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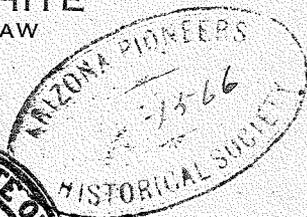
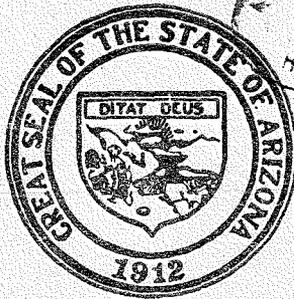
*From the Governor's Office*

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MEMORANDUM  
OF  
LAW POINTS AND AUTHORITIES  
RESPECTING  
THE RIGHTS OF ARIZONA  
IN THE COLORADO RIVER

PREPARED AND SUBMITTED TO  
HON. GEORGE W. P. HUNT  
GOVERNOR OF ARIZONA

BY  
SAMUEL WHITE  
ATTORNEY AT LAW



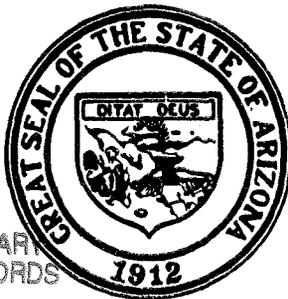
PHOENIX, ARIZONA, SEPT. 8, 1925

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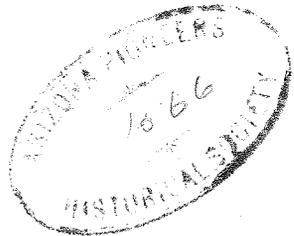
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PHOENIX, ARIZONA, SEPT. 8, 1925

# *The Rights of Arizona in the Colorado River*

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EXECUTIVE OFFICE, STATE HOUSE

Phoenix, Ariz., August 21, 1925.

My dear Judge:

Information has come to me that you have made a close study of, and have done a great deal of research in connection with, the legal questions affecting the ownership in the resources of the Colorado River.

During war times, when flags are waving and drums are beating, it is an easy matter for people to be patriotic; in fact, to be otherwise draws down upon them public condemnation.

An opportunity is presented at this time to the citizens of the State of Arizona to give a demonstration of their patriotism to their state. Due to a combination of circumstances the interests of this state are in jeopardy. Self seekers within our citizenship and those who base their theories of life from the viewpoint of "stake hunters" rather than "home builders," are willing to forfeit the economic interests of Arizona in the Colorado River because of some personal gain they hope to achieve for themselves. Others, because their ego would be gratified in seeing something done immediately, are willing to see the benefits go to some other states to the injury of Arizona. They deride the rights of posterity, suggesting that they are not to be considered. Posterity, as I conceive it, is your children and my children, and our lives will be rather worthless if we do not endeavor to make things better for our children than we found them.

You are an attorney and it is out of the law that you must make your livelihood. It is asking a considerable concession from an attorney to place his legal knowledge at the disposal of the State of Arizona without being recompensed for so doing.

However, we are in this position: We can make no payments for legal services other than such as are provided in the state budget and there are no funds available for the employment of attorneys. I am, therefore, going to appeal to you as a patriotic citizen to make available, for the use of the committee that I have appointed to work out a solution of the Colorado River problem and for the use of the people of this state, such legal information as you have compiled with reference to the law governing the rights of this state in the resources of the Colorado River.

I feel confident that if you do this you will enjoy the satis-

## THE RIGHTS OF ARIZONA

fraction of having measured up to the responsibilities of citizenship and you will be entitled to the approval and thanks of the people of our state.

Respectfully,

GEO. W. P. HUNT,

Governor.

Judge Samuel White,  
418 Luhrs Building,  
Phoenix, Arizona.

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SAMUEL WHITE, LAWYER

Phoenix, Ariz., September 8, 1925.

Hon. Geo. W. P. Hunt,  
Governor of Arizona,  
The Capitol, Phoenix, Ariz.

My dear Governor:

I am transmitting herewith a memorandum of authorities respecting the rights of the State of Arizona in the Colorado River in response to your request of August 21st.

