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Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West

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COMMENTS

Floating On Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West[1]

I. INTRODUCTION

Even before homesteaders or Mormon settlement took hold in the high valleys and plains of the Rockies, a "right to float" in the intermountain west was born and has taken on various meanings since.[2] From John Wesley Powell's groundbreaking expedition down the Green and Colorado Rivers to the establishment of modern day whitewater guiding services and fishing expeditions, the right to float has maintained a place in the West's outdoor culture and reputation.[3] Although more people than ever are being drawn to

1. The author would like to acknowledge the help of Wyoming Professor Reed Benson for his valuable suggestions and insight at various stages of the project.

2. FRANK WATERS, THE COLORADO 98 (Swallow Press/Ohio University Press ed. 1985) (1974). Highways and trade routes on the Colorado River can be traced back to seashell and parrot feather trade within the ancient Puebloen civilization, including the Paiutes, Mojaves, Yumas, and Cocopah tribes. *Id.*

3. JOHN WESLEY POWELL, SEEING THINGS WHOLE 61-89 (William deBuys ed., Island Press 2001) (chronicling John Wesley Powell's legendary expedition down the Colorado River in 1869). *See also* Stephen D. Osborne et al., *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENVTL. L. 399, 400 (2003) (describing floating down a stream as the "archetypal American experience of freedom").

our rivers for recreation, this commonly held public privilege is being threatened by an increase in ownership of riparian lands.[4] While the popularity of recreational floating has persisted and even grown in the new millennium, traditional legal notions of private property have challenged the modern day river runner's right to float.[5]

Owners of private property with interests to appurtenant rivers and streams have claimed a right to block access to floaters. Out of the concern that the growth of recreational water uses leads to increased traffic, trespass, litter, and vandalism of private land, landowners have reacted with barbed wire and "No Trespassing" signs.[6] In many instances landowners have taken drastic measures in order to keep recreationalists at bay. Aggravated ranchers, armed with shotguns, feud with boaters over barbed wire fences in Colorado's Cheeseman Canyon.[7] In Montana, Rock star Huey Lewis made the news as anglers lined up outside his property around his blockade on the Bitteroot River.[8] Such incidents are specifically tied to a misunderstanding of access law. More importantly, these incidents are provoked by a greater social conflict over property rights.[9]

In modern times, society has struggled perhaps more than ever over the definition of the public domain in the context of both land and water resources. The conflict as it applies to water resources has surfaced in two major areas of debate: instream water rights and public access rights. Both developed around the same time, but each uniquely addresses the greater public domain question.[10] Debate over instream water rights involves the public's right to quantities of water and has evolved out of the environmental

4. *See* John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 332 (2001) (discussing the growth of recreational floating on rivers like the Colorado and Arkansas as well as opposition from riparian landowners).

5. *Id.*

6. Osborne, *supra* note 3, at 400 (discussing the conflict between private landowners and recreational river users in the Northwest). *See also* Brian Morris, Comment, *When Rivers Run Dry Under a Big Sky: Balancing Agricultural and Recreational Claims to Scarce Water Resources in Montana and the American West*, 11 STAN. ENVTL. L.J. 259, 266 (1992) (describing the historical events leading up to Montana's law on recreational access).

7. Telephone interview with Shane Sigel, former U.S. Kayak team member (February 12, 2004). In the spring of 2000 Shane and other boaters were confronted by an armed landowner on the Cheeseman Canyon section of the South Platte River in Colorado. *Id.* After the boaters got through a man made obstruction that blocked the river, a County Sheriff was waiting for them at the take-out of the river run. *Id.*

8. *Anglers Protest Huey Lewis Stream Closure*, THE MIAMI HERALD, Mar. 4, 2004, *available at* http://www.miami.com/mld/miamiherald/entertainment/6453206.htm (last visited Apr. 25, 2005).

9. *See* Osborne, *supra* note 3, at 445 for a discussion of the underlying conflicts between private landowners and recreational river users.

10. *See* Morris, *supra* note 6, at 259-63 for a discussion of the relationship between instream flow and stream access laws in Montana.

concern for keeping more water in lakes and rivers.[11] In contrast, the public access debate centers on how the public may exercise its right to the use and enjoyment of water.[12]

This comment will address the public access issue in an attempt to address how society has reconciled private versus public rights to access waterways in the intermountain west.[13] In the intermountain west, the states of Colorado, Wyoming, New Mexico, Montana, Utah, and Idaho have all afforded some level of protection for the public to access their waterways.[14] However, the levels of protection afforded by these states vary greatly from jurisdiction to jurisdiction. This comment will reveal the legal underpinnings behind the different states' access rules and evaluate which are best grounded in contemporary law. Finally, this comment will evaluate the rules in place from a policy standpoint in order to suggest ways in which to improve the status quo.

An evaluation of both policy and law is especially relevant today, since debate over stream access law in the intermountain states continues to be a hot topic in need of resolution.[15] The debate is particularly active in Wyoming where a bill on recreational access was recently defeated by a slim margin in the beginning of 2005.[16] The proposed House Bill would have permitted recreationalists to drop an anchor or touch a river bottom while

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11. DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE 43 (Island Press 1997) (describing how changing societal demands for improved environmental quality and recreation opportunities spawned changes in law to keep more water in rivers and streams).

12. *See infra* notes 308-11 and accompanying text for discussion of the policy behind recreational access law.

13. Because of these unique differences between the two areas of debate, this comment will examine the issue of public access without extensive discussion of the appropriation question. Although many of the applicable laws require isolating the access and appropriation issues, it is nonetheless important to note that at a practical level the two issues are not so inseparable. Both issues interrelate in forming the greater societal policy governing how the public domain applies to water resources.

14. Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 498 (Spring 2002) (explaining a right of public access is recognized in Wyoming, New Mexico, Utah, Montana, and Idaho).

15. *See infra* notes 225-26 and accompanying text for discussion of how the ambiguities found in Colorado access law has prompted misunderstanding and a number of claims brought in state courts in order to clarify gray areas of law. *See also infra* notes 16-18 and accompanying text for a discussion of pending legislation in Wyoming.

16. *See* Equality State Policy Center, *The Wyoming Legislative Accountability Project Book (2005 Session)*, *available at* http://www.equalitystate.org/lapbook/05legislation/-hb088_05.html (last visited Mar. 20, 2005) ("Supporters of HB 88 noted that Wyoming's current trespass laws place a uniquely high burden on sportsmen and recreationalists, and characterized the restrictions on boaters as completely unreasonable. They pointed out that anglers sometimes need to anchor their boats to land fish, fish a reach of stream, or to perform basic safety functions."). House Bill 88 was defeated by a five to four vote in the Wyoming House Travel, Recreation, Wildlife, and Cultural Resources Committee in 2005. *Id.*

fishing and boating on state waterways.[17] Similar bills, expanding upon Wyoming's stream recreation laws, were also defeated in 2004.[18] Due to the latest narrow defeat in 2005 and prior attempts to revise access laws, the issue over recreational access rights in Wyoming will most likely be around for some time. This comment will attempt to provide guidance for lawmakers in Wyoming and other intermountain states, who will inevitably decide how we use our waterways when public and private interests clash.

II. BACKGROUND

A. Private versus Public Conflict

The modern conflict between recreational public rights and private riparian rights to surface waters is tied to older legal doctrines, established in early U.S. case law and English common law.[19] Many of our nation's rivers and streams have been recognized as public resources through navigability law, the authority of State constitutions, and the public trust doctrine. In this order, the background section of this comment will summarize these three sources of the public right to water resources and then trace the origins of the private land owner's right to exclusion. Once the principles of the private versus public conflict are established, the background section of this comment will conclude with an overview of the access laws in place in the Intermountain West.

Federal navigability law is one of the older legal concepts in the United States, the origins of which can be traced back to early Roman law.[20] The legal concept of navigability was later passed on to English common law, which held such waters to be under the dominion of the Crown.[21] In the 1800s the federal government granted states sovereignty over all navigable waters and associated beds and banks under the equal footing doctrine.[22] Title to navigable waterways was vested with the states under the condition that subsequent grants could not impair the public interest.[23] In effect, the

17. *Id.*

18. *See* Wyoming Conservation Voters, 2004 Legislative Voter Guide (House District 44 – Cheyenne), *available at* http://www.wyovoters.org/Publications/04VoterGuides/HD44%20-2004%20Primary%20Voter%20Guide.htm (last visited Feb. 1, 2005).

19. *See infra* notes 20-105 and accompanying text for a more detailed discussion of how U.S. case law and English common law have bolstered the legal rights associated with recreational pubic rights and private riparian rights.

20. Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 513, 605-10 (1975).

21. *Id.*

22. *See* Hill, *supra* note 4, at 340. The equal footing doctrine gives new states jurisdictional authority equal to the original thirteen colonies. *See* Pollard's Lessee v. Hagan, 44 U.S. 212 (1845) (establishing the equal footing doctrine).

23. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892). In *Illinois Central* the U.S. Supreme Court denied the Illinois legislature's grant of submerged lands in Lake

federally granted waterways created a public trust through state ownership.[24] Furthermore, privately held interests in navigable waters are subject to a federal navigational servitude, which requires no equitable compensation to private land owners.[25] The navigational servitude, created by the federal common law test, derives its authority through the commerce clause.[26] In order for rivers or streams to meet the common law test for navigability, they must be shown to be "[s]usceptible of being used, in their ordinary condition, as highways for commerce."[27] Many commentators also refer to the above test as the *Daniel Ball* or navigability for title test.[28]

For the purpose of determining the title to underlying beds and banks of a river, federal navigability has been a topic of much confusion for scholars and courts.[29] Depending upon the context, the meaning of "navigability" can create a variety of legal results.[30] For example, a determination that a waterway is navigable for title by the common law test has much broader legal implications than a determination of navigability under the U.S. Corps of Engineers' definition. Navigability under the common law test can establish title for a waterway's underlying beds and banks, in effect creating a near perfect public servitude.[31] By contrast, the U.S. Army Corps

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Michigan to a railroad company. *Id.* The legislative grant was said to contravene the public's interest in fishing and claiming the shoreline lake beds. *Id.* at 436.

24. *Id.*

25. *See* Potter, *supra* note 14, at 464 for an analysis of the federal navigational servitude and its implications on public access rights.

26. U.S. CONST. art. I, § 8, cl. 3. The commerce clause gives Congress the exclusive power to regulate commerce among the states. *Id.* In *Illinois Central*, "regulation of commerce" was found to include Congress' right to control their navigation. *Illinois Central,* 146 U.S. at 435-59.

27. Steamer Daniel Ball v. United States, 77 U.S. 557, 563 (1870) (holding the limited English common law definition of "navigability," which only covered waterways influenced by the ebbs and flows of tides, was inadequate in the United States and therefore needed to be expanded in modern times to also cover major inland water courses used for interstate and foreign commerce).

28. *See, e.g.*, Potter, *supra* note 14, at 461 for a description of the nomenclature of various types of federal navigability. *See also* Jennie L. Bricker, *Navigability and Public Use*, 38 WILLAMETTE L. REV. 93, 96 (2001).

29. *See generally* Kaiser Aetna v. United States, 444 U.S. 164 (1979). The majority opinion delivered by Justice Rehnquist and dissent delivered by Justice Blackmun disagreed on the legal significance behind the Army Corps' navigability test and federal common law tests. *Id. See also* Potter, *supra* note 14, at 461.

30. *See, e.g.*, 33 U.S.C. § 1362(12)(B) (2004). This provision triggers federal authority under the Clean Water Act when a discharge of a pollutant occurs on a navigable waters. *Id.* The Clean Water Act defines "navigable waters" liberally, defining said waters as all waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (2004).

31. *See* Osborne, *supra* note 3, at 404 for a description of the common law test for federal navigability.

of Engineers' test for navigability determines the jurisdictional reach of Corps, but not the legal title of the waterway for access purposes.[32]

The distinctions between various tests were made clear through the seminal U.S. Supreme Court case, *Kaiser Aetna v. United States*, a case that addressed the relationship between rights of access and navigability law.[33] In *Kaiser Aetna*, the Corps of Engineers' navigational servitude on a bay in Hawaii was challenged in the context of a Fifth Amendment takings claim by a private owner.[34] In a five-to-three decision, the majority held that the government's attempt to create a public right of access could not be imposed without paying the private owners just compensation.[35]

Kaiser Aetna involved a developer who leased Kuapa Pond from a private owner in 1961 to develop a marina on the pond.[36] In order to proceed with development of Kuapa pond, Kaiser Aetna dredged and filled parts of the pond, erected walls and bridges, and increased the average depth of the channel from two to six feet.[37] Most notably, the owner opened up the pond to the tides of the ocean through the installation of sluice gates, which made a previously privately owned bay subject to federal navigability.[38]

In addressing the Fifth Amendment takings issue raised by Kaiser Aetna, the Court determined what types navigability applied to Kuapa pond.[39] The Court found that the newly improved Kuapa pond met the definitional requirement of "navigability" under the Corp's test in section 10 of the Rivers and Harbors Act, but not under the common law *Daniel Ball* test to determine navigability for title purposes.[40] In many instances, distinctions like these have proven crucial in determining the extent of a public right to access where state law has nothing further to add.[41]

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32. *See Kaiser Aetna*, 444 U.S. at 170-71 (drawing a distinction between the U.S. Army Corps of Engineers' test and the federal common law approach).

33. *Id.* at 168.

34. *Id.* at 166-67.

35. *Id.* at 180.

36. *Id.* at 166-67.

37. *Id.* at 167.

38. *Id.* at 179. The Court found that before improvements were made, Kuapa Pond was private property under Hawaiian law and non-navigable for federal purpose. *Id.*

39. Potter, *supra* note 14, at 467 (describing how *Kaiser Aetna* made a distinction between "navigability" for the purpose of extending power to regulate navigation and "navigability" for the purpose of a navigational servitude and associated public rights to access).

40. *Kaiser Aetna*, 444 U.S. at 172-73.

