IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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. No. S-1-SC-38195

HONORABLE, MICHELLE LUJAN GRISHAM, Governor, and STATE GAME COMMISSION,

Respondents.

SENATOR TOM UDALL AND SENATOR MARTIN HEINRICH'S NOTICE OF CONDITIONALLY FILED PROPOSED MEMORANDUM BRIEF AS AMICI CURIAE

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On April 27, 2010, United States Senators Tom Udall and Martin Heinrich filed a motion with the Court for leave to file a memorandum brief as amici curiae. At the time, they requested leave to file their amicus brief within seven days of the date the Court enters an order on their motion. *See* Rule 12-320(A) ("The brief shall be conditionally filed with the motion for leave, unless otherwise ordered by the Court."). As of today, however, their amicus brief is fully prepared. Senators Udall and Heinrich attach that brief to this notice for conditional filing so it will be available without delay should the Court allow them to participate as amici.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was submitted for e-filing and service through the District Court's "Odyssey File & Serve" filing system this 5th day of May, 2020, which caused counsel of record to be served by electronic means or as otherwise stated, as more fully reflected on the Notification of Service.

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STATEMENT OF COMPLIANCE

The body of Senator Tom Udall and Senator Martin Heinrich's Memorandum Brief as Amici Curiae uses a proportionally-spaced typeface (Times New Roman), contains 3854 words, as counted by Microsoft Word, Version 2004 (Build 12730.20236 Click-to-Run), and thus complies with the limitations of Rule 12-320(E) NMRA and Rule 12-504(G)(3).

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INTRODUCTION

New Mexico has a long history of protecting public access to natural resources. A critical piece of that history is the Court's recognition 75 years ago that, under the New Mexico Constitution, even "small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks." *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 48, 51 N.M. 207 (internal quotation marks omitted).

As New Mexicans and as U.S. Senators representing this state, Tom Udall and Martin Heinrich submit this amicus brief to encourage the Court to continue enforcing that clear rule. *Amici* have spent decades working to protect and expand public lands here in New Mexico and throughout the nation. They recognize that New Mexico's wild areas, including its streams and watercourses, are among its greatest assets. And their work has laid bare problems in the federal system that arise because clear rules protecting public access do not exist. While *amici* have helped gain access to large tracts of previously landlocked federal lands, each step forward has taken years, if not decades, and millions of acres of federal land remain inaccessible.

This Court's adherence to a bright-line rule preventing private landowners from excluding people from streams and watercourses has protected New Mexico

from the access problems that plague federal lands. If the Court were to abandon the *Red River Valley* rule in favor of a new regime that ties access to a federal standard of "navigability" and title to streambeds, then fences and threats of "trespass" would exclude the public from streams and watercourses throughout New Mexico.

ARGUMENT

I. PUBLIC LAND AND WATER ARE AMONG NEW MEXICO'S MOST IMPORTANT ASSETS.

There is a reason the New Mexico Constitution preserves the public's right in water, including access to streams and watercourses. This is a state that is fortunate to enjoy an abundance of one of the country's greatest assets – open lands, free flowing streams, and wilderness areas. Capturing the essence of this, President Theodore Roosevelt cautioned: "There are no words that can tell the hidden spirit of the wilderness, that can reveal its mystery, its melancholy and its charm. The nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased and not impaired in value." U.S. Dep't of Interior, *Theodore Roosevelt's Legacy* (quoting Theodore Roosevelt), *available at* https://www.doi.gov/blog/theodore-roosevelts-legacy (last visited Apr. 28, 2020).

