

## **Attorney General Opinion Concerns New Mexico Landowners**

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Earlier this month, New Mexico Attorney General Gary King issued an opinion that has raised praise from wildlife groups and concern from private landowner groups across the state. The opinion was issued in response to the following question: May a private landowner exclude others from fishing in a public stream that flows across the landowner's property?

"No," was King's answer, "[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."

King's answer was based upon the fact that New Mexico is a prior appropriation state. Under New Mexico law, "unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico...is declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state." Thus, water in rivers and streams in New Mexico, even if flowing across private property, are the property of the state held in trust for the public.

Further, King cited to a 1945 New Mexico Supreme Court decision, *State Game Commission v. Red River Valley Company*, which held that waters in Conchas Lake were public waters and that the bordering landowner had no right to exclude the public from recreation or fishing thereupon.

The opinion concluded that it is the state's ownership of the water, regardless of whether a private person owns the streambed or banks that is determinative on this issue. Because the waters flowing in streams and rivers belong to the public, persons have what essentially amounts to an easement to utilize the stream for fishing purposes. Thus, the opinion holds that the public has the right to use public waters for fishing, including wading, walking, and standing in a streambed.

The opinion did, however, recognize an important limitation to this right. A fisherman may not trespass on private property in order to access the stream or river.

Groups on both sides of the issue have issued public comments. The New Mexico Wildlife Federation praised the decision as "great news for New Mexico anglers." Conversely, the New Mexico Farm and Livestock Bureau voiced concerns that the opinion goes against private property rights in the state.