

# Let My People Go Fishing: Public Stream Access and Navigability on Colorado's Rivers

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## INTRODUCTION

Every year in June, as snow in the high country melts and fills Colorado's rivers, there is a gathering in the small mountain town of Salida. The festival is known as FibArk, and people from all over the country bring rafts, kayaks, tubes, and all manner of vessels to float down the Arkansas River in a celebration of the state's upcoming whitewater rafting season.<sup>1</sup> The festival initially began as one of the first kayak races in the United States in 1949,<sup>2</sup> and evolved into an annual event that draws kayak competitors from all over the world.<sup>3</sup>

Now the celebration is a full weekend-long every June and includes kayaking competitions, raft races, and a floating parade that proceeds down the river. The spectacle takes place where the Arkansas River flows through downtown Salida, so participants and spectators can enjoy the festivities from the public park area of the town. It is a grand celebration of the town's whitewater heritage and is a major seasonal driver for the small mountain town's economy.<sup>4</sup>

Beyond FibArk, the Arkansas River draws hundreds of thousands of visitors a year, all seeking the recreational experience for which the river is famous.<sup>5</sup> Some come to fish the river's long stretch of Gold Medal trout waters; others come to raft and kayak the famous Brown's Canyon National Monument or the more technical Royal Gorge.<sup>6</sup> All the river's visitors come for the same purpose—to access the waterway and enjoy its recreational values. Boaters and anglers can access the river and all the enjoyment it has to offer, but there is a major restriction. If an angler, plying the waters in search of wild trout, walked down the riverbed beyond an invisible property line, or a boater decided to take a quick break and hop out of his or her vessel next to privately owned land, that person could be liable for criminal trespass in the state of Colorado.

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<sup>1</sup> *History of FibArk*, FIBARK, <http://www.fibark.com/history/> (last visited Feb. 12, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Salida: Whitewater of Creativity*, COLO. OFFICE OF ECON. DEV. & INT'L TRADE (Feb. 8, 2017), <https://choosecolorado.com/salida-whitewater-creativity/>.

<sup>5</sup> *History of FibArk*, *supra* note 1.

<sup>6</sup> *Colorado's Gold Medal Waters*, TROUT UNLIMITED (Nov. 1, 2015), <https://coloradotu.org/blog/2015/11/colorados-gold-medal-waters>.

Under current Colorado law, river users throughout the state could find themselves facing criminal trespassing charges if they touch the river bottom in waterways that flow through privately held land.<sup>7</sup> Adding to the difficulty, even those who float through private land on a public waterway may still be liable for civil trespass if the landowner decides to pursue damages.<sup>8</sup> The laws determining public access to Colorado's waterways stem from several fact-specific cases and the overarching fact that the Colorado legislature has never acknowledged nor defined what qualifies as a navigable waterway within the state. The legal void caused by the lack of a clear definition has effectively blocked public access to many of Colorado's waterways.<sup>9</sup>

Private landowners in Colorado argue that the riverbed belongs to the landowner, and there is no access right granted to the public through private land.<sup>10</sup> Despite Colorado's constitution defining the state's water as a resource held by the people, it has never been interpreted to provide a right of access.<sup>11</sup> Water rights advocates have rightfully argued that implementing the public trust doctrine for access to waterways could disrupt the property rights allocation regime for the entire state's water supply.<sup>12</sup>

The issue of navigability and public access in Colorado is multifaceted and requires an understanding of navigability definitions and uses, Colorado's historical access system, and comparative systems of public access across the western United States. This Note will begin by examining the economic impact of river-related recreation in the state to underline the importance of a clear definition of navigability in Colorado. Then, a background explanation of federal and state navigability in addition to a brief examination of comparative systems will further clarify the complications arising in Colorado. The Note aims to identify the best solution that balances the rights of the public and the recreation economy with the rights of private landowners.

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<sup>7</sup> *People v. Emmert*, 597 P.2d 1025, 1027 (1979).

<sup>8</sup> Lori Potter, Steven Marlin, & Kathy Kanda, *Legal Underpinnings of the Right to Float through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 458 (2002).

<sup>9</sup> STREAM ACCESS NOW: A REPORT ON STREAM ACCESS LAWS BY STATE, BACKCOUNTRY HUNTERS & ANGLERS 7 (July 2017), [https://www.backcountryhunters.org/stream\\_access\\_report](https://www.backcountryhunters.org/stream_access_report).

<sup>10</sup> See John R. Hill Jr., *The Right to Float through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 350 (2001).

<sup>11</sup> COLO. CONST. art. XVI, § 5; see also *Emmert*, 597 P.2d at 1028–29, 1033; *Hartman v. Tresise*, 84 P. 685, 686–87 (1905).

<sup>12</sup> See *Kemper v. Hamilton (In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45)*, 2012 CO 26, ¶¶ 39–42 (Hobbs, J., dissenting).

To clarify the convoluted system of public access, the Colorado legislature should establish a clear statewide definition of navigability that would allow public access for recreationists to qualifying rivers within the state.

## I. STREAM ACCESS IN COLORADO AND THE WEST

Public access to navigable waterways has a long history in the United States, stretching back to the importation of English common law to the original colonies. Recreation and public usage of waterways is a major economic driver in the West, particularly in Colorado, where there are abundant opportunities to enjoy the state's many rivers. But public access depends on the waterway's navigability, both in the federal and the state usage of the term. States across the West vary in their respective laws regarding navigability, but most lean towards a system of easements for public access, with few exceptions.<sup>13</sup> Colorado's current clouded stance on the issue derives from one principal case in 1979 involving a trespassing dispute on the Colorado river, *People v. Emmert*.<sup>14</sup>

### A. Stream Access and Recreation in Colorado

The Colorado Rocky Mountains have garnered a national reputation for outdoor recreation, drawing 84.7 million tourists to the state in 2017.<sup>15</sup> The state's advertising campaign focuses on the abundance of outdoor opportunities for visitors to enjoy in the state's many scenic areas.<sup>16</sup> The value added to the state's economy from outdoor recreation is incredibly significant; the outdoor industry contributed \$62.5 billion to Colorado's economy in 2017.<sup>17</sup> The outdoor recreation industry accounts for just over ten percent of the state's GDP, creating over half a million jobs for Coloradoans.<sup>18</sup> As a subset, fishing alone contributes \$2.4 billion to the

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<sup>13</sup> See STREAM ACCESS NOW, *supra* note 9, at 14–23.

