



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 7
ANGLERS, a non-profit organization**

vs.

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

No. S-1-SC-38195

**MOTION TO INTERVENE OR TO FILE AMICUS BRIEF OF ADDITIONAL
RESPONDENTS (AND REAL PARTIES IN INTEREST) CHAMA TROUTSTALKERS,
LLC, RIO DULCE RANCH, Z&T CATTLE COMPANY, LLC, RANCHO DEL OSO
PARDO, INC., RIVER BEND RANCH, CHAMA III, LLC, FENN FARM, THREE
RIVERS CATTLE LTD., CO., FLYING H RANCH INC., SPUR LAKE CATTLE CO.,
BALLARD RANCH, DWAYNE AND CRESSIE BROWN, COTHAM RANCH, WAPITI
RIVER RANCH, MULCOCK RANCH, WILBANKS CATTLE CO., 130 RANCH, WCT
RANCH, THE NEW MEXICO FARM AND LIVESTOCK BUREAU, CHAMA PEAK
LAND ALLIANCE, NEW MEXICO CATTLE GROWERS' ASSOCIATION, NEW
MEXICO COUNCIL OF OUTFITTERS AND GUIDES, and UPPER PECOS
WATERSHED ASSOCIATION**

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STATEMENT OF COMPLIANCE

As required by Rule 12-318(G), we certify that this Motion complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of this brief, as defined by Rule 12-318(F)(1) contains 2,671 words.

TABLE OF AUTHORITIES

New Mexico Cases

NM Right to Choose/RARAL v. Johnson,
1999-NMSC-005 9, 10

Thriftway Marketing Corp. v. State,
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INTRODUCTION

In their Verified Petition for Mandamus Original Jurisdiction, Petitioners challenge the viability of Rule 19.31.22 NMRA (the “Rule”)—a rule promulgated by the New Mexico State Game Commission that allows owners of lands under non-navigable public waters to obtain certificates which recognize that the land is privately owned and subject to criminal trespass laws. While Petitioners named the Governor and the State Game Commission as respondents, Petitioners failed to name a single person or entity that owns property subject to the Rule. Additional Respondents are all owners of lands under non-navigable public waters in the State or otherwise have an interest in ensuring that private property owners can prove that their riverbeds are privately owned.¹ Several of the Additional Respondents have already obtained certificates pursuant to the rule. Several others have pending applications pursuant to the Rule. One has attempted to apply for a certificate under the Rule, but was summarily rejected due to an unlawful action on the part of the Commission. The remainder own land subject to the Rule who would be entitled to certificates upon completion of the application process or have members who own

¹ Additional Respondents consist of just a small fraction of private landowners in New Mexico who own land over which non-navigable waters flow. There are likely thousands of additional landowners whose interests may be impacted by the outcome of this litigation, including but not limited to sovereign tribal nations which include within the borders of their sovereign nations lands over which non-navigable waters flow.

such land. The relief requested by Petitioners will materially impact the rights and interests of Additional Respondents as they will lose the value of the certificates that have already been obtained, which they are seeking, or which they will be seeking. Further, the underlying interests relevant to the Court's analysis of the Petition—the right of a property owner to exclude trespassers—will be placed at issue as Additional Respondents explain in detail in their Response Brief (attached hereto as Exhibit A and filed separately with the Court). Additional Respondents' interests are directly opposed to Petitioners and are not adequately represented by the existing Respondents as Respondents are not landowners and will not directly sustain any loss if the Court grants the relief requested by Petitioners. Additional Respondents thus request that the Court make them parties to this litigation and accept the Response Brief which is attached as Exhibit A to this Motion and which is also being conditionally filed with the Court. Additional Respondents requests that they be permitted to fully participate in all stages of this litigation, including oral argument.

BACKGROUND REGARDING ADDITIONAL RESPONDENTS INTERESTS IN THIS LITIGATION

Additional Respondent Chama Troutstalkers, LLC is the owner of property over which the nonnavigable waters of the Chama River and its tributary, the Rio Chamita, flow. Chama Troutstalkers, LLC submitted an application in accordance with the Rule on July 24, 2018 and was issued a non-navigability certification by the Commission on December 28, 2018.

