TO: Honorable members of the Water and Natural Resources Committee interim legislative committee
FROM: New Mexico Wildlife Federation; Jesse Deubel, executive Director

Below and attached: The NM Wildlife Federation's comments and documents compiled for the Water and Natural Resources Committee convened Oct. 18, 2019 in Silver City New Mexico, regarding issues surrounding public access to streams and streambeds running through private land.

In brief:
The New Mexico Wildlife Federation has spoken and acted on behalf of sportsmen and women, wildlife, wildlife habitat and watersheds ever since noted conservationist Aldo Leopold and other forward-thinking New Mexicans founded it more than a century ago. Now with approximately 80,000 followers, we of NMWF do our best to honor and uphold that heritage.

Regarding the issue of public access to waters flowing through private land, NMWF supports the current state game commission's prudent approach to the issue. The commission is awaiting an Attorney General's opinion regarding the constitutionality of rule 19.31.22, Landowner Certification of Non-Navigable Waters, enacted by the previous commission, and put a hold on the rule pending that legal review.

Beyond that, NMWF submits:

- The NM Supreme Court's 1945 decision, State ex rel. State Game Commission V. Red River Valley Co., 1945-NMSC-034, gave public recreationists the right to utilize such streams provided they did not, absent permission, trespass across private lands to access the streams, or trespass from the streams onto private lands.

- N. M. Attorneys General advisories from AG Gary King in 2014, AG Hector Balderas in 2015 and AG Thomas Udall in 1997, concurred with by leading water law attorney John Utton in 2017, correctly interpreted the Red River ruling as permitting activities that are necessary for fishing and boating, including walking, wading or standing on a stream bed.

- Although the State Game Commission of the 1940s successfully pursued the Red River case through the N.M. Supreme Court on behalf of their license-buying public, follow-through was virtually absent. Subsequent game commissions, Game and Fish Department administrators, legislators and governors failed to initiate laws, regulations and policies recognizing the public's right to recreate in streams flowing through private lands.

- There was a dearth of guidance not only regarding setting foot on streambeds and stream banks, but also other allowable or unallowable activities, landowner rights, responsibilities and liabilities, and enforcement.

- The legal and public information vacuum was such that the state's two major outdoor recreation agencies, the Game and Fish Department and State Parks Division, provided highly contradictory stream-use guidance to anglers and boaters.

- The leadership void enabled a steady erosion of public recreational rights by private interests despite the Red River decision. Sales of formerly accessible properties, often to wealthy nonresidents, has accelerated the process and added to resident anglers' resentment and sense of loss.

- Given all of the above: The State Game Commission, Department of Game and Fish, administration and legislature should, first, acknowledge the public's right to fish and boat in streams flowing through private lands. They should then act collectively to make it reality.

Respectfully,
Jesse Deubel
Executive Director, New Mexico Wildlife Federation

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ATTACHMENTS

1: Attorney General Gary King opinion: streams and streambeds open to public use, April 1, 2014
2: NMSA 17-4-6 trespass statutes as amended by SB 226, 2015 Legislature, to counter AG King's opinion
3: Attorney General Hector Balderas advisory, August 15, 2016: Key element of SB 226/NMSA 17-4-6 unconstitutional
4: Water law attorney John Utton letter concurring with AG King's and AG Balderas's advisories, May 8, 2017
5: State Parks Division boating guidance based on April 8, 1997 advisory letter from AG Thomas Udall

Additional documents, including the NM State Supreme Court's "Red River" decision of 1945, plus NMWF's and other sportsmen's, river runners' and environmental organizations' letters supporting public access, are here: https://nmwildlife.org/stream-access-documents-library

# Attorney General of New Mexico

**GARY K. KING**
Attorney General

April 1, 2014

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

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 14-04

BY: Stephen R. Farris
Assistant Attorney General

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

QUESTION:

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

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[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

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[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

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[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

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[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

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[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."

