

Whiteside Cove Association

4 Chestnut Square,  
Cashiers, NC 28717

To: The Chattooga Planning Team,  
4931 Broad River Road,  
Columbia, SC, 29212

6/27/2015

RE: Chattooga River Boating Access

A Segment of the upper Chattooga Wild and Scenic River has been leased to the Whiteside Cove Association from the Rust Family<sup>1</sup> since 1958. (the Private Segment). The WCA have enjoyed fishing, hiking and swimming in and along the Private Segment without interference by others for over fifty years; interference with our enjoyment was rare before the USFS recent actions. The affected area for both the 2012 Amendments and the 2015 proposed actions is defined as the Chattooga Wild and Scenic River corridor above Highway 28, which includes the Private Segment. The Whiteside Cove Association appealed the 2012 Action, and has provided previous comments into this proposed action to designate boater access trails along the upper Chattooga. Both actions remain ripe for judicial review.

As a result of agency planning documents and actions<sup>2</sup>, misinformed visitors to the Chattooga Wild and Scenic River (WSR) have damaged our boundary fences, gates and boundary signage. Misinformed WSR visitors have disrupted our use and enjoyment of the Private Segment<sup>3</sup>. One deranged Forest visitor even threatened a WCA member with a firearm while declaring a “right to be on the Chattooga Wild and Scenic River”. Since 2009 we have repeatedly informed the US Forest Service that a lack of clarity in their published planning documents has created conflict and has threatened our interests in the Private Segment. Despite repeated requests by the WCA and Rust Family for the USFS to correct this public misconception with respect to Wild and Scenic River designation, the USFS has directed WSR visitors to the Private Segment and implied discretionary authority over the Private Segment without basis or rationale.

Since publication of the Planning Documents, we have experienced a significant increase in conflict with misinformed WSR visitors. Agency actions have clouded property title, caused a significant amount of property damage, solicited frivolous lawsuits and increased interference with our use and enjoyment of the Private Segment. The WCA and the Rust family have been adversely affected as a result of the USFS actions – which include misstatements of law regarding public rights and our rights in the use of the Private Segment. Any uncertainty as to public access to the Chattooga River at Grimshawes Bridge was resolved by the courts recognition of a prohibition on boating above Greens Creek and across the Rust property, based on the Private

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<sup>1</sup> The Property is jointly owned by multiple Rust Family members including two Trustees overseeing Goodenow LLC.

<sup>2</sup> Publishing that the Private Segment has the capacity to accommodate 75 people at one time, when the area is private property. Publishing legal interpretations which cloud property title and undermines property rights, continuing to ambiguously define the action as defined as “actions” which can be challenged under the Administrative Procedures Act..

<sup>3</sup> The US Forest Service were notified of encroachment issues in 2009, 2012, 2013 and 2014 and now again here in 2015.

Encroachment by misinformed WSR visitors over the Private Segment has happened, is documented and is no longer speculative.

32 Segment being ‘private’ until adjudicated otherwise. The Court also found Family cross-claims unripe due  
33 entirely to its’ understanding that the agency is not allowing boating within ¼ mile of the Private Segment<sup>4</sup>.  
34 Either the Court rulings are premised upon a misapprehension or the EA is retroactively revising the previous  
35 Forest Plans thereby avoiding assessment. It not the responsibility of the courts, the WCA or the Rust family to  
36 detangle the web woven by mountains of Forest planning documents. Ambiguity within Forest Planning  
37 documents is itself a violation of procedural requirements, which were established to protect a fundamental due  
38 process right of judicial review and redress against a potentially harmful agency action.

39 The Forest Service can reverse its’ direction by correcting the implementation of the Forest Plan as outline by  
40 the courts and in our appeal below. To comport with the courts understanding of the 2012 Forest Plan  
41 Amendments we request the Forest Service not designate the Greens Creek Trail and prohibit boating upstream  
42 of “the confluence of Norton Mill Creek.” We hope this appeal reaches an objective USFS reviewer that has  
43 the foresight to appreciate the benefits within our appeal requests. We look forward to resolving our issues and  
44 concerns within this administrative process. Thank you for your time and consideration.

45 Sincerely,  
46 Michael Bamford  
47 For the Whiteside Cove Association`  
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55 **NOTICE OF APPEAL**

56  
57 Of

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59 Draft Decision Notice and Finding of No Significant Impact  
60 Chattooga River Boating Access

61 US Forest Service – Sumter National Forest Andrew Pickens Ranger District Oconee County, SC  
62 May 15<sup>th</sup> 2015 . Deciding Officer: Jennifer Barnhart.  
63

64 Draft Decision Notice and Finding of No Significant Impact  
65 Chattooga River Boating Access Project

66 USDA Forest Service Nantahala National Forest, Nantahala Ranger District  
67 May 15<sup>th</sup> 2015 Deciding Officer: MICHAEL WILKINS  
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69 And

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71 Environmental Assessment Chattooga River Boating Access Sumter National Forest Oconee County, South  
72 Carolina Chattahoochee-Oconee National Forest Rabun County, Georgia Nantahala National Forest Jackson  
73 and Macon Counties, North Carolina  
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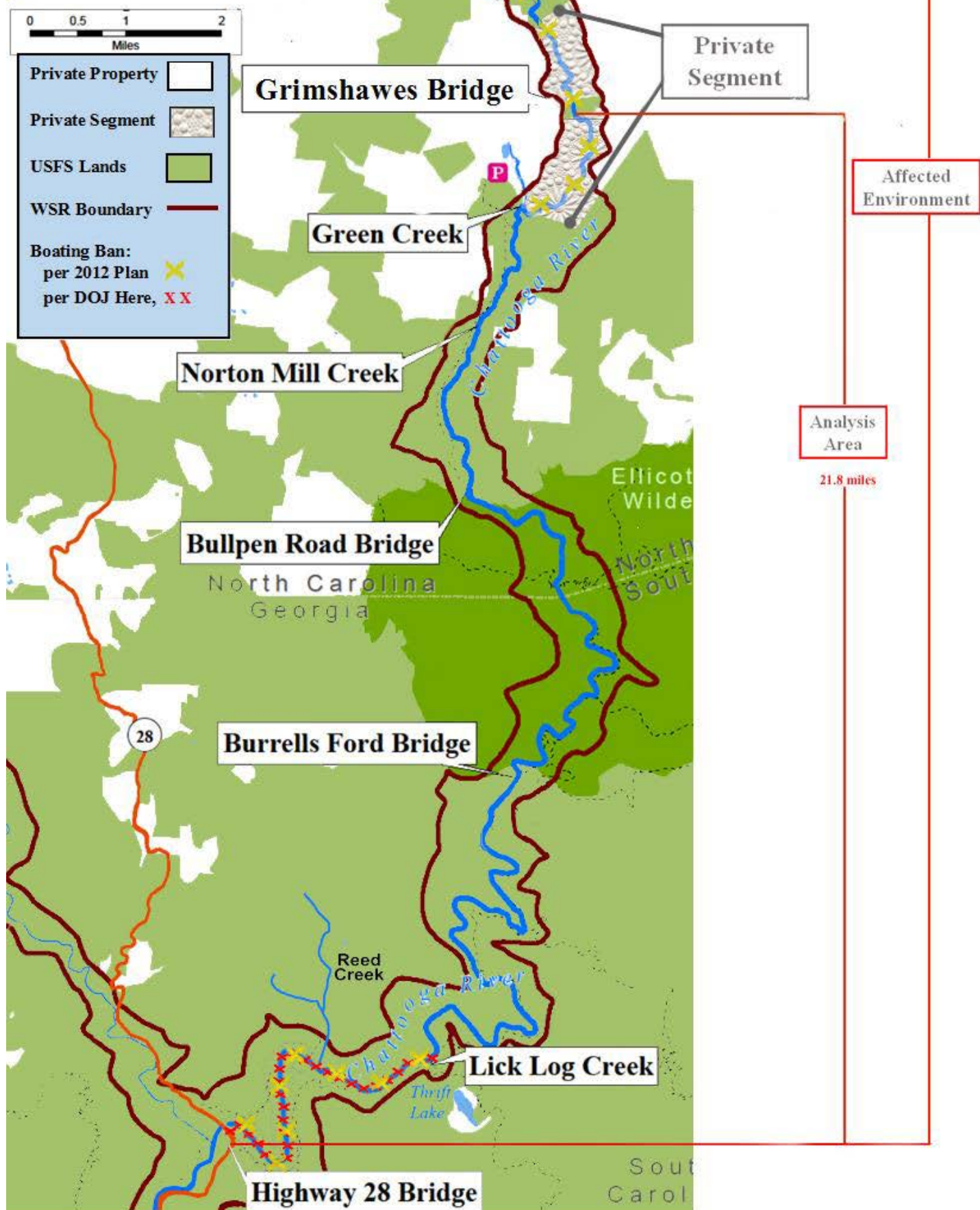
78 By