<sup>14</sup> *Emmert*, 597 P.2d at 1027.

<sup>15</sup> *Colorado Tourism Sets All-Time Records for Eighth Consecutive Year*, COLORADO.COM (June 28, 2018), <https://www.colorado.com/news/colorado-tourism-sets-all-time-records-eighth-consecutive-year>.

<sup>16</sup> *How We Promote Colorado*, COLO. TOURISM OFFICE, <https://industry.colorado.com/how-we-promote-colorado> (last visited Feb. 19, 2020).

<sup>17</sup> COLO. PARKS & WILDLIFE, THE 2017 ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION IN COLORADO 111 (2018), <https://cpw.state.co.us/Documents/Trails/SCORP/Final-Plan/SCORP-AppendixF-EconomicContributions.pdf> [hereinafter ECONOMIC CONTRIBUTIONS].

<sup>18</sup> *Id.* at 111, 118.

Colorado economy.<sup>19</sup> Colorado's scenic beauty and opportunities for outdoor recreation fuel the state's tourism industry, and the importance of outdoor recreation to that economic driver cannot be overstated.

Colorado has become a desirable place to live partially because of the ever-increasing popularity of outdoor recreation.<sup>20</sup> Colorado's population grew by 14.5 percent<sup>21</sup> from 2010 to 2019.<sup>22</sup> The outdoor recreation industry has experienced parallel growth in Colorado.<sup>23</sup> In the fishing arena, the state logged 8.4 million user days in 2011, increasing over two million user-days since 2006.<sup>24</sup> The state's whitewater rafting industry is also growing. The Pumphouse area, a popular picnic spot and launch point for those seeking to float the upper Colorado River, receives around 90,000 visitor days during the season.<sup>25</sup> Commercial user days have steadily increased relative to the population of the state for the last five years.<sup>26</sup> Additionally, the whitewater rafting industry contributed \$463 million in spending to the state economy in 2017.<sup>27</sup>

The trend of population growth and the corresponding demand for outdoor recreation puts increased pressure on Colorado's rivers and streams, setting the stage for more frequent conflicts between the public, and private landowners. Colorado's current public access regime will only increase the potential for conflict, as many recreationists may be subject to criminal or civil trespass charges without even knowing they are trespassing.<sup>28</sup>

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<sup>19</sup> *Id.* at 120.

<sup>20</sup> Blair Miller, *Report: Colorado's Outdoor Recreation Industry Continues Economic Growth*, DENVER CHANNEL 7 (Jan. 2, 2019, 5:06 PM), <https://www.thedenverchannel.com/news/politics/report-colorados-outdoor-recreation-industry-continues-economic-growth>.

<sup>21</sup> *Quick Facts Colorado*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CO/PST045218> (last visited Feb. 20, 2020).

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

<sup>23</sup> Miller, *supra* note 20.

<sup>24</sup> See U.S. CENSUS BUREAU, NATIONAL SURVEY OF FISHING, HUNTING, & WILDLIFE-ASSOCIATED RECREATION 7 (2011), <https://www.census.gov/prod/2013pubs/fhw11-co.pdf>; U.S. CENSUS BUREAU, NATIONAL SURVEY OF FISHING, HUNTING, & WILDLIFE-ASSOCIATED RECREATION 108 (2006), <https://www.census.gov/content/census/en/library/publications/2006/demo/fhw-06-nat.html>.

<sup>25</sup> *Pumphouse Recreation Site*, BUREAU OF LAND MGMT., <https://www.blm.gov/visit/pumphouse-recreation-site> (last visited Feb. 19, 2020).

<sup>26</sup> Jason Blevins, *2016 A Banner Year for Colorado Rafting Industry*, THE DENVER POST (Feb. 10, 2017), <https://www.denverpost.com/2017/02/10/2016-a-banner-year-for-colorado-rafting-industry/>.

<sup>27</sup> ECONOMIC CONTRIBUTIONS, *supra* note 17, at 27.

<sup>28</sup> Colorado law does not specifically state that landowners must post signs marking their property lines. See C.R.S. § 18-4-504 (2020).

### *B. Navigability and Stream Access*

Public access to waterways is a multitiered issue that involves both federal and state governments. At the most basic level, the navigability of waterways is a question of jurisdiction: who owns what, and who retains the right to exclude or to grant access. However, states and the federal government have their own respective definitions, and both use the term “navigability” to define jurisdictional control and qualify public access.<sup>29</sup> Jurisdictional authority depends upon which definition of navigable the waterway meets.<sup>30</sup>

#### *1. Federal Navigability*

State jurisdictional authority over waterways within the state’s borders is rooted in the Equal Footing Doctrine (“Doctrine”).<sup>31</sup> The Doctrine is the principle that enables states entering the Union to enter on the same constitutional footing as the original thirteen states.<sup>32</sup> Concerning waterways, the original thirteen states, borrowing from English common law,<sup>33</sup> claimed ownership of the ground underlying navigable waterways. According to the Doctrine, all newly admitted states enjoyed that same right of ownership.<sup>34</sup> Therefore, applying the Doctrine to waterways, the federal government ceded the title of all navigable waterways to the state upon the state’s entry into the Union.<sup>35</sup>

The Doctrine sets the baseline for determining navigability and ownership status on waterways in Colorado. Strictly following the Doctrine, Colorado received the title to streambeds of all navigable waterways within the state upon admission to the Union in 1876.<sup>36</sup> However, the waters quickly become muddied, as neither the legislature nor the judiciary has ever articulated a clear definition of navigability. Several courts have briefly mentioned in dicta that there are no navigable streams in the state,<sup>37</sup> but none have put forth any analysis on the subject

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<sup>29</sup> *Navigability Primer*, AMERICAN WHITEWATER, <https://www.americanwhitewater.org/content/Wiki/stewardship:navigability> (last visited Feb. 20, 2020).

<sup>30</sup> *Id.*

<sup>31</sup> PPL Montana, LLC v. Montana, 565 U.S. 576, 592 (2012).

<sup>32</sup> Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833 (1980).

<sup>33</sup> PPL Montana, 565 U.S. at 589.

<sup>34</sup> *Id.* at 590.

<sup>35</sup> *Id.* at 591.

<sup>36</sup> Appellant’s Reply Brief at 9, Hill v. Warsewa, 947 F.3d 1305 (10th Cir. 2020) (No. 19-1025) [hereinafter Brief].

