

  
Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**No. S-1-SC-38195**

**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 corporation,**

Petitioners,

**v.**

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

Respondents.

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**THE STATE GAME COMMISSION'S RESPONSE  
TO VERIFIED PETITION FOR A WRIT OF MANDAMUS**

HECTOR BALDERAS  
New Mexico Attorney General

Tania Maestas  
Chief Deputy Attorney General  
408 Galisteo Street  
Santa Fe, NM 87501  
(505) 490-4048  
[tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)

*Attorney for Respondent  
the State Game Commission*

Respondent, the State Game Commission (“the Commission”) was sued in this instance by Adobe Whitewater Club of New Mexico, New Mexico Wildlife Federation, and New Mexico Chapter of Backcountry Hunters & Anglers’ (“Petitioners”), and hereby files its Response to Petitioners’ *Verified Petition for Mandamus Original Jurisdiction*, filed on March 13, 2020 (“Petition”). Per this Court’s March 30, 2020 order, the Response is timely filed.

The Commission respectfully responds that the Commission has the lawful authority to regulate to protect the environment and for the health, safety, and welfare in the State. Further, the Court must further analyze Article 16, Section II to determine the appropriate constitutional application in this case.

### **STANDARD OF REVIEW**

Mandamus is a drastic remedy to be invoked only in extraordinary circumstances. *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm’n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566. As such, “it lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.” *Id.* “Assuming mandamus would otherwise lie, [this Court exercises its] power of original jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental constitutional question of great public importance.” *Cnty. Of Bernalillo v. N.M. Rub. Reg. Comm’n*, 2000-NMSC-035, ¶ 6, 129 N.M. 787, 14 P.3d 525.

## **BACKGROUND**

In 2015, the Legislature amended NMSA 1978, Section 17-4-6 (2015). For purposes of this petition, the relevant amendments were to Section 17-4-6(C), to expressly prohibit the trespass onto private property by public water and to prohibit the trespass onto private property to access public water. Following the statutory amendment, the Commission subsequently promulgated the rule at issue here, and it became effective January 22, 2018. It is important to note that the composition of the Commission did not include any of the commissioners who serve today. Pursuant to the rule, the Commission has approved five applications for certification. Additional applications were submitted to the Director of Game of Fish, in accordance with the rule, however those applications remain outstanding due, in part, to questions surrounding the validity of the rule.

Prior to the filing of this petition, the Commission was named as a defendant in a declaratory judgment action filed by the Director of Game and Fish, who was seeking a declaration regarding the constitutionality of the rule in the First Judicial District Court. That lawsuit, which Petitioners incorrectly attribute the Commission as having filed, involves substantially similar questions of law regarding the validity of the rule. The parties in that action have stipulated to a stay of any further proceedings there pending the outcome of this petition.

## DISCUSSION

The Commission's position in this action is simple---it has broad regulatory authority to effectuate the environmental protection and health, safety, and welfare mandates of the Legislature. There is no dispute about that fundamental principle that Article 16, Section 2 articulates, which is that water in New Mexico belongs to the public. Finally, in order to resolve the controversy before it, the Court must further analyze Article 16, Section 2 to consider the specific circumstances before it.

### **I. The Game Commission has the Legal Obligation and the Authority to Promulgate Regulations to Regulate the Recreational Use of New Mexico's Waters**

It is undisputed that the New Mexico Constitution defines water in New Mexico as public. However, as this Court has recognized, it is equally undisputed that the State also has the plenary authority to regulate the use of water. The Legislature has delegated that authority with respect to recreational use to the Commission for purposes of protecting the environment and the health, safety, and welfare of the State. The Game Commission has exercised its authority in promulgating the rule in this case, which effectuates the statutory mandates of the legislature.

The fundamental building block of the Commission's authority, is the Legislature's express pronouncement of the policy of the State, first articulated

nearly 100 years ago:

It is the purpose of this act and the policy of the state of New Mexico 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, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico.

NMSA 1978, Section 17-1-1 (1931). The Legislature created the Commission to “carry out the purpose of Chapter 17 NMSA 1978 and all other acts for like purpose,” Section 17-1-2, and provided it with the authority to hire a director to carry out its obligations, Section 17-1-5. Finally, the Legislature vested the Commission with broad regulatory authority “to make such rules and regulations and establish such service as it may deem necessary to carry out all the provisions and purposes of this act, and all other acts relating to game and fish.” Section 17-1-26.

As previously stated, the legislative intent behind the creation of these authorities is to ensure the protection of the environment, as well as the health, safety, and welfare of the State. For instance, Section 17-1-5.1 creates the “conservation services division,” which works under the Director for the express purpose of carrying out various conservation activities, including “assisting private landowners in improving wildlife habitats.” *Id.* This compliments the long list of statutory authorities granted to the Commission, many of which are focused not only on environmental stewardship. *See* Section 17-1-14 (listing the Commission’s

general authorities). There are also numerous examples of the authority to regulate for health, safety, and welfare. *See* Section 17-2-34 (providing for the creation of a program for the instruction on the safe handling of firearms); Section 17-2-7 (making it illegal to hunt game animals without regulatory approval); Section 17-1-11 (providing for conservation officers); as well as numerous penalty provision---both civil and criminal---for violations of the the State’s hunting and fishing laws.