17-4-6 posting pvt property annotated

**17-4-6. Hunting and fishing on private property; posting; penalty.**
A. Whenever the owner or lessee desires to protect or propagate game birds, animals or fish within the owner's or lessee's enclosure or pasture, the owner or lessee shall publish notices in English and Spanish warning all persons not to hunt or fish within the enclosure or pasture. The notices shall be posted in at least six conspicuous places on the premises and published for three consecutive weeks in a newspaper of general circulation in the county where the premises are situated. In the event a public road enters or crosses the enclosure or pasture, an additional notice shall be posted conspicuously within three hundred yards of the point where each public road enters the posted property.
B. After the publication and posting, it is a misdemeanor for any person to enter the premises for the purpose of hunting or fishing or to kill or injure any bird, animal or fish within the enclosure or pasture without permission of the owner or lessee.
C. No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or 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.
D. Nothing in this act shall be interpreted to affect or influence whether a water is a navigable water or a water of the United States for purposes of the federal Clean Water Act of 1977, 33 U.S.C. 1251 et seq.
**History:** Laws 1912, ch. 85, § 10; Code 1915, § 2433; C.S. 1929, § 57-215; 1941 Comp., § 43-405; 1953 Comp., § 53-4-5; Laws 1963, ch. 213, § 5; 1965, ch. 172, § 1; 2015, ch. 34, § 1.
**ANNOTATIONS**
**Cross references.** — For prohibition against hunting or fishing in licensed private park or lake without permission, *see* 17-4-15 NMSA 1978.
For posting notices against trespassing on licensed private parks or lakes, *see* 17-4-26 NMSA 1978.
For publication of notices generally, *see* 14-11-1 to 14-11-13 NMSA 1978.
**The 2015 amendment,** effective July 1, 2015, prohibited persons engaged in hunting and fishing from entering private property without the consent of the land owner or lessee; in Subsection A, after "within", deleted "his" and added "the owner's or lessee's", and after "pasture," deleted "he" and added "the owner or lessee"; and added Subsections C and D.
**Both publication and posting are required.** — Only by publishing a notice in English and Spanish, and by the posting of handbills in English and Spanish in six conspicuous places on the premises does the owner put into effect on his property a penal statute which protects him against trespassers. *State v. Barnett*, 1952-NMSC-065, 56 N.M. 495, 245 P.2d 833.
**An appeal** does not lie to supreme court from an order overruling a motion to quash an information brought against defendants for violation of this section in the absence of express statutory authority therefor. *State v. Barnett*, 1951-NMSC-084, 56 N.M. 1, 238 P.2d 694.

**English notice only is insufficient.** — Where the publication and posting were in English only, this section imposing criminal sanctions, did not become operative. *State v. Barnett*, 1952-NMSC-065, 56 N.M. 495, 245 P.2d 833.

**A tract of land which is not enclosed by fences may not be posted** under the terms of this section so as to subject persons who enter for the purpose of hunting and fishing to the penalties therein provided. 1957 Op. Att'y Gen. No. 57-237.

**17-4-7. Liability of landowner permitting persons to hunt, fish or use lands for recreation; duty of care; exceptions.**

A. Any owner, lessee or person in control of lands who, without charge or other consideration, other than a consideration paid to the landowner

**Posting by lessee permitted provided lessee does not conflict with action by commissioner of public lands.** — Assuming full and strict compliance with this section, as interpreted, a lessee of state land could not in all cases post under the statute. This section, insofar as this problem is concerned, must be read in light of the peculiar nature of the land involved. It must be borne in mind that under the Enabling Act, the constitution and statutes based thereon, the complete dominion and control over state lands is vested in the commissioner of public lands. In short, the lessee of state lands, even if he acts strictly in accordance with this section, could not do so in a manner in conflict with a duly taken action of the commissioner. 1958 Op. Att'y Gen. No. 58-194.

**Posting does not prevent hunting or fishing by owner or permittees.** — If posting is duly accomplished, the landowner does not thereby deprive himself of hunting and fishing privileges on these lands. The owner, or those permitted by him to do so, could still hunt or fish so long as done in accordance with the game and fish laws and lawful game fish regulations. 1958 Op. Att'y Gen. No. 58-194.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Title to fish and game taken by trespasser, 23 A.L.R. 1402.

