

  
Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

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**ADOBE WHITEWATER CLUB OF NEW MEXICO,  
A non-profit corporation, NEW MEXICO WILDLIFE  
FEDERATION, a non-profit corporation, and NEW  
MEXICO CHAPTER OF BACKCOUNTRY HUNTERS 7  
ANGLERS, a non-profit organization**

**v.**

**STATE GAME COMMISSION**

**and**

**CHAMA TROUTSTALKERS, LLC et al.**

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No. S-1-SC-38195

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**INTERVENORS-RESPONDENTS' MOTION TO STRIKE DUE TO  
APPARENT FRAUD ON THE COURT**

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## **STATEMENT OF COMPLIANCE**

As required by Rule 12-318(G), we certify that this Motion complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of this brief, as defined by Rule 12-318(F)(1) contains 2,876 words.

**TABLE OF AUTHORITIES**

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## INTRODUCTION

Appendix V to Petitioners' Petition—a memorandum written by former Assistant Attorney General John Grubescic and relied upon by Petitioners and Amici—appears to have been falsified so as to make the document appear to have more weight than it actually has. The document is strikingly different than the version of the memorandum that the State Game Commission (the Commission) published to its website in November 2019 and a version of the memorandum that was provided to Michael Sloane, the Director of the Department of Game and Fish, in September 2019 (and which was the same day retracted and qualified as a draft for discussion purposes only). While the content of the document is the same across all versions, the fact that Petitioners would utilize an apparently falsified document reveals the need for development of a factual record and demonstrates why the extraordinary relief Petitioners are seeking is inappropriate. This Court should not act on a falsified record. Requiring Petitioners to proceed first a before a district court that can assess evidentiary issues such as the one created by Petitioners' use of an apparently falsified document will ensure that if the issues raised by Petitioners ever reach this Court, they will be based on a fully vetted record rather than apparently falsified documents. The Court should thus enter an order striking the apparently misappropriated and doctored exhibit and dismissing Petitioners' Petition.

## DISCUSSION

Appendix V to Petitioners' Petition purports to be a memorandum from John Grubestic, a former Assistant Attorney General, to the New Mexico State Game Commission. Petitioners contend that the exhibit is an Attorney General opinion that "was provided to the Game Commission in the form of a Confidential Memorandum dated September 17, 2019." Petition at 11. Petitioners assert that the document constitutes a "conclusion of the Attorney General." *Id.* And, Petitioners cite Appendix V as a basis for the Court to exercise its original jurisdiction, contending that it creates or contributes to the alleged legal uncertainty that they contend justifies the extraordinary relief they are seeking. *See* Petition at 14.

Senators Udall and Heinrich, who filed an Amicus Brief, also rely on the document attached by Petitioners and contend that it constitutes advice of "the current Attorney General." Senator Tom Udall and Senator Martin Heinrich's Memorandum Brief as Amici Curiae at 21 n. 6.

The exhibit was a surprise to Additional Respondents. In November 2019, the Game Commission voted at a public meeting to release a memorandum it had received from the Assistant Attorney General who had been assigned to assist it—John Grubestic. After the meeting, the Commission published Mr. Grubestic's memorandum on its website. That as-published version of the memorandum is

attached hereto as Exhibit A.<sup>1</sup> As is evident from Exhibit A, the document published by the Commission is an unofficial memorandum that does not contain Office of the Attorney General letterhead or a signature of Mr. Grubestic. *See id.* This is markedly different from the document Petitioners attached to their Petition which appears to contain official Attorney General letterhead and thus has the imprimatur of the Office of the Attorney General.<sup>2</sup> The contrast between what appears to be an unofficial draft memorandum (Exhibit A) and what appears to be an official document of the Office of the Attorney General is striking. The addition of the Attorney General letterhead transforms a document that appears to be a draft and unofficial memorandum into a document that appears to constitute some official guidance that has been sanctioned by the Attorney General himself. It is likely this imprimatur of reliability is what induced the Amici Senators to incorrectly believe that the memorandum constitutes advice of “the current Attorney General.”

