

**STREAM ACCESS IN NM—Rule 19.31.22 Landowner Certification of Non-Navigable Water
3-5:00 PM, Wednesday, September 8, 2021—S State Capitol, House Chambers, Santa Fe, NM**

Joanna Prukop, Former EMNRD Secretary, Former Game Commission Chair

Partial List of Pertinent Documents and Topics:

Discussion on this issue starts with two key documents:

1. NM State Constitution—Article XVI, Section 2
“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”
2. NMSC State vs. Red River Valley Co (September 24, 1945)—Re: Conchas Dam Reservoir—An appeal to NMSC for a declaratory judgement about the SG Commission opening to public use for fishing and other general recreation a portion of the Reservoir which had been closed for public use upon completion of the Dam. [Bigger portion of lake opened to public use in 1940.] About 62 page decision including dissent...a long decision with many considerations, including non-navigability {6, 14+}, and Spanish/Mexican/Common law. The dam (1936) is just below the confluence of Canadian River and Conchas Rivers.

In this seminal case the Court held **“...that the waters in question were indeed public waters, the appellees had no more right to fish or recreate in them than the general public, saying the water area in question constitutes public waters of the State of New Mexico and is subject to the jurisdiction of the state game commission so far as uses here involved are concerned.”** {60} In the ruling, the **“waters in question”** include the Canadian and Conchas Rivers, which were noted to be public waters. {41} Appealed twice, 1946 & 1947, failed twice.

A critical piece of that history is in the Court’s recognition 76 years ago that, under the New Mexico Constitution, even ***“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 the private property along the banks.”*** State ex rel. State Game Comm’n v. Red River Valley Co., 1945-NMSC-034, ¶ 48, 51 N.M. 207

The Court found in Red River Valley, ***“this constitutional provision is only ‘declaratory of prior existing law,’ always the rule and practice under Spanish and Mexican dominion.”*** 1945-NMSC-034, ¶ 21.

Thus the Court recognized in Red River Valley that public access is protected as a matter of constitutional and historical law.

The New Mexico vs. Red River Valley Co decision remains unchallenged....

***More on this case will be explained under #4 SB 226 as passed and signed....**

3. **Senate Bill 226**—as introduced in 2015 session (6 pages)—Former Senator Richard C Martinez
 - Amended slightly in **Senate Conservation**—Senator Peter Wirth, Chair, and

- Amended significantly in **Senate Judiciary**—Senator Richard C Martinez, Chair and bill’s sponsor:
 - struck all substantive language
 - did not include definition of “navigable” or “non-navigable”
 - left what is now paragraph C in Regulation 17-4-6, again with no definition of “non-navigable,”
 - no new powers enacted for the State Game Commission
 - **On the House side** SB 226 as amended was heard in one Committee—House Judiciary and passed with a 6-1 vote; with members Chaney, Egolf, Gentry, Louis, Maestas, K Martinez excused absences. There were no amendments.

- 4. **Senate Bill 226**—as passed and signed in 2015 session (2 page law)
 - One paragraph of new language, Paragraph C, essentially restating the state’s trespass law except for the undefined word “non-navigable”:
 - ***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.***

 - **Navigability/Non-navigability**—No definition in SB 226 (17-4-6C), there are various definitions for various purposes at state & federal levels. Q: Does it have any meaning in NM?

 - Questions have arisen given the use of the word “**onto**” in the statutory language.

 - This language attempts to regulate the use of public waters....
 - Which leads me back to Red River Valley and...the long standing case law from 1945 in which the NMSC examined the test of navigability regarding “the character of public water” and determined that the test of navigability is not applicable because of the wording in Article XVI Section 2 in the NM state constitution re: public water.