<sup>37</sup> Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912); *In re German Ditch & Reservoir Co.*, 139 P. 2 9 (1913).

nor offered a definition of which use of the term “navigability” they were contemplating at the time.<sup>38</sup>

To clarify Colorado’s situation, it is helpful to distinguish between navigability under federal law and navigability for state purposes. Under federal law, the term “navigable” determines whether the federal government has jurisdiction over the waterway, such as under the Commerce Clause power or for Clean Water Act purposes.<sup>39</sup> The Supreme Court first articulated the test for federal navigability in *The Daniel Ball*, holding that rivers are navigable in law if they are navigable in fact.<sup>40</sup> Navigable in fact was defined as when rivers “are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”<sup>41</sup> *The Daniel Ball* concerned the federal government’s Commerce Clause authority over ships using navigable waterways and is the pivotal case on the definition of federal navigability.

*The Daniel Ball* test for navigability established that waterways that are capable of use as a “highway of commerce” are navigable in fact and therefore navigable for purposes of federal law.<sup>42</sup> The case established the concept that federal law determines who has jurisdictional authority over waterways that meet the standard and can determine title to the underlying ground.<sup>43</sup> Additionally, this area of law determines if there is a navigational servitude on the surface of the water, essentially determining who is allowed to float on the surface of the waterway.<sup>44</sup> After combining the federal definition with the Equal Footing Doctrine, a waterway would have to have been navigable in fact at the time of statehood for the state to exert title over the streambed.

## 2. State Navigability

State navigability is separate from federal navigability, but it also stems from the principles created by the Doctrine and federal navigability. The Submerged Lands Act of 1953 codifies the principles that the Doctrine and the *Daniel Ball* navigability definition created.<sup>45</sup> The Act officially codified the transfer of title to states by outlining that:

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<sup>38</sup> Brief, *supra* note 36, at 17.

<sup>39</sup> See Clean Water Act § 502 (7), 33 U.S.C. § 1251 (2012); 33 U.S.C. § 1362 (2012).

<sup>40</sup> *The Daniel Ball*, 77 U.S. 557, 563 (1870).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Navigability Primer*, *supra* note 29.

<sup>44</sup> *Id.*

<sup>45</sup> Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (2012).

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.<sup>46</sup>

The Act officially quieted title to ground underlying navigable waterways ceded to the state upon entry to the Union.<sup>47</sup>

Once the state has laid claim to the title of a streambed, it has broad authority to determine the property rights included with the streambed.<sup>48</sup> In several cases, the Supreme Court has upheld this principle, declaring states to have broad power over lands underlying their own jurisdictional waterways.<sup>49</sup> With this broad power, a state may create its own test for navigability and base state access laws off that definition instead of the federal one.<sup>50</sup> Consequently, a state may tailor its definitional laws to determine public usage and access to all waterways.<sup>51</sup> If a waterway does not meet the federal standard for navigability, a state may still apply its own definition and declare the waterway navigable for state purposes.<sup>52</sup> The main difference is that the state can then determine public access, and the federal government would not have Commerce Clause authority over the waterway.<sup>53</sup>

States differ on whether the waterway must have been navigable in fact at the time of statehood to be legally navigable.<sup>54</sup> Some adopt a more expansive definition, including waterways that have the physical

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<sup>46</sup> *Id.* § 1311(a).

<sup>47</sup> *Id.*

<sup>48</sup> *Shively v. Bowlby*, 152 U.S. 1, 40 (1894); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Packer v. Bird*, 137 U.S. 661, 669 (1891).

<sup>49</sup> *See Shively*, 152 U.S. at 1; *Hardin*, 140 U.S. at 371; *Packer*, 137 U.S. at 661.

<sup>50</sup> *Navigability Primer*, *supra* note 29.

<sup>51</sup> *Packer*, 137 U.S. at 670.

<sup>52</sup> *Navigability Primer*, *supra* note 29.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



characteristics that make their usage for commerce and transportation plausible at the time of statehood. Others follow the federal standard, restricting access to rivers that are only navigable in fact.<sup>55</sup> Of the eleven continental Western States,<sup>56</sup> all except Colorado have some sort of statewide accepted definition of navigability.<sup>57</sup> States with accepted navigability definitions take a varied approach to public access, for example:

- 1) Alaska's statutory definition of navigable includes "any water of the state forming a river... or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and taking off of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other recreational purposes."<sup>58</sup> The public has a statutory right to access and use "any navigable water."<sup>59</sup>
- 2) Montana's statutory public access law guarantees "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."<sup>60</sup>
- 3) California has a constitutional guarantee of public stream access which aligns with the state-created definition of navigability: "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."<sup>61</sup> The California Constitution allows for public access to any navigable stream, and Article X

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<sup>55</sup> Arizona follows this method. *See* ARIZ. NAVIGABLE STREAM ADJUDICATION COMMISSION-ANSAC, <http://www.ansac.az.gov/> (last visited Nov. 4, 2020) [hereinafter ANSAC].

<sup>56</sup> According to the US Census Bureau; Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *2010 Regions and Divisions of the United States*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/geographies/reference-maps/2010/geo/2010-census-regions-and-divisions-of-the-united-states.html>.

<sup>57</sup> *Stream Access Now*, *supra* note 9, at 14.

<sup>58</sup> ALASKA STAT. § 38.05.965 (13) (2006).

<sup>59</sup> ALASKA STAT. § 38.05.126 (2019).

<sup>60</sup> MONT. CODE ANN. § 23-2-302(1) (2019).

<sup>61</sup> *California Navigability Report*, AMERICAN WHITEWATER, <https://www.americanwhitewater.org/content/Wiki/access:ca> (last visited Oct. 19, 2020); *see generally* *Hitchings v. Del Rio Woods Recreation and Park District*, 55 Cal. App. 3d 560 (1976); *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040 (1971); *Bohn v. Albertson*, 107 Cal. App. 2d 738 (1951).

Section 4 directs the legislature to “enact such laws as will give the most liberal construction” to the access provision.<sup>62</sup>

- 4) Arizona adopted the federal test for navigability, and limited public access only to those waterways found to be navigable.<sup>63</sup> The state created a commission to determine navigability of waterways, placing the burden on the public to prove navigability at the time of statehood.<sup>64</sup>

With a clear definition of what qualifies as a navigable waterway, states are better able to quantify private landowners’ property rights and create access laws that accommodate any navigational servitudes.

