University of Cincinnati Law Review

Volume 91 | Issue 4 Article 9

May 2023

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WADING THROUGH TROUBLED WATERS: INEQUITIES & IMPROPRIETIES OF STREAM ACCESS LAWS IN THE AMERICAN WEST

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I. INTRODUCTION

"I'm in waders, but I don't have a rod in my hand when I step out of the drift boat. I have a camera. I want an underwater shot. Takes thirty seconds of record time. I haven't even settled onto my knees when I hear, 'You're trespassing.'"[1] In this instance, author Kris Millgate, an Idaho native, reflected on a momentary lapse in judgment while visiting Colorado. Unfortunately, unintentional trespasses are a common experience for recreationists, particularly anglers, in the American West.

Public policy debates over stream access rage in both the judiciary and the legislature where public and private interests struggle for supremacy. Variation among states has created a complicated web of stream access laws. The outcome is uncertainty for both public and private parties, requiring significant research on stream access and trespass laws to abate the risk of civil or criminal liability.[2]

Arguably, the most vehement voices are private riparian owners[3] and public waterway users.[4] Both public and private interests attained significant successes in distinct jurisdictions, which provides a sublime example of states' axiomatic roles as laboratories.[5] In Montana,

1. Kris Millgate, *Free Flow: Idaho's Commonsense Access Rule*, *in* STREAM ACCESS REPORT 6, 6 (Backcountry Hunters & Anglers, 2017), https://www.backcountryhunters.org/stream_access_report. [permalink optional].

2. While it is certainly the duty of all people to be aware of and follow the laws regardless of where they are, in most instances, there is a fair degree of predictability and notice allowing individuals to readily comport with the law, e.g., speed limit signs. The absence of predictability or notice requirements in the realm of stream access lends to uncertainty by those who would otherwise be law-abiding.

3. The term "riparian owners" refers to private actors with a present possessory interest in a riverbed or riverbanks. *See Riparian Proprietor*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019). While this is differentiated from littoral ownership (an ownership interest in a coastline or lakeshore), this Comment will only refer to riparian ownership for brevity but will differentiate where courts or statutes do so and where otherwise necessary.

4. Private riparian owners historically structure their arguments around traditional property values, such as the absolute right to exclude, esthetic interests, and privacy. *See, e.g.*, Ben Ryder Howe, *Does This Fisherman Have the Right to Be in a Billionaire's Backyard?*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html. Public interests are typically anchored in specific communities such as anglers, rafters, and tubers seeking access to preferred stretches of waterways. *Id.*

5. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

recreationists enjoy expansive rights on most watersheds in the state. At the other end of the spectrum, Colorado landowners prevail in maintaining their property rights.

This Comment proffers that a robust public trust is an equitable and legal necessity; however, states must exercise restraint in creating rights ancillary to the most basic public use. Part II of this Comment examines the legal and practical underpinnings of the public trust doctrine, illustrating the doctrine's most liberal form in Montana and most conservative form in Colorado. Part III then argues that both the Montana and Colorado models are incompatible with, and inferior to, other areas of law in each respective state. This Comment also argues, in striking a balance between private property interests and the public trust doctrine—specifically relating to recreational stream access and use—the most efficacious approach is favoring broad public access while providing explicit limitations on such use consistent with more traditional notions of private property rights.[6] Part III concludes by discussing the legal and practical flaws in states failing to strike an effective balance. Finally, Part IV summarizes the proffered arguments and reiterates the necessity of balance in this area of law.

II. BACKGROUND

Historical and ecological issues drove the status quo of stream access in the American West. This Part explores the legal doctrines guiding stream access issues and frames certain doctrines within historical and ecological realities. First, Part A discusses the role of navigability and the equal-footing doctrine. Part B discusses the development and modern status quo of water law in Colorado and Montana, including ecological and historical considerations. Part C discusses the birth, development, and contemporary treatment of the public trust doctrine in Colorado and Montana. Finally, Part D provides a terse background of jurisprudence around the Takings Clause of the Fifth Amendment as incorporated through the Fourteenth Amendment.

A. Navigability

Perhaps the most important issue to the rights of the public is nav-

6. Astonishingly, albeit with intuitive underpinnings, this issue has proved exceedingly divisive with very little advocacy for compromise. *Compare* Peter Jaacks, *Let My People Go Fishing: Public Stream Access and Navigability on Colorado's Rivers*, 32 COLO. NAT. RES. ENERGY & ENV'TAL L. REV. 135 (2021) *with* Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came From, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47 (2012).

igability. Congress has power to regulate navigable waterways via the broad powers vested through the Commerce Clause;[7] however, the necessary follow-up question—whether a given waterway is navigable—is significantly more difficult to answer.[8] This Part first examines the equal-footing doctrine, its importance when determining the public's rights, and how it set the scene for subsequent conflicts. This Part then discusses the different tests that have been applied to determine navigability. The navigability discussion concludes by establishing how a past determination of navigability or unnavigability might change.

1. Equal Footing

The equal-footing doctrine traces its roots to the earliest era in post-revolutionary American history. Prior to 1784, seven states held title to all lands in the American West.[9] Based on a variety of concerns, the Continental Congress recommended state legislatures cede their Western holdings to the national government.[10] In a compromise spearheaded by Thomas Jefferson, the Continental Congress passed the Ordinance of 1784.[11] Jefferson's brain-child outlined the path by which Western territories might enter the Union on "equal footing" with the original states,[12] thus establishing the framework for a new era in the expansion of the Union.[13]

The issue of state sovereignty over ceded territories first came to the fore in *Pollard*.[14] There, the determinative issue was where the boundary between state and federal jurisdiction should be drawn in Mobile Bay after Alabama's admission to the Union.[15] *Pollard* ultimately concluded that the United States held sovereign title to territories ceded in 1787 in trust and lost any residual interest when the territory achieve statehood.[16]

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7. *See* Gibbons v. Ogden, 22 U.S. 1, 195-96 (1824).

8. *See infra* Section (II)(A)(2). Use of the term "waterway" herein is no more than a useful abbreviation. The implicit connotation of this term includes all areas of a given body of water from its headwaters to its mouth. However, the Supreme Court has explicitly rejected such an understanding and, instead, endorses a "segmented" approach where certain sections of a waterway may be considered navigable for purposes of state ownership while others may not. *See* PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 595 (2012).

9. *See* 17 JOURNALS OF THE CONTINENTAL CONGRESS 806-08 (1780).

10. *Id.* at 807.

11. *See* 26 JOURNALS OF THE CONTINENTAL CONGRESS 119 (1784).

12. *Id.*

13. For an extensive discussion of the development of the equal footing doctrine, see James R. Rasband, *The Disregarded Common Parentage of the Equal Footing & Public Trust Doctrines*, 32 LAND & WATER L. REV. 1 (1997).

14. Pollard v. Hagan, 44 U.S. 212 (1845).

15. *Id.* at 220

16. *Id.* at 221

This ruling affirmed that Alabama obtained sovereign control over "the shores and the soils under the *navigable* waters" through a right of eminent domain,[17] qualified only by the supremacy of the Commerce Clause.[18]

Navigability necessarily becomes critical to any inquiry of whether a state owns a streambed under the equal-footing doctrine. Determining navigability is dispositive in questions of public access to waterways because the right to use navigable waters is among the exceedingly limited "privileges or immunities" afforded to United States citizens under the United States Constitution.[19]

2. Navigability in Fact

A waterway's navigability turns on whether the waterway is "navigable in fact."[20] *The Daniel Ball* defined waterways that are navigable in fact as those that 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."[21] The functional test derived from *The Daniel Ball* is the Steamboat Test, which grants "navigable" status to any waterway where a steamboat could operate at the time of statehood, given steamboats' prevalence as instruments of commerce.[22] However, the United States Supreme Court proffered numerous other answers to the question of how "susceptible" a waterway must be to certain commercial activities to satisfy this test.[23] A common theme of these alternative measures of "navigability in fact" is the capacity of a waterway to support commerce or transportation regardless of associated difficulties.[24]

This latter principle was squarely affirmed and elaborated upon in *Saint Anthony Falls Water Power Co.*, which involved an inverse condemnation claim after Minnesota diverted waters above and below a

17. *Id.* at 229-30 (emphasis added).

18. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 3.

19. U.S. CONST. amend. XIV; Slaughter-House Cases, 83 U.S. 36, 79-80 (1872).

20. Daniel Ball, 77 U.S. 557, 563 (1870).

21. *Id.*; *cf.* PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 595 (2012) (implicitly relegating a state's interest to purely commercial matters under the equal-footing doctrine by rejecting state ownership of non-navigable sections of rivers under equal-footing doctrine due to incapacity of such sections to support commerce).

22. Daniel Ball, 77 U.S. at 565.

23. The tests described herein include only those which have been recognized statutorily or at common law. However, some authors hypothesize that, because electrical generation is undeniably commercial in nature, a waterway's susceptibility to being used for hydroelectric generation may be indicative of navigability. *See, e.g.*, Dennison A. Butler, *Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana*, 38 PUB. LAND & RES. L. REV. 187, 194-95 (2017).

24. United States v. Utah, 283 U.S. 64, 82-83 (1931).

waterfall on the Mississippi River.[25] Importantly, the United States Supreme Court began its opinion by stipulating the navigability of the sections of the Mississippi River in question.[26] The Court held that even though the sections could only be navigated by shallow rafts, the sections were nonetheless navigable because they were still a useful highway for logging, thus creating the so-called Logging Test.[27]

Soon after, in *The Montello*, the Court again expanded the scope of navigability in fact.[28] *The Montello* involved the Fox River which connected Lake Michigan to the St. Lawrence River, albeit with significant obstacles along the way.[29] While *The Montello* acknowledged the difficulty in transporting goods along the Fox River and the necessity of portage in certain parts, it nonetheless found the river to be navigable given the indispensable role it played in connecting the trappers involved in the fur trade to the Mississippi River.[30] Finding the Fox River navigable, *The Montello* emphasized that the central inquiry is the capacity of a river to be used by the public for transportation and commerce—not the extent or manner of the use.[31]

Recently,[32] an emerging question is whether modern "recreational use" is sufficient to support a navigability-in-fact determination.[33] Generally, where recreational use has been treated as determinative, courts will consider whether a given waterway can support recreational vessels with even the shallowest drafts.[34] However, the application of this test, at least for questions around the equal-footing doctrine, has been relegated to a mere consideration for determining whether the waterway was navigable in fact at the time of statehood rather than a definitive test of navigability.[35] It should also be noted that not all determinations of navigability are treated equally.[36] For questions of state title to streambeds under the equal-footing doctrine, the determinative issue is whether a waterway in its "natural and ordinary condition" was navigable at the time

25. St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 357 (1897).

26. *Id.* at 359; *see* Slaughter-House Cases, 83 U.S. at 79-80. Stet. "Slaughter-House Cases" is the reported name.

