

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

LCE

No. D-412-CV-2023-00367

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

Plaintiff,

vs.

ERIK M. BRIONES, DOES 1–10,

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 Erik M. Briones from continuing to deprive New Mexicans of their constitutional right of access to the Pecos River through (1) threats of physical violence; (2) fencing and other physical obstructions of the river; and (3) false threats of baseless legal action.

INTRODUCTION

The right of access to New Mexico waterways is not just a historical right—it is a constitutional right. Erik Briones has deprived the public of that right, and that deprivation 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. Briones’s 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). All the State seeks now is an order requiring him to conform his conduct to the state constitution.

2. A preliminary injunction is necessary to prevent irreparable harm. Courts necessarily treat constitutional injuries as irreparable. Moreover, through threats of violence and false threats of baseless legal action, Briones has demonstrated a likelihood that, absent Court intervention, he 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 Briones's direct interference with the public's constitutional right of access to the Pecos River causes irreparable harm, Briones will suffer no injury if the Court grants the injunction the State seeks. The injunction instead merely requires him to conform his conduct to the state constitution and stop threatening people to prevent them 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 Briones to flout the law, and leaving this conduct unchecked is likely to result in someone being hurt or killed for doing what the constitution allows them to do.

ARGUMENT

To secure a preliminary injunction, the State must show that (1) there is a substantial likelihood 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 of the New Mexico Constitution, and public nuisance.¹

a. Constitutional Violation

Briones’s threats of violence, physical barriers, and false threats of prosecution are all clear constitutional violations. Article XVI, Section 2 of the New Mexico Constitution states that all unappropriated waters belong to the public. The New Mexico Supreme Court has clarified that this constitutional right includes waters that were not navigable at the time of statehood and also includes public use of the banks and streambeds. *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, ¶ 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.”).

It goes without saying that *Adobe Whitewater* does not allow property owners to threaten to shoot people for exercising their right to fish and recreate on the Pecos River, including in the section Briones’s land abuts. It is equally obvious that Briones has fenced off the river and placed a remarkable array of signs falsely threatening prosecution to deter the public from accessing the section of the river he seeks to control as his own. His fences prevent all access. And if that were

¹ The State additionally seeks declaratory relief, but that count of the Complaint is not a separate basis for granting this motion to enjoin Briones’s unconstitutional conduct and abate his public nuisance.

not enough, he has in place an array of signs that falsely threaten prosecution if New Mexicans exercise the right *Adobe Whitewater* reaffirms.

b. Public Nuisance

Defendants' threats of violence, physical barriers, and false threats of prosecution also clearly create a 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, Briones has 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 threatening false legal action prevents the public from enjoying their right of access to the Pecos River. And Briones's threats of violence prevent the public from exercising their constitutional right to stream access via intimidation. Briones has no legal authority to exclude the public from these public waterways.

The hazards Briones has in place 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 Briones's own comments and the signs on his property, the case presents a risk 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 are 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 (quoting *United Church of the Med. Ctr. v. Med. Ctr. Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982)). For example, in *Amkco*, the New Mexico Supreme Court found irreparable harm when an encroachment prevented “all use of a portion” of the property. *Id.* ¶ 11. Similarly, injunctive relief is appropriate where acts of trespass “constantly recur[]” or would lead to a “multiplicity of suits.” *Kaywal, Inc. v. Avangrid Renewables, LLC*, 2021-NMCA-037, ¶ 34, 495 P.3d 550 (citing *Stroup v. Frank A. Hubbell Co.*, 1920-NMSC-078, ¶¶ 2–5, 27 N.M. 35).

Here, 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. Briones’s 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 Briones wrongfully seeks to privatize for his exclusive use and control. *Amkco*, 2001-NMSC-012, ¶ 11.

Briones's threat to shoot members of the public who enter the section of the river that his property abuts poses its own distinct threat of irreparable harm, as do the physical hazard Briones's fencing and barbed wire impose. And without a preliminary injunction, the invasions into the public waterways will recur and will force individual citizens and law enforcement to play whack-a-mole with noncompliant property owners. *See Kaywal*, 2021-NMCA-037, ¶ 34. Court orders are now necessary to force Briones and other property owners who are disregarding *Adobe Whitewater* to conform to the law. These recurring violations exacerbate the irreparable harm to the public. 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, even a minor loss of this constitutional right would “trump” any harm to defendants. *See id.* at 806.

Here, any harm an injunction could impose to Briones is minimal. He had no right to threaten to shoot people for wading or floating the Pecos in the first place, nor does he have the right to falsely threaten baseless legal action for nonexistent “trespasses.” Moreover, removing fences strung together with PVC pipe, barbed wire, and concertina wire involves minimal expense. There is no likelihood that he will be permitted to put those fences back up given the clear holding in *Adobe Whitewater*. And Briones’s recourse if anyone trespasses through his land to access the Pecos or trespasses beyond the waterway and banks consistent with the New Mexico Supreme Court’s ruling is to report the violation to law enforcement. Along the way, he 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 Briones’s property. Defendants’ physical barriers completely block entry to significant segments of the river and make downstream recreation dangerous. In addition, threats of violence, 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. 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.* The Attorney General implores the Courts to make it clear that compliance with *Adobe Whitewater* is not optional.

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

4. A preliminary injunction is in the public interest.

The State of New Mexico has expressed a strong public policy in favor of public access to streams and rivers in Article XVI, Section 2 of the state constitution. 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 threats of violence, physical barriers, and false threats of legal action will only restore the public’s right to access that the state constitution guarantees. Removing these obstructions 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 Briones from continuing to deprive the public of its constitutional right of access to the Pecos River and to abate the public nuisance he is maintaining. The State of New Mexico respectfully requests that the Court order a preliminary injunction enjoining Briones and his agents or assigns from:

- a. making or acting on threats of physical violence against members of the public exercising the right *Adobe Whitewater* reaffirmed to access the Pecos River;

b. requiring Briones and other defendants to 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;

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

d. engaging in any other conduct to discourage public access to waterways.

Respectfully submitted,

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