

THE RIGHT TO FLOAT: THE NEED FOR THE COLORADO LEGISLATURE TO CLARIFY RIVER ACCESS RIGHTS

CORY HELTON*

For years, Colorado judges and legislators have struggled to clearly define and delineate public access rights for rivers running through private property. In Colorado, it is settled law that land underlying non-navigable streams is the subject of private ownership, but beyond this basic principle, little is settled. As a result, a dispute has developed between private landowners exercising their right to exclude individuals from their land and recreational river users seeking access to Colorado's rivers. The failure to resolve this longstanding dispute jeopardizes Colorado's multimillion-dollar commercial rafting industry and creates avoidable transaction costs. This Note examines the right-to-float debate as it pertains to Colorado law and argues that, to preserve the right to raft Colorado's rivers, the state legislature should adopt the modern and majority rule and grant a limited public access right to Colorado's rivers.

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INTRODUCTION

*We'd go down to the river,
And into the river we'd dive.
Oh down to the river we'd ride*

—Bruce Springsteen, “The River”¹

For years, Colorado judges and legislators have struggled to clearly define and delineate access rights for rivers running through private land.² Currently, public access to rivers turns on whether the river is classified as “navigable” or “non-navigable.”³ A navigable river is considered state property and is therefore open to public use.⁴ Rivers can be classified as navigable under federal or state law.⁵ Under federal law, the Supreme Court has defined a navigable river as one “susceptible to being used as an ‘avenue of commerce’ in its

1. BRUCE SPRINGSTEEN, *The River*, on THE RIVER (Columbia Records 1980).

2. See, e.g., *People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979); Jessica Fender, *Navigation Rights Make a Splash in Landowner's Skirmish with River Rafters*, DENVER POST (Jan. 31, 2010), http://www.denverpost.com/ci_14303397; Will Shoemaker, *Trouble on the Taylor*, GUNNISON TIMES (Jan. 14, 2010), http://www.gunnisontimes.com/index.php?content=C_news&newsid=6341.

3. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 234 (4th ed. 2009); Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 459–60 (2002).

4. Richard Gast, Note, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247, 263 (1981).

5. *Id.* at 263–65 (1981); see also John R. Hill, Jr., *The “Right” to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 341–42 (2001) (noting that “[f]ederal law is used to determine whether the federal government can regulate the waterway,” while states “may adopt . . . less stringent tests of navigability” to determine title).

ordinary condition at the time of statehood.”⁶ In place of this traditional federal definition, “states may develop (and, indeed, many have developed) their own [broader] definitions of navigability for distinguishing public from private waters.”⁷ When defining navigability, state determinations typically do not depend on a waterway’s ability to sustain commercial navigation; rather, many states tend to focus instead on a stream’s ability to support recreational use.⁸

Alternatively, public access rights to rivers classified as non-navigable are much more limited.⁹ In Colorado, it is settled law that “the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.”¹⁰ Beyond this basic principle, however, little is settled.¹¹ While the courts and the legislature have concluded that rafters who enter a river on public land and float through private property on a river cannot be held criminally liable,¹² whether they may be liable for civil trespass remains unresolved.¹³

Despite uncertainties surrounding the right to float, Colorado offers rafting opportunities unmatched by any other state, and, with over 150 named rivers,¹⁴ recreational river use

6. GETCHES, *supra* note 3, at 238 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

7. Potter et al., *supra* note 3, at 460; *see, e.g.*, ALASKA STAT. § 38.05.965(13) (2006) (defining “navigable water” as “any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, 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 public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes”).

8. GETCHES, *supra* note 3, at 240.

9. *See* Potter et al., *supra* note 3, at 458.

10. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

11. Fender, *supra* note 2.

12. *See id.* In Colorado, a property owner of parcels through which rivers and streams flow also owns the underlying streambed. Therefore, an individual can be liable for trespass for touching the streambed of a river that flows through private property. *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) (“[T]he owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof . . .”).

13. Fender, *supra* note 2 (noting that the question of whether “floaters can be sued for civil trespass if they float through private land” remains unresolved).

14. Potter et al., *supra* note 3, at 458; *see also Feature Query Results*, U.S. BOARD ON GEOGRAPHIC NAMES, <http://geonames.usgs.gov/pls/gnispublic/>

has become a favorite pastime for residents and visitors alike.¹⁵ Colorado's rivers attract numerous outdoor enthusiasts to the state each year.¹⁶ In 2010 alone, individuals logged a total of over 500,000 user days rafting Colorado's rivers,¹⁷ making Colorado the most popular locale for whitewater rafting in the country.¹⁸ As a result, Colorado's commercial rafting industry is the largest in the nation.¹⁹ Given the river-rafting industry's economic and cultural importance to Colorado,²⁰ it is surprising and ironic that the law surrounding the right to float remains ambiguous.²¹

Despite recreational rafting's popularity, there has been a "longstanding unease" between rafters and Colorado landowners concerning whether the public should be allowed to float over private lands.²² Since the early 1900s, disputes between those in favor of a public right to float and those opposed have been typically resolved through private mediation.²³ At the same time, the modern and majority public access rule acknowledges a limited right to float through private property for recreational purposes.²⁴ This Note argues that the Colorado Legislature should adopt the majority public access rule and grant the public a limited right to float. This rule would protect the interests of private property owners by preventing undue hardship and nuisance to their land, and it

f?p=132:2:178124501513393:.....:YES (last visited Mar. 19, 2012) (listing all named rivers in Colorado).

15. John R. Hill & Lori Potter, *The Right to Float in Colorado: Differing Perspectives*, COLO. WATER, Nov.–Dec. 2009, at 17, 17–19 (explaining that river rafting has grown in popularity in recent years).

16. *Id.*

17. COLO. RIVER OUTFITTERS ASS'N, COMMERCIAL RIVER USE IN THE STATE OF COLORADO: 1988–2010 (2011), available at <http://www.croa.org/media/documents/pdf/2010-commercial-rafting-use-report-final.pdf> ("A user day is defined as a paying guest on a river for any part of a day.").

18. Hill & Potter, *supra* note 15, at 18.

19. *Id.*

20. *Id.*

21. *Id.*

22. Jessica Fender, *Rafting Compromise Diffuses Debate for Now*, DENVER POST (June 15, 2010, 11:58 AM), <http://blogs.denverpost.com/thespot/2010/06/15/rafting-compromise-diffuses-debate-for-now/10578>; see also Hill & Potter, *supra* note 15, at 18.

23. Fender, *supra* note 22.

24. See, e.g., Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) ("[A]ny surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."). But see GETCHES, *supra* note 3, at 245; Potter et al., *supra* note 3 (noting that the majority rule has not been adopted in Colorado).

would also maintain Colorado's high quality of life and its important outdoor-adventure industries.

This Note examines the right-to-float debate as it pertains to Colorado law. Part I traces the current debate surrounding a public right to float over private lands. *People v. Emmert*,²⁵ the landmark Colorado Supreme Court case concerning river access in Colorado, is examined in Part II. Part III presents the arguments for and against granting the public a right to float through private lands. Finally, Part IV concludes that the Colorado Legislature should adopt the modern and majority rule as determined by other states and allow a limited public right of access for rafters.

