

Governor's River Access Dispute Resolution Task Force Final Report – December 13, 2010

On July 26, 2010, Governor Bill Ritter, Jr. issued Executive Order B 2010-010, thereby creating the Governor's River Access Dispute Resolution Task Force. The following excerpt from Executive Order B 2010-010 succinctly describes the Mission and Scope of the Task Force.

“II. Mission and Scope

The mission of the Task Force established by this executive order is to re-establish a dialogue between landowners and rafters that will lead to the establishment of a fair and efficient dispute-resolution process for the future. The charge of the Task Force is to develop a proposal for resolving conflicts among landowners, anglers, commercial rafters, and the boating public. The Task Force will be charged with developing a framework for resolving disputes on Colorado rivers on a stretch-by-stretch basis as those disputes arise. This approach recognizes that disputes vary from place to place and that a one-size-fits-all strategy is unlikely to succeed. Moreover, the Task Force shall clearly articulate the sources of conflict between rafters and landowners, recommend potential solutions, and develop a process for resolving disputes when they arise in a cost-effective, timely manner.” (Executive Order B 2010-010 Paragraph II. Mission and Scope)

The Task Force met five times: in Denver, Colorado on September 2, 2010, November 5, 2010, and November 18, 2010; in Salida, Colorado on September 22, 2010; and in Glenwood Springs, Colorado on October 13, 2010. These meetings included extensive dialogue about historical sources of conflicts, historical solutions between boaters and landowners around the state, and ways to efficiently minimize and resolve future conflicts. During these meetings, the Task Force heard presentations by representatives of the Arkansas Headwaters Recreation Area and the Yampa River Legacy Project, both of which are administered by the Colorado Division of Parks and Outdoor Recreation, and by a representative of American Whitewater, and by Mike Mitchell, owner of Queen of the River Consultants. The Task Force also solicited and received public comment at the Salida and Glenwood Springs meetings.

The Task Force was originally comprised of fourteen (14) voting members and three (3) non-voting members, all of whom are highly knowledgeable members of the affected stakeholder groups, including commercial river outfitters, non-commercial boaters, landowners, including members of the agricultural community, and law enforcement. One original voting member of

the Task Force resigned for personal reasons and was not replaced. The Task Force was co-chaired by Mike King, Executive Director of the Colorado Department of Natural Resources, and Rebecca Swanson, from the Colorado Governor's Office.

Conflicts and Resolutions

A variety of conflicts occur between boaters and landowners on the rivers and streams of Colorado. Colorado's rivers and streams vary widely by size, rate of flow, historic use, landowner use, and associated recreational values. Our rivers and streams also vary by segment, from year to year, by season and by month. As the rivers and streams themselves differ over time and on a segment-by-segment basis, the conflicts and solutions will vary accordingly. The majority of situations are characterized not by conflict but rather by locally derived mutual accommodations, agreements, or simply respectful co-existence. Reaching resolutions has not always been easy, and conflicts will continue to exist, if only because recreational boaters, on the one hand, and private landowners, on the other hand, disagree about the public's right to boat on waters flowing through private land.

Ultimately, however, responsible landowners and boaters on Colorado's rivers and streams share a deep affinity for these special riparian habitats and corridors. The Task Force seeks to incentivize and facilitate locally derived, mutually acceptable solutions between the parties involved and to encourage the leadership and citizens of all interested communities to advocate and foster an environment and attitude of mutual respect and good conduct as the best way to serve the interests of all. While the members of the Task Force have not always agreed on the sources of river-use conflicts or how to resolve them, the Task Force members are unanimous on two points. First, conflicts between members of the boating public and landowners can and should be minimized and resolved where possible. Second, nothing in this Final Report should be understood to endorse any stakeholder's side of the "right to float" dispute. The Task Force has attempted to objectively describe historical conflicts and solutions to those conflicts, and has offered recommendations to ameliorate or resolve conflicts between landowners and boaters. But nothing in this Final Report is intended to endorse one side of the debate at the expense of the other and no one should maintain otherwise.

