

**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

**HONORABLE, MICHELLE LUJAN GRISHAM,  
Governor, and STATE GAME COMMISSION,**

Respondents.

**PETITIONERS' MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY  
BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, AND  
TO EXCEED PAGE LIMITS**

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Petitioner Adobe Whitewater Club of New Mexico, New Mexico Wildlife Federation, and New Mexico Chapter of Backcountry Hunters and Anglers, through undersigned counsel, pursuant to Rules 12-504 (C)(1), 12-309 and 12-318 (F) NMRA, move for leave to file a Reply Brief in support of their Petition for Mandamus, and also move for leave to exceed the usual page limits for reply briefs. It is requested that the Reply Brief be allowed to consist of twenty pages with proportionate word limitation. In support of the Motion Petitioners state.

The Respondents have filed two separate Responses and, pending intervention, a group of land owners (Real Parties) have submitted a conditional Response. As a result Petitioners must address multiple issues and arguments across multiple Responses to the Petition. Authorizing Petitioners to address those issues in a consolidated reply brief will serve judicial economy and substantially aid in the Court's analysis of the issues of significant public importance and afford fairness to the Petitioners. In light of the multiple Responses, Petitioners submit good cause exists to allow a Reply Brief and to permit it to not exceed twenty pages. The proposed Reply Brief is attached.

The Petitioners have communicated with all opposing counsel inquiring whether they intend to oppose the motion and have been informed that Governor Michelle Lujan Grisham and Real Parties oppose. Rule 12-309 (C).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Motion for Leave to File Consolidated Reply Brief in Support of Petition for Writ of Mandamus, and to Exceed Page Limits to be served by electronic service on this 27th day of April, 2020 on the following counsel of record:

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/s/ J. E. Gallegos \_\_\_\_\_  
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## **STATEMENT OF COMPLIANCE**

Counsel certify that the brief complies with the type-style requirement of Rule 12-504(G)(3). The body of the brief consists of 20 pages and contains 5171 words.

## **INTRODUCTION**

The Petition for Writ of Mandamus presents a fundamental question: will New Mexico's rivers and streams remain free and open to the public or, where they pass through private lands, will they be subject to a patchwork of fencing and closures, limiting use and enjoyment to a fortunate few?

The Responses fail to justify any such incursion on the public's constitutional right to the State's water. There is no legal authority for the State Game Commission's promulgation of the rule allowing the privatization of rivers. Instead, the Real Parties attempt to graft federal legal doctrine pertaining to navigability onto New Mexico water law. That doctrine has no bearing here and cannot, in any case, override the fact that in New Mexico the waters of every stream "belong to the public." Real Parties also attempt to minimize their divestment of the public's rights, suggesting that the public can continue accessing these public waters so long as it does not touch the riverbeds. As to nearly every fishing stream in the State, however, this is, of course, a fallacy.

The constitutional issue presented here has now spawned at least three pending legal proceedings, it presents ongoing uncertainty for law enforcement, and it affects every river in the State. As the Petitioners, the Governor and the

Commission—through the Attorney General—agree, this matter warrants conclusive resolution by this Court.<sup>1</sup>

**I. THE COMMISSION EXCEEDED ITS AUTHORITY IN PROMULGATING THE RULE.**

The State Game Commission (“Commission”) acted beyond the scope of its authority when it promulgated 19.31.22 NMAC (the “Rule”), authorizing state-sanctioned closure of public access to “non-navigable public water.” In so doing, the Commission also encroached upon the province of this Court. By administrative fiat the Commission fundamentally redefined the scope of New Mexicans’ constitutionally protected right to use the “unappropriated water of every stream...within the State of New Mexico.” N.M. Const. Art. XVI, § 2.

The Commission makes the unsupported claim that it has the wide-ranging “obligation” and “authority” to “regulate the recreational use of New Mexico’s waters.” Comm. Resp. at 4. This position is echoed by the Real Parties. RP Resp. at 21-24. But the Commission, like all executive bodies, is created and authorized by statutes and is “limited to the power and authority expressly granted or necessarily implied by those statutes.” *Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 20, 143 P.3d. Whether an administrative rule is authorized by statute is a question of law. *Marbob Energy Corporation v. New Mexico Oil Conservation*

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<sup>1</sup> Petitioners concede that inclusion in this proceeding of the Governor is not essential to the relief requested.

*Commission*, 2009-NMSC-013 ¶ 5, 206 P.3d 135. No statute gives the Commission authority to promulgate the Rule.

The Rule creates a scheme under which the Commission, based on a landowner's application—including submission of "substantial evidence which is probative of the waters, watercourse or river's being non-navigable at the time of statehood, on a segment-by-segment basis"—may designate a segment of river as a "non-navigable public water." 19.31.22.8, 19.31.22.12 NMAC. A landowner that receives this designation from the Commission is thereby authorized to close off the designated "public water" segment from public access for fishing. 19.31.22.13 NMAC. The "riverbed or streambed is closed to access without written permission from the landowner." 19.31.22.6 NMAC. The unnecessary adjective "non-navigable" purportedly entitles exclusion of the public.

But none of the three statutes cited by the Commission as providing authority for the Rule do so. 19.31.22.3 NMAC (citing Section 17-4-6 NMSA 1978, Section 17-1-26 NMSA 1978, and Section 17-1-14 NMSA 1978).

Section 17-4-6, as amended in 2015, purportedly provides the principal basis for the Rule and the Commission's designations restricting access to non-navigable public waters. *See* RP Resp. at 22. Section 17-4-6(C) provides:

No person engaged in...fishing...or any other recreational use shall walk or wade onto private property through non-navigable public water or access public water via private property [without written consent from the landowner].

Nothing in this language or elsewhere in the three statutory sections prohibits or authorizes the prohibition of walking or wading “through non-navigable public water.” The Legislature could have included such language. It did not. Instead, by its plain language, this statute says no more than that one may neither access “private property...through non-navigable public water,” nor access “public water via private property.” Apparently, the Commission now agrees. *See Commission Resp. at 3* (interpreting 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.”) Indeed, implicit in the language and structure of 17-4-6(C) is the notion that “non-navigable public water” is different from the “private property” upon which trespass is prohibited. The difference is that because the water is public, ownership of the land over which the water flows comes subject to the public’s rights to use the water for recreational purposes.

No reasonable reading of Section 17-4-6 (C) allows the conclusion that it grants the Commission authority to: 1) make determinations about whether a stream was, at the time of statehood, navigable or not; or 2) having determined that a given stream was non-navigable, authorize a public landowner to exclude the public from what the statute, itself, refers to as “public water.” *State v. Rivera*, 2004-NMSC-001, ¶ 10, 82 P.3d 939, 941 (under the “plain meaning rule of statutory construction,” unambiguous language must be given effect without

“further statutory interpretation.”) *Marbob*, 2009-NMSC-013 ¶ 9. Further, any attempt by the Commission to construe this statute otherwise falls “outside the realm of [its] expertise” and is owed “little, if any, deference.” *Qwest* 2006-NMSC-042, ¶ 20.

Nor do Sections 17-1-14 or 17-1-26—both invoked as authority for the Rule at 19.31.22.3—provide the Commission with authority for its promulgation. Section 17-1-14 merely enumerates the specific types of authority granted to the Commission for game and fish management including, for example, the authority to operate fish hatcheries, the authority to purchase lands for game refuges, and the authority to close streams to fishing when necessary to protect a fishery. NMSA 17-1-14(B)(1), (4), (8). Section 17-1-26 grants the Commission broad rule-making authority, but that authority is limited only to what is necessary to carry out the State’s game and fish statutes, none of which pertains to making hydrologic judgments about navigability at statehood, much less making decrees about the scope of private property rights vis-à-vis the public’s constitutional right to make recreational use of public water.

