

STATE OF NEW MEXICO
COUNTY OF SAN MIGUEL
FOURTH JUDICIAL DISTRICT COURT
D-412-CV-2024-00289

BLC

No. _____

STATE OF NEW MEXICO ex rel. RAÚL TORREZ,
ATTORNEY GENERAL, STATE OF NEW
MEXICO,

Plaintiff,

vs.

RICHARD JENKINS and JEAN JENKINS,

Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The State of New Mexico, by and through Attorney General Raúl Torrez, brings this action to protect the public's constitutional right to access public streams and watercourses. Defendants Richard and Jean Jenkins are openly depriving the public of access to the Pecos River knowing that doing so violates the New Mexico Constitution. Attorney General Torrez seeks injunctive and declaratory relief to remedy this ongoing violation of the state constitution and abate the resulting public nuisance.

NATURE OF THE CASE

1. This case is brought to declare unconstitutional Defendants' efforts to deprive New Mexicans of their rights of public access to the Pecos River in New Mexico and to enjoin Defendants from placing barriers across the river, threatening baseless legal action, and otherwise interfering with New Mexicans' enjoyment of their right of access.

JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over this action pursuant to Article VI, Section 13 of the New Mexico Constitution.

3. Venue is appropriate pursuant to NMSA 1978, § 38-3-1(D)(1) (1988) because Defendants and other property owners have denied the public access to the Pecos River in San Miguel County through threats of violence, physical obstruction, and false legal threats and misstatements of the law.

PARTIES

4. The State of New Mexico, by and through the Attorney General, Raúl Torrez, brings this action in its *parens patriae* capacity to enforce New Mexico's laws and Constitution and to protect the safety and well-being of its citizens. Attorney General Torrez is authorized by NMSA 1978, § 8-5-2(B) (1975) to prosecute this action in which the state is an interested party.

5. Defendants Richard and Jean Jenkins own a parcel of land that abuts the public waters of the Pecos River. The property is located at 2153 Terrero Pecos, NM. They knowingly are engaged in an ongoing unconstitutional deprivation of the public's right of access to the Pecos River and a public nuisance.

FACTS COMMON TO ALL COUNTS

6. In 2022, the New Mexico Supreme Court reaffirmed and declared that the New Mexico Constitution protects the public's right to fish and recreate on and through our rivers and watercourses. That right includes access to streams passing through privately owned land. *Adobe Whitewater Club of New Mexico v. New Mexico State Game Comm'n*, 2022-NMSC-020, ¶¶ 28-34, 519 P.3d 46, *cert. denied*, 143 S. Ct. 980 (2023). The Court specified that the public's constitutional right of access "includes the privilege to do such acts as are reasonably necessary

to effect the enjoyment of such right” and provided examples of permissible uses, including the use of streambeds and banks. *Id.* ¶ 23 (citing with approval *Hartman v. Tresise*, 84 P. 685, 692 (Colo. 1905) (Bailey, J., dissenting) (“[T]he people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant.”), *Galt v. State*, 731 P.2d 912, 915 (Mont. 1987) (“The public has a right of use up to the high water mark, but only such use as is [reasonably] necessary to utilization of the water itself.”), and *Conatser v. Johnson*, 2008 UT 48, ¶ 26, 194 P.3d 897 (holding that the public’s easement includes touching riverbeds because “touching the water’s bed is reasonably necessary for the effective enjoyment of” the easement)).

7. At the same time, the Court correctly acknowledged that property owners hold important rights and determined that the law requires balance in this area:

We emphasize that the scope of the public’s easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of minimal impact. “The real property interests of private landowners are important as are the public’s property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible.” *Galt*, 731 P.2d at 916. That is, the right of the public and the right of the landowner “are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, [so] that there may be a due and reasonable enjoyment of both.” *Conatser*, 2008 UT 48, ¶ 20, 194 P.3d 897 (internal quotation marks and citation omitted).

Adobe Whitewater, 2022-NMSC-020, ¶ 33.

8. The balance that the Court struck granted the public the right to use any portion of public rivers and streams. A person can begin at the headwaters of any river in the state and walk or float to the end of the river without committing trespass once. This balance provided property owners the right to exclude the public from privately owned land—but not the public waterways. Thus, a person can touch the stream beds and banks as reasonably necessary to fish and recreate but cannot go beyond the stream or bank to exit the stream or river over private land. Similarly,

the public cannot trespass over private land to gain access to a waterway in the first place. *Id.*

¶ 23.

9. The Court's ruling leaves no room for landowners to deny the public access to streams and waterways like the Pecos River. Defendants continue violating the state constitution by excluding the public from the river with obstructions or barricades on the water itself.

10. Defendants know they are violating the state constitution through their ongoing refusal to grant the public access to the Pecos and to remove obstructions and signs that falsely claim that the public may not exercise that protected right of access. In fact, the New Mexico Department of Justice met with Defendants and other landowners on September 9, 2023 to explain their legal obligations in detail, notify them that NMDOJ would proceed to enforce *Adobe Whitewater* through court action against recalcitrant landowners, encourage them to come into compliance with the law, and explore whether other state agencies found that restrictions on the scope of recreation were appropriate per standard state policies on the Pecos where their land abuts the river (e.g., designating portions of the river as special waters with limitations on fishing).

11. Defendants continued their unlawful obstruction of access to the Pecos into 2024. On March 8, 2024, NMDOJ therefore sent them a cease-and-desist letter confirming that NMDOJ would proceed with court action if they failed to come into compliance.

