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TRANSMITTAL VIA EMAIL AND U.S. POSTAL SERVICE

CERTIFICATE OF SERVICE

September 2, 2021

Mr. Jason Wiebenga
Fenn Farms Ranch
P.O. Box 760
Roswell, New Mexico 88203

Mr. Marco Gonzales
Modrall, Sperling, Roehl, Harris, & Sisk, P.A.
P.O. Box 9318
Santa Fe, New Mexico 87504-9318

SUBJECT: FINAL AGENCY DECISION AND ORDER, NO. 21-04

Dear Messrs. Wiebenga and Gonzales:

Enclosed please find the New Mexico State Game Commission's Final Agency Decision and Order related to your application for Non-Navigable Certification pursuant to §19.32.11 NMAC Landowner Certification of Non-Navigable Water.

I hereby certify that a copy of the Final Agency Decision and Order, No. 21-04, dated September 2, 2021 was mailed to:

Mr. Jason Wiebenga
Fenn Farms Ranch
P.O. Box 760
Roswell, New Mexico 88203

Mr. Marco Gonzales
Modrall, Sperling, Roehl, Harris, & Sisk, P.A.
P.O. Box 9318
Santa Fe, New Mexico 87504-9318

Should you have questions regarding the Final Agency Action and Decision, please contact Assistant Attorney General Valerie Joe at vjoe@nmag.gov.

Sincerely,



Sharon Salazar Hickey
Chair, New Mexico State Game Commission

SSH

Enc. a/s

Cc via email:

Michael Sloane, Director, NM Department of Game & Fish
Valerie Joe, Assistant Attorney General, NM Office of the Attorney General
Tania Maestas, Chief Deputy Attorney General, Office of the Attorney General
Matt Baca, Chief Counsel, NM Office of the Attorney General
Aaron Wolf, Cuddy & McCarthy
Marco Gonzales, Modrall Sperling
Jeremy Vesbach, Vice Chair, Placitas, NM
Jimmy Ray Bates, Sr., Albuquerque, NM
Gail Cramer, Mayhill, NM
Tirzio Lopez, Cebolla, NM
Roberta Salazar-Henry, Las Cruces, NM

**NEW MEXICO
STATE GAME COMMISSION**

**IN THE MATTER OF THE APPLICATION
FOR CERTIFICATION OF NON-NAVIGABLE
WATER SEGMENT REVIEWED BY THE
DIRECTOR'S RECOMMENDATION DATED
MAY 12, 2020**

No. 21-04

**Fenn Farms Ranch,
Applicant.**

FINAL AGENCY DECISION AND ORDER

THIS MATTER came before the New Mexico State Game Commission (“the Commission”) upon a mandate from the United States District Court for the District of New Mexico in the matter titled, Rancho del Oso Pardo, Inc.; River Bend Ranch, LLC; and River Bend Ranch, LLC d/b/a Canones Creek Ranch v. New Mexico Game Commission et. al., CIV 20-427 SCY/KK (D.N.M. March 9, 2021), wherein the U.S. District Court granted partial summary judgment against the Commission on the Plaintiffs Rancho del Oso Pardo, Inc., River Bend Ranch, LLC, and Chama III, LLC’s Petition for Writ of Mandamus. The District Court has directed the Commission to “hold a meeting, following the meeting notice and procedure requirements contained in the applicable regulations, and issue a final agency decision on Plaintiffs’ applications as [§] 19.31.22 NMAC requires” within 180 days of its Order.¹ The U.S. District Court ordered “the Commission to issue the final agency action as [§] 19.31.22 requires,” but does not require the Commission to approve Plaintiffs’ applications. Id. The U.S. District Court’s mandate explains that “[u]nder the regulations, the Commission can accept or reject the director’s recommendation or can ‘take such other final action as necessary to resolve the application. § 19.31.22.11(G) NMAC.’” Id. at ¶13.

In accordance with the mandate and § 19.31.22.9(C) NMAC, the application and the Director’s recommendation were posted on the Department of Game and Fish’s (“Department’s”) website on May 28,

¹ See id. at ¶14. September 5, 2021 is 180 days from the U.S. District Court’s March 9, 2021 Memorandum Opinion and Order Granting Motion for Partial Summary Judgment. Although, Fenn Farms Ranch was not included in its Order, the Commission held a meeting on this application as well.

2021. Applications from Plaintiffs Rancho del Oso Pardo, Inc., River Bend Ranch, LLC and Chama III, LLC, and two additional §19.31.22 NMAC applications (Fenn Farms Ranch and Three Rivers Cattle Ltd. Co.) were duly scheduled for the Commission meeting.