Because the document attached by Petitioners had not previously been publicly disclosed, Petitioners were concerned about the veracity of the document. The document attached by Petitioners looks odd. There is a misalignment between

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<sup>1</sup> The as-published version of the memorandum remained on the Commission’s website until the day after undersigned counsel requested that the Commission remove the memorandum on account of a December 16, 2020 letter from the Attorney General indicating that the memorandum “does not constitute a formal Attorney General opinion, and notably does not have the force of law.”

<sup>2</sup> The content of the two documents is the same.

the letterhead and the text—the letterhead is aligned with the top margins, but the text is skewed slightly off-center. *See* Appendix V to Petitioners’ Petition. When printed on a standard 8.5 x 11 paper, there is a 4mm gap between the line below the letterhead and the top of the “a” in Attorney-Client Privileged” and a 5mm gap between that same line and the top of the final “m” in Memorandum. This angle and gap only exists in the body of the document—the header and footer portions of the letterhead align normally. This type of angle is, to counsel’s knowledge, impossible to generate with normal word processing software which does not normally move text off of a horizontal plane. But, this type of shift is easy to mistakenly produce when combining two image files via an editing program such as Photoshop or a .pdf editor.

Additionally, the letterhead portion of the document contains an image of a staple. Yet, the second and third pages contain no evidence that a staple ever penetrated the pages. Normally when photocopying a stapled document, the stapled pages will have small dots where the staple penetrated. *See e.g.* December 16, 2019 Office of the Attorney General Letter, attached as Exhibit B (visible staple holes in top left corner of each page). Not so with Appendix V. The letterhead portion of the document contains numerous artifacts from photocopying while the body of the page is suspiciously free of such artifacts. And, the letterhead footer, which provides the Attorney General’s contact information, only appears on the first page of Appendix

V even though other official Attorney General Hector Balderas correspondence contains the footer on each page. *Compare* Appendix V with December 16, 2019 Office of the Attorney General Letter (Exhibit B).

In an effort to ascertain the genesis of the odd looking document utilized by Petitioners, counsel for Intervener-Respondents submitted an Inspection of Public Records Act request to the Department of Game Fish and the Commission seeking, among other things, all copies of the memorandum and all correspondence related to the memorandum. But rather than comply with their obligations under IPRA, the Department and the Commission refused to provide any documents claiming that the requests are excessively burdensome and that the COVID-19 pandemic somehow makes it impossible for them to respond to the document requests until December 22, 2020. This stonewalling of Additional Respondents' attempt to investigate issues relevant to the Petition has hampered Additional Respondents' ability to ascertain all factual issues that need to be addressed before review of the issues in the Petition could be heard by this Court.

Concerned about the fact that someone was apparently falsifying documents, counsel also reached out to the Office of the Attorney General to request that it review the discrepancy and try to determine if the version attached to Petitioners' Petition originated from the Office of the Attorney General. On August 6, 2020, a records custodian for the Office of the Attorney General responded that it had

“conducted a thorough search of our files and conclude **that there is no document in our possession that matches the appearance of the document in Appendix V.**” August 6, 2020 Letter, attached as Exhibit C (emphasis added). The records custodian indicated that the AG’s files “include the copy of the memo . . . posted to the Game Commission’s website, which is not on official letterhead, as well as a final version of the memo that is on official letterhead, **but does not match the appearance of the document purporting to be the memo in Appendix V.**” *Id.* (emphasis added) In other words, the document that Petitioners provided to the Court was apparently falsified to create an appearance that it was an official document.

After receiving the Attorney General’s conclusion that Appendix V was not an official document contained in the AG’s files, counsel prepared this motion and sought the concurrence of Petitioners’ counsel as required by the Rules of Appellate Procedure. Rather than explain where the clearly falsified Appendix V came from, counsel for Petitioners provided yet *another* version of the Grubestic memorandum—one which was not publically released by the Commission and which is different from the document attached to the Petition. According to Petitioners’ counsel, the third version of the document, which is attached hereto as Exhibit D, was sent to Johanna Prukop (the former chair of the Commission) on “September 17, 2019 at 1:49 before she was to drive to Cloudcroft for a Commission meeting the next day.” August 18, 2020 Email chain, attached as Exhibit E. In an attempt to investigate the

veracity of that claim, undersigned counsel reviewed the metadata of the document counsel had emailed. But, that metadata revealed that the copy sent by Petitioners' counsel was scanned on August 18, 2020—just shortly before Petitioners' counsel emailed it. *See* Metadata Screenshot, attached as Exhibit F. Undersigned counsel thus asked Petitioners' counsel to send a copy of the original document Ms. Prukop supposedly received in September 2019. Petitioners' counsel never responded to that request.

