“A RIVER RUNS THROUGH IT”: BALANCING LANDOWNERS’ AND RECREATIONAL USERS’ CLAIMS TO COLORADO RIVERS

INTRODUCTION

Colorado is the largest river rafting destination in the United States, with thirteen river systems. In the 2000 rafting season, 519,378 people took commercial river rafting trips in Colorado, while an estimated 559,370 people rafted down Colorado’s rivers in the 2001 season. The State’s river rafting industry brought in about $122 million in the 2001 season, compared to just $61 million in 1991, which is a clear illustration of the growth in the Colorado river rafting industry. Not surprisingly, this significant growth has been accompanied by an increase in the tensions and confrontations between riverfront landowners and recreational users who pass through privately-owned property while rafting down the rivers.

Examples of the tension between Colorado landowners and recreational river users abound. In June 2001, Yosi Lutwak (“Lutwak”), a Colorado riverfront landowner who owns the Gateview Ranch, filed a trespass suit against Cannibal Outdoor Network, a Colorado river outfitter, and its owners, Jack and Leslie Nichols. In the suit, Lutwak alleges that recreational users who float down the Lake Fork of the Gunnison River through Lutwak’s property are committing trespass and seeks to permanently enjoin the defendants from passing through his property. According to Lutwak, the increase in the recreational use of rivers is “‘like turning this really pristine area into Six Flags Park.’” The Colorado White Water Association and American Whitewater have intervened in the suit and are asking the court to rule that private property owners cannot prevent a boater’s right of downstream passage on any waterway in Colorado. Another example of the Colorado conflict occurred in the spring of 2001: after threatening some boaters with a gun, a landowner on the Taylor River was found guilty of two counts of misdemeanor menacing. Additionally, tensions have been running high at the
Sportsman’s Paradise in the Cheesman Gorge of the South Platte River, where boaters usually portage or float over a dam and under a metal grate that hangs from the club’s entrance bridge.\[11\] Boaters there have reported being yelled at, have been accused of breaking the law, and have been intimidated by club members who have shoveled dirt on boaters from the bridge.\[12\]

The basic dispute between riverfront landowners and recreational river users is as follows. Riverfront property owners claim that rivers running through their land are private property and thus they have a right to exclude the public from the rivers.\[13\] According to the landowners, recreational use of rivers infringes on their privacy, disrupts ranch operations, interferes with fishing, and causes noise and pollution.\[14\] Furthermore, recreational users are “freeloaders” who do not pay landowners to travel on rivers running through the private property, while the landowners, on the other hand, “paid” for the rivers when they bought the land.\[15\] There is also concern about the effect of recreational river use on the value of property adjoining the rivers: if rivers were to become “highways” for anyone and everyone to use, the value of the property bordering the rivers would decrease substantially.\[16\] On the other side of the controversy, the recreational users claim that they have an absolute right of downstream passage on rivers running through privately-owned property.\[17\] Rivers, they contend, are like highways, and thus the public has a right to travel on them even if they do run through privately-owned property\[18\]: “A river is a road, and it’s about time the Republic of Colorado joined the civilized world in recognizing that fact.”\[19\]

The conflict between landowners and boaters has been heightened due to the increase in the number of recreational river users. Since the mid-1990’s, rafting, kayaking, and canoeing have almost tripled nationally,\[20\] and the number of rafts on the Lake Fork of the Gunnison River in Colorado, where Lutwak’s ranch is located, have increased tenfold in the 1990’s.\[21\] Furthermore, “as [the] demand for floating experiences increases and shallow-draft watercraft lead to floating even smaller streams,”\[22\] conflicts between landowners and boaters will continue to escalate.
In addition to the increase in recreational traffic on the State’s rivers, confusion in Colorado river law[23] has made the dispute between Colorado landowners and boaters particularly acute. In most states, it is clear that rivers are considered public domain and thus the public has a right to float on rivers through private property.[24] In Colorado, however, this rule is not clearly established.[25] In 1979, in *People v. Emmert*,[26] the Colorado Supreme Court ruled that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.”[27] In 1983, however, the Colorado Attorney General issued an opinion stating that floating on a river through private property without touching the riverbed or bank is not trespassing.[28] As one commentator has stated, “Colorado’s . . . river access laws are so ambiguous that landowners believe they own chunks of rivers, floaters believe everyone owns them and the Department of Natural Resources feebly ‘negotiates,’ hoping the issue will fade before someone has to make a decision or someone gets hurt.”[29]

However confused Colorado river law may be, it is clear that the conflict over the use of the State’s rivers is not going to fade any time soon and that the competing claims of landowners and boaters must be reconciled. In this Paper, I will present and evaluate several solutions to this controversy, all of which are based on the theory of balancing the landowners’ property rights with the public’s interests in the rivers. Part I of this Paper addresses the legal background necessary to understand the Colorado river rights controversy and the potential solutions to the controversy that are presented in this Paper. It outlines concepts of both federal and Colorado water law, including the doctrine of navigability and the public trust doctrine, and discusses property law concepts involving the joint ownership or use of property, including tenancies in common and easements. In Part II, I will argue that although landowners have ownership and privacy rights in their land which must be respected, the public should have a “privilege” to float on rivers running through privately-owned land. Landowners’ rights and the public privilege must be balanced and limited so that they can coexist. In Part III, I will present several solutions to the Colorado river controversy, including a judicial solution based on the property law concepts of tenancies in common and easements and three administrative solutions, a lottery
system, an auction system, and a licensing system. All of these solutions have as their focus the maintenance of a balance between landowner rights and the public privilege. Finally, in Part IV of this Paper, I will evaluate the possible solutions discussed in Part III, examining the advantages and disadvantages of each. I will conclude that the imposition of a lottery system in Colorado would best settle the State’s river rights controversy by both preserving landowners’ property rights and ensuring the equitable and effective exercise by the public of its privilege to float on the State’s rivers.

