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The Fight for Public Rights on America's Waterways

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"A river is more than an amenity; it is a treasure."[2]

Abstract

Water resources serve many important purposes. We use water to move goods, to grow crops, and to sate domestic and industrial water demands. Less appreciated, however, is the importance of water resources for the aesthetic, recreational, and spiritual needs of the public. People seek out water resources not only because of their beauty and their utility for swimming, surfing, fishing, and boating but also for the solace that they provide. The sound of water, for example, can reduce anxiety, give a sense of pleasure, and even reduce one's heart rate.

The benefits of water resources are only available, however, if people have free access to them. Public rights to access water resources have a long and storied history that easily predates the founding of the United States, tracing back to at least the time of the Roman Empire. In a series of early opinions, the U.S. Supreme Court embraced that history and recognized a federal trust responsibility to protect public access rights, especially as they relate to navigable waterways.

This article traces the history of public access rights in the United States. It reviews the relevant U.S. Supreme Court decisions that secured public rights in navigable waterways and describes how the law has evolved in more recent times. Despite legal recognition of public access rights, conflicts, and controversies, largely between private landowners and water users, remain. Moreover, because federal law limits public access rights to traditional navigable waterways, the states play an important role in securing public rights to waterways that do not meet the federal test for navigability.

The public's right to access water resources under state laws varies significantly. Some states broadly protect public access to all waterways that are susceptible to public use, irrespective of navigability. Other states are far less generous. Following a comprehensive review of public rights

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[2] New York v. New Jersey, 283 U.S. 336, 342 (1931) (per J. Oliver Wendell Holmes)

under federal law, the article summarizes state law in this area, offering examples of the various ways that states approach public access. The paper closes with an argument that supports broad public rights on all American waterways with a capacity for recreational use, as essential to the physical and spiritual well-being of the American people.

I. Introduction

Roger Hill is a Colorado fisherman who cares deeply about protecting the rights of fellow fishers to fish from the bed of rivers and streams. His passion for promoting fishing rights led him to become the plaintiff in a multi-year lawsuit that wound its way through both state and federal courts in Colorado over the course of more than five years. The case involved Hill's right to fish from the bed of a stunningly beautiful section of the Arkansas River, a major river with headwaters in the mountains near Leadville, Colorado. The Arkansas River flows eastward through Colorado, Kansas, Oklahoma, and Arkansas, before joining with the Mississippi River near the town of Napoleon, Arkansas.

After he was assaulted by a landowner with baseball-sized rocks, and threatened in writing with arrest, Hill sought a declaration from the Court that the Arkansas River is navigable and that accordingly, he and other members of the public have a right to fish from the bed of the River.[3] Hill grounded his claim of a legal right to fish from the Arkansas riverbed in a legal doctrine that traces back to the earliest history of the United States. That doctrine holds that when a state enters the Union, it does so on an equal footing with all other states.[4] Among the attributes of statehood granted to the state under this equal footing doctrine is title to the bed of all rivers, streams and lakes that are navigable at the time of statehood. The U.S. Supreme Court has made clear, however, that states hold title to the bed of navigable waterways, not as they might hold title to other land, but rather in trust for the use of its people.[5] This is the origin of what has come to be known as the Public Trust Doctrine.[6] Despite this well-established legal principle, a private landowner assaulted Hill and threatened him in writing with arrest if he ever tried to return to the Arkansas River to fish from the bed.

Roger Hill believes that the stretch of the Arkansas River where he chose to fish was navigable at statehood. If he is right, then the Public Trust

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[3] The author, along with co-counsel Alexander Hood, represented Mr. Hill in the litigation over his right to fish from the bed of the river.

[4] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

[5] Illinois Central RR v. Illinois, 146 U.S. 387, 452 (1892).

[6] See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

Doctrine affords him a legal right to fish from the bed free from interference by private landowners. Nonetheless, the Colorado Supreme Court sided with a hostile attorney general and denied Hill standing to pursue his claim in court.[7] This result was only possible because the Court chose to ignore the fundamental principle that states hold title to the bed of navigable streams, not as a traditional landowner, but as trustee for the people of the state.

As described below, the decision in *State v. Hill* is an outlier both in terms of water law and the rules of civil procedure. But it may also signal a growing hostility among riparian landowners and some state officials, to public access rights to America's waterways. For that reason, it cannot be allowed to stand. This article seeks to set the record straight on the law of public access in our nation's waterways, and to preserve and promote the public's historic right to enjoy the many benefits provided by its rivers, streams, and lakes.

II. Historical Background on Public Access to Waterways

The public right to access waterways has long, historical roots. While ancient Greek and Roman civilizations recognized and supported public access to water resources[8] the earliest legal document recognizing public rights in waterways is generally acknowledged to be the Institutes of Justinian. The Institutes, which took effect in 529 A.D. during the reign of the Roman Emperor Justinian, recognize remarkably broad rights of public access to water.[9] In Book II, Title I, the Institutes declare that "the

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[7] The author, along with co-counsel Alexander Hood, represented Mr. Hill in the federal and state court proceedings. In contrast to the Colorado Supreme Court, the U.S. Court of Appeals for the Tenth Circuit found that Hill did indeed have standing to pursue his claim:

> [Mr. Hill] is … like the purported holder of an easement…. [D]etermining whether Mr. Hill has any right to use the easement will require an examination of the underlying title. It would make little sense to deny Mr. Hill prudential standing to determine his rights in the easement because of the existence of a dispute between the underlying property owners. *The right he asserts is his own, even if it exists by virtue of the actions of another*.

Hill v. Warsewa, 947 F.3d 1305, 1310 (10th Cir. 2020) (emphasis added). Despite upholding Hill's standing, the case was ultimately returned to the state court system due to the state's 11th amendment objection to proceeding in federal court.

[8] *Adirondack League Club, Inc. v. Sierra Club, et al.* 92 N.Y.2d 591 (1998).

[9] The relevant text from the Institutes of Justinian, Book of Things, (¶¶ 1-5) is as follows:

> 1. Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses,

following things are by natural law common to all—the air, running water, the sea, and consequently the seashore." Thus, the Code treated these resources as public resources not subject to private ownership. But the Institutes do not stop there. They describe public use of the seashore and the sea itself, as "part of the law of nations." They recognize a right of "access to the seashore," subject only to the proviso that they avoid injury to private property. They announce that "all rivers and harbours are public" and guarantee the public's right to fish from them. And they establish the important principal that "[t]he seashore extends to the limit of the highest tide in time of storm or winter." This principal is reflected in modern law rules that protect public rights up to the "ordinary high-water mark" for inland waterways, and the "mean high tide line" for coastal areas.[10]

Some view the Magna Carta of 1215 as further supporting public access to waterways. Paragraph 33 of the Magna Carta provides that "[a]ll fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the seacoast."[11] The removal of these fish

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> monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations.
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> 2. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein.
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> 3. The seashore extends to the limit of the highest tide in time of storm or winter.
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> 4. Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently, everyone is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it.
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> 5. Again, the public use of the seashore, as of the sea itself, is part of the law of nations; consequently, everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.

[10] The Attorney-General ex rel. Yorkshire Trust v Brotherton, [1992] 1 A.C. 425. *See also, Riparian Owners, River and Access: What you Need to Know, Country Land and Business Association* (2022), *available at,* https://media.cla.org.uk/documents/GN16-22_Riparian_owners_rivers_and_access_-_What_you_need_to_know.pdf. In contrast to England and Wales, Scotland adopted the Land Reform (Scotland) Act 2003, which grants a right of access to all inland waters. Microsoft Word - Inland Water Guidance March 2010.doc Broad info on global access. http://www.riversaccess.org/pages/pv.asp?p=rac30&fsize=0

[11] Magna Carta,¶33. It further prohibits the British Crown from transferring the valuable coastal fisheries to private lords because the seabeds belong to the people. In The Daniel Ball, 77 U.S. 557, 563, the Supreme Court offered this explanation for distinguishing between English and American rules on access. In England, waters that are

dams arguably promotes public use for navigation and fishing, but modern English and Welsh law supports a right of navigation, and presumably fishing, only on tidal rivers. It is generally accepted that "there is no general public right of way to navigate non-tidal rivers in England and Wales."[12]

The American approach has its own rich history, but unlike much of American law, which borrows from English common law, American rules on stream access have more in common with the Roman tradition. Those rules trace back to the earliest history of the United States and a founding principle known as the "equal footing doctrine." Article IV, Section 3, Clause 1 of the U.S. Constitution provides that "[n]ew States may be admitted by the Congress into this Union…." While the Constitution does not specifically establish the principle of equality among the States, the Supreme Court gave that principle constitutional status in an 1845 case called *Pollard's Lessee v. Hagan*, where it held that upon admission to the Union, American states enter on an "equal footing" with the original thirteen states.[13]

Pollard's Lessee involved conflicting claims to certain partially inundated lands along the shores of the Gulf of Mexico near Mobile, Alabama. The United States had conveyed to the plaintiff title to these lands, and the question was whether that title included the soil beneath the navigable waters. The enabling act that admitted Alabama to the Union appeared to contain a contradiction. On the one hand, it declared that Alabama entered the Union on an equal footing with other States, but it also reserved to the United States title to the lands covered by navigable waters.[14] The Court resolved the contradiction in favor of Alabama, holding that "the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the States respectively." This was a necessary conclusion because the Court further found that "new States have the same rights, sovereignty, and

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navigable in fact are also subject to the ebb and flow of the tide, and for that reason, public rights derived from tidal waters. In the United States, however, many navigable water ways are inland and therefore not subject to tidal influence. Thus, navigability is the more appropriate test for determining public access rights.

[12] The policy of limiting access to waterway rights in England and Wales is consistent with the longstanding struggle in those countries over the right to roam. https://www.righttoroam.org.uk/about, and more recently, the right to swim. See https://www.youtube.com/watch?v=iyajtL49LFY. As noted above, supra, n. 10, this limit on access contrasts markedly with the rules in Scotland. Under The Land Reform Act of 2003, the people of Scotland enjoy broad rights of access to both land and water regardless of land ownership, so long as they act responsibly as required by the Scottish Outdoor Access Code. See https://www.nature.scot/enjoying-outdoors/your-access-rights.

[13] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

[14] 3 Stat. 489, 492 (1819)

jurisdiction over this subject as the original States." Since the original thirteen colonies held title to the bed of their waterways, so too must all future States. Under this "'equal footing doctrine" then states receive title to the bed of tidelands and all navigable streams and lakes within their borders.[15] Title to these lands transferred to the state upon statehood by operation of law.[16]

The conclusion that States hold title to the bed of all navigable waterways gave rise to another important rule that has come to be known as The Public Trust Doctrine. The seminal case is the U.S. Supreme Court's decision in *Illinois Central Railroad v. Illinois*.[17] That case involved a legislative grant to the railroad of the bed of Lake Michigan along the Chicago harbor. The grant effectively gave the railroad a monopoly over commercial transportation in the region. A few years after the legislature approved the grant, it had second thoughts and revoked the grant. The railroad sued, claiming that the revocation was unlawful. The Supreme Court framed the question as to "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters…."[18]

The Court conceded that granting limited tracts of submerged lands that improve opportunities for navigation and commerce might serve the public interest. But the Court made clear that such grants must not "substantially impair the public interest in the lands and waters remaining…." Accordingly, the original grant to the railroad was unlawful because "the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake…is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public."

The Court famously described the contours of this public trust doctrine as follows:

> That the state holds the title to the lands under the navigable waters … in the same manner that the state holds title to soils under tide water, by the common law, we have already shown …. *But it is a title different in character from that which the state holds in lands intended for sale.* It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. *It is a title held in trust for the people of the state, that they*

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[15] PPL Montana, 565 U.S. 576 at 590-91.
[16] *See* Hill v. Warsewa, 947 F.3d 1305 at 1310.
[17] 146 U.S. 387 (1892).
[18] *Id.* at 452.

> *may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.*[19]

The State's responsibility as trustee was further explained in the following passage:

> *The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,…than it can abdicate its police powers in the administration of government….*[20]

The Court reinforced its holding in *Illinois Central Railroad*, just two years later in *Shively v. Bowlby.*[21] The issue in *Shively* was whether a grant to Shively from the United States to lands along the Columbia River in Oregon included the bed of the River below the ordinary highwater mark. The Court held that it did not:

> *….the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government*, but, … shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but *shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state*, after it shall have become a completely organized community.[22]

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[19] *Id*. (emphasis added.) *See also,* Sax, *supra,* n. 8; Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Cour*t, 45 ENVTL L. 561 (2015).

[20] *Id.* at 453.

[21] 152 U.S. 1 (1894).

[22] 152 U.S. at 49-50 (emphasis added). It bears noting here that the original grant to Shively occurred in 1850, nine years before Oregon became a State. An Act for the Admission of Oregon into the Union, ch. 33, 11 Stat. 383(1859). Nonetheless, the Court specifically held that because the United States held the beds of navigable waterways in trust for the future states, a pre-Statehood land grant did not convey title to the bed of a navigable waterway below the ordinary highwater mark.

The Court's decision in *Shively* also holds that the State's title, and consequently public rights, extend to the ordinary high-water mark on the waterway.[23]

Illinois Central Railroad and *Shively* make clear that title to the bed of navigable waterways passes to the states upon statehood under federal constitutional law principles. But the government grants that title for the purpose of preserving public rights in commerce, navigation, and fishing. And while the Supreme Court has held that the *scope* of those public rights is subject to state law,[24] the states' trust obligation remains, and states must still administer those rights "for the public benefit."[25]

III. Public Access as a Human Right

On 28 July 2010, the UN General Assembly expressly recognized a human right to clean drinking water and sanitation.[26] The Resolution laments the fact that approximately 884 million people lack access to safe drinking water and that more than 2.6 billion people lack access to basic sanitation. The Resolution further expresses alarm that "approximately 1.5 million children under 5 years of age die and 443 million school days are lost each year as a result of water- and sanitation-related diseases,"[27] But the Resolution also seems to acknowledge that providing access to safe drinking water and sanitation will be costly. On that point, it calls upon States and international organizations "to provide financial resources, … in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all."[28] Thus, while the goal of universal access to safe drinking water and sanitation is critically important, it is necessarily aspirational rather than affording a legal right.