Then, Additional Respondents submitted an IPRA request to the Office of Attorney General seeking all documents related to the Grubestic memorandum. In a September 2020 response to that request, the Office of Attorney General provided an email chain in which Mr. Grubestic sends a letterhead version of his memorandum to Director Sloane and asks him to distribute it to the Commission. *See* September 17, 2019 Email chain, attached as Exhibit G. But later that day, Mr. Grubestic advised Director Sloane that “as we discussed, the memo is still in draft form for discussion purposes. Please do not distribute it beyond Commissioners.” *Id.* The Attorney General's IPRA response did not contain any documents reflecting that the Attorney General ever changed its position that the memorandum was a draft for discussion purposes only.

The timeline thus boils down to the following: (1) on September 17, Mr. Grubestic sends a letterhead version of his memorandum to the Director, but almost

immediately claws back the official version and advises that it is a draft for discussion purposes only; (2) in November 2019, the Commission releases a draft version of Mr. Grubestic's memorandum that does not contain letterhead or any other indicia that it is an official document; (3) On December 16, 2019, the Attorney General advises the Commission in writing that Mr. Grubestic's memorandum "does not constitute a formal Attorney General opinion; (4) sometime prior to March 13, 2020, someone attempts to recreate a letterhead version of the memorandum by performing a poor quality photoshop (or other digital or manual manipulation) job on the draft memorandum the Commission released; (5) on March 13, 2020 Petitioners file their Petition, attach the altered document, and make a false representation to the Court that the altered document was issued by the Attorney General and constitutes an official Attorney General conclusion.

In his August 18, 2020 email, counsel for Petitioners attributes the oddity of Appendix V to a reduction in size applied when "processing documents to bear Appendix designations." Aug. 18, 2020 Email chain (Ex. E). Counsel appears to be taking the position that adding an exhibit label to the document Mr. Grubestic circulated on September 17, 2019 (and which Mr. Grubestic almost immediately afterward made clear was a draft for discussion only) somehow created the oddities visible on Appendix V. But, Appendix V is not merely a resized version of the letterhead document Mr. Grubestic sent on September 17. Appendix V has a

misalignment between the letterhead and the text of the document. The new version does not. Appendix V has an image of a staple on the first page. The new version does not. Appendix V does not contain the AG's contact information on its second and third pages. The new version does.

Resizing a document to add an exhibit label does not alter the orientation of the text vis-à-vis the header. It does not add images of staples. It does not remove contact information. Appendix V is thus something different than what Petitioners have now provided.

The fact that for at least a brief period of time the Commission was in possession of a letterhead version of Mr. Grubestic's memorandum does not change the fact that someone created a false document to provide to the Court as Appendix V. Nor does it change the fact that Director Sloane was expressly advised that the memorandum was *not* official Attorney General guidance. The who and how of this apparent fraud is presently unknown. Falsified documents do not generate themselves. *Someone* photoshopped or otherwise pasted Mr. Grubestic's unofficial September 2019 memorandum onto official Office of the Attorney General letterhead.<sup>3</sup> That someone has some affiliation or connection to Petitioners or their counsel: how else would it end up attached to the Petition.

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<sup>3</sup> This act may be a crime, something that Additional Respondents defer to the Attorney General to investigate.

The why is obvious. By doctoring and misappropriating the unofficial document published by the Commission to include letterhead, the document transforms into something that appears more official than it is and gains the imprimatur of the Office of the Attorney General—something the document published by the Commission did not have. By attaching a falsified document to their Petition and then arguing that it is an official document of the Office of the Attorney General, Petitioners have created a false perception with the Court that the document has more meaning than it actually has. The actual document published by the Commission does not purport to be official attorney general guidance. Rather, it is an unofficial draft document drafted by a single Assistant Attorney General that does not in any way constitute an official Attorney General Opinion. The Office of the Attorney General told the Commission that the memorandum was just a draft on September 17, 2019. It did so again in its December 16, 2019 letter stating that Mr. Grubestic’s memorandum “does not constitute a formal Attorney General opinion, and notably does not have the force of law.” *See* Exhibit B at 1.

