

New Mexico Register / Volume XXVIII, Issue 21 / November 14, 2017

STATE GAME COMMISSION MEETING AND RULEMAKING NOTICE

The New Mexico State Game Commission ("Commission") has scheduled a regular meeting and rule hearing for Wednesday December 20, 2017, beginning at 9:00 a.m., at Albuquerque Marriott Pyramid North, 5151 San Francisco Rd NE, Albuquerque, New Mexico, to hear and consider action as appropriate on the following: Informational presentation and final action of proposed process for Landowner Certification of Non-Navigable Water;

Notice of Rulemaking

Proposed New Part in Rule

19.31.22 NMAC Landowner Certification of Non-Navigable Water

Synopsis:

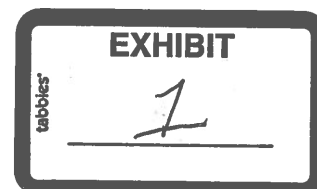
The purpose is to add a Part 22, of Chapter 31, of Title 19 NMAC to establish a certification process by which landowners can register their legally-posted property(s) with the department that will identify portions of non-navigable waters that run through privately owned property. This is a result from new language in statute §17-4-6 NMSA which was passed in the 2015 legislative session.

Summary of the proposed new part in rule (19.31.22 NMAC) will include all required headings to include: Issuing Agency, Scope, Statutory Authority, Duration, Effective Date, Objective, Definitions, Certification Requirements, Written Determination and Recommendations by the Director, Notice of Written Determination and Requirements, Meeting Procedures, Judicial review and Final Vote. The new Part in rule will identify language for the Department to 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. Full text of the new rule will be available on the Department's website (below).

Interested persons may submit comments on the new rule to dgf-fieldopscomments@state.nm.us ; or individuals may submit written comments to the physical address below. Comments are due by 5:00 p.m. on December 19, 2017 when the final rule will be voted on by the Commission during a public meeting on December 20, 2017. Interested persons may also provide data, views or arguments, orally or in writing, at the public rule hearing to be held on December 20, 2017. Full copies of text of the proposed rule amendments, technical information related to proposed rule changes, and the agenda can be obtained from the Office of the Director, New Mexico Department of Game and Fish, 1 Wildlife Way, P.O. Box 25112, Santa Fe, New Mexico 87507, or from the Department's website at www.wildlife.state.nm.commission/proposals-under-consideration/. The agenda is subject to change up to 72 hours prior to the meeting. Please contact the Director's Office at (505) 476-8000, or the Department's website at www.wildlife.state.nm.us for updated information.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact the Department at (505) 476-8000 at least one week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact the Department at 505-476-8000 if a summary or other type of accessible format is needed.

Legal authority for this rulemaking can be found in the General Powers and Duties of the State Game Commission 17-1-14, et seq. NMSA 1978; Commission's Power to establish rules and regulations 17-1-26, et seq. NMSA 1978.



**MEETING MINUTES
NEW MEXICO STATE GAME COMMISSION
Special Meeting and Rule Making Hearing
Wednesday, December 20, 2017
Albuquerque Marriott Pyramid North
5151 San Francisco Road NE
Albuquerque, NM 87109
9:00 a.m. –12:00 p.m.**

A P P E A R A N C E S

Chairman Paul Kienzle

Vice Chairman Bill Montoya

Game Commissioner Craig Peterson

Game Commissioner Ralph Ramos

Game Commissioner Bob Ricklefs

Game Commissioner Thomas Salopek

Game Commissioner Elizabeth Ryan (participated remotely via telephone)

A B S E N T

None

DIRECTOR SANDOVAL: Good morning. Commissioner Peterson.

COMMISSIONER PETERSON: Present.

DIRECTOR SANDOVAL: Commissioner Ramos.

COMMISSIONER RAMOS: Present.

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DIRECTOR SANDOVAL: Commissioner Ryan.

COMMISSIONER RYAN: Present.

DIRECTOR SANDOVAL: Commissioner Ricklefs.

COMMISSIONER RICKLEFS: Present.

DIRECTOR SANDOVAL: Commissioner Salopek.

COMMISSIONER SALOPEK: Present.

DIRECTOR SANDOVAL: Vice Chairman Montoya.

VICE CHAIRMAN MONTOYA: Here.

DIRECTOR SANDOVAL: Chairman Kienzle.

CHAIRMAN KIENZLE: Present.

CHAIRMAN KIENZLE: Can I get an approval of the Agenda?

COMMISSIONER RAMOS: So moved.

VICE CHAIRMAN MONTOYA: Second.

CHAIRMAN KIENZLE: All in favor?

COMMISSIONERS: Aye.

CHAIRMAN KIENZLE: Ayes have it. You want to lead us in the Pledge, Ralph?

COMMISSIONER RAMOS: Yes, sir.

DIRECTOR SANDOVAL: Mr. Chairman, if I may for the record. Commissioner Beth Ryan is joining us at this Commission Meeting via the telephone.

CHAIRMAN KIENZLE: Agenda item number 5a, informational, final rule landowner certification of non-navigable water 19.31.22 NMAC to be presented by the Director.

DIRECTOR SANDOVAL: Mr. Chairman, do you want to open the hearing?

CHAIRMAN KIENZLE: This is the informational part, right, which we don't open yet, correct?

MARYLOU POLI: Mr. Chairman, the informational part actually does not open the hearing but it will be on the record as such. Does that make sense?

CHAIRMAN KIENZLE: Yes. So, on 5b I will actually formally open the hearing.

MARYLOU POLI: Yes, Mr. Chairman.

CHAIRMAN KIENZLE: Okay. So, informationally speaking, have at it.

DIRECTOR SANDOVAL: Mr. Chairman, members of the Committee, Alexa Sandoval, Secretary to the State Game Commission. I'm here in front of you today to present the information regarding the rule that's been posted regarding landowner certification of non-navigable water.

[Inaudible]

CHAIRMAN KIENZLE: Okay, you want me to start in with that? Okay. So, I'm going to start in with an opening statement. So give me one second and then we'll get you to run through that one more time. Still living in this House Bill 58 world. Bear with me. This hearing will please come to order. My name is Commissioner Paul Kienzle. I am the chairman of the State Game Commission. I will be serving as the hearing officer and may be advised by the Commission's counsel from the Office of the Attorney General, Marylou Poli. The purpose of this hearing is, one, for the Commission to receive the public comment on proposed new part in title 19, chapter

31, part 22 of the New Mexico Administrative Code regarding establishing a certification process by which landowners can register their legally posted properties with Department that will identify portions of non-navigable, non-navigable waters that run through privately owned property. This is a result from new language in statute 17-4-6 NMSA which was passed in the 2015 legislative session. This hearing is being conducted in accordance with the provisions of the Game and Fish Act and the State Rules Act. The hearing is being audio tape recorded and anyone interested in a copy of the audio tape should contact Sandra DuCharme with the Game and Fish Department. Public notice of this hearing was advertised in the New Mexico Register, the Albuquerque Journal, New Mexico Sunshine Portal and on the Department's website. Copies of the proposed new rule have been available on the Department's website and at the Department office. Those here today, I have a sign-in sheet in my hand. I'll later enter this into the record as an exhibit but if you do wish to speak I need to get your name on this particular piece of paper in order to get it into the record. I think with that, we can go to the informational portion of this, correct?

MARYLOU POLI: Yes, Mr. Chairman.

CHAIRMAN KIENZLE: Okay. Now you can do the informational.

DIRECTOR SANDOVAL: Good morning, Mr. Chairman, members of the Commission. I am Alexa Sandoval. I am the secretary to the New Mexico State Game Commission. I am here today to present the final rule proposal for landowner certification of non-navigable water. As Chairman Kienzle pointed out, this rule is the result of the passage, adoption of additions to 17-4-6 NMSA. Before I actually get through the information, there are a few exhibits that do need to be read into the record. So.

CHAIRMAN KIENZLE: So, that's the formal hearing part of it. So can I end the informational portion of this, then.

MARYLOU POLI: Mr. Chairman, members of the Commission, the informational part is actually part of the whole hearing. So right now, the record is open.

CHAIRMAN KIENZLE: Okay. Understood. So 5b is the actual voting action portion of it.

MARYLOU POLI: Exactly. Yes.

CHAIRMAN KIENZLE: Got it. I'm with you.

DIRECTOR SANDOVAL: So, Mr. Chairman, if I may, I would like to enter in Exhibit Number 1 which is the State Game Commission meeting and rulemaking notice for the new rule 19.31.22 NMAC.

CHAIRMAN KIENZLE: So, in order to address that let me, one second. This rule hearing will be conducted in the following manner. Staff or the Director will present pre-filed exhibits. Exhibits entered in evidence are available for review by the public, but exhibits may not be removed from this room. After all exhibits are entered, we will proceed to the presentation of the proposed rule after which testimony will be taken from the audience. It's not exactly testimony but there will be public comment. In order to ensure that the hearing is accurately recorded, only one person at a time shall be allowed to speak. Any person recognized to speak is asked to, one, identify yourself by name and who you are affiliated with and for the record you want to do that each time you are recognized. And, two, speak loud and clearly so the recorder can accurately record your comments. After a person has offered comment, if there are any questions I will either ask them or another Commission member may be recognized to ask questions. The audience may also ask questions of anyone offering comments after being recognized by me, the

hearing officer. This hearing is not subject to judicial rules of evidence. However, in the interest of efficiency I reserve the right to limit any testimony deemed irrelevant, redundant or unduly repetitious. The Commission will discuss the proposed rules during a subsequent Commission meeting which will be today. Final Commission action including adoption of the rules will not take place as part of the rule hearing. That is why we have 5a and 5b. It is broken into two parts. So, at this point, I will declare this hearing open. I understand the Director has exhibits for proposed new part to rule 19.31.22 for admission into the record.

DIRECTOR SANDOVAL: Mr. Chairman, that is correct. So I would submit Exhibit Number 1 which is the State Game Commission Meeting and Rule Making Notice for the new rule 19.31.22 NMAC otherwise referred to as Landowner Certification of Non-Navigable Water. We have Exhibit Number 2 which is the actual rule itself, again 19.31.22 NMAC. And Exhibit Number 3 is a collection of the public comments that we received during the open comment period which was open for 30 days on the Department's website with access to an email address for them to submit comments to. There were 29 comments in total received by the Department during that 30-day time frame and that is Exhibit 3.

CHAIRMAN KIENZLE: Okay. I will admit Exhibits 1, 2 and 3 into the record. I have some additional exhibits which I'll get to on the public comment side of this in a moment. Director, can you introduce one more time the proposed amended rules for 19.31.22. And let me ask something of the Assistant Attorney General. Does the entire rule have to be read or is it enough to just give a summary or state the objective of the rule?

MARYLOU POLI: Mr. Chairman, the summary is sufficient. You don't have to read the entire rule into the record because it has been admitted as an exhibit.

CHAIRMAN KIENZLE: Okay.

DIRECTOR SANDOVAL: Thank you, Mr. Chairman. So I am here as the Secretary to the State Game Commission to present this new rule. As stated earlier, this is a result of the passage of some amendments to 17-4-6 which is the specific statute in New Mexico regarding hunting and fishing on private property. This rule, and I will just simply go through and read the objective of the rule, is 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 private—excuse me—the landowner’s private property is a segment of non-navigable public water whose river bed or stream bed or lake bed is closed to access without written permission from the landowner. So that is the objective or purpose of the rule. The rule then goes through and outlines the specific steps that a person is to follow in order to submit request for certification of their segment of their property that has non-navigable public water. I won’t go through the steps unless you all specifically want me to delineate what the application will be. But the rule does call for the Department to put into place by February 2nd, 2018 the specific documents that are needed and the format in which that will be received by the Director of the Department of Game and Fish.

CHAIRMAN KIENZLE: So, apart from that certification process, was there also signage that was involved in this.

DIRECTOR SANDOVAL: Mr. Chairman, that is correct. There is a specific set of language to be put onto signs that will be issued to the particular private landowner who makes application once it’s been approved by the Commission. Those signs will, the cost of those signs will have to be reimbursed by the private landowner whose application does get approved by the Commission.

CHAIRMAN KIENZLE: All right. Got an introduction to the rule, got Exhibits 1, 2 and 3. Now is the time to take public comment on the rule. Tanner Anderson.

SPEAKER: Mr. Chairman, while Mr. Anderson comes up I would submit to the record that you have public comments I believe 4 through 13.

CHAIRMAN KIENZLE: Yes. And I'm going to enter those in a moment. Tanner Anderson.

TANNER ANDERSON: Mr. Chairman, members of the Commission, I'd like to again thank you for allowing me to speak today. My name is Tanner Anderson. And I represent New Mexico Farm and Livestock Bureau and our almost 19 thousand members statewide. I'm going to try to stick to my notes here. Our CEO, Chad Smith, has submitted some comments so you should have those. We support the intent of this rule making 100 percent. We along with New Mexico Cattle Growers and the Council of Outfitters and Guides worked with Senator Martinez during the 2015 session to help pass Senate Bill 226, Use of Public Water and Landowner Protection. Four years ago, legislation addressing this topic wasn't anything that anybody could have predicted that we would need. But unfortunately, Attorney General King's 2014 opinion 14-04 created huge confusion amongst landowners throughout the State. Senate Bill 226 was meant to provide clear guidance on this issue and correct the confusion caused by the Attorney General's opinion. We applaud the Department for their work on this complex issue. But we cannot support the rule in its current form. Section 19.31.22.8, Subsection B, Number (4) requires that anyone applying for this certification provide substantial evidence (indiscernible) that the waters, water course or rivers being non-navigable at the time of statehood. The Department even left several options for landowners to consider when trying to provide non-navigability. But if there is not data supporting the landowner's claim, substantial evidence can prove to be an impossible standard to meet. And this single standard is what makes this a cumbersome process that will

have no guarantee of a desired outcome. This section makes it at the Department's discretion to certify non-navigable public water. And so we feel that the simplest fix for the Department is to designate all waters of New Mexico as non-navigable and even exempt those waters that are identified by the Army Corps of Engineers and State Engineer's Office to be navigable so as not to create further confusion. The Department can still allow the landowners to go through the certification process in order to receive appropriate documentation from the Department certifying their non-navigable status. This isn't a state-wide problem but there are landowners that need immediate relief and we don't want to stall this process any longer but we feel those simple changes could make this a little bit better. So with that, I'll wrap it up there.

CHAIRMAN KIENZLE: Any questions for Mr. Anderson? I don't have any questions. No questions. Commissioner Ryan, any questions for Mr. Anderson?

COMMISSIONER RYAN: No.

CHAIRMAN KIENZLE: Thank you.

TANNER ANDERSON: Thank you.

CHAIRMAN KIENZLE: Tom Sidwell.

