



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 BACK COUNTRY HUNTERS &
ANGLERS, a non-profit organization,**

Petitioners,

v.

STATE GAME COMMISSION,

Respondent,

and

CHAMA TROUTSTALKERS, LLC, et al.

Intervenors-Respondents.

RESPONDENT STATE GAME COMMISSION'S ANSWER BRIEF

Cuddy & McCarthy, LLP

AARON J. WOLF
Post Office Box 4160
Santa Fe, New Mexico 87502-4160
(505) 988-4476 // FAX 888-977-3814
Toll Free 866-679-4476
awolf@cuddymccarthy.com

TABLE OF CONTENTS

Table of Contents2

Table of Authorities3

Background4

Argument.....5

 I. The Game Commission had the legal obligation to promulgate the Rule
 consistent with its statutory authority, but now finds that the Rule is inconsistent
 with the State Constitution.5

 II. The Court must examine the Rule to decide whether the rule violates the
 Constitution.6

Conclusion7

TABLE OF AUTHORITIES

	Page(s)
Statutes	
Chapter 17 NMSA 1978	7
NMSA 1978 § 17-1-2	7
NMSA 1978, Section 17-4-6	6
NMSA 1978, §§ 17-1-1	7
Section 17-4-6(C).....	6, 8
Constitutional Provisions	
Article 16 Section 2 of the New Mexico Constitution	8

BACKGROUND

This matter stems from a challenge to a regulation implemented by the New Mexico Game Commission (“Commission”) to comply with NMSA 1978, Section 17-4-6. In 2015, the Legislature amended 1978, Section 17-4-6. The relevant amendments were to Section 17-4-6(C) prohibiting the trespass on private property by public water, and prohibiting trespass onto private property to access public water. Following the statutory amendment, the Commission promulgated Rule 19.31.22 NMRA (The “Rule”). The Rule became effective January 22, 2018. Pursuant to the Rule, the Commission approved five applications for “certifications of non-navigability”, thereby empowering the landowner applicants to deny public access to waterways on their property. After the approval of the five applications, the composition of the Commission has changed. Several of the Respondent-Intervenors are private landowner applicants that applied for certificates of non-navigability under the Rule. However, because the current Commission has had grave concerns regarding the constitutionality of the Rule, with support from the New Mexico Attorney General, the Commission ceased to hold hearings on the applications. Several landowners sued the Commission and individual Commissioners in *Rancho Oso Pardo Inc., et al. v. N.M. Game Comm’n et al.*, CIV 20-427SCY/KK. After being ordered by the federal judge in that matter to conduct the hearings on the pending applications, pursuant to the Rule, the Commissioners

held public hearings on Intervenors’ applications on August 12, 2021. The Commission entered decisions to deny each of the applications, with no dissenting votes on September 2, 2021. Those Decisions are the subject of appeals currently pending in the First Judicial District Court.

ARGUMENT

I. The Game Commission had the legal obligation to promulgate the Rule consistent with its statutory authority, but now finds that the Rule is inconsistent with the State Constitution.

The Commission, by its decision to 1) initially delay hearings on applications for certificates of non-navigability until subject to court order, and 2) deny the applications, generally adopts the arguments and reasoning of Petitioners’ Brief in Chief. The State has plenary authority to regulate the use of water. The legislature delegated the authority with respect to recreational use of water to the Commission. The Legislature created the Game Commission to “carry out the purpose of Chapter 17 NMSA 1978 and all other acts for like purpose.” NMSA 1978 § 17-1-2. The Commission’s duty is to “provide an adequate and flexible system for the protection of game and fish of New Mexico and for their propagation, planting, protection, regulation, and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico.” NMSA 1978, §§ 17-1-1 through 2. The legislature also granted the Commission the broad regulatory authority “to make such rules and

regulations and establish such service as it may deem necessary to carry out all the provisions and purposes of this act, and all other acts relating to game and fish.” When the legislature amended Section 17-4-6(C), the Commission was required to promulgate the Rule which effectuates the statutory mandates of the legislature.

While the Commission was required to promulgate the Rule, the new Commissioners sought guidance from the Attorney General’s Office regarding whether the Rule conflicted with Article 16 Section 2 of the New Mexico Constitution. That Opinion concluded that Article 16 Section 2 does not allow the Rule to be applied to exclude recreational use of public water running through private land when the public water is accessed without trespassing over private land. The Commission generally agrees with the Opinion that the Rule is in conflict with the New Mexico Constitution and statutory and case law. The Commission cited its concerns in denying each of the applications on August 12, 2021. The delay in holding hearings and the Commission’s decisions and reasoning in denying the applications show that the Commission believes there are issues with the Rule. The Commission had intended to institute proceedings in rule-making to strike or modify the Rule; however the Commission decided to wait, given the pending litigation in federal, state district court, and the Supreme Court.

II. The Court must examine the Rule to decide whether the rule violates the Constitution.

The Commission respectfully submits that the Court must decide the constitutionality of the Rule now before it. The current Commission has differing opinions regarding the constitutionality of the Rule than the previous Commission. The current Commissioners generally agree that, based on the guidance of the Attorney General, the Rule violates the state constitution. In three years or less, there will be yet a new Commission constituting different Commissioners that could interpret the Rule in another way. The Commission requests that the Supreme Court issue an opinion so that the Commissioners could hold a new rule making consistent with the opinion.

CONCLUSION

The Commission respectfully requests that the Supreme Court issue an opinion on the Rule, and rule that the Regulation violates the State Constitution, so that the Commissioners could then hold a new rule making consistent with the Opinion.

Respectfully submitted,

CUDDY & McCARTHY, LLP

By: /s/ Aaron J. Wolf
AARON J. WOLF
Attorneys for Respondent State Game
Commission
Post Office Box 4160
Santa Fe, New Mexico 87502-4160

(505) 988-4476 // FAX 888-977-3814
Toll Free 866-679-4476
awolf@cuddymccarthy.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing “*Respondent State Game Commission’s Answer Brief*” was emailed via the Court’s Odyssey system to the following counsel of record on the 19th day of January, 2022:

J. E. Gallegos, Esq.
Gallegos Law Firm, P.C.
jeg@gallegoslawfirm.net

Seth T. Cohen, Esq.
scohen@colawnm.com

Michael Condon
Gallegos Law Firm, P.C.
mjc@gallegoslawfirm.net

Attorneys for Petitioners

Mark T. Baker, Esq.
Matthew E. Jackson, Esq.
Rebekah A. Gallegos, Esq.
mbaker@peiferlaw.com

Logan Glasenapp, Esq.
logan@nmwild.org

*Attorney for Prospective
Amicus Curiae*

*Attorneys for Senator Tom Udall and
Senator Martin Heinrich*

Marco E. Gonzales
meg@modrall.com

Tania Maestas,
Deputy Chief Attorney General
tmaestas@nmag.gov

Jeremy K. Harrison
jkh@modrall.com

Attorneys for State Game Commission

Attorneys for Intervenors

/s/s/ Aaron J. Wolf

Aaron J. Wolf