



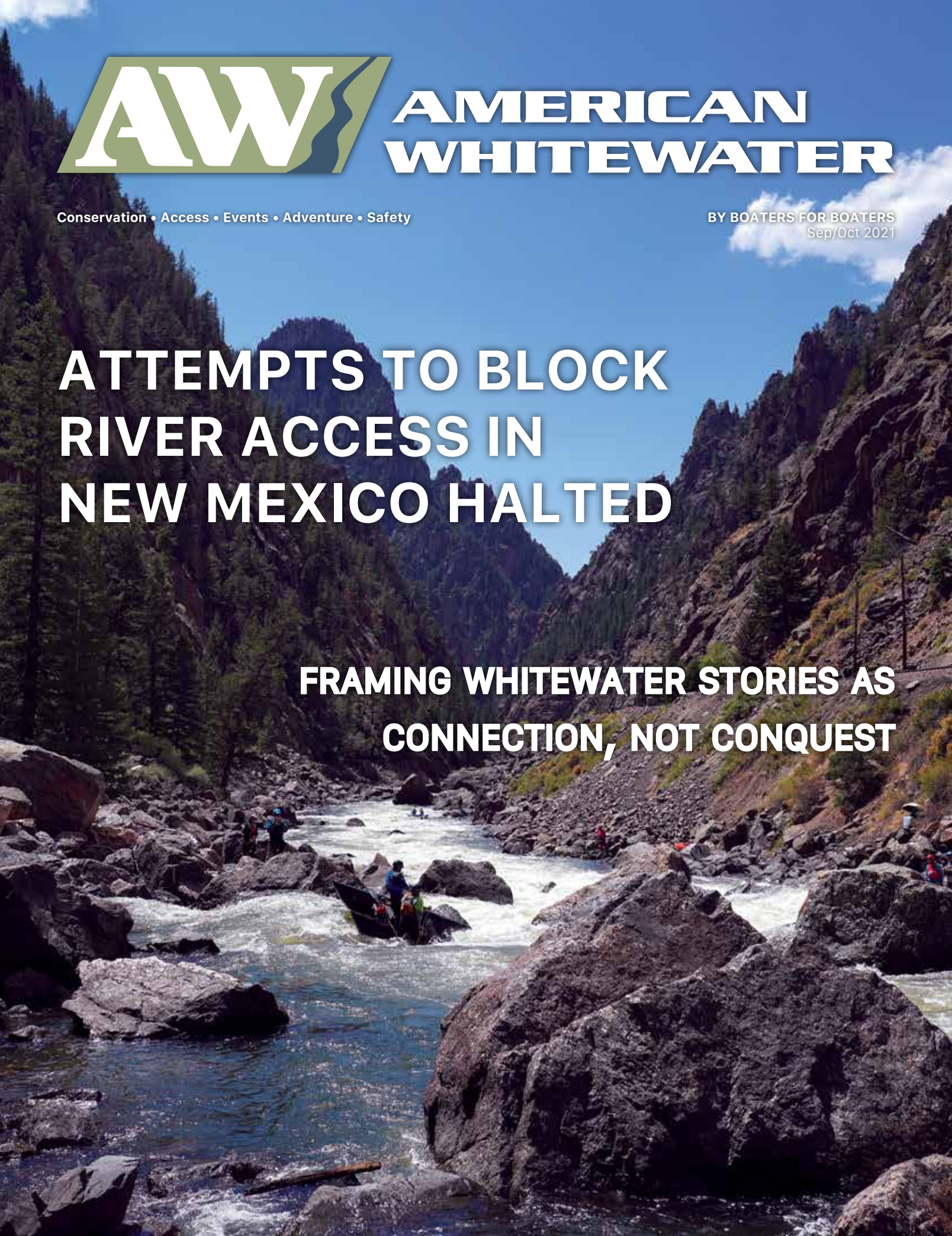
AMERICAN WHITEWATER

Conservation • Access • Events • Adventure • Safety

BY BOATERS FOR BOATERS
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ATTEMPTS TO BLOCK RIVER ACCESS IN NEW MEXICO HALTED

FRAMING WHITEWATER STORIES AS CONNECTION, NOT CONQUEST



THE WAR TO PROTECT PUBLIC LANDS AND WATER WINS A BATTLE IN NEW MEXICO

BY HATTIE JOHNSON

IN A MEETING at the state capitol in Santa Fe the morning of August 12th, 2021, the New Mexico Game Commission voted unanimously to reject five pending applications for non-navigable water status—a process that has resulted in closing off whitewater segments to boating with concertina wire fences and dangerous diversions since its inception in 2017.

