

NOTICE OF APPEAL

Of

Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Nantahala and Pisgah National Forests. August 2009. File Code 1900. Deciding Officer: Marisue Hilliard.

Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Sumter National Forests. August 2009. File Code 1900. Deciding Officer: Monica J. Schwalbach.

Decision Notice and Finding of No Significant Impact for Amendment #1 to the Chattahoochee-Oconee National Forests Revised Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Chattahoochee-Oconee National Forests. August 2009. File Code 1900. Deciding Officer: George Bain.

And

Environmental Assessment: Managing Recreation Uses on the Upper Chattooga River. Sumter National Forest, Chattahoochee National Forest, and Nantahala National Forest. August 2009. Deciding Officers: Marisue Hilliard, Monica J. Schwalbach, and George Bain

Pursuant to

36 CFR 219.14(b)(2)

By

American Whitewater, American Canoe Association, Atlanta Whitewater Club, Georgia Canoeing Association, and Western Carolina Paddlers

Filed electronically on Monday, October 19, 2009

To: appeals-southern-regional-office@fs.fed.us

I. Introduction

American Whitewater, American Canoe Association, Atlanta Whitewater Club, Georgia Canoeing Association, and Western Carolina Paddlers (Appellants) hereby appeal the three decisions and amendments listed above, as well as the environmental assessment listed above, in their entirety, pursuant to 36 CFR 219.14(b)(2). Appellants file this appeal because the United States Forest Service (“USFS”), has unlawfully, unfairly, and unnecessarily infringed on Appellants’ federally-protected right to recreate on the Chattooga Wild and Scenic River (the “Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters”) in hand-powered canoes and kayaks:¹

- The Wild and Scenic Rivers Act (“WSRA”) requires that administering agencies “protect and enhance” the “values” that caused a river to be included in the National Wild and Scenic Rivers System;² and
- Congress specifically identified canoe and kayak recreation on the Chattooga Headwaters as a value that caused the river to be included in the National Wild and Scenic Rivers System;³ yet
- The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

¹ Appellants will use the term “floating” throughout this Memorandum to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

² 16 U.S.C. § 1281.

³ Sen. Report No. 93-738 at 3008, 3010 (1974).

In addition to violating the WSRA and its implementing regulations,⁴ the USFS's actions violate the Wilderness Act and its implementing regulations⁵, the Multiple-Use Sustained-Yield Act,⁶ the Forest and Rangeland Renewable Resources Planning Act,⁷ the National Forest Management Act⁸ and its implementing regulations,⁹ the National Environmental Policy Act¹⁰ and its implementing regulations¹¹, the Administrative Procedures Act (“APA”),¹² and other applicable statutes and regulations.

Each of these violations is challenged in turn below and in the Declarations of Kevin Colburn, Mark Bain, and Glenn Haas which are incorporated herein by reference.

The environmental assessment, also appealed herein, contains significant errors in analysis and judgment as outlined below and in the attached Declarations of Colburn, Bain, and Haas. In this appeal we challenge the validity of the environmental assessment, its findings, and its preparation.

In addition to the Appeal language below, and the attached Declarations, we hereby incorporate by reference all published USFS studies regarding the Chattooga River and

⁴ 16 U.S.C. § 1271 *et seq.*

⁵ 16 U.S.C. §§ 1131 *et seq.*

⁶ 16 U.S.C. § 528 *et seq.*

⁷ 16 U.S.C. §§ 1600-14.

⁸ 16 U.S.C. § 1600 *et seq.*

⁹ 36 C.F.R. 219.1-219.29.

¹⁰ 42 U.S.C. §§ 4321-4370.

¹¹ 40 C.F.R. 1500-08.

¹² 5 U.S.C. §§ 551-706.

American Whitewater comments to those studies,¹³ American Whitewater's prior appeal of this issue and exhibits and attachments to that appeal,¹⁴ all American Whitewater comments and correspondence filed with the USFS on this issue since 2001, and all comments by whitewater boaters in the record since 2001.

The 2009 Amendments, because they were issued pursuant to an appeal of the 2004 Revised Land and Resource Management Plans constitute a final Revised Forest Management Plan. To be otherwise would create an endless loop of appeals, "final appeals," appeals from those final appeals, over and over and over. This American Whitewater appeal is being submitted through the administrative process, in accordance with the admonitions of the Forest Supervisors, even though this is a final agency action subject to review by the courts. American Whitewater, by submitting these comments does not waive its right to argue that the Amendments constitute final agency action subject to judicial review. The United States District Court for the District of South Carolina has approved that position, by issuing a Temporary Restraining Order on October 15, 2009 stating "Motion for TRO is granted in that the filing by the plaintiff of an administrative appeal will not constitute a waiver of its argument that the matter is ripe for judicial review and that there is final agency action."¹⁵

¹³ Including but not limited to the following reports and comments on those reports: Capacity & Conflict on the Upper Chattooga River (Shelby and Whittaker, 2007), Upper Chattooga River Visitor Capacity Analysis Data Collection Reports, Upper Chattooga River Phase I Data Collection Expert Panel Field Assessment Report, Chattooga River History Project Literature Review and Interview Summary, Inventory of Large Wood in the Upper Chattooga River Watershed.

¹⁴ April 15, 2004 Notice of Appeal of American Whitewater In Re: Appeal of resolution of Issue #13 in the Record Of Decision for the Revised Land and Resource Management Plan for the Sumter National Forest, the Record of Decision for the Revised Land and Resource Management Plan for the Chattahoochee National Forest, and to the extent that the decision is applicable, to the implementation of this decision in the Nantahala National Forest.

¹⁵ *American Whitewater et al v. Tidwell et al*, No. [8:09-cv-02665-RBH](#)

The USFS issued its RLRMP on January 15, 2004, continuing the USFS's unlawful ban on Headwaters floating. Plaintiff AW exercised its administrative remedy and appealed that decision. Following AW's appeal, the USFS Chief issued his Decision for Appeal reversing the RLRMP. The Regional Forester was to conduct a use analysis study and adjust or amend the RLRMP as appropriate.¹⁶ The 2009 Amendment issued pursuant to the 2005 Appeal Decision is therefore the culmination of the USDA's final administrative determination, and Plaintiffs have consequently exhausted their administrative remedies, making this case ripe for federal judicial review.

The finality of the 2009 Amendment is supported by the Northern District of Georgia's decision to dismiss AW's plea for injunctive relief in 2006. The court expressly and repeatedly stated that the 2009 Amendment would represent Defendants' final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time;*"¹⁷ that "*if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available . . . ;*"¹⁸ and that "[i]f [Plaintiffs'] vision [*of an open Headwaters*"] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time.*"¹⁹

¹⁶ *Id.*

¹⁷ *American Whitewater*, No. 2:06-CV-74-WCO at *12-13 [Doc. 23].

¹⁸ *Id.* at *18.

¹⁹ *Id.* at *20.

The court also indicated that even Defendants (the USFS) acknowledged that the 2009 Amendment would be their final agency action regarding the Headwaters boating ban, stating that: “Defendants point out that the agency has not yet made a final decision regarding whether floating on the Headwaters will be prohibited by the amended 2004 plan and argue that any decision prior to *that ultimate one* should not be considered final agency action.”²⁰ Therefore, by Defendants’ own admission, the 2009 Amendment is the “ultimate” decision and should be considered their “final agency action.”

II. The Appellants

American Whitewater: Appellant American Whitewater is a nonprofit 501(c)(3) corporation organized under the laws of Missouri. Its principal place of business is 629 W Main St. Sylva, NC 28779. The phone number is 828-586-1930. Since 1954, American Whitewater has been dedicated to restoring rivers to their natural condition, eliminating water degradation, improving public land management and -- as in this case -- protecting public access for responsible recreational use.

A nationwide organization, American Whitewater represents individuals, families and organizations having a combined membership of approximately 6,700 members and more than 100 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

American Canoe Association: Appellant American Canoe Association is a nonprofit 501(c)(3) corporation organized under the laws of New York. Its principal place of business is 7432 Alban Station Blvd., Suite B-232, Springfield, Virginia 22150. The phone number is

²⁰ *Id.* at *12 (emphasis added).

540.907.4460, ext 106. Since 1880, the American Canoe Association has been dedicated to promoting canoeing, kayaking, and rafting as wholesome lifetime recreational activities. The American Canoe Association provides a variety of worthwhile programs and public services in such areas as: event sponsorship, safety education, instructor certification, waterway stewardship, water trails, paddler's rights and protection, and public information campaigns.

A nationwide organization, the American Canoe Association represents individuals, families and organizations having a combined membership of approximately 50,000 individual members and more than 300 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

Georgia Canoeing Association: Appellant Georgia Canoeing Association is a nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 7023, Atlanta, Georgia 30357. The phone number is (770) 421-9729. The Georgia Canoeing Association promotes conservation, environmental and river access issues as well as boating safety and skills development. Since 1966, the Georgia Canoeing Association has been a member-operated paddling club representing individuals, families and organizations having a combined membership of approximately 2,000 individual members, the large majority of whom live in Georgia and many of whom regularly float the open portions of the Chattooga WSR, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

Atlanta Whitewater Club: Appellant Atlanta Whitewater Club is a member-operated nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 11714, Atlanta, Georgia 30355. The phone number is 404-210-1067. The

Atlanta Whitewater Club was founded in 1978 by a dedicated group of Atlanta's kayakers, canoeists, and rafters to provide educational services and events that increase the enjoyment, safety, and skills of paddlers at every level of the sport and to protect the environment.

The Atlanta Whitewater Club has a combined membership of approximately 110 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

Western Carolina Paddlers: Appellant Western Carolina Paddlers is a member-operated paddling club based in Asheville, North Carolina. The Western Carolina Paddlers can be reached at P.O. Box 8541, Asheville, North Carolina 28814. The phone number is 828-230-4474. The Western Carolina Paddlers' membership is comprised of paddlers of all types, including kayakers, canoeists, and rafters, all of whom are active in river conservation, access issues, and local paddle-sport events. The Western Carolina Paddlers has a combined membership of approximately 120 individual members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

Members of each of the Appellant organizations have used, and but for the unlawful closure currently would be using, the section of river at issue in this appeal for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by the USFS's failure to comply with the statutes and regulations cited in this Appeal.

III. Requested Relief.

We request that the USFS immediately revise their decisions and LRMP amendments to fully support the laws and policies discussed in this filing, in a manner consistent with the factual record. We request that the USFS issue a new record of decision in support of a modified Alternative 4 that is modified with the following constraints and mandates:

- 1) Immediately allow noncommercial paddling to occur, to the same extent that existing uses are allowed to occur in Alternative 4 (ie not limited by number, season, flow, or geography), on the entire upper Chattooga River between Grimshawes Bridge and Highway 28 and its tributaries.
- 2) Apply the same standards, monitoring, and permitting to paddling that is applied to all other existing uses.
- 3) Should monitoring of standards require limits on recreational visitation, require indirect use limits to be exhausted for all uses prior to instituting direct limits on all uses.
- 4) Should monitoring of standards require limits on recreational visitation, require that all Wilderness compliant uses have an equitable chance of enjoying the Upper Chattooga River and its tributaries.
- 5) Conduct a valid user capacity analysis.

Our request simply echoes the mandate issued by the Washington Office of the USFS in response to our successful appeal of this same decision in 2004. The reviewing officer stated some simple USFS regulations and rules that a new decision would have to comply with. Now half a decade later, the same regional and local USFS officials have issued the same decision as in 2004, which directly violates these tenants handed down from the Washington Office. We ask that the reviewing officer reflect on that 2005 Record of Decision that imposed constraints on the decision which we are now appealing. The USFS wholly fails to meet the legally required,

agency-directed goals for the EA and the ultimate decisions. The USFS staff has completely disregarded their direction from the Washington Office of the USFS.

The relief we request is simple: manage paddling on the upper Chattooga just like you manage all other existing uses on the Chattooga Headwaters and like paddling is managed on all other rivers in the region; manage paddling in a manner that is consistent with laws, policies, and the 2004 appeal ROD regarding this issue; manage paddling in a manner that sets no bad precedents; manage paddling in a manner that is fair and equitable, manage paddling in a manner consistent with accepted river management practices, and manage paddling in a manner that is respectful to all visitors and eliminates rather than fuels conflict. Providing the relief we request will endure all challenges, end conflicts, and end the discrimination against nature based paddling on the Upper Chattooga River.

IV. Background and Facts

A. Description of the Headwaters

1. Appellants incorporate the allegations otherwise set forth in this Appeal as if fully set forth herein.

2. The documents and decisions herein appealed involve the Chattooga River, which was designated as a Federal Wild and Scenic River in 1974, pursuant to the WSRA.

3. The Chattooga WSR is a spectacular natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northern Georgia.

4. The waters of the Chattooga WSR, which flow through the Nantahala, Chattahoochee, Francis Marion and Sumter National Forests contain navigable Class I through Class V rapids before eventually cascading into Georgia's Tugaloo Reservoir.

5. Primitive floating has occurred on the Chattooga WSR for more than 250 years.

6. Only the remote twenty -one river miles of the Chattooga WSR upstream of South Carolina Highway 28 are at issue in this case. That twenty-one-mile section is referred to herein as the “upper Chattooga” or “Headwaters.”

7. Four roads subdivide the Headwaters into three reaches, known, from northern-most to southern-most as Grimshawes Bridge to Bull Pen Bridge (GS-BP), Bull Pen Bridge to Burrells Ford Bridge (BP-BF), and Burrells Ford Bridge to the Highway 28 Bridge (BF-28).

8. Many parts of the Headwaters corridor, particularly in the Ellicott Rock Wilderness, are accessible only by boat.

B. History of the Ban on Floating

9. Appellants incorporate the allegations otherwise set forth in this appeal as if fully set forth herein.

10. In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), a policy statement of land use management values.

11. With this list of potentially competing uses at its roots, section two of MUSYA further provides that the Secretary of Agriculture must administer the national forests for multiple use and sustained yield of the several products and services of the national forests. 16 U.S.C. § 529 (1988).

12. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

13. MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

14. The Wilderness Act was passed in 1964, and prohibited the use of commercial enterprises, in wilderness areas and except to the extent necessary for administration of the Act, motorized equipment, motorboats, landing of aircraft and all other forms of motorized transport were prohibited. 16 U.S.C. § 1311.

15. In 1968, Congress passed the WSRA. The purpose of the act was to create a national wild and scenic rivers system so that rivers with “outstandingly remarkable scenic, recreational ... or other similar values ...[would] be preserved in a free-flowing condition, and ... be protected for the benefit and enjoyment of future generations.” 16 U.S.C. § 1271.

16. The WSRA specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

17. Section 1277 (b) of the Wild and Scenic Rivers Act provides for the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary *to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.* (emphasis added).

18. In 1971, local USFS personnel conducted a study of the Chattooga’s suitability for protection under the Wild and Scenic Rivers Act.

19. The Study recommended that Congress include all sections of the Chattooga River in the Wild and Scenic Rivers System, based in large part on the Chattooga’s outstanding recreation opportunities—and specifically whitewater boating on the upper Chattooga.

20. The Chattooga River was among the first rivers in the United States to be designated under the system, receiving its designation as a WSR in 1974.

21. To convince Congress that the Chattooga River was eligible for inclusion in the WSR system, the USFS published a *Wild and Scenic River Study Report* on June 15, 1971 (the “Study”).

22. Fittingly, the photo on the cover of the Study depicts a canoe floating the Chattooga.

23. The USFS recommended the following to Congress:

Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like ...whitewater canoeing ... will enhance the recreation opportunities for many people in an area *where river-oriented recreation is scarce...*a river capable of supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river...*Study*, 66-67.

24. The Chattooga River was considered for inclusion in the WSR system in six distinct sections.

25. Each of these sections was analyzed for inclusion separately, and each exhibited different outstandingly remarkable values and received different levels of protection based on those values.

26. The 1971 Study upon which Congress based its protection of the upper River recommends a “scenic” classification for the uppermost section of the Chattooga, noting:

Grimshawes Bridge crossing [which is 21 miles above Highway 28] is accessible by a country road. The section below the bridge can be floated by rubber raft and provides `exciting trips over small rapids and cascades. *Study, 73.*

27. The Study recommends a “wild” designation for several miles of river upstream of Highway 28 because, among other reasons:

Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen. *Study, 74 (emphasis added).*

28. The studies that the USFS sent to Congress, and upon which Congress based its protection of the upper Chattooga River, are laden with references to the value of these specific reaches as whitewater paddling resources. The table below documents these references, many of them to locations in the upper Chattooga:

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
General	All	USFS 1971a*	“Designating the Chattooga River a part of the National Wild and Scenic system would preserve—a

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River
Based on the Values of Paddling the Headwaters

Paddling Section	Designation Section	Source	Quote or Reference
		Page 67	river capable of supplying many intangible values. These values are difficult to assess but certainly exist for the canoeist as he meets the challenge of the river...”
General	All	USFS 1971a Page 67	“Compatible uses on the Chattooga River are floating (including rafting, canoeing, and kayaking), hiking (including sightseeing, nature study, and photography), hunting, fishing, and primitive camping.”
General	All	USFS, 1971a Page 150	“Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.”
General	All	USFS 1970	“The Chattooga is the only mountain river in the four

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River
Based on the Values of Paddling the Headwaters

Paddling Section	Designation Section	Source	Quote or Reference
		Page 1. USFS 1971b Page 5	state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores.” “Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness.” “The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed”
General	All	USFS 1971b**	“It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking beside it, it can provide a refreshing recreation experience.”
Headwaters (GS-BP***)	I	USFS 1970 Page 5	“Below Grimshawes Bridge, the river can be floated by raft.”
Headwaters (GS-BP)	I	USFS 1971a Page 158	“Hikers, rafters and vehicles will frequently meet here because the road is the only major access to the

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
			river in the Headwaters area.” Text accompanies a drawing of Grimshawes Bridge notes the “beginning of rafting water” labeling the river immediately downstream of Grimshawes Bridge.
Headwaters (GS-BP) (BP-BF) (BF-28)	I, II, III	USFS 1971a Page 163	Appendix I, Chattooga River Potential Recreation Development Plan Summary. Table indicates construction of canoe launch sites at two locations in the upper Chattooga.
Headwaters (GS-BP)	I	USFS 1970 Page 6 USFS 1971a Page 73	“The section below the bridge (Grimshawes) can be floated by rubber raft and provides exciting trips over small rapids and cascades with frequent portages around difficult cascades and narrow sluices.”
Headwaters (GS-BP) (BF-28)	I, II, III	USFS 1971b	“In the management of the Chattooga River as a unit of the National Wild and Scenic River System, one objective will be to provide a recreation experience where a feeling of adventure, challenge, and physical

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River
Based on the Values of Paddling the Headwaters

Paddling Section	Designation Section	Source	Quote or Reference
			achievement is dominant. In addition a maximum of outdoor skills, without comfort or convenience facilities will be provided. To provide this experience, river access will be primarily by trail, including canoe launch sites. Only three points will have road access—Grimshawes Bridge, Highway 28 bridge, and Highway 76 Bridge”
Headwaters (BP-BF)	II	USFS 1971a Page 74	“This part of the river can be floated only in rubber rafts, and many dangerous portions must be portaged.” “Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen.”
Headwaters (BP-BF) (BF-28)	II	USFS 1970 Page 9	“This entire section (Section II) is in a completely natural state. It includes some beautiful but hazardous whitewater. Enormous boulders, some

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River
Based on the Values of Paddling the Headwaters

Paddling Section	Designation Section	Source	Quote or Reference
			over 50 feet high with trees on top, rise from the riverbed. This part of the river may be floated only in rubber rafts and many dangerous portions must be portaged. In the entire 15.9 miles, only two narrow bridges cross the river.”
Headwaters (BF-28)	II	USFS 1970 Page 11	The 8.0 mile section from Burrell’s Ford to the Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater. It flows around huge rocks and through narrow sluices and drops over 21 small waterfalls and rapids in less than two miles.”
Headwaters (BF-28)	II	USFS 1971a Page 75	“The eight mile section from Burrells Ford to Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater.”
Headwaters (BF-28)	III	USFS 1971a Page 75	Section III: also contains Headwaters section. “It is shallow and easy for the inexperienced canoeist.”

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River
Based on the Values of Paddling the Headwaters

Paddling Section	Designation Section	Source	Quote or Reference
Headwaters (BF-28)	III	USFS 1970 Page 13	“It (Section 3) is shallow and easy for the inexperienced canoeist.” (13)

* Note that 1971a refers to; USDA Forest Service. (1971a). Wild and Scenic River Study Report: Chattooga River, 1971b refers to: USDA Forest Service—Southern Region. (1971b). Chattooga River as a Wild and Scenic River, and 1970 refers to: USDA Forest Service. (1970). A Proposal: The Chattooga, “A Wild and Scenic River.”

** Note that 1971b does not contain page numbers.

*** Note that “GS-BP” refers to the section of the Chattooga River between Grimshawes Bridge and Bullpen Bridge, “BP-BF” refers to the section of the Chattooga River between Bullpen Bridge and Burrells Ford, and “BF-28” refers to the section of the Chattooga River between Burrells Ford and Highway 28.

29. During its 1970 and 1971 studies to obtain congressional support to designate Chattooga as a WSR, the USFS specifically referenced channel characteristics supporting navigability: “Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities.

30. The USFS was also clear that Grimshawes Bridge was intended to be a major access area for paddlers to enter the Chattooga River: “Below Grimshawes Bridge, the river can be floated by raft.”

31. The Report stated: “Hikers, rafters and vehicles will frequently meet here (Grimshawes Bridge) because the road is the only major access to the river in the Headwaters area.”

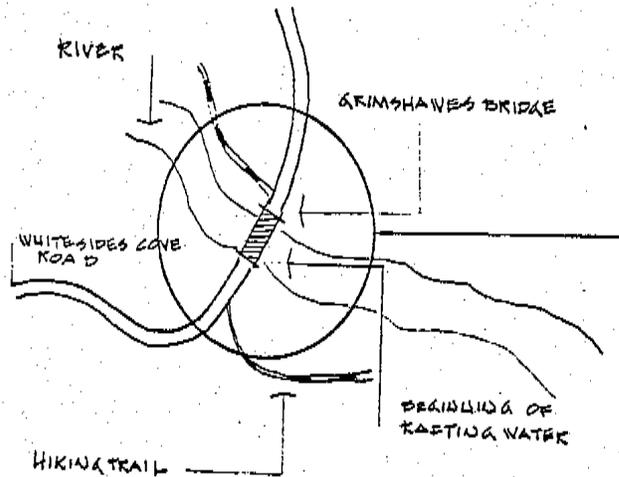
32. The Study even includes a map labeling Grimshawes Bridge (the beginning of the upper Chattooga) as the “beginning of rafting water” and discusses several “canoe launch sites” on the Headwaters. *Chattooga River as a Wild and Scenic River*, at 158.

33. The USFS organized at least one rafting trip during preparation of the studies in support of Wild and Scenic designation, in the early 1970’s. It confirmed in the study report that “Grimshawes Bridge crossing is accessible by a country road.”

34. The USFS concludes in the study report that “the section below Grimshawes Bridge can be floated by rubber raft and provides exciting trips over small rapids and cascades ...” and that “Rafting or some method of floating is the best way to see this rugged portion of the river.”

35. The USFS WSR Report contains this sketch, showing Grimshawes Bridge as the “Beginning of Rafting Water”

CONCENTRATION AREAS
ACCESS NODES



HIKERS, RAFTERS AND VEHICLES WILL FREQUENTLY MEET HERE BECAUSE THIS ROAD IS THE ONLY MAJOR ACCESS TO THE RIVER IN THE HEADWATERS AREA

AS AN ACCESS NODE, VEHICLES WILL ONLY BE PERMITTED FOR PICK UP AND DROPOFF OF RECREATIONERS AND THEIR EQUIPMENT

36. Whitewater boating on the upper Chattooga was an existing and vital element of the recreation outstandingly remarkable value warranting inclusion of that section of the Chattooga in the WSR on the Headwaters system. In addition, whitewater boating is also a stand-alone value that to the Headwaters inclusion in the WSR system.

37. Rapids and the paddling experience are described in detail for each section of the upper Chattooga, and boating is described as “the best way” to see these sections.

38. Whitewater boating river values contributed to, if not controlled, how the Study’s drafters viewed and classified the upper Chattooga.

39. The Study makes clear that whitewater boating is a vital component of the river’s wild and scenic character and a use that should be protected by including the Chattooga in the WSR system.

40. Whitewater boating was one of the outstandingly remarkable values upon which the USFS based its recommendation for the Chattooga's inclusion in the WSR system.

41. Based upon this study, Congress in 1974 included the Chattooga among the first rivers protected by the WSRA.

42. The entire upper Chattooga River was protected by Congress under the WSR system in 1974, in large part, because of the exceptional recreation value of boating on the upper river.

43. In sharp contrast to the many accolades of whitewater boating in this study and proposal to Congress, the USFS stated in the proposal: "The Chattooga is considered adequate for native trout stocking but is not outstanding trout water. In past years some areas have been stocked with catchable- size trout, but this practice will not be encouraged."

44. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

45. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the "NFMA").

46. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process.

47. In 1975, certain portions of the Chattooga WSR corridor above Highway 28 were designated as "wilderness" under the Wilderness Act.

48. This area, known as the Ellicott Rock Wilderness, includes 8,271 acres of land in Georgia, North Carolina and South Carolina.

49. Five and two tenths miles of the Chattooga WSR traverses the Ellicott Rock Wilderness above Highway 28.

50. A hiking trail, known as the “Chattooga Trail” parallels this wilderness portion of river for approximately 3.2 miles.

51. While the Chattooga Trail remains near the river for most of this stretch, hikers following the trail remain visually separated from the river, save for occasional glimpses around or through natural obstructions.

52. The Ellicott Rock Wilderness and the section of the Chattooga WSR that flows through it are precious wilderness resources.

53. Two years after Congress included the Chattooga in the Wild and Scenic River System, local USFS personnel, at least one of whom was an officer in the local chapter of Trout Unlimited, banned floating on the upper Chattooga. Floating is one of the very forms of outstanding river recreation values that led to the river being included in the national WSR system.

54. The first official decision to ban boating above Highway 28 was made in connection with the 1976 Sumter National Forest Land and Resource Management Plan (LRMP). According to the LRMP, the ban on boating was justified by “public safety” concerns.

55. No user capacity analysis or other valid supporting documentation was included in the LRMP in connection with the ban.

56. The 1976 decision resulted in a handful of local anglers having a near monopoly on river recreation on the upper Chattooga.

57. The 1976 ban was made arbitrarily, outside of an open NEPA-type process, without public input, and in direct contradiction to the Study produced by the Sumter National Forest just five years earlier to support designation of the Chattooga as a WSR.

58. In 1985, a new Sumter National Forest LRMP was issued and the ban on floating continued.

59. In contrast to the 1976 ban where “public safety” was the stated justification, the 1985 floating ban stated that protection of “quality trout fishing” necessitated denying boaters access to the upper Chattooga.

60. This rationale was completely circular and without any rational basis. In essence, the “quality trout fishing” was the result of stocking non-indigenous fish to increase the fishing experience, and unlawfully banning floating to provide an artificial solitude experience.

61. As with the 1976 ban, the 1985 decision contained no user capacity analysis, valid supporting documentation or relevant research.

62. The boating community’s interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers.

63. Although the boating on the Headwaters was banned in 1976, from 1976 through 1985, the USFS did not enforce the ban. Thus, between 1976 and 1985 a few members of the public occasionally floated the Headwaters as had been done for over 250 years.

64. When boaters learned of the prohibition, they began to challenge it.

65. As a result of challenges from boaters, in 2004, the USFS agreed to analyze why floating, a protected activity on the Chattooga Headwaters, had been illegally banned. This purported analysis was conducted in conjunction with the USFS Revised Land and Resource Management Plan (“RLRMP”) process.

66. Federal regulations require the USFS to periodically revise its management framework for managing the various national forests. The Regional level of the USFS conducts these revisions of its various forests on a rolling basis in cooperation with the local forests.

67. Historically, management of the entire Chattooga River, including the parts of the river corridor in Georgia and North Carolina, has been controlled by South Carolina’s Sumter and Francis Marion National Forests headquartered in Columbia, South Carolina.

68. Because “Region 8” of the USFS (also known as the Southern Region) had already slated 2004 as the timeframe for revising the Land and Resource Management Plan for the Sumter and Francis Marion National Forests in South Carolina, the Regional Forester decided to use the RLRMP process to consider boaters’ challenges to the Headwaters boating ban.

69. The 2004 RLRMP was divided into numerous “issues” that were being considered for revision. The USFS discussed the boating prohibition in “Issue #13” of “Appendix H” to the 2004 RLRMP.

70. Regrettably, the USFS ultimately failed to analyze the boating issue and instead published a cursory defense of its decision to maintain the boating ban.

71. The 2004 RLRMP discussion on boating contained no scientific analysis, contained only vague references to undocumented “potential” problems associated with “adding” boating as a “new” use.

72. Instead of reviewing why protected wild and scenic river activity had been banned and how it could be restored, the 2004 RLRMP discussion instead focused on imagined problems associated with introducing a “new” use to the river. The 2004 RLRMP discussed resource impacts related to all users in general and reasoned that “new” boating use would result in additional resource impacts (simply because there would be more users) and determined that such “potential” impacts were a basis for continuing the ban.

73. Appellant American Whitewater (“AW”) timely appealed the 2004 RLRMP ban through the USFS’s administrative process.

74. AW’s administrative appeal challenged the boating prohibition on the grounds that it was arbitrary and capricious under the APA, that it violated the WSRA, the Wilderness

Act, USFS regulations, and a host of other applicable laws and regulations and that it infringed on a federally protected right to use a federal resource.

75. The USFS did not respond to AW's appeal in a timely manner according to the USFS's own regulations.

76. After delaying a decision on AW's appeal for a year, the USFS Chief finally issued a decision on AW's appeal. In April 2005, the USFS Chief agreed with AW and reversed the boating ban:

After careful review of the record . . . I am reversing the Regional Forester's 2004 Decision to continue to exclude boating on the Chattooga [Headwaters]. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. *Id.* at Ex. 7, USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 4 (April 28, 2005) [hereinafter, the "2005 Appeal Decision"].

77. However, in the same document in which the Chief reversed the 2004 Headwaters floating ban, he resorted, as a technical fallback, to the prior 1985 land and resource management plan for the Sumter National Forest.

78. The 1985 plan contained a boating ban, so the result was that the Chief reinstated a 1985 Headwaters floating ban in place of the invalidated 2004 ban—a ban that had been invalidated by the Chief on the grounds that it violated federal law.²¹

79. The apparent paradox in the Chief’s order was mitigated by the fact that the Chief specifically identified for the Regional Forester the regulatory framework for immediately restoring paddling access: “36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed.”

