Public Ownership, Public Rights: Recreational Stream Access Decisions in the Mountain West

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PUBLIC OWNERSHIP, PUBLIC RIGHTS: RECREATIONAL STREAM ACCESS DECISIONS IN THE MOUNTAIN WEST

Reed D. Benson*

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ABSTRACT

Stream access disputes involve a clash of public and private rights. Boaters and anglers often view streams as public resources they can float or fish so long as they can reach them without crossing private land; many private landowners view streams flowing through their land as part of their property, from which they can exclude the public. Many such disputes have been litigated, forcing courts to decide whether state law provides a right of public access to streams crossing private land. This Article examines cases in the Mountain West, where six state supreme courts have made decisions on recreational access. Five of these courts have recognized a “right to float” under state law, based primarily on constitutional or statutory language declaring that water is owned by the public, or by the state. This Article examines the Mountain West stream access cases, analyzes the key legal factors involved in these decisions, and concludes with brief observations on public waters and public uses.

I. INTRODUCTION

Whitewater boating involves familiar risks, but four kayakers who set out to paddle rain-swollen Burro Creek in Arizona encountered a different kind of danger: a landowner (Button) who shot at them as they floated through his property. According to the Arizona Court of Appeals, Button took aim and fired several shots at the lead kayaker, who rolled underwater trying to avoid the bullets; when the kayaker rolled up, Button told him, “This one’s not going to miss.” Miss it did, but Button kept shooting until the lead kayaker paddled out of range. Button then ordered the other three off the river at gunpoint and forced them to carry their boats back up to the Bureau of Land Management campground from which they had launched. Later charged with multiple crimes, Button argued that his actions were justified because the kayakers were trespassing; he insisted that Arizona law provides no right to float over or through private property. The Arizona Court of Appeals upheld Button’s convictions because it held that his actions were unreasonable even if the kayakers were trespassing—but it expressly

2 Id.
3 Id.
4 Id. According to the Court of Appeals, Button “assumed a ‘shooter’s position,’ took aim, and fired shots at . . . [the lead kayaker], moving closer to his target between each round.” The last bullet that Button fired hit the water “within a few feet” of the kayak. Id.
5 Id. at *2. Button had posted a “no trespassing” sign above the creek at his property boundary, but the kayakers testified that they never saw it, and law enforcement officers found the sign to be “fairly faded” and “really difficult to read.” Id.
6 Id.
7 Id. at *4.
refused to decide whether Arizona recognizes a “right to float” on waters passing through private lands.\(^8\)

Encounters between recreational boaters and landowners do not typically involve gunfire, but there are often strong disagreements about legal rights. Boaters, anglers, and other recreational users claim they have a right to float on waters they can access without having to cross private land; private landowners claim the right to exclude such users from waters that flow over or through their property. In essence, recreational users tend to see the water as a public resource that is open for use regardless of the lands it passes over, whereas landowners see it as part of (or an extension of) their private property. Both tend to think the law is on their side, and appellate courts across the country have been called on to decide the issue.\(^9\)

Although Arizona has not yet settled whether there is a right to float that state’s waters, the supreme courts of six other states—Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming—have decided the issue in a set of cases that spans decades.\(^10\) Of these six states, all but Colorado have recognized a right to float under state law, and the supreme courts recognizing this right based their decisions primarily on state constitutional or statutory provisions declaring that water belongs to the public, or the state.\(^11\)

Recreational access rights have remained contested, even where there is an established right to float. Some disputes involve the extent to which recreational users of a stream or lake are allowed to touch the water’s privately owned beds and banks. The “right to touch” underlying lands is related to, but distinct from, the right to float. In a state with a recognized recreational right to float, the right to touch may be broad (e.g., allowing users to wade in private stream beds and stand on private banks), narrow (e.g., allowing lands to be touched only as needed to free a boat from sandbars or rocks), or not clearly defined.\(^12\)

In New Mexico, for example, recreational access rights remain fiercely disputed even though the state supreme court recognized a right to float in a pioneering 1945 decision.\(^13\) Decades later, the New Mexico State Game Commission

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\(^8\) Id. The district court had found that the kayakers were not trespassing, but the Court of Appeals had vacated that ruling, stating that there is “no Arizona authority” on the existence (or not) of a right to float. See id. at *3. When Button asked the Court of Appeals to hold that there is no right to float in Arizona, the court refused to reach the issue, saying it was not necessary to decide the case. Id. at *4.


\(^10\) See infra Part III.

\(^11\) Arizona has a public ownership provision in statute, ARIZ. REV. STAT. ANN. § 45-141(A) (2022), but no case has decided whether it provides a right to float on waters of the state. The situation is similar in Nevada. See NEV. REV. STAT. ANN. § 533.025 (2022).

\(^12\) See infra Part III.B–G.

\(^13\) See infra Part III.A.
adopted a rule by which a property owner with waters flowing over his/her lands could petition to have these waters declared private, allowing the owner to exclude the public from using them.\textsuperscript{14} Legal and political battles ensued, and a lawsuit challenging the rule reached the New Mexico Supreme Court in 2022.\textsuperscript{15} The court ruled from the bench within 15 minutes that the rule violated the state constitution.\textsuperscript{16} Six months later, its written opinion confirmed that the public has a right to touch privately owned streambeds as needed for recreational water use.\textsuperscript{17}

This Article focuses on the foundational decisions on recreational stream access rights in the Rocky Mountain states of the Interior West (a region this Article calls the Mountain West). Although stream access controversies have arisen in states throughout the country, the Mountain West offers an interesting study because the states of this region share some key commonalities regarding water. The Mountain West is by far the driest region in the country in terms of average annual precipitation.\textsuperscript{18} Every state in the region has always allocated and managed water exclusively under the prior appropriation doctrine, which recognizes water rights based on “beneficial use” and generally favors removing water from streams for economically productive uses.\textsuperscript{19} And although the language varies from state to state, each state provides by constitution or statute that the waters of the state belong to the public, or to the state.\textsuperscript{20}

Part II of this Article briefly explains background principles of law involving state control of water resources, ownership of stream and lake beds and banks, and the meaning and significance of “navigability.” Part III summarizes recreational access cases from six Mountain West supreme courts and ensuing developments in some states. Part IV analyzes the key factors in these judicial decisions on stream access, focusing on each state’s provision on public ownership

\textsuperscript{14} N.M. Code R. § 19.31.22 (2018) (repealed 2022) (setting up a process by which a landowner could petition the State Game Commission to have a waterway on his/her lands designated as “non-navigable public water,” which would then be closed to anyone without landowner permission).


\textsuperscript{17} Adobe Whitewater, 519 P.3d 46. The court released the Adobe decision on September 1, 2022, six months to the day after ruling from the bench. The landowners then petitioned the U.S. Supreme Court for a writ of certiorari, Petition for a Writ of Certiorari, Chama Troutstalkers, LLC v. Adobe Whitewater Club of N.M., No. 22-410 (U.S. Oct. 28, 2022), 2022 WL 16637940.


\textsuperscript{19} ROBIN KUNDIS CRAIG ET AL., WATER LAW 43 (2017).

\textsuperscript{20} See infra Part IV.A.
of water, state precedents and statutes, holdings from other states, and judicial views regarding public waters and public uses. Part V concludes with brief observations about public ownership and recreational access rights in the Mountain West.

II. Underlying Principles: Ownership and Control of Waters and Their Underlying Lands

In conflicts between landowners and recreational users, both tend to believe strongly that the law is on their side. Understanding these disputes requires a basic grasp of key legal principles regarding ownership and use of waters and the beds and banks of streams and lakes. Although some of the legal rules are federal, these are primarily issues of state law.

A. State Control of Water Resources

State law governs water allocation and use in most respects. In other words, each state establishes its own water rights framework, with rules for who may access and use water for a wide range of purposes. The U.S. Supreme Court has recognized since the 19th century that each state may determine its system of water rights.

For surface water rights, states have essentially chosen between two systems, riparian rights and prior appropriation. Among several major differences between the two, the most fundamental distinction is the basis for a water right—that is, the factors that give rise to a legal right to use water from a specific stream or lake. The riparian rights system generally limits such rights to those who own land adjacent to the stream or lake, i.e., riparian landowners. Prior appropriation bases water rights not on land ownership, but on application of water to a “beneficial use,” such as irrigation or public water supply. The beneficial use need not take place on land near the stream or lake from whence the water was taken. In the riparian system, ownership of land along a waterway confers a right to use its water; prior appropriation gives no such water rights to adjoining landowners, severing the legal tie between land rights and water rights.

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22 *Rio Grande Dam & Irrigation*, 174 U.S. at 702–03. The Court pointed to various federal statutes as evidence of congressional intent to allow states to recognize the prior appropriation system of water rights, rather than the common law system of riparian rights. *Id.* at 704–06.
23 Craig et al., supra note 19, at 1, 57.
24 *Id.* at 15.
25 *Id.* at 53–54; see also 78 AM. JUR. 2D Waters § 355 (2022).
26 Craig et al., supra note 19, at 42.
27 In a seminal 19th century case, the Colorado Supreme Court explained, “Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident
Riparian rights was the original water law regime in the United States, adopted by courts in several states, and many cases refer to it as the common law system. It largely remains the foundation of water law in the eastern states—those along, or east of, the Mississippi River—modified to some extent by “regulated riparian” water codes. In the West, however, prior appropriation prevailed. Several Great Plains and West Coast states started out recognizing riparian rights but shifted to prior appropriation by the early years of the 20th century. All the Mountain West states, however, embraced prior appropriation so early and so completely that they denied having ever recognized riparian rights. This absolute rejection of riparian rights as a system antithetical to the arid West is known as the “Colorado Doctrine,” having originated in the early and famous Colorado case of Coffin v. Left Hand Ditch Co.

Several of the western states were so firmly committed to prior appropriation that they included language in their state constitutions to ensure that water would be allocated and managed according to prior appropriation principles. These provisions stated, for example, that the waters of the state would be subject to appropriation, that water rights would be based on beneficial use, and that earlier water rights would have priority over later ones (“first in time, first in right”). With or without such language in their constitutions, the western states adopted more-or-less comprehensive water codes in the late 19th and 20th centuries; these codes were based on prior appropriation principles, but also included provisions authorizing state agencies to play significant roles in water allocation and management.