I have quoted only from decisions by the Supreme Court of the United States, not only because of the respect the decisions of that court command, but also for the reason that it will be in that forum that the rights of this state in the Colorado will be determined, should litigation respecting those rights ever arise.

These authorities, as you will observe, clearly and definitely establish the fact that the Colorado is a navigable stream. I think it is conceded to be navigable by all interests seeking to benefit through its development. It is so described in the Swing-Johnson bill, and the character of the stream meets the legal test of navigability as defined by the Supreme Court of the United States. If it be not navigable, the Federal Power Commission, under the terms of the act creating it, is devoid of any jurisdiction over the river or its development. If it is navigable the right of the United States therein is limited to the control thereof for the purposes of navigation.

The State of Arizona, being admitted to the union "on an equal footing with the original states," by virtue of her sovereignty and to the exclusion of all others, is the absolute owner of the bed of the river, from high water mark to high water mark, where the Colorado lies wholly within the state, and to the thread of the stream where it constitutes a boundary between states. Such ownership is declared to be in trust for the common benefit of all of the people of the State of Arizona, and not for the benefit of the people of other states. Being so vested with this great trust, the state is without power to deed it away, and, as a matter of law as well as of conscience, it is the duty of those in authority

in Arizona to carry out the purposes<sup>alienated</sup> of this trust, neither neglecting it nor suffering it to be ~~appropriated~~ or diminished without just compensation. As a necessary incident of its ownership, the consent of Arizona is indispensable before any dam or other structure may be laid in the bed of the river or its waters taken.

It is quite clear that in the Enabling Act, Congress did not attempt to reserve any part of the bed of the Colorado, and could not have done so had it so desired. The lands designated by the Secretary of the Interior under the reservation clause of the Enabling Act comprise only lands which, when surveyed, will be included within legal subdivisions in certain townships. It is a matter of common knowledge that the bed of navigable water is never included in a legal subdivision.

As I read the law, the position taken by you when you said in addressing the delegates from California, Nevada and Arizona:

“Arizona asserts that, while the Federal Government, as a proprietor, may own the lands abutting the dam sites and the lands that will be overflowed, the State of Arizona, as a sovereign, owns the land in the bed of the stream, upon which the dam will be erected, and the water in the stream, and that it reserves the right to tax and derive revenue from any development in the river in whatever manner the laws of this state may devise.”

is safe and well founded. You demonstrated that you fully appreciate the duty of administering the trust arising from the ownership of the bed and water of the Colorado River for the common benefit of all the people of this state, when on the same occasion, you said:

“Arizona expects to derive revenue from every unit of electrical energy generated in this state that is utilized in other states.”

Very respectfully,

SAMUEL WHITE.

EXECUTIVE OFFICE, STATE HOUSE

Phoenix, Ariz., September 9, 1925.

My dear Judge:

It affords me a great deal of pleasure to acknowledge receipt of your letter of September 8th, transmitting “Memorandum of Points and Authorities Respecting the Rights of Arizona in the Colorado River” which you prepared in response to my letter of August 21st, in which I appealed to you, as a patriotic duty, to make available such legal knowledge as you had compiled concerning Arizona’s interests in the river.

We have a tremendous fight ahead to conserve for the benefit of the people of the state our natural rights in this great resource.

We are faced with selfishness and greed without our borders

and defeatists at home, and it behooves all the citizens of this state who have a vision of a great future, to stand firm and unbending in this time of stress, and fight for what belongs to them.

On behalf of the State of Arizona I want to thank you for your contribution to the cause of Arizona's future destiny.

Very sincerely yours,

GEO. W. P. HUNT,

Governor.

Judge Samuel White,  
Phoenix, Arizona.

