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June 24, 2013

Grand Teton National Park
PO Drawer 170
Moose, WY 83012-0170

Re: Snake River Headwaters Comprehensive River Management Plan and EA (Project ID: 31397, Document ID: 53254)

Dear Park and Refuge Planners,

American Whitewater is pleased to offer our comments on the Draft Comprehensive River Management Plan and Environmental Assessment for the Snake River Headwaters. American Whitewater is a national non-profit organization dedicated to protecting and restoring our nation's whitewater resources while enhancing opportunities to enjoy them safely. Since 1954 we have been a leading advocate for the conservation of our country's wildest rivers, and have played a large role in the designation and management of many Wild and Scenic Rivers.

In the attached comments we highlight flaws in the CRMP, and seek protective, legal, and nationally consistent management of the Snake River Headwaters. We look forward to working in partnership with you on the management of these spectacular rivers.

If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin R. Colburn', written in a cursive style.

Kevin R. Colburn
National Stewardship Director
American Whitewater

Table of Contents

<i>Comments of American Whitewater on the Draft Comprehensive River Management Plan and Environmental Assessment for the Snake River Headwaters</i>	3
<i>Introduction</i>	3
<i>1. The NPS and USFWS failed to meet the legal and procedural standard for excluding an alternative from further consideration under NEPA</i>	5
<i>2. The NPS and USFWS erred in excluding an alternative from further consideration based on a misinterpretation of Section 10(c) of the WSR.</i>	7
<i>3. The NPS and USFWS erred in excluding an alternative from further consideration based on a misinterpretation of Section 10(a) of the WSR.</i>	9
<i>4. The CRMP wrongly limits current paddling management based on historic fisheries management actions.</i>	11
<i>5. The CRMP failed to include a legitimate visitor capacity analysis in violation of the WSR.</i>	12
<i>6. The NPS and USFWS erred in concluding that paddling conflicts with USFWS mission or policies.</i>	15
<i>7. The NPS and USFWS violated NEPA by excluding an alternative from further consideration because the analysis would not be cheap, easy, or produce an outcome favored by the Parks.</i>	17
<i>8. The CRMP wrongly concluded that the Wild and Scenic Rivers Act and Craig Thomas Snake Headwaters Legacy Act do not suggest that boating should be allowed on Wild and Scenic Rivers.</i>	17
<i>9. The CRMP promotion of paddling bans is inconsistent with NPS policy</i>	18
<i>10. The NPS proposed management framework would support sustainable paddling of the Parks' and USFWS's new WSRs.</i>	22
<i>Conclusion</i>	22



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Comments of American Whitewater on the Draft Comprehensive River Management Plan and Environmental Assessment for the Snake River Headwaters

Introduction

In the Draft Comprehensive River Management Plan and Environmental Assessment for the Snake River Headwaters (CRMP), the National Park Service (NPS) and US Fish and Wildlife Service (FWS) recognized that during the scoping period, American Whitewater asked the agencies to consider allowing recreational boating on the recently designated river reaches where boating is currently prohibited. (CRMP 58.) Those sections include the upper Snake River and lower Lewis River segments in Yellowstone National Park, the Pacific Creek and Buffalo Fork segments in Grand Teton National Park, and the Gros Ventre River segment on the boundary between Grand Teton National Park and the USFWS National Elk Refuge. (*Id.*)

Throughout the National Park System, Yellowstone and Grand Teton National Parks are unique in their treatment of human-powered boating. They remain the only two units in the National Park System which have implemented and maintain such large-scale boating bans. In contrast, most other National Parks with outstanding boating opportunities either actively manage boating (e.g. Grand Canyon) or include it as just another use, subject to the same regulations as other human-powered and non-mechanized recreation (e.g. Olympic, Great Smoky Mountains, Glacier, Denali, Black Canyon of the Gunnison, Big Bend, Kings Canyon, Mount Rainier, North Cascades, Sequoia, etc.).

Similarly, there are currently no other designated Wild and Scenic Rivers with blanket bans on human-powered boating anywhere in the country. Many Wild and Scenic Rivers do, however, require management to limit overnight use. These rivers include popular multi-day backcountry rivers like the Salmon, Selway, and Middle Fork of the Salmon in Idaho, and the Colorado River through Grand Canyon National Park. Like many rivers in the National Park system, however, many Wild and Scenic Rivers—whether managed by the United States Forest Service, NPS, BLM, or the USFWS—are suitable for day use and

therefore do not require permits. Examples of rivers that fall into this category include the Lochsa River in Idaho, sections of the Clark's Fork of the Yellowstone in Wyoming, and sections of the Flathead River in Montana.

Yet, despite the nearly universal accessibility of federally-managed rivers—both Wild and Scenic and others located both inside and outside National Parks—Yellowstone and Grand Teton river policy remains an anomalous example of federal management that bars one of the lowest impact forms of recreation: human-powered floating. Therefore, in light of the Wild and Scenic designation of stretches inside those Parks, and consistent with the policy mandates of the Wild and Scenic Rivers Act (WSRA) and NPS itself, Yellowstone and Grand Teton have a terrific and mandatory opportunity to revisit their river management objectives on those reaches in the CRMP.

But instead of carefully and seriously considering American Whitewater's and other submitted proposals, the draft CRMP classified the request as an "alternative considered but dismissed from detailed evaluation." (*Id.*) In the 456-page draft CRMP, boating was considered and then dismissed in less than three pages. (CRMP 58-60.) The NPS and USFWS offered three general reasons why boating was dismissed from detailed evaluation: (1) boating conflicts with existing Park regulations; (2) the existing boating "restrictions contribute to the protection of values for which rivers were designated;" and (3) recreational boating would conflict with the mission of the national elk refuge and national wildlife refuge system. Each of these rationale are flawed, and violate federal law, policy, common sense, and the trust that must exist between conservation-oriented Americans and our federal land managers.