41. *See, e.g.*, Boone v. United States 944 F.2d 1489 (9th Cir. 1991). Similar to *Kaiser Aetna*, *Boone* involved a man-made lagoon in Hawaii, the owner of which expended funds to convert a non-navigable littoral fishpond into a navigable waterway. *Id.* at 1491-92. The *Boone* court drew a direct analogy to *Kaiser Aetna*, holding that although the pond was navigable for the purpose of extending regulatory authority to the Corps, it was nonetheless not subject to a navigational servitude. Potter, *supra* note 14, at 469-70. Similar to Kuapa Pond, the fishpond in *Boone* was incapable of use as a continuous highway for purpose of naviga-

In other instances, waterways that do not pass the federal common law test have nonetheless been defined as public resources by many state governments.[42] Absent federal preemption under the commerce clause, states have been free to make their own navigability determinations of waters within their boundaries.[43] At least forty-two jurisdictions have adopted their own definitions of navigability in order to create public servitudes over their waters.[44] These state navigability determinations differ from the common law federal test in that they do not confer public title to the beds and banks of a waterway.[45] Nonetheless, state tests have had the same effect as far as access is concerned and have effectively created a public servitude over private land.[46]

Definitions for state navigability are less restrictive than the federal test and in effect expand public ownership of waterways for the public interest.[47] Unlike the federal test, expanded state definitions are usually based on something other than a waterway's ability to sustain commercial navigation.[48] State navigability in the West includes everything from Michigan's "saw log" test, asking whether a stream allows passage of logs toward a mill,

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tion in its natural state. Potter, *supra* note 14, at 470. *But see* Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982). In *Loving*, riparian landowners sought a declaration that the Jackson River in Virginia was non-navigable for the purpose of establishing a servitude for public access. *Id.* at 1081-82. The court decided that although Jackson River in its natural state could not support commercial floating, a navigational servitude existed by virtue of the river's susceptibility to recreational canoeing and cold-water fishing. *Id.* at 1085. In holding that a non-compensable public servitude existed on the Jackson River, the court distinguished *Kaiser Aetna*. *Id.* at 1089, 1091. The court reasoned that unlike the pond in *Kaiser Aetna*, Jackson River was not previously a non-navigable waterway made navigable by private expenditures. *Id.* at 1091. *See also* Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469, 1472-73 (N.D. Ga. 1997) (distinguishing *Kaiser Aetna* based on reasons similar to *Loving*).

42. *See* Osborne, *supra* note 3, at 403 (discussing the proposition that "title navigability under federal law establishes the minimum number of waterways open to public access, but typically not the maximum").

43. Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845) (holding the new states have the same rights, sovereignty, and jurisdiction over this subject [beds and banks of navigable waterways] as the original states).

44. *See* Potter, *supra* note 14, at 486 (noting the extent of state determinations of navigability for access purposes).

45. *See* Potter, *supra* note 14, at 461-63, 492-93 (summarizing the affect on title that federal and state navigability tests have on river beds and banks as well as their capacity to create servitudes).

46. *See* Potter, *supra* note 14, at 492-93 (describing the legal effect of state navigability determinations).

47. *See* Osborne, *supra* note 3, at 409 (observing that states, in recognizing the limits of the federal navigability-for-title test, have adopted a broader test). For a more in-depth discussion on state navigation servitudes, *see* Daniel J. Morgan & David G. Lewis, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969).

48. DAVID GETCHES, WATER LAW IN A NUTSHELL 222-23 (West Publishing Co. 1997) (1984).

to California's "pleasure boat" test, asking whether a waterway is useful for rafts, rowboats, or canoes.[49]

Access issues in the intermountain west typically revolve on state determinations, since federal determinations usually do not apply to this region.[50] Although some commentators argue that the federal servitude should apply to waters of the intermountain west, courts have yet to apply the federal servitude with any regularity.[51] The waterways in the intermountain west simply run too dry and are not the sort of "[g]reat navigable stream . . . [incapable] of private ownership" that *Kaiser Aetna* requires, but nonetheless may be of the type that satisfy state law.[52]

The less restrictive state tests of navigability for servitude purposes typically gain authority from state constitutions.[53] For example, the constitutions in Wyoming and New Mexico both declare that state waters belong to the public and the courts have unequivocally interpreted these declarations to grant a public right of access through private land.[54] In both Wyoming and

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49. For Michigan's "saw log" test, *see* Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 319 (1874). For California's "pleasure boat" test, *see* People v. Mack, 19 Cal. App. 3d 1040 (1971).

50. *See* Hill, *supra* note 4, at 344 (showing that despite several instances where the Corps of Engineers has invoked federal jurisdiction on Colorado waterways, the *Daniel Ball* federal test for navigability has never been applied by Colorado courts); Osborne, *supra* note 3, at 407-08 (generally demonstrating that court determinations of federal navigability have chiefly been made on larger, commerce-heavy water bodies found among the coastal states of Washington, Oregon, and Alaska).

51. *See* Potter, *supra* note 14, at 474 (laying out an argument for why the federal navigational servitude should apply to many of Colorado's waters); *See also* Osborne, *supra* note 3, at 409 (asserting that the modern federal navigable-for-title test is satisfied by evidence that commercially guided whitewater float trips could have been supported by rivers upon statehood).

52. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (citing U.S. v. Chandler-Dunbar Co., 229 U.S. 53, 69 (1913)). *See also infra* notes 119-22 and accompanying text (describing the arid nature of the climates found in Montana and Colorado).

53. *See infra* note 55 and accompanying text. State-imposed navigational servitudes are an exercise of the state's police powers, deriving its authority from the implicitly reserved power under the Tenth Amendment of the United States Constitution. Jessie H. Briggs, *Navigational Servitude as a Method of Ecological Protection*, 75 DICK. L. REV. 256, 260 (1971).

54. WYO. CONST. art. VIII, § 1 ("The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."). *See, e.g.*, Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961) (holding the state constitution granted to the public a right to float on streams flowing through private property). N.M. CONST. art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state."). *See, e.g.*, New Mexico v. Red River Valley Co., 182 P.2d 421 (N.M. 1946) (interpreting Article 16, Section 2 to grant a public right to access public waters).

New Mexico, state courts have granted a public right to access directly from the granting language of their constitutions.[55]

The New Mexico Supreme Court was perhaps one of the first courts in the intermountain west to recognize the public's ownership and right to use all waters in the state.[56] *New Mexico v. Red River Valley Co.* involved a corporation that owned six hundred and fifty-five thousand acres of land around and under the Conchas Dam Reservoir in San Miguel County.[57] The private land owner opposed the State Game Commission's request for a declaratory judgment to determine the waters of reservoir open to the public for fishing and general recreational use.[58] In the end, the New Mexico Supreme Court decided in favor of the public's claim to access, holding that the waters in question were, and are, public waters and the corporation's right to use the water are not distinct from that of the public's.[59]

The court's holding followed a careful inspection of the meaning of the New Mexico Constitution and the prior appropriation doctrine. The court read in to the meaning of Article 16, Section 2 of the New Mexico Constitution which provides, "[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 and to be subject to appropriation for beneficial use."[60] The court unequivocally interpreted this provision to grant a public right to access, regardless of whether or not it has been appropriated in advance.[61] The court rejected the theory that "[e]ven though these be public waters, subject to such appropriation, nevertheless, they cannot be used by the public until appropriated by the public for such use."[62] The majority reasoned, "[t]hat would be saying that the public must first appropriate its own property, the very waters reserved to it and which have always 'belonged' to it."[63]

The court also supported its decision through demonstrating that the prior appropriation doctrine superceded any riparian claims.[64] The majority found that the doctrine of prior appropriation "definitely and wholly super-

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55. *See* Potter, *supra* note 14, at 489, 491 (showing similarities in the judicial decisions in Wyoming and New Mexico, which held public ownership of waterways and implied access to those waterways are imbedded in their state constitutions).
56. *See* Potter, *supra* note 14, at 489-91. The *Red River Valley* decision was delivered in 1946. *Red River Valley Co.*, 182 P.2d at 421.
57. *Red River Valley Co.*, 182 P.2d at 424.
58. *Id.*
59. *Id.* at 434.
60. *Id.* at 427.
61. *Id.* at 434.
62. *Id.* at 432.
63. *Id.*
64. *Id.* at 430. New Mexico adopted a prior appropriation scheme through legislative enactment upon statehood in 1912. N.M. STAT. ANN. § 72 (LexisNexis 2004).

seded the common-law doctrine of riparian rights."[65] Tracing the doctrine of prior appropriation back to American mining and Mexican water rights practices, the court found the riparian doctrine to be extinct in the American West.[66] In so doing, the court dispelled any remaining doubt that a riparian right could be exercised to deny the use of waters lying above or adjacent to private land.[67] Thus, through a constitutional interpretation and inspection of the western doctrine of prior appropriation, a public right to access was born in the intermountain west.[68]

Like New Mexico, the prior appropriation state of Wyoming has also recognized a public right to access through an interpretation of its constitution. Article 8, Section 1 of the Wyoming Constitution, proclaiming "[t]he waters of all natural streams, springs, lakes . . . are hereby declared to be the property of the state," has likewise been interpreted to grant a public right to access in Wyoming.[69] In *Day v. Armstrong*, the Supreme Court of Wyoming found this provision to grant ownership to state waters and to create an easement for a right of way for public use over private lands.[70]

The conflict in *Day* arose after a private rancher on the North Platte River fenced off portions of the river, which obstructed the passage of recreational floaters.[71] Day, a recreationalist, sought a judgment declaring his rights and the public's right to float through private property in Wyoming.[72] The Supreme Court of Wyoming found the following facts to be undisputed: the river segment of concern was capable of floating small craft; because the river did not meet the federal navigability test, the landowner owned the beds and banks; and the public owned the overlying waters.[73]

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65. *Red River Valley Co.*, 182 P.2d at 430.

66. *Id.* at 428. In determining riparianism dead in New Mexico, the Court also cited the "Colorado doctrine," from the dictum in Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). *Red River Valley Co.*, 182 P.2d at 430.

67. *Red River Valley Co.*, 182 P.2d at 430.

68. Although a right to recreational access was born in New Mexico, the law is still unclear on whether a right to access allows for an incidental right to portage on private land. *See* N.M. STAT. ANN. § 72 (LexisNexis 2004). The New Mexico Water Code does not address the public's right of access as it may relate to an incidental right to portage on private land. *Id. But see Red River Valley Co.*, 182 P.2d at 429. In *Red River Valley Co.*, the majority cited the access laws of the Partidas, the prior existing Spanish laws in New Mexico in stating "[e]very man has a right to use them [private lands adjacent to public water], by repairing his ships and his sails upon them, and by landing his merchandise there." *Id.*

69. WYO. CONST. art. VIII, § 1.

70. Day v. Armstrong, 362 P.2d 137, 151 (Wyo. 1961).

71. *Id.* at 141.

72. *Id.* at 138-39. Day's action was also certified for a class action upon remand to the district court. *Id.*

73. *Id.* at 140. The *Day* court interpreted "state waters" in Article 8, Section 1, of the Wyoming Constitution to confer title of water to the state, to be held in "[t]rust for the benefit of the people." *Id.* at 145.

The main dispute in *Day* centered on whether or not such divided interest on waterways afforded a public right to float.[74] The court answered in the affirmative, finding the "actual usability" to be the only limit of the public's right to employ its right to state waters.[75] The court's rationale focused on the practicality of the situation, finding that waters capable of public use could include incidental contact with the beds and banks, such as "unavoidable scrapes by the grounding of the craft."[76] In the end, *Day* confirmed that the public's ownership of waters, granted by the constitution, and allowed the public to use the water, regardless of the ownership of the banks and beds.[77]

The federal Public Trust Doctrine ("Doctrine") also recognizes the public's right to water resources by providing a means of protection for the public right to water.[78] Similar to state constitutional provisions found in some western states, the Doctrine has provided a basis for a public right of access in certain contexts, particularly in the northwest.[79] Public trust theory was established in common law, which asserts that some aspects of water resources ought to be beyond the reach of private control and ownership.[80] To meet this end, the Doctrine imposes a duty on states to preserve water resources, held in trust, against significant impairments of public uses.[81] In its modern application, the Doctrine has been described as one of the more complex and misunderstood legal doctrines effecting environmental laws.[82]

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74. *Id.*

75. *Id.* at 143.

76. *Id.* at 145-46 (describing permissible incidents to public use, including contact with the channel and the "right to disembark and pull, push or carry over shoals, riffles and rapids").

77. *Id.* at 147. The court in *Day* found that "[i]rrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft." *Id.* Although the right of access, as expressed in *Day*, creates a recreational right of way, it remains unclear if it includes an incidental right to wade or walk. *Id.*

78. *See generally* 4 ROBERT E. BECK, WATERS AND WATER RIGHTS § 30 (1991) (discussing the sources of the public right to the use of water).

79. *See generally* Osborne, *supra* note 3 (examining the access laws of Montana, Idaho, Washington, and Oregon through looking at each state's respective treatment of the Doctrine).

80. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) ("[I]t is a title held in trust for the people of the state, 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."). The Doctrine was originally established in ancient Roman law, which deemed the sea and seashores *res communes*, meaning "common to all." Richard Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 409 (1986).

81. Osborne, *supra* note 3, at 411 (summarizing the function of the traditional Public Trust Doctrine as established in *Illinois Central*).

82. *See* DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 389 (Foundation Press 2002) (1971) (stating that the role of the public trust doctrine in the context of navigability is an elusive concept).

One scholar claims that "there are fifty-one public trust doctrines in this country alone."[83]

The Doctrine was first exercised in *Illinois Central Railroad Co. v. Illinois*, but has since been expanded through subsequent case law.[84] In *Illinois Central,* the United States Supreme Court held that the Doctrine conferred state title to the beds of Lake Michigan under the condition that the state would facilitate public uses.[85] Such uses included the allowance of public access to the lake for commercial fishing.[86] Although the original Doctrine seemed to apply to a limited set of uses and situations, its scope has since been expanded by *National Audubon Society v. Superior Court.*[87] The *National Audubon Society* court took the Doctrine one step further by applying it to non-navigable streams for the purpose of reserving quantities of water to the state.[88] In other instances, the scope of public uses protected by the trust has been expanded from the original traditional uses of fishing, commerce, and navigation. Following *Illinois Central,* a number of jurisdictions have found state trust responsibilities to also include conservation, aesthetics, and recreation purposes.[89]

Due to the modern expansion of its legal effect, even the mere use of the words "public trust" in codified laws has been perceived to have far-reaching effects.[90] And in the water appropriation context, the Doctrine has

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83. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 425 (1989).

