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.

PETITIONERS' RESPONSE TO THE INTERVENORS-RESPONDENTS MOTION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Intervenors-Respondents (hereafter "Real Parties") moved for rehearing pursuant to Rule 12-404(A) NMRA. Under Rule 12-404(A), the movant is to particularize the points of law or fact that the movant believes that this Court has "overlooked or misapprehended." The Court's Order of March 2, 2022 granting the Petition for a Writ of Mandamus, however, indicates that "an Opinion explaining the Court's reasoning will follow." Accordingly, at this point, there is no opinion in this case, and there is therefore no basis yet upon which to seek rehearing.

As a result, the arguments offered by Real Parties are based on conjecture. They suggest that the mere fact that the Court—in its questioning during oral argument—referenced the public's constitutional right as an "easement" raises new issues. **[3-17-22 Mot. 2; MIS 1]**. But there is nothing new here. Whether referred to as an easement, a servitude, some other form of encumbrance, or a public right, the state law issues implicated in this matter are unchanged. The public's right to use public waters enshrined in Article16, § 2 of the New Mexico Constitution—and any necessary incidental rights—derive from ancient custom.

These were the issues about which, over the span of nearly two years, the parties in this proceeding submitted 181 pages of briefing to this Court. These were the issues about which *amici* submitted an additional 38 pages of briefing. And these were the issues addressed at the March 1, 2022 hearing in this matter.

In other words, Real Parties had every opportunity to address these matters without needing to relitigate them now.

Even leaving aside that Real Parties' motion is premature and improper, their one "new" argument falls flat. They argue that a federal law that is unique to California's disposition of Mexican land grants applies to New Mexico—it does not. They argue that, at least in some of the landowner Real Parties, the United States patents conveyed streambeds unencumbered by public use rights—they do not. In fact, the United States patents attached by the Real Parties to their Motion and the federal laws under which they were issued, explicitly recognize the applicability of state law and custom regarding waters rights.

ARGUMENT

I. REAL PARTIES' MOTION IS PREMATURE AND IMPROPER.

A. Real Parties' Motion Jumps the Gun.

Rule 12-404 provides that a motion for rehearing "shall state briefly and with particularity . . . the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended." Alternatively, the Court may "recall its mandate . . . to correct or clarify a matter inadvertently overlooked" *Boudar v. E.G. & G., Inc.*, 1987-NMSC-077, ¶ 11, 106 N.M. 279. The import is clear: reconsideration is proper only to address alleged flaws or omissions in the factual or legal basis—in other words, the *reasoning*—for the Court's decision.

Here, however, the Court's Order of March 2, 2022 granting the Petition for a Writ of Mandamus indicates that "an Opinion explaining the Court's reasoning will follow." Accordingly, in the absence of any exposition of the Court's reasoning for its decision, rehearing or reconsideration under Rule 12-404 or otherwise is simply premature. Real Parties purport to have filed their motion for hearing to avoid waiving the right to do so in the event that this Court's March 2, 2022 order serves as the "disposition" that triggers the 15-day deadline for such motions. But Real Parties' filing ignores the plain language of Rule 12-404 in two respects. First, Rule 12-404(A) provides that Real Parties may move for rehearing within fifteen days of "any subsequent modification of [the Court's] disposition," which the Court's forthcoming opinion would be. Second, under Rule 12-404(A), the time to seek rehearing can be "enlarged by order," thus allowing for a later motion by Real Parties when the Court's final opinion is issued.

Under these circumstances, the proper course is to deny Real Parties' Motion without prejudice. In the alternative, given the fact that, as further set forth below, all of Real Parties' arguments for rehearing are arguments that they either did make or could have made before, this Court should affirm the finality of its unanimous March 2, 2022 Order and deny Real Parties' attempt to relitigate it now. In either case, Real Parties have failed to put forth a proper basis for rehearing here.

B. Real Parties Improperly Attempt to Relitigate Issues Exhaustively Presented to and Considered by this Court.

In the interest of finality, rehearing is improper for consideration of "a new theory" or argument offered by a party. *Telman v. Galles*, 1936-NMSC-073, ¶ 31, 41 N.M. 56; *Ellis v. Citizens' Nat. Bank of Portales*, 1918-NMSC-126, ¶ 15, 25 N.M. 319 (holding that "a party must present all questions in his original brief which he desires the court to consider, and he will not be permitted to present new points in a petition for rehearing."); *Mosley v. Magnolia Petroleum Co.*, 1941-NMSC-028, ¶ 64, 45 N.M. 230 (holding that "question . . . raised for the first time on . . . rehearing" is not properly considered by the Court).