Given that Petitioners have submitted a fraudulent document to the Court, the Court should strike the document from the record and disregard all argument made by Petitioners and Amici regarding the document constituting formal guidance from the Office of the Attorney General. *State ex rel. New Mexico State Highway & Transp. Dept. v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1 (noting that “both trial

and appellate courts must have inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings” (quotation marks omitted)). Further, the Court should issue an order requiring Petitioners to show cause regarding when and where they obtained the apparently falsified document. *Id.* If Petitioners falsified the document, they should be sanctioned for their conduct and referred to an appropriate law enforcement agency for impersonating the Office of the Attorney General. *Id.*

The emails from Petitioners’ counsel regarding this issue suggest that Petitioners will take the position that there is no harm here because the content across all versions of the document is the same and because at some point the AG’s office placed the memorandum on its official letterhead. While true that the content of each document is unchanged and that the AG at some point created a letterhead version of the document, the issue is the presentation of false evidence to the Court and the false representation that Mr. Grubestic’s memorandum was an official Attorney General document when it in fact, as Mr. Grubestic explained on the same day he sent the memorandum, was simply a draft for discussion purposes only.

Dismissal of Petitioners’ Petition is also appropriate. Petitioners use of falsified evidence (even if unwittingly) demonstrates the need for a complete evidentiary hearing by a district court. A district court, unlike this Court, can weigh

the evidence and assess issues such as the authenticity of evidence. Requiring Petitioners to pursue their claims in an ordinary manner will ensure that if the issues they raise ever reach this Court, they will reach this Court with a complete and unfalsified record. This will allow this Court to avoid being burdened and bothered with evidentiary issues of this nature—something that is better suited for a district court rather than the highest court in the state.

### **CONCLUSION**

Falsified evidence should not be a part of this Court's record. The document Petitioners attached as Appendix V has clearly been falsified. Even a cursory glance at the document reveals the poor quality manipulation that someone attempted, and the Office of the Attorney General's recent investigation establishes that the document attached as Appendix V did not originate from that office. Appendix V should be stricken. The parties involved in perpetrating the fraud should be found and sanctioned. And, the Court should decline to exercise its original jurisdiction as fact finding is necessary to ensure that the Court has a complete and *truthful* record before it on appeal.

Respectfully submitted,

/s/ Jeremy K. Harrison

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*Counsel for Interveners-Respondents*

### **STATEMENT REGARDING CONCURRENCE**

Pursuant to Rule 12-309(C), we have sought concurrence of counsel for Petitioners and the Respondent. Counsel for the State Game Commission did not respond to the request and thus should be deemed to oppose the relief sought in this motion. Counsel for Petitioners responded, but declined to provide their position on the relief requested. Petitioners thus should be deemed to oppose the relief sought in this Motion.

**CERTIFICATE OF SERVICE**

I certify that on September 28, 2020, I electronically filed this Response Brief with the State of New Mexico's Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

/s/ Jeremy K. Harrison  
Jeremy K. Harrison  
Modrall, Sperling, Roehl,  
Harris & Sisk, P.A.

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, 52<sup>nd</sup> 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.

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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December 16, 2019

Joanna Prukop, Chair  
New Mexico Game Commission  
PO Box 25112  
Santa Fe, NM 87504

Michael Sloane, Director  
Department of Game and Fish  
PO Box 25112  
Santa Fe, NM 87504

Dear Chair Prukop and Director Sloane,

Our office received a direct inquiry regarding correspondence of November 25, 2019 from Director Sloane to a landowner applicant, denying that individual's request for a designation of non-navigable water segment pursuant to Game and Fish Rule 19.31.22 NMAC. Your letter states that the reason for denial is that the Office of the Attorney General advised the Game Commission that the rule cannot be constitutionally enforced. As the Attorney General has stated, our office is committed to assisting in a process to strengthen the rule, however, we are concerned that the denial on this basis prematurely exposes the Commission and the State to extreme litigation risk. Accordingly, we respectfully advise you to administer the rule in a consistent manner until a proper rule change can take place, and we continue to offer our assistance to the Commission in order to reduce this risk.