84. *Illinois Central,* 146 U.S. at 459-60 (summarizing majority's holding). James R. Rasband, *Equitable Compensation for Public Trust Takings,* 69 U. COLO. L. REV. 331, 331-32 (1998) (describing *Illinois Central* as the foundation of the public trust doctrine).

85. *Illinois Central*, 146 U.S. at 452.

86. *Id.*

87. National Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983). The California Supreme Court granted the public trust title of the water, beds, and banks of non-navigable headwaters that feed a navigable lake to the state. *Id.* at 718-20. The facts of the case involved the city of Los Angeles, which diverted water from non-navigable headwaters flowing into Mono Lake, a navigable waterway under the federal test. *Id.* at 711-12. The court held that Los Angeles' water rights were subject to the state's public trust right to the same water. *Id.* The court held that the Doctrine could be invoked by the petitioner upon non-navigable waters for the purpose of protecting the waters of Mono Lake itself, ecological values, and recreation. *Id.* at 712. Although the court found for an enforceable public trust interest in the waterways at issue, the court did not definitively determine how the public trust interest was to be weighted against a conflicting claim with an earlier date of appropriation. *Id.* at 732. The case was remanded to the lower court for a final determination and quantification of awards. *Id.*

88. *National Audubon Society*, 658 P.2d at 718-20.

89. *See* Osborne, *supra* note 3, at 411 (noting the expansion of permissive uses entrusted to modern usages of the Doctrine).

90. *See* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (Fall 1995). The authors describe the modern day public trust doctrine's effect on prior appropriation "as the water law equivalent of the rule against perpetuities." *Id.* at 703. *See also* Hill, *supra* note 4, at 341 (making the proposition that if Colorado were to adopt the Doctrine for the purpose of establishing public access

made a big splash in at least two jurisdictions by retroactively reserving quantities of water for the public over prior appropriated rights.[91] Some commentators even suggest the same retroactive effect can be applied to confer a public right of access to waterways.[92] These and other recent developments of the Doctrine may or may not continue to push in the direction of public rights to access by extending the federal Doctrine to state law. Although states such as California and Washington have judicially expanded the public trust's traditional scope to include recreation, a future trend to do the same in the intermountain west is still up for question.[93]

Due to its complexity and varying legal applications, the topic is the source of much debate and commentary among environmental scholars and is perhaps best left for another article.[94] Although the modern Public Trust Doctrine plays a role in river access policy, its direct effect on title of intermountain riverbeds and banks has yet to take legal effect.[95] Like the definitions for federal navigability, the Doctrine with few exceptions has been understood to confer title of beds and banks on major watercourses in states bordering the sea and large lakes that have historically sustained commerce.[96] With the above considerations in mind, this comment will primarily discuss the public right of access in the context of state laws. On waters of the intermountain west, state laws have had the most definitive role in shaping the public right of recreational access.[97]

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rights, the Doctrine would also undermine prior appropriations of water). *See also* Lori Potter, *The 1969 Act and Environmental Protection,* 3 U. DENV. WATER L. REV. 70, 77 (1999) (describing the public trust in Colorado as "The Two Little Words That Can't Be Spoken").

91. *See supra* notes 87-88 and accompanying text for California's expanded usage of the Doctrine. *See also* Blumm, *supra* note 90, at 727 (describing Idaho's judicial adoption of "the California rule" of the Public Trust Doctrine, which extends the Doctrine to include non-navigable waterways in addition to navigable ones).

92. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine,* 19 ENVTL. L. 425, 465 (1989) (asserting that "[s]ome states have extended the coverage of the trust beyond those watercourses navigable for title to all, or nearly all, waters of the state").

93. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (finding trust purposes to include uses such as hunting, bathing, and swimming); Orion Corp. v. Washington, 747 P.2d 1062, 1073 (Wash. 1987) (expanding public trust right to include fishing, swimming, water skiing, and other recreational purposes). *See* Wilkinson, *supra* note 92, at 467-69 (arguing that the judiciary should actively decide matters concerning the expansion of the public trust doctrine for purposes other than those traditionally defined).

94. *See, e.g.,* James R. Rasband, *Equitable Compensation for Public Trust Takings,* 69 U. COLO. L. REV. 331 (1998). In the interest of clarity, this comment will not fully address the public trust implications on access law in the intermountain west.

95. *See generally* Osborne, *supra* note 3, at 411-13 (laying down the foundations of the Public Trust Doctrine to analyze access law in the American Northwest).

96. *See* Wilkinson, *supra* note 92, at 428-64 for a description of the traditional application of the Doctrine.

97. *See supra* notes 49-77 and accompanying text for discussion of how Wyoming and New Mexico have established state determinations of navigability.

As asserted upon the outset of this comment, the modern recognition of access to public waterways faces challenges based on English common law.[98] Riparian landowners argue that English common law vests exclusive right of their land up to the heavens, inclusive of the waters that lie within this area.[99] This legal concept has been expressed by courts with the Latin phrase *Cujus est solum, ejus est usque ad coelum* ("*ad coelum*"), or "he who owns the surface of the ground has the exclusive right to everything which is above it."[100] This ancient doctrine was often used in England as the legal foundation for water ownership by riparian water users.[101] In a notable 1843 English case, the *ad coelum* doctrine was used to rationalize a surface landowner's absolute title to groundwater beneath the overlying property, entitling the landowner to freely pump groundwater to the detriment of other users.[102]

The *ad coelum* argument has also been upheld in American law through the seminal United States Supreme Court case of *United States v. Causby*.[103] In *Causby*, a landowner successfully made a Fifth Amendment takings claim against a neighboring municipal airport for noise disturbance of their home and chicken farm. The *Causby* Court held that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[104] The *ad coelum* common law as it is applied by decisions like *Causby* is intrinsically at odds with the laws that grant public uses of waterways that lie above private land. When landowners attempt to exclude the public from the surface water overlying their lands, the conflicts between the two competing legal claims often rises to litigation.[105]

As long as a state's access laws are consistent with U.S. laws and state jurisdictional laws, states have remained largely free to make their own determinations of navigability.[106] As mentioned earlier, states use local navigability laws to further define the scope of rights associated with the two

98. *See, e.g.*, Colorado v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (supporting a recreational access ruling in favor of a private landowner by invoking the doctrine of *cujus est solum, ejus est usque ad coelum*). For a complete description and analysis of *Emmert*, *see infra* notes 182-214 and accompanying text.

99. *Emmert*, 597 P.2d at 1027.

100. *Id.*

101. *See, e.g.*, Acton v. Blundell, 152 Eng. Rep. 1223 (1843) (invoking the *ad coelum* doctrine to find that a surface owners right extended below the surface).

102. *Id.*

103. United States v. Causby, 328 U.S. 256 (1946).

104. *Id.* at 261. *But see id.* at 260-61 for dicta in *Causby* that found no absolute right to ownership of land to the periphery of the universe. The court pointed out practical restraints to absolute ownership, including air as a public highway in certain circumstances. *Id.* at 261.

105. *See* Osborne, *supra* note 3, at 400 (stating that in recent years owners of private property have brought civil trespass suits against public recreationalists).

106. *See supra* notes 42, 53 and accompanying text for the legal authority by which states have been able to establish their own determination on navigability.

conflicting legal rights associated with public rights to recreation and landowner exclusionary rights.[107] The main objective of the state law and policy on access is to reconcile the conflicting legal rights in a manner that best reflects contemporary values. That is not to say that claims based on *ad coelum* principles have always ended after a state makes a determination of law on navigability.[108] Nonetheless, to date no such claim has been successfully made and will not likely succeed in the future in light of the Tenth Circuit's recent denial of a takings claim that challenged the state access law of Montana.[109]

B. Diverging Laws in Montana and Colorado

In resolving conflicts between public recreationalists and private landowners, western states have taken a variety of approaches.[110] Perhaps the greatest differences are found between Colorado and Montana law, which represent two distinctively different policies in the recognition of public access to rivers on private land. With the recent U.S. Supreme Court decision to deny certiorari in *Madison v. Graham*, Montana has ended its lengthy dispute in favor of public recreation.[111] Colorado, on the other hand, has had judicial decisions in favor of private land interests. Throughout the past two decades the Colorado courts have continually acknowledged the 1979 decision of *Colorado v. Emmert*, which narrowly defined the scope of the recreational river easement.[112]

Montana and Colorado's laws generally reflect the most liberal and conservative policies in the west.[113] Although both states have grappled with river access law since statehood, Colorado has consistently favored private

107. *See supra* notes 42-47 and accompanying text for the proposition that state determinations on navigability broaden the scope of recreational servitudes available to the public.

108. *See, e.g.*, Madison v. Graham, 316 F.3d 867 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2221 (2003) (denying petitioner's claim that Montana's recreational access servitude imposed upon the petitioner's Fifth Amendment right to property.) *See infra* notes 172-77 and accompanying text for a closer look at the petitioner's Fifth Amendment claim in *Madison*.

109. *Madison*, 316 F.3d at 872, *cert. denied* 123 S. Ct. 2221 (2003) (denying the possibility of a Fifth Amendment takings claim).

110. *See generally* Osborne, *supra* note 3, at 402 (asserting that the four states of Montana, Washington, Oregon, and Idaho have different approaches to water access).

111. *Madison*, 316 F.3d at 872. The *Madison* court implied that the navigability servitude posed no issues under Fifth Amendment takings claims. *Id.* *Madison* involved a private landowner's Fourteenth Amendment due process claim as a result of a law in Montana that allows the public access to state waterways. *Id.* For a complete discussion of *Madison*, *see infra* notes 166-81 and accompanying text.

112. Colorado v. Emmert, 597 P.2d 1025 (Colo. 1979); *see also* Bd. of County Comm'rs of County of Park v. Park County Sportsmen's Ranch, 45 P.3d 693, 710 (Colo. 2002) (citing *Emmert*); Bijou Irr. Dist. v. Empire Club, 804 P.2d 175, 185 (Colo. 1991) (citing *Emmert*).

113. *See* Osborne, *supra* note 3, at 445 (asserting that Montana's access laws are the most liberal among the Northwestern states of Idaho, Washington, and Oregon). *See* Potter, *supra* note 14, at 498 (implying that Colorado's access laws are the most restrictive among the states of Wyoming, New Mexico, Utah, Montana, Idaho, and California).

interests over public uses, recreational rights included.[114] In stark contrast, Montana has successfully integrated the legal concepts of public resources within its access law.[115]

Since access laws have been extensively adjudicated and challenged in both states, a deeper look into Colorado and Montana access law is particularly appropriate to the topic of this comment. The underlying issues behind the "right to float" have already surfaced as the focus of debate in both Colorado and Montana.[116] In light of the above considerations, the background section of this comment will continue by further examining the current laws that shape Colorado's and Montana's public right of access.

1. Comparing Hydrology, Economy, and Water Use in Colorado and Montana

Montana and Colorado share the distinction of being true headwater states. The continental divide runs through both states, creating two major watersheds: one supplying flows eastward towards the Gulf of Mexico and the other supplying rivers bound for the Pacific Ocean.[117] Montana's rivers and streams are major tributaries to both the Missouri and Columbia watersheds, while Colorado headwaters help feed the Missouri, Rio Grande, Arkansas and Colorado River Watersheds.[118]

As with many of the western states, the climate of both Colorado and Montana is dry. In 2004 both states, along with most western states west of the 100th meridian, were declared major drought areas by federal or state governments.[119] During an average year the two states receive approximately the same annual precipitation of about fifteen inches and are respectively ranked the sixth and seventh driest among twelve other

114. *See generally* COLO. REV. STAT. §§ 37-92-101 to 602 (2004). These sections constitute the Colorado Water Code, which does not include any public interest rules or recognition of the Public Trust Doctrine.

115. *See, e.g.*, MONT. CODE ANN. §§ 23-2-301 to 322 (2004). Montana's Stream Access Law codified a public right of access as well as a number of uses incident to that right. *Id.* For a more complete discussion on Montana's Stream Access Law, *see infra* notes 148-62 and accompanying text. *See also* MONT. CODE. ANN. § 85-2-311 (2003) (requiring public interest review before large appropriations of water are adjudicated).

116. *See infra* notes 134-226 and accompanying text for detailed discussion on the legal disputes surrounding the "right to float" in Montana and Colorado.

117. MARK REISNER, CADILAC DESERT ix (Viking Penguin Inc. 1993) (1986).

118. *Id.*

119. *See* National Drought Mitigation Center, *available at* http://drought.unl.edu/ (last visited Feb. 1, 2005). The National Drought Mitigation Center declared various regions of Colorado and Montana as "drought watch" areas between August 2004 and January 2005. *Id.* A "drought watch" declaration is the most severe category designated by the National Drought Mitigation Center and is based on climate changes, reservoir and lake levels, and groundwater supply. *Id.*

neighboring western states.[120] Due to high elevations and dry climate, hydrology is dominated by peak flows during spring runoff from winter snowpack, as well as by seasonal precipitation.[121] The majority of precipitation in these two states occurs in the mountainous regions toward the west.[122]

Although the bulk of supply originates in the high-alpine regions, most water demand in Montana and Colorado is based in the arid eastern plains, where more people reside and long-standing dry land irrigation practices persist. By far, the leading water use in both Colorado and Montana is irrigation, which constitutes ninety percent of Colorado's total water use and ninety-six percent of Montana's.[123] In Colorado, public and domestic use is the second leading source of demand in the state, driven in large part by growing municipal demands from the city of Denver.

