December 19, 2017

TO: Members of the New Mexico State Game Commission (SGC); Alexandra Sandoval, Director, NM Department of Game and Fish (NMDGF)

FROM: Board of Directors, New Mexico Wildlife Federation (NMWF)

REF: NMWF Opposition to adoption of proposed rule 19.31.22 NMAC, “Landowner Certification of Non-Navigable Water”

The Board of Directors of the New Mexico Wildlife Federation opposes adoption of the proposed rule by the State Game Commission for the following reasons:

The proposed rule is contrary to the New Mexico Constitution;

The proposed rule is designed to aid implementation and enforcement of New Mexico trespass statute § 17-4-6 NMSA, as amended by Senate Bill 226 in 2015, which if enforced as its framers advertised is itself contrary to the New Mexico Constitution;

Whether any given New Mexico public water is “navigable” or “non-navigable” is irrelevant to our state’s trespass statutes or rules, as the New Mexico Constitution establishes the doctrine of Prior Appropriation as the ruling doctrine of ownership, management, and access to the public waters of New Mexico;

The proposed rule would infringe upon the constitutional rights of New Mexico citizens and tourists to utilize publicly accessible streams and their streambeds, including those flowing through or adjacent to private property, for fishing, boating or other recreational purposes;

The rule holds out a false promise to landowners, who would be required to undergo an arduous process to have a stream certified as non-navigable, when such status would be meaningless as it relates to trespass law and rule under the New Mexico Constitution.

The rule would impose new tasks on NMDGF staff, who have no known expertise in assessing whether a stream meets the arcane certification criteria proposed, but would be tasked with analyzing dozens and possibly hundreds of these complex applications. This process will be a demanding use of professional-level staff time. The proposal fails to address personnel demands and identify a new revenue source to fund the new duties.

Prosecuting alleged trespassers under the new rule, knowing that it is invalid, would expose landowners, the State Game Commission, the Game and Fish Department and other law enforcement agencies to civil liabilities.

DISCUSSION AND BACKGROUND:

The landmark 1945 decision by the New Mexico State Supreme Court, “State ex rel. State Game Commission vs. Red River Valley Co.” answered the question of ownership and access to New Mexico’s waters, ruling in favor the public and stating 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. . .”

The public’s right to utilize publicly accessible waters was clarified and strengthened by N. M. Attorney General Opinion No. 14-04 (dated April 1, 2014), which reviewed the Red River decision as well as other case law in New Mexico, Montana and Utah. It declared, in sum: “‘Question: May a private landowner exclude others from fishing in a public stream that flows across the landowner’s property?’ ‘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.’”

Subsequent to Senate Bill 226’s amendment to trespass statute § 17-4-6 NMSA, an Attorney General’s advisory letter dated August 5, 2016, addressed questions of access and the relevance of “non-navigability” to trespass: “. . .the (NM) 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.” Citing the 1945 “Red River” decision, the AG adds: “the ‘test of navigability’ used in other states to determine the public character of water does not apply in New Mexico.”

The above Attorney Generals’ advisories are not isolated: The attached N.M. State Parks advisory currently posted on the agency website for boaters, anglers and other recreationists references an Attorney General’s letter issued in 2005 or prior. That letter also cited the “Red River” case and reached the same conclusion: “**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.” (Emphasis in original.)

RECOMMENDATIONS

Given the public nature of the New Mexico Constitution, the 1945 “Red River” decision, and the Attorney Generals’ analyses of 2014, 2016 and ca. 2005, the State Game Commission is surely well aware of the flaws in both proposed rule 19.31.22 NMAC and trespass statute § 17-4-6 NMSA as amended by SB 226.

The New Mexico Wildlife Federation therefore recommends that the State Game Commission:

Accepts that the New Mexico Constitution and its doctrine of Prior Appropriation vests ownership of New Mexico’s waters with New Mexico’s citizens;

Accepts that the state Constitution, as interpreted by the New Mexico Supreme Court and state Attorney Generals, therefore opens those streams and streambeds to public use without permission from adjacent landowners if the streams are accessed via public property;

Rejects the proposed rule and abandons the irrelevant façade of ‘non-navigability’;

Takes the lead in bringing the New Mexico Game and Fish Department’s rules and policies regarding trespass definitions and enforcement into compliance with the New Mexico Constitution;

Assures that those policies and rules permit, protect and properly regulate the public rights to use public waters;

Takes the lead in educating the public and landowners as to the Constitutional rights of each, as regards stream access, including the legality of a citizen’s right to be present in a stream flowing through private property; landowners’ right to allow or withhold the privilege of trespass across their private property; anglers’ and other recreationists’ legal, responsible and ethical use of public waters flowing through private lands;

Work with, and direct the Game and Fish Department to work with, other public and private stakeholders such as anglers, boaters and landowners, the State Parks Division, and other state and local law enforcement agencies, to educate and inform all involved, and to bring about consistent legal definitions, policies, rules and enforcement of legal access to public waters and security of adjacent private lands;

Acknowledge that, although stream access advocacy is frequently framed as an assault on private property rights, the reverse is true: The long-standing failure of the state to recognize and enforce public access to public waters as allowed under the New Mexico Constitution has resulted in a steady erosion of public rights by private property owners;

Emulate their predecessors on the State Game Commission of 1945 who brought and won the “Red River” case, challenging a powerful coalition of private interests on behalf of the license-buying public angler. We urge the Commission to reverse its current course and again stand on the side of its license-buying angler: Seize the opportunity, Commissioners, and restore the eroded constitutional right of New Mexico’s public to fish in public waters.

SUPPORTING DOCUMENTS SEPARATELY ATTACHED:

N.M. Attorney General Opinion No.14-04

N.M. Attorney General Advisory Letter, dated Aug. 5, 2016

State Parks Division boating and recreational advisory, digitally copied and pasted in whole and verbatim as it appeared on the division’s website as of December 19, 2017