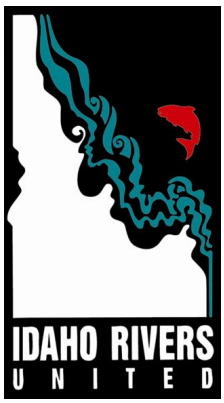

October 19, 2018

Zach Peterson
Forest Planner
Nez Perce-Clearwater National Forest

Re: Additional Comments on Wild & Scenic Suitability Determinations

Dear Mr. Peterson,

American Rivers, American Whitewater, Idaho Rivers United, and Outdoor Alliance submit these additional comments on the Forest Service's proposal to make suitability determinations for rivers eligible for protection under the Wild and Scenic Rivers Act (WSRA) during ongoing forest plan revisions for the Nez Perce-Clearwater National Forest.

The Forest Service has indicated that through these suitability determinations it intends to release eligible rivers found not to be suitable from further protection or consideration. This violates the Wild and Scenic Rivers Act and the 2012 Forest Planning Rule. The Forest Service cannot legally, and should not as a matter of policy, use this suitability process to strip eligible wild and scenic rivers of their eligibility and related protections. These comments include our recommendations for identifying suitable rivers in the Nez Perce-Clearwater National Forest.

The Forest Service Lacks Authority to Conduct Suitability Analyses During Forest Planning

The Forest Service has cited WSRA Section 5(d)(1) to claim it can conduct suitability determinations of river segments found eligible for inclusion in the National Wild and Scenic Rivers System though its forest planning processes. 16 U.S.C. § 1276(d)(1). That reading is erroneous as a matter of law under the plain language of the statutory text. As the Supreme Court has held, if statutory language is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837, 843 (1984).

The original 1968 Wild and Scenic Rivers Act did not address suitability analysis of potential additions to the System. Instead, Congress amended the WSRA twice, in 1974 and 1988, to include provisions for conducting suitability analysis, but neither applies to forest planning.

The term "suitability" was first added to WSRA Section 4 on May 10, 1974, directing that the appropriate Secretary of Interior or Agriculture (or both together) "shall study and submit to the President reports on the suitability or nonsuitability . . . of rivers which are designated herein or hereafter by the Congress as potential additions to such System." *See* Pub. L. No 93-279 § 4(a), 88 Stat. 122 (1974), *codified at* 16 U.S.C. § 1275(a) (emphasis added). Section 4(a) thus provides for suitability determinations to be made for Congressional study rivers designated under WSRA Section 5(a), which lists the specified study rivers as "designated for potential addition to the [System]." 16 U.S.C. § 1276(a). Because the Forest Service is not addressing Congressional study rivers under Section 5(a) in its proposed suitability determinations for all eligible river segments during the forest planning process, it is not authorized by Section 4(a) to undertake such suitability determinations.

The second instance of the term "suitability" in the WSRA occurs in Section 5(d)(2), which was added on October 28, 1988. *See* Pub. L. No. 100-557, 102 Stat. 2790 (1988), *codified at* 16 U.S.C. § 1276(d)(2). This amendment directed the Secretary of the Interior "to complete a study of the eligibility and suitability of [the Upper Klamath River] segment for potential addition to the [System]." *Id.* (emphasis added).

This specific Congressional direction to study eligibility and suitability of the Upper Klamath in Section 5(d)(2) stands in sharp contrast to WSRA Section 5(d)(1), which makes no reference to conducting suitability determinations during agency planning processes. *See* 16 U.S.C. § 1276(d)(1). The first sentence in Section 5(d)(1) simply directs federal agencies doing planning to "consider ... potential national wild, scenic and recreational river areas," while the second sentence directs the Secretaries to "make specific studies and investigations to determine which additional wild, scenic and recreational river areas . . . shall be evaluated in planning reports by all Federal agencies as potential alternative uses." *Id.* (emphasis added). Congressional use of these terms in Section 5(d)(1) – "consider," "study," "investigate" and "evaluate" – without directing that suitability determinations be done as expressly provided for in Sections 4(a) and 5(d)(2), underscores that Congress has not authorized the Forest Service to conduct suitability determinations during forest planning under Section 5(d)(1). *See, e.g.*, A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (Thompson/West 2012), Chap. 8 (discussing "Omitted-Case Canon," that nothing may be added to what a statutory text states or reasonably implies) & Chap. 10 (discussing "Negative-Implication Canon," that the expression of one thing implies the exclusion of others, or *expressio unius est exclusion alterius*).

Furthermore, using the forest planning process to conduct suitability determination and thereby strip rivers of their eligible status, remove protections, and foreclose their

potential addition to the System is counter to the purposes and statutory scheme of the WSRA.

The WSRA declares a national policy that certain rivers and their river corridors possessing outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values "shall be preserved in free-flowing condition" and "protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. In the WSRA, Congress declared that the national policy of dam building needed to be complemented "by a policy that would preserve other selected rivers . . . in their free-flowing condition to protect . . . water quality and to fulfill other vital national conservation purposes." *Id.* Releasing eligible rivers during forest planning does not further these goals; counter to these goals, the Forest Service's proposal would leave these free-flowing rivers and their outstandingly remarkable values unprotected.

