

STATE OF NEW MEXICO  
COUNTY OF SAN MIGUEL  
FOURTH JUDICIAL DISTRICT COURT

TDS

No. D-412-CV-2024-00289

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

Plaintiff,

vs.

RICHARD JENKINS and JEAN JENKINS,

Defendants.

**STATE OF NEW MEXICO'S MOTION FOR PRELIMINARY INJUNCTION**

The State of New Mexico, by and through Attorney General Raúl Torrez, files this motion for a preliminary injunction to prevent Defendants Richard and Jean Jenkins from continuing to deprive New Mexicans of their constitutional right of access to the Pecos River through (1) fencing and other physical obstructions of the river; and (2) false threats of baseless legal action.

**INTRODUCTION**

The right of access to New Mexico waterways is a historical right specifically protected under the state constitution. The Jenkins Defendants have deprived the public of that right and continue depriving the public of that right. Their conduct merits immediate equitable relief. More specifically, this case meets all of the elements for a preliminary injunction:

1. The State is likely to prevail on the merits. Defendants' conduct directly violates the New Mexico Supreme Court's decision in *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 State now seeks now an order requiring Defendants to conform their conduct to the state constitution.

2. A preliminary injunction is necessary to prevent irreparable harm. Courts necessarily treat constitutional injuries as irreparable. Moreover, through false threats of baseless legal action and menacing obstructions to access, Defendants have demonstrated a likelihood that, absent Court intervention, they may cause other concrete harm to New Mexicans who seek to exercise their constitutional right to recreate and fish on the Pecos River.

3. While Defendants' direct interference with the public's constitutional right of access to the Pecos River causes irreparable harm, Defendants will suffer no injury if the Court grants the injunction the State seeks. The injunction instead merely requires Defendants to conform their conduct to the state constitution and stop preventing people from exercising their constitutional right of access.

4. Granting the injunction serves the public interest for the same reasons. In *Adobe Whitewater*, the New Mexico Supreme Court reaffirmed the public's right of access to public waterways like the Pecos River. Courts cannot allow property owners like Defendants to flout the law. Leaving this conduct unchecked will deprive the public of a right they hold while emboldening property owners inclined to aggressively resisting compliance with this settled question of law. Absent a clear and consistent message from the judiciary that everyone is required to follow the law and cannot violate the state constitution, the risk will remain that an

overzealous property owner will resort to violence against people doing only what they have the right to do.

## **ARGUMENT**

To secure a preliminary injunction, the State must show that: (1) there is a substantial likelihood that it will prevail on the merits; (2) failing to impose the injunction will result in irreparable harm; (3) the threatened injury outweighs any damage the injunction might cause the defendant; and (4) issuing the injunction is not adverse to the public interest. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. All four requirements are met here.

1. There is a substantial likelihood that the State will prevail on the merits.

The State is likely to prevail on both claims relevant to issuing a preliminary injunction—deprivation of public access to the Pecos River in violation of Article XVI, Section 2 of the New Mexico Constitution and public nuisance.<sup>1</sup>

*a. Constitutional Violation*

Defendants are in clear violation of the New Mexico Constitution. Article XVI, Section 2 states that all unappropriated waters belong to the public. The New Mexico Supreme Court clarified long ago that this constitutional right includes waters that were not navigable at the time of statehood and carries with it the public’s right of access to water to fish and recreate. *See State ex rel. State Game Comm’n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 26, 51 N.M. 207 (“[T]he constitution is merely declaratory of the prior existing law obtaining before New Mexico came under American sovereignty . . . .”); *see also Adobe Whitewater Club*, 2022-NMSC-020, ¶

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<sup>1</sup> The State additionally seeks declaratory relief. That count is not a separate basis for granting this motion to enjoin Defendants’ unconstitutional conduct and abate their public nuisance.

28 (“We conclude that implicit in our holding is the privilege to do such acts as are reasonably necessary to effect the enjoyment of such enumerated rights.”).