New Mexico's streams and watercourses are essential to that asset, but they also are particularly vulnerable given the scarcity of water here. N.M. Envt. Dep't,

Comments on proposed rulemaking by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) defining the scope of waters federally regulated under the Clean Water Act (April 15, 2019), https://www.env.nm.gov/wp-content/uploads/2019/04/2019-04-15-Final-NMED-WOTUS-Comments-v2.pdf (highlighting that New Mexico is one of the driest states with an average of less than twenty inches of annual precipitation). By preserving the public's access to that limited resource – including for recreational purposes ranging from fishing and wading, to kayaking, rafting, and canoeing – the state has ensured its streams and watercourses can be used by everyone rather than the few who have the resources to buy up land. The Game Commission regulation at issue in this case threatens that access and the important contribution outdoor recreation makes to local economies.

II. IN THE ABSENCE OF A FEDERAL RULE PROTECTING ACCESS, THE PUBLIC STILL CANNOT USE MILLIONS OF ACRES OF FEDERAL LANDS.

Senators Udall and Heinrich have worked on federal lands issues in New Mexico and nationally for decades. Together, they have secured federal protection for more than a million acres of federal land across the state.[1] Through their work

[1] *See, e.g.*, Proclamation No. 8946, 3 C.F.R. § 8946 (2013 designation of Rio Grande del Norte National Monument giving protected status to over 240,000 acres of land in northern New Mexico that includes the "wild and scenic" portions of the Rio Grande and Red River); Proclamation No. 9131, 3 C.F.R. § 9131 (2014

on these issues, they have witnessed the intractable problems that exist because there is no clear rule protecting public access to federal lands. With no protected right of access under federal law, millions of acres of public land across the country remain inaccessible today.

The Government Accounting Office (now the Government Accountability Office) documented the scope of the problem in a 1992 report. U.S. Gov't Accounting Off., GAO-RCED-92-116BR, *Federal Lands: Reasons for and Effects of Inadequate Access* (1992), https://www.gao.gov/assets/80/78367.pdf (GAO Access Report). Of nearly 700 million acres of federal land in the United States at that time, about 465 million acres were managed by the Forest Service and BLM. *Id*. at 2. Looking only at the land those agencies managed in the contiguous 48 states, there was inadequate access to 50.4 million acres. *Id*. As the GAO noted, "[t]his is land that provides valuable resources – including timber, water, minerals, energy reserves, and livestock forage – and valuable uses – including wildlife

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designation of Organ Mountains-Desert Peaks as a national monument, protecting almost 500,000 acres in the starkly beautiful Chihuahuan Desert in southern New Mexico); John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1202 (2019) (securing permanent wilderness status for the Cerro del Yuta and Rio San Antonio Wilderness Areas within Rio Grande del Norte National Monument and 10 areas within Organ Mountains-Desert Peaks comprising approximately 240,000 acres, creating the Ah-shi-sle-pah Wilderness Area, and expanding the Bisti-De-Na-Zin Wilderness).

habitats, wilderness experiences, and recreational opportunities." *Id*. Most is located in the West. *Id.* at 17-18.

The GAO identified a significant contributing factor to the problem – the increase in "private landowners' unwillingness to grant public access across their land." *Id*. at 16. That is borne out by examples of landowners gaining functional control over large tracts of federal public land across the country by purchasing property abutting that public resource.

While progress has been made since the GAO issued its report, there are still millions of acres of federal land the public cannot access. In fact, a 2018 joint study by the Theodore Roosevelt Conservation Partnership and mapping technology company onX identified 9.52 million acres of landlocked federal lands in the western United States – an area larger than New Hampshire and Connecticut combined – with 554,000 acres of landlocked federal lands in New Mexico alone. *See* The Theodore Roosevelt Conservation Partnership and onX, *Off Limits, But Within Reach: Unlocking the West's Inaccessible Public Lands* (2018), https://www.trcp.org/wp-content/uploads/2019/02/TRCP-onX-Landlocked-Report-8-26-2018.pdf.