Importantly, the CRMP proposes a robust monitoring protocol aimed at protecting the rivers based on strict social and environmental standards. These measures will protect and enhance the Outstanding Remarkable Values (ORV's) of the Wild and Scenic Rivers (WSRs), and thus we applaud them. These measures also render the existing paddling bans completely unnecessary, and provide a protective framework for allowing sustainable paddling on the WSRs.

In addition, visitor capacities were arbitrarily set at current use levels in the CRMP, rendering the Visitor Capacity Analysis invalid.

American Whitewater, representing the interests of conservation-oriented Americans that connect with nature through paddling rivers in kayaks, canoes, and inflatables, looks forward to working with the NPS and USFWS to correct these errors. We are confident that each of the WSRs has some capacity to sustainably welcome visitors who seek simply to float down those stretches and experience their scenic, geologic, wildlife, and other wonders. American Whitewater requests in these comments that the agencies include paddling among the suite of recreation opportunities open to WSR visitors, and conduct a fair and valid visitor capacity analysis.

1. The NPS and USFWS failed to meet the legal and procedural standard for excluding an alternative from further consideration under NEPA

The CRMP excludes paddling on most of the WSR's from further consideration in any alternatives "because it conflicts with long-standing parkwide and refugewide management and regulations established under the general statutory authorities of the National Park Service." The regulations referred to are 60+ year old regulations that prohibited paddling explicitly and solely to prevent overfishing.¹ (See Section 4 of these comments)

CEQ NEPA regulations at 40 C.F.R. § 1502.14 require the NPS and USFWS to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." CEQ further elaborates that reasonable alternatives are "practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."²

By excluding paddling alternatives from detailed consideration, the CRMP is in direct violation of NEPA based on the above standards. The NPS has not claimed that allowing boating would be infeasible, and indeed any such finding would fail the tests of common sense and reasonableness that are core to NEPA. Likewise, allowing the public to enjoy Wild and Scenic Rivers by boat is common sense, as evidenced by the general lack of paddling prohibitions across NPS, private, and other public lands. The NPS and USFWS have, and offer in the CRMP, no evidence that allowing paddling would be infeasible. Rather, the NPS eliminated paddling from consideration because paddling is prohibited by an outdated and unsupported NPS regulation that is over 60 years old, and the USFWS followed suit based on its own regulatory latitude under 50 CFR 25.21.

The National Park Service implements NEPA based on the Department of Interior Handbook on NEPA implementation, DO-12. The Handbook is clear that "[t]he processes described in this handbook are binding on all NPS personnel." (Handbook 2, <http://planning.nps.gov/document/do12handbook1.pdf>.)

The Handbook specifically states that alternatives *must be included* in analysis if they are feasible, even if they are "in conflict with a law," or "outside those alternatives provided for by a GMP or other park planning document (particularly if the plan or policy is older or no longer applicable to the issues the park is now facing (1500.1 (a))." (Handbook 21)

¹ 36 CFR 7.13(d)(4ii) for Yellowstone National Park, and 36 CFR 7.22(e)(2-3) for Grand Teton National Park.

² <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol34/pdf/CFR-2012-title40-vol34-sec1502-14.pdf>.

Thus, the NPS has violated this clear and mandatory directive by eliminating feasible boating alternatives from analysis under NEPA for the explicitly prohibited reasons stated above. Specifically, the CRMP errs by claiming that paddling alternatives are out of scope because they would require updates to Park regulations and policies:

Reevaluating the existing regulations and restrictions would require significant review and potential revision of existing policies and plans, as well as additional planning and other processes well outside the intent of the Wild and Scenic Rivers Act and the river designations. It thus does not meet the purpose and need for this planning effort and is beyond its scope. (CRMP 59)

But CEQ and the Handbook consider and prohibit reliance upon this exact argument:

[Conflicts with law, policy, or GMP's] often are obstacles to implementing an action, because a law may need to be changed, an applicant may need to modify a proposal, or Congress may need to rethink approval or funding. However, CEQ notes that the EA or the EIS analyzing such alternatives may serve as the vehicle for such change. (Handbook 21.)

NPS and CEQ Policy regarding NEPA implementation is clear: when a regulation conflicts with a reasonable alternative, that alternative should be considered, and in concert, the agency must consider updating the regulation. This is especially true when the regulation is older or no longer applicable, which is the case in this instance. The CEQ rules on NEPA apply equally to the USFWS, who are also in violation of NEPA under these rules.

In addition to violations of agency policies and NEPA, the CRMP also violates the Administrative Procedures Act (APA). The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”³ “Agency action” includes any agency rule “or failure to act.”⁴ If an agency fails to follow through on its statutory obligations, a reviewing court can “compel agency action unlawfully withheld or unreasonably delayed.”⁵ Here, NPS has failed to follow through on its NEPA obligations as defined in the DO-12 Handbook and the 2006 Management Policies. It has failed to actually conduct a relevant user capacity analysis related to boating. Most importantly, it has failed to seriously consider boating, and has rejected it based solely on an existing regulation that bears little relation to the current management objectives of the NPS.

Likewise, NPS’s failure to seriously consider a demonstrably reasonable alternative violates the mandates of the APA. Under the APA, a court may set aside an agency’s

³ 5 U.S.C. § 702.

⁴ 5 U.S.C. § 551; See also *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S. Ct. 2373, 2378, 159 L. Ed. 2d 137 (2004).

⁵ 5 U.S.C. § 706(1).

actions, findings, or conclusions if they are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.⁶ It may also do so if the agency's actions are "without observance of procedure required by law" or if the agency decision is "unwarranted by the facts."⁷

The NPS's actions in declining to seriously address a reasonable alternative fail under any of these tests. Under the "arbitrary and capricious" standard, a court may set aside an agency decision when the agency fails to examine the relevant data and articulate a satisfactory explanation for its action.⁸ Further, courts will not accept an agency's post hoc rationalizations for its actions—the action may only "be upheld, if at all, on the basis articulated by the agency itself."⁹ In this case, there is no record—only NPS's reliance on its existing regulations, which, as the DO-12 Handbook makes clear, is insufficient under NEPA and under the DOI's own mandates.

