

American Whitewater

Colorado Navigability Report

Summary

It is unclear what test of navigability applies in Colorado, as no state statutes or regulations define or describe such a standard. Colorado courts also have not indicated which test applies, although the Colorado Supreme Court has summarily noted on two occasions that all streams in Colorado are non-navigable. The extent of the public's rights, if any, to float or otherwise recreate on non-navigable streams running through private property is unsettled. The Colorado Attorney General issued a formal legal opinion in 1983 stating that persons who float or boat on Colorado streams across private lands without the owner's permission do not commit trespass, so long as they do not touch the stream banks or beds. However, because the Attorney General's opinion is not binding on law enforcement officials, those officials may or may not apply the Attorney General's opinion, which could result in inconsistent enforcement across the state.

State Test of Navigability

Colorado statutes and regulations do not identify a test for determining the navigability of the state's streams. Colorado courts also have not identified or applied such a test. Instead, the courts have made conclusory statements about the non-navigability of streams, but without any detailed discussion of the particular characteristics of the streams at issue or any assessment of those characteristics against a set of criteria. For instance, the state Supreme Court has noted on two occasions (in *dicta*) that:

The natural streams of this state are nonnavigable within its limits, and practically all of them have their sources within its boundaries. The volume of these streams is made up of rains and snowfall on the surface, the springs which issue from the earth, and the water percolating under the surface which finds its way to the streams running through the watersheds in which it is found. It is likewise proper to take judicial notice of the fact that, upon account of the elevation of the state and other reasons, the precipitation is quite small, and that a large number of natural streams in the state are and always have been dry during a portion of each year.¹⁾

Several other cases refer to the Eagle, South Platte, and Arkansas Rivers as being non-navigable, but again, without identifying a navigability standard or engaging in any sort of analysis under such a test.²⁾ While these cases do not foreclose the possibility that a Colorado court might find a particular stream navigable under some sort of standard if called upon to make a specific navigability finding relative to a particular stream, the prevailing presumption is that all of the state's streams are non-navigable.

With respect to determining the ownership of streambeds of non-navigable streams, the Colorado Supreme Court has indicated that the general rule in Colorado is that such streambeds are privately-owned by the owners of the adjoining lands.³⁾ This rule is based upon the common law principle of "*Cujus est solum, ejus est usque ad coelum*" - that is, he who owns the surface of the ground has the exclusive right to everything that is above it⁴⁾ - and has been codified in the Colorado Revised Statutes.⁵⁾

Extent of Public Rights in Navigable and Non-Navigable Rivers

Under Colorado's legislative scheme and judicial precedents, the public's interest in recreational uses of streams is secondary to the public's interest in appropriating streams for irrigation and other beneficial uses, given the state's arid nature. Indeed, although 80 percent of the state's population lives on the eastern slope of the state, 75 percent of the surface water falls on the western slope of the state. Eastern municipal and agricultural water users divert more than half of that water to the eastern slope, through a complex maze of dams, reservoirs and tunnels. Article XVI, section 5 of the Colorado Constitution provides, "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." The Colorado Supreme Court has determined that this provision protects only a person's right to appropriate water for a beneficial use, (e.g., for municipal, industrial, or agricultural purposes), and not his or her right to float, fish, or otherwise recreate in non-navigable streams.⁶⁾

In *People v. Emmert*, the seminal case discussing the extent of the public's rights to float and recreate in non-navigable waters, the Colorado Supreme Court, relying on the "*cujus est solum*" principle, held that the public does not have a right to float on a non-navigable stream as it flows through, across, or within the boundaries of privately-owned property without first obtaining the owner's permission. The court also held that persons who encroached upon the space above the private property without the owner's consent, "whether it be for fishing or for other recreational purposes, such as floating," commit a

criminal trespass.⁷⁾ Although the court acknowledged that other states, including “water rich” states, permit the public recreational use of surface waters overlying privately-owned streambeds, it declined to follow suit, noting that it was unaware of any constitutional or statutory provisions that may have modified the longstanding “*cujus est solum*” common law principle.⁸⁾