The UN Resolution does not speak to the right of the public to access waterways, and it might seem callous to compare a lack of access to safe drinking water and sanitation with a denial of stream access. Certainly, efforts to secure safe drinking water and sanitation must have the highest

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[23] 152 U.S. at 27. The Court in Shively found "that, upon the admission of the state of Alabama into the Union, the title in the lands below high-water mark of navigable waters passed to the state, and could not afterwards be granted away by the congress of the United States," *citing* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

[24] *See* PPL Montana, *supra,* 565 U.S. at 603–04.

[25] 152 U.S. at 50.

[26] Resolution 64/292, adopted by the General Assembly on 28 July 2010.

[27] *Id.*

[28] *Id.* at ¶2.

priority. On the other hand, unlike the human right to safe drinking water and sanitation, a human right that guarantees public access to waterways does not impose significant costs on states[29] but it can help to secure the human connection that we all share with water resources. Water resources hold incalculable values for aesthetic, recreational, and spiritual purposes.[30] The mere sound of water can reduce anxiety, give a sense of pleasure, and even reduce one's heart rate.[31]

Justice Oliver Wendell Holmes, well known for his support for private property rights, was often poetic in describing the public values associated with natural rivers. In *Hudson County Water Co. v. McCarter*,[32] Holmes extolled those values while rejecting the notion that private rights should interfere with the public interest in waterways:

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state and grows more pressing as population grows. It is fundamental, and … the private property of riparian proprietors cannot be supposed to have deeper roots. … The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.[33]

It does not stretch the imagination to understand Holmes' celebration of the public values in natural waterways as something close to a legal recognition of a public or human right to stream access. This need not

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[29] To be sure, some landowners may claim a loss of property rights for which compensation is owed. But Professor Sax explains why courts should be skeptical of such claims. While water rights are property rights, they arguably enjoy "less protection than most other property rights…." because, among other things, their exercise may intrude on public common, Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 UNIV. COLO. L. REV. 257 (1990).

[30] *See e.g.,* Léah Khayat & Diego Jara, *An Insight into the Cultural and Spiritual Value of Water* (IUCN Environmental Law Centre, April 2021)., *available at*, https://iucn.org/news/environmental-law/202104/insight-cultural-and-spiritual-value-water.

[31] *See e.g.,* Chung-Heng Hsieh et al., The Effect of Water Sound Level in Virtual Reality: A Study of Restorative Benefits in Young Adults through Immersive Natural Environments, 88 J. Enviro. Psych. 102012 (2023).

[32] 209 U.S. 349 (1908).

[33] *Id.* at 356. *See also*, Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 479-487 (1989). (Sax argues that Holmes language "may be the most important statement the Court has ever made about the constitutional status of water rights.")

guarantee a public right to access all waterways, but it should support sufficient access for the public to gain that physical and spiritual connection to water that we all desire. Holmes' understanding of the intrinsic value of water might also support public rights to stream access for all people going forward.

IV. Defining Navigable Waterways for Purposes of Title to the Bed

As previously described, federal law protects access only to *navigable* waterways. In *The Daniel Ball*,[34] the Supreme Court defined "navigable rivers" generally as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[35]

The Daniel Ball involved the question of the navigability of the Grand River in Michigan for purposes of federal commerce clause authority. For that purpose, the test for navigability is based upon a waterbody's present-day condition, including navigability achieved through reasonable improvements.[36] Nonetheless, the Supreme Court has made clear that the *Daniel Ball* test for navigability applies when determining title to the bed of a watercourse, subject to a few adjustments. In contrast to the navigability test for commerce clause purposes, the test for title to the bed is determined at the time of statehood based upon the natural and ordinary condition of the waterway at statehood.[37] Navigability under this standard also depends on a showing that the waterway would support the type of watercraft that would have been available at the time of statehood.[38]

Moreover, the Supreme Court has made clear that navigability is determined on a segment-by-segment basis. So, in *PPL Montana v.*

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[34] The Daniel Ball, 77 U.S. 557 (1870).

[35] *Id.* at 563.

[36] United States v. Appalachian Electric Power, 311 U.S. 377, 426-427 (1940).

[37] PPL Montana v. Montana, 565 U.S. at 576 (2012), *citing* Oklahoma v. Texas, 258 U.S. 574, 591 (1922). Thus, according to the Supreme Court, the term "navigability" can mean different things in different contexts.

[38] In PPL Montana, the Court made clear that a "party seeking to use present-day evidence [of navigability] or title purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's post statehood condition is not materially different from its physical condition at statehood." 565 U.S. at 601.

Montana, the Court determined that while the Missouri River may be navigable over much of its length, it is not navigable through a 17-mile segment along the Great Falls of Montana that included five waterfalls with continuous rapids in between.[39]

V. Public Access Rights to Navigable for Title Waterways

The Roger Hill case offers an excellent case study for understanding navigability for title. Hill claimed that a segment of the Arkansas River where he liked to fish was navigable and that accordingly he had the right to stand on the bed of the River. That segment is near the place where Texas Creek enters the Arkansas River from the south, near the town of Cotapaxi, Colorado.

Cognizant of the rules involving navigability for title, as described by the Court in *PPL Montana*, Hill commissioned a study by a historian who had written his PhD thesis on the Arkansas River. That study produced evidence of commercial use of the Arkansas River before and around the time of statehood with contemporaneous newspaper accounts and other sources. The study summarized the key evidence as follows:

> 1. On March 1, 1813, on the upper reaches of the Arkansas River, Ezekiel Williams, after caching his furs, launched a canoe into the river. As he floated downstream for four-hundred miles, well past where Texas Creek enters the Arkansas River, he trapped beaver along the way.
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> 2. In May 1814, at Boon's Lick, Missouri, Ezekiel Williams employed twenty men in an effort to retrieve his cached furs in the upper Arkansas River Valley. In July 1815, in the upper reaches of the Arkansas River Valley, Williams and company, with furs in hand, loaded several canoes and floated downstream well past where Texas Creek enters the river.
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> 3. Charles and Robert May contracted for 60,000 ties in the spring of 1870. They cut the ties from a "mountain source," and floated the ties down the Arkansas River, following and guiding the ties in a "large skiff."
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> 4. By 1872, the Atchison, Topeka, and Santa Fe railroad companies contracted for railroad ties cut near Fairplay, Colorado

[39] *Id.* at 597. According to the Court, "the Montana Supreme Court was wrong to state, with respect to the Great Falls reach and other stretches of the rivers in question, that portages 'are not sufficient to defeat a finding of navigability.' 229 P.3d, at 446. In most cases, they are, because they require transportation over land rather than over the water. This is such a case, at least as to the Great Falls reach."

> to be floated down the Arkansas River, across the state line into Kansas, to Great Bend, where railroad construction crew were working.
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> 5. During the 1870s, prior to and beyond Colorado statehood, railroad tie drives regularly occurred on the Arkansas River originating near Fairplay, Colorado, to various booms on the river located in Colorado at Canon City, Pueblo, Lamar, and in Kansas as far away as Great Bend.
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> 6. The commercial uses of the Arkansas River near its junction with Texas Creek continued beyond 1876 when Colorado achieved statehood thereby making a vital contribution to the economic development of Colorado and the West, particularly in the railroad, cattle, agricultural and mining sectors.[40]

This historical record led the historian to conclude that the Arkansas River was commercially navigable at the time of Colorado's statehood, and that it was used, and was susceptible of being used, in its ordinary condition, as a highway for commerce over which trade and travel were conducted in the customary modes of trade and travel over water.[41] That conclusion finds support in various Supreme Court decisions that have addressed similar claims of navigability.

In *The Montello*,[42] for example, the Court laid out a generous test for

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[40] Expert Opinion and Report of James Sherow, Ph.D. on the Commercial Navigability of the Arkansas River at the Time of Colorado's Statehood (June 2018), (on file with the author).

[41] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922), the Supreme Court found that a different segment of the Arkansas River was not navigable for purposes of title to the bed. Since the Supreme Court has made clear that navigability is determined segment-by-segment, this holding has limited relevance to the *Hill* case. But the case can also be distinguished on its facts. It involved a claim by oil and gas lessees that an express federal grant of title to the bed of the Arkansas River to the Osage Tribe issued before Oklahoma became a state was void. The leases had been issued by the State of Oklahoma, which supported the lessee's claims. The Supreme Court found that the relevant segment of the Arkansas River was not navigable, based on evidence adduced at trial, although the Court never actually described or analyzed that evidence. But the Court was also persuaded that the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the riverbed, and had done so to the Osage.

[42] 87 U. S. 430, 441-442 (1874). The Montello did not specifically involve the question of navigability for title. Rather, it involved the issue of navigability of the Fox River in Wisconsin for purposes of government regulation. But this was an early case in interpreting "navigability, and the Court quite clearly embraced a definition in line with the modern reading of "navigability for title":

> [T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is

determining navigability:

> [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation…. [I]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.[43]

The Court reinforced this generous standard with its decision in *United States v. Holt State Bank.*[44] The *Holt State Bank* case involved a question of the navigability for title to Mud Lake, in Minnesota, a lake that had been drained and uncovered. Nonetheless, the Court found that at the time of statehood the lake was navigable because "[e]arly visitors and settlers in … used the river and lake as a route of travel, employing the small boats of the period for the purpose." The Court went on to note that:

> …[N]avigability 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.

The Court has applied these principles in several subsequent cases. In *United States v. Utah*,[45] for example, the Supreme Court addressed that portion of the Colorado River that flows through the State of Utah. The United States filed this case to quiet title to the bed of the Colorado River and certain tributaries within Utah. The State contested the federal action, claiming that the Colorado River and its tributaries were navigable and that accordingly, the State owned the bed of these waterways under the equal footing doctrine. The Court applied the segment-by-segment approach, which was subsequently affirmed in the *PPL Montana*, and upheld the

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> navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sand bars….
> From what has been said it follows that Fox River is within the rule prescribed by this Court in order to determine whether a river is a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce…."

Id. at 443. The Court also noted that "short portages" did not upset the finding of navigability because "Durham boats…propelled by animal power, were able to navigate the entire length of Fox River with the aid of a few portages and would readily carry a very considerable tonnage." *Id.*

[43] *Id.* at 441.

[44] 270 U.S. 49, 56 (1926).

[45] 283 U.S. 64 (1931).

State's claims of navigability on most of the key portions of the contested waterways. In so doing, it identified several key principles for determining navigability for title.

First, the Court made clear that the question of navigability for title is a federal question that does not depend on navigability in international or foreign commerce. Second, the Court anticipated the "segment-by-segment" holding in *PPL Montana*, by focusing on the Special Master's findings and conclusions on navigability with respect to the specific sections of the rivers in controversy.[46]

Third the Court made clear that "where conditions of exploration and settlement explain the infrequency or limited nature of such [commercial] use, the susceptibility to use as a highway of commerce may still be satisfactorily proved."[47] Accordingly—

> [Utah] is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state, either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers, in their ordinary condition, to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.[48]

Based on these findings, the Court found substantial sections of the relevant rivers navigable for title. Certain other sections, however, such as Cataract Canyon, a turbulent section that runs through what is now Canyonlands National Park, were deemed non-navigable, due to the powerful rapids in that section.[49]

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[46] The Court also made clear that "a short interruption of navigability" would not make an otherwise navigable, non-navigable. Rather, the Court focused on "long reaches with particular characteristics of navigability or non-navigability," *Id.* at 77.

[47] *Id.* at 82.

[48] *Id.* at 83.

[49] *Id.* at 89-90. The Court briefly references the two expeditions of Major John Wesley Powell in 1869 and 1871 that took several boats from Green River, Wyoming down through Utah, to the confluence with the Colorado River and through Cataract Canyon, all the way to the border with Arizona, but it does not treat these somewhat isolated efforts as determinative of navigability. *Id.* at 82.

A separate dispute between Utah and the United States over title to the bed of a navigable waterway involved the Great Salt Lake.[50] Evidence of commercial use of the Lake was minimal, although boats had occasionally transported livestock to graze on islands in the Lake. The State also presented evidence to show that the Lake was used to transport passengers and goods in the 1880's, which was well before statehood. This was sufficient, however, for the Court to find that "[t]he lake was used as a highway and that is the gist of the federal test."[51] The Court also noted that the Lake plainly "could have floated and afforded passage to large boats, barges, and similar craft, thus demonstrating its susceptibility to commercial activity. The case is interesting in part because the Great Salt Lake is shallow and modest fluctuations in water levels dramatically change the shoreline exposing or inundating land around the lake. This created a significant issue for federal surveyors who had to identify the lakebed boundaries at the time of statehood, and thus the land owned by the State.

State of Alaska v. Ahtna, Inc,[52] offers another interesting perspective on navigability for title. This case from the U.S. Court of Appeals for the Ninth Circuit involved the Gulkana River in Alaska. The Bureau of Land Management had conveyed to Ahtna, a native regional corporation, certain lands underlying thirty miles of the Gulkana River. The district court found that the relevant segment of the Gulkana was navigable when Alaska became a State in 1959, and that accordingly, Alaska owned that segment of the riverbed. The Ninth Circuit agreed.

The evidence of commercial use was fairly substantial but based entirely on recreational use. Immediately preceding statehood, hunters and anglers travelled the Gulkana River in powered 16 to 24-foot fiberglass and aluminum watercraft. The evidence presented to the court showed that "[o]n a typical busy weekend day in June or July, 20 boats will use the lower 30 miles of the River, carrying approximately 60 people." The local boat tourism industry employed more than four hundred people and used aluminum power boats and inflatable rafts to guide fishing and sightseeing tours. Based on this evidence, the court had no trouble concluding that the Gulkana River was used and was susceptible to use for commercial purposes at the time of statehood and was thus navigable for purposes of determining title to the bed under federal law.[53]

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[50] Utah v. United States, 403 U.S. 9 (1971).

[51] *Id.* at 11.

[52] 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).

