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.

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

No. S-1-SC-38195

ANSWER BRIEF OF INTERVENORS-RESPONDENTS

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TABLE OF CONTENTS

Statement of Compliance iii

Table of Authorities iv

INTRODUCTION 1

DISCUSSION 2

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 2

A. The Rule does not allow the closure of public waters 2

B. The Rule does not privatize waters or their beds or create private fisheries 4

C. It is well-established that stream and riverbeds below non-navigable waters can be privately owned 6

D. The right to exclude trespassers on privately owned riverbeds is settled law 9

E. The public owns the waters and can use them for any purpose that does not require trespass on private land 14

F. Out-of-state authority relied on by Petitioners does not support a taking of private property owners‘ right to exclude 22

G. Altering the settled property rights would constitute a judicial taking 26

II. AN EXTRAORDINARY WRIT OF MANDAMUS IS INAPPROPRIATE BECAUSE THIS CASE DOES NOT FIT WITHIN THE NARROW CIRCUMSTANCES UNDER WHICH THIS EXTRAORDINARY REMEDY IS TO BE USED 30

A. The petition does not concern the non-discretionary duty of a government official 31

B. The issue is not a fundamental question of great public concern 32

C. Fact finding is required for proper adjudication of the issues presented by Petitioners 33

D. Petitioners' challenge to the Rule does not require expeditious resolution and can be obtained through other more ordinary avenues 36

E. Petitioners lack standing as they have no cognizable injury 38

F. The Court should decline to exercise its original jurisdiction 39

III. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS HAVE ABANDONED A CENTRAL ARGUMENT IN THEIR PETITION AND HAVE IMPERMISSIBLY EXPANDED THE RELIEF THEY ARE SEEKING 41

A. Petitioners have abandoned their theory that the Commission lacked authority to promulgate the Rule 41

B. Petitioners impermissibly seek more in their Brief than they placed at issue with their Petition 41

CONCLUSION 43

CERTIFICATE OF SERVICE .....

STATEMENT OF COMPLIANCE

As required by Rule 12-318(G), we certify that the brief complies with the Type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of this brief, as defined by Rule 12-318(F)(1) contains 11,000 words.

TABLE OF AUTHORITIES

New Mexico Cases

ACLU of N.M. v. City of Albuquerque
2008-NMSC-045, 144 N.M. 471 38

Anaconda Co. v. Prop. Tax Dep't
1979-NMCA-158, 94 N.M. 202 19

Asplund v. Alarid,
1923-NMSC-079, 29 N.M. 129 38

Asplund v. Hannett,
1926-NMSC-040, 31 N.M. 641 38

Barreras v. State of New Mexico Corr. Dep't
2003-NMCA-027, 133 N.M. 313 18

Blount v. T D Pub. Corp.
1966-NMSC-262, 77 N.M. 384.....19

Bounds v. State ex rel. D'Antonio
2013-NMSC-037 21

Cmty. Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n
1966-NMSC-053, 76 N.M. 314 19

City of Farmington v. Fawcett
1992-NMCA-075, 114 N.M. 537 19

Cockrell v. Bd. of Regents of New Mexico State Univ.
2002-NMSC-009, 132 N.M. 156.....20

D'Avignon v. Graham
1991-NMCA-125, 113 N.M. 129 21

Fikes v. Furst
2003-NMSC-033, 134 N.M. 602 43

Laumbach v. Bd. of Cty. Comm'rs of San Miguel Cty.
1955-NMSC-096, 60 N.M. 226 42

Lee v. Martinez
2004-NMSC-027, 136 N.M. 166 42

McNeill v. Rice Eng'g & Operating, Inc.
2010-NMSC-015 10

Old Abe Co. v. New Mexico Min. Comm'n
1995-NMCA-134, 121 N.M. 83 16

Pierce v. State
1996-NMSC-001, ¶17, 121 N.M. 212 27

Sanders-Reed ex rel. Sanders-Reed v. Martinez
2015-NMCA-063 20

State v. Candelaria
2011-NMCA-001, 149 N.M. 125 19

State v. Druktenis
2004-NMCA-032, 135 N.M. 223 19

State ex rel. Coll v. Johnson
1999-NMSC-036, 128 N.M. 154 32

State ex rel. Clark v. Johnson
1995-NMSC-048, 120 N.M. 562 32

State ex rel. King v. Lyons
2011-NMSC-004, 149 N.M. 330 30

State of New Mexico v. Pangaea Cinema LLC
2013-NMSC-044 21

State ex rel. Sandel v. New Mexico Public Utility Com'n
1999-NMSC-019, 127 N.M. 272.....31

State ex rel. Sofeico v. Heffernan
1936-NMSC-069, 41 N.M. 219.....16

State ex rel. State Game Commission v. Red River Valley Co.
1945-NMSC-034, 51 N.M. 207.....1, 7-8, 11-13 21, 40

State v. Smith,
2004-NMSC-032, 136 N.M. 372.....15

State v. Swavola

1992-NMCA-089, 114 N.M. 472.....41

Stewart v. Oberholtzer

1953-NMSC-042, 57 N.M. 253.....35

Vanderford v. Wagner
1918-NMSC-099, 24 N.M. 467.....5

Federal cases

Bowen v. Roy
476 U.S. 693 (1986).....19

Cedar Point Nursery v. Hassid
141 S.Ct. 2063 (2021).....28

Dolan v. City of Tigard
512 U.S. 374 (1994).....9

Kaiser Aetna v. United States
444 U.S. 164 (1979).....10

Lingle v. Chevron U.S.A. Inc.
544 U.S. 528 (2005).....9

Nebbia v. People of New York
291 U.S. 502 (1934).....19

PPL Montana, LLC v. Montana
565 U.S. 576 (2012).....7, 24, 29, 34

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,
560 U.S. 702 (2010).....26

United States v. Causby
328 U.S. 256 (1946).....18

United States v. Cox
906 F.3d 1170 (10th Cir. 2018).....19

United States v. Pueblo of San Ildefonso
513 F.2d 1383 (Ct. Cl. 1975).....9

Cases from other jurisdictions

Conaster v. Johnson
194 P.3d 897 (Utah 2008).....23

Elder v. Delcour
269 S.W. 2d 17 (Mo. 1954).....23

Kramer v. City of Lake Oswego
365 Or. 422 (Or. 2019).....23, 25

Lebanon Lumber Co. v. Leonard
136 P. 891 (Or. 1913).....24

Utah Stream Access Coalition v. Orange Street Development
416 P.3d 553 (Utah 2017).....23

Utah Stream Access Coalition v. VR Acquisitions, LLC
439 P.3d 593 (Utah 2019).....24

Utah Stream Access Coalition v. VR Acquisitions, LLC
Case No. 100500558 (Fourth Judicial District, August 16, 2021)
(unpublished) 24

Coalition for Stream Access, Inc. v. Curran
682 P.2d 163 (Mont. 1984) 25

Public Lands Access Ass'n v. Board of County Com'rs
321 P.3d 38, 51 (Mont. 2014) 27-28

New Mexico Statutes, Regulations, and Rules

NM Const. Art. II, § 4 10

NM Const. Art. II, § 18 10

NM Const. Art. II, § 20 10

NM Const. Art. IX, §14 5

NM Const. Art. XVI, §2 14

NMSA 1978, §17-1-5 .....

