RIVER ACCESS IN NEW MEXICO

Attorney General Opinion No. 14-04
April 1, 2014

River Access New Mexico
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Reason We Are Here Today -

- The AG foisted this situation on the people of NM by issuing an April 1, 2014 Opinion contrary to current law, regulation.

- Question Asked by Opinion - May a private landowner exclude others from fishing in a stream that flows across their private property?

- Answer- No. A private landowner cannot prevent persons from fishing in a stream that flows across the landowner's private property provided that the stream is accessible without trespass across privately owned adjacent lands. This means as long as you access the private property through the river, you can walk for several miles into private property and fish and you are no longer considered to be trespassing.

What AG Opinion Does

- Defines the scope of the easement in relation to Art XVI Sec. 2 Beneficial Use Provision. Never takes into account nor mention one time Constitutional Art II Sec 2 and ART II SEC. 20 rights of individuals.
- AG Opinion states as long you are accessing private property through the rivers and streams of NM, you are not trespassing on the private owners land and you may recreate and fish in the river for as far as you want to enter the private property for as long as you like.
- He says the Constitutional provisions declaring the waters of NM to be owned by the public and the right of the public to the beneficial use of public water, supersede Constitutional rights to acquire, possess and protect private property and right to not have private property to be taken for public use without just compensation.
- Landowner has only the same interest in and right to use the water as the general 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.
- AG King overstepped his bounds with the opinion. He put property rights and the safety of the general public at risk with his opinion. We want the legislature and not the AG to define the scope of the relationship between these constitutional rights and we believe the scope of the easement is a simple clarification of what is already existing law.

Law Prior to Final Passage Of SB 226

- The Law and Regulation prior to 2015 Legislature's Passage Of SB 226 was you have to have landowner permission to fish on private property or you are criminally trespassing. By extension it has always been the understanding and interpretation that you cannot walk or wade on to private property without landowner's permission or you are trespassing. The AG reversed this to say that as long as you are access the private property through the river, you can walk and wade as far onto private property as you like, remain there as long as you want and fish and you are no longer trespassing.

- 30-14-1. Criminal Trespass
  - A. Criminal trespass consists of knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land.
    - Annotation: Access to public waters – A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner's property, providing the public stream is accessible without trespass across privately owned adjacent lands. 2014 Op. Att'y Gen. 14-04.

Why is this issue important?

- 1. The issue involves the relationship of public and private constitutional rights and the laws that govern the relationship between people with one another, people with all forms of business, and principles which are at core of how we live happily and peacefully with one another within our system of government.
- Constitutional Provisions at Issue
- - Art. XVI Sec. 2 Beneficial Use - The unappropriated water of every river and stream within the state of NM is declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.
- - Art II Sec. 2 -Inherent rights to acquire, possess and protect private property and to obtain safety and happiness.

Why is this issue important?

- - Art II Sec. 20 - Eminent Domain - You can't take private property for public use without just compensation.
- 2. It is properly the function of the legislature to define the relationship between these constitutional rights.
- 3. Economic Impact - Small business in rural communities.
- 4. - Uncertainty created not just about safety, but safety increases the need for immediate action.

Legislature Passes SB226; Signed April 3, 2015

1. Defines in statute the scope of the easement created by interaction of constitutional rights.

2. Scope of easement is Limited narrowly to existing law. Says you cannot walk or wade on private property without the express permission of the landowner.

3. "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.

Legal Underpinnings of Landmark Legislative Victory

1. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (stating that the rule for state riverbed title assumed federal constitutional significance under the equal footing doctrine).

2. State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 51 N.M. 207 (1945).

3. What Was Decided By NM Supreme Court in Red River - The impounded water in the Conches Dam reservoir is public water of the state of New Mexico and the public has a right of fishery and recreation on the impounded waters of the reservoir. ¶59 and ¶60.

LexisNexis®

PPL MONTANA, LLC, Petitioner v. MONTANA

No. 10-218

SUPREME COURT OF THE UNITED STATES

132 S. Ct. 1215*; *182 L. Ed. 2d 77*; *2012 U.S. LEXIS 1686*; *80 U.S.L.W. 4177*; *42 ELR 20045*; *23 Fla. L. Weekly Fed. S 144

December 7, 2011, Argued
February 22, 2012, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]
CERTIORARI TO THE SUPREME COURT OF MONTANA.
PPL Mont., LLC v. State, 2010 MT 64, 355 Mont. 402, 229 P.3d 421, 2010 Mont. LEXIS 75 (2010)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner power company filed an action in a Montana court, seeking a judgment declaring that respondent State of Montana was barred from seeking compensation for the company's use of riverbeds at locations where it had hydroelectric facilities. The trial court ordered the power company to pay Montana $41 million for riverbed use between 2000 and 2007, and the Supreme Court of Montana affirmed. The U.S. Supreme Court granted certiorari.

