



Joey D. Moya

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,

v.

No. S-1-SC-38195

**HON. MICHELLE LUJAN GRISHAM,
Governor, and STATE GAME COMMISSION,**

Respondents.

**GOVERNOR LUJAN GRISHAM'S RESPONSE TO PETITION FOR
MANDAMUS ORIGINAL JURISDICTION**

The Honorable Michelle Lujan Grisham, Governor of the State of New Mexico, by her counsel, files this Response to the Verified Petition for Mandamus Original Jurisdiction. While the Governor respectfully suggests that this Court resolve the dispute presented by the Petition, the Governor is not a proper Respondent and therefore should be dismissed.

I. INTRODUCTION

Petitioners, three organizations advocating on behalf of fishers and hunters, seek the extraordinary remedy of a writ of mandamus against two Respondents, the Governor of the State of New Mexico, Michelle Lujan Grisham (the "Governor" or

“Respondent”), and the State Game Commission (the “Commission”).¹ The subject of the Petition is a certain regulation, 19.31.22 NMAC (the “Regulation”) adopted by the Commission and certain actions taken by the Commission pursuant to that Regulation. Petitioners aver that the Commission’s Regulation -- allowing certain certificated landowners to close access to “non-navigable waterways” abutting their land, so that the waterways are not be open to fishers, hunters, campers and other members of the general public -- violates provisions of the New Mexico Constitution. Petition ¶ 5 (“The Commission lacks the authority and has proceeded in violation of the aforesaid constitutional principle . . .”). The Petition seeks relief by way of a prohibitory order of mandamus to “strike[] down the Regulation and prohibit[] any proceedings or actions by the Commission in reliance upon in furtherance of [sic] the unlawful regulation and the policy of privatizing segments of the public rivers and streams of New Mexico.” Petition at p. 15 (“RELIEF SOUGHT”).

The Governor has no clear legal, nondiscretionary duty with respect to the adoption or enforcement of the Regulation or the remedies the Petition seeks. The Petition alleges none; the Petition alleges no conduct of the Governor with respect

¹ A motion to intervene as respondents, filed by certain landowners who claim the benefit of the regulation at issue, is pending in this Court. *See* Motion to Intervene . . . (Apr. 17, 2020). The Governor consents to the intervention of the landowners. The landowners, the Petitioners and the Commission are all real parties in interest and are sufficient for this Court to address and resolve the issues raised.

to the adoption of the Regulation or its application to specific landowners. The conduct that the Petition complains of is conduct taken solely by the Commission. The relief Petitioners seek is directed at the Commission and not the Governor. In these circumstances a writ of mandamus cannot lodge against the Governor. The Governor should be dismissed as a Respondent.

II. THE PETITION ALLEGES NO CLEAR LEGAL, NONDISCRETIONARY DUTY OF THE GOVERNOR THAT WAS BREACHED AND SEEKS NO REMEDY THAT MAY BE HAD AGAINST THE GOVERNOR.

Other than being named in the caption of the Petition, the Governor is referenced only five times in the Petition. None of these references avers a clear, legal nondiscretionary duty that the Governor supposedly breached. On page 4 at paragraph 1 of the Petition, the Governor is listed under the heading “Respondents”: “Honorable Michelle Lujan Grisham, Governor of the State of New Mexico.” That is the reference in its entirety. There is no statement as to why she is named, what duties she breached or are subject to remediation. The next reference to the Governor is found on page 11 at paragraph 14, where (again in its entirety) the Petition refers to the discretionary appointment power² of the Governor: “A newly

