No. 22-____

In The Supreme Court of the United States

CHAMA TROUTSTALKERS, LLC; Z&T CATTLE CO., LLC,
PETITIONERS

v.

ADOBE WHITEWATER CLUB OF NEW MEXICO,
A NON-PROFIT CORPORATION; NEW MEXICO WILDLIFE
FEDERATION, A NON-PROFIT CORPORATION;
NEW MEXICO CHAPTER OF BACKCOUNTRY HUNTERS &
ANGLERS, A NON-PROFIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the equal-footing doctrine, the United States held title to the beds and banks of non-navigable waters in former U.S. territories, both before and after the territories' accession to statehood, until the United States transferred the title to private parties. Was the United States' title subject to an easement permitting any member of the public to walk and wade on those lands whenever reasonably necessary for the enjoyment of water sports, fishing, and other recreational activities that use the water?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petitioners are Chama Troutstalkers, LLC and Z&T Cattle Co., LLC. No publicly held company has a 10% or greater ownership interest in either petitioner.

The respondents named in the caption are 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.

The following parties were parties to the proceeding in the New Mexico Supreme Court:

130 Ranch

Ballard Ranch

Chama III, LLC

Chama Peak Land Alliance

Cotham Ranch

Dwayne and Cressie Brown

Fenn Farm

Flying H. Ranch Inc.

Mulcock Ranch

New Mexico Cattle Growers' Association

New Mexico Council of Outfitters and Guides

The New Mexico Farm and Livestock Bureau

New Mexico State Game Commission

Rancho del Oso Pardo, Inc.

Rio Dulce Range

River Bend Ranch

Spur Lake Cattle Co.

Three Rivers Cattle Ltd.

Upper Pecos Watershed Association

Wapiti River Ranch

WCT Ranch

Wilbanks Cattle Co.

RELATED PROCEEDINGS

Under Supreme Court Rule 14.1, there are no related proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES– continued

Page(s)

TABLE OF AUTHORITIES– continued

Page(s)

Constitutions, Treaties, Statutes, and Rules

TABLE OF AUTHORITIES– continued

Page(s)

Other Sources

TABLE OF AUTHORITIES– continued

Page(s)

Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Chama Troutstalkers, LLC and Z&T Cattle Co., LLC respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.

OPINION AND ORDER BELOW

The opinion of the New Mexico Supreme Court (App., *infra*, 4a–28a) will be published in the Pacific Reporter and is currently available at 2022 WL 3972745. The order of the New Mexico Supreme Court granting the petition for a writ of mandamus (App., *infra*, 1a–3a) is unpublished.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on March 2, 2022. A motion for rehearing was denied on May 31, 2022. App., *infra*, 29a–30a. On August 17, 2022, Justice Gorsuch extended the time in which to file a petition for a writ of certiorari to October 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

Other pertinent constitutional, statutory, and regulatory provisions are set forth in the appendix to this petition. App., *infra*, 42a–55a.

STATEMENT

The New Mexico State Game Commission promulgated a rule permitting owners of the beds and banks of non-navigable waters to obtain certificates and signs informing members of the public that walking or wading onto their property without written consent from the owner was prohibited. Respondents challenged the rule under the state constitution through a mandamus petition filed in the New Mexico Supreme Court, and petitioners intervened to defend the rule. The court granted the petition, voided all issued certificates, and vacated the rule. Six months later, the court issued an opinion holding that all privately owned beds and banks of non-navigable waters in

New Mexico are encumbered by a "broad" easement allowing any person to walk or wade onto those lands to the extent "reasonably necessary to effect the enjoyment" of "general outside recreation, sports, and fishing." App., *infra*, 20a (internal quotation marks omitted). The court concluded that recognizing such an easement did not amount to an uncompensated taking in violation of the Fifth Amendment because the easement had assertedly burdened the lands before title was transferred from the United States to private parties. *Id.* at 28a–30a.

A. Factual and Legal Background

1. Under the equal-footing doctrine, when former U.S. territories achieved statehood, they gained title to the beds under navigable waters "in their capacity as sovereigns[.]" *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589 (2012); see also, *e.g.*, *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228–229 (1845). Waterways were deemed "navigable" if they were "navigable in fact," *i.e.*, they were "used, or [were] susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel [were] or [could] be conducted in the customary modes of trade and travel on water." *PPL Montana*, 565 U.S. at 592 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

The United States, however, retained any title that it held to the beds of non-navigable waters. *PPL Montana*, 565 U.S. at 591; see also, *e.g.*, *United States v. Oregon*, 295 U.S. 1, 14 (1935); *United States v. Utah*, 283 U.S. 64, 75 (1931). So did parties to whom the United States had transferred such lands before statehood. *Brewer-Elliott Oil & Gas Co. v. United States*,

260 U.S. 77, 87–88 (1922). And after statehood, the United States remained free to "transfer[] or licens[e]" beds under non-navigable waters "as it cho[se]." *PPL Montana*, 565 U.S. at 591. Although the United States possessed the power to reserve for the state an easement over any lands otherwise conveyed to private parties, any such easement must have been asserted and confirmed at the time that the property was transferred. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 209 (1984); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487–488 (1921).

A different rule applied to the use of the waters themselves, both navigable and non-navigable. As this Court has explained, "[u]nder accepted principles of federalism, the States retain[ed] residual power to determine the scope of the public trust over waters within their borders." *PPL Montana*, 565 U.S. at 604. Accordingly, the state-law "public-trust doctrine" determines the extent to which the public may use both navigable and non-navigable waters, while "federal law determines riverbed title under the equal-footing doctrine." *Ibid.*

2. In 1848, after its defeat in the Mexican-American War, Mexico ceded most of what is today New Mexico to the United States. See Treaty of Guadalupe Hidalgo, Mex.-U.S., art. V, Feb. 2, 1848, 9 Stat. 922, 926–928. Two years later, Congress established the New Mexico Territory, which also included parts of present-day Arizona and Colorado. Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446; see *Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1059 n.4 (D.N.M. 2018). In 1853, the United States acquired the south-

western bootheel of New Mexico in the Gadsen Purchase. See Treaty of La Mesilla, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031.

Six decades later, New Mexico acceded to statehood. In 1911, Congress passed a joint resolution providing that "the Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States[.]" J. Res. 8, 62d Cong., 37 Stat. 39 (1911). After the state constitution was ratified in late 1911, New Mexico became a state on January 6, 1912.

Since its ratification, New Mexico's constitution has contained a provision governing the scope of the public trust over New Mexico's waters: "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, App., *infra*, 42a.

In 1945, the New Mexico Supreme Court construed the public-waters provision to permit members of the public to engage in fishing and recreation in public waters, including non-navigable waters in which title to the underlying land is held by private parties and can be traced to the United States. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 424, 434 (N.M. 1945). The court viewed that holding as "only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion." *Id.* at 427, 430–431 (internal quotation marks omitted). The court cautioned, however, that "[t]he question of the right of use, or trespass upon, the

lands of [the private party] bordering upon the [waters] in question is not involved." *Id.* at 427.

3. In 2015, the New Mexico legislature enacted a statute requiring those engaged in recreation in New Mexico waters to obtain written consent from landowners before encroaching on privately owned beds or banks. N.M. Stat. Ann. § 17-4-6(C) ("Trespass Statute"), App., *infra*, 43a. The statute provides:

> No 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.

Ibid.

The New Mexico State Game Commission ("Commission") promulgated a regulation in 2018 to help landowners enforce the written-permission requirement of the Trespass Statute. N.M. Admin. Code § 19.31.22.1 *et seq.* (Jan. 22, 2018) ("Trespass Rule"), App., *infra*, 44a–53a. The Trespass Rule established a "process for a landowner to be issued a certificate and signage * * * that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner." *Id.* § 19.31.22.6, App., *infra*, 44a–45a.

To apply for the certificate and signage, the landowner was required to submit "substantial evidence which is probative of the waters, watercourse or river's being non-navigable at the time of statehood, on a segment-by-segment basis." N.M. Admin. Code § 19.31.22.8(B)(4) (Jan. 22, 2018), App., *infra*, 46a–47a. If the Commission approved the landowner's application, the landowner was eligible to purchase signage that would constitute "prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass and related laws[.]" *Id.* § 19.31.22.13(A), (C), (F), App., *infra*, 51a–53a.

B. Proceedings Below

1. Respondents are nonprofit organizations that purport to represent New Mexicans who engage in recreation in state waters. They filed a petition for a writ of mandamus in the New Mexico Supreme Court challenging the Trespass Rule under the New Mexico Constitution (a direct-review power that the New Mexico Supreme Court enjoys in certain circumstances, see N.M. Const. art. VI, § 3). Respondents argued that the Trespass Rule violated the public-waters provision of the New Mexico Constitution. According to respondents, by creating a mechanism to establish that the beds and banks of a river are privately owned and to provide notice of that ownership to the public, the Trespass Rule "nullified" the public's right to use non-navigable waters for recreation, because it is "practically impossible" to engage in certain recreational activities "without touching the streambed and banks." Resp. N.M.S.C. Opening Br. 1–2.

The State Game Commission—composed now of different commissioners than those who had approved the Trespass Rule—did not defend the rule. Instead, it submitted a short brief stating that it "generally adopt[ed] the arguments and reasoning of [respondents]." Commission N.M.S.C. Br. 5.

Petitioners and other landowners intervened to defend the Trespass Rule. Petitioners own property in New Mexico that contains the beds and banks of non-navigable waters, and they had obtained certificates and signage under the Trespass Rule. App., *infra*, 9a; Pet. N.M.S.C. Br. in Support of Mot. for Reh'g 4 n.4. Their titles are traceable to the United States' territorial holdings, and the parcels that make up the lands were variously conveyed from the United States to petitioners' predecessors-in-interest both before and after New Mexico acceded to statehood. Pet. N.M.S.C. Br. in Support of Mot. for Reh'g Ex. A.

In defending the Trespass Rule, petitioners argued that the rule did not create any new property rights, but "simply allow[ed] landowners to obtain non-navigable waters certificates * * * and signage that will help them enforce their *existing* private property rights." Pet. N.M.S.C. Br. 3. They explained that although respondents claimed to limit their challenge to the Trespass Rule, the interpretation of the New Mexico Constitution's public-waters provision that respondents advanced would "strip thousands of New Mexico land owners of valuable property rights to the land below and adjacent to the non-navigable streams and rivers of this state[.]" *Id.* at 1.

For that reason, petitioners further argued, recognizing a right of members of the public to trespass on

private property while engaging in recreation on public waters would violate the Takings Clause of the U.S. Constitution by depriving titleholders of the core property right to exclude others—"perhaps the most fundamental of all property interests," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). App., *infra*, 32a–35a. They explained that "[t]he United States Supreme Court has made clear that interference with the right to exclude—even if it does not transfer title—constitutes a taking requiring just compensation[,]" and that "'physical invasions constitute takings even if they are intermittent as opposed to continuous.'" *Id.* at 34a (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075 (2021)). Petitioners allowed that "minimal contact," such as when "a boater briefly touches the bed or bank," would not constitute a trespass. *Ibid.* But they explained that respondents were seeking the right to engage in a great deal more than minimal contact: "extended walking and wading—of the type required to fly fish a low-flow stream or to transport watercraft around long stretches of unfloatable waters—that interferes with private landowners' right to exclude." *Ibid.*

As particularly relevant here, petitioners argued that respondents' position "ignore[d] the genesis of the property rights at stake" for the beds and banks of non-navigable waters. App., *infra*, 35a. "At statehood," they explained, "the United States retained title to all 'land beneath waters not then navigable . . . to be transferred or licensed if and as it chooses,'" under the equal-footing doctrine. *Ibid.* (quoting *PPL Montana*, 565 U.S. at 591). Because "the owners of land below non-navigable waters can trace their title back to the United States," petitioners said, "they

have the same property rights that were held by the United States[.]" *Ibid.* And "[s]ince it is beyond question that the United States has the right to exclude walking and wading on lands to which it retained title, it is also beyond question that that same right to exclude passed on to landowners who trace their title back to the United States." *Ibid.*

Petitioners pointed out the intolerable consequences that would follow if the courts were to adopt respondents' view. "The United States," they observed, "currently holds title to large amounts of land in New Mexico—lands that not only include nonnavigable riverbeds but that also house New Mexico's national laboratories and military bases." App., *infra*, 35a. "By asserting that riverbed title does not include a right to exclude," they explained, respondents "are also asserting that the United States does not have the right to exclude the public from the riverbeds it owns." *Ibid.*

2. On March 2, 2022, the New Mexico Supreme Court granted respondents' petition for a writ of mandamus. App., *infra*, 1a–3a. The court's order declared that the Trespass Rule violated the public-waters provision of the New Mexico Constitution. *Id.* at 2a. It further stated that "the certificates that the New Mexico State Game Commission has issued to private landowners pursuant to [the Trespass Rule] are hereby declared VOID." *Ibid.* The order "direct[ed] the Commission to withdraw the regulations" and stated that "an opinion explaining the Court's reasoning will follow." *Id.* at 2a–3a.

