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June 3, 2021

New Mexico State Game Commission
PO Box 25112
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Dear Commissioners:

I understand a federal court ordered the Game Commission to hold hearings on five pending applications from landowners seeking state certifications that rivers crossing their property are non-navigable and therefore closed to the public. I understand that the Commission will consider those applications at a special meeting scheduled for June 18. I am writing to encourage you to deny each of the applications.

The relief the applicants seek is foreclosed by the New Mexico Supreme Court's longstanding *Red River Valley* rule. This rule ensures that even "small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks." *State ex rel. State Game Comm 'n v. Red River Valley Co.*, 1945-NMSC-034,, 48, 51 N.M. 207 (internal quotation marks omitted). The rule leaves no room for the Commission to give wealthy private landowners control over every stream, river, and watercourse in New Mexico, and doing so would violate longstanding principles of New Mexico law.

First, unless and until the New Mexico Supreme Court chooses to abandon the *Red River Valley* rule, approving the applications would be plainly unconstitutional and would violate settled law that predates statehood. In *Red River Valley*, the Supreme Court recognized the public's constitutional right of access to streams and watercourses based on Article 16, Section 2 of the New Mexico Constitution, which provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

The Court went on to explain that "this constitutional provision is only 'declaratory of prior existing law,' always the rule and practice under Spanish and Mexican dominion." 1945-NMSC-034, ¶ 21. And the Court never has backed away from the clear right of access, deeply rooted in our state's history, that the public enjoys to New Mexico's streams and watercourses.

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Second, the Commission is authorized to deny the applications. The court order requiring the Commission to hear the applications was perfectly clear that the Commission is not required to approve any of them. In fact, the Court specifically instructed that:

> [T]he Commission can accept or reject the director's recommendation, or can 'take such other final action as necessary to resolve the application.'" 19.31.22.11(G) NMAC. The Commission, therefore, ***has discretion under the regulations as to the outcome of the decision***. Its duty to make that final decision within the time prescribed, however, is ministerial.

Rancho Del Oso Pardo, Inc. v. New Mexico Game Comm'n, 2021 WL 873355, *6 (D.N.M. Mar. 9, 2021) (emphasis added). By this, the court made clear that the Commission needs to make a decision while specifically leaving to you what the correct decision should be.

Third, by denying the applications pending before it, the Commission does not foreclose landowner-applicants from trying to force a change in the law that would allow them to cut off public access to streams, rivers, and other watercourses. In fact, the New Mexico Supreme Court currently has a petition pending before it that, if the Court chooses, will provide an opportunity to decide whether to abandon or change the *Red River Valley* rule. And, in any event, if the Commission denies an application, landowners have a separate right to court review. NMAC 19.31.22.12. Denying the applications under the *Red River Valley* rule in no way prevents landowners from resubmitting them should New Mexico courts overturn or narrow the *Red River Valley* rule in a way that makes room for private control over public access to public water. Absent such action by the New Mexico Supreme Court, however, the Game Commission should not—indeed must not—ignore the constitutional right of access the public enjoys.

Fourth, the Commission's unconstitutional regulation is not saved by any New Mexico statute. Section 17-4-6(C)—the only statutory basis for the Game Commission regulation—can and must be read to conform with *Red River Valley*. That is easily done by simply reading the statute as an instruction that, while a person has a right to access a stream or watercourse, she or he may not trespass over adjoining private land to reach the water or trespass from the stream or watercourse onto adjoining private land. See NMSA 1978, § 12-2A-18(A)(3) (1997) ("A statute or rule is construed ... [to] avoid an unconstitutional, absurd or unachievable result."); El Castillo Ret. Residences, 2017-NMSC-026,, 25 ("A statute must be interpreted and applied in harmony with constitutionally imposed limitations."). This reading is entirely consistent with the language of the statute. NMSA 1978, § 17-4-6(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.").

Finally, the Game Commission regulation that purports to make the public's right of access dependent on "navigability" renders the entire application process a sham. "Navigability" never has been the standard for access to public waters in New Mexico, nor could it be, given that: (a) "navigability" is a standard that was adopted for different purposes in other parts of the United States that have sufficient water to support waterborne commerce; and (b) even the Rio

Grande does not qualify as "navigable." *Compare* 19.31.22.7 NMAC (defining "non-navigable public water" to include any "watercourse or river" that "was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water") *with U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) ("Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water."). In stark contrast, it was settled law at the time of statehood that:

> All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

NMSA 1978, § 72-1-1 (1907 as amended through 1953) (emphasis added); N.M. Const. art. XXII, § 4 ("All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government.").

Consistent with this history, the Supreme Court in *Red River Valley* specifically refused to limit the state's authority to protect public access to streams and watercourses to "navigable" water. 1945-NMSC-034, ¶ 35 ("Navigability, perhaps the earliest test by which the public character of water was fixed, is not the only test to be applied."). The Court held that Article 16, Section 2, instead provides a right of public access to streams and watercourses that is no "less secure in the public because [the Court] determine[d] their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect." Id. ¶ 37. In *Red River Valley*, this meant that although a landowner had title to the land underneath and on both sides of Conchas Lake, the public retained the right to fish the lake so long as it gained access without trespassing on private property along the shores. Id. ¶¶ 32, 56. Granting applications under 19.31.22 NMAC is irreconcilable with that holding and would amount to gifting to the wealthy few control over one of New Mexico's greatest natural assets at the expense of the New Mexican public.

Thank you for your consideration of the issues outlined here.

Sincerely,

Martin Heinrich
United States Senator