NMSA 1978, §17-1-14 17

NMSA 1978, §17-1-26 17

NMSA 1978, §17-2-1(B) 16

NMSA 1978, §17-2-6 16

NMSA 1978, §17-4-6(C) 2-5, 11, 15-16, 20, 22-23, 35, 37, 40

NMSA 1978, §30-14-1(A) 10-11, 17-18

NMSA 1978, §72-1-1 33

NMSA 1978, §77-16-1 35

Rule 19.30.5 NMAC. 17

Rule 19.31.10.18 NMAC 37

Rule 19.31.22 NMAC .....*passim*

Rule 12-504 NMRA.....42

INTRODUCTION

Under the pretense of challenging an administrative rule that has no bearing on the ownership of land or the public's access to waters, Petitioners seek to strip thousands of New Mexican land owners of valuable property rights to the land below and adjacent to the non-navigable streams and rivers of this state (hereinafter "riverbeds"). While Petitioners claim that the River Access Rule, NMRA 19.31.22 (the "Rule") interferes with public ownership of public waters, the Rule does no such thing. There is no conflict between the public's constitutional ownership of the waters and private landowners' constitutional ownership of land, and the New Mexico Legislature has already balanced the constitutional interests at stake by making it unlawful to walk or wade on a privately owned stream or riverbed but otherwise preserving public ownership of waters. Petitioners fail to explain how or why public ownership of water can upend the constitutionally protected right to exclude—one of the most fundamental rights held by a property owner—and fail to acknowledge that *all* constitutional rights are subject to the balancing that has already been performed by this Court and the Legislature.

Petitioners ask the Court to apply stare decisis. Intervenors agree. This Court has already recognized that the public right to utilize waters only extends to those waters that the public can use without trespass on privately owned lands. *See State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶32, 51

N.M. 207 ("Access to this public water can be, and must be, reached without such trespass."). This Court has likewise recognized that private landowners can own the land below and adjacent to non-navigable streams and rivers. *Id.* at ¶6. And, the Legislature has codified a prohibition on walking or wading on privately owned riverbeds. *See* NMSA 1978, §17-4-6. Adopting Petitioners' argument would upend the long established property rights in this state, transfer ownership of valuable riparian property to the public, and result in an immense judicial taking that would cost the state hundreds of millions if not billions of dollars. Stripping private landowners of their property is not appropriate under any circumstances, but it is certainly inappropriate in the context of a challenge to an administrative rule that has no bearing on property rights, river access, or the other interests Petitioners claim they are trying to protect.

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.

A. The Rule does not allow the closure of public waters.

Petitioners case is built on the faulty premise that the Rule "allows [] outright closure to the public of segments of every river and stream in New Mexico where it runs through private property." BIC at 10. The Rule does no

such thing. Nothing in the Rule confers a right to close a stream, restricts public use of water, or otherwise interferes with public ownership of water. Instead, the Rule simply allows landowners to obtain non-navigable waters certificates ("Certificates") and signage that will help them enforce their *existing* private property rights. *See* Rule 19.31.22.13(B)-(E). The water—which is owned by the public—continues to flow and can be utilized up and downstream without restriction. To the extent that the waters can be floated, the public has a right to recreate on and in the water. *See* NMSA 1978, §17-4-6(C). It is only trespass to land that is prohibited, and that trespass is prohibited by statute (and existing trespass laws)—not by the Rule.

Because Petitioners' case is built on a faulty premise, the relief they seek—invalidation of the Rule—will not actually accomplish the result they want—a judicial declaration that they can trespass on privately owned property upon which public waters happen to flow. Providing Petitioners with the result they seek will require the Court to deviate far beyond the limited scope of this mandamus action, overturn well-established precedent, and contravene numerous statutes and rules which are not the subject of this litigation. And, because the only parties to this litigation are those with some interest in non-navigable waters certificates, this litigation is missing the thousands of landowners whose interests will be effected by the result Petitioners seek.

B. The Rule does not privatize waters or their beds or create private fisheries.

While Petitioners claim that the Rule privatizes New Mexico's streams, they notably do not point to any language in the Rule that actually yields this result. That is because a Certificate only results in (1) "formal[] recogni[tion] 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" and (2) eligibility to receive signs from the Department of Game and Fish that state "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 . . . has expressly consenting in writing." Rule 19.31.22.13(B)-(F). A Certificate does not allow a landowner to restrict floating or other water-uses that do not constitute a trespass to the lands, does not prohibit watersports or other recreational activities that do not involve walking or wading on privately owned land, does not transfer ownership of land or water, and does not in any way constitute or even permit a "closure" of a stream. While a Certificate assists with prevention of trespass by placing the public on notice that the segment at issue has been formally recognized as non-navigable, a Certificate is *not* necessary to enforce existing trespass laws, a Certificate is not necessary to place signs that give notice of private

ownership or bar trespassers, and a Certificate does not create the underlying private property right to exclude.[1] *See e.g.* NMSA 1978, §17-4-6. Since Petitioners' entire case is based on their incorrect belief that a Certificate alters the public/private interests, the fact that the Rule does no such thing is alone a basis for the Court to deny the Petition.

Without any evidence, Petitioners also assert that the Rule has led to private enclosures of segments of rivers and the creation of private fisheries. BIC at 25. While Petitioners included with their Petition a photograph of a fence over a section of stream, Petitioners fail to explain how the erection of that fence has anything to do with the Rule. The Rule does not allow for the erection of fences and there is no evidence the fence was erected as a result of the Certificate rather than as a result of other factors such as the landowners desire to keep livestock from straying or to preserve the right to seek damages for injury caused by trespassing animals. *See Vanderford v. Wagner*, 1918-NMSC-099, ¶10, 24 N.M. 467 (requiring compliance with "fence out" statute as prerequisite to asserting claim for damages caused by trespassing animals). Further, the fence does not create a "private fishery" or otherwise interfere with public waters, as there is no evidence that the fence operates

[1] Because a Certificate is not a pre-requisite to excluding trespassers from privately owned riverbeds and does not give state property to a private owner, the Anti-Donation Clause has no bearing on this case. *See* NM Const. Art. IX, §14.

to impound either waters or fish. The public can still fish and recreate in the waters provided it does not walk or wade on the privately owned property. To the extent that the fence interferes with floating, the appropriate remedy is an action against the individual landowner, not a general attack on the Rule.[2]

Nothing about public ownership of water gives rise to a right to use a particular drop of water in a particular location, nor does public ownership of fish give the public a right to take fish at any location they might be. The public is free to fish over private land while floating, the public is free to fish up or downstream of private land, and the public is free to fish, walk, wade or make any other use not prohibited by law on the hundreds of miles of public lands over which waters flow. Since there is no allegation that any landowner is preventing fish from freely traveling up and downstream, there is no merit to Petitioners' assertion that the Rule creates private fisheries.