TOM SIDWELL: Mr. Chairman, Commissioners, thank you. I'm Tom Sidwell, president of New Mexico Cattle Growers Association. And so we stand in support of this. What this does is, it gives landowners an option. It's not a requirement but they do have an option of being able to prevent trespass in those streams. I want to, I've got a couple of suggestions. Number one, I would suggest that you define commerce. It's mentioned in the definitions under navigable in fact and then also in non-navigable public water. And so commerce is the creation, sale, purchase, exchange or transfer of any commodity for another commodity. And I think that would

define what is meant by transport of commerce on a water whether it's navigable or non-navigable. And then as far as part 22.8 B, that process is, can be a little cumbersome but it may not, it may be difficult to determine whether your segment is actually non-navigable or not. And so I would also consider a physical description or limitation of that segment of stream bed. As an example, my wife and I own a small piece of property west of Las Vegas and there's a stream that crosses it. And so, it's about 6 inches deep, 2 to 3 feet wide, it's got rocks and boulders in it. And it's got debris and windfall across it. It's certainly not navigable. But I'm not sure that I could find any titled opinions or anything in that sort that would say that it is a navigable or non-navigable water. I would suggest that you consider some kind of a—I don't know what you would call it but—some sort of physical description maybe of that segment. So thank you.

CHAIRMAN KIENZLE: Thank you. Oscar Simpson.

OSCAR SIMPSON: Thank you, Mr. Chairman, members of the Commission. My name is Oscar Simpson. I represent New Mexico Sportsmen . I live in Albuquerque, New Mexico. In regards to this rule, I think this is a rule that goes counter to what was established when you had right of way, public access on the Conchas Lake. So this rule to me is an end around of saying how to eliminate public access to public waters. Thank you much.

CHAIRMAN KIENZLE: Mr. Crenshaw.

JOHN CRENSHAW: Mr. Chairman, Commissioners, thank you for the opportunity. I'm John Crenshaw. I'm President of the New Mexico Wildlife Federation. We have about 80 thousand license-buying members and supporters. And I'm a retired, long retired, employee of the State Game and Fish Department. I confess that on this particular issue I was a little bit slow to come around to the stance that I am taking today which would be in support of public access to public

streams and that's what they are. The evidence is very overwhelming. The Red River decision, as it is commonly called, of 1945 laid that out. It was subsequently really elaborated on most recently, first in 2014 under Attorney General King and then re-affirmed in my opinion in 2016 under Attorney General Balderas. The fact is that part of this is that navigability and holding that to the public and the landowners as being a tool to prevent trespass, as I read it and as I think the AG's did, navigability is really not the test for access. We're ruled by the prior appropriation laws here in New Mexico under the constitution and the water and the stream beds are accessible to the public if accessible through public lands. The Attorney General's opinion of 2016, Advisory Letter more technically, stated clearly the trespass laws that was written says that I cannot cross perhaps Mr. Ricklef's or Mr. Sidwell's property to get to that creek but if I can get to it from public land or public access then I can be there. I'm afraid you all are on the wrong side of this issue. I really would hope that you bear down and recognize that this is not an issue of assault on property, private property rights. It's been the reverse. Private property rights have been imposed and have been usurped from the public. Please take a stand on the side of your license-buying anglers. Thank you very much.

CHAIRMAN KIENZLE: Christopher Smith. You're not going to defer to Mr. Osoria?

CHRISTOPHER SMITH: No, sir, I won't. And to be clear, I'm representing myself on this issue, not WildEarth Guardians. So thank you, Chair. Thank you, members of the Commission for allowing public comment. My name is Christopher Smith. I was born and raised in northern New Mexico and spent a lot of my formative years fishing the rivers and streams up there. I see this rule as the continuation of a dangerous trend right now, and that is the erosion of public access and public lands in the United States and especially in the western United States. I fished in a number of states and a number of countries and we have this unique value here in the

western U.S. which is the immense public access we have to these resources and to lose that I think would be to continue the loss of kind of the identity of who we are as New Mexicans and as westerners. So I would urge you to avoid that. Thank you.

CHAIRMAN KIENZLE: Joel Gay. Nice to see you again.

JOEL GAY: You're getting funnier.

CHAIRMAN KIENZLE: I'm getting older.

[Laughter]

JOEL GAY: My name is Joel Gay. Good morning, everybody. My name is Joel Gay and I'm here representing the New Mexico Chapter of Back Country Hunters and Anglers which is a nationwide group of sportsmen and women dedicated to protecting public property rights. The New Mexico constitution and the State Supreme Court ruling known as Red River make it abundantly clear that the public has the right to fish, float or otherwise recreate on the streams and rivers that flow through private property in New Mexico provided that the individual does not trespass to reach that stream or trespass when they get out. In fact, the Red River decision specifically points out that the public right of access has nothing to do with navigability. In spite of those facts, previous game commissions have maintained just the opposite, that the public access to New Mexico streams running through private property is actually trespass and therefore subject to fines and even jail. The proposal before you today continues this terrible tradition by once again putting up roadblocks to the public to enjoy the state waters that our constitution and our Supreme Court have said unequivocally that we have a right to enjoy. Our membership urges you to vote down this proposal and instead to instruct the Department to take a different, a new tack. Ask them to prepare a plan that will allow the fishing public to access all

legally accessible waters in the state, conduct an education outreach for anglers and stream-side landowners on this new era in New Mexico fishing, write additional regulations as necessary to protect fisheries and habitat and increase the streamside law enforcement. It is past time for the state Game Commission and the Department of Game and Fish to respect the New Mexico constitution and provide public access to public waters once and for all. Thank you.

CHAIRMAN KIENZLE: Thank you. Teresa Seamster.

TERESA SEAMSTER: Good morning, Mr. Chair and Commissioners. My name is Teresa Seamster. I'm Chair of the Northern New Mexico Group of Sierra Club. I won't repeat a lot of the things that have already been said about public access. Just quickly, New Mexico constitution and New Mexico Supreme Court have already weighed in on this issue. The access to state waters are for all New Mexico citizens. This is clear. New Mexico citizens should not be allowed to trespass on private land. If there is a stream that runs across your property and if you own the entire property no one can walk across that property to fish your stream. But public rights are not up for sale. They don't come with a private or real estate transaction. If the public can access your stream through a public access then it is a public stream. And that is clear in the law. Our group, Sierra Club, here in New Mexico strongly supports the existing public access rule and we strongly oppose any change or any designation to allow private landowners to re-define and to restrict or deny public access. Thanks very much.

CHAIRMAN KIENZLE: Thank you. Caren Cowan.

CAREN COWAN: Thank you, Mr. Chairman, members of the Commission. My name is Caren Cowan. I am here today on behalf of the New Mexico Cattle Growers and New Mexico Wool Growers and the New Mexico Federal Lands Council. All of these organizations participated in

the passage of this bill that led us here today. The final language, as often happens at the legislature was on the fly late at night and so, you know, you can always look back and see things that perhaps you should have done differently. Since the language has passed, some cattle grower members have raised a concern about the use of the term, let me get this, non-navigable public water. The constitution has been liberally thrown around here in the last few minutes. If you read the state constitution, Article XVI Section 1 says: All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed. Section 2 goes on to say: 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 in accordance with the law of the state. Priority appropriation shall give the better right. There are a lot of waters navigable in the (indiscernible) that have already been appropriated and adjudicated to owners. So if we could recognize that not all water is public because it has been adjudicated, we would like to do that in that definition. The language that we've suggested would be in the definition of non-navigable public waters, include a statement that says, once appropriated/ water had been appropriated, is no longer public water. The other part, as we go through this, is this bill is more, is about the land underneath the water and whether or not that is owned. And so I think the constitution addresses the ownership of the water and the constitution also recognizes the private property rights associated with the land under the water. Thank you for your time.

CHAIRMAN KIENZLE: Thank you. Kerrie Romero.

KERRIE ROMERO: Thank you, Mr. Chairman, members of the Commission. Kerrie Romero on behalf of the New Mexico Council of Outfitters and Guides. We advocate the interests of both the hunting, the guided hunting industry and then also the guided fishing industry. And

overwhelmingly the guided fishing industry has always been in favor of protecting private property rights as it relates to the stream beds. We were one of the primary supporters of the legislation when it passed in 2015 and we are in favor of the Department's proposal on the new rule to certify non-navigable waters as well as landowners' requirements for posting against trespass. Thank you.

CHAIRMAN KIENZLE: Marco Gonzales.

MARCO GONZALES: Good morning, Mr. Chairman and members of the Commission. My name is Marco Gonzales and I represent the New Mexico Habitat Conservation Initiative. And we, too, along with many of the other supporters that you have heard from today were intricately involved in the process that's allegedly here to adopt Senate Bill 226. I wanted to just maybe spend just a little bit of time. We have submitted comments which I would commend to you for the record. I'm actually going to read a portion of it because some of it addresses exactly the concern that people have raised about Red River Supreme Court Case in New Mexico. But just to kind of address a couple of the issues that have been raised, so the issue about the Supreme Court case in Red River. Our comments actually address this and all throughout this process, and of course these bills were debated thoroughly and the Judiciary Committees and the respective bodies. But many people, including the New Mexico Wildlife Federation, confuse the issues of stream bed ownership and ownership of the waters of the state. And they further confuse the holding in Red River Valley. While New Mexico is a prior appropriation state, the New Mexico Supreme Court in Red River Valley did not address the issue of priority of appropriation. It discussed the issue of the right to use public waters for recreational purposes and held that the ownership of water is in the public and the public has the right to use all the unappropriated waters for recreational purposes. However, in making that holding the court stated that the small

streams of the state are fishing streams to which the public have a right to resort to as long as they do not trespass on private property along the banks. The court was also, the Supreme Court of New Mexico, was very careful that its holding dealt specifically and only with those impounded public waters at the Conchas Lake easily accessible without trespass upon riparian lands.

[Timer beeps]

CHAIRMAN KIENZLE: You can continue on. I didn't cut anyone else off.

MARCO GONZALES: Contrary to the assertion of those who have mentioned this case here today, the court didn't hold that the public's right to access the waters was superior to landowners' right to exclude others from his or her private property. The court didn't have to reach that issue because the water in question was accessible to the public through public access points and involved no trespass on private land. The river access law that passed in 2015 protects private property rights by providing that one can't walk or wade on privately owned stream bed in order to access a right to use public water for fishing or other recreational purposes. Whether or not a stream is navigable or non-navigable is relevant only to the question of stream bed ownership and not to the character of the water. And that's where most of this confusion took place.

CHAIRMAN KIENZLE: So I get to ask you a question before you leave. So this is a stream bed issue, not a water issue?

MARCO GONZALES: Absolutely 100 percent correct. And the issues about prior appropriation, etc., that has nothing to do, this particular rule that you've adopted is consistent with both New Mexico Supreme Court statute and Supreme Court of the United States case law.

And it does not affect anything to do with the prior appropriation of water or privately held rights. It only has to do with the issue of ownership of the stream bed which is set out in the rule.

CHAIRMAN KIENZLE: Okay. That is my last public comment. I've got Exhibits 4 through 13 which are comment cards which I will admit into evidence. And then I've got Exhibit 14 which is the meeting sign in sheet which has 10 people that are signed in. Can you—

SPEAKER: (indiscernible).

CHAIRMAN KIENZLE: Can you hand those to the Director, please and formally make those part of the record. Thank you. Are there any additional exhibits anyone has that they want to enter into the record? Any additional written evidence, exhibits, anyone who is part of the public wants to put into the record? Okay. Exhibits 1 through 14 are again admitted into the record. I think I had everyone sign the, I don't have any other witnesses so I'm going to go through the closing process on this hearing. I had everyone sign in who spoke. And we marked that as Exhibit 14. I admitted that attendance sheet into exhibit, into evidence as Exhibit 14. Comments submitted and testimony heard during this rule hearing will be reviewed by the Commission and discussed during the open session of today's meeting. The Commission will vote on the proposed rule at that time. Thank you, everyone, for your participation. The rulemaking hearing was adjourned at 11:29 a.m. Okay. So now we can go on to discussion of the rule, and I'll go first and address some of the comments that I heard. On the issue of substantial evidence, I'll just say bluntly, tough luck. That's what the standard is. It would be the standard in just about any court that you went into, anywhere that you went to prove up something along these lines. Now, will it be difficult? I don't know. We haven't had a hearing yet. Did anyone here today speak from having done their homework? No. Everyone's scared, saying I don't know if I can come up with it. Well, you won't know until you get out there and do some digging. So I would not be

overly concerned about the standard per se. But you're going to have to do some of your homework. And as for Mr. Anderson's suggestion that we just declare everything non-navigable, well that won't work. That evidence isn't in front of us. It's not something you would do lightly and what's required by the United States Supreme Court is that this determination of non-navigability be done on a segment-by-segment basis. So I don't think it's appropriate and it's probably outside our power to just say, all right, we have a magic wand. All of the water in New Mexico was non-navigable. So landowners, if as Mr. Sidwell pointed out, if they choose to avail themselves of this program, they're going to have to do their homework. Is it impossible? I don't think so. I've done this work throughout my career and it's not impossible to find the information that would be required to meet this standard. As far as defining what commerce is, I don't think that's necessary either. That is a term of art and it's used by the United States Supreme Court. It's in the definition of navigability or non-navigability. It's not something that needs to be further defined in the rule, and to do so would probably run afoul of what I'm going to talk about next which is PPL versus Montana. No one has discussed that case. Again, go do your homework. Read that case. Educate yourself. Figure out what it means. It deals with title to stream beds in the United States. This is not solely an issue of state law. It's also an issue of Federal law, equal footing doctrine and all the things that go with this. As I questioned one of the witnesses earlier, is it a water issue, is it a stream bed issue. This is not a water issue per se. This is a stream bed, terrestrial, you know, putting your feet on the ground kind of issue. So I would suggest, do your homework. Read what both this rule says and read the underlying statute to get a sense of exactly what the issue is and don't confuse things. I never appreciate when people come in front of me and whether it's by intention or through not doing their homework, trying to confuse the issue. With regard to the Attorney General opinions, I take disagreement certainly

with the one that Attorney General King provided. I believe it was in 2014. The most current opinion that actually deals with the statute that's in front of us says that the law is constitutional and so this is settled law. We are simply hanging some flesh, if you will, on the law we've been given. And that's 17-4-6. No one in this room that I'm aware of has challenged that law in court, said that it's unconstitutional, or done anything in the past 2 years to get rid of it. So I'm faced with a law that we are given the ability as a Commission to hang some flesh on to put it into operation. That's what this particular rule is designed to do. And again, and this is not what some of you are characterizing as a change in law. Law, to the extent you want to call it a change, was done in 2015. It's not being done here today by the Commission. So this has been tested by the political process and passed. It was signed by the Governor. It's been out there for two years. No one has challenged it. And, you know, now is the time to put some regulations on that particular law. This issue, as some of the heads of the various organizations here know, is part and parcel of the trespass issue that we've been dealing with, whether it's on land, on stream beds, and so this is one means of giving as I said in an earlier meeting, clarity to law enforcement on the ground. There will be a sign that gives them good guidance as to whether they're dealing with private property or not. So I am sympathetic when law enforcement shows up and it is not clear out in the middle of nowhere perhaps what the character of the property is that they're dealing with. This is one means of solving that particular problem. So, as I pointed out at our earlier meeting, and I'll say again today, there's two parts to this. One is the certification process. From the certification process, the landowner, provided they meet all of the criteria, they would get a certificate, something that's suitable for recording from that certification determination. That allows you to get a number of signs, signage from the Department. Landowner pays the full freight on the signs since you don't get something for nothing. And then those signs are posted in

the appropriate places. So there's two parts to this. And again, I take issue with people who come in front of us and say, well they're changing the law, you're doing something different. That ship already sailed. This law was changed in 2015 to the extent to which you want to call it a change. I think it just recognized private property rights as they already existed in this state. And with that, I'll turn it over to any other Commissioners for questions or comments. Yes, sir.

