

# Oregon Parks and Recreation Commission

April 15, 2015 Meeting

---

Agenda Item: 6a

Information

Topic: White River Falls Recreation Management

Presented by: Jerry Winegar

---

**Situation:** Through Oregon Administrative Rule 736-010-0040-14—“*The Director or designee may close park access to lakes, streams or waterfalls for kayaking, boating, diving, swimming or other water recreation activities when the park manager has determined the activity to be a danger to participants*”—access to the waterfalls at White River Falls State Park is closed from the state park property surrounding the river. The waterway itself is technically open if you enter upstream of the park boundary.

**Waterfall Access Closure Background:** White River Falls has the highest rate of fatalities of any park in the Oregon State Parks system; all drowning related. A 2002 – 2012 study calculated an average of 1.02 deaths per 100,000 visitors at White River Falls; the next highest park has a rate of 0.29 per 100,000. Annual visitation at the park is 78,000. Due to the frequency of fatalities at the park, risk to first responders and continued attraction of visitors to the waterfalls, local government has historically advocated that OPRD stop all visitor access (walking, climbing, swimming, kayaking, boating, etc.) to the waterfalls. These agencies include Wasco County Commission, Wasco County Sheriff’s Office (WCSO) and South Wasco County Ambulance.

- Sign and barriers (fence) were installed to promulgate the closure. Chain link fence was installed pre-1991. First “No climbing or kayaking” signs installed in late 1990’s.
- A risk assessment was conducted at the park in 2000. Following two unrelated fatalities within one week in 2008, a new assessment was conducted. Recommendations included some changes to safety sign language and a variety of water safety education outreach opportunities. The assessment also looked at the historic hydro plant facility.
- Following two related fatalities in 2012, WCSO called a meeting with OPRD. As a result, a cooperative work group was formed to work on a stronger interpretive approach to education regarding the closure and to implement PFD requirement.
- New signage was installed in July 2014: A “safety message ahead” sign for motor vehicles at the park entrance and a 4 ft. x 6 ft. “safety message” sign at the trailhead into the park proper and is posted when the park is in open season (April 1 – October 31).
- For the 2014 season, WCSO and park staff plans to have at least one on-site water safety education event. New park caretaker hosts have been recruited. They reside on-site during the park open season. Once trained, they will play a key role in conveying the safety and closure messages, as well as park staff during periodic visits.

- None of the fatalities involved kayakers or other boaters. When limiting access to a natural feature in a remote, unstaffed park, however, it's not practical or effective to close or open it solely to a select group.

Recent inquiries from the kayak community regarding the potential to remove the closure, or create an exception (permit) process, have led to follow up with WCSO. The WCSO strongly reaffirmed their stance on the closure and stated that there was certain to be similar support, from the other agencies involved previously, to maintain it as well.

**Prior Action by Commission:** Approved rulemaking of Oregon Administrative Rule 736-010-0040 on September 28, 2006.

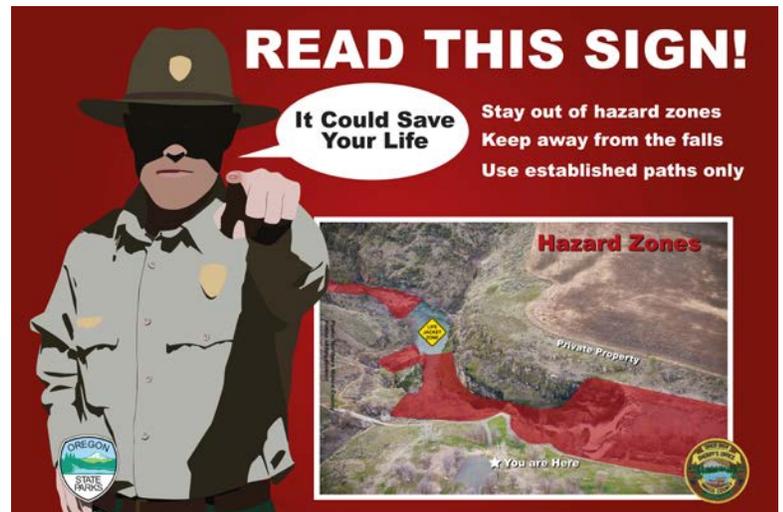
**Action Requested:** None. Report is to provide OPRD Commission background on Waterfall Access Closure at White River Falls State Park.

