COMMON SENSE INSTITUTE

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PUBLIC RESOURCES ON PRIVATE PROPERTY:

WHY THE RIGHT TO FLOAT IS COMPLICATED AND HOW COLORADO ADDRESSES IT

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ABOUT COMMON SENSE INSTITUTE

Common Sense Institute is a non-partisan research organization dedicated to the protection and promotion of our economy. As a leading voice for free enterprise, CSI's mission is to examine the fiscal impacts of policies and laws and educate voters on issues that impact their lives.

CSI's founders were a concerned group of business and community leaders who observed that divisive partisanship was overwhelming policy-making and believed that sound economic analysis could help people make fact-based and *common sense* decisions.

CSI employs rigorous research techniques and dynamic modeling to evaluate the potential impact of these measures on the Colorado economy and individual opportunity.

TEAMS & FELLOWS STATEMENT

CSI is committed to independent, in-depth research that examines the impacts of policies, initiatives, and proposed laws so that Coloradans are educated and informed on issues impacting their lives. CSI's commitment to institutional independence is rooted in the individual independence of our researchers, economists, and fellows. At the core of CSI's mission is a belief in the power of the free enterprise system. CSI's work explores ideas that protect and promote jobs and the economy, and the CSI team and fellows take part in this pursuit of academic freedom. The CSI team's work is informed by data-driven research and evidence.

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INTRODUCTION

Johann Wyss's 1812 classic, *Swiss Family Robinson*, describes an incident in which the narrator's son Ernest is scolded for fearing wet feet. As a result, he is denied the pleasure of eating the day's catch because he didn't help catch it. His father admonishes him never again to be afraid of getting his feet wet.

In Colorado there is a long-simmering debate, resurfacing again this year, about whether one must get one's feet wet to fish. More specifically, are anglers allowed to fish in a stream that runs through private property? In many other states, the answer has always been yes, so long as one remains in the stream – as long as one's feet are wet. Legally, Colorado has always treated this issue differently, partly because in this state the land under the water – the streambed – belongs to the adjacent landowner. Water belongs to the public, but not the land under it. Thus, wading on private property, as well as anchoring or otherwise touching the bottom, and portaging around obstructions, is trespassing.

In Colorado there is a long-simmering debate, resurfacing again this year, about whether one must get one's feet wet to fish. **More specifically, are anglers allowed to fish in a stream that runs through private property?**

That distinction raises the still uncertain question of whether people can float, rather than wade, through private property. The "right to float" is generally used as shorthand for a complex set of issues related to public recreational water uses that touch on private property. The public ability to use the state's waters for recreation is well established in most states, including Colorado, where the unappropriated waters of the state belong to the public, including the right to use those waters recreationally. Whether that conveys a "right" in the traditional legal sense of that word remains debatable, precisely because there is often private property under or adjacent to the water. Nevertheless, rafting, kayaking, and canoeing are multi-billion-dollar businesses in Colorado, especially in places like the Upper Arkansas, the most rafted river in America, or in popular runs like Glenwood Canyon. Most such large rivers are surrounded by public land, so there is no challenge to the public's access, but there are hundreds of smaller streams crossing private property where the question remains.

The issue came to a head in 2009 over a stretch of the Taylor River above Gunnison that passes through private property – including guest ranches that make their living selling access to that gold medal fishery. That may not seem complicated, because the public clearly owns the water, and the right to access it by boat. But in that area, there was no gold medal fishery until those landowners built it. At tremendous private expense, they installed rocks to slow the water and create spawning pools, paid to stock trophy trout, and financed numerous improvements to transform the waterway into a world-class trout stream. Guests pay well to stay in the lodges and to access one of America's premier flyfishing spots.

The issue was further complicated because that is cattle country, where many ranches rely on fencing to keep cattle in. In some places, fences had to cross streams, because cattle can, and do, wade up and down the creek, escaping their owner's property. Even so, fences across streams create obvious barriers to the public's "right to float," and are illegal in many states, but not Colorado.

In the Gunnison cases, a few ranchers put up fences and posted "no trespassing" signs, solely to assert property rights and discourage rafting. Conversely, several rafting companies organized floats through such properties, not because there was a great public demand, but because they wanted to force the State to change its law and guarantee the right to float, private property notwithstanding. In Colorado law the issue is more complex than that, as will be shown, so at best, the entire issue may be called "complicated."

During our respective tenures heading the Department of Natural Resources, the state became involved several times in mediating these disputes, with occasional success. We found some areas where rafters could acknowledge the need for fences, or the economic investments of guest ranch owners. Similarly, there were areas where ranchers could acknowledge that rafters weren't hurting anything, where floaters' activities did not adversely affect property rights. That case-by-case approach worked better than any one-size-fits-all solution.

The state legislature came close to changing the law in 2010, to conform to other western states that consider the public right to float absolute. But the Colorado Constitution also includes a strong prohibition against taking private property for public use without compensation. Legislators have generally feared the potentially high costs of such compensation, making such legislation difficult. The case-by-case mediated approach was ultimately formalized, creating an uneasy "truce" that has stood the test of time. But the call for ballot initiatives and/or legislation has never entirely stopped, nor have the occasional lawsuits. This confrontational approach inevitably reopens old wounds and may not be the best approach.

KEY FINDINGS

Colorado's Legal Framework around River Access Should Consider the Needs of Both Private Property Owners and Public Access

While water flowing through Colorado's streams and rivers is public, the streambed and embankments are often privately owned meaning wading and anchoring could be considered trespassing.

- Access disputes in recent decades have been solved through case-by-case mediation rather than through a firm legal framework.
- A legislative attempt to classify streambeds and embankments as public rather than private property would violate the takings clause of Colorado's constitution and require impacted property owners to receive compensation from the state.
- The current access mediation process is likely the best solution from a cost and legal standpoint.

Colorado has Spent Billions to Expand Outdoor Access for the Public

Colorado has consistently invested in expanding the public's access to the outdoors across the state, primarily through Great Outdoors Colorado (GOCO) funded in large part through lottery funds.

