

# [***ARTICLE:LEGAL UNDERPINNINGS OF THE RIGHT TO FLOAT THROUGH PRIVATE PROPERTY IN COLORADO: A REPLY TO JOHN HILL***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:46CJ-K400-00SW-508C-00000-00&context=1516831)

Spring, 2002

**Reporter**

5 U. Denv. Water L. Rev. 457 \*

**Length:** 25404 words

**Author:** LORI POTTER, STEVEN MARLIN AND KATHY KANDA+

+ Lori Potter practices environmental, public land, and water law as a member of the firm of Kelly - Haglund - Garnsey + Kahn LLC Denver, ***Colorado***. Ms. Potter serves as counsel for defendants in Gateview Ranch, Inc. v. Cannibal Outdoor Network, Inc., Case No. 01CV53, Gunnison County District Court, in which a rafting company and its owners are being sued for civil trespass for floating through private land. The views expressed in this article are the personal views of the authors, and do not represent and should not be construed as the positions of the defendants in the litigation. Steven Marlin practices natural resources and environmental law in ***Colorado*** as an associate with Davis Graham & Stubbs LLP. He earned a J.D. and Masters in Environmental Law with honors from Vermont Law School, and an LL.M. in Natural Resources from the University of Denver College of Law, where he served on the Water Law Review staff. Kathy Kanda is a member of the Class of 2003 at the University of Denver College of Law. She is a staff editor of the Denver University Law Review and past member of the Water Law Review staff. Ms. Kanda was Communications Director at the ***Colorado*** Department of Natural Resources from 1991-2000. She received her B.A. with distinction from the University of ***Colorado*** in 1976.

**Text**

**[\*457]**

[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). INTRODUCTION

Citizens of ***Colorado*** and tourists from around the world have enjoyed floating ***Colorado***'s world class ***rivers*** for years. They have made the rafting industry into an economic force, producing more **[\*458]** than $ 125 million per year in revenue. [[1]](#footnote-2)1 More people go whitewater rafting in ***Colorado*** than in any other state. [[2]](#footnote-3)2 Recreational boating also draws countless kayakers, canoeists, and rafters to the ***rivers*** and streams of the state. Running the ***rivers*** of ***Colorado*** is part of ***Colorado***'s continuing frontier heritage - essential to the state's quality of life and vital tourism economy. Indeed, the state of ***Colorado*** is named for the mighty ***river*** that rises here and cuts rugged canyons as it traverses the state.

The ***Colorado*** Supreme Court addressed public use versus exclusive private use of ***Colorado***'s waterways as long ago as 1906, when the court held that ownership of a non-navigable streambed in ***Colorado*** included exclusive rights to fish the water flowing over the streambed. [[3]](#footnote-4)3 The rights of public boaters to float ***rivers*** through private property in ***Colorado*** came to the forefront in the state with People v. Emmert, [[4]](#footnote-5)4 decided in 1979, where the court upheld the criminal trespass conviction of a boater who stepped on the bed of a non-navigable ***river***. [[5]](#footnote-6)5 The court in Emmert concluded the public has no right under the ***Colorado*** Constitution to use non-navigable waters overlying private lands for recreational purposes without permission from the owner of the bed. [[6]](#footnote-7)6

Because the holding in Emmert addressed criminal trespass from recreational use of a non-navigable ***river***, what remains unresolved in ***Colorado*** is whether boaters who float through private property on navigable ***rivers*** without touching the beds and banks (absent emergency portage), are subject to civil liability for trespass. This issue is now wending its way through the ***Colorado*** state courts. When resolved, it will either reaffirm the public's right to float the state's navigable ***rivers***, or provide riparian owners with control of the waters of ***Colorado***'s navigable ***rivers*** and streams simply because they own the beds or banks.

Those who argue citizens are prohibited from floating certain stretches of ***Colorado*** ***rivers*** that pass through private land do not take into account the history and law surrounding citizen access to ***rivers*** in this state and around the country. This article summarizes the historical nature of such public access over waters, and discusses the principles of federal and state constitutional, statutory, and common law that create and protect the public's right to float waters through private property in ***Colorado***. First, the article explains how this public access exists under a doctrine known as the federal navigational servitude, which is rooted in the traditional principle that navigable waterways cannot be privately owned. Second, the article explains the **[\*459]** bases under ***Colorado*** statutory law for the right to float navigable ***rivers*** in the state. Third, the article takes the reader on a journey through the mazes of the common law doctrines of equal footing and public trust, and describes how these doctrines provide a foundation on which public access over navigable waters is constructed where private ownership of the underlying streambed is asserted. Fourth, the article explains how the right to public access to waters flowing over privately owned beds and banks might exist, not only under the ***Colorado*** Constitution, but also pursuant to a public trust in the state's waters. Finally, the article demonstrates how citizens may have the right to boat particular navigable ***rivers*** through private property in ***Colorado*** based on other principles of real property law.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). NAVIGABILITY

A. Overview of Navigability.

For waters subject to federal commerce authority, "navigability" is the "legal benchmark for defining the realm of public use." [[7]](#footnote-8)7 In the Daniel Ball, [[8]](#footnote-9)8 decided in 1870, the Supreme Court articulated the well established definition of navigability in the following context:

Those ***rivers*** must be regarded as public navigable ***rivers*** in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. [[9]](#footnote-10)9

Public rights of passage and use may be assumed for waters designated as navigable under this definition. [[10]](#footnote-11)10 This principle is the core of the federal navigational servitude, a doctrine based on the federal Commerce Clause providing the federal government with the authority to protect and improve public navigation over such waters, regardless of who owns the beds and banks.

This oft-cited passage from the Daniel Ball also recognizes the **[\*460]** second context in which navigability may shape public use rights. Specifically, states may develop (and, indeed, many have developed) their own definitions of navigability for distinguishing public from private waters for state purposes. In this regard, a waterway that is non-navigable by federal standards may nonetheless be "public" under a state navigability standard for determining public use rights.

Finally, a federal definition of navigability that is based on, but is significantly more expansive than, the Daniel Ball definition determines title to lands underlying waterways. [[11]](#footnote-12)11 Lands beneath waters that are navigable under the federal test for title vested in the original colonies before nationhood [[12]](#footnote-13)12 and, in other states, upon their entry into the Union [[13]](#footnote-14)13 under the equal footing doctrine. [[14]](#footnote-15)14 Because such waters are navigable under a federal definition and the lands beneath them belong to the states, logic dictates public use rights would attach.

Technically, navigability for title is a federal question. [[15]](#footnote-16)15 However, because many such waters "are not adapted to, and probably will never be used to any great extent for commercial navigation," [[16]](#footnote-17)16 they have not invited federal regulatory attention. Therefore, state courts have had to interpret federal law in resolving questions concerning navigable-for-title and appurtenant public use rights for many water bodies, with predictably uneven results. [[17]](#footnote-18)17

Most recorded disputes have not been between federal and state claimants. Rather, they have arisen when a riparian landowner, who had assumed title to submerged lands within or adjacent to his or her property, comes into conflict with a state agency or citizens' organization claiming title in the state, often for public access and/or environmental reasons. In this regard, navigability for title is frequently the threshold question for determining public use rights to any given water body.

**[\*461]** Unfortunately, the case law and commentary have not arrived at consistent terms to distinguish the three types of navigability described above. To minimize confusion, and for the purposes of this article:

. "Navigable for federal purposes" or "federal navigability" refers to whether a water body satisfies the navigability test for federal regulation of interstate commerce, as well as the navigability test for determining title to submerged lands, unless otherwise specified for one or the other purpose.

. "Navigable for title" refers specifically to waters for which underlying lands passed from the federal government to the state at statehood.

. "Navigable for use," "navigable for state purposes," or "state navigability" refers to state standards of navigability for waters that are not navigable under any federal definition or test.

Where "navigability" stands alone, it is used in its generic sense unless otherwise defined. Note also, the term "navigable in fact" is avoided. The term has been used widely, but inconsistently, in both case law and commentary. At times, the term means "navigable for federal purposes" and, at others, it means "navigable for use," as those terms are defined above.

B. The Navigable Servitude

1. Traditional Federal Navigational Servitude

The federal navigational servitude is a doctrine under which the federal government protects the public right of navigation on the nation's naturally navigable waterways, including the right of free public passage. Under the navigational servitude, when federal action to improve navigation damages littoral or riparian owners' interests in navigable waters, no compensation for a taking under the Fifth and Fourteenth Amendments of the Constitution is required. [[18]](#footnote-19)18 The servitude extends only to the ordinary high water mark of the navigable waterway, and does not cover waterways that have become navigable through private expenditures. [[19]](#footnote-20)19

The federal navigational servitude originates from English common law, which viewed navigable water as incapable of being privately owned, giving the Crown dominion over such waters to protect the public's right to free passage. [[20]](#footnote-21)20 The United States Constitution incorporates this concept in the Commerce Clause, **[\*462]** giving the federal government the power to regulate activities affecting commerce. [[21]](#footnote-22)21 The power to regulate commerce encompasses the authority to regulate and improve navigation. [[22]](#footnote-23)22 Moreover, the Supreme Court has ruled that the power to regulate commerce includes control of all the navigable waters of the United States for navigational purposes, and, therefore, such navigable waters are the "public property of the nation." [[23]](#footnote-24)23 By implication, the federal navigational servitude is a component of the Commerce Clause. [[24]](#footnote-25)24

Title to lands beneath navigable waters can be held by a state as a condition of its admission into the Union under the equal footing doctrine, or by Indian tribes or private parties through pre-statehood federal grants, [[25]](#footnote-26)25 or post-statehood transfers by the state. [[26]](#footnote-27)26 The federal government has a paramount interest in maintaining the flow of commerce over the nation's navigable waterways, and it has the authority to do so under the Commerce Clause. Therefore, interests in such waters, including title to the underlying beds and banks held by a state, an Indian tribe, or a private party, are qualified interests that remain subject to the federal government's exercise of the navigational servitude power. The Supreme Court has described the nature of the federal navigational servitude and its relationship to private interests in navigable waterways:

If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. [[27]](#footnote-28)27

In Lewis Blue Point, the lessee of privately owned land beneath a navigable bay located in New York state challenged a federal dredging project that would destroy an oyster plantation located on the bay bed. The purpose of the dredging project was to deepen the channel across the bay to improve navigation. The owner/lessor of the bay bed **[\*463]** received title to the land through royal patents, issued prior to New York's statehood. The Court addressed the issue of whether the dredging project constituted a taking that required compensation. [[28]](#footnote-29)28

The Court held the owner of legal title to oyster beds underlying navigable waters in New York had no private property rights entitling him, or his lessee, to compensation for the destruction of the oyster plantation by a federal dredging project. [[29]](#footnote-30)29 The Court emphasized that title to the beds of navigable waters was qualified in nature and subject to the dominant servitude the federal government owned, which the government could exercise for the public's benefit. This servitude includes the right to use the privately owned beds to aid navigation. [[30]](#footnote-31)30

The Court reached a similar conclusion in United States v. Cherokee Nation of Oklahoma. [[31]](#footnote-32)31 In Cherokee, the Court held that although the Cherokee Nation received fee simple title by treaty to certain portions of the bed of the Arkansas ***River*** in what later became the state of Oklahoma, the federal government was not required to pay compensation to the Indian Nation for damage to these beds by a navigational improvement project. [[32]](#footnote-33)32 The Court concluded the federal government has a dominant servitude over navigable waters, which extends to the entire stream and streambed below the ordinary high-water mark, and the navigational servitude "applies to all holders of riparian and riverbed interests." [[33]](#footnote-34)33

In United States v. Willow ***River*** Power Company, the Court reiterated that riparian owners' rights in navigable streams are subject to a dominant public interest in navigation. [[34]](#footnote-35)34 In Willow ***River*** Power, a company that owned the title to the bed of a navigable ***river*** sought compensation from the United States for impairment of the company's hydroelectric power plant, caused by a federal project that raised the water level to improve navigation on the ***river***. The Court, citing United States v. Chandler-Dunbar Company, stated that private ownership of running water in a navigable ***river*** is "inconceivable," and concluded that the riparian owner has no right, as against improvements of navigation, to a constant water level below the ordinary high-water mark. Where private interests in navigable waters conflict with the function of the government in improving navigation, those private interests must bow to the federal government's superior navigational right. [[35]](#footnote-36)35

In United States v. Twin City Power, a case based on facts similar to those in Willow Creek, the Court described the navigational servitude as a "dominant one which can be asserted to the exclusion of any **[\*464]** competing or conflicting one." [[36]](#footnote-37)36 The Court concluded that even though the private owners of riparian land had interests in the navigable water recognized by state law, navigable water falls under federal domain; therefore, Congress can completely preempt, leaving no vested private claims that constitute private property under the Fifth Amendment. [[37]](#footnote-38)37

Thus, through this series of cases, the Court established the principle that private interests held in navigable waters, including title to the underlying beds and banks, are held subject to a federal navigational servitude. In each of these cases, the Court ruled that exercise of a federal navigational servitude, which extinguished or damaged private interests, relieved the federal government of the duty to pay compensation or reduced the total amount of compensation paid to the owner of taken riparian property.

The Court has placed limits on the federal government's exercise of a navigational servitude, recognizing that the federal navigational servitude does not create a blanket exception to the takings clause of the Fifth Amendment. [[38]](#footnote-39)38 Kaiser-Aetna does not undermine the principle that privately held interests in navigable waters are subject to a federal navigational servitude. Rather, the Court in Kaiser-Aetna merely limited the exercise of a navigational servitude, where private expenditures transformed a non-navigable waterway into a navigable waterway.

In this case, Kaiser Aetna leased Kuapa Pond, a privately owned pond located in Hawaii, from the private owner in 1961. For purposes of developing a marina on the pond, Kaiser-Aetna dredged a canal to link the pond to Manuala Bay, a navigable bay, and to the Pacific Ocean for boat passage. Private ownership of Kuapa Pond originated from Hawaii's pre-statehood feudal system. The United States Army Corps of Engineers ("Corps") claimed Kaiser Aetna was precluded from denying public access to Kuapa Pond, arguing it had become a navigable water of the United States subject to a navigable servitude as a result of the improvements made to the pond. [[39]](#footnote-40)39

The Court held although Kuapa Pond was a navigable waterway, the owners were not required to provide free public access to the pond, and the Corps' exercise of a navigational servitude did not preclude compensation to the owners. The Court noted Kuapa Pond, which was considered private property under state law, was previously not navigable and, therefore, incapable of being used as a highway for navigation or commerce. Furthermore, the owners had invested a substantial amount of money to make the pond navigable. [[40]](#footnote-41)40 The Court concluded that although Kuapa Pond had become a navigable waterway, therefore subject to regulation under the Corps' general **[\*465]** Commerce Clause powers, the Corps could not secure free public access to the pond without paying compensation to the owners. [[41]](#footnote-42)41

Notwithstanding this holding, the Court reaffirmed Congress' expansive authority over the nation's navigable waters under the Commerce Clause, indicating exercise of a federal navigational servitude to assure the public right of navigation over interstate waters used for commerce does not require compensation. [[42]](#footnote-43)42 Further, the Court noted, whatever the nature of the interests of a riparian owner in the submerged lands bordering on a public navigational water, title to such lands is qualified and to be held subordinate to the use of such submerged lands and overflowing waters for public navigation at all times. [[43]](#footnote-44)43

Thus, under the traditional federal navigational servitude, the Supreme Court has ruled that interests held in navigable waters, especially title to beds and banks, are subordinate to the federal government's power to regulate commerce on the nation's waterways. The federal government's authority to exercise a navigational servitude to protect and improve navigation on these waters is a constitutionally based power that operates to protect the public's use of navigable ***rivers*** for navigational purposes, regardless of ownership status of the ***river***'s beds and banks.

2. Modern Federal Navigational Servitude

Under the traditional federal navigational servitude doctrine, the federal government may take necessary actions to protect the navigability of waterways and avoid paying compensation to private parties whose property interests are adversely affected as a result of federal actions. Therefore, as the Court held in Lewis Blue Point, Willow ***River*** Power, and Chandler-Dunbar, the federal government may destroy privately owned beds of navigable waters, reduce or extinguish water power, and flood banks of fast lands if such government actions are related to a navigational purpose.