The WSRA's statutory scheme sets up a process for Congress and the states—not the Forest Service—to decide, from time to time, whether to Congressionally study or designate eligible wild and scenic rivers. The WSRA's declaration of purpose is to "institut[e] a national wild and scenic rivers system," "designat[e] the initial components of that system," and "prescrib[e] the methods by which and standards according to which additional components may be added to the system from time to time." 16 U.S.C. § 1272. Rivers can be added to the national wild and scenic rivers system by act of Congress or by State designation with federal approval. 16 U.S.C. § 1273(a).

Under the WSRA, the Forest Service should not be in the business of foreclosing potential future designations based on political considerations, but rather providing for them. The Forest Service's proposal to release "non-suitable" eligible rivers from administrative protections, opening them up to harmful development, during forest plan revisions undermines both the purposes and legislative direction the WSRA and Congress's and the state's ability to add additional rivers to the National Wild and Scenic Rivers System "from time to time." *See* 16 U.S.C. § 1272. Suitability determinations are temporal. *See* Department of the Interior and Department of Agriculture, *National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification and Management of River Areas*, 47 Fed. Reg. 39,454, 39,456 (Sept. 7, 1982) (explaining that a suitability determination includes temporally specific considerations such as political context, regional objectives, and current status of land ownership in the area). *See also* 16 U.S.C. § 1275(4)(a)(ii); 16 U.S.C. § 1276(c) (listing considerations). By stripping rivers of eligibility and related protections and considerations the Forest Service erodes Congress's and the states' authority to choose from rivers with Wild and Scenic potential to designate in the future.

In support of conducting suitability determinations through forest planning, the Forest Service also points to Jimmy Carter's 1979 Presidential Memorandum calling for federal land management agencies to conduct suitability determinations during land use planning. *Memorandums From the President on Wild and Scenic Rivers and National Trails* (Aug. 2, 1979). But that Presidential Memorandum cannot override the statutory language and authority granted by Congress under the WSRA; and its continued

relevance is doubtful, since it was not even issued as an Executive Order and presumably expired when President Carter left office.

Moreover, to the extent relevant, the Forest Service is misinterpreting the Carter Presidential Memorandum, as it called for suitability determinations during forest planning for the purpose of protecting rivers only—not for releasing rivers. The Memorandum states: "It is important for federal agencies to set an example of sound management for state, local, and private landowners by taking an aggressive role in protecting Wild and Scenic Rivers which flow through public lands." President Carter called on federal land management agencies to conduct suitability analyses as part of ongoing land use planning, and provided that if an agency determines a river is suitable, the agency should promptly take steps to protect the river and surrounding area, and the agency is encouraged to prepare legislation to designate the river as wild and scenic. Notably, the Memorandum did not call for removing any rivers found not to be suitable during planning from eligible river lists and did not call for stripping such rivers of any protections or future consideration under the WSRA.

Importantly, and consistent with the Carter Memorandum, the Forest Service's 2012 Planning Rule encourages identification of additional rivers for designation, and again does not provide for removing eligible rivers or stripping their protections. During plan assessment, the Rule requires the Forest Service to identify and evaluate information relevant to "[e]xisting designated areas located in the plan area including wilderness and wild and scenic rivers and potential need and opportunity for additional designated areas." 36 C.F.R. § 219.6(b)(15) (emphasis added). Additionally, the Rule requires plans to include standards or guidelines to "manage[] rivers found eligible or suitable 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) (emphasis added). The Rule does not distinguish between eligible rivers—eligible rivers found suitable, eligible rivers found not suitable, or eligible rivers for which no suitability analysis has been performed. Under the Rule, all eligible or suitable rivers must be protected to preserve their free-flowing condition and outstandingly remarkable values.

Lastly, the Forest Service has cited the Forest Service Handbook, which does not carry the force of law, as a basis for determining the suitability of streams during planning and releasing unsuitable streams from their eligibility. While the Handbook appears to envision such an action at Chapter 84.3, in doing so it directly conflicts with the superseding mandates of the Wild and Scenic Rivers Act and the 2012 Planning Rule as described above. The Handbook, in this instance, is simply wrong and should be amended to comply with relevant laws and regulations.

If the Forest Service Nevertheless Proceeds with Suitability Analyses, Here Are Our Recommendations.

If the Forest Service does make suitability determinations, we request that all 89 eligible streams remain eligible and are protected by the forest plan as such regardless of whether they are found suitable or not.

In summary, the Forest Service lacks authority to conduct suitability analyses during forest planning. Furthermore, the Forest Service lacks authority to strip any rivers of their eligible status and to release them from further protection and consideration as potential wild and scenic rivers. Finally, if the Forest Service does proceed with its misguided suitability analyses, it should protect all 89 eligible streams as eligible for Wild and Scenic designation regardless of their suitability.

Sincerely,

David Moryc
Senior Director of Wild and Scenic Rivers
American Rivers
317 SW Alder, Suite 900
Portland, OR 97212
503.827.8648
dmoryc@americanrivers.org

Kevin Colburn
National Stewardship Director
American Whitewater
PO Box 1540
Cullowhee, NC 28723
828.712.4825
kevin@americanwhitewater.org

Kevin Lewis
Executive Director
Idaho Rivers United
PO Box 633
Boise, ID 83701
208.343.7481
kevin@idahorivers.org

Louis Geltman
Policy Director
Outdoor Alliance
P.O. Box 2495
White Salmon, WA 98672
301.928.7789
Louis@outdooralliance.org

cc:
Cheryl Probert, Forest Supervisor
Leanne Marten, Regional Forester
Steve Chesterton, Wild and Scenic Rivers Program Manager