On the same day, the Commission voted to repeal the rule "on an emergency basis due to the New Mexico Supreme Court decision." App., *infra*, 54a. Under New Mexico law, that repeal would expire in 180 days unless the Commission permanently repealed the rule through ordinary rulemaking procedures. N.M. Stat. Ann. § 14-4-5.6(E).

Given that the New Mexico Supreme Court had not issued an opinion explaining the basis for the mandamus order, petitioners sought clarification from the court as to whether the time for moving for rehearing would not begin to run until an opinion issued. After the court failed to respond to that request, petitioners moved for rehearing.

In their motion, petitioners noted that questions at oral argument had focused on whether the public held an "easement" to encroach on privately owned beds and banks, which is not how respondents had framed their theory. App., *infra*, 39a–40a. Petitioners argued that "construing or changing New Mexico law to impose a public easement on privately held lands under or adjacent to non-navigable waters would violate the federal Takings Clause[.]" *Id.* at 40a. "[B]ecause such an easement did not encumber those properties at the time that they passed from the United States to private parties," petitioners argued, "any such holding would necessarily mean that New Mexico effected a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution—either through the enactment of the relevant provision of the New Mexico Constitution or some other provision [of] New Mexico law that purportedly imposes such an easement or through a judicial taking[.]" *Ibid.*

The New Mexico Supreme Court denied rehearing without explanation on May 31—still without issuing an opinion explaining the basis of its mandamus order. App., *infra*, 29a–30a. On August 19, shortly before the temporary repeal of the Trespass Rule was set to expire, "[t]he State Game Commission voted to permanently repeal" the rule "as directed by the State Supreme Court." *Id.* at 55a.

3. The New Mexico Supreme Court finally issued an opinion explaining the legal basis for its March 2 mandamus order on September 1. App., *infra*, 4a–28a. The court began by observing that its 1945 decision in *Red River Valley Co.*, *supra*, had "concluded that the scope of the public's right to use public waters is a matter of New Mexico law and that such right includes fishing and recreation." App., *infra*, 13a. While recognizing that, at statehood, the United States retained title to the lands under non-navigable waters, the court stated that "the beds to both navigable waters and non-navigable waters—whether title is vested in the state or the United States—are still subject to state law under the 'public trust doctrine.'" *Id.* at 16a (quoting *PPL Montana*, 565 U.S. at 603–604).

The court then found "implicit" in *Red River Valley Co.* that the public enjoys an "easement" that is "broad" and that includes "the privilege to do such acts as are reasonably necessary to effect the enjoyment" of "'general outside recreation, sports, and fishing'" in public waters. App., *infra*, 20a (quoting *Red River Valley Co.*, 182 P.2d at 432). The court further determined that "[w]alking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of recreation." *Id.* at 17a. The court cited for support decisions of the

Montana and Utah Supreme Courts and a dissenting opinion of a justice of the Colorado Supreme Court. *Ibid.*

The New Mexico Supreme Court acknowledged that its holding conflicted with a decision of the Wyoming Supreme Court that had "limited the scope of the public's easement to a 'right of flotation' upon the water and such activities 'as a necessary incident to' flotation." App., *infra*, 19a, 23a (quoting *Day v. Armstrong*, 362 P.2d 137, 146 (Wyo. 1961)). And it further noted that *Red River Valley Co.* itself had conflicted with the Colorado Supreme Court's decision in *Hartman v. Tresise*, 84 P. 685 (Colo. 1905), which had applied "the common-law rule" that "the owner of a streambed has the exclusive right of fishing in the stream that flows through their land," App., *infra*, 21a, and had held that the owner enjoys the right to exclude others from encroaching on beds or banks, see *Hartman*, 84 P. at 687.

Based on its analysis, the court held that the Trespass Rule was unconstitutional because it "close[s] access to public water based on a finding of nonnavigability[.]" App., *infra*, 23a. The Court further held that "[t]o the extent that the [Trespass Rule] could be interpreted as closing access only to public water where walking and wading is involved, as argued by [petitioners], the [Trespass Rule] would still be an unconstitutional limitation on the public's right to recreate and fish in public waters." *Ibid.*[1]

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[1] The Court upheld the Trespass Statute by construing it, as a matter of state constitutional avoidance, not to reach walking or wading onto privately held beds. App., *infra*, 24a–26a.

Finally, the New Mexico Supreme Court addressed petitioners' argument that the purported easement would effect an uncompensated taking in violation of the Fifth Amendment since their lands had never been encumbered by such an easement. App., *infra*, 26a–28a. According to the court, petitioners' "argument that the landowners can trace their title to the riverbeds back to the United States is immaterial[]" because "the waters at issue are public waters and always have been." *Id.* at 27a. For that reason, the court held, "any title held by [petitioners] was already subject to the public's easement in public waters[]" at the time that the United States conveyed the title to private parties. *Ibid*.

REASONS FOR GRANTING THE PETITION

The New Mexico Supreme Court held that any member of the public may intrude on privately owned beds and banks of waterways whenever reasonably necessary for water sports, fishing, and other recreational activities that use the water. App., *infra*, 16a–24a, 26a–28a. That holding effected an uncompensated taking of the property rights of thousands of New Mexicans in violation of the Fifth Amendment.

The New Mexico Supreme Court rested its decision on the ground that, before statehood, the United States' title in the beds and banks of non-navigable waters was burdened by a "broad" easement permitting such intrusions by any member of the public. App., *infra*, 20a, 26a–28a. But it cited no contemporaneous evidence or authority whatsoever for that claim. Moreover, the decision deepened a three-way conflict among state supreme courts over the scope of riverbed title that the United States retained upon

statehood—an issue of "federal constitutional significance under the equal-footing doctrine." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012). And the necessary implication of the decision is that land *currently* held by the United States, as well as federally recognized Native American tribes, is subject to the same easement. The decision thus both eviscerates private property rights across New Mexico and throws into doubt the power of federal and tribal authorities to prevent unwanted incursions onto their lands. This Court should grant review to conclusively resolve this important issue of federal law.

I. The Decision Below Effects a Massive Uncompensated Taking Based on a Misunderstanding of the Equal-Footing Doctrine

The New Mexico Supreme Court's decision effects a sweeping diminution of the property rights of thousands of New Mexicans without just compensation. That holding rested on a clear misunderstanding of the scope of title that the United States held and retained in non-navigable waters in former U.S. territories under the equal-footing doctrine.

1. In challenging the Trespass Rule, respondents asked the New Mexico Supreme Court to construe the state constitution to authorize any member of the public to walk or wade onto privately owned beds and banks of non-navigable waters when engaged in water-based sports, fishing, or other forms of recreation. Petitioners explained that imposing such an easement without compensation would represent a stark violation of the Fifth Amendment's Takings

Clause. App., *infra*, 32a–35a. That followed from two settled premises.

First, it is blackletter law that "government-authorized invasions of property * * * are physical takings." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073–2074 (2021) (discussing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)). That includes "a servitude or an easement." *Id.* at 2073.

Second, when the United States transferred land beneath or adjacent to non-navigable waters to private parties, it did not reserve for New Mexico or the public the kind of blanket easement that respondents sought. Under this Court's precedent, a state may not claim a public-trust easement in land tracing title to the United States unless the easement was asserted and confirmed at the time that title was transferred. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 209 (1984); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487–488 (1921). Under those precedents, it is irrelevant that a state alleges a "sovereign right" to the easement. *Summa Corp.*, 466 U.S. at 206, 209.

In light of those two principles of federal law, respondents' interpretation of the state constitution was unsustainable. State law could not impose an easement on land that was acquired from the United States free and clear of any such encumbrance, unless New Mexico paid the titleholders just compensation. Nor could state law have imposed an easement on lands at the time that they were held by the United

States, because "[s]tate laws cannot affect titles vested in the United States." *United States v. Utah*, 283 U.S. 64, 75 (1931); see *United States v. Oregon*, 295 U.S. 1, 27–28 (1935).

Thus, respondents' theory would have required the New Mexico Supreme Court either to (i) adopt an interpretation of the state constitution's public-waters provision that would have meant that it had violated the Takings Clause at its inception in 1912, or (ii) establish a new judge-made rule that would amount to a judicial taking or a violation of due process, see *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 713–715 (2010) (opinion of Scalia, J.); *id.* at 735 (Kennedy, J., concurring in part and concurring in the judgment).

2. The New Mexico Supreme Court attempted to sidestep that problem by claiming that even when title to the beds and banks of non-navigable waters was held by the United States before New Mexico's statehood, that title was subject to a "broad" public easement for all intrusions reasonably necessary for waters sports, fishing, and other forms of recreation. App., *infra*, 20a, 26a–28a.

But the court cited no evidence or authority whatsoever for the asserted easement. It did not identify, for example, any Nineteenth Century decisions of this Court or other courts recognizing such an easement. Nor did it cite any contemporaneous legal commentary suggesting that federal territorial land was uniformly burdened by a broad public easement or any evidence that the federal government or any other party recognized such an easement, in New Mexico or elsewhere.

Indeed, the oldest authority that the court cited was a 1905 *dissenting* opinion by a Colorado Supreme Court Justice articulating a view that had been rejected by that court. App., *infra*, 17a (citing *Hartman v. Tresise*, 84 P. 685, 692 (Colo. 1905) (Bailey, J., dissenting)); see pp.20–22, *infra*. The only other authorities that it cited were 1987 and 2008 decisions by the Montana and Utah Supreme Courts, respectively, neither of which examined any pertinent Nineteenth Century sources. App., *infra*, 17a.

Moreover, the New Mexico Supreme Court's own reasoning demonstrates that its understanding of the United States' title was mistaken. The court found it significant that its prior decision in *Red River Valley Co.*, *supra*, had "rejected the common-law rule" that gave the owner of the bed the "exclusive right to fish in the portion of the waters that flow through the land." App., *infra*, 21a. If the common-law rule did not even permit the public to use the *waters* running over privately owned beds, however, it is inconceivable that the United States' holdings were subject to an easement permitting recreational use of the beds and banks themselves incidental to use of the waters.

In short, the New Mexico Supreme Court had no basis to conclude that the United States' title to the beds and banks of non-navigable waters was burdened by a broad recreational easement. And without that erroneous premise, the court's decision clearly violates the Takings Clause.

3. Respondents' principal argument below was that certain recreational activities permitted by New Mexico's expansive public-trust doctrine would be "impossible, as a practical matter, without touching

the streambed and banks." Resp. N.M.S.C. Opening Br. 1–2, 11. That argument could not justify infringing petitioners' federal constitutional rights.

As an initial matter, petitioners acknowledged that "minimal contact" incidental to flotation and other activities, such as briefly touching the banks, would not be a trespass. App., *infra*, 34a. What respondents seek instead is the ability to *walk* and *wade* on the beds and banks during recreation.

Whatever the policy merits of that view, the state interest in facilitating recreation could not possibly excuse infringing federal constitutional rights. If New Mexico believes that a public easement burdening banks and beds of waterways is necessary for the public to enjoy the full range of recreational activities in state waters, it has a ready mechanism to obtain that easement: It can pay just compensation to the landowners. But under this Court's precedents, it may not impose an easement that never burdened the lands before statehood and that was not granted to New Mexico by the United States when it conveyed title to the lands to private parties.

II. The Decision Below Deepens a Three-Way Conflict Among State Supreme Courts

1. For two centuries, the law governing property rights in the beds and banks of non-navigable waters was settled and simple: Owners of those lands enjoyed the same right to exclude as any other property holders. But in recent decades, in light of the "modern tendency of several * * * states to allow the public to use any stream capable of being used for recreational purposes[,]" *State ex rel. Meek v. Hays*, 785 P.2d 1356,

1361 (Kan. 1990), some state supreme courts have jettisoned settled law and held that a broad recreational easement encumbers those lands. The New Mexico Supreme Court is the latest high court to adopt that view.

Thus, as the New Mexico Supreme Court itself recognized, state supreme courts have divided three ways on the existence and extent of such an easement. See App., *infra*, 19a–23a. Older decisions applying the common-law rule held that there is no public right to use the waters for recreation and so no attendant easement to encroach on the beds and banks; the Wyoming Supreme Court has held that the easement permits only those encroachments necessary for floating on the water; and three state supreme courts have held more recently that the easement encompasses all intrusions onto private property reasonably necessary for recreational activities.

No Easement. Three state supreme courts have issued published opinions enforcing the traditional common-law rule, which holds that ownership of the beds and banks of non-navigable waters carries with it the right to exclude members of the public from using the water for fishing and recreational activities—and therefore necessarily bars encroachment on the beds and banks themselves incidental to those activities.

