



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' BRIEF IN CHIEF

J. E. GALLEGOS
Gallegos Law Firm, PC
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686
(505) 986-1367 (fax)
jeg@gallegoslawnfirm.net

Attorney for Petitioners

SETH T. COHEN
Cohen Law Firm, LLC
316 East Marcy Street
Santa Fe, New Mexico 87501
(505) 466-5392
(505) 395-7540 (fax)
scohen@colawnm.com

Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION.....1

BACKGROUND3

 I. RELEVANT PROCEDURAL HISTORY3

 II. THE RULE PROHIBITS USE OF PRIVATE RIVERBEDS AND
 STREAMBEDS, THEREBY AUTHORIZING CLOSURE TO THE
 PUBLIC OF RIVERS IN NEW MEXICO.9

ARGUMENT.....11

 I. THE RULE’S ELIMINATION OF THE INCIDENTAL RIGHTS TO
 USE STREAMBEDS AND BANKS CANNOT BE RECONCILED
 WITH ARTICLE 16, SECTION 2.....11

 A. By Purporting to Extinguish the Public’s Essential Incidental Rights
 to Touch Streambeds or Banks, the Rule Nullifies
 Article 16, Section 2.....12

 B. The Necessary Incidental Rights to Use Riverbeds and Banks Must
 Be Made Explicit.....14

 C. This Court’s Decision in *Red River* Compels Invalidation
 of the Rule.....17

 1. *Red River makes clear that the public has a right to
 recreational use of public waters.*18

 2. *Red River rejects any connection between public use and ownership
 of underlying lands.*.....19

 3. *Red River rejects any connection between public use and
 navigability.*.....21

 D. The Rule Impermissibly Subordinates the State’s Control
 Over Public Water to Private Property Rights,
 Violating the Public Trust.22

 E. *Red River* Anticipated the Attempted Privatization
 of Public Waters and Fishery.....25

II. THIS COURT PROPERLY EXERCISES MANDAMUS JURISDICTION TO RESOLVE THE CONSTITUTIONAL QUESTION PRESENTED BY THE PETITION.26

A. The Petition Meets the Criteria for This Court’s Exercise of Mandamus Jurisdiction.26

B. Although Section 17-4-6 May be Read as Constitutional, the Court Must Decide the Constitutional Issue Raised by the Rule.....28

CONCLUSION.....29

TABLE OF AUTHORITIES

New Mexico Cases

<i>Albuquerque Land & Irr. Co. v. Gutierrez</i> , 1900-NMSC-017, 10 N.M. 177	25
<i>Corondoni v. City of Albuquerque</i> , 1963-NMSC-146, 72 N.M. 422	14
<i>Gelinas v. Taxation & Revenue Dep't</i> , 2020-NMCA-038	28
<i>Padilla v. State Farm Mut. Auto. Ins. Co.</i> , 2003-NMSC-011, 133 N.M. 661 ...	17
<i>Reule Sun Corp. v. Valles</i> , 2010-NMSC-004, 147 N.M. 512.....	10
<i>Sanders-Reed ex rel. Sanders-Reed v. Martinez</i> , 2015-NMCA-063.....	23
<i>State ex rel. Clark v. State Canvassing Bd.</i> , 1995-NMSC-001, 119 N.M. 12....	27
<i>State ex rel. Coll v. Johnson</i> , 1999-NMSC-036, 128 N.M. 154.....	27
<i>State ex rel. King v. Lyons</i> , 2011-NMSC-004	27
<i>State ex rel. King v. UU Bar Ranch Ltd. P'ship</i> , 2009-NMSC-010, 145 N.M. 769	24
<i>State ex rel. Pilot Dev. Northwest v. State Health Planning & Dev. Bureau</i> , 1985-NMCA-050, 102 N.M. 791	28
<i>State ex rel. Sandel v. N.M. Pub. Util. Comm'n</i> , 1999-NMSC-019, 127 N.M. 272	27
<i>State ex rel. Sego v. Kirkpatrick</i> , 1974-NMSC-059, 86 N.M. 359.....	27
<i>State ex rel. State Game Comm'n v. Red River Valley Co.</i> , 1945-NMSC-034, 51 N.M. 207.....	passim
<i>State ex rel. Sugg v. Oliver</i> , 2020-NMSC-002	26
<i>State v. Pangaea Cinema LLC</i> , 2013-NMSC-044.....	28
<i>State v. Torres</i> , 1999-NMSC-010, 127 N.M. 20	14

Federal Cases

<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	20
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997)	22
<i>PPL Montana, LLC v. Montana</i> , 565 U.S. 576 (2012)	9, 22

<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894)	24, 29
<i>U.S. v. Rio Grande Dam & Irr. Co.</i> , 174 U.S. 690 (1899).....	10

Other Cases

<i>Conaster v. Johnson</i> , 194 P.3d 897 (Utah 2008).....	16
<i>Elder v. Delcour</i> , 269 S.W.2d 17 (Mo. 1954)	16
<i>Ex Parte Powell</i> , 70 So. 392, (Fla. 1915).....	18
<i>Kramer v. City of Lake Oswego</i> , 446 P.3d 1 (Or. 2019)	15
<i>Mineral Cnty. v. Lyon Cnty.</i> , 473 P.3d 418, 425 (Nev. 2020).....	24
<i>Montana Coalition for Stream Access, Inc. v. Curran</i> , 682 P.2d 163 (Mont. 1984).....	15, 20, 22, 24
<i>Parks v. Cooper</i> , 676 N.W.2d 823 (S.D. 2004).....	21
<i>Pub. Lands Access Ass’n. v. Bd. of Cnty. Comm’rs of Madison Cnty.</i> , 321 P.3d 38 (Mont. 2014).....	15
<i>Utah Stream Access Coalition v. Orange Street Development</i> , 416 P.3d 553 (Utah 2017).....	16

