

IV. Analysis of Whitewater Recreation in Yellowstone

American Whitewater has examined the following questions as a framework for evaluating the legitimacy of whitewater recreation in Yellowstone National Park:

1. Is whitewater boating an appropriate use in Yellowstone National Park under the rules, regulations and laws governing the Park?
2. Can whitewater boating be managed successfully?
3. Is a re-examination of the Park's 1988 *Assessment* on boating warranted?

Our answer is "Yes" to each of these questions. In addition, we also address the points that were discussed and used in the *1988 Assessment*.

The key point of this discussion is that Yellowstone National Park's recreational use policy banning boating on the rivers is inconsistent with national policies. Therefore, whitewater recreation should be permitted.

The National Park Service's *Management Policies*¹ state that, "the Park Service will seek consistency in recreation management policies and procedures on both a service wide and interagency basis to the extent practicable." However, Yellowstone National Park's *1994 Draft Backcountry Plan* acknowledges that the system of managing its backcountry, "lacks consistent application across the Park and... is complex to explain to users and to new staff (p. 11)." American Whitewater requests that whitewater boating be treated fairly, consistently, and non-discriminatorily with other non-motorized recreational activities in Yellowstone National Park.

"The Park Service has a duty to nurture the environmental resources of Yellowstone by sponsoring the recreational alternatives that are most compatible with conservation mandates. Whitewater boating is surely one of those alternatives."

► Ron Ladders, boater and contributing author to *Western Whitewater*

1 *Management Policies, U.S. Department of the Interior National Park Service* (1988)

IV.A. The Laws, Regulations and Policies Governing Yellowstone Support and Encourage Whitewater Boating as an Appropriate Use.

The management of the National Park System (NPS) and its programs are governed by the Constitution, public laws, proclamations, executive orders, rules and regulations, case

“The National Park Service will manage recreational activities and settings so as to protect park resources, provide for public enjoyment, promote public safety, and minimize conflicts with other visitor activities and park uses.”

► National Park Service
Management Policies

law and directives of the Secretary of the Interior and the Assistant Secretary for Fish and Wildlife and Parks². These legal authorities support whitewater recreation as a legitimate and appropriate traditional recreational activity in the Park and suggest that an outright ban on whitewater boating is unfair, arbitrary and capricious.

The enabling legislation for Yellowstone established this Park for the "benefit and the enjoyment of the people." The prohibition against whitewater recreation discriminates against a significant segment of our society that would benefit from the opportunity of boating Yellowstone's rivers. Furthermore, it discriminates against many of the people

who have ardently supported the National Park System and donated money to fund our National Parks over the years.



2 Management Policies, U.S. Department of the Interior National Park Service, Forward: ix, (1988).

IV.A.1. Legislation

On March 1, 1872, Yellowstone National Park was "dedicated and set apart as a public Park or pleasuring ground for the benefit and the enjoyment of the people." In 1916, the Congress established the National Park Service via the National Park Service *Organic Act*³. The Act directs the Department of the Interior (DOI) to "promote and regulate the use of the Federal areas known as National Parks, Monuments, and Reservations... by such means and measures as conform to the fundamental purpose of said Parks, monuments, and reservations." The *Organic Act* also directs the Department of Interior to protect the resource and ensure that it will be preserved for the enjoyment of future generations. The *Organic Act* establishes the standard for uses within the Park and suggests that, as long as a use does not impair the resource, it is appropriate. Under this interpretation of the law, the complete ban on whitewater boating within Yellowstone is unwarranted.

“As our civilization grows older and more complex, we need a greater and not a less development of the fundamental frontier virtues.”

▶ Theodore Roosevelt (1899)

Whitewater recreation meets all legislative criteria for Park use within Yellowstone, including those laid out under the

National Park Service Special Park Uses: Permitting and Renewal Considerations, the *Endangered Species Act of 1973*, the *Wilderness Act of 1964*, Yellowstone’s designation as a Recommended Wilderness in 1972, the *National Historic Preservation Act of 1966*, and Yellowstone’s *Natural Resources Management Plan of 1982*.

Whitewater recreation will not result in a derogation of the resource or visitor experience for other users in Yellowstone.

This proposal is a request for access to use the resource in a manner that is not specifically prohibited by the National Park System’s guiding language and is in fact encouraged throughout the National Park

System. If regarded as a privilege rather than a right, this activity will not result in a derogation of the resource or visitor experience for other users; therefore access should be permitted and no special permits should be required.

Potential threats to wildlife, historic sites, and geothermal features are not unique to whitewater recreation and can be managed and mitigated as demonstrated by other permitted activities within the Park.

3 National Park Service Organic Act, 16 USC § 1 *et seq.*

“Yellowstone is a spectacular resource. Its treasures should not be limited to those in power vehicles like RVs, snowmobiles, and motor boats (as on Yellowstone Lake). The rivers and streams of the park are pathways for a unique wilderness and park experience. Boaters should be given the same priority given other forms of recreational endeavors so that they too can enjoy the park’s treasures.”

-Robert T. Bell, boater

IV.A.2. National Park Service Management Policies

The standard of acceptable recreational use in National Parks is further enunciated in *Management Policies, U.S. Department of the Interior National Park Service, (1988)* (referred to as *Management Policies*). In Chapter 8:2, the *Management Policies* state that the National Park Service will encourage recreational activities that are consistent with applicable legislation, promote visitor enjoyment of Park resources, and are also consistent with the protection of resources and other visitor uses. This chapter also states that “any restrictions on recreational use will be limited to the *minimum necessary* (emphasis added) to protect Park resources and values and to promote visitor safety and enjoyment.” This language clearly states that the guiding principle for regulating recreational use is the “minimum necessary.” A complete ban on whitewater recreation does not meet this standard and actually represents the strongest restriction imaginable.

The *Draft Backcountry Management Plan for Yellowstone National Park (1994)* cites the National Park Service Management Policies and states that the “NPS will encourage and facilitate those uses that require the wilderness environment and do not degrade wilderness resources and character. Management actions will be directed toward providing opportunities for primitive and unconfined types of recreation by Park visitors (pg 7).”

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▸ National Park Service Management Policies (1988)

The boating ban is clearly inconsistent with both of these policy statements. *Kayaking and canoeing have limited resource impacts, and do not degrade the character of the wilderness.* Furthermore, exploratory boating through our wilderness areas is one of the prototypical Western experiences, second only to the cowboy or range-riding experience. Lewis and Clark, Powell, early fur traders and

fishermen, and Yellowstone's first explorers would have been seriously handicapped in their ability to probe the vast wilderness areas of our country without the use of boats on America's wildest rivers. Who can forget the image of one-armed Powell riding down the rapids of the Grand Canyon in a dory, or the stories of Lewis and Clark plunging down the wild whitewater of the Missouri and its tributaries in and around Yellowstone. Few American experiences are as primitive and unconfined as canoeing or kayaking down a wild and unfamiliar river, rounding a bend and capturing the first sight of a new valley, a giant cliff, or other equally spectacular sight.

“Restrictions on recreational use will be limited to the *minimum necessary* to protect Park resources and values and to promote visitor safety and enjoyment.”

▸ National Park Service
Management Policies

Chapter 8:3 of the *Management Policies* provides five criteria for prohibiting a recreational activity in

a National Park. The Park Service can prohibit an activity if it would result in:

1. Inconsistency with the Park's enabling legislation or proclamation, or derogation of the values or purposes for which the Park was established;
2. Unacceptable impacts on visitor enjoyment due to interference or conflict with other visitor use activities;
3. Consumptive use of Park resources (does not apply to certain traditional activities specifically authorized by National Park Service general regulations);
4. Unacceptable impacts on Park resources or natural processes; or
5. Unacceptable levels of danger to the welfare or safety of the public including participants.

Whitewater recreation meets none of these criteria. Therefore, whitewater boating should not be prohibited in Yellowstone National Park.

The current ban on whitewater boating, which is guided by the *1988 Assessment*, does not accurately or adequately analyze whitewater boating under these five criteria. Significantly, the Assessment 1) fails to analyze any data regarding the actual impacts of whitewater boating, 2) relies on speculation and opinion rather than fact, 3) has received no expert review by researchers familiar with whitewater recreation in wilderness areas, 4) and makes inadequate comparisons between the impacts from other recreational uses and whitewater recreation in the riparian corridor.

IV.A.2.a. Whitewater Boating Is Consistent with the Park's Enabling Legislation and Does Not Diminish the Values or Purposes for which the Park Was Established.

As discussed earlier (§ IV.A.1.), whitewater boating is consistent with the Park's enabling language. Furthermore, Boating does not diminish the values or purposes for which the Park was established, and actually represents a historic and traditional use of Yellowstone's rivers and lakes. In fact, the Park's own assessment notes that the first recorded trip on a Park river occurred in 1872 when Captain William Jones of the Corps of Engineers led an expedition from the outlet of Yellowstone Lake to the Grand Canyon. Lieutenant Gustavus Doane and a party of six soldiers made another early trip by dragging a 22-foot, double-ended, wooden boat into Heart Lake in the winter of 1877. The Hayden survey also utilized boats in their exploration of the region.

Boating continued and increased steadily between the 1930's and 1950's until a regulation went into effect that closed all rivers and streams in the Park. As discussed in the history of the ban (Section II), the regulation was designed to protect Yellowstone's fisheries.

The premise of the regulation was that fishing from boats allowed anglers greater access to the fisheries, causing an unacceptable decline in fish populations. However, motorized boating continued on many of the lakes in Yellowstone, and extensive Park facilities have been constructed to support this activity. Currently all vessels are prohibited on park rivers and streams except the channel between Lewis and Shoshone Lakes, where only hand-propelled vessels are permitted. Furthermore, Yellowstone's managers have implemented a strong fisheries management program over the last 100 years which does not depend on the ban on boating. Yellowstone's fisheries have recovered, and in 1994 Charles Gauvin, the President of Trout Unlimited, described Yellowstone as the nation's "richest wild trout fishery⁴."

"Human activity has always centered around the park's waterways... the earliest 19th Century explorers to the Yellowstone country continued the logical practice of using rivers as pathways."

► Yellowstone
National Park's 1998
Assessment on Boating

The discriminatory effect of the regulation must be considered when evaluating arguments that boating on the rivers is "new" and not a traditional use of the Park. If the 1950 fishing regulation had not unintentionally resulted in a total ban on all degrees of river recreation, then whitewater boating would have become a mainstay recreational activity in Yellowstone. Regardless, whitewater boating is clearly a traditional use of the

⁴ Gauvin, Charles F., "From the President: A Tale of Yellowstone's Riches", Trout: The Journal of Coldwater Fisheries Conservation, pg 5-6, Spring 1994.

Park's resources with a rich history dating back prior to the creation of the park, and therefore qualifies as a legitimate historic use.

Whitewater recreation is permitted and encouraged throughout America's National Parks System. In fact, whitewater recreation is a mainstay in the Grand Canyon National Park, Dinosaur National Park, and Black Canyon of the Gunnison; all of which have resource considerations similar to Yellowstone.

Park Service *Management Policies* include numerous supporting references to boating, which encourage and advocate boating as a recreational activity in National Parks:

- Chapter 8:2 states that recreational activities that may be allowed in the Parks include, but are not limited to: “**boating** (emphasis added), camping, bicycling, fishing, hiking, horseback riding and packing, outdoor sports, picnicking, scuba diving, cross-country skiing, caving, mountain and rock climbing, and swimming.”
- Chapter 8:3 states that a river management plan will be developed for each Park having significant levels of river use, or the potential for such use. While the *Management Policies* advise that public use will be managed to prevent unacceptable impacts on aquatic or riparian resources, or adverse effects on visitor enjoyment, this chapter does not advocate a total prohibition on use such as the ban on whitewater recreation in Yellowstone.
- Chapter 9:7 states that the National Park Service will provide a variety of well-integrated transportation options, placing emphasis, wherever reasonable, on non-motorized means of travel. Lifting the ban on non-motorized boating on Yellowstone's rivers would provide a significant opportunity to move visitors off the roads and expose them to the Park.
- Chapter 9:14 states that boating facilities (such as courtesy docks, boat ramps, floating sewage pump-out stations, and marinas), breakwaters, and fish cleaners will be provided as appropriate for safe visitor enjoyment of water recreational resources and to protect natural resources. Significantly, American Whitewater is not proposing any facility enhancements for whitewater boating. This is due to the fact that we wish to protect wilderness values associated with river travel in Yellowstone National Park. Whitewater boating can be permitted in Yellowstone without damaging the Park's wilderness values.

An outright ban on human-powered whitewater recreation is not consistent with management of comparable uses in Yellowstone National Park.

Despite encouragement in the *Management Policies* promoting non-motorized boating and other traditional, low-impact, human-powered sports, Yellowstone National Park has experienced and even encouraged the growth of motorized uses. These motorized uses have arguably resulted in increased congestion and resource impacts throughout the Park.

Furthermore, *these motorized uses set the standard by which all new uses should be examined* as to whether they will diminish the values or purposes for which the Park was established. For example, it would be hard to make the comparison that snowmobile use is more consistent with Yellowstone's guiding legislation than whitewater boating. Additionally, Yellowstone National Park has spent considerable resources managing motorized lake use, but has outlawed non-motorized river travel despite the fact that kayaking and canoeing are more consistent with the Park Service's policies.

Chapter 8:2 states that general regulations addressing aircraft use, off-road bicycling, hang-gliding, hunting, off-road vehicle use, and snowmobiling require that special regulations be developed before these uses may be authorized in Parks. Whitewater boating is not considered one of the activities mandating special regulations and should be permitted and managed under the Park Service's general backcountry guidelines.

The supportive references to whitewater recreation in the National Park Service Management Policies demonstrate that whitewater use is consistent with the enabling legislation, laws and regulations governing the Park. *While the National Park Service*

"Yellowstone is a veritable paddler's paradise... Imagine, if you can, all the Idaho rivers, converted to pool drop and squeezed into a one hundred square mile area, and you have the Yellowstone riverine ecosystem."

► Ken Fischman, boater

has discretion in its decision making with respect to recreational activities in individual Parks, an outright ban is not consistent with management of comparable recreational uses in Yellowstone National Park. Furthermore, the ban is not consistent with the management practices of other comparable units of the Park System. The inconsistency of the prohibition of whitewater recreation is illustrated by a comparison with policies in Parks such as the Grand Canyon, Black Canyon of the Gunnison, Dinosaur National Monument, Great Falls of the Potomac, and Grand Teton National Park where whitewater recreation is

not only allowed, but encouraged. The ban is also inconsistent with other units of the Park System, such as the New and Gauley River National Recreation Area (WV) and on National Wild and Scenic Rivers where whitewater is successfully managed to protect Park resources. No other National Park has the unique resources, environment, scenery, wilderness setting, transportation system, and other features that make Yellowstone so desirable for whitewater recreation and backcountry, river running exploration.

IV.A.2.b. Whitewater Boating Will Not Have Unacceptable Impacts on Visitor Enjoyment.

One of the stated reasons for the ban on whitewater recreation is that it would conflict with other users⁵. Banning one use so that it does not interfere with other uses is arbitrary and unfair. Recreational uses naturally coexist in areas where a broad spectrum of recreational activities are allowed. Contact among visitor use activities occurs in any area that sustains a variety of activities^{6, 7, 8}.

In National Parks where boating is a primary activity (Grand Canyon, Dinosaur, Canyonlands, Grand Teton, etc.), backpacking and fishing have not been eliminated to "protect" or enhance the experience of whitewater boating or vice versa. In contrast to Yellowstone National Park's policy, these activities are successfully co-managed in other Parks without unacceptable conflicts.

If the desired management goal is the minimization of contact between recreational users, then governing regulations must be applied fairly and consistently, and be based on credible data. The National Park Service should rely on hard data when making resource decisions. As stated in Chapter 8:2 of *Management Policies*, "to the extent practicable, public use limits established by the NPS will be based on the results of scientific research and other available support data." However, the *1988 Assessment* failed to quantify user conflicts, relying instead on apparent prejudices in formulating predictions that conflicts would arise. It is American Whitewater's understanding that the team members did not have adequate personal knowledge or information regarding whitewater recreation or its possible environmental impacts, to support the continued ban in Yellowstone National Park.

Though boating on Yellowstone's rivers was a traditional activity in the Park prior to the 1950 regulation, it has been prohibited for such a long time that the extent of the impacts to other recreational users and their enjoyment is unknown. However, ***the potential for causing conflicts between users is not an adequate reason to continue the prohibition***

"I feel that the explanation that boating will damage the resource is without merit. We paddle through; the water closes behind us, leaving less trace than a land-borne user."

▶ Charlie Walbridge,
international river safety
expert and American
Whitewater board
member

5 *1988 Assessment*, p. 33

6 Kinney, T., 1997. "Class 5 Whitewater Paddlers in American Culture: Linking Anthropology, Recreational Specialization and Tourism to Examine Play." Northern Arizona University. M.A. Thesis. 150 pp.

7 Watson, A.E., 1991. "Sources of Conflicts between Hikers and Mountain Bike Riders in Rattlesnake NRA." *Journal of Park and Recreation Administration*, Vol. 9, Issue 3, p 59-71.

8 Watson, A.E., 1994. "The Nature of Conflict between Hikers and Recreational Stock Users." *Journal of Leisure Research*, Vol. 26, Issue 4, p. 372-385.

on boating, as it does not treat comparable uses in a comparable manner. Furthermore, it is logical to assume that, because whitewater boating is quiet, non-polluting, and non-motorized, it will result in fewer impacts than motorized activities, and have smaller negative impacts on visitor enjoyment than snowmobiles or motor boats⁹.

Finally, it is important to remember that the ban on boating was imposed to address resource concerns for overfishing, rather than value judgements related to visitor enjoyment. There is no evidence that whitewater boating can have, or will result in, unacceptable impacts on visitor enjoyment or on fish populations.

*“Pleasures spring like flowers within the
bosom of the wilderness.”*

▶ Thomas Cole, artist

IV.A.2.c. Whitewater Boating Is Not a Consumptive Use of Park Resources.

Recreational uses that are considered consumptive deplete a natural resource to some degree. In contrast, whitewater boating is a means of traveling through the backcountry that is akin to hiking with arguably smaller resource impacts. Unfortunately, the 1950 regulation on fishing from watercraft has had the unintended consequence of outlawing all whitewater recreation. Unlike fishing, *no evidence exists that whitewater boating is a consumptive use of the Park's resources.*



⁹ The Park reports that in a single month in 1996: 9273 snowmobiles (12,292 snow-mobilers), and 244 snow coaches (2219 visitors), entered the Park. In the same time period there were only 74 non-motorized visitors on skis or bicycles.

IV.A.2.d. Whitewater Boating Would Not Have Unacceptable Impacts on Yellowstone's Resources or Natural Processes.

Whitewater boating has minimal impacts on the natural environment relative to many other recreational uses, which are permitted in Yellowstone. A boater leaves no physical trace on the environment because water is the medium for travel. The only legitimate aesthetic impacts from boaters are temporary as boaters are transient as individuals pass briefly through a spectator's field of vision; aesthetic concerns can be easily mitigated. The only tangible physical impacts on resources that are distinctive to whitewater boating are visible at "put-in" and "take-out" sites on the rivers, as well as portage routes; again, these physical impacts can be easily managed.

Since the put-in and take-out sites already exist on the segments that American Whitewater has recommended for use, the primary opportunity for damage to the resource arises from portaging. However kayakers and canoeists generally scout and, if necessary, portage around difficult or dangerous locations at the water level, below the high water mark, where Spring flows annually scour the channel bed and banks. Therefore, impacts from portaging and scouting would be minimal. High flows should

erase any trace of human presence on an annual basis. Portage sites can be successfully managed in the same manner as backcountry trails, and with significantly less work since there are limited opportunities for boaters to cause erosion, compaction of the soil, or other impacts associated with hiking trails.

Whitewater boating is a skill developed over many years by highly dedicated individuals. In the process of acquiring this skill, boaters gain a deep respect for the aesthetics and integrity for natural environments

Furthermore, whitewater boating is a skill developed over many years by highly dedicated individuals. In the process of acquiring this skill, boaters gain a deep sense of appreciation and respect for the aesthetics and integrity of natural environments. As a result, whitewater boaters are extremely

conscientious about resource protection and strive to make minimal impacts. Our membership is active in national river clean-up activities and adopt-a-stream programs that are aimed at removing trash from America's river and riparian areas. Our members also travel extensively through other Wilderness and Proposed Wilderness areas without appreciable impacts to the environment.

The Parks, by the mere elimination of motor traffic, will come to seem far bigger than they are now--there will be more room for more persons, an astonishing expansion of space... Suppose we banned motorboats and allowed only canoes and rowboats; we would see at once that the lake seemed ten or perhaps a hundred times bigger. The same thing holds true, to an even greater degree, for the automobile.

▸ Edward Abbey, *Desert Solitaire*

IV.A.2.d.i. Environmental Impacts from Whitewater Boating Are Minimal Relative to Motorized Recreational Activities.

A wide variety of motorized activities are permitted within the Park boundaries, these include driving, camping in recreational vehicles, boating on lakes, snowmobiling, and snowcoaching. Although this proposal does not constitute a scientific analysis of the impacts of recreation, these motorized uses depend on fossil fuels and a network of roads and infrastructure, unlike non-motorized uses. These motorized uses are louder, result in greater pollution, have greater damaging effects on wildlife, and require more management than non-motorized uses such as kayaking and canoeing.

A comparative analysis of motorized uses in Yellowstone with whitewater recreation underscores the discriminatory nature of the current ban on boating. For example, the current road network in Yellowstone National Park offers unprecedented access to critical wildlife habitat, and results in countless wildlife mortality, yet there are no entrance quotas and little discussion of eliminating any roads. Whitewater recreation by itself would not have the impacts imposed by motorized activities and is much closer to the "resource-oriented pioneer experience traditionally encouraged by the Service"¹⁰.

The *Master Plan* for Yellowstone National Park states that, "an important objective is to lure the 'scenic drivers' from their automobiles," and to, "get the visitor off the road and into the Park." Allowing whitewater recreation would certainly help to achieve this goal.

10 *Master Plan, Yellowstone National Park*, p. 16

IV.A.2.d.ii. Whitewater Boating Will Not Have More Impact than other Non-Motorized Backcountry Uses.

Yellowstone National Park permits numerous non-motorized uses in the backcountry such as hiking, camping, fishing, bicycling, hiking, horseback riding and packing, picnicking, scuba diving, cross-country skiing, caving, rock climbing, ice climbing, mountaineering, swimming, snowshoeing, and dog sledding. The Park Service manages these activities in a manner compatible with resource protection and preservation. Whitewater recreation can be managed in Yellowstone in a similar fashion. For example, the Park Service authorizes hiking, fishing, horsepacking, camping and associated activities as well as commercially guided packing trips within the Black Canyon of the Yellowstone River. The impacts from whitewater recreation in the Black Canyon would not exceed those of other activities that are already permitted.

IV.A.2.d.iii. Whitewater Boating Will Not Have More Impact than Commercial Outfitters' Backcountry Use.

In addition to the backcountry uses listed above, Yellowstone National Park permits 51 licensed outfitters to operate within the Park boundaries. These outfitters guide visitors to backcountry destinations. Outfitters increase accessibility (and thus the impacts) to the backcountry by providing logistical support to individuals that would not normally venture there alone. Lastly, outfitting uses public resources for private profit. It is not consistent to permit a commercial use in a national Park while denying a comparable use (in this instance, boaters) the right to recreate within the Park. Whitewater recreation can be managed in the Park with far less impact on Park resources and natural processes than is presently evident with commercial outfitting.

**American
Whitewater does
not advocate
opening
Yellowstone's
rivers for
commercial
operations.**

One example of the impacts from outfitters arises from the use of horses for transporting clients. The *Backcountry Plan* lists horsepacking at 8,000 stock-use nights per year (p. 2). Horses erode trail systems, pollute surface waters, eat grasses and forbes critical for native fauna, lead to user conflicts with other trail users, and are also vectors for the introduction of exotic plants^{11, 12, 13, 14}.

11 Watson, Alan E; Niccolucci, Michael J; and Williams, Daniel R, "Hikers and Recreational Stock Users: predicting and managing recreation conflicts in three wildernesses." Res. Pap. INT-468. Ogden, UT: USDA Forest Service, Intermountain Research Station (1993).

12 Wilson, John P; and Seney, Joseph P, "Erosional Impact of Hikers, Horses, Motorcycles, and Off-Road Bicycles on Mountain Trails in Montana." Mountain Research and Development. 14(1): 77-88 (1994).

On a related note, American Whitewater does not advocate opening Yellowstone's rivers for commercial concessions (See Section IV.B.3.).

IV.A.2.d.iv. Whitewater Boating Will Not Result in Unacceptable Impacts in the Riparian Zone.

The *1988 Assessment* cited the remoteness and inaccessibility of rivers and riparian zones as one of the reasons for the prohibition on boating. The *1988 Assessment* notes that these areas are pristine and untrammled, serving as critical wildlife refuges with abundant geothermal features that make these areas ecologically sensitive and historically important (p. 44). However, the Park Service has not:

The Park Service needs to establish a clear link between recreational use and irreparable impacts in order to support decisions prohibiting specific recreational activities.

1. provided evidence for the detrimental effects that whitewater recreation will have on these resources,
2. adequately established that the hypothetical impacts of boating will be greater than that of approved uses in the backcountry, or
3. demonstrated that existing regulations for managing backcountry use will not adequately protect the environment from whitewater recreationists.

The importance of rivers and riparian zones is well-documented in the scientific literature; however the Park Service needs to establish a clear link between recreational use and irreparable impacts in order to support decisions prohibiting specific recreational activities. This connection was not made in the *1988 Assessment*.

In addition, the *1988 Assessment* acknowledges that, "human activity has always centered around the Park's waterways (p. 6)," and that, "the main Park road parallels 9 of the 11 rivers in the Park (p. 7)." Yellowstone National Park's *Draft Backcountry Management Plan and Environmental Assessment* (1994) cites the abundance of recreational use on Yellowstone's lakes. In 1993, the Park issued 3,233 boat permits, of which 58% were for non-motorized use and 42% were for motorized use.

13 McLaren, Mitchel P; and Cole, David N, "Packstock in Wilderness: use, impacts, monitoring, and management." Gen. Tech. Rep. INT-301. Ogden, UT: USDA For. Serv., Intermountain Research Station (1993).

14 Cole, David N; and Knight, Richard L, "Impacts of Recreation on Biodiversity in Wilderness." In: Wilderness Areas: their impacts; proceedings of a symposium; 1990 April 19-20; Logan, UT: Utah State University: 33-40 (1990).

IV.A.2.d.v. Whitewater Boating Will Not Cause Unacceptable Impacts in the Backcountry.

The *Backcountry Plan* states that, "Good data is essential to making intelligent management decisions. Some research studies on natural and cultural resources have occurred in the backcountry of the Park, but few efforts have been aimed at studying the relationship of backcountry users to Park resources (p. 85)". The National Park Service must study this relationship between backcountry uses and their impacts on the resource, and make decisions regarding use based on hard scientific data measuring the impacts of such uses.

Despite the dearth of information on the impacts from backcountry use, the high levels of use that the backcountry receives is well documented. Statistics concerning recreational activity near rivers of interest to kayakers were provided in the *1988 Assessment*. In that report, the Black Canyon of the Yellowstone (one of the best whitewater resources in the Park) received the following use:

- 1,700 angler days annually.
- 2,459 use-nights for 16 backcountry campsites in 1984.
- Day use was estimated around 5,000.

Backcountry uses, such as fishing and hiking, often mandate overnight stays, requiring adequate campsites, sources of water, and sanitation needs. The *1994 Draft Backcountry Plan* documents rising use levels in excess of 44,000 use nights each year (p. 2). The *1994 Draft Backcountry Plan* also states that "Day use is not thought to be a problem in most areas of the park at this time. At present there are no limits on day use in the backcountry (p. 48)." Whitewater boating can be easily managed for day use, though there are no logical reasons why boaters should not be able to apply for backcountry camping or night use permits as well.

The *Backcountry Plan* allows day hikers and horse riders to travel off trail in "Pristine Zones" except where areas are closed (p. 34). Similar language can be applied to river use.

The *1988 Assessment* states that, "A study in 1982 (Tyson) documented major abuse of the resource base in the Black Canyon. Nine campsites were identified as moderately to very heavily degraded by erosion, tree mutilation, illegal firepits, and irreversible soil alteration (p. 104)." Whitewater day trips in Yellowstone would not require the same facilities required by terrestrial-based overnight campers and should have lower resource impacts.

Whitewater boating can be managed for day use, though there are no logical reasons why boaters should not be able to apply for backcountry camping or night use permits like the Park's other visitors.

Whitewater boaters should be subject to the same rules and regulations as other backcountry or "Pristine Zone" users, and should be required to use minimum impact techniques and exercise minimum impact behaviors.

IV.A.2.d.vi. Whitewater Boating Will Not Cause Unacceptable Impacts to Wildlife.

The 1988 Assessment cites evidence of wildlife habituating to human presence in Yellowstone's backcountry areas. As stated in the 1988 Assessment, "In other Parks and recreation areas where river boating is present, numerous species of birds and mammals appear to live compatibly with humans (p. 30)."

"In other Parks and recreation areas where river boating is present, numerous species of birds and mammals appear to live compatibly with humans

Yellowstone's 1988 Assessment

Furthermore, the Backcountry Plan states that, "Today's trail and campsite network provides relatively predictable patterns of human use to which animals, including bears, have adapted. A major change in human-use patterns and distribution could result in associated changes in wildlife behavior (p. 35)... Temporary displacement of birds and wildlife away from trails and campsites would continue to occur during periods of human use; however, these impacts occur along long-established corridors and at sites to which birds and wildlife may already be habituated (p. 109)." Therefore the effects that whitewater boaters would have on the wildlife are likely to be minimal and transitory as the wildlife becomes accustomed to human encounters in the river corridor. Regardless, the wildlife in the river corridor has probably been exposed to a human presence from hikers and fishermen and would not be unduly alarmed by the passage of a few small, quiet craft on the river¹⁵.

Whitewater recreation can be managed to protect the wildlife during particularly sensitive reproductive periods

Whitewater recreation can be managed on an adaptive basis to protect the wildlife during particularly sensitive reproductive periods. However, all Park visitors should be regulated with the same concern for protecting the resource.

There is further evidence that boating will have minimal wildlife impacts in Yellowstone from regional surveys in the Black Canyon of the Gunnison, the Alpine Canyon of the Snake through Bridger-Teton National Forest, and the Snake River through Hell's Canyon National Recreation Area. These canyons provide habitat for rare and endangered species, including avian wildlife and fish stocks. In fact, the primary attraction on one stretch of the Snake River is the abundant wildlife, particularly the

15 Knight, Richard L; Cole, David N, "Effects of Recreational Activity on Wildlife in Wildlands." Transactions of the 56th North Americans wildlife and Natural resources conference: 238-247 (1991).

raptors. This demonstrates that whitewater recreationists and wildlife readily coexist in the region and share the resource.

At Great Falls on the Potomac, Boaters have numerous anecdotal stories about sharing the rapids with Bald Eagles, Osprey, Herons, Egrets, Vultures, and other threatened species. These stories provide further evidence that the wildlife is not unduly alarmed by the presence of humans, and that humans and wildlife can share the resource.

Additionally, during its discussion of potential impacts to grizzly bears, the 1988 *Assessment* states that, "Sixty-five percent of the variation in bear use was explained by levels of angler use (p. 22)." Though boaters may temporarily alarm the bears, the level of use by boaters is unlikely to approach the level of use or impacts from anglers. The number of boaters can be regulated, and boaters have few opportunities to startle bears. Finally, whitewater recreation does not deplete or adversely effect the bears' food supplies.

Kayaking will not have the effects on wildlife associated with other backcountry uses, yet it remains illegal due to *perceived* impacts.

IV.A.2.d.vii Viable Management Options Can be Implemented to Minimize Wildlife Impacts During Reproductive Seasons.

American Whitewater has recommended limiting access on the Black Canyon of the Yellowstone between August 1st and October 15th in order to protect wildlife during sensitive reproductive periods. Seasonal restrictions can be imposed on river recreation thereby limiting use to seasonal time periods that minimize, if not eliminate, disturbance to nesting and fledgling birds. Similar programs have been implemented by federal and state agencies to protect nesting peregrine falcons at popular climbing areas. The seasonal closures have been immensely successful at minimizing impacts from human disturbance. Incidentally, the closures are often voluntary but universally recognized by the climbing community¹⁶.

16 See Raptors & Climbers: Guidance for Managing Technical Climbing to Protect Raptor Nest Sites, Access Fund (1997).

“By emphasizing special regulations, no-kill, and respect for the aquatic ecosystem, managers successfully restored trout to their place in the greater ecological setting. Grizzly bears, osprey, bald eagles, otters, and hundreds of thousands of trout fishermen all benefited in the process.”

-Paul Schullery and John D. Varley are Senior Editor and Director, respectively, in the Yellowstone Center for Resources in Yellowstone National Park¹⁷.

IV.A.2.d.viii. Whitewater Boating Will Have No Impacts to Fish Populations.

The only use of Yellowstone's rivers that is currently permitted is fishing. Boaters find this ironic due to the fact that the ban on boating was implemented to reduce pressure from overfishing in Yellowstone National Park. Despite the ban, the Park has established new management systems for successfully managing the fisheries that are not dependent upon an all-encompassing ban on whitewater recreation. Furthermore, the *1988 Assessment* states that, “researchers suggested that recreational activities other than fishing apparently do not directly affect fish¹⁸.” Therefore the Park should re-examine the ban on watercraft since it does not appear to be an essential tool for managing the fisheries.

The ban on watercraft no longer appears to be an essential tool for managing the fisheries.

The impacts from anglers are well documented and the history of Yellowstone's fishery provides compelling evidence of the successes and failures of the Park's policies for managing recreational use^{19, 20}.

The *1988 Assessment* states that “upwards of 150,000 persons annually fish in Park waters. A number of the Park waters have had their fish population severely impacted by heavy fishing pressure (p. 6)”. The Grand Canyon of the Yellowstone alone receives 6,350 angler days annually.

However, these use figures stand in stark contrast to the historic development of fisheries in Yellowstone in which the lakes and tributaries were subject to extensive fish stocking of both native and non-native species. Many of the fisheries on Yellowstone's tributaries

¹⁷ This quote was in reference to Yellowstone's overhaul of fishing regulations in the 60's and 70's. and was taken from: Schullery, Paul; and Varley, John D., “Fires and Fish: The fate of Yellowstone waters since 1988.” *Trout: The Journal of Coldwater Fisheries Conservation*, pg 17-23, Spring 1994.

¹⁸ The *1988 Assessment* cites Clark, *et al.* 1985 in support of this statement.

¹⁹ Schullery, Paul, 1996. “More than a Fish Story,” *Trout*, Spring 1996: “In the first half of the twentieth century...commercial and sport fishermen removed 48 million adult cutthroat trout. By the 1960s, the trout population collapsed because of overharvest, but in the 1970s it was brought back by a far-reaching overhaul of park management policies” (p. 20).

²⁰ Behnke, Robert, “*Yellowstone Fishes: Changing Times and Changing Perspectives.*” *Trout: The Journal of Coldwater Fisheries Conservation*, pg 55-59, Spring 1994.

are not natural to Yellowstone and were developed in the late 19th Century by Captain Frazier Boutelle and Marshall Macdonald²¹.

Captain Frazier Boutelle, Yellowstone's Superintendent in 1889 found "...with surprise, the barrenness of most of the water in the Park. Besides the beautiful Shoshone and other small lakes, there are hundreds of miles of as fine streams as any in existence without a fish of any kind." Therefore, Boutelle embarked on a process to have all of Yellowstone's waters "so stocked that the pleasure-seeker in the Park can enjoy fine fishing within a few rods of any hotel or camp."

Boutelle invited Marshall Macdonald, the government's Commissioner of Fisheries, to Yellowstone. Marshall's reaction was that "Much could be done toward enhancing the attractions of the great national pleasuring ground by the stocking of those of its various streams and lakes which are now destitute of fishes." Macdonald planned "...to stock these barren waters with distinct species of *Salmonidae*, reserving a distinct river basin for each." The actions of these two men, as well as subsequent Superintendents and land managers, led to the development of Yellowstone's virgin rivers and the creation of new fisheries.

The 1988 Assessment on boating states that, "recreational activities other than fishing apparently do not directly affect fish."

