



Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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**ADOBE WHITEWATER CLUB OF NEW MEXICO,  
A non-profit corporation, NEW MEXICO WILDLIFE  
FEDERATION, a non-profit corporation, and NEW  
MEXICO CHAPTER OF BACKCOUNTRY HUNTERS 7  
ANGLERS, a non-profit organization**

vs.

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

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No. S-1-SC-38195

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

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**ORAL ARGUMENT NOT REQUESTED**

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## **STATEMENT OF COMPLIANCE**

As required by Rule 12-504(H), we certify that the brief complies with the type-volume limitation of Rule 12-504(G)(3). According to Microsoft Office Word, the body of this brief, as defined by Rule 12-504(G)(1) contains 5,997 words.

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## **INTRODUCTION**

Under well-settled law, riverbeds can be privately owned if the waters above them were non-navigable at the time of Statehood. To make clear that walking or wading on privately owned riverbeds is unlawful, the Legislature enacted Section 17-4-6 NMSA (the “Statute”). While the Statute is enforceable any time a member of the public walks or wades on private riverbeds, forcing the public and law enforcement to decide navigability on an ad hoc basis creates enforcement and compliance problems. Thus, to effectuate the Statute and give certainty regarding ownership, the State Game Commission (the “Commission”) promulgated a rule, 19.31.22 NMRA (the “Rule”), which allows landowners to obtain a certificate confirming non-navigability (and thus private ownership). These certificates inform the public and law enforcement that the riverbed at issue is privately owned, as set out by federal law, and that walking or wading is thus unlawful.

Despite never previously litigating the issue, Petitioners now ask the Court to invalidate the validly passed Rule. In challenging the Rule, Petitioners fail to acknowledge well-settled law that directly contradicts the assertions made in their Petition, fail to explain why they could not seek relief from a lower court, and fail to raise an issue that justifies this Court’s exercise of original jurisdiction. Striking the Rule will have no impact on the property rights at issue, as those rights are conferred by the United States Constitution. But, striking the Rule may neutralize Section 17-

4-6, as law enforcement and the public will have no way to readily determine whether a riverbed is private and landowners will lose the protections afforded by the Rule.

While not named in the Petition, Additional Respondents<sup>1</sup> own property in New Mexico over which non-navigable waters flow or otherwise have an interest in enforcement of private property rights, and are thus real parties in interest. Many of the Additional Respondents either already obtained certificates pursuant to the Rule, have pending applications pursuant to the Rule, have attempted to submit applications, or have property that could be certified under the Rule. Any ruling by the Court regarding the validity of the Rule will impact the rights and interests of Additional Respondents making them all real parties in interest.

## **BACKGROUND**

In asserting that the Court should invalidate the Rule, Petitioners fail to advise the Court of critical legal issues that must guide the Court's analysis: the federal right of an individual to own the riverbed of a non-navigable waterway (and thus exclude trespassers from walking or wading on that private property) and the right of the public to use the waters of the State of New Mexico (which Additional Respondents do not dispute are owned by the public). While Petitioners contend the Rule cannot be reconciled with the public's right to use the waters of the state, there

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<sup>1</sup> The Additional Respondents joining this Response are listed in Appendix A.

is in fact no conflict. That is because the public is free to use public waters to recreate in waters over privately owned land. The public simply cannot wade or walk on that riverbed (or use private land to access the waters) without written permission of the landowner. These two concepts are not mutually exclusive.

### **A. Background regarding ownership of riverbeds<sup>2</sup>**

A foundational issue is the private property interests of landowners who own riverbeds over which non-navigable waters flow. 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). But “[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.* Thus, private property owners (like Additional Respondents) who trace their title to the United States, or who can otherwise establish that the waters at issue were non-navigable<sup>3</sup> at the time of statehood, own the riverbed beneath any waters that flow over their land. *See id.* This

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<sup>2</sup> “Riverbeds” refers to streambeds, riverbeds, and the lands over which public waters, including torrential and perennial waters, flow.

<sup>3</sup> 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. 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.