On June 4, 2021, Adobe Whitewater Club of New Mexico, New Mexico Wildlife Federation and New Mexico Chapter of Backcountry Hunters and Anglers filed a Motion, as non-profit corporations advancing the public interest in recreational access to the rivers and streams of New Mexico, to request that a public evidentiary hearing to take testimony, allow cross-examination and to otherwise receive evidence and legal argument, and to deny the five applications before the Commission, which ask for landowner certification of non-navigable public water. This motion was denied by the Commission Chair as there was no good cause shown to make exception to the meeting procedures as described in § 19.31.22.11 NMAC.

In accordance with the mandate and § 19.31.22.10 NMAC, the Commission placed the application on its agenda for the June 18, 2021 meeting. During the June 18, 2021 meeting, the Commission Chair tabled the review of the application until the August 12, 2021 public meeting due to concerns about whether a Commission member had a conflict of interest. Further, the Commission Chair extended the time period for the Commission to receive written comments and proposed documentary evidence of the landowner, persons with standing, and the general public electronically and by mail until July 29, 2021, this information about how to include written comments and proposed documentary evidence was included on the August 12, 2021 meeting agenda pursuant to § 19.31.22.11(B) & (C) NMAC.

In accordance with the mandate and §19.31.22.11(E) NMAC, on August 5, 2021, copies of the application and supporting documentation and all comments and proposed documentary evidence were provided to the Commission members on August 5, 2021, as well as the public comments, the motion requesting a public evidentiary hearing, and the Chair's letter denying the Motion were posted on the Department's website the same day.

At a duly noticed and properly convened public meeting at the New Mexico State Capitol, located at 490 Old Santa Fe Trail, Room 322, in Santa Fe, New Mexico on August 12, 2021, the Commission met to review the five (5) landowner applications for certification of non-navigable water in accordance with

the U.S. District Court mandate and §19.31.22.11 NMAC. A quorum of the Commission's members was present and participated in the meeting.²

The Commission made and preserved an audio recording and a video recording, as well as a transcription of the audio recording of the Commission's review of the landowner applications for non-navigable public water segment(s) certificates in accordance with the mandate of the U.S. District Court and § 19.31.22.11(A) NMAC.³

The Commission, being familiar with the application, the determination and recommendation of the Director, the written public comments, and the Exhibits duly admitted into the record, hereby makes the following findings of fact, and conclusions of law:

FINDINGS OF FACT

1. On or about March 13, 2020, Fenn Farms Ranch ("Applicant") submitted its application for certification of non-navigable public water segment under §§ 19.31.22.1 to 19.31.22.13 NMAC. Exhibit 1-1G.
2. The subject of the Fenn Farms Ranch's application ("Application") are five (5) parcels of land that are described in Exhibit 1B identified as: (1) "W/2E/4 of Section 25, the E/2NW/4 of Section 25 ... ", (2) "W/2NW/4 and NW/4SE/4 of Section 25 ... ", (3) "that portion of the SW/4 of Section 25 and that portion of the NW/4 of Section 35, ..." (4) "the NE/4SW/4 Section 25, ..." and (5) that part of the NW/4SE/4 of Section 25, ...", which is collectively called Fenn Farms Ranch. Exhibit 1A-1C.
3. The Application for certification of non-navigable public water segment is for property owned by Fenn Farms Ranch where the Rio Hondo and Berrendo Rivers traverse through the Fenn Farms Ranch in Chaves County. Exhibit 1-1G.

² Four (4) members of the Commission were present at the New Mexico State Capitol, while one (1) member joined by electronic means.

³ During the meeting, the Commission noted that an abstaining vote would count towards the majority and that the one Commission member joining via electronic means had difficulties with connectivity.