27. *St. Anthony Falls*, 168 U.S. at 359.

28. Montello, 87 U.S. 430, 440 (1874).

29. *Id.* at 439.

30. *Id.* at 440-41.

31. *Id.* at 441. This is creatively known as the "Fur Trapping Test."

32. I.e., within the last century.

33. *See generally* Robin Kundis Craig, *A Comparative Guide to Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'TAL. L. REV. 1 (2007);

34. *See, e.g.*, Coleman v. Schaeffer, 126 N.E.2d 444, 446 (Ohio 1955) (quoting with approval 56 AM. JUR. 648, § 181).

35. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940); *United States v. Utah*, 283 U.S. at 82-83.

36. PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 591-92 (2012).

of statehood for purposes of commerce or transportation.[37]

While the absolute privilege to use the navigable waters held in trust by a state is necessarily limited by a state's title to its waters at the time of statehood and subsequent determinations of navigability, states may nonetheless provide additional rights for using waters within the state.[38] In other words, the federal determination of navigable waters provides a minimum baseline for waters that states must hold in trust for the public. A state's adherence to, or divergence from, this baseline, however, forms the foundation for controversy.[39]

B. Property Interests in Water

When reduced to the most basic principles, there are two doctrines that govern how water rights are allocated to private landowners in the United States: (1) by virtue of riparian ownership or (2) by the seniority of an appropriated water right.[40] As a preliminary matter, all Western states but one have adopted the latter model.[41] However, the precise form of each state's model, at least to some degree, drives how legislatures and courts have dealt with the most contentious issue at stake—the public trust doctrine.[42] This Part first discusses the common law origins of riparian rights and the ecological and political necessities of Western expansion that facilitated a new model.[43] This Part concludes with a discussion of the types of property interests in water rights in Montana and Colorado.

37. *See United States v. Utah*, 283 U.S. at 75; Oklahoma v. Texas, 258 U.S. 574, 591 (1922). Navigability for purposes of admiralty jurisdiction extends to all waters that are navigable in fact even if not formerly so. *See Ex parte* Boyer, 109 U.S. 629, 631-32 (1884). Navigability for purposes of federal regulatory authority extends to waters that are only recently navigable, were once navigable but are no longer, and those that may become navigable through reasonable improvements. *See* Philadelphia Co. v. Stimson, 223 U.S. 605, 634-35 (1912); Econ. Light & Power Co. v. United States, 256 U.S. 113, 123-24 (1921); *Appalachian Elec. Power Co.*, 311 U.S. at 407-08.

38. *See PPL Mont.*, 565 U.S. at 603-04 ("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.").

39. *See infra* Sections II(C)(2-3).

40. AMY K. KELLEY ET AL., WATERS & WATER RIGHTS, § 4.05 (13th ed. 2022).

41. The exception to this rule is Minnesota. *See generally* Lamprey v. State, 53 N.W. 1139 (Minn. 1892).

42. *See infra* Sections II(C)(2-3).

43. Riparian rights have traditionally only referred to those owning the banks of a stream, whereas littoral rights refer to those owning shoreline. *Compare Littoral*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019) *with Riparian Proprietor*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019). For brevity's sake, this article will refer only to riparian rights. Nevertheless, littoral rights are practically similar enough, at least outside of the coastal context, not to merit a separate discussion. Additionally, in keeping with historical tradition, this Comment assumes the convenient fiction that the Mississippi River is the boundary between the Eastern and Western United States.

1. Common Law Origins

Origins of riparian rights are grounded in a natural extension of the rights of the owner of a riverbank to use the water abutting their property. However, two schools of thought vehemently dispute the origin of riparian rights. Samuel Wiel first dated the origins to James Kent and Joseph Story bringing the Napoleonic Code to the United States in the early-nineteenth century.[44] Later revisionists, Anthony Scott and Georgina Coustalin, dated riparian rights' inception more than two centuries earlier than Wiel, albeit while debating the veracity of certain methods used.[45] Regardless of the true origin, riparian rights quickly began to develop with future-Justice Story's influential opinion in *Tyler v. Wilkinson*,[46] which unequivocally recognized the right of a riparian owner to use the water flowing over streambeds to which they have title.[47]

As riparian rights developed over time, it expanded to include, at a minimum, the rights to consume water;[48] to enjoy the natural advantages of owning property adjacent to water;[49] to access the water; to build a pier or wharf out to the point where the water becomes navigable; to make reasonable use of the water;[50] and to accretions.[51] In the eastern United States, a riparian owner was historically permitted to make liberal use of the water adjacent to their property, with increasing contemporary restrictions.[52] When conflicts between riparian owners arise, depending on the jurisdiction, courts resolve the dispute through either the natural flow doctrine or the "reasonable use" test.[53] Regardless of which

44. Samuel C. Wiel, Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law, 6 CAL. L. REV. 245, 247 (1918).

45. Anthony Scott & Georgina Coustalin, *The Evolution of Water Rights*, 35 NAT. RES. J. 821, 850-71 (1995).

46. Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D. R.I. 1827) (No. 14,312).

47. *Id.* at 474.

48. *See* KELLEY ET AL., *supra* note 40, § 6.01.

49. E.g., being the proprietor of a livery. *See* Thurston v. Portsmouth, 140 S.E.2d 678, 680 (Va. 1965) (citing Taylor v. Commonwealth, 47 S.E. 875, 880-81 (Va. 1904)).

50. *Id.*

51. *Id.* See KELLEY ET AL., *supra* note 40, § 6.01, for a thorough discussion of each of these rights and their development over time.

52. *See generally* Theresa Bixler Proctor, *Erosion of Riparian Rights Along Florida's Coast*, 20 J. LAND USE & ENV'TAL L. 117 (2004). One example of such restrictions is the requirement in Minnesota that riparian owners must obtain a permit before altering the flow of public waters. MINN. STAT. § 103G.245 (2022).

53. The natural flow doctrine creates an absolute right in each riparian owner to have a waterway flow through their property in its natural state without being perceptibly altered by any other riparian owner. Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 416 (1986) (citing Eva Morreale Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 621, 628-29 (1968)). The alternative, more pervasive approach—the reasonable use test—permits riparian owners to use the water for any beneficial purpose that does not unduly interfere with the legal rights of other riparian owners. *See, e.g.*, McGlashen v. Spade Rockledge Terrace Condo

approach a jurisdiction adopts, the focus is on the rights of downstream riparian owners.[54] Only five modern states whose territories were acquired in 1803 or later accept the riparian model without exception.[55]

2. A New Model in a New Era

As the United States pursued a policy of Manifest Destiny, a new problem began to unfold in many territories beyond the Mississippi River—there was not enough water. Efforts to spur Western migration were supported by promises of an unqualified right to appropriate water for useful purposes on a first-come-first-serve basis.[56] Because of the abundance of land and scarcity of water in the West, national policy shifted away from the riparian model of "interference" with downstream use and toward the "first in time, first in right" model.[57] Unlike the riparian model, which protects downstream users,[58] this new system preserved the most senior interest regardless of the location of the interest proximate to the mouth or headwaters of a given waterway.[59] Congress' legislative means of establishing the prior appropriations model to the policy ends of Manifest Destiny soon solidified as Western territories began achieving statehood and codifying the prior appropriations system into their laws and constitutions.[60] Thus, as a biproduct of Western expansion, this alternative "first in time, first in right" approach to water rights became the law of the West and developed into its modern forms.[61]

In Colorado, the right to prior appropriations was given constitutional stature at the time of statehood.[62] While the Colorado Constitution

Dev. Corp., 402 N.E.2d 1196, 1200 (Ohio 1980).

54. See generally Craig, *Eastern Public Trust Doctrines*, *supra* note 33, for a thorough discussion of every riparian State's individualized treatment of water rights.

55. These states are Arkansas, Iowa, Louisiana, Minnesota, and Missouri. See generally *id.* for a comprehensive discussion of how the riparian model has been treated on a state-by-state basis.

56. For example, Desert Land Act, 19 Stat. 377 (1877), provides that any purchaser of "desert lands" is entitled to consume water on the land limited only by the prior appropriations of the water which would take precedence over later users.

57. KELLEY ET AL., *supra* note 40, § 11.03.

58. *See supra* Part II.B.i.

59. *See generally In re* Big Horn River Sys., 48 P.3d 1040 (Wyo. 2002).

60. The desire to preserve historical entitlements to appropriations in perpetuity caused arid Western states to codify the right to prior appropriations in the earliest stages of their infancy. For instance, California achieved statehood in 1850, becoming the second "prior appropriation state" to enter the Union. It then codified the right to prior appropriations as late as three years later when the California Supreme Court held that a riparian owner downstream of a dam was entitled to at least as much flow as had been previously appropriated and that the upstream owner could not appropriate the entire flow of the watershed. *See* Eddy v. Simpson, 3 Cal. 249, 251-52 (Cal. 1853).

61. Irma S. Russell, *Article, Evolving Water Law and Management in the U.S.: Montana*, 20 U. DENV. L. REV. 35, 40-41 (2016).

