

## **Sharing the River: Outfitters' Perspective on Stream Access**

Presentation to Legislative Interim Committee on Water & Natural Resources Committee  
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Thank you, Madam Chair. I'm grateful for this Committee's interest in exploring ways of balancing the interests of private landowners and the recreating public. My name is Steve Harris. As many of you know, my mission is to see to it that New Mexico does the best job it can to conserve one of our most valuable resources, its miraculously beautiful, but woefully neglected, free-flowing rivers. Today, I'm representing New Mexico River Outfitter's Association, whose member businesses collectively provide safe and responsibly-guided river running experiences to thousands of citizens and visitors each year. NMROA is not a party to the present legal case before the New Mexico Supreme Court.

What you may not know is that I am also a resident of private land that borders the Rio Grande in Northern New Mexico. This gives me a bit of a dual perspective on the present conflict between landowners and recreationists.

My assumption is that there are several roles the Legislature can play in resolving the issue. My hope is that, coming out of this meeting, many committee members will engage in a search for productive policies and processes. And that the role of the Legislature may be at least as decisive as the Court's.

Secretary Prukop has described the emergence of a scheme that its authors hope will establish a private hegemony over access to fishing, where the rivers of New Mexico flow across private property. "Landowner Certification of Non-navigable Waters" was offered to the Legislature and narrowly defeated there in 2015.

Whereupon the State Game Commission adopted the scheme, by rule, and issued five certificates to three landowners. This, in my view, was bad policy accomplished by a nefariously bad process; the rule denies due process rights to parties who might be harmed. Its authors claimed that it would not/could not impact boating access. But in its very first application, the rule practically empowered the certificate-holders to fence us out.

Heated contention over paddler's access is nothing new. Nearly every state in the country has experienced long-running legal and political battles over the question. Some states, including our own, continue to struggle with the challenge of making wise and fair policies. Others, Nebraska for example, have defused their conflicts by enacting recreationist exemptions to their trespass laws.

As we've heard, in New Mexico "the unappropriated water of every stream... belongs to the public..." (Article XVI, Section 2 NM Constitution). The *Red River Valley* decision suggests that the State has thus established an easement over a private streambed, which the owner is

bound to respect. River-runners argue that they enjoy further protection- in federal law. Article IV of the US Constitution grants Congress the power to regulate interstate commerce, including authority over trade and travel on navigable streams. The Court has ruled that a stream is navigable in law, when it is "navigable-in-fact" (*The Daniel Ball*, 77 US 577 (1870)). Consideration of such a claim is the likely reason that authors and defenders of the rule have stated that the rule does not intend to prevent navigation. It is "touching the bed and banks of the river", that they would disallow. This professed intention is belied by all the wire that's been placed across the Pecos River in service of the "non-navigable water rule".

This begs a vital question for boaters, one which neither the Game Commission or the Court seem likely to address: ought the boater be subject to prosecution for trespass if, encountering hazardous rapids, strainers (downed trees), low-head dams, she is compelled to scout or portage? Surely no one would argue that boaters should be required to submit themselves to injury or death, simply to avoid trespass?

If you agree with me that this issue is ripe for a statutory remedy, wouldn't you also consider that a bill for this purpose might also contain a remedy for the misleading "no watercraft allowed" signage that Rob Levin Illustrated earlier?

Bearing in mind that the state has put forward a policy of developing a robust the outdoor recreation economy, "right to boat" legislation could include disincentives to fences intentionally constructed to endanger recreationists (known to Colorado boaters as "f--- you fences") or incidental barriers created for livestock management or irrigation.

**Fences-**In fact, I have observed over the past 20 years an increasing use of cross-river cattle fencing- the "slatted water gap" illustrated in Rob Levin's handout. Beyond its effectiveness in keeping cattle from crossing, this sort of design has the virtue for ranchers of reducing the need for maintenance or replacement after high water events that tend to knock out even well constructed three-strand barbed wire fencing. Consisting of a taut overhead cable with PVC or wooden slats depending from it, at 8-12 inch intervals across the river channel and adjacent floodplain, it is marginally less costly than barbed wire. Boats and woody debris can pass unimpeded.

**Diversion Dams-** Similarly, we've learned to achieve sufficient head to accomplish water diversions without the familiar low-head dam, which is essentially a drowning machine. Various named "rock vein weirs" or "vortex weirs", these consist of large rocks strategically placed, at the point of diversion, creating a pool that raises the surface elevation sufficiently to divert water into the head of a ditch. Gaps between the rocks allow some current to flow through the structure. These "soft" diversions permit boat passage and avoid disrupting fish passage, up- and downstream. In addition, they are much less likely to trap hapless swimmers.

Diversions of this type have recently been built on both the Rio Dulce and Canones Creek Ranches, which have obtained, or sought, certificates of non-navigable water. I wonder

whether the owners wouldn't agree that, while design costs are fairly high, the cost of construction is probably less than a conventional weir of steel and concrete.

Right-to-boat legislation could mandate that new construction utilize such non-lethal approaches; perhaps provision for technical assistance could be offered. Incentives, such as partial subsidies for cost of construction could be offered to landowners who chose to retrofit older, more hazardous fences and dams.

Under no circumstances should the Game and Fish Department permit construction of intentionally hazardous fencing.

**Conservation Cooperation-** Finally, I share the concern expressed by Lesli Allison that the state not disincentivize private land habitat restoration projects. Where the landowner's dominant concern is with privacy and destructive trespass, I can imagine various allocation schemes that could regulate angler access to protect their landscapes, their habitat improvements and their lifestyles.

Unrestrained access to limited resources is a real and growing concern for private and public land managers alike. But a thoughtless and heavy handed approach can make bitter enemies of conservation allies. In 2014, when the non-navigability scheme was hatched, a collaborative approach to was available to mitigate the slippery slope to destructive overuse. Instead, we were served with legal battles, a condition that seems likely persist into the foreseeable future, even after the Supreme Court rules on public access to public water. I do hold out hope for an opportunity to work with land owners in a different, and cooperative, way.

Thank you, Madam Chair for the chance to share my ideas and perspectives. I look forward to working with the committee in sessions to come.