



Adobe Whitewater Club of New Mexico

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June 4, 2021

Submitted by the Adobe Whitewater Club of New Mexico through its President to [NonNav.Comments@state.nm.us](mailto:NonNav.Comments@state.nm.us)

BEFORE THE NEW MEXICO GAME COMMISSION

Re: Proceedings Regarding the Following Applications for Certification of Non-Navigable Waters Set for Hearing on June 18, 2021:

1. Chama III NNW Application
2. Fenn Farms Nonnavigable Application
3. Rancho Del Oso Pardo Application
4. River Bend Ranch NNW Application
5. Three Rivers Applications

Dear Members of the State Game Commission,

Submittal of Public Comments. These written public comments of the Adobe Whitewater Club of New Mexico are submitted in response to the New Mexico Game Commission's (Commission) draft meeting notice and agenda for its June 18, 2021 meeting. The Adobe Whitewater Club is submitting these comments within the narrow time frame allowed by the Commission for written public comment.

The Adobe Whitewater Club of New Mexico hereby requests recognition by the Commission as a party in this matter. The Adobe Whitewater Club board has approved these comments and the positions stated herein.

The Adobe Whitewater Club hereby requests Chair Sharon Salazar Hickey in her sole discretion to recognize the Adobe Whitewater Club's board-authorized representative to present oral testimony, in person or by the Commission's public meetings video link, at the Commission's June 18 meeting. Our representative will summarize key evidence set forth herein that show good cause for the Commission to disapprove the pending applications. This testimony is estimated to require 10 minutes.

Please also see the Motion submitted by the attorneys that are representing the Petitioners, including the Adobe Whitewater Club, in the directly related matter awaiting a decision of the New Mexico Supreme Court.

The Adobe Whitewater Club's Standing, Interests, and Harm. The Adobe Whitewater Club of New Mexico is a 501C4 non-profit membership organization that promotes and advocates for recreational paddling opportunities on waters throughout the State of New Mexico. It has been active for decades. Current paid memberships as of June 3 are 95, representing 173 individuals. (Many paid memberships lapsed during the pandemic.) The Board of the Adobe Whitewater Club meets monthly and hosts monthly membership meetings. It routinely hosts multiple river clean-ups and paddling skills clinics each year.

Adobe Whitewater Club members, past, present, and future, actively float and paddle all types of streams all over New Mexico. The Adobe Whitewater Club's core purposes include protection of public access to New Mexico's rivers and streams for recreation and downstream travel, providing skills and safety training, promoting stewardship and respect for private property rights, and facilitating paddling opportunities.

Whether a stream is navigable, or not, is not germane to the public's constitutional rights to use the public waters of New Mexico for recreation. The State Game Commission has no statutory authority to determine navigability of New Mexico's rivers and streams, yet its determination of navigability is the central premise of its Rule that deprives New Mexico recreational paddlers of their state constitutional rights.

A river that may not be "navigable" for many is often the preferred type of river for our members. Small, lightweight rafts, kayaks, and canoes—both hard-shell and inflatable—can travel most sections of most rivers in the state. Thus, our members' historical and future river use areas include the Rio Chama and Rio Chamita in Rio Arriba County. River use areas also include the Hondo and Berrendo Rivers in Chaves County, and the upper Pecos River in San Miguel County (upstream of, thru, and downstream of the River Bend Ranch).

The non-navigable designations proposed in these applications would shut down boating and recreational access for our members, depriving us of our constitutional rights to use and enjoy the public waters of New Mexico. The non-navigable designations made by the Game Commission in 2018 resulted in denial of safe paddling down reaches of the (A) Upper Pecos River and (B) Upper Rio Chama promoted by the State of New Mexico for recreational whitewater paddling.

- A. The Commission awarded a non-navigable waters certificate to the Hersh Family Trust for a segment of the Upper Pecos River between Cowles and Pecos. Paddlers now are prevented from floating the Upper Pecos River through the privatized river segment by the Hersh barricade, a tall and river-wide barrier constructed of vertical pipes suspended from a cable and interwoven with barbed wire. The barricade's construction makes it a potential paddler death trap. The barricade is attached to and flanked by tall fences on both sides of the river, topped with concertina, with a second fence immediately behind. The Hersh barricade and flanking fences prevent both downriver travel and portage. They are illustrated in Exhibits A through E, attached.
- B. The Commission awarded a non-navigable waters certificate to Troutstalkers Ranch for a segment of the Upper Rio Chama. Troutstalkers Ranch installed a low cable spanning the river. This cable also is a paddler hazard and requires portage. It is illustrated in Exhibits F and G.