*Adobe Whitewater* plainly does not allow property owners to physically block public access for people exercising their right to fish and recreate on the Pecos River, including in the section Defendants’ land abuts. It is equally obvious that Defendants have used a combination of fencing off the river and placing an array of signs falsely threatening prosecution to deter the public from accessing the sections of the Pecos they seek to treat as their own.

*b. Public Nuisance*

Defendants’ use of fencing and/or false threats of prosecution also creates an obvious public nuisance. To prevail on a public nuisance claim, a plaintiff must show that the defendant knowingly created, performed, or maintained “anything affecting any number of citizens without lawful authority” which is:

- A. Injurious to public health, safety, morals, or welfare; or
- B. Interferes with the exercise and enjoyment of public rights, including the right to use public property.

NMSA 1978, § 30-8-1 (1963).

Here, Defendants have knowingly interfered with the public right to use the Pecos River that Article XVI, Section 2 protects. The maintenance of fences laced with barbed wire and signs falsely threatening legal consequences for doing what the constitution guarantees substantially interferes with the public enjoyment of the right of access to the Pecos River. Defendants have no legal authority to exclude people from these public waterways so long as they are not trespassing over private land to get access to the river.

The hazards Defendants have put on the public waters of the Pecos River also are harmful to public health and safety. The fencing is a hazard to waders and paddlers alike.

Combined with Defendants' threatening signs, the circumstances present a risk of a violent encounter and the danger that someone will be hurt or killed absent prompt judicial intervention.

2. The citizens of New Mexico will suffer irreparable injury without injunctive relief.

An irreparable injury “is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard.” *State ex rel. State Highway & Transp. Dep't of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151 (quoting *Parkem Indus. Servs., Inc. v. Garton*, 619 S.W.2d 428, 430 (Tex. Civ. App. 1981)). The “violation of a constitutional right alone constitutes irreparable harm.” *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020), *reinstated and reissued sub nom. Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021). *See generally LaBalbo*, 1993-NMCA-010, ¶ 11 (relying on federal cases to inform the four requirements to issue a preliminary injunction under state law).

In addition, lost access to land or resources is the precise type of harm that is not compensable with money damages. The law is “settled” that when “a given piece of property is considered to be unique, [] its loss is always an irreparable injury.” *Amkco, Co. v. Welborn*, 2001-NMSC-012, ¶ 11, 130 N.M. 155 (finding irreparable harm when an encroachment prevented “all use of a portion” of the property) (quoting *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982)). This is, in fact, just the inverse of the Court of Appeals' recognition in *Kaywal, Inc. v. Avangrid Renewables, LLC*, 2021-NMCA-037, ¶ 34, that injunctive relief is appropriate where acts of trespass “constantly recur[]” or would lead to a “multiplicity of suits.”

Depriving the public of access to the Pecos River constitutes irreparable harm. The Pecos River has been specifically reserved for public use by the New Mexico Constitution. Even temporary deprivation of this constitutional right constitutes irreparable harm. *See Aposhian*, 958

F.3d at 990. Defendants' encroachments directly infringe on the public's right to access public waterways. Indeed, the physical barriers that currently exist prevent *all* use of the Pecos River for a significant distance. The Pecos River is also a unique geographic feature, with natural beauty, resources, and recreational possibilities unlike other waterways. There is no other river, stream, or parcel of land that affords the same public access, the same climate, and the same recreational opportunities. Money damages cannot approximate the value of physically experiencing the Pecos River, including the section of the river Defendants wrongfully seek to privatize for their exclusive use and control. *Amkco*, 2001-NMSC-012, ¶ 11.

Without a preliminary injunction, landowner interference to deprive the public of access to the Pecos River will recur and will force individual citizens and law enforcement to resort to a multitude of legal actions against noncompliant property owners. *See Kaywal*, 2021-NMCA-037, ¶ 34. Court orders are now necessary to force Defendants and other property owners who are disregarding *Adobe Whitewater* to conform to the law. That process began with the consent decree against Erik Briones and should continue with these defendants. Their ongoing unconstitutional and unlawful conduct exacerbates the irreparable harm the public is enduring. For these reasons, the State has demonstrated irreparable harm sufficient to warrant injunctive relief. *Sunland Park*, 2000-NMCA-044, ¶ 19.