### C. Colorado Navigability and Public Access

Colorado’s lack of a clear navigability definition creates an unclear management system of public access to waterways that run through private property. Although several cases in state courts have mentioned navigability, none of them specifically set a precedential test for navigable waters in Colorado. Instead, the few cases that have mentioned navigability have broadly stated that all streams in Colorado are nonnavigable, failing to discuss or reference any sort of navigability test, criteria, physical characteristics, or historical use.<sup>65</sup> The legal void created by the lack of definition has created repeated problems between landowners and recreationists that float or wade through their property.<sup>66</sup>

The principal case on stream access in Colorado is *People v. Emmert*.<sup>67</sup> The case involved trespassing charges after the defendant floated and walked through a privately owned stretch of the Colorado

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<sup>62</sup> CAL. CONST. art. X, § 4; *Navigability Primer*, *supra* note 29.

<sup>63</sup> *Stream Access Now*, *supra* note 9, at 14–15.

<sup>64</sup> ANSAC, *supra* note 55.

<sup>65</sup> *In re German Ditch & Reservoir Co.*, 139 P. 2 9 (Colo. 1913); *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912).

<sup>66</sup> *Hill v. Warsewa* was a case that concerned public access for an angler on the Arkansas River near Texas Creek, Colorado. *Hill v. Warsewa*, 947 F.3d 1305 (10th Cir. 2020); *Gateview Ranch v. Cannibal Outdoors* concerned a commercial company floating through private property on the Lake Fork of the Gunnison River in southern Colorado. The ranch was suing for civil trespass, but the case mooted when Cannibal Outdoors went out of business and the Supreme Court never spoke on the question. Shara Rutberg, *Boaters Float for Their Rights*, HIGH COUNTRY NEWS (Aug. 13, 2001), <https://www.hcn.org/issues/208/10649>; *see also* Dan Frosh, *Dispute Revives Battle Between Rafters and Property Owners*, N.Y. TIMES (Apr. 16, 2010), <https://www.nytimes.com/2010/04/17/us/17colorado.html>.

<sup>67</sup> *People v. Emmert*, 597 P.2d 1025 (Colo. 1979).

River.<sup>68</sup> The parties to the case stipulated that the Colorado River is a nonnavigable waterway, and therefore not subject to state title.<sup>69</sup> Instead of raising a navigability question, the defendant asserted the Colorado Constitution gave a right to float through private land.<sup>70</sup> The specific section of the constitution cited in the case states “the water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.”<sup>71</sup> The Colorado Supreme Court did not agree with the defendant, and instead held that the constitution only guarantees the right to appropriate water for a beneficial use; the provision does not provide a right of access to the public.<sup>72</sup> Additionally, the court found that “premises” for the purposes of criminal trespass include the streambanks of nonnavigable waterways within the state.<sup>73</sup>

*Emmert* clearly stated that wading through private nonnavigable streams constitutes criminal trespass.<sup>74</sup> But it did not discuss navigability or state title, nor did it clarify if the right to float through private streams exists without touching the streambed. Because the holding left these issues unresolved, the *Emmert* court left the door open for members of the public to be found liable for civil trespass just by floating through private land.<sup>75</sup> Boaters and anglers in the state are left to decipher an unclear statement of law to determine whether they can float rivers in Colorado without exposing themselves to civil liability. To alleviate some of the confusion created by the *Emmert* holding, the Colorado Attorney General issued an opinion in 1983 declaring that wading through privately held streambeds remains a trespass, but floating through private property is not considered criminal trespassing.<sup>76</sup> The effort did little to clarify the issue, however, because the opinion was nonbinding on law enforcement officials.<sup>77</sup> It also specifically avoided speaking about the civil trespass issue.

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<sup>68</sup> *Id.* at 1026.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> COLO. CONST. art. XVI, § 5.

<sup>72</sup> *Emmert*, 597 P.2d at 1028.

<sup>73</sup> *Id.* at 1029–30.

<sup>74</sup> *Id.* at 1030.

<sup>75</sup> Hill, *supra* note 10, at 350.

<sup>76</sup> *The Legalities of Floating on Colorado Waters*, FRYINGPANANGLERS.COM, <http://www.fryingpananglers.com/archive-essays/articles/Legal-comments-on-Floating-Colorado-rivers/Attorney-General-Opinion-1983.htm> (last visited Jan. 21, 2020).

<sup>77</sup> *Colorado Navigability Report*, AMERICAN WHITEWATER, [https://www.americanwhitewater.org/content/Wiki/access:co?#fn\\_\\_2](https://www.americanwhitewater.org/content/Wiki/access:co?#fn__2) (last visited Feb. 20, 2020).

The Colorado legislature, seeking an end to conflicts between boaters and private landowners, drafted a narrow bill in 2010 that would have protected the right of commercial rafters to float through private land.<sup>78</sup> After extensive lobbying efforts by private land advocates, the bill failed to pass.<sup>79</sup> The legislature instead remanded the issue to the Colorado Water Congress, a nonprofit group representing water interests across the state, for further study.<sup>80</sup> The effort ultimately led only to mediation of access disputes on a case-by-case basis, leaving Colorado with an unclear statement of navigability and public access to waterways.<sup>81</sup>

### *1. The Public Trust Doctrine and Water in Colorado*

Of the Western States with strong public access laws, many recognize the public's right of access through a public trust held by the state. Although Colorado has never embraced this type of public trust,<sup>82</sup> it is a crucial element to understanding stream access across the West and is the underlying legal doctrine that state governments have used to reserve stream access rights for their citizens.

The concept of the Public Trust Doctrine ("PTD") began with a dispute over the Chicago Harbor in *Illinois Central Railroad v. Illinois*.<sup>83</sup> The case concerned the submerged lands under the harbor, which the state of Illinois had given to the railroad company years prior.<sup>84</sup> The state legislature granted the underlying ground to the railroad to construct railroad tracks, warehouses, and buildings along the wharf.<sup>85</sup> Years later, Illinois sought to reclaim the title to the land, asserting that the state alone held title to the submerged lands and held those lands in trust for the public.<sup>86</sup> The U.S. Supreme Court held that title to the lakebed belonged to the state and was to be held in trust for the use and enjoyment of the public.<sup>87</sup> This case effectively created the concept of the PTD; state governments have obligations to hold public resources in trust for the use

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<sup>78</sup> Jerd Smith, *Fighting for the Right*, WATER EDUCATION COLORADO (Sept. 1, 2010), <https://www.watereducationcolorado.org/publications-and-radio/headwaters-magazine/fall-2010-recreation/fighting-for-the-right/>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

<sup>83</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

<sup>84</sup> *Id.* at 439.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 453.

