

Takings and the Right to Fish and Float in Colorado

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INTRODUCTION

Colorado is the only state in the Intermountain West that does not have a clearly defined and protected right for the public to float on streams that pass through private land.¹ While other states' laws are either clearly codified or explicitly determined by case law,² the law governing the right to float in Colorado is comprised of a number of scattered and unclear precedents. The crux of the problem is reconciling the Colorado Supreme Court's holding in *People v. Emmert*³ with the state's criminal trespass statute. In *Emmert*, the court held that "the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner."⁴ At the same time, Colorado's criminal trespass statute applies only to "real property, buildings, and . . . the stream banks and beds of any nonnavigable fresh water streams flowing through such real property."⁵ Right-to-float advocates argue that the legislative intent of the criminal trespass statute was to allow the public to freely float on the state's rivers,⁶ and property rights advocates argue that the criminal trespass statute only decriminalized floating but left the property owner with the right to exclude floaters through civil actions.⁷

This Note examines the property rights that riparian landowners have as an incident of property ownership and how these rights affect the public's rights to

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1. See Cory Helton, Note, *The Right to Float: The Need for the Colorado Legislature to Clarify River Access Rights*, 83 U. COLO. L. REV. 845, 868 n.195 (2012). See generally 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 (2010) (describing public access throughout the West).

2. See MONT. CODE ANN. § 23-2-302 (2011); UTAH CODE ANN. §§ 73-29-101 to -205 (West Supp. 2012); *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1298 (Idaho 1974); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 430-31 (N.M. 1945); *Parks v. Cooper*, 2004 SD 22601, ¶ 47, 676 N.W.2d 823, 825; *Day v. Armstrong*, 362 P.2d 137, 146-47 (Wyo. 1961). Like Colorado, Kansas has proscribed recreational floating over private nonnavigable waters. See *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1365 (Kan. 1990).

3. 597 P.2d 1025 (Colo. 1979) (en banc).

4. *Id.* at 1030.

5. COLO. REV. STAT. ANN. § 18-4-504.5 (West 2013).

6. E.g., 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, 475-79 (2002).

7. E.g., John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 335 (2001); see also Memorandum from Felicity Hannay, Deputy Attorney General, to Ken Salazar, Attorney General, Re: Floating Access Issues (June 8, 1999) [hereinafter Hannay Memo] (describing the parties' positions).

fish and float in the state's waters. This Note adopts a more moderate position than previous commentators. While this Note agrees with right-to-float advocates that public policy supports a right to float and that the legislature should act to protect this right, it argues that right-to-float advocates have failed to fully appreciate riparian landowners' rights.

Part I briefly sketches out the nature of the conflict and why legislative action is necessary. Part II examines the 1905 case *Hartman v. Tresise*⁸ and argues that riparian owners of nonnavigable streams in Colorado have the exclusive right to fish those streams. Part III examines the 1979 case *People v. Emmert* and argues that riparian owners also have the right to exclude floaters through civil actions. Parts IV and V examine how these compensable property rights affect a legislative solution to the right-to-float problem. Part IV outlines the law of takings and argues that a statute that grants the public the right to float would constitute a taking subject to the constitutional requirement of just compensation. Finally, Part V examines the amount of just compensation necessary if the legislature granted the public a right to float and argues that the value attributable to a landowner's exclusive right to fish and right to exclude through civil actions is not sufficient to deter the legislature from acting.

I. THE RIVER ACCESS CONFLICT

A. The Nature of the Conflict

The battle over the state's waters is more than academic: it reflects deep class divisions,⁹ a xenophobic-like hatred of out-of-staters,¹⁰ and the turmoil of a state

8. 84 P. 685 (Colo. 1905) (en banc).

9. Compare *id.* at 693 (Bailey, J., dissenting) ("That which belongs to the whole people will be given to a few . . . who are enabled by reason of their wealth or other fortunate condition to acquire by purchase, lease or otherwise, the right of fishery from the ranchmen who live upon these streams. . . . The poor, to whom work is a necessity and recreation a blessing, will be deprived of a constitutional right, so that the pleasure of the clubmen and the landholders may be increased."), with Editorial, *Rafting Is Not a Basic Human Right*, COLO. SPRINGS GAZETTE (Feb. 22, 2010, 12:00 AM), <http://www.gazette.com/opinion/view-94619-basic-human.html> ("Politically, it's a no-brainer to take from the few and give to the many. The many can easily outvote the few, which rewards politicians for redistribution policies. . . . [A statute protecting a public right to float] creates a direct subsidy to the rafting industry at a cost in both money and privacy to those whose lives they disrupt when rafting parties float through their land [The proposed statute] will trash the rights of private property owners and cause some tremendous hardship for some.").

10. See, e.g., Phillip Doe, *Along Came a Texan . . . Stealing Rivers in Colorado*, COUNTERPUNCH (Apr. 29, 2010), <http://www.counterpunch.org/2010/04/29/stealing-rivers-in-colorado/> ("Recently, another Texan came to Colorado to buy his piece of the state."); Matt C, Comment to *Colorado's Rafting Industry Hangs in Balance*, DENVERPOST.COM (Apr. 1, 2010, 5:48 PM), http://www.denverpost.com/willoughby/ci_14734881 ("Texas developer = selfish, greedy problem."); parkhillposse, Comment to *Colorado's Rafting Industry Hangs in Balance*, *supra* (Mar. 23, 2012, 1:38 PM) ("Texan developer. Two of the worst words in the English language."); slave W, Comment to *Colorado's Rafting Industry Hangs in Balance*, *supra* (Mar. 23, 2010, 9:10 AM) ("When it's all said and done the Lewis

undergoing a massive economic and cultural transition.¹¹

Conflicts between floaters and landowners have occurred across the state. On the South Platte River, an exclusive fishing club sought to prevent floaters from floating through its two miles of property by building obstacles in the river, yelling at boaters, shoveling dirt on boaters from a bridge, and seeking criminal trespassing charges.¹² On another stretch of the South Platte, landowners strung barbed wire across the river to stop kayakers.¹³ On the Arkansas River—which is the busiest recreational river in the country¹⁴ and had a rafting-related economic impact of nearly fifty-two million dollars in 2012¹⁵—traditional ranchers have started to use their property for exclusive fishing and have become increasingly intolerant of rafters.¹⁶ On the Lake Fork, a landowner filed a civil trespass suit seeking nominal damages and a permanent injunction to keep a rafting company from floating through his ranch.¹⁷ While the landowner expressed conservation concerns,¹⁸ he was using the property as a private fishing retreat, and “[t]he handful of fly fishermen who pay [the ranch] to spend about 40 days on the river bring in more money than the ranch’s cows . . . and the boaters often scare the fish away.”¹⁹

Shaw’s of the world will wish they’d stayed in Texas”); Randaddy, Comment to *HB 1188 Outfitter Bill Committee Hearing*, MOUNTAINBUZZ.COM (Jan. 2, 2010, 8:19 PM), <http://www.mountainbuzz.com/forums/f11/hb-1188-outfitter-bill-committee-hearing-28731.html> (“And they are from Texas. Anyone want Texans to block navigable waterways?”).

11. The demographic of buyers in the West has shifted from traditional farm and ranch buyers to recreational buyers, who “often displace prominent ranching families with multi-generational tenure on the land, with significant implications for community dynamics, especially as they relate to the local management of natural resources.” Hannah Gosnell, Julia H. Haggerty & Patrick A. Byorth, *Ranch Ownership Change and New Approaches to Water Resource Management in Southwestern Montana: Implications for Fisheries*, 43 J. AM. WATER RESOURCES ASS’N 990, 991 (2007). Compare slavetotheflyrod, Comment to *HB 1188 Outfitter Bill Committee Hearing*, *supra* note 10 (Feb. 1, 2010, 8:52 AM), (describing out-of-state landowners as “the [ones] that want to land their gulfstream at the airstrip, have the porter ready their waders and rod while they have brandy and cigars at the clubhouse, then head out to the river and catch the biggest possible fish with the least possible effort, [after which] they’ll again retire to the clubhouse to congratulate themselves, again over brandy and cigars”), with *Deep Cut*, MISSOULA INDEP. (June 17, 2009), <http://missoulanews.bigskypress.com/missoula/deep-cut/Content?oid=1150506> (describing rock star Huey Lewis’s opinion of the “barbarity” of the Montana locals’ choice of worm fishing).

12. Jason Robertson, *River Access in Colorado Under Siege!*, AM. WHITEWATER (Aug. 23, 2001), <http://www.americanwhitewater.org/archive/article/195>.

13. Shara Rutberg, *Boaters Float for Their Rights*, HIGH COUNTRY NEWS, Aug. 13, 2001, at 3.

14. Julie Cart, *For Colo. Rafters, Troubled Waters; As Sport Grows More Popular, Ranchers Are Claiming River Rights*, WASH. POST, Sept. 9, 2001, at A7.

15. COLO. RIVER OUTFITTERS ASS’N, COMMERCIAL RIVER USE IN THE STATE OF COLORADO: 1988–2011 (2012), available at <http://croa.org/media/documents/pdf/2012-commercial-rafting-use-report.pdf>.

16. Cart, *supra* note 14.

17. See Rutberg, *supra* note 13.

18. Patrick O’Driscoll, *Boating Rights Hit Choppy Waters*, USA TODAY, July 26, 2001, at 3A.

19. Rutberg, *supra* note 13; see also *Lake Fork of the Gunnison River Information*, U.S.

Conflicts on the Taylor River have become commonplace. In one instance, a group of eight boaters—including a district attorney—deliberately floated through posted property, where they were confronted with a gun-wielding landowner, who was later arrested for threatening the floaters.²⁰ At Harmel's Ranch Resort, a private fishing retreat on the Taylor River that charges fishermen for exclusive access to the river,²¹ the owners have invested considerable amounts of money to improve the river and fishing habitat²² and are increasingly frustrated by the floaters: "They're splashing the water, going 'whee!' over the dams I created when I improved the fishing. They've hit the bridge with paddles. . . . So here I am, getting overrun with trespassers because trespassing is popular."²³ The floaters, on the other hand, have asserted a right to float through the ranch: "[W]e need to be rafting the middle section of the Taylor ROUTINELY this summer to preserve our legal rights to raft. . . . I rafted the section through Harmels many years ago, despite all the shouting and protests from the A-holes on the banks."²⁴

Downstream of Harmel's is Wilder on the Taylor.²⁵ Texas-based developer Jackson-Shaw describes the property as twenty-six individual thirty-five-acre home sites on a "2,000-acre shared ranch and recreation preserve."²⁶ The Taylor is the ranch's crown jewel: Jackson-Shaw spent two years restoring the section of river to improve trout and insect habitat in the river²⁷ to create a property that "is host to nearly two miles of professionally enhanced, very exclusive, and extremely private tailwater fishery."²⁸ In 2010, Jackson-Shaw threatened to sue local rafting companies to keep them from floating through the property.²⁹ The Colorado General Assembly responded by introducing House Bill 10-1188, which clarified

DEP'T. OF THE INTERIOR BUREAU OF LAND MGMT., COLO. (Jan. 30, 2006), http://www.blm.gov/co/st/en/fo/gfo/recreation_information/lakeforkinfo.html ("The landowners along this stretch have had numerous problems with boaters and fishermen blatantly trespassing, leaving trash, destroying property and verbally abusing them, their employees and their guests.").

20. Jason Robertson, *Why 'Access'?*, AM. WHITEWATER (Apr. 26, 2001), <http://www.americanwhitewater.org/archive/article/175>.

21. Nathaniel H. Amendola, *Let My People Go Fishing: Applying the Law of "Givings" to Private Fishing Preserves, Exclusive Fishing Rights, and State-Stocked Rivers*, 62 SYRACUSE L. REV. 117, 122 (2012).

22. Jessica Fender, *Rafters, Landowner Drift Apart on Taylor River: Legislation May Have to Settle a Fight over Water Navigation Rights*, DENVER POST, Jan. 31, 2010, at B01.

23. *Id.* (quoting Steve Roberts, operator of Harmel's Ranch Resort).

24. gunnisonriver, Comment to *Guide Arrested on Taylor River, Colorado*, MOUNTAINBUZZ.COM (Apr. 12, 2011, 8:26 AM), <http://www.mountainbuzz.com/forums/fl4/guide-arrested-on-taylor-river-colorado-35633.html> (spelling errors and emphasis in original).

25. See Fender, *supra* note 22.

26. *Real Estate Developer Jackson-Shaw Completes Taylor River Restoration Project*, BUS. WIRE (Nov. 17, 2009, 10:00 AM), <http://www.businesswire.com/news/home/20091117005535/en/Real-Estate-Developer-Jackson-Shaw-Completes-Taylor-River>.

27. *Id.*

28. *RanchesForSale, Wilder on the Taylor*, YOUTUBE (Dec. 6, 2012), <https://www.youtube.com/watch?v=AKj06zxTH50>.

