

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION

AMERICAN WHITEWATER, AMERICAN ) Civil Action No. 8:09-cv-02665-RBH  
CANOE ASSOCIATION, GEORGIA )  
CANOEING ASSOCIATION, ATLANTA )  
WHITEWATER CLUB, WESTERN )  
CAROLINA PADDLERS, FOOTHILLS )  
PADDLING CLUB, Joseph C. STUBBS, )  
Kenneth L. STRICKLAND, and Bruce A. )  
HARE, )

Plaintiffs, )

v. )

THOMAS TIDWELL, in his official capacity )  
as Chief of the United States Forest Service; )  
the UNITED STATES FOREST SERVICE, an )  
agency of the United States Department of )  
Agriculture; ELIZABETH AGPAOA, )  
Regional Forester, Southern Region, United )  
States Forest Service; MONICA J. )  
SCHWALBACH, Acting Forest Supervisor, )  
Francis Marion and Sumter National Forests; )  
MARISUE HILLIARD, Forest Supervisor, )  
National Forests in North Carolina; GEORGE )  
M. BAIN, Forest Supervisor, Chattahoochee )  
-Oconee National Forests; THOMAS )  
VILSACK, in his official capacity as Secretary )  
of the United States Department of )  
Agriculture; the UNITED STATES )  
DEPARTMENT OF AGRICULTURE, )

Defendants, )

**MOTION TO DISMISS  
AND  
MEMORANDUM IN SUPPORT**

**MOTION**

Pursuant to Fed. R. Civ. P. 12(b)(1), the defendants move this Court to dismiss the

action because it is moot and because plaintiffs were, in any event, required to exhaust their administrative remedies before coming to this Court in the first place, as is further explained in the following Memorandum in Support.<sup>1</sup>

## MEMORANDUM IN SUPPORT

### I. FACTUAL SUMMARY

The facts leading to this action have been presented to the Court previously in extensive detail.<sup>2</sup> They will be summarized here much more briefly.

The Chattooga River was designated by Congress as a Wild and Scenic River under the Wild and Scenic Rivers Act in 1974. On March 22, 1976 the Forest Service ("FS") published its Chattooga Wild and Scenic Development Plan in the federal register, allowing boating on the lower two-thirds of the Chattooga, but prohibiting it on the portion of the river above Highway 28, which is roughly one-third of the river. In 1978, the boating limitations were codified as 36 C.F.R. § 261.77. In essence, 36 C.F.R. § 261.77 prohibits boating on the entire river except where permits are provided by the Forest Service. From then until

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<sup>1</sup> This memorandum deals with the plaintiffs' Administrative Procedures Act claim, as that is the gist of their complaint. The plaintiffs also cited 28 U.S.C. § 1361, the Mandamus Act, as a jurisdictional basis for this action (in paragraph two of the complaint), but nowhere in the complaint do plaintiffs suggest there is any ministerial act to be performed, nor do they at any point ask for a writ of mandamus to be issued, so that allegation will not be discussed further in this memorandum. See United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 543-544 (1937); Lovall v. Froehlke, 468 F.2d 340, 343 (2d Cir.1972).

<sup>2</sup> Plaintiffs' complaint contained five hundred fifty-one paragraphs spread over eighty-one pages. The defendants do not dispute the general chronology of events set out in the complaint, though some of the facts alleged are incorrect and most of the plaintiffs' characterizations of events are incorrect. It should not be necessary to resolve those factual disputes, however, to decide this motion.

now, boating permits have only been provided on the lower two-thirds of the Chattooga, and since the 1980's that permission (along with the incident prohibition on boating on the upper one-third) has been provided pursuant to the Sumter Forest Plan.

In 2002, an amendment to the Sumter Forest Plan was approved which altered some of the rules regarding boating on the lower two-thirds of the river, but this amendment did not propose any changes to the rules for the upper one-third of the river. In 2003, a Draft Environmental Impact Statement for a Revised Sumter Forest Plan was released which proposed altering some of the rules regarding boating on the lower two-thirds, but maintained the boating prohibition on the upper one-third of the river. A Record of Decision adopting that Revised Forest Plan was signed by the Regional Forester in January of 2004. American Whitewater appealed that decision, opposing the prohibition on boating on the upper river. On April 28, 2005, the Reviewing Officer in American Whitewater's administrative appeal reversed the Regional Forester's decision to continue the prohibition on boating above Highway 28 in the Revised Sumter Forest Plan due to a lack of sufficient information in the record to substantiate the need for the prohibition, and sent that Forest Plan decision back for further study. The pre-existing prohibition on boating above Highway 28 remained in effect pending the reconsideration, although limited boating has been allowed on the upper portion of the river since then in conjunction with studies on the proper use of that portion of the river.

