Kevin Colburn
National Stewardship Director
P.O. Box 1540
Cullowhee, NC 28723
828-712-4825
www.americanwhitewater.org kevin@americanwhitewater.org

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Re: Ashley National Forest Wild and Scenic Rivers Draft Eligibility Report

Dear Ashley National Forest,

American Whitewater is a national non-profit organization dedicated to the conservation and restoration of our nation's whitewater resources, and to enhancing opportunities to enjoy them safely. We are a member-based organization representing conservation-oriented whitewater kayakers, rafters, and canoeists who connect with nature and special places through spending time on the water. We are among the leading advocates for the protection and restoration of our nation's headwater rivers and streams. We have played important roles in Wild and Scenic River designations across the United States, and recently co-founded a national Wild and Scenic River Coalition in honor of the 50th anniversary of the Wild and Scenic Rivers Act last year.

The May 2019 Draft Eligibility Report for the Ashley National Forest rests on a deeply flawed foundation and we request a wholesale change in approach. Specifically, previous "suitability" determinations should have no bearing on this eligibility process, nor were they appropriate to conduct at their time. The 2008 *Wild and Scenic River Suitability Study for National Forest System Lands in Utah* wrongly stripped protections from 28 streams, and those streams must now be reconsidered for their eligibility.

In addition, the Forest's previous eligibility studies and 2008 suitability study do not constitute a "systematic inventory" of potentially eligible Wild and Scenic Rivers because they were done piecemeal over a 20-year time period, under differing agency guidelines, and at widely varying geographic scales. First, the Forest looked at just six potential rivers (1988), then rivers in a 1:100,000 scale (2005 & 2008), and now are looking at the remaining streams that are named on a 1:24,000 USGS topo map but were not studied previously. What is missing is a uniform, complete, and integrated study of the rivers in context with their tributaries. Since many of these rivers flow from headwaters to mouth on Ashley National Forest, it is important to study their eligibility in their full context, at the same time, and under the same guidelines. The 2012 Planning Rule clearly directs the Forest to "[i]dentify the eligibility of rivers for inclusion in the National Wild and Scenic Rivers System, unless a <u>systematic inventory</u> has been previously completed and documented and there are no changed circumstances that warrant additional review. (36 CFR § 219.7 (c)(2)(vi); emphasis added).

Back in April, American Whitewater and several of our partners sent a letter to the Region 4 Regional Forester outlining our concerns regarding the way the Region - and now the Ashley National Forest - is applying the flawed concept of suitability to Wild and Scenic Rivers. Likewise, the approach to eligibility needs a clean and comprehensive restart. We request a change in approach that takes just such a fresh look at potential Wild and Scenic Rivers on the Forest.

1. The 2008 Suitability Determinations Were Unlawful and Should Have No Force or Effect on the Present Eligibility Analysis.

First and foremost, Suitability is legally restricted to Congressional study rivers. The concept never should have been applied to eligible streams outside of this context, as it was in the 2008 *Wild and Scenic River Suitability Study for National Forest System Lands in Utah*. The decision accompanying that study, which stripped eligible streams of protections, was not lawful. The 2008 suitability study should therefore be ignored moving forward.

The Forest Service erroneously cites the WSRA as providing the foundation for the suitability process it conducted in 2008 and relies upon in the present eligibility process. The agency cites Section 5(d)(1) to claim it can conduct suitability determinations of river segments found eligible for inclusion in the National Wild and Scenic Rivers System though its forest planning processes or otherwise outside of a Congressional mandate as was the case in the 2008 suitability process.[1] That reading is erroneous as a matter of law under the plain language of the statutory text. As the Supreme Court has held, if statutory language is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[2]

The Wild and Scenic Rivers Act did not address suitability analysis of potential additions to the System. Instead, Congress amended the WSRA twice, in 1974 and 1988, to include provisions for conducting suitability analysis, but neither applies to National Forest planning processes outside of Congressional study rivers.

