

Establishing a Right to Public Recreation: State-Based Water Law Reforms to Remedy the Nature Access Gap

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INTRODUCTION

When it gets too hot, Eugene Williams likes to swim. He floats on his back, eyes closed to the sun. He feels cool droplets evaporating off the parts of him that remain unsubmerged—his nose, his toes, the top of his belly and thighs. He listens to the stillness of the water below the surface. Until he accidentally drifts into the “white section” of the unofficially segregated Lake Michigan waters. Until someone begins throwing stones. Then there is only the sound of rocks hitting the water’s surface. There is only the feeling of solid earth against skin. When he dies, South Side cannot sleep for a week. The white man who killed him is not arrested. One thousand Black families lose their homes in riot fires.¹

* * *

Washington, D.C., a historically Black city, is one of the only cities in the United States where it is illegal to swim because of raw sewage in the waterways. They call it Chocolate City. The water brown like your neighbor’s skin.² Poughkeepsie, New York is the sort of postindustrial city familiar to descendants of the Great Migration’s midwestern settlers. Full of “Closed” signs, abandoned buildings, arid talk of decline. Sunrays intensify on concrete. So, we jump over the metal fence, ignoring “No Trespass” signs. We wriggle through the overgrown path. We run to the water. There, at last, we are weightless.³

* * *

At three years old, her mom decided it was time the family learned to swim. For mom, making sure her babies could swim was an act of resistance, an act of healing. If they could swim, they would not die like her brother, Easter Jones, did—in a mysterious drowning accident near Coos Bay, Oregon in 1964. An “accident” the family suspected was an act of racial violence. No, if her babies could swim, they would live. And they would teach other Black children to swim, too. They would change their legacy.⁴

* Georgetown University Law Center, J.D. 2023; Illinois State University, B.S. 2020. © 2023, Radiance Jeanette Campbell. The Author would like to thank Professor Bella Wolitz for her guidance and encouragement as well as Georgetown University Law Center for continuing to offer a seminar on Water Law. This Note is dedicated to my parents, who put me in swim lessons before I could walk. To my grandma, Radiance Jennifer, and my sister-cousin, Ali, and our snorkeling and cave-pool swimming adventures. And to the rest of my canoeing, kayaking, hiking, rafting, and cold-plunging family in Illinois and Colorado. Here's to many more adventures!

¹ Author’s words. Based on the following article: *The Red Summer of 1919*, HISTORY (Aug. 6, 2020), <https://www.history.com/topics/black-history/chicago-race-riot-of-1919> [https://perma.cc/4X6J-NUX4].

² Author’s words. Based on the following articles: *Why Statehood for DC*, STATE OF WASH., D.C., <https://statehood.dc.gov/page/why-statehood-dc> [https://perma.cc/HJ55-RZ93] (last visited May 26, 2023); Jacob Fenston, *Time to Lift the Ban on Swimming in the Potomac and Anacostia Rivers*, *Advocates Say*, NPR (Mar. 23, 2022), <https://www.npr.org/local/305/2022/03/23/1088192692/time-to-lift-the-ban-on-swimming-in-the-potomac-and-anacostia-rivers-advocates-say> [https://perma.cc/VN4M-38UG].

³ Author’s words. Based on the following article: Amitava Kumar, Opinion, *An Ode to the Queen City of the Hudson*, N.Y. TIMES (July 3, 2022), <https://www.nytimes.com/2022/07/03/opinion/poughkeepsie-watering-holes-hudson-valley.html?searchResultPosition=66>.

⁴ Author’s words. Based on the following video: Evan Grainger, *The Deep End - Mardi Fuller*, VIMEO (Nov. 16, 2021, 10:30 PM), <https://vimeo.com/646722900>.

* * *

This Note examines the U.S. “nature gap”—a term coined to describe the way historic discrimination and restrictions on natural spaces in the United States have resulted in a lack of diversity of participants in outdoor recreation⁵—and imagines U.S. water systems capable of protecting a right to recreation in the United States. Focusing specifically on water-based recreation, this Note envisions a reality where everyone, especially historically marginalized groups, has equal access to water-based recreation.

Part I investigates the causes and consequences of the U.S. nature gap, first discussing the generational effect of historical trauma on Black folks’ participation in outdoor recreation and then recounting the way U.S. laws, policies, and practices have systemically limited Black access to water-based recreation. Part I ends with stories of perseverance and resilience, recognizing that, despite these challenges, Black people have always enjoyed and contributed to the world of outdoor recreation.

Part II then offers the protection of a right to water-based recreation as a remedy to the U.S. nature gap and lays the foundation for such a legal right in the United States. A right to recreation would correct historical harms against Black Americans by increasing and protecting public access to existing resources. As water supplies shrink, the right would also protect marginalized groups’ future participation in water-based recreation by prioritizing public recreation access in future water-allocation decisions. Though the nature gap is a national problem, water law is primarily the domain of the states—therefore, by exploring the riparian water system of eastern states as well as the prior appropriations water system of western states, this Note analyzes the role state-based water systems have played with respect to water-based recreation access and proposes remedies to the nature gap problem specific to each state system. Using the problems and potential solutions of Illinois (a riparian state) and Colorado (a prior appropriations state) as case studies, this Note ultimately seeks to understand what legal mechanisms related to water-allocation systems are available for all states to ensure a right to recreation for their residents.

I. THE NATURE GAP

This Part discusses the U.S. “nature gap,” recounting how historic discrimination and restrictions on natural spaces in the United States have resulted in a lack of diversity of participants in outdoor recreation. Section I.A describes how racial violence has disrupted the ability of Black folks to freely enjoy outdoor spaces for generations. Section I.B details how racial discrimination—past and present—creates systemic barriers to accessing outdoor spaces. Section I.C then recognizes that, though Black people are severely underrepresented in outdoor spaces today, we have a rich history with nature and are actively reclaiming an outdoor culture. Part II then discusses legal mechanisms for ensuring a right to recreation, specifically for water-based activities, so that we may continue this legacy for generations to come.

⁵ See, e.g., Jenny Rowland-Shea, Sahir Doshi, Shanna Edberg & Robert Fanger, *The Nature Gap: Confronting Racial and Economic Disparities in the Destruction and Protection of Nature in America*, CTR. FOR AM. PROGRESS (July 21, 2020), <https://www.americanprogress.org/article/the-nature-gap/> [<https://perma.cc/6ZVN-WVJQ>].

A. THE TRAUMA OF RECREATION

When they tell
the Black girl
she can't play mermaid

ask them,

what their people know
about holding their breath
underwater.⁶

Racial violence has disrupted the ability of Black folks to freely enjoy outdoor spaces for generations. From 1865 to 1950, a monstrous number of Black people were lynched in public places, especially forests and natural spaces, just like Eugene Williams and Easter Jones.⁷ “[T]he fear of . . . lynching in the twentieth century was a real, palpable fear. And for good reason,” says Alexis Nikole—@blackforager on Instagram and TikTok.⁸ She continues:

[I]t doesn't take a lot of generations for outdoorsyness to fall away. If your grandparents are afraid of the violence that could befall them while camping out in the woods, they're not gonna take your parents out camping in the woods, your parents are not gonna take you out camping in the woods. There are a whole lot of things around that activity that you would just not be exposed to.⁹

In the United States, nearly seventy percent of Black children do not know how to swim or have low ability to swim as compared to forty-two percent of white children, and Black children are three times as likely as white children to die by drowning.¹⁰ This lack of exposure to swimming is, in part, because of generational trauma.¹¹ Of the lynching of Eugene Williams,¹² one Chicagoan remembers: “I was never permitted to learn to swim. For six years, we lived within two blocks of

⁶ JASMINE MANS, *The Little Mermaid*, in *BLACK GIRL, CALL HOME* 117, 117 (2021).

⁷ See HISTORY, *supra* note 1; Grainger, *supra* note 4.

⁸ Alexis Nikole (@blackforager), INSTAGRAM (Feb. 14, 2022), <https://www.instagram.com/p/CZ-ZWHDDUu6/> [<https://perma.cc/2GKE-RMQ5>].

⁹ *Id.*

¹⁰ Finlo Rohrer, *Why Don't Black Americans Swim?*, BBC NEWS (Sept. 3, 2010), <https://www.bbc.com/news/world-us-canada-11172054> [<https://perma.cc/C8DE-SXSK>] (“Just under 70% of African-American children surveyed said they had no or low ability to swim. Low ability merely meant they were able to splash around in the shallow end. A further 12% said they could swim but had ‘taught themselves’ . . . For white children, the figure [for no or low swimming ability] was only 42%.”).

¹¹ See Robbie Ann Darby, *Swimming in the Black Community: How Racism Is Drowning Us*, ROOT (July 11, 2016), <https://www.theroot.com/swimming-in-the-black-community-how-racism-is-drowning-1790855966> [<https://perma.cc/3R6E-4GCM>] (“Lack of access to swimming pools and public beaches meant that many black Americans were denied the opportunity to learn how to swim; and intergenerational fear of the water stops their descendants from learning now.”). See *infra* Section I.B for a more detailed discussion on recreational water access.