About one year after the decision sending the forest plan provisions back for

reconsideration, the same group of plaintiffs as are involved in this action filed an action in the Northern District of Georgia seeking to have the prohibitions on boating on the upper Chattooga judicially eliminated pending the completion of the review process and the issuance of a new amended forest plan.<sup>3</sup> The district court dismissed the action as premature.<sup>4</sup>

Over the next few years, studies were conducted of the river. Over 3,000 comments were received by the Forest Service in regard to the studies and proposed plan amendments.<sup>5</sup> On August 25, 2009, the Forest Supervisors for the Sumter National Forest, the Chattahoochee-Oconee National Forests and the Nantahala and Pisgah National Forests signed Decision Notices to amend their respective forest plans, which provided that boating would be allowed on the river above Highway 28, limited to a seven-mile long section and only during the months of December, January and February and only when the river was flowing at 450 cubic feet per second or higher. However, these plan amendments have never gone into effect. Five separate administrative appeals were filed in regard to the plan amendments, including one by American Whitewater. On October 26, 2009, the Deputy Regional Forester granted the stay request of Georgia Forest Watch, another administrative

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<sup>3</sup> American Whitewater v Bosworth, Civil Action NO. 2:06-CV-74-WCO, N.D. Ga.

<sup>4</sup> A copy of the final order in American Whitewater v Bosworth is attached hereto.

<sup>5</sup> In fairness, it should be noted that the public comments were received at two stages of the evaluation process and there are certainly some duplicates among the comments. However, there were thousands of unique public comments presented.

appellant, which prevented the amended boating rules for the upper portion of the river from going into effect until the agency had made a final decision regarding the administrative appeals.<sup>6</sup>

On December 18, 2009, the Forest Supervisors for the Sumter National Forest, the Chattahoochee-Oconee National Forests and the Nantahala and Pisgah National Forests withdrew their Decision Notices and indicated that they planned to conduct further analysis before issuing new amendments to the forest plans. This was prompted by the discovery of inconsistencies in the decision documents.<sup>7</sup> As a consequence, on that same date, Ken S. Arney, the Deputy Regional Forester and Appeal Reviewing Officer, dismissed the five pending appeals, based on the withdrawal of the decision notices.<sup>8</sup>

Plaintiffs filed this action to review an alleged final decision of the Forest Service regarding the amendments to the forest plans of the Sumter National Forest, the

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<sup>6</sup> One of the administrative appeals was filed by the Rust family and the Whiteside Cove Association, who have this week moved to intervene in the present case. They object to boating being permitted on the portion of the upper Chattooga that crosses their property and support the now-withdrawn forest plan amendments, at least insofar as those plan provisions prohibited boating on their property. Memorandum in Support, Docket Entry 43-1, page 7.

<sup>7</sup> Specifically, the decision notices were withdrawn because the analysis in both the Biological Evaluation and Biological Assessment were based upon an alternative that was different from the selected alternative, resulting in inconsistencies between the environmental documents. Specifically, the BE and BA assumed that there would be a maximum of four groups per boatable day, but the selected alternative did not contain a limitation on the number of groups allowed per boatable day. Therefore, more analysis needs to be completed and new decisions made. This was a discrepancy that was not raised in any of the administrative appeals from the withdrawn decision notices, nor was it raised in this action.

<sup>8</sup> Declaration of James W. Bennet, attached.

