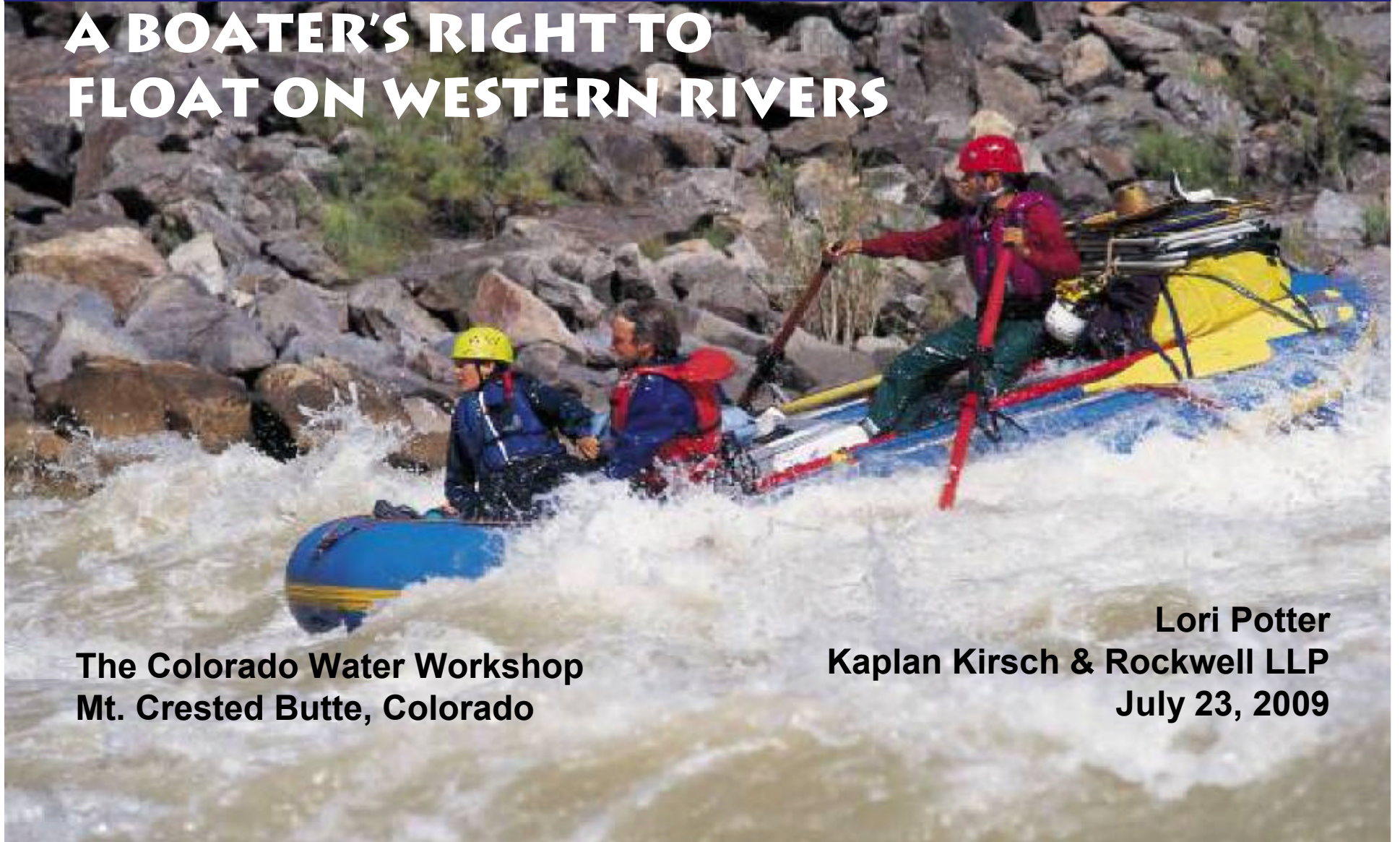


Float Like a Butterfly, Sting Like a Bee:

**A BOATER'S RIGHT TO
FLOAT ON WESTERN RIVERS**



**The Colorado Water Workshop
Mt. Crested Butte, Colorado**

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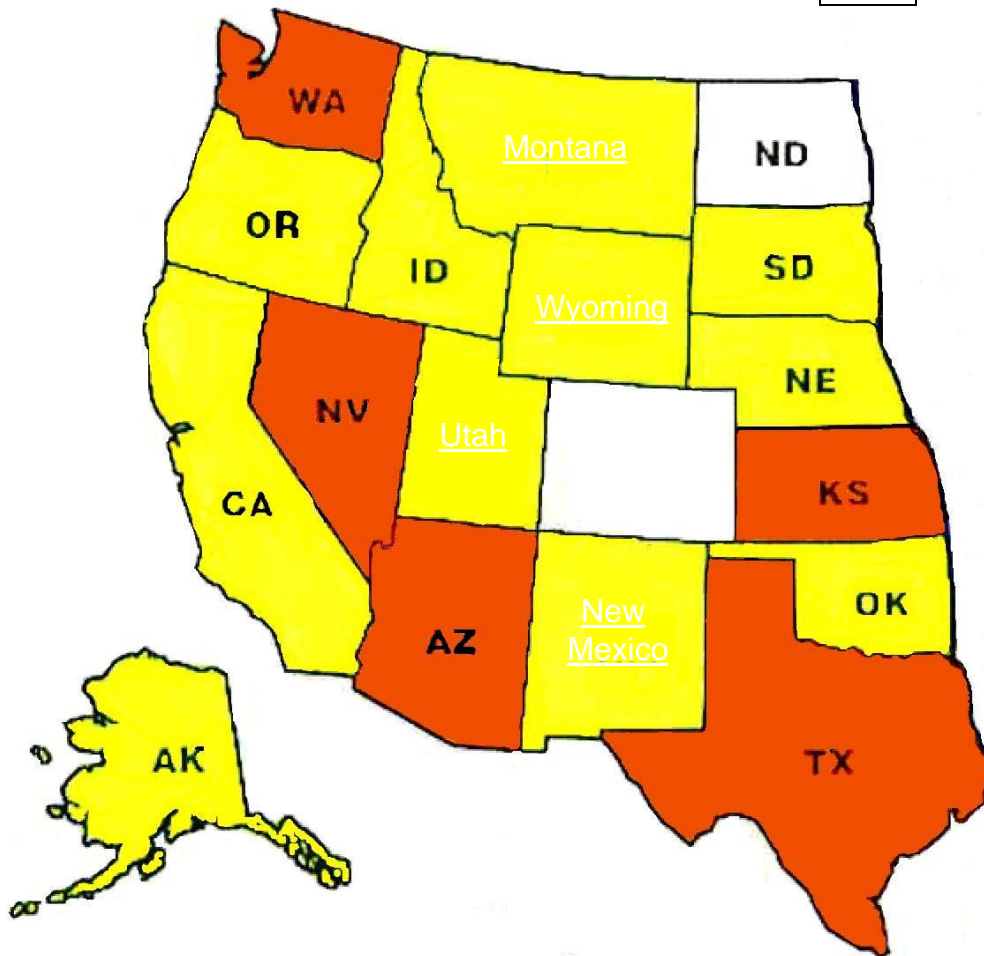
Public right to float broadly protected



Public right to float on navigable streams



Unsettled





New Mexico

- New Mexico Constitution Art. 16, § 2
- Unappropriated water of every natural stream is declared to belong to the public “and to be subject to appropriation for beneficial use”
- Private owners of adjacent property cannot exclude the public from streams or lakes: “don’t confuse title to land with title to water”
- No taking when water overlies private land



Wyoming

- Wyoming Constitution Art. 8, § 1
- Waters of all natural streams are declared to be the property of the State
- Public may float through private property and make limited use of streambeds, as needed for boating purposes



Montana

- Montana Constitution Art. IX, § 3(3)
- All waters are the property of the state for the use of its people and are “subject to appropriation for beneficial uses as provided by law”
- Includes floating and other kinds of recreational use even on privately owned beds and banks.