I. BACKGROUND: FEDERAL AND COLORADO WATER LAW AND RELEVANT PROPERTY LAW CONCEPTS

A. Federal Water Law

1. The Concept of Navigability

Colorado landowners’ claims to rivers and recreational users’ assertion of rights in the rivers are interwoven in concepts of navigability. The doctrine of navigability is used to determine whether waters are public or private. Navigability is significant in three main contexts, although for purposes of this Paper, only the first and third contexts are relevant. The first is the federal title test, which is the basic (federal) test of navigability, establishing title to the beds of lakes and rivers:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted in the customary modes of trade and travel on water.

In other words, water is navigable when members of the public use it, or can use it, in its ordinary condition, as a highway of commerce over which they can conduct trade and travel. The second context is the standard of navigability used to establish federal regulatory jurisdiction under the commerce clause and is very similar to the federal title test.

The third context of navigability encompasses state tests of navigability. States may establish their own rules of navigability for purposes other than determining title and defining the
limits of federal regulatory power. Many states have developed standards to establish a right of public passage on lakes and rivers and to encourage expanded recreational activities on the waters. These state standards are generally much more liberal than either the traditional federal title test or the commerce clause test. Some courts have rejected commercial use as the only test of navigability and instead employ a recreational or “public use” standard. These courts apply a public use test because the commercial use test was developed before recreational uses existed and thus did not take such uses into account. The justification for application of such an expanded standard for navigability is that it is necessary to protect the recreational use of water, which has become a significant economic activity. This broader, recreational use standard gives the public use of waters for navigation, fishing, and other recreational purposes. California has embraced such a “recreational boating test of navigability”: “the public may use for boating and related recreational purposes any body of water that may be navigated using a small oar or motor propelled craft.” Montana is another state that has adopted a recreational use test of navigability for purposes of public use of waters. In Montana, 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.”

2. The Public Trust Doctrine

Under the public trust doctrine, states hold navigable waters and the lands underneath them “in trust” for the people of the state, and thus they cannot sell or give rivers away to private ownership or control. The public trust doctrine is linked to the doctrine of navigability because navigability determines whether land or activity falls under the protection of the public trust doctrine. In other words, if water is navigable, then the land underneath the water is protected by the public trust doctrine and activities occurring on the water, such as bathing and fishing, may be considered incidents of navigation and thus also protected by the doctrine.

There are several important cases in the development of the public trust doctrine. *Arnold v. Mundy*, which was decided in 1821, was the first American case to suggest the concept of a
public trust over tideland areas.\[52\] About twenty years later, in *Martin v. Waddell*\[53\] the U.S. Supreme Court held that the individual states have title to land under navigable waters.\[54\] The Court stated that “the shores, and rivers, and bays, and arms of the sea, and the land under them [are held] as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish and floating fish . . . .”\[55\] In 1892, the Supreme Court decided *Illinois Central Railroad v. Illinois*,\[56\] which has been described as the “‘lodestar’” of American public trust law.\[57\] In that case, the Illinois legislature had made a grant of submerged lands under Lake Michigan to the Illinois Central Railroad.\[58\] Four years later, the State revoked the grant and sought to have it declared invalid.\[59\] The Court stated that the title under which Illinois held the property in question was a “trust devolving upon the State for the public . . . which can only be discharged by the management and control of the property in which the public has an interest, [and] cannot be relinquished by a transfer of the property.”\[60\] The Court found that the grant relinquished the State’s control over a significant portion of Lake Michigan and was inconsistent with the State’s obligation as trustee of such waters for the public.\[61\] In addition, the Court noted that the State’s control over trust property could never be lost.\[62\]

Although the original purpose of the public trust doctrine was to preserve navigable waters for the public for navigation, commerce, and fishing, the doctrine has been expanded by some courts to protect recreational uses.\[63\] For example, in *Marks v. Whitney*,\[64\] the California Supreme Court stated that public trust easements have been held to include the right to hunt, fish, bathe, swim, to use the water for boating and general recreational purposes, and to use the bed for anchoring, standing, or other purposes.\[65\]

**B. Colorado River Law**

1. The Confusing State of Colorado River Law

As noted in the Introduction to this Paper, Colorado law on the recreational use of rivers is in a state of confusion. One significant development in the State’s river law is the Colorado Supreme Court’s decision in *People v. Emmert*.\[66\] In *Emmert*, the defendants were convicted of
criminal trespass while tubing on the Colorado River because they had floated and fished from rafts over private property and had touched the riverbed as they crossed the property.\[^{67}\] The Colorado Supreme Court noted “the general rule of property law in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.”\[^{68}\] The parties had agreed that the Colorado River was non-navigable and had not been used for any kind of trade or commerce, and the defendants did not dispute the adjacent landowner’s ownership of the riverbed.\[^{69}\] Applying the common law 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’),” the court held that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.”\[^{70}\] The court recognized the rationales used by other courts in permitting public recreational use of waters overlying privately-owned riverbeds: “(1) practical considerations employed in water rich states such as Florida, Minnesota and Washington; (2) a public easement in recreation as an incident of navigation; (3) the creation of a public trust based on usability, thereby establishing only a limited private usufructuary right; and (4) state constitutional basis for state ownership.”\[^{71}\] However, the court in Emmert considered the common law rule stated above “of more force and effect” than these rationales.\[^{72}\] The defendants raised the argument that Article XVI, Section 5 of the Colorado Constitution\[^{73}\] establishes a public right to recreational use of all waters in the State. The court disagreed, citing to Hartman v. Tresise\[^{74}\] and stating that Article XVI, Section 5 applies only to the right to make appropriations of water (for beneficial use) and not to the use of the State’s water for recreation or fishing.\[^{75}\]

In 1977, after the defendants’ convictions in Emmert\[^{76}\] and while their appeal was pending,\[^{77}\] the Colorado General Assembly passed Colorado Revised Statutes (“C.R.S.”) § 18-4-504.5.\[^{78}\] This statute defined “premises” for purposes of criminal trespass: “As used in sections 18-4-503 and 18-4-504, ‘premises’ means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.”\[^{79}\] Section 18-4-504.5 seemed to impose criminal trespass
liability on anyone who touched the stream banks or beds of rivers running through private property.