80. In conjunction with the reversal of the boating ban and the regulatory framework for restoring boating access, the Chief’s order further directed the Regional Forester, *within two years* (i.e., by April 2007), to conduct a “visitor use capacity analysis, including non-commercial boat use” and to amend the 2004 RLRMP in accordance with the results of the capacity analysis.

81. Notwithstanding the Chief’s 2005 Order, the USFS’s regional office, and by extension the local forests under its control, continued to ignore Plaintiffs’ federally-protected right to float the Headwaters.

82. First, the Regional Forester ignored the Chief’s apparent intent that floating access be restored on the Headwaters during the “two year” amendment process in order to conduct a meaningful visitor capacity analysis that could determine an appropriate capacity number of users. The Chief pointed to “36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed.”

83. Instead, the USFS maintained a complete ban on Headwaters floating, allowing less than 20 boaters access to the river *on only two days* during what ultimately became a 4.5

²¹ *Id.* at 5.

year amendment process. With boating banned, no user capacity analysis study “including whitewater boating” was ever conducted.

84. Second, the USFS’s purported execution of the Chief’s 2005 Appeal Decision was undertaken by local forest managers (called “Forest Supervisors”) rather than by the Regional Forester. This deviation from the Chief’s order is significant because of the local forest managers’ distaste for boaters after having their 2004 ban reversed, their coziness with a small, but influential anti-boating interest, their demonstrated propensity to ignore federal law and USFS policy, and their apparent desire to prohibit Headwaters floating at any cost. Despite repeated protests by Appellants, local forest managers remained in control of the amendment process throughout its duration.

85. Although AW prevailed in appealing the 2004 ban, Appellants none the less remained banned from floating the Headwaters. Thus, Appellants assisted by Atlanta, GA based *pro bono* counsel sought relief in the United States District Court for the Northern District of Georgia.²² The Appellants asked the Northern District of Georgia for an order requiring the USFS to restore floating access while the USFS conducted a user capacity analysis.

86. The USFS opposed the Appellants’ request and argued that the floating ban was not yet ripe for judicial review because the USFS was still in the process of amending the 2004 RLRPM and might ultimately restore floating access, thus rendering moot the Appellants’ arguments and requested relief. The Northern District dismissed Appellants’ case, holding that

²² See Pl.’s Compl., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 1]; see also Pl.’s Mot. for Prelim. Inj., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 3].

Appellants' claim was not yet ripe for judicial review. However, the Court repeatedly noted that the case would be ripe once the USFS issued its 2009 Amendment.²³

87. The court expressly and repeatedly stated that the soon to be issued Amendment would represent the USFS's final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time;*"²⁴ that "*if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available . . . ;*"²⁵ and that "[i]f [Plaintiffs'] vision [*of an open Headwaters*"] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time.*"²⁶

88. The USFS missed its two-year deadline to amend the boating ban imposed by the 2004 RLRMP. In fact, it ultimately took the USFS four and a half *years* to publish an amendment that deviates little from the original decision reversed by the Chief.

89. Throughout the four and a half year decision period, Appellants participated in every phase of the administrative process by attending USFS meetings and hearing, submitting comments to every draft of the USFS amendment document, corresponding with the USFA on numerous occasions to remind the agency of its obligation to restore hand-powered boating on the Headwaters and to execute a user capacity analysis that actually determines a numerical capacity of the river for users. The USFS failed to properly respond to or address Appellants'

²³ See *American Whitewater v. Bosworth*, No. 2:06-CV-74-WCO, *12-13, 18, 20 (N.D. Ga. Oct. 6, 2006) [Doc. 23].

²⁴ *American Whitewater*, No. 2:06-CV-74-WCO at *12-13 [Doc. 23].

²⁵ *Id.* at *18.

²⁶ *Id.* at *20.

comments. *See* Colburn Declaration, October 16, 2009. The Colburn Declaration is incorporated herein, and contains the basis for our appeal of the EA and the portions of the Decisions based on the EA.

90. More than 1000 boaters from across the country asked the USFS to lift the boating ban in its 2004 RLRMP. Even more boaters requested the same of the USFS during the protracted amendment process. The USFS failed to properly respond to or address these requests.

91. Finally, on August 25, 2009, in direct violation of the USFS Chief's order, three Forest Supervisors, *not the Regional Forester*, issued the long-awaited 2009 Amendment to the 2004 RLRM. The 2009 Amendment deviates little from the invalidated 2004 RLRMP.

92. Like the 2004 RLRMP, the 2009 Amendment is based on an incomplete study that in no way meets the legal requirements for a user capacity study.²⁷ It is a user capacity study in name only.

93. The 2009 Amendment purports to provide "all potential users with a fair and equitable chance to obtain access to the river,"²⁸ but boaters are singled out for harsh restrictions while *all other users have unlimited access to the resource all year long*. In other words, the 2009 Amendment *only* restricts boating.

94. The 2009 Amendment bans boating on all but one seven-mile stretch of the nearly twenty-two miles of Headwaters. Those seven miles are separated from the rest of the river by complete floating bans on the Headwaters sections immediately upstream and downstream.

²⁷ *See* Ex. F, Declaration of Glenn E. Haas 1-2. *See* Haas Declaration. The Haas Declaration is incorporated here in.

²⁸ Ex. B, Colburn Decl., , USFS, *Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan: Managing Recreation Uses on the Upper Chattooga River*, 4 (Aug. 25, 2009) [hereinafter, the "2009 Amendment"]. . The Colburn Declaration is incorporated here in.

95. The 2009 Amendment permits boating on this small section of the Headwaters only in the dead of Winter—only during the months of December, January, February—and only when the Headwaters have exceptionally high water levels.²⁹

96. Boaters must hike 1.5 miles with their canoes or kayaks to the beginning of the section to access that section of the Headwaters.

97. Although Congress noted that there were readily accessible roadside launch sites when it designated the Chattooga as a Wild and Scenic River, the USFS has barred boaters from using those sites.

98. The 2009 Amendment also bars boaters from floating the entire 52-mile length of the Chattooga River from Grimshawes Bridge to Tugaloo Reservoir.

99. In stark contrast to its treatment of boaters, the 2009 Amendment grants wholly unrestricted access to and use by *all other* user groups.

100. By the USFS's own Orwellian estimation, this "fair and equitable access" would permit boaters to access one section of the Headwaters between zero and eleven days per year (and only in the Winter), with a likelihood of 3 days per year. In comparison, *all other user groups* are permitted to access and use the entire length of the Headwaters 365 days a year.

101. The 2009 Amendment, which maintains the illegal ban on paddling on the Headwaters, violates the same federal laws cited by AW in its 2004 Appeal of the 2004 RLRMP and the same federal laws that Chief of the USFS cited when he reversed the 2004 RLRMP.

102. Appellants reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy

²⁹ 2009 Amendment 2.

V. Appellants reasons for objecting to the Decisions and the EA, including reasons of fact, law, regulation, and policy, and specifically how the decisions appealed herein violate law, regulation, and policy.

A. Violation of the Wild and Scenic Rivers Act

103. Appellants incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

104. The 2004 USFS Land and Resource Management Plans for managing recreation uses on the Upper Chattooga River violated the Federal Wild and Scenic Rivers Act by instituting a total ban on all boating on the upper Chattooga.

105. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Federal Wild and Scenic Rivers Act by implementing a ban on boating on two of three sections of the upper Chattooga.

106. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Wild and Scenic Rivers Act by refusing to manage the ± two miles of Wild and Scenic River downstream of Grimshawes Bridge flanked by private property.

107. There were no user capacity analyses conducted prior to implementing the 1976, 1985, and 2004 USFS Land and Resource Management Plans, yet floating was banned (See Bain Declaration). This is a violation of the WSRA.

108. There was no legally valid user capacity analysis conducted prior to issuing the 2009 Amendment to the 2004 plan, yet floating was banned on two of three sections of the upper Chattooga, and virtually banned on the middle section. This is a violation of the WSRA.

109. Section 1281 of the WSRA provides in relevant part:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. 16 U.S.C. § 1281(a).

110. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the Wild and Scenic Rivers Act.101.

111. Whitewater boating is one of the values that prompted Congress to designate the upper Chattooga River as a WSR. It therefore must be protected and enhanced, not banned. The ban violates the WSRA.

112. Boating does not substantially interfere with public use and enjoyment of river values, and therefore its use should not be limited. In doing so, the USFAS violated the WSRA.

113. Floating must be protected and enhanced because in addition to itself being a stand alone value, it is also a fundamental component, one of the outstandingly remarkable values that caused the Chattooga to be included in the WSR system. The USFS failure to protect and enhance whitewater boating violates the WSRA.

114. Banning floating on over one-third of the Chattooga WSR—particularly on the cherished wilderness portions—destroys, rather than protects and enhances, this important value in violation of the WSRA.

B. Violation of the Wilderness Act

115. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

116. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days in the Winder on the middle section), violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is required to protect and enhance.

117. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days on the middle section), results in an allocation of uses in the Ellicott Rock Wilderness that violates the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

118. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

119. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

120. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

121. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

122. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

123. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

124. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

125. Thus as primitive recreation opportunities, hand-powered kayaking and canoeing are wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

126. Defendant’s own regulations implementing and giving effect to the statutory requirements of the Wilderness Act define hand-powered canoeing and kayaking as wilderness-complaint uses. *See* USFS Manual 2320.5.3.

127. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

128. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

129. Wilderness areas must be “devoted to the public purposes of *recreational, scenic, scientific, educational, conservation and historical use.*” 16 U.S.C. § 1133(b) (emphasis added).

130. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

131. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

132. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

133. Banning floating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

134. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

C. Violation of the Multiple Use

135. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

136. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

137. The MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

138. Many potential uses of the National Forest lands lack a market value in terms of dollars.

139. Readily available market values do not exist for aesthetics, recreation, watershed, and wildlife.

140. While no market value is readily available, the statute mandates that the value of these resources be considered.

141. Balancing values must also be consistent with other laws.

142. The Forest Service failed to attribute the appropriate “value” to boating the upper Chattooga and therefore could not possibly have properly balanced the mix of uses adequately.

143. Congress included the upper Chattooga River in the Wild and Scenic River system, in part, because whitewater boating is an “outstandingly remarkable” value of that river.

144. Because Congress fixed the value of river recreation on the Chattooga WSR as “outstanding” and “remarkable,” the USFS should have accorded river recreation that same value, and should have given substantial value to the importance of preserving boating recreation.

145. Accordingly, the USFS has failed to comply with the MUSYA’s requirement to give “due consideration” to the “relative values of various resources in particular areas.”

146. Whitewater boating on the upper Chattooga is an “outstanding” and “remarkable” value. As such, that value must be protected and enhanced in any appropriate balance of multiple uses.

147. USFS has not attributed any value to floating on the Headwaters, by setting the amount of floating at zero while not limiting other uses. Therefore, the USFS has not given due consideration to the relative values in violation of the MUSYA.

148. USFS has not attributed any value to floating on the Headwaters, even though Congress included the Headwaters in their identification of floating as an outstandingly remarkable value. This is a violation of the MUSYA.

D. Violation of the National Forest Management Act

149. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

150. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

151. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

152. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process. NFMA creates a statutory framework for the management of National Forests.

153. NFMA states that the Forest Service “shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a).

154. NFMA provides a two-step process for forest planning. First, the Forest Service must develop a Land Resource Management Plan (“LRMP”) and an EIS for the entire forest. *See* 36 C.F.R. § 219.10(a), (b). Second, once the LRMP is in place, the Forest Service must assess site-specific projects in light of the LRMP. *See* 36 C.F.R. § 219.10(e).

155. The LRMP is in essence, a programmatic statement of intent that establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions.”

156. Among other items, an LRMP must provide for multiple use and sustained yield of the products and services obtained from that use, including outdoor recreation. *See* 16 U.S.C. § 1604(e).

157. The USFS did not adequately provide for multiple use of resources—specifically with respect to outdoor recreation. The USFS’s programming statement of intent that establishes planning guidelines basically bans all boating on the Headwaters, which constitutes more than 40% of the Chattooga River.

158. “Due consideration” was not given to “relative values” in the LRMP and EIS as required by the RPA/NFMA.

159. The USFS failure to consider the outstandingly remarkable value of river recreation violates MUSYA. Therefore it also violates RPA and NFMA, which require the USFS to comply with MUSYA when managing the National Forests.

E. Violation of the Fifth Amendment of the United States Constitution

160. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

161. The floating ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

162. Congress protected the Upper Chattooga as a WSR for the express purpose of protecting and enhancing outstandingly remarkable river values such as floating, yet the USFS banned floating and did so without any rational basis.

163. The USFS deprived Appellants of the liberty to do as Congress intended, violating the Plaintiffs’ rights under the Fifth Amendment of the United States Constitution.

164. The ban of paddling on the river irrationally deprives recreational boaters of their liberty of movement on a river that the Wild and Scenic River Act says is to be managed and maintained expressly for their benefit.

165. The ban violates the equal protection clause of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis.

166. The upper Chattooga is a section of public river that is required by Congress to be protected and enhanced for the benefit of all Americans who wish to engage in primitive recreational activities, yet members of the public who would engage in floating are the only class to be singled out and denied access to this section of public river.

167. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationalists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

168. The following statements from the USFS EA and ROD demonstrate the failure of the USFS to provide equal protection to all users:

- There is a need to protect the unique angling experience above Highway 28.
- Allowing whitewater boating on some or the entire upper Chattooga River has the potential to ... affect the high-quality backcountry angling experience.
- Public comments and Forest Service studies have shown that angler/boater encounters are among the most important impacts associated with allowing boating on the upper Chattooga.
- [The USFS selected Alternative 4] emphasizes year-round, high-quality trout fishing.
- The take-out [mandated by the USFS selected Alternative 4] at Burrells Ford avoids potential on-river encounters with anglers in the Rock Gorge and in the delayed-harvest area.
- By establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

169. Nowhere in the EA does the USFS acknowledge that “there is a need to protect the unique *boating* experience above highway 28.”

170. Nowhere in the EA does the USFS acknowledge the ban on paddling not only “has the potential to ... affect the high-quality backcountry *boating* experience” but totally eviscerates this experience from the river.

171. Nowhere in the EA is there a proposed an alternative banning angling to “avoid potential on-river encounters with boaters.”

172. Nowhere in the EA does the USFS consider or find that “By establishing flow, season, and reach restrictions on *angling*, the high-quality boating experience is maintained and potential conflicts are reduced.”

173. This was a one sided analysis, conducted with a predetermined outcome.

174. Whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access with no rational basis while all other primitive recreationists are allowed to use the upper Chattooga without significant restriction or limitation.

F. Violations of the Administrative Procedures Act

1. Failure of USFS to Follow its Own Regulations

175. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

176. Under the Administrative Procedure Act (the “APA”), an agency’s decision may be set aside by a reviewing court if the court finds the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

177. When an Agency fails to follow its own regulations and procedures, its actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. The examples below all demonstrate that the USFS has violated the Administrative Procedures Act.

178. In banning floating, the USFS contravened its own regulations regarding how a Wilderness area should be managed.

179. The de facto boating ban flies in the face of these important regulatory directives. Floating is banned, not optimized.

180. The ban stands in direct opposition to the requirements that the Forest Service promote and perpetuate recreational use, and that wilderness is to be made available to the “optimum extent” consistent with wilderness preservation.

181. Banning a 250+ year historical and traditional form of wilderness recreation does not promote or perpetuate that recreation.

182. Human use is certainly not permitted to its optimum extent where, as here, a low-impact form of primitive recreation is virtually banned.

2. The Floating Ban Violates The Forest Service Manual

183. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

184. Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action.”

185. “Indirect techniques” means techniques (such as signage) that minimize or eliminate management concerns while still allowing users to access the resource. The USFS has never applied indirect techniques in the Headwaters.

186. The Forest Service Manual contains the following Wilderness Act policy:

Maximize visitor freedom within the wilderness. Minimize direct controls and restrictions. Apply controls *only when they are essential for protection of the wilderness resource* and *after indirect measures have failed*.

187. The USFS virtual ban on boating in the Headwaters is in violation of the above policy because indirect measures were never tried, and because boating poses no threat to the wilderness resource.

188. The USFS Manual suggests the following approach: “When it becomes necessary to limit use [of a WSR], ensure that all potential users have a fair and equitable chance to obtain access to the river.”

189. If the USFS is to limit use of the Chattooga Wild and Scenic River corridor, it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning floating, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use.

190. By banning floating on the Headwaters of the Chattooga, while allowing all other uses to occur without limits, the USFS is not providing paddlers a fair and equitable chance to obtain access to the river.

191. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the USFS is being arbitrary and capricious, abusing its discretion and otherwise not in compliance with the law.

192. The intense and unprecedented management controls that apply only to boaters and on such a limited scope and time do not comply with USFS policy of minimizing direct controls and restrictions.

193. No other USFS management of any day use, or overnight use for that matter, anywhere in the country is burdened with such harsh and burdensome restrictions.

194. No other Headwaters user group is subject to the restrictions and burdens placed on floating.

195. With respect to the middle section of the Headwaters, which runs through a protected Wilderness, the USFS Manual provides that one of the objectives for management of wilderness is to: "Protect and perpetuate wilderness character and public values including, but not limited to...primitive recreation experiences." USFS Manual § 2320.2.

196. That provision is later clarified in section 2320.5.3, indicating that rafts and canoes are considered primitive devices suitable for use in wilderness.

197. Banning floating on this reach on an average of 362 days each year is in violation of USFS policy.

198. Section 2323.14 of the USFS Manual instructs that managers of wilderness areas should "provide for the limiting and distribution of visitor use according to periodic estimates of capacity in the forest plan."

199. The USFS offers no estimates of user capacity for anglers, boaters, or other dispersed recreationists in the Ellicott Rock Wilderness Area, yet takes the most extreme use limitation measure available: virtually banning a use.

200. Without the information provided in a valid user capacity analysis, the USFS has violated the directives for managing wilderness areas.

3. The USFS Failed to Follow The Directives of the Chief to Comply With American Whitewater's Successful Appeal of the 2004 Revised Plan.

201. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

202. When American Whitewater successfully appealed the 2004 Revised Plan, the Chief of the USFS issued a decision that required the Regional Forester to conduct a user capacity study and to engage in a number of other activities.

203. The Regional Forester and Forest Supervisors failed to comply with the Chief's decision. That failure renders the 2009 Amendment arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

204. The Appeal Decision required that several considerations be made in the EA and in future management – the majority of which were not complied with in the 2009 Amendment and EA.

205. The Decision ordered that the USFS address the “Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.” (ROD pg. 3)

206. The USFS failed to analyze the entire length of river required by the Decision. The USFS does not analyze the over 2 mile section of river at and immediately downstream of Grimshawes Bridge.

207. The USFS, with very little analysis, makes new, extreme, management decisions related to Chattooga River tributaries, claiming that such tributaries are outside the scope of the ROD.

208. The Decision ordered that the USFS must ensure that “If it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river.”

209. The 2009 Amendment does not ensure that all potential users have a fair and equitable chance to obtain access to the river. On the contrary, the USFS does not treat all users equitably.

210. The USFS published a list of alternative new management regimes before ultimately adopting its “preferred alternative” which became the 2009 Amendment. Each proposed alternative singled out floating for unique and harsh limits.

211. The Decision ordered that the EA must ensure that Wilderness “be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness.”

212. The 2009 Amendment does not meet this mandate. Encounter standards as well as the causes of existing biophysical impacts are left unmitigated in the proposed alternative.

213. The Decision ordered that the USFS must ensure that “wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions” (36 CFR 293.2(b)).

214. The 2009 Amendment does not optimize floating. It bans floating and allows all other WSR uses in unlimited amounts at all times.

215. The Decision orders that the USFS ensure that ““direct controls and restrictions” be minimized, and that controls are to be applied only as necessary to protect the wilderness resource after indirect measures have failed (FSM 2323.12).”

216. The 2009 Amendment immediately applies direct control and restrictions by implementing unjustified direct boating limits prior to trying indirect measures.

217. The Decision orders that the USFS ensure that “limitation and distribution of visitor use should be based on “periodic estimates of capacity in the forest plan” (FSM 2323.14).” Specifically, the Order states: “I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, *including non-commercial boat use*.” (Emphasis added).

218. The EA for the 2009 Amendment does not contain a user capacity analysis that meets the standards for such an analysis. At most it addresses past and current use, with no consideration of capacity. In addition, the EA is limited in scope to addressing the capacity of paddlers – not all WSR users as directed by the Decision.

219. The Decision found that the RLRMP was “deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.”

220. The 2009 Amendment contains this same deficiency. It is simply a rewritten version of the same inadequate discussion document and ultimately proposes virtually the same actions.

221. The USFS wholly fails to meet the legally required goals for the EA and the ultimate decision as directed by the Chief in the Decision.

4. The USFS Abdicated its Lawful Duty to Protect and Enhance Outstanding Recreational Values on the Northern Most Section of the Headwaters

222. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

223. The section of the Chattooga River designated as Wild and Scenic begins at its northernmost point, Grimshawes Bridge on USFS lands.

224. Shortly downstream, the Wild and Scenic River flows through private lands for approximately 1.7 miles before reentering USFS lands for the remainder of its journey to Lake Tugaloo.

225. In all alternatives, the USFS would unlawfully ban floating on this section of the Headwaters.

226. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the WSRA.

227. One ORV that could easily be protected in this reach is recreation, and floating is the one form of recreation requiring little or no stream bank access, and yet the USFS banned this use without analysis in their EA and 2009 Amendment.

228. The consideration of paddling the upper half of the Chattooga Cliffs reach is simply discounted by the USFS as “out of scope” in the EA’s “Other Concerns” section.

229. The USFS state: “This issue is outside the scope of this proposal. The Forest Service does not encourage trespass on private lands.”

230. Aside from the upper Chattooga, the USFS does not ban uses (like paddling, hiking, hunting, etc) because recreationists may stray onto private lands.

231. Virtually all public lands are contiguous with private lands. Thus, without considering its legal obligations, the USFS simply chose not to consider recreational activities on this stretch of the Headwaters for which Congress had found floating to be an outstanding value.

232. While the EA is silent on why the reach was considered out of scope, a memo from the Southern Region Planning Staff, titled “Recommendations Regarding the Range of

Alternatives For Management of the Upper Chattooga River,” dated September 25, 2007, explicitly advised that this section of river be eliminated from analysis:

Although two identifiable stretches of private lands are located in North Carolina along the Chattooga River, the uppermost potential location to put in for recreational boating and general recreational access occurs at Grimshawes Bridge (County Road 1107) in North Carolina. The land on the north side of the bridge is part of the National Forest System, while the south side of the bridge marks the beginning of the Rust property.

Boaters putting in at this location and wishing to continue down the river would have to pass through the Rust property, which would put them at risk of potentially committing trespass. The private land interests in this segment of the river have expressed their opposition to public boating and general public use through the Rust property at any time and under any conditions. It is likely that any member of the general public attempting to use this section of the river would face legal action brought by the landowners.

233. In a letter dated September 26, 2007, then Forest Supervisor Jerome Thomas advised John Cleaves, the Chattooga River Analysis Core Team Leader and Interdisciplinary Team Leader:

In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper

Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river.

234. This direction is directly contrary to law.

235. The USFS owns a canoe launch site immediately upstream of Grimshawes Bridge with road access. The site – which was labeled “the beginning of rafting waters” in the USFS 1971 study, allows boaters to access the Headwaters without entering upon any private land.

236. Boaters may proceed downstream from this point for 52 continuous river miles of world class whitewater without even setting foot on any private property. Before the illegal ban, this was the regular custom of hand-powered canoeists and kayakers like the individual plaintiffs.

237. The USFS has well established authority to regulate – and allow – paddling through private lands on Wild and Scenic rivers based on the Property Clause of the Constitution. In *U.S. v Lindsey*, the court ruled: “It is well established that this [Property] clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters.” 595 F.2d 5 (1979). “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.” *Id.*

238. This authority overrides any conflicting state laws, based on the *Supremacy Clause* of the Federal Constitution.

239. This authority is clearly stated in the Forest Service Manual chapter addressing river recreation management:

Administration of the rivers within the National Forest System falls under the general statutory and regulatory authorities, including mining and mineral leasing, laws, that apply to lands. The basic authority to regulate public use of waters within the boundaries of a National Forest *or Wild and Scenic River* derives from the property clause of the U.S. Constitution as implemented through the laws pertaining to the administration of the National Forests. The authority of the Secretary of Agriculture to regulate the public use of waters found at 16 USC 551 has been upheld in many court decisions. The most notable cases are: *United States v. Lindsey*, 595 F.2d 5 (1979). The court held that within a federally designated area the Federal Government had the authority to regulate camping on State-owned land below the high water mark of a river. *United States v. Richard*, 636 F.2d 236 (1980) and *United States v. Hells Canyon Guide Service*, 660 F.2d 735 (1981). The courts held that the Forest Service can regulate use of a river notwithstanding the fact that users put in and take out on private land.

240. The Forest Service Manual is clear: the Forest Service retains authority to regulate the use of a river and the National Forest lands on the shorelines whether it is navigable or nonnavigable. Failure to do so is arbitrary and capricious, an abuse of authority and otherwise contrary to law.

A 2003 GAO Report titled: *FRESHWATER SUPPLY: States' Views of How Federal Agencies Could Help Them Meet the Challenges of Expected Shortages* reached a similar conclusion:

The *Property Clause* permits federal regulation of water as necessary for the beneficial use of federal property.

241. The USFS must protect the ORVs of the Upper Chattooga River as it flows through private lands, yet elected not to even consider this section in their EA, despite being directed to do so by the USFS Chief and required to do so by applicable law.

242. The USFS abdicated its responsibility to protect and enhance the Chattooga River and support its recreational enjoyment, thus violating the Wild and Scenic Rivers Act.

243. The USFS violated the directives of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses in the Chattooga river corridor of the Ellicott Rock Wilderness.

244. Not only does the USFS's omission of the uppermost two miles violate the Administrative Procedure Act, it also violates the WSRA, and NEPA. The entire upper stretch of the Chattooga was historically open to boating – even when the entire reach was private property.

245. All alternatives addressed in the EA propose a ban on the upper half of the Wild and Scenic Chattooga Cliffs reach without any rationale, analysis, or justification. There is no

discussion of the basis for the agency's failure to consider alternatives other than banning paddling, except a single sentence claiming the reach is "outside the scope of this proposal."

246. Banning floating on this reach is without a legal or rational basis and is a significant federal action limiting the public's legal rights.

247. The USFS has not conducted a user capacity analysis or collected any recreational information on this portion of the Headwaters on which to base a decision.

248. The public has been banned from floating this reach even during the USFS one-time on-river assessment in 2007. The USFS conceded this point in a memo from the Southern Region Planning Staff, titled "Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River," dated September 25, 2007:

Additionally, information regarding the ability to float and recreate on this stretch of the river and the environmental impacts of such uses *is incomplete and inconclusive*. To date, the Forest Service has been unable to secure the access needed from private land interests in this segment to assess conditions in the area. Therefore, the agency is limited in its ability to conduct an environmental assessment of alternatives which would permit boating and other recreational uses of the general public along this stretch of the river.

249. The USFS claims it could not study a federally protected river because adjoining private property landowners would not grant the USFS access. Yet, no permissions or access is required.

250. Boaters can enter the river on USFS land immediately upstream of Grimshawes Bridge and float the entire stretch through private property without setting foot on any private land. The arbitrary exclusion of this area from analysis violates NEPA and the APA.

251. In addition, because the agency failed to analyze floating use through the reach, the USFS believes it must therefore ban paddling – thus exacerbating its previous arbitrary and capricious decision.

252. The river should be open to paddling until conditions prove limits are needed. Indeed, the last time the USFS studied this section of river (in the 1971 study) they determined that floating this section was entirely appropriate. There has never been a contrary finding.

253. Furthermore, every whitewater river and stream in the entire region is open to kayaking and canoeing without any limits thereon. The USFS assumption that in this case the default management of the river should include a complete paddling prohibition is wholly inconsistent with normal management.

254. The Upper Chattooga River should be open to paddling unless there is a compelling reason to limit it. In this case, the USFS has failed to produce any such rationale. Because no rational basis is provided, this decision is arbitrary and capricious.

255. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

256. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

5. Boating Will Not “Substantially Interfere” with River Values

257. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

258. The WSRA provides that authorized uses should not be limited unless they ‘substantially interfere’ with the river’s remarkable values.

259. Whitewater boating on the upper Chattooga is one of that section’s outstandingly remarkable values. It is also an inseparable element of the recreation ORV.

260. All proposed uses of the upper Chattooga should be scrutinized under section 1281 to determine whether they ‘substantially interfere’ with, among other things, whitewater boating, not the other way around.

261. Because whitewater boating is an ORV, it cannot substantially interfere with itself, and therefore it cannot be limited (unless some form of limitation would actually protect and enhance the whitewater boating value), unless all other ORVs are limited equitably.

262. Whitewater boating does not ‘substantially interfere’ with any other outstandingly remarkable value.

263. While the USFS makes vague references to the *possibility* of some conflict between boaters and anglers or hikers, the record demonstrates that there will be *no* conflict between such uses, much less ‘substantial interference.’

264. Another important reason that the record fails to demonstrate ‘substantial interference’ is that the USFS’s reasoning is premised upon a false assumption: that whitewater boaters would be a “new” user group.

265. The USFS vague projections of conflict erroneously pit a “new” user group against “existing” user groups.

266. The reason the USFS attempts to designate whitewater boaters as a “new” user group is because the two prior (1976 and 1985) LRMPs also banned whitewater boating in violation of section 1281.

267. If any decision alters the *status quo ante*, it is the decision to ban a historical use that is cited in the Study as an important river value.

268. Boating is not “new” to the Chattooga.

269. Boating has been an important form of recreation on the entire reach of the Chattooga River for more than 250 years.

270. Accordingly, the USFS’s “new” versus “existing” analysis of conflict is based upon a false assumption and cannot substantiate vague claims of user conflicts.

271. Even if everything in the EA is accepted as true, there is no evidence that whitewater boating “*in fact substantially interferes*” with other values.

272. Unless there is clear evidence that floating ‘substantially interferes’ with outstanding river values, the USFS cannot even *limit* boating—much less ban it.

6. The USFS has not performed a User Capacity Analysis for the W&S upper Chattooga River

273. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

274. The Wild and Scenic River Act, as recognized in the Decision on American Whitewater’s appeal of the 2004 Revised Land and Resource Management Plan required the Sumter National Forest to conduct a user capacity analysis.

275. User capacity analyses are mandatory as a basis for managing both the types and levels of use.

276. The EA and 2009 Amendment do not state a total recreational capacity for the Upper Chattooga River, or capacities for individual types of use. Therefore, it is not a user capacity analysis. *See* Haas Declaration. The Haas Declaration is incorporated here in.

277. The Integrated Report (Shelby and Whittaker 2007) is not a user capacity analysis and identifies no capacities for the river corridor.