62. *See* COLO. CONST. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural

nominally creates a public right to unappropriated waters,[63] it also grants an unequivocal right to appropriate any water not previously appropriated and prioritizes agriculture and mining appropriations over other uses.[64]

In *Emmert*, the Colorado Supreme Court addressed a challenge to the scope of rights vested through prior appropriations.[65] The plaintiff pursued equitable relief under a constitutional provision that unappropriated waters be the property of the public, thereby vesting certain rights.[66] *Emmert* concluded that the specific use of the word "appropriations" in the Colorado Constitution was a deliberate effort to preserve the historical practice of appropriations, rather than vest any rights in the public.[67]

Generally, Colorado distinguishes the form of water right based on the location of the water pre-appropriation. Surface water rights to rivers, streams, creeks, and alluvial groundwater contributing to the source require reapplication every six years.[68] Groundwater that is non-alluvial is treated similarly.[69] Exempt wells, which are groundwaters in exceedingly rural areas, may be freely appropriated for "in-house and domestic animal uses" if they do not cause "material injury to prior vested water rights."[70] Perfect title to a water right is conditioned upon holder's reasonable diligence in making beneficial use of the appropriation.[71] Stated differently, a riparian owner does not take perfect title to water on their property until the specified appropriation is put to beneficial use.[72]

The property interest of one holding water rights is qualified as a right only to use the water, not a right to own the water.[73] Furthermore, the

stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.").

63. *Id.* § 5.

64. *Id.* § 6.

65. People v. Emmert, 597 P.2d 1025, 1027-28 (Colo. 1979)

66. *Id.*.

67. 597 P.2d at 1028. The discussion of *Emmert* here will be limited to the specific context of prior appropriations. It will be discussed more thoroughly in the context of the public trust doctrine. *See infra* Section II)(C)(2).

68. COLO. REV. STAT. § 37-92-301(4)(a)(III) (2022).

69. *Id.* § 37-90-301(3)(a). "Non-alluvial" waters are those that would be permanently inurned but for human efforts to bring them to the surface.

70. *Id.* § 37-92-602(6). Because this Comment is concerned only with surface waters and alluvial groundwaters, only they will be discussed in detail.

71. *Id.* § 37-92-102(6). The Colorado Supreme Court has explicitly recognized that recreational and piscatorial uses are beneficial. *See* St. Jude's Co. v. Roaring Fork Club, L.L.C., 2015 CO 51, ¶ 18.

72. *In re* Upper Gunnison River, 838 P.2d 840, 847 (Colo. 1992) (citing Fort Lyon Canal Co. v. Amity Mut. Irrigation Co., 688 P.2d 1110, 1113 (Colo. 1984)).

73. Frees v. Tidd, 2015 CO 39, ¶ 13 (en banc).

primary legal value of an interest in water lies in the ability to make a beneficial use of it, not in its continuous tangible possession.[74] For instance, in *Tidd*, an upstream landowner was granted a conditional water right for non-consumptive hydroelectric use.[75] The point water was taken from and return to the stream of origin were upstream from the more senior downstream interest that challenged the allocation.[76] In affirming the allocation based on the downstream owner's lack of an ownership interest, the court emphasized the policy goal of maximizing Colorado's scarce water resources without injuring existing water rights.[77]

Like Colorado, Montana adopted the prior appropriations model of water rights before its admission to the Union.[78] The right to maintain prior appropriations was codified in both of Montana's Constitutions.[79] Until the new Constitution was adopted, Montana was the Wild West in terms of barriers to appropriation and allowed uses subject only to the seniority of the interest and the availability of water.[80] However, in 1973, Montana began revolutionizing its system of prior appropriations.[81] Montana limited the purposes for which water could be appropriated, required users to register their appropriations, apply for new appropriations, and mitigate water loss in certain appropriations.[82] These changes arrived on the heels of two notable provisions of the new Montana Constitution.[83]

The first provision mandated the creation of a regulatory scheme for the allocation and use of water appropriations.[84] The second provision provided a fundamental right to a clean and healthy environment and charged the legislature with an affirmative duty to preserve Montana's natural resources.[85] Because of these charges, private interests have become secondary to environmental concerns—particularly in the realm of water management.[86] Nonetheless, water remains a necessary facet of

74. *Id.* ¶ 25 (citing Navajo Dev. Co., Inc. v. Sanderson, 655 P.2d 1374 (Colo. 1982)).

75. *Id.* ¶ 9.

76. *Id.* ¶¶ 9-10.

77. *Tidd*, 2015 CO 39, ¶ 29.

78. An Act to Protect and Regulate the Irrigation of Land in Montana Territory, 1st Leg. § 1 (Mont. 1865).

79. MONT. CONST. art. III, § 15 (1889); MONT. CONST. art. IX, § 3, cl. 1 (2022).

80. UNIV. OF MONT. SCH. OF L., LAND USE & NAT. RES. CLINIC, WATER RIGHTS IN MONTANA 5 (2014), https://courts.mt.gov/external/Water/UM_WaterRightsStudy.pdf.

81. MONT. CODE ANN. § 85-20-1902 (2022).

82. *Id.*

83. *1972 Montana Constitutional Convention*, MONT. HIST. PORTAL, https://mtmemory.recollectcms.com/nodes/view/91422 (last visited Apr. 11, 2023).

84. MONT. CONST. art. IX, § 3, cl. 4 (2022).

85. *Id.* at art. IX, § 1, cl. 1.

86. *See* MONT. CODE ANN. § 85-2-316 (2022) (empowering agencies to acquire appropriations to maintain a "minimum flow" in Montana waters); *id.* § 85-2-102 (2022) (allowing the Department of Fish,

human well-being; thus, the beneficial and efficient uses of this scarce resource must be maximized.[87]

In many respects, Montana's water law is akin to Colorado's. For instance, a water right is conditional until such right is perfected putting the water to a beneficial use.[88] Furthermore, water rights are perfected simply by streambed ownership.[89] However, the key differences between the two are the stated polices.[90] Of particular importance are the Montana policies that (1) any use of water is public use and (2) that waters are the property of the state.[91]

True, there is a facial disconnect between the nature of a party's water right and the ultimate issue in this Comment—the public trust doctrine. But the relevance of the appropriations issue is the measure by which it is used as tool to either exclude or expand the rights and interests of the public in waterways.[92] In Colorado, the judiciary's staunch adherence to traditional constructions of property rights in the realm of appropriations has cemented the state's wholesale rejection of the public trust doctrine.[93] However, in Montana, a degree of flexibility has allowed for a seamless, albeit overextended, integration of public rights.[94]

C. "[V]ested in the king as a public trust"[95]

Where states ultimately land on the contentious public trust doctrine fundamentally governs the starting point for further discussion surrounding recreational stream access. This Part begins with an examination of the common law origins and development of the public trust doctrine. This Part then discusses the exceptional limitations on the doctrine in

Wildlife, and Parks to modify its appropriations to protect fisheries); Mont. Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 183 (Mont. 2011) (holding organizations other than state regulatory entities may apply for appropriations to protect and preserve resources held in the public trust).

87. *See* MONT. CODE ANN. § 85-1-101(4) (2022).

88. *See id.* § 85-2-315 (2022). For instance, with irrigation, water is not considered "appropriated" until it soaks the soil, causing crops to grow.

89. Brennan v. Jones, 55 P.2d 697, 702 (Mont. 1936) ("We are committed to the rule that the appropriator of a water right does not own the water but has the ownership in its use only.") (citations omitted); *see also* MONT. CODE ANN. § 85-2-102(32) (2022) ("'Water right' means the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact.").

90. *See generally* MONT. CODE ANN. § 85-2-102 (2022).

91. *Id.* § 85-2-102(1). Of course, the legislative fine print to this *should* read "actual results may vary." *See In re* Dearborn Drainage Area, 782 P.2d 898, 900 (Mont. 1989) ("[A]s this case demonstrates, these uses often conflict, and competing interests often disagree over how this resource should be allocated.").

92. *See infra* Sections II(C)(2-3).

93. *See infra* Section II(C)(2).

94. *See infra* Section II(C)(3).

95. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892).

Colorado and uncertainties regarding potential criminal and civil liability. The discussion then shifts to Montana, with a particular emphasis on inverse condemnation jurisprudence.[96]

1. Origins of the Public Trust Doctrine

The modern public trust doctrine traces its roots to the charter of the Magna Carta, which required the English crown to keep the country free of fish-weirs that inhibited navigation.[97] While the equal-footing doctrine concerns state sovereignty over the banks and beds of navigable waterways,[98] the public trust doctrine focuses on the rights of the public over those banks and beds.[99]

The public trust doctrine gained prominence in American jurisprudence with the decision of *Illinois Central*.[100] Illinois achieved statehood in 1818 and took possession of the banks around and soil below its navigable waterways, including the Chicago Harbor.[101] In 1869, Illinois conveyed the right and title to certain submerged lands in the Chicago Harbor to a railroad, allowing the railroad to build wharves, piers, and docks in the harbor.[102] The State subsequently challenged the grant, arguing that it held an absolute right to the submerged land, precluding the railroad from developing such lands.[103] *Illinois Central* concluded that, because the use of navigable waters is of public concern for all people, the beds below the water must be held by the State in an unalienable trust.[104] While a state may convey title to submerged land, it must maintain the right to revoke the conveyance to comport with its interests.[105]

Historically, the public trust doctrine preserved the rights of the public to fish, engage in commerce, and navigate waterways.[106] However, after

96. "Inverse condemnation" is a private action for compensation from the government where property is taken in violation of the Fifth Amendment. *See Condemnation*, *in* BLACK'S LAW DICTIONARY (11th ed. 2019).

97. Magna Carta, cl. 33 (1215). Fish-weirs are essentially "bottleneck" traps in rivers that allow fish to swim in but not out. *See What Is a Weir?*, COOK INLET AQUACULTURE ASS'N (Jan. 7, 2022), https://www.ciaanet.org/what-is-a-weir.

98. *See supra* Part II.A.i.

99. PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 603 (2012).

100. 146 U.S. 387 (1892).

101. *Id.* at 435; *see supra* Part II.A.i.

102. *Ill. Cent. R.R. Co.*, 146 U.S. at 433-34; *see* Leonhardt & Spuhler, *supra* note 6, at 51.

103. *Ill. Cent. R.R. Co.*, 146 U.S. at 439.

104. *Id.* at 455-56. The importance of such a property right is that it may never be fully divested from the trustee—there must always remain a right of reversion.