The term "suitability" was first added to WSRA Section 4 on May 10, 1974, directing that the appropriate Secretary of Interior or Agriculture (or both together) "shall study and submit to the President reports <u>on the suitability or nonsuitability</u> … of rivers which are designated herein or hereafter by the Congress as potential additions to such System."[3] Section 4(a) thus provides for suitability determinations to be made for Congressional study rivers designated under WSRA Section 5(a), which lists the specified study rivers as "designated for potential

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[1] 16 U.S.C. § 1276(d)(1).
[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837, 843 (1984).
[3] *See* Pub. L. No 93-279 § 4(a), 88 Stat. 122 (1974), *codified at*16 U.S.C. § 1275(a) (emphasis added).

addition to the [System]."[4] Because the Forest Service was not addressing Congressional study rivers under Section 5(a) in its 2008 suitability determinations for eligible river segments, it was not authorized by Section 4(a) to undertake such suitability determinations.

The second instance of the term "suitability" in the WSRA occurs in Section 5(d)(2), which was added on October 28, 1988.[5] This amendment directed the Secretary of the Interior "to complete a study of the eligibility and suitability of [the Upper Klamath River] segment for potential addition to the [System]." *Id.*(emphasis added).

This specific Congressional direction to study rivers eligibility and suitability of the Upper Klamath in Section 5(d)(2) stands in sharp contrast to WSRA Section 5(d)(1), which makes no reference to conducting suitability determinations during agency planning processes.[6] The first sentence in Section 5(d)(1) simply directs federal agencies to "consider ... potential national wild, scenic and recreational river areas," while the second sentence directs the Secretaries to "make specific studies and investigations to determine which additional wild, scenic and recreational river areas … shall be evaluated in planning reports by all Federal agencies as potential alternative uses." *Id.*(emphasis added). Congressional use of these terms in Section 5(d)(1) – "consider," "study," "investigate" and "evaluate" – without directing that suitability determinations be done as expressly provided for in Sections 4(a) and 5(d)(2), underscores that Congress has not authorized the Forest Service to conduct suitability determinations during forest planning or other planning processes not ordered by Congress, under Section 5(d)(1).[7]

Furthermore, using the forest planning process or standalone suitability processes like the 2008 suitability study to conduct suitability determinations and thereby strip rivers of their eligible status, remove protections, and foreclose their potential addition to the System is counter to the purposes and statutory scheme of the WSRA.

The WSRA declares a national policy that certain rivers and their river corridors possessing outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values "shall be preserved in free-flowing condition" and "protected for the benefit and enjoyment of present and future generations." In the WSRA, Congress declared that the national policy of dam building "needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality … and to fulfill other vital national conservation purposes."[8] Releasing eligible rivers during forest planning and standalone suitability processes does not further these goals.

[4] 16 U.S.C. § 1276(a).
[5] *See* Pub. L. No. 100-557, 102 Stat. 2790 (1988), *codified at*16 U.S.C. § 1276(d)(2).
[6] *See* 16 U.S.C. § 1276(d)(1).
[7] *See, e.g.*, A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*(Thompson/West 2012), Chap. 8 (discussing "Omitted-Case Canon," that nothing may be added to what a statutory text states or reasonably implies) & Chap. 10 (discussing "Negative-Implication Canon," that the expression of one thing implies the exclusion of others, or *expressio unius est exclusion alterius*).
[8] *Id.*

Counter to these goals, the Forest Service's process and actions leave these free-flowing rivers and their outstandingly remarkable values unprotected.