Constitutional Provisions

Mont. Const. art. IX, § 3(3)	15
N.M. Const. art. II, § 5.....	19
N.M. Const. art. IX, § 14	25
N.M. Const. art. VI, § 3	26
N.M. Const. art. XVI, § 2	passim
N.M. Const. art. XXII, § 4.....	19, 23

Statutes

NMSA 1978, § 17-1-14 (2015)	28
NMSA 1978, § 17-1-26 (1947)	28
NMSA 1978, § 17-4-6 (2015)	5, 28
NMSA 1978, § 39-3-1.1 (1998, as amended through 1999).....	28
NMSA 1978, § 72-1-1 (1907, as amended through 1941).....	18, 23

Utah Code §73-29-101.....17

Rules

Rule 1-074(S) NMRA.....8

Regulations

19.31.22 NMAC (1/22/2018)1, 5
19.31.22.11(C) NMAC9
19.31.22.12 NMAC28
19.31.22.13(A) NMAC.....9
19.31.22.13(B) NMAC9, 10
19.31.22.3 NMAC28
19.31.22.6 NMAC 6, 9, 10, 29
19.31.22.7(G) NMAC9
19.31.22.7(H) NMAC12
19.31.22.8(B)(4) NMAC9
19.31.22.9(C) NMAC9

Other Authorities

Advisory Letter from Att’y Gen. to Rep. Varela at (Aug. 5, 2016)5, 28
N.M. Att’y Gen. Op. 14-04 (2014)..... 3, 4, 14, 20

INTRODUCTION

The Petition challenges the constitutionality of a regulatory scheme (the “Rule”) promulgated by the New Mexico State Game Commission (“SGC”) in January of 2018.¹

The Rule purports to allow the SGC to issue a certificate to a private owner of a riverbed that the segment of river overlaying that riverbed is a “non-navigable public water.” This certification effectively authorizes the owner of the riverbed to privatize that segment of the river. According to its proponents, the Rule closes to public use only the privately-owned riverbeds, themselves, and not the overlying river. But, as a practical matter, on nearly every segment of every river or stream in New Mexico, a prohibition on public use of the riverbed is a prohibition on the public’s use of the river. It is practically impossible for the public to kayak, boat, fish, wade, or swim without touching the streambed and banks.

By blocking public access to these certified “non-navigable” segments of a river, the Rule violates Article 16, Section 2 of the New Mexico Constitution, which provides that the “unappropriated water of every natural stream . . . within the state of New Mexico, is hereby declared to belong to the public.” As this Court made clear in *State ex rel. State Game Comm’n v. Red River Valley Co.*, 1945-

¹ 19.31.22 NMAC (1/22/2018).

NMSC-034, 51 N.M. 207 (“*Red River*”), Article 16, Section 2 guarantees that the public has the right to use public waters for “fishing and other recreational activities,” and this right applies notwithstanding private streambed ownership. *Red River*, 1945-NMSC-034, ¶¶ 4, 38.

The Petition asks the Court to strike down the Rule and undo the “non-navigable public water” certifications already issued under the Rule by the SGC. In doing so, the Petition calls upon the Court to make explicit the only construction of Article 16, Section 2 that is consistent with *Red River* and the longstanding legal, historical, and cultural traditions of river use in New Mexico—that the public’s right to recreate on public waters necessarily includes the incidental right to make reasonable use of riverbeds and banks. Otherwise, as the Rule demonstrates, Article 16, Section 2, as construed in *Red River*, is effectively nullified.

Since the filing of the Petition, the respondents-intervenors have, as described below, engaged in a vexatious, costly, and wasteful litigation campaign, initiating multiple overlapping lawsuits on these matters. The proliferation of litigation underscores the substantial public need for this Court to conclusively resolve the constitutional questions raised by the Petition.

BACKGROUND

To assist in this Court’s consideration of the arguments and issues raised by the Petition, a brief procedural background and description of the operation of the Rule is provided below.

I. RELEVANT PROCEDURAL HISTORY

The Petition both follows and has spawned a remarkable and overlapping array of legal proceedings, all of which underscore the need for this Court’s conclusive resolution of the constitutional issue presented by the Petition. The history set forth below provides the full procedural context for the matter now before the Court.

On April 1, 2014, the Attorney General’s Office issued a formal Opinion analyzing the question of whether a “private landowner” may “exclude others from fishing in a public stream that flows across the landowner’s property?” N.M. Att’y Gen. Op. 14-04 (2014). The Attorney General relied heavily on the New Mexico Supreme Court’s decision in *Red River* to conclude that “[a] private landowner cannot prevent persons from fishing in a public stream that flows across the landowner’s property, provided the public stream is accessible without trespass across privately owned adjacent lands.” *Id. citing* 1945-NMSC-034.² The Opinion

² A copy of Opinion 14-04 is attached as Appendix II to the Petition for Writ of Mandamus, March 13, 2020.

confirmed that the public's constitutional rights to use New Mexico streams includes walking, wading, and standing in the stream for recreational purposes. *Id.*

On August 11, 2014, several landowners that own property next to non-navigable streams and rivers in New Mexico, including some of the respondents-intervenors in this proceeding (with the same counsel in this proceeding), filed a lawsuit in the Fifth Judicial District Court in Chaves County. *See Soaring Eagle Lodge LLC, et al. v. King, et al.*, No. D-504-CV-2014-00417. The landowners alleged that the public does not have the right to trespass on privately-owned streambeds, that the Attorney General Opinion was incorrect, and that resolution was necessary to avoid confrontations between landowners and anglers. The Attorney General moved to dismiss, contending the complaint presented no judicable controversy. The SGC joined the landowner-plaintiffs in opposing the motion. The District Court granted the motion to dismiss on December 2, 2014.

