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USDA Forest Service
Intermountain Region
ATTN: Objection Reviewing Officer
324 25th Street
Ogden, UT 84401

**Re: Objection to Ashley National Forest Plan
Submitted on behalf of American Whitewater**

Dear Objection Reviewing Officer:

On behalf of American Whitewater, I hereby submit the enclosed Objection to the Draft Record of Decision (“Draft ROD”) and Final Environmental Impact Statement (“FEIS”) for the revised Land Management Plan (“Forest Plan”) for the Ashley National Forest in Utah & Wyoming (April, 2023). The official responsible for the Forest Plan is Susan Eickhoff, Forest Supervisor of the Ashley National Forest. This Objection is submitted pursuant to 36 C.F.R. Part 219. The Objection is timely because it is submitted less than 60 days after publication of the public notice announcing the objection period for the Forest Plan revisions. *See* 36 C.F.R. § 219.56(a).

The Objector’s mailing address is:

American Whitewater
PO Box 1540
Cullowhee, NC 28723

The Objector may be contacted in care of its undersigned counsel, or by contacting Kevin Colburn, American Whitewater’s National Stewardship Director, by email (kevin@americanwhitewater.org) or by telephone (828-712-4825).

Sincerely,

A handwritten signature in black ink that reads "James N. Saul".

James N. Saul
Attorney for American Whitewater

GROUNDS FOR THE OBJECTION

A. Statement of the issues and parts of the Forest Plan to which this Objection applies.

The Forest Service wrongly excluded 28 rivers from consideration and affirmation of their Wild and Scenic River eligibility based on a prior suitability study and a subsequent one in this forest plan. Rivers found eligible must remain so—so long as they are free flowing and possess at least one outstandingly Remarkable Value—regardless of any administrative findings of unsuitability.

The parts of the Draft ROD, FEIS, and Forest Plan to which this Objection applies include, but are not limited to, the following:

- The Draft ROD at page 9, in which the Forest Supervisor proposes to adopt “Alternative B Modified” as her decision; and pages 17–18, reflecting the Forest Supervisor’s determination that only segments of the Green and Uinta Rivers are “recommended as suitable” for designation under the Wild and Scenic Rivers Act “WSRA” or the “Act”);
- The FEIS at pages 16–23, 83–84, 86–87, Table 2–2, and Appendix A, Figure 2–22, which identify, describe, and provide the Forest Service’s NEPA analysis for its decision to manage segments of the Uinta and Green Rivers as “suitable for wild and scenic river designation” without considering the effects or impacts of failing to protectively manage the many other river segments previously found eligible for wild and scenic river designation;
- The FEIS, Appendix F: Wild and Scenic Rivers Suitability Report, in its entirety;
- The Forest Plan at pages 80–82 and Figure 1–8, which extends “interim protection measures” to only those segments of the Uinta and Green Rivers found by the Forest Service to be “suitable” for inclusion in the National Wild and Scenic Rivers System, but not to any of the other river segments previously found by the Forest Service to be “eligible” for inclusion.

B. Concise statement explaining the objection and suggesting how the decision may be improved.

In the Draft ROD, FEIS, and Forest Plan, the Forest Service wrongly and unlawfully relied upon new or existing Forest Service-initiated “suitability studies” as the basis for the agency’s determination that *only* those segments of the Uinta and Green Rivers found to be “suitable” for inclusion in the National Wild and Scenic Rivers System would receive “interim protection measures” to preserve their free-flowing state and their outstandingly remarkable values.

The Forest Service’s decision in this regard runs counter to the WSRA, the agency’s own 2012 Planning Rule at 36 C.F.R. Part 219, and other pertinent agency guidance. It is also without precedent; to the best of our knowledge, all other National Forests that have completed new or

revised forest plans since the promulgation of the 2012 Planning Rule have not conducted suitability determinations as part of the forest planning process, nor have they stripped interim protections from eligible rivers based on prior findings of unsuitability as part of a forest plan.