Although Colorado's economy is approximately eight times larger than Montana's, both states enjoy considerable revenues from recreational services. [124] In 2001, Colorado businesses received over $125 million in revenues from rafting operations alone—mainly from the Arkansas River Valley operations near Salida.[125] In Montana, tourism ranks as the number two economic generator, recently surpassing the timber and mining industries in 2003.[126] A large part of Montana's tourism is heavily dependent upon river recreation. Fishermen by the millions flock to reenact the popular images of Robert Redford's film, *A River Runs Through it*, and river runners worldwide come to enjoy the pristine flows from Montana's National Park

120. *See* Western Regional Climate Center, Climatological Data Summaries, *available at* http://www.wrcc.dri.edu/climsum.html. (last visited Feb. 1, 2005).

121. *See* United States Department of Agriculture, Natural Resource Conservation Service, *Water Supply Outlook for the Western United States, available at* http://www.wcc.nrcs.usda.gov/wsf/foreword.html (last visited Jan. 20, 2005) (correlating water supply in the western United States to runoff characteristics from mountain snow-pack).

122. World Atlas.Com, *Montana Precipitation Map, available at* http://www.worldatlas.com/webimage/countrys/namerica/usstates/mt.htm (last visited Apr. 30, 2005); World Atlas.Com, *Colorado Precipitation Map, available at* http://www.worldatlas.com/webimage/countrys/namerica/usstates/co.htm (last visited Apr. 30, 2005).

123. United States Geological Survey, *Estimated Use of Water in the U.S.* (2000), *available at* http://water.usgs.gov/pubs/circ/2004/circ1268/htdocs/table02.html (last visited Apr. 30, 2005).

124. United States Department of Commerce, Bureau of Economic Analysis (2001), *available at* http://www.uawc.org/news/july2001.html (last visited Apr. 30, 2005).

125. Becky Goff, *Upper Arkansas Watershed Council Newsletter*, March 2002 (stating that the Upper Arkansas River rafting industry brought in profits of over $60 million in 2001, making the area nationally known as one of the nations largest rafting industry regions). *See also* Water News Online, October 2002, *available at* http://www.uswaternews.com/archives/arcsupply/224mil10.html (last visited Feb. 1, 2005).

126. Kimberley Roth, *Picture the Progress 2003; A special report on Montana's Economy, available at* http://www.missoulian.com/bonus/progress03/progress38.html (last visited Apr. 30, 2005).

System.[127] Overall, both states seem to rely heavily on water resources for recreational uses, but are challenged by persistent drought patterns and competing demands of growth and irrigation.

2. Legal Foundations behind the "Right to Float" in Colorado and Montana

Montana and Colorado both share a likeness in hydrology, a high demand for irrigation, and both depend upon the economic benefits of strong outdoor recreation industries; however, the states differ greatly in how their laws recognize the public's "right to float." The very different access laws found in Montana and Colorado today were first created by judicial interpretation of each state's respective constitutional provisions on public river rights.[128] The constitutional interpretations were then given practical meaning through a court determination of the actual scope of the recreational servitude. The legislatures of each state have taken the role of either supporting the court determinations by codifying the effect of the opinion, filling in where the defined servitude is silent, or remaining inactive on the issue.

a) Constitutional Foundations behind the "Right to Float"

The constitutions of both intermountain states share a dedication to pure prior appropriation and recognition of public rights to state water resources. Both states' constitutional provisions on water rights specifically vest state waters to the public, subject only to the appropriative rights of individuals to make beneficial use of water through diversion.[129] Article 16, Section 5 of the Colorado Constitution proclaims, "[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* . . . subject to appropriation."[130] Similarly, Article 9, Section 3 of the Montana Constitution declares, "all surface, underground, flood, and atmospheric waters within the boundaries of the state are the *property of the state for the use of its people* and are subject to appropriation for beneficial uses as provided by law."[131]

The plain meaning of both constitutional provisions appears to vest all unappropriated waters of the state as public property. Nonetheless, as the case law and subsequent legislative responses to court decisions began to unfold in each state, the meaning of these nearly identical provisions has

127. *See* Morris, *supra* note 6, at 260. Morris asserts that "[t]ourism became big business in Montana, and many people came to fish, as evidenced by the fact that Montana now sells the third highest number of non-resident sport fishing licenses in the United States." *Id.*

128. *See generally* Madison v. Graham, 316 F.3d 867 (9th Cir. 2002); Colorado v. Emmert, 597 P.2d 1025 (Colo. 1979).

129. MONT. CONST. art. IX, § 3; COLO. CONST. art. XVI, § 5.

130. COLO. CONST. art. XVI, § 5 (emphasis added).

131. MONT. CONST. art. IX, § 3 (emphasis added).

diverged. Colorado's law, as established in the *Colorado v. Emmert* decision, narrowly defined the public's recreational easement.[132] In Montana, the case of *Madison v. Graham*, coupled with enactments by the legislature, has resulted in a broad constitutional right of public access to state waters.[133]

b) Montana Access Law: *Madison* and Other Laws that Shape Montana's Broadly Defined Recreational Easement

In Montana, the landmark opinion of *Madison v. Graham* was preceded by a series of state supreme court decisions in the 1980s.[134] The 1982 decision of *Montana Coalition for Stream Access, Inc. v. Curran* involved a landowner's attempt to prevent recreationists from floating down the Dearborn River through his land.[135] At the district court level, the Coalition's claim for a public right to use the river won partial summary judgment.[136] On appeal, the Supreme Court of Montana entirely rejected the landowner's trespass claim.[137] The court's sweeping decision recognized the public's constitutional right to state waters and interpreted the right to include public recreation "on any surface waters that are capable" of such use.[138]

According to the court, recognition of recreational rights was founded on both the public trust doctrine and the constitution, although it remains unclear if the public trust doctrine was at all necessary to confer a public right.[139] Through a preliminary analysis of the public trust doctrine and navigability law, the court determined that title to the beds and banks remained with the state.[140] However, the court later eroded the importance

132. *Emmert*, 597 P.2d 1025.

133. Madison v. Graham, 126 F. Supp. 2d 1320 (D. Mont. 2001), *aff'g* 316 F.3d 867 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2221 (2003). *See infra* notes 148-81 and accompanying text for description of Montana's Stream Access Law and discussion of *Madison*.

134. Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984); Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984); Galt v. Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (Mont. 1987).

135. *Curran*, 682 P.2d at 165.

136. *Id.* at 165.

137. *Id.* at 172.

138. *Id.*

139. Matt Clifford, *Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution*, 16 PUB. LAND L. REV. 117, 125-26 (1995) ("[The] exact relationship between the two [public trust doctrine and Constitution] is not entirely clear in the opinion.").

140. *Id.* The court determined that title to beds and banks vested in the state at the time of statehood under the federal log-floating test. *Curran*, 682 P.2d at 166-68. The court went on to determine that title remained in the state, citing the public trust doctrine from *Illinois Central*. *Id.* at 167-68. However, the necessity of this finding for the purpose of the court's final ruling has been questioned. *See* Osborne, *supra* note 3, at 434-35 ("Given the constitutional basis of the court's holdings and their subsequent codification in the Stream Access Law, the public trust doctrine is not really necessary to ensure broad public access to water bodies for recreation [in Montana]."). Furthermore, the application of *Illinois Central* as it relates to the Montana's trust obligation is confusing in light of the fact that the State does not have navi-

of the title analysis, declaring that private ownership of the Dearborn River's streambed was irrelevant to the question of the public's right of use.[141] In reaching its decision, the *Curran* majority followed the Wyoming decision in *Day v. Armstrong*, finding that "[i]n essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public."[142] Thus, *Curran* established a right of access in Montana through granting a public servitude on state waterways from the Montana Constitution.[143]

A year later, *Curran* was upheld and further clarified in *Montana Coalition for Stream Access, Inc. v. Hildreth*, a case involving a similar conflict that took place on the Beaverhead River in southwestern Montana.[144] In *Hildreth*, the constitutionally protected public right to state waters was again interpreted to grant a right to float and the scope of the recreational easement was thereby established.[145] The public was given a "[r]ight to access for fishing and navigational purposes to the point of the high water mark" and a right to portage in "the least intrusive manner possible" when faced with barriers.[146] Overall, *Hildreth* affirmed *Curran* by reiterating that the capabilities of the waters themselves establish the public's recreational easement, and further clarified *Curran* by spelling out the scope of the easement.[147]

The *Hildreth* and *Curran* opinions were codified into law the following year with the passage of Montana's Stream Access Law (the "SAL").[148] In 1984, legislative leaders met to develop the SAL in an attempt to define terms left unclear by *Hildreth* and *Curran,* and thereby allay the fears of landowners over the scope of the rulings.[149] The law's sponsor, state representative Bob Ream, touted it as an effort to "keep the law within the bounds of the Montana Supreme Court decisions and to express the Legisla-

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gable title for purposes of commerce as found in *Illinois Central*. *See* Clifford, *supra* note 139, at 126.

141. *See generally* Clifford, *supra* note 139. In support of its position, *Curran* relied upon the majority in the Wyoming case, *Day v. Armstrong*, which held that the public has the right to use public waters of the State without interference or curtailment by any landowner, irrespective of the ownership of the streambed or of their navigability. *Curran*, 682 P.2d at 170 (citing Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961)). Wyoming has yet to adopt the Public Trust Doctrine for the purposes of finding a public right to access. *See generally Day*, 362 P.2d 137 (omitting any discussion of the Doctrine in establishing a public right of access).

142. *Curran*, 682 P.2d at 170 (citing *Day*, 362 P.2d at 147).

143. *See* Clifford, *supra* note 139, at 126 (asserting that the primary authority in the *Curran* decision came from the Montana Constitution).

144. Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984).

145. *Id.*

146. *Id.* at 1091.

147. *See* Morris, *supra* note 6, at 271.

148. MONT. CODE ANN. §§ 23-2-301 to 322 (2004).

149. *See* Morris, *supra* note 6, at 273.

ture's desire to tie down and define the areas that were left very broad in those decisions."[150]

The final SAL legislation was signed into law in 1985, and like the *Hildreth* and *Curran* decisions, it interprets the constitutional public right broadly.[151] Section 302 of the SAL provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."[152] Such public use of waterways extends to the ordinary high water mark and allows an incidental right to portage on private land.[153] Although the public has no right to enter or cross private property to access waterways, the public in Montana has an incidental right to "portage around barriers in the least intrusive manner possible."[154] Through these main provisions, Montana's SAL clearly describes a state recreational servitude with a defined scope for boating, fishing, swimming, and other forms of recreation on all of its waterways.[155]

The SAL was slightly restructured by the Montana Supreme Court's interpretation in *Galt v. State Department of Fish, Wildlife and Parks*.[156] Galt, a private landowner, sought a declaratory judgment that the law in the SAL was unconstitutional on its face.[157] Galt attempted to convince the court that the SAL and the *Hildreth* and *Curran* decisions constituted a taking of private property without just compensation.[158]

Despite the plaintiff's best efforts, the court upheld prior law, finding no taking of the plaintiff's property, but directed some amendment of the SAL where the court felt the statute went too far.[159] In doing so, the court reaffirmed the constitutional public access right, but limited it to "only such use as is necessary to utilization of the water itself."[160] Based on this reason-

150. Galt v. Dept. of Fish, Wildlife and Parks, 731 P.2d 912, 919 (Mont. 1987) (quoting Hearings on H.B. 265 before the Senate Judiciary Committee, 49th Leg., 1st Sess. (Mar. 8, 1985)).

151. *See* Osborne, *supra* note 3, at 432 (asserting that the SAL basically codified the holdings of *Curran* and *Hildreth*).

152. MONT. CODE ANN. § 23-2-302(1) (2004).

153. *Id.* § 311. The "ordinary high water mark" is characterized by soils, terrestrial vegetation, and the destruction of the land's vegetative value (non-inclusive of the flood plain, adjacent to surface waters). *Id.* § 301(9).

154. *Id.* § 311 (granting an incidental right to portage). Montana's SAL also disallows public entry on private property in order to use waters for recreational purposes. *Id.* § 302(4).

155. *See id.* § 301(10). The stream access statute defines "recreational use" to mean "fishing, hunting, swimming, floating in small craft or other floatation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses." *Id.*

156. Galt v. Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (Mont. 1987).

157. *Id.* at 913.

158. *Id.*

159. *See* Morris, *supra* note 6, at 274 (asserting that the *Galt* majority sought out limitations to the SAL in order to better reflect prior case law on the subject).

160. *Galt*, 731 P.2d at 915.

ing, the court struck down the provisions of the statute that conferred public rights to overnight camping, construction of duck blinds, big game hunting, and requirements of private owners to compensate for the cost of portage routes.[161] Although the *Galt* decision slightly refined the bounds of the recreational easement, the case still stands as an affirmation of the public right of access up to the high water mark of Montana's streams.[162]

Like *Curran*, the majority in *Galt* relied on the Wyoming case of *Day v. Armstrong* for support. The *Galt* limitation of incidental use to "such use as is necessary to utilization of the water itself" almost exactly mirrors the language in *Day* that declared, "[w]hen 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."[163] Thus, *Galt* maintained legal consistency by relying on the same authority that previous Montana case law relied upon.[164] In doing so, *Galt* used Wyoming law for guidance for the rule of incidental contact, this time finding that the public's ownership of surface water confers only those incidental uses that are "necessary" to the full enjoyment of the public easement.[165]

Despite the strong rulings of *Curran, Hildreth,* and *Galt,* as well as legislative affirmation of those rulings, landowners continued to challenge Montana's access law.[166] Montana's SAL was contested again at the federal level in *Madison v. Graham*, a case that serves as the most representative of the current judicial opinion on the "right to float" in Montana.[167] In *Madison*, landowners brought action in the U.S. District Court for the District of Montana to enjoin the State from enforcing the SAL.[168] The landowner's action against the director of Montana's Department of Fish, Wildlife, and Parks was fought over some of Montana's most prominently fished and boated rivers, including the Stillwater and Ruby Rivers and O'Dell Creek.[169] The dividing lines of the *Madison* conflict were quickly drawn and aggressively supported on both sides. Madison's claim drew the attention of inter-

161. *See* Morris, *supra* note 6, at 274 (describing the legal effect of *Galt* as well as the court's reasoning behind its decision).