Additional Respondent Rio Dulce Ranch operates a ranch owned by two trusts that own land over which the non-navigable waters of the Pecos river flows. Those trusts submitted an application in accordance with 19.31.22 NMAC on July 24, 2018 and were issued a non-navigability certification by the Commission on December 28, 2018.

Additional Respondent Z&T Cattle Company, LLC is the owner of several properties over which the non-navigable waters of the Alamosa River, the Mimbres River, and the Penasco River flow. Z&T Cattle Company submitted applications in accordance with 19.31.22 NMAC for three separate river segments on July 24, 2018 and was issued non-navigability certifications by the Commission on December 28, 2018. Z&T Cattle Company owns additional properties in New Mexico over which non-navigable waters flow, and has an interest in obtaining additional certificates.

Additional Respondent 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 property over which the nonnavigable waters of the Chama River flow. RDOP submitted an application pursuant to the Rule on or about November 20, 2019. That application is still pending, and RDOP has initiated litigation in district court due to the Commission's failure to follow the Rule with respect to the processing of the application. *See Rancho Del Oso Pardo, Inc.,*

et al. v. New Mexico Dept. of Game and Fish, et al., Case No. D-101-CV-2020-00939.

Additional Respondents River Bend Ranch and Chama III, LLC, dba Cañones Creek Ranch (“Cañones”) are the owners of property over which the nonnavigable waters of the Pecos River (River Bend Ranch) and the Chama River (Cañones) flow. River Bend Ranch and Cañones submitted applications in accordance with the Rule on or about November 25, 2019. Those applications are still pending, and River Bend Ranch and Cañones have initiated litigation in district court due to the Commission’s failure to follow the Rule with respect to the processing of the applications. *See id.*

Additional Respondent Fenn Farm is a New Mexico corporation solely owned by Bill Fenn. Mr. Fenn owns land in New Mexico over which the non-navigable waters of the Hondo and Berrendo Rivers flow. On March 13, 2020, Fenn Farm attempted to submit an application pursuant to the Rule, but the Commission summarily rejected Fenn Farm’s application without any legal justification. Fenn Farm is in the process of initiating litigation related to this rejection.

Additional Respondent Three Rivers Cattle Ltd., Co. (“Three Rivers Ranch”) is a New Mexico corporation which owns land over which the nonnavigable waters of the Three Rivers, the Indian Creek, the Golondrina Draw, and the Candelaria Draw flow. Three Rivers Ranch was in the process of preparing an application

pursuant to the Rule but, due to the Commission's summary rejection of Fenn Farm's application, has stayed that process. Three Rivers Ranch is in the process of initiating litigation related to the Commission's unlawful refusal to accept applications.

Additional Respondents Flying H Ranch Inc., Spur Lake Cattle Co., Ballard Ranch, Dwayne and Cressie Brown, Cotham Ranch, Wapiti River Ranch, Mulcock Ranch, Wilbanks Cattle Co., 130 Ranch, and WCT Ranch, are the owners of property in New Mexico over which non-navigable waters flow. Upon completion of an application, each of these Additional Respondents would be entitled to a certificate under the Rule. Each of these Additional Respondents has an interest in ensuring that the application process set forth in the Rule remains available to them.

Additional Respondent The New Mexico Farm and Livestock Bureau is a free, independent, nongovernmental and voluntary organization of farm and ranch families united for the purpose of analyzing agricultural problems and formulating action to achieve educational awareness and social advancement, and thereby, to promote the national well-being. Many of its members own land over which non-navigable waters flow.

