

## **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 at the time of Nevada's statehood, on October 31, 1864.<sup>1</sup> The federal title test vests title to the beds underlying navigable waters in the state.<sup>2</sup> 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.<sup>3</sup> Log drives involved loggers floating logs and other timber down rivers to certain destinations.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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."<sup>7</sup>

### **Extent of Public Rights in Navigable and Non-Navigable Rivers**

In Nevada, the state holds banks and beds of navigable waterways in trust for public pursuant to the public trust doctrine.<sup>8</sup> Land underneath navigable water on October 31, 1864 (Nevada's date

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<sup>1</sup> Lawrence v. Clark Cty., 254 P.3d 606, 609-14 (Nev. 2011); State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972).

<sup>2</sup> Bunkowski, 503 P.2d at 1233.

<sup>3</sup> *Id.* at 1233-36.

<sup>4</sup> *Id.* at 1232-33.

<sup>5</sup> *Id.* at 1235.

<sup>6</sup> The following rivers have been declared navigable under the federal title test in Nevada: (1) Colorado River (Nev. Rev. Stat. Ann. § 537.010 (West 2021)); (2) Virgin River, including sources confluent above St. Thomas (Nev. Rev. Stat. Ann. § 537.020); and (3) Carson River at Carson City (*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. Ann. § 537.030), 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. *Bunkowski*, 503 P.2d at 1238 (citing *Davis v. United States*, 185 F.2d 938, 942-43 (9th Cir. 1950)).

<sup>7</sup> *Bunkowski*, 503 P.2d at 1238.

<sup>8</sup> Mineral Cty. v. Lyon Cty., 473 P.3d 418, 423 (Nev. 2020); *Lawrence*, 254 P.3d at 609-14; *see also* Nev. Rev. Stat. Ann. § 533.025 (West 2021) ("The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.").

of admission to the union), is subject to the public trust.<sup>9</sup> To determine the transferability of lands subject to the public trust, Nevada has looked to Arizona law and held that the state may transfer such lands, but only if the transfer occurred for a public purpose for which the state received fair compensation and if the transfer “satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations,’” to include the impact on “commerce, navigation, fishing or recreation.”<sup>10</sup>

For land under a navigable waterway on October 31, 1864, but now dry, whether the public trust doctrine still applies depends on the way in which a waterbed became dry.<sup>11</sup> If “caused by the gradual and imperceptible exposure of the land, title to the dry water bed is passed to the adjoining shoreland owners,” even if brought about by artificial means.<sup>12</sup> “In contrast, when changes to the water bed occur . . . by ‘sudden changes in the course of a stream,’” title remains with the state.<sup>13</sup>

The Nevada Supreme Court has also held that the public trust doctrine applies to non-navigable waters as well, based on a statutory declaration that all waters of the state belong to the public.<sup>14</sup>

Although the public trust doctrine applies to all waters, Nevada law has not defined the extent of the public trust or the navigation servitude. Navigable streams may be boated, and most likely waded, fished, and otherwise used for recreation,<sup>15</sup> but rights regarding portaging obstruction and other incidents to navigation have not been decided. It is unclear where the public trust rights end, though likely they extend to the high-water mark,<sup>16</sup> or whether the public may go above the high-water mark if incidental to navigation (e.g., such as to portage around an obstacle). And to the extent that banks and bottoms are conveyed by the state, it is also unclear whether the public may contact privately-owned banks and bottoms.

## Miscellaneous

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.<sup>17</sup> A landowner may provide “sufficient

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<sup>9</sup> *Lawrence*, 254 P.3d at 614-15. The Supreme Court of Nevada formally recognized the public trust doctrine in 2011, though Nevada “caselaw has adhered to several principles relevant to the existence of the public trust doctrine [and] while the doctrine was not formally adopted, this state has previously embraced the tenets on which it is based.” *Id.* at 609-11 (discussing cases and statutes that “embraced the tenets” of the public trust doctrine).

<sup>10</sup> *Id.* at 616

<sup>11</sup> *Lawrence*, 254 P.3d at 614.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Mineral Cty.*, 473 P.3d at 425 (citing Nev. Rev. Stat. Ann. § 533.025).

<sup>15</sup> See *id.* at 616 (quoting approvingly a discussion in *Arizona Ctr. For Law in Pub. Interest v. Hassell*, 837 P.2d 158, 160-70 (Ariz. 1991), in which the Arizona Supreme Court discussed the public trust interest to include “navigation, fishing, recreation and commerce.”)

<sup>16</sup> State law has declared the Colorado and Virgin Rivers to be navigable, with the state holding title below the high-water mark. Nev. Rev. Stat. Ann. §§ 537.010, 527.020. And the Supreme Court of Nevada decided that a property owner along Lake Tahoe also owned to the high-water mark. *Michelsen v. Henry*, 822 P.2d 660, 662 (Nev. 1991). But the Supreme Court of Nevada also indicated in 1878 that a riparian owner along a navigable river owned to the low-water mark. *Shoemaker v. Hatch*, 13 Nev. 261, 267 (Nev. 1878).

<sup>17</sup> Nev. Rev. Stat. Ann. § 207.200 (West 2021).

warning” by fencing the property or by following certain posting procedures set out in the trespass statute.<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

For additional information on boating and fishing in Nevada, please see the state’s Department of Wildlife at <http://www.ndow.org/>.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Op. Att’y Gen. 80-11 (Nev. 1980).

<sup>22</sup> *Id.*