

ATTORNEY-CLIENT PRIVILEGED, CONFIDENTIAL MEMORANDUM

To: New Mexico Game Commission

From: John Grubestic, Assistant Attorney General

Date: September 17, 2019

Re: Access to Public Waters on Private Property

Director Sloane requested our advice regarding whether 19.31.22 NMAC comports with State law and the New Mexico State Constitution. The rule was adopted by the State Game Commission in January 2018 and attempted to implement applicable sections of 17-4-6 NMSA (1978). Under the rule procedures are established which the State Game Commission can certify privately-owned stream segments as non-navigable and thereby subject to criminal trespass prohibitions for individuals hunting, fishing, and other outdoor recreation activities.

As you know, Senate Bill ("SB") 226 was enacted in 2015 and amended state law governing hunting and fishing on private property. In 2016 this office released an advisory letter to Representative Luciano "Lucky" Varela who requested this office's advice regarding the constitutionality of Senate Bill 226. *See* S.B. 226, 52nd Leg., 1st Sess. (2015) ("SB 226"), codified at NMSA 1978, § 17-4-6 (2015). SB 226 added a prohibition against accessing private property through public water or accessing public water through private property without the property owner's consent. *Id.* § 17-4-6(C). Based 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.

Since SB 226 purports to regulate the use of public waters, the amendment implicates Article XVI, Section 2 of the New Mexico Constitution, which states:

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.

See also NMSA 1978, § 72-1-1 (1941) ("[a]ll the natural waters flowing in streams or watercourses, whether such be perennial or torrential..., belong to the public and are subject to appropriation for beneficial use").

In a 2014 opinion, the Office of Attorney General addressed the constitutional right to use public streams. *See* N.M. Att'y Gen. Op. No. 14-04 (2014) ("AG Op. No. 14-04"). The opinion's focus was on the right to use public streams flowing through private property for fishing and other

recreational purposes. The opinion reviewed the history of Article XVI, Section 2 and its interpretation by New Mexico courts, particularly the New Mexico Supreme Court's interpretation in the seminal case of *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC- 034, 182 p.2d 421.

Red River involved a landowner who owned land bordering Conchas Lake and attempted to prevent members of the public from fishing in the lake from boats. The lake was accessible to the public without trespassing on private property. See 1945-NMSC-034, ¶ 56, 182 P.2d at 433. After an exhaustive analysis of the history and laws relating to public waters in New Mexico, the Supreme Court held that water flowing in streams and collected in the lake were public waters and subject to use by the public for fishing and recreation. According to the Court, the landowner's ownership of land surrounding the lake or beds underlying the streams flowing into the lake did not give the landowner any special interest in the water in the lake or streams. See 1945-NMSC-034, ¶ 59, 235, 182 P.2d at 434, 463. As the Court stated, "the waters in question ... are public waters; and ... [the landowner] has no right of recreation or fishery distinct from the right of the general public." *Id.* ¶ 59, 182 P.2d at 434.

Based on the analysis and holding in *Red River*, the 2014 Attorney General opinion concluded that the water flowing in New Mexico streams belongs to the public and even when a stream runs through private property, the property owner may not exclude the public from using water in the stream for fishing and other recreational activities. The opinion explained that "[t]he public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters," such as "walking, wading and standing in a stream in order to fish." AG Op. No. 14-04, p. 7. Permissible incidental activities do not include trespassing on private property to gain access to public waters, *id.*, and the use of public streams running through private property is subject to state regulation to the same extent as the use of public streams on public lands, *id.* at 4, note 4.

Under the rules of statutory construction, a statute must "be construed, if possible, to ... avoid an unconstitutional, absurd or unachievable result." NMSA 1978, § 12-2A-18(A)(3) (1997). See also *Benavides v. Eastern New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265, 1275 (court will adopt the construction of a statute that supports its constitutionality). Applying this principle to SB 226 and 19.31.22 NMAC, it must be construed consistently with Article XVI, Section 2's declaration that "the unappropriated water of every natural stream ... belong[s] to the public" As discussed above, the New Mexico Supreme Court has construed Article XVI, Section 2 to give members of the public the right to use public water in streams and lakes for fishing and other recreational activities, even when those streams and lakes are on private property.

While Article XVI, Section 2 prohibits the legislature from limiting the public's right to use public water, that use is otherwise subject to state regulation, including laws against trespassing on private property. We believe that 19.31.22 NMAC appropriately regulates the use of the state's public waters, **provided it is interpreted and applied only to prohibit a person, absent the required consent, from gaining access to private property from a stream or other public water and from gaining access to a stream or other public water from private property.** (emphasis added)

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. 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. *See Red River*, 1945-NMSC-034, 35-37, 182 P.2d at 430-31 (explaining that because Art. XVI, § 2 expressly provides for public ownership of the "water of every natural stream," the "test of navigability" used in other states to determine the public character of water does not apply in New Mexico). Subsequently, the objective listed in 19.31.22.6 NMAC, 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 landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner, is not in constitutional compliance and cannot be enforced. Additionally, any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable.