

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, :
AMERICAN CANOE ASSOCIATION, :
GEORGIA CANOEING :
ASSOCIATION, ATLANTA :
WHITEWATER CLUB, WESTERN :
CAROLINA PADDLER, FOOTHILLS :
PADDLING CLUB, JOSEPH C. :
STUBBS, KEN STRICKLAND, and :
BRUCE HARE, :

Plaintiffs, :

vs. :

CIVIL ACTION
NO. 2:06-CV-74-WCO

DALE BOSWORTH, in his official :
capacity as Chief of the United :
States Forest Service, UNITED :
STATES FOREST SERVICE, :
MIKE JOHANNNS, in his official :
capacity as Secretary of the :
United States Department of :
Agriculture, and UNITED STATES :
DEPARTMENT OF AGRICULTURE, :

Defendants. :

ORDER

The captioned case is before the court for consideration of defendants' motion to dismiss [8-1] plaintiffs' complaint.

I. Factual Background

This action involves a challenge to the United States Forest Service's ("the Forest Service") allegedly unlawful closure of the upper twenty-one miles of the Chattooga

River (“the Headwaters”) to recreational floaters.¹ Plaintiffs American Whitewater, American Canoe Association, Georgia Canoeing Association, Atlanta Whitewater Club, Western Carolina Paddler, and Foothills Paddling Club are nonprofit associations devoted to, in part, the enjoyment and preservation of the nation’s rivers. Plaintiffs Joseph C. Stubbs, Ken Strickland, and Bruce Hare are individual members of plaintiff American Whitewater who, but for the allegedly unlawful closure, would float the Headwaters. The defendants in this action are the agencies and agents responsible for the boating ban.

In January 2004, defendants published the Revised Land and Resource Management Plan for Sumter National Forest (“the 2004 plan”),² which renewed a floating prohibition on the Headwaters.³ Though the Forest Service considered management alternatives that would have allowed floating the Headwaters, the Regional

¹ The court uses the terms “floating” and “boating” interchangeably throughout this order to refer to primitive paddling. Similarly, it uses “floaters” and “boaters” interchangeably to refer to those who participate in primitive paddling.

² The Land and Resource Management Plan for Sumter National Forest was adopted in 1985. The National Forest Management Act directs the Secretary of Agriculture to “develop, maintain, and as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a). The management plan is a programmatic framework for management of Sumter National Forest that “guide[s] all natural resource management activities and set[s] management standards for the Sumter National Forest for the next 10 to 15 years.” The 2004 plan challenged by plaintiffs was, as its title indicates, a revised management plan drafted to replace the existing 1985 plan.

³ After Congress designated the Chattooga River a Wild and Scenic River on May 10, 1974, the Forest Service published the Chattooga Classification, Boundaries and Development Plan (“the 1976 plan”). The 1976 plan, the first plan under which the Chattooga River was managed, prohibited floating the Headwaters. Every management plan since the 1976 plan has renewed the ban, and its attempted renewal in the 2004 plan led to this lawsuit.

Forester concluded that opening the Headwaters would result in unacceptable impacts on social and physical resources and that the outstanding recreational values of the river would be protected and enhanced by continuing the floating ban. Therefore, he renewed the ban as part of the 2004 plan. On April 15, 2004, plaintiff American Whitewater administratively appealed that portion of the 2004 plan, contending that the ban's renewal was not supported by adequate data or studies in the administrative record. The Forest Service favorably decided the appeal on April 28, 2005, when Gloria Manning, in her capacity as Reviewing Officer for the Chief of the Forest Service ("the Reviewing Officer"), issued an order ("the 2005 order") that provided:

The Sumter National Forest [Revised Land and Resource Management Plan] record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an [outstanding remarkable value] or to protect the wilderness resource. No capacity analysis is provided to support restrictions or a ban on recreation use or any type of recreation user. While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.

. . . .

After careful review of the record, . . . , I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.

The 2005 order then directs "the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use, and to adjust or amend, as

appropriate the [2004 plan] to reflect a new decision based on the findings.” The Reviewing Officer estimated the ordered visitor use capacity analysis would take two years to complete.

The 2005 order also contemplates interim management of the Chattooga River, which would last until the Regional Forester could amend the 2004 plan in light of the visitor use capacity analysis findings. During the interim period, the order directs that “[m]anagement of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect.” Thus, until an adjusted or amended revised plan is published, management of the Headwaters remains governed by the 1985 plan, the plan immediately preceding the deficient 2004 plan.

Despite the favorable nature of the Reviewing Officer’s order, plaintiffs filed the instant action on May 18, 2006, nearly a year later. Notably, plaintiffs do not challenge the findings of the 2005 order, the ordered analysis, or the agency’s issuing an amended 2004 plan; they challenge only the Reviewing Officer’s decision to revert to the 1985 plan for interim management of the Headwaters and ask the court to open the Headwaters until the agency issues its amended 2004 plan. Plaintiffs argue that the Reviewing Officer’s interim management decision is arbitrary and capricious because it directly conflicts with her conclusion that the ban’s renewal in the 2004 plan is

unsupported by adequate data or studies.⁴ In response to the complaint, defendants filed a motion to dismiss, arguing (1) that plaintiffs lack standing because their alleged injury is neither traceable to the challenged 2005 order nor likely to be redressed by invalidation of that order and (2) that any dispute between the parties is not yet ripe for judicial review.

II. Discussion

Generally, a reviewing court must give due deference to the expertise of an agency, and agency decisions are not disturbed unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Before even considering that standard in this case, however, the court must resolve threshold justiciability issues, namely whether plaintiffs have standing to challenge the agency action and, if so, whether the dispute is sufficiently ripe for judicial resolution.

A. Standing

Standing is “an essential and unchanging part of the case-or-controversy requirement” of Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, 422 U.S. 490,

⁴ To be clear, the Reviewing Officer concluded that the ban included in the 2004 plan was not supported by an adequate record. The Reviewing Officer did not, and had no reason to, address the validity of the ban included in the 1985 plan. See 2005 Order at 6 (“The Sumter National Forest RLRMP record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.”).

498 (1975). To establish standing, a plaintiff seeking to invoke the federal court's jurisdiction must satisfy three constitutional elements:

- (1) [that] it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
- (2) the injury is fairly traceable to the challenged action of the defendant;
- and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Koziara v. Casselberry, 392 F.3d 1302, 1304-05 (11th Cir. 2004) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000)). "All three elements are an 'irreducible constitutional minimum,' and failure to show any one results in a failure to show standing." Id. at 1305 (quoting Lujan, 504 U.S. at 560). In the motion before the court, defendants argue that plaintiffs fail to satisfy the second and third requirements—that their injury is not fairly traceable to the agency's challenged decision and that their injury is not likely to be redressed by a favorable decision from this court.⁵

With regard to traceability, defendants argue that plaintiffs' alleged injury—their inability to float—is traceable to the preexisting 1985 plan, not the 2005 order, and point out that plaintiffs have not challenged the 1985 plan. Plaintiffs claim, however, that their injury is traceable to the 2005 order because but for the Reviewing Officer's

⁵ Defendants have not challenged plaintiffs' allegation of an injury-in-fact, and the court finds plaintiffs' allegation sufficient to satisfy the first prong of the standing analysis. See Lujan, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)). Unfortunately, the remaining two prongs are not as easily resolved.

decision to reinstate the 1985 plan in her 2005 order, no authority would exist for the boating ban.⁶ Alternatively, plaintiffs argued at the hearing held on this motion that they had in fact challenged the 1985 plan in the present action. The court disagrees with plaintiffs on both accounts.

First, the court finds that plaintiffs' injury is not traceable to the challenged 2005 order. Contrary to plaintiffs' claims, the challenged 2005 order does not ban boating; it merely provides that the existing 1985 plan would continue to govern in place of the deficient 2004 plan. See 2005 Order at 6 ("Management of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision *made in that plan will remain* in effect.") (emphasis added). The prohibition, as it has been for over twenty years, is a product of and traceable to the properly promulgated 1985 plan. The fact that the Reviewing Officer set aside, at plaintiffs' request, a portion of the plan drafted to replace the 1985 plan does not somehow lead to the conclusion that the Reviewing Officer's 2005 order caused plaintiffs' injury. If plaintiffs want to attack the floating ban, they must challenge the management plan that provides the current

⁶ Specifically, plaintiffs argue that "when the 2005 Order invalidated the 2004 Plan, the 2005 Order became the current – and only – agency authority for managing hand-powered boating on the Headwaters." (Pls. Resp. to Defs.' Mot. to Dismiss 16). They argue that the government erroneously assumes "that the 1985 Plan's existence continued *de facto* despite being superceded by the 2004 Plan." The court does not agree that the 2004 plan necessarily superceded the 1985 plan. Had the 2004 plan been approved by the Reviewing Officer or gone unchallenged by plaintiffs, then the court would have no difficulty in concluding that the 2004 plan replaced the 1985 plan in its entirety. But that situation is not the one the court faces. Here, plaintiffs have gone to great lengths to expose the deficiencies of the 2004 plan, and it seems inconsistent for them to now argue that the same deficient and allegedly illegal plan they challenged replaced and wholly superceded a valid and existing management plan.

authority for the ban, i.e., the 1985 plan; they cannot do so by challenging the favorable 2005 order.

Second, despite their suggestion at oral argument, plaintiffs have not challenged the 1985 plan. The arguments in plaintiffs' brief frame the nature and scope of their challenge⁷ and specifically state at one point that plaintiffs' "injuries derive not from the 1985 plan but from the 2005 Order." (Pls.' Resp. to Defs.' Mot. to Dismiss 16). Given plaintiffs' own characterization of their argument, the court has little trouble concluding that they have not challenged the validity of the 1985 plan.⁸ And because plaintiffs have chosen to challenge only the 2005 order, not the actual source of their harm, they fail to satisfy the second prong of the standing test.

The court also finds that plaintiffs lack standing because it is not likely a favorable decision by this court will redress their injury. In light of the court's conclusion that plaintiffs' injury derives from the 1985 plan, not the 2005 order, setting aside the 2005 order as plaintiffs request will not redress their injury. Plaintiffs' injury exists independently of the 2005 order, and regardless of whether that order is in place, they remain unable to float the Headwaters because of the governing 1985 plan.

⁷ For example, plaintiffs state that this case "presents a single, straightforward issue: Is the 2005 Order inconsistent with its own findings and rationale?" (Pls.' Resp. to Defs.' Mot. to Dismiss 6). They also claim that the 2005 order, not the 1985 plan, deprives them of their right to enjoy hand-powered boating on the Headwaters. (Pls.' Resp. to Defs.' Mot. to Dismiss 4).

⁸ It is not surprising that plaintiffs frame their challenge as one to the 2005 order, not the 1985 plan. A challenge to the 1985 plan would be barred by the statute of limitations. See 28 U.S.C. § 2401 (containing six year limitations period for actions against the United States).

Accordingly, plaintiffs have failed to show that a favorable decision is likely to redress their injury.⁹

Moreover, plaintiffs' suggestion that, in addition to setting aside the challenged portion of the 2005 order, the court could redress plaintiffs' injury by ordering the Forest Service to allow floating on the Headwaters is unpersuasive. Though the court's declaration would certainly redress plaintiffs' injury, the court is not convinced such an order would be proper and, therefore, that relief is not likely. For good reason, rivers that are part of the national forest system are managed by the Forest Service, and the court is in no position to fashion even an interim management plan for the Headwaters. Had the Reviewing Officer, in her order reversing the challenged portion of the 2004 plan, fashioned the interim relief suggested by plaintiffs, other aggrieved parties could rightfully claim that her failure to revert to the immediately preceding plan violated the laws governing the establishment and implementation of forest plans. Similarly, if this court were to pronounce the Headwaters open, it not only would undermine these same laws but also would frustrate ongoing agency efforts to resolve this dispute.

⁹ The court notes that its redressability concerns exist even if it is mistaken about the source of plaintiffs' injury. If plaintiffs' injury *can* be traced to the 2005 order, the fact remains that any favorable decision—short of entering an order opening the Headwaters without any expert agency or public comment—would ineffectively redress their injury. For example, if the court sets aside the 2005 order, effectively setting aside, too, the 1985 plan, a prudent option would be to call upon the agency to develop an interim management plan. The Forest Service, however, is already involved in a comparable task: in light of a defective 2004 plan, the agency is developing an amended plan. There is no indication that the Forest Service could develop an interim management plan any faster than it can develop the amended 2004 plan called for by the 2005 order. In fact, opening the Headwaters by court order is the only relief that would redress plaintiffs' injury, but absent circumstances not presented here, the court is simply going to be unwilling to impose its will in place of a valid management plan.

The court thus finds two independent bases for concluding plaintiffs lack standing. Plaintiffs failed to show their injury is fairly traceable to the challenged agency action and that a favorable decision by this court is likely to redress their injury. Either of these findings, and certainly both, prevent plaintiffs from meeting Article III's irreducible constitutional minimum. Koziara, 392 F.3d at 1305. However, even if plaintiffs had standing, "prudential concerns 'counsel judicial restraint'" and make review inappropriate at this time. Nat'l Advertising Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005).

B. Ripeness

The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Reno v. Catholic Social Services, Inc., 509 U.S. 43, 57 n. 18 (1993). The court's inquiry is simple; it "focuses on whether the claim presented is 'of sufficient concreteness to evidence a ripeness for review'" and asks "whether it is appropriate for this case to be litigated in a federal court by these parties *at this time*." Nat'l Advertising Co., 402 F.3d at 1339 (quoting Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759-760 (11th Cir. 1991). "Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." Id. The doctrine also serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect

the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties.” Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

In deciding whether a dispute is sufficiently ripe, the court must determine “(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” Nat’l Advertising Co., 402 F.3d at 1339. In considering these two factors, the Supreme Court has explained that courts should consider “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998). Common sense guides the court’s analysis. McCoy-Elkhorn v. U.S. EPA, 622 F.2d 260, 263 (6th Cir. 1980) (“Ripeness calls for a common sense judgment on the fitness of the issues for judicial review and the actual hardship to the parties if a court decision were withheld.”). Taken together, these considerations foreclose review in the present case.

As a general rule, “a case is fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings.” West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797, 800 (4th Cir. 1998). Here, the parties disagree about the finality of the challenged decision, and they thus disagree about the fitness of the issues for judicial resolution. Defendants

point out that the agency has not yet made a final decision regarding whether floating on the Headwaters will be prohibited by the amended 2004 plan and argue that any decision prior to that ultimate one should not be considered final agency action. For their part, plaintiffs argue that the 2005 order definitively fixes their rights with regard to the same interim period, and, therefore, it is final at least in that regard. That the 2005 order setting aside the challenged portion of the 2004 plan represents final agency action is indisputable; the order, itself, states as much.¹⁰

Despite the order's last sentence, the court agrees with defendants on this issue. While the order setting aside the 2004 plan constitutes final agency action, the decision to *temporarily* revert to the 1985 plan while an amended plan is developed is just that, temporary. Moreover, it is a temporary solution brought about by plaintiffs' own challenge of the 2004 plan. Though parties should be encouraged to aggressively pursue the appeal of deficient plans, they should not be heard to complain where, because of their success, the agency temporarily reverts to an existing management plan while it works to correct the inadequacies of its new plan. The agency's consideration of this issue is ongoing, and likely within a year of this court's order, the Forest Service will have completed its study and adjusted the revised plan accordingly. Whether that amended plan renews or lifts the floating ban, the question of floating on the Headwaters

¹⁰ The final sentence of the order reads: "This decision is the final administrative determination of the Department of Agriculture unless the Secretary, on his own initiative, elects to review the decision within 15 days of receipt."

will be definitively resolved by final agency action and subject to judicial review at that more appropriate time.

Guided by common sense and prudential concerns, the court is convinced this case is not fit for judicial review *at this time*, even if the challenged decision constitutes final agency action. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) (“[E]ven where agency action is final and the issues presented are purely legal, a court may nonetheless properly deem a matter unfit for resolution if postponing review would provide for a more efficient examination and disposition of the issues.”). This is so because the requirement of finality “is predicated upon the perception that litigants as a group are best served by a system which prohibits piecemeal . . . consideration of rulings that may fade into insignificance by the time the initial decisionmaker disassociates itself from the matter.” West Virginia Highlands, 161 F.3d at 800 (quoting Aluminum Co. of America v. United States, 790 F.2d 938, 942 (D.C. Cir. 1986) (Scalia, J.)). Here, the court believes both its decision and the challenged agency decision will “fade into insignificance” shortly and that review, therefore, is imprudent at this time.

Only the interim floating ban is challenged in this lawsuit. Whatever shape the court’s decision on the merits would take, it would likely carry force only for a few months. Unlike situations where future legislative or agency action in an area is probable, agency action here is ongoing, and an amended revised management plan will be issued shortly. By the time the proceedings in this court are complete and the losing

party has sought and received appellate review, the court's decision will be a mere afterthought because the Forest Service's amended 2004 plan for the Headwaters will have superseded the court's order and rendered it obsolete. The court can think of no greater waste of time and effort than to proceed to consider the merits of this action, have the parties and the court expend hours upon hours preparing, arguing, and deciding the case, only to enter an order that will expire, at best, months later. Given this reality, deciding the case at this time simply does not represent a wise investment of judicial resources.

Apart from the almost certain insignificance of an order entered by this court, the fitness factors articulated in Ohio Forestry—whether judicial intervention would interfere with future agency action and whether the court would benefit from further factual development—also support finding plaintiffs' claim unfit. As to the first factor, the court finds judicial intervention would interfere with further administrative action and thereby “hinder agency efforts to revise its policies . . . through revision of the Plan.” Ohio Forestry, 523 U.S. at 735. Though plaintiffs argue that the Forest Service will take no further action with regard to the discrete period they challenge and that, therefore, interference is a nonissue, their argument overlooks the practical effects judicial intervention would have on the Forest Service's ongoing attempt to resolve this issue.

Agency efforts to issue an amended 2004 plan are already underway, and judicial intervention would frustrate, if not prevent, the Forest Service's completing this task.

Simply having to litigate this action diverts personnel away from the study, and the court's opening the Headwaters to unanticipated users would certainly substantially interfere with the agency's ability to conduct its visitor use capacity analysis.¹¹ Also, disrupting the Forest Service's efforts would be costly. Plaintiffs waited over a year before filing this lawsuit, and during that time, defendants spent several hundreds of thousands of dollars in contracting fees, developed plans, held public meetings, researched data collection methods, identified techniques for collecting data, and recently completed a visitor capacity analysis plan for collecting social data and a general work plan for collecting biophysical data. To a large degree, the product of these costly efforts would be lost if the Headwaters were opened mid-study. The court thus agrees with defendants that judicial intervention at this time would inappropriately interfere with ongoing agency efforts to amend its revised management plan, causing the agency, but ultimately United States taxpayers, substantial harm.

The court would also benefit from further factual development. Though plaintiffs present to the court a "discrete legal question," this fact does not preclude the court from concluding that further factual development would aid judicial resolution of plaintiffs' claim. See, e.g., Nat'l Park Hospitality, 538 U.S. at 812 ("Although the question presented here is 'a purely legal one' and § 51.3 constitutes 'final agency action' within the meaning of § 10 of the APA, we nevertheless believe that further factual

¹¹ The court notes that interfering with the Forest Service's ability to expeditiously issue an amended 2004 plan benefits no one, including plaintiffs, whose long-term ability to float the Headwaters will be decided by the amended 2004 plan, not by any decision of this court.

development ‘would significantly advance our ability to deal with the legal issues presented.’”) (internal citations omitted). Here, the ongoing study may reveal that opening the Headwaters to floaters will substantially interfere with other recreational uses or that the Headwaters pose too great a risk to inexperienced floaters to open. Inasmuch as plaintiffs ask the court to make a decision that effectively opens or closes the Headwaters until a new management plan is in place, the court would certainly benefit from knowing whether the historical dangers of an open Headwaters, such as river fatalities and user conflicts, still exist before reopening it.

Finally, in deciding whether a claim is ripe, the court also asks whether delayed review would cause hardship to the parties.¹² Hardship exists where an action “results in ‘adverse effects of a strictly legal kind.’” Pittman, 267 F.3d at 1280 (quoting Ohio Forestry, 523 U.S. at 733). The Supreme Court has explained that such effects are not present if the challenged policies “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.” Ohio Forestry, 523 U.S. at 733. In this case,

¹² Having found the fitness factor weighs heavily in favor of delaying judicial review, the court notes that no amount of hardship may justify review. Though some commentators “state that ripeness may be found if either fitness or hardship is shown, the Supreme Court’s decisions ‘seem to indicate that both requirements must be met.’” Pittman v. Cole, 267 F.3d 1269, 1280 n. 8 (11th Cir. 2001) (quoting Erwin Chemerinsky, Federal Jurisdiction § 2.4.3 (3d ed. 1999)). In Pittman, the Eleventh Circuit did not definitely resolve the complex issue of whether both elements must be met or, alternatively, whether “a sliding scale approach should be applied such that some prematurity can be excused if more hardship is shown.” Id. This court need not attempt to resolve this difficult question either; even if “some prematurity can be excused if more hardship is shown,” plaintiffs have made an insufficient showing of hardship to warrant immediate judicial review.

plaintiffs argue that it is “abundantly clear” that the 2005 order causes them hardship because it commands them to refrain from floating on the Headwaters and withholds from them a legal license to enjoy floating on the Headwaters.

Borrowing from the court’s earlier standing discussion, the court finds that the 2005 order does not command plaintiffs to refrain from floating or withhold from them a legal license to float. Rather, plaintiffs’ injury—thus any hardship—derives from the 1985 plan. That unchallenged plan undoubtedly commands plaintiffs to refrain from boating the Headwaters and withholds from them a legal license to do so, but the 2005 order does not. Therefore, the court finds that plaintiffs suffer no hardship from the court’s withholding consideration of the agency’s challenged decision because no hardship could possibly flow from delayed review of an order that, itself, did not create the injury plaintiffs hope to remedy.¹³

Even if the 2005 order “results in ‘adverse effects of a strictly legal kind,’” additional circumstances present in this case offset the conclusion that delayed review would result in hardship. Significantly, the Forest Service’s amended 2004 plan is forthcoming, and any hardship imposed by the 2005 order will be endured for just a short time longer. Further, while the Headwaters is currently closed to floating,

¹³ The court is simply unconvinced that the 2005 order imposes a hardship. Plaintiffs are indisputably in a better position now than they were before the agency action they challenge. Specifically, plaintiffs have succeeded in having the 2004 plan set aside and, despite having missed their opportunity to challenge the validity of the 1985 plan, find themselves in the enviable position of (a) having the Forest Service lift the floating ban in light of the findings of the ongoing study in the amended plan, or (b) having an opportunity, with the benefit of a fully developed administrative record, to challenge the agency’s decision to keep the ban in place at the study’s conclusion.

abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters. Additionally, the 2005 order contemplates the possibility of user trials in conjunction with the capacity analysis and orders the Regional Forester to involve affected and interested parties in the design and execution of the capacity analysis. Plaintiffs continue to engage the agency and participate in the agency's decisionmaking process; they are not being shut out of the agency's consideration of this issue. Last, if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available and thankfully devoid of the hovering difficulties and uncertainties present in this action. These possibilities, coupled with the considerations previously discussed, preclude a finding of hardship in this matter.

III. Conclusion

The court concludes that plaintiffs lack standing to challenge defendants' 2005 order because plaintiffs' claimed injury is traceable to the 1985 plan and not a product of the challenged 2005 order. Further, plaintiffs' injury is not likely to be redressed by a favorable decision from the court. Even if the court were to set aside the 2005 order as plaintiffs request, the 1985 plan, which also includes a floating ban, would continue to provide management direction for the Headwaters. But even if plaintiffs could establish standing, the court concludes that prudential concerns weigh heavily against reviewing the merits of this action at this time. Most importantly, plaintiffs challenge the legality of an action set to expire in fall 2007; the Forest Service's adjusted or

amended management plan will render the court's decision obsolete at that time. Judicial resources should not be wasted on such fleeting relief, especially where, as here, the court has found that judicial intervention would inappropriately interfere with ongoing agency efforts, that the court would benefit from further factual development, and that plaintiffs would suffer little, if any, hardship from the delay.

Frankly, no party, including those not before the court, would be served by a "temporary" decision from this court. A floater should be able to easily determine whether he can float on a given part of the Chattooga River without worry of fine. Likewise, a fisherman should know whether he will have to cast around floaters while enjoying the quiet solitude of the Headwaters. The possibility that this court could reach a decision opening the Headwaters, thereby overriding thirty years of agency policy, only to have that decision superseded by a valid amended revised management plan less than a year later counsels in favor of judicial restraint. The law ought not be seen as so whimsical, and although there are circumstances where justice demands that a court intervene despite the real possibility of its decision being immediately overridden, those circumstances are not present here.

Plaintiffs have worked tirelessly to open the Headwaters to floaters, and they scored a major victory by successfully challenging the 2004 plan. Their vision of an open Headwaters may well be realized when the Forest Service issues its amended revised management plan, but they will have to wait until that plan is handed down to find out. In a situation like the one presented here, where the high costs, risks, and

uncertainties associated with judicial review significantly outweigh the harm of delaying it, plaintiffs must be content to allow the process they have started to play out. If their vision does not materialize, they can be assured that the courts will be open and willing to review their complaints at that time.

Accordingly, the court **GRANTS** defendants' motion to dismiss.

IT IS SO ORDERED, this 6th day of October, 2006.

s/William C. O'Kelley

WILLIAM C. O'KELLEY

Senior United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, ET AL.,	)	DOCKET NO.
	)	2:06-CV-74-WCO
PLAINTIFFS,)	
)	
V.)	
)	
DALE BOSWORTH, ET AL.,	)	GAINESVILLE, GEORGIA
	)	SEPTEMBER 6, 2006
DEFENDANTS.)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE WILLIAM C. O'KELLEY
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT MITCHELL
 BRIAN VANMETER
 ATTORNEYS AT LAW

FOR THE DEFENDANTS: STEVEN MCCLAIN
 ATTORNEY AT LAW

LOIS D. PHILLIPS, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
U.S. DISTRICT COURT
ATLANTA, GEORGIA 30303-3361
(404) 215-1317

P R O C E E D I N G S :

(BEFORE JUDGE O'KELLEY ON SEPTEMBER 6, 2006)

THE COURT: COUNSEL, BE SEATED.

THE CLERK: CALLING FOR HEARING ON MOTION TO DISMISS
CIVIL ACTION NO. 2:06-CV-74, AMERICAN WHITEWATER, ET AL., VERSUS
DALE BOSWORTH, ET AL. COULD COUNSEL PLEASE STATE THEIR NAME FOR
THE RECORD?

MR. MITCHELL: ROBERT MITCHELL OF ALSTON & BIRD FOR THE
PLAINTIFFS, YOUR HONOR.

THE COURT: ALL RIGHT, SIR.

MR. MCCLAIN: STEVE MCCLAIN FROM THE U.S. ATTORNEY'S
OFFICE FOR THE DEFENDANTS.

THE COURT: ALL RIGHT. I HAD A MESSAGE THAT WAS CALLED
IN TO MY LAW CLERK FROM ALAN JENKINS OF MCKINNON LONG STATING HE
HAD A DEATH IN THE FAMILY AND COULDN'T BE HERE, BUT HE'S NOT A
PARTY TO THIS ACTION, ANYWAY. IT HAD BEEN MY INTENT TO RULE ON
THOSE OBJECTIONS BEFORE TODAY. I JUST FLAT OVERLOOKED IT. I
DIDN'T CONSIDER THIS THAT URGENT. I THOUGHT THE CASE ITSELF WAS
MORE IMPORTANT TO GET TO THAN THAT.

I BELIEVE WE HAD A TELEPHONE CONFERENCE IN REGARD TO
THIS MATTER LAST, AND AT THAT TIME WE DISCUSSED THAT VERY POINT.
IN FACT, THAT IS THE ISSUE THAT PRECIPITATED MY CALLING UPON YOU
FOR THE TELEPHONE CONFERENCE, AS I WAS DISTURBED BY YOUR BRIEF AND
THE VARIOUS GROUPS PURPORTED TO BE REPRESENTED IN THE AMICUS, AND
IT FRANKLY IS MY INTENTION -- I THINK IT'S MY INTENTION TO STRIKE

1 THAT. THEY DIDN'T MOVE TO INTERVENE, IT'S JUST TO FILE AN AMICUS
2 BRIEF IS MY UNDERSTANDING. I THINK I MENTIONED PREVIOUSLY THAT
3 I'VE DEALT WITH THAT MATTER TWO OR THREE TIMES BEFORE, PRIMARILY
4 IN THE INTERSTATE HIGHWAY CASES, WHICH I HANDLED MANY, MANY YEARS
5 AGO. AND I TRY TO ALWAYS BE CONSISTENT, WHETHER IT'S CONSISTENTLY
6 RIGHT OR CONSISTENTLY WRONG, I TRY TO BE CONSISTENT AND NOT WAIVER
7 ONE WAY OR THE OTHER. SO I WILL BE CONSISTENT WITH THOSE RULINGS.

8 NOW, LET'S GET TO WHAT WE'RE HERE ABOUT TODAY. AND
9 BEFORE WE GET INTO THAT, BY THE COMPUTER I SEE THAT I'M -- IT'S MY
10 UNDERSTANDING -- I ASKED YOU -- THE COMPUTER SOMETIMES MAKES A
11 MISTAKE, SOMETIMES -- BUT IN THIS CASE THERE ARE THREE MATTERS
12 PENDING. ONE IS THE MOTION FOR PRELIMINARY INJUNCTION, WHICH
13 WHENEVER WE HAVE A HEARING OR IF WE HAVE OR WHENEVER WE HAVE IT, I
14 WILL CONVERT THAT IN ACCORDANCE WITH THE RULE 65 TO A PERMANENT
15 HEARING ON PERMANENT INJUNCTION. I SEE NO NEED TO HAVE
16 PRELIMINARY AND THEN HAVE TO HAVE ANOTHER HEARING FOR A PERMANENT
17 ISSUANCE.

18 THERE ARE NO JURY DEMANDS IN THIS CASE, SO WE CAN
19 PROCEED TO DISPOSE OF THIS MATTER ON EVERYTHING VERY QUICKLY, I
20 THINK. I'LL GET -- I'LL COME BACK TO THAT IN JUST A MOMENT, BUT
21 THERE IS -- DOCKET NUMBER 3 -- DOCUMENT NUMBER 3 ON THE DOCKET IS
22 A MOTION FOR INJUNCTION. DOCKET -- DOCUMENT NUMBER 8 IS A MOTION
23 TO DISMISS, AND THAT'S WHAT I'M GOING TO HEAR FROM YOU ON THIS
24 MORNING. AND NUMBER 15 IS THE MOTION TO STRIKE THE AMICUS
25 APPEARANCE, WHICH IS WHAT I WAS ALLUDING TO A FEW MOMENTS AGO.

1 NOW, IS THERE ANYTHING ELSE PENDING IN THIS MATTER?

2 MR. MCCLAIN: NO.

3 THE COURT: OKAY. INCIDENTALLY, ON THE MATTER WE HAD
4 BEFORE AND THE QUESTION OF RECUSAL, I'VE GONE BACK AND LOOKED, AND
5 THE BEST I CAN DETERMINE I'M NOT -- YOU KNOW, I RAISED THE
6 QUESTION OF WHETHER I WAS -- HAD EVER WRITTEN A CHECK TO OR
7 PAID -- I THINK IF YOU ORDER THEIR MAGAZINE YOU BECOME A MEMBER OR
8 SOMETHING, AND I THINK IT WAS DUCKS UNLIMITED I WAS THINKING ABOUT
9 AND NOT TROUT UNLIMITED. TROUT UNLIMITED, I DON'T KNOW THAT -- I
10 COULDN'T FIND THAT I'VE EVER IN RECENT HISTORY DONE ANYTHING WITH
11 TROUT UNLIMITED, EVEN THOUGH I GOT SOMETHING IN THE MAIL FROM THEM
12 SINCE THAT CONFERENCE, I HAD ANOTHER SOLICITATION, WHICH I
13 IMMEDIATELY THREW IN THE TRASH AND WASHED MY HANDS. I MAY HAVE AT
14 SOME TIME YEARS AGO HAVE -- I THOUGHT I REMEMBERED HAVING THEIR
15 MAGAZINES AROUND AT SOME TIME, EITHER IN THE OFFICE OR AT HOME,
16 ONE. BUT I KNOW I WAS READING IT IN THE DOCTOR'S OFFICE THE OTHER
17 DAY. THERE WAS ONE LAYING THERE AND I PICKED IT UP, AND I
18 IMMEDIATELY REALIZED WHAT IT WAS AND REALIZED THAT I DIDN'T HAVE
19 THAT ONE AT HOME AND NEVER HAD IT AT HOME.

20 I SAY THAT JUST TO SORT OF NOT TO REHASH THE ISSUE, BUT
21 TO -- WHEN I CAME ON THE BENCH I BELONGED TO A LOT OF THINGS,
22 BUT WHEN I CAME ON THE BENCH I WAS ALMOST EVEN AFRAID TO BE A
23 MEMBER OF THE CHURCH, QUIT GOING TO BOY SCOUTS AND ALL SORTS OF
24 THINGS BECAUSE EVERY -- YOU HAVE SO MANY CONFLICTS. AS A SENIOR
25 JUDGE I'VE BEEN LESS CONCERNED ABOUT THAT BECAUSE WE HAVE A LARGE

1 COURT AND MANY JUDGES WHO CAN HANDLE THESE THINGS, EVEN THOUGH I
2 HAVE ANOTHER CASE THAT I BELIEVE -- I BELIEVE, MR. MITCHELL, YOUR
3 FIRM IS INVOLVED IN THAT I WOULDN'T HAVE TAKEN IT EXCEPT TEN
4 JUDGES IN OUR COURT HAD ALREADY DISQUALIFIED THEMSELVES AS BEING
5 MEMBERS OF THE POTENTIAL CLASS, AND I DECIDED SOMEWHERE IT HAD TO
6 STOP, SOMEBODY HAD TO HANDLE THE CASE. AND FORTUNATELY IN A BIG
7 COURT YOU USUALLY CAN FIND -- IF ONE IS DISQUALIFIED, IT'S UNUSUAL
8 WE HAVE TEN. BUT WE -- WE DID IN THAT CASE, AND I HAVE UNDERTAKEN
9 IT. IT'S ONE I WOULDN'T HAVE KEPT OTHERWISE. IT'S THE LAST THING
10 IN THE WORLD I WANTED TO FOOL WITH IN SENIOR STATUS. I DIDN'T
11 HAVE ANY CHOICE AS AN ACTIVE JUDGE, BUT AS A SENIOR JUDGE, WE
12 SOMETIMES THINK WE DON'T -- YOU KNOW, WHY AM I DOING THAT?

13 OKAY. LET'S GET TO THE ISSUE OF SCHEDULING, AND THEN
14 THE LAST THING WE'LL DO IS THE MOTION.

15 IN THE EVENT I DENY THE MOTION -- AND I HAVEN'T MADE UP
16 MY MIND ONE WAY OR THE OTHER ON THE MOTION TO DISMISS, MY LAW
17 CLERK AND I HAVE GONE OVER IT AND I THINK I TOLD YOU I PROBABLY
18 WOULD DO NOTHING ON IT UNTIL AFTER I GOT BACK FROM -- I THINK I
19 TOLD YOU AFTER I GOT BACK FROM ALASKA ON A FLY FISHING TRIP.

20 MR. MITCHELL: YES, SIR.

21 THE COURT: I -- SO I'VE BEEN BACK AND BEEN TRYING TO
22 CLEAN UP MY DESK, AND I'VE ABOUT GOTTEN EVERYTHING OFF MY DESK TO
23 GET CURRENT, AND THAT'S THE REASON I WANTED TO HEAR FROM YOU ON
24 THIS. AND THEN I WANTED TO PROCEED PROMPTLY WITH IT IF WE NEED
25 TO.

1 LET ME ASK YOU IN THAT REGARD, MR. MITCHELL, IN THE
2 EVENT YOU PREVAIL ON THE MOTION TO DISMISS AND, THEREFORE, GO
3 FORWARD WITH THE MOTION FOR AN INJUNCTION HEARING, TELL ME WHAT --
4 HOW YOU INTEND TO PROCEED WITH THAT, WHAT YOU EXPECT TO PRESENT,
5 AND HOW LONG YOU THINK IT WILL TAKE? I DON'T MEAN IN GREAT
6 DETAIL?

7 MR. MITCHELL: WELL, YOUR HONOR, WE DON'T ANTICIPATE AT
8 THIS TIME PRESENTING LIVE EVIDENCE AT THAT HEARING. I THINK WE'RE
9 OKAY ON THE AFFIDAVITS AND MATERIAL THAT WE PRESENTED. IF THE
10 GOVERNMENT IS GOING TO PRESENT LIVE EVIDENCE, THAT WOULD PROBABLY
11 CHANGE OUR VIEW OF THAT, BUT I THINK --

12 THE COURT: YOU THINK IT COULD BE HANDLED BASICALLY ON A
13 STIPULATION OF FACT?

14 MR. MITCHELL: MUCH OF IT PROBABLY COULD BE, YOUR HONOR.

15 THE COURT: WELL, THAT'S QUITE OFTEN TRUE IN --

16 MR. MITCHELL: AND I THINK WE DO NEED A HEARING AND
17 THERE CERTAINLY WILL BE DISPUTED ISSUES, BUT A LOT OF IT IS
18 PROBABLY UNDISPUTED, AND --

19 THE COURT: WELL, SOMETIMES THE DISPUTED ISSUES ARE NOT
20 SO MUCH THE DISPUTE OF FACT, AS THEY ARE A DISPUTE OF THE
21 INFERENCES THAT MAY BE DRAWN FROM THE FACTS.

22 MR. MITCHELL: CORRECT, YOUR HONOR.

23 THE COURT: WELL, THEN, YOUR RESPONSE WOULD BE THAT WE
24 COULD DO IT THIS AFTERNOON?

25 MR. MITCHELL: WE COULDN'T DO IT THIS AFTERNOON.

1 THE COURT: WELL, I'M NOT SUGGESTING YOU ARE PREPARED,
2 BUT --

3 MR. MITCHELL: WELL, YES. OUR VIEW OF IT BASICALLY IT'S
4 KIND OF LOCKED AND LOADED AND READY TO GO. WE WOULD WANT A LITTLE
5 TIME TO PREPARE FOR IT AND THINK IT THROUGH PERHAPS A LITTLE BIT
6 MORE THOROUGHLY, BUT I DON'T ANTICIPATE CALLING LIVE WITNESSES.
7 AS I SAY, IF THE GOVERNMENT'S GOING TO DO THAT, THEN WE MAY WANT
8 TO RECONSIDER THAT POSITION.

9 THE COURT: IF YOU DON'T PREVAIL, MR. MCCLAIN, AND WE
10 HAVE A HEARING ON THAT ISSUE, WHAT'S YOUR ANTICIPATED -- IF I HAD
11 REALLY REALIZED THAT THAT WAS YOUR VIEW, I WOULD HAVE TRIED TO
12 CONSOLIDATE THESE THINGS, FRANKLY. BUT I ANTICIPATED YOU MIGHT
13 WANT TO CONSUME SOME LONGER PERIOD OF TIME THAN I HAD -- I WANTED
14 TO SET ASIDE AT THIS TIME.

15 MR. MCCLAIN: WE AGREE WITH MR. MITCHELL, THE -- THERE
16 IS -- WE DID SUBMIT AN AFFIDAVIT, I DON'T THINK IT'S REALLY
17 DISPUTED, THEY SUBMITTED A FEW AFFIDAVITS, AND SO THE FACTS ARE
18 SET.

19 THE COURT: SO BASICALLY EACH OF YOU WOULD LIKE TO JUST
20 BASICALLY HAVE ARGUMENT?

21 MR. MITCHELL: YES, THAT'S CORRECT, YOUR HONOR. AT THIS
22 POINT I THINK WE COULD -- IT COULD BE ARGUED.

23 I GUESS ONE CAVEAT IS -- AND BECAUSE YOU STILL HAVE NOT
24 DEFINITELY RULED ON THE AMICUS BRIEF -- THERE IS SOME EXTRANEOUS
25 EVIDENTIARY MATERIAL THAT IS PRESENTED IN THE AMICUS BRIEF THAT WE

1 WOULD WANT TO REBUT THAT IF FOR ANY REASON THE AMICUS BRIEF IS TO
2 BE CONSIDERED BY THE COURT.

3 THE COURT: WELL, THE BRIEF'S NOT EVIDENCE.

4 MR. MITCHELL: WELL, THEY SUBMITTED A COUPLE OF
5 AFFIDAVITS, AS WELL.

6 THE COURT: ALL RIGHT. WELL, LET ME HEAR FROM YOU IN
7 REGARD TO THIS PARTICULAR ISSUE. NOW, AS I SAID, I'VE NOT MADE UP
8 MY MIND ON THIS OR I WOULDN'T HAVE SCHEDULED IT FOR ARGUMENT, AND
9 AT A PRELIMINARY READING AND A MORE SUBSEQUENT READING I'VE KIND
10 OF LOOKED AT IT FROM DIFFERENT VIEWS. SO IT'S YOUR MOTION,
11 MR. MCCLAIN, YOU MAY PROCEED.

12 MR. MCCLAIN: THE GOVERNMENT REQUESTS DISMISSAL OF THE
13 COMPLAINT ON TWO GROUNDS: FIRST IS RIPENESS, AND THE SECOND IS
14 STANDING, AND BOTH ARE JURISDICTIONAL ARGUMENTS ON WHICH THE COURT
15 CAN CONSIDER MATTERS OUTSIDE THE RECORD, IF NEEDED.

16 THE BACKGROUND TO THIS DISPUTE, YOUR HONOR, WE --

17 THE COURT: LET ME INTERRUPT YOU RIGHT OFF THE BAT. ONE
18 OF YOUR GROUNDS GOES TO THE QUESTION OF WHETHER THE ATTORNEY
19 GENERAL HAS BEEN PROPERLY SERVED. IS THAT STILL AN ISSUE?

20 MR. MCCLAIN: NO, YOUR HONOR. THEY HAVE SUBMITTED
21 EVIDENCE THAT THEY, IN FACT, SERVED THAT PROPERLY AND NOW THEY'VE
22 MET THAT BURDEN THAT --

23 THE COURT: THIS WAS WHAT I THOUGHT, GET A SOLID
24 ADMISSION IN JUDICIO.

25 MR. MCCLAIN: THAT'S ONE I'LL MAKE. THAT GROUND IS

1 GONE.

2 THE BACKGROUND TO THIS DISPUTE, YOUR HONOR, IS
3 ESSENTIALLY THIRTY YEARS AGO IN 1976 THE FOREST SERVICE PROHIBITED
4 BOATING ON THE NORTH MOST PART OF THE CHATTOOGA. THAT WAS THEN
5 REINSTATED FOUR DIFFERENT TIMES AFTER THAT. IN 1977, 1978, 1980,
6 1985.

7 IN 1977 THERE WAS ACTUALLY A NOTICE AND COMMENT PERIOD
8 AND A REGULATION THAT WAS PROPERLY PROMULGATED. THERE IS NO
9 DISPUTE IN THIS CASE THAT THAT REGULATION WAS PROPERLY
10 PROMULGATED. THERE IS NO CHALLENGE TO THAT REGULATION IN THIS
11 PROCEEDING. IN THEIR COMPLAINT THEY MAKE NO MENTION OF IT, AND IN
12 THEIR BRIEFS THEY DON'T PURPORT TO MAKE A CHALLENGE TO THAT
13 REGULATION. AND SO THE FOREST SERVICE PRIOR TO 2004 HAD ON FIVE
14 SEPARATE OCCASIONS PROHIBITED THE FLOATING THAT IS AT ISSUE IN
15 THIS CASE. IN NONE OF THOSE INSTANCES DID THE PLAINTIFFS FILE ANY
16 OR ANY OF THE PLAINTIFFS, THE INDIVIDUALS OR ORGANIZATIONS TO MY
17 KNOWLEDGE, FILE ANY ADMINISTRATIVE APPEAL OF THAT, NOR DID THEY
18 EVER PURSUE ANY COURT OBJECTION ON. THAT SHOWS THAT'S THE
19 THIRTY-YEAR HISTORY THAT WE HAVE.

20 IN 2004 THE FOREST SERVICE REINSTITUTED THE PLAN.

21 THE COURT: HOW DID THAT COME ABOUT? WAS THIS A ROUTINE
22 REGULAR REINSTITUTION OF THE PLAN? IS IT DONE AT CERTAIN YEAR
23 INTERVALS? OR WHAT?

24 MR. MCCLAIN: MY UNDERSTANDING IS THAT THE NATIONAL
25 FOREST MANAGEMENT ACT -- AND THERE IS -- MR. TILDEN MAY BE

1 ACTUALLY MORE ABLE TO GIVE THE STATUTES -- BUT THE FOREST SERVICE,
2 IT DOES THIS PERIODICALLY, AND I BELIEVE IT'S A TEN TO
3 FIFTEEN-YEAR TIME PERIOD. THE AGENCY HAS EXPLAINED TO ME THAT
4 THEY BELIEVE THERE IS SOME DISCRETION THERE WHEN THEY HAVE TO DO
5 IT, BUT THEY DO UNDERSTAND THAT THEY ARE BOUND TO PERIODSCALLY
6 REVIEW AND REVISE THEIR FOREST PLANS. AND SO THAT'S WHAT THIS WAS
7 WAS REALLY A NINE-YEAR REVIEW AND REVISION OF THE PLAN THAT HAD
8 PROHIBITED BOATING, AS WELL.

9 THE COURT: DID THEY CONDUCT HEARINGS CONCERNING THAT
10 REVIEW?

11 MR. MCCLAIN: THEY DO CONDUCT AN ENVIRONMENTAL IMPACT
12 STATEMENT --

13 THE COURT: BUT NO HEARINGS.

14 MR. MCCLAIN: I THINK THERE IS PUBLIC COMMENT ON THAT.
15 I DON'T KNOW -- YOU KNOW --

16 THE COURT: THERE WAS OPPORTUNITY FOR PUBLIC COMMENT IN
17 2004?

18 MR. MCCLAIN: THAT'S CORRECT, YOUR HONOR. AND I'LL
19 DOUBLE CHECK WITH MR. TILDEN TO BE SURE, BUT I KNOW THEY DO HAVE
20 PUBLIC HEARINGS FOR THE ENVIRONMENTAL IMPACT STATEMENTS AND ALLOW
21 PUBLIC COMMENT GOING INTO THE PLAN, BUT I WILL CONFIRM THAT.

22 THE COURT: NOW, MY UNDERSTANDING THIS IS COMING OUT OF
23 THE SUMTER NATIONAL FOREST; IS THAT CORRECT?

24 MR. MCCLAIN: THAT'S CORRECT.

25 THE COURT: WELL, NOW, IS THE CHATTAHOOCHEE NATIONAL

1 FOREST INVOLVED IN THIS IN ANY WAY OR IS THIS ALL PART OF THE
2 SUMTER.

3 MR. MCCLAIN: I BELIEVE THIS IS ALL PART OF THE SUMTER.

4 THE COURT: NOW, SUMTER FOREST DOES NOT COME INTO THE
5 STATE OF GEORGIA, THOUGH, DOES IT?

6 MR. MCCLAIN: WELL, THE SUMTER -- I THINK THAT'S RIGHT.
7 BUT PART OF THE CHATTOOGA IS IN GEORGIA.

8 THE COURT: WELL, THAT'S WHAT I WAS GETTING AT. I WAS
9 WONDERING IF THIS WAS A JOINT --

10 MR. MCCLAIN: IT IS.

11 THE COURT: I KEPT READING THE SUMTER, AND THAT ALL
12 IMPLIED SOUTH CAROLINA TO ME, AND I KNEW THIS RIVER SUPPOSEDLY AT
13 LEAST IN CERTAIN PLACES -- I DON'T KNOW ABOUT THE UPPER REACHES --
14 BUT IN CERTAIN AREAS IT CROSSES THE STATE LINE.

15 MR. MCCLAIN: THAT'S TRUE. AND I KNOW THE RIVER GOES
16 THROUGH NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA --

17 THE COURT: WELL, IN NORTH CAROLINA OBVIOUSLY IT'S NOT
18 THE STATE LINE, IT'S UP IN --

19 MR. MCCLAIN: RIGHT.

20 THE COURT: I THOUGHT WHEN IT CROSSED THE SOUTHERN
21 BORDER OF NORTH CAROLINA IT WAS THEN THE STATE LINE.

22 MR. MCCLAIN: THAT'S MY UNDERSTANDING.

23 THE COURT: I MAY NOT BE CORRECT ON THE UPPER REACHES,
24 BUT I THOUGHT IT WAS.

25 MR. MCCLAIN: THAT'S MY UNDERSTANDING, TOO, IT IS THE

1 STATE LINE. AND RIVER DOES INVOLVE THREE DIFFERENT STATES, AND,
2 IN FACT, WE TALKED -- WHILE THEY FILED HERE INSTEAD OF SOUTH
3 CAROLINA AND NORTH CAROLINA, I THINK OUR VIEW IS THEY COULD FILE
4 ANY OF THOSE PLACES BECAUSE THE CHATTOOGA DOES RUN IN ALL OF THE
5 DIFFERENT STATES. THERE IS A REGIONAL FORESTER THAT IS THE HEAD
6 OF ALL THREE STATES.

7 THE COURT: OH, ALL RIGHT. THE REGIONAL FORESTER -- THE
8 REGIONAL FORESTER IS THE ONE WHO OVERRULED OR SET ASIDE THE '04 --
9 AM I NOT CORRECT.

10 MR. MCCLAIN: THAT'S CORRECT. THERE WAS A REVIEWING
11 OFFICER, GLORIA MANNING, WHO WAS ACTING ON HIS BEHALF, THAT'S
12 CORRECT.

13 THE COURT: REVIEWING THE ACTS TAKEN BY WHOEVER THE --
14 WHATEVER THE TITLE IS OF THE PEOPLE FROM THE SUMTER.

15 MR. MCCLAIN: CORRECT. CORRECT. AND THAT WAS IN 2004.
16 AND AMERICAN WHITE WATER APPEALED THAT, AND LED TO A DECISION IN
17 2005 BY GLORIA MANNING, WHO IS A REVIEWING OFFICER WHO ACTS UPON
18 BEHALF OF THE REGIONAL FORESTER. SO THE REGIONAL FORESTER HAS
19 AUTHORITY OVER THE ENTIRE CHATTOOGA BECAUSE I BELIEVE THERE IS
20 NINE REGIONAL FORESTERS IN THE COUNTRY, WHICH WOULD COVER SOUTH
21 CAROLINA NORTH CAROLINA GEORGIA. SO THAT ACTION IMPACTS THE
22 ENTIRE RIVER, AND WE AGREE THAT VENUE IS PROPER HERE BECAUSE THE
23 CHATTOOGA DOES RUN THROUGH GEORGIA.

24 THE COURT: IT WASN'T RAISED -- WELL, IT MIGHT HAVE LED
25 TO THAT, BUT --

1 MR. MCCLAIN: RIGHT. BUT IT IS TRUE, YOUR HONOR, THAT
2 THE RIVER DOES -- THAT IT DOES SPAN MULTIPLE STATES, BUT WE DON'T
3 HAVE ANY DISPUTE IN THIS CASE ABOUT --

4 THE COURT: HAS IT ALWAYS BEEN THE SUMTER NATIONAL
5 FOREST FORESTER OR WHATEVER THE TITLE OF THE PERSON, THE HEAD
6 PERSON FOR SUMTER? HAS IT ALWAYS BEEN THEM WHO HAS ESTABLISHED
7 THIS THIRTY-YEAR STANDING RULE OR HAS IT BEEN CHATTAHOOCHEE OR HAS
8 IT BEEN BOTH OF THEM? OR IS IT ACTUALLY ESTABLISHED AT A HIGH --
9 WELL, OBVIOUSLY IT WAS ULTIMATELY ESTABLISHED AT A NATIONAL LEVEL,
10 I GUESS, IF IT'S -- IF YOU GOT THE ULTIMATE REGULATIONS THAT WERE
11 ADOPTED? WHAT YEAR DID YOU SAY?

12 MR. MCCLAIN: 1977 IS THE REGULATION.

13 THE COURT: 1977.

14 MR. MCCLAIN: IT'S '76 --

15 THE COURT: THAT WOULD HAVE HAD TO HAVE BEEN AT THE
16 NATIONAL LEVEL, I GUESS.

17 MR. MCCLAIN: THAT'S RIGHT. AND 1976 WAS THE FOREST
18 SERVICE, '77 WAS THE FOREST SERVICE, 1980 WAS THE FOREST SERVICE,
19 SO ULTIMATELY IT IS A NATIONAL DECISION ULTIMATELY THAT THE UNITED
20 STATES FOREST SERVICE IS THE ENTITY FROM 1976 TO THE PRESENT DATE
21 THAT HAS MADE THE DECISION.

22 THE COURT: WELL, WHAT I WAS TRYING TO GET AT, THAT
23 DECISION ORIGINATES IN THE GOVERNMENT HIERARCHY SOMEWHERE, AND I
24 WAS JUST TRYING TO DETERMINE IF IT ALWAYS ORIGINATED THROUGH THE
25 SUMTER AS OPPOSED TO SOME OTHER ONE. BECAUSE I PRESUME IF IT WERE

1 IN NORTH CAROLINA IT WOULD BE THROUGH THE NANTAHALA.

2 MR. MCCLAIN: RIGHT.

3 THE COURT: AM I NOT -- I PRESUME THAT'S CORRECT.

4 MR. MCCLAIN: THERE IS A NORTH CAROLINA REGIONAL
5 FORESTER THAT ALSO ISSUED AN ORDER AT SOME POINT WHICH BANNED OR
6 PROHIBITED FLOATING ON THE NORTH CAROLINA PORTION OF THE
7 CHATTOOGA.

8 THE COURT: WELL, ISN'T NORTH CAROLINA, ISN'T THE
9 CHATTOOGA REALLY JUST A TRICKLE?

10 MR. MCCLAIN: THAT'S MY UNDERSTANDING. YES.

11 THE COURT: NOT MUCH OF A --

12 MR. MCCLAIN: THAT'S RIGHT.

13 THE COURT: NOT MUCH OF A STREAM. AT LEAST THE PART OF
14 IT -- IT'S BEEN MANY, MANY YEARS AGO, BUT IT'S NOT MUCH OF A
15 STREAM IN NORTH CAROLINA, I DIDN'T THINK.

16 MR. MCCLAIN: THAT'S CORRECT. THAT'S MY UNDERSTANDING
17 IS THAT THERE IS PARTS WHERE IT'S VERY SHALLOW, ONLY A BOAT OR TWO
18 COULD GO --

19 THE COURT: I WAS GOING TO SAY WHAT I SAW I DON'T THINK
20 A KAYAK COULD GET -- COULD EVEN OPERATE. IT DOESN'T TAKE MUCH
21 WATER FOR A KAYAK, BUT WHAT I'M -- AS I SAID, THIS GOES BACK
22 THIRTY-FIVE, FORTY YEARS AGO WHEN I WAS BACK IN --

23 MR. MCCLAIN: AND THAT'S --

24 THE COURT: IN THAT AREA.

25 MR. MCCLAIN: THAT IS ONE OF THE CONCERNS OF THE FOREST

1 IS THAT SOME OF THESE PORTIONS OF THE RIVER WHERE IT'S VERY
2 SHALLOW OR NOT VERY WIDE, THAT IF BOATING WERE PERMITTED WITHOUT
3 REGULATION IN THOSE AREAS IT COULD REALLY POTENTIALLY HARM THE
4 FISHING ABILITY, THE FISHING SITUATION. SO THAT'S ONE OF THE
5 THINGS THEY ARE LOOKING AT WITH THE STUDY.

6 THE COURT: WELL, THAT GETS TO THE MERITS OF THE MATTER.

7 MR. MCCLAIN: RIGHT.

8 THE COURT: I ASKED YOU A QUESTION THAT GOT YOU OFF, BUT
9 I WAS REALLY TRYING TO UNDERSTAND THE PROCEDURES THAT I THINK
10 RELATE TO WHAT YOUR MOTION RELATES TO.

11 MR. MCCLAIN: RIGHT. THE -- I'LL START WITH THE FIRST
12 ARGUMENT ON RIPENESS, YOUR HONOR. THE IMPORTANCE OF THE
13 THIRTY-YEAR HISTORY IN OUR VIEW IS THAT IT DOES IMPACT WHETHER
14 THIS COURT SHOULD EXERCISE JUDICIAL RESTRAINT. AND WHAT THE CASES
15 OF OHIO FORESTER THE NATIONAL ADVERTISING CASE THAT WE CITE, THE
16 NATIONAL PARK HOSPITALITIES CASE THAT WE CITE, IS THEY MAKE CLEAR
17 THAT RIPENESS IS BOTH CONSTITUTIONAL AND PRUDENTIAL. AND EVEN
18 WHEN THE CONSTITUTIONAL STANDARDS ARE MET IN THIS CASE -- AND WE
19 DON'T BELIEVE THEY ARE -- BUT THERE IS A HEAVY PRUDENTIAL ASPECT
20 TO THE RIPENESS DOCTRINE. AND AT THE VERY LEAST ALL OF THE
21 FACTORS -- TO TAKE IT SORT OF AS A BROAD PICTURE, YOUR HONOR --
22 RIPENESS LOOKS AT ISSUES OF PRACTICALITY, PRAGMATICS, WHAT MAKES
23 SENSE. DOES IT MAKES SENSE FOR THE COURT TO RESTRAIN ITSELF AT
24 THIS POINT OR JUMP IN IMMEDIATELY OR DOES IT MAKE SENSE TO WAIT
25 AND DELAY INTERVENING IN THE SITUATION.

1 AND IN OUR VIEW ALL OF THOSE CONSIDERATIONS COUNSEL IN
2 FAVOR OF WAITING. THIS DISPUTE, REGARDLESS OF HOW IT COMES OUT,
3 WILL ALMOST CERTAINLY BECOME MOOT SOME TIME IN 2007, EITHER
4 BECAUSE THE FOREST IS CURRENTLY REVIEWING --

5 THE COURT: I THOUGHT IT WAS 2008.

6 MR. MCCLAIN: WELL, THE STUDY WAS EXPECTED TO BE
7 FINISHED IN APRIL OF 2007. MR. TILDEN TELLS ME TODAY THAT THE
8 FOREST SERVICE NOW ANTICIPATES IT WILL BE COMPLETE IN THE FALL OF
9 2007. SO AFTER -- AND THE FOREST SERVICE HAS ASKED FOR AN
10 EXTENSION FROM MS. MANNING TO COMPLETE THAT STUDY, WHICH IS WHAT
11 HER 2005 ORDER PERMITTED. SHE HASN'T YET RULED ON THAT EXTENSION,
12 AS I UNDERSTAND IT, BUT THE FOREST SERVICE, YOU KNOW, THEIR
13 CURRENT UNDERSTANDING IS THAT PHASE ONE OF THE STUDY, WHICH MAY BE
14 ALL THAT'S REQUIRED, THEY DON'T KNOW, AND THE INFORMATION IS
15 GATHERED -- WILL BE COMPLETED IN FALL OF '07. IF THAT'S TRUE,
16 WHAT MS. MANNING, REVIEWING OFFICER MANNING HAS ORDERED IS THAT A
17 DECISION BE MADE AFTER THAT. AND IF THAT OCCURS, WE'RE LOOKING AT
18 LATE 2007. AND, YOUR HONOR, IT COULD BE 2008, YOU KNOW --

19 THE COURT: IF AN EXTENSION WERE GRANTED.

20 MR. MCCLAIN: RIGHT. YOU KNOW, IF THE STUDY TAKES LONG.

21 THE COURT: THAT HAS BEEN REQUESTED, AS I UNDERSTOOD IT.

22 MR. MCCLAIN: IT HAS BEEN REQUESTED. BUT THE CURRENT
23 DEADLINE WAS ALREADY APRIL '07, SO I THINK THE CURRENT EXTENSION
24 REQUEST IS TO GET IT TO THE FALL OF '07. BUT THERE MAY BE, YOU
25 KNOW, THE WAY STUDIES WORK AND THE WAY THE DATA COMES IN, THEY MAY

1 NEED MORE TIME. BUT I THINK, YOU KNOW, WE ARE LOOKING AT A 2007,
2 POSSIBLY 2008 TIMEFRAME WHERE THERE IS GOING TO BE A NEW DECISION
3 FROM THE FOREST SERVICE. AND I DON'T THINK ANYONE DISPUTES THAT
4 THAT IS TRUE. I MEAN, THERE IS SOME DISPUTE AS TO WHETHER IT'S
5 LIKELY TO BE '07 OR '08, BUT THERE WILL BE A NEW DECISION. AND
6 THE DECISION MAY VERY WELL PERMIT THE FLOATING THAT AMERICAN WHITE
7 WATER IS REQUESTING. THAT'S CURRENTLY UNDER REVIEW. THE FOREST
8 SERVICE IS TAKING COMMENTS ON IT, THEY HAVE A BULLETIN BOARD,
9 AMERICAN WHITE WATER IS VERY ACTIVE AT THE ADMINISTRATIVE LEVEL
10 PURSUING THAT THEY HAVE TALENTED LAWYERS WHO ARE LOBBYING FOR
11 THAT. THEY MAY PREVAIL. IF THEY PREVAIL, THIS DISPUTE IS MOOT.
12 THERE IS NO REASON --

13 THE COURT: WELL, ARE THESE OTHER FOLKS, ARE THEY
14 PARTICIPATING IN IT AS A -- WELL, THE ONES WHO WANTED TO BE AMICUS
15 HERE.