Historical Conflicts

Conflicts between boaters and landowners arise in a variety of contexts. In no particular order, those conflicts include the following:

- 1) **Criminal Trespass (on the land):** The law in Colorado provides that floating on rivers or streams flowing through private property does not constitute criminal trespass as long as one does not touch the bed or banks of the stream. A significant

number of the conflicts between landowners and boaters arise, for example, when boaters anchor or beach their crafts or get out of their boat to use the bed, banks, or adjacent property for activities such as walking, wading, picnicking, camping, resting or bathroom breaks. Conflicts also arise over contact by boaters with the streambed.

- 2) **Civil Trespass/Right to Float.** Some landowners assert that they have the right to exclude the public from the surface of waters flowing over privately owned stream beds. Some boaters assert that the waters of the state belong to the public for their use, whether or not those waters flow over private property. Conflicts over boating through private property have led to litigation.
- 3) **Diversion Structures, Bridges, Fences; Stream Improvements and Natural Obstructions:** Diversion structures, fences, bridges, stream improvement structures and natural obstructions, such as downed trees, are common features of Colorado's rivers and streams. Generally, recreational boaters view these types of man-made structures as legitimate necessities or property improvements, and treat their presence in the river channel as such. Boaters also acknowledge that natural obstructions occur frequently and unpredictably. However, to the extent that such structures or obstructions impede boaters' passage downstream, they are also viewed as potential hazards to safe boating. Conflicts arise when landowners object to boaters portaging these obstructions or when boaters cut fencing or otherwise damage structures to continue their downstream travel. Boaters, on the other hand, think that clear passage, or a portage alternative, should be maintained on rivers and streams with flows and access that support river surface recreation.
- 4) **Deliberate Obstruction of Waterways:** The Task Force was made aware of situations where landowners created deliberate obstructions in river channels presumably to impede boaters. Examples include hanging barbed wire and fishhooks below a bridge, felling trees across river channels, and constructing impassable fences that are maintained even during high water and in the absence of livestock. Such obstacles can be dangerous to boaters and may be illegal pursuant to C.R.S.18-9-107.
- 5) **Misconduct:** There are a variety of descriptions of poor conduct by both landowners and boaters. In addition to topics already covered such as trespassing and deliberate obstruction of waterways, examples of misconduct include inconsiderate and disruptive passage near wade fishermen; adversarial exchanges by both sides; littering; harassing livestock; and excessive use of a waterway during periods with physically impassable flows. In rare instances, both landowners and boaters have reported criminally menacing behavior by members of the other group.

- 6) **Lack of Enforceability:** The Task Force has heard primarily from landowners that they are unable to prevent repeated acts such as trespass and misconduct because of two issues: unresponsive local law enforcement officers and an inability to identify non-commercial boaters. Commercial boaters are required to be licensed and to display identification on their vessels. Some assert that non-commercial boaters should be required to identify, license or register their vessels to improve identification and to improve enforcement of the law. Boaters counter that Colorado does not require identification for other non-motorized activities such as biking, hiking, horseback riding or snowshoeing. They also have expressed concerns about the cost to individuals and the bureaucratic viability of a large, new licensing program at the state level.
- 7) **Fishing:** Conflicts occur when anglers fish while boating through private property. Some believe that landowners have exclusive rights to fish on streams within private properties. Fishing also raises conflicts when landowners have created a private fishing resort for which they charge guests to fish a particular segment of river; or when landowners have improved fishing habitat and float anglers linger in eddies or drop an anchor to fish in that improved habitat. Some assert that fish found in the state's rivers and streams belong to the People of Colorado and that investment in stream improvements does not change the legal definition of premises nor confer additional ownership or control of the surface of the river. Dropping anchor or getting out of a vessel to wade-fish on private land has been an additional source of conflict.
- 8) **Variation in Streamflow:** The actual water flow in rivers and streams in Colorado varies significantly throughout the year. Depending on the channel configuration, low flows may make it impossible or difficult to boat without touching the stream bed or to avoid conflicts with anglers, and can necessitate additional fencing by ranchers to control livestock. In some instances, diversion dams can also create significant changes in streamflows. Changes in the flow regime can create conflicts between competing uses, particularly when different segments of the boating community perceive different stream flow thresholds as viable for floating. The degree of conflict may vary with actual changes in the flow regime.
- 9) **Change in Ownership of the Land:** There have been instances in which a change in the ownership of the land has eventually caused a conflict between the landowner and the local boaters who had enjoyed a more constructive relationship with the prior landowner(s). Prospective purchasers from other states or countries may not be familiar with Colorado law or may not appreciate the potential conflicts associated with boating on waters flowing through private property.