New Mexico certainly has not been immune from land access problems. Public access to the ruggedly beautiful Sabinoso Wilderness in northeast New Mexico was blocked for years until Senators Udall and Heinrich helped lead a

coalition that convinced the U.S. Department of Interior to secure access by accepting a donation of private land adjacent to the wilderness area in 2017. U.S. Dep't of Interior, *Secretary Zinke Supports Acceptance of 3,595 Acres of Wilderness* (Aug. 9, 2017), https://www.doi.gov/pressreleases/secretary-zinke-supports-acceptance-3595-acres-wilderness-sportsmens-access-sabinoso. And this Court had to step in to resolve a longstanding dispute that arose in the absence of a clear rule preserving the public's right of access to state trust lands. *See State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶¶ 1-4, 145 N.M. 769 (holding 12 years after private ranch gated off a road that the public had a right of access to state trust lands through the blocked road).

Work to resolve federal access to public lands continues, including through further efforts to clearly identify the exact scope of the problem. Most recently, Senator Heinrich introduced a bill signed into law in March 2019 that requires each federal public land agency to develop and update, in consultation with local stakeholders, a priority list of inaccessible public lands under their management and the steps necessary to secure public access. *See* Pub. L. No. 116-9, § 4105.

But the reason the problem lingers is clear: With no rule securing a right of access to federal lands, the federal government must spend years or decades creating permanent, legal public access. Underscoring the difficulty of the piecemeal approach this requires, the GAO report noted that the federal

government was pursuing ***3,300 access actions*** in order to provide access to 9.3 million acres. *See* GAO Access Report, at 28.

III. NEW MEXICO HAS AVOIDED THESE PROBLEMS WITH STREAMS AND WATERCOURSES BY ENFORCING A CLEAR CONSTITUTIONAL RULE THAT PROTECTS THE PUBLIC'S RIGHT OF ACCESS.

New Mexico has not been plagued with similar fights over access to public water because of the rule – firmly grounded in the state's constitution and history – that protects the public's right to access streams and watercourses so long as they can be reached without trespassing on surrounding private property. *Red River Valley Co.*, 1945-NMSC-034, ¶ 48.

The *Red River Valley* rule is grounded in Article 16, Section 2 of the New Mexico Constitution, which provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

As the Court found in *Red River Valley*, "this constitutional provision is only 'declaratory of prior existing law,' always the rule and practice under Spanish and Mexican dominion." 1945-NMSC-034, ¶ 21. In fact, "by the Mexican law in force here at the time the United States acquired the territory, the use of the water of the streams was not limited to riparian lands, but extended to others, subject to regulation and control by the public authorities." *Id.* ¶ 34 (quoting *Hagerman Irr.*

Co. v. McMurry, 1911-NMSC-021, ¶ 6, 16 N.M. 172). And before Spanish and Mexican rule, the rights of the public to access water can be traced to "the law of Indian tillers of the soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems." *Id.*[2]

The public's right of access never has been limited to "navigable" rivers. Rather, it was settled law at the time of statehood that:

> 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. ***A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.***

NMSA 1978, § 72-1-1 (1907 as amended through 1953) (emphasis added); N.M. Const. art. XXII, § 4 ("All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts,

[2] The United States Congress had specific concerns about private exploitation of public resources in New Mexico that led it to impose limitations on the state's authority to transfer public lands as a condition of statehood. *See Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 463-64 (1967) (discussing the "fear that the trust would be exploited for private advantage," based on "repeated violations of a similar [land] grant made to New Mexico in 1898"). Other provisions of the New Mexico Constitution also protect the public against state actions that favor private interests, including the anti-donation clause. N.M. Const. art. IX, § 14.

liabilities and obligations, shall continue and remain unaffected by the change in the form of government.").

Given this history, the Court in *Red River Valley* specifically refused to limit the state's authority to protect public access to streams and watercourses to "navigable" water. 1945-NMSC-034, ¶¶ 35-36 ("Navigability, perhaps the earliest test by which the public character of water was fixed, is not the only test to be applied."). The Court held that Article 16, Section 2, instead provides a right of public access to streams and watercourses that is no "less secure in the public because [the Court] determine[d] their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect." *Id.* ¶ 37.[3] In application, this meant that, although a landowner had title to the land underneath and on both sides of Conchas Lake, the public retained the right to fish the lake so long as it gained access without trespassing on private property along the shores. *Id.* ¶¶ 32, 56.