16 MR. MCCLAIN: THEY ARE, YOUR HONOR, VERY ACTIVE, AS
17 WELL.

18 THE COURT: SO IF THEY DON'T GET TO BE HEARD HERE, THEY
19 ARE AT LEAST HEARD AT THE ADMINISTRATIVE LEVEL.

20 MR. MCCLAIN: CORRECT. THAT IS CORRECT. YES. THEY ARE
21 CURRENTLY MAKING THEIR VOICES KNOWN AND ARE BEING CONSIDERED BY
22 THE FOREST SERVICE. AND, FRANKLY, IF BOATING IS PERMITTED, IF THE
23 FOREST SERVICE DECIDES IN '07 OR '08 TO PERMIT BOATING, THEY COULD
24 VERY WELL FILE A LAWSUIT AND SAY THAT WAS IMPROPER. THE FOREST
25 SERVICE IS DOING EVERYTHING TO AVOID THAT BY FOLLOWING ALL LAWS IT

1 NEEDS TO, BUT THEY COULD HAVE A LAWSUIT. IF AMERICAN WHITE WATER
2 PREVAILS AT THE ADMINISTRATIVE IT WILL BE A WASTE OF TIME FOR THE
3 FOREST SERVICE, FOR YOUR HONOR, FOR THE JUDICIARY TO HAVE
4 CONSIDERED IT.

5 IF THEY DON'T PREVAIL IN THE ADMINISTRATIVE LEVEL, IT'S
6 NOT CLEAR WHAT THE PROHIBITION WILL BE. IT COULD BE AS IT
7 CURRENTLY IS. IT COULD BE THE FOREST SERVICE HAS, YOU KNOW, ONE
8 OF THE IDEAS THAT HAS COME UP IS SHOULD BOAT BEING PERMITTED ON
9 CERTAIN TIMES OF THE YEAR, FOR INSTANCE, WHEN THE WATER LEVEL IS
10 HIGHER SO THAT YOU DON'T HAVE SOME OF THE ISSUES WITH THE LOW
11 WATER LEVEL THAT'S IN NORTHERN PARTS. YOU KNOW, SHOULD IT BE
12 PERMITTED ON CERTAIN DAYS OF THE WEEK. I DON'T KNOW IF THAT
13 SPECIFIC PROPOSAL IS BEING CONSIDERED, BUT THERE IS A WIDE VARIETY
14 OF THINGS THAT COULD OCCUR IN TERMS OF HOW THE PROHIBITION WOULD
15 GO IN PLACE. AND IT COULD BE AS IT IS NOW.

16 AT THAT POINT OBVIOUSLY WHAT YOUR HONOR WOULD HAVE TO
17 REVIEW IS SOMETHING DIFFERENT THAN WHAT WE CURRENTLY HAVE. AND
18 SO, AGAIN, IT WOULD BE A WASTE OF TIME FOR THE COURT TO HAVE
19 OPINED ON WHAT A CURRENT PROHIBITION LOOKS LIKE. MOST
20 IMPORTANTLY, WHAT WE'LL HAVE IN '07 OR '08 IS A NEW ADMINISTRATIVE
21 RECORD BECAUSE THE FOREST SERVICE IS CURRENTLY DOING THE STUDY,
22 THEY HAVE ALREADY COMMISSIONED THE EXPERT, THEY'VE ALREADY
23 DESIGNED THE STUDY. THEY ARE GOING TO FLOAT EXPERTS DOWN THE
24 RIVER TO LOOK AT WHAT THE CURRENT USES ARE, HOW MANY PEOPLE
25 CURRENTLY USE THE RIVER, HOW THEY USE IT, WHAT THE FISHERMEN ARE

1 DOING. HOW MANY BOATERS ARE IN THE PARTS OF THE RIVER THAT ARE
2 BOATING, AND, YOU KNOW, TO MAKE SOME ASSESSMENTS AS TO THE LIKELY
3 ENVIRONMENTAL IMPACTS OF MORE BOATING AND LIKELY IMPACTS ON
4 FISHERMEN. THEY ARE GOING TO DO A QUESTIONNAIRE OF THE FISHERMEN
5 AND OF THE BOATERS TO DETERMINE IF THERE IS GOING TO BE LIKELY
6 SOCIAL CONFLICT LIKE THERE WAS IN THE 1970'S BETWEEN THE BOATERS
7 AND FISHERMEN. SO THERE IS GOING TO BE A WHOLE ADMINISTRATIVE
8 RECORD THAT'S DEVELOPED THROUGH THIS PROCESS THAT IF AMERICAN
9 WHITE WATER IS NOT ULTIMATELY PLEASED WITH HOW THAT COMES OUT,
10 YOUR HONOR IS GOING TO HAVE A COMPLETELY DIFFERENT ADMINISTRATIVE
11 RECORD TO VIEW AT THAT POINT, TOO. SO AGAIN THE WORK THAT WILL BE
12 DONE IN THIS CASE WILL BE VERY EPHEMERAL. THE LASTING IMPACT OF
13 WHAT YOUR HONOR DOES WON'T MEAN ANYTHING BEYOND THE 2007 DECISION.

14 AND WHAT THE RIPENESS CASE REALLY GETS AT ARE THOSE SORT
15 OF PRAGMATIC CONCERNS. DOES IT MAKE SENSE FOR THE COURT TO INVEST
16 RESOURCES NOW OR LATER? DOES IT MAKE SENSE FROM A COST
17 PERSPECTIVE? SHOULD WE INVEST THE COST IN LITIGATING THIS ISSUE
18 AND SO FORTH NOW OR LATER? WILL THE DISPUTE LIKELY BECOME MOOT IN
19 THE NEAR FUTURE, IN WHICH CASE COUNSEL IS IN FAVOR OF THE COURT
20 WAITING BEFORE IT COMES INTO THE CASE.

21 AND SO THE BIG PICTURE, YOUR HONOR, OF THE RIPENESS
22 DOCTRINE WE BELIEVE COUNSELS EXACTLY IN FAVOR OF WHAT THE SUPREME
23 COURT AND THE ELEVENTH CIRCUIT HAS SAID, COUNSELS FOR JUDICIAL
24 RESTRAINT AT THIS TIME. AND IT'S A SLIGHT DELAY RELATIVELY
25 SPEAKING, WE'RE TALKING ABOUT A THIRTY-YEAR PROHIBITION. WE'RE

1 TALKING ABOUT ANOTHER YEAR -- SIX MONTHS IS APRIL. ANOTHER YEAR
2 IS THE FALL OF '07, WHICH IS WHAT THEY ARE CURRENTLY PROJECTING.
3 '08 I THINK IS EVEN WHAT THE PLAINTIFFS WOULD SAY IS WHAT WE'RE
4 LOOKING AT. BY THE TIME WE GOT TO THE ELEVENTH CIRCUIT ON APPEAL,
5 YOU KNOW, THIS DISPUTE -- THE ISSUES THAT ARE GOING TO BE DECIDED
6 ARE GOING TO COMPLETELY CHANGED BEFORE THIS CASE IS EVEN THROUGH
7 THE APPEAL PROCESS. AND, YOU KNOW, THE OTHER BIG PICTURE ASPECT
8 OF RIPENESS IS THE AGENCY THAT IS ENTRUSTED WITH MAKING THESE
9 DECISIONS IS THE FOREST SERVICE, AND WHAT HAS CURRENTLY HAPPENED
10 IS THE FOREST SERVICE HAS SAID THE RECORD IS DEFICIENT. AND
11 BEFORE THE COURTS SHOULD GET INVOLVED, YOUR HONOR, WE BELIEVE THAT
12 THE COURTS WOULD WANT A FULL RECORD, IT'S CERTAINLY OUR POSITION
13 THAT THE COURT SHOULD HAVE A FULL RECORD. THE EXPERTISE IS IN THE
14 AGENCY --

15 THE COURT: ALL RIGHT. LET ME ASK YOU A QUESTION HERE
16 AGAIN PROCEDURALLY SO THAT I FULLY UNDERSTAND IT. THIS GOES BACK
17 TO SOME OF THE QUESTIONS I WAS ASKING YOU EARLIER TRYING TO
18 DETERMINE EXACTLY WHERE THE DECISION LIES IN THIS CASE. WE
19 HAVE -- I'VE FORGOTTEN THE NAME OF THE PERSON NOW, BUT WHOEVER IT
20 WAS THAT ENTERED THIS ORDER ON BEHALF OF THE REGIONAL FORESTER,
21 IT'S --

22 MR. MCCLAIN: GLORIA MANNING.

23 THE COURT: IT WAS A FEMALE NAME, I'VE FORGOTTEN WHAT IT
24 WAS.

25 MR. MCCLAIN: IT'S GLORIA MANNING.

1 THE COURT: THAT'S IT. NOW, THAT'S NOT THE FINAL
2 DECISION. WHAT'S THE NEXT LEVEL? DOES THE REGIONAL GO TO
3 NATIONAL OR IS THERE SOMETHING IN-BETWEEN THE FOREST SERVICE AND
4 THE REGIONAL FORESTER?

5 MR. MCCLAIN: I WAS TALKING ABOUT THIS WITH THE FOREST
6 SERVICE TODAY. THEY COULD HAVE -- THE FINAL LEVEL REVIEW IS THE
7 SECRETARY I GUESS AGRICULTURE.

8 THE COURT: WHAT I'M ASKING IS THERE A LINK IN-BETWEEN
9 THE SECRETARY -- ALL RIGHT. SECRETARY OF AGRICULTURE, THERE
10 WOULDN'T BE A LINK THERE BECAUSE IT WOULD BE WHOEVER IS THERE IN
11 THE INTERIOR.

12 MR. MCCLAIN: WELL, DALE BOSWORTH WOULD BE THE HEAD OF
13 THE FOREST SERVICE.

14 THE COURT: FOREST SERVICE, NOT INTERIOR, BUT FOREST
15 SERVICE.

16 MR. MCCLAIN: SO I THINK --

17 THE COURT: SO THAT WOULD BE THE LINK.

18 MR. MCCLAIN: THE LINK WOULD BE FROM BOSWORTH TO THE
19 SECRETARY. I BELIEVE THE WAY IT'S CONSIDERED IN THE REGULATION
20 THIS IS IS A DECISION OF MR. BOSWORTH.

21 MR. TILDEN: CORRECT.

22 MR. MCCLAIN: BECAUSE OF, YOU KNOW, IT'S REACHED
23 SUFFICIENT FINALITY.

24 THE COURT: BUT THERE IS NO LINK BETWEEN BOSWORTH -- I
25 MEAN, THERE IS JUST THE ONE LINK BETWEEN BOSWORTH AND GLORIA

1 WHATEVER HER NAME WAS.

2 MR. MCCLAIN: YES, BECAUSE SHE WAS ACTING FOR THE
3 REGIONAL FORESTER, SO AT SOME POINT THAT BECAME THE DECISION OF
4 DALE BOSWORTH --

5 THE COURT: ALL RIGHT. HER DECISION BECAME THE DECISION
6 OF THE FOREST SERVICE.

7 MR. MCCLAIN: CORRECT.

8 THE COURT: OKAY. NOT THE REGIONAL, BUT THE WAY I READ
9 IT IT WAS JUST A REGIONAL LEVEL. MAYBE I MISREAD IT.

10 MR. MCCLAIN: NO, I THINK THAT'S RIGHT. BUT I THINK IT,
11 YOU KNOW, EFFECTIVELY BECOMES THE POSITION OF THE FOREST SERVICE
12 IF HE DOESN'T INTERVENE AND OVERTURN IT IN 30 OR 45 DAYS.

13 THE COURT: AND THAT'S WHAT HAPPENED.

14 MR. MCCLAIN: AND THAT'S WHAT HAPPENED.

15 THE COURT: SHE ENTERED THE WHATEVER IT WAS SHE ENTERED
16 THAT DISAGREED WITH THE PLAN THAT HAD BEEN SUBMITTED.

17 MR. MCCLAIN: RIGHT.

18 THE COURT: SHE SET IT ASIDE OR WHATEVER.

19 MR. MCCLAIN: AND THEN THERE IS SOME TALK ABOUT WHETHER
20 THEY COULD HAVE REVIEWED -- DISCRETIONARY REVIEW BEFORE THE
21 SECRETARY, AND THERE IS SOME DISPUTE EVEN WITHIN THE PEOPLE OF THE
22 AGENCY THAT I'VE TALKED TO ABOUT WHETHER THAT WAS PERMITTED OR
23 POSSIBLE, AND I BELIEVE THE PLAINTIFFS CONSIDERED DOING THAT AND
24 DIDN'T DO THAT FOR WHATEVER REASON, BUT WE HAVEN'T WAIVED AN
25 EXHAUSTION DEFENSE. BUT AT THIS POINT THE FEELING IN THE AGENCY

1 WITH THE PEOPLE I HAVE TALKED TO IS THAT THEY HAVE, IN FACT,
2 EXHAUSTED WHATEVER --

3 THE COURT: I'M ASKING THOSE QUESTIONS BOTH IN REGARD TO
4 THE CURRENT SITUATION AND WHAT THE SITUATION WOULD BE.

5 MR. MCCLAIN: RIGHT.

6 THE COURT: AFTER THE STUDY.

7 MR. MCCLAIN: RIGHT.

8 THE COURT: IN OTHER WORDS, AFTER THE STUDY IS DONE IT
9 HAS TO GO BACK TO GLORIA --

10 MR. MCCLAIN: GLORIA MANNING.

11 THE COURT: MANNING, AND THEN I PRESUME FROM THERE TO
12 BOSWORTH.

13 MR. MCCLAIN: RIGHT.

14 THE COURT: THE FORESTRY SERVICE, AND I ASSUME FROM
15 THERE TO THE SECRETARY OF THE AGRICULTURE.

16 MR. MCCLAIN: THAT'S RIGHT. I THINK WE'LL BE IN THE
17 SAME POSITION -- THE REGIONAL FORESTER WILL ISSUE A NEW DECISION
18 JUST AS HE SIGNED OFF ON THE 2004 PLAN, THAT GLORIA MANNING CAN
19 THEN -- THE REGIONAL FORESTER THROUGH GLORIA MANNING CAN THEN
20 REVIEW THAT NEW DECISION AND DECIDE WHETHER THERE IS NOW EVIDENCE
21 IN THE RECORD TO SUPPORT THE PROHIBITION OR -- THERE MAY NOT BE
22 ANY CHALLENGE TO IT AT THAT POINT. HE MAY ISSUE A NEW DECISION
23 THAT SAYS AMERICAN WHITEWATER WILL FLOAT OR FLOAT WITH WHATEVER
24 REGULATION THAT THEY ARE HAPPY WITH. BUT I THINK -- YEAH, WE'LL
25 BE BACK IN THE SAME POSITION WITH THE REGIONAL -- THERE WILL BE A

1 NEW PLAN ISSUED, NEW DECISION, THAT CAN THEN BE REVIEWED THROUGH
2 ADMINISTRATIVE PROCESS, AND WE CAN BE BACK HERE.

3 THE COURT: IT WON'T BE FINAL UNTIL THE SECRETARY OF
4 AGRICULTURE SIGNS OFF OF IT; IS THAT CORRECT?

5 MR. MCCLAIN: I THINK EITHER SIGNS OFF ON IT OR DOESN'T
6 ACT.

7 THE COURT: OR DOESN'T ACT WITHIN A GIVEN PERIOD OF
8 TIME.

9 MR. MCCLAIN: RIGHT. RIGHT.

10 THE COURT: WHICHEVER, IS TANTAMOUNT TO SIGNING OFF ON
11 IT, THEN.

12 MR. MCCLAIN: RIGHT. RIGHT.

13 THE COURT: OKAY.

14 MR. MCCLAIN: AND WHAT I WANTED TO START WITH, YOUR
15 HONOR, SORT OF THE BIG PICTURE OF THE RIPENESS, TO -- IS IT A
16 PRUDENTIAL CONCERN, A CONSIDERATION, AND SO IT IS -- IT IS THE
17 KIND OF THING THAT IS, YOU KNOW, IN THE COURT'S JUDGMENT DOESN'T
18 MAKE SENSE TO RESTRAIN AT THIS POINT OR DOESN'T MAKE SENSE TO MOVE
19 FORWARD. I THINK IF YOU READ THE CASES THEY SAY IT'S VERY FACT
20 INTENSIVE AND IT'S THE KIND OF THING THAT, YOU KNOW, THE
21 JUDICIARY'S JUDGMENT TO DECIDE WHEN DOES IT MAKE SENSE TO
22 INTERVENE, DOES IT MAKE SENSE TO WAIT.

23 THE THREE FACTORS THAT HAVE ACTUALLY BEEN ARTICULATED BY
24 THE COURTS WE BELIEVE ALL GO TOWARD FAVORING DELAY IN THIS CASE.
25 ONE IS -- I GUESS I'LL START WITH WHETHER THE COURT WOULD BENEFIT

1 FROM FURTHER FACTUAL DEVELOPMENT. THAT'S ONE OF THE THREE THAT
2 OHIO FORESTRY HAS SET FORTH. ON THAT ONE, YOUR HONOR, I DON'T
3 EVEN SEE MUCH DISPUTE FROM THE PLAINTIFFS ON THAT. THEIR POSITION
4 IN FRONT OF THE REGIONAL FORESTER WAS THAT THE RECORD IS
5 DEFICIENT, AND THAT IT DOESN'T SUPPORT THE BAN. THAT, TO ME, IS
6 EXACTLY THE ISSUE. WHAT THE REGIONAL FORESTER HAS FOUND, GLORIA
7 MANNING, IS THAT THE RECORD IS DEFICIENT AND WE NEED TO STUDY, AND
8 THAT'S WHAT WE'RE DOING. AND SO IN DECIDING SHOULD WE OPEN THE
9 RIVER TO FLOATING? WILL IT HARM THE TROUT FISHING EXPERIENCE?
10 THAT'S WHAT PEOPLE THOUGHT IN THE 1970'S THE FOREST PLAN FOUND
11 THAT IN THE 1970'S THAT THERE WAS ANTAGONISM BETWEEN FISHERMEN AND
12 BOATERS, A SOCIAL ISSUE. THERE WAS ALSO DEATHS IN THE 1970'S THAT
13 WAS FROM --

14 THE COURT: DEATH?

15 MR. MCCLAIN: DEATHS, NOT FROM THE FISHERMAN AND THE
16 BOATERS FIGHTING, AT LEAST NOT FROM MY KNOWLEDGE, BUT FROM THE
17 HAZARDS OF THAT WHITE WATER. THE PLAINTIFFS I THINK WILL TELL
18 YOU, TOO, THAT THAT IS A MUCH MORE CHALLENGING AREA TO FLOAT ON
19 THE RIVER THAN ON THE SOUTH THIRTY-SIX MILES. AND WHAT THE 1976
20 FOREST PLAN FOUND IS THAT IN THE 1970'S IN THE EARLY 1970'S PRIOR
21 TO THE PROHIBITION, AFTER THE MOVIE DELIVERANCE, WHICH MADE THE
22 RIVER MUCH MORE POPULAR IN FLOATING ON THAT PORTION OF THE RIVER
23 MUCH MORE POPULAR, THERE WERE DOCUMENTED DEATHS ON THAT PORTION OF
24 THE RIVER RESULTING FROM THE EXTREME NATURE OF THE WHITE WATER IN
25 THAT AREA, UNSKILLED BOATERS WHO WERE GOING UP THERE TRYING TO GET

1 THE DELIVERANCE EXPERIENCE, AND IT APPARENTLY --

2 THE COURT: IS THIS THE SEGMENT OF THE RIVER THAT IS
3 ABOVE HIGHWAY TWENTIES-SOMETHING -- 28, HIGHWAY 28 BRIDGE? IS
4 THAT THE SEGMENT OF THE RIVER THAT WAS DELIVERANCE WAS ALL ABOUT
5 AND WHERE IT WAS FILMED?

6 MR. MCCLAIN: THAT'S MY UNDERSTANDING, YES. I BELIEVE
7 THAT'S RIGHT.

8 THE COURT: NOT BELOW THAT?

9 MR. MITCHELL: YOUR HONOR, I APOLOGIZE FOR INTERRUPTING
10 COUNSEL'S ARGUMENT, BUT THIS IS A MOTION TO DISMISS, AND WE ARE
11 WAY BEYOND THE BRIEFS AND TALKING --

12 THE COURT: HE'S A TIME OR TWO GOTTEN INTO THE REAL
13 MERITS OF THE ISSUE.

14 MR. MITCHELL: CORRECT, YOUR HONOR, AND ON THOSE GROUNDS
15 I RESPECTFULLY OBJECT TO THIS LINE OF ARGUMENT.

16 MR. MCCLAIN: CAN I RESPOND, YOUR HONOR? I MEAN THE --
17 WHAT I JUST ARTICULATED IS FROM THE 1976 FOREST PLAN IS ON PAGE
18 102 OF OUR MOTION. COUNSEL IN HIS OPPOSITION TO OUR
19 PRELIMINARY -- ALL OF THAT IS PART OF THE ADMINISTRATIVE RECORD,
20 IT'S ATTACHED, IT'S IN THE COURT FILE, THE '76 PLAN IS EXHIBIT C
21 TO THE AFFIDAVIT HE FILED IN SUPPORT OF PRELIMINARY INJUNCTION.
22 AND THE REASON IT'S RELEVANT IS THAT IT GOES TO THE -- THE
23 RIPENESS QUESTION OF WOULD THE COURT BENEFIT FROM FURTHER FACTUAL
24 DETERMINATION. AND THE ARGUMENT IS, YES, IT WOULD. BECAUSE IT
25 WOULD BE HELPFUL FOR THE COURT IN DECIDING WHETHER TO OPEN THE

1 RIVER TO KNOW THESE SAFETY ISSUES FROM THE 1970'S TO KNOW WHAT IS
2 THE SOCIAL ASPECTS LIKE NOW BETWEEN THE FISHERMEN AND THE BOATERS.

3 WHAT WE -- THE RELEVANCE OF THE 1970'S DATA ISN'T
4 NECESSARILY THAT THE COURT LACKS JURISDICTION, IT'S TO SHOW THAT
5 THESE ARE ISSUES, THEY WERE ISSUES IN THE SEVENTIES. BOATING HAS
6 ONLY GOTTEN MORE POPULAR OVER THE YEARS, AND THAT THE COURT WILL
7 BENEFIT FROM KNOWING IF THOSE CONDITIONS HOLD TRUE TODAY. AND SO
8 ALL OF THAT'S --

9 THE COURT: MR. MITCHELL, I'M GOING TO LET HIM GO AHEAD
10 AND ARGUE THESE THINGS.

11 MR. MITCHELL: VERY WELL, YOUR HONOR.

12 THE COURT: WHEN IT COMES TIME TO MAKING A DECISION,
13 I'LL HAVE TO SORT OUT WHAT'S APPROPRIATE.

14 MR. MITCHELL: YES, YOUR HONOR, BECAUSE THE STANDARD IS
15 THAT EVERYTHING THAT WE ALLEGE HAS TO BE CONSTRUED AS TRUE IN THE
16 CONTEXT OF THIS MOTION, AND THIS IS A VERY HEAVY FACT ARGUMENT,
17 MUCH OF WHICH I MUST SAY IS HIGHLY INACCURATE. SO I JUST --

18 THE COURT: I'LL GIVE YOU A CHANCE TO RESPOND TO IT IN A
19 MOMENT.

20 MR. MCCLAIN: AND SO THAT'S ONE -- AND IF YOU LOOK AT
21 WHAT THE COURTS DO IN THESE CASES, THEY DON'T -- WELL, FIRST OF
22 ALL, THEY DO RELY ON THINGS OUTSIDE THE PLEADINGS FOR SUBJECT
23 MATTER JURISDICTION ARGUMENTS, BUT THEY ALSO DON'T REQUIRE HEAVY
24 LEVELS OF EVIDENCE TO SUPPORT THE FACTORS THEY ARE GOING THROUGH.

25 THE COURTS, THE SUPREME COURT IN OHIO FORESTRY AND THE

1 NATIONAL PARK HOSPITALITY CASE, THE ELEVENTH CIRCUIT IN PITTMAN.
2 IN FACT, NATIONAL PARK HOSPITALITY IS A CASE WHERE THE SUPREME
3 COURT SUA SPONTE REACHED THE RIPENESS ISSUE BECAUSE THEY GRANTED
4 CERTIORARI ON A SEPARATE QUESTION AND PRIOR BRIEFING ON THE
5 RIPENESS ISSUE SUA SPONTE BECAUSE THEY BELIEVED THAT THE ISSUE WAS
6 NOT RIPE.

7 AND SO, YOU KNOW, COURTS HAVE NOT REQUIRED EXTENSIVE
8 AFFIDAVITS ON THESE ISSUES. IT'S A COMMON SENSE JUDGMENT. WOULD
9 THE COURT BENEFIT FROM FURTHER FACTUAL FINDING ON WHETHER IT WOULD
10 BE SAFE, APPROPRIATE, GOOD FOR THE ENVIRONMENT, TO OPEN A PORTION
11 OF THE RIVER THAT'S BEEN CLOSED FOR THIRTY YEARS BEFORE IT DOES
12 SO? THAT DOESN'T REQUIRE HEAVY EVIDENTIARY ANALYSIS. THAT'S A
13 COMMON SENSE JUDGMENT THAT WHEN SOMETHING HAS BEEN CLOSED FOR
14 THIRTY YEARS, BEFORE YOU OPEN IT, IT WOULD MAKE SENSE TO HAVE
15 FACTS TO KNOW WHAT THE EFFECTS OF THAT WILL BE. WILL IT CREATE
16 SOCIAL DISCORD? WILL IT RUIN THE TROUT FISHING EXPERIENCE? WILL
17 IT CAUSE SAFETY ISSUES? THERE IS EVIDENCE IN THE RECORD OR AT
18 LEAST INDICATION IN THE RECORD THAT WAS A PROBLEM IN THE 1970'S
19 AND SO THE COMMON SENSE QUESTION ON RIPENESS IS DOES IT MAKE SENSE
20 TO SEE IF THOSE CONDITIONS STILL HOLD OR IF THAT'S TRUE BEFORE
21 OPENING IT BEFORE THE FOREST SERVICE HAS COMPLETED ITS CURRENT
22 STUDY.

23 THE SECOND OF THE THREE FACTORS IS WOULD JUDICIAL
24 INTERVENTION INTERFERE WITH ONGOING ADMINISTRATIVE ACTION. AGAIN,
25 YOUR HONOR, THAT'S EXACTLY WHAT WE HAVE IN THIS CASE. GLORIA

1 MANNING A YEAR AGO, OVER A YEAR AGO, APRIL '05 ORDERED ONGOING
2 ADMINISTRATIVE ACTION. THAT IS ONGOING, THAT HAS BEEN ONGOING FOR
3 MORE THAN A YEAR NOW, SHOULD BE COMPLETED NEXT YEAR. BUT, YOU
4 KNOW, THE STUDY IS ALREADY UNDERWAY. THE DESIGNS HAVE ALREADY
5 BEEN MADE. AND IF YOUR HONOR WERE TO SAY, YOU HAVE TO PERMIT
6 FLOATING ON THE RIVER, IT'S GOING TO HARM THE DESIGN OF THOSE
7 STUDIES, THE EVIDENCE THAT THEY UNCOVER OF THE STATE OF THE RIVER,
8 WHAT THE CURRENT USE OF THAT PORTION OF THE RIVER IS, WHAT THE
9 BASE LINE CURRENTLY IS FOR THAT PORTION OF THE RIVER, AND WHAT
10 THEY ARE ANALYZING AND LOOKING AT NOW WILL CHANGE IF ALL OF A
11 SUDDEN EVERYONE COULD BOAT ON IT WHILE AT THE SAME TIME THEY ARE
12 STUDYING THE SAME ISSUE.

13 AND THE THIRD IS THE HARDSHIP THAT DELAY WOULD CAUSE TO
14 THE PLAINTIFFS. AND ONE WAY THAT THE COURTS HAVE ARTICULATED THIS
15 CONCERN, YOUR HONOR, IT SAYS, THAT ANYTHING IN THE REGULATION
16 BEING CHALLENGED THAT WOULD REQUIRE THEM TO MODIFY THEIR BEHAVIOR
17 IS ONE WAY THAT THIS PRONG HAS BEEN TALKED ABOUT. AND AGAIN IT
18 GETS BACK TO THE THIRTY-YEAR PROHIBITION. NOTHING ABOUT THE 2005
19 ORDER BEING CHALLENGED REQUIRED THE PLAINTIFFS TO MODIFY THEIR
20 BEHAVIOR. PRIOR TO THAT DECISION THEY COULDN'T FLOAT ON THE
21 RIVER. POST THAT DECISION, THEY CAN'T FLOAT ON THAT RIVER. SO IS
22 THERE ANY REAL HARDSHIP THAT FLOWS FROM THE 2005 ORDER? AND WE
23 SUBMIT, YOUR HONOR, THERE ISN'T. CASES LIKE PITTMAN THE ELEVENTH
24 CIRCUIT CASE, THAT'S A CASE WHERE THERE WAS A JUDICIARY COUNSEL
25 OPINION THAT SAID JUDGES SHOULD NOT RESPOND TO A QUESTIONNAIRE IN

1 JUDICIAL ELECTIONS THAT ASKED ABOUT THEIR RELIGIOUS VIEWS AND THIS
2 SORT OF THING. THERE SUBSEQUENTLY WAS A STATE BAR INFORMAL
3 OPINION THAT CAME TO THE SAME CONCLUSION. THE ELEVENTH CIRCUIT
4 SAID A CHALLENGE TO THE SECOND STATE BAR OPINION WAS NOT RIPE, AND
5 ONE OF THE THINGS THEY SAID IS THAT YOUR LEGAL POSITION HASN'T
6 CHANGED BECAUSE OF THE STATE BAR OPINION. PRIOR TO THE STATE BAR
7 OPINION, YOU WERE UNDER COMPULSION NOT TO ANSWER THAT
8 QUESTIONNAIRE BECAUSE THE JUDICIAL COUNSEL HAD MADE THE SAME
9 OPINION. POST THE BAR OPINION, YOU ARE IN THE SAME POSITION.

10 THAT'S EXACTLY WHERE WE ARE. PRE-2005 ORDER THEY
11 COULDN'T FLOAT, NOW THEY CAN'T FLOAT. SO THE DEGREE OF HARDSHIP
12 THAT FLOWS FROM THAT SINGLE DECISION, THE ONLY SINGLE DECISION.
13 THEY ARE NOT CHALLENGING THE '85 PLAN, THEY ARE NOT CHALLENGING
14 THE REGULATION THAT WAS PROPERLY PROMULGATED THAT PROHIBITS
15 FLOATING THEY ARE NOT CHALLENGING THE OTHER PLAN THAT PROHIBITS
16 FLOATING. THE DEGREE OF HARDSHIP FROM ANY ACTUAL OR DECISION
17 THAT'S BEEN CHALLENGED IS VERY MINIMAL BECAUSE THEY ARE IN SAME
18 POSITION THEY WERE BEFORE.

19 JUST IN TERMS OF DEGREE OF HARDSHIP, THEY STILL HAVE 36
20 MILES OF THE RIVER THEY CAN FLOAT ON OUT OF THE 57. ALL OF THE
21 MEMBERS OF THEIR ORGANIZATIONS CAN STILL VISIT THE TOP 21 MILES,
22 THEY CAN HIKE, FISH, DO EVERYTHING THAT ANY OTHER MEMBER OF THE
23 PUBLIC CAN DO. SO THERE IS NO TARGETING OF THEIR MEMBERS BECAUSE
24 MANY OF THEIR MEMBERS ARE ALSO, AS THEY'VE SAID, FISHERMEN AND
25 HIKERS AND SO FORTH. SO THEY CAN ENGAGE IN A WIDE VARIETY OF

1 ACTIVITIES IN THE FOREST FOR THIS SHORT TIME PERIOD WHILE THE
2 STUDY IS BEING COMPLETED.

3 THE ONE THING THAT THEIR OPPOSITION DID IN RESPONSE TO
4 THE RIPENESS IS THAT THE OVERTALL THEME OF THEIR OPPOSITION IS
5 THAT THEY ARE BEING INJURED RIGHT NOW, TODAY, THEY CAN'T FLOAT
6 RIGHT NOW, TODAY. AND THAT SORT OF THING -- AND, THEREFORE, THEY
7 SAY THEY ARE BEING INJURED CURRENTLY. THE PROBLEM WITH THAT
8 ARGUMENT, YOUR HONOR, IS THAT THAT CONFLATES THE INJURY
9 REQUIREMENT WITH THE RIPENESS REQUIREMENT. IF THEY WERE NOT BEING
10 INJURED, THEY WOULDN'T HAVE STANDING. SO IT'S NOT ENOUGH JUST TO
11 COME IN AND SAY THAT I'M INJURED AND THEREFORE A DISPUTE IS RIPE
12 BECAUSE RIPENESS WOULD SERVE NO PURPOSE IF THAT WERE THE CASE
13 BECAUSE YOU ALWAYS HAVE TO HAVE INJURY JUST FOR ARTICLE III
14 STANDING. SO IT'S NOT JUST TO SAY WE'RE BEING INJURED, IN SOME
15 SMALL WAY BY THIS CURRENT ORDER. THEY HAVE TO SHOW, AND IT'S A
16 BALANCE OF FACTORS, THE DEGREE OF HARDSHIP ALONG WITH THE HAZARDS
17 OF IMMEDIATE JUDICIAL INTERVENTION, ALONG WITH THE CONSIDERATION
18 OF WHETHER THE COURT WOULD BENEFIT FROM MORE FACTS. THE WEIGHING
19 OF ALL OF THOSE FACTORS PRUDENTIALY AND CONSTITUTIONALLY DOES IT
20 MAKE SENSE TO -- AND THE WORD THAT'S USED BY THE SUPREME COURT IN
21 THE ELEVENTH CIRCUIT -- DO THOSE COUNSEL IN FAVOR OF JUDICIAL
22 RESTRAINT? AND, YOU KNOW, WE SUBMIT REGARDLESS OF WHETHER THEY
23 ARE INJURED BY THE INABILITY TO FLOAT ON A MINORITY OF THE RIVER,
24 ALL OF THOSE FACTORS COUNSEL IN FAVOR OF WAITING TO LET
25 ADMINISTRATIVE RECORD DEVELOP, LET THEM MAKE THE NEW DECISION, LET

1 THEM APPLY THEIR EXPERTISE AND THEIR STUDY BEFORE THE COURT STEPS
2 IN AND TRIES REALLY TO ANSWER THE QUESTION WITHOUT A SUFFICIENT
3 RECORD.

4 AND THAT WAS THEIR POSITION IN THE ADMINISTRATIVE
5 AGENCY, AND THAT'S WHAT GLORIA MANNING FOUND, AND SO THEY'RE
6 REALLY ASKING FOR THE COURT WITHOUT A SUFFICIENT RECORD IN THEIR
7 RECORDS, A DEFICIENT RECORD, TO DECIDE WHETHER, HOW THE FOREST
8 SHOULD BE MANAGED HOW THE RIVER SHOULD BE MANAGED. AND THAT
9 QUESTION OF HOW THE RIVER SHOULD BE MANAGED IS ONE THAT'S
10 DELEGATED TO THE AGENCY AND ALL THE STATUTES AND REGULATIONS, AND
11 IT'S A DISCRETIONARY DISCUSSION OF HOW THEY CAN DO THAT.

12 THE SECOND ARGUMENT, YOUR HONOR, IS A STANDING ARGUMENT,
13 AND THIS ONE IS MORE STRAIGHTFORWARD OR CONSIDERED I THINK IT'S
14 LESS A PRUDENTIAL BALANCING QUESTION THAN THE RIPENESS QUESTION,
15 AND IT'S REALLY TWO ASPECTS OF IT.

16 TO HAVE ARTICLE III STANDING THE PLAINTIFFS HAVE TO SHOW
17 THAT THEIR CLAIMS ARE FAIRLY TRACEABLE, FAIRLY TRACEABLE TO THE
18 CHALLENGED ACTION. AND THE SECOND ASPECT, WOULD A FAVORABLE COURT
19 DECISION REDRESS THAT CLAIMED INJURY ON THE FIRST QUESTION? IS IT
20 FAIRLY TRACEABLE TO THE CHALLENGED -- THE CHALLENGED ACT IN THE
21 2005 ORDER? ALL THAT ORDER DID, IT WAS FAVORABLE TO THE
22 PLAINTIFFS, THE PLAINTIFFS PREVAILED IN THAT. SHE SENT -- SHE
23 MAINTAINED THE '85 PROHIBITION AND SAID, WE'RE GOING TO STUDY FOR
24 TWO YEARS AND YOU HAVE TO MAKE A DECISION. IS THEIR INABILITY TO
25 FLOAT ON THE RIVER FAIRLY TRACEABLE TO THAT ORDER? WE SUBMIT, NO.

1 THE INABILITY TO FLOAT ON THE RIVER IS TRACEABLE TO THE '85 -- TO
2 THE 1977 REGULATION, WHICH THEY DON'T CHALLENGE. AND THE OTHER
3 FOREST PLANS THAT ALL PROHIBITED FLOATING, EVEN GLORIA MANNING'S
4 ORDER SAYS WE'LL REVERT BACK TO THE '85 PLAN. THAT'S WHAT
5 PROHIBITS THE FLOATING IS THAT PLAN. SHE EVEN MENTIONS THAT PLAN
6 IN HER ORDER.

7 SO TO THE EXTENT THE COURT'S LOOKING AT WHAT IS FAIRLY
8 TRACEABLE SORT OF A PROXIMATE CAUSE ANALYSIS, IT'S TO THE PRIOR
9 PLANS. IT'S NOT TO THAT '05 ORDER.

10 THE SECOND ISSUE IN STANDING WOULD BE A FAVORABLE COURT
11 DECISION REDRESS THEIR CLAIMED INJURY. SPECIFICALLY IN THEIR
12 PRELIMINARY INJUNCTION MOTION WHAT THEY ASK FOR IS THE
13 IMPLEMENTATION OF THE '05 ORDER TO BE ENJOINED. AND EVEN IF WE'RE
14 LOOKING AT IT AS WIPING THE '05 ORDER OFF THE BOOKS, IF THAT WERE
15 WIPED OFF THE BOOKS, THEY STILL WOULD NOT BE ABLE TO FLOAT ON THE
16 RIVER BECAUSE THERE WOULD BE THE 1985 PROHIBITION. IF WE TAKE THE
17 STATE OF AFFAIRS AS WE WOULD PRIOR TO THE ORDER THEY ARE
18 CHALLENGING, THAT'S THE WAY I THINK YOU WOULD DETERMINE, WOULD
19 THEIR CHALLENGE REDRESS THEIR INJURY. TAKE AWAY THE THING THEY
20 ARE CHALLENGING, THEY ARE STILL PROHIBITED FROM FLOATING ON THE
21 RIVER. SO WIPING OFF THAT ORDER OFF THE MAP OR ENJOINING IT OR
22 HOWEVER YOU WANT TO PHRASE IT WOULD NOT REDRESS THE INJURY BECAUSE
23 THEY WOULD BE IN THE SAME POSITION, EVEN IF IT DIDN'T EXIST.

24 THOSE ARE OUR TWO ARGUMENTS. IF YOUR HONOR HAS ANY
25 QUESTIONS.

1 THE COURT: THANK YOU, MR. MCCLAIN.

2 ALL RIGHT. MR. MITCHELL.

3 MR. MITCHELL: THANK YOU, YOUR HONOR. MR. MCCLAIN
4 ADDRESSED A NUMBER OF ISSUES, AND I WANT TO KIND OF CUT TO THE
5 CHASE ON SOME OF THEM. AND FIRST OF ALL, I WANT TO MAKE IT CLEAR
6 WHAT WE ARE ASKING FOR AND WHAT WE ARE NOT ASKING FOR BECAUSE
7 THERE SEEMS TO BE A TREMENDOUS AMOUNT OF CONFUSION ON THAT POINT
8 ON THE PART OF THE GOVERNMENT.

9 WE ARE NOT ASKING YOU, YOUR HONOR, TO MANAGE THE RIVER.
10 WE ARE NOT ASKING YOU TO INTERVENE IN ANYTHING. WE ARE NOT ASKING
11 YOU TO INTERVENE INTO THE STUDY. WE ARE NOT CHALLENGING THE
12 STUDY. WE ARE NOT CHALLENGING THE GOVERNMENT'S RIGHTS TO HAVE THE
13 STUDY. AND TO SAY THAT PERMITTING BOATING WOULD INTERFERE WITH
14 THE STUDY IS PATENTLY LUDICROUS BECAUSE AS IT STANDS NOW THE
15 CONSULTANTS THAT THE GOVERNMENT HAS HIRED ARE HAVING TO STUDY AN
16 EVENT THAT IS NOT OCCURRING, AND THAT IS BOATING ON THE UPPER 21
17 MILES ON THIS RIVER.

18 AND I ALSO LIKE TO POINT OUT, YOUR HONOR, OUT OF ALL OF
19 THE RIVERS IN THE UNITED STATES THAT ARE MANAGED OR MISMANAGED BY
20 THE UNITED STATES FOREST SERVICE, THIS IS THE ONLY ONE, THE ONLY
21 ONE OF 21 RIVERS IN THE ENTIRE UNITED STATES WHERE THERE IS A BAN
22 ON PADDLE BOATING. AND THE GOVERNMENT'S DURING --

23 THE COURT: NO OTHER RIVER WHERE KAYAKING IS PROHIBITED?

24 MR. MITCHELL: THAT IS MY UNDERSTANDING, YOUR HONOR, AND
25 WE CAN PRODUCE EVIDENCE OF THAT. YOUR HONOR, AS I SAID --

1 THE COURT: ON THIS RIVER IS KAYAKING PERMITTED FROM
2 BRIDGE 24 OR HIGHWAY 24, WHATEVER IT IS THAT THE BRIDGE ON HIGHWAY
3 24, SOUTH, IS THAT CORRECT?

4 MR. MITCHELL: HIGHWAY 28, YOUR HONOR.

5 THE COURT: IS IT 28.

6 MR. MITCHELL: I BELIEVE SO, YOUR HONOR.

7 THE COURT: THAT'S CORRECT. 28. EXCUSE ME. HIGHWAY 28
8 BRIDGE SOUTH?

9 MR. MITCHELL: CORRECT, YOUR HONOR.

10 THE COURT: AND IT'S -- THERE IS NO RESTRICTION ANYWHERE
11 BELOW THERE?

12 MR. MITCHELL: WELL, THERE ARE -- YES, THERE ARE
13 RESTRICTIONS ON THE NUMBER OF BOATERS THAT CAN BE PERMITTED. THEY
14 HAVE NEVER EVEN COME CLOSE TO THAT. THERE IS NO COMMERCIAL --
15 THAT'S NOT TRUE -- THERE ARE RESTRICTIONS ON THE VOLUME OF BOATING
16 BELOW THAT BRIDGE.

17 THE COURT: MAYBE I DIDN'T ARTFULLY COUCH MY QUESTION.
18 THAT IS, THERE IS NO PART OF THE RIVER BELOW THERE WHICH PROHIBITS
19 KAYAKING.

20 MR. MITCHELL: THAT'S CORRECT, YOUR HONOR.

21 THE COURT: IS THERE ANY PART OF THE RIVER THAT -- WHERE
22 THE FISHERMEN ARE PROHIBITED?

23 MR. MITCHELL: I DON'T KNOW THE ANSWER TO THAT QUESTION,
24 BUT I DON'T THINK THERE IS.

25 THE COURT: SO THAT BELOW THERE THEY CAN -- BOTH FISHING

1 AND KAYAKING IS PERMITTED?

2 MR. MITCHELL: CORRECT.

3 THE COURT: OKAY.

4 MR. MITCHELL: AND BOATING AND FISHING COEXIST ON ALL OF
5 THE OTHER RIVERS MANAGED BY THE UNITED STATES FOREST SERVICE. AND
6 IT IS OUR CONTENTION THAT BANNING BOATING IS NOT MANAGEMENT OF THE
7 RIVER. IT IS THE OPPOSITE OF MANAGEMENT OF THE RIVER. IT IS
8 IGNORING MANAGEMENT OF THE RIVER. IT IS DECLINING TO MANAGE THE
9 RIVER.

10 NOW --

11 THE COURT: WELL, WE REALLY ARE GETTING INTO THE MERITS
12 I CHALLENGED HIM A MOMENT AGO, WE'RE GETTING INTO THE MERITS AND
13 ALLOWED HIM TO GO FORWARD, BUT THIS REALLY GETS TO THE MERITS OF
14 WHETHER THERE SHOULD BE AN INJUNCTION, NOT WHETHER IT SHOULD BE
15 DISMISSED.

16 MR. MITCHELL: WELL, YOUR HONOR, YES, BUT IF IT GETS
17 DISMISSED THERE IS NO INJUNCTION, AND --

18 THE COURT: WELL, LET ME ASK YOU EXACTLY LEGALLY WHAT
19 YOU'RE ATTACKING. I THOUGHT YOU WERE ADDRESSING IT A MOMENT AGO,
20 BUT YOU DIDN'T.

21 MR. MITCHELL: THIS IS A VERY --

22 THE COURT: I DON'T HAVE THE COMPLAINT BEFORE ME, BUT
23 DOES THE COMPLAINT ACTUALLY CHALLENGE THE -- DO WE CALL IT AN
24 ORDER OR WHATEVER IT IS, THE ACTION, AT LEAST, OF GLORIA MANNING
25 OF APRIL 2005? IS THAT WHAT YOU ARE CHALLENGING?

1 MR. MITCHELL: IT ONLY CHALLENGES ONE ASPECT OF THAT
2 ORDER, AND IT'S VERY CLEAR FROM OUR COMPLAINT AND OUR PRELIMINARY
3 INJUNCTION THAT WE AGREE WITH ALL OF THE FINDINGS IN THAT ORDER
4 BECAUSE THEY ARE VERY WELL FAVORABLE TO US, AND THEY ARE VERY
5 CORRECT.

6 WHAT WE DON'T UNDERSTAND AND WHAT WE BELIEVE IS
7 ARBITRARY AND CAPRICIOUS -- AND AGAIN IN THE SETTING OF THIS
8 HEARING WE'RE ENTITLED TO HAVE THAT DETERMINED IN OUR -- BECAUSE
9 IT'S A MOTION TO DISMISS, WE GET THE BENEFIT OF THAT ALLEGATION
10 BEING TAKEN AS TRUE -- GLORIA MANNING HELD THAT THE SUMTER
11 NATIONAL FOREST PLAN IS DEFICIENT IN SUBSTANTIATING THE NEED TO
12 CONTINUE THE BAN ON BOATING TO PROTECT RECREATION AS AN ORV OR TO
13 PROTECT THE WILDERNESS RESOURCE. SO AT NO TIME IN THIS
14 THIRTY-YEAR PERIOD AT NO TIME IN THIS THIRTY-YEAR PERIOD, HAS THE
15 GOVERNMENT EVER HAD EVIDENCE TO SUBSTANTIATE A BAN ON BOATING.
16 THIS IS A WILD AND SCENIC RIVER --

17 THE COURT: THAT'S NOT WHAT I UNDERSTOOD YOU TO HAVE
18 JUST READ. I THOUGHT SHE SAID THIS REPORT DID NOT HAVE
19 SUBSTANTIAL EVIDENCE.

20 MR. MITCHELL: YES, THE 2004 REPORT IS DEFICIENT IN
21 SUBSTANTIATING THE NEED TO CONTINUE THE BAN ON BOATING TO PROTECT
22 RECREATION. NO CAPACITY ANALYSIS PROVIDED TO SUPPORT RESTRICTIONS
23 OR A BAN ON RECREATION USE OR ANY TYPE OF RECREATION USER. IT'S
24 UNDISPUTED IN THIS LAWSUIT THAT THERE HAS NEVER BEEN SUCH A STUDY.
25 THE GOVERNMENT WON'T TELL YOU THAT THERE HAS BEEN SUCH A STUDY

1 BECAUSE THERE NEVER HAS BEEN.

2 THE COURT: THERE WASN'T ONE IN THE SEVENTIES?

3 MR. MITCHELL: THE ONLY STUDY THAT WAS DONE WAS THE 1971
4 STUDY, WHICH WAS DONE IN SUPPORT OF DESIGNATING THE CHATTOOGA
5 RIVER BY THE UNITED STATES CONGRESS AS A WILD AND SCENIC RIVER.
6 THAT'S THE ONLY STUDY THAT HAS BEEN DONE. THERE WAS A 2004 STUDY
7 DONE, IT WAS FOUND DEFICIENT BY GLORIA MANNING, WHO WAS A DESIGNEE
8 OF THE CHIEF OF THE FOREST SERVICE. AND JUST TO DOT ANOTHER I,
9 THIS IS A FINAL ORDER BECAUSE IT WAS ADOPTED BY THE CHIEF OF THE
10 FOREST SERVICE. THERE IS A PERIOD TO OBJECT, THE PERIOD PASSED.
11 THIS IS A FINAL ORDER, AND THAT ALONE GIVES US STANDING.

12 SO --

13 THE COURT: WELL, IT DIDN'T HAVE TO BE APPROVED ONE WAY
14 OR THE OTHER, I MEAN, APPROVED OR DISAPPROVED BY THE SECRETARY OF
15 AGRICULTURE?

16 MR. MITCHELL: IT WAS ADOPTED BY THE CHIEF, THE
17 SECRETARY OF AGRICULTURE HAS A CERTAIN PERIOD OF TIME --

18 THE COURT: AND DIDN'T ACT ON IT.

19 MR. MITCHELL: MY LAWYER WILL CORRECT ME IF I'M WRONG
20 BUT HAD -- BUT HE HAD A CERTAIN AMOUNT OF TIME TO ACT UPON IT AND
21 DID NOT, SO IT BECAME A FINAL ORDER.

22 THE COURT: ALL RIGHT. OKAY. WHAT YOU ARE SAYING IS
23 GLORIA MANNING, IF THAT'S THE NAME WE'RE USING CORRECTLY, WAS
24 ACTUALLY ACTING UPON BEHALF OF THE FOREST SERVICE DIRECTOR OR
25 WHATEVER THAT TITLE IS.

1 MR. MITCHELL: THAT IS ABSOLUTELY CORRECT. SHE GOES ON,
2 AND I WON'T READ A WHOLE LOT OF THIS ORDER -- SHE GOES ON TO SAY,
3 IN ADDITION, THERE IS NO BASIS IN LAW, REGULATION OR POLICY TO
4 EXCLUDE A TYPE OF WILDERNESS CONFORMING RECREATION, PADDLE BOATING
5 IS A TYPE OF WILDERNESS CONFORMING RECREATION DUE TO CONCERNS
6 RELATIVE TO SAFETY AND SEARCH AND RECUSE. SO SHE ADDRESSED THE
7 SAFETY ISSUE IN HER ORDER. THERE IS A COMPLETE ADMINISTRATIVE
8 RECORD ON THAT. SHE GOES ON TO SAY, AFTER CAREFUL REVIEW I AM
9 REVERSING THE REGIONAL FOREST DECISION TO CONTINUE TO EXCLUDE
10 BOATING ON THE CHATTOOGA WILD AND SCENIC RIVER ABOVE HIGHWAY 28.

11 WE'RE VERY PLEASED -- PLEASED AS PUNCH WITH EVERYTHING.

12 THE COURT: WHAT'S THE NEXT SENTENCE THEN?

13 MR. MITCHELL: WELL, IT'S A COUPLE OF SENTENCES. IT
14 SAYS, MANAGEMENT OF BOATING ABOVE HIGHWAY 28 WILL REVERT TO THE
15 DIRECTION IN THE 1985 FOREST PLAN, AND THE CLOSURE DECISION MADE
16 IN THAT PLAN WILL REMAIN IN EFFECT.

17 AND IT'S INCORRECT TO SAY THAT WE DON'T CHALLENGE THE
18 1985 PLAN. BY THIS ORDER ENTERED IN 2005 THE 1985 PLAN, WHICH HAD
19 BEEN REPLACED BY THE 2004 PLAN, IS SUDDENLY REINVIGORATED AND BACK
20 IN PLACE. AND GUESS WHAT? IT HAS NO STUDY TO SUBSTANTIATE A BAN
21 ON BOATING. THIS IS A SIMPLE LAWSUIT.

22 THE COURT: BUT THAT'S WHAT SHE SAID SHE WAS REVERSING,
23 BUT MAINTAINING THE STATUS QUO UNTIL THEY COULD DO THE STUDY; IS
24 THAT NOT WHAT --

25 MR. MITCHELL: IT'S NOT MAINTAINING THE STAT -- IT'S NOT

1 PROPER TO MAINTAIN THE STATUS QUO IF THE STATUS QUO ITSELF WAS
2 ILLEGAL. ESSENTIALLY THE GOVERNMENT'S ARGUMENT IS WE HAVE NEVER
3 DONE A STUDY ON THIS RIVER, EXCEPT FOR IN 2004, WHICH WE
4 OURSELVES, THE GOVERNMENT FOUND TO BE DEFICIENT. SO WE'VE BEEN
5 BREAKING THE LAW FOR THIRTY YEARS. AND IT'S OKAY TO KEEP BREAKING
6 IT AND KEEP THESE PEOPLE WHO ARE ENTITLED TO ENJOY A RECREATIONAL
7 VALUE ON A RIVER DESIGNATED AS WILD AND SCENIC BY THE UNITED
8 STATES CONGRESS. WE CAN TAKE OUR TIME DOING THIS STUDY, AND THEY
9 DON'T GET TO BOAT.

10 NOW, THAT IS WHAT DOESN'T MAKE SENSE. AND AS I WILL
11 REPEAT AGAIN, YOUR HONOR, WE AREN'T ASKING YOU TO MANAGE THE
12 RIVER.. WE ARE NOT ASKING YOU TO INTERVENE IN THEIR STUDY IN ANY
13 WAY WHATSOEVER. THERE IS NO BASIS -- IT'S A SIMPLE SYLLOGISM.
14 WILD AND SCENIC RIVER CREATES OUTSTANDING REMARKABLE VALUE, YOU
15 NEED A STRONG BASIS TO DENY SOMEONE AN OUTSTANDINGLY AND
16 REMARKABLE VALUE. IT DOES NOT EXIST. AND IT DISCRIMINATES
17 AGAINST US AS A TYPE TOP RECREATIONAL USE WHEN EVERY OTHER
18 RECREATIONAL USE IS PERMITTED ON THE RIVER WITH NO STUDY EVER
19 HAVING BEEN DONE RELATED TO THEM, EITHER.

20 THE COURT: IS THERE -- IS IT CLEAR AS TO WHAT THE
21 STATUS OF THEIR STUDY IS AT THIS TIME? THEY ARE GOING FORWARD
22 WITH IT, YOU CONCEDE THAT?

23 MR. MITCHELL: WELL, THEY ARE GOING FORWARD WITH IT. I
24 PROBABLY HAVE A VERY DIFFERENT VIEW OF WHAT THE STATUS IS THAN
25 THEY HAVE.

1 THE COURT: WELL, ARE YOU OR YOUR CLIENTS PARTICIPATING
2 IN IT?

3 MR. MITCHELL: IN AN EXTREMELY LIMITED WAY. HERE IS THE
4 THING.

5 THE COURT: ARE THEY BEING HEARD FROM?

6 MR. MITCHELL: WELL, WE'RE BEING HEARD FROM BUT IGNORED.
7 THEY WANT TO ALLOW A VERY, VERY LIMITED AMOUNT OF BOATING, LIKE
8 THREE DAYS OUT OF THE YEAR. AND I MAY BE MISQUOTING THIS, BUT
9 THIS IS THE CONTEXT IN WHICH IT, IS THREE DAYS OUT OF THE YEAR,
10 YOU PUT X NUMBER OF BOATERS ON THE RIVER, AND YOU CONDUCT SOME
11 SURVEYS AFTER THAT.

12 NOW, THEY -- YOU KNOW, AGAIN, WE -- WE DON'T THINK IT'S
13 A GREAT STUDY. WE MAY CHALLENGE IT WHEN IT'S DONE, BUT TODAY WE
14 SHOULD BE ABLE TO GO ON THE RIVER BECAUSE THERE IS NO STUDY AT
15 ALL. AND THIS IS AN OUTSTANDINGLY REMARKABLE VALUE. AND TO SAY
16 IT IS -- EXCUSE ME -- BUT IT IS REALLY ARROGANT FOR THE GOVERNMENT
17 TO SAY THAT YOU CAN JUST WAIT. THESE PEOPLE HAVE BEEN WAITING FOR
18 THIRTY YEARS. WHY SHOULD THEY HAVE TO WAIT WHEN THEY HAVE GOT --
19 THE GOVERNMENT HAS IT BACKWARDS. IT'S A WILD AND SCENIC RIVER,
20 IT'S AN OUTSTANDINGLY REMARKABLE VALUE. WE GET TO ENJOY IT.
21 WE'RE NOT SAYING THAT THEY CAN'T HAVE SOME SORT OF, YOU KNOW,
22 LIMITED MANAGEMENT RIGHTS TO THE RIVER. IT IS THEIR RIGHT AND
23 RESPONSIBILITY TO MANAGE THE RIVER. THEY CAN HAVE PERMITS, THEY
24 CAN REQUIRE SAFETY ISSUES AND SO FORTH, IN TERMS OF PROPER
25 EQUIPMENT. BUT TO COMPLETELY BAN US FROM THE RIVER? THAT IS NOT

1 PERMISSIBLE UNDER THE WILD AND SCENIC RIVERS ACT.

2 THE COURT: I THINK I ASKED YOU IN THIS TELEPHONE
3 CONFERENCE WE HAD EARLIER IF THIS IS NOT A PART OF THE SEGMENT OF
4 THE RIVER I HAD SOME OTHER LITIGATION OVER, WHERE THERE WAS A
5 CABLE OR SOMETHING ACROSS THE RIVER. DIDN'T I ASK THAT OF YOU?

6 MR. MITCHELL: YOU DID ASK THAT, AND I DON'T KNOW THE
7 ANSWER, YOUR HONOR. I HAVE NOT FOUND OUT.

8 THE COURT: I'M INCLINED TO THINK THAT IT IS. NOW, THAT
9 WAS PRIVATELY OWNED PROPERTY, THOUGH, AND THIS IS ALL GOVERNMENT
10 PROPERTY, THOUGH, ISN'T IT?

11 MR. MITCHELL: THERE IS SOME PRIVATE PROPERTY THAT ABUTS
12 THE RIVER IN THE UPPER PART OF THE RIVER.

13 THE COURT: AND IN THE UPPER REACHES. THAT WAS A
14 PRIVATE OWNER WHO WAS INVOLVED IN IT. I DON'T -- IT MAY HAVE
15 ENDED UP -- IN FACT, I'M NOT TOO SURE BUT WHAT THE RESOLUTION OF
16 THAT WAS THAT THE GOVERNMENT ENDED UP OWNING IT AFTER THAT, I
17 BELIEVE.

18 MR. TILDEN: IF I MAY, I BELIEVE THAT CASE WAS SETTLED,
19 AND I BELIEVE IT WAS ON THE WEST FORK OF THE CHATTOOGA, WHICH IS
20 CONSIDERED STILL THE WILD AND SCENIC RIVER CORRIDOR.

21 THE COURT: IT WAS A DIFFERENT FORK THAN WE'RE TALKING
22 ABOUT HERE.

23 MR. TILDEN: CORRECT.

24 THE COURT: THE WEST FORK WOULD HAVE BEEN COMPLETELY IN
25 GEORGIA.

1 MR. TILDEN: YES. THE WEST FORK IS COMPLETELY IN
2 GEORGIA, CORRECT.

3 THE COURT: THAT WAS THE LOVELLS; IS THAT NOT CORRECT?

4 MR. TILDEN: THAT'S CORRECT. AND --

5 THE COURT: DID THE GOVERNMENT END UP WITH THAT
6 PROPERTY?

7 MR. TILDEN: THE GOVERNMENT DID END UP WITH A PORTION OF
8 THAT PROPERTY.

9 THE COURT: ALL RIGHT. THAT'S WHAT I WAS THINKING.
10 THAT WAS PART OF THE RESOLUTION, WASN'T IT?

11 MR. TILDEN: RIGHT.

12 THE COURT: BUT THAT'S NOT PART OF THE RIVER WE'RE
13 TALKING ABOUT HERE.

14 MR. TILDEN: THAT'S CORRECT, YOUR HONOR, BECAUSE BOATING
15 IS ACTUALLY ALLOWED IN THAT SECTION OF THE RIVER ON THE WEST FORK.

16 THE COURT: OH, IT IS ALLOWED THERE?

17 MR. TILDEN: YES, SIR.

18 THE COURT: IN FACT, THAT WAS PART OF THE DISPUTE, PART
19 OF THE REASON THE CABLE WAS ACROSS THERE.

20 MR. TILDEN: THAT'S CORRECT, YES. AND THE FOREST
21 SERVICE AT THAT TIME WANTED THE CABLE REMOVED TO ALLOW FOR FREE
22 PASSAGE OF BOATS DOWN THAT AREA.

23 THE COURT: WHERE DOES THE WEST FORK COME INTO THE FORK
24 THAT WE'RE TALKING ABOUT HERE?

25 MR. TILDEN: BASICALLY --

1 THE COURT: ABOVE OR BELOW HIGHWAY 28?

2 MR. TILDEN: I BELIEVE BELOW.

3 THE COURT: OKAY.

4 MR. TILDEN: JUST BELOW.

5 THE COURT: JUST BELOW THAT BRIDGE?

6 MR. TILDEN: CORRECT.

7 THE COURT: ALL RIGHT. I'M SORRY TO INTERRUPT YOU,
8 MR. MITCHELL.

9 MR. MITCHELL: THAT'S ALL RIGHT, YOUR HONOR.

10 THE COURT: IT'S ALL -- I GET CASES LIKE THIS, I REALLY
11 HAVE THE STRONG URGE, YOU KNOW, TO GO TO THE SCENE.

12 MR. MITCHELL: WE'RE CERTAINLY NOT RELUCTANT TO HAVE YOU
13 DO THAT.

14 THE COURT: I DID THAT ON THE OLD WAGON TRAIL FROM
15 COMING OFF BRASSTOWN BALD. THAT WAS IN A WILD AND SCENIC AREA,
16 TOO. THE PROBLEM WAS WE -- WE COULDN'T GET THERE ANY OTHER WAY
17 THAN HIKING, BUT THEY MANAGED TO ARRANGE FOR US TO USE A MOTORIZED
18 VEHICLE PART OF THE WAY.

