Water Law Review

Volume 4 | Issue 2 Article 7

1-1-2001

The Right to Float through Private Property in Colorado: Dispelling the Myth

John R. Hill

The Right to Float through Private Property in Colorado: Dispelling the Myth

THE "RIGHT" TO FLOAT THROUGH PRIVATE PROPERTY IN COLORADO: DISPELLING THE MYTH

JOHN R. HILL, JR.[†]

I. INTRODUCTION

Floating on Colorado streams ranks as a popular sport with individuals and groups who use various watercraft ranging from kayaks to large pneumatic rafts. This activity utilizes streams flowing through both public and private land, despite a Colorado Supreme Court decision holding the public has no right to use waters overlying private lands for recreational purposes without the landowner's consent. Some proponents of a right to float through private land contend a statute defining "premises" for purposes of criminal trespass, or even an Attorney General's Opinion interpreting it, created an affirmative right to float so long as the floater does not touch the bottom or banks. Others insist that a right to float exists under federal law. Still others believe they should have the right to float any stream that can

---

[†] John R. Hill, Jr., is Of Counsel with the firm Bratton & McClow, L.L.C., in Gunnison, Colorado. He graduated from the United States Military Academy in 1958, received his M.S. in Civil Engineering from Stanford University in 1963, and received his J.D. from George Washington University in 1978. Before entering private practice in 1992, Mr. Hill was a trial attorney with the U.S. Department of Justice, Environmental and Natural Resources Division. He has also served as Assistant Director of Civil Works, U.S. Army Corps of Engineers.

The author wishes to express his appreciation to Daniel S. Young, a third-year law student at the University of Denver College of Law, who researched the law on navigability and greatly assisted in reviewing and revising this article.

be floated.

As floating has spread progressively from large rivers like the Colorado and Arkansas to smaller tributaries, it has caused conflicts among the floaters, riparian landowners, and wading anglers. Conflicts are likely to increase as demand for floating experiences increases and shallow-draft watercraft lead to floating even smaller streams. Where the smaller streams run through private land, floating is more intrusive. Many landowners have built homes near the stream because they enjoy being near the water. Some ranchers on smaller streams with good fisheries often generate a significant portion of their income from exclusive fishing easements. Floating these smaller streams conflicts with angling, threatening this source of income. Landowners also value their solitude and find their privacy invaded by the rafters. Historically, ranchers have had to fence across streams to manage livestock. Now they are finding their cattle fences and water diversion structures regarded as unlawful obstacles. Law enforcement officials in one county have threatened a rancher with arrest and prosecution for obstructing a waterway "to which the public has access," if he fences across the stream running through his ranch.

Many otherwise well-informed people, including some landowners and law enforcement officials, take for granted a right to float through private property. The expansion of floating from larger streams flowing through long reaches of public land to smaller streams with long reaches flowing through private land makes it imperative that the public be informed about Colorado law regarding floating. To that end, this article examines the Colorado Constitution, statutes, court decisions, the Public Trust Doctrine, and the concept of navigability to demonstrate that no affirmative right to float through private property exists in Colorado.

II. THE COLORADO CONSTITUTION

In *People v. Emmert,* the Colorado Supreme Court held Article XVI, section 5 of the Colorado Constitution does not give the public the right to use streams flowing through private land without the owner's consent.[1] Emmert and others were arrested, charged with and convicted of criminal trespass while "tubing" on the Colorado River in Grand County. The facts were not in dispute. Emmert and the other defendants had floated and fished from rafts over private property on the Colorado River and had touched the riverbed as they crossed that property. At the landowner's request, the sheriff arrested Emmert and the other defendants. The defendants were convicted of violating a trespass statute that provided: "[a] person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises."[2] Emmert appealed his conviction to the Colorado Supreme

1. People v. Emmert, 597 P.2d 1025, 1027–28, 1030 (Colo. 1979).

2. COLO. REV. STAT. § 18-4-504(1) (1973) (amended 1993); *Emmert,* 597 P.2d at 1026.

Court. The court noted the general rule of property law in Colorado states that land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.[3] The parties had stipulated that the Colorado River was not navigable and had not been used for any kind of trade or commerce. The defendants did not challenge the adjacent landowner's ownership of the riverbed.[4]

At the time of the defendants' arrest and conviction, the state had no statutory definition of "premises." The court applied an ancient common law rule "*cujus est solum, ejus est usque ad coelum,*" which means that the person who owns the surface controls everything above it.[5] Accordingly, the court concluded ownership of the stream beds included ownership of the space above those beds. Therefore, one who intruded upon that space without the permission of the owner, whether it be for fishing or for other recreational purposes such as floating, committed a trespass.[6] The court applied this rule, stating "the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations."[7]

Emmert raised the defense that Article XVI, section 5 of the Colorado Constitution[8] establishes a public right to recreational use of all waters in the state. The Colorado Supreme Court disagreed, stating, as it had earlier in *Hartman v. Tresise*,[9] that the constitutional provision applied to appropriation of water for beneficial use.[10] In other words, Article XVI, section 5 applies only to the right to make appropriations and not to the use of the state's water for recreation or fishing. Thus, *People v. Emmert* clearly enunciated the right of a riparian landowner to exclude the public from the surface and bed of streams overlying his land.

---

3. *Emmert*, 597 P.2d at 1027 (citing More v. Johnson, 568 P.2d 437, 439 (Colo. 1977); Hartman v. Tresise, 84 P. 685, 687 (Colo. 1905); Hanlon v. Hobson, 51 P. 433, 435 (Colo. 1897)).

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

5. *Id.* at 1027. The court also noted the General Assembly had recognized the same rule in 1937 by enacting section 41-1-107 of the Colorado Revised Statutes, which provides: "[t]he ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft." *Id.*; *see* COLO. REV. STAT. § 41-1-107 (2000).

6. *Emmert*, 597 P.2d at 1027 (citing RESTATEMENT (SECOND) OF TORTS § 159 (1965)).

7. *Id.* at 1027.

8. This section provides: "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." COLO. CONST. art. XVI, § 5.

9. Hartman v. Tresise, 84 P. 685, 686 (Colo. 1905).

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

III. STATUTES

A. COLORADO REVISED STATUTES SECTION 18-4-504.5

Colorado has no statute expressly authorizing public use of any stream flowing through private property. On the contrary, the Colorado Supreme Court in *Emmert* applied the common law "*ad coelum*" rule and its statutory equivalent in concluding the owner of the bed of a non-navigable river has the exclusive right of control of everything above the bed "subject only to constitutional and statutory limitations, restrictions and regulations."[11]

In 1977, after Emmert's conviction of criminal trespass and while his appeal pended, the General Assembly passed Colorado Revised Statutes section 18-4-504.5, defining "premises" for purposes of criminal trespass as follows: "[a]s used in sections 18-4-503 and 18-4-504, 'premises' means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable[12] fresh water streams flowing through such real property."[13]

In 1983, the Executive Director of the Department of Natural Resources asked then Attorney General Duane Woodard for his formal legal opinion on two related questions (the "Woodard Opinion").[14] The first question asked whether section 18-4-504.5 exposed floaters to criminal trespass liability if they floated through private property and did not touch the bed or banks. The second question asked whether section 18-4-504.5 "authorize[s] adjoining landowners to prohibit or otherwise control such floating or boating."[15] Woodard answered both questions in the negative.[16]

In answering the first question, Woodard examined legislative history.[17] He concluded the General Assembly, by defining "premises" in a manner inconsistent with the "*ad coelum*" doctrine, effectively repealed, for purposes of the criminal trespass statute, the common law rule the Colorado Supreme Court applied in affirming Emmert's conviction. Woodard then concluded it was not a criminal trespass to float through private property so long as the floater does not touch the bed or banks. Throughout his analysis, Woodard was careful to limit the applicability of section 18-4-504.5 to criminal trespass.[18]

Unfortunately, Woodard's answer to the second question was ambiguous. Woodard stated that "[b]ecause section 18-4-504.5 speaks

---

11. *Id.* at 1027.
12. *See* discussion *infra* Part V.
13. COLO. REV. STAT. § 18-4-504.5 (2000).
14. Purpose and effect of C.R.S. 1973, 18-4-504.5 (1978 repl. vol. 8), Colo. Op. Att'y Gen. No. ONR8303042/KW 1 (Aug. 31, 1983) [hereinafter Woodard Opinion].
15. *Id.*
16. *Id.*
17. *Id.* at 4–6.
18. *Id.* at 1–8.

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."[19] This language is susceptible of several interpretations, the most logical being that the landowner has no authority to charge the floater with criminal trespass, but still has civil remedies available. Alternatively, the statement is a *non sequitur.* The first part of the sentence about civil remedies is a correct statement. However, if Woodard intended to say that the legislature has to authorize property owners to exclude others from their property, then the opinion is wrong. The right to exclude others is inherent in the ownership of property.[20] "The hallmark of a protected property interest is the right to exclude others. That is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[21] The legislature does not have to grant the right to exclude others and cannot take that right away without constitutional consequences.[22] Attorney General Woodard would have been correct had he simply stated that, because section 18-4-504.5 does not address civil remedies, those remedies remain unaffected.

Additionally, those who rely on the Woodard Opinion as authority for an affirmative right to float ignore the fact that the issue was not presented to Woodard. Since the opinion contains no discussion on whether an affirmative right to float exists, it cannot be relied upon as a basis for an affirmative right to float.

The unfortunate consequence of Woodard's response to the second question is that landowners and floaters alike have been misled into believing that riparian landowners are powerless to control or stop floating through their property. Some even regard the Woodard Opinion as if it were the equivalent of a court decision or statute. On the contrary, an attorney general's opinion is given only "respectful consideration" and a court addressing the issue must make its own independent analysis.[23] Woodard's answer to the second question cannot withstand even the most superficial analysis.

In *Emmert,* the Colorado Supreme Court noted that one who intrudes upon the space above the surface of the land without the permission of the owner commits a trespass.[24] The same conduct can

---

19. *Id.* at 7.

20. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

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

22. Justice Carrigan, in his dissenting opinion in *Emmert,* notes that the majority has "painted the state into a corner" by creating a vested property right in stream water. People v. Emmert, 597 P.2d 1025, 1033 (Colo. 1979) (Carrigan, J., dissenting). The consequence is that the General Assembly "cannot give the public recreational access to rivers without taking away from landowners their newly recognized property interests and paying them 'just compensation.'" *Id.*

23. Colonial Bank v. Colo. Fin. Servs. Bd., 961 P.2d 579, 584 (Colo. Ct. App. 1998).

24. *Emmert,* 597 P.2d at 1027 (citing RESTATEMENT (SECOND) OF TORTS § 159 (1965)).

be both a crime and a tort.[25] Therefore, the civil remedies available to the landowner would be those available for a civil trespass: (1) damages,[26] and (2) injunction where the trespass is continuing or the threat of continuing trespass exists.[27]

The Colorado Supreme Court's trespass analysis in *Emmert* has been criticized for its reliance on the "*ad coelum*" doctrine.[28] The basis of the criticism stems from the United States Supreme Court's statement in *United States v. Causby* that the "*ad coelum*" doctrine has "no place in the modern world."[29] However, in the very same opinion, the Supreme Court stated "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[30] The Supreme Court held that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[31] Thus, the Supreme Court may have drastically reduced the reach of the "*ad coelum*" doctrine, but it did reaffirm the landowner's ownership of all airspace above the land that the landowner can use in connection with his land. Therefore, *Causby* supports rather than undercuts the Colorado Supreme Court's trespass analysis in *Emmert.*

In addition to the fact that section 18-4-504.5 does not speak to civil remedies as Woodard correctly noted, the normal rules of statutory construction militate against reading that section to deprive a riparian landowner of the civil remedies for trespass in existence at the time of the *Emmert* decision. First, the application of the definition of premises in section 18-4-504.5 is, by its terms, limited to "sections 18-4-503 and 18-4-504," second and third degree criminal trespass, respectively.[32] Because the statute is clearly on its face limited in scope to criminal trespass, resorting to other rules of statutory construction is inappropriate.[33] Second, even if section 18-4-504.5 is not clear on its face, it must not be presumed to alter the common law unless it does so expressly or by necessary implication.[34] Third, Colorado Revised Statutes section 41-1-107, which the *Emmert* court held was the basis of a riparian landowner's exclusive right to control everything above the stream bed, is still included in the Statutes.[35] If section 18-4-504.5 is an abrogation of civil remedies rather than a decriminalization of

25. 21 AM. JUR. 2D *Criminal Law* § 21 (1998).

26. Van Wyk v. Pub. Serv. Co. of Colo., 996 P.2d 193, 197 (Colo. Ct. App. 1999), *cert. granted,* (Apr.10, 2000).

27. Cobai v. Young, 679 P.2d 121, 124 (Colo. Ct. App. 1984).

28. *See, e.g.,* Richard Gast, Note, People v. Emmert: *A Step Backward for Recreational Water Use in Colorado,* 52 U. COLO. L. REV. 247, 250 (1981).

29. United States v. Causby, 328 U.S. 256, 261 (1946); *see also* Gast, *supra* note 28.

30. *Causby,* 328 U.S. at 264.

31. *Id.*

32. COLO. REV. STAT. §§ 18-4-503 to -504.5 (2000).

33. *See* Jones v. Cox, 828 P.2d 218, 221 (Colo. 1992).

34. City of Colo. Springs v. White, 967 P.2d 1042, 1055 (Colo. 1998).

35. *See* COLO. REV. STAT. § 41-1-107 (2000); People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).

floating, then it must have repealed by implication Colorado Revised Statutes section 41-1-107. "[A]n intent to repeal by implication to be effective must appear clearly, manifestly, and with cogent force."[36] No such intent is apparent. Fourth, courts will "infer no abrogation of a common law right of action absent clear legislative intent."[37] Therefore, a court is unlikely to interpret section 18-4-504.5 as a deprivation of a riparian landowner's right to bring a civil action for trespass.

Furthermore, the court in *Emmert* acknowledged the State had passed section 18-4-504.5 and, in the very next sentence, held, "the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner."[38] Section 18-4-504.5 was not an issue in deciding Emmert's appeal because it was passed after his conviction. Had the court believed section 18-4-504.5 abrogated the landowner's civil remedies for trespass, or created an affirmative right, it is unlikely the court would have stated its holding so unequivocally.

If section 18-4-504.5 does abrogate the civil remedy for trespass, it might be unconstitutional because it denies riparian landowners the ability to protect their right to exclude floaters in court—a right confirmed by *Emmert.* The Equality of Justice provision of the Bill of Rights in the Colorado Constitution guarantees a right of access to the courts, stating: "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."[39] In any event, when the General Assembly abrogates common law remedies, it must provide a statutory remedy.[40]

If section 18-4-504.5 did grant the public the right to float through private property after *Emmert* held there was no such right, then this grant operates as a taking of private property for public use.[41] In *Kaiser Aetna v. United States,* the United States Supreme Court held that a permit issued by the Corps of Engineers, which contained a condition that made previously private waters open to public use, was a compensatory taking.[42] Thus, under *Kaiser Aetna,* if section 18-4-504.5 granted a right to float, this grant constitutes a compensable taking of private property.

If section 18-4-504.5 authorized the public to float through private property, then it authorized a permanently recurring physical invasion

---

36. Prop. Tax Adm'r v. Prod. Geophysical Servs., Inc., 860 P.2d 514, 518 (Colo. 1993).

37. Bayer v. Crested Butte Mountain Resort, Inc., 960 P.2d 70, 74 (Colo. 1998) (citations omitted).

38. *Emmert,* 597 P.2d at 1029–30.

39. COLO. CONST. art. II, § 6 .

40. *See* Finn v. Indus. Comm'n of Colo., 437 P.2d 542, 544 (Colo. 1968) (abrogation of common law remedies constitutional where substitute statutory remedy provided); *accord* Kandt v. Evans, 645 P.2d 1300, 1306 (Colo. 1982).

41. *See* Kaiser Aetna v. United States, 444 U.S. 164, 175–78 (1979).