79 The Whiteside Cove Association  
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81 Filed electronically June 27, 2015  
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83 To: [appeals-southern-regional-office@fs.fed.us](mailto:appeals-southern-regional-office@fs.fed.us), [objections-southernnorth-carolina@fs.fed.us](mailto:objections-southernnorth-carolina@fs.fed.us), [objections-](mailto:objections-southern-francismarion-sumter@fs.fed.us)  
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# Upper Segment of the Chattooga



## Introduction

The Rust family (Family) own a segment of the designated Wild and Scenic Chattooga River (the Private Segment). The private segment includes the riverbed and the space through which the river flows. Exhibit A;Deed). A portion of the Private Segment -located entirely within the upper Chattooga WSR in North Carolina- is leased by the Whiteside Cove Association (WCA). The discretion to allow use and enjoyment of the Private Segment is held by the Family who lease a segment thereof for the exclusive benefit of the WCA members. For over 50 years WCA members have enjoyed fishing, Swimming and hiking throughout the Private Segment year-round and without interruption by boats or misinformed WSR visitors. That peaceful use and enjoyment of private property has been adversely effected as a result of actions by the US Forest Service. (“USFS”, “Agency”)

On May 19<sup>th</sup>, 2015, the Agency published an Environmental Assessment (EA) and Draft decision notices (collectively the “Proposed Actions”) regarding the upper Chattooga. Statements published in the EA conflict with the current status of property title and our associated interests in the Private Segment. This action has incited conflict, clouded property title and as presented here denigrates multiple court ruling. The EA also revises the previous Forest Plan which amounts to an illegal Plan revision outside of the required Forest Planning process. The WCA has submitted previous letters in this action. (Exhibit B), and previously appealed the 2012 to which this action is tiered (Exhibit C)

### • Background

From 1976 until 2012, the USFS limited boating to the 32 miles of the Chattooga below highway 28. Under the portents of challenging the Forest Service 2004 Forest Plan, the kayak lobby<sup>5</sup> insisted the US Forest Service actions violated their purported “right to float” and that the USFS failed to manage the uppermost 21 miles of the Chattooga Wild and Scenic River – which includes the Private Segment -for kayakers expressed benefit. Amenable to such an expanded interpretation of discretionary authority (to allow public use of private property), the USFS did not clarify the absence of such authority, and instead embarked on a decades long series of analysis, assessments and decisions made under the auspice that the USFS has discretionary authority over the Private Segment. The kayak lobby pursued legal action against the agency seeking an injunction that would have required the Forest Service manage the entire Chattooga WSR for the kayakers benefit. Both the USFS and kayak lobby failed to inform the court that a segment of the Chattooga WSR is private property. The court confirmed the existence of a boating prohibition s on the Chattooga WSR above Greens Creek, including over the Private Segment. The current EA and Proposed Actions places USFS jurisdiction across the Private Segment of the WSR and property ownership within the upper Chattooga at issue.

Due to a failure to define the contours of agency authority and discretion, the Private Segment, the WCA, and the Family have been integrated into a decade-long administrative processes designed for managing the

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<sup>5</sup> The kayak lobby refers to American Whitewater, the American Canoe Association and other listed Plaintiffs in the American Whitewater v. Tidwell, 770 F. 3d 1108, 1121 4th Circuit 2014 lawsuit.



National Forest System, and judicial action brought under the auspice of challenging the agencies failure to act in excess of statutory authority. The EA continues to perpetuate a charade by implying authority over private property and ambiguously defining the Proposed Action. The Proposed Action lacks clarity and the implied authority harms the Family and WCA. A potentially aggrieved party is denied their due process rights when denied the opportunity to defend themselves against a government action by a Forest Plan which could foreclose upon those rights.<sup>6</sup> The WCA and the Rust family due process rights were delayed and labeled ‘premature’ by the courts during the kayak lobby 2009-2014 lawsuit, but only after the court clarified boating remains prohibited across the Private Segment. Egregiously, the EA ignores these Court ruling and reverts back to the same ambiguities and misstatements of law published in their 2012 planning documents. Obviously, retroactively revising a Forest Plan outside of the planning process (redefining past decisions) violates NEPA and the National Forest Management Act, but also denies a fundamental due process right<sup>7</sup>. Disregarding the court confirmed prohibition on boating above Greens Creek, is an abuse of discretion, a denial of due process and open defiance of a court ruling.

The Forest Service should end the ten year long saga created by a misrepresentation of the WSR Act, property law and property rights; by confirming what the Secretary of Agriculture already acknowledges; that statutory authority under the Wild and Scenic Act is *limited* based on *property ownership*<sup>8</sup> and that “*Some [WSR] management principles obviously apply only to Federal Lands within the river area. ...the WSR Act does not open private land to public recreation*”<sup>9</sup> The EA interpretation of the WSR contradicts the Secretary of Agriculture, Congress, and the Judiciary by failing to recognize the contour of agency authority excludes allowing the public to recreate over the Private Segment.

We request the Forest Service alter its proposed course of action –including the CFR-, clarify the current status of property title to the Private segment; acknowledge that the discretionary authority granted to the US Forest Service does not include authorizing public use of private property, and that a prohibition on boating above Greens Creek continues until it is removed by the property owners or a federal court. Finally, we request the Forest Plan be understandable, comport with the multiple court rulings and their Secretary’s interpretation of the WSR Act by not interfering with property rights.

The WCA appeal presents violations under the National Forest Management Act (NFMA), the National Environmental Protection Act (NEPA) and the Wild and Scenic Rivers Act. The violation includes procedural deficiencies, improper standards of review and actions taken in excess of statutory authority or short of statutory obligation. Additionally, the lack of clarity in the proposed action would violate our constitutional due process rights of being able to defend ourselves against an agency decision which may cause irreparable harm. Despite

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<sup>6</sup> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." United States v. Florida East Coast R. Co., 410 US 224,242-3 Supra (1973)

<sup>7</sup> id

<sup>8</sup> Fed. Reg. 39,459 ( 1982) General statutory agency authority under the WSR, is limited based on property ownership.