19 MR. MITCHELL: YOUR HONOR, AS YOU RAISE THE ISSUE, YOU
20 MENTIONED EARLIER THAT THIS PART OF THE RIVER SEEMS TO BE NO MORE
21 THAN A CREEK, AND I'M NOT AN EXPERT ON RIVERS BY ANY STRETCH, BUT
22 IT'S MY UNDERSTANDING THAT -- KIND OF THE ANOMALY IN ALL OF THIS
23 IS THAT THAT PART OF THE RIVER IS BOATABLE MOST -- THE MOST
24 DESIRED PART -- THE MOST DESIRED TIME TO BOAT THAT RIVER IS
25 IMMEDIATELY AFTER A HEAVY RAIN EVENT, LIKE THE ONE WE HAD A WEEK

1 OR SO AGO. AND THERE AREN'T --

2 THE COURT: WE DON'T HAVE MANY OF THOSE HERE ANY MORE.

3 MR. MITCHELL: NO, WE HAVEN'T HAD MANY LATELY. AND
4 THERE ARE ONLY CERTAIN TIMES OF THE YEAR REALLY WHEN THEY DO
5 OCCUR, AND, YOU KNOW, THERE ARE A LIMITED NUMBER OF DAYS WHERE THE
6 RIVER IS AFFECTED BY THIS. AND, AGAIN, I DON'T KNOW A LOT ABOUT
7 FISHING, EITHER, BUT I UNDERSTAND THAT WHEN THE WATER IS VERY HIGH
8 ON THIS RIVER AS THE KAYAKERS LIKE IT TO BE, THAT THE FISHERMAN --
9 IT'S NOT PARTICULARLY GOOD FISHING, ANYWAY. THAT'S KIND OF AN
10 ISSUE FOR OUR --

11 THE COURT: THAT HAS TO ADDRESS ITSELF TO THE FORESTER
12 AND THEIR INVESTIGATION, I WOULD THINK.

13 MR. MITCHELL: RIGHT.

14 THE COURT: NOT MY DETERMINATION.

15 MR. MITCHELL: SO YOUR HONOR, AGAIN, I WOULD JUST ASK
16 THE COURT TO CONSIDER THE STANDARDS BY WHICH YOU SHOULD JUDGE A
17 MOTION TO DISMISS, THAT THE ALLEGATIONS BE TAKEN AS TRUE, AND THAT
18 IF THERE IS ANY ESSENTIALLY TRIABLE ISSUE, THAT THE MOTION TO
19 DISMISS SHOULD BE DENIED.

20 AND I THINK HERE THAT RIPENESS AND STANDING ARE EASILY
21 MET. I WOULD BE HAPPY TO GO THROUGH THE OHIO FORESTRY
22 DISTINCTIONS. FIRST OF ALL, OHIO FORESTRY INVOLVED A LAND AND
23 RESOURCE MANAGEMENT PLAN WHERE FOREST HARVESTING HAD BEEN
24 DESIGNATED BUT NO ORDER HAD BEEN MADE PERMITTING ANYONE TO DO THE
25 FORESTING. AND THE COURT SAID THIS IS NOT A SITUATION WHERE

1 SOMEONE HAS BEEN ORDERED NOT TO DO SOMETHING, THAT THEY WANT TO DO
2 OR IS DOING SOMETHING THAT THEY ARE BEING FORBIDDEN TO DO. AND
3 THAT'S IN CONTRAST TO THE SITUATION HERE WHERE WE ARE BEING
4 ORDERED NOT TO DO SOMETHING THAT WE WANT TO DO AND ARE BEING
5 FORBIDDEN TO DO SOMETHING, AND THAT COMPLETELY DISTINGUISHES THIS
6 CASE FROM OHIO FORESTRY.

7 THE COURT: WELL, LET ME ASK YOU THIS, MR. MITCHELL. I
8 THINK PART OF IT YOU HAVE TO BE SOMEWHAT PRAGMATIC, AND YOU ALSO
9 NORMALLY -- I WILL BE CANDID WITH YOU, AS I SAID IN THE BEGINNING,
10 I VACILLATED SORT OF MY VIEWS ON THIS THING, WITH THE BRIEF
11 ATTENTION IT'S GOTTEN SO FAR FROM ME, AND THE MORE RECENT ONE --
12 MAYBE IT WAS LEANING A LITTLE BIT YOUR WAY, BUT I'M NOT SURE WHERE
13 I STAND RIGHT NOW BECAUSE THERE IS SOME OF THIS CAUSES ME SOME
14 CONCERN.

15 YOU KNOW, AN INJUNCTION NORMALLY WHAT YOU ARE TRYING TO
16 DO IS MAINTAIN THE STATUS QUO, AND YOU ADDRESSED THAT A MOMENT
17 AGO, BUT YOU -- THE STATUS QUO HAS BEEN FOR THIRTY YEARS THAT
18 BOATING WAS NOT ALLOWED. YOU SAY THAT'S BEEN ILLEGAL, I
19 UNDERSTAND THAT ARGUMENT. SO YOU DON'T NEED TO DO IT AGAIN.

20 NOW, SECONDLY, I HAVE A PROBLEM WITH SAYING -- AND YOU
21 CHANGE SOMETHING AND THEN YOU ONLY HAVE TO CHANGE IT BACK AGAIN IN
22 SIX MONTHS TIME OR A YEAR'S TIME BECAUSE YOU CHANGE IT BEFORE YOU
23 GIVE THE GOVERNMENTAL AUTHORITIES, THE BUREAUCRATS, THE CHANCE TO
24 DO WHAT THEY ARE REQUIRED BY LAW TO DO. AND YOU SAY THEY HAVEN'T
25 DONE IT IN THE PAST, BUT APPARENTLY ARE DOING IT NOW, BUT YOU SAY

1 THEY ARE NOT DOING IT RIGHT.

2 MR. MITCHELL: NO, EXCUSE ME, YOUR HONOR. I DON'T MEAN
3 TO INTERRUPT YOU. WE ARE NOT JUDGING THE STUDY AT THIS POINT. WE
4 ARE SAYING THAT WHEN GLORIA MANNING DECIDED -- I MEAN, THE
5 GOVERNMENT ITSELF DECIDED THAT IT HAD NOT HAD A SUFFICIENT STUDY
6 TO BAN BOATING, AND AGAIN BECAUSE IT'S A WILD AND SCENIC RIVER AND
7 BECAUSE IT'S AN OUTSTANDINGLY REMARKABLE VALUE, WE ARE ENTITLED TO
8 ENJOY THE OUTSTANDINGLY REMARKABLE VALUES IN THE ABSENCE OF A
9 STUDY THAT HAS A HEAVY BURDEN ON IT TO DENY US THAT RIGHT. AND
10 HERE THERE IS NOTHING, THE SLATE IS CLEAN. MR. MCCLAIN TALKS
11 ABOUT HAVING A NEW ADMINISTRATIVE RECORD. OF COURSE THEY WANT A
12 NEW ADMINISTRATIVE RECORD BECAUSE THE ONE THEY HAVE FAILED. AND
13 DURING THIS TIME -- AND IT MAY BE A YEAR-AND-A-HALF, IT MAY BE TWO
14 YEARS, I HAVE NO IDEA WHEN THEY WILL ACTUALLY FINISH THIS STUDY,
15 AND NEITHER DO THEY. WHY IN THE WORLD, GIVEN THAT THIS IS A WILD
16 AND SCENIC RIVER, GIVEN THAT THIS IS AN OUTSTANDINGLY REMARKABLE
17 VALUE, GIVEN THAT GLORIA MANNING HAS ADDRESSED ALL OF THESE
18 ISSUES, INCLUDING THE SAFETY ISSUES IN HER ORDER, WHY SHOULD THESE
19 PEOPLE BE DENIED THIS OUTSTANDINGLY REMARKABLE VALUE? THE PURPOSE
20 OF THE WILD AND SCENIC RIVERS ACT IS TO OPEN UP THESE TERRITORIES,
21 NOT TO CLOSE THEM DOWN. THAT IS THE ONLY TWENTY-ONE RIVERS MILES
22 IN THE SYSTEM. THERE IS SOMETHING WRONG HERE.

23 THE COURT: WELL, AGAIN, THIS DOESN'T HAVE REALLY
24 ANYTHING TO DO, I DON'T GUESS, WITH THE MOTION TO DISMISS, BUT AM
25 I NOT CORRECT THERE ARE FIVE CLASSIFICATIONS OF -- FROM A KAYAKING

1 STANDPOINT OR FROM A BOATING STANDPOINT, FIVE CLASSIFICATIONS? OR
2 AM I INCORRECT?

3 MR. MITCHELL: THAT'S MY UNDERSTANDING, YOUR HONOR, I'M
4 A SKIER, MYSELF, BUT THAT'S MY UNDERSTANDING, ALSO.

5 THE COURT: ABOUT AS EQUALLY AS DANGEROUS, I GUESS. I
6 WOULD THINK KAYAKING, AS I TOLD YOU BEFORE, I -- WHEN I WAS A KID
7 WE DIDN'T HAVE -- THEY DIDN'T HAVE THE TECHNOLOGY THE KAYAKS HAD
8 TODAY. MINE WAS A BUILT LIKE AN OLD PIPER CUB PLANE WITH STRUTS
9 AND CANVAS, AND IT WOULD NEVER HAVE WITHSTOOD A STREAM LIKE
10 CHATTOOGA. BUT I THOUGHT THERE WERE -- WELL, WHAT I WAS GOING TO
11 SAY -- I WOULD THINK YOU TALK ABOUT DANGER, I WOULD THINK THERE IS
12 NOT MUCH MORE DANGER THAN A KAYAKER HAVING A FLY HOOKED IN HIM
13 GOING DOWN STREAM. ONE OR THE OTHER IS GOING TO HAVE TO BE -- I
14 WOULD THINK -- THAT'S NOT FOR THE COURT TO DECIDE -- THAT'S FOR
15 THE BUREAUCRATS TO DECIDE -- BUT GEE WHIZ. I HOOK ENOUGH
16 SQUIRRELS WITH MY FLY ROD, I WOULD HATE TO THINK OF HOOKING A
17 KAYAKER.

18 MR. MITCHELL: WELL, YOUR HONOR, YOU ARE ABSOLUTELY
19 CORRECT. THAT IS FOR THE BUREAUCRATS, IF YOU WILL, TO DECIDE.
20 THEY HAVEN'T DECIDED --

21 THE COURT: WELL, I USE THAT TERM BECAUSE I AM NOT ONE
22 THAT LIKES BUREAUCRACIES.

23 MR. MITCHELL: I DON'T TAKE IT AS A PEJORATIVE TERM BY
24 ANY MEANS. BUT IT IS -- THAT STUDY HAS NEVER BEEN DONE. I MEAN,
25 THE ABSENCE OF A STUDY.

1 THE COURT: WELL, THAT MAY BE WHAT THEY ARE DOING.

2 MR. MITCHELL: WELL, BUT THAT GIVES THEM NO BASIS WHILE
3 THEY ARE DOING IT TO BAN BOATING. THE DEFAULT POSITION IS YOU GET
4 TO ENJOY THE ORV.

5 THE COURT: I HAVE UNDERSTAND. I THOUGHT THERE WERE
6 FIVE CLASSIFICATIONS OF RIVER, AND MY NEXT QUESTION WAS GOING TO
7 BE, WHAT IS THE CLASSIFICATION OF THIS UPPER 21 MILES.

8 MR. MITCHELL: I WOULD HAVE TO ASK ONE OF MY CLIENTS
9 THAT. I THINK IT VARIES WITH THE STREAM LEVEL AND LOCATION.

10 THE COURT: TWENTY-ONE MILES COULD BE DIFFERENT
11 CLASSIFICATIONS, I GUESS.

12 MR. MITCHELL: IT'S A VERY CHALLENGING STRETCH OF RIVER,
13 THERE IS NO QUESTION ABOUT THAT.

14 THE COURT: WELL, I HAD ALWAYS THOUGHT IT WAS ONE OF THE
15 MOST CHALLENGING IN THE COUNTRY, THAT IT WAS THE HIGHEST
16 CLASSIFICATION, WHATEVER THAT -- AND I THOUGHT THERE WAS -- THEY
17 WERE GRADED ONE THROUGH FIVE SOME WAY, BUT I COULD BE WRONG. AND
18 MY NEXT QUESTION WAS GOING TO BE, WELL, WHAT ARE THE
19 CLASSIFICATIONS BELOW RIDGE NUMBER -- OR HIGHWAY NUMBER 28. THOSE
20 ARE NOT THINGS THAT I HAVE TO DECIDE. THIS WAS JUST PART OF MY
21 ADDITIONAL CURIOSITY.

22 MR. MITCHELL: WELL, TO SUMMARIZE, YOUR HONOR, THE -- I
23 THINK IT'S IMPORTANT TO UNDERSTAND WHAT WE DO SEEK AND WE DON'T --
24 WE DON'T SEEK TO TAKE ON THEIR STUDY. IF WE DID, THEN WE WOULD
25 HAVE A HUGE EVIDENTIARY ISSUE TO DEAL WITH. THIS IS A -- IN OUR

1 VIEW THIS IS A SIMPLE LAWSUIT. IT'S A WILD AND SCENIC RIVER.
2 THERE IS NO BASIS TO BAN THIS OUTSTANDINGLY REMARKABLE VALUE. THE
3 FACT THAT THEY MAY SPEND ANOTHER YEAR-AND-A-HALF OR TWO YEARS OR
4 WHATEVER DOING WHATEVER STUDY THEY ARE GOING TO DO DOES NOT
5 SUBSTITUTE FOR THE DEFICIENCY THAT EXISTS NOW AND HAS EXISTED FOR
6 THIRTY YEARS IN THIS PLAN THAT THERE HAS BEEN NO STUDY DONE AT ANY
7 POINT IN TIME THAT HAS BEEN SUFFICIENT TO GIVE RISE TO THIS BAN.

8 WE MEET ALL THE -- ALL THE CRITERIA FOR STANDING, WE
9 MEET THE CRITERIA FOR RIPENESS. AND UNDER THE STANDARDS OF THE
10 MOTION TO DISMISS, YOUR HONOR, I WOULD REQUEST THAT YOU DENY THE
11 GOVERNMENT'S MOTION.

12 THE COURT: LET ME ASK YOU AGAIN GOING BACK, DO YOU --
13 SINCE BOTH OF YOU ARE AGREEABLE THAT THE MATTER CAN BE SUBMITTED
14 ON ITS RECORD ON AN INJUNCTION REQUEST, I'VE INDICATED I WOULD IN
15 ACCORDANCE WITH RULE 65 -- AND I GUESS I SHOULD DO THAT IN A
16 WRITTEN ORDER AS OPPOSED TO JUST ANNOUNCING IT TODAY. I WOULD
17 ACCELERATE THAT TO A PERMANENT OR FINAL HEARING. BUT YOU -- DO
18 YOU WANT FURTHER ORAL ARGUMENT ON THAT ISSUE OR DO YOU WANT THAT
19 MATTER JUST SUBMITTED ON THE RECORD.

20 MR. MITCHELL: I WOULD PREFER TO HAVE ORAL ARGUMENT,
21 YOUR HONOR.

22 THE COURT: OKAY. THAT MEANS I NEED TO GO AHEAD AND
23 DISPOSE OF THIS BEFORE I ADDRESS THAT, THEN. PROBABLY. IF I HAD
24 REALIZED IT, I WOULD HAVE SET THEM BOTH DOWN FOR ORAL ARGUMENT AT
25 THE SAME TIME JUST TO SAVE ANOTHER APPEARANCE.

1 ALL RIGHT. WHAT ABOUT YOU, MR. MCCLAIN?

2 MR. MCCLAIN: WE'RE GOOD AT HAVING ANOTHER HEARING, AS
3 WELL, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. MCCLAIN: YOUR HONOR, COULD I JUST MAKE -- I DON'T
6 KNOW IF YOUR HONOR WAS GOING TO LET ME REPLY, BUT IF I COULD MAKE
7 JUST FOUR POINTS?

8 THE COURT: YOU CAN DO IT VERY QUICKLY.

9 MR. MCCLAIN: I WILL, YOUR HONOR.

10 THE FIRST IS A FACTUAL ISSUE THAT'S NOT -- PROBABLY NOT
11 RELEVANT TO THE MOTION, BUT MR. MITCHELL SAYS THIS IS THE ONLY
12 RIVER THAT HAS ANY AREAS CLOSED TO BOATING, AND THEY HAD SAID --
13 WE HAD SAID IN OUR OPPOSITION TO THE PRELIMINARY INJUNCTION THAT
14 WAS NOT TRUE, THAT ACTUALLY THE UPPER TWENTY-ONE MILES OF THE
15 UPPER ROGUE, WHICH IS SOMEWHERE IN THE PACIFIC NORTHWEST IS, IN
16 FACT, CLOSED TO BOATING.

17 THE COURT: ROGUE?

18 MR. MCCLAIN: YES. AND THEY HAD DISPUTED THAT IN THEIR
19 REPLY. SINCE THEY DISPUTED THAT IN OUR REPLY. WE HAVE SINCE RUN
20 THAT BACK THROUGH THE FOREST SERVICE AND HAVE RECEIVED BACK
21 INFORMATION FROM WASHINGTON THAT, IN FACT, THAT PORTIONS OF THE
22 ROGUE IS CLOSED. SO MR. MITCHELL SAYS HE CAN PROVIDE EVIDENCE,
23 BUT AT LEAST WHAT PEOPLE IN WASHINGTON ARE TELLING ME AT THE
24 AGENCY IS THAT, IN FACT, THIS IS NOT THE ONLY RIVER THAT HAS
25 PORTIONS CLOSED TO BOATING.

1 THE COURT: THE ROGUE IS A FASCINATING RIVER, TOO.
2 THAT'S IN SOUTHERN OREGON.

3 MR. MCCLAIN: OKAY, THAT'S GOOD.

4 THE COURT: IT'S IN THE SOUTHERN PART OF OREGON.

5 MR. MCCLAIN: WELL, I THOUGHT WE HAD IT RIGHT, BUT IT
6 WAS SAFER TO SAY PACIFIC NORTHWEST.

7 THE SECOND POINT, YOUR HONOR, IS THAT THE PLAINTIFFS AND
8 MR. MITCHELL, ONE OF THEIR PRIMARY RETORTS TO THE RIPENESS
9 ARGUMENT IS THAT THEY HAVE A FINAL AGENCY ACTION. AND THAT --
10 THAT IS A TERM OF ART IN THE APA THAT FOR THE COURT TO HAVE
11 JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT THERE HAS TO
12 BE A FINAL ADMINISTRATIVE ACTION. WE DON'T CONCEDE THAT THERE IS
13 SUCH AN ACTION BECAUSE THERE IS A TESTST THAT'S LAID OUT IN THE
14 CASES THAT SAY HAS THE AGENCY COMPLETED ALL THE WORK IT NEEDS TO
15 DO, ETCETERA.

16 BUT WE HAVEN'T MADE THAT ARGUMENT IN OUR MOTION THAT
17 THERE IS NO FINAL AGENCY ACTION. BUT THE POINT I WANTED TO MAKE
18 FOR YOUR HONOR IS THAT IT'S A SEPARATE QUESTION OF WHETHER THERE
19 IS A FINAL AGENCY ACTION FOR STATUTORY PURPOSES AND WHETHER A
20 DISPUTE IS RIPE FOR CONSTITUTIONAL SLASH PRUDENTIAL PURPOSES. AND
21 THE AUTHORITY FOR THAT, YOUR HONOR, IS THE NATIONAL PARK
22 HOSPITALITY CASE, SUPREME COURT CASE FROM 2003, IT'S 538 U.S. 803,
23 AND THE PAGE IS 812. AND WHAT THE SUPREME COURT SAYS, IT SAYS,
24 ALTHOUGH THE QUESTION PRESENTED HERE IS PURELY LEGAL AND
25 CONSTITUTES A FINAL AGENCY ACTION WITHIN THE MEANING OF SECTION 10

1 OF THE APA, WE NEVERTHELESS BELIEVE THAT FURTHER FACTUAL
2 DEVELOPMENT WOULD SIGNIFICANTLY ADVANCE OR ABILITY TO DEAL WITH
3 THE LEGAL ISSUES PRESENTED.

4 AND THE COURT GOES ON TO HOLD THAT THE CONTROVERSY WAS
5 NOT RIPE. SO THERE IS -- THERE IS A CASE FROM 2003, SUPREME
6 COURT, THAT SAYS EVEN IF THERE IS A FINAL AGENCY ACTION, WHATEVER
7 THAT MEANS, AND WE DON'T CONCEDE THERE IS ONE HERE, BUT EVEN IF
8 THERE IS AS THE PLAINTIFFS HAVE EMPHASIZED, THAT DOESN'T PRECLUDE
9 A FINDING OF NO RIPENESS. AND THE SUPREME COURT HAS MADE THAT
10 CLEAR.

11 THE THIRD POINT I WANTED TO MAKE IS MR. MITCHELL SAYS
12 THERE HAS NEVER BEEN A STUDY TO SUPPORT THE PROHIBITION. AND THE
13 IMPORTANCE OF THAT ARGUMENT, I BELIEVE, YOUR HONOR, IT SHOWS THEY
14 REALLY ARE CHALLENGING THE 1985 PLAN. BECAUSE THEY HAVEN'T -- I
15 MEAN, HE SAID THEY DIDN'T IN THEIR ARGUMENT, BUT IF YOU LOOK AT
16 THEIR COMPLAINT AND PRELIMINARY INJUNCTION MOTION THEY HAVE NEVER
17 CHALLENGED THE '85 PLAN, AT LEAST AS A TACTICAL MATTER, IN THIS
18 CASE. IT'S NOT IN THEIR COMPLAINT OR PRELIMINARY INJUNCTION. FOR
19 THEM TO SAY THERE HAS NEVER BEEN A STUDY, THEY HAVE TO BE
20 ATTACKING THAT PLAN BECAUSE IF THAT PLAN IF IT'S NOT ATTACKED, IS
21 PRESUMED VALID. IT IS DEEMED VALID IN THIS CASE WITHOUT AN ATTACK
22 ON IT. TO SAY IT'S SUPPORTED BY A STUDY IS DE FACTO AN ATTACK ON
23 THE PLAN, WE SUBMIT, BECAUSE IT'S NOT CHALLENGED IN THE COMPLAINT,
24 IT'S NOT CHALLENGED IN THE MOTION, THAT YOUR HONOR CAN'T REACH THE
25 ISSUE OF WHETHER THAT PLAN IS VALID, IT IS DEEMED VALID IN THIS

1 CASE, AND IT IS DEEMED TO BE SUPPORTED BY THE EVIDENCE.

2 WE CITE SOME OF THE EVIDENCE OR SOME OF THE FINDINGS IN
3 OUR MOTION THAT THERE WERE DEATHS AND THAT THERE WAS TROUT FISHING
4 ISSUES, BUT THAT PLAN SHOULD NOT BE DEEMED AS UNDER ATTACK IN THIS
5 CASE. AND THE REASON WE BELIEVE THEY DIDN'T, YOUR HONOR, IS THERE
6 IS A SIX-YEAR STATUTE OF LIMITATIONS UNDER APA FOR CHALLENGING
7 REGULATIONS AND AGENCY ACTION. OBVIOUSLY THE 1985 STATUTE OF
8 LIMITATIONS HAS PASSED, AND SO WE BELIEVE THERE IS A REASON THAT
9 THEIR COMPLAINT DOESN'T ATTACK THE VALIDITY OF THOSE PLANS OR THE
10 REGULATION IS BECAUSE IT'S TIME BARRED. AND WE CITE IN OUR MOTION
11 THE STATUTE THAT HAS THE SIX-YEAR STATUTE OF LIMITATIONS AND A
12 CASE THAT HAS APPLIED IT IN THE APA CONTEXT.

13 THE -- AND JUST ONE SIDE NOTE ON THAT, HE SAYS NO
14 EVIDENCE, BUT EXHIBIT B TO THEIR COMPLAINT ON THE FRONT OF THAT IT
15 SAYS THIS IS THE ONLY EVIDENCE OF USER CONFLICTS OR SOMETHING TO
16 THAT, THERE IS ACTUALLY A HANDWRITTEN NOTE ON IT. I DON'T KNOW IF
17 IT WAS MADE BY THE FOREST SERVICE OR WHO, BUT IT'S ACTUALLY A
18 REPORT THAT PRESUMABLY IS PART OF THE RECORD, IT'S ATTACHED TO
19 THEIR COMPLAINT THAT ACTUALLY DISCUSSES SOME OF THE TROUT
20 FISHERMEN VERSUS BOATING CONFLICTS THAT HAVE OCCURRED OVER TIME.
21 IT'S DATED IN 1980, AND IT CITES, YOU KNOW, EVIDENCE OR
22 CONVERSATIONS, INTERVIEWS THAT THE AUTHOR HAD HAD IN THE 1970'S
23 ABOUT THAT ISSUE.

24 AND THEN THE FINAL ISSUE IS THE WHY WAIT ISSUE? IT GETS
25 BACK TO THE THIRTY YEAR PROHIBITION -- AND I'LL WRAP UP BECAUSE I

1 KNOW WE'VE BEEN OVER THIS. THE WAY YOU KNOW THEY CHALLENGE THE
2 '85 PLAN BECAUSE IF THE '85 PLAN HAD PERMITTED FLOATING, THEN WHAT
3 MS. MANNING WOULD HAVE DONE, SHE WOULD HAVE REVERSED THE DECISION
4 THAT THEY MADE IN '04, REVERTED TO THE '85 PLAN, AND THEN WE WOULD
5 HAVE FLOATING. IF THE '85 PLAN PERMITTED FLOATING, THAT'S WHERE
6 WE WOULD BE.

7 BUT THAT'S NOT WHAT THE '85 PLAN DID. IT PROHIBITED THE
8 FLOATING, AND SO WE HAD TO REVERT TO SOMETHING YOU CAN'T HAVE A
9 FOREST WITHOUT MANAGEMENT, IT VIOLATES THE NATIONAL FOREST
10 MANAGEMENT ACT. IT VIOLATES NIPA SO THERE HAS TO BE A MANAGEMENT
11 PLAN, THAT'S BEEN CONGRESSIONALLY DIRECTED. SO REALLY THE ONLY
12 CHOICE FOR THE FOREST SERVICE IF SOMETHING IS THROWN OUT IS TO
13 REVERT WHATEVER EXISTED BEFORE BECAUSE THAT WENT THROUGH PUBLIC
14 NOTICE WENT THROUGH PUBLIC COMMENT, IT WENT THROUGH ALL THE
15 REGULATORY AND CONGRESSIONAL REQUIREMENTS THAT THE FOREST SERVICE
16 IS UNDER TO MAKE SURE THERE IS A MANAGEMENT PLAN FOR THE RIVER.

17 SO MR. MITCHELL SAYS WHY WAIT AND THE ANSWER IS BECAUSE
18 WE DON'T KNOW WHAT WOULD HAPPEN IF WE OPENED THAT TWENTY-ONE MILES
19 TO THE PUBLIC. WE DON'T KNOW IF THERE WOULD BE TROUT FISHERMEN
20 AND BOATERS IN CONFLICT. WE DON'T KNOW IF THE TROUT FISHING
21 EXPERIENCE WOULD BE DESTROYED BY THE BOATING THAT GOES THROUGH
22 THERE. WE DON'T KNOW IF THERE WOULD BE SAFETY ISSUES.

23 THE ONLY THING THAT HAS BEEN PROPERLY PROMULGATED,
24 STUDIED OR PASSED OR HAD PUBLIC COMMENT IS THE PROHIBITION.
25 THAT'S FROM '76 TO '85, AND ALL THE WAY TO 2004. THERE IS NO

1 DISPUTE OR AT LEAST THERE IS NO CHALLENGE HERE THAT ALL OF THAT
2 COMPLIED WITH CONGRESSIONAL STATUTE AND REGULATIONS. SO THE
3 PROHIBITION IS PROPERLY IN PLACE. THE QUESTION IS, SHOULD WE
4 CHANGE THE STATUS QUO? AND ON THAT QUESTION, YOUR HONOR, WE SAY
5 WE SHOULD STUDY IT, AND THAT'S WHAT MS. MANNING FOUND, AND THAT'S
6 WHAT THE RIPENESS DOCTRINE IS ABOUT IS LETTING THE AGENCY COMPLETE
7 ITS WORK BEFORE THE COURT DECIDES THE QUESTION WITHOUT A
8 SUFFICIENT RECORD.

9 THANK YOU, YOUR HONOR.

10 THE COURT: ANYTHING FURTHER?

11 MR. MITCHELL: WELL, YOUR HONOR, JUST TO -- WE THINK
12 IT'S BEEN ILLEGAL FOR THIRTY YEARS. BUT THE FACT THAT WE
13 CHALLENGE THE LAST ORDER IS THE FACT THAT WE DIDN'T CHALLENGE THE
14 LAST ORDER, AND WE WON ON THAT, EXCEPT FOR THE WAY THAT GLORIA
15 MANNING FINISHED IT. SHE COULD HAVE REVERTED TO OTHER OPTIONS IN
16 THE PLAN THEY WERE IN THE PLAN, SHE COULD HAVE DONE IT. INSTEAD,
17 SHE WENT BACK TO A PLAN THAT IS ITSELF DEFICIENT. IF THERE IS ANY
18 DOUBT WE HAVE THE '85 PLAN IN THE CASE, IT IS IN THE CASE BECAUSE
19 IT'S DEFICIENT.

20 THANK YOU.

21 THE COURT: ALL RIGHT. THANK YOU. WE'LL TAKE THE
22 MATTER UNDER ADVISEMENT, TRY TO GET IT OUT WITHOUT TOO MUCH DELAY.
23 THANK YOU.

24 MR. MCCLAIN: THANK YOU, YOUR HONOR.

25 (PROCEEDINGS CONCLUDED)

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

I, LOIS D. PHILLIPS, OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, DO HEREBY CERTIFY THAT THE FOREGOING PAGES INCLUSIVE, CONSTITUTE A TRUE TRANSCRIPT OF THE PROCEEDINGS HAD BEFORE THE SAID COURT HELD IN THE CITY OF GAINESVILLE, GEORGIA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF I HAVE HEREUNTO SET MY HAND ON THIS 8TH DAY OF NOVEMBER, 2006.



LOIS D. PHILLIPS, RMR, CRR
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, et al.	:	CIVIL ACTION NO.
	:	
Plaintiff,	:	2:06-CV-0074-WCO
	:	
v.	:	
	:	
DALE BOSWORTH, in his official	:	
capacity as Chief of the United States	:	
Forest Service, et al.	:	
	:	
Defendants.	:	

**FEDERAL DEFENDANTS' OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

I. INTRODUCTION

The federal defendants have filed a motion to dismiss, which, if granted, moots plaintiffs' motion for a preliminary injunction. Even if the Court were to reach the merits of the motion, plaintiffs fail to establish any of the four requirements for injunctive relief.

They have no likelihood of success on the merits under the Administrative Procedure Act ("APA"), because the 2005 Order at issue does not violate the Wild and Scenic Rivers Act ("WSRA") and is not arbitrary or capricious. Plaintiffs' argument to the contrary assumes that WSRA mandates that the Chattooga be opened to floating in all places, at all times, and by all users. But nothing in WSRA requires that result; to the contrary, WSRA confers broad discretion on the Forest Service to regulate and limit recreational uses to accommodate competing river values.

Plaintiffs' effort to show that the 2005 Order is arbitrary and capricious based on cherry-picking quotes out of context from the 2005 Order equally fails. The bottom-line conclusion of the 2005 Order is that the record before the Reviewing Officer was insufficient to determine that the 30-year prohibition on floating on the Chattooga's Headwaters should be continued, and that therefore the issue should be studied and a new decision made. Ordering a study to determine whether things have changed since the 1970s, when the prohibition first went into effect based on evidence of conflicts between boaters and fishermen, and when boaters died and were injured while floating the Headwaters, is imminently reasonable. Indeed, it would be irresponsible, and possibly violate a host of environmental laws, to throw open the river without first ascertaining whether and how the prohibition should be lifted and what the effects of doing so would be. The 2005 Order merely leaves in place the prohibition required by numerous prior forest plans and a properly-promulgated regulation, none of which is challenged here, while the study is completed. That action is rational and well within the bounds of agency discretion.

In any event, plaintiffs' request for the Court to open the river, despite a deficient record and without knowing the consequences, is foreclosed by recent Supreme Court precedent. That precedent makes clear that broad statutory mandates, like the WSRA mandate at issue here, cannot be enforced under the APA by mandatory injunction.

Finally, plaintiffs' claim that they are suffering irreparable injury, requiring immediate judicial intervention, from a prohibition that has been in place for thirty years

cannot be sustained. Nor have the plaintiffs shown that an injunction would serve the public interest. Indeed, plaintiffs' requested injunction would result in a disservice to the public and the reasoned and well-informed management decisions it deserves and expects from the Forest Service. Plaintiffs' motion should be denied.

II. BACKGROUND

The management history of the Chattooga Wild and Scenic River is best understood by reviewing seven key Forest Service documents spanning over 35 years.

A. Chattooga Wild and Scenic River Study Report – June 15, 1971

Prior to the Chattooga's designation as a Wild and Scenic River, the Forest Service performed a comprehensive study of the river and completed the Chattooga Wild and Scenic River Study Report ("Study Report"), dated June 1971. The study began in 1969 and was a significant governmental undertaking.

The study began with the assignment of a Forest Service field team charged with collecting and analyzing data on the river and its environment. A Task Force, consisting of a number of representatives, including the Governors of North Carolina, South Carolina and Georgia, as well as the Forest Supervisors for the Nantahala, Sumter and Chattahoochee National Forest, and the Bureau of Outdoor Recreation, United States Department of the Interior, reviewed the work of the field team and drafts of the study report. In addition to the Task Force, numerous other federal and state agencies, private individuals, and conservation groups contributed to the study effort and two public meetings provided an opportunity for interested citizens to express their opinions

concerning the future of the Chattooga. See Study Report at 1.

The Chattooga was designated by Congress as a Wild and Scenic River on May 10, 1974. The portion of the Chattooga designated as a component of the Wild and Scenic Rivers System covers a total distance of 57 miles. See 16 U.S.C. § 1274(a)(10).

B. Chattooga Wild and Scenic River Classification, Boundaries and Development Plan – March 15, 1976

The values for which the river was designated (otherwise referred to as Outstandingly Remarkable Values or ORVs) are (1) Geology, (2) Biology, (3) Scenery, (4) Recreation, and (5) History. Although noted as one among many recreational pursuits, floating was not identified as an ORV. Subsequent to its designation by Congress, the Forest Service published the Chattooga Classification, Boundaries and Development Plan in the Federal Register. See 41 Fed. Reg. 11,847 (Mar. 22, 1976).

The Development Plan recognized four recreational uses: boating, fishing, hiking, and camping. Id. at 11,849. Without being specific about which sections, the Development Plan states that sections of the river are ideal for floating in canoes, kayaks and rubber rafts. The Development Plan provides more detail about trout fishing. It states that trout fishing on the Chattooga ranges from excellent in the upper reaches to extremely marginal in the lowermost reaches, as a result of different water temperatures. It continues that because of its location in the South, the river is an extremely popular area for trout fishing. Most importantly, the Development Plan also states “[t]he recent increase in floaters using the river has had a detrimental effect on the fishing experience.

Conflicts have developed on certain sections of the river where floaters and fishermen use the same waters.” Id. at 11,849.

The Development Plan recognized that restrictions in WSRA limit the types of permissible recreation use, especially in those sections of the river designated “wild” or “scenic,” as opposed to areas designated “recreation.” It states that compatible uses on the Chattooga are floating, hiking, hunting, fishing, and camping. However, it states, “[a]lthough current levels of all types of uses create some problems, uncontrolled future use would probably result in safety hazards and a lowering of the quality of the recreation experience and when need warrants, this will be prevented by the establishment of regulations limiting size, number, type, etc., to provide optimum use.” Id. at 11,850.

In furtherance of the objective to strike an optimum balance of recreational uses and avoid user conflicts on the entire Chattooga, and while discussing areas of the river directly upstream of SC/GA Highway 28, the Development Plan states “[t]his area remains a favorite spot for trout fishing. This location is the source of some of the best trout fishing in both South Carolina and Georgia. Floating will be prohibited above Highway 28” Id. at 11,852. Although floating above Highway 28 was to be prohibited, to make certain that floating was accommodated on the river, no limitations or restrictions were placed on floating downstream of Highway 28, consisting of over 36 miles of the 57 mile river corridor. The Forest Service determined that this large portion was the most generally desirable, physically suitable, and highly used area for floating on the river. By exercising its discretion to manage the river this way, the Forest Service

was able to reasonably accommodate two specific conflicting recreational uses, benefitting the individuals who wished to float the river and those who wished to experience quality trout fishing in the only areas of the river that offered that experience.

C. Chattooga Wild and Scenic River Management Plan – August 26, 1977

Pursuant to 28 U.S.C. §1281(a), the Forest Service completed the first Chattooga Wild and Scenic River Management Plan (“1977 River Plan”) on August 26, 1977. The general objective of the plan was to provide direction in the day-to-day management of the resources and people using the river in a way that ensured protection and enhancement of the river’s ORVs. See 1977 River Plan.

Consistent with statements in the Development Plan issued a little over one year prior, the 1977 River Plan stated that “[a]lmost all floating occurs below [the] Highway 28 bridge. Fishermen tend to congregate at [the] Highway 28 Bridge, Burrells Ford and Bull Pen Bridge, the major stocking points [upstream of Highway 28].” Id. at 2. With regard to fisheries, the plan designated vehicular fish stocking points and again proclaimed that “[f]loating above Highway 28 Bridge will be prohibited and fishing encouraged in this section.” Id. at 26.

In an effort to properly manage the floating use and user conflicts, and to provide for safety of the public, the 1977 River Plan reiterates Interim Regulations and a Notice of Proposed Rulemaking published three months earlier in the Federal Register. Id. at 10-

13; 42 Fed. Reg. 27,244 (May 27, 1977).¹ Generally, the interim regulations prohibited floating (non-commercial and commercial) on any area of the Chattooga without a permit. As a condition of the permit, floating is not allowed above the Highway 28 Bridge. To make non-commercial floating permits readily available, the Forest Service constructed seven self-registration stations at major floating put-ins located from the Highway 28 Bridge downstream and at Overflow Bridge on the West Fork. To further serve and support floaters and other recreationists, the Forest Service also committed to install informational bulletin boards at seven major general access points where the Service would post the interim regulations and recommend safety precautions.

D. Revised Chattooga Wild and Scenic River Management Plan – July 11, 1980

In an effort to consistently protect and enhance the Chattooga's ORVs, the Forest Service completed a revised river management plan on July 11, 1980 ("1980 River Plan"). As more information about use and the environmental status of the area became available to the Forest Service, through its own initiatives and those of cooperating Federal and State agencies, conservation organizations, and members of the general public, the agency was able to add to its description of the resource and provide for additional management objectives designed to protect and enhance the ORVs.

With respect to floating, the 1980 River Plan points out that the river north of the Highway 28 Bridge is not open. It states that the prohibition is a condition of the floater

¹ The interim regulations were made final and published in the Federal Register. See 43 Fed. Reg. 3,706 (Jan. 27, 1978) (currently codified at 36 C.F.R. § 261.77).

permit, which is printed on the reverse side of the permit, and correctly points out that the condition is enforceable pursuant to 36 C.F.R. § 261.77(c). See 1980 River Plan at 10. The 1980 River Plan also indicates that several studies have been made regarding floating use on the Chattooga (including those sections downstream of Highway 28) and the perceptions of visitors. The major focus of these studies was the impact of commercial floating activities, but carrying capacity studies were underway and “[i]n the interim the present administratively set use limits will be continued.” Id. At 10-10a.

The 1980 Plan does not exclusively discuss accommodating and placing reasonable limitations on floating. It also expounds upon the prohibitions applicable to other recreational pursuits such as camping and motorized vehicle use, the necessity for commercial activities to be sanctioned by proper authorization through special use permits, and the emphasis that must be placed on search and rescue preparedness and protocol as well as the general safety of all members of the public visiting the Chattooga Wild and Scenic River Corridor. Id.

E. Land and Resources Management Plan, Sumter National Forest - August, 1985

The National Forest Management Act (“NFMA”) and its implementing regulations require the Forest Service to develop Land and Resource Management Plans (“LRMPs”) for each unit of the National Forest System. See generally 16 U.S.C. §§ 1600-14; 36 C.F.R. pt. 219. To ensure that provisions of the Chattooga Wild and Scenic River Plan were included in the comprehensive management of the forest and in order to streamline

the management of the Chattooga, in August of 1985, the Forest Service created the first Sumter Land and Resource Management Plan which included the Revised Chattooga Wild and Scenic River Plan as Appendix M.

Appendix M provided a significant update to the previous 1980 River Plan. On the first page, it highlights the agency's management objectives of protecting and enhancing the river's ORVs. It states "[t]his river corridor has the potential to become one of the most significant areas in the East providing a wide range of challenging outdoor recreational pursuits in a primitive setting." 1985 Plan at M-1. It proclaims that managers will have to evaluate carefully all actions to ensure that decisions are based on a national perspective rather than on a more limited scope and that the river plan provides detailed management direction for resources and people using the river under the guidance of the Forest Land Management Plan. Id.

After mentioning that the terrain is very rugged, since the river drops almost one-half mile over numerous rapids and waterfalls, Appendix M states that the Chattooga offers some of the most challenging white water in the Southeast, and floating by both commercial and private individuals has increased dramatically in the past 15 years. Appendix M then states that "[t]he Chattooga is also a major recreation attraction for numerous fishermen who consider it to be the premier trout fishing stream in South Carolina and one of the best in Georgia." Id. It again highlights that fishermen tend to congregate at major stocking points above Highway 28, but notes that many seek the recreational value of a hike into the more remote reaches of the river upstream of the

Highway 28 Bridge. Id.

Appendix M again states that “[f]loating is limited to the 26 mile [the actual distance is 36 miles] portion below Highway 28 Bridge and the West Forks lower 4 miles in Georgia. Sections of the river designated I-IV are open to boating with each section providing progressively more difficult white water than the preceding one.” Id. While discussing historical floating use patterns, Appendix M notes that as inexperienced and poorly equipped individuals encountered very difficult white water, numerous deaths occurred during the early 1970s. Id. at M-7. As part of its discussion about recreation permits, Appendix M recognizes that permits provide a necessary management tool that are used to provide recreational opportunities that many private individuals could not otherwise enjoy. It then highlights the desirability of allowing commercial guiding of white water but states that, in order to ensure that private floaters’ desires are addressed, commercial trips must not be allowed to eliminate all private floating. Id. at M-11. As part of its discussion of private floater permits, Appendix M states that floaters need to fill out the self registration permit forms at the shelters in order to legally run the river. Id. at M-14. It again states that floating north of the Highway 28 Bridge is prohibited through a condition of the floater permit under 36 C.F.R. § 261.77(c). With respect to floating safety, Appendix M notes that safety requirements were instituted in 1975 following several years with numerous fatalities and accidents to floaters that required frequent search and rescue efforts. It proclaims that under current management, “[a]ccidents are now infrequent, averaging one fatality every other year.” Id.

In addition to management prescriptions related to floating, Appendix M contains significant discussion regarding the management of other recreational activities with the objective of protecting and enhancing the Recreation ORV. Among these, Appendix M discusses fishing by stating that “[t]he Chattooga is considered to be the best trout stream in South Carolina and one of the best in Georgia,” which “has the size and volume to permit quality fly fishing in a very attractive setting,” and that “[t]his is especially true on the undeveloped section north of the Highway 28 Bridge where floating use is not permitted to provide quality trout fishing.” Id. at M-16. The upper portion of the river has colder water that is more conducive to trout survival and natural regeneration. Id.

F. Sumter National Forest Revised Land and Resources Management Plan – January, 2004

In response to comments from those who wished to have the agency lift the prohibition on floating, as part of the Final Environmental Impact Statement (“FEIS”) for the Revised Land and Resource Management Plan for the Sumter National Forest (“RLRMP”), the Forest Service considered three different management alternatives for the Chattooga upstream of Highway 28. Based upon the FEIS, the Regional Forester believed that adopting either alternative that allowed for boating above the Highway 28 Bridge would likely result in unacceptable impacts on social and physical resources. He concluded that by continuing to exclude floating above Highway 28, the ORVs for the river would be protected and enhanced for the next ten to fifteen years until the RLRMP for the Sumter National Forest was again revised.

G. Administrative Appeal Decision - April 28, 2005

American Whitewater administratively appealed the portion of the 2004 Plan that continued the 30-year-old prohibition on boating above Highway 28. On April 28, 2005, Gloria Manning, Reviewing Officer for the Chief, issued her Order. Doc. 1-1, Appx. 2. That 2005 Order notes that American Whitewater contended that “there is a lack of data or studies in the record to support the decision” to continue the prohibition. Id. at 4. The Reviewing Officer agreed that, while “there are multiple references in the record to resource impacts and decreasing solitude” applicable to all users, the record was “deficient” in substantiating the need for continuing the ban on floating to protect recreation as an ORV. Id. at 6. Thus, the Reviewing Officer reversed the decision of the Regional Forester and directed him “to conduct the appropriate visitor use capacity analysis, including non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings.” Id. The 2005 Order states that the study is estimated to take two years to complete (April 2007) but that the Regional Forester may request additional time if “unforeseen circumstances” arise. Id. The Order also provides that, “until the new decision is issued[, m]anagement of boating above Highway 28 will revert to the direction in the 1985 Plan,” which prohibited floating. Id. However, the 2005 Order notes, the Regional Forester is empowered under 36 C.F.R. § 261.77 to permit boating on sections of the river that are currently closed, should the Regional Forester conduct user trials as part of the capacity analysis ordered. Id. The 2005 Order requires the Regional Forester to involve interested and affected parties in the

design and execution of the capacity analysis. Id. at 6-7.

In the year since the issuance of the 2005 Order, plaintiffs have not applied for any special use permit to allow them to float the river above Highway 28, though they have been involved in working with the Forest Service to complete the ordered study needed to determine whether and how to open the Headwaters to floating. The general design of the visitor use capacity analysis has been completed, and as part of the data acquisition process, the Forest Service intends to issue permits that allow for public floater trials. Among other information, data from those trials will be used in the visitor use capacity analysis to reach a final management decision.

On May 18, 2006, however, in an apparent attempt to short-circuit the ongoing agency process, plaintiffs filed suit in this Court asserting that the prohibition on floating above Highway 28 – a condition that has existed for 30 years – is an emergency requiring immediate judicial intervention by this Court. Ironically, plaintiffs’ current suit is substantially diverting the resources of the same agency personnel who are involved in conducting the capacity analysis ordered by the Reviewing Officer and needed to issue a new decision regarding floating above Highway 28. As part of this action, plaintiffs filed a motion for a preliminary injunction, “ask[ing] that [the 2005 Order’s] implementation be enjoined.” Doc. 3-2 at 4.

III. ARGUMENT

A preliminary injunction is an “extraordinary and drastic remedy not to be granted unless the movant clearly establishes the ‘burden of persuasion’ as to the four requisites.”

McDonald's Corp v. Robertson, 147 F.3d 1301, 1306-07 (11th Cir. 1998) (internal quotation and citation omitted). To obtain an injunction, plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm that the preliminary injunction would cause to the non-movant; and (4) the preliminary injunction would not be adverse to the public interest. Parker v. State Bd. of Pardons and Paroles, 275 F.3d 1032, 1034-35 (11th Cir. 2001). Here, plaintiffs have not met their burden of establishing any of these requirements for injunctive relief.

A. Plaintiffs Are Unlikely to Succeed on the Merits.

Although plaintiffs' complaint cites several statutes, their preliminary injunction motion is based solely on alleged violations of the APA, 5 U.S.C. § 706, and WSRA, 16 U.S.C. §§ 1271 *et seq.* See Doc. 3-2 at 13-19. Because "WSRA does not provide for a private right of action," however, plaintiffs claim must be analyzed under the APA. Center for Biological Diversity v. Veneman, 394 F.3d 1108, 1110 (9th Cir. 2005); Center for Biological Diversity v. Norton, No. 02-CV-435-WDM-MJW, 2005 WL 1994251, at *1 n.1 (D. Colo. Aug. 17, 2005).

Under the APA, courts review agency decisions applying a highly deferential standard of review, limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The judicial role is solely to determine whether "the decision was based on a consideration of the relevant factors and whether there has been

a clear error of judgment.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (“[T]he ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.”). Moreover, while the Court “may not supply a reasoned basis for the agency’s action that the agency itself has not given, [it] will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974) (citations omitted).

1. The 2005 Order Does Not Violate WSRA.

Plaintiffs’ first claim is that the 2005 Order is invalid under the APA because it allegedly violates WSRA’s mandate that the Forest Service manage the river to “protect and enhance” river values. Doc. 3-2 at 15-19. The premise of this argument is that the broad “protect and enhance” statutory mandate requires the river to be open to floating, in all places and by all desiring users; and that the 2005 Order thus violates the mandate by not ordering the river immediately open to floating on the entire river.

The premise is false. The law is clear that WSRA does not require the Forest Service to open rivers without regulation to all uses in all places. WSRA permits the agency to regulate the use, occupancy, and activities that occur in national parks, forests, and waterways, even if that means that not all activities are permitted in all designated areas. See Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176-79 (9th Cir. 2000) (upholding restrictions on areas and levels of motorized water craft use in Hells Canyon area); United States v. Hells Canyon Guide Serv., Inc., 660 F.2d 735,

737-38 (9th Cir. 1981) (upholding permit system that resulted in injunction on boating services on Snake River). The Forest Service has wide discretion under the “protect and enhance” provision in deciding what regulations are appropriate and what uses will “substantially interfere” with the river’s values, Hells Canyon Alliance, 227 F.3d at 1178, especially where the uses may conflict. Moreover, section 1281(d) of WSRA explicitly provides that the agency, in its administration of the wild and scenic rivers system, “may utilize the general statutory authorities relating to the national forests in such manner as [it] deems appropriate to carry out the purposes of this chapter.” 16 U.S.C. § 1281(d), cited in Hells Canyon Guide Serv., 660 F.2d at 737-38. Neither the “protect and enhance” language nor any other provision of WSRA requires the Forest Service to allow boating, or any other form of recreation, on every square inch of any Wild and Scenic River.²

Nor does the 2005 Order’s interim management direction calling for the completion of a visitor use capacity analysis and a new decision, and for “[m]anagement of boating above Highway 28 [to] revert to the direction in the 1985 Forest Plan” pending the decision, 2005 Order at 6, violate WSRA. As plaintiffs themselves state, it is the

² Plaintiffs state that the Chattooga is the only Wild and Scenic River (“WSR”) under Forest Service administration where boating is prohibited. They are incorrect. Three sections of the Upper Rogue WSR, totaling about 21 miles, are closed to private whitewater boating and the entire length of the river is closed to commercial whitewater boating. Although administered by the National Park Service, whitewater boating is also prohibited in rivers present in Yellowstone National Park, as American Whitewater notes on its own website. See <http://www.americanwhitewater.org/archive/article/303>).

obligation of the Forest Service to “protect and enhance” the Chattooga’s ORVs. To simply allow the public to recreate on the Chattooga in any fashion it desires, without any type of management, would be contrary to the mandate of WSRA and potentially unlawful under a variety of other environmental statutes, including the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). Plaintiffs fail to explain how the decision to study and issue a new decision fails to “protect and enhance” the five Chattooga ORVs: (1) Geology, (2) Biology, (3) Scenery, (4) Recreation, and (5) History. Contrary to plaintiffs’ claim, boating is simply one pursuit under the Recreation ORV, not an ORV itself.

Plaintiffs are also unlikely to succeed on the merits because, even if they were to succeed in invalidating the 2005 Order, which was favorable to them, the prohibition on floating would remain in place under 36 CFR § 261.77 and the 1985 LRMP for the Sumter National Forest, neither of which is challenged here. Enjoining the implementation of the 2005 Order, as requested, would only terminate the ongoing study, at great cost to the government, and terminate the Order’s requirement that the Forest Service issue a new decision regarding floating. Neither result would benefit plaintiffs.

2. The 2005 Order Is Not Arbitrary or Capricious.

In appealing the 2004 Plan, plaintiffs argued that “there is a lack of data or studies in the record to support the decision” to continue the prohibition. 2005 Order at 4. The Reviewing Officer agreed, finding that the record was “deficient,” and ordered the Regional Forester “to conduct the appropriate visitor use capacity analysis, including

non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings.” Id. at 6. There is nothing arbitrary or capricious about studying an issue on which the record is “deficient” before eliminating a 30-year-old prohibition on floating that was supported by evidence and analysis when initiated. See supra Part II. On the contrary, it would be irrational not to conduct analysis first.

The crux of the 2005 Order is that more information is needed to determine how floating should be managed on the Headwaters of the Chattooga and that, until that new decision is made, the river should be managed under the previous forest plan. Before it considers changing management policies that have been in place for over 30 years, the Forest Service must analyze the potential ecological and social impacts of doing so. It is not arbitrary and capricious to manage the river under the previous management direction until the study is complete and a new decision is made. The 2005 Order does not pass on the validity of the 1985 Forest Plan or the properly-promulgated regulation, or on the sufficiency of the evidence underlying those prohibitions. If anything, it upholds the 1985 Forest Plan’s validity by ordering it to remain in place during the study.

Moreover, the decision to study rather than to immediately open the river is supported by evidence in the historical management record of the Chattooga from 1971 onward that clearly indicates that floaters and other recreational users, including trout fishermen, hikers, swimmers, and sightseers, wish to use the river and experience the area in ways that may significantly conflict. See supra Part II. In light of this evidence and the agency’s obligation to exercise its broad discretion in a way that protects and

enhances the Recreation ORV as a whole, it is not arbitrary and capricious to study the matter further in order to determine if events have changed since the 1970s and to ascertain whether potential user conflicts continue to exist, and if so, how they may be successfully managed in accordance with the WSRA mandate.

3. Plaintiffs Are Not Entitled to an Injunction Requiring the Forest Service to Open the River to Floating in Any Event.

Even if the 2005 Order were arbitrary or capricious, at most plaintiffs would be entitled to have the favorable Order set aside and remanded to the agency for further decision-making (which is already ongoing). 5 U.S.C. § 706(2)(A). They would not be entitled, as requested, to an injunction under the APA compelling the Forest Service to open the Headwaters of the Chattooga to unregulated floating. In Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004), the Supreme Court recently explained that § 706(1) of the APA only permits courts to compel an agency “to take a discrete agency action that it is required to take,” “without directing how it shall act.” Id. at 64 (citation omitted). In that case, SUWA sought to compel the agency to manage off-road vehicle (ORVs) use in wilderness study areas (WSAs), claiming that such use violated the agency’s mandate, under 43 U.S.C. § 1782(c), to “continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” Id. The Court held that, although § 1782(c) “is mandatory as to the object to be achieved,” “it leaves [the agency] a great deal of discretion in deciding how to achieve it” and thus the section “does not mandate, with the clarity necessary to support judicial

action under § 706(1), the total exclusion of ORV use.” SUWA, 542 U.S. at 66. The “principal purpose” of this APA limitation “is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.” Id. (also noting that “[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, . . . it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management”). The Court concluded that “[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.” Id. at 67.

Although SUWA did not involve the “protect and enhance” language from WSRA, the case applies to all such broad statutory mandates and has since been explicitly extended to WSRA. In Oregon Natural Desert Ass’n v. United States Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005), the District Court in Oregon held that the agency’s statutory duty under WSRA to “protect and enhance” values “is indistinguishable from the statutory duty to manage ‘in a manner so as not to impair’ addressed by the SUWA Court.” Id. at *10. The court held that the claims based on WSRA therefore “must fail under the weight of the SUWA Court’s holding that such general duties” may not be enforced by injunction under § 706(1) of the APA. Id. at *11. The District Court’s analysis is correct. Plaintiff’s request for an order to “compel agency

action,” 5 U.S.C. § 706(1), namely, to compel the Forest Service to open the entire Chattooga to floating, is based on WSRA’s broad statutory mandate that the agency “protect and enhance” values and not “substantially interfere” with public use and enjoyment of values. As SUWA makes clear, however, the APA does not permit courts to order compliance with such broad, discretionary mandates. 542 U.S. at 66.

B. Plaintiffs Are Not Suffering Irreparable Injury Requiring an Injunction.

Plaintiffs are not suffering irreparable harm from not being able to float on a portion of the Chattooga. Even assuming that the limited inability to float could be construed as an “injury,”³ the prohibition of which plaintiffs complain has been in effect for over 30 years. The relatively short additional amount of time needed for the agency to complete the ongoing study and issue a revised decision does not create an immediate emergency causing undue hardship to plaintiffs. The Forest Service continues to permit

floating on over 63% of the Chattooga, over 36 miles of the river, presenting some of the most challenging and picturesque whitewater available in this region. The Service has

also announced that as an element of the agency’s visitor use capacity analysis, it will allow expert panels and permitted members of the public (which may include members of plaintiffs’ organizations) to float the Headwaters for study-related purposes. Plaintiffs have not sought permits to date.

³ The cases on which plaintiffs rely largely involve timber sales, logging, grazing, mining, road building activities, or the capturing of nearly-extinct species, Doc. 3-2 at 13 n.30, 19, all of which result in an irretrievable commitment or destruction of natural resources. A limited prohibition on floating is plainly not comparable to such harms.

In addition, plaintiffs have the same ability as others to engage in a multitude of other recreational pursuits allowed throughout the Chattooga corridor. They are not prohibited from accessing the Headwaters of the Chattooga for recreational pursuits such as swimming, fishing, hiking, camping, and photographing, to name just a few. Nor is it true, as plaintiff claim, that they are being treated unfairly as the only individuals prohibited from engaging in their desired recreational pursuit on the Chattooga. As an initial matter, it is not the individual that is prohibited from accessing and recreating in the Chattooga corridor. Instead it is the recreational use or pursuit that is limited in order to strike a balance that protects and enhances the Recreation ORV. Many uses, not just floating, are prohibited or limited in the Chattooga corridor. For instance, although floating is only prohibited in a small section of the Chattooga, off-highway vehicle use and mountain bike use is prohibited throughout the Chattooga corridor and only allowed in specific areas on the forest. Likewise, there are numerous restrictions on fishing, camping, and horseback riding, among others.

In any event, plaintiffs cannot reasonably argue that, after 30 years of being in place, the limited floating prohibition somehow now presents an immediate harm that cannot be tolerated while the Forest Service performs a comprehensive study to determine the future management of the Headwaters. After completion of the visitor use capacity analysis and proper administrative processes the agency is employing (in which plaintiffs have been encouraged to play a significant role), it is quite possible that the Forest Service may ultimately allow floating on the Headwaters. Plaintiffs' claim of irreparable

injury during the short interim period is neither severe nor emergency-creating under the circumstances.

C. Plaintiffs' Alleged Injury Does Not Outweigh the Injury a Preliminary Injunction Would Inflict Upon the Forest Service and the Public It Serves.

The threatened injury plaintiffs claim is insignificant when compared to the injury the government would sustain if a preliminary injunction were issued. Ordering the agency to immediately open all of the Chattooga to floating would potentially cause it to violate numerous environmental laws. Without the proper environmental and social data that the visitor use capacity analysis and environmental impact statement or environmental assessment would fully analyze, the agency would potentially violate NEPA. In addition, as evidenced by the recently-filed amicus brief in this case, if floating were allowed on the Headwaters without study, other aggrieved parties, including those, such as the trout fishermen, who wish the Headwaters to remain closed to floating, would forcefully claim that the Forest Service's deviation from the properly-promulgated 1985 Plan violated the laws governing the establishment and implementation of forest plans, including WSRA.

Moreover, although the visitor use capacity analysis is not yet complete, it is quite possible that immediate introduction of floating on the Headwaters would have a detrimental effect on other elements of the Recreation ORV, such as fishing, swimming, and hiking. See generally Doc. 10. One of the key issues the visitor use capacity analysis is focusing on is whether the introduction of floating on the Headwaters will

have a detrimental impact on the quality trout fishing experience present only in areas on the Chattooga above Highway 28. In order to comply with WSRA, NEPA, and a variety of other environmental laws and policies, the agency needs to collect and analyze this data before any changes in management occur.

If the Court were to enjoin implementation of the 2005 Order as requested, it would also halt the administrative process currently underway to reach a new decision, thereby causing significant financial harm to the Forest Service, its contractors, and ultimately, the tax-paying public. Since issuance of the 2005 Order, the Forest Service has committed significant time, human and financial resources toward design and execution of the visitor use capacity analysis. See Declaration of Chris Liggett (attached to this brief). The agency has already spent several hundreds of thousands of dollars in contracting fees and, at this point, is projected to spend well over one million dollars to complete the study. Id. Plaintiffs permitted these substantial costs to accrue for over a year before filing suit. Having sat on their hands, they should not now be permitted to render meaningless the 2005 Order, which they obtained, costing the agency, its contractors, and the taxpayers a significant financial sum.

An injunction halting the study would also disserve the public who currently recreates on the river. Without completing the analysis necessary to make a new informed and lawful management decision, the effect of immediately opening the Headwaters to boating could have a potentially devastating effect on the public who currently recreate or will recreate on the Headwaters of the Chattooga. The vast majority

of the public enjoy experiences that may be negatively affected by boating on the Headwaters. See generally Doc. 10. From comments made at three public meetings already held by the Forest Service as well as numerous e-mail, letter and virtual bulletin board comments, it has become clear to the agency that many hikers, swimmers, fishermen, and even floaters themselves, are strongly opposed to any change in the prohibition on floating for fear of having their recreational experiences significantly impacted. A large number of comments state the current limitation on boating is not enough and that by allowing boating below Highway 28, numerous other recreational pursuits have been driven out of that area. Only the analyses currently underway can help the agency to determine whether and to what extent their fears are valid. Only then can the agency make a lawful and informed decision that protects and enhances the values for which the river was designated.

CONCLUSION

The government respectfully requests that the Court dismiss and deny the motion.⁴

⁴ If an injunction were issued, the government requests to brief the bond issue. From May 2005 to April 2006, the Forest Service has spent about \$335,000 in contracting fees and \$425,000 in staff and consultant costs associated with the ordered study. See Liggett Decl. It is projected to spend far more going forward. Id. An injunction would halt the study or cause it to be redesigned, increasing projected expenditures. There would also be costs (for which the agency does not currently have the funds) associated with monitoring floating on the entire river, enforcing existing applicable regulations on new users and areas, and searching and rescuing stranded and injured floaters in the Headwaters. Id.

