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Submitted electronically

Re: Fish Creek Watershed Recreation Strategy

Dear Montana, Fish, Wildlife & Parks,

American Whitewater is a national non-profit 501(c)(3) river conservation organization founded in 1954. With over 7,000 members and 80 local-based affiliate clubs, we represent approximately 80,000 whitewater boaters across the nation. American Whitewater's mission is to conserve and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. As a conservation-oriented paddling organization, American Whitewater has an interest in the ecological well-being of Fish Creek, as well as its recreational value. A significant number of our members reside within a reasonable driving distance from the Fish Creek and/or travel to this area for recreation.

In the Fish Creek Watershed Recreation Strategy, Montana, Fish, Wildlife & Parks is proposing a first-of-its-kind ban on paddling a stream. The given rationale is extremely concerning, and the proposal marks a significant shift for a state that has a long history of strongly supporting the public freedom to float rivers. The agency's rationale for the proposed floating prohibition centers on three primary factors. MTFWP claims that the prohibition is needed to prevent anglers from experiencing an "invasion of privacy" or "loss of solitude." MTFWP claims that it is needed to prevent the removal of large woody debris (i.e. strainers). And MTFWP claims that since floating has not yet become a well-established practice on Fish Creek, banning it now will be easier than later. Each of these flawed claims and the resulting paddling ban are an extreme reaction to issues that do not require a paddling ban to address, and we will address each in these comments.

We ask that MTFWP change course, and not prohibit paddling on Fish Creek. There are much better, more targeted management options that will better meet the agency goals.

1. Recreational floating in Fish Creek is not a relatively new or nascent phenomenon.

A core premise of the Strategy is that Fish Creek has a "long tradition of providing excellent opportunities for wade fishing," while "Recreational floating of Fish Creek is relatively new, having only been observed regularly in the past 5-7 years" and "has not yet become a well-established practice on Fish Creek." This framing is inaccurate.

I first paddled Fish Creek early in 1998 - 25 years ago. My journal notes that someone drove by me on the gravel road with a dead cougar in the back of their pickup truck - something I still remember vividly, that I saw a bald eagle, and that I enjoyed the water quality. I've paddled Fish Creek and its forks a few times over the years and am by no means alone. I paddled Straight Creek into the North and West forks of Fish Creek in 2011 and hiked up and paddled the West Fork of Fish Creek in 2012. On these trips we saw no other people and removed no wood.

At the time of my 1998 trip, whitewater paddling on Fish Creek had been occurring with regularity for several decades. In the 1970s the most common take-out for the Alberton gorge required hiking up a steep trail on the edge of Fish Creek back to the road, which led paddlers to enjoy Fish Creek as well. Throughout the 1970's and 1980's paddlers would routinely run several laps on the bottom gorge of Fish Creek as part of their trip to Alberton Gorge. Throughout this timeframe paddlers would drive up the road various distances to paddle Fish Creek, and also at times drove up and paddled the South Fork of Fish Creek.¹ In the mid-nineties at least one kayaking class was taught on Fish Creek, and in the early 2000's it served as the setting for a river rescue class and group paddle. There has been consistent light use of the stream for paddling for at least a half-century.

Like anglers, kayakers have a long tradition of enjoying Fish Creek and paddling the stream is a well-established use. Most likely, both the anglers and paddlers enjoying Fish Creek today began visiting the stream long after both uses were well established. Neither is a new use in the eyes of the other.

2. MTFWP is inappropriately prohibiting paddling to limit float-fishing

The issues raised by MTFWP on Fish Creek is not paddling or boating at all, but rather float fishing. We raised this issue in the spring with MTFWP staff in a collegial email dialog about wood management and their response was "The concern is less about paddlers, as you surmise, and more about anglers."² And yet, rather than choose to limit float-fishing as an activity, the Strategy proposes to prohibit all paddling, even the use of kayaks and packrafts that can easily portage wood rather than remove it and that have been used on Fish Creek without issue for at least five decades. Given that float-fishing is the problem, tailoring management to limit that use is the equitable solution.

