

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: Kootenai National Forest Plan Objection

American Whitewater and American Rivers hereby formally object to specific findings and decisions within the Revised Forest Plan for the Kootenai National Forest (KNF) 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.

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

This objection challenges the Kootenai National Forest's (KNF) determination that several streams on the Kootenai National Forest are ineligible for designation under the Wild and Scenic Rivers Act (WSRA). The specific streams that we assert were wrongly found ineligible are Callahan Creek, Granite Creek, Grave Creek, Libby Creek, Quartz Creek, Rock Creek, Ross Creek, Star Creek, Swamp Creek, and the Wigwam River.

The analysis we challenge herein is found on pages 29 and 30, as well as Appendices E and G, of the Final Environmental Impact Statement (FEIS). This analysis directly relates to the management direction found on pages 51 and 52 of the Forest Plan. The decision regarding this issue can be found on page 9 of the Record of Decision (ROD).

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

The KNF erred when it found ten rivers to be ineligible for Wild and Scenic designation based on clear deviations from Forest Service policy. The streams were found ineligible because 1) they had other administrative designations, or 2) were intermittent, or 3) had recognized exemplary values that were considered inadequate, or 4) had too many exceptional peers at the local scale, or 5) because one stream had a diversion at one discrete location. All of these reasons for finding a river ineligible are inconsistent with USFS rules, policy and the Wild and Scenic Rivers Act. We challenge herein the basis for finding these streams ineligible.

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 10 streams that American Whitewater, American Rivers, and other regional river experts recommended for eligibility in our *Wild and Scenic Eligibility Report* and in comments on the draft planning documents, yet were found ineligible in the Draft ROD. Specifically, we request that Callahan Creek, Granite Creek, Grave Creek, Libby Creek, Quartz Creek, Rock Creek, Ross Creek, Star Creek, Swamp Creek, and the Wigwam River be found eligible for Wild and Scenic designation.

3. Identification of how American Whitewater and American Rivers believe that the plan revision is inconsistent with law, regulation, or policy

The analysis supporting the KNF 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. Objectors highlighted these

exact errors in our comments on the draft planning documents, and in an in-person meeting with the KNF Forest Planner (Ellen Frament), Recreation Staff Officer (Mary Laws), Soil and Water Program Manager (Kenny Kindel), and Fisheries Biologist (John Carlson), on April 30, 2012. Even after an in-depth meeting in which we brought up each of these errors, the KNF carried them forward into the final planning documents. With the publication of the final documents, the errors have become violations of law and policy. These violations are as follows.

a. The KNF violated the WSRA and USFS and Interagency policy by admitting ORV's exist on certain streams yet finding those streams ineligible for Wild and Scenic Rivers Act designation because other administrative designations afford protection to the streams. (Callahan Creek, Granite Creek, Grave Creek, Quartz Creek, Rock Creek, Ross Creek, Star Creek, Wigwam River)

The FEIS clearly finds that Callahan Creek possesses a "historical" Outstandingly Remarkable Value (ORV), and that the Wigwam River possesses a "fisheries" ORV. Both streams are undisputedly free-flowing. Thus, under Section 2(b) of the WSRA, these streams are eligible for Wild and Scenic River designation. Likewise, the KNF previously determined that Quartz and Grave creeks had "fisheries" and "botanical" ORV's in the Draft EIS. The FEIS however wrongly finds these streams ineligible because of other overlapping administrative management designations.

In the case of Callahan Creek, the FEIS states:

The KNF recognized...the only rare, unique, or exemplary value was the historical value. The creek was allocated to a special area, MA3, because it is a historic mining and logging district that is eligible for the national register of historic places. MA3 would protect and manage these historic values. (FEIS 29)

In the case of the Wigwam River the FEIS states:

The KNF found it had a fisheries value for bull trout... The fisheries value because of bull trout presence is protected through critical habitat designation. Therefore the creek was not determined to be eligible as a wild and scenic river. (FEIS 30)

In the case of Grave and Quartz creeks the FEIS states:

Review of these creek systems between the draft and final found the outstandingly remarkable values for most segments were bull trout and sensitive plants... Critical habitat for bull trout and occurrence of sensitive plants are protected regardless of management area designation. (FEIS 478)

In the FEIS and Plan, overlapping protection was viewed by the KNF as a justification for finding other streams ineligible as well, including Granite, Rock, and Ross creeks. This was confirmed during the April 30, 2012 meeting that we had with KNF staff, who also mentioned Star Creek Canyon Special Geologic Area designation as the justification for not finding Star Creek to be eligible under the WSRA.