“equal-footing doctrine” is “the constitutional foundation for the navigability rule of riverbed title” and is a question of federal constitutional law. *Id.* at 603. The public trust doctrine, which dictates ownership of *waters* within the borders of a state, is “a matter of state law.” And, “[u]nder 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.” *Id.* at 604.<sup>4</sup> In other words, federal law decides who owns a riverbed while state law decides who owns the waters that flow over a riverbed.<sup>5</sup> And, federal law is clear that for non-navigable waters, any owner that traces title to the United States is the owner of the riverbed. Each of the Additional Respondents can trace title back to the United States and thus own the riverbeds on their property.

There is no legal distinction between private property under non-navigable water and other private property, so ordinary principles of property law apply to land over which non-navigable public waters flow. One fundamental property right, the

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<sup>4</sup> This common law doctrine is inapplicable where there is a statutory scheme on point. *See Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16.

<sup>5</sup> This Court has held that the citizens of New Mexico own the unallocated waters of the state and can use those waters for recreation purposes. *See State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶59. Additional Respondents do not contend that the public is precluded from using public waters for recreation. Additional Respondents simply contend that the public cannot use private property to access those waters. This position is consistent with, and supported by, New Mexico law.

right to exclude, has been recognized as “perhaps the most fundamental of all property interests” and is protected by the United States Constitution regardless of where the property is located. *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). Consequently, any action by the Court, the Legislature, the Department, or the Commission to restrict landowners’ right to prevent the public from using their land would deprive Additional Respondents of their constitutionally protected rights and give rise to an immense wave of litigation as owners of riverbeds would need to seek just compensation for the taking of their property. *See id.*

New Mexico law also recognizes the right to exclude from private property. Pursuant to NMSA 1978, Section 30-14-1(A), a person commits a “criminal trespass” by “knowingly entering or remaining upon posted private property without possessing written permission.” Any person who commits a criminal trespass “is guilty of a misdemeanor” and, if that person damages the property, “shall be liable . . . for civil damages.” *Id.* at (B)-(E). If a person commits a criminal trespass while engaged in hunting, fishing, or trapping activities, that person “shall have his hunting or fishing license revoked . . . for a period of not less than three years.” *Id.* at (E).

Outside of the criminal context (and the private right of action allowed by the criminal statute), New Mexico common law also recognizes a tort for trespass. *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 1. That tort protects against “injury to the right of possession.” *Id.* at ¶ 7.

While existing laws already precluded persons from walking on privately owned riverbeds, the New Mexico Legislature enacted new law in 2015 that made explicit what was implicit from already existing law. That legislation, which Petitioners do not challenge, provides that:

No person . . . shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner . . . has expressly consented in writing.

NMSA 1978 § 17-4-6. In essence, this legislation 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). The legislation, which was made a part of the Game and Fish and Outdoor Recreation chapter of the New Mexico Statutes, also made clear that the Department had authority to enforce trespass laws on non-navigable riverbeds. *See* NMSA 1978, § 17-1-5 (requiring the Department, “to enforce and administer the laws and

regulations relating to game and fish”).<sup>6</sup> The Statute thus removed any ambiguity and reduced the chance for conflict between recreationalists and landowners created by an April 2014 Attorney General King Opinion which many interpreted to give license to trespass on private property.

After a lengthy rulemaking process to create a rule that helps implement the Statute, the Commission enacted the Rule (which notably is the only law actually challenged by Petitioners). This Rule sets forth a process by which landowners may obtain a certificate proving that waters are non-navigable (and that the landowner is thus the owner of the riverbed) thereby giving public notice that the segment at issue is privately owned as dictated by *PPL Montana*. See Section 19.31.22.8. During the rulemaking process, the Commission made clear that the rule was being adopted to follow *PPL Montana*’s test for determining ownership of land. Since States cannot create navigability rules that alter federal law regarding ownership of riverbeds under non-navigable waters, the *PPL Montana* test was the *only* navigability test that

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<sup>6</sup> The Director and the Department have an obligation to enforce criminal trespass related to hunting and fishing, including the use of privately owned streambeds and riverbeds, separate from Section 17-4-6. New Mexico law broadly makes them responsible for enforcing *all* laws “relating to game and fish.” See Section 17-1-5. New Mexico’s criminal trespass statute contains specific additional penalties that apply when a person trespasses while “engaged in hunting, fishing, or trapping activities,” Section 30-14-1(E), so even the ordinary criminal trespass law is one “relating to game and fish” that the Department must enforce.

could be used—no further definition was required. *See PPL Montana*, 565 U.S. at 604.