- Since its inception in 1994, GOCO has spent an estimated $1.6 billion on various projects across the state including expanding river and stream access.
- In total, GOCO's investments have resulted in more than 5,700 projects in all 64 counties including:
  - **1,102 miles of river protected**
  - **1,816 parks/outdoor recreation areas created or improved**
  - **66,688 acres added to the state park system**

Outdoor Recreation is Big Business in Colorado

In 2023 alone, outdoor recreation is estimated to have contributed to the Colorado economy:

- **$36.5 billion in GDP (8.5% of state total)**
- **$11.2 billion in local, state, and federal tax revenue**
- **404,000 jobs (12.5% of state labor force)**

Although there are nearly 6 million people in the state, there are over 90 million people in 17 other states that are at least partly dependent on water that originates in Colorado.

The State Currently Lacks Comprehensive River & Stream Access Data

- Colorado should maximize its knowledge base regarding the breadth of publicly accessible waterways.
- No agency or group in Colorado currently publishes comprehensive data on the total number and location of stream and river miles available to the public for recreation.
- Tracking this number could help give Coloradans a better understanding of where they're able to recreate, inform the state's legislature on the status of the public's right to access waterways, and show the state's progress in expanding access to the public.

EFFORTS TO PRESERVE COLORADO'S GREAT OUTDOORS

Colorado's waterway access discussions take place against a larger history of investment in outdoor access and preservation.

Almost from the beginning of the "Pikes Peak or Bust" mining booms that brought thousands of settlers in the 1850s, Coloradans fell in love with the majestic scenery of the territory, and efforts to preserve its most spectacular places soon began. By the time the early conservation movement started to create national parks and monuments in the West in the early 20th century, Coloradans had a wish list ready to go. By 1915, they convinced national leaders to create Rocky Mountain and Mesa Verde National Parks, as well as Dinosaur, Yucca House, and Colorado National Monuments, followed shortly by park/monument status for the Black Canyon of the Gunnison, Great Sand Dunes, and Hovenweep. The effort to continue adding permanent protection to more areas has never really slowed since.

Today Colorado has four national parks, eight national monuments, eleven national forests, two national grasslands, seven national historic sites and trails, two national recreation areas, forty-four national wilderness areas, three national conservation areas, a 76-mile national wild and scenic river, eight national wildlife refuges, thirty-two national recreational trails, a national scenic trail, and three national heritage areas. The Bureau of Land Management controls over 12,500 square miles of Colorado land and water, and the U.S. Forest Service over 20,000 square miles of land and water.[i]

Altogether, the federal government owns roughly 36.2% of Colorado (24.1 million acres or 38,000 square miles).[ii] Sixty percent of that is U.S. Forest Service, 34% BLM, and roughly 3% National Park Service, all of which help provide significant public access to waters that flow across and through federal lands.

FIGURE 1.

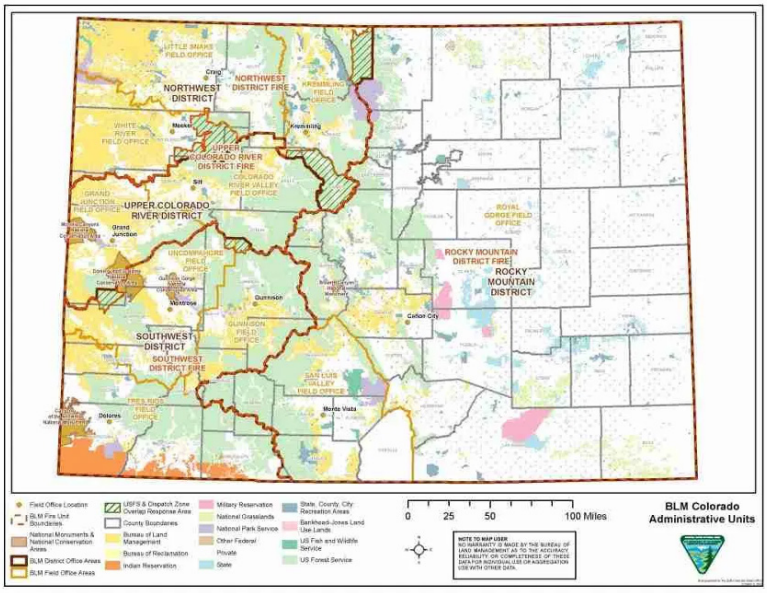

TABLE 1.

Federal Ownership of Colorado Land	
Percent of Colorado Land Owned by Federal Government	36.2%
U.S. Forest Service	60%
Bureau of Land Management	34%
National Park Service	3%
Other*	3%

*Other includes the Department of Defense, and other buildings and real estate

The State of Colorado itself owns over three million acres (2.8 million acres of State Trust Lands, 218,564 acres of state parks, 77,000 acres of state forest, 350 state wildlife areas, and others).

Recreation is Big Business

This history of investment in outdoor access and preservation has created significant economic and recreational value.

People throughout the arid West, including Colorado, are accustomed to wide open spaces and views of a horizon often hundreds of miles away. Mountains, valleys, plains, and streams are regular fixtures of life in the Centennial State, visible aspects of daily life that are ingrained in the culture of its people. So much so that voters willingly take measures that are sometimes viewed as extreme in other parts of the country to preserve open space, wildlife, wetlands, streams, and other outdoor resources.

In fact, the use of the state's waters for recreation is a crucial part of what Coloradans and visitors love about the state. The Arkansas Headwaters Recreation Area (AHRA) alone attracts more than 1.2 million users annually, and they rented at least 50,000 rafts during the last year such data was published (2021). At least 60,000 people take boat trips on the Colorado River headwaters, over 11,000 on the San Juan River, just to name two – rafting is also big business on the Animas, Blue, Cache la Poudre, Dolores, Eagle, Gunnison, North Platte, Piedra, Rio Grande, Roaring Fork, San Miguel, Taylor, and Yampa Rivers, as well as Clear Creek and many others. Nearly a dozen "whitewater parks" have been built specifically for the purpose.

