



(505) 299-5404
6100 Seagull St. Suite B-105
Albuquerque, NM 87109
nmwildlife@nmwildlife.org

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State Game Commission Chair Joanna Prukop
Vice-Chair Roberta Salazar-Henry
Honorable Members Jimmy Bates, Gail Cramer, Tirzio Lopez, David Soules, Jeremy
Vesbach
Michael Sloane, director, NM Dept. of Game and Fish

Dear Commissioners and Director,

This is to follow up, in greater detail, New Mexico Wildlife Federation's request that you rescind State Game Commission Rule 19.31.22 NMAC, "Landowner Certification of Non-Navigable Water."

The previous Commission adopted the rule in December 2017 and utilized it in November 2018 to certify a half-dozen stretches of New Mexico streams as "non-navigable." The rule and certifications aim at enforcing the constitutionally suspect trespass statute 17-4-6(C), enacted under Senate Bill 216 in 2015, and purportedly enable landowners to post those streams and their streambeds against trespass.

In taking these actions, the Commission knowingly contravened advisories from former Attorney General Gary King in 2014 and current AG Hector Balderas in 2016. (A third advisory, only recently identified as to source and date, was issued from former Attorney General Tom Udall's office in 1997.)

The upshot: All three Attorneys General agreed that the 1945 New Mexico Supreme Court decision in "State Game Commission vs. Red River Cattle Co." allows the public – anglers, boaters, or others – to fish, float and otherwise utilize streams and streambeds where they run through private property as long as they do not trespass across private land to access the waters or trespass onto private land from the stream. Access must be gained via public waters or lands, or from private property with the owner's permission.

Tellingly, the Commission seemed to do everything it legally could to minimize public exposure and input into certifications hearings such as the initial one on Nov. 8, 2018. Clauses within certification process rule 19.31.22 require an unusually long 14-day lead-time for submitting written public comments prior to the hearings and simply bar oral public testimony. For the November meeting, the Commission published the required legal notice just 30 days in advance, while 60 days is typical. Further, the public/press release about it didn't post on the Game and Fish Department website until Oct. 24 – a belated notice materializing just one day before the deadline for the public to submit written comments and only two weeks prior to the meeting. Such opacity is hardly appropriate to rules that criminalize ordinary public anglers and boaters recreating in public streams.

We believe the state's Attorneys General correctly interpreted the Red River decision, and New Mexico Wildlife Federation has additional evidence to support that assessment. Among this letter's attachments is an internal NMWF document not previously disclosed publicly. We believe this is the right time and the right Commission to share it with:

NMWF in 2017 contracted Santa Fe attorney John W. Utton, one of New Mexico's and the West's premier and most deeply respected water law authorities, to review the issue. In his brief but very direct analysis, Mr. Sutton confirms AG King's and Balderas's advisories, noting “. . . this conclusion means that landowners may not place a fence across a stream or otherwise preclude any person from recreating within a stream, including by traversing up and down the stream, so long as that person does not gain access to or from the stream by crossing private property.”

That kind of clarity from a preeminent water law attorney could hardly be more compelling.

State Game Commissioners of the 1940s brought suit on behalf of their license-buying anglers to affirm public access to public waters, and successfully fought for them and against politically and financially powerful special interests all the way through the state supreme court. The immediate past Commission unfortunately abandoned its license-buying anglers in favor of the special interests -- perhaps in the mistaken belief that anglers are too passive to pursue the matter through the courts on their own behalf.

The NMWF and the many thousands of anglers, boaters and other recreationists we represent, are hopeful that this new and public-spirited Commission will take this issue to its lawful conclusion. You will hear arguments that rescinding this rule would impinge on private property rights. The opposite is true: The state, including multiple State Game Commissions, has for decades allowed – and most recently actively abetted – erosion of the public's rights by private interests.

Rescinding the rule is not only the right thing to do on behalf of New Mexico's public anglers and boaters; it also would initiate the alignment of our state's policies with the law as laid out by the New Mexico Supreme Court. We urge you to set this aright; we sportsmen and women will stand with you and help in any way we can.

Sincerely,

John Crenshaw
President, NMWF

Jesse Deubel
Executive Director, NMWF

Attached documents:

1) AG G. King opinion, April 1, 2014:

"Question: May a private landowner exclude others from fishing in a public stream that flows through a 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."

2) AG H. Balderas advisory, Aug. 5, 2016:

". . .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."

17-4-6 C. 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. [SB 226 amendment]

3) AG G. King – SGC, initiate stream access process, Aug. 22, 2014:

". . . I encourage the Commission to act as soon as possible to develop policies and regulations that clarify the public's right to enjoy all of New Mexico's public streams while protecting the property rights of private landowners."

4) J. Utton – AG Balderas and King advisories correct, May 8, 2017:

“This letter confirms my review of the two legal opinions issued by the Attorney General’s Office identified above and confirms that I find no defect or omission in their respective analyses that would cause me to question their conclusions.”

5A) American Whitewater – access/nm and;

5B) EMNRD State Parks boating advisory:

Both documents reference a letter recently identified as having been sent from former NM Attorney General Tom Udall’s office to Mark Sundin, Bureau of Land Management River Manager, dated April 8, 1997. While the AG’s office has been unable to locate the original, both these documents closely paraphrase and probably quote directly from that letter, which precedes and closely tracks with the opinions from AGs King and Balderas.

6) NMWF Opposes 19.31.22, Dec. 12, 2017:

“... 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.”

“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.”

7) 1945-NMSC-034 ‘NM v Red River Cattle Co’

“We hold that the waters in question were, and are, public waters; and that appellee has no right of recreation or fishery distinct from the right of the general public.”

“Section 2, Art. 16, of the New Mexico Constitution provides: ‘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.’”

8) Link to minutes of Dec. 20, 2017 Commission meeting adopting Rule 19.31.22

NMAC

http://www.wildlife.state.nm.us/download/commission/minutes/2017/MIN-Game-Commission-12_20_2017-FINAL.pdf

Excerpt from the Dec. 20, 2017 Commission meeting

The objective of 19.31.22 NMAC “is to establish rules, requirements, definitions and regulations implementing the process for a landowner to be issued a certificate and signage by the Director and the Commission that recognizes that within the private – excuse me – the landowner’s private property *is a segment of non-navigable public water whose river bed or stream bed or lake bed is closed to access without written permission from the landowner.*” (Emphasis added)

9) Link to Rule 19.31.22 “Landowner Certification of Non-navigable Waters”

<http://164.64.110.134/parts/title19/19.031.0022.html>

10) Link to minutes of Nov. 8, 2018, Commission Meeting certifying certain waters as non-navigable:

http://www.wildlife.state.nm.us/download/commission/minutes/2018/MIN-Game-Commission-11_08_2018-FINAL.pdf

11) Link to landowners’ non-navigable certification applications:

<http://www.wildlife.state.nm.us/commission/non-navigable-water-application/>

The State Game Commission on Nov. 8, 2018, affirming the applications’ validity, certified six stretches of stream as non-navigable: Chama River and Rio Chamita portions within Chama Troutstalkers property; the Alamosa, Mimbres and Peñasco river portions within Z&T Cattle Co. property; upper Pecos River portion through the Kenneth A. and Julie K. Hersh resident trust property.