105. *Id.* at 453-54.

106. *Id.* at 452 ("It is a title held in trust for the people . . . 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

Illinois Central, the United States Supreme Court distinguished the public trust doctrine as a matter of state law that does not merit constitutional stature at the federal level.[107] As such, the public trust doctrine is subject to as many interpretations and applications as there are states.[108]

2. Colorado's Public Trust

Colorado has arguably embraced the most restrictive form of the public trust doctrine.[109] The most definitive rejection of the doctrine occurred in *Emmert*, when the Colorado Supreme Court addressed a charge of criminal trespass where the defendants entered the Colorado River from public lands on a raft with leg holes that allowed them to steer the raft by pushing off the bottom of the river.[110] While defendants drifted through a ranch, the owner strung barbed wire across the stream upon discovering the defendants' presence.[111] On appeal, the defendants argued that the Colorado Constitution established a public right to recreate on state waters.[112] Rejecting this proposition, the *Emmert* court emphasized the absolute property rights of the landowners both in the stream bed and in "everything above [it]," which had a strong common law and statutory history, as preeminent and preclusive of any consideration of the unperfected nature of the right.[113]

Emmert apparently addressed the public's capacity to both wade *and* float in 'private' waters. The Colorado Attorney General took exception to this construction in an advisory opinion that concluded there were no criminal sanctions against floating through private water where the actor does not tread on the banks or streambed.[114] However, the letter did little

interference of private parties.").

107. PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 603-04 (2012) ("Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law."); Appleby v. New York, 271 U.S. 364, 395 (1926) ("[*Illinois Central*] was necessarily a statement of [state] law.").

108. *See generally* Craig, *Eastern Public Trust Doctrines*, *supra* note 33.

109. 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, 76 (2010)("Among the Western states, Colorado and Idaho have most clearly adhered to the strict and limited traditional view of public rights in their public trust doctrines.").

110. People v. Emmert, 597 P.2d 1025, 1026 (Colo. 1979). The defendants had been charged with third-degree criminal trespass which qualified as a class 1 petty offense pursuant to COLO. REV. STAT. § 18-4-504 (1973). *Emmert*, 597 P.2d at 1026. This carried a mandatory minimum sentence of six months imprisonment, a $500 fine, or both. *See* COLO. REV. STAT. § 18-1.3-501(1)(a) (2022).

111. *Emmert*, 597 P.2d at 1026.

112. *Id.* at 1027-28. *See* COLO. CONST. art. XVI, § 5.

113. *Emmert*, 597 P.2d at 1027-28; *see* COLO. CONST. art. XVI, § 5. Colo. Rev. Stat. § 41-1-107 (2022) (expressly vesting streambed owners a fee simple interest in the "space above [their] lands and waters").

114. Letter from Duane Woodard, Att'y Gen., Colo., to Hamlet J. Barry III, Exec. Dir., Colo. Dep't

to clarify the civil component of the issue. Referendum efforts toward a public trust in Colorado waters have similarly floundered.[115]

Astonishingly, Colorado's wholesale rejection of the public trust doctrine was subsequently pushed to new limits.[116] In *Bijou*, the Irrigation District brought an action to enjoin littoral landowners' recreational use of an impounded reservoir, sought damages for trespass, and pursued a declaration that the Irrigation District had an easement on the reservoir.[117] Some of the defendants held title to the underlying lakebed through patents from the federal government.[118]

Bijou affirmed the lower court's declaration that the Irrigation District had an easement to the underlying land rather than a limited fee.[119] However, *Bijou* rejected the proposition that the Irrigation District lacked the power to exclude the littoral owners.[120] This holding was premised on an assertion that the Irrigation District's operations required it to raise or lower the water level in the reservoir suddenly and without warning, which posed a serious threat to those on or in the water during such operations.[121]

Because the servient estate could not interfere with the easement of the dominant estate, the hazards to recreational users during water level changes impermissibly interfered with the Irrigation District's right to change the water level without being exposed to liability.[122] Thus, the littoral landowners were precluded from recreating in any form on the reservoir.[123] However, perhaps in an attempt to "split the baby," *Bijou* also concluded that the Irrigation District could not obtain a change in its water right to include recreational and piscatorial uses.[124]

Nat. Res. (Aug. 31, 1983), 1983 Colo AG LEXIS 42.

115. *See In re* Title, Ballot Title, & Submission Cl. for 2011-2012 # 3, 2012 CO 25 (en banc) (failed to obtain requisite votes to submit to ballot box); *In re* Title, Ballot Title, & Submission Cl. for 2011-2012 # 45, 2012 CO 26 (same); Leonhardt & Spuhler, *supra* note 6, at 84; Hartman v. Tresise, 84 P. 685 (Colo. 1906) (rejecting trespasser's claim of an easement by necessity to access rivers to fish); Hill v. Warsewa, No. 18-cv-01710, 2020 U.S. Dist. LEXIS 51464 (D. Colo. Mar. 25, 2020) (rejecting fly fishing-loving plaintiff's attempts to establish an easement on the "hell-bent" landowner's riverbed on standing grounds)..

116. Bijou Irrigation Dist. v. Empire Club, 804 P.2d 175 (Colo. 1991).

117. *Id.* at 178. The district court found that the Irrigation District held an easement in the reservoir, but the right to exclude was beyond the scope of the easement. *Id.*

118. *Id.* at 179.

119. *Id.* at 182.

120. *Id.* at 183.

121. *Id.* at 184.

122. *Id.* at 183-84.

123. *Id.* at 184-85.

124. *Id.* at 187. It is here that one must seriously question the motivations of the Irrigation District in bringing the suit. This is particularly so given that the action was not brought until the littoral owners made commercial use of their property through membership programs that allowed the public to access the reservoir. *Id.* at 179.

Even so, the Colorado General Assembly has shown some signs of softening its position.[125] In 1992, Colorado exempted commercial rafting services from the trespass standards announced in *Emmert* by permitting licensed services to float down any waters in the state.[126] The critical language in the Colorado Code is the explicit intent not to "interfere in any way with private land owner [sic.] rights *along* rivers,"[127] suggesting the right to interact with private land *below* rivers.[128] Colorado's abrupt transition away from a de minimis public trust doctrine was stipulated as an effect of the industry's "significant contribution to the economy" of the state, and the adoption of the bill indicates the General Assembly's willingness to consider economic factors.[129]

3. Montana's Public Trust

In stark contrast to its southern counterpart, Montana has arguably developed one of the most liberal public trust doctrines.[130] In 1972, the Montana Constitutional Convention incorporated Referendum Number 68 into its new state Constitution.[131] The new Montana Constitution protected long-standing rights to appropriations;[132] however, it also declared that all waters of the state were the "property of the state for the use of its people."[133]

This provision created a fundamental right of the public to recreate on Montana's public waterways.[134] In *Curran*, Montana expressly adopted the recreational use test for determining whether a watershed was public and held in trust.[135] Thus, private actors, like Curran, could not exclude the public from such waters up to the high-water mark regardless of streambed ownership.[136] *Curran* also extended the rights of the public to portage above the high-water mark where barriers exist in "the least intrusive way possible, avoiding damage to the private property holder's

125. *See* COLO. REV. STAT. §§ 33-32-101 to -112 (2022).

126. *Id.* § 33-32-101 (1992); *see generally* People v. Emmert, 597 P.2d 1025 (Colo. 1979).

127. COLO. REV. STAT. § 33-32-101 (1992) (emphasis added).

128. I.e., the riverbed.

129. COLO. REV. STAT. § 33-32-101 (1992).

130. *See* Craig, *Western States' Public Trust Doctrines*, *supra* note 110, at 58.

131. *1972 Montana Constitutional Convention*, *supra* note 84. The new constitution passed by a mere 2,532 votes. *Id.*

132. MONT. CONST. art. IX, § 3, cl. 1.

133. *Id.* at art. IX, § 3, cl. 3.

134. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 170 (Mont. 1984).

135. *Id*. *See supra* Part II.A.ii.

136. *Curran*, 682 P.2d at 170, 172. Curran Oil Co., of which the named defendant was the principal stockholder, owned approximately seven miles of the banks of the Dearborn River and was alleged to be interfering with and harassing individuals recreating on the Dearborn River. *Id.* at 164.

rights."[137] However, the court explicitly precluded any public right to cross private property to access a waterway.[138]

Hildreth, *Curran*'s sister case, addressed the takings argument.[139] In *Hildreth*, plaintiffs alleged that a private riparian owner installed a fence across the Beaverhead River, precluding anglers from floating down the river.[140] The landowner counterclaimed under a theory of inverse condemnation, the dismissal of which gave cause to the appeal.[141] *Hildreth* distinguished "public use" from "title;" thus, the court found no violation of due process.[142]

Following *Curran* and *Hidreth*'s interpretations of the new Montana Constitution, the Montana legislature codified and expanded public rights on state waters.[143] The legislature defined recreational uses as "fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft . . . or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses."[144] *Hildreth*'s distinction between "public use" and "title" and *Curran*'s portage rule were also codified.[145]

Not all legislative efforts were successful.[146] In *Galt I*, a property owner challenged two statutes empowering the public to build duck blinds, boat moorages, and overnight campsites conditioned on the blinds being out of sight of, or 500 yards from, any occupied dwelling.[147] The property owner also challenged a statutory provision requiring landowners to bear the cost of constructing portage routes.[148] The Montana Supreme Court concluded that any public use of the bed or banks must be of "minimal impact," and that Montana's public trust could not extend to activities unnecessary to the enjoyment of Montana waters—including camping and building duck blinds or moorages—without becoming unconstitutional takings.[149]

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137. *Id.* at 172.

138. *Id.*

139. Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088, 1091, 1093 (Mont. 1984), *overruled by* Gray v. Billings, 689 P.2d 268 (Mont. 1984). *See* U.S. CONST. amend. V.

140. *Hildreth*, 689 P.2d at 1090.

141. *Id.*

142. *Id.* at 1093.

143. Less than a year later, the Montana Legislature passed no fewer than seven bills directly related to the rights of the public on Montana waterways. *See* MONT. CODE ANN. §§ 23-2-301 to -302, 23-2-309 to -312, 23-2-322 (1985).