In fiscal year 2023, CPW sold 952,200 fishing licenses.[iii] Colorado Parks and Wildlife has estimated that outdoor recreation contributes $65.8 billion in economic output, with fishing listed as the 5th most popular outdoor activity, much of which involves floating and boating, and all of which requires public access to the state's waters. In total in 2023, it's estimated that outdoor recreation contributed:[iv]

- **$65.8 billion in output**
- **$36.5 billion in GDP (8.5% of state total)**
- **$11.2 billion in local, state, and federal tax revenue**
- **404,000 jobs (12.5% of state labor force)**

No wonder Colorado voters have dedicated billions to preserving the state's land and water and to improving access to those resources.

THE LEGAL BACKGROUND OF ACCESS TO COLORADO WATERWAYS

The interests of both recreational and personal outdoor access are important aspects of Colorado water law.

In 1979 the Colorado Supreme Court ruled in *People v. Emmert* that individuals could be subject to criminal trespass prosecution for floating on non-navigable waters of the state. In response to the *Emmert* decision, the Colorado General Assembly amended the criminal trespass statute to define "premises" as only pertaining to "the stream banks and beds" flowing through private property. C.R.S 18-4-504 (1973). *Emmert* and the amended criminal trespass statute left open the possibility that individuals could still be subject to civil trespass for the same activity.

In the ensuing years, and for reasons this report will explore, the legislature has been unable to codify the current status of "right to float." Emmert and the amended trespass statute failed to completely resolve and clarify the right or lack thereof to float on non-navigable waters in Colorado.

Still, for more than 45 years this seemingly incomplete resolution has provided the framework which has allowed the commercial rafting industry to grow in Colorado through site specific discussions and resolution of tensions between rafters and individual landowners. Although this at times cumbersome process has resulted in periodic conflicts, the resulting discussions have resolved the vast majority of conflicts and allowed reasonable river access to Colorado's navigable waters. From time to time, conflicts have arisen that have brought the issue to the forefront of the public debate, and the legislature has in at least one instance attempted to resolve the issue.

The resulting tension has led to a de facto process of conflict resolution that has served the state well and is likely the best resolution for landowners and recreationists in the state. It is unlikely that any future legislative attempts to codify a "right to float" would resolve the access issues or be any more successful than they have been in the past.

The "one size fits all" approach of legislation is uniquely problematic in Colorado because of the innumerable situations that arise that can only be resolved on a case-by-case basis through site specific negotiations between recreational interests and private landowners.

River Access Litigation

Since *Emmert*, there have been two significant conflicts that have led to litigation, proposed legislation, and the establishment of an unused mediation process.

The first such conflict was on the Taylor River in 2009. A Texas-based developer purchased a two-mile tract of land on the lower Taylor River with the intention of selling high-end properties along that stretch of land. The developer notified two commercial rafting companies that they would no longer be able to raft through the two-mile stretch of the Taylor River. This led to two separate efforts to resolve the conflict.

The first effort was the creation of a River Access Mediation Task force in 2010 and the subsequent Colorado's River Access Mediation Commission to address site specific conflicts as they arose. The Commission is triggered by a request from any interested party to the Executive Director of the Colorado Department of Natural Resources. The specific Taylor River issue was resolved when the two river guiding companies agreed to limit the number of trips through the property to a number that was acceptable to the developer. It is unclear if the Commission has been utilized in a formal manner. It appears that subsequent conflicts throughout the state have been addressed more informally with discussions between rafting companies and landowners occurring as needed to successfully resolve conflicts as they arise.

The second effort arising from the Taylor River dispute was proposed legislation to establish standards for floating access by clarifying the "right to float" and acceptable standards for access to stream beds and banks when necessary to avoid threats to human health and safety. This legislation was ultimately unsuccessful because different versions of the bill passed the House and Senate, and the two chambers were unable to reconcile the different versions of the bill. The greatest point of contention centered around whether the expansion of the "right to float" to private parties constituted a taking.

THE LEGAL BACKGROUND OF ACCESS TO COLORADO WATERWAYS

Current talks about waterway access fail to address several of the most difficult legal aspects of the issue.

After the 1979 Emmert decision, the threat of expanded state action creating a credible "takings" claim became paramount. Advocates for expanded public access needed to find a way to work around the explicit property right recognized in Emmert.

In the early 2000's, advocates of an expanded "right to float" and the "right to wade" pivoted to a focus on navigable rivers of the state under the theory that if some of Colorado's rivers were deemed "navigable" at the time of statehood, ownership of streambeds and banks to the high water mark could be deemed property of the State and thus imply a broader right of access to the public. The theory being that Emmert was limited to "non-navigable" rivers and thus avoiding the contentious issue of takings at least as it pertained to navigable rivers. It should be noted that the amendment to the definition of "premises" to exclude surface water in C.R.S. 18-4-504 was not limited to "non-navigable" rivers and presumably removed the threat of criminal trespass to all rivers in the state provided the rafters did not touch the stream bed or banks.

The possibility of civil liability for trespass was not addressed in *Emmert* or in subsequent legislative amendments. Very few instances of landowners pursuing civil trespass against rafting companies or individual floaters have arisen since Emmert. There are multiple reasons for this dearth of civil claims but the biggest is probably the fairly small damages that any one landowner would receive against a single trespasser even assuming the landowner prevailed in such a claim.

The question of "navigability" is a quagmire that has not been resolved. The State of Colorado has taken the position that no waters of the state are navigable for purposes of Waters of the United States (WOTUS) as it relates to the purposes of the Clean Water Act. Notwithstanding this state determination, there are federal standards of "navigability" in common law that could potentially convey "ownership" to the state for stream beds and banks to the high-water mark.

Colorado has never asserted these potential claims of ownership via federal standards of "navigability" and thus arose the latest case involving access to Colorado's rivers. The Colorado Supreme Court has ruled that only the State can assert ownership of these waters and thus dismissed the case of Colorado v. Hill on the basis that an individual has no right to assert a claim of navigability on behalf of the State. Roger Hill, an angler, had sued Colorado in 2018 arguing the river section he fished was navigable and

thus available to the public. There is no reason to believe that the State has any intention of asserting "navigability" for the foreseeable future and thus the uneasy tension that has existed for 45 years will likely remain.

While it would generally be preferable to resolve the issue definitively and with absolute clarity, Colorado finds itself in a situation where the current status is preferable to any legislative solution. Somewhat paradoxically, a statute, initiative or referendum designed to provide clarity could result in far more ambiguity than the current situation.