12. Defendants further know that NMDOJ brought an action before this Court against Erik Briones, another owner of property abutting the Pecos, and secured a consent decree against him. Under the Court's consent decree, Briones was required under penalty of contempt to remove his obstructions and signs on the Pecos River by May 2024. He additionally is enjoined from (1) fencing or otherwise erecting physical barriers on his land that would interfere with the

right of the public to fish or recreate on the Pecos River, (2) posting signs suggesting that touching stream beds and banks incidental to a lawful recreational activity constitutes trespassing, or (3) making or acting on threats of physical violence against the public for exercising the right to access public water.¹

13. Defendants nevertheless have remained recalcitrant and continue violating the constitutional right of all New Mexicans to fish and recreate on public water. They continue depriving the public of access to the Pecos through:

a. **Physical Obstruction:** Defendants are directly blocking access to the Pecos river with fences laced with barbed wire and concertina wire. This includes fences approximately six feet tall blocking access to the Pecos through their property (and obstructed upstream by a commensurate fence on Briones's property):



¹ Contemporaneously with this filing, the state is proceeding with a motion to hold Briones in contempt for his blatant and continuing violation of the consent decree.

b. **False Legal Threats.** Defendants also have signs on the stream fences and other fences on their property that falsely claim that the river is privately owned and that it is trespassing for any member of the public to fish or recreate through the stream:



**COUNT I:
DEPRIVING THE PUBLIC OF ACCESS TO THE PECOS RIVER
IN VIOLATION OF THE NEW MEXICO CONSTITUTION**

14. The State realleges and reincorporates all previous paragraphs as though fully set forth herein.

15. In New Mexico, access to water is a fundamental constitutional right.

16. Article XVI, Section 2 of the New Mexico Constitution 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. *Id.*

17. At the time of statehood, New Mexico defined public waters broadly, including waterways that are not navigable:

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 (1941).

18. The New Mexico Supreme Court has confirmed that public use of the banks and streambed is a lawful auxiliary to recreation on public waterways. *See Adobe Whitewater*, 2022-NMSC-020, ¶¶ 22-33.

19. Defendants have obstructed, and continue to obstruct, access to the public waterways of the Pecos River.

20. Defendants are excluding the public from enjoyment of the Pecos River as a public waterway.

21. Defendants' conduct has put the public in danger of violence, physical harm, and property damage.

22. Defendants' ongoing violations of the New Mexico Constitution will cause irreparable harm to the State and its citizens for which no adequate legal remedy exists.

23. Damages will not replace access to public trust waters to which New Mexicans are constitutionally entitled.

**COUNT II:
PUBLIC NUISANCE UNDER SECTION 30-8-8(B)**

24. The State realleges and reincorporates all previous paragraphs as though fully set forth herein.

25. Defendants' ongoing obstruction of the public waterways on the Pecos River substantially interferes with public health, safety, welfare, and the exercise and enjoyment of public rights and property. *See* NMSA 1978, § 30-8-1 (1963).

26. Defendants have continued depriving the public of access to the section of the Pecos River that travels through their property after the New Mexico Supreme Court decided *Adobe Whitewater Club* in 2022. That decision put all landowners on notice of the law in this state, including the constitutional right of access.

27. Defendants have engaged in conduct—including threats of violence, constructing and/or leaving in place physical barriers that block access, and making false legal threats—with knowledge that it would interfere with and deprive the public of access to public waterways and with the intention that it do so.

28. Defendants engaged in this conduct without lawful authority.

29. Defendants' ongoing conduct shows that they intend to continue violating the New Mexico Constitution by depriving the public of access to the section of the Pecos River that travels through their property.

30. Defendants will not cease these violations without a court order.

31. Defendants' ongoing conduct constitutes a public nuisance that has caused irreparable harm.

32. The Legislature has authorized the Attorney General to bring a civil action to abate a public nuisance, NMSA 1978, § 30-8-8 (1963), and this Court has the authority to order Defendants to cease the conduct that creates a public nuisance.

COUNT III DECLARATORY JUDGEMENT UNDER SECTION 44-6-2

33. The State realleges and reincorporates all previous paragraphs as though fully set forth herein.

34. The New Mexico Declaratory Judgment Act gives this Court power "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." NMSA 1978, § 44-6-2 (1975).

35. In this case, there is a controversy as a result of Defendants' ongoing deprivation of the public's right of access to the Pecos River.

36. The Court should declare that:

- a) the Pecos River is a public waterway; and
- b) Defendants' use of physical barriers and false threats of legal action violates Article XVI, Section 2 of the New Mexico Constitution.

PRAYER FOR RELIEF

WHEREFORE, the State requests that the Court enter an order:

1) issuing declaratory relief against Defendants for the violations of the New Mexico Constitution's guarantee of public access to waterways;

2) Enjoining Defendants, as well as their agents or assigns as follows:

a. Defendants must remove any physical barriers that interfere with the public's right to access the Pecos River as *Adobe Whitewater* requires within 14 days subject to contempt of Court;

b. Defendants must remove all signage that claims it is trespass or otherwise unlawful for the public to access the Pecos River as *Adobe Whitewater* requires;

c. Defendants must refrain from any future obstruction of public access through physical barriers and improper signage; and

d. Defendants must refrain from engaging in any other conduct to discourage public access to waterways;

3) Awarding the State costs and expenses of this suit as provided by law. *See* § 30-8-8(C).

4) Providing additional relief as this Court deems just and proper.

Respectfully submitted,

/s/ Raúl Torrez

Raúl Torrez

New Mexico Attorney General

/s/ James Grayson

James Grayson

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VERIFICATION

I, Mark Sena, being sworn upon oath, depose and state as follows:

I am an investigator with the New Mexico Attorney General's Office and have reviewed the information contained in the Verified Complaint for Injunctive and Declaratory Relief. Based on my investigation of the matters at issue, the information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing statement is true and correct.

August 28, 2024



Mark Sena