

USDA Forest Service
Objection Reviewing Officer
EMC, RPC-6th Floor
Attn: Judicial and Administrative Reviews
1601 N. Kent St
Arlington, VA 22209
Submitted electronically to: objections-chief@fs.fed.us

November 26, 2013

Re: Idaho Panhandle National Forest Plan Objection

American Whitewater hereby formally objects to specific findings and decisions within the Revised Forest Plan for the Idaho Panhandle National Forest (IPNF) and the associated Final Environmental Impact Statement (FEIS) and Record of Decision (ROD). We do so following the regulations in 36 CFR 219. The Draft Record of Decision was signed August 28, 2013, by Regional Forester for the Northern Region, Faye Krueger. Subsequently, the legal notice of the objection period appeared in the newspaper of record, the Missoulian, on September 27, 2013. The 60-day objection period thus began on September 28, 2013, and ends November 26, 2013.

Objector

Kevin R. Colburn



National Stewardship Director
American Whitewater
2725 Highland Drive
Missoula, MT 59802
406-543-1802

kevin@americanwhitewater.org

1) Statement of the issues and/or the parts of the plan revision to which this objection applies.

This objection challenges the Idaho Panhandle National Forest's (IPNF) determination that several streams on the IPNF are ineligible for designation under the Wild and Scenic Rivers Act (WSRA). The specific streams that we assert were wrongly found ineligible are Big, Boulder, Boundary, Smith, Cow, Lighting, Slate, and Marble creeks, as well as the North Fork of the St. Joe River.

The analysis we challenge herein is found on pages 29-31 and 493-503 of the FEIS, as well as Appendix E of the FEIS. The decision regarding this issue can be found on pages 6, 8, and 35 of the Draft Record of Decision (ROD).

2) Concise statement explaining the objection and suggestion of how the proposed plan decision may be improved.

The IPNF erred when it found nine rivers to be ineligible for Wild and Scenic designation based on clear deviations from Forest Service policy and a lack of supportive information. The streams were found ineligible because the IPNF asserts the values we cite in our *Wild and Scenic Eligibility Report* are not rare, unique or exemplary. The IPNF offers no evidence, data, or rationale in support of these findings. Streams are dismissed with a single sentence each, based on an improper region of comparison, citing a lack of Outstanding Remarkable Values (ORV's). The IPNF determined that our proposal for additional eligible streams was an "alternative considered but eliminated from detailed study."

In dismissing consideration of potentially eligible streams, and offering no basis for that dismissal, the IPNF has violated Forest Service Policy, the Wild and Scenic Rivers Act (WSRA), the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA).

The plan decision could be improved by applying the nationally accepted criteria for conducting eligibility inventories to the streams on the Forest, with a special emphasis on the nine streams that American Whitewater recommended for eligibility in our comments on the Draft Environmental Impact Statement (DEIS), yet were found ineligible in the Draft ROD, and are addressed by this objection. Specifically, we request that Boulder, Boundary, Smith, Cow, Lighting, Big, Slate, and Marble creeks, as well as the North Fork of the St. Joe River be found eligible for Wild and Scenic designation.

3) Identification of how American Whitewater believes that the plan revision is inconsistent with law, regulation, or policy

The FEIS discussion supporting the IPNF determination that certain rivers and streams are ineligible for Wild and Scenic designation represents a significant misunderstanding and violation of federal law, regulation, and policy. American Whitewater highlighted these errors in our comments on the draft planning documents, with the exception of new arguments against our recommendations that first appear in the FEIS. With the publication of the final NEPA documents, these errors will become violations of law and policy. These violations are as follows.

a. The IPNF failed to meet the legal and procedural standard for excluding an alternative from further consideration under NEPA

The FEIS and Plan excludes consideration of American Whitewater's recommended Wild and Scenic eligible streams from further consideration in any alternatives because "The additional streams and rivers are not rare, unique, or exemplary when considered on a forest or a regional basis." (FEIS 31) No analysis is presented to support this finding.

CEQ NEPA regulations at 40 C.F.R. § 1502.14 require the IPNF to “[r]igorously explore and objectively evaluate **all reasonable alternatives**, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” (emphasis added) CEQ further elaborates that *reasonable alternatives* are “practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”¹ Forest Service Manual Chapter 1950 confirms that this CEQ policy is adopted as USFS policy.