278. Without a user capacity analysis showing that boating must be limited to protect the resource, the USFS has no basis to limit boating.

279. The National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas (the “Secretarial Guidelines”) addressed user carrying capacity. 47 Fed. Reg. 39,454 (Sept. 7, 1982).

280. The Secretarial Guidelines define “carrying capacity,” as “[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and free flowing character of the river area, the quality of recreation experience, and public health and safety.” *Id.* at 39,455.

281. The Secretarial Guidelines state that:

“[s]tudies will be made during preparation of the management plan and periodically thereafter to determine the *quantity and mixture* of recreation and other public use *which can be permitted* without adverse impact on the resource values of the river area.

Management of the river area can then be planned accordingly.”

Id. at 39,459 (emphasis added).

282. *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, recently held that:

The Secretarial Guidelines also require that a component's management plan state the *kinds and amounts* of public use which the river area *can sustain* without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.

283. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation of the principles and practices of the recreation resource planning profession.

284. The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River* (USDA Forest Service, August 2009) (EA) fails the test of adequacy on several fronts.

285. Visitor capacity is not adequately addressed in the EA, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year "visitor capacity analysis" effort in response to the 2005 Decision of Appeal;

286. In the EA, the USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;

287. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is

a maximum number of people. No range of visitor capacity alternatives were offered for recreation activities.

288. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

289. Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase “visitor capacity” has replaced the phrase “user capacity” and are used interchangeably herein.

290. While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people.

291. A visitor capacity can be defined as the prescribed *number(s)* of recreation opportunities that will be accommodated based upon an area’s approved comprehensive management prescription (i.e., the area’s goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

292. Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area’s prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment.

293. The EA is virtually silent on the issue of visitor capacity.

294. The EA does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year “visitor use capacity analysis.”

295. The USFS EA does not define the appropriate kinds and amount of public use that can be sustained in the Chattooga River corridor, and is therefore does not contain a user capacity analysis.

7. The USFS Failed to Adequately Address Floating in the Wilderness in the 2009 Amendment to the 2004 plan.

296. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

297. The USFS virtually bans non-commercial, hand-powered floating on the 5.2 miles of Chattooga River that traverses protected wilderness.

298. Meanwhile, the USFS promotes continued access to the Ellicott Rock Wilderness for hikers, backpackers, campers and anglers in unlimited numbers.

299. Hikers, backpackers, campers, and anglers have greater impacts on wilderness than do non-commercial, hand-powered boaters.

300. The USFS improperly adopts a non-sustainable approach to use management of wilderness by promoting higher impact uses over lower impact uses.

301. The USFS virtual ban on primitive boating in the Ellicott Rock Wilderness ignores a primary mandate for administration of wilderness: that it be devoted to recreational use.

302. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

303. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

304. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

305. The USFS Amendment #1 to the Revised Land and Resource Management Plan for the Upper Chattooga River proposes to allow an average of *only 6 days* of non-commercial, hand-powered floating recreation on the section of Chattooga River within the Ellicott Rock Wilderness.

306. The Revised Land and Resource Management Plan decision to essentially ban boating in this area violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is commanded to protect and enhance.

307. The Revised Land and Resource Management Plan allocation of uses in the Ellicott Rock Wilderness undermines the primary purpose of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

308. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

309. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the*

American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

310. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

311. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

312. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

313. Wilderness areas must be “devoted to the public purposes of *recreational, scenic, scientific, educational, conservation and historical use.*” 16 U.S.C. § 1133(b) (emphasis added).

314. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

315. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

316. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

317. Banning non-motorized boating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

318. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

319. The USFS suggests that boating should not be permitted in the Ellicott Rock Wilderness because it might disturb anglers.

320. Unless a documented need for wilderness preservation is the basis, discriminating against user groups runs contrary to Congress’s intent to protect these treasured areas for the benefit of all wilderness compliant forms of recreation.

321. The USFS floating ban is not based on any threat to wilderness preservation.

322. The floating ban is based upon an untested suggestion that some users “might” be upset if a “new” user group is introduced into the wilderness.

323. The prediction that some users will not want to share simply does not justify ignoring the intent of Congress to make wilderness available to all Americans. Floating is not a “new” use; it has occurred on this WSR for more than 250 years.

324. When defining “wilderness” under the Wilderness Act, Congress contemplated the very type of use Plaintiffs seek here. “Wilderness” is defined as an area “where man himself is a visitor who does not remain.”

325. Kayakers and canoeists seek access to float from an existing upstream put-in, through the Ellicott Rock Wilderness, to an existing take-out point downstream of the wilderness.

326. This low impact activity will take place in less than a single day. In other words, paddlers seek to enjoy a primitive area in which they will be visitors who do not remain—a use that not only comports with, but helps define wilderness.

327. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

328. Thus as a primitive recreation opportunity, floating is wholly consistent with, and actually incorporated into, the Wilderness Act's definition of wilderness.

329. Primitive boating must be permitted in the Ellicott Rock Wilderness absent clear proof that wilderness preservation would be jeopardized.

330. A management decision that favors higher-impact uses over lower-impact uses is inconsistent with the Wilderness Act.

331. Favoring higher impact uses over lower impact uses undermines the goal of wilderness preservation, which is to preserve (*i.e.*, lessen impact on) the wilderness characteristics of a protected area.

332. The USFS should allow non-commercial, hand-powered boating in the Ellicott Rock Wilderness at least to the extent it allows other higher impact uses.

333. The Chattooga River only flows through one wilderness area: the Ellicott Rock Wilderness.

334. Paddlers seek access to the Ellicott Rock Wilderness in order to enjoy its scenery and the high quality whitewater boating.

335. While nominally addressing encounter standards and use limits, the USFS's preferred alternative *artificially increases* recreational use by supporting the stocking of trout adjacent to a Wilderness area and in a Wild and Scenic River, while banning natural floating use.

336. In the EA, the USFS admits that "[t]he angling trends on the Chattooga also depend on stocking and regulation stability." The agency has reported that they support the *stocking of over 70,000 exotic game fish* annually in the Upper Chattooga River to artificially increase recreational use. *Shelby and Whittaker* p. 19.

337. At the same time as this environmentally harmful stocking program occurs, the USFS has virtually banned floating, thereby decreasing recreational use in the Wilderness area.

338. In a Wilderness area on a Wild and Scenic River, natural conditions should prevail. The upper Chattooga River naturally provides high quality boating opportunities during times of high flow and a moderate quality angling experience at low flows.

339. There is no justification in the EA for artificially increasing the angling experience while effectively banning another wilderness use, floating.

340. The most Wilderness compliant alternative would have a natural balance of boating and angling – without conflict, with little recreational overlap, and without the collateral impacts of stocking exotic game fish.

G. The USFS Failed to Treat All Users Equally as Required by the Chief's Decision and applicable laws.

341. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

342. The upper Chattooga is a section of a public river that Congress required the USFS to protect and enhance for the benefit of all Americans who wish to engage in primitive recreational activities. Yet members of the public who would like to float the upper Chattooga are the only class of persons to be singled out and denied access to the upper Chattooga.

343. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

344. The Decision on American Whitewater's appeal confirms that if use is to be limited it must be limited equitably. The EA, the alternatives, and the preferred alternative are not equitable. Each alternative proposes to radically limit or ban paddling use while other uses are virtually unlimited.

345. The USFS preferred alternative is to allow only six days of boating on one small stretch of the Headwaters, but even admits that only three of the six days would actually be available to paddlers. *Shelby and Whittaker 2007*, p. 36-37. Three days of paddling versus 365 days for other uses is not equitable.

346. The USFS has instituted the harshest possible management on one Wilderness Compliant use – a total ban on much of the river – while allowing all other uses unlimited access.

347. Only members of the floating public are required to receive advance permission to access the Headwaters. Putting the decision-making on whether the water is suitable to float on a government official will reduce boating opportunities (below the three days granted by the USFS), reduce safety, discourage use, slow permitting, and cause government waste. This practice is not conducted on any other river in the Nation.

348. No other user group is required to wait for last minute permission to recreate on the Upper Chattooga River.

349. Appendix B of the EA asserts that boaters *may* have to pay fees to access the Upper Chattooga River through the commercial website Recreation.gov. This website is an online reservation service used for camping in designated campgrounds and other resource intensive overnight-use management.

350. No other user group—hikers, swimmers, backpackers, anglers, hunters, and other users—is or will be required to pay a fee to engage in their chosen form of backcountry travel. Only paddlers will have to pay to use the river.

351. Appendix B of the EA asserts that boaters may have to use the commercial website Recreation.gov prior to accessing the upper Chattooga River. This website is an online reservation system.

352. No other user group has to register online prior to visiting and traveling in the Upper Chattooga watershed.

353. The USFS has decided to limit paddling to the three winter months of December, January, and February, while all other uses are allowed year round.

354. Winter days are often cold and they are short, both of which potentially increase the difficulty of floating in the Winter and decrease the enjoyment.

355. While Winter boating in the Southeast is common, no other user group is restricted to using any section of the Chattooga at the least optimal time of year.

356. The USFS has decided to allow a miniscule amount of paddling on a small section of the river, while existing user groups have unlimited access to the entire river corridor. Specifically floating can only occur on the Ellicott Rock Reach, and if they are willing to carry their boats 1.5 miles, floaters can enjoy part of the Chattooga Cliffs Reach.

357. Floating is completely banned on the upper half of the Chattooga Cliffs reach, the Rock Gorge, Nicholson Fields, and all tributaries. Floating is a place-based activity, and banning a large section of a Wild and Scenic River has a significant impact on paddlers.

358. The USFS has decided to only allow paddling to occur at rare high flows over 450 cfs, while no other user group is limited by flow. People are permitted to swim and fish on the entire length of the Chattooga regardless of the rate of flow.

359. This flow constraint eliminates the opportunity to enjoy moderate flow days which many members of the floating community find less challenging and more enjoyable. In fact, according to Shelby and Whittaker this plan eliminates one third of the optimal paddling flow range and all of the technical boating opportunities.

360. The USFS did not collect, refer to or rely on any scientific or empirical data to demonstrate that flow rates of 450 cfs and above provide a suitable floating experience. No such data exists.

361. The effect of the flow and seasonal limits imposed by the USFS is that an average of 6 days annually will be hydrologically viable for paddling, but only three of those days will likely be usable based on hydrologic complexity. *See* Shelby and Whittaker (2007).

362. While paddlers are given three days to recreate, all other users are given 365 days.

363. Due to the flow and seasonal restriction imposed on boaters by the USFS, every boater who wished to paddle the middle one third of the upper Chattooga (the only section of the upper Chattooga where boating is not completely banned) will be forced to do so during three days. All other user groups are permitted to use the entire river on any day of the year.

364. The chance that a significant number of paddlers will descend the river in a single day and possibly inadvertently violate standards is greatly increased by this arbitrary and capricious and illegal management choice. The USFS confirms that:

However, alternatives 4 and 8 propose an “adaptive management” component that could use registration, monitoring or surveys to determine the need for implementation of additional use restrictions.

365. Not only will the USFS consider additional use restrictions; the USFS will also single out paddlers for additional unique restrictions. Specifically, one of the monitoring questions the USFS intends to pursue is:

Above Highway 28 is the solitude component of the recreation ORV being maintained? Are the encounter levels within

established desires and estimates? Has the experience of historical recreation users been diminished due to the introduction of boating?

366. The USFS has created conditions that encourage relatively large numbers of paddlers to descend on a small portion of the river in a very small three day window. The USFS will then monitor this use and hold paddlers to a unique and biased standard.

367. The USFS is setting up paddling to fail on the Upper Chattooga.

368. The USFS has decided to limit all existing users indirectly only after standards are violated, and to limit paddlers directly immediately, prior to any standard violations.

369. Specifically, the USFS is immediately completely banning paddling on most of the upper river, and is requiring permits and harsh seasonal and flow limits where paddling is allowed.

370. On the other hand, existing users have no limits whatsoever until encounter standards are violated on 20% of days. This is a clear violation of USFS policy.

371. The USFS will judge the acceptability of existing use, based on encounter standards being violated less than 20% of days annually. Paddlers must meet a much more stringent standard.

372. Without actual visitor capacity numbers, so-called “encounter standards” are meaningless and are prone to grossly subjective enforcement terms.

373. Paddlers will be judged based on their impacts on the “solitude” of the USFS preferred user type, on whether or not the “experience of historical recreation users has been diminished,” and on monitoring of large woody debris and portage trail needs.

374. Judging paddlers by different standards is not equitable, especially when the standards that could lead to elimination of paddling are based on nothing more than the opinions of existing user groups that vehemently oppose paddling access.

375. The USFS is managing the potential biophysical impacts of paddling and other uses in totally different ways.

376. The potential impacts of paddlers are managed by banning the use entirely, before an impact even could potentially occur, and without justification.

377. The proven and significant impacts of other uses are appropriately managed through technical fixes. The USFS EA confirms that technical fixes are the appropriate way to manage biophysical impacts.

378. The Biophysical impacts are not typically addressed through use/encounter limits, but through “technical fixes” (e.g.: campsite hardening/ rehabilitation/obliteration, trail reconstruction/realignment/ obliteration, etc.) or through education and regulation.

379. By managing the similar impacts for different user groups in different ways that are discriminatory towards one group, the USFS has failed to act equitably and its actions are arbitrary and capricious.

380. Based on the use limitations described above, the USFS has determined that most of the upper Chattooga River has a capacity of zero paddlers, and the remaining section has a capacity that is extremely close to zero.

381. In essence, the agency claims that one paddler descending the river would cause unacceptable and significant impacts.

382. At the same time USFS has failed to establish a single capacity for any other use, which is analogous to claiming a capacity of infinite other users. While others hike, fish and

swim in the Headwaters in unlimited numbers, the USFS claims a single paddler would have impacts so severe a total ban is justified.

383. The EA reports that natural flow alone adequately separates user groups on the Chattooga, as they do on every other river in the region.

384. The study results show that paddlers and anglers prefer different flows. There is simply too little water to navigate the river when angling is really good, and too much water to fish when boating is really good.

385. Flows alone separate uses. Specifically, there are only 34 days each year when flows are optimal for boating (i.e. 350-650 cfs), and paddlers will only be able to use half (17) of those.

386. On those days angling is “Lower Quality.” Based on the USFS goal of protecting “High Quality” angling, even if you accept their erroneous argument that a few, random encounters with paddlers would ruin a day of fishing, they have no basis (or need) whatsoever for limiting boating at flows over 350 cfs.

387. The USFS has never explained why the simplest, cheapest, fairest, most common, and easiest to manage solution – allowing flows alone to passively separate uses – is not acceptable. Flows alone support high quality angling and paddling, and adequately separate uses.

388. The USFS clearly finds that encounter standards are already exceeded by existing users yet proposed no mitigation for these impacts.

389. Conversely, the USFS chose to initiate limits on non-boating uses when encounter violations reach 20% of days (73 days). That decision is both arbitrary and a clear sign that they do not wish to curtail existing impacts.

390. The EA readily admits that “the encounter limits established [described in alternative 8] for the Ellicott Rock Wilderness are closer to the desired tolerances in the literature (Whittaker and Shelby 2007) when compared to alternatives 3-5. The USFS decision to limit paddlers based on encounters that have not occurred and will never reach 20% is arbitrary and capricious.

391. To ban paddling, which has virtually no effects on encounter standard violations when allowed in unlimited numbers (like all other uses), while allowing uses with significant encounter standard violations to remain unlimited is absolutely inequitable and capricious.

392. The USFS has instituted paddling limitations as the sole direct management tool, while all other larger and more damaging uses are allowed in every location, in every time, in unlimited numbers, in every alternative that allows paddling.

393. Paddling is anticipated to be the smallest and lowest impact use on the river, and it is unreasonable to manage environmental or social impacts by directly managing only the smallest and lowest impact use.

394. USFS estimates in Shelby and Whittaker 2007 and in Upper Chattooga River Visitor Capacity Analysis Data Collection Reports concluded that unlimited paddling would make up roughly 2% of total use.

395. The EA fails to document a single impact of paddling on the river resource.

396. While it may be true that additional boaters may have increasing impacts, the USFS admits that so too will increasing numbers of hikers, anglers, and campers.

397. The USFS concedes that non-boaters cause significant residual impacts on the Headwaters.

398. Since non-boating use causes significant impacts, the USFS must analyze the effects of all recreationists on the corridor, and propose limits that address all of these factors.

399. The USFS EA indicates that some recreational impacts are acceptable because recreation is generally good for society – except apparently floating. This double standard permeates the EA and is arbitrary and capricious.

400. The EA shows that boating is be the slowest growing use on the Chattooga Headwaters:

- Angling is expected to grow and has recently grown.
- Day hiking in the South will increase by about 48% by 2020.
- Backpacking in the South will increase about 23% by 2020.
- Whitewater boating is flat or declining on Chattooga and Nationally.

401. By harshly managing the smallest and slowest growing use while allowing all other uses unlimited access the USFS is acting arbitrarily and capriciously.

402. The USFS clearly values the solitude of anglers higher than the solitude - or even the ability to experience the river at all - of paddlers.

403. The inequitable allocation of solitude to anglers seems to be the primary reason behind the USFS' decision to ban floating.

404. The EA concedes that even where paddling use is unlimited, solitude for all users remains intact.

405. The agency has elected to limit floating to protect anglers' solitude when an alternative with no paddling limits (on the sections considered by the USFS) was found to maintain outstanding opportunities for solitude. Both of these aspects of the USFS decision are arbitrary and capricious.

406. The EA suggests that the USFS rejected the potential permit system in alternative 2 (which proposed permits for all users) because use limit systems require administrative effort,

require users to plan ahead and compete for limited permits, and would displace some proportion of existing use on high use days.

407. If this is sufficient justification to eliminate alternative 2, it should be sufficient justification to eliminate the selected alternative and others that would require permits for paddlers.

408. The USFS manages thousands of whitewater rivers. By far the most common management of non-commercial floating is no management at all. To ban floating on the Chattooga Headwaters and nowhere else is inequitable, arbitrary and capricious.

409. The USFS has never banned boating to benefit anglers – except on the Chattooga.

410. On perhaps a few dozen rivers nationwide the USFS limits paddling by permit. In virtually all of these cases the rivers take several days to paddle, and the limits are designed to ensure campsites are available.

411. In virtually all of these cases, where permits are required, paddling is the largest use of the river corridor, and thus is the focus of management activities. In all of these cases paddling limits are designed to protect and enhance the paddling experience.

412. The upper Chattooga is mainly a day-use river on which paddling will comprise a relatively tiny portion of the total use, and limits are therefore inconsistent with USFS practice.

413. Angling use on the Headwaters is largely artificial, but the USFS has arbitrarily selected angling as the exclusive use to protect and enhance on the upper Chattooga.

414. The quality of fishing on the upper Chattooga is created by the stocking of over 50,000 exotic trout a year by helicopter and trucks.

415. Stocking of non-indigenous fish has a detrimental effect on indigenous fish. *See* Bain Declaration filed with Motion for Temporary Restraining Order. The Bain Declaration is incorporated here in.

416. The artificial fishery is a primary determinant of the angling experience.
417. Floating, however, is a nature-based activity, which is dependent on only the natural condition of the upper Chattooga River.
418. It is inequitable and unlawful to manage for an artificial use to the exclusion of a nature based use on a Wild and Scenic River and in a Wilderness Area.
419. The USFS is managing for a user group that in this location claims zero tolerance of other uses.
420. Nowhere else in the Nation are anglers known to claim zero tolerance of paddlers on a Wild and Scenic River managed by the USFS.
421. The USFS even forbids other uses during conditions when anglers are not even recreating on the river.
422. The USFS is required by law to manage for compatible uses.
423. Wild and Scenic Rivers must be shared equitably among users.
424. Equitable, indirect, means of reducing fishing exist and should be used before a ban on floating can legally occur.
425. One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.”
426. Nevertheless, the USFS currently allows large scale stocking programs on the upper Chattooga. In addition to large scale stocking programs there is a year round season with large creel limits.
427. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor.

428. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning or direct limiting of any other use.

429. USFS has ignored the massive impacts of industrial scale stocking and fish rearing on the upper Chattooga River, yet has banned floating. While the USFS makes much of the “high quality angling experience,” they clearly fail to describe or value the high quality paddling experience that the upper Chattooga provides.

430. For individuals with the appropriate skills and experience, the upper Chattooga is a unique and incomparable whitewater river.

431. A USFS-sanctioned Headwaters float revealed a beautiful stream filled with world class rapids, stunning views, and an intimate and remote feel.

432. There are extremely few opportunities in the region to paddle a Wild and Scenic River, a river flowing through a Wilderness Area, or a river flowing through a Roadless Area. The upper Chattooga provides all three.

433. The upper Chattooga is a high quality and unique river for skilled floating, and denying any portion of this river to paddlers, while leaving it fully open to all other uses is inequitable and unjustified.

H. The Forest Service Reliance on Unsubstantiated Possibility of User Conflicts is Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law

434. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

435. The USFS failed to document any conflicts on the upper Chattooga between boaters and anglers, or any similar stream in the region.

436. The USFS erroneously contends that by establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

437. The USFS has failed to prove that any amount of boating would have any impact whatsoever on trout fishing, or that there is any relationship whatsoever between boating and trout fishing quality.

438. USFS failed to show how flow, season, or reach restrictions on floating are needed to maintain high quality trout fishing.

439. USFS failed to show that banning floating would reduce conflicts even if conflicts did exist.

440. USFS has created a record that fully supports allowing boating, and its conclusion is simply not supported by the data.

441. Virtually all “creek boating” resources in the Southeast are also trout fishing resources (although the opposite is not true).

442. On these many other rivers, angling, paddling, and hiking coexist with no reports of any type of conflict.

443. The USFS failed to document a single angler-boater conflict occurring on the upper Chattooga or any similar stream in its EA.

444. Paddling and angling uses rarely overlap because of different flow preferences and when they do, this interaction is amicable.

445. Many “creek boaters” are also cold water anglers. Additionally, many cold water anglers prefer to fish from canoes and kayaks.

446. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the upper Chattooga River.

447. If boating is allowed without direct limits, anglers will have an average of 305 days each year to enjoy the Chattooga River.

448. The majority of remaining 60 days will be low quality angling days due to high flows which make fishing more difficult and wading less safe, while at the same time offering favorable conditions for paddling.

449. The USFS has decided to impose limits on non-boating uses only if and when standards are exceeded, beginning with indirect limits. In the “Proposed Action” section of the EA the USFS states it will manage encounters for existing users using indirect measures, “Manage encounters among existing users by limiting trails, campsites, group size and parking.”

450. The Proposed Action then recites a litany of direct measures *on boaters only* that they will use to limit encounters. “Manage encounters among users by establishing zone, season, group size restrictions and flow limits (including prohibition in some alternatives) on boating opportunities.”

451. In all proposed USFS management alternatives (except for some reaches in Alternative 8), the USFS imposed direct limits on paddlers before any standards were exceeded. However all other users have unlimited access until standards are exceeded to an unacceptable level. This is arbitrary and capricious.

452. Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters.

I. The 2009 Amendment, Without Notice, Bans Floating on Tributaries of the Upper Chattooga.

453. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

454. The USFS arbitrarily and capriciously decided to ban paddling on all tributaries of the Upper Chattooga River.

455. The USFS offered unfounded “concerns” as a justification for its failure to study the tributaries.

456. This is a new prohibition on paddling, made without any significant analysis.

457. The USFS erroneously believes that the tributaries to the Upper Chattooga River are currently banned to boating. The 1986 Sumter National Forest Plan, which currently dictates the management of the river, states:

Use patterns have stabilized on the river, although use continues to rise. Floating is limited to the 26 mile portion below Highway 28 Bridge and the West Fork’s lower 4 miles in Georgia.

458. The plan contains no mention of tributaries of the Chattooga River or its West Fork. The quote above refers to “*the river*,” not the tributaries of the river. Because the tributaries are not explicitly banned to boating, they are thus open to paddling as is every other stream in the region.

459. Several of these tributary streams are viable paddling resources, albeit rarely available based on the high flows required for recreational enjoyment. Banning a recreational use is a major federal action requiring analysis under NEPA and compliance with the APA.

J. There is no Rational Basis for Selecting 450 Cubic Feet Per Second (cfs) as a Flow Below Which No Floating Shall Occur.

460. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

461. The 2009 Amendment in the EA bans boating on several reaches and only allows boating on one reach if flows are above 450 cfs. There is no rational nor articulated basis for the selection of that flow.

462. The selection of 450 cfs as a cut off eliminates many optimal boating opportunities (that are not optimal angling flows), and forces paddlers to run the river at higher flows which some paddlers may not prefer.

463. Flows between 350 and 450 cfs for example offer *optimal* boating and *unacceptable* fly fishing. Shelby and Whittaker state that:

For many days in the “high overlap” period [350-650 cfs], boater-angler conflict and related capacity problems would be unlikely.

These are lower quality angling days for all but bait anglers, and they tend to occur in winter when bait angling use is low. Some fly and spin anglers certainly fish these flows...but they have lower quality conditions in comparison to the other 320 days per year that they have lower flows.

464. However, the EA states that “At these overlap flows [referring to all overlap – both high and low] some users of each group could be present (if boating were allowed) and encounters could create impacts and conflict.”

465. Whittaker and Shelby 2007 conclude that if any management of boating and angling would be acceptable, it would be required during the “low overlap” period between 225-350 cfs.

466. There is no scientific basis in the record for boating (or angling) limits based on a 450 cfs cut-off, or above 350 cfs. Thus the preferred alternative is arbitrary and capricious.

467. In addition, the EA provides that “450 cfs is near the bottom end (within 100 cfs) of the optimal range for whitewater boating opportunities,” while in fact, the bottom end of the optimal flow range for standard boating is estimated to be at or below 350cfs.

468. In this context, 350 is not “near” 450. The difference makes an enormous difference in the number of boating opportunities and is extremely significant for paddlers.

469. Even when suggesting an alternative that would provide a miniscule amount of time where boating can occur, the Forest Service has unlawfully treated paddlers unequally by selecting a flow rate that is at the highest end of the range where fishing can comfortably take place, yet well above the low end of the flow rate where optimal boating can occur.

470. The USFS acknowledges that the procedure for allowing the minimum boating on one stretch depends on their staff somehow predicting a boatable day that will then be made available for paddling use. The USFS States: “A new gauge at Burrells Ford would be used to help the Forest Service to declare a boatable day. (See Appendix C).” EA 29. The notion that one or more USFS officials will have the job of watching weather reports and stream gauges and then announcing a legal day of paddling is unrealistic.

471. Like many southern Appalachian streams, the upper Chattooga River is a flashy and unpredictable watershed. Paddlers make their own last minute decisions about where and when to paddle. Shelby and Whittaker 2007. 84-85.

K. The 2009 Amendment is Inconsistent with USFS Policy and Precedent

472. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

473. The USFS decision on the Chattooga flies in the face of precedent and accepted principles of river management.

474. River managers strive to provide the public with high quality non-motorized recreation experiences of all types.

475. River managers do not single out a single user group for management preference, and they do not limit uses unless absolutely necessary.

476. The USFS likely manages thousands of headwater streams. Virtually all of them are paddled and fished.

477. Nowhere in the United States, other than under Amendment 1 to the Revised Land and Resource Management Plan for the Chattooga, does the USFS:

- Ban non-commercial paddling (except one unboatable gorge in Oregon)
- Limit non-commercial paddling to certain moderate and high flow ranges
- Limit non-commercial paddling to certain seasons
- Require advance online reservations for any day-use.
- Require a fee merely to paddle (as opposed to access) a river

478. On no headwater stream in the entire region does the USFS impose any limit whatsoever on noncommercial floating. This is simply because floating steep headwater streams is a small and low-impact use that the agency supports everywhere but the Chattooga.

479. In the western United States on some large, high-demand rivers the USFS requires that paddlers acquire limited permits to ensure that the paddling experience remains high quality and that camping capacity is not exceeded. Those are not issues that were identified by the Forest Service in the Chattooga EA.

480. The paddling community broadly supports these policies. In those instances other uses typically do not have to acquire a permit because other uses are relatively much smaller and not in competition for the same resources.

481. On the Chattooga, boating is anticipated to be the smallest use and will not be in competition for resources with other visitors, therefore no unique boating limits are justified.

482. The discriminatory boating ban on the Chattooga is an unsupported, arbitrary and capricious management anomaly.

483. In four years of analysis the USFS failed to document a single biophysical impact of paddling, a single conflict, or that paddling would in any way cause the loss of the angling experience.

L. The 2009 Amendment Offers No Rationale for Allowing Boating Only In The Winter

484. Appellants allege again each and every allegation in the preceding paragraphs as though set forth in full here.

485. The EA offers no rationale or justification for allowing paddling only in the winter in certain alternatives. Winter days are shorter and colder, making them less desirable for paddling trips. The EA finds that:

Angler/boater encounters are more likely to occur in the winter months (December through February) when both groups are on the river in the middle of the day. As the weather warms by mid-March and April, boating concentrated in the middle of the day

would likely produce relatively fewer boater/angler encounters as anglers are more likely to fish in the early morning before temperatures rise (Whittaker and Shelby 2007)

486. Thus, selecting an alternative that allows paddling only in the winter and not during the rest of the year with the aim of reducing encounters is arbitrary and capricious.

M. The 2009 Amendment violates the requirements of NEPA.

487. Appellants incorporate the allegations set forth in the others parts of this Complaint as if fully set forth herein.

488. Under NEPA, the court must ensure that agency decision makers have taken the requisite “hard look” at the environmental consequences of its proposed action and that the agency decision is founded on a reasoned evaluation of the relevant factors.

489. In reviewing whether an agency’s decision complies with NEPA, a reviewing court must ultimately employ two criteria: it must decide (a) whether the agency in “good faith objectivity” has taken the required “hard look” at the alternatives; and (b) whether the discussion is detailed enough to permit those who did not participate in its preparation to understand and consider meaningfully the reasoning, premises, and data relied upon, and to permit a reasoned choice among different courses of action.

490. USFS decisions like the 2009 Amendment to the 2004 RLRMP must take a “hard look” at the environmental consequences of the proposed use and apply a “rule of reason.”

491. To take the requisite “hard look” agencies must consider and include some quantified or detailed information, otherwise, neither the courts nor the public, in reviewing the Forest Service’s decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

492. In particular, general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.

493. In the 2009 Amendment, just as in the 2004 RLRMP, the USFS makes vague, unsubstantiated statements about ‘possible’ effects without providing any hard evidence that impacts have or would occur.

494. The USFS took *4.5 years* to amend the illegal boating ban and failed to document a single impact of boating. Without offering any hard data to support its conclusions — and including unsubstantiated statements about ‘possible effects’ and in place of hard data—the USFS fails to take the requisite “hard look” at recreational use on the upper Chattooga River. The USFS has violated NEPA.