In *Hartman*, *supra*, a landowner sued a man who had entered his property and fished in a non-navigable stream running through it. 84 P. at 686 (reporter's synopsis). The defendant claimed that his action was authorized by Colorado constitutional and statutory provisions. *Ibid.* The district court had

ruled in favor of the defendant after concluding that the State held a "perpetual easement over the public lands of the United States for the natural streams[.]" *Ibid.*

The Colorado Supreme Court reversed. The court explained that "[w]hen [the Colorado] Constitution was adopted, the United States owned the lands which, after ratification, it conveyed to the plaintiff." 84 P. at 686–687 (opinion of the court). Because of that, "[w]hatever rights and title therein it owned passed to the plaintiff, unless excepted or reserved in the instrument of conveyance, or by some act of Congress." *Id* at 687. Because the "plaintiff's patent [did not] contain, any reservation of any public right of fishery, or of any easement over his lands to enable the public to enjoy such right[,]" the court held, the State could not impose a public-trust easement without paying just compensation: "[T]he power of the state is not so comprehensive as to enable it, without compensation to the owner of lands, to take any part of them from him and give them to another citizen[.]" *Ibid.* The court explained that its holding followed from the "common law" rule that "the owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof[.]" *Ibid.*

The Colorado Supreme Court went on to hold in the alternative that even if the defendant possessed a "right of fishery" on the plaintiff's property—*i.e.*, the right to use the waters—"he certainly has no easement over any portion of plaintiff's property, either in the beds of the streams or the adjacent soil, for the purpose of reaching the streams." 84 P. at 687.

In the decision below, the New Mexico Supreme Court expressly acknowledged that it had previously "rejected the majority holding in *Hartman*," instead embracing the dissenting opinion in the case. App., *infra*, 21a. That conflict is especially sharp because, although the New Mexico Supreme Court claimed to find support for its holding in Spanish and Mexican law, the United States acquired parts of both Colorado and New Mexico simultaneously through the Treaty of Guadalupe Hidalgo, see *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1156 (10th Cir. 2015), and the southern region of present-day Colorado was encompassed by the New Mexico Territory, see *Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1059 n.4 (D.N.M. 2018). For its part, the Colorado Supreme Court has continued to adhere to "the common law rule" and has declined to follow decisions from other courts recognizing a "public easement in recreation" in non-navigable waters. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

The Alabama Supreme Court adopted the same holding and analysis in *Hood v. Murphy*, 165 So. 219 (Ala. 1936). In *Hood*, the plaintiff owned land through which a non-navigable stream flowed. *Id.* at 219. The defendant had been entering the stream from elsewhere and then floating onto her property, where he would fish while standing on the streambed and on a small island in the middle of the stream. *Ibid.* The landowner sought an anti-trespassing injunction, and the defendant claimed that he was within his rights under an Alabama statute. *Ibid.*

The Alabama Supreme Court held that construing the statute to authorize incursions onto privately held, non-navigable streams would violate both the

Takings Clause and the equal-footing doctrine. 165 So. at 220–221. The court explained that while "[t]he state owns the bed and bottom of navigable streams in Alabama," it does not own "those which are nonnavigable." *Id.* at 220. The latter were "part of the public land ceded to the United States * * * , surveyed and patented by the government as such, by which the title passed to the patentees and their successors in ownership[.]" *Ibid.* The public had "no right of fishery in the waters," the court held, because it is the landowner's "private property under the protection of the constitution, and it cannot be taken * * * without compensation, or without due process of law." *Ibid.* (internal quotation marks omitted).

Citing one of this Court's landmark equal-footing doctrine cases, *Utah*, *supra*, the Alabama Supreme Court explained that, given that it would exceed the power of the State to enact legislation that would "affect[] the title of the [federal] government," including title to "the beds of [non-navigable] streams," state legislation also "cannot * * * affect the title of patentees of the government." 165 So. at 220. Accordingly, the court construed the Alabama statute "to apply only to those waters over beds which are owned by the state * * * but not to take away property rights secured by the Constitution." *Id.* at 221. The Alabama Supreme Court has continued to follow *Hood*. See *Wehby v. Turpin*, 710 So.2d 1243, 1250 (Ala. 1998).

In 1990, the Kansas Supreme Court reached the same conclusion as the Colorado and Alabama Supreme Courts. In *Hays*, *supra*, the defendant had built a fence across a non-navigable creek running through his property, and the county attorney sought a declaratory judgment that the public had the right

to use the creek. 785 P.2d at 1358, 1360. The Kansas Supreme Court rejected the government's argument that "the public is entitled to use [the] [c]reek under the public trust doctrine." *Id.* at 1363. The court explained that the traditional rule was that "[o]wners of the bed of a nonnavigable stream have the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations." *Id.* at 1364. Thus, the "public has no right to the use of nonnavigable water overlying private lands for recreational purposes without the consent of the landowner." *Id.* at 1365.

Flotation-Only Easement. The Supreme Court of Wyoming—another state acquired in part through the Treaty of Guadalupe Hidalgo, see *Montoya v. Tecolote Land Grant ex rel. Tecolote Bd. of Trustees*, 176 P.3d 1145, 1146 (N.M. 2007), cert. denied, 556 U.S. 1128 (2009)—has adopted an intermediate position: The public may encroach on the beds and banks of non-navigable waters, but only incident to flotation, not other types of activity.

The plaintiff in *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), wished to "use the bed and channel of [a non-navigable] river to fish, * * * either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of the stream" and to engage in other activities. *Id.* at 140, 151. He sought a declaratory judgment clarifying the public's rights under the "Federal Constitution" and state law. *Id.* at 138–139.

The court explained that a non-navigable river gives rise to a "clear case of divided ownership of the

river as an entity, because title to the bed and channel would be in the riparian owner and title to the waters is in the State." 362 P.2d at 145. In light of that divided ownership, the court endeavored to accord both parties "maximum incidents of ownership with minimum obligation upon the other." *Ibid.* To achieve that balance, the court held that the State possesses an easement under which the public may make "incidental use of the[] beds and channels" in connection with "floating," *id.* at 146, such as when a boater finds it "necessary" to "disembark and walk, or wade upon submerged lands in order to pull, push, or carry craft over or across shallows, riffles, rapids or obstructions," *id.* at 151.

But the Wyoming Supreme Court rejected the argument that the public easement "permitted wading or walking upon the bed or channel of the river or use of its banks for recreation." 362 P.2d at 145. And the court made clear that its holding was constitutionally compelled: "Such trespass cannot be made lawful," it held, "either by legislative or judicial action." *Ibid.* "[T]he State," the court explained, "is without power to authorize the violation of any property rights of riparian or other owners except as incident to the full exercise of easement to which property may be subject," *i.e.*, an easement "for floating useable craft[.]" *Id.* at 151. Given that holding, the decision of the New Mexico Supreme Court below acknowledged that it conflicted with *Day*. App., *infra*, 23a.

Broad Easement. As noted above, the New Mexico Supreme Court found support for its broad easement in decisions of the Montana and Utah Supreme Courts. App., *infra*, 15a.

In *Galt v. State Department of Fish, Wildlife and Parks*, 731 P.2d 912 (Mont. 1987), the plaintiffs challenged a state law authorizing the public to engage in recreation in all surface waters capable of recreational use without regard to the ownership of the underlying land. *Id.* at 913–914. The plaintiffs claimed that the statute was "unconstitutional as a taking of private property without just compensation." *Id.* at 913. Although the Montana Supreme Court struck down parts of the statute as overbroad, it construed its prior decisions to hold that "the public's right to use the waters [for recreational activities] includes the right of use of the bed and banks up to the high water mark even though the fee title in the land resides with the adjoining landowners." *Id.* at 915 (citing, *e.g.*, *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984)). Like the New Mexico Supreme Court, the Montana Supreme Court claimed that an "easement" burdens title to the beds and banks of waters owned by private parties, allowing any use that is "necessary for the public to enjoy its ownership of the water resources[.]" *Id.* at 916.[2]

Justice Gulbrandson, concurring in the result in part, argued that Montana Supreme Court precedent was unconstitutional and that the court should instead adopt the position of the Wyoming Supreme Court in *Day*: "Where the title to the streambed is privately owned," he argued, "the State has no legal authority to legislate use of the bed and banks of that

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[2] The Montana Supreme Court's rule appears to rest on the view that an easement for public use cannot be a taking because title is not transferred. See *Hildreth*, 684 P.2d at 1093. As explained above, p.16, *supra*, that is incorrect under this Court's precedents.

stream without paying just compensation through lawful eminent domain proceedings." *Id.* at 917 (Gulbrandson, J., specially concurring).

In *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008), the Utah Supreme Court likewise concluded that privately owned beds and banks are subject to an "easement" that "allows the public to (1) engage in all recreational 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." *Id.* at 898. In so holding, the court overruled a district court decision that had deemed such encroachment to violate "private property rights," *Conatser v. Johnson*, No. 000500092PR, 2006 WL 6200699 (Utah Dist. Ct. Apr. 25, 2006), and expressly rejected the constitutional holding of the Wyoming Supreme Court in *Day*, 194 P.3d at 900–901. The court defined the scope of the easement to cover all encroachments that are "reasonably necessary for the effective enjoyment of the public's easement and [that] do[ ] not cause unnecessary injury to the landowner[,]" including "wading." *Id.* at 902.[3]

2. This Court should resolve this deep division of authority among state supreme courts. The conflict can be resolved by answering a straightforward question: Was the United States' title to the beds and banks of non-navigable waters in former U.S. territories subject to an easement permitting all encroachments reasonably necessary for recreation and fishing? That is ultimately a question of federal law for this Court and should be answered uniformly

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[3] The easement recognized in *Conatser* was later modified in part legislatively. See Utah Code Ann. § 73-29-102 *et seq.* (2010).

across the country. As this Court has held, "[t]he laws of the United States alone control the disposition of title to its lands[,]" and thus "[t]he construction of grants by the United States is a federal not a state question[.]" *Oregon*, 295 U.S. at 27–28.

It is important that this Court resolve this conflict now. Most western states were admitted to the Union between the Civil War and the admission of New Mexico and Arizona in 1912. For decades thereafter, it was settled law that the successors-in-interest of the United States' pre-statehood title to the beds and banks of non-navigable waters could exercise the basic property right to exclude members of the public from encroaching on their lands. That was reflected in what even the New Mexico Supreme Court acknowledged to be the common-law rule.

But with the "modern tendency" of permitting the public to engage in a wide array of recreational activities in non-navigable waters, *Hays*, 785 P.2d at 1361, state supreme courts in recent years have overridden settled property rights and imposed an easement on the underlying and adjacent lands without paying just compensation. And because a number of other states have also adopted broad public-trust doctrines, see App., *infra*, 15a–16a, there is a substantial risk that other state supreme courts will follow the lead of the New Mexico, Utah, and Montana Supreme Courts and impose a broad recreational easement on privately held lands. Before that legal rule is adopted by more state supreme courts, sweeping away settled law, this Court should clarify the federal constitutional limitations on imposing an easement across riparian lands that trace title to the United States.

III. This Case Presents an Ideal Opportunity to Resolve the Conflict

This case is an ideal vehicle to resolve the conflict of authority among state supreme courts. Some decisions in this area have failed to conduct a robust analysis of the constitutional questions implicated by imposing a broad public easement on privately held riparian lands traceable to the United States. But in this case, the New Mexico Supreme Court expressly addressed that issue and rendered an unambiguous holding that the United States' pre-statehood title to those lands was burdened by such an easement. App., *infra*, 26a–28a. This case therefore presents a clear opportunity to resolve the question presented.

Petitioners, moreover, have a direct and powerful interest in challenging the judgment below. The order of the New Mexico Supreme Court voided the certificates that petitioners had obtained under the Trespass Rule. App., *infra*, 2a. And as the New Mexico Supreme Court acknowledged, petitioners "are owners of private property over which nonnavigable waters flow," *id.* at 9a, and so the holding directly controls the scope of petitioners' own property rights.

Although the State Game Commission has repealed the Trespass Rule, that action did not moot this case. That repeal was directed by the order of the New Mexico Supreme Court, and the Commission expressly stated that it was repealing the rule to comply with the order. App., *infra*, 2a, 55a. An action required by the judgment that is challenged on appeal does not moot the controversy where the appellate court can still provide meaningful relief. *See Church of Scientology of Calif. v. United States*, 506 U.S. 9,

17–18 (1992). In this case, were this Court to vacate the decision below, the certificates issued to petitioners would no longer be void, and the Commission would have authority to reinstate the Trespass Rule. Petitioners could challenge any failure to honor their certificates or reinstate the Trespass Rule as a violation of New Mexico's Administrative Procedure Act. See N.M. Stat. Ann. §§ 12-8-7, 12-8-8. The case is therefore not moot. Were it otherwise, any order by a lower court directing a state agency to immediately repeal a regulation would be insulated from appellate review.