The WSRA's statutory scheme sets up a process for Congress and the states—not the Forest Service—to decide, from time to time, whether to Congressionally study or designate eligible wild and scenic rivers. The WSRA's declaration of purpose is to "institut[e] a national wild and scenic rivers system," "designat[e] the initial components of that system," and "prescrib[e] the methods by which and standards according to which additional components may be added to the system from time to time."[9] Rivers can be added to the national wild and scenic rivers system by act of Congress or by State designation with federal approval.[10]

Under the WSRA, the Forest Service should not be in the business of foreclosing potential future designations based on political considerations, but rather providing for them. The Forest Service's 2008 release of "non-suitable" eligible rivers from administrative protections opened them up to potential harmful development, and undermined both the purposes and legislative direction the WSRA and Congress's and the state's ability to add additional rivers to the National Wild and Scenic Rivers System "from time to time."[11] Suitability determinations are temporal.[12] By stripping rivers of eligibility and related protections and considerations the Forest Service erodes Congress's and the states' authority to choose from rivers with Wild and Scenic potential to designate in the future.

Lastly, the Forest Service has cited the Forest Service Handbook, which does not carry the force of law, as a basis for determining the suitability of streams during planning processes and releasing unsuitable streams from their eligibility. While the Handbook appears to envision such an action at Chapter 84.3, in doing so it directly conflicts with the superseding mandates of the Wild and Scenic Rivers Act and the 2012 Planning Rule as described below. The Handbook, in this instance, is simply wrong and should be amended to comply with relevant laws and regulations.

In summary, the Forest Service lacked authority to conduct a suitability analysis in 2008. Furthermore, the Forest Service lacked authority to strip 28 eligible rivers of their eligible status and release them from further protection and consideration as potential wild and scenic rivers.

2. The Forest Service Must Reconsider Eligibility of Streams Previously Found Unsuitable

The Ashley National Forest now proposes not to reconsider the eligibility of the 28 streams that were eligible in 2005 but found unsuitable in 2008. This proposed omission is

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[9] 16 U.S.C. § 1272.
[10] 16 U.S.C. § 1273(a).
[11] *See* 16 U.S.C. § 1272.
[12] *See* Department of the Interior and Department of Agriculture, *National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification and Management of River Areas*, 47 Fed. Reg. 39454, 39456

unlawful because the suitability determination it rests on was unlawful for the reasons described above, but also in its own right as a new flawed decision.

The Forest Service's 2012 Planning Rule encourages identification of additional rivers for designation. During plan assessment, the Rule requires the Forest Service to identify and evaluate information relevant to "[e]xisting designated areas located in the plan area including wilderness and wild and scenic rivers and potential need and opportunity for additional designated areas."[13] The Agency must: "Identify the eligibility of rivers for inclusion in the National Wild and Scenic Rivers System, unless a systematic inventory has been previously completed and documented and there are no changed circumstances that warrant additional review."[14] The Forest Planning Rule rightly makes no exception allowing the exclusion of rivers and streams previously found unsuitable from an eligibility analysis, nor is there any basis for doing so in law, yet the Ashley National Forest now proposes to do just this.

These 28 streams are by their very nature potential Wild and Scenic Rivers: previous eligibility analyses and decisions determined them to be so. Only the inappropriate suitability analysis decided otherwise, for reasons explicitly not relevant to eligibility, which rests only on freeflow and the presence of at least one rare, unique, or exemplary value. The Forest Service must now reconsider these stream's eligibility.

3. Regardless of Legality, 2008 Suitability Determinations Are Moot

True suitability determinations are requested from a Congress to help that Congress make an informed time-sensitive decision whether or not to designate streams based in part on the political ripeness and support for the designations. Suitability determinations are in part political snapshots of a specific Congress and narrow range of time. Political analyses have an explicitly short relevant shelf-life, which is OK in this context because the Congress that passes a study rivers bill also reasonably has some interest in promptly designating streams found suitable. The 2008 suitability study was conducted outside of this important context. Regardless, there have been significant changes in political support for Wild and Scenic Rivers in Utah and Nation-wide since 2008, marking a significant changed condition that would negate any relevance that the 2008 study otherwise had.

Since 2008, vast mileage of Wild and Scenic Rivers have been designated.

