

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**No.**

**ADOBE WHITEWATER CLUB OF NEW MEXICO, a non-profit corporation, NEW MEXICO WILDLIFE FEDERATION, a non-profit corporation, and NEW MEXICO CHAPTER OF BACKCOUNTRY HUNTERS & ANGLERS, a non-profit organization.**

Petitioners,

vs.

**HONORABLE, MICHELLE LUJAN GRISHAM, Governor, and STATE GAME COMMISSION,**

Respondents.

**VERIFIED PETITION FOR MANDAMUS ORIGINAL JURISDICTION**

Petitioners bring this Verified Petition for writ of prohibitory mandamus to invalidate an illegal and unconstitutional regulation and unconstitutional and illegal practice by the executive branch acting through the New Mexico State Game Commission (“Commission”) and to prohibit further unlawful conduct. This petition invokes the original jurisdiction of the Court as legally authorized by N.M. Const. Art. VI § 3, procedurally advanced pursuant to Rule 12-504 NMRA.

**NATURE OF THE CASE**

In January 2018 the Respondent Commission adopted regulations on which it relies to grant private property owners exclusive access, possession and

dominion over segments of public rivers and streams of this state. The regulations are compiled as 19.31.22 NMAC and a copy thereof is attached as Appendix I hereto (hereafter “Regulation”). Five private persons or corporation have been granted “certificates” by the Commission to exclude the public from enjoying recreational activities on specified segments of public rivers. Applications for three additional such certificates are presently pending before the Commission.

The rivers and streams of New Mexico “belong to the public.” N.M. Const. Art. XVI § 2; NMSA 1978, § 72-1-1; NMSA 1978, § 72-12-1. The Commission’s conduct and its Regulation enabling privatization of New Mexico rivers is unconstitutional and unlawful. It will continue unless prohibited by writ of the Court.

#### **A. JURISDICTION OF THE SUPREME COURT**

This case is properly before the court as an original proceeding. The proceeding implicates fundamental constitutional questions of great and far reaching public importance. The constitutional fundamental that New Mexico rivers belong to the public and the constitutional separation of powers limitations on executive authority are willfully violated by the Commission and its Regulation. The public right to recreational use and access to the waters of New Mexico within private property was confirmed some seventy years ago by the Court in *State ex*

*rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421; the decision remains unchallenged.

The relevant facts are undisputed. The issues require resolution of questions of law. This case calls for expedition that can only obtain by the Court's timely exercise of its power of mandamus. Issuance of a prohibitory writ of mandamus is the necessary and proper means to preclude unlawful and unconstitutional executive action and to compel the Respondents to treat as void the subject Regulation.

#### **B. PROPER TO SEEK THE WRIT IN THIS COURT**

In addition to the afore stated considerations it is necessary and proper to seek the writ in this Court because, (a) there are no factual issues for a district court to hear and decide, (b) the purely legal issues are of such nature and import that they would eventually be before and require disposition by this Court and (c) an early decision resolves uncertainty of the Commission about the efficacy of its Regulation and the uncertainty of the public at large who have been, are being and may be further denied historically exercised access to the state rivers and streams for fishing, boating and other forms of common outdoor recreation and enjoyment.

## **C. THE PARTIES**

The Petitioners are:

1. Petitioner Adobe Whitewater Club of New Mexico is a New Mexico corporation qualified as an I.R.C. Section 501(c)(4) organization. It has 190 members and its purpose is to promote river sports and the improvement of river environment in New Mexico. It is based in Albuquerque, New Mexico.

2. Petitioner New Mexico Wildlife Federation is a New Mexico corporation qualified as an I.R.C. Section 501 (c)(3) organization. It is a leader and a communications conduit for approximately 80,000 hunting and fishing New Mexico license buyers, the great majority being New Mexico residents. It is based in Albuquerque, New Mexico

3. Petitioner New Mexico Chapter of Backcountry Hunters & Anglers is a chapter of the national organization that is qualified as an I.R.C. Section 501 (c)(3) organization. It's mission is to safeguard the nations outdoor heritage of hunting and fishing in a natural setting by work on behalf of wild public lands and waters. The office of the organization is in Missoula, Montana.

The Respondents are:

1. Honorable Michelle Lujan Grisham, Governor of the State of New Mexico.

2. State Game Commission of New Mexico.

## **D. GROUNDS FOR THE PETITION, FACTS AND LAW**

### **The Rivers of New Mexico Belong to the Public**

The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right. N.M. Const. Art XVI § 2.

All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the State of New Mexico, belong to the public and are subject to appropriation for beneficial use.

A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

NMSA 1978 § 72-1-1

The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, is declared to belong to the public and is subject to appropriation for beneficial use.

NMSA 1978 § 72-12-1

The water in the public streams belongs to the public . . . The small streams of the state are fishing streams to which the public have a right

to resort so long as they do not trespass on the private property along the banks. *State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034 ¶¶ 42, 48, 51 N.M. 207, 182 P.2d 421

### **The Respondents' Privatization of New Mexico Rivers is Unlawful**

1. The Regulation enacted by the Commission styled Landowner Certification of Non-Navigable Water is unconstitutional and violative of statute. The stated objective of the Regulation reads “for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner’s private property is a segment of a non-navigable public water, where riverbed or streambed or lakebed is closed to access without written permission from the landowner”. 19.31.22.6 NMAC
2. The Commission has no authority to violate the constitution and law in order to create private segments of public rivers.
3. The Regulation relies for its statutory authority on NMSA 1978 § 17-4-6 amended in the 2015 legislature to add the following subsection of the statute:
  - C. No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or over public waters via private

property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

4. The statute provides no support for the Regulation. It restates the law that one cannot enter on another's private property without permission, including entry from of a river or stream.

5. The State Game Commission exists to provide for the protection of game and fish of New Mexico. NMSA 1978 § 17-1-1. It can exercise only such authority as granted to it by the legislature. It must conduct its business within the limitations of the New Mexico Constitution. The Commission lacks authority and has proceeded in violation of the aforestated constitutional principle that the water courses belong to the public and the constitutional separation of powers to confer private property rights through issuance of regulations; it cannot confer or grant unique rights, privileges or exemptions in favor of certain select persons or entities who own lands intersected by public water courses. N.M. Const. Art. III § 1 (Separation of powers); NMSA 1978 § 17-1-14 (General powers and duties of state game commission).

### **Summary of Facts**

6. Individuals having the wealth to do so have acquired ownership of land abutting or straddling New Mexico flowing rivers and streams. These are rivers that are prized for trout fishing and have historically been enjoyed by the

public for that use; likewise, are rivers that are suitable at times of the year for rafting and kayaking.

7. Prior to adoption of the Regulation the rights of the public to enjoy fishing, wading, floating and other recreational uses of the state rivers at times have been in tension with the interests of those who have invested in prized lands having river frontage. To address and clarify those relative and sometimes contrary interests a state legislator requested Attorney General Gary King to research and opine on the inherent issues. In Opinion No. 14-04, dated April 1, 2014 Assistant Attorney General Stephen R. Farris responded to the inquiry. The opinion reflects extensive, sound legal research and case law analysis. The opinion relied on the decision in *Red River Valley* in which the Court upheld the public's access and use rights. The Attorney General opinion concluded that in the case of public streams flowing through private property "The public's right to use public waters for fishing, includes activities that are incidental and necessary for the effective use of the waters. This includes walking, wading and standing in a stream in order to fish." Op. 14-04 p. 7. A copy of the opinion is attached as Appendix II.

8. In January 2015 Senate Bill 226 was introduced in the legislature. A copy of the bill in the language as introduced is attached as Appendix III. Proposed Section C of the Bill surfaced the concept that a significance be attached



to whether a river or stream is “a navigable water”. Under the proposed legislation the determination of that status was to be made solely by the Commission and the Commission was authorized to adopt regulations to implement proposed Section C. The text of the legislation gave no explanation for that test. Implicit in the reading one detects a contention or premise that were the Commission to decide a stream is not navigable it is ergo not public. The right of “the public” to use public water on private property for any recreational uses was to be “governed by this section”. The text went on to create a procedure for bringing before the Commission the issue “of whether a public water on private property is a navigable water [to be decided by the Commission] . . . prior to using public water on private property for recreational activity.” Absent a determination by the commission “it shall be presumed that a public water on private property was and is a non-navigable water.” SB 226 Appendix III pp. 3, 4.

9. The content and effect of SB 226 were severely diminished by legislative committee amendments ultimately passing as nothing more than a restatement of basic trespass law. See Para. 3 above.

10. The Commission was not deterred by the legislative failure. It took on the role of legislating by regulation what was not accomplished in the Legislature. The lengthy, detailed Regulation was crafted and was adopted by the Commission effective January 22, 2018. The Regulation cites as its legislative

authorization NMSA § 17-1-14 (general powers of the commission); § 17-1-26 (rulemaking authority); § 17-4-6 (2015)(enacted in the form as described).

11. On July 24, 2019 the Commission received five completed applications each described as for “Certification of Non-Navigable Public Water Segment” by the department director’s August 28, 2018 notification to the Commission. Copies of the director’s notices of applications 1, 2, 3, 4 and 5 are attached as Appendix IV.

12. A centerpiece of the Regulation calls for a landowner applicant to submit an elaborate historical document display having the objective of firmly proving the obvious: whether a New Mexico river is non-navigable.

19.31.22.7(G), 19.31.22.8(B)(4). That exercise is presented as meaningful though the Constitution declaration that the state waters are public is unconcerned with navigability. “The unappropriated water of *every natural stream*, perennial or torrential...belong to the public...” Const. Art. XVI § 2 Likewise the legislature has no misgivings about the public nature of New Mexico water depending on navigability. “*All natural waters* flowing in streams and water courses ... belong to the public...” § 72-1-1 (Emphasis added).

13. The Commission approved the applications and awarded “Certificates” to each of those five landowners. Each certificate issued on December 31, 2018.

14. A newly constituted Commission was formed in 2019 as a result of appointment by Governor Lujan Grisham, who had recently been inaugurated.

15. The director of the department of Game and Fish requested the Attorney General to provide an opinion about “whether 19.31.22 NMAC comports with State law and the New Mexico Constitution.” The opinion was provided to the Game Commission in the form of a Confidential Memorandum dated September 17, 2019. The *Red River Valley* decision and Attorney General Opinion 14-04 were cited as guidance. This conclusion of the Attorney General is again that the Constitution precludes use of the Regulation by the Commission as a means to exclude the public from using public water within private property for recreational purposes if the stream is reached without trespassing on private property. A copy of the Attorney General Memorandum is attached as Appendix V.

16. The Attorney General Memorandum addressed the “non-navigable public water” notion, concluding that under the New Mexico Constitution “every natural stream in New Mexico belong to the public, whether it is navigable or non-navigable. See *Red River* 1945-NMSC-034, 35-37, 182 P.2d at 430-431 (explaining that because Art. XVI § 2 expressly provides for public ownership of

the ‘water of every natural stream’ the ‘test of navigability’ used in other states to determine the public character of water does not apply in New Mexico)”.<sup>1</sup>

17. During the October 25, 2019 meeting of the Commission the Chairwoman instructed the director with a consensus of the Commission to add the Regulation to the November meeting so the rule would be open for review at that time. During the November 21, 2019 meeting the Commission approved opening the Regulation for public input and releasing the Attorney General’s September 17, 2019 memorandum on the Regulation. Copy of the meetings’ minutes are attached as Appendix VI.