COMMISSIONER RAMOS: Mr. Chairman, Director Sandoval, I do have some questions and actually have about 5 key points that I'd like just clarification because just looking at our Department and the impact that's going to be, that we're going to be learning and living and going through, you know, it's just I need to wrap my brain around this. First of all, FTE's, full time employees, you know, how many do you think it's going to take within our Department just to start this process and to—and of course there's research that's going to be involved. There's going to be going out and doing assessments. I don't know, wrap my brain around that one.

DIRECTOR SANDOVAL: So Mr. Chairman, Commissioner Ramos, if you look at how the rule is written, it's actually the responsibility of the landowner to provide that information to the Department. So there will not be a need for the Department to go out and do research or do historical work or whatever that is. That is on the responsibility of the person making application to provide. There are 4 pieces to that application. And I won't get into the details of what that is, but that onus is actually on the individual. As we see it within the Department, that would come into our legal department for a review to make sure that it's in adherence with the rule. Then it comes to me and I put forth a recommendation to the Commission. So I don't know that there's additional FTE's because of how the rule is written and that the onus sits with the applicant.

COMMISSIONER RAMOS: Okay, thank you. And that clarifies that. So what is the protocol to determine navigable by your officers in the field. Of course, they're the ones that are going to be

monitoring out there. I hope that city, municipal, state, sheriffs, counties, also have some protocols to follow as well with trespassing and things like that. I do like the signage system I think that we've created where the private individual owner has to come and get these signs to post their property. I would hope that if I was a game warden out in the field, part of our Department having to enforce and to go in, you know, on a call, that private owners would have their property posted correctly after they go through this process but not only for fishing our streams but also their private property. I mean, I know the majority of private owners do know the fence out rule with cattle. I would hope that if you want hunters and people out of your property that you post it properly. I would hope that our Department also would go into, and I know down the road we're going to be discussing the E-PLUS with ranch only and as far as the unit wide, you know, signage as well, I think this just makes it so much clearer for everybody. But as a game warden I would hope that, you know it will make it a lot easier that if they do follow these steps and it is posted and there is trespassing going on, they get cited, the judicial system will take over its course on that. But to put it all on them when it's not posted properly, you know a verbal warning is kind of the common practice that's happening now. So what is happening with that and, you know, where do you think we're going on that?

DIRECTOR SANDOVAL: So Mr. Chairman, Commissioner Ramos, I think you had a number of questions in there. And I'm going to try and answer it in one fell swoop.

COMMISSIONER RAMOS: Sure.

DIRECTOR SANDOVAL: So, it's not going to be up to the officers to make that determination of navigable or non-navigable. That has nothing to do with what will be happening out there on the ground. That actually will be happening here at the Commission level based on a recommendation that comes from myself as the Director of the Department. Once and if this

Commission approves, or future Commissions approve that this truly is a non-navigable piece of public water, then that landowner, based on the certificate received by the Department will receive a series of signs. That will go into a data base that we will work on in producing. All officers in the State of New Mexico have CAD units which is computer assisted dispatch and that information will be readily available to the officers that are out there on the ground. And so, I think that takes away that whole issue of any officer having to know navigable versus not. That actually, that decision lies with you as the Commission. Once that approval happens then that certificate is given to the landowner and put into a data base for the officers. Now if it does not follow, if the landowners receive the signs and they decide not to put those signs up on the landscape as directed in the rule then of course they're not compliant with what's going on. If they are compliant, they take the signs, they put them out as needed, then the Department can take action. Law enforcement can take action at that point and provide a citation.

COMMISSIONER RAMOS: Okay, which leads me to one other question. So being the numerous private owners out there with these type of certifications and the application process, are we going to have to have a Commission meeting solely for this type of approval and review if we are the ones that are going to be—

CHAIRMAN KIENZLE: I'll answer that one. So it would seem to me that as we find our feet on this process, at least for the first or second or group of these, we would have a special meeting to address just this issue so we don't take up, I don't know how long it'll take. It could take a day.

COMMISSIONER RAMOS: Correct.

CHAIRMAN KIENZLE: I think we would do, have these done on a special meeting basis at least in the beginning until people start to understand the process and what's expected. Also, don't know if you're going to get one person or a hundred that are interested in what's going on. And they maybe have common evidence or common testimony and so there may be ways to deal with that to streamline the process as you will.

COMMISSIONER RAMOS: Thank you.

CHAIRMAN KIENZLE: Any other questions?

[Possible break in audio?]

DIRECTOR SANDOVAL: I heard a beeping, Mr. Chairman, earlier. So I'm not sure if Commissioner Ryan is still with us.

COMMISSIONER RYAN: Yes. I'm still here.

DIRECTOR SANDOVAL: Thank you.

CHAIRMAN KIENZLE: Commissioner Ricklefs, did you have a question?

COMMISSIONER RICKLEFS: I have a question. I thought Commissioner Ryan was going to speak.

CHAIRMAN KIENZLE: Commissioner Ryan, did you have any questions or comments?

COMMISSIONER RYAN: No. I just, you know, I'm interested to see this process works and if it can be applied to private landowners, across the state, help identify what is private property and the law enforcement officers to, you know, prosecute trespass violations so I am going to be personally looking into that.

CHAIRMAN KIENZLE: Commissioner Ricklefs.

COMMISSIONER RICKLEFS: When 17-4-6 passed, personally I have a small piece of property with a stream flowing through it. I felt that legislation saved me from having to confront somebody who entered the stream at the right of way on the highway and walked up the stream bed into my property. I felt that that legislation was adequate. But I do agree that this regulation has to do with the underlying property not the water itself. Of course that stream flowing through my property is not my water. It's appropriated water and does not belong to me. But I do own the property underneath that stream. I pay taxes on it. I don't measure that stream width and length and then subtract that from my county property taxes. I pay taxes on it. So it is a property right of who owns the stream bed and I feel that this regulation is not overly burdensome. A question for the Director or perhaps the Chairman. Is there a document that basically states at statehood, no streams in New Mexico are navigable?

CHAIRMAN KIENZLE: I think if you go to the UNM or you go to the state law library, you're going to find a bunch of dusty old books that'll tell you the answer to that question. And so the information is out there. It's available publicly for everyone to go look at. So it's not hide-the-ball or gosh I can't figure this out. The information is available from territorial records and other sources and publicly available for people to take a look at. To the extent you don't want to go dig it up yourself, you can probably hire someone like a title researcher to real property, you know, an expert or someone else. But this information is readily available to the public and I think to address Commissioner Ramos's concern, as we get into these applications I think you're going to see a lot of common evidence about what's navigable and what isn't. And pretty soon, both the Commission and the Director will be educated on, Oh, this is-this isn't, because there's only a finite number of sources at least from those territorial type records that are available. Now there

may be individual circumstances that we're not aware of: family history, great-great grandmother says this. I don't know what evidence will come in. But the sources that are available historically here in New Mexico, that's something that everyone will get ahold of and I can assure you once this process gets cranked up if it passes today, this will all be common knowledge in pretty short order.

COMMISSIONER RICKLEFS: Thank you. Director, if we pass this regulation and an officer in the field finds somebody who is ignoring the certification signs and is on private property I would assume the officer then can write them up as violating this regulation as well as criminal trespass under Chapter 30?

DIRECTOR SANDOVAL: Mr. Chairman, Commissioner Ricklefs, thank you for the question. So certainly if it is posted in accordance with this rule then of course we can cite under this particular rule. And actually the Statute 17-4-6, we can additionally, the other piece to look at under criminal trespass is just to ensure that they have properly, posted it, posted it, excuse me, in accordance with Chapter 30 as well.

CHAIRMAN KIENZLE: And let me add that again, the other part of this rule is to give clarity to law enforcement in the field. It doesn't change how they handle things. So if the Colonel's instructions to his team is let's try and talk these people down off the ledge, let's resolve these in the field, we're not going to write a ticket, I respect some of that discretion that he has to get that done. If you have a repeat offender you may say, well, you know, look Dude, we told you last week and you keep doing this. You know, today's the day I'm writing a ticket. So this doesn't change existing law, existing practice necessarily for law enforcement. It just gives them more clarity in the field where they can point to a sign and say, look, you know, clear out or you've got a problem or they write a ticket. I am not here to tell law enforcement how to do their job.

I'm here to give them the tools to do their job and if they, you know, choose to handle something without a citation in the field I respect that. If they choose to write a citation I respect that as well. But I don't want them to have to guess is this private property, isn't it, what's going on. And that's part of what this is designed to do, is to give them the bright line they need to make the best judgement possible when they're in the field.

COMMISSIONER RICKLEFS: Okay.

CHAIRMAN KIENZLE: Commissioner Salopek, any questions or comments?

COMMISSIONER SALOPEK: No.

CHAIRMAN KIENZLE: Commissioner Montoya?

COMMISSIONER MONTOYA: No.

CHAIRMAN KIENZLE: Commissioner Peterson?

COMMISSIONER PETERSON: No.

COMMISSIONER RYAN: Commissioner Ryan, any questions or comments? Any further questions or comments?

COMMISSIONER RYAN: No.

CHAIRMAN KIENZLE: Okay.

COMMISSIONER RYAN: No.

DIRECTOR SANDOVAL: So, Mr. Chairman, if I may, I would recommend a motion if that's okay with you.

CHAIRMAN KIENZLE: Yes.

DIRECTOR SANDOVAL: So I would make the motion that the State Game Commission approve a new rule 19.31.22, otherwise referred to as the landowner certification of non-navigable water, today with the allowance for the Department to make any necessary administrative changes according State Records and Archives to get it filed.

CHAIRMAN KIENZLE: I did notice there is one typographical error that may be significant because it's confusing. How do you want to handle a typographical error? It's an additional word that should not be in there.

MARYLOU POLI: Mr. Chairman, where is it?

CHAIRMAN KIENZLE: It is 19.31.22.13d(3). There's the word 'at', should be removed.

SPEAKER: And changed to?

CHAIRMAN KIENZLE: It should just say sign shall state the following prohibitions, instead of having the word at.

MARYLOU POLI: You said e?

CHAIRMAN KIENZLE: I'm sorry, d(3).

MARYLOU POLI: d(3).

CHAIRMAN KIENZLE: Need to take out the word 'at'.

MARYLOU POLI: Here?

CHAIRMAN KIENZLE: That is correct.

MARYLOU POLI: Thank you. So for the record, 19.31.22.13d(3) currently says: sign shall state at the following prohibitions in accord with, and then it continues. The proposed change

just removes the word 'at' so that d(3) reads: sign shall state the following prohibitions, etc. So if the motion is moved it would be as amended. So, Mr. Chair, I believe you actually have to second the motion before you can amend the motion.

CHAIRMAN KIENZLE: So let's—

DIRECTOR SANDOVAL: I'm sorry. There hasn't been, the motion actually hasn't been moved yet.

CHAIRMAN KIENZLE: Right. So we'll, just wanted to make it clear if we needed to do a change. So we'll do the motion. So you've done the motion. Can I get someone?

COMMISSIONER RAMOS: So moved, to support what Director Sandoval stated with the certification of non-navigable water 19.31.22 as amended.

DIRECTOR SANDOVAL: Second?

CHAIRMAN KIENZLE: Do you want a second on that, then.

DIRECTOR SANDOVAL: Yes, Mr. Chairman.

CHAIRMAN KIENZLE: Can I get a second on that?

COMMISSIONER PETERSON: Second.

MARYLOU POLI: If I may, just to clarify that this motion is passing with the proposed rule with that slight amendment of removing the word at.

DIRECTOR SANDOVAL: Mr. Chairman, that is not correct. We have to pass the motion first, initiate the motion as I presented it. Then they will do a friendly amendment. I would accept a friendly amendment to the motion . . .

CHAIRMAN KIENZLE: So . . .

DIRECTOR SANDOVAL: . . . which is the correction.

CHAIRMAN KIENZLE: So, propose a friendly amendment for removing the word, the first 'at' in 19.31.22.13d(3)

COMMISSIONER: So moved.

CHAIRMAN KIENZLE: I can't, no, so you did it. Okay.

COMMISSIONER #2: Second.

CHAIRMAN KIENZLE: Second.

COMMISSIONER: That is to amend the main motion by changing . . .

COMMISSIONER #2: Take out the word 'at'.

CHAIRMAN KIENZLE: Right. Got the word 'at'. Any further discussion, questions or comments.

DIRECTOR SANDOVAL: So, Mr. Chairman, you are on the amendment at this point.

CHAIRMAN KIENZLE: Did we second that?

DIRECTOR SANDOVAL: Yes. We need to vote on the amendment.

COMMISSIONER: Vote to change it.

CHAIRMAN KIENZLE: Okay. So let's vote on the amendment. All in favor?

COMMISSIONERS: Aye.

CHAIRMAN KIENZLE: Any opposed? None opposed. Okay. So now we have the original motion as amended on the table.

DIRECTOR SANDOVAL: Correct. Thank you, Mr. Chairman.

CHAIRMAN KIENZLE: Do I need that one moved and seconded or is it sufficient?

[crosstalk]

COMMISSIONER: That one's already done.

CHAIRMAN KIENZLE: So then we will move . . .

COMMISSIONER: Just passed it.

CHAIRMAN KIENZLE: You want the—

SPEAKER: Mr. Chairman, you have moved the amendment, a friendly amendment to the original motion. You now have a new motion—

CHAIRMAN KIENZLE: Right.

SPEAKER: —to approve the motion as amended.

CHAIRMAN KIENZLE: Okay. Can I get a motion to that effect, please?

COMMISSIONER RAMOS: So moved as we just amended the main motion [crosstalk].

CHAIRMAN KIENZLE: Go ahead.

COMMISSIONER: As she stated.

CHAIRMAN KIENZLE: Can I get a second?

COMMISSIONER MONTROYA: Second.

CHAIRMAN KIENZLE: Any further discussion, questions or comments? All in favor?

COMMISSIONERS: Aye.

CHAIRMAN KIENZLE: All right. Any opposed? All right, the motion passes. Anything else we need to do today?

COMMISSIONER: Mr. Chairman, I move to adjourn this meeting.

DIRECTOR SANDOVAL: Mr. Chairman, if I may, before they get seconded, on behalf of the Department I now have my Director's hat on. I'd like to thank everybody on the Commission for their support in this last year. It has been a heavy lift and appreciate all the work. And we want to wish you all a very blessed Christmas.