The NPS and USFWS erred and violated federal law and policy in eliminating boating, which is a reasonable alternative, presented by American Whitewater during scoping, from detailed NEPA analysis. The legal path forward is for the NPS to fully consider paddling among the mix of visitor activities on the WSRs and to consider, at the same time, overturning the outdated, harmful, and unnecessary regulation that currently prohibits paddling on the Park's rivers.

2. The NPS and USFWS erred in excluding an alternative from further consideration based on a misinterpretation of Section 10(c) of the WSRA.

Section 10(c) of the Wild and Scenic Rivers Act (WSRA) states that:

The lands involved shall be subject to the provisions of the chapter and the Acts under which the national park system or national wildlife system, as the case may be, is administered, and in the case of conflict between the provisions of this chapter and such Acts, the more restrictive provisions shall apply (16 USC § 1281(c)).

The CRMP argues that Section 10(c) of the WSRA grants priority to the 1950's regulations that prohibit paddling over the entirety of the WSRA.¹⁰ This is not the case. Section 10(c) grants priority to the "Acts" under which the National Park System and Wildlife Refuge System are administered. An "Act" in this legal context is an Act of the US Congress, in

⁶ 5 U.S.C. § 706(2).

⁷ *Id.*

⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

⁹ *Id.* at 50.

¹⁰ The CRMP specifically cites 36 CFR 7.13(d)(4ii) regarding Yellowstone, 36 CFR 7.22(e)(2-3) regarding Grand Teton National Park, and 50 CFR 25.21(a) regarding the National Elk Refuge.

other words, legislation passed by Congress and signed into law by the President. The NPS regulations that prohibit paddling are not “Acts,” they are merely regulations and are thus are not contemplated by Section 10(c) of the WSRA.

The “Act” that governs the administration of the National Park System is the National Park Service Organic Act, which with regards to management states:

The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (16 U.S.C. § 1).

Like the Wild and Scenic Rivers Act, the NPS Organic Act states a general mandate to promote and provide for sustainable recreation. The Wild and Scenic Rivers Act specifically requires the NPS to “protect and enhance” various values, while the NPS Organic Act requires various values remain unimpaired. On its face, a “protect and enhance” standard is more restrictive and protective than a standard that merely requires that values remain “unimpaired.” Both require that protective mandates be met while allowing for recreation to occur. Thus, the NPS Organic Act is in no way “more restrictive” than the Wild and Scenic Rivers Act.

The National Park System General Authorities Act of 1970 also governs the administration of the National Park System. This Act reiterates that the Parks are to be “preserved and managed for the benefit and inspiration of all the people of the United States...” (16 U.S.C. § 1a-1.) The Act further prohibits the “derogation of the values and purposes for which these areas have been established.” (*Id.*) Again, this language largely mirrors the NPS Organic Act and the Wild and Scenic Rivers Act, and is in no way more restrictive.

The enabling legislation for Yellowstone simply states that the Park be “dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people.” (16 U.S.C. § 21.) This mandate is certainly not more restrictive than the WSRA. The enabling legislation for Grand Teton National Park simply defers to the NPS Organic Act. (16 U.S.C. § 406d-1.)

Nothing in these Acts infers boating should be prohibited in the National Parks. Each of these Acts is less specific and less restrictive than the WSRA, and they do not conflict with the WSRA, therefore the WSRA applies without challenge or interference by NPS Acts. Section 10(c) of the WSRA therefore does not grant deference to the NPS Acts, and especially does not allow any NPS regulation to control administration of the WSRA when that regulation is inconsistent with the purposes of the WSRA.

The “Act” that governs the National Wildlife Refuge System is predominantly the National Wildlife Refuge System Administration Act, 16 USC § 668dd. This act states:

compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife[.]

Later, in 16 USC § 668ee, it is confirmed that “wildlife-dependent recreation” is “use of a refuge involving...wildlife observation and photography....” Obviously, paddling is a superb manner in which to observe wildlife and take pictures. In addition:

The term “compatible use” means a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge. (*Id.*)

The Director of the US Fish and Wildlife Service has supported paddling as a compatible use across the System, and there is no basis for finding otherwise. Most importantly, this simple non-degradation standard is not more restrictive than the WSRA.

The enabling legislation for the Elk Refuge states only that the land be managed for “the grazing of, and as a refuge for, American elk and other big game animals.” (16 USC § 673.) The USFWS offer no evidence that visitors choosing to paddle rather than fish or hike would have any unacceptable impact on these species. Furthermore, this Act is not more restrictive than the WSRA.

Nothing in these Acts infers boating should be prohibited on the National Elk Refuge. Each of these Acts are less specific and less restrictive than the WSRA, and they do not conflict with the WSRA, therefore the WSRA applies without challenge or interference by USFWS Acts. Section 10(c) of the WSRA does not grant deference to the USFWS Acts, or any USFWS regulations.

3. The NPS and USFWS erred in excluding an alternative from further consideration based on a misinterpretation of Section 10(a) of the WSRA.

The CRMP erroneously claims that “long-standing [paddling] restrictions protect and contribute to the values for which these particular rivers were designated; thus, eliminating these restrictions would be inconsistent with the purpose of this planning effort. (CRMP 58.)

This claim is made under Section 10(a) of the Wild and Scenic Rivers Act which states:

“Each component of the wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.”