I. THE SUMMER OF 2010 AND THE TAYLOR RIVER DEBATE

In the summer of 2010, Jackson-Shaw, a Dallas-based residential and commercial real estate developer,²⁶ purchased land in Colorado along a two-mile stretch of the Taylor River²⁷ and informed two local river rafting companies that they would not be permitted to float through the property.²⁸ Jackson-Shaw worried that the commercial rafters would “interfere with the fishing” in the area,²⁹ and, for Jackson-Shaw, access to fishing is a popular incentive to purchase homes in the development.³⁰

25. 597 P.2d 1025 (Colo. 1979).

26. While the company is involved in all aspects of real estate development, see JACKSON-SHAW, <http://www.jacksonshaw.com> (last visited Mar. 16, 2011), the particular development project along the Taylor River was a vacation home development designed to be “an exclusive fishing club community,” Fender, *supra* note 2.

27. Fender, *supra* note 22. The Taylor River is located in west central Colorado, near Gunnison County. Together with the East River, it later forms a section of the larger Gunnison River. *Taylor River*, THREE RIVERS RESORT & OUTFITTING, <http://www.3riversresort.com/activities/rafting> (last visited Mar. 27, 2012); see also Fender, *supra* note 2.

28. Fender, *supra* note 22; see also Steven K. Paulson, *Spring Brings Temporary Truce Between Property Owners, Rafters*, DENVER POST (May 15, 2010), http://www.denverpost.com/search/ci_15090063. The two commercial rafting companies denied access by Jackson-Shaw were Three Rivers Outfitting and Scenic River Tours. *Id.*

29. 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>.

30. *Id.* The interference by the rafters allegedly involved “disrupting” the natural habitat of fish and destroying structures designed to improve fishing in the area by floating the rivers. Fender, *supra* note 2 (acknowledging landowners’ concerns that rafting crews “float[] big groups through [their] land twice a day, sometimes disrupting fish and upsetting . . . clients”).

The commercial river rafters, however, vowed to continue to float through the property.³¹ This disagreement sparked a contentious battle between those in favor of public river access rights and those opposed to such rights.³² Additionally, the State of Colorado expended numerous resources sponsoring third-party negotiations in an attempt to avoid litigation and settle the conflict between Jackson-Shaw and the commercial rafting companies.³³ These efforts compelled the Colorado General Assembly to attempt to clarify whether the public has a right to float on rivers that flow through private property.

The General Assembly drafted a bill titled “Concerning Clarification of the Scope of the Existing Right of Navigation of Guides Employed by River Outfitters” to resolve the access debate.³⁴ The bill successfully passed both the House and the Senate but in two different forms. Ultimately, the two houses could not agree on a final version, and the bill failed to make it out of committee.³⁵ The initial draft allowed rafting companies licensed with the State of Colorado to legally float on rivers through private land without being liable for civil trespass as long as they only made “incidental contact with the beds and

31. Paulson, *supra* note 28.

32. Interested parties included representatives for various commercial river rafting operations, numerous coalitions of individual recreational river users, real estate development companies, and numerous coalitions of individual property owners. Fender, *supra* note 2; Fender, *supra* note 22.

33. See Fender, *supra* note 22.

34. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (re-revised version), available at http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188_rer.pdf. The bill’s sponsors were Representative Kathleen Curry and Senator Mary Hodge. See *id.* Representative Curry drafted the bill. Representative Curry was an unaffiliated Representative for House District 61, *Bio*, KATHLEEN CURRY, http://kathleencurry.org/?page_id=42 (last visited Dec. 9, 2011), which includes parts of Eagle, Garfield, Pitkin, Gunnison, and Hinsdale Counties, *State Representative District 61*, COMAPS, <http://www.comaps.org/disthd61.html> (last visited Dec. 9, 2011). Representative Curry held office from 2004 to 2010, *Bio*, *supra*, until being defeated by Roger Wilson in the November 2010 election, Marianne Goodland, *Election 2010: Shift of Power*, COLO. STATESMAN (Nov. 9, 2010), <http://www.coloradostatesman.com/content/992291-election-2010-shift-power>. Representative Curry specializes in property and water rights and has served as the manager of the Upper Gunnison River Water Conservancy District and as a physical scientist for the State of Colorado Water Conservation Board. She holds a Master’s Degree in Water Resources Planning and Management from Colorado State University. *Bio*, *supra*.

35. Jessica Fender, *Rafting Access Likely Headed to November Ballot After Bill Sinks in Legislature*, DENVER POST (May 12, 2010), http://www.denverpost.com/politics/ci_15065989.

banks” of the river.³⁶ After a series of amendments and revisions, the bill extended access beyond commercial outfitters to all private individuals.³⁷ The bill eventually stalled, however, once it became uncertain whether the legislation would constitute a taking under the Colorado Constitution.³⁸

After it was clear that the bill would not receive the necessary support, the legislature recommended that the Colorado Water Congress (CWC)³⁹ study House Bill 10-1188.⁴⁰ The CWC was tasked with determining “the legal, economic, environmental, and law enforcement issues related to boating through private property.”⁴¹ Typically, studying a bill is a “face-saving” tactic that “spare[s] the egos of sponsors while giving cover to opponents who don’t want to go on record with a ‘no’ vote.”⁴² As a result, this approach is used most often to “defuse an overheated political issue.”⁴³ Practically speaking, this legislative maneuver is a common “result of [the] inability to get a bill passed,” and it effectively killed House Bill 10-1188.⁴⁴

Because the legislature failed to clarify whether individuals have the right to float rivers overlying private property, both supporters and opponents of the bill sought a solution through the ballot initiative process.⁴⁵ This process

36. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (initial draft).

37. Fender, *supra* note 35.

38. See COLO. CONST. art. II, § 15 (“Private property shall not be taken or damaged, for public or private use, without just compensation.”); *People v. Emmert*, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting) (“[T]he General Assembly, therefore, cannot give the public recreational access to rivers without taking away from landowners their newly recognized property interests and paying them just compensation.”) (internal quotation marks omitted); Charles B. White, *Water Congress Can Help Find a Solution*, DENVER POST (Apr. 16, 2010), http://www.denverpost.com/search/ci_14893369.

39. The CWC provides the state with “an open forum to share information, form positions, and provide leadership for Colorado’s water community.” *Advocacy*, COLO. WATER CONGRESS, <http://www.cowatercongress.org/advocacy/advocacy.aspx> (last visited Feb. 22, 2012). Additionally, the CWC offers legislatures a venue “to share water-related legislation, and to vet and shape that legislation among a coalition of organizations representing the broad interests of the Colorado water community.” *Id.*

40. Debi Brazzale, *Want to Kill a Bill Without Voting Against It? Study It*, STATE BILL COLO. (May 24, 2010), <http://www.statebillnews.com/2010/05/want-to-kill-a-bill-without-voting-against-it-study-it>.

41. H.R. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (re-revised version), available at http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/4FD1374D97E6422B872576AA00693103?Open&file=1188_rer.pdf.