144. *Id.* § 23-2-301(10).

145. *Id.* §§ 23-2-309, 23-2-311. *See Hildreth*, 684 P.2d at 1091; Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984).

146. *See, e.g.*, Galt v. State (*Galt I*), 731 P.2d 912 (Mont. 1987).

147. *Id.* at 913-14.

148. *Id.* at 914. *See* MONT. CODE ANN. § 23-2-311 (1985).

149. *Galt I*, 731 P.2d at 915-16.

Likewise, the court found the codified portage right unconstitutional to the extent that it required landowners to bear the cost of building portage routes.[150] The court also concluded that statutory provisions requiring the landowner to establish portages were an unconstitutional taking under the Montana Constitution.[151] The legislature responded in 2015 by amending the unconstitutional statute to allow the public to camp and build seasonal duck blinds where the activities are "necessary for the enjoyment of that particular surface water" and are out of sight of or 500 yards from an occupied dwelling.[152]

The Montana State Legislature also empowered the public to access public waters for recreational use via the rights-of-way bridges and county roads, except for those established by a prescriptive easement prior to passage.[153] This right of access was expanded in *Public Lands Access Association* to allow public access from the land adjacent to bridges and county roads under a theory of secondary easement.[154] Montana law stipulated that road and bridge easements included as much adjacent land as reasonably necessary to maintain the right-of-way.[155] The court concluded that, because secondary easements are inseparable from an interest in the easement from which it is derived and the public holds an interest in the primary easement, the public has an interest in the property surrounding the easement as well.[156] The court further held that the public's easement extended to any "foreseeable uses," especially noting recreational uses.[157]

D. A Foray into Takings

The previous Part illustrates that many challenges to state action under the public trust doctrine derive from the Fifth and Fourteenth Amendments or comparable state constitutional provisions.[158] It becomes necessary then to provide insight into a recent development in takings jurisprudence that significantly alters the nature of takings issues

150. *Id.* at 916. *See* MONT. CODE ANN. § 23-2-311(2) (1985).

151. *Galt I*, 731 P.2d at 916. *See* MONT. CODE ANN. § 23-2-311(3)(e) (1985); MONT. CONST. art. II, § 29. *Galt II* held that the landowner was entitled attorney's fees and costs pursuant to MONT. CONST. art. II, § 29. Galt v. State (*Galt II*), 749 P.2d 1089, 1094 (Mont. 1988).

152. H.B. 232, 2015 Leg., 64th Sess. (Mont.); MONT. CODE ANN. § 23-2-302(2) (2015).

153. MONT. CODE ANN. § 23-2-312 (2009).

154. Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs, 2014 MT 10, ¶ 22, 373 Mont. 277, 321 P.3d 38.

155. MONT. CODE ANN. § 7-14-2107(3) (2022).

156. *Pub. Lands Access Ass'n*, 2014 MT 10 ¶ 71.

157. *Id.* ¶ 72.

158. U.S. CONST. amend. V. *See, e.g.*, Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088, 1091, 1093 (Mont. 1984).

concerning the public trust doctrine. This Part first provides a brief overview of takings jurisprudence and then discusses more recent developments in takings jurisprudence.[159]

Takings may generally be understood as a government appropriation of private property for a public purpose that mandates the private owner be compensated for their contributions to the public good.[160] Generally, takings occur through deprivation of value, regulatory restrictions, or physical occupation.[161] Physical takings are affected through occupation, appropriation, invasion, or surrender.[162] Physical takings include circumstances where the government extinguishes the most fundamental right that a private property owner has—namely, to exclude the public from their property.[163] Where a public party is empowered through state action to invade this fundamental interest, the Supreme Court has found such actions constitute physical takings that require compensation.[164]

While permanence was historically required for a party to assert a physical taking, in *Cedar Point*, the Court recognized that even temporary, government-sanctioned physical invasions are sufficient to affect takings where the private owner is precluded from exercising fundamental exclusion rights.[165] In *Cedar Point*, a California regulation permitted union representatives to "take access" to private property to solicit agricultural workers for three hours per day, 120 days per year.[166] One plaintiff sued the union for accessing without notice after union representatives solicited workers with a bullhorn in a confined room in the early morning hours.[167] Another plaintiff pursued equitable relief after the company barred union representatives from entry.[168] The Court eloquently summarized the whole of its takings jurisprudence as any "government-authorized invasions of property—whether by plane, boat,

159. The term "brevity" should be liberally interpreted in terms of both scope and depth.

160. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 n.1 (2002); Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 239 (1897).

161. A deprivation of value taking occurs only where a regulation deprives property of "all economically productive or beneficial uses." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992). Regulatory takings occur where a certain regulation "reaches a certain magnitude" in limiting a property owner's rights. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Physical takings involve direct governmental appropriation of private property through occupation. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). Because only physical takings are relevant to further discussion, only they will be discussed in any more detail.

162. *See* Horne v. Dep't of Agric. (*Horne I*), 576 U.S. 350, 360-61, 363-65 (2015). Professor Echeverria aptly ascribed to the Court a "remarkably cacophonous vocabulary in describing physical taking cases." John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 746 (2020).

163. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

164. *See Loretto*, 458 U.S. at 434-36.

165. *See Cedar Point*, 141 S. Ct. at 2074; *Loretto*, 458 U.S. at 434.

166. *Cedar Point*, 141 S. Ct. at 2069.

167. *Id.* at 2069-70.

168. *Id.* at 2070.

cable, or beachcomber" to find that the absence of continuous physical appropriation does not preclude constitutional requirements that landowners be justly compensated.[169] Rather, the issue is whether the government appropriates a legally cognizable interest in the property such as the rights to access and exclude.[170]

III. DISCUSSION

To briefly summarize before continuing, states take title to the beds and banks of streams through the equal-footing doctrine. The Court's navigability in fact jurisprudence provides the framework for determining the minimum rights vested in the public in a waterway. States such as Colorado adhere closely to federal constitutional minimums. Colorado, for instance, justifies this position based on doctrines of state water law. But states may, and many do, expand the rights of the public on waterways not meeting the federal bar for navigability. Montana provides a prime example of such an instance.

Practical and legal factors militate in favor of adopting a public trust doctrine that is both robust and scoped to preserve private interests. Subpart A argues, contrary to the position of Colorado courts and property owners,[171] that Colorado law is fully compatible with the public trust doctrine and even compels a broader application. Furthermore, Colorado's rejection of the public trust doctrine is incongruous with navigability jurisprudence and is generally imprudent. Part B then argues that the Montana model is inconsistent with traditional property rights, longstanding principles of tort law, federal takings jurisprudence, and results in arbitrary determinations.

A. Flying too Close to the Sea

Colorado's rejection of the public trust doctrine is principally based on the judiciary's refusal to accept definitions of navigability other than the one used for purposes of equal footing.[172] However, Colorado's notion of property rights flounders given the inherent transience of water and how similar "property" has been treated by the United States Supreme Court. Furthermore, a careful examination of Supreme Court jurisprudence reveals that Colorado's antiquated reliance on the surveys conducted prior

169. *Id.* at 2074-75.

170. *Id.* at 2075.

171. *See supra* Part II.C.ii.

172. Stockman v. Leddy, 129 P. 220, 221 (Colo. 1912), *overruled in part by* United States v. Denver, 656 P.2d 1 (Colo. 1982). *See* 33 U.S.C. § 329.4 (2022); People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).

to statehood severely undermines the Colorado judiciary's intransigence regarding determinations of navigability.

1. An Easement for the People

First, the Colorado Supreme Court's incorrect decision in *Emmert* must be discussed.[173] It is a fundamental principle of Colorado jurisprudence that, where there is a clear legislative intent to occupy and supersede a field of law, legislative enactments preempt common law standards.[174] Notably, the Colorado General Assembly deliberately crafted an administrative regime designed to maximize the utility of every drop of water in the state.[175]

Emmert justified a riparian owner's right to exclude the public under the principle that ownership of the ground includes an exclusive right to everything above it—including flowing water.[176] This argument was founded on a "fundamental rule of property law"— *cujus est solum, ejus est usque ad coelum* ("the one who owns the land owns the sky").[177] *Emmert* explicitly relied upon a section of the Colorado Code that provides "[t]he ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath."[178]

But both the Colorado General Assembly and the Colorado Supreme Court affirmed that streambed owners do *not* own the surface waters on their property.[179] Rather, this interest is unperfected until the water is put to beneficial use.[180] Furthermore, the plain language of the statute relied upon in *Emmert* cannot be reasonably constructed to achieve the outcome in *Emmert*.[181] The statute only provides that the "space above" lands and waters is vested in the owners of the surface beneath.[182] The Colorado

173. 597 P.2d 1025.

174. *See* Lombard v. Colo. Outdoor Educ. Ctr., Inc., 266 P.3d 412, 417 (Colo. Ct. App. 2011); Hawg Tools, L.L.C. v. Newsco Int'l Energy Servs., 411 P.3d 1126, 1138(Colo. Ct. App. 2016) (Jones, J., concurring); *see also* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 422-23 (2011).

175. *See* COLO. REV. STAT. § 37-80-102 (2022) (empowering and mandating State Engineer closely monitor water resources); *id.* § 37-81-102 (empowering State Engineer and water commissioners to closely monitor and administer allocations); *id.* § 37-92-102 (empowering Colorado Water Conservation Board to monitor all appropriations to maintain minimum stream flows). This list is not remotely exhaustive.

176. 597 P.2d at 1027.

177. *Id.* at 140-41.

178. *Id.* at 141; COLO. REV. STAT. § 41-1-107 (2022).

179. *See* COLO. REV. STAT. § 37-92-102(1)(a) (2022); St. Jude's Co. v. Roaring Fork Club, L.L.C., 2015 CO 51, ¶ 12; *In re* Upper Gunnison River, 838 P.2d 840, 847 (Colo. 1992); Frees v. Tidd, 2015 CO 39, ¶ 14 (en banc); Navajo Dev. Co., Inc. v. Sanderson, 655 P.2d 1374 (Colo. 1982).