162. *Galt*, 731 P.2d at 915 (upholding the law from *Curran* and *Hildreth* that grants a public right of use up to the high water mark of a waterway).

163. *Id.* at 917 (Gulbrandson, J., concurring); Day v. Armstrong, 362 P.2d 137, 145-46 (Wyo. 1961).

164. *See supra* note 142 and accompanying text for a description of how the *Curran* court likewise relied on Wyoming law.

165. *Galt*, 731 P.2d at 915-16.

166. *See generally* Madison v. Graham, 126 F. Supp. 2d 1320 (D. Mont. 2001), *aff'd* 316 F.3d 867 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2221 (2003).

167. *Id.* Although the issues were appealed in the Ninth Circuit, the district court ruling was upheld and has not, to date, been appealed again at the federal level. *See infra* notes 172-77 and accompanying text for a more detailed discussion on the post-District Court rulings on this issue.

168. *Madison*, 126 F. Supp. 2d at 1322.

169. *Id.*

vening defendants Trout Unlimited, the Montana Coalition for Stream Access, the Montana Wildlife Federation, and the Fishing Outfitters Association of Montana.[170] Madison, the original plaintiff, was joined by landowners from neighboring watersheds and gained substantial financial support from the Colorado-based Mountain States Legal Foundation.[171]

Madison challenged the constitutionality of the statute under both a due process and void for vagueness claim.[172] The district court dismissed both claims, holding that the due process claim was barred by res judicata and that the void for vagueness complaint was without merit.[173] The takings aspect of Madison's Fourteenth Amendment argument also failed, because the state was deemed to have a legitimate governmental interest in enforcing the statute. The statute was found to substantially advance a legitimate government interest in managing Montana's natural resources and promoting recreation.[174] Furthermore, the court found that the recreational easement on private land did not deny property owners of all economically viable use of his land.[175] After Madison lost at the district level, Madison sought an appeal from the United States Court of Appeals for the Ninth Circuit, focusing on a Fifth Amendment takings claim.[176] The Court of Appeals dismissed Madison's new complaint on similar grounds, and despite appeals reaching as high as the U.S. Supreme Court in 2003, the *Hildreth* and *Curran* precedent was upheld.[177]

Overall, *Madison* further defined the scope of easement for recreational use and strengthened the law under *Hildreth* and *Curran*. In addition to reaffirming the right of access for recreational floating that was originally granted in *Hildreth* and *Curran*, the *Madison* decision expressly recognized other uses that incidentally occur out of the exercise of those uses codified by the SAL.[178] The court used the example of wading to illustrate when an

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170. *Id* at 1320.

171. *Id.* at 1322. The Mountain States Legal Foundation was created by Coors Brewing Company and James Watt (President Reagan's Secretary of Interior). *See* Montana River Action, Navigable Rivers and Public Access, *available at* http://www.montanariveraction.org/navigable-rivers.html (last visited Apr. 30, 2005). Donors to the fund include Amoco, Chevron, Texaco, Coors, Ford, and Phillips Petroleum. *Id.*

172. *Madison,* 126 F. Supp. 2d at 1322.

173. *Id.* at 1327-28. The plaintiff's void for vagueness argument asserted that the statute failed to clarify whether natural or artificial barriers constituted a permissible portage by public river users. *Id.* The claim was dismissed for failure to meet the constitutional standard. *Id.* The prior Montana case of *Galt* barred the plaintiff's due process claim. *Id.* (citing Galt v. State Dept. of Fish, Wildlife & Parks, 749 P.2d 1089 (1988)).

174. *Id.* at 1325.

175. *Id.* at 1324.

176. *See* Madison v. Graham, 316 F.3d 867 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2221 (2003).

177. *Id.*

178. *Madison,* 126 F. Supp. 2d at 1324. The district court described wading as "an incidental de minimis appurtenance entirely dependent upon use of the surface water." *Id.*

incidental touching of the streambed is permissible as a *de minimis* intrusion of private property.[179] Wading on streambeds, as incident to the public's codified right to fish, was found to cause "[n]o more interference with private property rights than does a floater."[180] Although additional incidental uses have yet to be decided in court, other recreational users may act under the assumption that incidental contact directly related to other reasonable uses is protected by law.[181] This assumption is unlikely to be successfully contested in court since the legislature has clearly defined the scope through the SAL and the courts have tested the statute's validity through the decisions of *Madison* and *Galt*.

c) Colorado Access Law: *Emmert* and Other Laws that Shape Colorado's Narrowly Defined Recreational Easement

By contrast, Colorado's courts have interpreted the constitutionally protected public right to unappropriated waters very narrowly. The Colorado Supreme Court's divided decision in *Colorado v. Emmert* is representative of Colorado's current judicial opinion on the "right to float" and reveals the court's allegiance to the *ad coelum* argument made by private landowners.[182] The opinion in *Emmert* concludes by holding no public right to the use of waters overlying private land without the consent of the owner.[183] The *Emmert* holding has been acknowledged by courts over the past two decades.[184] In the absence of legislation that describes a public servitude, *Emmert* stands as Colorado's current definition of the recreational easement on its surface waters.[185]

The *Emmert* conflict involved a group of rafters who were criminally prosecuted for third-degree criminal trespass.[186] The rafters were float-

179. *Id.*
180. *Id.*
181. *Id.* The court held incidental contact, such as wading, is permissible because the "interest and intent of the public is to appropriate and use the surface water." *Id.* It can be assumed that absent further rulings on the issue, other incidental uses are permissible as long as the "interest and intent" of the public is for "use [of] the surface water." *Id.*
182. Colorado v. Emmert, 597 P.2d 1025 (Colo. 1979). Justice Lee delivered the majority opinion of the court and Justice Groves and Carrigan filed dissenting opinions. *Id.*
183. *Id.* at 1029-30.
184. *See, e.g.*, Bd. of County Comm'rs of County of Park v. Park County Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002); Bijou Irr. Dist. v. Empire Club, 804 P.2d 175 (Colo. 1991).
185. *See generally* COLO. REV. STAT. §§ 37-92-101 to 602 (2004). These statutory provisions constitute the Colorado Water Code, which does not include any law on the public right of access. *Id.* Justice Lee in his majority *Emmert* opinion stated that "[i]f 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." *Emmert*, 597 P.2d at 1029. Despite several citizen initiatives to amend the constitution to permit an undisputed right of safe passage, the legislature has yet to respond. *See* American Whitewater, Colorado Navigability Report, *available at* http://www.americanwhitewater.org/access/navigability/-reports/CO.htm (last visited Apr. 30, 2005).
186. *Emmert*, 597 P.2d at 1026.

ing down a segment of the Colorado River which bisected the property of a private ranch.[187] After ducking a barbed wire barrier and floating through the private property, the rafters were placed under arrest by a deputy sheriff.[188] The facts stipulated that the defendants made contact with the riverbed from time to time in order to control the progress of the rafts.[189] It was further stipulated that the stretch of the Colorado River under dispute did not meet the federal navigability test.[190]

Much like the defense in *Madison,* the floaters claimed they had a public right to float, granted by the Colorado Constitution, as well as an easement for any trespass incident to that right.[191] The defense relied upon Article 16, Section 5 of the Colorado Constitution, which proclaims, "[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* . . . subject to appropriation."[192] The constitutionally based defense failed: the Colorado Supreme Court held that the Colorado Constitution afforded no such public right to recreational use through private land, especially when it compromises a landowner's right to exclusion.[193] In support of its holding, the court cited the common law *ad coelum* rule, which was said to have been implicitly adopted by prior Colorado case law.[194]

The *Emmert* court reasoned that the private *ad coelum* rights were superior to any reserved rights that may have been granted to the public upon Colorado's adoption of its constitution. Article 16, Section 5 was interpreted within the historical context of its 1876 ratification.[195] Justice Lee in his majority opinion found:

> [S]ection 5, Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation.[196]

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187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1027.
192. COLO. CONST. art. XVI, § 5 (emphasis added).
193. *Emmert*, 597 P.2d at 1029.
194. *Id.* at 1027. The *Emmert* majority found that the *ad coelum* doctrine was implicitly adopted by Colorado courts in Hartman v. Tresise, 84 P. 685 (Colo. 1906). *But see Emmert*, 597 P.2d at 1031 (Groves, J., dissenting). In his dissent, Justice Groves questions whether the *ad coelum* was adopted in *Hartman*, stating "it is not clear that Hartman adopted this rule." *Id.* (Groves, J., dissenting).
195. *Id.* at 1028.
196. *Id.*

The *Emmert* court gave deference to the legislative posture on public rights to waterways in order to justify its narrow interpretation. The majority claimed that the Colorado Legislature has had a disposition toward keeping its waters "[n]ot unrestrictedly open to the public."[197] The majority's cited support included legislation governing the Wildlife Commission's power to negotiate with landowners to open their land to public hunting and fishing, the power of landowners to limit liability to public users on their land, and a provision in the criminal code that makes it unlawful for hunters and fishermen to trespass without permission from the landowner.[198]

Most notably, the *Emmert* court relied on section 18-4-504.5 of the Colorado criminal trespass statute.[199] In 1977, while Emmert's case was pending appeal, the General Assembly passed section 18-4-504.5 to define "premise" of private property for the purpose of determining trespass.[200] In so doing, the legislature included stream banks and beds within a list of legally protected private premises.[201] The *Emmert* majority ended its analysis by citing section 18-4-504.5 as the last piece of evidence that the legislature intended *Emmert's* conduct to constitute a trespass.[202]

Although section 18-4-504.5 of the criminal trespass statute supported the *Emmert* Court's finding that a trespass occurred through the defendant's conduct, it failed to provide clarity for the overall access issue.[203] Unlike the SAL Legislation in Montana, section 18-4-504.5 failed to address three main points: whether a trespass would occur in the civil context; if the law allowed recreationalists to legally float on water that runs above what is defined as a "premise;" and whether fencing by a landowner is permissible to protect these "premises."[204] The court concluded its analysis by deferring its future decision-making power to the legislature, providing that "if the increasing demand for recreational space on the waters of this state is to be

197. *Id.* at 1029.
198. COLO. REV. STAT. §§ 33-1-112(g); 33-41-102(2); 33-6-123(1) (1970).
199. COLO. REV. STAT. § 18-4-504.5 (2004).
200. *See* Hill, *supra* note 4, at 334 for a description of how section 18-4-504.5 applies to the law in *Emmert.*
201. COLO. REV. STAT. § 18-4-504.5.
202. *Emmert*, 597 P.2d at 1029-30.
203. *See* Potter, *supra* note 14, at 458. Potter points out that there are several unresolved issues in the aftermath of *Emmert*, including civil liability and whether floating without contacting beds and banks is permissible. *Id. Emmert* and section 18-4-504.5 also failed to address how section 18-9-107(1)(a) of the criminal code was to be enforced in light of the *Emmert's* holding and the new legislative enactment. *See* Potter, *supra* note 14 at 475. Section 107(1)(a) of the criminal code makes it a misdemeanor to obstruct a waterway "to which the public or a substantial group of the public has access." COLO. REV. STAT. § 18-9-107(1)(a) (2004). Although this provision seems to indicate the legislature's intent to protect boaters from dangerous obstructions, such as barbed wire, neither *Emmert* nor any other reported cases have applied this law. *See* Potter, *supra* note 14, at 475.
204. *See* Potter, *supra* note 14, at 475 (describing the gray areas left out of the decision in *Emmert*).

accommodated, the legislative process is the proper method to achieve this end."[205] Despite the fact that neither section 18-4-504.5 nor *Emmert* address these three gray areas of access law, the Colorado legislature has yet to lend any clarity to the situation.[206]

Currently, the only explanation of law in regard to these finer points has come in the form of an Attorney General's Opinion.[207] In 1983, Colorado Attorney General Duane Woodard issued a formal opinion in response to the mounting confusion that remained in the aftermath of *Emmert* and section 18-4-504.5.[208] First, Woodard found that the criminal trespass statute and the *Emmert* decision do not prohibit a person's right to float over private property when banks and beds are not touched by the floater.[209] Second, Woodard found that the *Emmert* decision only applies in the criminal trespass context, and therefore the law does not afford civil remedy for victims of trespass under the *Emmert* law.[210] Finally, Woodard opined that the law cannot be "viewed as authorizing the owners of stream banks and beds to prohibit or otherwise control the use for floating of waters passing over their lands."[211]

The Attorney General's reasoning comes from the legislative history of the criminal trespass statute's definition of "premises."[212] In proposing section 18-4-504.5, Senator Kinney, the bill's primary sponsor, explained that the definition "[w]ill not stop tubing, canoeing or boating on the water, but will give the property owners the help of law enforcement officials against a few people bent on causing trouble." Senator Kinney went on to clarify that the bill "[s]imply makes it a criminal trespass to loiter on the stream banks, as the Bill is now, or on the stream beds. If they want to canoe or tube or stay on the water, not bother the properties, why there would be no problem."[213] Despite the supportive statements made in Woodard's opinion, conflicts over the finer points that were not addressed by *Emmert* continue on Colorado's waters today.[214]

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205. *Emmert*, 597 P.2d at 1029.

206. *But see* Potter, *supra* note 14, at 476 (asserting that the legislative intention in mentioning banks and beds, but not "water" or "channel" in section 18-4-504.5 was deliberately done in order to approve of floating through private property).

207. 1983 Colo. AG Lexis 42.

208. *See* Potter, *supra* note 14, at 478 (discussing the "Woodard Opinion" as an interpretation of the impact of the statutory trespass statute).

209. 1983 Colo. AG Lexis 42.

210. *Id.*

211. *Id.*

212. *Id.*

213. 1983 Colo. AG Lexis 42 (citing transcript of the Senate Committee of the Whole Hearing on Second Reading of S.B. 360, March 31, 1977, at 2-4).