For example, as happened with Representative Kathleen Curry's 2010 legislation HB10-1188, any attempt to codify existing understanding or expand access will be subject to unanswerable questions regarding takings. Title has passed to the land underlying streambeds for 150 years in Colorado. Any legislation that diminishes the rights conveyed unconstrained over the last century and a half will undoubtedly be challenged in court. Emmert clearly stated that the streambed and banks are private property and legislation that diminishes the recognized right will very likely be deemed a taking.

The ramifications of such a decision would be devastating to the State. Colorado would be on the hook for incalculable damages. In addition to the fiscal impact, the procedural ramifications are equally untenable. First, the State would have to assert "navigability" retroactive to the time of statehood. This would trigger litigation regarding the State's ability to do this. Second, the issue of navigability is fact specific and would require site specific findings of commercial activity retroactive to 1876. To say this would be a procedural slog is a huge understatement. Even rivers determined to be navigable in certain reaches would not necessarily be determined navigable from the headwater or tributaries to the state border.

This is further complicated by interstate waterways such as the Arkansas River. Under federal law, the Arkansas is considered non-navigable above Tulsa, Oklahoma. So were Colorado to designate as navigable a river that both Kansas and Oklahoma designate otherwise is a legal quagmire, to say the least, especially since that could potentially impose on both states a federal WOTUS connection neither wants. For that reason and others, legislative attempts to add clarity would likely devolve into an evidentiary mess with rivers deemed to have both navigable and non-navigable reaches within Colorado and between states. Finally, any river not included in the "navigable" category would still be off limits to waders because of the Emmert decision.

Thousands of cases would proceed through an already overwhelmed court system to determine damages for each impacted landowner. Advocates for expanded access would likely try to argue that State's assertion of ownership retroactive to the time of statehood would obviate this risk but as stated earlier, there is zero reason to believe that the state has any intention of asserting such a claim of ownership. None of this massive procedural process happens in a vacuum.

The State Engineer is working toward rulemaking to standardize measurement for prior appropriation compliance on the Colorado River. That may lead to further rulemaking to address potential compact compliance among the seven basin states. Adding these additional processes to determine navigability within the state would tax human and financial resources beyond anything we have seen in the arena of water administration. As Attorney General Phil Weiser pointed out in the Hill case, only legislators

can make the navigability determination or change access laws. Weiser argued that to "upend these nearly 150 years of transfers and agreements" would require a "comprehensive process," not just a single angler's lawsuit. He told the Supreme Court that a judicial ruling about whether streams were navigable in 1876 "could have monumental consequences for water rights in Colorado and could lead to significant litigation challenging existing property rights."

While the current system is cumbersome and imperfect, it is working in most circumstances. Rafting companies have long-term relationships with landowners and work to assure that their ability to operate continues. This undoubtedly means that site specific concerns can be addressed to accommodate varying water levels and agricultural practices for example. The ever-increasing private floaters presents a greater challenge because they do not have the need to maintain relationships with the same landowners. But even private rafters understand that they can be charged with criminal trespass if they abuse the right to float and access the banks of the river for anything not related to safety.

Paradoxically, any attempt to codify existing access standards will not resolve this challenge. Statutory language that attempts to define such terms as "incidental contact" or "as necessary to protect human safety" would inevitably be debated and the subject of challenges in court based on fact specific circumstances. A necessary portage in early June would likely be deemed a trespass in August. This ever-shifting discretion would do little to assist law enforcement officers in making trespass determinations and could actually result in a greater time commitment by local law enforcement agencies to investigate trespass allegations.

SHORTAGE OF PUBLICLY ACCESSIBLE/ FLOATABLE RIVERS?

The discussion of public access to private property diverts attention from Colorado's expansive and continually growing public recreational resources.

There are hundreds of miles of floatable rivers and streams in Colorado with public access, and state agencies, counties, cities, towns, nonprofits, landowners, and private companies are continuously increasing that access.

Colorado has 158 named rivers totaling just over 107,000 miles, the vast majority of which are too small and/or intermittent to be floatable in any practical recreational sense. All of them originate in Colorado except the Green and Cimarron Rivers, both of which flow into and back out of the state, in the far northwest and southeast corners, respectively (the Green for 11 miles and the Cimarron for 22).

Though there are thousands of miles of smaller streams and creeks, access to the major rivers in Colorado for floating, rafting, and fishing is a multi-billion recreational industry, especially on the Colorado, Gunnison, Arkansas, South Platte, Cache la Poudre, Yampa, and Dolores Rivers. In addition, fishing is a significant industry on the Fryingpan, Crystal, Roaring Fork, North Platte, Blue, Taylor, San Juan, Conejos, and Animas Rivers. In total, 19 sections in 13 rivers are designated gold-medal fisheries and attract thousands of anglers annually. The state's legal water rights system complicates public access but does not preclude it.

COMPLEX WATER LAWS

Numerous books have been written about the complexity of western water law, and specifically about the intricate aspects of Colorado water laws. For purposes of this discussion, it should at least be noted that water politics in the American Southwest often seem mysterious to people in the rest of the country. Chicago gets almost 36 inches of precipitation a year, New York over 45, Houston 50, Miami nearly 62, and Washington, D.C about 40 inches per year.[v]

By contrast, America's second largest city, Los Angeles, sees less than 15 inches a year, Phoenix only 9. On average the Southwest gets less than a third as much rain as the rest of the country, and has but one major river, the Colorado.

The State of Colorado averages about 16.5 inches of precipitation a year, but much of that water evaporates before it even reaches the streams. Almost all of it comes in the form of snow, which melts and runs rapidly out of the state in eight major river basins: the Colorado, North Platte, South Platte, Rio Grande, Arkansas, Republican, San Juan, and Yampa/White.

Water uses, quality, and access will always be the source of dispute in the West, for one simple reason: there isn't enough. In Colorado, the ability to capture, move, and use some of that water, while it is available, is the basis of all life, including wildlife, human life, and community life. It directly and indirectly affects all other issues.