Moreover, beyond voiding petitioners' certificates and directing the repeal of the Trespass Rule, the New Mexico Supreme Court's judgment defined riparian property rights in a manner that directly injures petitioners by burdening their properties with an easement. App., *infra*, 9a. Petitioners have therefore suffered "an injury fairly traceable to the judgment below[,]" giving them standing to appeal the judgment independent of their interest in the certificates or the Trespass Rule. *West Virginia v. Envtl. Protection Agency*, 142 S. Ct. 2587, 2606 (2022) (internal quotation marks and emphasis omitted).

IV. Resolution of the Question Presented Is Important

The New Mexico Supreme Court's decision warrants further review because the court's misunderstanding of the title retained by the United States under the equal-footing doctrine threatens grave harm to property rights of private landowners and to the environment, and it will sow confusion about the

public's right to walk or wade onto lands held by the federal government and Native American tribes.

1. The decision below represents a sweeping diminution of New Mexicans' property rights—a wholesale declaration that all owners of riparian lands in New Mexico must permit any member of the public to walk or wade onto their property whenever reasonably necessary to the enjoyment of water sports, fishing, or other recreational activities. And the opinion neither identifies the full scope of recreational activities that permit intrusion onto privately held lands nor defines how far onto a landowner's property the "banks" of a waterway extend. It therefore promises to engender confusion and conflict among landowners, members of the public, and state authorities.

The court's holding impacts thousands of miles of privately held riparian lands. Out of the estimated 236,799 miles of smaller, non-navigable streams in New Mexico, approximately 94,518 miles flow through private lands. Western Landowners Alliance, *Stewardship with Vision: Caring for New Mexico's Streams* 3 (Apr. 13, 2014) ("*Stewardship with Vision*").[4] That figure does not include the hundreds of *acequias* (community irrigation ditches) that New Mexico communities have used for centuries. And because the public-waters provision of the New Mexico Constitution includes "torrential" waters—*i.e.*, waters that flow only during torrential downpours—

[4] https://westernlandowners.org/wp-content/uploads/2017/11/WLA-Stream-Stewardship-NM-Streams-Booklet.pdf.

the holding encompasses even lands that contain no permanent waterways.

The decision below will undermine investment-backed expectations and prospective economic incentives to develop riparian properties. Landowners exert considerable effort and spend significant sums of money improving the land around and under waterways—removing debris and obstructions, creating deep eddies for fish to congregate, and beautifying the banks. Those costly enhancements make the properties attractive places to engage in recreation with family and friends or to host paying guests—and distinguish the areas from state-owned riparian lands, which are often left unimproved. Yet without the core property right to exclude other people from intruding on their land, few landowners would undertake expensive and time-consuming beautification projects.

It is unlikely, moreover, that the effect of the decision below on investment-backed expectations will be limited to New Mexico. Landowners in other states have now seen three state supreme courts in recent decades cast aside the law's traditional solicitude for private property rights and impose an easement in favor of public access to privately owned beds and banks of non-navigable waters. Absent intervention from this Court, homeowners and investors in commercial properties can have little confidence that the courts in their states will not similarly override their federal property rights in the future.

The decision below also raises troubling safety and security concerns. Many landowners have built their

homes close to waterways—or close to ordinarily dry arroyos that accumulate water during torrential downpours. Under the New Mexico Supreme Court's ruling, any member of the public may float or wade into the waterway segment on their property and then exit onto the bank—quite literally in the homeowner's backyard—so long as the visitor claims to be engaged in activity that is "reasonably necessary for the enjoyment of fishing and recreation." App., *infra*, 23a. That could include armed individuals purportedly engaged in hunting. See *id.* at 20a. Such an intimate intrusion into residential areas offends basic principles of American property and privacy law.

2. Beyond nullifying private property rights, the broad public easement imposed by the New Mexico Supreme Court threatens considerable harm to land and wildlife conservation efforts. Tens of thousands of miles of New Mexico's streams flow through private lands that are considered vital conservation areas. *Stewardship with Vision*, *supra*, at 5, 9. Several private landowners, including petitioners, have undertaken extensive efforts to combat water pollution, erosion, and drought within the streams flowing through their properties to enhance public health and promote biodiversity. *Id.* at 10–16. For instance, petitioner Chama Troutstalkers reserved three hundred acres of its land under a conservation easement for the permanent protection of open space and wildlife. *Id.* at 12.

The New Mexico Supreme Court's ruling threatens to derail those efforts. Unimpeded use of riparian lands in conservation areas could introduce and accelerate erosion, pollution, and drought in the waterways. Unlike the owners of the properties,

individual members of the public have little incentive to preserve and protect the lands they are now permitted to use for free.

3. The decision below raises difficult legal questions about the status of the asserted easement on federal and tribal lands in New Mexico. The premise of the New Mexico Supreme Court's opinion is that the United States' holdings have always been subject to a broad recreational easement. App., *infra*, 20a, 26a–28a. That presumably means that the United States' *current* holdings—and those holdings previously transferred to Native American tribes—are also subject to the easement. Indeed, petitioners warned about precisely that consequence below, *id.* at 35a, yet the New Mexico Supreme Court made no effort to limit its ruling to private landowners.

The impact on federal and tribal lands could be significant. New Mexico's non-navigable waters run throughout much of the 24.7 million acres of federal lands overseen by the United States Bureau of Land Management, Forest Service, Fish and Wildlife Service, National Park Service, and Department of Defense in New Mexico. U.S. Dep't of the Interior, U.S. Geological Survey, *New Mexico: Federal Lands and Indian Reservations*, The National Atlas of the United States of America;[5] Cong. Res. Serv., *Federal Land Ownership: Overview and Data* (Feb. 21, 2020).[6] Many of those lands are protected conservation areas, and others contain national-security facilities. See, *e.g.*, U.S. Dep't of the Interior, Bureau of Land Mgmt.,

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[5] https://maps.lib.utexas.edu/maps/united_states/fed_lands_2003/new_mexico_2003.pdf.

[6] https://sgp.fas.org/crs/misc/R42346.pdf.

New Mexico National Conservation Lands (last updated Aug. 11, 2022);[7] U.S. Nat'l Park Serv., *White Sands Missile Range* (last updated Sept. 12, 2016).[8] The broad public easement that the New Mexico Supreme Court recognized could thus be profoundly destabilizing to important federal interests.

Likewise, thousands of miles of New Mexico's nonnavigable waters flow on the lands of many held by New Mexico's 23 federally recognized tribes—by one estimate, 32,368 miles of small streams alone. That includes lands held by the Navajo Nation; the Acoma, Isleta, Laguna, Sandia, San Felipe, Santa Ana, Santa Clara, Taos, and Zuni Pueblos; and the Mescalero Apache Tribe. *New Mexico: Federal Lands and Indian Reservations*, *supra*; see *Stewardship with Vision*, *supra*, at 3; Native American Election Information Program, New Mexico Sec'y of State's Office, *23 MN Federally Recognized Tribes in NM Counties*.[9] Recognizing an easement permitting any member of the public (including armed individuals) to intrude onto tribal land while engaged in recreation in the water would represent a deep affront to their sovereignty—and recall a time in our history when the interests of Native Americans were subordinate to the preferences of other Americans.

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[7] https://www.blm.gov/programs/national-conservation-lands/new-mexico.

[8] https://www.nps.gov/whsa/learn/historyculture/white-sands-missile-range.htm.

[9] https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/23-nm-federally-recognized-tribes-in-nm-counties/.

To be sure, Congress presumably has the authority to preempt the easement as applied to federal or tribal lands under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, and the Indian Commerce Clause, *id.* art. I, § 8, cl. 3. But the decision below will raise difficult questions about whether Congress intended to preempt an easement that was not recognized in New Mexico until this year. Before the federal government, tribes, and courts confront those issues, this Court should review the judgment of the New Mexico Supreme Court to determine whether the purported easement comports with the equal-footing doctrine and the scope of the United States' historical title in the beds and banks of non-navigable waters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 28, 2022

APPENDIX

APPENDIX A

IN THE SUREME 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 organization,

Petitioners,

v.

STATE GAME COMMISSION,

Respondent,

and

CHAMA TROUTSTALKERS, LLC; RIO DULCE RANCH; Z&T CATTLE COMPANY, LLC; RANCHO DEL OSO PARDO, INC.; RIVER BEND RANCH; CHAMA III, LLC; FENN FARM; THREE RIVERS CATTLE LTD., CO.; FLYING H. RANCH INC.; SPUR LAKE CATTLE CO.; BALLARD RANCH; DWAYNE AND CRESSIE BROWN; COTHAM RANCH; WAPITI RIVER RANCH; MULCOCK RANCH; WILBANKS CATTLE CO.; 130 RANCH; WCT RANCH; THE NEW MEXICO FARM AND LIVESTOCK BUREAU; CHAMA PEAK LAND ALLIANCE; NEW MEXICO CATTLE GROWERS' ASSOCIATION; NEW MEXICO COUNCIL OF OUTFITTERS AND GUIDES; AND UPPER PECOS WATERSHED ASSOCIATION,

Intervenors-Respondents.

March 02, 2022

ORDER

WHEREAS, this matter came on for consideration by the Court upon verified petition for writ of prohibitory mandamus, responses, reply, briefing by the parties, briefing by amici curiae, and oral argument, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that this case involves a matter of great public importance and petitioners have standing to bring this matter before the Court as an original proceeding under Article VI, Section 3 of the New Mexico Constitution and Rule 12-504 NMRA;

IT IS FURTHER ORDERED that the petition for writ of mandamus is GRANTED;

IT IS FURTHER ORDERED that the New Mexico State Game Commission's regulations set forth in 19.31.22 NMAC violate Article XVI, Section 2 of the New Mexico Constitution and are inconsistent with a constitutional reading of NMSA 1978, Section 17-4-6(C) (2015);

IT IS FURTHER ORDERED that the certificates that the New Mexico State Game Commission has issued to private landowners pursuant to 19.31.22 NMAC are hereby declared VOID;

IT IS FURTHER ORDERED that a writ of mandamus shall issue, prohibiting the New Mexico State Game Commission from further implementation of the regulations set forth in 19.31.22 NMAC and directing the Commission to withdraw the regulations; and

IT IS FURTHER ORDERED that an opinion explaining the Court's reasoning will follow.

IT IS SO ORDERED.

WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 2nd day of March, 2022.

/s/ Jennifer L. Scott
Jennifer L. Scott, Chief Clerk of the Supreme Court of the State of New Mexico

[SEAL Supreme Court State of New Mexico]

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
/s/ Jennifer L. Scott
Chief Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

IN THE SUREME 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 organization,

Petitioners,

v.

NEW MEXICO STATE GAME COMMISSION,

Respondent,

and

CHAMA TROUTSTALKERS, LLC; RIO DULCE RANCH; Z&T CATTLE COMPANY, LLC; RANCHO DEL OSO PARDO, INC.; RIVER BEND RANCH; CHAMA III, LLC; FENN FARM; THREE RIVERS CATTLE LTD., CO.; FLYING H. RANCH INC.; SPUR LAKE CATTLE CO.; BALLARD RANCH; DWAYNE AND CRESSIE BROWN; COTHAM RANCH; WAPITI RIVER RANCH; MULCOCK RANCH; WILBANKS CATTLE CO.; 130 RANCH; WCT RANCH; THE NEW MEXICO FARM AND LIVESTOCK BUREAU; CHAMA PEAK LAND ALLIANCE; NEW MEXICO CATTLE GROWERS' ASSOCIATION; NEW MEXICO COUNCIL OF OUTFITTERS AND GUIDES; AND UPPER PECOS WATERSHED ASSOCIATION,

Intervenors-Respondents.

September 1, 2022

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OPINION

VIGIL, Justice.

This mandamus proceeding concerns the scope of the public's right to use public water flowing over private property. Article XVI, Section 2 of the New Mexico Constitution provides that "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, *is hereby declared to belong to the public*." (Emphasis added.) In *State ex rel. State Game Commission v. Red River Valley Co. (Red River)*, this Court held that Article XVI, Section 2 conveys to the public the right to recreate and fish in public water. 1945-NMSC-034, ¶ 59, 51 N.M. 207, 182 P.2d 421. The question here is

whether the right to recreate and fish in public water also allows the public the right to touch the privately owned beds below those waters. We conclude that it does.