42. *Id.* at 180.

of that property. Courts have long considered physical invasions of private property authorized or perpetrated by governmental entities to be takings. The United States Supreme Court considered such an issue in *Loretto v. Teleprompter Manhattan CATV Corp.*[43] *Loretto* involved a New York statute that required a building owner to permit a cable television ("CATV") company to install its CATV facilities on his property without payment from the company in excess of a reasonable amount as determined by a state commission. The Court characterized the CATV facilities as a minor, but permanent, physical occupation of the building owner's property. The New York Court of Appeals had applied a balancing of interests analysis to uphold the statute because it benefited the community and served a legitimate police power purpose.[44] The Court reversed, noting "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."[45] In conclusion, the Court reiterated that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[46] Therefore, if the General Assembly actually created a right to float by enacting section 18-4-504.5, it has potentially exposed the State to liability for payment of just compensation to private riparian landowners statewide for opening to public use what *Emmert* held was private land.

The General Assembly enacted section 18-4-504.5 in reaction to *Emmert*. As noted above, the statute is limited to defining "premises" for the criminal trespass statutes. It contains no express grant of access to the streams. Defining a crime and creating a public easement are fundamentally different things. Perhaps the General Assembly heeded Justice Carrigan's admonition that the *Emmert* majority had "painted the state into a corner," making it impossible for the General Assembly to create a public right to float without compensating riparian landowners.[47] In any event, the prospect of the State compensating riparian landowners statewide, coupled with the arguments presented above, makes the likelihood of a court finding that section 18-4-504.5 creates a public right to float through private property highly improbable.

43. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

44. *Id.* at 423–26.

45. *Id.* at 427 n.5 (citations omitted).

46. *Id.* at 432; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (placing physical invasions in the category of regulatory action, which requires just compensation without case-specific inquiry into the public interest advanced by the regulation).

47. *See supra* note 22.

B. OTHER STATUTES

In *Emmert*, the Colorado Supreme Court found several statutes implicitly recognized a riparian landowner's right to exclude the public from streams running through his or her land: (1) Colorado Revised Statutes section 33-1-112(g) (1973)[48] (giving the wildlife commission the power to enter into agreements with landowners for public hunting and fishing areas); (2) Colorado Revised Statutes section 33-41-101 (1973) (stating that Article 41 of Title 33, which limits the liability of landowners who make land and water areas available for recreational purposes, is an implicit recognition of the landowner's right to close to public access the streams running over his land); and (3) Colorado Revised Statutes section 33-6-123(1) (1973)[49] (making it a misdemeanor to enter onto private land to hunt or fish without permission).[50]

Some floating interests believe Colorado Revised Statutes section 18-9-107 implies the right to float because it makes it a crime to obstruct a waterway. This statute provides:

> [a]n individual or corporation commits an offense if without legal privilege such individual or corporation intentionally, knowingly, or recklessly . . . [o]bstructs a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public has access or any other place used for the passage of persons, vehicles, or conveyances.[51]

On its face, the statute does not create any rights; it simply declares illegal the obstruction of any waterway "to which the public . . . has access."[52] There are obviously reaches of waterways flowing through public land, such as the Colorado and Arkansas Rivers, to which the public does have access. That fact, alone, provides ample reason for the legislature to have included waterways in the above statute. However, as this article demonstrates, no basis in Colorado law exists for the public to have access to any waterway other than those waterways flowing through public land. Therefore, the General Assembly had no legal basis to make the obstruction of a private waterway a crime, thereby making a rancher a criminal for fencing across a stream to keep cattle from straying off his or her land.[53] Indeed, some law enforcement authorities have threatened

48. Codified as amended at COLO. REV. STAT. § 33-1-105(1)(g) (2000).

49. Codified as amended at COLO. REV. STAT. § 33-6-116 (2000).

50. People v. Emmert, 597 P.2d 1025, 1029 (Colo. 1979).

51. COLO. REV. STAT. § 18-9-107(1)(a) (2000).

52. *Id.*

53. In addition, the General Assembly had no legal basis to make the rancher's neighbor a criminal for building a fence to keep the rancher's cattle from entering his or her land by way of the stream, as the law requires maintaining a fence in order for the neighbor to recover damages caused by livestock straying onto the neighbor's land. COLO. REV. STAT. §§ 35-46-101(1), -102 (2000).

landowners with arrest and prosecution if they build fences across streams flowing through their land that obstruct the passage of floaters. This threat is probably idle because securing a conviction would depend upon proof beyond a reasonable doubt that the public has access to the specific reach of the specific stream involved and that the landowner is not privileged to block access.

Colorado Revised Statutes section 30-30-102, passed in 1974, gives the board of county commissioners a right of access to any natural stream to remove obstacles for flood control purposes only, and then under very limited and specified circumstances.[54] This statute clearly contemplates that the streams are private. Thus, while a variety of implications may exist in the statutes discussed above, one cannot reasonably read any of these statutes as granting a right in the public to float through private property.