Following the court's *Emmert* decision, the state legislature amended the Criminal Code by defining “premises,” as the term used in the trespass provisions, to include a reference to streambeds. Specifically, a person commits a trespass when he or she unlawfully enters or remains upon “the stream banks and beds of any nonnavigable fresh water streams flowing through [another person's] real property.”⁹⁾ In 1983, in response to a request from the Colorado Department of Natural Resources to clarify the effect of the *Emmert* decision and the Criminal Code's new definition of “premises,” the Colorado Attorney General issued a formal legal opinion stating that persons who float or boat on Colorado streams across private lands without the owner's permission do not commit trespass, so long as they do not touch the stream banks or beds.¹⁰⁾ The Attorney General based his determination in large part on the legislative history behind the new definition of “premises.” He noted that the sponsor of the new language had made clear that the new language “simply makes it a criminal trespass to loiter on the stream banks ... or on the stream beds. If [people] want to canoe or tube or stay on the water, [and] not bother the properties, why there would be no problem.”¹¹⁾

It is important to note that the Attorney General's opinion, which has not been tested or endorsed by a Colorado court, merely provides guidance to law enforcement and agency officials; it is not *binding* on law enforcement officials, district attorneys, or, more importantly, judges. That is, although the opinion may provide important guidance, it does not carry the same legal, determinative weight that a court ruling carries. Until a court addresses (or the legislature provides further clarification on) the issue of whether the public can float on streams (without touching the streambeds or banks) crossing private property without permission, law enforcement officials may or may not apply the Attorney General's opinion. In short, the inconsistent enforcement of the criminal trespass provisions among the various county and local officials across the state will likely persist until a court resolves the issue squarely.

Miscellaneous

Several private landowners reportedly have attempted to block the public from boating on streams running through their property by erecting physical barriers across the streams. In one instance, private landowners along the Lake Fork of the Gunnison River sued a river outfitter that conducted floating trips through their private property for civil [trespass - rather than criminal trespass, as was the case in *Emmert*. Before the Gunnison County District Court could adjudicate the issue, however, Cannibal Outdoors went out of business, and the case was closed.¹²⁾

Beginning in 1999, a group of private landowners, private boaters, and commercial outfitters participated in a River Surface Recreation Forum ("Forum"), which was sponsored by the Department of Natural Resources and sought ways to accommodate conflicts between landowners and floaters.

Signage programs distinguishing public and private lands along river corridors are in place as a result of the Forum's activities.

Colorado State Parks will respond to landowner complaints about private property trespass and attempts to minimize such problems with accurate maps and information regarding private lands, length of float trips, appropriate access points, and good directions. State Parks has also attempted to resolve trespass problems through a recreational lease pilot program in which the state has leased certain sections of riverbank where the public can legally stop, fish, picnic or walk along the river.

A directory of boatable waters, including is available at: <http://parks.state.co.us/Boating/BoatableWaters/>. The state's boating regulations are available at: http://parks.state.co.us/NR/rdonlyres/B61851B2-F5EA-4AEA-A419-2C11780F6594/0/O7_BoatRegs.pdf.

1) In *Re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913) (en banc). See also *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), overruled on other grounds, *Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1 in City and County of Denver*, 535 P.2d 200 (Colo. 1975).

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

3) *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) ("It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands"). Unofficial version at: <http://www.nationalrivers.org/states/co-law-emmert.htm>.

4) *Id.*

5) See C.R.S. § 41-1-107 (2006) (“The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft”).

6) *Emmert*, 597 P.2d at 1028; *Hartman v. Tresise*, 84 P. 685, 686 (Colo. 1905).

7) *Emmert*, 597 P.2d at 1027.

8) *Id.*

9) C.R.S. § 18-4-504.5; see also *id.* §§ 18-4-503, 18-4-504.

10) AG Alpha No. NR AD AGALA, AG File No. ONR8303042/KW (Aug. 31, 1983).
Unofficial version at: <http://www.nationalrivers.org/states/co-law-ago1983.htm>.

11) *Id.* (quoting Transcript, Senate Committee of the Whole Hearing on Second Reading of S.B. 360, Mar. 31, 1977, at 4).

12) *Gateview Ranch v. Cannibal Outdoors*, 2001-CV-53.