IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioners,

vs. No. S-1-SC-38195

STATE GAME COMMISSION,

Respondent,

and

CHAMA TROUTSTALKERS, LLC, et al.

Intervenors-Respondents.

REPLY BRIEF

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INTRODUCTION

Intervenors-Respondents' Answer Brief provides *no* support in the law for the ruling they ask this Court to make for the first time in New Mexico history: that the public's constitutional right to use public waters under Article 16, Section 2 is subordinate to common law private property rights. In addition to arguing the primacy of private property, they contend this Court should step aside from ruling because: (1) the Rule does not really work to exclude the public from rivers, and (2) the Legislature has performed the balancing of public versus private rights that the Court failed to accomplish in *State ex. rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 ("*Red River*").

Intervenors-Respondents would have the Court bury its head in the sand and ignore the common-sense reality that, as to every river in New Mexico, a prohibition on use of the riverbed is, in effect, a prohibition on the use of the public's water in violation of Article 16, Section 1 and 2. Under three successive sovereign governments the public's rights to use of the state's water for fishing and recreation are preserved, protected and imbedded in our Constitution. "And under the Civil law, as it pertains to public waters, inherited by us from Mexico with the acquisition of the territory in question, fishing rights of the public always appertained to all public waters." *Red River*, 1945-NMSC-034, ¶ 48. The effect of the Rule is to foreclose the constitutional rights of the public in recreational use of

New Mexico rivers and streams in favor of enjoyment only by adjacent landowners.

I. THE RULE EFFECTIVELY PRECLUDES PUBLIC USE OF RIVERS.

Intervenors-Respondents would have this Court suspend its knowledge of commonly known facts in order to accept their contention that the "rule . . . has no bearing on . . . the public's access to waters." I-R at 1. But this Court can "take judicial notice" of matters of "common knowledge." *Appelman v. Beach*, 1980-NMSC-041, ¶ 16, 94 N.M. 237. And it is common knowledge, as suggested above, that for nearly every stretch of every river in New Mexico, the public recreational uses guaranteed in *Red River* are impossible if using the riverbed constitutes trespass. As a procedural matter, this is undisputed. As a practical matter, it is beyond dispute. It is also not a matter of degree: this Court need not determine *how many* rivers or *which segments* are unusable without use of the riverbed; the fact that many are unusable suffices for the purposes of the Petition.

Notably, the Director of the Game Commission confirmed this common-knowledge understanding of the impacts of the Rule. In *Sloane v. Game Commission*, No. D-101-CV-2020-00062, he makes the following allegation:

> If an application is approved, the subject river segment is deemed a non-navigable public water. That designation allows landowners to exclude members of the public from river segments passing through their property even when those waterways were accessed via public land or waterways.

Sloane Compl. ¶ 8; *see also* 19.31.22.6 NMAC (stating Rule's objective as making "riverbed[s] or streambed[s]" under public waters "closed to access" by the public).

Intervenors-Respondents argue that the Rule does nothing more than create a mechanism for riverbed owners to obtain "signage" from the Department of Game and Fish, and they assert that nothing about the Rule "restricts public use of water," and that the Rule merely "help[s] [landowners] enforce their *existing* private property rights." I-R at 3. But the proliferation of litigation initiated by Intervenors-Respondents belies these claims; more than signage is at stake here.

II. PRIVATE OWNERSHIP OF RIVERBEDS CANNOT NULLIFY PUBLIC CONSTITUTIONAL RIGHTS.

A. *Red River* Refutes the Contention that Riverbed Owners Can Exclude the Public from Public Waters.

Land ownership is not absolute, and an individual's land can be subject to various uses or servitudes imposed for the benefit of the public. That is particularly true when it comes to New Mexico water. *State ex. rel. Bliss v. Dority*, 1950-NMSC-066, ¶ 47, 55 N.M. 12, 225 P.2d 1007 (holding that water was "reserved . . . to the State of New Mexico as trustee for the public, and subject to use by the public at any time").

Accordingly, the Court in *Red River* rejected the *same argument* that Intervenors-Respondents make here. Specifically, *Red River* rejected the argument

that New Mexico should follow the Colorado Supreme Court's 1905 plurality opinion in *Hartman v. Tresise*, 84 P. 685 (Colo. 1905). 1945-NMSC-034, ¶¶ 38-43 (rejecting *Hartman*). That opinion held that private ownership of a Colorado streambed conferred exclusive rights to the fishery, and, therefore, that a member of the public "has no easement over any portion of the [landowner's] property," including the "the beds of the streams" in order to fish. *Hartman*, 84 P. at 687.