The third development of note in Colorado river law is the 1983 opinion by the then Colorado Attorney General, Duane Woodward ("Woodward"), interpreting C.R.S. section 18-4-504.5. Woodward’s opinion answered two questions: (1) does C.R.S. section 18-4-504.5 expose people who float or boat on Colorado rivers and streams to criminal trespass prosecution if they float across private lands, if they do not touch the riverbed or bank? and (2) does C.R.S. section 18-4-504.5 authorize adjoining landowners to prohibit or otherwise control such floating or boating? The Attorney General answered both questions in the negative. In response to the first question, Woodward concluded that it was not criminal trespass to float through private property, as long as the floater does not touch the bed or banks of the river. Woodward’s response to the second question, however, was ambiguous. He stated that “because section 18-4-504.5 speaks only to criminal trespass and does not address civil remedies, it cannot be viewed as authorizing the owners of stream banks and beds to prohibit or otherwise control the use for floating of waters passing over their lands.” This statement could be interpreted to mean that the landowner has no authority to charge the floater with criminal trespass, but still has civil remedies available. Alternatively, the statement could mean that the legislature has to confer on landowners authorization to exclude others from their property.

2. Navigability and the Public Trust Doctrine in Colorado

For purposes of the public use of waters, states do not have to follow the federal navigability test; rather, they may adopt their own, less rigorous tests of navigability. Colorado, however, has not adopted a definition of navigability for any purpose. With regard to the navigability of the State’s rivers, the Colorado Supreme Court has stated that “the natural streams of the state are nonnavigable within its limits.” Additionally, it has been asserted that there are no navigable streams in Colorado under any definition that would allow the public access to waters flowing through private land. As for the public trust doctrine’s role in Colorado water law, the State has never applied
the doctrine to water. Furthermore, the State is not likely to apply the doctrine to water use in the future because of the potential adverse effect that application of the doctrine would have on existing water rights under the prior appropriation system.

C. Relevant Property Law Concepts: Tenancies in Common and Easements

The property law models of tenancies in common and easements serve as the basis for the judicial solution to the Colorado river rights dispute, discussed in Part III of this Paper. A basic description of the common law regulating tenancies in common and easements is thus necessary for an understanding of how such a judicial solution can balance the competing claims of landowners and recreational users to Colorado’s rivers.

1. Tenancies in Common

A tenancy in common is a form of concurrent ownership of property. Concurrent ownership of property exists whenever two or more people own the same property at the same time. Tenants in common hold undivided shares in land which are alienable, devisable, and inheritable. No right of survivorship attaches to tenancies in common, which means that when one tenant in common dies, his share passes to his heirs or legatees, who then assume the decedent’s place in the shared possession.

There are several remedies available to tenants in common when their interests have been damaged by a cotenant. The remedy for damage to the jointly held property caused by one tenant in common is an action of waste. Damage to the property includes “any permanent diminishment in its value.” As a basic principle, actions changing the premises or land that reduce the property’s value, misuse or neglect of the land (or improvements on it), and removal of certain resources from the premises constitute waste. The classic example of waste is the case of mineral deposits in which removal of the deposits by one tenant in common injures a cotenant. If the case involves action taken by a tenant in common with respect to a renewable resource, such as trees, whether or not the act constitutes waste is not as clear. Generally, if the action of the tenant in common does not unreasonably deplete the renewable resource, the action should not be treated as waste.
occurred, a court will award damages, whereas if the waste is prospective, a court may grant an injunction.\textsuperscript{[106]}

A second remedy available to tenants in common is that of contribution.\textsuperscript{[107]} This remedy is available if one tenant in common has paid out of his own pocket expenses necessary to preserve the jointly held property.\textsuperscript{[108]} If, for example, a tenant in common pays for repairs needed to make a structure windproof and waterproof, the cotenant who did not pay for the repairs should be required to contribute to the cost of the repairs.\textsuperscript{[109]}

2. Easements

The law of easements is another basis of the judicial solution to the Colorado river rights dispute discussed in Part III of this Paper.\textsuperscript{[110]} An easement is “an interest in land that entitles its holder to some limited use or enjoyment of land possessed by another.”\textsuperscript{[111]} Easements may be positive or negative.\textsuperscript{[112]} A positive easement gives its holder a right to do something on another person’s land.\textsuperscript{[113]} A negative easement restricts the actions that another landowner may take on his own land.\textsuperscript{[114]} There are two types of easements: easements in gross and easements appurtenant.\textsuperscript{[115]} An easement in gross is created to benefit the holder of the easement personally and not his land.\textsuperscript{[116]} Thus, if the holder of an easement in gross sells his land, he still owns and may use the easement. An easement appurtenant is established to benefit the easement holder’s use of his land.\textsuperscript{[117]} If the holder of an easement appurtenant sells his land, then he no longer owns the easement, rather, the new owner of the land holds the easement. In other words, the easement appurtenant passes to the new owner with land.

The holder of easement rights may make reasonable use of them.\textsuperscript{[118]} However, when construing the scope of an easement, courts will attempt to balance the easement holder’s right to make use of the easement and the right of the landowner not to be adversely affected in the use of his land (over which the easement lies).\textsuperscript{[119]} The rights of the landowner depend on whether the easement is exclusive or non-exclusive.\textsuperscript{[120]} A non-exclusive easement allows the landowner to retain the right to use the property in common with the easement holder.\textsuperscript{[121]} The holder of a non-exclusive easement may not interfere with the landowner’s use of his land, as long as the
landowner’s use does not interfere with the easement rights. The landowner must not take any action which would interfere or be inconsistent with the easement holder’s rights.

Both landowners (who own land over which easements lie) and easement holders have remedies for harm involving the easements. If the landowner suffers harm due to misuse of the easement by the easement holder, the landowner may recover both compensatory and punitive damages. In addition, an easement may be terminated if it is overused or misused and the landowner is damaged as a result, or the easement holder may be enjoined from the overuse. Usually when an easement holder suffers harm involving his easement rights, it is due to the landowner’s failure to respect the easement. In such cases, the courts will grant the easement holder an injunction, forcing the landowner to respect the easement. If the harm suffered by the easement holder is not fully remedied by the grant of injunctive relief, the easement holder may also receive both compensatory and punitive damages.