Moreover, regardless of the statutory basis—or lack thereof—the Commission’s determinations about the scope and nature of property rights veer into the very kind substantive law-making that this Court has found to be beyond

the purview of the Commission, or any executive body. *State ex rel. Sofeico v. Hefferman*, 1936-NMSC-069, ¶ 42, 67 P.2d 240, 247.

The Commission’s promulgation of the Rule and subsequent issuance of certificates designating river segments as private and exclusive are *ultra vires* acts. They must be invalidated by this Court.

## **II. FEDERAL LAW REGARDING OWNERSHIP OF NON-NAVIGABLE STREAMBEDS DOES NOT DIVEST NEW MEXICANS OF THEIR CONSTITUTIONAL RIGHT TO USE PUBLIC WATERS.**

Real Parties stake their position on one basic argument: that private ownership of the streambeds of non-navigable streams—the validity of which is confirmed in *PPL Montana LLC v. Montana*—carries with it the “right to exclude” the public from those streams.<sup>2</sup> RP Resp. at 2-5 *citing* 565 U.S. 576, 590 (2010).

In fact, *PPL Montana* actually cuts against the Real Parties. In that case, the Court underscores—as a matter of federal law—the sanctity of the State’s public trust authority over even non-navigable waters. Thus, the Court explains 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, while federal law determines riverbed title under the equal-footing doctrine.” 565 U.S. at

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<sup>2</sup> For purposes of this proceeding, Petitioners assume private ownership of New Mexico streambeds under non-navigable waters; New Mexico rivers and streams are non-navigable and the oft repeated label is superfluous.

604. This same public trust authority over water has long been recognized by this Court. *Bliss, State ex rel. v. Dority*, 1950-NMSC-066, ¶ 11, 225 P.2d 1007, 1010 (“The public waters of this state are owned by the state as trustee for the people.”), and see *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997) (recognizing state’s “sovereign interest in its land and waters.”)

Real Parties ignore these fundamental principles. Instead, in effect, they urge this Court to find in favor of a small group of private landowners by nullifying both the State’s public trust authority over non-navigable public waters and the public’s established constitutional right to use those waters. Such a consequential change to New Mexico’s legal (and natural) landscape requires overruling *State ex rel. State Game Commission v. Red River Valley Co.* 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421. But Real Parties offer no authority for doing so. They fail to muster even a single case that supports their position, and they cite no case that applies *PPL Montana* in the manner they now urge.

Real Parties overlook the fact that this Court addressed this very issue in *Red River Valley* where it exhaustively established the legal historical basis, dating back to Spanish and Mexican law, for the independence of public water use from private land ownership in New Mexico. 1945-NMSC-034, ¶24. Accordingly, contrary to Real Parties’ suggestion that their title to streambeds divests the public of access to non-navigable streams, this Court held that the acquisition of title to



streambed property does not “destroy, or in any manner limit the right of the general public to enjoy the uses of public waters.” *Id.* at ¶ 45.

Real Parties avoid *Red River Valley* and avoid conceding that their position rests on the untenable proposition that their private ownership of streambeds supersedes the public’s rights to those waters. Instead, Real Parties make the disingenuous assertion that these conflicting rights are “readily harmonized” by allowing landowners to “exclude trespassers from their property so long as they do not prevent the public from recreating on the waters.” RP Resp. at 11. In the Real Parties’ formulation, the public may still enjoy its rights to use its public waters just so long as doing so does not require “walking or wading” on the streambeds. *Id.* This totally impractical limitation conjures a mental picture of a trout fisherman levitating a few inches above the streambed while being scrupulous that the trout he is landing does not run or dive so as to come in contact with the river bottom.

From the Gila and the Mimbres to the Puerco to the Pecos, to the Chama and the other rivers throughout New Mexico, Real Parties’ purported “harmonization” of conflicting rights is little more than a ruse. Without the ability to walk or wade in streams, the public will, as a practical matter, have no access at all to fishing stretches of rivers throughout the State that run through private land. As a matter of common knowledge, nearly all of the trout waters in the State are unsuited for

travel by boat or raft. It is true that, during portions of the year, sections of the Rio Grande and the Chama are suited for rafting and kayaking, but even those activities are jeopardized by the Rule because some popular stretches run through private land which could be closed to prevent contact with the streambed or rocks on the river bottom.

Moreover, as this Court anticipated in *Red River Valley*, permitting private landowners to exclude the public from public waters threatens a violation of the Anti-Donation Clause because it effectively confers on private parties the exclusive use of public waters and fisheries. 1945-NMSC-034 at ¶¶ 53-54, N.M. Const. art. IX, § 14.<sup>3</sup>

### **III. THE CONSTITUTIONAL RIGHT TO RECREATIONAL USE OF RIVERS BY THE PUBLIC IS THE LAW OF NEW MEXICO.**

This proceeding presents the Court with a judicial resurrection of the competition between public constitutional rights and private property rights. In its 1945 decision in *Red River Valley*, the two competing rights and their associated philosophies played out in a debate between the Court's majority and two dissenters. 1945-NMSC-034. The majority held that constitutional rights entitled the public to enjoy recreation in and across the state rivers and streams based on

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<sup>3</sup> The Court in *Red River Valley* cited the potential for violations of Article IV, Section 26 the Privileges and Immunities Clause, but the modern Anti-Donation Clause ratified decades after *Red River Valley* more directly prohibits the kind of privatization of public waters and fisheries urged by Real Parties here.

Article XVI, §2. *Id.* at ¶ 37. The constitutional provision was viewed as a recognition of pre-existing public rights guaranteed by Spanish and Mexican law. *Id.* at ¶¶ 24, 26. By contrast, and just as the Real Parties urge here, the dissent argued that the applicable rule of law holds the owner of “both banks of the stream owns the bed and has the exclusive right to fish therein.” *Id.* ¶74. The Court rejected this proposition as being fundamentally at odds with New Mexico law.

Ironically, it is the dissent of Justice Bickley that perhaps best summarizes the holding of *Red River Valley*.

[T]he majority feel that it is appropriate to declare that each individual member of the public has an inherent right and uncontrollable right to fish in the ‘unappropriated waters from every natural stream . . . within the state of New Mexico without the consent of the owners of the lands through which such streams flow and of the banks and beds of such streams because they say that the fact that such waters belong to the public is sufficient answer to the property owners.

*Id.* at ¶ 70 (internal quotes omitted). This correctly characterizes the Court’s decision, which has been settled law in New Mexico, unchallenged for over seven decades. *See, Id.* at ¶¶ 24, 27, 38, 40, 48 and 59.

Real Parties’ Response barely acknowledges *Red River Valley*, selectively citing the Court’s affirmance that the public is not to trespass on private riverbanks. RP Resp. at 20, 4, n. 5. Then, without any other authority, and contrary to the reasoning and holdings in *Red River Valley*, Real Parties proclaim “. . . well settled federal and state law makes clear that landowners have the right to exclude

the public from walking or wading on their land.” RP Resp., 17-18. In fact, the Court reached the opposite conclusion in *Red River Valley*. Real Parties are thus in the position of needing *Red River Valley* to be overruled while simultaneously arguing that this Court refrain from considering the Petition.