### **The Colorado River Is a Navigable Stream.**

It is so described in the Swing-Johnson Bill introduced in Congress by the California delegation to authorize the construction of a dam at Boulder Canyon. It has always been so treated by the government of the United States in the official survey of public lands bordering upon banks, and the character of the stream meets the legal definition of what constitutes navigability. In England those waters, only including rivers, were regarded as navigable, in which the tide ebbed and flowed. This doctrine was early repudiated by the United States as being unfitted to the conditions in this country where many of the rivers are in fact navigable for many miles above the highest reach of the tide, as well as the great lakes on the north and many inland lakes, in which there is no tide and which were also navigable and in fact used as great highways for commerce.

The Supreme Court of the United States examined this question many years ago in the case of **The Daniel Ball vs. United States**, 19 L. ed. 999, and said:

"Those rivers must be regarded as public navigable rivers in law, which are navigable in fact; and they are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade or travel are or may be conducted in the customary modes of trade and travel on water."

To the same effect may be cited:

- Moore vs. Sanborne, 2 Mich. 519;
- Brown vs. Chadbourne, 31 Maine 9;
- The Montello (U. S.) 22 L. ed. 391;
- Hickock vs. Hine, 23 Ohio State 523;
- Diedrich vs. Railway Co., 42 Wis. 248;
- Atty. General vs. Woods, 108 Mass. 436;
- Rowe vs. Granite Co., 21 Pick (Mass.) 344;
- Railway Co. vs. Brooks, 39 Ark. 403.

In the case of **Economy Light and Power Co., vs. United**

**States**, 65 L. ed. 847, the question involved was the navigability of the Des Plaines River in the State of Illinois. It was held to be a navigable river by the Supreme Court of the United States, although there was no evidence of actual navigation within the memory of living man and that there would not be any interference with navigation by the construction of the dam. But the court found that in its natural state the river was navigable in fact, and that it was actually used for the purposes of navigation and trading in the customary way and with the kinds of craft ordinarily in use for that purpose on rivers of the United States, from early fur-trading days (about 1675) down to the end of the first quarter of the nineteenth century. The court again defined the test of navigability:

"The test is whether the river, in its natural state is used, or capable of being used, as a highway of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year or at all stages of the water."

If the Colorado be not a navigable stream, the Federal Power Commission has no interest in or jurisdiction over the stream. The title of the act and the powers of the commission are: "To provide for the improvement of navigation, the development of water power and the use of the public lands in relation thereto; and the term 'public lands' is defined by the act to mean such lands and interests in lands owned by the United States as are subject to private appropriation and disposal under public land laws."

The fact that a stream, because of falls or rapids, does not furnish the means of unbroken navigation, does not affect its navigability. In **The Montello** case supra, the Supreme Court of the United States said:

"The learned judge of the court below rested his decision against the navigability of the Fox River below De-Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation . . . . Apart from this, however, the rules laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country, which are so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox, they may be so great while they last as to prevent the use of the best instrumentalities for car-

rying on commerce; but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars."

The statement of law as summarized in 29 Cyc. 289 is abundantly supported by the decided cases:

"Water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes. This rule is not only the one which prevails in nearly all of the states in the country, but was also the rule under the civil law . . . . It is immaterial that the stream is not navigable in its entirety if it is in fact navigable in whole or in part." And again:

"Navigable waters do not lose their character as such because interrupted by falls, if they can be used for purposes of commerce both above and below the falls, nor because of the existence of other obstructions not preventing navigation."

**The State of Arizona Is the Absolute Owner of the Bed of the Colorado River, Where it Lies Wholly Within the State, and to the Center of the Stream, where it Constitutes the Boundary Between Arizona and the States of Nevada and California.**

Arizona was admitted to the union upon an equal footing with the original states. It is so provided in the Enabling Act, and it is so declared in the Proclamation of President Taft admitting the state into the union.

Upon her admission to the union, Arizona at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states, and could, therefore, exercise the same powers over rivers within her limits as were possessed by the original states.

The shores of navigable waters and the soil under them between high and low water marks were not granted by the Constitution to the United States, but were reserved to the states respectively, and the new states have the same rights and jurisdiction on this subject as the original states. Congress cannot grant lands below high water mark on navigable water in a state.