180. *Upper Gunnison River*, 838 P.2d at 847 (citing Fort Lyon Canal Co. v. Amity Mut. Irrigation Co., 688 P.2d 1110, 1113 (Colo. 1984)).

181. *See* COLO. REV. STAT. § 41-1-107 (2022).

182. *Id.*

General Assembly in 1992 would indubitably be aware of the facts that (1) Colorado faces massive issues of water scarcity and has laws in place to address these issues and (2) that bodies of water have bottoms. The plain language of the statute and Colorado's well established law regarding property interests in water rights clearly indicate that a property owner's ownership interest ceases where a stream bed stops and water begins.[183] And any interest does not resume until the infinitely finite and perpetually changing point where the surface of the waterway meets the air.[184] This is further supported by a Colorado statute limiting the definition of "premises."[185] For purposes of criminal trespass, "premises" is limited to only the banks and beds of non-navigable waterways.[186] This definition clearly excludes surface waters, which, again, erodes the precedential value of *Emmert*'s inapposite reliance on property maxims.[187]

Even so, the nature of the relationship between the waterway and the land compels a conclusion that certain ancillary rights be vested in the public alongside this statutory and legal necessity of a right of public use.[188] Colorado law mandates that water is held by the state in trust for the public until it is appropriated and put to beneficial use.[189] This means that, until surface waters are appropriated, riverbeds act as pseudo highways for this publicly owned resource.

Stated differently, the value of land is in its use. Land covered in water is unusable. Water is held by the state in trust for its people. Therefore, the property of the public burdens a riparian owner's ability to use their land.[190] Colorado rightly rejected an easement by necessity for individuals attempting to access waterways given the prerequisites for such an easement.[191] However, because privately owned streambeds act as highways for a trusted resource without the underlying land owner's consent, such a relationship is more appropriately considered as an easement by prescription.[192]

183. *See id.* § 37-92-102(6); *St. Jude's*, 2015 CO 51 ¶ 12; *Upper Gunnison River*, 838 P.2d at 847; *Tidd*, 2015 CO 39 ¶ 14; *Sanderson*, 655 P.2d 1374.

184. *See id.* § 37-92-102(6); *St. Jude's*, 2015 CO 51 ¶ 12; *Upper Gunnison River*, 838 P.2d at 847; *Tidd*, 2015 CO 39 ¶ 14; *Sanderson*, 655 P.2d 1374.

185. *See generally* COLO. REV. STAT. § 18-4-504.5 (2022).

186. *See id.*

187. *Id.*

188. I.e., the ability to drop an anchor, run into a rock, go for a swim, wade on the stream bed.

189. *See supra* Part II.B.ii.

190. *See* Lobato v. Taylor, 71 P.3d 938, 945 (Colo. 2002).

191. *See* Hartman v. Tresise, 84 P. 685, 687 (Colo. 1906); Martino v. Fleenor, 365 P.2d 247, 249 (Colo. 1961).

192. *See* Allen v. First Nat'l Bank of Arvada, 208 P.2d 935, 941 (Colo. 1949) ("[A] prescriptive easement is an unopposed and continuous trespass for the statutory period of years."). In Colorado, establishing an easement by prescription requires a showing that the dominant interests were open,

Virtually every waterway running through private land satisfies these elements. Certainly, private owners are aware of waterways running through their property, which satisfies openness and visibility.[193] The issue of adversity is readily resolved by examining the interests involved. The sheer volume of transactions around water rights is indicative of landowners' interest in maximizing control over the water that flows over their property.[194] Maximizing control is directly adverse to the interests of the public given that state engineers are charged with controlling the distribution of water rights and supervising public water uses.[195] Notoriety is satisfied every six years when a water right application is renewed.[196] Thus, under Colorado law, the nature of property rights indicates a prescriptive easement over streambeds.

Such a prescriptive easement also indicates public rights beyond merely a servitude to allow public water to flow across private property. Colorado law clearly provides that the dominant estate holds a right to do what is reasonably necessary for the enjoyment of the easement.[197] The right to enjoy the easement is restricted only by unnecessary inconvenience to the owner of the fee and enlargement of the easement.[198] True, Colorado landowners may be agitated when a passing angler stops to fish at a spot on the landowner's property. But the General Assembly's recognition of a right to float plainly undermines the validity of such concerns.[199] Certainly, as in the allegorical example of Ms. Millgate,[200] any "inconvenience" is outweighed by the reasonable necessity to the enjoyment of the easement in stepping out of a boat to take a picture, dropping an anchor, going for a swim to escape the summertime heat, or merely bumping into a rock. All these activities would, presently, subject recreators to liability. It is antithetical to the law for parties to be subject to arbitrary liability as an incident to otherwise lawful behavior.[201] In

notorious, visible, and adverse for the prescribed statutory period. *Lobato*, 71 P.3d at 950. In Colorado, the statutory period required to establish a prescriptive easement is eighteen years. COLO. REV. STAT. § 38-41-101(1) (2022).

193. *See supra* Part II.B.ii. (discussing renewal of water rights).

194. Between 1987 and 2005, there were 1,707 water transactions in Colorado alone. Philip Womble & W. Michael Hanemann, *Water Markets, Water Courts, and Transaction Costs in Colorado*, 56 WATER RES. RSCH. 1, 1 (2020).

195. COLO. REV. STAT. § 37-80-102(1)(h) (2022).

196. *See supra* Part II.B.ii.

197. *See, e.g.*, Knudson v. Frost, 139 P. 533, 535 (Colo. 1914).

198. *Id.*

199. *See* COLO. REV. STAT. § 18-4-504.5 (2022); *id.* § 33-32-101.

200. *See* Millgate, *supra* note 1.

201. *See* Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co., 284 U.S. 151, 157 (1931) (stating that liberty is the freedom from arbitrary restraint); Goss v. Lopez, 419 U.S. 565, 574 (1975) ("The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied.") (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437

Colorado, criminal liability attaches to trespass simply by virtue of the trespass, regardless of whether a property is fenced or posted with "no trespassing" signs.[202] Colorado's trespass law is unsurprising given its strong roots in English common law and adoption in most states.[203]

The otherwise unassuming doctrines of common law trespass and the exceptions drawn by the Colorado become problematic when the reality of riparian ownership is considered—that many of Colorado's rivers flow in and out of private property.[204] The impractical outcome of Colorado's system of trespass is that otherwise law-abiding citizens may be subject to civil damages, significant fines, or incarceration for stepping over an infinitely small line without notice.[205] Without wholesale restrictions on public access, enacting posting requirements, some form of public trust, or the prescriptive easement described herein, uncertainty as to liability will persist.[206]

Regardless of any determinations of law, *Emmert* effectively punted to the General Assembly on the issue of public access to private riverbeds.[207]

(1971)). It certainly appears that subjecting an individual to civil and criminal liability for actions that are necessary incidents to otherwise lawful behavior is the sort of arbitrary line drawing that is abhorred under the Due Process Clause of the Fourteenth Amendment.

202. COLO. REV. STAT. § 18-4-504(1) (2022). *See, e.g.*, Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064, 1067 (Colo. Ct. App. 1990); *see also* RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965).

203. *See* George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 806-07 (1924). *See, e.g.*, Quarles v. United States, 139 S. Ct. 1872, 1877 (2019); Renz v. Everett-Martin, 2019 MT 251, ¶ 14, 397 Mont. 398, 450 P.3d 892; Baker v. Shymkiv, 451 N.E.2d 811, 813-14 (Ohio 1983); Coimach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 920 (Tex. 2013). Some state variations include notice requirements and/or enclosure, landowners demanding that the violator leave, or incorporating a higher *mens rea*. *See, e.g.*, CONN. GEN. STAT. § 53a-109 (2022); 720 ILL. COMP. STAT. ANN. 5/21-3 (2022); KY. REV. STAT. ANN. § 511.080 (2022).

204. *See Ownership Map*, COLO. STATE LAND BD., https://gis.colorado.gov/trustlands (last visited Apr. 11, 2023). By selecting the "SLB Surface Ownership," "Public Access Program," "Stewardship Trust," "SLB Acquisitions," "Bureau of Land Management," "US Forest Service," "US Fish & Wildlife Service," and "National Park Service" boxes, users can see the boundaries between all public and private lands and waters in Colorado.

205. In fact, this was precisely the issue at stake in People v. Emmert, 597 P.2d 1025, 1026 (Colo. 1979).

206. This is doubly problematic where some waterways are shared by Colorado and states with public trust doctrines, such as the Green River (Colorado and Utah); the San Juan River (Colorado, Utah, and New Mexico); the Mancos River, LaPlata River, Animas River, Navajo Reservoir, Navajo River, Rio Grande, Canadian River (Colorado and New Mexico); the Laramie River, North Platte River, Roaring Fork, and the Little Snake River (Colorado and Wyoming). *See* Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961) (endorsing the public trust doctrine under the laws of Wyoming); N.M. STAT. § 72-1-1 (2022); UTAH CODE ANN. § 73-29-103 (2022).

207. Certainly, because of the absence of federal action in this instance, a litigant would have a choice of fora. *See* COLO. CONST. art. II, § 15; U.S. CONST. amend V; Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-34 (1897) (incorporating the Fifth Amendment against the states). It is interesting to note that, while *Hartman v. Tresise* rightly held that there is no easement across private property to make recreational use of a waterway given that the legislature could not take private property for public use without just compensation, it did not address the issue of takings for individuals wading

As such, Colorado courts are unlikely to receive arguments going to the public trust doctrine very well.[208] However, the General Assembly has proven to be at least somewhat moved by economic arguments in the past.[209]

The recreational economy around waterways certainly weighs in favor of expanding both commercial and private rights on Colorado's waterways. A 2017 study conducted for Colorado Parks & Wildlife revealed that outdoor recreation contributed $62.5 billion to the Colorado economy.[210] Of this, anglers were responsible for more than $2.4 billion.[211] By expanding recreational opportunities for both private and commercial actors, Colorado will further stimulate its recreation-based economy and promote growth in other sectors as companies move in to meet this growing demand.[212]

2. A Theory of Navigability

Evolutions in navigability jurisprudence since the 1871 survey preceding Colorado's statehood in 1876 may provide additional opportunities for vesting broader rights in the public on Colorado waterways.[213] State title to a streambed through equal footing requires a waterway to, at the time of statehood, be navigable in its "natural and ordinary condition" for purposes of commerce or transportation.[214] The

through private property pursuant to a prescriptive easement and without a legislative directive. 84 P. 685, 687 (Colo. 1906). Indeed, this would pose a novel question to both Colorado and federal law. Given the Colorado Supreme Court's intransigence on issues of public trust, it seems likely that any challenge would be closely tailored to Colorado law to deprive the United States Supreme Court of appellate jurisdiction on insufficient alternative independent grounds. *See* Michigan v. Long, 463 U.S. 1032, 1038 (1983); *see, e.g.*, *Emmert*, 597 P.2d at 1027-29. Even so, the purpose of this Comment as it relates to Colorado is to propose a novel concept of a quasi-public trust under Colorado law—not to wade into Colorado's jurisprudence to speculate an answer to a novel question of takings that is more marginal to the essential arguments of this Comment.

