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Title:

Comments: Please find the attached letter from Wilderness Workshop regarding the GMUG Draft EIS's analysis of cultural resources.

[ATTACHMENT COPIED BELOW. NOTE PDF CONVERSION MAY RESULT IN FORMATTING ERRORS.]

November 26, 2021

Chad Stewart, Forest Supervisor Samantha Staley, Forest Planner

Grand Mesa, Uncompahgre and Gunnison National Forest 2250 South Main St.

Delta, Colorado 81416

Re: Wilderness Workshop's Comments on the Grand Mesa, Uncompahgre, and Gunnison National Forest Plan Revision Draft Management Plan

Dear Mr. Stewart and Ms. Staley,

Please accept these comments on the Draft Environmental Impact Statement (Draft EIS) recently released for the revised Grand Mesa, Uncompahgre and Gunnison National Forest Plan (Proposed Action). We are specifically submitting these separate comments regarding the forest plan revision's identification and evaluation of cultural resources. In short, we are concerned that the Forest Service has performed insufficient field inventories for cultural resources and that any adverse effects determination is based on incomplete information. We urge the Forest Service to complete field surveys as a part of the forest plan revision for all lands where management objectives will permit surface-disturbing activities and to also identify all historic sites eligible for inclusion on the National Register of Historic Places. Both actions should involve extensive consultation with applicable tribal historic preservation offices (THPOs) and the Colorado State Historic Preservation Office (SHPO).

I. The Proposed Action Violates the National Historic Preservation Act

The National Historic Preservation Act (NHPA) [ldquo]is a procedural statute requiring government agencies to

stop, look, and listen before proceeding when their action will affect national historical assets." *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp.*, 843 F.3d 886, 905 (10th Cir. 2016) (quoting *Presidio Historical Ass'n v. Presidio Trust*, 811 F.3d 1154, 1169 (9th Cir. 2016)). The NHPA was enacted "to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." 54 U.S.C. [sect] 300101(1).

The NHPA's Section 106 "requires that, prior to any federal undertaking, the relevant federal agency 'take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]' and 'afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam) (quoting 16 U.S.C. [sect] 470f). The procedural requirements of the NHPA demand that federal agencies must 1) make a reasonable and good faith effort to identify historic properties, 36 C.F.R. [sect] 800.4(b); 2) determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R.

[sect] 60.4; 3) assess the effects of the undertaking on any eligible historic properties found, 36

C.F.R. [sect][sect] 800.4(c), 800.5, 800.9(a); 4) determine whether the effect will be adverse, 36 C.F.R.

[sect][sect] 800.5(c), 800.9(b); and 5) avoid or mitigate any adverse effects, 36 C.F.R. [sect][sect] 800.8(e), 800.9(c).

#### A. The Forest Service Failed to Adequately Consult with the Colorado State Historic Preservation Office

NHPA regulations require agencies to consult with state and tribal historic preservation officers throughout the [sect] 106 process to determine if the proposed undertaking will adversely affect historic properties. See 36 C.F.R. [sect][sect] 800.4(a)[dash](c), 800.5(a), 800.6(a), 800.16(f).

Specifically, the Forest Service must initiate consultation with the SHPO to:

- (1) Determine and document the area of potential effects, as defined in [sect] 800.16(d);
- (2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;
- (3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and
- (4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to [sect] 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance. 36 C.F.R. [sect][sect] 800.4(a).

Here, there is no evidence in the record that the Forest Service consulted with the SHPO for a finding of no adverse effect on the proposed undertaking.

Summary of Comments: The Forest Service must consult with the SHPO and tribes throughout its Section 106 process.

B. The Forest Service Failed To Make a Reasonable and Good Faith Effort to Identify Cultural Resource

NHPA regulations require that an agency "shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey." 36 C.F.R. [sect] 800.4(b)(1). Furthermore, the agency must [ldquo]take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.[rdquo] Id. At a minimum during a planning process, the Forest Service [ldquo]shall make a good faith effort to identify (inventory) historic properties on NFS lands. The level of effort required to identify historic properties within a planning or project area varies and, at a minimum, must be sufficient to implement plans or activities without damage to historic properties and to meet SHPO requirements for NHPA Section 106 review.[rdquo] FSM 2300, Ch. 2360[mdash]Heritage Program Management at 43 (emphasis added).