214. *See, e.g., supra* note 7 and accompanying text for an example of recent conflict. *See also* American Whitewater, Colorado Navigability Report, *available at* http://www.americanwhitewater.org/access/navigability/reports/CO.htm (last visited Apr. 30, 2005) (identifying

d) What Does This All Mean? The Law in Practice on Montana and Colorado's Rivers and Streams

As discussed in the previous section, Colorado and Montana lawmakers have recognized the public right to float in some form, however varied it may be. The laws of each state have played the role of addressing the constitutionally granted right by defining the scope of the recreation easement. When all of Montana's public access laws are interpreted in concert, the following rules apply to recreationalists looking to float through private lands:

> (1) All surface waters capable of recreational use may be used by the public to the ordinary high water mark, regardless of land ownership;[215]
>
> (2) When faced with a dangerous situation or when faced with a barrier, recreationalists may portage on private land in the least intrusive manner;[216]
>
> (3) Recreational use includes fishing, hunting, swimming, boating by oar or engine, and all related incidental uses (including incidental contact with beds and banks); [217]
>
> (4) Permissible recreational use does not include overnight camping, construction of duck blinds, and big game hunting;[218] and
>
> (5) Fisherman may contact underlying riverbeds in order to fish rivers and streams.[219]

All of these enumerated rights may be exercised by the public without interference from landowners. Furthermore, landowners do not have standing for a Fifth Amendment takings claim when any of these public rights are exercised.[220]

By contrast, Colorado's vague recreational easement described in *Emmert* cannot be so easily described in just a few sentences. In Montana incidental contact is okay, while in Colorado it remains unclear whether or

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major areas of contention on the Cheeseman Gorge run from Lake George to the Cheeseman Reservoir, the Lake Fork of the Gunnison, the Taylor River, Bear Creek through the City of Morrison, and stretches of the Cache la Poudre River).

215. MONT. CODE ANN. § 23-2-302(1) (2004).
216. *Id.* § 23-2-311.
217. *Id.* § 23-2-301(10).
218. Galt v. Dep't of Fish, Wildlife and Parks, 731 P.2d 912, 915 (Mont. 1987).
219. Madison v. Graham, 126 F. Supp. 2d 1320, 1324 (D. Mont. 2001).
220. *Id.* at 1326.

not, or in what situations, incidental contact is permissible. There are several reasons why the decision in *Emmert* lends itself to ambiguity. First, *Emmert* addressed a conflict that arose out of stipulation that the defendants made contact with the riverbed.[221] It does not address how the law applies to a floater who does not touch river bottom. Second, *Emmert* involved a criminal suit and leaves open whether or not landowners have any civil recourse.[222] And finally, it is unclear when a private landowner may fence off a river to exclude the public and, when such an exclusionary right exists, whether a boater has a right of portage.[223] In the end, *Emmert* does not provide a sufficient blueprint for landowners and recreationalists to follow.[224]

Lawsuits on these finer points are currently wending their way through the Colorado state courts but have yet to be defined in law.[225] In the meantime, all of these areas of ambiguity have prompted misunderstanding among landowners and recreationalists alike, as local police continue to threaten prosecution for citizen-initiated complaints.[226]

III. ANALYSIS

The dissimilar laws and policies between the two states are particularly striking in light of the many similarities otherwise shared by the two states. Montana and Colorado share a likeness in hydrology, recreational

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221. People v. Emmert, 597 P.2d 1025, 1026 (Colo. 1979).

222. *Id.*

223. COLO. REV. STAT. § 18-9-107(1)(a) (2004). Although the obstruction criminal statute goes as far as to give a boater criminal recourse when faced with an unlawful obstruction, it does not inform a boater of what to do in order to avoid trespass when such circumstances exist. *Id.* Furthermore, the legislature has sent mixed signals by proclaiming that obstruction of public waters is a criminal act and by later defining a trespass to include the touching beds and banks of rivers on private land. *Id.* (making it a misdemeanor to obstruct a waterway to which the public has access); COLO. REV. STAT. § 18-4-504.5 (2004) (determining contact with private beds and banks underneath a waterway a trespass).

224. *See* Potter, *supra* note 14, at 458 (discussing ambiguities in the *Emmert* opinion).

225. *See, e.g.*, Jason Robertson, *River Access in Colorado Under Siege*, American Whitewater, Aug. 23, 2001, *available at* http://www.americanwhitewater.org/archive/article/195 (last visited Apr. 30, 2005). In 2001 a number of claims based on issues that were left unresolved in *Emmert* were filed in Colorado district courts. *Id.* Cannibal Outdoors, a river outfitter, was named as a defendend in Gunnison County District Court for alleged civil trespass on the Gunnison River through the private pary of Gateview Ranch. *Id.* On the Taylor River, a landowner was found to have no legal right for threatening boaters on a stretch of river that he believed to be private property. *Id.* The landowner was sentenced to "10 days in jail, 1 year probation, 96 hours public service, and about $450 in fines . . . he also has to attend anger management counseling, carry no firearms, and send letters of apology to the victims." *Id.*

226. *See* American Whitewater, Colorado Navigability Report, *available at* http://www.americanwhitewater.org/access/navigability/reports/CO.htm (last visited Apr. 30, 2005) (referring to the dismissal of two cases against four boaters on the Cheeseman Gorge segment of the South Platte River). On better understanding of the limited scope of the *Emmert* decision, district attorneys responsible for the prosecution, however, have dismissed many of these cases. *Id.*

growth, constitution, and water administrative systems, all of which should in theory dictate similar legal structures for public river access.[227] Nonetheless, the current and contrary legal structures provide sound lessons for future lawmakers in the intermountain states. The analysis section of this comment will evaluate the access laws of Montana and Colorado, first from a legal perspective and second in terms of policy implications.

A. Emmert *Got it Wrong*

The 1979 *Emmert* decision in Colorado is outdated and stands in isolation with respect to other established laws.[228] First, the Colorado law on access is inconsistent with other laws in Colorado, such as its current law on public servitudes and other laws within its water code.[229] Second, *Emmert's* reliance on the *ad coelum* argument runs contrary to federal law.[230] The ancient *ad coelum* doctrine that *Emmert* depends upon quite simply holds no water in federal and state jurisdictions.[231] This is especially true in jurisdictions like Colorado that have done away with the riparian doctrine altogether through adopting a pure prior appropriation water rights system.[232] Third, rather than depending upon the ancient doctrine for authority, *Emmert* should have looked to how access issues are handled in other prior appropriation states in the intermountain west.[233] In this respect, Colorado's interpretation of its state constitution runs contrary to the persuasive interpretations found in the neighboring prior appropriation states of Wyoming, New Mexico, and Montana.[234]

Before analyzing how the law in *Emmert* is contrary to federal and other similar intermountain state laws, it is important to note how *Emmert* is inconsistent with other Colorado law. First, *Emmert* is at odds with Colo-

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227. *See supra* notes 119-27 and accompanying text (describing similarities in hydrology and recreation growth shared between both states); *supra* notes 129-31 and accompanying text (describing similarities in state constitutions).

228. *See* People v. Emmert, 597 P.2d 1025, 1032 (1979) (Carrigan, J., dissenting). In his dissent, Justice Carrigan asserted that the ancient doctrine of *Cujus est slum, ejus est usque ad coelum*, which the majority relies upon, was never imported into Colorado's early common law. *Id.* The dissent stated that "[t]he principle is of such antiquity that the majority has to express it in Latin. *Id.*

229. *See infra* notes 235-57 and accompanying text for an analysis of relevant Colorado laws.

230. *See infra* notes 258-74 and accompanying text for an analysis of federal law.

231. *See infra* notes 258-74 and accompanying text for the proposition that *ad coelum* has been made obsolete in federal law.

232. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) (establishing the pure prior appropriation system in Colorado).

233. *See Emmert*, 597 P.2d at 1034 (Carrigan, J., dissenting) (implying that the majority should have recognized the same rights of access adopted in eleven other states west of the Mississippi River). For the proposition that Colorado law should follow the mainstream law expressed in other western states, *see* Potter, *supra* note 14, at 499.

234. *See infra* notes 277-91 for a discussion of how Wyoming, New Mexico, and Montana interpret their state constitutions on public rights to waterways.

rado's case law governing prescriptive easements for public trails. During the last year, Colorado has adopted a unique set of case law that recognizes rural trails and roads as public highways. In *Bockstiegel v. Board of County Commissioners*, an old stagecoach road was granted a prescriptive easement through private property for the public's use.[235] The prescriptive easement was granted after a showing of adverse use for a statutory period of twenty years or more.[236]

Hiking trails in Colorado are also considered public highways with certain prescriptive rights. In *McIntyre v. Board of County Commissioners*, the Colorado Supreme Court determined that an easement by prescription could be created for public trails if the petitioner could show adverse use for the twenty-year statutory period.[237] Although in this case the petitioner failed to show adverse use by hikers, the court nonetheless set the precedent that prescriptive rights do in fact apply to public trails.[238] In light of more recent case law, it seems reasonable that prescriptive rights might likewise be granted to public waterways. *Emmert* needs to be revisited in order to better reflect Colorado's current law on public rights of way. Because modern case law in Colorado seems to recognize waterways as public highways for the purposes of establishing adverse possession claims, *Emmert* should have addressed the issue in its opinion.[239] Nonetheless, the *Emmert* opinion fails to discuss the possibility of a prescriptive easement altogether.[240]

Secondly, the *Emmert* opinion is flawed because its method of interpreting the state constitution is inconsistent with how the same constitutional provision has been interpreted by modern Colorado courts. In order for the *Emmert* court to reach its holding, the Court carefully examined Article 16, Section 5 of the Colorado Constitution, which declares unappropriated water to be "the property of the public."[241] Through a historical interpretation, the *Emmert* majority found the framers used this language with the intent to preserve the appropriation system rather than grant an actual public right for the purpose of providing rights like access.[242] This interpretation is inconsistent with modern court opinions, which implicitly recognized Article 16, Section 5 to mean much more than merely an intention to protect a water rights system.

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235. Bockstiegel v. Bd. of County Comm'rs, 97 P.3d 324 (Colo. Ct. App. 2004), *cert. denied* 2004 Colo. LEXIS 679 (Sept. 7, 2004).
236. *Id.* at 328-29.
237. McIntyre v. Bd. of County Comm'rs, 86 P.3d 402 (Colo. 2004).
238. *Id.* at 413-14.
239. *See* Potter, *supra* note 14, at 496-98 (making the proposition that Colorado has implicitly recognized waterways as public highways).
240. Colorado v. Emmert, 597 P.2d 1025 (1979).
241. *See supra* notes 192-96 and accompanying text for discussion on how the majority in *Emmert* relied on Colorado's constitution to support its holding.
242. *Emmert*, 597 P.2d at 1028.

In the 1998 case of *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners,* the public's constitutional right to water was given definite legal meaning.[243] *Chatfield* expressly dispelled the belief that riparian land was superior to the public's right to keep water in underground storage in the name of the public.[244] In *Chatfield,* a subdivision owner attempted to deed land to a well company for the purpose of extracting groundwater.[245] The court ruled that the deed did not vest any absolute interest in the water below the property in question.[246] The court held that "no person 'owns' Colorado's public water resources as a result of land ownership."[247] Thus, this decision prioritized appropriative rights over public rights and public rights over riparian rights.[248]

Overall, *Chatfield* implies that the constitutional public right is more than an instrument of language.[249] The constitutional public right was interpreted to vest a legally recognized right that goes beyond the mere right to appropriate and is superior to riparian landowner claims.[250] With the holding of *Chatfield* in place in Colorado, the same superior public right should be recognized in the surface water context.

The Article 16, Section 5 public right to water was also interpreted to confer broader meaning in the 1995 case of *Aspen Wilderness Workshop v. Colorado Water Conservation Board.*[251] *Aspen Wilderness Workshop* involved a suit brought by an environmental organization that challenged the Colorado Water Conservation Board's (CWCB) decision not to enforce the public's instream flow water right respecting a creek under a water court decree.[252] The Court found that "the Conservation Board has a unique statutory fiduciary duty to protect the public in the administration of its water rights . . . ."[253] The court held that the CWCB breached its duty by not en-

243. Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n, 956 P.2d 1260 (Colo. 1998).
244. *Id.*
245. *Id.* at 1264.
246. *Id.* at 1268.
247. *Id. See also id.* at 1267 ("All surface and ground water in Colorado is a public resource.")
248. *See supra* note 247 and accompanying text (implying a riparian right, incident to land ownership is inferior to the public's right); *Chatfield,* 956 P.2d at 1271 (instructing the petitioner to appropriate water by applying for a well permit with the state engineer if they so desire to pump water and assert a claim that their right was superior to the public's right).
249. *See Chatfield,* 956 P.2d at 1268. The court extended the constitutional public right to state waters to include not only "natural streams" but also "tributary groundwater." *Id.* (citing COLO. CONST. art. XVI, § 5).
250. *Id.*
251. Aspen Wilderness Workshop, Inc v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).
252. *Id.* at 1253.
253. *Id* at 1260.

forcing water rights in the public's name.[254] If the public's right to water, as asserted in *Emmert*, only grants a right to appropriate through traditional means such as irrigation, it makes no sense that CWCB would have a duty to enforce the modern public water right for instream flows.[255]

Like the *Chatfield* decision, *Aspen Workshop* is representative of a recent trend in Colorado law affording more meaning to the public right to water as granted in Article 16, Section 5 of the Colorado Constitution. Although the modern cases do not expressly find the constitution to confer a public right of access, they nonetheless show that the public right expressed therein extends beyond traditional rights to irrigate.[256] Colorado's modern legal disposition toward affording more meaning to the public right is particularly relevant in determining a right of access, which was an integral factor within the *Emmert* analysis. The *Emmert* opinion rested on the legislative disposition towards confining the public right to irrigation and other traditional diversion needs.[257] If the law in Colorado should rest on the contemporary legislative disposition toward the public right, *Emmert* needs to be revisited in order to better reflect the aforementioned modern trend.