² The Governor’s power to appoint is founded in New Mexico’s Constitution. *See* N.M. Const. art. V, § 5 (“The governor shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him unless otherwise provided by law.”). This Court has viewed the Governor’s constitutional power to appoint as expansive and discretionary. *See State ex rel. Ulrick v. Sanchez*, 1926-

constituted Commission was formed in 2019 as a result of appointment by Governor Lujan Grisham, who had been recently inaugurated.” At page 12 at paragraph 18, the Petition avers: “The chairwoman presiding at the time of the October 2019 and November 2019 meetings was removed from the Commission by the Governor in December 2019 and thereafter a new chairwoman was appointed.”³ That is the entire reference; there are no allegations as to any duty the Governor had as to the regulation or its enforcement or that any duty was breached. At page 15, footnote 2, the Petition, in speculating as to the position of the Governor on the issues raised in the Petition, states: “The declaratory action Complaint is signed by the General Counsel and Deputy General Counsel for Governor Lujan Grisham. The signatures

NMSC-060, ¶ 46, 32 N.M. 265 (removal made in accordance with constitution is final and conclusive, “no matter how grievously [governor] might err in judgment.”).

³ There is nothing in the Petition that connects the “removal” of the Chairwoman and the Resolution at issue. Any insinuation that there is some unstated connection cannot be grounds for a mandamus remedy. Cf. *Antonetty v. Cuomo*, 131 Misc. 2d 1041, 1045, 502 N.Y.S.2d 902, 905 (Sup. Ct. 1986) (dismissing Governor from injunction lawsuit where there were only suspicions of the Governor’s improper involvement: “It is apparent from the petition that petitioners firmly believe that Governor Cuomo was the driving force in having the U.D.C. name the Fordham Plaza in honor and memory of Evelina Antonetty. Though this is clear from the petition, the legal basis for joining the Governor as a respondent is suspect. The court is not naive to realize that the Governor of the State of New York has some influence over the appointed Chairman of the U.D.C. However, this factor alone is insufficient to make a claim against the Governor who has no legal authority to rescind the naming and dedication of U.D.C. property. The Governor therefore is not a proper party to this action.”). This Court has recognized that the expansive and discretionary power of appointment and removal conferred on the Governor by the Constitution does not require the Governor to articulate a reason. *State ex rel. Duran v. Anaya*, 1985-NMSC-044, ¶¶ 6, 10, 102 N.M. 609.

provision does not state whether counsel represents none, one or both of the parties.” Finally, in the last paragraph of the Petition at page 15, describing the “RELIEF SOUGHT”, the Petitioners “request the court issue its Alternative Writ of Mandamus directing Respondents to invalidate, repeal, cancel and give no further effect to the Regulation . . .” The portions quoted above reflect the sum total of the language found in the Petition referencing the Governor.

The allegations of the Petition point to no duty that the Governor breached, and the only actions of the Governor that are alleged in the Petition relate exclusively to her appointment power – her appointment of the Commissioners and her failure to reappoint Chairwoman Prukop. Even as to these actions by the Governor, the Petition does not allege that either of them was illegal, unconstitutional, or in any way wrongful. The Petition simply provides no clue as to what the Petitioners think the Governor did that was wrong.

The insufficiency of the Petition to support a writ of mandamus against the Governor does not end with the complete absence of averments of any clear legal, nondiscretionary duties of the Governor or their breach. The Petition’s descriptions of the relief it seeks further highlights why mandamus is inappropriate as to the Governor. There are three statements of the relief sought in the Petition, each one varying somewhat from the others. The first description of the relief sought in the Petition is found on page 1, where the Petition states: “Petitioners bring this Verified

Petition for writ of prohibitory mandamus to invalidate an illegal and unconstitutional regulation and unconstitutional and illegal practice by the executive branch acting through the New Mexico State Game Commission and to prohibit further unlawful conduct.” This statement does not mention the Governor; it expressly identifies only the Commission whose regulation and conduct allegedly is illegal and unconstitutional.

As to the Petition’s request “to prohibit further wrongful conduct,” mandamus will not lie to generally prohibit unspecified future conduct. *See, e.g., Freeman v. Gregoire*, 171 Wash.2d. 316, 332 (2011). In denying the writ, the *Freeman* Court said:

At the onset, petitioners' request for mandamus to ensure that article II, section 40 funds will be used exclusively for highway purposes is too general to command issuance of the writ. [Citing cases.] And petitioners fail to identify a present constitutional violation remediable by writ. Instead, petitioners seek a writ broadly prohibiting DOT from taking or authorizing any future action with respect to the transfer or occupancy of I-90 for light rail. We have consistently held that we will not issue writs generally ordering state officers to adhere to the constitution because we presume that they already do so without our direction.