18. The chairwoman presiding at the time of the October 2019 and November 2019 meetings was removed from the Commission by the Governor in December 2019 and thereafter a new chairwoman appointed.

19. The Regulation remains in effect. It has not been opened for public comment nor reconsidered by the Commission. Applications for certificates of privatization are pending.

20. Where landowners have been granted certificates for segments of public streams there has followed physical closure to the public by those

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<sup>1</sup> This state’s “Great River” The Rio Grande is non-navigable within New Mexico. United State v. Rio Grande Dam & Irrigation Co. 174 U.S. 690, 698 19 S. Ct. 770, 772 (1899) “The Rio Grande, within the limits of New Mexico, is not a stream over which in its ordinary condition, trade and travel can be conducted in customary modes of trade and travel on water...”. All other lesser New Mexico streams are accordingly non-navigable. Thus to say that any river or stream in the state is non-navigable is to say that it is a New Mexico river or stream.

landowners. Certificate holders have installed physical barriers to passage. One such owner has blocked its portion of the Rio Chama by a cable across the river hung with a no trespassing sign. On the Pecos River a certificate holder has erected steel barriers featuring razor wire extending to the river's edge. That owner has added its own more threatening warning signed in addition to the Commission no trespassing signs furnished to the beneficiaries of its certificates. Photos of the Pecos River barriers and the signs appear attached as Appendix VII-A and VII-B.

#### **E. RESPONDENTS POSITION**

In accordance with Rule 12-504(B)(2) information about Respondents' position to the extent known to Petitioners is provided by a copy of a pleading filed by the Commission on March 4, 2020 in Santa Fe County district court, styled Complaint for Declaratory Judgment. A copy thereof is attached as Exhibit A. The pleading reflects that the director of the Commission is suing the Commission seeking a declaratory judgment. The action is framed between parties having the same legal interest in seeking legal advice. The Prayer for Relief asks not "whether" but "under what circumstances, a private landowner may exclude members of the public from fishing in public waterways that flow through that land owner's property". Exhibit A, p. 7

In the view of Petitioners, the filing is designed by the Commission to achieve a judicial advisory opinion approving the Commission Regulation and the policy of exclusion of the public from fishing in waters that flow through private property. The Complaint alleges that the *Red River Valley* case is only authority in the case of impounded public waters; inapplicable to rivers and streams. It alleges there exist differences among Attorney Generals opinions causing uncertainty. This alleged differences of opinions is based on dredging up a 100-year-old, one-page Attorney General Opinion 12-2108 (from 1918) presented as a contrast with the previously discussed 2014 Opinion 14-04 and the September 2019 memorandum. Exhibit A, p. 4.

The executive branch of state government includes a system that accommodates the need for legal advice on uncertain issues among departments, boards and commissions and legislators. The function and duty of the Attorney General is to provide a written opinion for them on legal questions. NMSA 1978 § 8-5-2 (D). It has done so competently on the instant issues. The opinion exists as of Opinion 14-04, April 1, 2014; confirmed by the Memorandum September 17, 2019. Appendices II, V. The declaratory lawsuit demonstrates the Respondents

dissatisfaction with Attorney General opinions rendered in this century and the authority of this Court's decision in *Red River Valley*.<sup>2</sup>

**F. RELIEF SOUGHT**

Petitioners request the court issue its Alternative Writ of Mandamus directing the Respondents to invalidate, repeal, cancel and give no further effect to the Regulation; in the alternative the writ direct Respondents to respond and show cause, if any, why the Court should not issue a Preemptory Writ of Mandamus concluding the Commission has violated the Constitution, striking down the Regulation as void and prohibiting any proceeding or actions by the Commission in reliance upon in furtherance of the unlawful Regulation and the policy of privatizing segments of the public rivers and streams of New Mexico.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By /s/ J. E. Gallegos

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<sup>2</sup> The declaratory action Complaint is signed by the General Counsel and the Deputy General Counsel for Governor Lujan Grisham. The signatures provision does not state whether counsel represents none, one or both of the parties.

**TITLE 19 NATURAL RESOURCES AND WILDLIFE**  
**CHAPTER 31 HUNTING AND FISHING**  
**PART 22 LANDOWNER CERTIFICATION OF NON-NAVIGABLE WATER**

**19.31.22.1 ISSUING AGENCY:** New Mexico State Game Commission.  
 [19.31.22.1 NMAC - N, 01-22-2018]

**19.31.22.2 SCOPE:** Department, staff, and landowners whose private property contains within its boundary, a segment of non-navigable public water.  
 [19.31.22.2 NMAC - N, 01-22-2018]

**19.31.22.3 STATUTORY AUTHORITY:** Section 17-1-14 NMSA 1978, Section 17-1-26 NMSA 1978, and Section 17-4-6 NMSA 1978, provide that the New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species.  
 [19.31.22.3 NMAC - N, 01-22-2018]

**19.31.22.4 DURATION:** Permanent.  
 [19.31.22.4 NMAC - N, 01-22-2018]

**19.31.22.5 EFFECTIVE DATE:** January 22, 2018, unless a later date is cited in the history note at the end of a section.  
 [19.31.22.5 NMAC - N, 01-22-2018]

**19.31.22.6 OBJECTIVE:** To establish rules, requirements, definitions and regulations implementing the process for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.  
 [19.31.22.6 NMAC - N, 01-22-2018]

**19.31.22.7 DEFINITIONS:**

**A. "Certified non-navigable public water"** shall mean a segment of watercourse or river submitted to the department by a landowner which has met all requirements described in 19.31.22.8 NMAC and has been issued a certificate by the director, and approved by the commission.

**B. "Commission"** shall mean the New Mexico state game commission.

**C. "Department"** shall mean the New Mexico department of game and fish.

**D. "Director"** shall mean the director of the department of game and fish or designee.

**E. "Landowner"** shall mean any person or entity that has legal, record title to private property within the state of New Mexico.

**F. "Navigable-in-fact"** shall mean that a watercourse or river is navigable-in-fact when it was used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water. A navigable-in-fact determination shall be made on a segment by segment basis.

**G. "Non-navigable public water"** shall mean a watercourse or river which, at the time of statehood, was not navigable-in-fact. A watercourse or river is not navigable-in-fact when it was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water. The certification on non-navigable public water shall be made by the director and approved by the commission on a segment by segment basis.

**H. "Segment"** shall mean the watercourse or river located within the boundaries of a landowner's private property.  
 [19.31.22.7 NMAC - N, 01-22-2018]

**19.31.22.8 LANDOWNER NON-NAVIGABLE PUBLIC WATER SEGMENT CERTIFICATION REQUIREMENTS:**

**A. Application:** An application by a landowner for certification of non-navigable public water on a segment by segment basis shall be made on a form or in a manner provided by the department as prescribed by the director. The form or manner shall be available to the public on or before February 2, 2018, via the department's website.

**B. Contents:** A landowner requesting certification of a non-navigable public water segment shall provide the following information:

(1) name of owner, address, telephone number, name of property or ranch, name of contact person authorized to grant written permission to access property;

(2) current recorded property deed(s) or other written, recorded instruments of title and a complete legal description of property(s); county; name(s) of non-navigable public water, stream or river on property; a map of sufficient size and detail to allow the identification of potential access points to water and access roads to be located by someone unfamiliar with the area shall be included;

(3) proof of publication of notice of application for certification for three consecutive weeks in a newspaper of general circulation in the county where the property is located.



(4) substantial evidence which is probative of the waters, watercourse or river's being non-navigable at the time of statehood, on a segment-by-segment basis. This may include any reports to the US department of interior from the territorial governor(s) of New Mexico, any pre-statehood cases discussing the navigability or non-navigability of New Mexico's watercourses or rivers, any title opinion or other expert opinion, and any other evidence that may be probative.

C. **Application acceptance:** An application shall be accepted for further consideration if it includes the required contents without regard to the merits of the application. An application shall not be refused for technical reasons. Refused applications may be amended, supplemented, and resubmitted and then reconsidered by the department and director in accord with the deadlines set forth herein for an original application. Refused applications can be appealed.

D. **Application deadline:** A landowner may engage in the certification process at any time by completing and submitting the proper application form. A refused application is without prejudice.  
[19.31.22.8 NMAC - N, 01-22-2018]

**19.31.22.9 WRITTEN DETERMINATION AND RECOMMENDATION BY DIRECTOR AND DESIGNATION OF NON-NAVIGABLE PUBLIC WATER STATUS:**

A. An accepted application shall be forwarded by the department to the director so that a determination can be made by the director whether the application meets the requirements set forth in 19.31.22.8 NMAC.

B. The director shall have 60 days to make a written determination and recommendation or a written rejection to the commission.

(1) If the director determines that the application meets the requirements set forth in 19.31.22.8 NMAC, the director's shall issue a written determination and recommendation to the commission that the segment in the application shall be designated a "non-navigable public water," stating the reasons for written determination and recommendation, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director issues a written determination and recommendation to the commission, for final vote of approval by the commission.

(2) If the director determines that the application does not meet the requirements set forth in 19.31.22.8 NMAC, the director shall issue a written rejection of the application stating the reasons for rejection, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director issues a written rejection, for final vote of approval by the commission.

C. The department shall post on its website, the director's recommendation to the commission at least 21 days before regular or special meeting at which the application will be presented to the commission.  
[19.31.22.9 NMAC - N, 01-22-2018]

**19.31.22.10 NOTICE OF WRITTEN DETERMINATION AND RECOMMENDATION OF NON-NAVIGABLE PUBLIC WATER STATUS:** The posting of the written determination and recommendation by the director of proposed certification of non-navigable public water on the commission's agenda or written rejection for final vote and approval shall serve as notice of the commission's intent to take final action on the application and written determination and recommendation or written rejection of the director.  
[19.31.22.10 NMAC - N, 01-22-2018]

**19.31.22.11 MEETING PROCEDURES:**

A. The commission shall make and preserve a record of the meeting.

B. Comments and proposed documentary evidence of the landowner, persons with standing, and the general public shall only be taken in writing and in a written format; this format will allow for comments and proposed documentary evidence to be submitted electronically as stated in the notice of meeting or the agenda. There shall be no oral or verbal comment from the landowner, persons with standing, and the general public at the meeting. There shall be no exception to this rule except upon good cause shown and at the sole discretion of the chairman.

C. The comment period closes 14 days before the meeting at which the application will be considered for final action by the commission.

D. Final action may be postponed or continued at the discretion of the commission but in no event shall a final determination as required in Subsection B of 19.31.22.9 NMAC exceed the 180 day deadline.

E. The director shall provide copies of the application and supporting documentation and all comments and proposed documentary evidence to the commission members at least seven days before the meeting at which the application will be considered for final action by the commission. The same information shall be posted on the department website at least seven days before the meeting at which the application will be considered for final action by the commission.

F. In a meeting held under this section, the chairman may admit any evidence, in his or her sole discretion, which is probative of the issues. The chairman may exclude, in his or her sole discretion, incompetent, irrelevant, immaterial and unduly repetitious evidence. Proposed documentary evidence may be received in the form of copies or excerpts. The commission may take notice of well-known, cognizable facts.

G. The commission may take final action on the application by approving or rejecting the written determination and recommendation or written rejection of the director but is not limited to those options. The commission may take such other final action as necessary to resolve the application, including but not limited to determining and finding that a segment be designated a non-navigable public water.

H. Within 60 days of the meeting, the commission shall issue its written final agency action and decision with the factual and legal basis for that decision. A copy of that decision will be given to all persons who were a party in the proceeding and every person who has filed a written request for notice of the final decision of that specific application.