CHAIRMAN KIENZLE: And before we break, Craig needs to introduce himself. So step up.

CRAIG PETERSON: Craig Peterson. I'm from Farmington, New Mexico. Lived there all my life. Born there. Glad to be part of this. I'm new at it, so I don't know a lot of what's going on but I really want to get involved in it and know more about it. If you have any questions or concerns, I'll get my number out and my email address and see if I can help.

CHAIRMAN KIENZLE: Right on. Thank you. Welcome aboard.

COMMISSIONER: Welcome aboard, Craig.

CHAIRMAN KIENZLE: Motion to adjourn?

COMMISSIONER: Second.

CHAIRMAN KIENZLE: So moved.

COMMISSIONER: Second.

CHAIRMAN KIENZLE: All in favor?

COMMISSIONERS: Aye.

CHAIRMAN KIENZLE: The Ayes have it.

In Re:

NEW MEXICO STATE GAME COMMISSION

**Special Meeting and Rulemaking Hearing
Albuquerque Marriott Pyramid North
5151 San Francisco Rd NE
Albuquerque, NM 87109**

**Wednesday, December 20, 2017
9:00 a.m. – 12:00 p.m.**

C E R T I F I C A T E

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

Alexandra Sandoval, Director and Secretary

Date

Paul M. Kienzle III, Chairman
New Mexico State Game Commission

Date

AS/scd

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.

19.31.22.2 **SCOPE:** department, staff, and landowners whose private property contains within its boundary, a segment of non-navigable public water.

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.

19.31.22.4 **DURATION:** Permanent.

19.31.22.5 **EFFECTIVE DATE:** January 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.

19.31.22.7 **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.

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

A. **Application:** 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

EXHIBIT

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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.

19.31.22.9 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.

19.31.22.10 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.

19.31.22.11 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 fourteen (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 19.31.22.9(B) 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 (7) 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 (7) 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.

19.31.22.12 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 NMSA 1978, § 39-3-1.1 (1999). 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.

19.31.22.13 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 NMSA 1978 § 17-4-6 (2015). Hunting and fishing on private property; posting; penalty.

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"X12")
- (2) Signs shall be printed in English and Spanish.
- (3) Signs shall state at the following prohibitions in accord with NMSA 1978 § 17-4-6(C)

(2015). 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.

2018 JAN -2 PM 1:35

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]

Transmittal Form

2018 JAN -2 PM 1:35

Volume: XXIX Issue: 1 Publication Date: 01/16/2018 Number of pages: 4 (ALD Use Only) Sequence No.

Issuing agency name and address: NEW MEXICO DEPARTMENT OF GAME AND FISH Agency DFA code: 516

Contact person's name: DONALD JARAMILLO Phone number: 505-476-8009 E-mail address: Donald.Jaramillo@state.nm.us

Type of rule action: New [checked] Amendment [] Repeal [] Repeal/Replace [] Renumber [] Emergency [] (ALD Use Only) Most Recent Filing Date:

Title number: 19 Title name: NATURAL RESOURCES AND WILDLIFE

Chapter number: 31 Chapter name: HUNTING AND FISHING

Part number: 22 Part name: LANDOWNER CERTIFICATION OF NON-NAVIGABLE WATER

Amendment Description (If filing an Amendment): Amendment's NMAC Citation (If filing an Amendment):

Are there any materials incorporated by reference? Yes [] No [] Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes [] No [] Public domain []

Concise Explanatory Statement for rulemaking adoption:

Notice date(s): November 14, 2017 Hearing date(s): December 20, 2017 Rule Adoption date: 12/20/2017 Rule Effective date: 01/22/2018

Specific statutory or other authority authorizing rulemaking: Sections 17-1-14, 17-1-26 and 17-4-6 NMSA 1978

Findings required for rulemaking adoption. Please attach and sign additional page(s) if necessary. The purpose of 19.31.22 NMAC is to establish a certification process by which landowners can register their legally-posted property with the department that will identify portions of non-navigable waters that run through privately owned property.

Issuing authority (If delegated, authority letter must be on file with ALD): Name: Alexandra Sandoval Check if authority has been delegated []

Title: Director

Signature: (BLACK Ink only) Alexandra Sandoval Date signed: 12/21/17

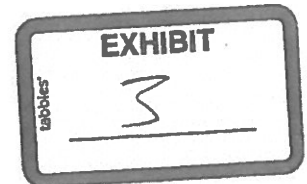
Jaramillo, Donald L., DGF

From: SCOTT ACKLESON [REDACTED]
Sent: Sunday, December 10, 2017 4:49 PM
To: DGF-FieldOpsComments
Cc: Jason Ackleson
Subject: Rule for landowner certificate and signage on private property

As a landowner on the upper Los Pinos River of private landowners I am strongly in support of the new rule that would allow the Department of Game and Fish director to establish rules, requirements, definitions and regulations that would allow a landowner to be issued a certificate and signage by the director and commission that recognizes that within my landowners private property that it is a segment of non-navigable public water whose riverbed is closed to access without written permission from the landowner. My property is posted with no trespassing signs and no fishing without written permission but I still continue to have trespassers come on my property trying to gain access to my portion of the river. Please implement this new rule.

Respectfully,
Scott M. Ackleson

[REDACTED]
[REDACTED]



Jaramillo, Donald L., DGF

From: Delbert Schafer [REDACTED]
Sent: Thursday, December 14, 2017 8:16 AM
To: DGF-FieldOpsComments
Subject: Public Access to waterways

Please retain public Access to all waterways whether navigable or non-navigable.

Jaramillo, Donald L., DGF

From: bart exposito <[REDACTED]>
Sent: Thursday, December 14, 2017 9:52 AM
To: DGF-FieldOpsComments
Subject: Non-Navigable Comment

I'm writing to express my opposition to the Non-Navigable legislation being considered by the Game Commission. This legislation would further privatize the waters that belong to the public. It's absolutely tragic that the Game Commission would even consider this. Many of the waters and land that has belonged to New Mexico and the public for generations are now largely under the ownership and influence of wealthy individuals who have zero vested interested in preserving the states heritage. This is all the effort of wealthy out of state (Texans) landowners who want to keep their land and water away from the public (New Mexicans), and in the hands of their wealthy clientele and friends. All one has to do is look at the case involving Dan Perry, the owner of Trout Stalker Ranch in Chama. Follow the money! Another case in point is the stretch of the Upper Pecos that is barb-wired to the point where it looks like the exterior of a maximum security prison. A total and complete abolition of our public lands. The more we let wealthy out of state individuals buy up our public lands and water with the aim to keep the public out and preserve it for the wealthy, the more our state will lose the very thing that makes it special. Once these lands and waters are out of reach of the public, they are gone forever.

Please keep public lands in public hands!

Sincerely,
Bart Exposito

Jaramillo, Donald L., DGF

From: Michael Cox [REDACTED] >
Sent: Thursday, December 14, 2017 1:54 PM
To: DGF-FieldOpsComments
Subject: Privatization of our public waters and access

My name is Michael Cox and I'm concerned about the up coming meet on access to water. I believe it is in direct conflict with our New Mexico constitution which states the water belongs to the public. I don't understand why this is being brought up for a bite so close to a new year which will limit the amount of input by the public. The Attorney General has stated in opinion he doesn't support this. Please pull this item.

Respectfully
Michael Cox

Sent from my iPhone

Jaramillo, Donald L., DGF

From: Robert Levin [REDACTED] >
Sent: Friday, December 15, 2017 9:49 AM
To: DGF-FieldOpsComments
Subject: Landowner Certification of Non-Navigable Water

I wanted to comment that I object to this subject rule which is in complete violation of the Navigation Act. Landowners of adjacent waterways do not consider the same knowledge base when making recommendations and do not have the required knowledge typically. In addition they are only concerned with limiting access to OUR public waters.

Hasty action on your part only leaves the door open for considerable litigation as this violates federal law. The Navigation Act is one of the oldest on the books and is still in effect and enforceable.

Regards

Robert Levin

Sent from [Mail](#) for Windows 10

Jaramillo, Donald L., DGF

From: Jeff & Patti Young <[REDACTED]>
Sent: Saturday, December 16, 2017 7:08 AM
To: DGF-FieldOpsComments
Subject: Re: NonNavigable Fishing Rule

https://d3n8a8pro7vhmx.cloudfront.net/backcountryhunters/pages/4547/attachments/original/1513398356/AG_opinion_April_2014.pdf?1513398356

From: "Jeff & Patti Young" <[REDACTED]>
To: [REDACTED]
Sent: Saturday, December 16, 2017 7:05:40 AM
Subject: Re: NonNavigable Fishing Rule

Please postpone action on New Mexico stream access until this issue can be thoroughly discussed. I cannot attend the meeting because as usual, the meeting is held during the week during working hours. I am a life long anger in New Mexico who respects the state constitutional rights of it's citizens. The 1945 Supreme Court ruling which the attorney general has recently also upheld indicates that the water should be accessible to the public provided we can access through public lands.

thanks

Jeff Young
Sandia Park

From: "Jeff & Patti Young" <[REDACTED]>
To: [REDACTED]
Sent: Thursday, December 14, 2017 6:37:27 PM
Subject: NonNavigable Fishing Rule

Just read the rule that would allow landowners to certify their water as non navigable and therefore restrict access to the water by the public.

This violates the constitutional rights and the ruling provided by the NM Attorney General on stream access.

I ask that you do not move forward with this proposal that would restrict public access to public water.

Thanks

Jeff Young
Sandia Park

Jaramillo, Donald L., DGF

From: Jeff & Patti Young [REDACTED]
Sent: Thursday, December 14, 2017 6:37 PM
To: DGF-FieldOpsComments
Subject: NonNavigable Fishing Rule

Just read the rule that would allow landowners to certify their water as non navigable and therefore restrict access to the water by the public.

This violates the constitutional rights and the ruling provided by the NM Attorney General on stream access.

I ask that you do not move forward with this proposal that would restrict public access to public water.

Thanks

Jeff Young
Sandia Park

Jaramillo, Donald L., DGF

From: Martin Torrez <[REDACTED]>
Sent: Saturday, December 16, 2017 8:31 AM
To: DGF-FieldOpsComments
Subject: Stream Access

Dear Game Commission Representatives,

I am a private land owner in the southern part of New Mexico and lucky enough to own property in which the Rio Ruidoso runs through. Several generations of our family have caught their first fish in this river, at times catching their biggest fish.

It would be selfish of me to keep others from enjoying these experiences. I fully support the New Mexico Constitution and think its only right to allow access to streams for all anglers. Take politics out and give us our already establish access.

Best regards

Martin C. Torrez

Jaramillo, Donald L., DGF

From: Brad Jones <[REDACTED]>
Sent: Saturday, December 16, 2017 8:48 AM
To: DGF-FieldOpsComments
Subject: Comments on 19.31.22 Proposal

Commissioners,

The news of this proposal came as a surprise to many sportsmen and anglers. I am writing to ask that this proposal be rejected by the Commission.

Upon review of Chapter 17 NMSA 1978, it is pretty clear that the Commission does not have the statutory authority to designate or certify non-navigable waterways for the purposes of preventing or defining criminal trespass on private property. The law is pretty clear: the Commission is obliged to serve and protect our state wildlife resources. It is allowed to close streams to protect wildlife. This proposal has nothing to do with the protection of wildlife or stream habitats.

The NM State Constitution is also pretty clear about stream access: "every natural stream...is hereby declared to belong to the public." The 1945 Red River Valley NM Supreme Court decision also supports anglers rights to access their public waters. This proposal flies in the face of these legal proclamations and ignores the rights of law abiding anglers.

Most disturbingly, the proposal provides more detail about the signage requirements than any criteria for determining the "non-navigability" certification of our waters.

At a minimum, the hearing of this proposal should be delayed until all relevant parties can review and comment on this proposal. No major conservation or sportsmen/angler groups was given adequate time to review, let alone provide input for this proposal. And, once again, the Commission has scheduled the public hearing during normal business hours in the middle of the work week which prevents hardworking citizens from attending. Unlike the Commission, many working sportsmen would be willing to use their personal time to attend these hearings.

Thank you for your consideration and again I ask that you delay, if not altogether reject, this anti-public access proposal.

-B. Jones
A Concerned NM Sportsman

Jaramillo, Donald L., DGF

From: Jeff Arterburn [REDACTED]
Sent: Saturday, December 16, 2017 4:47 PM
To: DGF-FieldOpsComments
Subject: Comment on Proposed Landowner Certification of Non-Navigable Water

Attn: Office of the Director, New Mexico Department of Game and Fish
1 Wildlife Way
P.O. Box 25112
Santa Fe, New Mexico 87507.

Re: New Rule NMAC 19.31.22 Landowner Certification of Non-Navigable Water

I am writing to express my opposition to the proposed new rule that would involve the Department and the Commission in the certification of "non-navigable" waters on private property. In my opinion, the proposed process is beyond the purview of the Department.

The determination of "navigable waters" should not consider the ownership status of the land (private or public). This determination should take place at the Federal level, preferably by the Environmental Protection Agency, or alternatively in cooperation with the Army Corps of Engineers.

Thank you for considering these comments.

Jeff Arterburn
[REDACTED]

Jaramillo, Donald L., DGF

From: Pat Florence [REDACTED]
Sent: Saturday, December 16, 2017 5:33 PM
To: DGF-FieldOpsComments
Subject: Public Comment Rule NMAC 19.31.22

Come on. You've got to be friggin' kidding me!!

You want to change the law to keep me out of the stream that the public owns? Give me a break!! This is just another attempt by you Republicans to keep average citizens from enjoying what we own and, instead, give the rich folks who contribute to your campaigns even more. As you can see, I'm very opposed to the passage of this biased rule. But there are many reasons this rule should not be passed other than the fact that it is *only* being considered because a bunch of right-wing fanatics are in charge of the state government's administrative branch for one more year.

One reason this regulation should not be passed is because it is entirely illegal. Should you choose to pass this bogus rule, it will cost the state quite a bit of money to defend your actions (both administrative and judicial budgets would be effected) before it is thrown out anyway. Please help the state by not forcing this expenditure of money, time, and effort in a wasted cause.

Even if you decide to approve this rule, you shouldn't do it now. The last-minute procedure you are using is not the proper process. That alone will make the rule invalid.

It seems like you should take the advise of your attorneys and be responsible with the authority you have been given instead of being boobs. DON'T approve this rule.

Thank you.

Sincerely,
Pat Florence



Jaramillo, Donald L., DGF

From: Joel Gay [REDACTED]
Sent: Sunday, December 17, 2017 8:31 AM
To: DGF-FieldOpsComments
Subject: Landowner certification of non-navigable water
Attachments: NM BHA testimony on Non-navigable Streams proposal.docx

To: State Game Commission
From: NM Chapter of Backcountry Hunters and Anglers

The New Mexico Chapter of Backcountry Hunters and Anglers would like to express our opposition to the proposal before you today to establish new regulations regarding landowner certification of non-navigable waters in New Mexico.