There is further evidence of abuses to Yellowstone's fisheries. The Yellowstone and West Slope cutthroat trout have been listed as a species of special concern in Montana. The illegal introduction of Lake Trout in Yellowstone Lake poses a significant threat to the continued viability of the Yellowstone Cutthroat. Yellowstone Cutthroat Trout will likely be petitioned as a candidate species for listing on the Endangered Species List because of threats from the Lake Trout.

The management of the fisheries in the early 1900's also had impacts on Yellowstone's wildlife, leading to the expansion of both hunting and foraging grounds for bears and raptors into wider sections of the Park.

Whitewater recreation is non-consumptive and can be easily managed for negligible impacts on riparian environments. Whitewater boaters only make occasional contact with land to scout or portage around difficult or dangerous obstacles and limit these portages to identifiable areas and social trails developed by other visitors in the river corridor. The majority of whitewater activity takes place on the river, and uses a natural trail, leaving no resource "footprints" on the landscape.

Contrasting Yellowstone's management of fishing resources and the ban on whitewater recreation illustrates the inconsistencies in the Park's resource management policies.

21 Behnke, Robert, "Yellowstone Fishes: Changing Times and Changing Perspectives." Trout: The Journal of Coldwater Fisheries Conservation, pg 55-59, Spring 1994.

Regardless, whitewater boating will have less impact to fisheries than other backcountry uses.

IV.A.2.d.ix. Whitewater Boating Does Not Require the Use of Park Resources or the Construction of New Facilities.

Whitewater boating does not necessitate a need for the construction of any new facilities. Boaters can use existing trails, parking areas, and restrooms. Yellowstone National Park could designate access points to the rivers, which would concentrate use in specific areas, thereby preventing degradation to the resource. At most, this would require a sign and some rudimentary trailwork to establish clear access paths. As noted earlier in this proposal, most portages are conducted at water level below the spring high water mark. A few portage routes are around major waterfalls, and require very limited trail development. American Whitewater will work with the Park to provide volunteers to work on these trails.



IV.A.2.d.x. Whitewater Recreation in Grand Canyon National Park.

Boating in Grand Canyon National Park (GCNP) makes a convincing case that whitewater recreation is compatible with other recreational uses in America's National Parks and can be managed in an area with sensitive resources. The Colorado River through the Grand Canyon is one of the most enjoyable, scenic and exciting whitewater experiences in the country. This experience is considered to be one of wilderness quality even though the GCNP received 4,702,989 visitors in 1994 (more than Yellowstone National Park) and the Colorado River had 166,251 user days in 1994.

Whitewater recreation in GCNP promotes visitor enjoyment while protecting sensitive resources and leaving them unimpaired for future generations. The following observations are particularly noteworthy:

- Numerous endangered animal species exist in the Park, including the bald eagle, peregrine falcon, humpback chub and razorback sucker. In addition, one category 1 species, twelve category 2 species and six category 3 species have been identified.

- Endangered plant species like the Brady pincushion cactus and sentry milkvetch exist in GCNP. In addition, 11 category 2 plant species and 26 category 3 plant species have been identified.
- Over 2,700 archeological resources have been identified in the Park though only 5% of the Park has been intensively surveyed.

Despite the proven ability of Grand Canyon National Park and other Parks to manage whitewater boating and protect its resources, Yellowstone National Park has eliminated this use altogether.



*"No law or regulation can enforce common sense."
-Rich Hoffman, Regional Coordinator and former Access Director
for American Whitewater*

IV.A.2.E. Whitewater Boating Does Not Unnecessarily Endanger the Welfare or Safety of its Participants or the Public.

While whitewater boating is generally acknowledged to be a sport with some degree of inherent risk, this risk does not differ materially from the risk associated with other popular activities such as skiing, rock and ice climbing, and mountain biking. Although it is not widely publicized, major ski areas such as Killington (VT) and Red Lodge Mountain (MT) rarely pass a season without at least one participant fatality²².

While the few deaths that do occur on whitewater often catch the attention of the media and the public, whitewater boating has a very low number of fatal injuries in comparison to many other "risk" sports. For example, nearly 1000 climbers died in domestic mountaineering accidents between 1950 and 1990²³.

Whitewater boating requires skill and education. American Whitewater's comprehensive database of whitewater accidents has recorded only 115 deaths of non-commercial whitewater paddlers in the modern history of our sport (1974 to present)²⁴. Learning to maneuver whitewater kayaks and canoes is very challenging. Instruction and extensive experience are required to negotiate even easy whitewater, and, early in the learning process, paddlers become knowledgeable of river dangers. As a result, whitewater boaters are well prepared for the difficulties and dangers that they face. Boaters are prepared for emergencies, and are forced to be self-reliant and assume responsibility for the risks that they undertake.

Boaters are prepared for emergencies, and are forced to be self-reliant and assume responsibility for the risks that they undertake.

Part of American Whitewater's mission is the promotion of whitewater safety. American Whitewater has developed and maintained the *Safety Code of the American Whitewater Affiliation* since

1959 (See Appendix III). This code remains the standard for safety in whitewater sports. American Whitewater is also responsible for developing the *Whitewater Safety Flash*

²² The National Ski Areas Association (January 1998) reported that "During the past 13 years about 32 people per year, on average, have died skiing or snowboarding, a fatality rate of 0.69 per million skier/snowboarder visits."

²³ *Accidents in North American Mountaineering*, Table 1: 72 (1990).

²⁴ Statistics calculated from the American Whitewater Accident Database, at <<<http://www.awa.org>>> and the River Safety Task Force book series (Edited by Charlie Walbridge and Published by the American Canoe Association).

Cards and publishes a wide variety of safety information through our bimonthly magazine, the *American Whitewater Journal*.

The internet has also proven an effective tool for distributing and sharing safety information. One of American Whitewater's most important educational efforts has been the development of the *Whitewater Accident Database*, published on our website at (www.awa.org) in conjunction with accident reports in the *Journal*. Another integral tool for distributing information about safety and drownings has been an Internet newsgroup via rec.boats.paddle. The result is a sport consisting of well-informed participants who are educated sufficiently to take personal safety into their own hands and accept responsibility for their actions.

American Whitewater has encountered the argument that allowing whitewater paddling in an area popular with tourists and other non water-based recreational users may encourage copycat behavior. However, whitewater boating rarely, if ever, encourages copycat behavior as evidenced by thousands of runs down Great Falls on the Potomac in front of large crowds (see Appendix IV for editorials from the *Washington Post*). Regardless, a ban on boating based on the "copycat" argument is unlikely to stop the "copycat," but will penalize experienced boaters.

Furthermore, American Whitewater strongly believes that the presence of whitewater boaters, with their knowledge of river safety and swiftwater rescue skills, enhances the safety of other recreationists by providing information and immediate rescue assistance. There are countless documented and anecdotal accounts of paddlers rescuing fishermen, hikers, backpackers, inexperienced rafters, and commercial raft passengers who have gotten into trouble on a river. Rather than banning an activity such as whitewater boating, American Whitewater has found that providing education and information are more effective means of protecting unskilled members of the general public. ***No law or regulation can enforce common sense.***

With our extensive experience in whitewater safety and education, American Whitewater is prepared to work closely with Park management to develop signs and warnings that are appropriately worded and positioned. American Whitewater will also participate in any public education campaign that is calculated to alert the public about inherent dangers from whitewater boating in Yellowstone Park. Finally, American Whitewater is ready to place the Park's staff in contact with swift water rescue experts who conduct rescue clinics for natural resource managers around the country.

The National Park Service has extensive experience managing other activities that involve some degree of risk, such as rock climbing in Yosemite National Park, and mountaineering in Denali and Mount Rainier National Parks. The Park Service recognizes that there are numerous activities involving some degree of risk in Yellowstone and captures this fact in their Backcountry Plan. In fact, the *Backcountry Plan* states that:

NPS will not eliminate or unreasonably control risks that are normally associated with wilderness, but will strive to provide users with general information, recommended precautions, minimum-impact use ethics and applicable restrictions (pg. 7)... Many persons tolerate or even expect an increased degree of personal risk when entering the backcountry (pg. 30)... All users would be encouraged to accept the inherent risks of the backcountry experience, and to provide for their own safety and comfort in accordance with existing regulation. Users could expect that in emergency situations all reasonable efforts would be made in search-and-rescue attempts... Thus, when using Backcountry Zones and, especially, Pristine Zones, users should be prepared to be self-sufficient (pg. 36)... ***The safety of the visitor is not guaranteed*** (pg. 87, emphasis added).

The National Park Service web site²⁵ on visitor use in the National Parks further states that:

The National Park Service recognizes that the environment being preserved is a visitor attraction but that it also may be potentially hazardous. ***The recreational activities of some visitors may be of a high risk, high-adventure type and pose a high personal risk to participants, which the National Park Service has neither the authority nor the ability to control physically.***

Several studies have examined adventure activities on public lands²⁶. Rock climbing provides a good comparison to whitewater boating. The *Backcountry Plan* encourages climbing and recognizes the inherent risk in the activity:

In 1993 a service-wide task force proposed guidelines for climbing in National Parks; this information has been used to develop the Park's proposed action. Climbing would continue to be allowed as part of the backcountry experience in all areas of the Park not specifically closed to this activity (as described above), in accordance with other regulation. Each climber is primarily responsible for his/her own safety in undertaking this high-risk activity; the Park would undertake no special efforts to prepare for high-risk climbing rescues, although rangers would respond to emergencies to the best of their skills and abilities (p. 71).

25 Web site at <http://www.nps.gov/htdocs2/planning/mngmtplc/npsmpup.html> (as of Oct 31, 1998)

26 Mackay, S., 1988. "Risk Recreation in Wilderness Areas: Problems and Alternatives." Western Wildlands, p. 33-38.

McEwen, D.N., 1983. "Being High on Public Lands: Rock Climbing and Liability." Parks and Recreation, Vol. 18, Issue 10, p. 46-50.

IV.A.3. Case Law

Although infrequent, the National Park Service's (NPS) decisions have been successfully challenged in courts of law. A review of the case law scrutinizing National Park Service decisions strongly suggests that the decision to ban boating in Yellowstone National Park is unreasonable and may not be upheld if challenged in a court of law.

In *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), non-commercial river runners challenged an National Park Service decision that governed the manner in which recreational use of the Colorado River was apportioned between concessionaires and non-commercial users in Grand Canyon National Park. The Ninth Circuit Court of Appeals reviewed the authority of the National Park Service to make rules and regulations, and identified the standard to which those rules and regulations must be held. The Court confined its review of the regulations to the question whether the National Park Service acted within its authority and whether the action taken was arbitrary. The Court ruled that the National Park Service decision was within its authority, stating that where several administrative solutions exist for a problem, the courts will uphold any one with a rational basis as long as it is not arbitrary.

To determine arbitrariness, the Court stated that the regulation must be fair and follow appropriate standards:

Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary.

Kleppe, 608 F.2d at 1253.

Additionally, the Court gave guidance on the subject of competing uses:

If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others.

Importantly, the Ninth Circuit in *Kleppe* emphasized the rights of all and did not favor the rights of one group over another. In applying the legal standards set forth in *Wilderness Public Rights Fund v. Kleppe* to the issue of boating in Yellowstone National Park, it is clear that the National Park Service has failed to grant access to whitewater boaters. Therefore the decision may be subject to reversal in a court of law.

Recently, the Ninth Circuit reviewed National Park Service regulations in a case entitled *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996). In that case, various mountain bike associations brought suit against the Secretary of the Interior,

NPS, and the Superintendent of Golden Gate National Recreation Area (GGNRA) challenging regulations governing use of mountain bicycles within areas administered by GGNRA.

As a side note, by a series of amendments to the National Park Service Organic Act, 16 U.S.C. § 1 *et seq.*, Congress disapproved of the management by categories scheme (natural, historical, and recreational). Congress directed that all units of the National Parks were to be treated consistently, with resource protection the primary goal, while retaining the flexibility for individual Park units to approve particular uses consistent with their specific enabling legislation. *Id* at 1449-50. American Whitewater believes that Yellowstone National Park's present ban on whitewater boating is inconsistent with the policies in other parks under National Park Service jurisdiction (such as Grand Canyon, Dinosaur National Monument, Great Falls of the Potomac, etc).