The law in *Emmert* is also inconsistent with federal law. Together, the seminal U.S. Supreme Court cases of *United States v. Causby* and *Laird v. Nelms* long ago abandoned the *ad coelum* doctrine in federal jurisdictions.[258] Although Colorado law is not bound by federal law, the U.S. Supreme Court decisions on the *ad coelum* doctrine should have had a more persuasive effect on the indecisive *Emmert* court. The 1946 *Causby* decision may have merely raised doubts as to the modern day application of the *ad coelum* doctrine, but the 1972 *Laird* decision went further by explicitly invalidating the doctrine in federal law.

The *Causby* Court found that a landowner's property interest is not absolute, but must yield to certain modern realities such as air travel.[259] Although the landowner in *Causby* in the end prevailed in their nuisance claim against a neighboring municipal airport, the Court nonetheless prospectively

254. *Aspen Workshop*, 901 P.2d at 1253 (citing section 37-92-102 of the Colorado water code). *See* COLO. REV. STAT. ANN. § 37-92-102(3) (2004) (providing that all instream flow rights appropriated by the CWCB are to be held in "behalf of the people of the state").

255. *See* Colorado v. Emmert, 597 P.2d 1025, 1028 (1979) (finding that Article 16, Section 5 of the Colorado Constitution "[w]as intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded").

256. *See supra* notes 243-54 and accompanying text for discussion of the modern cases that afford more meaning to the public right to waterways in Colorado, granted by the language of COLO. CONST. art. XVI, § 5.

257. *See supra* notes 197-202 and accompanying text for discussion of the *Emmert* court's reliance on the legislature's disposition towards limiting public rights of access.

258. United States v. Causby, 66 S. Ct. 1062 (1946); Laird v. Nelms, 406 U.S. 797 (1972). *See also Emmert*, 597 P.2d at 1033 (Carrigan, J., dissenting). Judge Carrigan cited *Causby* to support his assertion that *ad coelum* should not apply to Emmert's case. *Id.*

259. *Causby*, 66 S. Ct. at 1068.

invalidated the *ad coelum* doctrine for the future.[260] The Court concluded that the Doctrine has "no place in the modern world."[261] With dicta in the chief opinion in *Causby* ending with this skeptical message, it appeared that the landowners in *Causby* would be the last to advance a plausible *ad coelum* argument in a U.S. court.[262]

Almost thirty years later, *Causby's* skepticism of the doctrine was affirmed in *Laird v. Nelms*.[263] *Laird* involved a civil action under the Federal Tort Claims Act against a government military facility.[264] Nelms, a private landowner, sought recovery for alleged damages to his house as a result of sonic booms caused by a U.S. Air Force aircraft.[265] The Court held that the government was free of liability, finding high-altitude flights over land do not constitute a trespass.[266] The majority cited dicta from *Causby* in order to support its holding, pointing out that the ancient *ad coelum* doctrine has "no place in the modern world."[267] Thus, *Laird* fulfilled the prophecy laid out in *Causby* by invalidating legal claims based on the archaic reasoning from the *ad coelum* doctrine in the modern world.

In the water navigability context, there is no federal law that directly addresses the *ad coelum* doctrine. However, the doctrine seems to have been made obsolete with the U.S. Supreme Court decision of *Kaiser Aetna*.[268] Although the *Kaiser Aetna* Court held that the federal navigational servitude constituted a Fifth Amendment taking of the plaintiff's land on the Hawaiian Harbor, the opinion implied that the *ad coelum* concept is invalid for the purpose of determining navigability in U.S. jurisdictions.[269] Other courts in following *Kaiser Aetna* have found instances where a federal navigational servitude does not warrant compensation to private landowners.[270] Thus, it appears that the analysis established in *Kaiser Aetna* is open to the possibility that private land may be encumbered by a non-compensatory public ser-

260. *Id.* at 1066. The majority upheld the petitioner's nuisance claim, after finding that the federal government's conduct rendered the claimant's property uninhabitable. *Id.*
261. *Id.* at 1065.
262. *Id.*
263. Laird v. Nelms, 406 U.S. 797 (1972).
264. *Id.* at 798-99.
265. *Id.* at 797.
266. *Id.* at 800.
267. *Id.* at 799-800.
268. Kaiser Aetna v. United States, 444 U.S. 164 (1979).
269. *Id.* at 175 (implying that private rights to ownership are not absolute). "Whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Id.*
270. *See, e.g.*, Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982); *see also* Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997). *See supra* note 41 for the holdings of these two cases.

vitude. Such reasoning goes against the very definition upon which the *ad coelum* doctrine derives its legitimacy.[271]

Although the above reasoning seems to further undercut the doctrine's validity, there are admittedly certain limitations to *Kaiser Aetna's* legal effect on *Emmert.* The Supreme Court in *Kaiser Aetna* did not directly address *ad coelum* in the same context as *Emmert.* The *Kaiser Aetna* decision involved a federal determination of navigability, which put title of the beds and banks of the waterway at issue in a Fifth Amendments takings context.[272] *Emmert,* on the other hand, involved a determination of whether private title to beds and banks was subject to an easement by virtue of public ownership of overlying waters.[273] Due to this distinction in the facts, there is no guiding federal authority over the decision made in *Emmert.*[274]

Lastly, and perhaps most importantly, the law in *Emmert* runs contrary to laws in neighboring intermountain states. Given a lack of state law and of any persuasive federal authority on the issues addressed in *Emmert,* the majority should have relied upon other state decisions for authority.[275] The judicial decisions on access law in the neighboring states of New Mexico and Wyoming should have been addressed more fully by the *Emmert* majority, since those state decisions were based on the same issues that the *Emmert* court faced.[276] First, like Colorado, the intermountain states of New Mexico and Wyoming are both pure prior appropriation states that do not recognize any rights to water based on the common law rule of riparianism.[277] Second, New Mexico, Wyoming, and Colorado all have similar con-

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271. *See* Colorado v. Emmert, 597 P.2d 1025, 1027 (1979) (describing the common law rule of *cujus est solum, ejus est usque ad coelum* to hold that "he who owns the surface of the ground has the exclusive right to everything which is above it").

272. *See supra* notes 34-40 and accompanying text for a detailed discussion of the *Kaiser Aetna* decision.

273. *See supra* notes 186-92 and accompanying text for the factual background of *Emmert.*

274. *But see* Madison v. Graham, 123 S. Ct. 2221 (2003). The *Madison* court denied a petition for writ of certiorari from the Court of Appeals for the Ninth Circuit on the issue of whether Montana's public servitude for access constituted a Fifth Amendment taking of private ownership of beds and banks. *Id.* If a definite public easement for access were established in Colorado and subsequently challenged under a takings claim at the federal level, it would most likely fail. *See* Potter, *supra* note 14, at 498 for the assertion that that public access opponents in Colorado ignore potential conflicts with federal and constitutional law.

275. *See supra* notes 243-56 and accompanying text for support of the proposition that although Colorado state law provides guidance, it does not directly address the question raised in *Emmert* as to whether a definite public right of access is granted by the Colorado Constitution.

276. *See supra* notes 54-77 and accompanying text for detailed discussion of New Mexico and Wyoming law on public access rights.

277. New Mexico v. Red River Valley Co., 182 P.2d 421, 430 (N.M. 1946) (stating that the Colorado rule of pure prior appropriation is followed in New Mexico). Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation,* 71 OREGON L. REV. 381, 390-91 (1992) (implying that Wyoming law follows the "Colorado Rule" of pure prior appropriation). The "Colorado Rule," established in *Coffin v. Left Hand Ditch Co.,*

stitutional provisions that grant a public right to state waters.[278] Finally, the courts of all three states have heard cases involving a determination of whether a public servitude exists on waterways that do not meet the federal test for navigability.[279] Despite these overwhelming similarities, Colorado stands in isolation as the only state out of the three that does not grant a definite public servitude on state waterways.[280]

In defining a narrow recreational easement, *Emmert* appropriately looked for authority in the Wyoming case, *Day v. Armstrong*, but erroneously distinguished it.[281] The majority in *Emmert* asserted that because the Wyoming constitutional provision does not mention appropriation, the outcome of *Day v. Armstrong* doesn't apply to Colorado.[282] This reasoning is inherently flawed, since the public's undeniable right to appropriate is granted within other provisions of the state constitution.[283] The *Emmert* majority failed to read Wyoming's constitutional provision on public rights to water in conjunction with other pertinent state constitutional provisions.[284] Furthermore, *Emmert* avoided discussion of the New Mexico decision in *Red River Valley* altogether.[285] The decision in *Red River Valley* would seem particularly important to the *Emmert* analysis, given that the New Mexico opinion draws on Colorado law in order to arrive at its holding.[286]

It has been argued by at least one scholar that because Colorado has never applied the Public Trust Doctrine to water, there is no basis in Colo-

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erases all vestiges of riparian common law by recognizing prior appropriation to have existed in Western America, before statehood. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882).

278. *See* Potter, *supra* note 14, at 489-92 (comparing the constitutions of New Mexico, Colorado, and Wyoming).

279. Colorado v. Emmert, 597 P.2d 1025 (1997); Day v. Armstrong, 362 P.2d 137 (1961); New Mexico v. Red River Valley Co., 182 P.2d 421 (N.M. 1946). *See supra* notes 54-77 and accompanying text for discussion of the *Red River Valley* and *Day* cases.

280. *See supra* notes 221-26 and accompanying text for an illustration of the ambiguities within the defined scope of Colorado's recreational easement.

281. *Emmert*, 597 P.2d at 1028 (distinguishing the Colorado Constitution from Wyoming's). The majority compared the language in WYO. CONST. art. VIII, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.") with COLO. CONST. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). *Emmert*, 597 P.2d at 1028.

282. *Id.*

283. WYO. CONST. art. VIII, § 3 (providing that "[n]o appropriation shall be denied except when such denial is demanded by the public interests").

284. *See Emmert*, 597 P.2d at 1028 (discussing Wyoming law on recreational access rights).

285. New Mexico v. Red River Valley Co., 182 P.2d 421 (N.M. 1946); *see Emmert*, 597 P.2d at 1028 (failing to cite the New Mexico case in its discussion of other state authorities on the issue).

286. *See supra* note 66 and accompanying text for support of this proposition.

rado to grant stream access through a public servitude.[287] This assertion ignores the methods employed by the courts in New Mexico and Wyoming in granting a public right of access. In the majority opinions of both *Day* and *Red River Valley* there is no mention of the Public Trust Doctrine.[288] Rather, both courts establish a public right of access solely from the language of the state constitution and an analysis of the prior appropriation doctrine.[289]

As a final matter the access law in Colorado now stands contrary to Montana's law. Although the *Emmert* court at the time it issued its decision in 1979 was not able to look to Montana's access laws, which developed five years later, *Emmert* should be revisited in order to reflect upon the recent developments of its northern neighboring state.[290] Like the other intermountain states, Montana has granted an affirmative public right of access from the plain meaning of its state constitution.[291] Colorado should follow Montana's lead in recognizing the law in *Day* in light of the fact that the Montana Constitution also expressly grants a public right to state waterways that is subject to appropriation.[292] However, as the access laws stand today, the introduction of Montana's access law only serves to pit Colorado's law further as the minority state in the intermountain west.

B. Montana Law is Legally Grounded

In stark contrast to Colorado law, Montana's laws are consistent with federal laws, with other laws in Montana, and most importantly with

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287. *See* Hill, *supra* note 4, at 341 for the argument that Colorado's rejection of the Public Trust Doctrine should lead to a denial of a public servitude for recreationalists on Colorado waterways.

288. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). No mention of the words "public trust" appear in the opinion. *Id.* Like *Day*, no mention of the words "public trust" appear in the opinion of *Red River Valley*. *Red River Valley*, 182 P.2d at 421.

289. *See supra* notes 54-77 and accompanying text for a discussion of Wyoming and New Mexico access law and how an affirmative public right of access has been granted by the language of state constitutions and the prior appropriation doctrine. Some scholars suggest that the Public Trust Doctrine was also unnecessary for Montana to grant a public right to access. *See supra* notes 140-43 and accompanying text for a discussion of the relevance of the Public Trust Doctrine as it relates to the holding in Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984).

290. *See generally Curran*, 682 P.2d 163 (establishing a definite right of access five years after *Emmert* delivered its decision).

291. *See supra* notes 134-81 and accompanying text for a detailed look at Montana access law, which interprets the plain meaning of its constitution to support state recognition of an affirmative public right of access.

292. *See supra* notes 129-31 and accompanying text. *Emmert* distinguished the Wyoming *Day* case after finding that the Wyoming Constitution did not grant a public right that was subject to appropriation. *See supra* note 281 and accompanying text. However, Montana followed the ruling in *Day*, despite the fact that the Montana Constitution mentions appropriation. *See supra* notes 129-31 and accompanying text; *see also* MONT. CONST. art. IX, § 3 ("[A]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation . . . .").

other western state law on access. In providing a public right of access, Montana uses a sound, plain-meaning method of interpretation that broadly recognizes the "public right" to waterways.[293] Montana not only established a public right for recreational access on its waters, but also a public right for the incidental contact associated with wading and emergency portages.[294]

The broad meaning afforded to the "public right" has also been tested and affirmed at the federal level.[295] Furthermore, unlike Colorado's law from *Emmert*, Montana law does not contradict federal law that seems to have made the *ad coelum* argument long ago obsolete.[296] In this regard, Montana law runs a much lesser risk of being overturned or modified in the future.

Montana's broad law on access is also supported by the state's related legislation, which also recognizes a public right to state waterways. Specifically, the Montana water code includes public interest and public instream flow laws that actively recognize and facilitate such a right.[297] In Montana's 1984 Water Use Act, the legislature amended its water code to provide representation of public rights within its overall water allocation scheme.[298] The legislature also authorized the Department of Fish, Wildlife, and Parks to represent the public in establishing water rights for recreation.[299] Under this authority, the Department of Fish, Wildlife, and Parks has filed instream flow reservations on twelve of its "blue ribbon" streams for the maintenance and preservation of flows for the public.[300] The 1984 legislative package also required that local public interests be factored before issuing water rights permits.[301] The Department of Natural Resources and Conservation is now required to consider any economic and environmental factors, impacts, and benefits to the state before issuance.[302] Most signifi-

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293. *See supra* notes 134-81 and accompanying text for detailed discussion of Montana's public access laws.

