

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-38195

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

Petitioners,

v.

**HON. MICHELLE LUJAN GRISHAM,
Governor, and STATE GAME COMMISSION,**

Respondents.

**BRIEF OF NEW MEXICO WILDERNESS ALLIANCE, LEAGUE OF
UNITED LATIN AMERICAN CITIZENS, THE HISPANO ROUNDTABLE
OF NEW MEXICO, HISPANICS ENJOYING CAMPING, HUNTING, AND
THE OUTDOORS AND THE NUESTRA TIERRA CONSERVATION
PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONERS
PETITION FOR MANDAMUS**

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New Mexico Wilderness Alliance, League of United Latin American Citizens, The Hispano Roundtable of New Mexico, Hispanics Enjoying Camping, Hunting, and the Outdoors, and the Nuestra Tierra Conservation Project (“Amici”) file this brief in support of Petitioners’ writ for prohibitory mandamus to invalidate an illegal and unconstitutional regulation by the executive branch acting through the New Mexico State Game Commission (“Commission”). Petitioners filed their verified petition on March 13, 2020, requesting the Court direct Respondents to invalidate, repeal, cancel and give no further effect to the regulation titled Landowner Certification of Non-Navigable Water and codified at 19.31.22.6 NMAC (“the Regulation”). Respondents filed their response on April 20, 2020, asserting that the state’s plenary power gave them the authority to promulgate the Regulation and continues to give them authority to put the Regulation into force and effect.

Amici now humbly offer this brief to provide the Court with additional background on the issue and further support Petitioners’ arguments in support of their petition for writ. The Court should grant the petition for five reasons: (1) as argued by Petitioners, the Commission lacked the authority to promulgate the Regulation;¹; (2) the Regulation renders meaningless the reasonable right of incidental use of the beds and banks of streams, creates a new private property right

¹ New Mexico Wild does not offer any additional arguments to those made by Petitioners regarding the Commission’s authority, but supports the arguments made in the Petition for Writ of Mandamus.

to the beds and banks of streams, and paves the way to the privatization of waters; (3) the Regulation is an unconstitutional restriction of the right of the public to access New Mexico's public waters; (4) the concept of "navigability" as a means for testing the limits of public access has already been dismissed by this Court; and (5) recognizing a "riparian right" will have detrimental unintended consequences.

New Mexico Wild is a New Mexico non-profit corporation qualified as an I.R.C. Section 501(c)(3) organization. It represents the conservation interests of over 13,000 supporters. It is dedicated to the protection, restoration, and continued enjoyment of New Mexico's wildlands, waterways, and wilderness areas. It is based in Albuquerque, New Mexico.

LULAC is our Nation's oldest, largest and most respected Hispanic civil rights organization in the country with well over 250,000 members nationwide and over 1,000 chartered member councils in the country. Headquartered in Washington DC, LULAC was established in 1929 to seek the advancement of education, employment, economic justice, environmental justice, civil rights and social justice for Hispanic Americans.

The Hispano Roundtable of New Mexico is a coalition of over 50 Hispanic organizations and over 50,000 members at the local, state and national levels. This coalition includes organizations like LULAC, MANA, IMAGE, the American GI Forum, the Hispanic Bar Association, Hispanic Teachers Association, Hispanic

Physicians Association, New Mexico ENLACE, AFL-CIO, AFSCME, MAES and many others. Established in New Mexico in 1980, we seek the advancement of education, employment, economic development, environmental justice, civil rights and social justice for Hispano Americans across our state and nation.

Hispanics Enjoying Camping, Hunting, and the Outdoors (HECHO) was founded in New Mexico, a state with forty-seven percent of the population having Hispanic ancestry, to empower Hispanic leaders to engage their communities in the conservation of public lands and waters. It elevates the vital importance of Hispanic culture, traditions, and perspectives, and of the contributions Hispanic leaders make, in the conservation of public lands and waters for future generations. HECHO is a fiscally sponsored program at the National Wildlife Federation, a 501(c)(3) organization, representing a hunters, anglers, outdoor, and traditional land users.