Nothing in the WSRA or USFS policy allows the KNF to find a river ineligible because of overlapping administrative designations. The KNF findings are a violation of federal law and policy. In fact the Wild and Scenic Rivers Act provides that companion designations are permitted and encouraged. The Interagency Wild and Scenic Rivers Coordinating Council (IWSRCC) has addressed this issue in the following manner:

Overlapping or Dual Federal Designations

Q. Can areas already in another federal designation, such as wilderness or national conservation area, be designated as a WSR?

A. Yes. Congress has frequently added WSR status to rivers flowing through national parks, national wildlife refuges and designated wilderness. Each designation recognizes distinct values for protection, and management objectives generally designed to not conflict. In some cases, WSR designations extend beyond the boundaries of other administrative or congressional area designations, thereby providing additional protection to the free-flowing condition and river values of the area. Section 10(b) of the Act addresses potential conflicts between the Wilderness Act and the Wild and Scenic Rivers Act and states, in cases where this occurs, the more restrictive provisions would apply.

Q. Why is it necessary to designate a river area as wild and scenic when it is already protected under another congressionally authorized designation?

A. In many cases, there may be no practical effect. However, laws like the Wilderness Act do allow certain activities in designated wilderness which may be incompatible on a WSR, e.g., water resource developments if authorized by the President. In addition, WSR designation prohibits federal participation in, or assistance to, water resource developments upstream or downstream of a designated river (potentially outside the wilderness area) which may adversely affect the designated river segment. Agencies are required by policy and law to evaluate potential additions to the National System located in wilderness. (*See A Compendium of Questions & Answers Relating to Wild & Scenic Rivers. Technical Report of the*

The points made by the IWSRCC with regards to Wilderness apply to an even greater extent to administratively designated special areas like Research Natural Areas and Geologic Special Areas.

The KNF's own guidance detailing key criteria for establishing whether one or more ORVs is present for a stream clearly uses Research Natural Areas, Special Interest Areas, and overlapping designations as an indication that ORVs are present:

Natural Areas:

- Are there any designated research natural areas along the river?
- Are there any special interest areas (Botanical, Geological, Scenic, Zoological, etc.) along the river?
- Are there any other specially designated areas in the corridor (such as National Natural Landmarks)? (KNF - FEIS, Appendix E, page 223)

Clearly, 1) Special Area designations do not eliminate the agency's legal mandate to evaluate a stream for eligibility or to find them eligible if streams have at least one ORV and are free-flowing, 2) the "special" values which Special Area designations are created to protect are viewed by the agency as indications of ORVs, and 3) WSR eligibility, suitability, and designation each convey unique protections that Special Areas do not, including protection from dams and protections specific to the river corridor. Thus, the KNF unquestionably violated agency policy and federal law by finding these streams ineligible because of overlapping designations.

b. The KNF violated USFS and Interagency policy by admitting a stream has four ORVs yet finding the stream was ineligible for WSR designation because it is intermittent. (Ross Creek)

The FEIS states: "This creek [Ross Creek] was found to have botanical, fisheries, recreation, and scenic values. However the creek runs dry in the late summer and would not be appropriate as an eligible wild and scenic river." (KNF - FEIS, Ch. 2, page 30)

Finding a river with four documented ORVs ineligible because it is intermittent violates agency policy. The Interagency Wild and Scenic Rivers Coordinating Council stated the policy as follows in a question and answer format:

Q. Can intermittent rivers be considered eligible?

A. Yes. For purposes of eligibility evaluation, the volume of flow is sufficient if it is enough to sustain or complement the ORVs identified within the segment. Rivers with intermittent or non-perennial flows exist within the National System and may be representative of rivers within particular physiographic regions. (See A Compendium of Questions & Answers Relating to Wild &

Flows are clearly sufficient to sustain the bottomland cedar forests and trout habitat that make up the botanical and fisheries ORVs, as evidenced by their existence, as well as a recreation ORV based on well documented spring paddling opportunities and a scenery ORV based on the exemplary setting enshrined by the Ross Creek Scenic Area.