A consistent feature of western state water laws is a declaration in constitution or statute that the waters of the state are owned by the public, or by the state on behalf of the public. In a 1957 article analyzing these declarations, Professor

to the soil, it rises, when appropriated, to the dignity of a distinct and usufructuary estate . . . .” Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882).

28 Id.
30 See Craig, supra note 19, at 59–60 (describing the “California Doctrine” (where riparian rights are still recognized) and the more common “Oregon Doctrine” (where riparian rights were essentially converted to appropriative rights)).
31 Id. at 57–58 (explaining the origins of the doctrine and the rationale given in Coffin).
32 At least ten states—Alaska, Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, Utah, and Wyoming—have constitutional provisions regarding water rights. Christine A. Klein, The Constitutional Mythology of Western Water Law, 14 Va. Envt’l. L.J. 343, 347 n.22 (1995). Some of these provisions, such as the Colorado, New Mexico, and Wyoming provisions discussed below, clearly mandate prior appropriation as the state’s exclusive system of water law. See Colo. Const. art. XVI, § 6; N.M. Const. art. XVI, § 2; Wyo. Const. art. VIII, § 3. Others do not. See, e.g., Cal. Const. art. X, § 2; Utah Const. art. XVII, § 1.
33 See, e.g., Colo. Const. art. XVI, § 6; N.M. Const. art. XVI, § 2.
34 See generally Zellmer & Amos, supra note 29, at 76.
Frank Trelease wrote that all 17 western states have some such constitutional or statutory provision, although they “seem to differ both as to who is the owner and as to what is owned,” despite these variations, courts had “blurred the distinctions” and generally interpreted such provisions similarly. Trelease concluded that such provisions had little practical importance, and that state ownership had played no “really significant role in developing or shaping the law of water rights.”

Although state law determines water rights with limited exceptions, some important aspects of water allocation and use are governed by federal law. Water allocation and management on interstate rivers, along with water rights for Indian Reservations and specifically designated federal lands, are perhaps the best-known areas of federal water law. But the original national interest in waterways was in ensuring that they could be used for commerce, as routes to transport goods and people. Thus, the federal government has special authority over “navigable” waterways, including the power to override a state’s proposed water development for the sake of protecting a river’s “navigability.” The federal test for navigability also affects ownership of a waterway’s beds and banks, as explained in the next subpart.

B. Bed/Bank Ownership, Navigability, and the Public Trust Doctrine

With certain exceptions, the lands underlying streams and lakes in the Mountain West are held by the owners of adjoining lands. Thus, unless the adjoining landowner is a government entity, streambeds and banks are usually privately owned. Courts have long recognized private ownership of the beds and banks of such waters:

For centuries, where title to the riverbed was not in the sovereign, the common-law rule for allocating riverbed title among riparian landowners involved apportionment defined both by segment (each landowner owns bed and soil along the length of his land adjacent) and thread (each landowners owns bed and soil to the center of the stream).

In other words, a riparian landowner typically owns the beds and banks of a non-navigable stream in the reach flowing over or through his/her property. This

36 Id. at 641. Arizona, then still a territory, enacted the first state or public ownership provision by statute in 1864. Colorado, in 1876, became the first state to include such language in its constitution. Id.
37 Id. at 642.
38 Id. at 646.
42 See PPL Montana, 565 U.S. at 595 (citing 19th-century treatise and judicial decision).
ownership extends to the center line of the stream if he/she owns land only on one side or to the entire bed if he/she owns the land on both sides. Under traditional common law principles, private title to the beds and banks carried exclusive rights to fish the overlying waters and might even allow the landowner to exclude boats from floating over or through the property.\footnote{As stated by one authority, “The classic position has been that even though the waters are ‘floatable’ or usable by boats, the owner of the bed is entitled to exclusive fishing rights in the waters over his portion even from boats,” but the cases are less clear on “the public’s right to use the waters for mere passage by boat . . . .” Marvel, \textit{supra} note 9, § 2.}

“Navigable” waters, however, have beds and banks that are owned by the government—specifically, the government of the state in which the waters are located—regardless of who owns the adjoining lands.\footnote{\textit{Craig et al.}, \textit{supra} note 19, at 18, 115–16.} Such waters are sometimes called “navigable for title,” because their status as navigable waters means the state has title to their underlying lands. For this purpose, the relevant test is whether waters are “navigable in fact,” meaning that they must be used, or capable of being used, “in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”\footnote{\textit{PPL Montana}, 565 U.S. at 592 (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).} Often called the \textit{Daniel Ball} test after an 1871 Supreme Court case,\footnote{\textit{The Daniel Ball}, 77 U.S. (10 Wall.) 557.} this test relates to the Court’s equal footing doctrine, whereby later-admitted states are to have the same attributes of sovereignty—here, title to the lands underlying navigable waters—as the original thirteen states of the Union.\footnote{See \textit{PPL Montana}, 565 U.S. at 590–91 (tracing this aspect of the Court’s equal footing jurisprudence through a series of cases dating back to 1842). Because the equal footing doctrine transfers title to the beds and banks of navigable waters to a state upon its admission to the Union, the navigability-for-title test applies at the time of statehood. \textit{Id.} at 592.} Because this is a federal test as required by Supreme Court caselaw,\footnote{See, e.g., United States v. Holt State Bank, 270 U.S. 49, 55–56 (1926).} waters that meet it are sometimes called “navigable in the federal sense.”\footnote{Marvel, \textit{supra} note 9, § 3; see \textit{Day v. Armstrong}, 362 P.2d 137, 143 (Wyo. 1961).}

As that phrase suggests, the term “navigable” does not always carry the same meaning, and the test for navigability varies depending on the context. For example, certain federal statutes apply to “navigable waters,”\footnote{These statutes include the Federal Power Act, 16 U.S.C. § 796(8), and the Clean Water Act, 33 U.S.C. § 1362(7).} but because the test for regulatory jurisdiction is different than the one for title,\footnote{For example, the navigability-for-title test is applied based on the ordinary condition of the waterway at the time the state in which it was located was admitted to the Union. See \textit{PPL Montana}, 565 U.S. at 592. Other tests are less restrictive in various ways, e.g., by allowing a waterway to be deemed navigable if it was or could be made so by “improvements.” See \textit{id.} at 592–93 (identifying differences in the navigability test depending on whether it is being used to determine bed and bank title, admiralty jurisdiction, or regulatory jurisdiction).} these statutes may
apply to waters with privately owned beds and banks. At the federal level, a river may be considered “navigable” for one purpose but not another.52

Waterway beds and banks are different than other types of land, however, because the title to these lands is subject to the public trust doctrine. The U.S. Supreme Court announced this principle in a famous case involving Chicago’s waterfront on Lake Michigan, a navigable waterway.53 The Court explained that the State of Illinois’ title to the lakebed is unlike the title to other kinds of land:

[T]itle necessarily carries with it control over the waters above them, whenever the lands are subjected to use. . . . It 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.54

Thus, the public trust doctrine applies to navigable waters and their underlying lands. It requires the state, as owner of these resources, to ensure that they remain available for public uses such as commerce, navigation, and fishing.55

Although the source and scope of the public trust doctrine have been much debated,56 the Supreme Court has repeatedly stated that it is a matter of state law.57 The Court addressed the public trust doctrine in PPL Montana, LLC v. Montana, a 2012 decision involving title to the beds and banks of certain Montana rivers.58 Noting that the public trust doctrine is ancient, with roots in Roman

52 See, e.g., United States v. Appalachian Electric Power Co., 311 U.S. 377, 403–10 (1940) (comparing navigability test for title purposes, which considers the waterway in its natural condition, with the Federal Power Act test for navigability, under which a waterway may be considered navigable if “reasonable improvements” could make it suitable for commercial use).


54 Id. at 452.

55 Id. at 457–58 (pointing to several cases “where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted”).

56 See, e.g., Michael C. Blumm & Thea Schwartz, Mono Lake and the Evolving Public Trust in Western Water, 37 Ariz. L. Rev. 701, 713–15 (1995) (discussing various possible sources of the doctrine). The application of the public trust doctrine to water has been the source of much commentary both before and after that article; it may be the subject of more legal scholarship than any other topic in water law. For a thorough examination of the public trust doctrines of the western states, see Robin Kundis Craig, A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust, 37 Ecology L.Q. 53 (2010).


58 Id. at 580–88 (explaining dispute over bed ownership between Montana and utility that owned hydropower dams on various rivers in the state).
civil law and English and U.S. common law, the Court made two points that are especially relevant for recreational access rights. It stated that the public trust doctrine “concerns public access to the waters above [the Montana riverbeds at issue] for purposes of navigation, fishing, and other recreational uses.” The Court then emphasized that “the contours of that public trust do not depend on the [U.S.] Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal footing doctrine.”

States may, therefore, provide a public right of access to waters that are not “navigable in the federal sense,” even though the beds and banks are privately owned. Many states have recognized public access rights on streams that would fail the Daniel Ball test but are capable of floating recreational watercraft. For example, California courts did so more than 50 years ago, broadening recreational access rights in line with a growing trend in other states. The following part examines how several Mountain West courts have decided which streams are “navigable” for purposes of public recreational use.

III. Recreational Access Decisions by Six Mountain West Supreme Courts

This Part reviews foundational decisions by six supreme courts on rights of recreational access based on state laws declaring water to be owned by the public. This Part also summarizes the origins of these cases, the provision of state law declaring public ownership of water, and the holdings regarding public rights to float on the water surface and to touch privately owned beds and banks. These decisions span decades, from 1945 through 2008, and are presented in chronological order. Further, this Part examines the newest stream access ruling, issued in 2022 by New Mexico’s high court, and closes by explaining briefly that the holdings tell only part of the story of stream access disputes in the region.

