



Administrative Office of the Courts

FOR IMMEDIATE RELEASE

Sept. 1, 2022

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Supreme Court issues opinion on right to use public water flowing over private property

SANTA FE – People have a constitutional right to walk or wade on the streambed of water flowing over privately owned land in New Mexico when they fish or engage in other recreation, the state Supreme Court ruled in an opinion issued today.

“We hold that the public has the right to recreate and fish in public waters and that this right includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right,” the Court concluded in a unanimous opinion by Justice Michael E. Vigil.

The opinion provided the legal reasoning for a decision announced from the bench in March that invalidated regulations by the state Game Commission permitting property owners to close public access to waters on their land.

Under the New Mexico Constitution, the Court explained, water within the state belongs to the public but the banks next to that water and the land beneath the water may be owned privately. In 1945, the Supreme Court concluded that the constitution – Article XVI, Section 2 – and pre-statehood law established a right for the public to fish, boat and engage in other forms of recreation in public water. The 1945 case determined that a landowner with property on both sides of a lake could not prohibit someone from fishing in boats on the lake.

In today’s opinion, the state’s highest court addressed “whether the right to recreate and fish in public water also allows the public the right to touch the privately owned beds below those waters. We conclude that it does.”

“Walking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing and recreation,” the Court wrote. “Having said that, we stress that the public may neither trespass on privately owned land to access public water, nor trespass on privately owned land from public water.”

The Court emphasized that “the scope of the public’s easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of minimal impact.”

The justices concluded that the Game Commission’s regulations unconstitutionally infringed on the public’s right to use public waters and that the commission lacked the authority to promulgate the regulations, which went into effect in 2018. The regulations set up a process for landowners to obtain a designation that water flowing through their property was “non-navigable public water” and that authorized them to close access without written permission from the property owner. People could have been cited for trespass if they touched a streambed or lakebed on waters closed to access.

The Adobe Whitewater Club of New Mexico, the New Mexico Wildlife Federation and New Mexico Chapter of Backcountry Hunters and Anglers challenged the regulations in a lawsuit filed with the Supreme Court. The justices heard oral arguments earlier this year and verbally announced a decision afterwards, ordering the commission to withdraw the unconstitutional regulations.

The Court noted in today’s opinion that New Mexico “is not alone in concluding title to the beds beneath water is immaterial in determining the scope of public use. Montana, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming, and South Dakota have all recognized public ownership and use of water is distinct from bed ownership.”

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To read the decision in *Adobe Whitewater Club v. State Game Commission*, No. S-1-SC-38195, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/521316/index.do>