**Prepared by:** Chris Parkins, District Manager

**Safety Message sign – installed**



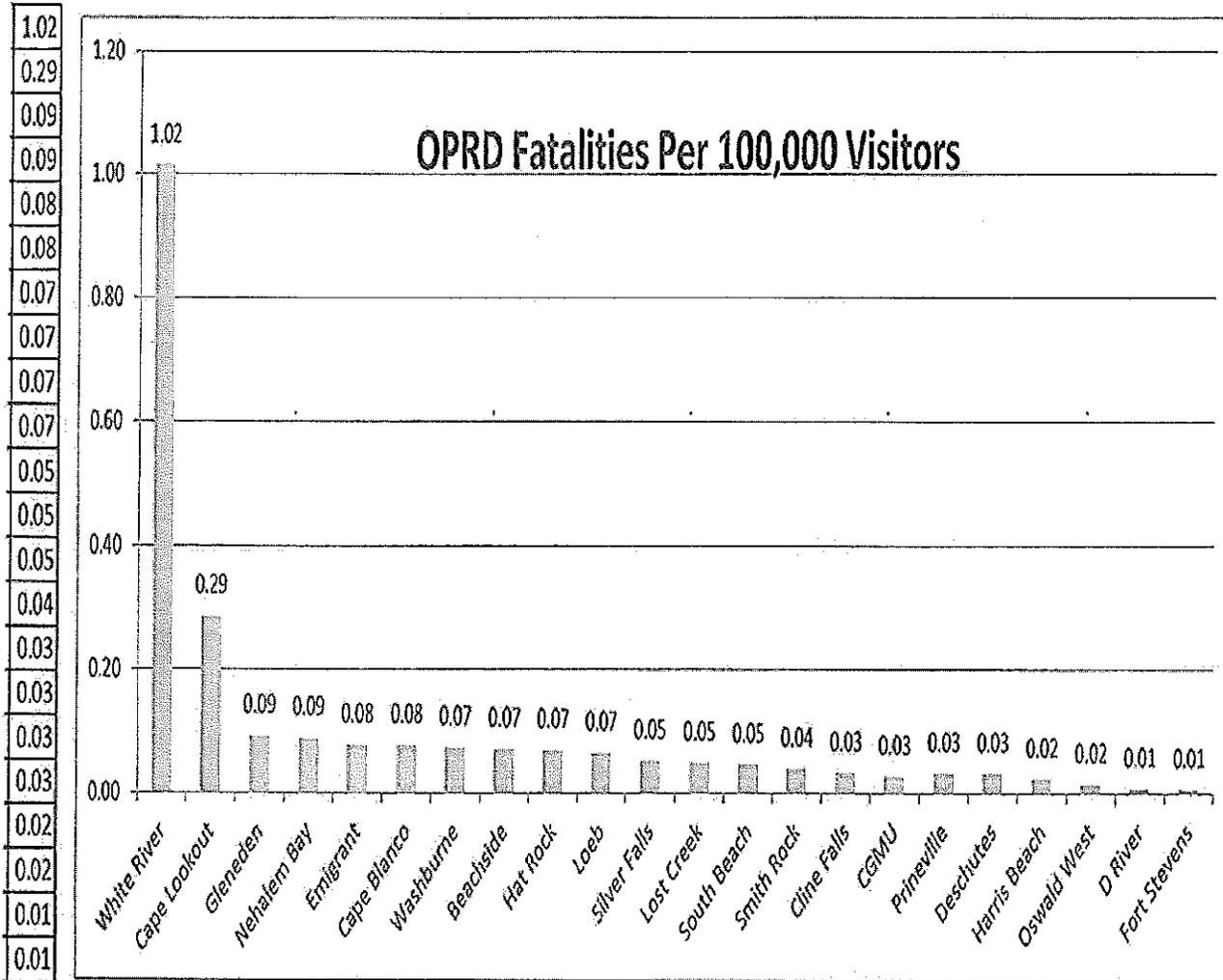
**Safety Message sign – content**



**Safety Message Ahead sign - park entrance**



# OPRD Fatalities in Parks 2002-2012



Ms. Lisa Van Laanen  
Oregon Parks and Recreation Department Director  
725 Summer Street N.E., Suite C  
Salem, Oregon 97301

April 7, 2015

Greetings:

I will be attending the Oregon Parks and Recreation Department, Commissioner's meeting on April 15, 2015. Although my topic of discussion is a rule change petition promoting collaborative governance, I feel that it is necessary for me to respond to the information packet titled "White River Falls Recreation Management", and presented by Mountain Region Manager, Jerry Winegar.

The handling of the recreation management within White River Falls State Park is one example of why I feel that collaborative governance is needed when an extended restriction to park resources is established. I have enclosed my response and I hope this explains how the public would be better served by their involvement in these management decisions.

Additionally, due to new information pertaining to a "cooperative work group" involving the OPRD and the WCSO in 2012 following the tragic drownings of two photographers in WRFSP in 2012, I require the following information.

- What were the time, place and agenda of these meetings?
- Who were the persons in attendance at these meetings?
- Please provide the minutes and public records generated by these meetings.
- Were these meetings open to the public?
- How was notice provided pursuant to ORS 192.640?
- Did these meetings adhere to ORS 192.630?

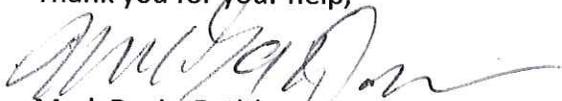
Because of the suspiciously narrow focus on "Kayakers" within the October 11, 2000 risk assessment that could indicate a discriminatory treatment of kayakers, I require all communications between park staff involved in that risk assessment at the time it was produced. Specifically I request all communications between any of the following park staff from January 1, 2000 to December 31, 2001.

- Safety Manager, Jim Neifert
- Area 5 Manager, Larry Miller
- WRFSP Manager, Darryl Fitzwater

I have previously requested and I am still waiting for the following information.

- The name and contact information of the Oregon Parks and Recreation Department's Alternative Dispute Resolution Coordinator.

Thank you for your help,



Mark Davis, Petitioner

Enclosed: Response to Agenda 6a, "White River Falls Recreation Management"

cc: Commissioners Brad Chalfant, Lisa Dawson, Jay Graves, Cal Mukumoto, Robin Risley, Wendy Veliz

## **Response to Agenda 6a, “White River Falls Recreation Management”**

For convenience and clarity I have responded to the issues of the “White River Falls Recreation Management” in the order that it was written with the topics in bold at the head of the discussion.

1. **“OAR 736-010-0040(14)”**

This rule was adopted exclusively to ban kayakers from Celestial Falls and it contains no logical process for determining if the activity is a danger to participants other than the subjective discretion of the Park Manager. The term “danger” is undefined and allows for an unlimited application by the Park Manager. This rule provides no recourse for the impacted public and no follow up to confirm the usefulness of the policy. This rule shows little sensitivity for the recreational needs of the public and has elevated the authority of the Park Manager to unreasonably dictate policy for Oregon’s publicly funded park resources. The worst safety record in the department’s history occurred under this safety policy. There was no collaborative governance in the development of this rule.

2. **“The waterway itself is technically open if you enter upstream of the park boundary”**

The vast majority of waterways in Oregon are used under the Public Use Doctrine including the entire Deschutes Basin, and this is far more than just a technicality. The White River is legally open under public rights that were first granted 1500 years ago by Emperor Justinian, then written into the Magna Carta, then written into Common Law, then spread to the states under the Equal-Footing Doctrine, then written into the Oregon Admission Act, then written into the Oregon Constitution, upheld by Oregon Courts, discussed in the 2005 AG Opinion 8281, and finally written into the DSL pamphlet “Public Use of Oregon’s Rivers and Lakes”. These long standing public rights continue to be encumbered by the recreation management policy in WRFSP created behind closed doors without collaborative governance. It has been a common problem for riparian land owners to exert the false claim of ownership and control over waterways passing through their land. This applies to the OPRD policy that closes segments of the White River to the public. The OPRD and WCSO have shown disrespect for these public rights provided by the Oregon State Constitution. Training and collaborative governance both are needed to ensure that park staff has a functional knowledge of the 2005 AG opinion 8281.

3. **“White River Falls State Park has the highest rate of fatalities of any park in the Oregon State Parks System.”**

There were no records of fatalities in WRFSP until seven years after the kayaking ban was enacted and the kayaking ban has substantially contributed to these deaths. All the drowning and near drowning incidents occurred within feet of the location where kayakers running Celestial Fall would have set safety if the kayaking ban was not implemented. It is reasonable to postulate that the drowning victims in WRFSP could have been rescued if a whitewater kayaker had been there at that time.