Under a modern application of the navigational servitude, courts have recognized the federal navigational servitude serves as the basis for the federal government's protection of the public's right to access over navigable waters, even where the submerged lands of such waters are privately owned. As the Court in Kaiser Aetna observed, "the navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." [[44]](#footnote-45)44

Other courts have also applied the navigational servitude to permit or protect public use of navigable waters over privately owned **[\*466]** submerged lands. For example, in Atlanta School of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Authority, a county water and sewer authority denied non-residents access to a public reservoir and boat ramp, thus preventing use of the Dog ***River***. [[45]](#footnote-46)45 The plaintiffs, a non-resident kayaking school and private canoeing instructor, asserted the federal navigational servitude existed in favor of all individuals, apparently as members of the public, and created a constitutional right of public access under the Commerce Clause. [[46]](#footnote-47)46 The court held the plaintiffs showed a likelihood of success on the merits of their claim that the subject waterway was navigable under federal law, and that a navigational servitude existed in the waterway to create a public right of access, entitling them to a preliminary injunction. [[47]](#footnote-48)47 The court noted that "the federal navigational servitude to which the plaintiffs refer generally provides the federal government, particularly Congress, the power to regulate navigable bodies of water by allowing it to obstruct or modify the flow of waterways and by preventing others from illegally obstructing or modifying those same waterways." [[48]](#footnote-49)48 Other federal courts have recognized the modern federal navigational servitude doctrine to permit public access over privately owned beds and banks. [[49]](#footnote-50)49

3. Elements of Federal Navigational Servitude

The federal navigational servitude applies only to navigable waters that are capable of carrying interstate commerce. The Court in Kaiser Aetna made this clear in affirming the government's authority under the federal navigational servitude to assure that navigable waterways "retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." [[50]](#footnote-51)50 The Court stated that in determining whether a federal action taken pursuant to a navigational servitude constitutes a taking, "the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation" must be considered. [[51]](#footnote-52)51

**[\*467]** Although the federal navigational servitude derives from the Commerce Clause, the question whether the general federal regulatory authority under the Commerce Clause, including a federal navigational servitude, extends to a particular waterway, depends on whether the waterway is deemed navigable under the basic federal navigability test articulated in the Daniel Ball case. Courts have extended the general authority to regulate waterways under the commerce clause to control waters that are in fact presently navigable, non-navigable tributaries, waters that were once navigable but no longer so, and waters neither formerly nor presently navigable but that can be made navigable by reasonable improvements. [[52]](#footnote-53)52

The Court in Kaiser Aetna, however, explained that navigability of a waterway for purposes of extending: (1) the power to regulate navigation under the Commerce Clause; (2) the authority of the Corps under the ***Rivers*** and Harbors Appropriation Act of 1899; [[53]](#footnote-54)53 or (3) admiralty and maritime jurisdiction, is broader than navigability for purposes of a navigational servitude. The Court acknowledged that for purposes of extending the Corps' power to regulate commerce, Kuapa Pond is navigable water. However, this conclusion does not mean the pond is subject to a navigational servitude:

It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause [citing to Appalachian Power and the Daniel Ball], to determine the extent of authority of the Corps of Engineers under the ***Rivers*** and Harbors Appropriation Act of 1899 [citing *United States v. Republic Steel Corp., 362 U.S. 482 (1960)],* and to establish limits of the jurisdiction of the federal courts conferred by Art. III, 2, of the United States Constitution over admiralty and maritime cases… . Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the ***Rivers*** and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access. [[54]](#footnote-55)54

As the Court in Kaiser Aetna explained, the navigational servitude **[\*468]** involves "the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." [[55]](#footnote-56)55 The court in Dardar v. LaFourche Realty stated, "waters so encumbered are subject to public use as 'continuous highways for the purpose of navigation in interstate commerce'." [[56]](#footnote-57)56 Thus, waterways subject to a navigational servitude must meet the federal test of navigability and cannot become navigable for federal navigational servitude purposes through improvements, even though such waterways are subject to regulatory authority under the Commerce Clause or statute. Therefore, the scope of navigability for a servitude is narrower than the scope of navigability for regulating commerce in general.

A waterway deemed navigable for federal purposes must be capable of carrying interstate commerce, which courts have defined broadly. [[57]](#footnote-58)57 In Wickard v. Fillburn, the Court addressed the regulation of commerce in general, noting:

Even if appellee's activity be local and though it may be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." [[58]](#footnote-59)58

The interstate commerce element of the federal navigable servitude derives from the definition of "navigable waters of the United States" set forth in the Daniel Ball. [[59]](#footnote-60)59

The Court in Kaiser Aetna, at least for purposes of regulation of **[\*469]** commerce in general, noted that "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause." [[60]](#footnote-61)60 The Court reasoned Congress, therefore, could prescribe rules to regulate running lights on boats, to remove obstructions to navigation, and for any other reasons that further navigation or commerce. The opinion, however, suggests that to satisfy the interstate commerce element of the navigational servitude, the waterway, in its natural state, must be physically capable of transporting interstate commerce, i.e., floating vessels. [[61]](#footnote-62)61

The lower district court in Kaiser Aetna concluded that Kuapa Pond was used for interstate commerce because Kaiser Aetna, the lessee, used the pond to raise revenue and to transport both residents and non-residents in and out of the attached bay. [[62]](#footnote-63)62 The Ninth Circuit ruled Kuapa Pond was transformed into a navigable water of the United States, subject to a federal navigational servitude even though it was privately owned and had never been used for interstate commerce purposes. [[63]](#footnote-64)63 The Supreme Court, however, did not address the "effect" of the pond on interstate commerce. Instead, the court seemed to focus on whether interstate commerce could, in fact, be conducted on the waters of the pond:

It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing. It consequently is not the sort of "great navigable stream" that this Court has previously recognized as being "'[incapabl e] of private ownership'." [[64]](#footnote-65)64

The Supreme Court noted that before the private improvements, while Kuapa Pond was still a fishpond, fishermen operated a few flat-bottomed boats on the pond, but no evidence existed that these boats could acquire access to the adjacent bay and ocean from the pond. As such, Kuapa Pond "clearly was not navigable in fact in its natural state," apparently because of the lack of physical links to other navigable waters, i.e., the open ocean. [[65]](#footnote-66)65

In Boone v. United States, [[66]](#footnote-67)66 the [*Ninth*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T532-D6RV-H381-00000-00&context=1516831) Circuit reached a similar conclusion based on the ruling in Kaiser Aetna. In Boone, the owner of a man-made lagoon in Hawaii, formed from a littoral fishpond and **[\*470]** separated from open ocean, brought an action against the Corps to secure the right to deny public access to the lagoon. [[67]](#footnote-68)67 Similar to the facts in Kaiser Aetna, the lagoon owner expended private funds to make the lagoon navigable, and the Corps subsequently claimed the lagoon was subject to a navigational servitude; therefore, it was open to the public for free access. [[68]](#footnote-69)68

The court drew a direct analogy to Kaiser Aetna, holding that although the pond was navigable for purposes of regulation by the Corps under the Commerce Clause, it was not subject to a navigational servitude because the fishpond was "incapable of use as a continuous highway for purpose of navigation in interstate commerce." [[69]](#footnote-70)69 The court also noted that although the maximum depth of the pond was three feet, the pond was separated from open ocean by the artificial barrier, and there was little evidence in the record of any commercial use of the pond since 1957. [[70]](#footnote-71)70

The court indicated that the possible prior navigability of the area comprising the lagoon in its natural state, although insufficient to impose a navigational servitude, was a relevant factual consideration in determining whether a navigational servitude applied. Although the pond may have been navigable prior to construction of the stonewall, the lagoon was not the sort of "great navigable stream" susceptible to a navigational servitude. [[71]](#footnote-72)71

Other courts have also struggled in determining whether a waterway meets the interstate commerce element of the federal navigational servitude doctrine. For example, in Loving v. Alexander, riparian owners sought a declaration that the Jackson ***River*** was non-navigable, and requested an injunction to bar public access over the ***river***. [[72]](#footnote-73)72 The Corps claimed regulatory jurisdiction over the ***river*** under section 10 of the ***River*** and Harbors Act of 1899. [[73]](#footnote-74)73

The Jackson ***River*** is relatively narrow, crooked, rocky, and shallow, with depths ranging from ten inches to six feet and a width of approximately forty to one hundred feet wide. Although the ***river*** is located entirely within the state of Virginia, it joins with the Cowpasture ***River*** to form the James ***River***, which ultimately flows into the Chesapeake Bay. [[74]](#footnote-75)74 The court held the evidence introduced at trial was sufficient to show the ***river*** was historically used as a highway for useful commerce, especially by lumber companies floating logs to sawmills. The court also noted that even though the ***river*** in its present condition could not support commercial log floating, it was **[\*471]** susceptible to use for recreational canoeing and cold-water fishing. [[75]](#footnote-76)75

The court concluded that although the ***river*** was navigable, therefore susceptible to regulation under the Commerce Clause, it was nonetheless exempt from the Corps' regulatory jurisdiction. The court found that under section 10 of the ***River*** and Harbors Act of 1899, pursuant to [*33 U.S.C. 59*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0FN2-D6RV-H255-00000-00&context=1516831)(1), bodies of water located entirely within one state, and considered navigable solely on the basis of historical use in interstate commerce, are exempt from section 10's permit requirements. [[76]](#footnote-77)76

Notwithstanding this holding, the court proceeded to rule that the Jackson ***River*** was subject to a navigational servitude, and therefore the Corps could guarantee free public access over the ***river*** without paying compensation to the riparian owners. [[77]](#footnote-78)77 In addressing the interstate commerce element of navigability for purposes of a navigational servitude, the court noted that as a navigable water of the United States, the Jackson ***River*** was subject to the exercise of federal authority because future recreational use by out-of-state visitors of a proposed federal fishery would affect interstate commerce. [[78]](#footnote-79)78 The court concluded that under these circumstances, a federal navigational servitude would traditionally apply to the ***river***. [[79]](#footnote-80)79

The court then considered whether a navigational servitude would apply in light of the holding and reasoning in Kaiser Aetna. [[80]](#footnote-81)80 In distinguishing Kaiser Aetna, the court concluded that although the bed of Jackson ***River*** was considered privately owned under Virginia law, unlike the pond in Kaiser Aetna, it was not previously a non-navigable waterway made navigable by private expenditures. Rather, the evidence showed the Jackson ***River*** was historically navigable in its natural state, as manifested by past use of the ***river*** to float railroad ties, lumber, and furs. [[81]](#footnote-82)81

In Atlanta School of Kayaking, [[82]](#footnote-83)82 the court granted a preliminary injunction to the plaintiff recreational floaters, permitting them to use a navigable reservoir and access ramp linked to the Dog ***River***. [[83]](#footnote-84)83 The court stated that when considering whether a body of water is a navigable waterway to which individuals have a right of access, a court must first ascertain whether the waterbody is navigable in fact, and **[\*472]** then determine whether a "navigational servitude exists creating a public right of access." [[84]](#footnote-85)84 A waterway is navigable in fact "if it is used or susceptible of being used in its ordinary condition to transport [interstate] commerce." [[85]](#footnote-86)85 The court concluded that the plaintiffs had a substantial likelihood of success on a finding that the Dog ***River*** was navigable in fact because it was susceptible of being used as a highway for commerce at statehood. [[86]](#footnote-87)86

The court noted that while there was then little use of the Dog ***River*** as a major source of interstate commerce, "'the presence of recreational craft may indicate that a water body is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time,'" to support a finding of navigability. [[87]](#footnote-88)87 The court concluded that the plaintiffs could show the waterway was navigable because kayaks and canoes could travel down the Dog ***River***, and students paid to float down the ***river***. [[88]](#footnote-89)88 The court addressed the interstate commerce requirement by pointing out that the fact that the Dog ***River*** was entirely within the state of Georgia did not make it incapable of carrying interstate commerce, pursuant to [*33 C.F.R. 329.7*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P7-00000-00&context=1516831). [[89]](#footnote-90)89

In Dardar v. LaFourche Realty ***Co***., [[90]](#footnote-91)90 the owners of a series of canals in Louisiana constructed levees and gates limiting public access through the canals. [[91]](#footnote-92)91 Commercial fisherman and the state of Louisiana brought suit claiming a federal navigational servitude applied to the waterways, providing a right of public access. [[92]](#footnote-93)92 Based on the reasoning in Kaiser Aetna, the Fifth Circuit held that a navigational servitude did **[\*473]** not apply to the canals because evidence presented at trial showed that the waterways could not, in their natural state, serve as "highways for commerce, over which trade and travel are or may be conducted in customary modes." [[93]](#footnote-94)93 Specifically, photographic and cartographic exhibits and testimony showed that the waterways were too shallow (eighteen inches and seven inches in some places) and discontinuous in nature for passage, were isolated and/or were connected to outlying bodies of water only by man-made ditches dug with private expenditures, thus becoming passable only by private dredging. [[94]](#footnote-95)94 The court held that the waterways were not navigable in fact. [[95]](#footnote-96)95

The court further reasoned that even if the waterways were navigable, a federal navigational servitude would not exist because due to "the shallow depth and discontinuous nature" of the canals, they could not be considered "akin to the 'sort of great navigable stream that … has [been] previously recognized as being incapable of private ownership'." [[96]](#footnote-97)96 Moreover, the canals could serve as highways of commerce only after private dredging efforts. [[97]](#footnote-98)97 Thus, similar to the court in Kaiser Aetna, the Fifth Circuit emphasized the fact that the canals were incapable, in their natural state, of transporting interstate commerce. [[98]](#footnote-99)98

The capability of a waterway to carry interstate commerce in its natural state, including the waterway's unimpeded connection to open waters, which themselves are capable of carrying commerce, was one factor the Court in Kaiser Aetna applied to determine whether a navigational servitude existed. The expenditure of private funds to make the water susceptible of carrying commerce, as well as traditional Hawaiian law that designated the pond as private property, were the other primary factors that the Court emphasized in reaching its conclusion. The Supreme Court in Kaiser Aetna never explicitly rejected the lower district court's conclusion that use of the pond by out-of-state boaters made the pond susceptible to interstate commerce. This conclusion by the lower court, and the similar reasoning by the court in Loving, focused on the "substantial economic effect on interstate commerce" principle from Wickard v. Fillburn to determine whether a waterway is susceptible to use in interstate commerce. Moreover, the court in Atlanta School of Kayaking made it clear that an isolated waterway is capable of carrying interstate commerce for purposes of applying a federal navigational servitude.

As the series of cases discussed above underscore, a federal navigational servitude exists on navigable waters of the United States. That is, a water that, in its ordinary condition, by itself or uniting with **[\*474]** other waters, is used as a continuous highway for the purpose of navigation in interstate commerce. In many cases, the Army Corps of Engineers ("Corps") has designated a waterway a "navigable water of the United States" in accordance with the agency's definition of navigable waters of the United States contained in [*33 C.F.R. 329.4*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P4-00000-00&context=1516831). For instance, the Corps' Sacramento District office [[99]](#footnote-100)99 has specifically designated Navajo Reservoir and the thirty-nine mile length of the ***Colorado*** ***River*** from Grand Junction to the Utah-***Colorado*** border as "navigable waters of the Unites States" within the district's regulatory boundaries. [[100]](#footnote-101)100

The Corps acknowledges that "precise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies," although the policies and criteria contained in the Corps' regulation "are in close conformance with the tests used by Federal courts." [[101]](#footnote-102)101 The Corps' regulations also note that "the lists [of waters determined navigable waters of the United States] represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable." [[102]](#footnote-103)102 Thus, the lower ***Colorado*** ***River*** and Navajo Reservoir are not necessarily the only "navigable waters of the United States" that exist in the state of ***Colorado***.

In the absence of specific Corps designation, evidence of a ***river***'s ability to transport interstate commerce now and in the past will support the interstate commerce element of a navigational servitude. Such evidence could show that the ***river***, in its natural condition, was historically used for transportation of commerce such as floating logs or other commercial products and that it is presently being used for commercial purposes, including commercial and recreational boating. As an example, one ***Colorado*** court has ruled that based on historical use by boats and rafts, the Gunnison ***River*** from Almont downstream to Cimarron is a navigable stream and the waters therein public waters. [[103]](#footnote-104)103 In addition, evidence showing that out-of-state visitors use a ***river*** for recreational purposes also indicates that the ***river*** is used for interstate commerce purposes, as the Fourth Circuit in Loving, the Seventh Circuit in Byrd, and the district court in Kaiser Aetna all concluded, therefore making the ***river*** navigable for federal **[\*475]** navigational servitude purposes.

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). STATUTORY BASIS FOR RIGHT TO FLOAT IN ***COLORADO***

Two statutory provisions, [***Colorado*** *Revised Statutes sections 18-9-107(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J389-00000-00&context=1516831) and 18-4-504.5 respectively, support the concept of a public right to float the navigable ***rivers*** and streams of the state of ***Colorado***, either independently or in conjunction with other legal principles. [[104]](#footnote-105)104

Under section 18-9-107(1)(a), it is a misdemeanor to obstruct a waterway "to which the public or a substantial group of the public has access." [[105]](#footnote-106)105 This provision indicates that the legislature intended to keep ***Colorado***'s waterways open to boaters and free of dangerous obstructions. There are no reported cases interpreting or applying this law.

Private landowners would argue that the public has no access to the segment of any ***Colorado*** waterway that flows through their land. In a typical situation, however, the public accesses a ***river*** by starting a trip at a recognized boat ramp or "put-in" on public land and ending at a similarly designated boat ramp or "take-out" spot downstream. Many such trips are made subject to permits or regulations issued by the public land management agencies that own and regulate use of the put-ins and take-outs, with the understanding that the float trip will pass through private land at some point in the floatable stretch. Under such a scenario, the public has legal access to the ***river***, and the question remains whether, consistent with section 18-9-107(1)(a), a private landowner may deny all use of the floatable stretch. In an analogous situation, the Oklahoma Supreme Court upheld the right to float against a trespass claim:

We are of the opinion and hold that the ***river*** in question is navigable in fact and that plaintiff owns the land to the middle of the stream but that the water is in the nature of a street or highway so that people who get on the ***river*** without committing an act of trespass has [sic] the right to boat on either side of the middle of the stream, either up or down stream. [[106]](#footnote-107)106

The second statutory provision relevant to the right to float is section 18-4-504.5. [[107]](#footnote-108)107 In 1977, while the Emmert case was pending, the General Assembly amended Article 4 of Title 18, "Offenses Against Property," by adding section 18-4-504.5, which defined the term "premises" so that boating on a non-navigable stream was not a trespass. [[108]](#footnote-109)108 More specifically, the definition of premises refers to "real property, buildings, and other improvements thereon, and the stream **[\*476]** banks and beds of any non-navigable fresh water streams flowing through such real property." [[109]](#footnote-110)109 A review of the legislative record reveals the legislature deliberately amended the trespass statute in order to approve of floating through private property. [[110]](#footnote-111)110 The mention of banks and beds, but not the mention of "water" or "channel," was intentional. The result is that boating a ***river*** is not a trespass under the statute, so long as the boaters stay in their boats and do not get out onto the real property.

