

Atlanta
Beijing
Brussels
Chicago
Frankfurt
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Tokyo
Washington, DC

(415) 856-7068
racheldoughty@paulhastings.com

November 6, 2009

32078.00112

VIA US MAIL AND E-MAIL

APPEALS-SOUTHERN-REGIONAL-OFFICE@FS.FED.US

USDA Forest Service
Attn: Appeal Reviewing Officer
1720 Peachtree Road, NW, Ste. 811N
Atlanta, GA 30309-9102

**Re: Response to American Whitewater et al.'s Request that the Forest Service
Reconsider and Vacate the Stay Granted in Response to Georgia
ForestWatch's Appeal**

Dear Appeal Reviewing Officer:

On behalf of Georgia ForestWatch, we respond to American Whitewater's ("AW") request that the Forest Service reconsider and vacate those portions of the stay (granted on October 26, 2009) regarding "the boating provisions on the Upper Chattooga River."¹

¹ The three stayed decisions are:

- (1) 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 (published in the Times on September 3, 2009); deciding officer: Forest Supervisor George Bain (Decision Notice signed on August 25, 2009);
- (2) 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 (published in The State on September 4, 2009); deciding officer: Forest Supervisor Monica J. Schwalbach (Decision Notice signed on August 25, 2009); and
- (3) Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala and Pisgah National Forests Revised Land and Resource Management Plan Managing Recreation Uses on the Upper Chattooga River (published in the Asheville

(continued...)

USDA Forest Service
November 6, 2009
Page 2

The Decision to Grant the Stay is Not Subject to Review

The decision to grant a stay is not reviewable; as AW correctly points out, Section 10(i) bars discretionary review of the decision to grant a stay. AW argues that a procedural review is instead in order, but fails to cite any authority for that type of review. We too are unaware of any authority for such a review.

Even if the decision to grant the stay were subject to review (which it is not), AW failed to provide any detail about what portions of the stay it wanted vacated. A party requesting a stay must provide a “description of the specific project(s), activity(ies), or action(s) to be stopped.” Optional Procedures, Section 10(d)(3)(i). AW has requested that the Forest Service vacate the stay of “the boating provisions on the Upper Chattooga River” but has not identified which portions of the stayed decisions or implementing projects those are. Just as the party requesting a stay must specifically identify the action it seeks to stay, AW would similarly need to specifically identify what it is it wishes the Forest Service to reconsider and vacate.

The Stay was Issued by an Appropriate Forest Service Official

The stay was signed by Ken S. Arney. Arney is the Deputy Regional Forester. The Deputy Regional Forester may sign on behalf of the Regional Forester in the deputy’s own name and over his own title. FSM 1236 (available at: <http://www.fs.fed.us/im/directives/field/r3/fsm/1200/1230.doc>). Forest Service regulations permit this delegation. See 36 CFR 200.4(b).

The Justification Provided for the Stay was Legally Sufficient

AW criticizes the reasons given by the Forest Service for granting the administrative stay, saying that they are “unsupported opinions based on expediency.” The Optional Procedures direct that the reviewing officer consider “[t]he effect that granting a stay would have on preserving a meaningful appeal on the merits.” Section 10(f)(2). The bases for granting an administrative stay are analogous to those for which a preliminary injunction is granted. “The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court’s ability to render a meaningful judgment on the merits.” *See Microsystems, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 333 F.3d 517, 525 (4th Cir. 2003). The stay the Forest Service granted will maintain the status quo pending consideration of the numerous alleged deficiencies in the three decisions that were stayed,

(...continued)

Citizen-Times on September 4, 2009); deciding officer: Forest Supervisor Marisue Hilliard (Decision Notice signed on August 25, 2009).

USDA Forest Service
November 6, 2009
Page 3

including several raised by AW. If the stay were vacated, amendments to three Forest Land and Resource Management Plans would permit a new activity (floating) that is controversial (as demonstrated by the public interest and the number of appeals filed). Furthermore, there is evidence presented by multiple appellants that implementing the amendments would harm the resources the Forest Service is charged with protecting. Until that evidence is considered, it is prudent to maintain the status quo that has, by and large, protected the resource to date.

AW was not a “party to the appeal” of Georgia ForestWatch at the Time the Stay was Granted and so the Forest Service had no Legal Obligation to Consider AW’s Comments

AW argues that it intervened in Georgia ForestWatch’s appeal and therefore it was a “party to the appeal,” a status which AW claims required the Forest Service to consider its comments before granting the stay requested by Georgia ForestWatch (citing Section 10(f)(3) of the Optional Appeal Procedures). In fact, AW had not successfully intervened in Georgia ForestWatch’s appeal by October 26 when the stay was granted and so was not a party to the appeal on that date. AW subsequently requested to intervene in Georgia ForestWatch’s appeal, but not until October 30, 2009—several days after the stay was granted.²

Conclusion

The decision to grant the stay is not subject to review. AW’s request to review and vacate the stay is procedurally improper. The Forest Service followed procedure and articulated a sufficient justification for granting the stay.

For all of the reasons discussed herein, Georgia ForestWatch respectfully requests that the Forest Service reject AW’s request for review of the stay.

Sincerely,



Rachel S. Doughty
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

² Incidentally, the copy of the appeal was furnished to Georgia ForestWatch directly, and not to the appellant’s counsel as it should have been.

USDA Forest Service
November 6, 2009
Page 4

cc:

Marisue Hilliard
Forest Supervisor
National Forests in North Carolina
160A Zillicoa Street
Asheville, NC 28801

Acting Forest Supervisor
Sumter National Forest
Supervisor's Office
4931 Broad River Road
Columbia, SC 29212

George Bain
Forest Supervisor
Chattahoochee-Oconee National Forest
1755 Cleveland Highway
Gainesville, GA 30501

Cecil Huron Nelson, Jr.
Nelson Galbreath
Attorney for American Whitewater et al.
25 E. Court Street, Suite 201
Greenville, SC 29601