A certificate obtained pursuant to the Rule is a valuable property interest conferred on applicants who meet its requirements. While the certificate does not create the underlying property right (*PPL Montana* and federal law determines riverbed ownership), the certificates make clear that the segments at issue are “certified non-navigable public water” and thus allow landowners to pre-adjudicate ownership of the riverbed. *Id.* at 19.31.22.13. The certificates can be recorded “with the various county clerks of the state of New Mexico” and become a property interest that “shall run with the segment, the land, and the real property.” *Id.* Importantly, the certificates allow landowners to obtain signs from the Department which make clear that walking or wading is prohibited. Those signs in turn are “prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass and related laws, rules, and regulations.” *Id.* The signs assist law enforcement and the public by eliminating any doubt regarding ownership of the property. The public easily knows to stay off such property, and law enforcement officers can cite trespassers without engaging in an analysis of the navigability of the waters.<sup>7</sup> Furthermore, by documenting that the riverbed is

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<sup>7</sup> In an amicus brief in *PPL Montana*, the National Wildlife Federation argued that requiring the public to make a segment by segment determination of navigability

private property, a certificate protects the landowner from the diminution in value that occurs when ownership and the right to exclude is called into question. Finally, the Department has promised to respond to trespass complaints on certified properties and take enforcement actions that recognize and protect the private property rights of riverbed owners.

### **B. Background regarding ownership and use of public waters**

A separate and distinct issue<sup>8</sup> is ownership of the waters that flow through the various streams and rivers in 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. 16, Section 2. 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.

This Court in fact has stated that there is no such right as it painstakingly made clear, when addressing whether the public generally could use public waters over

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would lead to conflict between the public and landowners. The Rule provides a mechanism to avoid this conflict.

<sup>8</sup> 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.

private land, that it was dealing “specifically, and only, with these impounded public waters, easily accessible *without trespass* upon riparian lands.” *State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶56 (emphasis added); *and id.* at ¶48 (“The 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 private property along the banks.*” (emphasis added)). And, the Court emphasized that ownership of the land below public waters is a separate and distinct concept from ownership (or use) of public waters, stating “[w]e must not confuse title to the land with that to water, certainly not to water which was not upon the land when the grant was made or when the confirmation by the Congress was effected; these are waters which have no relation to the land as it is affected by title to the latter.” *Id.* at ¶ 44. The Court also cited with approval a Texas appellate decision which held that waters “which overflow upon private lands are, nevertheless, and remain, public waters, and being such, the right of the public to fish therein *without disturbing the terrain in private ownership* cannot be denied.” *Id.* at ¶29.

Given this Court’s repeated efforts to distinguish between public use of water and private ownership of land, there is no inconsistency between the public’s right to use *water* and the private right to control access to land. 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 Mexico law,

are free to exclude the public from trespassing on their private properties. Taking these two concepts to create a harmonious whole, as required by New Mexico's rules of statutory construction, the public can use public waters to recreate provided that it does not touch privately owned land. *See State v. Smith*, 2004-NMSC-032, ¶10 (“Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another.” (quotation marks omitted)). And, private landowners can exclude trespassers from their property so long as they do not prevent the public from recreating on the waters. When a member of the public walks or wades on private property, that person is a trespasser. When a landowner bars a person from recreating on waters that can be utilized without walking or wading on private property, 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.

The notion that private property owners and the public can simultaneously enjoy their rights has been addressed by this Court with respect to the public's rights regarding wildlife. Much like 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. 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 and adding



additional penalties if the trespass occurs while the person is hunting). Federal courts have similarly harmonized the private right to own land with the public right to use 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 (1946). Just as there is no tension between private ownership of land and public ownership of airspace, there is no tension between private ownership of riverbeds and public ownership of waters above them.

It is also important to note that the public’s right to use public waters is not absolute. The Commission has long had authority to close public waters. *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 could be construed as limiting the public’s access to public waters, the Legislature has the authority to limit that access. The New Mexico Constitution itself subjects the public’s ownership of waters “to appropriate[ion] for beneficial use, *in accordance with the laws of the state.*” N.M. Const. Art. 16, §2.