 - {35} *Navigability, perhaps the earliest test by which the public character of water was fixed, is not the only test to be applied. We do not pause to detail the historical incidents of growing navigation, inland commerce, fishery, and recreation, etc. from which has developed our present law of public waters. At one time, public waters were thought of only as they afforded rights of navigation to the height of tide water; later they were extended to include all clearly navigable streams, and later still, to streams which would be used, not for boats of commerce, but only for the floating of logs and other items of commerce; and, later has come the recreational use where the strict test of navigability earlier applied is less rigidly adhered to. See the following cases and authority on the right of fishery and public waters generally.*

 - {37} *But, we need not here be concerned with the tests required in many of the decisions, the test of navigability. All of our unappropriated waters from "every natural stream, perennial or torrential, within the state of New Mexico" Art. 16, Sec. 2, Const., are public waters. These waters belong to the public until beneficially appropriated. And, since the right to fish in public waters, by the test of any rule, is universally recognized it cannot be said that the right to fish and to use these unappropriated public waters in question is less secure in the public because we determine their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and*

follow in this respect, and under which appellee's predecessors in title to the Pablo Montoya Grant necessarily took.

[The Court in Red River Valley specifically refused to limit the state's authority to protect public access to streams and watercourses to "navigable" water. 1945-NMSC-034, ¶¶ 35-36 ("Navigability, perhaps the earliest test by which the public character of water was fixed, is not the only test to be applied."). The Court held that Article 16, Section 2, instead provides a right of public access to streams and watercourses that is no "less secure in the public because [the Court] determine[d] their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect." Id. ¶ 37.]

In application, this meant that, although a landowner had title to the land underneath and on both sides of Conchas Lake, the public retained the right to fish the lake so long as it gained access without trespassing on private property along the shores. {32, 56}

- **NOTE:** Paragraph D in SB 226 as passes was added on floor of Senate to preserve state's standing regarding the federal Clean Water Act.

**5. Rule 19.31.22 NMAC Landowners Certification of Non-Navigable Water (January 2018)—
Explain the rule:**

- To establish rules and a process to allow SGC to recognize that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without LO permission.
- Established a definition for "*non-navigable public water*" as: ***"Non-navigable public water" shall mean a watercourse or river which, at the time of statehood, was not navigable-in-fact. A watercourse or river is not navigable-in-fact when it was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water. The certification on non-navigable public water shall be made by the director and approved by the commission on a segment by segment basis.***
- List requirements for application and evidence/documents that must be provided.
- Outlines timelines for actions for Department, Commission, applicants and public, and hearing procedures.
- Provides for appeals to NM District Court.

Concerns raised by recent/current Game Commissioners and the public:

- Commission Authority
 - **17-1-1**—State Game Commission Purpose:
 - *It is the purpose of this act and the policy of the state of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico.*

○ **17-1-14 (A)**—State Game Commission General Powers:

- *The state game commission shall have general control over the collection and disbursement of all money collected or received under the state laws for the protection and propagation of game and fish, which money shall be paid over to the state treasurer to the credit of the game protection fund, unless otherwise provided by law, and the fund, including all earned income, shall not be transferred to another fund. Prior to depositing money into the game protection fund, the department of game and fish shall ensure that an amount adequate to cover the cost of refunds allowed by the provisions of Chapter 17 NMSA 1978 is held in a liability suspense account. All refunds shall be made from the liability suspense account. Money not needed to cover the cost of refunds shall be deposited in the game protection fund at the end of each month. Chapter 17 NMSA 1978 shall be guaranty to the person who pays for hunting and fishing licenses and permits that the money in that fund shall not be used for any purpose other than as provided in Chapter 17 NMSA 1978.*

○ **17-1-26**—Commission Powers to Establish Rules, Etc.:

- *The state game commission is hereby authorized and directed to make such rules and regulations and establish such service as it may deem necessary to carry out all the provisions and purposes of this act, and all other acts relating to game and fish, and in making such rules and regulations and in providing when, to what extent, if at all, and by what means game animals, birds and fish may be hunted, taken, captured, killed, possessed, sold, purchased and shipped, the state game and fish commission [state game commission] shall give due regard to the zones of temperatures, and to the distribution, abundance, economic value and breeding habits of such game animals, birds and fish.*

○ **72-1-1**—Natural Waters, public:

- *All 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. NMSA 1978, § 72-1-1 (1907 as amended through 1953).*

○ **12-2A-18-A3**—Principles Construction, Presumption:

- *A statute or rule is construed, if possible, to:*
 - (1) *give effect to its objective and purpose;*
 - (2) *give effect to its entire text; and*
 - (3) *avoid an unconstitutional, absurd or unachievable result.*