Shortly thereafter, in the 2015 Legislative Session, proponents of stream privatization introduced Senate Bill 226. A copy of the legislation, as introduced, is attached as Appendix III to the Petition. The title of the legislation states that it amends Section 17-4-7 NMSA 1978, which limits the liability of a landowner for hunting, fishing, or other recreational use on their land.

SB 226 sought to restrict the public's use of public water on private property. It also sought to vest in the SGC the authority to adopt regulations to

“implement” the new law. The language of the original version of SB 226 expressly vested the SGC with authority to determine whether a stream was navigable.

Most provisions of SB 226 were stripped away in the committee process. In the end, the Legislature did not amend Section 17-4-7 but only added a one-sentence Subsection C to NMSA 1978, Section 17-4-6 stating:

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.

On August 5, 2016, the Attorney General’s Office responded to request by Representative Varela concerning the constitutionality of SB 226 as enacted. In response, the Attorney General’s Office opined that that the statutory subsection is constitutional so long as it is interpreted to allow fishing and other recreational use of stream beds that are accessed without trespassing on private property. Advisory Letter (Aug. 5, 2016), *available at* <https://tinyurl.com/nhffiphv>.

Ostensibly acting pursuant to Section 17-4-6(C), the SGC promulgated the Rule at Title 19, Chapter 31, Part 22 (“Landowner Certification of Non-Navigable Water”), with an effective date of January 22, 2018. The Rule’s stated objective is to establish a process for making a privately-owned “riverbed or streambed” under “a segment of non-navigable public water . . . closed to [public] access without

written permission from the landowner.” 19.31.22.6 NMAC.³ Under the Rule, applicants who own a streambed or riverbed can apply for certification from the SGC that the overlying water was non-navigable at the time of statehood; with a certification, landowners make the segment of public water “closed to access.” *Id.*

With the Rule in place, applications for certification were submitted on behalf of five owners, including two—Chama Trout Stalkers and Z & T Cattle Co.—who were plaintiffs in the 2014 case against the Attorney General. At the outgoing Commission’s last meeting in November of 2018, those five applications were granted. As a result, stretches of the Chama and Pecos effectively became closed to public access.

In 2019, the SGC sought guidance from the Attorney General’s Office regarding whether the Rule—adopted by the prior Commission—conflicted with the New Mexico Constitution. The Attorney General’s Office provided the Commission with a response on September 17, 2019. That informal opinion concluded that the Constitution does not allow the regulation to be applied to exclude recreational use of public water running through private property so long as the public water is accessed without trespassing over private land.

³ The complete regulation is attached as Appendix I to the Petition.

On April 4, 2020, the Director of the Department of Game & Fish sued the SGC in the First Judicial District Court in Santa Fe County. *See Sloane v. N.M. State Game Comm'n*, No. D-101-CV-2020-0062. (Attached as Ex. A to the Petition.). As alleged in the complaint, on July 24, 2019 the SGC placed a 90-day moratorium on considering applications under the Rule, and on November 21, 2019, the SGC ordered the Director to produce for it a proposal to appeal or amend the Rule. The court was asked by the Director to resolve the legal question of whether the public can be excluded from fishing in public waters flowing through private property. By an April 2, 2020 order, the case was stayed pursuant to a joint stipulation.

On April 14, 2020, three of the five landowners with pending, undecided applications before the SGC filed a petition for a writ of mandamus against the SGC in the First Judicial District Court in Santa Fe, seeking to compel action on their pending applications. *Rancho del Oso Pardo Inc., et al. v. Dep't of Game and Fish, et al.*, D-101-CV-2020-00939. On May 5, 2020, the other two applicants filed a duplicate mandamus petition in Chaves County. *Fenn Farm, et al. v. Dep't of Game and Fish, et al.*, D-504-CV-2020-00390.

The Department and the Director removed both of these mandamus actions to the United States District Court for the District of New Mexico, which consolidated them into one action. *Rancho del Oso Pardo Inc., et al. v. N.M. Game*

Comm'n, et al., CIV 20-427SCY/KK and CIV 20-468SCY/KK. In a March 3, 2021 memorandum opinion in the consolidated proceeding, the Magistrate Judge granted the landowners' motion for partial summary judgment against the SGC, ordering the SGC to act on the pending applications.

On August 12, 2021, the SGC held a public meeting to review the five pending applications and voted to deny each of the applications. On September 2, 2021, the SGC finalized its decisions by serving on each applicant a Final Agency Decision and Order, including Findings of Fact and Conclusions of Law.

On October 1, 2021, each of the five applicants whose applications had been rejected by the SGC filed separate notices of appeal of the SGC's decisions in the First Judicial District Court in Santa Fe.