- 10) Discharge of Firearms Across a River or Stream.** Landowners who utilize or lease their land for hunting have liability concerns when boaters are on the water while hunters are hunting and possibly shooting across the river or stream. Conversely, there are instances when boaters hunting from their vessels could endanger persons or property on the land.
- 11) Alcohol and Boating:** Inebriated people may be more prone to engage in bad conduct or may need assistance should they find themselves in unsafe situations on the river.
- 12) Landowner Concern About Liability:** Landowners have expressed concern over their liability should a boater be injured while floating downstream, portaging around an obstacle or hazard, or simply using designated launch points on their property. Landowners also assert that Colorado’s premises liability and recreational use statutes are unclear as applied to boating, conflict with one another, and do not provide enough protection from lawsuits.

Historical and Potential Solutions (Or Historical Best Practices)

A variety of creative, locally derived and mutually acceptable historical solutions have been described to this Task Force. Each solution tends to be very case-specific, but the successful approaches can be applied to other locales as well. Many of these locally derived solutions find inventive ways to circumvent the underlying or unaddressed issue of “right to float” or “no right to float”. In each case, detailed local knowledge and personal relationships are the key factors that help the involved parties understand, reduce, and ultimately resolve or pragmatically “work around” the specific conflict. Potential solutions have included or may include:

- 1) Mutual Desire for “Good Conduct” by All Parties:** As stated so well by Tim Canterbury, a rancher along the Arkansas River, if this Task Force can “legislate respect” then its task would be finished. On the other hand, there are many stories of mutual respect and accommodation by boaters and landowners along the rivers and streams of Colorado. Above all, a conscious effort to develop personal relationships and “treat others with respect” has been a very effective tactic to avoid, minimize, and resolve conflicts.
- 2) Communication.** Communication between landowners and boat owners can help reduce conflicts. Communication promotes a better understanding of each party’s concerns, expectations and objectives. Communication can also allow landowners and boaters to identify each other when problems arise.

- 3) **Agreements between Landowners and Boaters.** Landowners and boaters have reached agreements on some or all of the following topics:
- a. **Agreements to Resolve Disputes Over Floating:** Disputes arise between landowners and boaters concerning floating through private property and many of the other issues noted in the preceding section. In some cases, those disputes have been resolved, and litigation has been avoided, by oral or written agreements. Such agreements can address, among other issues, the timing and frequency of boating, minimum streamflows, fishing, boater and landowner conduct and removal of obstacles.
 - b. **Agreements to Cross or Lease Private Land:** There are multiple examples where landowners and boaters, either commercial or non-commercial, have agreed, either orally or in writing, on terms for the use of private land for access or launch points. In exchange for passage across the private land, these agreements sometimes require limitations on the amount and nature of the boating activities, particularly as the water flow in the river decreases. The agreements typically indemnify landowners against liability. In other cases, the actual variation in streamflows creates a *de facto* lower threshold for boating as boaters are not interested in “scraping rocks” in a river with inadequate flow. Furthermore, many riparian landowners in Colorado are farmers and ranchers and additional sources of income are often highly valuable to the continued agricultural production of these undeveloped lands and the widely supported preservation of their “picture postcard” views. Such agreements can enhance boating opportunities and reduce conflicts.
 - c. **Agreements to Portage:** To address landowner and boater concerns about instream structures such as fences, diversion structures, bridges and stream improvement structures, an Agreement to Portage can be negotiated between willing parties to accomplish mutually acceptable objectives. The Task Force is aware that the Colorado Division of Parks and Outdoor Recreation has entered into such agreements with landowners on the Yampa River as part of the Yampa River Legacy Project.
 - d. **Liability.** For the agreements discussed in subparagraphs a through c, landowner and/or boater liability may also be discussed.
- 4) **Official Signage:** Official signage has reportedly reduced alleged criminal trespass conflicts significantly in the Arkansas and Yampa River areas. “Official Signs” from