In addition, nothing in the WSRA grants the USFS authority to find a river ineligible based on stream flow irregularity. If the river is free-flowing and possesses at least one ORV, it is eligible under the WSRA.

Thus, the KNF violated the WSRA and agency policy in finding Ross Creek ineligible because it is intermittent.

c. The KNF violated the WSRA and the Administrative Procedures Act by finding certain streams ineligible for WSR designation based on its determination that the streams had no ORV's, despite the KNF's prior and concurrent findings that these streams' river-related values are "Outstanding" and otherwise exemplary. (Star Creek, Ross Creek)

Star Creek contains a unique 100+ foot double waterfall in a dramatic rock gorge, making this one of the largest waterfalls of its volume in the region, and much more so on the Forest. It is viewable via a short hike from FR 4402. The KNF has designated the waterfall and its surrounding rock gorge as the "Star Creek Canyon Geological Special Area," specifically referencing the outstanding waterfalls in the designation (FEIS Appendix F, Page 257).

Appendix F of the FEIS, page 255, defines a Geological Special Area as follows:

A geological area is a unit of land with **outstanding** formations or **unique** geological features of the earth's development such as caves, fossils, dikes, cliffs, or faults. (emphasis added)

The KNF has thus determined in the FEIS that a portion of Star Creek possesses "outstanding" and/or "unique" geologic values. However in the Wild and Scenic eligibility determination the KNF states:

This creek was found by [American Whitewater, American Rivers, and others] to have geologic and scenery values. The KNF found no Outstandingly Remarkable Values. Therefore this creek is not eligible for Wild and Scenic designation (FEIS, page 30)

It is arbitrary for the KNF to find that Star Creek possesses "outstanding" and/or "unique" geologic values in the context of designating it a Geological Special Area,

yet find the same river gorge ineligible for Wild and Scenic designation because the river lacks unique or outstanding geologic values.

In a meeting with current KNF staff, it was clear that the analysis team had not even been to the falls at Star Creek. They presented a photograph taken of a smaller falls presumably located downstream of the actual falls, with the presumption that the photo was of the much larger falls upstream. Star Creek, its falls, and its canyon are unique and exemplary on a Forest and regional scale, as determined by the KNF in its Geologic Special Area designation. As such it is deserving of eligibility for Wild and Scenic designation.

Ross Creek is a unique, beautiful stream lined with old growth cedars in its upper reaches and offering a highly scenic whitewater run on its lower reaches that includes a waterfall and numerous high-quality rapids. A portion of Ross Creek flows through the Ross Creek Scenic Area. The FEIS defines scenic areas as:

A scenic area is a unit of land with **outstanding** natural beauty that requires special management to preserve this beauty. (FEIS Appendix F, Page 255) (emphasis added)

In the description of the Ross Creek Scenic Area, the FEIS states:

The trees are upwards of eight feet in diameter and 175 feet tall. The area includes [trees] referred to by descriptive names: “Cedar Chimney”, the “Wrestlers”, the “Fairy Den”, and the “Twins.”

Thus the KNF admits that the Ross Creek river corridor possesses outstanding botanical and scenery values attributed to massive cedar trees that are even unique enough to merit individual names.

However, in the Wild and Scenic Eligibility inventory in the FEIS, the KNF finds that:

The creek was found by [American Whitewater, American Rivers, and others] to have botanical, fisheries, recreational, and scenic values. The KNF found botanical values for the area. However, this creek runs dry in the late summer and would not be appropriate as an eligible wild and scenic river.

It is unclear if by stating they found “botanical values” the KNF means they determined the stream to have a botanical ORV. If so, the stream is automatically eligible per Section 2 (b) of the WSRA. If they did not mean that the value qualified as an ORV, they contradict the Scenic Area language in the FEIS that admits the river corridor is both “outstanding” and unique enough to contain individually named cedar trees. Likewise, why the “outstanding” scenery of Ross Creek that is enshrined in the Ross Creek Scenic Area does not qualify as an ORV is not explained either, leaving the objectors to believe that these were arbitrary and capricious decisions.