495. In addition, the NEPA’s implementing regulations require agencies to *rigorously explore* and *objectively evaluate* all reasonable alternatives.

496. The USFS wholly failed to analyze reasonable alternatives that were in compliance with federal law. The USFS proposed alternatives leading up to the 2009 Amendment were fundamentally flawed, including in the following ways:

- No alternative proposes a capacity for uses
- No alternative analyzed allowing boating or any other form of recreation immediately below Grimshawes Bridge adjacent to private lands.

- No alternative analyzed banning boating on tributaries of the upper Chattooga River
- No alternative protects or enhances boating
- No alternative bans any use except boating.
- No alternative treated existing uses and boating equitably
- No alternative considered immediately directly limited existing users
- No alternative considers the role of stocking exotic trout
- All alternatives immediately directly limit boating

497. By failing to consider reasonable alternatives and by failing to provide any scientific evidence to support the boating ban, the USFS's 2009 Amendment violates NEPA.

VI. Conclusion

A. Appellants have shown that the decisions herein appealed must be modified

498. Appellants have shown that the decisions herein appealed violate applicable laws, regulations, and policies.

499. Appellants have shown that the decisions herein appealed are based on information that is inadequate, biased, flawed, and misapplied.

500. Appellants have shown that the decisions herein appealed are not rationally based on the full record for this issue.

501. Appellants have shown that the decisions herein appealed are precedential, and contradict the accepted practices of river management.

502. Appellants have shown that the decisions herein appealed are inequitable, unfair, and discriminatory.

503. Appellants have shown that the decisions herein appealed will not protect or enhance the Chattooga River, will not resolve conflicts and disagreements, and will in every instance not meet their intended goals.

B. Appellants have shown that the relief requested herein is justified and is the defines the most appropriate management of the upper Chattooga River.

504. The relief requested by Appellants is consistent with all applicable laws, regulations, and policies and would survive any level of review.

505. The relief requested by Appellants is fully supported by the record for this project and by the scientific literature on related topics.

506. The relief requested by Appellants is not precedential, and is fully consistent with accepted practices of river management.

507. The relief requested by Appellants is equitable, fair, and not discriminatory.

508. The relief requested by Appellants will protect and enhance the Chattooga River, will resolve conflicts and disagreements, and will meet the goals of the USFS.

Thank you for considering this appeal. Please restore nationally consistent river management to the Chattooga River.

Sincerely,



Kevin Colburn
National Stewardship Director
American Whitewater

1035 Van Buren St
Missoula, MT 59802
(406)-543-1802

American Canoe Association

7432 Alban Station Blvd., Suite B-232,
Springfield, Virginia 22150.
540.907.4460, ext 106

Georgia Canoeing Association

P.O. Box 7023,
Atlanta, Georgia 30357.
(770) 421-9729.

Atlanta Whitewater Club

P.O. Box 11714,
Atlanta, Georgia 30355.
404-210-1067

Western Carolina Paddlers

P.O. Box 8541,
Asheville, North Carolina 28814.
828-230-4474.

NELSON GALBREATH, LLC

Cecil H. Nelson, Jr. SC Bar #4182 (Fed. ID #25211)
J. Nathan Galbreath SC Bar #75261 (Fed. ID #10157)
25 East Court Street, Suite 201
Greenville, South Carolina 29601
Telephone: (864) 232-3766
Facsimile: (864) 235-1420

PATTON BOGGS LLP

John D. Austin, Jr.

R. Brian Hendrix
2550 M Street, N.W.
Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 894-6315

Erik M. Dullea
1801 California Street
Suite 4900
Denver, CO 8020

Phone: (303) 830-1776
Fax: (303) 894-9239

Jeffrey T. Prudhomme
2001 Ross Avenue
Suite 3000
Dallas, TX 75201
Phone: (214) 758-1500
Fax: (214) 758-1550

ATTORNEYS FOR APPELLANTS

EXHIBIT 1

DECLARATION OF KEVIN R. COLBURN

AS PART OF AND IN SUPPORT OF

NOTICE OF APPEAL

My name is Kevin R. Colburn. I am the National Stewardship Director of American Whitewater. My areas of expertise include collaborative natural resource management, recreational in-stream flow studies, the ecology of large woody debris in streams, restoration ecology (emphasis on riparian areas and rivers), and certain aspects of recreational management.

The comments below are my review of the August 2009 “Environmental Assessment Managing Recreation Uses on the Upper Chattooga River” (the “EA”) and the Regional Foresters’ Decisions (the “2009 Amendment”). My comments are based on my research of technical and/or peer-reviewed literature and eight and one-half years involved in the management of the Chattooga and other rivers dealing with issues such as: management of Wilderness and Wild and Scenic Rivers; user capacity analyses; matters relating to recreational conflicts; solitude; and the impacts of fish stocking.

Credentials

I obtained a Master of Science Degree in Environmental Studies from the University of Montana in 2001. My thesis was focused on the ecological role of Large Woody Debris in stream recovery and restoration, and my coursework included aquatic ecology, environmental policy including the Wilderness Act and Wild and Scenic Rivers Act, and environmental ethics and the concept of place.

I obtained a Bachelor of Science in Environmental Studies from the University of North Carolina at Asheville in 1998. I conducted undergraduate research on turtles at a Southern Appalachian wetland and stream restoration site, where I also worked for over 2 years as a field ecologist collecting data on hydrology, soils, and other aspects of the area. My undergraduate coursework included plant ecology, soils, zoology, botany, math, and other aspects of environmental science.

I was hired by American Whitewater in May of 2001 to work on eastern river conservation and access issues out of an office in Asheville, North Carolina. Through collaborative interest-based processes, I spent three years in North Carolina negotiating complex settlement agreements resolving many ecological and recreational issues associated with the management of dams on the Cheoah (NC), Nantahala (NC), Tuckasegee (NC), East and West Forks of the Tuckasegee (NC), and Catawba rivers (NC/SC). As part of these processes I played an integral role in the development and implementation of controlled recreational instream flow studies that are designed to determine the minimum acceptable, optimal, and high challenge flow ranges for whitewater boating. These studies also addressed angling and environmental elements.

In 2004 I moved to Idaho where I took on additional national policy and western responsibilities,

and then to my current office in Montana two years later. I have worked on many complex river management negotiations including flows and access on the Ocoee (TN), Hiwassee (TN), Tallulah (GA), Bear River (ID), West Rosebud Creek (MT), Ausable (NY), Youghiogheny (MD), and others. I have also assisted with the management of river access areas owned by American Whitewater in North Carolina, West Virginia, and Kentucky. I have worked on national policy issues such as hydropower reform, Forest Service roadless area protection, and other river conservation initiatives. I have played a supporting role in the designation of rivers as Wilderness and Wild and Scenic.

I have been an active member of the River Management Society (RMS) since 2002, attending and presenting at related conferences. In 2007 I presented and participated on a RMS panel discussion with the Forest Service on the management of Large Woody Debris in rivers as it relates to recreation. In 2003 I gave a presentation on collaboration with Trout Unlimited at the “Partners in Stewardship” conference hosted by the National Park Service.

I have significant first-hand knowledge of whitewater boating resources in the Southern Appalachians, particularly Western North Carolina, and contributed significantly to the current guidebook for the region, North Carolina Rivers and Creeks, by Leland Davis. I have visited all upper Chattooga access areas, and hiked several portions of the river.

I have been the American Whitewater project manager for the Chattooga River issues since 2001. I believe I have read all available Forest Service publications regarding the Chattooga River. I have organized several Freedom of Information Act requests regarding the Chattooga River, and I have reviewed the government’s responses to these requests. Since 2001, I have been conducting exhaustive reviews of Forest Service documents related to the Chattooga River, and I have regularly prepared detailed comments to these Forst Service documents.

The Environmental Assessment Relied On By The Southern Region Forest Supervisors In The August 2009 Decisions are Incomplete And Flawed

VII. The USFS failed to consider and incorporate the comments of American Whitewater on the studies and reports that ultimately formed the basis of the EA.

Throughout the 4.5 year development of the EA, American Whitewater participated fully in the regulatory process. American Whitewater commented on numerous studies and reports.³⁰ These

³⁰ American Whitewater’s Comments on the “Chattooga River History Project Literature Review and Interview Summary” submitted on April 17, 2007;

American Whitewater’s Comments and Suggested Revisions Regarding the Draft *Upper Chattooga River Phase I Data Collection Expert Panel Field Assessment Report*, dated February 2007, and first made available to the public on April 2, 2007;

American Whitewater’s Comments on the USFS Report titled “Capacities on other Wild and Scenic Rivers: seven case studies” submitted on May 7, 2007;

American Whitewater’s Comments on Draft Environmental Impact Statement for the Revised Land and Resource Management Plan—Sumter National Forest;

American Whitewater’s Comments on the USFS Report Titled Capacity and Conflict on the Upper Chattooga River and authored by Shelby and Whittaker, submitted on July 3rd, 2007;

comments were universally ignored in the EA and the USFS selected Alternative 4, which was a flawed decision for all the reasons stated below and in the comments of American Whitewater.

The USFS published every study underlying the EA in only final form. While we offered comments, these comments never resulted in a revision to these documents. The USFS has unilaterally developed a flawed record. While this record is likely sufficient to allow appropriate forms of recreation (including paddling) to occur, it is wholly insufficient to justify any direct limits on use.

VIII. The stated biophysical justifications relied on by the USFS for its imposition of the Floating Ban are not persuasive and are not based on adequate information:

A. The USFS chose to collect inadequate data.

In the EA, the USFS opined at length about the potential biophysical impacts of allowing paddling to occur on the upper Chattooga River, however they have no basis in the record for these opinions. The USFS allowed only 2 days of paddling to occur during its 4.5 year long study. In those two days, and over the 4 years, it failed to document a single biophysical impact of paddling. Paddlers did and would access the river at existing high use access points at bridges, with the exception of the access to the uppermost reach to which the USFS artificially and unnecessarily required trail access. Once on the water they traveled downstream with only two mandatory portages and perhaps 2-3 more optional portages, all of which were made on bedrock in the streambed. There was no documented erosion caused, and no impact to vegetation or animals. The USFS has no basis whatsoever for their opinions about the biophysical impacts of paddling. Furthermore, non-commercial paddling is limited on no other river or stream in the region for biophysical reasons and the USFS offers no evidence of significant impacts where paddling use regularly occurs.

B. The analysis was biased against paddling in a manner that exaggerates potential biophysical impacts of paddling and downplays other impacts:

1. The EA weighs exotic species and their potential future effects over certain current benefits of nature based paddling.

USFS voices concern in the EA that the exotic Hemlock Woolly Adelgid will cause significant mortality in hemlocks along the Chattooga River over the next five to ten years. It then postulates that those trees will fall into the river and impede paddlers, possibly causing an increase in portages.³¹ The agency then postulates that this increase in portage trails could have impacts on vegetation, but in all of the management alternatives, the USFS bans the removal of fallen trees from the river. Thus through its own rules, the agency is creating a situation where portage would sometimes be necessary. The logic of this management approach is flawed for several reasons. The comments of American Whitewater addressed the deficiencies in the

³¹The word portage as it refers to paddling is the act of carrying a boat, raft, canoe, or kayak around an obstacle in the water. Portage can also refer to the path one uses to carry their boat around the obstacle.

Inventory of Large Wood in the Upper Chattooga River Watershed, but these comments were not taken into account in the final EA.

First, the USFS erroneously assumes that the introduction into the Chattooga River of large amounts of trees killed by an introduced exotic species is beneficial for the river. This is not a safe assumption. The USFS admits that the amount of wood currently in the river is meeting standards and ecological needs. EA p. 101. An artificial introduction of additional wood would be neither natural nor necessarily beneficial for the river or its Outstandingly Remarkable Values (“ORVs”). The USFS must protect and enhance the Wild and Scenic Chattooga River’s ORVs. Allowing an exotic species to directly impact the river and its recreational use is not compliant with the WSRA.

Second, and perhaps more significantly, the USFS makes the assumption that logs in the river require portage. In what is likely the most definitive study ever completed on this topic, a USFS analysis proved otherwise. The USFS hired an expert team to count every single piece of wood on the entire Upper Chattooga and its forks.³² The team found that:

- The Upper Chattooga (where wood has never been moved or removed by paddlers) has 4,171 pieces of wood and only 2 wood-related portages. Therefore only 0.02% of wood is potentially a recreational issue.
- Overflow Creek where boating has been popular for decades has essentially the same average amount of wood as the Upper Chattooga (where no boating has occurred).
- Recreationists (on streams with and without boating) only managed “several” pieces of wood out of 8,322 total pieces. Ecologically, and in the context of other accepted recreational impacts, this miniscule effect is not significant.

The USFS has proven that wood in the Chattooga River and rivers in general, is simply not a significant issue for recreational paddlers. Even if the amount of wood doubled based on the Hemlock Woolly Adelgid, the number of portage trails would on average only increase to four on the entire 21-mile stretch of the Upper Chattooga.

2. The EA and 2009 Amendment overlook significant biophysical impacts from other uses that make any paddling impacts pale in comparison:
 - a. Stocking of fish have significant widely recognized impact.

The state fishing agencies, the USFS, and various local angling groups work closely to plan, fund, and implement a massive program of stocking exotic non-native trout in the upper Chattooga River. The USFS Commissioned Shelby and Whittaker (2007) report titled Capacity & Conflict on the Upper Chattooga River (herein after referred to as Shelby and Whittaker 2007) states that the number of exotic trout stocked in the upper Chattooga annually is roughly 70,000:

In recent years, South Carolina DNR [Department of Natural Resources] used truck stocking each May to October to place roughly 40,000 rainbow and brown

³²Inventory of Large Wood in the Upper Chattooga River Watershed, USFS (COLBURN Ex. 3.)

trout adults (9 to 12 inches in length) into the Chattooga at Burrells Ford, the mouth of Reed Creek to Hwy. 28, and between Highway 28 and Long Bottom Ford. Georgia DNR and SCDNR work cooperatively with USFS to stock an additional 32,000 sub-adult rainbow and brown trout into the backcountry area from Burrells Ford downstream to the mouth of Reed Creek (see backcountry fishing below). Taken together, over 70,000 trout are stocked into the Chattooga River.

Stocking has included rainbow and brown trout, but sampling shows that brown trout are more abundant. However, creel data suggest most caught fish (>70%) are rainbows, highlighting “conventional wisdom” that browns are harder to catch, and that rainbow provide the primary fishery for most anglers.

And

The fishery from *Burrells Ford downstream to Reed Creek* relies largely on helicopter stocking. GDNR and SCDNR work cooperatively with USFS to stock 16,000 sub-adult (under 7 inches) rainbow and 16,000 sub-adult brown trout into this backcountry area (Rankin, 2007). About 1,000 of each species are over 12 inches. Shelby and Whittaker (2007) p. 19.

This stocking is conducted at least in part through a cost-share agreement with Trout Unlimited and the state agencies. One such 5-year agreement, signed in 2004 states that:

TU (Trout Unlimited) Shall: Provide funds to pay for one hour of helicopter operation in fall and for one hour of helicopter operation in the spring for five years. The helicopter will be used to stock rainbow and/or brown trout in the West Fork Chattooga River and/or the Chattooga River...

TU Shall: Make an annual advance payment of \$1,500 payable to the USDA Forest Service for FY 05 with payments for future years negotiated on an annual basis.

The [US]FS Shall: In the fall and spring of each year, plan and schedule the stocking date, location and other details necessary to carry out the trout stocking of the West Fork Chattooga River and the Chattooga River and relay this information to the Georgia Department of Natural Resources who shall supply the trout.

The [US]FS Shall: Assume responsibility for assembling all equipment and materials to the project site by the scheduled stocking day.

The [US]FS Shall: Provide technical personnel at the project site on the scheduled workday.³³

³³From: Challenge Cost Share Agreement between The United States Department of Agriculture Forest Service and Rabun County Chapter of Trout Unlimited. Signed 11/23/04 (COLBURN Ex. 6.)

In summary, the anglers pay for the helicopter and the state agencies provide the fish, but it is the USFS that is overseeing and in charge of the stocking.

The USFS accepts that this stocking program significantly increases recreational use and impacts on the upper Chattooga River, but the agency fails to consider that there are ecological and social impacts of the stocking program itself. American Whitewater is not opposed to stocking fish, indeed many paddlers are also anglers. However the USFS's one-sided solution regarding the potential, unproven, and miniscule effects associated with allowing paddling to occur on the upper Chattooga while explicitly supporting the massive, proven, and artificial impacts of the fishery the agency created and maintains is unwarranted. The USFS bond with this artificial fishery is so strong that the USFS did not consider a single alternative to the stocking program, or an immediate and direct limitation on access for anglers.

Section 1284(a) of the Wild and Scenic River Act states: "Hunting and fishing shall be permitted on lands and waters administered as parts of the system under applicable State and Federal laws and regulations."

While the WSRA states that fishing shall be permitted, the statute in no way limits the USFS's authority to limit angler numbers. Thus, despite having the authority to limit stocking and access for anglers, the USFS arbitrarily and capriciously ignored these options in its analysis.

Indeed the USFS acknowledges that the agency has a role in fish stocking on the Chattooga River. In response to a Freedom of Information request, the agency provided a document which states:

The [US]FS is a land management organization dedicated to wise management of the Nation's natural resources and is interested in providing to the public a variety of goods and services including a resource for fishing. The [US]FS has the responsibility to manage, protect, and enhance these fisheries resources and is willing to develop projects that will assist in providing fishing in remote areas such as the West Fork Chattooga and the Chattooga River.

The reason behind the agency's failure to consider limitations on fish stocking or angling as one of its alternatives may be attributed the agency's close relationship with anglers and the state fishing agencies. For example, the Chattooga Coalition's membership includes USFS staff from NC, SC and GA, personnel from the fisheries/fishing agencies from all three states, and the SC and NC chapters of Trout Unlimited. In fact, the founder and Chairman of the Chattooga Coalition, Monty Seehorn, is a retired USFS staff and a member of the Rabun Chapter of Trout Unlimited.

Together, these groups work to "give special emphasis to protection and enhancement of the fishery resources, water quality, and overall health of the Chattooga River and its tributaries." In no small part their focus is to protect and increase the stocking of massive numbers of exotic trout via trucks and helicopters. The website for the group states that their objectives include developing stocking recommendations.³⁴ For example:

³⁴<http://www.saludatu.org/Chattooga.cfm>

Put and Grow' Management w/helicopter stocking of 40,000 sub-adult trout in 22 drops every fall. The results are Excellent! The increased numbers of trout provide an excellent catch rate. The rainbows provide a good daytime fishery. The browns provide more 'hold over' potential. The [Chattooga] Coalition is responsible for the restoration of this backcountry fishery resulting in better quality than it was in 1970 (35 years ago). *Id.*

The Coalition's defense of the stocking program is so ardent that the Coalition formally opposed Wilderness designation for the Rock Gorge because it would end the helicopter stocking:

In 1995 the Wilderness Society and Sierra Club identified the Upper Chattooga backcountry section (between Reed Creek and Burrell's Ford) as a prime candidate for designation as a Wilderness Area. This designation would bring to an end the 'Put and Grow' fisheries management with helicopter stocking. The new Forest Management Plans for both Sumter NF and Chattahoochee NF placed this area in "backcountry" prescriptions. The Coalition supported the allocation of the "backcountry" prescriptions to this beautiful wild area. *Id.*

In a 1997 letter to the TU membership, the Rabun Chapter of TU warned its members that "The wilderness designation precludes stocking of any kind, including helicopter stocking, so put-and-grow fisheries would be put to an end." Therefore TU concluded it "would like to have the status quo maintained and feel the proposed changes (i.e., Wilderness Designation) would in fact be detrimental."³⁵

Perhaps the most vocal opponent of boating on the headwaters, who is associated with a local angling group, posted on an angling message board:

The USFS Rolling Alternative recommends the area for prescription 12.A. REMOTE BACKCOUNTRY RECREATION - FEW OPEN ROADS, which would allow the continuation of the GA & SC managed fishery program while protecting the area from logging and road building. I felt that this would be common ground that would fit the needs of the "preservationists". However, the WILDERNESS proponents are turning out in large numbers and are vocal in their attempt to have the area "preserved" permanently as designated WILDERNESS, ending fishery management. They either don't care or don't acknowledge that it will result in the loss of another trout fishery. Their reason for opposing REMOTE BACKCOUNTRY RECREATION designation is that it will come up for review every 10 or 15 years and WILDERNESS is permanent, not subject to review.

Due to warmer water and competition from non-trout species of fish, natural trout reproduction does not occur in the river below Big Bend Falls (about 2 miles below Burrells Ford). As you may already know, the GA TU Council, the SC TU Council, SE Region TU VP (Ray Mortensen), The Chattooga River Coalition (Monte Seehorn's group) are all on the record by letters to the USFS in both states

³⁵<http://www.geocities.com/yosemite/5696/fn0297.htm>

in favor of the "Backcountry" option. Remember, we can't have it both ways. If it is designated "Wilderness", there can NOT be an exception to allow the continuation of the sub-adult Rainbow and Brown trout "put and grow" fall helicopter stocking program. It can NOT be written into the legislation, it is in conflict with the "Wilderness Act".

I think that we, as individuals, need to let our opinions be known. This is, without a doubt, the biggest threat to the future of the Chattooga River trout fishery."³⁶

The Chattooga Coalition also opposes boating on the upper Chattooga. In 2009, Don Eng, who signed the 1985 Sumter National Forest Plan, the document that bans paddling on the upper Chattooga River, was honored with the SC Trout Unlimited 2008 "Palmetto Trout Award." The award notice states:

Don was instrumental in helping to fund and in actively supporting with staffing the three year macro-invertebrate and other studies of the Chattooga River in the 1980's. That multi-agency project with TU and the state fisheries agencies of SC, GA and NC gave impetus to the 'Chattooga Coalition' of agency and advocate groups which still meets and works together to improve the trout fishery of that national wild and scenic river.

In addition to his support throughout his career with the US Forest Service, Don was one of 12 charter members along with Malcolm when the Saluda River Chapter was formed in 1982. Over the years, Don served in many chapter roles, including a term as chapter President, and also as a SC TU Council chapter delegate for more than 10 years.³⁷

That personal involvement from a federal resource agency leader was noteworthy as it demonstrated Don's strong personal convictions about protecting and enhancing coldwater fisheries. These statements demonstrate the unified interests of those that fish, those that stock, and those that manage the river. It is a collaborative relationship, and also a financial one, with each of the three groups sharing resources to maintain this artificial attraction.

Regardless of the motivations, the fact remains that the USFS does not consider the environmental and social impacts of stocking massive numbers of exotic rainbow and brown trout in the Wild and Scenic Chattooga River. The fact that stocking is not adequately addressed in the EA is a further indication of its bias. The EA contains numerous references to the unique experiences for anglers and the high quality of the fishing as justifications for banning boating so as to not interfere with those anglers. If the EA took into account the number, age and size of the fish that are stocked, the methods by which they are stocked and that fact that the fish being stocked are non-indigenous, the EA would have to reach a far different conclusion about the value of the angling on the Upper Chattooga. American Whitewater does not believe there is any evidence to justify a ban on any lawful recreational activity on the Upper Chattooga.

³⁶Doug Adams, Director Rabun Chapter of Trout Unlimited. 11/8/99. <http://www.georgia-outdoors.com/forum/archive/index.php/t-44999.html>

³⁷<http://www.chattoogatu.org/February2009.pdf>

However, if the Forest Service were to conclude that it is necessary to limit some uses on the Upper Chattooga, it would be a logical step to conclude that boating should be allowed and fishing should be indirectly limited by providing only natural fish species and numbers.

3. The EA failed to consider the impacts associated with fish stocking

American Whitewater's May 7, 2007 Comments on the Chattooga, *Literature Review Report*, outline numerous proven ecological impacts associated with stocking.³⁸ American Whitewater raised these issues in its scoping comments and elsewhere in the record, but these issues were not addressed in the EA, thus violating NEPA.

a. Impacts on native trout

The USFS has stated a goal in the EA of protecting and restoring native brook trout in the Chattooga River watershed.

Of particular concern is the brook trout, the only salmonid native to the Southern Appalachian Mountains. The South Carolina Department of Natural Resources (SCDNR) has documented the complete loss of some brook trout populations and significant loss of range in recent years. Recent survey data and historical records indicate that in South Carolina, brook trout range has also declined at least 70 percent. Remnant populations are found in only six streams on the Andrew Pickens Ranger District. EA p. 17.

According to the USFS, this goal is one of the reasons that form a basis for severely limiting boating on the river and its tributaries, but the agency offered no hard data that showed that paddling could cause any significant impacts to the river and its tributaries. Indeed, paddling occurs on many brook trout streams across the Southern Region and nowhere has an agency found paddling to be incompatible with brook trout persistence or recovery. While focusing on, and managing for, an impact that does not exist, the USFS has turned a blind eye to the significant and widely known impacts on native brook trout caused by the artificial stocking of exotic rainbow and brown trout – a practice they enthusiastically support.

It is widely accepted that the replacement of native brook trout by non-native rainbow trout in the majority of their historic habitat in the Southern Appalachians is caused in large part by the stocking of rainbow trout. Removing rainbow trout from streams results in increases in brook trout numbers.³⁹ USFS officials acknowledge these facts and have poisoned streams to remove rainbow trout for the purpose of protecting brook trout:

³⁸ Comments on the Chattooga, *Literature Review Report*, American Whitewater, May 7, 2007.

³⁹ Declaration of Mark Bain, Oct. 8, 2009 ("Bain Decl.") See Complaint of American Whitewater, et al. October 14, 2009, U.S. District Court, District of South Carolina, Anderson Division. Also attached as an Exhibit.

All of the activities covered in this decision (which include stream poisonings) are needed to improve brook trout dispersal throughout streams, restore brook trout where they no longer exist and to reduce nonnative rainbow and brown trout competition among existing brook trout populations. Since it has been proven that brook trout cannot compete with non-native trout species, the streams proposed for restoration and rehabilitation will no longer be stocked with the above mentioned non-native trout species.⁴⁰

The USFS decision to limit floating based on unfounded concerns about hypothetical, miniscule impacts to brook trout, and to ignore the obvious and significant impacts of the USFS sanctioned fish stocking program, is arbitrary and capricious.

b. Impacts on rare vertebrates and invertebrates

The USFS raised numerous unfounded concerns that paddling may effect rare species – an effect that is mentioned nowhere in the literature, and that was never documented during the four year analysis period. At the same time the USFS enthusiastically supports the stocking of tens of thousands of exotic trout annually that are known to eat organisms like these native rare species.

Rainbow trout feed on invertebrates, other fish, and fish eggs. Goldstein and Simon 1999. Specifically, rainbow trout eat caddis flies, stoneflies, mayflies, crane flies, crayfishes, salamanders, and frogs. They also eat terrestrial prey that falls into the river including earthworms, beetles, butterflies, moths, bees, and wasps. Needham 1969; Johnson 1981; Cada et al. 1987.

The USFS lists sixteen forest-listed locally rare aquatic species in the Chattooga vicinity in EA, Table 3.2-21. These sixteen locally rare species include one salamander species, two crayfish species, eight insect species, and five species of fish. All of these locally rare species are potential food for the stocked exotic trout. While attributing an unknown impact from floating onto these species, the USFS failed to even consider the readily foreseeable impact of its own stocking program.

The impact and harm to native and rare species was recently recognized by a state court in California. In *Pacific Rivers Council v. California Department of Fish and Game*, the court stated “there is little doubt that...respondent’s fish stocking program has significant environmental impacts on the aquatic ecosystems into which hatchery fish are introduced, and, in particular, on native species of fish, amphibians and insects, some of which are threatened or endangered.”⁴¹

c. Impacts of the Walhalla Hatchery

The USFS acknowledges several places in the EA that “The Wild and Scenic Rivers Act requires that the managing agency “protect and enhance” the free flowing condition, the *water quality*

⁴⁰ David W. Jensen, *Decision Memo for Brook Trout Habitat Enhancement*, February 09, 2007.

⁴¹ *Pacific Rivers Council v. California Department of Fish and Game*, No. 06-CS-01451, Order Modifying Judgment

and the ORVs of designated rivers. EA p. 3 (emphasis added). The USFS voiced unfounded concerns about the potential impacts of paddling on water quality, but it supports the operation of a large scale fish hatchery in the watershed and fails to consider the likely impacts of this hatchery on the river's water quality.

The EA lists the "East Fork and The Chattooga River (Downstream of Fish Hatchery)" as an "Upper Chattooga Reach of Concern" that is only partially supporting beneficial uses. There is little or no development in the entire East Fork Watershed, and it would be unreasonable to assume the hatchery is not contributing to the water quality impacts.

Studies have shown a direct and measurable link between the operation of salmonid hatcheries and diminished water quality.⁴² Other states have determined that:

All fish culture stations discharge wastewater that contains a limited set of metabolically generated waste products. The major waste products include phosphorus, nitrogen, solids and carbon dioxide. Fish metabolic activity also consumes oxygen and increases the biochemical oxygen demand in the wastewater.⁴³

Ignoring these collateral impacts of the artificial Chattooga River fishery fails to protect the river from these recreational impacts and places other recreational impacts in a false context. The EA is deficient in not addressing these known recreational impacts.

4. Angling has significant and unique impacts

While stocking to support angling is in itself environmentally destructive, angling in and of itself has its own impacts on native plant and animal species.

a. Impacts on brook trout:

Unlimited numbers of anglers fishing the Upper Chattooga River and its tributaries are allowed to catch and kill four brook trout each per day based on state regulations and USFS management,⁴⁴ while the USFS bans paddling in part because of unproven concerns related to brook trout.

⁴²Kendra, W. Quality of Salmonid Hatchery Effluents during a Summer Low-Flow Season. Article in Transactions of the American Fisheries Society 120:43-51, 1991. Abstract "Ecology assessed the quality of salmonid hatchery effluents and receiving water streams in Washington State during the 1988 summer low-flow period. Relative to hatchery influent waters, effluents showed significant increases in temperature, pH, suspended solids, ammonia, organic nitrogen, total phosphorus, and chemical oxygen demand. Wastewater discharges sometimes violated state water quality standards; effects were exacerbated by low dilution. Hatchery nutrient loads equaled or exceeded receiving water loads; effects of enrichment were most evident in oligotrophic waters. Benthic invertebrates sensitive to organic waste were often replaced by pollution-tolerant forms in the vicinity of hatchery outfalls. Survey findings necessitated revision of existing hatchery wastewater discharge permits in Washington."