There are no other resources better equipped or trained to perform a quick and successful whitewater rescue than a class-five whitewater kayaker. The rescue of swimmers is an integral aspect of the sport of whitewater kayaking and this rescue experience is extensive. Whitewater kayakers are designed as a rescue platform with four or five handles positioned around the perimeter of the kayak designed for swimmers to secure a grip so that the paddler can quickly move them to safety. The PFD used by whitewater kayakers has a built in tow line that can be clipped on to objects so that the paddler can have both hands available for paddling. Whitewater kayakers are equipped with a throw rope specifically designed for rescues where direct access is not possible. The PFD and throw rope can be combined to facilitate an active swimmer rescue, where a tethered rescue

## **Response to Agenda 6a, “White River Falls Recreation Management”**

swimmer enters the water to grab a victim who is unable to help themselves and both are then pulled to safety by rescuers onshore. The kayaking ban contributed to the five deaths in White River Falls State Park by removing from the park the only persons properly prepared with the equipment and know-how for a successful whitewater rescue.

Every drowning that occurred in WRFSP included one or more rescue attempts, indicating that a kayaker in the pool would have also had the opportunity to take part in a rescue attempt but with a much greater chance of success. The rescuers in all these cases were not prepared to perform a rescue and did not have a PFD or a proper throw rope. All drownings occurred between 2pm and 5pm which would have been a common time for kayakers to have been in the park if there was not a ban. Collaborative governance would have allowed the park management to understand the capabilities and benefits of whitewater kayakers.

#### **4. “A risk assessment was conducted at the park in 2000”**

The October 11, 2000 risk assessment by Jim Neifert was narrowly focused on kayaking, and no factual evidence was included to form a logical basis for its recommendation to prohibit kayaking. Swimming, jumping and photography were omitted from this risk assessment even though these were common and conspicuous activities at that time. These uses have proven to be the most dangerous in the park and are the only ones that have resulted in fatalities. The only activity included in this risk assessment was kayaking characterized as “extreme sports”, and this assertion was only supported by the statement, “Many know the nature of the activity as extreme sports and carries a great deal of risk even when precautions are followed.” Without any supporting facts, such as the names and qualifications of the persons who know the activity to be “extreme sports”, this statement and the resulting conclusions are nothing more than hearsay. Additionally, the Oregon State Marine Board does stipulate that precautions can reduce this risk and has authorized OAR 250-010-0154, which requires wearing a USCG approved PFD in whitewater class III or greater. The errors and omissions of this risk assessment have been lethal to park visitors. This would have been revealed during collaborative governance.

#### **5. “Cooperative Work Group”**

In 2012, eleven years after the kayak ban was implemented and four drownings, the WCSO and OPRD created a cooperative work group to address the dismal safety record of WRFSP. I assume that these meetings were closed to the public and that park policy was developed with no public input or knowledge. If so, this is the type of back room deal that has no place in Oregon’s government. A rule requiring collaborative governance for a policy that restricts the public’s use of a publicly funded resource is needed to avoid the mistakes that have occurred when utilizing this limited perspective. In this case, the group has decided to escalate the violation of the Public Use Doctrine and has created great confusion about the use of kayaks in the park. The group has decided not to adapt most recommendations of the 2008 risk assessment including the creation of a PFD loaner program, memorials, outreach programs, a throwable life ring, or powerhouse safety. The safety policy of WRFSP has never been adequately addressed and collaborative governance provides the path to reach that goal.

#### **6. “None of the fatalities involved kayakers or other boaters.”**

This dispels the departmental misconception that “kayakers try to run the falls, leading to a high number of injuries and deaths”, and acknowledges that kayaking Celestial Falls is not “a danger to participants”. As such,

## Response to Agenda 6a, "White River Falls Recreation Management"

there remains no legal basis to ban access to kayaking on Celestial Falls under OAR 736-010-0040(14). After 22 years and tens of thousands of descents there is not even one record of any injury to kayakers. This is a tremendously impressive safety record that any reasonable organization would celebrate. The fallacy perpetuated by the OPRD that kayaking Celestial Falls is a danger to the participant has lost all its validity. If the OPRD continues to embrace this fallacy it would only be disingenuous to the public and damaging the reputation of the agency.

**7. "it's not practical or effective to close or open it solely to a select group."**

For twelve years the OPRD aggressively prohibited kayakers from WRFSP yet allowed swimmers and hikers free access to Celestial Pool. It is unreasonable of the OPRD to now make the claim that specific policies for user groups can't be facilitated. Kayakers have established an impressive safety record using Celestial Falls and swimmers and hikers have a proven track record of drowning in Celestial Pool. The different safety records of these user groups are fully explained by the significant difference in preparedness between these user groups within the whitewater environment. This permitted use policy could easily be developed by using collaborative governance to reach a mutually satisfactory solution.

**8. "The WCSO strongly reaffirmed their stance on the closure"**

The WCSO does not have the mission of providing recreation to the public and their accountability does not include all the residents of Oregon. The vast majority of kayakers using Celestial Falls are not residents of Wasco County, but most are residents of Oregon. The OPRD has a different mission than the WCSO and far more stakeholders than the 25k residents of Wasco County.

The WCSO stance has dismissively decided that whitewater kayakers using Celestial Falls are not worthy of Wasco County's approval, even though after 22 years Wasco County has not expended any public funds serving these kayakers. WCSO has performed no rescue of kayakers running Celestial Falls and there is no factual evidence to justify their dismissive stance. This stance is illogical and is seen by kayakers as an unreasonable discrimination. There would be a better understanding of all stakeholders through the process of collaborative governance.

9. Concluding, it should be apparent that this issue is too extensive for resolution at a Commissioners meeting. That is why I am petitioning for this rule change so that collaboration between stakeholders can occur in a more appropriate forum. To date kayakers have been dismissed from this conversation. We are not asking for anything but to be treated fairly and allowed to affably go boating.

Sincerely,



Mark Davis,

Collaborative Governance Rule Change Petitioner

Ms. Lisa Van Laanen  
Oregon Parks and Recreation Department Director  
725 Summer Street N.E., Suite C  
Salem, Oregon 97301

March 16, 2015

Greetings:

I am writing you today to initiate a petition to the Board of Commissioners for an amendment to OAR 736-010-0020. The goal of this amendment is to develop collaborative governance by obtaining stakeholder consensus along with a written plan when establishing an extended restriction to Oregon State Park resources.

The need for this amendment became evident while researching the kayaking closure to Celestial Falls. The risk assessment used to establish this closure was narrowly focused on kayaking and excluded swimming, jumping and photography. These less prepared visitors were allowed access to the class 5 White River while properly prepared kayakers were prohibited. This inconsistency was immediately voiced by American Whitewater, but the park manager had no requirement to obtain stakeholder consensus. The result of this policy has been five drowned visitors, the worst safety record of the department, declining visitation and increased rescue expenses. This policy failure could have been avoided if a broader perspective was obtained.