The New Mexico Constitution and the state Supreme Court ruling known as "*Red River*" make it abundantly clear that the public has the right to fish, float or otherwise recreate on the streams and rivers that flow through private property in New Mexico -- provided that the individual does not trespass to reach that stream or trespass when they get out. The "*Red River*" decision specifically notes that this right of access has nothing to do with navigability.

Yet for unknown reasons, previous State Game Commissions have maintained just the opposite, that the public's constitutional right to access our streams is actually trespass, and therefore subject to fines and even jail.

The proposal before you today continues this terrible tradition by once again putting up roadblocks to the public to enjoy the state waters that our Constitution and Supreme Court have said, unequivocally, that we have a right to enjoy.

Our membership urges you to vote down this proposal, and instead instruct the Department to take a new tack. Ask them to prepare a plan that will allow the fishing public to access all waters in the state, to conduct an education outreach for anglers and streamside landowners on this new era in New Mexico fishing, to write additional regulations as necessary to protect fisheries and habitat, and to increase the streamside law enforcement.

It is past time for the State Game Commission and the Department of Game and Fish to respect the New Mexico Constitution and provide public access to public waters, once and for all.

Respectfully submitted for the NM BHA Board and Membership,

Joel Gay
Albuquerque

Jaramillo, Donald L., DGF

From: Peter Aniello <[REDACTED]>
Sent: Monday, December 18, 2017 6:37 AM
To: DGF-FieldOpsComments
Subject: Stream access

I'm a licensed New Mexico fisherman. I will be unable to attend your December 20 meeting on stream access, since it's during work hours on a weekday, but wanted to comment that any decision you make should strengthen the right for fishermen to access streams, as enshrined in the state constitution. Any attempt to block fishermen from accessing streams goes directly against the constitution, and would therefore be illegal, as well as unethical. Thanks for the opportunity to comment.

Pete Aniello
[REDACTED]

Jaramillo, Donald L., DGF

From: Miller Talbot <[REDACTED]>
Sent: Monday, December 18, 2017 6:44 AM
To: DGF-FieldOpsComments
Subject: New Mexico Stream Access

I fail to understand why our Government "of the people, by the people, and for the people" continues to deny the people access to the things that help keep us culturally sane. I am a law abiding angler and I desire nothing more than increased access to our already limited number of streams for fishing. I understand that there are those who want to horde these waters for their own fun and profit but this is not the way.

I ask you to please postpone action on the pending stream access action. Please prepare a plan that will allow public access to all waters in New Mexico. Help the fishing public do a better job of enjoying these waters and conserving these wild areas by educating us regarding the protection of fisheries and habitat. And for God's sake, increase stream side law enforcement! Enlist the help of anglers in enforcing fishing laws by offering rewards for reports that lead to citations... like reduced cost or free fishing licenses for one season.

I would love to be able to attend the meeting on Wednesday, December 20, but it's during work hours!

Thank you in advance for protecting our access.

--

Nothing clears a troubled mind like casting a fly...

Miller

Jaramillo, Donald L., DGF

From: Carl Bickford [REDACTED]
Sent: Monday, December 18, 2017 6:48 AM
To: DGF-FieldOpsComments
Subject: Public Stream Access Comment

I am a NM angler that is concerned about public access to our state's streams. Growing up in a state (New York) that has well-established water access for the public, and where private land owners cannot restrict water-borne access to streams that cross their property, I am discouraged to see my home for the last 25 years struggle with this issue. I understand that our own state constitution upholds access to streams for angling as long as private land is not crossed to get there. Let's stay with that interpretation - at least.

I am not able to attend the meeting this week because NW NM is too far away for work-week travel to ABQ, and the time would preclude anyone with a job.

I appreciate you attention.

Carl

--
Carl Bickford
[REDACTED]

Jaramillo, Donald L., DGF

From: Brent Taft [REDACTED]
Sent: Monday, December 18, 2017 6:51 AM
To: DGF-FieldOpsComments
Subject: Non-Navigable Water

Hello,

I'd love to make Wednesday's Commission meeting; however, I will be working since it is being held during normal business hours. Regardless, I would like to make it known that I do not support the new landowner certification of non-navigable water. Given the fact that stream access is a constitutional right in New Mexico (backed by Attorney General Opinion No 14-04), I don't see how Game and Fish would have jurisdiction to rule on this matter. It is not a good use of Game and Fish's limited resources. I hope that you will scrap this idea entirely, but at the very least it should be postponed to provide sufficient public input on the mater.

Thanks,
Brent Taft

Jaramillo, Donald L., DGF

From: Steve McCloskey <[REDACTED]>
Sent: Monday, December 18, 2017 7:29 AM
To: DGF-FieldOpsComments
Subject: Stream Access

I request there be no further impacts to lawful access to public streams. I support private property rights, but in the case of streams in NM, fishermem should be able to fish within the stream, bank to bank. Thank you.
Steve McCloskey



Jaramillo, Donald L., DGF

From: Lane Leckman [REDACTED]
Sent: Monday, December 18, 2017 9:06 AM
To: DGF-FieldOpsComments
Subject: Access

AS a fisherman since my childhood 60 years ago I have appreciated the access I have to fishing streams.
I oppose any restrictions other than those already in place.

Lane Leckman
[REDACTED]

Jaramillo, Donald L., DGF

From: Howard Hutchinson [REDACTED]
Sent: Monday, December 18, 2017 3:55 PM
To: DGF-FieldOpsComments
Subject: Comment on Non-Navigable Rule
Attachments: Coalition Non-Navigable Rule Comments.docx

Dear Commissioners,

The comments of the Coalition are attached.

Howard

Howard Hutchinson
Executive Director
Coalition of Arizona/New Mexico Counties

[REDACTED]

Like the Coalition on Facebook: <https://www.facebook.com/coalitionofaznmcounties>

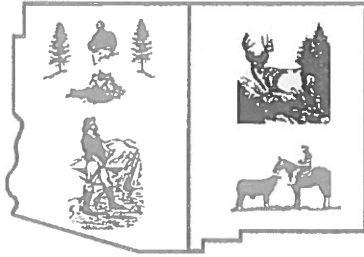
"Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has." -Margaret Mead, US Anthropologist

"Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms and the grass will grow in the streets of every city in the country." -William Jennings Bryan

"Extremism in the defense of liberty is no vice. Moderation in the pursuit of justice is no virtue." - Drafted by Karl Hess Sr. for Barry Goldwater

"Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves." William Pitt, speech, Nov. 18, 1783.

Coalition of Counties



Coalition Of Arizona/
New Mexico Counties
For Stable Economic
Growth

*"Working together for responsible
management."*

December 18, 2017

New Mexico Game Commission
C/O Office of the Director
New Mexico Department of Game and Fish
1 Wildlife Way, P.O. Box 25112
Santa Fe, New Mexico 87507

Dear Commissioners,

These comments are being submitted by the Arizona Counties Cochise, Gila, Graham and Navajo and the New Mexico Counties, Catron, Chaves, Eddy, Harding, Hidalgo, Lincoln, McKinley, Rio Arriba, Roosevelt and Sierra along with strong support from the timber, farming, livestock, mining, small business, sportsman and outfitter industries as members of the Coalition of Arizona/ New Mexico Counties (Coalition). Our representation currently exceeds 700,000 in combined county populations.

Thank you for this opportunity to comment. We appreciate your effort to put into effect NMSA 1978 § 17-4-6(C). We only have a single comment concerning 19.31.22.13 D. (3) and E. (4). We feel that it is not clear if a person operating a watercraft on non-navigable water can pass through private land if they don't walk or wade onto private land. This was a concern voiced on the legislation but was not addressed by the legislature. The Coalition feels that this ambiguity may lead to cross interpretations giving rise to unnecessary conflicts.

The problem is the use of the terms, "walk or wade onto private land." If a person is floating and never walks or wades onto private land are they in violation? Can this be clarified in the rule?

19.31.22.13 FINAL VOTE AND APPROVAL BY COMMISSION AND EFFECT THEREOF:

D. Sign requirements:

(1) Signs shall be at least 144 square inches (12"X12")

(2) Signs shall be printed in English and Spanish.

(3) Signs shall state at the following prohibitions in accord with NMSA 1978 § 17-4-6(C) (2015). 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.

E. Sign Posting requirements:

(4) Signs shall be posted where water line crosses all property boundaries.

Lewis Derrick, President

Jaramillo, Donald L., DGF

From: Ted Koch <[REDACTED]>
Sent: Monday, December 18, 2017 9:43 PM
To: DGF-FieldOpsComments
Subject: Stream access

Commissioners:

Please do all you can and that is allowable by out state constitution to increase access to streams in New Mexico. Lack of access is the greatest challenge to maintaining our hunting and fishing heritage. Pay it forward.

Thank you,

Ted Koch, hunter and angler
[REDACTED]

Sent from my iPad

Jaramillo, Donald L., DGF

From: Howard Bradley [REDACTED]
Sent: Tuesday, December 19, 2017 5:45 AM
To: DGF-FieldOpsComments
Subject: Public stream access

As an aging NM angler dependent on public lands for hunting and fishing, I urge you to think and act more for public fishing opportunities in this great state, rather than lock them up. Please honor the attorney generals decision.

Thank you,
Howard Bradley

Sent from my iPad

Jaramillo, Donald L., DGF

From: Nathaniel Sims [REDACTED]
Sent: Tuesday, December 19, 2017 8:37 AM
To: DGF-FieldOpsComments; mom mom
Subject: Stream access

As usual wealth and power seem to drive the land regulations and hunting laws in New Mexico. Stream access should be protected for the entire public not just those privileged few lucky enough to own large tracts of land in NM. Please do not let the greed and cronyism in this state dictate more of our land use and hunting and fishing laws. Is it not bad enough that the land owners of this state already enjoy more than half of the elk tags which they are free to sell for a profit to wealthy out of state hunters even though more than half the elk habitat is on public land. Please consider the ethics of protecting the rights of the general public and not the privileged few.

Sincerely,

Nate Sims

Griego, Robert, DGF

From: Susan Torres [REDACTED]
Sent: Tuesday, December 19, 2017 9:29 AM
To: DGF-FieldOpsComments
Subject: NMWF Opposition to adoption of proposed rule 19.31.22 NMAC, "Landowner Certification of Non-Navigable Water"
Attachments: SGC Navigability rule NMWF comment.pdf

Good morning,

Please find the New Mexico Wildlife Federation's comments in response to the proposed rule 19.31.22 NMAC attached. Please let me know if you have any questions!

Susan Torres

Communications Director

New Mexico Wildlife Federation



www.nmwildlife.org

<https://twitter.com/NMWildlife>

<https://www.facebook.com/nmwildlife/>

TO: Members of the New Mexico State Game Commission (SGC); Alexandra Sandoval, Director, NM Department of Game and Fish (NMDGF)

FROM: Board of Directors, New Mexico Wildlife Federation (NMWF)

REF: NMWF Opposition to adoption of proposed rule 19.31.22 NMAC, "Landowner Certification of Non-Navigable Water"

The Board of Directors of the New Mexico Wildlife Federation opposes adoption of the proposed rule by the State Game Commission for the following reasons:

The proposed rule is contrary to the New Mexico Constitution;

The proposed rule is designed to aid implementation and enforcement of New Mexico trespass statute § 17-4-6 NMSA, as amended by Senate Bill 226 in 2015, which if enforced as its framers advertised is itself contrary to the New Mexico Constitution;

Whether any given New Mexico public water is "navigable" or "non-navigable" is irrelevant to our state's trespass statutes or rules, as the New Mexico Constitution establishes the doctrine of Prior Appropriation as the ruling doctrine of ownership, management, and access to the public waters of New Mexico;

The proposed rule would infringe upon the constitutional rights of New Mexico citizens and tourists to utilize publicly accessible streams and their streambeds, including those flowing through or adjacent to private property, for fishing, boating or other recreational purposes;

The rule holds out a false promise to landowners, who would be required to undergo an arduous process to have a stream certified as non-navigable and subject to the new rule and trespass statute, when such certification would be meaningless under the New Mexico Constitution.

DISCUSSION AND BACKGROUND:

The landmark 1945 decision by the New Mexico State Supreme Court, "State ex rel. State Game Commission vs. Red River Valley Co." answered the question of ownership and access to New Mexico's waters, ruling in favor the public and stating 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. . ."

The public's right to utilize publicly accessible waters was clarified and strengthened by NM Attorney General Opinion No. 14-04 (dated April 1, 2014), which reviewed the Red River decision as well as other case law in New Mexico, Montana and Utah. It declared, in sum: "Question: May a private landowner exclude

others from fishing in a public stream that flows across the landowner's property?' '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.'"

Subsequent to Senate Bill 226's amendment to trespass statute § 17-4-6 NMSA, an Attorney General's advisory letter dated August 5, 2016, addressed questions of access and the relevance of "non-navigability" to trespass: "...the (NM) 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. 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." Citing the 1945 "Red River" decision, the AG adds that "the 'test of navigability' used in other states to determine the public character of water does not apply in New Mexico."

RECOMMENDATIONS

Given the public nature of the New Mexico Constitution, the 1945 "Red River" decision, and the Attorney Generals' analyses of 2014 and 2016, the State Game Commission is surely well aware of the flaws in both proposed rule 19.31.22 NMAC and trespass statute § 17-4-6 NMSA as amended by SB 226.

The New Mexico Wildlife Federation therefore recommends that the State Game Commission:

Accepts that the New Mexico Constitution and its doctrine of Prior Appropriation vests ownership of New Mexico's waters with New Mexico's citizens;

Accepts that the state Constitution, as interpreted by the New Mexico Supreme Court and state Attorney Generals, therefore opens those streams and streambeds to public use without permission from adjacent landowners if the streams are accessed via public property;

Rejects the proposed rule and abandons the irrelevant façade of 'non-navigability';

Takes the lead in bringing the New Mexico Game and Fish Department's rules and policies regarding trespass definitions and enforcement into compliance with the New Mexico Constitution;

Assures that those policies and rules permit, protect and properly regulate the public rights to use public waters;

Takes the lead in educating the public and landowners as to the Constitutional rights of each, as regards stream access, including the legality of a citizen's right to

be present in a stream flowing through private property; landowners' right to allow or withhold the privilege of trespass across their private property; anglers' and other recreationists' legal, responsible and ethical use of public waters flowing through private lands;

Work with, and direct the Game and Fish Department to work with, other public and private stakeholders such as anglers, boaters and landowners, the State Parks Division, and other state and local law enforcement agencies, to educate and inform all involved, and to bring about consistent legal definitions, policies, rules and enforcement of legal access to public waters and security of adjacent private lands;

Acknowledge that, although stream access advocacy is frequently framed as an assault on private property rights, the reverse is true: The long-standing failure of the state to recognize and enforce public access to public waters as allowed under the New Mexico Constitution has resulted in a steady erosion of public rights by private property owners;

Emulate their predecessors on the State Game Commission of 1945 who brought and won the "Red River" case, challenging a powerful coalition of private interests on behalf of the license-buying public angler. We urge the Commission to reverse its current course and again stand on the side of its license-buying angler: Seize the opportunity, Commissioners, and restore the eroded constitutional right of New Mexico's public to fish in public waters.