¹² See HISTORY, *supra* note 1.

the lake, but that did not change [my parents'] attitude. To Dad and Mama, the blue lake always had a tinge of red from the blood of that young black boy."¹³

To this day, the ability to enjoy public spaces with little to no concern—such as the ability to learn to swim in a public pool or lake—is a privilege white Americans rarely consider and Black Americans rarely enjoy. News stories tell of summers full of poolside confrontations: a Black boy at a community pool harassed by a white woman who claimed he “did not belong”;¹⁴ a Black girl pushed by the head and shoved to the ground by a white cop at a pool party;¹⁵ a Black teen’s birthday canceled when his party arrived for their water park reservation;¹⁶ a Black woman asked by white neighbors to provide identification at her own private community pool;¹⁷ a Black man reported to the police for wearing socks in a neighborhood pool.¹⁸ Where lynching was only just made a federal crime in 2022,¹⁹ there is a palpable fear of being the next Black person victimized for trying to participate in public spaces—a young, Black gardener has the cops called on her by her own neighbor; a Black bird watcher is threatened in Central Park; a Black runner is killed on an outdoor jog.²⁰

B. BARRIERS TO RECREATION ACCESS

I’ve got a confession to make. I’ve never swum in a lake. Never climbed a mountain. I was in a cave once. And I’ve never slept in a tent. But I’m beginning to think that I might be missing something. . . . I’m 51, and I haven’t done any climbing whatsoever. And I’ve [] always had this secret fantasy that [] I wanted to

¹³ Andrew W Kahrl, *America’s Segregated Shores: Beaches’ Long History as a Racial Battleground*, GUARDIAN (June 12, 2018, 6:00 AM) (alteration in original), <https://www.theguardian.com/world/2018/jun/12/americas-segregated-shores-beaches-long-history-as-a-racial-battleground> [https://perma.cc/FP85-H3JU].

¹⁴ Sarah Mervosh, *Woman Assaulted Black Boy After Telling Him He ‘Did Not Belong’ at Pool, Officials Say*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/us/pool-patrol-paula.html>.

¹⁵ Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police’s Use of Force at Texas Pool Party*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html>.

¹⁶ *Missouri Family Says Racism Led to Pool Party Cancellation*, AP NEWS (Aug. 9, 2022), <https://apnews.com/article/travel-race-and-ethnicity-racial-injustice-parks-4b8fbb7e877bd6355d0cc7ba90bd00c8> [https://perma.cc/G56F-QSSB].

¹⁷ Karen Zraick, *Man Labeled ‘ID Adam’ Is Fired After Calling the Police on a Black Woman at Pool*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/pool-racial-profiling-white-man.html>.

¹⁸ Sarah Mervosh, *A Black Man Wore Socks in the Pool. After Calling the Police on Him, a Manager Got Fired.*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/memphis-pool-manager-fired-socks.html>.

¹⁹ Tom Meisfjord & Matt Reigle, *Why It Took So Long for Lynching to Become a Federal Crime*, GRUNGE (Feb. 4, 2023, 12:20 AM), <https://www.grunge.com/216633/the-real-reason-lynching-is-still-not-a-federal-crime/> [https://perma.cc/2FRW-L7FD].

²⁰ Jalen Brown & Meron Moges-Gerbi, *A Neighbor’s Call to Police on a Little Black Girl While She Sprayed Lanternflies Exposes a Deeper Problem, Mom Says*, CNN (Nov. 23, 2022, 2:00 PM), <https://www.cnn.com/2022/11/23/us/lanternflies-black-girl-new-jersey-police-reaj/index.html> [https://perma.cc/ZM8R-YEBH]; Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html>; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

Racial discrimination—past and present—creates systemic barriers to accessing outdoor spaces. Jim Crow laws were still in place when the National Park Service was founded in 1916.²² The investment in public spaces across the country in the 1920s and 1930s, including a wave of investment in public pools,²³ was not intended to benefit Black Americans. Even after the National Park Service desegregated its parks in 1945,²⁴ many local ordinances continued to prohibit Black people from entering state parks, national parks, and other public lands, or else segregated these public spaces.²⁵ Public beaches open to Black swimmers were mostly in “remote, polluted, and hazardous areas.”²⁶ In the nation’s capital, government officials “designated . . . a former dumping ground located downstream from a sewage plant[] as . . . the city’s ‘colored’ bathing beach.”²⁷ The biggest and best public pools were enjoyed by white Americans, while a smaller sect of ordinary pools were designated for Black Americans.²⁸

In the 1960s, Civil Rights activists organized “wade-ins” at their local beaches²⁹ and “dive-ins” at their local pools.³⁰ Though the President, the Legislature, and the courts showed support for the Civil Rights activists, white managers continued to dump acid in their pools rather than let Black people swim.³¹ White mayors filled their pools with dirt and cement rather than watch them be integrated.³²

Even in cities with integrated public pools, Black attendees were asked to provide “health certificates” to prove they were disease-free, and they were often harassed and attacked by white poolgoers.³³ Pools were a constant battleground.³⁴ Ongoing clashes led some cities to re-segregate their pools.³⁵

²¹ Will Smith, *Welcome to Earth: The Silent Roar* (DISNEY+ 2021), <https://on Disneyplus.disney.com/show/welcome-to-earth>.

²² Leah Asmelash, *Outdoor Recreation Has Historically Excluded People of Color. That’s Beginning to Change*, CNN (Dec. 14, 2021, 3:19 PM), <https://www.cnn.com/2021/12/14/us/national-parks-history-racism-wellness-cec/index.html> [<https://perma.cc/2ZVP-RL8C>].

²³ Rose Hackman, *Swimming While Black: The Legacy of Segregated Public Pools Lives On*, GUARDIAN (Aug. 4, 2015, 12:41 PM), <https://www.theguardian.com/world/2015/aug/04/black-children-swimming-drownings-segregation> [<https://perma.cc/GC6S-8LPQ>].

²⁴ Asmelash, *supra* note 22.

²⁵ Joe Kanzangu, *The Deep Roots of Outdoor Recreation’s Diversity Gap*, MOTHER JONES (Aug. 27, 2021), <https://www.motherjones.com/politics/2021/08/outdoor-recreation-diversity-gap-black-access-nature-national-parks/> [<https://perma.cc/FY59-UZUK>].

²⁶ *Beach Segregation*, NAT’L PARK SERV., <https://www.nps.gov/articles/beach-segregation.htm> [<https://perma.cc/L2YQ-TUUL>] (last visited May 26, 2023).

²⁷ Kahrl, *supra* note 13.

²⁸ See Hackman, *supra* note 23.

²⁹ See *Freedom Trail*, COASTAL MISS., <https://www.gulfcoast.org/things-to-do/arts-and-history/mississippi-history-trails/freedom-trail/?view=list&sort=qualityScore> [<https://perma.cc/J7VF-C6RG>] (last visited May 26, 2023).

³⁰ See John Herbers, *16 Rabbis Arrested as Pool Dive-In Sets Off St. Augustine Rights Clash*, N.Y. TIMES, June 19, 1964, at 1.

³¹ See Niraj Chokshi, *Racism at American Pools Isn’t New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html>.

³² See Hackman, *supra* note 23.

³³ Chokshi, *supra* note 31.

³⁴ See, e.g., *Race Rioters Battle in Pittsburgh Pool*, N.Y. TIMES, Aug. 21, 1931, at 6.

³⁵ See *Judge Orders St. Louis to Open Pools to Negroes*, N.Y. TIMES, July 18, 1950, at 13.

As desegregation orders for public spaces increased, investment in public spaces by white public officials dropped,³⁶ and segregation became a private practice. Cities sidestepped integration laws by befriending local YMCAs—as nonpublic institutions, YMCAs could create segregated chapters and restrict membership.³⁷ For example, the YMCA in Montgomery, Alabama, began building new facilities complete with pools and whites-only summer swimming programs—secretly aided by city officials in the form of tax exemptions, free water for its pools, and reduced sales of property—until a successful lawsuit stopped the practice in 1970.³⁸ Their scheme exposed, cities sold these parks off, rather than keeping them open under desegregation orders.³⁹

At the same time, individual white Americans sidestepped integration laws by retreating to the suburbs—a federally sanctioned all-white project⁴⁰—for access to privately managed pools. Public pools subsequently fell into disrepair,⁴¹ and private property became the new battle ground for pool access. But Black people were—and are—less likely to own private property.⁴² When Black families did move to the suburbs, they were often denied membership to their own community pools, forcing them to take their cases all the way to Supreme Court to win the property right of pool access.⁴³ Meanwhile, Black families without the ability to own properties with pools in effect lost the right to enjoy pool access.

The legacy of this historical segregation in housing and public spaces is the unequal distribution of nature in America and a lack of diversity in recreation spaces today. According to the Center for American Progress, “the United States has fewer forests, streams, wetlands, and other natural places near where Black, Latino, and Asian American people live.”⁴⁴ Children of color have the least access to nearby nature in the country.⁴⁵ While thirteen percent of the U.S. population identified as Black in 2010, only one percent of National Park Service visitors between 2001 and 2011 were Black.⁴⁶

The cost of recreation access is also often prohibitive; there is the cost of travel to public parks when there are none nearby, and there is the cost of appropriate gear and equipment for recreational

³⁶ See Hackman, *supra* note 23.