Recreation is a value that led to designation on the WSR's, and river access and use—including paddling—is explicitly stated as a value in the Snake River Headwaters Act. (See also Section 8 of these comments.) The NPS, in managing recreation, is charged with promoting river-related forms of recreation. It is arbitrary and capricious to state that paddling should be excluded from the range of river-related forms of recreation that should be promoted simply because an unsupported policy has previously banned paddling. The WSRA does not freeze use types and capacities at the time of designation, and in claiming it does the CRMP conveys a deep misunderstanding of the Act.

Regardless, even if the NPS continues to assert that paddling is not a component of the recreation ORV, the standard for limiting a non-ORV use under the WSRA is *substantial interference* with public use and enjoyment of the values. The substantial interference standard is an extremely high bar. The CRMP, however, offers absolutely no evidence that paddling would substantially interfere with public use and enjoyment of the values.

The reality is quite the opposite. Allowing paddling would grant the public direct experiences of the WSRs. Rivers are more than just scenery—they are lively natural water trails that people have been travelling for thousands of years. Paddlers would have unequalled front row seats to the many ORV's of each river, and the recreation ORV would be greatly enhanced by allowing low impact and human-powered paddling to occur.

Rather than evidence of substantial interference, the CRMP simply claims that the rivers on which boating is prohibited “provide an opportunity to experience solitude and the wild nature and scenery of these areas without the sights or sounds that recreational watercraft would present.” (CRMP 59-60.) This claim is unfounded.

First, solitude is best measured via the number of encounters a visitor experiences. It is important to note that the solitude of a person paddling is just as important as the solitude of any other person, and that paddling has no unique impacts on solitude. The CRMP offers no evidence or rationale that indicates how allowing paddling in concert with other recreational uses would increase encounters or diminish solitude. Capacities and standards in the plan govern the number of visitors and indirectly the number of encounters. These management tools are more than capable of managing encounters between paddlers and other visitors. In many cases, paddling occurs out of sight of a trail or road, and allowing paddling may thus reduce encounters that would otherwise occur under the same capacity.

Second, the CRMP offers no evidence that the sights and sounds of paddling negatively affects the wild nature and scenery of a river. Paddling is a virtually silent activity, rendering the NPS claim about soundscape impacts wholly irrational. As for the sight of a person floating a river, the NPS has no evidence that a) other visitors would encounter paddlers to any significant extent, or that b) those encounters would be negative. It defies logic that a limited number of people simply floating down a river would “substantially interfere” with other visitor’s enjoyment. Due to terrain and limited river access, paddlers would be seldom seen. When seen, encounters would be brief, quiet, and compatible. Casual tourists would be more likely to raise their cameras than lower them when a paddler quickly and quietly floats by.

Paddling exists on virtually every other river, and every other National Park and Wilderness area in the country without evidence of “substantial interference” with other visitors. Quite the opposite: paddling is a celebrated and promoted form of river enjoyment that is compatible with other forms of travel and recreation in even the most wild and protected landscapes on the continent. The weight of precedent and the common sense evidence shows that unfounded claims that paddling would substantially interfere with other visitors are arbitrary and capricious, and in violation of the APA.

4. The CRMP wrongly limits current paddling management based on historic fisheries management actions.

In reconsidering the regulations currently prohibiting paddling on the WSRs, as is required by law and policy, the origins of the prohibitions will provide critical insight.

The paddling prohibitions in Yellowstone and Grand Teton National Park were not enacted in response to any concern over negative impacts from recreational floating. Rather, they were enacted solely in response to significant fishing pressure. The regulation dates to 1950, and in that year’s Yellowstone Annual Report, the NPS stated that:

[h]eavy fishing pressure exerted on park waters during the post war period made it necessary to add two new provisions to the park regulations....the second prohibits the use of boats on park streams. These new regulations, which became effective on the opening of the fishing season on May 30, 1950, and the limit of take of five fish per person per day, which became effective a year earlier, have met with general approval of anglers and others who are interested in the protection of sport fishing in park waters.

The following year, the 1951 Superintendent's Compendium stated:

The provision of the boating regulation in effect during the 1950 season which prohibited the operation of boats on park streams was most

beneficial to the fish in that part of the Yellowstone River between Fishing Bridge and Canyon. Fish can now find refuge in those parts of the stream which are not accessible to fishermen who wade of [sic] fish from the stream banks. (1951 Compendium at 36.)

These fish protection measures became more formal regulations in Yellowstone in 1959, and were carried over to Grand Teton National Park in 1962, which subsequently formalized them as regulations in 1971.

Thus, the boating closures were intended as an indirect limit on fishing and were not created in response to any impacts associated with merely paddling a river or stream. This is perhaps understandable in the early days of river management, but no longer. Today, state and federal agencies employ a suite of direct and indirect limits on fishing activities with a high degree of success, and nowhere else do these involve banning paddling. Rarely, an agency will prohibit fishing from a boat as a limit on fishing, but never the act of boating itself. Banning boating to prevent overfishing is an unnecessary, outdated, and arbitrary management tool. The Parks no longer need to bar citizens who want to float the rivers within their borders to protect fisheries.

According to current Yellowstone statistics, approximately 50,000 Park visitors fish inside the Park boundaries every year.¹¹ What this historical record shows, when combined with current usage statistics, is that NPS has determined that while 50,000 people fish in the Park every year, none may float down Park rivers—even if they don't fish. The Wild and Scenic planning process offered NPS an ideal opportunity to revisit this clearly arbitrary distinction, but it failed to do so.

5. The CRMP failed to include a legitimate visitor capacity analysis in violation of the WSRA.

As the CRMP notes, all CRMPs must include a visitor capacity analysis that states “the kinds and amounts of public use that the river can sustain without impact to the values for which it was designated.” (CRMP 47.) This language, as well as the 2008 Merced River Lawsuit, as described on pages 47 and 48 of the CRMP, clearly requires the NPS to “deal with and discuss the *maximum* number of people that can be received at a WSR” (emphasis added).