In *Bicycle Trails*, the National Park Service regulations reflected the fact that the National Park Service generally considers bicycle use a very appropriate, low impact method for visitors to enjoy Park areas, but that certain limitations on their use are necessary and appropriate in the interest of public safety, resource protection, and the avoidance of user conflict. *Id* at 1455. The National Park Service conceded that, "the evolution of the National Park System, new statutory authorities and directions, ... [and] modifications in recreation and visitation patterns ... have all contributed to rendering many of the existing National Park Service regulations unnecessary, ineffective and/or otherwise outdated." *Id* at 1456-57.

Although the Court in *Bicycle Trails* was interpreting the GGNRA Act which emphasizes recreational opportunities more than the Organic Act, **the Ninth Circuit held that a failure by the National Park Service to address recreational concerns could be a basis for invalidating an agency action.** *Id* at 1460. Correspondingly, the *Yellowstone Assessment* could be invalidated on the basis that it fails to adequately evaluate the needs and desires of whitewater boaters and ultimately discriminates against them as a recreational group.

Although it may have been in anticipation of a legal challenge, the basis for the National Park Service regulations in *Bicycle Trails* was much more extensive than the basis for the ban on whitewater boating in the *Yellowstone Assessment*. The level of science utilized in the National Park Service decision to limit off-road bicycle use in *Bicycle Trails* was based on a comprehensive scientific document titled the *Erosion Rehabilitation Survey*. *Id* at 1462-63. Moreover, the rule making process was much more extensive and the court recognized that the National Park Service undertook a careful and rigorous process in which all of the bicyclists' concerns were voiced. *Id* at 1468. The National Park Service's position was developed through a five-year process including an environmental assessment, a staff report, a Finding of No Significant Impact (FONSI), a proposed rule, and a final rule. *Id* at 1464.

In the end, the Ninth Circuit found that the National Park Service "struck a **reasoned balance** among the sometimes competing goals of recreation, safety, and resource protection as well as among the sometimes competing recreational interests of bicyclists and other Park visitors." *Id* at 1468. The Ninth Circuit held that the bicyclists' challenges to the 1992 trial plan failed and that the NPS' action was not arbitrary or capricious. *Id* at 1468.

In contrast, the *Yellowstone Assessment* falls far short of the extensive research and analysis that was put into the environmental assessment in *Bicycle Trails*. American Whitewater feels that the Yellowstone Assessment failed to adequately address the needs and concerns of whitewater boating, especially considering that it is a low impact method for visitors to enjoy park areas. The decision to perpetuate the ban on whitewater boating did not strike any balance. It was an uncompromising decision that closed the door on any further review or analysis of the decision.

American Whitewater is not seeking a court battle on the issue of whitewater recreation in Yellowstone. The National Park Service should reconsider its current ban on whitewater boating in Yellowstone Park.



IV.B. Whitewater Boating Can Be Successfully Managed

During the meeting in June of 1995, several management issues were raised with respect to whitewater boating in Yellowstone. In this section, we will address the Park's concerns point-by-point. American Whitewater has substantial experience resolving management issues based on our work with agencies for improving safety, providing education about rivers, conducting legal research, and setting up volunteer river patrols.

The liability risks from kayaking are negligible.

IV.B.1. Liability Concerns

Yellowstone National Park raised liability concerns during our June 1995 meeting. These concerns focused on the risks that whitewater boaters face when pursuing their sport, and the risks to Park personnel should rescue be necessary. As discussed on the following pages, the liability risks for the Park by allowing kayaking are negligible.

Concerns for personal safety are addressed in Section IV.A.2.e and Appendix II.

IV.B.1.a. Federal law (the discretionary function rule)

Under the Supremacy clause of the U.S. Constitution, in general, a state cannot impose a duty on the Federal government through the State tort law system or in any other way without the Federal government's consent. The Federal government is immune from lawsuits based on State or Federal law under the doctrine of sovereign immunity, unless the government consents to the suit. U.S. v Sherwood, 312 U.S. 584 (1941).

Under the Federal Tort Claims Act, 28 USC §§ 1346 and 2671 *et. seq.*, the United States government has consented to being sued under State law. However, there are a number of exceptions. One key exception is the "discretionary function" exception, 28 USC § 2680(a). Under this rule, the waiver of sovereign immunity in the Federal Tort Claims Act does not apply where the Federal agency is taking action that is discretionary in nature. There are thousands of cases interpreting the meaning of "discretionary" in this law. The leading case is Dalehite v U.S., 346 U.S. 15 (1953).

In the National Parks and public lands context, a number of cases hold that the National Park Service (and other Federal land managers) are exercising a discretionary function when deciding whether or not to rescue people in national Parks or on other Federal lands. E.g., Wysinger v U.S., 784 F. 2d 1252 (1986); Johnson v U.S., F. Supp. (1991).

The only exception to the "rescue-is-a-discretionary-function" rule is where the National Park Service has signed a commercial concession contract obligating the Park to rescue people. Kiehn v U.S., 984 F.2d 1100 (1993). The National Park Service would not be liable for an unsuccessful rescue that they undertook, again because of the discretionary function exemption. The exemption also applies to decisions of how to execute a rescue.

IV.B.1.b. State Law Issues

American Whitewater has examined Wyoming's laws on landowner liability, contributory negligence, and assumption of risk. It is our belief that the Park Service would be protected under state law from liability if Yellowstone is opened to whitewater recreation.

IV.B.1.b.i. Landowner Liability

State landowner liability laws provide another defense to liability for the federal government. Under these laws, a Federal landowner, in general, is in essentially the same position as a private landowner: if a private landowner has no liability under the circumstances, neither would the federal government, unless there is a statute or regulation that imposes such a duty. The landowner-liability statutes often address this issue and hold that the landowner who allows his property to be used for recreational purposes without charge has no duty to maintain the premises and no duty to provide assistance to those who are injured. The purpose of these laws is to increase public access.

IV.B.1.b.ii. Contributory Negligence

There are also a number of cases under State law dealing with National Parks and other public lands. These cases establish that the doctrine of contributory negligence prevents liability on the part of the United States in situations where, for example, someone goes rafting on a dangerous whitewater river, or drowns while swimming in a national lakeshore. E.g., Harmon v. U.S., 532 F.2d 669 (1986); Clem v U.S., 601 F. Supp. 835 (1985).

IV.B.1.b.iii. Assumption of Risk

The Park Service could provide further immunity (and also provide valuable educational and informational material) by requesting that Assumption of Risk waivers be signed

before using any of the rivers. For example, the waiver or release could state that, "I request that no rescue efforts be undertaken on my behalf in the event that the proposed activity is not successfully completed." Even if an injured boater alleged that the Park Service had a duty to rescue, the waiver would be persuasive evidence that the citizen waived or released his right to rescue.

For those seeking to expand and expound on the resources and values found in the wilderness and front country, exceptional interpretive opportunities and media are available. A wide variety of activities and challenges are available which include sightseeing, hiking, fishing, wilderness backpacking, climbing, and whitewater boating.

▶ National Park Service description of the Black Canyon of the Gunnison²⁷

IV.B.1.c. Examples for Managing Liability from Other National Parks

The National Park Service allows whitewater boating in many of its Parks. At Great Falls Park²⁸ just outside of Washington, DC, whitewater boating is allowed over a series of difficult Class V-VI waterfalls. This Park attracts large crowds of visitors from the greater Washington, DC area. Another example is the Black Canyon of the Gunnison National Monument where whitewater boating is allowed. This stretch of river is an extremely difficult run located in the heart of a primitive backcountry area.

Outdoor sports with risks comparable to whitewater boating are allowed in many National Parks. Mountaineering is allowed in Denali in Alaska; rock climbing is allowed in Yosemite and many others. The Park Service successfully manages whitewater boating and other comparable risk activities in many other Parks around the country. Prohibiting whitewater recreation in Yellowstone on this basis is neither consistent with National Park Service policy nor warranted.

IV.B.2. Cost of Administration, Rescue and Facilities

American Whitewater believes that the cost of administration and rescue would be minimal relative to other uses in the National Park and the Park's operating budget. Whitewater recreation will not result in a significant increase in personnel time for administering the resource. The costs of monitoring future use should not exceed the cost of enforcing the total ban on whitewater recreation in Yellowstone, and would utilize the same backcountry resources as hiking and horsepacking.

Whitewater recreationists will pay appropriate entrance and use fees equivalent to fees paid by other human-powered recreationists within the Park. The Park currently charges visitors \$10.00 for an annual permit or \$5.00 for a weekly permit for non-motorized boats. Permits are required for all vessels. Permits for both motorized and non-motorized vessels may be obtained at Bridge Bay Marina, Grant Village Visitor Center,

27 Web site at <http://www.nps.gov/htdocs1/cure/gmp/vision1.htm> (Oct 31, 1998)

28 Web site for Great Falls Park, <http://www.nps.gov/htdocs4/gwmp/grfa/index898.htm> (Oct. 31, 1998)

Lake Ranger Station, Lewis Lake Campground, and the South Entrance. Non-motorized boating permits are also available at the Bechler Ranger Station, Canyon Backcountry Office, Mammoth Backcountry Office, and Northeastern and Western entrances. The entrance fee (one week pass) is \$20.00 for private, non-commercial vehicles.

American Whitewater is not proposing any facility enhancements specifically for whitewater boating. Boaters can use existing trails, parking areas, and restrooms. American Whitewater can work with the Park to arrange for volunteers to provide labor and materials to open a few essential portage routes in an environmentally responsible manner at minimal expense for the Park. At most, this would require a sign and some rudimentary trailwork to establish access paths. As noted earlier in this proposal, most portages are conducted at or below the high watermark. The remaining portage routes are around major waterfalls.

IV.B.2.a. The Cost Of Administering Whitewater Boaters Would Be Minimal.

Another management concern that was expressed during our June 1995 meeting centered on increased costs resulting from whitewater recreation. While we recognize the reality of decreased appropriations from Congress²⁹, the cost of managing boating would be minimal. The only "facilities" necessary would be a place to park a vehicle, and a trail down to the river. Whitewater boating could be administered through the system that is currently in place for other backcountry uses (via registration or permit). Furthermore, the Park is unlikely to require much activity in terms of managing unqualified boaters as boaters tend to self-regulate their activities according to their ability.

IV.B.2.b. The Cost Of Rescuing Whitewater Boaters Would Be Minimal.

With respect to rescue, accidents from whitewater boating are rare (see section IV.A.2.e.), and Yellowstone already has an existing rescue system for backcountry accidents that could be applied to whitewater boaters. The cost of managing whitewater boating and rescue would be similar with that of other backcountry uses. Rescues from other recreational activities are successfully managed in Yellowstone National Park, rather than being prohibited, with sufficient monetary resources to prevent adverse impacts.

IV.B.2.c. The Cost of Enforcing the Ban on Whitewater Recreation Probably Exceeds the Management Costs of Permitting Whitewater Recreation.

²⁹ American Whitewater is a strong advocate for the National Park Service, and funding programs such as the Land and Water Conservation Fund.

In the end, enforcing the current ban probably costs more to the Park than permitting whitewater recreation. Enforcement costs include substantial staff time spent in catching the offenders, equipment costs such as the use of helicopters, and the expense of apprehension and prosecution before the Magistrate.

Unfortunately, we were not able to obtain any firm data from Yellowstone's staff or the National Park Service on the actual expense of enforcing the ban on whitewater recreation despite requests for this information in 1995 and 1998. However, in 1995, Yellowstone National Park employed approximately 50 permanent rangers and 70 seasonal rangers. These rangers issued more than 3,000 citations and 20,000 verbal warnings for a variety of offenses, some of which were for boating on Yellowstone's rivers. The Park also spent more than \$50,000 on search and rescue in 44 incidents, including 14 hours of helicopter use.

IV.B.2.d. The Cost of *Managing* Whitewater Recreation will be Minimal Relative to the Cost of Managing Other Activities.

Significant amounts of Yellowstone National Park resources are already spent on successfully managing recreational activities. In 1994, over three million visitors traveled to Yellowstone National Park. In 1995, Yellowstone National Park's appropriations amounted to \$21.3 million dollars. Over \$10 million of these dollars were spent on maintenance and more than \$4 million dollars were spent on resource management and visitor protection.

Yellowstone National Park's history of successful management of other recreational uses testifies to its ability to successfully manage whitewater recreation as well. The Park manages recreational uses with higher environmental impacts and higher facility needs such as snowmobiling with its grooming requirements, motor boating with its dock and fuel requirements, and fishing with its licensing and policing requirements than would be required for managing whitewater recreation.