³⁷ *Id.*

³⁸ *Id.*; see *Smith v. Young Men’s Christian Ass’n of Montgomery, Inc.*, 316 F. Supp. 899, 899 (M.D. Ala. 1970), *aff’d as modified*, 462 F.2d 634 (5th Cir. 1972).

³⁹ Hackman, *supra* note 23.

⁴⁰ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017) (describing how local, state, and federal laws promoted racial segregation in American cities and suburbs).

⁴¹ See Chokshi, *supra* note 31.

⁴² See Keith Romer & Jacob Goldstein, *How Jacob Loud’s Land Was Lost*, NPR (Apr. 7, 2021, 5:25 PM), <https://www.npr.org/2021/04/02/983897990/how-jacob-louds-land-was-lost> [<https://perma.cc/77W4-8KEP>] (“In the last hundred years, heirs’ property laws have contributed to the loss of millions of acres of Black-owed land.”); Vann R. Newkirk II, *The Great Land Robbery*, ATLANTIC (Sept. 29, 2019, 2:15 PM), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>; Alanna McCargo & Sarah Stochak, *Mapping the Black Homeownership Gap*, URB. INST. (Feb. 26, 2018), <https://www.urban.org/urban-wire/mapping-black-homeownership-gap> [<https://perma.cc/5RTW-HZWZ>] (“Not one of the 100 cities with the largest black populations has a black homeownership rate close to the white homeownership rate. Even in places where black households are the majority, like Albany, Georgia, the gap persists.”).

⁴³ See Fred P. Graham, *High Court Bars Exclusion of Negro from a Neighborhood Pool*, N.Y. TIMES, Dec. 16, 1969, at 30.

⁴⁴ Rowland-Shea, et al., *supra* note 5 (noting that communities of color are three times more likely than white communities to live in places that have no immediate access to nature).

⁴⁵ *Id.*

⁴⁶ Kanzangu, *supra* note 25.

activities. Where people of color are more likely than their white counterparts to lack paid time off and disposable income to cover the costs of travel and equipment, they are also less likely to partake in recreational activities.⁴⁷ But programs designed to increase access to these communities—such as summer camps that bus children to neighborhoods with pools,⁴⁸ or transit authorities’ attempts to offer bus routes from inner-city neighborhoods to the beach⁴⁹—have been met with resistance.

Additionally, while poverty can exacerbate access inequalities, it is not true that, income being equal, Black people would participate in outdoor activities as much as white people.⁵⁰ Even Will Smith, at the age of 51, had never swum in a lake.⁵¹ In part, this is because generational trauma and nature deprivation do not lead to a culture of outdoorsyness—if your grandparents did not take your parents to public beaches, they are not going to take you to public beaches.⁵²

Nature could be a “great equalizer”—providing free, universal, and accessible services to all humans without discrimination.⁵³ Instead, “American society distributes nature’s benefits—and the effects of its destruction and decline—unequally.”⁵⁴ For example, in some states, over ninety percent of people of color live in nature-poor neighborhoods, compared to less than fifteen percent of white communities.⁵⁵ A lack of access to nature impacts health because nature is essential to well-being. The Center for American Progress notes that

[t]hese disparities are particularly concerning because nature is not an amenity but a necessity for everyone’s health and well-being. In the places where human activities in the United States have destroyed the most nature, there are fewer trees to filter the air and provide shade on a hot day; there are fewer wetlands and marshes to clean the water and to protect communities from floods and storm surges; there are fewer parks where children can grow their curiosity and fewer trails where adults can stretch their legs; and there are

⁴⁷ See *Poverty Rate by Race/Ethnicity*, KFF, <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/W35M-8N9N>] (last visited May 26, 2023); *Earnings Disparities by Race and Ethnicity*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity> [<https://perma.cc/G3GM-C6DT>] (last visited May 26, 2023).

⁴⁸ See Press Release, DOJ, Justice Department Settles Race Discrimination Case Against Pennsylvania Country Club (Aug. 16, 2012), <https://www.justice.gov/opa/pr/justice-department-settles-race-discrimination-case-against-pennsylvania-country-club> [<https://perma.cc/YH64-M8M6>]; Ian Urbina, *Club in Philadelphia Suburb Faces Accusations of Racism*, N.Y. TIMES (July 10, 2009), <https://www.nytimes.com/2009/07/11/us/11pool.html>.

⁴⁹ Kahrl, *supra* note 13.

⁵⁰ Emma Gosalvez, *Nature Gap: Why Outdoor Spaces Lack Diversity and Inclusion*, N.C. STATE UNIV. (Dec. 14, 2020), <https://cnr.ncsu.edu/news/2020/12/nature-gap-why-outdoor-spaces-lack-diversity-and-inclusion/> [<https://perma.cc/G7MP-WG9T>].

⁵¹ Smith, *supra* note 21.

⁵² See Nikole, *supra* note 8 (“[Y]ou say that you love my videos, but you also say that you don’t think my race matters, and I beg to differ. We’ve already talked about the historical context on this page. We’ve talked about trespass laws being passed in the mid-1800s. And how if you weren’t a landowner, which hardly anyone who was enslaved was upon emancipation, how that was just like a huge, you know, cutting you off at the knees for any kind of food sourcing: farming, foraging, trapping, fishing, you name it.”).

⁵³ Rowland-Shea et al., *supra* note 5.

⁵⁴ *Id.*

⁵⁵ Alejandra Borunda, *How ‘Nature Deprived’ Neighborhoods Impact the Health of People of Color*, NAT’L GEO. (July 29, 2020), <https://www.nationalgeographic.com/science/article/how-nature-deprived-neighborhoods-impact-health-people-of-color> [<https://perma.cc/HJ5Z-83Y4>].

fewer public spaces where people of all races, cultures, and backgrounds can forge the common experiences and understandings that build respect, trust, and solidarity.⁵⁶

In short, nature is medicine. “Plants suck up heavy metals from soil,” and “[g]reen spaces . . . keep[] cities functional and safe.”⁵⁷ Walking through nature lowers heart rates, reduces stress, and staves off depression.⁵⁸ Decades of discrimination and racism in the United States, and the resulting nature gap, have deprived Black Americans of these benefits at alarming rates.⁵⁹

C. RECLAIMING OUTDOORSYNESS

I’m always happy when I’m surrounded by water. . . . I’m born again when I get out of the ocean.

— Beyoncé Knowles⁶⁰

Though Black people are severely underrepresented in outdoor spaces, they have also always been in these spaces.⁶¹ It was the “Buffalo Soldiers”—Black U.S. Cavalry men—who protected Yosemite in the early twentieth century, before the National Park Service was formally established.⁶² Today, Black park rangers serve national parks across the United States—for example, “Jerry Bransford is a fifth-generation cave guide at Mammoth Cave National Park,” and Olivia Williams joined the Reconstruction Era National Historical Park to ensure that “lesser-known histories[] stay in the rotation for many generations to come.”⁶³

⁵⁶ Rowland-Shea et al., *supra* note 5; *see also* Sahir Doshi & Nicole Gentile, *When Confronting a Pandemic, We Must Save Nature to Save Ourselves*, CTR. FOR AM. PROGRESS (Apr. 20, 2020), <https://www.americanprogress.org/article/confronting-pandemic-must-save-nature-save/> [<https://perma.cc/4ULX-PCR2>] (discussing the importance of nature in the context of global pandemics).

⁵⁷ Borunda, *supra* note 55.

⁵⁸ *See* Gregory N. Bratman, J. Paul Hamilton, Kevin S. Hahn, Gretchen C. Daily & James J. Gross, *Nature Experience Reduces Rumination and Subgenual Prefrontal Cortex Activation*, 112 PSYCH. & COGNITIVE SCI. 8567, 8567 (2015); Eugenia C. South, Michelle C. Kondo, Rose A. Cheney & Charles C. Branas, *Neighborhood Blight, Stress, and Health: A Walking Trial of Urban Greening and Ambulatory Heart Rate*, 105 AM. J. PUB. HEALTH 909, 909, 911 (2015); Borunda, *supra* note 55.

⁵⁹ A lack of access to nature and its healing powers in this way compounds the health disparities Black Americans face. *See, e.g.*, Robert Otto Valdez, *The 2022 National Healthcare Quality and Disparities Report: We Still Have Much Work to Do*, AGENCY FOR HEALTHCARE RSCH. & QUALITY (Nov. 22, 2022), <https://www.ahrq.gov/news/blog/ahrqviews/2022-national-healthcare-disparities-report.html> [<https://perma.cc/ZKH3-W595>] (“Data increasingly showed that social, economic, environmental, and community conditions—together known as social determinants of health—may substantially influence the population’s health more than care delivered by practitioners and healthcare systems.”); *see generally* Eleesha Lockett, *Racial Bias in Healthcare: What You Need to Know*, HEALTHLINE (June 23, 2022), <https://www.healthline.com/health/racial-bias-in-healthcare> [<https://perma.cc/UUE9-X3NX>] (discussing racism’s effects on healthcare disparities in diagnosis and treatment).