⁴³http://www.fish.state.pa.us/promo/fishpro/execsumm_15-22.pdf

⁴⁴See http://www.ncwildlife.org/Regs/2009_10/2009_10_Inland_Fishing.pdf and http://www.ncwildlife.org/Fishing/Trout_Fishing_Maps.htm

b. Impacts on riparian communities:

The USFS estimates that the access rate for the Nicholson Fields reach solely by anglers is about three anglers at one time Monday through Friday, and eight anglers at one time on Saturday and Sunday. The resultant effect on the landscape is 6.5 miles of user-created trails and 27 points of erosion in a short river reach that is between 3 and 4 miles long. This is 1.7 miles of user-created trails per mile of river. Similarly, the second most heavily stocked reach has the second highest ration of user-created trails to river miles. See the reproduced Table 3.1-5 from the EA below:

Table 3.1-5. Summary Of Existing Trail Information For The Entire Upper Chattooga River Corridor (All Reaches And For A Distance Of ¼ Mile On Both Sides Of The Chattooga River).

Reach	Designated Trail (mi)	User-created Trails (mi)	# of Erosion Points	User-Created Trail Miles per River Mile	# Erosion Points per Trail Mile	# Erosion Points per River Mile
Chattooga Cliffs	6.1	1.9	3	0.4	0.375	0.6
Ellicott Rock	13.4	2.5	17	0.5	1.1	3.2
Rock Gorge	11.1	8.4	44	1.1	2.5	6.0
Nicholson Fields	4.4	6.5	27	1.7	2.1	7.1
Total	35	19.3	91	n/a	n/a	n/a

Sources: USDA 2007 and Whittaker and Shelby 2007

What is also clear is that angling trails have a unique impact on the river, because they travel adjacent to the river and in the riparian corridor. The table below reproduced from the EA exhibits this impact.

Table 3.1-6. Summary Of Trail Information For Existing Trails Within 20 And 100 Feet Of The Chattooga River (All Upper Chattooga Reaches).

Reach	Designated Trails Within 100 ft of River (mi)	User-created Trails Within 100 ft of River (mi)	Designated Trails Within 20 ft of River (ft)	User-created Trails Within 20 ft of River (ft)
Chattooga Cliffs	1.7	0.3	1,300	360
Ellicott Rock	2.6	1.2	1,580	1,033
Rock Gorge	3.8	2.4	3,536	2,901
Nicholson Fields	0.9	5.9	0	3,170
Total	9	9.8	6,416 ft (1.21 mi)	7,464 ft (1.41 mi)

Sources: USDA 2007, and Whittaker and Shelby 2007

The large mileage of user-created trails within 100 feet, and 20 feet of the river in the Nicholson Fields reach, where use is predominantly angling, is evidence of the unique biophysical impacts of angling. These impacts are directly correlated to fish stocking.

C. Boating Access will not cause significant or unique biophysical impacts.

1. Boating has no significant and/or cumulative biophysical impacts.

a. Boating has no significant and/or cumulative impact on plants.

During the four year analysis period, the USFS did not document a single impact of paddling on plants. Nowhere else in the region, where unlimited paddling occurs on similar streams, have paddling impacts to plants been documented. Regardless, the USFS goes to great lengths in the EA to describe which plants live in the river corridor, and which plants “might” be impacted by several hundred paddlers floating down the river or making the occasional portage.

The agency's logic is roughly as follows:

- **If** an insect kills a Hemlock tree,
- **and** that tree happens to fall across the river,
- **and** that tree is one of the 0.02% in the river requiring paddlers to portage,
- **and** that portage must take place on the edge of the river (as opposed to the middle of the river or high on the bank),
- **and** that portage happens to be in the exact location of a rare plant,
- **and** the paddlers happen to step on that plant,
- **and** those steps do not benefit the plant by encouraging dispersal and reproduction through fragmentation which is common among riparian plants including liverworts and lichens.
- **and** those steps are so damaging that they kill the plant,
- **then** there will an impact of paddling on rare plants, and the more paddlers traversing the river the greater the impact.

There is an obvious problem with this logic: the odds of this occurring, no matter how many paddlers traverse the river, are insignificant and miniscule. Furthermore, the USFS proposes mitigation measures to negate any paddling impacts, making the whole discussion moot. What the USFS acknowledges and then ignores are the tens of thousands of hikers and anglers that take advantage of unlimited access to the river, including wading and swimming in the river:

Recent studies have shown that existing users are already affecting vegetation along the corridor by trampling and clearing vegetation around campsites, erosion and loss of plants along user-created trails, damaged trees, denuded banks at stream crossings and the potential for damage to rare species in sensitive settings along rock cliffs and gorges. EA p. 56.

And

Current recreation use in the upper corridor is causing numerous areas of vegetation damage including trampling and clearing of vegetation around campsites, erosion and loss of plants along user-created trails, damaged trees and bare banks at stream crossings. Existing impacts to rare species from current use are unknown. EA p. 64.

And

Proposed, Endangered, Threatened and Sensitive species ("PETS") and Locally Rare Plants – Direct, Indirect and Cumulative Effects:

All users potentially could affect these 28 plant species.

And

Seven of these sensitive plant species could have individuals impacted by any one of the eight alternatives. These species occur in more accessible corridor areas and could be trampled or crushed with existing and/or increased recreational usage. EA p. 72.

The USFS proposes no actions to curb these potential impacts of other users. Instead it continues to focus on paddling's "potential" effects, which it admits can be easily mitigated. After an exhaustive discussion of potential paddling effects on plants, the USFS acknowledges that:

...none of the alternatives are anticipated to result in the loss from the corridor of any existing species, provided the monitoring measures are implemented and future decisions regarding portage trails adequately assess and avoid impacts. EA p. 56.

The USFS has failed to document a single impact of paddling on plants in the Upper Chattooga River corridor, or on any other regional stream. If impacts did occur, the impacts would pale in comparison to those of land-based visitors seeking river access for swimming and angling, the impacts from floating would be easily mitigated, and would not be significant.

- b. Boating has no significant and/or cumulative impact on animals and the related analysis is biased

Perhaps nowhere in the entire USFS analysis is the bias against paddlers so evident as in the analysis of wildlife impacts. The analysis concludes that:

Current management appears to be providing for conservation of rare wildlife species known to occur in the corridor, as *there has been no documentation* which links "declines" of rare species to the current management of the upper Chattooga River. EA p. 78.

Yet, when the USFS discusses potential paddling impacts, for which there are also no documented impacts, it reaches a very different conclusion:

There are relative differences among the boating alternatives; however, in general, those that have the greatest restrictions on the number of boatable days (Alternative 4) and avoid extensive use of the upper reaches of the corridor where most of the rare species are located (Alternative 5) would likely result in fewer impacts on wildlife. EA p. 78.

Here, the USFS is blatantly applying two different standards - one to paddlers, and one to everyone else. Paddlers are presumed guilty until proven innocent - and are not even given a chance to be proven innocent, while all other uses are assumed innocent until proven guilty. Furthermore, the USFS infers that there is a relationship between the number and location of paddlers and wildlife impacts that somehow does not also apply to other visitors. The USFS offers no defense of, or basis for, this assertion.

A similarly biased view is expressed regarding the impact of newly created trails associated with the vastly larger and faster growing uses of hiking and angling, compared with the impacts associated with paddling. When considering existing uses, uncertainty regarding user-created trails results in a finding of no impact:

Although new trails and campsite construction/relocation, if not carefully planned, could affect rare species, this is not assumed to be the case since any new actions must adhere to project-level NEPA analysis. Overall, the proliferation of user created trails and campsites could affect rare species in the future, but the exact effect is unknown, since the proliferation of user created trails is sporadic and unpredictable. EA p. 88.

When the USFS similarly considers effects of user created trails associated with paddling it finds that uncertainty must result in an assumed impact.

Potential direct and indirect effects [of paddling] to sensitive and locally rare species include trampling and disturbance from increased user densities. Impacts to habitat for sensitive and locally rare species include creation of portage trails and new access trails and increased trampling and disturbance to plants. Based on the uncertainty (in amount, time and location) associated with some of the effects resulting from this alternative, such as portage trails, it is unreasonable to assume this alternative will have no effect on rare species. EA p. 88.

If the USFS analysis were unbiased, the USFS could not possibly have reached the conclusion that it would be “unreasonable” to assume a trail created by paddlers has no impact, yet at the same time assume a trail created by an angler or hiker has no impact.

Regardless of the inherent bias in the analysis, in its findings the USFS reached the conclusion that allowing paddling would not have significant or cumulative impacts on wildlife.

As with other alternatives, although some individuals may be directly or indirectly impacted, it is not likely that this alternative [Alternative 8 - maximum paddling], when combined with other past, present and future management actions on both public and private land, would have a cumulative effect on the population viability of rare species. EA p. 89.

Throughout the 4.5-year user capacity analysis, the USFS failed to document a single impact of paddling on wildlife. No studies anywhere else in the region have found that paddling has any impacts on wildlife. Paddling is not limited on any other river in the region based on concerns about wildlife impacts. The USFS simply has no basis for their claims that paddling has any impacts on wildlife that are distinct from impacts of any other type of use.

- c. Boating has no significant and/or cumulative impact on woody debris

Throughout the EA, “LWD,” standing for “Large Woody Debris” is found 105 times. Pages upon pages are devoted to LWD. However, removal of LWD is prohibited in all action alternatives (except 2 and 3), so LWD is a non-issue. Still the EA considers the impacts that

“unauthorized removal” of wood might have. They do not at the same time consider the impact of unauthorized removal of fish, damage to rare species, camping, trail creation, ATV use, or other recreational misdeeds. The USFS selects only boaters as presumed rule-breakers. This is unfair, inequitable, biased, and indefensible.

American Whitewater commented at length on LWD in the *Inventory of Large Wood in the Upper Chattooga River Watershed*, March 25, 2008. American Whitewater found absolutely no justification for limiting boating based on LWD – and neither has the USFS. The USFS has found that the Upper Chattooga (where wood has never been managed by paddlers) has 4,171 pieces of wood and only 2 mandatory wood-related portages. Therefore only 0.02% of wood is potentially a recreational issue. The USFS has generated – and in the EA ignored – conclusive data that shows boating would have no impact on wood in the Chattooga River.

To limit boating based on concerns about unauthorized removal of LWD is not justified, just as it would be to ban all angling because some anglers might fish without a license. Furthermore, wood removal was shown in the *Inventory of Large Wood in the Upper Chattooga River Watershed* to be carried out by non-boaters on the Upper Chattooga—a logical conclusion because boating has been banned. Thus, any decision to ban or limit boating based on concerns about unauthorized removal of LWD by boaters without banning or limiting other uses known to remove LWD would be inequitable. LWD is simply not a significant management issue on the Upper Chattooga.

While the USFS infers at least that paddlers may impact habitat created by Large Woody Debris, they have banned the removal of woody debris, acknowledged that current wood amounts meet standards, and proved that only 0.02% of wood pieces are a recreational impediment. In the four-plus years of their analysis they have shown no need for wood removal on the Upper Chattooga. In addition, paddling is not limited because of concerns regarding Large Woody Debris anywhere in the region. While the USFS in this instance is arbitrarily creating a standard of zero wood removal for the purposes of recreational passage, this is far from the agency standard. In fact the USFS regularly allows and conducts the limited movement of wood in streams in general forest lands, Wilderness areas, and Wild and Scenic Rivers, in order to support public enjoyment.

- d. Boating has no significant and/or cumulative impact on riparian areas via trails or erosion

The USFS grossly overestimates trail and access needs of paddling, while at the same time discounting the needs as insignificant. In the EA, Table 3.1-18, *Estimated Length Of Trail Features Reconstructed Or Created In The Upper Chattooga For Alternatives 4, 5, 8, 9, and 10, As A Result Of The Addition Of Boating* misrepresents the reality of access and trail needs of paddlers in the following ways.

- **River Access:** The USFS states: “Alternatives range from a total of 3-7 put-ins and take-outs; each estimated to be ¼ mile in length for up to a total of 1-2 miles of trail depending on Alternative.” The USFS fails to note that all river access needs can be accommodated at existing bridges with nearby parking. There are absolutely no additional facilities or

trail needs to accommodate river access. Paddling use at these popular locations will be orders of magnitude smaller than other uses.

- **Norton Mill Trail:** The USFS claims that 1.5 miles of old roadbed would need to be converted to a trail to provide access. Access via this trail is totally unnecessary and no improvements are needed. Paddlers will access this river point by putting in upstream at Grimshawes Bridge as was intended by Congress at the time of Wild and Scenic designation.
- **Portage:** The USFS contends that ½ miles of portage trails will be required, but the agency admits that existing user-created trails would be used for portaging. During the one descent of the river allowed by the USFS during the user capacity analysis, all portaging was done on bedrock in the river. The USFS has no basis for claiming any new trails will be needed for portage.
- **User-Created Trails:** The USFS lists 19.3 miles of *existing* user-created trails in the table that is supposed to predict trails that occur as a result of *future* boating. These trails were created by anglers and hikers, and are irrelevant to the issue of paddlers floating downstream in the future.

Regardless of these wildly inflated and illogical estimates of trail needs, the USFS finds that:

...the total length of these trails or the amount of ground disturbance associated with these activities (boating) would be small compared to the total miles of existing trails and roads in the upper Chattooga watershed EA p. 45.

And

Boating would result in additional ground disturbance but there would be an overall net reduction in sediment when watershed improvement projects are implemented. EA p. 46.

And

Although existing user-created trails, dispersed campsites and parking areas, along with chronic erosion points, are ongoing sources of soil impacts, they are minor when compared with chief contributors to erosion and sediment input such as roads and road maintenance. Similarly, impacts from introducing boating also would be minor. EA p. 47.

And

...new user-created trails solely associated with boating are expected to be minimal.... EA p. 122.

Allowing unlimited boating to occur in the Upper Chattooga River and its tributaries would result in little or no additional trails, access areas, or soil disturbance. The USFS offers no evidence that any significant impacts are likely to occur in association with boating, especially in the context of vastly larger and faster growing land-based forms of recreation.

D. The EA and the 2009 Forest Supervisors' Decisions do not contain sufficient biophysical information to directly limit boating.

Even if the USFS could prove that paddling on the Upper Chattooga River has unique and significant impacts, it has no basis for banning floating. All recreational uses have some footprint on the landscape. Campers need campsites and leave behind human waste, hikers need trails and create new ones, anglers need river access and kill fish, hunters disturb and kill animals, and the list goes on. In the multiple use context of USFS management, these impacts are accepted, and when necessary controlled through technical fixes. The USFS is accepting impacts for some Wilderness compliant groups and avoiding other supposed impacts by denying access to other Wilderness compliant groups. As noted above, banning a use is the harshest possible management action, and one that should only be undertaken after other remedies have been exhausted. Regarding paddling, no impacts have even occurred, let alone required management.

E. The USFS proposes measures to minimize or mitigate potential impacts of paddling for all alternatives.

The USFS opines about potential biophysical impacts associated with allowing unlimited paddling to occur, it proposes mitigation measures that render these unlikely impacts moot. The USFS proposes to monitor woody debris and rare plants, and to create any trails needed at USFS standards. Even if these unfounded opinions that some impacts may occur with paddling are accepted, the USFS acknowledges that these impacts can be minimized and mitigated through common land and river management practices.

IX. The Stated Social Justifications for the Boating Ban Are Not Persuasive and Are Not Based On Adequate Information

A. The USFS chose to collect inadequate data.

The USFS took four years to collect user data on which to make a decision. However, as part of the data collection, only one group of 8-10 people was allowed to paddle part of the river over a two day period. All other users were allowed in unlimited numbers throughout the four year period. The USFS did not conduct surveys, require permits, conduct robust user counts, study user conflicts, or collect encounter data. In this four year period the USFS did not witness a single social impact from paddling on the Chattooga or elsewhere in the region, nor did it collect data for the social impacts of other uses. The agency missed an opportunity to conduct a meaningful user capacity analysis.

B. The analysis was biased against paddling in a manner that exaggerates potential social impacts of paddling.

1. The USFS admits bias by managing for a single artificial use.

The USFS is clear: They are banning nature-based paddling opportunities to benefit an elite community of anglers that pursue stocked exotic trout. The USFS states that:

The 21-mile stretch above the Highway 28 bridge, known as the upper Chattooga, is highly valued for the unique fishing experience, the solitude and scenery, as well as the quality of the trout fishery. *Heavy stocking* and the institution of a delayed-harvest section in the Nicholson Fields reach have recently made the fishing experience even more attractive (Samsel 2007). There is a need to protect the unique angling experience above highway 28. EA p. 2.

Allowing whitewater boating on some or the entire upper Chattooga River has the potential to...affect the high-quality backcountry angling experience. EA p. 3.

Angler/boater on-river encounters are among the most important impacts associated with allowing boating use on the upper Chattooga River. EA p. 135.

Not only has the USFS selected an alternative that virtually guarantees anglers exclusive use of the Upper Chattooga River, the USFS selected an alternative that bans paddling on many days that anglers are not even fishing. The USFS made this choice because the mere *thought* of a paddler on the river would impact the elite anglers. Under the alternative chosen by the forest supervisors:

Boating is only allowed when it is very likely that boaters will not encounter any other river users (especially anglers on river, where existing encounter levels are very low and where asymmetric impacts are most likely) to preserve the unique year-round backcountry angling opportunities, an important component of which is on-river solitude.

Because of the limitations on boating (flow, zoning and season) in this alternative, boaters are expected to be a small contributor to on trail and on-river encounters thereby preserving the unique year-round backcountry angling opportunities on the upper Chattooga, a critical ingredient of which is on-river solitude. EA p. 135.

The USFS has arbitrarily and capriciously elected to appease one small intolerant user group. The USFS and their partners in the state agencies stock damaging exotic fish to attract the anglers, which creates an expectation among the anglers that the river is theirs alone, and the agencies exclude another user group to meet the demands of the anglers. There is no basis for managing a Wild and Scenic River to maximize one use and eliminate another.

Regarding angling, the Chattooga is managed more like an industrial trout farm and a grocery store than a Wild and Scenic River. Roughly 70,000 exotic fish are stocked annually, but without this artificial enhancement the river would just be a good stream to fish. At present, it is attractive largely because of the stocking program. However, anglers do not rate the Upper Chattooga highly among local substitutes, a glaring omission from the EA's glowing review of the angling resource. Studies have shown for example that:

The low number of substitutes and the high levels of attachment among the whitewater boaters suggest that the Chattooga represents a fairly unique resource within the greater regional system. Alternatively, among the TU member the

Chattooga is an option among an array of alternatives, some of which provide a better angling experience than the Chattooga experience. These findings may indicate that the Chattooga fills a niche for the whitewater boaters not found elsewhere in the region (i.e. a Wild & Scenic River relatively close to large population centers). Whereas for the TU members, the Chattooga may be a good place to fish near home, but not an optimal experience.⁴⁵

Thus the only empirical evidence relating to the importance of the upper Chattooga as an angling resource strongly disagrees with the EA's premise, conclusions, and preferred alternative. The EA lacks a suitable description of the Upper Chattooga River as a boating resource. The reaches that the USFS allowed to be paddled during the one-time, two day assessment were rated very high by paddlers, and paddlers appreciate all the same scenery and solitude opportunities that anglers do. Perhaps the main difference is that the experience of boaters is of a natural river, whereas artificially stocked fish are critical to angler's experiences. The USFS has no basis to claim that the Upper Chattooga provides an angling experience that is any more unique, powerful, or important than the paddling experience it provides. To make such a claim is inequitable and unsupported.

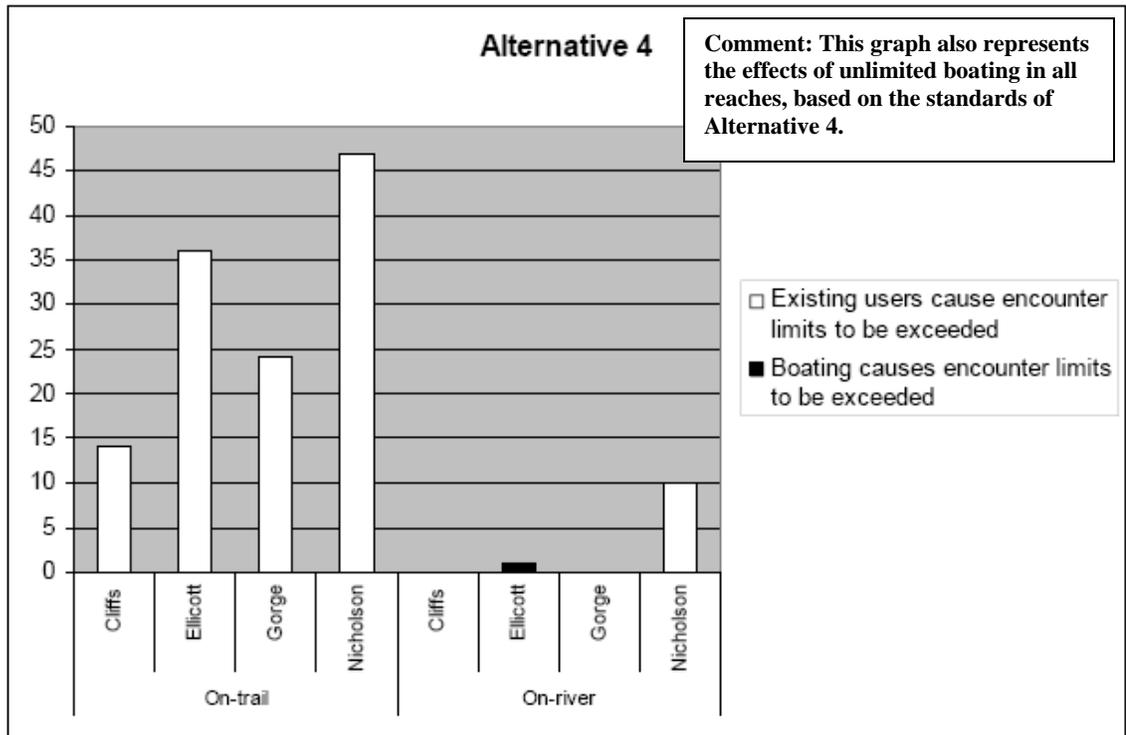
2. The USFS alternatives exaggerate potential social paddling impacts, and hide the fact that boating has no encounter impacts.

The USFS analyzed three different sets of encounter standards: a tight standard in Alternative 2, a loose standard for Alternatives 3-5 (which harshly limit boating), and an intermediate standard for Alternatives 8-10. Applying different standards to different management alternatives makes a comparison of management alternatives in their analysis impossible. More to the point, the application of tight standards to Alternative 8 which allows the most boating, and loose standards to those alternatives that restrict boating, makes Alternative 8 artificially appear higher impact than other alternatives. This intentional bias of the analysis makes a fair comparison between Alternative 8 and the selected Alternative 4 impossible – unless Appendix D is used to calculate the number of days on which encounter standards would be violated in concert with unlimited boating occurring on all reaches using the standards of Alternative 4 and eliminating the non-existent “scenic boating” group. American Whitewater conducted this analysis.

For perspective, the USFS analysis of encounters Alternative 4 is best depicted in Figure 3.3-2, copied below with comment added.

⁴⁵ Backlund, Erik A. in Peden, John G.; Schuster, Rudy M., comps., eds. Proceedings of the 2005 Northeastern Recreation Research Symposium; 2005 April 10-12; Bolton Landing, NY. Gen. Tech. Rep. NE-341. Newtown Square, PA: U.S. Forest Service, Northeastern Research Station

Figure 3.3-2. Estimated Number Of Days Per Year On-Trail And On-River Encounters From Existing Users And Boaters Are Likely To Exceed Encounter Limits By Reach For Alternative 4.



When the same calculations that were used to generate this graph (i.e. encounter standards from Alternative 4) are run on unlimited boating on all reaches, the graph does not change at all. When the same standards are applied to all management alternatives demonstrates that **allowing unlimited boating does not create one additional day of encounter limits to be exceeded. Thus, the seasonal, reach, and flow restrictions that the USFS claims are needed to minimize the violation of their standards have no effect on encounter standard violations.**

The USFS has constructed the alternatives to mask the real effect of unlimited floating on encounter data: *none*.

The USFS has failed to directly compare an unlimited boating alternative with its biased preferred alternative. Instead, the agency analyzed the closest alternative to an unlimited boating alternative (Alternative 8) with severely restricted standards and added a non-existent user group into the analysis. The results of these strategic manipulations of the analysis are evidence in Figure 3.3-4 below.

Figure 3.3-4 Estimated Number Of Days Per Year On-Trail And On-River Encounters From Existing Users And Boaters Are Likely To Exceed Encounter Limits By Reach For Alternative 8.

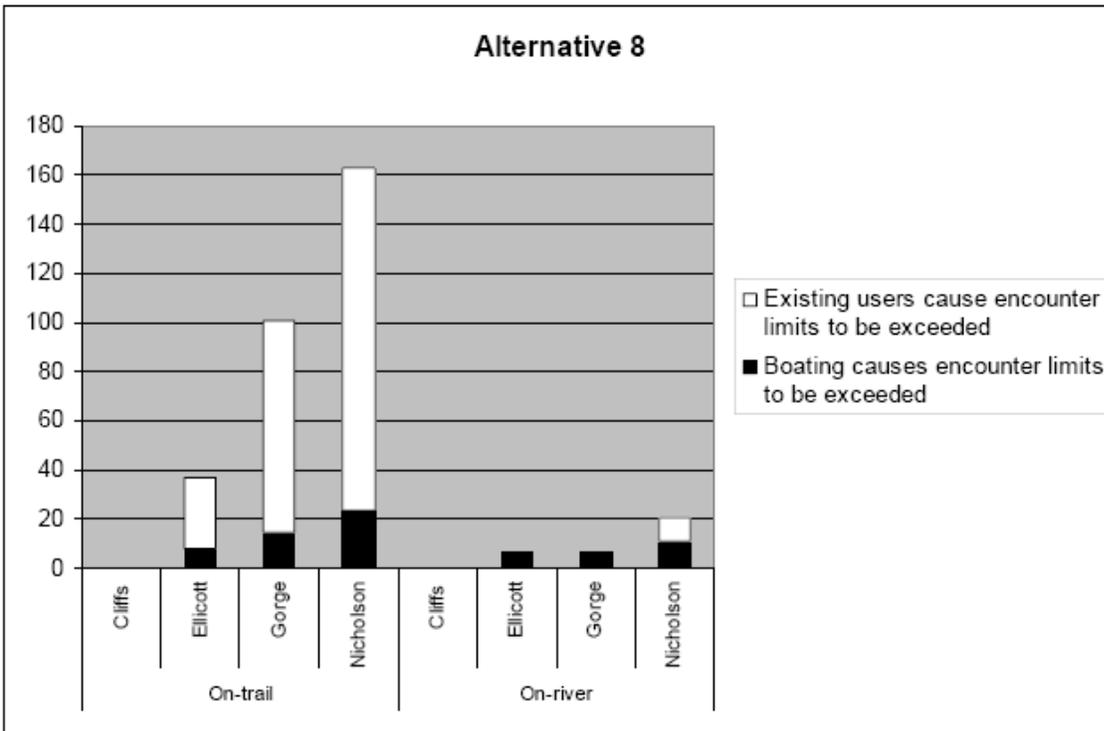


Figure 3.3-4, viewed in combination with figure 3.3-2 shows that the encounter standard violation increases exhibited by Alternative 8 are **totally the result of tighter standards and the addition of a nonexistent group – not expanded boating access.** The USFS failed to conduct a fair analysis of a far set of alternatives. Instead, the agency masked the fact that allowing unlimited boating would have no impact whatsoever on encounter standard violations. This is an unconscionable breach of ethics and/or scientific practice, and a clear example of the bias that permeates the USFS analysis.

3. The EA, by focusing on boating as the only management variable, does not consider a full range of alternatives and introduces inherent inequity.

The USFS alternatives were designed with an inherent bias against paddling. Indeed, direct limits to paddling, and standard management actions common to all alternatives are the only actions proposed by the USFS.

The USFS proposes to limit all existing uses as a single group, in its primary action alternatives, but only after encounter standards for those groups are violated on 20% of days. Limits would first be imposed through indirect measures, and only if and when those indirect measures fail would the USFS impose direct limits. This is appropriate. The USFS proposes three sets of encounter standards: 1) a tight standard in Alternative 2, 2) current encounter levels in Alternatives 3-5, and 3) intermediate standards in Alternatives 5-8. The USFS adopts the loosest standard – current use - allowing the most people to visit before actions are required. While the agency proposes a range of standards for encounters for existing uses across alternatives, it fails to compare any actions that would directly limit the amount of hiking, angling, swimming or

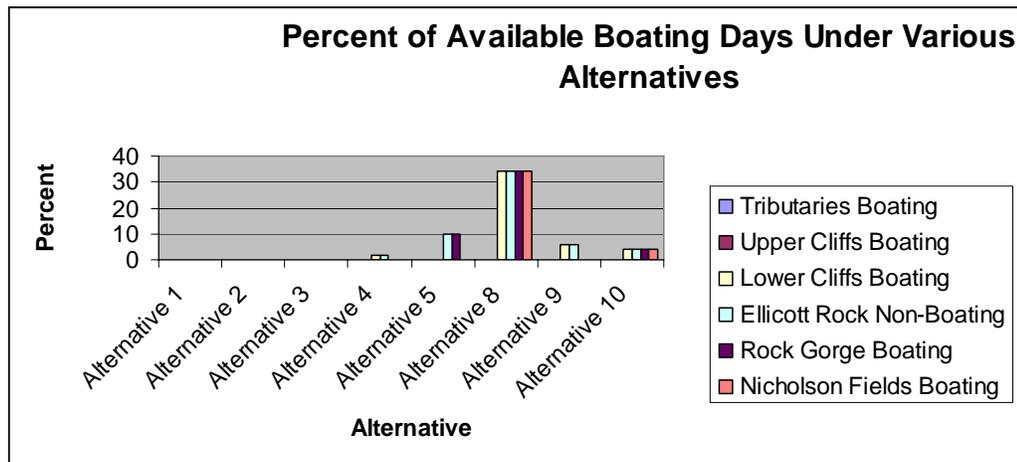
other non-paddling uses. To put it another way, the amount, location, season and flow level associated with non-boating uses were not used as variables in this analysis.

The USFS also includes a host of standard resource management actions that only have two variations across alternatives: the highly protective Alternative 2, and the less protective Alternative 3. These analyses are unnecessary because the measures are simply designed to bring the corridor up to normal standards for trails, camping, and erosion. The USFS does not consider banning or limiting existing uses based on their biophysical impacts.

The alternatives treat paddling very differently than other uses. All alternatives ban paddling on the uppermost section of the Wild and Scenic upper Chattooga River and its tributaries without analysis. Alternatives 1-3 ban paddling on the entire upper Chattooga, all the time, at all flows. Four of the remaining five alternatives impose harsh limits on paddling using flow, season, and reach limitations. Only Alternative 8 treats paddlers like the USFS treats all other uses in all alternatives, with the noteworthy exception of the geographical bans in Alternative 8. In the USFS analysis, paddling was the only active variable, and was treated inequitably.

