

Opinion 14-04

OPINION OF GARY K. KING, Attorney General

April 1, 2014

BY: Stephen R. Farris, Assistant Attorney General

TO: The Honorable Luciano “Lucky” Varela, New Mexico State Representative, 1709 Callejon Zenaida, Santa Fe, NM 87501

QUESTION:

May a private landowner exclude others from fishing in a public stream that flows across the landowner’s property?¹

CONCLUSION:

No. A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner’s property, provided the public stream is accessible without trespass across privately owned adjacent lands.²

BACKGROUND:

New Mexico is a prior appropriation state. Under the prior appropriation doctrine, recognized in most western states, a user acquires a right to water by diverting that water and applying it for a beneficial use. Under the corollary rule of priority, the relative rights of water users are ranked in the order of seniority. *See Colorado v. New Mexico*, 459 U.S. 176, 179 (1982). This is pertinent to the question asked because in accordance with this doctrine, the Territory of New Mexico and later the State of New Mexico declared that all the waters in the state belong to the public. In 1907, when the Territorial Legislature enacted the Water Code, it declared:

All the natural waters flowing in streams and watercourses, whether such be perennial or torrential within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek arroyo, canyon draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

See NMSA 1978, § 72-1-1 (1907, as amended through 1941). The Water Code of 1907 was merely declaratory of the law existing at that time. *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021, ¶ 4, 113 P. 823, 824. The prior appropriation doctrine was subsequently incorporated in the New Mexico Constitution:

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.

N.M. Const. art. XVI, § 2.

By contrast, some states follow the riparian doctrine, which entitles the owner of land contiguous to a watercourse to have that water flow by or through the owner's land "undiminished in quantity and unpolluted in quality," except that any such owner may make whatever use of the water that is reasonable with respect to the needs of other water users. *Colorado*, 459 U.S. at 179. Riparian ownership of water has never been recognized in New Mexico. *Hagerman Irrigation Co.*, 1911-NMSC-021, ¶ 6, 113 P. at 825, and prior appropriation continues to be the law in this state.

Even though the New Mexico Constitution declares all the waters in the state to be public, there continues to be some confusion and misunderstanding of what this means for public waters crossing the private property of a landowner. The question addressed in this opinion arises from the tension between the rights of the public and the rights of private landowners.

ANALYSIS:

The New Mexico Supreme Court addressed a question similar to that presented here in 1945. The question decided in *State ex rel. State Game Commission v. Red River Valley Company* was whether the public had the right "when properly authorized by the State Game Commission, to participate in fishing and other recreational activities in the waters in question" even though the banks on both sides of those waters were owned by a private company via patent from the U.S. government.³ 1945-NMSC-034, ¶ 4, 51 N.M. 207, 212. The Supreme Court answered the question in the affirmative. While the holding in *Red River* is nearly 70 years old, it has never been successfully challenged or overturned.

In *Red River*, the landowner sought to exclude others from fishing in boats in Conchas Lake where the landowner owned the land on both sides of the lake. The New Mexico Supreme Court held that "the waters in question were, and are, public waters; and that appellee [landowner] has no right of recreation or fishery distinct from the right of the general public." 1945-NMSC-034, ¶ 59, 51 N.M. at 228.

On rehearing, the Court affirmed its original conclusion. See 1945-NMSC-034, ¶ 195, 51 N.M. at 264 (stating that "[o]n consideration of motion for rehearing, our conviction as to the correctness of the result reached in the majority opinion is not weakened, but strengthened rather"). As to the ownership of the beds of the streams that fed into Conchas Lake, the Court found: "[i]f appellee owns the beds of the streams on the Pablo Montoya Grant, as claimed by it, ... it obtained no interest of any kind (*riparian or otherwise*) in the water flowing over those beds by virtue of the United States patent."

Id. ¶ 235, 51 N.M. at 273 (emphasis added) (citing *California–Oregon Power Co. v. Beaver Portland Cement*, 295 U.S. 142 (1935)). Thus, the Court concluded that determination of the ownership of the bed of the stream was not material to answering the question presented; regardless of who owned the beds of the streams, the water flowing in the streams and collected in the lake were public and subject to use by the public for fishing and recreation.

The point that the ownership of the stream bed does not determine who owns the water is further supported by *State ex rel. Bliss v. Dority*, 1950-NMSC-066, 55 N.M. 12. There, the question was whether the surface landowner also owned the groundwater under the surface, a kind of underground riparian water right. The New Mexico Supreme Court applied the same reasoning used in *Red River* regarding the ownership of surface waters on private lands, and quoted extensively from *California-Oregon Power Company*, which was also cited in *Red River*. *Id.* ¶ 25, 28, 55 N.M. at 21, 23-27. The Court concluded that, as with surface water, patents to lands acquired from the United States did not convey any interest to underground waters on those lands. Rather, “the water involved was reserved ... to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter....” *Id.* ¶ 47, 55 N.M. at 31.