The next description of relief sought is found on page 15: “Petitioners request the court to issue its Alternative Writ of Mandamus directing Respondents to invalidate, repeal, cancel and give no further effect to the Regulation . . .” But, the New Mexico statutes do not vest in the Governor the power or the duty directly to enforce the regulations of the Commission. Rather, that power and duty is assigned

to the Director of the New Mexico Game and Fish Department and the Commission, the Director's supervisor. See Point III, *infra*. See *New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶ 23, 149 N.M. 207 (where “rules and regulations [were not] under the Governor’s authority . . . a writ of mandamus . . . is denied.”).

The final description of the remedy sought by the Petition is also found at page 15, where the Petition seeks “a Peremptory Writ of Mandamus concluding *the Commission* has violated the Constitution, striking down the Regulation as void and prohibiting any proceedings or actions *by the Commission* in reliance upon in furtherance of [sic] the unlawful Regulation” (Emphasis added.) This requested remedy does not address or apply to the Governor; it does not command her to do anything nor prohibit her from doing anything, much less a clear legal, nondiscretionary duty.

The Petition on its face fails to establish a basis for the grant of the extraordinary relief of mandamus against a sitting Governor. The Governor should be dismissed as a Respondent.

III. THE GOVERNOR TOOK NO SPECIFIC ACT AND BREACHED NO CLEAR LEGAL, NONDISCRETIONARY DUTY WITH RESPECT TO THE PROMULGATION OR APPLICATION OF THE REGULATION.

There is a simple reason why the Petition cannot allege a basis for a mandamus remedy against the Governor. The facts are that (in addition to having no clear legal nondiscretionary duty) the Governor had no legally relevant involvement in the

adoption or application of the Regulation. The Commission is autonomous;⁴ the Governor does not supervise the Commission or the Director of the Game and Fish Department. The Governor had no involvement in the passage or application of the Regulation at issue. She took no specific acts with respect to the passage or application of the Regulation that breached a clear, nondiscretionary legal duty. In these circumstances, mandamus may not lie against the Governor.

The autonomy of the Commission and the distance of the Governor from the acts complained of in the Petition are highlighted by a brief review of the Commission's founding and evolution. The legislative history of the enabling legislation for the Department and Commission indicates the legislature's intent to place the responsibility for administering the statutes and policies at issue with the Commission and not the Governor and to distance the Governor from, and limit the

⁴ See *New Energy*, 2011-NMSC-006, ¶¶ 14, 15. As described *infra* in the text, the statutory power of the Commission to issue rules and regulations contains no restrictions or need for approval or supervision. While the Commission is administratively attached to the New Mexico Energy, Minerals and Natural Resources Department, *see* NMSA 1978, § 9-5A-3(B), the Commission exercises its functions independently of and without approval or control of that Department. NMSA 1978, § 9-1-7(A)(1). The Department is there to “(1) provide, if mutually agreed, the budgeting, record-keeping and related administrative and clerical assistance to the agency; and (2) include the agency’s budgetary requests, as submitted and without changes, in the departmental budget.” NMSA 1978, § 9-1-7(B); *see also* NMSA 1978, § 9-1-5 (limiting relationship to “cooperation, at the request of heads of administratively attached agencies and adjunct agencies . . .”).

Governor's involvement in, the State Game Commission's decision-making process, thereby increasing the independence of both the Department and the Commission.

The First Legislature of the State enacted legislation creating the department of game and fish and creating the position of Game and Fish Warden, who was appointed by the Governor and confirmed by the Senate. 1912 N.M. Laws, ch. 85. The Warden served as the head of the game and fish department and was charged "rigidly and strictly to care for and enforce the provisions of this and all other laws of the State of New Mexico for the protection of fish and game[.]" *Id.* § 3.