29. Fender, *supra* note 22.

river access and guaranteed the public a right to float through private property.³⁰ The bill eventually failed when it was unclear whether or not the bill would constitute an unconstitutional taking of private property without just compensation.³¹

B. Legislative Solutions

This Note focuses on a legislative response to the right-to-float problem. Starting with *Emmert*, the Colorado Supreme Court has refused to intrude on what it believes is properly the role of the legislature. The *Emmert* majority noted that “[i]f the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end”³² and that “it is within the competence of the General Assembly to modify rules of common law within constitutional parameters.”³³ Justice Carrigan’s dissent agreed, noting that the right to float was best left to the legislature.³⁴ Just last year, Justice Hobbs noted that “*Emmert* is best read for the proposition that the Colorado Constitution does not address the recreational use of water and that this subject is properly a matter for legislative consideration.”³⁵

The legislature is also the most competent branch in this regard. A court decision that reversed *Emmert* would likely not resolve the issue: both property and recreational interests are sufficiently strong to compel a legislative response to such a court decision.³⁶ Finally, a comprehensive legislative definition of a right to float would shorten the years of litigation necessary for courts to determine the full scope of the public’s right.³⁷

30. See H.B. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010); Helton, *supra* note 1, at 850–51.

31. *HB 10-1188 (Clarify River Outfitter Navigation Right) Dies in Conference Committee*, COYOTE GULCH (May 15, 2010), <http://coyotegulch.wordpress.com/?s=%22hb+10-1188%22>; see also Helton, *supra* note 1, at 850–51.

32. *People v. Emmert*, 597 P.2d 1025, 1029 (Colo. 1979) (en banc).

33. *Id.* at 1027; see also *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364–65 (Kan. 1990) (“Where the legislature refuses to create a public trust for recreational purposes in nonnavigable streams, courts should not alter the legislature’s statement of public policy by judicial legislation. If the nonnavigable waters of this state are to be appropriated for recreational use, the legislative process is the proper method to achieve this goal.”).

34. *Emmert*, 597 P.2d at 1033–34 (Carrigan, J., dissenting).

35. Gregory J. Hobbs, Jr., *Reviving the Public Ownership, Antispeculation, and Beneficial Use Moorings of Prior Appropriation Water Law*, 84 U. COLO. L. REV. 97, 125 (2013).

36. For example, after the Utah Supreme Court expanded recreational access by allowing floaters to touch the beds of privately owned streams, the Utah legislature responded by curtailing that right and limiting the public’s access to floating. Jeremiah I. Williamson, *Stream Wars: The Constitutionality of the Utah Public Waters Access Act*, 14 U. DENV. WATER L. REV. 315, 322–23 (2011).

37. Cf. Charles B. White, *To Float or Not to Float: Water Congress Can Help Find a Solution*, DENVER POST, Apr. 16, 2010, at B11 (describing the many variables and issues that need to be resolved).

Even though the legislature is the appropriate forum for changing the law, the legislature is faced with the serious obstacle that granting a right to float may constitute a taking of property without just compensation.³⁸ Justice Carrigan explained the problem while dissenting in *Emmert*:

Ironically the majority opinion, while implying that the General Assembly is competent to change the rule adopted today, has complicated the prospects of having the rule changed in the future. The Court has painted the state into a corner, and its brushwork assures that any effort to alter the rule will be difficult and expensive. The Court, by creating a vested property right in stream water (with the concomitant right to exclude all others from that water), has created a valuable property interest. And the 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.”³⁹

Justice Carrigan’s predictions came true in 2010 when the General Assembly failed to pass right-to-float legislation because of the fear that it would be an unconstitutional taking⁴⁰ after property rights advocates argued that the legislation would ensure “[a] flood of lawsuits by landowners . . . [that] could result in tens or hundreds of millions of dollars in compensation claims that would drain the state treasury.”⁴¹

The failure of House Bill 10-1188 has left Colorado in the state of uncertainty that has existed since *Emmert*, and the legislature will have to try again.⁴² In doing so, the legislature must consider the full nature, extent, and value of the rights of riparian owners.

II. THE EXCLUSIVE RIGHT TO FISH

In *Hartman v. Tresise*,⁴³ the Colorado Supreme Court held that a landowner who owned the banks and bed of a nonnavigable stream had the exclusive right to the fishery in the stream.⁴⁴ In doing so, the *Hartman* court implicitly created the foundational rules for limiting the public’s right to float in Colorado.⁴⁵

38. See U.S. CONST. amend. V, cl. 4; COLO. CONST. art. II, § 15.

39. *Emmert*, 597 P.2d at 1033 (Carrigan, J., dissenting) (citations omitted).

40. See *HB 10-1188 (Clarify River Outfitter Navigation Right) Dies in Conference Committee*, *supra* note 31.

41. *Rafting Is Not a Basic Human Right*, *supra* note 9.

42. See *generally* Helton, *supra* note 1 (arguing the legislature should revive the right-to-float debate).

43. 84 P. 685 (Colo. 1905) (en banc).

44. *Id.* at 687.

45. See *People v. Emmert*, 597 P.2d 1025, 1027–28 (Colo. 1979) (en banc) (relying on *Hartman*).

A. Hartman v. Tresise

Alonzo Hartman was an important and wealthy figure in the early history of Western Colorado who owned “one of the largest and most prosperous ranches” in Western Colorado,⁴⁶ which sat at the junction of the Gunnison River and Tomichi Creek.⁴⁷ Hartman’s land was fenced and posted, and Tomichi Creek had been stocked with fish by the state.⁴⁸ Hartman had warned Tresise not to trespass, but Tresise ignored him and trespassed “to fish in such stream, which he succeeded in doing.”⁴⁹

The Gunnison District Court dismissed the action for trespass, holding as a matter of law that Tresise had the constitutional and statutory right to fish in the stream.⁵⁰ Article XVI, section 5 of the Colorado Constitution provides 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 as hereinafter provided.”⁵¹ In 1903, the Colorado General Assembly passed a statute providing “[t]hat the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream.”⁵²

The Colorado Supreme Court overruled the trial court and held that the state constitution, which declares the water of the state “to be the property of the public,” only confirmed a right of appropriation and did not give the public any other rights to the water.⁵³ Next, because Hartman owned the streambeds and the banks of the creek, Hartman had the exclusive right to the fishery in the creek.⁵⁴ The statute, which gave the public the right to fish in any waters in the state, was thus

46. Judy Buffington Sammons, *One Long Ride (Beginning on a Government Mule)*, GUNNISON COUNTRY MAG., 2012, at 74, 76. Hartman built “the fanciest of the early ranch houses in the area,” which “boasted a tower with ascending arched windows, a white oak staircase, parquet floors, stained glass windows and fancy wood filigree everywhere.” *Id.* Hartman seemed to be present at important events in the history of the area. He was apparently the first person to talk to Alferd Packer when Packer rode into the Los Pinos Agency and confessed to cannibalism. See Ed Quillen, *Alferd Packer, the Colorado Cannibal*, COLO. CENT. MAG., Sept. 1995, available at <http://cozine.com/1995-september/alferd-packer-the-colorado-cannibal/>. Cannibal Outdoors, the rafting company discussed *infra* Part II, bears Packer’s namesake. In addition to being a rancher, Hartman was Gunnison’s first postmaster. WILSON ROCKWELL, UNCOMPAHGRE COUNTRY 136 (1965). In 1911, Hartman and his brothers organized the Paradox Irrigation Land and Development Company in Gunnison to develop Buckeye Reservoir in the West End, which brought in more than \$200,000 in outside investments and required some 250 laborers. *Id.*

47. Sammons, *supra* note 46, at 75–76.

48. *Hartman*, 84 P. at 686.

49. *Id.*

50. *Id.*

51. COLO. CONST. art. XVI, § 5.

52. 1903 Colo. Sess. Laws 233.

53. *Hartman*, 84 P. at 686.

54. *Id.* at 687.

unconstitutional under the state's takings clause.⁵⁵ Alternatively, the court noted, even if the public did have a right to fish in streams that crossed private property, the statute would be an unconstitutional taking for granting an easement across private lands to reach public water.⁵⁶

The *Hartman* court's decision was grounded in a long history of English common law. Particularly, the court relied on two traditional rules: because the creek was a nonnavigable stream, Hartman held title to the streambed; and, as owner of both the streambed and the stream banks, Hartman held the exclusive right to the fishery.⁵⁷

1. Navigability Under Federal and State Law

At English common law, streams were divided into three classes: those streams subject to the ebb and flow of the tides were navigable at law;⁵⁸ those nontidal streams that were capable of navigation were navigable in fact;⁵⁹ and those streams both nontidal and nonnavigable were private streams.⁶⁰ Title to the streambed and soil in navigable rivers was held by the Crown, and the public had the right of passage and the right to fish.⁶¹ Title to the streambed in those nontidal, navigable-in-fact waters was privately owned, so that the public maintained the right of passage, but the owner of the streambed held the right to fish.⁶² In those streams that were nontidal and nonnavigable, the landowner held the exclusive right of passage and fishing.⁶³

In the United States, the traditional tidal rule was difficult to apply: unlike England, whose size and coastal geography meant that rivers that were navigable in fact were substantially those that were influenced by the tides, the United States' size and geography resulted in significant inland rivers that were navigable in fact but were not influenced by tides.⁶⁴ American courts thus rejected the distinction between navigable at law and navigable in fact and applied navigability to those rivers "used, or are susceptible of being used, in their ordinary condition, as highways for commerce"⁶⁵ capable of forming "a continued highway over which commerce is, or may be, carried on with other States or foreign countries."⁶⁶ This federal test of navigability is used to determine the application of federal regulatory authority, application of specific federal statutes, title to streambeds under the

55. *Id.* at 686–87.

56. *Id.* at 687 (citing COLO. CONST. art. II, § 15).

57. *Id.*

58. See *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226–27 (2012).

59. Henry William McMillan, Note, *Water and Watercourses—Public Right of Fishery in Navigable Waters over Private Submerged Lands*, 12 TEX. L. REV. 72, 74 (1933).

60. *Id.* at 74–75.

61. *PPL Mont.*, 132 S. Ct. at 1226–27.

62. *Id.*

63. McMillan, *supra* note 59, at 75.

64. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); see also *PPL Mont.*, 132 S. Ct. at 1227.

65. *PPL Mont.*, 132 S. Ct. at 1228 (quoting *The Daniel Ball*, 77 U.S. at 563).

66. *Id.* at 1231–32.

equal-footing doctrine, admiralty jurisdiction, and the breadth of the federal commerce power.⁶⁷

In addition to the federal test for navigability, states can adopt their own tests for navigability.⁶⁸ For those streams that do not meet the federal navigation standard, the respective rights of the landowners and the public will be set by these state laws.⁶⁹

2. The Exclusive Right to Fish

The court in *Hartman* never explicitly weighed navigability, though it seemed to assume that Tomichi Creek was nonnavigable,⁷⁰ and the court simply applied the traditional common law rule that a landowner who owns the streambed and the banks has the exclusive right to the fishery.⁷¹

By the nineteenth century, in the years leading up to *Hartman*, it was well-settled in England that the owner of the banks and the streambed held the exclusive right to the fishery.⁷² The landowner who owned the streambed maintained the exclusive right to fish, even if the river was navigable in fact.⁷³ In America, some courts allowed the public to fish in navigable-in-fact streams over private streambeds,⁷⁴ but the majority of courts continued to follow the traditional rule that the landowner of a nonnavigable stream held the exclusive right to fish.⁷⁵ Thus, when *Hartman* was decided in 1905, there was a clear line of authority that

67. *Id.* at 1228–29.

68. Hill, *supra* note 7, at 342; *see also infra* Part IV.C.2. Indiana, for instance, has adopted the traditional English rule that navigable-at-law rivers are those subject to the ebb and flow of the tides and that navigable-in-fact rivers are those that meet the *Daniel Ball* test for commercial navigability. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 48 (2007).

69. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984).

70. *See Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) (en banc).

71. *Id.*

72. *See, e.g., Hudson v. MacRea*, (1863) 122 Eng. Rep. 579 (K.B.) 582; 4 B. & S. 584, 591–92 (upholding a criminal conviction for illegally fishing in a private, nonnavigable river, “where the public could not possibly have a right of fishing”).

73. *See, e.g., Hargreaves v. Diddams*, (1875) 10 L.R. 582 (Q.B.) 585–86 (upholding a criminal conviction for unlawfully fishing private water when a nonnavigable stream had been rendered navigable in fact by significant improvements and Acts of Parliament); *see also Musset v. Burch*, (1876) 35 L.T. 486 (Div. App.) 487 (“Can the right to navigate give the right to fish? No case has been made out to satisfy the court that such is the law [T]he other cases . . . are too strong to leave any doubt on the question.”).

74. *See, e.g., Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914).