Water Recreation Laws Across the West

The best that can be said of the inconsistent laws of other western states is that they are all over the map. They range from an absolute right to float without restriction to a bewildering array of detailed restrictions that can leave many recreation boaters uncertain.

ARIZONA

Laws in Arizona are very similar to those in Colorado. There is no public right to float on waters across private land, except in "navigable" waters. And Arizona recognizes only one waterway, the Colorado River, as navigable at the time of statehood, which means the state owns the riverbed. All others reverted to the adjacent landowner, as in Colorado. There are significant stretches of the river that cross federal land, however, such as the entire California/Arizona border, making that riverbed federal property.

CALIFORNIA

In California, riverbeds belong to the adjacent property owners, but a public easement in the state constitution grants the right to use all "navigable" waters in the state, including boating, swimming, hunting, and other recreational uses, up to the high-water mark. However, in California, "navigable" has a broader definition than other states in two respects. First, it does not include only water that was designated as navigable at the time of statehood (it may have been improved at any time since). Second, the waterway need not be navigable year-round, if it is determined "suitable for public use" by a combination of state agencies.

IDAHO

Idaho law is among the nation's most floater-friendly. Any stream that can be floated by any watercraft which can be powered by oars is open to the public for any recreational purpose. Boaters may also lawfully scout and portage, as long as they return to the river at the closest safe spot. Idaho adopted a recreational boating test to determine which streams are navigable, and therefore subject to a public easement – a standard explicitly rejected by Colorado in 1979.

KANSAS

Kansas law is modeled after Colorado's, meaning that streambeds and banks belong to adjacent landowners, as none of the state's streams were designated as navigable at the time of statehood, nor have any been so designated since. Floating across private property without landowner permission is trespassing.

MONTANA

Montana also allows floating only on navigable waters, but uses a hybrid approach to defining "navigable," based on two factors – navigability at the time of statehood, and floatability today. The traditional federal test determines who owns the streambeds, but the recreational use test determines the public's right to float, up to the high-water mark, making the practical effect similar to the public trust doctrine used in Idaho.

NEVADA

Nevada law uses the same federal navigability test as Colorado for determining streambed ownership, though Nevada has designated as navigable at the time of statehood only the Colorado and Virgin Rivers and Winnemucca Lake. However, state law also provides a public right to access navigable waters, though the statutes have not yet determined which waters may qualify. Several recreational rafting/boating businesses have evolved, operating primarily on the Colorado, Truckee, and Carson rivers.

NEW MEXICO

New Mexico defines public rights completely independent of any definition of navigability. It relies on the prior appropriation doctrine, and not navigability tests, to determine which waters are public. Nearly all streambeds are owned by the adjacent private property owners, all unappropriated waters are considered public waters. So, navigability is not the primary determinant of a public right to float – legal access is. The law condones recreational uses of public waters, but the main factor distinguishing public from private streams is whether the public has legal access across the necessary lands. Such access is not granted by recreational water laws, so trespassing remains an important issue.

OKLAHOMA

Oklahoma law and court rulings support a public right to float on navigable and non-navigable streams, but the law is unsettled on any right to touch the streambeds, which are privately owned, or to portage around obstructions.

OREGON

Oregon owns the beds of navigable rivers, and the public has a right to boat, fish, and swim in these rivers up to the high-water mark. Yet the law regarding both navigability and recreational floating rights is not entirely settled. A public floating easement is generally assumed, probably including streams that do not meet the federal navigability test. Case law suggests a public right in streams "capable of being commonly and generally useful for floating boats, rafts, logs, for any useful purpose." The State Land Board determines navigability using the federal test, and has adopted a list of streams that qualify. But it is not comprehensive and questions remain about many streams in the state, including whether that includes any portage right.

TEXAS

Texas considers all waters navigable under the federal test if they are at least 30 feet wide, and navigable under state law even if less than 30 feet wide, if they are "navigable in fact," meaning "capable of being used... as a highway for commerce," or are "floatable for recreation or small craft." In those cases, the state owns the streambeds, so wading and fishing are legal. Streams that fail those two tests are not considered navigable, the streambeds are private, and there is no public right to float on those.

UTAH

In Utah, the public owns the water and has the right to use any surface water for which legal access exists. The public has the right to use the surface water for recreation, including boating, but not the right to cross private property to get there. State law is silent on whether the streambed can be used or touched by boaters, and there is no governing case law on portage.

WYOMING

Wyoming law is also similar to Colorado law. The public may float any navigable or non-navigable stream that can be floated by any craft, but that does not include the right to touch the riverbeds or riverbanks, which are private property. The right to float the stream does include, however, a right to portage around and over obstructions, and the right to contact with the streambed that is "incidental" to moving the boat. That does not convey the right to wade or to fish from the bank.

WHY COLORADO IS DIFFERENT

Even among the complex array of western water laws, Colorado's situation is unique.

The arid states of the American West developed, over the course of a century, a complex and distinctive system of laws to make scarce water available to human inhabitants. Today, Westerners often find themselves explaining that water system, which seems peculiar to people in greener parts of the country.

Yet the constitutions of nearly all western states contain a simple provision: if a person diverts water from a natural stream and puts it to beneficial use, he has acquired a property right and may not be stopped. In the Colorado Constitution, the specific wording is, "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[vi]

That is different than the basic premise underlying water law in the eastern U.S., which is based on the riparian doctrine – essentially, that water rights generally belong to whoever owns the land along the streams. In Colorado, the fact that a person owns land, even under the stream and on both sides, does not mean he has the right to use its water. The waters belong to the people of the state, but the right to use them belongs to those who divert water, put it to specified beneficial uses, and thus obtain a property right, in the priority order in which they do so.[vii]

In most of America, the current political discussion around water largely centers around water quality: water must be used in ways that do not diminish its value to others, and in ways that do not endanger public health.

Maintaining the purity of water supplies and eliminating pollution is important everywhere. But in Colorado, issues of water *quality* are far less daunting than the nearly-insurmountable challenges of water *quantity* and the related difficulty of deciding who can use it for *recreation.* An adequate and affordable water *supply* means the difference between life and death in the western half of the country, and owning older and more senior water rights literally conveys the power to control agriculture, businesses, industries, and even entire communities.