The authority to regulate for health, safety and welfare, also includes the Commission’s obligation, through the Department of Game and Fish, to regulate for the protection of cultural and tribal interests within the State. While the Commission has no authority to regulate within the boundaries of sovereign tribal land, it must effectively regulate non-tribal members adjacent to those boundaries as it would those of any private landowner. This is consistent with State and local governments’ obligations to protect public water for the sacred use of tribes.

The 10th Circuit Court of Appeals has held that New Mexico governments are obligated to heightened water safety standards, specifically for protecting it for tribal use within the State. *City of Albuquerque v. Browner*, 97 F.3d 415, 428-29 (10th Cir. 1996). There, the 10th Circuit upheld a challenge by the City of Albuquerque to Isleta Pueblo’s promulgation of regulations for “‘Primary Contact Ceremonial Use’ as a designated use of the Rio Grande River within the boundaries of the Indian reservation.” *Id.* The Pueblo defined that as “the use of a stream, reach,

lake, or impoundment for religious or traditional purposes by members of the Pueblo.” The City essentially argued, unsuccessfully, that it should not have to take extra measures to protect water flowing downstream to Isleta and that the designation of the water for ceremonial use was illegal. The 10th Circuit rejected these arguments, thus affirming the obligations of State and local government to heightened safety standards and recognition of stretches of public water for ceremonial use.

Finally, the Commission regulates for the safety of the environment and game. For instance, 19.31.10 NMAC regulates the method of taking game and fish in the State. That regulation addresses the manner in which game and fish can safely be taken. One example of game protection is the prohibition on “snagging” fish, found at 19.31.10.14(X), which makes it illegal---with a single exception---to use the technique in the State. The regulation defines “snagging” as “the repeated or exaggerated jerking or pulling of the fishing line or angling hooks in any attempt to impale fish, whether or not it results in physically snagging a fish.” 19.31.10.7(PP). This technique is widely considered to harm game fish populations and to be an unfair method of chase. Accordingly, the Commission has outlawed its use to ensure the safety of game fish populations and maintain the integrity of the sport.

To say that hunting, fishing, and outdoor recreation are regulated in the State would be an understatement---the number of statutory and administrative regulations

is longer than necessary to illustrate the simple point that the Commission has been given broad authority to regulate on behalf of all stakeholder groups in New Mexico, including conservationists, anglers and hunters, and tribal interests.

## **II. The Court must further examine Article 16, Section 2 to decide whether the rule violates the Constitution**

New Mexico Courts have established a presumption of constitutionality for a regulation, just as with a legislative enactment. *Old Abe Co. v. New Mexico Min. Com'n*, 1995-NMCA-134, ¶ 43, 908 P.2d 776. However, the Commission respectfully submits that the Court must weigh the constitutionality of the rule now before it, and it will require the Court to further analyze Article 16, Section 2. Because the court in *Red River Valley* explicitly limited its holding, to find the rule unconstitutional this Court will have to further interpret the meaning of Article 16, Section II to address the circumstances before it now. The Court expressed this limitation in its response to the dissents in the case:

Much of the reasoning supporting the minority's view as expressed by the dissents must rest upon the thoroughly unsound idea that the majority holding opens wide the opportunity for trespass upon the lands of all riparian owners, in every class of stream; that with every such perennial or torrential stream carrying unappropriated public waters would go a right to trespass as against the owner over whose lands such water flowed, if that be necessary to reach such public waters. Of course, no such result follows from the majority holding, which deals specifically, and only, with these impounded public waters, easily accessible without trespass upon riparian lands.

*Id.* ¶ 56. Because the Court limited its holding, the Commission respectfully submits



that the Court must further analyze to decide this issue.

### CONCLUSION

For the foregoing reasons, the Commission respectfully submits that the *Verified Petition for Mandamus Original Jurisdiction* in the event that the Court extend its analysis beyond *Red River* to consider the specific circumstances before it.

Respectfully Submitted,

HECTOR BALDERAS  
New Mexico Attorney General

By: /s/ Tania Maestas

Tania Maestas  
Chief Deputy Attorney General  
Post Office Drawer 1508  
Santa Fe, NM 87504-1508  
(505) 490-4048  
tmaestas@nmag.gov

*Attorney for Respondent  
the State Game Commission*

### CERTIFICATE OF SERVICE

I hereby certify that I filed a true and correct copy of the foregoing *Response* via the Odyssey File & Serve electronic filing system, thereby providing service to all counsel of record, on April 20, 2020.

/s/ Tania Maestas