The rule was the result of a 2015 bill that sought to establish private ownership of public waters that run through private land. When the legislature declined to authorize this sort of privatization scheme, the State Game Commission instituted the rule that allows for private landowners to apply for non-navigable waters and subject those passing on “their” streams to criminal trespass.

At the forefront of the fight for both the state law and agency rulemaking is Texas oil and mineral lawyer, Dan Perry. After purchasing Trout Stalker Ranch on the Rio Chama and Chamita in 2011, Perry was actively involved in the consideration of the 2015 bill, arguing that protection and conservation of our lands depends mainly on private landowners. This anti-public land rhetoric is also used by groups like the Western Landowners Alliance and their partner organization, Property and Environment Research Center, whose president developed a “Blueprint for Auctioning off all Public Lands.” After working with the state’s governor to secure \$8M in public funds for clean-up and restoration of the river on his property, Perry’s efforts shifted to ensuring that work would be accessible only by those who paid for permission to access his land.

The New Mexico constitution gives the legal right to paddle all New Mexico rivers and streams. The constitution states, “[T]he unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public....”

The State Game Commission acted far beyond its authority when it promulgated the rule in 2017. Rivers once promoted by the New Mexico State Parks Division in their publication, “New Mexico Whitewater - A Guide to River Trips,” are now being blocked by private landowners with barricades, cables, and No Trespassing

signs. The closures now include portions of the upper Chama and Pecos Rivers.

In April 2020, an American Whitewater Affiliate Club and partner, the Adobe Whitewater Club (AWC), joined New Mexico Wildlife Federation and Backcountry Hunters and Anglers to petition the New Mexico Supreme Court to uphold the constitutional rights of the people to access our public waters, even where they cross private lands.

The vote this August came on the heels of a dramatic meeting in June at which the commissioners were slated to review the five new applications. In a surprise turn of events, the chairwoman, citing a potential conflict of interest, pushed back the hearing until this most recent vote on August 12. American Whitewater, as a member of the New Mexico Paddlers Coalition (AW, ACA, AWC, and New Mexico River Outfitters Association) and in partnership with organizations such as New Mexico Wilderness Alliance and New Mexico Wildlife Federation, has been providing detailed comments to the commission identifying that not only are the proposed “non-navigable” segments of river in fact navigable, but that granting them this status would likely also violate the New Mexico constitution, which protects all unappropriated waters of the state as belonging to the public.

Jeremy Vesbach, vice-chairman of the commission, said he couldn’t vote to approve any of the applications.

“I think it’s a denial of the public’s constitutional right to deny access to the streambed,” Vesbach said. He added that it’s well known that people have floated watercraft on several of the rivers at issue.

Commissioner Tirzio Lopez held up a copy of his signed oath of office.

“This piece of paper here is the oath I took on becoming a New Mexico state game commissioner,” Lopez said. He proceeded to read the portion that says the unappropriated water of the state belongs to the public.



Commissioner Jimmy Bates, the lone Republican on the commission, voted to deny the applications but made no comment.