## DISCUSSION

### A. An Extraordinary Writ Is Inappropriate

Petitioners assert that this Court should issue an extraordinary writ pursuant to Rule 12-504 of the Rules of Appellate Procedure. They contend that their Petition raises a “fundamental constitutional question of great and far reaching public importance” that should be resolved in the first instance by this Court. Petition at 2-3. But rather than challenge Section 17-4-6 or the numerous laws that allow landowners to bar the public from walking or wading on private property, Petitioners *only* challenge the Rule. And, they have not previously brought a dispute before the Commission, any administrative agency, or any lower court. The Rule allows Petitioners to submit comments and documentary evidence opposing an Application and, if they have standing, even appeal the issuance of a certificate, but Petitioners failed to avail themselves of that right.

While Article VI, Section 3 of the New Mexico Constitution gives the Court original jurisdiction over extraordinary writs, the Court only exercises that jurisdiction in limited circumstances where “1) the issue presented a fundamental question of great public concern; 2) the relevant facts were virtually undisputed and no further factual questions existed for the district court to decide; 3) the purely legal issue eventually would have come before this Court; and 4) the petitioners and the

respondents desired an early resolution of the dispute.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶16. A search of this Court’s opinions citing to Rule 12-504 reveals that the Court exercises original jurisdiction in an exceptionally small number of cases and for issues of far greater public importance than raised by Petitioners. *See e.g. Twohig v. Blackmer*, 1996-NMSC-023, ¶28 (interplay between constitutional right to free speech and constitutional right to a fair trial); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶17 (addressing the separation of powers with bearing on the investment of large sums of money). Petitioners cannot overcome this high bar.

First, the issue presented is not a fundamental question of great public concern. As explained above, there is no tension between the public’s right to use the waters of the state for recreational purposes and landowners’ right to exclude the public from private property. The public is free to float on public waters above private property, and private property owners are free to bar the public from walking or wading on private land. Further, while the public owns the waters of the state, the issues raised only implicate the small percentage of New Mexican’s who seek to walk or wade on private property, without the permission of the landowner, while engaged in fishing, hunting, or other recreational activities. New Mexicans can currently fish and hunt on private property with appropriate permission, they can fish above private property provided they can float to and then above the area where

they are fishing, and they can walk or wade on public lands. And, Petitioners only challenge the Rule, so the relief sought will not alter the ownership of land or the public's ability to walk or wade. Elimination of the Rule will, however, create conflict between landowners and the public and increase litigation as landowners will be forced to establish non-navigability in judicial proceedings against trespassers rather than in the streamlined process set out by the Rule.

Second, there are factual determinations that may need to be made by a trial court before the viability of the Rule can reach this Court. Evidence and 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 elimination of the Rule 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, 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.

Evidence and fact finding on the burden to both the public and to law enforcement officers in making ad hoc determinations about whether water is or is not navigable

is also necessary when assessing the viability of the Rule. Private landowners can restrict access to their land with or without a Certificate, but without Certificates law enforcement officers and the public will be forced to make field determinations regarding whether a particular river segment is or is not navigable. The burden of requiring officers to make these determinations should be considered in an evidentiary phase of any challenge to the Rule.

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 would be impossible to float without touching the private property below the waters. 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. 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.

Petitioners also fail to provide evidence to the Court regarding how many hundreds 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. The impact on the land owned by sovereign nations over which non-navigable waters flow should be addressed during fact-finding. These are but a handful of factual issues that should be addressed. This Court is thus the wrong forum to challenge the Rule.

Third, this case does not involve purely legal issues and does not involve an issue that necessarily would have come before this Court. Petitioners' challenge does not impact the underlying property rights at issue, so a lower court's ruling on the validity of the Rule might have been addressed through additional rulemaking or Legislative action, not an appeal. And as Petitioners note in their Petition, the Commission has indicated that it will reevaluate the Rule—a process that may moot any ruling on the Rule.