⁶⁰ Beyoncé, *Beyoncé - Year of 4*, YOUTUBE (July 1, 2011), <https://www.youtube.com/watch?v=3vXXiku0580>. This quote has become a popular sound on Instagram, which users often add to videos of themselves enjoying water-based recreation. *See, e.g.*, Daryl K. Thomas, Jr. (@dktj), INSTAGRAM (Dec. 9, 2022), <https://www.instagram.com/reel/C199iu3gBeZ/?igshid=YmMyMTA2M2Y%3D> [<https://perma.cc/4C9L-YB7F>].

⁶¹ *See* Latria Graham, *We’re Here. You Just Don’t See Us.*, OUTSIDE (May 1, 2018), <https://www.outsideonline.com/culture/opinion/were-here-you-just-dont-see-us/>.

⁶² James Edward Mills, *Bringing Black History to Life in the Great Outdoors*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/interactive/2021/09/20/multimedia/black-national-park-rangers.html>.

⁶³ *Id.*

“If we look at our history more carefully,” notes KangJae Lee, an assistant professor at North Carolina State’s College of Natural Resources, “despite our many challenges, pressures and difficulties imposed by white people, people of color did find a way to enjoy outdoor recreation, which is remarkable.”⁶⁴ During the Civil Rights Movement, Black outdoor enthusiasts created organizations to support each other in their enjoyment of outdoor recreation, despite adversity or hostility from mainstream outdoor recreation spaces.⁶⁵ This legacy lives on in historically Black beaches,⁶⁶ Black athletes,⁶⁷ and Black state and national park enthusiasts.⁶⁸

We need to shift our dialog from “Blacks don’t do it, Blacks don’t do it, Blacks don’t do it” to “No, no, no. Blacks did it, and despite all odds, they found a way to enjoy outdoor recreation and they made significant contributions to national parks and the great outdoors in the United States.”⁶⁹

From introducing the “crawl stroke” to the western world in the early twentieth century⁷⁰ to becoming the first African-American woman to win an individual swimming event at the Olympics

⁶⁴ Gosalvez, *supra* note 50.

⁶⁵ For example, the National Brotherhood of Skiers started “group trips” in the 1960s to make participation in skiing easier for Black Americans who often lived in cities without access to snowy mountains and who found a sense of safety in numbers. The organization also set up scholarship funds for young skiers, supporting the first Black people to compete for the U.S. Alpine team and win medals at the Paralympic Winter Games. *See, e.g.,* Tariro Mzezewa, ‘*Magic*’ on the Slopes: In Vail, 2,000 Black Skiers Celebrate a Milestone, N.Y. TIMES (Feb. 26, 2023), <https://www.nytimes.com/2023/02/24/travel/african-american-skiers-snowboarders-vail.html> (celebrating fifty years of “Soul on the Snow” with the National Brotherhood of Skiers). And Lincoln Hills, founded by two Black men in 1922, was then the only leisure destination for African Americans west of the Mississippi. It welcomed Black recreators when mainstream camps were segregated and is still home to historic cabin owners. @outdoorsydiva, INSTAGRAM (May 24, 2023), https://www.instagram.com/reel/Cso_r96Jiu9/?igshid=MzRIODBiNWFIZA== [<https://perma.cc/3K3Z-LCBG>] (captioning a video of a mountain train ride with “POV: Learning about the Black owned mountain retreat in Colorado and realizing Softlife is our legacy too”).

⁶⁶ Angela Dennis, *Six Historically Black Beaches to Visit This Summer*, MEDIUM (Feb. 28, 2019), <https://medium.com/@AngelaDennisWrites/six-historically-black-beaches-to-visit-this-summer-46045aa3e348>.

⁶⁷ To be Black in America is to every day hear of another Black “first.” Robert Taylor, the first African American to thru-hike both the Appalachian and Pacific Crest Trails, acknowledges the steep learning curve he overcame as someone raised in a city and the racism he encountered on the most southern parts of the trail. *First African American to Thru-Hike Both the AT & Pacific Crest Trails*, APPALACHIAN TRAIL HISTS., <https://appalachiantrailhistory.org/exhibits/show/african-americans-on-the-appal/robert-taylor> [<https://perma.cc/TH8E-CE5X>] (last visited May 26, 2023). Yet, his main message to Black people who hear his story is one of encouragement: there is “something out there” for African Americans, and we deserve to “experience nature as much as possible.” *Id.*

⁶⁸ *See, e.g.,* @_asipoftee_, *5 Must See GA State Parks*, INSTAGRAM (Aug. 1, 2022), <https://www.instagram.com/reel/CguPR8RAwso/?igshid=ZWFiZDJJMTg%3D>.

⁶⁹ Gosalvez, *supra* note 50 (quoting assistant professor KangJae Lee of North Carolina State’s College of Natural Resources).

⁷⁰ Alice Dearing & Ned Denison, *Black History Month: Alick Wickham Opened Doors in Open-Water Swimming*, SWIMMING WORLD (Feb. 7, 2022, 7:29 AM), <https://www.swimmingworldmagazine.com/news/black-history-month-alick-wickham-opened-doors-in-open-water-swimming/> [<https://perma.cc/U985-RK24>]; *Alick Wickham Swimming*, SPORT AUSTL. HALL OF FAME, <https://sahof.org.au/hall-of-fame-member/alick-wickham/> [<https://perma.cc/VT4Q-CKDZ>] (last visited May 26, 2023).

in 2016,⁷¹ “[h]istory comes along with” Black excellence in recreation and sport.⁷² And Black recreators across the country have created community spaces designed to help expose other Black people to recreation activities, literally lifting as they climb.⁷³ The remainder of this Note is about ensuring a right to recreation so that we may continue this legacy for generations to come.

II. THE RIGHT TO RECREATION IN THE CONTEXT OF WATER SCARCITY

A universal, legal right to water-based recreation would remedy some of the harms discussed above as resulting from the U.S. nature gap. It would also work to mitigate anticipated harms—such as those stemming from climate change—that will exacerbate the issues presented by the nature gap. For example, in the United States, water supplies are shrinking on account of climate change and overuse of natural resources.⁷⁴ And in times of scarcity, the harms associated with the nature gap will be felt even more acutely; as with any climate disaster, Black folks and other marginalized communities can expect to be hit first and worst in the impending water crisis.⁷⁵ To remedy past harms to marginalized populations and protect those populations in the face of impending crises, it is thus imperative that decisionmakers take action to strengthen recreational water rights in their states.⁷⁶

Though the broad problem of a shrinking water supply is universal, eastern states and western states experience these problems differently. Due to geography and the development of different water systems—the riparian system and the prior appropriations system, respectively—the task of

⁷¹ Karen Crouse, *For Simone Manuel, Gold Ripples Beyond the Pool*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/13/sports/olympics/for-simone-manuel-gold-ripples-beyond-the-pool.html> (Lia Neal, another trailblazing swimmer, stating, “[W]e’re here, like everyone else here we’re training toward winning, toward representing their country in the best way possible. History comes along with that.” Manuel, sharing, “I would like there to be a day where there are more of us and it’s not Simone, the black swimmer, because the title ‘black swimmer’ makes it seem like I’m not supposed to be able to win a gold medal or I’m not supposed to be able to break records.”).

⁷² *Id.* (internal quotations marks omitted).

⁷³ *See, e.g., About Us*, SOUL TRAK OUTDOORS, <https://soultrak.com/about/> [<https://perma.cc/NDQ7-5MQY>] (last visited May 26, 2023) (“Soul Trak Outdoors is a D.C. based nonprofit organization that connects communities of color to outdoor spaces while also building a coalition of diverse outdoor leaders.”); *Find Your Adventure Tribe*, VIBE TRIBE ADVENTURES, <https://vibetribeadventures.org/> [<https://perma.cc/QS7S-NXLU>] (last visited May 26, 2023); *SUMMITS IN SOLIDARITY*, <https://www.summitsinsolidarity.org/> [<https://perma.cc/T5NY-VEEV>] (last visited May 26, 2023). *See also* @_asipoftee_, INSTAGRAM, https://www.instagram.com/_asipoftee/ (last visited May 26, 2023) (organizing group hikes for people of color); @wecoloroutside, INSTAGRAM, <https://www.instagram.com/wecoloroutside/> (last visited May 26, 2023) (“Helping women of color create unapologetic, JOY-filled lives through outdoor adventure.”).

⁷⁴ *See, e.g.,* Jon Heggie, Opinion, *Why Is America Running Out of Water?*, NAT’L GEO.: SCI. (Aug. 12, 2020), <https://www.nationalgeographic.com/science/article/partner-content-americas-looming-water-crisis> [<https://perma.cc/7JYP-BA4A>]; Lauren Sommer, *The Drought in the Western U.S. Is Getting Bad. Climate Change Is Making It Worse*, NPR (June 9, 2021, 5:00 AM), <https://www.npr.org/2021/06/09/1003424717/the-drought-in-the-western-u-s-is-getting-bad-climate-change-is-making-it-worse> [<https://perma.cc/M7W4-T7MF>].