Dated: July 7, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in L.R. 5.1B (Times New Roman, 14 pt.) for documents prepared by computer.

This 7th day of July 2006.

s/ Stephen H. McClain
STEPHEN H. McCLAIN
ASSISTANT U.S. ATTORNEY

CERTIFICATE OF SERVICE

I certify that I have this day served the FEDERAL DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION by causing a copy thereof to be electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 7th day of July 2006.

s/ Stephen H. McClain
STEPHEN H. McCLAIN
ASSISTANT U.S. ATTORNEY

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

American Whitewater; American Canoe
Association; Georgia Canoeing Association;
Atlanta Whitewater Club; Foothills Paddling
Club; Western Carolina Paddlers; 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; and the United States Department of
Agriculture,

Defendants,

and

Richard Rust; Philip Rust; Henry Rust;
and the Whiteside Cove Association,

Intervenors.

C.A. No. 8:09-cv-02665-JMC

OPINION AND ORDER

Plaintiffs American Whitewater (“AW”), American Canoe Association, Georgia Canoeing Association, Atlanta Whitewater Club, Foothills Paddling Club, Western Carolina Paddlers, Joseph C. Stubbs, Kenneth L. Strickland, and Bruce A. Hare (“Hare”) (collectively “Plaintiffs”) bring this action alleging that the United States Department of Agriculture (“USDA”), through its agency, the United States Forest Service (“USFS”) (collectively with the named agency defendants and named individual defendants in their official capacity “Defendants”), unlawfully infringed upon Plaintiffs’ right to use and enjoy the Chattooga River (the “Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters” or “Upper Chattooga”) through hand-powered floating.¹ Now before the court are Plaintiffs’ Motion for Preliminary Injunction [Doc. # 15], Plaintiffs’ related Motion for Reconsideration of Temporary Restraining Order [Doc. # 35], Defendants’ Motion to Dismiss [Doc. # 44], the Rust Family and Whiteside Cove Association’s (“Intervenors”) Amended Motion to Dismiss [Doc. # 69], and Motion by Government Defendants to Exclude Some of the Plaintiffs’ Proposed Exhibits and Witnesses [Doc. # 84].

FACTUAL AND PROCEDURAL HISTORY

The Chattooga River is a natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northeastern Georgia. Only those remote and northernmost twenty-one miles of the Chattooga above South Carolina Highway 28 are at issue in this case.

¹The terms “floating” and “boating” are used herein to describe water activities such as canoeing, kayaking, whitewater rafting, or other similar paddling activities. Floaters or boaters are used to describe those who engage in these activities.

In 1974, Congress designated the entire Chattooga as a “Wild and Scenic River” under the Wild and Scenic Rivers Act (“WSRA” or “Act”).² Under this designation, the river was and is protected as a valuable natural resource to be preserved for present and future use. *See* 16 U.S.C. § 1271. Under the WSRA, the USDA was placed in charge of managing the Chattooga in compliance with the Act, *see* 16 U.S.C. § 1281(d), and the USDA primarily executed its management responsibilities through the USFS. In 1976, the USFS instituted the 1976 Chattooga Wild & Scenic River Classifications, Boundaries and Development Plan (the “1976 Plan”) to manage the use of the resources available at and around the Chattooga. In 1978, the USFS promulgated final regulations which prohibited all private and commercial floating on the entire Chattooga River without a permit. 36 C.F.R. 261.77 (2010). The summary of the agency action provided that permits would “include conditions of use to protect river values and provide for floater safety.” *See* 43 Fed. Reg. 3706 (Jan. 27, 1978). While safety was noted as a concern, the agency provided no detailed purpose for enacting this prohibition. Although the regulation prohibited floating on the entire Chattooga, the USFS permitted floating on the lower portion of the Chattooga River below South Carolina Highway 28. There was allegedly no posting regarding the ban on or near the Chattooga Headwaters and floaters continued to use this portion of the river for floating activities. However, the USFS did not permit floating on the Headwaters and noted this continued prohibition under a new management plan in 1985, the Sumter National Forest Land and Resource Management Plan (the “1985 Plan”).

²In 1968, Congress enacted the Wild and Scenic Rivers Act to preserve certain rivers of the United States which “possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” 16 U.S.C. §§ 1271-1287 (2009).

Plaintiffs claim that floaters did not learn of the prohibition until several years after the institution of the 1985 Plan, and it was at this time that interested parties allegedly began efforts to lift the ban. As a result of an official challenge in 2003, the USFS agreed to analyze the reasons for disallowing floating on the Headwaters under the various plans. Unfortunately, in the 2004 Revised Sumter National Forest Land and Resource Management Plan (the “2004 Plan”) issued by the Regional Forester, the USFS determined that the floating prohibition was warranted without substantial analysis or explanation. In April 2004, AW filed an administrative appeal of the 2004 Plan. The USFS Reviewing Officer of the Chief of the Forest Service (“Reviewing Officer”) reversed the Regional Forester’s decision to continue the floating ban on the Headwaters. In her decision, the Reviewing Officer stated:

I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.

(Decision for Appeal of the Sumter National Forest Land and Resource Management Plan Revision, at 6 (April 2004)). The Reviewing Officer further directed the Regional Forester to conduct a visitor use capacity analysis of the Headwaters and to adjust or amend the 2004 Plan based on the findings. The Reviewing Officer estimated that the analysis would be completed in approximately two years. Because the Reviewing Officer reversed the section of the 2004 Plan concerning the floating ban, she also provided for an interim management direction reverting back to the 1985 Plan for the management of floating on the Headwaters. This interim management direction effectively continued the floating prohibition.

In May 2006, AW filed suit in the United States District Court for the Northern District of Georgia challenging the Reviewing Officer's decision to revert to the 1985 Plan for the interim management of the Headwaters.³ AW requested the court to set aside the Reviewing Officer's 2005 decision perpetuating the ban until the USFS issued an amendment to the 2004 Plan. *American Whitewater, et al v. Bosworth, et al*, C.A. No. 2:06-cv-00074-WCO (N.D. Ga. Oct. 6, 2006). AW argued that the Reviewing Officer's interim management decision was arbitrary and capricious in that it directly conflicted with her analysis that the incorporation of the ban in the 2004 Plan was inadequately supported. *Id.*

The court declined to grant AW the relief it sought on the grounds that it lacked standing because the alleged injury - the prohibition against floating on the Headwaters - was not traceable to the Reviewing Officer's 2005 decision, but was derived from the 1985 Plan. The court also found that the issue was not ripe for review. In discussing the ripeness of the Reviewing Officer's decision, the court stated:

Despite the order's last sentence [stating that the decision was final and appealable], the court agrees with defendants on this issue. While the order setting aside the 2004 plan constitutes final agency action, the decision to *temporarily* revert to the 1985 plan while an amended plan is developed is just that, temporary. . . . Whether that amended plan renews or lifts the floating ban, the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time.

Id. at 12-13. While the court found that AW's suit was not ripe, the court noted that AW only challenged the interim floating ban and not the 1985 Plan. The court also noted that any hardship experienced by AW would last for only a short period while the USFS amended the 2004 Plan and

³The Chattooga River also flows through Georgia. Therefore, the United States District Court for the Northern District of Georgia had jurisdiction to hear the matter and the suit was filed in Georgia for the convenience of counsel at that time.

that the affected parties, by order of the Reviewing Officer, would be involved in the visitor use capacity analysis. *Id.* at 17-18.

In August 2009, the USFS issued the 2009 Amendments to the 2004 Plan which allowed very limited floating on the Headwaters from December 1 through March 1 only when river flow levels reach approximately 450 cubic feet per second or higher. Plaintiffs filed the instant action in October 2009, and sought a temporary restraining order (“TRO”) and preliminary injunction to require the USFS to entirely lift any and all prohibition against floating on the Headwaters. In addition to alleging a violation of the WSRA, Plaintiffs also allege in their Complaint that Defendants’ actions violate the Wilderness Act, the Multiple-Use Sustained-Yield Act, the Forest and Rangeland Renewable Resources Planning Act, the National Forest Management Act and its implementing regulations, the Administrative Procedures Act (“APA”), and the National Environmental Policy Act and its implementing regulations.

This court heard Plaintiffs’ motion for TRO and denied that motion, in part, on the basis that court intervention was not necessary because the 2009 Amendments allowed at least some access to floating on the Headwaters. The court granted the TRO to the extent it allowed Plaintiffs to proceed with the administrative appeals process without waiving any rights to proceed with judicial review.

Several entities brought administrative appeals challenging the 2009 Amendments, including Plaintiffs. Approximately one week after the court’s decision on the TRO, Defendants issued a stay of the 2009 Amendments based on a request from a third party. Consequently, floating on the Headwaters was effectively completely banned again. Plaintiffs promptly filed a motion for reconsideration of the TRO based on Defendants’ stay of the implementation of the 2009

Amendments.

In December 2009, the USFS withdrew its decision notices concerning the 2009 Amendments and indicated that it planned to conduct further analysis before issuing new amendments to the 2004 Plan. According to the USFS, the discovery of inconsistencies in the decision documents prompted the withdrawal. As a consequence, on that same date, the Deputy Regional Forester and Appeal Reviewing Officer dismissed the five pending appeals based on the withdrawal of the decision notices.

Defendants filed a motion with the court to dismiss Plaintiffs' claims for lack of jurisdiction on the grounds that the action is moot and because Plaintiffs have failed to exhaust administrative remedies. The Rust Family and the Whiteside Cove Association, private land owners whose land is adjacent to the Chattooga River, moved to intervene and dismiss Plaintiffs' action on similar grounds.

DISCUSSION

I. Defendants' Motion to Dismiss

Defendants seek to dismiss Plaintiffs' action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Defendants contend that Plaintiffs' claims for relief from the 2009 Amendments became moot once the USFS withdrew the decision notices concerning the amendments. Defendants further argue that, even if Plaintiffs' claims are not moot, Plaintiffs have failed to exhaust administrative remedies as required by statute. Therefore, any judicial action is not yet ripe.

"When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond*,

Fredericksburg & Potomac Railroad Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991) (internal citations omitted). The court should consider the allegations contained in the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.* In determining whether jurisdiction exists, the court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* The moving party should prevail only if there is no dispute of material jurisdictional facts and the moving party is entitled to prevail as a matter of law. *Id.*

A. Mootness

The court's exercise of its power of judicial review depends on the existence of a case or controversy. *Preiser v. Newkirk*, 422 U.S. 395 (1975). "A case becomes moot whenever it loses its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (internal citations omitted). Stated otherwise, a case becomes moot once the parties no longer maintain a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations omitted).

There are two exceptions to mootness: challenges to conduct "capable of repetition yet evading review" and "voluntary cessation of the allegedly unlawful conduct." *Los Angeles v. Lyons*, 449 U.S. 934, 935 n. 1 (1980). If one of the exceptions to mootness applies, then the central inquiry becomes whether the court can render any effective relief. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *see also Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065

(9th Cir. 2002) (only if effective relief is still available to counteract the effects of the alleged violation is the controversy live and present).

The first mootness exception applies where (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). “[T]he ‘capable of repetition’ exception requires a ‘reasonable expectation’ or a ‘demonstrated probability’ that ‘the same controversy will recur involving the same complaining party.’ [Supreme Court] cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it ‘will again be subjected to the alleged illegality,’ or ‘will be subject to the threat of prosecution’ under the challenged law.” *Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (internal citations omitted).

The second exception to the mootness doctrine occurs when there is a voluntary cessation of the allegedly unlawful activity. Under this exception, a defendant carries the heavy burden to demonstrate there is no reasonable expectation that the allegedly wrongful behavior will recur. *Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv.*, 528 U.S. 167, 189 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). A party asserting mootness may also meet its burden by establishing that “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Davis*, 440 U.S. at 631; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998). Courts are prudent in granting dismissals in the context where the plaintiff could be exposed to the substantial risk of having to run to court repeatedly, only to be stymied each time as the defendant voluntarily, but temporarily, ceases its actions. *See Laidlaw*, 528 U.S. at 189.

The court applies the voluntary cessation exception in this case. In their memorandum, Defendants state that the “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.” Def. Mem. in Supp. of Mot. to Dismiss, at 9. However, Defendants’ counsel recognized at the hearing on the motion that the decisions were withdrawn to correct inconsistencies within the decisions, and it was likely that the USFS would issue new decisions continuing at least a partial ban against floating on the Headwaters. Defendants also have a long history of enacting decisions which prohibit or place stringent limitations against floating on the Headwaters. *See supra*, 1976 Plan and 1984 Plan. Plaintiffs challenge not only the limited floating allowed by the 2009 Amendments, but the broader ability of Defendants to place *any* limitation against floating on the Headwaters.

“Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule.” *Dow Chemical Co. v. Env’tl. Prot. Agency*, 605 F.2d 673, 678 (3rd Cir.1979). “Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn.” *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498 (1911)). Furthermore, when an agency withdraws an order while maintaining that the legal position of the order remains justified or is likely to be reinstated, repetition is likely, and the claim should not be considered moot. *See Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982).

Based on the agency history combined with the indication that the agency's decision would probably not deviate dramatically from its previous stance on the issue, there is a "reasonable expectation" that the same controversy or allegedly wrongful behavior will recur and potentially escape review by this court due to continuous revisions. Therefore, Plaintiffs' claims are not moot simply because the decision notices have been withdrawn.

B. Exhaustion of Remedies

Defendants argue that dismissal is also appropriate because Plaintiffs are required to exhaust administrative remedies prior to seeking relief from this court. Defendants essentially contend that the 2009 Amendments were not final agency decisions subject to review; and therefore, Plaintiffs must wait until all agency level appeals of the 2009 Amendments (or now, their forthcoming replacements) are completed before requesting judicial review in accordance with agency regulations.

The APA authorizes judicial review of a final agency action for which there is no other adequate remedy in court. *See* 5 U.S.C. § 704 (2009). Although section 10(c) of the APA only permits review of agency actions that are "final," any definitive agency decision is considered "final," and therefore reviewable, unless the agency's regulations require exhaustion as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 153 (1993). Agency regulations explicitly require exhaustion as a prerequisite to judicial review. 36 C.F.R. § 215.21 ("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)").

Agency action may be "final" upon the satisfaction of two conditions: (1) the action must mark the consummation of the agency's decision making process – it must not be merely tentative

or interlocutory in nature; and (2) the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In determining whether an agency action is final, a court should consider: (1) whether the agency’s position is definitive; (2) if the agency’s actions affect the plaintiff’s day-to-day activities; (3) whether judicial relief is likely to interfere with the proper functioning of the agency and would be a burden to the courts; (4) whether judicial intervention would deny the agency an opportunity to correct its own mistakes and to apply its expertise; and (5) whether judicial intervention would lead to piecemeal review which is inefficient and possibly unnecessary. *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 239-242 (1980).

While an amendment to an agency regulation or decision may not always meet the requirements of a final agency decision, the 2009 Amendments issued by the USFS do. They qualify as the consummation of the agency’s decision making process in this case and they definitively set forth the rights of boaters to float on the Headwaters. Here, Plaintiffs’ legal challenge to Defendants’ limitations against floating on the Headwaters began with the administrative appeal of the 2004 Plan. They were successful in their efforts to demonstrate that the agency’s decision to continue the prohibition against floating was arbitrary and capricious. However, their success was a hollow victory which resulted in the agency’s temporary reversion to the 1985 Plan which also contained a prohibition against floating the Headwaters. Plaintiffs sought judicial review of the Reviewing Officer’s decision. At that time, Plaintiffs challenged only the 2005 Decision on Appeal determination to temporarily revert to the 1985 Plan for the interim management of the Headwaters pending issuance of an amendment to the 2004 Plan. The 2009 Amendments were issued in August

2009 and set forth the revised parameters for floating on the Headwaters based on the agency's analysis of various information.

The instant situation is distinctly different from the posture of the case before the District Court for the Northern District of Georgia. That court found that Plaintiffs' suit was premature given the temporary nature of the Decision on Appeal and the availability of judicial review after issuance of the agency decision revising the 2004 Plan. No appeals were taken from that court's order. The 2009 Amendments were issued and, as the United States District Court for the Northern District of Georgia instructed, Plaintiffs sought judicial review. The 2009 Amendments were not temporary, tentative, or interlocutory in nature. In fact, they were the complete opposite - actions intended to be permanent resolutions to the matter first appealed in 2004 and actions that would likely be in place now but for the agency's withdrawal of the decision notices. Consequently, the 2009 Amendments are final agency decisions susceptible of judicial review. However, even assuming exhaustion of administrative remedies applied to the 2009 Amendments, Plaintiffs' circumstances qualify for an exception to the exhaustion requirement.

"The exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'" *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991) (citing *Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987)). However, there are exceptions to the requirement that parties exhaust administrative remedies before seeking judicial review. Exceptions to the doctrine exist where "(1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be

futile.” *Id.* “Absent a clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty, a litigant’s prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion.” *Thetford Properties IV Ltd. Partnership v. U.S. Dep’t of Housing & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990).

As demonstrated above, Defendants have an established record of prohibiting floating on the Headwaters. They have represented to this court that there will be at least some degree of prohibition against floating on the Headwaters in the future. Plaintiffs are opposed to any level of floating bans on the Headwaters. Therefore, it is almost a certainty that Plaintiffs will fail in pursuing the relief they request before the agency. In this matter, requiring the exhaustion of administrative remedies would be futile.

Accordingly, the court will not dismiss Plaintiffs’ claims for failure to exhaust administrative remedies.

C. Statute of Limitations

Aside from Plaintiffs’ alleged failure to properly challenge the 2009 Amendments through the administrative appeals process, Defendants further contend that Plaintiffs have not challenged the regulations and actions prohibiting floating on the Upper Chattooga, either 36 C.F.R. § 261.77⁴ or the 1985 Plan, within the established statute of limitations. Defendants particularly argue that Plaintiffs’ Complaint mounts, at most, only a facial challenge to the agency actions and that Plaintiffs’ attempt to couch their Complaint in broader terms of a constitutional claim does not convert the impermissible facial challenge into a viable one.

⁴This regulation was promulgated in 1978 and officially prohibited all floating on the Chattooga except where allowed by permit issued by the USFS.

A general six-year statute of limitations applies to “every civil action commenced against the United States.” 28 U.S.C. § 2401(a) (2009). A challenge to a procedural violation in the adoption of a regulation or other agency action must be brought within six years of the decision. Similarly, a facial challenge to the regulation or action must also be brought within six years of the decision. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991).

However, a party may contest the substance of an agency decision as exceeding constitutional or statutory authority later than six years following an agency decision by filing a complaint for review of the adverse application of the decision to the party. *Id.*

As applied to rules and regulations, the statutory time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it. For unlike ordinary adjudicative orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

NLRB Union v. Federal Labor Relations Authority, 834 F.2d 191, 195-96 (D.C. Cir. 1987) (quoting *Functional Music, Inc. v. Fed. Comm’n Comm’n*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)). A party may also obtain judicial review of a regulation outside of the statutory time limitation by petitioning the agency for amendment or rescission of the applicable regulation and then appealing the agency’s decision regarding the petition.⁵ *Id.* at 196.

⁵Certain Plaintiffs appeared to originally follow the course of action suggested by this latter method of obtaining judicial review by requesting an amendment to the 1985 Plan. That request resulted in the implementation of the 2004 Plan which continued the ban. Instead of appealing the agency decision denying the request to modify the 1985 Plan, those plaintiffs only pursued judicial review of the agency Reviewing Officer’s decision to replace portions of the 2004 Plan with an interim management directive. *See American Whitewater, et al v. Bosworth, et al*, C.A. No. 2:06-cv-00074-WCO (N.D. Ga. Oct. 6, 2006) (dismissing plaintiffs’ case as premature and noting possible statute of limitations issues). No appeal was taken from the district court’s order; therefore, review of Plaintiffs’ petitions to amend the 1985 Plan has been waived.

While Plaintiffs have missed the opportunity to make facial challenges to 36 C.F.R. 261.77 and the 1985 Plan, they are within the statutory time frame to challenge the 2009 Amendments to the 2004 Plan. Notwithstanding their ability to facially challenge the Headwaters' floating prohibition through the 2009 Amendments, Plaintiffs may also bring an "as applied" challenge to the regulations. Although worded broadly, the Complaint in this case achieves that task. The claims articulated in the Complaint challenging the regulations and actions prohibiting floating on the Headwaters stem, not merely from abstract disagreement with the policies, but from the direct application of those policies in a way that has burdened and continues to burden Plaintiffs' specific rights to currently enjoy the benefits of the Upper Chattooga. Particularly, the Complaint alleges, *inter alia*, that members of AW, the Georgia Canoeing Association, and Mr. Bruce Hare are presently prohibited from floating on the Headwaters. *See* Complaint at ¶¶ 11, 18, and 37. As additional support for their "as applied" challenge and in rebuttal of Defendants' statute of limitations argument during the hearing, Plaintiffs submitted correspondence wherein AW sought a special use permit to float on the Headwaters and was denied such permit based on the existing agency rules and regulations. *See* Pl. Ex. 15 and 16.⁶

⁶Defendants filed their Motion by Government Defendants to Exclude Some of the Plaintiffs' Proposed Exhibits and Witnesses [Doc. # 84] one day prior to the hearing on the motions addressed in this order. At the beginning of the hearing, the parties informed the court that they had resolved the evidentiary matters at issue in the motion and there was no need for the court to rule upon the motion. However, Plaintiffs reserved the right to introduce certain evidence depending on the nature of the arguments developed during the hearing. After Defendants presented arguments to the court asserting that Plaintiffs' claims were barred by the statute of limitations, Plaintiffs sought to introduce Plaintiffs' Exhibits 15 and 16, which consist of correspondence from AW requesting a special use permit to float on the Headwaters and the USDA's correspondence denying the same. Plaintiffs contend that these exhibits were introduced in rebuttal of Defendants' statute of limitations argument. Defendants and Intervenor objected to the admission of Plaintiffs' Exhibits 15 and 16 at the hearing arguing, in large part, that the exhibits should be disallowed because they were not part of the administrative record below and that Plaintiffs impermissively submitted them for the court's

Because the court finds that Plaintiffs' challenge to the 2009 Amendments is not moot, Plaintiffs are within the statute of limitations to make a facial challenge to the USFS actions related to the floating prohibitions. Plaintiffs also have made a sufficient "as applied" challenge to the subject regulations. Therefore, their Complaint also withstands Defendants' statute of limitations argument on this ground.

II. Intervenor's Motion to Dismiss

Intervenors moved to dismiss Plaintiffs' Complaint pursuant to the provisions of Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Intervenors substantially adopted Defendants' position as to dismissal under Rule 12(b)(1) and also stated that, even if the Motion to Dismiss was not granted under that rule, it should be granted pursuant to Rule 12(b)(6), concerning the portion of the Complaint that seeks relief regarding that section of the Chattooga River that flows through the private property of the Intervenors.

As to Intervenors' Rule 12(b)(1) argument, it is denied for the same reasons as set forth above in Part I, *supra*.

review of an "as applied" challenge to the regulation that does not appear in the Complaint. The court allowed Plaintiffs to make their rebuttal argument using the exhibits, but reserved the ruling on admissibility pending further review. "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *United States v. Abel*, 469 U.S. 45, 54 (1984). The preliminary injunction procedure is generally less formal than a trial on the merits and often encompasses a more lenient view of evidentiary matters. *American Angus Ass'n v. Sysco Corp.*, 829 F. Supp. 807, 816 (D.C.N.C. 1992) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). The court is allowed some latitude to determine relevant evidence where necessary to prevent irreparable harm. *Id.* (citing 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2949). Therefore, the court now admits Plaintiffs' Exhibits 15 and 16 on the grounds that they are relevant to the court's analysis of the statute of limitations issue and its determination of whether injunctive relief is justified in this matter.

In regard to Intervenor's alternative argument that Plaintiffs' Complaint should be dismissed as it would apply to the section of the river flowing through Intervenor's property, the court also declines to dismiss the Complaint on this basis. Plaintiffs conceded that they seek no injunctive relief which will affect Intervenor's private property adjacent to the river. However, both parties vigorously dispute whether the property over which the river actually flows is private property. The dispute turns on the determination of navigability. The Supreme Court has held that navigability "involve[s] questions of law inseparable from the particular facts to which they are applied," and navigability of a particular river "is, of course, a factual question." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940); *see also New York State Dept. of Env'tl. Conservation v. Fed. Energy Reg. Comm'n*, 954 F.2d 56, 60 (2nd Cir. 1992).

Because there are unresolved issues of fact regarding the navigability of the river, it is not appropriate to dismiss Plaintiffs' Complaint concerning this portion of the Chattooga at this stage in the litigation.

III. Plaintiffs' Motion for Reconsideration of TRO; Plaintiffs' Motion for Preliminary Injunction

The parties agreed at the hearing on these motions that Plaintiffs' Motion for Reconsideration of the TRO was effectively collapsed into Plaintiffs' Motion for Preliminary Injunction. Therefore, the court will not render any separate order on Plaintiffs' request for reconsideration. Instead, the court will move forward with its determination of the prudence of issuing a preliminary injunction in this case.

"A preliminary injunction is an 'extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.'" *MicroStrategy Inc.*

v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001); *see also Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated by* 103 S. Ct. 2371 (April 26, 2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. June 8, 2010). Generally, the goal 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.” *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). In contrast, mandatory preliminary injunctions compel action and, typically, do not preserve the status quo. Therefore, mandatory preliminary injunctions should be sparingly exercised and granted “only in those circumstances when the exigencies of the situation demand such relief.” *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). “[A] mandatory preliminary injunction must be necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court’s ability to enter ultimate relief on the merits of the same kind.” *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526.

To determine whether a plaintiff is entitled to a preliminary injunction, the plaintiff must demonstrate “(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). “[A]ll four requirements must be satisfied.” *Real Truth About Obama, Inc.*, 575 F.3d at 346; *see also Winter*, 129 S. Ct. at 376.

A. Injunctive Relief Against Defendants

Plaintiffs request that the court enjoin “Defendants from enforcing any of their Headwaters floating prohibitions” and order “Defendants to withdraw or remove any portions of the Revised

Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests that implement a ban of any kind on floating the Chattooga.” Pl. Memo. in Supp. of Preliminary Injunction, at 3.

The regulations promulgating the floating prohibitions at issue have been in place for more than thirty (30) years. Therefore, the requests by Plaintiffs do not seek to maintain the status quo, but are requests for mandatory preliminary injunctive relief. Accordingly, the court must be more scrutinizing in its determination of whether mandatory relief is warranted. *In re Microsoft Antitrust Litig.*, 333 F.3d at 525.

1. Success on the Merits

Plaintiffs contend that they are entitled to injunctive relief against Defendants because they can demonstrate that they are likely to succeed on the merits. Because a preliminary injunction grants relief on a temporary basis prior to trial, the party seeking the preliminary injunction must demonstrate that it is likely to succeed on the merits at trial by “a clear showing” and may not rest on merely the probability of success. *Real Truth About Obama, Inc.*, 575 F.3d at 345 (citing *Winter v. Nat’l Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008)), *vacated by* 103 S. Ct. 2371 (April 26, 2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. June 8, 2010).

Plaintiffs allege that Defendants’ actions are in direct contravention of the statutes governing the agencies and the resources they are empowered to protect. Specifically, Plaintiffs note that the WSRA directs Defendants “to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” *See* 16 U.S.C. § 1281(a). Plaintiffs further note that floating is one of the outstanding remarkable values (“ORV”) that caused the

Chattooga, particularly the Headwaters, to be designated as a wild and scenic river. *See generally*, 1971 Study. Therefore, Plaintiffs contend Defendants' institution of a complete prohibition against floating on the Headwaters is a direct violation of the statutory mandate demonstrating that Plaintiffs are likely to prevail on the merits.

Conversely, Defendants argue that its decisions regarding floating on the Headwaters are nothing more than necessary regulation to balance the many uses and ORVs for which the Chattooga was designated as wild and scenic. The other uses and ORVs include hiking, hunting, fishing, and camping. In this way, Defendants claim to fulfill the very essence of the requirements under the statute - that is to protect and enhance all values, not just one value.

In making this determination, the court notes that floating is one of the ORVs of the Chattooga, but it cannot overlook the many other values which caused the river to be included in the Act. Indeed, the WRSA contemplates that some level of regulation is necessary to balance the river's ORVs. By the same token, the court does not take lightly the agency's own Reviewing Officer's assessment revealing some of the flaws in the previous ban contained within the 2004 Plan. Additionally, the agency has submitted little support for the ban contained in the 1985 Plan and has admittedly withdrawn the 2009 Amendments due to irregularities. Based on the agency's past inability to substantiate the reasons for wholly banning floating on the Headwaters, Plaintiffs may have some chance of success on the merits. However, at this stage of the proceedings, Plaintiffs have not met the heightened burden required to sanction mandatory relief.

2. Irreparable Harm

Plaintiffs also claim that they will suffer irreparable harm without the issuance of injunctive relief. Plaintiffs seeking injunctive relief must demonstrate that irreparable harm is likely in the

absence of an injunction, not merely speculative. *Winter*, 129 S. Ct. at 376. Plaintiffs seeking injunctive relief must do more than establish the “‘possibility’ of irreparable harm.” *Id.* at 375. Instead, the “frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate injury is *likely* in the absence of an injunction.” *Id.* (emphasis supplied) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)); *see also Real Truth About Obama, Inc.*, 575 F.3d at 346-48 (holding that the preliminary injunction standard articulated in *Winter* has overruled the Fourth Circuit’s previous standard for preliminary injunctions found in *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977)). The harm to be prevented must be of an immediate nature and not simply a remote possibility. *In re Microsoft Antitrust Litig.*, 333 F.3d at 527.

The primary source of harm alleged by Plaintiffs is the loss of opportunities to experience floating on the Headwaters of the Chattooga. In particular, Plaintiff Hare testified that he had enjoyed experiences in the very waters at issue as a child, and now, is denied that experience day after day, with little hope that he will be able to float on the Headwaters again. However, he also agreed with Defendants that the water levels of the Chattooga naturally limit floating on the Headwaters to very few days during any given year. Although Hare presented moving testimony, the fact that he and others will not have imminently unfettered access to the Headwaters is not the type of immediate and irreparable harm which merits the imposition of a mandatory preliminary injunction.

Plaintiffs’ claim of injury is incompatible with those cases cited to this court in support of their position. Most notably, Plaintiffs cited *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), *rev’d on other grounds by Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997), wherein that court considered the issuance of a preliminary injunction to stop a timber project which would

have caused the death of thousands of migratory birds. In *Martin*, the plaintiffs presented the court with clear evidence of the number of deaths that would occur without court intervention. *Id.* at 1565. Plaintiffs also cited *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993). The *Espy* court addressed a request for an injunction against the capture of pregnant bison near Yellowstone National Park for a scientific experiment in which the bison would be infected with bacteria and later forced to endure abortions. There, the plaintiffs alleged irreparable injury to the aesthetic interest of viewing the bison “and the prospect of viewing the less than humane baiting and capturing of the bison with the knowledge of their destination and fate.” *Id.* While these cases may involve concerns for a natural resource, the immediate and urgent nature of the irreparable injuries displayed in the cases cited by Plaintiffs is not exhibited in the instant case.

The United States District Court for the District of the Virgin Islands has examined a case which concerned only a lost opportunity to experience a resource. *See Rivera v. United States*, 910 F. Supp. 239 (D.V.I. 1996). In *Rivera*, the plaintiffs brought suit against the United States government concerning the closing of a public island beach due to a partial government shutdown caused by a budget dispute. The plaintiffs sought an injunction prohibiting the government from closing the island beach to the public. *Id.* The beach was included as public land for recreation and enjoyment by presidential proclamation. The proclamation provided, in part, that:

Provided, that neither the Department of the Interior, nor any other agency or instrumentality of the United States, shall adopt or attempt to enforce any rule, regulation or requirement limiting, restricting or reducing the existing fishing (including the landing of boats and the laying of fishpots outside the marine garden), bathing or recreational privileges by inhabitants of the Virgin Islands, or charge any fees for admission to the area.

Proclamation No. 3443, reprinted in 1962 U.S.C.C.A.N. 4169-70. In addition to the clear violation

of the presidential proclamation, the district court found that the plaintiffs' loss of enjoyment of the use of the beach was an irreparable hardship and "not a mere inconvenience that this Court should treat as de minimis." *Rivera*, 910 F. Supp. at 243.

The instant case is patently distinguishable from *Rivera*. The *Rivera* court was presented with a request for a prohibitory injunction to preserve the status quo. Here, Plaintiffs petition the court for mandatory injunctive relief, asking the court to disrupt the status quo of Defendants' decades-long regulation of the Chattooga and potentially cede from other users' enjoyment which may rightfully belong to them. Understandably, Plaintiffs are disappointed in not being able to freely access this portion of the river as they would like. However, Plaintiffs are not denied total use of a natural resource as was the case in *Rivera*. Plaintiffs have access to the Chattooga River to experience floating on the lower portion of the river and experience different ORVs in other areas. Unlike the cases cited above, Plaintiffs present this court with only a partial loss of opportunity to participate in one particular activity. Plaintiffs are not being denied the opportunity to enjoy the resource on a wholesale basis in this case and the loss of opportunity claimed is one that will recur, absent harm to the natural resource, once the merits of the matter are determined.

This court remains concerned about whether Defendants have properly exercised its regulatory authority to wholly prohibit floating on the Headwaters. However, Defendants' limitation of one use within an isolated section of the river does not rise to the level of harm required to warrant the imposition of a mandatory injunction - particularly where it is unclear whether Plaintiffs are likely to succeed on the merits.

3. Balance of Hardships

The third factor the court must consider is whether a preliminary injunction is justified

considering the balance of hardships between the litigants. In making this determination, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 129 S. Ct. at 376 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

Plaintiffs claim that, without preliminary relief, they will continue to be wholly prohibited from floating on the Headwaters for an indeterminate amount of time subject only to the discretion and whim of Defendants. Defendants, on the other hand, argue that completely lifting its regulations or imposing different regulations concerning floating on the Headwaters would lead to more difficulty in implementation of balancing all uses by the agency and will likely disrupt existing uses. Both sides submit persuasive arguments on this factor. However, because injunctive relief in favor of Plaintiffs would have a sweeping effect on all users of the Headwaters, in addition to Defendants, the court finds that the balance of the hardships disfavor Plaintiffs in this case.

4. Public Interests

The final factor that must be considered in determining the propriety of a preliminary injunction is whether such an injunction would be in the public interest. Similar to the balance of hardships between the parties, the public interest factor seeks to evaluate the impact of the issuance of injunctive relief relative to the interest of the public at large. *See* 11 A. Wright & A. Miller, *Federal Practice & Procedure*, § 2948.4. The court “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S. Ct. at 377. As mentioned above, the impact of injunctive relief could potentially affect multiple classes of users and other recreational uses on the Headwaters of the Chattooga. Balancing the ORVs is an important goal of the WSRA, and the charge of overseeing that balance has been delegated to Defendants. It

is not in the public interest to remove all regulation against floating on the Headwaters without a further hearing on the merits to determine whether Defendants have appropriately discharged their statutory obligations.

Consequently, the court denies Plaintiffs' request for preliminary injunctive relief against Defendants.

B. Injunctive Relief Against Intervenor

Intervenor contend that, even if injunctive relief is warranted against Defendants, such relief is not appropriate as to Intervenor.

First, it is not clear that Plaintiffs would prevail on the merits regarding this portion of the Chattooga. The parties strongly contest the navigability of the waters; and therefore, the issues as to whether or not this portion of the Chattooga is private property remains unresolved at this point in the litigation. The section of the Chattooga which crosses the Intervenor's property only spans approximately two miles and the balance of equities and public interest tip in favor of the private landowner here. Although it is well established that the United States has the power to regulate conduct on non-federal land when necessary to protect adjacent federal property, *see U.S. v. Lindsey*, 595 F.2d. 5, 6 (9th Cir. 1979), the courts also have a strong interest in protecting private property. *See U.S.C.A. Const. Amend. V.* Therefore, injunctive relief as to the section of the Chattooga which crosses the Intervenor's property is not appropriate at this time.

Accordingly, the court denies any preliminary injunctive relief to Plaintiffs as to the section of the River abutting Intervenor's property.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [Doc. # 44] and Intervenor's

Amended Motion to Dismiss [Doc. # 69] are **DENIED**. Plaintiffs' Motion for Preliminary Injunction [Doc. # 15] and Plaintiffs' related Motion for Reconsideration of Temporary Restraining Order [Doc. # 35] are also **DENIED**. Motion by Government Defendants to Exclude Some of the Plaintiffs' Proposed Exhibits and Witnesses [Doc. # 84] is **GRANTED IN PART, AND DENIED IN PART** to the extent that Plaintiffs' Exhibits 15 and 16 are admitted as indicated herein. It is further ordered that Defendants answer Plaintiffs' Complaint within thirty (30) days from the date of this Order.

IT IS SO ORDERED.

s/ J. Michelle Childs
United States District Judge

Greenville, South Carolina
December 2, 2010

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

AMERICAN WHITEWATER, et al)	
)	
Plaintiffs,)	
)	
v.)	
)	
THOMAS TIDWELL, in his official capacity as	)	Civil Action No 8:09-cv-02665
Chief of the United States Forest Service; et al)	
)	
Defendants.)	
)	
)	
)	

I am filing the attached document related to this matter:

DECLARATION OF GLENN E. HAAS

DATED: October 15, 2009

NELSON GALBREATH, LLC

s/ J. Nathan Galbreath

Cecil H. Nelson, Jr. (Fed. ID #2511)
J. Nathan Galbreath (Fed. ID #10157)
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ATTORNEYS FOR PLAINTIFFS

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

AMERICAN WHITEWATER, et al.)	
)	
Plaintiffs,)	
v.)	
)	
THOMAS TIDWELL, in his official capacity as Chief	)	Civil Action No.
of the United States Forest Service, et al.)	
)	
Defendants.)	

DECLARATION OF DR. GLENN E. HAAS

My name is Glenn E. Haas. I am a Professor Emeritus in the College of Natural Resources at Colorado State University and partner in the land use planning firm of Aukerman, Haas, and Associates. My areas of expertise include natural resource planning and policy, recreation planning and management, recreation supply and demand analysis, administrative decision making, and visitor capacity analysis. A summary of my credentials is set out at the end of this Declaration.

I was asked by American Whitewater to provide an expert review of the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (USDA Forest Service, August 2009)*. More specifically, I was tasked with assessing the adequacy of the EA with regard to the issue of visitor capacity.

In summary, I conclude the USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and violates the principles and practices of the recreation resource planning profession.

The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (USDA Forest Service, August 2009)* fails the test of adequacy on several fronts:

1. Visitor capacity is not adequately addressed, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year "visitor capacity analysis" effort in response to the 2005 Decision of Appeal;
2. The USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;
3. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is a maximum number

of people. The range of alternatives considered by the USFS, in terms of visitor capacity, ranged from a maximum of zero or no boating capacity to zero prescribed boating capacity being offered on some reaches but not all. No range of visitor capacity alternatives were offered for the other significant recreation activities;

4. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

Visitor Capacity.

The Wild and Scenic Rivers Act of 1968 specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase visitor capacity has replaced the phrase user capacity and will be used henceforth.

While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people. A visitor capacity can be defined as the prescribed number(s) of recreation opportunities that will be accommodated based upon an area’s approved comprehensive management prescription (i.e., the area’s goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area’s prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment. (Federal Interagency Task Force, 2002)

Table 1 is a summary of the visitor capacities that were compared and contrasted across the eight alternatives considered in the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River (August, 2009)*. In instances where there is no visitor capacity considered, the cell is left blank. In instances where a visitor capacity is set at zero (i.e., not permitted), the number “0” is inserted in the cell.

Table 1. A Summary of the Visitor Capacities That Were Compared and Contrasted Across the Eight Alternatives in the *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River. (August 2009)*

Significant Recreation Activities	Chattooga EA Alternatives							
	1	2	2	4	5	6	7	8
Boating on tributaries and upper 2 miles	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)	0 (not permitted)
Boating below upper 2 miles on main body	0 (not permitted)	0 (not permitted)	0 (not permitted)					
Angling								
Hiking/ Backpacking								
Camping								
Hunting								
Swimming								

Other non-significant activities and capacities included in the EA:

- no, or zero (0), capacity for commercially guided boating across all alternatives
- “no net gain in parking capacity” across all alternatives

Observations:

1. As revealed in Table 1, the EA is virtually silent on the issue of visitor capacity. It does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year “visitor use capacity analysis” with extensive public involvement. A proper study would provide information to place numbers in the blank boxes.

2. For three alternatives, the EA includes a zero (0) capacity for boating on the entire upper Chattooga; that is, boating is not allowed on the entire upper Chattooga. There is no boating capacity included in alternatives 4-8 on the sections where boating is allowed, and on the prohibited sections the capacity is zero.

3. None of the alternatives address the visitor capacity for those other significant activities recognized by the USFS: angling, hiking/backpacking, camping, hunting, and swimming.

4. The alternatives considered by the USFS do not reflect a reasonable range of options or choices for rigorous analysis and public discussion. For example, it would seem reasonable that a range of alternatives might consider capacities and associated management programs for all the significant activities recognized by the USFS, and that these capacities might well vary by time of day, week, season or year; water flows; and managed by a simple timed-entry reservation system akin to systems used to reserve campsites, hotel rooms, golf outings, museum exhibits, and restaurants..

5. In section 1.1 (paragraph 3) of the EA, it is stated that “The Forest Service has been tasked with finding the right balance for the Chattooga River corridor so the overall recreation ORV is protected and enhanced.” Stated otherwise, the Forest Service is tasked with making an allocation of visitor opportunities for the corridor. In order to make allocation one must address visitor capacity. This EA does not complete the task the Forest Service was charged with.

6. There is no explanation for not addressing visitor capacity. On the contrary, the Forest Service’s numerous claims in the EA regarding substantial numbers of people, increasing use, premier whitewater destination in the world, 20% projected use increase, increasing impacts, increasing litter and social trail, excessive campsites, trails and parking, excessive encounters, conflicts, and other situations make a compelling case for addressing visitor capacity, not simply banning boating.

Comprehensive Management Planning.

The Wild and Scenic Rivers Act of 1968 specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment. Furthermore, the procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process.

Observations:

1. The EA in question only addresses recreation management for the upper 21-mile portion of the Chattooga Wild and Scenic River, without due consideration for the lower 36-mile river segment below Highway 28. Yet the resources, resources uses and ORVs in one segment affect, and are affected by, those in other segments. Certainly visitor capacity decisions in one segment can significantly affect visitor capacity decisions in other segments in order to respond fairly and equitably to diverse public demands and values. Partitioning of the Chattooga Wild and Scenic River for the purpose of revising the recreation management direction for only 21-mile portion is not justifiable and compromises the benefit of full, integrated and comprehensive planning.

2. The EA tiers off additional management direction for the Chattooga Wild and Scenic River. That is, to fully understand the management direction for the river one must be familiar with portions of three forest plans and the Ellicott Rock Wilderness management plan. There appears to be no single comprehensive management plan for the Chattooga WSR, and the EA does not adequately integrate all the existing management direction. This places an unreasonable burden on the public to locate, understand and meaningfully participate in any comprehensive planning process.

3. The USFS was able to issue a Finding of No Significant Impact on the EA and avoid a full EIS because, in part, it was decided (a) to address only a 21-mile segment of the 57-mile Chattooga Wild and Scenic River corridor, (b) to not address the significant issue of visitor capacity, and (c) to only consider a narrow range of alternatives. The Chattooga WSR deserves the benefit of a full environmental impact statement and a stand-alone comprehensive management plan for the entire corridor.

In closing, there are numerous examples in the United States across state and federally-managed rivers where capacity has been properly addressed, including USFS managed rivers such as the Selway, Toulumme, Salmon, Salt and Snake Rivers. Visitor capacity is a fundamental tool for recreation resource planning and management, and is one of the professional principles for recreation resource planning formally endorsed by the National Association of Recreation Resource Planners. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation with the principles and practices of the recreation resource planning profession.

Credentials

I obtained a Ph.D. in Natural Resource Planning/Recreation and Nature-based Tourism Management from Colorado State University in 1979, a Masters in Outdoor Recreation/Tourism Management from Pennsylvania State University in 1975, a Bachelor's in Natural Resource Management from West Virginia State University in 1972, and an Associate in Forest Management from Pennsylvania State University 1970.

I was the expert witness for the plaintiff in the recent Merced WSR litigation whereby the courts found that the NPS did not adequately address visitor capacity. I also provided expert advice on the Yellowstone National Park snowmobile litigation, the Imperial Sand Dunes Recreation Area (BLM) off-road vehicle litigation, the Grand Canyon National Park/Colorado River boating litigation, and the Lake Pleasant (BOR) marina-development litigation.

I have twice served on the national board of the National Society for Park Resources (1986-1990, 2003-2006) and six years on the national board of the National Parks Conservation Association (1992-1998), including three years as the vice-chair. I was the Chairman of the Department of Recreation Resources and Tourism at Colorado State University from 1987-1997. I am currently serving as the Vice President for Development for the National Association of Recreation Resource Planners and served as the President from 2007-09.

I have an extensive working relationship with state and federal public land and water management agencies and am relied on as an expert witness and consultant related to NEPA-compliant planning, estimating future recreation demand, and recreation carrying capacity. In 1980-81, I worked in the national office of the U.S. Forest Service and drafted the agency policy on limits of acceptable change (LAC) and worked to advance the Recreation Opportunity Spectrum system. In 2000-2002, I worked as a special advisor for the Assistant Secretary for Fish and Wildlife and Parks in the U.S. Department of the Interior, during which time I chaired of the Federal Interagency Task Force on Visitor Capacity on Public Lands and Waters involving the National Park Service, U.S. Forest Service, Fish and Wildlife Service, Bureau of

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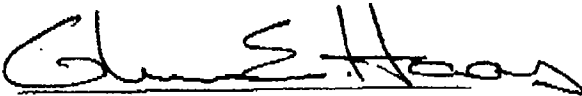
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PAGE 07

Reclamation, and Bureau of Land Management. Since 2002, I have worked closely with the Bureau of Reclamation in developing of the Water Recreation Opportunity Spectrum (WROS) system as a means for the recreation profession to inventory, plan, and manage water-based recreation opportunities. I also recently completed a manager's guidebook on estimating future recreation demand.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 8th day of October, 2009.


Glenn E. Haas, PhD

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

AMERICAN WHITEWATER, AMERICAN CANOE)
ASSOCIATION, GEORGIA CANOEING)
ASSOCIATION, ATLANTA WHITEWATER CLUB,)
FOOTHILLS PADDLING CLUB, WESTERN)
CAROLINA PADDLERS, 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.)

Civil Action No. 8:09-2665-RBH

COMPLAINT

INTRODUCTION

Plaintiffs bring the instant action because the United States Department of Agriculture (“USDA”), through the United States Forest Service (“USFS”), has unlawfully infringed on Plaintiffs’ federally-protected right to recreate on the Chattooga Wild and Scenic River (the

“Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters”) in hand-powered canoes and kayaks:¹

- The Wild and Scenic Rivers Act (“WSRA”) requires that administering agencies “protect and enhance” the “values” that caused a river to be included in the National Wild and Scenic Rivers System;² and
- Congress specifically identified canoe and kayak recreation on the Chattooga Headwaters as a value that caused the river to be included in the National Wild and Scenic Rivers System;³ yet
- The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

In addition to violating the WSRA,⁴ Defendants’ actions violate the Wilderness Act⁵, the Multiple-Use Sustained-Yield Act,⁶ the Forest and Rangeland Renewable Resources Planning Act,⁷ the National Forest Management Act⁸ and its implementing regulations,⁹ the National

¹ Plaintiffs will use the term “floating” throughout this Memorandum to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

² 16 U.S.C. § 1281.

³ Sen. Report No. 93-738 at 3008, 3010 (1974). (COMPLAINT EX. 1)

⁴ 16 U.S.C. § 1271 *et seq.*

⁵ 16 U.S.C. §§ 1131 *et seq.*

⁶ 16 U.S.C. § 528 *et seq.*

⁷ 16 U.S.C. §§ 1600-14.

⁸ 16 U.S.C. § 1600 *et seq.*

⁹ 36 C.F.R. 219.1-219.29.

Environmental Policy Act¹⁰ and its implementing regulations¹¹, the Administrative Procedures Act (“APA”),¹² and other applicable statutes and regulations.

Each of these violations is addressed in turn below. These unlawful actions are causing irreparable damage to the natural Plaintiffs, the members of the Plaintiff organizations, the floating public and the public at large. For the reasons set forth below, this court should order Plaintiffs’ requested relief, including entering temporary, preliminary and ultimately final injunctions that restore the ability of paddlers to float the Chattooga Headwaters as was done for at least 250 years prior to the unlawful actions of the USFS and to bring management of the Headwaters in congruity with management of every other federally managed and Wild and Scenic river in the United States.

Plaintiffs further seek an award of costs and attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.

I. JURISDICTION, VENUE AND ENDORSEMENT OF DIVISION

1. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty).

¹⁰ 42 U.S.C. §§ 4321-4370.

¹¹ 40 C.F.R. 1500-08.

¹² 5 U.S.C. §§ 551-706.

3. In addition, the APA gives this Court jurisdiction to hear the claims in Plaintiffs' Complaint. 5 U.S.C. §§ 551-96, 601-12 and 701-03. Judicial review is appropriate under 5 U.S.C. § 701 et seq.

4. As a basis therefore, Plaintiffs allege that all actions challenged in the Complaint are final actions for purposes of review and that Defendants are taking actions that are arbitrary and capricious, that are abuses of discretion, and that are not in accordance with applicable law.

5. In addition, Defendants' failures and refusals to take certain actions as described herein constitute agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) and (2). The complained-of conduct creates an actual, justiciable controversy.

6. Venue is properly vested in this Court by 28 U.S.C. § 1391(e) because Defendants are a federal agency and officers thereof and a substantial part of the events or omissions giving rise to the claims herein occurred in this district. In particular, a substantial part of the section of the river at issue in this Complaint is situated in the Anderson Division of the District of South Carolina, thus undersigned endorses that the Anderson Division is the proper forum for this case to be assigned.

7. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. § 703, 28 U.S.C. § 2202 and Fed. R. Civ. P. 65.

8. A temporary restraining order and a preliminary injunction are necessary to prevent further unlawful agency action. Plaintiffs have a substantial likelihood of success on the merits; there is a substantial risk of irreparable harm absent an injunction; the irreparable harm threatened is greater than that which could be caused by an injunction; and the public would be served by an injunction.

II. THE PARTIES

A. Plaintiffs

9. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

10. Plaintiff American Whitewater is a nonprofit 501(c)(3) corporation organized under the laws of Missouri. Its principal place of business is Western Carolina University, 1101 Outreach Center, Cullowhee, North Carolina, 28723. Since 1954, American Whitewater has been dedicated to restoring rivers to their natural condition, eliminating water degradation, improving public land management and -- as in this case -- protecting public access for responsible recreational use.

11. A nationwide organization, American Whitewater represents individuals, families and organizations having a combined membership of approximately 6,700 members and more than 100 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

12. American Whitewater's members have used, and but for the unlawful closure would be currently using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

13. American Whitewater has standing in this case.

14. Plaintiff American Canoe Association is a nonprofit 501(c)(3) corporation organized under the laws of New York. Its principal place of business is 7432 Alban Station Blvd., Suite B-232, Springfield, Virginia 22150. Since 1880, the American Canoe Association has been dedicated to promoting canoeing, kayaking, and rafting as wholesome lifetime recreational activities. The American Canoe Association provides a variety of worthwhile programs and public services in such areas as: event sponsorship, safety education, instructor certification, waterway stewardship, water trails, paddler's rights and protection, and public information campaigns.

15. A nationwide organization, the American Canoe Association represents individuals, families and organizations having a combined membership of approximately 50,000 individual members and more than 300 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

16. American Canoe Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

17. The American Canoe Association has standing in this case.

18. Plaintiff Georgia Canoeing Association is a nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 7023, Atlanta,

Georgia 30357. The Georgia Canoeing Association promotes conservation, environmental and river access issues as well as boating safety and skills development. Since 1966, the Georgia Canoeing Association has been a member-operated paddling club representing individuals, families and organizations having a combined membership of approximately 2,000 individual members, the large majority of whom live in Georgia and many of whom regularly float the open portions of the Chattooga WSR, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

19. Georgia Canoeing Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

20. The Georgia Canoeing Association has standing in this case.

21. Plaintiff Atlanta Whitewater Club is a member-operated nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 11714, Atlanta, Georgia 30355. The Atlanta Whitewater Club was founded in 1978 by a dedicated group of Atlanta's kayakers, canoeists, and rafters to provide educational services and events that increase the enjoyment, safety, and skills of paddlers at every level of the sport and to protect the environment.

22. The Atlanta Whitewater Club has a combined membership of approximately 110 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

23. Atlanta Whitewater members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

24. The Atlanta Whitewater Club has standing in this case.

25. Plaintiff Western Carolina Paddlers is a member-operated paddling club based in Asheville, North Carolina. The Western Carolina Paddlers can be reached at P.O. Box 8541, Asheville, North Carolina 28814. The Western Carolina Paddlers' membership is comprised of paddlers of all types, including kayakers, canoeists, and rafters, all of whom are active in river conservation, access issues, and local paddle-sport events. The Western Carolina Paddlers has a combined membership of approximately 120 individual members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

26. Western Carolina Paddler's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography,

fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

27. The Western Carolina Paddlers has standing in this case.

28. Plaintiff Foothills Paddling Club is a member-operated nonprofit corporation organized under the laws of South Carolina. Its principal place of business is 25 Heritage Green Place, Greenville, South Carolina 29601. The Foothills Paddling Club was founded in 1993 by a dedicated group of South Carolina's kayakers and canoeists to promote safe enjoyment of both whitewater and flatwater rivers. The Foothills Paddling Club has a combined membership of approximately 115 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

29. Foothills Paddling Club members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

30. The Foothills Paddling Club has standing in this case.

31. Plaintiff Joseph C. Stubbs is an individual residing at 535 Earlvine Way, Kennesaw, Georgia 30152. Mr. Stubbs is an American Whitewater member who, prior to the

unlawful closure, paddled the upper reaches of the Chattooga WSR legally but is now prevented from doing so.

32. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the upper reaches of the Chattooga WSR were open for floating recreation in accordance with applicable law.

33. Mr. Stubbs has standing in this case.

34. Plaintiff Ken Strickland is an individual residing at 210 Padena Drive, Box #63 Morganton, Georgia 30560. Mr. Strickland is an American Whitewater member whose primitive recreational floating use of the upper reaches of the Chattooga WSR has been interrupted by defendants' unlawful closure of the river. Mr. Strickland has been paddling the Chattooga WSR for more than thirty years, including the Headwaters section prior to the illegal closure. Because of Defendants' unlawful river closure, it is currently a federal crime for Mr. Strickland to float his kayak on more than one-third of the wild and scenic and wilderness waters of the Chattooga WSR.

35. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

36. Mr. Strickland has standing in this case.

37. Plaintiff Bruce Hare is an individual residing at 30 Three Cabin Trail, Franklin, North Carolina, 28734. Mr. Hare is an American Whitewater member whose primitive recreational floating use of the Headwaters has been interrupted by Defendants' unlawful closure

of the river. Mr. Hare legally paddled the closed portions of the river prior to the unlawful closure and is now prevented from lawfully doing so.

38. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

39. Mr. Hare has standing in this case.

B. Defendants

40. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

41. Defendant Thomas Tidwell is the Chief of the U.S. Forest Service, and in that capacity he has the responsibility to ensure that his agency acts in accordance with applicable laws and regulations.

42. Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture. The U.S. Forest Service is, by law, responsible for the management policies and actions undertaken with respect to the Chattooga River and certain other rivers on public lands. By statutory authority, and the agency's own regulations, it is also responsible for implementing the APA, WSRA, the Wilderness Act, MUSYA, the RPA/NFMA, NEPA and other land management laws and regulations pertaining to actions and decisions on rivers flowing through lands the U.S. Forest Service administers.

43. Defendant Elizabeth Agpaoa is the Regional Forester for the Southern Region of the United States Forest Service. The Southern Region encompasses thirteen states, including those states that Chattooga River flows through - North Carolina, South Carolina and Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national

forests, all under the supervision of Defendant Agpaoa, selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

44. Defendant Monica J. Schwalbach is the acting Forest Supervisor for the Francis Marion and Sumter National Forests in South Carolina. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

45. Defendant Marisue Hilliard is the Forest Supervisor for the national forests in North Carolina, one of which is the Nantahala National Forest. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

46. Defendant George M. Bain is the Forest Supervisor for the Chattahoochee-Oconee National Forest, located in northern Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

47. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture, and in that capacity he has the responsibility of ensuring that the U.S. Department of Agriculture acts in accordance with applicable laws and regulations.

48. Defendant U.S. Department of Agriculture administers the National Forest system.

49. Defendants are hereinafter collectively referred to as “Defendants” or as the “U.S. Forest Service” unless context requires otherwise.

III. FACTS

A. Description of the Headwaters

50. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

51. This case involves the Chattooga River, which was designated as a Federal Wild and Scenic River in 1974, pursuant to the WSRA.

52. The Chattooga WSR is a spectacular natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northern Georgia.

53. The waters of the Chattooga WSR, which flow through the Nantahala, Chattahoochee, Francis Marion and Sumter National Forests contain navigable Class I through Class V rapids before eventually cascading into Georgia’s Tugaloo Reservoir.

54. Primitive floating has occurred on the Chattooga WSR for more than 250 years.

55. Only the remote twenty -one river miles of the Chattooga WSR upstream of South Carolina Highway 28 are at issue in this case. That twenty-one-mile section is referred to herein as the “upper Chattooga” or “Headwaters.”

56. Four roads subdivide the Headwaters into three reaches, known, from northern-most to southern-most as Grimshawes Bridge to Bull Pen Bridge (GS-BP), Bull Pen Bridge to Burrells Ford Bridge (BP-BF), and Burrells Ford Bridge to the Highway 28 Bridge (BF-28) (see Table I and the Headwaters map attached hereto as (COMPLAINT EX. 2)).

57. Many parts of the Headwaters corridor, particularly in the Ellicott Rock Wilderness, are accessible only by boat.

B. History of the Ban on Floating

58. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

59. In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), a policy statement of land use management values.

60. With this list of potentially competing uses at its roots, section two of MUSYA further provides that the Secretary of Agriculture must administer the national forests for multiple use and sustained yield of the several products and services of the national forests. 16 U.S.C. § 529 (1988).

61. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

62. MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

63. The Wilderness Act was passed in 1964, and prohibited the use of commercial enterprises, in wilderness areas and except to the extent necessary for administration of the Act, motorized equipment, motorboats, landing of aircraft and all other forms of motorized transport were prohibited. 16 U.S.C. § 1311.

64. In 1968, Congress passed the WSRA. The purpose of the act was to create a national wild and scenic rivers system so that rivers with “outstandingly remarkable scenic, recreational ... or other similar values ...[would] be preserved in a free-flowing condition, and ... be protected for the benefit and enjoyment of future generations.” 16 U.S.C. § 1271.

65. The WSRA specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

66. Section 1277 (b) of the Wild and Scenic Rivers Act provides for the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary *to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.* (emphasis added).

67. In 1971, local USFS personnel conducted a study of the Chattooga’s suitability for protection under the Wild and Scenic Rivers Act.

68. The Study recommended that Congress include all sections of the Chattooga River in the Wild and Scenic Rivers System, based in large part on the Chattooga’s outstanding recreation opportunities—and specifically whitewater boating on the upper Chattooga.

69. The Chattooga River was among the first rivers in the United States to be designated under the system, receiving its designation as a WSR in 1974.

70. To convince Congress that the Chattooga River was eligible for inclusion in the WSR system, the USFS published a *Wild and Scenic River Study Report* on June 15, 1971 (the “Study”).

71. Fittingly, the photo on the cover of the Study depicts a canoe floating the Chattooga.

72. The USFS recommended the following to Congress:

Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like ...whitewater canoeing ... will enhance the recreation opportunities for many people in an area *where river-oriented recreation is scarce...*a river capable of

supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river...*Study*, 66-67.

73. The Chattooga River was considered for inclusion in the WSR system in six distinct sections.

74. Each of these sections was analyzed for inclusion separately, and each exhibited different outstandingly remarkable values and received different levels of protection based on those values.

75. The 1971 Study upon which Congress based its protection of the upper River recommends a “scenic” classification for the uppermost section of the Chattooga, noting:

Grimshawes Bridge crossing [which is 21 miles above Highway 28] is accessible by a country road. The section below the bridge can be floated by rubber raft and provides `exciting trips over small rapids and cascades. *Study*, 73.

76. The Study recommends a “wild” designation for several miles of river upstream of Highway 28 because, among other reasons:

Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen. *Study*, 74 (emphasis added).

77. The studies that the USFS sent to Congress, and upon which Congress based its protection of the upper Chattooga River, are laden with references to the value of these specific reaches as whitewater paddling resources. The table below documents these references, many of them to locations in the upper Chattooga:

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
General	All	USFS 1971a* Page 67	“Designating the Chattooga River a part of the National Wild and Scenic system would preserve—a river capable of supplying many intangible values. These values are difficult to assess but certainly exist for the canoeist as he meets the challenge of the river...”
General	All	USFS 1971a Page 67	“Compatible uses on the Chattooga River are floating (including rafting, canoeing, and kayaking), hiking (including sightseeing, nature study, and photography), hunting, fishing, and primitive camping.”
General	All	USFS, 1971a Page 150	“Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.”
General	All	USFS 1970 Page 1. USFS 1971b Page 5	“The Chattooga is the only mountain river in the four state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores.” “Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness.” “The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed”
General	All	USFS 1971b**	“It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking beside it, it can provide a refreshing recreation experience.”
Headwaters (GS-BP***)	I	USFS 1970 Page 5	“Below Grimshawes Bridge, the river can be floated by raft.”