In **Pollard vs. Hagan**, 11 L. ed. 565, the Supreme Court of the United States considered this question with great care, and the law then announced by that court has continued unchallenged to this day as the law of this country. In that case the plaintiff

held a patent from the United States issued by virtue of an Act of Congress, for land lying below high water in the Mobile River near the point where it discharges into Mobile Bay. In that case the court said:

“When Alabama was admitted into the Union on an equal footing with the original states, SHE SUCCEEDED TO ALL THE RIGHTS OF SOVEREIGNTY, JURISDICTION AND EMINENT DOMAIN WHICH GEORGIA POSSESSED AT THE DATE OF THE CESSION, EXCEPT SO FAR AS THIS RIGHT WAS DIMINISHED BY THE PUBLIC LANDS REMAINING IN THE POSSESSION AND UNDER THE CONTROL OF THE UNITED STATES FOR THE TEMPORARY PURPOSES PROVIDED FOR IN THE DEED OF CESSION, AND THE LEGISLATIVE ACTS CONNECTED WITH IT. Nothing remained in the United States, according to the terms of agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.”

After discussing the manner by which the United States gained title to the public lands, the court proceeds:

“Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. TO MAINTAIN ANY OTHER DOCTRINE IS TO DENY THAT ALABAMA HAS BEEN ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, THE CONSTITUTION, LAWS AND COMPACT TO THE CONTRARY NOTWITHSTANDING. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of **Martin et al vs. Waddell**, 16 Peters, 410, the present Chief Justice, in delivering the opinion of the court said: ‘When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the constitution.’ Then to Alabama belong the navigable waters, and soils under rights surrendered

by the Constitution of the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

After pointing out that the jurisdiction of the United States over navigable waters was confined to the regulation of commerce with foreign nations and among the several states, the court proceeds:

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of policy powers. But, in the hands of the state this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning, we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively. Second, the new states have the same right, sovereignty and jurisdiction over this subject as the original states. Third, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The same court, in **Huse vs. Glover**, 30 L. ed. 487, reaffirmed the doctrine established in **Pollard vs. Hagan**, supra, saying, as to the State of Illinois:

"That the language of the resolution admitting her was that 'she is' admitted into the union on an equal footing with the original states in all respects whatsoever, and that she could, therefore, afterwards exercise the same powers over rivers within her limits as Delaware exercised over Blackbird Creek and Pennsylvania over Schuylkill River."

Again, the same court, speaking of the jurisdiction of the

State of California over the American River, a navigable tributary of the Sacramento, in **Cardwell vs. American River Bridge Company**, 28 L. ed. 959, said:

"She was not, therefore, shorn by the clause as to navigable waters within her limits, of any powers which the original states possessed over such waters within their limits."

In **Illinois Central Railway vs. People of the State of Illinois**, 36 L. ed. 1018, the Supreme Court again expressed itself on several phases of the question under consideration. The State of Illinois had by an act of its legislature attempted to grant the fee title to the bed of a portion of Lake Michigan to the railway company and some years later by an Act of the Legislature attempted to revoke this grant. The court was considering the rights of the state and the railway. The opinion is very lengthy, but very instructive, and we quote at length:

"The State of Illinois was admitted into the union in 1818 on an equal footing with the original states in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the state was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several states of the union in character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the state were prescribed by Congress and accepted by the state in its original Constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the state and the middle of the lake south of latitude 42 degrees and 30 minutes.

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any parties. **Pollard vs. Hagan**, 44 U. S., 3 How. 313 (11:565); **Weber vs. Board of State Harbor Commissioners**, 85 U. S. 18 Wall 57 (21:798).

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which

is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of **The Genesee Chief vs. Fitzhugh**, 53 U. S., 12 How. 443, 455 (13:1058, 1063). 'Tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions meant nothing more than public rivers, as contradistinguished from private ones,' and writers on the subject of admiralty jurisdiction 'took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.'

"But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce. As said in the case cited: 'There is certainly nothing in the ebb and flow of the tide that makes the water peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.'

"The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also by the common law, the doctrine of

the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters, and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the domination and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty, and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time the assent of the state to such encroachment, and also the validity of the claim which the company asserts of a right to make further encroachments thereon by virtue of a grant from the state in April, 1869."