Fourth, Additional Respondents do not desire an early resolution of the dispute by this Court. There is in fact no dispute to be resolved—well-settled federal and state law makes clear that landowners have the right to exclude the public from

walking or wading on their lands. The Rule was validly promulgated, and is binding on the Commission and the Department. The Rule has no actual impact on Petitioners, as non-certified property owners have the same right to exclude as certified property owners. Certified property owners simply have prima facie proof of the ownership status of their land that assists with law enforcement, gives notice to the public, and helps preserve property values. There is thus no need for resolution of a dispute, much less early resolution by the Court.

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).

**B. The Relief Requested Will Not Address The Issues Raised By Petitioners**

Petitioners assert that the Commission has granted certificates “to exclude the public from enjoying recreation activities on specified segments of public rivers.” The Commission has done no such thing. Existing law (including *PPL Montana*) allows landowners to exclude the public *regardless* of the existence of a certificate from the Commission. The Commission did not create the property rights at issue, and invalidation of the Rule—the only relief sought by Petitioners—will not change the fact that owners of land below non-navigable waters have the Constitutional right to bar walking or wading on their land. The change Petitioners seek would require invalidation of the United States Supreme Court’s ruling in *PPL Montana*, invalidation of the United States Constitution, invalidation of Section 17-4-6, changes to New Mexico’s criminal trespass laws, and numerous other changes that are not even raised in the Petition. If the Court invalidates the Rule, landowners and the public would only lose a means of obtaining certainty regarding the status of land *before* a trespass occurs. The extraordinary relief sought by Petitioners is thus inappropriate.



Petitioners also assert that the Commission unlawfully “privatized” New Mexico’s rivers. This assertion is based on a false framing of the issues. The Commission did not privatize New Mexico rivers. It has simply followed well-settled United States Supreme Court precedent recognizing that the land under non-navigable water is private property on which landowners can exercise their fundamental right to exclude. To the extent that recognizing the distinction between public ownership and use of the waters and private ownership and use of the land constitutes the privatization of rivers, it is the United States Supreme Court, not the Commission, that created the issue of which Petitioners complain.

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 to the waters (either by walking on the riverbed itself or walking through private property to reach the waters).

### **C. The Commission had authority to promulgate the Rule**

Petitioners contend the Commission had no authority to promulgate the Rule. This is incorrect. First, the Rule is an exercise of executive, not legislative, powers. Where a member of the executive branch “execute[s] existing New Mexico statutory or case law,” it is operating in an executive, not a legislative, capacity. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶34. *PPL Montana* controls whether land below public water is privately owned or publicly owned. The Rule merely provides a process by which a prior determination can be made about the status of land—an executive function that applies *existing law* (Section 17-4-6 and *PPL Montana* among others). The Commission thus did not exceed its authority as it created *no* new law and simply applied existing law.

Further, the New Mexico Constitution permits the Legislature to “delegate both adjudicative and rule-making power to administrative agencies.” *New Energy Economy v. Shoobridge*, 2010-NMSC-049, ¶14. In 1931, the Legislature delegated to the Commission the authority to “make such rules and regulations . . . as it may

deem necessary to carry out all the provisions and purposes of [the Game and Fish and Outdoor Recreation Act], and all other acts relating to game and fish.” NMSA 1978, §17-1-26. At the time that it enacted Section 17-4-6 and incorporated the Legislation into the Game and Fish and Outdoor Recreation Act, the Legislature was well aware that it had delegated authority to the Commission to make all rules and regulations necessary to carry out the provisions of the Game and Fish and Outdoor Recreation Act. *See Herrera v. Quality Imports*, 1994-NMSC-109, ¶15 (“We presume the legislature is aware of existing law when it enacts legislation.”).

The Legislature thus knew two essential pieces of information when it enacted the Statute: (1) that the Commission was responsible for adopting any regulations necessary to carry out the law and (2) that *PPL Montana* controls the question of who owns the land below waters.<sup>9</sup> *See id.* By choosing to make Section 17-4-6 a part of the Game and Fish and Outdoor Recreation Act, the Legislature intentionally gave the Commission authority to promulgate Rule 19.31.22. The Commission’s decision

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<sup>9</sup> That the Legislature intended *PPL Montana*’s non-navigability test to be controlling is evidenced by the fact that it expressly rejected other navigability tests by stating “[n]othing in this act shall be interpreted to affect or influence whether a water is a navigable water or a water of the United States for purposes of the federal Clean Water Act of 1977, 33 U.S.C. 1251 et seq.” Section 14-4-6.