A. New Mexico, 1945: A Right to Float on all “Public Water”

The first “right to float” case in the Mountain West, State ex rel. Game Commission v. Red River Valley Co., involved a federal reservoir on the South
Canadian River, formed by a dam built in 1936 by the Army Corps of Engineers.\(^6\)

Conchas Reservoir inundated private lands owned by the Red River Valley Co., which entered into an agreement with the federal government to allow recreational boating and fishing on a portion of the reservoir.\(^5\) The State of New Mexico assumed control of recreational activities at the reservoir,\(^6\) and sought a declaratory judgment on whether it had the right to open the entire reservoir—not just a limited area—to public recreation.\(^7\)

The court acknowledged the common law rule giving landowners the exclusive right to hunt, fish, and boat on waters overlying their privately owned beds and banks.\(^8\) Under this rule, only navigable waters (or others with publicly owned beds and banks) would be open for public recreational use; non-navigable waters would generally be private.\(^9\) The court found this rule inapplicable, however, because the New Mexico Constitution declared “[t]he unappropriated water of every natural stream . . . to belong to the public and to be subject to appropriation for beneficial use.”\(^70\) Thus, the court deemed the waters of Conchas Reservoir to be public as a matter of state law\(^71\) and further determined that recreational fishing and boating were appropriate uses of public waters.\(^72\)

Because the court based public recreational rights on the state constitution’s declaration that the public owns the “unappropriated water of every natural stream,”\(^73\) *Red River Valley* indicated that public recreational rights extend to any unappropriated surface water in New Mexico regardless of whether that water is navigable for title.\(^74\) While clearly establishing a right to float, the decision did not address the right of recreational users to touch privately owned beds and banks.\(^75\)

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\(^6\) Id. at 424–25.

\(^5\) Id. at 424–25 (noting a 1940 act of Congress that had authorized this transfer).

\(^6\) Id. at 424.

\(^7\) Id. at 426.

\(^8\) See id.

\(^9\) Id. at 427 (quoting N.M. Const. art XVI, § 2).

\(^70\) Id. at 429, 431 (noting that the waters were public regardless of being impounded in a reservoir).

\(^71\) Id. at 432–34. The court also indicated that it regarded recreation and fishing as “beneficial uses,” id. at 428, although it rejected the idea that such uses could only be made if water were appropriated for them. Id. at 432.

\(^72\) Id. at 427 (quoting N.M. Const. art XVI, § 2).

\(^73\) Id. at 430.

\(^74\) Id. at 434.
The court distinguished a Colorado case holding that an angler who waded on a privately owned streambed committed trespass\textsuperscript{76} and repeatedly emphasized that access to the public waters of Conchas Reservoir would not require—or allow—crossing of private lands.\textsuperscript{77}

Although the New Mexico court blazed a trail by holding that public water ownership under state law provides public recreational rights, \textit{Red River Valley} is distinguishable from most of the cases discussed below. The water at issue was a federal reservoir, not a flowing and relatively shallow stream. The party asserting public rights was the state government, not a private recreational user. And there was no issue regarding the right to touch privately owned beds and banks—only the right to float over them.\textsuperscript{78}

\textbf{B. Wyoming, 1961: A Broad Right to Float, a Narrow Right to Touch}

The Wyoming Supreme Court addressed recreational access rights in \textit{Day v. Armstrong}.\textsuperscript{79} In \textit{Day}, recreational users sued riparian landowners on the North Platte River, seeking a declaratory judgment regarding public rights to use the river and its banks to fish and float.\textsuperscript{80} The defendant landowners claimed the right to fence off the river and exclude all recreational users from waters flowing over their private lands.\textsuperscript{81} The Wyoming Attorney General, as \textit{amicus curiae}, took the position that the river was non-navigable, but the public nonetheless had a right of access for floating and fishing.\textsuperscript{82}

The issue of the river’s navigability “in the federal sense” was extensively litigated, but the court found it unnecessary to decide that question because it determined that recreational access rights do not depend on the federal navigability test.\textsuperscript{83} The court emphasized that the Wyoming Constitution declares the waters of all natural streams, springs, and lakes to be property of the State, and noted that its prior decisions had “interpreted the State’s title to the waters to be one of trust for the benefit of the people.”\textsuperscript{84} According to the court, “there must be an easement in [sic] behalf of the State” for waters to flow through their natural channels, even over private lands.\textsuperscript{85} And because these waters are public, “they are available for

\begin{itemize}
  \item \textsuperscript{76} Id. at 431 (distinguishing and criticizing Hartman v. Tresise, 84 P. 685 (Colo. 1905)).
  \item \textsuperscript{77} Id. at 427, 429, 434.
  \item \textsuperscript{78} The New Mexico Supreme Court revisited recreational access rights, including the right to touch, in 2022. \textit{See infra} Part III.G.
  \item \textsuperscript{79} 362 P.2d 137 (Wyo. 1961).
  \item \textsuperscript{80} Id. at 138–40.
  \item \textsuperscript{81} Id. at 141.
  \item \textsuperscript{82} Id. at 142.
  \item \textsuperscript{83} \textit{See id.} at 143–44.
  \item \textsuperscript{84} Id. at 145 (citing \textit{Wyo. Const.} art. 8, § 1).
  \item \textsuperscript{85} Id. at 145.
\end{itemize}
such uses by the public of which they are capable. When waters are able to float
craft, they may be so used.”

Having skirted the issue of whether the river was navigable, the court
especially assumed that it was not, and went on to define the public’s right to
touch privately owned beds and banks. The court ruled that touching is allowed
only as a “necessary incident” to the right to float, and that this right extends to
allow a boater to “dismembark and pull, push or carry over shoals, riffles and rapids . . . .” If, however, “the primary use is of the bed or channel rather than the floating
use of the waters, such wading or walking is a trespass upon lands belonging to a
riparian owner and is unlawful.”

Like its New Mexico counterpart, the Wyoming Supreme Court found a
public right to float based on public ownership language in the state constitution.
However, Day placed important limits on recreational stream use by addressing
the use of beds and banks and emphasizing the property rights of underlying
landowners. By restricting the public’s right to make contact with underlying private
land, the decision essentially broke recreational access rights into two distinct pieces:
floating the surface and touching beds and banks.

C. Idaho, 1974: A Broad Right to Float (and More)

In Southern Idaho Fish & Game Ass’n v. Picabo Livestock, Inc., a group of
Idaho anglers sued a private landowner to establish their right to use the waters
of Silver Creek for floating, fishing, and other purposes. Six members of the
plaintiff group were fishing while floating down the creek through defendant’s
lands when they were accused of trespassing and ordered to leave. A few days
later, another group of members took several logs over six and one-half inches in
diameter and placed them in Silver Creek above defendant’s upstream property
line, most of which drifted past the downstream property line. Plaintiffs then
sought a declaratory judgment, supported by two statutes. One statute provided
for a public right to fish in or along the banks of any “navigable” stream, and the

86 Id.
87 Id.
88 Id. at 146.
89 Id.
90 528 P.2d 1295 (Idaho 1974).
91 Id. at 1296.
92 Id.
93 Id.
94 Id. at 1297 (quoting Idaho Code § 36-901 (1974)).
second defined “navigable” for this purpose as any stream capable of floating logs greater than six inches in diameter during the high-flow season.\textsuperscript{95}

The district court determined that the public had a right to recreate on Silver Creek, which qualified as “navigable” under the statute because the creek could float logs exceeding six inches in diameter.\textsuperscript{96} The lower court went further, finding that the public had a broader right to use the creek than the one set forth in statute and extended this right to recreational activities including boating, swimming, and hunting.\textsuperscript{97} In recognizing this right, the district court found “the title to all water in Silver Creek belongs to the State of Idaho” under both state constitution and statute.\textsuperscript{98} Therefore, the state held an easement for public use of these waters flowing in their natural channels.\textsuperscript{99} The district court declared this navigability test: “Any stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable.”\textsuperscript{100}

The Idaho Supreme Court affirmed both the district court’s navigability test and its statement defining the public’s right to recreational use of Silver Creek.\textsuperscript{101} The high court said very little about its own rationale for these holdings, however, except to quote from a recent California case that reached almost identical conclusions.\textsuperscript{102} Thus, the opinion is not entirely clear about the source of public recreational rights in Idaho, as it did not explicitly endorse the district court’s reasoning but took no issue with it. The opinion is also somewhat unclear on the extent of public rights to touch beds and banks, although declaring a public right to “all recreational purposes,” including swimming, would strongly suggest a right to touch as reasonably needed for those activities.\textsuperscript{103}

\textsuperscript{95} \textit{Id.} at 1297 (quoting \textit{Idaho Code} § 36-907 (1974)).

\textsuperscript{96} \textit{Id.} The Idaho Supreme Court upheld these findings as supported by substantial evidence.\textit{Id.}

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.} (citing \textit{Idaho Const.} art. XV, § 1 and \textit{Idaho Code} § 42-101 (1974) (providing that “[a]ll the waters of the state, when flowing in their natural channels . . . are declared to be the property of the state . . . .”)).

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.} at 1297–28 (“In so holding, the trial court reasoned that in accordance with modern authorities, the basic question of navigability is simply the suitability of water for public use.”).

\textsuperscript{101} \textit{Id.} at 1298.

\textsuperscript{102} \textit{Id.} (citing \textit{People ex rel. Baker v. Mack}, 97 Cal. Rptr. 448 (Cal. Ct. App. 1971)). The court specifically rejected the navigability-for-title test, finding it inappropriate to determine public recreational rights under state law.\textit{Id.}

\textsuperscript{103} \textit{Id.} As the Utah Supreme Court stated years later, swimming is an activity that “cannot be effectively enjoyed or even practically accomplished without touching the water’s bed.” \textit{Conatser v. Johnson}, 2008 UT 48, ¶ 25, 194 P.3d 897, 902.
D. Colorado, 1979: No Right to Float or Touch

Rafters convicted of trespass brought the recreational access issue to the Colorado Supreme Court in *People v. Emmert*.\(^{104}\) These rafters were cited after floating a stretch of the Colorado River that passed through a private cattle ranch.\(^{105}\) The rancher confronted the rafters as they approached a bridge on his property and strung barbed wire inches above the river to block their passage.\(^{106}\) The rafters admitted to touching the riverbed, apparently with their feet, as they floated through the ranch.\(^{107}\) They were cited and later convicted of third-degree criminal trespass, defined as “unlawfully enter[ing] or remain[ing] in or upon premises.”\(^{108}\)

The rafter defendants argued that they had committed no trespass because they had a right of recreational access under the 1876 Colorado Constitution, which provides that the water of “every natural stream, not heretofore appropriated,” is “the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.”\(^{109}\) The court rejected this argument, insisting that this constitutional provision “was primarily intended to preserve the historical appropriation system upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation.”\(^{110}\)

While the court rejected public rights under the state constitution, it gave great weight to landowners’ private property rights under the common law: “The common law rule holds that he who owns the surface of the ground has the exclusive right to everything which is above it (‘*cujus est solum, ejus est usque ad coelum*’).”\(^{111}\) Under this rule, a person who “intrudes upon the space above the surface of the land” for purposes such as fishing or floating commits a trespass.\(^{112}\) The court declared that Colorado law had not “modified the common law rule of property law upon which we predicate this decision[,]”\(^{113}\) and declined “to follow

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\(^{104}\) 597 P.2d 1025 (Colo. 1979).