II. PUBLIC PRIVILEGE TO FLOAT DOWN “PRIVATE” RIVERS

In order to give more shape to the Colorado river rights dispute and as background for the various solutions discussed in Part III of this Paper, I will first address in this Part the various arguments made by both sides in the river rights controversy. I will then present the basic theory underlying the solutions discussed in this Paper. This theory is as follows: Recreational river users have a privilege to float down rivers through privately-owned property. This privilege, however, must be balanced with the ownership and property rights of the landowners in a way that enables both the landowners’ rights and the recreational users’ privilege to be respected.

A. The Colorado River Rights Debate

There are strong arguments on both sides of the debate between landowners and boaters over the use of Colorado’s rivers. Arguments against a public privilege to float on rivers running through private property are generally based ownership and privacy rights. One such argument is that landowners have a right to exclude others from their property, which right is inherent in the ownership of property. As the U.S. Supreme Court has stated, “The hallmark of a protected property interest is the right to exclude others. That is ‘one of the most essential
sticks in the bundle of rights that are commonly characterized as property.”

A second contention against a public privilege to float the rivers is that landowners have a right to enjoyment and use of their land, without interference from others, and that raft upon raft of boaters floating through the landowners’ backyards impermissibly interferes with this right. An argument based on the Fifth Amendment to the U.S. Constitution may also be asserted on behalf on landowners: allowing so many boaters to float through privately-owned property is essentially a taking of the property, and the government may not take private property without just compensation. Yet another argument that may be asserted against a public privilege is that recreational users are “freeloaders” who do not pay anything to the landowners whose property they pass through, while landowners have properly paid for their land and the right to use it without interference by others. In addition, it can be asserted that there is no public privilege because of the Colorado Supreme Court’s holding in People v. Emmert that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.” Furthermore, in addition to the general loss of privacy, the potential negative effects of recreational river use on privately-owned property adjoining the rivers abound: recreational use may decrease property values, interfere with ranch operations taking place on the private property, cause an increase in noise, contribute to pollution of rivers, facilitate vandalism of and trespass on the private property, scare off wildlife, and interfere with fishing on the rivers (which is a profitable business for some landowners).

Arguments in support of a public privilege to float on rivers through privately-owned property are also persuasive. One such argument is that rivers are highways and thus are open to the public, as long as the public does not trespass getting to or from the water. A second contention is that the public’s right to float on rivers in small, human-powered craft is thousands of years old: this right was recognized under the common law of England before the founding of the United States and under the civil law of Rome and other ancient civilizations. A third argument, based on the public trust doctrine, is that the State holds rivers “in trust” for the public and thus cannot abdicate its responsibility to maintain public recreational river rights. Yet
another argument in support of the public privilege to float is that the 1983 Colorado Attorney General opinion created an affirmative right to float on rivers through private property, as long as the boater does not touch the riverbed or banks.

B. Reconciling and Balancing the Competing Interests: Coexistence of Landowners’ Rights and a Public Privilege

1. Issue of Navigability

Before any kind of solution to the Colorado river rights dispute can be reached, a threshold issue regarding the concept of navigability in Colorado must be addressed. As noted above, Colorado has not adopted a definition of navigability for any purpose. One major step in resolving the river rights controversy would be the adoption by the State of a navigability test for purposes of public use of the State’s waters. A navigability test for purposes of public use of Colorado’s rivers must also be established so that it can be determined to which rivers the solutions to the dispute discussed in this Paper apply.

Clearly, the expanded, “recreational test of navigability,” which is used in such states as California and Montana, is too broad to be applied in Colorado. Use of such a test would not sufficiently protect landowners’ ownership and privacy rights, especially in light of the rise in recreational traffic on the rivers. Also, application of such a standard could be perceived as a major change in Colorado property law, as Colorado has more carefully protected landowners’ property rights than other states, and may thus promote litigation against the government by affected landowners alleging a taking of property rights under the Fifth and Fourteenth Amendments of the U.S. Constitution. Therefore, rather than using an expanded navigability test, the basic federal test for navigability, the federal title test, should be applied in Colorado to determine navigability for purposes of public use of waters. Under this test, rivers are navigable when they are used, or are susceptible of being used, as highways for commerce, over which trade or travel are or may be conducted in the usual modes of trade and travel on water. Use of this standard in Colorado would allow sufficient availability of rivers for recreational use and yet would not overly burden property owners’ rights. The basic federal test
is consistent with maintaining the coexistence of landowners’ ownership and privacy rights and the public’s privilege to float.

2. Balancing Landowner Rights and the Public Privilege

The basis of the solutions to the Colorado river dispute presented in Part III of this Paper is the theory that landowners have ownership and privacy rights in rivers running through their land and recreational users have a privilege to float on rivers running through privately-owned land. A balance must be achieved between the landowners’ rights and the public’s privilege so that these rights and this privilege can coexist.

To achieve this balance of interests the landowners’ rights and the public privilege must both be limited. The landowners’ rights must be limited because of the increase in private ownership of land with rivers running through it: if a public privilege to use such rivers is not preserved, the public will have an increasingly small number of rivers and parts of rivers to use and enjoy. Additionally, as participation in recreational activities, including boating, increases, the demand for the availability of recreational use of rivers will grow. Furthermore, there is an important public interest in the use of the State’s waters, which interest must be protected. Water-based activities provide a high quality of life for Colorado citizens and visitors to the State and also are a vital part of the State’s tourism industry. Likewise, the public’s privilege to float must be limited because of the great increase in recreational traffic on the rivers. If the public’s privilege is not limited there is the danger that recreational use could “overtake” the rivers and interfere to an impermissible extent with landowners’ property rights. The public privilege to float must also be limited because of the protection that Colorado has traditionally provided to landowners’ private property rights. As one author has noted:

In . . . states, such as Montana and Wyoming, where navigational rights were reserved as a part of the state constitution, the rights of [landowners whose land is bounded or traversed by a natural stream] are very limited, and the public has almost unlimited access to the rivers and streams. Colorado has no such history. Rather, it has carefully guarded the rights of private property owners, even those who own riparian areas. It is this history which cannot simply be
dismissed in a wave of public desire to recreate. It will require careful crafting and attention to detail to evolve a compromise which will allow the public access to important recreational resources while protecting the rights of landowners.[155]

III. POTENTIAL SOLUTIONS TO THE COLORADO RIVER CONTROVERSY

There are several possible solutions to the Colorado river controversy which would maintain the balance between the landowners’ ownership and privacy rights and the public’s privilege to float down the rivers. In this Section, I will present a judicial solution, based on the property law models of tenancies in common and easements, and three administrative solutions, including a lottery system, an auction system, and a licensing system. The goal of these solutions is to enforce and protect both the landowners’ privacy and ownership rights and recreational users’ privilege to float down the State’s rivers, thus enabling the coexistence of the competing interests of landowners and boaters.