42. Brazzale, *supra* note 40.

43. *Id.*

44. *Id.*

45. See Fender, *supra* note 22.

allows citizens to propose statutes and amendments to the Colorado Constitution.⁴⁶ All initiatives that meet statutory requirements are then subject to a majority vote in a general election.⁴⁷ If any amendment received majority support, it would become law.⁴⁸ Therefore, interested parties were allowed to propose amendments concerning river access on the November 2010 ballot for a vote.⁴⁹ For example, one initiative advanced by rafting advocates granted unfettered access by “allow[ing] anyone to use any portion of Colorado’s rivers.”⁵⁰ Ultimately, all of the twenty-plus ballot initiatives were inadequate because they “glossed over” complicated issues such as portage for individuals in emergency situations.⁵¹ At the eleventh hour, however, the parties agreed to mediation and withdrew their initiatives.⁵²

Jackson-Shaw and the two commercial rafting companies involved in the dispute, Three Rivers Outfitting and Scenic River Tours, agreed to a compromise that required the Governor’s Office and the Colorado Department of Natural Resources to mediate future disputes on a case-by-case basis.⁵³ This settlement formalized⁵⁴ the system of mediation that Colorado had used to resolve similar rafting disputes in the past.⁵⁵ As the agreement pertains to the Taylor River debate, the compromise stipulated that Jackson-Shaw must allow passage through its property.⁵⁶ The river outfitters, in turn, may only send a limited number of rafts “during certain hours” when water flow is high enough “to prevent damage to the river bottom.”⁵⁷ The compromise would also allow rafters to “briefly

46. COLO. CONST. art. V, § 1; *see, e.g.*, *Billings v. Buchanan*, 555 P.2d 176 (Colo. 1976).

47. COLO. CONST. art. V, § 1.

48. *See id.*

49. *See Fender, supra* note 22.

50. Jessica Fender, *Critics Question Rafter’s Motives After Land, Money Talk*, DENVER POST (Apr. 7, 2010, 12:42 PM), <http://blogs.denverpost.com/thespot/2010/04/07/critics-question-rafter-motives-after-land-money-request/8051>.

51. Fender, *supra* note 35.

52. Fender, *supra* note 22.

53. *Id.*

54. The mediation process was previously informal because mediation was neither required nor sanctioned by the Governor’s Office or the Colorado Department of Natural Resources. *See id.*

55. *Id.*

56. *Id.*

57. *Id.* This requirement is significant because Colorado recognizes that ownership of land underlying streams is “vested in the proprietors of the adjoining lands.” *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

land on the banks to bypass dangerous obstacles in the river.”⁵⁸ Although it was an acceptable short-term solution for all parties involved, both sides acknowledged that the “piecemeal” compromise would not preclude them from taking future legal action to protect their interests.⁵⁹ The agreement was inadequate because it did nothing to determine whether rafters ultimately had the right to float through private land.⁶⁰ Therefore, a “cleaner decision” is necessary to bring finality to this longstanding dispute.⁶¹

Private landowners want greater protection of their right to exclude individuals from trespassing through their land, while recreational river users seek to increase access to Colorado’s rivers.⁶² Specifically, commercial river rafters are unhappy with the current system where they “have to sit down and come to an agreement with every single land owner.”⁶³ Negotiations are often time-consuming and highly contentious because the private landowners believe they have the right to exclude the rafters, while the rafting companies argue they have unlimited access and do not need permission to raft.⁶⁴ Additionally, while the mediation agreements between landowners and private rafting companies resolve individual situations, they do nothing to solve the problem as a whole or establish a system of rules to resolve future disputes.

The current system of mediation also results in high transaction costs⁶⁵ to all parties involved.⁶⁶ Not only is it

58. Fender, *supra* note 22. Overall, the agreement was reasonable to both sides. Scenic River Tours touted it as a “big victory” for rafters everywhere. *Id.* Jackson-Shaw initially sought to deny all rafters access to float through its property, but mediation led to a deal that ultimately would not have a “big impact” on Scenic River Tours’s commercial river rafting operations. *Id.* (noting that the only impact on Scenic River Tours’s daily operations was that it “may have to add a few more passengers to each boat” to comply with the terms of the agreement).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Fender, *supra* note 22 (quoting the owner and operator of Scenic River Tours, Matt Brown, on his concerns about how “ineffective” it is to come to a temporary agreement with every landowner); Paulson, *supra* note 28.

65. “Transaction costs include the costs of searching for an appropriate exchange partner, negotiating the terms of the deal, producing information, policing strategic behavior, and enforcing the contract.” Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1587 (2006).

66. See Fender, *supra* note 22.

inefficient for each commercial rafting company to negotiate with each individual landowner, but this system is also susceptible to serious collective action, free rider, and holdout problems.⁶⁷ For example, a holdout problem occurs when a private landowner, knowing that she is the final party required for approval to float, demands higher compensation for allowing rafters to cross her land. Collective action also poses challenges and results when multiple individuals would all benefit from a certain action, but “they will still not voluntarily act to achieve that common or group interest.”⁶⁸ Here, although society would benefit from the certainty of a clear standard, interested parties—“as rational, self-interested individuals”—will instead advance their own personal interests.⁶⁹ A cursory examination of the ballot initiatives proposed by various groups illuminates this. Rather than developing a comprehensive plan that furthers all common interests, the interested parties instead presented one-sided proposals that simply advanced their own interests.⁷⁰ Without a definite answer, these costs will continue to prevent efficient solutions.⁷¹

II. *PEOPLE V. EMMERT*

People v. Emmert, decided in 1979, is the seminal case in Colorado concerning the right to float. In *Emmert*, a group of rafters touched the riverbed of private land without obtaining permission to raft through the property.⁷² In determining whether the rafters were liable for criminal trespass, the Colorado Supreme Court held that the Colorado Constitution does not grant an affirmative right to float through private property without consent and found the defendant-rafters liable for criminal trespass.⁷³ However, the legislature complicated matters by amending the statutory definition of premises while the case was pending.⁷⁴ This legislative action raised questions concerning the proper interpretation of the court’s holding. An in-depth discussion of this case is important

67. *See id.*

68. MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION 2* (Harvard Univ. Press 1965).

69. *Id.*

70. *See supra* text accompanying notes 49–52.

71. *See Fender, supra* note 22.

72. *People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979).

73. *Id.* at 1028.

74. *Id.* at 1029–30.

because the court's opinion in *Emmert* is subject to opposing interpretations concerning the right to float.⁷⁵ To understand the court's holding, the *Emmert* facts are examined in detail below, followed by an outline of the majority and dissenting opinions.

A. Facts

In the summer of 1976, the defendants—an adult and three children—went rafting on the Colorado River.⁷⁶ They entered the river from public land and traveled downstream.⁷⁷ After the river passed the town of Parshall,⁷⁸ it bisected the Ritschard Cattle Company ranch.⁷⁹ The river varied in depth from a few inches to several feet,⁸⁰ and as a result, the defendants' rafts occasionally touched the river bottom on the Ritschard Cattle Company's property.⁸¹ However, while on the private property, the defendants never left their rafts or touched the shoreline or banks of the river.⁸²

Although they floated through private property, the defendants had not asked for, nor received, permission from the property owner.⁸³ After an employee informed the ranch owner of the defendants' activity, the ranch owner extended barbed wire across the river to stop the rafters.⁸⁴ The owner informed the defendants that they were trespassing on private property and had them arrested and charged with third-degree criminal trespass.⁸⁵ The river had previously been used for recreational rafting but, at the time of the incident, "No Trespassing" signs were posted.⁸⁶

At trial, both parties stipulated that the river was "non-navigable"⁸⁷ and had therefore not been used "for commercial

75. Compare Hill, *supra* note 5, with Potter et al., *supra* note 3.

76. Gast, *supra* note 4, at 247.

77. *Emmert*, 597 P.2d at 1026.