The Forest Service’s flawed decision excludes 28 rivers or river segments within Ashley National Forest—previously found to be eligible—from further consideration of their potential for inclusion in the National Wild and Scenic Rivers system, and administratively strips them of their interim protection under the WSRA and the 2012 Planning Rule. Under the Draft ROD and Forest Plan, these rivers would no longer be managed in a way that protects their wild and scenic eligibility.

The Forest Service’s decision may be improved by revising the Draft ROD, FEIS, and Forest Plan to clarify that *all* rivers or river segments previously found to be eligible for inclusion in the National Wild and Scenic Rivers system will be managed to protect their free-flowing state and their outstandingly remarkable values. More specifically, the Forest Plan should be revised to include “plan components, including standards or guidelines, to provide for . . . management of rivers found eligible . . . for the National Wild and Scenic River system to protect the values that provide the basis for their suitability for inclusion in the system.” 36 C.F.R. § 219.10(b)(1)(v).

This management directive should include the 24 rivers previously found eligible in the Forest Service’s 2005 Eligibility Study¹ as well as the four streams newly found to be eligible in 2022 (Dowd Creek, Honslinger Creek, North Skull Creek, and Spring Creek).²

C. Detailed statement of the objection: By failing to protectively manage rivers found to be eligible for wild and scenic designation in the Draft ROD and Forest Plan for Ashely National Forest, the Forest Service acted arbitrarily, capriciously, and contrary to law and agency policy.

1. The Forest Service lacks the authority under the WSRA or its 2012 Planning Rule to use “suitability studies” to administratively release from interim protection those rivers already found eligible for designation under the Act.

At the outset, the Forest Service lacks the legal authority to use suitability studies as a means to forever release from interim protection and abandon rivers or river segments deemed by the agency to be “unsuitable” for designation under the Act, either as part of or separate from the forest planning process. This is especially true where those rivers have already been found *eligible* for designation under the Act.

Section 5(d)(1) of the WSRA states that, “[i]n all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to

¹ See USFS, Final Eligibility Determination of Wild and Scenic Rivers, Ashley National Forest, Vernal, Utah (July 2005) (“2005 Final Eligibility Report”).

² See USFS, Ashley National Forest, Wild and Scenic Rivers Eligibility Study and Report: Final Eligibility Report (Oct. 2022), prepared by Environmental Management and Planning Solutions, Inc. (cited in the References section of the Draft ROD at p. 49) (“2022 Final Eligibility Report”).

potential national wild, scenic and recreational river areas[.]” 16 U.S.C. § 1276(d)(1). The Act itself does not define what a “potential national wild, scenic and recreational” river is, but federal case law suggests that the phrase means rivers that may warrant designation under the Act, as opposed to rivers the Forest Service may wish to exclude from further consideration. *See, e.g., Ctr. for Biological Diversity v. Veneman*, 335 F.3d 849, 854 (9th Cir. 2003), *opinion withdrawn and superseded on reh'g*, 394 F.3d 1108 (9th Cir. 2005) (construing 16 U.S.C. § 1276(d)(1) in the context of rivers that the Forest Service had “determine[d] to be *potentially eligible* for inclusion in the national wild and scenic rivers systems.”) (emphasis added by the Ninth Circuit).

Indeed, *Veneman* lends credence to an interpretation of the WSRA that permits the use of suitability studies only as vehicles for recommendations to Congress—not for the removal of interim protections for eligible rivers. As the Ninth Circuit explained,

[F]or rivers added to the WSRS through the inventory process, the Forest Service determines the eligibility of a particular river first by establishing whether the river is free-flowing and possesses one or more ORV. If the river is found to have both characteristics, the Service classifies the river as “wild,” “scenic,” or “recreational.” **Once the river has been deemed “eligible,” the Service conducts a suitability study before Congress makes the ultimate decision regarding designation.**

Id. at 855 (emphasis added). The *Veneman* court’s reference to a “suitability study” plainly implies an administrative antecedent to Congressional action—an agency recommendation only, not a license to remove substantive interim protections for rivers already deemed eligible for designation under the WSRA. The ability of Congress to make “the ultimate decision regarding designation” would clearly be frustrated if eligible rivers lost their interim protections through administrative action resulting from an agency-initiated suitability study.