[53] *Id.* at 1404-05. The state's case was no doubt aided by the fact that watercraft had evolved substantially by the time Alaksa achieved statehood in 1959. Thus, even rubber rafts could be used to show that a river was navigable. Moreover, the court was not troubled by the fact that the evidence of commercial use was recreational since it plainly

Another important question with relevance to the Roger Hill case is whether the use of a river to transport logs is sufficient to demonstrate navigability for title. Those who claim that evidence of transporting logs is not sufficient to demonstrate navigability for title often cite *United States v. Rio Grande Dam Irrigation Co.,*[54] where the Court stated that "[t]he mere fact that logs . . . are floated down a stream *occasionally* and in times of *high water* does not make it a navigable river…."[55] But this finding does not fully resolve the issue. For one thing, the case involved the Rio Grande River in New Mexico at a time before New Mexico had achieved statehood. Accordingly, title to the bed of navigable rivers would not yet have transferred to the state. For another, while affidavits were filed in the lower court with evidence about the River's navigability, the Court apparently did not consider it necessary to analyze that evidence with care, before finding "that the Rio Grande is not navigable within the limits of the Territory of New Mexico."[56] Moreover, while the Court may be correct that floating logs down a river *occasionally* during *high water* is not sufficient to show navigability, that statement suggests a likelihood that more regular use of a river for transporting logs intended for commercial use would be sufficient. Indeed, a contrary rule would essentially allow any single private riparian along the river to block the transport of logs or claim trespass. That would obviously interfere with an important commercial use of the river at the time of statehood.

Two other cases decided after the *Rio Grande Dam Irrigation Co*. decision illustrate how evidence of transporting logs might support a claim of navigability for title. In *State of Oregon v. Riverfront Protection Association,*[57] Oregon sued the Riverfront Protective Association, an unincorporated association of riparian landowners along Oregon's McKenzie River seeking a declaratory judgment that the McKenzie was navigable for title. Much of the evidence focused on log drives and the court acknowledged that transporting logs down the McKenzie could be difficult. The evidence showed that "it took an average of from thirty to fifty days to complete a log drive down the 32-mile reach at issue," but it could take as much as ninety days.[58] Log jams, flooding and low water could also hamper the drives. Intractable log jams had to be broken up with

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satisfied the requirement to show susceptibility to commercial use.

[54] 174 U.S. 690, 698 (1899).

[55] *Id*. at 698.

[56] *Id.* at 696. The Court even suggested that the navigability or non-navigability of a river was something about which the Court could take judicial notice, obviating the need for evidence.

[57] 672 F.2d 792 (9th Cir. 1982)

[58] *Id.* at 795.

dynamite. Nonetheless, "thousands of logs and millions of board feet of timber were driven down the river," and this was sufficient to persuade the court that the McKenzie was navigable for title. The court distinguished the case from *Rio Grande Dam Irrigation Co*. noting that the log drives on the McKenzie were not limited to high water nor were they occasional.[59]

The Utah Supreme Court also found navigability based upon log drives in *Utah Stream Access Coalition v. Orange Street Development*.[60] The case involved the navigability of the Weber River in Utah, and to be clear, the issue was whether the River was navigable under state law. However, the Court clearly chose to invoke the federal standard for navigability in deciding that the Weber River is indeed navigable:

> We hold that the Act invokes a legal term of art [navigable] embedded in federal law. And we uphold the district court's conclusion that the stretch of the Weber River in question qualifies as "navigable" under this standard.

The federal law that the Court relied on was the test from *The Daniel Ball,*[61] which is, of course, the federal test used to determine navigability for title. The evidence of navigability relied entirely on log drives. Relying on the district court decision, the Court found "evidence of regular log drives to supply the railroad, transportation of mining timbers, and the delivery of logs to sawmills at the relevant time of statehood." The evidence further showed that "this commercial activity could not feasibly have taken place but for the Weber River, as there were no commercially viable overland means of transporting the timber from the forest to its destination." The Court found this evidence plainly sufficient to show that the Weber River "was 'used and susceptible of being used, in its natural and ordinary condition, as highway of commerce.'"[62]

Of relevance to the Roger Hill case, the Court in *Utah Stream Access Coalition* considered the possibility that this evidence also supported a finding that the Weber River was navigable for title. Indeed, the district court had taken that additional step in its decision and had quieted title to the bed in the State. A majority of the Utah Supreme Court, however, vacated that part of the lower court's ruling because the plaintiffs had chosen not to raise the issue.[63] In an opinion dissenting from this latter aspect of the majority's decision, Justice Durham found that the Court had

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[59] *Id.* The Court found that "[m]ost drives on the McKenzie were held in April, May, and early June over a period of seventeen years."

[60] 416 P.3d 553 (Utah 2017).

[61] *Id.* at 557-559.

[62] *Id.* at 559-560.

[63] *Id.* at 555.

little choice but to recognize that the State held title to the bed of the Weber River, in light of its finding that the River met the navigable for title test under *The Daniel Ball*:

> I would hold that the State cannot have its cake and eat it too. First, the State cannot, over one-hundred and twenty years after it acquired title under the United States Constitution, decide it does not want title, or does not want its title to be recognized at this time. "[T]he State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance ...." [64]

Justice Durham went on to make clear that the Utah Stream Access Coalition (USAC) had standing to raise this issue because the USAC's claim that the Weber River is navigable-for-title is "identical to a claim for quiet title" He admitted that not every citizen could claim such standing and would require a party claiming standing "to show a particularized injury in addition to their interest in the land." But he found that USAC had done so.[65]

The *Riverfront Protective Association* and *Utah Stream Access Coalition* cases have direct relevance to Roger Hill's claim on the Arkansas River. As in those cases, Hill offered substantial evidence of commercial log drives on the Arkansas River, and the River was plainly the only way to get these logs to the market. Thus, the sections of the Arkansas River used for these log drives easily meet the test of navigability at the time of statehood. The Utah Stream Access case also offers support for Hill's claim to have standing. Importantly, Justice Durham's partial dissent was only from the decision of the majority to avoid the issue of navigability for title. The majority took no position on his separate finding that the USAC had standing to litigate a quiet title claim. Like the USAC, Roger Hill suffered a "particularized injury" having been assaulted and threatened with arrest if he returned to fish from the riverbed. Thus, under Justice Durham's analysis, Hill clearly would have standing to litigate his quiet title claim.

VI. Public Access to Non-Navigable for Title Waterways

As a matter of federal law, the public enjoys broad access rights to waterways deemed navigable for title. But public access rights also extend to many streams that do not meet the traditional *Daniel Ball* test of navigability, which applies to determine title to the bed of the waterway. These rights derive not from federal law, but rather from state law. As such, the rules relating to public access to non-navigable waterways vary widely

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[64] *Id.* at 564, *citing* Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370 (1977).

[65] *Id.* at 565-66.

across the country and are often in flux.

The primary legal issue involved in affording public access rights on non-navigable waterways has to do with the nature of bed ownership. Whereas the states own the bed of navigable streams under the equal footing doctrine, the adjacent riparian landowner owns the bed to the thread or "talweg" of the stream.[66] Thus, a question arises as to whether the use of the surface of the water above the bed, or whether the use of the bed itself for recreational purposes, might constitute a trespass.

State laws and rules on such public access to non-navigable streams adjacent to private property can roughly be divided into three categories:

(1) States that expressly allow broad access to non-navigable waterways for recreational purposes, including access to and use of the bed of the waterway;[67]

(2) States that allow recreational access to the surface of non-navigable waterways for floating, usually typically incidental touching of the bed, but precluding the right to wade or stand on the bed for recreational purposes; and

(3) States that deny or severely limit recreational access on the surface and bed of non-navigable waterways.

Set forth below is a review of various states that fall into each of these categories. This review does not attempt to cover all fifty states, and, in any event, the law in some States remains unclear.[68] Nonetheless, it offers

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[66] "In geography, hydrography, and fluvial geomorphology, a thalweg or talweg is the line or curve of lowest elevation within a valley or watercourse. Its vertical position in maps is the nadir (greatest depth) … in the stream profile." *See* https://everything.explained.today/Thalweg/. *See also*, James W. Garner, *The Doctrine of the Thalweg as a Rule of International Law,* 29 AM. J. OF INT'L L. 309-310 (1935).

[67] Many landowners are particularly opposed to this first category of states that allow the public to stand on the bed of a non-navigable river. They argue that they are better stewards of the river, often expending substantial funds to improve the riverine habitat. But these landowners often expend funds to monetize their monopoly over a river section by, for example, supporting a private fishing club that charges significant fees to people who want to fish in the section of the waterways that they claim to own. For example, the Wigwam Club on the South Platte River is one of the oldest in Colorado and reportedly charges annual fees in excess of $15,000. https://coloradostreamaccess.org/inside-colorados-secretive-wigwam-club-how-elites-lock-you-out-of-your-rivers/. The North Park Anglers Fishing Club, which claims private rights on fifty miles of rivers, streams, and lakes near Walden Colorado, charges a $2,000 one-time initiation fee, and $4,750 in annual dues. https://www.coloradoflyfishingclub.com/.

[68] Summaries of state access laws in all fifty states are available on the websites hosted by American Whitewater, https://www.americanwhitewater.org/content/Wiki/access:start,

the reader a sampling of the current law in a wide range of states, and it lays out the reasons for the various state approaches. This review reveals that while many states support broad public access rights to non-navigable waterways, many others have resisted this trend, or limited public access, often at the behest of wealthy and well-connected riparian landowners. Securing public access rights in these states will require supporters to persevere in persuading courts and political actors that public access rights to our nation's waterways are essential to the human spirit and well-grounded in the long history of the human experience.

A. ***States That Support Broad Public Access to Non-Navigable Streams***

Several American states allow broad public access to non-navigable streams and rivers. Public access in these states generally includes the right to wade and stand on the bed for recreational purposes. As a result, recreational rights in these states are generally the same whether a waterway is navigable or non-navigable. The only difference is in who owns the bed of the waterway.

California

In *Baker v. Mack*, the California Court of Appeal held that "members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below the high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft."[69] California's test for public access thus goes beyond the traditional navigability for title test set forth in *The Daniel Ball*. Instead, a capacity for recreational boating, sometimes called a "pleasure boat test," defines the scope of public access on non-navigable streams, although public uses are not limited to boating. According to the Court, the public can make "incidental use of the bottom … walking as a trout fisherman does in a navigable stream, boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc."[70]

In *California v. Superior Court* (Lyon),[71] the California Supreme Court confirmed that the state affords broad public access on steams capable of use for recreational purposes. The Court explained that even if

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and Backcountry Hunters and Anglers, https://d3n8a8pro7vhmx.cloudfront.net/backcountryhunters/pages/3215/attachments/original/1500574514/Stream_Access_Report_web.pdf?1500574514.

[69] 19 Cal.App.3d 1040, 1050 (Cal. Ct. App. 1971).

[70] Bohn v. Alpertson, 107 Cal.App.2d 738, 749 (Cal. Ct. App. 1951) (*quoting* Munninghoff v. Wisconsin Conservation Com., 38 N.W.2d 712, 715 (Wis. 1949)).

[71] 625 P.2d 239, 251 (Cal. 1981).

the body of water is within a landowner's title, those waters are "impressed with the public trust" and the landowner may not use the water in a way "incompatible with the public's interest in the property."[72]

Notably, California also protects the public's right to fish its waterways free from harm caused by pollution. In *People v. Truckee Lumber Co.*,[73] the Truckee Lumber Company, operated a sawmill along the Truckee River, a non-navigable stream stocked with fish. The sawmill discharged sawdust and other pollutants into the River. The Court held that a private landowner does not have the right to infringe on the public's right to fish by polluting a stream because the people own the fish and the waters in the stream even on non-navigable waterways.

1. *Idaho*

Idaho law expressly authorizes public recreational rights in "navigable streams," which it defines as:

> [a]ny stream which, in its natural state, during normal high water, will float cut timber having a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes is navigable.[74]

Although the statute does not explicitly grant the right to wade, Idaho appears to recognize that right as part of the public's recreational rights.[75]

Idaho expressly recognizes the public trust doctrine[76] and maintains a list of streams that it deems "navigable for title."[77] Nonetheless, Idaho has adopted a statute that allows the State Board of Land Commissioners "to authorize public or private use, encumbrance or alienation of the title to the beds of navigable waters held in public trust."[78] The only limits on the Commissioner's authority are the requirements of Idaho laws and the State constitution. Thus, while Idaho generally protects broad public access rights it retains the authority to infringe on those rights in circumstances that it deems appropriate.

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[72] *Id.* at 252.

[73] 48 P. 374 (Cal. 1897).

[74] Idaho Code § 36-1601. See also *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974)

[75] See https://idfg.idaho.gov/sites/default/files/fishing-boating-access-right-of-way-fish-id-2016.pdf.

[76] Idaho Code § 58-1201.

[77] https://www.idl.idaho.gov/lakes-rivers/.

[78] Idaho Code § 58-1203.

2. *Iowa*

Under Iowa law, "[n]avigable waters" are defined to include "all lakes, rivers, and streams that, during a total of six months in one out of every ten years, can support a vessel capable of carrying one or more persons."[79] Iowa recognizes that the State holds title to the bed of navigable waterways under the public trust doctrine, but the scope of public rights under the doctrine encompass a wide range of public uses beyond commerce and navigation. Those rights include navigation and commerce, but "also fishing, bathing, recreation, and general enjoyment, as well as other purposes traditionally associated with public waters."[80]

While the Iowa Supreme Court recognizes that "… the public trust doctrine applies broadly to public access of [Iowa's] waters…" public access rights are not limited to navigable waters. Rather, Iowa law provides that—

> …water occurring in any river, stream, or creek having definite banks and bed with visible evidence of the flow of water is flowing surface water and is declared to be public waters of the state of Iowa and subject to use by the public for navigation purposes in accordance with law. Land underlying flowing surface water is held subject to a trust for the public use of the water flowing over it. Such use is subject to the same rights, duties, limitations, and regulations as presently apply to meandered streams, or other streams deemed navigable for commercial purposes and to any reasonable use by the owner of the land lying under and next to the flowing surface water.[81]

Thus, Iowa seems to fit comfortably into the group of states that support broad public access rights to waterways regardless of whether they are navigable for purposes of title.