The New Mexico State Game Commission (Commission) promulgated a series of regulations, 19.31.22 NMAC (1/22/2018) (Regulations), outlining the process for landowners to obtain a certificate allowing them to close public access to segments of public water flowing over private property. *See* 19.31.22.6 NMAC (1/22/2018). In particular, access is closed to the "riverbed or streambed or lakebed" located on private property. *Id.* The reasoning is that because the landowner holds title to the bed below public water, the landowner may exclude the public from accessing the public water if it involves walking or wading on the privately owned bed. Petitioners, nonprofit organizations and corporations affected by the Regulations, sought a writ of prohibitory mandamus challenging the constitutionality of the Regulations.

This Court assumed original jurisdiction over the petition under Article VI, Section 3 of the New Mexico Constitution. Concluding that the Regulations are an unconstitutional infringement on the public's right to use public water and that the Commission lacked the legislative authority to promulgate the Regulations, we issued the writ of mandamus and an order on March 2, 2022, directing the Commission to withdraw the Regulations as void and unconstitutional. In this opinion, we explain the reasoning and rationale underlying our issuance of the writ of mandamus.

I. BACKGROUND

In 2015, the Legislature amended NMSA 1978, Section 17-4-6 (2015), adding a one-sentence Subsection C:

> No 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.

(Emphasis added.) Purportedly acting under the above-emphasized language of Section 17-4-6(C), the Commission promulgated the Regulations. *See* 19.31.22 NMAC (1/22/2018).

The Regulations' "Objective" is to implement

> the process for a landowner to be issued 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, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.

19.31.22.6 NMAC (1/22/2018). Once a landowner is issued a certificate, the landowner is then issued signs from the Commission which are "prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass." 19.31.22.13(F) NMAC (1/22/2018). Members of the public may then be cited for criminal trespass if they touch the now-closed "riverbed or streambed or

lakebed," 19.31.22.6 NMAC (1/22/2018), beneath the public water. 19.31.22.13(F) NMAC (1/22/2018).

To obtain the certificate and signage necessary to close access to segments of public water, landowners must fill out an application providing "substantial evidence which is probative of the waters, watercourse or [rivers] being non-navigable at the time of statehood, on a segment-by-segment basis." 19.31.22.8(B)(4) NMAC (1/22/2018). The Regulations define "Non-navigable public water" as water that "was not used at the time of statehood, in its ordinary and natural condition, 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." 19.31.22.7(G) NMAC (1/22/2018).

Following the promulgation of the Regulations, Petitioners filed a verified petition for prohibitory mandamus in this Court to nullify any certificates issued under the Regulations and to enjoin the Commission from enforcing the Regulations. Petitioners argue the Regulations violate Article XVI, Section 2 by impermissibly interfering with the public's constitutional right to use public water and that the Commission lacks the authority under Section 17-4-6(C) to promulgate the Regulations. In its answer brief, the Commission concedes the Regulations conflict with Article XVI, Section 2.

This Court granted leave for Intervenor-Respondents ("Intervenors"), who are owners of private property over which nonnavigable waters flow, to intervene. Intervenors argue mandamus should be denied because the Regulations do not privatize or close public waters, but instead express the existing right to exclude trespassers on privately owned riverbeds.

II. DISCUSSION

A. Mandamus Is Appropriate

Before addressing Petitioners' constitutional challenges to the Regulations, we explain the basis for our exercise of original mandamus jurisdiction. Article VI, Section 3 of the New Mexico Constitution gives this Court "original jurisdiction in . . . mandamus against all state officers, boards and commissions" and the "power to issue writs of mandamus . . . and all other writs necessary or proper for the complete exercise of its jurisdiction." "Although relief by mandamus is most often applied to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law, the writ may also be used in appropriate circumstances in a prohibitory manner to prohibit unconstitutional official action." *State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7, 456 P.3d 1065 (internal quotation marks and citation omitted). "In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official's act; we determine whether that act goes beyond the bounds established by the New Mexico Constitution." *Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132, 257 P.3d 952.

Petitioners and Intervenors disagree about whether mandamus is the proper vehicle to address the fate of the Regulations. To resolve such disagreements, this Court applies a multifactor test to evaluate whether mandamus is appropriate. Mandamus is a discretionary writ that will lie when there is a purely legal issue "that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained

through other channels such as a direct appeal." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *see also* NMSA 1978, § 44-2-5 (1884).

In applying the *Sandel* factors, we conclude that mandamus is appropriate. First, the scope of the public's ownership rights in the natural waters of New Mexico and the competing real property interests of private landowners implicates a question of great public importance. Second, whether it is unconstitutional for the Regulations to restrict the recreating public from accessing public waters flowing over private property and whether the Commission may promulgate the Regulations in the first place are both legal questions that can be decided on undisputed facts. Third, the importance of the constitutional issue and the need for clarification on public water access and private property ownership merits an expeditious resolution that this Court is uniquely positioned to provide. Therefore, we determine all three *Sandel* factors are met and that mandamus is appropriate in this case.

B. Natural Water Within the State Belongs to the Public But the Beds May Be Privately Owned

Having determined that prohibitory mandamus is an appropriate vehicle to address Petitioners' claims, we begin by reviewing the relevant law on public ownership rights in state waters and private ownership rights in the beds that lie beneath those waters. Such a review is necessary for understanding why the Regulations' threshold for closing public access, which is based on navigability, is irrelevant to the scope of the right of the public to use public waters under Article XVI, Section 2.

In 1907, the Territorial Legislature enacted the Water Code that declared, "All 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." NMSA 1978, § 72-1-1 (1907). This was a declaration of "prior existing law, always the rule and practice under Spanish and Mexican dominion." *Red River*, 1945-NMSC-034, ¶ 21 (internal quotation marks and citation omitted). The prior-appropriation doctrine was then incorporated into 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. Priority of appropriation shall give the better right.

N.M. Const. art. XVI, § 2 (emphasis added).

In 1945, this Court determined that Article XVI, Section 2, combined with prestatehood law, established a public right to recreate in the waters of New Mexico and that this right is equal to the right of the owners of the land near the water. *Red River*, 1945-NMSC-034, ¶ 59 (holding that a landowner with private property bordering and below public water had "no right of recreation or fishery distinct from the right of the general public"). In *Red River*, we addressed whether a landowner who owned land on both sides of Conchas Lake, deemed nonnavigable water, could exclude others from fishing in boats on the lake. *Id*. ¶¶ 1-13. We acknowledged ownership in the banks and beds of a body of water may be private but emphasized that such ownership does not change the fact that the

water, next to the banks and above the beds, is public. *Id.* ¶ 37.

In analyzing the permissible uses of public water, this Court rejected limiting the public's right to those of traditional navigation. *See id.* ¶ 36 ("[U]ses of public water are not to be confined to the conventional ones first known and enjoyed."). In support of the rejection, we noted the historical expansion of the public's use of public water:

> At one time, public waters were thought of only as they afforded rights of navigation to the height of tide water; later they were extended to include all clearly navigable streams, and later still, to streams which would be used, not for boats of commerce, but only for the floating of logs and other items of commerce; and, later has come the recreational use where the strict test of navigability earlier applied is less rigidly adhered to.

Id. ¶ 35. With this historical backdrop, we concluded that the scope of the public's right to use public waters is a matter of New Mexico law and that such right includes fishing and recreation. *Id*. ¶¶ 35-37, 59. The conclusion that state law governs the scope of the right of the public to use public waters over private beds tracks with federal law. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012) ("[T]he [s]tates retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title.").

Under federal law, title to land under nonnavigable waters remains with the United States, *United States v. State of Utah*, 283 U.S. 64, 75 (1931), and title to land under navigable waters rests with the states.

Utah Div. of State Lands v. United States, 482 U.S. 193, 196 (1987). This rule that the states "hold title to the beds under navigable waters has [its] origins in English common law." *PPL Mont., LLC*, 565 U.S. at 589. In England, there was a distinction "between waters subject to the ebb and flow of the tide (royal rivers) and nontidal waters (public highways)." *Id.* "With respect to royal rivers, the Crown was presumed to hold title to the riverbed and soil, but the public retained the right of passage and the right to fish in the stream." *Id.* For public highways, "the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership." *Id.*

The tide-based distinction was ill-suited for the United States, and by the late nineteenth century, the prevailing doctrine for determining title to riverbeds was "navigability in fact." *Id.* at 590. The question of navigability for determining riverbed title is governed by federal law, which provides that public rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 591-92 (internal quotation marks and citation omitted). That said, the beds to both navigable waters and nonnavigable waters—whether title is vested in the state or the United States—are still subject to state law under the "public trust doctrine." *Id.* at 603-04; *see also Red River*, 1945-NMSC-034, ¶ 259 (opinion on second motion for rehearing) ("These waters are publici juris and the state's control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States.").

The public trust doctrine "concerns public access to the waters above . . . beds for purposes of navigation,

fishing, and other recreational uses." *PPL Mont., LLC*, 565 U.S. at 603. The public trust doctrine is a matter of state law subject only to governmental regulation by the United States under the Commerce Clause and admiralty power. *Id.* at 604. "Under accepted principles of federalism, the [s]tates retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title." *Id.; see also State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P.2d 983 ("The state as owner of water has the right to prescribe how it may be used.").

Thus, while the federal "navigability" test is used to determine title to the beds beneath water, such a test is irrelevant when determining the scope of public use of public waters. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984) ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."). Moreover, "[p]rivate ownership of the land underlying natural lakes and streams does not defeat the [s]tate's power to regulate the use of the water or defeat whatever right the public has to be on the water." *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1137 (Utah 1982). This is why, in *Red River*, we could reject the traditional navigability test—the test applied by the Regulations—for determining public use and instead conclude that the scope of public trust to waters in New Mexico includes fishing and recreation. 1945-NMSC-034, ¶¶ 35, 43, 48. New Mexico is not alone in concluding title to the beds beneath water is immaterial in determining the scope of public use. Montana, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming, and South Dakota have all recognized public ownership and use of water is distinct from bed

ownership. *See Parks v. Cooper*, 2004 SD 27, ¶ 46, 676 N.W. 2d 823 (describing the states—including New Mexico—where the public trust doctrine applies to water independent of ownership of the underlying land).

With the understanding that state law governs the scope of the public's right to use waters and that public use within New Mexico includes fishing and recreation, we now turn to the merits of Petitioners' claims. First, we address the constitutionality of the Regulations and Section 17-4-6(C). We then consider Intervenors' argument on judicial taking.

C. The Regulations Are Unconstitutional

Petitioners challenge the constitutionality of the Regulations and the Commission's authority under Section 17-4-6(C) to promulgate the Regulations. "We review questions of statutory and constitutional interpretation de novo." *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232.

Petitioners argue the Regulations are unconstitutional because Article XVI, Section 2 and this Court's decision in *Red River* implicitly recognize the public's right to use streambeds and banks. Petitioners contend that if the public cannot use streambeds and banks in the exercise of its right to public waters, as a practical matter, the public "could enjoy no fishing or recreational rights upon much of the public water of this state." *Red River*, 1945-NMSC-034, ¶ 43. On the other hand, Intervenors argue that when a member of the public walks or wades in a river where the bed is privately owned, that person is a trespasser, and only when a landowner bars a person from floating upon public water that can be used without walking and

wading does the landowner interfere with the person's right to use the water. Intervenors contend because the Regulations merely reiterate the existing right to exclude trespassers on privately owned riverbeds, they are constitutional. We are not persuaded by Intervenors' arguments.

We conclude under Article XVI, Section 2 and our holding in *Red River* that the public has the right to recreate and fish in public waters and that this right includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right. *See Hartman v. Tresise*, 84 P. 685, 692 (Colo. 1905) (Bailey, J., dissenting) ("[T]he people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant"); *see also Galt v. State*, 731 P.2d 912, 915 (Mont. 1987) ("The public has a right of use up to the high water mark, but only such use as is [reasonably] necessary to utilization of the water itself."); *Conatser v. Johnson*, 2008 UT 48, ¶ 26, 194 P.3d 897 (holding that the public's easement includes touching riverbeds because "touching the water's bed is reasonably necessary for the effective enjoyment of the easement). Walking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing and recreation. Having said that, we stress that the public may neither trespass on privately owned land to access public water, nor trespass on privately owned land from public water. *See Red River*, 1945-NMSC-034, ¶ 32 ("Access to this public water can be, and must be, reached without such trespass.").

Article XVI, Section 2 declares that the natural waters of New Mexico "belong to the public and [are] subject to appropriation for beneficial use, in accordance with the laws of the state." Thus, individuals

have no ownership interest in those natural waters, only the right to put the water to certain uses. *See* N.M. Const. art. XVI, § 3; *see also Snow v. Abalos*, 1914-NMSC-022, ¶ 11, 18 N.M. 681, 140 P. 1044 ("The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose."). As reflected above, this is true whether the public water is navigable or nonnavigable. A determination on navigability only goes to who has title to the bed below the public water, *Red River*, 1945-NMSC-034, ¶¶ 18, 37, not to the scope of public use.