78. Gast, *supra* note 4, at 247.

79. *Emmert*, 597 P.2d at 1026.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* Regarding the term "navigable," Professor Robin Kundis Craig notes: Colorado retains a "commercial use" definition of "navigable waters." However, the Colorado Supreme Court has declared most streams in Colorado non-navigable: "the natural streams of this state are, in fact,

or trade purposes of any kind.”⁸⁸ The defendants conceded that they floated on the property “without the owner’s consent”⁸⁹ and were, therefore, in violation of Colorado’s third-degree criminal trespass statute.⁹⁰ They argued, however, that article XVI, section 5 of the Colorado Constitution—which requires that “every natural stream, . . . within the state of Colorado, . . . [be] dedicated to the use of the people of the state”—grants the right to float through private property.⁹¹ Additionally, in response to the lawsuit, the legislature amended the criminal trespass statute to clarify the definition of “premises.”⁹² The amendment stated that “premises,” in this context, means “the stream banks and beds of any non-navigable fresh water streams flowing through such real property.”⁹³ This clarification was significant because it impacted whether the water overlying a streambed could be classified as “premises” in the trespass context.⁹⁴

nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and . . . no stream of any importance whose source is without those boundaries, flows into or through this state.” As a result, there is almost no case law further explicating the definition of “navigable water.”

Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 117–18 (2010) (alteration in original) (footnotes omitted) (quoting *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), *overruled by* *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982)).

88. *Emmert*, 597 P.2d at 1026; *see also* Hill, *supra* note 5, at 342 (“For purposes of public use of waters, states may adopt different and less stringent tests of navigability. Some states define navigability for public use based on the state constitution or statutory law. Some states recognize a right to float if the stream accommodates recreational watercraft”) (footnotes omitted); Gast, *supra* note 4, at 263 (explaining that a “declaration that all of the state’s streams, or those with certain characteristics, *are navigable* opens them up to public use . . . [and] the riparian landowner’s uninhibited use of the stream is restricted”) (emphasis added).

89. *Emmert*, 597 P.2d at 1027.

90. “A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises. Third degree criminal trespass is a class 1 petty offense.” *Id.* at 1026 (quoting COLO. REV. STAT. § 18-4-504 (1973)).

91. *Id.* at 1028.

92. *Id.* at 1029–30.

93. *Id.* at 1030 (quoting COLO. REV. STAT. § 18-4-504.5 (1977)).

94. *See id.* at 1026–27.

B. The Majority Opinion

The case ultimately turned on the court's interpretation of article XVI, section 5 of the Colorado Constitution.⁹⁵ This section, entitled "Water of streams public property," falls under "Irrigation" and states that "[t]he 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."⁹⁶ In a split decision, the court ruled that the Colorado Constitution does not grant a public access right to Colorado's rivers.⁹⁷

The court rejected the defendants' argument that article XVI, section 5 of the Colorado Constitution provided an affirmative right to float through private property. Instead, the court found that the provision "simply and firmly establishes the right of appropriation" as opposed to "assur[ing] public access to waters."⁹⁸ Relying on *Hartman v. Tresise*, the court held that "the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands."⁹⁹

The court closely scrutinized the text of article XVI, section 5 of the Colorado Constitution, concluding that the Colorado Legislature intended that section 5 "preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded."¹⁰⁰ The majority noted that, because article XVI was titled "Mining and Irrigation" and section 5 was under the heading "Irrigation,"¹⁰¹ section 5 applied to water appropriation for irrigation purposes only, as

95. *Id.* at 1026.

96. COLO. CONST. art. XVI, § 5.

97. *Emmert*, 597 P.2d at 1026.

98. *Id.* at 1028. Oxford English Dictionary defines "appropriation" as "[t]he assignment of anything to a special purpose." *Appropriation, n.*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/9877?redirectedFrom=appropriation#eid> (last visited Jan. 26, 2012). For example, water can be appropriated for irrigation purposes.

99. *Emmert*, 597 P.2d at 1027 (citing *Hartman v. Tresise*, 84 P. 685 (Colo. 1905)).

100. *Id.* at 1028. Essentially, the court held that section 5 "does not create any public right to make non-consumptive surface uses of water such as floating, but instead recognizes only the right to appropriate water for consumptive uses," meaning the public has a right to use the water for activity such as irrigation and other consumptive uses. Gast, *supra* note 4, at 251 n.20.

101. *Emmert*, 597 P.2d at 1028.

opposed to providing a public right for recreational use.¹⁰² Ultimately, this provision granted the public the right to use Colorado's waters for consumptive use, which was the only protection that the legislature intended.¹⁰³ The majority reiterated that "[i]f the increasing demand for recreational space on the waters . . . is to be accommodated, the legislative process is the proper method to achieve this end."¹⁰⁴

The *Emmert* court also relied on section 41-1-107 of the Colorado Revised Statutes, which provides that "[t]he ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft."¹⁰⁵ The majority acknowledged that the common-law rule—*cujus est solum, ejus est usque ad coelum*, which stands for the ancient rule that "he who owns the surface of the ground has the exclusive right to everything which is above it"—is codified in section 41-1-107.¹⁰⁶ Therefore, the law vests the property owner with the "right of control [over] everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations."¹⁰⁷

While the *Emmert* court alluded to other potential solutions to the access debate,¹⁰⁸ it rejected them without further examination because it saw no reason to stray from the common-law doctrine announced in *Hartman*.¹⁰⁹ Additionally, the court concluded that any alteration of the *Hartman* approach is best left to the legislature because "it is a legislative and not a judicial function to make any needed change."¹¹⁰ For example, *Emmert* explicitly rejected the Wyoming Supreme Court's approach in *Day v. Armstrong*,¹¹¹ which held that the public has a right to float on the surface

102. *Id.*

103. *Id.*

104. *Id.* at 1029.

105. *Id.* at 1027 (quoting COLO. REV. STAT. § 41-1-107 (1973)).

106. *Id.*

107. *Id.*

108. *Id.* ("We recognize the various rationales employed by courts to allow public recreational use of water overlying privately owned beds, *i.e.*, (1) practical considerations employed in water rich states such as Florida, Minnesota and Washington; (2) a public easement in recreation as an incident of navigation; (3) the creation of a public trust based on usability, thereby establishing only a limited private usufructary right; and (4) state constitutional basis for state ownership.").

109. *Id.*

110. *Id.* (quoting *Smith v. People*, 206 P.2d 826, 832 (Colo. 1949)).

111. 362 P.2d 137 (Wyo. 1961).

waters of rivers that run through private property for recreational purposes.¹¹² The *Emmert* majority acknowledged that the Wyoming Supreme Court reached its conclusion based on constitutional language similar to Colorado's,¹¹³ but because the Wyoming Constitution makes no reference to appropriation rights, the Wyoming Legislature intended to make "a stronger statement of the public's right to recreational use" than the Colorado Legislature.¹¹⁴ The court stressed that appropriation rights should not be twisted to "subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands."¹¹⁵

To further support its interpretation, the *Emmert* court held that sections 33-1-112(g),¹¹⁶ 33-41-101,¹¹⁷ and 33-6-123(1)¹¹⁸ of the Colorado Revised Statutes supported its reading that the legislature did not intend to "unrestrictedly open" the waters of the state to the public.¹¹⁹ Lastly, the majority concluded its opinion by merely noting that the

112. *Emmert*, 597 P.2d at 1028.

113. "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." WYO. CONST. art. VIII, § 1.

114. *Emmert*, 597 P.2d at 1028.

115. *Id.* at 1029.