3. *Minnesota*

In Minnesota, streams and lakes are open for recreational use,

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[79] Iowa Code § 462A.2(22).

[80] State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989), *citing* Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632-33 (1986).

[81] Iowa Code § 462A.3A. A "meandered" water body is one whose boundary was surveyed and documented with meander lines by government surveyors during the original General Land Office (GLO) public land surveys that were carried out in the 19th and early 20th centuries. Surveyed waterways are presumed to be public and navigable but that determination can be challenged on legal or factual grounds. *See* Bureau of Land Management (BLM), *Manual of Surveying Instructions*, §§ 3-158-207 (2009),

regardless of whether they are navigable for title, so long as they are capable of recreational use and accessible from a public right of way. Moreover, if a stream can float a canoe, Minnesota considers it capable of recreational use.[82]

Broad public access rights to Minnesota's waterways find support in the Minnesota Supreme Court's decision in *State v. Kuluvar*.[83] The case did not involve public access rights but rather whether the Court should uphold the conviction of Kuluvar for dredging a channel in a lake without first obtaining the necessary permit. But in upholding the conviction, the Court used broad language to describe the State's authority over its waterways, including its trust responsibility to the public when it comes to access rights:

> [T]he state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state…. Such a regulation cannot be regarded as unreasonable and certainly not as taking property without compensation. When it is established that the public has access to waters capable of substantial beneficial use by all who so desire, the statute directs that the state fulfill its trusteeship over such waters by protecting against interference by anyone, including those who assert the common-law rights of a riparian owner. To permit such owners to interfere with the natural rights of the public to fish, hunt, swim, navigate, and otherwise enjoy such waters would result in subordinating public rights to private rights and in abdicating the state's trust over an incomparable natural resource. We find no difficulty in holding that the statute is a reasonable regulation and that it does not unconstitutionally infringe upon any rights of a riparian owner….[84]

Thus, Minnesota plainly belongs in the company of those states that afford broad access to state waterways.

4. *Missouri*

Missouri was one of the first states to recognize broad public access rights to waterways. In *Elder v. Delcour*,[85] the Missouri Supreme Court considered a petition by the plaintiff, Elder, seeking a declaration that he

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[82] 2025 Minnesota Fishing Regulations, at 12, *available at*, https://files.dnr.state.mn.us/rlp/regulations/fishing/fishing_regs.pdf.

[83] 123 N.W.2d 699 (1963).

[84] *Id.* at 706–07.

[85] 269 S.W. 2d 17 (Mo. 1954).

had a right to fish from the bed of the Meramec River. The controversy arose when Elder and his wife took a canoe down the Meramec and had to portage around certain obstructions on the River, including one on the defendant Delcour's property. Delcour claimed that the plaintiff had no right to access the River or portage across his land because the section of the Meramec that flowed through his property was not navigable.

In reviewing the parties' claims, the Court described the basic federal test for navigability from *The Daniel Ball* and further acknowledged a somewhat broader test for purposes of commercial regulation.[86] The Court's discussion of navigability is a bit muddled, however, because it does not describe navigability for title in terms of the evidence of navigability at the time of statehood, and it does not suggest a limit based upon the type of commercial activities that might have occurred at statehood.[87] Perhaps this was because the Court's analysis of the Meramec River's navigability was based entirely on a stipulated set of facts that did not include that information. Among the facts to which the parties had agreed was that the Meramec had been used in the past to transport logs and timber, and further that the River "is navigable in fact by canoes, rowboats, and other small floating craft of similar size and nature, but that it is not navigable in fact by larger boats and vessels."[88] This was enough for the Court to conclude that "the Meramec River at the point in question is a 'non-navigable river' … for the purpose of determining title…." Nonetheless, the Court confirmed that the public enjoys broad rights to use the Meramec River for recreational purposes:

> [W]e must and do hold that the waters of the Meramec River are public waters and the submerged area of its channel over and across appellant's farm is a public highway for travel and passage by floating and by wading, for business or for pleasure, and that in traveling the course of the stream by canoe or wading, respondent was not a trespasser on the property of appellant.[89]

The decision in *Edler v. Delcour* makes the clear that a stream may be navigable for purposes of protecting public access rights under State law even if it is not navigable for title purposes under federal law. It also takes the important step of protecting public rights to stand on the bed and wade for recreational purposes.

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[86] *Id.* at 20.
[87] *See* PPL Montana v. Montana, *supra* n. 85, at 22.
[88] *Id*., 269 S.W.2d at 19.
[89] *Id.* at 26.

5. *Montana*

Although not the first state to recognize broad public access rights to non-navigable streams, Montana is certainly one of the leading state to do so. *Montana Coalition for Stream Access v. Curran*,[90] involved the Dearborn River, which the Montana Supreme Court determined was navigable in fact. Accordingly, the State owns the stream bed and federal law thus allows public access . Nonetheless, the Montana Supreme Court went on to hold that "the question of title of the underlying bed is immaterial in determining public recreational use of State-owned waters."[91] Thus, in Montana, the public's right to use the surface and bed of waterways in Montana for recreational purposes is essentially the same and not dependent on a finding that a waterway is navigable for title. The State legislature has largely confirmed this holding. Under Montana's Stream Access Law, the public has a right to use rivers and streams for recreational purposes up to the ordinary high-water mark, including the right to wade on the stream bed.[92] The Montana law makes clear, however, that while recreationists have a right to use rivers and streams for water-based recreation, they cannot lawfully enter private lands bordering those streams or cross private lands to gain access to streams.[93]

6. *New Mexico*

Like the other states in this section, New Mexico recognizes broad rights of public access to the State's waterways, irrespective of whether the waterway is navigable for purposes of title to the bed. This conclusion follows from the New Mexico Supreme Court's decision in *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission.*[94] The case involved regulations promulgated by the New Mexico State Game Commission (Commission), that laid out a process for landowners to obtain a certificate that would allow them to close to public access segments of waterways flowing through the landowner's private property.[95] The Commission reasoned that because the landowner holds title to the bed below the public water, the landowner could exclude the public from

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[90] 682 P.2d 163 (1984).

[91] *Id.* at 172.

[92] Mt. Code, §23-2-301 et seq.; see also, Montana Stream Access Law, *available at*, https://fwp.mt.gov/fish/Id. at stream-access. This includes the right to "portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights." *Id*. at §23-2-311. It does not, however, include the right to use "a streambed as a right-of-way for any purpose when water is not flowing in the streambed." *Id*. at §23-2-302(2)(h).

[93] *Id*. at §23-2-302(4).

[94] 519 P.3d 46 (N.M. 2022).

[95] *See* 19.31.22.6 NMAC (1/22/2018).

accessing the public water if it involved walking or wading on the privately owned bed.

The Adobe Whitewater Club and others sued, claiming both that they these regulations adversely impacted them, and also that the rules violated the New Mexico Constitution. That Constitution simply states that the natural waters of New Mexico "belong to the public and [are]… subject to appropriation for beneficial use…."[96].. The New Mexico Supreme Court found this language sufficient to support broad public access rights and held that the Commission's rules were unconstitutional. The Court held that because "the public owns the water … there is a public easement over the water regardless of who owns the beds beneath the water."[97] Furthermore, according to the Court, that public easement includes the right to walk and wade on the bed of the waterway.[98]

The result in *Adobe Whitewater* was foreshadowed by an earlier New Mexico Supreme Court decision in *State ex rel. State Game Commission v. Red River Valley Co.*[99] In that case, the Court was asked to decide whether the State could open to the public for fishing and general recreational use a portion of the Conchas Dam Reservoir that had previously been closed to public use. In concluding that it could, the Court cited the New Mexico Constitution, which states that "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public…."[100] Moreover, the Court made clear that public rights were not limited by a navigability test because the Constitution made the waters of every natural stream, public waters.

The one issue that the Court does not address in *Red River Valley*, was the public's right to wade on the bed of New Mexico's waterways. In *Adobe Whitewater,* the Court confirmed that the public easement that the public enjoyed over the state's waterways included the right to wade.[101]

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[96] N.M. Const. art. XVI, § 2. It bears noting here that the Colorado Constitution, contains similar but broader language, providing that "the water of every natural stream, … within the state of Colorado, … ***the property of the public, … dedicated to the use of the people*** of the state…." Colo. Const. Art. XVI, § 5 (emphasis added). Despite this, Colorado law largely denies public access rights through private property even to the surface of the water. Colorado's law is explained in more detail in the section that describes States that severely restrict public access. *See text accompanying notes 177-179, infra*.

[97] *Adobe Whitewater Club of New Mexico,* 519 P.3d at 54.

[98] *Id.* at 55.

[99] 182 P.2d 421, 51 N.M. 207 (1945). The Court denied rehearing in the case twice – once in 1946 and again in 1947.

[100] The Court cited Art. 16, Sec. 2, Const.,

[101] 519 P.3d. at 56. ("[W]e conclude that the public may engage in such acts as are

7. *Wisconsin*

The law of public access in Wisconsin traces back to a rather unusual case. *Munninghoff v. Wisconsin Conservation Commission*,[102] involved a claim by a party to use a waterway for float trapping muskrats. These float traps were anchored to the bottom of the river. The waterway was navigable under state law but not for purposes of title to the bed. The Court found that the use of the bed to anchor these traps amounted to a trespass. In its decision, however, the Court made clear that public recreational rights on streams that are navigable under state law include the right to use the bed for "walking as a trout fisherman does in a navigable stream, boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen…."[103] It was the language that the California Supreme Court quoted with approval in *Baker v. Mack*.[104]

B. States that Allow Limited Public Access to Non-Navigable Waterways

The states in this section limit public access to non-navigable waterways, while still allowing some forms of recreational use. Some limit access based on the size of the waterway; others limit access by denying the right to stand on the bed, although they usually accept incidental contact with the bed as may be necessary to exercise the right of access. Such contact might involve, for example, portaging around obstacles or shoals, or scraping the bottom with a boat in shallow water.

1. Arkansas

Arkansas v. McIlroy[105] involved an action brought by the landowner, McIlroy, seeking a declaration that the Mulberry River was not navigable and not available for public access. The Mulberry River is a popular and challenging river for canoeists. The lower court ruled that the Mulberry was not a navigable stream and that McIlroy who owned land on both sides of the River, had a right to block public access. The Arkansas Supreme Court reversed. The Court found that "the Mulberry River, as it passes through McIlroy's property, [is] navigable,"[106] though it did not focus specifically on whether the River was navigable *for title.* Nor did the Court invoke *The Daniel Ball* test or ask whether the River was navigable at the time of

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reasonably necessary for the enjoyment of fishing and recreation." The Court specifically found that this included the right to wade.)

[102] 38 N.W.2d 712 (Wis. 1949).

[103] *Id.* at 716.

[104] 19 Cal.App.3d 1040, 1050 (Cal. Ct. App. 1971).

[105] 595 SW 2d 659 (Ark. 1980).

[106] *Id.* at 661.

statehood using the types of boats that could have been used at statehood. Instead, it applied a definition "similar to the general test used by the federal courts," reflecting a "river's potential for commercial usefulness." The Court concluded that for rivers deemed navigable "members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft."[107] It further found that "the segment of the Mulberry River … involved in this lawsuit can be used for a substantial portion of the year for recreational purposes [and that accordingly] it is navigable at that place with all the incidental rights of that determination."

The Court's decision to base navigability on the River's capacity to support recreational oar boats, and its failure to consider whether these boats could have been used at statehood, suggests a broader test for navigability than that supported by *The Daniel Ball.* The Court does not address the public's right to wade in rivers that are navigable under the recreational boat test, and moreover, the 2024 Arkansas Game and Fish Commission's Fishing Guidebook appears to undercut the holding in *McIlroy* by indicating that public access is only allowed on waterways in Arkansas that are navigable for title.[108] An Arkansas Supreme Court decision is, of course, more authoritative than a Game and Fish Commission Guidebook, but Arkansas would do well to clarify the scope of the public's right to access State waterways.

2. Michigan

The most recent case involving stream access in Michigan is *Bott v. Michigan Department of Natural Resources*.[109] *Bott* involved two cases with similar facts. In both, a small creek connected a small lake with a larger lake. Various parties attempted to use the creeks to access one of the lakes from the other. The creeks were quite shallow – as little as six or eight inches deep in some parts, but they were sometimes used by small recreational boats. The case turned on whether Michigan was prepared to follow the lead of several other States in adopting a recreational or pleasure boat test for state law navigability. This would have replaced an old "log floatation" test that the Court had previously adopted in *Moore v. Sanborne*,

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[107] *Id.* at 664.

[108] In a section of the Guidebook titled *Public v. Private Waters*, the public is advised that the State owns the bed of navigable waters to the ordinary high-water mark, but "a landowner adjacent to non-navigable water generally owns to the center of its bed… [and] the public generally has no right to use the water." Arkansas Game and Fish Commission's Fishing Guidebook 2024, at 51.

[109] 327 NW 2d 838 (Mich. 1982).

an 1853 decision.[110] A majority of the Michigan Supreme Court decided to stick with the log floatation test, ultimately finding that the creeks were not navigable and thus not subject to public access rights.

On the other hand, the *Moore* decision seems broader than the *Bott* Court had suggested. *Moore* held that "[t]he true test in determining the right of public use in freshwater streams, as public highways, is whether a stream is inherently and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts or logs." According to the *Moore* Court. "[w]here a stream possesses such a character the easement exists…."

Two other Michigan cases decided after *Moore* but before *Bott,* reinforce the conclusion that Michigan supports broad access rights that might justify including Michigan in the first category of states. *Collins v. Gerhardt*[111] involved the Piner River, which the Court found was navigable for title purposes based on evidence that the River was used to float pine logs and other timber to sawmills and to market down the stream. Indeed, the Court in *Collins* adopted an extremely broad definition of navigability without reference to the limits of *The Daniel Ball* test. The Court also conceded that the private landowner owned the bed of the River, perhaps based upon a grant from the State. But the Court insisted that "the [landowner's] title was impressed with [a public] trust for the preservation of the public right of fishing and other public rights…." The Court went on to hold that—

> In [the Pine River,] the people have the common right of fishing. The plaintiff, though owner of the soil, has no greater fishing rights than any other citizen. Their rights are equal and correlative. So long as water flows and fish swim in Pine river, the people may fish at their pleasure in any part of the stream….