Based on *Red River* and subsequent cases construing New Mexico law, it is clear that even if a landowner claims an ownership interest in a stream bed, that ownership is subject to a preexisting servitude (a superior right) held by the public to beneficially use the water flowing in the stream. The landowner has only the same interest in and right to use the water as the general public. Since fishing is recognized as a public beneficial use, the landowner, even if he owns the bed of the stream, cannot prevent others from fishing in the stream in accordance with state law.⁴

New Mexico is not alone in holding that determination of the ownership of the bed of a stream is not material to deciding the question of whether the public waters may be used for fishing or other recreational activities. For example, in *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984), the Montana Supreme Court held that “under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.” *Id.* at 171.5 Similarly, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming and South Dakota have recognized that the public ownership and use of water is independent of the bed ownership. See *Parks v. Cooper*, 676 N.W. 2d 823, 838 (S.D. 2004) (describing states (including New Mexico) where the public trust doctrine applies to water independent of ownership of the underlying land).

While it may be well established that all the waters in a stream or watercourse are public and subject to the beneficial use of the public, the scope of the public’s easement to use public waters on private land is less clear. An “easement,” as used here, refers to the public’s lawful use of water in a stream that runs across private land and any incidental use of private property, such as the stream bed, that is necessary to use the water.⁶

Factually, the only difference between *Red River* and the question presented here is the depth of the water. *Red River* involved a lake where the water was deep enough to float a boat and there was no need for a person fishing in the lake to touch the lake bed. In contrast, the water in a stream may be shallow, making it likely that a person fishing in the stream would walk in the stream rather than float on it. *Red River* does not suggest that a person's right to use public waters that flow on private land for fishing and other recreational purposes depends on whether the waters are deep enough to float a boat. See *Red River*, 1945-NMSC-034, ¶ 41 (stating that if water flowing in the Canadian and Conchas rivers was public water prior to the construction of the dam, it was no less so after the construction and when a large volume of water from the two rivers was artificially impounded).⁷ The question then becomes whether walking or wading in a stream that runs across private property is permissible as a necessary incident to the public's right to use public water for fishing.

The Supreme Court of Utah discussed and decided this question in *Conaster v. Johnson*, 194 P.3d 897 (Utah 2008). In that case, the plaintiffs floated down the Weber River in a rubber raft and crossed parcels of private property belonging to the defendants. During the course of their float trip, the plaintiffs touched the river bed in ways that were incidental to floating in the raft, such as the raft and the raft's paddles occasionally touching the shallow parts of the river bottom, and also "intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing that the [defendants] had strung across the river." 194 P.3d at 898.

The lower court, relying on a Wyoming Supreme Court decision, *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), held that the scope of the public's easement was limited "to activities that could be performed 'upon the water' - chiefly floating - and that the right to touch the river's bed was incidental only to the right of floatation." *Conaster*, 194 P.3d at 898-899. In reversing the district court, the Utah Supreme Court distinguished *Day*:

The interpretative difference turns on a single significant word. Where *Day* limits the easement's scope to activities that can be performed "upon" the water, this court expands the scope to recreational activities that "utilize" the water. Thus the rights of hunting, fishing, and participating in any lawful activity are coequal with the right of floating and are not modified or limited by floating as they are in *Day*.

Id. at 901. The Utah Supreme Court therefore held that the scope of the public's easement in state waters allowed the public to (1) "float, hunt, fish and participate in all lawful activities that *utilize* the water" and (2) "touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as they do so reasonably and cause not unnecessary injury to the landowner." *Id.* at 898 (emphasis added).

As discussed above, the New Mexico Supreme Court in *Red River* interpreted the state constitution to confer upon the public the right to fish and engage in other recreational activities in unappropriated waters, including those located on private property. 1945-NMSC-034, ¶ 59, 51 N.M. at 228. As in Utah, the scope of the public's easement to use

public waters in New Mexico has not been limited to recreational activities that can be performed “upon” the water. Consequently, we believe it likely that a New Mexico court reviewing the issue today would follow the Utah Supreme Court’s rationale in *Conaster v. Johnson* and conclude that the public’s right to use public waters for fishing includes touching the bed of a stream in ways that are reasonably incidental to that right, including wading, walking and standing in the stream.

As the Utah Supreme Court emphasized in *Conaster*, permissible touching or contact with a stream bed on private property is limited to what is “reasonably necessary” for the effective use of the water and “does not cause unnecessary injury to the landowner.” 194 P.3d at 902. For example, while a landowner cannot prevent others from exercising their right to fish in a stream or watercourse that crosses the landowner’s property, the public’s easement to fish in public waters is limited to those things which are necessary to enjoy the public use and does not include activities are unnecessary to exercising the right to use the water to fish or those that cause injury to the landowner, such as littering or defacing property.