75. *See, e.g., Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500, 506 (1872); *Albright v. Cortright*, 45 A. 634, 636 (N.J. 1900) (quoting *Smith v. Andrews*, (1891) 2 Ch. 678, 695–96 (Eng.)); *Griffith v. Holman*, 63 P. 239, 243 (Wash. 1900); *see also JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS* § 46 (Chicago, Callaghan & Co. 1883). “Further citation of authority and illustration that, when the plaintiff became the purchaser of the land and the beds of the streams and ponds, he prima facie had the exclusive right of fishery therein, is futile and unnecessary.” *Rockefeller v. Lamora*, 83 N.Y.S. 289, 293 (App. Div. 1903).

supported the holding that Hartman alone had the exclusive right to fish in the nonnavigable river that flowed through his property.⁷⁶

Despite this traditional line of authority, Justice Gunter concurred specially, and Justices Bailey and Steele dissented.⁷⁷ Justice Gunter, agreeing that the 1903 statute that granted the public a right to fish in any state-stocked waters⁷⁸ was unconstitutional because it granted the public an easement over private lands, believed that the court should have decided the case on the much narrower ground that Tresise had violated a game law that made it illegal to fish on private property without consent.⁷⁹

In a passionate dissent, Justice Bailey argued that article XVI, section 5 of the Colorado Constitution granted the public title to the water until the water was appropriated.⁸⁰ Applying the English rule that the public has the right of navigation and the right of fishing in public waters,⁸¹ Justice Bailey argued that the state constitution itself protected the public's right to float and fish in all waters that had not been appropriated.⁸² Forty years later, the New Mexico Supreme Court agreed with Justice Bailey, holding in *State ex rel. State Game Commission v. Red River Valley Co.*⁸³ that unappropriated waters belong to the public, so the owner of the underlying streambed did not have any exclusive right of fishery or recreation distinct from the general public.⁸⁴

B. The Relevance of Hartman

Hartman was virtually unheard of for nearly seventy-five years before the Colorado Supreme Court applied *Hartman* in *People v. Emmert*.⁸⁵ While no Colorado decision has overturned or questioned *Hartman*, neither has any decision directly reaffirmed *Hartman*'s holding that the owner of the beds and banks of a nonnavigable stream has the exclusive right of the fishery. The question is whether a century-old case still has any relevance today. This Part argues that it does.

1. *Hartman* and Stare Decisis

Admittedly, *Hartman* is not the strongest case on which to define a right: *Hartman* was based on an English rule “[that] evolved when clothing was made from buckskin and surviving the winter depended upon capturing, killing, and preserving enough wild fish and game”;⁸⁶ the holding of *Hartman* is arguably all

76. See *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) (en banc).

77. *Id.* at 687, 688.

78. See *supra* text accompanying note 52.

79. *Hartman*, 84 P. at 688 (Gunter, J., concurring specially).

80. *Id.* at 690–91 (Bailey, J., dissenting).

81. See *supra* text accompanying note 61.

82. *Hartman*, 84 P. at 690–91 (Bailey, J., dissenting).

83. 182 P.2d 421 (N.M. 1946).

84. *Id.* at 431, 434 (citing *Hartman*, 84 P. at 690 (Bailey, J., dissenting)).

85. See 597 P.2d 1025, 1027 (Colo. 1979) (en banc).

86. Robert W. Malmshemer & Donald W. Floyd, *Fishing Rights in Nontidal, Navigable New York State Rivers: A Historical and Contemporary Perspective*, 62 ALB. L. REV. 147,

dicta,⁸⁷ and neighboring New Mexico explicitly rejected *Hartman*. Still, none of these reasons are sufficient to overturn *Hartman* today.

Colorado courts follow the doctrine of stare decisis and follow precedent established in earlier cases⁸⁸ “unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come from departing from precedent.”⁸⁹

First, the rule announced in *Hartman* was not originally erroneous. While the court could have decided *Hartman* on the narrower ground that Tresise had trespassed across Hartman’s land to reach the creek,⁹⁰ the court’s holding that Hartman maintained the exclusive right of fishery in a nonnavigable stream⁹¹ simply applied the traditional majority rule that had existed for centuries, first in England and later in the United States.⁹²

The key inquiry in determining *Hartman*’s precedential value is whether the Colorado Supreme Court correctly interpreted section 5 of article XVI to only protect the right of appropriation.⁹³ If, as Justice Bailey argued, the title to the water belonged to the public, then the right of fishery would follow the title and inhere in the public.⁹⁴ While New Mexico and Wyoming have interpreted similar provisions in their constitutions to protect a public recreational right,⁹⁵ Colorado has consistently “adhere[d] to a strong, state constitutionally based public water ownership doctrine. This doctrine serves the public interest by allowing public and private entities to appropriate water for beneficial use, subject to exercise of the state’s police power in making those uses.”⁹⁶ When the Colorado Supreme Court had the opportunity to reexamine *Hartman*’s interpretation of the Colorado Constitution in *Emmert*, the court directly affirmed *Hartman* and explicitly rejected Wyoming’s competing interpretation of its own constitution.⁹⁷ Colorado courts have continued to apply this interpretation of the constitution⁹⁸ and have continued to affirm the various related holdings of *Hartman*.⁹⁹

172 (1998).

87. *Emmert*, 597 P.2d at 1031 (Groves, J., dissenting).

88. *Bedor v. Johnson*, 2013 CO 4, ¶ 23, 292 P.3d 924, 929 (en banc); *see also* *People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999) (en banc) (collecting cases).

89. *Blehm*, 983 P.2d at 788.

90. *See Hartman v. Tresise*, 84 P. 685, 688 (Colo. 1905) (Gunter, J., concurring specially).

91. *See id.* at 687.

92. *See supra* Part II.A.1.

93. *See Hartman*, 84 P. at 686.

94. *See id.* at 690–91 (Bailey, J., dissenting).

95. *See State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421, 430–31 (N.M. 1945); *Day v. Armstrong*, 362 P.2d 137, 146–47 (Wyo. 1961).

96. Hobbs, *supra* note 35, at 127–28.

97. *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979) (en banc).

98. *See Bd. of Cnty. Comm’rs of Cnty. of Park v. Park Cnty. Sportsmen’s Ranch, LLP*, 45 P.3d 693, 710 (Colo. 2002) (en banc); Hobbs, *supra* note 35, at 124–25.

99. *See Koch v. United States*, 47 F.3d 1015, 1020–21 (10th Cir. 1995) (applying Colorado law and holding that a riparian owner of a nonnavigable stream also owns the streambed); *Bergan Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365, 366–67 (Colo. App. 1984) (affirming the *ad coelum* doctrine); *In re Confined Aquifer New Use Rules for Div. 3*, No. 2004 CW 24, 2006 WL 4037484, ¶¶ 487, 491, 505, 507 (Colo. Dist. Ct. Nov. 9, 2006);

Second, *Hartman* has not been rendered erroneous by changing conditions. The sheer number of fishing cases over the last few centuries across English and American jurisdictions suggests that the public's demand to fish is not a sufficient factor to abrogate a landowner's exclusive right to fish. Thus, even though the demand for fishing access may be higher today than it was a century ago, *Hartman* was not decided in an era devoid of conflicts between public fishers and private landowners. Indeed, the conflict in *Hartman* grew directly out of a statutory attempt to solve the conflict. Furthermore, the rule announced in *Hartman* is perhaps even more relevant today as landowners purchase properties as fishing retreats or invest money in improving the fishery in order to increase their property's value.¹⁰⁰

2. The Right to Fish as an Incident of Navigation

If *Hartman* is still good law, then a statute that grants the public a right to float must address a landowner's exclusive right to fish—that is, the legislature must address whether a public right to fish is an incident of navigation.

States have split on whether the right to fish is incidental to the right to float,¹⁰¹ but those states that have held that the public has the right to fish have tied that right to the public trust doctrine,¹⁰² which Colorado has rejected.¹⁰³

The Wyoming Supreme Court recognized the conflict inherent in protecting landowners and granting a right to fish but decided that a right to fish was inherent and incidental in the right to float in *Day v. Armstrong*.¹⁰⁴ Within a couple of paragraphs, the court held both that “in using the State's waters for floating, the public is not privileged, except as incidental to such use, to violate other property rights of riparian owners”¹⁰⁵ but that “[i]t is also the right of the public while so lawfully floating in the State's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful.”¹⁰⁶

On the other hand, a recent case in New York applied the traditional common law rule that the owner of the streambed maintains the exclusive right to fish, even if the stream is navigable in fact. In *Douglaston Manor, Inc. v. Bahrakis*,¹⁰⁷ the New York Court of Appeals held that a public right to fish was not incidental to a

Gateview Ranch, Inc. v. Cannibal Outdoor Network, Inc., No. 01CV52 (Colo. Dist. Ct. Dec. 5, 2001) (order on cross motions for a determination of question of law).

100. Cf. Ben Pierce, *Making Land Investments Pay*, LIVE WATER PROPS. (Dec. 2011), <http://www.livewaterproperties.com/PDFS/2011/DecNewsletter2.pdf>.

101. Compare *Schulte v. Warren*, 75 N.E. 783, 787 (Ill. 1905) (holding that plaintiff landowner was entitled to an injunction because the right to hunt and fish was not incidental to the right of navigation), with *Willow River Club v. Wade*, 76 N.W. 273, 276–77 (Wis. 1898) (holding that the right to fish was an incident of navigation, so the owner of the streambed did not have the exclusive right to fish in a river that was navigable in fact).

102. See, e.g., *Kerley v. Wolfe*, 84 N.W.2d 748, 752 (Mich. 1957); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984).

103. See *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (en banc).

104. 362 P.2d 137 (Wyo. 1961).

105. *Id.* at 146.

106. *Id.* at 147.

107. 678 N.E.2d 201 (N.Y. 1997).

public right to float.¹⁰⁸ *Douglaston Manor* is instructive because it involves many of the same elements at play in Colorado fishing disputes.¹⁰⁹ In that case, Douglaston Manor owned the banks, bed, and river islands of a one mile stretch of the Salmon River,¹¹⁰ one of the premier fisheries in the Great Lakes region.¹¹¹ Douglaston Manor managed their section of the river as a private fishery, charging for access while providing security, constructing support facilities for paying anglers, and paying taxes on the property and riverbed.¹¹² Though Douglaston Manor owned the riverbed, the Salmon River is navigable in fact under New York law, and the public has the right to float through the private property.¹¹³ Commercial fishing guides launched their boats at public access points and floated into the private property to fish it.¹¹⁴ Though the guides anchored and waded,¹¹⁵ there is no indication that the wading affected the court's decision.¹¹⁶

Relying on New York precedent, the court upheld the traditional doctrine that the owner of the streambed had the exclusive right to fish, even if the public had the right to float the river, for “[t]he easement of passage over navigable waters does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator.”¹¹⁷

The *Douglaston Manor* rule is a closer statement of the law as it should apply in Colorado than *Day*. Like New York, Colorado has considered the right to fish and the right to float as two independent property rights. Furthermore, those cases that held that fishing was an incident to navigation misapplied the common law tradition, which clearly recognized and separated the two independent property rights by granting the public the right to fish in navigable streams but granting the landowner the exclusive right to fish in nontidal, navigable-in-fact streams.¹¹⁸ Collapsing the two property rights would thus be inconsistent with the common law tradition on which Colorado has relied.¹¹⁹ Moreover, since Colorado has rejected the public trust doctrine regarding water in Colorado,¹²⁰ those cases that hold that the right of fishing is vested in the public are not persuasive.¹²¹ Finally, like the owners of Douglaston Manor, the landowners who would most want to protect an

108. *Id.* at 204.

109. *See generally* Amendola, *supra* note 21, at 118–23 (comparing the Douglaston Salmon Run on the Salmon River in New York to Harmel's Ranch Resort on the Taylor River in Colorado).

110. *Douglaston Manor*, 678 N.E.2d at 202.

111. *See* BOB LINSEMAN, BEST STREAMS FOR GREAT LAKES STEELHEAD 248–51 (2005); MATT SUPINSKI, STEELHEAD DREAMS 124 (2001).

112. *Douglaston Manor*, 678 N.E.2d at 202.

113. *Id.* at 203–04.

114. *Id.* at 202.

115. *Id.*

116. *See id.* at 201–05.

117. *Id.* at 204 (emphasis omitted) (quoting *Smith v. Odell*, 137 N.E. 325, 327 (N.Y. 1922)).

118. *See* McMillan, *supra* note 59, at 75.

119. *See generally* *Hartman v. Tresise*, 84 P. 685 (Colo. 1905) (en banc).

120. *See infra* text accompanying notes 244–247.

121. *Cf.* *Kerley v. Wolfe*, 84 N.W.2d 748, 752 (Mich. 1957); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984).

exclusive right to fish are those who have expended significant amounts of money in improving the streambed, the fish habitat, and the access for anglers.¹²²

3. The Effect of an Exclusive Right to Fish

The effect of an exclusive right to fish presents additional problems. If, as argued above, *Hartman* is still good law, then landowners have an independent argument against those floaters who float and fish through their property. This argument would not stop floaters who were not fishing, but it could be effective against commercial fishing guides, especially on rivers that see more fishing traffic than whitewater traffic. Further, if *Hartman* is still good law, then it would not be diminished by a new legislatively created right to float.