4. The EA, by considering a skewed range of boating alternatives, does not consider a full range of alternatives and introduces inherent inequity.

As seen in the graph below, all of the boating alternatives except Alternative 8 provide either zero or very small amounts of boating on any given reach. American Whitewater addressed this inequity in its Scoping Comments, which the USFS failed to address. All alternatives propose zero use on one reach and the tributaries, three alternatives propose zero boating on all reaches, and all but two alternatives propose zero use on additional reaches. Other than Alternative 8, all alternatives consider allowing boating on only 0-10 percent of days.



Essentially, the USFS considered Alternative 8 as a throwaway, and only gave serious consideration to extremely small amounts of paddling. By limiting analysis in such a skewed manner, the USFS has biased the EA and violated NEPA.

5. The USFS attributes encounters caused by a user group that does not exist (scenic floaters) to paddlers.

The USFS created a user group in their analysis that does not exist, which inflates the estimated

encounters associated with allowing unlimited paddling to occur. To our knowledge, this user group, “scenic boaters,” was not represented by a single letter, comment, or meeting attendee. They simply do not exist. Not only does the USFS create the user group, but they also create specific use numbers and encounter estimates for them. The EA states that:

Additionally, [Alternative 8] is the only alternative in which scenic boating is anticipated on the main stem upper Chattooga. Whittaker and Shelby (2007) estimate this activity would likely occur on 50 days or less per year in the Nicholson Fields reach, and on ten days or less per year in portions of Ellicott Rock and Rock Gorge reaches. This translates into 75 boatable days in an average year for the Chattooga Cliffs reach (3 + 34 + 77/2), 85 for the middle two reaches (3 + 34 + 77/2 + 10 scenic boaters), and 125 (3 + 34 + 77/2 + 50 scenic boaters) for Nicholson Fields. Using data from the last 67 years the number of boatable days would range from 85 to 168 in Nicholson Fields (Hansen 2007), and less in the other three reaches... EA p. 142.

The USFS applies the encounters caused by this nonexistent group only to Alternative 8, the alternative that most closely represents unlimited paddling. The artificial data skews the analysis by inflating the impacts of allowing paddling.

Furthermore, the USFS fails to consider the simple option of not allowing river access at the top of Nicholson Fields and thus requiring paddlers to float the entire challenging Rock Gorge reach if they wish to float through Nicholson Fields. Indeed, this is what virtually all whitewater paddlers would prefer regardless. No user group has ever requested river access at the top of the Nicholson Fields reach. The USFS abused its discretion when it created a user group, created a problem, and arbitrarily and capriciously limit paddling based on imaginary impacts.

6. The EA and Forest Supervisors’ Decisions overlook massive social impacts of other uses that make any paddling impacts pale in comparison
 - a. Stocking of fish and associated angling have significant widely recognized impacts
 - (i) Increased use and encounter standards violations

The USFS widely accepts that stocking and intensive management for angling has led to violation of encounter standards and significantly increased use. They acknowledge for example that:

Heavy stocking and the institution of a delayed-harvest section in the Nicholson Fields reach have recently made the fishing experience even more attractive.

Angling trends on the Chattooga also depend on stocking and regulation stability. Major changes in current stocking levels or regulation changes that favor one type of fishing over another would probably affect future use. EA p. 117.

...in the highest encounter segment (Nicholson Fields), current on-trail encounters exceed limits about 47 days (13%) of the year.

Currently, fishing competition is probably an issue at the front country fisheries at Burrells Ford and Highway 28 during stocking season and for the Nicholson Fields reach during delayed-harvest season. EA p. 123.

The USFS fails to analyze alternatives that limit angling either directly or through limits to stocking.

(ii) Helicopter flyovers

The USFS acknowledges on page 114 of its EA that the Rock Gorge section of the Upper Chattooga River, which flows through an inventoried Roadless Area, is stocked via helicopter in the fall. The USFS fails to consider the impacts of low elevation helicopter flights on backcountry visitors.

What is less clear is whether or not the USFS endorses helicopter stocking in the Ellicott Rock Wilderness Area. In a 2004 cost-share agreement between the USFS and Trout Unlimited, it is stated:

The purpose of this agreement is to work cooperatively to stock areas of the West Fork Chattooga and the Chattooga River with brown and rainbow trout. The areas are designated as Wilderness and must be stocked by helicopter due to lack of access by motorized vehicles.

Low elevation flights in Wilderness Areas are widely recognized as damaging to the Wilderness experience of visitors.

Helicopters and airplanes are the most common means for planting fish in wilderness lakes. Even if they do not land, they violate the spirit of the Wilderness Act and its prohibition against motorized vehicles and any form of mechanical transport. Aerial stocking also significantly degrades the primitive recreation experience by disrupting the solitude and quiet that most wilderness visitors seek. Wilderness experiences may also be compromised by the increase in the number of anglers that will be attracted to stocked lakes. Finally, the introduction of fish as a top predator significantly alters natural selection pressures within the aquatic ecosystem, potentially leading to different evolutionary trajectories and severely compromising a fundamental aspect of wildness.⁴⁶

(iii) Intolerant users push out nature based visitors

Perhaps the biggest social impact of the massive angling program on the Upper Chattooga is that it has resulted in the total exclusion of paddlers from the river for well over 30 years. The intense stocking and historic boating bans have created an apparently crowded and absolutely intolerant user group that advocates for exclusive rights to enjoy the river. While encounters would be shared between boaters and anglers, albeit rarely, the USFS proposes limits only on paddlers.

⁴⁶ Peter Landres, Shannon Meyer and Sue Matthews, *The Wilderness Act and Fish Stocking: An Overview of Legislation, Judicial Interpretation, and Agency Implementation*, Ecosystems 2001, vol. 4 at 289.

C. There are no user conflicts on the Chattooga River in need of management.

The decision to ban paddling to prevent user conflicts that are not occurring, have never occurred, occur nowhere else, and are not likely to occur is arbitrary and capricious. While the USFS may have the authority to zone uses, it must have justification for doing so and have exhausted other opportunities first (see the ROD for American Whitewater's Forest Plan appeal).⁴⁷ In the EA, the USFS offers neither justification, nor evidence that other management techniques have been attempted – let alone exhausted. The USFS assertion that it must ban paddling to prevent conflicts is arbitrary, capricious and unfounded.

1. History Shows No User Conflict on the upper Chattooga

There is no reliable evidence in the USFS record that a conflict between boaters and anglers ever occurred on the upper Chattooga River. The evidence of conflicts is anecdotal and generally provided by sources that are interested in maintaining the existing ban on floating. This evidence is also scant, refers only to the lower river, and appears to refer to only one or two instances. Thus the USFS is managing for an impact that has never existed.

2. Precedent Shows No User Conflicts Anywhere in the Region

There are no conflicts to minimize between boaters and anglers on the Chattooga or anywhere in the region. Boating and angling co-occur on 213 river reaches in North Carolina, 142 in Georgia, and 80 in South Carolina. None of these 435 rivers has a limit on the number of private boaters allowed to float the river. None of these rivers has a documented conflict between anglers and boaters. The USFS takes an enormous leap of judgment to assume that unique conflicts will develop between anglers and boaters on the upper Chattooga. This defies overwhelming precedent. The USFS asks the public to accept that these conflicts will be so severe that one use must be totally eliminated. This is an extreme and unreasonable response to a non-existent problem.

3. Boating will not impact the solitude provided by the upper Chattooga River.

The EA uses the word solitude 129 times but fails to properly apply the term in a recreational context. The EA infers that boating has some relationship to the solitude of the area, but inexplicably ignores that relationship by stating that all of their alternatives protect solitude. The EA states:

Information from the public indicates that solitude is one of the most valued, if not *the* most valued quality of the recreation experience in the upper Chattooga corridor. Solitude is also one component of the Chattooga River's recreation ORV and also part of the "outstanding opportunities for solitude" goal in the Wilderness Act.

⁴⁷See section IV.B.5 of American Whitewater's 2004 appeal of the RLRMP for additional discussion of why zoning is not justified on the Upper Chattooga.

The USFS has responded to this by constructing alternatives that they feel all protect solitude:

Action alternatives in this analysis ... all maintain outstanding opportunities for solitude in the Ellicott Rock Wilderness (Wilderness Act) and the upper Chattooga as a whole, and protect and enhance high quality recreation experiences (including opportunities to experience outstanding natural environments, challenge, solitude, etc.) that are part of the recreation ORV (Wild and Scenic Rivers Act). EA p. 120.

Yet elsewhere in the document they claim that their goal of limiting paddling is:

[T]o preserve the unique year-round backcountry angling opportunities, an important component of which is on-river solitude. EA p. 134.

According to the USFS, even Alternative 8 preserves solitude, thus it is unclear why boating must be banned to preserve solitude for anglers. The EA refers to “dictionary.com” for their definition of solitude:

Solitude refers to 1) the state of being or living alone; seclusion; 2) remoteness from habitations, as of a place; absence of human activity; and 3) a lonely, unfrequented place (*Dictionary.com Unabridged (v 1.1)*). EA p. 120.

This is an over-simplistic definition of solitude and one that departs from established backcountry methodology. Backcountry management research and methodology demonstrate the flawed oversimplification of the USFS discussion of solitude. For example, Patterson and Hammitt conclude that encounters between recreationists have a minimal impact, if any, on the solitude experienced by those recreationists.⁴⁸ Their conclusion is based on the fact that “solitude has a broader meaning than simply visitor encounters and perceived crowding.”⁴⁹

Their research concludes that “solitude refers to remoteness, primitiveness, nonconfinement, cognitive freedom, and autonomy. In fact, many of these other aspects of solitude appear to be more important than being alone.”⁵⁰ Thus, contrary to the over-simplified definition used by the USFS, encounters do not represent the whole of solitude experience for wilderness users.

When analyzed under established backcountry management methodology, it is clear that paddling will have minimal, if any, impacts on solitude. It will not affect any of the above-referenced characteristics of solitude. To the contrary, restoring paddling access allows

⁴⁸Patterson, M.E., and Hammitt, W.E. (1990). *Backcountry Encounter Norms, Actual Reported Encounters, and Their Relationship to Wilderness Solitude*. Journal of Leisure Research. Vol. 22. No. 3. 259-275.

⁴⁹ Hammitt, W.E. (1983). *Toward and Ecological Approach to perceived crowding in outdoor recreation*. Leisure Sciences. 5. 309-320. “Solitude need not be the opposite of social crowding.”

⁵⁰Hammitt, W.E. (1983). *Toward and Ecological Approach to perceived crowding in outdoor recreation*. Leisure Sciences. 5. 309-320; Hammitt, W.E. (1982). *Cognitive Dimensions of Wilderness Solitude*. *Environment and Behavior*. 14. 478-493; Hammitt, W.E., Brown, G.F. (1984). *Functions of privacy in wilderness environments*. Leisure Sciences. 6. 151-165.

additional people (paddlers) to experience “remoteness, primitiveness, nonconfinement, cognitive freedom, and autonomy.” Thus, the ban on paddling actually decreases the overall solitude experience on the Headwaters because it eliminates the nonconfinement, cognitive freedom, and autonomy of a group of primitive backcountry users.

Even if the oversimplified analysis of solitude is accepted, it is still unpersuasive. If encounters reduce solitude, then all interactions between individuals in a backcountry setting reduce the solitude for all others, regardless of the nature of that interaction. Whether it is two anglers interacting, an angler and a hiker, or an angler and a paddler, the impacts on solitude are identical. Thus the EA solitude analysis, at most, suggests that backcountry interactions should be reduced in general. If this is the case, then all uses should be equitably limited rather than one type of use being completely banned. There is nothing inherent in the general conclusion that interactions should be reduced that suggests a certain *type* of use (boating) should be banned.

Under the USFS approach, the appropriate inquiry should be: “how can we best reduce interactions between users on the upper Chattooga to keep encounters within an acceptable range?” Banning whitewater boating is the *least* effective way to reduce user interactions on the upper Chattooga.

Experiencing solitude is a privilege to which all backcountry enthusiasts should have equal access. Thus, if a land manager decides that use must be limited to encourage solitude, the most responsible and ethical way to limit use is to limit all users equitably. A paddler has the same appreciation, desire, and rights regarding access to solitude experiences as anglers, hikers, and other forest users. It is unfair and discriminatory to ban paddlers from the Chattooga Headwaters while allowing all other users to access the area in unlimited numbers.

Indeed the highest office of the USFS agreed with American Whitewater based on their 2004 appeal of the Sumter National Forest Plan. The ROD of the appeal stated:

While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.

Paddlers deserve equal access to experience the solitude of our Nation’s most pristine wilderness areas and wild and scenic rivers. If the USFS must limit use on the Chattooga Headwaters to protect solitude, then it should be equitably limited for all users to the extent compatible with Wilderness and WSR designations.

4. Boating and Angling are Complimentary River Uses.

The USFS implies that conflict will occur between anglers and paddlers if access is restored to paddlers. This conclusion is not supported by any study or in practice. Anglers and paddlers have common goals in promoting river conservation and access and have participated in countless successful collaborations that promote sharing resources with minimal conflict. Studies show that anglers and paddlers tend to use rivers at different water levels, including the EA on this issue. Therefore contact is self-limiting between these user groups. The ban on paddling is an artificial and unnecessary separation of two compatible user groups. Contact between paddlers and anglers is infrequent, but when it occurs it is complimentary.

Solitude, scenery, small group definition, and sense of place are important to every specialized group.⁵¹ This is true for both paddlers and anglers.

Both anglers and paddlers should be seen as groups with strong commitments to environmental stewardship, strong connection to place, and high appreciation of wilderness and solitude. In essence, these two groups should be viewed similarly.

A review of studies in recreation specialization reveals that both boating and angling take place in the context of limited resources. Both user groups must contend with environmental degradation, and the intensification of legal concerns regarding use of private lands.⁵² Analysis and resolution of these issues is often the same for whitewater paddling and coldwater angling. For these reasons, the two groups commonly collaborate to preserve their joint goals and complimentary uses.

Recreation specialization is characterized by a range of elements related to individual attributes of participation and setting preferences. Recreation specialization research examines widely ranging topics including, locus of control,⁵³ privacy orientation,⁵⁴ specialization, experience, social group structure,⁵⁵ recreation setting preferences, natural setting preferences, equipment,⁵⁶ risk,⁵⁷ and safety.⁵⁸

Land managers have implemented various programs to address these issues, including: 1) interpretive programs,⁵⁹ 2) educational material,⁶⁰ 3) user fees,⁶¹ 4) permit systems,⁶² and 5)

⁵¹Ewert, Alan., Hollenhorst, S. 1994. *Individual and Setting Attributes of the Adventure Recreation Experience*. Leisure Sciences 16: 177-191.

⁵²Lee, R.D. *Recreational Use Statutes and Private Property in the 1990's*. 1995; *Journal of Park and Recreation Administration*. 13: 71-83

⁵³Knopf, R.C., Peterson, G.L., Leatherberry, E.C. 1983. *Motives for Recreational Floating: Relative Consistency Across Settings*. Leisure Sciences. 5: 231-255.

⁵⁴Knopf, R.C. 1987. *Human Behavior, Cognition and Affect in the Natural Environment*. In *Handbook of Environmental Psychology*. Stokols, D. and Altman, I. New York: Wiley, McIntyre, N, 1989, *The Personal Meaning of Participation: Enduring Environment*. *Journal of Leisure Research*. 21: 167-179.

⁵⁵Roggenbuck, E.J., Williams, D.R., Bange, S.P., et al. 1991. *River Float Trip Encounter Norms: Questioning the Use of the Social Norms Concept*. *Journal of Leisure Research*. 23: 133-153. Schuett, M.A. 1995. *Predictors of Social Group Participation in Whitewater Kayaking*. *Journal of Park and Recreation Administration*. 13: 42-54.

⁵⁶Block, P.H., Black, W.C., Lichtenstein, D. 1989. *Involvement with the Equipment Component of Sport: Links to Recreational Commitment*. Leisure Sciences. 11: 187-200.

⁵⁷Slovic, P. 1964. *Perception of Risk*. *Psychological Bulletin*. 61: 220-223. Slovic, P. 1987. *Perception of Risk*. *Science*. 236: 280-285.

⁵⁸Mackay, S. 1988. *Risk Recreation in Wilderness Areas: Problems and Alternatives*. *Western Wildlands*. 33-38. McEwan, D.N. 1983. *Being High on Public Land: Rock Climbing and Liability*. *Parks and Recreation*. 18: 4650.

⁵⁹Burzynski, R. 1991. *Promoting Land Ethics: A Challenge for Interpretation*. *Trends*. 28: 31-34.

establishing limited access areas.⁶³ Effectively implementing the programs above requires quality information about user groups. Recreation specialization research does not support exclusion of boating or angling because they are complimentary uses with complimentary goals. The USFS fails to implement established management tools, and instead adopts an unprecedented ban.

Kinney maintains that the complexity of inter-group relationships is increasing in outdoor recreation settings.⁶⁴ There is not always consensus on how land should be managed, or in some cases not managed. The challenge before land managers is to accommodate a wide spectrum of values, beliefs, and economic interests to form directed and sustainable management plans. The USFS's near absolute ban on paddling does not rise to this challenge.

The USFS concludes that since certain users expect there to be no paddlers on the upper Chattooga, and that those users will be disturbed by the presence of paddlers in some undefined way. Several studies contradict this assumption. These studies show that an individual's cognitive belief that a particular backcountry situation is a problem may not correspond with that individual's experience.⁶⁵ In other words, while some users may expect the presence of paddlers to impact their experience, those impacts may not actually occur.

While the USFS states they are banning boating to "preserve the unique year round backcountry angling opportunities, EA p. 134," the agency fails to offer any evidence that allowing paddling

⁶⁰Hollenhorst, S., Schuett, M.A., Olson, D, et al. 1995. *An Examination of the Characteristics, Preferences and Attitudes of Mountain Bike Users of National Forests*. Journal of Park and Recreation Administration. 13: 41-51.

⁶¹Wisman, S.A., 1992. *The Satisfaction and Willingness to Pay of Whitewater Recreationists*. Ph. D., West Virginia University.

⁶²Bates, S.F. 1992. *Whitewater Dilemma: Allocating Boating Permits on Limited-Entry Rivers*. Rivers. 3: 266-275. Baxter, W. 1991. *Permits on the Smith? Evolution of Use on a Montana River*. Western Wildlands. 16:38.

⁶³Bonnicksen, T.M. 1991. *Managing Biological Systems*. Journal of Forestry. 89: 10-15. Driver, B.L. 1985. *Specifying What is Produced by Management of Wildlife by Public Agencies*. Leisure Sciences. 7: 281-295.

⁶⁴Kinney, T.K. 1997. *Class V Whitewater Paddlers in American Culture: Linking Anthropology, Recreation Specialization, and Tourism to Examine Play*. Unpublished Graduate Thesis. Northern Arizona University.

⁶⁵Patterson, M.E., and Hammitt, W.E. (1990). *Backcountry Encounter Norms, Actual Reported Encounters, and Their Relationship to Wilderness Solitude*. Journal of Leisure Research. Vol. 22. No. 3. 259-275.

Ditton, R.B., Fedler, A.J., and Graefe, A.R. (1983). *Factors Contributing to Perceptions of Recreational Crowding*. Leisure Sciences. Vol. 5, No. 4. 273-288.

Hendricks, W.W. (1995). *A Resurgence in Recreation Conflict Research: Introduction to the Special Issue*. Leisure Sciences. 17. 157-158.

Owens, P.L. (1985). *Conflict as a social interaction process in environmental and behavior research: The example of leisure and recreation research*. Journal of Environmental Psychology. Vol. 5. 241-259.

would lead to the loss of those angling opportunities.

In reality, boating and angling are complimentary uses because flows largely separate the recreational uses. Boaters prefer to float the deepest and swiftest channels of water, while anglers prefer to cast from the bank or from a place in the streambed where the current is not overly forceful. Thus boaters and anglers are rarely in the same physical part of the river corridor. To accommodate the rare instances that paddlers and anglers desire to occupy the same physical spot on the river, these two user groups have developed a common sense and accommodating river ethic. In the rare instances that a paddler floats through an area where an angler desires to cast, the angler simply modifies his casting patterns to incorporate a seconds-long delay, allowing the boater to pass without inconvenience or difficulty. Similarly, in common river practice, boaters will alter their course to minimize any disturbance to an angler. While this river ethic is already widely practiced, minimal educational steps could be taken to reinforce it – for example by posting signs at put-ins and take-outs. Also evidencing the complimentary nature of boating and angling is the fact that many individuals enjoy both forms of primitive recreation, often at the same time. In short, boating and angling are inherently complimentary.

D. The EA and Forest Supervisors’ Decisions are not based on a complete or defensible use estimation system.

American Whitewater submitted comments on the failure of the USFS to conduct a valid user capacity study. Dr. Glen Haas has opined that in regard to user capacity analysis, the USFS is in violation of federal law, is contradicting its very own practices on other Wild and Scenic rivers, and is in violation of the principles and practices of the recreation resource planning profession.⁶⁶

Appendix D of the EA typifies the flawed statistics relied on by the USFS to address the upper Chattooga recreational issues. If standard margins of error were acknowledged for each set of data, the error would be enormous, likely exceeding the predicted encounters many times over. For example:

- USFS does not know how many hikers, anglers, campers, hunters, or other users visit the river corridor, where they visit, how long they stay, or the quality of their experience.
- USFS does not know how many paddlers will visit the river corridor.
- “Specific information about trail encounters has not been collected for most parts of the Chattooga River.” EA (Appendix D)
- Data about the relationship between use and encounters is not available. (EA Appendix D)

The USFS EA is clear:

⁶⁶ Declaration of Dr. Glenn E. Haas; See Complaint of American Whitewater, et al. October 14, 2009, U.S. District Court, District of South Carolina, Anderson Division. Also Attached as an Exhibit.

Current information on the existing condition of backcountry encounters for all sections of the river was not available for this analysis. However, the results of the Use Estimation Workshop (Berger and CRC 2007) were used to estimate the average and peak use levels in the upper river corridor. In addition, averages from Rutlin (1995) and assumptions about existing rates and use encounter relationships were applied to the Use Estimation Workshop results to develop encounter estimates for existing users (see Appendix D). EA p. 120.

Despite a four year long user analysis that completely failed to address capacity, the USFS still lacks data indicating how many people are using the river corridor, what they are doing, or how often they encounter one another. In the place of real data, Appendix D offers a series of guesses which in turn are based on the Use Estimation Workshop and Shelby and Whittaker 2007. The Use Estimation Workshop was nothing more than a meeting of the same USFS and state fisheries department officials that are generally opposed to paddling, in which they guessed at use levels and encounters. Participants included:

Michelle Burnett, USFS
John Cleeves, USFS
Mike Crane, USFS
Jeff Durniak, GAWRD
Steve Hendricks, USFS
Lee Keifer, GA WRD
Karen Klosowski, Berger
Jeff Owenby, USFS
Dan Rankin, SCDNR
Joe Robles, USFS
Vern Shumway,
Allen Smith, USFS
Jot Splenda, Berger
Doug Whittaker, CRC
Joel Harrison, USFS

Shelby and Whittaker also could only guess at use numbers, because there is minimal data available. These guesses simply do not, by any standard, form an adequate basis for decision making. The USFS has published specific methods for determining use, and the Sumter National Forest failed to utilize them. The USFS handbook Wilderness Recreation Use Estimation: A Handbook of Methods and Systems offers the following cautionary advice to managers:⁶⁷

With little or no reliable wilderness use information, managers cannot adequately judge resource condition trends. Visitor opinions alone are inadequate for evaluation purposes; there may be little agreement between visitor perceptions

⁶⁷Watson, Alan E.; Cole, David N.; Turner, David L.; Reynolds, Penny S. 2000. Wilderness recreation use estimation: a handbook of methods and systems. Gen. Tech. Rep. RMRS-GTR-56. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 198 p. (page 2).

and the actual condition of the resource, or even on the conditions that determine “primitive and unconfined” experiences. Quality wilderness use information is absolutely essential for examining and testing the various tenets, principles, and dogmas of wilderness management; for optimal management of the resource, it is critical to distinguish management principles which have been empirically verified from those which have never been tested, and are based on nothing more than “authoritative opinions (Cole 1995).

Furthermore, the EA falls into the exact trap warned against by the authors of the USFS Technical Report on Wilderness user capacity. In the preparation of their analysis, the USFS has collected barely a shred of actual user data, and have instead relied upon the very type of “authoritative opinions” that Cole concludes are inadequate.

The USFS Technical Report lists five essential steps of any use estimation system. They stress that “If any of these elements is missing from the system, the exercise of data collection is of little or no value.” The five steps, and the Sumter National Forest’s treatment of these steps are outlined below.

509.A Statement of Objectives: We are not aware of a specific statement of objectives for the treatment of use estimation in the EA. However, the elements of the statement of objectives are generally found in Whittaker and Shelby 2007.

510. Identification of the specific use characteristics to be measured. No use characteristics were measured for the EA, except extremely limited presence data and some data on Wilderness condition. In addition to this minute amount of data collected, the USFS inappropriately relied upon existing use information (which was scant, old, and spatially limited), a problematic “use estimation workshop” and national or regional surveys of use trends (Shelby and Whittaker 2007). The EA failed to identify group size, length of stay, method of travel, use of commercial services, type of activity, temporal and spatial use distribution patterns, visitor perceptions, and visitor characteristics.

511. Choice of appropriate wilderness visitor use measurement techniques. The Technical Report offers the following measurement techniques: external visual observation, stationary internal observation, roaming internal observation, mechanical counters, registration, permits, surveys, indirect estimation⁶⁸, and aerial surveys. The only use measurement techniques actually employed by the Sumter National Forest were intermittent vehicle spot counts, which were extremely limited in temporal and spatial scope and wholly inadequate. No boating was allowed (except for one small group on one weekend) so no measurement of boating use could occur.

512. Choice of the appropriate strategy for sampling. There was no sampling strategy identified, except for occasional vehicle spot counts. The use estimations in the EA are largely based on the

⁶⁸While on its face the EA may seem to present “indirect estimation” of use, it does not. “Indirect estimation” is a technique that employs actual data on use-related variables that have known relationships to visitation numbers to estimate visitation. This extrapolation is rigorously tested for statistical and on-the-ground significance before relied upon for decision making. The EA makes no such efforts.

“use estimation workshop.” The Technical Report clarifies that such workshops are of little or no value and are inherently biased.

In reality, convenience or judgment samples are an extremely poor alternative to statistical sampling procedures. The use of human judgment invariably results in biased sample selection; judgment is unavoidably influenced by untested assumptions of how the various properties of the users or visit characteristics, or both, should be related. Furthermore, it is impossible to determine the size of the bias from sampling methods of this kind. *The samples obtained from judgment surveys are therefore not representative of the population as a whole.* Examples are wilderness users that are convenient or easy to survey, vocal supporters or critics of special interest groups at public meetings, users surveyed at easily accessed trailheads. The characteristics of the individuals sampled will invariably differ from those of users who travel into more remote or less-accessible areas, or who do not belong to a special-interest group. *Because standard errors cannot be calculated for such samples, statistical testing procedures and analyses cannot be used (Id. 44).*

It should be noted that the USFS attempts detailed statistical analysis of data generated by judgment sampling. The extremely small amount of real data was greatly massaged by SNF judgment and therefore there was no reliable strategy for sampling employed.

513. *Choice of a specific technique and/or procedure for data analysis and summary.* There were few data to analyze or summarize, and those that were analyzed were inappropriately generated through judgment sampling.

Based on these 5 steps, the technical report suggests 10 use estimation systems, none of which remotely resemble the approach taken by the SNF. In essence, the SNF hired consultants to conduct the first step of a use estimation system, statement of objectives, and stopped there. Instead of moving ahead with the other 4 steps as recommended by their own guidance documents, the SNF embarked on a process controlled by their own “authoritative opinions” and based on a near total absence of data. Because the EA fails to include a use estimation system that is consistent with USFS standards and protocols, the EA fails to provide a sound basis for estimating existing, past, or future use. Likewise, decisions made to limit paddling based on the EA’s estimates of use or encounters also lack a sound or defensible basis. As such, decisions to impose immediate and direct limits on use based on encounters are without merit, arbitrary and capricious.

1. Assumptions behind encounter estimates are not reasonable or defensible

The EA is based on encounter estimates that are unsupported and illogical. The USFS “assumes that a hiker, angler, camper, etc. will see an average of 75% of all boaters floating a specific stretch on any particular day” EA p. 98). Roughly half the days on which flow triggers are reached would be un-boatable because of the timing of the flows, the unpredictability of the flows, or other conditions. In addition, the vast majority of the Upper Chattooga is not visible from any trail or campsite so non-boaters actually seeing paddlers would be minimal at best – not 75%. Boating and other uses typically occur during four hour windows, so overlap would be

limited by roughly 1/3 of use even if occurring at the same time. Use estimates for boating and other uses is not based on hard data, and is thus unreliable for decision making. The assumption that 75% of visitors would see paddlers has no rational basis and thus is not a reasonable basis for decision making. The USFS's reliance on these assumptions is arbitrary and capricious.

2. The EA concedes that managers created disagreements, and suggests that boaters alone should pay for it

The EA makes the obvious finding that local USFS managers have created the current disagreements and hard feelings about how the Chattooga should be managed by instituting a policy that gave privileged access to one user group while removing another. These local managers essentially created a microcosm of prejudice. The EA provides:

For the last 30 years, some recreationists in the upper Chattooga corridor have come to expect a boat-free recreation experience and a place where they may be able to find a sense of solitude. In addition, the state natural resource agencies have pursued active fisheries management above Highway 28 by annually stocking the river with trout to enhance the angling experience. EA p. 113.

And

The conflict between existing users, as well as potential users, is tangible and may exist to a greater extent on the Chattooga than it does on other rivers. This is because non-boating groups have developed a "place attachment" to the area over the last 30 years that does not include boats. Conversely, boaters have developed an antipathy towards various existing users and land managers, the perception being that they are unfairly excluded from the use of the upper river. Currently, goal interference, and the resulting face to face conflict between existing users and boaters, is mostly "perceived" as there is no on-the-ground mixing of these uses. Conversely, opportunities foregone for boaters, along with the associated conflict, are very real. EA p. 126-27.

While managers have created this inequity, the USFS now seeks to maintain it rather than clean up the mess. A US federal agency seeking to institutionalize unequal treatment is not acceptable.

E. Zoning Is Not The Answer

1. Conflicts Methodology Instructs Against Boating Ban

A specific example of conflict is viewed by scientists as either interpersonal conflict or social values conflict. Interpersonal conflict can be defined as the presence of an individual or group interfering with the goals of another individual or group. Social value conflict can arise between groups who do not share the same norms⁶⁹ and/or values,⁷⁰ independent of the physical presence

⁶⁹Ruddell, E.J., Gramann, J.H. 1994. *Goal orientation, norms, and noise induced conflict among recreation area users*. Leisure Sciences. 16: 93-104.