New Mexico statutes and regulations that apply to fishing do not currently recognize or address the public’s right to fish in streams that cross private property.⁸ The existing laws that mention fishing on private property generally are concerned with trespassing. For example, the statutory provisions that govern licensing state, in pertinent part:

A fishing license does not entitle the licensee to fish for or take fish within or upon a park or enclosure licensed or posted as provided by law *or within or upon a privately owned enclosure without consent of the owner....*

NMSA 1978, § 17-3-2(C) (2011) (emphasis added). *See also* NMSA 1978, § 30-14-1(A)(1) (1995) (defining criminal trespass as entering posted private property without consent unless the property owner has entered into an agreement with the Game and Fish Department granting access to the general public for hunting and fishing); Game and Fish Commission Rules, 19.31.10.18 NMAC (Sept. 1, 2012) (making it unlawful to hunt or fish on posted private property without written permission from the property owner, unless otherwise permitted by rule or statute).

The dissent in *Red River* cited a predecessor statute to Section 17-3-2(C) that similarly prohibited licensees from hunting or fishing “within or upon any privately owned enclosure without consent of the owner.” 1945-NMSC-034, ¶ 51, 51 N.M. 207, 226 (quoting 1941 Comp. § 43-301(9)). *See also id.* ¶¶ 152-152, 51 N.M. at 250-251 (Bickley, J., dissenting). According to the dissent, the statute made clear the legislature’s intent to bar hunting and fishing in public waters if they were enclosed.

In response to the dissent, the majority made three points. First, the majority stated that a private landowner could not convert waters owned by the public simply by enclosing them: “one does not make of a fenced-in area ‘a privately owned enclosure’ merely by extending the physical markings to cover property not one’s own.” *Id.* ¶ 52, 51 N.M. at 226. Second, the majority questioned whether a prohibition against the use of public

waters within a privately owned enclosure granted the landowner an exclusive right or privilege to fish contrary to Article IV, Section 26 of the New Mexico Constitution.⁹ *Id.* ¶¶ 53-54, 51 N.M. at 227. Finally, the majority rejected the dissenting justices' underlying contention that the majority holding created a right to trespass if necessary to reach public waters on private property. "Of course, no such result follows from the majority holding, which deals specifically, and only, with these impounded public waters, easily accessible without trespass upon riparian lands." *Id.* at ¶ 56, 51 N.M. 228

To summarize, the Supreme Court's decision in *Red River*, which has been the controlling law for nearly 70 years, leaves no doubt that the water in New Mexico streams belongs to the public and is subject to public's beneficial use for fishing and recreational activities. The public's right to enjoy the use of public waters is no different when those waters are located on or run through private property. The 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," *Red River*, 1945-NMSC-034, ¶ 59, 51 N.M. at 228, and cannot exclude others from fishing in the stream.

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. Although, as *Red River* makes clear, a person may not trespass on private property in order to gain access to public waters, a person using public waters to fish, including incidental activities such as walking, wading or standing in a stream bed, is not trespassing.

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[1] The opinion request focused on the available procedures for enforcing fishing rights in public streams on private property. However, we determined during the course of our research that New Mexico statutory and regulatory law does not clearly recognize or protect the right to use public streams on private land for fishing, nor has the legislature authorized the Department of Game and Fish or any other state agency to regulate or enforce that right. Accordingly, this opinion is intended to clarify the parameters of the right to use public streams flowing through private property for fishing and other recreational purposes.

[2] The scope of this opinion is limited to public streams that flow across private property. It does not analyze or express any opinion as to public streams that flow across federal lands or lands owned by Indian nations, tribes and pueblos.

[3] A land patent is the conveyance of a tract of land from the United States government to a private party. Such a patent is generally recognized as "the highest evidence of title...." *Bustamante v. Sena*, 1978-NMSC-067, 8, 92 N.M. 72, 73 (citations omitted).

[4] As the Supreme Court observed in *Red River*, "the right of the public ... to participate in fishing and other recreational activities" is subject to proper authorization by the New Mexico Game Commission. 1945-NMSC-034, 4. State laws and regulations requiring a license and otherwise governing fishing apply to streams and lakes on private property to the same extent as they apply to those on public lands.

[5] Montana's Constitution has a provision similar to N.M. Const. art. XVI, § 2, which states that "[a]ll surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." *Curran*, 682 P.2d at 170.

[6] In general, an easement is a privilege which one person has a right to enjoy over the land of another. It gives rise to two distinct property interests: a "dominant estate" that has the right to the use of the land of another, and a "servient estate" that permits the exercise of that use. Because there are two parties' interests involved, "the rights of the easement owner over the rights of the landowner is not absolute, irrelative and uncontrolled but are so limited each by the other that there may be a due and reasonable enjoyment of both." 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 1 (2007). Use of the easement includes uses that are incidental or necessary to the reasonable and proper enjoyment of the easement. *See id.* § 72.

[7] The majority opinion in *Red River* did not address whether a person had the right to wade in a stream or lake on private property in order to fish. In response to the dissenters' objection that the majority holding "opens wide the opportunity for trespass upon the lands of all riparian owners," the majority responded "[o]f course, no such result follows from the majority holding, which deals specifically, and only, with these impounded waters, easily accessible without trespass upon riparian lands." 1945-NMSC-034, 56, 51 N.M. at 227-28.

[8] *See* note 1 *supra*.

[9] Article IV, Section 26 prohibits the legislature from granting "to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."