the State of Colorado are reported to be much more effective than simple, private “No Trespassing” signs. The State Parks has developed simple but effective signage for its Yampa River efforts. Such signage could have applicability in other areas of the state. Further, information boards at public access points displaying landownership maps could help reduce inadvertent trespassing.

- 5) **Professional Mediation:** Professional mediation has been successfully utilized to resolve particularly acute conflicts between landowners and boaters on rivers and streams in Colorado.
- 6) **Use of Fences that Permit Downstream Passage:** The Task Force was made aware of types of fences that allow boaters downstream passage when flows are high yet still control livestock during low flows. By way of examples only, the Task Force was advised that suspended fences and streamside fences that are pushed down during higher water flows and rise up during lower flows control livestock without obstructing downstream travel. Designing fences and other structures to be boater-friendly will incentivize boaters to remain on the water and not trespass to get around a structure.
- 7) **Enforcing Existing Criminal Laws:** Existing criminal laws prohibit unlawful criminal trespass on private property and the unlawful obstruction of a waterway. Such actions are sources of conflict that can be addressed by thoughtful and consistent enforcement of existing laws. Similarly, harassment, menacing, and boating under the influence are prohibited under Colorado law and should not be tolerated.
- 8) **Public Education of Boaters, Landowners and Law Enforcement Officials:** Effective education as to what activities are and are not prohibited by criminal laws would also reduce conflicts. Publications by Colorado State Parks, official government websites and information boards at public access points could help educate the public.
- 9) **Resource Management Plans (RMPs):** RMPs have been utilized in Colorado on a large scale manner with the statutorily created Arkansas Headwaters Recreation Area. Similarly, the Colorado Division of Parks and Outdoor Recreation has effectively used RMP techniques to systematically manage access and use on approximately 175 miles of the Yampa River in Northwest Colorado. These RMP techniques and approaches can be employed on a smaller scale for shorter stretches of river to help identify and manage such key factors as stakeholder groups and input, environmental

issues and concerns, appropriate uses and impacts, consequences for non-compliance, and enforcement.

Recommendations to the Governor

As previously described, conflicts have occurred and will continue to occur between boaters and landowners. These disputes could benefit from the application of one or more historically successful resolution tactics that have been employed on a variety of rivers and streams in Colorado. Knowledge of historical conflicts and solutions throughout the state could help resolve future disputes, at little or no cost, as affected parties work to identify, understand, and hopefully minimize or eliminate those disputes.

The Task Force has reviewed and discussed the sources of conflicts and the historical and potential solutions, and has listened to public testimony. The Task Force has considered legal, political and policy implications of proposing a vision for a cost-effective, timely process for resolving disputes when they arise.

