

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 Oteró, 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 existence. 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 can not 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 stream beds in order to fish. This River Access Law passed in 2015 clarifies that walking wading and standing on a privately-owned stream 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 Cattlegrowers 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.