[19.31.22.11 NMAC - N, 01-22-2018]

**19.31.22.12 JUDICIAL REVIEW:** A landowner having made application under this rule or a person with standing may appeal to the district court for relief in accordance with Section 39-3-1.1 NMSA 1978. Any appeal may not be filed more than 30 days after issuance of the written final agency action and decision. Any appeal filed outside that 30 day period is untimely. Upon appeal, the district court shall set aside the action and decision only if it is found to be:

- A. fraudulent, arbitrary, or capricious;
- B. not supported by substantial evidence in the record; or
- C. otherwise not in accordance with the law.

[19.31.22.12 NMAC - N, 01-22-2018]

**19.31.22.13 FINAL VOTE AND APPROVAL BY COMMISSION AND EFFECT THEREOF:**

A. If the commission votes to approve the director's determination that a segment be designated a non-navigable public water or otherwise votes to determine and find that a segment be designated a non-navigable public water and issues a written final agency action and decision indicating the segment identified in the application or any portion thereof is now a "certified non-navigable public water", a certificate shall be issued by the director immediately following the issuance of the written final agency action and decision indicating the segment identified in the application, or any portion thereof identified by the commission, is now a "certified non-navigable public water". The certificate shall include sufficient information for recording purposes with the various county clerks of the state of New Mexico and shall be in a format sufficient for recording purposes with the various county clerks of the state of New Mexico. The certificate and certification shall run with the segment, the land, and the real property.

B. The certificate formally recognizes that the segment and certain waters found on the private property are non-navigable public waters and therefore trespass on private property through non-navigable public water or via accessing public water via private property is not lawful unless prior written permission is received from the landowner in accordance with Section 17-4-6 NMSA 1978.

C. Landowners that receive an actual certificate are eligible to receive a sufficient number of signs for a reasonable fee. The fee is to fully compensate the department for the cost of sign production. The posting of signs and the addition of contact information written or adhered to the sign will be the responsibility of the applicant.

D. **Sign requirements:**

- (1) Signs shall be at least 144 square inches (12 inches by 12 inches)
- (2) Signs shall be printed in English and Spanish.
- (3) Signs shall state the following prohibitions in accord with Subsection C of Section 17-4-6 NMSA 1978.

Hunting and fishing on private property; posting; penalty: No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

- (4) Signs shall have the name and address of a person authorized to grant permission.

E. **Sign posting requirements:**

- (1) Signs shall be posted in at least six conspicuous places on the property.
- (2) Signs shall be posted along all the exterior boundaries of the property.
- (3) Signs shall be posted at each roadway or other way of access in conspicuous places.
- (4) Signs shall be posted where water line crosses all property boundaries.
- (5) Signs shall be posted every 500 feet along the exterior boundaries if property is not fenced.
- (6) Signs shall not be posted on any public land or any easements that the department or commission has acquired.

F. **Effect of signage:** A sign issued in accordance with this rule and meeting the requirements of this rule is prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass and related laws, rules, and regulations.

[19.31.22.13 NMAC - N, 01-22-2018]

**HISTORY OF 19.31.22 NMAC: [RESERVED]**



## Attorney General of New Mexico

**GARY K. KING**  
Attorney General

April 1, 2014

**ALBERT J. LAMA**  
Chief Deputy Attorney General

OPINION  
OF  
GARY K. KING  
Attorney General

Opinion No. 14-04

BY: Stephen R. Farris  
Assistant Attorney General

TO: The Honorable Luciano "Lucky" Varela  
New Mexico State Representative  
1709 Callejon Zenaida  
Santa Fe, NM 87501

### QUESTION:

May a private landowner exclude others from fishing in a public stream that flows across the landowner's property?<sup>1</sup>

### CONCLUSION:

No. A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner's property, provided the public stream is accessible without trespass across privately owned adjacent lands.<sup>2</sup>

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<sup>1</sup> The opinion request focused on the available procedures for enforcing fishing rights in public streams on private property. However, we determined during the course of our research that New Mexico statutory and regulatory law does not clearly recognize or protect the right to use public streams on private land for fishing, nor has the legislature authorized the Department of Game and Fish or any other state agency to regulate or enforce that right. Accordingly, this opinion is intended to clarify the parameters of the right to use public streams flowing through private property for fishing and other recreational purposes.

<sup>2</sup> The scope of this opinion is limited to public streams that flow across private property. It does not analyze or express any opinion as to public streams that flow across federal lands or lands owned by Indian nations, tribes and pueblos.

BACKGROUND:

New Mexico is a prior appropriation state. Under the prior appropriation doctrine, recognized in most western states, a user acquires a right to water by diverting that water and applying it for a beneficial use. Under the corollary rule of priority, the relative rights of water users are ranked in the order of seniority. *See Colorado v. New Mexico*, 459 U.S. 176, 179 (1982). This is pertinent to the question asked because in accordance with this doctrine, the Territory of New Mexico and later the State of New Mexico declared that all the waters in the state belong to the public. In 1907, when the Territorial Legislature enacted the Water Code, it declared:

All the natural waters flowing in streams and watercourses, whether such be perennial or torrential within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek arroyo, canyon draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

*See* NMSA 1978, § 72-1-1 (1907, as amended through 1941). The Water Code of 1907 was merely declaratory of the law existing at that time. *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021, ¶ 4, 113 P. 823, 824. The prior appropriation doctrine was subsequently incorporated in the New Mexico Constitution:

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.

N.M. Const. art. XVI, § 2.

By contrast, some states follow the riparian doctrine, which entitles the owner of land contiguous to a watercourse to have that water flow by or through the owner's land "undiminished in quantity and unpolluted in quality," except that any such owner may make whatever use of the water that is reasonable with respect to the needs of other water users. *Colorado*, 459 U.S. at 179. Riparian ownership of water has never been recognized in New Mexico. *Hagerman Irrigation Co.*, 1911-NMSC-021, ¶ 6, 113 P. at 825, and prior appropriation continues to be the law in this state.

Even though the New Mexico Constitution declares all the waters in the state to be public, there continues to be some confusion and misunderstanding of what this means for public waters crossing the private property of a landowner. The question addressed in this opinion arises from the tension between the rights of the public and the rights of private landowners.

ANALYSIS:

The New Mexico Supreme Court addressed a question similar to that presented here in 1945. The question decided in *State ex rel. State Game Commission v. Red River Valley Company* was

whether the public had the right “when properly authorized by the State Game Commission, to participate in fishing and other recreational activities in the waters in question” even though the banks on both sides of those waters were owned by a private company via patent from the U.S. government.<sup>3</sup> 1945-NMSC-034, ¶ 4, 51 N.M. 207, 212. The Supreme Court answered the question in the affirmative. While the holding in *Red River* is nearly 70 years old, it has never been successfully challenged or overturned.

In *Red River*, the landowner sought to exclude others from fishing in boats in Conchas Lake where the landowner owned the land on both sides of the lake. The New Mexico Supreme Court held that “the waters in question were, and are, public waters; and that appellee [landowner] has no right of recreation or fishery distinct from the right of the general public.” 1945-NMSC-034, ¶ 59, 51 N.M. at 228.

On rehearing, the Court affirmed its original conclusion. *See* 1945-NMSC-034, ¶ 195, 51 N.M. at 264 (stating that “[o]n consideration of motion for rehearing, our conviction as to the correctness of the result reached in the majority opinion is not weakened, but strengthened rather”). As to the ownership of the beds of the streams that fed into Conchas Lake, the Court found: “[i]f appellee owns the beds of the streams on the Pablo Montoya Grant, as claimed by it, ... it obtained no interest of any kind (*riparian or otherwise*) in the water flowing over those beds by virtue of the United States patent.” *Id.* ¶ 235, 51 N.M. at 273 (emphasis added) (citing *California-Oregon Power Co. v. Beaver Portland Cement*, 295 U.S. 142 (1935)). Thus, the Court concluded that determination of the ownership of the bed of the stream was not material to answering the question presented; regardless of who owned the beds of the streams, the water flowing in the streams and collected in the lake were public and subject to use by the public for fishing and recreation.

The point that the ownership of the stream bed does not determine who owns the water is further supported by *State ex rel. Bliss v. Dority*, 1950-NMSC-066, 55 N.M. 12. There, the question was whether the surface landowner also owned the groundwater under the surface, a kind of underground riparian water right. The New Mexico Supreme Court applied the same reasoning used in *Red River* regarding the ownership of surface waters on private lands, and quoted extensively from *California-Oregon Power Company*, which was also cited in *Red River*. *Id.* ¶ 25, 28, 55 N.M. at 21, 23-27. The Court concluded that, as with surface water, patents to lands acquired from the United States did not convey any interest to underground waters on those lands. Rather, “the water involved was reserved ... to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter....” *Id.* ¶ 47, 55 N.M. at 31.

Based on *Red River* and subsequent cases construing New Mexico law, it is clear that even if a landowner claims an ownership interest in a stream bed, that ownership is subject to a preexisting servitude (a superior right) held by the public to beneficially use the water flowing in the stream. The landowner has only the same interest in and right to use the water as the general

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<sup>3</sup> A land patent is the conveyance of a tract of land from the United States government to a private party. Such a patent is generally recognized as “the highest evidence of title....” *Bustamante v. Sena*, 1978-NMSC-067, ¶ 8, 92 N.M. 72, 73 (citations omitted).

public. Since fishing is recognized as a public beneficial use, the landowner, even if he owns the bed of the stream, cannot prevent others from fishing in the stream in accordance with state law.<sup>4</sup>

New Mexico is not alone in holding that determination of the ownership of the bed of a stream is not material to deciding the question of whether the public waters may be used for fishing or other recreational activities. For example, in *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984), the Montana Supreme Court held that “under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.” *Id.* at 171.<sup>5</sup> Similarly, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming and South Dakota have recognized that the public ownership and use of water is independent of the bed ownership. *See Parks v. Cooper*, 676 N.W. 2d 823, 838 (S.D. 2004) (describing states (including New Mexico) where the public trust doctrine applies to water independent of ownership of the underlying land).

While it may be well established that all the waters in a stream or watercourse are public and subject to the beneficial use of the public, the scope of the public’s easement to use public waters on private land is less clear. An “easement,” as used here, refers to the public’s lawful use of water in a stream that runs across private land and any incidental use of private property, such as the stream bed, that is necessary to use the water.<sup>6</sup>

Factually, the only difference between *Red River* and the question presented here is the depth of the water. *Red River* involved a lake where the water was deep enough to float a boat and there was no need for a person fishing in the lake to touch the lake bed. In contrast, the water in a stream may be shallow, making it likely that a person fishing in the stream would walk in the

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<sup>4</sup> As the Supreme Court observed in *Red River*, “the right of the public ... to participate in fishing and other recreational activities” is subject to proper authorization by the New Mexico Game Commission. 1945-NMSC-034, ¶ 4. State laws and regulations requiring a license and otherwise governing fishing apply to streams and lakes on private property to the same extent as they apply to those on public lands.

<sup>5</sup> Montana’s Constitution has a provision similar to N.M. Const. art. XVI, § 2, which states that “[a]ll surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” *Curran*, 682 P.2d at 170.

