

**BEFORE THE NEW MEXICO
STATE GAME COMMISSION**

**In re APPLICATIONS OF CHAMA III, LLC,
FENN FARMS, RANCHO DEL OSO
PARDO, RIVER BEND RANCH and THREE
RIVERS
for land owner certification of non-navigable
public water**

MOTION FOR A PUBLIC EVIDENTIARY HEARING ON THE APPLICATIONS

Adobe Whitewater Club of New Mexico, New Mexico Wildlife Federation and New Mexico Chapter of Backcountry Hunters and Anglers (Movants) bring this motion before the New Mexico Game Commission (Commission) in connection with the referenced applications to be addressed by the Commission at its meeting on June 18, 2021. The applications are brought under 19.31.22.1 et. seq. NMAC (Regulation). The landowners ask for a certificate issued by the Commission that there be a “segment of a non-navigable public water, [across their land] whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.” 19.31.22.6 Movants intervene and move the Commission to hold a full public evidentiary hearing to take testimony, allow cross-examination and to otherwise receive evidence and legal argument, and, based thereon, Movants ask the Commission to deny the applications.

1. Movants are non-profit corporations advancing the public interest in recreational access to the rivers and streams of this state. They are petitioners in the mandamus action against the Commission currently pending before the New Mexico Supreme Court. That action challenges the constitutionality of the Regulation under Article XVI, Section 2 of the New Mexico Constitution mandating that all rivers and streams of New Mexico

“belong to the public.” This motion is brought in reliance on different constitutional provisions, the 14th Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution, both of which guarantee that no person shall be deprived of liberty or property “without due process of law.” In this matter the subject is procedural Due Process.

2. The Regulation, adopted by a prior game commission, fails the test of Due Process. It is unabashedly antagonistic to an open fair decision-making process. “There shall be no oral or verbal comment from the landowner, persons with standing, and the general public at the meeting.” 19.31.22.11 (B) The rights of access, use and enjoyment of the state’s rivers and streams is transformed from public to private merely by the filing of some papers.

3. On the contrary Due Process requires that such a determination come about only after a full and fair evidentiary hearing leading to an informed decision. The ranchers who ask the Commission to change “public” to “private” must appear in person before the Commission, testify under oath and be subject to cross examination in order to justify the significant transfer of property rights they request. Contemporaneous with this Motion the Movants are submitting comments and affidavits establishing their standing and detailing their position on the applications. They welcome, however, an opportunity to testify in person under oath and be subject to cross examination. Indeed, it is believed untold numbers of New Mexico anglers would be heard from on the applications if there were a public hearing. For the Commissions reference the Administrative Procedure Act sets the measure of Due Process that could be followed by the Commission in its adjudication of these applications. NMSA 1978 §§12-8-2, 12-8-10.

4. The absurdity of the Regulation is unmistakable when compared to other Commission decision making. The Commission can revoke or suspend a fishing license only “after reasonable notice and hearing . . .” NMSA 1978 §17-1-18(B) (10). The Commission must have rules providing for “reasonable notice and a hearing” before withholding of a license privilege. *Id.* (11). When three percent of qualified electors of a county wish to question a Commission hunting of fishing regulation the Commission “shall grant a public hearing “NMSA 1978 §171-27. Yet, under the Regulation all citizens’ rights to fish in a New Mexico stream can be revoked without notice or a hearing.

5. The Commission must be guided by the legislation that brought it into existence. “It is the purpose of this act and the policy of the state of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for *public recreation and food supply* . . . NMSA 1978 § 17-1-1 Emphasis added. Service by the Commission is to the public. Nothing in its statutory authority makes it a servant of a select few landowners.

6. Common sense and sound judgment must guide the Commission, not the dubious Regulation. The Constitutional guarantee of Due Process is a higher authority. A full public hearing, with live testimony and cross-examination, should be held to consider the applications.

7. Should the Motion be denied, Movants suggest the Commission has yet a reasonable solution within in the terms of the Regulation, which provides:

G. The commission *may* take final action on the application by approving or rejecting the written determination and recommendation or written rejection of the director *but is not limited to those options*. 19.31.22.11 Emphasis added.

The New Mexico Supreme Court will decide whether the Regulation does or does not pass constitutional scrutiny. The Commission is free to do other than approve or reject the applications. The prudent and reasonable option for this Commission is to defer action on the pending applications, and any others that emerge, until after the Supreme Court has ruled whether it will issue a Preemptory Writ of Mandamus directed at the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2021, I served the foregoing via email

on the following counsel of record:

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