Some commentators have argued that the right to fish should be an incident of navigation because a contrary rule would be too burdensome on fishermen: A landowner's exclusive right to fish will "require[] anglers to learn and locate property lines on all navigable streams where they fish [T]he duties imposed . . . are archaic for anglers fishing from drifting or trolling boats."¹²³ While it is unclear why a common law tradition developed for anglers fishing from drifting boats is now archaic for modern anglers fishing from drifting boats, the argument is unpersuasive. Even though floating anglers would have to obtain permission from a landowner, landowners could easily post private property signs that notify boaters that they had entered private property and thus could not fish until they reached public land again.¹²⁴ The real problem is not the burden on anglers but whether anglers would actually follow the posted signs. Because landowner enforcement would be difficult, anglers would have little incentive to follow posted signs, thus raising the possibility of more direct river conflicts.

The number of rules developed by the common law reflect the diverse problems between fishermen and landowners and stand as a cautionary example of why the legislature should address both the right to fish and the right to float together.¹²⁵ Because of the inherent enforceability problems of a landowner's right to fish and the likelihood that distinguishing between two property rights would only escalate river conflicts, the legislature should view the right to fish as a compensable property right and address it directly in crafting right-to-float legislation.

122. *See supra* Part I.A.

123. Malsheimer & Floyd, *supra* note 86, at 178.

124. *Cf.* GOVERNOR'S RIVER ACCESS DISPUTE RESOLUTION TASK FORCE, FINAL REPORT 6-7 (2010) [hereinafter GOVERNOR'S TASK FORCE] (describing signs that notify boaters of private land).

125. For example, based only on the traditional common law, a landowner has the right to enforce the exclusive right to fish, but the landowner cannot do anything that interferes with navigation. *See* GOULD, *supra* note 75, § 186 (describing the various common law rules of navigation and fishing).

III. THE RIGHT TO FLOAT

A. People v. Emmert

The right-to-float conflict in Colorado centers on the 1979 case *People v. Emmert*.¹²⁶ There, the defendants were convicted of third-degree criminal trespass for floating and fishing through private ranch property on the Colorado River.¹²⁷ The parties stipulated that the Colorado River was nonnavigable.¹²⁸ The defendants floated in rafts with leg holes that allowed them to touch the streambed and control the rafts with their feet, and they touched the streambed as they crossed the private ranch land.¹²⁹ Right-to-float proponents have described the facts as “three fisher[men], attempting to escape the workaday world in a time honored fashion,”¹³⁰ but Emmert was a lawyer¹³¹ who trespassed “for the express purpose of testing whether the criminal trespass statute covered floating across private property.”¹³²

The defendants were convicted under the criminal trespass statute that applied if “[one] unlawfully enters or remains in or upon premises.”¹³³ At the time of the conviction, the scope of “premises” was unclear.¹³⁴ To analyze the trespass, the Colorado Supreme Court applied the doctrine adopted in *Hartman* that the streambeds of nonnavigable streams are the property of the owner of the adjacent land.¹³⁵ Next, the court applied the classic common law doctrine of *cujus est solum*,

126. 597 P.2d 1025 (Colo. 1979) (en banc).

127. *Id.* at 1026.

128. *Id.*; see also *infra* Part IV.C.2 (describing how the Colorado Supreme Court has interpreted navigability in Colorado).

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

130. Doe, *supra* note 10. This language mirrors Justice Bailey’s dissenting argument in *Hartman*. See *supra* note 9.

131. *Water Law*, AMICUS, Spring 2010, at 3, 10.

132. Hannay Memo, *supra* note 7, at 2.

133. *Emmert*, 597 P.2d at 1026 (quoting COLO. REV. STAT. § 18-4-504 (1973)).

134. See Helton, *supra* note 1, at 856.

135. *Emmert*, 597 P.2d at 1027 (citing *More v. Johnson*, 568 P.2d 437 (Colo. 1977) (en banc); *Hartman v. Tresise*, 84 P. 685 (Colo. 1905) (en banc); *Hanlon v. Hobson*, 51 P. 433 (Colo. 1897)). Some commentators predicted that *Hartman* would control the issue of recreational access years before *Emmert* was decided. See G.E. RADOSEVICH, K.C. NOBE, D. ALLARDICE & C. KIRKWOOD, *EVOLUTION & ADMINISTRATION OF COLORADO WATER LAW: 1876–1976*, at 209–10 (1976) (“The views expressed by Justice Bailey would no doubt appeal to the hearts of many sportsmen today. But, as the Colorado law now stands, the public has no right to fish or enter the lands of another in search of recreation or leisure. As the court stated, ‘the public has no easement over any portion of private property, for the purpose of reaching the streams.’ A 1973 legislative declaration bears on this question indirectly. The Colorado Water Conservation Board is now vested with the authority, *on behalf of the people of the State of Colorado*, to appropriate or acquire such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. It should be clear that, if the appropriation is on behalf of the people, they should certainly be entitled to use it. However, the legislature or the courts must remove the constraint of the *Hartman* case.” (footnote omitted) (emphasis in original)).

ejus est usque ad coelum (“he who owns the surface of the ground has the exclusive right to everything which is above it”).¹³⁶ The majority noted that the *ad coelum* doctrine was “implicitly adopted by the court in *Hartman*”¹³⁷ and is also defined by statute.¹³⁸ With these prior precedents, the court held that “the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations.”¹³⁹

The Colorado Supreme Court explicitly rejected other states’ laws and constitutions, a public easement for recreation as an incident of navigation, and the public trust doctrine.¹⁴⁰ The court acknowledged that other states had ruled differently, but “consider[ed] the common law rule of more force and effect, especially given its long-standing recognition in this state.”¹⁴¹ Further, the court noted that the constitutional provision did not apply because the provision is a section on “Irrigation” in an article entitled “Mining and Irrigation.”¹⁴² The court approved of *Hartman* and explicitly “reaffirm[ed] . . . that section 5, Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation.”¹⁴³ Although the Wyoming Supreme Court had found a right to public access in a similarly worded constitutional provision in *Day v. Armstrong*,¹⁴⁴ the *Emmert* court distinguished *Day* because the Wyoming Constitution was a stronger statement of the public’s right to use the water, but Colorado’s constitution only protected the right of appropriation.¹⁴⁵

B. The Right to Float After Emmert

While *Emmert* was on appeal, the Colorado General Assembly passed section 18-4-504.5, which provides that for purposes of the criminal trespass statute, “‘premises’ means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.”¹⁴⁶ The statute, which excludes the water itself,¹⁴⁷

136. *Id.* at 1027; see also RESTATEMENT (SECOND) OF TORTS § 159(1) (“[A] trespass may be committed on, beneath, or above the surface of the earth.”). For early citations, see *Bury v. Pope*, (1587) 78 Eng. Rep. 375; 2 WILLIAM BLACKSTONE, COMMENTARIES *18.

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

138. COLO. REV. STAT. § 41-1-107 (West 2004) (“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.”).

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

140. *Id.*

141. *Id.*

142. *Id.* at 1028.

143. *Id.*

144. See 362 P.2d 137, 146–47 (Wyo. 1961).

145. See *Emmert*, 597 P.2d at 1028 & n.2.

146. COLO. REV. STAT. ANN. § 18-4-504.5 (West 1977).

147. “Every river consists of: (1) the bed; (2) the water; (3) the banks or shores; and it also has a current.” GOULD, *supra* note 75, § 41 (footnote omitted).

seems to suggest that floating through private property is no longer a trespass, but *Emmert* held explicitly that a floater could not float through private property without permission. The *Emmert* court believed that section 18-4-504.5 had “clarified the meaning of the word ‘premises,’”¹⁴⁸ but the court gave no further analysis of how its decision was consistent with the statute for future cases.¹⁴⁹

In 1983, Attorney General Woodard released an opinion on the effect of section 18-4-504.5 and *Emmert*.¹⁵⁰ The Woodard AGO concluded that floaters who cross private property without touching the streambed or banks are not guilty of criminal trespass and that landowners were not authorized to prohibit floaters from passing through their land.¹⁵¹ The opinion was limited to discussing criminal trespass because section 18-4-504.5 is a criminal trespass statute.¹⁵²

Since *Emmert*, no appellate court has determined how *Emmert* and section 18-4-504.5 relate,¹⁵³ and no appellate court has ruled on whether a floater can be a civil trespasser.¹⁵⁴ In 2001, the Gunnison District Court¹⁵⁵ ruled as a matter of law that section 18-4-504.5 did not preclude civil liability because the statute clearly and unambiguously provided only that the streambed and banks are part of the premises for purposes of the criminal trespass statute.¹⁵⁶ Thus, floaters who did not touch the streambed or banks could not be convicted for criminal trespassing but could be enjoined or held liable for civil damages. Furthermore, since the statute was unambiguous in content and scope, the court could not reach the question of legislative history for the purposes of statutory interpretation.¹⁵⁷ The district court’s plain reading of the statute is the most in-depth judicial explication of *Emmert* and

148. *Emmert*, 597 P.2d at 1029.

149. *See id.* at 1029–30.

150. *See Purpose and Effect of C.R.S. 1973, 18-4-504.5* (1978 repl. vol. 8), Colo. Op. Att’y Gen., No. ONR8303024/KW, 1 (1983) [hereinafter Woodard AGO].

151. *Id.*

152. *See id.* at 1–2. Like the Woodard AGO, the Hannay Memo was limited to the question of criminal trespass, noting that there is no authority on whether floaters can be held liable for civil trespass. Hannay Memo, *supra* note 7, at 3, 5.

153. Hannay Memo, *supra* note 7, at 3.

154. *Id.* at app. A.

155. It should not have been surprising that another floating issue came before the Gunnison court: the Hannay Memo was written partly in response to requests from the Gunnison County Sheriff’s Department and the District Attorney for the Seventh Judicial District. *See id.* at 1.

156. *See Gateview Ranch, Inc. v. Cannibal Outdoor Network, Inc.*, No. 01CV52, at 5–7 (Colo. Dist. Ct. Dec. 5, 2001) (order on cross motions for a determination of question of law).

157. *Id.* at 6. The rafting business was forced to close. Years later, the *Colorado Springs Gazette* published an editorial in opposition to Colorado House Bill 10-1188 that seemed to applaud that the rafting company had been shut down. *See Rafting Is Not a Basic Human Right*, *supra* note 9 (“The last vestige of legal protection landowners have to protect their property rights are civil trespass laws. That’s what commercial outfitters fear. In at least one case, a commercial outfitter guiding trips through private lands was put out of business by the District Court, which ruled in obedience to the state Supreme Court. The purpose of this bill is to remove the right of landowners to seek civil redress of grievances and leave commercial outfitters immune from any legal restraints.”).

remains the most convincing argument that a landowner maintains the civil right to exclude floaters.

C. The Right to Exclude

The *Emmert* majority's reliance on the *ad coelum* doctrine was criticized at the time by Justice Carrigan in dissent¹⁵⁸ and has been criticized by subsequent commentators.¹⁵⁹ This criticism is compelling. The maxim is the better part of eight hundred years old¹⁶⁰ and "of such antiquity that [it must be] . . . express[ed] . . . in Latin."¹⁶¹ As long ago as 1946, the U.S. Supreme Court in *United States v. Causby*¹⁶² declared that the "doctrine has no place in the modern world,"¹⁶³ and "[a] long 'leap of faith' would be necessary to assume that ancient rule had been imported into Colorado's early common law."¹⁶⁴ The doctrine has been "explicitly invalidat[ed] . . . in federal law"¹⁶⁵ and "is outdated and is not a reliable basis for justifying compensation."¹⁶⁶ Consequently, "Colorado should no longer be restricted by the dead hand of history."¹⁶⁷

But whatever the rhetorical force of these arguments, they are not convincing as a matter of history, law, or policy.¹⁶⁸ The *ad coelum* rule was never applied literally¹⁶⁹ and was never assumed to mean "more than a right of control to the height man could exert control."¹⁷⁰ The *ad coelum* doctrine was only meant "merely as a statement of a landowner's right of freedom from interference in the use and enjoyment of his land."¹⁷¹ This is why the *Causby* Court recognized that

158. See *People v. Emmert*, 597 P.2d 1025, 1032–34 (Colo. 1979) (Carrigan, J., dissenting).

159. See Travis H. Burns, Comment, *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 WYO. L. REV. 561, 590, 593–94 (2005); Richard Gast, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247, 249–50 (1981); Helton, *supra* note 1, at 851; Lisa LaBelle Scott, Comment, *The Public Trust Doctrine—A Tool for Expanding Recreational Rafting Rights in Colorado*, 57 U. COLO. L. REV. 625, 627 (1986).