⁷⁵ *See* Press Release, EPA, EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable> [<https://perma.cc/AC6L-TGDR>]; Payton Wilson, *How Climate Change Affects the Black Community*, ESSENCE: GIRLS UNITED, <https://girlsunited.essence.com/article/climate-change-racial-justice/> [<https://perma.cc/CMF5-CMVU>] (last visited May 26, 2023).

⁷⁶ The law of water allocation is most often governed by the states. *See Water Law: An Overview*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/water-law/> [<https://perma.cc/PPT5-GCCM>] (last visited May 26, 2023); *see generally* DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, *WATER LAW IN A NUTSHELL* (5th ed. 2015) (discussing states’ legal systems for surface water allocation).

addressing recreational water rights in the face of water scarcity is a different one depending on where you stand, east or west of the 100th meridian. Therefore, this Note examines problems and solutions by presenting two case studies. It first examines an eastern state, Illinois. It then examines a western state, Colorado.⁷⁷

In advocating for a legal right to water-based recreation access, this Note values recreation for the sake of recreation. However, states may be motivated to protect recreational water uses for other reasons: there are often economic benefits to recreation and ecotourism, and there are likely lower health costs associated with a more active population and cleaner water. In any event, this Part is concerned with mechanisms for securing water rights for recreation for generations to come.

A. ILLINOIS

Water rights in Illinois are based on a legal framework known as the riparian doctrine. There are two defining features of riparian water rights: (1) water rights are attached to real property that is adjacent to water, and (2) water rights are limited to “reasonable use.” This system developed in areas of plentiful water supply, because of both water bodies and rainfall, where water was easy to come by and seemed in no danger of disappearing.⁷⁸

But that plentiful water supply is now threatened by climate change and excessive water extraction. In 2005, much of the state was experiencing “Extreme Drought.”⁷⁹ The effect on recreation was significant—“[t]he Kishwaukee River flowed at sixty cubic feet per second rather than the usual 300 cubic feet per second, denying ordinary citizens the opportunity to participate in recreational activities such as boating and fishing.”⁸⁰ This Section discusses riparian law’s main features of property rights and reasonable use, respectively, with attention to current Illinois law and potential reforms aimed at increasing and securing a right to recreation for state residents.

1. Attaching Water Rights to Property Ownership Hinders Public Recreation

Under riparian law, if a person owns land that touches a stream or lake, that person typically has a right to use its water.⁸¹ The problem with attaching water rights to land, however, is that the right to access recreation is then distributed inequitably; landowners with adjacent water bodies have a right to recreation, and non-landowners or landowners without adjacent water bodies have no such right. Where property—especially waterfront property—is expensive, this means that large swaths of the population may not be able to afford water-based recreation access. And where people of color are less likely to own land than white people—whether because of a lack of generational wealth or because of redlining and other discriminatory housing practices—the right to water-based recreation becomes unequally distributed across racial lines. To increase access to

⁷⁷ Having grown up in Illinois, and having regularly visited family in Colorado, the Author has a personal connection to the waters of these two states. The Author does not intend to present Illinois and Colorado as model states. Rather, Illinois and Colorado are offered as examples of states representative of the problems of hydraulically similar states and useful for examining potential solutions under similar governing law. The Author invites the reader to examine the water systems, problems, and solutions in the lands they call home.

⁷⁸ See ROBIN KUNDIS CRAIG, ROBERT W. ADLER & NOAH D. HALL, *WATER LAW* 15–30 (2017).

⁷⁹ Michael Kuntz, *A Watershed Moment: Reforming the “Reasonable Usage” Standard of Water Extraction Rights in Illinois*, 2017 U. ILL. L. REV. 2009, 2012.

⁸⁰ *Id.*

⁸¹ See CRAIG ET AL., *supra* note 78, at 15–23.

public recreation, Illinois and other riparian states should (a) increase public lands and (b) increase private land for public use.

a. Illinois Should Increase Public Lands

In a country with a history of discriminatory provision of resources, tying the right to recreation to private landownership rights will inevitably perpetuate past inequities. One remedy is to make public those lands abutting water bodies—public land systems allow states to hold natural resources in common for public use. Illinois has a small share of national recreation resources—there are no national parks in Illinois,⁸² and there is only one wild and scenic river in the entire state.⁸³ There are sixty-three national parks in the United States, covering fifty-two million acres of land.⁸⁴ None of these acres are in Illinois. There are 226 wild and scenic rivers—over 13,400 miles of U.S. rivers and streams—protected by the Wild and Scenic Rivers Act.⁸⁵ Illinois holds just 17.1 miles of these rivers.⁸⁶ However, Illinois has eleven state recreation areas, located along natural and manmade lakes.⁸⁷ There are also sixty-nine state parks, and several provide access to swimming,⁸⁸ canoeing and kayaking,⁸⁹ boating,⁹⁰ and fishing.⁹¹ All Illinois residents, regardless of landownership, can access waterways for recreation on these state public lands.

One way to increase availability of waters for recreation is to increase the number of public lands. Illinois should join activists in making a case for more eastern national parks.⁹² While states east of the 100th meridian are home to a variety of natural resources—such as the Great Plains, the Gulf Coast, and marshlands, bayous, and swamps—western states are home to more than twice

⁸² The National Park Service does manage three national historic trails running through Illinois: Lewis & Clark trail, Trail of Tears trail, and Mormon Pioneer trail. *Illinois*, NAT'L PARK SERV., <https://www.nps.gov/state/il/index.htm> [<https://perma.cc/G5ZQ-43J6>] (last visited May 26, 2023).

⁸³ *Illinois*, NAT'L WILD & SCENIC RIVERS SYS., <https://www.rivers.gov/illinois.php> [<https://perma.cc/6BWC-JHEJ>] (last visited Apr. 23, 2023) (“Illinois has approximately 86,076 miles of river, of which 17.1 miles of one river are designated as wild & scenic—approximately 2/100ths of 1% of the state’s river miles.”).

⁸⁴ Jennifer Melroy, *A Complete Break Down of the US National Parks by Size*, NAT'L PARK OBSESSED (Sept. 16, 2022), <https://nationalparkobsessed.com/national-parks-by-size/> [<https://perma.cc/A6YL-FUXD>].

⁸⁵ *Wild & Scenic Rivers*, FOREST SERV., U.S. DEP'T OF AGRIC., <https://www.fs.usda.gov/managing-land/wild-scenic-rivers> [<https://perma.cc/7J9R-278P>] (last visited May 26, 2023); *About the WSR Act*, NAT'L WILD & SCENIC RIVERS SYS., <https://www.rivers.gov/wsr-act.php> [<https://perma.cc/K8FH-GKHF>] (last visited May 26, 2023).

⁸⁶ These are designated as “scenic.” *Vermilion River (Middle Fork), Illinois*, NAT'L WILD & SCENIC RIVERS SYS., <https://rivers.gov/rivers/vermilion.php> [<https://perma.cc/CJD2-CP75>] (last visited May 26, 2023). The three possible designations of rivers are wild, scenic, or recreational. *What Are Wild and Scenic Rivers?*, WILD & SCENIC RIVERS PROGRAM, NAT'L PARK SERV., <https://www.nps.gov/orgs/1912/what-are-wild-and-scenic-rivers.htm> [<https://perma.cc/BL2B-KDZG>] (last visited May 26, 2023).

⁸⁷ *Illinois's Parks*, ILL. STATE PARKS, https://www.stateparks.com/illinois_parks_and_recreation_destinations.html [<https://perma.cc/U94A-XUMF>] (last visited May 26, 2023).

⁸⁸ *Swimming*, ILL. DEP'T OF NAT. RES., <https://dnr.illinois.gov/recreation/swimming.html> [<https://perma.cc/9ECG-DTFR>] (last visited May 26, 2023).

⁸⁹ *Canoe/Kayaking*, ILL. DEP'T OF NAT. RES., <https://dnr.illinois.gov/recreation/canoekayak.html> [<https://perma.cc/QL9X-9GLN>] (last visited May 26, 2023).

⁹⁰ *Boating Opportunities*, ILL. DEP'T OF NAT. RES., <https://dnr.illinois.gov/boating/boatingopportunities.html> [<https://perma.cc/ZBG8-VD72>] (last visited May 26, 2023).

⁹¹ *Welcome to I Fish Illinois—Illinois DNR Division of Fisheries*, ILL. DEP'T OF NAT. RES., <https://www.ifishillinois.org/> [<https://perma.cc/NQ6F-9U2Z>] (last visited May 26, 2023).