\(^{105}\) Id. at 1026.

\(^{106}\) Id.

\(^{107}\) According to the court, the rafts “had leg-holes through which the occupants could extend their legs into the water below the rafts. This enabled the defendants as they floated down the river to touch the bed of the river from time to time to control the rafts, avoid rocks and overhangs, and to stay in the main channel of the river.” Id. This technique is highly unusual, as rafts are normally steered with oars or paddles, and modern rafts do not have the type of leg-holes described by the court.

\(^{108}\) Id. (quoting Colo. Rev. Stat. § 18-4-504 (1973)).

\(^{109}\) Id. at 1027–28 (quoting Colo. Const. art. XVI, § 5).

\(^{110}\) Id. at 1028.

\(^{111}\) Id. at 1027.

\(^{112}\) Id. (citing Restatement (Second) of Torts § 159 (Am. L. Inst. 1965)).

\(^{113}\) Id. To the contrary, the court pointed to a 1937 statute and to *Hartman v. Tresise*, 84 P. 685 (Colo. 1905), as having essentially adopted the common law rule in Colorado. Id.
the trend away from the coupling of bed title with the right of public recreational
use of surface waters . . . .”

The court found further support for its decision in a 1977 statute, enacted
after the Emmert defendants had been cited for trespass, which defined “premises”
in the trespass statute to include “the stream banks and beds of any non-navigable
fresh water streams flowing through . . . real property.” By defining “premises” to
include beds and banks rather than the water itself, this statute arguably prohibited
touching but not floating. Based on its common law rationale, however, the court
drew no such distinction: “We hold that the public has no right to the use of
waters overlying private lands for recreational purposes without the consent of
the owner.”

E. Montana, 1984: A Broad Right to Float and Touch

The Montana Supreme Court recognized public rights to recreational
stream access in a pair of cases decided weeks apart. In both cases, the Montana
Coalition for Stream Access sued a riparian landowner to establish a public right to
use a stream running through the defendant landowner’s property. In Montana
Coalition for Stream Access, Inc. v. Curran, the river at issue was the Dearborn; in
Montana Coalition for Stream Access, Inc. v. Hildreth, the river was the Beaverhead.
Each defendant claimed to own the land underlying the river flowing through his
property and a right to exclude boaters and anglers based on that ownership.

The court in Curran held that the Dearborn River met the federal
navigability-for-title test, and the State of Montana, therefore, owned its beds
and banks. Following this determination, the court could have decided the case
solely on the ground that Curran had no right to exclude the public because
he did not own the bed of the river as it flowed through his land. The court

114 Id.
115 Id. at 1029–30 (quoting Colo. Rev. Stat. § 18-4-504.5 (1977)).
116 Id. at 1030.
June 21, 1984).
118 Curran, 682 P.2d at 165; Hildreth, 684 P.2d at 1090.
119 Curran, 682 P.2d at 165.
120 Hildreth, 684 P.2d at 1090.
121 Curran, 682 P.2d at 165; Hildreth, 684 P.2d at 1090. In Hildreth, the plaintiff alleged that
the landowner had built a fence across the river and was preparing to place a cable across the river
before the start of fishing season. 684 P.2d at 1090.
122 Curran, 682 P.2d at 166 (basing this finding primarily on affidavits, submitted by
historians, showing that the Dearborn was used to transport many thousands of commercial logs in
the years just preceding Montana statehood).
went further, however, explaining that state law governs “navigability for use” and states increasingly allow for public use of waters without regard to bed and bank ownership. After noting that the Montana Constitution declares that all waters within the state are owned by the state for public use, the court ruled that the question is whether the state’s waters “are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant.”

The court applied this rule in Hildreth, reaching the issue of public access to the Beaverhead River without deciding ownership of the river’s beds and banks as it flowed through Hildreth’s property. Hildreth claimed that a land patent gave him title to the streambed, and the court essentially assumed that was true, as bed ownership was irrelevant to the recreational use issue under its holding in Curran.

Hildreth further contended that he had been deprived of a property right, but the court rejected that argument because a bed owner has no right to exclude the public from using a stream that is suitable for recreation. “Navigability for recreational use is limited, under the Montana Constitution, only by the capabilities of the waters themselves for such use. Hildreth has never owned and does not now own the waters of the Beaverhead River.”

Although both cases focused primarily on the right to float, the Montana court also recognized a public right to touch beds and banks. At the end of its Curran opinion, the court sought to clarify the scope of the recreational access right and began by stating that the right to recreational use of waters did not include a right to cross or enter private land to reach those waters. Within the streambed,

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123 Id. at 169–70.
124 Id. at 170 (quoting Mont. Const. art. IX, § 3 (all 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”)).
125 Id. The court based this right of recreational access on the public trust doctrine as well as the Montana Constitution. Id. at 170–71; see infra notes 276–79 and accompanying text.
126 Hildreth, 684 P.2d at 1092.
127 Id.
128 Id. at 1094.
129 Id.
130 The court stated early in its Curran opinion that the defendant could not “interfere with the public’s right to recreational use of the surface of the State’s waters.” Curran, 682 P.2d at 170. The court then declared that that the public has a right to use “any surface waters that are capable of recreational use” regardless of bed ownership. Id. at 171. The court returned to these points in Hildreth, stating that “no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property.” Hildreth, 684 P.2d at 1091.
131 Curran, 682 P.2d at 172.
the court found a public right “to use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters. In case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder’s rights.” The opinion in *Hildreth* summed up the right to touch more succinctly: “The public has the right to use the waters and the bed and banks up to the ordinary high water mark.”

*F. Utah, 2008: A Broad Right to Float and Touch*

A dispute over the Weber River brought the recreational access issue to the Utah Supreme Court in *Conatser v. Johnson*. The Conatser family floated a raft down the Weber through lands owned by the Johnsons, clearing away fencing across the river and ignoring the landowner’s demands to stop. After floating through the Johnsons’ property, the Conatser family was cited and ultimately convicted for trespass. The state dropped the charges on appeal due to “uncertainty regarding the Conatser family’s status as trespassers.” The Conatser family then sued, seeking a declaratory judgment of their recreational access rights, and largely prevailed. The district court found that the public had both a right to float “upon the water” and a limited right to touch beds and banks.

The Utah Supreme Court opinion said relatively little about the right to float; neither party appealed the district court ruling on that point, and the high court seemed to regard that issue as settled. The court began its discussion by quoting Utah’s statute declaring all waters within the state “to be the property of the public, subject to all existing rights to the use thereof.” The court then cited its decision in *J.J.N.P. Co. v. State* for several key principles.

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132 *Id.*. The court appeared to base this right on its decision in *Gibson v. Kelly*, 39 P. 517 (Mont. 1895), and on what it called the “angling statute,” Mont. Code Ann. § 87-2-305. *Id.*

133 *Hildreth*, 684 P.2d at 1091. The court restated this point a few times, *id.* at 1093, 1094 (twice), and further mentioned the additional, limited right to portage on private property to avoid barriers in the stream. *Id.* at 1094.


135 *Id.* ¶ 3, 194 P.3d at 899 (“As they had done on at least two previous occasions, the Johnsons ordered the Conatser family off the river and told them to pick up their raft and carry it out via a parallel railroad easement.”).

136 *Id.*

137 *Id.* ¶ 4, 194 P.3d at 899.

138 *Id.*

139 See *id.* ¶¶ 10–12, 194 P.3d at 900 (summarizing district court’s determination of the scope of the public easement).

140 *Id.* ¶ 4, 194 P.3d. at 899 (noting that the Conatser family appealed the portion of the ruling on the right to touch beds and banks).

141 *Id.* ¶ 8, 194 P.3d at 899 (quoting Utah Code Ann. § 73-1-1 (2008)).

142 *Id.* ¶¶ 13–14, 194 P.3d at 901.
determined that public ownership of water gives the public an “easement over the water” regardless of bed and bank ownership. This easement gives the public a right to float, fish, and “participate in any lawful activity when utilizing that water.” And this right of use exists even if the water is non-navigable for title, with privately owned beds and banks.

Conatser focused primarily on the right to touch beds and banks, which was not at issue in the earlier J.J.N.P decision. The district court in Conatser, borrowing from the Wyoming case of Day v. Armstrong, found a right to touch beds and banks only as “incidental to the right of floating,” with no right to walk or wade. The high court found a broader right to touch under Utah law: “we hold that the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement.” The court reasoned that touching beds and banks was “reasonably necessary and convenient for the effective enjoyment” of the easement, and that landowners would not be unnecessarily injured by such touching. It closed by emphasizing that the public’s right of use is limited in various ways that protect landowner interests.

G. New Mexico’s New Decision, 2022: A Right to Touch

The region’s newest decision on stream access, Adobe Whitewater Club of New Mexico v. State Game Commission, resulted from a challenge to a state agency action designed to restrict public access. The New Mexico State Game Commission, in 2018, adopted a rule allowing a landowner with a stream flowing through his/her property to petition the Commission to have that stream declared “non-navigable public water.” If the Commission approved the petition, the

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143 Id. ¶ 8, 194 P.3d at 901 (citing J.J.N.P. v. State ex rel. Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982)).
144 Id. ¶ 8, 194 P.3d at 900 (citing J.J.N.P., 665 P.2d at 1137).
145 Id. ¶¶ 8–9, 194 P.3d at 899–900 (citing J.J.N.P., 665 P.2d at 1136–37).
146 Id. ¶ 19, 194 P.3d at 901 (citing J.J.N.P., 655 P.2d at 1138 n.6). In fact, J.J.N.P. did not directly involve public recreational access at all. See infra notes 204–10 and accompanying text.
147 See supra Part III.B.
148 See Conatser, 2008 UT 48 at ¶ 17, 194 P.3d at 901.
149 Id. ¶ 19, 194 P.3d at 901–02.
150 Id. ¶ 23, 194 P.3d at 902.
151 Id. ¶ 28, 194 P.3d at 903. The court identified four limits: (1) “the public may engage only in lawful recreational activities”; (2) these activities must have utilizing water as their purpose; (3) the public’s actions in touching beds and banks must be reasonable; and (4) “the public must not cause unnecessary injury to the landowner.” Id.
153 Id. at 50 (citing N.M. CODE R. § 19.31.22 (2018) (repealed 2022)). The landowner
streambed would be closed to public use. The Game Commission based this rule on a 2015 statute making it illegal to “walk or wade onto private property through non-navigable public water,” interpreting that law to cover privately owned streambeds. Sporting organizations within New Mexico sued the Game Commission to overturn the rule, and several landowners intervened to defend it.