OVERVIEW: A power company that owned and operated hydroelectric facilities on several rivers in Montana, and two other power companies, sued the State of Montana, seeking a determination that the company did not have an obligation to pay compensation for its use of riverbeds at locations where its facilities were located. The State filed a counterclaim, contending that it owned the riverbeds under the equal-footing doctrine and could charge rent for their use. The trial court granted the State's motion for summary judgment and the Montana Supreme Court affirmed. The U.S. Supreme Court found that the Montana Supreme Court erred when it found that Montana owned the riverbeds where the company's facilities were located because the rivers in question were navigable at those locations. The state supreme court should have considered the rivers in question on a segment-by-segment basis to assess whether segments of the rivers where the company had its facilities were or were not navigable at the time Montana entered the Union in 1889, and it failed to do so. The primary flaw in the court's reasoning occurred in its treatment of the question of river segments and overland portage.

OUTCOME: The Supreme Court reversed the Montana Supreme Court's ruling that Montana owned the riverbeds at issue and could charge for use of those riverbeds, and remanded the case. 9-0 Decision.

CORE TERMS: river, riverbed, navigability, navigable, segment, statehood, equal-footing, portage, stretch, bed, navigation, commerce, present-day, stream, rent, feet, nonnavigable, travel, disputed, dam, recreational use, hydroelectric, waterfall, highway", boat, interruption", miles, matter of law, expedition, sovereign

LexisNexis(R) Headnotes

Governments > Public Lands > General Overview
Governments > State & Territorial Governments > Property
Real Property Law > Ownership & Transfer > Public Entities
[HN1] By the late 19th century, the United States Supreme Court had recognized the now prevailing doctrine of state sovereign title in the soil of rivers really navigable. This title rule became known as "navigability in fact." a State gains title within its borders to the beds of waters then navigable or tidally influenced. It may allocate and govern those lands according to state law subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview
Governments > Public Lands > General Overview

528-529 (9th ed. 1858).

While the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard. Some state courts came early to the conclusion that a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide. See, *e.g., Carson v. Blazer, 2 Binn. 475 (Pa. 1810)*; *Executors of Cates* v. *Wadlington*, 12 S. C. L. 580 (1822); *Wilson v. Forbes, 13 N. C. 30 (1828)*; *Bullock v. Wilson, 2 Port. 436 (Ala. 1835)*; *Elder v. Burrus, 25 Tenn. 358 (1845)*. The tidal rule of "navigability" for sovereign ownership of riverbeds, while perhaps appropriate for England's dominant coastal geography, was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained. See [***26] L. Houck, Law of Navigable Rivers 26-27, 31-35 (1868); *Packer v. Bird, 137 U.S. 661, 667-669, 11 S. Ct. 210, 34 L. Ed. 819 (1891)*. [HN1] [**LEdHR1] [1] By the late 19th century, the Court had recognized "the now prevailing doctrine" of state sovereign "title in the soil of rivers really navigable." *Shively, supra, at 31, 14 S. Ct. 548, 38 L. Ed. 331*; see *Barney v. Keokuk, 94 U.S. 324, 336, 24 L. Ed. 224 (1877)* ("In this country, as a general thing, all waters are deemed navigable which are really so"). This title rule became known as "navigability in fact."

[HN2] [**LEdHR2] [2] The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, "hold the absolute right to all their navigable waters and the soils under them," subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell, 41 U.S. 367, 16 Pet. 367, 410, 10 L. Ed. 997 (1842)*. In a series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution. See, *e.g., Lessee of Pollard v. Hagan, 44 U.S. 212, 3 How. 212, 228-229, 11 L. Ed. 565 (1845)*; [***27] *Knight v. United States Land Assn., 142 U.S. 161, 183, 12 S. Ct. 258, 35 L. Ed. 974 (1891)*; *Shively, supra, at 26-31, 14 S. Ct. 548, 38 L. Ed. 331*; see *United States v. Texas, 339 U.S. 707, 716, 70 S. Ct. 918, 94 L. Ed. 1221 (1950)*. These precedents are the basis for the equal-footing doctrine, under which a State's title to these lands was "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977)*. It follows that any ensuing questions of navigability for determining [**92] state riverbed title are governed by federal law. See, *e.g., United States v. Utah, 283 U.S. 64, 75, 51 S. Ct. 438, 75 L. Ed. 844 (1931)*; *United States v. Oregon, 295 U.S. 1, 14, 55 S. Ct. 610, 79 L. Ed. 1267 (1935)*.