In order "to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply[.]" the legislature modified its prior legislation in 1921 to create the State Game Commission. 1921 N.M. Laws, ch. 35. The three members of the Commission were appointed to staggered six-year terms by the Governor and confirmed by the Senate. *Id.* § 2. The Warden continued to be appointed by the Governor, but the term of appointment was shortened, and confirmation was eliminated. *Id.* § 5. The Commission was "authorized and directed to make such rules and regulations and establish such service as they may deem necessary to carry out" the legislation. *Id.* § 6. The Warden remained the administrative head of the Department. *Id.* § 5.

In 1931, the enabling legislation was amended to grant greater powers to the Commission. 1931 N.M. Laws, ch. 117. The warden and all his subordinates were made employees of the Commission, who could be fired for reasons the Commission deemed sufficient. *Id.* § 5. The 1931 legislation repealed large sections of the prior laws relating to game and fish and empowered the Commission to enact regulations to replace these laws. *Id.* §§ 3, 10.

In 1945, the Commission was expanded to five members, still appointed by the Governor. 1945 N.M. Laws, ch. 25, § 1. In 1955, the position of “warden” was renamed to that of “director.” 1955 N.M. Laws, ch. 59, § 2. The director continued to be employed by the Commission, but Department employees were now employed by Director and not directly by the Commission. *Id.* § 1. In 1985, the legislature mandated that the Governor’s appointments each come from separate districts to create geographic diversity on the Commission. 1985 N.M. Laws, ch. 107. In 1991, the legislature expanded the Commission to seven members for four-year terms and created requirements designed to provide greater continuity and diversity of the Commission. 1991 N.M. Laws, ch. 103, § 1.

The enabling legislation and its evolution show that from the very beginning of statehood the legislature has reposed in the Department first and then the Commission and the Department the responsibility to “enforce the provisions” of all relevant legislation and to “make such rules and regulations” as necessary with

respect to game and fish and “for their use and development for public recreation and food supply.” Further, this legislative history shows that the Governor has *no duties* and no involvement with respect to the promulgation or enforcement of Commission regulations. And the facts confirm the lack of involvement of the Governor with respect to the Regulation at issue.

On May 11, 2017, the Chairman of the Commission first raised the issue of the 2015 legislative changes to the hunting and fishing on private property statute, NMSA 1978, § 17-4-6(C). Minutes of the State Game Commission (“Minutes”), May 11, 2017, at 65-66.⁵ On June 22, 2017, the Commission took public comment on the development of a new regulation. Minutes, June 22, 2017, at 70-76. Then, on September 28, 2017, the Commission Chairman proposed to put together a regulation to allow for a certification process where a landowner would be able to apply to the Department to have property certified and thereby exclude the public from any non-navigable waterway abutting that property. Minutes, Sept. 28, 2017, at 64-65. On November 14, 2017, a Rulemaking Notice was published in the New Mexico Register along with the proposed text of the regulation. N.M. Reg. Vol. XXVIII, Issue 21, Nov. 14, 2017. By November 16, 2017, the proposed regulation was posted on the Department website. Minutes, Nov. 16, 2017, at 96-98. On

⁵ All Minutes of the State Game Commission referenced herein are available at <http://www.wildlife.state.nm.us/commission/meeting-agendas/>.

December 20, 2017, the Commission held a formal rulemaking hearing and approved the Regulation. Minutes, Dec. 20, 2017, at 45-74. The Regulation, as adopted, is now published as 19.31.22 NMAC.

To date, the Commission has acted on five applications for Certification of Non-Navigable Public Water Segment under the Regulation. All of these applications were acted on by the Commission prior to the administration of Governor Lujan Grisham. The five applications are available at <http://www.wildlife.state.nm.us/commission/non-navigable-water-application>.