During the Senate Committee Hearing on Senate Bill 360, which became section 18-4-504.5, the "intent" expressed by Senator Soash was "to make sure … they stay on the water, don't get out and roam around and interfere with these people's property." [[111]](#footnote-112)111 With this, the Senate addressed the problem with people getting out of their boats and causing trouble on adjacent private land, and not with people staying in their boats. [[112]](#footnote-113)112 The problem perceived by many senators regarding an earlier version of the bill, however, was with the meaning of the term "channels" and whether that would result in a trespass for boaters who stayed on the water. [[113]](#footnote-114)113 Several senators expressed concern that this draft of the bill might impair long-standing kayak and raft races, and other existing boating uses. [[114]](#footnote-115)114 Likewise, Senator Cooper expressed the need to represent people who use streams for tubing and the like. [[115]](#footnote-116)115 These comments reflected the Senate's desire to maintain the existing public boating uses unhindered.

At the Second Reading of Senate Bill 360 before a full Senate on March 31, 1977, Senate sponsor, Senator Kinnie offered a floor amendment to "strike channels and substitute stream banks." [[116]](#footnote-117)116 He proposed this amendment to address the concern by some that "channels … might mean water of these streams." [[117]](#footnote-118)117 The Senate subsequently struck the language to ensure "no inference to the water." [[118]](#footnote-119)118 More importantly, Senator Kinnie stated that the bill protected landowners, but "will not stop tubing, canoeing, or boating **[\*477]** on the water." [[119]](#footnote-120)119 In other words, the bill essentially ensured that those existing uses could continue. Senator Kinnie repeated himself later by noting "if they want to canoe or tube or stay on the water, not bother the properties, why there would be no problem." [[120]](#footnote-121)120

The revised bill then went to the House Judiciary Committee on April 15, 1977. The revision was explained as necessary because one could misconstrue the term "channels" to mean water, and "we are not talking about the water, we are talking about the stream beds, the real property." [[121]](#footnote-122)121 A representative informed the House Committee that the amended bill "is not to interfere with [a boater's] right to go down the creek or the ***river***." [[122]](#footnote-123)122 The following testimony also supports that intent:

People said that they could use the streams in the state - I don't think there's any question about that - for people boating down, to fish in the streams, but what people were doing was running jeeps down the middle of the streams claiming that this is all public property and they had the right to use it. That's the intent behind this Bill. [[123]](#footnote-124)123

The changes to the bill were further explained as necessary because the earlier version of the bill may have "prevented people from … floating the boats down the stream, and there was never any intent to prevent that in the Bill, and that was pointed out; that's what resulted in the change to stream banks to make that clear, that didn't include water." [[124]](#footnote-125)124

Did the legislature act with the stated intent to ensure the long-standing right to boat a ***river*** without interference, while still intending that the very same right be impossible to exercise by allowing civil lawsuits for damages against boaters? Further, did the legislature act to ensure that boating was possible while at the same time make boating impossible by subjecting boaters to liability and injunction for civil trespass? Such an interpretation is inconsistent with the legislature's expressed intent. Transcripts of the debates in both the House and the Senate demonstrate that the legislature was consciously trying to protect the interests of floaters as well as adjacent landowners. Additionally, the transcripts show that the legislature thought it was doing so in passing subsection 504.5, the effect of which was to allow floaters to pass through private land so long as they did not touch the bed or banks as they floated through.

The definition of premises in the criminal code is both the clearest **[\*478]** and the only statement by the legislature on whether boating through private property is a trespass. Neither common law nor case law defines "premises" for purposes of the alleged civil trespass for floating; therefore, it is appropriate to rely upon the criminal code to provide the definition. The legislative history supports this assertion, illustrating that when the legislature defined "premises," it intended to speak broadly to the right to boat ***rivers*** free from trespass liability.

People v. Emmert [[125]](#footnote-126)125 does not alter the above conclusions. The legislature enacted subsection 504.5 prior to the Emmert decision. The trespass statute at issue in Emmert was the version in effect before the legislature acted in 1977. [[126]](#footnote-127)126 The Supreme Court referred only in passing to the 1977 amendment and noted that the legislature had "clarified" the law. [[127]](#footnote-128)127 Because the definition of "premises" was not at issue in Emmert, the Court did not interpret or apply the new statutory definition. The present statute addressing trespass contains the best and clearest statement by the legislature on whether boating is a trespass.

***Colorado*** Attorney General Duane Woodard reached much the same conclusion in 1983, when he issued a formal opinion ("Woodard Opinion") interpreting the impact of the statutory trespass amendment. [[128]](#footnote-129)128 The Woodard Opinion answered two key questions: (1) are boaters subject to criminal prosecution if they float across private lands without touching the riverbed or banks? (2) Does the law of trespass, which defines "premises" to exclude the stream channel, authorize private property owners to prohibit boating? [[129]](#footnote-130)129 The Attorney General concluded that the answer to both questions was "no." [[130]](#footnote-131)130

Consistent with the legislative statements of purpose, the Woodard Opinion indicates that the legislature modified the common law. Specifically, the Woodard Opinion notes that the Emmert discussion of the "ad coelum" doctrine was "arguably dictum." [[131]](#footnote-132)131 Even assuming the "ad coelum" doctrine was not dictum, however, the Woodard Opinion noted that the legislature has authority to modify the common law and, based upon the new definition of "premises," concluded that the "ad coelum" doctrine was necessarily repealed in the criminal trespass **[\*479]** context. [[132]](#footnote-133)132 The Woodard Opinion squared this finding with the clear legislative intent and ultimately found that a private property owner cannot prohibit boating. [[133]](#footnote-134)133

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). THE EQUAL FOOTING DOCTRINE AND THE PUBLIC TRUST IN THE STATE'S STREAMBEDS

Another legal basis for the public's right to float is the state's property interest in lands underlying navigable waters as provided by the Equal Footing Doctrine. Under the Equal Footing Doctrine, when a state entered the Union, the federal government granted it title to lands beneath navigable watercourses within its boundaries. [[134]](#footnote-135)134 The foundation for the modern Public Trust Doctrine is the well-settled principle that such lands belong to the states. The Public Trust Doctrine imposes upon the states a responsibility to manage these lands consistent with public trust interests. [[135]](#footnote-136)135

Whether a watercourse is navigable for purposes of determining title to its streambeds is a federal question. [[136]](#footnote-137)136 The "starting point in determining navigability for resolving title" [[137]](#footnote-138)137 is the test the United States Supreme Court set forth in the Daniel Ball, and discussed in section II above. [[138]](#footnote-139)138 In applying this test, which originally developed in the context of determining congressional authority to regulate navigation under its Commerce Clause authority, [[139]](#footnote-140)139 the courts have interpreted its provisions expansively in the title test context.

For example, in Alaska v. Ahtna, Inc., the Ninth Circuit held navigability for title turned on a ***river***'s susceptibility to commerce, not actual use. [[140]](#footnote-141)140 Ahtna, Inc. involved a title dispute in which the state of Alaska successfully challenged the Bureau of Land Management's conveyance of lands beneath the Gulkana ***River*** to a Native American corporation under the Alaska Native Claims Settlement Act. [[141]](#footnote-142)141 The stream segment at issue was on average three feet deep and frozen **[\*480]** seven months of the year. [[142]](#footnote-143)142 Most of the ***river***'s use was recreational; including guided fishing and sightseeing trips beginning in the 1970s. [[143]](#footnote-144)143 The court observed that the aluminum powerboats and rafts customarily used for such trips exceeded the 1,000-pound capacity of watercraft used by hunters and anglers on the ***river*** during the 1940s and 1950s before statehood. [[144]](#footnote-145)144 Accordingly, the court found the watercraft customarily used at statehood could have "at least supported commercial activity of the type carried on today, with minor modifications due to a more limited load capacity and rudimentary technology." [[145]](#footnote-146)145 In so holding, the court rejected the argument that recreational industry activity did not constitute commerce as "too narrow a view of commercial activity." [[146]](#footnote-147)146

As a result of Ahtna and other case law, the modern definition of navigability for title places primary emphasis on whether the "natural conditions" of a stream at statehood were "susceptible to commerce, rather than whether the stream was actually used for commerce." [[147]](#footnote-148)147 Because many such waters "are not adapted to, and probably will never be used to any great extent for commercial navigation," [[148]](#footnote-149)148 they have not invited federal regulatory attention. Therefore, questions concerning navigability for title and any appurtenant public use rights for many water bodies have required state courts to interpret federal law, with predictably uneven results. [[149]](#footnote-150)149

In 1912, the ***Colorado*** Supreme Court declared in dictum that "the natural streams of this state are, in fact, non-navigable within its territorial limits." [[150]](#footnote-151)150 This declaration, presumably, has given rise to the **[\*481]** widespread assumption that, because ***Colorado***'s watercourses are non-navigable, the state has never acquired an ownership interest in its streambeds. [[151]](#footnote-152)151 Left unchallenged, this assumption suggests that unless a stream flows through public property, its streambed is presumptively privately owned.

At least one jurisdiction has declared, however, that a state has an obligation to make particularized assessments of the navigability of its watercourses before it can disclaim its equal footing interest to the beds beneath them. [[152]](#footnote-153)152 In Defenders of Wildlife v. Hull, the Arizona Court of Appeals held that the state could not disclaim or relinquish its putative title to streambeds without first determining their navigability under the federal test for determining streambed ownership. [[153]](#footnote-154)153 The court based its determination, in part, on leading United States Supreme Court decisions that "made it clear that the states owe a fiduciary obligation to the general public" regarding management of "sovereign resources" including "public trust" lands underlying navigable waters. [[154]](#footnote-155)154 As authority for requiring the Daniel Ball test to determine navigability for title, the court cited the "constitutional nature of the equal footing doctrine, [[155]](#footnote-156)155 the indisputably federal basis for the navigability for title definition" [[156]](#footnote-157)156 and state courts' "'constitutional obligation' … to uphold federal law." [[157]](#footnote-158)157

At issue were legislative efforts beginning in the late 1980s to relinquish Arizona's interest in its watercourse bedlands after state officials began asserting state ownership rights to streambeds beneath navigable waters. [[158]](#footnote-159)158 Arizona, like ***Colorado***, historically had not asserted claims to such streambeds. [[159]](#footnote-160)159 Until 1985, Arizona did not assert equal footing claims in any watercourse except for the ***Colorado*** **[\*482]** ***River***. [[160]](#footnote-161)160 Predictably, Arizona officials' state ownership claims "upset longstanding assumptions about title to riverbed lands" [[161]](#footnote-162)161 and "clouded the title held by political subdivisions, private individuals, and corporations that had for years exercised control over, made improvements to, and paid taxes upon these affected stretches of land." [[162]](#footnote-163)162 In 1987, the Arizona Legislature, concerned about "economic displacement," enacted a statue ("1987 Act") designed to resolve the state's claims without "lengthy, difficult and expensive fact-finding," while recognizing titleholders' "accrued equity in taxes, improvements and family and social ties." [[163]](#footnote-164)163 The 1987 Act intended to confirm titles held by private parties and political subdivisions in the beds of waters other than the ***Colorado*** ***River***, while compensating the state for relinquishing lands where the state's claim appeared more viable. [[164]](#footnote-165)164 The act also provided for public recreational surface use of navigable waters. [[165]](#footnote-166)165

The 1987 Act sought to achieve these ends by, inter alia, providing for: (1) "an uncompensated quitclaim of the state's equal footing interest in all watercourses" except the ***Colorado***, Gila, Salt and Verde ***Rivers***; (2) a $ 25 per acre fee by which a record titleholder could obtain from the state a quitclaim deed for all of the state's equal footing interests in lands in or near the Gila, Salt or Verde riverbeds; (3) conveyance of the state's equal footing interest in any state land patent issued after the statute's effective date; and (4) the state's equal footing claims to be subject to statutory and equitable time bars, from which the state was previously exempt. [[166]](#footnote-167)166

In Arizona Center for Law in the Public Interest v. Hassell, representatives of both taxpayers and recreational users of Arizona's riverbeds successfully challenged these provisions as violating both the Public Trust Doctrine and the "gift clause" of the Arizona Constitution. [[167]](#footnote-168)167

The legislature responded to Hassell by creating a commission to investigate the navigability of the state's watercourses. This move subsequently provided the basis for legislation disclaiming the state's "right, title or interest based on navigability and the equal footing doctrine" to the beds of several streams. [[168]](#footnote-169)168 The wildlife conservation organization Defenders of Wildlife challenged the statutory standards **[\*483]** for determining navigability enacted in 1994 ("1994 Act"), [[169]](#footnote-170)169 as contrary to the federal navigability-for-title test and "deliberately designed to defeat trust claims." [[170]](#footnote-171)170

The Arizona Court of Appeals agreed and invalidated the statutory standards. The court first rejected an argument that the state's prior appropriation system was "irreconcilable with the state's equal footing claims based on navigability," which the Farm Bureau argued was impossible to separate from the riparian water rights doctrine. [[171]](#footnote-172)171 The court responded that, although both equal footing and riparian rights are common law doctrines and invoke "'navigability' to define the scope of their respective applications, they are two distinct systems that address two different issues - water use versus land ownership." [[172]](#footnote-173)172

The court then identified conflicts between the statutory standards and the federal Daniel Ball navigability-for-title test. [[173]](#footnote-174)173 For example, the 1994 Act required "clear and convincing evidence" as proof of a stream's navigability for title. [[174]](#footnote-175)174 But the court cited an Eighth Circuit case establishing a "preponderance" of the evidence as the requisite burden of proof. [[175]](#footnote-176)175 In fact, the court suggested only a "scintilla" of evidence might be sufficient proof of navigability. [[176]](#footnote-177)176

Additionally, in the 1994 Act, the court found several presumptions and evidentiary limitations that essentially prohibit a determination of navigability in conflict with the federal test. [[177]](#footnote-178)177 The provision that if any "portion or reach of a watercourse" is found non-navigable, the entire watercourse is presumed non-navigable was among the presumptions the court found violative of federal law. [[178]](#footnote-179)178 The court cited Supreme Court precedent finding navigability established in part of a waterway might be enough to support navigability for the entire watercourse. [[179]](#footnote-180)179 The 1994 Act also established the presumption that a watercourse was non-navigable unless it was **[\*484]** susceptible for commercial trade, as well as travel. [[180]](#footnote-181)180 To the contrary, the court found the federal test did not require both trade and travel, nor did it require a commercial nexus. [[181]](#footnote-182)181 The court rejected the statute's presumption of nonnavigability for waters never used for profitable commercial enterprise. [[182]](#footnote-183)182 It also rejected the presumption of nonnavigability for waters not used by "'vessels customarily used for commerce on navigable watercourses [at statehood], such as keelboats, steamboats or powered barges'." [[183]](#footnote-184)183 Instead, the court adopted a federal district court standard that "'ordinary modes of trade and travel,'" as set forth in the Daniel Ball test, "are not fixed and need not be construed with reference only to the 'ordinary modes of trade and travel' in existence" at statehood. [[184]](#footnote-185)184 With respect to the presumption that recreational - rather than commercial - boating and fishing rendered a watercourse non-navigable, [[185]](#footnote-186)185 the court adopted the Ninth Circuit and the New York Court of Appeals' liberal construction of recreational use consistent with the federal standard. [[186]](#footnote-187)186

To bolster its position, the court held "determinations regarding the title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of state's title." [[187]](#footnote-188)187 Additionally, "the equal footing doctrine is ***co***-existent with a strong presumption of state ownership." [[188]](#footnote-189)188 Furthermore, the court held that the conflict between state and federal law rendered the Act's navigability standards invalid under the Supremacy Clause and the preemption doctrine. [[189]](#footnote-190)189

Whereas other jurisdictions have based the public trust on state ownership of navigable waters, [[190]](#footnote-191)190 Arizona emphasized the state's property interest in the land beneath navigable waters. In ***Colorado***, **[\*485]** although Chief Justice Mullarkey once noted that the ***Colorado*** Supreme Court has not recognized a public trust related to water, [[191]](#footnote-192)191 the court has not addressed whether the public trust might apply to the lands beneath navigable waters in this state. Nor has ***Colorado*** established a system for making particularized determinations as to the navigability of any of its watercourses. [[192]](#footnote-193)192 If ***Colorado*** adopted Arizona's reasoning, the public's right to float on a given stream or ***river*** could not be precluded without first ascertaining whether the state retains an equal footing interest in the streambed based on a particularized assessment of its navigability under the federal standard.