But in recent decades, recreation became such an important value that the Colorado legislature eventually changed the historic laws in a couple important ways. First, the original laws specifically defining beneficial uses for which water rights could be obtained (agriculture, mining, municipal, and industrial) were amended in 1969 to include recreation, and in 1973 to include instream flow rights, the latter owned exclusively by the Colorado Water Conservation Board. Although recreation was recognized as a beneficial use in 1969, that meant "impounding" water for recreational purposes, requiring structures

such as reservoirs. In 2001 the legislature added "in-channel" water rights, an exclusive province of local governments referred to as Recreational In-Channel Diversion Rights (RICDs). That is why constructed whitewater parks are owned and operated by cities and counties. In all, 21 communities have secured RICD rights for whitewater parks, kayak parks, engineered waves, and similar recreational facilities within the stream. At least three of those have enforced that right by forcing upstream users to curtail diversions, so RICDs have the same legal muscle as other water rights.[viii]

Private parties can use water for recreation, including fishing, rafting, and boating, but that does not require a decreed water right because it does not convey ownership, and because boaters are merely floating on water that others may own the right to use in specified ways.

Colorado's Unique Situation

There are good reasons that Colorado's water system evolved differently than other states – its situation is entirely different. Other states have advantages Colorado does not have:

- Eighty percent of Colorado's tiny annual water supply comes in the form of snow, mostly within a four-month period. Colorado is sometimes called the "rooftop state" because all of its water flows out of the state in eight small rivers. Virtually none flows in from other states, as noted earlier.
- Although there are nearly 6 million people in the state, there are over 90 million people in 17 other states that are at least partly dependent on water that originates in Colorado.
- Ten states and Mexico have legal claims that require Colorado to deliver portions of its water downstream. There are nine interstate compacts, two Supreme Court decrees, two memoranda of understandings and two international treaties that govern how much water Colorado can use, significantly limiting its own ability to grow.[ix]
- Finally, 80% of the state's water falls on the Western side of the Continental Divide, while 80% of the people live on the Eastern side.[x]

For the people in Colorado, there will never be an end to the political battles over a much-too-small water supply. And those battles will never really be about the amount of snowfall, which political leaders cannot control, but about storage, diversion, and uses, which they can.

The Business of Recreation

In 2021 Colorado rafting outfitters hosted 620,000 rafters, a single-year record for the state.[xi] Over 300,000 rafters per year are estimated to use the Arkansas River alone, which offers 150 miles of rafting access. That makes it the most heavily rafted river in the U.S. with triple the number who float the New River Gorge in West Virginia and 12 times the number who float the Colorado River through the Grand Canyon.

At least 150 miles of the Colorado River are accessible for floating/rafting, as are nearly 175 miles of the White River. So are roughly 150 miles of the South Platte, over 100 miles of the Yampa, 60 miles of the Animas, 50 miles of the San Juan, the portion below Navajo Dam being especially popular, 30 miles of the Roaring Fork, 120 miles of the Gunnison, Black Canyon (14 mi) being especially popular. And many other smaller streams.

Indeed, Colorado's water is vital to this massive recreational industry. It is also habitat for a world-class population of fish, birds, and other wildlife. Yet it is also crucial for food production, energy, power generation, industry, drinking water supplies, and much more. Thus, the same waters used by wildlife and by recreational boaters also belong to legal water rights holders, including cities and towns, farms and ranches, businesses and industries.

Those two priorities – traditional water rights vs. recreational floaters – may seem competitive, but they need not be irreconcilable.

In fact, Colorado has evolved a very specific process to acquire access for the public where possible. And it has worked in large portions of nearly every major river and stream across the state.

Lottery Proceeds

The Great Outdoors Colorado (GOCO) program's impact on Colorado began with a ballot initiative adopted by voters in 1992, now Article 27 of the State Constitution. It is ten sections long, but the ballot measure was a single simple paragraph, entitled "Great Outdoors Colorado." It read:

> *"Shall there be an amendment to the Colorado Constitution to create the Great Outdoors Colorado Program; to provide for the permanent dedication of net proceeds from every state-supervised lottery game for the program after payment of certain existing obligations; to specify that the program provide for the preservation, protection, enhancement, and management of the state's wildlife, park, river, trail, and open space heritage; to establish a board as an independent political subdivision of the state to oversee the program; and to create a trust fund for the program?"*

The measure passed, 876,424 votes to 629,490 – a simple idea but a different approach than any other state had ever taken in preserving outdoor resources.

To this day, spending lottery proceeds for outdoor recreation, parks, wildlife, and open space is unique to Colorado. The Lottery's net proceeds are allocated very specifically: 10% to Colorado state parks through Colorado Parks and Wildlife (CPW); 40% to the Colorado Conservation Trust Fund, which allocates funds to eligible local governments on a per capita basis; and the other 50% to the Great Outdoors Colorado trust fund, against a constitutionally mandated cap adjusted for inflation each year. That cap was originally set at $35 million, but is adjusted for inflation, so today it is over $90 million. In addition, GOCO is allowed to spend interest on its funds, which through 2024 had totaled roughly $54 million.

On other words, the Constitution dedicates half the net proceeds from every state-supervised lottery game, after payment of lottery expenses, to the GOCO program. The GOCO Board is an independent political subdivision of the state that oversees grants from the trust fund for four specified purposes (wildlife, parks, open space, and local government).

Wildlife grants are used to develop wildlife watching opportunities; implement educational programs about wildlife; provide "programs for maintaining Colorado's diverse wildlife heritage;" protect habitat by acquiring leases, easements, or ownership of land and/or water; and "restore critical areas." Note that at least two of those purposes are vague and undefined, leaving that determination to the Parks and Wildlife Commission and the GOCO board.

Parks grants can be used to establish and improve state parks and recreation areas; develop public information and education on natural resources; acquire, construct and maintain trails and river greenways; and provide water for recreational purposes by buying water rights or making agreements with owners, in accordance with existing water laws. Those projects must be funded through State Parks.

Open space grants are used to acquire and manage open space and "natural areas of statewide significance." Those grants may also go to State Parks, but can also go to local governments, special districts, or nonprofit land conservation organizations, and must be matched, or as the amendment says, include "cooperative investments by other public or private entities."