The SGC filed a motion under Rule 1-074(S) NMRA requesting that the District Court certify all five cases to the Court of Appeals. On November 29, 2021, the appellant landowners filed oppositions to the SGC's Motions, arguing that the appeals did not present an issue of public importance.⁴

⁴ With the exception of the April 4, 2020 lawsuit by the Director of the Department of Game and Fish against the SGC, all of the lawsuits described herein have been initiated by landowners including respondents-intervenors and have been by and through the same counsel that represent respondents-intervenors in this proceeding.

II. THE RULE PROHIBITS USE OF PRIVATE RIVERBEDS AND STREAMBEDS, THEREBY AUTHORIZING CLOSURE TO THE PUBLIC OF RIVERS IN NEW MEXICO.

The Rule provides that a “riverbed or streambed . . . is closed to access without written permission from the landowner” if the segment of river or stream flowing over that bed is deemed by the SGC to have been “[n]on-navigable” at the time of statehood. 19.31.22.6, 7(G), 13(A) NMAC. A private landowner need only submit “substantial evidence which is probative of the waters . . . being non-navigable at the time of statehood,” in order to have a segment of river designated a “certified non-navigable public water.” 19.31.22.8(B)(4), 19.31.22.13(A) NMAC.⁵ After a truncated public comment period, if the SGC approves the “non-navigable” designation, the landowner is, in effect, authorized to close that stretch of river to public access. 19.31.22.13(B) NMAC.⁶

⁵ Non-navigability under the Rule serves as a proxy for private ownership of the streambed, a connection that derives from federal law. *See* Respondent-Intervenors’ Resp. Br. (“R-I Br.”) (Apr. 17, 2020) at 3-4, *citing PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012).

⁶ The Rule provides for only a *seven-day* period for public review and comment on a proposed non-navigability determination. 19.31.22.9(C) NMAC (requiring Game and Fish Department to post proposed non-navigability certification “at least 21 days before” the SGC meeting to act on the certification); 19.31.22.11(C) NMAC (closing the public comment period “14 days before the meeting at which the application will be considered for final action by the commission.”).

The Rule’s practical implications are substantial: it allows the outright closure to the public of segments of every river and stream in New Mexico where it runs through private property. *See Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512 (noting that the Court’s construction of a law may be guided by its “practical implications”). These implications are inevitable under the Rule. First, for present purposes, every stretch of every river and stream in New Mexico may be considered “non-navigable” as defined by the Rule.⁷ *See, e.g., U.S. v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 699 (1899) (affirming “that the Rio Grande, within the limits of New Mexico, is not navigable”). Every stretch of every river in New Mexico that flows through private property is therefore potentially subject to privatization under the Rule.

Second, the Rule makes those privatized segments “closed to access.” 19.31.22.6 NMAC. It prohibits “trespass on private property through non-navigable public water”—which, as respondents-intervenors explain—means that “walking or wading” through non-navigable public streams for any recreational purpose, or “touch[ing] privately owned land” constitutes trespass. 19.31.22.13(B)

⁷ The Rule defines “[n]on-navigable public water” as “a watercourse or river which, at the time of statehood, was not navigable-in-fact,” meaning that it was “not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted.” 19.31.22.7(G) NMAC.

NMAC; R-I Br. at 8, 11. Accordingly, while the public’s right to make recreational use of the public *water* is nominally preserved, such use is only lawful if it can be made without touching the streambed. But recreational use of any river in New Mexico—whether through boating, fishing, swimming or otherwise—is impossible, as a practical matter, without touching the streambed and banks. In other words, as to every river in New Mexico, the practical effect of the Rule’s application is the closure to the public of portions of New Mexico’s rivers and streams.

ARGUMENT

I. THE RULE’S ELIMINATION OF THE INCIDENTAL RIGHTS TO USE STREAMBEDS AND BANKS CANNOT BE RECONCILED WITH ARTICLE 16, SECTION 2.

By providing for the closure of privately-owned streambeds from public use, the Rule, in effect, closes any segment of public water running over those streambeds. This violates New Mexicans’ constitutional rights under Article 16, Section 2.

Respondents-intervenors fancifully suggest that the public’s right to use public *waters* is unaffected by the Rule. Instead, they say the Rule functions only to “recognize and protect the private property rights of riverbed owners.” R-I Br. at 9. Indeed, in respondents-intervenors’ explanation, these land and water rights are made “harmonious” under the Rule because “[t]he public, pursuant to the New

Mexico Constitution, is free to recreate on the public waters” while “[l]and owners . . . are free to exclude the public from trespassing on their private [riverbeds].” R-I Br. at 11.

This is a ruse. It more than strains credulity to suggest that the purpose of the Rule is simply to protect the private *riverbeds* while not excluding the public.⁸ And the purported harmonization of these rights is, as a practical matter, illusory. More importantly, the Rule’s ostensible application only to *private riverbeds*—and not to *public waters*—does not undo its constitutional defects. The public can either contact the riverbeds and banks, or it has no right to use the streams.

A. By Purporting to Extinguish the Public’s Essential Incidental Rights to Touch Streambeds or Banks, the Rule Nullifies Article 16, Section 2.