Furthermore, the issuance of a federal or state patent to a private landowner for lands traversed by a navigable watercourse does not necessarily defeat state title to such lands. [[193]](#footnote-194)193 Nor is a state estopped from claiming title to streambeds simply because it has not previously asserted its ownership. [[194]](#footnote-195)194 States in their sovereign capacity may use and dispose of state owned lands as they elect. [[195]](#footnote-196)195 However, the public trust doctrine dictates that the sale or conveyance of lands beneath navigable waters is "subject to a reserved easement in the state for trust purposes" unless "irrevocably conveyed in absolute private ownership" after a legislative determination that such lands may no longer serve trust purposes. [[196]](#footnote-197)196

In Nevada v. Bunkowski, the Nevada Supreme Court determined the Carson Creek was navigable under the federal title test. The court found the state held title to the creek bed in trust for public use, notwithstanding claims of ownership by private landowners, pursuant **[\*486]** to pre-statehood federal and state patents. [[197]](#footnote-198)197 Here, the court noted that when the United States granted patents without restriction, it "assented to … construction [of such patents] according to the local law." [[198]](#footnote-199)198 Thus, the court construed "unrestricted federal and state patents by the same criterion." [[199]](#footnote-200)199 Like the Arizona court in Defenders of Wildlife, the Nevada court established a presumption of state ownership of lands beneath navigable waters as the starting point of its analysis. The court quoted United States v. Oregon for the proposition that …

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the states passes to it, as incident to the transfer to the state of local sovereignty … . [[200]](#footnote-201)200

Because the record did not rebut the presumption that "the federal government held the subject lands in trust for the State of Nevada … . The federal government did not have control over the bed, and it would appear obvious that the federal patents conveyed none of the submerged lands." [[201]](#footnote-202)201 With respect to the state patents, the court ruled, absent an express legislative determination to the contrary, the state in its sovereign capacity "did not grant away the public land of the ***river*** bed." [[202]](#footnote-203)202

In rejecting the landowners' claim that the state was estopped from claiming title because Carson Creek was not included on a list of legislatively declared navigable waters, the court stated that public rights cannot "be impaired by an estoppel growing out of a mere failure to object to encroachment." [[203]](#footnote-204)203

The Defenders of Wildlife and Bunkowski cases suggest ***Colorado*** courts should reexamine the presumption that all of ***Colorado***'s ***rivers*** and streams that flow through private property are non-navigable for title purposes.

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). THE ***COLORADO*** CONSTITUTION AND THE PUBLIC TRUST IN THE STATE'S WATERS

At least forty-two jurisdictions have recognized that the state holds an interest in its waters [[204]](#footnote-205)204 or streambeds [[205]](#footnote-206)205 in trust for the public. [[206]](#footnote-207)206 **[\*487]** This trust responsibility gives rise to public use rights which preclude riparian landowners from claiming exclusive and exclusionary rights to surface waters even, in some jurisdictions, when the streambeds are privately owned. [[207]](#footnote-208)207 Additionally, courts have held that a state has a fiduciary obligation to the public to manage such trust assets, and this obligation limits a state's ability to dispose of or disclaim the public's **[\*488]** rights to such assets. [[208]](#footnote-209)208

The jurisdictions that have recognized some form of public trust doctrine have relied on several different, although often interrelated, sources of authority. These include the Equal Footing Doctrine, [[209]](#footnote-210)209 state constitutional provisions [[210]](#footnote-211)210 or state statutes declaring public ownership of the waters within a state. [[211]](#footnote-212)211 Although the ***Colorado*** Supreme Court has declined on more than one occasion to adopt the public trust doctrine based on any of these or other theories, [[212]](#footnote-213)212 a divided court in the 1979 Emmert case did not completely reject the concept and left the door open for the legislature to do so. [[213]](#footnote-214)213 Additionally, other prior appropriation states in the West have relied on constitutional language similar to that in Article XVI, section 5 of the ***Colorado*** Constitution to create a public trust based on public ownership of the state's waters. Specifically, section 5 provides "the water of every natural stream, not heretofore appropriated, within the state of ***Colorado***, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." [[214]](#footnote-215)214

The Emmert majority construed section 5 as "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." [[215]](#footnote-216)215 Specifically, the phrase "'subject to appropriation' … simply and firmly establishes the right of **[\*489]** appropriation." [[216]](#footnote-217)216 The court buttressed this assertion with language from Article XVI, section 6 providing that the right to divert water "shall never be denied." [[217]](#footnote-218)217

In dissent, Justice Groves construed section 5 as establishing that the state's waters are "the property of the public and are dedicated to the use of the people of the state." [[218]](#footnote-219)218 He interpreted "subject to appropriation" as "a caveat establishing that appropriation for a beneficial use is superior to other uses" without limiting other uses. [[219]](#footnote-220)219 Quoting extensively from Judge Bailey's dissent in the earlier Hartman case, Justice Groves argued the waters of every natural stream were public, "dedicated to the use of the people … in such manner as they see fit," subject only to the right of appropriation for beneficial purposes. [[220]](#footnote-221)220

Until the waters are appropriated and diverted from the stream, they belong to the public. No stronger words could have been used by the people than are used in this declaration. It is idle to say that the waters of the streams are dedicated to the public for the purpose of appropriation, because those are not the words of the Constitution. It is a grant made subject to that right. [[221]](#footnote-222)221

Justice Groves' interpretation is consistent with the analysis of other states' courts. [[222]](#footnote-223)222

For example, Article 16, section 2 of the New Mexico Constitution **[\*490]** provides "the unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." [[223]](#footnote-224)223 The wording of this provision is almost identical to that in Article XVI, section 5 of ***Colorado***'s constitution. The New Mexico Supreme Court interpreted this language as an affirmative statement of the public's ownership and right to use all waters in the state until they are appropriated for beneficial use. [[224]](#footnote-225)224 The New Mexico court also held that unappropriated waters are "public waters," and riparian landowners did not have the right to claim exclusive use rights. [[225]](#footnote-226)225 Therefore, the court held the private owner of land adjacent to and beneath two non-navigable streams could not exclude the public from using the waters of a man-made lake that inundated his property. [[226]](#footnote-227)226 To deny public use of such water, the New Mexico court reasoned, "would be saying that the public must first appropriate its own property, the very waters reserved to it and which have always 'belonged' to it, subject, of course, to being specifically appropriated for private beneficial use." [[227]](#footnote-228)227

The New Mexico court also held that the state's authority over public water is "plenary." [[228]](#footnote-229)228 Thus, dedicating waters for public recreational uses does not constitute a "taking" even when such water overlies private land. [[229]](#footnote-230)229 The court admonished that to hold otherwise would "confuse title to the land with that to water." [[230]](#footnote-231)230

Like the New Mexico court, the Wyoming Supreme Court found public ownership of all waters embedded in the state constitution. In Day v. Armstrong, [[231]](#footnote-232)231 the court held the public had a right to float on streams flowing through private property, but the public did not have an unrestricted right to walk or wade on the streambeds of such waters. [[232]](#footnote-233)232 Instead, walking or wading on streambeds was limited to necessary incidents of recreational use. [[233]](#footnote-234)233 In authorizing public use of **[\*491]** any waters capable of floating watercraft of any kind, [[234]](#footnote-235)234 the court based its conclusion "solely upon Wyoming's Constitutional declaration that all waters within the boundaries belong to the State." [[235]](#footnote-236)235

The Wyoming court acknowledged a "clear case of divided ownership of the ***river*** as an entity" exists when the state holds title to the water and title to the bed and channel vest in the riparian landowner. [[236]](#footnote-237)236 The court analogized such divided ownership to the "horizontal division in land ownership" between surface and subsurface areas for which "the enjoyment of the rights incident to separate ownership may require easement in the property of another." [[237]](#footnote-238)237 Therefore, concomitant with state ownership of its waters, "there must be an easement in behalf of the State for a right of way through their natural channels for such waters upon and over lands submerged by them." [[238]](#footnote-239)238

In prohibiting riparian landowners from interfering with or curtailing public use, the court emphasized that it was not "creating a new public right nor even … giving initial recognition to an unused public right." [[239]](#footnote-240)239 Rather, the court defended "a use long enjoyed by the public" which belonged to them, but which riparian owners now sought to deny them. [[240]](#footnote-241)240

The Montana Supreme Court examined the Montana Constitution, which has language similar to ***Colorado***'s, to find authority for public use of the state's waters, including those overlying private lands. [[241]](#footnote-242)241 Like the New Mexico and Wyoming courts, the Montana Supreme Court ruled public ownership precluded riparian landowners from controlling surface uses. [[242]](#footnote-243)242 Unlike Wyoming, however, Montana did not restrict public use to floating, but rather authorized recreational use even on privately owned streambeds and banks to the extent such use is "necessary for the public's enjoyment of its water ownership." [[243]](#footnote-244)243

The New Mexico, Wyoming and Montana models serve to illustrate **[\*492]** that, if the ***Colorado*** legislature or courts recognized the public's right to recreate on waters overlying private property, the ***Colorado*** Constitution could serve as the foundation for this right - either standing alone or in combination with other sources of authority.

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). OTHER SOURCES OF AUTHORITY FOR THE RIGHT TO FLOAT THROUGH PRIVATE PROPERTY

A. State Navigability

As noted above, the federal government obtains its navigational servitude authority by implication from the federal powers under the Commerce Clause of the United States Constitution. [[244]](#footnote-245)244 State navigational servitude authority is an implicitly reserved power under the [*Tenth Amendment of the United States Constitution.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T552-8T6X-7328-00000-00&context=1516831) [[245]](#footnote-246)245 The navigational servitude is an exercise of the state's police powers in navigable waters to regulate public health, welfare and safety. [[246]](#footnote-247)246 State navigational servitude authority is subordinate to the federal government's authority, but in the absence of the federal government's exercise of its navigational servitude, the state retains full authority to control ownership and use of the waterways within its boundaries. [[247]](#footnote-248)247

One commentator has characterized state navigational servitude, similar to the federal version, as "an easement in favor of the public to use the water for navigation." [[248]](#footnote-249)248 Alternatively, the privately-owned title to the bed of a navigable waterway may be conceived as a qualified title not held at the owner's absolute disposal, but subordinate to the public's use of the overflowing waters for navigation.

Many states apply their own common law interpretation of navigability to allow what is tantamount to a public easement for passage, even where a stream is not navigable under the federal tests, or where the federal tests are not applicable. Given federal preemption law, it would be futile for states to adopt a more restrictive navigability standard than the federal standards. [[249]](#footnote-250)249 States, however, may find additional ***rivers*** navigable under their own laws. ***Colorado*** courts have not yet set forth a state standard for navigability. [[250]](#footnote-251)250

***Colorado*** allows for the development of a common law standard **[\*493]** for navigability. ***Colorado*** adopted the common law of England "so far as the same is applicable and of a general nature." [[251]](#footnote-252)251 "English common law gave all subjects rights to navigate and to make other uses of waterways such as fishing and hunting." [[252]](#footnote-253)252 Under the English common law, "the one clear right of the public in the use of water was for travel." [[253]](#footnote-254)253 More importantly, the United States Supreme Court has confirmed that, under the English common law, the public had the right of passage over waterways to which a private party held the title:

American law, in some ways, enhanced and extended the public aspects of submerged lands. English law made a distinction between waterways subject to the ebb and flow of the tide and large enough to accommodate boats (royal ***rivers***) and nontidal waterways (public highways). With respect to the royal ***rivers***, the King was presumed to hold title to the ***river*** bed and soil while the public retained the right of passage and the right to fish. With public highways, as the name suggests, the public retained the right of passage, but title was typically held by a private party. [[254]](#footnote-255)254

This common law derived first from the law of the sea, then became applicable to coastal waters, and then to inland waterways. [[255]](#footnote-256)255 This doctrine applies to navigable inland courses in all of the states, and is not limited to tidal waters. [[256]](#footnote-257)256 Incorporating and following the common law of England, the common law of navigability in ***Colorado*** confirms the public's right to use navigable waterways.

The ***Colorado*** legislature has acknowledged the existence of a common law of navigability. By providing that one does not commit a criminal trespass on any "nonnavigable fresh water streams" in the state unless one touches the bed or banks, the legislature distinguished between streams that are navigable and those that are not for state law purposes. [[257]](#footnote-258)257 The ***Colorado*** statutes do not define the terms "navigable" and "nonnavigable" leaving it to the courts to define both kinds of waterways. In United States v. Goodrich Farms Partnership, [[258]](#footnote-259)258 the court partially defined a non-navigable stream as a ditch. [[259]](#footnote-260)259

In two ***Colorado*** cases where navigability was not at issue and where no navigability standard was applied, the court stated in dicta **[\*494]** that ***Colorado*** streams are not navigable. In Stockman v. Leddy, [[260]](#footnote-261)260 the ***Colorado*** Supreme Court examined the constitutionality of a statute that authorized state scrutiny of federal acts to insure they did not infringe upon the state's right to control the distribution of its own waters… . [[261]](#footnote-262)261 The court stated the "property right … in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state." [[262]](#footnote-263)262 The court also observed that the federal government knew the natural streams of the state were nonnavigable. [[263]](#footnote-264)263 In making this observation, the court likely intended to minimize the potential for federal infringement on ***Colorado*** water resources. While the court did not apply a navigability standard, its statement in Stockman is not a rejection of a state common law navigability standard.

One year after Stockman, the ***Colorado*** Supreme Court in In re German Ditch & Reservoir ***Co***. [[264]](#footnote-265)264 had to decide whether a mostly dry stream augmented by return flows was subject to appropriation under the ***Colorado*** Constitution. [[265]](#footnote-266)265 The court referred to streams as non-navigable in the context of minimal stream flows, unrelated to the legal question posed in the case, and without application of any test for navigability. [[266]](#footnote-267)266 Thus, the court's reference is not binding on the state common law of navigability because the court did not discuss that law.

By necessary implication, ***Colorado*** should adopt the English common law standard of navigability in fact. Many other states have either adopted the English common law standard or fashioned their own hybrid common law definitions. The following cases are illustrative, not exhaustive.

In Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., [[267]](#footnote-268)267 the Idaho Supreme Court affirmed the trial court's development of a common law definition of navigability. [[268]](#footnote-269)268 Idaho adopted a navigable-for-use test that is a blend of the traditional log-floating test and the contemporary pleasure boat test. Although the private landowner urged the court to adhere to only the federal navigability for title test, the court unequivocally separated interests in real property - which remained in the adjacent landowner - from the public's interests in access and use:

The question of title to the [creek bed] is not at issue in this proceeding. This is not an action by the State of Idaho or respondent [hunting and fishing club] to quiet title to the bed of a navigable stream… . The federal test of navigability involving as it does **[\*495]** property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage… . [[269]](#footnote-270)269

California adopted the pleasure boat test and rejected commercial nexus as the test of state navigability in People v. Mack. [[270]](#footnote-271)270 California started by adopting the English common law and has refined its common law definition over time. [[271]](#footnote-272)271 While California also legislated on the subject - designating certain ***rivers*** navigable - legislative action did not supersede the common law doctrine or undercut the general applicability of the principle set forth in Mack. [[272]](#footnote-273)272 California's test is whether waters are "capable of being navigated by oar or motor propelled small craft." [[273]](#footnote-274)273 If so, "members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark… ." [[274]](#footnote-275)274 The court enjoined riparian landowners from obstructing the ***river*** at issue to prevent the public from using it for boating, hunting and fishing as it passed through the defendants' property. [[275]](#footnote-276)275

New York also derived its definition of navigability from the English common law. In Adirondack League Club v. Sierra Club, [[276]](#footnote-277)276 New York's highest court held that if "a ***river*** is navigable-in-fact, it is considered a public highway, notwithstanding the fact that its banks and bed are in private hands." [[277]](#footnote-278)277

Oklahoma has also adopted a state common law navigability-in-fact standard. [[278]](#footnote-279)278 The Oklahoma Supreme Court held:

We are of the opinion and hold that the ***river*** in question is navigable in fact and that plaintiff owns the land to the middle of the stream but that the water is in the nature of a street or highway so that people who get on the ***river*** without committing an act of trespass has [sic] the right to boat on either side of the middle of the stream, either up or down stream. [[279]](#footnote-280)279

Because ***Colorado*** has yet to set a state standard for navigability, it has yet to apply to ***Colorado*** waterways the state navigational servitude other states have adopted. The experience of other states illustrates that state navigation servitude may protect the right to float on ***Colorado***'s ***rivers*** and streams.

**[\*496]**

B. Adverse Possession

***Colorado***'s "Public Highways" statute permits creation of "public highways" by adverse public use of any "roads" for twenty consecutive years without interruption or objection. [[280]](#footnote-281)280 ***Colorado*** courts have embraced a broad, flexible definition of road and highway under which many of ***Colorado***'s waterways could logically be "roads" or "highways." Western ***rivers*** historically were arteries for travel, commerce, exploration and recreation. From the Snake and Columbia ***Rivers*** providing a road west for Lewis and Clark to the Platte ***River*** for John C. Fremont to the Gunnison for Torrence and his party in ***Colorado***, ***rivers*** have met and still do meet the practical definition of a road.

The courts have long viewed ***rivers*** as highways. [[281]](#footnote-282)281 According to a recent edition of Black's Law Dictionary, "in [a] broader sense, [highway] refers to any main route on land, water or the air." [[282]](#footnote-283)282 In an earlier edition, Black's states that "a ***river*** is called a 'highway'..." [[283]](#footnote-284)283 Similarly, "highway" has been defined as "a generic term frequently used in a very broad sense … for all kinds of public ways, whether by land or by water." [[284]](#footnote-285)284 Thus, the very definition of highway includes waterways.