⁹² See Scott Summers, *The Case for More National Parks in Middle and Eastern America*, MATADOR NETWORK (Nov. 29, 2016), <https://matadornetwork.com/life/case-national-parks-middle-eastern-america/> [<https://perma.cc/YHJ7-6WD4>].

the number of national parks as eastern states.⁹³ The National Park Service does accept proposals for new national parks, and these proposals may be submitted by the public; state, local, and tribal officials; members of Congress; or the Park Service itself.⁹⁴ Wild and scenic rivers may be designated by Congress or by the Secretary of the Interior, at the request of a state governor.⁹⁵ New national parks and protected rivers do not even require huge quantities of land—while Alaska’s Wrangell-St. Elias is 13 million acres, Arkansas’s Hot Springs is just 5,550 gross acres, or roughly 8.7 square miles.⁹⁶ Similarly, the smallest wild and scenic river is just 7.6 miles.⁹⁷ Additionally, the state should increase the quantity of state and local parkland adjacent to waterways, as discussed further below.

b. Illinois Should Increase Public Use of Private Lands

Existing public resources are insufficient to ensure recreation access for every resident because over ninety percent of land in Illinois is privately owned.⁹⁸ Compare this with Colorado, where over forty percent of land is publicly owned.⁹⁹ State decisionmakers have a powerful tool to acquire land for park designation: state eminent domain authority. The eminent domain power has been used by states to obtain private lands for public recreational use, whether to protect existing natural land from development or to revert developed land back to public space.¹⁰⁰ This power can allow Illinois to preserve and create public recreation space for future generations.

But using eminent domain power is both politically and economically costly. It may be simpler and more feasible, then, for the state to incentivize private cooperation in the effort to increase public lands. One such tool for incentivization is conservation easements. Conservation easements are a way for landowners to voluntarily limit their land use and development for a specified purpose, such as conservation and recreation, while retaining ownership of the land. These

⁹³ Compare Kevin Krajick, *The 100th Meridian, Where the Great Plains Begin, May Be Shifting*, COLUM. CLIMATE SCH. LAMONT-DOHERTY EARTH OBSERVATORY (Apr. 11, 2018), <https://lamont.columbia.edu/news/100th-meridian-where-great-plains-begin-may-be-shifting> [<https://perma.cc/V4EX-RPH6>] (map of the 100th meridian), with *Complete National Parks List 2023 (Printable MAP + By State)*, MORE THAN JUST PARKS (May 1, 2023), <https://morethanjustparks.com/list-of-national-parks-by-state/> [<https://perma.cc/RR8X-FHQA>] (map of U.S. national parks).

⁹⁴ NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, CRITERIA FOR NEW NATIONAL PARKS (n.d.), <http://npshistory.com/brochures/criteria-parklands-2005.pdf> [<https://perma.cc/AHJ5-B5E8>] (last visited May 26, 2023).

⁹⁵ *Wild & Scenic River Designation*, NAT’L WILD & SCENIC RIVERS SYS., <https://www.rivers.gov/designation.php> [<https://perma.cc/Q2KL-UHGF>] (last visited May 26, 2023).

⁹⁶ Summers, *supra* note 92.

⁹⁷ A 7.6-mile segment of the Loxahatchee River in Florida is classified as wild (1.3 miles), scenic (5.8 miles) and recreational (0.5 miles). *Loxahatchee River, Florida*, NAT’L WILD & SCENIC RIVERS SYS., <https://www.rivers.gov/rivers/loxahatchee.php> [<https://perma.cc/WN7W-6QTD>] (last visited May 26, 2023). For a complete map of wild and scenic rivers, see *Wild and Scenic Rivers*, NAT’L WILD & SCENIC RIVERS SYST. IN THE U.S.: NPS MAPS, <https://nps.maps.arcgis.com/apps/MapJournal/index.html?appid=ba6debd907c7431ea765071e9502d5ac#> [<https://perma.cc/T65Z-MQDA>] (last visited May 26, 2023).

⁹⁸ “Illinois ranks 46th in the nation for publicly-owned land with more than 97% of the land is [sic] privately owned.” *Illinois Recreational Access Program*, ILL. DEP’T OF NAT. RES., <https://www2.illinois.gov/dnr/conservation/IRAP/Pages/default.aspx> [<https://perma.cc/9CRV-UHSD>] (last visited May 26, 2023).

⁹⁹ *Public and Private Land Percentages by US States*, SUMMITPOST, <https://www.summitpost.org/public-and-private-land-percentages-by-us-states/186111> [<https://perma.cc/Q4QP-JBMZ>] (last visited May 26, 2023).

¹⁰⁰ See, e.g., *Before Central Park: The Story of Seneca Village*, CENT. PARK CONSERVANCY: MAG. (Jan. 18, 2018), <https://www.centralparknyc.org/articles/Seneca-village> [<https://perma.cc/5PR5-E2F4>] (recounting New York City’s seizure of an African-American community, Seneca Village, to acquire land for Central Park).

programs already exist in Illinois. The Illinois Conservation Reserve Enhancement Program (CREP) enrolls frequently flooded and environmentally sensitive cropland into an easement contract for fifteen years, or in perpetuity.¹⁰¹ Through CREP, farmers have voluntarily agreed to remove over 90,000 acres of land from production and implement conservation practices in exchange for monetary compensation.¹⁰² In another program, the Illinois Recreational Access Program (IRAP), the state helps private landowners protect and restore their land for recreational purposes.¹⁰³ Through IRAP, “more than 27,000 acres [of land] . . . have been leased for outdoor recreational activities.”¹⁰⁴

These programs should be expanded to increase public recreational land in the state. For example, Illinois can further incentivize landowners to take part in conservation initiatives through a conservation tax credit program.¹⁰⁵ Under this type of program, landowners who take out a conservation easement become eligible to “offset[] state income taxes with a dollar-for-dollar reduction in taxes owed.”¹⁰⁶ Thirteen states currently have a conservation tax credit program, and the incentivizing structure is working: these thirteen states have more private conservation easements than states without credit programs.¹⁰⁷

2. An Unclear “Reasonable Use” Doctrine Fails to Protect Recreation

Under riparian law, water use is subject to a “reasonable use” limitation. In most states, it is unreasonable to use the water in a way that hurts the natural flow of the river or disrupts your neighbor’s co-equal right to use the water. When water rights come in conflict, courts balance the relative needs of the water user and the use’s benefit to society.¹⁰⁸ To ensure access to public recreation is protected under this system, Illinois and other riparian states should (a) develop recreation-friendly common law standards or (b) establish a statutory allocation scheme that prioritizes recreation access.

a. Illinois Should Develop Recreation-Friendly Common Law Standards

Common law’s reasonable use standard applies to most diversions of surface water in the state.¹⁰⁹ The Illinois Supreme Court adopted the common law doctrine in an 1842 case, *Evans v.*

¹⁰¹ ILL. CONSERVATION RSRV. ENHANCEMENT PROGRAM, WHAT IS CREP? (2022), <https://dnr.illinois.gov/content/dam/soi/en/web/dnr/conservation/crep/documents/what-is-crep-2022.pdf> [<https://perma.cc/3NMH-F6T6>].

¹⁰² *Id.*

¹⁰³ ILL. DEP’T OF NAT. RES., *supra* note 98.

¹⁰⁴ *Id.*

¹⁰⁵ CHI. METRO. AGENCY FOR PLAN., https://www.cmap.illinois.gov/updates/all/-/asset_publisher/UIMfSLnFfMB6/content/promoting-conservation-easements-on-private-land-with-state-tax-credits [<https://perma.cc/LC6U-ZFK8>] (last visited May 26, 2023).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See* CRAIG ET AL., *supra* note 78, at 24–28.

¹⁰⁹ Diversions from Lake Michigan are governed by statutory law. For a summary of the Great Lakes Compact and the Level of Lake Michigan Act, see CATHERINE JANASIE, SEA GRANT L. CTR., AN OVERVIEW OF WATER LAW IN ILLINOIS 5–7 (2020), <https://nsglc.olemiss.edu/Advisory/pdfs/il-water-law.pdf> [<https://perma.cc/8M6N-JB5V>].

Illinois’s Water Use Act of 1983 also codifies the reasonable use doctrine for groundwater withdrawals: “the use of water to meet natural wants and a fair share for artificial wants.” 525 ILL. COMP. STAT. 45/4 (2016). This is similar language to the 1842 Illinois Supreme Court case, *Evans v. Merriweather*, 4 Ill. (3 Scam.) 492, 495–96 (Ill. 1842).

Merriweather: “Each riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one.”¹¹⁰ The court also distinguished between natural, presumptively reasonable uses—those uses necessary for survival, such as drinking, cooking, and raising cattle—and artificial uses subject to scrutiny—those uses not essential for survival, such as irrigation and industrial uses.¹¹¹

But the law of Illinois’s reasonable use requirement remains vague in its application to recreational uses. Under Illinois law, is recreation a “natural” want or an “artificial” want? Where does recreational use fall on Illinois’s scale of “necessity?” If recreational uses are “artificial,” and if these uses come in conflict with other artificial water uses, is the recreational user more or less likely to be protected than the agricultural or industrial water user? In Illinois, there is little case law for interpreting reasonable use,¹¹² and there is little hope for more guidance. According to one scholar, “[i]t is the responsibility of a jury to decide what constitutes reasonable use on a case-by-case basis. Juries rarely do this, however, because these types of cases rarely come before the courts. As a result, the reasonableness standard is underdefined and Illinois’s system is characterized by vagueness and unpredictability.”¹¹³

Activist litigants should seek to develop a common law definition of reasonable use that includes and even grants preference public recreational use by bringing strategic cases to Illinois courts. But this strategy is slow and risky. Therefore, a legislative solution is likely necessary.

b. Illinois Should Establish a Statutory Allocation Scheme That Prioritizes Recreation Access

There is little room for state involvement in water disputes between private parties in courts, but the Illinois state legislature can implement policies addressing statewide problems, such as drought and shrinking water supplies. In recent years, Illinois has created commissions charged with developing statewide water management plans.¹¹⁴ But these plans are flawed: they rely on voluntary participation and thus leave the state with no powers of enforcement.¹¹⁵

Illinois should instead regulate state water use through a clearly defined statutory scheme of water allocation. In fact, most eastern states have moved away from the pure common law riparian system and toward a system of statutory regulation, such as registration or permitting systems.¹¹⁶ Like these other states, Illinois would then have the ability to monitor water use in the state and the authority to control who receives water, how much they receive, and for what purposes they may use it. To protect water-based recreation, Illinois’s statutory scheme should recognize that recreational instream uses are reasonable uses under Illinois law. Other states have done this by establishing instream flow requirements, which set minimum water levels for particular bodies of

¹¹⁰ *Evans*, 4 Ill. (3 Scam.) at 495.