[HN3] [**LEdHR3] [3] The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State [*1228] gains title within its borders to the beds of waters then navigable (or tidally influenced, see *Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988)*, although that is not relevant in this case). It may allocate and govern those lands according to state law subject only to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *Oregon, supra, at 14, 55 S. Ct. 610, 79 L. Ed. 1267*; see *Montana v. United States, 450 U.S. 544, 551, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*; [***28] *United States v. Holt State Bank, 270 U.S. 49, 54, 46 S. Ct. 197, 70 L. Ed. 465 (1926)*. The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses. See *Utah, supra, at 75, 51 S. Ct. 438, 75 L. Ed. 844*; *Oregon, supra, at 14, 55 S. Ct. 610, 79 L. Ed. 1267*.

[HN4] [**LEdHR4] [4] Returning to the "navigability in fact" rule, the Court has explained the elements of this test. A basic formulation of the rule was set forth in *The Daniel Ball, 77 U.S. 557, 10 Wall. 557, 19 L. Ed. 999 (1871)*, a case concerning federal power to regulate navigation:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id., at 563, 10 Wall.*

557, 563, 19 L. Ed. 999.

The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. See, *e.g., ibid.; The Montello, 87 U.S. 430, 20 Wall. 430, 439, 22 L. Ed. 391 (1874)*; *United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406, and n. 21, 61 S. Ct. 291, 85 L. Ed. 243 (1940)* [***29] (Federal Power Act); *Rapanos v. United States, 547 U.S. 715, 730-731, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006)* (plural [redacted] Water Act); *id., at 761, 126 S. Ct. 2208, 165 L. Ed. 2d*

See *Kaiser Aetna v. United States, 444 U.S. 164, 173-174, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)*. In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See *Utah, supra, at 76, 51 S. Ct. 438, 75 L. Ed. 844*. This list of differences is not exhaustive. Indeed, "[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration." *Appalachian Elec. Power Co., supra, at 406, 61 S. Ct. 291, 85 L. Ed. 243*.

IV

A

New Mexico anglers about to lose access to public waters

Taking a page out of Utah lawmakers' playbook, New Mexico looks to shut down angler access.

by Chad Shmukler - Wednesday

The San Juan River below Navajo Dam offers anglers over seven miles excellent trout fishing and incredible scenery (photo: NM Game and Fish). – Hatch Magazine

Utah anglers reel in a win as judge tosses 'stream access' law

By Amy Joi O'Donoghue, Deseret News

Published: Thu, Nov. 5, 2015, 11:15 a.m. MST

- Judge Derek Pullen: Under the law, "the people of the state of Utah are constitutionally entitled to have public lands — including the public's easement on state waters flowing over private lands — to be held in trust for them,"

Akilah Sanders-Reed, and Earth Guardians v. Governor Susana Martinez and State of New Mexico – Public Trust Doctrine - March 12, 2015

- "We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state. However, we also conclude that New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere."

- "Our Supreme Court explained the relationship between common law and statutory law in the context of the public trust doctrine. Where it found a statute counter to its provisions, it yielded to the statute but it gave way only in so far as the statute conflicted with its principles."

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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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:

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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

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.