3. A paddling prohibition is not justified to protect angler privacy or solitude

MTFWP offers no evidence of crowding or conflicts between paddlers and anglers to support the proposed paddling ban. MTFWP offers no data on the amount or seasonality of either use, or the number and nature of encounters between them.

¹ Personal Communication, Doug Ammons, September 2023

² Email dialog with MTFWP Staff, April 18, 2023. Note that we were not made aware of the development of the Strategy or the possibility of a paddling ban during this exchange.

Instead, the Strategy states that “a few stakeholders” thought increased paddling could lead to wood removal, though most did not, and none had seen wood being removed. The Strategy then goes on to note that “A few fishing advocates suggested closing Fish Creek to floating in response to this concern.” The Strategy also claims that “Some stakeholders noted the conflict between wade fishing and floating that can have a negative impact on the traditional wade-fishing experience on Fish Creek...” One must assume that these few fishing advocates are the same respondents across these findings, and they simply don’t want to share Fish Creek with other visitors. They may have also been led to these statements with leading questions. These “few” minority voices do not constitute evidence of conflicts, wood removal, or need for an unprecedented paddling ban. They are a few individuals that when asked - requested exclusivity on a public river for their benefit. They should be denied outright.

The Strategy claims that paddlers and anglers are a “classic recreational conflict,” though both uses co-occur on every river in Montana almost universally without issue. The Strategy cites Kainzinger, et al., 2015 as supporting the MTFWP claim. That study, on a stream renown for extremely crowded shoulder-to-shoulder steelhead fishing, found that:

Neither boaters’ nor anglers’ overall trip satisfaction was negatively influenced by in- and outgroup conflict as hypothesized. Very little conflict was perceived, and conflict was not an issue for most of the recreationists on the North Umpqua River. Pg 549

Rather, the study found that perceived *crowding* (not conflict) with boaters and other anglers negatively influenced anglers’ trip satisfaction, and crowding with anglers negatively influenced boater’s trip satisfaction. The idea that crowding exists on Fish Creek is beyond the pale. Sure, crowding can impact recreational experiences, but that is distinct from conflicts, and has no bearing on the sparsely-used Fish Creek.

MTFWP also cites Graefe, et al., 1984, as noting that when “anglers fishing from the bank, or while wading, encounter recreational floaters in areas where their presence is new or infrequent, they may view this as an invasion of privacy (Graefe, et al., 1984). This review article is in turn citing a 45 year old paper by Vaske that was presented at a conference but not otherwise published, and is not publicly available in the peer-reviewed literature. Specifically, the quote from Graefe et al is referencing a *hypothetical* example of a fisherman meeting a tuber, and that fisherman having a negative reaction to “not the individual per se ... but rather to what the tuber represents.”

Rather than a “classic recreational conflict,” anglers and paddlers ubiquitously share rivers across Montana, the United States, and the world, and issues with that shared use are the vanishingly rare exceptions rather than the rule. MTFWP has not shown Fish Creek to be an exception to the positive shared-river norm. In our experience, the rare cases of conflict are always caused by a manager of flow or access proposing to exclude or restore paddling in a way that either creates or threatens a privilege of exclusive angling use rather than shared use of a public river. In other words, MTFWP is fomenting conflict with this Strategy, and in asking