With respect to the litigation risk, it is my understanding that your denial relies on a document from your assigned counsel, which does not constitute a formal Attorney General opinion, and notably does not have the force of law. To rely solely upon it as a basis for denying an application to what until now has been a properly promulgated rule, is tenuous, at best. Further, the denial, which comes after several approvals were issued under the same rule, raises serious

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**EXHIBIT B**

due process and equal protection concerns that make that risk untenable. Moreover, there is nothing within said document that advises such rash action.

Further, without a conclusive finding that the rule is unconstitutional, the Commission is effectively repealing an otherwise validly promulgated rule based on its own opinion of the legal status of the rule. State law makes clear that if the Commission does want to repeal a rule, under the State's Administrative Procedures Act, the Commission must take specific steps to withdraw the rule, if it so chooses. *See* NMSA 12-8-4 (1969) (providing the process for repealing a rule); and *Rivas v. Board of Cosmetologists*, 1984-NMSC-076, ¶ 8, 686 P.2d 934, 935-936 ("Agencies are required to give notice of proposed action regarding the adoption, amendment or repeal of any rule . . . [and] if the agency adopts or repeals a contested rule, a concise statement of rationale must be issued by the agency."). Absent a determination that the rule is in fact unconstitutional, and absent a proper procedure, the Commission's actions may be deemed arbitrary or capricious, which even further increases the risk of litigation.

As the Attorney for the State of New Mexico, we take seriously the correct application of the New Mexico Constitution, work to support agencies in proper rulemaking, and we work zealously to protect the State from unnecessary litigation risk. Because all New Mexicans deserve certainty in the administrative process to ensure fairness and equal application of the law, we reiterate that disparate treatment of applicants under the rule, without a judicial determination or a proper remedial course, exposes the Commission and the State to untenable litigation risk. Accordingly, we respectfully advise you to enforce the rule in a consistent manner or to consider any other steps that would eliminate this risk.

Sincerely,

A handwritten signature in black ink that reads "Tania Maestas". The signature is written in a cursive, flowing style.

Tania Maestas  
Chief Deputy Attorney General

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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August 6, 2020

*Via Email*

Marco Gonzales  
Modrall Sperling Roehl Harris & Sisk P.A.  
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Dear Mr. Gonzales:

This letter responds to your correspondence regarding the authenticity of Appendix V to Adobe Whitewater, New Mexico Wildlife Federation, and Backcountry Hunters and Anglers Verified Petition to the Supreme Court of New Mexico in Case No. S-1-SC- 38195, which purports to be a memo from one of the Office of the Attorney General's former staff to the State Game Commission dated September 17, 2019. In your letter you describe the difference between a memo from that employee that was published on the State Game Commission's website and what is attached as Appendix V.

We have conducted a thorough search of our files and conclude that there is no document in our possession that matches the appearance of the document in Appendix V. Our files include the copy of the memo you describe as the one posted to the Game Commission's website, which is not on official letterhead, as well as a final version of the memo that is on official letterhead, but does not match the appearance of the document purporting to be the memo in Appendix V.

We appreciate you bringing this matter to our attention.

Sincerely,

A handwritten signature in blue ink that reads "Patricia M. Salazar".

Patricia Salazar  
Records Custodian

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EXHIBIT C

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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<sup>1</sup> 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, 52<sup>nd</sup> 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-NMSC034, 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.

## Jeremy K . Harrison

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**From:** Marco E. Gonzales  
**Sent:** Tuesday, August 18, 2020 2:07 PM  
**To:** Gene Gallegos  
**Cc:** Seth Cohen; Tammy Peinado; Jeremy K . Harrison  
**Subject:** Re: Wildlife v Game Commission

Mr.Gallegos:

We will submit an IPRA request to the AG's office. But with respect to the memorandum that was allegedly on Ms. Prukop's computer, the document you forwarded today was created at 8:50:19 today on a Konica Minolta bizhub C458 photocopier today. It is thus not the original pdf that Ms. Prukop allegedly received. So that we can be accurate with the Court, please send us the original pdf that you received from Ms. Prukop.