⁷⁰Saremba, J., Gill, A. 1991. *Value conflicts in mountain park settings*. Annals of Tourism Research. 18: 155-172.

or contact between the groups.⁷¹ The authorities suggest that:

Understanding these sources of conflict (interpersonal conflict versus conflicts in social values) is important for natural resource managers because the solution to the conflict depends on the cause of the problem. Zoning, for example, may reduce conflicts stemming from interpersonal conflict because the user groups are physically separated. On the other hand, zoning is likely to be ineffective when conflicting values are involved (Ivy, *et al.*, 1992, Owens, 1985). Because social interaction is not necessary for this type of conflict to occur, physically separating users will have little influence. In these situations, education may be more effective.⁷²

The alleged conflict on the Headwaters is a social values conflict. For example, an angler representative made the following comment in support of keeping boaters out of the Headwaters: "Obviously they [boaters] just don't understand backcountry anglers...and our low tolerance for encounters with others with different beliefs." Researchers describe social values conflicts as follows:

if people do not observe an event, but believe a problem situation exists, the type of conflict must stem from a conflict in social values.

Obviously there has not been interpersonal conflict between boaters and anglers (or other users) on the Chattooga Headwaters because boaters are not allowed on the Chattooga Headwaters. Furthermore there are no studies documenting interpersonal conflicts between boaters and other dispersed recreationists on any of the hundreds of rivers in the region that anglers and paddlers share. Therefore, the alleged conflict must be based on the perception of a problem rather than on any actual event.

Specifically the conflict on the Chattooga is a social values conflict created by the Sumter National Forest, which gave one group exclusive access to the river while discriminatorily excluding another. This decision to favor one user group is not based on any scientific studies. Studies show that if an activity is stereotyped, it may result in intolerance, regardless of situational factors.⁷³ The USFS exacerbates intolerance and creates conflict where there would otherwise be none. In short, the USFS is not managing a conflict, they are creating, maintaining, and fueling one.⁷⁴

⁷¹Vaske, J.J., Donnely, M.P., Wittman, K., and Laidlaw, S. (1995). *Interpersonal Versus Social-Values Conflict*. *Leisure Sciences*, 17, 205-222.

⁷² Id.

⁷³Ivy, M.I., Stewart, W.P., and Lue, C. (1992). *Exploring the Role of Tolerance in Recreational Conflict*. *Journal of Leisure Research*. 24. 348-360.

⁷⁴Significantly, Vaske, *et al.* assert that "the potential for interpersonal conflict increases with increased visitation. On the other hand, for individuals who fundamentally disagree with an activity..., these conflicts in values should not vary with visitation."

Significantly, authorities on conflict assert that “the potential for interpersonal conflict increases with increased visitation. On the other hand, for individuals who fundamentally disagree with an activity..., these conflicts in values should not vary with visitation.”⁷⁵ In other words, allowing boating on the Headwaters would not exacerbate the alleged social values conflict that may be present. Studies conclude that “when the source of conflict is differences in values, however, zoning is not likely to be very effective.” “In this situation educational efforts...may be more effective.”⁷⁶

The Southern Region of the USFS noted in a 2002 document (COLBURN Ex. 21.) that “conflict resolution may involve both zoning and education. When the source of conflict is goal interference, it is more appropriate to consider zoning by time, space, or activity.”⁷⁷ Goal interference is synonymous with interpersonal conflict. Thus, according to the Southern Region, while zoning may be an effective tool for managing interpersonal conflict, it is not recommended for managing social values conflict such as those on the Chattooga. The 2002 study further noted:

Zoning seems less effective when the conflict is attributable to differing social values, because such conflict does not necessarily require physical presence or actual contact between users.⁷⁸

The USFS banned paddling based on a misunderstanding or misapplication of its own policy on zoning as it relates to the literature on conflict.

Past decisions gave anglers a privilege they never should have had: exclusive access to a Wild and Scenic River. Now anglers consider that privilege a right worth protecting at the expense of other users. This inequality has created tension between groups who want to enjoy the Chattooga River, while these same groups share and collaborate on every other Southeastern river. Recreational specialization research shows that re-instituting a boating ban will do nothing to eliminate the perceived conflict on the Chattooga River, and will instead exacerbate conflict. This research also shows that education, not zoning, is the most efficacious means of reducing conflict.

2. Education as a Solution to Conflict

Even if a conflict between boaters and other users did exist, education—not zoning—would be the best (and only) way to resolve that conflict.⁷⁹ Dyke and Rule found that people are less

⁷⁵Vaske, J.J., Donnelly, M.P., Wittman, K., and Laidlaw, S. (1995). *Interpersonal Versus Social-Values Conflict*. *Leisure Sciences*, 17, 205-222.

⁷⁶*Id.*

⁷⁷USDA Forest Service—Southern Research Station. (2002) *The Southern Forest Resource Assessment: Section 4.5. Potential Conflicts Between Different Forms of Recreation*.

⁷⁸*Id.*

⁷⁹Vaske et al.’s recommendation that education be utilized to resolve social values conflict like those on the Chattooga is critical to the resolution of this issue and is well supported by other literature.

likely to experience anger if they are aware of the roots of the behavior that would have otherwise angered or frustrated them.⁸⁰ Likewise, Ramthun accordingly suggests that “interpretive efforts that help users to understand the behaviors, motivations, and land use needs of other user groups may reduce perceptions of conflict.”⁸¹ Examples of this type of education on the Chattooga would include educating anglers on paddlers’ river stewardship efforts, the compatibility of paddling use, concern with safety, and paddlers’ enjoyment of solitude. Ramthun also states that “while it is obviously necessary to establish some behavioral protocols, it may be equally necessary to promote understanding and acceptance for the needs and motives of different user groups. If these educational efforts emphasize that different user groups have many similarities, especially regarding relationship to setting, perhaps fewer biased evaluations will occur.”⁸² The USFS has done the exact opposite by stating erroneously that paddlers have different goals and values than other uses, break laws, and that paddling is incompatible with angling. In so doing the USFS breeds intolerance and contempt for paddlers among anglers and other users where there could be tolerance, respect, and harmonious use.

Ramthun concludes his study as follows:

An emphasis on understanding and acceptance, if successful, would help to redefine the social situation in outdoor recreation settings. At present, other user groups are often viewed by recreationists as a source of interference and competition. *By emphasizing tolerance in our interpretive efforts, we may encourage the people in different user groups to see each other simply as fellow travelers in the outdoors.*⁸³

This conclusion shows that education, not zoning, is the most appropriate means of resolving any alleged user conflicts. One of the most important educational tools available to the USFS to encourage tolerance is its publication of records of decision and the media coverage associated with those decisions. Sadly, the Sumter National Forest uses this educational medium to encourage discrimination rather than to encourage tolerance and collaboration.

F. The EA admits users will adapt to new norms

While the USFS asserts that allowing paddling would impact their favored use of angling, the agency also admits that the anglers would adjust to the new conditions. Even under Alternative 8 which allows the most boating of any alternative, the USFS finds that existing users will adapt:

Like Alternatives 4, 5, 9 and 10, this alternative will create a new “norm;” users with a “zero tolerance” for boating will either adjust or be displaced on 125 days in an average year. EA p, 146.

⁸⁰ Cited in Ramthun, R. 1995. *Factors in User Group Conflict Between Hikers and Mountain Bikers*. 159-169.

⁸¹Ramthun, R. 1995. *Factors in User Group Conflict Between Hikers and Mountain Bikers*. 159-169.

⁸² Id.

⁸³ Id.

The USFS fails to estimate the number of users with a “zero tolerance,” but this group is likely very small. Also, the number-of-days analysis is false. Shelby and Whittaker (2007) were clear that there are an average of 247 days (68%) each year that are too low to paddle, 77 days (21%) of optimal angling and technical boating overlap, 34 days (9%) of optimal boating and low quality angling overlap, and 3 days of big water boating and low quality angling. This results in 114 days when boating and angling could co-occur based purely on hydrology – but Shelby and Whittaker also assert that *only half of these days would be usable by boaters*. Therefore, if paddling were permitted on the Upper Chattooga River, anglers would potentially share the river with paddlers on 57 days (16%) of days, and have the river to themselves on 308 days (84%).

Expecting anglers to share the river on 16% of days is not unreasonable, and the USFS acknowledges that anglers can adapt to this change.

G. The EA states and then ignores the fact that flows alone adequately separate uses

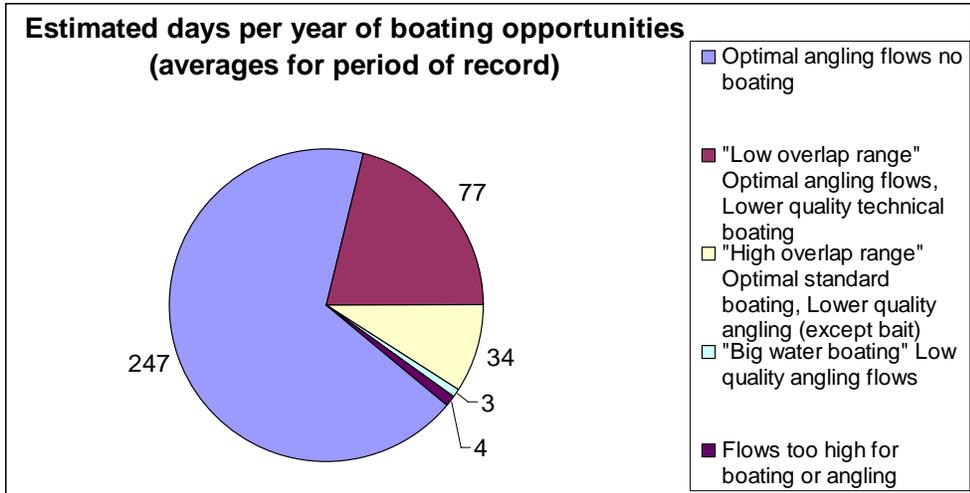
Of the tens of thousands of river miles in the United States that are attractive to anglers and paddlers, the Headwaters represent the only miles where floating is banned on such a Wild and Scenic River. Default management of the Headwaters does not include floating-access limitations because the natural water flow acts as a self-regulating mechanism by which the river is ideal for some uses, such as fishing, hiking, and swimming, when water levels are lower, and floating when the water levels are higher.

The EA clearly reports that natural flow alone adequately separates user groups on the Chattooga, as they do on every other river in the region:

Studies from many rivers show that different activities may be optimal and much more likely to occur at certain flows than others. In many cases, for example, whitewater boating occurs at higher flows (when the waves are larger and the hydraulics are more powerful) than wading based angling (because it is easier to wade and cross the river at lower flows).

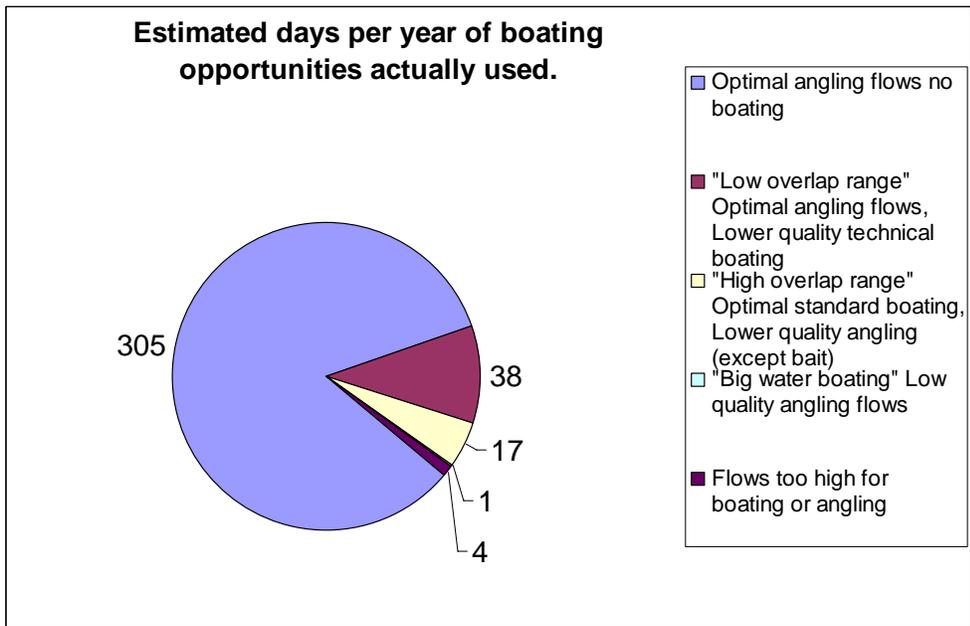
Whittaker and Shelby (2007) describes acceptable and optimal flows for different kinds of boating and angling opportunities, documenting when flows are better for one activity (and not the other), as well as when flow ranges for these activities overlap. The report provides greater detail about these flow ranges for different opportunities and segments, *but overall suggests that the highest quality fishing and boating generally occur in different parts of the hydrograph* (the exception is bait fishing, which remains optimal through higher flows). EA p. 117. (emphasis added)

The pie chart below is a reproduction from Shelby and Whittaker depicting this reality.



Assuming that the encounter standard between boaters and anglers is zero (i.e. a single encounter violates the standard, which is an extreme example), and that anglers see every group of paddlers (unlikely), unlimited boating would still come nowhere close to violating the USFS trigger for limiting use. If the encounter standards of Alternative 4 are used, the violations of these encounter standards between anglers and boaters would be miniscule. The USFS is clear in their selected management that only after encounter standards are violated on 20% of days would indirect limits be initiated – and only after these indirect limits fail would direct limits be instituted. Flows alone will manage recreational use interactions.

When other hydrologic factors are considered by Shelby and Whittaker, the authors predict that roughly half of these days will actually support whitewater boating because of hydrologic complexity. With these limiting factors included, the pie graph would look like this.



Source: Shelby and Whittaker 2007.

So without any limits to paddling whatsoever, anglers will have the river to themselves on 305

days each year.

There is likely some overlap of technical boating and optimal angling flows. According to Shelby and Whittaker (2007) those conditions occur on roughly 77 days annually, half of which will be usable by paddlers. Thus, the only overlap that the USFS could even reasonably consider managing for is the 38 days of overlap which occurs at flows between 225 and 350 cfs. Thus, on 10% of days each year anglers might see one or more groups of paddlers.

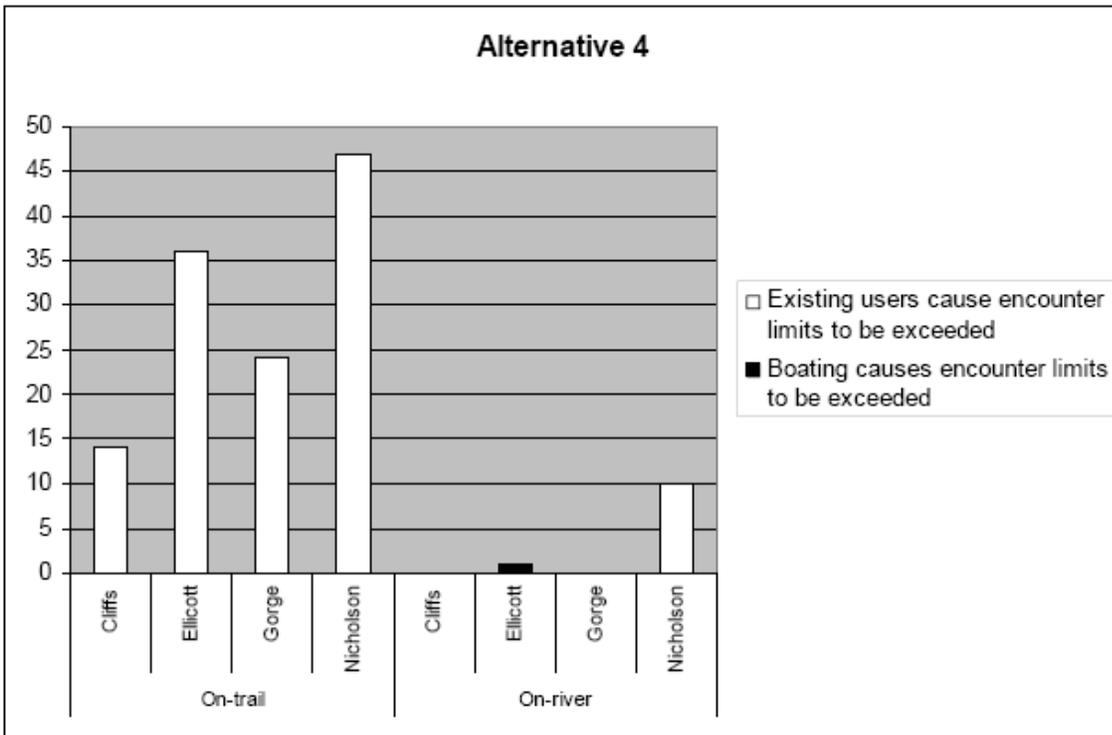
H. The USFS solution, allows recreational uses that already exceed its encounter standards to continue unabated, while the agency imposes absolute limits on the less impactful use of boating

The USFS clearly finds that encounter standards are already exceeded by existing users yet proposed no mitigation for these impacts. The EA states:

Based on existing use estimates and the above assumptions, the number of encounters currently occurring in the upper Chattooga on some days, especially in the wilderness, exceeds the threshold that typically defines solitude in wilderness and primitive backcountry settings. This is especially the case on weekends in the spring, summer and fall in most sections. EA p. 122.

For the USFS selected alternative and management regime the encounter standard violations are significant, as is made apparent in Figure 3.3.2, copied below.

Figure 3.3-2. Estimated Number Of Days Per Year On-Trail And On-River Encounters From Existing Users And Boaters Are Likely To Exceed Encounter Limits By Reach For Alternative 4.



As stated earlier in this document, when unlimited paddling is allowed under the standards of

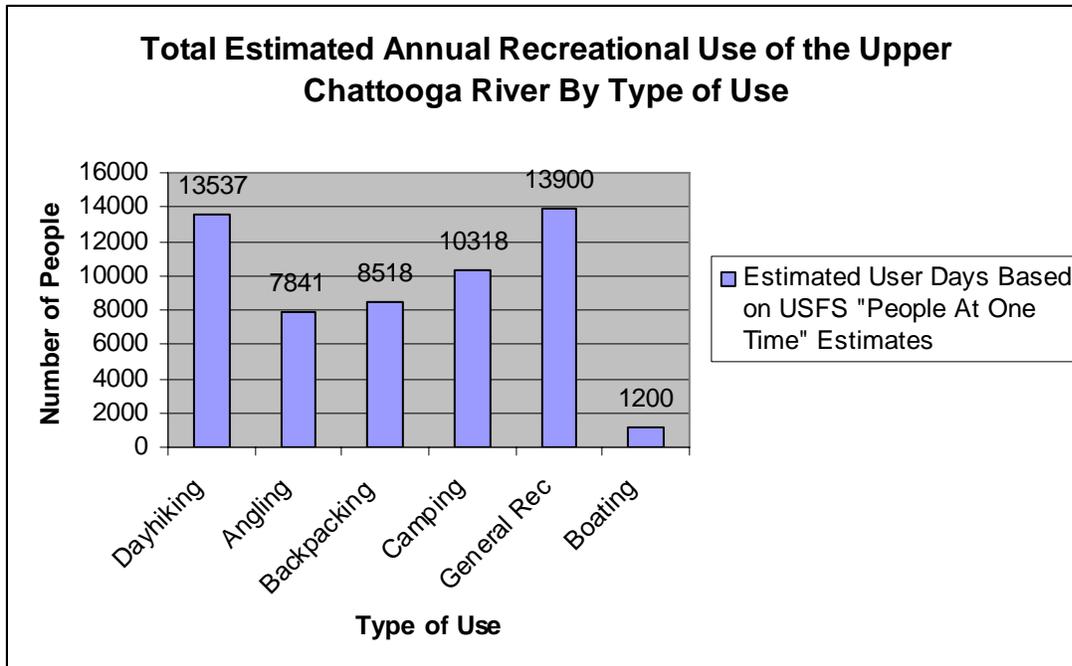
Alternative 4, and the USFS-created Scenic boating category is removed, the above graph does not change at all. Paddling causes encounter standards to be exceeded on only 2 days, roughly 1.5% of the total days on which standards are exceeded. Thus, all the seasonal, reach, and flow restrictions on paddling have no effect on encounters. Those limits have no benefits to other users – only senseless impacts on paddlers.

On a lesser note, the USFS chose to initiate limits on non-boating uses only when encounter violations exceeded 20% of days (73 days). This not only arbitrary, it is a clear sign that the USFS does not wish to curtail existing impacts. Indeed the EA readily admits that “the encounter limits established [in Alternative 8] for the Ellicott Rock Wilderness are closer to the desired tolerances in the literature (Whittaker and Shelby 2007) when compared to Alternatives 3-5. EA p. 142. That the USFS chose to limit paddlers based on encounters that have not occurred and will never reach 20% is an abuse of discretion.

I. The USFS limits paddling while failing to limit vastly larger and faster growing uses.

The USFS report titled “Upper Chattooga River Visitor Capacity Analysis Data Collection Reports” contains USFS staff’s estimates of use on the upper Chattooga. While the validity of this document could certainly be argued, the fact remains that it is the basis for all of the USFS encounter standards and thus recreational use limitations. While never tabulated in the report or the EA, the results are stunning. If all of the data from the report are converted to People At One Time and considered on an annual basis, which significantly underestimates user days, the number is a staggering 54,114 people that currently visit the upper Chattooga River to hike, fish, camp, or backpack. In sharp contrast, Shelby and Whittaker (page 37) conclude that the total number of paddling user days “would probably not exceed 1,200.”

The graph below depicts the estimated annual recreational use on the upper Chattooga River, and is based wholly on USFS estimates.



*Note that the number of boaters is estimated user days, not estimated PAOT.

By all accounts, and based on the USFS data, boating would be the smallest use of the river. Boating would also be the slowest growing use. Consider the following estimates from the EA:

- Angling is expected to grow and has recently grown (EA 117)
- Day hiking in the South will increase by about 48% by 2020 (EA 117)
- Backpacking in the South will increase about 23% by 2020 (EA 117)
- Whitewater boating is flat or declining on Chattooga and Nationally (EA 117)

By harshly managing the smallest and slowest growing use while allowing all other uses unlimited access the USFS is acting arbitrarily and capriciously.

J. The USFS inequitably weighs the solitude and place based experiences of anglers higher than paddlers.

The USFS is very clear that they value the solitude of anglers higher than the solitude - or even the ability to experience the river at all - of paddlers. The USFS states clearly that under their selected management:

Boating is only allowed when it is very likely that boaters will not encounter any other river users (especially anglers on river, where existing encounter levels are very low and where asymmetric impacts are most likely) to preserve the unique year-round backcountry angling opportunities, an important component of which is on-river solitude.

While the inequitable allocation of solitude to anglers seems to be the primary reason behind their decision to severely restrict and ban boating, this runs counter to their mandate in American Whitewater's appeal ROD, as well as the conclusions of their own analysis. The appeal ROD states specifically:

While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.

Furthermore, the USFS in its own EA admits that all of their alternatives, including Alternative 8 protect the solitude of all users.

Action alternatives in this analysis (alternatives 2-10) offer different amounts and types of recreation opportunities (e.g. hiking, camping, angling, boating) and different encounter limits (that define acceptable levels of impacts), but all maintain outstanding opportunities for solitude in the Ellicott Rock Wilderness (Wilderness Act) and the upper Chattooga as a whole... (EA 120)

In summary, the USFS continues to weigh the solitude of anglers as more important than other user groups without basis and in direct opposition to national direction. In addition they decide to impose harsh paddling limits to protect anglers' solitude when an alternative with no paddling limits (on the sections considered by the USFS) was found to maintain outstanding opportunities for solitude. Both of these aspects of the USFS decision are arbitrary and capricious.

K. The EA inequitably and explicitly rules out immediate direct use limits for existing users while mandating them for paddlers

The EA suggests that the USFS rejected the potential permit system in alternative 2 because "Use limit systems require administrative effort, require users to plan ahead and compete for limited permits, and would displace some proportion of existing use on high use days" (EA 106). If this is sufficient justification to eliminate alternative 2, it should be sufficient justification to eliminate the preferred alternative and others that would require permits for paddlers.

L. The EA offers no basis for selecting 450 cfs as a management trigger

The preferred alternative in the EA totally bans boating on several reaches and allows boating on one reach restricted to flows above 450cfs. There is no basis for the selection of that flow. The selection of 450 cfs as a cut off eliminates many optimal boating opportunities (that are not optimal angling flows), and forces paddlers to run the river at higher flows which some paddlers may not prefer to somewhat lower flows.

Flows between 350 and 450 cfs for example offer *optimal* boating and *unacceptable* fly fishing. Shelby and Whittaker state that:

"for many days in the "high overlap" period [350-650 cfs], boater-angler conflict and related capacity problems would be unlikely. These are lower quality angling days for all but bait anglers, and they tend to occur in winter when bait angling use is low. Some fly and spin anglers certainly fish these flows...but they have lower quality conditions in comparison to the other 320 days per year that they have lower flows."

However, the EA states that "At these overlap flows [referring to all overlap – both high and low] some users of each group could be present (if boating were allowed) and encounters could create impacts and conflict." (EA 95)

Whittaker and Shelby 2007 clearly conclude that if any management of boating and angling would be acceptable it would be required during the "low overlap" period between 225-350 cfs. There is simply no scientific basis in the record for boating (or angling) limits based on a 450 cfs cut-off, or above 350 cfs. Thus the preferred alternative is arbitrary and capricious.

In addition, The USFS dubiously states that "450 cfs is near the bottom end (within 100 cfs) of the optimal range for whitewater boating opportunities." (EA 134) In fact, as expressed above,

the bottom end of the optimal flow range for standard boating is estimated to be 350cfs. In this context, 350 is not “near” 450. The difference makes an enormous difference in the number of boating opportunities and is extremely significant for paddlers.

Even when suggesting an alternative that would provide a miniscule amount of time where boating can occur, the Forest Service has unlawfully treated boaters unequally by selecting a flow rate that is at the highest end of the range where fishing can comfortably take place, yet well above the low end of the flow rate where optimal boating can occur.

M. The EA offers no rationale for allowing boating only in the winter

The EA offers no rationale or justification for allowing paddling only in the winter in certain alternatives. Winter days are shorter and colder, making them less desirable for paddling trips. In addition the EA finds that:

Angler/boater encounters are more likely to occur in the winter months (December through February) when both groups are on the river in the middle of the day. As the weather warms by mid-March and April, boating concentrated in the middle of the day would likely produce relatively fewer boater/angler encounters as anglers are more likely to fish in the early morning before temperatures rise (Whittaker and Shelby 2007). (EA 118)

Thus, selecting an alternative that allows paddling only in the winter and not during the rest of the year with the aim of reducing encounters is arbitrary and capricious.

N. The USFS preferred alternative artificially increases demand in a Wilderness Area.

While paying lip service to encounter standards and use limits, the USFS preferred alternative *artificially increases* recreational use by supporting the stocking of trout adjacent to a Wilderness area and in a Wild and Scenic River, while banning natural floating use. The EA admits that “The angling trends on the Chattooga also depend on stocking and regulation stability” (EA 117). The agency has reported that they support the *stocking of over 70,000 exotic game fish* annually in the Upper Chattooga River to artificially increase recreational use. At the same time they have banned boating to decrease that use. In a Wilderness area natural conditions should prevail. The upper Chattooga River naturally provides high quality boating opportunities during times of high flow and a moderate quality angling experience at low flows. We see no justification in the EA for artificially increasing one use while effectively banning another wilderness use (paddling). Surely this is not the kind of management the authors of the Wilderness Act anticipated or would approve of. The most Wilderness compliant alternative would have a natural balance of boating and angling – without conflict, with little recreational overlap, and without the collateral impacts of stocking exotic game fish.

O. No rationale is given for overlapping limits (season, flow, reach) in the preferred alternative

Several alternatives ban boating in certain reaches at all flows, including the USFS preferred alternative. The USFS offers no rationale for why paddling should not be allowed during flow conditions when other in-stream recreation is not occurring or optimal. In the preferred alternative for example, there would be many boating days available when flow conditions will exclude other in-stream users on the Rock Gorge reach and Chattooga Cliffs reach beginning at Grimshaws Bridge. Likewise, there are high flow conditions outside of the December through February time frame in the preferred alternative that would provide boating when other users

were not even present in the river. There is no rationale for banning boating in those conditions. Doing so is arbitrary and capricious.

P. The preferred alternative offers no basis or discussion of the ban on floating the Rock Gorge

The USFS offers no rationale for the complete ban of paddling on the Rock Gorge section of the upper Chattooga. In fact the EA offers compelling evidence that there is no reason to limit boating in the reach. The EA offers:

The steeper gradients starting at Big Bend Falls to about half way down the Rock Gorge reach and extending through the Rock Gorge itself tend to be difficult to fish during higher boatable flows, and therefore would naturally present less opportunity for interference. (EA 126)

And:

...the wider channel and easier gradient may serve to help mitigate interference in a popular and easily accessible fishing reach. (EA 126).

In addition, Table 3.2-8., Eastern Hemlock Communities Within Different Reaches Of The Main Stem Of The Upper Chattooga River, confirms that only 1% of the Rock Gorge has a hemlock-hardwood forest type along the river, which should have led the USFS to explicitly rule out their unfounded concerns regarding hemlock mortality for the rock gorge.

In summary, The USFS offers no rationale for limiting, let alone banning boating on this reach at all flows at all times of year. Their analysis shows that interactions with anglers are unlikely to occur, that if they do occur will not cause interference, and that hemlock mortality is not an issue there. Thus, their decision to ban boating on this reach is arbitrary and capricious.

Q. The USFS failed to consider and incorporate the comments of American Whitewater on the studies and reports that were ultimately addressed in the EA.

Throughout the development of the EA, American Whitewater participated fully in the regulatory process. American Whitewater commented on numerous studies and reports.⁸⁴ These comments were almost universally ignored and the USFS selected Alternative 4, which was a flawed decision for all the reasons stated above and in the comments of American Whitewater.

⁸⁴ American Whitewater's Comments on the "Chattooga River History Project Literature Review and Interview Summary" submitted on April 17, 2007;

American Whitewater's Comments and Suggested Revisions Regarding the Draft *Upper Chattooga River Phase I Data Collection Expert Panel Field Assessment Report*, dated February 2007, and first made available to the public on April 2, 2007;

American Whitewater's Comments on the USFS Report titled "Capacities on other Wild and Scenic Rivers: seven case studies" submitted on May 7, 2007;

American Whitewater's Comments on Draft Environmental Impact Statement for the Revised Land and Resource Management Plan—Sumter National Forest;

American Whitewater's Comments on the USFS Report Titled Capacity and Conflict on the Upper Chattooga River and authored by Shelby and Whittaker, submitted on July 3rd, 2007;

X. The USFS analysis supports allowing boating to the same extent and in the same locations as all existing uses.

- 1. The USFS proposed management is inconsistent with management of all other rivers in the system.**

The USFS manages thousands of whitewater rivers. By far the most common management of non-commercial paddling is no management at all. Paddling is widely recognized by the agency as a public benefit of public lands that is to be supported. It is also recognized as low enough impact and low enough use that management is unnecessary. Active management of paddling only occurs where use is dominant, large, and overnight.