Following the *Collins* decision, the Court appeared to go even further to protect public access to the State's waterways. *Rushton ex rel. Hoffmaster v. Taggart*,[112] involved the right to fish and wade on the Little South Branch of the Pere Marquette River. The Court conceded that the Little South Branch was not navigable in the sense of commercial travel by boat. Rather, it was only navigable in its natural state during periods of high water and then only for the floating of single logs and ties rather than logs tied together in rafts. This was because the many sharp turns in the Little South Branch would cause rafts to jam. Nonetheless, the Court appeared to say that the stream

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[110] Moore v. Sanborne, 2 Mich. 519 (1853).
[111] 237 Mich. 382, 11 N.W. 115 (1926).
[112] 306 Mich. 43, 211 N.W.2d 193 (1943).

was navigable under the *Collins* decision:

> The court finds that although the case is close to the border line—very much nearer than the stream considered in the Pine River cases,—this stream has what the cases describe as 'the capacity of floatage,' but only during the spring seasonal periods of high water, or at other short periods.**…**

The Court also pointed to the fact that the public had been fishing on this property for many years and that the State had, at great expense, stocked the stream with fish.

Viewing these cases together suggests the need for caution in interpreting Michigan's approach toward stream access. The narrow view laid out in *Bott* must be balanced against the broader approach taken in *Moore*, and especially in *Collins* and *Taggart*. Indeed, Michigan appears to protect the public's right to recreate and wade on waterways that meet a single definition of navigability that goes well beyond *The Daniel Ball* test. As such, it arguably puts Michigan in close alignment with those states that protect a public right to wade on all waters used for fishing and other recreational purposes. Moreover, while *Bott* adheres to the six-inch diameter test, *Taggart* indicates that courts can apply that test to include what some might argue are only marginally navigable waterways.

1. ***New York***

It is somewhat difficult to characterize the stream access rules in New York, in part because the state uses different terminology to describe waterways that are navigable for title and those that are not but that nonetheless may support a public right of access. New York distinguishes between waters that are "*navigable-in-law*" and those that are "*navigable-in-fact*." The former describes those waterways that satisfy the navigability for title test, including waters subject to the ebbs and flows of tides and the Great Lakes. As with all navigable for title waterways, the public generally has a right to use those waters for navigation as well as for fishing. For New York rivers deemed navigable in fact, however, the adjacent landowner owns the banks and the bed to the thread of the stream. So, rivers deemed navigable in fact in New York are not navigable for purposes of title to the bed but might be navigable under a more liberal recreational boat test.

Douglaston Manor v. Bahrakis[113] illustrates the scope of public rights on navigable in fact New York waterways. The case involved the Douglaston Salmon Run on the Salmon River. It is located on Douglaston's

[113] 678 N.E.2d 201, 203 (N.Y. 1997).

property, which traced its title to a 1792 patent from the state.[114] Douglaston manages the land as an exclusive private sport fishery. Those who want to fish there must pay Douglaston a fee, and Douglaston excludes the general public from the property. Douglaston brought the action seeking damages for past trespasses, and to enjoin commercial fishing guides from fishing or dropping anchor on his section of the River. The New York Court of Appeals found the Salmon River to be navigable in fact and made clear that "navigable-in-fact rivers remain subject to an implied, reserved public easement of navigation."[115] Nonetheless, the Court followed earlier precedent and held that general conveyance language in a grant is sufficient to transfer to the grantee the bed of the river and associated exclusive right of fishery.[116]

A year after the *Douglaston Manor* decision, the Court considered the extent to which the public enjoys recreational rights on a navigable in fact rivers. In *Adirondack League Club (ALC) v. Sierra Club*,[117] the ALC owned 50,000 acres of land, including twelve miles along the South Branch of the Moose River. Several of the defendants traveled through this section of the River in two canoes and a kayak, necessitating several portages around obstacles in the river. The ALC sued for trespass claiming that public rights on the south Branch only extended to traditional commercial uses. The Court disagreed, holding that public rights in navigable in fact rivers can include some recreational uses. Nonetheless, the Court denied the defendants' motion for summary judgment and held that the case presented issues of material fact regarding the navigability of the South Branch that would have to be determined at trial.[118]

2. *North Dakota*

Although North Dakota law is somewhat unclear regarding public rights to access non-navigable waterways, the North Dakota Game and Fish Department published a *Guide to Navigating North Dakota Navigable Waters* that appears to support the right to access the water's surface.[119] In

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[114] *Id.* The New York Court of Appeals upheld a 1792 patent from the state that transferred ownership of the stream bed and banks to Douglaston Manor. The Court indicated that the Salmon River was navigable-in-fact, but not navigable-in-law. Accordingly, the transfer of ownership to the bed and banks did not implicate the public trust doctrine.

[115] *Id.* at 204.

[116] *Id.* at 205. *See also*, Dale v. Chisholm, 889 N.Y.S.2d 58, 59-60 (N.Y. App. Div. 2009).

[117] 706 N.E.2d at 1195 (N.Y. 1998)

[118] *Id.* at 1198. Friends of Thayer Lake LLC v. Brown, 53 N.E.3d 730 (2016) reached a similar result.

[119] https://www.swc.nd.gov/pdfs/navigating_sovereign_lands_waters.pdf.

its discussion of "*Boating on Non-Navigable Waters,*" the Guide states that while the adjacent landowner owns the bed and banks of the River, members of the public can legally access the waterbody so long as they do so from a public right-of-way or with the landowner's permission. Moreover, according to the Guide, "You are NOT trespassing if you do not exit the watercraft while on the waterbody."[120] Thus, North Dakota appears to follow the same approach taken by states like Wyoming where floating on water is not a trespass since you are technically floating on state property. It is unclear whether this policy includes the right of incidental touching of the bed, as in Wyoming, but that would be a sensible policy because it reflects the uncertainties regarding the obstacles that a party might encounter when floating on a natural stream.[121]

3. Oregon

In Oregon, the public enjoys the right to use waterways, regardless of who owns the bed of the waterway.[122] For waterways that meet the federal navigability for title test, the bed of the waterway is owned by the state and held in trust for the public uses of navigation, commerce, and fishery, under the classic application of the public trust doctrine.[123] This includes the right to stand on the bed of the waterway. For such waters, the state, and any municipality within the state, cannot interfere with the public's ability to exercise their right of access unless their interference is objectively reasonable in effectuating the purpose of the trust.[124]

In addition to the access rights on navigable for title waterways, the public may use other waterways so long as the water is "navigable in a qualified or limited sense."[125] "Navigable in a qualified or limited sense" was initially applied to waterways that were used to float logs but has since been expanded to recognize a public right to use the water so long as it is

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[120] *Id*., (emphasis in original). This conclusion arguably follows from a North Dakota statute that provides that "[a]ll waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation … and the right to the use of these waters…." NDCC, 61-01-01 (2021).

[121] Although the issue arose in a context quite different from the public's right of access, the North Dakota Supreme Court has held that "[t]he State does not lose its right to exercise authority over a lake merely because its lake bed is subject to private ownership." *North Dakota State Water Comm'n,* 332 N.W.2d 254, 258 (1983). Thus, the Court appears to recognize its authority to protect public access rights in non-navigable waterways.

[122] Kramer v. City of Oswego, 446 P.3d 1,8, 365 Ore. 422, 430 (2019).

[123] *Id*. at 8, *Id*. at 430.

[124] *Id*. at 25, *Id*. at 461. (Whether an interference with the public's ability to access public waters is reasonable is a question of fact.)

[125] *Id*. at 8, *Id*. at 430.

navigable for recreational purposes.[126]

Oregon limits the public's right to touch the bed of waterways that are "navigable in a qualified or limited sense." The public does not have the right to wade in such waterways but Oregon allows contact with the bed and banks that is incidental to exercising the right to use the waterway for recreational purposes.[127]

4. Utah

In *Conatser v. Johnson,*[128] Jodi Conatser and several other plaintiffs were arrested for criminal trespass for floating through Johnson's private property on the Weber River and fishing from the River's bed. While the criminal trespass action was pending the plaintiffs filed a civil lawsuit seeking a declaration that the public enjoyed an easement to use the Weber River for recreational purposes, including the right to touch the privately owned beds below the River. The district court ruled for Johnson and the plaintiffs appealed to the Utah Supreme Court. The Court held that the public's easement in state waters is not limited to activities that can be performed on the water; it includes all recreational activities that use the water.[129] The Court further held that the public easement includes the right to touch the privately owned beds below those waters, where it is incidental to exercising recreational rights such as fishing.

The Utah State legislature responded to the *Conatser* decision by adopting a statute that limits public access rights on non-navigable waterways.[130] The Public Waters Access Act limits public access rights in Utah's waterways to waters that are navigable, on public property, or authorized by the landowner.[131] The law also allows public recreational access if the private property has been used by the public for recreational access "for a period of at least 10 consecutive years after September 22, 1982; and the public use has been: (i) continuous during the season conducive to the recreational access; (ii) open and notorious; (iii) adverse; and (iv) without interruption."[132] The law also allows the public to acquire public recreational rights by adverse possession, but this path is unlikely to yield much relief for recreational water users because the rules for proving

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[126] *Id*. at 9-10, *Id*. at 433.

[127] Weise v. Smith, 1869 Ore.LEXIS 28, 9, 3 Ore. 445, 450. In Kramer v. City of Oswego, 446 P.3d 1, 11, 365 Ore. 422, 436 (2019), the Court made clear that contact with a private streambed that is incidental and temporary, is permissible.

[128] 194 P.3d 897 (Utah 2008).

[129] *Id.* at 901.

[130] Public Waters Access Act, §§ 73-29-101 *et. seq*.

[131] *Id.* at § 73-29-201.

[132] *Id.* at § 73-29-203.

adverse possession are onerous, and the defenses against such possession robust.[133]

In a previously discussed subsequent case, *Utah Stream Access Coalition v. Orange Street Development,*[134] the plaintiffs were able to secure access to the Weber River (the River also involved in *Conatser*) but the Court's decision was based on its finding that the Weber River was navigable. The case is interesting because the Court found that the Weber River is navigable under a state navigability test, that essentially tracks the federal navigability test for determining title to the bed. But the Court refused to make a title determination because the Utah Stream Access Coalition had stated that it was only seeking recreational use rights for its members and not a title determination. As Judge Durham pointed out in his concurring opinion, a quiet title decision would not implicate a separate remedy but was rather "an inescapable legal corollary to a court determination that a waterway was navigable at the time of statehood under the federal navigability-for-title test."

The Utah Supreme Court appeared to take a narrower view of public access rights in *Utah Stream Access Coalition v. VR Acquisitions, LLC*.[135] In that case, the Court rejected several legal arguments seeking to establish public access on the Provo River, irrespective of whether it is deemed navigable.[136] The Court acknowledged that it had recognized a public easement in *Conatser,* under modern public trust principles. But the legislature narrowed the holding in *Conatser* when it adopted the Public Waters Access Act (PWAA).[137]

The PWAA recognizes "a public right to float on public water that has sufficient width, depth, and flow to allow free passage …"[138] The law specifically recognizes the right of incidental touching of the bed and portaging around dangerous obstructions.[139] This right, however, must be read in conjunction with the very next section of the law, which recognizes public recreational access only if—

> (a) the private property has been used by the public for recreational access … for a period of at least 10 consecutive years that begins

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[133] *Id.* at § 73-29-203.

[134] 416 P.3d 553 (Utah 2017).

[135] 531 P.3d 195 (Utah 2023).

[136] *Id.* Whether the Provo River is a navigable river remains in doubt, but the decision plainly takes a less expansive view of public rights than the Utah Supreme Court adopted in *Conatser.*

[137] Utah Stat. §§ 73-29-101 *et seq*.

[138] *Id.* at § 73-29-202(1).

[139] *Id.* at § 73-29-202(2).

> after September 22, 1982; and
>
> (b) the public use has been: (i) continuous during the season conducive to the recreational access; (ii) open and notorious; (iii) adverse; and (iv) without interruption.[140]

This section also provides that "the extent and nature of the public recreational access … [is] determined by the nature of the historical recreational access during the 10 consecutive years required [by the law]."[141] This could be construed to authorize the use of the bed of a non-navigable stream if fishers historically waded during the ten-year public use period.

Finally, Utah authorizes the Division of Wildlife Resources to file a quiet title action "to obtain a judicial declaration of the existence of a right to public recreational access." The Division cannot, however, be compelled to file any such action. However, the losing party can be ordered to pay attorney's fees and costs if their position lacks "a reasonable basis in law or fact."[142]

5. Wyoming

The seminal case in Wyoming regarding public access to waterways is *Day v. Armstrong*.[143] The case involved a section of the North Platte River. The stipulated facts indicated that during intermittent periods the River can float canoes, rowboats, outboard motors, and other floating craft. Also "from early days until 1940, the River was used commercially for floating logs, ties and timber…." The Court reviews at some length the question of whether the section of the North Platte River at issue is navigable, and the stipulated facts arguably supported a navigability finding under *The Daniel Ball* test. But the Court never discusses *The Daniel Ball* or reviews the condition of the River at statehood. That seems critical here because Wyoming became a state in 1890, and the water of the North Platte River has been used extensively for irrigation, much of that use occurring post-statehood. Thus, river flows were likely substantially higher than they were when the Court decided *Day*. Nonetheless, the Court ultimately concluded that the North Platte River section is not navigable, and so the case proceeded on the question of public rights to non-navigable waterways.