The *Red River* Court instead relied on the principle that "the right of fishery follows the ownership of the water," and concluding, as to the *Hartman* line of argument that:

> If the rule contended for…were to obtain we could enjoy no fishing or recreational rights upon much of the public water of this state, although access thereto could be reached without trespass on the privately owned lands of another.

1945-NMSC-034, ¶ 43.

Thus, not only is Intervenors-Respondents' core contention without any direct support in the authority, it has been considered and rejected by this Court.

B. NMSA 1978, Section 17-4-6(C) Must Be Read in Harmony with Article 16, Section 2 and *Red River*.

Without support in the case law, Intervenors-Respondents rely on the amendment to NMSA 1978, Section § 17-4-6(C) (2015) adopted by the Legislature in 2015 to argue for barring the public from recreational use of streambeds. It states that:

> 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 or lessee or person in control of private lands has expressly consented in writing.

Id. Intervenors-Respondents argue that this *statutory* provision bypasses this Court's *constitutional* decision in *Red River* by "balanc[ing] the public's interest in recreating on water with private ownership of land . . .[and] thus remov[ing] any ambiguity and reduc[ing] the chance for conflict between recreationalists and landowners created by a 2014 Attorney General Opinion[.]" I-R at 11.

But such a balancing of constitutional rights is the province of this Court, as the "the ultimate arbiter[] of the law of New Mexico." *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 22, 89 N.M. 351, *overruled on other grounds by State v. Rondeau*, 1976-NMSC-044, ¶ 22, 89 N.M. 408. And, in any event, the 2014 Attorney General's Opinion is devoid of ambiguity; it applies *Red River* to conclude that "[t]he public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters. This includes walking, wading and standing in a stream in order to fish."[1]

Intervenors-Respondents urge a reading of Section 17-4-6(C) that, they say, is consistent with *Red River*, allowing riverbed owners the "right to exclude" the

[1] Appendix II, Petition for Writ.

public from use of private riverbeds. I-R, p. 11. But while *Red River* balances relative rights holding members of the public cannot trespass *on land* to gain "access to the waters in question," it nowhere says that private riverbeds may not be used. N.M. Att'y Gen. Op. 14-04 (2014), *citing* 1945-NMSC-034, ¶ 17.

In fact, Intervenors-Respondents' reading of Section 17-4-6(C) conflicts with *Red River's* holdings that the right to use public waters for "recreational and fishing purposes . . . cannot . . . be reserved against the state, or the public" and that this holds true regardless of "title to the land." 1945-NMSC-034, ¶¶ 19, 44. And it cannot be squared with Article 16, Section 2.

This Court "seek[s] to avoid an interpretation of a statute that would raise constitutional concerns." *Chatterjee v. King*, 2012-NMSC-019, ¶ 18. And a constitutionally sound interpretation of Section 17-4-6(C) exists here. It is properly read as prohibiting the use of private streambeds as a means to access private property *outside of the stream*, consistent with the existing law of trespass. The prohibition in 17-4-6(C) that "[n]o person . . . shall walk or wade onto private property through non-navigable public water" is logically read as prohibiting entry "*onto private property* through non-navigable water," not as prohibiting the act of wading or walking "through non-navigable water" by itself.

The Rule, by contrast, cannot be so readily preserved. It serves the express purpose of making a "riverbed or streambed" under a "non-navigable public

water…closed to access" by the public "without written permission from the landowner." 19.31.22.6 NMAC.

III. INTERVENORS-RESPONDENTS CANNOT OVERCOME THE AUTHORITY FROM OTHER STATES' HIGH COURTS.

High courts around the country recognize the necessity of incidental rights to touch streambeds and banks in order to make recreational rights to public water meaningful. Intervenors-Respondents do not point to a *single* case that adopts a contrary position.