The court recognized that the lands underlying non-navigable waters are privately owned, but explained that the state has authority under its public trust doctrine to determine public-access rights to waters without regard to bed ownership. The Red River Valley decision had already recognized a right to float on the state’s waters for recreation, based on the public ownership provision of the state constitution. That decision did not address the touching of private beds and banks, requiring the Adobe Whitewater court to examine closely the language and reasoning of Red River Valley, and to weigh the merits of Day and Conatser on the right to touch. The court noted that “[w]alking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing and recreation,” and held that the public’s right to use state waters for recreation “includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right.”

After holding the Game Commission’s rule unconstitutional because it violated the public’s right to use state waters, the court turned to the validity of the underlying statute. It noted that the prohibition on walking or wading from public water onto “private property” could be interpreted to exclude streambeds and banks, thus preserving the public’s right to touch these lands as reasonably needed for recreational water use. The court ruled that the statute would be constitutional if so construed, as Red River Valley had emphasized that the public would have to provide evidence that the stream segment through his/her property was “non-navigable at the time of statehood” under the navigability-for-title test. This rule, adopted on January 22, 2018, was repealed in 2022 following the court’s decision that it was unconstitutional. N.M. Code R. § 19.31.22 (2018) (repealed 2022).

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154 Id.
155 Id. at 49 (citing N.M. STAT. ANN. § 17-4-6(C) (2015)).
156 Id. at 50. The Game Commission, now with new members under a new governor, doubted that the rule was legal. The court noted that the Commission had conceded that the rule was inconsistent with the “public ownership” provision of the constitution. Id.
157 Id. at 51–53 (citing PPL Montana, LLC v. Montana, 565 U.S. 576, 603–04 (2012)).
158 See id. at 51–52 (citing N.M. CONST. art. XVI, § 2 and State ex rel. State Game Comm’n v. Red River Valley Co., 182 P.2d 421 (N.M. 1945)).
159 See id. at 53–56.
160 Id. at 53.
161 Id. at 55.
162 Id. at 58.
163 Id. at 57.
has no right to use private uplands to access public waters. The Adobe Whitewater court noted that even the public's right to touch beds and banks extends “only [to] such use as is reasonably necessary to the utilization of the water itself,” and “must be of minimal impact.”

H. More to the Story of the Recreational Access Cases

Stream access disputes between landowners and recreational users are often intense and emotional, and the judicial decisions summarized above have often failed to resolve disputes over private versus public rights to state waterways. Announcement of a rule on recreational access cannot answer all the questions, as there are sure to be disagreements over how a state's test for recreational “navigability” applies to a specific stream. But the test itself has remained contested, at least in some states, even after the supreme court established it.

Some of the disputes are obvious from the opinions themselves, as most of the cases summarized above were decided by divided courts. Of the six cases decided from 1945–1984, five involved at least one dissent and most had more than one dissenting opinion. Several dissents fundamentally took issue with the majority over public versus private rights and the role of the courts in deciding them. The dissenter in Emmert, for example, believed the majority had misread both the letter and spirit of the public ownership provision in Colorado, and had established bad policy that would be difficult to correct legislatively. The justice who dissented in both Curran and Hildreth called the recreational use test “a radical departure from the well-established public policy of the State of Montana” and argued that the court had usurped the legislature's role. One of the Red River Valley dissenters howled: “Another birthright of Anglo-Saxon jurisprudence—the citizen’s dominion over his own property—has been stricken down and laid low . . . by the very department—the judicial—long since come to be regarded as the last refuge and sanctuary of the rights, the liberties and even the lives of the people!”

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164 *Id.* (citing *State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945), in four different places as prohibiting trespass across private uplands).

165 *Id.* at 56.


167 See *Emmert*, 597 P.2d at 1030 (Groves, J., dissenting).

168 *Id.* at 1033 (Carrigan, J., dissenting).

169 *Hildreth*, 684 P.2d at 1094 (Gulbrandson, J., dissenting).

170 *Id.* at 1095. He had argued that the court was acting legislatively in his dissent in *Curran*, 682 P.2d at 173.

171 *Red River Valley*, 182 P.2d at 451 (Sadler, J., dissenting). This litigation produced three
Moreover, in several states the foregoing decisions were not the last word on the relative rights of the landowners and the public regarding stream access. In Colorado, for example, Emmert was followed by an Attorney General's opinion suggesting that much of the majority opinion was dicta, and concluding that “one who floats up on the waters of a river or stream over or through private property, without touching the stream banks or beds, does not commit a criminal trespass;” thus, landowners do not have a right to exclude boaters from floating. More recently, litigation has bounced between state and federal courts in Colorado over public access to the bed of the recreationally popular Arkansas River. In Montana, a statute followed Curran and Hildreth, providing greater details regarding public and private rights to waters, beds, and banks. The statute was challenged and the Montana Supreme Court ruled a few provisions unconstitutional; the court also qualified its earlier holdings on the right to touch, saying that any recreational use of privately owned beds and banks must have only “minimal impact.” In Utah, a statute significantly narrowed the public recreational rights announced in Conatser. The Utah Supreme Court found that the statute had essentially adopted the federal navigability-for-title test for public access, but further litigation ensued on whether the statute violated the Utah Constitution. And the New Mexico Supreme Court recently had to decide a new dispute over stream access rights despite the decades-old precedent of Red River Valley.

These subsequent developments are mostly beyond the scope of this Article, which focuses on why state supreme courts, except for Colorado’s, have found a right of recreational access under state law. The following Part takes a

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172 Colo. Att’y Gen. Op. No. ONR8303042/KW at 6 (Aug. 31, 1983), 1983 WL 167506 at *5. The opinion examined the language and legislative history of a 1977 statute clarifying that stream beds and banks were “premises” for criminal trespass purposes and concluded that the statute was intended to cover touching of underlying lands, not floating. Id.


175 Id. at 915–16.

176 Id.


178 Id. at 557–59.

179 See Utah Stream Access Coal. v. VR Acquisitions, LLC, 2019 UT 7, 439 P.3d 593.

180 See supra notes 152–65 and accompanying text. The New Mexico Supreme Court’s 2022 opinion remains contested as of this writing, as streamside landowners petitioned for review in the U.S. Supreme Court. Petition for a Writ of Certiorari, Chama Troutstalkers, LLC v. Adobe Whitewater Club of N.M., No. 22-410 (U.S. Oct. 28, 2022), 2022 WL 16637940.
deeper dive into the courts’ reasoning in deciding public access rights to streams in the Mountain West.

IV. GROUNDING THE RIGHT TO FLOAT: PUBLIC OWNERSHIP PROVISIONS AND OTHER FACTORS

Five of the six Mountain West states to decide the stream access question have recognized a right to float based on state law, with Colorado as the regional exception. Although the decisions (other than Emmert) have reached similar conclusions on the right to float, the results are less uniform on the right to touch beds and banks. This Part examines some of the factors addressed by the courts in the Mountain West, including public ownership provisions, state precedents and statutes, relevant holdings from other states, and judicial views on the nature of public waters.

A. The States’ Public Ownership Provisions

Each case discussed in the previous Part turned primarily on the court’s interpretation of language in state law declaring water to be property of the public, or the state. The wording is roughly similar from state to state, all the provisions are associated with state laws governing water rights, and none speaks even indirectly to issues of recreational access. The language varies somewhat from state to state, but the most important difference among these provisions is that some appear in the constitution, while others are found only in statute.

The archetype of public water ownership provisions in the Mountain West is Article XVI, § 5 of the Colorado Constitution, which declares, “The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” This section cemented prior appropriation as Colorado’s system of water law. Under the terms of this provision, appropriative water rights effectively remove water from public ownership: the constitution makes water public property only if it had not been “heretofore appropriated,” and makes any water dedicated to public use expressly available for appropriation.

Several other Mountain West states followed suit by declaring in their constitutions that water is owned by the public, or by the state. Wyoming’s 1890 constitution provides, “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.” The relevant language in New Mexico’s 1912...
constitution is very similar to Colorado’s: “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 . . . .”\textsuperscript{184} Montana’s constitution, remade and ratified in 1972, 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.”\textsuperscript{185}

Idaho and Utah also have public ownership language, but it is statutory\textsuperscript{186} rather than constitutional.\textsuperscript{187} Idaho’s provision declaring state ownership of waters is part of a statutory section dealing with appropriations: “All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment . . . .”\textsuperscript{188} Utah's public ownership language appears in the first section of its state water code, and provides that “All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”\textsuperscript{189}

In states where the right to float is based on public ownership language that appears only in statute, the legislature can more readily alter that right. The Utah Legislature responded to \textit{Conatser} with a 2010 statute that imposed new limits on public water ownership.\textsuperscript{190} Further, the state enacted a “Public Waters Access Act” that cut back significantly on the stream access rights recognized by the courts.\textsuperscript{191} Litigation over the statute ensued, but because \textit{Conatser} was based on statutory public ownership language, the Utah Supreme Court did not suggest that the 2010 law may have infringed on a constitutional right of public access.\textsuperscript{192}

\textsuperscript{184} N.M. Const. art XVI, § 2. The provision concludes by providing that appropriation must be done in accordance with state law, and that “[p]riority of appropriation shall give the better right.” \textit{Id.}

\textsuperscript{185} Mont. Const. art. IX, § 3, cl. 3.


\textsuperscript{187} See Idaho Const. art XV, §§ 3, 1 (addressing water rights in some detail, making prior appropriation the state’s system of water law, and declaring certain types of water use to be “public uses,” but lacking the kind of public ownership language contained in the constitutions of Colorado, Montana, New Mexico, and Wyoming); see also Utah Const. art. XVII, § 1 (saying relatively little about water, declaring only that existing rights to the use of water are protected).

\textsuperscript{188} Idaho Code § 42-101 (2022).

\textsuperscript{189} Utah Code Ann. § 73-1-1 (2022).