On this issue, the Court had to first confront a state law limiting public access to those sections of rivers where the state engineer determines that the stream had an average flow for the month of July in excess of 1,000

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[140] *Id.* at § 73-29-203(1).
[141] *Id.* at § 73-29-203(4).
[142] *Id.* at § 73-29-204.
[143] 362 P.2d 137 (Wyo. 1961)

cubic feet per second for the ten years preceding such floating. In finding this law unconstitutional, the Court focuses on the fact that Wyoming's water is the property of the state.[144] This allows the Court to conclude that floating on state water above private land cannot be a trespass:

> When waters are able to float craft, they may be so used. When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a right to disembark and pull, push, or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement. … On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful.[145]

The decision in *Day v. Armstrong* offers a unique approach to public access. It allows the public to float on the water and even to engage in incidental contact with the bed, because the Wyoming Constitution makes the water the property of the state. But the *Day* decision draws a line at walking on the bed or using the bed for purposes unrelated to floating on the water.

Washington

The Washington Constitution asserts state "…ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."[146] This is a classic articulation of the public trust doctrine as applied to the bed of navigable and tidal waterways. Washington defines "navigable" by statute to mean "that a body of water is capable or susceptible of having been or being used for the transport of useful commerce." [147] Furthermore, "all bodies of water meandered by government surveyors as navigable unless otherwise declared by a court."[148] This suggests a broader definition than required by federal law because the statute does not limit the commercial use test to the time of statehood nor to craft that could have been used at statehood. Moreover, it establishes a

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[144] Wyo. Const. Art. 8, §1 (1890).

[145] 362 P. 2d at 145-146.

[146] Wash. Const. Art. XVII, § 1.

[147] WAC § 332-30-106(42).

[148] *Id.*. As previously described, a meandered waterbody is one that was surveyed by the government. They are deemed navigable and public but that determination is subject to challenge in the courts. *See* the discussion of meandered waterbodies at footnote 81.

presumption that meandered water bodies, i.e., those that were surveyed by the General Land Office, are navigable, unless a court finds otherwise.

In *Orion Corp. v. State*, the Washington Supreme Court made clear that the public trust doctrine protects the public's rights to fishing, boating, swimming, water skiing, and other related recreational purposes with respect to such navigable waters.[149] In that case, the state denied Orion's permit to fill tidelands to build a Venetian-style development and Orion claimed that its property rights had been taken.[150] The Court found that the tidelands in question were navigable waters, and that Orion's proposed development would impair the public's right to navigation, fishing, and recreation in violation of the public trust doctrine.[151] The Court remanded the case, however, to determine whether Orion would use the land for purposes that would not impair the trust.[152] In this way, the Court made clear that the state may transfer title to the beds of navigable waters, so long as the state protects the public's right to use the navigable waters for trust purposes.[153]

A Washington law outlines the conditions for lease and sale of shorelands and beds of navigable waters.[154] Specifically, the law provides that "state-owned second class shorelands on lakes legally determined or considered by the department of natural resources to be navigable, may be sold to private owners of abutting upland property…"[155] Second class shorelands refer to the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city.[156] Likewise, the Washington State Department of Natural Resources may lease state-owned lands beneath navigable waters to private entities.[157] Importantly, however, if the water above the second-class shoreland is navigable, then the private landowner cannot obstruct the public's right to access the waterway, [158] and any right conveyed to a private party remains subject to the public's right to use the water for public trust purposes.[159]

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[149] Orion Corp. v. State, 747 P.2d 1062, 1073, 09 Wn.2d 621, 641 (1987).

[150] *Id*. at 1066, *Id*. at 627.

[151] *Id*. at 1072, 1073, *Id*. at 639, 641.

[152] *Id*. at 1073, *Id*. at 641.

[153] *Id*. at 1066, *Id*. at 627.

[154] WAC § 332-30-119 and Rev. Code Wash. § 79-130-010.

[155] WAC § 332-30-119.

[156] WAC § 332-30-106(66).

[157] Rev. Code Wash § 79-130-010.

[158] Dawson v. McMillan, 75 P. 807, 809, 34 Wash. 269, 275.

[159] Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549, 555, 190 Wn.2d 249, 261 (2018).

In *State v. Longshore*, the Washington Supreme Court addressed the scope of rights protected by the public trust doctrine. The Court held that while the public trust encompasses rights to navigation, fishing, boating, swimming, and other related recreational activities, it does not include the right to take clams from a privately owned land under navigable waters.[160] Specifically the Court found that "clamming activity is more closely related to ownership of underlying land than to utilization of public waters." [161] Whether the public has the right to wade on privately owned land beneath navigable waters, however, remains an open question.[162]

Regarding non-navigable waters, *Griffith v. Holman* held that the owner of the streambed under non-navigable waters has the exclusive right to fish the waters flowing over the land and thus is empowered to exclude the public.[163] However, because Washington appears to use a broader definition of navigability than is used under the federal test.[164] For example, in *Lant v. Wolverton*, the Court declared that any body of water that is capable of being used for commerce is navigable, regardless of whether it has in fact been used for commercial purposes. In *Lant*, a the Court blocked a private landowner from maintaining a fence that would limit public access to Pacific Lake.[165] The landowner claimed that because the Lake had only ever been used for pleasure craft and fishing, it was not navigable, but the Court rejected this argument, holding that navigability is a matter of capacity, not actual use.[166] Thus, Washington's broad interpretation of navigability appears to adopt something close to a recreational use test, allowing public access on waterways that might be deemed non-navigable in other states. Whether that access includes the right to wade, however, remains uncertain.

C. States that Deny or Severely Limit Public Access to Non-Navigable Waterways

1. *Arizona*

Arizona has what may be the most restrictive laws on public access anywhere in the country. Legal efforts to secure public access rights began

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[160] State v. Longshore, 982 P.2d 1191, 1195, 97 Wn.App. 144, 151 (1999).

[161] *Id*. at 1195, *Id*. at 150-51.

[162] *Public Trust Doctrine*, Wash. State Dep't of Ecology, https://ecology.wa.gov/water-shorelines/shoreline-coastal-management/shoreline-coastal-planning/shoreline-laws-rules-and-cases/public-trust-doctrine (last visited July 3, 2025).

[163] Griffith v. Holman, 63 P. 239, 243, 23 Wash. 347, 359 (1900).

[164] As previously noted, the State legislature defines navigability at WAC § 332-30-106(42).

[165] *Id*. at 1, *Id*. at 63.

[166] *Id*. at 2, *Id*. at 64.

in 1985 when the State filed a quiet title action claiming that it owned the bed of the Verde River. The State Legislature responded by adopting a law that disclaimed ownership of all riverbeds in the state except for the Colorado, Gila, Verde, and Salt Rivers. The Arizona Court of Appeals had previously found the Colorado River navigable.[167]

The Arizona Center for Law in the Public Interest challenged the law and the Arizona Court of Appeals held that the state law violated the Arizona Constitution and the public trust doctrine.[168] This decision led the legislature to create the Arizona Navigable Stream Adjudication Commission (ANSAC), which was charged with reviewing evidence from the State Land Department (SLD) and other parties as to the navigability of Arizona watercourses as of February 14, 1912 when Arizona became a State.[169] Subsequently, the legislature enacted a law that defined navigability far more narrowly than the U.S. Supreme Court definition from *The Daniel Ball*. The Arizona Court of Appeals also rejected that law on the ground that navigability for title must be determined under the federal test.[170]

After holding many hearings and reviewing a substantial body of evidence, the Commission has essentially held, with one minor exception, that Arizona has no rivers or streams that were navigable under *The Daniel Ball* test at the time of statehood.[171]

Notwithstanding Arizona's decision to deny that its rivers and stream are navigable for title purposes, the state might still recognize public access rights on non-navigable streams. While no case law or statutes appear to have addressed this issue, a report by American Whitewater indicates that the public has no rights on non-navigable streams, thus appearing to cement Arizona's position as one of the worst states for protecting the public's right to use the state's waterways.[172]

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[167] Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), *vacated on other grounds*, 419 P.2d 505 (Ariz. 1966). ("The Colorado River … is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment.")

[168] Arizona Ctr. For L. In Pub. Int. v. Hassel, 837 P.2d 158, 162 (Ct. App. 1991).

[169] Ariz. Rev. Stat. Ann. §§ 37-1121.

[170] Defenders of Wildlife v. Hull, 18 P.3d 722 (2001).

[171] Defenders of Wildlife v. Arizona Navigable Stream Adjudication Comm'n, 525 P.3d 641, 662 (Ariz. App. 1st Div. 2023). (The only exception was segment eight of the Gila River. The problems surrounding ANSAC are described in more detail in section VII of this article, which addresses *The Path Forward*.)

[172] American Whitewater, Arizona Navigability Report, *available at*, https://www.americanwhitewater.org/content/Wiki/access:az#fn__6. ("If… the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the owner's permission.")

2. *Colorado*

In some ways, Colorado may be even more hostile to public access rights than Arizona. This is especially surprising given Colorado's reputation for supporting outstanding outdoor recreational opportunities.[173] As previously noted, the Colorado Supreme Court has denied the public the right to ask a court to declare that a waterbody in Colorado is navigable for title.[174] Furthermore, while the Attorneys General in other states have fought to protect public access rights in their waterways,[175] the Colorado Attorney General has actively opposed efforts to secure such rights. So, at the present time, no Court has found any waterway in Colorado to be navigable for title.[176]

To make matters worse, the Colorado Supreme Court has denied the public all rights to access Colorado's non-navigable waterways through private property. In *People v. Emmert*[177] David Emmert and others were arrested and charged with criminal trespass for floating down a section of the Colorado River through a private ranch. The parties had stipulated that this section of the Colorado River was not navigable[178] but Emmert claimed that Art. XVI, § 5 of the Colorado Constitution gave the public the right to use the State's waterways for recreational purposes. It provides that:.

> The water of every natural stream, not heretofore appropriated within the State of Colorado, is hereby ***declared to be the property of the public, and the same is dedicated to the use of the people*** ….[179]

Notably, this language is even stronger than the New Mexico Constitution provision that declares that State's unappropriated water to be the property

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[173] *See, e.g.,* Colorado Outdoor Recreation Industry Office, *available at,* https://oedit.colorado.gov/colorado-outdoor-recreation-industry-office.

[174] State v. Hill, 530 P.3d 632 (2023).

[175] Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n, 519 P.3d 46, 58 (2022). *See also*, Glass v. Goeckel, 703 N.W.2d 58, 74 (2005).

[176] Indeed, at last two decisions have suggested that Colorado has no navigable for title rivers, although these statements must be viewed as dictum, since the Supreme Court has made clear that the test for navigability for title must be applied on a segment-by-segment basis, and no such analysis was even attempted in these cases. *See* People v. Emmert, 597 P. 2d 1025, 1027 (Colo. 1979) and Hartman v. Tresise, 84. P. 685, 687 (Colo. 1905).

[177] 597 P. 2d 1025 (Colo. 1979).

[178] It is not clear why Emmert agreed to this stipulation. At a minimum, a strong argument could have been made that the extensive use of this section of the Colorado River for recreational purposes suggested that the River was at least "susceptible of being used in [its] ordinary condition as [a] highway[] for commerce" at the time of statehood, as required by *The Daniel Ball* test.

[179] Colo. Const., Art. XVI, § 5. (*Emphasis added*).

of the public, because it does not dedicate that water to the use of the people. Nonetheless, the *Emmert* Court upheld the criminal trespass, finding that "the public has no right to the use of [non-navigable] waters overlying private lands for recreational purposes without the consent of the owner."[180] The majority was persuaded that a contrary ruling might somehow interfere with the appropriated water rights that were protected by the constitution, but it is not clear how the Court reached that conclusion. Emmert never claimed the right to interfere with appropriative water rights. He merely claimed the right to float through private land if unappropriated water was available in the river or stream.

Justice Carrigan offered a powerful dissent from the majority decision:

> The majority opinion dramatically alters the law of Colorado as it has been perceived by the many boaters, rafters, and tubers and who for years have sought rest, recreation and relaxation on our beautiful streams and rivers. As our population grows, so grows the need for surcease from the cares and concerns of city dwelling. Those who in our state constitution dedicated our natural streams "to the use of the people of the state . . . ." were not elitists. They did not reserve the enjoyment of these great natural resources to the few. Nor did they exclude from such pleasures all but the few who owned land on stream banks. If the recreational use of streams was not among those uses for which streams were reserved to the public, it is impossible to conceive what uses were contemplated and reserved by the constitution.[181]

The *Emmert* decision and the Court's more recent decision in *State v. Hill*, places Colorado in the somewhat unique position of effectively denying public access rights on Colorado's navigable and non-navigable waterways. But pressure for broader stream access in Colorado is building, most likely through legislation.[182] And while it may take time, change seems inevitable given Colorado's reputation as a mecca for outdoor recreation, including

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[180] *Id.* at 1030.

[181] *Id.* at 1033. In a separate dissent Justice Groves objected to the majority's reading of [Art. XVI, § 5]:

> The narrow construction ignores the grammar and twists the sense of this provision. The provision establishes that the waters of the state are the property of the public and are dedicated to the use of the people of the state. The clause "subject to appropriation as hereinafter provided" functions as a caveat establishing that appropriation for a beneficial use is superior to other uses. The clause in itself does not limit other uses.

[182] Various individuals and organizations have joined together to form the Colorado Stream Access Coalition, with a goal of reforming Colorado's stream access rules. The author of this article is a founding member of that organization.

water-based recreation.

3. *Kansas*

In *Kansas ex rel. Meek v. Hays,*[183] the Kansas Supreme Court confronted language in a Kansas statute that was similar to that in the Colorado Constitution. It declared that "[a]l water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed."[184] After finding that the creek at issue in the case was not navigable for title, the Court reviewed the rules from other states addressing public access rights on non-navigable streams. It further noted several failed attempts in the Kansas legislature to grant public access rights on certain non-navigable waterbodies. In the end, however, the Court followed Colorado's lead and declared that "[t]he public has no right to the use of non-navigable water overlying private lands for recreational purposes without the consent of the landowner."[185]

On the other hand, Kansas recognizes at least three rivers as navigable for title. They are the Arkansas, the Kansas, and the Missouri Rivers.[186] While public access rights in Kansas are obviously limited, their recognition that at least three rivers are navigable for title and thus available for public recreational use places Kansas ahead of Colorado in protection public access rights.