The Nuestra Tierra Conservation Project (Nuestra Tierra) has been organizing and serving underserved New Mexico youth for three years. Its goal is to provide more Hispanic and low-income youth and their families with opportunities to enjoy federal public lands, state lands, state parks, public waterways and more. It engages youth in hunting, fishing, hiking, camping, and cultural learning opportunities throughout the year with the goal of creating access and opportunities for them to

continue our state's rich outdoor traditions. Nuestra Tierra is a 501(c)(3) organization.

DISCUSSION

I. The constitutional right of access is rendered meaningless without the reasonable right of incidental use of the beds and banks of streams

1. The Regulation has already *de facto* restricted public access. The Regulation's purpose is "for a landowner to be issues 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, where riverbed or streambed or lakebed is closed to access without written permission from the landowner." 19.31.22.6 NMAC. Five certificates have already been granted by the Commission, thus restricting access only to those uses that can be accomplished without touching the bed of a now deemed non-navigable stream. By certifying stretches of streams as non-navigable through application of the Regulation, the Commission created a property interest in the beds and banks, bestowing that property right to the adjacent landowners.² *See* 19.31.22.6 NMAC (Saying "where riverbed or streambed or

² We note here that the Legislature gave no authority to the Commission to create new private property interests. *See* NMSA 1978 § 17-4-6(C) ("No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the

lakebed is closed to access”). The impact of this fundamental shift is that one can now only recreate upon these non-navigable public waters if one can do so without touching the streambed, a logical impossibility but one that is asserted by the Additional Respondents in this case. *See* Response Brief of Additional Respondents, pp. 20-21 (“In other words, *all* of the public waters of the state remain accessible, regardless of the ownership of the land below the waters, provided that the public does not use private land to access to the waters [sic] (either by walking on the riverbed itself or walking through private property to reach the waters).” (emphasis in original)).

2. While not the definitional test employed by the Game Commission in this instance, one of the early tests of navigability was whether a log could float through the stream segment in question. *See Red River*, 1945-NMSC-034, ¶ 35 (“At one time, public waters were thought of only as they afforded rights of navigation . . . and, later . . . to streams which would be used, not for boats of commerce, but only for the floating of logs and other items of commerce.”). As a logical exercise, we note that if a log cannot float through a stream segment in New Mexico, it is unlikely that a recreationalist would be able to float through that same stream segment.

operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or over public waters via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.”).

3. This Court has long recognized the reasonable right of bed and bank use incident to public access:

And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them, by mooring his vessels to the trees, by repairing his ships and his sails upon them, and by landing his merchandise there; and fishermen have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live.

Id. ¶ 27 (quoting Farnham’s Water and Water Rights, Vol. 1, p.662).

4. The Regulation is a breathtaking departure from decades of precedent. Not only does the Regulation create private property interests in the beds and banks of streams now certified as non-navigable, but the Regulation has likewise paved the way for the creation of a private property interest in the waters, themselves, of such streams that would inevitably lead to a complete restriction on public access. *See id.* ¶ 14 (“So far as non-navigable streams are concerned, the common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, *the waters are private waters*, and the owner has the exclusive right to fish therein.” (emphasis added)).

5. The right of access is not and cannot be limited to the use of the water in the stream, rather the right of access encompasses all reasonable uses incidental to

the use of the water including wading and walking through the stream, pausing on the bank to repair or tend to gear, as well as floating through the stream segment. *See id.* ¶ 27 (quoting Farnham's Water and Water Rights, Vol. 1, p.662).

6. Fishing in New Mexico often requires wading through streams or walking along the banks, casting flies upstream in an effort to catch one of any number of species of fish. The practice, according to the Regulation can no longer occur on non-navigable public waters. Furthermore, the Regulation creates an open question as to the impact of casting a wet fly upstream into certified non-navigable waters. Will that practice now be considered trespass when the fly makes contact with the streambed despite the angler standing on undisputed public land?

7. Backcountry experiences often require fording, wading, or walking through streams, taking advantage of the primitive recreation offered throughout New Mexico. This practice, according to the Regulation can no longer occur on non-navigable public waters.