<sup>9</sup> Fed. Reg. 39,454 ( 1982)

the extensive list of appealable violations presented here, the remedy we are requesting is straight forward. Clarification of the Forest Plan and the implementation of the Forest Plan in compliance with the Federal court rulings. Simply not designating the Greens Creek Trail and moving downstream the uppermost point from where boaters could initiate a floating trip a few hundred yards would meet this standard and comply with the Court's understanding of the 2012 Forest Plan which was already upheld.

## **I. The EA Clouds Title and Property Rights**

The EA claims property title and public access rights are uncertain (EA 163), such a statement denigrates multiple court rulings by questioning property rights and current ownership of the Private Segment. By reasserting uncertainties over access rights, property ownership and navigability, the Agency harms the WCA and Rust family by clouding property title and questioning the most valued of all property rights, the right to exclude.

a) **Access Rights:** A fundamental element of the property right is the right to exclude others. There are no "rights" or "liberty interests" for the public to travel down the Chattooga River through the Private Segment. A Federal Court verified that boating remains prohibited "above Greens creek and over the Rust Family property"<sup>10</sup>. The Court found the Agency meet its' obligation to document visitor capacity for the upper Chattooga<sup>11</sup>, and published the Private Segment has no capacity for public use.<sup>12</sup> The court also determined the Kayak lobby's purported 'Federally protected right to float' down the upper Chattooga has no merit<sup>13</sup>. If kayakers had a liberty interest in boating the upper Chattooga, it would apply to both the National Forest property and the Private Segment, which would denigrates the court's findings. By confirming that boating remains prohibited "above Greens creek and over the Rust Family property"<sup>14</sup> the court establishes that there is no "right to recreate" across the Private Segment.

b) **Property Title:** Title to the watercourse flowing through the upper Chattooga and Private Segment is not "uncertain" as claimed in the EA. The agency must identify property ownership within an assessment area. 36 CFR 219.6, and the USFS claim jurisdiction to manage the Chattooga River as it flows though the National Forest by incorporation of the water's course as part of National Forest property. Similarly, a

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<sup>10</sup> The Court confirmed the existence of the prohibition on boating above Greens Creek. Because the Rust family did not contest their right to float, the court found unripe the need to adjudicate the origins of the prohibitions (USFS discretion v. property rights)

<sup>11</sup>Whitewater v. Tidwell, 959 F. Supp. 2d 839,855 Dist.Court, D. South Carolina 2013

<sup>12</sup> Notified the public of" the continued ban on floating above Green's Creek, and the Rusts' property. J.A. at 911, 943." Whitewater v. Tidwell, 770 F. 3d 1108,1121 4th Circuit 2014 AW v Tidwell

<sup>13</sup> Whitewater v. Tidwell, 959 F. Supp. 2d 839,865 SC 2013 American Whitewater's purported a "constitutionally protected liberty interest in the right to interstate travel and personal movement" was being violated by the "prohibitions on whitewater floating." The court disagreed and found the argument has no merit.

<sup>14</sup> When defending constitutionally protected liberty interests (like property rights) the USFS can prevent conduct. Younger v. Harris, 401 US 37,52 Supra (1971) Limits to statutory authority "does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution."

176 registered Deed to the Private Segment was provided to the agency in 2009, and an undisputed deed is  
177 sufficient proof of ownership. The Court documented the agency does not dispute the family's property title  
178 to the water's course, and therefore ownership of the water's course did not require adjudication.<sup>15</sup> The  
179 Court also documented that the agency does not manage the Private Segment, which confirms it is not part of  
180 the National Forest System. This EA contradicts the agency's previous judicial concessions.

181 .. The agency was required to, and the court confirmed did, document the current status of ownership  
182 throughout the Chattooga WSR.<sup>16</sup> The Court recognized the Private Segment of river is "private until found  
183 otherwise."<sup>17</sup> The 4<sup>th</sup> circuit reconfirmed a long litany of cases where property title to smaller streams is  
184 presumed included in the land grants, with the burden of proof on the party asserting otherwise. Therefore,  
185 for the 2015 EA to question ownership clouds property title and challenges the associated property rights,  
186 including the right to exclude. The current status of tile to the watercourse flowing through the Private  
187 Segment is settled; the Private Segment is private until found otherwise in a court of law, or title is  
188 transferred by sale.<sup>18</sup> Speculating over the future status of title in planning documents, while defining the  
189 proposed action ambiguously based on title boundary, raises the issue of title and property boundaries here.

190 **We ask the USFS clarify in this EA that the Private Segment is not suitable for Public**  
191 **recreational use, because ownership is currently privately held. Further, that Planning**  
192 **documents make clear that Boating remains banned upstream of the Private Segment, across**  
193 **the Private Segment and within ¼ mile of the Private Segment. We further request that the**  
194 **Greens Creek Trail not be designated and that the uppermost point from where boating is**  
195 **allowed is moved downstream to Norton Mill Creek.**

## 196 197 **II. The EA Defines the Proposed Action based on Property Boundaries:**

198 The EA defines the proposed Action based upon property boundaries. The EA defines the proposed, and  
199 previous action, as applying to 'federal lands', the 'National Forest System'<sup>19</sup>, and importantly not to  
200 'private property' nor 'private lands'. In order to assess the impact of the Proposed Action, and before the  
201 Proposed Action could be made understandable for a court and public review, the location of the property  
202 boundaries must be certain. Although the Family's Deed confirms their property includes the lands adjacent  
203 to the Chattooga and over which the Chattooga flows, the EA presents the previous action as allowing  
204 boating access to the upper Chattooga; this, without excluding the Private Segment, or the National Forest

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<sup>15</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1120-1 4th Circuit 2014

<sup>16</sup> Whitewater v. Tidwell, 959 F. Supp. 2d 839,856 Dist.Court, D. South Carolina 2013.

<sup>17</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1121 4th Circuit 2014. The Court found the issue of navigability not ripe for review because the kayak lobby retracted their initial and unfounded claim that the Chattooga is navigability.

<sup>18</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1121 4th Circuit 2014

<sup>19</sup> 16 U.S. § 1609 The National Forest System consists of federally owned lands and resources.



lands upstream of the Private Segment or immediately downstream between Greens Creek and the uppermost put-in.<sup>20</sup>

The contours of federal lands and the National Forest System<sup>21</sup> (both lands and waters) is needed in order to clarify the scope of the agency action (where the River Management Plan applies, and where agency obligations under various Acts does and does not apply). Identification and publication as to the contours of the National Forest System is a statutory requirement. 16 USC § 1603 and therefore must be known and documented before publishing a Plan. These contour of USFS authority are based upon property ownership and property interests, and importantly not Wild and Scenic River designation boundaries<sup>22</sup>. The contours of the National Forest System defines both the limits of statutory authority as well as defining the administrative obligations under both the Wild and Scenic Rivers Act and the National Forest Management Act. 16 USC § 1604(a). The agency has published enforceable regulations, set limits to those regulations, proposes to update CFRs, and now has set administrative obligations based upon the contours of the National Forest System, federal land and has insisted this does not apply to private property. Therefore, by redefining the contours of the agency previous Actions in the 2015 EA and remaining silent as to the contours of jurisdictional limits (i.e. property boundaries) requires clarity as to property boundaries in order to define the Action being taken, and provide potentially aggrieved parties the right to challenge that action . Although the 4<sup>th</sup> circuit upheld the “Forest Service policy [of] treating rivers as [] private until found otherwise.”,<sup>23</sup> the EA redefines ownership of the Private Segment as ‘uncertain’, which makes the Proposed Actions uncertain, undefined and therefore illegal.