<sup>6</sup> In general, an easement is a privilege which one person has a right to enjoy over the land of another. It gives rise to two distinct property interests: a “dominant estate” that has the right to the use of the land of another, and a “servient estate” that permits the exercise of that use. Because there are two parties’ interests involved, “the rights of the easement owner over the rights of the landowner is not absolute, irrelative and uncontrolled but are so limited each by the other that there may be a due and reasonable enjoyment of both.” 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 1 (2007). Use of the easement includes uses that are incidental or necessary to the reasonable and proper enjoyment of the easement. *See id.* § 72.

stream rather than float on it. *Red River* does not suggest that a person's right to use public waters that flow on private land for fishing and other recreational purposes depends on whether the waters are deep enough to float a boat. See *Red River*, 1945-NMSC-034, ¶ 41 (stating that if water flowing in the Canadian and Conchas rivers was public water prior to the construction of the dam, it was no less so after the construction and when a large volume of water from the two rivers was artificially impounded).<sup>7</sup> The question then becomes whether walking or wading in a stream that runs across private property is permissible as a necessary incident to the public's right to use public water for fishing.

The Supreme Court of Utah discussed and decided this question in *Conaster v. Johnson*, 194 P.3d 897 (Utah 2008). In that case, the plaintiffs floated down the Weber River in a rubber raft and crossed parcels of private property belonging to the defendants. During the course of their float trip, the plaintiffs touched the river bed in ways that were incidental to floating in the raft, such as the raft and the raft's paddles occasionally touching the shallow parts of the river bottom, and also "intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing that the [defendants] had strung across the river." 194 P.3d at 898.

The lower court, relying on a Wyoming Supreme Court decision, *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), held that the scope of the public's easement was limited "to activities that could be performed 'upon the water' - chiefly floating - and that the right to touch the river's bed was incidental only to the right of floatation." *Conaster*, 194 P.3d at 898-899. In reversing the district court, the Utah Supreme Court distinguished *Day*:

The interpretative difference turns on a single significant word. Where *Day* limits the easement's scope to activities that can be performed "upon" the water, this court expands the scope to recreational activities that "utilize" the water. Thus the rights of hunting, fishing, and participating in any lawful activity are coequal with the right of floating and are not modified or limited by floating as they are in *Day*.

*Id.* at 901. The Utah Supreme Court therefore held that the scope of the public's easement in state waters allowed the public to (1) "float, hunt, fish and participate in all lawful activities that utilize the water" and (2) "touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as they do so reasonably and cause not unnecessary injury to the landowner." *Id.* at 898 (emphasis added).

As discussed above, the New Mexico Supreme Court in *Red River* interpreted the state constitution to confer upon the public the right to fish and engage in other recreational activities in unappropriated waters, including those located on private property. 1945-NMSC-034, ¶ 59, 51 N.M. at 228. As in Utah, the scope of the public's easement to use public waters in New Mexico

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<sup>7</sup> The majority opinion in *Red River* did not address whether a person had the right to wade in a stream or lake on private property in order to fish. In response to the dissenters' objection that the majority holding "opens wide the opportunity for trespass upon the lands of all riparian owners," the majority responded "[o]f course, no such result follows from the majority holding, which deals specifically, and only, with these impounded waters, easily accessible without trespass upon riparian lands." 1945-NMSC-034, ¶ 56, 51 N.M. at 227-28.

has not been limited to recreational activities that can be performed “upon” the water. Consequently, we believe it likely that a New Mexico court reviewing the issue today would follow the Utah Supreme Court’s rationale in *Conaster v. Johnson* and conclude that the public’s right to use public waters for fishing includes touching the bed of a stream in ways that are reasonably incidental to that right, including wading, walking and standing in the stream.

As the Utah Supreme Court emphasized in *Conaster*, permissible touching or contact with a stream bed on private property is limited to what is “reasonably necessary” for the effective use of the water and “does not cause unnecessary injury to the landowner.” 194 P.3d at 902. For example, while a landowner cannot prevent others from exercising their right to fish in a stream or watercourse that crosses the landowner’s property, the public’s easement to fish in public waters is limited to those things which are necessary to enjoy the public use and does not include activities are unnecessary to exercising the right to use the water to fish or those that cause injury to the landowner, such as littering or defacing property.

New Mexico statutes and regulations that apply to fishing do not currently recognize or address the public’s right to fish in streams that cross private property.<sup>8</sup> The existing laws that mention fishing on private property generally are concerned with trespassing. For example, the statutory provisions that govern licensing state, in pertinent part:

A fishing license does not entitle the licensee to fish for or take fish within or upon a park or enclosure licensed or posted as provided by law *or within or upon a privately owned enclosure without consent of the owner....*

NMSA 1978, § 17-3-2(C) (2011) (emphasis added). *See also* NMSA 1978, § 30-14-1(A)(1) (1995) (defining criminal trespass as entering posted private property without consent unless the property owner has entered into an agreement with the Game and Fish Department granting access to the general public for hunting and fishing); Game and Fish Commission Rules, 19.31.10.18 NMAC (Sept. 1, 2012) (making it unlawful to hunt or fish on posted private property without written permission from the property owner, unless otherwise permitted by rule or statute).

The dissent in *Red River* cited a predecessor statute to Section 17-3-2(C) that similarly prohibited licensees from hunting or fishing “within or upon any privately owned enclosure without consent of the owner.” 1945-NMSC-034, ¶ 51, 51 N.M. 207, 226 (quoting 1941 Comp. § 43-301(9)). *See also id.* ¶¶ 152-152, 51 N.M. at 250-251 (Bickley, J., dissenting). According to the dissent, the statute made clear the legislature’s intent to bar hunting and fishing in public waters if they were enclosed.

In response to the dissent, the majority made three points. First, the majority stated that a private landowner could not convert waters owned by the public simply by enclosing them: “one does not make of a fenced-in area ‘a privately owned enclosure’ merely by extending the physical markings to cover property not one’s own.” *Id.* ¶ 52, 51 N.M. at 226. Second, the majority questioned whether a prohibition against the use of public waters within a privately owned

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<sup>8</sup> *See* note 1 *supra*.




enclosure granted the landowner an exclusive right or privilege to fish contrary to Article IV, Section 26 of the New Mexico Constitution.<sup>9</sup> *Id.* ¶¶ 53-54, 51 N.M. at 227. Finally, the majority rejected the dissenting justices' underlying contention that the majority holding created a right to trespass if necessary to reach public waters on private property. "Of course, no such result follows from the majority holding, which deals specifically, and only, with these impounded public waters, easily accessible without trespass upon riparian lands." *Id.* at ¶ 56, 51 N.M. 228

To summarize, the Supreme Court's decision in *Red River*, which has been the controlling law for nearly 70 years, leaves no doubt that the water in New Mexico streams belongs to the public and is subject to public's beneficial use for fishing and recreational activities. The public's right to enjoy the use of public waters is no different when those waters are located on or run through private property. The owner of property upon which a public stream is located "has no right of recreation or fishery distinct from the right of the general public," *Red River*, 1945-NMSC-034, ¶ 59, 51 N.M. at 228, and cannot exclude others from fishing in the stream.

The public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters. This includes walking, wading and standing in a stream in order to fish. Although, as *Red River* makes clear, a person may not trespass on private property in order to gain access to public waters, a person using public waters to fish, including incidental activities such as walking, wading or standing in a stream bed, is not trespassing.

  
GARY K. KING  
Attorney General

  
for STEPHEN R. FARRIS  
Assistant Attorney General

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<sup>9</sup> Article IV, Section 26 prohibits the legislature from granting "to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

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SENATE BILL 226

**52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

INTRODUCED BY

Richard C. Martinez

AN ACT

RELATING TO PUBLIC WATERS; AMENDING SECTION 17-4-7 NMSA 1978  
(BEING LAWS 1967, CHAPTER 6, SECTION 1, AS AMENDED); DEFINING  
THE SCOPE OF EASEMENT CREATED BY CONSTITUTIONAL PROVISIONS  
REGARDING OWNERSHIP OF PUBLIC WATERS, BENEFICIAL USE OF PUBLIC  
WATERS AND THE RIGHT TO ACQUIRE, OWN AND PROTECT PRIVATE  
PROPERTY; PROVIDING LIABILITY PROTECTION FOR LANDOWNERS FROM  
RECREATIONAL USERS OF PUBLIC WATERS AND TO PROVIDE FOR LAWFUL  
RECREATIONAL ACCESS TO PUBLIC WATERS; PROVIDING FOR INJUNCTIVE  
RELIEF.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** Section 17-4-7 NMSA 1978 (being Laws 1967,  
Chapter 6, Section 1, as amended) is amended to read:

"17-4-7. LIABILITY OF LANDOWNER PERMITTING PERSONS TO  
HUNT, FISH OR USE LANDS FOR RECREATION--DUTY OF CARE--

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1       EXCEPTIONS--RECREATIONAL ACCESS TO PUBLIC WATER--INJUNCTIVE  
2       RELIEF.--

3               A. Any owner, lessee or person in control of lands  
4       has no duty of care to trespassers. Any owner, lessee or  
5       person in control of lands who, without charge or other  
6       consideration, other than a consideration paid to the landowner  
7       by the state, the federal government or any other governmental  
8       agency, grants permission to any person or group to use the  
9       owner's, lessee's or land controller's lands for the purpose of  
10      hunting, fishing, trapping, camping, hiking, sightseeing, the  
11      operation of aircraft or any other recreational use does not  
12      thereby:

13                       (1) extend any assurance that the premises are  
14      safe for such purpose;

15                       (2) assume any duty of care to keep such lands  
16      safe for entry or use; or

17                       (3) assume responsibility or liability for any  
18      injury or damage to or caused by such person or group [~~or~~

19                       ~~(4) assume any greater responsibility, duty of~~  
20      ~~care or liability to such person or group than if permission~~  
21      ~~had not been granted and the person or group were trespassers].~~

22               B. This section shall not limit the liability of  
23      any landowner, lessee or person in control of lands that may  
24      otherwise exist by law for injuries to any person granted  
25      permission to hunt, fish, trap, camp, hike, sightsee, operate

underscored material = new  
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1 aircraft or use the land for recreation in exchange for a  
2 consideration, other than a consideration paid to the landowner  
3 by the state, the federal government or any other governmental  
4 agency.

5 C. Notwithstanding the provisions of Sections  
6 72-4-15 and 72-4-17 NMSA 1978 or any other provision of law,  
7 the right of the public to use public water on private property  
8 for hunting, fishing, trapping, camping, hiking, sightseeing,  
9 the operation of aircraft or any other recreational use shall  
10 be governed by this section. No person shall walk or wade onto  
11 private property by use of public water on private property or  
12 access public water via private property unless the private  
13 property owner, lessee or person in control of private lands  
14 has expressly consented in writing. Determination of whether a  
15 public water on private property is a navigable water shall be  
16 implemented solely by the state game commission. The state  
17 game commission is authorized to adopt rules, regulations and  
18 procedures to implement the provisions of this section. Any  
19 person may bring the issue of whether a public water on private  
20 property is a navigable water before the state game commission  
21 for determination prior to using public water on private  
22 property for recreational activity. With or without  
23 application by the public or a private property owner or lessee  
24 or person in control of private lands so affected, the state  
25 game commission may in its own right make a determination of

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1 whether a public water on private property is a navigable water  
2 and such determination may be challenged by interested parties.  
3 An administrative appeal to the state game commission of any  
4 final determination by the commission is available to any  
5 interested person. Absent such a determination by the state  
6 game commission, it shall be presumed that a public water on  
7 private property was and is a non-navigable water.