For example, Intervenors-Respondents suggest that the Utah Supreme Court's decision in *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008) "is not relevant to this litigation" because it was later "overturned" and the court lacked "legislative direction" at the time of its decision. I-R at 23, *citing Conatser*. But *Conatser* held that even though "the bed" of a "non-navigable" body of water "may be privately owned . . . the public's easement to use the water . . . exists irrespective of the ownership of the bed and navigability of the water." *Conatser*, 194 P.3d at 900-901. *Conatser* further held that, in order to effectuate the public's right to "any lawful activity when utilizing the water," the public also has "the right to touch privately owned beds . . . in ways incidental to" recreational use. *Id.* (emphasis omitted). *Conatser*'s *reasoning* is thus squarely relevant to the instant case. As to Utah's legislative override of the court's decision, Intervenors-Respondents overlook the crucial distinction: Utah's public right to recreational

use of water arose from a *statute*, while New Mexico's arises from Article 16, Section 2 of the *Constitution*.

Intervenors-Respondents attempt to distinguish *Elder v. Delcour*, 269 S.W.2d 17 (Mo. 1954), which likewise established the necessity of incidental rights to use the bed and banks, by incorrectly suggesting that it dealt with a "navigable water." I-R at 23, *citing Elder*, 269 S.W.2d at 26. In fact, the *Elder* court found "that the Meramec River at the point in question is a 'non-navigable' river" only suitable for passage by "by canoes, rowboats and other small floating craft," much like the New Mexico rivers in question here. *See Elder*, 269 S.W.2d at 20, 23.

Likewise, Intervenors-Respondents incorrectly attempt to narrow the Montana Supreme Court's recognition of the public's rights incidental to the use of public waters in *Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) suggesting that it applies "only to navigable waters." I-R at 24, *citing Curran*, 682 P.2d at 170. To the contrary, the court held that it is "[t]he capability of use of the waters for recreational purposes" that "determines their availability for recreational use by the public," not "streambed ownership or navigability for nonrecreational purposes" *Curran*, 682 P.2d at 170-71. Accordingly, "no private party may bar the use of those waters by the people," and "the public has a right to use the state-

owned waters to the point of the high water mark," including the right to "portage" over abutting private lands "in the least intrusive way possible." *Id.* at 172.

IV. STRIKING THE RULE AS UNCONSTITUTIONAL WOULD NOT EFFECT A TAKING.

Intervenors-Respondents warn this Court that "[a]dopting Petitioners' argument . . . would 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." I-R at 2. This is incorrect—Petitioners do not seek any transfer of property. To the contrary, in adopting the Petitioners' position, the Court would "make explicit what has necessarily been implicit for centuries: that the public's right to use public waters in New Mexico carries with it the incidental rights to use privately owned riverbeds or banks as reasonably necessary for fishing or recreational use." BIC at 14.

Intervenors-Respondents ignore a key prerequisite for finding a taking: a taking can occur only where there is an already "established right." I-R at 26, *citing Beach Renourishment, Inc. v. Florida Dept. of Envt'l Prot.*, 560 U.S. 702, 714 (2010); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 80 (1982) (noting takings implications of congressional divestment if there are "established . . . property rights."). New Mexico has never recognized an "established right" in private riverbed owners to exclude the public from making use of those riverbeds when exercising its rights to use public waters under Article

16, Section 2. New Mexico landowners have always acquired riparian property subject to these public rights, and "if such investments have been made under a mistaken idea of the law, the resulting hardship will be beyond the power of courts to relieve." *Yeo v. Tweedy*, 1929-NMSC-033, ¶ 14, 34 N.M. 611. As explained in *Red River*, "[t]he small streams of the state are fishing streams to which the public has a right to resort so long as they do not trespass on the private property along the bank," and a landowner "has no right of recreation or fishery distinct from the right of the general public." 1945-NMSC-034, ¶¶ 48, 59.

To say that Section 17-4-6 confirms an "established right" to exclude the public from public waters begs the very questions this Court is now asked to resolve.

V. ORIGINAL JURISDICTION IN THIS COURT IS PROPER.

Intervenors-Respondents' effort to dissuade this Court from exercising mandamus jurisdiction over the Petition is as baseless as it is telling. On the one hand, landowning Intervenors-Respondents have themselves pursued *multiple* mandamus proceedings in two state district courts and in federal court to compel action by the Commission under the Rule. *See* BIC at 7. On the other hand, they now say that this Court should decline to exercise mandamus jurisdiction over the constitutionality of that Rule here. I-R at 30.

Intervenors-Respondents argue that mandamus is improper here because there is no "non-discretionary duty of a government official." I-R at 31. But they ignore this Court's repeated recognition that mandamus "may be used in a prohibitory manner to prohibit unconstitutional official action." *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23; *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562 (explaining same.)