By excluding our alternative which proposed to add eligible Wild and Scenic rivers from detailed consideration, the IPNF is in direct violation of NEPA based on the above standards. The IPNF has not claimed that finding these streams to be eligible would be technically or economically infeasible or impractical, or would violate common sense. Any attempt to do so would fail. Indeed just this type of reconsideration of new eligible rivers based on changed circumstances or new information is envisioned and required by USFS Policy.² Rather, the IPNF eliminated our proposal from consideration based on opaque and unsupported determinations that the values we describe are not rare, unique, or exemplary. If any analysis was done on our alternative, it was done outside of the legally mandated NEPA process.

In addition to violation of NEPA, the IPNF also violates the Administrative Procedures Act (APA) by arbitrarily and capriciously excluding a reasonable alternative from detailed consideration. The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”³ “Agency action” includes any agency rule “or failure to act.”⁴ If an agency fails to follow through on its statutory obligations, a reviewing court can “compel agency action unlawfully withheld or unreasonably delayed.”⁵ Under the APA, a court may set aside an agency’s actions, findings, or conclusions if they are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.⁶ It may also do so if the agency’s actions are “without observance of procedure required by law” or if the agency decision is “unwarranted by the facts.”⁷ The IPNF’s failure to seriously consider a demonstrably reasonable alternative violates NEPA and the mandates of the APA.

¹ <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol34/pdf/CFR-2012-title40-vol34-sec1502-14.pdf>.

² Forest Service Handbook, 1909.12_81.2, Amendment No. 1909.12-2006-8, January 31, 2006.

³ 5 U.S.C. § 702.

⁴ 5 U.S.C. § 551; See also *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S. Ct. 2373, 2378, 159 L. Ed. 2d 137 (2004).

⁵ 5 U.S.C. § 706(1).

⁶ 5 U.S.C. § 706(2).

⁷ *Id.*

The IPNF erred and violated federal law and policy in eliminating consideration of additional Wild and Scenic eligible streams, which is a reasonable alternative, presented by American Whitewater prior to, and in response to the DEIS, from detailed NEPA analysis.

b. The IPNF violated the National Environmental Policy Act and the Administrative Procedures Act by failing to articulate a rational connection between the facts found and the choices made.

The standard by which courts review decisions under the APA's "arbitrary and capricious" standard, 5 U.S.C. § 706(2), is "to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); see also *Southwest Center for Biological Diversity v. USFS*, 100 F.3d 1443, 1448 (9th Cir.1996); *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir.2003).

In this instance, the IPNF offers no facts regarding the streams we propose should be found eligible for Wild and Scenic designation. None. The FEIS simply states what while many of American Whitewater's recommended streams have values, these values are not rare, unique or exemplary. In the absence of facts, there can be no rational connection between the facts found and the choices made.

With this said, there are facts in the record provided by American Whitewater, and the weight of evidence tips in favor of our proposal. Our eligibility report describes specific values that qualify as ORV's. The IPNF's own screens support these findings. Take for example, the guidelines for Recreational ORV's:

- Are recreational opportunities unique or rare within the region?
- Are recreational opportunities popular enough or have the potential to be popular enough to attract visitors from throughout the region of comparison?
- Are visitors willing to travel long distances to use the river resources for recreational purposes?
- Are interpretive and/or educational opportunities exceptional and unique within the region of comparison? (FEIS Appendix E Pg 218)

We have presented photographic, online, and expert opinion evidence that the nine streams emphasized in this objection meet several of these guidelines (See our Wild and Scenic River Eligibility Inventory, and DEIS comments). American Whitewater, representing whitewater paddlers, has requested that only 13 out of 1,332 rivers be found eligible in part because of their Recreational ORV's, which is evidence itself of the rarity and popularity of these rivers.

I personally wrote the Eligibility Report with support from local paddler Todd Hoffman and others. I have travelled many hours to paddle these rivers with friends from Missoula and beyond, and am myself evidence that people will travel long distances to paddle these rivers. Having paddled hundreds of rivers across the Country, the Eligibility Report is my assessment that the 13 recommended streams are recreationally rare, unique, and exemplary at a regional and national scale, as well as at the Forest level. Anyone with significant knowledge of whitewater paddling would be extremely unlikely to come to a different conclusion. Soaring off Magnolia Falls on Boulder Creek, tackling the continuous rapids of Boundary Creek, or navigating the spectacular blue water ledge drops of Slate Creek are nothing short of exemplary. Marble and Lightning Creek are staples of the whitewater paddling community that are deeply cherished for their recreational values. There is nowhere else like these 13 streams on the planet. They are special. We presume that the IPNF simply lacks the recreational expertise to appreciate or recognize these values. This is understandable, however ignoring the expert opinions and data we offered is not.