Consistent with Section 5(d)(1) of the WSRA, the Forest Service’s own 2012 Planning Rule imposes obligations on the agency to consider the eligibility of rivers for inclusion, and does not authorize “non-suitability” determinations as part of forest planning. First, the 2012 Planning Rule requires the agency, as part of the forest planning process, to:

[i]dentify 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.

36 C.F.R. § 219.7(c)(2)(vi) (emphasis added). Like the WSRA itself, the focus of the 2012 Planning Rule is thus on the identification of eligible rivers, and the rule says nothing about identification of rivers deemed suitable (or not) for designation. This stands in sharp contrast to the immediately preceding subsection of the rule, which instructs the Forest Service to “[i]dentify and evaluate lands that may be *suitable* for inclusion in the National Wilderness Preservation System and determine whether to recommend any such lands for wilderness designation.” 36 C.F.R. § 219.7(c)(2)(v) (emphasis added). Had the Forest Service intended for its Regions to identify the suitability of rivers as part of forest planning, it would have stated so explicitly—as it clearly knows how to do.

The 2012 Planning Rule also requires new or revised forest plans “to provide for” the 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.

36 C.F.R. § 219.10(b)(v) (emphasis added). The rule’s use of the conjunctive “or” indicates that the Forest Service is required to protect rivers that fall within either of the two categories. Thus, rivers “found eligible” must be protected, just as rivers “determined suitable” for inclusion in the National Wild and Scenic River system must be protected by a revised forest plan.

Support for this approach is found in Forest Service guidance. The Forest Service Handbook, for example, makes clear that because Congress is the ultimate decider on Wild and Scenic River designation, rivers found by the agency to be eligible should be managed so as to preserve their eligibility characteristics until Congress makes its decision. *See* Forest Service Handbook, FSH 1909.12–Land Management Planning Handbook, Ch. 80–Wild and Scenic Rivers, at 26–27 (“Forest Service Handbook”) (“The planning rule at 36 CFR 219.10 provides for interim management of Forest Service-identified eligible or suitable rivers or segments, to protect their values prior to a congressional decision whether to designate them as part of the National System.”).

Notably, in the “Decision Framework” section of the FEIS, the Forest Service correctly recognizes that among the “eight primary decisions to be made in forest plans” is the decision to identify, and protectively manage, “rivers *eligible* for inclusion in the National Wild and Scenic Rivers System[.]” FEIS Ch. 1, p. 5 (citing 36 C.F.R. § 219.7(c)(2)(vi)) (emphasis added). The Forest Service thus implicitly recognizes at the outset of its NEPA analysis that a decision regarding the suitability of rivers for designation under the WSRA falls outside the scope of the 2012 Planning Rule, whereas the protective management of eligible rivers is of primary importance.

The Forest Service repeats this correct interpretation of the 2012 Planning Rule later in the FEIS, explaining that the WSRA:

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. Eligibility studies are required, but a suitability analysis is not.

FEIS at 331. The statement above correctly depicts that the general legislative mandate of the WSR to consider potential wild and scenic rivers is interpreted into specific and actionable agency policy in the 2012 Planning Rule. Instead of following this policy though, the ANF relies upon conflicting advice in the Forest Service Handbook.

Elsewhere, however, the FEIS incorrectly states that making “[r]ecommendations to Congress” regarding “rivers eligible for inclusion in the National Wild and Scenic Rivers System” is within the ambit of the 2012 Planning Rule, and that through forest plan revisions the agency can “recommend rivers or river segments to be eligible or suitable for wild and scenic river status.” FEIS at 5–6. To the contrary, nothing in 36 C.F.R. Part 219 relates to or even mentions making recommendations to Congress about wild and scenic river designation as part of the forest planning process. To be clear, American Whitewater supports the Forest Service’s ability to make recommendations to Congress regarding the *addition* of eligible rivers to the Wild and Scenic Rivers System, but not its use of forest plan revisions or so-called “suitability studies” to strip interim protections rivers already found by the agency to be eligible.