In Hale v. Sullivan, the ***Colorado*** Supreme Court construed the term "road" in the ***Colorado*** Constitution to include an airport landing strip. [[285]](#footnote-286)285 The court adopted a broad definition of "road" which included "ferries, canals and navigable ***rivers***… ." [[286]](#footnote-287)286 The court rejected the argument that the term should be limited to the common usage or to the definition of road at the time the ***Colorado*** Constitution was adopted, and reasoned that the "word has a much broader meaning and may be said to include 'overland ways of every character' … [and that] airports of this nation are links in the transportation system" and are thus "logically within the term 'roads'..." [[287]](#footnote-288)287 Moreover, the cases **[\*497]** the court quotes and relies upon from other jurisdictions expressly compare airports to docks and wharves for boating. [[288]](#footnote-289)288 This suggests that ***Colorado*** courts would consider waterways to be roads.

In Simon v. Pettit, the ***Colorado*** Supreme Court relied upon Hale in interpreting "road" and "public highways" under the Public Highways statute. [[289]](#footnote-290)289 After discussing how airport landing strips are part of the general "transportation system," the court summarized as follows:

Hale stands for the principle that, in certain situations, a broad definition of what constitutes a road should be adopted. In other situations, however, a more restricted definition may be warranted. We reaffirm our previous statement in Hale that the scope to be given the word depends upon the context in which it appears. [[290]](#footnote-291)290

The opinion held that narrow footpaths do not constitute roads, but cautioned that "the footpaths in question are not 'roads'..." only after studying their factual context. [[291]](#footnote-292)291 Accordingly, ***Colorado*** courts have found public "roads" under [***Colorado*** *Revised Statutes 43-2-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-X0C1-DYDC-J04F-00000-00&context=1516831) for transportation ways of all character and based upon public uses that include recreation. [[292]](#footnote-293)292

The other jurisdictions that have considered the issue have treated ***rivers*** as public highways or as subject to adverse possession by public use. For example, in Buffalo ***River*** Conservation & Recreation Council v. National Park Service, a trial court found that under Arkansas state law, the public obtained a prescriptive easement on a ***river*** by canoeing. [[293]](#footnote-294)293 The United States Court of Appeals for the Eighth Circuit affirmed, holding that "in the same way a public highway can be obtained by prescription, a public right-of-way has been established in the ***River***." [[294]](#footnote-295)294 The Court of Appeals held that the Arkansas cases finding prescriptive rights-of-way on land were directly analogous to rights-of-way over non-navigable streams and their beds. [[295]](#footnote-296)295

The Mississippi Supreme Court applied a similar analysis in holding that "where the public has enjoyed access to waters for in **[\*498]** excess of ten consecutive years, those waters belong to the state by adverse possession, to be held in trust for the people." [[296]](#footnote-297)296 As in Buffalo ***River***, the court in Dycus explicitly noted that while the "law well recognizes that roadways may become public by prescription… . By analogy, waters may similarly become public." [[297]](#footnote-298)297

In Elder v. Delcour, the Missouri Supreme Court held that the ***river*** in question was non-navigable for purposes of title (i.e., the owner of the stream banks owned the stream bed), but did not rule on the broader definition of navigable used for purposes of regulation. [[298]](#footnote-299)298 Instead, the court examined whether the "land within the water area of the ***river*** was a public highway and so subject to an easement for public travel by boat and wading… ." [[299]](#footnote-300)299 In so doing, the court summarized various cases in which public use of the ***river*** resulted in the "right of the public to use a stream as a public highway… ." [[300]](#footnote-301)300 The court ultimately concluded there was no trespass because the ***river*** in question was public "and the submerged area of its channel … is a public highway for travel and passage by floating and by wading… ." [[301]](#footnote-302)301

[*VII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831). CONCLUSION

Across the West, most other states have recognized the right of citizen access to float on ***rivers*** and streams under legal authorities that would also support, or arguably compel, recognition of such rights in ***Colorado***. Opponents of public access rely primarily on two flawed assumptions: first, that all ***Colorado*** streams are non-navigable; and second, for that reason, riparian landowners possess absolute title, free from any state property interest, to the beds beneath all waters flowing through private property. At best, such declarations are premature because the ***Colorado*** courts have not had to rule on the navigability of any of the state's watercourses, which is necessarily a fact-based inquiry not subject to general pronouncements. More significantly, public access opponents ignore potential conflicts with the federal, constitutionally-based, navigational servitude and equal footing doctrines, as well as ***Colorado*** statutes and case law that also can establish public access rights.

Our neighbors in Wyoming, New Mexico and Utah, among other western states, including Montana, Idaho and California, protect the right of public access to their waterways. These states have recognized that the public use of waterways is not a new right; it dates to the days of explorers and settlers. Moreover, it is a right that existed at common law, which both predates private claims to absolute title to an **[\*499]** inherently public resource and precludes private interests from interfering with the public's right of access to those resources. For the ***Colorado*** courts to formally recognize such a right would place the state and its boaters right where they belong - in the mainstream.

University of Denver Water Law Review

Copyright (c) 2002 University of Denver (***Colorado*** Seminary) College of Law

**End of Document**

1. 1 ***Colorado*** ***River*** Outfitters Association (CROA), Commercial ***River*** Use in the State of ***Colorado*** 1988-2001 (2002). [↑](#footnote-ref-2)
2. 2 Id. [↑](#footnote-ref-3)
3. 3 [*Hartman v. Tresise, 84 P. 685 (****Colo.*** *1905).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) [↑](#footnote-ref-4)
4. 4 [*597 P.2d 1025 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-5)
5. 5 Id. [↑](#footnote-ref-6)
6. 6 [*Id. at 1027.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-7)
7. 7 David Getches, Water Law in a Nutshell 217 (1997). [↑](#footnote-ref-8)
8. 8 ***Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557 (1870).*** [↑](#footnote-ref-9)
9. 9 ***Id. at 563*** (emphasis added) (holding the English common law definition of "navigability," which was limited to waters influenced by the ebbs and flows of the tides, was inadequate for the United States in which many major water courses essential to interstate and foreign commerce were non-tidal, inland waters). [↑](#footnote-ref-10)
10. 10 See, e.g., [*Choctaw Nation v. Oklahoma, 397 U.S. 620, 645 (1970)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1T0-003B-S2H7-00000-00&context=1516831) (holding navigable waterways "shall be and remain public highways … for the public purposes of commerce, navigation and fishery."). [↑](#footnote-ref-11)
11. 11 See ***Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989)*** (holding navigability for title turns on a ***river***'s susceptibility to commerce, not whether it was actually so used); see also discussion infra pp. 8-10. [↑](#footnote-ref-12)
12. 12 [*Martin v. Waddell's Lessee, 41 U.S. 367 (1842)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KD80-003B-H4H1-00000-00&context=1516831) (holding the Duke of York held title to tidelands in public trust for the state and, therefore, had no authority to grant title in such property to private individuals). [↑](#footnote-ref-13)
13. 13 [*Utah Div. of State Lands v. United States, 482 U.S. 193, 196 (1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H730-003B-450F-00000-00&context=1516831) [*Shively v. Bowlby, 152 U.S. 1, 49-50 (1894)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F7T0-003B-H3BG-00000-00&context=1516831) ("The navigable waters and the soils under them … shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the union."); see also [*Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KBP0-003B-H49X-00000-00&context=1516831) [↑](#footnote-ref-14)
14. 14 See, e.g., Charles F. Wilkinson, The Headwaters of Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine, [*19 Envtl. L. 425, 444-45 (1989).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-3H60-00CW-B2SJ-00000-00&context=1516831) [↑](#footnote-ref-15)
15. 15 [*United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVD0-003B-70JW-00000-00&context=1516831) [↑](#footnote-ref-16)
16. 16 ***Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893).*** [↑](#footnote-ref-17)
17. 17 Compare [*State ex rel. Meek v. Hays, 785 P.2d 1356 (Kan. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-38M0-003F-D286-00000-00&context=1516831) (holding Shoal Creek was non-navigable because it lacked the capacity "for valuable floatage in transportation to market of … products;" therefore, the state did not own creek bed and riparian landowner could fence the creek to prevent canoe passage), with [*Guilliams v. Beaver Lake Club, 175 P. 437, 442 (Or. 1918)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XRX-4D00-00KR-C4M5-00000-00&context=1516831) ("We do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit."). [↑](#footnote-ref-18)
18. 18 ***Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979);*** see also Law of Water Rights and Resources, 9.04[2][a] and [b]. [↑](#footnote-ref-19)
19. 19 ***United States v. Rands, 389 U.S. 121, 123 (1967);*** see also ***Kaiser Aetna, 444 U.S. at 179-80.*** [↑](#footnote-ref-20)
20. 20 Theresa D. Taylor, Determining the Parameters of the Navigation Servitude Doctrine, 34 Vand. L. Rev. 461, 463 (1981). [↑](#footnote-ref-21)
21. 21 [*U.S. Const. art. I, 8, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=1516831).; [*United States v. Darby, 312 U.S. 100, 118 (1941).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=1516831) [↑](#footnote-ref-22)
22. 22 [*Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 7 (1824).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=1516831) [↑](#footnote-ref-23)
23. 23 [*Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1866).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JX80-003B-H2JN-00000-00&context=1516831) The Court similarly recognized that "great navigable streams" are incapable of private ownership. [*United States v. Twin City Power* ***Co****., 350 U.S. 222, 228 (1956);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J9H0-003B-S0JG-00000-00&context=1516831) [*United States v. Chandler-Dunbar* ***Co****., 229 U.S. 53, 69 (1913).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49S-00000-00&context=1516831) [↑](#footnote-ref-24)
24. 24 See Wilkinson, supra note 14. [↑](#footnote-ref-25)
25. 25 States are free to transfer public trust lands, such as the beds and banks of navigable waters, if such a transfer is consistent with trust purposes. See [*Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 455-56 (1892).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FKW0-003B-H44X-00000-00&context=1516831) [↑](#footnote-ref-26)
26. 26 Transfer of title to the states under the equal footing doctrine was subject to pre-statehood federal grants of such lands to patentees. [*Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-K7H0-003B-H41P-00000-00&context=1516831) see also [*Shively v. Bowlby, 152 U.S. 1, 47-48 (1894).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F7T0-003B-H3BG-00000-00&context=1516831) Federal authority to make pre-statehood grants of such lands that defeated a future state's equal footing title was affirmed by the United States Supreme Court in Shively, and again in [*Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261 (1997).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HXW0-003B-R16J-00000-00&context=1516831) But see [*State v. Bunkowski, 503 P.2d 1231, 1236-38 (Nev. 1972).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) [↑](#footnote-ref-27)
27. 27 [*Lewis Blue Point Oyster Cultivation* ***Co****. v. Briggs, 229 U.S. 82, 87 (1913).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49T-00000-00&context=1516831) [↑](#footnote-ref-28)
28. 28 [*Id. at 85-86.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49T-00000-00&context=1516831) [↑](#footnote-ref-29)
29. 29 [*Id. at 88.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49T-00000-00&context=1516831) [↑](#footnote-ref-30)
30. 30 [*Id. at 87-88.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49T-00000-00&context=1516831) [↑](#footnote-ref-31)
31. 31 [*480 U.S. 700 (1987).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HMH0-003B-415K-00000-00&context=1516831) [↑](#footnote-ref-32)
32. 32 [*Id. at 700.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HMH0-003B-415K-00000-00&context=1516831) [↑](#footnote-ref-33)
33. 33 [*Id. at 704, 706.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HMH0-003B-415K-00000-00&context=1516831) [↑](#footnote-ref-34)
34. 34 [*United States v. Willow* ***River*** *Power* ***Co****., 324 U.S. 499, 507 (1945).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-K0K0-003B-S4RB-00000-00&context=1516831) [↑](#footnote-ref-35)
35. 35 [*Id. at 509-10.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-K0K0-003B-S4RB-00000-00&context=1516831) [↑](#footnote-ref-36)
36. 36 [*United States v. Twin City Power* ***Co****., 350 U.S. 222, 224-25 (1956).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J9H0-003B-S0JG-00000-00&context=1516831) [↑](#footnote-ref-37)
37. 37 [*Id. at 227-28.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J9H0-003B-S0JG-00000-00&context=1516831) [↑](#footnote-ref-38)
38. 38 ***Kaiser Aetna v. United States, 444 U.S. 164, 165 (1979).*** [↑](#footnote-ref-39)
39. 39 ***Id. at 164.*** [↑](#footnote-ref-40)
40. 40 ***Id. at 176.*** [↑](#footnote-ref-41)
41. 41 ***Id. at 178-79.*** [↑](#footnote-ref-42)
42. 42 ***Id. at 175.*** [↑](#footnote-ref-43)
43. 43 ***Kaiser Aetna, 444 U.S. at 176.*** [↑](#footnote-ref-44)
44. 44 ***Id. at 177.*** [↑](#footnote-ref-45)
45. 45 ***Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997).*** [↑](#footnote-ref-46)
46. 46 ***Id. at 1472.*** [↑](#footnote-ref-47)
47. 47 ***Id. at 1473-74.*** [↑](#footnote-ref-48)
48. 48 ***Id. at 1472 n.6.*** [↑](#footnote-ref-49)
49. 49 See, e.g., [*Dardar v. LaFourche Realty* ***Co****., 985 F.2d 824, 832 (5th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HCY0-003B-P4N2-00000-00&context=1516831) ("When a navigational servitude exists, it gives rise to the right of the public to use those waterways as 'continuous highways for the purpose of navigation in interstate commerce'."); [*United States v. Harrell, 926 F.2d 1036, 1041 (11th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHK0-008H-V00H-00000-00&context=1516831) ("If the navigational servitude of the Tombigbee ***River***, as a 'navigable waterbody,' encompasses Lewis Creek, [then] Lewis Creek is public property and appellants may, subject to state law, have a right of public access."); ***Goodman v. City of Crystal River, 669 F. Supp. 394, 398 (M.D. Fla. 1987)*** (holding Three Sisters Springs is a navigable water of the United States and therefore subject to a federal navigational servitude). Consequently, the plaintiff, who owned the land surrounding the Three Sisters Springs, had no right to restrict public access by water to Three Sisters Springs except pursuant to a Corps of Engineers permit. Id. [↑](#footnote-ref-50)
50. 50 ***Kaiser Aetna, 444 U.S. at 177.*** [↑](#footnote-ref-51)
51. 51 ***Id. at 175.*** [↑](#footnote-ref-52)
52. 52 See, e.g., [*United States v. Appalachian Power* ***Co****., 311 U.S. 377 (1940).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HJ0-003B-71GR-00000-00&context=1516831) The Supreme Court recently signaled the start of a possible trend towards reducing the scope of navigability for purposes of the Corps' regulatory authority in [*Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4238-TKY0-004C-1015-00000-00&context=1516831) The Court held that isolated intrastate wetlands were not navigable waters for purposes of the Corps' regulatory authority under the Clean Water Act, narrowing this authority to waters that tend to fall more within the classical definition of "navigable" waters by having some hydrological connection to navigable waters. This case, however, is not applicable for purposes of determining whether a federal navigational servitude applies to a waterbody, as the holding turned on the agency's interpretation of a specific statutory provision. [↑](#footnote-ref-53)
53. 53 [*33 U.S.C. 403*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0FN2-D6RV-H2DP-00000-00&context=1516831) (1994). [↑](#footnote-ref-54)
54. 54 ***Kaiser Aetna, 444 U.S. at 171-73.*** [↑](#footnote-ref-55)
55. 55 ***Id. at 175*** (citing [*United States v. Cress, 243 U.S. 316 (1917)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B30-003B-H1KY-00000-00&context=1516831) The court in Cress held the servitude applies to ***rivers*** that are navigable in fact in their natural condition. In discussing the concept of navigable in fact, the court cited the reasoning in the [*Montello. Montello, 87 U.S. 430 (1874).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JJC0-003B-H0RT-00000-00&context=1516831)

    The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a ***river***, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public ***river*** or highway.