4. South Dakota

In *Parks v. Cooper,*[187] the South Dakota Supreme Court appeared to take a broad view of public access rights to non-navigable waterways.[188] It aligned itself with the many western states that "recognize the public trust doctrine's applicability to water, independent of bed ownership."[189] All of the states cited by the Court recognize public recreational rights to varying degrees in non-navigable waterways. Furthermore, the Court made clear

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[183] 785 P.2d 1356 (1990).

[184] K.S.A. 82a–702.

[185] 785 P.2d at 1365.

[186] *See* State, ex rel. v. Akers, 92 Kan. 169, 140 P. 637 (1914) (Finding that the Arkansas and Kansas Rivers in Kansas are navigable for title, and that accordingly, the State could regulate the taking of sand from these Rivers.); Dana v. Hurst, 86 Kan. 947, 964, 122 P.. 1041 (1911)(Also finding the Arkansas River navigable.); Wood v. Fowler, 26 Kan. 682 (1882)(" To attempt to prove that the Mississippi or the Missouri is a navigable stream, would seem an insult to the intelligence of the court.")

[187] 676 N.W.2d 823 (S.D. 2004).

[188] The State describes these as non-meandered waterways.

[189] *Id.* at 838. ("[W]e align ourselves with the Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming decisions that have recognized the public trust doctrine's applicability to water, independent of bed ownership.")

that "the public trust doctrine imposed an obligation on the State to preserve water for public use,…and that the State…as a trustee, controls the water for the benefit of the public" Nonetheless, the Court ultimately concluded that it was "up to the Legislature to decide how these waters are to be beneficially used in the public interest," including whether they should be available to the public for recreational use.[190]

The Court reaffirmed this decision in *Duerre v. Hepler,*[191] holding that "the Legislature (not this Court, not [Game, Fish & Parks] and not the public) must 'decide how these waters are to be beneficially used in the public interest.'"[192] It bears noting that in Both *Parks* and *Duerre*, the State Attorney General appeared on behalf of the public to support expansive public recreational rights in non-navigable waterways. This support stands in contrast to the hostility toward these rights shown by the Colorado Attorney General in the *State v. Hill* litigation.

In 2017, the South Dakota Legislature did finally adopt legislation, dubbed the *Open Waters Compromise,*[193] that addressed public access rights on non-meandered (non-navigable) waterways. It was a decidedly mixed bag.

On the one hand, the legislation declared that thirteen named lakes[194] were open to public recreation based upon their "open, obvious, and continuous recreational use by the public for a significant period", and the fact that the public had expended funds to construct one or more boat ramps on these lakes.[195] On the other hand, the statute strictly prohibits the public from walking, wading, standing, or operating a motor vehicle on the bed of a non-meandered lake, or trapping or hunting on the frozen surface above private land, without the landowner's permission.[196] The law also allows a landowner to petition the Game, Fish and Parks Commission to restrict public access to land overlying a non-meandered lake.[197] Those who enter or remain on private property in violation of the law are guilty of a criminal trespass, although the law exempts from criminal trespass contact between

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[190] *Id.* at 841.

[191] 892 N.W.2d 209 (2017).

[192] *Id.* at 222.

[193] *See* https://gfp.sd.gov/nonmeandered-summary/#:~:text=Any%20contact%20between%20recreational%20equipment,point%20of%20access%20is%20legal.

[194] S.D. Codified Laws § 41-23-8 (2017).

[195] *Id.* at § 41-23-7.

[196] *Id*. at § 41-23-15.

[197] *Id*. at § 41-23-9. A similar petition process devised by the New Mexico Game and Fish Commission led to the New Mexico Supreme Court's decision to open all of New Mexico's waters capable of recreational use to the public. *See infra*, at ??

recreational equipment and private property under a non-meandered lake.[198]

VII. The Fight For Public Rights on America's Streams

Several States have championed the cause of granting broad public access rights to their waterways, often without regard to whether those waterways are navigable or not. Others, like Colorado, have moved aggressively to deny those rights. Even in states like Utah that once broadly protected public rights, backsliding can occur. So, the fight to secure public rights to our nation's waterways is far from over.

Prodded by wealthy landowners who claim exclusive rights in stream segments that flow through their lands,[199] some states have resisted claims from members of the public to protect broad access to State waterways. Colorado's response to the Roger Hill lawsuit offers a stark example.

Hill filed his original lawsuit in federal court against the landowners who tried to stop him from fishing from the bed of the Arkansas River. Hill sought both a declaration of his right to stand on the Arkansas River bed, and a finding that the public enjoyed an easement to use the riverbed under the public trust doctrine based upon his argument that the Arkansas was navigable for title purposes.[200] The landowners failed to file a timely answer to Hill's complaint and, at that point, the court might have simply entered a default judgment against the landowners. But the State of Colorado moved to intervene in the case for the sole purpose of having it dismissed outright, initially on the theory that the State as the alleged owner of the bed of the Arkansas River was an indispensable party to the case and intended to assert immunity from being sued under the 11th amendment of the U.S. Constitution.[201]

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[198] *Id*. at § 41-23-13. This appears to protect boaters from criminal trespass, although they could still be liable for a civil trespass.

[199] *See, e.g.,* The North Park Angler's Fly-Fishing Club, *available at*, https://www.coloradoflyfishingclub.com/. (This club charges a $2,000 initiation fee plus annual dues of $4,750.) *See also, Does this Fisherman have the Right to be in a Billionaire's Backyard,* New York Times, Sept. 1, 2022, *https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html*.

[200] Specifically, Hill sought a declaratory judgment that he had standing to pursue his claim that the Arkansas River is navigable for title and that the public thus had a right to stand on the bed of the River. He further claimed that Hill was the beneficiary of a public easement under the public trust doctrine and could thus quiet title on behalf of the public in that easement. See Utah Stream Access Coalition v. Orange Street Development, 416 P.3d 553, 562 (concurring opinion of Justice Durham).

[201] The 11th amendment of the U.S. Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State…." Although it seems contrary to the text, this language has been construed to apply to lawsuits by a citizen against their own State. Hans v. Louisiana, 134 U.S. 1 (1890). That was the reason

Hills responded by voluntarily withdrawing his federal complaint and refiling the same case in State court where the State had no immunity claim. Then, in an extraordinarily cynical move, the landowner appeared for the first time and had the case removed back to federal court. Removal occurs automatically; it does not require a motion.[202] So, Hill found himself back in federal court where he knew that he could face a State immunity claim at any time.

The case proceeded with arguments by both the landowner and the State that Hill lacked standing to sue. They made this claim even though a landowner had threatened Hill with arrest and assaulted him with rocks the size of baseballs. The federal district court agreed with the State, but the 10th Circuit Court of Appeals reversed that decision. Rather than risk an entire new set of federal court proceedings over the State's claim of 11th amendment immunity, Hill agreed to return to the State courts for further disposition.[203]

Once again the landowner and the State sought to have the case dismissed on the grounds that Hill lacked standing. The State district court agreed but the Colorado Court of Appeals reversed:

> If, as Hill alleges, the relevant segment of the river was navigable at statehood, then the Warsewa defendants do not own the riverbed and would have no right to exclude him from it by threats of physical violence or prosecution for trespass. In support of his claim, Hill proffers numerous factual allegations that the river was used for commerce at or near the time of statehood, including floating beaver pelts, logs, and railroad ties down the river. We certainly cannot, at this early stage, know whether Hill will be able to establish that the river segment was navigable at statehood. But we cannot say it is not plausible.
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> Moreover, as noted, the question of whether, and to what extent, the public trust doctrine should apply to the bed of a

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that the State sought to bar Hill's lawsuit.

Hill was not persuaded that the State was an indispensable party. If the Arkansas River was navigable for title purposes then the State owned the bed but held that title in trust for the use of the public. Moreover, Hill had reason to hope, and perhaps even expect, that the State would welcome the chance to establish ownership of the bed and the public rights associated with it Had the State chosen to side with Hill, it could have simply waived any claim to immunity. Instead, the State chose to fight Hill and deny him his day in court. It is hard to imagine a more hostile response to a fisherman's claim that he had a right to use the bed under the public trust doctrine.

[202] 28 U.S.C. § 1446.

[203] Hill v. Warsewa, 947 F.3d 1305 (10th Cir. 2020).

> navigable river has never been resolved — or, as far as we can tell, even addressed — in Colorado. … Because Hill states a plausible claim, the district court erred by granting the motion to dismiss the declaratory judgment claim….[204]

While the Court of Appeals agreed that Hill had standing to pursue his declaratory judgment claim, it rejected Hill's assertion of a legally protected interest in the easement created under the public trust doctrine, sufficient to support Hill's quiet title claim in that easement.

The State then petitioned the Colorado Supreme Court to review the Court of Appeals decision granting Hill standing to seek a declaratory judgment, and Hill responded with his own petition for review of the quiet tile portion of the Appeals Court decision. The Colorado Supreme Court granted the State' s petition but denied Hill's petition. The Court then reversed the Court of Appeals and denied Hill standing.

The essential holding of the Court was that because Hill lacked standing to pursue a quiet title claim based on a public easement theory, he also could not pursue a declaratory judgment action. There are two obvious problems with this holding. First, the Court had denied Hill's petition to review the adverse decision from the Appeals Court regarding his quiet title claim. As a result, Hill was denied the chance even to brief that issue. Had the Court granted him that opportunity, he would likely have pressed upon the Court the compelling argument offered by Utah Supreme Court Justice Durham in support of the Utah Stream Access Coalition's standing to bring a quiet title action.[205]

More importantly, the Court ignored State and federal law on the availability of declaratory judgment. The Colorado Supreme Court previously held that the Declaratory Judgment Act allows plaintiffs to seek a declaration of rights without "risk[ing] the imposition of fines or imprisonment or the loss of property or profession in order to secure the adjudication of uncertain legal rights."[206] Federal law is even more emphatic. In *MedImmune, Inc. v. Genentech, Inc*., Justice Scalia noted that "putting the challenger to the choice between abandoning his rights or risking prosecution – 'is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'"[207] But that, of course, was exactly the dilemma facing Hill. If he returned to the River he faced the

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[204] 20CA1780 Hill v Warsewa, 01-27-2022 (Co. Court of App.).

[205] *See supra* n. 60, at 565.

[206] *See* Community Tele-Communications, Inc. v. Heather Corp., 677 P.2d 330, 334 (Colo. 1984).

[207] 549 U.S. 118, 129 (2007).

prospect of arrest or a further assault.

While Hill's effort to secure public access to navigable waterways through the Courts was unsuccessful his fight continues. Supporters have formed a new organization – the Colorado Stream Access Coalition[208] – that seeks to secure public access rights through the legislative and executive branches. But Hill and other advocates for public access to America's waterways must recognize that powerful interests are aligned against it. Public access advocates have had great success gaining access rights in some States. But defeating the powerful interests that oppose these rights in other States will require patience, and a smart and effective strategy.

One way in which Colorado is in line with virtually every other state, and indeed with most countries around the world, is in its Constitutional declaration that that—

> the water of every natural stream in the State of Colorado is hereby declared to be the property of the public and dedicated to the use of the people.

This universal principle of public ownership of the water should be enough on its own to protect public access rights to our nation's waterways. Sadly, in their zeal to protect the private monopoly rights of landowners rather than the public interest in securing access rights in waterways for everyone, some Courts, like those in Colorado, have chosen to ignore the plain meaning of their Constitutional language. One hopes that in time, wise leaders will recognize the important human values associated with the water resources that we all share, and that it will inspire those leaders to use that knowledge to protect public access to America's waterways for the benefit of the entire community.

VIII. The Path Forward

This article builds on the constitutional principle that American states own the beds of navigable for title waterways. As the Supreme Court has found, the states own those beds in trust for the people "*that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties*." Because the states own the bed of navigable waterways, public rights generally include the right to stand on the bed to fish, bathe, and swim.

Many states also grant public rights on non-navigable for title

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[208] *See Colorado Stream Access Coalition, available at,* https://coloradostreamaccess.org/.

waterways. Often those rights are more limited, denying, for example, the right to stand on the bed of the waterway. Other states extend the same public access rights enjoyed on navigable waterways to non-navigable waterways. Still other states deny virtually all public rights on non-navigable waterways.

But this summary does not reflect the complexity of the problem. Most importantly, while the U.S. Supreme Court has held that Courts must assess navigable for title waterways against the test announced in *The Daniel Ball*, as modified by the Court,[209] state analyses vary considerably in their application of that test to specific facts. Indeed, many Courts fail to even mention *The Daniel Ball* test when assessing navigability for title.

Moreover, the only way to know for certain that a waterway is navigable for title is to adjudicate that claim in a judicial or administrative proceeding. This will be an expensive, tedious, and time-consuming process, especially because the determination must be made for each segment of every waterway in the state that might arguably be deemed navigable. So, for example, the Supreme Court found that while the Missouri River might be navigable throughout much of its length, it is not navigable through the Great Falls section in Montana.[210] Likewise, much of the Colorado River as it flows through Utah might be navigable but not, according to the Court, the fast-moving section that runs through Cataract Canyon in Canyonlands National Park.[211]

Navigability determinations could also prove highly political, leading to different applications of the navigability for title test among the several states. The experience in Arizona is illustrative. In 1992, Arizona established the Arizona Navigable Stream Adjudication Commission (ANSAC), with a mandate to hold hearings and make legal determinations about the navigability of Arizona's waterways as of 1912, when Arizona achieved statehood.[212] But in *Defenders of Wildlife v. Hull*,[213] an Arizona Court of Appeals found that the law establishing ANSAC—

> contradicts the *Daniel Ball* test by defining the bed of a watercourse from the low-water mark, establishing "clear and

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[209] In addition to meeting *The Daniel Ball* showing that the relevant waterways "are used or are susceptible of being used in their ordinary condition as highways for commerce" a party claiming navigability for title must show that it met that test at the time of statehood using the types of craft available at statehood. *See* PPL Montana, supra, n.?? 565 U.S. at 601.

[210] PPL Montana, *supra* at n.??, 565 U.S. at ??

[211] United States v. State of Utah, 283 U.S. 64 (1931)

[212] A.R.S. § 37-1121 *et seq*.

[213] 18 P.3d 722 (Ct. App. 2001).