- **Private property rights issues**—Landowners and their representatives have voiced a variety of concerns about trespass and issues related to stream access, including those discussed in item #14 below—Response Brief from Landowners to NMSC. **I believe you'll be hearing more about this in the presentations that follow.**

- No definition of “non-navigable” included in final version of SB226, Legislature did not address
- The rule is “ministerial” in nature—Judge Yarbrough—administrative or clerical in nature
- Confusion and mis-information about SB 226 and Rule 19.31.22
 - Many ignore required certification process and simply think SB 226 and Rule 19.31.22 did something to change things for all landowners along public waterways

- “Certified” vs. non-certified...if they are not closed by Commission must be open
- To date 5 water sections certified in December 28, 2018;
- 5 NNW certifications rejected Aug 12, 2021 (more below on those decisions)

6. **One example of NNW Certification Application—Chama III, LLC—*copy provided online***
Includes two NM Territorial Governor’s letters to Secretary of Interior regarding the status of New Mexico waters at the time of statehood, as at that time Governor Otero and state were seeking funding for water projects in NM from the federal government.
7. **First 5 NNW Landowner Applications—Certified on December 28, 2018:**
Chama^{tr} Troutstalkers, LLC—Chama River—Dan and Ashlyn Perry
Rio Dulce Ranch—Upper Pecos River—Kenneth and Julie Hersh Trusts
Z&T Cattle Company, LLC—3 separate segments on Alamosa, Mimbres and Penasco Rivers—
Zane and Tanya Kiehne

NM Attorney General Opinions and Advice: I acknowledge that some say an AG Opinion is just that an opinion, however, the AG is the chief legal officer in the state, “The People’s Lawyer,” and is there to advise state entities like the SGC on how to proceed on legal matters.

8. **1959—Frank B. Zinn—June 3, 1959—Bonita Lake, upheld constitution and Red River Valley**
9. **2014—Gary King—April 1, 2014— requested by Rep Lucky Varela re: *May a private landowner exclude others from fishing in a public stream that flows across the landowner’s property?*—well documented review cites state constitution, Red River, a variety of court cases and concludes....”*a person using public water to fish, including incidental activities such as walking, wading or standing in a stream bed, is not trespassing.*”**
10. **2014—Gary King—August 22, 2014— to SGC Chair Paul Kienzle re: the ability for public to fish publicly accessible public waters.**
11. **2016—Hector Balderas—August 5, 2016—requested by Rep Lucky Varela Re: constitutionality of SB226. That opinion concluded that “...*B a s e d on the applicable constitutional and statutory provisions, case law and previous Attorney General opinions, we concluded 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.*”**
12. **2019—Hector Balderas—Sept 17, 2019—requested by Joanna Prukop, Game Comm Chair Although an AG OPINION was requested, and thus required by rule, an Attorney-Client Privileged, Confidential Memorandum” was issued. As Commission Chair, I released it to the full Commission and the general public at a public Commission meeting on Sept 18, 2019 in Cloudcroft.**

The Advisory Letter concluded with...” *The constitution does not allow an interpretation of 19.31.22 NMAC 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.*” The final paragraph goes on to say that the Rule does not

comply with 12-2A-18 (3) and the state constitution, ending with: *“Additionally, any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable.”* (p. 3)

12. Definition—“Writ of Mandamus”—a judicial remedy in the form of an order from the court to do some specific act which the body is obligated under law to do. Must be a duty of public nature and be imperative, not discretionary, and typically for which adequate relief cannot be obtained by other means.

13. Petitioners—Writ of Mandamus—submitted to NMSC, March 13, 2020 [Case # S-1-SC-38195]

Respondents: Governor Lujan Grisham and NM State Game Commission

- Cites State Constitution Article XVI, Section 16—rivers and streams of NM are public waters
- Cites Red River Valley about public waters and public right to use, especially fish
- Former Commission’s conduct and Rule 19.31.22 enabling privatization of public waters is unconstitutional and unlawful
- Cites the constitution and “separation of powers” limitations of executive authority are willfully violated by the Commission and Rule 19.31.22; Statute provides on support for rule; legislative effort failed.
- Petitioners are: Adobe Whitewater Club of NM, NMWF & NM Chapter of Backcountry Hunters and Anglers, all users of NM’s public waters
- Cites 72-1-1, 72-12-1
- Cites various AG opinions re: Commission to... “...*the constitution precludes use of the Regulation by the Commission as a means to exclude the public from using public water within private property for recreational purposes if the stream is reached without trespassing on private property.*”
- States elaborate historical documentation in the applications is meaningless given that the State Constitution declaration that the state waters are public in unconcerned with navigability.”

