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# PUBLIC TRUST AND PRIVATE DISTRUST: A STORY OF FISHING AND FIGHTING

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To some, a case involving access to fishing waters may seem unremarkable. That is because it may be thought of as a local-level dispute that ostensibly involves little more than deed restrictions or property boundaries. But sometimes, even fishing rights cases can invoke important issues such as privacy and public access, and such a case was recently heard in Colorado.<sup>[i]</sup> To Mark Warsewa and Roger Hill—the property owner and fisherman at odds in the case—their ordinary property rights

case might only matter because of the stakes involved for each party; but for the broader public, this case has transformed into a dispute over a foundational tenet of natural resources law: the public trust doctrine.[ii]

To understand the fundamentals of their case, it is necessary to first explain the public trust doctrine. This doctrine establishes that some natural resources are so precious or valuable to the public that they are to be permanently held in trust by the government for the public's enjoyment.[iii] This precludes private ownership of the implicated resources, meaning that the public will never be prevented from enjoyment of those resources by means of private restriction.[iv] It is often associated with bodies of water, such as rivers—like the one in which Roger Hill was fishing at the moment this dispute began.[v]



In 2012, Hill entered Colorado's Arkansas River to fish for trout.[vi] He entered via government property and had already asked some neighboring landowners for permission before going to his desired fishing spot—but he did not ask all of them. [vii] One property owner, Linda Joseph, came out of her home and adamantly objected to Hill's fishing there, demanding that he leave.[viii] When Hill returned to the spot a few weeks later, Mark Warsewa, Joseph's husband, again forced Hill and his guest to leave.[ix] A year after these events, a number of fishermen visited that spot and were met with gunshots, which resulted in a 30-day jail sentence for Warsewa.[x] Finally, Hill sued Warsewa and the State of Colorado, relying on the public trust doctrine as the basis for his argument that he did, in fact, have a right to fish at that location.[xi] Their dispute amounted to whether the state of

Colorado held the riverbed in public trust, and if so, whether landowners could prevent Hill—or anyone else—from fishing in navigable waterways that are tangential to private property.[xii] In June of 2023, the Supreme Court of Colorado dismissed Hill’s claim against the State of Colorado for lack of standing (a procedural issue), thus declining to decide the case on the merits.[xiii] It appears that if Hill wants to guarantee his right of access to the Arkansas River, he must first pursue a declaration that the State of Colorado owns that river.[xiv]

In many other states, the public trust doctrine is established law.[xv] Because of Colorado’s lack of clear precedent on the subject, however, the answer might not have been straightforward if Hill’s case had been decided on the merits.[xvi] And because Colorado law allows private individuals to acquire title to different parts of a body of water—including the surface and bed of the body, as well as the water itself—there are genuine grounds for the parties’ confusion.[xvii] While Hill might have justifiably believed he could fish there, so too could the landowners have believed they had guaranteed for themselves complete privacy when they purchased the adjacent land. Given these considerations, how should Colorado courts rule in such a case?



Hill’s attorney, Mark Squillace, is an expert in natural resources law, and he argues that the U.S. Supreme Court has already answered the question.[xviii] In at least one case, *Illinois Central Railroad Company v. Illinois* (1892), the Court held that the public trust doctrine must apply to land under submerged, navigable waterways (Lake Michigan, in that case) because of the “necessity of preserving to the public the use of navigable water from private interruption and encroachment.”[xix] This case

established precedent that states hold navigable waterways in public trust, and a court would be hard-pressed to rule inconsistently with such a clear authority if the Arkansas River were already declared to be a “navigable waterway.” If this is the applicable law on the subject, there is likely no equally strong precedent Warsewa could raise to counter it—a fact that, if true, should be dispositive of the case’s outcome.

Nevertheless, a court should not be dismissive of the landowners’ privacy concerns because they are by no means illegitimate. The laws of Colorado are vague and have created substantial ambiguity, and to the extent that it is appropriate, Warsewa’s expectations as a landowner should be considered. [xx] To Joseph and Warsewa, it might not have been obvious when they bought the land that their property bordered a river that could have later been declared to be public property. For homebuyers in search of private property that is truly private, a verdict for Hill suggests that, to secure privacy, they must predict the future legal status of adjacent natural resources before purchase. For these landowners, a verdict for Hill suggests that the goalpost has been moved.

[i] *See* Ben Ryder Howe, *Does This Fisherman Have the Right to Be in a Billionaire’s Backyard?* The New York Times (Sept. 7, 2022, 10:30 AM), <https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html> (Last viewed Sept. 7, 2022) [<https://perma.cc/5WK8-NYYS>].

[ii] *Id.*

[iii] *Public Trust Doctrine*, Legal Information Institute, Cornell Law School [https://www.law.cornell.edu/wex/public\\_trust\\_doctrine](https://www.law.cornell.edu/wex/public_trust_doctrine) (Last viewed Sept. 17, 2023) [<https://perma.cc/QPB4-UTUR>].

[iv] *See id.*

[v] *Id.*; Howe, *supra* note 1.

[vi] Howe, *supra* note 1.

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*

[x] *Id.*

[xi] *Id.*

[xii] *Id.*

[xiii] *State v. Hill*, 530 P.3d 632, 635-36 (Colo. 2023).

[xiv] *See id.*

[xv] Howe, *supra* note 1.

[xvi] *Id.*

[xvii] Charlie Booher, *Will a Colorado Supreme Court Case Open Thousands of Miles of “Private Water” to Public Fishing?* Field and Stream (May 8, 2023, 6:00 PM)

<https://www.fieldandstream.com/conservation/colorado-stream-access-supreme-court/> (Last viewed Sept. 17, 2023).

[xviii] *See* Howe, *supra* note 1.

[xix] *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 437 (1892).

[xx] Howe, *supra* note 1.

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