Chattahoochee-Oconee National Forests and the Nantahala and Pisgah National Forests. However, because those decisions have been withdrawn, the judicial challenge to them is moot. While new decisions regarding recreation management on the upper Chattooga Wild and Scenic River will be forthcoming, the contents of those decisions have not yet been determined, let alone subjected to the full agency administrative process required by statute. Accordingly, any court action is premature.<sup>9</sup>

## II. STANDARD FOR DECISION

When a Rule 12(b)(1) challenge is raised to the factual basis for subject matter jurisdiction of the Court, the burden of proving subject matter jurisdiction is on the plaintiff. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir.1982). In determining whether jurisdiction exists, the district court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Richmond, Fredericksburg & Potomac Railroad Co. v. United States, 945 F.2d 765 (4th Cir. 1991); Dow AgroSciences LLC v. National Marine Fisheries Service, 638 F.Supp.2d 508, 511 (D.Md. 2009); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2009).

## III. ARGUMENT

### A. The Forest Supervisors' Decisions Withdrawing the Forest Plan Amendments Render This Case Moot.

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<sup>9</sup> The Forest Service has issued a press release stating that it anticipates the three new revised forest plans being issued in the "early spring." The press release is available online at: [http://www.fs.fed.us/r8/fms/sumter/resources/documents/1650\\_1\\_R81609\\_NewsRelease\\_ChattoogaRiverDecisionsVoluntarilyWithdrawn.pdf](http://www.fs.fed.us/r8/fms/sumter/resources/documents/1650_1_R81609_NewsRelease_ChattoogaRiverDecisionsVoluntarilyWithdrawn.pdf)

**1. There Is No Longer A Live Case Or Controversy Before The Court.**

The jurisdiction of the federal courts extends only to live cases and controversies. See U.S. Const. art. III, § 2. That requirement persists throughout all stages of the litigation. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (“[A]n actual controversy must be extant at all stages of review.”); McAlpine v. Thompson, 187 F.3d 1213, 1216 (10th Cir. 1999). A federal court lacks jurisdiction “to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it.” Church of Scientology v. United States, 506 U.S. 9, 12 (1992). If an order in plaintiff’s favor would do no good or serve no purpose, the appeal is moot. McAlpine, 187 F.3d at 1216. See also Horstkoetter v. Department of Public Safety, 159 F.3d 1265, 1277 (10th Cir. 1998) (holding that challenge to regulation was moot because “any injunction that we might issue in this case . . . would be meaningless”); Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 728 (10th Cir. 1997) (“If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed.”); Central Wyoming Law Assoc. v. Denhardt, 60 F.3d 684, 687-88 (10th Cir. 1995) (holding that challenge to warrant was moot where warrant had expired). As the Tenth Circuit has stated, “[t]he crucial question is whether ‘granting a present determination of the issues offered . . . will have some effect in the real world.’” Citizens for Responsible Government Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000) (quoting Kennecott Utah Copper Corp. v. Becker, 186 F.3d 1261, 1266 (10th Cir. 1999)).

Thus, for example, when a new agency decision supersedes an older decision, challenges to the older decision are moot. See American Rivers v. National Marine Fisheries Service, 126 F.3d 1118, 1123 (9th Cir. 1997) (challenge to a Biological Opinion is moot when that opinion has been superseded by a later Biological Opinion); Idaho Dep't of Fish & Game v. National Marine Fisheries Service, 56 F.3d 1071, 1074-75 (9th Cir. 1995) (same). See also Aluminum Co. of America v. Bonneville Power Administration, 56 F.3d 1075, 1078 (9th Cir. 1995) (challenge to an agency decision is moot when current actions are being undertaken pursuant to a new, superseding decision). When an agency is no longer relying on an old decision, any challenges to that old decision do not present a live controversy. See Aluminum Co., 56 F.3d at 1078 (holding that review of earlier decision document “would be especially inappropriate” because it had been superseded); Ramsey v. Kantor, 96 F.3d 434, 445-46 (9th Cir. 1996) (claim is moot when agency “will be basing its rulings on different criteria or factors in the future”). See also Spencer v. Kemna, 523 U.S. 1, 18 (1998) (“[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.”).