Griego, Robert, DGF

From: John Crenshaw [REDACTED]
Sent: Tuesday, December 19, 2017 2:04 PM
To: DGF-FieldOpsComments
Cc: [REDACTED]; Sandoval, Alexandra J., DGF; [REDACTED]
Subject: NMWF Comments regarding New Rule NMAC 19.31.22 Landowner Certification of Non-Navigable Water
Attachments: NM Wildlife Federation Comments re proposed Rule 19.31.22.docx; 1_April_2014_Representative_Varela-14-04.pdf; 5_August_2016_Representative_Varela.pdf; SPD boating-fishing advisory 12-19-2017.docx

Good Afternoon;

On behalf of the New Mexico Wildlife Federation board of directors and the federation's fishing- and hunting-license buying membership, the attached letter states the Federation's position on proposed New Rule NMAC 19.31.22, "Landowner Certification of Non-Navigable Water." This transmission also includes the attached supporting documents: N.M. Attorney General Opinion 14-04, issued in response to a question by the late State Representative Luciano "Lucky" Varela; Attorney General letter to Rep. Varela dated August 16, 2016; and a verbatim copy of a New Mexico State Parks Division informational advisory for boating, fishing and other recreational access to New Mexico streams, as it was digitally copied and pasted from the SPD website into a Microsoft Word document on December 17, 2017.

Please acknowledge receipt. Thank you very much.

John Crenshaw

John Crenshaw, President
New Mexico Wildlife Federation

[REDACTED]
www.nmwildlife.org
<https://www.facebook.com/nmwildlife>
<https://twitter.com/NMWildlife>

December 19, 2017

TO: Members of the New Mexico State Game Commission (SGC); Alexandra Sandoval, Director, NM Department of Game and Fish (NMDGF)

FROM: Board of Directors, New Mexico Wildlife Federation (NMWF)

REF: NMWF Opposition to adoption of proposed rule 19.31.22 NMAC, "Landowner Certification of Non-Navigable Water"

The Board of Directors of the New Mexico Wildlife Federation opposes adoption of the proposed rule by the State Game Commission for the following reasons:

The proposed rule is contrary to the New Mexico Constitution;

The proposed rule is designed to aid implementation and enforcement of New Mexico trespass statute § 17-4-6 NMSA, as amended by Senate Bill 226 in 2015, which if enforced as its framers advertised is itself contrary to the New Mexico Constitution;

Whether any given New Mexico public water is "navigable" or "non-navigable" is irrelevant to our state's trespass statutes or rules, as the New Mexico Constitution establishes the doctrine of Prior Appropriation as the ruling doctrine of ownership, management, and access to the public waters of New Mexico;

The proposed rule would infringe upon the constitutional rights of New Mexico citizens and tourists to utilize publicly accessible streams and their streambeds, including those flowing through or adjacent to private property, for fishing, boating or other recreational purposes;

The rule holds out a false promise to landowners, who would be required to undergo an arduous process to have a stream certified as non-navigable, when such status would be meaningless as it relates to trespass law and rule under the New Mexico Constitution.

The rule would impose new tasks on NMDGF staff, who have no known expertise in assessing whether a stream meets the arcane certification criteria proposed, but would be tasked with analyzing dozens and possibly hundreds of these complex applications. This process will be a demanding use of professional-level staff time. The proposal fails to address personnel demands and identify a new revenue source to fund the new duties.

Prosecuting alleged trespassers under the new rule, knowing that it is invalid, would expose landowners, the State Game Commission, the Game and Fish Department and other law enforcement agencies to civil liabilities.

DISCUSSION AND BACKGROUND:

The landmark 1945 decision by the New Mexico State Supreme Court, "State ex rel. State Game Commission vs. Red River Valley Co." answered the question of ownership and access to New Mexico's waters, ruling in favor the public and stating 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. . ."

The public's right to utilize publicly accessible waters was clarified and strengthened by N. M. Attorney General Opinion No. 14-04 (dated April 1, 2014), which reviewed the Red River decision as well as other case law in New Mexico, Montana and Utah. It declared, in sum: "Question: May a private landowner exclude others from fishing in a public stream that flows across the landowner's property?' '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.'"

Subsequent to Senate Bill 226's amendment to trespass statute § 17-4-6 NMSA, an Attorney General's advisory letter dated August 5, 2016, addressed questions of access and the relevance of "non-navigability" to trespass: ". . .the (NM) 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. 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." Citing the 1945 "Red River" decision, the AG adds: "the 'test of navigability' used in other states to determine the public character of water does not apply in New Mexico."

The above Attorney Generals' advisories are not isolated: The attached N.M. State Parks advisory currently posted on the agency website for boaters, anglers and other recreationists references an Attorney General's letter issued in 2005 or prior. That letter also cited the "Red River" case and reached the same conclusion: "**Red River Valley defined public waters very broadly, and expressly condoned recreational uses of public waters.** The only clearly important factor to distinguishing public from private streams is whether the public has legal access." (Emphasis in original.)

RECOMMENDATIONS

Given the public nature of the New Mexico Constitution, the 1945 "Red River" decision, and the Attorney Generals' analyses of 2014, 2016 and ca. 2005, the State Game Commission is surely well aware of the flaws in both proposed rule 19.31.22 NMAC and trespass statute § 17-4-6 NMSA as amended by SB 226.

The New Mexico Wildlife Federation therefore recommends that the State Game Commission:

Accepts that the New Mexico Constitution and its doctrine of Prior Appropriation vests ownership of New Mexico's waters with New Mexico's citizens;

Accepts that the state Constitution, as interpreted by the New Mexico Supreme Court and state Attorney Generals, therefore opens those streams and streambeds to public use without permission from adjacent landowners if the streams are accessed via public property;

Rejects the proposed rule and abandons the irrelevant façade of 'non-navigability';

Takes the lead in bringing the New Mexico Game and Fish Department's rules and policies regarding trespass definitions and enforcement into compliance with the New Mexico Constitution;

Assures that those policies and rules permit, protect and properly regulate the public rights to use public waters;

Takes the lead in educating the public and landowners as to the Constitutional rights of each, as regards stream access, including the legality of a citizen's right to be present in a stream flowing through private property; landowners' right to allow or withhold the privilege of trespass across their private property; anglers' and other recreationists' legal, responsible and ethical use of public waters flowing through private lands;

Work with, and direct the Game and Fish Department to work with, other public and private stakeholders such as anglers, boaters and landowners, the State Parks Division, and other state and local law enforcement agencies, to educate and inform all involved, and to bring about consistent legal definitions, policies, rules and enforcement of legal access to public waters and security of adjacent private lands;

Acknowledge that, although stream access advocacy is frequently framed as an assault on private property rights, the reverse is true: The long-standing failure of the state to recognize and enforce public access to public waters as allowed under the New Mexico Constitution has resulted in a steady erosion of public rights by private property owners;

Emulate their predecessors on the State Game Commission of 1945 who brought and won the "Red River" case, challenging a powerful coalition of private interests on behalf of the license-buying public angler. We urge the Commission to reverse its current course and again stand on the side of its license-buying angler: Seize the opportunity, Commissioners, and restore the eroded constitutional right of New Mexico's public to fish in public waters.

SUPPORTING DOCUMENTS SEPARATELY ATTACHED:

N.M. Attorney General Opinion No.14-04

N.M. Attorney General Advisory Letter, dated Aug. 5, 2016

State Parks Division boating and recreational advisory, digitally copied and pasted in whole and verbatim as it appeared on the division's website as of December 19, 2017



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
[REDACTED]

QUESTION:

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

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.²

¹ 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.

² 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.³ 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

³ 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.⁴

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 171.⁵ 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.⁶

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

⁴ 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.

⁵ 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.

⁶ 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).⁷ 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

⁷ 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.⁸ 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

⁸ *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.⁹ *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

⁹ 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."

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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Chief of Staff for Policy & Public Affairs

August 5, 2016

The Honorable Luciano "Lucky" Varela
New Mexico State Representative

Re: Opinion Request – Access to Public Waters on Private Property

Dear Representative Varela:

You requested our advice regarding the constitutionality of Senate Bill 226, which was enacted in 2015 and amended state law governing hunting and fishing on private property. *See* S.B. 226, 52nd 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). As discussed below, based on the applicable constitutional and statutory provisions, case law and previous Attorney General opinions, we conclude 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.

SB 226 amended Section 17-4-6 to provide, in pertinent part:

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.

NMSA 1978, § 17-4-6(C).

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

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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

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to SB 226, 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.

SB 226 precludes a person engaged in hunting or other recreational activities from "walk[ing] or wad[ing] onto private property through non-navigable public water or access public water via private property" without the written consent of the person who owns, leases or controls the 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 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.

To state our conclusion another way, 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. 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).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Jennie Lusk
Assistant Attorney General

cc: Tania Maestas
Deputy Attorney General of Civil Affairs

STATE PARKS DIVISION BOATING & FISHING ADVISORY, digitally copied from the division's website on December 19, 2017 and pasted below in whole on that same date by John Crenshaw, president, N.M. Wildlife Federation:

Overview

This is a general overview of the laws allowing use of rivers in New Mexico. It was last researched in 2005.

NEW MEXICO

1. Basic Description

The constitution of New Mexico declares water in a stream to be public. The public has the right to use this water for recreational purposes, subject to the right of appropriators to remove water from the stream (e.g. for irrigation). So, in New Mexico, it seems that you can float any stream for which there is legal access.

2. State Test of Navigability

New Mexico, a state that follows the **doctrine of prior appropriation**, has taken a different approach to determining public rights in streams where the streambed is privately owned. New Mexico is one of the few states that have used the appropriation doctrine, and not common law navigability tests, to determine which waters are public. In New Mexico, while title to streambeds may be held by a private entity, appropriators hold only a usufructuary right in the water, and title to the water remains in the state. **All unappropriated waters from every natural stream, perennial or torrential, are public waters in the public domain. In fact, navigability is but one criterion in determining whether there exists public rights to use a body of water.**

While no case or law has carefully defined the criteria for distinguishing public and private waters, the most liberal of tests distinguishing public and private waters is consistent with Red River Valley. **Red River Valley defined public waters very broadly, and expressly condoned recreational uses of public waters.** The only clearly important factor to distinguishing public from private streams is whether the public has legal access.

3. Extent of Public Rights in Navigable Rivers

Red River Valley recognized a general expansion in the public water doctrine. **The public has a right to use these waters for a beneficial use, including recreation and fishing.**

No case or statute discusses portaging on private land around obstructions in the stream. While the public doctrine gives the public the right to use the zone between the high and low water marks, the New Mexico attorney general's office expressed doubts about the right to portage above this zone. The letter cited the trespass statute, which says "knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land," or "knowingly entering or remaining upon the unposted land of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. Notice of no consent to enter shall be deemed sufficient notice to the public . . . by posting the property at all vehicular access entry ways." The letter did not discuss portaging as being a necessary incident to the right to navigate. (Note: Old Spanish/Territorial Law in the southwest was told to this editor contained references to portage being continuation of the right to navigate due to seasonal or water variability issues in the Southwest)

Red River Valley, however, does provide evidence that portaging may be accepted. The court looked to the laws of the Partidas, which were the prior existing Spanish laws in New Mexico that the New Mexico constitution is based upon. The court cited the following law of the Partidas: "And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them, by mooring his

vessels to the trees, by repairing his ships and sails upon them, and by landing his merchandise there; and fishermen have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live." This language is tempered by another quote later in the opinion that states, "The small streams of the state are fishing streams to which the public has a right to resort so long as they do not trespass along the banks." This latter statement is not dispositive because it can be argued that use of the bank incident to navigation is not a trespass, and that the court was referring to trespass as it relates to access.

4. Statutes Governing Landowner Liability

New Mexico's recreational use statute (N.M. Stat. Ann. §§ 16-3-9, 17-4-7, & 66-3-1013) was passed in 1973. This law does not specify if the landowner has a duty to keep the property safe. It does specify that a landowner does not have a duty to warn or to provide an assurance of safety. In general, this law grants landowners broad immunity from liability for personal injuries or property damage suffered by recreationists on the owner's land. However, the law does not protect the landowner from liability for willful or wanton misconduct, and does not protect the landowner if a fee is charged for the use of the property unless they are fees from land leased to a public agency.

New Mexico's tort claims act, which defines the scope of the government's liability, is detailed in N.M.S.A. 27 § 41-4-1 to 41-4-27 et seq.

5. Miscellaneous

Description of Federal Navigability Law, the Federal Title Test, & the Importance of The Daniel Ball

Federal navigability law is used to designate federal waters as navigable. If a body of water does not meet these requirements it can still be declared navigable under state law through a state test, but Congress may not regulate it under the powers of the Commerce Clause of the Constitution.

The federal definition of "navigable" waters determines title to the beds underlying streams and lakes. If water was "navigable" under the federal test at the time of statehood, title to the bed of the stream or lake passed to the state upon admission into the Union.

The Daniel Ball is an important Supreme Court case dealing with navigability. It set precedent in three major areas:

- A river is regarded as a "public navigable river" if it is susceptible of being 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 travel and trade on water.
- A river that is navigable in fact is navigable in law.
- The test of navigability, as applied to "navigable waters," is the capability of being used for useful purposes of navigation, -- of trade and travel in the usual & ordinary modes, -- and not the extent and manner of such use.

The federal tests of navigability for determining title and defining Congress's power differ slightly. Both determine whether the body of water was navigable in fact as of the date a state came into the Union, not the time the determination was made. However, the natural & ordinary condition of the body of water at statehood determines navigability for title; whereas, the turning issue for commerce clause and congressional management purposes is determined by whether the body of water could be made navigable by reasonable artificial improvements.

Notes on Landowner Liability and Recreational Use Statutes

Often, private landowners are unwilling to open up their land to public use for the simple reason of liability. While this is a valid concern, virtually every state has legislation that addresses this issue and usually offers private landowners protection from liability. Generally, these laws are

called Recreational Use Statutes. While each state has some form of Recreational Use Statute, the protection offered to landowners varies greatly from state to state.

The underlying policy of a Recreational Use Statute (RUS) is that the public's need for recreational land has outpaced the ability of local, state, and federal governments to provide such areas and that private landowners should be encouraged to help meet this need. Generally speaking, a RUS provides that a landowner does not owe, to one using his/her property for recreational purposes and without charge, a duty of care to keep the property safe for entry or use, nor a duty to give any warning of a dangerous condition, use, structure, or activity on the property. In other words, under an RUS, recreational users are treated in the same manner as trespassers and thus the landowner owes them no duty of care.

When the tract of land is owned publicly (e.g. city or state owned park), and in the absence of sovereign immunity, the governing law is some form of a State Tort Claims Act or Governmental Immunity Act that the individual state has passed. This acts as the primary basis for tort liability for municipal, county, school, and state governmental bodies. On the Federal level, the Federal Tort Claims Act serves as a basis for liability. Additionally, some state courts have held that the state RUS was applicable to governmental entities.

