



Colorado Legal Issue: River Access

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Hill v. Warsewa, No. 19-1025 (10th Cir.)

FACTS:

- ▶ Fishing access dispute
- ▶ Arkansas River Headwaters Recreation Area near confluence with Texas Creek
- ▶ Homeowners:
 - ▶ Mark Warsewa and Linda Joseph
 - ▶ Hold title tracing to federal patent, including river bed
- ▶ Angler:
 - ▶ Roger Hill, late 70s
 - ▶ Repeatedly wades onto Warsewa's property
- ▶ Conflict:
 - ▶ Warnings, threats, rocks
 - ▶ Warsewa shoots at another angler; pleads guilty to menacing



Arkansas Headwaters Recreation Area

Welcome to the Upper Arkansas River Valley, famous for its 14ers, whitewater, wilderness and wildlife. The Arkansas Headwaters Recreation Area offers many fun and exciting activities.

Please:

- know your skill level
- be aware of risks involved in an activity
- be familiar with safety practices
- equip yourself properly

Visitor Etiquette

Hundreds of thousands of visitors boat on the river each year, and close to a million people enjoy the recreation area. Courtesy and respect for others will make everyone's experience more enjoyable. You can minimize your impact and help us protect this valuable resource by observing the following guidelines:

- respect private property and don't trespass
- keep noise down
- if you are boating, travel on opposite side of the river from anglers and avoid fishing holes
- learn and practice Leave No Trace backcountry ethics, including pack it in/pack it out
- use existing restrooms facilities, or a portable toilet (groover), required by regulation
- stop only at well-established, well-used sites and avoid trampling streamside vegetation
- build fires only in grills and fire pans, required by regulation

Arkansas Headwaters Recreation Area Visitor Center

- Annual passes, regulations, and guide books are available at the AHRA Visitor Center.
- The AHRA Visitor Center is located on the corner of G Street and Sackett Avenue in downtown Salida, one block North of Highway 291.



For campground reservations, please call 1-800-244-5613 or online at www.cpwwshop.com

Texas Creek

[illegible]

LEGEND

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- Arkansas River**
 (County manager) Colorado Parks and Wildlife, the Bureau of Land Management, and the U.S. Forest Service
- AHRA Visitor Center**
 AHRA Recreation Site (See chart for activities available at each site.)
 Bear Remedy Site (See chart for activities available at each site.)
- Fishing easements crossing private lands**
 Look for signs marking easements
- Whitewater Park**
 Public Campground
 Recreation Site
 Visitor Information
 Wildlife Viewing Information
- Legend:**
 Private/State Lands (no public access)
 Colorado Parks and Wildlife Lands
 Bureau of Land Management (BLM) Public Land
 BLM Wilderness Study Area
 US Forest Service Land
 US Forest Service Wilderness Area
 Communities
 US Highway and Interchange
 Paved Road
 Dirt Road
 Continental Divide
 Trail
 National Monument Border
- Scale:**
 0 5 10 Miles
- North Arrow:**
 N

Access for the Physically Challenged

The Arkansas Headwaters Recreation Area has fully accessible restroom facilities and at least one fully accessible campsite at each developed campground, except for Saluda East, Potter Barr and Valle Bridges (walk-in/boat-in only access). Select river access sites have fully accessible restroom facilities, complete with accessible parking spots. Please call 719-539-7289 or visit www.cpw.state.co.us for more information.



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PROCEDURAL BACKGROUND:

- ▶ Hill files complaint in State Court, asserting:
 - ▶ Arkansas River was navigable for title in 1876;
 - ▶ Newspaper accounts of log drives
 - ▶ Fur-trapper's journal reports using canoe
 - ▶ Riverbed is therefore held exclusively by the State of Colorado in trust for the public; and
 - ▶ Homeowners have no right to exclude Hill from the riverbed.
- ▶ Homeowners remove to federal court under 28 U.S.C. §1331.
 - ▶ Questions of navigability for determining state riverbed title are governed by federal law. See, e.g., *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. 1, 14 (1935).
- ▶ Hill adds State of Colorado as defendant in federal court.

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EQUAL FOOTING DOCTRINE:

- ▶ States admitted to the Union after its formation are coequal sovereigns under the Constitution, and therefore, like the 13 original States they “hold the absolute right to all their navigable waters and the soils under them.” See, e.g. *Lessee of Pollard v. Hagan*, 11 L.Ed. 565 (1845).

NAVIGABILITY FOR TITLE:

- ▶ “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 19 L.Ed. 999 (1871).

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DISMISSED BELOW – PRUDENTIAL STANDING

- ▶ Magistrate Tafoya, District Court, District of Colorado
 - ▶ Third-party standing: “It is undisputed that Plaintiff does not own the land in question and does not contend he *should* own the land in question. Therefore, Plaintiff fails on the element that he must assert his own rights.”
 - ▶ Generalized grievance: “Additionally, Plaintiff does not show his claim is more than a generalized grievance based on a desire for the general public, including himself, to be able to fish in certain spots while standing on the bed of the Arkansas River and avoid the unpleasantness which could go along with trespassing on private property.”
 - ▶ Avoided determination that claims are barred by sovereign immunity.
 - ▶ Avoided determination that Hill lacks standing under Article III.

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HILL'S ARGUMENTS ON APPEAL

- ▶ Federal common-law creates public easement in lands underlying navigable water ways:
 - ▶ “That the state holds the title to the lands under the navigable waters ... we have already shown **But it is a title different in character from that which the state holds in lands intended for sale.** It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. **It is a title held in trust for the people of the state, 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 interference of private parties.” *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).
 - ▶ Hill has suffered a personal injury because his right to use that easement is impaired.
- ▶ State’s assertion of sovereign immunity automatically deprived district court of jurisdiction and, thus, it was required to remand under 28 U.S.C. §1447(c).
- ▶ District Court abused its discretion by dismissing on non-jurisdictional issue before determining whether it had jurisdiction.

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COLORADO RESPONSE – Hill improperly assert the rights of third party (Colorado).

- ▶ No federal common-law under equal footing doctrine.
 - ▶ *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977).
- ▶ Scope of public trust in navigable waters is defined by state law.
 - ▶ *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012)
- ▶ Colorado law does not create public trust or public rights of access.
 - ▶ COLO. CONST. art. XVI, § 5 “preserve[s] the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded”; it does not “assure public access to waters for purposes other than appropriation.” *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979).
 - ▶ COLO. CONST. art XVI, § 7 also protects access for the purpose of applying water to beneficial use, but not for recreation or other purposes.
- ▶ Members of the public do not have title in public lands.
 - ▶ *Wilderness Soc. v. Kane Cnty.*, 632 F.3d 1162 (10th Cir. 2011)

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COLORADO RESPONSE – Hill improperly asserts a generalized grievance.

- ▶ Hill's claims are no different than those that might be suffered by any other trespassing angler.
- ▶ Asserting title in riverbed has far reaching consequences.
- ▶ Whether to do is best left to elected officials after considering all of those consequences; it should not be left to individuals to assert title for the state.

ORAL ARGUMENT: November 19, 2019.



Questions?