Plaintiffs’ court challenge is moot because the constitutionally required “case or controversy” that provides federal court jurisdiction over the case is no longer live. U.S. Const. art. III, § 2. See, also, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180 (2000). The central issue presented in Plaintiffs’ challenge is the validity of the three Forest Supervisor decisions that amend the three amendments to

the Forest Plans. However, those amendments have been withdrawn in order to complete additional analyses and make new decisions. When future forest plan amendments are reissued (which they will be), whatever provisions they contain will be based on revised analyses and will constitute entirely new decisions. Any relief granted by this Court with respect to the withdrawn decisions would be meaningless, and would have no “effect in the real world.” Citizens for Responsible Government, 236 F.3d at 1182. Because the parties have no interest in the validity of a superseded decision, the Court must dismiss this action as moot.

**2. Neither Of The Narrow Exceptions To The Mootness Doctrine Apply.**

There are two narrow exceptions to the Mootness Doctrine: the “voluntary cessation” exception and an exception for matters “capable of repetition, yet evading review.” Neither exception applies here.

While a defendant may render a controversy apparently moot by voluntarily altering its conduct, the “voluntary cessation” exception arises where “despite the apparent demise of the controversy, its resolution has a reasonable chance of affecting the parties’ future relations.” Clarke v. United States, 915 F.2d 699, 703 (D.C. Cir. 1990). The early cases developing the exception focused on preventing a private defendant from voluntarily ceasing an activity and then later returning to its “old ways.” Id. at 705. Even in that context, though, voluntary cessation by the defendant would still render an action moot where: (1) there is no reasonable expectation that the wrong will be repeated and (2) interim events have

eliminated the effects of the alleged violation. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The burden is on the defendant to demonstrate that there is no reasonable expectation of a recurrence. Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

There is a presumption of agency regularity and compliance. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). Based upon the general presumption that public officers “discharge their duties correctly, lawfully, and in good faith,” Frizelle v. Slater, 111 F.3d 172, 177 (D.C. Cir. 1997), courts have treated the cessation of allegedly unlawful conduct by government officials with more solicitude than similar actions by private parties. Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320, 1329 (11th Cir. 2004); Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988); see also Clarke, 915 F.2d at 705 (with respect to Congress, “[a]t least in the absence of overwhelming evidence (and perhaps not then) it would seem inappropriate for the courts to either impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.”). See generally Barilla v. Ervin, 886 F.2d 1514, 1521 (9th Cir. 1989) (refusing to presume defendant would resume challenged behavior where there had been no indication of such

intent by defendant), overruled on other grounds by Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir. 1996).

The Court should apply the presumption of good faith and regularity to the Forest Service here. While the Forest Service has struggled to accommodate the conflicting desires of multiple groups of citizens, along with fulfilling its additional statutory charge to protect and enhance the outstandingly remarkable values of the Chattooga, it has dealt with the plaintiffs and the other groups in an even-handed fashion. Indeed, when the plaintiffs disagreed with the terms of the 2004 Sumter National Forest plan revisions, their administrative appeal was upheld and the affected portions of the plan sent back to the local officials for further study, which, as plaintiffs' substantial filings in this Court demonstrate, was conducted, even though plaintiffs disagree with some of the methodology and with the result (which has since been withdrawn). There is no reason to doubt that the FS remains willing to deal properly with any challenges to the forthcoming decisions.

Additionally, an agency has the lawful discretion to reconsider its decisions and change its mind. See Cooley v. United States, 324 F.3d 1297, 1303 (Fed. Cir. 2003) (citing United States v. Sioux Tribe, 222 Ct. Cl. 421, 616 F.2d 485, 493 (Ct. Cl. 1980)). In the present case, the expert agency, on its own and without interference from the Court, should be allowed to "correct its own mistakes." F.T.C. v. Standard Oil Co. of California, 449 U.S. 232, 242 (1980). An agency should be allowed to reconsider its own decision if the agency has doubts about the correctness of that decision, "otherwise judicial review is turned into

a game in which an agency is ‘punished’ for procedural omissions by being forced to defend them well after the agency has decided to reconsider.” Citizens Against the Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004) (holding agency reconsideration of potential environmental impacts of a project furthers the public interest and purposes of NEPA); see Natural Res. Def. Council, Inc. v. U.S. Dep’t of Interior, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002).