For its part, the Commission’s Response attempts to sidestep *Red River Valley* by overstating the limitation on its ultimate holding. Comm. Resp., 8, *citing* 1945-NMSC-034, ¶ 56. The Court tempered its holding to ensure that it did not “open[] wide the opportunity for trespass *upon the lands* of all riparian owners” if such trespass were “necessary to reach such public waters,” because the case before the Court dealt only with “public waters, easily accessible without trespass upon *riparian lands*.” *Id.* (emphasis added).

The Court’s analysis in *Red River Valley* compels the conclusion that the public can access public water by traveling private streambeds. This necessarily follows from the basic principles recognized by the Court: its affirmation that all waters in the State are for the beneficial use of the public, and its determination that fishing and recreation are beneficial uses. 1945-NMSC-034, ¶¶ 23, 37. The Court expressly applied these principles regardless of private streambed ownership. *Id.* at ¶¶ 40, 44-45. And it emphasized that private rights could not “destroy, or in any manner limit the right of the general public to enjoy the uses of public waters.” As to any public waters, the Court made clear, “no exclusive use

could ... be retained.” *Id.* at ¶¶ 19, 45, and see *Id.* at ¶ 5 (“The property of the public is not converted into private property by any such simple [physical enclosure].”)

It is a given that the rivers and streams of New Mexico are non-navigable. It is a given for purposes of these proceedings that the Real Parties holding Commission Certificates own the land over which the public waters flow. It is a given that there are statutes that make it a criminal trespass to enter posted private property without consent (including section 17-4-6(C) which does not by its terms prohibit persons walking in the rivers).

What is equally and most importantly undisputed is that the waters of the streams “belong to the public.”

The Real Parties vociferously assert authority over what belongs to them. Neither *Red River Valley* nor the Petitioners take issue with their proposition as applied to riparian lands outside the streams. But Real Parties overstep when they seek to assert their will to constrain the use of what belongs to the public. Their bogus “harmonization” of these rights (the public can use the waters provided that it does not touch the riverbeds), conflicts with the harmonization found in *Red River Valley*. There, this Court called for respect of what belongs to the landowners as well as what belongs to the public.

*Red River Valley* compels the conclusion that those who own land through which New Mexico rivers and streams flow take their lands subject to the rights of the public to use those waters. As the Court explained:

It is well settled in this country, as well as in England, that where title to the bed of a river is in one owner and the title to the water is in another, the right of fishery follows the title to the water.

1945-NMSC-034, ¶ 40. There is no question that the preclusion of trespass on the private land bordering the river is recognized, and the Court noted that “[a]ccess to this public water can be, and must be, reached without such trespass.” *Id.* at ¶¶ 32, 48. But the Court equally recognized the recreational rights of the public in enjoying the water belonging to them. *Id.* at ¶¶ 27, 38, 40.

*Red River Valley* compels the conclusion that the New Mexico law provides that public ownership of the waters includes a right to make reasonable use of the riverbeds, that is, use of the complete river. Otherwise, the principles espoused in *Red River* must be abrogated, and the public’s constitutional right to use public waters for recreation is rendered meaningless.

#### **IV. THE PETITION WARRANTS EXERCISE OF THIS COURT’S MANDAMUS JURISDICTION.**

The Petition presents issues appropriately resolved by this Court through the exercise of its original jurisdiction in mandamus. This Court exercises such jurisdiction “to restrain one branch of government from unduly encroaching or

interfering with the authority of another branch in violation of Article III, Section 1 of our constitution.” *State of New Mexico ex rel. Sandel v. NM Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 280 P.2d. Here such encroachments abound.

Moreover, the tension between the public’s right to use public water and the rights of those who own the streambeds requires a determination of the scope of Article XVI, § 2. This Court properly serves as the final authority on such matters in its capacity as the “the ultimate arbiter[] of the law of New Mexico.” *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 22, 552 P.2d 787, 792, *overruled on other grounds by State v. Rondeau*, 1976-NMSC-044, ¶ 22, 553 P.2d 688.

For these reasons, the Governor joins in the Petitioners’ request for this Court’s review. *See* Governor’s Response at 1 (“[T]he Governor respectfully suggests that this Court resolve the dispute presented by the Petition.”) Indeed, on May 4, 2020, the Game and Fish Director, by and through counsel for the Governor, directly initiated his own declaratory judgment action *against the Commission* in the First Judicial District Court seeking a determination of the constitutionality of the Rule. *See* Ex. A to Verified Petition. Likewise, the Commission, through the Attorney General, “respectfully submits that the Court must weigh the constitutionality of the rule now before it.” Comm. Resp., 8.

The Real Parties stand alone in contesting this Court’s exercise of original jurisdiction. As set forth below, however, their grounds for doing so are meritless.<sup>4</sup>

**A. The Petition Presents Fundamental Constitutional Questions of Great Public Concern.**

Perhaps the key consideration for the exercise of original jurisdiction is whether the Petition “implicates fundamental constitutional questions of great public importance.” *Sandel*, 1999-NMSC-019, ¶ 11, and see *State ex rel. Clark v. Johnson*, 1995-NMSC-048 ¶19, 904 P.2d 11 (“[M]andamus is an appropriate means to prohibit unlawful or unconstitutional official action.”) Here, in challenging the Rule, the Petition calls upon the Court to determine the scope of the public’s constitutional right to use unappropriated water as provided in Article XVI, § 2. In Petitioners’ view this section of the Constitution is effectively nullified if it does not carry with it the incidental public right to travel not only above but on and through the streambeds of public waters. In Real Parties’ view the public’s use of streambeds they privately own violates their property rights and

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<sup>4</sup> Although there is no such requirement, Real Parties also suggest that Petitioners have forsaken their right to petition this Court because “they have not previously brought a dispute before the Commission, any administrative agency, or any lower court.” RP Resp. at 13. Petitioners have submitted written and oral opposition to the original promulgation of the Rule and submitted similar support to recent efforts to suspend and revisit the Rule. In addition, the Rule notably contains unusually limited opportunity for public comment on decisions about specific non-navigability designations. See 19.31.22.11 NMAC.



constitutes criminal trespass. RP Resp. at 4-5. This constitutional conflict is of substantial statewide significance.

Real Parties nonetheless suggest “there is no tension” here because of their disingenuous suggestion that the public can continue accessing public waters just so long as they do not contact privately-owned streambeds and, instead, “float...above” those streambeds. RP Resp. at 14. But, as set forth above, and as a matter of common knowledge, in nearly all of the rivers in New Mexico, this restriction effectively nullifies the public’s constitutional right to use public waters. Aside from fishing, rafting in many ways necessarily entails contact with the river beds, boulders, overhanging branches and banks. The constitutional conflict, in other words, cannot be so easily brushed aside.

Real Parties’ argument is further belied by their own assertions and conduct. In the same Response in which Real Parties say that there is no “fundamental question of great concern,” Real Parties threaten an “immense wave” of constitutional “litigation” in the event that “any action by the Court, the Legislature, the Department, or the Commission...restrict[s] landowners’ rights to prevent the public from using their” streambeds underlying public waters. RP Resp., 5. This prospect, alone, would seem to support the existence of a “fundamental question of great public concern.”

In addition, on April 20, 2020 three of the Real Parties (not yet awarded certificates under the Rule) filed their own Petition for Writ of Mandamus against the Department of Game and Fish and the Commission in the First District Court. *See Exhibit B*, attached hereto. Their petition seeks to compel action on pending applications to privatize “their streams” under the Rule. In the alternative, they seek relief for constitutional violations of their due process and equal protection rights and assert a claim of civil conspiracy in the deprivation of those rights.