#### **736-010-0020 (amendment)**

##### **General Regulations**

**(14) If a park policy restricts public use to a park resource exceeding 180 days, then the park manager will obtain stakeholder consensus to determine the need, method and duration of the policy. After stakeholder consensus is obtained the park manager will develop a written plan describing the method, duration, and assessment process of the policy. If stakeholder consensus cannot be achieved, then the park manager will initiate a collaborative dispute resolution process as specified in OAR 137-005-0010.**

By obtaining stakeholder consensus during the decision making process a broader perspective will lead to a greater body of knowledge for the park manager to utilize and will better protect the park and visitors. The consensus developed by a collaborative process will add support to the legitimacy of the policy and to the public's willingness to further fund park projects. A written plan will allow the public and the park staff to have greater clarity concerning the details of the policy and will also provide the park manager with a measuring stick to prove the usefulness of the policy.

This amendment should not substantively alter the effectiveness of this rule or create a negative financial impact for business. The new technologies of social media can assist in gaining the consensus of this rule.

Stat. Auth.: ORS 183.341, ORS 183.502, ORS 390.124

Executive Order No. 00-09, 11-12

Thank you for your consideration of this petition.

Petitioner, Mark Davis

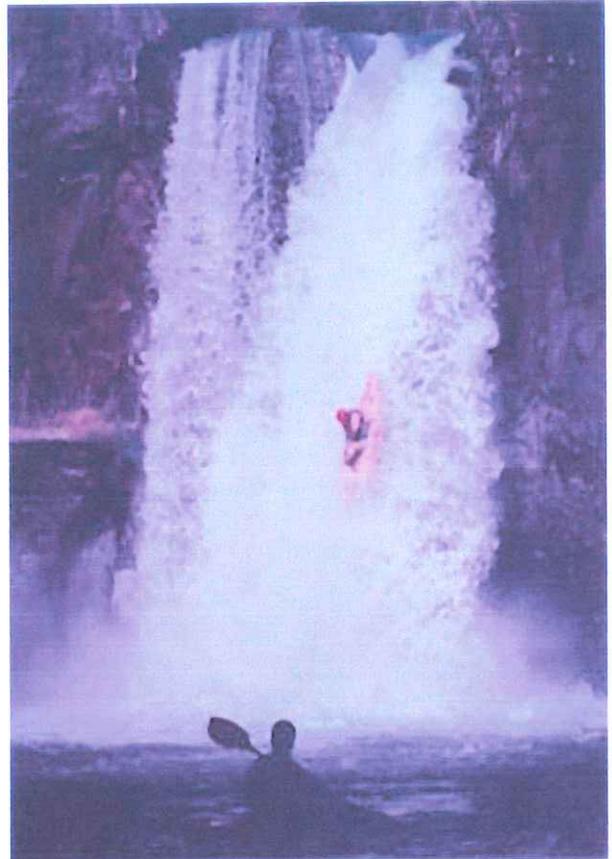
Enc: Celestial Falls Summary of Facts

cc: Commissioners Brad Chalfant, Lisa Dawson, Jay Graves, Cal Mukumoto, Robin Risley, Wendy Veliz

# CELESTIAL FALLS-SUMMARY of FACTS

## Introduction to Celestial Falls

Celestial Falls is located on the White River 3.7 miles downstream from Tygh Valley and within the 298 acre White River Falls State Park (WRFSP). The park is open seasonally from March 15 to October 31 and is six miles from Maupin, a center of commercial whitewater recreation. The White River begins on the southeast slopes of Mount Hood below the White Glacier. A significant basalt shelf creates a series of waterfalls on the White River as it descends from the upland slopes east of Mount Hood into the canyons of the Deschutes Basin. Celestial Falls is 44 feet high and is the second waterfall on the shelf, located below White River Falls. The US Board on Geographic Names approved the names for both of these waterfalls on December 11, 2014 and they are now officially recognized geographic features. Celestial Falls emerges from sheer cliffs and free-falls into a deep pool situated in a large rock bowl carved out of the basalt shelf. This is a setting of exceptional beauty and attracts photographers and recreationalists.



The entire White River was designated as a National Wild and Scenic River in 1988 except for a 0.6 mile segment at WRFSP. This isolated segment was left undesignated for consideration of a hydroelectric project that was subsequently abandoned in 1993 largely because of the objections by the OPRD Commission. The managing agency for the Lower White River is the Bureau of Land Management (BLM). The White River Management Plan now recommends the inclusion of this omitted segment as a scenic waterway and also categorizes kayaking on Celestial Falls as an Outstanding Recreational Opportunity (appendix A). The BLM also lists the WRFSP as a water craft access point and does not find interference with landowner's uses, property damage or trespass (page 3-27). Although no navigability study of the White River has been completed or requested, and its status remains undetermined, the Department of State Lands (DSL) has determined there may be sufficient evidence to support a claim of navigability (page 1-19).

In 1993 local river guide Matt Rutledge was the first to run the falls and he named it Celestial Pool Falls. This was shortened to Celestial Falls by the public's common usage. Matt Rutledge along with fellow guides carefully scouted the drop with the intent of running the falls that summer. They dropped logs off the falls and explored the pool with dive masks. Matt felt confident that he knew the possible consequences of running the falls and after a day of guiding he made the first descent successfully in a Perception Corsica-S kayak. Later in the fall another descent was made by Matt along with Kevin Gage and Jimmy Faulkner. As the word of a large runnable waterfall in Oregon spread, the park became very popular with kayakers from an ever increasing distance and the running of Celestial Falls became a rite of passage.

Because of the skill and natural beauty presented by images of kayakers navigating Celestial Falls, artists and multimedia producers have been attracted to the park. There was a two-page article in the July 27, 1998 addition of Sports Illustrated with a picture of Bret Kiene navigating Celestial Falls. A National Geographic award winning photograph by

## CELESTIAL FALLS-SUMMARY of FACTS

Tyler Roemer of Christie Glissmeyer on Celestial Falls was displayed in the Smithsonian. Charlie Borland won the "People in Nature" Windland Smith Rice International award with a photograph of a kayaker navigating Celestial Falls. King TV in Seattle aired a video of brothers Dustin and Brandon Knapp on Celestial Falls in 1997. There have been a large number of kayak specific movies that have included runs of Celestial Falls that are still for sale today. In Bend there are posters of kayakers running Celestial Falls displayed on the walls in REI, Good Life Brewing, and other businesses. These iconic images of kayakers navigating Celestial Falls are marketable items and a national treasure belonging to the American people.

