

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

MICHAEL SLOANE,
in his official capacity as Department of Game and Fish Director,

Petitioner,

Case assigned to Sanchez-Gagne, Maria S.

v.

Case No. D-101-CV-2020-00621

NEW MEXICO STATE GAME COMMISSION

Respondent.

COMPLAINT FOR DECLARATORY JUDGMENT

Petitioner Michael Sloane, in his capacity as Department of Game and Fish Director, hereby submits this request for declaratory judgment pursuant to NMSA 1978, § 44-6-1 to -15 (1975). As grounds for this pleading, Petitioner states as follows.

JURISDICTION, VENUE, AND PARTIES

1. Michael Sloane is the Department of Game and Fish Director (hereafter referred to as “the Director”). As Director, Mr. Sloane is obligated “to enforce and administer the laws and regulations relating to game and fish.” NMSA 1978, § 17-1-5 (1973).

2. The New Mexico State Game Commission (hereafter referred to as “the Commission”) is comprised of seven commissioners who are appointed by the Governor with the advice and consent of the Senate. NMSA 1978, § 17-1-2 (1991). The Commission is administratively attached to the Energy, Minerals and Natural Resources Department, which means that it exercises its functions independently and without oversight from any executive agency. NMSA 1978, § 9-5A-3(B) (1997); NMSA 1978, § 9-1-7(A) (1977). The Commission is

tasked with a number of responsibilities including, inter alia, the establishment of rules and regulations attendant to pertinent state statutory law. See NMSA 1978, § 17-1-14 (2015).

3. Jurisdiction and venue are proper in this Court pursuant to NMSA 1978, § 38-3-1(G) (1988) and NMSA 1978, § 44-6-2 (1975).

PERTINENT FACTUAL BACKGROUND AND DISCUSSION

A. The Legislature passes § 17-4-6 and the Commission promulgates rules to implement that legal directive.

4. NMSA 1978, Section 17-4-6 (2015) sets out restrictions to hunting and fishing on private property. The original version of the statute was codified in 1912 and subsequently amended in 1963 and 1965. See 1912 N.M. Laws, ch. 85, § 10; 1963 N.M. Laws, ch. 213, § 5; 1965 N.M. Laws, ch. 172, § 1. Those amendments made relatively minor changes to the provision that is currently codified as Section 17-4-6, such as modernizing language in the law and imposing more specific posting requirements when a public road enters or crosses private property. Id.

5. In 2015, the Legislature amended Section 17-4-6 to provide that “[n]o 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 or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.” § 17-4-6(C). That amendment was signed into law by then Governor Susana Martinez.

6. Although the substantive access restrictions encompassed within the amendment—i.e., precluding the public from walking or wading onto private property through certain waterways—turned on the definition of “non-navigable public waters”, the Legislature did not define that phrase or otherwise provide a means for designating waterways as non-navigable. Those tasks were therefore left to the Commission.

7. In January 2018, the Commission promulgated regulations addressing both of these matters. First, the Commission defined the phrase non-navigable public water as “a watercourse or river which, at the time of statehood, was not navigable-in-fact.” 19.31.22.7(G) NMAC. The Commission, in turn, defined navigable-in-fact as a “watercourse or river” that was used “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.” Id. See also 19.31.22.7(F) NMAC (defining the term “navigable-in-fact”). Second, the Commission set out a regulatory scheme for determining whether a particular stream or river segment qualified as non-navigable. That process requires landowners to file an application designating river or watercourse segments passing through their property as a non-navigable public waterway. 19.31.22.8 NMAC. The Director reviews those applications, and he is then required to issue a recommendation on the application within 60 days. 19.31.22.9(B) NMAC. That decision must be accompanied with a written factual basis for the Director’s recommendation. Id. The Director’s decision is not controlling, and the Commission may approve or reject the recommendation. See generally NMAC 19.31.22.11 (describing the Commission’s process for reviewing applications seeking to certify a waterway segment as non-navigable).

8. If an application is approved, the subject river or stream segment is deemed a non-navigable public water. Id. That designation allows landowners to exclude members of the public from river segments passing through their property even when those waterways were accessed via public lands or waterways, § 17-4-6(C), and a person may be charged with trespass for wading or walking in waterways designated as non-navigable public waters. See NMSA 1978, § 30-14-1 (1995) (defining criminal trespass).

B. There is no binding precedent regarding whether the Legislature may grant landowners a right to exclude the public from waterways flowing through private property.

9. The question at issue in this matter is whether excluding members of the public from rivers and streams flowing through private property violates Article XVI, Section 2 of the New Mexico Constitution, which declares “the unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico ... to belong to the public.”