The Rusts have provided the USFS with a registered property Deed. It is well settled law that an unchallenged Deed is sufficient evidence of title. The 2012 Planning Documents which also ambiguously defined the proposed action but failed to define the scope of the National Forest System incited ten years of litigation, which cumulated with an Appeals Court confirming that the Private Segment is currently private property and not open to the public. However, the EA again clouds property boundaries<sup>24</sup> by including the boundaries of the entire Wild and Scenic River –including the Private Segment-, while using the contours of USFS authority and discretion to define the proposed action; the EA fails to recognize private property is within the designated WSR corridor. Clouding title harms the Family and the WCA by encouraging frivolous lawsuits and by inciting trespass. By defining the Proposed Actions based on *National Forest System* boundaries and not the *private property* boundaries would require property boundaries be certain in

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<sup>20</sup> EA pg 21 “Boaters have been allowed to access the upper segment of the Chattooga River..”

<sup>21</sup> The Forest Service is required to know and publish for review the contours of the National Forest System which define the scope of their authority. 16 USC § 1603 The agency must “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 USC § 1604(a)”

<sup>22</sup> The WSR Act, notes “jurisdiction over water is based on established principles of Law”, that the Act “does not abrogate existing rights” and recognizes the limits to eminent domain authority. Existing rights limit the contours of agency discretionary authority.

<sup>23</sup> *Whitewater v. Tidwell*, 770 F. 3d 1108,1121 4th Circuit 2014

<sup>24</sup> EA p163 asserts property title and associated property interests are uncertain

order that the 2012 and 2015 actions be adequately defined and assessed. The EA defines its proposed action, including publishing a CFR, based on being within the upper Chattooga, without defining and excluding the Private Segment. Because the proposed actions can not be ambiguous, property ownership defining the contours of the action throughout the upper Chattooga cannot be ambiguous. The Planning Documents ignore private property exists within the upper Chattooga and disregards multiple Court Orders which identifies current that current status ownership to the Private Segment as being private property.

**We request the Forest Service remove ambiguity over property ownership within the planning documents. This can be accomplished by either defining the boundaries of the National Forest System, Forest Lands and Private Property which defines the proposed and previous agency actions, Or define the location of those Actions –including the conditions of the permit- based upon locations well within National Forest System boundaries as outlined by the 4<sup>th</sup> circuit court rulings. Not designating the Greens Creek trail, and moving downstream the location from where boaters could start a float trip to “the confluence of Norton Mill Creek” would accomplish our appeal request and comport with the Court Orders.**

### **III. The proposed Actions lack sufficient Clarity to assure existing rights are not abrogated:**

Conflicting statements within the Planning document and contradictions to the 4<sup>th</sup> circuit court ruling obfuscate the action being proposed, this is a violation of law<sup>25</sup>. Clarity of any proposed actions is required to protect the due process rights of potentially aggrieved parties<sup>26</sup>. In order to meet this constitutional requirement, first requires a precisely-defined action. Then, to assess the potential consequences of that proposed action are procedural mandate under the National Forest Management Act and NEPA<sup>27</sup>. Therefore, clarity extends beyond the action to include the *rationale* and *analysis* behind any decision; the judiciary “*should not have to guess what action was taken*” an agency is “*required to explicate fully its course of inquiry, its analysis and its reasoning.*”<sup>28</sup>. The Planning Documents contain a series of contradictions which obfuscate the Proposed Action to which an Assessment of potential effects must be conducted. Ambiguously proposed actions, circumvent the protections Congress and the President implemented to protect the WCA and Family from a regulatory taking of private property.<sup>29</sup> It is not the responsibility of the WCA, the Family or the Court to define and assess a proposed action, the very low bar the agency must clear is first presenting an understandable proposed Action for review; it has not done so here. Ambiguity in defining “broad-based” actions denies aggrieved parties the right to challenge both the actions and the deficiencies in the required Assessment of those actions; this is both a procedural violation and constitutional violation.

<sup>25</sup> “State what the Decision was” 40 C.F.R. § 1505.2(a).

<sup>26</sup> Vth amendment to the US Constitution.

<sup>27</sup> The USFS must “State what the Decision was” 40 C.F.R. § 1505.2(a). A Forest Plan must be “understandable”. 36 CFR §219.30.

<sup>28</sup> Ely v. Velde, 451 F.2d 1138-39, 4th (1971)

<sup>29</sup> Executive Order:

The EA defines the 2012 Plan Amendment as the removal of the boating prohibition on the upper Chattooga, even though a Federal court previously ruled that a prohibition on boating remains above Greens Creek and over the Rust family property. Because neither the 2012 nor 2015 EA assessed the potential impacts (direct or indirect) of the likely effects of “allowing boating” upstream of, across and immediately downstream of the Private Segment, redefining the previous Forest Plan as allowing boating on the upper Chattooga would violate NFMA and NEPA procedural requirements for plan revisions. The court defined, before upholding, the 2012 Plan as not allowing boating within ¼ mile of the Private Segment; the EA contradicts the court’s ruling here.

The USFS has presented a narrow assessment but proposes an ambiguously broad “action” that affects the entire upper Chattooga including the Private Segment. The deficiency of assessment -between the ambiguously broad action and narrow assessment- is both a procedural and due process violation.

**We request the Forest Service comport with the court-defined 2012 Forest Plan Amendments and recognized that boating is prohibited “above Greens Creek and over the Rust family property” and that boaters can not access the Chattooga within ¼ mile of the Private Segment. Since the Greens Creek trail is the only trail that does not comport with the court’s ruling, we request the agency not designate Greens Creek trail and move downstream the location from where boaters could initiate a trip to “the confluence of Norton Mill Creek”.**

#### **IV . Misrepresents Discretionary Authority to Include Allowing Public Use of Private Property.**

a) Although the agency conceded it has no authority to manage private property for public recreation<sup>30</sup>, the EA continues to assert and imply such authority over the Private Segment. The EA misrepresents the agency action as “not authorizing” and “not allowing” public use of private property, rather than acknowledging jurisdictional limits. The statement implies some discretionary authority to act; an action (authorize) taken to a subject (private property). After extensive litigation the agency thwarted judicial review as to the scope of their discretion and authority by conceding it does not Plan or manage the Private Segment because it considers the Private Segment private property.<sup>31</sup> Therefore the Private Segment can not be part of the National Forest System, which must be planned and managed<sup>32</sup>. The USFS does not have discretion to “authorize” public use of private property and its’ persistent assertion that it *allows* recreational use of the upper Chattooga raises the issue of their discretionary authority over private property within a designated Wild and Scenic River area. By implying such discretionary authority, has incited the kayak lobby to challenge the Forest Service failure to manage the Private Segment for public recreation; therefore misrepresenting agency authority has cost the Family and WCA hundreds of thousands of dollars in legal

<sup>30</sup> See note 9 Whitewater v. Tidwell, 959 F. Supp. 2d 839, SC 2013

<sup>31</sup> Id 1119

<sup>32</sup> The SC district court confirmed the USFS did manage and plan for the National Forest System and is not planning or managing the Private Segment. id

fees protecting their property interests clouded by agency actions and misstatements in planning documents and to the courts.

In this current NEPA process, the kayak lobby again requests that the USFS permit boating above Greens Creek and through the Private Segment.<sup>33</sup> In reply to this request, the agency fails to acknowledge that removal of the prohibition requires approval of the landowners or a court ruling invalidating current title to the Private Segment. Not until title of the Private Segment is transferred to the agency -by future purchase from a willing seller-, would the agency have the discretionary authority to remove the court recognized prohibition on boating. It cannot do so by pretending the court-recognized prohibition does not exist.