116. *Id.* ("[The Wildlife commission may enter] into agreements with landowners for public hunting and fishing areas. Such agreements shall be negotiated by the commission or its authorized agent and shall provide that if the landowner opens the land under his control to public hunting and fishing, the commission shall reimburse him in an amount to be determined by the parties to the agreement. Under the agreement the commission shall control public access to the land to prevent undue damage to the land. In no event shall the commission be liable for damages caused by the public other than those specified in the agreement.") (quoting COLO. REV. STAT. § 33-1-112(g) (1973)).

117. *Id.* ("The purpose of this article is to encourage owners of land within rural areas to make land and water areas available for recreational purposes by limiting their liability toward persons entering thereon for such purposes.") (quoting COLO. REV. STAT. § 33-41-101 (1973)).

118. *Id.* ("It is unlawful for any person to enter upon the privately owned land of any other person, firm, or corporation to hunt or fish without first obtaining permission from the owner or person in charge. A violation of the provisions of this section is a misdemeanor and, upon conviction thereof, shall be punished as provided in section 33-6-127.") (quoting COLO. REV. STAT. § 33-6-123(1) (1973)); *id.* at 1029-30 ("As used in sections 18-4-503 and 18-4-504, 'premises' means real property, buildings, and other improvements thereon, and the stream banks and beds of any non-navigable fresh water streams flowing through such real property.") (quoting COLO. REV. STAT. § 18-4-504.5 (1977)).

119. *Id.* at 1029.

legislature amended the criminal trespass statute to clarify the definition of premises.¹²⁰

In sum, the court found that the language and structure of the Colorado Constitution and statutes evidenced legislative intent that article XVI, section 5 of the Colorado Constitution was not meant to grant the public unrestricted access to all of Colorado's rivers and streams.¹²¹ Additionally, the court reaffirmed its holding in *Hartman* that land underlying non-navigable streams is subject to the private ownership vested in the owner of the adjoining land.¹²² This rule, in combination with section 41-1-107—that the space above waters is “vested in the several owners of the surface beneath”—did not grant the public the right to float on waters overlying private land.¹²³ Finally, the majority declined to follow the modern trend adopted in neighboring states granting the right to recreational use of the states' waters based on similar constitutional provisions.¹²⁴

C. *The Dissent*

Justice James Groves was one of two dissenters in *Emmert*. Justice Groves took issue with the court's “narrow construction” of article XVI, section 5.¹²⁵ The justice opined that the appropriation clause “functions as a caveat” establishing appropriation as “superior to other uses” but that the clause does not bar other potential uses, such as recreation.¹²⁶ Justice Groves reasoned that if the legislature intended section 5 to apply only to appropriation, it would have clearly said so.¹²⁷

Next, Justice Groves argued that *Hartman* is distinguishable from *Emmert*.¹²⁸ The issue in *Hartman* was whether a statute that provided an easement for a public right to fish in any stream was constitutional.¹²⁹ The *Hartman* court

120. See *id.* But see Potter et al., *supra* note 3, at 475–80 (arguing that COLO. REV. STAT. § 18-4-504.5 “support[s] the concept of a public right to float the navigable rivers and streams of the state of Colorado”).

121. *Emmert*, 597 P.2d at 1030.

122. *Id.*

123. *Id.* at 1027–30 (quoting COLO. REV. STAT. § 41-1-107 (1973)).

124. *Id.* at 1027.

125. *Id.* at 1030 (Groves, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

concluded that the statute “constituted a taking of private property without compensation.”¹³⁰ Therefore, because the law in *Hartman* was held invalid, “[n]o determination as to the rights to use of streams in the absence of a trespass to land was necessary.”¹³¹ More importantly, the *Hartman* opinion concerning article XVI of the Colorado Constitution was “merely *dicta*, not precedent.”¹³² Therefore, any language in the *Hartman* court’s ruling that concerns the public’s right to float on rivers through private property was not controlling.¹³³

Regarding the *Emmert* majority’s reliance on the common-law *ad coelum* doctrine, Justice Groves opined that “it is not clear that *Hartman* adopted this rule.”¹³⁴ The justice reasoned that the language in *Hartman* relied on by the *Emmert* majority is susceptible to multiple interpretations.¹³⁵ Therefore, it was imprudent for the *Emmert* majority to adopt an expansive common-law doctrine from a case that dealt with fishing rights and had little in common with the facts at hand.

Justice James Carrigan penned the second dissenting opinion in *Emmert*. Justice Carrigan echoed Justice Groves’s sentiment but took special issue with the majority overstepping its bounds by unnecessarily deciding a “major constitutional issue of far-ranging implications.”¹³⁶ Justice Carrigan’s opinion focused on the pragmatic consequences of the majority’s constitutional interpretation.¹³⁷ Most importantly, he reasoned, “no individual ‘owns’ the beauty or buoyancy of [Colorado’s] streams.”¹³⁸ Therefore, the *Emmert* majority’s utilization of “medieval concepts” to secure “unlimited fee simple title[s]” for wealthy property owners is not appropriate in the modern-day access debate.¹³⁹ The court’s split reveals the difficulty in finding an adequate solution.

130. *Id.* at 1031.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (“This language could just as well mean that the court concluded that the defendant could not fish without trespassing, and that since trespassing was forbidden, so was fishing.”).

136. *Id.* at 1032 (Carrigan, J., dissenting).

137. *Id.*

138. *Id.*

139. *Id.* at 1033.

III. THE DIFFERING VIEWPOINTS

This Part will examine the current state of the law surrounding the right to float on rivers through private property and discuss the Colorado General Assembly's response to the multiple interpretations of *Emmert*.¹⁴⁰ Section A discusses the legislative and executive responses to the court's holding. Section B examines the private landowners' argument for denying the right to float through their property. Finally, Section C analyzes the argument in favor of a right to float through private property.

A. *The Current State of the Law*

In response to the *Emmert* litigation, the General Assembly enacted several statutes aimed at clarifying criminal trespass liability.¹⁴¹ In section 18-4-504.5 of the Colorado Revised Statutes, the legislature defined "premises" as "real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property."¹⁴² Both proponents and opponents of the right to float cite this amendment to support their respective arguments.¹⁴³ Opponents argue that, because *Emmert* was decided with the premises definition set forth in section 18-4-504.5 in mind, this amendment does nothing to alter the law.¹⁴⁴ At the same time, proponents argue that the statute clarifies that rafting does not constitute a trespass because water is explicitly excluded from the definition.¹⁴⁵

Unfortunately, the Colorado Legislature offered little guidance on how this modified definition affected the right to float after the *Emmert* decision.¹⁴⁶ As a result, the public asked

140. See Hill, *supra* note 5; Potter et al., *supra* note 3.

141. E.g., COLO. REV. STAT. § 18-4-504 (1977) ("A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises. Third degree criminal trespass is a class 1 petty offense."); see Hill & Potter, *supra* note 15, at 17.