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
Headwaters (GS-BP)	I	USFS 1971a Page 158	“Hikers, rafters and vehicles will frequently meet here because the road is the only major access to the river in the Headwaters area.” Text accompanies a drawing of Grimshawes Bridge notes the “beginning of rafting water” labeling the river immediately downstream of Grimshawes Bridge.
Headwaters (GS-BP) (BP-BF) (BF-28)	I, II, III	USFS 1971a Page 163	Appendix I, Chattooga River Potential Recreation Development Plan Summary. Table indicates construction of canoe launch sites at two locations in the upper Chattooga.
Headwaters (GS-BP)	I	USFS 1970 Page 6 USFS 1971a Page 73	“The section below the bridge (Grimshawes) can be floated by rubber raft and provides exciting trips over small rapids and cascades with frequent portages around difficult cascades and narrow sluices.”
Headwaters (GS-BP) (BF-28)	I, II, III	USFS 1971b	“In the management of the Chattooga River as a unit of the National Wild and Scenic River System, one objective will be to provide a recreation experience where a feeling of adventure, challenge, and physical achievement is dominant. In addition a maximum of outdoor skills, without comfort or convenience facilities will be provided. To provide this experience, river access will be primarily by trail, including canoe launch sites. Only three points will have road access—Grimshawes Bridge, Highway 28 bridge, and Highway 76 Bridge”
Headwaters (BP-BF)	II	USFS 1971a Page 74	“This part of the river can be floated only in rubber rafts, and many dangerous portions must be portaged.” “Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen.”
Headwaters (BP-BF)	II	USFS 1970 Page 9	“This entire section (Section II) is in a completely natural state. It includes some beautiful but hazardous whitewater. Enormous boulders, some

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
(BF-28)			over 50 feet high with trees on top, rise from the riverbed. This part of the river may be floated only in rubber rafts and many dangerous portions must be portaged. In the entire 15.9 miles, only two narrow bridges cross the river.”
Headwaters (BF-28)	II	USFS 1970 Page 11	The 8.0 mile section from Burrell’s Ford to the Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater. It flows around huge rocks and through narrow sluices and drops over 21 small waterfalls and rapids in less than two miles.”
Headwaters (BF-28)	II	USFS 1971a Page 75	“The eight mile section from Burrells Ford to Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater.”
Headwaters (BF-28)	III	USFS 1971a Page 75	Section III: also contains Headwaters section. “It is shallow and easy for the inexperienced canoeist.”
Headwaters (BF-28)	III	USFS 1970 Page 13	“It (Section 3) is shallow and easy for the inexperienced canoeist.” (13)
<p>* Note that 1971a refers to; USDA Forest Service. (1971a). Wild and Scenic River Study Report: Chattooga River, 1971b refers to: USDA Forest Service—Southern Region.¹³ (1971b). Chattooga River as a Wild and Scenic River, and 1970 refers to: USDA Forest Service. (1970). A Proposal: The Chattooga, “A Wild and Scenic River.”¹⁴</p> <p>** Note that 1971b does not contain page numbers.</p> <p>*** Note that “GS-BP” refers to the section of the Chattooga River between Grimshawes Bridge and Bullpen Bridge, “BP-BF” refers to the section of the Chattooga River between Bullpen Bridge and Burrells Ford, and “BF-28” refers to the section of the Chattooga River between Burrells Ford and Highway 28.</p>			

78. During its 1970 and 1971 studies to obtain congressional support to designate Chattooga as a WSR, the USFS specifically referenced channel characteristics supporting

¹³ (COMPLAINT EX. 3)

¹⁴ (COMPLAINT EX. 4)

navigability: “Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities.

79. The USFS was also clear that Grimshawes Bridge was intended to be a major access area for paddlers to enter the Chattooga River: “Below Grimshawes Bridge, the river can be floated by raft.”

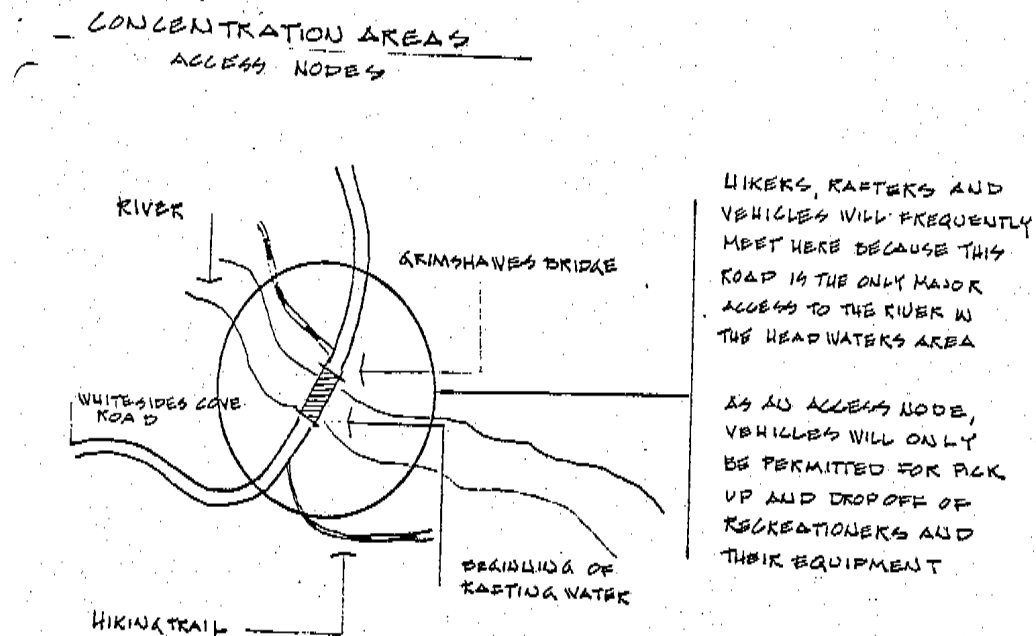
80. The Report stated: “Hikers, rafters and vehicles will frequently meet here (Grimshawes Bridge) because the road is the only major access to the river in the Headwaters area.”

81. The Study even includes a map labeling Grimshawes Bridge (the beginning of the upper Chattooga) as the “beginning of rafting water” and discusses several “canoe launch sites” on the Headwaters. *Chattooga River as a Wild and Scenic River*, at 158.

82. The USFS organized at least one rafting trip during preparation of the studies in support of Wild and Scenic designation, in the early 1970’s. It confirmed in the study report that “Grimshawes Bridge crossing is accessible by a country road.”

83. The USFS concludes in the study report that “the section below Grimshawes Bridge can be floated by rubber raft and provides exciting trips over small rapids and cascades ...” and that “Rafting or some method of floating is the best way to see this rugged portion of the river.”

84. The USFS WSR Report contains this sketch, showing Grimshawes Bridge as the “Beginning of Rafting Water”



85. Whitewater boating on the upper Chattooga was an existing and vital element of the recreation outstandingly remarkable value warranting inclusion of that section of the Chattooga in the WSR on the Headwaters system. In addition, whitewater boating is also a stand-alone value that to the Headwaters inclusion in the WSR system.

86. Rapids and the paddling experience are described in detail for each section of the upper Chattooga, and boating is described as “the best way” to see these sections.

87. Whitewater boating river values contributed to, if not controlled, how the Study’s drafters viewed and classified the upper Chattooga.

88. The Study makes clear that whitewater boating is a vital component of the river’s wild and scenic character and a use that should be protected by including the Chattooga in the WSR system.

89. Whitewater boating was one of the outstandingly remarkable values upon which the USFS based its recommendation for the Chattooga’s inclusion in the WSR system.

90. Based upon this study, Congress in 1974 included the Chattooga among the first rivers protected by the WSRA.

91. The entire upper Chattooga River was protected by Congress under the WSR system in 1974, in large part, because of the exceptional recreation value of boating on the upper river.

92. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

93. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

94. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process.

95. In 1975, certain portions of the Chattooga WSR corridor above Highway 28 were designated as “wilderness” under the Wilderness Act.

96. This area, known as the Ellicott Rock Wilderness, includes 8,271 acres of land in Georgia, North Carolina and South Carolina.

97. Five and two tenths miles of the Chattooga WSR traverses the Ellicott Rock Wilderness above Highway 28.

98. A hiking trail, known as the “Chattooga Trail” parallels this wilderness portion of river for approximately 3.2 miles.

99. While the Chattooga Trail remains near the river for most of this stretch, hikers following the trail remain visually separated from the river, save for occasional glimpses around or through natural obstructions.

100. The Ellicott Rock Wilderness and the section of the Chattooga WSR that flows through it are precious wilderness resources.

101. Two years after Congress included the Chattooga in the Wild and Scenic River System, local USFS personnel, at least one of whom was an officer in the local chapter of Trout Unlimited, banned floating on the upper Chattooga. Floating is one of the very forms of outstanding river recreation values that led to the river being included in the national WSR system.

102. The first official decision to ban boating above Highway 28 was made in connection with the 1976 Sumter National Forest Land and Resource Management Plan (LRMP). According to the LRMP, the ban on boating was justified by “public safety” concerns.

103. No user capacity analysis or other valid supporting documentation was included in the LRMP in connection with the ban.

104. The 1976 decision resulted in a handful of local anglers having a near monopoly on river recreation on the upper Chattooga.

105. The 1976 ban was made arbitrarily, outside of an open NEPA-type process, without public input, and in direct contradiction to the Study produced by the Sumter National Forest just five years earlier to support designation of the Chattooga as a WSR.

106. In 1985, a new Sumter National Forest LRMP was issued and the ban on floating continued.

107. In contrast to the 1976 ban where “public safety” was the stated justification, the 1985 floating ban stated that protection of “quality trout fishing” necessitated denying boaters access to the upper Chattooga.

108. This rationale was completely circular and without any rational basis. In essence, the “quality trout fishing” was the result of stocking non-indigenous fish to increase the fishing experience, and unlawfully banning floating to provide an artificial solitude experience.

109. As with the 1976 ban, the 1985 decision contained no user capacity analysis, valid supporting documentation or relevant research.

110. The boating community’s interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers.

111. Although the boating on the Headwaters was banned in 1976, from 1976 through 1985, the USFS did not enforce the ban. Thus, between 1976 and 1985 a few members of the public occasionally floated the Headwaters as had been done for over 250 years.

112. When boaters learned of the prohibition, they began to challenged it.

113. As a result of challenges from boaters, in 2004, the USFS agreed to analyze why floating, a protected activity on the Chattooga Headwaters, had been illegally banned. This purported analysis was conducted in conjunction with the USFS Revised Land and Resource Management Plan (“RLRMP”) process.

114. Federal regulations require the USFS to periodically revise its management framework for managing the various national forests. The Regional level of the USFS conducts these revisions of its various forests on a rolling basis in cooperation with the local forests.

115. Historically, management of the entire Chattooga River, including the parts of the river corridor in Georgia and North Carolina, has been controlled by South Carolina’s Sumter and Francis Marion National Forests headquartered in Columbia, South Carolina.

116. Because “Region 8” of the USFS (also known as the Southern Region) had already slated 2004 as the timeframe for revising the Land and Resource Management Plan for

the Sumter and Francis Marion National Forests in South Carolina, the Regional Forester decided to use the RLRMP process to consider boaters' challenges to the Headwaters boating ban.

117. The 2004 RLRMP was divided into numerous "issues" that were being considered for revision. The USFS discussed the boating prohibition in "Issue #13" of "Appendix H" to the 2004 RLRMP.

118. Regrettably, the USFS ultimately failed to analyze the boating issue and instead published a cursory defense of its decision to maintain the boating ban.

119. The 2004 RLRMP discussion on boating contained no scientific analysis, contained only vague references to undocumented "potential" problems associated with "adding" boating as a "new" use.

120. Instead of reviewing why protected wild and scenic river activity had been banned and how it could be restored, the 2004 RLRMP discussion instead focused on imagined problems associated with introducing a "new" use to the river. The 2004 RLRMP discussed resource impacts related to all users in general and reasoned that "new" boating use would result in additional resource impacts (simply because there would be more users) and determined that such "potential" impacts were a basis for continuing the ban.

121. Plaintiff American Whitewater ("AW") timely appealed the 2004 RLRMP ban through the USFS's administrative process.

122. AW's administrative appeal challenged the boating prohibition on the grounds that it was arbitrary and capricious under the APA, that it violated the WSRA, the Wilderness Act, USFS regulations, and a host of other applicable laws and regulations and that it infringed on a federally protected right to use a federal resource.

123. The USFS did not respond to AW's appeal in a timely manner according to the USFS's own regulations.

124. After delaying a decision on AW's appeal for a year, the USFS Chief finally issued a decision on AW's appeal. In April 2005, the USFS Chief agreed with AW and reversed the boating ban:

After careful review of the record . . . I am reversing the Regional Forester's 2004 Decision to continue to exclude boating on the Chattooga [Headwaters]. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. *Id.* at Ex. 7, USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 4 (April 28, 2005) [hereinafter, the "2005 Appeal Decision"].

125. However, in the same document in which the Chief reversed the 2004 Headwaters floating ban, he resorted, as a technical fallback, to the prior 1985 land and resource management plan for the Sumter National Forest.

126. The 1985 plan contained a boating ban, so the result was that the Chief reinstated a 1985 Headwaters floating ban in place of the invalidated 2004 ban—a ban that had been invalidated by the Chief on the grounds that it violated federal law.¹⁵

127. The apparent paradox in the Chief's order was mitigated by the fact that the Chief specifically identified for the Regional Forester the regulatory framework for immediately restoring paddling access: "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

¹⁵ *Id.* at 5.

128. In conjunction with the reversal of the boating ban and the regulatory framework for restoring boating access, the Chief's order further directed the Regional Forester, *within two years* (i.e., by April 2007), to conduct a "visitor use capacity analysis, including non-commercial boat use" and to amend the 2004 RLRMP in accordance with the results of the capacity analysis.

129. Notwithstanding the Chief's 2005 Order, the USFS's regional office, and by extension the local forests under its control, continued to ignore Plaintiffs' federally-protected right to float the Headwaters.

130. First, the Regional Forester ignored the Chief's apparent intent that floating access be restored on the Headwaters during the "two year" amendment process in order to conduct a meaningful visitor capacity analysis that could determine an appropriate capacity number of users. The Chief pointed to "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

131. Instead, the USFS maintained a complete ban on Headwaters floating, allowing less than 20 boaters access to the river *on only two days* during what ultimately became a 4.5 year amendment process. With boating banned, no user capacity analysis study "including whitewater boating" was ever conducted.

132. Second, the USFS's purported execution of the Chief's 2005 Appeal Decision was undertaken by local forest managers (called "Forest Supervisors") rather than by the Regional Forester. This deviation from the Chief's order is significant because of the local forest managers' distaste for boaters after having their 2004 ban reversed, their coziness with a small, but influential anti-boating interest, their demonstrated propensity to ignore federal law and USFS policy, and their apparent desire to prohibit Headwaters floating at any cost. Despite

repeated protests by Plaintiffs, local forest managers remained in control of the amendment process throughout its duration.

133. Although AW prevailed in appealing the 2004 ban, Plaintiffs none the less remained banned from floating the Headwaters. Thus, Plaintiffs assisted by Atlanta, GA based *pro bono* counsel sought relief in the United States District Court for the Northern District of Georgia.¹⁶ The Plaintiffs asked the Northern District of Georgia for an order requiring the USFS to restore floating access while the USFS conducted a user capacity analysis.

134. The USFS opposed the Plaintiffs' request and argued that the floating ban was not yet ripe for judicial review because the USFS was still in the process of amending the 2004 RLRPM and might ultimately restore floating access, thus rendering moot the Plaintiffs' arguments and requested relief. The Northern District dismissed Plaintiffs' case, holding that Plaintiffs' claim was not yet ripe for judicial review. However, the Court repeatedly noted that the case would be ripe once the USFS issued its 2009 Amendment.¹⁷

135. The court expressly and repeatedly stated that the soon to be issued Amendment would represent Defendants' final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time;*"¹⁸ that "*if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available . .*

¹⁶ See Pl.'s Compl., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 1]; see also Pl.'s Mot. for Prelim. Inj., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 3].

¹⁷ See *American Whitewater v. Bosworth*, No. 2:06-CV-74-WCO, *12-13, 18, 20 (N.D. Ga. Oct. 6, 2006) [Doc. 23].

¹⁸ *American Whitewater*, No. 2:06-CV-74-WCO at *12-13 [Doc. 23].

. ;”¹⁹ and that “[i]f [Plaintiffs’] vision [“of an open Headwaters”] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time.*”²⁰

136. The USFS missed its two-year deadline to amend the boating ban imposed by the 2004 RLRMP. In fact, it ultimately took Defendants four and a half *years* to publish an amendment that deviates little from the original decision reversed by the Chief.

137. Throughout the four and a half year decision period, Plaintiffs participated in every phase of the administrative process by attending USFS meetings and hearing, submitting comments to every draft of the USFS amendment document, corresponding with the USFA on numerous occasions to remind the agency of its obligation to restore hand-powered boating on the Headwaters and to execute a user capacity analysis that actually determines a numerical capacity of the river for users. The USFS failed to properly respond to or address Plaintiffs’ comments. *See* Colburn Declaration, October 9, 2009 filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated herein.

138. More than 1000 boaters from across the country asked the USFS to lift the boating ban in its 2004 RLRMP. Even more boaters requested the same of the USFS during the protracted amendment process. The USFS failed to properly respond to or address these requests.

139. Finally, on August 25, 2009, in direct violation of the USFS Chief’s order, three Forest Supervisors, *not the Regional Forester*, issued the long-awaited 2009 Amendment to the 2004 RLRM. The 2009 Amendment deviates little from the invalidated 2004 RLRMP.

¹⁹ *Id.* at *18.

²⁰ *Id.* at *20.

140. Like the 2004 RLRMP, the 2009 Amendment is based on an incomplete study that in no way meets the legal requirements for a user capacity study.²¹ It is a user capacity study in name only.

141. The 2009 Amendment purports to provide “all potential users with a fair and equitable chance to obtain access to the river,”²² but boaters are singled out for harsh restrictions while *all other users have unlimited access to the resource all year long*. In other words, the 2009 Amendment *only* restricts boating.

142. The 2009 Amendment bans boating on all but one seven-mile stretch of the nearly twenty-two miles of Headwaters. Those seven miles are separated from the rest of the river by complete floating bans on the Headwaters sections immediately upstream and downstream.

143. The 2009 Amendment permits boating on this small section of the Headwaters only in the dead of Winter—only during the months of December, January, February—and only when the Headwaters have exceptionally high water levels.²³

144. Boaters must hike 1.5 miles with their canoes or kayaks to the beginning of the section to access that section of the Headwaters.

145. Although Congress noted that there were readily accessible roadside launch sites when it designated the Chattooga as a Wild and Scenic River, the USFS has barred boaters from using those sites.

²¹ See Ex. F, Declaration of Glenn E. Haas 1-2. See Haas Declaration filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

²² Ex. B, Colburn Decl., Ex. __, USFS, *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*, 4 (Aug. 25, 2009) [hereinafter, the “2009 Amendment”]. See Colburn Declaration filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated here in.

²³ 2009 Amendment 2.

146. The 2009 Amendment also bars boaters from floating the entire 52-mile length of the Chattooga River from Grimshawes Bridge to Tugaloo Reservoir.

147. In stark contrast to its treatment of boaters, the 2009 Amendment grants wholly unrestricted access to and use by *all other* user groups.

148. By the USFS's own Orwellian estimation, this "fair and equitable access" would permit boaters to access one section of the Headwaters between zero and eleven days per year (and only in the Winter), with a likelihood of 3 days per year. In comparison, *all other user groups* are permitted to access and use the entire length of the Headwaters 365 days a year.

149. The 2009 Amendment, which maintains the illegal ban on paddling on the Headwaters, violates the same federal laws cited by AW in its 2004 Appeal of the 2004 RLRMP and the same federal laws that Chief of the USFS cited when he reversed the 2004 RLRMP.

IV. COUNTS

A. Violation of the Wild and Scenic Rivers Act

150. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

151. The 2004 USFS Land and Resource Management Plans for managing recreation uses on the Upper Chattooga River violated the Federal Wild and Scenic Rivers Act by instituting a total ban on all boating on the upper Chattooga.

152. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Federal Wild and Scenic Rivers Act by implementing a ban on boating on two of three sections of the upper Chattooga.

153. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Wild and Scenic Rivers Act by refusing to manage the \pm two miles of Wild and Scenic River downstream of Grimshawes Bridge flanked by private property.

154. There were no user capacity analyses conducted prior to implementing the 1976, 1985, and 2004 USFS Land and Resource Management Plans, yet floating was banned. This is a violation of the WSRA.

155. There was no legally valid user capacity analysis conducted prior to issuing the 2009 Amendment to the 2004 plan, yet floating was banned on two of three sections of the upper Chattooga, and virtually banned on the middle section. This is a violation of the WSRA.

156. Section 1281 of the WSRA provides in relevant part:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. 16 U.S.C. § 1281(a).

157. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the Wild and Scenic Rivers Act.101.

158. Whitewater boating is one of the values that prompted Congress to designated the upper Chattooga River as a WSR. It therefore must be protected and enhanced, not banned. The ban violates the WSRA.

159. Boating does not substantially interfere with public use and enjoyment of river values, and therefore its use should not be limited. In doing so, the USFAS violated the WSRA.

160. Floating must be protected and enhanced because in addition to itself being a stand alone value, it is also a fundamental component, one of the outstandingly remarkable values that caused the Chattooga to be included in the WSR system. The USFS failure to protect and enhance whitewater boating violates the WSRA.

161. Banning floating on over one-third of the Chattooga WSR—particularly on the cherished wilderness portions—destroys, rather than protects and enhances, this important value in violation of the WSRA.

B. Violation of the Wilderness Act

162. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

163. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days in the Winder on the middle section), violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is required to protect and enhance.

164. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days on the middle section), results in an allocation of uses in the Ellicott Rock Wilderness that violates the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

165. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

166. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

167. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

168. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

169. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

170. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

171. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

172. Thus as primitive recreation opportunities, hand-powered kayaking and canoeing are wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

173. Defendant’s own regulations implementing and giving effect to the statutory requirements of the Wilderness Act define hand-powered canoeing and kayaking as wilderness-complaint uses. *See* USFS Manual 2320.5.3.

174. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

175. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

176. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

177. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

178. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

179. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

180. Banning floating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

181. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

C. Violation of the Multiple Use

182. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

183. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

184. The MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

185. Many potential uses of the National Forest lands lack a market value in terms of dollars.

186. Readily available market values do not exist for aesthetics, recreation, watershed, and wildlife.

187. While no market value is readily available, the statute mandates that the value of these resources be considered.

188. Balancing values must also be consistent with other laws.

189. The Forest Service failed to attribute the appropriate “value” to boating the upper Chattooga and therefore could not possibly have properly balanced the mix of uses adequately.

190. Congress included the upper Chattooga River in the Wild and Scenic River system, in part, because whitewater boating is an “outstandingly remarkable” value of that river.

191. Because Congress fixed the value of river recreation on the Chattooga WSR as “outstanding” and “remarkable,” the USFS should have accorded river recreation that same value, and should have given substantial value to the importance of preserving boating recreation.

192. Accordingly, the USFS has failed to comply with the MUSYA’s requirement to give “due consideration” to the “relative values of various resources in particular areas.”

193. Whitewater boating on the upper Chattooga is an “outstanding” and “remarkable” value. As such, that value must be protected and enhanced in any appropriate balance of multiple uses.

194. Defendants have not attributed any value to floating on the Headwaters, by setting the amount of floating at zero while not limiting other uses. Therefore, Defendants have not given due consideration to the relative values in violation of the MUSYA.

195. Defendants have not attributed any value to floating on the Headwaters, even though Congress included the Headwaters in their identification of floating as an outstandingly remarkable value. This is a violation of the MUSYA.

D. Violation of the National Forest Management Act

196. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

197. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

198. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

199. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process. NFMA creates a statutory framework for the management of National Forests.

200. NFMA states that the Forest Service “shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a).

201. NFMA provides a two-step process for forest planning. First, the Forest Service must develop a Land Resource Management Plan (“LRMP”) and an EIS for the entire forest. *See* 36 C.F.R. § 219.10(a), (b). Second, once the LRMP is in place, the Forest Service must assess site-specific projects in light of the LRMP. *See* 36 C.F.R. § 219.10(e).

202. The LRMP is in essence, a programmatic statement of intent that establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions.”

203. Among other items, an LRMP must provide for multiple use and sustained yield of the products and services obtained from that use, including outdoor recreation. *See* 16 U.S.C. § 1604(e).

204. The USFS did not adequately provide for multiple use of resources—specifically with respect to outdoor recreation. The USFS’s programming statement of intent that establishes planning guidelines basically bans all boating on the Headwaters, which constitutes more than 40% of the Chattooga River.

205. “Due consideration” was not given to “relative values” in the LRMP and EIS as required by the RPA/NFMA.

206. Defendants’ failure to consider the outstandingly remarkable value of river recreation violates MUSYA. Therefore it also violates RPA and NFMA, which require the USFS to comply with MUSYA when managing the National Forests.

E. Violation of the Fifth Amendment of the United States Constitution

207. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

208. The floating ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

209. Congress protected the Upper Chattooga as a WSR for the express purpose of protecting and enhancing outstandingly remarkable river values such as floating, yet the USFS banned floating and did so without any rational basis.

210. The USFS deprived Plaintiffs of the liberty to do as Congress intended, violating the Plaintiffs’ rights under the Fifth Amendment of the United States Constitution.

211. The ban of paddling on the river irrationally deprives recreational boaters of their liberty of movement on a river that the Wild and Scenic River Act says is to be managed and maintained expressly for their benefit.

212. The ban violates the equal protection clause of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis.

213. The upper Chattooga is a section of public river that is required by Congress to be protected and enhanced for the benefit of all Americans who wish to engage in primitive recreational activities, yet members of the public who would engage in floating are the only class to be singled out and denied access to this section of public river.

214. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationalists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

215. The following statements from the USFS EA and ROD demonstrate the failure of the USFS to provide equal protection to all users:

- There is a need to protect the unique angling experience above Highway 28.
- Allowing whitewater boating on some or the entire upper Chattooga River has the potential to ... affect the high-quality backcountry angling experience.
- Public comments and Forest Service studies have shown that angler/boater encounters are among the most important impacts associated with allowing boating on the upper Chattooga.
- [The USFS selected Alternative 4] emphasizes year-round, high-quality trout fishing.

- The take-out [mandated by the USFS selected Alternative 4] at Burrells Ford avoids potential on-river encounters with anglers in the Rock Gorge and in the delayed-harvest area.
- By establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

216. Nowhere in the EA does the USFS acknowledge that “there is a need to protect the unique *boating* experience above highway 28.”

217. Nowhere in the EA does the USFS acknowledge the ban on paddling not only “has the potential to ... affect the high-quality backcountry *boating* experience” but totally eviscerates this experience from the river.

218. Nowhere in the EA is there a proposed an alternative banning angling to “avoid potential on-river encounters with boaters.”

219. Nowhere in the EA does the USFS consider or find that “By establishing flow, season, and reach restrictions on *angling*, the high-quality boating experience is maintained and potential conflicts are reduced.”

220. This was a one sided analysis, conducted with a predetermined outcome.

221. Whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access with no rational basis while all other primitive recreationists are allowed to use the upper Chattooga without significant restriction or limitation.

F. Violations of the Administrative Procedures Act

1. Failure of USFS to Follow its Own Regulations

222. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

223. Under the Administrative Procedure Act (the “APA”), an agency’s decision may be set aside by a reviewing court if the court finds the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

224. When an Agency fails to follow its own regulations and procedures, its actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. The examples below all demonstrate that the USFS has violated the Administrative Procedures Act.

225. In banning floating, the USFS contravened its own regulations regarding how a Wilderness area should be managed.

226. The de facto boating ban flies in the face of these important regulatory directives. Floating is banned, not optimized.

227. The ban stands in direct opposition to the requirements that the Forest Service promote and perpetuate recreational use, and that wilderness is to be made available to the “optimum extent” consistent with wilderness preservation.

228. Banning a 250+ year historical and traditional form of wilderness recreation does not promote or perpetuate that recreation.

229. Human use is certainly not permitted to its optimum extent where, as here, a low-impact form of primitive recreation is virtually banned.

2. The Floating Ban Violates The Forest Service Manual

230. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

231. Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action.”

232. “Indirect techniques” means techniques (such as signage) that minimize or eliminate management concerns while still allowing users to access the resource. The USFS has never applied indirect techniques in the Headwaters.

233. The Forest Service Manual contains the following Wilderness Act policy:

Maximize visitor freedom within the wilderness. Minimize direct controls and restrictions. Apply controls *only when they are essential for protection of the wilderness resource* and *after indirect measures have failed*.

234. The USFS virtual ban on boating in the Headwaters is in violation of the above policy because indirect measures were never tried, and because boating poses no threat to the wilderness resource.

235. The USFS Manual suggests the following approach: “When it becomes necessary to limit use [of a WSR], ensure that all potential users have a fair and equitable chance to obtain access to the river.”

236. If the USFS is to limit use of the Chattooga Wild and Scenic River corridor, it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning floating, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use.

237. By banning floating on the Headwaters of the Chattooga, while allowing all other uses to occur without limits, the USFS is not providing paddlers a fair and equitable chance to obtain access to the river.

238. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the USFS is being arbitrary and capricious, abusing its discretion and otherwise not in compliance with the law.

239. The intense and unprecedented management controls that apply only to boaters and on such a limited scope and time do not comply with USFS policy of minimizing direct controls and restrictions.

240. No other USFS management of any day use, or overnight use for that matter, anywhere in the country is burdened with such harsh and burdensome restrictions.

241. No other Headwaters user group is subject to the restrictions and burdens placed on floating.

242. With respect to the middle section of the Headwaters, which runs through a protected Wilderness, the USFS Manual provides that one of the objectives for management of wilderness is to: "Protect and perpetuate wilderness character and public values including, but not limited to...primitive recreation experiences." USFS Manual § 2320.2.

243. That provision is later clarified in section 2320.5.3, indicating that rafts and canoes are considered primitive devices suitable for use in wilderness.

244. Banning floating on this reach on an average of 362 days each year is in violation of USFS policy.

245. Section 2323.14 of the USFS Manual instructs that managers of wilderness areas should "provide for the limiting and distribution of visitor use according to periodic estimates of capacity in the forest plan."

246. The USFS offers no estimates of user capacity for anglers, boaters, or other dispersed recreationists in the Ellicott Rock Wilderness Area, yet takes the most extreme use limitation measure available: virtually banning a use.

247. Without the information provided in a valid user capacity analysis, the USFS has violated the directives for managing wilderness areas.

3. The USFS Failed to Follow The Directives of the Chief to Comply With American Whitewater's Successful Appeal of the 2004 Revised Plan.

248. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

249. When American Whitewater successfully appealed the 2004 Revised Plan, the Chief of the USFS issued a decision that required the Regional Forester to conduct a user capacity study and to engage in a number of other activities.

250. The Regional Forester and Forest Supervisors failed to comply with the Chief's decision. That failure renders the 2009 Amendment arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

251. The Appeal Decision required that several considerations be made in the EA and in future management – the majority of which were not complied with in the 2009 Amendment and EA.

252. The Decision ordered that the USFS address the “Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.” (ROD pg. 3)

253. The USFS failed to analyze the entire length of river required by the Decision. The USFS does not analyze the over 2 mile section of river at and immediately downstream of Grimshawes Bridge.

254. The USFS, with very little analysis, makes new, extreme, management decisions related to Chattooga River tributaries, claiming that such tributaries are outside the scope of the ROD.

255. The Decision ordered that the USFS must ensure that “If it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river.”

256. The 2009 Amendment does not ensure that all potential users have a fair and equitable chance to obtain access to the river. On the contrary, the USFS does not treat all users equitably.

257. The USFS published a list of alternative new management regimes before ultimately adopting its “preferred alternative” which became the 2009 Amendment. Each proposed alternative singled out floating for unique and harsh limits.

258. The Decision ordered that the EA must ensure that Wilderness “be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness.”

259. The 2009 Amendment does not meet this mandate. Encounter standards as well as the causes of existing biophysical impacts are left unmitigated in the proposed alternative.

260. The Decision ordered that the USFS must ensure that “wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions” (36 CFR 293.2(b)).

261. The 2009 Amendment does not optimize floating. It bans floating and allows all other WSR uses in unlimited amounts at all times.

262. The Decision orders that the USFS ensure that ““direct controls and restrictions” be minimized, and that controls are to be applied only as necessary to protect the wilderness resource after indirect measures have failed (FSM 2323.12) (COMPLAINT EX. 5).”

263. The 2009 Amendment immediately applies direct control and restrictions by implementing unjustified direct boating limits prior to trying indirect measures.

264. The Decision orders that the USFS ensure that “limitation and distribution of visitor use should be based on “periodic estimates of capacity in the forest plan” (FSM 2323.14).” Specifically, the Order states: “I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, *including non-commercial boat use*.” (Emphasis added).

265. The EA for the 2009 Amendment does not contain a user capacity analysis that meets the standards for such an analysis. At most it addresses past and current use, with no consideration of capacity. In addition, the EA is limited in scope to addressing the capacity of paddlers – not all WSR users as directed by the Decision.

266. The Decision found that the RLRMP was “deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.”

267. The 2009 Amendment contains this same deficiency. It is simply a rewritten version of the same inadequate discussion document and ultimately proposes virtually the same actions.

268. The USFS wholly fails to meet the legally required goals for the EA and the ultimate decision as directed by the Chief in the Decision.

4. The USFS Abdicated its Lawful Duty to Protect and Enhance Outstanding Recreational Values on the Northern Most Section of the Headwaters

269. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

270. The section of the Chattooga River designated as Wild and Scenic begins at its northernmost point, Grimshawes Bridge on USFS lands.

271. Shortly downstream, the Wild and Scenic River flows through private lands for approximately 1.7 miles before reentering USFS lands for the remainder of its journey to Lake Tugaloo.

272. In all alternatives, the USFS would unlawfully ban floating on this section of the Headwaters.

273. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the WSRA.

274. One ORV that could easily be protected in this reach is recreation, and floating is the one form of recreation requiring little or no stream bank access, and yet the USFS banned this use without analysis in their EA and 2009 Amendment.

275. The consideration of paddling the upper half of the Chattooga Cliffs reach is simply discounted by the USFS as “out of scope” in the EA’s “Other Concerns” section.

276. The USFS state: “This issue is outside the scope of this proposal. The Forest Service does not encourage trespass on private lands.”

277. Aside from the upper Chattooga, the USFS does not ban uses (like paddling, hiking, hunting, etc) because recreationists may stray onto private lands.

278. Virtually all public lands are contiguous with private lands. Thus, without considering its legal obligations, the USFS simply chose not to consider recreational activities on this stretch of the Headwaters for which Congress had found floating to be an outstanding value.

279. While the EA is silent on why the reach was considered out of scope, a memo from the Southern Region Planning Staff, titled “Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River,” dated September 25, 2007 (COMPLAINT EX. 6), explicitly advised that this section of river be eliminated from analysis:

Although two identifiable stretches of private lands are located in North Carolina along the Chattooga River, the uppermost potential location to put in for recreational boating and general recreational access occurs at Grimshawes Bridge (County Road 1107) in North Carolina. The land on the north side of the bridge is part of the National Forest System, while the south side of the bridge marks the beginning of the Rust property.

Boaters putting in at this location and wishing to continue down the river would have to pass through the Rust property, which would put them at risk of potentially committing trespass. The private land interests in this segment of the river have expressed their opposition to public boating and general public use through the Rust property at any time and under any conditions. It is likely that any member of the general public attempting to use this section of the river would face legal action brought by the landowners.

280. In a letter dated September 26, 2007, then Forest Supervisor Jerome Thomas advised John Cleaves, the Chattooga River Analysis Core Team Leader and Interdisciplinary Team Leader:

In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river.

281. This direction is directly contrary to law.

282. The USFS owns a canoe launch site immediately upstream of Grimshawes Bridge with road access. The site – which was labeled “the beginning of rafting waters” in the USFS 1971 study, allows boaters to access the Headwaters without entering upon any private land.

283. Boaters may proceed downstream from this point for 52 continuous river miles of world class whitewater without even setting foot on any private property. Before the illegal ban, this was the regular custom of hand-powered canoeists and kayakers like the individual plaintiffs.

284. The USFS has well established authority to regulate – and allow – paddling through private lands on Wild and Scenic rivers based on the Property Clause of the Constitution. In *U.S. v Lindsey*, the court ruled: “It is well established that this [Property] clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters.” 595 F.2d 5 (1979). “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.” *Id.*

285. This authority overrides any conflicting state laws, based on the *Supremacy Clause* of the Federal Constitution.

286. This authority is clearly stated in the Forest Service Manual chapter addressing river recreation management:

Administration of the rivers within the National Forest System falls under the general statutory and regulatory authorities, including mining and mineral leasing, laws, that apply to lands. The basic authority to regulate public use of waters within the boundaries of a National Forest *or Wild and Scenic River* derives from the property clause of the U.S. Constitution as implemented through the laws pertaining to the administration of the National Forests. The authority of the Secretary of Agriculture to regulate the public use of waters found at 16 USC 551 has been upheld in many court decisions. The most notable cases are: *United States*

v. Lindsey, 595 F.2d 5 (1979). The court held that within a federally designated area the Federal Government had the authority to regulate camping on State-owned land below the high water mark of a river. *United States v. Richard*, 636 F.2d 236 (1980) and *United States v. Hells Canyon Guide Service*, 660 F.2d 735 (1981). The courts held that the Forest Service can regulate use of a river notwithstanding the fact that users put in and take out on private land.

287. The Forest Service Manual is clear: the Forest Service retains authority to regulate the use of a river and the National Forest lands on the shorelines whether it is navigable or nonnavigable. Failure to do so is arbitrary and capricious, an abuse of authority and otherwise contrary to law.

288. A 2003 GAO Report (COMPLAINT EX. 7) reached a similar conclusion:

The Property Clause permits federal regulation of water as necessary for the beneficial use of federal property.

289. The USFS must protect the ORVs of the Upper Chattooga River as it flows through private lands, yet elected not to even consider this section in their EA, despite being directed to do so by the USFS Chief and required to do so by applicable law.

290. The USFS abdicated its responsibility to protect and enhance the Chattooga River and support its recreational enjoyment, thus violating the Wild and Scenic Rivers Act.

291. The USFS violated the directives of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses in the Chattooga river corridor of the Ellicott Rock Wilderness.

292. Not only does the USFS's omission of the uppermost two miles violate the Administrative Procedure Act, it also violates the WSRA, and NEPA. The entire upper stretch of the Chattooga was historically open to boating – even when the entire reach was private property.

293. All alternatives addressed in the EA propose a ban on the upper half of the Wild and Scenic Chattooga Cliffs reach without any rationale, analysis, or justification. There is no discussion of the basis for the agency's failure to consider alternatives other than banning paddling, except a single sentence claiming the reach is "outside the scope of this proposal."

294. Banning floating on this reach is without a legal or rational basis and is a significant federal action limiting the public's legal rights.

295. The USFS has not conducted a user capacity analysis or collected any recreational information on this portion of the Headwaters on which to base a decision.

296. The public has been banned from floating this reach even during the USFS one-time on-river assessment in 2007. The USFS conceded this point in a memo from the Southern Region Planning Staff, titled "Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River," dated September 25, 2007:

Additionally, information regarding the ability to float and recreate on this stretch of the river and the environmental impacts of such uses *is incomplete and inconclusive*. To date, the Forest Service has been unable to secure the access needed from private land interests in this segment to assess conditions in the area. Therefore, the agency is limited in its ability to conduct an environmental assessment of alternatives which would permit boating and other recreational uses of the general public along this stretch of the river.

297. The USFS claims it could not study a federally protected river because adjoining private property landowners would not grant the USFS access. Yet, no permissions or access is required.

298. Boaters can enter the river on USFS land immediately upstream of Grimshawes Bridge and float the entire stretch through private property without setting foot on any private land. The arbitrary exclusion of this area from analysis violates NEPA and the APA.

299. In addition, because the agency failed to analyze floating use through the reach, the USFS believes it must therefore ban paddling – thus exacerbating its previous arbitrary and capricious decision.

300. The river should be open to paddling until conditions prove limits are needed. Indeed, the last time the USFS studied this section of river (in the 1971 study) they determined that floating this section was entirely appropriate. There has never been a contrary finding.

301. Furthermore, every whitewater river and stream in the entire region is open to kayaking and canoeing without any limits thereon. The USFS assumption that in this case the default management of the river should include a complete paddling prohibition is wholly inconsistent with normal management.

302. The Upper Chattooga River should be open to paddling unless there is a compelling reason to limit it. In this case, the USFS has failed to produce any such rationale. Because no rational basis is provided, this decision is arbitrary and capricious.

303. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

304. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

5. Boating Will Not “Substantially Interfere” with River Values

305. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

306. The WSRA provides that authorized uses should not be limited unless they ‘substantially interfere’ with the river’s remarkable values.

307. Whitewater boating on the upper Chattooga is one of that section's outstandingly remarkable values. It is also an inseparable element of the recreation ORV.

308. All proposed uses of the upper Chattooga should be scrutinized under section 1281 to determine whether they 'substantially interfere' with, among other things, whitewater boating, not the other way around.

309. Because whitewater boating is an ORV, it cannot substantially interfere with itself, and therefore it cannot be limited (unless some form of limitation would actually protect and enhance the whitewater boating value), unless all other ORVs are limited equitably.

310. Whitewater boating does not 'substantially interfere' with any other outstandingly remarkable value.

311. While the USFS makes vague references to the *possibility* of some conflict between boaters and anglers or hikers, the record demonstrates that there will be *no* conflict between such uses, much less 'substantial interference.'

312. Another important reason that the record fails to demonstrate 'substantial interference' is that the USFS's reasoning is premised upon a false assumption: that whitewater boaters would be a "new" user group.

313. The USFS vague projections of conflict erroneously pit a "new" user group against "existing" user groups.

314. The reason the USFS attempts to designate whitewater boaters as a "new" user group is because the two prior (1976 and 1985) LRMPs also banned whitewater boating in violation of section 1281.

315. If any decision alters the *status quo ante*, it is the decision to ban a historical use that is cited in the Study as an important river value.

316. Boating is not “new” to the Chattooga.

317. Boating has been an important form of recreation on the entire reach of the Chattooga River for more than 250 years.

318. Accordingly, the USFS’s “new” versus “existing” analysis of conflict is based upon a false assumption and cannot substantiate vague claims of user conflicts.

319. Even if everything in the EA is accepted as true, there is no evidence that whitewater boating “*in fact substantially interferes*” with other values.

320. Unless there is clear evidence that floating ‘substantially interferes’ with outstanding river values, the USFS cannot even *limit* boating—much less ban it.

6. The USFS has not performed a User Capacity Analysis for the W&S upper Chattooga River

321. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

322. The Wild and Scenic River Act, as recognized in the Decision on American Whitewater’s appeal of the 2004 Revised Land and Resource Management Plan required the Sumter National Forest to conduct a user capacity analysis.

323. User capacity analyses are mandatory as a basis for managing both the types and levels of use.

324. The EA and 2009 Amendment do not state a total recreational capacity for the Upper Chattooga River, or capacities for individual types of use. Therefore, it is not a user capacity analysis. *See* Haas Declaration as filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

325. The Integrated Report (Shelby and Whittaker 2007) is not a user capacity analysis and identifies no capacities for the river corridor.

326. Without a user capacity analysis showing that boating must be limited to protect the resource, the USFS has no basis to limit boating.

327. The National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas (the “Secretarial Guidelines”) addressed user carrying capacity. 47 Fed. Reg. 39,454 (Sept. 7, 1982).

328. The Secretarial Guidelines define “carrying capacity,” as “[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and free flowing character of the river area, the quality of recreation experience, and public health and safety.” *Id.* at 39,455.

329. The Secretarial Guidelines state that:

“[s]tudies will be made during preparation of the management plan and periodically thereafter to determine the *quantity and mixture* of recreation and other public use *which can be permitted* without adverse impact on the resource values of the river area. Management of the river area can then be planned accordingly.” *Id.* at 39,459 (emphasis added).

330. *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, recently held that:

The Secretarial Guidelines also require that a component’s management plan state the *kinds and amounts* of public use which the river area *can sustain* without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.

331. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation of the principles and practices of the recreation resource planning profession.

332. The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River* (USDA Forest Service, August 2009) (EA) fails the test of adequacy on several fronts.

333. Visitor capacity is not adequately addressed in the EA, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year “visitor capacity analysis” effort in response to the 2005 Decision of Appeal;

334. In the EA, the USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;

335. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is a maximum number of people. No range of visitor capacity alternatives were offered for recreation activities.

336. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

337. Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase “visitor capacity” has replaced the phrase “user capacity” and are used interchangeably herein.

338. While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people.

339. A visitor capacity can be defined as the prescribed *number(s)* of recreation opportunities that will be accommodated based upon an area's approved comprehensive management prescription (i.e., the area's goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

340. Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area's prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment.

341. The EA is virtually silent on the issue of visitor capacity.

342. The EA does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year "visitor use capacity analysis."

343. The USFS EA does not define the appropriate kinds and amount of public use that can be sustained in the Chattooga River corridor, and is therefore does not contain a user capacity analysis.

7. The USFS Failed to Adequately Address Floating in the Wilderness in the 2009 Amendment to the 2004 plan.

344. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

345. The USFS virtually bans non-commercial, hand-powered floating on the 5.2 miles of Chattooga River that traverses protected wilderness.

346. Meanwhile, the USFS promotes continued access to the Ellicott Rock Wilderness for hikers, backpackers, campers and anglers in unlimited numbers.

347. Hikers, backpackers, campers, and anglers have greater impacts on wilderness than do non-commercial, hand-powered boaters.

348. The USFS improperly adopts a non-sustainable approach to use management of wilderness by promoting higher impact uses over lower impact uses.

349. The USFS virtual ban on primitive boating in the Ellicott Rock Wilderness ignores a primary mandate for administration of wilderness: that it be devoted to recreational use.

350. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

351. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

352. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

353. The USFS Amendment #1 to the Revised Land and Resource Management Plan for the Upper Chattooga River proposes to allow an average of *only 6 days* of non-commercial, hand-powered floating recreation on the section of Chattooga River within the Ellicott Rock Wilderness.

354. The Revised Land and Resource Management Plan decision to essentially ban boating in this area violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is commanded to protect and enhance.

355. The Revised Land and Resource Management Plan allocation of uses in the Ellicott Rock Wilderness undermines the primary purpose of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

356. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

357. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

358. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

359. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

360. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

361. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

362. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

363. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

364. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

365. Banning non-motorized boating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

366. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

367. The USFS suggests that boating should not be permitted in the Ellicott Rock Wilderness because it might disturb anglers.

368. Unless a documented need for wilderness preservation is the basis, discriminating against user groups runs contrary to Congress’s intent to protect these treasured areas for the benefit of all wilderness compliant forms of recreation.

369. The USFS floating ban is not based on any threat to wilderness preservation.

370. The floating ban is based upon an untested suggestion that some users “might” be upset if a “new” user group is introduced into the wilderness.

371. The prediction that some users will not want to share simply does not justify ignoring the intent of Congress to make wilderness available to all Americans. Floating is not a “new” use; it has occurred on this WSR for more than 250 years.

372. When defining “wilderness” under the Wilderness Act, Congress contemplated the very type of use Plaintiffs seek here. “Wilderness” is defined as an area “where man himself is a visitor who does not remain.”

373. Kayakers and canoeists seek access to float from an existing upstream put-in, through the Ellicott Rock Wilderness, to an existing take-out point downstream of the wilderness.

374. This low impact activity will take place in less than a single day. In other words, paddlers seek to enjoy a primitive area in which they will be visitors who do not remain—a use that not only comports with, but helps define wilderness.

375. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

376. Thus as a primitive recreation opportunity, floating is wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

377. Primitive boating must be permitted in the Ellicott Rock Wilderness absent clear proof that wilderness preservation would be jeopardized.

378. A management decision that favors higher-impact uses over lower-impact uses is inconsistent with the Wilderness Act.

379. Favoring higher impact uses over lower impact uses undermines the goal of wilderness preservation, which is to preserve (*i.e.*, lessen impact on) the wilderness characteristics of a protected area.

380. The USFS should allow non-commercial, hand-powered boating in the Ellicott Rock Wilderness at least to the extent it allows other higher impact uses.

381. The Chattooga River only flows through one wilderness area: the Ellicott Rock Wilderness.

382. Paddlers seek access to the Ellicott Rock Wilderness in order to enjoy its scenery and the high quality whitewater boating.

383. While nominally addressing encounter standards and use limits, the USFS's preferred alternative *artificially increases* recreational use by supporting the stocking of trout adjacent to a Wilderness area and in a Wild and Scenic River, while banning natural floating use.

384. In the EA, the USFS admits that "[t]he angling trends on the Chattooga also depend on stocking and regulation stability." The agency has reported that they support the *stocking of over 70,000 exotic game fish* annually in the Upper Chattooga River to artificially increase recreational use. *Shelby and Whittaker* p. 19.

385. At the same time as this environmentally harmful stocking program occurs, the USFS has virtually banned floating, thereby decreasing recreational use in the Wilderness area.

386. In a Wilderness area on a Wild and Scenic River, natural conditions should prevail. The upper Chattooga River naturally provides high quality boating opportunities during times of high flow and a moderate quality angling experience at low flows.

387. There is no justification in the EA for artificially increasing the angling experience while effectively banning another wilderness use, floating.

388. The most Wilderness compliant alternative would have a natural balance of boating and angling – without conflict, with little recreational overlap, and without the collateral impacts of stocking exotic game fish.

G. The USFS Failed to Treat All Users Equally as Required by the Chief's Decision and applicable laws.

389. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

390. The upper Chattooga is a section of a public river that Congress required the USFS to protect and enhance for the benefit of all Americans who wish to engage in primitive recreational activities. Yet members of the public who would like to float the upper Chattooga are the only class of persons to be singled out and denied access to the upper Chattooga.

391. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

392. The Decision on American Whitewater's appeal confirms that if use is to be limited it must be limited equitably. The EA, the alternatives, and the preferred alternative are not equitable. Each alternative proposes to radically limit or ban paddling use while other uses are virtually unlimited.

393. The USFS preferred alternative is to allow only six days of boating on one small stretch of the Headwaters, but even admits that only three of the six days would actually be available to paddlers. *Shelby and Whittaker* 2007, p. 36-37. Three days of paddling versus 365 days for other uses is not equitable.

394. The USFS has instituted the harshest possible management on one Wilderness Compliant use – a total ban on much of the river – while allowing all other uses unlimited access.

395. Only members of the floating public are required to receive advance permission to access the Headwaters. Putting the decision-making on whether the water is suitable to float on

a government official will reduce boating opportunities (below the three days granted by the USFS), reduce safety, discourage use, slow permitting, and cause government waste. This practice is not conducted on any other river in the Nation.

396. No other user group is required to wait for last minute permission to recreate on the Upper Chattooga River.

397. Appendix B of the EA asserts that boaters *may* have to pay fees to access the Upper Chattooga River through the commercial website Recreation.gov. This website is an online reservation service used for camping in designated campgrounds and other resource intensive overnight-use management.

398. No other user group—hikers, swimmers, backpackers, anglers, hunters, and other users—is or will be required to pay a fee to engage in their chosen form of backcountry travel. Only paddlers will have to pay to use the river.

399. Appendix B of the EA asserts that boaters may have to use the commercial website Recreation.gov prior to accessing the upper Chattooga River. This website is an online reservation system.

400. No other user group has to register online prior to visiting and traveling in the Upper Chattooga watershed.

401. The USFS has decided to limit paddling to the three winter months of December, January, and February, while all other uses are allowed year round.

402. Winter days are often cold and they are short, both of which potentially increase the difficulty of floating in the Winter and decrease the enjoyment.

403. While Winter boating in the Southeast is common, no other user group is restricted to using any section of the Chattooga at the least optimal time of year.

404. The USFS has decided to allow a miniscule amount of paddling on a small section of the river, while existing user groups have unlimited access to the entire river corridor. Specifically floating can only occur on the Ellicott Rock Reach, and if they are willing to carry their boats 1.5 miles, floaters can enjoy part of the Chattooga Cliffs Reach.

405. Floating is completely banned on the upper half of the Chattooga Cliffs reach, the Rock Gorge, Nicholson Fields, and all tributaries. Floating is a place-based activity, and banning a large section of a Wild and Scenic River has a significant impact on paddlers.

406. The USFS has decided to only allow paddling to occur at rare high flows over 450 cfs, while no other user group is limited by flow. People are permitted to swim and fish on the entire length of the Chattooga regardless of the rate of flow.

407. This flow constraint eliminates the opportunity to enjoy moderate flow days which many members of the floating community find less challenging and more enjoyable. In fact, according to Shelby and Whittaker this plan eliminates one third of the optimal paddling flow range and all of the technical boating opportunities.

408. The USFS did not collect, refer to or rely on any scientific or empirical data to demonstrate that flow rates of 450 cfs and above provide a suitable floating experience. No such data exists.

409. The effect of the flow and seasonal limits imposed by the USFS is that an average of 6 days annually will be hydrologically viable for paddling, but only three of those days will likely be usable based on hydrologic complexity. *See* Shelby and Whittaker (2007).

410. While paddlers are given three days to recreate, all other users are given 365 days.

411. Due to the flow and seasonal restriction imposed on boaters by the USFS, every boater who wished to paddle the middle one third of the upper Chattooga (the only section of the

upper Chattooga where boating is not completely banned) will be forced to do so during three days. All other user groups are permitted to use the entire river on any day of the year.

412. The chance that a significant number of paddlers will descend the river in a single day and possibly inadvertently violate standards is greatly increased by this arbitrary and capricious and illegal management choice. The USFS confirms that:

However, alternatives 4 and 8 propose an “adaptive management” component that could use registration, monitoring or surveys to determine the need for implementation of additional use restrictions.

413. Not only will the USFS consider additional use restrictions; the USFS will also single out paddlers for additional unique restrictions. Specifically, one of the monitoring questions the USFS intends to pursue is:

Above Highway 28 is the solitude component of the recreation ORV being maintained? Are the encounter levels within established desires and estimates? Has the experience of historical recreation users been diminished due to the introduction of boating?

414. The USFS has created conditions that encourage relatively large numbers of paddlers to descend on a small portion of the river in a very small three day window. The USFS will then monitor this use and hold paddlers to a unique and biased standard.

415. The USFS is setting up paddling to fail on the Upper Chattooga.

416. The USFS has decided to limit all existing users indirectly only after standards are violated, and to limit paddlers directly immediately, prior to any standard violations.

417. Specifically, the USFS is immediately completely banning paddling on most of the upper river, and is requiring permits and harsh seasonal and flow limits where paddling is allowed.

418. On the other hand, existing users have no limits whatsoever until encounter standards are violated on 20% of days. This is a clear violation of USFS policy.

419. The USFS will judge the acceptability of existing use, based on encounter standards being violated less than 20% of days annually. Paddlers must meet a much more stringent standard.

420. Without actual visitor capacity numbers, so-called “encounter standards” are meaningless and are prone to grossly subjective enforcement terms.

421. Paddlers will be judged based on their impacts on the “solitude” of the USFS preferred user type, on whether or not the “experience of historical recreation users has been diminished,” and on monitoring of large woody debris and portage trail needs.

422. Judging paddlers by different standards is not equitable, especially when the standards that could lead to elimination of paddling are based on nothing more than the opinions of existing user groups that vehemently oppose paddling access.

423. The USFS is managing the potential biophysical impacts of paddling and other uses in totally different ways.

424. The potential impacts of paddlers are managed by banning the use entirely, before an impact even could potentially occur, and without justification.

425. The proven and significant impacts of other uses are appropriately managed through technical fixes. The USFS EA confirms that technical fixes are the appropriate way to manage biophysical impacts.

426. The Biophysical impacts are not typically addressed through use/encounter limits, but through “technical fixes” (e.g.: campsite hardening/ rehabilitation/obliteration, trail reconstruction/realignment/ obliteration, etc.) or through education and regulation.

427. By managing the similar impacts for different user groups in different ways that are discriminatory towards one group, the USFS has failed to act equitably and its actions are arbitrary and capricious.

428. Based on the use limitations described above, the USFS has determined that most of the upper Chattooga River has a capacity of zero paddlers, and the remaining section has a capacity that is extremely close to zero.

429. In essence, the agency claims that one paddler descending the river would cause unacceptable and significant impacts.

430. At the same time USFS has failed to establish a single capacity for any other use, which is analogous to claiming a capacity of infinite other users. While others hike, fish and swim in the Headwaters in unlimited numbers, the USFS claims a single paddler would have impacts so severe a total ban is justified.

431. The EA reports that natural flow alone adequately separates user groups on the Chattooga, as they do on every other river in the region.

432. The study results show that paddlers and anglers prefer different flows. There is simply too little water to navigate the river when angling is really good, and too much water to fish when boating is really good.

433. Flows alone separate uses. Specifically, there are only 34 days each year when flows are optimal for boating (i.e. 350-650 cfs), and paddlers will only be able to use half (17) of those.

434. On those days angling is “Lower Quality.” Based on the USFS goal of protecting “High Quality” angling, even if you accept their erroneous argument that a few, random

encounters with paddlers would ruin a day of fishing, they have no basis (or need) whatsoever for limiting boating at flows over 350 cfs.

435. The USFS has never explained why the simplest, cheapest, fairest, most common, and easiest to manage solution – allowing flows alone to passively separate uses – is not acceptable. Flows alone support high quality angling and paddling, and adequately separate uses.

436. The USFS clearly finds that encounter standards are already exceeded by existing users yet proposed no mitigation for these impacts.

437. Conversely, the USFS chose to initiate limits on non-boating uses when encounter violations reach 20% of days (73 days). That decision is both arbitrary and a clear sign that they do not wish to curtail existing impacts.

438. The EA readily admits that “the encounter limits established [described in alternative 8] for the Ellicott Rock Wilderness are closer to the desired tolerances in the literature (Whittaker and Shelby 2007) when compared to alternatives 3-5. The USFS decision to limit paddlers based on encounters that have not occurred and will never reach 20% is arbitrary and capricious.

439. To ban paddling, which has virtually no effects on encounter standard violations when allowed in unlimited numbers (like all other uses), while allowing uses with significant encounter standard violations to remain unlimited is absolutely inequitable and capricious.

440. The USFS has instituted paddling limitations as the sole direct management tool, while all other larger and more damaging uses are allowed in every location, in every time, in unlimited numbers, in every alternative that allows paddling.

441. Paddling is anticipated to be the smallest and lowest impact use on the river, and it is unreasonable to manage environmental or social impacts by directly managing only the smallest and lowest impact use.

442. USFS estimates in Shelby and Whittaker 2007 and in Upper Chattooga River Visitor Capacity Analysis Data Collection Reports concluded that unlimited paddling would make up roughly 2% of total use.

443. The EA fails to document a single impact of paddling on the river resource.

444. While it may be true that additional boaters may have increasing impacts, the USFS admits that so too will increasing numbers of hikers, anglers, and campers.

445. The USFS concedes that non-boaters cause significant residual impacts on the Headwaters.

446. Since non-boating use causes significant impacts, the USFS must analyze the effects of all recreationists on the corridor, and propose limits that address all of these factors.

447. The USFS EA indicates that some recreational impacts are acceptable because recreation is generally good for society – except apparently floating. This double standard permeates the EA and is arbitrary and capricious.

448. The EA shows that boating is be the slowest growing use on the Chattooga Headwaters:

- Angling is expected to grow and has recently grown.
- Day hiking in the South will increase by about 48% by 2020.
- Backpacking in the South will increase about 23% by 2020.
- Whitewater boating is flat or declining on Chattooga and Nationally.

449. By harshly managing the smallest and slowest growing use while allowing all other uses unlimited access the USFS is acting arbitrarily and capriciously.

450. The USFS clearly values the solitude of anglers higher than the solitude - or even the ability to experience the river at all - of paddlers.

451. The inequitable allocation of solitude to anglers seems to be the primary reason behind the Defendants' decision to ban floating.

452. The EA concedes that even where paddling use is unlimited, solitude for all users remains intact.

453. The agency has elected to limit floating to protect anglers' solitude when an alternative with no paddling limits (on the sections considered by the USFS) was found to maintain outstanding opportunities for solitude. Both of these aspects of the USFS decision are arbitrary and capricious.

454. The EA suggests that the USFS rejected the potential permit system in alternative 2 (which proposed permits for all users) because use limit systems require administrative effort, require users to plan ahead and compete for limited permits, and would displace some proportion of existing use on high use days.

455. If this is sufficient justification to eliminate alternative 2, it should be sufficient justification to eliminate the selected alternative and others that would require permits for paddlers.

456. The USFS manages thousands of whitewater rivers. By far the most common management of non-commercial floating is no management at all. To ban floating on the Chattooga Headwaters and nowhere else is inequitable, arbitrary and capricious.

457. The USFS has never banned boating to benefit anglers – except on the Chattooga.

458. On perhaps a few dozen rivers nationwide the USFS limits paddling by permit. In virtually all of these cases the rivers take several days to paddle, and the limits are designed to ensure campsites are available.

459. In virtually all of these cases, where permits are required, paddling is the largest use of the river corridor, and thus is the focus of management activities. In all of these cases paddling limits are designed to protect and enhance the paddling experience.

460. The upper Chattooga is mainly a day-use river on which paddling will comprise a relatively tiny portion of the total use, and limits are therefore inconsistent with USFS practice.

461. Angling use on the Headwaters is largely artificial, but the USFS has arbitrarily selected angling as the exclusive use to protect and enhance on the upper Chattooga.

462. The quality of fishing on the upper Chattooga is created by the stocking of over 50,000 exotic trout a year by helicopter and trucks.

463. Stocking of non-indigenous fish has a detrimental effect on indigenous fish. *See* Bain Declaration filed with Motion for Temporary Restraining Order. The Bain Declaration is incorporated here in.