On August 28, 2018,⁶ Director Sloane submitted these applications to the Commission. Under the Regulation, the Director's responsibilities are strictly ministerial. If the requirements of the Regulation are met, the Director must recommend that the applications be granted, which he did with respect to these five applications. Letters from Michael Sloane to State Game Commission (August 28, 2018), Petition Appendix IV. On November 8, 2018, the Commission held a special meeting to address and approve the five applications. Minutes, Nov. 8, 2018, at 1, 14-16. On December 28, 2019, the Chairman issued Final Agency Action and Decision documents for the five applications, which set forth findings of fact and

⁶ The Petition incorrectly identifies the date for this submission by Director Sloane to the Commission as *July 24, 2019*. Petition ¶ 11. This must be a typographical error, as the Petition later recognizes that the letters are dated August 28, 2018, *see* Petition ¶ 11, and that the Commission acted on the applications in December 2018, *before* the July 24, 2019 date. Petition ¶ 13.

conclusions of law and certified the segments of water as “certified non-navigable public water.” These documents are attached to this Response as Attachment A. Governor Lujan Grisham was not involved in any of these activities; they all occurred before she assumed office.

After the Governor assumed office in January 2019, she appointed seven new members of the Commission in May 2019. *See* Letters from Governor Lujan Grisham to Appointees (May 24, 2019), attached to this Response as Attachment B. Since its appointment, the new Commission has not certificated any landowners under the Regulation.⁷ The totality of the Commission’s activities with respect to the Regulation are as follows:

- On July 24, 2019, the Commission heard a presentation regarding the history of the Regulation. Minutes, July 24, 2019, at 4. Vice-Chair Roberta Salazar Henry moved “to place a moratorium, of not more than 90 days, on considering any new applications under 19.31.22 NMAC,

⁷ Since January 2019, five applications by landowners for certification under the Regulation have been submitted to Director Sloane. Two, received by Director Sloane on September 27, 2019, were forwarded to the Commission on November 25, 2019, recommending that they be denied. Letters from Michael Sloane, Director of Game and Fish Department, to State Game Commission (Nov. 25, 2019) (attached hereto as Attachments C & D). On November 20, 2019, Director Sloane received another application, which he forwarded to the Commission on January 19, 2020, recommending approval. Letter from Michael Sloane, Director of Game and Fish Department, to State Game Commission (Jan. 19, 2020) (attached hereto as Attachment E). On February 20, 2020, and March 13, 2020, Director Sloane received the fourth and fifth applications. To date, Director Sloane has not forwarded either of these two applications to the Commission or taken a position on whether they should be approved.

in order to receive and review advice, provided by the attorney general regarding the rule.” *Id.* at 4.

- At the meeting on August 22, 2019, the Attorney General’s Office advised the Commission “to not enforce the moratorium until the AG’s office has the opportunity to review authority to enact a moratorium.” Minutes, Aug. 22, 2019, at 3.
- At the October 25, 2019 meeting, members of the public commented on the issue. Minutes, Oct. 25, 2019, at 1. Chairwoman Prukop requested “the Commission’s consensus approval that they put the Landowner Certification of Non-Navigable Water Rule on the November Commission meeting agenda” and recommended to open the Regulation at the November meeting. *Id.* at 1. The Regulation was ordered to be opened. *Id.* at 4.
- At the meeting on March 4, 2020, the Department informed the Commission that it had filed a declaratory judgment action related to the non-navigable waters statute, NMSA 1978, Section 17-4-6(C). Minutes, Mar. 4, 2020, at 2. The Commission determined that it “will have no further comment on the matter of non-navigable statute [sic] or any other issues related to non-navigable waters.” *Id.*

The Governor was not involved in any of these activities. The Governor has never attended a Commission meeting.⁸ The Governor has no clear legal,

