

Notice of Appeal of Draft Decision Notice and Finding of No Significant Impact
Chattooga River Boating Access US Forest Service – Sumter National Forest
Andrew Pickens Ranger District Oconee County, SC
May 15, 2015
Deciding Officer: Jennifer Barnhart

Draft Decision Notice and Finding of No Significant Impact
Chattooga River Boating Access Project
USDA Forest Service
Nantahala National Forest, Nantahala Ranger District
May 15, 2015

Environmental Assessment Chattooga River Boating Access
Sumter National Forest Oconee County, SC
Chattahoochee-Oconee National Forest Rabun County, Georgia
Nantahala National Forest Jackson and Macon Counties, NC

36 CFR §218 Subparts A and B
By the Rust Family

Filed electronically June 26, 2015

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The Chattooga Planning Team
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RE: Chattooga River Boating Access

Since 1946, the Rust family (Family) have held title to segments of what was later designated the Chattooga Wild and Scenic River (the Private Segment). Their property title includes the riverbed which forms the Chattooga River as defined by points within the water's course. The 2015 Environmental Assessment (EA) and Draft Decision Notices (collectively Proposed Actions) raise issues of property boundaries, property rights and the scope of USFS discretionary authority over private property within a designated wild and scenic river corridor. The EA defines the Proposed Actions based on property boundaries while leaving ambiguous the location of those property boundaries; therefore the Proposed Actions lack necessary clarity. Additionally, the EA redefines the previous Forest Plan as the

removal of the prohibition of boating upstream of highway 28, without recognition that boating remains prohibited above Greens Creek.

The EA and Proposed Action revise the previous Forest Plan that was clarified, before being upheld, by a Federal Court. The Court verified that boating remains prohibited “above Greens Creek and over the Rust Family property”. The Court also accepted that the Plan only allowed boaters to access the river at discrete points, the uppermost being well downstream of the Private Segment. In contradiction to the Court-defined Forest Plan which prevents boating across private property, the EA presents the previous Forest Plan as the removal of the boating prohibitions, including above Greens Creek, and that boaters could access the River anywhere. Either six Federal court rulings are premised upon a misapprehension, or the EA is retroactively revising the Forest Plan to which it is tiered, thereby circumventing the required procedures and oversight processes necessary to make such a revision.

The National Forest Management Act, Executive Orders and the National Environmental Procedures Act mandate revision procedures for Forest Plans. And, citizens’ rights are protected from Federal Agency overreach via judicial oversight under the Administrative Procedures Act. The procedural mandates in these Acts serve more than some abstract purpose, they protect the due process rights of potentially aggrieved parties before an agency action is finalized and the harm created. Retroactively revising Forest Plans circumvents the due process rights of the Rust Family by denying their right to object to an agency action at a reasonable time and in the appropriate forum. The harm to the Family is particularly acute here because a court dismissed as unripe the Family cross-claims because the Forest Plans prevent boating within a quarter mile of the Private Segment.

Whether inconsistent interpretations of lengthy planning documents are honest mistakes or obfuscation, in either case the multiple interpretations are evidence that the Forest Planning Documents lack clarity, which is itself a violation of law. Regardless of whether the Forest Policy was revised in 2012, or now in 2015, the laws which guard against a Federal Agency acting in excess of their statutory authority or which adversely affect adjacent landowners was never considered, assessed or adjudicated. Neither of the two EAs has considered the indirect consequences the Proposed Actions (as defined for review within the 2015 EA) could have on the Private Segment, the property rights of the Family, or of their productive use and enjoyment of their property. Here the agency attempts to circumvent administrative and judicial review by redefining past action which were clarified by a court of law.

Although the Private Segment is within the designated Chattooga Wild and Scenic River (WSR) corridor, the management provision under the WSR Act are limited in scope based on property ownership and that “Some (WSR) management principles obviously apply only to Federal Lands within the river area. For instance, the WSR Act does not open private land to public recreation”. What is “obvious” in the secretarial guidelines has been misrepresented as discretionary authority by the Forest Service. For over a decade the USFS has included the Private Segment of the Chattooga River in their Forest Planning process and continues to publish planning documents under the assumption that the agency has discretion to allow public use of the Private Segment within a Wild and Scenic River. Such an assertion contradicts the congressional intent of the WSR Act and depredates property rights. The USFS failed to conduct the required suitability analysis which must remove areas from forest planning consideration if the proposed use violates the law, rights or executive order. Instead the EA misrepresents settled law as ‘uncertain’ and asserts discretionary authority to allow public use of private property.

These Actions and inactions have consequences to the Rust family. Misinformed visitors have damaged our property gates and fences, and threatened us with firearms while trespassing onto our own property. This charade not only encourages trespass, but has incited litigation based upon the Forest Service's failure to permit or provide for public use of private property; litigation that has cost the family hundreds of thousands of dollars. Harm resulting from Forest Service actions to the Rust Family are cognizable, costly, documented in both the 2012 and current administrative record but completely ignored in the planning process. This continued interference with property rights and clouding property title represents an abuse of agency power and is precisely why the APA was enacted and Executive Orders created.

The Rust family requests the USFS: First, clarify the scope of their discretionary authority over the Private Segment (the agency has no discretion to allow public use of private property, the agency can prohibit boating because of property rights, and it cannot remove a court-recognized prohibition without an assessment as to the effects such a removal would have on the property owners). Second, we ask the USFS to comply with the 4th Circuit Court ruling by enforcing the boating prohibition both upstream of Greens Creek and over private property, and that no river access point be designated within a quarter mile of the Private Segment. Third, we request the USFS conduct a legally sufficient review (a complete EIS) if the Proposed Actions include the removal of boating prohibitions above Greens Creek. Alternatively, not designate the proposed Greens Creek trail and move the location from where boating is allowed downstream to Norton Mill Creek.

Thank you for your time and consideration.

Sincerely

Richard Rust
And, on behalf of Goodenow LLC
with expressed permission from Henry Rust