The Adobe Whitewater Club of New Mexico along with the New Mexico Wildlife Federation and the New Mexico chapter of Backcountry Hunters and Anglers have petitioned the New Mexico Supreme Court for a Writ of Mandamus to overturn the Game Commission's unconstitutional non-navigable water rule, which the Game Commission promulgated without statutory authority, and the certificates it issued pursuant to its rule. The matter is fully briefed. The New Mexico Supreme Court's decision is pending.

The Adobe Whitewater Club is also harmed by the near total deprivation of participatory rights in the Commission's consideration of these pending applications. We would like to put on live testimony, present evidence in person and have the opportunity to cross examine witnesses. Moreover, the timing of the notice and comment periods have limited our ability to review and fully comment on the applications. We feel that this is a rubber-stamp process by the Commission with a pre-ordained outcome dictated by the Commission's 2017 Rule.

Current Applications Under Consideration for Approval on June 18. Additional proponents of privatizing and monetizing public water flowing down New Mexico's rivers and streams that cross private property have applied to the Game Commission to approve their pending applications and have forced a premature decision through a federal magistrate's order.

The current applicants request that the Game Commission make new illegal approvals, requiring the presumption that the Martinez administration's Game Commission and the current administration's Game Commission had and have the lawful power and authority to approve their applications. Proponents and applicants seek to expand the Game

Commission's number of certificate holders that deny paddlers' constitutional access to rivers promoted historically by the Energy, Minerals, and Natural Resources Department for recreational downriver whitewater paddling, which demonstrates the Upper Pecos River and the Upper Rio Chama are indeed navigable-in-fact. See Exhibit H.

The Game Commission Lacks the Powers and Authority to Have Issued its Non-Navigable Waters Rule and to Issue Privatization Certificates Pursuant to Its Rule.

Senate Bill 226 (2015) as passed by the Legislature and signed into law by Governor Martinez had been stripped by the Senate Judiciary Committee of the bill proponents' definition of navigable water in New Mexico and all of the proponents' language pertaining to Game Commission's authority to determine whether a river or stream is navigable. Yet the previous governor's Game Commission acted as if it had the powers that the bill, as introduced, would have granted. Senate Bill 226 (2015), as passed and signed into law, looked nothing like the proponents bill as introduced. The signed bill added one short paragraph concerning trespass to Game Commission law. That paragraph did not change the Game Commission's statutory powers and authorities, which have nothing to do with navigability or the operation of watercraft.

In its original form as introduced, Senate Bill 226 (2015) contained six uses of the word navigable, two of which were a definition:

"navigable water" means a water course that at the time of statehood was navigable in fact and that is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water;

The other four uses of the word navigable were in sections of the bill that would have granted power and authority to the Game Commission.

Determination of whether a public water on private property is a navigable water shall be implemented solely by the state game commission.

Any person may bring the issue of whether a public water on private property is a navigable water before the state game commission for determination prior to using public water on private property for recreational activity.

With or without application by the public or a private property owner or lessee or person in control of private lands so affected, the state game commission may in its own right make a determination of whether a public water on private property is a navigable water and such determination may be challenged by interested parties.

Absent such a determination by the state game commission, it shall be presumed that a public water on private property was and is a non-navigable water.

The definition of navigable water, presumption of non-navigable water, and the three grants of power and authority to the Game Commission to determine the navigability of a New Mexico river or stream were stripped from the bill in committee before the bill was passed by the Senate and approved by the House.

The Game Commission's statutory grant of powers and assignment of duties is set forth in Section 17-1-14 NMSA General powers and duties of state game commission. All of these powers and duties pertain to game and fish or endangered non-game species. None pertain to navigability of rivers and streams. None pertain to the operation of watercraft.

An annotation to 17-1-14 NMSA describes limitations of the Game Commission's powers:

Purpose for which waters may be closed are exclusive. — The state game commission is not authorized under this section to close any public stream or lake or portion thereof to fishing, when such action is not for the purpose of protecting a recently stocked water or to protect spawning waters, or to prevent undue depletion of the fish in such waters. 1958 Op. Att'y Gen. No. 58-119.