Article 16, Section 2 of the New Mexico Constitution provides that “[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public.” As a matter of simple common sense, the customary and legal historical public recreational use of rivers in New Mexico—which Article 16, Section 2 enshrines, and this Court’s

⁸ Respondents-intervenors betray the true purpose of this scheme, noting that the Rule allows landowners to give “public notice that the *segment* at issue is privately owned.” R-I Br. at 7 (emphasis added). A “segment,” in this context, is defined as “the *watercourse or river* located within the boundaries of a landowner’s private property.” 19.31.22.7(H) NMAC (emphasis added).

decision in *Red River* recognized—necessarily carried with it a concomitant right to incidental use of riverbeds and banks. Indeed, this Court in *Red River* rejected the argument that private streambeds that underlay public waters were off limits to public, recognizing that such a limitation would mean that the public, as a practical matter, “could enjoy *no fishing or recreational rights* upon much of the public water of this state.” 1945-NMSC-034, ¶ 43 (emphasis added).

The Court in *Red River* traced the public’s right to use rivers and streams back to time “immemorial.” There is no hint in the historical or legal record that this right was limited based on a prohibition against public use of privately-owned streambeds. *See id.* ¶ 37. In other words, the Rule’s restriction on the incidental rights necessary for the public to recreate on streams and rivers (i.e., the prohibition on touching private streambeds) is not only without precedent, it directly conflicts with centuries of law, custom and history under Spanish and Mexican rule.

The public’s right to make recreational use of the public waters under Article 16, Section 2 is rendered meaningless without the necessary incidental right to walk or wade on, or touch the streambeds or banks. Whether boating, fishing, swimming or otherwise recreating, little to no practical use of New Mexico’s rivers can be made without regular contact with the bed or banks. This is a matter of

“common and general knowledge” subject to judicial notice by this Court. *State v. Torres*, 1999-NMSC-010, ¶ 41, 127 N.M. 20.

By extinguishing these necessary incidental rights, the Rule has the effect of nullifying the public’s constitutional rights to use rivers for “recreation and fishing” under Article 16, Section 2. *Red River*, 1945-NMSC-34, ¶ 23. Because the Rule cannot infringe upon New Mexicans’ constitutional rights in this manner, it must be stricken. *Corondoni v. City of Albuquerque*, 1963-NMSC-146, ¶ 8, 72 N.M. 422 (avoiding result that “would effectively nullify [a] right”).

B. The Necessary Incidental Rights to Use Riverbeds and Banks Must Be Made Explicit.

These proceedings present this Court the opportunity to 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. *See* N.M. Att’y Gen. Op. 14-04, at 3 (2014) (“Based on *Red River* . . . it is clear that even if a landowner claims an ownership interest in a stream bed, that ownership is subject to a preexisting servitude (a superior right) held by the public to beneficially use the water flowing in the stream.”).⁹

⁹ Respondents-intervenors’ threat to unleash a “torrent of litigation” asserting unconstitutional takings if the Rule is invalidated rings hollow. The Montana Supreme Court reasoned that on such a claim there is no constitutional taking because the riparian owner “never owned a property right that allowed him

Courts in other states where a public right to make recreational use of streams is recognized have held that that right carries with it the necessary incidental rights to make its exercise useful. Montana, with its own constitutional provision guaranteeing that “[a]ll . . . waters within the boundaries of the state are the property of the state for the use of its people,” provides an instructive analog. Mont. Const. art. IX, § 3(3). The Montana Supreme Court applied Montana’s constitutional provision to hold that “streambed ownership by a private party is irrelevant” because the “Constitution and the public trust doctrine do not permit a private party to interfere with the public’s right to recreational use of the surface of the State’s waters.” *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984).

In clarifying the extent of that right, the Court held that “the public has the right to use the state-owned waters to the point of the high water mark.” *Id.* at 172. This rule reflects “a recognition of the physical reality that in order for the public to recreationally use its water resource, some ‘minimal’ contact with the banks and beds of rivers is generally necessary.” *Public Lands Access Ass’n*, 321 P.3d at 52.

Similar conclusions have been reached in several jurisdictions. *See Kramer v. City of Lake Oswego*, 446 P.3d 1, 10 (Or. 2019) (holding that public waters in

to exclude the public from using its water resource, including the riverbed and banks up to the high-water mark.” *Pub. Lands Access Ass’n. v. Board of County Comm’rs of Madison County*, 321 P.3d 38, 53 (Mont. 2014).

Oregon are “public highways,” which “prevent[s] those who own the underlying land from interfering with the public’s use of the waterway as it flows over that private land.”); *Elder v. Delcour*, 269 S.W.2d 17, 26 (Mo. 1954) (holding that because the “waters of the Meramec River are public waters,” the “submerged area of its channel over and across [private property] is a public highway for travel and passage by floating and wading, for business or for pleasure.”).

The Utah Supreme Court likewise held that because the public had a statutory right to use “[a]ll waters” in the state for recreational purposes, including to “float leisure craft, hunt, fish and participate in any lawful activity when utilizing that water,” the public had a commensurate right to “touch privately owned beds of state waters in ways incidental to all recreational rights.” *Conaster v. Johnson*, 194 P.3d 897, 899-900, 901-02 (Utah 2008). Its holding reflected “the practical reality” that “the public cannot effectively enjoy its right to ‘utilize’ the water to engage in recreational activities without touching the water’s bed.” *Id.* at 902. The Utah Supreme Court’s analysis in *Conaster* remains highly instructive here, notwithstanding the fact that—unlike New Mexico or Montana—because the public’s right to use public water in Utah is statutory, and not constitutional, the incidental rights recognized in *Conaster* were subsequently scaled back by the Utah legislature. See *Utah Stream Access Coal. v. Orange Street Dev.*, 416 P.3d

553, 555 (Utah 2017) (describing legislative limitation of rights established in *Conaster* at Utah Code §73-29-101 *et seq.*).