The CRMP fails to accomplish this task. Instead, the CRMP estimates current use and arbitrarily considers that amount of use the *maximum* capacity of the river. The CRMP states that under the preferred alternative “[m]aximum amounts of visitor use remain the same as current conditions.” (CRMP 164.) For most reaches this *maximum* use is characterized as a *low* level of visitor use with *minimal* impacts. The table below conveys this paradoxical treatment of visitor capacity.

¹¹ See <http://www.yellowstone.co/fishingregs.htm> (accessed Jan. 25, 2013).

Table 1: NPS claims that current use levels equate to the capacity of each river reach.			
River Segment	CRMP Capacity	Rationale	Description of Current use
Upper Lewis (p.165)	1300 people, 800 boats, 319 anglers per year. 21 campsites, 164/night. 240,541 vehicles (p.110)	Current Peak Use	Currently low levels of use. "Currently, visitor use levels are low in this segment." (p.108)
Lower Lewis (p.166)	138 Anglers Per Year. Zero paddlers.	Current Peak Angling Use	Currently low levels of use. "Due to the transient nature and low levels of visitor use along the river, impacts on river values related to these activities are minimal." (p.110)
Snake (In Yellowstone) (p.167)	107 backcountry permits/year. 84 people per night. 106 pack animals. Zero paddlers.	Current Use (2006-2010)	"Hiking and fishing uses are not limited and are relatively low in this segment." (p.112)
Snake (at Flagg Ranch)(p.167)	97 RV, 74 tent site cap. 92 room cap. 3 sites / 36 people backcountry cap.	Current Use	None.
Snake (below Flagg Ranch)(p.167)	28 commercial float, 2 fishing. 60 private trips (30 float, 30 fish)	Current Use.	None.
Scenic Snake	Commercial: ave 63,179 people/year. peak 68,673. 133 float launches/day, 47 fishing launches/day, 360	Current Use	"Direct river-related visitor use is higher in this segment than in others, and is focused on

	meal trips.Private: ave 21,181 people/year, max 23,915.		floating and fishing.” (p.117)
Pacific Creek	600 visitors/year, 5/day. No overnight. Zero paddlers.	Approximate Current Use.	“Overall, use is low along this segment...”(p.121)
Buffalo Fork	500 visitors/year, 5/day. No overnight. Zero paddlers.	Approximate Current Use.	“Generally, as in the Pacific Creek segment, use levels are low along Buffalo Fork.” (p.123)
Gros Ventre	1900 people per year. 1150 general riverbank use, 450 anglers. 150 boat takeouts at boundary. 300 swimmers. Zero paddlers below boundary.	Typical Average Use	None

The Wild and Scenic Rivers Act does not require or envision managers freezing visitor use kinds and amounts at the arbitrary conditions at the time of designation. Indeed, many rivers have use that far exceeds capacity at the time of designation while others have far less use than their capacity. Importantly, allowing additional kinds and amounts of use, so long as standards are met and capacities not exceeded, can protect *and enhance* Recreation ORV’s as well as the enjoyment of other ORVs under the WSR. The decision to set capacities and freeze use at current kinds and amounts was arbitrary and capricious.

The CRMP offers no evidence or rationale indicating that additional visitors would impact the values for which the rivers were designated. By the NPS’s own admission the supposed “maximums” presented in the CRMP are actual a “low” level of use—and not a true maximum. The CRMP thus fails to meet the legal mandate for a visitor capacity analysis by not discussing and dealing with maximum numbers of visitors.

Furthermore, by arbitrarily and capriciously failing to consider paddling among the mix of recreational uses on all river reaches—an accepted kind of river-related use, of which analysis was formally requested during scoping—the CRMP has failed to meet the legal

mandate for a visitor capacity analysis. Paddling is clearly a “kind of use,” and thus must be considered.

6. The NPS and USFWS erred in concluding that paddling conflicts with USFWS mission or policies.

The CRMP wrongly claims that boating would “conflict with the National Elk Refuge purpose and the National Wildlife Refuge System (NWRS) mission.” (CRMP 60.)

The Mission of the National Wildlife Refuge System is “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”

The CRMP offers no evidence whatsoever that paddling would be inconsistent with this mission. This can’t in fact be the case because paddling is a celebrated use of many rivers in the NWRS. The USFWS has many active members in the River Management Society that themselves regularly enjoy river trips through refuge lands, as well as managing the public’s sustainable enjoyment of these opportunities. As examples, the Arctic National Wildlife Refuge welcomes paddlers to enjoy the many rivers in the refuge,¹² and the CRMP for the high-use Niobrara Wild and Scenic River in Nebraska was developed in part to “to ensure that river floating through the Refuge remains a compatible, wildlife-dependent public use activity.” (2004 Niobrara River CRMP 8.) It is arbitrary and capricious to claim boating is inconsistent with the mission of the NWRS when it regularly occurs and is actively and sustainably managed throughout that system.

Furthermore, the CRMP notes that 1900 people engage in various forms of recreation in the Gros Ventre River corridor in an average year: 1150 general riverbank use, 450 anglers, 150 boat takeouts at the boundary, and 300 swimmers. The CRMP proposes to allow this use to continue, and thus must necessarily find it to be consistent with the mission of the NWRS. The CRMP offers no evidence proving paddling is different or higher impact than these other forms of recreation—and none exists. It is arbitrary and capricious to claim boating is inconsistent with the mission of the NWRS while at the same time allowing similar or higher impact uses.

Likewise, as stated in other sections of these comments, the enabling legislation for the Elk Refuge states only that the land be managed for “the grazing of, and as a refuge for, American elk and other big game animals.” (16 USC § 673.) The USFWS offer no evidence that visitors choosing to paddle rather than fish or hike would have any unacceptable impact on these species. It is arbitrary and capricious to claim paddling is inconsistent with the purpose of the Elk Refuge.