C. It is well-established that stream and riverbeds below non-navigable waters can be privately owned.

Another fundamental error in Petitioners' brief is their insinuation that landowners lack a property right, which is protected by the United States Constitution itself, in the beds and banks of non-navigable rivers. To say that private ownership of the beds of non-navigable waters is well-settled would be an

[2] Attacking the Rule due to the actions of one purported Certificate holder is akin to attacking the validity of all driver's licenses because of the actions of a single driver.

understatement. While States hold title, conferred "by the Constitution itself," to the soils under "their navigable waters," *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012), "[t]he United States retains any title vested in it before statehood to any land beneath waters not then navigable . . . to be transferred or licensed if and as it chooses." *Id.* at 591. Thus, private property owners (like Intervenors) who trace title to the United States, or who can otherwise establish that the waters at issue were non-navigable[3] at the time of statehood, own the riverbed beneath any waters that flow over their land. *See id.*

This Court has also recognized that private landowners can and do own land below non-navigable waters. In *Red River*—the case Petitioners assert gives them a right to trespass—this Court repeatedly recognized private ownership of land below non-navigable waters. The Court noted that Red River Valley Co. owned land which was flooded to create the reservoir and that Red River Valley Co. "*still is the owner of all the said lands.*" *Red River*, 1945-NMSC-034, ¶6 (emphasis added). The only lands that were no longer privately owned were those which Red River Valley Co.

[3] The determination of whether waters are navigable for title purposes "is determined at the time of statehood and based on the natural and ordinary condition of the water." *PPL Montana*, 565 U.S. at 592 (citation and quotation marks omitted). This analysis is performed "on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not." *Id.* at 598. As part of the Rule's substantial evidence requirement, landowners seeking Certificates provide title history tracing title to the United States.

had "parted with its title by reason of the instruments" actually conveying land to the State. *Id.* Throughout the opinion the Court recognized the private ownership of lands below public waters. *See e.g. id.* at ¶13 ("appellee owned the beds and banks").

Further, the Court rejected the notion that it could "employ Spanish or Mexican law in force at the time [of confirmation] to qualify or limit the title to the land which passes to a grantee by the act confirming and patent," explained that it was "dealing with public waters which are constantly flowing through and upon this as upon other privately owned land the title to the fee in which may be as finally and fully established," and made clear that it "must not confuse the title to the land with that to water."[4] *Id.* at ¶44. The Court concluded that when the United States conferred title to the land at issue, it did not confer ownership of the water—an express recognition that land below public waters can be privately owned. *Id.* at ¶45. There thus can be no legitimate question that landowners can and do own the riverbeds below non-navigable waters in this State.[5]

[4] *Red River* expressly forecloses Petitioners' argument that the Court should look to the Treaty of Guadalupe Hidalgo, as the Court rejected the assertion that pre-statehood laws have bearing on the title that passed to private landowners.

[5] If Petitioners believe a landowner does not actually own a segment of land, the appropriate remedy is an action against that landowner, not a general attack on the Rule.

D. The right to exclude trespassers on privately owned riverbeds is settled law.

Since it is undisputable that private ownership of riverbeds is permissible, the question thus becomes whether that ownership encompasses the right to exclude trespassers—i.e. to prevent the public from walking and wading. Reading Petitioners' brief, one would think this question has never been decided in New Mexico. But settled precedent of this Court as well as laws passed by our Legislature make clear that the right to exclude is well-established.

As the United States Supreme Court has explained, the right to exclude is "perhaps the most fundamental of all property interests" and is protected by the United States Constitution. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Because of the constitutional importance of the right to exclude, any government action that allows public access to private property "would deprive [an owner] of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quotation marks omitted). As explained by the United States Court of Claims, "[i]mplicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders." *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). Since the right to exclude is an essential element of the private ownership of riverbeds, the title that

passed from the United States to private landowners necessarily included this right and any interference with it is a compensable taking. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979) (holding that the "'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation").

Because of the importance of the right to exclude,[6] New Mexico law has long made it unlawful for a person to enter or otherwise utilize privately owned land. *See* NMSA 1978, § 30-14-1(A) (defining "criminal trespass" as "knowingly entering or remaining upon posted private property without possessing written permission"). Trespass is not just a criminal matter, but also a basis for imposing civil liability for "injury to the right of possession." *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 1, 148 N.M. 16.

While trespass laws have always precluded persons from walking on privately owned riverbeds (since trespass bars the use of any private property without express permission of the owner), the New Mexico Legislature enacted a new law in 2015 that made explicit that:

[6] The right to "possess[] and protect[] property" is also an inherent right guaranteed by New Mexico's Constitution. NM Const. Art. II, § 4; Art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law"); Art. II, § 20 ("Private property shall not be taken or damaged for public use without just compensation").

> 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 . . . has expressly consented in writing.

NMSA 1978 § 17-4-6. This legislation balanced the public's interest in recreating on water with private ownership of land, and combined two longstanding and fundamental principles of the law: (1) that a private property owner owns the riverbed of any non-navigable waters as reflected in *PPL Montana* and (2) that it is unlawful to trespass on private property as made clear by Section 30-14-1(A) (and *Red River*). The Statute thus removed any ambiguity and reduced the chance for conflict between recreationalists and landowners created by a 2014 Attorney General Opinion which many (including Petitioners in their Brief-in-Chief) interpreted to allow trespass.

Resounding proof that landowners have a right to exclude comes directly from the case Petitioners ask the Court to apply. In its *Red River* opinion, this Court repeatedly recognized that use of privately owned land to access public waters was a trespass. The Court was emphatic that "[t]he question of right of use, or trespass upon, the lands of appellee bordering upon the lake area in question is not involved" and that "[a]ccess to the waters in question can be had by entry at points on the lake area not owned or controlled by appellee." 1945-NMSC-034, ¶17. This principle was reiterated by the majority when it denied a motion for rehearing: "no person has

the right to approach public water through private property, or fish in public water while on private property without the consent of the owner; but he may fish in public water if he does not trespass upon the lands of another; and fishing in public water from a *boat* is not a trespass upon the property of the owner of the underlying land." *Id.* at ¶244 (emphasis added). And, the principle was re-reiterated when the majority, in denying a second motion for rehearing, explained that the landowner had "no more right to the use of the unappropriated water on the land grant than has any other person, *except as the law against trespassing on private property favors it.*" *Id.* at ¶260 (emphasis added).