8 D. The owner of private property may obtain  
9 injunctive relief against a person who, without permission,  
10 enters, remains or persists in an effort to enter or remain on  
11 the owner's property for recreational use of public water other  
12 than use pursuant to this section. An injunction under this  
13 section is in addition to any remedy for trespass. The court  
14 may award attorney fees and costs in an action under this  
15 section if the court finds that the losing party's arguments  
16 lack a reasonable basis in law or fact.

17 E. Nothing in this section affects the right of the  
18 public to use public water for public recreational access,  
19 including the touching of the bed beneath the public water if  
20 the bed beneath the public water is public property or the bed  
21 beneath the public water is private property to which access is  
22 not restricted. A person using a public water for public  
23 recreational access is subject to any other restriction  
24 lawfully placed on the use of the public water by a  
25 governmental entity with authority to restrict the use of the

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1 public water. Nothing in this section limits or enlarges any  
2 right granted by express easement.

3 F. When leaving a public access area, a person  
4 shall remove any refuse or tangible personal property the  
5 person brought into the public access area.

6 G. As used in this section:

7 (1) "department" means the department of game  
8 and fish;

9 (2) "navigable water" means a water course  
10 that at the time of statehood was navigable in fact and that is  
11 used, or is susceptible of being used, in its ordinary  
12 condition, as a highway for commerce, over which trade and  
13 travel are or may be conducted in the customary modes of trade  
14 and travel on water;

15 (3) "private property to which access is  
16 restricted" means privately owned real property that is:

17 (a) cultivated land;

18 (b) properly posted pursuant to Sections  
19 17-4-6 and 17-4-26 NMSA 1978; and

20 (c) fenced or enclosed as a posted area  
21 pursuant to Section 17-4-6 or 17-4-26 NMSA 1978; or from which  
22 the owner or a person authorized to act on the owner's behalf  
23 has requested a person to leave;

24 (4) "public access area" means the limited  
25 part of privately owned property that is open to public

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1 recreational access by public easement contracted for by the  
2 department and private landowner; and

3 (5) "public recreational access" means the  
4 right to engage in recreational access pursuant to this  
5 section."

6 SECTION 2. SEVERABILITY.--If any part or application of  
7 this act is held invalid, the remainder or its application to  
8 other situations or persons shall not be affected.

9 SECTION 3. EFFECTIVE DATE.--The effective date of the  
10 provisions of this act is July 1, 2015.

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GOVERNOR  
Susana Martinez



DIRECTOR AND SECRETARY  
TO THE COMMISSION  
Michael B. Sloane

DEPUTY DIRECTOR  
Vacant

STATE OF NEW MEXICO  
DEPARTMENT OF GAME & FISH

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STATE GAME COMMISSION

PAUL M. KIENZLE III  
Chairman  
Albuquerque

BILL MONTOYA  
Vice-Chairman  
Alto

CRAIG PETERSON  
Farmington

RALPH RAMOS  
Las Cruces

BOB RICKLEFS  
Cimarron

THOMAS "DICK" SALOPEK  
Las Cruces  
VACANT

August 28, 2018

**VIA ELECTRONIC MAIL ONLY**

New Mexico State Game Commission

**Re: Application No. 1 for Certification of Non-Navigable Public Water Segment**

Dear Chairman Kienzle and Members of the Commission:

The Department of Game and Fish received this application for certification of non-navigable public water on behalf of Chama Troutstalkers, LLC on July 24, 2018. This application is for property that they own where the Chama River and the Rio Chamita meet and traverses through their property in Rio Arriba County.

Submitted in their application is the name, address, telephone number, name of property and the name of the contact person authorized to grant written permission to access the property. Recorded property deeds for the property are also included as well as the legal description of the property and a survey from November 10, 2011 showing the property boundaries and the course that the rivers take through the property. They also submitted the original patents from the US government to show that there was not a reserved interest or title to the streambed of this property.

They have submitted proof by an affidavit that a notice of intent to seek this certification was published for three consecutive weeks in The Taos News newspaper. That paper is from the area where the property is owned and is a paper of general circulation in the county.

This application contained a legal brief written by an attorney that shows by substantial evidence that the Chama River and the Rio Chamita at the time of statehood was non-navigable. The attorney discusses the history of the Chama River and provided historical evidence in the form of reports of the Governor of New Mexico to the Secretary of the Interior from 1902 and 1905. Other historical evidence included information about surface water supply and hydrology of the river in 1911 and 1912, notes of the Chama River from the fall of 1874, as well as other sources. The evidence provided indicates that the Chama River was never used in its ordinary and natural condition as a highway for commerce and was non-navigable since statehood.



Based on the above mentioned evidence and the other documents provided in the application, it is determined that the application meets the requirements set forth in 19.31.22.8 NMAC. It is recommended that the State Game Commission approve the section listed in this application being designated as "non-navigable public water" pursuant to NMSA 1978 § 17-4-6 and 19.31.22 NMAC.

Sincerely,  


Michael B. Sloane  
Director  
New Mexico Department of Game and Fish

Enclosure

CC:  
Marylou Poli, NM Attorney General's Office

GOVERNOR  
Susana Martinez



DIRECTOR AND SECRETARY  
TO THE COMMISSION  
Michael B. Sloane  
DEPUTY DIRECTOR  
Vacant

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STATE GAME COMMISSION

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Las Cruces  
BOB RICKLEFS  
Cimarron  
THOMAS "DICK" SALOPEK  
Las Cruces  
VACANT

August 28, 2018

**VIA ELECTRONIC MAIL ONLY**

New Mexico State Game Commission

**Re: Application No. 2 for Certification of Non-Navigable Public Water Segment**

Dear Chairman Kienzle and Members of the Commission:

The Department of Game and Fish received this application for certification of non-navigable public water on behalf of The Kenneth A. Hersh Qualified Residence Trust and The Julie K. Hersh Qualified Residence Trust on July 24, 2018. This application is for property that they own where the Pecos River traverses through their property in San Miguel County.

Submitted in their application is the name, address, telephone number, name of property and the name of the contact person authorized to grant written permission to access the property. Recorded property deeds for the property are also included as well as the legal description of the property and a survey from June of 2018 showing the property boundaries and the course that the river takes through the property. They also submitted the original patents from the US government to show that there was not a reserved interest or title to the streambed of this property.

They have submitted proof by an affidavit that a notice of intent to seek this certification was published for three consecutive weeks in the Las Vegas Optic newspaper. That paper is from the area where the property is owned and is a paper of general circulation in the county.

This application contained a legal brief written by an attorney that shows by substantial evidence that the Pecos River at the time of statehood was non-navigable. The attorney discusses the history of the Upper Pecos River and provided historical evidence in the form of reports of the Governor of New Mexico to the Secretary of the Interior from 1902 and 1905. Other historical evidence included information about surface water supply of the river between 1911 and 1912 and a profile of the river from 1915 among other evidence. The evidence provided indicates that the Upper Pecos River was never used in its ordinary and natural condition as a highway for commerce and was non-navigable since statehood.

Based on the above mentioned evidence and the other documents provided in the application, it is determined that the application meets the requirements set forth in 19.31.22.8 NMAC. It is recommended that the State Game Commission approve the section listed in this application being designated as "non-navigable public water" pursuant to NMSA 1978 § 17-4-6 and 19.31.22 NMAC.

Sincerely,



Michael B. Sloane  
Director  
New Mexico Department of Game and Fish

Enclosure

CC:  
Marylou Poli, NM Attorney General's Office

GOVERNOR  
Susana Martinez



DIRECTOR AND SECRETARY  
TO THE COMMISSION  
Michael B. Sloane

DEPUTY DIRECTOR  
Vacant

STATE OF NEW MEXICO  
DEPARTMENT OF GAME & FISH

One Wildlife Way, Santa Fe, NM 87507  
Post Office Box 25112, Santa Fe, NM 87504  
Tel: (505) 476-8000 | Fax: (505) 476-8123  
For information call: (888) 248-6866

[www.wildlife.state.nm.us](http://www.wildlife.state.nm.us)

STATE GAME COMMISSION

PAUL M. KIENZLE III  
Chairman  
Albuquerque

BILL MONTOYA  
Vice-Chairman  
Alto

CRAIG PETERSON  
Farmington

RALPH RAMOS  
Las Cruces

BOB RICKLEFS  
Cimarron

THOMAS "DICK" SALOPEK  
Las Cruces

VACANT

---

August 28, 2018

VIA ELECTRONIC MAIL ONLY

New Mexico State Game Commission

**Re: Application No. 3 for Certification of Non-Navigable Public Water Segment**

Dear Chairman Kienzle and Members of the Commission:

The Department of Game and Fish received this application for certification of non-navigable public water on behalf of Z & T Cattle Company, LLC on July 24, 2018. This application is for property that they own where the Mimbres River traverses through their property in Grant County.

Submitted in their application is the name, address, telephone number, name of property and the name of the contact person authorized to grant written permission to access the property. Recorded property deeds for the property are also included as well as the legal description of the property and a map showing the property boundaries and the course that the river takes through the property. They also submitted the original patents from the US government to show that there was not a reserved interest or title to the streambed of this property.

They have submitted proof by an affidavit that a notice of intent to seek this certification was published for three consecutive weeks in the Silver City Daily Press and Independent newspaper. That paper is from the area where the property is owned and is a paper of general circulation in the county.

This application contained a legal brief written by an attorney that shows by substantial evidence that the Mimbres River at the time of statehood was non-navigable. The attorney discusses the history of the Mimbres River and provided historical evidence in the form of reports of the Governor of New Mexico to the Secretary of the Interior from 1902 and 1905. Other historical evidence included information about surface water supply and hydrology of the river in 1911 and 1912, as well as other sources. The evidence provided indicates that the Mimbres River was never used in its ordinary and natural condition as a highway for commerce and was non-navigable since statehood.

Based on the above mentioned evidence and the other documents provided in the application, it is determined that the application meets the requirements set forth in 19.31.22.8 NMAC. It is recommended that the State Game Commission approve the section listed in this application being designated as "non-navigable public water" pursuant to NMSA 1978 § 17-4-6 and 19.31.22 NMAC.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael B. Sloane", with a long horizontal flourish extending to the right.

Michael B. Sloane  
Director  
New Mexico Department of Game and Fish

Enclosure

CC:  
Marylou Poli, NM Attorney General's Office

GOVERNOR  
Susana Martinez



DIRECTOR AND SECRETARY  
TO THE COMMISSION  
Michael B. Sloane  
DEPUTY DIRECTOR  
Vacant

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Farmington

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Las Cruces

BOB RICKLEFS  
Cimarron

THOMAS "DICK" SALOPEK  
Las Cruces

VACANT

---

August 28, 2018

**VIA ELECTRONIC MAIL ONLY**

New Mexico State Game Commission

**Re: Application No. 4 for Certification of Non-Navigable Public Water Segment**

Dear Chairman Kienzle and Members of the Commission:

The Department of Game and Fish received this application for certification of non-navigable public water on behalf of Z & T Cattle Company, LLC on July 24, 2018. This application is for property that they own where the Alamosa River traverses through their property in Socorro County.

Submitted in their application is the name, address, telephone number, name of property and the name of the contact person authorized to grant written permission to access the property. Recorded property deeds for the property are also included as well as the legal description of the property and a map showing the property boundaries and the course that the rivers take through the property. They also submitted the original patents from the US government to show that there was not a reserved interest or title to the streambed of this property.

They have submitted proof by an affidavit that a notice of intent to seek this certification was published for three consecutive weeks in the El Defensor Chieftain newspaper. That paper is from the area where the property is owned and is a paper of general circulation in the county.