With the Game and Fish Director’s declaratory judgment action and the instant Petition, the Real Parties’ petition marks the third pending matter on these same underlying constitutional issues. The multiplicity of litigation (and the threat of more) creates the risk of inconsistent rulings, unduly burdens the judiciary, and weighs in favor of resolution here.

**B. The Petition Presents No Disputed Fact Issues.**

The Petition raises purely legal questions relating to the scope of Article XVI, § 2 of the New Mexico Constitution and the application of *Red River Valley*. There is no dispute here about the facts of ownership. Nor is there any dispute about navigability. The only dispute is over the reconciliation as a matter of law between the public’s right to use public waters and the private property rights of the owners of streambeds across which those waters flow.

Nonetheless, Real Parties conjure up several irrelevant fact issues to fend off mandamus jurisdiction. They suggest, for example, that “[e]vidence and fact finding regarding the value private landowners add to recreation in the State...is necessary.” RP Resp., 15-16. But none of the fact issues Real Parties raise are relevant, much less “necessary” to this Court’s determination regarding the constitutionality of the Rule. Real Parties offer no explanation or citation as to how they could be. The constitutional questions raised by the Petition in no way turn on the extent or location of rivers; they have universal applicability to all public waters that run across private lands in New Mexico.

**C. The Petition is Properly Resolved in This Court.**

Finally, Real Parties argue against original jurisdiction in this Court because these matters could be resolved by a lower Court or through administrative action. RP Resp., 17. While district courts have overlapping mandamus authority, the gravity and scope of this issue warrants direct review by this Court. *See State ex rel. Clark*, 1995-NMSC-048, ¶¶ 16-17.

Existing remedies—through the lower courts or the Commission—are inadequate. Neither of the matters pending in lower court reach all of the questions presented here, and, even if they did, this dispute will make its way to this Court in any event. This multiplicity of piecemeal litigation—rife with statutory, regulatory, and constitutional contentions—wastes judicial resources while

creating the prospect for inconsistent results. As for administrative action, the arguments now before the Court make clear that, no matter how the Commission now acts on or under the Rule, constitutional litigation will ensue.

A definitive decision is needed here. Real Parties themselves raise the concern that, without a conclusive determination as to the scope of these conflicting rights, “law enforcement officers” have to make “field determinations.” RP Resp., 16. In other words, criminal or civil sanctions may be sought or meted out based on constitutional questions that, without final resolution by this Court, might otherwise take years to be finally resolved. The Department of Game and Fish articulates this same concern in its pending (but stayed) declaratory judgment action, stating that the Department “has been placed in the untenable position [of] enforcing competing and undefined legal rights.” Ex. A at ¶ 17.

### **CONCLUSION**

The heart of the issue before the Court is this: what kind of people are we New Mexicans? Can citizens and visitors from all walks of life enjoy New Mexico’s best natural fishing streams? Or will a handful of landowners have the exclusive recreational and economic benefits of those stream segments?

New Mexicans’ constitutional right to use the unappropriated waters of this State cannot be subordinated to private streambed owners. New Mexico’s Constitution and the principles set forth in *Red River Valley*—not to mention

generations of custom and practice—compel the conclusion that the right to use the public waters of this State necessarily includes incidental and reasonable use of the streambeds and riverbeds for public recreation, without the consent of or threat of trespass by owners of land through which the public water flows.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By /s/ J. E. Gallegos

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Consolidated Reply Brief in Support of Petition for Writ of Mandamus to be served by electronic service on this 27th day of April, 2020 on the following counsel of record:

Honorable Michelle Lujan Grisham  
Governor of the State of New Mexico  
490 Old Pecos Trail, Suite 400  
Santa Fe, New Mexico 87501

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

FILED 1st JUDICIAL DISTRICT COURT  
Santa Fe County  
4/20/2020 9:30 AM  
KATHLEEN VIGIL CLERK OF THE COURT  
Leah Baldonado

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT**

**RANCHO DEL OSO PARDO, INC.,  
RIVER BEND RANCH, LLC, and  
CHAMA III, LLC, dba CANONES  
CREEK RANCH,**

**Plaintiffs**

**v.**

**Cause No.:D-1010CV-2020-00939**

**NEW MEXICO DEPARTMENT OF GAME  
AND FISH; MICHAEL SLOANE, DIRECTOR  
OF THE NEW MEXICO DEPARTMENT OF GAME  
AND FISH, in his individual and official capacity;  
NEW MEXICO GAME COMMISSION; SHARON SALAZAR  
HICKEY, CHAIR OF THE NEW MEXICO GAME  
COMMISSION, in her individual and official capacity;  
ROBERTA SALAZAR-HENRY, VICE-CHAIR  
OF THE NEW MEXICO GAME COMMISSION,  
in her individual and official capacity;  
JIMMY BATES, MEMBER OF THE NEW  
MEXICO GAME COMMISSION, in his individual  
and official capacity; GAIL CRAMER,  
MEMBER OF THE NEW MEXICO GAME  
COMMISSION, in her individual and official capacity;  
TIRZIO LOPEZ, MEMBER OF  
THE NEW MEXICO GAME COMMISSION, in his  
individual and official capacity; DAVID SOULES,  
MEMBER OF THE NEW MEXICO GAME  
COMMISSION, in his individual and official capacity,  
and JEREMY VESBACH, MEMBER OF THE NEW  
MEXICO GAME COMMISSION, in his individual  
and official capacity,**

**Defendants.**



**WRIT OF MANDAMUS**

The State of New Mexico

**To: NEW MEXICO DEPARTMENT OF GAME AND FISH; MICHAEL SLOANE, NEW MEXICO GAME COMMISSION; SHARON SALAZAR HICKEY, ROBERTA SALAZAR-HENRY, JIMMY BATES, GAIL CRAMER, TIRZIO LOPEZ, DAVID SOULES, and JEREMY VESBACH,**

**Addresses:** 1 Wildlife Way, Santa Fe, NM 87507; PO Box 25112, Santa Fe, NM 87504 (all defendants); 1702 Medio Street, Santa Fe, NM 87504 (Michael Sloane, Director); 806 Camino Zozobra, Santa Fe, NM 87505 (Sharon Salazar Hickey); 5062 Heno Mine Rd., Las Cruces, NM 88011-9331 (Roberta Salazar Henry); 11300 Carmel Ave NE, Albuquerque, NM 87122 (Jimmy Bates); 4088 US Highway 82, Mayhill, NM 88339 (Gail Cramer); 37 Feather Rd., Santa Fe, NM 87506 (Tirzio Lopez); 5045 Las Alturas Dr., Las Cruces, NM 88011 (David Soules); and 14 Davis Loop, Placitas, NM 87043 (Jeremy Vesbach).

THIS MATTER, having come before the Court on Petitioners' Verified Petition for Writ of Mandamus, the Court having considered the Petition and otherwise being fully advised in the premises, issues its ORDER as follows pursuant to Rule 1-065 NMRA:

You are each required to serve upon Modrall, Sperling, Roehl, Harris & Sisk P.A. (Marco E. Gonzales and Jeremy K. Harrison) an Answer or Motion in Response to the Verified Petition for Writ of Mandamus, which is attached as Exhibit 1, the allegations of which are incorporated by reference as if fully stated herein, within 14 days after service of this alternative writ upon you, exclusive of the day of service, and file a copy of your response or motion with the Court as provided in Rule 1-005 NMRA.