The state, as a trustee, regulates the water for the benefit of the people. *See State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶11, 55 N.M. 12, 225 P.2d 1007.

> Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the [s]tate must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the [s]tate as a whole.

J.J.N.P., 655 P.2d at 1136. "A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water." *Id.* In New Mexico, we have recognized that the scope of the public's easement in state waters includes fishing and recreational activities. *Red River*, 1945-NMSC-034, ¶¶ 26, 59. The question now is should the scope of the public's easement be interpreted narrowly and limited to those activities which may be performed *upon the water*, as argued by Intervenors, *see Day v. Armstrong*, 362 P.2d 137 (Wyo.

1961), or should the scope of the public's easement be interpreted broadly to include lawful activities that *utilize* the water, as argued by Petitioners, *see Conatser*, 2008 UT 48, ¶ 15.

In *Day*, the Wyoming Supreme Court limited the scope of the public's easement to a "right of flotation" upon the water and such activities "as a necessary incident to" flotation. 362 P.2d at 146, 151. There, a member of the public sought a declaration that he had a right to fish "either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of" the North Platte River where it crossed privately owned land. *Id.* at 140. The *Day* Court declined to interpret the scope of the public's easement to include walking and wading on the bed of a river for fishing, but held that the public could fish while floating. *Id.* at 146. The *Day* Court reasoned that because the right of flotation had long since been enjoyed by the public through floating logs and timber, it "was but a right of passage" for floating in a craft. *Id.* at 146-47. The right to hunt, fish, and engage in other lawful activities were all modified by the right to float, *id*., meaning they could be done as long as the person was floating and only with "minor and incidental use of the lands beneath" water. *Id.* This narrow servitude interpretation was rejected in *Conatser*, 2008 UT 48, ¶ 15.

In *Conatser*, the Utah Supreme Court held that the scope of the public's easement included the right of the public to engage in all recreational activities that utilize the water. *Id.* ¶¶ 11-28.[1] The plaintiffs in *Conatser* sought a declaration that the public's

[1] The Utah legislature subsequently limited the scope of the public's easement. *See* Utah Code Ann. § 73-29-102 (2010).

easement allows the public to walk and wade on the beds of public waters. *Id.* ¶¶ 1, 2. The district court held that the public's easement was like that in *Day* and that the public only had a right to be "upon the water." *Id.* ¶ 2 (internal quotation marks omitted). The Utah Supreme Court reversed the district court, reasoning that where *Day* limits the easement's scope, Utah had expanded the scope to recreational activities. *Id*. ¶¶ 2, 13-16. "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*. ¶ 14. The *Conatser* Court then concluded, "In addition to the enumerated rights of floating, hunting, and fishing, the public may engage in any lawful activity that utilizes the water . . . [and] touching the water's bed is reasonably necessary for the effective enjoyment of those activities." *Id.* ¶ 25.

Red River did not require this Court to address whether the scope of the public's easement includes the touching of privately owned beds beneath public water. 1945-NMSC-034, ¶ 4. Instead the question was whether the public's easement included the right of the public "to participate in fishing and other recreational activities in" public waters. *Id.* Similar to the easement in *Conatser*, this Court held that the public's easement is not limited to flotation or traditional navigability, but is broad and includes the right to "general outside recreation, sports, and fishing." *Id.* ¶¶ 35, 48, 59. We conclude that implicit in our holding is the privilege to do such acts as are reasonably necessary to effect the enjoyment of such enumerated rights. The majority's opinion in *Red River* facilitates such a conclusion for the reasons below.

First, *Red River* rejected the common-law rule that the owner of the land beneath water held title to the water as well as possessed an exclusive right to fish in the portion of the waters that flow through the land. *Id.* ¶¶ 13, 36. To prohibit those acts reasonably necessary to enjoy the right to recreation and fishing, such as the touching of beds and banks, effectively reinstates the common-law rule granting landowners the exclusive right of fishery—even if only for waters the Regulations deem nonnavigable. *See* 19.31.22.6 NMAC (1/22/2018) (allowing landowners to receive a certificate recognizing that there are segments of "non-navigable public water" within the landowner's property whose riverbed or streambed or lakebed is closed to public access).

Second, *Red River* rejected the majority holding in *Hartman*, 84 P. 685, because it was contrary to "the better reason and the great weight of authority." *Red River*, 1945-NMSC-034, ¶¶ 38-40. In *Hartman*, the majority concluded that the common-law rule—the owner of a streambed has the exclusive right of fishing in the stream that flows through their land—applied and that there was no "public right of fishery." 84 P. at 687. On the other hand, the dissent, the views with which *Red River* agreed, 1945-NMSC-034, ¶ 38, stated that "a public river is a public highway, and this is its distinguishing characteristic; that the right to common of fishery was vested in the people in all public rivers." *Hartman*, 84 P. at 689 (Bailey, J., dissenting). The *Hartman* dissent elaborated, "where the land belongs to one party and the water to another, the right of fishery follows the ownership of the water; and where the public has an easement in the water . . . fishing goes with the easement as an incident thereto, for the reason that the waters are public." *Id.* at 690 (Bailey, J., dissenting). In discussing the portion of the

Colorado constitution similar to our Article XVI, Section 2, the *Hartman* dissent stated, "if the streams themselves are public, and the water belongs to the people, the people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant." *Hartman*, 84 P. at 692 (Bailey, J., dissenting). *Compare* Colo. Const. art. XVI, § 5 (declaring waters of natural streams as property of the public, "dedicated to the use of the people of the state"), *with* N.M. Const. art. XVI, § 2 (declaring unappropriated water of natural streams as "belong[ing] to the public . . . for beneficial use"). Thus, in favoring the view of the dissent in *Hartman*, we implicitly condoned the public's use of beds under public water as that use is reasonably necessary to effect the enjoyment of the public's easement.

Finally, both the holding of the majority and the criticism from the dissent in *Red River* suggest that the public's right to use public waters includes such acts as are reasonably necessary to effect enjoyment of the right to recreation and fishing. *Red River* held that "[b]roadly speaking, the rule in this country has been that the right of fishing in all waters, the title to which is in the public, belongs to all the people in common." 1945-NMSC-034, ¶ 48 (internal quotation marks and citation omitted). With this holding, echoing the dissent in *Hartman, Red River* again implicitly condones the use of beds beneath public water. Justice Bickley's dissent in *Red River* criticized the majority's holding that the public's easement included use of the beds beneath public water:

> [T]he majority feel that it is appropriate to declare that each individual member of the public has . . . [a] right to fish in the unappropriated waters from every natural stream

> . . . within the state of New Mexico without the consent of the owners of the lands through which such streams flow and of the banks and beds of such streams because they say that the fact that such waters belong to the public is sufficient answer to the protests of such property owners.

Id. ¶ 70 (Bickley, J., dissenting) (fourth alteration in original) (internal quotation marks omitted); *see also id.* ¶ 177 (Sadler, J., dissenting) (criticizing the majority for stating that access to public water must be done without trespass but then establishing a rule that allows trespass onto banks and beds). This criticism of the majority's holding also suggests the dissent's recognition of the implicit right to do such acts as are reasonably necessary for the enjoyment of the public's easement.

Based on the aforementioned, and because we did not limit the scope of the public's easement to floating as in *Day*, we conclude that the public may engage in such acts as are reasonably necessary for the enjoyment of fishing and recreation. Because the Regulations close access to public water based on a finding of nonnavigability, something *Red River*, 1945-NMSC-034, ¶¶ 18, 37, expressly rejected, the Regulations are unconstitutional. To the extent that the Regulations could be interpreted as closing access only to public water where walking and wading is involved, as argued by Intervenors, the Regulations would still be an unconstitutional limitation on the public's right to recreate and fish in public waters.

We emphasize that the scope of the public's easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of minimal impact.

"The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible." *Galt*, 731 P.2d at 916. That is, the right of the public and the right of the landowner "are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, [so] that there may be a due and reasonable enjoyment of both." *Conatser*, 2008 UT 48, ¶ 20 (internal quotation marks and citation omitted).

Since we conclude that the Regulations are an unconstitutional limitation on the public's right to recreate and fish in public waters, we must determine whether Section 17-4-6(C), the statute purportedly giving the Commission authority to promulgate the Regulations, can be read to avoid constitutional concerns. If so, we must read it as such and conclude that the Commission lacked statutory authority to promulgate the Regulations.

D. Section 17-4-6(C) Can Be Read to Avoid Constitutional Concerns

Petitioners argue that Section 17-4-6(C) must be read to avoid constitutional concerns and in doing so, the statute provides no support for the Regulations. Petitioners contend that because the Commission is created and authorized by statute it is limited to the authority expressly granted or necessarily implied by those statutes, and it cannot promulgate regulations that conflict with the only constitutional reading of Section 17-4-6(C). We agree.

"It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions."

Lovelace Med. Ctr. v. Mendez, 1991-NMSC-002, ¶12, 111 N.M. 336, 805 P.2d 603; *see also Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("[C]ourts will avoid deciding constitutional questions unless required to do so."). Put another way, we should "avoid an interpretation of a . . . statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

Section 17-4-6(C) provides that no person "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." Section 17-4-6(C) can be interpreted one of two ways: (1) the public cannot walk or wade onto private property (*excluding* the beds of public water) from public water, and the public cannot gain access to public water by crossing over private property, or (2) the public cannot walk or wade onto private property (*including* the beds of public water) from public water, and the public cannot gain access to public water by crossing over private property. The former raises no constitutional question. *Red River* reiterated several times that trespass onto privately owned lands is not permitted. 1945-NMSC-034, ¶¶ 32, 43, 48, 56. The latter would, like the Regulations, be an unconstitutional limitation on the public's right to recreate and fish in public waters.

Because Section 17-4-6(C) can be construed to avoid a constitutional question and the Regulations conflict with that constitutional reading, we conclude not only that the Regulations are unconstitutional, but also that the Commission lacked the authority to promulgate the Regulations. *See Qwest Corp. v. N.M. Pub.*

Regul. Comm'n, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 143 P.3d 478 ("Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.").

E. Because Article XVI, Section 2 Is Declaratory of Prior Existing Law, Our Holding in This Case Is Not a Judicial Taking

As a final matter, we address Intervenors' argument that our conclusion—that the public has a right to engage in such acts that utilize public water and are reasonably necessary for the enjoyment of fishing and recreation—amounts to a judicial taking. Intervenors contend that because they can trace title to the riverbeds back to the United States the riverbeds cannot be subject to the public's easement. We are not persuaded.

As reflected above, Article XVI, Section 2 and the public's easement in public water stem from prior existing law recognized by the United States government. In *Red River*, we began by analyzing whether Article XVI, Section 2's declaration that the waters of New Mexico "belong to the public" applied to the waters above nonnavigable streams. 1945-NMSC-034, ¶¶ 16-19. This Court determined that even though the landowner in *Red River* could trace his title to the land under the nonnavigable water to an early Mexican grant and Article XVI, Section 2 could not deprive the title of any right which may have vested prior to 1911, the constitutional declaration still applied because it was "only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion." *Red River*, 1945-NMSC-034, ¶ 21 (internal quotation marks and citation omitted). "The doctrine of prior appropriation, based upon the theory that all waters subject to appropriation are *public*," applied

"before New Mexico came under American sovereignty and continu[ed] thereafter." *Id.* ¶¶ 22, 26.

Thus, the waters at issue are public waters and always have been. *Id.; see also* § 17-4-6(C) (referring to nonnavigable waters as "public water"). Intervenors' argument that the landowners can trace their title to the riverbeds back to the United States is immaterial. Even if Intervenors can trace their title back to the United States—as is the case with nonnavigable waters under the federal navigable-in-fact test—this does not change that the owner of the land must "yield its claim of right to so reserve as against use by the public." *Red River*, 1945-NMSC-034, ¶ 23; *see also id.* ¶ 24 ("[T]he United States government . . . has always recognized the validity of local customs and decisions in respect to the appropriation of public waters."); *id.* ¶ 259 (opinion on second motion for rehearing) ("These waters are publici juris and the state's control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States."). As succinctly stated by the Attorney General,

> 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.

N.M. Att'y Gen. Op. 14-04 (April 1, 2014). Thus, any title held by Intervenors was already subject to the public's easement in public waters. *See Red River*, 1945-NMSC-034, ¶ 45 (providing that when the United States confirmed title to the lands in question, it did not "destroy, or in any manner limit, the right of the general public to enjoy the uses of public waters");

see also Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs, 2014 MT 10, ¶ 70, 373 Mont. 277, 321 P.3d 38 (concluding that under the Montana Constitution and the public trust doctrine, nothing had been taken from the riparian owner because he "never owned a property right that allowed him to exclude the public from using its water resource"); *cf. State v. Wilson*, 2021-NMSC-022, ¶¶ 52-56, 489 P.3d 925 (describing how there is no taking when the owner's title was already barred under existing law from using the land a certain way). Today we merely clarify the scope of that easement by making explicit what was already implicit in *Red River*.