<sup>87</sup> *Id.* at 463.

and enjoyment of the public. Since *Illinois Central Railroad*, the Supreme Court has consistently held that the public trust is a matter of state law.<sup>88</sup>

The PTD as it relates to water resources is most clearly explained by the California Supreme Court case *National Audubon Society v. Superior Court of Alpine County*.<sup>89</sup> The case involved water diversions from Mono Lake and most clearly exemplifies the conflict between appropriative water rights and the public trust.<sup>90</sup> Water diversions from Mono Lake tributaries to Los Angeles were lowering the overall lake level.<sup>91</sup> The Audubon Society sued, claiming injury from the environmental damages to Mono Lake that resulted from the diversions.<sup>92</sup> Los Angeles countered that they had permits under the appropriative system for the diversions, and therefore were permitted to divert.<sup>93</sup> The California Supreme Court held that the state has a continuing public trust obligation to prevent appropriating water in a manner that harms public interests.<sup>94</sup> The case established the precedent in California that the state has an affirmative obligation under the PTD to consider the public interest and minimize harm when appropriating water.<sup>95</sup>

*National Audubon* was a victory for environmental protection. It not only slowed the powerful water interests of Los Angeles, it set an environmentally friendly public trust precedent for water in an arid western state.<sup>96</sup> But it also caused irreparable disruption to California's system of water allocation. Because the state government suddenly had trust responsibilities over water usage, water related litigation skyrocketed.<sup>97</sup> Parties seeking to curb water diversions cited to the *National Audubon* reasoning, claiming that some well-established allocations were contrary to the public good.<sup>98</sup> The implications of California's situation has created justifiable mistrust of any language seeking to establish a public-trust-type precedent in Colorado.<sup>99</sup> Despite

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<sup>88</sup> Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came from, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 49 (2012).

<sup>89</sup> Nat'l Audubon Soc'y v. Superior Court of Alpine Cty., 658 P.2d 709 (Cal. 1983).

<sup>90</sup> *Id.* at 711–12.

<sup>91</sup> *Id.* at 711.

<sup>92</sup> *Id.* at 715–16.

<sup>93</sup> *Id.* at 713–14.

<sup>94</sup> *Id.* at 728.

<sup>95</sup> STEVEN FERRY, ENVIRONMENTAL LAW 34 (8th ed. 2019).

<sup>96</sup> *Id.*

<sup>97</sup> Leonhardt & Spuhler, *supra* note 88, at 75.

<sup>98</sup> *Id.*

<sup>99</sup> *In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 586 (Colo. 2012) (en banc) (Hobbs, J., dissenting).

the Colorado Constitution stating that waters of the state are “declared to be the property of the public,”<sup>100</sup> the provision has never been interpreted to establish a public trust obligation on the state, instead creating a “protection for appropriation, not protection from use or preservation.”<sup>101</sup>

The hesitancy to establish a similar doctrine to California comes from the assertion that any sort of PTD in Colorado would upset 150 years of established water law in Colorado,<sup>102</sup> and threaten the very well-established prior appropriation system that strictly governs water in the state. In 2012, two proposed ballot initiatives sought to create a public trust in Colorado’s water system.<sup>103</sup> One of the proposals, Initiative 3, sought to amend the Colorado Constitution to read, “the public’s estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law.”<sup>104</sup> The language proposed essentially followed the holding in *National Audubon*, creating a public trust obligation for the state. Both proposed initiatives failed to gain enough signatures to qualify for the statewide ballot.<sup>105</sup> Justice Hobbs of the Colorado Supreme Court articulated the issue that a public trust obligation would create for Colorado water:

[I]t would prevent farmers, cities, families and businesses from making beneficial use of water rights that have vested in them over the past 150 years under Colorado’s statutes and Constitution . . . the public’s dominant water estate would also supersede the Colorado Water Conservation Board’s appropriations for instream flows and lake level water rights, which are designed to protect the environment and recreational uses.<sup>106</sup>

Colorado’s system of water rights creates a traditional usufructuary property right in the water.<sup>107</sup> A separate state court system adjudicates these rights between users, and the Colorado Constitution guarantees the right to appropriate for a beneficial use, as discussed *supra*.<sup>108</sup>

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<sup>100</sup> COLO. CONST. art. XVI, § 5.

<sup>101</sup> Leonhardt & Spuhler, *supra* note 88, at 64.

<sup>102</sup> *In re Title*, 274 P.3d at 586 (Hobbs, J., dissenting).

<sup>103</sup> Bruce C. Walters, *A Brief History of the Public Trust Doctrine in Colorado: Arguments Made For and Against Its Application*, 18 U. DENV. WATER L. REV. 456, 459 (2015).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 460.

<sup>106</sup> *Id.*

<sup>107</sup> See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

<sup>108</sup> Leonhardt & Spuhler, *supra* note 88, at 64.

Despite stream access and water rights being separate issues, public access to waterways is often conflated with the water rights system. This confusion is due, in no small part, to the defendant's public trust argument for access that specifically failed in *Emmert*.<sup>109</sup> As a result, there has been significant pushback against any sort of stream access argument that incorporates public trust language.<sup>110</sup>

## II. DEFINING NAVIGABILITY IN COLORADO

Colorado occupies a rare position in the western United States in that the state has not articulated, through the legislature or the judiciary, what standard of navigability it accepts. The lack of clarity in this field of law in Colorado leaves a gray area that tends to favor private landowners over the public. Since the onus falls upon recreationists to distinguish private property from public on unmarked rivers, conflicts abound.<sup>111</sup> To resolve this issue permanently, Colorado needs to designate a state standard for navigability to clarify public access issues that have arisen in all parts of the state.

The confusion about navigability and its many uses and meanings does not lie solely with the public. The limited Colorado case law that speaks about navigability within the state courts often confuses the different types of navigability designations and the different purposes that derive from those designations.<sup>112</sup> To better clarify the subject, there is a particular framework of the various levels of navigability designations that the state would need to categorize waterways under:<sup>113</sup>

- a. Federal navigability refers specifically to waters that satisfy the *Daniel Ball* standard and are subject to federal interstate commerce jurisdiction.
- b. Navigable for title refers specifically to waters for which the submerged lands passed to state ownership at statehood.

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<sup>109</sup> *People v. Emmert*, 597 P.2d 1025, 1027–28 (Colo. 1979).