Consistent with *Red River* and New Mexico’s custom and history and the common-sense approach taken by high courts in other jurisdictions, this Court should now make explicit the necessary incidental rights of the public to make reasonable use of the river or streambeds and banks to the mean high water mark when exercising its recreational rights under Article 16, Section 2.

C. This Court’s Decision in *Red River* Compels Invalidation of the Rule.

The Rule cannot be reconciled with this Court’s decision in *Red River*. The Rule relies on navigability and private streambed ownership to limit the scope of the public’s right to use public waters under Article 16, Section 2 of the New Mexico Constitution. But in relying on those ideas, the Rule directly contradicts *Red River*. To uphold the Rule, respondents-intervenors would have this Court abrogate the principles espoused in *Red River*. Longstanding precedent cannot be so readily discarded. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661 (observing that “[t]he principle of stare decisis dictates adherence to precedent,” which “fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.”) (internal quotations and citations omitted).

1. *Red River* makes clear that the public has a right to recreational use of public waters.

In *Red River*, the Court confronted the question of whether the public had a right to make recreational use of the Conchas Reservoir where its waters overlaid private property. 1945-NMSC-034, ¶ 13. The answer, in the Court’s view, turned simply on a determination of “whether the waters in question are public waters.”

Id. ¶ 19. The Court concluded that the waters were public, based on the pronouncement in Article 16, Section 2 of the New Mexico Constitution, that:

[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public.

Red River, 1945-NMSC-034, ¶ 20. Formulation of the constitutional principle predates statehood; it had been previously adopted, in the 1907 water code by the Territorial Legislature, which established that “[a]ll the natural waters flowing in streams and watercourses, whether such be perennial or torrential within the limits of the State of New Mexico, belong to the public.” NMSA 1978, § 72-1-1 (1907, as amended through 1941). The Court found the constitutional provision to be “only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion.” *Id.* ¶¶ 21-24 (internal quotations omitted), citing *Ex Parte Powell*, 70 So. 392, 396 (Fla. 1915) (noting that “the civil law of Spain provided that the public waters of the kingdom were ‘common to all the inhabitants thereof, present and to come, and that they may freely enjoy the use of them.’”) (internal

quotation marks omitted). The Court traced the origins of public river use even further back, finding it to be an “immemorial custom” in New Mexico deriving from the “ancient law of the Indian,” and which remained “the rule and practice under Spanish and Mexican Dominion.” *Red River*, 1945-NMSC-034, ¶¶ 21, 33, 37. In other words, Article 16, Section 2 enshrines centuries of custom and practice, all of which the Rule would upend.¹⁰

The Court also found that the public’s constitutional right to use public waters under this provision “include[s] uses for recreation and fishing.” *Red River*, 1945-NMSC-034, ¶ 23. That is, the Court did not limit construction of the right to fishing or boating, it construed the right to extend to “fishing *and other recreational activities*.” *Id.* ¶ 4 (emphasis added).

2. *Red River* rejects any connection between public use and ownership of underlying lands.

In reaching this conclusion in *Red River*, the Court flatly rejected the proposition that private ownership of riparian property, including land underlying the Conchas Reservoir, had *any* bearing on the public’s rights to use the water. *Id.*

¹⁰ The historical rights recognized by the Court in *Red River* are, themselves, separately protected both pursuant to Article 22, Section 4 of the Constitution, which preserves “[a]ll laws of the territory of New Mexico in force at the time of its admission to the union as a state;” as well as pursuant to Article 2, Section 5, which preserves the “rights, privileges and immunities . . . guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo.”

¶¶ 22-24. The Court noted that it had “many times” rejected the common law doctrine of riparian rights—whereby ownership of land abutting a watercourse determined water rights—because that doctrine was not “suited to the region, was never recognized and d[oes] not obtain” in New Mexico. *Id.* ¶ 24; see N.M. Atty Gen. Op. 14-04 at 2 (“New Mexico is a prior appropriation state.”) citing *Colorado v. New Mexico*, 459 U.S. 176, 179 (1982).

The Court therefore rejected the notion that, where the “ownership of the bed was . . . private”, this would negate the “right of the public to use the water of a stream,” because such a rule was “contrary to what we believe to be the better reason and the great weight of authority.” *Red River*, 1945-NMSC-034, ¶ 38. The Court recognized that if this were the law—and the Rule attempts to establish the law in precisely this way—“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.” *Id.* ¶ 43; accord *Curran*, 682 P.2d at 170 (construing comparable constitutional right to hold that “[s]treambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people.”)

Accordingly, the Court found that the appellee in *Red River*, a private owner of the bed and banks of the Conchas Reservoir, “must yield its claim of right . . . as

against use by the public.” 1945-NMSC-034, ¶ 23. In other words, under *Red River*, riparian owners—like the applicants and recipients of non-navigable certificates under the Rule at issue here—have neither exclusive nor superior rights vis-à-vis the public’s use of water. *See Parks v. Cooper*, 676 N.W.2d 823, 835-7 (S.D. 2004) (noting that the Court in *Red River* relied upon an “explicit state constitutional provision to “approve the public’s right to use water *independent of bed ownership*.” (emphasis added)).

3. *Red River* rejects any connection between public use and navigability.