160. See Clement L. Bouvé, *Private Ownership of Airspace*, 1 AIR L. REV. 232, 247 (1930).

161. *Emmert*, 597 P.2d at 1032 (Carrigan, J., dissenting).

162. 328 U.S. 256 (1946).

163. *Id.* at 261.

164. *Emmert*, 597 P.2d at 1032 (Carrigan, J., dissenting).

165. Burns, *supra* note 159, at 593 (citing *Laird v. Nelms*, 406 U.S. 797 (1972)).

166. Helton, *supra* note 1, at 871.

167. *Id.*

168. "Or it may be because the frequent admonitions of the courts against a literal acceptance of the maxim, voiced in the act of applying it to a given situation, have remained lost to the sight of those who have succumbed to the magic of the phrase." Bouvé, *supra* note 160, at 238.

169. See *id.* at 249–50.

170. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 452 (N.M. 1945) (Sadler, J., dissenting); see also Bouvé, *supra* note 160, at 254 ("Ownership is founded upon occupancy and the capacity to occupy.").

171. Howard H. Hackley, *Trespassers in the Sky*, 21 MINN. L. REV. 773, 777 (1937).

the *ad coelum* doctrine was unworkable for the overflight cases but was still a necessary element for other property rights: “[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run.”¹⁷² Thus, the rule that the *Emmert* court applied was not “a doctrine which the United States Supreme Court long ago abandoned as obsolete”;¹⁷³ the court’s citation of section 41-1-107 shows that the court was never applying a literal interpretation of *ad coelum*.¹⁷⁴

Thus, *Emmert*’s citation of the *ad coelum* doctrine is unfortunate not for its legal grounding but for the historically loaded language of the maxim itself.¹⁷⁵ Modern courts continue to decide cases by applying some variation of the *ad coelum* rule,¹⁷⁶ and, “[i]n the decades since *Causby*, courts’ frequent recognition of private airspace rights in the context of view easements, condominium laws, and solar access easements has left little doubt that rights in non-navigable airspace are a legitimate

172. *United States v. Causby*, 328 U.S. 256, 264–65 (1946).

173. *People v. Emmert*, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting).

174. *Id.* at 1027. It should be noted, additionally, that it has only been in the aircraft cases that the upward ownership of air space has been questioned. RESTATEMENT (SECOND) OF TORTS § 159 cmt. g (1965). The aircraft cases are distinguishable from those involving the ordinary airspace above a landowner’s property: air travel is necessary for the public good, *id.*, and national defense, Bouvé, *supra* note 160, at 238; the burden of negotiated settlements in establishing transcontinental flights is too great, RICHARD EPSTEIN, TORTS § 1.10.3 (1999); landowners have never actually possessed the upper air space, so it makes sense to prevent the landowner from excluding airlines from space that the landowner could never use, *id.*; and a landowner has been amply compensated for the loss of a right to exclude by the vast benefits of commercial air travel, *id.* These considerations are not nearly as persuasive in the case of landowners in nonaircraft cases. *But see* Scott, *supra* note 159, at 627 (“In 1946, the United States Supreme Court held that the ancient doctrine of ownership of land extending to the periphery of the universe has no place in the modern world. Although the Court was referring to public use of the air space, the same reasoning applies to public use of free running waters, especially in light of the increased importance of water recreation states like Colorado.”(footnote omitted)). While public use of free running waters has increased in importance, it is not obvious why the reasoning behind the aircraft cases applies to rivers. If anything, the river cases are more analogous to the low-flying airplane cases, where courts consistently award compensation. *See infra* notes 176–80 and accompanying text. And, with the ever-growing importance of private fishing properties, *see supra* Part I.A, the analogy to the low-flying airplane cases is even more apt, *cf.* Gast, *supra* note 159, at 251 n.18 (noting that floaters would more substantially interfere with the enjoyment of fishing properties than other properties).

175.

An Irish lawyer named Sullivan once argued an air rights case before the highest court of Great Britain. A member of the court asked during oral argument: “Mr. Sullivan, have your clients not heard of the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*?” Sullivan responded: “My lords, the peasants of Northern Ireland speak of little else.”

Steel Creek Dev. Corp. v. James, 294 S.E.2d 23, 27 n.2 (N.C. Ct. App. 1982).

176. *See, e.g.*, *Smith v. Mun. Ct.*, 245 Cal. Rptr. 300, 303 (Cal. Ct. App. 1988); *Orr v. Mortvedt*, 735 N.W.2d 610, 616–17 (Iowa 2008); *Steel Creek*, 294 S.E.2d at 27; *Brenner v. New Richmond Reg’l Airport Comm’n*, 816 N.W.2d 291, 304 (Wis. 2012).

form of property and that sub-adjacent landowners inherently possess those rights.”¹⁷⁷ Colorado courts have continued to differentiate the property interests above and below navigable air space and have recognized property rights and takings claims in that space above a landowner’s property and below the navigable airspace.¹⁷⁸ A legislative body may limit the landowner’s use of this space, but a restriction may constitute a taking.¹⁷⁹ Finally, the existence of easements does not render the *ad coelum* doctrine obsolete as a whole. In those cases where an easement exists, the landowner maintains the right to exclude, qualified by the easement.¹⁸⁰ Thus, Kansas followed the *Emmert* rule without relying on the *ad coelum* doctrine: “Owners of the bed of a nonnavigable stream have the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations.”¹⁸¹

Whatever the baggage of the *ad coelum* maxim, its essence is still applicable: the compensable property at stake in establishing a public right to float is the landowner’s right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁸²

IV. TAKINGS

A. *The Law of Takings*

Takings law consists of a two-tiered analysis.¹⁸³ At the outset, a plaintiff property owner can establish a per se taking if the landowner can prove that the regulation results in any “permanent physical occupation of real property”¹⁸⁴ or deprives the landowner of all economically beneficial or productive use of the

177. Troy A. Rule, *Airspace and the Takings Clause*, 90 WASH. U. L. REV. 421, 428 (2012) (footnotes omitted).

178. See *Claassen v. City & Cnty. of Denver*, 30 P.3d 710, 713 (Colo. App. 2000); *Thompson v. City & Cnty. of Denver*, 958 P.2d 525, 528 (Colo. App. 1998).

179. *Cf. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129–30 (1978) (regulation that limited the height of new construction was not a taking).

180. *Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365, 366–67 (Colo. Ct. App. 1984). One commentator has argued that “the [*ad coelum*] doctrine seems to have been made obsolete with . . . *Kaiser Aetna*” because “the opinion implied that the *ad coelum* concept is invalid for the purpose of determining navigability in U.S. jurisdictions.” Burns, *supra* note 159, at 594. The explanation suggested by *Bergen* is more convincing: private property owners can exclude trespassers to the extent that there is not an easement that burdens the property. *Bergen*, 683 P.2d 365. The federal navigation servitude is one such easement and has always burdened property where it applies, but the imposition of that easement where it had never existed before constituted a taking that required just compensation.

181. *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364 (Kan. 1990).

182. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

183. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001); *Animas Valley Sand & Gravel, Inc. v. Bd. of the Cnty. Comm’rs of Cnty. of La Plata*, 38 P.3d 59, 61 (Colo. 2001) (en banc) (citing *Palazzolo*, 533 U.S. 606).

184. *Palazzolo*, 533 U.S. at 617 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982)).

property.¹⁸⁵ If the plaintiff fails to meet one of these per se tests, the plaintiff is still entitled to a fact-specific inquiry to determine if a taking has occurred.¹⁸⁶

The U.S. Supreme Court has consistently held that even a de minimis physical invasion constitutes a per se taking, so that a “permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”¹⁸⁷ A government action constitutes a “permanent physical occupation” when “individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”¹⁸⁸ For these permanent physical occupations, compensation is required “no matter how minute the intrusion, and no matter how weighty the public purpose behind it.”¹⁸⁹ For example, in *Kaiser Aetna v. United States*,¹⁹⁰ the Court held that a public right of access over water that had traditionally been considered private constituted a taking because this public right of access violated the landowner’s right to exclude.¹⁹¹

While a violation of the right to exclude constitutes a per se taking, a takings analysis of other property rights must consider the relation of these rights to the property as a whole.¹⁹² Thus, in a takings analysis, individual property rights such as mineral rights, airspace rights, or hunting rights are not separable from the property as a whole but must be considered together with all the other rights that the landowner retains.¹⁹³ For example, in *Clajon Production Corp. v. Petera*,¹⁹⁴ the Tenth Circuit rejected the landowners’ claim that a hunting license requirement was

185. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

186. *Id.* at 617–18; *Animas Valley*, 38 P.3d at 61 (citing *Palazzolo*, 533 U.S. 606). The relevant factors in a fact-specific inquiry are the economic impact of the regulation of the landowner, the extent to which the regulation has interfered with distinct investment-based expectations, and the character of the government action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see also *Palazzolo*, 533 U.S. at 617. For a plaintiff to be entitled to use the fact-based inquiry, the plaintiff must fall within the category of landowners whose land has effectively been taken but whose property retains a value slightly more than de minimis. *Animas Valley*, 38 P.3d at 67.

187. *Loretto*, 458 U.S. at 426.

188. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987).

189. *Lucas*, 505 U.S. at 1015.

190. 444 U.S. 164 (1979).

191. *Id.* at 179–80 (“[W]e hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.”) (citations omitted); see also *Nollan*, 483 U.S. at 836–37.

192. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of Cnty. of La Plata*, 38 P.3d 59, 67–68 (Colo. 2001) (en banc).

193. *Id.* at 68 (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995)).

194. 70 F.3d 1566 (10th Cir. 1995).

a taking of the landowners' common law property right to hunt on their property because "the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land"¹⁹⁵ rather than the separate right to hunt. The court then rejected the plaintiffs' claim that a taking had ever occurred, for the regulation did not destroy the plaintiffs' use of the property as a whole because the plaintiffs "still c[ould] 'use their property for ranching, farming, and other livestock operations.'"¹⁹⁶

B. Taking the Right to Exclude and the Right to Fish

The preceding discussion shows that a landowner could likely prove that granting the public a right to float would constitute a per se taking. As the Court noted in *Loretto*, "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."¹⁹⁷

Kaiser Aetna and *Nollan* are particularly instructive. As *Kaiser Aetna* suggests, granting a right to float would burden historically private waters with a public right of access. This private burden is substantially similar to *Nollan*, where the landowners were required to grant an easement for the public to connect public beaches. While the specific issue in *Nollan* was whether the building permit could be conditioned on granting of the easement, the Court noted that had the state imposed the easement by itself "to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking."¹⁹⁸

Furthermore, courts have not had to rely on the *ad coelum* doctrine in finding that a legislative declaration of navigability constitutes a taking.¹⁹⁹ The deciding factor in these cases is whether the stream is navigable under state law. Some of these states have adopted broad definitions of navigability that would include many of Colorado's rivers,²⁰⁰ and other states have persuasively included recreational use to determine navigability.²⁰¹ Still, Colorado's adherence to a narrow definition of commercial navigability and insistence that there are no navigable rivers within the state²⁰² make a legislative right to float fall within the traditional rule that a statute

195. *Id.* at 1577 (citations omitted).

196. *Id.* (quotations omitted) (citation omitted).

197. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 n.5 (1982) (quoting Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967)).

198. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

199. *See United States v. Cress*, 243 U.S. 316, 322 (1917) (collecting cases); *Morgan v. King*, 35 N.Y. 454, 461 (1866); *Miller v. State*, 137 S.W. 760, 761 (Tenn. 1911) (collecting cases); Comment, *Right of States to Declare Non-Navigable Rivers Navigable*, 19 YALE L.J. 654 (1910).

200. *See, e.g., Morgan*, 35 N.Y. at 458–59; *Miller*, 137 S.W. at 762.

201. *See, e.g., Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194–96 (N.Y. 1998).

202. *See infra* Part IV.C.2.

that grants public access to a nonnavigable stream is a taking that requires just compensation.

On the other hand, a landowner would be unable to prove that legislation that granted a public right to fish amounts to a per se taking, for the regulation would not amount to a permanent physical occupation and would not completely devalue the landowner's property.