<sup>110</sup> See *In re Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 972–73 (Colo. 1995); *In re Title, Ballot Title, Submission Clause for 2011–2012 No. 45*, 274 P.3d 576, 586–87 (Colo. 2012) (Hobbs, J., dissenting).

<sup>111</sup> See *Hill v. Warsewa*, 947 F.3d 1305 (10th Cir. 2020); Rutberg, *supra* note 66; Frosh, *supra* note 66.

<sup>112</sup> *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 222 (1912), *overruled by* *Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1 in City & Cty. of Denver*, 188 Colo. 310, 535 P.2d 200 (1975), and *United States v. City & Cty. of Denver, By & Through Bd. of Water Comm'rs*, 656 P.2d 1 (Colo. 1982).

<sup>113</sup> This is a definitional framework articulated in *Potter, Marlin & Kanda*, *supra* note 8.

- c. State navigability refers to the state standard for navigability for waters that do not qualify as navigable under the federal *Daniel Ball* standard.<sup>114</sup>

Despite the restrictive laws on stream access, Colorado presents itself to the nation as a state that highly values outdoor recreation and the natural resources the state has to offer.<sup>115</sup> In 2018, the Governor's Office stated that an official goal for the state is to ensure "every Coloradan has access to the outdoor opportunities our state has to offer."<sup>116</sup> The goal of the Governor's Office recognizes the huge economic impact that outdoor recreational tourism contributes to the state.

To comport with this goal, Colorado needs to create a clear definition of navigability to protect the interests of the public and prevent conflicts between outdoor recreationists and private landowners. A statutory definition would give state citizens and tourists alike a clear statement on the law determining access rights to state waterways. The legislature intervening and taking control of this situation would subject the determination to the democratic process of the state, removing ambiguity created by the state judiciary during litigation. The legislative process can include stakeholders from all sides of the issue to accommodate concerns and write legislation accordingly. The *Emmert* court acknowledged this principle in their majority opinion: "If a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change. We specifically note that it is within the competence of the General Assembly to modify rules of common law within constitutional parameters."<sup>117</sup>

Colorado has attempted several times to mediate between landowners and recreationists, but conflicts still arise, and Colorado remains the only state in the West that has not resolved the issue of stream access.<sup>118</sup> The state initiated several forums to bring stakeholders together and resolve

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<sup>114</sup> *Id.* at 498.

<sup>115</sup> *Colorado Tourism Office Unveils Fresh Strategy Behind Its 'Come to Life' Campaign*, COLO. TOURISM OFF. (Apr. 3, 2018), <https://www.colorado.com/news/colorado-tourism-office-unveils-fresh-strategy-behind-its-%E2%80%98come-to-life%E2%80%99-campaign> [hereinafter *Colorado Tourism Office*].

<sup>116</sup> *Governor Announces Economic Impact Data for Outdoor Recreation Industry, Creates New Council*, GREAT OUTDOORS COLO. (Oct. 26, 2018), <https://www.go.co.org/news/governor-announces-economic-impact-data-outdoor-recreation-industry-creates-new-council>.

<sup>117</sup> *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

<sup>118</sup> Shara Rutberg, *Boaters Float for Their Rights: Colorado Paddlers Confront Property Owners Over River Access*, HIGH COUNTRY NEWS (Aug. 13, 2001), <https://www.hcn.org/issues/208/10649>.



access conflicts without litigation; the placement of several no trespassing signs on riverbanks was the most progress that resulted.<sup>119</sup>

After a serious dispute between a commercial rafting company and a private ranch on the Taylor River in 2010, the state created a mediation board to arbitrate disputes between stakeholders.<sup>120</sup> The board hears disputes case-by-case; each commercial rafting entity must resolve each dispute with every landowner along a river.<sup>121</sup> This process creates high transaction costs for both sides, and is ineffective at resolving the access issue in the long run, since each section of river must be resolved individually and no state-wide solution is created.

### A. *The Two-Step Approach to Defining Navigability*

To fully resolve the issue of navigability and public stream access in Colorado, the state should take a two-step approach that would both establish ownership of federally navigable streambeds within the state and define use and access parameters for waterways that do not meet that test. The first step would necessitate Colorado establish which waterways meet the federal standard for navigability and are therefore navigable for title purposes.

Revisiting the Equal Footing Doctrine and the Submerged Lands Act, all of the ground underlying federally navigable waterways in Colorado passed to the ownership of the state when Colorado entered the Union in 1876. Colorado could statutorily recognize the federal standard for navigability, which would then determine which rivers in the state were navigable for title purposes in 1876.

Determining which rivers were federally navigable in 1876 would require significant evidentiary research, as parties would have to prove the waterway met the *Daniel Ball* standard at the time.<sup>122</sup> To be determined a “highway for commerce,”<sup>123</sup> evidence would need to show that people used the river or stream for some commercial purpose or activity prior to 1876. Commercial uses could potentially include barging, fur-trapping, logging timber drives, or other trading activities.<sup>124</sup> Historical evidence does exist on some of Colorado’s rivers, including the Arkansas in

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<sup>119</sup> *Id.*

<sup>120</sup> Jessica Fender, *Rafting Compromise Diffuses Debate for Now*, DENVER POST (June 15, 2010), <http://blogs.denverpost.com/thespot/2010/06/15/rafting-compromise-diffuses-debate-for-now/10578>.

<sup>121</sup> *Id.*

<sup>122</sup> See generally *The Daniel Ball*, 77 U.S. 557 (1873).

<sup>123</sup> *Navigability Primer*, *supra* note 29.

<sup>124</sup> *Id.*

southern Colorado,<sup>125</sup> but the evidence may be exceedingly difficult to find for rivers in more remote parts of the state.

To alleviate the difficulties and inefficiencies of determining actual historical use section-by-section, several western states only require that the waterway be capable of being used by recreational watercraft.<sup>126</sup> This approach would negate the effort needed for actual section-by-section evidence and offer a potential compromise to some private landowners with smaller creeks running through their property since many of those waterways would not meet that test. It could also avoid potential litigation over the issue, which would necessitate the gathering of evidence of actual historical use.

Under this first step, Colorado could legally quiet title to the streambeds of federally navigable waterways within the state. This navigability for title approach could result in a greater compromise; it is likely that only the larger designated drainage rivers would fall under this category due to their size.<sup>127</sup> The Arizona Navigable Stream Adjudication Commission (“ANSAC”) demonstrates the potential problem of how cabining the issue of stream access to a commission serves to only maintain the status quo. Despite its goal of adjudicating access to navigable streams,<sup>128</sup> the Commission to date has only declared the Colorado River to be navigable.<sup>129</sup> Outside of the Colorado River, the Commission has only maintained the status quo of private ownership by placing the burden of proof on anyone challenging navigability designations.<sup>130</sup> With Colorado’s history of attempting to resolve conflicts through mediation without much result, it is likely that the creation of a commission of the ANSAC style would run into the same issues and not aid in resolving public access issues.