This application contained a legal brief written by an attorney that shows by substantial evidence that the Alamosa River at the time of statehood was non-navigable. The attorney discusses the history of the Alamosa River and provided historical evidence in the form of reports of the Governor of New Mexico to the Secretary of the Interior from 1902 and 1905. Other historical evidence included information about the river's characteristics and flow rates as well as the size and use of other larger rivers in New Mexico. The evidence provided indicates that the Alamosa River was never used in its ordinary and natural condition as a highway for commerce and was non-navigable since statehood.

Page 2

Based on the above mentioned evidence and the other documents provided in the application, it is determined that the application meets the requirements set forth in 19.31.22.8 NMAC. It is recommended that the State Game Commission approve the section listed in this application being designated as "non-navigable public water" pursuant to NMSA 1978 § 17-4-6 and 19.31.22 NMAC.

Sincerely,



Michael B. Sloane  
Director  
New Mexico Department of Game and Fish

Enclosure

CC:  
Marylou Poli, NM Attorney General's Office

GOVERNOR  
Susana Martinez



DIRECTOR AND SECRETARY  
TO THE COMMISSION  
Michael B. Sloane  
DEPUTY DIRECTOR  
Vacant

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RALPH RAMOS  
Las Cruces  
BOB RICKLEFS  
Cimarron  
THOMAS "DICK" SALOPEK  
Las Cruces  
VACANT

---

August 28, 2018

**VIA ELECTRONIC MAIL ONLY**

New Mexico State Game Commission

**Re: Application No. 5 for Certification of Non-Navigable Public Water Segment**

Dear Chairman Kienzle and Members of the Commission:

The Department of Game and Fish received this application for certification of non-navigable public water on behalf of Z & T Cattle Company, LLC on July 24, 2018. This application is for property that they own where the Penasco River traverses through their property in Chaves County.

Submitted in their application is the name, address, telephone number, name of property and the name of the contact person authorized to grant written permission to access the property. Recorded property deeds for the property are also included as well as the legal description of the property and a map showing the property boundaries and the course that the rivers take through the property. They also submitted the original patents from the US government to show that there was not a reserved interest or title to the streambed of this property.

They have submitted proof by an affidavit that a notice of intent to seek this certification was published for three consecutive weeks in the Roswell Daily Record newspaper. That paper is from the area where the property is owned and is a paper of general circulation in the county.

This application contained a legal brief written by an attorney that shows by substantial evidence that the Penasco River at the time of statehood was non-navigable. The attorney discusses the history of the Penasco River and provided historical evidence in the form of reports of the Governor of New Mexico to the Secretary of the Interior from 1902 and 1905. Other historical evidence included information about surface water supply and irrigation from the river in early 18th and 19th Centuries, as well as other sources. The evidence provided indicates that the Penasco River was never used in its ordinary and natural condition as a highway for commerce and was non-navigable since statehood.

Based on the above mentioned evidence and the other documents provided in the application, it is determined that the application meets the requirements set forth in 19.31.22.8 NMAC. It is



recommended that the State Game Commission approve the section listed in this application being designated as "non-navigable public water" pursuant to NMSA 1978 § 17-4-6 and 19.31.22 NMAC.

Sincerely,



Michael B. Sloane  
Director  
New Mexico Department of Game and Fish

Enclosure

CC:  
Marylou Poli, NM Attorney General's Office

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

ATTORNEY-CLIENT PRIVILEGED, CONFIDENTIAL MEMORANDUM

To: New Mexico Game Commission  
From: John Grubestic, Assistant Attorney General  
Date: September 17, 2019  
Re: Access to Public Waters on Private Property

Director Sloane requested our advice regarding whether 19.31.22 NMAC comports with State law and the New Mexico State Constitution. The rule was adopted by the State Game Commission in January 2018 and attempted to implement applicable sections of 17-4-6 NMSA (1978). Under the rule procedures are established which the State Game Commission can certify privately-owned stream segments as non-navigable and thereby subject to criminal trespass prohibitions for individuals hunting, fishing, and other outdoor recreation activities.

As you know, Senate Bill ("SB") 226 was enacted in 2015 and amended state law governing hunting and fishing on private property. In 2016 this office released an advisory letter to Representative Luciano "Lucky" Varela who requested this office's advice regarding the constitutionality of Senate Bill 226. See S.B. 226, 52<sup>nd</sup> Leg., 1st Sess. (2015) ("SB 226"), codified at NMSA 1978, § 17-4-6 (2015). SB 226 added a prohibition against accessing private property through public water or accessing public water through private property without the property owner's consent. *Id.* § 17-4-6(C). Based on the applicable constitutional and statutory provisions, case law and previous Attorney General opinions, we concluded that SB 226 is constitutional, provided it is interpreted to allow the use of streams and other public water that are accessible without trespassing on private property for fishing and other recreational activities.

Since SB 226 purports to regulate the use of public waters, the amendment implicates Article XVI, Section 2 of the New Mexico Constitution, which states:

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.

See also NMSA 1978, § 72-1-1 (1941) ("[a]ll the natural waters flowing in streams or watercourses, whether such be perennial or torrential..., belong to the public and are subject to appropriation for beneficial use").

In a 2014 opinion, the Office of Attorney General addressed the constitutional right to use public streams. See N.M. Att'y Gen. Op. No. 14-04 (2014) ("AG Op. No. 14-04"). The opinion's focus was on the right to use public streams flowing through private property for fishing and other

recreational purposes. The opinion reviewed the history of Article XVI, Section 2 and its interpretation by New Mexico courts, particularly the New Mexico Supreme Court's interpretation in the seminal case of *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, 182 p.2d 421.

*Red River* involved a landowner who owned land bordering Conchas Lake and attempted to prevent members of the public from fishing in the lake from boats. The lake was accessible to the public without trespassing on private property. See 1945-NMSC-034, ¶ 56, 182 P.2d at 433. After an exhaustive analysis of the history and laws relating to public waters in New Mexico, the Supreme Court held that water flowing in streams and collected in the lake were public waters and subject to use by the public for fishing and recreation. According to the Court, the landowner's ownership of land surrounding the lake or beds underlying the streams flowing into the lake did not give the landowner any special interest in the water in the lake or streams. See 1945-NMSC-034, ¶ 59, 235, 182 P.2d at 434, 463. As the Court stated, "the waters in question ... are public waters; and ... [the landowner] has no right of recreation or fishery distinct from the right of the general public." *Id.* ¶ 59, 182 P.2d at 434.

Based on the analysis and holding in *Red River*, the 2014 Attorney General opinion concluded that the water flowing in New Mexico streams belongs to the public and even when a stream runs through private property, the property owner may not exclude the public from using water in the stream for fishing and other recreational activities. The opinion explained that "[t]he public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters," such as "walking, wading and standing in a stream in order to fish." AG Op. No. 14-04, p. 7. Permissible incidental activities do not include trespassing on private property to gain access to public waters, *id.*, and the use of public streams running through private property is subject to state regulation to the same extent as the use of public streams on public lands, *id.* at 4, note 4.

Under the rules of statutory construction, a statute must "be construed, if possible, to ... avoid an unconstitutional, absurd or unachievable result." NMSA 1978, § 12-2A-18(A)(3) (1997). See also *Benavides v. Eastern New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265, 1275 (court will adopt the construction of a statute that supports its constitutionality). Applying this principle to SB 226 and 19.31.22 NMAC, it must be construed consistently with Article XVI, Section 2's declaration that "the unappropriated water of every natural stream ... belong[s] to the public ...." As discussed above, the New Mexico Supreme Court has construed Article XVI, Section 2 to give members of the public the right to use public water in streams and lakes for fishing and other recreational activities, even when those streams and lakes are on private property.

While Article XVI, Section 2 prohibits the legislature from limiting the public's right to use public water, that use is otherwise subject to state regulation, including laws against trespassing on private property. We believe that 19.31.22 NMAC appropriately regulates the use of the state's public waters, **provided it is interpreted and applied only to prohibit a person, absent the required consent, from gaining access to private property from a stream or other public water and from gaining access to a stream or other public water from private property.** (emphasis added)

The constitution does not allow an interpretation of 19.31.22 NMAC that would exclude the public from using public water on or running through private property for recreational uses if the public water is accessible without trespassing on private property. In particular, the term "non-navigable" in SB 226 cannot be applied to limit the public's access to public waters. Under Article XVI, Section 2, the water of "every natural stream" in New Mexico belongs to the public, whether it is navigable or non-navigable. *See Red River*, 1945-NMSC-034, 35-37, 182 P.2d at 430-31 (explaining that because Art. XVI, § 2 expressly provides for public ownership of the "water of every natural stream," the "test of navigability" used in other states to determine the public character of water does not apply in New Mexico). Subsequently, the objective listed in 19.31.22.6 NMAC, To establish rules, requirements, definitions and regulations implementing the process for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner, is not in constitutional compliance and cannot be enforced. Additionally, any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable.

**MINUTES - NEW MEXICO STATE GAME COMMISSION**  
**Friday, October 25, 2019**  
**Civic Center Exhibition Hall - Farmington, NM 87401**

**AGENDA ITEM NO. 1: Meeting Called to Order**

Called to order by Chairwoman Prukop at 9:03 AM.

**AGENDA ITEM NO. 2: Roll Call**

Present: Chairwoman Prukop, Vice-chairwoman Salazar-Henry, Commissioner Cramer, Commissioner Lopez, Commissioner Soules, Commissioner Vesbach.

**AGENDA ITEM NO. 3: Approval of Agenda**

**Motion by:** Vice-chairwoman Salazar-Henry to approve the agenda as presented.

**Seconded by:** Commissioner Cramer.

**Approved:** Unanimously.

**AGENDA ITEM NO. 4: Introduction of Guests**

**AGENDA ITEM NO. 5: Consent Agenda Items**

**Motion by:** Commissioner Vesbach to accept the minutes as presented.

**Seconded by:** Commissioner Soules.

**Approved:** Unanimously.

**AGENDA ITEM NO. 6: Workshop - Habitat Enhancement and Restoration Efforts – Presented by Stewart Liley**

Stewart Liley, Chief of the Wildlife Management Division, provided a presentation on the Department's habitat enhancement and restoration efforts.

There was a subsequent discussion on habitat enhancement and restoration efforts.

**NEW BUSINESS:**

**AGENDA ITEM NO. 7: General Public Comments**

Chairwoman Prukop asked for the Commission's consensus approval that they put the Landowner Certification of Non-navigable Water Rule on the November Commission meeting agenda. None of the Commissioners objected.

**AGENDA ITEM NO. 8: Presentation on the Recovering America's Wildlife Act- Presented by Matt Wunder**

Matt Wunder, Chief of the Ecological and Environmental Planning Division, presented an overview on the Recovering America's Wildlife Act of 2019 (H.R. 3742) as introduced into the House of Representatives on July 12, 2019. The proposed legislation would provide dedicated federal

funding to states, territories and tribes to monitor, manage and protect Species of Greatest Conservation Need and their habitats as described in the State Wildlife Action Plans.

There was a subsequent discussion on the Recovering America's Wildlife Act. The Department asked the Commission for a resolution supporting the Act.

**Motion by:** Commissioner Lopez: "Move to authorize the Chair of the Commission to sign a resolution in support of the Alliance for America's Fish and Wildlife Campaign to enact the Recovering America's Wildlife Act (H.R. 3742) which will dedicate \$1.3 billion annually to the Wildlife Conservation Restoration Program to diversify funding for and management of all wildlife."