Additional Respondent Chama Peak Land Alliance is a diverse group of conservation-minded landowners committed to embracing and practicing responsible land, water and wildlife stewardship in northern New Mexico. Members

of the Alliance represent a land area that runs from the headwaters of the Navajo River in south Archuleta County, Colorado and the Conejos River system to the Brazos headwaters and Rio Nutrias in Rio Arriba County, New Mexico. The membership currently consists of a land block of approximately 200,000 acres, many of which lie under non-navigable waters of the State.

Additional Respondent New Mexico Cattle Growers' Association serves as the voice of the beef industry in New Mexico since 1914. The New Mexico Cattle Growers' Association was established to assist livestock producers in the State of New Mexico and since that time, the Association has worked to ensure that the rights of livestock producers are protected. Over its 100 year history, the Association has served the livestock industry faithfully. That tradition continues today. NMCGA currently has members in all 33 of New Mexico's Counties. Many of NMCGA's members own land over which non-navigable waters flow.

Additional Respondent the New Mexico Council of Outfitters and Guides is the official organization for NM Outfitters and Guides, and represents the finest hunting and fishing professionals in the state of New Mexico. Established in 1978, NMCOG strives to promote and enhance the outdoor recreation industry by supporting ethical hunting practices and wildlife conservation. Members spend thousands of hours in the field annually and have a practical knowledge regarding location, health, and quality of game populations. Its members have an interest in

ensuring that private property rights are recognized and that private property owners continue to have an incentive to develop their riverfront properties, encourage spawning of fish, and otherwise contribute to the quality of New Mexico's waterways.

Additional Respondent the Upper Pecos Watershed Association seeks to encourage and promote appropriate recreation management, improve watershed ground cover conditions where feasible, support improved land use, waste management, and transportation planning and management, and protect wildlife and improve habitat. Many of its members own land over which non-navigable waters flow.

DISCUSSION

C. The Court should permit Additional Respondents to file a Response brief and participate as parties in this matter

Petitioners seek relief pursuant to Rule 12-504. That Rule allows “[t]he respondent, the real parties in interest, and the attorney general” to “file a response to the petition.” While Additional Respondents were not named in the Petition, they are real parties in interest as they have a vested interest in the validity of the Rule. With respect to the Additional Respondents that have already obtained Certificates or have applied or prepared applications for certifications, a ruling by this Court that the Rule is invalid would impair the property rights conferred by the Rule, diminish the value of their property, and cause monetary damages. With respect to the

Additional Respondents who own property over which non-navigable waters flow and the Additional Respondents that benefit (or whose members benefit) from the availability of certificates, the relief requested by Petitioners will cause harm by eliminating a means by which the Additional Respondents can protect their right to exclude the public from their lands. Certificates issued pursuant to the Rule provide certainty to landowners, members of the public, and law enforcement regarding the status of land below non-navigable waters in the State. While the certificates do not confer the property interest at issue, they prove to the public and to law enforcement that the particular river segment at issue is privately owned. This assists the public in avoiding trespass and assists law enforcement in enforcing trespass laws. As pointed out by the National Wildlife Federation in briefing before the United States Supreme Court in *PPL Montana v. Montana*, forcing the public to “decide when, in a given circumstance, a river is open to use and when it is not” will likely result in “escalating conflict” between the public and landowners. *See* Brief of the National Wildlife Federation, *et al.*, filed in U.S. Supreme Court Case No. 10-218, *available at*

www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-218_respondentamcu22wildlifegrps.pdf. Certificates help to avoid this potential conflict, as all parties gain certainty regarding the status of particular segments of waterways. Elimination of the Rule will not alter the underlying

property rights, but will eliminate the means by which all interested parties can conclusively establish that a particular riverbed is privately owned. Additional Respondents thus have a legitimate and substantial interest in the outcome of the issues raised in the Petition, and Additional Respondents should be given the opportunity to have their position heard by the Court.

