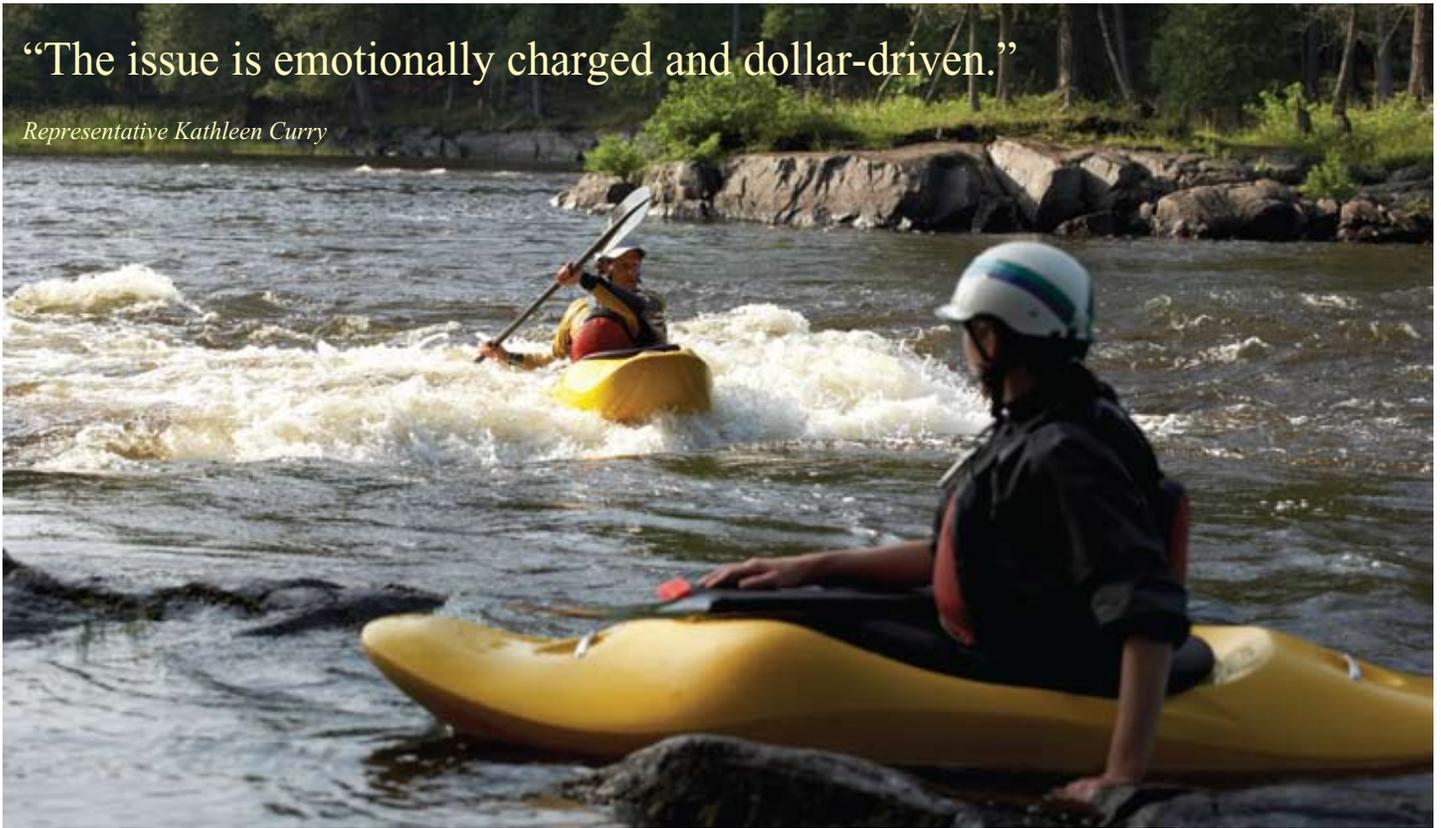


WHAT IF A RIVER RUNS THROUGH IT?

“The issue is emotionally charged and dollar-driven.”

Representative Kathleen Curry



BY LARRY MORANDI

If the public owns the water but it flows through private land, are there limitations on its use?

That question has confronted state legislatures and courts for more than 100 years. It pits rafters and fishermen against land owners. It is particularly vexing in Western states where constitutions often declare water to be public property but want to protect private property from public use without compensation.