464. The artificial fishery is a primary determinant of the angling experience.

465. Floating, however, is a nature-based activity, which is dependent on only the natural condition of the upper Chattooga River.

466. It is inequitable and unlawful to manage for an artificial use to the exclusion of a nature based use on a Wild and Scenic River and in a Wilderness Area.

467. The USFS is managing for a user group that in this location claims zero tolerance of other uses.

468. Nowhere else in the Nation are anglers known to claim zero tolerance of paddlers on a Wild and Scenic River managed by the USFS.

469. The USFS even forbids other uses during conditions when anglers are not even recreating on the river.

470. The USFS is required by law to manage for compatible uses.

471. Wild and Scenic Rivers must be shared equitably among users.

472. Equitable, indirect, means of reducing fishing exist and should be used before a ban on floating can legally occur.

473. One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.”

474. Nevertheless, the USFS currently allows large scale stocking programs on the upper Chattooga. In addition to large scale stocking programs there is a year round season with large creel limits.

475. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor.

476. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning or direct limiting of any other use.

477. USFS has ignored the massive impacts of industrial scale stocking and fish rearing on the upper Chattooga River, yet has banned floating. While the USFS makes much of

the “high quality angling experience,” they clearly fail to describe or value the high quality paddling experience that the upper Chattooga provides.

478. For individuals with the appropriate skills and experience, the upper Chattooga is a unique and incomparable whitewater river.

479. A USFS-sanctioned Headwaters float revealed a beautiful stream filled with world class rapids, stunning views, and an intimate and remote feel.

480. There are extremely few opportunities in the region to paddle a Wild and Scenic River, a river flowing through a Wilderness Area, or a river flowing through a Roadless Area. The upper Chattooga provides all three.

481. The upper Chattooga is a high quality and unique river for skilled floating, and denying any portion of this river to paddlers, while leaving it fully open to all other uses is inequitable and unjustified.

H. The Forest Service Reliance on Unsubstantiated Possibility of User Conflicts is Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law

482. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

483. The USFS failed to document any conflicts on the upper Chattooga between boaters and anglers, or any similar stream in the region.

484. The USFS erroneously contends that by establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

485. The USFS has failed to prove that any amount of boating would have any impact whatsoever on trout fishing, or that there is any relationship whatsoever between boating and trout fishing quality.

486. USFS failed to show how flow, season, or reach restrictions on floating are needed to maintain high quality trout fishing.

487. USFS failed to show that banning floating would reduce conflicts even if conflicts did exist.

488. USFS has created a record that fully supports allowing boating, and its conclusion is simply not supported by the data.

489. Virtually all “creek boating” resources in the Southeast are also trout fishing resources (although the opposite is not true).

490. On these many other rivers, angling, paddling, and hiking coexist with no reports of any type of conflict.

491. The USFS failed to document a single angler-boater conflict occurring on the upper Chattooga or any similar stream in its EA.

492. Paddling and angling uses rarely overlap because of different flow preferences and when they do, this interaction is amicable.

493. Many “creek boaters” are also cold water anglers. Additionally, many cold water anglers prefer to fish from canoes and kayaks.

494. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the upper Chattooga River.

495. If boating is allowed without direct limits, anglers will have an average of 305 days each year to enjoy the Chattooga River.

496. The majority of remaining 60 days will be low quality angling days due to high flows which make fishing more difficult and wading less safe, while at the same time offering favorable conditions for paddling.

497. The USFS has decided to impose limits on non-boating uses only if and when standards are exceeded, beginning with indirect limits. In the “Proposed Action” section of the EA the USFS states it will manage encounters for existing users using indirect measures, “Manage encounters among existing users by limiting trails, campsites, group size and parking.”

498. The Proposed Action then recites a litany of direct measures *on boaters only* that they will use to limit encounters. “Manage encounters among users by establishing zone, season, group size restrictions and flow limits (including prohibition in some alternatives) on boating opportunities.”

499. In all proposed USFS management alternatives (except for some reaches in Alternative 8), the USFS imposed direct limits on paddlers before any standards were exceeded. However all other users have unlimited access until standards are exceeded to an unacceptable level. This is arbitrary and capricious.

500. Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters.

I. The 2009 Amendment, Without Notice, Bans Floating on Tributaries of the Upper Chattooga.

501. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

502. The USFS arbitrarily and capriciously decided to ban paddling on all tributaries of the Upper Chattooga River.

503. The USFS offered unfounded “concerns” as a justification for its failure to study the tributaries.

504. This is a new prohibition on paddling, made without any significant analysis.

505. The USFS erroneously believes that the tributaries to the Upper Chattooga River are currently banned to boating. The 1986 Sumter National Forest Plan, which currently dictates the management of the river, states:

Use patterns have stabilized on the river, although use continues to rise. Floating is limited to the 26 mile portion below Highway 28 Bridge and the West Fork's lower 4 miles in Georgia.

506. The plan contains no mention of tributaries of the Chattooga River or its West Fork. The quote above refers to "*the river*," not the tributaries of the river. Because the tributaries are not explicitly banned to boating, they are thus open to paddling as is every other stream in the region.

507. Several of these tributary streams are viable paddling resources, albeit rarely available based on the high flows required for recreational enjoyment. Banning a recreational use is a major federal action requiring analysis under NEPA and compliance with the APA.

J. There is no Rational Basis for Selecting 450 Cubic Feet Per Second (cfs) as a Flow Below Which No Floating Shall Occur.

508. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

509. The 2009 Amendment in the EA bans boating on several reaches and only allows boating on one reach if flows are above 450 cfs. There is no rational nor articulated basis for the selection of that flow.

510. The selection of 450 cfs as a cut off eliminates many optimal boating opportunities (that are not optimal angling flows), and forces paddlers to run the river at higher flows which some paddlers may not prefer.

511. Flows between 350 and 450 cfs for example offer *optimal* boating and *unacceptable* fly fishing. Shelby and Whittaker state that:

For many days in the “high overlap” period [350-650 cfs], boater-angler conflict and related capacity problems would be unlikely. These are lower quality angling days for all but bait anglers, and they tend to occur in winter when bait angling use is low. Some fly and spin anglers certainly fish these flows...but they have lower quality conditions in comparison to the other 320 days per year that they have lower flows.

512. However, the EA states that “At these overlap flows [referring to all overlap – both high and low] some users of each group could be present (if boating were allowed) and encounters could create impacts and conflict.”

513. Whittaker and Shelby 2007 conclude that if any management of boating and angling would be acceptable, it would be required during the “low overlap” period between 225-350 cfs.

514. There is no scientific basis in the record for boating (or angling) limits based on a 450 cfs cut-off, or above 350 cfs. Thus the preferred alternative is arbitrary and capricious.

515. In addition, the EA provides that “450 cfs is near the bottom end (within 100 cfs) of the optimal range for whitewater boating opportunities,” while in fact, the bottom end of the optimal flow range for standard boating is estimated to be at or below 350cfs.

516. In this context, 350 is not “near” 450. The difference makes an enormous difference in the number of boating opportunities and is extremely significant for paddlers.

517. Even when suggesting an alternative that would provide a miniscule amount of time where boating can occur, the Forest Service has unlawfully treated paddlers unequally by selecting a flow rate that is at the highest end of the range where fishing can comfortably take place, yet well above the low end of the flow rate where optimal boating can occur.

518. The USFS acknowledges that the procedure for allowing the minimum boating on one stretch depends on their staff somehow predicting a boatable day that will then be made available for paddling use. The USFS States: “A new gauge at Burrells Ford would be used to

help the Forest Service to declare a boatable day. (*See* Appendix C).” EA 29. The notion that one or more USFS officials will have the job of watching weather reports and stream gauges and then announcing a legal day of paddling is unrealistic.

519. Like many southern Appalachian streams, the upper Chattooga River is a flashy and unpredictable watershed. Paddlers make their own last minute decisions about where and when to paddle. Shelby and Whittaker 2007. 84-85.

K. The 2009 Amendment is Inconsistent with USFS Policy and Precedent

520. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

521. The USFS decision on the Chattooga flies in the face of precedent and accepted principles of river management.

522. River managers strive to provide the public with high quality non-motorized recreation experiences of all types.

523. River managers do not single out a single user group for management preference, and they do not limit uses unless absolutely necessary.

524. The USFS likely manages thousands of headwater streams. Virtually all of them are paddled and fished.

525. Nowhere in the United States, other than under Amendment 1 to the Revised Land and Resource Management Plan for the Chattooga, does the USFS:

- Ban non-commercial paddling (except one unboatable gorge in Oregon)
- Limit non-commercial paddling to certain moderate and high flow ranges
- Limit non-commercial paddling to certain seasons
- Require advance online reservations for any day-use.
- Require a fee merely to paddle (as opposed to access) a river

526. On no headwater stream in the entire region does the USFS impose any limit whatsoever on noncommercial floating. This is simply because floating steep headwater streams is a small and low-impact use that the agency supports everywhere but the Chattooga.

527. In the western United States on some large, high-demand rivers the USFS requires that paddlers acquire limited permits to ensure that the paddling experience remains high quality and that camping capacity is not exceeded. Those are not issues that were identified by the Forest Service in the Chattooga EA.

528. The paddling community broadly supports these policies. In those instances other uses typically do not have to acquire a permit because other uses are relatively much smaller and not in competition for the same resources.

529. On the Chattooga, boating is anticipated to be the smallest use and will not be in competition for resources with other visitors, therefore no unique boating limits are justified.

530. The discriminatory boating ban on the Chattooga is an unsupported, arbitrary and capricious management anomaly.

531. In four years of analysis the USFS failed to document a single biophysical impact of paddling, a single conflict, or that paddling would in any way cause the loss of the angling experience.

L. The 2009 Amendment Offers No Rationale for Allowing Boating Only In The Winter

532. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

533. The EA offers no rationale or justification for allowing paddling only in the winter in certain alternatives. Winter days are shorter and colder, making them less desirable for paddling trips.

534. The EA finds that:

Angler/boater encounters are more likely to occur in the winter months (December through February) when both groups are on the river in the middle of the day. As the weather warms by mid-March and April, boating concentrated in the middle of the day would likely produce relatively fewer boater/angler encounters as anglers are more likely to fish in the early morning before temperatures rise (Whittaker and Shelby 2007)

535. Thus, selecting an alternative that allows paddling only in the winter and not during the rest of the year with the aim of reducing encounters is arbitrary and capricious.

536. The 2009 Amendment violates the requirements of NEPA.

537. Plaintiffs incorporate the allegations set forth in the others parts of this Complaint as if fully set forth herein.

538. Under NEPA, the court must ensure that agency decision makers have taken the requisite “hard look” at the environmental consequences of its proposed action and that the agency decision is founded on a reasoned evaluation of the relevant factors.

539. In reviewing whether an agency’s decision complies with NEPA, a reviewing court must ultimately employ two criteria: it must decide (a) whether the agency in “good faith objectivity” has taken the required “hard look” at the alternatives; and (b) whether the discussion is detailed enough to permit those who did not participate in its preparation to understand and consider meaningfully the reasoning, premises, and data relied upon, and to permit a reasoned choice among different courses of action.

540. USFS decisions like the 2009 Amendment to the 2004 RLRMP must take a “hard look” at the environmental consequences of the proposed use and apply a “rule of reason.”

541. To take the requisite “hard look” agencies must consider and include some quantified or detailed information, otherwise, neither the courts nor the public, in reviewing the

Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

542. In particular, general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.

543. In the 2009 Amendment, just as in the 2004 RLRMP, the USFS makes vague, unsubstantiated statements about 'possible' effects without providing any hard evidence that impacts have or would occur.

544. The USFS took *4.5 years* to amend the illegal boating ban and failed to document a single impact of boating. Without offering any hard data to support its conclusions — and including unsubstantiated statements about 'possible effects' and in place of hard data—the USFS fails to take the requisite "hard look" at recreational use on the upper Chattooga River. The USFS has violated NEPA.

545. In addition, the NEPA's implementing regulations require agencies to *rigorously explore* and *objectively evaluate* all reasonable alternatives.

546. The USFS wholly failed to analyze reasonable alternatives that were in compliance with federal law. The USFS proposed alternatives leading up to the 2009 Amendment were fundamentally flawed, including in the following ways:

- No alternative proposes a capacity for uses
- No alternative analyzed allowing boating or any other form of recreation immediately below Grimshawes Bridge adjacent to private lands.
- No alternative analyzed banning boating on tributaries of the upper Chattooga River

- No alternative protects or enhances boating
- No alternative bans any use except boating.
- No alternative treated exiting uses and boating equitably
- No alternative considered immediately directly limited existing users
- No alternative considers the role of stocking exotic trout
- All alternatives immediately directly limit boating

547. By failing to consider reasonable alternatives and by failing to provide any scientific evidence to support the boating ban, the USFS's 2009 Amendment violates NEPA.

M. Incorporation of Pleadings and Exhibits from Motion for Temporary Restraining Order and Preliminary Injunction

548. Plaintiff Incorporates into this Complaint all pleadings and exhibits filed with Motion for Temporary Restraining Order and Preliminary Injunction. The declarations, affidavits, and associated exhibits are incorporated here in.

V. REQUESTED RELIEF

549. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

550. Plaintiffs respectfully request this Court to issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to cease their unlawful ban on recreational floating of the Headwaters of the Chattooga Wild and Scenic River.

551. Plaintiffs further request that this Court issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to withdraw any portions of the Forest Management Plans for the three National Forests that implement a ban of any kind on primitive floating.

October 14, 2009;
Greenville, South Carolina

NELSON GALBREATH, LLC

/s/ J. Nathan Galbreath

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

AMERICAN WHITEWATER, AMERICAN
CANOE ASSOCIATION, GEORGIA CANOEING
ASSOCIATION, ATLANTA WHITEWATER
CLUB, FOOTHILLS PADDLING CLUB,
WESTERN CAROLINA PADDLERS, 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.

Civil Action No. _____

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of October, 2009, copies of the foregoing **PLAINTIFFS' COMPLAINT, CIVIL COVER SHEET, AFFIDAVIT OF BRUCE HARE, AFFIDAVIT OF JOSEPH STUBBS, AFFIDAVIT OF KENNETH STRICKLAND; ANSWER TO L.R. 26.01 INTERROGATORIES; CORPORATE DISCLOSURE STATEMENT, MOTION FOR TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION, MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, DECLARATIONS OF DONALD KINSER, KEVIN COLBURN, DONALD HAAS and MARK BAIN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRO HAC VICE APPLICATION FOR JOHN D. AUSTIN, JR and APPLICATION FOR PRO HAC VICE ADMISSION OF R. BRIAN HENDRIX**

VIA HAND DELIVERY

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**U.S. ARMY CORPS OF ENGINEERS DETERMINATION
THAT THE CHATTOOGA RIVER IS NON-NAVIGABLE.**

7074(Savannah River)-1

Subject: Navigable status of
Savannah River, Ga.
and S. C., and its
tributaries.

2d Ind.

Office, G. of E., March 28, 1934 - To the Division Engineer,
South Atlantic Division,
NORFOLK, VA.

1. The views of the District Engineer on the navigable status of the Savannah River and its Tributaries, as set forth in paragraph 1 of his report dated September 27, 1932, are concurred in, except as to the Savannah River above Augusta and Seneca River.

2. While it appears that the condition of Savannah River above Augusta is such as to make impossible the present use of the stream for the transportation of commerce in appreciable volume, nevertheless in view of the past use of the stream, the expenditure of funds thereon, the provisions made by the Federal Power Commission in the interests of navigation when granting licenses for power dams, and the absence of federal legislation abandoning the improvement, it is the opinion of this office that the river has the legal status of a navigable waterway to the forks at Mile 297.1. Seneca River in its natural state apparently provides navigable depths and widths from its mouth to the foot of Portman Shoals at Mile 8. However, it is the view of this office that the interests of navigation are not such as to make necessary the granting of approval of bridges or other structures in the Savannah River above Augusta (Mile 204.5) or in the Seneca River unless the proponents specifically request such approval.

G. B. Pillsbury,
Brigadier General,
Acting Chief of Engineers.

SOUTH ATLANTIC DIV. MAR 30 1934

GD-900/1(Savh)

3rd Ind.

Office, Div. Engr., South Atlantic Div., - To the District Engineer,
Norfolk, Va., March 30, 1934. SAVANNAH, GA.

Forwarded.

T. H. J.

The views of the District Engineer on the navigable status of the Savannah River and its Tributaries, as set forth in paragraph 1 of his report dated September 27, 1932, are concurred in, except as to the Savannah River above Augusta and Seneca River. See 2d Ind. Letter from G. of E. dated March 14, 1934, File S. R. 2005/102-2

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
POST OFFICE BUILDING
SAVANNAH, GA.

FILE No.

M.L. 76/

November 7, 1932

Subject: Navigable status of waterways - United States.

To: The Division Engineer, South Atlantic Division, Norfolk, Va.

1. In compliance with Circular Letter from the Division Engineer on the above subject, dated January 23, 1931, CD 900/1, detailed report dated November 2, 1932, and entitled "Report on Navigability of Savannah River, Ga. and S. C., and Its Tributaries" is transmitted herewith.

2. Final recommendations as to navigability are contained in paragraph 1 of the report.

C. Garlington
Major, Corps of Engineers
District Engineer

12/jbb

Enclosures:
Report (in tripl.)

SECTION I

General

Syllabus - - - - -	1
Authority - - - - -	2
Scope of Investigation - -	3

1. Syllabus - It is recommended:

a. That the following waterways, specifically called for in this report, be classified as shown below:

Stream	Mileage		Ref. Par.
	Navigable	Non-navigable	
Savannah River, Ga. & S.C. (Bull St. to Forks)	0.0 to 204.5 <i>see memorandum attached</i>	204.5 to 297.1	
Abercorn Cr., Ga. (Including Little Abercorn Cr.)	Throughout		12, 13, 14, 16
Big Collis (Collins) Cr., Ga. (Including Little Collis Cr.)	"		15, 16
Ebenezer Cr., Ga.	0.0 to S.A.L. Ry. Br. (M 7.0)	7.0 to end	17 - 19
Brier Cr., Ga.	0.0 to O. of Ga. Ry. near Waynes- boro	50.0 to end	20 - 25
Beaverdam Cr., Ga.		Throughout	22 - 25
Stevens Cr., S. C.		"	33 - 36
Little River, Ga.		"	37 - 41
Upton Creek, Ga.		"	39, 41
Broad River, Ga.		"	42 - 46
South Fork, Ga.		"	
North Fork, Ga.		"	
Middle Fork, Ga.		"	
Hudson River, Ga.		"	
Rocky River, S. C.		"	47 - 49
Seneca River, S. C.	<i>See memorandum attached</i>		50 - 58
Deep Creek, S. C.		"	53, 58
Twelve Mile Cr., S.C.		"	54, 58
Little River, S. C.		"	56, 58
Tugaloo R., Ga. & S.C.		"	59 - 67
Chauga River, S. C.		"	62, 67
Chatooga R., Ga. & S.C.		"	64, 67
Tallulah River, Ga.		"	63, 67

b. That the following waterways, which were not included /

d. Chattooga River, Ga. and S. C..- In view of the rugged nature of the country through which this stream also flows, the sparse population of the area, and the unfavorable slopes of the stream itself, it is believed that there is no justification for considering it a navigable stream.

Recommendations.-

- a. That Tugaloo River, Ga. and S. C. (Cd 297.1L) be classified as non-navigable throughout.
- b. That Chauga River, S. C. (Cd 297.1L-29.4R) be considered non-navigable throughout.
- c. That Tallulah River, Ga. (Cd 297.1L-45.9L) be considered non-navigable throughout.
- d. That Chattooga River, Ga. and S. C. (Cd 297.1L-45.9R) be considered non-navigable throughout.

U. S. Engineer Office,
Savannah, Ga.
November 2, 1932.

C. Garlington,
Major, Corps of Engineers
District Engineer

Other Documents

[2:06-cv-00074-WCO American Whitewater et al v. Bosworth et al](#)

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was received from Jenkins, Alan R. entered on 7/5/2006 at 4:23 PM EDT and filed on 7/5/2006

Case Name: American Whitewater et al v. Bosworth et al

Case Number: [2:06-cv-74](#)

Filer: Friends of the Upper Chattooga

Document Number: [10](#)

Docket Text:

Amicus Curiae APPEARANCE entered by Alan R. Jenkins on behalf of Friends of the Upper Chattooga. (Jenkins, Alan)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1060868753 [Date=7/5/2006] [FileNumber=1347303-0]
[4bfb2250d77b43a8027f65bd79ffa8d4f5acb70b695e90f32f666966a87bcc7f8d14
93e2ad78ea495221990e07b19151b659b4bd94b2eb152c2f0307473df22d]]

2:06-cv-74 Notice will be electronically mailed to:

Alan R. Jenkins ajenkings@mckennalong.com

Stephen H. McClain stephen.mcclain@usdoj.gov, sandra.phillips@usdoj.gov

Natalie S. Whiteman nwhiteman@alston.com

2:06-cv-74 Notice will be delivered by other means to:

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Atlanta, GA 30309-3424

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, et al.,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL ACTION NO.
)	
DALE BOSWORTH, in his official	)	2:06-CV-0074-WCO
capacity as Chief of the United States)	
Forest Service, et al.,)	
)	
Defendants.)	
)	

AMICUS BRIEF OF THE FRIENDS OF THE UPPER CHATTOOGA

The Friends of the Upper Chattooga (“Chattooga Friends”)¹ being potentially harmed by the complaint (“Complaint”) and motion for preliminary injunction (“Motion”) of American Whitewater (“AW”) and its allied Plaintiffs hereby files a friend of the court brief in the above-captioned proceeding and urges

¹ The Friends of the Upper Chattooga consists of the Chattooga Conservancy (a conservation organization founded in 1991 to protect and restore the Chattooga watershed ecosystems), Trout Unlimited, South Carolina and Georgia chapters (the nation’s leading coldwater fisheries conservation organization), the Georgia ForestWatch (a forest conservation and watchdog organization), Georgia Wildlife Federation (Georgia's oldest and largest conservation organization founded in 1938), South Carolina Wildlife Federation (a conservation organization founded in 1931), Whiteside Cove Association (a North Carolina flyfishing and family activity club formed in 1956), and Atlanta Fly Fishing Club (affiliate of the National Federation of Fly Fishers). Members of these groups enjoy the many types of recreational uses of the Chattooga, both boating and non-boating uses.

the Court to dismiss the Complaint and deny the Motion. The Plaintiffs claim that boating does not substantially interfere with other recreational values.

Memorandum in Support of Plaintiffs Motion for a Preliminary Injunction

(“Plaintiffs Memo”), p. 18. The Plaintiffs also claim that only the northernmost 21 miles of river are at issue. Complaint ¶ 45. Both claims are untrue. In short, the proliferation of boaters in the Wild and Scenic River portion of the Chattooga River has conflicted with, and essentially driven out, many other users from the great majority of the Wild and Scenic River, i.e., the lower two-thirds² of the Wild and Scenic River area, and the Forest Service has taken (and should continue to take) such impact into account. Granting an injunction and opening the last remaining portion of the river to unlimited boating would substantially interfere with and harm the other uses that make up the Outstandingly Remarkable Value of Recreation.

The U.S. Attorney has already adequately demonstrated why the Complaint should be dismissed. The Friends of the Upper Chattooga argue that the Motion should be denied as well because the Complaint has little likelihood of success on the merits, the Plaintiffs suffer no irreparable harm, granting the injunction would

² In terms of drainage area (and hence water volume for fishing, boating, etc.), the lower 36 miles of the Wild and Scenic River represent an even higher percentage of the river’s water volume.

instead harm the other users of the Chattooga River, and granting the injunction would not serve the public interest. This brief touches upon all four prongs, but focuses on the incorrect claim that Plaintiffs are suffering some unique and irreparable harm, and also demonstrates the harm to non-boating users of the Wild and Scenic River that would be caused by granting the injunction.

I. BACKGROUND:

In 1974, Congress designated 57 miles of the Chattooga River as a Wild and Scenic River in part because of the Outstandingly Remarkable Value (“ORV”) of Recreation.³ According to the March 22, 1976 Notice of the Chief of the Forest Service, 41 Fed. Reg. 11847, 11850 (“Notice”), the area designated as a Wild and Scenic River provided outstanding recreation opportunities for floating, hiking, hunting, fishing, and camping. In part because of the potential designation as a Wild and Scenic River and in part because of the movie *Deliverance* filmed at the Chattooga River, boating usage of the river increased dramatically. See Affidavit of Max Gates, ¶9, USFS Forest Ranger, the Andrews Pickens District of the

³ The other ORVs are Geology, Biology, Scenery and History. See Plaintiffs Kinser Affidavit, Exh. E, p.3-8 (Document 3-15, p.8). The Kinser affidavit attached to Plaintiffs Memo references the attachment of the 1976, 1985 and 2004 Forest Plans as Exhibits C, D and E. As the Plans themselves are voluminous and as the entire Plans may not have been appended, for the Court’s convenience copies of any particular pages referenced herein shall be attached as Exhibit 1.

Sumter National Forest, from 1961-1972, attached hereto as Exhibit 2.⁴ In the Notice, the Chief of the Forest Service described the Wild and Scenic River area of the Chattooga River in the early days of increased boating use, both above and below Highway 28 (the demarcation for zoning of the river among the boating and non-boating uses). The Notice described the river corridor below Highway 28 as an area often used for hiking, primitive camping, hunting, and fishing and pointed out several areas below Highway 28 that had excellent fishing. The Notice also described excellent opportunities for boating, but noted that “[t]he recent increase in floaters using the river has had a detrimental effect on the fishing experience.” Notice p. 11849. The USFS further warned that “uncontrolled future use would probably result in safety hazards and lowering of the quality of the recreation experience.” *Id.* at 11850. This concern proved prophetic as boating usage continued to soar after 1976.

For example, evidence in the underlying proceeding demonstrates that boat count figures showed an 800-fold increase in the Chattooga River from 1968 to the

⁴ This affidavit is part of the record in the current USFS Chattooga user analysis proceeding. The Sumter National Forest has the lead authority for all boating/floating use on the main channel of the Chattooga River including its West Fork. See Plaintiffs Kinser Affidavit, Exh. E, p.3-8 (Document 3-15, p.8), Exhibit 1 hereto.

1990s and a 500 percent increase in the 20 years following the Notice in 1976.⁵

Mr. Max Gates as USFS Forest Ranger was involved in both the study of how best to manage the proposed Wild and Scenic River portion of the Chattooga River and in the implementation of the zoning use plan adopted by the Forest Service whereby conflicting uses were zoned above and below Highway 28. According to his signed and verified affidavit, the dramatic increase in boating stretched the resources of the Forest Service and “the sheer number of floaters [below 28] ... discouraged other uses.” Exhibit 2, ¶¶10, 16. Therefore, zoning of use was introduced “to allow citizens reasonable use of the Wild and Scenic River while minimizing conflicts between user groups, maximizing the ability of the USFS to manage the resource, and preserving the unique natural qualities of the river that resulted in such designation.” Exhibit 2, ¶13.

Mr. Jim Barrett succeeded Mr. Gates as USFS Forest Ranger for the Andrew Pickens Ranger District beginning in 1972. Mr. Barrett avers that “[b]oaters already have access to the majority of the river, i.e., all the section below Highway 28, and their usage of the river has impacted the quality of usage by non-boaters.” See affidavit of Jim Barrett (¶8b), attached hereto as Exhibit 4 (also in the USFS

⁵ USFS Chattooga River Use Data, attached as Exhibit 3.

record). Mr. Gates and Mr. Barrett both aver that the heavy boating usage on the portion of the river below Highway 28 has severely impacted other uses but that the remaining “portion of the Chattooga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience and the quality of its wilderness hiking, nature watching, fly fishing, and other outstanding recreational experience.” Exhibit 2, ¶17, Exhibit 4, ¶8a. Further, according to Mr. Gates, based on his many years of professional forestry experience in the area and his years of enjoying the use of the Chattooga River,

lifting the ban on boating above Highway 28 will damage the unique wilderness solitude experience and quality of wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences above Highway 28. Boaters already have access to the majority of the river and their usage of the river has impacted the quality of usage by non-boaters. Therefore it is fair to protect the interest and solitude and outstanding recreation experience of non-boaters in the remaining section. In short, something should be set aside for solitude and wilderness experience.

This is the historical background not mentioned in the Complaint.

II. ARGUMENT

The Court must take into account four factors in deciding whether to grant a preliminary injunction: 1) a substantial likelihood that plaintiff will prevail on the merits; 2) a substantial threat that plaintiff will suffer irreparable injury if the

injunction is not granted, 3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and 4) that granting the preliminary injunction will not disserve the public interest. The Canal Auth. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). The movant carries the burden on all these factors. Sierra Club v. Atlanta Regional Comm., 171 F.Supp.2d 1349, 1355 (N.D. Ga. 2001). Prongs three and four of the analysis are collapsed where the government law being challenged is designed to protect the public, as is the case here.⁶ Plaintiffs fail to carry their burden on all four prongs.

A. No injunction should be granted because there is little likelihood of the Plaintiffs succeeding on the merits.

As the U.S. Attorney ably demonstrated in the Motion to Dismiss and Supporting Memorandum of Law (“USFS Memo”), the Complaint is procedurally deficient for a number of reasons. Therefore, the Court need not reach the merits of the case and the Plaintiffs have no likelihood of succeeding on the merits.

⁶ See Spiegel v. City of Houston, 636 F.2d. 997, 1002 (5th Cir. 1981). In that decision (made before the Fifth Circuit split into the Fifth and Eleventh Circuits), the Court reversed a preliminary injunction because it determined that enjoining the enforcement of the law would harm the public. As the Court determined:

Since this injunction is against public institutions and against public servants charged with the enforcement of the law, we shall consider together the balancing of the equities required by test three and the question of whether the injunction would disserve the public interest, which is test four of the prerequisites for a preliminary injunction.

Indeed, the Plaintiffs are both too late and too early. The Plaintiffs are too late to challenge the Forest Service zoning decisions and regulations that were made and implemented 20 to 30 years ago. Kentucky Heartwood, Inc. v. Worthington, 20 F.Supp.2d 1076, 1092-1093 (E.D.Ky. 1998) (“Court [in 1998] does not have jurisdiction over ... challenge to the validity of the Forest Plan” adopted in 1985). As the U.S. Attorney stated in the USFS Memo (pp. 2-6), the zoning of river uses has been in place for 30 years based on a number of prior decisions (and rulemaking) that Plaintiffs chose not to appeal. This includes the 1985 Land and Resource Management Plan (“1985 Plan”) that Reviewing Officer Manning determined in her 2005 decision should continue in effect (with respect to the zoned boating policy) until the Forest Service completes its additional fact-finding. Not only did Plaintiffs not appeal those earlier decisions, they apparently chose not to be involved in the use zoning process for decades.

For example, in the 939-page Environmental Impact Statement (“EIS”) and Land and Resource Management Plan, the Forest Service addressed 11 management topics, two of which are germane to the current controversy:

ISSUE TOPIC 2. HOW WILL THE CHATTOOGA RIVER BE MANAGED TO PROVIDE A VARIETY OF RECREATIONAL EXPERIENCES AND ALSO MEET THE OBJECTIVES OF THE WILD AND SCENIC RIVERS ACT?

ISSUE TOPIC 5. HOW WILL THE FOREST [SERVICE] MINIMIZE USER CONFLICT AND PROVIDE AN

ACCEPTABLE RANGE OF OPPORTUNITIES FOR
DISPERSED RECREATION?

EIS for 1985 Plan, p.iii (Exhibit 1). During the course of completing the EIS, the Sumter National Forest management published notice in the Federal Register, placed public notices in major newspapers of the area, sent general news releases to local newspapers, published other relevant information in 10 newspapers, made radio announcements on 6 stations, held 10 public meetings, made presentations to various groups, made personal phone calls and placed posters around the area. Id. pp. A-8, 9. There is no record of any of the Plaintiffs attending any of these meetings and none of the Plaintiffs are listed as providing any of the 234 written comments on the EIS and proposed 1985 Plan. Id., pp. I-53-64. Ultimately, the Forest Service after collecting evidence on these two (and the other nine) issues and considering all the public comments, determined that the zoning of conflicting boating and non-boating uses should continue. Thus, the oft-repeated claim by Plaintiffs' Response to the Defendants' Motion to Dismiss (e.g., p.13) that "the Forest Service has failed to provide any evidence supporting its ban during that time [i.e., over the last 30 years]" is both flatly wrong⁷ and legally irrelevant as

⁷ Even a cursory review of the record evidence over the past 30 years shows that this statement grossly overreaches. The 1976 Notice alone references the increase in boating harming the fishing experience (p.11849), the harm to the recreation experience from "uncontrolled future use" particularly in light of "[f]uture technological advances" of "new types of equipment"

(footnote continued on next page)

those proceedings are now final and non-appealable. Over twenty years later, Plaintiffs challenge the 1985 Plan and prior determinations. The Court has no jurisdiction to entertain collateral attacks on final non-appealed agency decisions,⁸ and even if it did, should not consider equitable action where Plaintiffs failed to exercise their rights in a timely fashion. Accordingly, the Complaint should be dismissed and the Motion denied.

On the other hand, Plaintiffs are too early in asking the Court to intervene in an agency process that is on-going and has not been finalized. As the U.S. Attorney points out (USFS Memo Section I), the proceeding was remanded to the U.S. Forest Service for further fact-finding and decision. During this remanded proceeding, the Plaintiffs have every opportunity to present evidence and argue their positions, and it is premature for the Court to interfere with that agency process, particularly because the Forest Service is “required to provide public participation before adopti[ng] new policies,” such as a significant change to the

(footnote continued from previous page)

(p.11850), very infrequent historic use by boaters of sections above Highway 28 because of the relatively low water shallow and rugged conditions (pp.11851-52), and the excellent trout fishing, particularly in the area above Highway 28 (*Id.*). These few facts alone justify the Forest Service’s zoned use management.

⁸ Miller v. Meinhard-Commercial Corp., 462 F.2d 358, 360 (5th Cir. 1972) (rejecting collateral attack on final order); Kentucky Heartwood, *supra*, at 1902-93.

settled zoning management policy. Kentucky Heartwood, *supra*, 20 F.Supp.2d at n.12. Thus, the Plaintiffs have it backwards - to alter the status quo, the USFS must prove why its 30-year policy to zone conflicting uses is no longer necessary to protect the environment and ORVs. *E.g.*, 5 U.S.C. §556(d); Minn. Milk Producers Association v. Glickman, 153 F.3d. 632, 642 (8th Cir. 1998).

Accordingly, even if this Court would overturn the 2005 Manning decision, such reversal would have no practical effect as the Court could not lawfully order the Forest Service to abandon its long-standing policy without sufficient fact-finding and evidence that the environment and ORVs would be protected. The Court could only do what Ms. Manning did – remand the proceeding for further fact-finding. Thus, the Complaint stands no likelihood of success.

The Plaintiffs also claim that the Complaint has a substantial likelihood of success because boating does not substantially interfere with other values.

Plaintiffs Memo p. 18. First of all, Recreation, not boating, is an Outstandingly Remarkable Value (“ORV”) in the Wild and Scenic River portion of the Chattooga River. The Recreation ORV recognizes the wonderful opportunities that existed for various types of recreation in and along the river including hiking, nature study and photography, fishing, boating, hunting, and camping, as demonstrated more fully in Section II.C below. See also, Notice, p.11850. Contrary to Plaintiffs’

claim, the underlying record is full of evidence of how boating has substantially harmed the other recreation uses of the Wild and Scenic River. Therefore, the Complaint stands little likelihood of success on the merits for this reason as well, and the Motion should be denied.

B. Plaintiffs suffer no unique, irreparable harm.

The Plaintiffs understandably take only one page to describe the “irreparable harm” they will suffer if the Court does not reverse the 2005 decision and each prior decision over the last 30 years to zone uses in the river. First, boaters have not been “completely banned” from the river as alleged in the Complaint (§107). To the contrary, as demonstrated in Section I above, boating now controls a large majority of the Wild and Scenic portion of the river to the near exclusion of other uses.

Second, the claim by Plaintiffs that boating is the only recreation use being regulated and limited by the Forest Service is also false. To the contrary, many types of private wilderness uses in the Chattooga corridor are regulated and zoned by the Forest Service or banned altogether including those constituting the original Recreation ORV. Off-highway vehicle and mountain bike uses are limited to certain designated routes in the Sumter National Forest and not allowed on the Chattooga WSR corridor. FW-69. Tubing is zoned to river sections I and II. No

motor boat use is allowed. FW-84; Standard 2.A-3. Horseback riding is allowed only on designated trails. Standard 2.A-14. Camping uses are restricted to areas away from the river. FW-81. Of course, hunting is restricted to certain times and places.⁹ The Forest Service and other supporting agencies have also managed fishing, effectively zoning this use away from certain areas of the river.¹⁰ Notably, as cited in Section I above, camping, fishing and hunting were all mentioned as part of the Recreation ORV that led to the creation of the Wild and Scenic River area, yet these uses are directed to certain areas or are otherwise restricted. *Id.*, p. 2-23 (Standards FW-81, 82). In fact, the Forest Service's basic management policy in the area is one of concentrating certain activities into developed recreation areas and isolating conflicting uses by dispersed recreation. Certainly, the Forest Service need not conduct exhaustive scientific studies to determine that hunting for ducks in the river can conflict with fishing or boating, and the Forest Service accordingly zones such conflicting activities, each of which constituted the

⁹ These and other use restrictions are cited in January 2004 Revised Land and Resource Management Plan (Sumter National Forest), Kinser Aff. Exhibit E (see Exhibit 1 hereto).

¹⁰ For example, in the 1985 Plan (pp.F-8&9), the Forest Service noted heavy fishing use around certain easy access sections of the river and decided to "[e]ncourage stocking of trout in areas away from the Wilderness to reduce concentration within the Wilderness." Exhibit 1. So also, bait fisherman currently are in Plaintiffs' words "completely banned" for more than half the year from fishing the Nicholson Fields area immediately above Highway 28.

original Recreation ORV. Thus, the claim by Plaintiffs that boating alone has been restricted among recreation uses or the original Recreation ORV is inaccurate.

Boating and other uses simply are managed to minimize conflict.

Third, a boater has every right to hike, fish, and camp in the river corridor above Highway 28 just like any other person. Thus, as with horseback riding, bicycling, off-road vehicle use, snowmobiling, and the like, it is not the user that is “banned” or restricted from an area but the transportation vehicle. Indeed, many members of the Friends of the Upper Chattooga are boaters, but they comply with Forest Service rules by enjoying boating below Highway 28, they enjoy camping in certain designated areas, and they enjoy other recreational activities within the applicable rules. Plaintiffs likewise may do the same.

Fourth, the focus of Plaintiffs on only the 21 miles of river north of Highway 28¹¹ is quite similar to the argument of off-road vehicle riders, mountain bikers or horseback riders that they should have access to 100 percent of a trail system in a Wild and Scenic River or national park area, even if that use would harm other

¹¹ Plaintiffs similarly cast the “Headwaters” as a region separate from the rest of the Wild and Scenic River. What the Plaintiffs term Headwaters is simply the upper portion of one branch of the Chattooga River. Boaters have access to the 7.5 mile stretch of headwaters that is the West Fork of the Chattooga River. Thus, Plaintiffs’ claim that they are “completely banned” from the Headwaters is as much of a misnomer as the rest of their rhetoric. What they simply ask for is 100 percent of everything, anything less than that is in their eyes unlawful, even if it means other uses are substantially harmed or effectively eliminated.

uses of the trail system. Federal courts have routinely rejected such claims. See e.g., Bicycle Trails Council of Marin v. Babbitt, 83 F.3d, 1445, 1461 (9th Circuit 1996) (upholding as reasonable an agency decision that limited bicycle access to over 64 percent of the parks trail system and the agency's conclusion that "experiences that will remain available to cyclists are numerous and varied"). See also, Northwest Motorcycle Association v. U.S. Department of Agriculture, 18 F.3d 1468 (E.D. Wash. 1992) (banning off road vehicles from a particular area to reduce actual and/or likely user conflicts was neither arbitrary nor capricious). Obviously, when a type of vehicle has access to travel on two-thirds or more of a trail or river system, calling the restriction from the remaining portion of the trail or river system (so that other users can enjoy at least the small portion) a "complete ban" is nothing more than clever word play. Further, as demonstrated in the underlying proceeding, boating use below Highway 28 has negatively impacted the quality of non-boating uses along the majority of the river, effectively zoning such uses to the area of the river above Highway 28. The bottom line is that boaters/floaters suffer no greater restriction than any other type of user in the Chattooga corridor, and in many ways, they suffer less restriction.

As the U.S. Attorney additionally points out (USFS Memo, p. 13), simply maintaining the status quo that has been in place for 30 years for an additional year

or two to allow the Forest Service to conduct additional studies does not create irreparable harm, and once again, federal courts concur. See Niobara River Ranch v. Hubert, 277 F.Supp.2d 1020, 1038 (D.Neb. 2003) (the agency decision was not arbitrary and capricious to deny a boating permit and maintain the status quo in order to collect scientific data). As mentioned in Section II.A above, the Plaintiffs have it backwards - to alter the status quo, the USFS must prove why the 30-year zoning of use is no longer necessary to protect the environment and ORVs. E.g., 5 U.S.C. §556(d); Minn. Milk Producers Association v. Glickman, 153 F.3d. 632, 642 (8th Cir. 1998); Kentucky Heartwood, supra n.12.

Finally, the Court should note that the Plaintiffs did not participate in the lengthy Forest Service processes that established and maintained the management status quo for decades. They also waited over a year after the April 2005 decision to raise a claim that they were suffering the irreparable harm that they now ask the Court to enjoin immediately. Obviously, if the harm to Plaintiffs from two more years of the status quo that has already continued for 30 years were so great, Plaintiffs would likely not have kept silent for decades or waited over a year into the fact-finding process that AW gained on appeal to raise the current claim for an immediate injunction. For these and other reasons mentioned in the USFS Memo, Plaintiffs suffer no irreparable harm and the Motion should be denied.

C. Granting the Motion would harm the other users of the Wild and Scenic River.

With the Plaintiffs focusing only on the interests of boaters, Plaintiffs not unexpectedly claim that the Court should analyze only the potential harm to the U.S. Forest Service as an agency from granting the injunction. However, as the Spiegel court concluded (see n.6 supra), in determining whether to enjoin the application of a government measure designed to protect certain segments of the population, the Court must balance the potential harm to that segment of the population from removing the protective measure, rather than simply the potential harm to the agency. Because the other users of the Wild and Scenic River would be substantially harmed by any such injunction, the Motion should be denied.

As Mr. Gates and Mr. Barrett aver, high boating use has driven fishermen, hikers, campers, and other users from the majority of the Wild and Scenic River. Simply put, with tens of thousands of kayaks, rafts, and other boating vehicles passing by each year, the wilderness solitude experience that was cited in the Notice as being so special has in large part ceased to exist below Highway 28. Thus, 30 years after the Notice, the areas below Highway 28 that were once prized by boating and non-boating interests alike are mostly used by boaters. Now, boaters seek by way of preliminary injunction to have unlimited access to 100 percent of the Wild and Scenic River area over the objections of the agency

entrusted with the care of the river and those persons that enjoy the majority of uses that comprise the Outstandingly Remarkable Value of Recreation in the Upper Chattooga.

As described in Section I, there is ample evidence in the underlying proceeding (and the Forest Service is in the process of collecting additional evidence) of the harm that non-boating users have suffered from dramatically increased boating on the river, and of the substantial harm that such users would suffer if boating is allowed on 100 percent of the Wild and Scenic River. The U.S. Forest Service is, and should be, studying the impact of boating on other uses throughout the Wild and Scenic River portion of the Chattooga River. Once the Forest Service has concluded this analysis, the Forest Service likely will yet again recognize that the zoning of uses above and below Highway 28 is well supported by historic and current evidence and should be continued.

The Court should deny the Motion because granting it would substantially harm the great majority of protected recreational uses of the Upper Chattooga, uses that have already been degraded and relegated to a small section upstream by heavy boating use downstream.

D. Granting the injunction would not serve the public interest but instead would harm the public.

Finally, the Plaintiffs claim that a preliminary injunction is in the public interest because eliminating the zoned usage would benefit boaters (Plaintiffs Memo, pp. 21-22) and would compel the Forest Service to comply with applicable federal law. As the Plaintiffs ignore the substantial harm that boaters have already caused the majority of uses of the Upper Chattooga River and the substantial harm that the preliminary injunction would cause that majority of other uses, it is not surprising that Plaintiffs also ignore the strong public interest in avoiding conflict between incompatible uses and in minimizing the impact of boaters on the environment. As demonstrated in Section II.C above, allowing boaters to crowd out other uses on 100 percent of the Wild and Scenic River area is certainly not in the public interest but is only in the interest of boaters.

Much of the Upper Chattooga has narrow sluices with blind drops. Swimmers enjoying the Cashiers slide rock and other swim areas and fly fishermen enjoying a quiet wilderness experience fishing the pools below the many waterfalls in the upper Chattooga would not only have their recreational experiences diminished, they could also be at risk of physical injury from thrill-seeking kayakers cascading over the waterfalls immediately above.

As Mr. Gates avers, increased boating in the 1970s produced conflicts between boaters and non-boaters including verbal barbs, stone throwing and even gunshots as Forest Service and other law enforcement personnel had to break up confrontations. Exhibit 2, ¶1. Accordingly, the river was “divided into zones of usage so as to allow citizens reasonable use of the Wild and Scenic river while minimizing conflicts between user groups, maximizing the ability of the USFS to manage the resource, and preserving the unique natural qualities of the river that resulted in such designation.” Id. ¶¶11, 13. Mr. Gates further avers that following implementation of this zoning, conflicts between boaters and other users gradually declined in part because of the “sheer number of floaters which discouraged other uses.” Id. ¶16. Thus, the underlying record evidence demonstrates that upsetting the delicate balance that the Forest Service has maintained over the past 30 years through the zoning of conflicting uses would not be in the public interest, particularly when ordered by a court reviewing a preliminary injunction motion that lacks the expertise of the Forest Service.

Granting the injunction could also harm the environment. There is evidence in the underlying proceeding of the potential harm to the environment from enjoining the zoned usage. For example, some boaters as a matter of practice remove downed logs that cross the river, logs that may endanger kayakers but that

protect against erosion and protect wildlife including trout.¹² This environmental issue is particularly important in the Upper Chattooga (many parts of which are no more than shallow, narrow streams) where the entire population of stream-loving Eastern Hemlocks may be killed off by the woolly adelgid epidemic.¹³ Boats also can only pass through the shallow upriver sections during high flow conditions that occur during or just after significant rainfalls. The U.S. Department of Agriculture has determined that the riverside soils that kayakers would trample on to scout or portage around the many obstructions in the upper Chattooga are particularly susceptible to shear from foot traffic and erosion in wet conditions.¹⁴ These are precisely the type of facts that the Forest Service must consider before it could open the entire river to boating. For this reason also, it is in the public interest to deny the Motion.

Finally, as cited in Section II.B above, ordering the Forest Service to abandon its long-employed zoned boating management policy without public input

¹² Under Goal 4, p. 2-4 (Exhibit 1), one of the goals of the 2004 Plan is for the Forest Service to manage streams “in a manner that emphasizes and recruits large woody debris” in order to provide aquatic habitat.

¹³ See 2004 Plan, pp. H-3 and 1-3 (Exhibit 1).

¹⁴ "Soil Survey of Jackson County, NC," Natural Resources Conservation Service under USDA (June 1997).

and fact-finding would cause the Forest Service to violate the law. This certainly is not in the public interest.

III. CONCLUSION

WHEREFORE, the Friends of the Upper Chattooga urge the Court to dismiss the Complaint and deny the Motion. As Mr. Gates aptly put it: “Boaters already have access to the majority of the river ... something should be set aside for solitude and wilderness experience.”

/s/ Alan R. Jenkins

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in L.R.5.1B (Times New Roman, 14 pt.) for documents prepared by computer.

This 5th day of July, 2006.

/s/ Alan R. Jenkins

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CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the within and foregoing **Amicus Brief of the Friends of the Upper Chattooga** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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2.A. Chattooga Wild and Scenic River Corridor

Table 3-1. Acres in Chattooga Wild and Scenic River Corridor by Forest by Classification

National Forest	Wild	Scenic	Recreational
Sumter (South Carolina)	3,290	224	1,030
Nantahala (North Carolina)	1,065	305	985
Chattahoochee (Georgia)	5,998	468	1,551
Total Acres	10,353	997	3,566

Emphasis: Congress designated this corridor as part of the National Wild and Scenic Rivers System. It is managed to protect and enhance the outstandingly remarkable values of the river and its surroundings. The river will be preserved in a free-flowing condition for the benefit, use, and enjoyment of present and future generations.

The Chattooga Wild and Scenic River corridor is located in the Sumter, Nantahala, and Chattahoochee National Forests. Its 57 designated miles begin in North Carolina (Nantahala National Forest) and forms the state boundary between South Carolina (Sumter National Forest) and Georgia (Chattahoochee National Forest). The river includes sections designated as 'wild,' 'scenic' and 'recreational'.

The direction in this Forest Plan specific to the Chattooga (prescriptions 2A, 2.A.1, 2.A.2. and 2.A.3.) constitutes the comprehensive plan as required in Section 3(d)(2) of the Wild and Scenic Rivers Act (Act).

Relative to the requirements in the Act, this direction:

- Describes the outstandingly remarkable values.

- Includes emphasis statements, desired conditions and standards to protect river values.
- Provides detailed direction for on-river recreational capacity and establishes capacity for in-corridor recreation through a desired condition for facility development.
- Addresses water quality issues within the watershed, particularly through partnerships in Chapter 4.
- Includes river-specific monitoring measures for water quality and the outstandingly remarkable values in Chapter 5. Plan Implementation, Monitoring and Evaluation.

The Nantahala and Chattahoochee National Forests will use this direction for management of the river within their respective forest boundaries.

By agreement among the three forests, the Sumter National Forest has the lead authority for all boating/floating use (commercially-guided and self-guided) on the Chattooga River when it involves the main channel from Burrell's Ford to Lake Tugaloo, as well as the West Fork.

Outstandingly Remarkable Values of the Chattooga River

In 1974, when the river was designated by Congress as a part of the National Wild and Scenic Rivers System, the river possessed several outstandingly remarkable values including geology, biology, scenery, recreation and history. These values have generally improved over the years.

Geology—The geologic and geomorphologic values of the Chattooga, as described in the 1971 *Wild and Scenic River Study Report* for the Chattooga River and included the deeply dissected escarpment and the steep, rocky, forested slopes that plunge into deep, narrow gorges. There are a series of outstanding monolithic treeless domes and slopes of exposed resistant granite, which occur at the upper

headwaters of the river in North Carolina. Another feature of the river is that it is the headwaters of the Savannah River, which flows into the Atlantic Ocean. It is likely that a combination of geologic fault, severe erosion, and channel entrenchment associated with the headwaters of the Savannah River, now known as the Tugaloo River (formed by the confluence of Chattooga and the Tallulah) captured these rivers from the Chattahoochee River. A stream capture of this magnitude is unusual in the region, but the adjacent Chauga River also exhibits these characteristics.

Biology—There is a variety and richness of the plant life within the Chattooga Watershed, including the Chattooga Wild and Scenic River Corridor. The unique geography and climate characteristics provide habitats for uncommon assemblages of endemic, disjunct, and relic plant species. The most rare species within the Chattooga River Gorge landtype are the Southern Appalachian endemics, which include the liverworts; the rock gnome lichen and Blue Ridge bindweed, Fraser's loosestrife, Manhart's sedge, Biltmore's sedge pink shell azeala and the divided leaf ragwort. Old growth communities comprise almost 10 percent of the corridor. Federal and state agencies consider several non-game wildlife species within the watershed sensitive species.

Scenery—The scenery along the Chattooga River is exceptional. The scenery plays an important part of the Wild and Scenic River experience. The river is deeply entrenched between high ridges for large stretches of its length. Steep forested slopes on either side of the river give a feeling of seclusion. The river constantly meanders and curves, and there are excellent views along these bends. The seasons change the landscape from the varying soft greens of spring and summer to the patchwork of red, yellow, and orange. The winter finds the leaves stripped away and the patches of green from the white pines stand out against the gray-brown hillsides and exposed rock formations.

The river itself provides a varying scene from a smooth flowing stream to a river with thundering falls and cascades, raging rapids, enormous boulders, and cliff-enclosed deep pools.

Recreation—The recreational values of the river and corridor are outstanding along its 57-mile course. The river offers a wide variety of activities in a high-quality setting. Activities range from swimming to hiking and horseback riding with spectacular scenery, to excellent trout fishing and nationally recognized white-water rafting opportunities. Other activities include backpacking, photography, and nature study. Most of these activities take place in largely unmodified natural surroundings, with many opportunities for remoteness and solitude.

History—Very little systematic survey has been completed in the river corridor. A total of 38 archeological sites have been recorded within the corridor. These include 15 prehistoric sites, 15 historic house and farmstead sites, a railroad embankment, 2 historic cemeteries, a 19th century mineral prospecting pit, and a rock shelter. About half of these sites are considered potentially eligible for the *National Register of Historic Places*. The Cherokees destroyed Chattooga Town, a large settlement of Indians, before 1600. The site is near the present day Highway 28 bridge site. This regionally significant site is potentially eligible for the *National Register of Historic Places*.

Standards

2.A.-1 Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge.

2.A.-2 Organized events (such as boat races) are not allowed on the river.

2.A.-3 Motorized boats or craft are not allowed on the river.

United States
Department of
Agriculture

Forest Service
Southern Region



South Carolina

1985

Final Environmental Impact Statement

Sumter National Forest Land and Resource Management Plan



"LMP FILE COPY"

SUMMARYPurpose and Need For Plan

This Final Environmental Impact Statement (FEIS) discloses and evaluates ten alternatives including the selected alternative (the Forest Plan) which were considered for managing the land and resources of the Sumter National Forest. This document also describes the environment which will be affected and the significant environmental effects of the alternatives considered.

The result of the selected alternative discussed in the FEIS is a separate action -- the Land and Resource Management Plan (Forest Plan) for the Sumter National Forest. Land and resource management planning process for the Sumter National Forest is designed to provide for multiple use and sustained yield of goods and services from Sumter National Forest in a manner that maximizes long-term net public benefits in an environmentally sound manner (36 CFR 219.1a). For purposes of National Environmental Policy Act (NEPA) disclosure, the FEIS and the Forest Plan are treated as combined documents (40 CFR 1506.4).

National Forest land and resource management planning is required by the Forest and Rangeland Resources Planning Act of 1974 (RPA) as amended by the National Forest Management Act of 1976 (NFMA). This Final Environmental Impact Statement (FEIS) meets requirements of the National Environmental Policy Act of 1969 (NEPA), Council of Environmental Quality (CEQ) NEPA regulations and NFMA implementing regulations (36 CFR 219). For purposes of NEPA disclosure, the EIS and Forest Plan are treated as combined documents (40 CFR 1506.4) to reduce duplication and paperwork.

Sumter National Forest is physically separated into three separate "divisions" located in northwestern South Carolina. This 359,412-acre Forest contains five Ranger Districts. Andrew Pickens, Edgefield, Enoree, Long Cane and Tyger. Andrew Pickens (78,137 acres) District parallels Chattooga River in western Oconee County. Edgefield (67,362 acres) and Long Cane (55,139 acres) Districts lie east of Clark Hill Reservoir in Abbeville, Aiken, Edgefield, Greenwood, McCormick and Saluda Counties. Enoree (78,600 acres) and Tyger (80,174 acres) Districts are located east of Interstate 26 in Chester, Fairfield, Laurens, Newberry and Union Counties.

National Forest Land and Resource Management planning is issue - oriented. The first step in preparing land and resource management plans is "identification of public issues and management concerns." As a result of this process, eleven major issue topics were identified for the Sumter National Forest

ISSUE TOPIC 1. HOW WILL THE FOREST BE MANAGED TO PROVIDE HABITAT FOR WILDLIFE?

ISSUE TOPIC 2. HOW WILL THE CHATTOOGA RIVER BE MANAGED TO PROVIDE A VARIETY OF RECREATIONAL EXPERIENCES AND ALSO MEET THE OBJECTIVES OF THE WILD AND SCENIC RIVERS ACT?

ISSUE TOPIC 3. WHAT SPECIAL AREAS WILL BE ESTABLISHED OR MODIFIED?

ISSUE TOPIC 4. WHAT SHOULD BE THE FINAL RECOMMENDATION FOR ROADLESS "FURTHER PLANNING" AREAS?

ISSUE TOPIC 5. HOW WILL THE FOREST MINIMIZE USER CONFLICT AND PROVIDE AN ACCEPTABLE RANGE OF OPPORTUNITIES FOR DISPERSED RECREATION?

ISSUE TOPIC 6. HOW WILL THE FOREST BE MANAGED TO PROVIDE WOOD FOR HOME HEATING AND OTHER ENERGY USES?

ISSUE TOPIC 7. HOW WILL THE FOREST BE MANAGED FOR TIMBER ON A SUSTAINED YIELD BASIS?

ISSUE TOPIC 8. WHAT CRITERIA SHOULD BE USED FOR SELECTING ROADS TO BE CLOSED?

ISSUE TOPIC 9. WHERE SHOULD FOREST ROADS AND TRAILS BE LOCATED AND TO WHAT STANDARD SHOULD THEY BE DESIGNED, CONSTRUCTED AND MAINTAINED?

ISSUE TOPIC 10. HOW CAN FOREST OWNERSHIP BE CHANGED TO PROVIDE GREATER SERVICE, EFFICIENCY AND PUBLIC ACCESS?

ISSUE TOPIC 11. HOW WILL THE SOIL AND WATER RESOURCES BE PROTECTED AND ENHANCED, AND WHAT WILL BE THE EXTENT OF THE RESOURCE IMPROVEMENT PROGRAM FOR TREATING AREAS WITH SEVERE SOIL EROSION?

Alternatives Including the Selected Action

Land management planning is designed to identify and select for implementation an alternative for managing a National Forest which most nearly maximizes NET PUBLIC BENEFITS in an environmentally sound manner. This final environmental impact statement contains "...a broad range of reasonable alternatives to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits" [36 CFR 219.12].

The process to formulate alternatives on the Sumter National Forest consisted of:

- (1) Identification of major public issues and management concerns (refer to Appendix A);
- (2) Preparation of resource inventories to identify site-specific areas having common environmental characteristics,
- (3) Identification of capability, suitability and availability of the Sumter National Forest for different resources and practices;
- (4) Preparation of management prescriptions, representing sets of compatible management practices to answer public issues and management concerns and to permit different management goals.

Agency	Method of Contact	Number of Contacts	Input Received
LOCAL (Cont.)			
County Administrator, Fairfield County	Letter	1	Yes
County Manager, Greenwood County	Letter	1	Yes
County Supervisor, Laurens County	Letter	1	No
County Supervisor, McCormick County	Letter	1	Yes
County Administrator, Newberry County	Letter	1	No
County Supervisor, Oconee County & the Oconee County Council	Letters, Meetings, Telephone and Personal Visits	Numerous	Yes
County Supervisor, Saluda County	Letter	1	No
County Supervisor, Union County	Letter	1	No

The documentation of this consultation is contained in the process records for the Sumter National Forest Land and Resource Management Plan.

The ID Team was unable to identify any significant conflicts between the Sumter Land and Resource Management Plan and the goals, objectives and plans of other Federal, State and local agencies. Members of the ID Team and Management Team continued coordination with these agencies throughout the planning process. Agencies expressing a concern for the management of the Sumter National Forest were consulted prior to the identification of the selected alternative.

Indian Tribes

There were no known Indian tribes in the planning area.

Other Consultation

1. Interest Groups -- Contacts with special interest groups were handled through the normal public involvement process.
2. Timber Industries -- Fourteen timber industries (Westvaco, Champion, etc.) were contacted by letter in March of 1980. This letter provided a brief explanation of the planning process, asked for any comments and asked for copies of any management plans which would be pertinent to the planning process. Five written responses were received and analyzed by the ID Team.
3. Landowners -- Due to the constant changing of landownership and the large number of adjacent landowners, the ID Team felt it was impractical to try to contact each individual by a separate letter. This large and changing number of adjacent landowners made it impractical to coordinate with individual landowners. In many cases, the identity or address of the present landowner was unknown or incorrect. The ID Team agreed that the regular public involvement process was adequate notification to adjacent landowners that a Land Management Plan was being prepared

for the National Forest. The public involvement process included advertisements in local newspapers and radio announcements on local stations. Issue statements from some adjacent landowners were incorporated into issue topics during the "issues, concerns and opportunities identification process" as an indirect method of coordinating with adjacent landowners. The ID Team analyzed comments received from adjacent landowners during the public review of the draft environmental impact statement.

PUBLIC INVOLVEMENT

A nine step process was used to solicit public comments and statements concerning the management of the Sumter National Forest.