Finally, Callahan, Granite, Grave, Libby, Quartz, Rock, Ross, and Swamp Creeks, as well as the Wigwam River, were all designated as Bull trout critical habitat by the U.S. Fish and Wildlife Service on September 30, 2010, constituting significantly “changed conditions” as of that date, and warranting a fresh, hard look at a fisheries ORV for each stream, as was requested in our comments on the Draft Plan and Wild and Scenic Eligibility Report (*see* FSH 1909.12_81.2). The KNF responded to our findings that these nine streams have a fisheries ORV with the following statement:

Designation of critical habitat for bull trout does not affect the eligibility inventory. Streams containing bull trout do not necessarily meet the criteria for being “rare, unique, or exemplary” on the Forest. Areas identified as critical habitat for bull trout are protected through management direction in the revised Forest Plan and the retained INFISH direction. (FEIS, Appendix G, page 557)

This determination is inconsistent with the criteria that the KNF lists in FEIS Appendix E, page 226, for “Fish Populations” and “Habitat” ORVs:

Fish Populations:

- Is there threatened or endangered species represented?
- Is it an important stronghold for native fish assemblages (diversity)?
- Are there genetically pure strains of native populations?
- Is there a Native American dependence on this fishery?
- Is there a lack of exotic species or non-native species in this river?
- Are there other important wildlife species dependent upon this fishery?

Habitat:

- Is there a relationship between this river and the health and vigor of the fishery that would warrant protection of the river?
- Are there natural barriers to fish migration that restrict the distribution of the population?
- Is there high restoration or recovery potential for the habitat?
- Is this an intact system and does the habitat support native or wild stock assemblages?
- Does the habitat represent a pristine river system? (FEIS, Appendix E, p. 226)

If the KNF used this set of criteria to evaluate “fisheries” ORVs for the streams listed above, Callahan, Granite, Grave, Libby, Quartz, Rock, Ross, and Swamp Creek, as well as the Wigwam River would have all been found Wild and Scenic eligible with at least a “fisheries” ORV for each. Likewise, 9 streams out of 752 that have a “fisheries” ORV for Bull trout critical habitat, or just 1% of KNF streams, should qualify as “rare” enough to not be excluded from Wild and Scenic eligibility.

d. The KNF violated USFS and Interagency policy by reasoning that rivers are ineligible because they are not rare, unique, or exemplary at the Forest and regional scale due to the existence of other Wild and Scenic eligible and designated rivers on nearby Forests (All)

The FEIS states:

The comparative scale used for this assessment is the individual Forest. That is, the rivers and streams on the KNF were compared one to another. (FEIS Appendices, p. 223)

The KNF has many creeks and rivers that support these values. The same is true when looking at wild and scenic rivers regionally. Neighboring forests, such as the IPNF and the Flathead, 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, p. 30)

The presence of these features are not necessarily “rare, unique, or exemplary” across the KNF, with bull trout and sensitive plants found on many creeks and rivers throughout the Forest. (FEIS, p. 478)

First, if the KNF holds that the region of comparison that they used was the Kootenai National Forest, the fact that the IPNF or the Flathead National Forest (FNF) 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 to include the region or nation, as we have advocated in the past, it will need to reevaluate the potential ORVs that it found not 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 KNF is attempting to rationalize a set of foregone conclusions, but is a violation of law and policy.

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. P. 12*). The KNF violated agency policy, and the statutory mandate of the WSRA to address eligibility at the regional or national level.

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 bull trout, rare wildlife, blue

water, towering cedars, and distinct whitewater paddling opportunities may be shared among multiple rivers on the KNF, but they are rare and exemplary when compared to other rivers in the region and the Nation. The KNF twists the eligibility criteria to be as un-protective as possible: if a stream fails at any scale then 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,” then it is eligible for WSR designation.

Second, each Wild and Scenic eligible stream is unique and has a unique set of ORVs. The KNF stating that the Forest has many creeks and rivers that support the same set of Outstandingly Remarkable Values as Wild and Scenic eligible and/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.

Finally, if Wild and Scenic eligible and designated rivers on the IPNF and FNF have the same values as the rivers being proposed for eligibility on the KNF, admitted by the KNF 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.

e. The KNF 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 (All streams)

The FEIS states:

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

The KNF found 20 different streams eligible for Wild and Scenic designation. We have proposed 17 rivers in our own inventory, and support the additional KNF streams for a possible combined total of 30 rivers. It is arbitrary and capricious to assert that it is reasonable to find 20 rivers eligible but not 17 or 30, out of a total of 752 rivers examined by the KNF, based solely on the perception that 30 (just 4%) are too many to be considered “rare.”