IV.B.3. Commercial River Use Is Not Recommended

Another issue raised during the meeting with Superintendent Finley was the precedent that opening Yellowstone for private boaters would set for future commercial use.

Commercial use should be addressed separately from American Whitewater's proposal under the Park's concessions management authority if concession operators approach the Park. ***American Whitewater does not endorse or in any way support commercial use of the river resource in Yellowstone.*** Our proposal should not be judged in association with commercial river running. The National Park Service is under no legal obligation to allow commercial use if private use is allowed³⁰. Commercial use of Park resources requires a completely different set of regulations than private users.

The *Concessions Policy Act*³¹ states that, "It is the policy of the Congress that such development [concessions] shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located...." Therefore, if the National Park Service does not think that a concession would be appropriate, and has a rational basis for its decision, the concession can be prohibited. There are many publicly managed rivers, such as the Metolius in Oregon, where commercial outfitters are not allowed.

Therefore, American Whitewater only recommends opening Yellowstone's waterways to limited non-commercial use for whitewater recreation by kayak and canoe.

30 USFS v. Joe Monroe--on McCloud River, CA and USFS on South Fork of the Salmon River, CA.

31 *Concessions Policy Act*, 16 U.S.C. § 20.

“Cradled in Yellowstone’s coniferous forests are the headwaters of three great rivers: the Snake, which begins in the southern part of the park and heads west to the Columbia; the Madison, which is formed by the junction of two streams along whose banks are found a great majority of the world’s geysers and hot springs; and the Yellowstone, which, like the Madison, finds its way into the turbid Missouri, but only after passing through deep canyons and over major waterfalls.”

▸ Yellowstone National Park’s 1988 Assessment on Boating

IV.C. Discussion of Boating on Yellowstone's Rivers: An Analysis and Assessment (1988) and the Draft Backcountry Management Plan and Environmental Assessment (1994)

Yellowstone’s backcountry includes more than 95 percent of the Park and most of the Park’s waterways. Though Yellowstone’s *Draft Backcountry Plan and Environmental Assessment* (1994) is an appropriate forum for examining backcountry river and boating activities, it does not evaluate or include an alternative describing the possibility of boating on rivers within Yellowstone National Park³². While the Plan states that "Park staff met with representatives of several backcountry use groups in 1992 and 1993 to discuss the planning process and issues³³," they did not, to the best of our knowledge, consult any river recreation groups or examine whitewater recreation in the Park. In fact, the only discussion of whitewater boating in the *Backcountry Plan* is contained within a few sentences stating that, "based upon the environmental analysis (referring to the *1988 Assessment*) and public input, the Superintendent reaffirmed the boating restrictions on all rivers but the Lewis Channel."

As indicated by the volume of responses that American Whitewater has received, there is considerable support for boating in Yellowstone.

American Whitewater is very concerned about the lack of public involvement in the development of the *Backcountry Plan* and *1988 Assessment*. In an interview in the Nov/Dec, 1997 issue of *American Whitewater* (see Appendix IV), a National Park Service staff member states that the decision to ban all boating was, “based on the combination of the analysis and the public response.” However, the staff member also states that, “We did not get a lot of public comment at the time.” As indicated by the volume of responses that American Whitewater has received (see Appendix I), there is considerable support for boating in Yellowstone. Therefore, the lack of commentary indicates that our constituency was not given an adequate opportunity for becoming involved in the decision making process.

³² See Table 1 - Alternatives for Backcountry Management, p. 20 of the *Backcountry Plan*.

³³ *1994 Draft Backcountry Plan*, p. 1.

The *1988 Assessment* based its evaluation of whitewater recreation on nine environmental parameters and ranked them by their relative importance as high, medium and low. The Park ranked threatened and endangered species, significant geothermal features, and historical and archaeological sites as the three highest factors of concern. Concerns for birds and wildlife (those that are not endangered species), fish, and conflicts with other Park users were of medium importance. While vegetation, sanitation, and safety hazards were of least importance.

Whitewater recreation has no greater impact on these nine Park resources than any comparable use. In fact, whitewater recreation should score lower than all other comparable uses in the backcountry under each of these parameters. The fact that it did not score lower is strong evidence of the study's inadequacy.

Each of the nine parameters were included on the list to ensure protection of Park resources under any proposed activity. However, the grounds for the ban appear to be unclear in the minds of the Assessment Team, prejudicial in nature, and less about protecting the resource than protecting the status quo. For instance, one team member was quoted in *American Whitewater*, saying that the ban was based primarily on "aesthetics," though aesthetics were not explicitly addressed anywhere in the *1988 Assessment*.

American Whitewater has identified several fundamental inadequacies in the *1988 Assessment*, which range from concerns about the methodology applied in the report to lapses in objectivity and scientific rigor. Our discussion of the *1988 Assessment* follows. We have addressed our comments in the specific format of the environmental analysis.

IV.C.1. No Independent Representatives Participated in the Assessment.

The Park Service evaluated eighteen rivers as part of the assessment. However, no independent third party was consulted to add objectivity to the individual river segment assessments.

IV.C.2. "Consensus Format" Was Used Inappropriately in the Assessment.

The study uses a consensus format inappropriately for scoring the environmental parameters of individual river segments or reaches. A study relying on cumulative scores should average the combined scores of the independent team members for each environmental parameter for robustness. The sum of the averages would then be the cumulative score for the reach. Team members should score reaches independently and anonymously. This study did not follow these guidelines.

Furthermore, the Assessment Team consisted solely of National Park Service employees, none of whom had the adequate expertise or objectivity to represent the whitewater recreation community. Impacts attributed to whitewater recreation were merely speculative and reflected individual team members' preconceptions and personal prejudices. A consensus format requires the inclusion of informed, objective, and educated experts that represent all sides of a resource issue.

Consensus is grossly misused in the *1988 Assessment*. The fundamental flaws in the study approach, and the selection of uninformed team members, raises questions concerning the objectivity and scientific rigor of the study.

IV.C.3. The Park's Staff Did Not Have an Adequate Understanding of the Logistics Associated with Whitewater Recreation.

Yellowstone National Park's staff did not have a complete understanding of whitewater recreation, which is necessary for this assessment.

One way in which the staff's limited experience came to American Whitewater's attention is that many of the river segments in the Park are unrunnable for most of the year, however whitewater recreation is evaluated as a year-round activity.

In addition, the Assessment highlights the authors' concern that whitewater recreationists would trample banks and impact riparian areas. In contrast, kayakers float on the water, and primarily get out of their boats in order to scout more difficult rapids, which typically occur at bedrock constrictions on the river. Scouting almost always takes place at water level on the bedrock; therefore soil compaction and general impacts to riparian areas are non-detectable.

Any assessment of whitewater recreation must include an evaluation by an expert, independent third party with specific knowledge and expertise in assessing whitewater recreation. American Whitewater and our staff can provide this expertise for Yellowstone National Park as we do routinely for the Federal Energy Regulatory Commission (FERC) on Hydropower licensing projects.

American Whitewater has participated and helped design whitewater recreation studies on dozens of rivers, including the:

Nisqually (WA),
Kern (CA)
Mokelumne (CA)
Pit (CA)
Bear (ID)
Rhineland on the
Wisconsin (WI)
Magalloway (ME)
Tallulah (GA)
Deerfield (MA)
Racquette (NY)
Beaver (NY)
Black (NY).

IV.C.4. The Assessment Gives an Unacceptable Score to Rivers with Heavy Fishing Pressures. These Fishing Pressures Are Entirely Unrelated to Whitewater Recreation and Should Be Managed and Evaluated Separately.

River segments that were under heavy fishing pressures were automatically assigned an artificially high score because, "Fish and Wildlife personnel believe that increased fishing pressure is likely to have noticeable consequences on fish populations." However, fishing pressure should not be attributed to whitewater recreation. Park management should deal with overfishing by implementing more restrictive fishing regulations, rather than banning whitewater recreation. In fact, the *1988 Assessment* refers to numerous techniques for managing the fisheries that do not rely on a total ban on river running.

Use quotas should be met equitably by limiting all recreational uses, rather than arbitrarily discriminating against a single user group in an effort to reduce cumulative recreational impacts. Fishermen accounted for more than 400,000 user days in Yellowstone in 1990³⁴. Whitewater boaters accounted for none.

IV.C.5. The Assessment Does Not Consider Seasonal Use or Limited Geographic Scope.

Seasonal use was never considered in the *1988 Assessment*. However, seasonal use greatly reduces potential impacts to wildlife and habitat. Whitewater recreation can be easily managed for seasonal use based on water levels or wildlife breeding seasons. The scores of the *1988 Assessment* need to be reevaluated in light of seasonal restrictions and limited geographic scope rather than complete closure. American Whitewater can help the Park's staff generate a legitimate evaluation of seasonal use of Yellowstone's rivers. Likewise, American Whitewater can assist the Park in making an educated analysis based on geographic segments of Yellowstone's rivers and streams and their difficulty.

The Black Canyon of the Yellowstone, "*may be the premier multi-day whitewater run in any National Park in the United States. Its uniqueness as a whitewater resource would justify its exclusive use in this manner.*"

► Ron Ladders, boater and contributing author to *Western Whitewater*

As demonstrated in America's other national parks and public lands, all of Yellowstone's concerns for managing and protecting the resource can be addressed and mitigated through seasonal controls and geographical limitations.

³⁴ Yellowstone implemented a stricter permit system for anglers in 1994 and use dropped to 237,000 user days.

IV.C.6. An Analysis of the Park's Findings in the 1988 Assessment.

The *1988 Assessment* listed numerous findings and recommendations in the conclusion (p. 44-45). The following discussion addresses these findings and recommendations.

- 1. “The river corridors of the Park, especially those in the backcountry, offer a view of the environment as untamed as when the Yellowstone region was first explored (p. 44).”**

Whitewater recreationists are attracted to Yellowstone as a paddling resource precisely because of its wilderness qualities. Paddlers should be allowed to experience the landscape in its backcountry settings just as a hiker or rock climber can experience this beauty, and just as an RV driver views the landscape through their windshield. Paddlers will not detract from another visitor's experience any more than an RV viewed on ridge from the river below.

Banning whitewater recreation in order to preserve wilderness viewsheds, while simultaneously permitting comparable uses in the same area is discriminatory. Ranking one use as preferential over another is a value judgement. National Park Service policy does not permit this prejudicial form of management.

- 2. Fishing has caused the only major alterations to the riverine resources in the Park and fishing use remains high.**

Overuse of Yellowstone's rivers by anglers is a separate issue and should not be the basis for determining the appropriateness of whitewater recreation. In fact, the *1988 Assessment* states that, “researchers suggested that recreational activities other than fishing apparently do not directly affect fish³⁵.” If the Park perceives impacts resulting from fishing, then appropriate management precautions should be taken that target anglers. Whitewater recreationists should not be penalized for another group's use of the resource. If overfishing from boats poses a significant problem, then the use of boats for fishing should be addressed separate from the use of boats for whitewater recreation.

- 3. “Significant geothermal features (pg. 24)”**

American Whitewater agrees that Yellowstone's geothermal features are unique and should be protected. Geysers and hotsprings would not be affected or accessible by whitewater recreationists through American Whitewater's proposal. For example, no geysers or hotsprings are located on the Yellowstone River between Tower Junction and

35 The *1988 Assessment* cites Clark, *et al.* 1985 in support of this statement.

Gardiner. Our proposal purposefully recommends against opening the Firehole River despite its fantastic whitewater due to the unique geothermal features.

However, on rivers in the Park that have significant geothermal features, such as the Firehole and Gibbon Rivers, Yellowstone National Park staff could develop clear management guidelines outlining restricted areas while also allowing paddlers to float through on the main channel. The *1998 Assessment* claims that boating restrictions have helped limit human presence at the Park's thermal features; however, the total ban on whitewater recreation goes beyond protecting the resource and is far stricter than warranted by the Park's guiding language and management policies.

As described in the *Backcountry Plan*, geothermal resources can be protected through increased monitoring and protection. Safety would be the responsibility of the user. Travel away from the river could be restricted. Educational materials can be provided to backcountry users emphasizing the unique importance and fragility of the resource.