¹² <http://arctic.fws.gov/rivers.htm>

The other arguments presented in the CRMP regarding the NWRS are similarly unmoored from common sense and the law.

First, the CRMP claims that allowing paddling would conflict with the “wildlife-first” mandate of the USFWS. The American Whitewater alternative that was dismissed from consideration did not propose a “paddling-first” scenario, and was wholly consistent with placing wildlife first, and all forms of recreation second in priority. It is arbitrary and capricious to claim that paddling could not be sustainably managed as a second priority to wildlife. It defies logic and common practice at other Wildlife Refuges to claim otherwise.

Second, the CRMP wrongly claims that paddling is not a wildlife-dependent use and is not among the six priority uses listed in NWRS policies. 16 USC § 668ee confirms that “wildlife-dependent recreation” is “use of a refuge involving...wildlife observation and photography...” The CRMP would have readers believe that visitors could observe wildlife while walking, fishing, or swimming but not while paddling. Paddling offers a wonderful low-impact way to view wildlife, at least on par with other accepted uses in the CRMP, and it is arbitrary and capricious to claim otherwise.

Lastly, the CRMP states that the National Elk Refuge will continue to ban boating under 50 CFR 25.21 for the benefit of priority wildlife species. 50 CFR 25.21 and other regulations and laws however, require the CRMP must include an analysis of the paddling prohibition under federal law and policy. First, NEPA prohibits the USFWS from excluding paddling from consideration simply because of a regulation granting the manager authority to manage recreational uses, and requires the de facto prohibition be reconsidered. (See Section 1 of these comments.) Second, there is a USFWS policy requiring a process for considering the compatibility of a recreational use on a refuge.¹³ This process is formally required for “all refuge uses,” and in concert with refuge planning efforts like the CRMP. It is also triggered after 15 years have passed since the last compatibility determination for a use. We are aware of no prior compatibility determination regarding paddling. USFWS policy thus requires that the CRMP include a compatibility determination regarding paddling, as well as all other current and proposed uses like angling, fishing, and swimming. Where conducted elsewhere, compatibility analyses have found paddling to be a highly compatible activity that facilitates wildlife viewing and enjoyment in a low impact manner.

Outside of a mandatory compatibility determination, and without basis, the CRMP assumes that paddling would impact wildlife and other forms of recreation would not. The CRMP cites concerns with ungulate winter range during a time of the year when paddling is generally not even possible on the Gros Ventre. The CRMP cites concerns regarding spring and fall migration of elk and bison, as well as year round moose habitat. The CRMP offers no rationale or evidence showing that a visitor paddling would have any significant impact on ungulate migration or habitat use. The CRMP also fails to show that a visitor

¹³ See Refuge Policy Section 603 FW 2. <http://www.fws.gov/policy/603fw2.html>. See also 50 CFR 25.21.

paddling would have a greater impact than one hiking, swimming, or fishing—all accepted uses. The unfounded claims in the CRMP that limited paddling would somehow be incompatible with the protection of priority wildlife species, unlike other similar forms of recreation, are arbitrary and capricious. We look forward to reviewing a fair and objective compatibility determination that looks at paddling, hiking, angling, swimming, and any other current or proposed form of recreational enjoyment. We are confident that any hard look will reveal paddling to be a compatible and desirable way for Americans to visit the Gros Ventre River and the National Elk Refuge.

Arbitrarily and capriciously claiming that paddling conflicts with the USFWS mission and policies violates the Administrative Procedures Act, and is inconsistent with agency policy. More importantly it serves to senselessly alienate a significant group of conservation-oriented Americans that are traditionally advocates for the USFWS and the NWRS.

7. The NPS and USFWS violated NEPA by excluding an alternative from further consideration because the analysis would not be cheap, easy, or produce an outcome favored by the Parks.

The CRMP states that:

Reevaluating the existing regulations and restrictions would require significant review and potential revision of existing policies and plans, as well as additional planning and other processes ... It thus does not meet the purpose and need for this planning effort and is beyond its scope.

The NPS Handbook counters that “CEQ is also clear that agencies should not pare the list down to only those alternatives that are cheap, easy, or your park’s favorite approach.” This is precisely the error that the CRMP makes in eliminating paddling alternatives in part because analyzing them, in the view of the Park, would not be cheap, easy, or produce an outcome favored by the Parks. Thus, excluding paddling from alternatives for the stated reason violates mandatory NPS Policy, NEPA and the APA.

In addition, we believe adding paddling to the mix of visitors would in fact be cheap and easy. The alternative we presented would simply allow visitors to choose paddling as opposed to hiking, while securing all the same permits and following all the same rules as hikers.

8. The CRMP wrongly concluded that the Wild and Scenic Rivers Act and Craig Thomas Snake Headwaters Legacy Act do not suggest that boating should be allowed on Wild and Scenic Rivers.

The CRMP errs in concluding that analysis of paddling is outside of the intent of the Wild and Scenic Rivers Act and the Craig Thomas Snake River Headwaters Act.

The Wild and Scenic Rivers Act is clear that various forms of enjoyment of designated rivers should not be limited unless they “substantially interfere” with the values that led to designation. In addition, paddling is a component of the recreation ORV for all WSR’s on which paddling is possible. (See also Section 3 of these comments.)

The Craig Thomas Snake River Headwaters Act also is clear that paddling is part of the Recreational ORV on the WSR’s. The Act states:

FINDINGS--Congress finds that-- the rivers and streams of the headwaters of the Snake River System...provide unparalleled fishing, hunting, **boating**, and other recreational activities for local residents and millions of visitors from around the world... (emphasis added)(§ 5002 (b)(1).)

In addition to clearly placing boating among the unparalleled recreational values, the Craig Thomas Snake River Headwaters Act states one of the primary purposes of the Act is to “ensure that future generations of citizens of the United States enjoy the benefits of the rivers and streams of the headwaters of the Snake River System...” These benefits certainly include river recreation, and river recreation certainly includes paddling. The Act further affirms that the Act will celebrate the ORV’s of these rivers while “preserving public access to those rivers and streams...”