The second step to fully resolve the issue of stream access would be for Colorado to adopt a statutory definition of state navigability. The statutory definition would have a two-fold effect: it would codify and determine the parameters of public access to streams that are nonnavigable under the federal test (potentially many rivers in the state), and it would

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<sup>125</sup> Brief, *supra* note 36, at 9.

<sup>126</sup> See *Navigability Primer*, *supra* note 29; see, e.g., *California Navigability Report*, AM. WHITEWATER, [americanwhitewater.org/content/Wiki/access:ca](http://americanwhitewater.org/content/Wiki/access:ca) (last visited Nov. 3, 2020); *Montana Navigability Report*, AM. WHITEWATER, [americanwhitewater.org/content/Wiki/access:mt](http://americanwhitewater.org/content/Wiki/access:mt) (last visited Nov. 3, 2020).

<sup>127</sup> The Colorado Water Court System divides the state into seven river basins to reflect the hydrology of the state. *Colorado Water Courts*, COLORADO JUDICIAL BRANCH, <https://www.courts.state.co.us/Courts/Water/Index.cfm> (last visited Jan. 21, 2020).

<sup>128</sup> ANSAC, *supra* note 55.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

nullify the evidentiary requirement of commercial use. Assuming an easement for access burdens state navigable waters, there is a spectrum of avenues that the legislature could take to qualify public access ranging from most to least restrictive:

### *1. The Arizona Method*

The state could define navigability to mirror the federal test, linking navigability for title to the *Daniel Ball* standard at statehood. However, this method presents the same issue as in the first step, the evidentiary burden required to prove commercial activity at statehood. This approach would maintain the status quo and prevent public access to streams for the foreseeable future until a bureaucratic entity creates navigability determinations.

### *2. The California Method*

A less restrictive approach would be similar to what California instituted. There, state navigability determinations are based on present use and are anchored in the California Constitution.<sup>131</sup> The constitutional provision guarantees public access to waterways deemed navigable by the state.<sup>132</sup> To be considered navigable for this purpose, the waterway must be suitable for public uses and presently navigable in fact by any watercraft, including small recreational watercraft.<sup>133</sup> This method would allow for a wide degree of access to waterways in the state and take into consideration the impact of current recreational uses for the waterway. This method also does not allow for trespassing through private land to access public water.<sup>134</sup>

### *3. The Alaska Method*

The Alaska interpretation of navigability gives the widest latitude of stream access to the public. Alaska has codified navigability as any waterway the public is capable of boating.<sup>135</sup> This expansive definition of navigability would likely be very controversial in Colorado, as it would open up virtually all rivers and creeks in the state to public access.

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<sup>131</sup> CAL. CONST. art X § 4 (2018).

<sup>132</sup> *Id.*

<sup>133</sup> *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050 (Cal. Ct. App. 1971).

<sup>134</sup> *California Navigability Report*, *supra* note 126.

<sup>135</sup> ALASKA STAT. § 38.05.965 (14) (2016); ALASKA STAT. § 38.05.965 (21) (2016).

With the history of strong opposition by private landowners and water rights advocates to stream access in Colorado, a more middle ground approach is likely to be the best way forward and be more plausible in the long run. While stakeholders on both sides would likely prefer opposite ends of the spectrum, an approach that accounts for private property rights and recreational use is the most sustainable middle ground approach considering Colorado's history with the topic.

Colorado should define navigability based on the recreational demand that brings at least \$463 million to the state's economy,<sup>136</sup> but also account for the long history of private landowner rights to exclude. To achieve this, Colorado should create a state definition of navigability that includes all waters of the state that are navigable in fact and have a historical recreational use. These waters would be defined as navigable, and therefore burdened by an easement for public access up to the mean high-water mark. Historical recreational use would encompass waterways that commercial or private parties have historically floated or waded.

To account for private landowner rights, users would need to access waterways through public land; the public has no right to trespass through private property to access public water. However, exceptions must exist for the public to take reasonable means to avoid obstructions in the waterway by briefly entering private property to avoid injury to life or property.

This middle ground definition of navigability would allow for public access on commonly floated and fished waterways without fear of civil litigation or criminal charges from private landowners. Moreover, it considers the state goal of ensuring access to outdoor opportunities for all Coloradans,<sup>137</sup> and guarantees conflict-free access to the nineteen commercially floated rivers in the state that flow through private property.<sup>138</sup> Colorado could join the other states in the West that place high value on the recreation economy and explicitly allow access to publicly held waterways. For private landowners, this style of navigability interpretation would not be so far-reaching as to sweep in small creeks and streams that flow through private property that have no historical recreational use.

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<sup>136</sup> This figure reflects only the whitewater industry numbers from 2017, it does not account for fishing or other uses. ECONOMIC CONTRIBUTIONS, *supra* note 17, at 27.

<sup>137</sup> *Colorado Tourism Office*, *supra* note 115.

<sup>138</sup> See COLO. RIVER OUTFITTERS ASS'N, COMMERCIAL RIVER USE IN THE STATE OF COLORADO: 1988–2019 (2019), available at <https://www.croa.org/wp-content/uploads/2020/05/2019-Commercial-Rafting-Use-Report.pdf>.

There is another option that has been presented in Colorado before.<sup>139</sup> Referred to as “Right to Float,” the proposal would avoid the issue of navigability entirely and simply codify a right of commercial boaters to float through private property without touching the streambed.<sup>140</sup> This was the aim of the failed 2010 bill, which attempted to officially codify the 1983 Attorney General opinion that recreationists may pass through private land as long as they do not touch the stream bottom or banks<sup>141</sup>

The “Right to Float” approach would be more amenable to private property owners, but issues would still likely arise as there would remain a confusing gray area in the law. Private landowners would still be allowed to prevent access by obstructing the waterway, creating potentially dangerous situations for recreationists. Additionally, recreationalists would still not be able to touch the river bottom, a prospect which in reality is incompatible with floating many of Colorado’s rivers.