There USFS has banned boating on only two rivers in the whole country: the upper Chattooga and the upper Rogue in Oregon. Boating is prohibited on the upper Rogue because the river flows for long distances through lava tubes. This ban is not actively enforced and is irrelevant to the paddling community because the much of the reach is physically impossible to navigate. American Whitewater has not opposed this policy. The upper Chattooga is a highly desirable whitewater river and thus the precedent of the upper Rogue does not apply.

The USFS has never banned boating on a Wild and Scenic River that has recreation listed as a designated Outstanding Remarkable Value – except on the Chattooga. The only reach of a Wild and Scenic River banned to boating is the Upper Rogue which has no recreational boating value, and no recreation ORV. As mentioned before, American Whitewater has not opposed this policy. The upper Chattooga was designated with a recreation ORV in large part for its value as a boating resource and thus the precedent of the upper Rogue does not apply.

The USFS has never banned boating to benefit anglers – except on the Chattooga. In one extreme case on the North Umpqua in Oregon, where steelhead anglers fish virtually shoulder to shoulder. In this case the USFS recommends that paddlers not float a 5 mile reach during certain hours during steelhead season. This recommendation is not a ban, and is as much to alert paddlers of safety and experience concerns as it is to protect the anglers experience. American Whitewater does not oppose this policy. The upper Chattooga is not dangerously choked with anglers, and in fact few or no anglers will co-occur with paddling, so the precedent of the North Umpqua does not apply.

The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands. The USFS simply does not ban uses (like paddling, hiking, hunting, etc) because recreationists may stray onto private lands.

On perhaps a few dozen rivers the USFS limits paddling by permit. In virtually all of these cases the rivers take several days to paddle, and the limits are designed to ensure campsites are available. Also, in virtually all of these cases paddling is the largest use of the river corridor, and thus is the focus of management activities. In all of these cases paddling limits are designed to protect and enhance the paddling experience. American Whitewater generally supports these policies. The upper Chattooga is a day-use river on which paddling will comprise a relatively tiny portion of the total use, and limits are therefore inconsistent with USFS practice.

- 2. The USFS should not manage for an artificial, intolerant, high-impact use over a nature-based, tolerant, low-impact use.**

The USFS has arbitrarily selected angling as the exclusive use to manage for on the upper Chattooga. This angling use is totally artificial. It is created by the stocking of over 70,000

exotic trout a year by helicopter and trucks. The USFS readily admits that the artificial fishery is a primary determinant of the angling experience. Paddling however is a nature-based activity, which is dependent on only the natural condition of the upper Chattooga River. It is inappropriate to manage for an artificial use to the exclusion of a nature based use on a Wild and Scenic River and in a Wilderness Area.

The USFS is managing for a user group that in this location claims zero tolerance of other uses. Nowhere else in the Nation do anglers claim zero tolerance of paddlers. This intolerance is a choice they are making to secure (successfully we might add) exclusive rights to enjoy and Wild and Scenic River. Worse yet, they are asking the USFS to forbid other uses during conditions when they themselves are not even recreating on the river. What message does it send to gift a public river to any group claiming to need exclusivity 365 days per year? The USFS should manage for compatible uses, and it is inequitable and bad public policy to divide up public resources purely in response to selfish and irrational demands of intolerant members of the public. Wild and Scenic Rivers should be shared.

In a discussion of 30+ year old rumors of past crimes of vandalism and harassment against paddlers on the lower Chattooga River, the USFS states that:

...locals are concerned that similar frustrations and the resulting conflict may recur if boaters are allowed to float the upper Chattooga. (EA 113)

First, paddlers are as local as any other user group, if not more so, and what the USFS is referring to are called “threats.” Should the USFS really be managing for criminals and against people that merely want to float the river? No. The USFS should be managing against crimes of vandalism and for public enjoyment.

The USFS is also managing for a high impact use over a low impact use. They USFS has turned a blind eye to the massive impacts of industrial scale stocking and fish rearing on the upper Chattooga River, but the impacts on riparian areas and visitor encounters could not be ignored. These are all proven impacts. Yet the USFS was unable to document a single impact of paddling on the Chattooga or elsewhere. It is inequitable to manage for the group causing the most violations of standards and against the group causing the fewest, yet that is exactly what the USFS is doing.

3. The record supports limiting boating, if needed at all, in the same ways as other users – not differently.

As stated elsewhere in this document, the USFS has decided to impose limits on non-boating uses only when standards are exceeded, beginning with indirect limits. In the “Proposed Action” section of the EA the USFS states how they will manage encounters for existing users using indirect measures:

Manage encounters among existing users by limiting trails, campsites, group size and parking. (EA 4)

They then state a litany of direct measures *on boaters only* that they will use to limit encounters.

Manage encounters among users by establishing zone, season, group size restrictions and flow limits (including prohibition in some alternatives) on boating opportunities.(EA 4)

This management choice is not equitable or justified. In addition, in all alternatives (except for some reaches in Alternative 8), the USFS imposed the direct limits on paddlers immediately before any standards have been exceeded, however all other users are unlimited until standards are exceeded. This is an arbitrary and capricious decision that the USFS admits is unnecessary.

In alternative 8 they consider managing all uses similarly on some reaches, and admit that this alternative would work:

When the boater impacts (Table 3.3-10) are combined with the impacts from existing users (Table 3.3-9), both the Rock Gorge and Nicholson Fields reaches may exceed encounter limits on trails (Figure 3.3-4 below). At this encounter level, if after two years of implementation, encounter limits are still being exceeded, then indirect measures would be taken to reduce encounter levels for the following two years. If after that time encounters have not been reduced, then a permit system would be implemented to continue maintaining the desired levels of solitude and quality recreation experiences defined in this alternative. These actions ensure that both the Chattooga River's recreation ORV, and in particular its solitude component, are being "protected and enhanced," and the "outstanding opportunities for solitude" in the Ellicott Rock Wilderness are being preserved at the desired levels for this alternative.(145)

The USFS never justifies its decision to treat paddlers totally differently and discriminatorily when compared with their treatment of other uses. This treatment is inequitable.

4. The USFS excludes many boating opportunities that would not co-occur with "high quality backcountry fly fishing."

The USFS has imposed geographical, seasonal, and flow-based limits on paddlers. They never justify, and indeed could not justify, why all three of these overlapping limits are needed to prevent angling and paddling from co-occurring (a goal which we do not feel is valid). Flows alone separate uses. Even if one were to accept the unfounded concepts that uses must be separated by an agency mandate, an agency selected flow limit (of 325-350 cfs) would assure that paddling and angling never co-occur anywhere on the upper Chattooga. Why then does the USFS impose additional seasonal and geographical closures. The only effect that the seasonal and geographical closures have is to deny paddlers unique and high quality opportunities to enjoy the upper Chattooga River during times and in places where *no angling* will be occurring. To deny paddlers these opportunities is without basis, inequitable, arbitrary, and capricious.

5. Boaters Coexist Peacefully With Other River Recreationists on All Other Southeastern Rivers

Virtually all "creek boating" resources in the Southeast are also trout fishing resources (although the opposite is not true). On these hundreds of other rivers, angling, paddling, and hiking coexist with no reports of any type of conflict. Paddling and angling uses rarely overlap because of different flow preferences and when they do, this interaction is amicable. It must be noted that many "creek boaters" are also cold water anglers. Additionally, many cold water anglers prefer to fish from canoes and kayaks. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the upper Chattooga River.

6. Data Indicates Overlap of Boating Use and Other Uses will Be Minimal.

As stated above, if boating is allowed without direct limits anglers will have an average of 305 days each year to enjoy the Chattooga River. The majority of remaining 60 days will be low quality angling days due to high flows which make fishing more difficult and wading less safe.

7. Boating Is the Smallest and Slowest Growing Use

As stated above, boating, if allowed, would likely be the smallest and slowest growing use of the upper Chattooga River. Banning the smallest and slowest growing use is unfair and irrational management.

8. Banning a Use should Be a Last Resort

Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers:

“apply indirect techniques for regulation of use before taking more direct action.”⁸⁵

The USFS has not attempted to limit boating use on the upper Chattooga with indirect techniques before using direct management techniques (such as zoning and banning uses). The USFS has never tried a permit system, education, or other indirect techniques to limit paddling use of the river before resorting to a ban. In fact there was never any evidence or data to suggest that boating use should be limited in the first place, let alone banned completely. It must also be noted that the USFS has not attempted to limit total *use*, but instead has chosen to eliminate *a use*.

One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.” Still, the USFS supports large scale stocking programs on the upper Chattooga. In addition to large scale stocking programs there is a year round season with large creel limits. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor. When the USFS decides to limit use of a Wild and Scenic River, the USFS Manual states that the USFS should exhaust passive or indirect techniques before using direct techniques such as the ban of a use. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning of any other use. How can the USFS justify taking the most extreme action to limit one group of recreationists on the grounds of overuse, while going to great lengths to attract more use of the same resource by other user groups?

9. If Uses Are to Be Banned, Boating Should Be Last Rather than First

Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters. Interactions between boaters and other dispersed recreationists would be focused at access areas where solitude is not expected. In addition, paddlers travel far more quickly than land based recreationists. Interactions in the wilderness itself would be limited temporally as well as spatially compared to interactions between other user groups.

Boaters will also be attracted to the upper Chattooga only during periods of high water which generally occur in the winter and early spring months. This flow preference will have several

⁸⁵ The USFS MANUAL TITLE 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT

distinct effects. First, paddlers will use the upper Chattooga during periods of high water when angling is less desirable and when wading is dangerous. Therefore, interactions between anglers and boaters will be minimal. Secondly, paddlers will most often use the upper Chattooga River in the cold winter and early spring months when hiking, bird-watching, and swimming are less popular. Therefore interactions between boaters and other dispersed recreationalists will be minimal.

If uses must be banned to maintain the Headwater's character, boating should be the last use banned rather than the first given that boating has the least impact on the environment and on other users.

10. All Primitive Recreationists Should Share Access to the Headwaters

If the goal of the USFS is to limit use of the Chattooga Wild and Scenic River corridor then it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning paddling, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use. The USFS Manual suggests the following approach: "When it becomes necessary to limit use [of a W&S River], ensure that all potential users have a fair and equitable chance to obtain access to the river."⁸⁶ By banning paddling on the Headwaters of the Chattooga while allowing all other uses to occur without limits, the USFS is not providing paddlers a fair and equitable chance to obtain access to the river. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the USFS is not being fair or equitable. American Whitewater supports any use limitation that is equitably imposed on all users of the upper Chattooga based on solid data that indicates a need for limiting use.

11. The Headwaters Are Federally Protected Due In Large Part to Boating

As noted above, the upper Chattooga was included in the Wild and Scenic River system based in large part on the incredible paddling opportunity those reaches would provide to the public in perpetuity.

The USFS is robbing the paddling public of this Wild and Scenic paddling treasures. Banning paddling on the Headwaters of the Chattooga is at odds with the intent of the Chattooga's WSR designation. The USFS does a great disservice to the American Public by banning what the USFS finds is the public's most low impact and best way of viewing the Chattooga Headwaters.

12. Boating Above Highway 28 Will Not Adversely Affect the Recreation Opportunity Spectrum (ROS)

⁸⁶ USFS MANUAL TITLE 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT

Self-guided floating on the Chattooga Headwaters will not affect the Recreation Opportunity Spectrum (ROS) and is consistent with all ROS settings in the corridor including semi-primitive, semi-primitive non-motorized, and roaded natural standards for management.

13. Boaters Have a Strong Sense of Place and Enjoy Solitude

Boaters enjoy solitude and have a strong sense of place. Studies show that boaters have an even stronger sense of place than other dispersed recreationists. Accordingly, boaters' access to the Headwaters should be restored so that their sense of place and feelings of solitude may be explored, and in the case of some boaters—revived.

14. The Upper Chattooga is a Great Whitewater River

While the USFS makes much of the “high quality angling experience,” they clearly fail to describe or value the high quality paddling experience that the upper Chattooga provides. Let us be clear – the upper Chattooga is not for everyone - but for those with the skills and experience it is a unique and incomparable whitewater river. The one legal descent of the river in over 30 years revealed a beautiful stream filled with world class rapids, stunning views, and an intimate and remote feel. There are extremely few opportunities in the region to paddle a Wild and Scenic River, a river flowing through a Wilderness Area, or a river flowing through a Roadless Area. The upper Chattooga provides all three. The upper Chattooga is a high quality and unique river for skilled kayakers and canoeists, and denying any portion of this river to paddlers is inequitable and unjustified.

15. The Boating Ban Sets a Damaging Precedent

Making the Chattooga River an exception to the traditionally collaborative relationship between paddlers and anglers has done more to create conflict between these two user groups than any on-river interaction ever will. The USFS has driven a wedge between these groups that threatens to have significant unwanted ripple effects.

The coldwater angling and whitewater paddling communities have many shared interests that are based on a love of wild mountain rivers. Both Trout Unlimited and AW are steering committee members of the Hydropower Reform Coalition and regularly work together to protect regulated rivers from corporate abuse. Trout Unlimited and AW recently signed a pro-river settlement (with the USFS) on the relicensing of the Duke Power Dams on the Nantahala and Tuckasegee Rivers in Western North Carolina that meet many of the two groups shared interests. Trout Unlimited and AW even presented at a National Park Service conference in November of 2003 called “Partners in Stewardship.” The thesis of the presentation was that when anglers and paddlers collaborate the river wins, and when there is conflict the river loses. The USFS now threatens the relationship between anglers and paddlers by pitting the two complimentary groups against one another.

If the USFS decision is allowed to stand, it will establish that angling and paddling are incompatible uses. Such a decision will spawn a race-to-the-bottom among primitive recreationists. Anglers, hikers and paddlers will scramble to establish monopolies on their favorite sections of river across the country, or to defend their right to experience their favorite

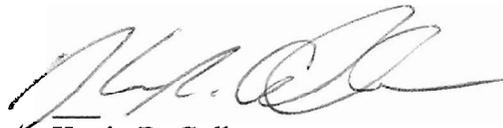
places. This struggle will be a losing battle for all parties involved—including the USFS. These struggles will take place in the NEPA arena, and will be incredibly taxing on USFS procedures. Anglers will find themselves displaced from some of their favorite fishing spots as boaters successfully “zone” anglers onto “non-angling” sections of river. Undoubtedly boaters will also suffer “Chattooga-type” treatment on other rivers as anglers successfully zone boaters up or downstream. The equities clearly weigh against establishing such a damaging and divisive precedent, particularly given that no less drastic measures have been attempted to deal with a “conflict” that has no documented existence.

XI. Conclusion:

The USFS preferred alternative and EA are flawed for a multitude of reasons as expressed above. The agency’s continued reliance on this flawed data and preconceived notions of how floating will affect the Upper Chattooga River constitute arbitrary and capricious conduct. Restoring nationally consistent management to the upper Chattooga River required significant modifications to the decisions on this matter. Specifically, revisions to Alternative 4 that allow paddling on the entire upper Chattooga River from Grimshawes Bridge to Highway 28 and the tributaries to the same extent that all other uses are allowed, that apply the same standards and monitoring to all uses, that only limit uses when standards and/or capacities dictate such limits, and that then limits all uses equitably while exhausting indirect limits prior to establishing direct limits.

I declare that the foregoing is true and correct.

Executed on the 16th day of October, 2009.



Kevin R. Colburn

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

AMERICAN WHITEWATER, et al.)
)
 Plaintiffs,)
 v.)
)
 THOMAS TIDWELL, in his official capacity as Chief) Civil Action No.
 of the United States Forest Service, et al.)
)
 Defendants.)

DECLARATION OF DR. MARK BAIN

My name is Dr. Mark Bain. I am an Associate Professor in the Department of Natural Resources at Cornell University. I received my Ph. D. from the University of Massachusetts. I am a quantitative aquatic biologist and ecosystem scientist who conducts both basic research and studies driven by current management issues. My specialties are fish and macroinvertebrates in lakes, streams and estuaries. Statistics, modeling, and biological assessment are heavily used in most research and teaching. My current research involves testing complex systems theory, planning ecosystem restoration and conservation, and ecology of pathogens in Great Lakes waters. My environmental policy experience includes ecosystem management, endangered species protection, energy - environment conflicts, watershed conservation, and international conservation planning.

I have reviewed the document “Environmental Assessment Managing Recreation Uses on the Upper Chattooga River” to provide my opinion on the portions of that document that address the fish population in the headwaters of the Chattooga River, at the request of American Whitewater.

Conservation and restoration of the southern genotype of brook trout (*Salvelinus fontinalis*) has long been a priority of fishery biologists in the Appalachian Mountain Region of the middle and southern states. The American Fisheries Society, the primary professional fishery organization of North America, has adopted a policy that southern brook trout are a significant component of the Appalachian region's ecological integrity, biological diversity, and sportfishing legacy (1). The decline of brook trout in the region has long been recognized (2-4) and well documented (5-7). One factor implicated in the decline of brook trout populations has been the establishments of nonnative rainbow trout (*Oncorhynchus mykiss*) and brown trout (*Salmo trutta*) in streams inhabited by brook trout.

The most closely studied location for this issue has been the Great Smoky Mountains National Park where the National Park Service management policy is to protect and preserve the naturally functioning ecosystem (8). Nonnative dominate substantial lengths of trout streams in the Park,

and since the mid-1970s the Park Service has reduced and eradicated rainbow and brown trout trout to promote expansion of stream lengths used by brook trout. Evaluations of this management (9-11) have documented increased brook trout numbers following reduction in nonnative trout. Restoration of brook trout streams by reduction and elimination of rainbow and brown trout continue to this time in Great Smoky Mountains National Park (<http://www.nps.gov/grsm/naturescience/dff109-researchfisheries.htm>).

The mechanism of impact of nonnative trout on brook trout is less clear and different research findings have been reported. The relative abundance and stream lengths of domination by rainbow and brook trout have been found to change back and forth through time in the middle Appalachian region (TN, 12). Competition between rainbow and brook trout at the earliest life stage has been found to favor rainbow trout (13), and more frequent poor reproduction and lower fecundity of brook trout can explain rainbow trout dominance in the southern Appalachian Mountains (14). Behavioral displacement is also possible because stream trout are territorial but the mechanism has not been well studied. The trend for brook trout to be disadvantaged by stocked rainbow and brown trout appears most common on the margin of the brook trout range - south of Virginia and North Carolina (15).

Regardless of the mechanism and extent of impact on brook trout, stocking of nonnative trout species would not favor brook trout and would depart from management southern Appalachian Mountain streams for ecological integrity and natural trout populations. The southern Appalachian brook trout remains a species that is sensitive to human alterations of the environment and disruptions of the natural stream fish fauna.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 8th day of October, 2009.


Mark Bain, PhD

-
1. Habera, J., and S. Moore. 2005. Managing Southern Appalachian brook trout: A position statement (American Fisheries Society). Fisheries 30(7):10-20.
 2. King, W. 1937. Notes on the distribution of native, speckled, and rainbow trout in the streams at Great Smoky Mountains National Park. Journal of the Tennessee Academy of Science 12:351–356.
 3. Kelley, G. A., J. S. Griffith, and R. D. Jones. 1980. Changes in the distribution of trout in Great Smoky Mountains National Park, 1900–1977. U.S. Fish and Wildlife Service Technical Papers 102.

4. Bivens, R. D., R. J. Strange, and D. C. Peterson. 1985. Current distribution of the native brook trout in the Appalachian region of Tennessee. *Journal of the Tennessee Academy of Science* 60:101–105.
5. Habera, J. W., and R. J. Strange. 1993. Wild trout resources and management in the Southern Appalachians. *Fisheries* 18(1):6–13.
6. Galbreath, P. F., N. D. Adams, S. Z. Guffey, C. J. Moore, and J. L. West. 2001. Persistence of native southern Appalachian brook trout populations in the Pigeon River System, North Carolina. *North American Journal of Fisheries Management* 21:927–934.
7. Hudy, M., T. M. Thieling, N. Gillespie, and E. P. Smith. 2008. Distribution, status, and land use characteristics of subwatersheds within the native range of brook trout in the Eastern United States. *North American Journal of Fisheries Management* 28:1069–1085.
8. NPS. 1988. Chapter 4:5. Management Policies. U.S. National Park Service, Washington, DC.
9. Moore, S. E., B. L. Ridley, and G. L. Larson. 1983. Standing crops of brook trout concurrent with removal of rainbow trout from selected streams in Great Smoky Mountains National Park. *North American Journal of Fisheries Management* 3:72–80.
10. Moore, S. E., G. L. Larson, and B. Ridley. 1986. Population control of exotic rainbow trout in streams of a natural area park. *Environmental Management* 10(2):215-219.
11. Larson, G. L., and S. E. Moore. 1985. Encroachment of rainbow trout in the southern Appalachian mountains. *Transactions of the American Fisheries Society* 114:195–203.
12. Strange, R. J., and J. W. Habera. 1998. No net loss of brook trout distribution in areas of sympatry with rainbow trout in Tennessee streams. *Transactions of the American Fisheries Society* 127:434–440.
13. Clark, M. E., and K. A. Rose. 1997a. Individual-based model of stream-resident rainbow trout and brook char: model description, corroboration, and effects of sympatry and spawning season duration. *Ecological Modelling* 94:157-175.
14. Clark, M. E., and K. A. Rose. 1997b. Factors affecting competitive dominance of rainbow trout over brook trout in southern Appalachian streams: Implications of an individual-based model. *Transactions of the American Fisheries Society* 126:1-20.
15. Flebbe, P. A. 1994. A regional view of the margin: salmonid abundance and distribution in the southern Appalachian Mountains of North Carolina and Virginia. *Transactions of the American Fisheries Society* 123:657–667.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

AMERICAN WHITEWATER, et al.)
)
Plaintiffs,)
v.)
)
THOMAS TIDWELL, in his official capacity as Chief) Civil Action No.
of the United States Forest Service, et al.)
)
Defendants.)

DECLARATION OF DR. GLENN E. HAAS

My name is Glenn E. Haas. I am a Professor Emeritus in the College of Natural Resources at Colorado State University and partner in the land use planning firm of Aukerman, Haas, and Associates. My areas of expertise include natural resource planning and policy, recreation planning and management, recreation supply and demand analysis, administrative decision making, and visitor capacity analysis. A summary of my credentials is set out at the end of this Declaration.

I was asked by American Whitewater to provide an expert review of the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (USDA Forest Service, August 2009)*. More specifically, I was tasked with assessing the adequacy of the EA with regard to the issue of visitor capacity.

In summary, I conclude the USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and violates the principles and practices of the recreation resource planning profession.

The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (USDA Forest Service, August 2009)* fails the test of adequacy on several fronts:

1. Visitor capacity is not adequately addressed, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year “visitor capacity analysis” effort in response to the 2005 Decision of Appeal;
2. The USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;
3. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is a maximum number

of people. The range of alternatives considered by the USFS, in terms of visitor capacity, ranged from a maximum of zero or no boating capacity to zero prescribed boating capacity being offered on some reaches but not all. No range of visitor capacity alternatives were offered for the other significant recreation activities;

4. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

Visitor Capacity.

The Wild and Scenic Rivers Act of 1968 specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase visitor capacity has replaced the phrase user capacity and will be used henceforth.

While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people. A visitor capacity can be defined as the prescribed number(s) of recreation opportunities that will be accommodated based upon an area’s approved comprehensive management prescription (i.e., the area’s goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area’s prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment. (Federal Interagency Task Force, 2002)

Table 1 is a summary of the visitor capacities that were compared and contrasted across the eight alternatives considered in the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (August, 2009)*. In instances where there is no visitor capacity considered, the cell is left blank. In instances where a visitor capacity is set at zero (i.e., not permitted), the number “0” is inserted in the cell.

Table 1. A Summary of the Visitor Capacities That Were Compared and Contrasted Across the Eight Alternatives in the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River. (August 2009)*

Significant Recreation Activities	Chattooga EA Alternatives							
	1	2	2	4	5	6	7	8
Boating on tributaries and upper 2 miles	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)
Boating below upper 2 miles on main body	0 (not permitted)	0 (not permitted)	0 (not permitted)					
Angling								
Hiking/ Backpacking								
Camping								
Hunting								
Swimming								

Other non-significant activities and capacities included in the EA:

- no, or zero (0), capacity for commercially guided boating across all alternatives
- “no net gain in parking capacity” across all alternatives

Observations:

1. As revealed in Table 1, the EA is virtually silent on the issue of visitor capacity. It does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year “visitor use capacity analysis” with extensive public involvement. A proper study would provide information to place numbers in the blank boxes.

2. For three alternatives, the EA includes a zero (0) capacity for boating on the entire upper Chattooga; that is, boating is not allowed on the entire upper Chattooga. There is no boating capacity included in alternatives 4-8 on the sections where boating is allowed, and on the prohibited sections the capacity is zero.

3. None of the alternatives address the visitor capacity for those other significant activities recognized by the USFS: angling, hiking/backpacking, camping, hunting, and swimming.

4. The alternatives considered by the USFS do not reflect a reasonable range of options or choices for rigorous analysis and public discussion. For example, it would seem reasonable that a range of alternatives might consider capacities and associated management programs for all the significant activities recognized by the USFS, and that these capacities might well vary by time of day, week, season or year; water flows; and managed by a simple timed-entry reservation system akin to systems used to reserve campsites, hotel rooms, golf outings, museum exhibits, and restaurants..

5. In section 1.1 (paragraph 3) of the EA, it is stated that “The Forest Service has been tasked with finding the right balance for the Chattooga River corridor so the overall recreation ORV is protected and enhanced.” Stated otherwise, the Forest Service is tasked with making an allocation of visitor opportunities for the corridor. In order to make allocation one must address visitor capacity. This EA does not complete the task the Forest Service was charged with.

6. There is no explanation for not addressing visitor capacity. On the contrary, the Forest Service’s numerous claims in the EA regarding substantial numbers of people, increasing use, premier whitewater destination in the world, 20% projected use increase, increasing impacts, increasing litter and social trail, excessive campsites, trails and parking, excessive encounters, conflicts, and other situations make a compelling case for addressing visitor capacity, not simply banning boating.

Comprehensive Management Planning.

The Wild and Scenic Rivers Act of 1968 specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment. Furthermore, the procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process.

Observations:

1. The EA in question only addresses recreation management for the upper 21-mile portion of the Chattooga Wild and Scenic River, without due consideration for the lower 36-mile river segment below Highway 28. Yet the resources, resources uses and ORVs in one segment affect, and are affected by, those in other segments. Certainly visitor capacity decisions in one segment can significantly affect visitor capacity decisions in other segments in order to respond fairly and equitably to diverse public demands and values. Partitioning of the Chattooga Wild and Scenic River for the purpose of revising the recreation management direction for only 21-mile portion is not justifiable and compromises the benefit of full, integrated and comprehensive planning.

2. The EA tiers off additional management direction for the Chattooga Wild and Scenic River. That is, to fully understand the management direction for the river one must be familiar with portions of three forest plans and the Ellicott Rock Wilderness management plan. There appears to be no single comprehensive management plan for the Chattooga WSR, and the EA does not adequately integrate all the existing management direction. This places an unreasonable burden on the public to locate, understand and meaningfully participate in any comprehensive planning process.

3. The USFS was able to issue a Finding of No Significant Impact on the EA and avoid a full EIS because, in part, it was decided (a) to address only a 21-mile segment of the 57-mile Chattooga Wild and Scenic River corridor, (b) to not address the significant issue of visitor capacity, and (c) to only consider a narrow range of alternatives. The Chattooga WSR deserves the benefit of a full environmental impact statement and a stand-alone comprehensive management plan for the entire corridor.

In closing, there are numerous examples in the United States across state and federally-managed rivers where capacity has been properly addressed, including USFS managed rivers such as the Selway, Toulumme, Salmon, Salt and Snake Rivers. Visitor capacity is a fundamental tool for recreation resource planning and management, and is one of the professional principles for recreation resource planning formally endorsed by the National Association of Recreation Resource Planners. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation with the principles and practices of the recreation resource planning profession.

Credentials

I obtained a Ph.D. in Natural Resource Planning/Recreation and Nature-based Tourism Management from Colorado State University in 1979, a Masters in Outdoor Recreation/Tourism Management from Pennsylvania State University in 1975, a Bachelor's in Natural Resource Management from West Virginia State University in 1972, and an Associate in Forest Management from Pennsylvania State University 1970.

I was the expert witness for the plaintiff in the recent Merced WSR litigation whereby the courts found that the NPS did not adequately address visitor capacity. I also provided expert advice on the Yellowstone National Park snowmobile litigation, the Imperial Sand Dunes Recreation Area (BLM) off-road vehicle litigation, the Grand Canyon National Park/Colorado River boating litigation, and the Lake Pleasant (BOR) marina-development litigation.

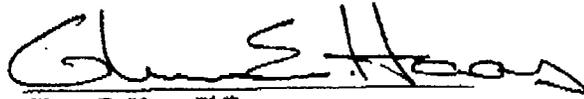
I have twice served on the national board of the National Society for Park Resources (1986-1990, 2003-2006) and six years on the national board of the National Parks Conservation Association (1992-1998), including three years as the vice-chair. I was the Chairman of the Department of Recreation Resources and Tourism at Colorado State University from 1987-1997. I am currently serving as the Vice President for Development for the National Association of Recreation Resource Planners and served as the President from 2007-09.

I have an extensive working relationship with state and federal public land and water management agencies and am relied on as an expert witness and consultant related to NEPA-compliant planning, estimating future recreation demand, and recreation carrying capacity. In 1980-81, I worked in the national office of the U.S. Forest Service and drafted the agency policy on limits of acceptable change (LAC) and worked to advance the Recreation Opportunity Spectrum system. In 2000-2002, I worked as a special advisor for the Assistant Secretary for Fish and Wildlife and Parks in the U.S. Department of the Interior, during which time I chaired of the Federal Interagency Task Force on Visitor Capacity on Public Lands and Waters involving the National Park Service, U.S. Forest Service, Fish and Wildlife Service, Bureau of

Reclamation, and Bureau of Land Management. Since 2002, I have worked closely with the Bureau of Reclamation in developing of the Water Recreation Opportunity Spectrum (WROS) system as a means for the recreation profession to inventory, plan, and manage water-based recreation opportunities. I also recently completed a manager's guidebook on estimating future recreation demand.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 8th day of October, 2009.



Glenn E. Haas, PhD