The landowner that fails the per se test is still entitled to prove that there has been a taking if the property's value is slightly above de minimis but has sufficiently depreciated to constitute a taking.²⁰³ This will be a difficult burden for a plaintiff landowner. While the right to fish has always been considered a valuable property right²⁰⁴ that cannot be taken without just compensation,²⁰⁵ the right to fish is a right incidental to property ownership, so the landowner must prove that the taking of the right to fish devalued the property as a whole. Like the right to hunt in *Clajon*,²⁰⁶ the right to fish is merely a single stick in the larger bundle of rights.²⁰⁷ *Clajon* showed how difficult it is for a landowner to prove that the loss or restriction of an incidental right amounts to a taking: even though the court acknowledged that the right had been restricted, the court held that there had not been a taking because the value of the ranch as a whole had not diminished and the ranch could be used for other purposes.²⁰⁸ Finally, even if a property owner could prove that the property had become substantially devalued by granting a public right to fish, the landowner would be subjected to the complex, fact-intensive inquiry of *Penn Station*.²⁰⁹ While some landowners could likely prove that the regulation interfered with their investment-based expectations,²¹⁰ the nature of the regulation would be reasonable.²¹¹

Consequently, a statute that grants the public a right to float through private property would constitute a taking of private property, but it would likely be impossible for a landowner to prove that a grant to the public of a right to fish

203. See *supra* Part II.A.

204. See GOULD, *supra* note 75, §§ 182–84.

205. See, e.g., *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 454–55 (N.M. 1945) (Sadler, J., dissenting) (“The wild berries growing upon my land are exclusively mine, and merely because they are wild no stranger has the right to trespass and pick them. The exclusive right of fishery in non-navigable streams is just as sacred as an owner's exclusive right to pick wild fruit and berries upon his own land. When, by virtue of public ownership of waters flowing in natural streams, we take away from an owner through which a non-navigable stream flows rights in such waters appurtenant to ownership of the land and unessential to the attainment by the state of the dominant purposes underlying the constitutional declaration that such waters belong to the public, then, in truth and reality are we violating the constitutional inhibition against the taking of private property for public use without just compensation.”).

206. See *supra* text accompanying notes 196–98.

207. James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 187–88 (1987).

208. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995).

209. See *supra* note 186 and accompanying text.

210. See *supra* Part I.A.

211. See *supra* note 201.

while floating through private property sufficiently devalued the property to constitute a taking.

C. Background Principles as a Takings Defense

Lucas held that a regulation that destroys all economic value of a property is categorically a taking unless the government can prove that the new regulation was consistent with the background principles of the state's property and nuisance law that inhered in the title itself.²¹² While the categorical taking in *Lucas* only applies to those situations in which a regulation destroys all economic value of the property,²¹³ the use of the background principles defense applies to physical occupation and *Penn Central* cases in which total economic deprivation has not occurred.²¹⁴

The background principles defense is remarkably powerful: if the government can prove that the regulation is part of the state's background of property or nuisance laws, then the regulation is not a taking, and the state does not owe the property owner compensation.²¹⁵ With an existing background principle, the government is not required to pay compensation for taking a property right because there never was a property right to begin with.²¹⁶ These arguments have been handled admirably by other commentators,²¹⁷ but the persistence of these arguments requires a brief discussion.

1. The Federal Navigation Servitude

The federal navigation servitude has been suggested as grounds for establishing a right to float in Colorado.²¹⁸ The federal navigation servitude is based on the principle that the federal government, by its authority under the Commerce Clause,²¹⁹ can ensure that navigable streams maintain the character necessary for

212. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1029 (1992).

213. *Id.* at 1015; see also Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325 (2005).

214. Blumm & Ritchie, *supra* note 213, at 326.

215. *See id.* at 322.

216. Huffman, *supra* note 207, at 173.

217. *See generally* Hill, *supra* note 7, at 341–49 (discussing federal and state navigability); 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 (2012) (discussing the public trust argument).

218. *See* Potter et al., *supra* note 6, at 473–75. The federal navigation servitude is also one of the more popular arguments used by the public in defending a right to float. *See, e.g.*, Ed Dentry, *Colorado Needs to Go with the Flow*, ROCKY MOUNTAIN NEWS, July 11, 2001, at 11C (“In U.S. law, two definitions most forcefully dictate whether a river is navigable and, therefore, free for public travel (including the river bottom and banks to the high-water mark). One, it should have a history of commercial use. Two, ‘a river that is navigable in fact is navigable in law.’ In other words, if you can float it, you may float it. U.S. law supersedes state law, even in the Republic of Colorado.”).

219. *See supra* Part II.A.1.

navigation in interstate commerce.²²⁰ Consequently, the federal navigation servitude provides public access to waters governed by the servitude²²¹ and is a defense to takings claims.²²² If any rivers in Colorado were subject to the federal navigation servitude, then the public would have a right to fish and float, and that river's landowners would have no grounds for a takings claim.²²³

It is unlikely that the federal navigation servitude applies to many rivers in Colorado. The servitude applies so far as the federal navigation power applies,²²⁴ and exercise of the federal navigation power requires that the stream is capable of being used as a continued highway for interstate commerce.²²⁵ To date, only Navajo Reservoir and the far downstream section of the Colorado River where it enters Utah have been deemed navigable for federal purposes.²²⁶ While it is true that these are only the two waters that have been designated as navigable waters and that there is the possibility that other waters are subject to federal control,²²⁷ it is unlikely that many waters in Colorado are navigable according the federal test.²²⁸ While some rivers in Colorado may be able to support interstate commerce,²²⁹ many likely do not. In *United States v. Rio Grande Dam & Irrigation Co.*,²³⁰ the U.S. Supreme Court noted that the Rio Grande was not navigable within the state of New Mexico, and “[t]he mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.”²³¹ If the lower stretches are not navigable, then it is unlikely that the upper stretches in Colorado are navigable. Others have provided convincing evidence that the upper Colorado River is incapable of sustaining trade or travel for federal purposes.²³² If larger rivers like the Rio Grande and Colorado are incapable of

220. *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

221. *See id.* at 175.

222. *See, e.g., id.*; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63–64 (1913); *see also* Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 20 (1963).

223. *See* Morreale, *supra* note 222, at 20.

224. *Id.*

225. *See supra* text accompanying note 66.

226. *Navigable Waterways in the Sacramento District*, U.S. ARMY CORPS ENG'RS, <http://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/NavigableWatersoftheUS.aspx>.

227. *See* Potter et al., *supra* note 6, at 474.

228. *See* Leonhardt & Spuhler, *supra* note 217, at 62 (“[W]est of the 100th Meridian, such navigability generally ends. . . . The rivers of the West are not like those of the Midwest or East. In their natural state, they flood in the late spring and taper off to trickles by midsummer. Some western rivers may now provide excellent sport for whitewater enthusiasts, but their nature was never that of navigable rivers; nor was navigation a common public value inextricably intertwined in the fabric of settlement between the High Plains and the Sierras.”).

229. For example, there is some evidence that logs were floated on the North Platte River from Colorado to Wyoming. *See* DAVID H. ELLIS & CATHERINE H. ELLIS, *STEAMBOAT SPRINGS* 58–60 (2009).

230. 174 U.S. 690 (1899).

231. *Id.* at 698.

232. *See* Leonhardt & Spuhler, *supra* note 217, at 61–62.

meeting the federal test, then it is unlikely that the smaller interior tributaries are capable of meeting the federal test.

2. State Navigability

Apart from the defined and established *Daniel Ball* test for federal navigability, states are free to establish their own tests for navigability,²³³ which can vary widely.²³⁴ Though many states have defined navigability for state use purposes as the capability to float logs or small recreational craft,²³⁵ others have retained a stricter commercial standard of navigability.²³⁶ But whatever the persuasive value of other jurisdictions, a broad definition of state navigability does not form part of the background principles of property law in the state of Colorado. While no appellate court in Colorado has been confronted with the scope of the state's navigability law, the Colorado Supreme Court has consistently considered that "the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state."²³⁷

233. Hill, *supra* note 7, at 342.

234. "There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question." Kinkead v. Turgeon, 109 N.W. 744, 744 (Neb. 1906).

235. See, e.g., IDAHO CODE ANN. § 36-1601(a) (2011).

236. See, e.g., *supra* note 68.

237. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds*, United States v. City & Cnty. of Denver, 656 P.2d 1, 17 (Colo. 1982); see also *In re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913) ("The natural streams of the state are nonnavigable within its limits."). In addition to this general statement in *Stockman*, the Colorado Supreme Court has specifically noted that a number of rivers are nonnavigable, including the Arkansas River, Smith v. Town of Fowler, 333 P.2d 1034, 1036 (Colo. 1959), the Eagle River, United States v. Dist. Ct. in & for Cnty. of Eagle, 458 P.2d 760, 762 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971), the South Platte River, Hall v. Brannan Sand & Gravel Co., 405 P.2d 749, 750 (Colo. 1965); Heimbecher v. City & Cnty. of Denver, 9 P.2d 280, 281 (Colo. 1932); Platte Water Co. v. N. Colo. Irrigation Co., 21 P. 711, 713 (Colo. 1889) ("It is scarcely necessary to add that the South Platte River is not navigable in Colorado . . ."), and Tomichi Creek, Hartman v. Tresise, 84 P. 685, 690 (Colo. 1905) (Bailey, J., dissenting).

The Colorado Supreme Court has never given a standard of navigability, but it is generally understood to have adopted a narrow commercial test. Craig, *supra* note 1, at 76. The ease with which the Colorado Supreme Court has taken judicial notice of nonnavigability stands out from the stacks of reporters on the topic in the common law countries. Perhaps the Colorado court's unspoken reasoning is somewhat akin to the rule in Pennsylvania:

We think that the concept of navigability should not be limited alone by lake or river, or by commercial use; or by the size of the water or its capacity to float a boat. Rather it should depend upon whether the water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes, or whether with all of the mentioned factors counted the water remains a local focus of

Because navigability was never at issue in any of these cases, there is no binding law on state navigability in Colorado,²³⁸ but it seems unlikely that the Colorado Supreme Court would abandon its long-standing assumption that there are no navigable streams within the state. Consequently, a state definition of navigability cannot be used as a background defense for a takings claim.

3. The Public Trust Doctrine

The public trust doctrine is one of the most popular arguments used by right-to-float proponents.²³⁹ There is no single definition of a “public trust doctrine,”²⁴⁰ and an expansive discussion is beyond the scope of this Note.²⁴¹ In general, however, the public trust doctrine recognizes that some resources should be preserved by the state for public use because private ownership of these resources is inappropriate.²⁴²

The U.S. Supreme Court’s recent decision in *PPL Montana* affirmed that the public trust doctrine is solely a matter of state law and does not depend on the U.S. Constitution.²⁴³ Thus, while other states have used the public trust doctrine to secure a public right to float,²⁴⁴ the scope of the public trust doctrine in Colorado must be based on Colorado law.

Colorado has long rejected the public trust doctrine as grounds for a right to float. In *Emmert*, the Colorado Supreme Court explicitly rejected the public trust doctrine as a basis for a right to float,²⁴⁵ and there is no indication that the court has abandoned its original holding.²⁴⁶ Furthermore, the public trust doctrine “is

attraction, which is the rule sensibly applicable to shallow streams and small lakes and ponds. The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private.

Mountain Props., Inc. v. Tyler Hill Realty Corp., 2001 PA Super 45, ¶ 11, 767 A.2d 1096, 1100 (quoting *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 489 (1959)). An early note plausibly argued that *Stockman* and *German Ditch* “must also be limited by the historical period in which they were delivered. At the time these cases were decided, the legal approach to the issue of navigability was confined to the traditional commercial, navigable-in-fact standard.” *Gast*, *supra* note 159, at 267. Still, the Colorado Supreme Court has consistently repeated over the past century that there are no navigable rivers in Colorado. The point is this: the modern trend may be toward a broad, recreational-based test, but that does not necessarily invalidate the commercial test as a matter of law.

238. Thus, it is not exactly correct that “[t]he Colorado Supreme Court has held no navigable streams exist in Colorado.” *Hill*, *supra* note 7 at 348. To be more precise, the Colorado Supreme Court has consistently taken judicial notice that no navigable streams exist in Colorado.

239. *See, e.g.*, *Potter et al.*, *supra* note 6, at 479–92; *Scott*, *supra* note 159.

240. *Leonhardt & Spuhler*, *supra* note 217, at 50.

241. For a helpful discussion of the public trust doctrine and why it should not be adopted in Colorado, see generally *Leonhardt & Spuhler*, *supra* note 217.

242. *Scott*, *supra* note 159, at 626.

243. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012); *see also* *Leonhardt & Spuhler*, *supra* note 217, at 49.

244. *See, e.g.*, *Kerley v. Wolfe*, 84 N.W.2d 748, 752 (Mich. 1957); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984).