In practice, commercial and private rafters already float through private property under the shaky framework of *Emmert* and the 1983 opinion, effectively already operating in the gray area created by this precedent.<sup>142</sup> Codifying a “Right to Float” would not achieve more progress than what functionally exists already as the status quo of Colorado’s public stream access.

Another important aspect of this two-step method is avoiding the incorporation of public trust language in relation to the establishment of waterway access in Colorado. Incorporating the public trust into water-related laws has not been met favorably in Colorado in the past and could create strong resistance to an access friendly navigability definition. The first attempt was in *Emmert* itself; the defendant’s argument was rooted in the fact that the public access is implied from Section 5 of Article XVI in Colorado’s constitution.<sup>143</sup> This argument was roundly rejected when the court held that the constitutional provision specifically guarantees only the right to appropriate water for a beneficial use.<sup>144</sup> Furthermore, it has been argued that incorporating a public trust element into Colorado water law would “drop what amounts to a nuclear bomb on Colorado water rights.”<sup>145</sup> Colorado creates and modifies water rights in a separate court

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<sup>139</sup> Cory Helton, *The Right to Float: The Need for the Colorado Legislature to Clarify River Access Rights*, 83 U. COLO. L. REV. 845, 850 (2012).

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* at 850–51.

<sup>142</sup> *Colorado Navigability Report*, *supra* note 77.

<sup>143</sup> COLO. CONST. art. XVI, § 5; *People v. Emmert*, 597 P.2d 1025, 1027 (1979).

<sup>144</sup> *Emmert*, 597 P.2d at 1028.

<sup>145</sup> *Kemper v. Hamilton (In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45)*, 2012 CO 26, ¶¶ 37–40 (Hobbs, J., dissenting).

system, which has its own line of precedent and its own procedure.<sup>146</sup> Any language that creates a *National Audubon*-like public trust obligation for the state very likely would cause significant disruption to the firmly established water system, and is an inappropriate resolution for Colorado.<sup>147</sup>

The public trust argument the defendant in *Emmert* used has created confusion about the public trust in the water rights context. Establishing an easement for access to waterways that are navigable for use would avoid conflict with any appropriative water rights system, as the easement would only apply to public access and not how the water is appropriated. Avoiding altogether the public trust language and its implications prevents conflict with Colorado's longstanding and well-protected system of prior appropriation.

The policy of ensuring public access to waterways in Colorado will benefit the state in the long run. Colorado has one of the largest whitewater industries in the country,<sup>148</sup> and ensuring public access by defining navigability will support that industry. Business owners would have an unambiguous system of law to base decisions on, reducing the risk of running trips through previously contested areas, increasing growth and investment in the industry. As a state, Colorado has fallen behind neighboring states in public recreational access, especially for a state that touts its outdoor opportunities across the nation.<sup>149</sup> Colorado remains one of two states in the West that does not specifically allow for public access.<sup>150</sup>

The uncertainty about the law and regulations about stream access in Colorado continues to cause confusion and conflicts between the public seeking to enjoy Colorado's rivers and private landowners seeking to exclude their use. Adopting an access-friendly definition would be a permanent solution that reduces the transaction costs associated with mediation or litigation to resolve each individual conflict. Furthermore,

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<sup>146</sup> Colorado has its own court system specifically for adjudicating water rights under the prior appropriation doctrine. The doctrine is outlined in *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882); *Colorado Water Courts*, *supra* note 127.

<sup>147</sup> Without delving too deeply into Colorado's complex water law system, the implication of a state public trust over how water is appropriated could give cause to challenge any number of established water rights in the state. Any diversion that arguably harms the public's interest could be modified by a court outside of the water system, upsetting years of precedent. Hence, the dropping of a nuclear bomb.

<sup>148</sup> John R. Hill & Lori Potter, *The Right to Float in Colorado: Differing Perspectives*, COLO. WATER, Nov.–Dec. 2009, at 17, 18 (Colo. State Univ., Fort Collins, Colo.).

<sup>149</sup> See *Stream Access Now*, *supra* note 9; *How We Promote*, *supra* note 16.

<sup>150</sup> Dan Frosch, *Dispute Revives Battle Between Rafters and Property Owners*, N.Y. TIMES (Apr. 16, 2010), <http://www.nytimes.com/2010/04/17/us/17colorado.html>.

increasing the public's access would increase the areas available for public use, and ease the burden of usage at the most popular areas currently.

## CONCLUSION

Stream access in Colorado has long been a contentious issue, placing the interests of private landowners against those of the recreating public seeking to enjoy the opportunities the state of Colorado provides. Despite numerous conflicts, stakeholders have never been able to achieve a permanent resolution. The holding from *Emmert* only created more confusion about the rights of the public. It established a clear rule for nonnavigable streams but muddied the water further about navigability and float through access.

The uncertainty of the issue of access places the burden on the public to research what are, at times, ambiguous property lines, placing them in the position of weighing the risk of trespassing against their use and enjoyment of Colorado's public outdoor resources. This uncertainty is rooted in the fact that Colorado has never formally adopted a definition of navigability and what it means for use.

To resolve this issue permanently, rather than attempting to mediate on a case-by-case basis, Colorado should take a two-step approach to defining and establishing a state navigability standard. First, Colorado should recognize the federal standard for navigability for title. Adopting this first aspect, and then using the Equal Footing Doctrine and the Submerged Lands Act, Colorado can assert the state's ownership in the streambeds underlying federally navigable waterways in the state.

For the second step, Colorado should adopt a state standard for navigability for use. The second step would reinforce the first by codifying public access and defining navigability for all the waterways in Colorado that do not meet the federal standard. The state legislature can use the recreational test that several other western states have adopted to define what a navigable for use waterway is and give the public a clear expectation of where they are allowed to go. The historical consideration for the use definition would consider the interests of both the recreating public and private property owners. This would exclude private landowners with smaller creeks that have no past recreational use, and heavily used larger rivers would have a clear statement on the law. The historical use component would also consider the vast outdoor recreation and whitewater rafting industry that provides an economic driver for the state.

Colorado presents itself to the nation as an outdoor haven and invites recreationists from all parts of the country to come and enjoy the natural

beauty the state has to offer. Codifying public access to navigable streams upholds Colorado's stated goals of ensuring access to the state's resources for all to enjoy. It also supports the ever-expanding recreational tourism economy. Visitors and residents alike know where they can go without trespassing to enjoy the many rivers Colorado has to offer. The trend of access laws in the West is moving more and more towards access for the public, and Colorado would do well to learn from the gains of its neighbors by clearing up the law and easing restrictions on public use for generations to come.