**We request the Forest Service comport with the court-defined 2012 Forest Plan Amendments and recognized that boating is prohibited “above Greens Creek and over the Rust family property” and that boaters can not access the Chattooga within ¼ mile of the Private Segment. Since the Greens Creek trail is the only trail that does not comport with the court-approved action, we request the agency not designate Greens Creek trail and move downstream the location from where boaters could initiate a trip to “the confluence of Norton Mill Creek”.**

#### **IV. Fails to conduct a Suitability Analysis and identified visitor capacity in excess of authority.**

A fundamental element of the Forest Planning process is to determine if an area is suitable for the action being proposed.<sup>34</sup> An area is considered not suitable for a proposed action if the action violates law, statutes or an executive Order. Including Recreational use of private property fails to meet all three standards for the suitability of the Private Segment for any form of public recreational use. The inclusion of the Private Segment within the upper Chattooga visitor capacity analysis is a violation of the planning process, has been a violation of the planning process. The visitor capacity for the Private Segment is defined by the Family and not the agency.

The failure to conduct the suitability analysis and to transparently document the Private Segment is not suitable for recreational use in planning documents represents a procedural deficiency under NFMA. This administrative requirement is also recognized as being the “first step” in any judicial review of an agency action<sup>35</sup>.

Further, the agency does not set visitor capacity for private property as the 2012 EA purported. However, the court clarified, before upholding, the 2012 Plan to mean the Private segment is not suitable for public use because it is currently private property. This EA reopens whether the 2012 Action is in excess of statutory authority by reintroducing the 2012 planning documents without recognition of the court rulings.

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<sup>33</sup> EA p121-2

<sup>34</sup> 16 U.S. Code § 1604 (e),2 “the Secretary shall assure that [Forest] plans.. determine..[an areas] suitability for resource management

<sup>35</sup> Overton case.

The kayak lobby has requested the agency permit boating upstream of and through the Private Segment in this EA and in the Nantahala Forest Plan Revisions currently underway. Neither has documented the Private Segment of the Chattooga WSR is not suitable for public use, and rather presents their action as permitting or not permitting boating throughout the upper Chattooga which includes the Private Segment. The EA perpetuates the public misconception that private property is, or could be, available for public use by the agency, while WCA members are harassed by misinformed WSR visitors with firearms is harm. The Planning requirement to remove areas unsuitable for a proposed use early in the planning process, rather than bumble through ten years of published ambiguity and implied authority has harmed the WCA and Family.

**We request the Forest Service include in this EA- and all future EAs which include the Chattooga WSR- that the Private Segment is not suitable for public recreational uses. We request the agency not designate Greens Creek trail and move downstream the location from where boaters could initiate a trip to from the Private Segment Property boundary located at the confluence of Greens Creek to “the confluence of Norton Mill Creek”.**

**V. Applied the Incorrect Standard of Review for Defining than Managing for O.R.Values:**

The Standard to which the Forest Service must manage federally owned lands within any designated Wild and Scenic River is based upon the protection of the outstanding and remarkable values (O.R.V.s or Values) that the resource possess 16 USC 1271,1281. And, requires that primary emphasis be placed on protecting the scenic, biological and esthetic values over visitor use. 16 USC 1281. These requirement has been defined as the non-degradation of resource conditions. WSR Secretarial guidelines. The Court specified:"nondegradation in the context of a wild and scenic river is assurance that there is no downward trend in conditions that affect O.R.V.s."<sup>36</sup> Despite clarity of the management standard, the EA contradicts the standard by first defining recreational activities as values, then protecting these activities at the expense of resource conditions.

- a) **Activities are not Values** The EA misidentifies activities which exploit the resource Values as Values themselves<sup>37</sup>, then assesses the effects of agency action against protecting the activity rather than protecting the resource values. Elevating activities -or uses exploiting the values- to the status of a Value denigrates the court findings that boating –or any activity- is not a protected Value. The Court identified “recreational value” as one value of the Chattooga WSR possesses, “and that floating is not a value of the Chattooga that must be protected and enhanced.”<sup>38</sup> The agency is not obligated to protect a ‘visitor uses’ or ‘activities’ which exploit the resource’s recreational values, rather it must protect the Values from visitor uses that would degrade those “resource values”. See WSR guidelines Fed. Reg. 39,458-9 ( 1982) The WSR Act contrasts Values which must be protected and enhanced with

<sup>36</sup> Whitewater v. Tidwell, 959 F. Supp. 2d 839,855 Dist.Court, D. South Carolina 2013

<sup>37</sup> EA p 24-25

<sup>38</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1118 4th Circuit 2014



“potential uses” which can be “foreclosed or curtailed.” 16 U.S.C. § 1275(a). By mislabeling the Values, the agency misdirects its Proposed Action toward protecting ‘uses of the resource’, at the expense of documented resource degradation caused by river access trails. see EA 24 &76.

b) **The standard can not be geographically fragmented**

The management standard applies to the “component of the National [WSR] system” § 1281.

However, the EA only considers how agency action effects ‘values’ at site-specific locations. The management standard applies to the entire 57miles of the designated Chattooga Component. For instance over a third of the designated ‘component’ allows limitless boating, even at the expense of other visitors and the resource, and, court has already upheld a complete ban on boating the entire upper 21 miles of the Chattooga because the experiences downriver are varied and plenty. Here the EA presents fewer yards of boating as limiting the options of this Proposed Action.

Unlike other statutory mandates where the agency is awarded deference in assessing the ‘significance’ of impacts to Values, degradation within a Wild and Scenic River must be managed under the non-degradation Standard. Discretion does not extend to allowing recreational uses that have already been shown to cause a downward trend in the condition of the resource. The EA identifies a ‘downward trend’ in the condition of the Greens Creek Trail is creating sediment into the stream<sup>39</sup> (EA p 24, 71 & 76),and even the need for corrective action to prevent further degradation. id p.76. Degradation is documented, and more degradation is anticipated. id Therefore a ‘downward trend’ in the condition of the resource and water quality exists as a result of the 2012 Action -which allows boating above Norton Mill Creek- and is expected to continue with the proposed action of designating the Greens Creek Trail for all visitors. A 2012 Plan that created the downward trend in the condition of the resource is already in violation of the WSR standard and the EA presents no corrective action alternative that would even meet the WSR management standard. By continuing to allow boating above Norton Mill Creek, the agency already violates the standard.

The 1985 Forest Plan documented the improvements to resource conditions from closing river access points in 1976.<sup>40</sup> Despite documented evidence that conditions of the resource improved by limiting access trails, the Proposed Action would now reverse a previous action found to improve resource conditions. In light of this evidence in the agency planning documents, it is befuddling how opening these previously closed access points suddenly improves conditions of the resource. The EA offers no rationale that contradict the 1985 findings.

The EA also conflicts the Forest Service handbook which requires all new WSR trails “must be compatible with and fully protect identified values” FSH1901.12\_80. To fully protect values requires that these values be properly identified. Then that potential impacts from designating the new trail be assessed against this ‘fully protect’ standard. The Handbook reinforces the non-degradation standard has been misapplied in this EA.

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<sup>39</sup> p76 “Designation of the access trail and access for user entry to the Chattooga WSR would create adverse soil effects.”