294. *See supra* notes 215-19 and accompanying text for a list of the permissible incidental uses that are verified by Montana law.

295. *See* Madison v. Graham, 123 S. Ct. 2221 (2003) (denying petition for writ of certiorari on the issue of whether Montana's state determination of navigability constitute a governmental taking).

296. *See supra* notes 258-71 and accompanying text for discussion of how federal law has rejected the *ad coelum* doctrine.

297. *See generally* MONT. CODE. ANN. §§ 85-2-223, 85-2-316, 85-2-311 (LexisNexis 2004).

298. *See id.* for the relevant provisions of Montana's Water Use Act.

299. *Id.* § 85-2-223 (2004).

300. *Id.* § 85-2-316.

301. *Id.* § 85-2-311. The Montana Department of Natural Resources and Conservation along with local water judges (comprised within Montana's four water court divisions) were given the authority of managing/issuing water permits. *Id.* This general adjudicative authority was granted after the passage of the Montana Water Use Act of 1984. *Id.*

302. *Id.*

cantly, Montana's SAL statute codifies all of Montana's case law on recreational access issues.[303]

Perhaps more importantly, Montana's liberal law on access puts Montana in line with the majority of western states that likewise recognize a right of access.[304] Montana's access laws are particularly consistent with the other intermountain, prior appropriation states of New Mexico and Wyoming.[305] Like these two states, Montana has affirmatively afforded a right of access through recognizing the Montana Constitution grants a general public right to water.[306] Since there is no clear authority on the issue of whether a state servitude for the public can be imposed upon private ownership of bed and banks, consistency with other state access laws is an important measure to legitimizing lawmaking.[307]

C. Montana Law Creates Better Policy

Because water laws are primarily intended to conform to societal needs, policy considerations play a major role in river access legislation in the west.[308] Policy considerations are particularly relevant to the making of water laws, since water resources in America have been legally and historically recognized as a public form of property.[309] The legislative process that determines recreational river access in the west should unfold in order to best reflect societal stimuli and all the modern circumstances that drive it.[310]

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303. *See supra* notes 148-62 and accompanying text for a summary of Montana's SAL statute.

304. *See supra* notes 54-77 and accompanying text for discussion of Wyoming and New Mexico's recreational access laws.

305. *See* Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (granting a right of access over waterways that do not meet the federal definition of navigability); State Game Comm'n v. Red River Valley Co., 182 P.2d 421 (N.M. 1946) (granting a right of access similar to Wyoming's).

306. *See* Mont. Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984) (granting a public right to access in Montana).

307. *See supra* notes 243-57 and accompanying text for a closer look at other Colorado laws that address the issue; *see supra* notes 268-74 and accompanying text for a closer look at relevant federal law.

308. *See* DAVID GETCHES, WATER LAW IN A NUTSHELL 3 (West Publishing Co. 1997) (1984). Getches states that "[t]he law's success—in any field, but especially in water law—has to be evaluated in terms of what society needs from it." *Id.*

309. *See id.* at 11. The author states that "[w]ater is legally and historically a public resource," linking the historical development of the Public Trust Doctrine with the Navigability law in America to support his assertion. *Id. See also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) (written as part of the *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow* held in New York City in 1989).

310. GETCHES, *supra* note 308, at 2-3. Getches describes water law as an illustration of "[h]ow courts and legislatures create and alter law according to societal stimuli: one set of historical conditions drove the initial development of water law but different modern circumstances provoke changes." *Id. See also* Bruce Babbit, *The Public Interest in Western Water*, 23 ENVTL. L. 933, 937 (1993) ("[T]he [river access] issues have evolved way beyond owner-

To meet this end, legislatures should strive to preserve the contemporary common interest of the public and should do so notwithstanding any bureaucratic inefficiencies that may thwart the common needs of society.[311] Thus, good access law is backed by a policy that balances the underlying private and public interests behind recreational access issues as if they were being weighed by the people themselves.

Sound policy is particularly imperative in the intermountain west, considering the many factors that will undoubtedly exacerbate water controversies that will affect future generations of westerners. An already scarce supply of water in the region is certain to intensify with ensuing urban growth.[312] As water resources continue to be stretched in the arid west, the values associated with public and private rights will rise to new heights of concern.[313] In this respect, neither Colorado nor Montana will be afforded the luxury of time, as both share almost identical drought conditions and citizen demands of water.[314]

Determining the aforementioned societal stimuli can be effectively done by looking at the economies of the states making the laws.[315] As men-

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ship issues and ought to be seen as a part of an effort to recapture the public interest in the water resource.").

311. Frank J. Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat,* 14 NAT. RESOURCES J. 207 (1974). In this aptly titled article, western water guru and former University of Wyoming School of Law Dean, Frank Trelease, stated:

> The Wise Administrator, as every one knows, is the man in a government office who protects "the public interests" (read *my* interests) from actions which would adversely affect those interests, when the public is (I am) otherwise unable to influence the course of those actions. The other fellow is as easy to spot; he is the man in government who makes decisions for me that I would rather, and could better, make for myself.

Id. at 207.

312. *See* Kenneth D. Frederick & Peter H. Gleik, *Water and Global Climate Change: Potential Impacts on U.S. Water Resources* 31-33 (1999), *available at* http://www.earthscape.org/p1/frk01/frk01.pdf (last visited May 1, 2005). Urban growth rates in the intermountain states are the highest in Colorado. U.S. Census Bureau, Census 2000, States Ranked by Percent Population Change: 1990 to 2000 (Apr. 2, 2001), *available at* http://censusscope.org/us/rank_popl_growth.html (last visited May 1, 2005). From 1990 to 2000 Colorado's population growth was more than two times greater than Montana's. *Id.*

313. *See supra* notes 119-23 and accompanying text for a summary of the climates and competing demands for water in Montana and Colorado.

314. *See supra* notes 119-22 and accompanying text for a description of the arid nature of Montana and Colorado's climates and citizen demand for water.

315. Commentators on water law often turn to economics in order to develop recommendations on policy. *See, e.g.,* Reed D. Benson, *Recommendations for an Environmentally Sound Federal Policy on Western Water,* 17 STAN. ENVTL. L.J. 247, 262-63 (1998). To evaluate federal water policies in the west, the author uses an economic analysis to weigh the value of current allocated water uses in the west. *Id. See also* Osbourne, *supra* note 3, at 448. The authors observe the evolution of access laws as a reflection of "[c]hanging historical, cultural, and economic developments." *Id.*

tioned in the background of this comment, the overall economies in both Colorado and Montana are highly influenced by recreationally based industries.[316]

Without doubt, these recreational industries should continue to thrive into the future if current public support for water-based recreational activities has anything to do with it. In the 1990s, the number of out-of-state fishing licenses sold in Montana increased dramatically, ranking sales in Montana as the third highest among the fifty states.[317] Likewise, there appears to be a growing appreciation for recreational opportunities in Colorado, as evidenced by the number of recreational water rights that are being acquired by municipalities.[318] In-channel water rights have been decreed by Colorado water courts and continue to be filed for numerous towns across the state.[319] Water rights for recreational uses are decreed for whitewater parks that provide kayaking, tubing, and canoeing to promote local recreation and draw tourism.[320] Awareness of recreational values has even reached the political forum in Colorado. In a recent U.S. House of Representatives meeting, Colorado Representative, Mark Udall, spoke of the importance of

316. *See supra* notes 124-27 and accompanying text for an overview of the recreational economies in Colorado and Montana.

317. *See supra* note 127.

318. In 1986, the city of Fort Collins, Colorado applied for two water rights on the Cache La Poudre River; one for fifty-five cfs for boating and piscatorial purposes and one for a diversion from the Cache La Poudre River into the old channel to sustain habitat for a nature center. Case No. 86CW371 (Water Division No. 1). Despite opposition from the City of Thornton, these water rights were upheld in City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992). Since the decision in *City of Thornton*, other Colorado municipalities have obtained water decrees for recreational uses. *See* State Engineer v. City of Golden, 69 P.3d 1027 (Colo. 2003) (affirming water decrees for the City of Golden's whitewater park); State Engineer v. Eagle River Water and Sanitation Dist., 69 P.3d 1028 (Colo. 2003) (affirming water decrees for recreational water rights for whitewater parks in Breckenridge and Vail); Case No. 94CW273 (Water Division No. 1) (decreeing 100 cfs for the City of Littleton's boating course on the South Platte River). Applications for recreation water rights are pending approval from the CWCB for the cities of Pueblo, Steamboat Springs, Longmont, and Gunnison. Colorado's Recreational In-Channel Diversion (RICD) Program: Pending RICD Applications, *available at* http://www.cwcb.state.co.us/isf/rules/RICDapp.htm (last visited May 1, 2005).

319. *See supra* note 318 and accompanying text for summary of decrees for in-channel water rights in Colorado. In 2001, the Colorado legislature passed Senate Bill 216, which significantly changed the way rights for recreation purposes are currently appropriated in Colorado. COLO. REV. STAT. § 37-92-103(4) (2004). The legislation provided that in-channel recreational water rights may only be appropriated by local governmental entities and water districts. *Id.* § 37-92-103(10.3). Senate Bill 216 also required that requested minimum stream flows are "[d]iverted, captured, controlled, and placed to beneficial use between specific points." *Id. See also* 2 COLO. CODE REGS. § 408-3(p) (2004) (the CWCB's agency rules for recreational in-channel diversions).

320. *See* Bruce Barcott, *There's an Old Saying in Colorado: You Can Steal My Wife, But Not My Water*, 2004-Aug LEGAL AFF. 48 (2004) (summarizing the motivation and justification behind the City of Golden's recreational water right filing).

recreation for youths and adults, emphasizing the value of recreation and paddlesports on fitness.[321]

In light of the above considerations, good policy behind the access laws of Colorado and Montana should in theory reflect the current economic and social values in river recreation. Nonetheless, the laws in place in these states represent policies that stand in direct contradiction to each other. Montana's liberal recreational servitude embraces public values by facilitating outdoor enthusiasts and recreation-based industries with uninterrupted use of rivers and streams. In stark contrast, Colorado's narrowly defined recreational servitude does not serve to support policy that would recognize the economies and social values associated with water recreation. It serves only to limit the necessary means by which river tourism may continue to grow and by which river enthusiasts may exercise their passions and lifestyles.

IV. CONCLUSION

Montana's scope of the public's right is the clearest in the intermountain west, while Colorado's access law stands alone as the most ambiguous. Montana's liberal stream access statute provides a bright-line rule for future recreational users and landowners to plan their affairs accordingly. The Montana legislature has addressed important issues related to right of portage and other incidental rights pursuant the public's constitutional right to state water.[322] Because Montana's stream access statute leaves no gray areas for misinterpretation, there is a low potential for future conflict. Thus, Montana can rest assured that law enforcers and water users alike will have statutory authority for the conduct they take before and after claims of trespass arise on state waters.

By contrast, in Colorado where recreational access law remains ambiguous, the potential for conflict is greatest. The Colorado Legislature has not provided recreational users and landowners with a solid blueprint of law to follow. There is no statutory law that defines when and where a private landowner may fence off rivers and streams to public access, whether a right of portage exists for recreational users, or if a private landowner has civil recourse.[323] Not only does the current law in Colorado under *Emmert* fail to comport with the laws of neighboring prior appropriation states, it also fails as a matter of policy.

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321. Jason Robertson, *Political Update: Bipartisan Congressional 'House Party,'* American Whitewater, January/February 2004.

322. *See supra* notes 215-19 and accompanying text for a list of the permissible incidental uses in Montana.

323. *See supra* notes 221-24 and accompanying text for discussion of the ambiguities found in Colorado's access law.

Although the Colorado Attorney General attempted to address some of these areas of law in a formal opinion, the legislature has failed to do the same.[324] The reason for this failure is not entirely clear. Perhaps it is due to an unfounded fear that the Public Trust Doctrine may take hold and undermine Colorado's traditionally protected uses or maybe the legislature has other complex political justifications.[325] Regardless of why the legislature avoids the issue, this provides little comfort to those who support public policy to promote and perfect recreational use of the state's water resources.

Even beyond Montana, the recreational access laws found in the neighboring intermountain states of Wyoming and New Mexico appear to be on the right track. Although the access laws in both of these states may not be as clear as Montana's law, they nonetheless provide a general right of access on state waters that is upheld against criminal or civil claims of trespass.[326] There remains some uncertainty in these states as to whether rights of portage or wading are protected. However, Wyoming has begun to refine its access law in regard to these areas of ambiguity. During the 2005 legislative session, a bill revising their current law to allow for more incidental uses was proposed in the House and other bills like it have reached the capital building in the past.[327]

Colorado lawmakers should follow the lead of the intermountain states and pass legislation that affirmatively recognizes a public right of access. Perhaps the political change in the Colorado General Assembly following the 2004 elections may serve as a catalyst for much needed legislation.[328] As asserted earlier, policy and law is on the side of such recognition, but so is the logic of nature. Are the river beds and banks so inseparable from the river itself? Perhaps Norman McClain answered this question best in stating, "The river was cut by the world's great flood and runs over from the basement of time. On some of the rocks are timeless raindrops—under the rocks are the words and some of the words are theirs."[329]

TRAVIS H. BURNS

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324. *See supra* notes 207-14 and accompanying text for a summary of the Colorado Attorney General's opinion.

325. *See* Lori Potter, *The 1969 Act and Environmental Protection*, 3 U. DENV. WATER L. REV. 70, 77 (1999) (describing the public trust in Colorado as "The Two Little Words That Can't Be Spoken").

326. *See supra* notes 54-77 and accompanying text for a detailed discussion of Wyoming and New Mexico's public access laws.

327. *See supra* notes 15-18 and accompanying text for overview of Wyoming's proposed legislation that addresses public access rights.

328. Dennis Cauchon, *Dems Gain in 'Hidden Election,'* USA TODAY, Dec. 14, 2004, at 3A (reporting that "[C]olorado democrats took control of both the House and Senate for the first time since 1974.").

329. *A River Runs Through It*, Columbia/Tristar Studios, 1992.