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DECISION FOR

APPEAL

#04-13-00-0026 American Whitewater

OF THE

SUMTER NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN REVISION

/s/ Gloria Manning 04/28/05

GLORIA MANNING
Reviewing Officer for the Chief

Date

EXHIBIT G

SUMTER NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN REVISION

APPEAL DECISION
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PROCEDURAL BACKGROUND

Appellant and Record of Decision

This is my decision on American Whitewater's appeal (#04-13-00-0026) of the Record of Decision (ROD) for the Sumter National Forest Revised Land and Resource Management Plan (RLRMP) and its accompanying Final Environmental Impact Statement (FEIS). Regional Forester Robert T. Jacobs signed the ROD approving the Sumter National Forest RLRMP on January 15, 2004. His decision was subject to appeal pursuant to the Code of Federal Regulations (CFR) at 36 CFR 217 (Appeal of Regional Guides and National Forest Land and Resource Management Plans).

Appellant American Whitewater, under regulations at 36 CFR 217.8, filed a timely notice of appeal (NOA). The Regional Forester transmitted the records for the appeals to the Chief of the Forest Service in conformance with the regulations at 36 CFR 217.15(a). There were no requests for intervention received on this appeal. An additional four appeals were filed on the ROD for the Sumter National Forest RLRMP. These additional appeals are unrelated to the American Whitewater appeal, and will be included in a separate decision.

Request for Relief

Appellant requests modification of the selected alternative, Alternative I, from the FEIS in the form of proposed Alternative E. This would allow "year-round access for self-guided groups of non-commercial, non-motorized canoeists and kayakers to float the Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge" (NOA, pp. 1-2).

Background

The Sumter National Forest includes approximately 362,000 acres of National Forest System land in the mountains and piedmont of South Carolina. The Forest is divided into three ranger districts located in 11 counties. The Sumter National Forest includes a portion of the Chattooga Wild and Scenic River, and the Ellicott Rock Wilderness; both lie within the Andrew Pickens Ranger District in western Oconee County.

The Sumter National Forest RLRMP was prepared under the Multiple-Use Sustained-Yield Act (MUSYA) (16 U.S.C. 528 et seq.), the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 as amended by the National Forest Management Act (NFMA) (16 U.S.C. 1600 et seq.), the September 30, 1982, implementing regulations of the NFMA (36 CFR 219, as amended September 7, 1983), and the National

Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) and its implementing regulations (40 CFR 1500-1508). The original Sumter Forest Plan was issued in 1985.

The RLRMP at issue in this appeal generally is a programmatic framework for management of the Sumter National Forest. It allocates portions of the forest into management areas that reflect biological, physical, watershed, and social differences.

In 1974, Congress designated 57 miles of the Chattooga River as a component of the National Wild and Scenic Rivers System. The headwaters of the river begins in North Carolina and continue downriver along the South Carolina and Georgia border. A portion of the river also flows through the Ellicott Rock Wilderness.

The Chattooga River Management Area (Management Area 2 in the Sumter National Forest RLRMP) consists of public lands in National Forest management located within the Blue Ridge Mountains and upper piedmont of Georgia, South Carolina, and North Carolina. The Chattahoochee-Oconee National Forests in Georgia, Nantahala National Forest in North Carolina, and the Sumter National Forest in South Carolina share management of the watershed, with the Sumter National Forest in charge of administering the river uses associated with the Chattooga Wild and Scenic River.

RESPONSE TO ISSUES

Contention

Appellant alleges a ban on non-commercial boating above Highway 28 "contravenes the Federal Wild and Scenic Rivers Act (WSRA), the National Environmental Policy Act (NEPA), the Wilderness Act, the Multiple-Use Sustained-Yield Act (MUSYA), the Forest and Rangeland Renewable Resources Planning Act (RPA), the National Forest Management Act (NFMA), the Administrative Procedures Act (APA), and the United States Constitution, as well as relevant federal case authority." Appellant contends that there is a lack of data or studies in the record to support the decision (NOA, p.1).

Discussion

Appellant's primary concern is a ban on non-commercial boating within a wild and scenic river and designated wilderness. Therefore, the following discussion focuses on the Regional Forester's decision and its adherence to law, regulation, and policy for allegations related to wild and scenic rivers and wilderness.

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1(b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification."

Recreation is identified as one of the Chattooga River's ORVs in the pre-designation study (*Wild and Scenic River Study Report: Chattooga River*, p. 66) and the FEIS (FEIS, p. 3-301, Appendix H, p. H-4). Whitewater boating (canoeing and rafting) is specifically recognized as one of the recreational opportunities available in this generally remote river setting (*Chattooga WSR Classification, Boundaries, and Development Plan* (41 FR 11830, March 22, 1976)).

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river."

The Wilderness Act directs that areas designated as 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"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish 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)).

Agency policy for wilderness echoes law and policy relative to maximizing visitor freedom, directing 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). The Forest Service manual further requires that limitation and distribution of visitor use should be based on "periodic estimates of capacity in the forest plan" (FSM 2323.14).

The Regional Forester based his decision to continue the ban on non-commercial boating above Highway 28 on likely impacts that would result from lifting the ban (Sumter NF RLRMP ROD, p. 5). These include impacts to social and physical resources anticipated by the introduction of a new user group, such as, decreased opportunities for solitude, increased user-created trails to facilitate boating, and increased need for search and rescue operations. In addition, he stated that there were adequate opportunities for "creek boating" experience on other rivers in the area (ROD, p. 13).

The Regional Forester, based on the authorities listed above, can limit or restrict use within a WSR or Wilderness area. To protect the Chattooga River's ORVs and Ellicott Rock Wilderness resources, the Regional Forester may:

- Disallow or restrict the number of (private and commercial) on-river and in-corridor recreation users,
- Determine the type of recreation use,
- Dictate the timing of such use.

This authority should be exercised only with adequate evidence of the need for such restrictions.

The Sumter National Forest RLRMP record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource. No capacity analysis is provided to support restrictions or a ban on recreation use or any type of recreation user. 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.

In addition, there is no basis in law, regulation or policy to exclude a type of wilderness-conforming recreation use due to concerns relative to safety, and search and rescue. Agency policy includes provisions for use of motorized equipment or mechanical transport in emergency situations, including health and safety (FSM 2326.1), and defines the role of the Forest Service as one of support to local and State search and rescue entities (FSM 1599.03).

DECISION

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. 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.

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. I estimate that this work could be completed within two years of this decision. If additional time, based on unforeseen circumstances, is needed, the Regional Forester should contact this office to establish a mutually agreed time for completion. I am also providing the following interim management direction, to be in effect until the new decision is issued:

1. Management of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect. Should the capacity analysis require user trials, 36 CFR 261.77 provides the

Regional Forester with the authority to permit boating on sections of the river that are currently closed.

2. Involve affected and interested parties in the design and execution of the capacity analysis

This decision is the final administrative determination of the Department of Agriculture unless the Secretary, on his own initiative, elects to review the decision within 15 days of receipt (36 CFR 217.17(d)). By copy of this appeal decision, I am notifying all parties to this appeal.