A. A Judicial Solution Based on Tenancies in Common and Easements

One solution to the Colorado river rights dispute which balances landowner rights and the public privilege to float is a judicial solution based alternatively on the theory of a tenancy in common, which is a form of concurrent ownership, or on the theory of an easement, which is an interest in the property of another. Under this solution, the law of tenancies in common or easements would govern the relationship between landowners and recreational users. Landowners and boaters would have the rights and obligations of tenants in common or, alternatively, easement holders and owners of the land underlying the easements. They could bring lawsuits to enforce these rights and remedy violations of these obligations.

If the landowners and recreational users were considered to be tenants in common, they would jointly own the rivers, holding undivided shares in the rivers. The same remedies available to “true” tenants in common, including actions for waste and contribution, would be available to landowners and recreational users. If a landowner committed waste, thereby diminishing the value of the use of the river to recreational users, then the recreational users would be able to bring an action for waste. If a recreational user (i.e., a river outfitter) has paid
expenses necessary to preserve the river, and such preservation or improvements benefit the landowners, the river outfitter would have as a remedy an action for contribution. Similarly, if a recreational user took actions that constituted waste and decreased the value of the river to the landowners, then the landowners could bring an action for waste. Finally, if a landowner paid expenses necessary to preserve the river, an action for contribution against the river outfitters should be available to him.

The law of easements could also govern and balance the relationship between landowner rights and the public privilege to float. If easement law were applied to this relationship, recreational users would be the easement holders, while the landowners would be the “owners” of the underlying property. The easement would be a positive easement, giving recreational users the right to float down the rivers owned by the landowners. Furthermore, the easement would have the character of an easement appurtenant, as opposed to that of an easement in gross, so that the easement would run with the use of the land, thus benefiting all recreational users. To preserve the rights of the landowners, the easement held by the recreational users would be a non-exclusive easement, which would allow the landowners to retain their right to use the property (i.e., the rivers) in common with the recreational users. As holders of a non-exclusive easement, recreational users would be prohibited from interfering with the landowners’ use of their land, as long as the landowners’ use did not interfere with the easement rights. Such prohibited interference would include trespassing on property owners’ land, making excessive noise, littering or polluting, and interfering with wildlife or ranch operations. Similarly, landowners would be prohibited from taking any action that would interfere or be inconsistent with the recreational users’ easement rights, such as erecting cattle fences across the rivers.

Both landowners and recreational users would have remedies for harm involving the easements. If the landowners were harmed by the misuse of the easement by the recreational users, then the landowner would be able to recover damages for the violation. Injunctive relief would also be available to landowners to enjoin recreational users from misuse of the easement. The extreme remedy of termination of the easement with respect to a certain river
An outfitter or individual boater could also be appropriate in some situations in which the outfitter or boater overused or misused the easement. Likewise, if a landowner did not respect the recreational users’ easement rights, both injunctive relief and damages would be available to remedy the harm caused to the recreational users.

The remedies available to landowners and recreational users as tenants in common, or easements holders and owners of the underlying property would be in addition to any other judicial remedy available, such as actions for trespass to land or nuisance.

B. A Lottery System

One administrative solution to the Colorado river rights controversy would be the imposition of a lottery system, administered by Colorado State Parks (“CSP”). CSP would hold a lottery each year for each of the thirteen river systems in Colorado. There would be a limited number of lottery slots available each year for each of the river systems. Individuals would pay a nonrefundable lottery fee to have their names entered in any one or all of the lotteries for that year. The lottery fee charged to entrants would fund the costs incurred by the State in running the lottery system. Each individual would be limited to one entry for each river system each year. However, the total number of lottery entrants would not be limited. CSP would notify the individuals whose names were drawn in the lotteries and the lottery winners would receive permits to float down the river system one time that year. The winners could take as many people with them on the trip as would fit in one raft. In addition, the individual winners would be free to decide whether to employ a river outfitter and which outfitter to employ to take their groups down the river. The lottery winners would be prohibited from selling, assigning, or giving away their lottery slots.

The number of lottery slots in each of the thirteen lotteries would be determined each year and would be based on a number of factors. One factor is the number of individuals who rafted each particular river system in the previous year. Another factor is the environmental condition of the particular river system. If the water level of a river were low, or other environmental concerns necessitated, the number of names drawn for that river system would be
decreased from the previous year. The number of names drawn would also be determined using input from landowners and river outfitters. A limit on the number of groups allowed down each river would be set each year based on the above factors.

If there were more lottery slots available for a particular river system than lottery entrants for that particular river system, then these unused lottery slots would be available to individuals on a first-come, first-serve basis. These open slots would be available to individuals who did not enter the lottery for any river system, as well as to individuals who entered the lottery for another river system(s) and were not picked. To obtain one of these unused rafting permits, an individual would have to contact CSP and pay a fee equal to the amount of the fee charged to lottery entrants. Individuals who had entered the lottery for another river system (and were not picked) and had thus already paid a lottery fee would not have to pay a second fee.