The Court in *Red River* more readily dispensed with the issue of navigability, rejecting navigability as a relevant factor for determining the public’s rights. As the Court explained, “we need not here be concerned with . . . the test of navigability” because, under Article 16, Section 2 of the Constitution “[a]ll of our unappropriated waters from every natural stream, perennial or torrential, within the State of New Mexico are public waters.” (internal citation and quotation omitted). 1945-NMSC-034, ¶¶ 35, 37.

Because the Rule cannot be reconciled with these plain holdings in *Red River*, it must be stricken. *Red River* rejected streambed ownership as determining the right to use a stream. But the Rule relies on streambed ownership as the sole basis for granting exclusive private rights for stream use. *Red River* also rejects navigability as having any bearing on the public’s right to use public water. But the

Rule uses non-navigability (which is merely a proxy for streambed ownership) as the basis for, in effect, barring public access to public waters. *See, e.g., Curran*, 681 P.2d. at 171 (holding that “any surface waters that are capable of recreational use may be so used by the public *without regard to streambed ownership or navigability for nonrecreational purposes.*”) (emphasis added).

D. The Rule Impermissibly Subordinates the State’s Control Over Public Water to Private Property Rights, Violating the Public Trust.

The respondents-intervenors defend the regulation as protecting private property rights, *see* R-I Br. at 2, 4-9, but the State’s control over public waters – including ensuring public access to those waters as required by *Red River*, is paramount. *See, e.g., PPL Montana, LLC v. Montana*, 565 U.S. at 604 (explaining that “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders”); *see also Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997) (recognizing state’s “sovereign interest in its land and waters.”).

Accordingly, as this Court recognized in *Red River*, “[t]hese waters are publici juris and the state’s control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States.” 1945-NMSC-034, ¶ 259 (on second motion for rehearing). This has been the case at least as far back as the Spanish era:

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. . . . 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. If the title vested in the owner does not necessarily exclude the common right of fishery, that cannot be affected by a title to the soil merely; and the ordinance does not attempt to impart any exclusive right of fishery to such owner.

Id. ¶ 24 (internal quotation marks and citations omitted); *see also id.* ¶ 37 (“[S]ince the right to fish in *public waters*, by the test of any rule, is universally recognized, it cannot be said that the right to fish and use these unappropriated public waters in question is less secure in the public because we determine their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect, and under which appellee’s predecessors in title . . . necessarily took.”) (emphasis in original); N.M. Const. art. XXII, § 4 (preserving existing rights at time of statehood); NMSA 1978, § 72-1-1 (1907, as amended through 1941) (providing that all natural waters in streams and watercourses belong to the public).

Under the public trust doctrine, the State’s plenary control necessarily includes the power and obligation to secure public access to that public resource – here, New Mexico’s streams and watercourses. *See Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 13 (noting that although New Mexico courts have not referred to the doctrine, “they have recognized that common law

public trust principles apply in the context of public waters and public trust lands.”); *see also Red River*, 1945-NMSC-034, ¶ 38 (rejecting rule of riparian ownership as barring public use of water where ownership of the bed was private); *Cf. State ex rel. King v. UU Bar Ranch Ltd. P’ship*, 2009-NMSC-010, ¶¶ 5-6, 145 N.M. 769 (noting that the central issue of the case was public access to public lands).

The principle of state control over public resources, and the concomitant limitation on private property rights, was also recognized at the common law:

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or corporation has acquired rights in it by express grant, or by prescription of usage . . . , and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing

Shively v. Bowlby, 152 U.S. 1, 13 (1894). And as other jurisdictions have recognized, the principle continues to have vitality today. *See, e.g., Curran*, 682 P.2d at 171 (Mont. 1984) (“[W]e hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability issues.”); *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418, 425 (Nev. 2020) (“[W]e clarify that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable

waters.”). The fact that the respondents-intervenors may hold title to the streambed thus cannot permit the restriction of public access to public waters.

E. *Red River Anticipated the Attempted Privatization of Public Waters and Fishery.*

The Rule has already led to private enclosures of segments of rivers. These enclosures effectively privatize not only the recreational use of public water, they also effectively privatize the public’s fishery in those river segments. The Court in *Red River* anticipated this problem, noting that such enclosures would constitute “the granting of a special ‘right’ or ‘privilege’ contrary to” Article 4, Section 26 of the Constitution. 1945-NMSC-034 at ¶¶ 53-54; *see also Albuquerque Land & Irr. Co. v. Gutierrez*, 1900-NMSC-017, ¶ 26, 10 N.M. 177 (holding that “there is no such thing as private ownership in the waters of the streams of this territory”), *aff’d*, 188 U.S. 545 (1903).¹¹

¹¹ Because the Rule effectively confers on private parties the exclusive right or privilege to possess and use public waters and fisheries, the Rule conflicts with the Anti-Donation Clause. N.M. Const. art. IX, § 14. The Anti-Donation Clause, ratified decades after *Red River*, more directly prohibits the kind of privatization of public waters and fisheries urged by respondents-intervenors here, since it is affected by the Rule and not by statute.

II. THIS COURT PROPERLY EXERCISES MANDAMUS JURISDICTION TO RESOLVE THE CONSTITUTIONAL QUESTION PRESENTED BY THE PETITION.