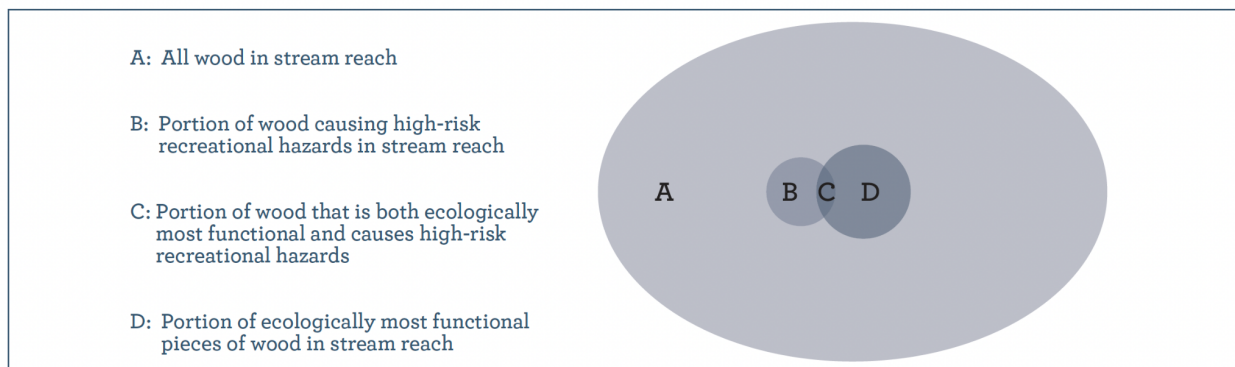
about support for a paddling ban. Regardless, there is no basis for banning paddling to create a privilege of angler privacy or solitude at the expense of other river users. As noted elsewhere in these comments, the frame of angler-paddler conflict is also a false construct since if there is an issue it appears to be specifically with float-fishing rather than paddling.

4. A paddling prohibition is not justified to prevent wood removal

We fully support the Strategy’s assumption that wood in Fish Creek is an important component of the stream’s geomorphology and ecology. Likewise, we support MTFWP’s goal of limiting the removal or management of wood in Fish Creek as needed to protect those values.

We must point out though that MTFWP does not offer either the percentage of wood that has been managed by floaters in Fish Creek, nor any actual evidence of wood removal. Managing wood in a river environment is extremely labor intensive and difficult, which is a limiting factor for members of the public interested in such management. Our assumption is that less than 1% of wood in the river has been or would ever be managed to provide for recreational passage because a) the vast majority of wood is not a recreational problem, b) managing wood is extremely labor intensive, and c) paddlers desire to leave things in a natural condition. Of that managed wood some of it would be functionally important, and other pieces much less so. The following diagram, originally presented at a River Management Society symposium and then integrated into a white paper illustrates this point:³

Figure 6.1 | Diagram showing that a subset of natural wood in a stream has disproportionately high ecological value, that another subset creates objective recreational hazards, and that there is a small amount of overlap. Scale of relationship is estimated.



Additionally, managed wood does not mean removed wood: wood can most easily be trimmed or moved but remain a functioning part of the ecosystem. While a problem could hypothetically exist, MTFWP has not shown wood removal to be a problem on Fish Creek. These facts notwithstanding, using a paddling ban to prevent wood removal is unnecessary and unjustified.

³ Colburn, Kevin. 2012. Integrating Recreational Boating Considerations Into Stream Channel Modification & Design Projects. American Whitewater. Available for download at: <https://www.americanwhitewater.org/content/Document/view/id/1006>

As evidence of wood removal being a problem, the Strategy cites Krejčí, L. & Máčka, 2012, which studied a river in the Czech Republic from which wood is most often harvested for firewood and removed at the request of the river manager. They note that canoeists do sometimes remove wood to make the river navigable, however “[c]anoeists typically concentrate their efforts upon the most dangerous pieces of large wood, those that obstruct their routes, and tend to cut only the upper (thin) parts of the trees.”⁴

The Strategy also cites Schafft’s global meta-analysis of the ecological impacts of water-based recreation on freshwater ecosystems, which does not mention wood removal among impacts. Schafft did however recommend that while temporal zoning can fix some issues, “... selectively constraining or banning single activities while allowing others will unlikely generate substantial conservation gains but fuel stakeholder conflicts instead.”⁵ Indeed the agency would be hard pressed to create a better arena for conflict than to propose to ban one use for the exclusive benefit of another. Furthermore, the analysis stated:

“Our work showed that ecological impacts of outdoor recreation may not be present in certain taxa and for certain levels of biological organization. In these situations, constraining recreation with the hope of achieving conservation gains may be an illusion that negatively affects human welfare without supporting conservation. Additionally, as the aggregated effect sizes of the various recreation types were often quite similar, we warn against conservation policies that are tailored to just one type of recreational use. Constraints on single-user groups may have no conservation benefit as long as other activities continue to use local ecosystems.”⁶

As these quotes point out, a paddling ban would unnecessarily affect human welfare, with questionable benefits at best, and in a way that causes conflict.