IV. PUBLIC TRUST DOCTRINE

The Public Trust Doctrine declares that the state holds navigable waters and the lands underneath them in trust for the people of the state.[55] This doctrine is rooted in ancient Roman law and evolved under English common law into the concept of the public trust.[56] The original purpose of the doctrine was to preserve navigable waters for the public for navigation, commerce, and fishing.[57] In *National Audubon Society v. Superior Court*, the California Supreme Court extended the doctrine to protect recreational and ecological values by limiting diversions from non-navigable tributaries of navigable waters.[58] Of most interest to Colorado, however, is the California Supreme Court's holding that water rights previously granted can be challenged and reevaluated because of the Public Trust Doctrine.[59]

Proponents of public access for floating and wading often cite Montana's stream access law[60] as an example Colorado should emulate. In 1985, the Montana Legislature enacted its stream access law, which provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."[61] The basis of the legislation was the Public Trust Doctrine, as discussed in *Montana Coalition for Stream Access, Inc. v. Curran*.[62] In that case, the Montana Supreme Court found no taking occurred because, under the Public Trust Doctrine

54. COLO. REV. STAT. § 30-30-102 (2000).

55. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

56. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 718 (Cal. 1983).

57. *Id.* at 719.

58. *Id.* at 719, 721.

59. *Id.* at 730; *see* Stephen H. Leonhardt & Brent A. Waite, *The Public Trust Doctrine: What It Is, Where It Came From, and Why Colorado Doesn't (and Shouldn't) Have One*, COLO. WATER RESOURCES RES. INST., INFO. SERIES NO. 78, 190, 205–07 (1995).

60. MONT. CODE ANN. §§ 23-2-301 to -322 (1999).

61. *Id.* § 23-2-302(1).

62. Mont. Coalition For Stream Access, Inc. v. Curran, 682 P.2d 163, 167–68 (Mont. 1984).

and state constitution, any surface waters capable of use for recreational purposes are available to the public for those purposes, irrespective of streambed ownership.[63]

Colorado has never applied the Public Trust Doctrine to water.[64] Consequently, there is no basis in Colorado for a stream access law to ignore bed ownership and taking issues. As popular as the Public Trust Doctrine may be with environmentalists, its application to water use in Colorado is unlikely because of the potential adverse impact on existing water rights under the prior appropriation system.[65] Recognition of the Public Trust Doctrine would place owners and users of water at risk because a public trust would undermine the priority system by subjecting existing rights to curtailment or revocation.[66] Furthermore, in *Emmert*, the Colorado Supreme Court declined to apply the Public Trust Doctrine as a basis for a right to float.[67] One Colorado lawyer, in an article lamenting the lack of environmental protection provisions in Colorado water law, titled the public trust as "The Two Little Words That Can't Be Spoken."[68]

In 1994, 1995, and 1996, advocates of the Public Trust Doctrine proposed a ballot initiative to amend Article XVI, section 5, of the Colorado Constitution[69] to adopt the Public Trust Doctrine.[70] Each time the initiative failed to qualify. The climate for the Public Trust Doctrine in Colorado is hostile, and likely to remain so, because it is widely perceived as antithetical to the doctrine of prior appropriation. Moreover, retroactive application or adoption of the Public Trust Doctrine for water could itself raise the specter of takings problems.[71]

V. THE CONCEPT OF NAVIGABILITY

In any question of navigability, the preliminary step is to determine whether to apply federal or state law. Federal law is used to determine whether the federal government can regulate the waterway, whether admiralty and maritime jurisdiction applies, and of most interest here, to determine title to the stream bed. The term "navigable" has different meanings for different purposes. As the Supreme Court has

---

63. *Id.* at 171.

64. *See* Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251, 1263 (Colo. 1995) (Mullarkey, J., dissenting) (Colorado Supreme Court has never recognized the public trust doctrine with respect to water).

65. *See generally* Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 855–56 (1989) (criticizing attempts to use the Public Trust Doctrine to reduce existing water rights).

66. *See* Leonhardt & Waite, *supra* note 59, at 212–13.

67. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979).

68. Lori Potter, *The 1969 Act and Environmental Protection*, 3 U. DENV. WATER L. REV. 70, 77 (1999).

69. *See supra* note 8.

70. *In re* Proposed Initiative "1996-6," 917 P.2d 1277, 1278–79 (Colo. 1996); *In re* Proposed Initiative "Public Rights In Waters II," 898 P.2d 1076, 1077 (Colo. 1995); *In re* Proposed Initiative on Water Rights, 877 P.2d 321, 324 (Colo. 1994).

71. *See* Leonhardt & Waite, *supra* note 59, at 210–11.

noted, "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."[72]

For purposes of public use of waters, states may adopt different and less stringent tests of navigability.[73] Some states define navigability for public use based on the state constitution or statutory law.[74] Some states recognize a right to float if the stream accommodates recreational watercraft, that is "whatever floats your boat."[75] Colorado, however, has not adopted a definition of navigability for any purpose. To the contrary, the Colorado Supreme Court long ago stated "[t]he natural streams of the state are nonnavigable within its limits."[76] Therefore, if a right to float through private property exists in Colorado based on the concept of navigability, it must rest on federal law.

A. FEDERAL LAW—NAVIGABILITY IN FACT

Uses of the term "navigable" in federal law can be confusing. "Navigable" in the federal sense dictates whether the federal government can regulate a waterway under the Commerce Clause of the United States Constitution,[77] the Rivers and Harbors Appropriation Act of 1899,[78] the Clean Water Act,[79] or the admiralty and maritime jurisdiction of the federal courts.[80] Federal uses of the term "navigable" are best understood by considering the concept of "navigability in fact" as originally defined by the United States Supreme Court in *The Daniel Ball*.[81]

The issue in *The Daniel Ball* was whether the Grand River in Michigan was navigable water within the meaning of the acts of Congress regulating navigation.[82] The Supreme Court disposed of the English common law notion that only those waters subject to the ebb and flow of the tide are navigable waters. After noting there are rivers in the United States navigable for hundreds of miles above the

72. Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979) (citation omitted).

73. Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 834 (Cal. Ct. App. 1976) (citing Fox River Paper Co. v. R.R. Comm'n, 274 U.S. 651, 655 (1927)).

74. *See, e.g.*, S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297–98 (Idaho 1974) (under Idaho statute, streams which will float logs over six inches in diameter, or are capable of being navigated by oar or motor propelled small craft are navigable); Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961) (under Wyoming's Constitution, title to all waters is in the state, and the state has an easement for public right-of-way through natural channels).

75. *See, e.g.*, Chris A. Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9, 41 (1999).

76. *In re* German Ditch & Reservoir Co., 139 P. 2, 9 (Colo. 1913).

77. U.S. CONST. art I, § 8, cl. 3.

78. 33 U.S.C. §§ 401–418 (1994).

79. *Id.* at §§ 1251-1387.

80. U.S. CONST. art. III, § 2, cl. 1.

81. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

82. *Id.* at 558–59.

influence of the tide, the Court held:

> [t]hose 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.[83]

Thus, *The Daniel Ball* proscribes the test for navigability in fact for public use. Courts apply *The Daniel Ball* test as the basic test of navigability.[84]

B. NAVIGABLE WATERS OF THE UNITED STATES

In defining "navigable waters of the United States," *The Daniel Ball* Court stated:

> [t]hey 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.[85]

Thus, interstate or international use or susceptibility of such use makes a waterbody that is navigable in fact a "navigable water of the United States."

Over time, the Supreme Court has expanded and clarified the definition of "navigable waters of the United States" to include streams which have been used in the past but are no longer used,[86] or which are susceptible of use, with improvements, to transport interstate or foreign commerce.[87] Thus, "navigable waters of the United States" is a term of art defining the admiralty jurisdiction of the federal courts, jurisdiction of the Corps of Engineers under the Rivers and Harbors Act of 1899,[88] and jurisdiction under other acts of Congress using the term. Although courts make conclusive determinations of navigability,[89] the Corps of Engineers' administrative definition of "navigable waters of the United States" reads as follows:

> 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

83. *Id.* at 563.
84. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 (1940).
85. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.
86. Econ. Light & Power Co. v. United States, 256 U.S. 113, 123–24 (1921).
87. *Appalachian Elec. Power Co.*, 311 U.S. at 407–08.
88. 33 U.S.C. §§ 401–418 (1994).
89. 33 C.F.R. § 329.3 (2000).

> interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.[90]

The Corps of Engineers classifies the Colorado River downstream of Grand Junction, and the Navajo Reservoir, as a "navigable water[s] of the United States."[91] These classifications appear to be administrative determinations as no court decisions to date so hold. No other "navigable waters of the United States" exist in Colorado.[92]

C. THE NAVIGATION SERVITUDE

"Navigable waters of the United States" are normally subject to the navigation servitude.[93] The navigation servitude is a dominant servitude pursuant to which the United States may alter the stream or do other things that would ordinarily be an invasion of private property rights without payment of just compensation.[94] The Supreme Court explained:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.[95]

The navigational servitude expresses the notion that the determination "whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation."[96] However, where private interests have made a waterbody navigable for interstate commerce at considerable cost, the federal government may not require that the waterbody be open to the public without payment of just compensation.[97]

The term "navigation servitude" often is used incorrectly, as if it were synonymous with a public right of access. Streams subject to the

---

90. *Id.* § 329.4.

91. U.S. Army Corps of Eng'rs, Sacramento Dist., *Waterways within Sacramento District Regulatory Boundaries,* http://www.spk.usace.army.mil/cespk-co/regulatory/navigable.html.

92. Telephone Interview with Anita Culp, Albuquerque District, U.S. Army Corps of Eng'rs (Jan. 8, 2001).

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

94. United States v. Rands, 389 U.S. 121, 123 (1967).

95. United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 312 U.S. 592, 596–97 (1941).

96. *Kaiser Aetna,* 444 U.S. at 175.

97. *Id.* at 179–80.

navigation servitude, that is "navigable waters of the United States," are open for public use, unless they fall within the *Kaiser Aetna* type of exception discussed in the preceding paragraph.[98] The converse, however, does not necessarily follow. There are streams that may be open for public use under state law[99] or intrastate waters navigable for title purposes that are not "navigable waters of the United States" because they are not used or susceptible of use in interstate commerce.[100] Without the interstate commerce component, there is no navigation servitude.[101] In any event, the navigation servitude is of very limited applicability in Colorado because the only "navigable waters of the United States" in Colorado are the Colorado River downstream of Grand Junction and the Navajo Reservoir.

D. NAVIGABLE WATERS

In contrast to "navigable waters of the United States," the Clean Water Act defines the term "navigable waters" as "the waters of the United States."[102] Courts have construed "navigable waters" very broadly, holding intermittent streams to be "navigable waters."[103] However, a very recent Supreme Court decision may signal a retreat from this broad interpretation. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court found the Corps of Engineers' regulations defining "navigable waters" as applied to some isolated ponds used by migratory waterfowl exceeded the authority granted to the Corps under section 404(a) of the Clean Water Act.[104] The regulation defined "waters of the United States" to include a long list of intrastate waters "the use, degradation or destruction of which could affect interstate or foreign commerce."[105] The Court found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit," even though it was used by migratory waterfowl.[106]

The Corps' definition of "waters of the United States," that is "navigable waters," for purposes of regulating the discharge of dredged or fill material pursuant to section 404(a) of the Clean Water Act,[107] deals exclusively with the Corps' jurisdiction under that Act.