1. Publishing a Notice of Intent in the Federal Register (3/14/80);
2. Placing paid public notices in three major newspapers (published 3/25/80):
 - a. The State, Columbia, SC;
 - b. The News and Courier, Charleston, SC;
 - c. The News, Greenville, SC;
3. Sending general news releases to local newspapers,
4. Information about the Sumter National Forest Land and Resource Management Plan was published in the following papers:
 - a. Keowee Courier (4/9/80, 4/16/80, 4/23/80, 5/7/80, 7/23/80)
 - b. Seneca Journal (4/23/80, 5/7/80)
 - c. Westminster News (5/7/80)
 - d. Union Daily News (4/1/80)
 - e. Union County News (4/2/80)
 - f. Whitmire News (4/3/80)
 - g. Newberry Observer (4/3/80)
 - h. Greenwood Index Journal (4/8/80)
 - i. Press & Banner (4/8/80)
 - j. McCormick Messenger (4/10/80)

5. Radio announcements about Land Management Planning were made on the following stations:

- a. WBCU - Union, SC (4/4/80, 4/7/80)
- b. WKDK - Newberry, SC (3/21/80, 5/1/80)
- c. WKMG - Newberry, SC (3/21/80, 5/2/80)
- d. WJES - Johnson, SC (4/18/80)
- e. WGDG - Walhalla, SC (5/15/80)
- f. WSNW - Seneca, SC (5/16/80)

6. Meetings were held at the following locations:

Location	Date	# Present
Old College St. School, Westminster, SC	4/24/80	13
Forestry Building, Clemson Campus, Clemson, SC	4/28/80	19
Court House, Walhalla, SC	4/29/80	11
Long Creek Community Club, Long Creek, SC	5/9/80	35
Mountain Rest Community Club, Mountain Rest, SC	5/10/80	23
Seneca Lions Club, Seneca, SC	5/20/80	11
Seneca Rotary Club, Seneca, SC	5/15/80	
American Legion Building, Walhalla, SC	5/12/80	12
Stumphouse Ranger Station, Walhalla, SC	4/17/80	7
Brunson-Cleora Community Club	3/17/80	35

7. Other groups to which presentation on Land Management Planning were made include:

Group	Date	# Attending
SC Council of Profession Archeologists	4/18/80	17
Oconee County Council	3/25/80	-
Group Meeting	4/1/80	16
Group Meeting	4/10/80	12
Group Meeting	4/11/80	9
Edgefield County Council Meeting	4/21/80	10
Group Meeting	5/12/80	12
Waterlee Forestry Club	4/24/80	20
Group Meeting	4/16/80	27
Bush River Senior Citizens Club	3/19/80	21
Forester's Council of South Carolina	3/19/80	-

8. Many individuals were contacted on a one-to-one basis and by phone. A complete list of all persons contacted in this manner is found on file under the "Record of Public Involvement" in the process records. Many of these individuals (as well as those attending group meetings) are either adjacent or intermingled landowners.
9. Posters were placed in stores, restaurants, post offices and other places commonly visited by local people. The posters explained that the Forest Service was beginning a Land and Resource Management Plan, that it was interested in knowing any concerns about National Forest management, and that anyone could be added to the mailing list by filling out a card (25 were attached to each poster) and mailing it to the Forest Service.

SELECTED ISSUES, CONCERNS AND OPPORTUNITIES

There are eleven issue topics with 150 statements made by the public and management that met the criteria to be analyzed in the planning process. These statements were renamed "issue facets" and grouped by resource categories to form 11 categories called "issue topics". All issue topics and facets are addressed in this FEIS.

The following list of issue topics describes each issue topic by (a) the issue facets within the issue and (b) the relationship (whether complementary or conflicting) among resources within and between issues.

ISSUE TOPIC 1. HOW WILL THE FOREST BE MANAGED TO PROVIDE HABITAT FOR WILDLIFE?

Wildlife populations on the Forest are directly related to the amounts and types of habitat that are present. The way vegetation is managed determines wildlife habitat. The silvicultural systems and cutting practices that are chosen can degrade, maintain or enhance the diversity and distribution of habitat. There is strong public interest in specific wildlife species as well as in maintaining a wide diversity of habitats.

a. Issue Facets.

1. Utilize Russell House Fields and Ridley Fields rather than let them grow up.
2. Need to control access to wildlife openings managed by Wildlife Commission.
3. Wildlife habitat would be substantially improved if mast producing hardwood stands were increased to represent a minimum of 20 percent of the Forest.
4. Transition zones should be protected and efforts made to establish these zones where they were previously destroyed.
5. Longer rotation of 70-plus years for pine and 110-plus years for hardwood would be more beneficial to wildlife.
6. Keep all National Forest land in the Game Management Area Program.
7. Need to locate and save mast producing hardwoods, especially in clearcut areas.
8. Make the establishment of maintained planted openings in the piedmont for wildlife the exception. Temporary roads closed and revegetated to wildlife foods along with regeneration areas should provide enough openings in most cases.
9. What percent of National Forest land should be devoted to turkey production?
10. Some old growth hardwood stands or inclusions should be allowed to develop within all compartments.
11. Careful attention should be paid to leaving enough mature trees in an area to satisfy the needs of hole nesting and dening species.
12. Stop cutting hardwoods which produce food for wildlife.

SUMTER LMP PUBLIC COMMENTS

RECEIVED FROM:

- 1.) USDA, Animal & Plant Health Insp. Svc., Director's Office,
Federal Building, Room 648, Hyattsville, MD FP 20782
- 2.) W.M. McGovern, Chief, Environmental Compliance and Review
Branch Planning and Evaluation Staff, U.S. Dept. of
Transportation (DOT), U.S. Coast Guard, Washington, DC 20593
- 3.) Ronald D. Althoff, Asst. Executive Director, S. C. Project
Notification & Review System, Central Midlands Regional
Planning Council, Suite 155 Dutch Plaza, Columbia, SC 29210
- 4.) J. F. Wyse, Past Pres. S. C. Wild Turkey Federation, R6, Box
340D, Columbia, SC 29210
- 5.) Clato E. Hamly, Rt #3, Box 197, Walhalla, SC 29691
- 6.) Karl "Blue" Miller, P. O. Box 567, Walhalla, SC 29691
- 7.) Ken Dobbins, 300 Century Drive, Columbia, SC 29210
- 8.) Wade Harris/Donna Millar, 520 Woodland Way, Greenville, SC
29607
- 9.) Charles P. Koshiol, A.M.A. #494558A, 348 Augusta,
Paynesville, Minnesota 56362
- 10.) Linda Hansard, Rt 1, 104 Leisure Lane, Spartanburg, SC 29302
- 11.) Doug Hansard, Rt 1, 104 Leisure Lane, Spartanburg, SC 29303
- 12.) Paul E. Shirley, Jr., #158 La Vista Apts, Greenville, SC
29609
- 13.) Sam Chalk, President, Yamaha of Greensboro, 715 Tri-City
Blvd., Greensboro, NC 27407
- 14.) Jess Sherbert, President, Southern Management Services, Inc.,
Route 6, Suite 20 & 21, Country Plaza, Greer, SC 29651
- 15.) John D. Thomas, D.M.D., 412-A Old Trolley Road, Summerville,
SC 29483
- 16.) W. Herman Sharpe, Rt. 2, Box 443, Irmo, SC 29063
- 17.) Chester E. Sansbury, Manager, Impact Analysis and Standards
Section, South Carolina Dept. of Health & Environmental
Control, 2600 Bull St., Columbia, SC 29201
- 18.) Harry M. Dalton, Chairman, Star Paper Tube, Inc., Drawer B,
CRS, Rock Hill, SC 29731
- 19.) David West, Jr., Rt 1, Box 11, Holly Hill, SC 29059
- 20.) Constance L. Zdnek, Speech Therapist, Fort Mill Schools, 752
Harrell Street, Rock Hill, SC 29730
- 21.) Stan M. Sharpe, Rt 2, Box 443, Irmo, SC 29063

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 22.) Joseph W. Zdenek, Chairman, Winthrop College, College of Arts and Sciences, Department of Modern & Classical Languages, Rock Hill, SC 29733
- 23.) Mike Gibson, Capitol Kawasaki, 3718 Rosewood Dr., Columbia, SC 29205
- 24.) William T. Bigham, Capitol Kawasaki, 3718 Rosewood Dr., Columbia, SC 29205 (Same comment as #23.)
- 25.) Van Keisler, 717 Chapel Rd., West Columbia, SC 29169
- 26.) Danny E. Donahue, 7839 Wessex Lane, Columbia, SC 29223
- 27.) B. G. Cloyd, Division Administrator, U. S. Dept. of Transportation, Federal Highway Administration, 1835 Assembly St., Suite 758, Columbia, SC 29201
- 28.) William A. Simons, 7835 Wessex Lane, Columbia, SC 29223 (Also, see # 54)
- 29.) I. Bjir, Capitol Kawasaki, 3718 Rosewood Dr., Columbia, SC 29205 (Same comment as #23.)
- 30.) Jon U. Sonder and Donald A. Plina, Capitol Kawasaki, 3718 Rosewood Drive, Columbia, SC 29205 (Same comment as #23.)
- 31.) Howard Barfield, Capitol Kawasaki, 3718 Rosewood Dr., Columbia, SC 29205 (Same comment as #23.)
- 32.) Jeffrey Noland, Route 9, Box 447, Inman, SC 29349
- 33.) Kurt Lemhouse, 1146 Meadow Bend Dr., York, SC 29745
- 34.) Ferrell Power, Rt #15, Bell Rd., Greenville, SC 29607
- 35.) B. L. Mims, III, Manager, B.L. Mims & Son Lumber Company, Edgefield, SC 29824
- 36.) M. Gault "Bunny" Beeson, Jr., State President, Wildlife Action, Inc. P. O. Box 543, Mullins, SC 29574
- 37.) Darrell Davis, President, Davis Brothers Lumber Co., Inc., P. O. Box 5, Seneca, SC 29678
- 38.) Roger Dale Jackson, 401 Laurens St., Joanna, SC 29351
- 39.) Allen A. Young, Jr., Rt. 2, Box 375, Clinton, SC 29325 (Also see # 136)
- 40.) Marion R. Henderson, P. O. Box 412, McCormick, SC 29835
- 41.) Russel Ivey, R#5, Chester, SC 29706
- 42.) Dennis Ivey, R#5, Chester, SC 29706 (Same comment as #41.)
- 43.) Ellis Love, R#3, Box 673, Chester, SC 29706 (Same comment as #41.)

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 44.) John E. Lowe, R#3, Box 673, Chester, SC 29706 (Same comment as #41.)
- 45.) Roy Clement, R#3, Chester, SC 29706 (Same comment as #41.)
- 46.) Will Eckhardt, Columbia Enduro Riders Assn., P.O. Box 382, Columbia, SC 29202
- 47.) Paul A. Dickey, President, S.C. Motorcycle Dealers Assn., 3718 Rosewood Drive, Columbia, SC 29205
- 48.) Marie M. Pace, Route 10, Country Side Apts., Apt. A-2, Easley, SC 29640
- 49.) William M. Webster, III, Chairman, S.C. Wildlife & Marine Resources Comm., P.O. Box 167, Columbia, SC 29202
- 50.) Avery L. Yount, State President, S.C. Chapter National Wild Turkey Federation, Inc., 409 Richardson Circle, West, Hartsville, SC 29550
- 51.) Maurice Peele, 10 Dinwiddle Dr., Greenville, SC 29611
- 52.) Paul D. Pilkington, 520 Pleasant View Dr., Lexington, SC 29072
- 53.) William F. McCrary, Newberry District Manager, Georgia Pacific Corp., S.C. Piedmont Timber Division, P.O. Box 218, Prosperity, SC 29127
- 54.) William A. Simon, 7835 Wessex Lane, Columbia, SC 29223
(Included 345 signed form letters)
(Also, see # 28)
- 55.) Charles D. Peterson, P.O. Box 36, Richlands, NC 28574
- 56.) Charles D. Shealy, 608 Melton St., West Columbia, SC 29169
- 57.) John L. Greer, Union County Supervisor, Union, SC 29379
- 58.) Don Pace, Route 10, Country Side Apts., Apt. A-2, Easley, SC 29640
- 59.) H. C. Morgan, Jr., P. O. Box 313, Mt. Carmel, SC 29840
- 60.) Bob Bowie, President, Edgefield Local Chapter, National Wild Turkey Federation, Inc., Wild Turkey Bldg., P.O. Box 530, Edgefield, SC 29824
- 61.) Marian W. Power, Rt. 15, Box 259, Bell Road, Greenville, SC 29607
- 62.) Will Eckhardt, 17 Ragin Dr., Hopkins, SC 29061
- 63.) Harold S. Jarvis, 1316 Glenhaven Dr., Columbia, SC 29205

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 64.) Carol G. Wells, Soil Scientist, Forest Sciences Laboratory,
P.O. Box 12254, Research Triangle Park, NC 27709
(Also see # 85)
- 65.) Daniel, Barbara, Allen & Jonathan Day (address unknown)
- 66.) Mike Adams (address unknown)
- 67.) Jay L. Ellie, 3637 Falling Springs Rd., Apt. B., Columbia, SC
29203
- 68.) Brian Ellis, 201 Fair Place, Clinton, SC 29325 (Same comment
as #67.)
- 69.) Edwin B. Drane, Conservation Chairman, South Carolina
Chapter, Sierra Club, P.O. Box 4904, Hilton Head, SC 29928
- 70.) J.P. Richardson, Jr., President, Honda of Orangeburg, 188
Calhoun Dr., SW, Orangeburg, SC 29115
- 71.) W. Dennis Chamberlain, 910 E. Washington St., Greenville, SC
29601
- 72.) Bruce C. Sahlman, 309 Coldbranch, Columbia, SC 29223
- 73.) Honorable Robin Tallon, Congress of the United States, House
of Representatives, 128 Cannon Building, Washington, DC 20515
- 74.) Thomas J. Kwiatkowski, HCR 65, Box 578, Huger, SC 29450
- 75.) Richard McAdams, 4649 Old Spartanburg Rd., Taylors, SC 29687
- 76.) Don Pilzer, 18 Fairmont Dr., Greenville, SC 29605
- 77.) Dennis C. Matherly, President, S.C. Trappers Assn., 3713
Gable Terrace, Florence, SC 29501
- 78.) Pat Mason, 204 Pee Dee Rd., Georgetown, SC 29440
- 79.) John A. Freeman, John's Press, Mt. Gallant Road,
P.O. Box 3405, CRS, Rock Hill, SC 29731
- 80.) Honorable Strom Thurmond, United States Senate, Senate Office
Building, Washington, DC 20510 (Included comment #50.)
- 81.) Dr. & Mrs. Herman F. Senter, Rt. 2, Box 424, Liberty, SC
29657
- 82.) William E. Wilberly, 1007 Sightler Dr., W. Columbia, SC 29169
- 83.) W. D. Baughman, Manager, Southern Woodlands,
and
A. C. Edwards, Manager, Woods Procurement Department, Kraft
Division, Timberlands Division, WESTVACO, Box WV,
Summerville, SC 29483

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 84.) Honorable Floyd D. Spence, House of Representatives, House Office Building, Washington, DC 20515
- 85.) Carol G. Wells, Soil Scientist, Forestry Sciences Laboratory, P.O. Box 12254, Research Triangle Park, NC 27709
(Also, see Comment # 64)
- 86.) James P. Yount, Director and Past President, North Carolina Wildlife Federation, Route 33, Box 583, Newton, NC 28658
- 87.) Russell Cumbee, Rt. 2, Box 568, Batesburg, SC 29006
- 88.) Edward J. Royals, Rt. 2, Box K69, Fountain Inn, SC 29644
- 89.) Walt Schrader, Environmental Consultant for South Carolina Sierra Club, 733 Colonial Drive, Rock Hill, SC 29730
- 90.) Dr. Robert Guytine, 1067 Oakmont Drive, Orangeburg, SC 29115
- 91.) Norman D. Crain, Supervisor-Chairman, Oconee County Council, Route 3, Westminster, SC 29693
- 92.) T. C. McCain, County Administrator, Edgefield County Council, P.O. Box 633, Edgefield, SC 29824
- 93.) Dr. Billy Campbell, Box 152, Westminster, SC 29693
- 94.) Oliver P. Case, 2903 Little Creek Dr., Anderson, SC 29621
- 95.) Lee Dickert, 1948 Bolin Road, N. Augusta, SC 29841
- 96.) Robert W. Pollard, Jr., Pollard Lumber Co., Inc., Appling, GA 30802
- 97.) Dr. Joseph B. James, Blue Ridge Orthopaedic Association, P.A., The Commons, 123 By-Pass, Seneca, SC 29678
- 98.) Yamaha Suzuki of Columbia, Inc., 6329 Two Notch Road, Columbia, SC 29204
(Included 14 signed letters)
 - a) Whiley Ryr
 - b) Kenneth M. Rowland
 - c) Robert D. Frazer
 - d) David B. Guest
 - e) Larry Bracknell
 - f) Mike Sharpe
 - g) Pursell A. Lericke
 - h) Brian Baldwin
 - i) Philip R. Boykin
 - j) Garry Tomlin
 - k) Duane A. Copowzey
 - l) Chuck Paxton
 - m) Mark Moak
 - n) Norman Moak
- 99.) Dr. James A. Timmerman, Jr., S.C. Wildlife & Marine Resources Dept., P.O. Box 167, Columbia, SC 29202
- 100.) Pam Edwards, 11 Montagu St., Charleston, SC 29401
- 101.) F. W. Darracott, III, Rt 8, Box 225, Piedmont, SC 29673
- 102.) Dr. Thomas Cloer, Route 3, Hwy. 178, Pickens, SC 29671

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 103.) Dorothy E. Coley, 59-B Montagu St., Charleston, SC 29401
- 104.) W. H. Harrison, President, Millway Lumber Co., Bradley, SC 29819
- 105.) Tom Linn, American General Life Insurance Company, 308 Columbia Ave., Lexington, SC 29072
- 106.) Cyrus Y. Schelly, Route 5, Box 411, Clover, SC 29710
- 107.) Mark T. Jones, Rt. 9, N. Parker Rd., Greenville, SC 29609
- 108.) Ellis H. Dantzler, CLU, American General Life Insurance Co., 308 Columbia Avenue, Lexington, SC 29072
- 109.) Brian Claycomb, P.E., Vice-President, Advanced Automation, 3014 White Horse Rd., Greenville, SC 29611
- 110.) John D. Thurston, Rt. #8, Box 99, Piedmont, SC 29673
- 111.) Paul Jones, Jr., The Great Escape 1426 Laurens Rd., Greenville, SC 29607
(Included 70 signature petition)
- 112.) John S. Cullum, P.O. Box 625, Batesburg, SC 29006
- 113.) W. Edward Jackson, 616 Bernard St., Leesville, SC 29070
(Same comment as #112.)
- 114.) Gene Weeks, 150 Cypress Drive, N. Augusta, SC 29841
- 115.) Ernest W. Tart, 24 Crosswinds Est. Dr., Pittsboro, NC 27312
- 116.) Samuel R. Wooten, Superintendent, Edgefield County Department of Education, P.O. Box 608, Edgefield, SC 29824
- 117.) Judith E. Gordon, Ph.D., 150 Cypress Dr., N. Augusta, SC 29841
- 118.) Marjorie B. Hyman, 102 David St., Dillon, SC 29536
- 119.) D. W. Sweatman, 1133 John Rutledge Ave., Hanahan, SC 29406
- 120.) Gordon Bowdler, Rt. 3, Box 500, Saluda, SC 29138
- 121.) Richard D. Boone, P.O. Box 416, Henrietta, NC 28076
- 122.) James Earl Kennamer, Ph.D., Director of Research and Management and
Rob Keck, Executive Vice President of
National Wild Turkey Federation, Inc., P.O. Box 530,
Edgefield, SC 29824
- 123.) Langdon D. Long, 102 Church Street, Laurens, SC 29360
- 124.) T. R. Cooke, Berea High School Environmental Education Instructor, Route 5, Box 1586, Travelers Rest, SC 29690

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 125.) Leonard A. Kilian, Jr., State Forester, S. C. Forestry Commission, P. O. Box 21707, Columbia, SC 29221
- 126.) Petition -- including 16 signatures (Addresses listed)
- 127.) Howard Queen, Star Route, Walhalla, SC 29691
- 128.) Donald A. Brown, Manager, S.C. Piedmont Timber Division, Georgia Pacific Corp., P.O. Box 218, Prosperity, SC 29127
- 129.) Walter T. Ahearn, Affiliate Representative and Betty Spence, Executive Director for S.C. Wildlife Federation, P.O. Box 4186, Columbia, SC 29240
- 130.) Carol Keck, 2078 Awappoo Hall Rd., Charleston, SC 29412
- 131.) Norman Sharp, #8A, Pinecroft Drive, Taylors, SC 29687
- 132.) Danis L. Hill, 1128 Windsome Place, Mt. Pleasant, SC 29464
- 133.) Dale Chappell, 101 Larkspur Dr., Greenville, SC 29611
- 134.) Gary Timms, 4 Gardeina Drive, Greenville, SC 29611
- 135.) Petition signed by 10 individuals (addresses listed)
- 136.) Allen A. Young, Jr., Rt. 2, Box 375, Clinton, SC 29325 (Also see # 39) (Same comment as #112.)
- 137.) Cheves Leland, 1430 Hindman Ave., Mt. Pleasant, SC 29464
- 138.) Ricky Moore, Rt. 1, Gibson Dr., Greenville, SC 29611
- 139.) T. T. Satterfield, 8 Lilac St., Greenville, SC 29611
- 140.) Doug Jennings, Rt. 3, Trammell Rd., Greenville, SC 29611
- 141.) Billy Moore, 11 Tucson Drive, Greenville, SC 29611
- 142.) Dennis M. Forsythe, Ph.D., President, Charleston Natural History Society, The Citadel, Charleston, SC 29402
- 143.) Mike Cothran, 11 Childress Circle, Greenville, SC 29611
- 144.) Gerry W. Carter, Jr., 109 Shubuta Dr., Greenville, SC 29611
- 145.) Rick Perry, 129 Shubuto Drive, Greenville, SC 29611
- 146.) Chris Vaughan, 11 Oak Hill Drive, Greenville, SC 29611
- 147.) Cindy Ross Bradford, 616 Charlotte Ave., Rock Hill, SC 29730
- 148.) Charles S. Bradford, 616 Charlotte Ave., Rock Hill, SC 29730
- 149.) Tommy Blount (address unknown)
- 150.) Nancy Taylor (address unknown) (Same comment as #149.)

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 151.) Michael Lamb, Rt. 4, Box 163, Ridgeland, SC 29936
- 152.) William F. and Marjorie C. Wagner, Rt. 4, Gilmer Circle,
Anderson, SC 29624
- 153.) E. Gary Cox, Jr. (address unknown) (Same comment as #149.)
- 154.) Fosia Lamb, Rt. 4, Box 163, Ridgeland, SC 29936
- 155.) Cecil Talley (address unknown) (Same comment as #149.)
- 156.) J. Harris (address unknown) (Same comment as #149.)
- 157.) James H. Haygreen, Manager, Northern Timber Group,
Georgia-Pacific Corporation, P.O. Drawer 200, Hwy. 521,
Alcolu, SC 29001
- 158.) Charles E. Holmes, Holmes Timber Co., Inc., Route 2, Box 244,
Johnston, SC 29832
- 159.) Mike A. Williamson, 1601 Preston Dr., Anderson, SC 29621
- 160.) Joel R. Thrift, Thrift Brothers Lumber Co., P.O. Box 96,
Westminster, SC 29693
- 161.) Thomas W. Hughes, P.O. Box 763, Ridgeland, SC 29936
- 162.) Dr. M. Dean Martin, President, Nantahala Chapter National
Wild Turkey Federation, P.O. Box 1179, Cullowhee, NC 28723
- 163.) Eve E. Gentiers (address unknown)
- 164.) Doug Cole, President, Foothills Local Chapter National Wild
Turkey Federation, 12 Concord St., Greenville, SC 29609
(Includes petition signed by 56 individuals)
- 165.) Hayes H. Patterson, Jr., 1742 Sam Rittenberg Blvd,
Charleston, SC 29407 (Same comment as #163.)
- 166.) Dave Clark, 848 Stiles Drive, Charleston, SC 29412
- 167.) Kathy C. Thompson (address unknown) (Same comment as #149.)
- 168.) George L. Moon (address unknown) (Same comment as #149.)
- 169.) Robert F. Martin, Conservation Chairman, South Carolina
Council Trout Unlimited, 205 East Hillcrest Dr., Greenville,
SC 29609
- 170.) Worth A. Kendall, President, Canal Wood Corp. of Chester,
P.O. Box 3009, Greenwood, SC 29648
- 171.) Michael C. Landrum, Route 1, Box 376-C, Merritt Road,
Piedmont, SC 29673
- 172.) Tommy Lombard, Rt. 1 Box 347, Mt. Rest, SC 29664

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 173.) Elizabeth B. O'Connor, 202 Needlerush Road, Johns Island, SC 29455 (Same comment as #163.)
- 174.) Deborah Barrier, Dove Cir 17, 500 Skyview Dr., Clemson, SC 29631
- 175.) Sandra Tickson (address unknown) (Same comment as #149.)
- 176.) Dean L. Butler, 2124 Oaktop Dr., Gaston, SC 29053
- 177.) W. H. Van Riper, Route #2, Greenville, SC 29609
- 178.) Robert K. Phillips, Rte 2, Box 393, Donalds, SC 29638
- 179.) Ted Burton (address unknown) (Same comment as #149.)
- 180.) Stephen Root, 115 Bangor St., Mauldin, SC 29662 (Same comment as #163.)
- 181.) Ms. Patti Logar, 15 Runion Dr., Taylors, SC 29687 (Same comment as #163.)
- 182.) H. K. Riddle (address unknown) (Same comment as #149.)
- 183.) Steve W. Tanner, Rt. 2, Box 556, Union, SC 29379 (Same comment as #163.)
- 184.) D. Dib Caldwell (address unknown) (Same comment as #149.)
- 185.) William Leatherwood, Jr., P.O. Box 17472, Greenville, SC 29606
- 186.) Bobby Joe Burton (address unknown) (Same comment as #149.)
- 187.) Fritz Gusmer, Rt. 1, Box 322-D, Clover, SC 29710
- 188.) William H. Horton, 152 Citadel Drive, Quail Creek, Conway, SC 29526
- 189.) Donald L. Cash, Rt#1, Box 277, Williamston, SC 29697 (Same comment as #149.)
 (Included signed letters from two other individuals also)
 - a) Donnie Sentell
 - b) Marshall Cash
- 190.) Scott Mount, 153 Dickert Drive, Lexington, SC 29072
- 191.) Petition including 27 signatures (addresses unknown)
- 192.) CSRA Dirt Riders, The Cycle Center, 1018 Atomic Road, North Augusta, SC 29841
 (Petition included names & addresses of 8 individuals)
- 193.) Nicole Hayler, Mountain Rest, SC 29664
- 194.) Emmett Farr, 12 Hunt's Bridge Rd., Greenville, SC 29611

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 195.) Billy McTeer, President, S.C. Chapter of the Wildlife Society, P.O. Box 167, Columbia, S.C. 29202
- 196.) John R. Swanson, P.O. Box 922, Berkeley, CA 94701
- 197.) Douglas A. Rayner, Ph.D., Botanist, S.C. Heritage Trust Program, S.C. Wildlife & Marine Resources Dept., P.O. Box 167, Columbia, SC 29202
- 198.) State Senator Edward E. Saleeby, Box 519, Hartsville, SC 29550
- 199.) Eddie Bull, 20 Lajuan Dr., Greenville, SC 29611
- 200.) Craig Osteen, 1008 Edgemont Ave. Ext., Greenville, SC 29611
- 201.) Roger L. Paige, Conservation Chair, Sierra Club (Bachman Group), 307 Parlock Rd., Irmo, SC 29063
- 202.) Robert R. Scott, President, S.C. Forestry Association, P.O. Box 21303, Columbia, SC 29221
- 203.) Russ Hallberg, Catawba Timber Company, P.O. Box 128, Catawba, SC 29704
- 204.) Fred P. Brinkman, Executive Director, S.C. Department of Parks, Recreation and Tourism, Suite 110, Edgar A. Brown Building, 1205 Pendleton Street, Columbia, SC 29201
- 205.) Danny L. Cromer, Office of the Governor, 1205 Pendleton Street, 4th Floor, Columbia, SC 29201
- 206.) Sheppard N. Moore, Chief, NEPA Review Staff, Environmental Assessment Branch, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, GA 30365
- 207.) James H. Lee, Regional Environmental Supervisor, U.S. Department of the Interior, Office of Environmental Project Review, SE Region, Suite 1360 Richard B. Russell Federal Bldg., 75 Spring Street, SW, Atlanta, GA 30303
(Also, see # 231)
- 208.) Edward F. Lominack, Jr., County Administrator, Office of the County Council, County of Newberry, P.O. Box 156, Newberry, SC 29108
- 209.) Daniel A. Poole, President, Wildlife Management Institute, Suite 725, 1101 14th Street, N.W., Washington, DC 20005
- 210.) Mildred K. Porter, Crooked Creek, Inc., Rt. 10, Box 28, Lexington, SC 29072
- 211.) Bob Karel, Vice President, Georgia Chapter, National Wild Turkey Federation, 3275 Rollingbrook Way, Duluth, GA 30136
- 212.) Buzz Williams, Rt. 1, Box 114, Mountain Rest, SC 29664

SUMTER LMP COMMENTS RECEIVED FROM: (continued)

- 213.) Chris Elliott, 1 Lora Ct, Greenville, SC 29611
- 214.) Rickey Landrum, 1220 West Parker Rd., Greenville, SC 29611
- 215.) Dr. George M. Lear, Legislative Officer, Northern Virginia Trail Riders, 15119 Old Dale Road, Centreville, VA 22020
- 216.) Donald E. Maurer, 104 Pine Ridge Lane, Clemson, SC 29631
- 217.) Harry R. Wright, P.O. Box 1028, Highlands, NC 28741
- 218.) Philip Fairbanks, Graber, Baldwin & Fairbanks, 605 Carteret Street, Beaufort, SC 29902
- 219.) Virginia & Dana Beach, 683 Folly Rd., Charleston, SC 29412
(Same comment as #163.)
- 220.) James E. Bagwell, Jr., Route 7, Box 356, Piedmont, SC 29673
- 221.) Ted R. Hughes, Rt. 8 Freeman Dr., Greenville, SC 29611 (Same comment as #149.)
(Includes two signed letters)
 - a) Phillip J. Stephens
 - b) M. W. Stephens
- 222.) A. Wayne Mount, 153 Dickert Dr., Lexington, SC 29072
- 223.) Roy Janson, Land Use Coordinator, The American Motorcyclists' Association, 33 College View Rd., Westerville, OH 43081
- 224.) Honorable Richard W. Riley, Governor of South Carolina, P.O. Box 11450, Columbia, SC 29211
- 225.) Billy Abercrombie, State Conservationist, USDA-Soil Conservation Service, 1835 Assembly St., Room 950, Columbia, SC 29201
- 226.) Derb S. Carter, Jr., Director and Counsel, National Wildlife Federation, Southeastern Natural Resources Center, 1033 Wade Avenue, Suite 207, Raleigh, NC 27605
- 227.) Connie Roberts, O.A. Anders Tile Inc., Route 8, Box 292, Greenville, SC 29611 (Same comment #149.)
(Included 9 letters signed by other individuals)

a) Richard L. Anders	e) Linetta Anders
b) Clifford Piders	f) Terry Hensley
c) Gleeria S. Anders	g) Robert Waldrop
d) Ott A. Anders, III	h) Roger Muritt
	i) Keith Boggs
- 228.) Roger L. Jones, Jr., Land Programs Coordinator, The South Carolina Nature Conservancy, P.O. Box 5475, Columbia, SC 29250
- 229.) Cary Cox, Jr., Rt. 7, Box 334, Piedmont, SC 29673 (Same comment as #149.)

SUMTER LMP COMMENTS RECEIVED FORM: (continued)

- 230.) Thomas T. Bridges, Rt#8 Bridges Dr., Greenville, SC 29611
(Same comment as #149.)
- 231.) James H. Lee, Regional Environmental Officer, U.S. Dept. of
the Interior, Office of Environmental Project Review, SE
Region, Suite 1360, Richard B. Russell Federal Bldg., 75
Spring Street, NW, Atlanta, GA 30303
(Also, see #207)
- 232.) L. Wayne Carlton, Carlton's Hunting Accessories, P.O. Box
1746, Montrose, CO 81402
- 233.) Robert L. Davis, Director of Forest Resources, Southeastern
Lumber Manufacturers Association, 671 Forest Parkway, P. O.
Box 1788, Forest Park, GA 30050
- 234.) Wallace Wood, Cooperative Extension Service, P.O. Box 1150,
McCormick, SC 29835

environmental impacts must be considered. In order to maximize value to the public with the limited resources available, the forest will focus on providing those opportunities that are unique or of exceptional long-term value in a manner that focuses on maximizing visitor satisfaction within financial and environmental limitations.

Goals and Objectives

Goal 22 Provide a spectrum of high quality nature-based recreational settings and opportunities that reflect the unique or exceptional resources of the Sumter and the interests of the recreating public on an environmentally sound and financially sustainable basis. Adapt management of recreation facilities and opportunities as needed to shift limited resources to those opportunities.

Goal 23 Where financially and environmentally feasible, enhance the following opportunities:

- Hiking, biking, canoe, kayak, raft and equestrian trail systems, especially in non-motorized settings with high quality landscapes
- Designated OHV routes
- The high priority improvements, expansions, or additions of facilities to provide developed recreational opportunities
- Hunting, fishing, wildlife, bird, and plant viewing opportunities
- Educational and interpretive opportunities

Objective 23.01 Maintain or improve 150 acres of ponds/lake habitat for recreational fisheries.

Objective 23.02 In the piedmont, increase acreage that is at least ½ mile from an open road to 35,000 acres, emphasizing land blocks that are at least 2,500 contiguous acres in size.

Goal 24 Enhance opportunities to provide backcountry (semi-primitive motorized and non-motorized/remote) recreational experiences that are generally not available on other land ownerships.

Goal 25 Provide a range of accessible recreation facilities and trails.

Standards

General

FW-69 Limit OHVs and mountain bikes to designated routes.

FW-70 Prohibit camping stays over 14 days, unless permitted.

FW-71 No new OHV routes in the Turkey, Stevens, Chauga and Chattooga Watersheds.

FW-72 Dispersed camping is not allowed on the Enoree and Long Cane ranger districts without a permit.

FW-73 Motorized use of the trail system is permissible for administrative purposes and emergencies.

FW-74 All management activities will be consistent with meeting or exceeding the condition associated with each Recreation Opportunity Spectrum (ROS) class.

FW-75 At developed recreational sites and on trails, effects from recreational use that conflicts with environmental laws (such as Endangered Species Act, National Heritage Preservation Act, or Clean Water Act), are analyzed and mitigated.

FW-76 At developed recreational sites, water, wastewater, and sewage treatment systems meet federal, state and local water quality regulations.

FW-77 At developed recreation sites high-risk conditions do not exist.

FW-78 At developed recreation sites, utility inspections meet federal, state and local requirements

FW-79 When signed as accessible, constructed features meet current accessibility guidelines.

FW-80 Trails, when signed accessible, meet current accessibility guidelines.

FW-81 Dispersed camping occurs at least 50 feet from lakes and streams to protect riparian areas, 50 feet from trails, and 1/4 mile from a road on the Andrews Pickens district.

FW-82 Camping with horses may only occur in designated areas on the Andrew Pickens District.

Roadless Areas and Wilderness Management

Congressionally designated wilderness areas are protected by law and valued for their ecological, historical, scientific, and experiential resources.

There is one designated wilderness area on the Sumter National Forest. Ellicott Rock Wilderness is shared between three national forests, the Sumter, the Nantahala and the Chattahoochee. Of the combined 8,271 acres for the entire wilderness area, 2,856 acres are on the Sumter. This acreage represents less than 1 percent of the total forest acreage. The existing wilderness areas will be managed to maintain the area's natural characteristics. Natural occurrences such as outbreaks of insects or disease are allowed as part of the natural cycle. Man-caused intrusions are not allowed. Under emergency conditions, mechanical equipment and motorized transport may be approved for use to control fire, which threatens life, property, or the wilderness resource. The Sumter National

Forest contains one recommended wilderness study area that has not been acted upon by Congress, Ellicott Rock Extension (1,982 acres.)

The Sumter National Forest has 4 inventoried roadless areas, totaling approximately 6,161 acres. One of the areas is shared with the Chattahoochee National Forest.

Air pollution emitted within or near the Sumter can be transported and transformed over long distances. The impacts from secondary pollutants on natural resources can be found downwind of where the air pollution is emitted. There are four areas within 200 km of the Sumter that are designated as class I air quality according to the Clean Air Act Amendments of 1977. Three of these class I areas (Linville Gorge, Joyce Kilmer/Slickrock, and Shining Rock Wilderness) are under the responsibility of the USDA Forest Service on other national forests. The forests managing Class I wilderness have a legal responsibility to advise the state environmental agencies if any new or modified source of air pollution originating within the state will have an adverse impact to the air quality related values (AQRV) of the nearby class I areas.

Goals and Objectives

Goal 26 Maintain wilderness, wilderness study areas, and inventoried roadless area characteristics.

Goal 27 Manage wilderness, wilderness study areas, and inventoried roadless areas to provide the social and ecological benefits that only they can offer.

2-6 shows the rivers that were studied and found eligible.

Management direction for the eligible rivers is not in separate management prescriptions but is governed by the following forest-wide direction. An explanation of the Wild and Scenic River study process can be found in Appendix D of the FEIS. A map of the eligible rivers can be found in Appendix I.

Goals and Objectives

Goal 28 The Chattooga Wild and Scenic River would be managed to protect and enhance free-flow, water quality and the outstandingly remarkable values of geology, biology, scenery, recreation and history.

Goal 29 Eligible rivers will be managed to protect free-flow, protect and to the extent possible enhance outstandingly remarkable values, and maintain the identified wild, scenic, or recreational classification.

Objective 29.01 A suitability analysis for Turkey and Stevens Creek will be completed by the year 2009.

Standards

Eligible Rivers

The following standards apply to ¼ mile on each side of the eligible rivers shown in Table 2-6.

FW-83 No new road construction in wild sections.

FW-84 No motorized boats or crafts are allowed on the wild sections.

FW-85 No motorized trails are allowed.

FW-86 No federal mineral leasing or mineral material authorization is permitted.

FW-87 New utility corridors or communications/electronic sites will be discouraged.

FW-88 Protect the outstandingly remarkable values and maintain the identified wild, scenic or recreational classification.

Aesthetics/Scenery Management

Public concern for the quality of scenery in National Forest System lands in the Blue Ridge and piedmont regions is increasing. Many sightseers visit the national forest as part of an interwoven experience with other tourist opportunities. The Sumter National Forest provides opportunities for high quality nature-related sightseeing and scenic viewing. Scenic features include the Chattooga Wild and Scenic River, a Congressionally-designated wilderness area, the Oscar Wigginton National Forest Scenic Byway. The Sumter National Forest also, offers premier opportunities for wildlife viewing and driving for pleasure.

These highly visible lands, including those adjacent to heavily used waterways, major forest trails, scenic road corridors and major highways through the forests, present challenges to land managers. Potential conflicts could arise between scenery management and other resource objectives. The visual resource has been inventoried and classified in an effort to arrive at management solutions that include the scenic resource. A visual inventory was mapped on Sumter lands using the Scenery Management System (SMS). This system increases the role of constituents throughout the inventory and planning process. It borrows from and is integrated with basic concepts and terminology of ecosystem management. The system provides for improved integration of aesthetics with other biological, physical, and social/cultural resources in the planning process.

headwaters of the river in North Carolina. Another feature of the river is that it is the headwaters of the Savannah River, which flows into the Atlantic Ocean. It is likely that a combination of geologic fault, severe erosion, and channel entrenchment associated with the headwaters of the Savannah River, now known as the Tugaloo River (formed by the confluence of Chattooga and the Tallulah) captured these rivers from the Chattahoochee River. A stream capture of this magnitude is unusual in the region, but the adjacent Chauga River also exhibits these characteristics.

Biology—There is a variety and richness of the plant life within the Chattooga Watershed, including the Chattooga Wild and Scenic River Corridor. The unique geography and climate characteristics provide habitats for uncommon assemblages of endemic, disjunct, and relic plant species. The most rare species within the Chattooga River Gorge landtype are the Southern Appalachian endemics, which include the liverworts; the rock gnome lichen and Blue Ridge bindweed, Fraser's loosestrife, Manhart's sedge, Biltmore's sedge pink shell azeala and the divided leaf ragwort. Old growth communities comprise almost 10 percent of the corridor. Federal and state agencies consider several non-game wildlife species within the watershed sensitive species.

Scenery—The scenery along the Chattooga River is exceptional. The scenery plays an important part of the Wild and Scenic River experience. The river is deeply entrenched between high ridges for large stretches of its length. Steep forested slopes on either side of the river give a feeling of seclusion. The river constantly meanders and curves, and there are excellent views along these bends. The seasons change the landscape from the varying soft greens of spring and summer to the patchwork of red, yellow, and orange. The winter finds the leaves stripped away and the patches of green from the white pines stand out against the gray-brown hillsides and exposed rock formations.

The river itself provides a varying scene from a smooth flowing stream to a river with thundering falls and cascades, raging rapids, enormous boulders, and cliff-enclosed deep pools.

Recreation—The recreational values of the river and corridor are outstanding along its 57-mile course. The river offers a wide variety of activities in a high-quality setting. Activities range from swimming to hiking and horseback riding with spectacular scenery, to excellent trout fishing and nationally recognized white-water rafting opportunities. Other activities include backpacking, photography, and nature study. Most of these activities take place in largely unmodified natural surroundings, with many opportunities for remoteness and solitude.

History—Very little systematic survey has been completed in the river corridor. A total of 38 archeological sites have been recorded within the corridor. These include 15 prehistoric sites, 15 historic house and farmstead sites, a railroad embankment, 2 historic cemeteries, a 19th century mineral prospecting pit, and a rock shelter. About half of these sites are considered potentially eligible for the *National Register of Historic Places*. The Cherokees destroyed Chattooga Town, a large settlement of Indians, before 1600. The site is near the present day Highway 28 bridge site. This regionally significant site is potentially eligible for the *National Register of Historic Places*.

Standards

2.A.-1 Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge.

2.A.-2 Organized events (such as boat races) are not allowed on the river.

2.A.-3 Motorized boats or craft are not allowed on the river.

- D. Inflatable raft trips in Sections III and IV can be moved to Sections I or II.
- E. Short-term adjustments to the locations of launches and takeouts are necessary on rare occasions because of occurrences such as accidents or natural disasters, which affect access to or navigability of the river. These adjustments will only be made with the approval of the Forest Service.

2.A.-10 The total allocation of guided hardboat trips (for all multi-year permittees combined) and their locations are as follows (See Table 3-3):

Allocation

- A. No more than 48 trips per week (20 on Section I/II and 28 on Section III) on weekdays.
- B. No more than 13 trips (6 on Section I/II and 7 on Section III) on weekdays.
- C. No more than 2 trips per day on weekends.
- D. No trips on holidays or holiday weekends.
- E. The combined total number of clients and instructors will not exceed 24 people per trip.
- F. Two inflatable canoes and kayaks are allowed on each trip.

Location

- A. Section I/II trips launch as far upstream as the West Fork registration site and take out as far downstream as Earls Ford.
- B. Section III trips launch as far upstream as Earls Ford and take out as far downstream as Highway 76.
- C. A trip in Section IV is allowed in the place of a scheduled Section IV guided inflatable trip.

2.A.-11 The total allocation of short-term canoe, kayak and inner-tube guided trips (for short term permits) and their locations are as follows:

Allocation

- A. The number of permits is unlimited.
- B. The maximum number of trips permitted each year by each different organization is 5. (Each day on the river is considered one trip.)
- C. The maximum group size is 12 crafts (10 for students) for canoes and kayaks, not to exceed 24 people (including instructors).
- D. The maximum group size is 24 inner tubes, not to exceed 24 people (including instructors).
- E. Trips are allowed on weekdays only from April 1 through September 30 and on all days (including weekends) during the remainder of the year.

Location

- A. Canoe and kayak trips can be taken in Sections I, II, and III only.
- B. Inner tube trips can be taken in Sections I and II only.

2.A.-12 The total allocation of self-guided boaters and their locations are as follows. (See Table 3-5.)

Allocation and Location

- A. In Section III, year-round allocation for self-guided use at all water levels is 175 people per weekend day and holidays and 125 people per weekday.
- B. In Section IV, year-round allocation for self-guided use at all water levels is 160 people per weekend day and holidays and 75 people per weekday.
- C. The procedure for the enforcement of self-guided use allocations in Sections III and IV is:

In Section III between April 1 and August 31, should daily self-guided use ever reach 175 people per weekend day (holidays included) for 20 days per year for 2 consecutive years, reservations would be required for self-guided boaters on Section III on weekends and holidays during those

months beginning the following year. Similarly, should daily self-guided use reach 125 people per weekday for 50 weekdays per year for 2 consecutive years, reservations would be required for self-guided boaters on Section III on weekdays during those months beginning the following year.

In Section IV between April 1 and August 31, should daily self-guided use ever reach 160 people per weekend day (holidays included) for 20 weekend days per year for 2 consecutive years, reservations would be required for self-guided boaters on Section IV on weekends and holidays during those months beginning the following year. Similarly, should daily self-guided use reach 75 people per weekday for 50 weekdays per year for 2 consecutive years, reservations would be required for self-guided boaters on Section IV on weekdays during those months beginning the following year.

- D. Self-guided users will use a non-voluntary registration system.

Tables 3-2 through 3-5 summarize some of the requirements discussed above in standards 2.A.-9 through 2.A.-12.

2.A.-13 The total allocation of shuttles for self-guided boaters is as follows:

- A. No more than two shuttle permittees.
- B. No more than 30 percent of the daily self-guided allocation by section is authorized for shuttle services.

2.A.-14 Possessing or using a saddle, pack, or draft animal is prohibited within the corridor unless on a designated trail or road.

2.A.-15 The corridor is unsuitable for timber production.

2.A.-16 New utility corridors or communications/electronic sites will be discouraged within the corridor.

2.A.-17 Fire can be used within the corridor if the outstandingly remarkable values of the stream are protected.

2.A.-18 Limit mountain biking to designated routes.

Table 3-2. Chattooga River Guided Rafting Allocations Section III

Water Levels	Capacity Permitted	May-September		October-April	
		Weekdays	Weekends ¹	Weekdays	Weekends ¹
Low	Trips/day	0	0	0	0
	People/day ²	0	0	0	0
Moderate	Trips/day	7	4	7	4
	People/day ²	280	160	280	160
High	Trips/day	7	4	7	4
	People/day ²	280	160	280	160
Very High ³	Trips/day	13/3	8/3	13/3	9/3
	People/day ²	520	320	520	360

¹Includes Holidays

²Includes Guides

³Denominator indicates portion of trips allowed from Hwy 28 to Earl's or Sandy Ford

communities, and recreation and aesthetic values will be determined on 50 streams.

Goal 3 Riparian ecosystems, wetlands, and aquatic systems are managed (and where necessary restored) to protect and maintain their physical, chemical, and biological integrity.

Goal 4 Maintain or restore natural aquatic and riparian communities or habitat conditions in amounts, arrangements, and conditions to provide suitable habitats for riparian dependent and migratory species, especially aquatic species including fish, amphibians, and water birds within the planning area. Perennial and intermittent streams are managed in a manner that emphasizes and recruits large woody debris (LWD).

Objective 4.01 Create and maintain dense understory of native vegetation on 1 to 5 percent of the total riparian corridor acreage during the 10-year planning period.

Goal 5 Maintain or restore soil productivity and quality.

Objective 5.01 Improve soil productivity on 8,000 acres of disturbed, low productivity, eroded soils with loblolly and shortleaf pine on the piedmont during the 10-year planning period.

Goal 6 Cooperate with landowners and other partners to address watershed needs and participate in efforts to identify stream problems, watershed planning, BMP and Total Mean Daily Load (TMDL) implementation with the South Carolina Department of Health and Environmental Control, South Carolina Forestry Commission and other agencies.

Goal 7 Provide good air quality for people's health and the health of the forest environment.

Standards

Water and Soil Quality

FW-1 Water quality, soil productivity, and channel structure are protected using best management practices to avoid impacts to water quality and soils. Where riparian prescription direction differs from BMP, the more restrictive or protective prescription will be followed. Seed mixtures and the removal of large woody debris added by harvest activities suggested in the state BMP for Forestry may not be followed when they conflict with native vegetation and aquatic habitat objectives.

FW-2 Where BMP are not specifically developed for activities, apply similar preventive measures such as those published by the SC Forestry Commission concerning forestry which avoid, minimize and/or mitigate effects to water quality, streamside management zones and soils.

FW-3 Major soil disturbances that expose the soil surface or substantially alter soil properties such as temporary roads, skid trails, landings, and rutting will not occupy more than 15 percent of forest vegetation management treatment areas except for chopping, watershed improvements, or other treatments during a rotation designed to reforest to suitable species or correct soil and water problems.

FW-4 To limit soil and water quality impacts, heavy mechanical equipment (dozers, skidders, feller/bunchers, etc.) will not be used on slopes over 40 percent except in designated locations with adequate and timely mitigation. Emergency fire lines and soil and water improvements specifically designed to stabilize or rehabilitate severe erosion such as active gullies are exceptions to this slope limit.

FW-5 Water is not diverted from streams (perennial or intermittent) or lakes when an in-stream flow needs or water level assessment indicates the diversion would adversely affect

These harvests should favor retention of mast producing species.

With canebrakes, the preferred harvest is generally a sequence of thinnings until approximately 20 square feet per acre or less basal area remains. Prescribed fire is needed approximately once every 10 years.

Silviculture in eastern hemlock forest types— Harvest operations are not anticipated because of the threat to this species from hemlock woolly adelgid, and because much of this forest type is in riparian areas.

Site Preparation, Reforestation, and Stand Improvement Methods

All site preparation methods are available for use on the Forest. These include, but may not be limited to mechanical methods, prescribed fire, manual methods and herbicide use. Many of these have been discussed under the previous section of this appendix. Limitations on these methods are found in standards in chapters 2 and 3 in this Forest Plan.

Planting is anticipated mainly in:

1. Areas being converted from loblolly pine to shortleaf pine and/or pitch pine
2. Regeneration of shortleaf pine, pitch pine, or table mountain pine stands in the mountains.
3. Areas being converted from Virginia pine to shortleaf pine or pitch pine.
4. Salvage areas of sufficient size (larger than 5 or 10 acres) that natural regeneration may not be sufficient.
5. Gullied areas that are being restored to reduce erosion and sedimentation.

The primary methods of stand improvement are expected to be release, precommercial thinning, and fertilization. Release is a treatment designed to free young trees from undesirable, usually overtopping, competing vegetation. Precommercial thinning is the removal of trees not for immediate financial return, but to reduce stocking to concentrate growth on the more desirable trees.

Release and precommercial thinning have been addressed in the previous section, and may be applied in circumstances not already mentioned. Selective application of herbicides will probably be the method used to accomplish most release work. This activity is most useful in shaping the species composition of individual stands. Fertilization for stand improvement is principally done in loblolly pine stands after a first thinning. Soil fertility is a key ecosystem component that was much reduced on many eroded piedmont farm lands before they became National Forest lands.

Other Vegetation Management Practices

Prescribed fire is used to reduce hazardous fuel accumulations and to manipulate vegetative communities. Many plant species on the forest are fire adapted to some degree. Some are perhaps fire dependent.

Herbicides will be the primary means of controlling non-native invasive plants. There are a wide variety of these plants in a wide variety of places across the forest. In some circumstances pulling can be effective, but in most cases it is important to kill all of the root tissue of these species.

The vegetation in wildlife openings will be maintained by a number of methods. These may include prescribed fire, mowing, disking, herbicide application, chain saw use or tree grinding.

In regeneration areas, snags (dead trees) are sometimes lacking. These are sometimes created by either cut surface application of herbicide, or by girdling.

Fertilization will be used in conjunction with seeding done for erosion control and wildlife habitat enhancement. It may also be used for soil/water improvement to increase the growth of understory plants, reducing runoff and erosion.

Summary of the “Analysis of the Management Situation” (AMS)

The “Analysis of the Management Situation” (AMS) for the Sumter National Forest is a determination of the forest’s ability to supply goods and services in response to society’s demand. The AMS provides a basis for determining the need for change in the existing Forest Plan and for formulating a broad range of reasonable alternatives. A draft AMS was completed in August 1996. A few important findings follow:

- Although water quality continues to improve, many of the streams on the national forest are listed by the state of South Carolina as impaired due to elevated fecal coliform levels.
- According to South Carolina’s Department of Health and Environmental Control (DHEC), no violations of air quality standards have occurred on the Sumter National Forest. Following existing state guidelines should allow increased prescribed burning.
- Within the piedmont, early successional forests covered 16.9 percent and late successional forest covered 4.7 percent in 1996. This trend was reversed on the Andrew Pickens Ranger District where early successional forests covered 6.4 percent and late successional forests covered 31 percent in 1996. Since 1996 the early successional habitat has declined significantly to 5 percent on the piedmont and 2 percent on the Andrew Pickens in the year 2003.
- Inventory and monitoring have increased our knowledge of rare plant distributions, habitat requirements, and responses to management. The greatest number of rare plant species and populations is on the Andrew Pickens Ranger District in Oconee County.
- Very little existing old growth occurs on the Sumter National Forest.
- Southern pine beetle (SPB) has been the focus of the forest’s insect suppression efforts from 1985 to present. Activity is cyclical with outbreaks occurring in 1988-89, 1992-93, and 1995-96. Since 1996, approximately 78 percent of the forest’s pine stands (young, overstocked stands or stands greater than 60 years) are at great risk for SPB infestation. Another outbreak occurred in 2002.
- The hemlock woolly adelgid poses a long-term threat to hemlock on the forest.
- The Sumter National Forest represents a small portion of the timber inventory in South Carolina, but the quality of the material is generally higher than timber found on private land.
- Few requests are received for mineral exploration or mining operations.
- There were five roadless areas identified in the 1985 Forest Plan. The Ellicott Rock Extension was recommended for a wilderness study area. Long Creek and Ellicott Rock Expansion were placed in general forest management. The remaining two areas were placed in allocations that protected their roadless characteristics (i.e., scenic areas).
- In 1996, the following streams were determined to have outstandingly remarkable values and are eligible for possible inclusion in the National Wild and Scenic River System: Brasstown Creek, Cedar Creek,

natural appearing surface that will hold up under heavy foot traffic.

3.5 Forage

Situation - The area is composed of mature forest with the resultant limitation of understory forbs. This lack of forage, combined with the generally steep terrain, renders the area unsuitable for grazing use. There are no existing grazing permits within the Wilderness.

Assumptions - Demand for grazing is negligible. Conflicts with recreation users would be severe since these hikers would not accept cattle or horses. There is little demand for horse riding in the wilderness. Horses would bring in exotic seeds that would compete with native vegetation.

Management Direction - Forage is insufficient to support the grazing of pack, saddle or other domestic stock without loss of wilderness values. Grazing will not be permitted. Horses are prohibited.

3.6 Wildlife

Situation - The wilderness ecosystem provides habitat for many species of fish and wildlife native to the Appalachian Mountains, as well as several introduced species.

Deer and turkey are the primary big-game species existing within the area. There is also a sparse population of black bear and an increasing population of feral hogs.

Small-game animals within the area include grouse, squirrel, raccoon, opossum, etc. There are also numerous non-game animals, primarily rodents and birds.

No rare and/or threatened animal species are known to live within the area; however, the area is within the range of Bald Eagles which have been seen near Lake Jocassee (approx. 10 air-miles east).

The wildlife departments of the three states, have responsibility for establishing and administering regulations pertaining to wildlife. The Forest Service is responsible for habitat protection. Hunting is a minor recreational activity in the wilderness in the fall and spring.

The influence of human activity on the distribution and abundance of fish and wildlife populations affects the wilderness resource. The general absence of fire due to man's past efforts in fire suppression is reducing the variety of habitats available for native wildlife.

No wildlife habitat management efforts have been conducted in the wilderness for over 10 years.

Assumptions - As the area succeeds into mature forest the early-successional wildlife species (deer, grouse, turkey, etc.) will suffer declining populations while late successional species (bear, squirrel, raccoon, etc.) will increase. Increased human activity could adversely affect the bear populations.

Management Direction - Provide a natural distribution and abundance of native species of fish and wildlife by allowing natural processes to shape habitat and interactions among species. Legal hunting will be carried out in a manner consistent with wilderness values. Stocking or management of non-native animals will not be permitted.

The jurisdiction and responsibilities of the representative states with respect to the harvest or game animals and fish are unchanged.

Native animal and plant species will be maintained, with special emphasis on the preservation of threatened or endangered species and their habitats.

3.7 Fisheries

Situation - Virtually all streams within the wilderness area support fish populations, primarily trout.

The South Carolina Wildlife and Marine Resources Department considers the East Fork and the Chattooga Rivers to be some of the best trout water in the state. The Georgia and North Carolina Departments rate their streams within the Wilderness as marginal because higher elevation streams with lower water temperatures exist in those states.

Fishing pressure near Burrell's Ford Bridge and Chattooga Picnic Area is heavier than natural reproduction can support. Heavy stocking programs outside the Wilderness are maintaining the fish populations.

The large numbers of fishermen have beat out paths to pools on the streams and along the stream banks. These paths are often steep and contribute to erosion of the stream banks. Most fishermen are not seeking a wilderness experience.

The heavy fishing use adds to congestion in the parking lot at Chattooga Picnic Area and the Fish Hatchery. Topography makes expansion of this lot expensive and questionable.

No trout stocking is done within the Wilderness, but portions of the East Fork around the Chattooga Recreation Area/Walhalla Fish Hatchery Complex and the Chattooga River at Burrell's Ford Bridge are stocked on a regular basis with subsequent migration into the Wilderness. Corn is a favored bait that is very effective on newly-stocked trout. It permits fishermen to quickly catch most of the fish stocked.

One possibility is to consider changing the designation of streams within the Wilderness and outside the Wilderness at Burrell's Ford and the Hatchery to Artificial Lures Only. (This would result in less fisherman use which could reduce damage to banks and vegetation. It could also reduce the need for heavy stocking in order to meet demands for bait fishermen and would make

fish available for longer periods following stocking.)

Assumption - Bank deterioration, loss of solitude caused by large numbers of fishermen, and the negative effect of stocked trout on the native trout fishery will continue unless stocking is reduced. Reduced stocking and a change in fishing methods should be implemented together. Reduction of stocking at the hatchery site would provide additional trout at locations further from the Wilderness.

Management Direction - Jurisdiction and responsibilities of the State with respect to the protection and management of fish and wildlife are not changed by Wilderness classification. The Forest Service will continue to work closely with State wildlife authorities in all aspects of fisheries management. Forest recommendations will be predicated on a demonstrable need for protection and maintenance of the wilderness resource. Fishing will be permitted in accordance with State law.

The Forest Supervisors (SC and GA) will work with the representative state agencies to develop a Memorandum of Understanding to establish a fisheries policy for the Wilderness area.

Encourage stocking of trout in areas away from the Wilderness to reduce concentration within the Wilderness.

Where fish stocking is a desirable part of wilderness management, it will be done by primitive transport, except that Regional Foresters may authorize dropping of fish from aircraft where this was an established practice before the area was included in the National Wilderness Preservation System. If stocking is necessary to meet objectives, sub-adults should be stocked and allowed to grow to catchable size to prevent large influxes of fishermen.

3.8 Water

Situation - The Chattooga River and the East Fork of Chattooga are classified by the state of South Carolina as Primary Contact Water. Except during flood conditions, the water is clear and contains little pollution. The hatchery has two small impoundments (1/4 acre) on the East Fork outside the Wilderness which serve as settling basins for turbidity. Water discharged from the Walhalla National Fish Hatchery into the East Fork of the Chattooga River contains nutrients from fish food and excrement. This nutrient enrichment has not been observed to cause problems downstream and increases the stream's trout productivity.

The Fish Hatchery also uses water from Indian Camp Branch for hatching eggs and has requested that the Forest Service keep activity within the drainage to a minimum to avoid contamination of the water source. There are no developed water supply systems, such as dams, spring boxes, or wells in the Wilderness. Extensive water quality testing of the East Fork and the main river began in 1979 and is continuing. No problem areas have been discovered.

Assumption - Water quality and volume will remain stable, and the Fish Hatchery will remain in operation. There are no plans to increase the nutrient enrichment in the East Fork.

Management Direction - Watersheds will not be specifically altered or managed to provide increased water quantity, unnatural water quality, or change the timing and duration of spring runoff.

Any use that unnaturally alters the aquatic ecosystem will be eliminated or reduced to an acceptable level determined during the Wilderness water resource inventory.

Watershed management will be designed to improve watershed values through activities, such as providing proper drainage on trails, revegetating soil exposed during trail construction or site restoration. Water supply systems, such as spring boxes and wells, will not be developed.

3.9 Soils

Situation - Except for a small percentage of the Wilderness, along narrow strips immediately adjacent to streams, the soils are mostly loam to silty loam gneiss. The rapid removal of rainfall by infiltration and runoff results in the soils being classified: dry to moist. Slope steepness is a critical factor and indicates that any significant disturbance will result in soil movement.

The high rainfall (80+ inches/year) on the Wilderness supports a dense growth of lesser vegetation where the overstory is broken. This dense growth restricts cross-country travel and thereby serves to concentrate use. The dense canopy and high humidity prevent rapid soil drying. Under these conditions, damage to trails by horses could be severe if permitted.

Man's use of the area increases natural erosion by exposing soil along trails. Erosion rates are also increased in and around campsites and fishing holes by compaction and vegetation trampling. The use of pack and saddle stock would compound the problem, especially in the wet soil conditions so prevalent during the spring and summer-use periods. Techniques of trail location and design that reduce the impact of trails are available to the manager.

Assumption - Additional wilderness use, without a corresponding improvement in the visitor's skill and knowledge levels, will increase the rates of soil compaction and erosion at popular camping and fishing sites and at heavy-use areas.

Erosion will continue to remain a problem on improperly constructed and maintained system trails.

Management Direction - Soil compaction at campsites and fishing holes should be reduced by the limitations mentioned previously. Some heavily impacted sites will require rehabilitative efforts involving closure and revegetation with native plants where indicated by the manager's subjective judgment.