Celestial Falls turned out to be the safest runnable waterfall of its size, and became the standard by which other waterfalls were measured. Well prepared kayakers can safely run Celestial Falls, which provides a unique and critically important training ground for the next generation of advancing kayakers looking to perfect the mechanics of running waterfalls. This is why the use of Celestial Falls represents a broad and substantial interest for kayakers across the nation. It is also a wonderful after work recreational activity for river guides working out of Maupin. Celestial Falls allows for a forgiving descent into a soft aerated pillow of water and facilitates easy repeat laps. Oregon's volcanic geology created rock layers that erode into the perfect topography for waterfalls with smooth spills and deep pools. This is well known worldwide by kayakers and has even led to the local development of waterfall techniques such as the "Oregon Tuck". Whitewater competitions and festivals with waterfall venues are common in the Pacific Northwest such as the NW Creeking Competition and the Steelhead Falls Huck Fest.

The Pacific Northwest has become home for some of the best waterfall kayakers in the world due to the easy access of runnable waterfalls such as Celestial Falls. The waterfall world record is presently held by local kayaker Tyler Bradt when on April 21, 2009 he descended the 189 foot Palouse Falls. The female waterfall world record is held by another local kayaker Christie Glissmeyer when on May 10, 2009 she descended the 82 foot Metlako Falls. Both of these outstanding athletes gained experience on Celestial Falls.

### Closure in the Park

Soon after Celestial Falls became popular, conflicts between kayakers and the camp host are rumored to have occurred. Local kayaker Josh Kutella recalled a particular incident between out-of-state boaters and the camp host that degraded to the point where law enforcement was called. Josh agreed that a small number of boaters have failed to act professionally when confronted by a cantankerous camp host. Complaints levied at boaters included playing loud music, leaving trash, and being a detriment to the peace of the park.

October 11, 2000

OPRD Safety Manager Jim Neifert issued a memorandum titled White River State Park Risk Assessment. Kayakers were identified as the only activity and were classified as "extreme sports". No supporting documentation or records of injuries were included. Other uses included "Visitation" and "Hydroelectric Power House".

The memorandum's risk assessment reads:

- "1. Kayaker's - The falls cascades over a basalt shelf in two stages before ending in a pool of water at the base. On occasions Kayaker's will traverse the four-foot chain link fence, scale across rugged rock outcroppings and launch themselves over the falls into the pools of water. Many know the nature of the activity as extreme sports and carries a

# CELESTIAL FALLS-SUMMARY of FACTS

great deal of risk even when precautions are followed. If a kayaker becomes stranded in the middle section of the falls accessibility for rescue is difficult and of high risk."

The recommendations of this risk assessment included the following:

"1. Kayaking - Based on the high risk factor and the ability to access the area for the Kayaker's and rescue response, kayaking should be prohibited. If kayaking is allowed, OPRD would be required to provide reasonable access a to the waterfall headwaters. Kayaker's with lower skill abilities may increase their likelihood of injury or death when attempting to ride the falls. An Oregon Administrative Rule promulgating prohibiting kayak use on the falls may discourage adverse activity and allow OPRD to reduce at risk behaviors."

June 28, 2001

A group of kayakers visiting the park were told that Celestial Falls was closed to their use and a sign was posted reading, "No Kayaker Access." Group member Charlie Munsey contacted Parks Safety & Risk Manager, Jim Niefert. The ranger explained that the rule had not been made a law yet but could be enforced by a "manager's discretion" OAR code. This was the first indication of the OPRD intent to close access to Celestial Falls.

July 3, 2001

Jason Robertson posted a letter to American Whitewater expressing concern that, "Meanwhile hikers still have full access and can jump off the falls at will."

Soon afterwards signs were placed in the park which prohibited kayaking, climbing and diving under the temporary authority of OAR 736-010-0020(8)

October 2, 2001

Dave Slover, owner of Alder Creek Kayak, Canoe, Raft & SUP in Portland, Oregon, formally requested the one-day use of WRFSP for a "waterfall jumping kayak competition" on Celestial Falls for the Teva Oregon Cup Whitewater Festival planned for the next year. This was a well thought out proposal to "bridge the gap between the concerns of State Parks with the needs of the paddling public." As an experienced whitewater event coordinator, Mr. Slover fully addressed all safety, emergency services, insurance and natural resource issues that he thought would be needed and solicited input from the OPRD for their concerns.

December 17, 2001

Dave Slover's request was rejected in a letter from Area 5 Manager Larry Miller based on the event being "inherently dangerous" and to "protect native grasses, shrubs, and plants." No discussion of alternative uses or mitigating options was offered in order to meet the needs of the paddling public.

September 25, 2003

DEQ reported, "Site is still being used by visitors to nearby park: recommend site visit to assess current conditions." This is a follow up to the 2/10/1994 site visit, "Potential for PCBs should be investigated."

March 30, 2004

OPRD engaged a site inspection concerning the powerhouse to address the structural condition of the building and possible remediation.

## CELESTIAL FALLS-SUMMARY of FACTS

August 7, 2006

Wasco County Undersheriff Steve Conover contacted Area 5 Manager Larry Miller by phone to create an agreement in which the Wasco County Sheriff Office (WCSO) could enforce a no diving closure similar to the no kayaking closure inside the park and to allow sheriffs to cite violators. Difficulty in mustering adequate personnel to facilitate a safe extrication of injured persons was presented as a reason for the agreement.

September 28, 2006

During the OPRD commission meeting, approval of proposed rulemaking update to OAR 736-010-0040 passed. The action proposed included, "prohibit kayaking over water falls when the park manager has determined the activity to be a danger to participants..."

October 12, 2006

OPRD filed a Notice of Proposed Rulemaking to amend OAR 736-010-0040 and the proposed changes were published in the Oregon Bulletin during the month of November 2006. No public comments were received.

May 10, 2007

OPRD the Commission meeting agenda Item 7b, General Park Area Rules Adoption was discussed. The approved minutes read:

"Commissioners discussed the agency's role and authority to prohibiting kayaking over water falls. Brad Chalfant expressed his concern about the implication that the department would be getting in the business of "rating" a fall or ensuring the safety of waterfalls. He does not think this is the right approach. Mr. Walkoski said that without this rule there is no way a ranger could tell someone not to jump off rocks, etc. TORT claims and recreational immunity issues were discussed. Brad Chalfant suggested that a notice at the trailhead be posted reminding folks of the danger. Kyleen Stone said that this rule was at the request of local county government because of EMT rescue costs. Director Wood explained enforcement would occur by having a park manager post warning signs, then counsel the person by encouraging voluntary compliance, and lastly issue a citation for violating a park rule, which is not a civil penalty. Sharon Rudi moved the adoption of the rule. Jim Parr seconded. Commissions Parr, Blosser, Brown, Rudi, and Chair Gregory voted aye. Brad Chalfant voted nay."