142. COLO. REV. STAT. § 18-4-504.5 (1977).

143. Hill, *supra* note 5; Potter et al., *supra* note 3; see *infra* Part III.B-C.

144. See Hill, *supra* note 5, at 338.

145. Potter et al., *supra* note 3, at 476.

146. Compare *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding that despite clarifying the meaning of "premises," section 18-4-504.5 does not approve a public right to use rivers floating through private land), with Potter et

the Colorado Attorney General, Duane Woodard, to clarify the purpose and effect of the modified definition.¹⁴⁷ Attorney General Woodard concluded that the legislature intended that “one who floats upon the waters of a river or stream over or through private property, without touching the stream banks or beds, does not commit a criminal trespass.”¹⁴⁸ Next, when considering whether section 18-4-504.5 authorizes private landowners “to prohibit . . . floating or boating,” Attorney General Woodard concluded that the phrase “stream banks and beds,” as used in the statute, does not include the water itself.¹⁴⁹ Therefore, it follows that section 18-4-504.5 does not authorize private landowners to prevent the public from floating through their land.¹⁵⁰ In regard to the *Emmert* majority’s reference to section 18-4-504.5 in its opinion, Attorney General Woodard stated that section 18-4-504.5 could not apply to the court’s decision because “[t]he majority did not analyze or interpret” the section.¹⁵¹ Attorney General Woodard’s opinion is significant because it clarifies the definitions at issue and forms much of the backbone of the current debate discussed in the next Section.

B. *The Private Landowners’ Claim*

To justify excluding rafters from floating on rivers running through their property, private landowners in Colorado often cite *Emmert* for the proposition that there is “no affirmative right to float”¹⁵² because the court concluded that “the land underlying non-navigable streams is the subject of private ownership.”¹⁵³ Additionally, opponents of the right to float claim that the amended definition of “premises” in section 18-4-504.5 does nothing to change the *Emmert* holding because the

al., *supra* note 3, at 476 (arguing that the legislature “deliberately amended the trespass statute in order to approve of floating through private property”).

147. The request for an opinion was filed by Hamlet J. Barry III, the Executive Director of the Department of Natural Resources. Purpose & Effect of C.R.S. 1973, 18-4-504.5 (1978 repl. vol. 8), 1983 WL 167506, at *1 (Op. Colo. Att’y Gen. Aug. 31, 1983) [hereinafter Woodard Opinion].

148. *Id.* at *5.

149. *See id.* at *1–2.

150. *See* COLO. REV. STAT. § 18-4-504.5 (1977); Travis H. Burns, Note, *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 WYO. L. REV. 561, 587 (2005).

151. Woodard Opinion, *supra* note 147, at *3.

152. Hill, *supra* note 5, at 332.

153. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

court was aware of the amendment yet still concluded that the defendants were in violation of the Colorado Criminal Trespass statute.¹⁵⁴ Further, section 18-4-504.5 “contains no express grant of access” to streams.¹⁵⁵ Despite criticisms of the *ad coelum* doctrine,¹⁵⁶ private landowners argue that the *Emmert* court held that section 41-1-107 codifies the doctrine and that the legislature must repeal the statute to abolish it.¹⁵⁷ Therefore, private landowners argue that the current statute grants them the right to exclude rafters from the water running over their property.¹⁵⁸

In response to Attorney General Woodard’s opinion, private landowners note that this opinion is not binding legal precedent.¹⁵⁹ Furthermore, because it does not address “whether an affirmative right to float exists, it cannot be relied upon as a basis for an affirmative right to float.”¹⁶⁰ Private landowners argue that Attorney General Woodard’s opinion merely states that section 18-4-504.5 does not provide a legal basis for private landowners to exclude rafters from floating through their lands but does not grant the right to float either.¹⁶¹ Finally, opponents of the right to float point out that “[n]o Colorado statute expressly confers a right on the public to float through private property.”¹⁶² Therefore, the private landowners argue that the public has no right to float through the rivers that run alongside private land¹⁶³ and that any statute that would allow access for river rafters through private land would infringe upon their recognized property interest and constitute a taking.¹⁶⁴

154. *Id.* at 1030.

155. Hill, *supra* note 5, at 338.

156. *See Emmert*, 597 P.2d at 1030 (Carrigan, J., dissenting).

157. *See Emmert*, 597 P.2d at 1027 (“The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft.”) (quoting COLO. REV. STAT. § 41-1-107 (1973)); Hill, *supra* note 5, at 336–37.

158. Hill, *supra* note 5, at 336–37.

159. *Id.* at 335.

160. *Id.*

161. *Id.*

162. Hill & Potter, *supra* note 15, at 17.

163. *Id.*

164. *Id.* at 17–18; *see also* COLO. CONST. art II, § 15; *infra* Part IV.B–C.

C. *The River Rafters' Claim*

While some private property owners believe that the law is clear, advocates of the right to float argue that the law is “about as clear as the water of a mighty river at the height of spring runoff.”¹⁶⁵ They assert that *Emmert's* holding is limited to the issue of “criminal trespass from recreational use of a non-navigable river.”¹⁶⁶ However, “what remains unresolved in Colorado is whether boaters who float through private property . . . without touching the beds and banks . . . are subject to civil liability for trespass.”¹⁶⁷

Right-to-float advocates make strong policy arguments against a decision that they believe is no longer applicable in modern society.¹⁶⁸ For example, access proponents feel that *Emmert* is out of touch with the modern trend for river access because Colorado has “parted ways with neighboring states”¹⁶⁹ that permit a right to float and have nearly identical constitutional provisions.¹⁷⁰ The uncertainty in Colorado law does not exist elsewhere. Neighboring states have clearly outlined who has the right to float rivers running through private land and under what circumstances. It is unsound policy for a popular whitewater-rafting destination like Colorado to have the “most ambiguous” river access law of any western state.¹⁷¹ Additionally, proponents cite the law’s financial harm to Colorado’s economy and how denying this right jeopardizes the \$150 million per year industry.¹⁷² To support this, access proponents argue that the state legislature “reacted” to the *Emmert* decision by amending the criminal trespass law to clarify the legislature’s intent.¹⁷³ While the *Emmert* court did not adequately address exactly what effect

165. Hill & Potter, *supra* note 15, at 19. In a partial ruling on access to the Gunnison River in 2001, a district court acknowledged that Colorado law is in a state of flux. *Id.*

166. Potter et al., *supra* note 3, at 458 (emphasis omitted).

167. *Id.*

168. Hill & Potter, *supra* note 15, at 18.

169. *Id.* at 19; see MONT. CONST. art. IX, § 3(3) (“All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.”); WYO. CONST. art. VIII, § 1 (“The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.”).

170. Hill & Potter, *supra* note 15, at 19.

171. See Burns, *supra* note 150, at 602.

172. COLO. RIVERS OUTFITTERS ASS’N, *supra* note 17, at 6.

173. Hill & Potter, *supra* note 15, at 19.

section 18-4-504.5 had on the public's right to access,¹⁷⁴ Attorney General Woodard found that the *Emmert* rationale applies only in criminal trespass situations and does not provide a civil remedy.¹⁷⁵ Access proponents argue that Attorney General Woodard's opinion supports their argument that *Emmert* did not prohibit a person's right to float over private property "when [the] banks and beds are not touched by the floater."¹⁷⁶

IV. THE NEED FOR LEGISLATIVE CHANGE GRANTING THE RIGHT TO FLOAT

Considering these opinions and looking forward, the Colorado Legislature should balance the interests of private landowners and river rafters by allowing public access to waters that overlie private land. Throughout the years, disputes between property owners and recreational river users have threatened the entire commercial rafting economy.¹⁷⁷ Because it is unrealistic to negotiate a settlement with every single property owner, clarity is needed to eliminate disputes resulting from the *Emmert* decision. This Part will address the rationale for legislation granting a public access right. Section A examines the public policy reasons that support the right to float. Section B analyzes the potential arguments against allowing the right to float over private land. Finally, Section C addresses these concerns by presenting the counterarguments to private landowners' concerns. Section C further argues that the Colorado Legislature should clarify this unsettled law by establishing a limited right to float in Colorado.