Here, Real Parties offer a new line of argument: that the State's trust authority and the public's longstanding rights of use of public waters do not survive the issuance of federal patents. Real Parties say this newly offered line of argument is proper because this Court, in some its questioning at oral argument, for the first time likened the public right to use public water—and any essential incidental rights—to an "easement." **[MIS 1]**. But Real Parties' contention is false in two respects. First, the issue of what state-based rights apply to public waters—and the status and nature of those rights vis-à-vis private streambed owners (all of whom derive title from federal patents)—has always been at the core of this proceeding. Second, the characterization or nomenclature used for the state rights

governing public use of public water does not alter the essential analysis—or the scope of relevant arguments.

In other words, the Court's reference to an easement-like right in the public was—for all practical purposes—nothing new. Whether an easement or public right, it certainly does not justify Real Parties' attempt to repackage arguments that it could have but failed to make before.

II. FEDERAL DISPOSITION OF SPANISH/MEXICAN GRANT LANDS OR OTHER LANDS DOES NOT NEGATE THE PUBLIC'S WATER RIGHTS AS A MATTER OF STATE LAW.

Even assuming rehearing were timely and appropriate here—which it is not—and that Real Parties should be excused from their failure to raise these new arguments now on rehearing—which they should not be—their arguments have no merit whatsoever.

A. Federal Law Addressing California's Disposition of Land Grants Has No Bearing Here.

Real Parties argue that New Mexico's claim to a public trust servitude in the nature of an easement over private land cannot exist because the State did not expressly preserve such rights in any relevant "patent proceeding." **[MIS 3]**. Real Parties reference the patents to lands owned by landowners who received certificates under the State Game Commission's non-navigable waters rule, 19.31.22 NMAC (2018). Those are certificates held to be void by the Court's Order of March 2, 2022.

Real Parties' argument relies on *Summa Corp. v California ex rel. Land Commissioner*, 466 U. S. 198 (1984). There, the Supreme Court addressed the Mexican lands claims settlement procedure that applied pursuant to the California Land Act of 1851. But Real Parties overlook the obvious: the *Summa* case turns on considerations that are unique to California and inapplicable here. Moreover, only one of the five landowners' chain of title derives from a Mexican grant. The others rely on United States patents, as discussed below.

The Court's decision in *Summa* was based entirely on the Act of 1851, which was confined to California's Spanish and Mexican land claims. It had nothing to do with Spanish/Mexican land claims in New Mexico and other western states. As the Supreme Court explained:

> It will thus be seen that the modes for the determination of land-claims of Spanish or Mexican origin **were radically different**. Where they embraced lands in California, a procedure, essentially judicial in its character, was provided, with the right of ultimate appeal by either the claimant or the United States to this court. No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instances. The final action on each claim reserved to Congress, is, of course conclusive, and therefore not subject to review in this or any other forum.

Tameling v United States Freehold, 93 U.S.644, 662 (1876) (emphasis added).

The Supreme Court in *United States v Sandoval* further explained that "[i]n respect to California this [securing of private property rights] was done through establishment of a judicial tribunal; but in respect of the adjustment and

confirmation of claims under grants from the Mexican government in New Mexico and in Arizona, congress reserved to itself, prior to the passage of act of March 3, 1891, creating the court of private land claims the determination of such claims." 167 U. S. 278, 291 (1897); *accord, H.N.D. Land Co v Suazo*, 1940-NMSC-061, ¶ 21, 44 N.M. 547 (citing *Tameling*).

The only land as to which Real Parties' argument could even apply here is that of Real Party Chama Troutstalkers LLC, which is on Tierra Amarilla Grant land. (The grant was confirmed by Act of Congress June 21, 1860, 12 Stat.71) The subject lands in *Red River Valley v Game Commission*, 1945-NMSC-034, ¶¶ 44,45, 51 N.M. 207 were likewise Mexican grant lands, the Pablo Montoya grant. In either case, and for all like lands, the property is subject to the laws of New Mexico. The California land claim procedure is irrelevant.

B. Private Land Acquired through United States Patents Is Subject to the Customs, Constitution, Laws and Authority of the State.

The Real Parties erroneously contend that land acquired from the United States cannot be subject to a public easement "because statehood did not alter the United States' absolute title to the land." But the grants to private owners were expressly made subject to all the customs, laws and judicial decisions of New Mexico.