Finally, local government grants, which must be matched by local funds, are used to acquire, develop and manage open space, parks, and environmental education facilities. Those grants have been used in numerous communities to acquire and enhance water-based recreation, including whitewater parks and other improvements.

In 2024 the Lottery announced a new sales record of $900.8 million, largely credited to the introduction of more and higher-priced games, and it projects that revenue may top $1 billion in 2025.[xii] Two-thirds of that revenue (65%) goes to prize winners and 21-24% to the constitutional beneficiaries, especially GOCO and State Parks (after program costs).[xiii]

Massive Investment in the Outdoors

The first GOCO board was appointed in 1993 and began awarding grants in 1994. Since that time, GOCO has committed roughly $1,645,903,983 in lottery proceeds to approximately 6,440 projects (as of 06/2025) in all 64 counties, none of it from tax dollars. Because of matching fund requirements, those dollars leveraged another $914,796,342 in matching funds from local governments, state parks and wildlife agencies, landowners, and other contributors (through 2023). In total, GOCO grants have helped complete projects with budgets totaling $2.4 billion (01/2023).[xiv]

A few examples illustrate that most communities have benefited, some substantially, from these grants. Mesa County, for example, has received 234 grants totaling over $47 million through 2022.Las Animas County has received 55 grants totaling $30.6 million; La Plata County 73 grants totaling $12.6 million; Weld County 158 grants totaling nearly $39 million. Denver County projects have received 123 grants

totaling $31.2 million, and Boulder County 147 grants totaling $27 million. Kiowa County has seen the least GOCO activity, receiving 13 grants totaling $643,524; the highest recipient has been Larimer County, with 214 grants totaling over $63 million.[xv]

GOCO has funded significant projects to help restore rivers, streams, wetlands, riparian habitats, grasslands, and forestlands through a program called Restoration and Stewardship of Outdoor Resources and the Environment (RESTORE). The program was designed specifically for large-scale habitat restoration and stewardship projects, based on funding partnerships with the National Fish and Wildlife Foundation (NFWF), the Colorado Department of Natural Resources, Gates Family Foundation, OXY, Chevron, and four federal agencies. RESTORE serves as a single point of application for funding from the various partners, "creating an efficient, one-stop shop," as GOCO explains. The program was budgeted for about $4.5 million in 2025, enough to fund a dozen or more such projects.[xvi]

The Great Outdoors Colorado program continues to deliver open space, parks, wildlife, and outdoor recreation projects across Colorado, more than 30 years after its creation, and its funding continues to grow every year. In total, GOCO's investments have resulted in more than 5,700 projects in all 64 counties including:

- **1,173 miles of trail built or reconstructed**
- **1,102 miles of river protected**
- **1,816 parks/outdoor recreation areas created or improved**
- **1,391,294 acres conserved in urban and rural areas**
- **66,688 acres added to the state park system**

The current GOCO five-year spending plan calls for increasing annual spending steadily, to $90.9 million for 2025. GOCO's operational expenses generally hovered at just over $5 million through the past five years, or about 7% of its total budget, considered relatively low by most standards.[xvii]

A Vital Tool for Enhancing Public Recreation

Great Outdoors Colorado (GOCO) has significantly contributed to stream access and conservation through various land acquisitions and easements. While the GOCO grants database does not specifically isolate grants that paid for public access to streams, there are numerous and notable projects that highlight that important function:

- GOCO provided $6.25 million to match local funding for acquisition of the 1,860-acre Collard Ranch, which includes five miles of Tarryall Creek, a renowned fly-fishing stream.
- A GOCO grant of $275,000 helped expand the Arkansas River Community Preserve by 74 acres, ensuring public access to over three miles of the Arkansas River.

- GOCO contributed significantly to the acquisition of the 975-acre Shur View Property along the Cache la Poudre River in Greeley, providing badly-needed access to the river.
- Fountain Creek watershed and trails projects received $2.5 million from GOCO to construct and improve several miles of trails that provide public access to the creek.
- A GOCO grant of $544,150 to Cañon City helped acquire a former power plant property to develop riverfront recreation and river access for recreation.
- A $300,000 GOCO grant to the Town of Silverthorne supported improvement of three miles of river corridor in Silverthorne, including community-designated access points, potentially accessible river entries, and inclusion of whitewater parks.

GOCO has made hundreds of grants over the past 30 years that help gain public access to streams, maintain the associated habitat, enhance recreational opportunities, and help manage programs and organizations whose work is a vital part of the outdoor recreation economy.

Colorado's Gold Medal waters have been a particular emphasis, since they are always among the most sought-after destinations in the state. Given their high-quality populations of trout and other sportfish, and their scenic settings, they attract thousands of anglers each year. The Great Outdoors Colorado program, working with its state and local partners, has added considerably to these fisheries' size, quality, and accessibility.

Arkansas River: The 102-mile Gold Medal section from Leadville to Parkdale is especially renowned for its accessibility and diverse fishing opportunities. It is among Colorado's most popular rivers for both fishing and rafting. The GOCO program made one of its earliest grants in 1994 to the State Parks program to enhance that access. GOCO also gave Cañon City $200,000 for its Whitewater Kayak Recreation Park in 2009 and has continued to add resources to the Arkansas Headwaters Recreation Area for years.

- **Blue River:** The Gold Medal stretch below Dillon Reservoir is easily accessible and well-known for its trophy-sized trout, attracting anglers from across the region. A 2021 GOCO grant of $350,000 helped complete Phase 2 of the Breckenridge River Park, and a multimillion-dollar partnership between GOCO and the federal Interior Department has restored miles of habitat and will eventually result in Gold Medal status to a majority of the River.
- **Roaring Fork River:** GOCO awarded $1 million to Carbondale for its Roaring Fork River Access Park, part of the Crystal Watershed Legacy program, and in 2019, Pitkin County received a $350,000 GOCO grant for improvements to the Healthy Rivers Whitewater Park on the Roaring Fork River, just upstream from the Fryingpan, another gold medal fishery.
- **Eagle River:** GOCO has awarded at least two grants to Minturn for the Eagle River Park and for Cemetery Bridge river access, and in 2016 gave the Town of Eagle a $35,000 grant to construct whitewater wave features in the Eagle River, while also restoring adjacent riparian areas. The project was aimed at enhancing recreational opportunities and improving the health of the river.