For more information on the specific laws that govern this topic in your state please refer to a source of information directed at that subject. Our website has links to these statutes at <www.awa.org/liability_statutes.htm>. Another source on the internet is <www.law.utexas.edu/dawson/recreate/recreate.htm>. Recreational Use Statutes and landowner liability are other areas where legal counsel would be a wise option.

The reason this issue is pertinent to access rights and navigability law is that there is often a right to portage natural obstructions in a body of water that accompanies the right to float a river. Additionally, this subject may come into context when a boater, fisherman, or bather exits the water for some other reason

Griego, Robert, DGF

From: Marco E. Gonzales <[REDACTED]>
Sent: Tuesday, December 19, 2017 1:47 PM
To: DGF-FieldOpsComments
Subject: Fwd: New Mexico Habitat Conservation Initiative's (NMHCI's) Comments Supporting Landowner Certification Of Non-Navigable Water Draft Rule
Attachments: River Access (W3105653x7A92D).pdf; ATT00001.htm



Marco E. Gonzales
Shareholder



D: [505.982.8170](tel:505.982.8170) | O: [505.983.2020](tel:505.983.2020) | F: [505.988.8996](tel:505.988.8996)

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Begin forwarded message:

From: <[REDACTED]>
Date: December 14, 2017 at 12:27:38 PM CST
To: <[REDACTED]>
Subject: New Mexico Habitat Conservation Initiative's (NMHCI's) Comments Supporting Landowner Certification Of Non-Navigable Water Draft Rule

On behalf of NMHCI please find comments supporting NMGFD's Landowner Certification Of Non-Navigable Water Draft Rule.

Thanks very much.

This e-mail may be a confidential attorney-client communication. If you received it in error, please delete it without forwarding it to others and notify the sender of the error.

The New Mexico Habitat Conservation Initiative stands in strong support of the draft rule. The Draft Rule comports with US Supreme Court and NM Supreme Court precedent. The United States Supreme Court set out the test for determining title to stream bed ownership in PPL vs Montana in 2012. The decision is based on federal constitutional principles. The two New Mexico Attorney General Opinions addressing this issue failed to address this seminal and controlling case.

The test for stream-bed ownership under this United States Supreme Court decision is whether, at the time of statehood, the river was navigable in fact. Navigable in fact means whether the river or watercourse was used or could be used in its normal course as a mode of transportation for commerce. The determination of navigability or non-navigability is to be made on a segment by segment basis. If the water is non-navigable, the private riparian landowner owns the land underneath the water as that title has passed down from the United States.

At the time of New Mexico statehood there were no rivers in New Mexico that were navigable. In 1905 the Territorial Governor of NM, Miguel Otero, issued a Report to the United States Department of the Interior stating that, "None of the rivers of the Territory are navigable . . ." See: Report of the Governor of New Mexico to the Secretary of The Interior 1905, Washington Government Printing Office, Pg. 18. (1905).

Opponents of the Bill that passed and was signed into law in 2015, mainly the New Mexico Wildlife Federation, have knowingly made numerous false allegations designed to insight the fears and passions of the citizenry and so we would like to clarify the record on a few.

Allegation - This law officially closed some sections of the public waters in New Mexico you should be able to recreate in. This is yet another example for public lands seizure and keeping you off YOUR public lands and waters.

Response - The new River Access Law did not close any section of public water. All public waters in NM that were previously open to the public remain open to the public. The new law only deals with public waters on private property and simply codifies what has been in regulatory format since the earliest days NMGFD existance. If you want to fish on private property you need the written permission of the private property owner. If a river flows through private property you have always been, and still are, able to float and fish that river by boat, you just cannot walk or wade into private property by use of the stream beds to recreate.

Finally, the stream beds on private property are not public lands. The water is public water. And the people continue to have access to recreate by boat on the public water. The stream bed, if the river is a non-navigable river, is private property. And the public may not Trespass on private property by walking or wading into private property using a stream bed as ingress.

Allegation – “Establishing a legislative definition of “navigable” In New Mexico would be irrelevant. Under article 16, Section 2 of the New Mexico Constitution, all natural waterways in New Mexico are deemed public. From that starting point, the right to use those waters depends on who has the prior appropriation. In Red River Valley, the New Mexico Supreme Court said the public’s recreational use of the waters is a beneficial use and thus is a prior appropriation of those waters which make the public’s right to access the waters superior to the landowners’ right to exclude. In essence, SB 226 directly conflicts with the state Constitution and the New Mexico Supreme Court’s holding.’

Response – the NMWF confuses the issues of the stream-bed ownership and ownership of the waters of the state. It further confuses the holding of Red River Valley. While New Mexico is a prior appropriation state, the New Mexico Supreme Court in Red River Valley did not address the issue of priority of appropriation. It discussed the issue of the right to use public waters for recreational purposes and held that ownership of the water is in the public and that the public has a right to use all unappropriated waters for recreational purposes. Red River Valley, 1945-NMSC-034, ¶ 48. However, in so holding, the court stated “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 private property along the banks.”

The Court was careful to state that it’s holding deals specifically, and only, with those impounded public waters, easily accessible without trespass upon riparian lands. ID. at ¶56. Contrary to the assertion of the New Mexico Wildlife Federation, the court did not hold that the public’s right of access to the waters was superior to the landowners’ rights to exclude others from his or her private property. The court did not have to reach that issue because the water in question was accessible to the public through public access points and involved no trespass on private land. The River Access Law passed in 2015 protects private property rights by providing that one cannot walk or wade on a privately owned streambed in order to access a right to use public water for fishing or other recreational purposes. Whether or not a stream is navigable or non-navigable is relevant to the question of streambed ownership only. The definition of navigability in the Draft Rule is consistent with U.S. Supreme Court Case law in PPL Montana, LLC v. Montana.

Allegation by NMWF: Passing legislation that attempts to give the State Game Commission the power to prohibit the public from accessing public water, while in turn retaining the private landowner’s right to access that same public water, may be in violation of Article 4 Section 26 of the New Mexico Constitution. “The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like condition, insure equally to all persons or corporation, no exclusive right, franchise, [privilege or immunity shall be granted by the legislature or any municipality in this state.

Response: NMWF assertion that this bill may violate Article 4, Section 26 of the New Mexico Constitution has no merit because the River Access Law passed in 2015 does not grant any corporation or person any right or privilege. It gives the State Game and Commission additional authority to enforce existing hunting and fishing regulations and trespass laws and protect private property. The State Game Commission already has the power to enforce hunting and fishing regulations, which require permission from a private landowner before entering such private land to do so. NMAC §19.31.2.9(A)(7) provides that penalties, including suspension or revocation of licenses, permits or certificates, will be assessed by NMDGF for criminal trespass, in violation of §30-14-1, when in connection with hunting, fishing or trapping activity. NMAC §19.31.10.18(C) provides that it shall be unlawful to knowingly enter upon any private property to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish without possessing written permission from the landowner or person in control of the land or trespass rights unless otherwise permitted in rule or statute. Amongst other enumerated powers of the State Game Commission, NMAC § 19.31.2.10 provides that the State Game Commission retains all authority for final decisions regarding hunting and fishing licenses, permits and certificates.

The determination of whether a river or stream is navigable or non-navigable must be made in order to determine who owns the bed of the stream. Contrary to the New Mexico Wildlife Federation's assertion, The River Access Law of 2015 does not give the State Game Commission the authority to decide who owns the water or water rights in a stream or river, or who has the right to use water for recreational purposes. This bill addresses only the State Game Commission's authority to protect private land from trespass. Under current New Mexico law, the public does not have the right to trespass on privately owned steam beds in order to fish. This River Access Law passed in 2015 clarifies that walking wading and standing on a privately-owned steam bed in order to fish, is trespassing

Finally, We commend to the Commission and wholeheartedly endorse the explanation of the reasons offered by the New Mexico Cattle Growers Association, the NM Farm Bureau and the NM Outfitter and Guides Association for Governor Martinez to sign SB226 about which this draft rule is crafted in an April 4, 2015 Editorial Published in the Santa Fe New Mexican, Attached at the end of our comments.

Reader View: Governor should sign law protecting private property

By Caren Cowan Apr. 4, 2015 (0)

Article II, Section IV, of the New Mexico Constitution bestows upon all citizens of New Mexico the inalienable right to acquire, possess and protect private property. An inalienable right granted by the constitution cannot be repealed or restrained by any law created by man. This is what makes an inalienable right, in fact, inalienable. When former Attorney General Gary King foisted his opinion on the people of New Mexico on April 1, 2014, declaring that walking or wading on private property via streambeds was no longer trespassing, with one stroke of his pen, private property

rights were no longer inalienable. This caused confusion and created potential for serious, potentially armed, conflict on the waters.

Not once in this opinion did the former attorney general mention or address Article II, Section IV, of our constitution. The attorney general's opinion is no laughing matter, as it was recently annotated to the criminal law trespass statute. That makes the opinion a legally arguable position and further erases long-held inalienable private property rights.

Senate Bill 226 would restore the balance between important constitutional rights and simply codifies what it is currently in regulatory format. Under current regulation, if a person walks or wades onto private property through a streambed without the written permission of the landowner, she or he is guilty of misdemeanor trespass. This is no different than today's statutory framework when a New Mexican draws a deer permit and the permit is in a unit that is located on private property. The permit holder cannot harvest this public resource without first obtaining the written permission of the landowner to harvest the deer on private property. Both the regulatory and statutory frameworks are consistent with the New Mexico Constitution and the regulatory framework for river access is consistent with the Supreme Court of New Mexico's decision in the 1945 case, Red River Valley.

Last week, the Utah Stream Access Coalition, misinformed the people of New Mexico by stating SB 226 takes away a long-held public right to fish or float in New Mexico rivers and streams. This is the same propaganda shoveled by the main opposition to the bill during the recent Legislature. It should have no place in New Mexico.

The Supreme Court of New Mexico in the Red River Valley case decided once and for all that New Mexicans have the right to float by boat and fish on any river in New Mexico, public or private, if they have a legal right to do so. Contrary to the wild assertions by the Utah Stream Access Coalition and the New Mexico Wildlife Federation, SB 226 does nothing to change the currently held legal rights of people to enjoy New Mexico's rivers. Unfortunately this opposition, which is in favor of making all lands publicly accessible, even constitutionally guaranteed private property, has spread this propaganda wildly.

Private property owners are tremendous stewards of the land and work to improve habitat for threatened and endangered species. Many landowners are working around the state to ensure that resources and opportunities remain for future generations. Policies that encourage and support voluntary stewardship by private landowners will continue to help make this possible. We respectfully request Gov. Susana Martinez sign SB 226 into law and restore the balance shaken out of place by the attorney general's opinion and by the New Mexico Compilation Commission's annotation of the opinion to the current trespass statute.

Jaramillo, Donald L., DGF

From: Sandoval, Alexandra J., DGF
Sent: Tuesday, December 19, 2017 4:00 PM
To: Jaramillo, Donald L., DGF
Subject: Fwd: Water trespass comments
Attachments: NMDGF-NMCGA.pdf; ATT00001.htm; NMDGF-NMWGI.pdf; ATT00002.htm; NMDGF-NMFLC.pdf; ATT00003.htm

Another one with attachments for tomorrow, thx

~ Sorry for the short message, I am working from my phone ~

Begin forwarded message:

From: Caren Cowan [REDACTED]
Date: December 19, 2017 at 3:18:11 PM MST
To: [REDACTED], "Alexa Sandoval", "Bob Ricklefs", "Elizabeth Atkinson Ryan", Paul Kienzle, [REDACTED], "Ralph Ramos", [REDACTED], "Robert Espinosa"
Cc: Caren Cowan [REDACTED]
Subject: Water trespass comments

Please accept the attached comments from the New Mexico Cattle Growers' Association, the New Mexico Wool Growers, Inc. and the New Mexico Federal Lands Council.

Should you have any questions or difficulty in opening the documents, please let us know.

Thank you for your time and attention.

Caren Cowan
[REDACTED]



New Mexico Cattle Growers' Association

WEB SITE: www.nmagriculture.org

December 19, 2017

New Mexico Department of Game and Fish
Attn: Office of the Director
1 Wildlife Way
P.O. Box 25112
Santa Fe, NM 87507

Re: NMAC 19-31-22 Landowner Certification of Non-Navigable Water

Dear Commissioners:

Thank you for the opportunity to comment on the above captioned rule-making. These comments are being submitted on behalf of the New Mexico Cattle Growers' Association (NMCGA) members who are located in all 33 of the state's counties as well as members located in 19 other states.

The NMCGA participated in the development and passage of the legislation on this issue during the 2015 New Mexico Legislature. The bill passed in the waning hours of the Session with the final language done on the fly in the Senate Judiciary Committee.

Since that passage, NMCGA members have raised a concern. That concern is the use of the term "non-navigable public water." The New Mexico State Constitution states:

ARTICLE XVI

Sec. 1. [Existing water rights confirmed.] All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

Sec. 2. [Appropriation of water.] 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.

The NMCGA would greatly appreciate if these regulations would recognize the fact that once adjudicated, the water is no longer "public" water. Perhaps the definition of "non-navigable public water" could include the statement that "once water had been appropriated, it is no longer "public" water.

Thank you in advance for your consideration of this suggestion.

Sincerely,

Tom Sidwell
President

TOM SIDWELL, President, Quay; RANDELL MAJOR, President-Elect, Magdalena; JACK CHATFIELD, Vice-President At Large, Mosquero; TY BAYS, SW Vice-President, Silver City; DUSTIN JOHNSON, NW Vice-President, Farmington; JEFF BILBERRY, SE Vice-President, Elida; BLAIR CLAVEL, NE Vice-President, Roy; SHACEY SULLIVAN, Secretary-Treasurer, Bosque Farms; PAT BOONE, Past-President, Elida; CAREN COWAN, Executive Director, Albuquerque



New Mexico Wool Growers, Inc.

December 19, 2017

New Mexico Department of Game and Fish
Attn: Office of the Director
1 Wildlife Way
P.O. Box 25112
Santa Fe, NM 87507

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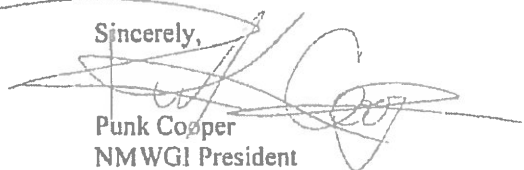
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Thank you in advance for your consideration of this suggestion.

Sincerely,


Punk Cooper
NMWGI President



New Mexico Federal Lands Council

December 19, 2017

New Mexico Department of Game and Fish
Attn: Office of the Director
1 Wildlife Way
P.O. Box 25112
Santa Fe, NM 87507

Re: NMAC 19-31-22 Landowner Certification of Non-Navigable Water

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Thank you in advance for your consideration of this suggestion.

Respectfully,

A handwritten signature in cursive script that reads "Bebo Lee".