⁸ A member of the Governor’s staff attended two Commission meetings since January 2019. At the inaugural meeting of the new Commission on June 14, 2019 and at the Commission meeting on August 22, 2019, during the introduction of members of the public, Victor Reyes, Legislative Director for the Governor, introduced himself. At both meetings, Mr. Reyes did not give public comment or interact in the proceedings in any way and left shortly thereafter. Audio-recording: State Game Commission Meeting Proceedings (June 14, 2019) (available at <https://media.avcaptureall.com/session.html?sessionId=61fec3c6-e9f3-41c6-b0c8-bb3df5513cf5&prefilter=840,5943>); *Id.* (Aug. 22, 2019) (available at

nondiscretionary duty as to the promulgation or application of the Regulation and was not involved in its promulgation or application. Nor can she order its rescission. She should be dismissed as a Respondent.

IV. ARGUMENT

A. Mandamus is an extraordinary remedy that is rarely invoked and only when a public official's legal duty is clear and indisputable.

A writ of mandamus may be issued only in the most exceptional circumstances, and only where the rights of the parties are clear and the public official at whom the writ is directed has a clear and indisputable duty to act or to refrain from taking an action that violates the law. This Court has recognized that mandamus “is a drastic remedy to be invoked only in extraordinary circumstances.” *Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, ¶ 19 (quoting *State ex rel. Richardson v. 5th Judicial Nominating Commission*, 2007-NMSC-023, ¶ 9, 141 N.M. 657); see also *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154 (same); 52 Am. Jur. 2d Mandamus § 4 (February 2020 Update) (“Mandamus is an unusual and extraordinary remedy which the courts issue only as a last resort”); 55 C.J.S. Mandamus § 7 (March 2020 Update) (“Mandamus is an

<https://media.avcaptureall.com/session.html?sessionId=e1d3b908-a68a-4a4f-b630-3061c19ec789&prefilter=840.5943>).

extraordinary remedy that should be awarded only in exceptional or truly extraordinary causes . . . A party seeking a writ of mandamus must show that its right is clear and indisputable.”).

This judicial concern to carefully limit the mandamus remedy is founded on the recognition that the mandamus remedy almost always implicates separation of power issues. As Justice Chavez explained in his dissent in *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 96, 149 N.M. 330:

The Constitution and laws of New Mexico define the limits of authority for each branch of government. In 1904, the limits of our authority to issue a writ of mandamus were defined by the Territorial Supreme Court when it wrote “[i]t is said by the highest judicial tribunal in the land that, ‘mandamus lies to compel the performance of a statutory duty only when it is clear and indisputable.’” *Vaughn*, 12 N.M. at 342–43, 78 P. at 53 (quoting *Bayard v. United States ex rel. White*, 127 U.S. 246, 250, 8 S.Ct. 1223, 32 L.Ed. 116 (1888)). We have never abandoned the requirement of a clear and indisputable duty as essential for the issuance of a writ of mandamus. *Johnson v. Vigil–Giron*, 2006–NMSC–051, ¶ 22, 140 N.M. 667. Instead, because it is such an extraordinary writ that must be issued only in extraordinary circumstances, we have carefully defined its limits.

Justice Chavez’s observations in *Lyons* are echoed by Justice Cooley in his opinion in *People ex rel. Sutherland v. Governor*, 29 Mich. 320 (1874), at a time when the courts were struggling with the application of the extraordinary writ to governors. Justice Cooley observed:

It may be doubted if this concession would not require us to dismiss the present application, if not to deny our jurisdiction in all cases where the governor is respondent and his executive action or duties are involved. There is no very clear and palpable line of distinction between those

duties of the governor which are political, and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. . . . [I]t is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons.

Id. at 323.

Recognizing the extraordinary nature of the mandamus remedy and its implications on the separation of powers, this Court has fashioned three limiting requirements, all of which must be satisfied for mandamus to lie. First, the respondent must have a clear legal, nondiscretionary duty with relation to the subject matter of the controversy. *See* Point IV. B. Second, the respondent must have taken some specific action or failed to take some directed action with respect to the subject matter of the controversy. *See* Point IV. C. Finally, there must be no plain, speedy and adequate remedy at law. Neither one of the first two requirements is met as to the Governor in this case⁹ and she should be dismissed as a Respondent.