More importantly, it is the evaluation of **values** to be “outstandingly remarkable,” **not rivers** as a whole, that the Forest Service Handbook determines should be “rare, unique, or exemplary,” though the KNF continually applies these criteria to rivers not just ORVs. 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

individuals of a rare animal, hundreds of copies of a rare coin, and certainly there can be 17 or 33 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 17 or 33 rivers could be very special or unusual when compared with 752 others on the KNF, 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 25 rivers on the KNF that exhibit rare, unique or exemplary values, but not 17 or 33 is arbitrary and capricious. Semantics aside, the eight streams that we recommended **do contain** rare, exemplary, or unique values. Our *Wild and Scenic Eligibility Report* catalogs their unique values in some level of detail, and our meeting with KNF staff following the release of the draft planning documents went into much greater detail.

We hold that the following streams be considered as eligible for Wild and Scenic designation by the KNF:

- Callahan Creek
- Granite Creek
- Grave Creek
- Libby Creek
- Quartz Creek
- Rock Creek
- Ross Creek - cedars
- Swamp Creek
- Star Creek
- Wigwam River

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

f. The KNF violated USFS and interagency policy by finding an entire stream ineligible for WSR designations because a diversion exists in its lower reaches. (Swamp Creek)

The FEIS states: “The KNF found [Swamp Creek] is not freeflowing, but has a ditch bill diversion. Therefore, this creek is not eligible as a wild and scenic river.” (FEIS, Pg. 30)

Agency policy based on Section 16(b) of the WSRA directly contradicts the KNF’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 a stream ineligible because of a single diversion structure in a single location, the KNF has violated agency policy and federal law. At least one example of this policy exists within the KNF’s own analysis: Libby Dam blocks the Kootenai River but does not render the reach downstream ineligible in the KNF analysis. It is arbitrary and capricious to apply the standard correctly to some rivers and incorrectly to others.

g. The KNF violated USFS and interagency policy, as well as the Administrative Procedures Act, by finding some streams ineligible that have undisputedly greater ORV’s than other streams found eligible.

We agree with the KNF that determining which streams are rare, unique, or exemplary, and thus eligible for WSR designation, requires significant professional judgment. However, that judgment can and should be based on all available information as stated by the Interagency Wild and Scenic River Coordinating Council (IWSRCC):

The determination that a river area contains ORVs is a professional judgment on the part of the IDT, based on **objective, scientific analysis**. Input from organizations and individuals familiar with specific river resources should be sought and documented as part of

the process. (See *The Wild & Scenic River Study Process*. Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council. December 1999. P. 12. Emphasis added.)

In response to the “objective, scientific analysis” requirement listed above, the KNF states on page 546 in Appendix G of the EIS that:

Identification of ORVs is **subjective** and the KNF resource specialists completed comparisons based on-the-ground knowledge [*sic*] (emphasis added)

While this may or may not be true, the public is left to guess at what this supposed knowledge is or how it was applied to the streams in question. While the FEIS offers a discussion of the process that KNF staff used, the small amount of resource-specific content there highlights the errors of judgment listed above rather than an analysis of facts.

The Administrative Procedures Act further governs how this objective, scientific process that considers public input must be carried out. This specifically falls under the APA's "arbitrary and capricious" standard, 5 U.S.C. § 706(2). Courts have interpreted their charge in reviewing APA charges as follows: "to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." (See *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)).

The KNF's analysis failed to comply with the agency policies and federal law as established in the above case law. This is evident both in the succinct language in the EIS used to justify finding streams ineligible, and also in the arbitrary and capricious conclusions of the KNF's eligibility inventory.

As an example of the latter, the KNF found without analysis that an unnamed tributary to a fork of Big Creek is eligible, but did not find Callahan Creek or the other popular streams with documented (and in some cases, designated by the KNF in Special Areas) outstanding values that we recommended to be eligible. (See *Objectors' Wild and Scenic Eligibility Report*) We do not argue that tributaries of Big Creek are ineligible, however the disparity between finding tiny unnamed creeks eligible while finding large, popular, floatable streams with historic significance, containing designated bull trout critical habitat, and protected in Special Areas to be ineligible is evidence of a failure in what must be an objective, science-based process.