The regulation the Game Commission adopted at the end of the last administration directly conflicts with *Red River Valley* by purporting to supplant

[3] Because *Red River Valley* rested its analysis in part on Spanish and Mexican law, the public property right of access to public waters is protected not only by Article 16, Section 2, but also by Article 2, Section 5. *See* N.M. Const. art. II, § 5 ("The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate."); Treaty of Guadalupe Hidalgo, art. VIII (preserving existing property rights "of every kind" held by those living in the ceded territory).

New Mexicans' traditional, constitutionally protected right of access to streams and watercourses with the same navigability standard the Court already rejected. *See generally* 19.31.22 NMAC (2018). The Court instead should enforce the longstanding *Red River Valley* rule and strike down the Game Commission regulation as unconstitutional.

IV. THERE IS NO JUSTIFICATION FOR EXCLUDING THE PUBLIC FROM STREAMS AND WATERCOURSES BASED ON "NAVIGABILITY" OR TITLE TO STREAMBEDS.

If allowed to stand, the reach of the Game Commission regulation cannot be overstated. The regulation would allow private landowners to deny public access to any "non-navigable public water," which is defined to include any "watercourse or river" 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 NMAC. Even the Rio Grande does not meet that standard. *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) ("Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water."). And landowners already have submitted applications under the Game Commission regulation to

establish a right to deny the public access up and down the Chama River, Rio Chamita, Pecos River, Mimbres River, Alamosa River, and Penasco River. Pet. Appx. IV.

The choice between enforcing the *Red River Valley* rule or abandoning it in favor of the Game Commission regulation therefore is stark. The former will allow the people of New Mexico to continue enjoying streams as they have throughout our history. The latter will lead to landowners gouging streams and watercourses across the state with warning signs and fences like this: [4]

[4] This photo is an example of a stream that, but-for the hazard posed by the two fences landowners have installed, could be fished or floated by the public. It should not be missed that upending *Red River Valley* with the Game Commission rule poses a threat to the public's ability to access streams and watercourses for uses beyond fishing and wading. Any rule that treats as a trespass contact with

There is no reason public access ever should be tied to "navigability" or streambed title in New Mexico. To the contrary, the United States Supreme Court has recognized that each state has the authority to resolve for itself local water issues, including public access to streams and rivers, and the public's right of public access in New Mexico is firmly grounded in the state's constitution and history.

Federal standards of "navigability" have been used in a variety of unrelated contexts, including "for purposes of assessing federal regulatory authority under the [United States] Constitution, and the application of specific federal statutes, as to the waters and their beds." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012). The Game Commission regulation parrots the navigability standard from federal cases that has not changed since at least the 1870s. *See The Daniel Ball*, 77 U.S. 557, 563 (1870). As such, the regulation sets up a direct conflict with *Red River Valley* by adopting the same test this Court refused to use to determine the scope of public access to New Mexico streams and watercourses. 1945-NMSC-034, ¶¶ 35-36.

The United States Supreme Court's decision in *PPL Montana* makes it clear that New Mexico is free to decide for itself whether to recognize a public right to

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streambeds or other objects underneath or abutting from public water quickly will be used to also exclude rafts, kayaks and canoes.

access streams or watercourses, and how broad or narrow that right should be. Writing for the Court, Justice Kennedy first applied the federal "navigability" test to determine that, because the federal government retained title, the State of Montana could not charge power companies rent for plants located on certain riverbeds. 565 U.S. at 580, 603-05. He went on to explain, however, that separate from the question of title, each state retains the authority to determine the scope of the public trust over waters within its borders. *Id*. at 603-04 ("Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."). That authority includes the right to determine "public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses." *Id.* at 603.