10. Although the New Mexico Supreme Court has ruled on a similar question addressing the public character of water pursuant to Article XVI, Section 2, and regarding the public’s right of access to public waters via public lands, it has not expressly addressed the specific matter raised in this Complaint. See State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 55, 182 P.2d 421 (stating that the Court’s opinion “deals specifically, and only, with [] impounded public waters, easily accessible without trespass upon riparian lands.”). Several non-binding Attorney General opinions have also opined on the question of whether a property owner could legally prohibit members of the public from fishing in streams running through that privately-owned land. However, those opinions have reached differing conclusions. See, N.M. Att’y Gen. Op. 18-2108 (1918) (concluding that “the owner of a non-navigable stream[] has the right to prevent or forbid fishing thereon by other persons.”), compared with N.M. Att’y Gen. Op. 14-04 (2014) (concluding that “[t]he owner of property upon which a public stream is located has no right of recreation or fishery distinct from the right of the general public, and cannot exclude others from fishing in the stream.”) and N.M. Att’y Gen. Advisory Letter to the Honorable Luciano “Lucky” Varela (Aug. 5, 2016) (concluding that “the constitution does not allow an interpretation of [Section 17-4-6] 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.”).

11. The lack of clear legal guidance regarding public access to streams and waterways flowing through private property has led to dysfunction in the implementation of § 17-4-6 and the corresponding regulation, 19.31.22 NMAC.

12. For example, on November 8, 2018, the Commission approved five applications designating five stream segments non-navigable pursuant to 19.31.22.8 NMAC.

13. Thereafter, on July 24, 2019, after additional meetings and discussion regarding the operative rule, the Commission implemented a 90-day moratorium in which the Director was precluded from considering any new applications seeking designation of river segments as non-navigable public waters. During the pendency of that moratorium, the Department was instructed to enforce trespass laws only on previously approved stream segments and by issuing only warnings.

14. On November 21, 2019, the Commission further directed the Director to reconsider the 19.31.22.8 NMAC and directing the Department to produce a proposal to either repeal or amend the Rule.

15. The Director has been without a sound basis to address new applications seeking designation of stream segments as non-navigable given the lack of clarity regarding the applicable law.

C. Judicial resolution of the Commission’s rules and regulatory framework necessary in order to ensure that the rights at issue are clearly defined.

16. As explained above, the Commission has promulgated rules affording landowners an opportunity to exclude the public from waterways passing through private property—even when access is initially effectuated through public land or waterways. See generally 19.31.22 NMAC.

17. Given the lack of clear legal guidance as to whether landowners may lawfully exclude members of the public from accessing waterways flowing through private property, the Department Director has been placed in the untenable position enforcing competing and undefined legal rights.

18. There is no controlling authority directly on point, and this Court's guidance is necessary to address the legal question at hand. This Court should act and interpret Section 17-4-6 to ensure that New Mexico citizens—both landowners and those who access New Mexico waterways for recreational purposes—are afforded the full measure of legal privileges to which they are entitled.

**PETITIONER'S REQUEST FOR RELIEF PURSUANT TO
THE NEW MEXICO DECLARATORY JUDGMENT ACT**

19. Petitioner incorporates the preceding paragraphs as though they were fully stated herein.

20. An actual controversy exists thereby rendering declaratory relief proper pursuant to Rule 1-057 NMRA and the New Mexico Declaratory Judgment Act ("DJA"), NMSA 1978, §§ 44-6-1 to -15 (1975).

21. The DJA provides that "[a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." § 44-6-4. This authority is neither exclusive nor exhaustive and does not restrict this Court from exercising authority where "a judgment or decree will terminate the controversy or remove an uncertainty." § 44-6-6.

22. In all instances, the DJA is to be liberally construed in order "to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations". § 44-6-14. That

purpose and effect will be accomplished by the Court's resolution of the legal ambiguities addressed herein.

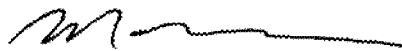
23. The DJA constitutes the sole means for Petitioner to resolve the legal question at issue in this matter thereby ensuring that the State is complying with its constitutional and statutory mandates.

24. Pursuant to the DJA, this Court should enter judgment and address the legal question of whether, and under what circumstances, a private landowner may exclude members of the public from fishing in public waterways that flow through that landowner's property.

PRAYER FOR RELIEF

Petitioner respectfully requests that this Court resolve the legal question at issue and issue an order addressing the legal question of whether, and under what circumstances, a private landowner may exclude members of the public from fishing in public waterways that flow through that landowner's property.

Respectfully submitted,



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