

Perspectives on Stream Access
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Good afternoon Madame Chair, members of the Committee. My name is Lesli Allison and I am the executive director of the Western Landowners Alliance, based here in Santa Fe. We are a West-wide, landowner-led organization dedicated to keeping the working lands of the West whole and healthy for the benefit of both people and wildlife.

I'd like to make several clarifying points at the outset. Some people have claimed that landowners are trying to close off rights of access to streams that the public has long enjoyed. This is false. It has been the longstanding policy of the state that to wade up streams on private land requires the permission of the landowner. The 2015 river access law reaffirmed this long-time policy. What IS happening is that some sportsmen are seeking to open access to private lands where such access has not existed historically.

The problem is that we have a situation in which two different rights intersect in one location. The public owns the water. The private landowner owns the land across which the water flows. The New Mexico constitution recognizes both rights.

For many decades, New Mexico has taken a fair, equitable approach to this situation. In accordance with the Red River case of 1945, the public is within its rights to enter the water at a point of public access and float or fish in lakes and streams flowing through private property provided they do not trespass on the privately-owned bed and banks. If a member of the public desires to utilize the privately owned bed and banks for wading or other purposes, they need to have permission from the landowner.

The issue about whether a stream is considered "navigable" has proven very confusing to people. In relation to the question of access, the term "navigability" doesn't have to do with whether someone can float or raft on a stream today. It is a matter of who legally owns the land and is entitled to control access—a fundamental tenet of private property rights. As described in the US Supreme Court Case PPL Montana vs Montana, the determination of navigability for this purpose has to do with the chain of ownership title going back to statehood. When states came into the union, the bed and banks of major rivers used for commercial navigation were retained in public ownership. This was so that commerce could be ensured along major waterways like the Hudson River which served, at the time, as interstate highways. When land was conveyed into private ownership, the title to the bed and banks of **non-navigable** streams was conveyed with it, meaning these landowners trace title of ownership back to statehood.

Some people have claimed that PPL vs. Montana has no relevance to New Mexico because the public owns and is entitled to use the water. However, the two rights are not to be confused. Even under the Red River case, while the public owns the water, the private landowner owns the land across which the water flows. Both rights must be respected.

Private property rights are enshrined in both the United States Constitution and the New Mexico Constitution. We live in a country where people invest in homes, land and other material property in good faith that their rights and investments will be secure.

Imagine if you purchase a home with your hard-earned savings and then the public suddenly decides they would like to enjoy access to your home whenever they please. Maybe the public would like to help themselves to the water in your sink, to enjoy watching public wildlife in your yard, or shortcut through your house to a street on the other side.

Landowners purchased land in good faith under the laws and regulations of the State of New Mexico. They invested money in the purchase, paid taxes and liability insurance, and in many cases improved the stream and the land around it. They set up homes, farms and ranches on that land. Some placed permanent conservation easements to protect that land from development.

One of the most despicable things about this public access debate has been the willingness of some access proponents to vilify New Mexico landowners—suggesting that these are all wealthy, out of state landowners who are trying to privatize and profit from New Mexico's streams. Let's think about who New Mexico landowners actually are. They are multi-generational landowners and newcomers who have chosen to invest in our state. They are our farmers and ranchers. They are Hispanic and Anglo and Native American. They are young and old. They are families. They sit on the school boards and library boards and local commissions. They are volunteer firefighters and local business people. They are the backbone of communities all across New Mexico. A few wealthier landowners have become visible in this fight because they are the ones who have been able to afford the attorneys. There are many landowners who cannot afford to defend their lands and their rights against well-funded sportsmen's groups and some are afraid to stand up in public because of the vitriol being generated by access proponents. So, let's stop vilifying New Mexico landowners, whether they are full-time or part-time residents.

A disproportionate number of people in New Mexico are land rich and cash poor. Their land is their primary asset but they hold onto it, often through generations, because of what it means to them. Many of these lands are on small streams where people settled historically. Opening uncontrolled recreational access will not only devalue their land but violate the character, integrity, peace and security of people's lives and communities. Just as one example, my mother has a very small piece of property along a small stream where she has lived since 1970. She recently suffered a terrifying home invasion by armed trespassers who broke through her property gate and then through her front door. If public access were suddenly opened so that

she had an endless flow of strangers merely yards from her bedroom window, I don't think she could live there anymore.

One of the things I find most troubling is what I know that forcing open access to private lands will do to fish and wildlife. I spent 16 years on a private ranch working to restore imperiled cutthroat trout in tiny little streams. Public foot traffic, which would necessarily be directed right up the streambed, would destroy those fragile spawning beds and habitat. It would also destroy refuge and vital habitat found there by birds and other wildlife. I grew up along a little creek in the Upper Pecos and these days the public land section is bumper to bumper with RVs and ATVs and tents. The turkey, deer, bobcats and other wildlife we used to see come down to the stream in the mornings and evenings can't get there anymore.

New Mexico's streams are exceptionally fragile and the investments landowners make in keeping them healthy and keeping the lands around them intact are crucial. Yet, what landowner will buy and conserve a piece of land along a stream if it just going to become a public playground? We should be partnering with landowners, not driving those investments and good will away. The benefits that come from landowners investing in conservation and restoration flow far beyond property lines.

I'd also like to take a moment to address the concerns of boaters. Red River establishes the constitutional right of the public to float on publicly owned waters, including those flowing across private land. No one is contesting this and further clarification by the courts or the legislature is unnecessary. Nothing in the 2015 legislation or certification of non-navigability affects the public's right to float.

New Mexico is also a fence-out state in which landowners must fence out livestock to prevent damages to their properties. In some cases, fencing can be designed to accommodate boaters. In other cases, this may be more challenging. Boaters already have the option of trying to work with landowners to find mutually agreeable solutions and they also already have the option of legal recourse where landowners have intentionally sought to impede boaters.

Finally, Mr. Harris and others suggest that the Red River case implies a public easement to access bed and banks of non-navigable streams. We are unaware of any evidence to date that such an easement exists. A similar claim made by access proponents in Utah was recently defeated. The court held that, "The Coalition has failed to produce any statute or other evidence of Congressional action granting a public easement in the beds of non-navigable rivers and streams in the Utah territory." Should such an easement be declared by the state of New Mexico, then another US Supreme Court ruling, Cedar Point Nursery vs. Hassid, may become relevant which finds that the right-to-exclude is a fundamental and protected private property right and when government appropriates a landowner's right-to-exclude, it is a physical taking.

Here is a quote from the ruling: "The Court declines to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers' right to exclude. The right to exclude is not an empty formality that can be modified at the government's pleasure."

The reality is that the majority of fishable streams in New Mexico are already public. If we want to conserve our fish and wildlife, if we want high quality outdoor recreation, including fishing, then we need to focus our energy and money into improving and managing the publicly accessible land and water we already have. And we need to recognize and treat landowners as partners in conserving and managing these resources. With good management and good will on both sides of the property line, we can also expect better relationships and greater cooperation. That's what I would like to see for New Mexico.

Ultimately, however, this matter will be decided in the multiple state and federal courts that are now considering this issue. Ever since the statute passed, everyone knew this would end up in the courts. Landowners have made significant investments in bringing this matter before the courts in order to defend their constitutional rights and we ask that this legislature allow that case to proceed without further complication.