Thus, as to patents issued under the Homestead Act of May 20, 1862 and the Desert Lands Act of March 3, 1877, the Supreme Court's articulation of that principle has been followed by courts of western states. *See California-Oregon Power Co. v Beaver Portland Cement Co.*, 295 U.S. 142, 162, 55 S. Ct. 725 (1935):

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately and all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . . The terms of the statute, thus construed must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location.

295 U.S. at 162.

This Court recognized as much in *State ex rel. State Game Commission v. Red River Valley Co.*, where it noted that "the United States government . . . has always recognized the validity of local customs and decisions in respect to the appropriation of public waters." 1945-NMSC-034, ¶ 24 (citing *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903)). Later, the Court again cited federal law for the proposition that "all nonnavigable" waters on federally patented land "***should be reserved for the use of the public under the laws of the states and territories named***." *Id.* ¶ 220 (citing *California-Oregon Power Co.*, 295 U.S. at 162) (emphasis added).

Indeed, the patents that Real Parties attached to their Motion each specify that the grant to the patentee is "subject to any vested and accrued water rights for mining, agriculture, manufacturing ***or other purposes…as may be recognized and acknowledged by the local customs, laws and decisions of Courts.***" *See, e.g.*, **[3-17-22 Mot. Ex. A at "#3 Non Navigable Application 021."]**

Accordingly, privately-owned land under and adjacent to nonnavigable water is subject to public use as established by law, custom and judicial decisions of New Mexico, notwithstanding the fact that that land was conveyed into private ownership by a U.S. Patent.

C. New Mexico Law Provides an Adequate and Independent Ground for Concluding that Private Land Containing Public Waters Are Subject to a Public Use Right That Includes Incidental Touching of the Land.

The water rights at issue here are state-law rights determined under the states' trust authority over their natural resources. They are rights upon which the federal courts have—based on principles of federalism—uniformly declined to encroach. Thus, in *PPL Montana, LLC v Montana*, 565 U.S. 576 (2012) the Supreme Court acknowledged a state's authority under the public trust doctrine to determine use of its waters, holding that "the public trust doctrine remains a matter of state law . . . [and that u]nder accepted principles of federalism, the states retain power to determine the scope of the public trust over waters within their borders." *Id.* at 603-604.

Despite these bedrock principles, Real Parties again attempt to manufacture a federal law basis to disregard the state's exercise of its public trust authority over its waters. In doing so, Real Parties apparently seek to create the opportunity for federal review of any final decision by this Court. But the United States Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 531 U.S. 722, 729 (1991). And here, state law provides an adequate and independent basis for this Court's conclusion.

As a matter of New Mexico law, it is the private ownership over which "all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states including those since created out of the territories named." *State ex. rel Bliss v Dority,* 1950-NMSC-066 ¶¶ 25,28, 55 N.M. 12 (internal quotations omitted). Thus, "[t]he public waters of this state are owned by the state as trustee for the People. *See id.* ¶ 11 (citing *Murphy v. Kerr*, 296 F. 536 (D.N.M. 1923)); *see also, e.g.*, *State ex rel. Madrid v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 (10th Cir. 2006) ("No one doubts the State of New Mexico manages the public waters within its borders as trustee for the people and is authorized to institute suit to protect those waters on the latter's behalf.").

As this Court recognized in *Red River Valley*, the public cannot be denied access to this public resource simply by private ownership of the riverbed. *See Red River Valley Co.*, 1945-NMSC-034, ¶ 24 ("It is quite certain, we think, that the mere fact that the jus privatum, or right of soil, was vested in an individual owner does not necessarily exclude the existence of a jus publicum, or right of fishery in the public.") (quoting *Weston v. Sampson*, 62 Mass. 347 (1851)).

This principle is far older than the State of New Mexico. With respect to the common law, in *Shively v. Bowlby*, 152 U.S. 1 (1894), the Supreme Court, relying on Lord Chief Justice Hale's 17th-century treatises, *De Jure Maris* and *De Portibus Maris*, held:

> the people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances; for the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the kings subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

See Shively, 152 U.S. at 12 (internal quotation marks and citations omitted). As if anticipating the Real Parties' argument regarding the quality of sovereign title, *see* **[MIS 2]**, the Court went on to state that "though the soil and franchise or dominion thereof prima facie be in the king, or by derivation from him in a subject, yet that jus privatum is clothed and superinduced with a jus publicum . . . . [T]his title, jus privatum, whether in the king or in a subject, is held subject to the public right, jus

publicum, of navigation and fishing." *See id.* (internal quotation marks and citations omitted).

