the health of Nevadans."

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- *Center for Biological Diversity - $100.00*

Nevada state officials stand by as EPA withdraws Clean Water protections

By **Brian Bahouth** - September 15, 2019

Conservation groups say seasonal wetlands in arid states like Nevada are likely to lose federal protections by repealing the Waters of the United States rule. (Ken_Lund)

Carson City – The Trump administration announced on Thursday the withdrawal of Obama-era anti-pollution protections for smaller streams, known as the Waters of the United States (WOTUS) rule – and in Nevada, state officials are not denouncing the move.

Listen to an audio report.

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Nevada Attorney General Aaron Ford's statement says, "At this time, Nevada believes it would be in its best interest to remain under the pre-2015 WOTUS rule."

Scott Edwards, with the nonprofit Food & Water Watch, says states are free to raise their standards above the federal level – and thinks Nevada is too close to the mining industry.

"The whole Southwest mining industry is not well regulated by the state governments,"

Edwards charges. "A lot of the challenges to the Obama 2015 WOTUS rule were coming out of southwestern mining states, who didn't like what they claimed was the overreach of the Obama rule."

Several years ago, former Attorney General Adam Laxalt joined a dozen other states in suing the EPA to get the WOTUS rule overturned.

Neither Ford's office nor the Nevada Department of Environmental Protection would comment on the current status of that lawsuit, but NDEP said it is in agreement with Ford that Nevada is "better off" under the pre-2015 rules.

The 2015 rule made smaller waterways and seasonal streams subject to Clean Water Act protections.

Edwards claims that Trump's replacement rule will imperil the country's water supply and allow developers, industrial farming operations and mining concerns to pollute smaller waterways.

"Under an analysis of the Trump WOTUS rule, over half of the wetlands in this country will have protections stripped away from them," he adds.

During the public comment period, the EPA was deluged with pleas to keep the Obama-era rule. But the agency scrapped it anyway, and is expected to issue a less-restrictive set of rules later this year.

Nevada Division of
STATE LANDS

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State Land Office

Agency Lands

The State Land Office functions as the real estate agency for a number of state agencies. Our current land portfolio consists of over 300,000 acres. Under statutory authority, we hold title to state lands and interests in state lands, such as easements and water rights. This agency acquires land needed for state use, whether it's land for a new DMV, a veteran's facility or a state park.

We work with our federal and local agency partners as well as willing

State Land Office

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private sellers to acquire land to help us achieve our mission to conserve, protect, manage and enhance the state's natural resources. We also dispose of land when directed by a legislative action or when a property no longer meets the need of a managing agency.

One of the main roles of the State Land Office involves authorizing uses of state land. We are experts in issuing permits, easements and licenses to use state land and routinely review applications for commercial, agricultural and recreational uses. We are always happy to review an application prior to submission to answer any questions you may have about our process.

We have an extensive collection of records associated with state land, and can assist with researching land patent information upon request. If you need a copy of a document or a map, we can provide that for a nominal fee.

Sovereign Lands

Upon statehood in 1864, title to the bed and banks of navigable water bodies passed from the federal government to the new state. It's important to note that there are currently a limited number of sovereign lands that the state claims; not all of Nevada's lakes and rivers are considered state owned. Here's a list of state owned sovereign lands:

Lake Tahoe, Truckee River, Carson River, Colorado River, Walker Lake, Washoe Lake, Winnemucca Lake, and the Virgin River

The state owns the bed and banks of these bodies of water, generally to the ordinary and permanent high water mark. Our ownership typically doesn't extend to wetlands, tributaries or flood overflow areas. Any use or disturbance of sovereign land needs to be authorized by this agency. Structures like piers, buoys, irrigation diversions, and bridges need authorizations and are subject to an annual use fee. If a dredging project or aquatic invasive species removal is planned, we can issue a short term authorization for these

uses. In order to obtain authorization, please review our authorizations and permitting page and submit the appropriate application to our office.

School Trust Land

Pursuant to the Enabling Act of 1802 from the federal government, Nevada was originally granted sections 16 and 36 in each township (totaling approximately 3.9 million acres), to be taken when the land was surveyed. However, surveys were slow to be completed, and the state suggested a different approach and received approval for a land exchange from Congress.

In 1880, the state exchanged its remaining grant lands for 2 million acres of land to be selected by the state in any location where federal lands were available. The state then went on to sell these "state selection" lands, depositing revenues into the Permanent School Fund. By the early 1900's, only a few parcels of land remained.

In 1926, the state once again requested and received approval from Congress to exchange the remaining lands for a like number of replacement acres. After returning to the federal government 30,000 acres of low potential land, the state was basically given a "credit" of 30,000 acres of federal land that could be acquired for the benefit of the trust. Most of these "exchange" lands were selected, sold, and the proceeds were deposited in the fund.

Currently the state holds about 3,000 acres of school trust lands concentrated in Washoe County, Carson City, Nye County and Clark County. These lands are considered assets to the trust and must be managed to generate revenue for the School Fund.

Persuant to NRS 387, the State Treasurer is the legal custodian of all securities in which the moneys of the State Permanent School Fund are invested.

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