The question before the Court in *Red River* was narrow: "the simple one of whether use for recreation and fishing may be considered as among the uses which usually pertain to public waters." *Id.* at ¶26. The Court answered this inquiry by concluding that "the right of the public to fish [in public waters] *without disturbing the terrain in private ownership* cannot be denied." *Id.* at ¶29. Any doubt about whether the *Red River* Court recognized the private ownership of riverbeds is unequivocally resolved by the Court's pronouncement that "[a]ccess to this public water can be, *and must be*, reached without such trespass" and that the public could use the lake for fishing "so long as they do not trespass on the private property along the banks." *Id.* at ¶¶ 32 and 48 (emphasis added).

Further, when responding to the dissenters' view that the majority opinion would "open[] wide the opportunity for trespass upon the lands of all riparian owners, in every class of stream; that with every such perennial or torrential stream carrying unappropriated public waters would go a right to trespass as against the owner over whose lands such water flowed, if that be necessary to reach such public waters," this Court emphasized that it was narrowly addressing "impounded public waters, easily accessible *without trespass on riparian lands*." *Id.* at ¶56. Petitioners now make the *exact* that this Court *already* rejected. *See id.* Petitioners ask the Court to read *Red River* as having held that public ownership of waters usurps the constitutional right to exclude, but *Red River* holds no such thing and made clear that public use of waters *must* be without trespass on private land. *Red River's* clear pronouncement that the public's use of water must yield to private ownership of land settled the issue now raised by Petitioners, set expectation interests held by owners of riverbeds, and any change to that holding will result in a taking the likes of which this state has never seen before. Thousands of property owners will be stripped of valuable property if the Court takes the right to exclude out of the bundle of property rights held by riverbed owners.

E. The public owns the waters and can use them for any purpose that does not require trespass on private land.

A separate and distinct issue[7] is ownership of the waters that flow through New Mexico. Pursuant to the New Mexico Constitution, "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico … belong[s] to the public and [is] subject to appropriation for beneficial use, in accordance with the laws of the state." Art. XVI, Section 2.[8] While this Court has concluded that the public has a right to use public waters for recreational purposes, neither the Court nor the Legislature have given the public license to trespass on private property in order utilize public waters.

To the contrary, both the Court and the Legislature have *already* balanced the public and private interests at stake and concluded that the public's use of water does not create a right to walk or wade on private land. *Supra* Section I(D). The public, pursuant to the New Mexico Constitution, is free to recreate on public waters. Land owners, pursuant to the United States Constitution and long-established New

[7] Ownership of the waters has no bearing on the ownership of the land over which the waters flow, just as ownership of a vehicle has no bearing on the ownership of the road over which it travels, and just as ownership of wildlife has no bearing on the ownership of the lands they roam.

[8] Without explanation, Petitioners assert that historical rights including the Treaty of Guadalupe Hidalgo somehow bear on their Petition. Petitioners offer no evidence that any pre-statehood historical rights to utilize waters included a right to walk or wade on private land.

Mexico law are free to exclude the public from trespassing on their private properties—including the banks and beds of non-navigable waters. Taking these two concepts to create a harmonious whole, as required by New Mexico's rules of statutory construction, the public can recreate on water provided it does not walk or wade on private land. *See State v. Smith*, 2004-NMSC-032, ¶10, 136 N.M. 372 ("Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another." (quotation marks omitted)). And, landowners can exclude trespassers so long as they do not prevent the public from floating on the waters. Section 17-4-6(C). When a member of the public walks or wades on private property, that person is a trespasser. When a landowner bars a person from floating on waters that can be utilized without walking or wading, that landowner has interfered with the person's right to use the waters. There is no conflict between these two concepts, and the interests at stake are readily harmonized by long-established principles.

Petitioners' demand for unfettered access to public waters at the time and place of their choosing is contrary to other well-established restrictions on the public's right to utilize waters.[9] State law already allows numerous restrictions on

[9] Since Petitioners initiated this litigation, the State shut down state parks—prohibiting use of public waters—due to COVID-19. Under Petitioners' logic, this public-safety closure is unconstitutional since Petitioners believe public ownership of water usurps all other rights and interests.

access to waters even when those waters are on public land. *See* NMSA 1978, §17-2-6 (setting posting requirements for "closed lakes or streams or closed portions of lakes or streams"); *and* NMSA 1978, §17-2-1(B) (giving the Commission authority to establish "closed seasons for the killing or taking of . . . game fish."). Thus, to the extent that Section 17-4-6 (or even the Rule) could be construed as limiting access to public waters, the Legislature has the authority to do so and, via Section 17-4-6(C), concluded that an appropriate balance was to restrict walking and wading on privately owned land. The public's right to utilize waters is not unlimited, and the Legislature codified a reasonable balance between public ownership of waters and the constitutionally protected right to exclude when it enacted Section 17-4-6(C). This reasonable balance should not be disturbed, especially in a case in which the statute is not being directly challenged. *See Old Abe Co. v. New Mexico Min. Comm'n*, 1995-NMCA-134, ¶ 43, 121 N.M. 83 (noting that "[t]here is a strong presumption supporting the constitutionality of a statute or administrative regulation" and that the "Court has a duty to affirm the legislation's validity and constitutionality if reasonably possible").

Balancing of public resources and private land ownership is not limited to water. Wildlife in New Mexico is "the property of the state which it holds in trust for the public." *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶25, 41 N.M. 219. Yet, hunters cannot enter private land without permission of the landowner to

take wildlife. *See* NMSA 1978, §30-14-1(A) (making it a criminal trespass for a person to enter private property without written permission); Rule 19.31.10.18 NMAC (making it unlawful to "enter upon any private property to take or attempt to take any game animal . . . or game fish without possessing written permission from the landowner or person in control of the land"). There are in fact numerous statutes and regulations that limit the public's ability to utilize private land to take wildlife (and even limit the public's ability to take wildlife from public lands). *See e.g.* NMSA 1978, §17-1-14 (giving Commission authority to "close any public stream or lake"); NMSA 1978, §17-1-26 (giving Commission authority to establish any rules necessary to protect game and fish); Rule 19.30.5 NMAC (creating regulatory system for taking of elk on private lands); Rule 19.31.10.18 NMAC (prohibiting hunting or fishing on private property without written permission).

If, as Petitioners assert, public ownership of a resource gives the public unfettered access to that resource, then the public could not be prohibited from hunting wildlife—which is owned by the public—on private land.[10] If the public can walk wherever water happens to flow, then the public can walk wherever *any* public

[10] And the Department of Game and Fish would not need to pay one-million dollars per year to lease land from the State Land Office so that the public can hunt and fish on state trust lands—such a lease is unnecessary if the public has an unrestricted right to be wherever waters flow. *See* Game Commission Easement, available at https://www.nmstatelands.org/wp-content/uploads/2021/11/SLO-Game-Commission-Easement-2021-2025-FINAL-fully-executed.pdf

resource happens to be. It is beyond dispute that a hunter cannot enter private property to take wildlife—even if that wildlife was lawfully shot on public land—without written permission of the landowner. *See* §30-14-1. Water—a transitory public resource that can cross both public and private lands—is no different and the public no more has a right to walk and wade on private land to utilize public waters than it has a right to walk on private land to hunt wildlife.