208. *Emmert*, 597 P.2d at 1029. However, the legislative deference espoused in *Emmert* seems to be somewhat tongue-in-cheek. As annunciated by the dissent in *Emmert*, the majority's construction of property rights effectively creates a catch-22 for the public in that the majority precludes legislature from crafting a public trust without being also compelled to compensate riparian owners for the deprivation of a "valuable property interest." *Id.* at 1033 (Carrigan, J., dissenting).

209. *See, e.g.*, COLO. REV. STAT. § 33-32-101 (2022).

210. COLO. PARKS & WILDLIFE, THE 2017 ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION IN COLORADO, at ii (2018).

211. *Id.* at 7.

212. Colorado sees persistent growth in its "angling economy" every year, including a more than $1 billion increase in the fourteen years leading up to the most recent study. *Id.* at 12.

213. Proclamation No. 230 (Aug. 1, 1876); *Report of F. V. Hayden*, *in* SIXTH ANNUAL REPORT OF THE UNITED STATES GEOLOGICAL EXPLORATION OF THE TERRITORIES 100-08 (1873); *Hayden's U.S. Geological Survey: Expedition to Colorado*, SMITHSONIAN NAT'L MUSEUM OF NAT. HIST., https://naturalhistory.si.edu/research/botany/about/historical-expeditions/haydens-us-geological-survey-colorado (last visited Apr. 11, 2023).

214. United States v. Utah, 283 U.S. 64, 73, 76 (1931); Oklahoma v. Texas, 258 U.S. 574, 591

navigability inquiry becomes difficult given the innumerable changes to waterways in Colorado since achieving statehood.[215]

Given the fact-specific nature of examining the navigability of even specific sections of waterways, such a specific inquiry of Colorado's renowned rivers is beyond the scope of this Comment.[216] However, some historical evidence supports the notion at least some rivers were navigable. Colorado's waterway usage is evidenced in several primary sources that describe the state's role in the fur trade.[217] While many early pioneers in Colorado elected to use pack animals instead of navigating Colorado's difficult headwaters, small vessels were used by fur trappers.[218] In fact, there are strong indicia of fur traders using different types of shallow-draft boats to transport furs out of the mountains.[219] Furthermore, the use of rivers for transportation and commerce is evidenced by the proliferation of trading posts in Colorado exclusively along rivers, likely indicating some degree of navigability.[220]

Regardless of whether the mountain men of the nineteenth century used Colorado's waterways for transportation, the United States Supreme Court has consistently held that the relevant inquiry is the waterways'

(1922).

215. Most notably are the influence of dams, which drastically modify the character of rivers. As of 2022, there are 1,983 dams in Colorado ranging from minor impoundments for fire suppression to the incredible feat of engineering responsible for creating Lake Powell. *National Inventory of Dams*, FEMA, https://www.fema.gov/emergency-managers/risk-management/dam-safety/national-inventory-dams (last visited Apr. 11, 2023).

216. *See* PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 595 (2012).

217. In 1840, E. Willard Smith recounted his experiences on the South Platte River stating, "We started in a mackinaw boat . . . thirty-six feet long and eight feet wide . . . [with] seven hundred buffalo robes on board, and four hundred buffalo tongues . . . and we proceeded with great difficulty." J. Neilson Barry, *Journal of E. Willard Smith While with the Fur Traders, Vasquez and Sublette, in the Rocky Mountain Region, 1839-1840*, 14 Q. OR. HIST. SOC'Y 250, 272-73 (1913).

218. *Colorado's Early Adventurers, the Fur Trappers, 1810-1840*, SALTOFAMERICA (May 20, 2014) (quoting LEROY REUBEN HAFEN, COLORADO: THE STORY OF A WESTERN COMMONWEALTH (The Peerless Publishing Co. 1933)), http://saltofamerica.com/contents/displayArticle.aspx?0_344.

219. In recounting his oft romanticized experiences in the Rocky Mountains, Colonel Robert Campbell recalls using bull boats, essentially circular canoes made of flexible branches and stretched hides, and mackinaw boats, which are a sort of wide canoe, to transport hides out of the mountains. *A Narrative of Colonel Robert Campbell's Experiences in the Rocky Mountain Fur Trade from 1825 to 1835*, LIB. W. FUR TRADE HIST. SOURCE DOCS., https://user.xmission.com/~drudy/mtman/html/camp_nar.html (last visited Apr. 11, 2023).

220. In Central Colorado, the fur trade revolved around an outpost on the Upper Arkansas River near modern Leadville, Colorado. *See* STEVEN F. MEHLS, THE VALLEY OF OPPORTUNITY: A HISTORY OF WEST-CENTRAL COLORADO ch. 2 (1982). Additionally, trappers would travel up the Colorado River Basin from modern New Mexico into the San Juan Mountains where the rivers produced higher quality pelts due to better habitat. *Id.* Historical evidence also shows that trappers extensively exploited the Crystal River; Gunnison River; Rio Grande; Colorado River; White River; and rivers in the Flattop Mountains, Elk Mountains, and Eagle Valley. *Id.* The trading posts developed in the nineteenth century were Zebulon Pike's stockade on a tributary of the Rio Grande; Fort Uncompahgre on the Gunnison River; and Bent's Old Fort on the Arkansas River; Forts Vasquez, Lupton, Jackson, and St. Vrain along the South Platte River. *Id.*

condition at the time of statehood and the capabilities of vessels to navigate them for commerce or transportation.[221] Notably, modern white-water rafts, canoes, and drift boats share many characteristics—including width, length, and draft—with the bull boats and mackinaw boats used by mountain men.[222] The United States Supreme Court has discounted the difficulties encountered in navigation and relegated the standard to something akin to whether Brad Pitt could traverse the river in a stolen rowboat.[223] Thus, a plausible argument is that many rivers in Colorado—especially the South Platte, San Juan, Grande, Colorado, and Gunnison—may be susceptible to a navigability determination, particularly when examined on a segment-by-segment basis as the Court recently re-endorsed in *PPL Montana*.[224]

B. Flying too Close to the Sun

Montana's expansive public trust in waterways and adjacent lands has effectively ousted many private property rights that have permeated Anglo-American law since the time of the Magna Carta. Notably, this includes the right to exclude.[225] While the law carved certain exceptions out from this right,[226] Montana's public trust eviscerates any semblance of equity for private actors that own water-adjacent property. This Part argues that a careful examination of Montana's public trust implicates an

221. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940); United States v. Utah, 283 U.S. 64, 82-83 (1931); Oklahoma v. Texas, 258 U.S. 574, 591 (1922).

222. *Compare NuCanoe Classic*, NUCANOE, https://www.nucanoe.com/nucanoe-classic (last visited Apr. 11, 2023) (showing an example of a modern canoe), *and SBDS 140 14' Drop-Stitch Raft*, ROCKY MOUNTAIN RAFTS, https://rockymountainrafts.com/collections/rafts-self-bailing/products/sbds-140-14-drop-stitch-raft?variant=41516515885233 (last visited Apr. 11, 2023) (showing an example of a modern white water raft), *and Drift Boats*, ADIPOSE BOATWORKS, https://adiposeboatworks.com/drift-boats (last visited Apr. 11, 2023) (showing an example of a modern river fising boat), *with* Joseph A. Mussulman, *Bull Boats*, DISCOVER LEWIS & CLARK, https://lewis-clark.org/boats/bull-boats (last visited Apr. 11, 2023) (showing an example of a bull boat), *and* Vicki Brooker, LAKELANDTODAY (Apr. 15, 2020, 12:30 PM), *New Chapters Added to History of Elk Point and Surrounding Area*, https://www.lakelandtoday.ca/local-news/new-chapters-added-to-history-of-elk-point-and-surrounding-areas-2255370 (showing a scow boat traversing white water).

223. A RIVER RUNS THROUGH IT (Columbia Pictures 1992); *see* Montello, 87 U.S. 430, 440-41 (1874).

224. PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 595 (2012). As was previously noted, this is an extremely fact specific inquiry that requires comparing modern characteristics and use of a given waterway with its condition at the time of statehood and its susceptibility to being used for commerce or transportation. This sort of examination is outside the scope of this Comment except as it relates to a consideration for expanded public use of Colorado's rivers. Certainly, this is an area that is ripe for further scholarly inquiry.

225. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); United States v. Causby, 328 U.S. 256, 264 (1946).

226. E.g., the doctrines of public necessity, *see* RESTATEMENT (SECOND) OF TORTS § 196 (AM. L. INST. 1965);.private necessity, *see id.* § 197; and the Takings Clause. *See* U.S. CONST. amend. V.

unconstitutional taking of private property for public use.[227] This Part also argues that Montana's statutory and common law jurisprudence diminish predictability for landowners as to the rights of the public using waterways on their property.