---

98. *Id.* at 172–73.

99. *See supra* note 73.

100. *See supra* note 86.

101. *Kaiser Aetna*, 444 U.S. at 175.

102. 33 U.S.C. § 1362(7) (1994).

103. Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (finding occasional surface flow at times of heavy rainfall enough to be navigable); United States v. Earth Scis., Inc., 599 F.2d 368, 375 (10th Cir. 1979) (finding stream located entirely in one county navigable when it is not navigable in fact and transports no goods).

104. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675, 684 (2001).

105. *Id.* at 678 (quoting 33 C.F.R. § 328.3(a)(3) (1999)).

106. *Id.* at 684.

107. 33 U.S.C. § 1344(a) (1994).

Therefore, the Corps' definition has no applicability in determining public access to water bodies.

E. NAVIGABILITY FOR TITLE UNDER THE EQUAL FOOTING DOCTRINE

As new states joined the Union, each received title to the lands underlying navigable waters under the Equal Footing Doctrine.[108] The Federal Government held such lands in trust for the future states, to be granted to each new state upon admission to the Union on an "equal footing" with the other states.[109] The law is settled that lands underlying navigable waters within each state belong to the state as sovereign, and the state can use and dispose of them as it sees fit, subject to Congress's paramount power to control the waters for navigation and commerce.[110] Consequently, if any streams in Colorado meet the test of navigability for purposes of title, the state owns the underlying land and the public would have access to the stream for floating and other purposes subject to whatever regulations the state imposes.

Whether a stream is navigable for the purpose of determining title to the bed is a federal question.[111] In *United States v. Holt State Bank*, the Supreme Court summarized the federal rule for determining whether a body of water is navigable for title purposes.

> The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and 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 further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.[112]

Note that the test of navigability for title purposes is *The Daniel Ball* "navigability in fact" definition. However, the type of commerce required to meet the navigability for title test is intrastate commerce.[113]

To determine navigability for title, the Court limits the finding of navigability to the date of "admission of a State to the Union."[114] Also, the test for navigability of a waterbody is not limited to evidence of actual commerce, but to evidence of the susceptibility of useful

---

108. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).
109. Montana v. United States, 450 U.S. 544, 551 (1981).
110. United States v. Holt State Bank, 270 U.S. 49, 54 (1926).
111. *Id.* at 55–56.
112. *Id.* at 56.
113. *See* Utah v. United States, 403 U.S. 9, 10 (1971).
114. United States v. Oregon, 295 U.S. 1, 14 (1935).

commerce.

> The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question.... The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.[115]

Thus, in deciding questions of navigability for title, the Supreme Court limits the evaluation of navigability to (1) the time the state in which the water is located was admitted to the Union, and (2) finding the body of water was susceptible for useful commerce conducted in customary modes of trade and travel. In doing so, the Court implicitly requires that evidence of navigability be limited to both the type of commerce and the type of watercraft that existed when the state was admitted to the Union. In *Utah v. United States,* the Supreme Court determined the Great Salt Lake was navigable since the Special Master found the "Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at that time."[116]

The United States Court of Appeals for the Ninth Circuit, in a case determining the navigability of the Gulkana River in Alaska, appears to have expanded the limitation of useful commerce by allowing recreational watercraft involved in the rafting industry to evidence useful commerce.[117] The court noted, however, that both parties agreed the principal uses of the Gulkana had always been recreational, and evidence of "watercraft customary for the River's use at statehood included powered boats with a load capacity of approximately 1,000 lbs."[118] Considering this evidence, the court reasoned that "the watercraft customary 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."[119] Therefore, even though the court considered evidence of commercial rafting in a navigability for title analysis, the type of activity from which the commerce was derived both existed and was supportable by the type of watercraft used on the Gulkana at the time Alaska became a state in 1959. Such is probably not the case in Colorado. It is very unlikely that any commercial recreational rafting occurred in Colorado in 1876, when Colorado achieved statehood.

---

115. United States v. Utah, 283 U.S. 64, 82 (1931).
116. *Id.* at 12.
117. Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989).
118. *Id.*
119. *Id.*

Another factor distinguishing the Gulkana River from the streams flowing through private property in Colorado is that the Gulkana flowed through federal public land.[120] The Gulkana River dispute involved neither private parties nor private property. In contrast, if courts were to relate back to 1876 the present day use of Colorado's streams for recreational floating, and hold these streams navigable for title purposes, the relation back would effectively divest riparian property owners of property they and their predecessors have possessed, used productively, and paid taxes on since the land was settled and patented in the good faith belief they owned the beds of the streams. Furthermore, such action would trivialize the whole concept of navigability for title because many of the streams in Colorado would qualify if present use for recreational boating could be related back to 1876.

A widely held belief is that a stream's ability to float a log makes the stream navigable. However, the United States Supreme Court, in *United States v. Rio Grande Dam & Irrigation Co.* held logs, poles, and rafts that floated during high water insufficient evidence of navigability.[121] The Court applied *The Daniel Ball* navigability in fact test, adding,

> [i]t is not, however, . . . "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."[122]

To further place the standard for navigability for title purposes in a local perspective, the Supreme Court has held some parts of the Colorado and Green Rivers in Utah navigable for title purposes and other parts of both rivers not navigable.[123] In determining whether a useful channel for commerce existed, the Court considered evidence of actual use, as well as the magnitude and timing of discharge (flow), depth, gradient, rapids, and other obstacles to navigation.[124] The reaches declared not navigable were those containing high and dangerous rapids.[125]

The Colorado Supreme Court has held no navigable streams exist in Colorado.[126] Those cases, however, did not apply the navigability for

---

120. This distinction is apparent from the facts. The district court set aside the conveyance from the United States to an Alaska native corporation. *Id.* at 1403.