**Seconded by:** Commissioner Cramer.

**Approved:** Unanimously.

**AGENDA ITEM NO. 9: Subsequent Discussion on the Fair Chase Rule - Presented by Stewart Liley**

Stewart Liley, Chief of the Wildlife Management Division, presented on the Fair Chase Rule development. The rule would prohibit the premature release of wildlife location data collected by the Department or its contractors.

There was a subsequent discussion on the development of the Fair Chase Rule.

**AGENDA ITEM NO. 10: Fiscal Year 2019 Depredation and Nuisance Abatement Report - Presented by Stewart Liley**

Stewart Liley, Chief of the Wildlife Management Division, presented on the number of wildlife complaints filed and resolved in accordance with 19.30.2 NMAC for Fiscal Year 2019.

This agenda item was required under Commission rule 19.30.2 NMAC to summarize the total number of depredation and wildlife nuisance complaints filed with, and resolved by, the Department for Fiscal Year 2019.

There was a subsequent discussion on the Depredation and Nuisance Abatement Report.

**AGENDA ITEM NO. 11: Update on the Mexican Gray Wolf program - Presented by Stewart Liley**

Stewart Liley, Chief of the Wildlife Management Division, provided an update on the Mexican Gray Wolf Recovery Program.

The Department's recommendations are as follows:

- Direct the Department to become a Cooperating Agency and sign the associated MOU.
- Authorize the Director to allow for the importation and release of pups for cross foster in New Mexico.
- Authorize the Director to allow for the importation of wolves into captive facilities in New Mexico for management purposes.

The Department asked the Commission for direction on involvement in the Mexican Gray Wolf Recovery Program in the United States. The Department also discussed the efforts and roles the Department has played in assisting the U.S. Fish and Wildlife Service in the recovery of Mexican wolves since reintroduction and the Department's future role.

There was a subsequent discussion on the Mexican Gray Wolf Recovery Program.

**Motion by:** Commissioner Soules: “Move to direct the Department to engage in the Mexican Gray Wolf Recovery Program including becoming a signatory to the Cooperating Agencies MOU and engaging in on the ground management activities. Further, move to authorize the Director, at his discretion, to approve the importation and release of pups in New Mexico for the purpose of cross fostering to achieve genetic recovery goals. Finally, move to authorize the Director, pursuant to 19.35.7 NMAC and at his discretion, to approve the importation of Mexican gray wolves to private captive facilities in New Mexico.”

**Seconded by:** Vice-chairwoman Salazar-Henry.

**Approved:** Unanimously.

#### **AGENDA ITEM NO. 12: Discussion on the Department’s Special Draw**

Stewart Liley, Chief of the Wildlife Management Division, presented on the Department’s Special Draw.

The Department sought direction from the Commission regarding the application of 17-3-16 NMSA 1978 to 2020 license draws.

There was a subsequent discussion on the Department’s Special Draw.

**Motion by:** Commissioner Lopez: “Move to direct the Department to allocate licenses such that residents receive a minimum of 84% of all draw licenses by hunt code, unless doing so is not possible due to a lack of resident applications. Further, move to no longer allow the application of 19.31.3(O) NMAC, Director’s authority to adjust licenses and permits.”

**Seconded by:** Commissioner Vesbach.

**Approved:** Unanimously.

#### **AGENDA ITEM NO. 13: General Public Comments**

#### **AGENDA ITEM NO. 14: Other Business**

Chairwoman Prukop said that the Commission would like to reinstate a policy, for all rule making procedures going forward, that if any member of the public wants their public comment email to be part of the official rule-making record, then it must be sent to the official rule-making email address. The current email addresses are as follows:

Trapping and Furbearer Rule:

[Dgf-furbearer-rules@state.nm.us](mailto:Dgf-furbearer-rules@state.nm.us)

Bear and Cougar Rule:

[DGF-Bear-Cougar-Rules@state.nm.us](mailto:DGF-Bear-Cougar-Rules@state.nm.us)

Chairwoman Prukop stated for clarification that for these rule makings, and for any future rule makings, in order for public comment emails to be recorded as part of the rule making record, they must be sent to the official Department rule-making email addresses.

### **AGENDA ITEM NO. 15: Closed Executive Session**

**Motion:** The State Game Commission voted to adjourn into Executive Session closed to the public; pursuant to 10-15-1(H)(2) NMSA 1978, to discuss limited personnel matters relating to complaints and discipline; pursuant to Section 10-15-1(H)(8) NMSA 1978, to discuss property acquisition; and pursuant to Section 10-15-1(H)(7) NMSA 1978, to discuss matters subject to attorney-client privilege relating to threatened or pending litigation.

**Moved by:** Commissioner Cramer.

**Seconded by:** Commissioner Vesbach.

**Roll Call Vote – Approved:** Unanimously; Chairwoman Prukop, Vice-chairwoman Salazar-Henry, Commissioner Cramer, Commissioner Lopez, Commissioner Soules, Commissioner Vesbach.

After returning from closed executive session, Chairwoman Prukop made a recommendation to the Commission that in addition to putting the Landowner Certification of Non-navigable Water Rule on the agenda for the November meeting, to consider directing the Department to also open the rule at that meeting. With no objection from Commissioners, Chairwoman Prukop so directed the Director, with the consensus of the State Game Commission, to add the Landowner Certification of Non-navigable Water Rule 19.31.2.22 on the November meeting agenda and that the rule be open at that time.

### **AGENDA ITEM NO. 16: Adjourn at 5:22 PM**

**Motion by:** Commissioner Lopez to adjourn.

**Seconded by:** Commissioner Cramer.

**Approved:** Unanimously.



**APPROVAL OF MEETING MINUTES  
NEW MEXICO STATE GAME COMMISSION**

**October 25, 2019  
Civic Center Exhibition Hall  
200 W. Arrington St.  
Farmington, NM 87401  
9:00 a.m.-5:00 p.m.**



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**Michael B. Sloane, Director**

11/21/19

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**Date**



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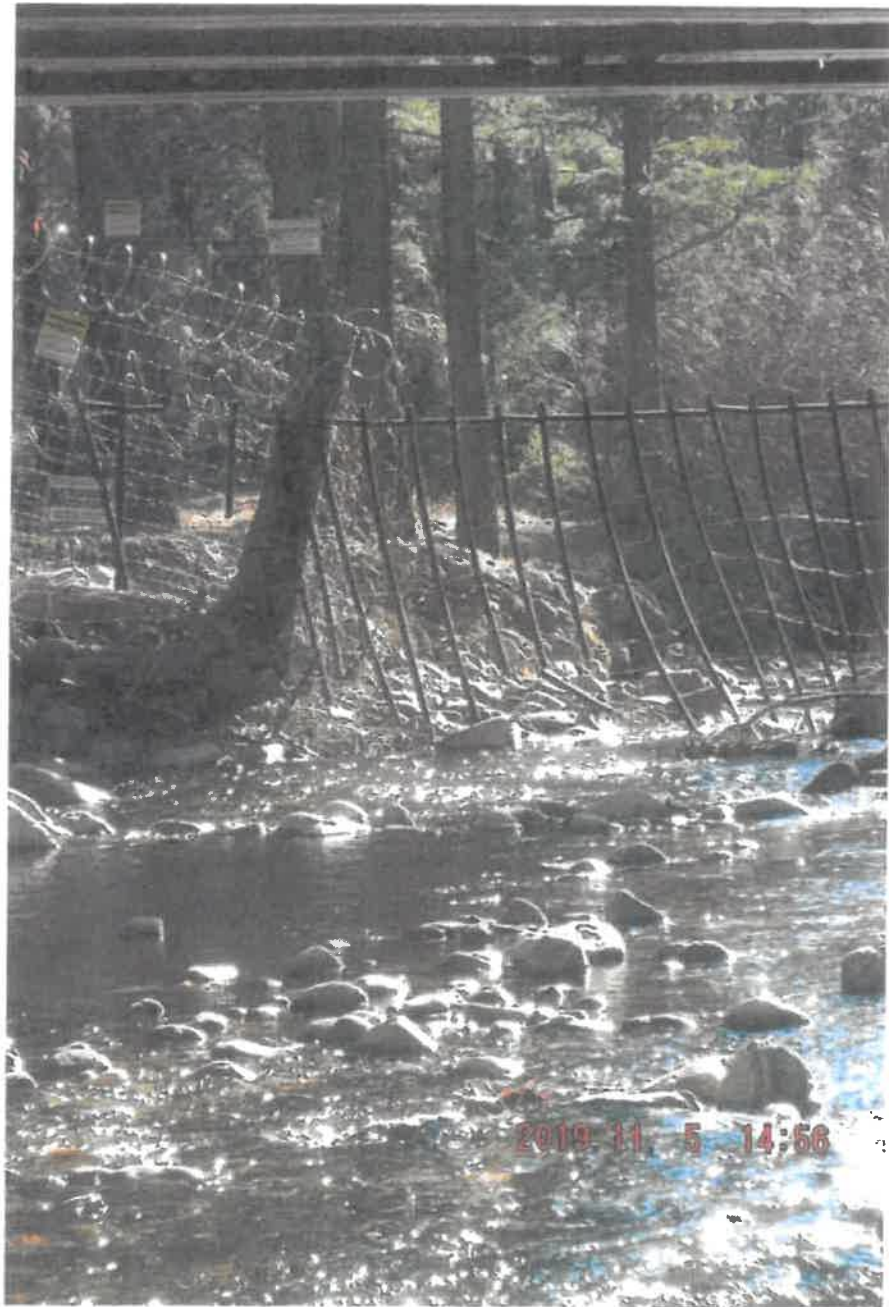
**Joanna Prukop, Chair  
New Mexico State Game Commission**

11/21/19

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**Date**

**MS/scd**





**WARNING: PRIVATE PROPERTY**  
**NO TRESPASSING**  
NO HUNTING, FISHING, TRAPPING,  
CAMPING, FIRES, SIGHTSEEING,  
WATERCRAFT OPERATION, OR ANY  
OTHER USE, RECREATIONAL OR  
NON-RECREATIONAL IS AUTHORIZED  
WITHOUT WRITTEN PERMISSION.

This notice of prohibited activities is in accordance with  
KRS 1976, §§ 17-6-6 (2015) & 20-14-6 (1979)  
STATE OF KENTUCKY, PROPERTY DAMAGE - P.O. BOX 66, THOMAS, KY 40381

**ADVERTENCIA: PROPIEDAD PRIVADA**  
**NO TRASPASAR**  
NO CAZAR, PESCAR, ATRAPAR,  
CAMPAMENTO, EXCURSIONISMO,  
TURISMO, NI PASEO EN BARCO  
NI NINGUNO OTRO USO ESTA  
PERMITIDO SIN PERMISO ESCRITO

Este Aviso Es De Conformidad Con  
KRS 1976, §§ 17-6-6 (2015) y 20-14-6 (1979)  
ESTADO DE KENTUCKY, DAÑOS A LA PROPIEDAD - P.O. BOX 66, THOMAS, KY 40381

**No Trespassing**  
Prohibited El Paso  
No persons engaged in hunting, fishing, trapping, camping, fires, sightseeing, the operation of boats, or any recreational activity shall enter or use any public property through non-designated public trails or across public water via private property without written consent from the landowner. Entry of persons is prohibited on the private lands, Subsection C, Section 20-14, KRS 1976 Hunting and Fishing on Private Property and 20-14-1 KRS 1976 Closed Tracts.

