



June 4, 2021

New Mexico Department of Game & Fish
Sharon Salazar Hickey, Chair
P. O. Box 25112
Santa Fe, NM 87504

Dear Commissioners:

The five applications for “certificates of non-navigability” that you, as Game Commissioners will be considering, have resulted from a well-funded six-year long campaign to selectively restrict recreational access to public waters. Your ruling on the applications will have profound implications for water-oriented recreation in New Mexico, in particular for recreational rafters, kayakers and canoeists. Recreational boaters feel that we have become collateral damage as Rule 19.31.22 is being applied to “private streambeds”. We are being barred from access to streams which we have heretofore enjoyed.

Proponents of privatizing and monetizing public water flowing down New Mexico's rivers and streams that cross private property have litigated against the Game Commission seeking to obtain your approval of their pending applications, through a federal magistrate's order. It is erroneous to assume that the Game Commission has the lawful power and authority to approve their applications. We examine the Department's statutory authorities, below.

While proponents and applicants seek to expand the Game Commission's number of non-navigable certificate holders, these same rivers have historically been promoted by the Energy, Minerals, and Natural Resources Department for recreational paddling. The Department's 1983 publication, *New Mexico Whitewater: A Guide to River Trips*, demonstrates that the Upper Pecos River and the Upper Rio Chama are indeed navigable-in-fact.

Recreationists (New Mexico Wildlife Federation, Backcountry Hunters and Anglers and the Adobe Whitewater Club of New Mexico) have petitioned the NM Supreme Court for a writ of mandamus and seek a ruling on the constitutionality of the Rule. The Game Commission is the original Respondent; the Supreme Court ruling is pending.

In the interim, the New Mexico Paddlers Coalition urges you to deny the present applications, or defer making judgement until the Court has ruled. Even absent the Court's determination, the Rule has significantly violated, and will continue to violate, due process rights and deny paddlers constitutional rights of stream access.

Who we are: The New Mexico Paddlers Coalition (NMPC) is a New Mexico non-profit corporation, whose governing board includes members of two statewide (Adobe Whitewater Club and New Mexico River Outfitters Association) and two national (American Canoe Association and American Whitewater) paddlers' organizations. The combined membership of the constituent groups have logged tens of thousands of miles of travel on New Mexico's rivers, and have long histories of defending individual paddler's rights of access to recreational rivers, in public forums, courts and legislatures throughout the United States.

Standing of organization: The mission of NMPC is to act as a public interest advocate defending recreational access to streams in New Mexico. Members of the NMPC have paddled nearly all of the 38 streams identified as "boatable" in canoe, kayak and raft, by the NM State Parks Division in 1983, which include sections that have been closed by the Commission under the provisions of the Rule in the past four years. Thus, we are substantially and specifically affected by the applications for certificates of non-navigable water.

We have also collected affidavits from a number of other paddlers, affirming that they have boated these streams or desire to do so.

Although it may not have been its intent, the Commission's "Landowner Certification of Non-navigable Water Rule" (19.31.22 NMAC) adversely impacts the paddling community. Two of the applications approved in November 2017 were swiftly followed by erection of barricades, creating impassable and dangerous obstacles, across runnable segments of the Rio Chama and Pecos Rivers. The Hersh posting included the Game and Fish Department-issued signage, along with another barring "operation of watercraft". The Hersh barricade (pictured on Page 4) is an indicator of what recreational boaters might face more frequently, should the Rule continue to be more broadly applied.

Importance of protecting public rights: The future shape of outdoor recreation in New Mexico, a matter of express economic and public health concern to lawmakers and administrators, is very much at stake in the present proceedings.

Restricting access to waterways runs counter to economic growth and outdoor equity policies of the state. In implementing the State Office of Outdoor Recreation (OOR), the New Mexico Economic Development Department has been tasked with realizing unmet potential in New Mexico's outdoor recreation economy. A primary OOR policy is to

expand outdoor opportunities to low-income minority communities. Reducing opportunities for recreational boating, which the Commission is effectively undertaking here, is entirely contrary to state policy.

The NMPC opposes the five new applications to be acted upon at the June 18, 2021 meeting of the Commission (i.e. River Bend Ranch, Rancho Oso del Pardo; Chama III, LLC; and Fenn Farms).

We ask the Chair of the Commission for leave to present evidence that the streams proposed for closure are navigable in fact (using the federal definition of this term), and offer other testimony against these applications.

NMPC asserts an original, state-granted right to enjoy public water, guaranteed in Article 16 of the New Mexico Constitution and confirmed by the New Mexico Supreme Court in *State Game Commission v. Red River Valley* (1945-NMSC-034, ¶ 48). We also assert that we enjoy a prescriptive easement to travel on rivers of the United States. Article IV of the US Constitution, the Commerce Clause, has been interpreted by the courts to convey a modern right for persons to travel on the navigable waters of the US (*The Daniel Ball*-USC 557-77 (1870)).

In addition to our objection to the Rule abrogating our rights, we note that there are many glaring deficiencies in the Rule which deprive all interested parties, including boaters, of due process protection and lead inevitably to improper and inequitable decisions concerning the closure of public waterways.

The Rule, absent clear authority, establishes a “sham process”:

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.

1. The Commission wrongly promulgated the Rule, assuming an authority which the Legislature did not intend it to have. Yet the previous Governor’s Game Commission still assumed the powers that the bill, as originally introduced, would have granted. To be clear: Senate Bill 226 (2015), as passed and signed into law, looked nothing like the proponents’ bill as introduced. The final bill added but one short paragraph concerning trespass to Game Commission law. That paragraph did not add, to the Game Commission’s statutory powers and authorities, anything pertaining to navigability or operation of watercraft.