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

246. Justice Hobbs writes that “*Emmert* is clear on the point . . . that the Colorado Supreme Court will not rely on public trust theory to resolve the issue of recreational use of

fundamentally incompatible with the Colorado Constitution's [system of prior appropriation].²⁴⁷

A related argument is that the language of the Colorado Constitution can support a right to float without relying on a public trust theory.²⁴⁸ In other words, the language in article XVI, section 5 should be interpreted as granting a public right of access to the state's waters. While this argument does not rely on the language of the public trust theory, its effect is the same and is equally foreclosed: in Colorado, the public ownership of water protected by the constitution only "serves the public interest by allowing public and private entities to appropriate water for beneficial use."²⁴⁹

4. English Common Law and Prescription

One of the more interesting arguments in favor of a right to float is that the right is protected by section 2-4-211 of the Colorado Revised Statutes, which adopts English common law as the law of the state until repealed by the General Assembly.²⁵⁰ Because "English common law gave all subjects rights to navigate and to make other uses of waterways such as fishing and hunting,"²⁵¹ the argument goes, "Colorado should adopt the English common law standard of navigability in fact."²⁵² The proposed right-to-float bill 10-1188 used section 2-4-211 and the English common law as the legal authority for establishing a right to float in Colorado.²⁵³

Despite the broad public right of navigation in tidal rivers,²⁵⁴ English law established no general right of public navigation in nontidal rivers,²⁵⁵ but a right of navigation could be established in the same way as a highway: by dedication by the owner of the riverbed, by Act of Parliament, by usage that could give rise to the presumption of a lost grant, and by usage since time immemorial.²⁵⁶ Immemorial

the public's flowing water resources as it runs through the beds and banks of the stream." Hobbs, *supra* note 35, at 126.

247. *Id.*

248. See Potter et al., *supra* note 6, at 489–90; Burns, *supra* note 159, at 597.

249. Hobbs, *supra* note 35, at 127.

250. COLO. REV. STAT. ANN. § 2-4-211 (West 2004) ("The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.").

251. Potter et al., *supra* note 6, at 493 (quoting DAVID H. GETCHES, WATER LAW IN A NUTSHELL 218 (3d ed. 1997)).

252. *Id.* at 494.

253. H.B. 10-1188, 67th Gen. Assemb., 2d Reg. Sess. § 2(a) (Colo. 2010) (House reengrossed version).

254. See *supra* Part II.A.1.

255. 39 HALSBURY'S LAWS OF ENGLAND ¶¶ 730–31 (3d ed. 1957).

256. Attorney-General *ex rel.* Yorkshire Derwent Trust Ltd. v. Brotherton, [1990] Ch. 185 (C.A.) 197, *rev'd on other grounds*, [1992] 1 A.C. 425 (H.L.) (1991).

usage allowed a user to establish a right through prescription so long as the use could be dated to 1189,²⁵⁷ which made establishing a public highway on a nontidal river through common law prescription particularly difficult.²⁵⁸ There appears to be no English case law that holds that a highway was established by prescription by recreational use.²⁵⁹ More importantly, Colorado has adopted its own statutory rule for creating a highway through prescription, which thus supersedes the English law invoked in the right-to-float bill.

In Colorado, public highways may be established by prescription,²⁶⁰ and such action is not a taking that requires just compensation.²⁶¹ If rivers are public highways, prescription is potentially a powerful defense to a takings claim.

In Colorado, a public highway can only be established if the following three elements are met:

- (1) members of the public must have used the road under a claim of right and in a manner adverse to the landowner's property interest;
- (2) the public must have used the road without interruption for the statutory period of twenty years; and
- (3) the landowner must have had actual knowledge of the public's use of the road and made no objection to such use.²⁶²

Navigable rivers have long been described as public highways in English²⁶³ and American law.²⁶⁴ The Colorado Supreme Court has acknowledged this rule in dicta,²⁶⁵ though there are no published cases in Colorado where a public right of navigation was established through prescription.

While navigable rivers have been described as highways, the more difficult question is whether a nonnavigable river—which, by its very nature is not a public highway—falls within statutes that establish public highways by prescription.²⁶⁶

257. *Id.*

258. 19 HALSBURY'S, *supra* note 255, ¶ 60.

259. *Id.*

260. COLO. REV. STAT. ANN. § 43-2-201(1)(c) (West 2004).

261. Bd. of Cnty. Comm'rs of Saguache Cnty. v. Flickinger, 687 P.2d 975, 984–85 (Colo. 1984) (en banc).

262. McIntyre v. Bd. of Cnty. Comm'rs, Gunnison Cnty., 86 P.3d 402, 407 (Colo. 2004) (en banc).

263. For traditional English cases, see generally Attorney-General *ex rel.* Yorkshire Derwent Trust Ltd. v. Brotherton, [1990] Ch. 185, 193–96 (C.A.) 197 (collecting cases), *rev'd* [1992] 1 A.C. 425 (H.L.) (1991).

264. *E.g.*, United States v. Utah, 283 U.S. 64, 82 (1931); Coe v. Town of Errol, 116 U.S. 517, 518–19 (1886); The Montello, 87 U.S. 430, 442 (1874).

265. See Hale v. Sullivan, 362 P.2d 402, 405 (Colo. 1961) (en banc) (including as highways “ferries, canals and navigable rivers”) (citing *Strange v. Bd. of Comm'rs of Grant Cnty.*, 91 N.E. 242, 247 (Ind. 1910)). Neither *Hale* nor *Strange* involved rivers.

266. Compare Attorney-General *ex rel.* Yorkshire Derwent Trust Ltd. v. Brotherton, [1992] 1 A.C. 425 (H.L.) (1991) (holding that prescription statute could not apply because nonnavigable streams were fundamentally distinguishable from public highways), with Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344–45 (8th Cir. 1977) (holding, without extensive explanation, that under Arkansas law the laws

The most analogous authority to Colorado is *State ex rel. Meek v. Hays*,²⁶⁷ where the Kansas Supreme Court considered whether prescription applied to rivers after rejecting the so-called modern recreational test for navigability in favor of *Emmert's* rule that the public has no right to float in nonnavigable streams.²⁶⁸ The *Meek* court agreed that a river could be established as a public highway by prescription so long as a claimant met Kansas's strict requirements for public rights gained by prescription.²⁶⁹ In *Kratina v. Board of Commissioners*,²⁷⁰ the Kansas Supreme Court held that public rights could only be gained by prescription where public officials had taken some positive action, either formally or informally, to show the intention of the public to establish a public highway.²⁷¹ This may be a difficult burden to meet in the case of a river, for

[n]either occasional use of the creek by a large number of canoeists nor frequent use by a small number of canoeists gives rise to a prescriptive right in the public to use nonnavigable streams. A public prescriptive right arises during the prescribed period when public use becomes so burdensome that government must regulate traffic, keep the peace, invoke sanitary measures, and insure that the natural condition of the stream is maintained.²⁷²

Like Kansas, Colorado has adopted the strict *Kratina* rule.²⁷³ Thus, in Colorado, "the public entity must establish its claim of right by some overt action that puts the landowner on notice that it intends to include the public way within its road system; only then can the public way be considered a 'road' or 'public highway,' thus beginning the prescriptive period."²⁷⁴

As in *Meek*, it will likely be difficult for the state to prove that a public entity has taken some action that demonstrates the public intends that a river is a public highway. Even if public entities take some sort of action like managing public boat ramps or access points, they are unlikely to do so while claiming the river as a public highway. For example, Colorado State Parks has permissive agreements with landowners on the Arkansas River and posts areas of private water along the riverbanks on the Yampa River.²⁷⁵ Because the prescription period does not start until the public entity takes action, historic use of a stream will not count toward the claim, and the cases in which the government has taken action may be too recent to win the prescription claim.

of prescriptive rights over land apply by analogy to nonnavigable rivers).

267. 785 P.2d 1356 (Kan. 1990).

268. *Id.* at 1363.

269. *Id.*

270. 548 P.2d 1232 (Kan. 1976).

271. *Id.* at 1237.

272. *Meek*, 785 P.2d at 1363.

273. *McIntyre v. Bd. of Cnty. Comm'rs, Gunnison Cnty.*, 86 P.3d 402, 407–08 (Colo. 2004) (en banc).

274. *Id.* at 408.

275. See Jerd Smith, *Fighting for the Right*, HEADWATERS, Fall 2010, at 11, 16.

V. JUST COMPENSATION

A. Just Compensation and Land Values

Just compensation is a limiting principle of government takings²⁷⁶ and remains a check on legislative overreach.²⁷⁷ Just compensation measures the value of the property right lost by measuring the diminution in the fair market value of the property after the taking.²⁷⁸ In a normal partial takings case, the value of just compensation includes not only the value of the property taken but also the damage to the remainder of the property.²⁷⁹ Thus, an exercise of eminent domain that takes an easement for a highway would require compensation for the easement taken and the damage to the remainder of the property: the property, once a single tract, has now been effectively divided into two separate, smaller parcels.²⁸⁰ In other words, the price of just compensation in establishing the right to float or fish would be the sum of the value of the property right taken and the diminution of the property as a whole caused by the loss of that property right. Personal losses are not included in this calculation: only damage to the property's market value is compensable.²⁸¹

Determining the amount of just compensation in a partial takings case is one of the most difficult types of condemnation appraisals.²⁸² Landowners may vastly overvalue their property,²⁸³ and takings parties will secure professional appraisers who are willing to testify in a way favorable to that party.²⁸⁴ Naturally, then, property rights advocates overestimate the value of the property taken, and right-to-float advocates tend to dramatically underestimate the value of the property taken.²⁸⁵

Writing in dissent in *Emmert*, Justice Carrigan suggested the diminution in value caused by floaters was de minimis: “[T]he ‘trespassers’ were merely making a fleeting, non-consumptive use of the quality of buoyancy inherent in the water. A prosecution for trespass is no more appropriate than would be such a prosecution

276. See JOSEPH WILLIAM SINGER, PROPERTY § 14.1 (3d ed. 2010).

277. See, e.g., Leonhardt & Spuhler, *supra* note 217, at 69 (“[T]he issue of potential takings claims by riparian landowners . . . remains a constant check on the development of an expansive public access right in Colorado.”).

278. See *supra* notes 194–97 and accompanying text.

279. COLO. REV. STAT. ANN. § 38-1-114(1), (2)(c) (West 2013); *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1156 (Colo. 2002) (en banc).

280. See WILLIAM G. MURRAY, FARM APPRAISAL AND VALUATION 400 (4th ed. 1961).

281. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188, 1197 (Colo. App. 1999).

282. MURRAY, *supra* note 280, at 402.

283. See Jeffrey Evans Stake & Fiery Cushman, *Determining “Just Compensation”* 7 n.19 (Ind. Univ. Maurer Sch. Law–Bloomington Legal Research Paper Series, Research Paper No. 173, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633920 (describing an English case where the property owner asked for £9,000,000 but was awarded only £121,000).

284. See MURRAY, *supra* note 280, at 410–12 (describing the vast gap in values offered by the competing appraisers).

285. Compare *supra* text accompanying note 41, with *infra* text accompanying note 287.

against one making use of the buoyancy of air”²⁸⁶ Likewise, at least two commentators have cited *Madison v. Graham*²⁸⁷ for the proposition “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.”²⁸⁸

Neither Justice Carrigan’s dissent in *Emmert* nor the Ninth Circuit’s holding in *Madison* is particularly helpful. Justice Carrigan was concerned that recognizing the *ad coelum* doctrine in Colorado would lead to absurd and unjust results.²⁸⁹ The force of Justice Carrigan’s argument is mostly rhetorical. While there is no doubt that some brief intrusions of a landowner’s air space may be de minimis, it does not follow that all that is at stake is simply the “buoyancy of air.” This is why courts have consistently found that landowners have a cause of action against invasions of the space above a landowner’s property.²⁹⁰

Relying on *Madison* is similarly problematic. While a Colorado court would look to federal precedent in a takings case,²⁹¹ *Madison* is not reliable authority for the proposition that a right to float constitutes a de minimis diminution in a property’s value. In *Madison*, the plaintiffs challenged the Montana Stream Access Law²⁹² as violating their Fourteenth Amendment right of substantive due process but failed to plead that the law was an unconstitutional taking.²⁹³ The federal district court rejected the Fourteenth Amendment argument for failure to state a claim for which relief could be granted.²⁹⁴ The court noted in passing that “the touching of the private streambed by a wader . . . is de minimis and causes no more interference with private property rights than does a floater”²⁹⁵ and expressed skepticism about whether a taking had even taken place.²⁹⁶ The court made clear that a takings claim had not been pleaded and that the court was not deciding a

286. *People v. Emmert*, 597 P.2d 1025, 1032 (Colo. 1979) (Carrigan, J., dissenting) (en banc); see also Helton, *supra* note 1, at 871–72 (agreeing with Justice Carrigan and arguing that a right to float “should not amount to a compensable taking”).

287. 316 F.3d 867 (9th Cir. 2002).

288. Helton, *supra* note 1, at 871 (citing 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)); see Adams & Winterton, *supra*, at 651 n.234 (“The Ninth Circuit affirmed that the legislation did not amount to a taking of property under the Fifth or Fourteenth Amendments because, far from denying the property owner all economically viable use of the land, the effect of the statute on the riparian owners’ property rights was ‘de minimis.’” (citing *Madison*, 316 F.3d at 872)). See *infra* text accompanying notes 292–99 for a different interpretation of *Madison*.

289. *Emmert*, 597 P.2d at 1032.

290. See *supra* text accompanying note 176.

291. See *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of the Cnty. of La Plata*, 38 P.3d 59, 62 (Colo. 2001).

292. MONT. CODE ANN. § 23-2-302(1) (2011).

293. *Madison v. Graham*, 126 F. Supp. 2d 1320, 1322 (D. Mont. 2001), *aff’d* 316 F.3d 867 (9th Cir. 2002).