to promulgate a rule that tracks the non-navigability test set out by the United States Supreme Court was a proper exercise of that delegated authority.<sup>10</sup>

This Court has *already* recognized that the Commission has “the authority . . . to determine certain facts or a state of things upon which the law has already acted,” that the exercise of such authority “is not the enactment of substantive law,” and that the Commission’s promulgation of regulations based upon existing law “is not a delegation of legislative power.” *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶36. The Rule creates no new law and merely codifies the only means of proving non-navigability for title purposes—*PPL Montana*’s test for establishing non-navigability at the time of statehood on a segment-by-segment basis.<sup>11</sup> The Rule does not create any new legal property rights (beyond the value of the certificate), it does not create any new legal test, and it is not an exercise of legislative functions. The legal test for navigability, as it pertains to ownership of riverbeds, was set by the United States Supreme Court. The evidence that the Commission will accept to

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<sup>10</sup> Petitioners reference provisions in a proposed bill that were not incorporated into Section 17-4-6. While Petitioners assert that there is some significance to amendments during the Legislative process, early versions of legislation have no bearing on the final legislation. *Regents of University of New Mexico v. New Mexico Federation of Teachers*, 1998-NMSC-020, ¶30-32.

<sup>11</sup> See *PPL Montana*, 565 U.S. at 604 (emphasizing “[i]t is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State”).

issue a certificate is set by the Rule. This is entirely within the scope of power granted to the Commission by the New Mexico Legislature.

#### **D. Attorney General Opinions are irrelevant**

Throughout the Petition, Petitioners reference Attorney General opinions they claim control the issues before the Court. But, “opinions of the Attorney General do not have the force of statute” and have no bearing on this Court’s analysis of the issues raised in the Petition. *Martinez v. State*, 1989-NMSC-026, ¶ 3. Further, it is well settled 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.” *Old Abe Co. v. New Mexico Min. Comm'n*, 1995-NMCA-134, ¶ 43. Even if the referenced opinions called the validity of the Rule into question (they do not), those opinions are irrelevant and need not be considered.

### **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. The Rule was validly promulgated, comports with constitutional law, and does not dictate ownership of private property. The relief Petitioners seek will not alter the existing law, and

striking the Rule will not give the public license to utilize privately owned land. The Petition is wholly without merit, and should be rejected by this Court.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on April 17, 2020, 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.

/s/ Marco E. Gonzales

Marco E. Gonzales

Modrall, Sperling, Roehl, Harris & Sisk,  
P.A.

## APPENDIX A

Additional Respondents are the following:

Additional Respondent Chama Troutstalkers, LLC is the owner of property over which the nonnavigable waters of the Chama River and its tributary, the Rio Chamita, flow. Chama Troutstalkers, LLC submitted an application in accordance with the Rule on July 24, 2018 and was issued a non-navigability certification by the Commission on December 28, 2018.

Additional Respondent Rio Dulce Ranch operates a ranch owned by two trusts that own land over which the non-navigable waters of the Pecos river flows. Those trusts submitted an application in accordance with 19.31.22 NMAC on July 24, 2018 and were issued a non-navigability certification by the Commission on December 28, 2018.

Additional Respondent Z&T Cattle Company, LLC is the owner of several properties over which the non-navigable waters of the Alamosa River, the Mimbres River, and the Penasco River flow. Z&T Cattle Company submitted applications in accordance with 19.31.22 NMAC for three separate river segments on July 24, 2018 and was issued non-navigability certifications by the Commission on December 28, 2018. Z&T Cattle Company owns additional properties in New Mexico over which non-navigable waters flow, and has an interest in obtaining additional certificates.

Additional Respondent Rancho Del Oso Pardo, Inc. (RDOP) is a New Mexico corporation with its principal place of business in the Village of Chama, New Mexico. The company is the owner of property over which the nonnavigable waters of the Chama River flow. RDOP submitted an application pursuant to the Rule on or about November 20, 2019. That application is still pending, and RDOP has initiated litigation in district court due to the Commission's failure to follow the Rule with respect to the processing of the application. *See Rancho Del Oso Pardo, Inc., et al. v. New Mexico Dept. of Game and Fish, et al.*, Case No. D-101-CV-2020-00939.