3. The deprivation of the constitutional right to access public waterways outweighs any temporary damage that an injunction would cause to Defendants.

Deprivation of a constitutional right is a serious harm that weighs in favor of granting a preliminary injunction. “When a constitutional right hangs in the balance . . . even a temporary loss usually trumps any harm to the defendant.” *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (internal quotations omitted). This case is unique in that the constitutional right also involves access to public water and public resources. Because

New Mexico has enshrined access to waterways in its constitution and recognized that the right predates statehood, even a minor loss of this constitutional right would “trump” any harm to Defendants. *See id.* at 806.

Moreover, any harm an injunction could impose on Defendants is minimal. They have long known that they have no right to interfere with people wading or floating the Pecos River and no right to falsely threaten baseless legal action for nonexistent “trespasses.” Removing signs and fences strung together with PVC pipe, barbed wire, and concertina wire involves minimal expense. There is no likelihood that Defendants will be permitted to put those fences back up given the clear holding in *Adobe Whitewater*. And Defendants’ recourse is to report to law enforcement anyone who trespasses through their land to access the Pecos or trespasses beyond the waterway and banks in contravention of the New Mexico Supreme Court’s ruling. Defendants cannot deprive the public of the constitutional right of access or menace those who exercise that right.

Conversely, without an injunction, the public will continue to be deprived of *all* access to portions of the Pecos River that abut Defendants’ property. Defendants’ physical barriers completely block entry to significant segments of the river and make downstream recreation dangerous. In addition, physical obstruction and false threats of legal action discourage the public from taking the risk of using the Pecos River *anywhere* near private property for fear of injury even though they have a clear constitutional right to access those waters. This loss is not only more severe, but it involves the deprivation of a constitutional right. *See Free the Nipple-Fort Collins*, 916 F.3d at 806. The public waterways of the Pecos River are of “tremendous” historic and personal value to the citizens of New Mexico who recreate there. *See id.* Compliance with *Adobe Whitewater* is not optional.

Because the loss of a constitutional right outweighs the temporary inconvenience to Defendants, the balance of the hardships tips heavily in favor of a preliminary injunction.

4. A preliminary injunction is in the public interest.

The State has expressed its strong public policy in favor of public access to streams and rivers in Article XVI, Section 2, and it is “always in the public interest to prevent the violation of a party’s constitutional rights.” *People for Pearce v. Oliver*, 2017 WL 5891763, at \*15 (D.N.M. Nov. 28, 2017) (quoting *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012)). The public interest also encompasses enforcing “the fundamental rights” of vulnerable citizens. *LaBalbo*, 1993-NMCA-010, ¶ 8.

Prohibiting Defendants from continuing their knowing violation of the state constitution will only restore the public’s right of access. Removing the physical obstructions and false threats of legal action will also prevent future constitutional violations for other members of the public. *See People for Pearce*, 2017 WL 5891763, at \*15. Because there is “no evidence indicating that the proposed preliminary injunction would have a significant adverse effect on the public interest,” this factor also weighs in favor of injunctive relief. *Logan v. Pub. Emps. Ret. Ass’n*, 163 F. Supp. 3d 1007, 1032 (D.N.M. 2016).

## CONCLUSION

A preliminary injunction is necessary to prevent Defendants from continuing to deprive the public of its constitutional right of access to the Pecos River and to abate the public nuisance Defendants are maintaining. The State of New Mexico respectfully requests that the Court order a preliminary injunction requiring Defendants and their agents or assigns to:



b. remove all physical barriers that deny the public access to the Pecos River as *Adobe Whitewater* requires within 14 days subject to contempt of Court, and leave the river unobstructed;

c. remove all signs that suggest it is trespassing for the public to access any section of the Pecos River; and

d. avoid otherwise discouraging or interfering with public access to the Pecos River, including the sections of the river their land abuts.

Respectfully submitted,

/s/ Raúl Torrez

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