¹¹¹ *Id.* at 495–96; JANASIE, *supra* note 109, at 2–3.

¹¹² *See generally* Kuntz, *supra* note 79, at 2019–20 (describing three cases).

¹¹³ *Id.* at 2020.

¹¹⁴ OFF. OF THE GOVERNOR, STATE OF ILL. EXEC. DEP’T, EXEC. ORDER NO. 2006-01, EXECUTIVE ORDER FOR THE DEVELOPMENT OF STATE AND REGIONAL WATER-SUPPLY PLANS (2006), <https://www.illinois.gov/content/dam/soi/en/web/coronavirus/documents/execorder2006-1.pdf>.

¹¹⁵ Kuntz, *supra* note 79, at 2022.

¹¹⁶ *Id.* at 2024 (noting that eighteen out of thirty states located east of the Mississippi River now use a statutory system and that these statutory systems vary greatly according to the geographical needs of each state). Registration systems monitor water use through reporting requirements. *Id.* at 2025. Permitting systems allow the government greater control in water allocation and use. *Id.* at 2032–33.

water and prohibit extraction where water levels are low enough to threaten the state’s environmental, recreational, or cultural priorities.¹¹⁷

One scholar advocating for a statutory system in Illinois lists additional benefits of a “clear and well-defined statutory system”: such a system (1) “can help to preserve aquatic life and vegetation by regulating minimum flow rates in surface water”; (2) “helps to alleviate problems with pollution by ensuring that low water levels do not lead to high concentrations of pollutants”; (3) “protects local economies that depend on fishing, aquatic navigation, and aquatic tourism”; (4) “helps resolve conflicts between users in a way that is more predictable and efficient than going through the court system”; (5) “ensure[s] that states have concrete data with which to monitor usage and adjust regulations accordingly”; and (6) “provides standing for local governments and public interest groups to enforce regulations against users violating the statutes.”¹¹⁸ Such a system also prevents unreasonable use before it happens rather than depending on courts for backward enforcement.¹¹⁹ And while the common law reasonable use standard was developed in the nineteenth century to further industrial interests, a modern statutory permitting scheme should be developed to consider equity and sustainability in its allocation of state waters, privileging conservation and protecting public recreational uses.

B. COLORADO

Water rights in Colorado are based on a legal framework known as the prior appropriations doctrine. This water system, having developed in more arid areas where sources of surface water were more dispersed, decouples riparian land ownership from water rights. There are two defining features of the prior appropriations system: (1) water appropriators must use their diversions in a “beneficial” way, and (2) earlier water users have senior water rights, which are enforceable against later, junior holders.¹²⁰

In recent years, claims to recreational water rights have come in conflict with agricultural and real estate interests. “[A]lliance[s] of white-water rafters and amateur anglers” have filed lawsuits against wealthy landowners, seeking to prevent those landowners from barring public use of riverbeds.¹²¹ This Section thus discusses prior appropriation law’s main features—requiring beneficial use and privileging “first” users, respectively—with attention to current Colorado law and potential reforms aimed at increasing and securing a right to recreation for state residents.

1. An Outdated “Beneficial Use” Doctrine Fails to Protect Recreation

Beneficial use is the “basis, measure, and limit” of an appropriative right.¹²² Traditionally, mining, irrigation, domestic, and power uses were presumptively beneficial uses, though more

¹¹⁷ See, e.g., *id.* at 2033–37 (discussing Iowa’s permitting system).

¹¹⁸ *Id.* at 2014.

¹¹⁹ See *id.* at 2023.

¹²⁰ See CRAIG ET AL., *supra* note 78, at 39–56.

¹²¹ Ben Ryder Howe, *Does This Fisherman Have the Right to Be in a Billionaire’s Backyard?*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html?searchResultPosition=14>.

¹²² *Important Concepts: Beneficial Use*, COLO. STATE UNIV.: COLO. WATER KNOWLEDGE, <https://waterknowledge.colostate.edu/water-management-administration/water-rights/beneficial-use/> [https://perma.cc/N8KT-Y47E] (last visited May 26, 2023).

uses have been recognized over time.¹²³ Additionally, a water rights holder abandons their water right if they fail to put it to beneficial use.¹²⁴ This “use it or lose it” system prevents water speculation; however, it also creates perverse incentives for water rights holders to use their full appropriation even if they do not need it, which may contribute to overuse of water resources. To protect water-based recreation, Colorado and other prior-appropriations states should reform their “beneficial use” definition to (a) strengthen instream flow rights and (b) remove barriers to establishing instream flow rights.

a. Colorado Should Strengthen Instream Flow Rights

Some western states, including Colorado, have been shifting their definition of “beneficial use” to adapt to modern realities where, in recent years, “agriculture is a dwindling portion of the overall economy while recreation (fishing, rafting, and general enjoyment of natural amenities) increasingly drives economic activity in the West.”¹²⁵ One such reform is the insertion of reasonable-use-like concepts into the beneficial use requirement. Some states even require efficiency in order to prevent the waste inherent in a “use it or lose it” system.¹²⁶ Increasingly, instream flow is recognized as a beneficial use; typically, individual water rights holders may lease a portion of their right to the state to be held in trust to protect instream flow.¹²⁷

Indeed, Colorado has pioneered efforts to recognize instream flows for conservation and recreation as a beneficial use, serving as a model for other western states. Under Colorado law, “beneficial use” is defined as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.”¹²⁸ This definition explicitly includes “appropriation by the state of Colorado” to “preserve the natural environment to a reasonable degree” for “the benefit and enjoyment of present and future generations.”¹²⁹ And in 2001, Colorado officially recognized water-based recreation as a beneficial use, allowing local governments to apply for recreational in-channel diversion water rights (RICDs), which “set a minimal stream flow between structures to support ‘a reasonable recreation experience.’”¹³⁰ To ensure protection of its residents’ access to water-based recreation, Colorado should continue along this path of strengthening instream flow rights for conservation and recreational uses.

It is worth noting that, in Colorado and other western states, reforms to the definition of beneficial use to protect instream flow apply only to diversions by the state itself. Private parties

¹²³ *See id.*

¹²⁴ *Id.*

¹²⁵ Steven M. Smith, *Instream Flow Rights Within the Prior Appropriation Doctrine: Insights from Colorado*, 59 NAT. RES. J. 181, 183 (2019).

¹²⁶ *See* CRAIG ET AL., *supra* note 78, at 53–56. Some states have articulated a “reasonable use” or “customary practice” judicial standard for determining beneficial use. *Id.* at 55; *see* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 986 (Cal. 1935). Other states set a “water duty”—standards for diversion quantities that are actually necessary using scientific methods—instead of allowing private parties to divert what they think is necessary. CRAIG ET AL., *supra* note 78, at 56. This allows for conservation and incentivizes senior water holders to increase efficiency.

¹²⁷ CRAIG ET AL., *supra* note 78, at 54; *see also infra* notes 128–132 and accompanying text.

¹²⁸ COLO. REV. STAT. § 37-92-103(4).

¹²⁹ *Id.* § 37-92-103(4)(c).

¹³⁰ Jason Blevins, *Should River Towns Be Forced to Build Costly Parks to Get Recreational Water Rights?*, COLO. SUN (Sept. 28, 2021, 4:15 AM), <https://coloradosun.com/2021/09/28/recreational-in-channel-diversion-ricd-water-rights-colorado/> [<https://perma.cc/97BM-D9QB>].

cannot appropriate instream flow rights, as the Colorado Supreme Court confirmed in a 2015 case, which rejected a private club’s application for “appropriative rights for aesthetic, recreation, and piscatorial uses.”¹³¹ In response to this ruling, the state legislature moved to protect existing direct-flow rights for aesthetic, recreational, and piscatorial uses, but it did not seek to protect subsequent private appropriations for such uses. Private parties seeking to protect instream flow instead must transfer their water right, even if only temporarily, to the state to be held in trust. Though this limitation appears restrictive, it likely serves the important purpose, discussed above, of decoupling water-based recreation from private rights.¹³² Having made the policy decision to limit private users’ appropriation for recreational uses, the next section encourages Colorado to incentivize private parties to transfer their water rights to the state to protect instream flows.

b. Colorado Should Remove Barriers to Establishing Instream Flow Rights

Although Colorado’s first legislation recognizing water rights for recreational uses led to an initial boom in recognition of RICD rights, there have been no new RICD filings since 2013.¹³³ Conservation activists point out the limits of RICD rights, which require communities to build whitewater features, and advocate for reform: “[S]tructures in the river [should not be] necessary for river recreation and communities should be able to file for RICD water rights without expensively engineered features that create waves and holes for kayaking, rafting and stand-up paddling.”¹³⁴ Colorado should continue to be a pioneer in the area of water-based recreational rights by expanding its coverage of rights beyond whitewater parks.