Under NEPA, the IPNF must identify the methodologies used, and must "make explicit reference by footnote to the scientific and other sources relied upon." 40 C.F.R. § 1502.24; see also, *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). Particularly, where the agency relies upon opinions of its own experts, it must present the hard data supporting such opinions. (Id) These reporting requirements must be met within the NEPA document. (*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-1214 (9th Cir. 1998)).

In this instance, the IPNF stated their opinion that recognized values were not sufficiently rare, unique, or exemplary to qualify as ORV's. However, they did so in violation of NEPA and the APA by failing to disclose any data sources that support these decisions. The IPNF disclosed their methodology, but did not transparently apply it to the streams that we proposed as eligible and were rejected by the IPNF. The FEIS contains substantive information only on the river that the IPNF found to be eligible, not the streams that were rejected.

The IPNF has failed to take the hard look at this issue required by NEPA, and has failed to draw a clear connection between the record before them and the decisions made, in violation of NEPA and the APA.

c. The IPNF violated USFS and Interagency policy by reasoning that rivers are ineligible because they are not rare, unique, or exemplary at the Forest scale.

It is agency policy that, "In order to be assessed as outstandingly remarkable, a river-related value must be a unique, rare or exemplary feature that is significant at a comparative **regional or national scale.**" (Emphasis added, *See The Wild & Scenic River Study Process. Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council. December 1999. Pg 12*). This policy is reflective of the WSR,

which aims to fulfill “vital **national** conservation purposes” (Emphasis added, WSRA, Section 1(b)). The FEIS however, states:

The comparative scale used for this assessment is the individual Forest. That is, the rivers and streams on the IPNF were compared one to another. (FEIS Appendices - 217)

In addressing eligibility at the Forest level, the IPNF violated interagency policy, and the statutory mandate of the WSRA to address eligibility at the regional or national level. While current USFS practice may differ, it is the Wild and Scenic Rivers Act itself that is mandated, and the IWSRCC policies are a direct reflection of the statutory language of the Act and are endorsed by the USFS. Conducting eligibility inventories at the Forest scale clearly obscures the national conservation value of rivers, and leaves rivers unprotected that legally fall under the WSRA mandate.

The FEIS further states:

The IPNF has many creeks and rivers that support many of these values. The same is true when looking at wild and scenic rivers regionally. Neighboring forests, such as the KNF and the Clearwater, have several rivers designated as eligible wild and scenic rivers, and numerous additional rivers requested by the public for consideration as eligible for wild and scenic river designation. The additional streams and rivers are not rare, unique, or exemplary when considered on a forest or a regional basis. (FEIS 31)

If the IPNF holds that the region of comparison that they used was the Idaho Panhandle National Forest, the fact that the Kootenai National Forest (KNF) or the Clearwater National Forest (CNF) have several Wild and Scenic eligible rivers should have no bearing on this analysis. If the Forest would like to expand its region of comparison include the region and/or nation, as we have advocated and believe is essential, it will need to reevaluate the potential ORVs that it found to not be unique or exemplary within the existing region of comparison. To arbitrarily and capriciously switch between regions of comparison not only gives the impression that the IPNF is attempting to rationalize a set of foregone conclusions, but is a violation of law and policy.

We have argued, and continue to argue, that a set of streams may be rare and exemplary at the regional or national scale, even though they are viewed as similar to one another at a Forest-level scale. Similarly, a set of streams could be nationally significant without being regionally significant. The unique scenery, lush forests, endangered endemic fish and wildlife, and exceptional bedrock paddling opportunities may be shared among multiple rivers on the IPNF, but they are rare and exemplary when compared to other rivers in the region and the Nation. The IPNF twists the eligibility criteria to be as un-protective as possible: if a stream fails at any scale than they find it ineligible. This violates the congressional intent of the

WSRA, which is to protect rivers. We argue that if a river is rare, unique, or exemplary at any scale, 'regional or national," than it is eligible for WSR designation.