Under the civil law that prevailed in New Mexico during the Spanish and Mexican periods, the rule was not materially different. *See Red River Valley*, 1945-NMSC-034, ¶ 24 ("Under the civil law of Spain all those owing allegiance to the crown were equally entitled to the right to fish in the public waters of the kingdom.") (quoting *Ex parte Powell*, 70 So. 392, 396 (Fla. 1915)).

Thus, *Red River Valley* wrote of the State's authority that "no grant of the sovereign power capable of any other should receive a construction that would destroy or impair any right held in trust for the common benefit of the people." *Id.* ¶ 26 "These waters are *publici juris* and the state's control of them is plenary, that is, complete . . . ." *Id.* ¶ 259 (on second motion for rehearing). In order to vouchsafe to the public the practical and real benefit of its rights, this Court has authority to adjudge that the public is allowed the incidental touching of private property over which the public's waters flow.

As presented to this Court in prior briefing in this proceeding, these principles—that the public holds a right to make recreational use of public waters and that this right includes the incidental right to touch streambeds and banks—have been adopted by several similarly-situated western states. *See, e.g.*, **[BIC 15-17]**; **[RB 7-9]**. Notably, in none of these states has there ever been a determination

that the state-law public rights—including incidental rights to touch streambeds and banks—conflict with federal patents or rights. Real Parties cite no such authority.

To the contrary, the notion that any such conflict exists between state authority over public waters and federal rights has been considered and rejected by at least one federal court. *Madison v Graham,* 126 F. Supp 2d 1320 (D. Mont. 2001) (rejecting landowner claims that Montana's public stream access law allowing public use of private streambeds and banks violate the U.S. constitution).

As the federal district court in Montana explained, and as is true here, the public use of streambeds and banks at issue "is an incidental *de minimis* appurtenance entirely dependent on use of the surface water." *See id.* at 1325. Further, in that courts' analysis, recreational use of public water did "not necessarily involve[e] any easement over private land at all" because "no private property right is being extracted from [private landowners] in exchange for their receipt of a discretionary benefit." *Id.* With respect to public use of public waters, the court held that "the public has no interest at all in the private streambed *per se,* but only in the publicly owned surface waters that traverse the streambed." *Id.* at 1326.

Here, this Court's suggestion, at oral argument, that the public holds what is akin to an "easement" to make incidental contact with private streambeds or banks

seems to have led Real Parties to the conclusion that the Court's was now recognizing a *new* or different public right. But, whether denominated as an "easement," or what the civil law of Mexico referred to as a "servitude," or otherwise, the right is necessarily as old as the public's right to use the water itself. And, as this Court recognized in *Red River Valley*, the right derives from "immemorial custom," carried through "Spanish or Mexican law," and into our Constitution. *Red River Valley Co.*, 1945-NMSC-034, ¶ 37.

III. REAL PARTIES' ADDITIONAL ARGUMENTS ARE ENTIRELY MISPLACED.

Beyond the purportedly novel easement argument, Real Parties offer this Court a rehashing of the arguments that have already exhaustively been presented to this Court. This is not a proper basis for rehearing and wastes this Court's time.

Thus, for example, Real Parties argue, yet again, that "in 2015 the legislature reconfirmed the longstanding right of owners of land under public waters to exclude the public from trespassing on those lands by enacting Section 17-4-6 (C)." **[MIS 9-12]**. This issue has, of course, already been presented to and considered by this Court, and Real Parties' attempt to relitigate it is improper.

Otherwise, Real Parties argue that, as a factual matter, this Court's affirmation of public access "would have harmful consequences for the State." *Id.* at 14-18. In support, Real Parties offer a smattering of years-old news articles and landowner declarations. But Real Parties already attempted to construct similar

fact issues repeatedly in these proceedings without success. *See, e.g.*, **[AB 15]** (arguing that, "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."). And these purported fact issues—the private landowners' view of the cost-benefit analysis of allowing public access—are, of course, not before this Court. The Petition raises the purely legal question regarding the extent of the public's constitutional right to make recreational use of public waters under Article XVI, Section 2 of the New Mexico Constitution. Real Parties' attempt to rehash these arguments here are even more misplaced now, and serve only to underscore the baselessness of Real Parties' Motion.

CONCLUSION

There is no basis for the Motion for Rehearing. The Court has not yet issued an opinion setting forth the grounds for its decision. In any case, the arguments put forth by Real Parties lack merit and fall far short of showing the kind of error or omission required to justify reconsideration of this Court's decision. The Motion for Rehearing must be denied.

Dated: April 25, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 25, 2022, I electronically filed the foregoing with the State of New Mexico's Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

/s/ *Seth T. Cohen*