1. Takings

The Montana Supreme Court and the Montana State Legislature historically engaged in an Abbott and Costello-like effort to expand the state's public trust.[228] While the court has occasionally invalidated legislative actions as takings,[229] it has been far more inclined to dispose of claims for inverse condemnation related to the state's public waterways.[230] This Subpart proposes that Montana's statutory and common law treatment of some aspects of portage, access, and use are takings within the context of the Fifth Amendment.[231]

Several key aspects of Montana's public trust, as sanctioned by the Montana State Legislature, must be understood as unconstitutional takings within the Fifth and Fourteenth Amendments—specifically the provisions permitting portages above the high-water mark and provisions for access through private property.[232]

Montana's public trust in waterways extends only to the high-water mark pursuant to a use easement vested in the public.[233] In instances where a waterway is barricaded unnaturally,[234] the public is permitted to portage around the obstacle "in the least intrusive way possible, avoiding damage to the private property holder's rights."[235] The Montana Supreme Court has limited portage rights only to the extent that landowners are

227. *See* U.S. CONST. amend. V.

228. *See* THE NAUGHTY NINETIES (Universal Pictures 1945). This reference is particularly apropos on the issue of river access. In 2009, the Montana Legislature empowered the public to access waterways via the right-of-way and abutments of bridges and the right-of-way of county roads that the Montana Supreme Court expanded to provide broader access across private land where an abutment alone was insufficient to provide access. *See* MONT. CODE ANN. § 23-2-312 (2009); Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs, 2014 MT 10, ¶¶ 69-70, 373 Mont. 277, 321 P.3d 38.

229. *See, e.g.*, *Galt I*, 731 P.2d 915-16 (Mont. 1987) (holding that legislatively permitted activities not necessary to the enjoyment of public waters constitute an unconstitutional taking).

230. *See, e.g.*, Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984); Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984).

231. U.S. CONST. amend. V. This analysis is proper given the incorporation of the Takings Clause against the states. *See* Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-34 (1897).

232. *See* MONT. CODE ANN. § 23-2-313 (2022); *id.* § 23-2-311; *Curran*, 682 P.2d at 172.

233. *Curran*, 682 P.2d at 170, 72.

234. E.g., where a landowner has constructed a bridge across a waterway.

235. *Curran*, 682 P.2d at 172. *See* MONT. CODE ANN. § 23-2-311 (2022) ("A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights.").

required to bear the burden of constructing portage routes.[236]

This public rights formulation is problematic as it minimizes the landowner's interest in their most fundamental property right—namely, the right to exclude.[237] There is no feasible construction of a right to portage over the high water mark, especially at specifically designated points, that is commensurate with *Cedar Point*'s *per se* holding.[238] This infringement is not mitigated by the requirement that the state bear the burden of building the portage route unless there is also due compensation for the use of the portage route.[239] Furthermore, even where a portage route is not permanently established, Montana has empowered the public to engage in the sort of temporary trespasses that were explicitly disavowed as unconstitutional takings in *Cedar Point*.[240]

For similar reasons, aspects of Montana's trust are takings under *Cedar Point* to the extent that the public is permitted to move across private property to access waterways.[241] Montana has mandated that private property bordered by cattle fences that is adjacent to a waterway provide some means of access to the waterway by a stile, gate, roller, walkover, removeable wooden fence rail, or some other method.[242] As with portages,[243] where disputes arise around this provision, the Montana Department of Fish and Wildlife is required to fund and maintain any access points.[244] However, no provisions require the landowner to be compensated for the state-sanctioned trespass or the mandatory changes

236. *See supra* Part II.C.ii.

237. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

238. *See* Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2072 (2021).

239. *See* MONT. CODE ANN. § 23-2-311(e) (2022). While it could feasibly be argued that the public has a de facto easement over portage routes if not de jure, such a finding would likely extend beyond the bounds of public trust found in *Illinois Central* and into the realm of takings. This is such because the high-water mark is, necessarily, the highest feasible point at which land could become a streambed and held in trust by the state. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436-37 (1892). Obviously, navigation is impossible at a point where there is not and never has been a waterway. That is walking.

240. *See Cedar Point*, 141 S. Ct. at 2074 ("[A] physical appropriation is a taking whether it is permanent or temporary . . . ."). While a rebuttal to this is that use of a waterway could be precluded vis-à-vis natural or unnatural objects requiring portage over the high-water mark, this is readily ameliorated through expanding common law doctrines around private necessity.

241. *See* MONT. CODE ANN. § 23-2-313 (2022). Arguably, the statutory provision providing access from the right-of-way and abutments of bridges and right of way of county roads *could* constitute a taking. *See id.* However, the Court found this was not a taking under the Montana Constitution given that the right was a secondary use of an easement for which just compensation had already been provided. Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs, 2014 MT 10, ¶¶ 68-70, 373 Mont. 277, 321 P.3d 38. *See* MONT. CONST. art. II, § 29. Thus, this would likely be an ill-advised hill to die on. Nonetheless, if, through some hyper-intensive historical analysis, it was found that the roadway or bridge existed before the land was patented, a private owner might have an inverse condemnation claim that could survive a motion to dismiss.

242. MONT. CODE ANN. § 23-2-313 (2022).

243. *See supra* Part II.C.ii.

244. MONT. CODE ANN. § 23-2-313(3) (2022).

to the property exist.[245] This state-sanctioned temporary trespass is precisely what the United States Supreme Court found to be an unconstitutional taking in *Cedar Point*.[246] Furthermore, the portage statute directly contradicts *Curran's* explicit holding that, "the public do not have the right to enter into or trespass across private property in order to enjoy the recreational use of [s]tate-owned waters."[247] Thus, even if by some stretch of the imagination, this access law is not a taking within the Fifth Amendment, it is wholly incompatible with even Montana's expansive public trust.

2. Uncertainty

While Colorado's absence of a public trust creates uncertainty for public users,[248] Montana's public trust has the inverse effect of creating uncertainty for private landowners. This Subpart examines the practical issues faced by landowners through certain public uses that are explicitly and implicitly permitted where they are "necessary for the enjoyment of surface waters." It also examines the practical issues landowners face around compulsory changes to their property.

As discussed,[249] the Montana State Legislature revised the statute regarding permissible uses, limitations, and prohibited uses after the Montana Supreme Court found certain uses to constitute unconstitutional takings.[250] The unconstitutional statute was subsequently amended to permit the same unconstitutional uses when "necessary for the enjoyment of surface waters."[251] Perhaps the most concerning aspect of this statute is its explicit empowerment of the public to place or build structures—specifically duck blinds—on private property below the high-water mark on waters held in public trust.[252] The perplexing and difficult questions

245. *See generally id.*

246. *Cedar Point*, 141 S.Ct. at 2074.

247. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984).

248. *See supra* Part III.A.i.

249. *See supra* Part II.C.iii.

250. *See* MONT. CODE ANN. § 23-2-311 (1985); *Galt I*, 731 P.2d 915-16 (Mont. 1987).

251. *Compare* MONT. CODE ANN. § 23-2-311(e)-(g) (1985) *with* MONT. CODE ANN. § 23-2-311(e)-(g) (2015). Astonishingly, the 2015 changes to the statute have never been challenged on constitutional grounds despite only minor changes in semantics. The two cases citing to the statute following the 2015 amendments relate to the statute only insofar as it relates to establishing the public trust generally, and access via rights-of-way. *See* Ash v. Merlette, 2017 MT 305, ¶ 10, 389 Mont. 486, 407 P.3d 304; Bugli v. Ravalli Cnty., 2019 MT 154, ¶ 27, 396 Mont. 271, 444 P.3d 399.

252. MONT. CODE ANN. § 23-2-302(2)(g) (2022). While the statute does qualify that the structures must be out of sight of or 500 yards from occupied buildings, that does not change the fact that the blinds are on private property. *Id.* Additionally, despite the Montana Legislature's attempt to circumvent the Supreme Court's ruling in *Galt I*, this statute indubitably constitutes a taking under the framework of *Cedar Point*. *See Galt I*, 731 P.2d at 915-16; Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

landowners are left with include (1) whether a party's subjectively reasonable necessity for use of the waterway is objectively reasonable;[253] and (2) whether a previously necessary fixture becomes unnecessary and gives rise to a cause of action. These unresolved questions diminish the landowner's capacity to exercise dominion over their property given the potential liability for obstructing the public's constitutional right to enjoy the waters of the state.

Additional uncertainty arises through provisions requiring landowners to provide access through cattle fencing and portage routes around unnatural barriers.[254] Both statutes provide an interactive process with the landowner and require the state to fund any such projects.[255] However, both statutes implicitly guarantee the outcome will favor the public every time regardless of equitable considerations.[256] Thus, the only certainty for riparian owners is that, eventually, a stranger could attempt to access a section of river, and the landowner will be legally required to make changes to their property to allow more strangers to walk across it.

IV. CONCLUSION

Both Montana and Colorado have strayed from established principles of law in their respective determinations of the rights of the public on waterways. In Colorado, the nature of water rights and the possessory interest therein compels the creation of some public trust. This would vest certain rights in the public while recreating, essentially eliminating the risk of liability for otherwise law abiding citizens. Furthermore, historical evidence preponderates that, under the navigability analysis for purposes of state title, at least some rivers or segments of rivers are susceptible to findings of navigability in fact. In Montana, the rights ancillary to its public trust subvert traditional notions of property rights and due process while depriving landowners of predictability concerning the future condition of their property.

States must strike an effective balance between the interests of the public and private owners that clearly articulates the rights of both. An approach akin to Montana's infringes on due process property rights of landowners and creates significant uncertainties as to their ability to exercise dominion over their property. Likewise, Colorado's approach

253. In fact, even the Montana Supreme Court dodged this rather difficult question by holding that the use need not be convenient, productive, and comfortable as possible. *Galt I*, 731 P.2d at 915. The Court only spoke to permanent fixtures, but completely eluded the question of more temporary ones. *Id.* at 915-16.

254. *See generally* MONT. CODE ANN. § 23-2-311 (2022); *id.* § 23-2-313.

255. *Id.* §§ 23-2-311, 23-2-313.

256. *Id.* §§ 23-2-311, 23-2-313.

inures the public to a perpetual state of uncertainty as to when lawful acts might subject them to civil or criminal liability. Certainly, a middle ground exists between these two formulations of the public trust doctrine that protects the fundamental rights inherent in property ownership while ensuring the public enjoys the fruits of the property entrusted to the state.