III. CONCLUSION

We conclude that the Regulations are an unconstitutional infringement on the public's right to use public water and that the Commission lacked the legislative authority to promulgate the Regulations. We hold that the public has the right to recreate and fish in public waters and that this right includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right.

IT IS SO ORDERED.

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Justice

WE CONCUR:
/s/ C. Shannon Bacon
C. SHANNON BACON, Chief Justice
/s/ David K. Thomson
DAVID K. THOMSON, Justice
/s/ Julie J. Vargas
JULIE J. VARGAS, Justice
/s/ Briana H. Zamora
BRIANA H. ZAMORA, Justice

APPENDIX C

IN THE SUREME 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 organization,

Petitioners,

v.

STATE GAME COMMISSION,

Respondent,

and

CHAMA TROUTSTALKERS, LLC; RIO DULCE RANCH; Z&T CATTLE COMPANY, LLC; RANCHO DEL OSO PARDO, INC.; RIVER BEND RANCH; CHAMA III, LLC; FENN FARM; THREE RIVERS CATTLE LTD., CO.; FLYING H. RANCH INC.; SPUR LAKE CATTLE CO.; BALLARD RANCH; DWAYNE AND CRESSIE BROWN; COTHAM RANCH; WAPITI RIVER RANCH; MULCOCK RANCH; WILBANKS CATTLE CO.; 130 RANCH; WCT RANCH; THE NEW MEXICO FARM AND LIVESTOCK BUREAU; CHAMA PEAK LAND ALLIANCE; NEW MEXICO CATTLE GROWERS' ASSOCIATION; NEW MEXICO COUNCIL OF OUTFITTERS AND GUIDES; AND UPPER PECOS WATERSHED ASSOCIATION,

Intervenors-Respondents.

May 31, 2022

ORDER

WHEREAS, this matter came on for consideration by the Court upon intervenors' motion for rehearing, petitioner's response thereto, and respondent's response and motion to extend deadline for filing a response, and the Court having considered the foregoing and being sufficiently advised, Chief Justice C. Shannon Bacon, Justice Michael E. Vigil, Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that respondent's motion to extend deadline for filing a response is GRANTED and the response is ACCEPTED; and IT IS FURTHER ORDERED that the motion for rehearing is DENIED.

IT IS SO ORDERED.

WITNESS, the Honorable C. Shannon Bacon, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 31st day of May, 2022.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

By /s/ Neil Bell
Acting Deputy Clerk

[SEAL Supreme Court State of New Mexico]

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
/s/ Neil Bell
Deputy Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

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 ORGANIZATION
Petitioners,

vs.

STATE GAME COMMISSION.,
Respondent

and

CHAMA TROUTSTALKERS, LLC; RIO DULCE RANCH; Z7T CATTLE COMPANY, LLC; RANCHO DEL OSO PARDO, INC.; RIVER BEND RANCH; CHAMA III, LLC; FENN FARM; THREE RIVERS CATTLE LTD., CO.; FLYING H RANCH INC.; SPUR LAKE CATTLE CO.; BALLARD RANCH; DWAYNE AND CRESSIE BROWN; COTHAM RANCH; WAIPITI RIVER RANCH; MULCOCK RANCH; WILBANKS CATTLE CO.; 130 RANCH; WCT RANCH; THE NEW MEXICO FARM AND LIVESTOCK BUREAU; CHAMA PEAK LAND ALLIANCE; NEW MEXICO COUNCIL OF OUTFITTERS AND GUIDES; AND UPPER PECOS WATERSHED ASSOCIATION,
Intervenors-Respondents

ANSWER BRIEF OF
INTERVENORS-RESPONDENTS

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ORAL ARGUMENT SCHEDULED FOR MARCH 1, 2022

* * *

DISCUSSION

I. THE PETITION SHOULD BE DENIED BECAUSE THE RULE DOES NOT PRIVATIZE OR CLOSE PUBLIC WATERS, BECAUSE THE RIGHT TO EXCLUDE THE PUBLIC FROM PRIVATE RIVERBEDS IS WELL ESTABLISHED, AND BECAUSE THE LEGISLATURE HAS ALREADY BALANCED THE COMPETING INTERESTS AT STAKE.

* * *

G. Altering the settled property rights would constitute a judicial taking.

The takings clause of the United States Constitution provides that the private property shall not be taken for public use without just compensation. U.S. Const., Amdt. 5. The clause applies to *all* state action that deprives a person of private property. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 714 (2010) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

"If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriate it or destroyed its value by regulation." *Id.*

As set out above, landowners have a well-established right to own riverbeds—a right that includes the right to exclude. *See* Supra at Section I(D); *and see Pierce v. State*, 1996-NMSC-001, ¶17, 121 N.M. 212 (defining "vested rights as the power to do certain actions or possess certain things lawfully" (quotation marks omitted)). Any interference with that right will constitute a taking, and require the payment of just compensation to the thousands of individuals who own riverbeds.

Petitioners contend that a Montana case somehow protects the state from effectuating a taking if the Court were to allow walking and wading on privately owned land. BIC at 14, n. 9. However, that case is inapplicable for several reasons. First, the portions of the Montana case on which Petitioners rely is dicta. The Montana Supreme Court concluded that the landowner's predecessor in interest had deeded a right of way to the state—a conclusion that rendered any additional analysis completely unnecessary. *Public Lands Access Ass'n v. Board of County Com'rs*, 321 P.3d 38, 51 (Mont. 2014). Second, the case did not address the various rights held by a property owner, and instead focused solely on whether use by the public constituted a transfer of title. *Id.* at 302. As Intervenors have explained in this brief, the right to exclude is one of the many property rights that they hold, and the fact that title may not transfer to the public does not mean that a taking has not occurred when the right to exclude is stripped from landowners.

The United States Supreme Court has made clear that interference with the right to exclude—even if it does not transfer title—constitutes a taking requiring just compensation. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2073 (2021). As the Court explained, "physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2076. The manner in which the Montana Supreme Court assessed a taking—focusing narrowly on the transfer of title—cannot survive *Cedar Point* and should not be relied on by this Court. Montana failed to look at all of the rights in the "bundle of sticks" that comes with property ownership, and Montana's incorrect decision should not be followed by this Court.

Third, the Montana case relied on Montana law which, unlike New Mexico law, does not have established precedent or statutory law making clear that the public's right to use waters must be done without trespass on private property.

Finally, the Montana Court emphasized that the public's right to recreate included "some 'minimal' contact with the banks and beds of rivers." *Public Lands Access* 321 P.3d at 52. Respondents do not contend here that no minimal contact can ever happen—if while floating a non-navigable water a boater briefly touches the bed or bank, there is no trespass. It is extended walking and wading—of the type required to fly fish a low-flow stream or to transport watercraft around long stretches of unfloatable waters—that interferes with private landowners' right to exclude. Minimal contact while passing through on the surface waters is not at issue here since Petitioners seek the right to walk wherever they please provided that they at some point intend to recreate on the water.

Petitioners' assertion also ignores the genesis of the property rights at stake here. At statehood, the United States retained title to all "land beneath waters not then navigable . . . to be transferred or licensed if and as it chooses." *PPL Montana,* 565 U.S. at 591. Since the owners of land below non-navigable waters can trace their title back to the United States, they have the same property rights that were held by the United States and Petitioners offer no evidence that this title did not include the right to exclude. The United States currently holds title to large amounts of land in New Mexico—lands that not only include non-navigable riverbeds but that also house New Mexico's national laboratories and military bases. By asserting that riverbed title does not include a right to exclude, Petitioners are also asserting that the United States does not have the right to exclude the public from the riverbeds it owns. The national security implications of such a contention—unfettered walking and wading on riverbeds that cross the national laboratories and air force bases in New Mexico—would be immense.[15] Since it is beyond question that the United States has the right to exclude walking and wading on lands to which it retained title, it is also beyond question that that same right to exclude passed on to landowners who trace their title back to the United States.

* * *

[15] The amicus filings of New Mexico's Senators were surprising given the impact their arguments would have on National Security.

APPENDIX E

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 7 ANGLERS, A NON-PROFIT ORGANIZATION

v.

STATE GAME COMMISSION

and

CHAMA TROUTSTALKERS, LLC et al.

INTERVENORS-RESPONDENTS' BRIEF IN SUPPORT OF MOTION FOR REHEARING

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* * *

INTRODUCTION

* * *

A. Construing the New Mexico Constitution or other state law to impose a public easement on privately owned lands under or adjacent to non-navigable waters would violate the U.S. Constitution

If the Court were to construe New Mexico law to impose a public easement on privately owned lands under or adjacent to non-navigable public waters, as the questioning at oral argument suggested, that holding would violate the U.S. Constitution.

The private lands at issue in this matter—all of which lie either under non-navigable waters or potentially adjacent to non-navigable waters (since Petitioners seek access up to the high water mark)—trace title back to the United States. During the period in which title to those lands was vested in the United States, the lands could not have been subject to any public easement or other encumbrance, because the United States holds absolute title to its land. *See e.g. Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *and see Lux v. Haggin*, 10 P. 674 (Cal. 1886) ("The government of the United States has the absolute and perfect title to its lands."). Accordingly, for any lands transferred to private parties through federal land patent proceedings before New Mexico became a state in 1912, title passed unburdened by any public easement or other encumbrance, unless a particular parcel was made subject to such an encumbrance during the patent proceedings themselves. *See Summa Corp. v. California ex rel. State Lands Com'n*, 466 U.S. 198, 201 (1984).

Nor was the land transferred from the United States to private parties after New Mexico's ascension to statehood subject to any broad public easement, because statehood did not alter the United States' absolute title to that land. As Intervenors-Respondents explained in their merits brief, under the equal-footing doctrine, although title to the *waters* held by the United States was transferred to New Mexico upon statehood, "[t]he United States retain[ed] any title vested in it before statehood to any *land beneath waters* not then navigable." *PPL Montana*, 565 U.S. 576, 590-91; *see* Respondent-Intervenors' Merits Br. 6-7.[1] Thus, while New Mexico "retain[s] residual power to determine the scope of the public trust over waters within [its] borders," it is "federal law [that] determines riverbed title." *PPL Montana*, 565 U.S. at 604

For those reasons, privately owned land under or adjacent to non-navigable waters that traces title to the United States—whether transferred before or after statehood—could be subject to a public easement only if the patent proceedings for the particular parcel created such an easement. As the United States Supreme Court has explained, a state's claim to a public trust servitude "must have been presented in the federal patent proceeding in order to survive the issue of a fee patent." *Summa Corp.*, 466 U.S. at 201; *see id.* at 209 (holding that State couild not later assert "public trust easement" when it did not do so "in the patent proceeding").[2] But in this case, the record

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[1] The state holds title to the beds of navigable streams (as well as the thousands of miles of streambeds that are public land), so it is only the beds and banks of non-navigable streams that are at issue here.

[2] This principle was recognized by this Court in *H.N.D. Land Co. v. Suazo,* 1940-NMSC-061, ¶32, where the Court concluded

contains no evidence that during federal patent proceedings any of the lands at issue were made subject to an easement or other encumbrance that would allow the general public to walk and wade on those lands.[3] To the contrary, the chain-of-title documents for the five properties for which non-navigable water certificates have been issued show that they have never been subject to such an easement (and Petitioners have not contended otherwise).[4] Accordingly, when title to those lands was transferred from the United States to the private landowners (either before or after statehood), they were not subject to an easement in favor of public access.

Given the Court's questions at oral argument, however, it appears that the Court may have based its Order and Writ of Mandamus on the view that the New Mexico Constitution or some other provision of New Mexico law imposes a public easement allowing

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that title to land—which was first passed from the Mexican government to the United States and then passed from the United States to a private landowner via a land patent—"passed, of course, free of any trust in favor of anyone."

[3] Use of land by the public prior to statehood also cannot establish an easement, as any community use of land prior to the United States taking title was "simply a permissive use at the pleasure of the crown." *Bond v. Unknown Heirs of Barela*, 1911-NMSC-069. Title to community land passed to the United States and thus cannot give rise to an easement. *United States v. Sandoval*, 17 S.Ct. 868 (1897).

[4] Exhibit A to the Motion contains the chain of title documents for the five properties for which non-navigable waters certificates have been issued. These documents provide a small window into the varying ways in which landowners took title from the United States, and confirm that any claimed easement must be decided on a segment-by-segment basis by examining the actual documents establishing title.

walking and wading on lands below or adjacent to non-navigable waters (or that the Court should recognize such an easement for some other reason). But because such an easement did not encumber those properties at the time that they passed from the United States to private parties, any such holding would necessarily mean that New Mexico effected a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution—either through the enactment of the relevant provision of the New Mexico Constitution or some other provision New Mexico law that purportedly imposes such an easement or through a judicial taking, as explained in Respondent-Intervenors' merits brief. *See* Respondent-Intervenors Merits Br. 26.