Based on the materials provided to the public, the Forest Service has failed to make a reasonable and good faith effort to identify historic sites by only completing field surveys on 7% of the GMUG planning area. See Revised Draft Forest Assessments: Cultural and Historic

Resources at 13 (March 2018) (explaining that: [ldquo][a]s of 2017 approximately 217,00 acres across all three forests have been surveyed for cultural resources, or about 7%.[rdquo]). Interpreting what constitutes reasonable and good faith efforts, federal courts have found that in a land management planning process, field surveys on 8% of the planning area or less is not a reasonable or good faith effort. See *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1008 (9th Cir. 2013) (where the 9th Circuit found the agency[rsquo]s cultural resource inventory deficient when [ldquo]only 8 percent of Monument lands have been subject to Class III inventories, and only 16 percent of the Monument has been subject to Class II or Class III inventories.[rdquo]); see also *S. Utah Wilderness All. v. Burke*, 981 F. Supp. 2d 1099, 1109 (D. Utah 2013) (where the court reasoned [ldquo][b]ecause [the agency] only conducted a Class I survey, the BLM has not demonstrated that it conducted a reasonable and good faith inventory[.].[rdquo]).

The quality of the GMUG[rsquo]s minimal cultural resource inventories is also questionable.

The Forest Service has highlighted that its existing inventories may be inadequate, stating: [ldquo][p]re-2000 inventories may be suspect in terms of their adequacy of information and fulfillment of the NRHP process; some of these inventories require further and updated surveys.[rdquo] Revised Draft Forest Assessments: Cultural and Historic Resources at 19 (March 2018). If this is the case, the Forest Service must update its surveys by making

a reasonable and good faith effort to inventory and investigate cultural resources on a much larger portion of the Forest, especially where the forest plan revision will allow surface-disturbing uses.

Summary of Comments: Prior to making an adverse effects determination, the Forest Service must perform field surveys on all lands where surface disturbing activities would be authorized by the forest plan.

#### C. The Forest Service Failed to Evaluate the Eligibility of Historic Sites for the National Register of Historic Places

As a result of its failure to undertake a good faith and reasonable effort to identify cultural resources, the Forest Service has failed to adequately determine if its properties in the area of potential effects are eligible for listing on the National Register of Historic Places. The NHPA regulations require that the agency:

apply the National Register criteria to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. 36 C.F.R. [sect] 800.4(c)(1).

Here, the Forest Service's 2018 assessment of cultural resources on the Forest found that nearly 20% of the GMUG plan area's known cultural resources have not been evaluated for National Register eligibility. See Revised Draft Forest Assessments: Cultural and Historic

Resources at 19 (March 2018) (stating: "[dquo]Of the known resources within the plan area, 18% or 1374 of 7657 resources have not been evaluated for their National Register eligibility, representing a backlog that makes it difficult to adequately manage significant sites.[rdquo]).

Moreover, "[dquo]over 63% of total known cultural resources have no condition information for the plan area, resulting in a significant data gap of site condition status that could have critical and negative impacts on resources.[rdquo] Id (emphasis added). Because of the deficient cultural resource information in the GMUG planning area, the Forest Service cannot reasonably determine whether the GMUG forest plan revision will have adverse effects on historic properties within the area of potential effects.

Summary of Comments: The Forest Service must identify and evaluate all historic sites eligible for inclusion on the Historic Register of Historic Places prior to making an adverse effects determination.

#### D. The Forest Service Cannot Make An Adverse Effects Finding With Its Deficient Identification Efforts

The Forest Service itself admits that with so many gaps in its cultural resource data, the agency cannot determine the adverse effects of the forest plan on cultural resources. Specifically, the Forest Service states:

These information gaps, in addition to the lack of prehistoric and historic contexts, inhibits managers in making efficient and critical conclusions for cultural and historic resources during evaluations. It further demonstrates the limited information known about the plan area such as inhabitation and uses. Finally, there is limited understanding in how specific cultural resources respond to climate change impacts. Having full awareness of resources, contexts, and federal requirements will be beneficial for management direction.

Revised Draft Forest Assessments: Cultural and Historic Resources at 20 (March 2018) (emphasis added).

Summary of Comments: The Forest Service must adequately identify and evaluate all historic properties eligible for inclusion on the National Register prior to making an adverse effects determination.

In conclusion, we urge the Forest Service to thoroughly identify and document all cultural resources impacted by the forest plan revision. To comply with the NHPA, this will entail a reasonable and good faith effort to identify cultural resources where surface-disturbing use will be authorized; extensive consultations with the SHPO and applicable THPOs; identify all historic sites eligible for inclusion on the National Register; and support a finding of no adverse effects with a robust understanding of the potential impacts to cultural resources from the Proposed Action.

Please feel free to contact us if you have any questions or concerns.

Sincerely,

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