    [*Id. at 441-42.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JJC0-003B-H0RT-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 [*Dardar v. LaFourche Realty* ***Co****., 55 F.3d 1082, 1084 (5th Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) (citing ***Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979)).*** [↑](#footnote-ref-57)
57. 57 See 4 Waters and Water Rights 30.05 (Robert E. Beck ed., 1996) ("The [servitude navigability test] - presumably reflecting the historic, if puzzling, commerce clause association - demands susceptibility to use for navigation in interstate commerce.") (citing ***Kaiser Aetna v. United States, 444 U.S. 164 (1979)).*** [↑](#footnote-ref-58)
58. 58 [*Wickard v. Fillburn, 317 U.S. 111, 125 (1942).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=1516831) [↑](#footnote-ref-59)
59. 59 ***Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557 (1870).***

    And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

    ***Id. at 563.*** [↑](#footnote-ref-60)
60. 60 ***Kaiser Aetna, 444 U.S. at 174.*** [↑](#footnote-ref-61)
61. 61 See generally id. [↑](#footnote-ref-62)
62. 62 [*United States v. Kaiser Aetna, 408 F. Supp. 42, 53-54 (D. Haw. 1976).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-K6B0-0054-61H5-00000-00&context=1516831) [↑](#footnote-ref-63)
63. 63 [*United States v. Kaiser Aetna, 584 F.2d 378, 378-79 (9th Cir. 1978).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XT10-0039-M4NG-00000-00&context=1516831) [↑](#footnote-ref-64)
64. 64 ***Kaiser Aetna, 444 U.S. at 178-79*** (citing [*United States v. Chandler-Dunbar* ***Co****., 229 U.S. 53, 69 (1913)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49S-00000-00&context=1516831) [↑](#footnote-ref-65)
65. 65 Id. at 179 n.10. [↑](#footnote-ref-66)
66. 66 [*944 F.2d 1489 (9th Cir. 1991).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8C10-008H-V505-00000-00&context=1516831) [↑](#footnote-ref-67)
67. 67 [*Id. at 1489.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8C10-008H-V505-00000-00&context=1516831) [↑](#footnote-ref-68)
68. 68 See generally id. [↑](#footnote-ref-69)
69. 69 [*Id. at 1501.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8C10-008H-V505-00000-00&context=1516831) [↑](#footnote-ref-70)
70. 70 [*Id. at 1501-02.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8C10-008H-V505-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 [*Id. at 1502.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8C10-008H-V505-00000-00&context=1516831) [↑](#footnote-ref-72)
72. 72 [*Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) aff'd, [*745 F.2d 861 (4th Cir. 1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V880-003B-G3N4-00000-00&context=1516831) [↑](#footnote-ref-73)
73. 73 [*33 U.S.C. 403*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0FN2-D6RV-H2DP-00000-00&context=1516831) (1994). [↑](#footnote-ref-74)
74. 74 [*Loving, 548 F. Supp. at 1084.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) [↑](#footnote-ref-75)
75. 75 [*Id. at 1085.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) [↑](#footnote-ref-76)
76. 76 [*Id. at 1090.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) [↑](#footnote-ref-77)
77. 77 Id. (citing ***Kaiser Aetna v. United States, 444 U.S. 164 (1979)).*** [↑](#footnote-ref-78)
78. 78 Id. at 1090-91 (citing [*United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TTC0-0039-M2SR-00000-00&context=1516831) In Byrd, the court held, based on Wickard v. Fillburn, that a landowner's filling of wetlands, though local, had the potential for exerting substantial economic effect on interstate commerce because out-of-state visitors used the lake affected by the filling activities for recreation. [*Id. at 1209-10.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TTC0-0039-M2SR-00000-00&context=1516831) The case, however, did not involve a federal navigational servitude, and it was decided approximately two months before the Kaiser Aetna decision. [↑](#footnote-ref-79)
79. 79 [*Loving, 548 F. Supp. at 1091.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) [↑](#footnote-ref-80)
80. 80 Id. [↑](#footnote-ref-81)
81. 81 [*Id. at 1089, 1091.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9J20-0039-S35K-00000-00&context=1516831) [↑](#footnote-ref-82)
82. 82 ***981 F. Supp. 1469 (N.D. Ga. 1997).*** [↑](#footnote-ref-83)
83. 83 ***Id. at 1470, 1475.*** [↑](#footnote-ref-84)
84. 84 ***Id. at 1472*** (citing [*United States v. Harrell, 926 F.2d 1036, 1040 (11th Cir. 1991)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHK0-008H-V00H-00000-00&context=1516831) [↑](#footnote-ref-85)
85. 85 Id. at 1472-73 (internal quotations omitted). [*33 C.F.R. 329.4 (2001)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P4-00000-00&context=1516831) provides that "navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [↑](#footnote-ref-86)
86. 86 ***Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469, 1473 n.8 (N.D. Ga. 1997)*** (citing the ***Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).*** [↑](#footnote-ref-87)
87. 87 Id. at 1473 (citing [*33 C.F.R. 329.6(a)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P6-00000-00&context=1516831)). [↑](#footnote-ref-88)
88. 88 Id. at 1473-74. [↑](#footnote-ref-89)
89. 89 Id. at 1473 n.11. [*33 C.F.R. 329.1*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P1-00000-00&context=1516831) addresses the required interstate nature of "navigable waters of the United States" for purposes of the Corps of Engineers' regulatory authority. [*33 C.F.R. 329.7*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P7-00000-00&context=1516831) provides that:

    [a] waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

    Id. [↑](#footnote-ref-90)
90. 90 [*55 F.3d 1082 (5th Cir. 1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) [↑](#footnote-ref-91)
91. 91 [*Id. at 1083.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) [↑](#footnote-ref-92)
92. 92 [*Id. at 1083-84.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) [↑](#footnote-ref-93)
93. 93 [*Id. at 1084-86*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) (citing the ***Daniel Ball, 77 U.S (10 Wall.) 557, 563(1870)).*** [↑](#footnote-ref-94)
94. 94 Id. at 1085-86. [↑](#footnote-ref-95)
95. 95 Id. at 1085. [↑](#footnote-ref-96)
96. 96 [*Dardar, 55 F.3d at 1086*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DDT0-001T-D3G3-00000-00&context=1516831) (citing ***Kaiser Aetna v. United States, 444 U.S. 164, 178-79 (1979)).*** [↑](#footnote-ref-97)
97. 97 Id. [↑](#footnote-ref-98)
98. 98 Id. at 1085-86. [↑](#footnote-ref-99)
99. 99 The Corps' jurisdiction over ***Colorado***'s watersheds is divided among four different districts, with the Sacramento District overseeing the western slope watersheds, and the Albuquerque, Omaha, and Kansas City districts overseeing the state's eastern watersheds. [↑](#footnote-ref-100)
100. 100 United States Army Corps of Engineers, Sacramento District, Waterways within Sacramento District Regulatory Boundaries, at [*www.spk.usace.army.mil/cespk-****co****/regulatory/navigable.ht*](http://www.spk.usace.army.mil/cespk-co/regulatory/navigable.ht) ml (last visited Mar. 29, 2002). [↑](#footnote-ref-101)
101. 101 [*33 C.F.R. 329.3 (2001)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6065-H3N1-DYB7-W2P3-00000-00&context=1516831); see also id. 329.14 ("Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts."). [↑](#footnote-ref-102)
102. 102 Id. 329.16(b). [↑](#footnote-ref-103)
103. 103 Arnett v. Trouthaven, Inc., No. 5702 (Gunnison County Dist. Ct., Sept. 13, 1961) (on file Gunnison County Dist. Ct.). [↑](#footnote-ref-104)
104. 104 [***Colo.*** *Rev. Stat. 18-9-107(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J389-00000-00&context=1516831), 18-4-504.5 (2001). [↑](#footnote-ref-105)
105. 105 Id. 18-9-107 (1)(a), (3). [↑](#footnote-ref-106)
106. 106 [*Curry v. Hill, 460 P.2d 933, 936 (Okla. 1969).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVB-XJ10-003G-61NF-00000-00&context=1516831) [↑](#footnote-ref-107)
107. 107 [***Colo.*** *Rev. Stat. 18-4-504.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V4-00000-00&context=1516831) (2001). [↑](#footnote-ref-108)
108. 108 Id.; Hearing on Second Reading of Senate Bill 360 Before the Senate, 51st Gen. Assembly, First Regular Sess. (***Colo.*** 1977) [hereinafter Hearing on Second Reading] (unpublished Transcript on file with Author). [↑](#footnote-ref-109)
109. 109 [***Colo.*** *Rev. Stat. 18-4-504.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V4-00000-00&context=1516831) (2001). [↑](#footnote-ref-110)
110. 110 See generally Hearing on Senate Bill 360 Before the Senate Judiciary Comm., 51st Gen Assembly, First Regular Sess. (***Colo.*** 1977) [hereinafter Senate Hearing on 360] (unpublished Transcript on file with Author); Hearing on Second Reading, supra note 108. [↑](#footnote-ref-111)
111. 111 [*Senate Hearing on 360, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5VN0-003C-V0T9-00000-00&context=1516831) note 110, at 8 (statement of Sen. Soash). [↑](#footnote-ref-112)
112. 112 See, e.g., id. at 16, 19-20, 22-25, 29. By way of examples: "when you are talking about trespass on the bank, that's one thing; and trespass certainly on the buildings and that sort of thing, you bet … but that's quite different than the bed and stream." Id. at 22 (statement of Sen. Cooper); "If the guy was riding on the water and wasn't on the bed of the stream, then he wouldn't be in violation of the law." Id. at 25; "They wouldn't bother … if you stay in your boat." Id. at 20; "It's the … ones that get out and get on your land." Id. [↑](#footnote-ref-113)
113. 113 Id. at 23-26. [↑](#footnote-ref-114)
114. 114 Id. at 18-19, 21, 26. [↑](#footnote-ref-115)
115. 115 Id. at 25. [↑](#footnote-ref-116)
116. 116 Hearing on Second Reading, supra note 108, at 2. [↑](#footnote-ref-117)
117. 117 Id. [↑](#footnote-ref-118)
118. 118 Id. [↑](#footnote-ref-119)
119. 119 Id. at 3. [↑](#footnote-ref-120)
120. 120 Id. at 4. [↑](#footnote-ref-121)
121. 121 Hearing Before the House Judiciary Comm. on Senate Bill 360, 51st Gen. Assembly, First Regular Sess. 3 (***Colo.*** 1977) [hereinafter House Hearing on 360] (unpublished transcript on file with Author). [↑](#footnote-ref-122)
122. 122 Id. (emphasis added). [↑](#footnote-ref-123)
123. 123 Id. at 4 (statement of Mr. McLain). [↑](#footnote-ref-124)
124. 124 Id. at 6-7. [↑](#footnote-ref-125)
125. 125 [*597 P.2d 1025 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-126)
126. 126 [*Id. at 1026*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) (applying the 1973 [***Colorado*** *Revised Statutes section 18-4-504*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V3-00000-00&context=1516831), which did not include a definition of "premises" until the General Assembly added subsection 504.5 in 1977). Subsection 18-4-504 simply stated, "A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises. Third degree criminal trespass is a class 1 petty offense." [***Colo.*** *Rev. Stat. 18-4-504*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V3-00000-00&context=1516831) (1973). [↑](#footnote-ref-127)
127. 127 [*Emmert, 597 P.2d at 1029-30.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-128)
128. 128 Purpose and Effect of [*C.R.S. 1973, 18-4-504.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V4-00000-00&context=1516831) (1978 repl. vol. 8), [*1983* ***Colo.*** *AG LEXIS 42, at 1 (1983)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3RHH-Y7R0-003Y-Y0BB-00000-00&context=1516831) [hereinafter Woodard Opinion]. [↑](#footnote-ref-129)
129. 129 Id. As discussed in greater detail supra, ***Colorado*** law makes it a crime for any person to obstruct passage on a waterway to which the public has access. See also [***Colo.*** *Rev. Stat. 18-9-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J389-00000-00&context=1516831) (2001). [↑](#footnote-ref-130)
130. 130 [*Woodard Opinion, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-55R0-003F-N0T0-00000-00&context=1516831) note 128, at 1-2. [↑](#footnote-ref-131)
131. 131 Id. at 4. [↑](#footnote-ref-132)
132. 132 Id. at 5-8. [↑](#footnote-ref-133)
133. 133 Id. at 10-14. Although the Woodard Opinion primarily addresses the criminal trespass issue, it does state, for example, "that statute [18-4-504.5] therefore, does not authorize either law enforcement officials or the owners of stream beds or of adjoining property to prohibit such activities." Id. at 13-14. Also, "because section 18-4-504.5 speaks to criminal trespass and does not address civil remedies, it cannot be viewed as authorizing the owners of stream banks and beds to prohibit or otherwise control the use for floating of waters passing over their lands." Id. at 14. [↑](#footnote-ref-134)
134. 134 [*Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KBP0-003B-H49X-00000-00&context=1516831) [*Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KD80-003B-H4H1-00000-00&context=1516831) see also [*Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel* ***Co****., 429 U.S. 363 (1977);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9M20-003B-S4DG-00000-00&context=1516831) [*United States v. Oregon, 295 U.S. 1 (1935).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BC60-003B-750S-00000-00&context=1516831) See generally Charles F. Wilkinson, The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine, [*19 Envtl. L. 425, 439-48 (1989)).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-3H60-00CW-B2SJ-00000-00&context=1516831) [↑](#footnote-ref-135)
135. 135 [*Ill. Cent. R.R.* ***Co****. v. Illinois, 146 U.S. 387, 452 (1892).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FKW0-003B-H44X-00000-00&context=1516831) [↑](#footnote-ref-136)
136. 136 [*United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVD0-003B-70JW-00000-00&context=1516831) [↑](#footnote-ref-137)
137. 137 [*Alaska v. United States, 563 F. Supp. 1223, 1226 (D. D. Alaska 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-T210-0054-50R3-00000-00&context=1516831) [↑](#footnote-ref-138)
138. 138 ***Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 563 (1970).*** [↑](#footnote-ref-139)
139. 139 See discussion supra Part II. [↑](#footnote-ref-140)
140. 140 ***Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989).*** [↑](#footnote-ref-141)
141. 141 ***Id. at 1402-03.*** [↑](#footnote-ref-142)
142. 142 ***Id. at 1402.*** [↑](#footnote-ref-143)
143. 143 ***Id. at 1403.*** [↑](#footnote-ref-144)
144. 144 ***Id. at 1403, 1405.*** [↑](#footnote-ref-145)
145. 145 ***Ahtna, Inc., 891 F.2d at 1405.*** [↑](#footnote-ref-146)
146. 146 Id. [↑](#footnote-ref-147)
147. 147 Id.; see also A. Dan Tarlock, Law of Water Rights and Resources 8:12 (Supp. 2001) (citing [*United States v. Oregon, 295 U.S. 1 (1935);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BC60-003B-750S-00000-00&context=1516831) ***United States v. Utah, 283 U.S. 64 (1931);*** [*United States v. Holt State Bank, 270 U.S. 49 (1926)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVD0-003B-70JW-00000-00&context=1516831) [↑](#footnote-ref-148)
148. 148 ***Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893).*** [↑](#footnote-ref-149)
149. 149 See, e.g., [*State v. Bunkowski, 503 P.2d 1231,1236 (Nev. 1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) ("No case has been found which holds that there is exclusive federal jurisdiction to determine title navigability… . The uniform federal 'test' … has been applied by both state and federal courts to determine title to submerged lands."). Compare [*Kansas ex rel. Meek. v. Hays, 785 P.2d 1356, 1360 (Kan. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-38M0-003F-D286-00000-00&context=1516831) (holding Shoal Creek was non-navigable because it lacked the capacity "for valuable floatage in transportation to market of products," therefore, the state did not own the creek bed and its riparian landowner could fence the creek to prevent canoe passage), with ***Lamprey, 53 N.W. at 1143*** ("We do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit."). See also [*Bunkowski, 503 P.2d at 1234*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) (holding that because the Carson ***River*** had historically been used for floating timber, it satisfied the federal test for navigability for title, after noting other states had "adopted varying and less stringent tests … in order to establish the right of public use."). [↑](#footnote-ref-150)
150. 150 ***Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912),*** overruled on other grounds by [*United States v. City & County of Denver, 656 P.2d 1, 16-17 (****Colo.*** *1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831) and [*Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200, 204 (****Colo.*** *1975);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1MP0-003D-93R3-00000-00&context=1516831) accord [*In re German Ditch & Reservoir* ***Co****., 139 P. 2, 9 (****Colo.*** *1913)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0R60-0040-032B-00000-00&context=1516831) ("The natural streams of the state are non-navigable within its limits."). [↑](#footnote-ref-151)
151. 151 2 George Vranesh, ***Colorado*** Water Law 6.9 n.454 (Margaret Nagel Dillon ed., 1987) ("It is generally assumed that ***Colorado***'s streams are non-navigable for purposes of bed title."). [↑](#footnote-ref-152)
152. 152 See [*Defenders of Wildlife v. Hull, 18 P.3d 722, 729 (Ariz. Ct. App. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (invalidating a statute that would have allowed the state to disclaim its ownership of streambeds under a definition of navigability more restrictive than the federal definition of navigability for title). [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 Id. (citing [*Phillips Petroleum* ***Co****. v. Mississippi, 484 U.S. 469, 475 (1988)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FPW0-003B-40GC-00000-00&context=1516831) [↑](#footnote-ref-155)
155. 155 Id. at 731 n.11; see [*Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel* ***Co****. 429 U.S. 363, 374 (1977);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9M20-003B-S4DG-00000-00&context=1516831) see also 4 Water and Water Rights, supra note 57, 30.01(a) (citing [*Coyle v. Smith, 221 U.S. 559, 566-67 (1911)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8XJ0-003B-H09G-00000-00&context=1516831) ("the equal footing doctrine is treated by the Supreme Court as a federal constitutional dimension.")). [↑](#footnote-ref-156)
156. 156 [*Defenders of Wildlife, 18 P.3d at 731*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (internal citation omitted). [↑](#footnote-ref-157)
157. 157 Id. (citing [*Allen v. McCurry, 449 U.S. 90, 105 (1980)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6TT0-003B-S3R7-00000-00&context=1516831) [↑](#footnote-ref-158)
158. 158 Id. at 727. [↑](#footnote-ref-159)
159. 159 Id. at 726. Though the state had allowed its right of ownership to lie "dormant" for more than seventy years, the court noted such dormancy did not invalidate the state's claims, because "neither doctrines of laches nor statutes of limitations [could] defeat the state's sovereign title to trust lands." Id. at 726 n.1 (citing [*State ex rel. Bd. of Univ. & Sch. Lands v. Andrus, 506 F. Supp. 619, 625 (D. N.D. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-TTG0-0039-S1GT-00000-00&context=1516831) rev'd on other grounds by [*Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4YD0-003B-S4S9-00000-00&context=1516831) (internal quotations omitted)). [↑](#footnote-ref-160)
160. 160 Ariz. Ctr. for Law in the ***Pub. Interest v. Hassell, 837 P.2d 158, 162 (Ariz. Ct. App. 1992).*** [↑](#footnote-ref-161)
161. 161 ***Id. at 161.*** [↑](#footnote-ref-162)
162. 162 [*Defenders of Wildlife, 18 P.3d at 727.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) [↑](#footnote-ref-163)
163. 163 ***Hassell, 837 P.2d at 162*** (citing H.B. 2017, 1987 Leg., First Regular Sess. (Ariz. 1987)). [↑](#footnote-ref-164)
164. 164 Id. [↑](#footnote-ref-165)
165. 165 Id. [↑](#footnote-ref-166)
166. 166 ***Id. at 162-63.*** [↑](#footnote-ref-167)
167. 167 [*Defenders of Wildlife, 18 P.3d at 727*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing ***Hassell, 837 P.2d at 173).*** Ariz. Const. art. IX, 7 states in relevant part, "neither the state, nor a subdivision shall … make any donation to any individual, [association], or corporation… ." [↑](#footnote-ref-168)
168. 168 [*Defenders of Wildlife, 18 P.3d at 727*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (internal quotations omitted). [↑](#footnote-ref-169)
169. 169 [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) (West Supp. 2001) (original version at 1994 Ariz. Sess. Laws, ch. 277, 1-14 (effective April 25, 1994)). [↑](#footnote-ref-170)
170. 170 [*Defenders of Wildlife, 18 P.3d at 728*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (internal quotations omitted). [↑](#footnote-ref-171)
171. 171 Id. [↑](#footnote-ref-172)
172. 172 [*Id. at 728 n.4.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) [↑](#footnote-ref-173)
173. 173 [*Id. at 731-37.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) [↑](#footnote-ref-174)
174. 174 [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) hist. & stat. n.(B), (D), (G) (West Supp. 2001). [↑](#footnote-ref-175)
175. 175 [*Defenders of Wildlife, 18 P.3d at 731*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing [*North Dakota v. United States, 972 F.2d 235, 237-38 (8th Cir. 1992)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1XJ0-008H-V1M0-00000-00&context=1516831) [↑](#footnote-ref-176)
176. 176 Id. at 731-32 (citing [*Utah v. United States, 403 U.S. 9, 11-12 (1971)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DJ80-003B-S29C-00000-00&context=1516831) (finding susceptibility for navigation supported solely on evidence that farmers had transported livestock across a lake). But see, e.g., [*North Dakota v. United States, 972 F.2d at 238-40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1XJ0-008H-V1M0-00000-00&context=1516831) (implying more than a "scintilla" of evidence is required by holding an isolated tie drive in unusually high water, the historical use of ferries for transportation across the ***river***, present-day recreational canoe use, previous boat use by Indians and inconclusive evidence from explorers' journals combined did not support a finding of navigability). [↑](#footnote-ref-177)
177. 177 Id. at 732. [↑](#footnote-ref-178)
178. 178 [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) hist. & stat. n.(B) (West Supp. 2001). [↑](#footnote-ref-179)
179. 179 [*Defenders of Wildlife, 18 P.3d at 732*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing [*United States v. Appalachian Elec. Power* ***Co****., 311 U.S. 377, 410 (1940)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HJ0-003B-71GR-00000-00&context=1516831) [↑](#footnote-ref-180)
180. 180 [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) hist. & stat. n.(C)(1) (2001). [↑](#footnote-ref-181)
181. 181 [*Defenders of Wildlife, 18 P.3d at 732*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing [*Utah v. United States, 403 U.S. 9, 11(1971)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DJ80-003B-S29C-00000-00&context=1516831) [↑](#footnote-ref-182)
182. 182 Id. at 733 (citing [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) hist. & stat. n.(D)(2) (West Supp. 2001)). [↑](#footnote-ref-183)
183. 183 Id. at 733-34 (citing Ariz. Rev. Stat . 37-1128 hist. & stat. n.(D)(3) (West Supp. 2001)). [↑](#footnote-ref-184)
184. 184 Id. at 734 (citing [*Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-D1K0-003B-60R1-00000-00&context=1516831) [↑](#footnote-ref-185)
185. 185 [*Ariz. Rev. Stat. 37-1128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J151-6MP7-F43C-00000-00&context=1516831) hist. & stat. n.(D)(5) (West Supp. 2001). [↑](#footnote-ref-186)
186. 186 [*Defenders of Wildlife, 18 P.3d at 734-35*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing ***Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989)*** ("'To deny that … use of the ***River*** is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity'"); [*Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1194 (N.Y. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VBY-1W50-0039-41JB-00000-00&context=1516831) ("...evidence of the ***river***'s capacity for recreational use is in line with the traditional test of navigability, that is, whether a ***river*** has a practical utility for trade or travel."). In following these recent precedents, the court noted two prior cases where federal courts declined to find navigability based solely on recreational boating and fishing activities. These cases were nineteenth century decisions, while a third was decided in 1935. [*Defenders of Wildlife, 18 P.3d at 734.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) [↑](#footnote-ref-187)
187. 187 [*Defenders of Wildlife, 18 P.3d at 737*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (citing [*United States v. Alaska, 521 U.S. 1, 34 (1997);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HY50-003B-R1DD-00000-00&context=1516831) [*United States v. Oregon, 295 U.S. 1, 14 (1935)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BC60-003B-750S-00000-00&context=1516831) [↑](#footnote-ref-188)
188. 188 Id. (citing Idaho v. Coeur d'[*Alene Tribe of Idaho, 521 U.S. 261, 284 (1997)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HXW0-003B-R16J-00000-00&context=1516831) [↑](#footnote-ref-189)
189. 189 Id. [↑](#footnote-ref-190)
190. 190 See Discussion infra Part V. [↑](#footnote-ref-191)
191. 191 [*Aspen Wilderness Workshop, Inc. v.* ***Colorado*** *Water Conservation Bd., 901 P.2d 1251, 1263 (****Colo.*** *1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) (Mullarkey, J., dissenting) (emphasis added). [↑](#footnote-ref-192)
192. 192 See [*Defenders of Wildlife, 18 P.3d at 739-41.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) In a separate opinion, Judge Thompson concurred with the majority in requiring a "particularized assessment" of the state's equal footing claims, consistent with federal standards for navigability for title. [*Id. at 739.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) However, he objected to the presumption that equal footing lands could not be alienated, arguing that in the arid west, conveyance of such lands into private ownership would "not necessarily violate the public trust doctrine." [*Id. at 740*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) (analogizing Arizona statutory language providing "state waters belong to the public and are subject to appropriation and beneficial use" to similar language in the ***Colorado*** Constitution, which the ***Colorado*** Supreme Court construed as "'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'.") (citing [*People v. Emmert, 597 P.2d 1025, 1028 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) (discussed infra Part V)). [↑](#footnote-ref-193)
193. 193 [*State v. Bunkowski, 503 P.2d 1231, 1236-38 (Nev. 1972).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) [↑](#footnote-ref-194)
194. 194 [*Id. at 1238.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) [↑](#footnote-ref-195)
195. 195 [*Id. at 1237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) (citing [*United States v. Holt State Bank, 270 U.S. 49, 54 (1926)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVD0-003B-70JW-00000-00&context=1516831) [↑](#footnote-ref-196)
196. 196 [*Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRK-J2N0-003C-H0MN-00000-00&context=1516831) see also [*Defenders of Wildlife, 18 P.3d at 730 n.9.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831)