If you fail to file a responsive pleading, a default judgment may be entered against you for the relief demanded in the petition.



**Attorneys for Petitioners:**

**MODRALL, SPERLING, ROEHL,  
HARRIS & SISK, P.A.**

Marco E. Gonzales  
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Post Office Box 2168  
500 Fourth Street, N.W. Suite 1000  
Albuquerque, New Mexico 87103-2168  
Telephone: (505) 848-1800

Dated: 4-17-2020

Date Issued: 4/20/20

  
\_\_\_\_\_  
HONORABLE BRYAN BIEDSCHEID  
First Judicial District Court Judge



RETURN

STATE OF NEW MEXICO )  
 )ss  
COUNTY OF \_\_\_\_\_ )

I, being duly sworn, on oath, state that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served this Writ of Mandamus in \_\_\_\_\_ county on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by delivering a copies of this Writ of Mandamus, with a copy of Verified Petition for Writ of Mandamus attached, in the following manner:

For the **NEW MEXICO DEPARTMENT OF GAME AND FISH and the NEW MEXICO GAME COMMISSION**, by delivering the above referenced copies:

[ ] to \_\_\_\_\_ (name of person), \_\_\_\_\_, (title of person authorized to receive service for head of the Department and the Commission).

**And to**

[ ] to \_\_\_\_\_ (name of person), \_\_\_\_\_, (title of person authorized to receive service for the New Mexico Attorney General.

For the **MICHAEL SLOANE, SHARON SALAZAR HICKEY, ROBERTA SALAZAR-HENRY, JIMMY BATES, GAIL CRAMER, TIRZIO LOPEZ, DAVID SOULES, and JEREMY VESBACH**, by delivering the above referenced copies:

[ ] to Michael Sloane, Sharon Salazar Hickey, Roberta Salazar Henry, Jimmy Bates, Gail Cramer, Tirzio Lopez, David Soules, and Jeremy Vesbach by certified mail as provided by Rule 1-004 NMRA.

Fees: \_\_\_\_\_

\_\_\_\_\_  
Signature of person making service

\_\_\_\_\_  
Title (if any)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, 2

\_\_\_\_\_  
Judge, notary or other officer authorized to administer oaths

\_\_\_\_\_  
Official title

My commission expires: \_\_\_\_\_  
File0001.docx

FILED 1st JUDICIAL DISTRICT COURT  
Santa Fe County  
4/14/2020 2:46 PM  
KATHLEEN VIGIL CLERK OF THE COURT  
Edith Suarez-Munoz

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

RANCHO DEL OSO PARDO, INC.,  
RIVER BEND RANCH, LLC, and  
CHAMA III, LLC, dba CAÑONES  
CREEK RANCH,

Plaintiffs

Case assigned to Biedscheid, Bryan

v.

Cause No.: D-101-CV-2020-00939

NEW MEXICO DEPARTMENT OF GAME  
AND FISH; MICHAEL SLOANE, DIRECTOR  
OF THE NEW MEXICO DEPARTMENT OF GAME  
AND FISH, in his individual and official capacity;  
NEW MEXICO GAME COMMISSION; SHARON SALAZAR  
HICKEY, CHAIR OF THE NEW MEXICO GAME  
COMMISSION, in her individual and official capacity;  
ROBERTA SALAZAR-HENRY, VICE-CHAIR  
OF THE NEW MEXICO GAME COMMISSION,  
in her individual and official capacity;  
JIMMY BATES, MEMBER OF THE NEW  
MEXICO GAME COMMISSION, in his individual  
and official capacity; GAIL CRAMER,  
MEMBER OF THE NEW MEXICO GAME  
COMMISSION, in her individual and official capacity;  
TIRZIO LOPEZ, MEMBER OF  
THE NEW MEXICO GAME COMMISSION, in his  
individual and official capacity; DAVID SOULES,  
MEMBER OF THE NEW MEXICO GAME  
COMMISSION, in his individual and official capacity,  
and JEREMY VESBACH, MEMBER OF THE NEW  
MEXICO GAME COMMISSION, in his individual  
and official capacity

Defendants.

**VERIFIED PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,  
FOR DECLARATORY JUDGMENT OR, IN THE ALTERNATIVE, COMPLAINT FOR  
DENIAL OF CONSTITUTIONAL RIGHTS**

Plaintiffs, Rancho del Oso Pardo, Inc., River Bend Ranch, LLC, and Chama III, LLC through their undersigned counsel, bring this action for a writ of mandamus or, in the alternative, declaratory relief, injunctive relief, and damages as follows:

**Introductory Allegations**

1. Plaintiff RANCHO DEL OSO PARDO, INC. ("RDOP"), is a New Mexico corporation with its principal place of business in the Village of Chama, New Mexico. The company is the owner of a ranch in the Upper Chama River Valley, consisting of approximately 17,000 acres, of which 7 miles lie along both sides of and under the Rio Chama.

2. Plaintiff RIVER BEND RANCH, LLC ("River Bend"), is a limited liability company organized under the laws of the State of Delaware, and is duly registered as a limited liability company under the laws of New Mexico. The company is the owner of ranch property, known as Timberland Ranch, in San Miguel County, New Mexico, consisting of approximately 219 acres, of which approximately 5,000 feet lie along both banks of and under the Pecos River.

3. Plaintiff CHAMA III, LLC, dba CAÑONES CREEK RANCH ("CAÑONES") is a limited liability company organized under the laws of the State of New Mexico. The company is the owner of a ranch known as Cañones Creek Ranch, a portion of which lies along both banks of and under the Chama River.

4. The beneficial and economic use of the property owned by Plaintiffs is derived from the ability of the owners, guests and shareholders of the companies to enjoy Plaintiffs' private river-front properties without interference by non-owners. Plaintiffs, and the shareholders of their companies, obtained and developed such properties for the purpose of enjoying such private and unmolested river-front use of the properties.

5. Defendant NEW MEXICO DEPARTMENT OF GAME AND FISH is a political subdivision of the State of New Mexico with governing authority and power to act under color of state law as expressly granted by the New Mexico State Legislature.

6. Defendant MICHAEL SLOANE is the Director of the New Mexico Department of Game and Fish. For purposes of this action, SLOANE is sued in his individual and official capacity.

7. Defendant NEW MEXICO STATE GAME COMMISSION is a political subdivision of the State of New Mexico with governing authority and power to act under color of state law as expressly granted by the New Mexico State Legislature.

8. Defendant SHARON SALAZAR HICKEY is chair of the New Mexico State Game Commission, a political subdivision of the State of New Mexico with governing authority and power to act under color of state law as expressly granted by the New Mexico State Legislature. For purposes of this action, SALAZAR HICKEY is sued in her individual and official capacity.

9. Defendant ROBERTA SALAZAR-HENRY is vice-chair of the New Mexico State Game Commission. For purposes of this action, SALAZAR-HENRY is sued in her individual and official capacity.

10. Defendant JIMMY BATES is a member of the New Mexico State Game Commission. For purposes of this action, BATES is sued in his individual and official capacity.

11. Defendant GAIL CRAMER is a member of the New Mexico State Game Commission. For purposes of this action, CRAMER is sued in her individual and official capacity.

12. Defendant TIRZIO LOPEZ is a member of the New Mexico State Game Commission. For purposes of this action, LOPEZ is sued in his individual and official capacity.