Sincerely,



Marco E. Gonzales  
Shareholder  
Modrall Sperlring | <http://modrall.com>  
[P.O. Box 9318 | Santa Fe, NM 87504-9318](#)  
[123 East Marcy Suite 201 | Santa Fe, NM 87501](#)  
D: [505.982.8170](tel:505.982.8170) | O: [505.983.2020](tel:505.983.2020) | F: [505.988.8996](tel:505.988.8996)

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On Aug 18, 2020, at 1:40 PM, Gene Gallegos <jeg@gallegoslawfirm.net> wrote:

Mr. Gonzales—The emails from the AG on the request. The AG office can supply the documents responsive to that request. The memorandum from Ms. Prukop's computer as stated.  
*Gene Gallegos*

---

**From:** Marco E. Gonzales <MEG@modrall.com>  
**Sent:** Tuesday, August 18, 2020 1:00 PM  
**To:** Gene Gallegos <jeg@gallegoslawfirm.net>  
**Cc:** Seth Cohen <scohen@colawnm.com>; Tammy Peinado <TAP@gallegoslawfirm.net>; Jeremy K. Harrison <jkh@modrall.com>  
**Subject:** Re: Wildlife v Game Commission

Mr. Gallegos,

Thank you for your response. Is the memorandum that you attached a document that your client obtained from his IPRA request, or is it a document that you received from Ms. Prukop? If from Ms. Prukop, can you please provide us with the original pdf that she received so that we can evaluate this issue further?

Also, to save us time in requesting from the AG the documents that your client obtained via his IPRA request, can you please provide us with all documents your client was given in response that request? We can submit an IPRA for those, but can more quickly evaluate these issues if you provide them directly.

<~WRD0004.jpg>

Marco E. Gonzales  
Shareholder  
Modrall Sperling | <http://modrall.com>  
[P.O. Box 9318 | Santa Fe, NM 87504-9318](#)  
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On Aug 18, 2020, at 10:21 AM, Gene Gallegos <jeg@gallegoslawfirm.net> wrote:

**EXTERNAL EMAIL:** Please do not click any links or open any attachments unless you trust the sender and are expecting this message and know the content is safe.

*Mr. Gonzales*

*Attached September 16, 2019 email string obtained from AG in response to Ben Neary IPRA request. Grubestic is to provide Maestas "a final copy" of his memo "in memo form for our records."*

*Attached Grubestic Memo in final form arrived on Johanna Prukop computer on September 17, 2019 at 1:49 before she was to drive to Cloudcroft for a Commission meeting the next day. She believes that it came from Director Mike Sloane.*

*In processing documents to bear Appendix designations some were reduced in size. No change in the content.*

*Gene Gallegos*

J. E. Gallegos  
Gallegos Law Firm, P.C.  
460 St. Michaels Dr., Bldg. 300  
Santa Fe, NM 87505  
Ph. 505.983.6686

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## Fwd: Attorney-Client Memo

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email: "jgrubestic@nmag.gov Grubestic, John" Tuesday, September 17, 2019 at 4:06:43 PM Mountain Daylight Time  
To: email: "smalave@nmag.gov Malave, Sally"

I was instructed to send this to Director Sloane.

----- Forwarded message -----

From: **Grubestic, John** <jgrubestic@nmag.gov>  
Date: Tue, Sep 17, 2019 at 4:01 PM  
Subject: Attorney-Client Memo  
To: Sloane, Michael B., DGF <Michael.Sloane@state.nm.us>  
CC: Tania Maestas <tmaestas@nmag.gov>

As we discussed, the memo is still in draft form for discussion purposes. Please do not distribute beyond Commissioners. Thank you.

--  
John Grubestic

--  
John Grubestic

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email: "smalave@nmag.gov Malave, Sally" Tuesday, September 17, 2019 at 4:10:31 PM Mountain Daylight Time  
To: email: "jgrubestic@nmag.gov Grubestic, John"

From the front office?

On Tue, Sep 17, 2019 at 4:06 PM Grubestic, John <jgrubestic@nmag.gov> wrote:  
I was instructed to send this to Director Sloane.

----- Forwarded message -----

From: **Grubestic, John** <jgrubestic@nmag.gov>  
Date: Tue, Sep 17, 2019 at 4:01 PM  
Subject: Attorney-Client Memo  
To: Sloane, Michael B., DGF <Michael.Sloane@state.nm.us>  
CC: Tania Maestas <tmaestas@nmag.gov>

As we discussed, the memo is still in draft form for discussion purposes. Please do not distribute beyond Commissioners. Thank you.

--  
John Grubestic

--  
John Grubestic