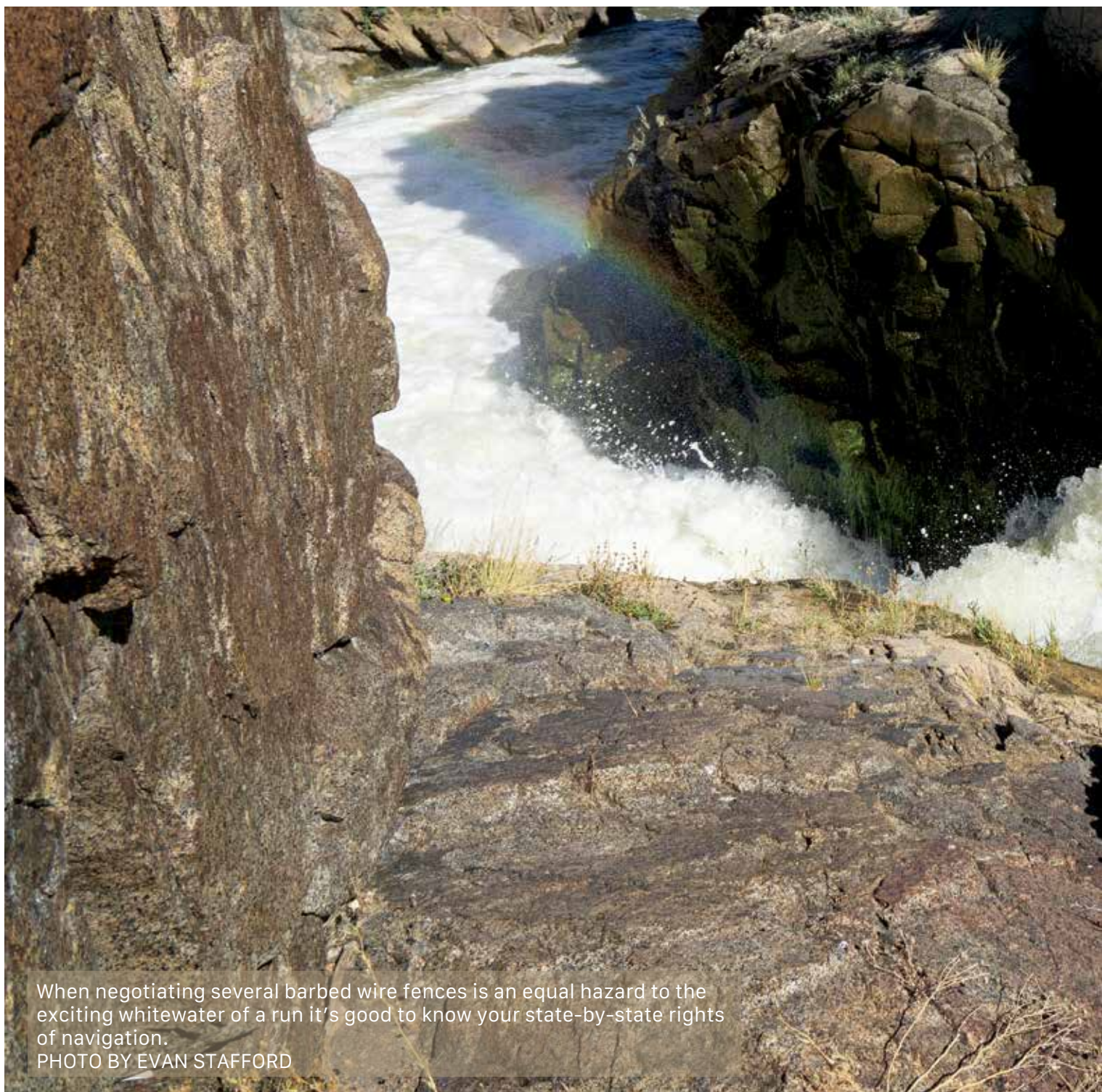
Commission Chair Sharon Salazar Hickey abstained from the votes, noting that the New Mexico Wildlife Federation and other groups have a pending legal challenge against the certification program.

This is an enormous win but only a single battle in the ongoing war to preserve the lawfully protected right for the public to access its rivers and streams. Unfortunately, this is far from over. We are still awaiting a decision from the New Mexico Supreme Court on the constitutionality of the rule that made these applications possible.