Colorado

- Colorado Constitution Art. XVI, § 5
- The water of every natural stream “not heretofore appropriated” is hereby declared to be the property of the public and dedicated to the use of the people of the state, “subject to appropriation”
- A majority of the Colorado Supreme Court said in a 1979 criminal trespass case that this protects the appropriation system, not public access. *People v. Emmert*, 597 P.2d 1025 (Colo. 1979)



Colorado

- Other Cases in Colorado:
 - *Gateview Ranch v. Cannibal Outdoor Network*, Case No. 01CV43, Gunnison Cty. Dist. Ct. (Lake Fork)
 - South Platte and Yampa Rivers
 - Private fishing clubs contest right to float through private property
 - Gunnison River from Almont to Cimarron. *Arnett v. Trouthaven, Inc.* No. 5702, Gunn.Cty. Dist. Ct., 1961
 - Taylor River ...



Colorado



Taylor River – Gunnison County, Colorado



State Navigability, Trust, or Public Boating Rights

- Oklahoma
- California
- Oregon
- Arizona
- Nevada
- Washington
- Texas
- Kansas
- Alaska
- Idaho

Navigability – Different Things in Different Places

- Federal navigable servitude test – commerce clause based: used or susceptible for use in interstate commerce in natural condition
- Navigability for title: use in commerce at statehood or susceptible to use (*Alaska* case)
- State law definitions of navigability – vary widely; cannot be more restrictive than federal test
- Colorado: no definition or standard for what is navigable
- Idaho & California – English common law definition
- Corps – “precise definitions depend on the courts”; Lower 39 miles of Colorado River above UT line determined navigable



Even if There's Private Ownership of River Bed...

- Public easement through waters and over submerged private lands (WY, UT, others)
- Analogy: split estate in oil & gas and minerals context
- Overlying surface land owner must provide reasonable access to owner of subsurface minerals



Utah

- State statute declares all waters to be the property of the public.
Utah Code Ann. § 73-1-1
- Public has an easement to “float, hunt, fish and participate in any lawful activity” using water, regardless of ownership of bed and navigability of water
- *Conatser v. Johnson*, 194 P.3d 897 (Utah Supreme Court 2008)



Who's a Criminal?

- Misdemeanor in Colorado to obstruct a waterway or any other place used for the passage of persons, vehicles, or conveyances when the public or a substantial group of the public has access. Colo.Rev.Stat. § 18-9-107(1)(a)
- No criminal trespass to float a river in CO if one does not touch bed or banks, but portaging or touching down to fish is problematic. Colo.Rev.Stat. § 18-4-504.5; 1983 Colo. AG Lexis 42



Takeaway Principles

- Right to float – a law professor’s dream
- Assertion of takings needs to be addressed in any context
- *Emmert* not the last word
 - Court can change its mind: navigability / *dicta* / change in statute / just plain wrong
 - Court can look to theories not addressed in *Emmert*



Put-ins for Resolution

- Via statute / initiative, *but* likely to wind up in court in a court challenge as too broad or too narrow
- Via a license, *but* licenses are revocable and don't resolve broad public claims for access
- Via civil trespass action against a boater or a declaratory judgment action against private landowner who abridges access
- Via criminal charges against a riparian landowner who denies access

Resources for Further Research

- American Whitewater Association's web site has a state-by-state "navigability report." The link below is for the state of Washington. Change the last two letters in the link to the abbreviation for the state you are interested in.
<http://www.americanwhitewater.org/content/Wiki/do-op/id/access:wa>
- Potter, Marlin and Kanda, *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*. Univ. of Denver Water Law Review, Vol. 5, Issue 2 (Spring 2002).
- Hill, *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*. Univ. of Denver Water Law Review, Vol. 4, Issue 2 (Spring 2001).
- Watson, *Stream Access Across the West*, PERC, the Property and Env't Research Center (March 2009), www.perc.org/articles

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