<sup>40</sup> 1985 Sumter Forest Service, Revised Land Management Plan (pp.F-8&9),

392 . The Draft EA mistakenly applied the ‘protect and enhance’ mandate to activities exploiting resource  
393 values, rather than protecting the actual resource Values. The WSR Act contrasts protected Values from  
394 “Potential uses” which can be “foreclosed or curtailed.” 16 U.S.C. § 1275(a). The EA recognizes impacts to the  
395 resource from the proposed action, but incorrectly presumes it has discretion to continue with a downward trend  
396 of resource conditions. This is a violation of the WSR management standard. At a minimum “primary  
397 emphasis” Values take precedence over visitor uses. Id §1281. The EA conducted the analysis under an  
398 improper management standard in violation of the WSR Act.

399 **We request the Forest Service take immediate corrective action by closing the River above**  
400 **Norton Mill Creek to stop the downward trend in the condition of the resource. Under the**  
401 **proper standard of review we request the Greens Creek Trail not be designated and that the**  
402 **agency prohibit boating upstream of Norton Mill Creek”.**  
403

#### 404 **VI. The Proposed Action lack a full range of reasonable Alternatives thereby violating NEPA**

405 The 2015 EA presents a single management direction as two ‘supposed alternatives’. Either to designate user-  
406 created trails currently being used by boaters, or to not designate them, but continue to allow boaters to access  
407 the river at these same trails. pg.7 Because there is no discernable difference between the proposed  
408 alternatives, the EA provides no basis for comparison to analyze and contrast those issues raised during  
409 scoping,<sup>41</sup> which circumvents the mandated ‘Hard Look’ through comparative analysis<sup>42</sup>. The lack of any  
410 alternative for comparison results in a deficient assessment and a NEPA violation.

411 Even considering the previous 2012 EA which only presented two sets of alternatives<sup>43</sup>, the EA has presented  
412 a false dichotomy for public review, assessment and comparative analysis. Either boating was to be allowed  
413 from the confluence of Greens Creek (a property boundary), or all boating would be prohibited throughout the  
414 upper Chattooga. Additionally, this EA verifies the 2015 was a ‘connected action’ to the trails being proposed  
415 for designation now. The limited range of alternatives fragmented the Assessment creating two arbitrary and  
416 capricious decisions. The 2015 EA simply confirms the resources were previously committed, which is a  
417 connected action violation. Regardless of potential impacts, the EA presents the need to provide boater access  
418 trails as a result of the 2012 Decision to allow boating at all.<sup>44</sup> Without a basis for a comparison of likely  
419 impacts, neither this EA -nor the 2012 EA- considered the benefits of continuing the prohibition on boating on a

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<sup>41</sup> The kayak lobby proposed the USFS exclude the Private Segment of the upper Chattooga from the conditions of the permit, while the WCA requested the USFS define the Private segment as unavailable for public use.

<sup>42</sup> Analyze and document “impacts of the proposal and the alternatives in a comparative form, thus sharply defining the issues and providing a clear basis for choice among option by the decision maker and the public” 40 CFR 1502.16

<sup>43</sup> The 2012 Actions –to which this Proposed Actions is tiered- offered two sets of alternative. One set expanded boating up to the confluence of Greens Creek, while the other set continued to ban all boating from the upper Chattooga. Over fifty requests to reduce the uppermost range of where boating is allowed further downstream in order to not incite interference with property rights or to reduce impacts to the resource were never assessed or analyzed.

<sup>44</sup> “the decision [to allow boating] was already made” EA p 185-210

larger segment of the Chattooga River; the benefits which include the need for fewer access trails and their associated impacts. The benefits of moving boating downstream also include reduced disturbances to nesting birds along the riparian zone, fewer impact to the riparian zone caused by boaters when scouting and portaging rapids, and less interference with private property rights immediately adjacent to the proposed action. Multiple requests from the WCA to assess an alternative that would only allow boater access downstream of the property boundary that does not encourage trespass through the Private Segment was never assessed. The only reason provided for rejecting any alternative that would not designate a proposed access trail was that it would reduce boaters' access to use the resource. This applies the wrong standard of review, because unlike the resource, the wildlife, the water quality and property rights, boating is not "protected" under the WSR Act, NEPA or the US Constitution (see above). The circular logic used to rationalize the actions verifies the connected action NEPA violation.

The lack of any reasonable alternative, prevented a comparative analysis and Hard Look of the effects from agency Actions. A full EIS would have resulted in a "hard look" by including review of indirect impacts and consideration of a full range of reasonable alternatives; an EIS was required here.

The EA confirms the 2012 Action and Proposed Actions are connected actions, which illegally allocated resources before taking a hard look at the likely indirect impacts. It is for that reason that fragmenting the assessments from the Decision that committed access trail resources is a NEPA violation. By never considering to continue the prohibition above Norton Mill Creek, rather than Greens Creek, resulted in a biased EA and by arbitrary and capricious decision. This has incited interference with property rights which harm the WCA.

A Federal Court ruled kayakers suffer no harm as a result of a complete prohibition on boating above highway 28: "while the Headwaters is currently closed to floating, abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters<sup>45</sup>. More recently the court found no 'protected rights' are being violated by boating restrictions across the upper Chattooga<sup>46</sup>. Therefore there is no legal basis that would prevent the Forest Service from moving the uppermost boater put-in downstream to Norton Mill Creek, Bull Pen or even Highway 28. The supposed shackles limiting any alternative to move boating further downstream in this EA are imagined and as presented here confirms the fragmentation of assessments for the 2012 and Proposed Actions remains a NEPA violations. Limiting alternatives has resulted in an arbitrary and capricious decision harming the WCA and Rust Family.

**We request the Forest Service assess the benefits to the resource, the riparian zone, property interests, financial management burdens, non-boating visitors and wildlife from not designating**

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<sup>45</sup> 2:06-cv-00074-WCO ,Whitewater v. US Forest Service, final Order (2006) p.17-18

<sup>46</sup>Whitewater v. Tidwell, 959 F. Supp. 2d 839,865 SC 2013 the kayak lobby's purported "constitutionally protected liberty interest in the right to interstate travel and personal movement" was being violated by the "prohibitions on whitewater floating." The court disagreed and found the argument has no merit.

the Greens Creek Trail and moving the location from where boating is allowed downstream to “the confluence of Norton Mill Creek”.

## **VII. The EA Verifies a Connected Action NEPA Violation**

The Agency is required to assess connected action simultaneously in order to prevent a commitment of resources without the necessary assessment. Actions as defined as ‘connected’ when an earlier action makes a commitment without the necessary assessment, than a later action limits assessment based on the previous Action. Here the EA acknowledges being tiered to the earlier decision that did not assess the indirect effect to the Private Segment or the WCA members. And presents only a limited assessment based on a perceived commitment<sup>47</sup> to the resource. Fragmenting assessment and Decisions circumvent the planning process and due process of law owed to the WCA and Rust Family.

Having isolated the Decision on where to ‘allow boating’, from this Proposed Action on where to designate access trails, the agency has circumvented ever considering the benefits of reducing the boatable river miles in order to prevent documented degradation of the resource at the access locations. The previous legal challenge to the locations of access trails relative to segment of river where boating is permitted was declared premature for judicial review”,<sup>48</sup> because the access trail Decisions had not yet been finalized. It was under this understanding that the SC District Court found the issues of property title, navigability, the rights of the family to access their own property, and the scope of Forest Service jurisdiction not ripe for judicial review<sup>49</sup>.

In contradiction to the court ruling, the Proposed Action is presented as a ‘need to designate trails’ due to the commitment of the resource previously made under the 2012 Decision. This fragmentation of a complete assessment circumvents the assessment requirement entirely, specifically the indirect effects of the action above Greens Creek. The Proposed Actions simply confirms the assessment deficiency. The WCA and Family have been aggrieved by the fragmentation of assessment and the absence of any assessment as to the indirect effects from agency action on the use and enjoyment of the Private Segment.