> convincing" as the burden of proof for determining navigability, and enacting evidentiary limitations and almost irrefutable presumptions in favor of non-navigability.

Accordingly, the court held that the Arizona law was unconstitutional because it was preempted by federal law, violated the public trust doctrine, and violated the Arizona Constitution's gift clause.[214] The court had especially harsh words for the statute's presumption against navigability, noting that the U.S. Supreme Court has repeatedly held that "title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of state's title."[215]

Notwithstanding the holding in *Hull*, a later Arizona Court of Appeals decision rejected a Defenders of Wildlife challenge to ANSAC's findings of non-navigability on 16 of 17 segments of the Verde, Salt, and Gila Rivers. Only one segment of the Gila was deemed navigable.[216] While it is not possible to judge how well ANSAC applied *The Daniel Ball* standard in these cases without reviewing the evidence they considered for each river segment, it is clear that the hearings that were needed for the Commission to make these judgments, and the litigation that followed, took considerable time and imposed significant costs on all who participated. Indeed, because of the cost and time involved, many and perhaps most segments of our nation's waterways lack any navigability determination, even for some of the country's most significant waterways. This breeds uncertainty. It also means that, in many states, the public lacks the information they need to understand their right to access these waterways.

There is a simple solution to this problem that avoids the bureaucratic nightmare associated with the segment-by-segment assessment of navigability, and it is a solution that at least seven American states appear to have adopted. States can treat public access rights to non-navigable waterways the same as they treat public access to navigable waterways. Under this approach, states recognize the public's right to use both the bed and surface of waterways for recreational purposes, whether or not those waterways are navigable for title. In this way, no determination of navigability need be made, at least for purposes of public access rights. Issues surrounding a state's property rights in the bed might still arise, but

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[214] *Id.* at 739.

[215] United States v. Alaska, 521 U.S. 1, 34 (1997); *see also*, Montana v. United States, 450 U.S. 544, 551-552 (1981); Utah Div. of State Lands v. United States, 482 U.S. 193, 197-198 (1987).

[216] *See* Defenders of Wildlife v. Arizona Navigable Stream Adjudication Commission 254 Ariz. 54, 525 P.3d 64 (Ct. App. 2023)

most likely in narrow circumstances involving a small section of a waterway.

This approach has the advantage of appealing broadly to all recreational users. States that only allow the use of the surface – that is, the right to float through private property – effectively limit access to the small minority of people with access to a boat. But many others would benefit greatly from a rule that recognized recreational rights to wade on a riverbed for fishing and swimming. Colorado's Justice Carrigan in his dissent in the *Emmert* case, understood this point when he noted that "[t]hose who in our state constitution dedicated our natural streams 'to the use of the people of the state . . . .' were not elitists. They did not reserve the enjoyment of these great natural resources to the few." States would be wise to heed Carrigan's words as they consider their approach to public access to waterways.

IX. The Takings Issue

While the proposed solution avoids the difficult problem of having to adjudicate the hundreds of stream segments in every state that might conceivably be considered "navigable for title," it raises another issue—does the public use of a private stream bed constitute a taking of private property for a public use, in violation of the fifth amendment of the U.S. Constitution.[217] No one disputes that riparian landowners on non-navigable streams generally hold title to the bed of that stream. These landowners may argue that allowing a private party to stand on the bed of that stream is a physical occupation of that stream that gives rise to a *per se* "taking" of their property.[218]

But the *per se* takings claim does not fit the circumstances surrounding the right to wade because the public retains residual rights even on non-navigable waterways. These rights are reflected in longstanding legal principles, and are sometimes described as a public easement or public servitude.[219] The scope of these public rights on the non-navigable waterways of a state are subject to regulation by the state, but the public nature of waters and waterways, which is commonly set forth in state constitutions, affords the states broad powers to authorize public

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[217] U.S. Constitution, Amend. V ("…nor shall private property be taken for public use, without just compensation.")

[218] The classic case for a physical taking is *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). In that case the Court held that the installation of a cable TV box and associated materials on the side of a private building was a permanent physical invasion and thus a taking for which compensation was owed.

[219] *See, e.g.,* Adobe Whitewater, *supra* n. ??, and text accompanying note 96.

recreational activities, including the right to use a non-navigable stream bed for such purposes. Indeed, the author could find no published court opinion supporting a claim that public stream access on non-navigable streams constitutes a taking.[220]

Perhaps the clearest acknowledgment of a public easement in non-navigable waterways comes from the New Mexico Supreme Court's decision in *Adobe Whitewater*. There the Court held that the New Mexico Constitution supported a public easement for recreational uses, and that easement includes the right to wade.[221] The Court based its decision on the New Mexico Constitution, which like many other states merely declares that the water is the property of the public. The Court's broad reading of the New Mexico Constitution is remarkable, however, because it stands in marked contrast to the Colorado Supreme Court's narrow reading of the much more generous text of the Colorado Constitution, which dedicates the water to the use of the people.[222]

A good example that illustrates why a takings claim in the context of public stream access ought not survive judicial scrutiny comes from the Colorado Supreme Court's decision denying public access rights in *People v. Emmer*t.[223] As previously described, Colorado's Constitution provides that "[t]he water of every natural stream … 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…."[224] It does not stretch the imagination to conclude that any waterway dedicated to the use of the people should be available to the public for all reasonable recreational uses, including a right to wade on the bed of that waterway. In upholding the criminal trespass against those who floated through the private property, the Court appeared to recognize this fact when it acknowledged that the state legislature could authorize the very access that they denied in *Emmert*.[225] In other words, the Court appeared to acknowledge that a legislative decision allowing public access on non-navigable waterways

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[220] All the reported cases appear to hold the contrary position. *See e.g.,* McQueen v. South Carolina Coastal Council, 580 S.E.2d 116 (S.C. 2003); Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 984 (9th Cir. 2002); Galt v. State by and through Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (Mont. 1987).

[221] 519 P.3d at 55-56. The Court repeatedly describes public access rights to non-navigable streams as a public easement.

[222] *Compare* N.M. Const. art. XVI, § 2 *with* Colorado Const., art XVI, § 5.

[223] 597 P. 2d 1025 (Colo. 1979).

[224] Colorado Const., art XVI, § 5.

[225] 597 P. 2d at 1031. ("If the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end.")

would not raise any constitutional concerns.

A public easement theory might also be used to support public stream access. The clearest argument for a public easement in non-navigable waterways comes from the New Mexico Supreme Court's decision in *Adobe Whitewater*. There the Court held that the New Mexico Constitution supported a public easement for recreational uses and further held that this easement includes the right to wade.[226] The Court based its decision on the New Mexico Constitution, which like many other states merely declares that the water is the property of the public. The Court's broad reading of the New Mexico Constitution is important, however, because it stands in marked contrast to the Colorado Supreme Court's narrow reading of the much more generous text of the Colorado Constitution, which dedicates the water to the use of the people.[227]

The public easement or public rights theory for access to non-navigable waterways finds further support from the previously described Justinian Code. Recall that the Code provides that "all rivers … are public, so that all persons have a right to fish therein."[228] A court might reasonably find that the Code represents a longstanding background principle of property law that would allow it to reject a takings claim based on the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Commission*.[229] *Lucas* is not directly on point since it involved a regulatory standard that allegedly denied the property owner the entire value of the property. But the case is nonetheless relevant here because it lays out an escape hatch for takings claims where the state was merely enforcing background principles of property or nuisance law.[230]

To summarize, most states recognize some form of public access rights on non-navigable waterways and they have claimed broad discretion to determine the scope of those rights. Some states have exercised this discretion by granting the right to float and the right to wade; others allow floating but deny the right to wade. A few states that have refused to recognize public access to non-navigable waterways that run through private land but those states likely have the power to authorize such access if they are so inclined. So, given the historic recognition of public rights to waterways, and the historic acceptance of broad state regulatory powers over water resources generally, and over public access to waterways in

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[226] 519 P.3d at 55-56. The Court repeatedly describes public access rights to non-navigable streams as a public easement.

[227] *Compare* N.M. Const. art. XVI, § 2 *with* Colorado Const., art XVI, § 5.

[228] *See supra*, n. 11.

[229] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992).

[230] *Id.* at 1028-29.

particular, it seems unlikely that a court would find that providing public stream access, whether it includes the right to float only, or the right to both float and wade, causes a taking of private property interests.

To be sure, a court could decide to review a property owner's takings claim as involving a regulatory matter to be resolved under the takings test set forth by the Supreme Court in *Penn Central Transportation Co. v. New York City*.[231] *Penn Central* involved two alternative proposals by the Transportation Company, which owned Grand Central Terminal, to build either a 53 or 55 story office building over it. New York City had designated the Terminal as a historic landmark under its Landmarks Preservation Law. The Court described the Terminal is "a magnificent example of the French beaux-arts style." Following a review of the two proposals, the City rejected both, leading Penn Central to claim a "taking" of their "right" to develop the airspace above the Terminal. The Court rejected the claim and offered the classic test for determining whether a reduction in a property's value that resulted from a regulatory action constituted a taking:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. Courts will more readily find a "taking" when the interference with property can be characterized as a physical invasion by the government, in contrast to a public program that adjusts the benefits and burdens of economic life to promote the common good.

Applying this test to the facts, the Court found that the City's decision to protect the architectural integrity of the Grand Central Terminal did not result in a taking. While the City's decision might impact Penn Central economically, the Company retained the use of the Terminal and even received development rights that could be transferred to another property. Moreover, Penn Central's development expectations should have been tempered by the fact that the Terminal was a well-known, highly regarded historic building. Finally, the Court noted that it often upheld zoning regulations that destroy or adversely impact real property interests where necessary to promote "the health, safety, morals, or general welfare."[232]

A state's recognition of public rights on non-navigable waterways

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[231] 438 U.S. 104 (1978).

[232] *Id.* at 125, *citing Nectow v. Cambridge,* 277 U. S. 183, 277 U. S. 188 (1928), and *Euclid v. Ambler Realty Co.,* 272 U. S. 365 (1926).

should easily satisfy the *Penn Central* test. The economic impact on a riparian landowner is modest, and a riparian landowner's expectations are tempered by the fact that public rights in waterways have longstanding historic roots. The character of the government's actions likewise reflects those roots because state decisions allowing public access to recreational waterways, whether navigable or not, have received broad acceptance by state courts and legislatures. Finally, recognizing public rights in recreational waterways plainly serves the common good. So, under the *Penn Central* test, a state's decision to allow public access to recreational waterways does not run afoul of the takings clause.

Of course, riparian property owners might alternatively argue that the public's recreational use of a private streambed is a physical invasion of their property. This, however, would require the court to ignore the historic limits to private ownership of a streambed and the residual public rights in waterways that courts have long recognized. Indeed, many states that deny the right to wade on non-navigable waterways expressly allow incidental contact with the private bed as necessary for the public to exercise their lawful recreational rights. Moreover, even if a court were to treat private streambed access as a physical invasion the outcome of a case would likely be the same because any takings claim would necessarily involve a temporary and non-exclusive invasion, which the Court has historically analyzed under the *Penn Central* test.[233]

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[233] The Court has traditionally distinguished between *permanent* physical invasions, which are *per se* takings, and temporary invasions, for which courts apply a modified *Penn Central* test. Obviously, the public recreational use of a private streambed would only be temporary and the Supreme Court has explained how courts should handle temporary takings in several cases. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 306 (2002), for example, the Court found that a thirty-two-month moratorium on development pending the completion of a comprehensive land-use plan was a temporary taking that should be assessed under the flexible framework of *Penn Central* rather than the *per se* standard of *Loretto*. *See also, Arkansas Game and Fish Commission v. United States*. 568 U.S. 23 (2012). More recently, in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), however, the Court found that a longstanding California law allowing labor organizations to enter private property for up to 120 days per calendar year was a *per se* taking. Moreover, contrary to its prior decisions in *Tahoe-Sierra* and *Arkansas Game and Fish Commission*, the Court held that "a physical appropriation is a taking whether it is permanent or temporary." *Id*. at 160. *See also*, Timothy M. Harris, *What's Your Damage?!,* 78 U. MIA. L. REV. 121, 135 (2023) (Professor Harris offers a compelling analysis of why Cedar Point is contrary to the Court's earlier pronouncements on temporary takings.) The *Cedar Point* decision can be distinguished on the grounds that labor organizations do not need access to private property to carry out their union activities. Moreover, the *Cedar Point* decision fails to grapple with its consequences for the many federal, state, and local inspection programs that allow for non-consensual and often warrantless access to private property, suggesting

Conclusion

Despite some important successes, the fight for access to America's waterways goes on in many states. For navigable waterways, the strong federal authority afforded by the public trust doctrine generally guarantees broad public access rights to use these waters for recreational purposes, although even here significant resistance remains in some states. Roger Hill can attest to that. Moreover, the Supreme Court's requirement that navigability for title be determined for each segment of a waterway imposes a cumbersome adjudication process for determining navigability. As a result, many significant waterway segments throughout the country lack the necessary finding, which causes much uncertainty and confusion about public access rights.

For non-navigable waterways, states exercise significant authority to shape their own rules with a wide range of results. Some states protect public rights in these waterways for all recreational uses. Others allow the public to float through private property but draw the line at using the bed beyond incidental touching that may be necessary when exercising the right to float. A few states deny public rights on non-navigable waterways altogether. But the rules in many states are still evolving and those states are under pressure from landowners to further restrict access, and from recreational users to improve and protect their access.

The simple solution that could clarify the rules in favor of public access is to treat non-navigable waterways the same as navigable waterways by opening those that are susceptible to recreational use, whether by floating, swimming, bathing, or wading, to the public. This would avoid the costly, cumbersome, and time-consuming process of endlessly adjudicating navigability. Moreover, it meets the current moment when concerns about government efficiency are paramount.

But still, landowners will resist and they will likely have substantial resources to support their resistance. They will also likely challenge decisions that offer broad public access on non-navigable waterways based on the claim that their property has been taken. But the public has strong arguments to support broad access rights, and it has the advantage of widespread public support for its position. The challenge will be marshalling that support to achieve its ambitious goals. I, for one, hope that their efforts succeed.

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that the Court will likely construe the decision narrowly in future litigation.