A. The Petition Meets the Criteria for This Court’s Exercise of Mandamus Jurisdiction.

The Court should issue a writ of mandamus to Respondents striking the Rule, prohibiting its enforcement, and directing Respondents to nullify previously certified stream closures. The Court should also provide a clear statement that private landowners may not interfere with the constitutional right to use and enjoy New Mexico’s public streams, which right necessarily includes the concomitant right to make reasonable incidental use of stream beds and banks. The Rule promulgated by the SGC, in effect, authorizes the closure of any of New Mexico’s streams and rivers crossing private land. It is therefore inconsistent with the holdings in *Red River*, and cannot otherwise be reconciled Article 16, Section 2 of the New Mexico Constitution.

The Court has original jurisdiction over this matter pursuant to Article VI, Section 3 of the New Mexico Constitution and is therefore empowered to issue a writ of mandamus granting the requested relief and make clear the already implicit public right of incidental use, thus prohibiting future administrative, regulatory or statutory closures of this kind. *See, e.g., State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7 (noting that “the writ may also be used in appropriate circumstances in a prohibitory manner to prohibit unconstitutional official action.”) (internal

quotations omitted). Mandamus is appropriate because there can be no dispute that the Rule and river closures certified by the SGC under the Rule violate the Constitution. Further, this matter presents only the pure legal issue of whether Respondents are required to comply with Article 16, Section 2 and *Red River*. See *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (explaining that mandamus appropriate when Court can resolve issues based on virtually undisputed facts and where petitioner presents purely legal issue.).

Petitioners have standing to seek relief from this Court because they have been directly harmed by Respondents' acts and are therefore beneficially interested in Respondents' compliance with the governing law. See *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 17, 128 N.M. 154 (parties that are "beneficially interested" are entitled to sue for mandamus relief); see also Pet. at 4. Petitioners also have standing because they have raised an issue of great public interest and importance. See *State ex rel. Clark v. State Canvassing Bd.*, 1995-NMSC-001, ¶ 3, 119 N.M. 12; *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359 (recognizing standing in cases of great public interest or importance).

There is no plain, speedy or adequate remedy at law available to Petitioners. See, e.g., *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 26 (mandamus appropriate when there is no adequate remedy at law). Thus, mandamus is plainly appropriate. See *State ex rel. Pilot Dev. Northwest v. State Health Planning & Dev.*

Bureau, 1985-NMCA-050, ¶ 32, 102 N.M. 791 (mandamus appropriate where no right of appeal exists).¹²

B. Although Section 17-4-6 May be Read as Constitutional, the Court Must Decide the Constitutional Issue Raised by the Rule.

The Rule purports to be authorized by Section 17-4-6(C). It is well settled that the Court “seek[s] to avoid an interpretation of a statute that would raise constitutional concerns.” *See, e.g., State v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 18. Section 17-4-6(C) can be read to comport with Article 16, Section 2, consistent with public access to public waters. *See* Advisory Letter from Att’y Gen. to Rep. Varela at 3 (Aug. 5, 2016) (“We believe that SB 226 appropriately regulates the use of the state’s public waters, provided it is interpreted and applied only to prohibit a person, absent the required consent, from gaining access to private property from a stream or other public water and from gaining access to a stream or other public water from private property. . . . In particular, the term ‘non-

¹² Although the regulation purports to create a right of appeal under NMSA 1978, Section 39-3-1.1, *see* 19.31.22.12 NMAC, that right is illusory because Section 39-3-1.1 applies “only to judicial review of agency final decisions that are placed under the authority of this section by specific *statutory* reference.” *See* NMSA 1978, § 39-3-1.1(A) (1999) (emphasis added); *Gelinas v. Taxation & Revenue Dep’t*, 2020-NMCA-038, ¶ 5 (rejecting appeal because of lack of specific statutory reference, among other reasons). None of the statutory authorities listed for the regulation contain any such reference. *See* 19.31.22.3 NMAC; *see also* NMSA 1978, §§ 17-1-14 (2015), 17-1-26 (1947), 17-4-6 (2015) (failing to provide right of appeal).

navigable' in SB 226 cannot be applied to limit the public's access to public waters.'").

This constitutionally sound construction of the statute provides no support for the Rule. Thus, the Rule cannot be saved. It necessarily violates the public's constitutional right to enjoy New Mexico's public waters. This is clear in the Rule's stated objective of implementing a "process for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner." 19.31.22.6 NMAC. As the foregoing demonstrates the Rule nullifies the public's rights under Article 16, Section 2, and conflicts with the holdings of *Red River* and *Shively*. The Court must thus reach the constitutional issue and affirm that without a right of to use the streambeds and banks, the public's right to use and enjoy public waters is abridged. The Rule violates the New Mexico Constitution.

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 New Mexico 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,

GALLEGOS LAW FIRM, PC

COHEN LAW FIRM, LLC

By /s/ J. E. Gallegos
J. E. GALLEGOS

By /s/ Seth T. Cohen
Seth T. Cohen

J. E. GALLEGOS
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686
(505) 986-1367 (fax)
jeg@gallegoslawnm.com

SETH T. COHEN
316 East Marcy Street
Santa Fe, New Mexico 87501
(505) 466-5392
(505) 395-7540 (fax)
scohen@colawnm.com

Attorney for Petitioners

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
Petitioners' Brief in Support of Petition for Writ of Mandamus to be served by
electronic service on this 20th day of December, 2021 on the following counsel of
record:

New Mexico Attorney General
Hector Balderas
408 Galisteo St
Santa Fe, New Mexico 87501

New Mexico State Game Commission
1 Wildlife Way
Santa Fe, New Mexico 87504

/s/ J. E. Gallegos
J. E. Gallegos