The second exception to the Mootness Doctrine provides that a case is not moot when it is “capable of repetition, yet evading review.” Under this “narrow exception,” an action is not moot when (1) the type of action challenged is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. McAlpine, 187 F.3d at 1216 (citing Spencer, 523 U.S. at 17). This exception to the Mootness Doctrine applies only in “exceptional situations.” Id. at 1216 (quoting Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). Because any new decisions will be subject to administrative and then judicial review, if necessary, once they are promulgated, there will be no evasion of review. This case does not present the type of “exceptional situation” where this narrow exception applies.

As the Tenth Circuit has explained,

the Supreme Court limited application of the ‘capable of repetition, yet evading review’ exception to the mootness doctrine to those factual circumstances where the plaintiff can demonstrate a ‘reasonable expectation’ or ‘demonstrated probability’ that the same controversy will recur involving the same complaining party.

Central Wyoming Law Assoc. v. Denhardt, 60 F.3d 684, 687 (10th Cir. 1995) (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982)). The mere “theoretical possibility” of recurrence is insufficient to satisfy the test. Central Wyoming Law Assoc., 60 F.3d at 687. See also Jones v. Temmer, 57 F.3d 921, 923 (10th Cir. 1995) (holding that fact that Colorado legislature remained free to reinstate the old law at a later date was “too conjectural and speculative to avoid a finding of mootness”) (citing Anderson v. Green, 513 U.S. 557, 559 (1995)). The Plaintiffs cannot demonstrate that the FS will make new decisions with the same alleged flaws that the Plaintiffs complain of in this case. No one, at this point, is in a position to forecast what decisions will be implemented following the additional analyses.

Second, the Plaintiffs cannot demonstrate that “the challenged action is of the type typically too short in duration to be fully litigated prior to its cessation.” Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 729 (10th Cir. 1997). An approved forest plan amendment is not an action that is “inherently limited in duration such that it is likely always to become moot before federal court litigation is completed.” Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1509-10 (9th Cir. 1994). When the FS renders new decisions, the Plaintiffs will have the opportunity to challenge those decisions in a subsequent administrative appeal and, if necessary, subsequent judicial challenge. See Colorado Interstate Gas v. FERC, 83 F.3d 1298, 1302 (10th Cir. 1996) (holding that although the action challenged in the case may well arise in other proceedings involving the same parties, “the matter can be addressed through a petition for review from those proceedings”); Native

Village of Noatak, 38 F.3d at 1510 (stating that if in the future the government “does implement regulations or policies which [plaintiff] finds objectionable, [plaintiff] can challenge them at that time”). Accordingly, even if the Forest Service, after the current review is completed, were to make new decisions that were substantially similar to (or, for that matter, even identical to) the withdrawn decisions, there is no “reasonable expectation” or “demonstrated probability” that the Plaintiffs will be unable to challenge such decisions in court, following, of course, the statutorily mandated administrative appeal.

**B. Plaintiffs Must, In Any Event, Have Exhausted Their Administrative Remedies Before Coming to This Court.**

In evaluating the mootness argument above, it must be kept in mind that the case was never properly before this Court prior to its becoming moot, as the plaintiffs had not exhausted their administrative remedies. Following an agency decision regarding the amendment of a plan for management of a national forest, any party feeling aggrieved by the decision is offered an appeal route by the Forest Service. Once that appeal route has been exhausted, the party can seek judicial review of the final agency decision. 5 U.S.C. § 704. However, 5 U.S.C. § 704 “explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule ... .” Darby v. Cisneros, 509 U.S. 137, 147 (1993).

In the present case, American Whitewater objected to the previously proposed 2004 revisions to the Sumter National Forest plan and appealed. American Whitewater prevailed in its appeal and the Chief of the Forest Service returned the plan provisions relating to

boating limitations on the Chattooga to be reconsidered. The result of the subsequent reconsideration was the 2009 amendments to the forest plans for the Sumter National Forest, the Chattahoochee-Oconee National Forests and the Nantahala and Pisgah National Forests. When announcing the amendments to those plans, the three forest supervisors of the national forests advised the public that they were opting to utilize the Optional Appeal Procedures provided for in 36 C.F.R. 219.14 and 58 FR 58915. Plaintiffs (and four other parties) administratively appealed the forest plan amendments pursuant to those procedures. However, those appeals had not been decided prior to the plaintiffs filing suit. Indeed, the plaintiffs even filed this suit prior to filing their administrative appeal.