This action created OAR 736-010-0040(14) which reads,

"The director or designee may close park access to lakes, streams or waterfalls for kayaking, boating, diving, swimming, or other water recreation activities when the park manager has determined the activity to be a danger to participants. Persons accessing through closed areas to engage in such activities commit a Class C misdemeanor as provided in section (8)(f)."

August 8, 2008

A risk assessment was issued for WRFSP by Safety and Risk Manager David Solomon. This focused mostly on the hazards of the defunct hydro-power project, swimming and diving. Also discussed were the improvements needed to the trail that descends into the canyon. Pictures of the signs prohibiting climbing, kayaking and diving under the temporary authority of 736-010-0020(8) were included. Recommendations included signage addressing the drowning hazard, memorials, outreach program, PFD loaner program, throwable life ring, targeting minority communities with educational messages and powerhouse safety.

# CELESTIAL FALLS-SUMMARY of FACTS

February 13, 2013

I called Park Manager Jim Anderson to obtain information about the access closure on Celestial Falls. Mr. Anderson stated that there would not be a change of the policy. I was then referred to David Solomon for more information.

February 17, 2015

I met with Chris Parkins to discuss the access closure in WRFSP and we agreed to continue discussions.

March 9, 2015

I received an email from Chris Parkins stating that the closure would not change.

## Incidents in WRFSP

After a record request to the WCSO and the OPRD for any records of incidents within WRFSP or Tygh Valley State Wayside I received the following records.

DATE	NATURE of INCIDENT	ACTIVITY	Park Manager
8/19/01	2 persons with serious injuries	Jumping off cliff	Fitzwater
6/02/02	Call from camp host-JR	Vehicle parked/occupants walking	Fitzwater
8/18/03	Call from camp host-DB	Kids rafting & wearing PDF	Fitzwater
6/20/05	Call from camp host-DB	Men jumping off rocks	Fitzwater
5/30/06	Call from camp host-DB	Kayak in park	Fitzwater
7/30/06	Near drowning	Swimming in lower pool	Fitzwater
8/02/06	Possible broken back	Jumping 60 ft into lower pool	Fitzwater
8/04/06	Near drowning	Jumping & swimming in lower pool	Fitzwater
6/04/07	Injury due to fall on the trail	Drinking and walking	Fitzwater
7/28/07	Near drowning	Swimming in lower pool	Fitzwater
7/24/08	Drowning	Swimming in lower pool	Anderson
7/31/08	Drowning & near drowning	Swimming in lower pool	Anderson
6/26/09	Dislocated hip (stated by victim)	Rafting Celestial Falls	Anderson
7/10/10	Near drowning	Swimming in lower pool	Anderson
7/09/12	Two drownings	Photography at the lower pool	Anderson
3/31/13	Call from camp host-CF	Kayaking on Celestial Falls	Anderson
6/28/13	Drowning	Swimming at the base of Zach's Falls	Anderson
7/15/13	Call from camp host-CF	Kayakers pursued by camp host	Anderson
7/18/13	Call from camp host-CF	Swimming	Anderson
8/12/13	Call from camp host-CF	Kayak in park	Anderson
10/26/13	Call from camp host-CF	Kayaking on Celestial Falls	Anderson
5/07/14	Call from camp host-CF	Kayaking on Celestial Falls	Anderson
6/02/14	Call from camp host-CF	Kayakers pursued by camp host	Anderson

# CELESTIAL FALLS-SUMMARY of FACTS

## WRFSP Aquatic Hazards

All the tragic drowning and near-drowning incidents have involved victims that were not wearing a PFD and were engaged in swimming, jumping or photography. These incidents have all occurred during the warm summer months when thermal-protective gear was not needed, the park was open and a camp host was assigned to the park. Celestial Falls, including the pool at its base, is rated by the International Whitewater Scale as class V. White River Falls is rated class VI and Zach's Falls (unofficial name) is rated class IV. It is unsafe to be in or near whitewater without the proper use of safety equipment, especially a PFD, whether boating, swimming, jumping or standing on the bank. Two photographers died here because of a slip into the river from the bank. The class VI White River Falls is unrunnable because of the 90 foot drop onto a shallow rocky landing and should not be attempted or approached.

There are strong undercurrents in the pool at the base of Celestial Falls that are created by the force of the descending waters from the falls. These undercurrents can violently submerge a person not wearing a PFD. This violent and prolonged submersion can drown a person as it has in the past. There is also an underwater recess in the rock behind the falls that can trap a submerged person or body. These underwater features were described by whitewater salvage diver Mark Angel who has SCUBA dived into Celestial Falls pool twice to recover three bodies and is familiar with the underwater terrain.

Jumping from the 60-foot cliff above and north of Celestial Falls into the pool is inherently dangerous to the participant and to any person in the target area below. This activity has led to injuries. There are no reasonable or likely precautions that can make jumping from this cliff safe. Jumping with a PFD from this height can cause injury to the jumper from the force of the PFD when it hits the water and is a skill that needs to be learned in professional training. Jumping without a PFD will lead to drowning as discussed above.

Depending on the sediment load and flow of the river, the depth of the water in the target area for jumpers from this cliff can become too shallow due to steep alluvial deposits that can build up along the edge of the pool. Jumpers have impacted the bottom at these times of shallow water with injuries as a result. This buildup of deposits is variable and is greatest when the moraine of the White Glacier is exposed to erosion coupled with a low flow of water at Celestial Falls. It is likely that these deposits will become more common due to receding glaciers on Mount Hood and the increased area that is exposed to erosion. The turbidity of the White River is always too great to see the bottom for a visual determination of its depth. These deposits do not build up at the base of Celestial Falls due to the direct erosional action of the descending waters, so this hazard does not exist at the base of the falls. The existence of these deposits was revealed by locals and confirmed by Mark Angel.

At the bottom of Zach's Falls are keeper holes similar to a low head dam. These exist across the full span of the river, but these are exceptionally dangerous on the south side of the river where three swimmers have drowned. Keeper holes are a common hazard for whitewater kayakers and the proper use a PFD has enabled kayakers to exit this hazard successfully.