In its original form as introduced, Senate Bill 226 (2015) contained six uses of the word navigable, two of which were included in this 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 (and represented a breathtaking overreach):

“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 Legislature declined to grant these sweeping provisions. Senate Bill 226 (2015) as passed (compiled at 17-4-6) simply states:

“Hunting and fishing on private property; posting; penalty:

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 lands has expressly consented in writing.”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 property.”

Nowhere in statute is there a grant of authority to the Department to enact the present Rule.

2. Nor does the Game and Fish Department’s enabling legislation support the Commission's arrogating to itself the power to make such determinations.

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. No Game Commission powers pertain to navigability of rivers and streams. None of the Game Commission’s powers or authorities pertain to blocking the operation of watercraft on trips downstream floating New Mexico’s public streams and rivers.”

An annotation to 17-1-14 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](#).”

3. The Rule erroneously characterizes the role of “navigability.” Whether or not a stream is navigable is not germane to the public's constitutional rights to the public waters of New Mexico. The NMPC believes that the Rule's treatment of the term serves no other purpose than to deny New Mexico downriver paddlers their constitutional rights.

In addition, the Rule deliberately conflates “navigation for title” with “navigation-in-fact” (Section 7.F). The federal test for navigability was established in the Daniel Ball case (USC 557-77):

“Rivers are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

The Game Commission's Rule definition of “navigable-in-fact” conveniently omits what is, for paddlers, a most important component of the federal definition, i.e. “susceptible of such navigation.” Reference to the year 1912, when New Mexico achieved statehood, may be relevant to the question of who owns a particular streambed, but not to a contemporary person's right to “trade and travel on the water.”

It is significant to note that at least 28 states have enacted statutes that expressly permit travel on any stream where travel is feasible. The Commission has no authority to and never should have attempted to truncate the definition of a legal term in the service of securing a closed section of a public river or stream.

4. The 1905 letter from Territorial Governor Otero to the Secretary of the Interior is improperly enshrined in the Rule (Section 8.B.4). If case-by-case consideration of an application is truly what is sought, it ought not declare that Otero's statement (that there are no navigable streams in New Mexico) provides “substantial evidence” of the condition of a specific stream segment under consideration. That is the very definition of a preordained conclusion since, under Otero, every mile of every public river or stream that flows into and out of private property could never be floated.

While, from our twenty-first century vantage, it may not be possible to parse Otero's intent for making his assertion, but it is certain to have been motivated by the complex political calculations of a Territorial Governor of the early 1900's. In Otero's time, water development was a dominant issue for New Mexico Territory, over which the Secretary has considerable authority. For example, in 1905, New Mexico was contending with Texas over whether a Rio Grande Dam would be sited in Engle, NM or the El Paso (TX) Narrows, a political contest which lasted for more than a decade and involved Congress and the other branches of Federal Government. The Secretary of the Interior was

authorized to issue a right-of-way to one project or another. Ultimately, it was the US Supreme Court that decided the outcome of this fierce interstate rivalry based, at least partly, on Otero's argument that the Rio Grande was non-navigable.

The Otero to Secretary of the Interior letter fails to meet the high standard of proof of non-navigability ascribed to it, but it certainly serves to unduly prejudice decision-making in favor of every applicant. While the Commission might well consider the Otero statement, it ought not be ascribed its special status in the body of the Rule.

5. The Rule creates the mere appearance of a hearing process when in fact any application which is correct in form must be accepted (Section 9.B). Under the Rule, correctly completing an application appears to be the only substantive standard for granting non-navigable water status. There is no apparent requirement to consider the merits of an application.

6. The Rule actually prevents the Commission from considering the merits of an application, by withholding adequate and fair due process from interests with standing. By failing to guarantee interested parties, such as ourselves, an opportunity to provide testimony and evidence in person (including cross-examination of witnesses), the Rule prevents a fair adjudicatory hearing. Without basic due process, the right to travel many of New Mexico's public rivers is too easily forfeited.

7. The Rule grants the Department's Director disproportionate power to determine the outcome of an application (Section 9.B.2). This seems especially egregious, considering that the Director may not have any of the requisite legal or scholarly qualifications to make any sort of informed determination concerning "non-navigability". It's the opposite of a fair adjudication on the merits of application.

8. The Rule grants Applicants a right of judicial appeal that it denies to other affected parties. This is a gross violation of due process and is illegal.

9. The Rule does not prescribe any fair process to evaluate an Applicant's submission, thus assuring its fundamental accuracy.

10. The required posting language (Section 13.D.3) is so misleadingly worded so as to conflate permitted activities (e.g. operation of watercraft) with the non-permitted activity (walking and wading onto private property). The manifest danger is that the successful applicant will be misled into creating hazardous barriers to lawful travel.

11. The process for merely providing this written comment at the June 18 proceeding is confounded by a tangle of conflicting deadlines. From beginning to end, the Rule sets up a public process that is inaccessible, prejudiced and illegal.

While the constitutionality of the Rule is currently being litigated before the NM Supreme Court, the Commission would be ill-advised to add more river sections to the five dubious certificates of non-navigability previously granted by the prior Governor's Game Commission.

Thank you for this opportunity to comment and for your consideration of our testimony.

Sincerely,

Sherry Barrett, Chair, New Mexico Paddlers Coalition

Scott Carpenter, President, Adobe Whitewater Club

Norm Gaume, NMPC Stream Access Committee Chair

Steve Harris, Director, NM River Outfitters Association

Hattie Johnson, Southern Rockies Stewardship Director, American Whitewater

Donna Koechner, River Runner, NMPC Board

Robert Levin, NM Director, American Canoe Association

Laurie McCann, River Runner, NMPC Board



Barbed and concertina wire erected across one of NMDGF's "certified non-navigable streams".