121. United States v. Rio Grande Dam & Irrigation Co. 174 U.S. 690, 698 (1899) (finding the Rio Grande not navigable throughout its course in New Mexico).

122. *Id.* at 698–99 (quoting The Montello, 87 U.S. (20 Wall.) 430, 442 (1874)).

123. United States v. Utah, 283 U.S. 64, 73–74 (1931).

124. *Id.* at 77–81.

125. *Id.* at 80.

126. *In re* German Ditch & Reservoir Co., 139 P. 2, 9 (Colo. 1914) ("The natural streams of the state are nonnavigable within its limits."); Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912) ("[T]he natural streams of this state are, in fact, nonnavigable within its territorial limits."), *overruled on other grounds by* United States v. City & County

title test proscribed by the United States Supreme Court in *Holt State Bank*, or any other test for that matter.[127] Other Colorado cases note in passing that certain rivers are not navigable.[128] The United States Supreme Court has also made such observations in passing.[129] Because navigability of streams is a matter of general knowledge, courts can and do take judicial notice of navigability or non-navigability of streams in their respective jurisdictions.[130] Therefore, *Stockman v. Leddy* and *In re German Ditch & Reservoir Co.* probably reflect the state of general knowledge in Colorado in 1912 and 1914, respectively. At the very least, they indicate that Colorado has not elected to adopt its own definition of navigability. Furthermore, the Colorado Supreme Court and other Colorado courts believe Colorado's topography does not lend itself to rivers that are navigable in fact. While state ownership of the bed of any stream in Colorado cannot be ruled out, such ownership would have to be proven by specific facts on a case by case basis, with each determination of navigability standing on its own facts.[131] In any event, the State has not established title to the bed of any Colorado stream at this time.

To summarize, with the possible exception of the Colorado River downstream of Grand Junction to the Utah state line, there are no navigable streams in Colorado under any definition that would allow the public access to those reaches flowing through private lands. A century and a quarter after statehood, Colorado has not adopted its own definition of navigability for any purpose. *Emmert* is still the law of Colorado. Nor is there any basis for a right to float through private lands under federal law, with the possible exception of the reach of the Colorado River discussed above. No reported court decisions have applied any of the federal tests for navigability to any stream in Colorado.

---

of Denver, 656 P.2d 1, 16–17 (Colo. 1982) *and* Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200, 204 (Colo. 1975).

127. *See In re German Ditch & Reservoir Co.*, 139 P. at 6–10; *Stockman*, 129 P. at 222.

128. United States v. Dist. Court In & For the County of Eagle, 458 P.2d 760, 762 (Colo. 1969) (Eagle River); Hall v. Brannan Sand & Gravel Co., 405 P.2d 749, 750 (Colo. 1965) (South Platte River); Smith v. Town of Fowler, 333 P.2d 1034, 1036 (Colo. 1959) (Arkansas River); Platte Water Co. v. N. Colo. Irrigation Co., 21 P. 711, 713 (Colo. 1889) (South Platte River).

129. *See, e.g.*, Oklahoma v. Texas, 258 U.S. 574, 585 (1922) (passing reference to "Platte and other large western streams known to be unnavigable").

130. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 633 n.9 (1970) (referring to district court's taking of judicial notice of relevant reaches of the Arkansas River); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899) (discussing limitations on the ability of courts to take judicial notice of navigability of streams within their jurisdiction).

131. United States v. Utah, 283 U.S. 64, 87 (1931); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 403 (1940). These cases indicate that a court decision is necessary, contrary to the position taken by at least one proponent of a general unlimited right to float.

VI. CONCLUSION

In 1979, the Colorado Supreme Court in *Emmert* reconfirmed that the beds of streams flowing through private property in Colorado are privately owned, and held that the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner. Just prior to *Emmert*, the General Assembly had defined "premises" for purposes of the criminal trespass statutes to exclude the water overlying private lands. Then, in 1983, Attorney General Woodard correctly opined that it is not a crime to float through private property if the floater does not touch the bottom. However, in that same opinion, Woodard confused the floating public and property owners in stating that, in amending the criminal trespass statute, the General Assembly had not authorized property owners to prevent floating through their property. Woodard simply ignored the constitutional right of a property owner to exclude others, which exists independent of any legislative act. Nothing has happened since *Emmert* to establish any right for the public to float through privately owned lands. No reported court decisions declare any Colorado stream navigable for title purposes, or for any other purpose. No statute authorizes floating through private property. Floating through private property remains a civil trespass and riparian landowners still have civil remedies for trespass available to them.

The increasing popularity of floating with its attendant economic benefits to boaters and the resulting impacts on private property rights will inevitably compel the General Assembly to address the issue. In doing so, the General Assembly must recognize the constitutional limitations inherent in granting access to private property. If the General Assembly is to enact a law opening streams flowing through private lands to public use, it must provide for, and be prepared to pay, just compensation. Alternatively, and with far less cost to taxpayers, it could provide incentives for obtaining voluntary easements or licenses from the landowners. As Justice Oliver Wendell Holmes said: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[132]

132. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, J.).