The Wild and Scenic Rivers Act celebrates Americans’ direct and meaningful connections with rivers. These connections are forged through river-based recreational experiences, with paddling being the foremost way people directly experience most Wild and Scenic Rivers. The Wild and Scenic Rivers Act was written by, advocated for, and employed by paddlers to save rivers since the mid-1960s. The Craig Thomas Snake River Headwaters Act is a fine example of this fact, with American Whitewater representatives and many paddlers playing a role in its passage. The NPS attempt to fracture the connection between paddlers and Wild and Scenic Rivers runs counter to the history, language, and intent of the Wild and Scenic River Act, the Craig Thomas Snake River Headwaters Act, and the National Park Service mission.

9. The CRMP promotion of paddling bans is inconsistent with NPS policy

The preamble to the *Use of the Parks* chapter of the 2006 NPS Management Policies document states:

National parks belong to all Americans, and the National Park Service will welcome all Americans to experience their parks. The Service will focus special attention on visitor enjoyment of the parks while recognizing that the NPS mission is to conserve unimpaired each park’s natural and cultural resources and values for the enjoyment, education, and inspiration of present and future generations.¹⁴

¹⁴ <http://www.nps.gov/policy/mp2006.pdf>.

Parks are managed based on a tiered system of authorities including the Organic Act, the Management Policies document cited above, the enabling legislation for the specific park, general regulations, Executive Orders, Directors Orders, and Superintendent Compendiums. Decisions on which uses to allow or prohibit in Parks are based on a combination of the above, however decisions must be consistent with overriding layers of legislation and policy.

The Organic Act mirrors the quote above voicing a dual mission of preservation and public enjoyment. Regarding recreation, the enabling legislation for Yellowstone National Park simply states that the region be “dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people.” It is the Management Policies document that offers the most guidance on specific recreational uses. This document focuses on the concept of “appropriate uses”:

The concept of appropriate use is especially important with regard to visitor enjoyment because, in accordance with the Organic Act, the fundamental purpose of all parks also includes providing for the enjoyment of park resources and values by present and future generations. The scope of enjoyment contemplated by the Organic Act is described in section 1.4.3. Appropriate forms of visitor enjoyment emphasize appropriate recreation consistent with the protection of the park. This includes interpretation of park resources and contemplation and understanding of the purposes for which a park unit’s resources are being preserved. Many of these forms of enjoyment support the federal policy of promoting the health and personal fitness of the general public, as set forth in Executive Order 13266 (Activities to Promote Personal Fitness). (2006 Management Policies, § 8.1.1 Appropriate Use.)

Additional guidance can be found in § 1.5 of the same document:

Appropriate visitor enjoyment is often associated with the inspirational qualities of the parks. As a general matter, preferred forms of enjoyment are those that are uniquely suited to the superlative natural and cultural resources found in the parks and that (1) foster an understanding of and appreciation for park resources and values, or (2) promote enjoyment through a direct association with, interaction with, or relation to park resources. These preferred forms of use contribute to the personal growth and well-being of visitors by taking advantage of the inherent educational value of parks. Equally important, many appropriate uses also contribute to the health and personal fitness of park visitors.

Section 8.1.2 continues:

To provide for enjoyment of the parks, the National Park Service will encourage visitor activities that: are appropriate to the purpose for which the park was established; and are inspirational, educational, or healthful, and otherwise appropriate to the park environment; and will foster an understanding of and appreciation for park resources and values, or will promote enjoyment through a direct association with, interaction with, or relation to park resources; and can be sustained without causing unacceptable impacts to park resources or values.

Paddling rivers in canoes, kayaks, and suitable inflatable boats on each of the WSR's meet and exceed these standards that define "appropriate uses."

- Paddling is consistent with the purposes of the Parks – which include human powered outdoor recreation.
- Paddling is consistent with the protection of the Parks. It is the lowest impact manner to explore the Parks. Visitors do not generally require trails or other infrastructure, and move relatively quickly through an area without a trace.
- Paddling fosters an understanding of and appreciation for park resources and values through providing immersive interactions with the Parks' water, geology, and scenery. Through no other reasonable means can one come to understand and appreciate the rivers and river-created-landforms of the Parks so thoroughly.
- Paddling absolutely promotes enjoyment through a direct association with, interaction with, or relation to park resources. As stated previously paddling is a fully immersive experience, allowing the visitor to feel the power of the Parks' rivers as they move through highly scenic areas.
- Paddling contributes to the personal growth and well-being of visitors by taking advantage of the inherent educational value of parks. Few could argue that a day spent floating down a Wild and Scenic River in a National Park would not provide personal growth – it would be the experience of a lifetime. Rivers are also spectacular natural classrooms in which to learn about geology, hydrology, and ecology.
- Paddling contributes to the health and personal fitness of park visitors. Like hiking, paddling offers a physically challenging human-powered means of exploring the Parks.

For these reasons paddling is overwhelmingly supported by the National Park Service across the Country. Enjoyment of rivers in kayaks and canoes is prohibited in only 3 parks out of 393 units of the National Park System. Only Yellowstone, Grand Teton, and Yosemite National Parks prohibit paddling on the vast majority of the rivers they manage.¹⁵ Yosemite is currently revising their CRMP for the Wild and Scenic Tuolumne and Merced rivers. While conducting their Visitor Capacity Analysis, they are formally

¹⁵ Grand Teton allows paddling only on the Snake River, Yellowstone only on certain sections of the Snake and Lewis rivers, and Yosemite only on certain sections of the Merced.

analyzing paddlers among the mix of other river visitors. For a wide array of legal, regulatory, and public interest reasons, Yosemite National Park will soon ease restrictions on paddling their rivers in canoes, kayaks, and inflatable river craft as a result of the Wild and Scenic River CRMP process. Thus, while all other National Parks support paddling as a wilderness-compliant form of place-based outdoor recreation that is integral to their mission, Grand Teton and Yellowstone are alone in prohibiting paddling.