294. *Id.* at 1325.

295. *Id.* at 1324.

296. *Id.* at 1325–26.

takings claim.²⁹⁷ On appeal, the Ninth Circuit held that the plaintiffs should have proceeded under the takings clause, but “in light of the appellants’ steadfast disclaimer that they do not rely on the Takings Clause . . . , we do not construe their claims as takings claims. This leads to the inevitable conclusion that . . . the district court correctly dismissed their complaint with prejudice.”²⁹⁸ Thus, neither the district court nor the court of appeals ever addressed the takings claim as such, and the district court’s remark that neither a floating right nor a wading right interferes with the property is only dicta.²⁹⁹

The larger problem with these arguments is that they fail to address the reasons that landowners want to exclude floaters in the first place. No landowner would complain about a taking of the “buoyancy of water”: landowners are concerned with privacy,³⁰⁰ exclusive fishing easements,³⁰¹ being held liable for injuries sustained by floaters,³⁰² and the ability to build cattle fences and water diversion structures across the stream.³⁰³ To the extent that these values are reflected in the real estate market, their loss should form the value of just compensation in a takings claim.

B. The Value of the Right to Exclude and the Exclusive Right to Fish

As a preliminary matter, some of the landowners’ concerns truly are de minimis. For instance, Colorado already limits landowner liability for landowners who allow uncompensated recreational use.³⁰⁴ Additionally, establishing a right to float would not prevent landowners from building livestock fences across streams that run through their property. Landowners can install fencing with float gates that allow floaters but prevent livestock from passing through,³⁰⁵ which has been used effectively in Montana.³⁰⁶

More important is the value attributable to landowner privacy and exclusive fishing easements. The value of landowner privacy will depend on how the market thinks of that privacy. If privacy means the ability to enjoy land without anyone floating through it, then establishing a right to float should not substantially diminish the property as a whole because a landowner’s right to exclude is in some

297. *Id.* at 1325.

298. *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002).

299. The court’s assertion that there is no distinction between a wader and a floater is not particularly persuasive. The court might be right as a matter of Montana law, but other states have been willing to draw this distinction. This is why the Wyoming Supreme Court limited public access to floaters but prohibited waders, *see Day v. Armstrong*, 362 P.2d 137, 146–47 (Wyo. 1961), and why the Utah legislature overturned the Utah Supreme Court’s holding that wading was allowed across private property in *Conatser v. Johnson*, 2008 UT 72, 194 P.3d 897 (Utah 2008), *see* UTAH CODE ANN. §§ 73-29-101 to -205 (West Supp. 2012).

300. *Hill*, *supra* note 7, at 332.

301. *Id.*

302. GOVERNOR’S TASK FORCE, *supra* note 124, at 5.

303. *Hill*, *supra* note 7, at 332.

304. *See* COLO. REV. STAT. ANN. § 33-41-103 (West 2006 & Supp. 2012).

305. GOVERNOR’S TASK FORCE, *supra* note 124, at 7; *Gast*, *supra* note 159, at 263.

306. *See Smith River State Park Frequently Asked Questions*, MONT. STATE PARKS, <http://stateparks.mt.gov/smith-river/smithRiverFAQ.html>.

ways already qualified, such that a landowner cannot say that the property today has no floaters going through it. After the passage of section 18-4-504.5, floating is no longer a criminal trespass, so landowners cannot simply call the sheriff to arrest floaters.³⁰⁷ Instead, a landowner's sole remedy to exclude floaters is an action for civil trespass. While a civil trespass claim can be effective, as it was on the Lake Fork in 2001 and the Taylor in 2010, a civil trespass claim can be costly and difficult to prove.³⁰⁸ Thus, the market today accepts that a landowner cannot stop every boat that floats through the property because a landowner cannot stop floaters with criminal prosecution and is unlikely to stop floaters with a civil action. Furthermore, many landowners have already reached voluntary agreements with boaters,³⁰⁹ which suggests that many landowners expect and accept a certain amount of boaters each year. Thus, landowners seeking compensation cannot say that they have lost an absolute right to privacy; a right to float is not the same as building a highway through a pasture where there was no highway before.

The better argument is that having a civil remedy available is necessary for a right to privacy. Even though some floaters will inevitably get through, the landowner retains at least some right to exclude some floaters if the landowner needs to. The problem for a landowner seeking substantial just compensation is the difficulty of proving that the loss of this legal remedy is sufficient to diminish the fair market value of the property. This is a formidable task: passing right-to-float legislation will likely not increase the amount of boaters traveling through the property because the existing right to a civil remedy appears to serve no deterrent effect on boaters now.³¹⁰

Since just compensation is measured by fair market value and fair market value is measured by comparable sales, a landowner will have to show that the value of the property has decreased in comparison to other similar properties. This will be difficult for several reasons. First, there is some anecdotal evidence that a landowner's civil remedy does not contribute to property values because some landowners assume that boaters already have the right to float. In *Cannibal Outdoors*, the property owner was apparently only concerned with preventing liability in case floaters were hurt while traveling through the property.³¹¹ While the controversy over floating may be better known since the cases in 2001 and 2010, it is still not so obvious that a right to exclude floaters is contributing to land values. Furthermore, it is unclear how much the civil right to exclude all floaters is reflected in the current fair market value of properties. Montana provides a telling

307. Woodard AGO, *supra* note 150, at 5.

308. See Hannay Memo, *supra* note 7, at 3 (noting that a landowner seeking an injunction for civil trespass would have to establish all of the factual and legal elements of the tort).

309. GOVERNOR'S TASK FORCE, *supra* note 124, at 6.

310. Over 400,000 commercial user days were logged last year alone. See COLO. RIVER OUTFITTERS ASS'N, *supra* note 15.

311. See Rutberg, *supra* note 13 ("When the landowner got a call from the BLM in 1998, warning him that one of his cow fences across the river was in the process of being washed away, he called his lawyer; he was concerned about his responsibility to keep the river safe for boaters. 'Our lawyer said he didn't think they had a right to be there in the first place,' he says.").

example. Even though Montana affirmed a right to float in 1984,³¹² property sales in the 1990s “were driven by the specific goal of obtaining exclusive access to the region’s famed fisheries,”³¹³ which resulted in “phenomenal increases in the value of land.”³¹⁴ Thus, in Montana at least, the public’s right to float did not diminish land values, and buyers did not perceive public access as diminishing their privacy expectations. The results appear to be the same in Idaho, New Mexico, and Wyoming.³¹⁵

Second, a properly drafted statute would not reduce property values by decreasing demand. In a typical takings case, a landowner can prove the diminution of a single piece of property by comparing it to those properties that have not been so affected. For example, a landowner can calculate the cost of diminution caused by a highway easement by showing a comparable property without a highway easement. If a right-to-float statute applied to all rivers in the state, then there would be no unaffected properties, and prospective buyers would not be able to choose between parcels that do or do not allow floating.

Third, it is unlikely that the civil remedy to exclude floaters is contributing to property values because of the nature of the market. Today, the highest and best use for the most desirable properties is as a recreational ranch rather than as a traditional working ranch.³¹⁶ The market for recreational ranches is driven by buyers who are willing to look throughout the West for property, which creates a stabilizing effect on prices and creates comparable values for comparable properties throughout the entire region.³¹⁷ In other words, it does not appear that property owners are choosing Colorado because of the civil remedy to exclude floaters. Moreover, arguments against a right to float may overvalue the effect privacy has in driving the recreational ranch market. While some purchasers may value privacy and exclusivity, others may be more concerned with creating a new lifestyle.³¹⁸ Others may be more interested in making savvy investments that will appreciate over time, purchasing legacy ranches that they can pass to their heirs, buying properties that provide exclusive big game hunting opportunities, or even with

312. See *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984).

313. Gosnell et al., *supra* note 11, at 992; see also *id.* at 1000 (“[N]ewcomers purchasing ranches in southwestern Montana often do so with a strong interest in privacy and exclusivity.”).

314. *Id.* at 992.

315. See Brooke Lange, *The Sporting Life*, VACATION HOMES, Oct.–Nov. 2006, at 25 (describing the market for river properties). Comparison to these states is somewhat less valuable than Montana in showing that public access will not diminish property values because their public access laws have been in place for decades, see sources cited *supra* note 2, and property values may have had time to recover, but comparison to these states is instructive to the extent that potential buyers are searching for properties throughout the West and comparable properties tend to sell for comparable prices across the West.

316. See Sarah Drummond, *Hunting for Recreational Properties*, COM. INVESTMENT REAL ESTATE, Jan.–Feb. 2005, at 32.

317. See Clark Wheeler, *Newsletter: 2012—Annual Land Study Report*, NORMAN C. WHEELER & ASSOCIATES, <http://www.nwheeler.com/Pages/Newsletter.aspx> (describing market trends in Montana and throughout the West).

318. See Trish Bennett, *City Slickers*, UNIQUE HOMES, July 2005, at 332, 332.

owning a prize property to show their family or business associates.³¹⁹ Even purchasers of a fishing property look at the relevant amenities offered in the property's market in making their decision.³²⁰

Finally, it is unlikely that granting the public a right to fish would require substantial compensation. At the outset, it is unlikely that such a right would even rise to the level of a taking requiring compensation because the statute would be evaluated on its effect on the full rights of the property, not the single right to fish.³²¹ This alone will be a significant hurdle for most property owners.

Even if granting the public a right to fish is a taking, the taking may not require substantial compensation. While some properties have advertised exclusive fishing as a key amenity, those same properties have often expended tremendous amounts of money in developing the fishery itself.³²² In other words, the value attributable to the property may be more attributable to the investments in the quality of the fishery rather than the exclusive right to the fishery itself. Thus, not only will the landowner have to prove that there has been a diminution in the fair market value of the property, the landowner will also have to prove that the diminution is attributable to the public's new right to fish. This is further complicated by a general public sense that the public already has the right to fish.³²³ even though incorrect, it informs the general understanding of the market, so the market may have already adjusted for the public's right to fish.

Even though landowners might value a right to exclude and an exclusive right to fish, it is not apparent that these rights contribute significantly to the fair market value of the property. If that is the case, then the legislature could act effectively, without the fear of overwhelming compensation. It is more likely that the administrative costs of providing compensation would be the most significant cost.³²⁴ These administrative costs may be sufficient to prevent the legislature from acting, but this is where the debate should take place, taking into account the cost of establishing a right to float and the benefits that the right would provide.

CONCLUSION

Right-to-float advocates have convincingly argued that establishing a public right to float in Colorado best promotes public policy,³²⁵ but their arguments for the legal authority to establish such a right have been unpersuasive. While right-to-

319. RanchesForSale, *Hall and Hall—Eric O'Keefe of the Land Report*, YOUTUBE (Mar. 20, 2011), <https://www.youtube.com/watch?v=INvBmiRVxMI>.

320. *Cf.* Lange, *supra* note 315, at 27 (“Fisherman looking to invest in tax-friendly Wyoming, which boasts no state income or estate taxes, typically pursue active water, acreage and access to Jackson Hole’s many amenities and activities, including golf, fine dining, a world-class symphony, museums and film festivals.”).

321. *See supra* notes 194–98, 203–10 and accompanying text.

322. *See, e.g.*, RanchesForSale, *supra* note 28.

323. *See, e.g.*, *Public Ownership of Rivers in Colorado*, NAT’L ORG. FOR RIVERS, <http://www.adventuresports.com/river/nors/states/co-law.htm>.

324. *See* COLO. REV. STAT. ANN. §§ 38-1-101 to -122 (West 2007 & Supp. 2012) (providing the complex statutory regime for providing compensation).

325. *See, e.g.*, Helton, *supra* note 1, at 867–68.

float advocates have shown that Colorado is out of step with the rest of the West, they have failed to adequately consider the formidable barriers created by Colorado's unique set of precedents. Further, right-to-float advocates have failed to fully address the scope of landowner's rights, and, in doing so, they risk achieving only a partial victory—perhaps securing a right to float but leaving potential areas of conflict unresolved.

At the same time, property advocates have overstated their hand, and the legislature has fallen for their bluff. Even if landowners do have the right to exclude floaters, the value of this right is not sufficient to prevent the legislature from acting, and right-to-float advocates should not avoid confronting the issue of compensable property rights head-on. By confronting this issue directly, right-to-float advocates can create a strong, legally grounded right to float that can withstand future challenges, promote public policy throughout the state, and effectively address the rights of both landowners and the public. Property rights advocates have warned that “[i]f the General Assembly is to enact a law opening streams flowing through private lands to public use, it must provide for, and be prepared to pay, just compensation.”³²⁶ Instead of being intimidated into inaction, the legislature should embrace this requirement as a necessary step to opening rivers to the people of Colorado.

326. Hill, *supra* note 7, at 350.