Intervenors-Respondents also argue that there is no issue of "great public importance" here. I-R at 32-33. Such issues exist, they say, where the disputed issue affects "the liberties of" our citizens, or the "interplay between constitutional right[s]," or the "separation of powers." *Id.*, *citing State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, *and Twohig v. Blackmer*, 1996-NMSC-023, ¶ 28, 121 N.M. 746. But the issues raised by the Petition do all of these things. First, these issues affect every citizen's constitutional right to use the public waters on every river in the State. Second, they implicate the "interplay" between that right and the private property rights of riverbed owners. Finally, they implicate disputed/conflicting legislative and executive constitutional interpretations as to which this Court is the ultimate arbiter. *See*, I-R at 14 ("both the Court and the Legislature have *already* balanced [the competing constitutional rights].")

Intervenors-Respondents also attack Petitioners' standing. Petitioners are identified as organizations that include tens of thousands of New Mexico

fishermen and women and recreationists who fish and recreate on the rivers subject to closure under the Rule. Pet. 4. By not summarily denying the Petition and ordering a Reply, the Petitioners' standing in this proceeding is acknowledged by the Court. Rule 12-504(C) NMRA.

Next, having already failed to manufacture fact issues to defeat mandamus, Intervenors-Respondents make another errant attempt. I-R at 33-36; *see also* I-R's Resp. at 15-17 (April 17, 2020); Pet'rs' Reply at 17-18 (Apr. 28, 2020). No fact determinations are required to resolve the legal questions presented here.

Finally, the very fact alone that, as Intervenors-Respondents emphasize, the validity of statewide law enforcement actions turn on the issues presented here requires expeditious resolution by this Court rather than additional years of legal uncertainty and potentially conflicting rulings by lower courts. The Petition falls squarely within the scope of this Court's proper exercise of mandamus jurisdiction.

VI. PETITIONER'S BRIEF-IN-CHIEF DOES NOT SUPPORT DENIAL OF THE PETITION.

Finally, Intervenors-Respondents make two misguided arguments to suggest that the Petitioners' Brief itself, requires denial of the Petition.

First, Intervenors-Respondents claim Petitioners "abandoned" the argument that the Commission "lacked authority to promulgate the Rule". They say the Petition should be denied if this issue served as the basis for the Court's decision not to summarily deny the Petition. I-R at 41. But, Petitioners did not "abandon"

the argument, which was already presented to the Court both in the Petition and in Petitioners' April 28, 2020 Reply. Instead, Petitioners focused the briefing on the core issue before the Court: the appropriate scope and "balancing" of "the public's constitutional ownership of the waters [under Article 16, Section 2], and private landowners' constitutional ownership of the land." I-R at 1.

The question of whether the Commission exceeded its authority is inextricably tied to Petitioner's contention that "the Commission encroached upon the province of this Court" when it, "[b]y administrative fiat . . . fundamentally redefined the scope of New Mexicans' constitutionally protected right to use the 'unappropriated water of every stream…within the State of New Mexico.'" Pet'rs' Reply at 2 (Apr. 28, 2020).

Second, Intervenors-Respondents make the misplaced argument that the Petitioners went from seeking "narrow" relief in the Petition—"invalidation of the Rule"—to now seeking, in Petitioner's Brief-in-Chief, the "far broader" relief of "a transfer of private property rights from owners of riverbeds to the public." I-R at 41. But the Brief-in-Chief does not expand the requested relief. It urges the Court to invalidate the Rule by confirming the constitutional "balancing" accomplished by *Red River*. But unlike Intervenors-Respondents, Petitioners urge a balancing that neither eviscerates Article 16, Section 2, and comports with *Red River*.

Otherwise, Intervenors-Respondents cite zero authority for their contention that a change in requested relief somehow invalidates a petition. I-R at 41-43. To the contrary, this Court has made clear that it has discretion in mandamus to fashion appropriate relief, even if it deviates from what the Petition requested. *See, e.g.*, *Riddle*, 2021-NMSC-018, ¶¶ 37-40 (issuing writ of mandamus but fashioning relief other than requested by Petitioners).

CONCLUSION

Petitioners respectfully request that the Court issue the writ of mandamus, and strike down the Rule, invalidating all certifications already issued under the Rule to date. In doing so, Petitioners ask that the Court make explicit what has necessarily been the law for centuries; that the public's right to use the public waters for fishing and recreation includes the incidental right to make reasonable use of riverbeds and banks to the high-water mark.

Respectfully submitted,

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