

# **Discussion of the Landowner Certification of Non-navigable Water Rule – 19.31.22 NMAC**



# Non-navigable Water Rule

## NM Constitution - Article XVI, Section 2

“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public. . .”

## Red River Case - 51 N.M. 207 (1945)

- Unappropriated waters of the state of New Mexico are considered public waters and can be accessed by the public for purposes of fishing and recreation



# Non-navigable Water Rule

Attorney General's Opinion 59-57

Is levy of recreation fee by municipality on public water compatible with statute authorizing NMGF to stock public waters?

Yes, municipality may charge small fee and does not change character, still considered "public water"

- Article XVI, Section 2 of NM Constitution
- Red River Case – 51 N.M. 207 (1945)



# Non-navigable Water Rule

Attorney General's Opinion 14-04



“May a private landowner exclude others from fishing in a public stream that flows across the landowner’s property?”

“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.”

- Article XVI, Section 2 of NM Constitution
- Red River Case – 51 N.M. 207 (1945)

# Non-navigable Water Rule

Senate Bill 226 (2015)

Amended 17-4-6 NMSA (1978)

Subsection C – “No person engaged in hunting, fishing, trapping, camping, hiking, . . . 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”



# Non-navigable Water Rule

## Attorney General Advisory Letter – August 2016

Constitutionality of SB 226 regarding prohibition against accessing private property through public property or accessing public water through private property without the property owner's consent.

“We believe that SB 226 appropriately regulates the use of the state's public waters, provided it is interpreted and applied only to prohibit a person, absent 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. “

“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.”

# Non-navigable Water Rule

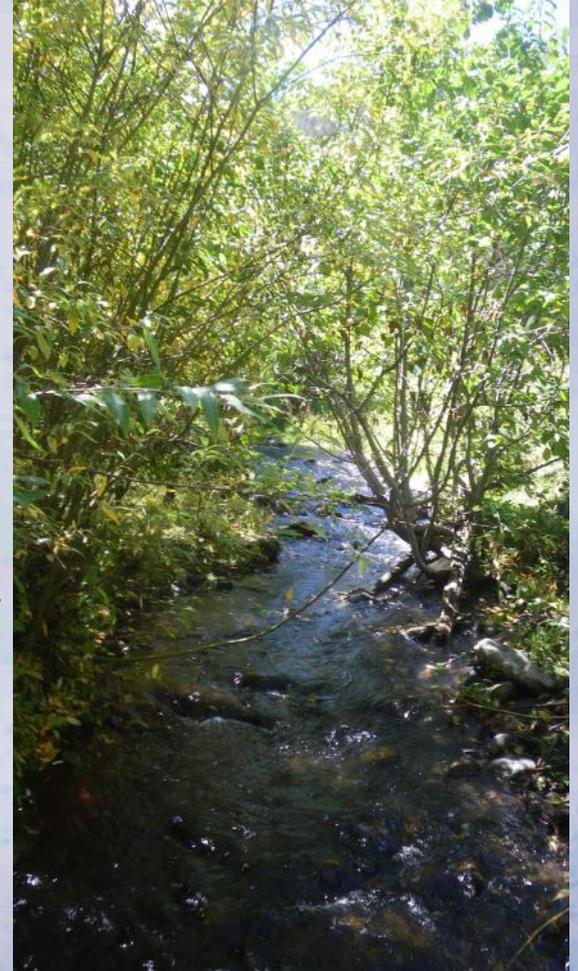
PPL Montana v. Montana – 565 U.S. 576 (2012)

State of MT claimed ownership to all riverbeds in MT whether navigable or non-navigable

State riverbed title is based upon navigability at time of statehood, under Equal Footing doctrine

- If navigable, state holds title
- If non-navigable, Federal government retained title, to be transferred or licensed if and as it chooses

“Under the accepted principles of federalism, the States retain the residual power to determine the scope of the public trust over waters within their border, while federal law determines riverbed title under the equal-footing doctrine.”



# Non-navigable Water Rule

19.31.22 NMAC – Adopted in January 2018

- Establishes application process by which a landowner can apply for Certification of a water segment within the property boundaries as a Non-navigable Public Water
- Upon receipt of a complete application, Director can recommend to accept or reject application
- Notice and hearing by Commission and, if approved, certification as a Non-navigable Public Water
- Signs issued by Department
- If Certified as Non-navigable Public Water and posted, property is subject to laws, rules, and regulations of trespass.



# Recent Activities

- Commission has certified five private properties to include segments of water as Non-navigable Public Waters and subject to trespass laws under 19.31.22 NMAC
- July 2019 - Department requested legal opinion from the Attorney General regarding whether 19.31.22 NMAC itself, certification of Non-navigable Public Waters by the Commission, and issuance of signs by the Department are lawful
- Expect response from Attorney General in August 2019