In addition, the KNF received detailed information from “organizations and individuals familiar with specific river resources,” as required by agency policy, and disregarded it. The *Wild and Scenic Eligibility Report* submitted by American Whitewater, American Rivers, and others was based on countless hours in the field,

including kayaking descents of many of the streams. We are familiar with large portions of these streams, and offered photos and descriptions of the recreational, fisheries, and other ORV's. Our groups collectively possess significant expertise in recreation and fisheries science. It appears that the KNF failed to consider relevant factors like whitewater recreation and bull trout critical habitat almost entirely in their assessment.

As objectors, we ask that the reviewer consider our *Wild and Scenic Eligibility Report*, as the KNF should have, and compare the streams we recommended with the streams the KNF recommended. We believe that any rational assessment that considers all the relevant factors will find that the outstanding values of the streams we recommended are every bit as rare, unique, or exemplary as those found eligible by the KNF.

h. The KNF violated USFS policy, the National Environmental Policy Act, and the Administrative Procedures Act, by finding some streams ineligible for Wild and Scenic designation in the FEIS, that they found eligible in the DEIS, based on flawed rationale.

The KNF removed two “creek systems,” or more to the point six streams from their previous roster of streams protected as eligible for Wild and Scenic River designation: Quartz Creek, West Fork Quartz Creek, Grave Creek, Stahl Creek, Clarence Creek, and Blue Sky Creek. The KNF states:

Based on public comment, the inventory of potentially eligible wild and scenic rivers was reviewed and changes made to eligible rivers for Alternative B Modified. Under this alternative, the Grave Creek and Quartz Creek systems are no longer considered eligible as wild and scenic rivers. (FEIS 475)

Review of these creek systems between the draft and final found the outstandingly remarkable values for most segments were bull trout and sensitive plants. The presence of these features are not necessarily “rare, unique, or exemplary” across the KNF, with bull trout and sensitive plants found on many creeks and rivers throughout the Forest. Critical habitat for bull trout and occurrence of sensitive plants are protected regardless of management area designation. (FEIS 478)

These statements, and their conclusion, contain many errors. These seven streams were previously found eligible, and the KNF now proposes to find them ineligible, citing once again the KNF's flawed screens. Specifically the KNF erred in admitting ORVs but finding a river ineligible because of 1) overlapping designations (see Section 3.a above), and 2) an improperly narrow region of comparison (see Section 3.d above), and 3) a complete lack of data to support this significant removal of federal protection. Because

these rivers were previously found to possess ORV's, if these additional screens are found to be flawed through this objection process then the streams necessarily remain eligible.

i. The KNF violated USFS policy, the National Environmental Policy Act, and the Administrative Procedures Act, by refusing to accept data offered by outside organizations during the Draft EIS.

As mentioned in Section 3(g) above, even though new data in our *Wild and Scenic River Eligibility Report* was offered in accordance with FSH 1909.12 (81.2) by a coalition of conservation organizations during NEPA review of the Draft EIS, qualifying as "changed conditions," it appears that the KNF had determined not to analyze the river reaches listed in the report:

The report issued by American Rivers was not available in time to be included in the DEIS. Management area allocations had been finalized and most of the DEIS analysis completed when the report was released in May of 2011. (KNF EIS, Appendix G, page 547)

It is unreasonable to claim that our coalition's *Wild and Scenic Eligibility Report*, submitted nearly one year before publication of the DEIS and nearly two and a half years before the ROD was issued, was "not in time" to be substantively included in the planning process. Though the Forest claims that this new data was "addressed" in the FEIS, it does not appear that the streams mentioned were given an updated, site-specific evaluation, but instead were arbitrarily rejected in favor of an analysis that was completed before our coalition submitted its data, as evidenced by the KNF's use of the same rationale even after new data was presented. Though the Forest claims to have analyzed 752 individual rivers previously, it is incumbent upon the Forest to give new data on changed conditions a hard look. The quotation above and the factual errors in the FEIS (detailed in this objection) lead us to believe that this was not the case.

j. The KNF 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 and American River's recommended Wild and Scenic eligible streams from further consideration in any alternatives based on a variety of flawed screens as described above, without any supportive analysis.

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 several Wild and Scenic eligible rivers from detailed consideration, the KNF is in direct violation of NEPA based on the above standards. The KNF 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, especially given the arguments we make elsewhere in this objection. 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 If any such analysis was done on our alternative, it was flawed and was done outside of the legally mandated NEPA process.

