

  
Joey D. Moya

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

**ADOBE WHITEWATER CLUB OF NEW MEXICO,  
a non-profit corporation;  
NEW MEXICO WILDLIFE FEDERATION,  
a non-profit corporation;  
and NEW MEXICO CHAPTER OF  
BACKCOUNTY HUNTERS & ANGLERS,  
a non-profit organization,**

Petitioners,

v.

No. S-1-SC-38195

**STATE GAME COMMISSION,**

Respondent,

and

**CHAMA TROUTSTALKERS, LLC, et al.,**

Intervenors-Respondents.

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

Petitioners respond to the Motion to Strike Due to Apparent Fraud on the Court filed by various, mostly riparian land-owning parties opposed to the Petition for Mandamus; those parties, as a group, have been previously referred to and will be herein referred to as the "Additional Respondents."

The Motion seeks to influence if not derail this Court’s consideration of fundamental questions raised in the Petition by accusing Petitioners of “fraud on the Court,” conduct that “may be a crime.” Motion at 1, 9 n.3.

The Motion is about a September 17, 2018 Assistant Attorney General memorandum to the Game Commission, a copy of which was attached as Appendix V to the Petition for Writ of Mandamus. The Additional Respondents do not question the accuracy of the content of the memorandum. Nor do they challenge that it faithfully sets forth the advice given to the Commission. Instead, their complaint is about something they perceive in the *physical appearance* of the document. That, for Additional Respondents, provides enough of a basis for accusing the Petitioners (in actuality, their counsel) with criminal acts, and for their request that the Court decline to exercise its jurisdiction in this case.

## **I. THE MOTION IS FRIVOLOUS**

*Additional Respondents do not desire an early resolution of this dispute by this court... There is thus no need for resolution of a dispute, much less early resolution by this Court.*

Additional Respondents’ Brief at 17 and 18.

Additional Respondents have made clear that they do not want this Court to decide this case. Beginning with page 1 of their Brief, filed on April 17, 2020, and resuming at page 13, they have invented fact disputes and offered other arguments aimed at persuading this Court to decline to resolve the important public issues at

stake. They urge this Court to step aside and leave it to a lower court to address manufactured and irrelevant fact disputes. Brief at 13-19.

The instant Motion is more of the same: “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.” Motion at 12.

### **1. The Attorney General Memorandum**

The document that is at the center of this tempest in a teapot is the Attorney-Client Confidential Memorandum to the Game Commission from John Grubestic, Assistant Attorney General<sup>1</sup>. The Motion accuses Petitioners of falsifying the document, noting that “[i]f 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.” Motion at 11. While the descriptions in the Motions are obtuse, it appears that these serious and defamatory charges are based on the belief : i) that there is a 4mm non-alignment between the Attorney General letterhead and the beginning text; and ii) that Appendix V does not have the Attorney General contact information at the bottom of pages 2 and 3 that appear on another version of the memorandum.

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<sup>1</sup> The Commission voted to publicly release the memorandum, thereby waiving any claim of privilege.

Petitioners (and counsel) state unequivocally that they did not falsify the document. It is likely that the copying process accounts for the meaningless differences in appearance.

Counsel for Additional Respondents previously demanded information from Petitioners' counsel about this matter. Exhibit E to the Motion is an email string including an August 18, 2020 email from counsel for Petitioner, Mr. Gallegos. The email from Petitioner's counsel explains that he is providing an attachment containing emails from September 16, 2019 between Mr. Grubestic and Chief Deputy Attorney General Tania Maestas that give key context for Appendix V. Additional Respondents omitted these emails in the exhibits attached to their Motion. Thus, a copy is attached hereto as Exhibit 1. The emails show the Chief Deputy Attorney General approving the memorandum and directing the author (Mr. Grubestic) to put it in final form. They also show that he planned to provide it to the Commissioners.

It is undisputed that every version of the Memorandum contains verbatim language, that the Memorandum was placed on the letterhead of the Attorney General's Office, and that the final version was distributed to the Commissioners. Ultimately, former Commission Chair, Ms. Prukop, herself shared with Petitioners' counsel the document that became Appendix V.

## **2. Referenced in the Petition**

The Verified Petition for Mandamus filed March 13, 2020 includes a Summary of Facts set forth in numbered paragraphs 6 through 20. Pet. at 7-13. Paragraphs 15 and 16 recite as fact that the Director of the Department of Game and Fish asked the Attorney General to provide an opinion about whether 19.31.22 NMAC (the private stream certification rule) complied with law and the Constitution. The substance of the resulting opinion was briefly summarized.