The majority of Western states allow public use of rivers that flow through private property to some degree. The basic thrust of those allowances is this: If you enter a river from public property, you can continue to float through privately owned land so long as any contact with the streambed or banks is necessary only to avoid obstacles. Can you get out and wade? Usually not.

The extent of public use varies, with Mon-

tana affording the greatest access. Rafters can float and fishermen can wade in rivers that flow through private land so long as they enter from public property. They can even leave the river and walk up to the high-water mark.

Utah came close to Montana’s approach after a 2008 state Supreme Court decision that involved a rafter who got out to wade and fish and moved fencing the landowner had placed across the river. He was cited for criminal trespass. The court determined that a statute declaring all waters of the state to be public property allowed people to use the water for a variety of recreational activities and to touch the streambed and banks in a reasonable manner.

The decision “hit like a bombshell,” says

Utah Representative Kay McIff, because in the past disputes between recreationalists and landowners usually had been worked out without going to court. Now the court was expanding public access, McIff argues, with little regard for property rights.

“While the state constitution contains no provision for public ownership of water—the declaration is statutory—it does protect private property.”

McIff introduced HB 141 to clarify legislative intent. It passed and was signed into law this year. The new law allows rafters to float on public waters that flow through private property and to touch streambeds and banks to ensure safe passage around dangerous obstacles. Entry must be from public



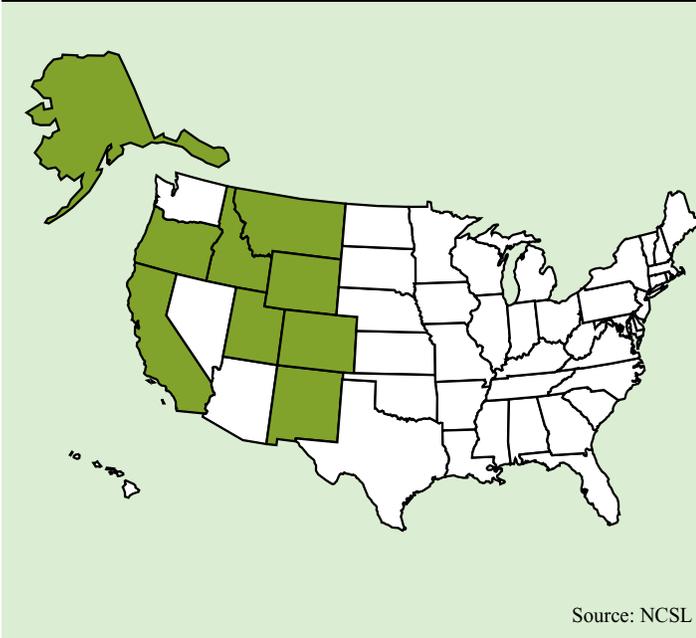
REPRESENTATIVE
KAY MCIFF
UTAH



REPRESENTATIVE
KATHLEEN CURRY
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WESTERN STATES WITH PUBLIC ACCESS LAWS



property or from private property with permission of the owner. The public can fish while floating, and wade in those streams it has used openly and without disapproval for at least 10 consecutive years. This latter provision is a concession to existing rights.

Colorado also considered legislation this year. The state has tighter limits on public water access than either Montana or Utah. A 1979 state Supreme Court decision found that a constitutional provision declaring streams to be publicly owned did not grant public access for recreational purposes when the water flowed through private property. A subsequent attorney general's opinion, however, determined floating through private property does not subject rafters to criminal prosecution. The unresolved question is whether a rafter can be hauled into court for civil trespass.

The trigger for the legislation was a dispute between a commercial rafting company that had used a river for years and a landowner who developed a fishing club and no longer wanted the public floating through his property. Representative Kathleen Curry drafted a bill to clarify the rights of commercial rafters to float through waters without being guilty of trespass. It applies to commercial rafters only—an industry, Curry notes, “that contributes \$140 million a year to Colorado’s economy”—and does not allow fishing. Incidental contact with streambeds or banks is permitted to ensure safe passage around obstacles.

The bill passed the House but was amended in the Senate to undergo further study. The House rejected the Senate changes and a conference committee failed to iron out the differences, resulting in 24 ballot initiatives circulating on both sides of the issue. “The issue is emotionally charged and dollar-driven,” says Curry.

A four-year agreement announced in mid-June calls for both sides to recall their initiatives and allows rafters limited access to the river in dispute. The broader “right-to-float” question is far from resolved, however, and a newly formed state panel of landowners, commercial and recreational river users, and police will attempt to come up with a solution. Its report is due before the next legislative session convenes in January.