**We request the EA comport with the 4<sup>th</sup> circuit court ruling which defined, before it upheld, the 2012 Plan Amendments. Boating is prohibited “above Greens Creek and over the Rust family property” and within ¼ mile of the Private Segment. Since the Greens Creek trail is the only trail that does not comport with the court’s ruling, we request the agency not designate the Greens Creek trail and move downstream the location from where boaters could initiate a trip to “the confluence of Norton Mill Creek”.**

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<sup>47</sup> We believe the EA illegally revises the previous plan and that the Court did not commit the Private Segment or the National Forest within ¼ mile of the Private Segment, for boating. However, if it did do, the Court rulings are in error, and the 2012 Decision was enacted without the necessary analysis, assessment and judicial review process.

<sup>48</sup> Whitewater v. Tidwell, 959 F. Supp. 2d 839,862 SC 2013

<sup>49</sup> Whitewater v. Tidwell, 959 F. Supp. 2d 839,858 South Carolina (2013)

480

481 **VIII. The 2015 Decision revises the 2012 Plan to which it is tiered, and Conflicts with Court rulings.**

482 The 2015 EA and associated Decision notices contradict the 2012 Forest Plan and denigrates a series of  
483 Federal court rulings regarding the upper Chattooga. The 2012 Plan Amendment states: “boating is not allowed  
484 above highway 28,” except under certain conditions and only downstream of Greens Creek. The 4<sup>th</sup> circuit  
485 court documented that Boating remains prohibited upstream of Greens Creek, across both public and private  
486 segments (a “continued ban on floating above Greens Creek, and the Rust’s property”<sup>50</sup>). The court ruled that  
487 because the Forest Service prevents boating upstream of the Private Segment, through the Private Segment, and  
488 restricts boater access to the river within ¼ mile of the Private Segment, the 2012 EA did not need to assess the  
489 indirect affects of the proposed agency actions on the Private Segment or property interests.<sup>51</sup> In contrast to  
490 these court rulings, the EA defines the previous Forest Pan as allowing boating throughout the upper Chattooga.  
491 EA p4. The EA misrepresents the restrictions on boater access as only applying after the 2015 action is  
492 published. (EA 4, 24,27-8) The agency has reversed course from its previously taken position -that the 2012  
493 Action continues to prohibit boating above Greens Creek and prevents access within 1/4 mile of the Private  
494 Segment- be revising the ‘no action alternative’ to mean the lifting of all restrictions on boating throughout the  
495 upper Chattooga. Allowing boating upstream of or through private property would impact the Private Segment  
496 and the interests therein, such an action was never assessed in 2012 or in 2015. Importantly the court upheld the  
497 2012 Forest Plan amendments -against the Rust Family cross claims- because the Plan prevented use across the  
498 Private Segment and the uppermost Four (4) WSR river miles.

499 . As recently as this year, the USFS presented to a federal court the following explanation of the 2012 Plan  
500 Decision: “The 2012 Decisions do not contain site-specific decisions for specific put-ins and take-outs for boats,  
501 or access trails for boaters; those site-specific decisions are subject to a separate NEPA analysis currently  
502 underway. In the interim, the 2012 Decisions require boaters to start and/or complete their trips at five specific  
503 locations.”<sup>52</sup> Therefore the 2012 Decision did not establish a free-for-all access provision that allowed boaters  
504 to boat upstream of, through or even near the Private Segment as the EA purports here.

505 Redefining a previous Forest Plan, is the creation -out of thin air- of revised Forest Plan without the need for  
506 following the mandated Planning Process for Plan revisions under NFMA or NEPA. A revised Plan  
507 circumvents the protections awarded the WCA and Rust Family under the APA which provides redress when a  
508 federal regulation adversely affects a property right. Because the WSR Act does not abrogating any existing  
509 right, a retroactively revised Plan in excess of Statutory authority alos violates the WSR Act. Here this  
510 redefining is especially egregious where the Action was defined, before being upheld, in an extensive and

<sup>50</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1121 4th Circuit 2014

<sup>51</sup> Id 1121 , see also Whitewater v. Tidwell, 959 F. Supp. 2d 839,858 South Carolina (2013)

<sup>52</sup> GA Forest Watch v. USFS, CV# 8:12-cv-03455-BHH , USFS Motion for Judgment EN#54 p11,12 03/27/15



expensive judicial process. Revising a Plan outside of the NFMA and NEPA process denies the due process rights owned to those potentially aggrieved by agency action

The inconstancy in defining the Forest Plan depending on the audience violates the need to publish understandable planning documents under NEPA and NFMA. Either the draft EA is in error, or multiple court rulings are each premised upon a misapprehension fraudulently presented to the court by the USFS. Any misapprehension of the Forest Plan by the public, the courts or even the Forest Officials, can be resolved through clarity now.

**We request the Draft EA comport with the 4<sup>th</sup> circuit court ruling which defined, before it upheld, the 2012 Plan Amendments. Boating is prohibited “above Greens Creek and over the Rust family property” and boaters cannot access the Chattooga River within ¼ mile of the Private Segment. Since the Greens Creek trail is the only trail that does not comport with the court-defined Plan, we request the agency not designate the Greens Creek trail and move downstream the location from where boating starts to “the confluence of Norton Mill Creek”.**

**IX. Segmentation of the trail analysis for the upper Chattooga is biased and results in a net increase in trails:**

The 2012 Decision -which expanded limited boating opportunities to the upper Chattooga- was premised upon a net reduction in the overall length of trails and associated sedimentation run-off.<sup>53</sup> This Proposed Action contradicts the earlier Plan to which it is purportedly ‘tiered’<sup>54</sup>. In place of reducing the overall length of trails, the Proposed Action would designate additional trails, but only for boaters.

The pending future action <sup>55</sup> of closing non-boater trails and campsite to meet the “net reduction” is not considered here which again violates planning requirements under the NFMA and NEPA. . The EA allocates miles of new boater-trails which must be offset by closures of hiker and angler trails. Therefore, fragmenting this EA negatively effects WCA members who are also hiker, anglers, birdwatchers and campers. Fragmenting the resource commitments being made violates NEPA’s connected action clause and is inherently biased. Isolating this Proposed Action for the sole benefit of the boaters is inherently biased.

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<sup>53</sup>2012 EA p73

<sup>54</sup> The Forest Supervisor must ensure that all projects are consistent with the Forest Plans to which it is tiered. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.11(e) Idaho Conservation League v. Mumma, 956 F. 2d 1508,1512 ,9th (1992)

<sup>55</sup> Trail/campsite designation/restoration

Most importantly, designation of these new trails is inconsistent with the current Forest Plan to which it purports to be tiered<sup>56</sup>. Designing new trails for boaters, prior to closing other poorly sited trails, results in a net increase in trails in the riparian zone; which violates the stated objective of the Forest Plan.

**We request the Forest Service Stay the 2015 Decision to designate any new access trails, and move downstream the location from where boaters could initiate a trip to “the confluence of Norton Mill Creek”<sup>57</sup>, thereby removing the perceived need for the Greens Creek Trail.**

**X. The 2015 EA Misrepresents angler preferences in NC.**

The Draft EA claims there were “almost no interactions between boaters and non-boaters on the North Carolina side (EA p23); implying no conflict between anglers and boaters in North Carolina. The EA attributes the lack of interaction to few anglers, which contradicts the data collected showing that there are few boaters. (EA p21) The EA rationale fails to identify *displacement of anglers* who seek a boat-free segment of stream as the cause of few interactions.