Below are specific recommendations that the Task Force has *unanimously agreed* to make to Governor Bill Ritter, Jr. regarding river access disputes in the State of Colorado:

- 1) **Report Publication.** Publish or post this Final Report in a readily accessible location as an education tool to help facilitate the cost-effective and timely resolution of future disputes as they arise. Armed with the knowledge of historical conflicts and solutions between boaters and landowners on the rivers and streams of Colorado, the affected parties in future disputes might more readily identify cost-effective and timely solutions to their own local conflicts.
- 2) **Executive Leadership.** Utilize the Governor's pulpit to encourage and foster an environment and attitude of good conduct and respect as multiple stakeholder groups with different viewpoints continue to share the use, conservation, and protection of these special riparian corridors and environments.
- 3) **Public Education.** Promote public education via publications by Colorado State Parks, official government websites, and information boards at public access points to inform the public at large about ways to avoid or resolve conflicts; recommend best practices for boaters and landowners; and address liability for unlawful trespass, unlawful obstruction of a waterway, and other prohibited activities.
- 4) **Official Statewide Signage System.** Direct the Colorado Department of Natural Resources to design an Official Signage system modeled after the signs developed by

State Parks for the Yampa River that clearly designate “No Public Access” and “Public Access”. A signage system with statewide application and recognition would more clearly delineate land use boundaries along Colorado’s rivers and streams. These signs could be purchased from State Parks, if desired, by interested parties.

- 5) **Engage Law Enforcement.** Implement a proactive and ongoing effort with county sheriffs and district attorneys to raise their awareness of the conflicts between landowners and boaters, and their role in helping to resolve conflicts. Advocate for more consistent enforcement of existing laws regarding trespass, illegal obstruction of waterways, boating under the influence, harassment, criminal mischief and menacing. Provide members of sheriffs’ associations and district attorneys with all educational materials and with information concerning contact, activation, and utilization of the River Access Dispute Mediation Commission.
- 6) **Landowner Liability Legislation.** Recommend legislation to clarify Colorado’s recreation use and premises liability statutes to specifically address landowner liability, or exemption from liability, when a member of the public is floating on waterways flowing over private property and suffers injury.
- 7) **River Access Dispute Mediation Commission.** Occasionally, a contentious and personalized conflict can arise between boater(s) and landowner(s). Usually these conflicts involve one or two parties on either side and are specific to the local stream segment in question. For those cases in which parties are unable to resolve the conflict, the Task Force recommends that the Governor of Colorado create, by Executive Order, the River Access Dispute Mediation Commission, as outlined in Attachment 1 hereto.
- 8) **Funding Sources.** Encourage funding opportunities including, but not limited to, tax credits/incentives, GOCO, state agency or private funds. Such funding could be used to develop and implement dispute resolution tools, provide public education, develop/acquire river access and/or portage sites, remove barriers for downstream passage or otherwise implement recommendations of this Task Force.

The Task Force *did not* agree on the following recommendation:

- 9) **Vessel Identification.** The Task Force did not reach consensus on a recommendation to establish a vessel identification program. However, the Task Force does recommend further exploration of vessel identification as a potential tool to prevent or resolve conflicts and as a source of funding under Recommendation number 8 above. **Final vote: No: 6 Yes: 5**

This Task Force appreciates the Governor's leadership and effort to establish a constructive dialogue between the interested and affected stakeholders. We are hopeful that this report constructively contributes to a future environment of mutual respect, accommodation, and cooperation that has served Colorado well in the past.

Respectfully Submitted,

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Attachment 1

Governor's River Access Dispute Mediation Commission

Formed by Executive Order.

- **Purpose:** On an as-needed basis to help mediate and resolve particularly acute disputes between boater(s), either commercial or non-commercial, and the relevant private property owner(s). Non-DNR commission members would be volunteers and participation by disputing parties would be voluntary.
- **Authority:** The mediation commission would be empowered to hear disputes and provide a sounding board for both parties. The objective would be to mediate and resolve the dispute without litigation or legislation. This commission would not have the power of arbitration.
- **Criteria for participation:** Commission members shall determine which disputes they will accept for mediation. Considerations may include, but not be limited to, a commitment by all parties to explore solutions and to participate in good faith negotiations.
- **Composition:**
 - 3 standing members appointed for four-year terms:
 - Executive Director of Colorado Department of Natural Resources or his/her designee.
 - 1 representative of the boating community.
 - 1 representative of the private riparian landowner community.

Additionally, the commission may select up to four people from the local community to participate in the mediation of a particular dispute.