13. Defendant DAVID SOULES is a member of the New Mexico State Game Commission. For purposes of this action, SOULES is sued in his individual and official capacity.

14. Defendant JEREMY VESBACH is a member of the New Mexico State Game Commission. For purposes of this action, VESBACH is sued in his individual and official capacity.

**Factual Allegations**

15. Effective July 1, 2015, the New Mexico Legislature enacted the “Stream Access Law”, §17-4-6, NMSA, which provides in pertinent part:

C. 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.

The Act also provides for the posting of notices warning the public that they may not hunt or fish on private property.

16. In furtherance of this statute the New Mexico Game Commission (“Game Commission”) promulgated the Landowner Certification of Non-Navigable Water Rule, 19.31.22, NMAC (01/22/18), establishing a process for application by landowners for certification of non-navigable streams and rivers, and issuance of appropriate prohibitory signage.

17. These regulations set out a process through which landowners can apply for and obtain a Landowner Certification of Non-Navigable Public Water Segment. *See* 19.31.22.8 NMAC. A landowner’s application must include the following information: (1) the landowner’s name, address, telephone number, name of property, and a contact person who could grant permission to access the property; (2) a current recorded property deed and map to identify potential access points to water and access roads; (3) proof of publication of notice of application for certification;

and (4) substantial evidence of the water's being non-navigable at the time of New Mexico's statehood, on a segment-by-segment basis. See 19.31.22.8(B) NMAC.

18. Under 19.31.22.8(C) NMAC, if an application includes the aforementioned required contents, then the application "*shall be accepted for further consideration . . . without regard to the merits of the application.*" (emphasis added).

19. After an application is "accepted for further consideration," it "*shall* be forwarded by the department to the director so that a determination can be made by the director whether the application meets the requirements set forth in 19.31.22.8 NMAC." 19.31.22.9(A) NMAC (emphasis added). "The director *shall* have 60 days to make a written determination and recommendation or a written rejection to the commission." 19.31.22.9(B) NMAC (emphasis added).

20. If the Director determines that the application meets the requirements of 19.31.22.8 NMAC, the Director "*shall* issue a written determination and recommendation to the commission that the segment in the application shall be designated a 'non-navigable public water' . . . and the matter shall be heard at a future regular meeting or special meeting" of the Commission. 19.31.22.9(B)(1) NMAC (emphasis added). If the director determines that the application does not meet the requirements of 19.31.22.8 NMAC, the director "*shall* issue a written rejection of the application . . . and the matter *shall* be heard at a future regular meeting or special meeting" of the Commission. 19.31.22.9(B)(2) NMAC (emphasis added).

21. Section 19.31.22.11(H) of the Rule provides that within 60 days of the meeting described above, "the commission *shall* issue its written final agency action and decision with the factual and legal basis for that decision." (emphasis added). If the Commission finds that a segment should be designated a non-navigable public water, then "a certificate *shall* be issued by the

director immediately following the issuance of the written final agency action and decision indicating the segment . . . is now a 'certified non-navigable public water.'" 19.31.22.13(A) NMRA (emphasis added).

22. Acting pursuant to the Non-Navigable Water Rule, the Game Commission has certified a number of rivers and streams on property owned by similarly situated applicants as being non-navigable, thereby enabling effective law enforcement to prevent persons engaged in hunting and fishing from entering upon those private certified properties, including upon riverbeds located thereon, without the consent of the landowners.

23. On or about September 27, 2019, Plaintiff RIVER BEND RANCH submitted to Director SLOANE its application for certification pursuant to Rule 19.31.22, NMAC

24. The Application of RIVER BEND RANCH complied in all respects with requirements of Rule 19.31.22, NMAC, and demonstrated that the portions of the river owned by Plaintiff are certifiable as being non-navigable under the Rule.

25. On or about November 25, 2019, Defendant SLOANE issued a letter to the Commission concerning his formal recommendation on the application of RIVER BEND RANCH, stating that "[w]hile the application provides similar information to applications approved by the previous Commission, given recent advice by the Office of the Attorney General regarding 19.31.22 NMAC and recent Commission direction, I cannot recommend approval of the applications."

26. After receiving the Director's November 25, 2019 letter, RIVER BEND RANCH sent correspondence to the Director demanding that he provide the Commission with a recommendation of approval pursuant to the Rule as the Rule requires that he either recommend approval or rejection. Other than acknowledging receipt of the letter, the Director failed to respond to that Correspondence or provide a recommendation to the Commission.



27. On or about November 25, 2019, Defendant SLOANE issued a letter to the Commission concerning his formal recommendation on the application of CAÑONES, stating that “[w]hile the application provides similar information to applications approved by the previous Commission, given recent advice by the Office of the Attorney General regarding 19.31.22 NMAC and recent Commission direction, I cannot recommend approval of the applications.”

28. After receiving the Director’s November 25, 2019 letter, CAÑONES sent correspondence to the Director demanding that he provide the Commission with a recommendation of approval pursuant to the Rule as the Rule requires that he either recommend approval or rejection. Other than acknowledging receipt of the letter, the Director failed to respond to that Correspondence or provide a recommendation to the Commission.

29. On or about November 20, 2019, Plaintiff RANCHO del OSO PARDO submitted to Director SLOANE its application for certification pursuant to Rule 19.31.22, NMAC.

30. The Application of RANCHO del OSO PARDO complied in all respects with requirements of Rule 19.31.22, NMAC, and demonstrated that the portions of the river owned by Plaintiff are certifiable as being non-navigable under the Rule.

31. On or about January 19, 2020, Defendant SLOANE issued his formal recommendation on the application of RANCHO del OSO PARDO, stating that “the application, as submitted, provides the information required by the Landowner Certification of Non-navigable Water Rule 19.31.22 NMAC.” And, thereupon, Defendant SLOANE advised the Game Commission that “I have determined and recommend, pursuant to the current rule and the application, that the Rancho del Oso Pardo, Inc., segment of the Chama River be designated a non-navigable public water.”

32. After receiving the Director’s letters, Plaintiffs sent correspondence to the Commission and each of the Commissioners requesting that the Commission schedule a meeting to take place in

March 2020, so that the Commission would have the full 60 days post-meeting to consider the applications as specified by the Rule. The Commission did not respond to that letter and failed to hold a public meeting related to Plaintiffs' applications.

33. On or about March 9, 2020, and without any public notice or hearing, the Commission placed a banner on the "Landowner Certification of Non-Navigable Water Segment" section of its webpage stating that "The Department is not currently considering any new application under this program. (Effective 04-09-2020)."

34. Based on the Commission's failure to respond to Plaintiffs' correspondence, failure to hold a public meeting regarding Plaintiffs' applications, and the Commission's unlawful announcement that the Department will no longer consider new applications under the Rule, Plaintiffs believe that the Commission does not intend to act in accordance with the Rule in relation to Plaintiffs' applications.

35. Despite submittal of fully-compliant Applications by Plaintiffs, and despite having granted applications of other similarly situated property owners, the Game Commission and its duly authorized members, acting in their individual and official capacities, have willfully, deliberately, intentionally and knowingly failed and refused to act upon Plaintiffs' Applications, thereby subjecting Plaintiffs' property rights and interests to trespass, or threatened trespass upon the streams and riverbeds of their private property, subjecting Plaintiffs to the very harm that the New Mexico Legislature sought to be remedied by §17-4-6, NMSA, and which the Game Commission is bound to enforce under New Mexico law.