\textsuperscript{190} Act of March 31, 2010, 2010 Utah Laws 2873 (amending statutes on recreational stream access). The statute left in place the public ownership language of Utah Code Ann. § 73-1-1, which became subsection (1), but added three new subsections, one of which specified that public ownership of water did not provide a right of recreational stream access. Utah Code Ann. § 73-1-1(2) (2022).


\textsuperscript{192} See Utah Stream Access Coal. v. Orange St. Dev., 2017 UT 82, ¶¶ 1, 26, 416 P.3d 553,
By contrast, the New Mexico Supreme Court ruled that a 2015 statute forbidding wading onto “private property” would be unconstitutional if interpreted to prohibit any public right to touch private beds and banks. The Wyoming Supreme Court held that a statute limiting public access rights—enacted while Day was being litigated—violated the state constitution, albeit based on vagueness rather than impairing a protected right to float.

Although every public water ownership provision in the Mountain West is connected to constitutional or statutory measures on appropriative rights, only the Colorado Supreme Court held that state ownership of water was meant solely to reinforce prior appropriation as the exclusive system of water rights. The majority in Emmert declined to follow Day primarily because it found that Wyoming’s public ownership provision “does not mention appropriation.” Despite the general similarity in the language and context of these provisions, none of the other Mountain West supreme courts read their state’s language so narrowly, and the New Mexico Supreme Court pointedly rejected such a construction.

B. The States’ Judicial Decisions and Statutes

As crucial as the public ownership provisions have been in the Mountain West recreational access cases, they have presented a major interpretation challenge for the courts. These provisions say nothing about the use of water for purposes such as boating or angling, and their context and history shed little or no light on how they should apply to issues of recreational access. Thus, each supreme court has had to look elsewhere for indications of whether the state recognizes—or should recognize—a right to float on the state’s waters or touch beds and banks.


People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979) (stating that Art. XVI, Section 5 of the Colorado Constitution “simply and firmly establishe[d] the right of appropriation in this state”).

Several of the decisions relied heavily on judicial precedent within the state, although each of the earlier cases was at least somewhat distinguishable. A key factor in Emmert was a 1905 case, Hartman v. Tresise. In Hartman, the Colorado Supreme Court held that an angler who had broken through a fence to reach a stream flowing through private lands and then stood in the bed of that stream to fish, had no right to take these actions despite the public ownership language of Colorado’s constitution. The Emmert court read Hartman as not only rejecting any right of recreational stream access based on public water ownership, but also as “implicitly” adopting the common law property rule “that he who owns the surface of the ground has the exclusive right to everything which is above it (‘cujus est solum, ejus est usque ad coelum’)."

Conatser turned on a 1982 decision, J.J.N.P. Co. v. State ex rel. Division of Wildlife Resources, involving a Utah agency’s rejection of a “private fish installation” for stocking a natural lake surrounded entirely by private land. The J.J.N.P. court upheld the agency’s action based on the state’s public ownership provision, which provides both state regulatory power over water and a public right of access to use the state’s waters for recreation. The dispute in J.J.N.P. was primarily about state fishery regulation, and only indirectly about the public’s right to fish on state waters, but the opinion included a general statement about the public’s right to use these waters for recreational purposes. The Conatser court regarded J.J.N.P. as having settled the right to float and as having established a public recreational

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200 Emmert, 597 P.2d at 1027–28 (citing Hartman v. Tresise, 84 P. 685 (Colo. 1905)).

201 Hartman, 84 P. at 686–87. The angler also relied on a Colorado statute stating that “the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream.” Id. at 686 (quoting Act of Jan. 7, 1903, 1903 Colo. Sess. Laws 230). The court found that the statute violated the state constitution and the property rights of landowners. Id. at 687.

202 Emmert, 597 P.2d at 1028.

203 Id. at 1027.


205 J.J.N.P., 655 P.2d at 1135. A statute provided that “no such installation shall be developed on natural lakes or natural flowing streams . . . .” Id. at 1135 n.1 (quoting Utah Code Ann. § 23-15-10 (1953)).

206 Id. at 1136.

207 Id. After discussing the meaning of the state’s public ownership provision, the court stated, “Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.” Id. at 1137. The court specifically did not address the issue of touching beds and banks, however. Id. at 1138 n.6.

208 Conatser, 2008 UT 48 at ¶ 8, 194 P.3d at 899–901.
easement to use water; Conatser then held that this easement includes a right to touch underlying beds and banks, subject to certain limits.

Precedent also played a role in the Montana Supreme Court’s decision to recognize rights both to float and to touch underlying lands on streams with privately owned beds and banks. As discussed above, Hildreth relied on the Curran opinion, issued only weeks earlier, involving a stream that was found to be navigable and therefore had state-owned beds and banks. And the New Mexico opinion recognizing a right to touch was based primarily on the court’s interpretation of the precedent set 77 years earlier in Red River Valley.

Compared to prior cases concerning the meaning of public ownership, statutes addressing recreational water uses have carried much less weight with Mountain West courts evaluating rights to float and touch. This was notably true in Wyoming, where the court in Day ruled that a new statute that allowed floating only on streams with an average July flow of 1,000 cubic feet per second was unconstitutional, and relied on the state’s public ownership provision in fashioning a broad right to float with a narrow right to touch. In Montana, where the legislature responded to Curran and Hildreth with a statute specifying a range of public rights to use beds and banks, the supreme court held parts of it unconstitutional, finding that certain public rights under the statute went

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209 Id. ¶ 14, 194 P.3d at 901.
210 Id. ¶ 27, 194 P.3d at 902–03 (basing this holding primarily on general principles of law regarding easements).
212 See supra Part III.E. The Curran court arguably departed from precedent, however, in declining to follow Herrin v. Sutherland, 241 P. 328 (Mont. 1925), where the court held that it was trespass for an angler to stand in a non-navigable creek whose beds and banks were privately owned by someone else, observing that “it is held uniformly that the public have no right to fish in a nonnavigable body of water, the bed of which is owned privately.” Herrin, 241 P. at 331. The Curran court found Herrin “irrelevant” because it involved a non-navigable stream, whereas the stream in Curran was found navigable; because it thought the Herrin ruling on trespass was dicta; and because “the holding is contrary to the public trust doctrine and the 1972 Montana Constitution.” Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984).
213 See supra Part III.G.
215 Day v. Armstrong, 362 P.2d 137, 149 (Wyo. 1961). As noted above, the court’s stated rationale was that the statute was unconstitutionally vague. See supra note 196 and accompanying text.
218 Galt v. State ex rel. Dep’t of Fish, Wildlife & Parks, 731 P.2d 912, 916 (Mont. 1987).
beyond those “necessary to utilization of the water.”219 In the recent New Mexico decision, the court ruled that a statute prohibiting walking or wading onto private property from public water would be constitutional only if interpreted to allow touching of beds and banks.220

The Idaho Supreme Court in Picabo Livestock quoted state statutes specifying a test for which streams qualify as “public highways” for fishing.221 But the court then declared a broader public right to use waters for “all recreational purposes,” including swimming and boating, applicable to “any stream which, in its natural state . . . is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes . . . .”222 The court’s establishment of this non-statutory right is especially remarkable because the plaintiffs—apparently all anglers—had shown that the stream at issue qualified as a “public highway” for fishing under the statutes.223 Although its opinion offered little explanation, the supreme court seemingly based this right on Idaho’s public ownership language and on the modern trend of recreational access rights.224

In New Mexico and Colorado, statutes were used to argue that state law did not recognize a right to float over or through private lands despite the constitution’s public ownership language.225 This argument failed in Red River Valley, where the court rejected the dissent’s argument based on a statute prohibiting

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219 Id. at 915. The court held that some of the public rights in the statute—regarding overnight camping, duck blinds, and big-game hunting—were “not a necessary part of the easement granted the public for its enjoyment of the water.” Id. at 915–16. The court also held unconstitutional the statute’s requirement that the landowner bear the cost of constructing a portage route around artificial barriers, such as dams. Id. at 916. The court upheld most of the statute, with the caveat that the public’s right to touch underlying land covers “only such use as is necessary to utilization of the water itself. We hold that any use of the bed and banks must be of minimal impact.” Id. at 915.


221 S. Idaho Fish & Game Ass’n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297 (Idaho 1974) (quoting Idaho Code § 36-901 (1974) (declaring that certain “navigable” streams are “public highways” for fishing, where anglers can use the beds and banks below the high water mark) and Idaho Code § 36-907 (1974) (defining “navigable” streams for fishing purposes as those on which logs greater than six inches in diameter “can be floated to market or the place of use during the high water season of the year”)).

222 Id. at 1297–98 (describing the trial court’s rulings on these points and affirming the trial court’s rulings on both the navigability test for recreational use and the scope of allowable recreational activities).

223 Id. at 1296–97.

224 Id. at 1297–98 (explaining the lower court’s finding that “title to all water in Silver Creek belongs to the State of Idaho” under both constitution and statute, and later quoting other authorities (including Day v. Armstrong) on the right to float).

hunting or fishing “within or upon any privately owned enclosure . . . .”\textsuperscript{226} Having found the state’s waters to be public, the majority observed that they would not become private property simply by being enclosed with a fence.\textsuperscript{227} It succeeded in \textit{Emmert}, as the majority found support in a variety of Colorado statutes enacted over time.\textsuperscript{228} The court relied on a 1937 statute declaring that “space above the lands and waters of this state” is held by the surface owner, “subject to the right of flight of aircraft,” to show the state’s support of the common law rule that an owner of land owns everything above it.\textsuperscript{229} It also noted a statute enacted “after the incident here in controversy had occurred” that amended the definition of “premises” in the trespass statute to include “the stream banks and beds of any non-navigable fresh water streams flowing through such real property.”\textsuperscript{230} But the Colorado Supreme Court has not always upheld statutes in this field, as its decision in \textit{Hartman—}on which the \textit{Emmert} court relied heavily\textsuperscript{231}—invalidated a statute providing a public right to fish on any stream in the state that had been stocked at public expense.\textsuperscript{232}

\textbf{C. Recreational Access Decisions from Other States}

Courts in many states have addressed issues of recreational stream access, and the Mountain West courts have all faced similar questions about the meaning of public ownership provisions in this context. One might expect the opinions in the Mountain West cases to discuss what other states in the region have decided on the right to float and to touch beds and banks. The decisions vary, however, in their treatment of authority from other states.