Additional Respondents River Bend Ranch and Chama III, LLC, dba Cañones Creek Ranch ("Cañones ") are the owners of property over which the nonnavigable waters of the Pecos River (River Bend Ranch) and the Chama River (Cañones) flow. River Bend Ranch and Cañones submitted applications in accordance with the Rule on or about November 25, 2019. Those applications are still pending, and River Bend Ranch and Cañones have initiated litigation in district court due to the Commission's failure to follow the Rule with respect to the processing of the applications. *See id.*

Additional Respondent Fenn Farm is a New Mexico corporation solely owned by Bill Fenn. Mr. Fenn owns land in New Mexico over which the non-navigable waters of the Hondo and Berrendo Rivers flow. On March 13, 2020, Fenn Farm



attempted to submit an application pursuant to the Rule, but the Commission summarily rejected Fenn Farm's application without any legal justification. Fenn Farm is in the process of initiating litigation related to this rejection.

Additional Respondent Three Rivers Cattle Ltd., Co. ("Three Rivers Ranch") is a New Mexico corporation which owns land over which the nonnavigable waters of the Three Rivers, the Indian Creek, the Golondrina Draw, and the Candelaria Draw flow. Three Rivers Ranch was in the process of preparing an application pursuant to the Rule but, due to the Commission's summary rejection of Fenn Farm's application, has stayed that process. Three Rivers Ranch is in the process of initiating litigation related to the Commission's unlawful refusal to accept applications.

Additional Respondents Flying H Ranch Inc., Spur Lake Cattle Co., Ballard Ranch, Dwayne and Cressie Brown, Cotham Ranch, Wapiti River Ranch, Mulcock Ranch, 130 Ranch, Wilbanks Cattle Co., and WCT Ranch, are the owners of property in New Mexico over which non-navigable waters flow. Upon completion of an application, each of these Additional Respondents would be entitled to a certificate under the Rule. Each of these Additional Respondents has an interest in ensuring that the application process set forth in the Rule remains available to them.

Additional Respondent The New Mexico Farm and Livestock Bureau is a free, independent, nongovernmental and voluntary organization of farm and ranch

families united for the purpose of analyzing agricultural problems and formulating action to achieve educational awareness and social advancement, and thereby, to promote the national well-being. Many of its members own land over which non-navigable waters flow.

Additional Respondent Chama Peak Land Alliance is a diverse group of conservation-minded landowners committed to embracing and practicing responsible land, water and wildlife stewardship in northern New Mexico. Members of the Alliance represent a land area that runs from the headwaters of the Navajo River in south Archuleta County, Colorado and the Conejos River system to the Brazos headwaters and Rio Nutrias in Rio Arriba County, New Mexico. The membership currently consists of a land block of approximately 200,000 acres, many of which lie under non-navigable waters of the State.

Additional Respondent New Mexico Cattle Growers' Association serves as the voice of the beef industry in New Mexico since 1914. The New Mexico Cattle Growers' Association was established to assist livestock producers in the State of New Mexico and since that time, the Association has worked to ensure that the rights of livestock producers are protected. Over its 100 year history, the Association has served the livestock industry faithfully. That tradition continues today. NMCGA currently has members in all 33 of New Mexico's Counties. Many of NMCGA's members own land over which non-navigable waters flow.

Additional Respondent the New Mexico Council of Outfitters and Guides represents the finest hunting and fishing professionals in the state of New Mexico. Established in 1978, NMCOG strives to promote and enhance the outdoor recreation industry by supporting ethical hunting practices and wildlife conservation. Members spend thousands of hours in the field annually and have a practical knowledge regarding location, health, and quality of game populations. Its members have an interest in ensuring that private property rights are recognized and that private property owners continue to have an incentive to develop their riverfront properties, encourage spawning of fish, and otherwise contribute to the quality of New Mexico's waterways. One or more of its members own land over which non-navigable waters flow.

Additional Respondent the Upper Pecos Watershed Association seeks to encourage and promote appropriate recreation management, improve watershed ground cover conditions where feasible, support improved land use, waste management, and transportation planning and management, and protect wildlife and improve habitat. Many of its members own land over which non-navigable waters flow.