8. Boating or floating in New Mexico often requires using oars or paddles to avoid obstacles or to remove a vessel from an underwater snag in order to continue the venture downstream. This practice, according to the Regulation, can no longer occur on non-navigable public waters and boaters hoping to avoid damage to their vessel from an impending rock will have to do so without touching the streambed or risk being liable for trespass.

9. Many recreational activities which occur on water have been rendered impossible due to the Regulation. Additional Respondents' stated argument that the Regulation does not restrict the use of the water misrepresents the reality of the actual impact of the Regulation. Despite Additional Respondents' contentions otherwise, "use of the water" has always and will continue to necessitate the incidental use of the streambed. It is simply illogical and improbable to assert that one can use the water without also incidentally using the streambed.

II. The Regulation is an unconstitutional restriction of the right of the public to access New Mexico's public waters

10. Respondents assert that this Court limited its holding in *Red River*,³ however, any asserted limitation does not preclude reliance on *Red River*'s generally applicable precedent that the Constitution provides that "[t]he unappropriated water of every natural stream, perennial or torrential . . . is hereby declared to belong to the public[;]" recreational use of public waters is a beneficial use; "the Common law doctrine of riparian right [is] not suited to the region, was never recognized, and did

³ Respondents quote the following paragraph as an explicit limitation on the holding in *Red River*, but do not provide any argument further as to why this Court should not follow the overall precedent recognized or set by the opinion in *Red River*:

Much of the reasoning supporting the minority's view as expressed by the dissents must rest upon the thoroughly unsound idea that the majority holding opens wide the opportunity for trespass upon the lands of all riparian owners, in every class of stream; that with every such perennial or torrential stream carrying unappropriated public waters would go a right to trespass as against the owner over whose lands such water flowed, if that be necessary to reach such public waters. 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.

State Game Commission's Amended Response to Verified Petition for a Writ of Mandamus, p. 8.

not obtain in this jurisdiction[;]” and, finally, “the constitution is merely declaratory of the prior existing law obtaining before New Mexico came under American sovereignty and continuing thereafter[.]”

11. Further, even when title to the land lies with a private individual and title to the water lies with the public, the right to recreation flows with the water. *See id.* ¶ 40. In *Red River*, the Court cited several authorities to affirm the common right of fishery vested in the public. *See id.*, ¶¶ 24, 31, 35, 40, 48, 53, 55, 59 (citing *Weston v. Sampson*, 8 Cush., Mass., 347, 54 Am.Dec. 764; *Moulton v. Libbey*, 37 Me. 472; *Diversion Lake Club v. Heath*, 86 S.W.2d 441; *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 228 N.W. 144, affirmed 283 U.S. 787; *Lamphrey v. State*, 53 N.W. 1139; *People v. Horling*, 100 N.W. 691; 22 Am.Jur. “Fish and Fisheries,” Secs. 8 and 9; *Hartman v. Tresise*, 84 P. 685 (J. Gunter, dissenting); Farnham on Waters, § 368a; *Herrin v. Sutherland*, 241 P. 328, 331; 22 Am.Jur. 675; 22 Am.Jur. 675, § 11).

12. The right of fishery runs with the water, regardless of ownership of the underlying streambed and cannot be abridged by an arbitrary regulation promulgated without authority that purports to extend our law of trespass to include stepping foot on now-privately owned streambeds when that “trespass” occurs only incidentally to the well-recognized right of public access.

13. This Court should affirm those same determinations and hold that the Regulation is unconstitutional. A decision finding the Regulation constitutional will throw our entire water and property law system into disarray, leading to unexpected new legal controversies. For example, if a landowner acquires certification of non-navigability per the Regulation for a stream running through or adjacent to their lands, what then is the status of their right to use the water and is that right now senior to the right of a downstream water right holder? Alternatively, how long will it take for such landowners to begin declaring their certified non-navigable streams as private and completely restricting access regardless of the potential ability of recreationalists to use the stream without touching the now-private bed? And what will become of downstream acequias, tribal and other cultural interests? A decision finding the Regulation constitutional would be in error, unraveling a system already too complex for many to understand and wreaking havoc on New Mexico's traditional communities.