4. The Application included the name of the owner, address, telephone number, name of the property or ranch, name of the contact person authorized to grant written permission to access the property. Exhibit 1.
5. The Application included current recorded property deeds. Exhibit 1A.
6. The Application included a complete legal description of the property and a description of the sections of the Rio Hondo and Berrendo Rivers, which traverse through the Fenn Farms Ranch. Exhibit 1A-1C.
7. The Application included the location of the Fenn Farms Ranch in Chaves County, New Mexico. Exhibit 1A-1C.
8. The Application included a map that identifies potential access points to water and access to roads to be located by someone unfamiliar with the area. Exhibit 1C.
9. The Application included copies of the patents from the United States government. May 5, 1883, January 13, 1894, August 9, 1884, October 3, 1890, November 23, 1891, and July 9, 1895. Exhibit 1D.
10. The patents from the United States government demonstrated that the United States government did not retain title to any part of the stream bed of Rio Hondo and Berrendo Rivers that traverses the Applicant's property, and that the State of New Mexico was never given express title to any part of the stream bed of this section of the Rio Hondo and Berrendo Rivers. March 3, 1909, September 1, 1860, January 27, 1947, and February 4, 1959 Exhibit 1D.
11. The Application included U.S. v. Rio Grande Dam & Irrigation Co. to support the proposition that the test of navigability test as applied to the Rio Grande prior to New Mexico entering the United States of America as its 47th State on January 6, 1912. However, the U.S. Supreme Court stated that at times of temporary high water on the Rio Grande, the river could be used for purposes of transportation. 174 U.S. 690, 697 (1899).
12. No evidence has been provided that conclusively demonstrates that commerce was not conducted on the Rio Hondo and Berrendo Rivers, which traverse the Applicant's property at the time of statehood. Further, the submitted application relied heavily on a statewide analysis of a territorial governor. Exhibit 1F.

13. The Application relied heavily on a statewide analysis of a territorial governor and not on the particular segment of the Rio Hondo and Berrendo Rivers that traverse the Applicant's property. Exhibit 1F.
14. On or about May 12, 2020, the Director issued his written determination and recommendation to the Commission, stating "[t]he application, as submitted, provides the information required by the Landowner Certification of Non-navigable Water Rule [§] 19.31.22 NMAC."
15. Further, the Director's determination and recommendation stated "[a] December 16, 2019, letter from the Office of the Attorney General directs that I follow the plain meaning of the rule until such time as it is changed or other advice is provided" and "I am advising the Commission that I have determined and recommend, pursuant to the current rule and the application, that the Fenn Farms Ranch segment of the Rio Hondo and Berrendo River be designated a non-navigable public water."
16. On March 4, 2020, the Director filed a Petition for Declaratory Judgment against the Commission in the First Judicial District Court of the State of New Mexico requesting the Court to resolve the legal question at issue, namely "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." Michael Sloane v. New Mexico State Game Commission, No. D-101-CV-2020-00621.
17. On March 13, 2020, the Adobe Whitewater Club of New Mexico, the New Mexico Wildlife Federation, and the New Mexico Chapter of Backcountry Hunters & Anglers filed a Petition for Mandamus with the New Mexico Supreme Court, seeking a decision on whether § 19.31.22 NMAC is constitutional under the New Mexico Constitution. Adobe Whitewater Club of N.M. et al., v. State Game Commission, No. S-1-SC-38195.
18. In Michael Sloane, the Director and the Commission requested the Court to stay the proceedings pending the outcome of the New Mexico Supreme Court Case No. S-1-SC-38195 and until the Office of Governor lifts the emergency statewide Covid-19 restrictions, which the Court granted on April 2, 2020. No. D-101-CV-2020-00621.
19. On April 20, 2020, Rancho del Oso Pardo Inc., River Bend Ranch, LLC, and Chama III, LLC filed a Petition for Writ of Mandamus against the New Mexico Department of Game and Fish ("Department"),

the Department's Director, the Commission, and the individual Commissioners in the First Judicial District Court of the State of New Mexico. Rancho del Oso Pardo, Inc. et al. v. N.M. Department of Game and Fish, No. D-101-CV-2020-00939. The Department and Director removed the case from State Court on May 5, 2020 to the U.S. District Court, which has mandated the Commission to follow §19.31.22 NMAC's requirements to hold a meeting and issue a final agency decision on Plaintiffs' applications. Rancho del Oso Pardo, Inc. et al. v. New Mexico Game Commission et. al., No. 20-CIV-427 SCY/KK (D.N.M. March 9, 2021).