The binary approach taken by Petitioners—that the public should have access to water regardless of where the water lies—assumes that a Constitutional right never needs to be balanced with other rights. But Constitutional rights—even those far more fundamental than public ownership of water—are routinely balanced with other rights and interests. *See e.g. Barreras v. State of New Mexico Corr. Dep't*, 2003-NMCA-027, ¶ 16, 133 N.M. 313 (balancing right of access to the courts with protection of the public treasury).[11] As explained by the Court of Appeals, even liberty interests are "not absolute in the sense that no matter who exercises an aspect of it, what the nature of it is, or what degree of abridgement it confronts, the interest constitutes a fundamental right . . . Liberty implies the absence of arbitrary restraint,

[11] Federal courts have harmonized private land ownership with the public right to airspace, concluding that while "airspace is a public highway" a landowner "is to have full enjoyment of the land" and thus "he must have exclusive control of the immediate reaches of the enveloping atmosphere" and "owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States v. Causby*, 328 U.S. 256, 264 (1946).

not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *State v. Druktenis*, 2004-NMCA-032, ¶ 96, 135 N.M. 223 (Internal citations and quotations omitted). Even **"**the constitutional liberty to speak freely can be limited to the extent it conflicts with other constitutionally protected rights." *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶¶ 8-11, 114 N.M. 537. The same is true of every all Constitutional rights. *See e.g. United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018) (noting that "[t]he right to keep and carry arms, like other constitutional guarantees, has limits"); *State v. Candelaria*, 2011-NMCA-001, ¶¶ 20-21 149 N.M. 125 (right to be free from search and seizure balanced with officer safety and reasonable suspicion); *Blount v. T D Pub. Corp*., 1966-NMSC-262, ¶ 10, 77 N.M. 384 ("Further, the right of privacy is generally inferior and subordinate to the dissemination of news.")*; Nebbia v. People of New York*, 291 U.S. 502, 527 (1934) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest."); *Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.")*; Anaconda Co. v. Prop. Tax Dep't*, 1979-NMCA-158, ¶28, 94 N.M. 202 (finding absolute equality in taxation is not required under the Fourteenth Amendment); *Cmty. Pub. Serv. Co. v. New Mexico Pub. Serv.*

Comm'n, 1966-NMSC-053, ¶7, 76 N.M. 314 (finding absolute equal treatment of parties performing similar service is not required for legislative act to withstand an attack on its constitutionality). If the fundamental liberties guaranteed by the United States and New Mexico Constitutions must be balanced with other important interests, then the public's right to own the waters absolutely can be balanced with private property owners' Constitutional right to own property.

And, it is the role of the Legislature, not the Court, to balance and harmonize competing rights. *Cockrell v. Bd. of Regents of New Mexico State Univ*., 2002-NMSC-009, ¶ 13, 132 N.M. 156 (recognizing that "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State" and that "it is the particular domain of the legislature, as the voice of the people, to make public policy"). The Legislature has already balanced the competing constitutional rights at issue here—public ownership of water and private ownership of land—and concluded that the appropriate balance is to give the public access to water provided that the public does not walk or wade on private property. Section 17-4-6(C). This is a proper exercise of the Legislature's authority and should put to rest any contention that private property rights must yield to the public's ownership of public waters. *See e.g. Sanders-Reed ex rel. Sanders-Reed v. Martinez,* 2015-NMCA-063, ¶16 (declining to apply common law public trust doctrine to alter "statutory framework to address how protections for the

atmosphere are implemented" even though the environment is a held in public trust); *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 46 (concluding that "aggrieved citizens must look to the Legislature" to resolve tensions related to water availability); *D'Avignon v. Graham*, 1991-NMCA-125, ¶ 36, 113 N.M. 129 (Hartz, J.) (specially concurring) (noting that "[m]ost legislative enactments represent a compromise between competing interests" and that "the court may well be undermining the compromise intended by the legislature that enacted the statute").

The Legislature—reflecting the will of the people—concluded that an appropriate balance between the public ownership of water and private ownership of land is to allow recreational use provided such use does not require walking or wading on privately owned land—the exact same balance struck by this Court in *Red River*. That is a reasonable balance between the interests at stake, and just as the Legislature can impose reasonable time, place, and manner restrictions on the exercise of free speech, it can impose time, place and manner restrictions on the use of public waters.[12] *See e.g. State of New Mexico v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶9 (noting that time, place, and manner restrictions can be imposed on the fundamental right to freedom of speech).

[12] When legislative balancing results in the taking of privately owned property, just compensation is required.

That the Legislature, and not the Court, should decide the proper way in which to balance public and private rights is evidenced by the lack of specificity of relief that Petitioners seek. Petitioners want the Court to rule that the public can "make reasonable use of the river or streambeds and banks to the mean high water mark when exercising its recreational rights." BIC at 17. But Petitioners do not define the scope of recreation that they want allowed. Does this encompass off-road vehicle enthusiasts who might enjoy driving on a riverbed or bank? Hikers who might enjoy walking on a riverbed? Bicyclists that seek the challenge of riding along a river bed and bank? Or is it just anglers and boaters that Petitioners want to give license to trespass? Also, what do Petitioners seek in areas where it is impossible to fish from the bed or bank? Under their theory that they have a right to use water wherever it flows, Petitioners' argument would allow the public to stand and walk anywhere provided there is some general intention to use the water. Without statutory definition of the scope of water-related recreation, the ruling Petitioners seek opens private lands up to any public use that a member of the public can tie to the water. The Legislature resolved all these questions when it enacted Section 17-4-6, and the Court should not disturb the balance struck by the Legislature.

F. Out-of-state authority relied on by Petitioners does not support a taking of private property owners' right to exclude.

Ignoring that the Legislature already balanced the public and private interests, Petitioners ask the Court to follow opinions from several other jurisdictions which

have found a right to touch stream and riverbeds. Petitioners cite to a Utah opinion which concluded that walking and wading on privately owned stream and riverbeds was within the scope of a public easement. BIC at 16 (citing *Conaster v. Johnson*, 194 P.3d 897 (Utah 2008)). But *Conaster* is not relevant to this litigation. While *Conaster* concluded that the Utah public could walk and wade on privately owned stream and river beds, the opinion was quickly overturned by the Utah legislature in a statute that limited public access to "public water that is 'navigable water 'or water 'on public property.'" *Utah Stream Access Coalition v. Orange Street Development*, 416 P.3d 553 (Utah 2017). Further, Utah did not have a statute similar to Section 17-4-6, and the *Conaster* court was thus required to assess competing interests of the public and private landowners without legislative direction.