NOTE: Other arguments were also included. See complete filing for more details.

Respondents:

- **Governor Lujan Grisham’s response**—requested she be removed because she had no direct control of the matter AND she was not governor when the 5 existing NNW certifications were issued.
- **Game Commission & Game Commission**—Submitted by AG Hector Balderas—basically said quote “...*the Court must further analyze Article 16, Section 2 to consider specific circumstances before it.*” Although they did argue for the broad powers granted to the Commission under existing statutes.

14. Response Brief of Additional Respondents (and Real Parties in Interest)—Attorney Marco Gonzales on behalf of Landowner Applicants (and other NM Landowners and related landowner organizations as “Additional Respondents”), filed April 17, 2020—Argues that:

- Relief requested by the Petitioners will cause harm by eliminating a means by which the Respondents can protect their right to exclude the public from their lands
- ...”riverbeds can be privately owned if the waters above there were non-navigable at the time of statehood.” Goes on to argue the significance of waters being non-navigable at the time of statehood. Leading to the statement that this documents “*that the riverbed is private property*”, and subsequently the assertion that walking on a non-navigable riverbed is trespassing.

- Cites *PPL Montana vs. Montana, LLC v. Montana* 565 U.S. 576 592 (2012) as the legal precedent adopted by the Game Commission to promulgate Rule 19.31.22.
 - *PPL v. Montana*—Involved a dispute as to who owned sections of riverbeds on three rivers in Montana where PPL owns 10 hydroelectric projects. It involved the concepts of “navigable-in-fact at the time of statehood,” “non-navigable water” segments, and the equal footing doctrine. The U.S. Supreme Court held that the State of Montana did not own the beds beneath certain rivers and that a determination of navigability for purposes of determining title to a riverbed must apply a “segment by segment” analysis and must be based on navigability at the time of statehood, not on evidence of present day conditions.
 - Writing for the Court, Justice Kennedy first applied the federal “navigability” test to determine that, because the federal government retained title, the State of Montana could not charge power companies rent for plants located on certain riverbeds. 565 U.S. at 580, 603-05.
 - However, Justice Kennedy went on to explain that separate from the question of title, each state retains the authority to determine the scope of the public trust over waters within its borders. Id. at 603-04 “Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.” That authority includes the right to determine “public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses.” Id. at 603.
- States a foundational issue is the private property interests landowners who own riverbeds over non-navigable waters flow.
- That the Legislature enacted 17-4-6 (SB 226 as amended)...”...to make clear that walking or wading on privately owned riverbeds is unlawful.”
-”to effectuate the Statute and give certainty regarding ownership, the State Game Commission promulgated a rule, 19.31.22 NMRA, which allows landowners to obtain a certificate confirming non-navigability (and thus private ownership).”
- That this issue fails to justify a writ mandamus or the Court exercising original jurisdiction
- That there would be an economic impact if petition granted
- Agrees that “When a landowner bars a person from recreating on waters that can be utilized without walking or wading on private property the, the landowner has interfered with the person’s right to use the waters.” (p. 11)
- Argues that the property rights at issue is ...”the fact that owners of land below non-navigable waters have the Constitutional right to bar walking or wading on their land.” (p.19)
- Asserts the Legislature knew in 2015 that the Commission had the authority to promulgate rules, that it knew about some outcomes of a US Supreme Court case *PPL V.s. Montana*, and that it “intentionally gave the Commission authority to promulgate Rule 19.31.22”, referring to 17-1-26.