36. The Department, the Director, the Game Commission, and the Commissioners (acting in their individual and official capacities), have willfully, deliberately, intentionally and knowingly

failed and refused to consider Plaintiffs' applications, thereby depriving Plaintiffs of the property rights and protections provided by Rule 19.31.22, NMCA.

37. Plaintiffs each have significant property interests in protecting their property from trespass, rights that Defendants were mandated to protect, and Defendants' willful, deliberate, intentional and knowing abdication of those duties has caused damage to Plaintiffs' property rights. In order to prevent further injury to their constitutionally protected rights, Plaintiffs bring this action. Plaintiffs seek issuance of a writ of mandamus, or in the alternative, declaratory relief in the form of an Order that Defendants shall comply with and enforce §17-4-6, NMSA, and perform their statutory obligations through duly enacted Rules and Regulations of the Commission. Plaintiffs further seek an injunction barring Defendants from further violation of Plaintiffs' constitutional rights by their refusals to act upon legitimate claims of entitlement to certification and for enforcement pursuant to Rule 19.31.22, NMAC.

38. In addition to complying in all respects with the requirements of Rule 19.31.22, the Applications submitted by RDOP, CAÑONES and RIVER BEND demonstrate that the United States did not retain title to any parts of the riverbeds underlying the Rio Chama and Pecos River, nor was the State of New Mexico granted express title to any part of such riverbeds.

39. Thus, Plaintiffs' title includes the beds of the streams and rivers that flow through their properties, with the corresponding right to exclude trespassers from wading on such river and stream beds.

40. New Mexico law criminalizes trespass and establishes the right to civil damages therefrom, § 30-14-1.1, NMSA, and the New Mexico Legislature has recently specifically declared that private property owners have the right to exclude trespassers who go on their land to fish. Section 17-4-6(C), NMSA.

41. As to property reserved by its owner for private use, the right to exclude others is one of the most-essential sticks in the bundle of rights that are commonly characterized as property.

42. RDOP, CAÑONES and RIVER BEND have property interests in excluding trespassers, which are protected by the Fifth Amendment to the United State Constitution, including the right to exclude persons who might seek to use private riverbeds to gain access to the public waters.

43. Defendants' willful, deliberate, intentional and knowing failure and refusal to act, in their individual and official capacities, upon Plaintiffs' Applications for Certification of Non-Navigable Water poses an imminent threat to the Plaintiffs' private property rights, and has been the proximate cause of damages to Plaintiffs in the form of a diminution in value of their property holdings.

44. As a result of the willful, deliberate, intentional and knowing actions of Defendants, Plaintiffs have sustained damages, including without limitation the diminution in value of Plaintiffs' property, the interference in and disruption of their right to the quiet and peaceful enjoyment of their property, and the prevention of trespass and poaching on their Ranches, in an amount to be established at trial according to proof.

45. Upon information and belief, and as stated above, Defendants have granted a number of Applications submitted by other similarly situated owners of private property along non-navigable rivers or streams.

46. Upon information and belief, two or more members of the Game Commission and the Director of the Department of Game and Fish have willfully, deliberately, intentionally and knowingly combined to act together to defeat Plaintiffs' constitutional and statutory rights through unlawful schemes that include, without limitation, the filing of a "declaratory judgment" action by Director SLOANE against the Game Commission alleging a sham "controversy" over the Stream

Access Law, by conspiring to enact a moratorium on applications for certification, by failing to process pending applications, and by prohibiting the filing of further applications.

47. Upon information and belief, members of the Game Commission, and/or one or more of their spouses, are allied with organizations that are opposed to the Stream Access Law, but have failed to disclose such conflicts of interest and have nevertheless acted upon matters regarding the Stream Access Law and have done so willfully, deliberately, intentionally and knowingly to defeat Plaintiffs' constitutional and statutory rights.

**Claim for Relief**  
**Writ of Mandamus**

48. Plaintiffs incorporate by reference all preceding paragraphs as though set forth fully herein.

49. Without legal justification, the Department, the Commission, and the Commissioners have failed and/or refused to comply with the clear legal mandates regarding the processing and approval of applications submitted pursuant to the Rule.

50. Specifically, the Department and the Director have failed or refused to recommend that Plaintiffs' Applications be approved as required by Section 19.31.22.9(B)(1). And, the Commission and the Commissioners have failed or refused to give notice of or otherwise hold a meeting as required by Section 19.31.22.10 and .11 NMCA.

51. The regulations that set forth the process for landowners to apply for Landowner Certification of Non-Navigable Public Water Segment do not afford any discretion to the Commission (or its Commissioners, its Director, or any Department representative) about whether to make a recommendation regarding approval or rejection of any application or whether to hold a public meeting and issue a final determination. The regulations do not afford any discretion regarding (1) the Director's duty to review the applications and determine whether their contents

comply with 19.31.22.8(A) NMAC; (2) the Director's duty to make a recommendation on each application to the Commission within 60 days; (3) the Commission's duty to address each application at a regular or special meeting; and (4) the Commission's duty to issue a final agency action within 60 days of the aforementioned regular or special meeting.

52. Accordingly, the duties set out above and in 19.31.22.1 to .13 NMAC are ministerial duties of the Department, the Commission, and the Commissioners. *See Matter of Grand Jury Sandoval Cty*, 1988-NMCA-007, ¶ 14, 106 N.M. 764, 750 P.2d 464 (“A ministerial duty required of a public official constitutes ‘an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.’”).

53. Plaintiffs cannot appeal Defendants' refusal to accept and consider applications to district court, because 19.31.22.12 NMAC provides that appeals are limited to “final agency action[s] and decision[s]” on applications. Defendants' refusal to accept and consider applications thus necessitates a writ of mandamus, as Plaintiffs have “no other plain, speedy, and adequate remedy in the ordinary course of law.” *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶ 16, 124 N.M. 698, 954 P.2d 763.

54. The Court should thus grant an Alternative Writ of Mandamus requiring Respondents/Defendants to file an answer or other responsive pleading within 14 days of service of the Alternative Writ of Mandamus.

55. The Court should further enter an order compelling Defendants to comply with their statutory and regulatory obligations as set forth above.

**First Claim for Alternative Relief**  
**Declaratory Judgment**

56. Plaintiffs incorporate by reference all preceding paragraphs as though set forth fully herein.

57. In the alternative to a writ of mandamus, the Court should enter a declaratory judgment declaring that Plaintiffs have satisfied all requirements of Rule 19.31.22 and compelling the Commission to issue a certificate to Plaintiffs pursuant to Rule 19.31.22.

**Second Claim for Alternative Relief**  
**Denial of Constitutional Rights – 42 U.S.C. § 1983**  
**(Denial of Substantive Due Process)**

58. Plaintiffs incorporate by reference all preceding paragraphs as though set forth fully herein.

59. Plaintiffs have fundamental rights under the Fourteenth Amendment to the United States Constitution to acquire, use, maintain and enjoy their private property.

60. Defendants are violating Plaintiffs' substantive due process through an abuse of governmental power by arbitrarily and capriciously depriving Plaintiffs of their fundamental rights to acquire, use, maintain and enjoy private property without interference by trespass or the threat of trespass upon the riverbeds of their properties. Specifically, by refusing to grant certificates to Plaintiffs pursuant to the Rule, Defendants are preventing Plaintiffs from preserving a valuable property interest that assists with the enforcement of existing trespass laws and maintains and adds to the value of Plaintiffs' property.