C. An Auction System

Another administrative solution which would balance landowner rights and the public privilege to float is a sealed-bid auction system. As with the lottery system, the auction system would be administered by Colorado State Parks. Each year, CSP would hold an auction for each of the thirteen river systems in Colorado. A limited number of slots for each river system would be auctioned out to individuals. CSP would set a minimum bid amount, or the smallest amount that an individual could bid, but would not set a maximum bid amount. Individuals would submit irrevocable bids for the year on the slots, which would have to be received by CSP by the close of the bidding period. After the bidding period closed, CSP would open all of the bids and fill the available slots with the highest bidders. Individuals would be limited to the submission of one bid for each river system each year. There would be a nonrefundable processing fee required for submission of a bid. Individuals who won the bids would be given a permit to float down the river system one time that year, and could take as many people with them on the trip as would fit in one raft. As with the lottery system, the individual winners would be able to choose which river outfitter they wanted to take them down the river, or alternatively they could float down the river on their own. Winning bidders would
be prohibited from selling, assigning, or giving away their rafting slots. Funding for the implementation and administration of the auction system would come from the processing fees required for submission of bids and from the money that the winning bidders would have to pay.

D. A Licensing System

A third way in which landowners’ property rights and recreational users’ privilege to float could be balanced and protected is through imposition of a licensing or permit system for individuals who wanted to raft the rivers. This licensing system would be administrated by CSP on a yearly basis for each of the thirteen river systems, and interested individuals would apply to CSP for a rafting license to raft a particular river system. Applications to raft would have to be submitted by a certain date each year. Individuals would have to pay a nonrefundable application fee and would be limited to one application per river system per year. The licenses would be available on a first-come, first-serve basis, and would be limited in number for each river system. The limits on available licenses would be determined each year using the same factors as those used to set the limits on the slots available under both the lottery and auction systems. Once an applicant’s rafting application was accepted by CSP, the applicant would have to pay a nonrefundable licensing fee and would then receive a license or permit to raft the particular river system one time that year. Applicants who received a license would be allowed to take as many people with them on the trip as would fit in one raft. They would also be able to choose which river outfitter they wanted to take them down the river, or alternatively they could float down the river on their own. Funding for the licensing system would come from the nonrefundable application and licensing fees charged to applicants. Individuals receiving a rafting permit would be prohibited from selling, assigning or giving away their permit.

IV. EVALUATION OF THE SOLUTIONS

A. Advantages and Disadvantages of the Potential Solutions

Although the judicial solution and the three administrative solutions outlined in Part III all have as their basis the protection of landowners’ property rights and the public privilege to
float, all of the solutions have advantages and disadvantages. The strengths and weaknesses of each solution must be considered and weighed to determine which solution should be applied to resolve the Colorado river rights dispute.

1. The Judicial Solution

With regard to the judicial solution of allowing landowners and recreational users to bring lawsuits for enforcement of their rights as tenants in common, easement holders, or owners of the property subject to the easement, there is one huge advantage that it has over the administrative solutions: it would impose no financial costs on the State. Unlike the three administrative solutions, all of which would be very expensive for the State to manage, the judicial solution would cost the State nothing because it does not require that any system or scheme be implemented. A second advantage of the judicial solution, which could also be viewed as a disadvantage, as discussed below, is that it enables the parties to the dispute, the landowners and recreational users, to enforce their rights themselves, without having to depend on the State to enforce their rights for them through a management plan like a lottery, auction, or licensing system.

There are two major weaknesses of the judicial solution, both of which would ultimately lead to insufficient protection of landowners’ property rights. Because of these two weaknesses, the judicial solution is not the best solution to resolve the Colorado river rights dispute. One weakness is that the judicial solution imposes no limit on the number of recreational users who may float down the rivers. Without such a limit, the number of users exercising their privilege to float is likely to continue increasing, as the popularity of river rafting grows. The increase in recreational users floating down the rivers would impermissibly interfere with landowners’ property rights. The second weakness is that the judicial solution imposes heavy financial and regulatory or enforcement burdens on the landowners. In light of the current costs of litigation, it would be very expensive for the landowners to have to continuously bring lawsuits to enforce their rights as tenants in common or as the owners of the property underlying the public easement. Also, if landowners are going to bring lawsuits to enforce their rights, they have to
know against whom to bring them. It would probably be extremely difficult for the landowners to know which person or group floating down the river was responsible for the damage or violation of rights at issue.

2. The Lottery System

The main advantage of a lottery system is that it is the most equitable system in terms of allocation of the limited number of river rafting slots available. Whether or not an individual who enters the lottery wins a slot depends entirely on chance, instead of on how much money the individual was willing to bid for the slot (as with the auction system) or how diligent the individual was in submitting an application for a rafting license (as with the licensing system). With the lottery system, each individual who enters has an equal chance of obtaining a rafting slot. With its limit on the number of lottery slots available, it would more adequately protect landowner rights than would the judicial solution. The lottery system would also be relatively easy to administer, or at least a lot easier to administer than an auction system. With a lottery system, the State would simply accept the names of the entrants and their fees, randomly choose the winners, and then notify the winners. Furthermore, the lottery system does not prohibit or interfere with the entry of new river outfitters into the State’s river rafting market. With the lottery system, there is no possibility of existing river outfitters consuming all of the permissible recreational use of the rivers because the individuals whose names are drawn in the lottery get to choose which river outfitters to employ.

One disadvantage of the lottery system is the financial cost to the State of implementing and administering the system, although presumably the fee charged to the lottery entrants would offset a portion of this cost. Another weakness of the lottery system is that because it puts a limit on the number of recreational users who may float, it would cause a decrease in the number of recreational users of Colorado’s rivers, which would negatively impact the State’s economy. This limit is necessary, however, to protect landowners’ property rights. This decrease in the number of recreational users floating down the rivers would also financially harm river outfitters. This effect, however, is of minor concern because the goal of all the solutions
discussed in this Paper is not to protect commercial use of the rivers or the operations of river outfitters; rather, it is to protect the public’s privilege to float down the rivers and landowners’ property rights. As long as the public’s privilege to float is preserved and the landowners’ property rights are protected, the impact of the imposition of a lottery system on river outfitters is of secondary concern.\[167\]

3. The Auction System

A great advantage of an auction system is that it would bring in more money for the State than either a lottery or licensing system. Assuming the popularity of river rafting does not decrease, the demand for auction slots will remain high and so also will the amount of money that individuals will be willing to bid to win an auction slot. As with the lottery system, the auction system imposes a limit on the number of recreational users who may float down the State’s rivers in a year, and thus it would better protect landowner rights than would the judicial solution. The auction system has the additional benefit, as does the lottery system, of not prohibiting or interfering with the entry of new river outfitters into the State’s river rafting market.

