

The Right to Float in Colorado: Differing Perspectives

Editor's Note: River running has become one of the most popular forms of recreation in Colorado, yet some believe that state law regarding the right to float through privately owned property is not well defined. This perceived ambiguity has prompted several lawsuits between outfitter companies and private land owners, and the stage is set for future legal entanglements related to this issue. In this article, we present the differing perspectives of two legal experts in Colorado: John R. Hill, attorney and shareholder in the firm of Bratton Hill Wilderson & Lock, LLC; and Lori Potter, attorney with Kaplan Kirsch & Rockwell LLP. In sharing their perspectives and expertise, both authors were asked to respond to the following questions:

1. *What does Colorado law (both statute and case law) say about the right to float in Colorado?*
2. *Are there issues regarding the right to float that are still open to interpretation? If yes, which issues and why?*
3. *Do you have any stories you can share that will help readers understand the issues?*

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Introduction

More people—over 500,000 in 2007 and 2008—take commercial whitewater raft trips in Colorado than in any other state. Commercial rafting powers Colorado's summer tourism economy. Private recreational boating also draws countless kayakers, canoeists, and rafters to the rivers and streams of Colorado every year. In fact, the state is named for one of its mightiest and most boatable rivers.

Despite the popularity of the state's waterways, the right of public boaters to float rivers as they run through private property in Colorado is frustratingly unclear. Thirty years ago, the Colorado Supreme Court concluded in a criminal trespass case under a now-superseded law that the public has no constitutional right to touch the bed or banks of a non-navigable river that overlies private lands. However, that decision ("Emmert") raises far more questions than it answers. Don't citizens have a right to float on navigable waters? What if a boater does not touch the river's bed or banks? The Emmert case was a criminal one; what happens when no one brings criminal charges? Almost every other state in the country recognizes and protects a boater's right

to float through private property; surely there is a good answer for Colorado.

The Law of the Current in Colorado

Long before David Emmert decided to test the limits of the right to float by touching the bed of the Colorado River, another boater brought a test case, *Arnett v. Trouthaven*, on the Gunnison River. The Gunnison boater won a ruling from the state district court that said, based on historical use by rafts and boats, the Gunnison River from Almont to Cimarron is a navigable stream and its waters are open to the public. Proof of navigability was the key to this precedent, and even in 1961—years before the widespread popularity of commercial whitewater float trips—the court found sufficient evidence to support navigability and thus a public right to float.

As private and commercial rafting grew in popularity, there were more incidents of streamside landowners calling the sheriff when boaters floated through. At times, boaters needed to get out of their boats to portage around fencing erected across a river to control livestock. At other

times, floaters left their boats to fish or simply to picnic or relax on the banks. Some of the incidents involved boating through stream reaches that contained prized trout fisheries. The Emmert case was designed to test the constitutionality of the law that made the touching of the river bed a criminal trespass.

The Emmert float trip in 1976 began with a put-in on public land and continued through a private ranch that the boaters knew to oppose raft trips. Emmert deliberately touched the river bed and then floated under a strand of barbed wire strung to catch boaters. The rancher had the sheriff waiting on the other side to arrest Emmert for trespass.

Emmert argued in court that Colorado boaters have a right under the state constitution to float on the state's rivers. Colorado's constitution declares the water of every natural stream to be the property of the public, dedicated to the people's use. The Supreme Courts of Wyoming, Montana, and New Mexico had approved the right to float through private land based on nearly identical text in their state constitutions. The Colorado Supreme Court parted ways with neighboring states, holding that the constitution protects only the right of appropriation of water.

Meanwhile, however, the Colorado legislature reacted to Emmert's trespass conviction with disapproval and, with an alacrity that legislatures are not known for, amended the criminal trespass law. Henceforth, boaters who floated through private property but remained in their boats could not be charged with criminal trespass. The hearings on the amendment contained strong statements supporting the right to float. A formal opinion by Colorado's then-attorney general, Duane Woodard, stated that this immunity from liability extended to charges of civil trespass as well.

There continued to be the occasional flare-up along stretches of floatable water on private land. The South Platte River above Denver, prized by both fishing clubs and kayakers, is an example. Boaters secured a victory on at least a segment of that waterway when a landowner who had historically placed barriers in the river agreed that the Colorado Whitewater Association had established a right to float by more than 20 years of persistent use. The owner settled a lawsuit by formally granting that easement.

In 2001, a landowner along the Lake Fork Gunnison River demanded an end to float trips run by a husband and wife outfitting team known as Cannibal Outdoors. Despite operating under a federal permit and having a long history of running small, family-friendly trips on this quiet stretch of water near Lake City, Cannibal found itself defending a civil trespass complaint in state court. The outfitter was forced out of business by the cost and stress of the lawsuit before it could get a court ruling on the river's navigability.

The court issued a partial ruling, holding that the state's abolition of criminal trespass liability **did not** resolve the question of whether civil trespass liability still remains.

Where Things Stand

What, then, is the state of the law on the right to float in Colorado? It is widely agreed that no criminal liability exists for floaters who remain in their boats and do not touch the bed or banks; sheriff's tickets issued to them are usually dismissed. Boaters who do touch the bed or banks of a private owner may be cited, but they have raised a choice-of-evils defense to trespass where their contact was a direct result of fencing or another hazard in the water.

On the civil trespass side, the status of the law is about as clear as the water of a mighty river at the height of spring runoff. Navigability continues to be the basis on which boaters who put in on public land are entitled to float a river as it passes through private land. No fewer than 42 other states sustain the right to float in those circumstances, as did the state district court in Gunnison in the 1961 Arnett case, but no higher court in Colorado has yet weighed in. Navigability remains a complicated concept because it has at least three different definitions, but its central proposition is that proof of the use of a waterway for transportation renders it available to boaters for float trips today. The Emmert case is widely cited in opposition to a right to float based on navigability, but Emmert explicitly did not decide that legal issue because the parties stipulated that the river was not navigable.

Floating Downstream or Paddling Against the Current?

The two most common flashpoints involve (1) float trips through riverside subdivision developments marketed as exclusive second home sites, and (2) float trips through waters where fishing clubs or leases are maintained. Where the streamside land owner is absentee, as is often the case, the conflict takes on an additional dimension. The loss of commercial rafting revenue or, as in the Cannibal case, the loss of an operating business, to say nothing of the loss of a prized recreational opportunity, is a heavy price for a tourism- and recreation-driven economy to pay.

The status quo is hardly satisfactory if streamside landowners can use the mere threat of a civil trespass lawsuit to force longstanding river runners to cease river trips rather than face crushing legal costs and possible damage awards. Colorado's neighboring states with river-running opportunities have protected the right to float, notwithstanding those states' unquestioned sensitivity to private property interests. When presented with a new right to float case, Colorado courts will have a chance to follow suit.