A. *Public Policy Supports Allowing a Right to Float*

Public policy supports legislative action granting a limited right to float because the right benefits the commercial rafting industry, assuages environmental concerns, and is consistent with the modern and majority trend allowing access. First, commercial rafting brings a significant amount of income into

174. Potter et al., *supra* note 3, at 478 ("[T]he Court did not interpret or apply the new statutory definition. The present statute addressing trespass contains the best and clearest statement by the legislature on whether boating is a trespass.")

175. See Hill & Potter, *supra* note 15, at 19.

176. Burns, *supra* note 150, at 587.

177. See Hill & Potter, *supra* note 15, at 19.

the state.¹⁷⁸ Colorado rafting companies both attract tourists and generate tax revenue.¹⁷⁹ In the last ten years alone, commercial rafting had a \$1.3 billion economic impact on Colorado.¹⁸⁰ Without the legislature clarifying the law, these companies are in jeopardy of being “sued out of business” if private landowners block passage on traditionally traveled streams that flow through their land.¹⁸¹

Typically, disputes between commercial rafting businesses and private landowners occur about once a year.¹⁸² Therefore, every year that the legislature neglects to take action increases the risk that the entire industry could be “wipe[d] . . . off the map.”¹⁸³ Article X, section 2 of the Colorado Constitution requires the legislature to keep a balanced budget.¹⁸⁴ Because of how heavily the state relies on tax revenues from the rafting industry, the demise of that industry would have devastating economic implications. The state would lose not only the tax revenue associated with rafting businesses but also the economic benefits from rafting-based tourism. In order to maintain a balanced budget, the state would be forced either to find new sources of revenue or to decrease spending in other areas to offset these lost earnings.¹⁸⁵

Additionally, there are serious pragmatic consequences if the legislature fails to act. If rafters are denied access to rivers that float over private land, the result will be an “intensification of use of those waters flowing through public lands.”¹⁸⁶ Currently, commercial rafting companies operate on twenty-seven different rivers in the state,¹⁸⁷ and “all of them go through private land.”¹⁸⁸ Because only public rivers will be available for rafting, river traffic will become focused on a smaller number of rivers.¹⁸⁹ With the same number of users focusing on a smaller supply of accessible whitewater rafting,

178. See *supra* text accompanying notes 16–19.

179. See COLO. RIVERS OUTFITTERS ASS’N, *supra* note 17, at 1.

180. *Id.* at 5.

181. Fender, *supra* note 2.

182. *Id.*

183. Frosch, *supra* note 29.

184. COLO. CONST. art. X, § 2 (“The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year.”).

185. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 6.

186. Gast, *supra* note 4, at 258.

187. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 8.

188. Fender, *supra* note 22 (quoting Scenic River Tours owner Matt Brown).

189. Gast, *supra* note 4, at 258.

the higher “intensity of use” will decrease the benefit that each user experiences;¹⁹⁰ for example, this phenomenon of overuse occurred on the Colorado River, where excessive use resulted in “resource damage[] and serious aesthetic and sanitary problems.”¹⁹¹ Therefore, denying access to any one of the twenty-seven rivers used by commercial outfitters would increase the pressure on the other rivers of the state and would potentially reduce the quality of our natural resources, similar to what happened on the Colorado River.¹⁹² The legislature should “spread the impact of public recreational energy over as broad a range of resource facilities as possible”¹⁹³ and affirmatively grant the public access to float rivers through private land, so long as the rafters do not touch the beds or banks.¹⁹⁴

In granting the public river-floating access, Colorado would join the majority of Western states.¹⁹⁵ Currently, Colorado is one of only two mountain states that have not affirmatively granted river access for recreational use, the other being North Dakota.¹⁹⁶ The concerns of allowing a limited right to float in these states have been addressed by various means.¹⁹⁷ These include, but are not limited to, interpreting constitutional provisions similar to Colorado’s as granting a right to float and classifying rivers as navigable to open them up to the public.¹⁹⁸ This has been accomplished through both judicial and legislative means.¹⁹⁹ Additionally, these states “have protected the right to float, notwithstanding those states’ unquestioned sensitivity to private property interests,” as recreational river

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Because property owners own the right to the streambed, touching the banks qualifies as a trespass. *See Frosch, supra* note 29.

195. *See id.* (“[Sixteen] Western states clearly allow rafters to float freely through private property without the threat of trespassing charges.”); *see also* Dustin Trowbridge Till, Comment, *The Right to Float on By: Why the Washington Legislature Should Expand Recreation Access to Washington’s Rivers and Streams*, 28 SEATTLE U. L. REV. 1093, 1109 n.136 (2005) (noting that only “[n]ine states have explicitly refused” to grant recreational access rights). These include Alabama, Colorado, Delaware, Georgia, Indiana, Louisiana, Kansas, Missouri, and Pennsylvania. *Id.*

196. Frosch, *supra* note 29 (noting that in North Dakota, rafting laws are less clear).

197. *See* Potter et al., *supra* note 3, at 486–92.

198. *Id.* at 490–92.

199. *Id.*

rafters have used the property with little to no damage to owners' interests.²⁰⁰

B. Arguments Against Allowing Access

Private property owners argue that the legislature “cannot give the public recreational access to rivers without taking away from landowners their newly recognized property interests and paying them just compensation.”²⁰¹ Landowners argue that the Colorado Constitution demands that “[p]rivate property shall not be taken or damaged, for public or private use, without just compensation.”²⁰² To assess the proper amount of compensation, the Colorado Constitution stipulates that a jury, or a commission of three landowners, should determine a reasonable amount to be awarded should the legislature affirmatively grant a right to float through their private property.²⁰³ Landowners justify receiving compensation because *Emmert* “clearly enunciated the right of a riparian landowner to exclude the public from the surface and bed of streams overlying his land.”²⁰⁴ Therefore, allowing access would infringe on the landowner’s right to exclude others.²⁰⁵ Considering that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” it would be unfair to deny landowners their due compensation.²⁰⁶ Private property advocates also point to the Colorado Legislature’s codification of the *ad coelum* doctrine at section 41-1-107.²⁰⁷ If the legislature intrudes on this property interest and denies landowners the right to exclude persons from this property, it would constitute a taking.

Landowners also stress that they have an interest in protecting their land.²⁰⁸ With an abundance of rivers available to raft in the state, landowners question why rafters need to

200. Hill & Potter, *supra* note 15, at 19.

201. *People v. Emmert*, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting) (internal quotation marks omitted).

202. COLO. CONST. art. II, § 15.

203. *Id.*

204. Hill, *supra* note 5, at 333.

205. *Id.* at 335.

206. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

207. COLO. REV. STAT. § 41-1-107 (2011).

208. *See Fender*, *supra* note 2.

pass through their property at all.²⁰⁹ Large commercial rafting operations can create a nuisance for property owners, as boatfuls of rowdy individuals can lead to property damage as they float through.²¹⁰ In essence, property owners are “overrun with trespassers because trespassing is [so] popular.”²¹¹

Landowners also point to the rafting industry’s post-*Emmert* success as a sign that fears of a shutdown are overstated.²¹² Additionally, legislative action is unnecessary because the system of case-by-case mediation, recently formalized by the Governor’s office following the Taylor River compromise, has “served Colorado well by balancing the needs” of both property owners and recreational river users.²¹³ Therefore, landowners argue that property owners’ concerns of the industry being shut down and damaging the Colorado economy are hyperbolic because under the current regime the commercial rafting industry has seen unprecedented growth.²¹⁴

C. *Response to Arguments Against Access*

Despite these arguments, the risk of failing to acknowledge a right to float has significant consequences. First, there is debate concerning whether the right granted in *Emmert* constitutes a protectable property interest that justifies compensation.²¹⁵ The property interest at stake in *Emmert* can be characterized as “the right to exclude.”²¹⁶ The Colorado Supreme Court, however, has “only recognized the right to make beneficial use of the water as a protected property right,”

209. Jessica Fender, *Raft Rift Bill Floats Through Committee*, DENVER POST (Feb. 9, 2010, 10:40 AM), <http://blogs.denverpost.com/thespot/2010/02/09/raft-rift-bill-floats-through-committee/5126>.