In 2009, Public Law 111-11 designated South Fork Clackamas, Eagle Creek, Middle Fork Hood, South Fork Roaring, Zig Zag, Fifteenmile Creek, East Fork Hood, Collawash, Fish Creek, Battle Creek, Big Jacks Creek, West Fork Bruneau, Cottonwood Creek (ID), Deep Creek, Jarbidge, Little Jacks Creek, North Fork Owyhee, South Fork Owyhee, Red Canyon, Sheep Creek, Wickahoney Creek, Amargosa, Owens Headwaters, Cottonwood Creek (CA), Piru Creek, North Fork San Jacinto, Fuller Mill Creek, Palm Canyon Creek, Bautista Creek,

[13] 36 C.F.R. § 219.6(b)(15) (emphasis added).
[14] 36 C.F.R. § 219.7(c)(2)(vi)

Virgin, Fossil Creek, Snake Headwaters & Taunton; Added to Elk & Owyhee Designations; and added Missisquoi & Trout for study.

In 2014, Public Law 113-291 designated Cave Creek (River Styx), Middle Fork Snoqualmie, Pratt, Illabot Creek, Mississquoi & Trout; Added to White Clay Creek Designation; Added Cave Creek, Lake Creek, No Name Creek, Panther Creek, Upper Cave Creek, Beaver, Chipuxet, Queen, Wood, Pawcatuck, Nashua, Squannacook, Nissitissit and York for study.

In 2018, Public Law 115-229 designated East Rosebud Creek.

In 2019 Public Law 116-9 designated additional mileage on the Amargosa (CA); West Branch Farmington (CT); Chetco, Elk, Rogue (OR). Added Elk Creek, Franklin Creek, Lobster Creek, Molalla, Nestucca, North Fork Silver Creek, Spring Creek, Walker Creek, Wasson Creek (OR); Farmington & Salmon Brook (CT); Wood-Pawcatuck System (CT, RI); Nashua (MA, NH); Deep Creek, Surprise Creek, and Whitewater (CA). Importantly, also designated in this law was a 63-mile segment of the Green River in Utah.

The decade prior to 2008 saw a much smaller number of designations, and in many ways 2009 marked a turning point in support and enthusiasm for Wild and Scenic River designations. The draft Eligibility Report erroneously claims that there have been no WSR designations since December 2014 (p. 1-2). The politics of 2008 are simply no longer relevant to public and political support for designating new Wild and Scenic Rivers.

4. The Forest Service Should Not Conduct a New Suitability Analysis

For the reasons expressed above, the Forest Service may not, and should not, conduct a new suitability study as part of or following this eligibility process. Doing so would run counter to the Wild and Scenic Rivers Act, and would be unlawful.

5. The Forest Service Should Consider Recreational Information in Determining Eligibility.

We ask that the Forest Service consider the following streams for their eligibility, based in part on the recreational values described in our National Whitewater Inventory.

- Duchesne: https://www.americanwhitewater.org/content/River/detail/id/1846/
- Green River: https://www.americanwhitewater.org/content/River/detail/id/1852/
- Lake Fork: https://www.americanwhitewater.org/content/River/detail/id/1858/
- Rock Creek: https://www.americanwhitewater.org/content/River/detail/id/11056/
- Uinta: https://www.americanwhitewater.org/content/River/detail/id/1878/
- Yellowstone: https://www.americanwhitewater.org/content/River/detail/id/1884/

Conclusion

The 2008 *Wild and Scenic River Suitability Study for National Forest System Lands in Utah* was not lawful at the time, and it is not lawful to rely upon it in the current eligibility process for the reasons we outline above. We ask that the Ashley National Forest disregard the 2008 Study as at least irrelevant, if not unlawful, as a factor in the current eligibility process. As such, we ask that all previously eligible streams be reconsidered for their eligibility, as well as streams newly under consideration and proposed herein, and that these streams be found eligible based on their documented values.

Thank you for considering these comments.

Sincerely,

Kevin Colburn
National Stewardship Director
American Whitewater
PO Box 1540
Cullowhee, NC 28723
kevin@americanwhitewater.org