In \textit{Red River Valley}, the New Mexico court faced what was then a novel question about public ownership of water and the right to float.\textsuperscript{233} The court extensively discussed a wide range of authorities on “public waters” and public

\begin{footnotes}
\textsuperscript{226} \textit{Red River Valley}, 182 P.2d 421, 433–34 (rejecting an argument asserted in Justice Bickley’s dissenting opinion).

\textsuperscript{227} \textit{Id.} at 433. The majority also regarded the statute as “nothing more than the ordinary regulatory statute for fishing and hunting,” and focused on licensing rather than property or access rights. \textit{Id.}

\textsuperscript{228} \textit{Emmert}, 597 P.2d at 1027, 1029.

\textsuperscript{229} \textit{Id.} at 1027 (quoting \textit{Colo. Rev. Stat.} § 41-1-107 (1937)). One might argue, however, that the statute was seemingly intended to address airspace, and that if Colorado truly followed the \textit{ad coelum} rule, supra note 111–12 and accompanying text, the statute would not need to mention water, as it would already be considered to be property of the landowner.

\textsuperscript{230} \textit{Id.} at 1029–30 (quoting \textit{Colo. Rev. Stat.} § 18-4-504.5 (1977)). As the court explained, the underlying statute, \textit{Colo. Rev. Stat.} § 18-4-504, states that a person who “unlawfully enters or remains in or upon premises” commits third-degree criminal trespass. \textit{Id.} at 1026.

\textsuperscript{231} See supra notes 200–03 and accompanying text.

\textsuperscript{232} \textit{Hartman v. Tresise}, 84 P. 685, 687 (Colo. 1905) (discussing common law property rules and declaring: “The legislature cannot make lawful a trespass by one man upon the lands of another . . . .”).

\textsuperscript{233} \textit{State ex rel. State Game Comm’n v. Red River Valley Co.}, 182 P.2d 421 (N.M. 1945).
\end{footnotes}
rights to float and fish them, including some relating to Spanish and Mexican legal traditions, and particularly emphasized a Texas decision recognizing a right to float and fish on a reservoir. The court also had to address Hartman, where the Colorado Supreme Court ruled that the state’s public ownership language—so similar to New Mexico’s—had nothing to do with recreational water uses. The Red River Valley majority favored the dissent in Hartman, regarded that dispute as mostly about trespass on private lands, and criticized the holding for “an entire misconception of the true nature of public waters as inherited by us from the early, and continued, Spanish and Mexican law and custom.” The recent New Mexico opinion relied chiefly on Red River Valley, but also cited several cases discussed above, and pointed generally to nine states that allow public use of waters with private beds and banks.

In deciding Day, the Wyoming Supreme Court cited recreational use cases from other states, but only after stating that the great majority of such cases “are of limited helpfulness” because of differences in conditions and state laws. The court noted that it took a narrower view of the right to touch beds and banks than the Missouri court did, probably because the Wyoming constitution’s state ownership language was key to its decision, and Missouri law had no comparable provision. Although New Mexico does have constitutional public ownership language, which was key to the decision in Red River Valley, the Wyoming court did not mention that case.

Both the Idaho and Colorado Supreme Courts cited Day, but otherwise took opposite approaches to authority from other states. The Idaho court was

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234 These authorities included several decisions from eastern and Great Lakes states. Id. at 428, 430.
235 One of these authorities was “Siete Partidas, a Spanish Code sanctioned as early as A.D. 1505.” Id. at 429.
236 Id. at 429–30 (discussing Diversion Lake Club v. Heath, 86 S.W.2d 441 (Tex. 1935)).
237 The Red River Valley opinion called Hartman “the principal [case] upon which [the landowner] relies . . . .” Id. at 431.
238 Id.
240 Id. at 52–55 (citing both Curran and J.J.N.P. and discussing both Day and Conatser).
241 Id. at 53 (“Montana, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming, and South Dakota have all recognized public ownership and use of water is distinct from bed ownership. See Parks v. Cooper, 2004 S.D. 27, ¶ 46, 676 N.W. 2d 823 (describing the states—including New Mexico—where the public trust doctrine applies to water independent of ownership of the underlying land).”).
243 Id. at 146.
influenced by “modern” trends of recognizing public rights to recreational access on streams with privately owned beds and banks, and twice cited both a California stream access case and a water rights treatise on the subject. In *Emmert*, the court brushed aside authority from other states by saying “we do not feel constrained to follow the trend away from the coupling of bed title with the right of public recreational use of surface waters . . . .” The court placed more weight on the common law property rule than on decisions from “water rich states such as Florida, Minnesota, and Washington.” It distinguished *Day* based on language differences between the state constitutions, and ignored *Red River Valley* despite the similarity of the New Mexico and Colorado language on public ownership of water.

Similarly, the Montana and Utah cases discussed *Day*, but otherwise had little in common in this regard. *Curran* included quotes from both *Day* and a much older Minnesota case, and cited commentary from a University of Montana water law expert on the recreational access trend in other states. *Hildreth*, while based primarily on *Curran*, contained a lengthy quote from a California case that included citations from California, Idaho, and Washington. By contrast, *Conatser* cited only Utah cases except for *Day*, which it had to discuss because the lower court adopted *Day*’s limited right to touch beds and banks; the Utah Supreme Court held that right was too narrow based on the broader public easement it had recognized in *J.J.N.P.* *Conatser* indirectly looked beyond Utah, however, because it found that the right to float had been established by *J.J.N.P.*, which cited several cases from other states in support of public rights to use waters with privately owned beds and banks.

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244 S. Idaho Fish & Game Ass’n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297–98 (Idaho 1974).


247 *Id.*

248 *Id.* at 1028 (finding it significant that Wyoming’s public-ownership provision “does not mention appropriation,” unlike Colorado’s).

249 See *supra* notes 181–85 and accompanying text.


253 See *supra* notes 143–44 and accompanying text.

Thus, the Mountain West supreme courts have treated \textit{Day} as the leading case on the right to float, even though \textit{Red River Valley} was decided years earlier on similar grounds,\footnote{One conceivable explanation for the lack of attention to \textit{Red River Valley} is the opinion’s emphasis on the Spanish and Mexican roots of New Mexico’s water law, see supra notes 233–35, 238 and accompanying text, which may have caused other Mountain West courts to question whether New Mexico law was similar enough to their states’.} and even though none of them adopted the Wyoming court’s split between public and private rights. Except for Colorado’s, however, all the courts have seen some relevance in other states’ decisions in favor of recreational access and have relied on such decisions in support of their holdings on public rights. The \textit{Emmert} court chose to buck the modern trend, but the others took notice and recognized a public right to use waters with privately owned beds and banks.

\textit{D. Judicial Views on Public Waters and Public Uses}

Having found that waterways may be public even if their underlying lands are not, the Mountain West courts still had to decide more specific questions about access and use. What characteristics make a waterway with privately owned beds and banks open for public recreation? Which activities are acceptable on such waterways? And what are the limits to the public’s right to touch the beds and banks? None of the public ownership provisions in the Mountain West provided much guidance to the courts on these points.

The opinions in the early cases show the courts grappling with a fundamental question: what makes a waterway public? In \textit{Red River Valley}, the court acknowledged the common law rule that waters overlying private lands were regarded as private waters closed to public use,\footnote{State \textit{ex rel. Game Comm’n v. Red River Valley Co.}, 182 P.2d 421, 426 (N.M. 1945).} but then asked whether the waters at issue should be considered public waters.\footnote{Id. at 427.} The court reasoned that the state constitution makes waters public if they are unappropriated,\footnote{Id. (quoting N.M. Const. art XVI, § 2).} and found that the owner of the land underlying the reservoir had not appropriated its waters.\footnote{Id. at 427–28, 431 (noting that the riparian rights doctrine—by which riparian landowners have a right to use water flowing on or over their property—had never applied in New Mexico, and that the landowner had not appropriated them to beneficial use under the requirements of the prior appropriation doctrine).} The court thus determined that the waters were necessarily public,\footnote{Id. at 429–30.} and declared that “the right to fish in \textit{public waters}, by the test of any rule, is universally recognized . . .”\footnote{Id. at 430.} This right of public use did not require that water first be appropriated for

528 P.2d 1295 (Idaho 1974)). \textit{J.J.N.P.} also included a footnote citing cases, including \textit{Red River Valley}, from more than ten states. \textit{Id.} at 1137 n.4.
the purpose of fishing, although the court did indicate that recreation and fishing were beneficial uses for appropriation purposes. Although the opinion was not specific on which waters should be considered public for purposes of recreational use, it suggested that all unappropriated waters of every natural stream are open.

The court in Day examined whether public waters for recreational purposes were limited to those “navigable in the federal sense,” with state-owned beds and banks. The court noted that water was public property in Wyoming because of the constitution, regardless of who owns the underlying lands, thus giving the state the “right to use and control its waters as it sees fit.” Private ownership of beds and banks “does not necessarily limit, destroy or curtail the public’s right to use nonnavigable waters nor prevent the public’s floating in or upon those waters and fishing for fish planted and propagated therein by the State, so long as such uses do not unnecessarily trespass” on underlying lands. The court reasoned that the state must have an easement for passage of its waters in their natural course over private lands, and because the waters are there legally, “they are available for such uses by the public of which they are capable. When waters are able to float craft, they may be so used.” Because the beds and banks remain privately owned, however, the public has only a narrow right to touch them, limited to incidental touching or scraping, or perhaps “a right to disembark and pull, push or carry over shoals, riffles or rapids . . . .” But wading or walking, or any touching of beds and banks “more than incidental to the right of floating use of the waters,” would be considered a trespass on private lands. Thus, although the Day court took a broad view of public waters and acceptable public uses, it saw the public portion of the river ending at the streambed.