There can be little question that a compelled easement is a taking. As Respondents-Intervenors explained in their merits brief, the U.S. Supreme Court has held that "'physical invasions constitute takings even if they are intermittent as opposed to continuous.'" Respondent-Intervenors Merits Br. 28 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021)). Applying that principle, the Supreme Court has repeatedly held that a compelled easement effects a taking. *See id.* at 2073-74 (discussing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)).

Accordingly, construing or changing New Mexico law to impose a public easement on privately held lands under or adjacent to non-navigable waters would violate the federal Takings Clause (as incorporated through the Fourteenth Amendment to the U.S. Constitution), as well as New Mexico's Takings Clause

(Art. II, § 20), given that the State has never compensated landowners for that diminution of their property rights. Depending on the basis for this Court's decision, either the particular constitutional or statutory provision construed to impose an easement would have constituted an unconstitutional taking at the time of its enactment or this Court would itself effect a judicial taking through its decision in this case. As the U.S. Supreme Court held in *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Id.* at 2167.[5] But for the reasons explained below, there is no good reason to modify New Mexico law to so sharply conflict with the U.S. Constitution.

* * *

[5] Moreover, to the extent that this Court's holding would mean that New Mexico imposed a public easement on lands held at the time by the United States, it would violate the Supremacy Clause of the U.S. Constitution.

APPENDIX F

West's New Mexico Statutes Annotated
Constitution of the State of New Mexico
Article XVI. Irrigation and Water Rights
(Refs & Annos)

Const. Art. 16, § 2

§ 2. Public waters subject to appropriation

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. S. A. 1978, § 17-4-6

§ 17-4-6. Hunting and fishing on private property; posting; penalty

Effective: July 1, 2015

* * *

C. No 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.

* * *

CODE OF NEW MEXICO RULES

Title 19. Natural Resources and Wildlife
Chapter 31. Hunting and Fishing Regulations
Part 22. Landowner Certification of Non-Navigable Water (Refs & Annos)

N.M. Admin. Code 19.31.22.1

19.31.22.1 ISSUING AGENCY

New Mexico State Game Commission.

19.31.22.2 SCOPE

Department, staff, and landowners whose private property contains within its boundary, a segment of non-navigable public water.

19.31.22.3 STATUTORY AUTHORITY

Section 17-1-14 NMSA 1978, Section 17-1-26 NMSA 1978, and Section 17-4-6 NMSA 1978, provide that the New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species.

19.31.22.4 DURATION

Permanent.

19.31.22.5 EFFECTIVE DATE

January 22, 2018, unless a later date is cited in the history note at the end of a section.

19.31.22.6 OBJECTIVE

To establish rules, requirements, definitions and regulations implementing the process for a landowner to be

issued 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, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.

19.31.22.7 DEFINITIONS

A. "Certified non-navigable public water" shall mean a segment of watercourse or river submitted to the department by a landowner which has met all requirements described in 19.31.22.8 NMAC and has been issued a certificate by the director, and approved by the commission.

B. "Commission" shall mean the New Mexico state game commission.

C. "Department" shall mean the New Mexico department of game and fish.

D. "Director" shall mean the director of the department of game and fish or designee.

E. "Landowner" shall mean any person or entity that has legal, record title to private property within the state of New Mexico.

F. "Navigable-in-fact" shall mean that a watercourse or river is navigable-in-fact when it was used at the time of statehood, in its ordinary and natural condition, 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. A navigable-in-fact determination shall be made on a segment by segment basis.

G. "Non-navigable public water" shall mean a watercourse or river which, at the time of statehood, was not navigable-in-fact. A watercourse or river is not

navigable-in-fact when it was not used at the time of statehood, in its ordinary and natural condition, 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. The certification on non-navigable public water shall be made by the director and approved by the commission on a segment by segment basis.

H. "Segment" shall mean the watercourse or river located within the boundaries of a landowner's private property.

19.31.22.8 LANDOWNER NON-NAVIGABLE PUBLIC WATER SEGMENT CERTIFICATION REQUIREMENTS

A. Application: An application by a landowner for certification of non-navigable public water on a segment by segment basis shall be made on a form or in a manner provided by the department as prescribed by the director. The form or manner shall be available to the public on or before February 2, 2018, via the department's website.

B. Contents: A landowner requesting certification of a non-navigable public water segment shall provide the following information:

(1) name of owner, address, telephone number, name of property or ranch, name of contact person authorized to grant written permission to access property;

(2) current recorded property deed(s) or other written, recorded instruments of title and a complete legal description of property(s); county; name(s) of non-navigable public water, stream or river on property; a map of sufficient size and detail to allow

the identification of potential access points to water and access roads to be located by someone unfamiliar with the area shall be included;

(3) proof of publication of notice of application for certification for three consecutive weeks in a newspaper of general circulation in the county where the property is located.

(4) substantial evidence which is probative of the waters, watercourse or river's being non-navigable at the time of statehood, on a segment-by-segment basis. This may include any reports to the US department of interior from the territorial governor(s) of New Mexico, any pre-statehood cases discussing the navigability or non-navigability of New Mexico's watercourses or rivers, any title opinion or other expert opinion, and any other evidence that may be probative.

C. Application acceptance: An application shall be accepted for further consideration if it includes the required contents without regard to the merits of the application. An application shall not be refused for technical reasons. Refused applications may be amended, supplemented, and resubmitted and then reconsidered by the department and director in accord with the deadlines set forth herein for an original application. Refused applications can be appealed.

D. Application deadline: A landowner may engage in the certification process at any time by completing and submitting the proper application form. A refused application is without prejudice.

19.31.22.9 WRITTEN DETERMINATION AND RECOMMENDATION BY DIRECTOR AND DESIGNATION OF NON-NAVIGABLE PUBLIC WATER STATUS

A. An accepted application shall be forwarded by the department to the director so that a determination can be made by the director whether the application meets the requirements set forth in 19.31.22.8 NMAC.

B. The director shall have 60 days to make a written determination and recommendation or a written rejection to the commission.

(1) If the director determines that the application meets the requirements set forth in 19.31.22.8 NMAC, the director's shall issue a written determination and recommendation to the commission that the segment in the application shall be designated a "non-navigable public water," stating the reasons for written determination and recommendation, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director issues a written determination and recommendation to the commission, for final vote of approval by the commission.

(2) If the director determines that the application does not meet the requirements set forth in 19.31.22.8 NMAC, the director shall issue a written rejection of the application stating the reasons for rejection, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director

issues a written rejection, for final vote of approval by the commission.

C. The department shall post on its website, the director's recommendation to the commission at least 21 days before regular or special meeting at which the application will be presented to the commission.

19.31.22.10 NOTICE OF WRITTEN DETERMINATION AND RECOMMENDATION OF NON-NAVIGABLE PUBLIC WATER STATUS

The posting of the written determination and recommendation by the director of proposed certification of non-navigable public water on the commission's agenda or written rejection for final vote and approval shall serve as notice of the commission's intent to take final action on the application and written determination and recommendation or written rejection of the director.

19.31.22.11 MEETING PROCEDURES

A. The commission shall make and preserve a record of the meeting.

B. Comments and proposed documentary evidence of the landowner, persons with standing, and the general public shall only be taken in writing and in a written format; this format will allow for comments and proposed documentary evidence to be submitted electronically as stated in the notice of meeting or the agenda. There shall be no oral or verbal comment from the landowner, persons with standing, and the general public at the meeting. There shall be no exception to this rule except upon good cause shown and at the sole discretion of the chairman.

C. The comment period closes 14 days before the meeting at which the application will be considered for final action by the commission.

D. Final action may be postponed or continued at the discretion of the commission but in no event shall a final determination as required in Subsection B of 19.31.22.9 NMAC exceed the 180 day deadline.

E. The director shall provide copies of the application and supporting documentation and all comments and proposed documentary evidence to the commission members at least seven days before the meeting at which the application will be considered for final action by the commission. The same information shall be posted on the department website at least seven days before the meeting at which the application will be considered for final action by the commission.

F. In a meeting held under this section, the chairman may admit any evidence, in his or her sole discretion, which is probative of the issues. The chairman may exclude, in his or her sole discretion, incompetent, irrelevant, immaterial and unduly repetitious evidence. Proposed documentary evidence may be received in the form of copies or excerpts. The commission may take notice of well-known, cognizable facts.

G. The commission may take final action on the application by approving or rejecting the written determination and recommendation or written rejection of the director but is not limited to those options. The commission may take such other final action as necessary to resolve the application, including but not limited to determining and finding that a segment be designated a non-navigable public water.

H. Within 60 days of the meeting, the commission shall issue its written final agency action and decision

with the factual and legal basis for that decision. A copy of that decision will be given to all persons who were a party in the proceeding and every person who has filed a written request for notice of the final decision of that specific application.

19.31.22.12 JUDICIAL REVIEW

A landowner having made application under this rule or a person with standing may appeal to the district court for relief in accordance with Section 39-3-1.1 NMSA 1978. Any appeal may not be filed more than 30 days after issuance of the written final agency action and decision. Any appeal filed outside that 30 day period is untimely. Upon appeal, the district court shall set aside the action and decision only if it is found to be:

A. fraudulent, arbitrary, or capricious;

B. not supported by substantial evidence in the record; or

C. otherwise not in accordance with the law.

19.31.22.13 FINAL VOTE AND APPROVAL BY COMMISSION AND EFFECT THEREOF

A. If the commission votes to approve the director's determination that a segment be designated a non-navigable public water or otherwise votes to determine and find that a segment be designated a non-navigable public water and issues a written final agency action and decision indicating the segment identified in the application or any portion thereof is now a "certified non-navigable public water", a certificate shall be issued by the director immediately following the issuance of the written final agency action and decision indicating the segment identified in the application, or any portion thereof identified by the commission,

is now a "certified non-navigable public water". The certificate shall include sufficient information for recording purposes with the various county clerks of the state of New Mexico and shall be in a format sufficient for recording purposes with the various county clerks of the state of New Mexico. The certificate and certification shall run with the segment, the land, and the real property.

B. The certificate formally recognizes that the segment and certain waters found on the private property are non-navigable public waters and therefore trespass on private property through non-navigable public water or via accessing public water via private property is not lawful unless prior written permission is received from the landowner in accordance with Section 17-4-6 NMSA 1978.

C. Landowners that receive an actual certificate are eligible to receive a sufficient number of signs for a reasonable fee. The fee is to fully compensate the department for the cost of sign production. The posting of signs and the addition of contact information written or adhered to the sign will be the responsibility of the applicant.

D. Sign requirements:

(1) Signs shall be at least 144 square inches (12 inches by 12 inches)

(2) Signs shall be printed in English and Spanish.

(3) Signs shall state the following prohibitions in accord with Subsection C of Section 17-4-6 NMSA 1978. Hunting and fishing on private property; posting; penalty: No 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.

(4) Signs shall have the name and address of a person authorized to grant permission.

E. Sign posting requirements:

(1) Signs shall be posted in at least six conspicuous places on the property.

(2) Signs shall be posted along all the exterior boundaries of the property.

(3) Signs shall be posted at each roadway or other way of access in conspicuous places.

(4) Signs shall be posted where water line crosses all property boundaries.

(5) Signs shall be posted every 500 feet along the exterior boundaries if property is not fenced.

(6) Signs shall not be posted on any public land or any easements that the department or commission has acquired.

F. Effect of signage: A sign issued in accordance with this rule and meeting the requirements of this rule is prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass and related laws, rules, and regulations

New Mexico Register/Volume XXXIII, Issue 6/ March 22, 2022

GAME AND FISH DEPARTMENT

The State Game Commission voted to repeal 19.31.22 NMAC, Landowner Certification of Non-Navigable Waters on an emergency basis due to the New Mexico Supreme Court decision in Adobe Whitewater Club v. N.M. State Game Commission, S-1-SC-38195). The emergency basis for the State Game Commission vote was in accordance with emergency rule provisions in 14-4-5.6 NMSA (1978). (filed 1/2/2018), effective 3/2/2022.

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GAME AND FISH DEPARTMENT FISHERIES MANAGEMENT

On March 1, 2022 the New Mexico Supreme Court issued an opinion that 19.31.22 NMAC is unconstitutional. As such, the New Mexico State Game Commission voted to repeal the entire rule on an emergency basis that same day. The State Game Commission voted to permanently repeal 19.21.22 NMAC on August 19, 2022 as directed by the State Supreme Court.