Two other out-of-state cases relied on by Petitioners utilize a public easement theory that has no applicability in New Mexico. The waterway at issue in *Elder v. Delcour*, a Missouri case relied on by Petitioners, was a short segment that could be floated and was deemed to be a "public floatable highway for travel"—i.e. a navigable water—which the public could fish in while "passing down the stream by boat or by wading." 269 S.W. 2d 17, 26 (Mo. 1954). An Oregon case, *Kramer v. City of Lake Oswego*, 446 P.3d 1, 10 (Or. 2019), focused on the use of waterways as "public highways" and provided for a public easement on waters which, although passing over privately owned land, can be used "for purposes of navigation and

commerce." And, the Oregon Supreme Court has made clear that the public easement to use waters as public highways "does not give the navigator a right of way on the land" and that any such right of way "can be acquired only by the exercise of the right of eminent domain." *Id.* (quoting *Lebanon Lumber Co. v. Leonard*, 136 P. 891 (Or. 1913)).[13]

Even Montana law, which Petitioners cite to but which is based on an inapplicable navigability standard and applies only to navigable waters,[14] is clear that while the Montana "Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use *of the surface* of the State's waters" and give the public a right "while so lawfully *floating* in the State's waters to lawfully hunt or fish," the public does not have the "right to enter

[13] The Utah Supreme Court later concluded that a public easement is a fact question that must be addressed—on a segment-by-segment basis—after review of relevant title history. *Utah Stream Access Coalition v. VR Acquisitions, LLC*, 439 P.3d 593 (Utah 2019). After a review of such history, a Utah district court concluded that there *was no public easement* on privately owned riverbeds. *Utah Stream Access Coalition v. VR Acquisitions, LLC*, Case No. 100500558 (Fourth Judicial District, August 16, 2021).

[14] It is unlikely that the Montana case survives *PPL Montana*, as the case utilized an inapplicable "navigability for use" standard. 682 P.2d at 170 (discussing navigability for use and recreational use). The inapplicable standard focused on "surface waters that are capable of recreational use" and thus does not apply to waters that cannot be floated or otherwise used for water recreation. *Id.* Further, Montana's legislature had authorized anglers to fish all public waters from the banks—a statute that is directly contrary to New Mexico's statute barring walking or wading on private land for fishing or other recreational purposes.

upon or cross over private property to reach the State-owned waters" at issue. *Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 and 172 (Mont. 1984) (emphasis added).

Further, even in those jurisdictions where there is a public easement, that easement only allows an "incidental and temporary" touching of the land and the touching must be necessary to the navigation of the water. *Kramer,* 446 P.3d at 11. Fishing or incidental touching of land while passing over private property in the course of using a waterway as a public highway is vastly different than the type of continuous use of private lands that Petitioners seek in this case. Petitioners ask that *all* recreationalists, not just those engaged in fishing, be permitted to walk and wade at their leisure on every "perennial or torrential" stream in New Mexico regardless of who owns the land. Petitioners are thus asking for an unrestricted right to utilize for any "recreational" purpose any land upon which water has ever flowed. Even for perennial waterways with constant flows, walking and wading is not a temporary or incidental touching of land that occurs while simply passing through, but is instead an activity that requires constant and regular use of the land such that the use of water becomes incidental to the use of the land rather than the use of land being incidental to the use of water. As the Oregon Supreme Court concluded, the public use doctrine is limited to uses that are "just an incidental and temporary burden on

the land that is a 'necessity 'to continue their existing use of the water" and does not give the public a broader right to use privately owned land. *Kramer*, 446 P.3d at 11.

There is no evidence that the type of land use contemplated in this case is incidental or temporary, and Petitioners in fact ask the Court to take judicial notice that the waters they seek to use *cannot* be floated (i.e. used as public highways). By asserting a right to recreate on these waters, Petitioners are thus seeking an unfettered portage right to traverse privately owned dry land to gain access to waters that are floatable, or to simply fish, splash, or be near public water. At its core, Petitioners' argument is that because the public owns the waters, the public can do whatever it chooses to access and use those waters. But this is not the law of New Mexico, and the out of state authority relied on by Petitioners does not apply here.

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,

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

it is also beyond question that that same right to exclude passed on to landowners who trace their title back to the United States.

II. **AN EXTRAORDINARY WRIT OF MANDAMUS IS INAPPROPRIATE BECAUSE THIS CASE DOES NOT FIT WITHIN THE NARROW CIRCUMSTANCES UNDER WHICH THIS EXTRAORDINARY REMEDY IS TO BE USED.**

Petitioners ask the Court to exercise its mandamus jurisdiction. Brief at 26. That jurisdiction is to be exercised only where "the petition presents a purely legal issues concerning the non-discretionary duty of a government official 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 expeditious resolution that cannot be obtained through other channels such as a direct appeal." *State ex rel. King v. Lyons,* 2011-NMSC-004, ¶21, 149 N.M. 330. This is because mandamus "is an extraordinary writ that must be issued only in extraordinary circumstances," so has carefully defined limits that recognize the drastic nature of the remedy. *Id.* at ¶96 (Chavez, J. dissenting). Petitioners have failed to establish that this case justifies the Court's use of a drastic remedy, and the Court should thus decline to exercise its original jurisdiction.

A. The petition does not concern the non-discretionary duty of a government official.

Although Petitioners seek mandamus relief from the Court, they fail to identify any non-discretionary duty of a state official that is in any way implicated. While mandamus allows the Court to determine "the outer bounds of that discretion," *Lyons*, 2011-NMSC-004 at ¶ 28, mandamus is only appropriate where the exercise of discretion would result in "unlawful or unconstitutional official action." *State ex rel. Sandel v. New Mexico Public Utility Com'n*, 1999-NMSC-019, ¶11, 127 N.M. 272. But as explained in detail above, the discretion the Commission exercises under the Rule has absolutely no possibility of resulting in unlawful or unconstitutional official action. A Certificate does not confer a right to exclude, does not prohibit the public from walking or wading, and does not otherwise interfere with the rights of the public. A Certificate simply helps to clarify the ownership of land that is *already* privately owned and on which the owner *already* has a right to exclude the public. Mandating the Commission to withdraw previously issued Certificates, striking down the Rule, or providing the other Rule-related relief Petitioners seek will not in any way alter the interests at stake. To the extent Petitioners seek remedies beyond the scope of the Rule they purport to call into question, such remedies go beyond the scope of mandamus by asking this Court to invalidate validly-enacted legislation, other rules promulgated by administrative agencies, and well-settled precedent of this Court.