61. The actions of Defendants MICHAEL SLOANE, SHARON SALAZAR HICKEY, ROBERTA SALAZAR-HENRY, JIMMY BATES, GAIL CRAMER, TIRZIO LOPEZ, DAVID SOULES, and JEREMY VESBACH, as alleged herein, were committed willfully, deliberately, intentionally and knowingly in their official and individual capacities, and in violation of clearly

established federal constitutional law, thereby subjecting them to the prospective relief claimed herein, as well as money damages.

62. The actions of the State DEPARTMENT OF GAME AND FISH and the State GAME COMMISSION, as alleged herein, subject those entities to liability for the prospective relief sought herein.

63. Defendants' interference with Plaintiffs' fundamental rights, and/or their failure or refusal to afford Plaintiffs the protection of duly-enacted Legislative statutes and administrative Rules, is an abuse of governmental power, is unconstitutionally arbitrary and capricious and does not serve any legitimate state interest.

64. Defendants, including the individuals named herein who are sued in their individual and official capacities, are each liable for money damages under 42 U.S.C. § 1983, in order to compensate Plaintiffs for damages sustained as will be proven at trial.

**Third Claim for Alternative Relief**  
**Denial of Constitutional Rights – 42 U.S.C. § 1983**  
**(Denial of Equal Protection)**

65. Plaintiffs incorporate by reference all preceding paragraphs as though set forth fully herein.

66. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

67. The granting by Defendants of Applications submitted by other similarly situated owners of private property along non-navigable rivers or streams, and the refusal to act upon or denial of Plaintiffs' Applications, without any rational basis, is discriminatory and in violation of the Fourteenth Amendment to the United States Constitution.

68. The actions of Defendants MICHAEL SLOANE, SHARON SALAZAR HICKEY, ROBERTA SALAZAR-HENRY, JIMMY BATES, GAIL CRAMER, TIRZIO LOPEZ, DAVID



SOULES, and JEREMY VESBACH, as alleged herein, were committed willfully, deliberately, intentionally and knowingly in their official and individual capacities, and in violation of clearly established federal constitutional law, thereby subjecting them to the prospective relief claimed herein, as well as money damages.

69. The actions of the State DEPARTMENT OF GAME AND FISH and the State GAME COMMISSION, as alleged herein, subject those entities to liability for the prospective relief sought herein.

**Fourth Claim for Relief**  
**Denial of Constitutional Rights – 42 U.S.C. § 1983**  
**(Civil Conspiracy)**

70. Plaintiffs incorporate by reference all preceding paragraphs as though set forth fully herein.

71. Two or more members of the New Mexico Game Commission have combined through undisclosed agreements among themselves to deprive Plaintiffs of their constitutional and statutory rights.

72. Plaintiffs have suffered damages as a proximate result thereof.

**Relief Requested**

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A writ of mandamus compelling Defendants to comply with Rule 19.31.22 and issue certificates to Plaintiffs in accordance with that Rule;

B. Entry of a judgment declaring that Plaintiffs have satisfied the requirements of Rule 19.31.22 and compelling Defendants to issue certificates to Plaintiffs as set forth in Rule 19.31.22;

C. Entry of a judgment against each of the Defendants declaring their willful, deliberate, intentional and knowing failure and refusal to act upon Plaintiffs' Applications for

Certification of Non-Navigable Public Waters and to enforce §17-4-6, NMSA, and Rule 19.31.22, constitutes a violation of Plaintiffs' substantive rights to due process and equal protection of the laws;

D. Issuance of a permanent injunction requiring Defendants to act upon Plaintiffs' Applications for Certification of Non-Navigable Public Waters;

E. Entry of judgment against Defendants MICHAEL SLOANE, SHARON SALAZAR HICKEY, ROBERTA SALAZAR-HENRY, JIMMY BATES, GAIL CRAMER, TIRZIO LOPEZ, DAVID SOULES, and JEREMY VESBACH, in their individual capacities, awarding Plaintiffs' damages in an amount to be proven at trial;

F. Entry of judgment awarding Plaintiffs' their costs and attorney's fees pursuant to 42 U.S.C. § 1988;

G. Entry of judgment awarding Plaintiffs their prejudgment interest; and

H. Granting or awarding any other relief this Court deems just and proper.

Respectfully submitted:

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

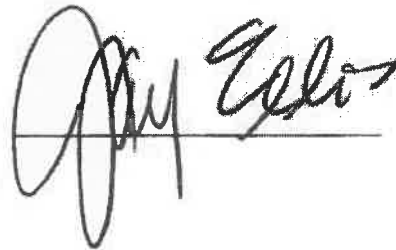
By: /s/ Marco E. Gonzales

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*Attorneys for Petitioners/Plaintiffs*

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**VERIFICATION PAGES FOLLOW**

**VERIFICATION**

Jay Ellis, Manager of Chama III, LLC, being first duly sworn upon his oath, deposes and states that he has read the Verified Petition and affirmatively states that it is true and correct to the best of his knowledge and belief.



STATE OF TRXAS

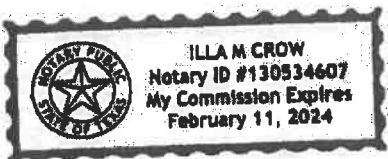
COUNTY OF DALLAS

This instrument was acknowledged before me on April 8, 2020, by Jay Ellis as Manager of Chama III, LLC a Texas limited liability company.



(Seal)

Notary Public



My commission expires: 2-11-24

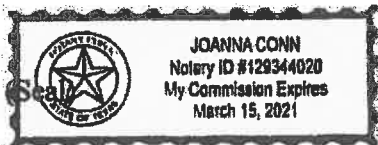
**VERIFICATION**

Albert B. Wharton Secretary of Rancho Del Oso Pardo, Inc., being first duly sworn upon his oath, deposes and states that he has read the Verified Petition and affirmatively states that it is true and correct to the best of his knowledge and belief.

A.B. Wharton

Texas  
STATE OF ~~NEW MEXICO~~  
COUNTY OF ~~BERNALILLO~~ Wilbarger

This instrument was acknowledged before me on April 13 2020, by Albert B Wharton as secretary of Rancho Del Oso Pardo, Inc. a New Mexico corporation.

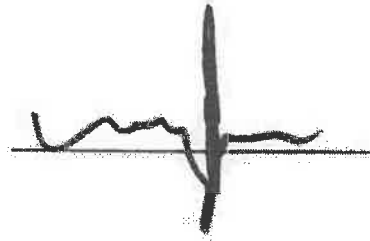


Joanna Conn  
Notary Public

My commission expires: 3-15-21

**VERIFICATION**

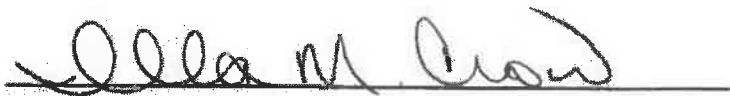
William L. Graham, Manager of River Bend Ranch, LLC, being first duly sworn upon his oath, deposes and states that he has read the Verified Petition and affirmatively states that it is true and correct to the best of his knowledge and belief.



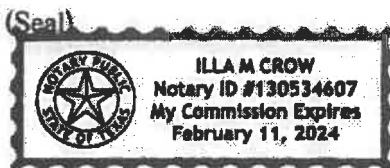
STATE OF TEXAS

COUNTY OF DALLAS

This instrument was acknowledged before me on April 8, 2020, by William L. Graham as Manager of Riverbend Ranch, LLC a Delaware limited liability company.



Notary Public



My commission expires: 2-11-24