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Re: Comments on the Draft Forest Plan and Draft Environmental Impact Statement for the Ashley National Forest

Dear Ashley National Forest,

The rivers and streams within the Ashley National Forest serve as a vital refuge for native fish and wildlife as our climate warms, and important recreational resources for many citizens. The Draft Forest Plan does not adequately protect these waterways for current and future generations, based on significant legal and policy flaws, and we ask that the Forest Service change course in how the Draft Plan selects potential Wild and Scenic Rivers for protection.

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.

The Ashley National Forest's Draft Land Management Plan (hereafter Draft Plan) and related Draft Environmental Impact Statement (hereafter DEIS) contain significant and clear violations of federal law and policy in their approach to potential Wild and Scenic Rivers. We write to urge the Ashley National Forest to change course, and follow well established federal law, policy, and practice in your approach to the rivers and streams on the Forest. We will seek in these comments to clearly and concisely communicate the flaws in the Draft Plan and related analysis, and to propose a remedy.

1. The 2012 Planning Rule Prohibits Conducting and Relying Upon Wild and Scenic Suitability Analysis During Forest Planning.

The DEIS wrongly states that the 2012 Forest Planning Rule allows or requires a Wild and Scenic River suitability analysis.

The forest plan revision process can recommend areas for wilderness designation, or recommend rivers or river segments to be eligible or suitable for wild and scenic river status.¹

This claim that suitability can occur as part of planning is false and carries significant negative consequences for rivers in the Draft Plan, at least to the extent that rivers found unsuitable are stripped of their mandated eligibility protections. Elsewhere, the DEIS correctly states that the 2012 Planning Rule requires a Wild and Scenic River eligibility analysis but falsely places this in the context of a Recommendation to Congress:

The 2012 Planning Rule specifies eight primary decisions to be made in forest plans: Recommendations to Congress (if any) for lands suitable for inclusion in the National Wilderness Preservation System and rivers eligible for inclusion in the National Wild and Scenic Rivers System (NWSRS) (36 CFR 219.7(c)(2)(v) and (vi))²

Amidst these errors though the DEIS also states the correct agency policy in at least one instance:

Wild and Scenic Rivers Act of 1968—Directs Federal agencies to consider potential wild and scenic rivers in their land and water planning processes. To fulfill this requirement, the Forest Service's 2012 planning rule requires the agency to identify rivers eligible for inclusion in the NWSRS. This is required whenever the Forest Service undertakes the development or revision of a land and resource management plan, commonly called a forest plan.³

To be clear, the 2012 Planning Rule has two basic mandates regarding potential Wild and Scenic Rivers. First, as referenced in the quote above, the Agency must identify only eligible rivers:

§ 219.7 New plan development or plan Revision. (2) In developing a proposed new plan or proposed plan revision, the responsible official shall: (vi) Identify the eligibility of rivers for inclusion in the National Wild and Scenic Rivers System,

¹ DEIS. Pg. 5

² DEIS. Pg. 3

³ DEIS. Pg. 310

unless a systematic inventory has been previously completed and documented and there are no changed circumstances that warrant additional review.⁴

Importantly and correctly, the 2012 Planning Rule makes no mention of conducting a Wild and Scenic suitability analysis, or recommending potential Wild and Scenic Rivers to Congress, nor does it allow such actions in a manner that would eliminate eligibility protections.

The second mandate in the 2012 Planning Rule regarding potential Wild and Scenic Rivers is to protect them:

§ 219.10 Multiple use. ... (b) Requirements for plan components for a new plan or plan revision. (1) The plan must include plan components, including standards or guidelines, to provide for: ... (v) Protection of designated wild and scenic rivers as well as management of rivers found eligible or determined suitable for the National Wild and Scenic River system to protect the values that provide the basis for their suitability for inclusion in the system.⁵

The Forest Service is thus required to protect rivers found eligible (through a planning process), as well as those found suitable (e.g. Congressionally recommended study rivers). In the DEIS and Draft Plan, the Ashley National Forest violates this mandate by failing to protect eligible streams that were presently or in the past found unsuitable. The release of eligible streams from protection in a forest plan is plainly unlawful.

We are fully aware that Forest Service directives contain misleading advice regarding suitability analyses and releasing eligible streams that conflicts the 2012 Planning Rule. These directives do not contain the weight of law however, and are superseded by the 2012 Planning Rule. Given this clear conflict the Ashley National Forest must follow the 2012 Planning Rule, not the non-binding and misdirected advice in the Agency's directives.

We also point out that the Ashley National Forest's plan to release eligible rivers from protection is without precedent. To the best of our knowledge, all the National Forests that have completed Forest Plans since the 2012 Forest Planning Rule's publication have not conducted suitability determinations, nor have they stripped eligibility protections from rivers based on prior findings of unsuitability.

Our preferred remedy to this flaw in the Draft Plan is for the Ashley National Forest to remove the suitability analysis from the plan entirely and not rely upon or reference past unsuitability findings. Alternately, the Ashley National Forest could clearly state that past or present so-called suitability studies have no bearing on the roster of eligible streams and are solely intended to convey Congressional recommendations. In both remedies, all streams currently or previously

⁴ 2012 Forest Planning Rule, 36 CFR § 219.7 (2) (vi)

⁵ 2012 Forest Planning Rule, 36 CFR § 219.10 (b) (1) (v)

found eligible would be protected as eligible in the Final Plan, as described in the following section of these comments.