⁹ The Governor takes no position as to the third requirement.

B. Mandamus requires that there be a clear legal, nondiscretionary duty of the respondent at issue as to the subject matter of the proceeding.

This Court has repeatedly recognized that an indispensable requirement for the issuance of a writ of mandamus is a clear legal, non-discretionary duty. *See, e.g., New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207 (mandamus appropriate only “to compel the performance of a ministerial act or duty that is clear and indisputable.”); *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 22, 140 N.M. 667 (“Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act . . .”); *Greer v. Walker*, 1955-NMSC-012, ¶ 4, 59 N.M. 119 (“[A] party cannot be compelled to perform an act by mandamus unless it is made to affirmatively appear that it is his clear duty to do so.”).

As described in Point II, *infra*, the Petition here fails to identify a clear legal, nondiscretionary duty of the Governor with respect to the Regulation at issue; nor articulates a specific remedy applicable to her. That should be the end of the inquiry. *See Greer*, 1955-NMSC-012, ¶ 5 (dismissing writ; “In the case at bar the alternative writ sets forth no allegations from which it could be inferred that the Commissioner is under duty to issue mining leases to petitioner.”). “The writ of mandamus does not create or confer authority upon the officer to whom it is directed. It should be directed to those whose duty it is to do the thing required. It must clearly appear that

the person to whom it is directed has the absolute power to execute it; otherwise it should not be issued.” *Wells v. Purcell*, 267 Ark. 456, 466 (1979).

The fact that the Governor is the head of the executive branch of government does not create the type of clear legal, nondiscretionary duty necessary for a writ of mandamus to issue. As this Court stated in *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 17, 128 N.M. 154:

The rule to be deduced from these cases is that the existence of a generalized duty that state officials owe to the people of the state as a whole, such as implementing the Criminal Code—or passing and signing lawful legislation—is not sufficient to authorize an enforcement action by a person seeking to serve as a “private attorney general.” Rather, some additional authority is required. Plaintiffs point to no such additional authority under which they may serve as private attorneys general, and we therefore reject this argument.

Cf. 1st Westco Corp. v. Sch. Dist. of Philadelphia, 6 F.3d 108, 116 (3d Cir. 1993)

(“If we were to allow Westco to join the Commonwealth Officials in this lawsuit based on their general obligation to enforce the laws of the Commonwealth, we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it.”); *New York Cty. Lawyers' Ass'n v. Pataki*, 188 Misc. 2d 776, 787, 727 N.Y.S.2d 851, 859–60 (Sup. Ct. 2001), *aff'd sub nom. New York Cty. Lawyers' Ass'n v. State*, 294 A.D.2d 69, 742 N.Y.S.2d 16 (2002) (“The State contends the Governor is not a proper party to this lawsuit because he plays no role in the implementation of the statutes

governing the provision of assigned counsel to children and indigent adults. NYCLA points to the Governor's comments, reported in the media, coupled with the state constitutional provision that the Governor shall faithfully execute the laws. . . . This Court finds the allegations in the complaint do not draw a sufficient connection between the Governor and the alleged unconstitutional conduct of the state to conclude that the Governor, independent of the State of New York, is a real party in interest, requiring his removal as a party to this action.”).

The Petition fails to allege a clear legal, nondiscretionary duty of the Governor with respect to the Resolution at issue and she has none. The Governor should be dismissed as a Respondent.

C. Mandamus requires that the Governor be directly involved in the promulgation or application of the Resolution at issue.