The major weakness of the auction system is that it rewards individuals who bid the most money, thus discriminating against individuals who may be interested in rafting but who cannot afford to bid an amount high enough to win a slot. Because it favors wealthier individuals, the auction system is not a very equitable mechanism for protecting the public privilege to float. Another disadvantage of the auction system is that it would be slightly harder to administer than the lottery or licensing systems. Instead of simply distributing slots to the individuals whose names are drawn (as in the lottery system), or distributing rafting licenses on a first-come, first-serve basis (as in the licensing system), with an auction system the State would have to determine who the highest bidders were before distributing the rafting slots. Also, as with the lottery system, the auction system could hurt Colorado’s economy because of the limit it imposes on the number of individuals who may float down rivers each year and could financially harm river outfitters.
4. **The Licensing System**

The licensing system has many of the same advantages and disadvantages as the lottery and auction systems. Like the lottery system, it would be relatively easy to administer (in fact, it would probably be easier to administer than the lottery system). The State would simply collect applications and fees and then distribute licenses to applicants until the yearly limit on the number of licenses was reached. Because it would be so easy to administer, it would probably not be as expensive to manage as the lottery and auction systems. As with both the lottery and auction systems, the licensing system limits the number of individuals who can raft down the rivers each year, and thus it would adequately protect landowner rights.

The disadvantages of this system include the negative impact that it could have on Colorado’s economy because of the limit it imposes on the number of licenses issued to recreational users and the related financial harm it could cause to the operations of river outfitters. Furthermore, the licensing system probably is not as equitable as the lottery system because it rewards those individuals who have the time and resources to position themselves “at the front of the line” (due to the fact that licenses are distributed on a first-come, first-serve basis), whereas with the lottery system, everyone who enters has an equal chance of being selected.

**B. Ending the River Rights Dispute: Imposition of the Lottery System**

Although the lottery, auction, and licensing systems have many similarities, the lottery system would best resolve the river rights controversy in Colorado because it provides for the most equitable method of allocating rafting slots. The dispute between landowners and recreational users over river rights has been so intense and the popularity of river rafting is so high that it seems prudent to adopt the most equitable method of distributing the limited number of rafting spots. Considering all of the controversy that has surrounded the Colorado river rights dispute and as valuable as rights to the rivers are, it would be foolish to adopt a system of regulating river rights that could be viewed as unfair. As noted above, the lottery system has its disadvantages, the most significant one of which is the negative impact that imposition of such a
system would have on Colorado’s economy. Such an effect is unavoidable, however, if landowners’ property rights are to be protected and balanced with the public privilege to float and a resolution of the controversy reached.

CONCLUSION

Colorado’s rivers are a valuable natural resource that should be enjoyed by both landowners who own land through which the rivers run and by recreational river users. To preserve both the landowners’ privacy and ownership rights in the rivers that run through their land and the public’s privilege to enjoy the rivers and float down them, a balance must be struck between the landowners’ and boaters’ competing claims. While all of the potential solutions discussed in this Paper would protect both landowners’ property rights and the public’s privilege to float, the lottery system is the best solution to the Colorado river rights dispute because it is the most equitable solution. Although certainly not flawless, the lottery system would most equitably apportion the limited number of rafting slots that would be available to the public under such a system. Imposition of the lottery system in Colorado would resolve the State’s river rights controversy by both protecting landowners’ property rights and ensuring the fair and effective exercise by the public of its privilege to float on the State’s rivers.


Id.

Id.

Id.


Id.

Id.

See infra Part I for a more detailed discussion of this confusion.


See id.


Frank, *supra* note 31, at 588. This standard is not relevant for purposes of this Paper.

Id. at 583.

Id. at 589. *See also Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 170 (Mont. 1984) (stating that “[n]avigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes.”).*

These public rights are similar to a public recreational easement because they exist regardless of private ownership claims to the river or lakebeds. See Galt v. State, 731 P.2d 912, 915 (Mont. 1987).

The public trust doctrine has as its source ancient Roman law and developed under English common law into the concept of the public trust. See Ausness, supra note 33, at 413.

The National Organization for Rivers, Public Ownership of Rivers in Colorado, at http://www.nors.org/states/co-law-boat-rights.htm (1999). While the public trust doctrine prohibits state legislatures and other governmental entities from completely abandoning control over trust resources, it does not entirely prevent conveyance of some property to private parties: the states can transfer trust property into private ownership to support navigation or other trust purposes. See Ausness, supra note 33, at 413.


6 N.J.L. 1 (1821).

Article XVI, Section 5 provides: “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.”

84 P. 685 (Colo. 1906).

COLO. REV. STAT. § 18-4-504.5 (2000).

Id. C.R.S. § 18-4-503 provides in relevant part: “A person commits the crime of second degree criminal trespass if such person unlawfully enters or remains in or upon premises of another which are enclosed in a manner designed to exclude intruders or are fenced . . . .” COLO. REV. STAT. § 18-4-503 (2000). C.R.S. § 18-4-504 provides in relevant part: “A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another. . . .” COLO. REV. STAT. § 18-4-504 (2000).

See id. at *1.

See id. at *1-*2.

See id. at *13.

Hill, supra note 22, at 334. Hill states that “[t]he unfortunate consequence of Woodward’s response to the second question is that landowners and floaters alike have been misled into believing that riparian landowners are powerless to control or stop floating through their property.” Id. at 335.


Hill, supra note 22, at 335.

Id. Hill notes that if this is what the Attorney General meant, the opinion is wrong because the “right to exclude others is inherent in the ownership of property. . . . The legislature does not have to grant the right to exclude others and cannot take that right away without constitutional consequences.” Id.


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See id. at *14.

Hill, supra note 22, at 335.