B. The issue is not a fundamental question of great public concern.

In order for the Court to review an issue based on the great public importance doctrine, the issues must involve "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution—a government in which the 'three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional power." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶21, 128 N.M. 154 (quotation marks omitted). An issue is only of great public concern if "the conduct at issue affects, in a fundamental way, the sovereignty of the state, its franchise or prerogatives, or the liberties of its people." *Id.* The doctrine is reserved for issues that will impact each and every New Mexican such as the right to free speech and separation of powers. *See e.g. Twohig v. Blackmer*, 1996-NMSC-023, ¶28, 121 N.M. 746 (interplay between constitutional right to free speech and constitutional right to a fair trial); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶17, 120 N.M. 562 (addressing the separation of powers with bearing on the investment of large sums of money).

River access, in the context being raised by Petitioners, is not such an issue. First, the public can freely float on all waters of the state regardless of whether they flow over state or private land. Second, the public can freely walk and wade on all publicly owned riverbeds regardless of whether that ownership is derived from navigability

at statehood or title held by the state. Third, restrictions on walking and wading do not impact the public's ownership of the waters flowing over privately owned land. Fourth, water ownership is not a fundamental right—like freedom of speech or the right to vote—and has no impact whatsoever on the sovereignty of the state or the liberties of its people. Fifth, river access issues do not have a broad impact on all New Mexicans, but instead only affect a small percentage of New Mexicans[16] who own private property over which waters flow and an even smaller percentage of New Mexicans who desire to walk and wade on privately owned land. Walking and wading on privately owned land simply is not the type of important public issue for which this Court's original jurisdiction is intended.

C. Fact finding is required for proper adjudication of the issues presented by Petitioners.

The constitutional provision on which Petitioners rely applies to "every natural stream, perennial or torrential" anywhere within the state of New Mexico. Const. Art. 16, §2. The related statute expands this to include "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. The lands that Petitioners place at issue in this case are thus not just streams and rivers in the

[16] Unlike the Rule, the taking requested by Petitioners will impact all New Mexicans given the immense cost of compensating landowners for their valuable property rights.

ordinary sense of a constantly flowing body of water, but also dry lands over which small trickles of water occasionally flow. While Petitioners couch their claims as a right of access to water for recreational purposes, Petitioners offer no evidence that all the waters of New Mexico—as defined by the Constitution and statute—actually are suitable for recreational or other purposes. It is already well-settled that ownership interests in the streams and rivers is decided on a segment-by-segment basis. Public access to privately owned riverbeds via walking and wading—if the Court is inclined to conclude that the public has such a right—should similarly be decided on a segment-by-segment basis. A broad ruling that the public can walk and wade anywhere water happens to be is inconsistent with the manner in which waters are assessed and would give the public access to long stretches of dry land under the pretense of giving access to water. Consistent with *PPL Montana,* district courts will need to consider historical usages of the particular segments, the ownership interests obtained by the landowner, whether a particular segment could be deemed a public highway, and a multitude of other factors that cannot be properly addressed when this Court exercises its original jurisdiction.

Similarly, evidence and fact finding on the extent to which Petitioners have even suffered an injury is necessary—Petitioners claim that certain landowners have blocked access to public waters, but the photograph they attached shows a stream on which it appears to be impossible to float. Whether placing a gate or fence over a

trickle of water precludes public use of the *water* is a factual question, not a legal question for the Court. This is especially so because New Mexico law *requires* landowners to erect fences to keep out roaming livestock. *See* NMSA 1978, §77-16-1; *and see Stewart v. Oberholtzer*, 1953-NMSC-042, ¶6, 57 N.M. 253. For those lands over which only a small easily crossable trickle of water flows, property owners may have an obligation to fence out roaming stock. *Id.* But, Petitioners make no challenge to New Mexico's fencing statute. Further, the proper avenue to challenge a particular landowner's erection of a fence is an individual action against that landowner, not a broad request to invalidate a rule that does not even authorize such a fence.

Petitioners also fail to provide evidence to the Court regarding how many thousands of miles of public riverbeds they *can* walk and wade without any restriction, which privately owned lands they can or cannot float above, and other types of evidence that bear on the extent to which Petitioners actually have been somehow precluded from using the public waters of the state. Without an evidentiary record regarding the extent to which Petitioners can or cannot use waters, the Court should not second guess the Commission's decision to promulgate the Rule (much less the Legislatures decision to enact Section 17-4-6). The impact on the land owned by sovereign nations over which non-navigable waters flow should also be addressed during fact-finding—if the public can walk wherever water flows, what does that

mean for sovereign tribes within New Mexico's borders? Finally, fact finding regarding the value private landowners add to recreation in the State (private landowners have invested significant resources into developing fisheries that enhance the recreational value of the waters on their property *as well as* the waters above and below their properties) and the impact that opening private property to public access would have on that added value is necessary. Private landowners' investment is part of the reason that New Mexico's waters are so prized for recreational purposes, many have indeed granted public easements to the state for the public to enjoy,[17] and at a minimum there should be fact-finding regarding the extent to which altering private interests will be harmful to the ecosystem, spawning areas, and the very fishing that Petitioners claim they are being deprived of.

These are but a handful of factual issues that should be addressed (and which are best weighed by the Legislature). This Court is thus the wrong forum to challenge the Rule.

D. Petitioners' challenge to the Rule does not require expeditious resolution and can be obtained through other more ordinary avenues.

Because the right to exclude trespassers exists independently of the Rule, there is no need for expeditious resolution of Petitioners' challenge. Striking the Rule will

[17] That the state has accepted easements from landowners further establishes that there is not an existing public right to walk and wade.

not alter the public/private interests that Petitioners claim are at stake, and will not give Petitioners the access to private property that they seek. What Petitioners really seek is a ruling that Section 17-4-6 is unconstitutional. But that challenge can be made in ordinary litigation by a party with standing. Such a challenge could come from a direct challenge to the statute, from a person charged with criminal trespass for walking and wading on privately owned riverbeds, or in a civil trespass case against a person who walked or waded on private land. Such a proceeding would ensure a full evidentiary record and opportunity for interested parties to seek to intervene. Because Petitioners purport to only challenge the Rule, owners of riverbeds in New Mexico who have no interest in obtaining a Certificate may have ignored this litigation even though they might intervene on a direct challenge to the long-settled laws that give them the right to exclude.

Insofar as this case could be construed as narrowly limited to the Rule itself, the Rule allows members of the public to participate in the administrative process and to challenge a final decision by the Commission. *See* Rule 19.31.22.12. While Petitioners contend that the Rule does not actually allow for review of a final agency decision, a proposition which Intervenors disagree with, Petitioners ignore that Rule 1-075 allows for review of final agency decisions even when there is not a statutory right to appeal. Since Petitioners could have participated in the administrative proceedings that resulted in the issuance of Certificates, they had a right to seek relief

through ordinary avenues (and could have moved to intervene in one of the pending river access cases in lower courts).