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT**

**MICHAEL SLOANE,**  
in his official capacity as Department of Game and Fish Director,

**Petitioner,**

Case assigned to Sanchez-Gagne, Maria S.

**v.**

**Case No.** D-101-CV-2020-00621

**NEW MEXICO STATE GAME COMMISSION**

**Respondent.**

**COMPLAINT FOR DECLARATORY JUDGMENT**

Petitioner Michael Sloane, in his capacity as Department of Game and Fish Director, hereby submits this request for declaratory judgment pursuant to NMSA 1978, § 44-6-1 to -15 (1975). As grounds for this pleading, Petitioner states as follows.

**JURISDICTION, VENUE, AND PARTIES**

1. Michael Sloane is the Department of Game and Fish Director (hereafter referred to as “the Director”). As Director, Mr. Sloane is obligated “to enforce and administer the laws and regulations relating to game and fish.” NMSA 1978, § 17-1-5 (1973).

2. The New Mexico State Game Commission (hereafter referred to as “the Commission”) is comprised of seven commissioners who are appointed by the Governor with the advice and consent of the Senate. NMSA 1978, § 17-1-2 (1991). The Commission is administratively attached to the Energy, Minerals and Natural Resources Department, which means that it exercises its functions independently and without oversight from any executive agency. NMSA 1978, § 9-5A-3(B) (1997); NMSA 1978, § 9-1-7(A) (1977). The Commission is

tasked with a number of responsibilities including, inter alia, the establishment of rules and regulations attendant to pertinent state statutory law. See NMSA 1978, § 17-1-14 (2015).

3. Jurisdiction and venue are proper in this Court pursuant to NMSA 1978, § 38-3-1(G) (1988) and NMSA 1978, § 44-6-2 (1975).

#### **PERTINENT FACTUAL BACKGROUND AND DISCUSSION**

##### **A. The Legislature passes § 17-4-6 and the Commission promulgates rules to implement that legal directive.**

4. NMSA 1978, Section 17-4-6 (2015) sets out restrictions to hunting and fishing on private property. The original version of the statute was codified in 1912 and subsequently amended in 1963 and 1965. See 1912 N.M. Laws, ch. 85, § 10; 1963 N.M. Laws, ch. 213, § 5; 1965 N.M. Laws, ch. 172, § 1. Those amendments made relatively minor changes to the provision that is currently codified as Section 17-4-6, such as modernizing language in the law and imposing more specific posting requirements when a public road enters or crosses private property. Id.

5. In 2015, the Legislature amended Section 17-4-6 to provide that “[n]o person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.” § 17-4-6(C). That amendment was signed into law by then Governor Susana Martinez.

6. Although the substantive access restrictions encompassed within the amendment—i.e., precluding the public from walking or wading onto private property through certain waterways—turned on the definition of “non-navigable public waters”, the Legislature did not define that phrase or otherwise provide a means for designating waterways as non-navigable. Those tasks were therefore left to the Commission.

7. In January 2018, the Commission promulgated regulations addressing both of these matters. First, the Commission defined the phrase non-navigable public water as “a watercourse or river which, at the time of statehood, was not navigable-in-fact.” 19.31.22.7(G) NMAC. The Commission, in turn, defined navigable-in-fact as a “watercourse or river” that was used “as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water.” Id. See also 19.31.22.7(F) NMAC (defining the term “navigable-in-fact”). Second, the Commission set out a regulatory scheme for determining whether a particular stream or river segment qualified as non-navigable. That process requires landowners to file an application designating river or watercourse segments passing through their property as a non-navigable public waterway. 19.31.22.8 NMAC. The Director reviews those applications, and he is then required to issue a recommendation on the application within 60 days. 19.31.22.9(B) NMAC. That decision must be accompanied with a written factual basis for the Director’s recommendation. Id. The Director’s decision is not controlling, and the Commission may approve or reject the recommendation. See generally NMAC 19.31.22.11 (describing the Commission’s process for reviewing applications seeking to certify a waterway segment as non-navigable).

8. If an application is approved, the subject river or stream segment is deemed a non-navigable public water. Id. That designation allows landowners to exclude members of the public from river segments passing through their property even when those waterways were accessed via public lands or waterways, § 17-4-6(C), and a person may be charged with trespass for wading or walking in waterways designated as non-navigable public waters. See NMSA 1978, § 30-14-1 (1995) (defining criminal trespass).

**B. There is no binding precedent regarding whether the Legislature may grant landowners a right to exclude the public from waterways flowing through private property.**

9. The question at issue in this matter is whether excluding members of the public from rivers and streams flowing through private property violates Article XVI, Section 2 of the New Mexico Constitution, which declares “the unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico ... to belong to the public.”

10. Although the New Mexico Supreme Court has ruled on a similar question addressing the public character of water pursuant to Article XVI, Section 2, and regarding the public’s right of access to public waters via public lands, it has not expressly addressed the specific matter raised in this Complaint. See State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 55, 182 P.2d 421 (stating that the Court’s opinion “deals specifically, and only, with [] impounded public waters, easily accessible without trespass upon riparian lands.”). Several non-binding Attorney General opinions have also opined on the question of whether a property owner could legally prohibit members of the public from fishing in streams running through that privately-owned land. However, those opinions have reached differing conclusions. See, N.M. Att’y Gen. Op. 18-2108 (1918) (concluding that “the owner of a non-navigable stream[] has the right to prevent or forbid fishing thereon by other persons.”), compared with N.M. Att’y Gen. Op. 14-04 (2014) (concluding that “[t]he owner of property upon which a public stream is located has no right of recreation or fishery district from the right of the general public, and cannot exclude others from fishing in the stream.”) and N.M. Att’y Gen. Advisory Letter to the Honorable Luciano “Lucky” Varela (Aug. 5, 2016) (concluding that “the constitution does not allow an interpretation of [Section 17-4-6] that would exclude the public from using public water on or

running through private property for recreational uses if the public water is accessible without trespassing on private property.”).

11. The lack of clear legal guidance regarding public access to streams and waterways flowing through private property has led to dysfunction in the implementation of § 17-4-6 and the corresponding regulation, 19.31.22 NMAC.

12. For example, on November 8, 2018, the Commission approved five applications designating five stream segments non-navigable pursuant to 19.31.22.8 NMAC.

13. Thereafter, on July 24, 2019, after additional meetings and discussion regarding the operative rule, the Commission implemented a 90-day moratorium in which the Director was precluded from considering any new applications seeking designation of river segments as non-navigable public waters. During the pendency of that moratorium, the Department was instructed to enforce trespass laws only on previously approved stream segments and by issuing only warnings.

14. On November 21, 2019, the Commission further directed the Director to reconsider the 19.31.22.8 NMAC and directing the Department to produce a proposal to either repeal or amend the Rule.

15. The Director has been without a sound basis to address new applications seeking designation of stream segments as non-navigable given the lack of clarity regarding the applicable law.

**C. Judicial resolution of the Commission’s rules and regulatory framework necessary in order to ensure that the rights at issue are clearly defined.**

16. As explained above, the Commission has promulgated rules affording landowners an opportunity to exclude the public from waterways passing through private property—even when access is initially effectuated through public land or waterways. See generally 19.31.22 NMAC.



17. Given the lack of clear legal guidance as to whether landowners may lawfully exclude members of the public from accessing waterways flowing through private property, the Department Director has been placed in the untenable position enforcing competing and undefined legal rights.

18. There is no controlling authority directly on point, and this Court's guidance is necessary to address the legal question at hand. This Court should act and interpret Section 17-4-6 to ensure that New Mexico citizens—both landowners and those who access New Mexico waterways for recreational purposes—are afforded the full measure of legal privileges to which they are entitled.

**PETITIONER'S REQUEST FOR RELIEF PURSUANT TO  
THE NEW MEXICO DECLARATORY JUDGMENT ACT**

19. Petitioner incorporates the preceding paragraphs as though they were fully stated herein.

20. An actual controversy exists thereby rendering declaratory relief proper pursuant to Rule 1-057 NMRA and the New Mexico Declaratory Judgment Act ("DJA"), NMSA 1978, §§ 44-6-1 to -15 (1975).

21. The DJA provides that "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." § 44-6-4. This authority is neither exclusive nor exhaustive and does not restrict this Court from exercising authority where "a judgment or decree will terminate the controversy or remove an uncertainty." § 44-6-6.

22. In all instances, the DJA is to be liberally construed in order "to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations". § 44-6-14. That

purpose and effect will be accomplished by the Court's resolution of the legal ambiguities addressed herein.

23. The DJA constitutes the sole means for Petitioner to resolve the legal question at issue in this matter thereby ensuring that the State is complying with its constitutional and statutory mandates.

24. Pursuant to the DJA, this Court should enter judgment and address the legal question of whether, and under what circumstances, a private landowner may exclude members of the public from fishing in public waterways that flow through that landowner's property.

**PRAYER FOR RELIEF**

Petitioner respectfully requests that this Court resolve the legal question at issue and issue an order addressing the legal question of whether, and under what circumstances, a private landowner may exclude members of the public from fishing in public waterways that flow through that landowner's property.

Respectfully submitted,



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Matthew L. Garcia,  
Jonathan J. Guss  
490 Old Santa Fe Trail, Suite 400  
Santa Fe, New Mexico 87501  
(505) 476-2210

**VERIFICATION**

STATE OF NEW MEXICO            )  
  ) ss.  
COUNTY OF SANTA FE            )

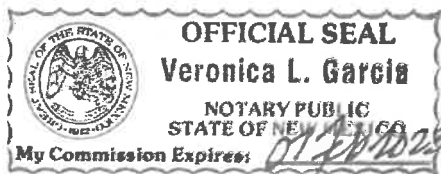
UNDERSIGNED STATES he is president of the Adobe Whitewater Club of New Mexico, that he has read the Petition for Writ of Mandamus and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

*Scott A. Carpenter*  
\_\_\_\_\_  
Scott Carpenter, President

Subscribed and sworn to before me this 11 day of March 2020, by Scott Carpenter.

*Veronica L. Garcia*  
\_\_\_\_\_  
Notary Public


My Commission Expires: 01 Feb 2023



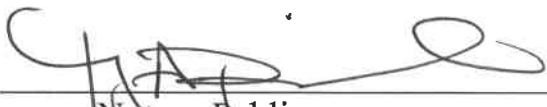
**VERIFICATION**

STATE OF NEW MEXICO            )  
  ) ss.  
COUNTY OF SANTA FE            )

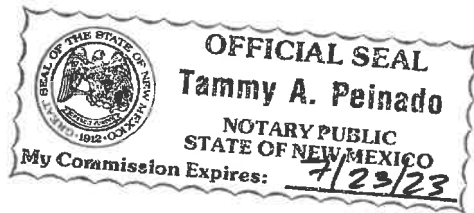
UNDERSIGNED STATES he is President of the New Mexico Wildlife Federation, that he has read the Petition for Writ of Mandamus and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
John Crenshaw, President

Subscribed and sworn to before me this 10<sup>th</sup> day of March 2020, by John Crenshaw.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: July 23, 2023



**VERIFICATION**

STATE OF NEW MEXICO             )

) ss.

COUNTY OF SANTA FE             )

UNDERSIGNED STATES he is Chairman of the New Mexico Chapter Backcountry Hunters & Anglers, that he has read the Petition for Writ of Mandamus and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
Joel Gay, Chairman

Subscribed and sworn to before me this 13 day of March 2020, by Joel Gay.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: April 30, 2023

