



River Access in Colorado

By Alexa Kelly

The right of the public to access rivers flowing through private property in Colorado has been a source of debate since before statehood. Coloradans rely primarily on case law to determine how and where one can float on Colorado's rivers. This issue brief discusses relevant court cases and other developments that govern river access in Colorado.

What is Navigability?

The navigability of rivers is determined under a streambed title test, which dictates whether private landowners or the state own the bed or banks of a stream. [The Daniel Ball](#) U.S. Supreme Court ruling¹ and the [Equal Footing Doctrine](#) of the U.S. Constitution² are also used to determine navigability.

In 1870, under *The Daniel Ball* ruling, the U.S. Supreme Court stated that rivers are navigable if they are used or are susceptible 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.

Courts at the state level have used *The Daniel Ball* criteria to determine whether a river is navigable or non-navigable based on if a river was used for commerce prior to statehood. If a river has been used for commerce, it may be found navigable under federal law.

Navigability in Colorado

Several cases have played a role in classifying Colorado's rivers as non-navigable. The Colorado Supreme Court in *In re German Ditch & Reservoir Co.* declared that all streams within the limits of the state are non-navigable.³ The court however, did not expand on what test or law it relied on to make this determination.

Three other Colorado Supreme Court cases declared specific rivers as non-navigable. These cases and rivers are the:

- Arkansas River - [Smith v. Town of Fowler](#);⁴
- South Platte River - [Hall v. Brannan Sand and Gravel Company](#);⁵ and
- Eagle River - [United States v. District Court of County of Eagle](#).⁶

¹ 77 U.S. 557 (1870).

² See Article IV, Section 3, Clause 1 of the U.S. Constitution.

³ 129 P.2d 3, 9 (Colo. 1913).

⁴ 333 P.2d 1034 (Colo. 1959).

⁵ 405 P.2d 749 (Colo. 1965).

⁶ 169 P.2d 760 (Colo. 1969).

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People v. Emmert (1979)

The foundation for current stream access restrictions stems largely from the Colorado Supreme Court case *People v. Emmert*.⁷ The case focused on whether the public has a right to float or recreate in non-navigable waters.⁸ The Colorado Supreme Court upheld that the public does not have a right to float on a non-navigable stream if it flows through, across, or within the limits of private property unless they have the owner's permission. It also determined that Section 5, Article XVI of the Colorado Constitution, which declares water as public property, was primarily intended to preserve the historical appropriation system of water rights upon which irrigation in Colorado was founded, rather than to assure public access to waters for recreation.

The court determined that a person who owns the surface of the ground has exclusive right to everything above it, and cited Section 41-1-107, C.R.S., which states – "The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight of aircraft." Applying this rule, the court stated that an individual who "intrudes upon the space above the surface of the land -- without the permission of the owner, whether it be for fishing or other recreational purposes,

such as floating, as in this case, commits a trespass."⁹

Amending the Definition of Premises

While *Emmert* was pending in 1977, the General Assembly, through Senate Bill 77-360, amended the Criminal Code to include non-navigable stream beds and banks in the definition of "premises." In criminal cases concerning trespassing, premises is currently defined as "real property, buildings, and other improvements thereon, and the stream banks and beds of any non-navigable fresh water streams flowing through such real property."¹⁰

Recent Developments

1983 Attorney General Formal Opinion

Following the change to the definition of premises, the Colorado Attorney General issued a formal legal opinion in 1983 on what constitutes trespassing when it comes to floating on streams through private property. An opinion offered by the Attorney General serves an advisory function and does not operate as governing law.

The opinion stated that "banks and beds," as used in Section 18-4-504.5 C.R.S., refer to the real property confining and defining a

⁷ 597 P.2d 1025 (Colo. 1979).

⁸ The parties stipulated that the Colorado River is non-navigable and had not been historically used

for commercial or trade purposes of any kind. *Id.* at 1026.

⁹ *Id.* at 1032.

¹⁰ Section 18-4-504.5, C.R.S.

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watercourse, but not the water itself. The opinion also stated that “one who floats upon the waters of a river or stream over or through private property, without touching the stream’s banks or beds, does not commit a criminal trespass.” In addition, the opinion offered that because Section 18-4-504.5, C.R.S. does not address civil remedies, it cannot be viewed as allowing owners of stream banks or beds to prohibit or control access for the use of floating through waters passing through their lands.¹¹

Legislative Action

While there have since been several attempts through the legislative and initiative process to clarify the right to access non-navigable streams in Colorado, no such attempt has been successful. In 2010, the Colorado General Assembly introduced [House Bill 10-1188](#) in response to a conflict between two commercial rafting companies and a commercial developer over access to a portion of the Taylor River in Gunnison County. The bill allowed rafting companies licensed in Colorado to legally float on rivers through private land without being held liable for civil trespass as long as they only made “incidental contact” with the beds and banks of the river. The bill ultimately failed in the conference committee.

2023 Colorado Supreme Court Case

In addition, the Colorado Supreme Court ruled in 2023 that a plaintiff had no legal standing to argue that the Arkansas River was navigable at the time of statehood and therefore accessible to the public.¹²

¹¹ A copy of the opinion can be obtained from the [Colorado Supreme Court Library](#).

¹² 530 P.3d 632 (Colo. 2023).