



June 4, 2021

Commissioner Sharon Salazar Hickey, Chair
Commissioner Jimmy Bates
Commissioner Gail Cramer
Commissioner Roberta Salazar-Henry
Commissioner Tirzio Lopez
Commissioner Jeremy Vesbach
c/o Office of the Director
New Mexico Department of Game & Fish
P.O. Box 25112
Santa Fe, NM 87504

Re: Applications for landowner certification of non-navigability on the June 2021 agenda

Submitted via NonNav.Comments@state.nm.us

Dear Madam Chair Salazar Hickey and State Game Commissioners:

Below are comments from New Mexico Wild, a non-profit organization representing the conservation interests of over 13,000 supporters dedicated to the protection, restoration, and continued enjoyment of New Mexico's wildlands, waterways, and wildlife. We of course appreciate the opportunity to provide input on the submitted landowner applications to certify streams as non-navigable, as currently allowed under the Landowner Certification of Non-navigability rule. We are, however, disappointed that the rule uses a very opaque and secretive process that renders the public essentially grasping in the dark to submit comments opposed to the privatization of New Mexico's streams and rivers. Nonetheless, New Mexico Wild is staunchly opposed to the five applications currently on the agenda for the Game Commission's June 18, 2021, meeting. We urge the commissioners to vote against approving these applications, or at the

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very least to table discussion of the applications until a later date, as allowed by the federal court order and the regulations.

This letter refers equally and opposes unequivocally all five applications to be considered on June 18, 2021.

Preliminary Matters

The Game Commission should deny these applications to certify or, at the very least, vote to table discussion of all five certification applications until at least the July Commission meeting to allow the public adequate time to review the final applications and provide useful and substantial comments to the Commission. Approval of these applications for landowner certification under the inadequate public engagement process used thus far would be a serious departure from the purpose of, mission of, and promises made by the Game Commission and would almost certainly invite litigation. Delaying a decision increases the possibility that the New Mexico Supreme Court will issue a ruling in *Adobe Whitewater Club v. State Game Commission*, Case No. S-1-SC-38195, a ruling that may very well strike down the landowner certification rule and render this entire process superfluous.

The application and approval process used by the Game Commission under the Landowner Certification rule robs New Mexicans of their due process rights and resembles little more than a rubber stamp “yes” on requests to unconstitutionally privatize streams and rivers. For example, the public is expected to submit comments two weeks prior to the next Game Commission meeting without access to the full applications and supporting materials. Those are not required to be made

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available to the public until seven days prior to the meeting. We fail to see how New Mexico Wild, or other members of our community, can provide the Game Commission with substantive comments without access to all available information. Furthermore, and likely stated by many other commenters, the entire Landowner Certification program is unconstitutional and robs New Mexicans of their right of public access wherever these certifications are granted.

We appreciate that the Game Commission, under court order, must hold a meeting on these pending applications but we fail to understand why the Commission is rushing to hold that meeting immediately and without adequate public engagement. The court gave the Game Commission 180 days to conduct a meeting, yet only one commissioner voted against adding these applications to the agenda for the June meeting. Everyone engaged in this process—commissioners, applicants, advocates—would benefit from placing these applications on the agenda for the November Game Commission meeting, giving the Supreme Court ample time to issue a decision in *Adobe Whitewater Club* and clarify the constitutional landscape upon which the Landowner Certification rule depends. Failure to delay a decision on these applications will only disrupt the status quo and risk a tremendous waste of resources. It’s also worth noting that if these applications are granted and landowners are permitted to restrict access to these streams there is a high likelihood that the barbed wire, concertina wire, and no trespassing signs we see elsewhere in the state will appear quite quickly on these streams as well. We are concerned that once those barriers are erected they will remain in place regardless of the upcoming Supreme Court decision.

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Finally, we must urge the commissioners to dismiss with the entire concept of navigability as it is currently employed by the Landowner Certification rule. Simply put, navigability has no effect on the constitutional right to enjoy and use the streams and rivers of New Mexico and the beds and banks appurtenant thereto. The navigability red herring has been used for far too long and cannot again be used to rob the public of their constitutional rights.

Public Access to Streams and Their Beds and Banks is a Constitutional Right

The New Mexico Constitution provides: “The unappropriated water of every natural stream, perennial or torrential . . . is hereby declared to belong to the public[.]” N.M. Const. Art. XVI § 2.

It has long been established in New Mexico that “[t]he small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks.” *State ex Rel. State Game Commission v. Red River Valley Co.*, 51 N.M. 207, ¶ 23 (1945). This right was recognized—and clarified—in 2014 when the Office of the Attorney General published Attorney General Opinion 14-04, stating: “The public’s right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters. This includes walking, wading and standing in a stream in order to fish.”

In 2015 the New Mexico legislature passed, and the Governor signed, SB 226, “An Act Relating to Public Waters,” which included the provision, “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[.]” Being asked to interpret the constitutionality of this statute, and recognizing that “a statute must be construed, if



possible, to . . . avoid an unconstitutional, absurd or unachievable result[,]” the Office of the Attorney General replied in the form of a letter, stating: “[T]he 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. In particular, the term ‘non-navigable’ in SB 226 cannot be applied to limit the public’s access to public waters.”