This wholesale ban and the agencies' failure to seriously consider paddling as a proper use of the newly designated Wild and Scenic River segments is also contrary to the management policies of the NPS that govern planning. Like the DO-12 Handbook, the Management Policies states that it is the "basic Service-wide policy document of the NPS," and "[a]dherence to policy is mandatory unless specifically waived or modified by the Secretary, Assistant Secretary, or the Director." (Management Policies 3.) In the "Use of Parks" chapter, the Management Policies sets forth the process for considering new appropriate uses. According to this document, anytime a Park unit engages in a planning activity—such as drafting a CRMP—NPS must undertake (1) an assessment the purpose of the park via the Organic Act and the specific Park enabling legislation, and then (2) the assessment of impacts. (Management Policies 99.) Again, NPS appears to have ignored this mandate.

Under "Visitor Use," the document sets forth a series of criteria for appropriate use, and paddling fits easily within each criteria as described above. At the same time, paddling does not run afoul of any of the enumerated "unacceptable impacts" listed in § 8.2.31. Further, "boating" is specifically listed within § 8.2.2's list of acceptable recreational activities. (*Id.* 101) Of course, it is also the policy of NPS that not all activities are appropriate for all Park units. (*Id.*) Therefore, the Superintendent may restrict use, but "[a]ny restriction of appropriate recreational uses will be limited to what is necessary to protect park resources and values, to promote visitor safety and enjoyment, or to meet park management needs." (*Id.*) But the same section also requires that public use limits on the enumerated acceptable uses (including boating) must be based on the results of scientific research and other available support data— including the findings from a carrying capacity analysis. (16 U.S.C. § 1271.)

Here, there has been no carrying capacity analysis that includes boaters, and no valid carrying capacity analysis whatsoever. Once again, NPS has failed to follow its own policy mandate in excluding a use that the NPS itself recognizes as appropriate unless shown otherwise. Further, NPS has failed to demonstrate any adverse impacts that human-powered floating might create.

The current bans on floating the WSRs is unsupported by evidence, outdated, and in direct conflict with NPS and Park-specific management policies and goals. These bans are arbitrary and capricious and are an abuse of discretion. In concert, the NPS Handbook and Management Policies, NEPA, and the WSRA require that regulations like the boating bans be reconsidered during the development of a CRMP. The facts and NPS policies

require that these prohibitions be eliminated in favor of active management that allows visitors to enjoy the rivers by boat.

10. The NPS proposed management framework would support sustainable paddling of the Parks' and USFWS's new WSRs.

The Draft Management Plan proposes a suite of strict management actions, standards, and limits that in concert with a monitoring plan ensure that the new WSRs will be protected from unsustainable recreational impacts. These standards include limits to changes in water quality, invasive species, visitor-created trails, vegetation loss, nesting bird disturbance, and hot spring modification. (See CRMP 113 as an example.) In addition, visitor capacities are set at existing use levels.

The NPS and USFWS are confident that these measures are sufficient to protect the river values. We generally agree and support these strict standards, with the caveat that the capacities were wrongly set at current use levels. These measures are applied to hiking, angling, and all other types of accepted visitation in the CRMP—except paddling. Visitors seeking non-paddling activities are simply managed through “interpretive messaging” on most reaches, while visitors seeking paddling opportunities are wholly denied. This is a baseless double standard.

It is arbitrary and capricious for the CRMP to claim that paddling could impact the river values given the strict monitoring and standards. If an impact began to occur it would quickly be recognized, documented, and remedied through common management actions. But increased adverse impacts are virtually impossible under this CRMP, whether a visitor chooses to paddle, fish, or hike. Thus, exclusion of paddling from consideration and promotion based on concerns over potential impacts is in violation of the Administrative Procedures Act and NPS's own management directives and policy mandates.

Importantly, paddling is of similar or lower impact to other uses supported in the draft plan. Paddling could be allowed and would be environmentally sustainable under the management framework of the preferred alternative.

Conclusion

The NPS and USFWS have an outstanding opportunity to celebrate the sustainable enjoyment of Wild and Scenic Rivers by revisiting the unnecessary prohibitions on paddling the WSRs. Ending these unnecessary and harmful prohibitions would bring the management of these rivers up to legal, professional, and ethical standards. More importantly, it would allow current and future generations of Americans to have an incomparable opportunity to enjoy, learn from, and experience these incredible Wild and Scenic Rivers.

We ask that the NPS and USFWS change course, and consider allowing visitors to paddle the Upper Snake River, Lewis River, Buffalo Fork, Pacific Creek, and the Gros Ventre River, without distinction from visitors choosing to fish, hike, wade, swim, or drive by. This consideration would require only subtle changes to the CRMP, since all standards and capacities would apply to visitors whether they choose to paddle or not. Any fair analysis will find that visitors that paddle will have similar or fewer impacts compared to those who visit via any other approved method.

Based on this forthcoming analysis, which is mandated by law and policy, American Whitewater fully supports the selection of an alternative that allows the public to choose paddling as a means of experiencing each of the Wild and Scenic Rivers, without distinction from those choosing hiking or fishing as their preferred activity. Such an alternative would ensure that recreational visitation is environmentally sustainable through the standards and monitoring proposed in the current preferred alternative.

Thank you for considering these comments, and the interests of the many Americans who would cherish the opportunity to experience the Snake River Headwaters in a kayak, canoe, or inflatable boat.

Sincerely,

A handwritten signature in black ink, appearing to read "K. R. Colburn", written in a cursive style.

Kevin R. Colburn
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