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NMAGO NEWS RELEASE

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AG: Landowners Must Allow Fishing on Public Streams *Legal Opinion Finds Public Access on Private Land is Limited*

(SANTA FE)---Attorney General Gary King says a private landowner cannot exclude others from fishing in a public stream that flows across the landowner's property.

An official legal opinion on the matter was requested by State Representative Luciano "Lucky" Varela, who asked, "May a private landowner exclude others from fishing in a public stream that flows across the landowner's property?"

The answer is..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, according the Attorney General's Office.

The AG's Opinion states: "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...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."

The Opinion goes on to state: "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 (precedent case) 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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