     Although individual states are free to pass laws that address the disposition of public trust lands, this power is subject to the obligation of the state to preserve the trust. Thus, trust land may only be used in ways that promote the trust's purposes or improve the public's use of the resource. In short, a transfer of public trust property is valid as long as the grantee's use does not impair or interfere with the public interest.

     Id. (citing Ariz. Ctr. for law in the ***Pub. Interest v. Hassell, 837 P.2d 158, 166-69 (Ariz. Ct. App. 1992)).*** [↑](#footnote-ref-197)
197. 197 [*Bunkowski, 503 P.2d at 1236-38.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) [↑](#footnote-ref-198)
198. 198 [*Id. at 1236-37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) (citing [*Wear v. Kansas, 245 U.S. 154 (1917)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6650-003B-H11W-00000-00&context=1516831) [↑](#footnote-ref-199)
199. 199 Id. at 1237. [↑](#footnote-ref-200)
200. 200 Id. (quoting [*United States v. Oregon, 295 U.S. 1, 14 (1935)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BC60-003B-750S-00000-00&context=1516831) [↑](#footnote-ref-201)
201. 201 Id. [↑](#footnote-ref-202)
202. 202 Id. at 1238. [↑](#footnote-ref-203)
203. 203 [*Bunkowski, 503 P.2d at 1238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) (citing [*State v. Hutchins, 105 A. 519, 523 (1919)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VJ8-B620-0039-44NB-00000-00&context=1516831) [↑](#footnote-ref-204)
204. 204 As discussed, infra this section, New Mexico and Wyoming, for example, have declared that all waters within their boundaries are "public waters" for the purpose of establishing public use rights notwithstanding streambed ownership. [↑](#footnote-ref-205)
205. 205 See discussion supra Part IV. See, e.g., [*Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) (holding the title to the bed of a non-navigable stream that the federal government conveyed to a private landowner before statehood, was not absolute but burdened with a public easement that entitled the public to fish by canoe and wading); [*Collins v. Gerhardt, 211 N.W. 115, 118 (Mich. 1926)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S12-4MC0-003G-Y27P-00000-00&context=1516831) (holding lands beneath navigable streams that the federal government ceded to the state and which the state granted to private owners were impressed with a perpetual trust that secured the public's rights to float, fish and hunt water fowl). [↑](#footnote-ref-206)
206. 206 See [*Mobile Transp.* ***Co****. v. City of Mobile, 44 So. 976, 977 (Ala. 1907);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y9P-B6T0-0046-80D7-00000-00&context=1516831) [*Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 494-95 (Alaska 1988);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-W9X0-003C-G1J0-00000-00&context=1516831) Arizona Ctr. for Law in the ***Pub. Interest v. Hassell, 837 P.2d 158, 162 (Ariz. Ct. App. 1992);*** [*Anderson v. Reames, 161 S.W.2d 957, 960 (Ark. 1942);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YW7-XGC0-00KR-D1WY-00000-00&context=1516831) [*Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F0N0-003D-J1V1-00000-00&context=1516831) [*Lovejoy v. City of Norwalk, 152 A. 210, 212 (Conn. 1930);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X3S-MJP0-00KR-C0Y5-00000-00&context=1516831) [*Coastal Petroleum* ***Co****. v. Am. Cyanamid* ***Co****., 492 So. 2d 339, 342 (Fla. 1986);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XVY0-003D-X2X9-00000-00&context=1516831) [*Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1B90-003F-G1C9-00000-00&context=1516831) [*Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1S80-003D-32Y3-00000-00&context=1516831) [*People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 779 (Ill. 1977);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S11-VB30-003C-B18D-00000-00&context=1516831) [*State ex rel O'Connor v. Sorenson, 271 N.W. 234, 238 (Iowa 1937);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YRV-JXV0-00KR-F31T-00000-00&context=1516831) [*Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-57P0-008T-X09N-00000-00&context=1516831) [*Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-55R0-003F-N0T0-00000-00&context=1516831) [*Caine v. Cantrell, 369 A.2d 56, 58 (Md. 1977);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5B50-003G-207T-00000-00&context=1516831) [*Opinion of Justices to Senate, 424 N.E.2d 1092, 1098 (Mass. 1981);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5VN0-003C-V0T9-00000-00&context=1516831) [*Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 860 (Mich. 1982);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-J620-003D-616K-00000-00&context=1516831) [*Nelson v. De Long, 7 N.W.2d 342, 346 (Minn. 1942);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-55K0-003G-V4X6-00000-00&context=1516831) [*Cinque Bambini P'ship v. State, 491 So. 2d 508, 512 (Miss. 1986),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-6TN0-003G-74X6-00000-00&context=1516831) aff'd sub nom. [*Phillips Petroleum* ***Co****. v. Mississippi, 484 U.S. 469 (1988);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FPW0-003B-40GC-00000-00&context=1516831) [*Elder v. Delcour, 269 S.W.2d 17, 23 (Mo. 1954);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) [*Galt v. Montana Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 915 (Mont. 1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4MB0-003G-84HN-00000-00&context=1516831) [*State v. Bunkowski, 503 P.2d 1231, 1237 (Nev. 1972);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-4920-003D-C49G-00000-00&context=1516831) ***New Hampshire Water Res. Bd. v. Lebanon Sand & Gravel Co., 233 A.2d 828, 829-30 (N.H. 1967);*** [*Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WTY0-003C-N0R9-00000-00&context=1516831) ***New Mexico ex rel. State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 440 (N.M. 1945);*** [*Coxe v. State, 39 N.E. 400 (N.Y. 1895);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y840-003F-62MM-00000-00&context=1516831) [*State ex rel. Rohrer v. Credle, 369 S.E.2d 825, 828 (N.C. 1988);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-XRN0-003G-02K2-00000-00&context=1516831) [*United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXP-6560-003G-90FH-00000-00&context=1516831) [*Thomas v. Sanders, 413 N.E.2d 1224, 1227 (Ohio Ct. App. 1979);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-SR50-0054-C44F-00000-00&context=1516831) [*Morse v. Or. Div. of State Lands, 590 P.2d 709, 711 (Or. 1979);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-X8Y0-003F-Y311-00000-00&context=1516831) [*Alburger v. Philadelphia Elec.* ***Co****., 535 A.2d 729, 731 (Pa. Commw. Ct. 1988);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-1990-003C-S50R-00000-00&context=1516831) [*Jackvony v. Powel, 21 A.2d 554, 557 (R.I. 1941);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y9P-B6K0-00KR-F54Y-00000-00&context=1516831) [*Hobonny Club, Inc. v. McEachern, 252 S.E.2d 133, 135 (S.C. 1979);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVJ-F3G0-003G-C41D-00000-00&context=1516831) [*Hillebrand v. Knapp, 274 N.W. 821, 822 (S.D. 1937);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:401R-N430-00KR-C425-00000-00&context=1516831) [*State ex rel. Cates v. W. Tenn. Land* ***Co****., 158 S.W. 746, 752 (Tenn. 1913);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X6S-1HM0-00KR-D03V-00000-00&context=1516831) ***Cameron County v. Velasquez, 668 S.W.2d 776, 780 (Tex. Ct. App. 1984);*** [*Colman v. Utah State Land Bd., 795 P.2d 622, 635 (Utah 1990);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXP-4XR0-003G-F10S-00000-00&context=1516831) [*State v. Cent. Vt. Ry., 571 A.2d 1128, 1130 (Vt. 1989);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-1590-003G-G1TC-00000-00&context=1516831) [*Darling v. City of Newport News, 96 S.E. 307 (Va. 1918),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W4R0-003D-505J-00000-00&context=1516831) aff'd. [*249 U.S. 540 (1919);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FX0-003B-H506-00000-00&context=1516831) [*Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W3T0-003F-W53Y-00000-00&context=1516831) [*Campbell Brown &* ***Co****. v. Elkins, 93 S.E.2d 248, 260 (W. Va. 1956);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XMH-88D0-00KR-C29P-00000-00&context=1516831) [*Wis's Envtl. Decade, Inc. v. Dept. of Natural Res., 271 N.W.2d 69, 72 (Wis. 1978);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-W8J0-003G-32J4-00000-00&context=1516831) [*Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) [↑](#footnote-ref-207)
207. 207 See, e.g., ***S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1298 (Idaho 1974)*** (holding the public was entitled to boat, swim, hunt and engage in any other recreational activity on any stream which was suitable for such public uses regardless of streambed ownership). But see [*Brosnan v. Gage, 133 N.E. 622, 624 (Mass. 1921)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRJ-DMM0-003C-T35N-00000-00&context=1516831) (holding title to streambed entitled private landowner to assert exclusive fishing rights, but that his title was impressed with a public easement for business and pleasure boating). [↑](#footnote-ref-208)
208. 208 See, e.g., [*Defenders of Wildlife v. Hull, 18 P.3d 722, 729 (Ariz. Ct. App. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) ("'The leading nineteenth century Supreme Court decisions on state sovereignty made it clear that the states owe a fiduciary obligation to the general public with regard to the management of their sovereign resources,' which are … 'public trust' lands.") (citing [*Phillips Petroleum* ***Co****. v. Mississippi, 484 U.S. 469, 475 (1988));*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FPW0-003B-40GC-00000-00&context=1516831) 4 Waters and Water Rights, supra note 57, 30.01(c). [↑](#footnote-ref-209)
209. 209 See discussion supra Part IV. [↑](#footnote-ref-210)
210. 210 See discussion of New Mexico and Wyoming Constitutions as compared with ***Colorado***'s Constitution, infra this Part V. [↑](#footnote-ref-211)
211. 211 For example, Texas and Mississippi have statutory standards for navigability that some courts have interpreted as also defining waters to which the public has recreational access. See ***Ryals v. Pigott, 580 So. 2d 1140, 1148-49 (Miss. 1990);*** [*Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847, 850 (Tex. Civ. App. 1976);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-C3J0-003C-52K5-00000-00&context=1516831) see also ***S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297 (Idaho 1974)*** (relying, in part, on a statute that allows the public to fish on streams capable of floating logs of a certain dimension); [*Muench v. Pub. Serv.* ***Co****., 53 N.W.2d 514, 519 (Wis. 1952)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2980-003V-H3T8-00000-00&context=1516831) (applying statute that declared streams that are "'navigable in fact for any purpose whatsoever'."). [↑](#footnote-ref-212)
212. 212 [*People v. Emmert, 597 P.2d 1025, 1027 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) (Groves, J., and Carrigan, J., dissenting); [*Hartman v. Tresise, 84 P. 685, 686 (****Colo.*** *1905)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) (Steele, J., and Bailey, J., dissenting). More recently, in a dissenting opinion, Justice Mullarkey remarked, in dicta, "This court has never recognized the public trust with respect to water." [*Aspen Wilderness Workshop, Inc. v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1263 (****Colo.*** *1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) (Mullarkey, J., dissenting) (emphasis added). [↑](#footnote-ref-213)
213. 213 [*Emmert, 597 P.2d at 1029*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) ("If 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."). [↑](#footnote-ref-214)
214. 214 ***Colo.*** Const., art. XVI, 5 (emphasis added). [↑](#footnote-ref-215)
215. 215 [*Emmert, 597 P.2d at 1028*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) (reaffirming [*Hartman, 84 P. at 686).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) [↑](#footnote-ref-216)
216. 216 Id. [↑](#footnote-ref-217)
217. 217 Id. (quoting [*Hartman, 84 P. at 686).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) By contrast, the Idaho Supreme Court construed similar language as imposing no constraints on the state's park agency from appropriating water for scenic and recreational purposes. [*State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 926 (Idaho 1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-22V0-003D-34R2-00000-00&context=1516831) (construing Article 15, section 3, of the Idaho Constitution, which states: "'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied'."). Although the Idaho case involved a stream flowing over public land, it illustrates an alternate construction of constitutional language almost identical to that which the ***Colorado*** court relied upon in Emmert to restrict public access to unappropriated waters. Additionally, this language did not prevent the Idaho court from allowing public use rights for "all recreational purposes" on waters deemed navigable under a state definition of navigability, even where the streambed was in private ownership. See ***S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297-98 (Idaho 1974).*** [↑](#footnote-ref-218)
218. 218 [*Emmert, 597 P.2d at 1030.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-219)
219. 219 Id. [↑](#footnote-ref-220)
220. 220 Id. (quoting Bailey, J., in [*Hartman, 84 P. at 690*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) (Steele, J., concurring)). [↑](#footnote-ref-221)
221. 221 Id. (Groves, J., dissenting) (quoting [*Hartman, 84 P. at 690-91*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2430-0040-0540-00000-00&context=1516831) (Bailey, J., dissenting)). [↑](#footnote-ref-222)