2. All Eligible Streams Must Be Protected in the Forest Plan, Including Those Found Eligible In A Prior Systematic Inventory

Based on the policies described above, the four streams newly found eligible in the DEIS (Dowd Creek, Honslinger Creek, North Skull Creek, and Spring Creek) must remain protected as eligible streams in the final forest plan.⁶ In addition, streams previously documented as eligible must remain protected as such.

As stated above, the Ashley National Forest is required by the 2012 Forest Planning Rule to “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.”⁷ In this instance there was just such a systematic inventory previously completed, in 2005 and integrated into the 2019 Draft Eligibility Report and the DEIS, which found the following rivers eligible for Wild and Scenic designation:

- Middle Main Sheep Creek
- Lower Main Sheep Creek
- Carter Creek
- Cart Creek Proper
- Green River
- Pipe Creek
- Upper Whiterocks River
- West Fork Whiterocks River
- Reader Creek
- East Fork Whiterocks River
- Middle Whiterocks River
- Lower Dry Fork Creek
- South Fork Ashley Creek
- Black Canyon
- Ashley Gorge Creek
- Upper Rock Creek
- West Fork Rock Creek, including Fish Creek
- Fall Creek
- Oweep Creek
- Upper Lake Fork River, including Ottoson and East Basin Creeks
- Upper Yellowstone Creek, including Mill Creek
- Garfield Creek

⁶ See DEIS Pg. 313

⁷ 2012 Forest Planning Rule, 36 CFR § 219.7 (2) (vi)

- Upper Uinta River, including Gilbert Creek, Center Fork, and Painter Draw
- Shale Creek and tributaries⁸

The new forest plan must protect these 24 eligible streams under the 2012 Planning Rule §219.10(b)(1)(v).

In 2008 the Forest Service undertook a self-directed so-called suitability study and deemed only 2 of these 24 rivers to be suitable for designation.⁹ Eligibility protections were stripped from the remaining 22 rivers through a subsequent forest plan amendment. That “release” of eligible stream protections in the prior amendment based on suitability factors has no bearing on the current forest planning process which by law concerns itself only with eligibility. The Forest Service is on record stating that these rivers are eligible, and now must protect them in the new Forest Plan.

Not only are the suitability findings explicitly irrelevant in the context of § 219.7 of the Forest Planning Rule, relying upon these findings would directly violate §219.3 of the 2012 Planning Rule that requires the Agency to:

... use the best available scientific information to inform the planning process required by this subpart. In doing so, the responsible official shall determine what information is the most accurate, reliable, and relevant to the issues being considered.

In this instance, the 2005 eligibility study documented the free-flowing status and presence of an ORV in each of the 24 eligible streams.¹⁰ The fresh look of the current forest planning process must rely on the “best” and most “relevant” information in determining which streams are eligible (e.g. are free-flowing and possessing at least one ORV). That information is the 2005 eligibility study, supplemented by the 2019 Draft Eligibility Report. No analysis since that time has meaningfully reconsidered or called into question those findings of fact. The political, economic and other information that the Agency relied upon to find each river unsuitable is immaterial to their eligibility.

In addition to conflicting with the 2012 Planning Rule, reliance upon irrelevant information and reaching conclusions not supported by the factual record of eligibility would be arbitrary, capricious, and an abuse of discretion under the Administrative Procedures Act.

While clear in policy and law, protecting eligible streams regardless of suitability findings also makes sense. Suitability factors change rapidly and quickly become inaccurate. For example, the political ripeness lens of suitability sunsets quickly with each election and with each shift in

⁸ Ashley National Forest Draft Wild and Scenic River Eligibility Report. Pg. I-6. May 2019.

⁹ See: https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5122056.pdf

¹⁰ See summary and citation: Ashley National Forest Draft Wild and Scenic River Eligibility Report. Pg. I-6 - I-7. May 2019

public awareness and opinion. Practically, securing a successful strawpoll of support for designation at precisely the same time as a forest planning decision is nearly impossible. If such strawpolls can render streams ineligible in the next forest plan and beyond, then over a very short timeframe the potential Wild and Scenic rivers on our public lands with interim protection would be ratcheted down to nearly none. To do this would be, and is, inconsistent with the language and intent of the Wild and Scenic Rivers Act. This is especially true because eligible and suitable rivers receive the same protections in forest plans, and the same consideration in Congress. There is no conservation value to suitability in the context of forest planning. It is solely a release tool.

Conclusions and Recommendations

American Whitewater requests that the final management plan for the Ashley National Forest find the 28 rivers and streams that the Forest has found eligible in recent years to be eligible still. Whether or not the Agency may legally conduct additional political and economic analysis during forest planning for the purposes of recommending rivers for Congressional designation, the Agency cannot just wave away the objective, on-the-ground facts that make rivers eligible by deciding they are not politically suitable for designation at that time. The DEIS and Draft Plan err in stripping eligibility and/or eligibility protections from rivers found not suitable, and doing so without a reasonable basis is arbitrary and capricious. The DEIS makes no claims and provides no evidence that these 28 streams the Forest has found eligible are not free-flowing or do not possess at least one Outstandingly Remarkable Value, and thus these streams remain eligible.

The Forest has erred in following outdated agency direction rather than the 2012 Forest Planning Rule, and erred in attempting to release 26 of the 28 eligible streams from mandated protections in the Draft Plan. We brought up these same issues in our comments on the Draft Eligibility Report, and are concerned that the Forest did not change course in preparing the DEIS. Protecting potential Wild and Scenic rivers is part of fulfilling the Forest Service's multiple use mandate and the Wild and Scenic Rivers Act. We ask again that you meet these mandates and protect the 28 eligible streams as such in the final plan.

Thank you for considering these comments and this request.

Sincerely,



Kevin Colburn
National Stewardship Director
American Whitewater