20. Similarly, Fenn Farm and Three Rivers Cattle, LTD filed a Petition for Writ of Mandamus against the Department, the Department's Director, the Commission, and the individual members of the Commission, in the Fifth Judicial District Court of the State of New Mexico. Fenn Farm et al. v. N.M. Department of Game and Fish et al., No. D-504-CV-2020-00390. Again, the Department and Director made a motion to remove the case from state court on May 14, 2020, to the U.S. District Court, and the Court granted the unopposed motion to consolidate Fenn Farm with the Rancho del Oso Pardo, with Rancho del Oso Pardo as the "lead" case. Fenn Farm et al. v. N.M. Department of Game and Fish et al., No. 2:20-CV-0468-MV-GJF (D.N.M. June 29, 2020). There is no mandate from the U.S. District Court for the Commission to hold a meeting and issue a final agency determination for Fenn Farm and Three Rivers Cattle, LTD.
21. Physical barriers exist at locations where landowner non-navigable public water segment certificates have been issued, including at the Rio Dulce Ranch that is contained in the Kenneth A. Hersh Qualified Residence Trust and the Julie K. Hersh Qualified Residence Trust's ("Hersh Trust") certificate that was authorized by the Commission on December 28, 2018. Specifically, Exhibit 3A states that there is a fence that contains multi-strand barbed wire that is topped by concertina wire on Hersh Trust land on the Pecos River in San Miguel County. In addition, Exhibit 3A states that where the Chama River and Rio Chamita traverses the Chama Troutstalkers LLC's property at in Rio Arriba County, there are two cross-river cables with "No Trespass" signage authorized by the Commission on December 28, 2018.

22. In a public comment Exhibit 3AJ, a person who has fished on the Pecos River described an encounter with a private landowner stating, “I was fishing a stretch of water that had National Forest on one side and a private landowner on the other. I had fished this stretch for years. The landowner was throwing rocks at me (I did not know he was there until he almost hit me) and yelling at me to get off his water. I left but it was not his water.”
23. At the August 12, 2021, meeting to review the Application, a Commissioner described the oath taken when appointed to the Commission to support 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...” NMAC applications for landowner certification of non-navigable water Tr. p. 24-25, Article XVI, §2.
24. A public comment noted observations at the present time when the Pecos River can be used for recreational watercraft and that the Commission granting landowner certificates for non-navigable public water has impacted paddlers’ ability to traverse the Pecos River by watercraft. Specifically noting. “[t]he Commission awarded a non-navigable water certificate to the Hersh Family Trust for a segment of the Upper Pecos River between Cowles and Pecos. Paddlers are now prevented from floating the Upper Pecos River through the privatized river segment by the Hersh barricade, a tall and river-wide barrier constructed of vertical pipes suspended from a cable and interwoven with barbed wire. The barricade’s construction makes it a potential paddler death trap. The barricade is attached to and flanked by tall fences on both sides of the river, topped with concertina, with a second fence immediately behind. The Hersh barricade and flanking fences prevent both downriver travel and portage. They are illustrated in Exhibits A through E, attached.” Exhibit 3BS.
25. A public comment also described the impact of physical barriers on the paddling community stating that after the Commission’s approval of landowner certifications of non-navigable public water segments there were barricades erected, “creating impassable and dangerous obstacles, across runnable segments, of the Rio Chama and Pecos Rivers. The Hersh posting included the Game and Fish-issued signage, along with another barring ‘operation of watercraft’.” Exhibit 3BX. A photo was also provided

in Exhibit 3BX to illustrate the barricade erected at the Hersh Trust property. Public comments also provided the New Mexico State Park Division of the Natural Resources Department published in 1983, “A New Mexico Whitewater: A Guide to River Trips,” which in its Table of Contents refers to segments of the Chama River, Pecos River, Red River, among other rivers including the Rio Grande as well as maps. Exhibit 3BS. A public comment noted the Upper Pecos River and the Upper Rio Chama have been promoted by the State for recreational paddling. Exhibit 3BX. Another public comment stated “small, lightweight rafts, kayaks, and canoes — both hard-shell and inflatable — can travel most sections of most rivers in the state ... historical and future river use areas include the Rio Chama and Rio Chamita in Rio Arriba County. River use areas also include the Hondo and Berrendo Rivers in Chaves County, and the upper Pecos River in San Miguel County (upstream of, thru [sic], and downstream of the River Bend Ranch).” Exhibit 3BS.

CONCLUSIONS OF LAW

I. STATUTE AND REGULATIONS

1. The Commission complied with all notice requirements §19.31.22.10 NMAC.
2. The Commission conducted the review of the Application in accordance with the procedures set forth in § 19.31.22.11 NMAC.