222. 222 See, e.g., [*Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 491-98 (Alaska 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-W9X0-003C-G1J0-00000-00&context=1516831) (construing Alaska Const. art. VIII, 3); [*Galt v. Montana Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 914-15 (Mont. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4MB0-003G-84HN-00000-00&context=1516831) (construing Mont. Const. art. IX, 3(3)); ***State ex rel. State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 430-31 (N.M. 1947)*** (construing N.M. Const. art. 16, 2); [*Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) (construing Wyo. Const. art. 8, 1). But see [*State ex rel. Meek v. Hays, 785 P.2d 1356, 1364-65 (Kan. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-38M0-003F-D286-00000-00&context=1516831) (analogizing [*Kan. Stat. Ann. 82a-702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-TCW1-DYB8-31MH-00000-00&context=1516831) (1997) to Mont. Const. art. IX, 3, but following [*Emmert, 597 P.2d at 1030,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) in holding the public has no recreational use rights to non-navigable water overlying private lands without landowner consent). [↑](#footnote-ref-223)
223. 223 N.M. Const. art 16, 2 (emphasis added). [↑](#footnote-ref-224)
224. 224 ***Red River Valley, 182 P.2d at 430-34*** (acknowledging the similarities between New Mexico and ***Colorado*** Constitutions, but rejecting the ***Colorado*** Supreme Court majority's holding and reasoning in its Hartman decision). [↑](#footnote-ref-225)
225. 225 ***Id. at 427-28.*** [↑](#footnote-ref-226)
226. 226 The New Mexico court affirmed title to the submerged lands was vested in the riparian landowner, whose ownership could be traced to the Pablo Montoya Grant of 1869. ***Id. at 424-26.*** However, because the water belonged to the state, the court stated "justice and common sense" dictated the federal government's confirmation of the landowner's title to the lands did not purport to "destroy, or in any manner limit, the right of the general public to enjoy the uses of public waters." ***Id. at 432.*** [↑](#footnote-ref-227)
227. 227 ***Id. at 432*** (emphasis in original). [↑](#footnote-ref-228)
228. 228 ***Id. at 467*** (plurality on second motion for rehearing). [↑](#footnote-ref-229)
229. 229 Id. [↑](#footnote-ref-230)
230. 230 ***Red River Valley, 182 P.2d at 432.*** [↑](#footnote-ref-231)
231. 231 [*362 P.2d 137 (Wyo. 1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) [↑](#footnote-ref-232)
232. 232 [*Id. at 151.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) [↑](#footnote-ref-233)
233. 233 Id. [↑](#footnote-ref-234)
234. 234 [*Id at 145.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) ("When waters are able to float craft, they may be so used."). [↑](#footnote-ref-235)
235. 235 [*Id. at 146;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) see Wyo. Const. art. 8, 1 ("The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state"). [↑](#footnote-ref-236)
236. 236 [*Day, 362 P.2d at 145.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) [↑](#footnote-ref-237)
237. 237 Id. [↑](#footnote-ref-238)
238. 238 Id. [↑](#footnote-ref-239)
239. 239 [*Id. at 151.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-KT40-000K-1089-00000-00&context=1516831) [↑](#footnote-ref-240)
240. 240 Id. [↑](#footnote-ref-241)
241. 241 [*Mont. Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 170 (Mont. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-50P0-003G-80J8-00000-00&context=1516831) (construing Mont. Const. art. IX 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.") (emphasis added)); accord [*Galt v. Montana ex rel. Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 915 (Mont. 1987);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4MB0-003G-84HN-00000-00&context=1516831) [*Mont. Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5050-003G-80GP-00000-00&context=1516831) [↑](#footnote-ref-242)
242. 242 [*Curran, 682 P.2d at 170.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-50P0-003G-80J8-00000-00&context=1516831) [↑](#footnote-ref-243)
243. 243 [*Galt, 731 P.2d at 915*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4MB0-003G-84HN-00000-00&context=1516831) (invalidating sections of a statute that would have allowed activities not necessary to water-based recreational activities, but affirming the constitutional basis for the state's public trust doctrine). [↑](#footnote-ref-244)
244. 244 See discussion supra Part II. [↑](#footnote-ref-245)
245. 245 Jessie H. Briggs, Navigational Servitude as a Method of Ecological Protection, 75 Dick. L. Rev. 256, 260 (1971). [↑](#footnote-ref-246)
246. 246 Id. at 256. [↑](#footnote-ref-247)
247. 247 Daniel J. Morgan & David G. Lewis, The State Navigation Servitude, 4 Land & Water L. Rev. 521, 521-22 (1969); see also [*Briggs, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8340-003B-H49T-00000-00&context=1516831) note 245, at 256. [↑](#footnote-ref-248)
248. 248 Id. at 522. [↑](#footnote-ref-249)
249. 249 See, e.g., [*People v. Rister, 803 P.2d 483, 494 (****Colo.*** *1990);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0P00-003D-92PX-00000-00&context=1516831) see also, [*Defenders of Wildlife v. Hull, 18 P.3d 722 (Ariz. Ct. App. 2001);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3590-0039-4423-00000-00&context=1516831) discussion supra Part IV. [↑](#footnote-ref-250)
250. 250 See, e.g., [*People v. Emmert, 597 P.2d 1025 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) One of the stipulated facts was that the stream reach was non-navigable. Thus, the navigability issue, whether under federal or state standards, was avoided in Emmert. [*Id. at 1026.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-251)
251. 251 [***Colo.*** *Rev. Stat. 2-4-211*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WTB1-DYDC-J0K2-00000-00&context=1516831) (2001). [↑](#footnote-ref-252)
252. 252 David H. Getches, Water Law in a Nutshell 218 (3d ed. 1997). [↑](#footnote-ref-253)
253. 253 4 Waters and Water Rights, supra note 57, 29.02(b). [↑](#footnote-ref-254)
254. 254 Idaho v. Coeur d' [*Alene Tribe, 521 U.S. 261, 285 (1997).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HXW0-003B-R16J-00000-00&context=1516831) [↑](#footnote-ref-255)
255. 255 4 Waters and Water Rights, supra note 57, 30.01(d)(2). [↑](#footnote-ref-256)
256. 256 Id.; see, ***Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 563 (1870).*** [↑](#footnote-ref-257)
257. 257 [***Colo.*** *Rev. Stat. 18-4-504.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J2V4-00000-00&context=1516831) (2001) (emphasis added); see also discussion supra Part III. By providing that it is a misdemeanor to obstruct a "waterway" or "any other place used for the passage of persons, vehicles, or conveyances" when that waterway or place is one "to which the public or a substantial group of the public has access," the legislature has indicated that navigable streams in this state enjoy certain protections. [***Colo.*** *Rev. Stat. 18-9-107(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WSW1-DYDC-J389-00000-00&context=1516831) (2001). [↑](#footnote-ref-258)
258. 258 [*947 F.2d 906 (10th Cir. 1991).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7MD0-008H-V16V-00000-00&context=1516831) [↑](#footnote-ref-259)
259. 259 [*Id. at 908.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7MD0-008H-V16V-00000-00&context=1516831) [↑](#footnote-ref-260)
260. 260 ***129 P. 220 (Colo. 1912).*** [↑](#footnote-ref-261)
261. 261 ***Id. at 221.*** [↑](#footnote-ref-262)
262. 262 ***Id. at 222.*** [↑](#footnote-ref-263)
263. 263 Id. [↑](#footnote-ref-264)
264. 264 [*139 P. 2 (****Colo.*** *1913).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0R60-0040-032B-00000-00&context=1516831) [↑](#footnote-ref-265)
265. 265 [*Id. at 5-9.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0R60-0040-032B-00000-00&context=1516831) [↑](#footnote-ref-266)
266. 266 See id. [↑](#footnote-ref-267)
267. 267 ***528 P.2d 1295 (Idaho 1974).*** [↑](#footnote-ref-268)
268. 268 ***Id. at 1297-98.*** [↑](#footnote-ref-269)
269. 269 ***Id. at 1298.*** [↑](#footnote-ref-270)
270. 270 ***97 Cal. Rptr. 448, 454 (Cal. Ct. App. 1971).*** [↑](#footnote-ref-271)
271. 271 ***Id. at 451.*** [↑](#footnote-ref-272)
272. 272 ***Id. at 453.*** [↑](#footnote-ref-273)
273. 273 ***Id. at 454.*** [↑](#footnote-ref-274)
274. 274 Id. [↑](#footnote-ref-275)
275. 275 ***Id. at 450.*** [↑](#footnote-ref-276)
276. 276 [*706 N.E.2d 1192 (N.Y. 1998).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VBY-1W50-0039-41JB-00000-00&context=1516831) [↑](#footnote-ref-277)
277. 277 [*Id. at 1194.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VBY-1W50-0039-41JB-00000-00&context=1516831) [↑](#footnote-ref-278)
278. 278 [*Curry v. Hill, 460 P.2d 933 (Okla. 1969).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVB-XJ10-003G-61NF-00000-00&context=1516831) [↑](#footnote-ref-279)
279. 279 [*Id. at 936.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVB-XJ10-003G-61NF-00000-00&context=1516831) [↑](#footnote-ref-280)
280. 280 [***Colo.*** *Rev. Stat. 43-2-201(1)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-X0C1-DYDC-J04F-00000-00&context=1516831) (2001). [↑](#footnote-ref-281)
281. 281 See, e.g., [*Utah v. U.S., 403 U.S. 9, 11 (1971)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DJ80-003B-S29C-00000-00&context=1516831) (ranchers used ***river*** as a highway to transport cattle); [*Choctaw Nation v. Oklahoma, 397 U.S. 620, 645 (1970)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1T0-003B-S2H7-00000-00&context=1516831) (holding navigable waterways "shall be and remain public highways … for the public purposes of commerce, navigation and fishery..."); ***Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893)*** (declaring waters "public highways"); [*Gaston v. Mace, 10 S.E. 60, 63 (W. Va. 1889)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XHR-30J0-00KR-C0MK-00000-00&context=1516831) (referring to the public use of streams as "highways"). [↑](#footnote-ref-282)
282. 282 Black's Law Dictionary 656 (5th ed. 1979) (emphasis added). The definition of "highway" further states, in part:

     The term "highway," as generally understood, does not have a restrictive or a static meaning, but it denotes ways laid out or constructed to accommodate modes of travel and other related purposes that change as customs change and as technology develops, and the term "highway," as it is generally understood, includes areas other than and beyond the boundaries of the paved surface of a roadway.

     Id. [↑](#footnote-ref-283)
283. 283 Black's Law Dictionary 862 (rev. 4th ed. 1968). [↑](#footnote-ref-284)
284. 284 39A C.J.S. Highways 1(1) (2001). [↑](#footnote-ref-285)
285. 285 [*Hale v. Sullivan, 362 P.2d 402 (****Colo.*** *1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WY70-0040-015W-00000-00&context=1516831) [↑](#footnote-ref-286)
286. 286 [*Id. at 405*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WY70-0040-015W-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-287)
287. 287 Id. [↑](#footnote-ref-288)
288. 288 [*Id. at 404-05*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WY70-0040-015W-00000-00&context=1516831) (quoting [*Dysart v. City of St. Louis, 11 S.W.2d 1045 (Mo. 1928);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-9490-000F-J158-00000-00&context=1516831) ***Hesse v. Rath, 164 N.E. 342 (N.Y. 1928)).*** [↑](#footnote-ref-289)
289. 289 [*Simon v. Pettit, 687 P.2d 1299, 1302 (****Colo.*** *1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HR-00000-00&context=1516831) (interpreting [***Colo.*** *Rev. Stat. 43-2-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-X0C1-DYDC-J04F-00000-00&context=1516831) (1973)). [↑](#footnote-ref-290)
290. 290 Id. (citations omitted). [↑](#footnote-ref-291)
291. 291 Id. (emphasis added). [↑](#footnote-ref-292)
292. 292 See, e.g., [*Bd. of County Comm'rs v. Flickinger, 687 P.2d 975, 981 (****Colo.*** *1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14V0-003D-90HY-00000-00&context=1516831) (unimproved dirt road adversely possessed by public recreational use); [*Shively v. Bd. of County Comm'rs, 411 P.2d 782, 782-84 (****Colo.*** *1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-24M0-003D-9200-00000-00&context=1516831) ("a rugged mountain trail" accessed by the public on foot, horseback, "traversed at least part way by jeep in modern times," and used for recreation and hauling lumber, deemed a public road). [↑](#footnote-ref-293)
293. 293 [*Buffalo* ***River*** *Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344-45 (8th Cir. 1977).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G40-0039-M1G7-00000-00&context=1516831) [↑](#footnote-ref-294)
294. 294 [*Id. at 1345.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0G40-0039-M1G7-00000-00&context=1516831) [↑](#footnote-ref-295)
295. 295 Id.; see also [*State v. McIlroy, 595 S.W.2d 659, 659-60, 663-65 (Ark. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-Y1C0-003C-119B-00000-00&context=1516831) (court did not find it necessary to determine whether public had acquired prescriptive easement for use of ***river*** as the public's recreational use was adequate to find the ***river*** navigable). [↑](#footnote-ref-296)
296. 296 [*Dycus v. Sillers, 557 So. 2d 486, 501 (Miss. 1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5HY0-003G-71NG-00000-00&context=1516831) [↑](#footnote-ref-297)
297. 297 [*Id. at 501 n.69.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-5HY0-003G-71NG-00000-00&context=1516831) [↑](#footnote-ref-298)
298. 298 [*Elder v. Delcour, 269 S.W.2d 17, 22-23 (Mo. 1954);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) see also [*State ex rel. Meek v. Hays, 785 P.2d 1356, 1362-63 (Kan. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-38M0-003F-D286-00000-00&context=1516831) (right of passage on ***river*** subject to adverse possession; test not met under facts presented). [↑](#footnote-ref-299)
299. 299 [*Elder, 269 S.W.2d at 24.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) [↑](#footnote-ref-300)
300. 300 [*Id. at 25.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) [↑](#footnote-ref-301)
301. 301 [*Id. at 26.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRH-PPN0-003F-B0X4-00000-00&context=1516831) [↑](#footnote-ref-302)