III. The concept of “navigability” has been dismissed by this Court as a means for testing the limits of public access

14. The New Mexico Constitution provides:

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. Priority of appropriation shall give the better right.

N.M Const. Art. XVI § 2. Based upon this constitutional provision, this Court recognized a right of access to public waters bestowed upon all New Mexicans. *See State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶¶ 20-21 It is important to note that this Court *recognized*, not created or announced, this constitutional right of stream access. *Id.* ¶ 21 (“[T]his constitutional provision is only ‘declaratory of prior existing law,’ always the rule and practice under Spanish and Mexican dominion.”).

15. Whether a stream is now navigable or was navigable at statehood—the standard imposed by the Game Commission—cannot be a concept used to restrict public access to water. *See id.* ¶ 18. This Court had the opportunity to rely on navigability as a standard and said:

If it may be said that the waters in which the right to fish is here in question, are in fact public waters, yet unappropriated, applied to beneficial use by others, *it is unimportant whether that is because these waters may now be considered navigable*, or for whatever reason the character of public ownership attaches. If they be public, as distinguished from private, or prior appropriated, waters, the contention of appellant must be sustained, and only in this circumstance may it be.

Id. (emphasis added).

16. The navigability or non-navigability of a stretch of water has nothing to do with the public's right of access, and cannot now be used to restrict the constitutional right.

IV. Recognizing a “riparian right” will have detrimental unintended consequences

17. In *Red River*, this Court stated, “We have said many times that the [c]ommon law doctrine of riparian right was not suited to this region, was never recognized, and did not obtain in this jurisdiction.” *Id.*, ¶ 24. The so-called “riparian right” dismissed by this Court in 1945 provides “that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has the exclusive right to fish therein.” *Id.*, ¶ 14. Certifying any stretch of public water as “non-navigable” has had the effect of restricting public access by creating a private property interest in the streambed, but it is also the first step towards declaring that water as private and thereby completely restricting access.

18. Despite precedent standing to the contrary, Respondents and Additional Respondents in this case now ask the Court to recognize the riparian right of bed and bank ownership, and as an extension, the riparian right of water privatization. This dangerous proposition would run contrary to the constitutional

19. A private property interest in the streambed is but one facet of the “riparian right” dismissed by this Court. This riparian right also creates a private

property interest in the waters themselves. Upholding the Regulation sets the stage for the privatization of waters in direct conflict to New Mexico's prior appropriation water law system and will cause uncertainty across the state for all water rights holders and any ongoing adjudications.

CONCLUSION

The Court offered an ominous forewarning in 1945 that bears repeating today: "If the rule contended for by [Respondents] were to obtain we could enjoy no fishing or recreational rights upon much of the public water of this state, although access thereto could be reached without trespass on the privately owned lands of another." *Red River*, 1945-NMSC-034, ¶ 43. This Court has yet another opportunity to confirm the long-held right in New Mexico, established before statehood: the right to access public waters for recreational purposes. The Game Commission had no authority to introduce a non-prior appropriation concept into our water law system. This Court has rejected to apply "navigability" as the means for testing the limits of public access, and should do so again here because upholding the Regulation would be a recognition of a "riparian right" in New Mexico and would lay the path towards the privatization of waters.

Finally, we note the irony of this situation. In *Red River*, the Court told a land grant heir that he had no exclusive right to fish a body of water that was created when his lands were flooded. Now, landowners ask this Court to tell the people of

New Mexico that they no longer have a right to access public waters. We respectfully ask this Court to grant the relief requested by Petitioners and any further relief it sees fit to grant.

CERTIFICATE OF SERVICE

I certify that on April 27, 2020, I electronically filed this Conditional Brief of Amicus Curiae concurrent with a Motion for Leave to File Brief of Amicus Curiae with the State of New Mexico's Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

/s/ Logan Glasenapp
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