Later opinions included less detailed discussions on the public right to float. In Emmert, the court held that it was foreclosed by the common law rule and state statutes consistent with it. Beginning with and after Picabo Livestock,
cases generally accepted the principle of public access for any recreational purpose on any waters that are capable of floating recreational craft.\textsuperscript{273} The \textit{Curran} court summarized by declaring that “any surface waters that are capable of recreational use may be so used by the public . . . .”\textsuperscript{274} Other cases focused on the use of beds and banks, while recognizing that these lands remain privately owned, gave less weight to the owner’s interests and more to what was “reasonably necessary for the effective enjoyment of the public’s easement . . . .”\textsuperscript{275}

Although the public trust doctrine\textsuperscript{276} is a long-established principle that addresses private vs. public rights related to ownership and use of waters and their underlying lands, most of the Mountain West recreational access cases did not mention it. Prior to the recent New Mexico decision, only the Montana cases relied on the public trust doctrine for any holding, and only \textit{Curran} discussed it at length. \textit{Curran} contained a long quote from the seminal U.S. Supreme Court case of \textit{Illinois Central},\textsuperscript{277} and later based its right-to-float holding on “the public trust doctrine and the 1972 Montana Constitution.”\textsuperscript{278} This quote suggested that the public trust doctrine is distinct from the state constitution. But in a later decision regarding the state’s new stream access statute, the Montana Supreme Court declared, “[t]he public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution,” which provides that waters of the state are “property of the state for the use of its people.”\textsuperscript{279}

The recent New Mexico opinion features the public trust doctrine more prominently than any preceding case, relying on it for the proposition that states are free to establish public rights to use waters regardless of bed or bank ownership.\textsuperscript{280}


\textsuperscript{274} \textit{Curran}, 682 P.2d at 171.


\textsuperscript{276} See supra notes 42–43, 46–57 and accompanying text.


\textsuperscript{278} \textit{Id.} at 171.

\textsuperscript{279} \textit{Galt v. State ex rel. Dep’t of Fish, Wildlife & Parks}, 731 P.2d 912, 914–15 (Mont. 1987). Chief Justice Turnage took issue with the majority’s statement about the public trust doctrine, stating that it was “not expressly set forth in the Montana Constitution” and was instead “a legal theory created by courts.” \textit{Id.} at 916 (Turnage, C.J., concurring).

Although *Red River Valley* had not mentioned the public trust doctrine, the *Adobe Whitewater* court pointed to the U.S. Supreme Court’s statements in the 2012 *PPL Montana* decision.\(^{281}\) The New Mexico court quoted *PPL Montana* as recognizing state power, based on the public trust doctrine, to determine public access to waters for recreation and other uses regardless of underlying land ownership.\(^{282}\) In defining the scope of public access rights under state law, however, the New Mexico court invoked the state constitution and *Red River Valley* rather than the public trust doctrine.\(^{283}\)

While the absence of the public trust doctrine from most of the decisions is notable, it is also understandable. The courts saw their state’s constitutional or statutory public ownership provisions as an adequate foundation for recreational use rights,\(^{284}\) and must have preferred to base their (highly controversial) holdings on these provisions rather than a judicially-created doctrine with no clear textual basis in state law. But now that the Supreme Court has specifically recognized it as a source of state power to determine recreational access rights, the public trust doctrine is likely to play a bigger role in stream access decisions, as it did in *Adobe Whitewater*.

### V. Conclusion

When the great water law scholar Frank Trelease examined public ownership provisions in western state water law, he essentially concluded that they had little real value or significance.\(^ {285}\) He noted that public ownership provisions had been invoked in various disputes over water allocation, management, and delivery, and found that state ownership was not crucial to the outcome of any of the cases on these issues: “each of these results could be accomplished without the concept of state ownership.”\(^ {286}\) Trelease may have been right in the context of appropriative water rights, but his article did not mention recreational water use or cite *Red River Valley*.\(^ {287}\)

\(^{281}\) *Id.* at 52 (citing *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012)).

\(^{282}\) *Id.*

\(^{283}\) *Id.* at 53.

\(^{284}\) Montana Chief Justice Turnage made just this point concurring in *Galt*, stating that the court need not “resort to the theory of the Public Trust Doctrine to find a right to the use of surface waters in this State for recreational purposes. This right . . . is to be found in the express language of Article IX, Section 3(3) of the Montana Constitution,” declaring the state’s ownership of all waters within its boundaries. *Galt v. State ex rel. Dep’t of Fish, Wildlife & Parks*, 731 P.2d 912, 916 (Mont. 1987) (Turnage, C.J., concurring).

\(^{285}\) See Trelease, *supra* note 35.

\(^{286}\) *Id.* at 644 (writing that the state’s police powers provided adequate legal basis for state laws governing the acquisition, determination, use, and loss of water rights).

\(^{287}\) To the contrary, the article stated that public rights of navigation and fishing attach to “navigable waters,” *id.* at 640, suggesting that such public rights would apply only to waters
Public ownership has been crucial for recreational access, however, providing a foundation in state law for a public right to float on state waters. In a series of cases spanning decades, supreme courts in the Mountain West have based public rights on public ownership of water as declared in constitution or statute. While Colorado’s supreme court chose to read its constitutional language narrowly, others interpreted their state’s public ownership provision to provide a right to float on state waters with privately owned beds and banks, for any recreational purpose, so long as the water is capable of floating recreational craft. Of the five cases that found a right to float, most also addressed the right to touch beds and banks of state-owned waters and held that recreational users have at least a limited right to touch them.

The courts’ challenge in deciding on public waters and uses has been exacerbated by the fact that public entities played such a limited role in the recreational access cases, nearly all of which involved disputes solely between private parties. While state government entities participated in some of the Mountain West cases, usually as amici curiae, the only such case brought by a state agency to establish public access rights was Red River Valley. In interpreting state constitutions and statutes for purposes of determining public rights in a fiercely contested area, the courts would surely have benefited from hearing state officials take a clear position on major legal questions of statewide significance. For the most part, however, such officials have left it to the courts to decide issues of public ownership and public rights in the context of localized disputes between private litigants.

State officials often hesitate to “wade into” stream access issues, which force them to choose between public floating and fishing rights, and private property rights—or more specifically, the rights of influential streamside landowners. Resolving such disputes outside of litigation is especially daunting—and seemingly a no-win situation for state officials—where both sides are vehemently convinced that existing law is on their side. Because stream access conflicts involve both a clash of values and a basic disagreement about established rights, they nearly always require courts to answer fundamental questions of law.

The judicial decisions certainly do not answer all questions about public access and use rights on state waters. Some have prompted legislative action, which

considered navigable for title. A decade earlier, the New Mexico Supreme Court had already decided otherwise based on the state’s public ownership provision.

288 See, e.g., Day v. Armstrong, 362 P.2d 137, 139 (Wyo. 1961) (Att’y Gen. as amicus curiae); S. Idaho Fish & Game Ass’n v. Picabo Livestock, Inc., 528 P.2d 1295, 1296 (Idaho 1974) (Fish and Game Commission as amici curiae). In Curran, two state agencies were listed as plaintiffs, although the Department of Fish, Wildlife and Parks appeared as an “involuntary” plaintiff. Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 163 (Mont. 1984).

has in turn been the subject of more litigation; most notably, the Utah Legislature largely rolled back the public rights recognized in Conatser. Some of the holdings do not clearly define the scope of public rights, especially as to touching private beds and banks; uncertainty left by Red River Valley contributed to renewed conflict over access rights in New Mexico, forcing the supreme court to clarify that the public right to use state waters allows contact with beds and banks. In Colorado, a 1983 attorney general’s opinion challenged Emmert’s finding on the right to float, and concluded that floating through private lands is not trespass if the boater does not touch the streambed. The legislature has not amended the relevant statute to clarify that floating alone is not trespass, however, leaving room for argument about whether there is a right to float under state law despite Emmert.

As the Mountain West sees continued growth in both population and the economic significance of outdoor recreation, it becomes increasingly important for states to clearly delineate public versus private rights regarding state waters. Uncertainty perpetuates continuing tensions between landowners and recreational users, sometimes leading to ugly confrontations. This Article began

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290 See supra notes 156–62 and accompanying text.
292 See supra Part III.G.
295 Utah and Idaho were the two fastest-growing states in the nation by percentage between 2010 and 2020, Nevada and Colorado were fifth and sixth respectively, Arizona was ninth and Montana was fourteenth. 2020 Census Apportionment Results, tbl E: Numeric and Percent Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 2020 Census and 2010 Census, U.S. Census Bureau (April 26, 2021), https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-tableE.pdf [https://perma.cc/DU38-UYU6].
296 Outdoor recreation is a significant part of the Mountain West economy, and several states are among the leaders nationally in outdoor recreation as a percentage of the state economy. According to the Commerce Department, Montana led the nation with outdoor recreation contributing 4.3% of its state Gross Domestic Product (GDP) in 2020, well ahead of second-place Hawaii at 3.8% of GDP; Wyoming was third at 3.4%. Other Mountain West states among the national leaders in this category included Idaho at 2.7% and both Colorado and Utah at 2.5%. Bureau of Econ. Analysis, Outdoor Recreation Satellite Account, U.S. and States, 2020, (Nov. 9, 2021), https://www.bea.gov/sites/default/files/2021-11/orsa1121.pdf [https://perma.cc/T4HH-XMHy]. Boating and fishing was the number one category nationally in economic value, id. at 5, and the overall value of outdoor recreation nationally rose every year from 2012 through 2019 before dropping sharply in the pandemic year of 2020. Id. at tbl.1.
by recounting an incident on Arizona’s Burro Creek between a group of kayakers and a trigger-happy landowner, an extreme but not entirely unique example. While Button’s conviction on criminal charges shows that a landowner may not shoot at boaters who merely float though his property, Arizona courts have not yet decided whether to recognize a right to float on waters that by statute “belong to the public.”

Those words have meaning for stream access in the Mountain West. Most of the courts have read their state’s public ownership declaration to confer a right to float on waters of the state, regardless of bed ownership. Colorado was already in the minority on this point when Emmert was decided, and now stands as an outlier. While the provisions vary from state to state, cases decided by five supreme courts have cumulatively established a regional rule of water law: public ownership means public access.

297 State v. Button, No. 1 CA-CR 18-0256, 2019 WL 439823 (Ariz. Ct. App. Feb. 5, 2019). The angler plaintiff in a stream-access case involving the Arkansas River in Colorado alleges that the landowner defendant “sought to exclude him from the [streambed] by chasing him off by force and threats of force, throwing rocks at him, threatening legal action, and shooting a gun at one of his friends.” Hill v. Warsewa, 947 F.3d 1305, 1307 (2020); see also Harrison v. State, No. A-13276, 2022 WL 1769132 (Alaska Ct. App. June 1, 2022) (upholding landowner’s conviction for reckless endangerment of rafters floating a river through his lands, despite his argument that his actions were justifiable as a defense of his property).

298 See Button, 2019 WL 439823.