Senate Bill 226 (2015) as passed is compiled at 17-4-6. Hunting and fishing on private property; posting; penalty. The changes, except for changes to replace gender references in Section 17-46 A. are compiled at 17-4-6 C. This new paragraph of the law deals solely with trespass. It states:

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.

The Game Commission has no authority to determine whether or not a river or stream is navigable or not. Neither does it have any power over the operation of watercraft or the closure of public water to the operation of watercraft. It has harmed the interests and rights of the Adobe Whitewater Club, its members and the public through its unlawful Rule, its past determinations of non-navigable waters, and if approved, four of the five additional determinations. Please note that the Adobe Whitewater Club and its members do not wish to paddle dry arroyos on private property, which appears to be what one of the five pending applications seeks to protect.

The Game Commission Rule Establishes a Sham Process with a Preordained Conclusion. There certainly is no process of adjudication of individual applications, most of which seek to deprive the public of the rights for recreation on New Mexico's public rivers and

streams. (Paddlers have no interest in dry arroyos or drainages within private property.) By failing to guarantee interested parties the right to put on live testimony, present evidence in person, and have the opportunity to cross examine witnesses, the Rule prevents the Commission from adjudicating the applications in a fair hearing. The Rule denies consideration of and does not allow the Commission to weigh pertinent evidence concerning the merits of an application. The Rule withholds adequate and fair due process to the Adobe Whitewater Club and its members. In doing so, the Commission deprives paddlers of their constitutional rights to travel downstream on New Mexico's public rivers.

Recommendation and Request. While the constitutionality of the Rule and the Commission's authority to have promulgated the Rule and privatized public rivers and streams pursuant to it is a live issue before the NM Supreme Court, the Commission would be ill-advised to add more river sections to the dubious five granted by the prior governor's Game Commission.

Let the New Mexico Supreme Court decide. Please disapprove the pending applications for the good cause summarized herein.

Sincerely,

/s/

Scott Carpenter  
President

Attachments: Sworn Affidavit of Scott Carpenter

Exhibits A through H

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- 5. Three Rivers Applications**

### **Affidavit of Scott Carpenter – Adobe Whitewater Club of New Mexico**

1. My name is Scott Carpenter. I currently serve as the President of the Adobe Whitewater Club of New Mexico.

2. The Adobe Whitewater Club of New Mexico is a 501C4 non-profit membership organization that promotes and advocates for recreational paddling opportunities for our members on waters throughout the State of New Mexico. Our members actively float and paddle all types of streams all over the State.

3. A river that may not be “navigable” for many is often the preferred type of river for our members. Small, lightweight rafts, kayaks, and canoes—both hard-shell and inflatable—can travel most sections of most rivers in the state. Thus, our members’ historical and future river use areas include the Rio Chama and Rio Chamita in Rio Arriba County. It also includes the Hondo and Berrendo Rivers in Chaves County, and the upper Pecos River in San Miguel County (upstream of, thru, and downstream of the River Bend Ranch).

4. The non-navigability designations proposed in these applications would shut down boating and recreational access for our members, depriving us of our constitutional rights to use and enjoy the public waters of New Mexico. The non-navigability designations made by the Game Commission in 2018 resulted in denial of safe paddling down reaches of the Rio Chama and the Upper Pecos River promoted by the State of New Mexico for recreational whitewater paddling. An Upper Pecos River tall pipe-with-interwoven-barbed-wire river-wide barricade that is a potential paddler death trap is flanked by concertina preventing downriver travel or portage. A cable across the Upper Rio Chama also is a paddler hazard and requires portage.

5. The Adobe Whitewater Club is also harmed by the near total deprivation of participatory rights in the Commission’s consideration of these pending applications. We would like to put on live testimony, present evidence in person and have the opportunity to cross examine witnesses. Moreover, the timing of the notice and comment periods have limited our

ability to review and fully comment on the applications. We feel that this is a rubber-stamp process by the Commission with a pre-ordained outcome.

6. I swear and attest under penalty of perjury under the laws of the State of New Mexico that the statements contained herein are true and correct.

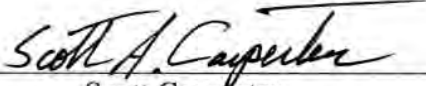
  
\_\_\_\_\_  
Scott Carpenter



Exhibit A





Exhibit B





Exhibit C





Exhibit D





Exhibit E





Exhibit F





Exhibit G





# New Mexico Whitewater

A Guide to River Trips





# New Mexico Whitewater

## A Guide to River Trips

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