A. COMMISSION AUTHORITY OVER PUBLIC WATERS

1. The Commission’s duty is to “provide an adequate and flexible system for the protection of game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico.” §17-1-1 & 17-1-2 NMSA 1978.
2. In 1945, the New Mexico Supreme Court examined the test of navigability to determine the character of public water, where the State on the relation of the Commission, brought suit for a declaratory judgment against a corporation, to determine whether or not the Commission could open to the public for fishing and general recreational use a portion of the Conchas River Dam reservoir that was closed

to the public use for such purposes. The State of New Mexico was the riparian owner of a portion of the lake area, and an additional limited area where the corporation had authorized the State general recreational privileges, where access could be gained to all of the water without touching the corporation's land. State et rel. State Game Comm'n v. Red River Valley Co. 1945-NMSC-034, ¶¶ 1 & 3, 182 P.2d 421. The area in dispute is not owned by the State and separate from State's riparian ownership interest and where the corporation granted permission for recreational access to the public. Id. at ¶ 3.

3. The N.M. Supreme Court in Red River stated the public waters of the State of New Mexico are subject to the jurisdiction of the Commission for its authorization of fishing and general recreational use. Id. ¶¶ 4 & 60. Further, the N.M. Supreme Court stated the test of navigability to examine the public character of water is not applicable in New Mexico because the N.M. Constitution states, "[a]ll of our unappropriated waters from 'every natural stream, perennial or torrential, within the state of New Mexico' Art. 16, Sec. 2, Const. are public waters. These waters belong to the public until beneficially appropriated. And, since the right to fish in *public waters*, is universally recognized," as the N.M. Supreme Court determined, "their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect." Id. at ¶¶ 35 & 37 (emphasis in original).
4. In addition, the N.M. Supreme Court held that the "waters in question were, and are, public waters and that [the corporation] has no right of recreation or fishery distinct from the right of the general public." Id. at ¶ 59.
5. The 2014 Attorney General utilized the Red River case to answer the question, "[m]ay a private landowner exclude others from fishing in a public stream that flows across the landowner's property?" 2014 Op. Att'y Gen. No. 14-04. The 2014 Attorney General opinion stated the answer was, "[n]o. 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." Id.

6. The 2014 Attorney General opinion also stated, “the opinion request focused on the available procedures for enforcing fishing rights in public streams on public property” and “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.” Id.
7. In analyzing the landowner’s property interest with the public’s ability to use public water for fishing or recreational uses, the 2014 Op. Att’y Gen. No. 14-04 analyzed Red River and the “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 or other recreational activities” and “[p]ermissible incidental activities do not include trespassing on private property to gain access to public waters [] 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 p. 4, note 4 & 7, quoting Att’y Gen. Advisory Letter, dated August 5, 2018.
8. The 2014 Attorney General Opinion stated the N.M. Constitution protects “[t]he public’s right to use public waters for fishing includes activities that are incidental to and necessary for the effective use of the waters,” such as “walking, wading and standing in a stream in order to fish.” Id.

B. TEST OF NAVIGABILITY CONTEMPLATED FOR THE COMMISSION’S OVERSIGHT

1. Senate Bill 226 (“SB 226”) of the 52nd Legislature of the State of New Mexico was filed on January 26, 2015, and introduced significant changes that enhanced the Commission’s ability to determine “whether a public water on private property is a navigable water” and provided that “[a]ny person may bring the issue of whether a public water on private property is a navigable water before the [C]ommission for determination prior to using public water on private property for recreational activity.” S.B. 226. 52nd Leg. Reg. Sess. (N.M. introduced on January 26, 2015), p. 3, lines 14-16 and 18-21.
2. SB 226 as introduced, defines navigable water as “a water course that at the time of statehood was navigable in fact and that is used, in its ordinary condition, as a highway for commerce, over which

trade and travel are or may be conducted in the customary modes of trade and travel on water.” Id. at p.5, lines 9-14.

3. Further, SB 226 as introduced, authorized the Commission to “make a determination of whether a public water on private property is a navigable water” even when a member of the public or private property owner has not made an application. Id. at p.3, lines 22-25, and p. 4, line 1. SB 226 as introduced, also detailed that the Commission’s determination may be challenged by interested parties. “An administrative appeal to the [C]ommission of any final determination by the [C]ommission is available to any interested person.” Id. at p.4, lines 3-5.
4. In addition, SB 226 as introduced, stated if the Commission had not made a determination on a specific segment of water, then it was presumed that a public water on private water was and is a non-navigable water. Id. at p.4, lines 5-7.
5. When SB 226 was enacted, it stated, “[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.” S.B. 226. 52nd Leg. Reg. Sess. (N.M. 2015), p. 2, lines 6-12.
6. The Senate Judiciary Committee removed the definition of non-navigable water, the presumption of non-navigable water, and the authority and ability for the Commission to apply the test of navigability to characterize New Mexico public waters as navigable or non-navigable. Id.
7. On August 5, 2016, the Attorney General issued an Advisory Letter after State Representative Luciano “Lucky” Varela requested an opinion regarding the constitutionality of Senate Bill 226. Att’y Gen. Advisory Letter, dated August 5, 2018. The Advisory Letter stated “SB 226 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.” Id.