Injunction against repeated or continuing trespasses by fishing, 32 A.L.R. 463, 60 A.L.R.2d 310.

Reservation in grant of land of right to hunt and fish, with like right to the grantee, as limiting the right of the grantee to actual owners of the land, 32 A.L.R. 1533.

Rights, title and remedies of hunter in respect of game which he is pursuing or has killed or wounded, 49 A.L.R. 1498.

Inland lakes as public fisheries, 57 A.L.R.2d 569. 36A C.J.S. Fish § 34; 38 C.J.S. Game § 59.

STATE OF NEW MEXICO
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August 5, 2016

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

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:

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

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

In a 2014 opinion, the Office of Attorney General addressed the constitutional right to use public streams. *See* N.M. Att'y Gen. Op. No. 14-04 (2014) ("AG Op. No. 14-04"). The opinion's focus was on the right to use public streams flowing through private property for fishing and other recreational purposes. The opinion reviewed the history of Article XVI, Section 2 and its interpretation by New Mexico courts, particularly the New Mexico Supreme Court's interpretation in the seminal case of *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, 182 P.2d 421.

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

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

Under the rules of statutory construction, a statute must "be construed, if possible, to ... avoid an unconstitutional, absurd or unachievable result." NMSA 1978, § 12-2A-18(A)(3) (1997). *See also Benavides v. Eastern New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265, 1275 (court will adopt the construction of a statute that supports its constitutionality). Applying this principle

to SB 226, 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

UTTON & KERY

ATTORNEYS AT LAW

May 8, 2017

Todd Leahy, Deputy Director
New Mexico Wildlife Federation
6100 Seagull NE, Ste 105B
Albuquerque, NM 87109
todd@nmwildlife.org

Re: April 1, 2014 AG Opinion 14-04 OPINION OF GARY K. KING, Attorney General
Question: May a private landowner exclude others from fishing in a public stream that flows across the landowner's property?
By: Stephen R. Farris, Assistant Attorney General
To: The Honorable Luciano "Lucky" Varela, New Mexico State Representative, 1709 Callejon Zenaida, Santa Fe, NM 87501

August 5, 2016 AG Opinion, Office of the Attorney General, State of New Mexico
2016 WL 4361592 (N.M.A.G.)
Re: Opinion Request - Access to Public Waters on Private Property
By: Jennie Lusk, Assistant Attorney General
To: The Honorable Luciano "Lucky" Varela

Dear Todd,

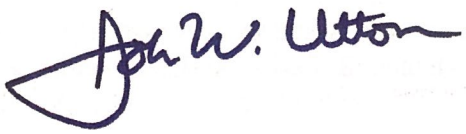
This letter confirms my review of the two legal opinions issued by the Attorney General's Office identified above and confirms that I find no defect or omission in their respective analyses that would cause me to question their conclusions. You and I also met with Jennie Lusk the author of the 2016 Opinion and she confirmed the bases and conclusions of the opinions. The key conclusion is summed up in the 2016 Opinion as follows:

> 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.

As we discussed with Ms. Lusk, this conclusion means that landowners may not place a fence across a stream or otherwise preclude any person from recreating within a stream, including by traversing up and down the stream, so long as that person does not gain access to or from the stream by crossing private property. While the Attorney General's Opinions provide well-reasoned guidance, they do not have the force of law of a court holding. As the New Mexico Supreme Court has held: "This court is not bound by opinions of the Attorney General. We need give them only such weight as we deem they merit. If we think they are right we follow and approve, and if we are convinced they are wrong we will reject them." *Perea v. Board of Torrance County Comm'rs,* 77 N.M. 543 (1967).

Very Truly Yours

UTTON & KERY, P.A.



BY: _____
John W. Utton




http://www.emnrd.state.nm.us/SPD/BoatingWeb/RiverRunsLawsOfUse.html

**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.