NOTES:

- Other arguments were also included. See complete filing for more details.
- Montana Stream Access Law, 23-2-302—As stated in 2021 Montana Fishing Proclamation, p 14: “Under the Montana Stream Access Law, the public may use rivers and streams for recreational purposes up to the ordinary high water marks. Although the law gives recreationists the right to use rivers and streams for water-related recreation, it does not give them the right to enter private lands bordering those streams or to cross private lands to gain access to streams without landowner permission.”

PLEASE ALSO NOTE: Since these initial filings there have now been many other amicus briefs, motions and other filings with the NMSC on this matter.

15. US District Court Ruling—US Magistrate Judge Yarbrough Ruling, March 9, 2021 re: must act under existing rule

- Commission must hold a hearing on pending NNW applications, gave them 180 days
- **However**, in the US District Court order (Case 1:20-cv-0047-SCY-KK; 03/09/21) issued by US Magistrate Judge Steve Yarbrough, he writes: *“To be clear, the Court is not requiring the Commission to approve Plaintiffs’ applications. Under the regulations, the Commission can accept or reject the director’s recommendation, or can ‘take such other final action as necessary to resolve the application.’ 19.31.22.11(G) NMAC. The Commission, **therefore, has discretion under the regulations as to the outcome of the decision.**”* It’s duty to make the final decision within the time prescribed, however, is ministerial. [see page 13-14 of decision]
- “ministerial”—administrative, clerical

NM State Game Commission Action, August 12, 2021—Denied the following five NNW applications:
Chama III, LLC (Canones Creek Ranch)—Chama River
River Bend Ranch, LLC—Upper Pecos River
Rancho del Oso Pardo, Inc—Chama River
Fenn Farms Ranch—Hondo River and Berrendo River (Chaves County)
Three Rivers Ltd Cattle Company/Ranch—Three Rivers Indian Creek (Lincoln & Otero Counties)

NEW: State Game Commission **FINAL AGENCY ACTION AND DECISION**—issued Friday, Sept 3, 2021. See item #19 below.

16. Maps—for all applications submitted to date, excluding the Three Rivers Ltd Cattle Co because maps submitted and available to public were illegible; provided courtesy of American Whitewater—Included for your information and reference, indicates locations, cumulative effects, etc.

17. NM State Parks—Excerpts from 1983 State Parks Whitewater Guidebook—example of state publication and current website information. (seeming example of lack of clarity and confusion)

18. Treaty of Guadalupe Hidalgo—See letter dated June 4, 2021 from Merced de Los Pueblos de Tierra Amarilla to State Game Commission for initial information from a quasi-governmental entity about this issue. Some believe that:

- Because Red River Valley rested its analysis in part on Spanish and Mexican law, the public property right of access to public waters is protected by Article 2, Section 5, *and*
- That under Article II, Section 5.....*“The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.”*
- See also, Treaty of Guadalupe Hidalgo, Article VIII (preserving existing property rights “of every kind” held by those living in the ceded territory).

QUESTIONS FOR YOUR CONSIDERATIONS AS LEGISLATORS:

Is there a legitimate concern about State Game Commission authority vs. Legislative authority (separation of power)? How do these statutes apply:

17-1-1—Purpose

17-1-14—General Powers

17-1-26—Commission Powers to Establish Rules, etc.

e.g., Commission can only exercise such authority as granted by the State Legislature, and Commission actions must comply with the State Constitution

*

Does 17-4-6(C) conform to the State Constitution....and Red River Valley Decision?

Also, does it conform with 12-2A-18 (A)(3)—Principles of construction; presumption?

What did the Legislature intend with SB 226 as passed?

- What does 17-4-6(C) really mean? Who can answer that? Only the NMSC??

Are the terms “navigability” and “non-navigability” relevant to New Mexico Waters given our State Constitution, now, or at the time of statehood, and New Mexico’s long history?

Are Territorial Governor Otero’s Letters to the Secretary of Interior relevant to the navigability argument given our State Constitution?

How, if at all, does *PPL v. Montana* affect New Mexico public waters?

How does the case concerning the constitutionality of Rule 19.31.22 pending before the NMSC relate to the State Legislature’s interests, responsibilities, and options?

It’s possible the NMSC will not answer all the key questions, or might they answer some in ways that don’t satisfy the parties involved. Then what?