Outside of RICD rights, Colorado’s statutory definition of beneficial use allows for both new appropriations and market-based transactions to establish instream flows for conservation, which also provides residents with more opportunities for water-based recreation. Similar to conservation easements in Illinois, water rights holders in Colorado can voluntarily transfer their diversion rights to instream uses for compensation. For decades, groups like the Colorado Water Trust have used such mechanisms to restore billions of gallons of water to Colorado’s river flows.¹³⁵ However, state laws require a review of any changes to a water right, and Colorado “lag[s] behind some other western states in laws that facilitate formal changes of water rights to environmental uses.”¹³⁶ Still, despite some cumbersome administrative practices and other transaction costs that limit transfers or appropriations, irrigators and conservation groups have managed to popularize temporary deals to promote water security without requiring a water right change by the state.¹³⁷ Colorado should continue to incentivize more water rights holders to participate in transfers and sales for instream flows, encourage the flexible and temporary approaches adopted by environmental interests groups, and work to remove the administrative barriers currently hindering more permanent transactions.

¹³¹ *St. Jude’s Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 447, 456 (Colo. 2015).

¹³² *See supra* Section II.A.1.

¹³³ Blevins, *supra* note 130.

¹³⁴ *Id.*

¹³⁵ *Impact*, COLO. WATER TR., <https://coloradowatertrust.org/impact/> [<https://perma.cc/8SSM-EWCW>] (last visited May 26, 2023).

¹³⁶ Leon Szeptycki, David Pilz, Rachel O’Connor & Bea Gordon, ENVIRONMENTAL WATER TRANSACTIONS IN THE COLORADO RIVER BASIN, STANFORD: WATER IN THE W. (Dec. 19, 2018), <https://waterinthewest.stanford.edu/publications/environmental-water-transactions-colorado-river-basin> [<https://perma.cc/7GW9-RFHF>].

¹³⁷ *Id.*

2. Privileging “First Users” Disadvantages Public Users

The prior appropriations system is a “first in time, first in right” system—earlier diverters have senior water rights, which are enforceable against later, junior holders. This has the effect of locking in earlier uses, even if they are no longer the most valuable use, with little room for shifting public policy. To meet its residents’ public-recreation needs now and in the future, Colorado and other prior-appropriations states should reform their water law to (a) increase legislative involvement in allocations and (b) privilege instream uses.

a. Colorado Should Increase Legislative Involvement in Allocations

In Colorado, water rights are determined by general stream adjudications. These adjudications are for all water users who seek legal recognition of their rights—a water user’s claimed water right becomes enforceable through general stream adjudications. All of Colorado’s state rights have been adjudicated, though courts issue monthly supplements, and federal and tribal rights are now being incorporated into Colorado’s divisional decrees.¹³⁸

Colorado is the only state where adjudications are exclusively judicial; administrative agencies are involved in all other states’ general stream adjudications.¹³⁹ While judicial adjudications are not inherently anti-recreational rights, the courts may be an ill-suited forum for reform. For one, judicial adjudications take place on a case-by-case, party-by-party basis, whereas legislative and administrative involvement would likely increase Colorado’s ability to make holistic policy choices about water allocations in the state. For example, a water commission could be empowered to quantify the water rights in the state as a whole, making recommendations to increase allocations for recreation in each basin, thus ensuring sufficient water quantities are maintained for recreation across the state. Agency involvement is not necessary to achieve a right to recreation, but legislative involvement likely is—if the Colorado legislature reformed existing statutes to align Colorado water law with the recognition of a universal right to water-based recreation, the courts would of course enforce such a right in each individual dispute.

b. Colorado Should Privilege Instream Uses

Prior appropriation’s “first in time, first in right” system does not necessarily privilege the “best” or even the “fairest” allocation of state water. For example, a senior rights holder who inefficiently irrigates an industrial farm producing a water-intense crop such as alfalfa for animal feed will have a stronger water right claim than any more junior holder, regardless of how efficient, sustainable, or important their water use. And this water system developed at a time when agricultural and industrial uses—such as those for irrigation and mining—were valued higher than uses for conservation and recreation. But this valuation is not inherently accurate; rather, it reflects a certain period in American history flawed for its settlement-centered land development at the expense of native populations and its exploitation of natural resources at the expense of future generations. In fact, Native American water rights in the West are only just beginning to be

¹³⁸ John E. Thorson, *Clarifying State Water Rights and Adjudications*, in TWO DECADES OF WATER LAW AND POLICY REFORM: A RETROSPECTIVE AND AGENDA FOR THE FUTURE 15, 28 (Nat. Res. L. Ctr., Univ. of Colo. Sch. of L. 2001).

¹³⁹ *Id.* at 5; see also Justice Gregory J. Hobbs, Jr., *Colorado’s 1969 Adjudication and Administration Act: Settling In*, 3 U. DENV. WATER L. REV. 1, 5 (1999).

recognized by water rights settlements in the region;¹⁴⁰ although Indigenous populations surely should have been “first in time” users under the prior appropriations system, systemic racism has prevented tribes from securing quantified water rights. Therefore, a water law system based in principles of equity must leave room for a reevaluation of statewide priorities, even if that means disrupting the well-settled law of seniority.

A central issue to establishing a right to water-based recreation is that more recent water transfers made to preserve instream flow are often subordinate to more senior diversions for other uses. So, even if Colorado removes administrative barriers to establishing instream flow rights and such appropriations increase throughout the state, there is still the problem of low seniority. As one scholar has noted, “[instream flow rights] were fairly powerless at improving flows where existing water uses and rights already impaired the aquatic ecosystem. Senior water rights continued to have priority, and new laws held no power to augment streamflows where existing rights caused depleted flows.”¹⁴¹

Therefore, a right to instream flow as a beneficial use does little to address access to recreation unless also accompanied by a right to be privileged over senior users. Establishing this right would recognize that water preserved for recreational use should have more quantified rights than just whatever is left over in a good year, when something is left over. Especially as longer and more frequent droughts shrink water supplies in the American West, Colorado should seriously consider enacting laws that privilege public users of water before some first-in-time users. For example, recreational public use could be treated like domestic use, which is a privileged use that can trump other uses (such as inefficient irrigation and industrial uses) in times of shortage.¹⁴² Such a change would reflect changing value judgments—where agricultural and industrial users have disproportionately contributed to climate change and the shrinking water supply, should such inefficient uses continue to be rewarded with large water diversions while the general public suffers? Privileging instream uses does not mean the economic benefits of all business uses or the security of the food supply must be forsaken. However, by inserting the value of public recreation as a legitimate balancing factor, some parties with taken-for-granted water rights would be required to make new sacrifices, such as reevaluating their business models to include necessary conservation measures.

CONCLUSION

To address the U.S. nature gap and ensure all U.S. residents may enjoy water-based recreation for generations to come, every state must investigate its current water-allocation system and realign its laws with the equity-based goals laid out in this Note. State water laws should increase residents’ access to nature by recognizing, honoring, and privileging public recreational water uses. Additionally, state agencies should be empowered to implement policies addressing the problem of shrinking water supplies and incentivizing private cooperation with public goals.

¹⁴⁰ See *Enacted Indian Water Rights Settlements*, SEC’Y’S INDIAN WATER RTS. OFF., U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/siwro/enacted-indian-water-rights-settlements> [<https://perma.cc/RJ3W-PN3L>] (last visited May 26, 2023).

¹⁴¹ LEON F. SZEPTYCKI, JULIA FORGIE, ELIZABETH HOOK, KORI LORICK & PHILIP WOMBLE, ENVIRONMENTAL WATER RIGHTS TRANSFERS: A REVIEW OF STATE LAWS 9 (2015), <https://waterinthewest.stanford.edu/sites/default/files/WITW-WaterRightsLawReview-2015-FINAL.pdf> [<https://perma.cc/B8Y9-UJVS>].

¹⁴² See Fox 13 News Utah, *How Do Utah Water Rights Work During Drought?*, YOUTUBE (June 24, 2021), <https://www.youtube.com/watch?v=e4dUgVNzZa8> (describing how Utah’s water rights change in times of emergency, such as drought).

This Note only begins to imagine the ways state water systems can prioritize public water-based recreation rights. It invites further thinking and scholarship on legal mechanisms for addressing the past harms of the U.S. nature gap and mitigating the future effects of increasing water scarcity on marginalized communities.