While Petitioners brought this dispute directly to this Court (something that was inappropriate as explained in the Response Additional Respondents have conditionally filed), Additional Respondents would have had the right to intervene if the dispute had first been brought in district court. Under Rule 1-024(A) NMRA, which would have controlled the type of proceeding that Petitioners should have filed, “anyone shall be permitted to intervene in an action” on a “timely application” when “a statute confers an unconditional right to intervene” or when “the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” This standard “requires a person claiming a right of intervention to demonstrate an interest in the action that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than to an existing party to the suit.” *NM Right to Choose/RARAL v. Johnson*, 1999-NMSC-005, ¶ 17. Under Rule

1-024(B) NMRA, a party may be permitted to intervene “when a statute confers a conditional right to intervene” or “when an applicant’s claim or defense and the main action have a question of law or fact in common.”

Additional Respondents all own land or otherwise have an interest in the private ownership of land below non-navigable waters in New Mexico. They all either have, or have the right to obtain or receive the benefits of, certificates issued pursuant to the Rule that Petitioners challenge. Their rights to obtain certificates—certificates which in and of themselves confer valuable property interests (by assisting with law enforcement and protecting the right to exclude trespassers)—will be impacted by the outcome of this litigation. And, none of the existing parties to the Petition will adequately represent Additional Respondents’ interests as Petitioners seek to invalidate the Rule and the existing Respondents have no property rights at stake. Further, action by the Court related to issues that underlie the Rule—the right to private ownership of riverbeds below non-navigable waters and the right to exclude trespassers—could significantly harm Additional Respondents’ constitutionally protected property rights and result in a taking for which Additional Respondents would be entitled to just compensation. The relief requested by Petitioners thus directly impacts the rights and interests of Additional Respondents (and in fact all New Mexico landowners who own land below non-navigable waters). Since Additional Respondents would have had a right to intervene had Petitioners filed

their action in an appropriate forum, Additional Respondents should be permitted to submit the Response brief attached as Exhibit A to this filing (and which is being filed with the Court contemporaneously with the motion). *See Thriftway Marketing Corp. v. State*, 1990-NMCA-115, ¶13 (recognizing a right to intervene on appeal under “unusual circumstances” and noting that “intervention may be allowed even at the appellate level . . . in appropriate circumstances”).

D. In the alternative, the Court should accept Additional Respondents’ brief as an amicus brief

If the Court concludes that Additional Respondents should not be made parties, the Court should accept the briefing of Additional Respondents as an amicus brief. As explained above, Additional Respondents have an interest in the outcome of this litigation that is not adequately represented by the existing parties. The arguments made by Additional Respondents in their Response Brief are not covered in the Petition, and may not be covered by the existing Respondents. Consideration of the arguments made in Additional Respondents’ Response Brief will assist the Court in understanding the important constitutional issues involved in any analysis of the Rule including, but not limited to, the fact that a ruling by the Court that landowners cannot exclude the public from privately owned riverbeds will result in a taking that will result in additional litigation and which will subject the State of New Mexico to enormous financial liability.

CONCLUSION

While the existing Respondents are responsible for the promulgation and enforcement of the Rule, Additional Respondents have a vested interest in the Rule and the underlying property rights issues raised in the Petition. Additional Respondents' rights and interests are not adequately represented by the existing parties as they have no incentive to advocate for the rights of the landowners whose interests will be directly harmed by the relief Petitioners seek. The Court should thus allow Additional Respondents to intervene in this action and accept the Response Brief attached as an exhibit to this Motion (and which was conditionally filed contemporaneously with this Motion).

Respectfully submitted,

/s/Marco E. Gonzales

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STATEMENT REGARDING CONCURRENCE

Pursuant to Rule 12-309(C), we have sought concurrence of counsel for Petitioners and each of the Respondents. Counsel for Michelle Lujan Grisham concurs with to relief sought in this Motion. Counsel for the State Game Commission consents to the relief sought in this Motion. Counsel for Petitioners opposes the relief sought in this Motion.

CERTIFICATE OF SERVICE

I certify that on April 17, 2020, I electronically filed this Response Brief with the State of New Mexico’s Tyler/Odyssey E-File & Serve system, which caused service upon all parties through counsel of record.

/s/ Marco E. Gonzales

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