Proponents of the Non-navigable Waters certifications in New Mexico claim their intention is not to impede paddlers passage but is only to stop contact with the bed or banks of the river. Not only have barbed wire fences and signage disallowing the use of "watercraft" popped up in response to certified non-navigable applications, access to the bed and banks is essential to paddlers.
PHOTO BY SCOTT CARPENTER



Boaters on the Rio Chama, pictured here, have to get creative to safely pass this run.
PHOTO BY SCOTT CARPENTER



When negotiating several barbed wire fences is an equal hazard to the exciting whitewater of a run it's good to know your state-by-state rights of navigation.
PHOTO BY EVAN STAFFORD

A **AMERICAN WHITEWATER'S ACCESS** policy, as a part of our river stewardship program, has sought to ensure rights of public access to rivers and streams for recreational use by human-powered watercraft including kayaks, canoes, and rafts. As a part of American Whitewater's mission, we've also sought to improve citizens' knowledge of the rights Americans have to access and float our nation's rivers and streams. In 2000, American Whitewater first published a navigability toolkit as a starting point for creating this pool of knowledge. In 2007, we were proud to publish the Second Edition of the Navigability Toolkit. As time has passed and access issues in a handful of states have become more and more common and navigability laws have been tested, we decided it was time to revamp the toolkit and make sure our community knows it's available for their benefit.



AMERICAN WHITEWATER UPDATES ITS STATE-BY-STATE NAVIGABILITY RIGHTS TOOLBOX

BY EVAN STAFFORD

Recently, an American Whitewater team of legal volunteers revisited the navigability statutes for all 50 states and researched relevant new case law that state courts have developed to define the scope of the public's rights to access and float rivers across the country. The result is a new and updated Third Edition of the American Whitewater Navigability Toolkit for 2021. We're excited to publish this new edition of the Navigability Toolkit, which was edited and updated by a team of attorneys at Morgan, Lewis & Bockius LLP. We hope that through building this knowledge base among both the whitewater community and land owners, we can reduce conflicts and support responsible enjoyment of our country's rivers and streams.



Like many western states, New Mexico has many livestock fences that create issues for paddlers and don't always have a Game and Fish Department certification prior to being put up. A durable solution is needed to remove unnecessary fences and retrofit livestock fences with paddler-friendly solutions.

PHOTO BY SCOTT CARPENTER

Opposite: Despite these signs, you have a constitutional right to float the Pecos, New Mexico.

PHOTO BY SCOTT CARPENTER

The public's right to access rivers has been controversial most likely since the concept of "property law" was created. Current laws on navigability in the United States were, and are still, influenced by the Institutes of Justinian, ancient English judicial opinions, the Northwest Ordinance, the obscure "equal footing" doctrine, and theories enunciated by the Supreme Court in the 1870 Daniel Ball case. Times have changed significantly since navigability laws in this country were established and digging for clams in the streambed, building docks, piloting barges, and floating logs downstream are no longer the sole focus of navigability law, precedent, or conflict. Legal opinions and precedents surrounding river access have multiplied and at times become more complex, while attempts to establish recreational use and the public's enjoyment of rivers for swimming, floating, sport fishing, kayaking, and canoeing now form the basis of modern navigability law.

Meanwhile, rivers continue to see more use and riverside lands have become more developed. Dams and diversions, timber and mining operations, outfitters, and private residences have been, and continue to be, built along riverbanks, at times causing conflicts with public river users. Laws, such as the recent river privatization law in New Mexico and New Mexico State Game Commission Rule that attempted to certify streams as "non-navigable" (see *The War to Protect Public Lands and Water Wins a Battle in New Mexico* pg. 6), have sought to circumvent and undermine the public's right to access and float rivers in multiple states. American Whitewater has played an active role in standing up for the public's navigability rights, utilizing this guide alongside our legal team of volunteers in states where these issues have cropped up.

We hope this Toolkit helps clarify some of the rights of the public to access and use the rivers and streams in the fifty states and Puerto Rico. Our intention is for the information in this handbook to serve as a starting point for educating the reader on navigability law in general and will contribute to a reduction of conflicts and more enjoyable relationships between river users, managers, landowners, and others with an interest in these resources. The "law" is always changing, and therefore all of the information contained in this guide needs to be reconfirmed prior to going to any court. This Toolkit is only as up to date as its publish date and this resource does not replace proper legal representation if you were ever to become entangled in an access dispute. It is intended to provide a non-definitive resource to assess your state-by-state navigability situation and to help create an understanding about where it is and is not appropriate to assert navigability rights, with the hope of saving the whitewater community a bit of the hassle in potential future conflicts. To access the Third Edition of the Navigability Toolkit please visit www.americanwhitewater.org/content/Wiki/access:start?