There have been no recorded accidents in over 20 years of use involving kayakers running Celestial Falls because they use proper safety equipment, procedures and training. Their safety equipment includes a USCG approved PFD designed for whitewater, a whitewater specific helmet, thermal-protective gear, river footwear, float bags, whistle, throw rope, river knife and first aid kit. Procedures include knowing the flow, knowing the beta from previous runs, scouting the

## CELESTIAL FALLS-SUMMARY of FACTS

waterway for present conditions, setting safety personnel, signals, proper technique at the lip of the falls and proper body position entering the pool. Training is the most important factor and it is not uncommon for kayakers to spend 100+ days per year on rivers of class IV and V. Beginning kayakers do not attempt Celestial Falls because of the barrier created by the seal launch into the gorge.

Properly prepared kayakers in the park would aid in the safety of all park visitors in three ways. First: by presenting an example of safety including the use of a PFD. Second: by providing rescue assistance with the skills and equipment ready for immediate action. Third: by providing expert advice to the public and park on safe practices.

### Legal Sufficiency

The DSL and the April 21, 2005 Opinion by Oregon Attorney General Hardy Myers, No. 8281, both uphold the Public-Use Doctrine which provides for the public's right to navigation, commerce, fisheries and recreation as a condition of statehood, and that this right is not dependent on a formal declaration of the waterway's status. This means that the public has the right to the "reasonable enjoyment" of the White River including navigation through WRFSP. A waterway is navigable-for-public-use if it has "capacity in terms of length, width, and depth, to enable boats and vessels to make successful progress through its waters", *Guilliams*. We are also confident that the White River would be deemed navigable if a study was conducted due to its susceptibility for use in its natural and ordinary condition by a mode of travel that was customary in 1859, *Daniel Ball*. Out of 53 total river miles only the 0.08 mile White River Falls is not Navigable-in-Fact.

The Opinion by Oregon Attorney General Hardy Myers concludes:

State-owned waterways are generally open to public use, and the state's management of the waterway may not substantially impair the public's rights of navigation, commerce, fisheries and recreation. Under the public use doctrine, the public's right to passage must be exercised without unreasonably interfering with the riparian owner. The public's right to use a waterway that is state-owned or subject to the public use doctrine does not depend on a formal declaration of the waterway's status.

The OPRD's documented goal to prohibit navigation of Celestial Falls is legally limited to the creation of an area-closure enforced by trespass on the banks of the White River, thereby blocking the access point to Celestial Falls. Federal law precludes the installation of a barricade across the White River to stop navigation or of taking legal action based solely on the act of navigation. Legal access for navigation on the White River could be from any open public access point or from private land with the permission of the property owner, and can continue downstream through the park. In addition, the public may use the upland areas of the park, above the line of ordinary high water, for the "necessary" portage of the Class VI White River Falls, which is incidental to this lawful navigation, *Weise*. We acknowledge that this use must exercise reasonable and prudent care, and not cause negligent damages to riparian lands or these damages could be assessed.

# CELESTIAL FALLS-SUMMARY of FACTS

The Public-Use-Doctrine is explained by DSL, Senior Proprietary Policy Analyst, Nancy Pustis as follows:

What this means is, if you obtain access (permission from a private land owner or another public location) outside of the White River State Park to the White River, you would have the right to use (kayak) it. However, the opinion warns that in these situations, such a person risks incurring liability for trespass in the event that the waterway turns out not to be state-owned and not subject to the public use doctrine as mentioned in the 2005 AG Opinion. The opinion further means that the public may use the land above the line of ordinary high water only if the use is "necessary" for a water-dependent or incidental use of the waterway. The public must exercise reasonable and prudent care. Public users will have to pay for damage they cause if they act negligently.

An incident occurred demonstrating these public rights on 6/26/09 when two rafters navigated Celestial Falls and one required emergency services. These individuals did not receive a citation for trespass from the WCSO. The rafters portaged White River Falls and then reentered the river above Celestial Falls to continue navigation downstream when one participant dislocated his hip. After interviewing the two participants and three witnesses, WCSO Deputy Lane Magill's report reads, "No citations were issued as no apparent violations were noted."

The assertion by the OPRD that a total closure to navigation exists on Celestial Falls or the White River exceeds the rights of a riparian land owner. This is perpetuated on the OPRD website by the statement, "Kayaking is not allowed at White Rivers Falls, also known as Celestial Falls", and on park signage that reads, "Kayaking Prohibited" along with pictorial signage. This false assertion has emboldened park personnel to take actions that infringe on legitimate public rights including when they confront and remove kayakers who have used private property south of the park with the owner's permission to access the White River, or have engaged in legal portages across park property, or when accessing areas of the river open to the public, or for simply having a kayak on their vehicle in the park.

## Results of the Closure

After the implementation of the kayaking closure the following results were noted:

1. The fatality rate for WRFSP has gone from none to 1.02 Deaths/100,000 Visitors and is now the worst of any OPRD facility. In the last six years five individuals have drowned and five reported near-drownings all involving visitors without the most basic safety precautions necessary for the whitewater in the park.
2. Visitation has declined from 52,722 in 2002 to 31,832 in 2012 according to vehicle count from an entry/exit gate counter and a passenger factor of two. This represents a 40-percent decline in visitation, leading to a below-target 106 visitors per acre. In 2000, before the kayak closure, visitation was 89,753 and 301 visitors per acre.
3. The number of emergency service calls to WRFSP has increased even though the number of visitors has dropped. Reducing emergency service expenses for the WCSO was the primary reason for the closure as presented by Assistant Director of Recreation Programs and Planning Kyleen Stone to the commissioners at the May 10, 2007 meeting. It is reasonable to assume that any anticipated cost savings have failed to materialize and that the WCSO emergency service expenses have increased along with the number of incidents. No rescues have been required for kayakers from the gorge above Celestial Falls which was a reason for prohibiting kayaking in the October 11, 2000 risk assessment.

## CELESTIAL FALLS-SUMMARY of FACTS

4. The camp host has taken actions reserved for a peace officer to enforce the kayaking prohibition, such as pursuing violators off park property, continuing down public highways and attempting to cite them for trespass.
5. The OPRD has exceeded their rights as a riparian land owner by infringing on the public rights of the Public-Use-Doctrine as outlined in the 2005 AG opinion, 8281.

### **Kayakers Opinion of the Closure**

After extensive research of this area closure and interviews with a multitude of park users I can conclude the following consensus among fellow kayakers.