Importantly, removing wood is currently allowed on Fish Creek as far as we know, and those that purportedly took part in wood removal in the past were presumably doing nothing wrong from a legal or regulatory perspective. The Strategy proposes an extreme punitive management response to something that MTFWP has heretofore allowed. Punishing the public when a very small number of people engaged in a legal activity is not right.

Plainly put, the agency can allow paddling and prevent wood removal. There are many management options described below that can serve the same goal of preventing wood removal without banning paddling.

5. A paddling prohibition is not justified because of low paddling use

⁴ Krejčí, L. & Máčka, *Anthropogenic controls on large wood input, removal and mobility: examples from rivers in the Czech Republic*, at 232 (2012).

⁵ Schafft, M. et al., *Ecological impacts of water-based recreational activities on freshwater ecosystems: a global meta-analysis*, at 9 (2021).

⁶ Id. at 11.

The Strategy makes the statement that MTFWP is banning paddling now because use is low, and “as recreational floating becomes mainstream practice, it can be more difficult for agencies to implement changes.” As noted elsewhere in these comments, paddling use of Fish Creek is indeed low but by no means “nascent” and is certainly “mainstream” based on a half century or more of use, and MTFWP offers no evidence that it is growing or causing impacts. The idea that the State should ban recreational uses that are not a problem, to prevent future problems is anathema to the Montana way of life, Montanan’s basic rights and freedoms to enjoy public rivers, and evidence from other similar rivers. This approach to recreational management could apply equally well to any other recreational use on any of our natural resources. MTFWP should not take this draconian step.

6. Outreach regarding the Strategy did not meaningfully include paddlers

Significant design and equity issues exist within the public outreach and survey efforts. The Strategy cites that 82% of people would support a floating ban on Fish Creek, yet Figure 1 of the Public Survey Summary indicates that no (or insignificant numbers of) paddlers of Fish Creek were actually included in the survey. There are several equity problems with this fact. Asking one group if another should be banned is inherently inequitable, conflict triggering, and asymmetrical to the point of meaninglessness. There is no cost to a non-paddler supporting a paddling ban—only potential competitive gain. Relatedly, asking a population (Fish Creek visitors) this question when there is an overwhelming majority of one kind of user (non-paddlers) will by design skew/bias the outcome, and risk producing a tyranny of the majority. In addition, it appears as though the question was worded to infer that a floating ban was needed to protect critical fish habitat, something all visitors are likely to care about and support, which is fundamentally untrue and creates significant bias in the question.

The Strategy cites “thoughtful participation in the development” of the Strategy by twelve organizations including at least two fishing-related organizations. None of the participating organizations were paddling-related. Likewise, not a single organization or individual listed in the meeting summaries and stakeholder field trip summary were paddling-related. Almost certainly, attendees of the public meetings were members of the participating organizations who had the advantage of being made aware of the opportunity.

As far as we are aware there was no outreach to American Whitewater, local paddling businesses, or local whitewater paddling groups, notifying them of this process or inviting them to participate. The paddling community seems to have been—and certainly American Whitewater was—entirely unaware of this process.

Banning paddling on a Fish Creek would constitute a significant breach of trust with the public. The people that enjoy floating Fish Creek—and would be harmed by this decision—were not included in the decision-making process in any way. The ban is unnecessary, overly broad, and overbearing, and impacts a very small group of people that have been sustainably enjoying Fish Creek in small boats for at least half a century.

7. The proposed paddling prohibition would have significant negative policy consequences and would be unlikely to survive legal review.

When an agency makes a decision, courts determine whether the agency's decision was arbitrary, capricious, unlawful, or not supported by substantial evidence.⁷ In this case there is no evidence of ecological harm caused by paddlers, no quantitative data on wood removal by paddlers, no evidence of conflicts or crowding, no evidence to support the claim that paddling is a new use or a growing use or a soon-to-grow use, and no evidence that more narrowly tailored regulations would not suffice. The studies cited as justification do not reasonably apply to Fish Creek. The public outreach and data collection was not equitably conducted or applied. The Strategy admits that it would arbitrarily ban paddling before considering supporting evidence. MTFWP did not rely on substantial evidence to support the Fish Creek paddling ban.