8. Further, the Attorney General's Advisory Letter stated, "the constitution does not allow an interpretation of SB 226 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." Id.

C. COMMISSION ENACTS §19.31.22 NMAC TO ESTABLISH A LANDOWNER CERTIFICATION PROCESS TO REGISTER AND IDENTIFY PORTIONS OF NON-NAVIGABLE WATER FLOWING THROUGH PRIVATELY-OWNED PROPERTY

1. The Notice of Rulemaking for proposed Rule 19.31.22 NMAC, entitled Landowner Certification of Non-Navigable Water, states its purpose is "to establish a certification process by which landowners can register their legally-posted property(s) with the department that will identify portions of non-navigable waters that run through privately[-]owned property," a result of §17-4-6 NMSA that passed during the 2015 legislative session. N.M. Reg. Vol. 28, Issue 21 (November 14, 2017).
2. In addition, the Notice of Rulemaking detailed that the Department would establish a formal certification process "by which landowners can submit to the Department an application which will recognize certain waters found on private property as non-navigable public waters and therefore trespass is not lawful unless prior written permission is received from the landowner." Id.
3. A public comment during the December 20, 2017, Rulemaking Hearing for proposed Rule 19.31.22 NMAC, described that Red River, and the 2014 Attorney General Opinion and the August 5, 2016 Advisory Letter explained that navigability is not the test for access and that the N.M. Constitution describes prior appropriation of water that allows access to the public if the water and stream beds are accessible by public means. December 20, 2017 Rule Hearing Tr. p.11.
4. A member of the Commission addressed public comments related to the constitutionality of §17-4-6 NMSA, stating that the August 5, 2016 Attorney General's Advisory Letter indicated that §17-4-6 NMSA is constitutional. Id. at 18-20. In particular, the Commission member stated the issue involved the Commission providing the process to implement §17-4-6 NMSA, as the law changed when the statute took effect, which was not challenged for the two years after it was enacted. Id. A Commission member continued to state that this process should not be characterized as water issue that might

implicate the N.M. Constitution, it is a trespass issue that allows a landowner to put up signs and to provide clarity to law enforcement. Id.

D. DETERMINATION

1. It was noted in U.S. v. Rio Grande Dam & Irrigation Co., that there are times of high water where the Rio Grande could be used for purposes of transportation. 174 U.S. 690, 697 (1899). It may be true that these occasions may be exceptional, but it seems to indicate that there are times close to the time period of at statehood where commerce may have been conducted on a segment-by-segment basis throughout the state of New Mexico on its public streams or watercourses.
2. In practice, the Commission's past approval of landowner non-navigable public water certificates has reduced the ability of the public to use the State's public waters as intended by the N.M. Constitution and legal precedent.
3. The public is harmed when landowners erect physical barriers that include cables across public water segments as a result of the Commission approving landowner non-navigable public water segment certificates, both in the lack of access to the State's public water for fishing, utilizing watercraft, and other recreational uses.
4. The test of navigability should not be utilized to characterize the public waters as stated in Red River, when it interpreted the N.M. Constitution. 1945-NMSC-034, 182 P.2d 421. However, the Commission has been mandated by the U.S. District Court to review this Application pursuant to § 19.31.22 NMAC.
5. For the following reasons, the Commission denies the Application:
 - a) Landowners, who have received landowner certificates pursuant to §19.31.22 NMAC, have created physical barriers to exclude trespassers from stream beds and have harmed the public.
 - b) The Applicant has not provided substantial evidence to demonstrate substantial evidence the Rio Hondo and Berrendo River that traverse its property was not 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.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and in accordance with § 19.31.22 NMAC and the U.S. District Court mandate, the **NEW MEXICO STATE GAME COMMISSION ORDERS THAT:**

- A. The Director's Written Determination, dated May 12, 2020, recommending approval of the Application is rejected.
- B. The Application is disapproved.

NEW MEXICO STATE GAME COMMISSION

By: Sharon Salazar Hickey
Sharon Salazar Hickey, CHAIR

Date: Sept. 2, 2021