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Hill, supra note 22, at 334.
See infra Part III for discussion of the potential solutions to the Colorado river rights controversy.

See infra p. 8. Under the recreational test of navigability in California, “the public may use for boating and related recreational purposes any body of water that may be navigated using a small oar or motor propelled boat.” Frank, supra note 31, at 590 (citations omitted).

See infra p. 4, where I note that in most states, but not in Colorado, it is clear that rivers are considered public property and that the public has a right to float on rivers through private property.

See Frank, supra note 31, at 626.

See infra pp. 6-7.

Note that the solutions to the river rights controversy discussed in Parts III and IV of this Paper would apply only to waters that meet the federal title test for navigability. Waters that do not meet this test, or in other words, which are not considered navigable for purposes of public use under the federal title test, would be considered the private property of the landowners and no public privilege to float would exist with respect to such waters.

See The Daniel Ball, 77 U.S. 557, 563 (1870).
Note that this public privilege to float applies only to rivers which meet the federal title test of navigability. There is no public privilege to float on rivers which do not meet this test of navigability.


See Patrick O’Driscoll, Boating Rights Hit Choppy Waters, U.S.A. TODAY, July 27, 2001, at 3A, http://www.usatoday.com/usatonline/20010727/3514845s.htm (noting that since the mid-1990’s, rafting, kayaking, and canoeing have almost tripled nationally, and that the number of rafts on the Lake Fork of the Gunnison River in Colorado have increased tenfold in the 1990’s).

The doctrine of private nuisance could be used as the basis for limiting the public’s privilege to use rivers. A private nuisance is an “unreasonable interference with the use or enjoyment of a property interest in land.” JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ’ S CASES AND MATERIALS ON TORTS 811 (9th ed. 1994). Conduct constituting a private nuisance includes interference with the physical condition of the premises, with the health of the occupant, with his comfort or convenience, or merely with his peace of mind. Id. The high number of recreational river users can be viewed as a private nuisance to the owners of land through which the rivers run because the recreational users may interfere with the landowners’ comfort and enjoyment of their land.


Note that other states have characterized the public’s interest in recreational use of waters as an easement. For example, the Montana Supreme Court has referred to the “easement granted the public for its enjoyment of the water.” Galt v. State, 731 P.2d 912, 916 (Mont. 1987). See also Justice Sheehy’s dissenting opinion in Galt, 731 P.2d at 921, which criticizes the majority for finding the public’s right to use waters for recreational purposes to be “something in the nature of an easement.” The Wyoming Supreme Court has stated that “title to waters within this State being in the State, in concomitance, it follows that there must be [a public] easement . . . for a right of way through their natural channels for such waters upon and over lands submerged by them or across the bed and channels of streams or other collections of waters.” Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961). In addition, several states, including California, Idaho, Oregon, Montana, Wyoming, and New York, have adopted the common law doctrine of the “floatage easement.” A floatage easement gives the public a right to use rivers for recreational purposes even if the bed and banks of the rivers are privately-owned (i.e., even if the river is non-navigable under the federal title test of navigability). See Rich Hoffman, Oregon Navigability!, at http://www.americanwhitewater.org/oldawa/awa/journal/j1196/access1096.html; Memorandum from Eric Leaper, to All Participants in the River Surface Recreation Forum, at http://www.nors.org/states/co/news.htm#story-seventeen (October 10, 2000). In Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 170 (Mont. 1984), the Montana Supreme Court recognizes such a “floatage easement” (although it does not use this term) when it states that the public can use waters for recreational purposes if the waters are capable of use for recreational purposes, regardless of private streambed ownership.

For purposes of this Paper, the “underlying property” is the rivers.

Examples of misuse include trespassing on private property, impermissibly interfering with ranch operations, and vandalizing or littering on private property.

Colorado State Parks manages over 215,000 land and water acres in the State and also manages the Commercial River Outfitter Licensing program. Colorado State Parks, About Us, at http://parks.state.co.us/home/aboutus.asp?page=aboutus. See also Colorado River Outfitters Association, Colorado’s River Rafting Industry Questions & Answers to Commonly Asked Questions, at http://www.croa.org/faq.htm (2001) (stating that Colorado State Parks, which the website refers to as the “Colorado Division of Parks and Recreation,” issues river outfitters licenses which the outfitters are required to obtain in order to take commercial passengers river rafting in Colorado).

In a sealed-bid auction, each bidder submits a single, irrevocable bid without knowledge of the other bids. When the bidding period is closed, the bids are opened simultaneously, and the winner is the highest bidder. SeeDovebid® Auction Glossary & Terminology, at http://www.dovebid.com/help/glossary.asp (2000).

The number of slots auctioned would depend on the same kinds of factors upon which the number of slots available in the lottery system would depend. See infra p. 30. Such factors include the number of individuals who
rafted each river system in the previous year, the environmental condition of the river system, and input from landowners and river outfitters.

[162] CSP would set the closing date of the bidding period.

[163] Imposition of the judicial solution could result in an increase in the number of lawsuits filed in the State, but it would probably be unlikely to have too great an effect on the State’s judicial and economic resources.

[164] See infra p. 34.

[165] However, if the dispute is settled by a court, the parties will be dependent on the court to enforce their rights.

[166] It could also be expensive for recreational users to bring suits against landowners for violations of their privilege to float.

[167] State governments may actually limit and even prohibit commercial river trips. See The National Organization for Rivers, Public Ownership of Rivers in Colorado, at www.nors.org/states/co-law.htm (1999) (stating that motorized trips and commercial trips can legally be limited or prohibited by state governments); Who Owns the Rivers? Questions and Answers about River Ownership, Use, and Conservation, at www.usahawk.com/waterways.htm (noting that state and federal courts, viewing rivers as public resources, have upheld the authority of government agencies to limit commercial river trips on waterways or prohibit them altogether; the courts view this authority as arising from the government’s general authority to control commercial operations, not from an authority to control or prohibit river navigation per se).

[168] Note that imposition of a lottery system, or for that matter, any of the solutions discussed in this Paper, would not preclude landowners from seeking judicial remedies traditionally available to them for enforcement of their property rights, such as actions for trespass to land and nuisance.