To counsel’s knowledge from the reported cases, this Court has *never* issued a writ of mandamus against a governor where she or he was not directly involved in the matter at issue – where the governor did not take an action or failed to take an action that was directly connected to the subject matter of the mandamus proceedings. Outside the context of challenges to a governor’s line item veto or appointment authority,¹⁰ this Court has issued a writ of mandamus to prohibit a

¹⁰ The cases involving appointments and the exercise of line item veto power are inherently different than here because in those cases there was no question that the governor took an action that was at issue. Rather, the question was whether the governor’s action exceeded constitutional or statutory authority. *See, e.g., Am. Fed’n*

governor from taking unlawful action only three times. In each case the sitting governor took *affirmative action* him or herself in violation of a clear and

of State, Cty. & Mun. Employees v. Martinez, 2011-NMSC-018, 150 N.M. 132 (addressing Governor's stated intent to remove appointed members of the Public Employees Labor Relations Board; writ entered on the basis that the Governor had no power to remove); *State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, 134 N.M. 59 (addressing Governor's power to remove six lay members of the Judicial Standards Commission; writ of quo warranto denied because the removal was within the Governor's Constitutional power); *Denish v. Johnson*, 1996-NMSC-005, 121 N.M. 280 (addressing Governor's stated intent to appoint to a full term regents at a state university appointed after the mid-term resignation of their predecessors; writ granted on the basis that appointees could only serve out the remainder of the predecessors' term and that the Governor could not appoint regents for a full term without Senate approval); *State ex rel. Duran v. Anaya*, 1985-NMSC-044, 102 N.M. 609 (addressing Governor's discharge of members of the State Board of Barber Examiners; writ of mandamus or quo warranto denied on the basis that such discharge and appointment was within the Governor's broad statutory authority); *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, 91 N.M. 279 (addressing Governor's removal and transfer of the State Highway Engineer to a different position; writ granted on the basis that the specific statutory provisions defining the scope and purpose of the Engineer's position deprived the Governor of authority to remove and transfer); *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001 (addressing Governor's partial veto of an appropriation for a judicial salary increase; the court denied mandamus as veto was within Governor's discretion); *State ex rel. Smith v. Martinez*, 2011-NMSC-043, 150 N.M. 703 (addressing Governor's partial veto scaling down appropriation for the mortgage financing authority; writ issued); *State ex rel. Stewart v. Martinez*, 2011-NMSC-045 (addressing Governor's partial veto of unemployment compensation bill; writ issued); *State, ex rel. Coll v. Carruthers*, 1988-NMSC-057, 107 N.M. 439 (addressing Governor's line item vetoes of an appropriation bill; writ issued as to one partial veto and denies as to remainder); and *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359 (addressing Governor's partial vetoes; writ issued on the basis that the veto changed the legislative intent and thus the Governor had engaged in the legislative function).

ascertainable statutory or constitutional provision. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343 (issuing a writ of mandamus to prohibit the governor from rewriting New Mexico's public assistance system by executive order in derogation of separation of powers); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562 (issuing a writ of mandamus to prohibit the governor who himself had entered into state gaming compacts that permitted gaming activities that were unauthorized by statute); *State ex rel. Robinson v. King*, 1974-NMSC-028, 86 N.M. 231 (issuing a writ of mandamus to require the governor to issue an election proclamation that was required by statute).

Here, the Governor was not and could not have been directly involved in the promulgation or implementation of the Regulation at issue. *See Point III, infra*. Mandamus cannot lie against the Governor. She should be dismissed as a Respondent.

V. CONCLUSION

For all the above reasons, the Governor respectfully requests that this Court dismiss her as a Respondent in these proceedings. The Governor respectfully submits a proposed order as Attachment F.

STATEMENT OF COMPLIANCE RULE 12-504(H)

As required by Rule 12-504(H) NMRA Respondent Governor Lujan Grisham certifies that the body of this brief complies with Rule 12-504(G)(3) NMRA because:

1. The body of this brief contains a total of 5,929 words excluding the parts of the brief exempted by Rule 12-504(G)(1) NMRA.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word version 2019 in 14-point Times New Roman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 20, 2020, I filed a true and correct copy of the foregoing Governor Lujan Grisham's Response to Petition for Mandamus Original Jurisdiction electronically through the Odyssey File & Serve system, thereby providing service to all counsel of record.

/s/ Joseph Goldberg
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