Flow levels do not separate kayaks from anglers, rather anglers avoid boat-filled streams which can only happen during higher flows. The EA misrepresents the effect the Agency Plan has had on anglers by implying citing naturally occurring flows separate these conflicting uses. It is the Forest Plan that permits boats during higher flows, that displaced anglers, and the EA does not document displacement. Even the court recognizes that “floating can interfere substantially with other recreational uses.”<sup>58</sup> Allowing boating during higher flows discouraged angling during high flows, expanding boating further will displace and discourage more anglers.

In 2007, the Whiteside Cove association provided the Forest Service with 50 years of data on angling the North Carolina Chattooga River, on both the public and private river segments. The data shows that anglers visit the Chattooga above Bull Pen Bridge at flow levels well above 900cfs. Similarly, the USFS published “It is clear that acceptable ranges for the two groups [anglers and boaters] overlap.”<sup>59</sup> Therefore flows do not separate anglers and boaters, Forest Service policy which allows boating discourages anglers from visiting the upper Chattooga during those times.

WCA members have avoided fishing the public segment of the upper Chattooga during the higher winter flows in order to avoid interruption from boaters. The EA misrepresents the desires of NC anglers seeking to avoid interruption from boaters, as not desiring to fish; that simply is not true. Even the court recognized the importance of providing “year round boat-free, cold water angling”<sup>60</sup> Anglers in NC are discouraged from

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<sup>56</sup> The Forest Supervisor must ensure that all projects are consistent with the Forest Plans to which it is tiered. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.11(e) Idaho Conservation League v. Mumma, 956 F. 2d 1508,1512 ,9th (1992)

<sup>57</sup> Boaters can arrive at the confluence of Norton Mill creek via the existing trail system, thereby requiring no new trails.

<sup>58</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1119 4th Circuit 2014

<sup>59</sup> Page 42 *Chattooga River Expert Panel Field Assessment Report 2007*

<sup>60</sup> Whitewater v. Tidwell, 770 F. 3d 1108,1113-4 4<sup>th</sup> 2014

visiting the Chattooga during high flows in the winter due to Forest Policy. The EA misrepresents visitor behavior, which could be misinterpreted during adaptive management revisions. This error should be corrected.

**We request the Forest Service provide a year-round opportunity for anglers to enjoy a public segment of the NC Chattooga without interference from boats by prohibiting boating upstream of “the confluence of Norton Mill Creek”.**

#### **XI. Tributaries: Inconsistency management throughout the WCA**

The Court upheld the 2012 Plan amendments that continues to ban boating on the Chattooga tributaries due to likely environmental impacts and other conflicts<sup>61</sup>. However, the Forest Service has not applied the same protection to the headwater segment of the Chattooga main stem above Norton Mill Creek which is of similar size to the tributaries. The 2012 EA found sufficient basis to support a continued ban of floating smaller more delicate streams<sup>62</sup>. The need to protect smaller headwater streams from impacts caused by boating was inconstantly applied throughout the Chattooga WSR. In order to “provide consistent management” as is the stated objective (EA p 3), the Chattooga main stem above Norton Mill Creek deserves the same protective policy as provided for the similarly sized tributaries.

**We request the agency provide consistent management by treating the Chattooga Headwaters as a tributary by prohibiting boating upstream of Norton Mill Creek.**

#### **XII. Illegal Delegation of the Responsibility to the Kayak lobby.**

In 2013, Nantahala Forest Planning documents cited the Kayak lobby’s website to inform the public where boating opportunities exist in Western North Carolina. (Exhibit D) According to the AW website (Exhibit E) boating the Chattooga WSR starts at Grimshawes Bridge, nearly 2 miles upstream of Greens Creek. The actions of the Forest Service –informing the public to start boating from Grimshawes Bridge and through the Private Segment- violates property laws. Since both the USFS and AW were parties to a Court rulings, (finding “boating is prohibited above Greens Creek”), both the agency and the kayak lobby actions are not in compliance with the Court’s Rulings. The Forest Service must correct the misconception created by their own actions and clarify that *Boating Remains Prohibited Above Greens Creek* on their own website and in all future literature published to inform boaters on where to access the Chattooga WSR.

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<sup>61</sup> *Whitewater v. Tidwell*, 770 F. 3d 1108, 4th Circuit 2014 At note 5

<sup>62</sup> *Whitewater v. Tidwell*, 959 F. Supp. 2d 839,857-858 SC 2013

The Agency did not divest itself of the responsibility notify WSR visitors the boundaries of the National Forest System by shielding itself behind a third party website. The WCA and Rust family are adversely effected when WSR visitors are directed to the Private Segment indirectly as much as directly.

**We request the Forest Service correct the public misconception by adding signage at Grimshawes Bridge, on kiosks, and maps and make as a condition of the *Floater Permit* that *Boating Remains Prohibited*, either above the uppermost Put-in, or Norton Mill Creek.**

**XIII. The rationale used to justify the Greens Creek trail does match the evidence in front of the agency.**

Under the US Department of Agriculture, the NCRS published an extensive analysis on soil and land use within Jackson County, North Carolina. The publication notes that due to the slopes and type of soil located at the proposed Greens Creek Trail, the NCRS does not recommend its' use for recreational trails. Further, the NCRS further warns that wet soil conditions- after periods of heavy rains when kayakers are present- increase the severity of impacts created by recreational trail usage, as is identified in the EA. (p.76). The evidence in front of the agency does not support the Proposed actions. The EA provides no analysis which shows the soil and slope conditions at proposed Greens Creek trail could sustain recreational use after the heavy rains required to facilitate kayaking, rather the evidence in the record indicates this trail is not suitable for boaters. (EA p76)

The Forest Service handbook also suggests avoiding trial on step slopes and warns that wet conditions increase the likelihood of sedimentation run-off . The handbook even suggest closing trails during wet condition in order to protect the resource conditions. The warnings from the NCRS and Handbook were realized in the short time the Greens Creek trial has been identified for boater use. The EA recognizes a deterioration of resource conditions surrounding the Green Creek trails due to boater access use. (EA p71-76),

Despite the deterioration of Green Creek trail conditions, and the best available science from the US Department of Agriculture, the EA proposes designating a trail near Greens Creek to provide a kayakers a few extra yards of access to the Chattooga. The evidence in the record does not support the Proposed Action.

Finally, the EA notes "Overall, the effects on soils are expected to be minimal due to the limited amount of boating use." (p76). However, once "designated" the trail would be used by all visitor types as is predicted by the EA and impacts from all types of visitors was not assessed, nor are the benefits of not designating the Greens Creek trail. These are procedural deficiencies under the NFMA and NEPA. Impacts based upon all visitors, not just boaters, is the standard by which the impacts of the proposed actions must be measured.

**We request the Forest Service not designate the Greens Creek Access Trail, and immediately issue a closure Order for boating on the segment of the Chattooga River above Norton Mill Creek River.**

625

626 **XIV.** Conclusion: The Whiteside Cove Association and Rust Family object to the published EA and  
627 Proposed Actions. For the reasons outlined above, we request the agency not designate the Greens  
628 Creek trail and move downstream the location from where boaters could initiate a trip to either “Bull  
629 Pen Bridge” or “the confluence of Norton Mill Creek”

630

Thank you for your consideration

631

Sincerely,

632

*/s/ Michael Bamford*

633

Michael Bamford

634

On behalf of the Whiteside Cove association and Goodenow LLC.

635

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