4. "Rivers serve as natural barriers between humans and wildlife (p. 44)."

This finding overlooks the present reality of the Park's infrastructure. Park roads parallel several rivers in the Park allowing visitors ample opportunity to displace wildlife from critical riparian habitats. As stated in the *1988 Assessment*, "today the main Park road parallels nine of the eleven rivers in the Park (p. 7)." Wildlife that frequent these high use areas are habituated to human presence. Whitewater recreationists are unlikely to alter that scenario.

5. Boating would open up access to large segments of rivers leading to potential wildlife impacts particularly endangered species.

"The least affected of park rivers would still likely receive impact to a significant number of environmental factors. These impacts would be attributable, not to the sport of boating, per se, but to the increased access to inaccessible rivers and streambanks which boating could provide (pg 45)."

Recognizing concerns for potential impacts to endangered species in critical habitats and during specific times of the year, American Whitewater suggests setting management guidelines for whitewater recreation that would limit potential impacts to sensitive wildlife species. Seasonal use restrictions would virtually eliminate interactions between whitewater recreationists and Yellowstone National Park's endangered species. The *1988 Assessment* analyzes boating impacts from an unlimited use perspective, failing to consider the mitigating effects of management tools for controlling use.

Concerns for impacts from activities other than boating can be regulated separately from whitewater recreation. As stated elsewhere, the overuse of Yellowstone's rivers by other visitors is a separate issue and should not be the basis for determining the appropriateness

of whitewater recreation. Whitewater recreation should not be penalized for another group's use of the resource.

6. “The cumulative effects of any additional intensive recreational use, added to current use levels, may be more noticeable than impacts directly attributable to boating (p. 45).”

Cumulative effects are a legitimate and often overlooked threat to natural resources. However, eliminating whitewater recreation while allowing virtually unlimited use of the resource by other user groups is not an equitable management solution, and certainly does little to protect the resource. Creative management alternatives over multiple use groups could be implemented as an effective solution for avoiding cumulative impacts.

7. “Threatened and endangered species (pg 15).”

The *Endangered Species Act of 1973* (as amended) outlines a program “to conserve threatened and endangered species... insure that any action carried out by [each federal] agency is not likely to jeopardize the continued existence... or result in destruction or adverse modification of habitat of such species³⁶.” The 1988 Assessment addresses five endangered species of birds and mammals: The American peregrine falcon, bald eagle, whooping crane, and gray wolf; the grizzly bear is listed as threatened.

As noted earlier in this proposal, impacts to endangered species can be mitigated through seasonal and area restrictions aimed at negating affects on wildlife.

Peregrines and Bald Eagles: In 1997, the Access Fund published a study and analysis of rock climbing's impacts on raptors titled, *Raptors & Climbers: Guidance for Managing Technical Climbing to Protect Raptor Nest Sites*³⁷. This study notes the importance of conducting detailed scientific examinations of raptor populations, species, recovery plans, distributions of breeding birds, breeding success rates, ecological requirements of the species, whether climbing (or in this case kayaking) adversely affects the behavior and/or nesting requirements of the species, and whether other activities in the area also impact the species. The study notes that it is possible to schedule season-limited restrictions, and that education is the best tool for reducing impacts to threatened species such as peregrines while simultaneously permitting a reasonable level of use of the resource.

The *Backcountry Plan* states that:

Peregrine Falcons forage along backcountry rivers; no known peregrine falcon aeries are in close proximity to backcountry trails or campsites. However, if a peregrine aerie would be found near a campsite or trail, **that**

³⁶ *Endangered Species Act of 1973* (as amended), 87 Stat. 884)

³⁷ Raptors & Climbers: Guidance for Managing Technical Climbing to Protect Raptor Nest Sites, Access Fund (1997)

campsite or trail could be closed if necessary to prevent human disturbance of the nesting birds at sensitive times. Bald Eagles, which both migrate through and reside year-round in the park, are closely monitored. Campsite, trail, and boat access is restricted as necessary to prevent disturbance on the nesting birds. Therefore, **both direct and indirect effects of backcountry use on Yellowstone's endangered bird population is (sic) minimal, and the effects have been and will continue to be mitigated by management actions.**" (emphasis added)

Therefore, using this judgement, backcountry rivers and streams could be managed for whitewater boating through temporal closures in the usual Peregrine feeding and nesting grounds as warranted. The *1988 Assessment* states that the sensitive period around the aeries extends from early March to late July.

However, some degree of whitewater recreation should be possible without significantly disturbing the raptor populations. Many of the areas in which American Whitewater has proposed limited use of the resource already receive human visitation, therefore visitation impacts and concerns for these areas are addressed directly in the *Backcountry Plan* and whitewater recreation should be treated no more sternly than these other activities.

Whitewater recreationists have no proven effects on nesting peregrines, and have no opportunity to disturb peregrine aeries on Yellowstone's cliffs, which are, according to the *1988 Assessment*, generally more than 200 feet above the rivers.

Whooping Cranes: The *1988 Assessment* states that "The presence of boaters in occupied riparian zones could displace cranes away from their nests during the sensitive period of nesting, incubation, and child-rearing (p. 18)." The *1988 Assessment* also explains that the cranes arrive in mid-April and begin migrating South in August. The *Backcountry Plan* only notes the observed presence of 2 whooping cranes in the Park and states that they live in two distinct and remote portions of the backcountry. Therefore, Yellowstone's backcountry rivers and streams could be managed for whitewater boating through temporal and spatial closures based on the detection of breeding pairs of whooping cranes during the cranes' breeding season.

Grizzly Bears and Wolves: As stated earlier in this proposal, the effects that whitewater boaters would have on the wildlife are likely to be minimal and transitory as the wildlife becomes accustomed to brief human encounters in the river corridor. Regardless, the wildlife in the river corridor has probably been exposed to a human presence from hikers and fishermen and would not be unduly alarmed by the passage of a few small, quiet craft on the river³⁸.

Though boaters may occasionally encounter grizzly bears, the level of use by boaters is unlikely to approach the level of use or impacts from other visitors in the riparian zone. Whitewater recreation should not deplete or adversely effect the bears' food supplies.

38 Knight, Richard L; Cole, David N, "Effects of Recreational Activity on Wildlife in Wildlands." Transactions of the 56th North Americans wildlife and Natural resources conference: 238-247 (1991).

The number of boaters can be regulated. There are a number of rivers in Canada, Alaska, and the Pacific Northwest with grizzly bear populations. These rivers are frequently boated and, logically, all anecdotal stories regarding encounters with wildlife have been in the bear's favor.

In regard to Yellowstone's wolf populations, the *Backcountry Plan* states that:

Wolves are not highly sensitive to human backcountry use, except during times of denning, and, if wolves are restored to Yellowstone, the park would restrict access to denning areas if necessary. Wolves are highly mobile and secretive, generally avoiding areas of human use and occupation.

Since the *Backcountry Plan* was drafted, wolves have been reintroduced to Yellowstone. However there is no evidence that the wolves' nature as described above has changed. Therefore, it is unlikely that boaters would either come into contact with the wolves, disturb their dens, or otherwise have an impact on wolf populations.

It is interesting to note that the *1988 Assessment* credits "historic" uses in the Park with routinely bringing visitors in contact with Yellowstone's wildlife causing displacement and in some cases "management induced mortality (p. 22)." Whitewater boating should not contribute to this mortality.

8. "Birds and wildlife (p. 28)"

As described earlier, boating will have no unique impacts to birds and wildlife beyond allowed human-powered activities within the Park. In fact, the *1988 Assessment* states that, "In other parks and recreation areas where river boating is present, numerous species of birds and mammals appear to live compatibly with humans." If, however, the Park observes a unique causal wildlife disturbance related to boaters that has a measurable impact on the resource, then boating can be effectively managed to mitigate these impacts.

Concerns for nesting success by specific species of raptors and waterfowl may be addressed through seasonal restrictions on access.

9. Conflicts with other user groups.

Conflicts between whitewater recreationists and other use groups are unlikely. There is no evidence supporting the premise that whitewater recreation will cause conflicts with other Park visitors. Whitewater recreationists, fishermen, hikers, horsepackers, and climbers share Park resources in many other National Parks without creating conflicts between use groups. In fact, there is abundant evidence that whitewater recreationists can use Park resources with minimal interaction with other use groups.

As an example, the Black Canyon of the Yellowstone is likely to receive less recreational use from other use groups due to the high temperatures during the prime boating season between August and October. Furthermore, this section of the Yellowstone River is not visible from traditional tourist areas except at a narrow viewshed at Tower Junction and outside the Park at Gardiner, Montana. Therefore, user conflicts in the Black Canyon are particularly unlikely.

10. “Historical and archaeological sites (pg. 26)”

Regulations could be enforced and informative signs can be posted regarding protection of archaeological sites. Of all the backcountry user groups in the Park, whitewater recreationists are the least likely to stumble across archaeological sites due to their use of the river rather than the shore. If whitewater recreationists accidentally discover archaeological sites they can report the location of the site to the Park’s management. Any artifacts located within the high water mark would have a short tenure in that location given the annual erosive forces of spring floods. Concerns over archaeological sites have not caused Yellowstone National Park to restrict activities by other user groups that are more likely to come in contact with such sites. Whitewater recreation should not be evaluated by a different, more stringent standard than Yellowstone National Park is willing to impose on other user groups.

This section of the report also cites the occasional view from the roadside “which appears unchanged by humans over the course of a century or two.” However the report draws no connection between whitewater recreation and this statement, fails to explain how these roadside views are of archaeological significance, or how whitewater boaters will change the appearance of the landscape.

The report also cites concerns for trampling of archaeological sites at put-ins and take-outs; however as discussed earlier, we have proposed limiting access to existing trails and areas which already receive public use.

11. The finding that rivers would receive impacts based on the consensus decision matrix.

This finding is not applicable in light of the scoring flaws in the decision matrix. These flaws include the lack of experts on the evaluation team, lack of a third party for objective analysis, the assignment of impacts from other recreational uses to the score, and the lack of independent scoring of individual river segments. The consensus requirement trivializes the cumulative score.

12. Whitewater recreation is available in other areas of the West. Yellowstone’s unique viewing opportunities should be retained (pg. 45).

Whitewater recreationists deserve an equal opportunity for experiencing the grandeur of Yellowstone's pristine rivers in a state much like they were when the early explorers discovered them (see # 1 above). As recognized by the Park Service and the American public, Yellowstone is unique. No other rivers in the West offer the combination of experiences available in Yellowstone. Therefore whitewater recreationists should be permitted to use Yellowstone's rivers and enjoy Yellowstone's unique viewing opportunities from the river.

The assessment's summary that all of the Parks' rivers should be protected as boat-free viewsheds at all times appears indefensible based on inconsistencies with National Park Service Management Policies and Yellowstone's own guiding language. It is also interesting to note that Park concessions, associated buildings, roadways, and campers' tents greatly detract from the pristine views in Yellowstone; yet these facilities and structures do not receive the same scrutiny as a few transient boats on Yellowstone's rivers.

13. Based on analysis in the decision matrix, least affected rivers would still accumulate a score equal to 50 percent of the total possible points depicting impacts.

As noted earlier, the analysis applied for the decision matrix scores is flawed. The fact that not a single river can score less than fifty percent of the total further supports the flaws of this analysis and the preconceptions and prejudices of the analysis team. American Whitewater recommends that the scoring methodology be discarded for a more scientifically sound method.

14. "Boating has not traditionally been a major use of Yellowstone rivers (pg. 2).

Arguments against boating that are based on historic or traditional use are flawed for four reasons. The first is that several early explorers used boats to navigate Yellowstone's lakes and rivers. The second is that the native Americans and early fur traders used canoes in the region. The third is that there was enough fishing from watercraft on the rivers between 1900 and 1950 to compel the Superintendent at the time to ban boating for the sake of the fisheries. The final reason is that even with the ban on boating in place, there are numerous whitewater descents of Yellowstone's rivers every year, and have been since the ban was first imposed on May 30, 1950. The difference is that the ban has only been heavily enforced since 1981 when a kayaker was arrested for running the Black Canyon, thereby attracting national attention to the ban.

Furthermore, the *1988 Assessment* states that "the earliest 19th-century explorers to the Yellowstone country continued the logical practice of using rivers as pathways into unknown territory. In 1807, John Colter followed the Snake, Yellowstone, and Lamar Rivers into what is now park land."

