

June 4, 2021

New Mexico State Game Commission
Sharon Salazar Hickey, Chairwoman
Michael Sloane, Secretary

Dear Chairwoman Salazar Hickey,

Enclosed are comments from the New Mexico Chapter of Backcountry Hunters & Anglers (NM BHA) regarding the five pending applications to close certain sections of public waters under 19.31.22 NMAC. Rather than provide separate comments for each pending application, please note that the attached comments are meant to extend to all five applications: Chama III LLC; Fenn Farms; Rancho del Oso Pardo; River Bend Ranch; and Three Rivers.

The 2,000-plus members and supporters of the NMBHA appreciate the State Game Commission's ongoing review of the current stream access regulations (19.31.22 NMAC) on behalf of all New Mexicans. We understand that doing the right thing is not always easy or expeditious, but we commend the Commission for its action thus far, including the decision in late 2019 to place a moratorium on all new non-navigability certification requests and to conduct a thorough review of the regulations to determine whether they comport with the New Mexico Constitution. That review remains unfinished.

Without guidance from the current Game Commission, NM BHA bases its comments today on the actual wording of the New Mexico Constitution, the state Supreme Court's 1945 *Red River Valley* decision and the official opinions and other statements from recent New Mexico Attorneys General, all of which agree that the public has the undisputed right to fish or float any stream in New Mexico, provided they do not trespass to reach the stream or to leave it. As then-Assistant Attorney General John Grubestic wrote to you less than two years ago, "any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable."

We know that a federal magistrate has ordered you to make a decision on the five pending applications. But we believe you owe it to the hunters, anglers and other members of the public who fund the New Mexico Department of Game and Fish to deny all five of these pending applications in order to protect the Department of Game and Fish and your own law enforcement officers from the legal jeopardy they would face for enforcing what your own attorneys -- the New Mexico Attorney General's Office -- have said multiple times is an unconstitutional regulation.

The New Mexico Supreme Court is currently considering whether the regulations at issue today are, in fact, unconstitutional. We ask you to respect the high court in New Mexico and wait for their decision before approving any additional applications under 19.31.22 NMAC.

If the Commission is unwilling to wait for the New Mexico Supreme Court to act, we respectfully request that you delay the hearing set for June 18 and allow NM BHA and others to participate in the hearing itself, in a manner that provides the type of due process afforded in the Administrative Procedures Act. Using the APA as a benchmark for adequate due process, these adjudicatory proceedings should allow "all parties an opportunity for a full and open hearing," including the opportunity to respond and present evidence and argument on all issues involved, to consider and challenge the evidence applicants have presented and to cross-examine witnesses and/or submit rebuttal evidence.

Many members of the New Mexico Chapter of Backcountry Hunters & Anglers are lifelong New Mexico residents who have fished extensively throughout the state. Some of us remember fishing with a parent or grandparent on the Chama, Pecos and other streams. We also remember being turned away from waters that the adjacent landowners themselves – with no legal standing – had deemed “closed to the public,” when in fact the New Mexico Supreme Court in 1945 had specifically said those waters should have been open. In other words, we would have fished on all five of the streams who closure applications are pending had we been allowed to.

While NM BHA strongly supports the right of New Mexicans to access our streams and rivers freely, we also recognize that with rights come responsibilities. If our constitutional right of access is affirmed by the state Supreme Court and previously closed streams are reopened to public use, we believe the State Game Commission has an obligation to enact additional regulations to protect fishery resources, establish an education program to inform the fishing public about the limits of their right of access, and boost law enforcement presence on streams where increased public use is anticipated.

Under pressure from a federal magistrate, you have been asked to decide the fate of the five pending applications. This is a golden opportunity for the Commission to be the voice of all New Mexicans – as it was when it took the battle for public stream access to the Supreme Court in the 1940s -- and to uphold the rights spelled out so clearly in our state Constitution: That all waters of the state are owned by the public and open for recreational use, provided we don't trespass across private land to reach them.

Sincerely,

Charles Tripp, Chairman, NM Backcountry Hunters & Anglers

Joel Gay, Chairman Emeritus, NM Backcountry Hunters & Anglers

Katie DeLorenzo, Southwest Chapter Coordinator, Backcountry Hunters & Anglers