After the Court ordered the case to proceed and set a briefing schedule, Petitioners' legal arguments were set forth in its twenty-page Consolidated Reply Brief, which was filed on April 27, 2020. Notably, in Petitioners' Reply, there is no mention of, let alone reliance upon, any Attorney General Opinion. Indeed, Additional Respondents have made clear they believe that Attorney General opinions are of no value in resolving this case because, "opinions of the Attorney General do not have the force of statute and have no bearing on this Court's analysis of the issues raised in the Petition . . . those opinions are irrelevant and need not be considered." Additional Respondents' Resp. Brief at 24. No one, including Petitioners, contends that even formal Attorney General Opinions have the force of law. Of even less relevance, then, is the frivolous accusation of fraud premised on something about the subject Attorney General Memorandum having not to do with its content but with its appearance.

## II. THERE ARE NO MATERIAL FACT ISSUES

The Petition “raises purely legal questions relating to the scope of Article XVI, § 2 of the New Mexico Constitution and the application of *Red River Valley*.” Reply at 17. Facts regarding ownership, navigability or, for that matter, the appearance of Appendix V are irrelevant to the sole issue before the Court: the “reconciliation as a matter of law between the public’s right to use public waters and the private property rights of the owners of streambeds across which those waters flow.” Id.

Additional Respondents nonetheless use the Motion as an attempt to reframe the legal question as a factual dispute. They argue that the alleged formatting fraud warrants “[d]ismissal of Petitioners’ Petition” because the “use of falsified evidence (even if unwittingly) demonstrates the need for a complete evidentiary hearing by a district court.” Motion at 11. But, of course, Appendix V is not “evidence,” it was offered, expressly, as non-binding legal authority. And an evidentiary inquiry into the margin sizes of Appendix V sheds no light whatsoever on whether streambed ownership could limit New Mexicans’ use of water “declared to belong to the public” under the Constitution.

In other words, the matters raised in Additional Respondents’ Motion create no factual dispute that could bear, even remotely, on the legal issue presented by

the Petition. Intervenors-Respondents' suggestions to the contrary extend beyond the realm of reasonable argument.

### III. CONCLUSION

The Motion should be denied.

Respectfully submitted,

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By /s/ J. E. Gallegos

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Response to Intervenors-Respondents' Motion to Strike Due to Apparent Fraud On the Court to be served by electronic service on this 15<sup>th</sup> day of October, 2020 on the following counsel of record:

New Mexico Attorney General  
Hector Balderas  
408 Galisteo St  
Santa Fe, New Mexico 87501

New Mexico State Game Commission  
1 Wildlife Way  
Santa Fe, New Mexico 87504

/s/ J. E. Gallegos  
J. E. Gallegos



# Fw: [EXT] Fwd: Game Commission-Attorney/Client Memo

Prukop, Joanna, DGF

Fri 11/22/2019 2:39 PM

To: Prukop, Joanna, DGF <Joanna.Prukop@state.nm.us>;

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

From: Maestas, Tania <[tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)>

Date: Mon, Sep 16, 2019 at 5:01 PM

Subject: Re: Game Commission-Attorney/Client Memo

To: Grubestic, John <[jgrubestic@nmag.gov](mailto:jgrubestic@nmag.gov)>

CC: Patricia Salazar <[psalazar@nmag.gov](mailto:psalazar@nmag.gov)>, Malave, Sally <[smalave@nmag.gov](mailto:smalave@nmag.gov)>

Hi John! Yes yes - you're all good to go and yes please provide me a final copy in memo form for our records. Best of luck and safe travels!!!! Please call my cell if you have any questions or lingering concerns. I will be in Santa Fe all day tomorrow, so available if you need anything before you head out.

On Mon, Sep 16, 2019 at 2:11 PM Grubestic, John <[jgrubestic@nmag.gov](mailto:jgrubestic@nmag.gov)> wrote:

Hello Tania:

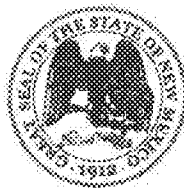
I just wanted to check in regarding the memo I submitted. The Commission is meeting in Cloudcroft this Wednesday, September 18. As we discussed, I was going to provide this to the Commissioners as an attorney-client privileged memorandum. Have you and the AG had an opportunity to review and final? Thank you.

John Grubestic  
Assistant Attorney General  
Open Government Division  
NM Office of the Attorney General  
PO Drawer 1508  
Santa Fe, New Mexico 87504-1508  
(505) 490-4834 office  
(505) 717-3800 fax  
<http://www.nmag.gov/>

John Grubestic

EXHIBIT 1

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.