Second, each Wild and Scenic eligible stream is unique and has a unique set of ORVs. Stating that the IPNF has many creeks and rivers that support the same set of Outstandingly Remarkable Values as Wild and Scenic eligible or designated streams on neighboring National Forests is an argument **for** their Wild and Scenic eligibility, not against it. Calling multiple rivers outstanding does not make each individual river less so. The IPNF does not get a pass on complying with the WSRA simply because other nearby Forests have complied with the WSRA.

Finally, if Wild and Scenic eligible and designated rivers on the KNF and CNF have the same values as the rivers being proposed for eligibility on the IPNF, admitted by the Forest above, it is arbitrary and capricious to not determine that these rivers should at the very least be considered eligible for Wild and Scenic designation.

d. The IPNF violated USFS and Interagency policy, as well as the APA, by asserting the streams recommended by the public are ineligible because there are too many of them

The FEIS states:

The number of additional creeks and rivers suggested for designation [by American Whitewater] as eligible wild and scenic rivers supports the determination that these values are not rare, unique, or exemplary features. (FEIS 31)

The IPNF found 8 different streams eligible for Wild and Scenic designation. We have proposed 13 rivers in our own inventory. We proposed, and the IPNF denied, that 11 streams be found eligible not previously determined by the IPNF to be so. It is arbitrary and capricious to assert that it is reasonable to find 8 rivers eligible but not 13, out of a total of 1,337 rivers examined by the KNF, based solely on the perception that less than 1% of the Forest's streams are too many to be considered "rare, unique, or exemplary."

More importantly, it is evaluation of values to be outstandingly remarkable, not rivers as a whole, that the Forest Service Handbook determines should be "rare, unique, or exemplary." Likewise, there can be many "rare, unique, or exemplary" ORVs and rivers based upon the definition of these words.

Rare simply means "marked by unusual quality, merit, or appeal; superlative or extreme of its kind; or seldom occurring or found." There can be thousands of a rare animal, hundreds of a rare coin, and certainly there can be 13 rivers with a rare combination of values that are unusual, superlative, and seldom occurring within the area of comparison, and even more so on a regional or national scale. (see <http://www.merriam-webster.com/dictionary/rare>)

Unique means “very special or unusual, or belonging to or connected to only one particular thing, place, or person.” There can be many unique values and rivers, just as there are many unique people. By definition every river is unique in that they are each belonging to only one place, and certainly 13 rivers could be very special or unusual when compared with 1,332 others on the IPNF, and even more so at a regional or national scale. (see <http://www.merriam-webster.com/dictionary/unique>)

Exemplary means extremely good and deserving to be admired or copied, or serving as an example of something. Certainly there is no limit on the number of values or rivers that can be “extremely good” or that are examples of certain elements of the region. (see <http://www.merriam-webster.com/dictionary/exemplary>)

The argument that there can be 8 rivers on the IPNF that exhibit rare, unique or exemplary values, but not 13 is arbitrary and capricious. Semantics aside, the eleven streams that we recommended *do contain* rare, exemplary, or unique values. Our *Wild and Scenic Eligibility Report* catalogs their unique values in significant detail, as do our comments on the draft planning documents.

We hold that the following streams be considered as eligible for Wild and Scenic designation by the IPNF, in addition to those streams already found to be eligible:

- Big Creek
- Boulder Creek
- Boundary Creek
- Smith Creek
- Cow Creek
- Lighting Creek
- Marble Creek
- North Fork of the St. Joe River
- Slate Creek

All of these streams should be considered Wild and Scenic eligible by the IPNF. We ask that the reviewing officer thoroughly review and consider our *Wild and Scenic Eligibility Report*, attached and included herein by reference.

- e. **The IPNF violated USFS and interagency policy by finding an entire stream ineligible for WSR designations because historic breached dams slated for full removal exist in some reach(es).**

The FEIS states:

...it was found that [Marble] creek had many splash dams built up and down the river in the first half of the 20th century, which has changed

the character of the river. Many remnants of these artificial splash dams remain. These remnants create artificial cataracts and blockages that continue to alter the creek's natural path and flow. Because the flow continues to be altered, the basic screening criterion of "free-flowing" is not being met; therefore, this creek we not considered as an eligible river for wild and scenic designation. (FEIS 31)

Agency policy based on Section 16(b) of the WSRA directly contradicts the IPNF's conclusion:

The existence of small dams, diversion works, or other minor in-channel structures shall not automatically disqualify a river as a potential addition to the National System. Congress did not intend all rivers to be "naturally flowing," i.e., flowing without any manmade up- or downstream manipulation. The presence of impoundments above and/or below the segment (including those which may regulate flow within the segment), and existing minor dams or diversion structures within the study area, do not necessarily render a river segment ineligible. There are segments in the National System that are downstream from major dams or are located between dams. (*See A Compendium of Questions & Answers Relating to Wild & Scenic Rivers. Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council. May 2011. Pg 15*)

Thus, in finding an entire stream is ineligible because of historic diversion structures in specific places along its length, the IPNF has violated agency policy and federal law. At least one example of this policy exists within the IPNF's own analysis: Libby Dam blocks the Kootenai River but does not render the reach downstream ineligible in the IPNF analysis. It is arbitrary and capricious to apply the standard correctly to some rivers and incorrectly to others.

It is impossible to tell from the IPNF's single paragraph dismissal of Marble Creek where these splash dams are compared to other values that both American Whitewater and the IPNF have found to exist (see FEIS 31). We propose though, that significant reaches with ORV's, such as the popular paddling reach, are sufficiently free of historic splash dams and their effects to qualify as free-flowing. In addition, several of these dams are currently slated for removal by the IPNF specifically to restore the flow to natural conditions. Upon completion of this fully scoped project, this issue would become moot in these locations as well.

4) Statement that demonstrates the link between prior substantive formal comments submitted by the objector and the content of the objections, unless the objection concerns an issue that arose after the opportunity for formal comment.

Beginning with the submission of our *Wild and Scenic Eligibility Report* in November, 2011, American Whitewater has communicated a consistent, data-driven set of recommendations to the IPNF based upon the original research that we completed, USFS policy on Wild and Scenic eligibility found in FSH 1909.12_80, the WSRA, NEPA, and the APA. Our findings and methods were ground-truthed at the Regional and National levels of the Agency, and both our previous written comments on the Draft Forest Plan and our in-person meetings with Region 1 and Washington Office staff have communicated our desires for complete and transparent documentation, consistent and logical screens, science-based and objective determinations, the consideration of all relevant and available information, and following both Agency guidance and the letter of the law. American Whitewater made every attempt to avoid having to object to the IPNF Forest Plan and FEIS, but because our data and formal comments were not addressed in accordance with law or USFS policy, we are forced to submit this objection.

We expected that if the IPNF disagreed with our *Wild and Scenic Eligibility Inventory*, they would do so by citing objective, science-based data and in accordance with all applicable laws and policies. As a partner who has engaged in this process on good-faith, we are disappointed that this did not occur.

The Draft EIS and Plan failed to consider the nine rivers that this objection is focused on. We proposed that these nine rivers be formally considered in our November 2011 *Wild and Scenic Eligibility Report* sent to the IPNF and again in our comments on the Draft EIS (DEIS) and Plan. The IPNF analysis of these nine rivers was new information in the Final EIS (FEIS) that was not in the DEIS. Thus all treatment of these nine rivers was a new issue.

In our comments on the DEIS, we laid out the analysis we expected, and that is required by law. Specifically we addressed the DEIS's insufficient documentation, improper selection of scale, insufficient descriptions of ORV's, and failure to consider relevant information. In response, the FEIS offered one-sentence dismissals of our recommended rivers with no supporting analysis.

5) Conclusion

The Idaho Panhandle National Forest Final EIS clearly outlines significant violations of federal law and policy. The result is that at least nine streams that are clearly eligible for Wild and Scenic designation would be left un-protected or under-protected by the proposed new Forest Plan. These regionally and nationally exemplary streams are managed in trust by the US Forest Service on behalf of all Americans, and fall under the clear protective mandate of the Wild and Scenic Rivers Act. We ask that the reviewing officer find that the Idaho Panhandle National Forest violated law and policy, and respond to this objection with a clear mandate on how these nine, and other streams are to be considered for their eligibility for Wild and Scenic designation. We ask that the reviewing officer strongly recommend or

require that the nine streams that are the subject of this objection be found eligible for Wild and Scenic designation.

Thank you for considering this objection,

Sincerely,

Kevin R. Colburn

A handwritten signature in black ink, appearing to read "K. R. Colburn", written in a cursive style.

National Stewardship Director
American Whitewater