- **Colorado River:** GOCO gave multiple grants of over $118,000 for Hot Sulphur Springs to acquire and build Pioneer Park, which included river access trails. And GOCO grants also helped provide river access at Parachute, as well as the planning process for recreational improvement.
- **Yampa River System Legacy:** An $89,000 grant in 1996, and another $95,000 grant in 2003, both through State Parks, added or enhanced both Yampa River access site projects and recreational leases.
- **Uncompahgre River:** The Public Access Group of Ouray County was awarded nearly $20,000 in 2009 for planning, acquiring, and enhancing public access.
- **Ducks Unlimited:** Numerous grants have helped enhance habitat through this organization, including one $28,500 grant in 2010 specifically for the Youth, Family and the Outdoors program, for development of public access programs.

Between 1994 and 2021 GOCO made at least 463 grants directly related to river projects. Only 15 of those were conservation easements, which normally do not convey public access. But the vast majority of those grants were for land acquisition, access-oriented greenways, river parks, riverside access trails, and open space projects that provide public access. So do nearly all river stewardship projects undertaken by CPW, including those at San Luis Hills and Collard Ranch State Wildlife Refuges, Yampa River and James Robb State Parks, Arkansas Headwaters Recreation Area, and the RiversEdge West projects in the Grand Valley.

GOCO also made 13 grants totaling nearly $1.5 million during that period specifically related to boating access, in 6 counties and 5 state parks. In addition, at least 21 GOCO grants totaling $2.8 million between 1994 and 2018 funded projects specifically intended to enhance public access to waterways. Those included at least 6 grants through Colorado State Parks, one through Colorado Open Lands, One to Ducks Unlimited, and at least 9 cities and towns. Many of those grants included matching funds from local governments and others, resulting in total budgets of over $3.5 million.

In short, of the over $2 billion Coloradans have invested in outdoor recreation, open space, and wildlife, a significant portion has been directly related to the ongoing demand for public access to the state's rivers and streams. It remains a high priority for the state and is addressed by state agencies, local governments, and a vast network of nonprofit and corporate partners every year.

One of the difficulties in researching such data is that neither GOCO nor CPW actively track, as a reportable statistic, the number of miles of river and stream access purchased or obtained through management agreements. Grants and agreements related to acquisition of land and/or water frequently contain provisions involving public access, but in the GOCO database they are categorized under broader terms such as "Acquisition," "Conservation Easements," "Planning and Capacity Building," "Wildlife habitat" and others. It is likely a source of frustration for recreational floaters that there is no reliable state-published source of accurate information about all the available sites and how/where to access them. This shortage of information is probably a larger problem than any perceived shortage of available publicly accessible sites. It needs to be addressed on both the data-collection and public reporting sides.

POLICY RECOMMENDATIONS

GOCO through CPW, land trusts and local open space programs should continue to prioritize river and stream access for Coloradans and visitors to the state. Within existing revenue sources, Colorado can continue to be a leader in outdoor fishing and boating recreation.

CPW should continue to provide mediation services through the 2012 program. While it is apparent that most conflicts are resolved independent of the formal mediation process, having this process available can be a release valve for pressure points as they arise.

CPW should work with local governments (including law enforcement) to educate anglers and floaters about the existing status of floating Colorado's waters. This education should not try to gloss over the tension that exists in the law but rather focus on the responsible behavior that will result in fewer conflicts going forward. Further, landowners should be educated on the law of trespass with an emphasis that any perceived transgression should be handled through law enforcement not through threats or intimidation.

Increasing the public's understanding of how much revenue is being allocated to stream and river access is important. We encourage GOCO and CPW to track and at least annually publish their efforts involving stream and river access acquisition. In addition, CPW should publish a brochure (much like their annual Big Game Brochure and Public Land Access Brochure) setting forth all of the public access either held by fee or access agreement by the state or US government. Making this information available will confirm the state's efforts as well as educate the public about available access.

CONCLUSION

It is true that Colorado treats floating rights somewhat differently than many other western states, but that is because its water situation is unique. Its headwaters status means most of the state's water is not only appropriated to existing users but is also obligated to other states under legal agreements. However, Colorado has also dedicated unique resources to conserving and acquiring public resources, including river access.

Because Coloradans have long recognized the dilemma of public resources on private land, it is the only state in the U.S. that dedicates its lottery proceeds to parks, wildlife, open space, and outdoor recreation. Of the western states mentioned above, only Arizona and Oregon provide any such funding from lottery proceeds. Arizona provides a mere $10 million to its wildlife agency, the remainder to the general fund. Oregon gives 15% to parks and watershed enhancement, the remainder to education and economic development. All the other western states mentioned dedicate their lottery proceeds to educational funds or the state general fund (Utah and Nevada do not have lotteries).

Conflicts over the issue of floating rights will likely continue for the foreseeable future. Legislators, associations, attorneys, and policy makers have an inherent and positive bias towards trying to solve problems, to make difficult situations better. Public policy is a noble calling, and efforts to address tough issues should generally be encouraged. On the other hand, the fact that legislators can legislate, associations can sue, and activists can push ballot initiatives does not always mean they should do so.

It may not be especially satisfying to conclude that addressing this particular issue through legislation, ballot initiatives or lawsuits might only make it worse. But because of Colorado's unique history, culture, and circumstances, that is sometimes the right conclusion. Colorado's "uneasy tension" regarding river access is precisely such a situation. While it is easy to make a definitive policy statement regarding both public rights and private property rights, the path to clarification is fraught with innumerable bad outcomes where both sides and ultimately the State of Colorado will be worse off than they are now. As a practical matter, anglers and floaters currently have some carefully defined access rights, and private property owners have some protection of their underlying and adjacent property. But as shown in this report, attempts by either side to expand those rights at the expense of the other are likely to create more problems than they solve.

The existing system provides opportunities, though perhaps imperfect, for both sides to work out differences on a case-by-case basis, and to achieve outcomes that work for both.

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