210. *Id.*; see also Fender, *supra* note 2 (quoting one landowner’s concerns that rafters on his property are “splashing the water, going ‘wheel’ over the dams [he] created when [he] improved the fishing [and are] hit[ting his] bridge with paddles”).

211. Fender, *supra* note 2 (quoting a landowner).

212. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 7–8.

213. Fender, *supra* note 22 (quoting John Leede, president of the Creekside Coalition, which represents 600 riverfront property owners).

214. See COLO. RIVER OUTFITTERS ASS’N, *supra* note 17, at 7–8. *But see* Hill & Potter, *supra* note 15, at 18 (discussing a 2001 river access dispute that caused a commercial rafting company to go out of business after a landowner denied the company access through its land).

215. Gast, *supra* note 4, at 260.

216. *Id.*

not the right to exclude.²¹⁷ The right to exclude is “not necessarily a positive right to make beneficial use.”²¹⁸ This interpretation is justified because it incentivizes and rewards individuals for improving land through positive rights.

Furthermore, the majority in *Emmert* did not assess whether action by the legislature allowing access would constitute a taking.²¹⁹ Rather, the Colorado Supreme Court suggested that the legislature is the proper avenue rather than the judiciary.²²⁰ Language suggesting that any action would result in a taking was in the dissent and therefore is not law.²²¹ In regard to the *ad coelum* doctrine, this law is outdated and is not a reliable basis for justifying compensation. In fact, the doctrine has been rejected by the U.S. Supreme Court as having “no place in the modern world.”²²² Colorado should no longer be restricted by the dead hand of history, and it is time for Colorado to reevaluate the most “conservative [river access] policies in the [W]est.”²²³

In the alternative, assuming *Emmert* did grant a protectable property interest, the Colorado Supreme Court could rule that a public access law would not require compensation because any infringement on landowners’ rights is *de minimis*.²²⁴ For example, both the Montana Supreme Court and the Ninth Circuit have found that statutes allowing recreational access to individuals on rivers running through private property do not justify compensation because the imposition on the property right at stake is *de minimis* when individuals merely float through a landowner’s property.²²⁵ Public policy supports this conclusion because “mere[] . . . fleeting, non-consumptive use of the quality of buoyancy inherent in the water” should not amount to a compensable taking.²²⁶ For example, where floaters only pass over a

217. *Id.* at 260 n.43 (citing *Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P. 339 (Colo. 1908)).

218. *Id.*

219. *See* *People v. Emmert*, 597 P.2d 1025 (Colo. 1979).

220. *Id.* at 1027.

221. *Id.* at 1033 (Carrigan, J., dissenting).

222. *United States v. Causby*, 328 U.S. 256, 261 (1946).

223. Burns, *supra* note 150, at 575.

224. *See* *Madison v. Graham*, 316 F.3d 867, 872 (9th Cir. 2002); Jas. Jeffrey Adams & Cody Winterton, *Navigability in Oregon: Between a River Rock and a Hard Place*, 41 WILLAMETTE L. REV. 615, 651 n.234 (2005).

225. Adams & Winterton, *supra* note 224, at 651 n.234.

226. *People v. Emmert*, 597 P.2d 1025, 1032 (Colo. 1979) (Carrigan, J., dissenting).

landowner's property, without touching the banks or streambed, and are mindful of the property owner's rights, the nuisance value is minimal.²²⁷

To assuage opponents of the right to float, the Colorado Legislature should establish a right to float that balances the interests of property owners with those of recreational users. The legislature should incorporate statutory limitations similar to those found in previous agreements between landowners and recreational rafters.²²⁸ The hours and number of commercial rafts allowed through certain areas should be limited. This would decrease the likelihood that private property would be damaged. Also, the legislature should limit the rivers accessible to those that have historically been commercially rafted. These measures would protect the interests of property owners without unduly burdening rafting operations because rafting outfitters would be free to continue floating the rivers that they currently raft. These are practical solutions to private landowner concerns because they have been forged through decades of mediation between proponents of the right to float and those opposed.²²⁹ Therefore, by incorporating past individual agreements into the legislative solution, the legislature can formulate a practical solution without risking opportunistic behavior by individuals through an inefficient case-by-case approach.

Additionally, Attorney General Woodard's opinion clarified that section 18-4-504.5 controls, not the *Emmert* decision.²³⁰ Therefore, the legislature intended section 18-4-504.5 to "approve of floating through private property" because it specifically mentioned beds and banks in the new definition while purposefully omitting the word "water."²³¹ Because the *Emmert* majority did not address the definition of "premises" in its opinion, this amendment "contains the best and clearest statement by the legislature on whether boating is a trespass," and its intent clearly shows a desire to allow the right to float.²³²

Finally, private landowners' concern that it is unnecessary for rafters to have access to their private land when there is an

227. Gast, *supra* note 4, at 260.

228. Fender, *supra* note 22.

229. *See id.*

230. Potter et al., *supra* note 3, at 478.

231. *Id.* at 476.

232. *Id.* at 478.

abundance of public streams in Colorado is unfounded. Every commercially rafted river in Colorado passes through private land at some point.²³³ This showcases the opportunism that landowners can use to hold rafting companies hostage. Considering the significant positive economic impact that rafting has on the state, landowners can effectively hold an entire \$150 million industry hostage to secure more benefits and concessions.²³⁴ To deny the right to float and force rafting companies to negotiate with every single landowner exposes companies to transactional costs that could ruin the most prosperous rafting industry in the country and harm an industry that is vital to Colorado's tourism economy.²³⁵ This effect would trickle down to consumers and result in much higher costs to enjoy Colorado's natural streams or, even worse, completely destroy the ability to raft in Colorado.

CONCLUSION

To preserve the right to raft Colorado's rivers, the state legislature should pass a bill that would grant a limited right of access to float rivers through private property. The legislature, as *Emmert* suggested, is the proper avenue to resolve this issue because "[a]t some point, . . . you have to put your foot down and clarify . . . the right to float."²³⁶ Because the right to exclude is a crucial part of the bundle of rights property owners enjoy, it is necessary to protect those rights within reasonable limits. At the same time, rafting is invaluable to Colorado. Benefits derive both from the revenue that the rafting industry brings to the state and the quality of life that it promotes. These interests need to be balanced properly. The Colorado Legislature should take action to clarify a murky law by establishing a public right to float that respects landowners' private property concerns but also ensures the continued economic prosperity of the rafting and tourism industry that is essential to Colorado's quality of life.

233. See Fender, *supra* note 2.

234. See COLO. RIVER OUTFITTERS ASS'N, *supra* note 17, at 7.

235. See *id.*; Fender, *supra* note 2.

236. Frosch, *supra* note 29 (quoting a local raft guide).