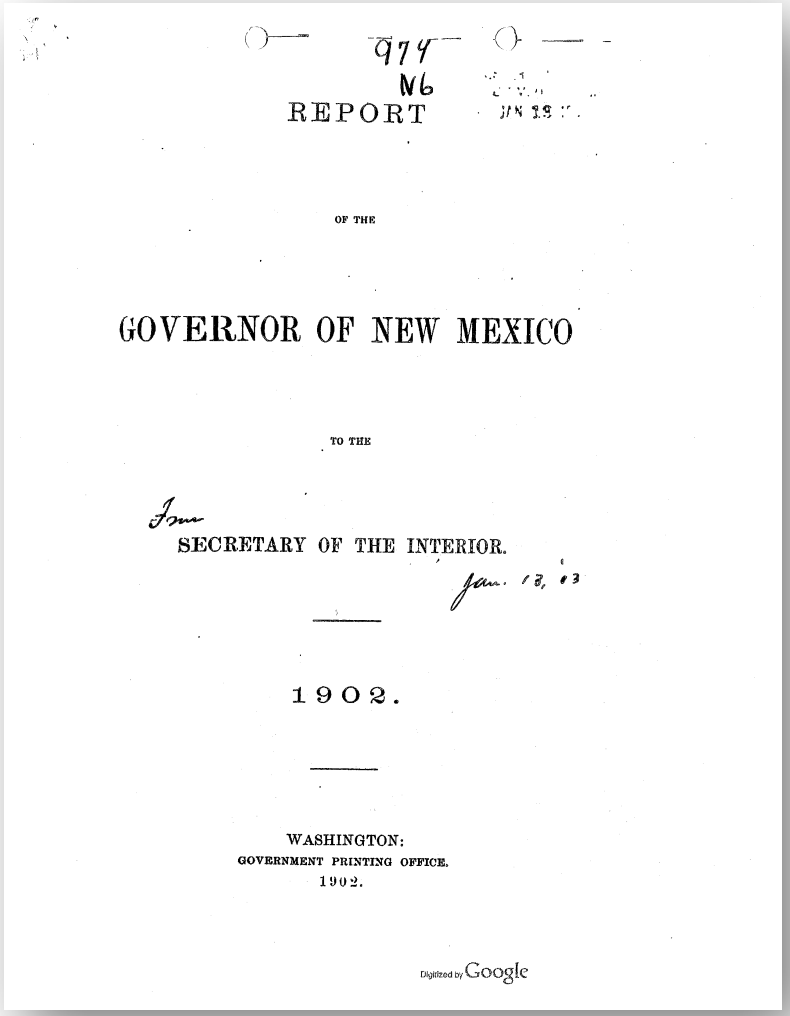
Sincerely,

Jennie Lusk

PPL Montana Navigability Test

- To be navigable for purposes of title under the equal footing doctrine, rivers must be “navigable in fact” at the time of statehood, meaning they were used or susceptible of being used as highways for commerce, over which trade and travel were conducted in the customary modes of trade and travel on the water.

Reports to the Department of Interior from the Territorial Governors of New Mexico 1902 and 1905



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REPORT

OF THE

GOVERNOR OF NEW MEXICO

TO THE

SECRETARY OF THE INTERIOR.

1902.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1902.

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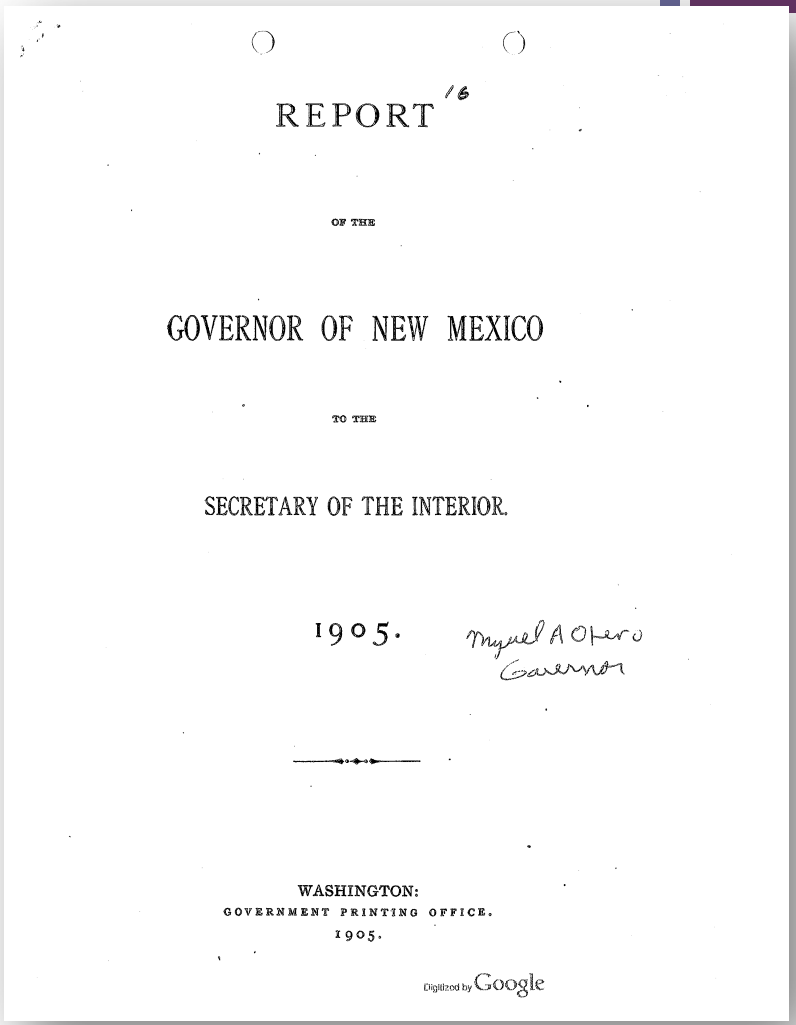

REPORT

OF THE

GOVERNOR OF NEW MEXICO

TO THE

SECRETARY OF THE INTERIOR.

1905.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1905.

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1902 Report to Department of Interior

- The Rio Grande is not a navigable river in New Mexico, nor is it navigable for over 1,200 miles below our southern boundary; and conclusive proof has been submitted in the courts that, even under existing conditions, without storage dams, our torrential floods do not reach the so-called head of navigation in substantial quantities – i.e. in sufficient amount to improve materially the "navigable capacity" of the stream.

1905 Report to Department of Interior

- None of the rivers of the Territory are navigable nor are there any large bodies of water, although there are numerous mountain lakes and several lakes formed by irrigation systems, while at certain seasons of the year the submersions of deep places on the plains or mesas form lakes and lakelets.