When making the factual inquiry about whether an agency decision was arbitrary or capricious, a court will "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁸ The Strategy restricts the use and enjoyment of Fish Creek and ignores core conservation principles that protect scenic, scientific, and recreational resources.⁹ MTFWP does so by not considering: the opinions of paddlers; the bias of the outreach efforts; the history of paddling on Fish Creek; the lack of conflicts on Fish Creek and on other similar streams in Montana; the likely de minimis and undocumented extent of wood removal on Fish Creek; and the role of float-fishing in this matter versus mere paddling. The court reviewing this decision would likely remand the paddling ban on Fish Creek due to MTFWP acting ultra vires.

When riverside property owners have sought to close other Montana rivers to public floating to provide for angling privacy, the state has vigorously defended the public's rights to paddle rivers. This right was firmly established by the State Supreme Court in 1984 and the subsequent Montana Stream Access Law in 1985. The State defended this public right perhaps most famously in a case against ultra-wealthy landowners involving the Bitterroot River's Mitchell Slough. We raise this matter to highlight that the proposed ban collides headlong with decades of judicial and legislative positions taken by the State. If implemented it would mark a dire shift in the State's perspective on the public right to float rivers. On Fish Creek, the Strategy acknowledges the paddling prohibition stems from the support of a few angling advocates. We have to ask, if these advocates are successful, where else in the state will a few well-connected individuals press the state to designate waters exclusively for shore-based angling by banning paddling?

8. Solutions exist and should be selected that prevent wood removal while not prohibiting paddling.

⁷ 2-4-704, MCA.

⁸ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

⁹ 23-1-101, MCA.

Fish Creek is a natural and dynamic stream like many in Montana, and paddlers are more than capable of sustainably enjoying it without causing harm or conflicts. MTFWP has many management options to support sustainable use. MTFWP has shared that the issues they seek to address are related to oar-raft-based angling, not recreational paddling, yet their proposed remedy would impact all floaters. Oar rigs are heavy and difficult to portage around strainers compared to smaller boats more suited to small rivers like Fish Creek. MTFWP could:

- Prohibit the removal of wood – something currently allowed.
- Issue permits for removal of specific wood pieces.
- Limit commercial use.
- Limit or prohibit fishing from a boat.
- Limit craft types to exclude large rafts and drift boats.
- Work with American Whitewater and other organizations to encourage paddlers and other river visitors to not manage wood.

MTFWP acknowledges that they considered these options in response to public comments but offer no explanation for their selection of the most severe management restriction available. American Whitewater has developed guidelines and expertise in the field,¹⁰ and there are a range of resources to support wood management for multiple values. Those resources were not consulted or cited by MTFWP. A wholesale floating ban is unnecessary and overbearing, and not consistent with professional standards for how to approach the agency's concerns.

Conclusions

There is room on Montana's rivers for traditional forms of enjoyment like angling, paddling, and swimming. Taking away one of these forms of enjoyment from the public should be a grave last resort, after lighter management approaches have failed and harm is documented or reasonably foreseeable. The Montana Fish Wildlife and Parks' proposal fails to meet this basic standard, and fails to honor the relationship that people have with Montana's rivers. Just as troubling, the agency risks creating a new wedge among river enthusiasts that are tightly aligned and working hard on river conservation and access issues across the state, and risks creating new demand for similar exclusivity rulings on other streams.

Thank you for considering these comments, and we would welcome dialog with MTFWP on this matter. Please do not ban paddling on Fish Creek.

Sincerely,



¹⁰ See: Colburn, Kevin., 2001. Large Woody Debris Removal Ecology and Ethics. Available at: https://www.americanwhitewater.org/content/Wiki/stewardship/woody_debris?, and Colburn, Kevin. 2012. Integrating Recreational Boating Considerations Into Stream Channel Modification & Design Projects. American Whitewater. Available for download at: <https://www.americanwhitewater.org/content/Document/view/id/1006>

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