1. Commissioner Brad Chalfant's initial concern that, "this is not the right approach" is correct and we believe that this park policy suffers from unintended consequences. This policy has created disenfranchised park visitors, a dismal safety record, a neglected park, increased emergency service expenses, and a frustrated park staff.
2. No records of injuries or fatalities could be produced by OPRD or WCSO involving kayaking on Celestial Falls that provides for a factual support of a need to close access to the gorge above Celestial Falls. The park's dismal safety record has been the result of only one factor, visitors in or around the pool below Celestial Falls without a PFD. The OPRD and WCSO have mistakenly and irrationally focused their safety efforts on the prohibition of well-prepared whitewater kayakers instead of focusing on the visitors who are unprepared for this hazard.
3. Of the nine recommendations listed in the 2008 risk assessment the two that have been implemented are the 07/18/2014 special notice, "Swimming in the White River is not recommended due to dangerous river currents" and a life jacket zone. During a 1/27/2015 visit to the park I observed the following. The powerhouse has 5 easy ingresses used conspicuously by the public and an unstable makeshift ladder. This structure is an extreme safety hazard due to the pits in the floor, unsecured machinery, unsecured overhead objects, peeling lead paint and the unaddressed 09/25/2003 recommendation by DEQ to assess public access to potential PCB contamination (DEQ site 1358, White River Hydroelectric Plant). The trail down to the powerhouse has deteriorated from erosion and neglect to the point of becoming treacherous, and the viewing areas adjacent to the trail are bordered by cliffs without railings.
4. The October 11, 2000 risk assessment by Jim Neifert was narrowly focused on kayaking, and no factual evidence was included to form a logical basis for its recommendation to prohibit kayaking. Swimming, jumping and photography were omitted from this risk assessment even though these were common and conspicuous activities at that time. These uses have proven to be the most dangerous in the park and are the only ones that have resulted in fatalities. The only activity included in this risk assessment was kayaking characterized as "extreme sports", and this assertion was only supported by the statement, "Many know the nature of the activity as extreme sports and carries a great deal of risk even when precautions are followed." Without any supporting facts, such as the names and qualifications of the persons who know the activity to be "extreme sports", this statement and the resulting conclusions are nothing more than hearsay. Additionally, the Oregon State Marine Board does stipulate that precautions can reduce this risk and has authorized OAR 250-010-0154, which requires wearing a USCG approved PFD in whitewater class III or greater. The prohibition of kayaking is the only safety recommendation from this risk assessment that has been enacted.

## CELESTIAL FALLS-SUMMARY of FACTS

5. The loss of commerce caused by the rejection of the request by the Teva Oregon Cup Whitewater Festival to use Celestial Falls creates a broad and substantial public interest for the communities and people of southern Wasco County. This region adjusted to the downturn of the timber industry by shifting towards a recreation economy based largely on whitewater. Festivals of this type provide a significant boost to the local economy and would have meshed nicely with the well-established whitewater recreation industry centered in Maupin. We don't understand the reasoning behind this rejection considering the documented reputation of the applicant, the thoroughness of his proposal and the prospect of long term commerce for the region.
6. The rule used to close access to Celestial Falls, OAR 736-010-0040(14), provides no logical process for determining if an activity could be a danger to participants, and requires no public input for a permanent access closure to a publicly-funded resource. This determination relies solely on the subjective discretion of the park manager with no recourse for the impacted public. There is also no follow up prescribed to determine if a closure has been achieved, effective or continues to be warranted. This rule shows little sensitivity for the recreational needs of the public and has elevated the authority of the park manager to unreasonably dictate policy for Oregon's publicly-funded resources. We understand that the temporary authority under OAR 736-010-0020(10) is necessary to protect the public and resources, but a permanent closure of this type strips the public of their legitimate rights to access publicly-funded resources such as Celestial Falls. Additionally, there is no record of an advisory committee or any public input to develop consensus for this rule, even though there were previous complaints made by members of the public about the temporary closure to kayaking in the park.
7. A departmental misconception concerning the justification behind this area closure became apparent during my January 14, 2015 communications with DSL Public Information Manager Julie Curtis who was provided the following incorrect statement by the OPRD Associate Director, "Apparently one of the main issues is that kayakers try to run the falls, leading to a high number of injuries and deaths". In view of the fact that this statement was made by the OPRD Associate Director to another state agency on a state email account it is reasonable to consider this to be the official position of the OPRD. This position is incorrect and the OPRD has not been able to produce any records of injuries or deaths to kayakers using Celestial Falls.
8. WRFSP is held as a public trust and visiting kayakers should be afforded the normal respect that citizens deserve from their government. Their choice of recreation should not be excluded from the park without a legitimate justification. No segment of the public should be the subject of dismissive treatment by a government agency. The route used to run Celestial Falls is "Navigable-in-Fact" and "Navigable-for-Public-Use". There is a 20+ year history of this successful year-round navigation for the purposes of recreation and commerce, which should be affably permitted and not considered a crime.

### **Actions Requested**

1. We welcome the opportunity to open a conversation regarding a reasonable and safe access policy for Celestial Falls. This would address the concerns of the paddling public and at the same time protect riparian concerns. We would like to cooperate through a stakeholder's advisory committee to provide local knowledge in discussions working towards the reasonable enjoyment of this resource for everyone. This is an exciting opportunity for Oregon to enjoy the benefits of this iconic national treasure.

## CELESTIAL FALLS-SUMMARY of FACTS

2. The kayaking of Celestial Falls is part of the park's cultural history. The park is the site of a significant historical advancement of whitewater kayaking standards. This history should be embraced and proudly displayed in the park.
3. Celestial Falls (GNIS ID: 2770703) and White River Falls (GNIS ID: 2770704) are now both official names and recognized geographic features. All park publications and signage should clearly identify these waterfalls by their official names.
4. The viewing and photographing of kayakers descending the falls should be advertised and developed as a visitor activity. This would be a bold and celebrated addition to the offerings of OPRD.
5. Continue to solicit for the Wild and Scenic River designation for the 0.6 mile excluded segment to protect this exceptional natural resource for future generations. There are two water rights (64196 & 73267) for aquatic life, recreation & Aesthetics held by ODWR that will ensure that these uses will endure.
6. Create collaborative governance by gaining public consensus along with a written plan when establishing an extended restriction to park resources.
7. Develop a comprehensive risk assessment for the park that includes all uses and hazards, and is based on facts used to support the conclusions and recommendations. OPRD could establish a rapport with users to gain local knowledge of activities and hazards. We strongly recommend a PFD requirement for all persons near Celestial Falls.
8. Respect the Public-Use-Doctrine as outlined by the 2005 AG Opinion 8281 and provide all OPRD personnel with the training needed to obtain a functional knowledge of the Opinion in order to protect the public's right to navigation, commerce, fisheries and recreation.

I look forward to the time when the park can benefit from the abundant energy and talent that the kayak community has to offer. I believe that this opportunity to connect with the next generation is ready to flourish and that WRFSP could become an iconic destination on par with Smith Rock State Park. When stakeholders work together great achievements are realized. My appreciation goes to all the public servants and interested persons who have helped to make this information available.

Mark Davis  
American Whitewater