In 1994, Congress added a mandatory exhaustion requirement for all administrative appeal procedures that are established by the Department of Agriculture (which includes the Forest Service) or are otherwise required by law. The mandatory exhaustion requirement appears in section 212(e) of the U.S. Department of Agriculture Reorganization Act of 1994,<sup>10</sup> and states:

(e) Exhaustion of Administrative Appeals

Notwithstanding any other provision of law, a person **shall** exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against - -

- (1) the Secretary;
- (2) the Department; or
- (3) an agency, office, officer, or employee of the Department.

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<sup>10</sup> Pub.L. 103-354, Title II, § 212, Oct. 13, 1994, 108 Stat. 3210.

[Emphasis added.] This provision is codified at 7 U.S.C. § 6912(e).<sup>11</sup> This provision was enacted by Congress the year after the Supreme Court issued its opinion in Darby v. Cisneros, 509 U.S. 137 (1993), which held that exhaustion is generally not a prerequisite to APA judicial review of otherwise final agency action unless specifically mandated by statute or agency rule. Exhaustion of administrative appeals is explicitly required by the above statutory provision.

The courts of appeals are split as to whether 7 U.S.C. § 6912(e) is jurisdictional. See Dawson Farms, LLC v. Farm Serv. Agency, 504 F.3d 592, 603-06 (5th Cir.2007) (discussing the views of the various circuits). This Court need not resolve that issue, though, to determine that the plaintiffs were never properly before it in this case. Regardless of whether the statutory provision is jurisdictional, the explicit exhaustion requirement in § 6912(e) is, nonetheless, mandatory. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required.”); Portela-Gonzalez v. Secretary of the Navy, 109 F.3d 74, 77 (1st Cir.1997) (“[E]xhaustion of administrative remedies is absolutely required if explicitly mandated by Congress.”). Bastek v. Fed. Crop Ins. Corp., 145 F.3d 90, 94-95 (2d Cir.1998) (noting that § 6912(e) “unambiguously required plaintiffs to exhaust their administrative remedies before bringing suit, and their failure to do so deprived them

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<sup>11</sup> The Department of Agriculture has also included this exhaustion provision in its regulations. 36 C.F.R. § 215.21 (“It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to appeal is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the appeal procedures in this part (7 U.S.C. 6912 (e)).”)

of the opportunity to obtain relief in the district court”); Forest Guardians v. U.S. Forest Service, 579 F.3d 1114, 1121 (10th Cir. 2009).

Even if the exhaustion requirement were not jurisdictional, and even if Congress had not mandated by statute that the administrative appeal process be followed before coming to court, and the exhaustion requirement were therefore only a judicially created prudential one, this Court would still have to require the administrative appeal process to be completed. “[M]erely because exhaustion requirements are prudential does not mean that they are without teeth. Even prudential exhaustion requirements will be excused in only a narrow set of circumstances.” Wilson v. MVM, Inc., 475 F.3d 166, 175 (3d Cir. 2007). In the present case, it is clear that the underlying dispute involves complex issues. This is an additional reason why the administrative process should not be short-circuited, since “even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.” McCarthy v. Madigan, 503 U.S. 140, 145-146 (1992). See Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (exhaustion may allow the agency “to compile a record which is adequate for judicial review”); Association of Flight Attendants-CWA v. Chao, 493 F.3d 155, 159 (C.A.D.C. 2007).

Since the Forest Service established an appeal process from the decisions to amend the three national forest plans at issue here, and since Congress has mandated in 7 U.S.C. § 6912(e) that any such appeal process established by the Secretary of Agriculture shall be

exhausted prior to seeking judicial review, the plaintiffs were never properly before this Court and the withdrawal of the decisions can hardly be seen as depriving plaintiffs of proper judicial review.

#### IV. CONCLUSION

The withdrawal of the three forest plan amendments has rendered this case moot. The action must be dismissed.

Respectfully submitted,

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UNITED STATES ATTORNEY

BY: s/ John H. Douglas

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Charleston, South Carolina

December 30, 2009

#### CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of the United States Attorney for the District of South Carolina, and on December 30, 2009, I served one true and correct copy of the forgoing document, in the above-captioned case, via the court's e-noticing system.

s/John H. Douglas

John H. Douglas

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