Like New Mexico, Montana has exercised its trust authority to protect the public's right of access to streams and rivers regardless of navigability or title to streambeds. Mont. Const. art. IX, § 3 (1889); Mont. Code Ann. § 23-2-302(1) (1985, as amended through 2015); *see also Mont. Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984) ("[W]e hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability issues."). The *PPL Montana* decision did nothing to

disturb that right, and "navigability" and title do not control the Court's analysis here for the same reasons.

New Mexico recognizes its public trust responsibilities and authority. *State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶ 11, 55 N.M. 12 ("The public waters of this state are owned by the state as trustee for the people."); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 13 (New Mexico courts "have recognized that common law public trust principles apply in the context of public waters"). And in this circumstance, the New Mexico Constitution requires the state to protect the public trust by preserving access. N.M. Const. art. XVI, § 2. Private title to land under New Mexico streams and watercourses therefore necessarily is limited by the public's superior right of access. *Red River Valley*, 1945-NMSC-034, ¶ 37.[5]

That the public's right of access to streams and waterways is a constitutional right also ensures that it would remain intact even if the Legislature attempted to abrogate it by statute. After all:

[5] Utah also has recognized a public right of access that is not restricted by title to streambeds. *See, e.g., Utah Stream Access Coalition v. VR Acquisitions, LLC*, 439 P.3d 593, 601 (Utah 2019) ("Because the public has an unquestioned right to use the water of the state themselves (even non-navigable ones), that right may also encompass an easement to touch the streambeds of those waters." (internal citations omitted)). Because that right was not grounded in Utah's constitution, however, its scope was subject to amendment by the Utah Legislature. *Id.* at 610.

> [S]tate constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.

El Castillo Ret. Residences v. Martinez, 2017-NMSC-026, ¶ 26 (alteration in original) (quoting *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 20, 120 N.M. 562). Here, the Game Commission claimed the authority to adopt 19.31.22.6 NMAC based on NMSA 1978, § 17-4-6 (2015). Petitioners already have highlighted the fundamental problems with that argument. Pet. at 6-7; Reply Br. at 2-6 (conditionally filed). But even if the Court were to disregard those problems entirely, a statute purporting to allow landowners to deny the public access to streams and watercourses would violate the state constitution just as surely as a regulation. *El Castillo Ret. Residences*, 2017-NMSC-026, ¶ 26.[6]

[6] As the current Attorney General recently advised the Game Commission, N.M. Att'y Gen. Mem. to N.M. Game Commission (Sep. 17, 2019) (Pet. Appx. V.), the constitutional defect in Section 17-4-6(C) can be avoided by reading the statute to conform to *Red River Valley* (i.e., while a person has a right to access a stream or watercourse, she or he may not trespass over adjoining private land to reach the water or trespass from the stream or watercourse onto adjoining private land). *See* NMSA 1978, § 12-2A-18(A)(3) (1997) ("A statute or rule is construed . . . [to] avoid an unconstitutional, absurd or unachievable result."); *El Castillo Ret. Residences*, 2017-NMSC-026, ¶ 25 ("A statute must be interpreted and applied in harmony with constitutionally imposed limitations."). That interpretation is consistent with the language of the statute. NMSA 1978, § 17-4-6(C) ("No person

CONCLUSION

The Game Commission regulation violates the New Mexico Constitution and threatens to put in the hands of a small number of landowners the power to deny access to streams and watercourses that the people of this state have enjoyed for generations. By recognizing in *Red River Valley* that public access is protected as a matter of constitutional right and historical law, the Court avoided difficult problems that *amici* have confronted in trying to open up federal lands. Abandoning the *Red River Valley* rule will invite those problems into the state. Senators Tom Udall and Martin Heinrich ask that the Court continue to enforce New Mexicans' right of access to streams and watercourses and strike down the Game Commission regulation as unconstitutional.

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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.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was submitted for e-filing and service through the District Court's "Odyssey File & Serve" filing system this 5th day of May, 2020, which caused counsel of record to be served by electronic means or as otherwise stated, as more fully reflected on the Notification of Service.

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