Don L. (Bebo) Lee

President

New Mexico Federal Lands Council

Sanchez, Rey A., DGF

From: Griego, Robert, DGF
Sent: Wednesday, December 20, 2017 8:04 AM
To: Sanchez, Rey A., DGF
Subject: FW: Rulemaking Comments
Attachments: NMDGF-NMCGA.pdf; NMDGF-NMFLC.pdf; NMDGF-NMWGI.pdf

Same.....145

Robert L. Griego
Colonel of Field Operations



CONSERVING NEW MEXICO'S WILDLIFE FOR FUTURE GENERATIONS

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From: Alicia Briggs [mailto:
Sent: Tuesday, December 19, 2017 3:06 PM
To: DGF-FieldOpsComments
Subject: Rulemaking Comments

Please find the attached comments on behalf of the New Mexico Cattle Growers' Association, New Mexico Wool Growers Inc., and New Mexico Federal Lands Council.

Alicia Briggs
New Mexico Cattle Growers' Association





New Mexico Cattle Growers' Association

WEB SITE: www.nmagriculture.org

December 19, 2017

New Mexico Department of Game and Fish
Attn: Office of the Director
1 Wildlife Way
P.O. Box 25112
Santa Fe, NM 87507

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New Mexico Federal Lands Council

December 19, 2017

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1 Wildlife Way
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Santa Fe, NM 87507

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Respectfully,

Don L. (Bebo) Lee
President

New Mexico Federal Lands Council



New Mexico Wool Growers, Inc.

December 19, 2017

New Mexico Department of Game and Fish
Attn: Office of the Director
1 Wildlife Way
P.O. Box 25112
Santa Fe, NM 87507

Re: NMAC 19-31-22 Landowner Certification of Non-Navigable Water

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Sincerely,

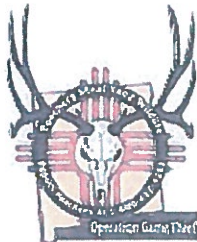

Punk Cooper
NMWGI President

Sanchez, Rey A., DGF

From: Griego, Robert, DGF
Sent: Wednesday, December 20, 2017 8:02 AM
To: Sanchez, Rey A., DGF
Subject: FW: Comments on Landowner Certification of Non-Navigable Waters
Attachments: NMDGF Navigable comments.docx


Rey will you print this email and attachment.....145

Robert L. Griego
Colonel of Field Operations



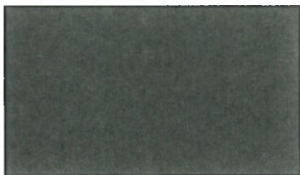
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From: Matt Gonzales [mailto:
Sent: Tuesday, December 19, 2017 5:03 PM
To: DGF-FieldOpsComments
Subject: Comments on Landowner Certification of Non-Navigable Waters

Please see attached document. Thank you.

Matthew E. Gonzales
Director, Government Affairs
New Mexico Farm & Livestock Bureau



The New Mexico Farm and Livestock Bureau would like to thank the Department of Game & Fish and the Game Commission for allowing us the opportunity to comment on the proposed rule. NMF&LB supports the intent of the proposed rule, in fact we lobbied in support of the legislation that forced the rule making. However, we do have some concerns that certainly warrants further conversation. Because we were not part of the conversation in developing the rule we were unaware of the draft rule in its current form. NMF&LB has concerns that we do believe can be addressed and would ask the game commission for the opportunity to sit down with the commission to address the issues we have identified. We believe small changes to the current proposal would accomplish the necessary intent of the proposed rule with minimal burdens on landowners. In its current form, the rule places the burden of "certifying" strictly on the landowners. While we believe landowners must be involved, we feel the requirements set out with this rule are incredibly cumbersome and may be impossible for some landowners to comply. If you look at the history of New Mexico and evaluate rivers and streams that were indeed navigable at the time of statehood, we are of the belief that the only river that may have been navigable at that time would have been the Rio Grande. So, this begs the question of whether the department could make a single declaration on all streams in New Mexico as non-navigable (with the exception of those identified as navigable by the Army Corps of Engineers and the State Engineers Office; or unless found otherwise) and avoid a segment by segment declaration, giving reprieve to landowners from what seems to be a very long and difficult process. The proposed rule requires notice of declaration be provided by the landowners and then even further, once a declaration is made, the landowner must purchase signage from the department. The final version of SB 226 that was adopted also had similar provisions, but it not require that "substantial evidence" to certify. New Mexico has never been good at keeping records, so to expect the small landowner to find documentation dating back to the time of New Mexico's statehood that proves non-navigability will be impossible for some landowners to comply. We have had discussions with our counterparts in Montana where Montana had dealt with this issue through the courts and their legislature and it seems their process of a declaration by their Department of Natural Resources on all non-navigable waters at the time of statehood. Although Montana did have some streams that we declared through the courts by way of lawsuits, for the most part the department assumed the burden.

As mentioned we absolutely do not oppose the intent and the goal of this proposed rule we just want to make sure the means to the end are the most effective, efficient and easy for both landowners and the department. What kind of workflow does this create for the department? Does the department have adequate staffing to address on a segment by segment basis, which could equate to several hundred declarations? Must the declaration be done on a segment basis or is it possible to look at all navigable waters at the time of state hood and make a blanket designation and then ask landowners to provide documentation to the department to acquire the appropriate signage.

We would like to applaud the commission and department and as always appreciate your continued support of the industry. We would be happy to sit down with whomever to ensure we are putting forth a rule that is in fact efficient, effective and less burdensome on both landowners and the department.

We thank you for your time and attention to this matter and look forward to further conversations. Should you have any questions please do not hesitate to contact me at [REDACTED] or by email at [REDACTED]

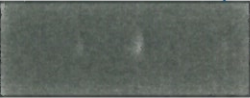
Chad Smith
CEO
New Mexico Farm & Livestock Bureau

Sanchez, Rey A., DGF

From: Griego, Robert, DGF
Sent: Wednesday, December 20, 2017 8:05 AM
To: Sanchez, Rey A., DGF
Subject: FW: Landowner certification of non-navigable streams comments
Attachments: WLA Stream Certification Rule.pdf; ATT00001.htm


Same.....145

Robert L. Griego
Colonel of Field Operations



CONSERVING NEW MEXICO'S WILDLIFE FOR FUTURE GENERATIONS

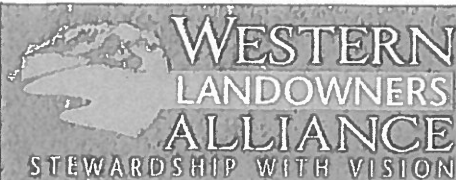
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From: Lesli Allison [mailto:
Sent: Tuesday, December 19, 2017 2:41 PM
To: DGF-FieldOpsComments
Subject: Landowner certification of non-navigable streams comments

Please accept the attached comments on the proposed rule concerning landowner certification of non-navigable streams. Thank you!

Lesli Allison
Executive Director
Western Landowners Alliance





the WESTERN LANDOWNERS ALLIANCE advances policies and practices
that sustain working lands, connected landscapes, and native species

December 19, 2017

New Mexico Department of Game and Fish,
Attn: Office of the Director,
1 Wildlife Way,
P.O. Box 25112,
Santa Fe New Mexico 87507

Sent via email to: [REDACTED]

Re: Landowner Certification of Non-Navigable Water

Dear Commissioners,

Western Landowners Alliance, whose members own and manage more than two million acres of land and natural resources in New Mexico, supports the draft rule establishing a process for landowner certification of non-navigable water. The rule is in keeping with long-standing policy, rules and regulations in the State of New Mexico that the bed and banks of non-navigable streams are privately owned. It will help reduce conflict and litigation and provides certainty to landowners, the public and regulatory agencies alike.

The majority of streams in New Mexico are located on public land and available to the public for recreation. Of the streams flowing across private lands, only a minor percentage contains fisheries suitable for recreational fishing. These streams and the riparian areas supporting them are maintained at personal expense by private landowners. Based on well-established state policy, private landowners have in good faith purchased land, paid taxes, incurred liabilities, carried insurance, transacted leases and easements and expended personal funds in the management of these riparian lands. The benefits of these landowner investments extend well beyond private land boundaries. In the limited circumstances where recreational fishing is feasible, some have established commercial hunting, fishing and guest businesses and obtained related bank financing. These operations enable landowners to keep ownership affordable, land and fisheries intact, and support local economies.

From the conservation standpoint, New Mexico's fish and wildlife populations depend on private land stewardship and financial investment. A fishery is dependent on the riparian vegetation for food, shelter and shade—all things managed and funded by the private landowner. Streams and riparian areas on private lands also provide refugia and critical habitat to the great majority of the state's wildlife species. There are approximately 30,000 miles of stream on private land in NM that support 6-20 endangered species. Opening public wading access jeopardizes these vital habitat areas and species. Outdoor recreation can create large-scale impacts on these systems.

Western Landowners Alliance acknowledges that the water flowing across private lands is publicly owned and that the public has the right of access to boat and fish in such streams provided they do not trespass by wading and walking along the privately owned bed and banks. These two policies, that the public retains its right to the use and enjoyment of public waters by boating while landowners retain their rights to control access on privately owned land underlying public water, combine to strike a reasonable resolution in a challenging intersection between public and private property rights. Most importantly, it is a solution that helps sustain New Mexico's fish and wildlife habitats and populations.

For the above reasons, the Western Landowners Alliance encourages the commission to adopt the non-navigable stream certification rule. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'L Allison', written in a cursive style.

Lesli Allison
Executive Director
Western Landowners Alliance

EXHIBIT
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WATERWAY OWNER'S CARD
New Mexico State Game Commission Meeting
Please Place Form in Appropriate Agenda Slot)

HEARING 5A PLEASE PRINT

Name: TANNER ANDERSON
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]
Officially Representing: NM Farm & Livestock Bureau
(Organization(s))
Your Title: SE REGIONAL DIRECTOR
Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

WE SUPPORT THE INTENT OF THIS ALLEGATION, HOWEVER WE CANNOT SUPPORT THE RULE IN ITS CURRENT FORM. SECTION 19.31.22 & SUB SECTION B, NUMBER 4 REQUIRING ANYONE APPLYING FOR CERTIFICATION PROVIDE "SUBSTANTIAL EVIDENCE PROBATIVE THAT THE WATERS, WATER COURSE OR REVERBS WERE NON-NAVIGABLE AT THE TIME OF STATEHOOD." IF THERE IS NO DATA TO SUPPORT THE LANDOWNER'S CLAIM THIS CAN BE A DEPRECIATED STANDARD TO MEET. WE FEEL THE SIMPLEST FIX IS FOR THE DEPT. TO DESIGNATE ALL WATERS OF NM NON-NAVIGABLE,

EXHIBIT
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WATERWAY OWNER'S CARD
New Mexico State Game Commission Meeting
Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5a PLEASE PRINT

Name: TOM S. DUELL
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]
Officially Representing: NMCCRA
(Organization(s))
Your Title: President
Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

Property rights are essential that the land be put to productive use & its value protected by the landowner. With property rights come a bundle of rights that include the right to use, lease, transfer, and allow whom they want on the property.

I recommend the definition of commerce be included in rule's. Commerce is the creation, sale, purchase, exchange or transfer of any commodity for another commodity.

EXHIBIT
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tabbles

SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5A PLEASE PRINT

Name: John Crossland
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]
Officially Representing: NM Wildlife Federation
(Organization(s))
Your Title: President
Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

Would confirm & restate
opposition to adoption
of rule 19.31.22 NMAC



SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

HEARING 5A PLEASE PRINT

Name: Christopher Smith
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]
Officially Representing: N/A
(Organization(s))
Your Title:
Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

Public access to waterways
should not be curtailed

EXHIBIT
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SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5A PLEASE PRINT

Name: Joel Cain

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

Officially Representing: NM Buck company
(Organization(s))

Your Title: hunters & anglers

Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

Submitted already

EXHIBIT
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SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5a/5b PLEASE PRINT

Name: MARLO GONZALEZ

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

Officially Representing: NM Habitat Conservation Inc
(Organization(s))

Your Title:

Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

already submitted by email
12/19/17

WJ

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State Game Commission Meeting
December 20, 2017

Comment:
Northern NM Group of Sierra Club



RE: Stream Access Rule

The New Mexico Constitution and the New Mexico Supreme Court have already weighed in on this issue: access to the state's waters are for all New Mexico citizens, not selectively managed for the wealthy few.

This is not to say that New Mexico citizens should be able to trespass on private land. If there's a stream running across your property and you own the entire property, no one can walk across your property to fish that stream. But, public rights are not for sale; they don't come with a private real estate transaction. If the public can access that stream via public land, that's a public stream.

The Game Commission should not disregard the legal advice of two attorneys general (including the current AG Hector Balderas) and the New Mexico Legislature who have outlined the way rulemaking is to be done.

The Northern NM Group of Sierra Club supports the existing public stream access rule and strongly opposes any modification that allows private landowners to redefine, restrict or deny legal public access.

Teresa Seamster
Chair





SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5A PLEASE PRINT

Name: Ruben Cowan

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

Officially Representing: NMCGA + NMWGA
(Organization(s))

Your Title: Exec. Dir.

Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

Written Comments Submitted

[Empty lines for additional comments]

EXHIBIT

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SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5A PLEASE PRINT

Name: Kerrie Romero

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

Officially Representing: NMCOG
(Organization(s))

Your Title: ex. Director

Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

We Support New Rule

[Empty lines for additional comments]

EXHIBIT

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SPEAKER'S CARD

New Mexico State Game Commission Meeting

(Please Place Form in Appropriate Agenda Slot)

AGENDA ITEM 5-A

PLEASE PRINT

Name: OSCAR SIMPSON

Address: [REDACTED]

City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Phone: [REDACTED]

Email: [REDACTED]

Officially Representing: XI M SPORTS MGR
(Organization(s))

Your Title: STATE CHAIR

Do you wish to be heard? Yes No

WRITTEN COMMENT (Below or Attached)

THE GAME COMMISSION
is establishing rules
that restrict access
to public waters
by stat supreme court
decision 1975 regarding
concha lake & red
river cattle company

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MEETING SIGN-IN SHEET

New Mexico State Game Commission

Hearing 5A - Final Rule Landowner Certification Non-Navigable Water

(Sign-in to be in the official record as having attended this meeting. Mark the box if you wish to be added to the meeting notifications mailing list.)

PLEASE PRINT

	NAME	ADDRESS CITY, STATE, ZIP	E-MAIL ADDRESS	PHONE	ADD TO MAILING LIST
1	Tanner Anderson				<input type="checkbox"/>
2	Tom Sidwell				<input type="checkbox"/>
3	John Crenshaw				<input type="checkbox"/>
4	OSCAR S. RUFFAW				<input type="checkbox"/>
5	Christopher Smith				<input checked="" type="checkbox"/>
6	Del Gay				<input checked="" type="checkbox"/>
7	Marco Gonzales				<input type="checkbox"/>
8	TERRA S. SHERMAN				<input checked="" type="checkbox"/>
9	Alex Cowan				<input checked="" type="checkbox"/>
10	Kerrie Romero				<input type="checkbox"/>
			@	() -	<input type="checkbox"/>
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