Finally, the Commission asserts in its Answer Brief that it intended to utilize rule making "to strike or modify the Rule." Commission Answer at 6. Since the Commission has no intention of keeping the Rule, there is no reason for this Court to exercise its original jurisdiction to address issues surrounding a Rule that will be mooted by the Commission's actions.

E. Petitioners lack standing as they have no cognizable injury.

As a final matter, Petitioners lack standing to challenge the Rule. "It is not the duty of this or any other court to sit in judgment upon the action of the legislative branch of the government, except when the question is presented by a litigant claiming to be adversely affected by the legislative act on the particular ground complained of." *Asplund v. Alarid*, 1923-NMSC-079, ¶21, 29 N.M. 129; *Asplund v. Hannett*, 1926-NMSC-040, ¶ 26, 31 N.M. 641. To establish standing, Petitioners must demonstrate that they are "imminently threatened with injury, or, put another way, that [they are] faced with a real risk of future injury, as a result of the challenged action or statute." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 11, 144 N.M. 471 (internal quotation marks and citations omitted). "Accordingly, there

can be no constitutional challenge to the statute without at least a specific probability of impairment in a given case." *Bounds*, 2013-NMSC-037 at ¶15.

Here, Petitioners cannot establish that the Rule impairs any of their constitutional rights. The Rule does not create the private right to exclude that they claim is at issue, and Petitioners have failed to identify any rights that are actually impaired by operation of the Rule. The closest Petitioners come is to assert—without evidence—that one Certificate holder has placed a fence over a stream. But since the Rule does not permit fencing of land, this alleged injury has no connection to the Rule. Petitioners' lack of injury from the Rule is yet another basis for the Court to decline to exercise its original jurisdiction. *See Bounds* at ¶52 (declining to review an issue where "[p]etitioners have been unable to demonstrate with any specificity how the [domestic well statute] caused or will cause any deprivation of their water rights").

F. The Court should decline to exercise its original jurisdiction.

Unlike freedom of speech, the separation of powers, or the other important constitutional issues implicated in prior cases where this Court has exercised original jurisdiction, Petitioners' desire to disturb and destroy privately owned land is not an important constitutional interest. The Rule does not impede Petitioners' ability to use public waters, and does not prevent Petitioners from walking or wading on public lands. A ruling by this Court that landowners do *not* have the right to exclude trespassers from their property would constitute a taking for which the State of New

Mexico would be obligated to provide just compensation. Landowners pay a premium to own land over which waters flow, and the cost to the State of transferring ownership of that land to the public would be immense: by one estimate, there are over 94,518 miles of streams flowing on privately owned land in New Mexico and the taking of this would not just result in an enormous expenditure of public funds, but it would also result in a decrease in tax revenue as the State could no longer collect property tax on this valuable land (not to mention the diminishment in property values of surrounding land, which would further decrease tax revenues).

Moreover, while Petitioners portray the issue as a conflict between private and public rights, there is no such conflict. Neither the Rule nor Section 17-4-6(C) provides a landowner with the right to bar the public from using the *waters* of a river. Instead, the statute only precludes "walking or wading onto private property through non-navigable public water" (e.g. walking on the privately owned bed of a stream or river) and "access[ing] public water via private property" (e.g. walking on private land to access public waters). The statute does not allow landowners to preclude members of the public from "passing through" private property via public waterways or recreating above privately owned land while floating on the waters—such a construction of the statute would violate the Supreme Court of New Mexico's holding in *Red River* that the people of New Mexico own the water. In other words, *all* of the public waters of the state remain accessible, regardless of the ownership of

the land below the waters, provided that the public does not use private land to access the waters (either by walking on the riverbed itself or walking through private property to reach the waters).

III. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS HAVE ABANDONED A CENTRAL ARGUMENT IN THEIR PETITION AND HAVE IMPERMISSIBLY EXPANDED THE RELIEF THEY ARE SEEKING.

A. Petitioners have abandoned their theory that the Commission lacked authority to promulgate the Rule.

In their Petition, Petitioners asserted that this Court should exercise its original jurisdiction because the Commission lacked authority promulgate the Rule. Petitioners make no such argument in their Brief, and have thus abandoned this theory. *See State v. Swavola*, 1992-NMCA-089, ¶ 1, 114 N.M. 472 ("She abandons other issues she listed in the docketing statement but did not argue in her Brief-in-Chief."). To the extent that this issue was material to the Court's decision to not summarily deny the Petition, the Court should now dismiss the Petition since one of the central arguments made by Petitioners has been withdrawn.

B. Petitioners impermissibly seek more in their Brief than they placed at issue with their Petition.

The relief that Petitioners claimed they were seeking in their Petition was narrow—invalidation of the Rule. The relief they are seeking in their Brief is far broader—a transfer of private property rights from owners of riverbeds to the public.

In filing their Petition, Petitioners were obligated to "set forth . . . the ground or grounds on which the petition is based, and the facts and law supporting the same stated in concise form." Rule 12-504 NMRA. By significantly broadening the relief they are seeking, and by in fact abandoning the primary argument they made in their petition regarding the Commission's authority, Petitioners have engaged in a bait-and-switch that should be rejected by the Court. *See Lee v. Martinez*, 2004-NMSC-027, ¶ 6, 136 N.M. 166 ("declin[ing] to address the applicability of Rule 11–608(B) because the issue was not raised in the Petition for a Writ of Superintending Control and was not extensively briefed by the parties."). As previously explained by this Court

> [o]nce the proceeding is accepted as one in mandamus, then certain well-recognized rules emerge to control the consideration of the case. A most important one is that the case must be tried on the writ and answer. The complaint itself drops out of the picture and the writ must contain allegations of all facts necessary to authorize the relief sought. Furthermore, allegations in the writ should be made as in ordinary actions. Hence, the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply. The facts should be pleaded with the same certainty, neither more nor less.

Laumbach v. Bd. of Cty. Comm'rs of San Miguel Cty., 1955-NMSC-096, ¶ 16, 60 N.M. 226 (emphasis added); *see also State v. Collier*, 2013-NMSC-015, ¶ 26, 301 P.3d 370 ("We agree with the State that it is improper for this Court to consider any questions except those set forth in the petitions for certiorari.") (internal quotations

omitted); *Fikes v. Furst*, 2003-NMSC-033, ¶ 9, 134 N.M. 602 ("We thus limit our discussion to those issues raised in the petition for certiorari.").

CONCLUSION

The Petition should be denied. If Petitioners believe they have the right to walk and wade on private property, challenging a rule that has no bearing on that right is not the appropriate way to litigate their issues. Private ownership of the beds of non-navigable waters is well-established, and the Legislature has already acted to balance the public ownership of water with the private ownership of land. There is no tension between these two interests, and the Court should reject Petitioners' attempt to upend vested property rights and grant private property to the public without just compensation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 19, 2022, I electronically filed this Response Brief with the State of New Mexico's Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

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