New Mexico has adopted the general rule that for non-navigable waters, “the adjoining landowner has title to the center of the stream.” *Tagliaferri v. Grande*, 16 N.M. 486, ¶ 2 (1911). However, the Supreme Court recognized “every man has a right to use [private banks adjacent to public waters], by mooring his vessels to the trees, by repairing his ships and sails upon them, and by landing his merchandise there; and fishermen have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live.” *Red River Valley*, 51 N.M. 207, ¶ 27 (internal citation and quotation marks omitted). The logical extension of this right, therefore, must be that the public has a right to use privately owned beds of streams when that use is incidental to the recognized right to use the public water flowing over those beds.

There is a clearly established right to recreate in public waters, regardless of their navigability status. This right includes activities that are incidental to that recreational use, such as walking, wading, and standing, as first stated in *Red River Valley*, and as later affirmed by Attorney General Gary King. While the constitutionality of SB 226 has yet to be determined, the Office of



the Attorney General clearly stated in a publicly available letter that the constitution does not allow an interpretation which would hinder the public's use of public waters, nor does the constitution allow the term "non-navigable" to be applied to limit the public's access to public waters.

The Landowner Certification Rule is Unconstitutional

The Landowner Certification rule, promulgated in 2017, "establish[ed] rules, requirements, definitions and regulations implementing the process for a landowner to be issued a certificate and signage . . . that recognizes that within the landowner's private property is a segment of non-navigable water, whose riverbed or streambed or lakebed is closed to access[.]" Presumably as a means to enforce SB 266, the Game Commission created a system by which private landowners could, for all intents and purposes, shut out public use of otherwise public waters. As explained below in more detail, this rule goes beyond the plain language of, and is in direct conflict with the Office of the Attorney General's interpretation of, SB 266.

The Game Commission's Landowner Certification rule has had the effect of hindering public access to and use of public waters and will continue to have that effect so long as the rule is in place. This effect runs afoul not only of the constitution, but also of the law laid forth by our Supreme Court in *Red River Valley*, and the interpretations provided by the Office of the Attorney General. The Game Commission is bound to comply with the law. In light of a formal Attorney General Opinion and a publicly available letter from the Office of the Attorney General, the Game Commission went beyond its authority when it promulgated the Landowner Certification rule. This rule, as it has been applied, clearly interprets SB 226 as a means to exclude the public from using



public water when it is found on private property, in direct conflict with the Office of the Attorney General. Moreover, the Landowner Certification rule undoubtedly applies the term “non-navigable” as a means to limit public access to public waters, again in direct conflict with the Office of the Attorney General. The effect of the Landowner Certification rule is that one may use non-navigable public waters so long as one does not touch the streambed beneath.

The Landowner Certification rule has resulted in a *de facto* closure of some public waters to public use. The definition of non-navigable public water, as stated in the Landowner Certification rule is: “a watercourse or river which, at the time of statehood, was not navigable-in-fact. A watercourse or river is not navigable-in-fact when it was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water.” 19.31.22.7(G) NMAC. If a watercourse or river was not and may have not been used as a highway for commerce or travel at statehood, it is most likely because the watercourse or river was too shallow or had too many natural impediments, thus rendering it an inefficient highway for commerce and travel. Due to the effects of human intervention in the form of diversions, climate change, and increased consumption, someone attempting to use certified non-navigable public water today would have a difficult time doing so without violating the law due to the shallowness of the watercourse, or the natural impediments requiring time spent wading or portaging around boulders, rapids, fallen logs, etc.



The Game Commission's interpretation of SB 226, as evidenced by the Landowner Certification rule, clearly runs afoul of Attorney General Opinion 14-04 and the publicly available letter sent from the Office of the Attorney General in August 2016. In so doing, the Game Commission has acted beyond its authority as part of the executive branch and is applying a rule that has no support in our constitution.

We also note that it is strange that the certification of non-navigable waters would fall within the purview of the Game Commission in the first place, as this seems more squarely within the mission and responsibilities of the Office of the State Engineer. However, until such time as the legislature clarifies, amends, or repeals SB 226, the Game Commission must enforce that law without hindering public use of public waters. Furthermore, as elucidated by the Supreme Court in *Red River Valley*, the Game Commission should make clear that users of public waters have an inherent right to use the beds and banks of public waters, regardless of their navigability status, in a manner consistent and incidental to their use of the public water, including portaging.

Conclusion

We implore the commissioners against continuing to engage in an unconstitutional practice. New Mexico is finally emerging from the COVID-19 cave of the last fifteen months, the Supreme Court's docket is no longer stuffed to the gills with lawsuits challenging the Governor's reasonable actions to protect the public, and people are continuing to seek outdoor activities as the weather improves and friends can be hugged. Because the constitutionality of the Landowner

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Certification rule is suspect and currently being challenged in the Supreme Court, the “navigability” status of a stream in New Mexico has no nexus with the constitutional right of the public to use and access that stream, and the Game Commission has more time to properly consider, discuss, and hear from the public about these pending applications, we urge the commissioners to deny these applications for certification or wait for the Supreme Court to rule on the constitutionality of the Landowner Certification rule and table all discussion of any current or future applications for non-navigability certification.

Sincerely,

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