Proceeding, the court also said:

"The question, therefore, to be considered is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing

therein freed from the obstruction or interference of private parties. The interests of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and so long as their disposition is made for such purposes, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundations for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable water, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when

parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

Discussing the nature of the tenure of the state of soil underlying navigable waters, the court said:

"We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declared that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbors and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

"This follows necessarily from the public character of the property, being held by the whole people for the purposes in which the whole people are interested. As said by Chief Justice Taney, in **Martin vs. Waddell**, 41 U. S. 16 Pet. 367, 410 (10:997, 1012): 'When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' In **Arnold vs. Mundy**, 6 N. J. L. 1, which is cited by this court, and in **Martin vs. Waddell**, 41 U. S. 16 Pet. 418 (10:1015) and spoken of by Chief Justice Taney, as entitled to great weight, and in which the decision was made 'with great deliberation and research,' the Supreme Court of New Jersey comments upon the rights of the state in the bed of navigable waters, and after observing that the power exercised by the state over the lands and waters is nothing more than what is called *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: 'The sovereign power itself, therefore,

cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.' Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

"In the case of **Stockton vs. Baltimore and N. Y. R. Co.**, 32 Fed. Rep. 9, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the state of lands under the navigable waters of the United States, he said. 'It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the jura regalia of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the state, as they were by the King, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither

did these dispositions of useless parts affect the character of the title to the remainder.

"Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted. **Martin vs. Waddell**, 41 U. S. 16 Pet. 367, 410 (10:997, 1012); **Pollard vs. Hagan**, 44 U. S. 3 How. 212, 220 (11:565, 569); **McCready vs. Virginia**, 94 U. S. 391, 394 (24:248)."

"This rule was again specifically recognized by the Supreme Court of the United States in **Oklahoma vs. Texas**, 66 L. ed. 771, saying:

"Oklahoma claims complete ownership of the entire bed of the river within that state, and, in support of its claim contends that the river throughout its course in the state, is navigable, and therefore, that upon the admission of the state into the union on November 16, 1907, the title to the river bed passed from the United States to the state, in virtue of the constitutional rule of equality among the states whereby each new state becomes, as was each of the original states, the owner of the soil underlying the navigable waters within its boundaries. If that section of the river be navigable, its bed undoubtedly became the property of the state under that rule."

However, the court decided that that part of the river under consideration was not navigable, and that the title to the bed of the river did not pass to the State of Oklahoma, and said:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether in any particular instance, it has done so, is essentially a question of what it intended."

In **Port of Seattle vs. Oregon and Washington Ry. Co.**, 65 L. ed. 500, the Supreme Court of the United States, again speaking, said:

"The right of the United States in the navigable waters within the several states is LIMITED TO THE CONTROL THEREOF FOR PURPOSES OF NAVIGATION. Subject to that right Washington became upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under the same."

**The Bed of the Colorado River was Not Withheld from the State By the Enabling Act.**

The reservation clause of the Enabling Act is found in Section 28, which declares:

"There is hereby reserved to the United States and ex-

cepted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission, and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the state."

The designation by the Secretary of the Interior is:

"All land of the United States which, when surveyed, will be included within legal subdivisions" in certain designated townships.

It is well known that the bed of a navigable stream is never included by government surveys "within legal subdivisions," and as has been pointed out by the Supreme Court of the United States in **Illinois Central Ry. Co. vs. State of Illinois**, supra, is of a different character and tenure from the lands held by the United States for sale or pre-emption. If it had been the intention of Congress to make an attempt to reserve the bed of the stream, it would certainly have used some appropriate language to make clear such an unprecedented intention. Even if such was the intention of Congress, the reservation was only of such lands as were to be designated by the Secretary of the Interior within a specified time, long since expired, and the Secretary made no attempt to designate the bed of the Colorado or any part thereof, and even if the Secretary had attempted to so designate a part of the bed of the stream his act would have been in violation of the Federal Constitution.

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