15. **“However, it appears that few park visitors were interested in floating streams until the 1950’s, when enough boats were used on the Madison River to create conflicts with fishermen (pg. 2).”**

The conflicts that are mentioned above are related to fishing pressures and overfishing of the Madison rather than boating. Boating by fishermen impacted fishermen.

Appendix II of this proposal includes an article describing the development of whitewater recreation and the impact of new technologies on the sport following World War II.

16. **“(W)hole rivers or major segments of rivers and streams within the park would be evaluated; minor tributaries and stretches less than five miles long would not be analyzed. The purpose of this was to keep the analysis from becoming unnecessarily complex and fragmented; although certainly there are shorter segments of river which are floatable (pg. 3).”**

The decision to ignore tributaries and short stretches of rivers demonstrates a basic ignorance of the recreational patterns of whitewater enthusiasts. Whitewater recreation, and the lengths of rivers that are run, is dependent upon the difficulty of the river segment and the time spent negotiating difficult rapids. Furthermore, many segments are desirable for boating precisely because of their brevity, ease of access, or other conditions (such as steepness or remoteness) contributing to the unique qualities of running rivers in Yellowstone.

17. **“The Director of the National Park Service (1985)... reiterated that priority: to seek a better balance between visitor use and resource management... we intend to favor preservation in cases where the likely effects of more use are expected to be adverse (pg. 5).”**

American Whitewater’s position that boating is unlikely to have any detectable adverse impacts on Yellowstone, is supported by other statements within the *1988 Assessment* as well as the National Park Service’s own *Management Policies*. Virtually all of the quantifiable impacts that are described in the *1988 Assessment* are from other visitor groups in Yellowstone. The assessment does not describe any impacts which are unique to whitewater recreation over existing uses in the Park. The assessment fails to draw a definitive case that any degree of whitewater recreation will cause an adverse impact on the resource.

Whitewater boating can be managed effectively through seasonal controls and other management techniques to protect the resource.

18. “Regional Boating Opportunities (pg. 10).”

The *1988 Assessment* lists a number of regional rivers that permit whitewater recreation. However, these rivers do not provide a “Yellowstone experience.” Furthermore, the rivers in Yellowstone offer a unique experience in terms of whitewater, skill development, wilderness challenges, and scenery that is not offered anywhere else in the region or in the National Park System.

19. “Commercial guided fishing trips could also be provided, giving anglers access to previously inaccessible stretches of streams... With the continuing popularity of river boating and the heavy river use levels in other national parks, Yellowstone should expect to manage considerable numbers of boaters within a very short time and, perhaps more importantly, higher numbers of anglers (pg. 11).”

As stated earlier, concerns for angling should be addressed through fishing permits and fishing restrictions from boats. Angling is a separate issue from whitewater recreation and should be managed and addressed separately.

Second, the river segments that we have recommended opening in this proposal are unlikely to receive “heavy river use.” However, should they begin to receive heavy use, then American Whitewater and the Park’s management can design an appropriate reservation-based permit system or examine other adaptive management techniques for the resource. Use can be managed effectively without resorting to a total ban on whitewater recreation in the Park.

20. “To complete the inventory, members of the river team visually surveyed the 18 segments, relied on additional park staff who were familiar with particular rivers, and consulted park maps, resource management files, and fisheries surveys. The U.S. Fish & Wildlife Service unit stationed in Yellowstone has floated many of the park waterways in conjunction with their fisheries work, and their reports provided significant information in absence of having park staff float the rivers (pg. 13).”

From this statement we can infer that: 1) whitewater recreationists were not consulted, or that their input was dismissed, while the Park developed its inventory; 2) the Fish & Wildlife Service routinely floats some rivers in the park providing further evidence that boating is a reasonable and traditional use of the Park; 3) no members of the Park’s river team have actually floated Yellowstone’s rivers, and therefore the Park’s staff can not adequately represent the unique attributes and qualities of Yellowstone’s rivers for recreational purposes or visitor enjoyment.

Furthermore, the Fish and Wildlife Service is not a recreational agency, meaning that the Assessment only examined the use of the resource from a wildlife perspective and that the recreational aspects of the survey were not given equal attention.

21. “Consultation with others (pg. 46).”

The *1988 Assessment* lists several groups and individuals that were consulted in the development of the assessment. However, our research indicates that whitewater recreationists were not directly consulted, or that their input was dismissed, while the Park developed its inventory. The public should have been consulted to a greater degree, and the Park should have made a greater effort to solicit public comments during the course of developing the *1988 Assessment*.

Though mentioned as a contact in the 1988 Assessment, a representative of the Beartooth Paddlers stated in conversations with American Whitewater, that his club submitted a brief proposal in 1986 asking for access to the Black Canyon. However, the Park neglected to acknowledge receipt of their proposal, follow-up with the club, or seek additional input from the group before issuing its own report two years later.

Likewise, Dick Dolan, another listed contact, explained in a phone conversation in November 1998, that he prepared a few brief comments on river access for the Greater Yellowstone Coalition, but that he was never consulted about his input and that the Park did not appear to include his comments in the *1988 Assessment*.

22. “Several of the planning team members are experienced kayakers whose evaluations of river hazards were relied upon by other team members (pg 41).”

The *1988 Assessment* does not describe the qualifications of the team’s kayakers, and implies that no parties beyond the Park’s staff were consulted about the opportunities for whitewater recreation in Yellowstone. At the time of the assessment, American Whitewater, the American Canoe Association (ACA), and the National Organization of Rivers (NORs) had gathered safety information on river running, river hazards, and river safety. The Park was aware of this information and quoted a few safety statistics from American Whitewater board member, Charlie Walbridge. However, our research indicates that the Park made no effort to directly communicate with Mr. Walbridge or any of these national non-profit organizations that represent whitewater recreationists and America’s river resources.

The Park should have made a greater effort to solicit public comments and expert advice during the course of developing the *1988 Assessment*.

The Park should have made a greater effort to solicit public comments and expert advice during the course of developing the *1988 Assessment*.

IV.C.7. An Analysis of the Park's Recommendation in the 1988 Assessment

1. **“Due to the high level of potential impact that river boating has on the biophysical environment of Yellowstone National Park, the no boating/no action alternative is recommended (p. 45).”**

American Whitewater's discussion of the findings presented in the *1988 Assessment* discredit the prediction that boating will cause a “high level of potential impact... on the biophysical environment.” The *1988 Assessment* analyzes boating impacts from an unlimited use perspective, failing to consider the mitigating effects of management tools for controlling use. American Whitewater requests that the findings and recommendations of the *1988 Assessment* be discarded until a scientific analysis can be carried out. The *1988 Assessment* appears to have been a reflection of the authors' personal opinions toward whitewater recreation, rather than an objective evaluation of resource impacts.

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The Park's assessment appears to have been a reflection of the authors' personal opinions toward whitewater recreation, rather than an objective evaluation of resource impacts.

2. Changes in Whitewater Recreation Since the 1988 Assessment Was Conducted.

Regardless of the objectivity or scientific rigor used in the 98 assessment, whitewater boating has changed dramatically in the past 11 years. Changes include a significant growth in participation, improved education, safety, and personal skills, as well as technical developments which have allowed rivers which were previously thought too difficult or even un-runnable to be frequently boated by expert and even advanced paddlers.

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In regard to safety, there is better information and educational material about exercising personal safety (see Appendix III). There are better standards of comparison regarding the relative safety of individual rapids as well as longer river segments. Boaters have also developed better skills related to exercising personal safety which has allowed more difficult rivers and drops to be run. Examples include the Great Falls of the Potomac within Great Falls National Park in Maryland and Virginia, the Clarks Fork of the Yellowstone, the Cataracts of the Kern in California, and hundreds of other steep gradient rivers and streams across the country. This growth in skill and ability opens many rivers and streams, including many short sections of river. which were not addressed in the *1988 Assessment*.

In terms of safety training, an unofficial survey conducted by park staff at Georgia's Tallulah Falls State Park indicated that virtually all boaters on this Class IV-V river had First Aid and CPR training, many are qualified medical technicians, and a high percentage are EMT's or MD's. This survey was conducted in November 1997, on the first weekend of releases for a river never previously run by whitewater boaters. Tallulah, a beautiful and nearly 1000 foot deep canyon, is approximately 1.5 miles long but routinely attracts 250 whitewater boaters per weekend (the limit allowed) because of its beauty and outstanding whitewater. Given the world-class attributes of Yellowstone National Park, American Whitewater believes that many short sections of river in the park, overlooked by the *1988 Assessment*, would provide an unmatched and world-class whitewater experience for those with the requisite skills and determination.

In terms of education and skill, boaters are learning how to boat more difficult rivers. With the proliferation of kayaking instructional schools and the advent of whitewater freestyle events, specific moves and technical skills have increased greatly, allowing rapids and river sections previously thought un-runnable to be boated.

There have been significant improvements in the technology of the sport and equipment used for whitewater recreation since the *1988 Assessment*. Boaters and the paddling industry have developed durable, recyclable plastic boats to replace the fiberglass boats of the 70's and 80's. The use of plastic boats, in itself, has allowed steeper and more difficult rapids to be run, and opens many river segments thought too difficult in 1988. Whitewater boats have also become more specialized for downriver running, expedition and exploratory boating, and creek boating.

Likewise, technology has improved other whitewater equipment, allowing boaters to carry lighter and more safety equipment. Boaters on difficult runs carry spare break-down paddles, safety throw ropes, and river knives, all designed for the protection of themselves and their paddling partners.

One of the prime changes in attitude includes the proven quality of short sections of rivers for whitewater recreation. For instance the Tallulah Gorge in Georgia, and the La Grande Canyon of the Nisqually in Washington are less than 5 miles long, yet both provide some of the best recreation opportunities in their regions. There are countless tributaries in Yellowstone which are less than 5 miles long and would provide outstanding opportunities for whitewater recreation that are unique to the region.

In the past five years, many rivers thought to be too difficult or un-runnable have been opened to whitewater boating. Many of these were first run by small groups of expert boaters exploring on their own. Others have been opened through a deliberate and methodical series of whitewater studies. American Whitewater has been involved and participated directly in over 20 whitewater studies over the last decade, and has worked with various local, state and federal agencies, private industry and landowners, and other non-governmental organizations in conducting these studies.

American Whitewater is willing to work with staff members in Yellowstone National Park to conduct similar whitewater studies and to increase the current information base available regarding rivers and streams within the park.

“No nation facing the unhealthy softening and relaxation of fibre that tends to accompany civilization can afford to neglect anything that will develop hardihood, resolution, and the scorn of discomfort and danger.”

-Theodore Roosevelt in reference to touring Yellowstone (1903)

IV.D. CONCLUSION

Given the lack of objective scientific data in the *1988 Assessment* on boating, it appears that one of the primary reasons for the exclusion of whitewater recreation is management convenience. While we recognize the limited resources of Yellowstone National Park and the era of gradually declining appropriations from Congress, we believe that whitewater boating can be managed within the constraints of these limited resources. American Whitewater seeks to work with Yellowstone National Park in making whitewater access as simple as possible for the Park's management and visitors.

The National Park Service's responsibility and management directives permit and encourage human-powered outdoor sports like whitewater recreation. *Yellowstone National Park's successful management of other backcountry recreational activities presents compelling evidence that whitewater boating can also be successfully managed.* The management of the Yellowstone fishery illustrates an effective strategy for managing recreational use by combining regulated seasons with certain use restrictions in order to protect the resource. As with fishing, whitewater boating is a seasonal use dictated by the hydrologic cycle.

More compelling evidence of the feasibility of allowing boating in Yellowstone National Park is presented by America's other National Parks that successfully manage whitewater recreation. Some of these Parks are the Grand Canyon, the Black Canyon of the Gunnison, and Grand Teton. As with Yellowstone National Park, these Parks have sensitive resources and management concerns and have effectively imposed limited restrictions to meet resource needs rather than banning use.

American Whitewater submits this proposal in a constructive manner and looks forward to working closely with the National Park Service and Yellowstone National Park's staff on allowing whitewater recreation in the future. We thank the Park Service and all other interested parties in taking the time to consider our proposal.



“If Roosevelt had been photographed in Yellowstone with his canoe rather than his horse, there is little doubt that whitewater recreation would be permitted in the Park today.”

- Jason Robertson, American Whitewater's Access Director