In sum, both the WSRA and the 2012 Planning Rule require the Forest Service to identify *eligible* wild and scenic rivers as part of the forest planning process, and to provide for the management of those eligible rivers so as to “protect the values that provide the basis for their suitability for inclusion in the system.” 36 C.F.R. § 219.7(c)(2)(vi). They do not, however, authorize the use of either forest plans or so-called “suitability studies” as a means to strip away such interim protections from eligible rivers.

2. The Forest Service must protectively manage all rivers and river segments within Ashley National Forest already found to be eligible for inclusion in the Wild and Scenic Rivers System—including those found eligible in previous inventories and studies.

As briefly noted above, in its 2005 Final Eligibility Report the Forest Service found that the following 24 rivers or river segments were eligible for inclusion in the Wild and Scenic Rivers System:

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

See 2022 Final Eligibility Report at I-6 to I-7 (summarizing findings of the earlier 2005 Final Eligibility Report). We are aware that in 2008 the Forest Service prepared a “suitability study” for National Forest System Lands in Utah finding that, within Ashley National Forest, only the Green River and the Upper Uinta River were suitable for designation under the WSRA, and that the agency then issued a ROD and amendments to the Forest Plan finding that the other 22 eligible rivers “are not suitable are no longer afforded agency protection as potential wild and scenic rivers.” Record of Decision and Forest Plan Amendments: Wild and Scenic River Suitability Study for National Forest System Lands in Utah (November 2008) (“2008 Suitability Study”).

However, there are no changed conditions or other factual circumstances that might render any of those 22 other rivers no longer eligible for designation. They were eligible in 2005, and they remain eligible today. Accordingly, under the WSRA and the 2012 Planning Rule, the Forest Plan must provide for their interim protection, notwithstanding the findings of the 2008 Suitability Study or the failure to properly manage those eligible rivers between 2008 and the present day.

Additionally, and for the same reasons, the four streams newly found eligible in the 2022 Final Eligibility Report must remain protected as eligible streams in the Forest Plan, notwithstanding the purported conclusions of the 2023 Wild and Scenic Rivers Suitability Report that appears as Appendix F to the FEIS. These streams are:

- Dowd Creek
- Honslinger Creek
- North Skull Creek
- Spring Creek

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 public awareness and opinion. Practically, securing a successful straw poll of support for designation at precisely the same time as a forest planning decision is nearly impossible. If such straw polls 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.

3. The Forest Service violated the 2012 Planning Rule and the Administrative Procedure Act by failing to use the best available scientific information regarding wild and scenic river eligibility.

Not only are the suitability findings irrelevant in the context of the 2012 Planning Rule, relying upon these findings would directly violate that rule, which 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.

36 C.F.R. § 219.3. In the 2005 Final Eligibility Report, the Forest Service documented the free-flowing status and presence of an outstandingly remarkable value (“ORV”) in each of the 24 eligible streams. 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 Final Eligibility Report, supplemented by the 2022 Final 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 APA.

D. Statement that demonstrates the link between prior substantive formal comments attributed to the objector and the content of the objection.

On April 2, 2019, American Whitewater, American Rivers, Idaho Rivers United, and Outdoor Alliance submitted comments on the Region 4 Draft Wild & Scenic Suitability Process document, dated December 2018. These comments echo the arguments in this objection, and urge the Region not to allow the release of Wild and Scenic eligibility protections through what the agency refers to as suitability.

On November 19, 2019, American Whitewater submitted a comment letter on the Ashley National Forest Wild and Scenic Rivers Draft Eligibility Report. These comments raised the very same issues as we raise in this objection, to no avail. As an example, we stated:

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.

On February 16, 2022, American Whitewater filed comments on the Draft Forest Plan and DEIS. Our Letter ID issued by the agency is 49606-4143-75. These comments raise each issue that is raised in this objection.

E. Conclusion

For the foregoing reasons, the Forest Service must revise its Draft ROD, FEIS, and the Forest Plan to provide interim protections for all rivers or river segments found by the agency to be eligible for inclusion in the Wild and Scenic Rivers system in either the 2005 Final Eligibility Report or the 2022 Final Eligibility Report.