In addition to violation of NEPA, the KNF 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 KNF’s failure to consider a demonstrably reasonable alternative violates NEPA and the mandates of the APA.

The KNF 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 and American Rivers prior to, and in response to the DEIS, from detailed NEPA analysis.

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.*

k. The KNF 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 KNF offers almost no facts regarding the streams that we propose should be found eligible for Wild and Scenic designation, certainly none refuting their ORV's.

With this said, there are facts in the record provided by American Whitewater and American Rivers, and the weight of evidence tips in favor of our proposal. Our *Eligibility Report* describes specific values that qualify as ORV's. The KNF'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 224)

We have presented photographic, online, and expert opinion evidence that the 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 752 rivers analyzed by the KNF be found eligible in part because of their Recreational ORV's, which is evidence itself of the rarity and popularity of these rivers.

The lead objector has personally travelled many hours to paddle many of our recommended rivers with friends from Missoula and beyond. This is evidence that people will travel long distances to paddle these rivers. Having paddled hundreds of rivers across the country, the *Eligibility Report* is the lead objector's assessment that the 13 recommended streams with proposed recreational ORV's are recreationally rare, unique, and exemplary at a regional and national scale, as well as at the Forest level. These streams are special. We presume that the KNF 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.

The signatories of this objection personally wrote the *Eligibility Report* based on meetings with over 100 river-oriented scientists, conservationists, and informed members of the public. There is significant scientific depth behind our recommendations. We have visited these streams first-hand, and stand behind these robustly supported recommendations.

Under NEPA, the KNF 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)).

While the KNF explained their methodology, they did not transparently apply it to the rivers we proposed for eligibility. The only streams that garner significant discussion and substantive information in the FEIS are those selected by the KNF as eligible. There is no similar discussion and information on the rivers that we proposed for eligibility and that were not endorsed by the KNF. In addition, the KNF stated their opinion that certain 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 KNF 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.

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 May 2011, American Whitewater, American Rivers, and other members of our coalition have communicated a consistent, data-driven set of recommendations to the KNF based upon the original research that our coalition completed, USFS policy on Wild and Scenic eligibility found in FSH 1909.12_80, the Wild and Scenic Rivers Act, 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 KNF, USFS Region 1, and USFS 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 fidelity to both Agency guidance and the letter of the law. Our coalition made every attempt to avoid having to object to the KNF Forest Plan and FEIS, but because the new data that we submitted and formal comments were not addressed in accordance with law or USFS policy, we are forced to submit this objection.

Our *Wild and Scenic Eligibility Inventory* was completed at the behest of the Forest Service. We originally asked Region 1 to complete the eligibility inventory, but citing insufficient resources, the Region asked our coalition to complete it instead. While we did not expect the Region or the Forests to agree with all of our findings and recommendations, we do expect that if units like the KNF disagree, they 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 in good-faith, we not only do not feel that this is too much to ask of the Agency, but it is also required by law.

The Draft EIS and Forest Plan failed to address the 8 rivers that this objection is focused on. We proposed that these 8 rivers be formally considered in our May 2011 *Wild and Scenic Eligibility Report* presented to the Northern Regional Office, and again in our comments on the Draft EIS (DEIS) and Plan. The KNF analysis of these 8 rivers was new information in the Final EIS (FEIS) that was not in the DEIS. Thus all treatment of these 8 rivers was a new issue.

The KNF's new decision that 6 rivers deemed eligible in the DEIS but ineligible in the FEIS is also a new issue. Two of these 6 rivers were also recommended for eligibility in our eligibility report.

In our previously submitted 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.

Many of the errors made in the FEIS that we have highlighted in Section 3 of this objection are absent in the DEIS. It is unclear whether or not these errors underlie the analysis of all 752 rivers because the DEIS states only the proper screens for assessing eligibility (with the exception of region of comparison). The FEIS however explicitly offers new and numerous flawed screens that we address in Section 3 above. The justifications for not finding the eight streams discussed in this objection eligible are new issues that we have not previously had the opportunity to offer written comments on.

5. Conclusion

The Kootenai National Forest Final EIS clearly outlines significant violations of federal law and policy. The result is that at least 10 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 Kootenai National Forest violated law and policy, and respond to this objection with a clear mandate on how these 10, 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 10 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



National Stewardship Director
American Whitewater

Michael Fiebig



Associate Director, Northern Rockies
American Rivers