I, Max Gates, being first duly sworn, depose and say:

1. I am a citizen and resident of Clayton, Georgia.
2. I am competent and have personal knowledge of the matters discussed herein.
3. I served as USDA Forest Service ("USFS") Forest Ranger for the Andrews Pickens District of the Sumter National Forest in the Walhalla, South Carolina office from 1961-1972.
4. I served as Resource Assistant District Ranger for the USFS Tallulah District of the Chattahoochee National Forest from 1972 to 1986.
5. During the course of my employment with the USFS from 1961 to 1986 and as a citizen that often used and still uses the Chattooga River for personal enjoyment, I had regular and consistent opportunity to observe the Chattooga River and its uses before and after its designation as a Wild and Scenic River.
6. During the course of my employment with the USFS, I regularly traveled to and observed other wilderness and park areas throughout the Southeastern and Northwestern United States.
7. During the course of my employment with the USFS, I was involved in the study as how best to manage the newly established Wild and Scenic River portion of the Chattooga River.
8. Prior to this period, users of the portions of the Chattooga River that are now designated as wild and scenic enjoyed an experience of solitude and enjoyment of nature that was unique in the Southeast.
9. Following the publishing of the Wild and Scenic River Study (1971) and the release of the movie *Deliverance* (1972), boating usage of the Chattooga River increased dramatically.
10. As boating usage increased, we in the USFS had to respond to a number of boating accidents on the river both above and below Highway 28. One group involved 15 to 20 boy scouts in canoes floating from Burrell's Ford. Two of the boys showed up at my house at midnight after becoming separated from the rest of the group. Each of the canoes had capsized and I do not believe we recovered any of the canoes. We simply did not have the resources at the USFS to monitor and regulate adequately all this usage above and below Highway 28.

11. As boating usage increased, we also had to respond to reports of conflicts between boaters and non-boaters. Many local non-boaters told me that they felt that boaters were intruding on their feeling of safety and solitude in areas long used by such non-boaters for camping, swimming, hiking, fishing and picnics. Some of these people responded by expressing their anger at boaters through verbal barbs, throwing stones, and even firing of gunshots. USFS and other law enforcement personnel had to break up a number of such confrontations.

12. I concluded that the increased boating usage presented a threat to the quality of wilderness experience available to non-boating users.

13. I, with other managers, concluded that the area of the Chattooga River being designated as a Wild and Scenic River should be divided into zones of usage so as to allow citizens reasonable use of the Wild and Scenic river while minimizing conflicts between user groups, maximizing the ability of the USFS to manage the resource, and preserving the unique natural qualities of the river that resulted in such designation.

14. We concluded that boaters should be allowed access to sections of the Wild and Scenic River (often referred to today as Sections 2 through 4) but that the portion above Highway 28 should be preserved for those who desire the solitude experience that all sections of the river formerly provided.

15. The USFS adopted these recommendations to zone use.

16. Following adoption of the zoning, there were many people drowned while floating the Chattooga. (I remember 19 people were drowned in the first three years alone) There were a number of conflicts between boaters and other users in the sections zoned for boating. However, the conflicts between boaters and other users gradually declined because of limited road access and the sheer number of floaters which discouraged other uses.

17. In my opinion, based on 25 years of professional forestry experience in the area and 40+ years of enjoying the use of the Chattooga River, the portion of the Chattooga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience, and the quality of its wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences.

18. In my opinion, based on my years of professional forestry experience in the area and my years of enjoying the use of the Chattooga River, lifting the ban on boating above Highway 28 will damage the unique wilderness solitude experience and quality of wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences above Highway 28. Boaters already have access to the majority of the river and their usage of the river has impacted the quality of usage by non-boaters. Therefore it is fair to protect the interest in solitude and outstanding recreation experience of non-boaters in the remaining section. In short, something should be set aside for solitude and wilderness experience.

19. Finally, in my opinion based on 25 years of professional forestry experience in the area (that includes 14 years of responsibility for USFS law enforcement) and 40+ years of enjoying the use of the Chattooga River, the USFS would not be able to enforce adequately any rules for limited boating access above Highway 28.

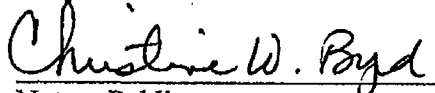
Further, Affiant sayeth not.


Max Gates

Sworn to and subscribed before me

This 10th day of

April, 2006.


Notary Public

My Commission Expires

~~My Commission Expires July 27, 2006~~

USDA FOREST SERVICE

Forest Service National

Francis Marion and Sumter National Forests

Search

Recreational Activities

Chattooga Wild & Scenic River:

About the River

[Regulations](#) | [River Sections](#) | [Rapid Classifications](#) | [Use Data](#) |

Chattooga River Use Data

Year	Total Use	Commercial Use	Private Use
1967	0	0	0
1968	100	0	100
1969	300	0	300
1970	800	0	800
1971	800	0	800
1972	7,600	0	7,600
1973	21,100	6,904	14,196
1974	28,600	6,326	22,274
1975	20,414	6,989	13,425
1976	17,100	10,233	6,867
1977	17,400	13,089	4,311
1978	30,000	20,000	10,000
1979	33,600	19,400	14,200
1980	43,587	29,626	13,961
1981	37,450	26,162	11,288
1982	55,129	37,879	17,250
1983	53,900	38,470	15,430
1984	56,978	39,718	17,260
1985	53,742	38,902	14,840
1986	39,010	29,560	9,450
1987	56,790	42,200	14,590
1988	49,200	38,300	10,900
1989	68,210	49,850	18,360

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- ▼ Recreational Activities
 - Birding
 - Camping/Picnicking
 - Canoeing
 - Canoeing
 - Fishing
 - Hunting
 - Target Shooting
 - Trails
 - Carolina Bays
 - Chattooga Wild & Scenic River
 - Sewee Visitor Center
 - Waterfalls
 - Wilderness
- ▶ Volunteering

Services



Got a question, comment, or suggestion? We'd like to hear it! Help us improve our services to you by giving us your [feedback](#).

Francis Marion & Sumter National Forests
 4931 Broad River Rd.

Columbia, SC 29212

(803) 561-4000



1990	65,806	50,148	15,658
1991	71,293	52,555	18,738
1992	73,094	53,072	20,022
1993	63,051	47,623	15,428
1994	82,871	58,281	24,590
1995	89,233	62,219	27,014
1996	83,608	57,155	26,453
1997	84,502	57,712	26,790
1998	78,834	52,411	26,423
1999	73,655	50,277	23,378
2000	48,370	33,550	14,820
2001	52,540	40,901	11,639
2002	57,997	40,824	14,173
2003	63,672	44,055	19,617
2004	63,096	43,281	19,815
Expiration Date: None			

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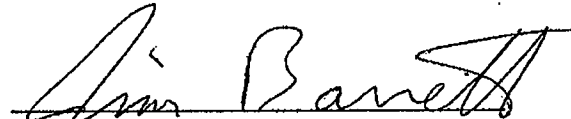
I, Jim Barrett, being first duly sworn, depose and say:

1. I am a citizen and resident of Rockport, TX.
2. I am competent and have personal knowledge of the matters discussed herein.
3. I served as USDA Forest Service ("USFS") title District Ranger for the Andrews Pickens Ranger District of the Sumter National Forest in the Walhalla, South Carolina office beginning in 1972. As such, I was responsible for timber, recreation, wildlife and general forest management in the district, including management of the portion of the Chattooga River that flowed through the District.
4. I served with USFS for six years in the USFS regional office in Atlanta. I then transferred to Louisiana and retired in 1987. Although I lived in the Atlanta area during this period I had regular opportunity to observe the Chattooga River and its uses before and after its designation as a Wild and Scenic River and still visit the river. I also had the opportunity during my 23 years of work with the USFS to travel to and observe forests and rivers throughout the Southeast.
5. During the course of my employment with the Andrew Pickens Ranger District, the UFS was conducting its study of the portions of the Chattooga River that were being considered for designation as a Wild and Scenic River and I had responsibility to assist with that study.
6. As part of its study, the USFS held a number of public forums to receive input from the general public, and various user interests and groups participated. We also discussed at these public forums proposed changes to the historic practices the USFS had used to manage the area, including the proposed zoning of the river for boating below Highway 28.
7. After much study and consideration of the public comments, we recommended and the USFS approved the use zoning that is still in place, and that I understand is currently being challenged.
8. In my opinion, based on 30 years of professional forestry experience in the Southeast and years of personal experience enjoying the Chattooga river
 - a. The portion of the Chattoga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience, and the quality of its wilderness hiking, nature watching, fly fishing and other outstanding recreational experience;
 - b. lifting the ban on boating above Hwy 28 will damage the unique wilderness solitude experience and quality of wilderness Hiking, nature watching, fly fishing and other outstanding

recreational experience above Highway 28. Boaters already have access to the majority of the river and their usage of the river has impacted the quality of usage by non-boaters. Therefore it is fair to protect the interest in solitude and outstanding recreation experience of non-boaters in the remaining section. In short, there is no legitimate, valid reason to allow boating from Burrells Ford to Highway 28, or from even further upriver as some suggest; and

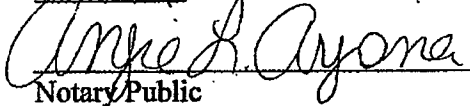
- c. given its limited budget, the USFS has done an excellent job of managing the Wild and Scenic Area of the Chattooga River, having a bright line demarcation between boating and non-boating areas has made that job easier, and maintaining the existing status quo would help the USFS continue to manage this unique resource for the benefit of all users.

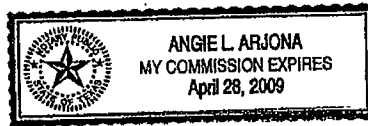
Further, Affiant sayeth not.


Jim Barrett

Sworn to and subscribed before me
This 30 day of

March, 2006


Notary Public



My Commission Expires

4-28-09

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

AMERICAN WHITEWATER, AMERICAN CANOE)
ASSOCIATION, GEORGIA CANOEING)
ASSOCIATION, ATLANTA WHITEWATER CLUB,)
FOOTHILLS PADDLING CLUB, WESTERN)
CAROLINA PADDLERS, 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.)

Civil Action No. 8:09-2665-RBH

COMPLAINT

INTRODUCTION

Plaintiffs bring the instant action because the United States Department of Agriculture (“USDA”), through the United States Forest Service (“USFS”), has unlawfully infringed on Plaintiffs’ federally-protected right to recreate on the Chattooga Wild and Scenic River (the

“Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters”) in hand-powered canoes and kayaks:¹

- The Wild and Scenic Rivers Act (“WSRA”) requires that administering agencies “protect and enhance” the “values” that caused a river to be included in the National Wild and Scenic Rivers System;² and
- Congress specifically identified canoe and kayak recreation on the Chattooga Headwaters as a value that caused the river to be included in the National Wild and Scenic Rivers System;³ yet
- The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

In addition to violating the WSRA,⁴ Defendants’ actions violate the Wilderness Act⁵, the Multiple-Use Sustained-Yield Act,⁶ the Forest and Rangeland Renewable Resources Planning Act,⁷ the National Forest Management Act⁸ and its implementing regulations,⁹ the National

¹ Plaintiffs will use the term “floating” throughout this Memorandum to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

² 16 U.S.C. § 1281.

³ Sen. Report No. 93-738 at 3008, 3010 (1974). (COMPLAINT EX. 1)

⁴ 16 U.S.C. § 1271 *et seq.*

⁵ 16 U.S.C. §§ 1131 *et seq.*

⁶ 16 U.S.C. § 528 *et seq.*

⁷ 16 U.S.C. §§ 1600-14.

⁸ 16 U.S.C. § 1600 *et seq.*

⁹ 36 C.F.R. 219.1-219.29.

Environmental Policy Act¹⁰ and its implementing regulations¹¹, the Administrative Procedures Act (“APA”),¹² and other applicable statutes and regulations.

Each of these violations is addressed in turn below. These unlawful actions are causing irreparable damage to the natural Plaintiffs, the members of the Plaintiff organizations, the floating public and the public at large. For the reasons set forth below, this court should order Plaintiffs’ requested relief, including entering temporary, preliminary and ultimately final injunctions that restore the ability of paddlers to float the Chattooga Headwaters as was done for at least 250 years prior to the unlawful actions of the USFS and to bring management of the Headwaters in congruity with management of every other federally managed and Wild and Scenic river in the United States.

Plaintiffs further seek an award of costs and attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.

I. JURISDICTION, VENUE AND ENDORSEMENT OF DIVISION

1. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty).

¹⁰ 42 U.S.C. §§ 4321-4370.

¹¹ 40 C.F.R. 1500-08.

¹² 5 U.S.C. §§ 551-706.

3. In addition, the APA gives this Court jurisdiction to hear the claims in Plaintiffs' Complaint. 5 U.S.C. §§ 551-96, 601-12 and 701-03. Judicial review is appropriate under 5 U.S.C. § 701 et seq.

4. As a basis therefore, Plaintiffs allege that all actions challenged in the Complaint are final actions for purposes of review and that Defendants are taking actions that are arbitrary and capricious, that are abuses of discretion, and that are not in accordance with applicable law.

5. In addition, Defendants' failures and refusals to take certain actions as described herein constitute agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) and (2). The complained-of conduct creates an actual, justiciable controversy.

6. Venue is properly vested in this Court by 28 U.S.C. § 1391(e) because Defendants are a federal agency and officers thereof and a substantial part of the events or omissions giving rise to the claims herein occurred in this district. In particular, a substantial part of the section of the river at issue in this Complaint is situated in the Anderson Division of the District of South Carolina, thus undersigned endorses that the Anderson Division is the proper forum for this case to be assigned.

7. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. § 703, 28 U.S.C. § 2202 and Fed. R. Civ. P. 65.

8. A temporary restraining order and a preliminary injunction are necessary to prevent further unlawful agency action. Plaintiffs have a substantial likelihood of success on the merits; there is a substantial risk of irreparable harm absent an injunction; the irreparable harm threatened is greater than that which could be caused by an injunction; and the public would be served by an injunction.

II. THE PARTIES

A. Plaintiffs

9. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

10. Plaintiff American Whitewater is a nonprofit 501(c)(3) corporation organized under the laws of Missouri. Its principal place of business is Western Carolina University, 1101 Outreach Center, Cullowhee, North Carolina, 28723. Since 1954, American Whitewater has been dedicated to restoring rivers to their natural condition, eliminating water degradation, improving public land management and -- as in this case -- protecting public access for responsible recreational use.

11. A nationwide organization, American Whitewater represents individuals, families and organizations having a combined membership of approximately 6,700 members and more than 100 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

12. American Whitewater's members have used, and but for the unlawful closure would be currently using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

13. American Whitewater has standing in this case.

14. Plaintiff American Canoe Association is a nonprofit 501(c)(3) corporation organized under the laws of New York. Its principal place of business is 7432 Alban Station Blvd., Suite B-232, Springfield, Virginia 22150. Since 1880, the American Canoe Association has been dedicated to promoting canoeing, kayaking, and rafting as wholesome lifetime recreational activities. The American Canoe Association provides a variety of worthwhile programs and public services in such areas as: event sponsorship, safety education, instructor certification, waterway stewardship, water trails, paddler's rights and protection, and public information campaigns.

15. A nationwide organization, the American Canoe Association represents individuals, families and organizations having a combined membership of approximately 50,000 individual members and more than 300 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

16. American Canoe Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

17. The American Canoe Association has standing in this case.

18. Plaintiff Georgia Canoeing Association is a nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 7023, Atlanta,

Georgia 30357. The Georgia Canoeing Association promotes conservation, environmental and river access issues as well as boating safety and skills development. Since 1966, the Georgia Canoeing Association has been a member-operated paddling club representing individuals, families and organizations having a combined membership of approximately 2,000 individual members, the large majority of whom live in Georgia and many of whom regularly float the open portions of the Chattooga WSR, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

19. Georgia Canoeing Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

20. The Georgia Canoeing Association has standing in this case.

21. Plaintiff Atlanta Whitewater Club is a member-operated nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 11714, Atlanta, Georgia 30355. The Atlanta Whitewater Club was founded in 1978 by a dedicated group of Atlanta's kayakers, canoeists, and rafters to provide educational services and events that increase the enjoyment, safety, and skills of paddlers at every level of the sport and to protect the environment.

22. The Atlanta Whitewater Club has a combined membership of approximately 110 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

23. Atlanta Whitewater members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

24. The Atlanta Whitewater Club has standing in this case.

25. Plaintiff Western Carolina Paddlers is a member-operated paddling club based in Asheville, North Carolina. The Western Carolina Paddlers can be reached at P.O. Box 8541, Asheville, North Carolina 28814. The Western Carolina Paddlers' membership is comprised of paddlers of all types, including kayakers, canoeists, and rafters, all of whom are active in river conservation, access issues, and local paddle-sport events. The Western Carolina Paddlers has a combined membership of approximately 120 individual members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

26. Western Carolina Paddler's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography,

fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

27. The Western Carolina Paddlers has standing in this case.

28. Plaintiff Foothills Paddling Club is a member-operated nonprofit corporation organized under the laws of South Carolina. Its principal place of business is 25 Heritage Green Place, Greenville, South Carolina 29601. The Foothills Paddling Club was founded in 1993 by a dedicated group of South Carolina's kayakers and canoeists to promote safe enjoyment of both whitewater and flatwater rivers. The Foothills Paddling Club has a combined membership of approximately 115 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

29. Foothills Paddling Club members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

30. The Foothills Paddling Club has standing in this case.

31. Plaintiff Joseph C. Stubbs is an individual residing at 535 Earlvine Way, Kennesaw, Georgia 30152. Mr. Stubbs is an American Whitewater member who, prior to the

unlawful closure, paddled the upper reaches of the Chattooga WSR legally but is now prevented from doing so.

32. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the upper reaches of the Chattooga WSR were open for floating recreation in accordance with applicable law.

33. Mr. Stubbs has standing in this case.

34. Plaintiff Ken Strickland is an individual residing at 210 Padena Drive, Box #63 Morganton, Georgia 30560. Mr. Strickland is an American Whitewater member whose primitive recreational floating use of the upper reaches of the Chattooga WSR has been interrupted by defendants' unlawful closure of the river. Mr. Strickland has been paddling the Chattooga WSR for more than thirty years, including the Headwaters section prior to the illegal closure. Because of Defendants' unlawful river closure, it is currently a federal crime for Mr. Strickland to float his kayak on more than one-third of the wild and scenic and wilderness waters of the Chattooga WSR.

35. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

36. Mr. Strickland has standing in this case.

37. Plaintiff Bruce Hare is an individual residing at 30 Three Cabin Trail, Franklin, North Carolina, 28734. Mr. Hare is an American Whitewater member whose primitive recreational floating use of the Headwaters has been interrupted by Defendants' unlawful closure

of the river. Mr. Hare legally paddled the closed portions of the river prior to the unlawful closure and is now prevented from lawfully doing so.

38. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

39. Mr. Hare has standing in this case.

B. Defendants

40. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

41. Defendant Thomas Tidwell is the Chief of the U.S. Forest Service, and in that capacity he has the responsibility to ensure that his agency acts in accordance with applicable laws and regulations.

42. Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture. The U.S. Forest Service is, by law, responsible for the management policies and actions undertaken with respect to the Chattooga River and certain other rivers on public lands. By statutory authority, and the agency's own regulations, it is also responsible for implementing the APA, WSRA, the Wilderness Act, MUSYA, the RPA/NFMA, NEPA and other land management laws and regulations pertaining to actions and decisions on rivers flowing through lands the U.S. Forest Service administers.

43. Defendant Elizabeth Agpaoa is the Regional Forester for the Southern Region of the United States Forest Service. The Southern Region encompasses thirteen states, including those states that Chattooga River flows through - North Carolina, South Carolina and Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national

forests, all under the supervision of Defendant Agpaoa, selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

44. Defendant Monica J. Schwalbach is the acting Forest Supervisor for the Francis Marion and Sumter National Forests in South Carolina. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

45. Defendant Marisue Hilliard is the Forest Supervisor for the national forests in North Carolina, one of which is the Nantahala National Forest. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

46. Defendant George M. Bain is the Forest Supervisor for the Chattahoochee-Oconee National Forest, located in northern Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

47. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture, and in that capacity he has the responsibility of ensuring that the U.S. Department of Agriculture acts in accordance with applicable laws and regulations.

48. Defendant U.S. Department of Agriculture administers the National Forest system.

49. Defendants are hereinafter collectively referred to as “Defendants” or as the “U.S. Forest Service” unless context requires otherwise.

III. FACTS

A. Description of the Headwaters

50. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

51. This case involves the Chattooga River, which was designated as a Federal Wild and Scenic River in 1974, pursuant to the WSRA.

52. The Chattooga WSR is a spectacular natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northern Georgia.

53. The waters of the Chattooga WSR, which flow through the Nantahala, Chattahoochee, Francis Marion and Sumter National Forests contain navigable Class I through Class V rapids before eventually cascading into Georgia’s Tugaloo Reservoir.

54. Primitive floating has occurred on the Chattooga WSR for more than 250 years.

55. Only the remote twenty -one river miles of the Chattooga WSR upstream of South Carolina Highway 28 are at issue in this case. That twenty-one-mile section is referred to herein as the “upper Chattooga” or “Headwaters.”

56. Four roads subdivide the Headwaters into three reaches, known, from northern-most to southern-most as Grimshawes Bridge to Bull Pen Bridge (GS-BP), Bull Pen Bridge to Burrells Ford Bridge (BP-BF), and Burrells Ford Bridge to the Highway 28 Bridge (BF-28) (see Table I and the Headwaters map attached hereto as (COMPLAINT EX. 2)).

57. Many parts of the Headwaters corridor, particularly in the Ellicott Rock Wilderness, are accessible only by boat.

B. History of the Ban on Floating

58. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

59. In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), a policy statement of land use management values.

60. With this list of potentially competing uses at its roots, section two of MUSYA further provides that the Secretary of Agriculture must administer the national forests for multiple use and sustained yield of the several products and services of the national forests. 16 U.S.C. § 529 (1988).

61. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

62. MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

63. The Wilderness Act was passed in 1964, and prohibited the use of commercial enterprises, in wilderness areas and except to the extent necessary for administration of the Act, motorized equipment, motorboats, landing of aircraft and all other forms of motorized transport were prohibited. 16 U.S.C. § 1311.

64. In 1968, Congress passed the WSRA. The purpose of the act was to create a national wild and scenic rivers system so that rivers with “outstandingly remarkable scenic, recreational ... or other similar values ...[would] be preserved in a free-flowing condition, and ... be protected for the benefit and enjoyment of future generations.” 16 U.S.C. § 1271.

65. The WSRA specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

66. Section 1277 (b) of the Wild and Scenic Rivers Act provides for the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary *to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.* (emphasis added).

67. In 1971, local USFS personnel conducted a study of the Chattooga’s suitability for protection under the Wild and Scenic Rivers Act.

68. The Study recommended that Congress include all sections of the Chattooga River in the Wild and Scenic Rivers System, based in large part on the Chattooga’s outstanding recreation opportunities—and specifically whitewater boating on the upper Chattooga.

69. The Chattooga River was among the first rivers in the United States to be designated under the system, receiving its designation as a WSR in 1974.

70. To convince Congress that the Chattooga River was eligible for inclusion in the WSR system, the USFS published a *Wild and Scenic River Study Report* on June 15, 1971 (the “Study”).

71. Fittingly, the photo on the cover of the Study depicts a canoe floating the Chattooga.

72. The USFS recommended the following to Congress:

Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like ...whitewater canoeing ... will enhance the recreation opportunities for many people in an area *where river-oriented recreation is scarce...*a river capable of

supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river...*Study*, 66-67.

73. The Chattooga River was considered for inclusion in the WSR system in six distinct sections.

74. Each of these sections was analyzed for inclusion separately, and each exhibited different outstandingly remarkable values and received different levels of protection based on those values.

75. The 1971 Study upon which Congress based its protection of the upper River recommends a “scenic” classification for the uppermost section of the Chattooga, noting:

Grimshawes Bridge crossing [which is 21 miles above Highway 28] is accessible by a country road. The section below the bridge can be floated by rubber raft and provides `exciting trips over small rapids and cascades. *Study*, 73.

76. The Study recommends a “wild” designation for several miles of river upstream of Highway 28 because, among other reasons:

Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen. *Study*, 74 (emphasis added).

77. The studies that the USFS sent to Congress, and upon which Congress based its protection of the upper Chattooga River, are laden with references to the value of these specific reaches as whitewater paddling resources. The table below documents these references, many of them to locations in the upper Chattooga:

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
General	All	USFS 1971a* Page 67	“Designating the Chattooga River a part of the National Wild and Scenic system would preserve—a river capable of supplying many intangible values. These values are difficult to assess but certainly exist for the canoeist as he meets the challenge of the river...”
General	All	USFS 1971a Page 67	“Compatible uses on the Chattooga River are floating (including rafting, canoeing, and kayaking), hiking (including sightseeing, nature study, and photography), hunting, fishing, and primitive camping.”
General	All	USFS, 1971a Page 150	“Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.”
General	All	USFS 1970 Page 1. USFS 1971b Page 5	“The Chattooga is the only mountain river in the four state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores.” “Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness.” “The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed”
General	All	USFS 1971b**	“It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking beside it, it can provide a refreshing recreation experience.”
Headwaters (GS-BP***)	I	USFS 1970 Page 5	“Below Grimshawes Bridge, the river can be floated by raft.”

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
Headwaters (GS-BP)	I	USFS 1971a Page 158	“Hikers, rafters and vehicles will frequently meet here because the road is the only major access to the river in the Headwaters area.” Text accompanies a drawing of Grimshawes Bridge notes the “beginning of rafting water” labeling the river immediately downstream of Grimshawes Bridge.
Headwaters (GS-BP) (BP-BF) (BF-28)	I, II, III	USFS 1971a Page 163	Appendix I, Chattooga River Potential Recreation Development Plan Summary. Table indicates construction of canoe launch sites at two locations in the upper Chattooga.
Headwaters (GS-BP)	I	USFS 1970 Page 6 USFS 1971a Page 73	“The section below the bridge (Grimshawes) can be floated by rubber raft and provides exciting trips over small rapids and cascades with frequent portages around difficult cascades and narrow sluices.”
Headwaters (GS-BP) (BF-28)	I, II, III	USFS 1971b	“In the management of the Chattooga River as a unit of the National Wild and Scenic River System, one objective will be to provide a recreation experience where a feeling of adventure, challenge, and physical achievement is dominant. In addition a maximum of outdoor skills, without comfort or convenience facilities will be provided. To provide this experience, river access will be primarily by trail, including canoe launch sites. Only three points will have road access—Grimshawes Bridge, Highway 28 bridge, and Highway 76 Bridge”
Headwaters (BP-BF)	II	USFS 1971a Page 74	“This part of the river can be floated only in rubber rafts, and many dangerous portions must be portaged.” “Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen.”
Headwaters (BP-BF)	II	USFS 1970 Page 9	“This entire section (Section II) is in a completely natural state. It includes some beautiful but hazardous whitewater. Enormous boulders, some

Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters			
Paddling Section	Designation Section	Source	Quote or Reference
(BF-28)			over 50 feet high with trees on top, rise from the riverbed. This part of the river may be floated only in rubber rafts and many dangerous portions must be portaged. In the entire 15.9 miles, only two narrow bridges cross the river.”
Headwaters (BF-28)	II	USFS 1970 Page 11	The 8.0 mile section from Burrell’s Ford to the Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater. It flows around huge rocks and through narrow sluices and drops over 21 small waterfalls and rapids in less than two miles.”
Headwaters (BF-28)	II	USFS 1971a Page 75	“The eight mile section from Burrells Ford to Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater.”
Headwaters (BF-28)	III	USFS 1971a Page 75	Section III: also contains Headwaters section. “It is shallow and easy for the inexperienced canoeist.”
Headwaters (BF-28)	III	USFS 1970 Page 13	“It (Section 3) is shallow and easy for the inexperienced canoeist.” (13)
<p>* Note that 1971a refers to; USDA Forest Service. (1971a). Wild and Scenic River Study Report: Chattooga River, 1971b refers to: USDA Forest Service—Southern Region.¹³ (1971b). Chattooga River as a Wild and Scenic River, and 1970 refers to: USDA Forest Service. (1970). A Proposal: The Chattooga, “A Wild and Scenic River.”¹⁴</p> <p>** Note that 1971b does not contain page numbers.</p> <p>*** Note that “GS-BP” refers to the section of the Chattooga River between Grimshawes Bridge and Bullpen Bridge, “BP-BF” refers to the section of the Chattooga River between Bullpen Bridge and Burrells Ford, and “BF-28” refers to the section of the Chattooga River between Burrells Ford and Highway 28.</p>			

78. During its 1970 and 1971 studies to obtain congressional support to designate Chattooga as a WSR, the USFS specifically referenced channel characteristics supporting

¹³ (COMPLAINT EX. 3)

¹⁴ (COMPLAINT EX. 4)

navigability: “Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities.

79. The USFS was also clear that Grimshawes Bridge was intended to be a major access area for paddlers to enter the Chattooga River: “Below Grimshawes Bridge, the river can be floated by raft.”

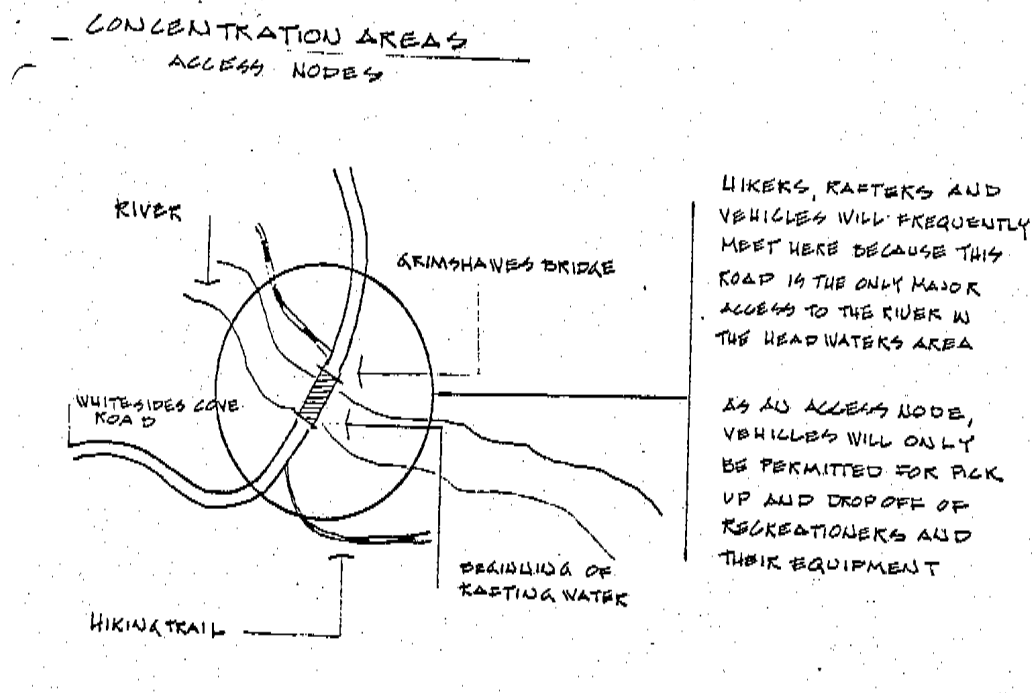
80. The Report stated: “Hikers, rafters and vehicles will frequently meet here (Grimshawes Bridge) because the road is the only major access to the river in the Headwaters area.”

81. The Study even includes a map labeling Grimshawes Bridge (the beginning of the upper Chattooga) as the “beginning of rafting water” and discusses several “canoe launch sites” on the Headwaters. *Chattooga River as a Wild and Scenic River*, at 158.

82. The USFS organized at least one rafting trip during preparation of the studies in support of Wild and Scenic designation, in the early 1970’s. It confirmed in the study report that “Grimshawes Bridge crossing is accessible by a country road.”

83. The USFS concludes in the study report that “the section below Grimshawes Bridge can be floated by rubber raft and provides exciting trips over small rapids and cascades ...” and that “Rafting or some method of floating is the best way to see this rugged portion of the river.”

84. The USFS WSR Report contains this sketch, showing Grimshawes Bridge as the “Beginning of Rafting Water”



85. Whitewater boating on the upper Chattooga was an existing and vital element of the recreation outstandingly remarkable value warranting inclusion of that section of the Chattooga in the WSR on the Headwaters system. In addition, whitewater boating is also a stand-alone value that to the Headwaters inclusion in the WSR system.

86. Rapids and the paddling experience are described in detail for each section of the upper Chattooga, and boating is described as “the best way” to see these sections.

87. Whitewater boating river values contributed to, if not controlled, how the Study’s drafters viewed and classified the upper Chattooga.

88. The Study makes clear that whitewater boating is a vital component of the river’s wild and scenic character and a use that should be protected by including the Chattooga in the WSR system.

89. Whitewater boating was one of the outstandingly remarkable values upon which the USFS based its recommendation for the Chattooga’s inclusion in the WSR system.

90. Based upon this study, Congress in 1974 included the Chattooga among the first rivers protected by the WSRA.

91. The entire upper Chattooga River was protected by Congress under the WSR system in 1974, in large part, because of the exceptional recreation value of boating on the upper river.

92. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

93. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

94. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process.

95. In 1975, certain portions of the Chattooga WSR corridor above Highway 28 were designated as “wilderness” under the Wilderness Act.

96. This area, known as the Ellicott Rock Wilderness, includes 8,271 acres of land in Georgia, North Carolina and South Carolina.

97. Five and two tenths miles of the Chattooga WSR traverses the Ellicott Rock Wilderness above Highway 28.

98. A hiking trail, known as the “Chattooga Trail” parallels this wilderness portion of river for approximately 3.2 miles.

99. While the Chattooga Trail remains near the river for most of this stretch, hikers following the trail remain visually separated from the river, save for occasional glimpses around or through natural obstructions.

100. The Ellicott Rock Wilderness and the section of the Chattooga WSR that flows through it are precious wilderness resources.

101. Two years after Congress included the Chattooga in the Wild and Scenic River System, local USFS personnel, at least one of whom was an officer in the local chapter of Trout Unlimited, banned floating on the upper Chattooga. Floating is one of the very forms of outstanding river recreation values that led to the river being included in the national WSR system.

102. The first official decision to ban boating above Highway 28 was made in connection with the 1976 Sumter National Forest Land and Resource Management Plan (LRMP). According to the LRMP, the ban on boating was justified by “public safety” concerns.

103. No user capacity analysis or other valid supporting documentation was included in the LRMP in connection with the ban.

104. The 1976 decision resulted in a handful of local anglers having a near monopoly on river recreation on the upper Chattooga.

105. The 1976 ban was made arbitrarily, outside of an open NEPA-type process, without public input, and in direct contradiction to the Study produced by the Sumter National Forest just five years earlier to support designation of the Chattooga as a WSR.

106. In 1985, a new Sumter National Forest LRMP was issued and the ban on floating continued.

107. In contrast to the 1976 ban where “public safety” was the stated justification, the 1985 floating ban stated that protection of “quality trout fishing” necessitated denying boaters access to the upper Chattooga.

108. This rationale was completely circular and without any rational basis. In essence, the “quality trout fishing” was the result of stocking non-indigenous fish to increase the fishing experience, and unlawfully banning floating to provide an artificial solitude experience.

109. As with the 1976 ban, the 1985 decision contained no user capacity analysis, valid supporting documentation or relevant research.

110. The boating community’s interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers.

111. Although the boating on the Headwaters was banned in 1976, from 1976 through 1985, the USFS did not enforce the ban. Thus, between 1976 and 1985 a few members of the public occasionally floated the Headwaters as had been done for over 250 years.

112. When boaters learned of the prohibition, they began to challenged it.

113. As a result of challenges from boaters, in 2004, the USFS agreed to analyze why floating, a protected activity on the Chattooga Headwaters, had been illegally banned. This purported analysis was conducted in conjunction with the USFS Revised Land and Resource Management Plan (“RLRMP”) process.

114. Federal regulations require the USFS to periodically revise its management framework for managing the various national forests. The Regional level of the USFS conducts these revisions of its various forests on a rolling basis in cooperation with the local forests.

115. Historically, management of the entire Chattooga River, including the parts of the river corridor in Georgia and North Carolina, has been controlled by South Carolina’s Sumter and Francis Marion National Forests headquartered in Columbia, South Carolina.

116. Because “Region 8” of the USFS (also known as the Southern Region) had already slated 2004 as the timeframe for revising the Land and Resource Management Plan for

the Sumter and Francis Marion National Forests in South Carolina, the Regional Forester decided to use the RLRMP process to consider boaters' challenges to the Headwaters boating ban.

117. The 2004 RLRMP was divided into numerous "issues" that were being considered for revision. The USFS discussed the boating prohibition in "Issue #13" of "Appendix H" to the 2004 RLRMP.

118. Regrettably, the USFS ultimately failed to analyze the boating issue and instead published a cursory defense of its decision to maintain the boating ban.

119. The 2004 RLRMP discussion on boating contained no scientific analysis, contained only vague references to undocumented "potential" problems associated with "adding" boating as a "new" use.

120. Instead of reviewing why protected wild and scenic river activity had been banned and how it could be restored, the 2004 RLRMP discussion instead focused on imagined problems associated with introducing a "new" use to the river. The 2004 RLRMP discussed resource impacts related to all users in general and reasoned that "new" boating use would result in additional resource impacts (simply because there would be more users) and determined that such "potential" impacts were a basis for continuing the ban.

121. Plaintiff American Whitewater ("AW") timely appealed the 2004 RLRMP ban through the USFS's administrative process.

122. AW's administrative appeal challenged the boating prohibition on the grounds that it was arbitrary and capricious under the APA, that it violated the WSRA, the Wilderness Act, USFS regulations, and a host of other applicable laws and regulations and that it infringed on a federally protected right to use a federal resource.

123. The USFS did not respond to AW's appeal in a timely manner according to the USFS's own regulations.

124. After delaying a decision on AW's appeal for a year, the USFS Chief finally issued a decision on AW's appeal. In April 2005, the USFS Chief agreed with AW and reversed the boating ban:

After careful review of the record . . . I am reversing the Regional Forester's 2004 Decision to continue to exclude boating on the Chattooga [Headwaters]. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. *Id.* at Ex. 7, USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 4 (April 28, 2005) [hereinafter, the "2005 Appeal Decision"].

125. However, in the same document in which the Chief reversed the 2004 Headwaters floating ban, he resorted, as a technical fallback, to the prior 1985 land and resource management plan for the Sumter National Forest.

126. The 1985 plan contained a boating ban, so the result was that the Chief reinstated a 1985 Headwaters floating ban in place of the invalidated 2004 ban—a ban that had been invalidated by the Chief on the grounds that it violated federal law.¹⁵

127. The apparent paradox in the Chief's order was mitigated by the fact that the Chief specifically identified for the Regional Forester the regulatory framework for immediately restoring paddling access: "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

¹⁵ *Id.* at 5.

128. In conjunction with the reversal of the boating ban and the regulatory framework for restoring boating access, the Chief's order further directed the Regional Forester, *within two years* (i.e., by April 2007), to conduct a "visitor use capacity analysis, including non-commercial boat use" and to amend the 2004 RLRMP in accordance with the results of the capacity analysis.

129. Notwithstanding the Chief's 2005 Order, the USFS's regional office, and by extension the local forests under its control, continued to ignore Plaintiffs' federally-protected right to float the Headwaters.

130. First, the Regional Forester ignored the Chief's apparent intent that floating access be restored on the Headwaters during the "two year" amendment process in order to conduct a meaningful visitor capacity analysis that could determine an appropriate capacity number of users. The Chief pointed to "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

131. Instead, the USFS maintained a complete ban on Headwaters floating, allowing less than 20 boaters access to the river *on only two days* during what ultimately became a 4.5 year amendment process. With boating banned, no user capacity analysis study "including whitewater boating" was ever conducted.

132. Second, the USFS's purported execution of the Chief's 2005 Appeal Decision was undertaken by local forest managers (called "Forest Supervisors") rather than by the Regional Forester. This deviation from the Chief's order is significant because of the local forest managers' distaste for boaters after having their 2004 ban reversed, their coziness with a small, but influential anti-boating interest, their demonstrated propensity to ignore federal law and USFS policy, and their apparent desire to prohibit Headwaters floating at any cost. Despite

repeated protests by Plaintiffs, local forest managers remained in control of the amendment process throughout its duration.

133. Although AW prevailed in appealing the 2004 ban, Plaintiffs none the less remained banned from floating the Headwaters. Thus, Plaintiffs assisted by Atlanta, GA based *pro bono* counsel sought relief in the United States District Court for the Northern District of Georgia.¹⁶ The Plaintiffs asked the Northern District of Georgia for an order requiring the USFS to restore floating access while the USFS conducted a user capacity analysis.

134. The USFS opposed the Plaintiffs' request and argued that the floating ban was not yet ripe for judicial review because the USFS was still in the process of amending the 2004 RLRPM and might ultimately restore floating access, thus rendering moot the Plaintiffs' arguments and requested relief. The Northern District dismissed Plaintiffs' case, holding that Plaintiffs' claim was not yet ripe for judicial review. However, the Court repeatedly noted that the case would be ripe once the USFS issued its 2009 Amendment.¹⁷

135. The court expressly and repeatedly stated that the soon to be issued Amendment would represent Defendants' final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time;*"¹⁸ that "*if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available . .*

¹⁶ See Pl.'s Compl., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 1]; see also Pl.'s Mot. for Prelim. Inj., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 3].

¹⁷ See *American Whitewater v. Bosworth*, No. 2:06-CV-74-WCO, *12-13, 18, 20 (N.D. Ga. Oct. 6, 2006) [Doc. 23].

¹⁸ *American Whitewater*, No. 2:06-CV-74-WCO at *12-13 [Doc. 23].

. ;”¹⁹ and that “[i]f [Plaintiffs’] vision [“of an open Headwaters”] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time.*”²⁰

136. The USFS missed its two-year deadline to amend the boating ban imposed by the 2004 RLRMP. In fact, it ultimately took Defendants four and a half *years* to publish an amendment that deviates little from the original decision reversed by the Chief.

137. Throughout the four and a half year decision period, Plaintiffs participated in every phase of the administrative process by attending USFS meetings and hearing, submitting comments to every draft of the USFS amendment document, corresponding with the USFA on numerous occasions to remind the agency of its obligation to restore hand-powered boating on the Headwaters and to execute a user capacity analysis that actually determines a numerical capacity of the river for users. The USFS failed to properly respond to or address Plaintiffs’ comments. *See* Colburn Declaration, October 9, 2009 filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated herein.

138. More than 1000 boaters from across the country asked the USFS to lift the boating ban in its 2004 RLRMP. Even more boaters requested the same of the USFS during the protracted amendment process. The USFS failed to properly respond to or address these requests.

139. Finally, on August 25, 2009, in direct violation of the USFS Chief’s order, three Forest Supervisors, *not the Regional Forester*, issued the long-awaited 2009 Amendment to the 2004 RLRM. The 2009 Amendment deviates little from the invalidated 2004 RLRMP.

¹⁹ *Id.* at *18.

²⁰ *Id.* at *20.

140. Like the 2004 RLRMP, the 2009 Amendment is based on an incomplete study that in no way meets the legal requirements for a user capacity study.²¹ It is a user capacity study in name only.

141. The 2009 Amendment purports to provide “all potential users with a fair and equitable chance to obtain access to the river,”²² but boaters are singled out for harsh restrictions while *all other users have unlimited access to the resource all year long*. In other words, the 2009 Amendment *only* restricts boating.

142. The 2009 Amendment bans boating on all but one seven-mile stretch of the nearly twenty-two miles of Headwaters. Those seven miles are separated from the rest of the river by complete floating bans on the Headwaters sections immediately upstream and downstream.

143. The 2009 Amendment permits boating on this small section of the Headwaters only in the dead of Winter—only during the months of December, January, February—and only when the Headwaters have exceptionally high water levels.²³

144. Boaters must hike 1.5 miles with their canoes or kayaks to the beginning of the section to access that section of the Headwaters.

145. Although Congress noted that there were readily accessible roadside launch sites when it designated the Chattooga as a Wild and Scenic River, the USFS has barred boaters from using those sites.

²¹ See Ex. F, Declaration of Glenn E. Haas 1-2. See Haas Declaration filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

²² Ex. B, Colburn Decl., Ex. __, USFS, *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*, 4 (Aug. 25, 2009) [hereinafter, the “2009 Amendment”]. See Colburn Declaration filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated here in.

²³ 2009 Amendment 2.

146. The 2009 Amendment also bars boaters from floating the entire 52-mile length of the Chattooga River from Grimshawes Bridge to Tugaloo Reservoir.

147. In stark contrast to its treatment of boaters, the 2009 Amendment grants wholly unrestricted access to and use by *all other* user groups.

148. By the USFS's own Orwellian estimation, this "fair and equitable access" would permit boaters to access one section of the Headwaters between zero and eleven days per year (and only in the Winter), with a likelihood of 3 days per year. In comparison, *all other user groups* are permitted to access and use the entire length of the Headwaters 365 days a year.

149. The 2009 Amendment, which maintains the illegal ban on paddling on the Headwaters, violates the same federal laws cited by AW in its 2004 Appeal of the 2004 RLRMP and the same federal laws that Chief of the USFS cited when he reversed the 2004 RLRMP.

IV. COUNTS

A. Violation of the Wild and Scenic Rivers Act

150. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

151. The 2004 USFS Land and Resource Management Plans for managing recreation uses on the Upper Chattooga River violated the Federal Wild and Scenic Rivers Act by instituting a total ban on all boating on the upper Chattooga.

152. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Federal Wild and Scenic Rivers Act by implementing a ban on boating on two of three sections of the upper Chattooga.

153. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Wild and Scenic Rivers Act by refusing to manage the \pm two miles of Wild and Scenic River downstream of Grimshawes Bridge flanked by private property.

154. There were no user capacity analyses conducted prior to implementing the 1976, 1985, and 2004 USFS Land and Resource Management Plans, yet floating was banned. This is a violation of the WSRA.

155. There was no legally valid user capacity analysis conducted prior to issuing the 2009 Amendment to the 2004 plan, yet floating was banned on two of three sections of the upper Chattooga, and virtually banned on the middle section. This is a violation of the WSRA.

156. Section 1281 of the WSRA provides in relevant part:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. 16 U.S.C. § 1281(a).

157. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the Wild and Scenic Rivers Act.101.

158. Whitewater boating is one of the values that prompted Congress to designated the upper Chattooga River as a WSR. It therefore must be protected and enhanced, not banned. The ban violates the WSRA.

159. Boating does not substantially interfere with public use and enjoyment of river values, and therefore its use should not be limited. In doing so, the USFAS violated the WSRA.

160. Floating must be protected and enhanced because in addition to itself being a stand alone value, it is also a fundamental component, one of the outstandingly remarkable values that caused the Chattooga to be included in the WSR system. The USFS failure to protect and enhance whitewater boating violates the WSRA.

161. Banning floating on over one-third of the Chattooga WSR—particularly on the cherished wilderness portions—destroys, rather than protects and enhances, this important value in violation of the WSRA.

B. Violation of the Wilderness Act

162. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

163. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days in the Winder on the middle section), violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is required to protect and enhance.

164. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days on the middle section), results in an allocation of uses in the Ellicott Rock Wilderness that violates the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

165. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

166. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

167. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

168. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

169. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

170. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

171. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

172. Thus as primitive recreation opportunities, hand-powered kayaking and canoeing are wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

173. Defendant’s own regulations implementing and giving effect to the statutory requirements of the Wilderness Act define hand-powered canoeing and kayaking as wilderness-complaint uses. *See* USFS Manual 2320.5.3.

174. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

175. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

176. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

177. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

178. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

179. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

180. Banning floating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

181. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

C. Violation of the Multiple Use

182. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

183. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

184. The MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

185. Many potential uses of the National Forest lands lack a market value in terms of dollars.

186. Readily available market values do not exist for aesthetics, recreation, watershed, and wildlife.

187. While no market value is readily available, the statute mandates that the value of these resources be considered.

188. Balancing values must also be consistent with other laws.

189. The Forest Service failed to attribute the appropriate “value” to boating the upper Chattooga and therefore could not possibly have properly balanced the mix of uses adequately.

190. Congress included the upper Chattooga River in the Wild and Scenic River system, in part, because whitewater boating is an “outstandingly remarkable” value of that river.

191. Because Congress fixed the value of river recreation on the Chattooga WSR as “outstanding” and “remarkable,” the USFS should have accorded river recreation that same value, and should have given substantial value to the importance of preserving boating recreation.

192. Accordingly, the USFS has failed to comply with the MUSYA’s requirement to give “due consideration” to the “relative values of various resources in particular areas.”

193. Whitewater boating on the upper Chattooga is an “outstanding” and “remarkable” value. As such, that value must be protected and enhanced in any appropriate balance of multiple uses.

194. Defendants have not attributed any value to floating on the Headwaters, by setting the amount of floating at zero while not limiting other uses. Therefore, Defendants have not given due consideration to the relative values in violation of the MUSYA.

195. Defendants have not attributed any value to floating on the Headwaters, even though Congress included the Headwaters in their identification of floating as an outstandingly remarkable value. This is a violation of the MUSYA.

D. Violation of the National Forest Management Act

196. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

197. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

198. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

199. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process. NFMA creates a statutory framework for the management of National Forests.

200. NFMA states that the Forest Service “shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a).

201. NFMA provides a two-step process for forest planning. First, the Forest Service must develop a Land Resource Management Plan (“LRMP”) and an EIS for the entire forest. *See* 36 C.F.R. § 219.10(a), (b). Second, once the LRMP is in place, the Forest Service must assess site-specific projects in light of the LRMP. *See* 36 C.F.R. § 219.10(e).

202. The LRMP is in essence, a programmatic statement of intent that establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions.”

203. Among other items, an LRMP must provide for multiple use and sustained yield of the products and services obtained from that use, including outdoor recreation. *See* 16 U.S.C. § 1604(e).

204. The USFS did not adequately provide for multiple use of resources—specifically with respect to outdoor recreation. The USFS’s programming statement of intent that establishes planning guidelines basically bans all boating on the Headwaters, which constitutes more than 40% of the Chattooga River.

205. “Due consideration” was not given to “relative values” in the LRMP and EIS as required by the RPA/NFMA.

206. Defendants’ failure to consider the outstandingly remarkable value of river recreation violates MUSYA. Therefore it also violates RPA and NFMA, which require the USFS to comply with MUSYA when managing the National Forests.

E. Violation of the Fifth Amendment of the United States Constitution

207. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

208. The floating ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

209. Congress protected the Upper Chattooga as a WSR for the express purpose of protecting and enhancing outstandingly remarkable river values such as floating, yet the USFS banned floating and did so without any rational basis.

210. The USFS deprived Plaintiffs of the liberty to do as Congress intended, violating the Plaintiffs’ rights under the Fifth Amendment of the United States Constitution.

211. The ban of paddling on the river irrationally deprives recreational boaters of their liberty of movement on a river that the Wild and Scenic River Act says is to be managed and maintained expressly for their benefit.

212. The ban violates the equal protection clause of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis.

213. The upper Chattooga is a section of public river that is required by Congress to be protected and enhanced for the benefit of all Americans who wish to engage in primitive recreational activities, yet members of the public who would engage in floating are the only class to be singled out and denied access to this section of public river.

214. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationalists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

215. The following statements from the USFS EA and ROD demonstrate the failure of the USFS to provide equal protection to all users:

- There is a need to protect the unique angling experience above Highway 28.
- Allowing whitewater boating on some or the entire upper Chattooga River has the potential to ... affect the high-quality backcountry angling experience.
- Public comments and Forest Service studies have shown that angler/boater encounters are among the most important impacts associated with allowing boating on the upper Chattooga.
- [The USFS selected Alternative 4] emphasizes year-round, high-quality trout fishing.

- The take-out [mandated by the USFS selected Alternative 4] at Burrells Ford avoids potential on-river encounters with anglers in the Rock Gorge and in the delayed-harvest area.
- By establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

216. Nowhere in the EA does the USFS acknowledge that “there is a need to protect the unique *boating* experience above highway 28.”

217. Nowhere in the EA does the USFS acknowledge the ban on paddling not only “has the potential to ... affect the high-quality backcountry *boating* experience” but totally eviscerates this experience from the river.

218. Nowhere in the EA is there a proposed an alternative banning angling to “avoid potential on-river encounters with boaters.”

219. Nowhere in the EA does the USFS consider or find that “By establishing flow, season, and reach restrictions on *angling*, the high-quality boating experience is maintained and potential conflicts are reduced.”

220. This was a one sided analysis, conducted with a predetermined outcome.

221. Whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access with no rational basis while all other primitive recreationists are allowed to use the upper Chattooga without significant restriction or limitation.

F. Violations of the Administrative Procedures Act

1. Failure of USFS to Follow its Own Regulations

222. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

223. Under the Administrative Procedure Act (the “APA”), an agency’s decision may be set aside by a reviewing court if the court finds the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

224. When an Agency fails to follow its own regulations and procedures, its actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. The examples below all demonstrate that the USFS has violated the Administrative Procedures Act.

225. In banning floating, the USFS contravened its own regulations regarding how a Wilderness area should be managed.

226. The de facto boating ban flies in the face of these important regulatory directives. Floating is banned, not optimized.

227. The ban stands in direct opposition to the requirements that the Forest Service promote and perpetuate recreational use, and that wilderness is to be made available to the “optimum extent” consistent with wilderness preservation.

228. Banning a 250+ year historical and traditional form of wilderness recreation does not promote or perpetuate that recreation.

229. Human use is certainly not permitted to its optimum extent where, as here, a low-impact form of primitive recreation is virtually banned.

2. The Floating Ban Violates The Forest Service Manual

230. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

231. Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action.”

232. “Indirect techniques” means techniques (such as signage) that minimize or eliminate management concerns while still allowing users to access the resource. The USFS has never applied indirect techniques in the Headwaters.

233. The Forest Service Manual contains the following Wilderness Act policy:

Maximize visitor freedom within the wilderness. Minimize direct controls and restrictions. Apply controls *only when they are essential for protection of the wilderness resource* and *after indirect measures have failed*.

234. The USFS virtual ban on boating in the Headwaters is in violation of the above policy because indirect measures were never tried, and because boating poses no threat to the wilderness resource.

235. The USFS Manual suggests the following approach: “When it becomes necessary to limit use [of a WSR], ensure that all potential users have a fair and equitable chance to obtain access to the river.”

236. If the USFS is to limit use of the Chattooga Wild and Scenic River corridor, it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning floating, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use.

237. By banning floating on the Headwaters of the Chattooga, while allowing all other uses to occur without limits, the USFS is not providing paddlers a fair and equitable chance to obtain access to the river.

238. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the USFS is being arbitrary and capricious, abusing its discretion and otherwise not in compliance with the law.

239. The intense and unprecedented management controls that apply only to boaters and on such a limited scope and time do not comply with USFS policy of minimizing direct controls and restrictions.

240. No other USFS management of any day use, or overnight use for that matter, anywhere in the country is burdened with such harsh and burdensome restrictions.

241. No other Headwaters user group is subject to the restrictions and burdens placed on floating.

242. With respect to the middle section of the Headwaters, which runs through a protected Wilderness, the USFS Manual provides that one of the objectives for management of wilderness is to: "Protect and perpetuate wilderness character and public values including, but not limited to...primitive recreation experiences." USFS Manual § 2320.2.

243. That provision is later clarified in section 2320.5.3, indicating that rafts and canoes are considered primitive devices suitable for use in wilderness.

244. Banning floating on this reach on an average of 362 days each year is in violation of USFS policy.

245. Section 2323.14 of the USFS Manual instructs that managers of wilderness areas should "provide for the limiting and distribution of visitor use according to periodic estimates of capacity in the forest plan."

246. The USFS offers no estimates of user capacity for anglers, boaters, or other dispersed recreationists in the Ellicott Rock Wilderness Area, yet takes the most extreme use limitation measure available: virtually banning a use.

247. Without the information provided in a valid user capacity analysis, the USFS has violated the directives for managing wilderness areas.

3. The USFS Failed to Follow The Directives of the Chief to Comply With American Whitewater's Successful Appeal of the 2004 Revised Plan.

248. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

249. When American Whitewater successfully appealed the 2004 Revised Plan, the Chief of the USFS issued a decision that required the Regional Forester to conduct a user capacity study and to engage in a number of other activities.

250. The Regional Forester and Forest Supervisors failed to comply with the Chief's decision. That failure renders the 2009 Amendment arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

251. The Appeal Decision required that several considerations be made in the EA and in future management – the majority of which were not complied with in the 2009 Amendment and EA.

252. The Decision ordered that the USFS address the “Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.” (ROD pg. 3)

253. The USFS failed to analyze the entire length of river required by the Decision. The USFS does not analyze the over 2 mile section of river at and immediately downstream of Grimshawes Bridge.

254. The USFS, with very little analysis, makes new, extreme, management decisions related to Chattooga River tributaries, claiming that such tributaries are outside the scope of the ROD.

255. The Decision ordered that the USFS must ensure that “If it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river.”

256. The 2009 Amendment does not ensure that all potential users have a fair and equitable chance to obtain access to the river. On the contrary, the USFS does not treat all users equitably.

257. The USFS published a list of alternative new management regimes before ultimately adopting its “preferred alternative” which became the 2009 Amendment. Each proposed alternative singled out floating for unique and harsh limits.

258. The Decision ordered that the EA must ensure that Wilderness “be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness.”

259. The 2009 Amendment does not meet this mandate. Encounter standards as well as the causes of existing biophysical impacts are left unmitigated in the proposed alternative.

260. The Decision ordered that the USFS must ensure that “wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions” (36 CFR 293.2(b)).

261. The 2009 Amendment does not optimize floating. It bans floating and allows all other WSR uses in unlimited amounts at all times.

262. The Decision orders that the USFS ensure that ““direct controls and restrictions” be minimized, and that controls are to be applied only as necessary to protect the wilderness resource after indirect measures have failed (FSM 2323.12) (COMPLAINT EX. 5).”

263. The 2009 Amendment immediately applies direct control and restrictions by implementing unjustified direct boating limits prior to trying indirect measures.

264. The Decision orders that the USFS ensure that “limitation and distribution of visitor use should be based on “periodic estimates of capacity in the forest plan” (FSM 2323.14).” Specifically, the Order states: “I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, *including non-commercial boat use*.” (Emphasis added).

265. The EA for the 2009 Amendment does not contain a user capacity analysis that meets the standards for such an analysis. At most it addresses past and current use, with no consideration of capacity. In addition, the EA is limited in scope to addressing the capacity of paddlers – not all WSR users as directed by the Decision.

266. The Decision found that the RLRMP was “deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.”

267. The 2009 Amendment contains this same deficiency. It is simply a rewritten version of the same inadequate discussion document and ultimately proposes virtually the same actions.

268. The USFS wholly fails to meet the legally required goals for the EA and the ultimate decision as directed by the Chief in the Decision.

4. The USFS Abdicated its Lawful Duty to Protect and Enhance Outstanding Recreational Values on the Northern Most Section of the Headwaters

269. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

270. The section of the Chattooga River designated as Wild and Scenic begins at its northernmost point, Grimshawes Bridge on USFS lands.

271. Shortly downstream, the Wild and Scenic River flows through private lands for approximately 1.7 miles before reentering USFS lands for the remainder of its journey to Lake Tugaloo.

272. In all alternatives, the USFS would unlawfully ban floating on this section of the Headwaters.

273. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the WSRA.

274. One ORV that could easily be protected in this reach is recreation, and floating is the one form of recreation requiring little or no stream bank access, and yet the USFS banned this use without analysis in their EA and 2009 Amendment.

275. The consideration of paddling the upper half of the Chattooga Cliffs reach is simply discounted by the USFS as “out of scope” in the EA’s “Other Concerns” section.

276. The USFS state: “This issue is outside the scope of this proposal. The Forest Service does not encourage trespass on private lands.”

277. Aside from the upper Chattooga, the USFS does not ban uses (like paddling, hiking, hunting, etc) because recreationists may stray onto private lands.

278. Virtually all public lands are contiguous with private lands. Thus, without considering its legal obligations, the USFS simply chose not to consider recreational activities on this stretch of the Headwaters for which Congress had found floating to be an outstanding value.

279. While the EA is silent on why the reach was considered out of scope, a memo from the Southern Region Planning Staff, titled “Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River,” dated September 25, 2007 (COMPLAINT EX. 6), explicitly advised that this section of river be eliminated from analysis:

Although two identifiable stretches of private lands are located in North Carolina along the Chattooga River, the uppermost potential location to put in for recreational boating and general recreational access occurs at Grimshawes Bridge (County Road 1107) in North Carolina. The land on the north side of the bridge is part of the National Forest System, while the south side of the bridge marks the beginning of the Rust property.

Boaters putting in at this location and wishing to continue down the river would have to pass through the Rust property, which would put them at risk of potentially committing trespass. The private land interests in this segment of the river have expressed their opposition to public boating and general public use through the Rust property at any time and under any conditions. It is likely that any member of the general public attempting to use this section of the river would face legal action brought by the landowners.

280. In a letter dated September 26, 2007, then Forest Supervisor Jerome Thomas advised John Cleaves, the Chattooga River Analysis Core Team Leader and Interdisciplinary Team Leader:

In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river.

281. This direction is directly contrary to law.

282. The USFS owns a canoe launch site immediately upstream of Grimshawes Bridge with road access. The site – which was labeled “the beginning of rafting waters” in the USFS 1971 study, allows boaters to access the Headwaters without entering upon any private land.

283. Boaters may proceed downstream from this point for 52 continuous river miles of world class whitewater without even setting foot on any private property. Before the illegal ban, this was the regular custom of hand-powered canoeists and kayakers like the individual plaintiffs.

284. The USFS has well established authority to regulate – and allow – paddling through private lands on Wild and Scenic rivers based on the Property Clause of the Constitution. In *U.S. v Lindsey*, the court ruled: “It is well established that this [Property] clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters.” 595 F.2d 5 (1979). “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.” *Id.*

285. This authority overrides any conflicting state laws, based on the *Supremacy Clause* of the Federal Constitution.

286. This authority is clearly stated in the Forest Service Manual chapter addressing river recreation management:

Administration of the rivers within the National Forest System falls under the general statutory and regulatory authorities, including mining and mineral leasing, laws, that apply to lands. The basic authority to regulate public use of waters within the boundaries of a National Forest *or Wild and Scenic River* derives from the property clause of the U.S. Constitution as implemented through the laws pertaining to the administration of the National Forests. The authority of the Secretary of Agriculture to regulate the public use of waters found at 16 USC 551 has been upheld in many court decisions. The most notable cases are: *United States*

v. Lindsey, 595 F.2d 5 (1979). The court held that within a federally designated area the Federal Government had the authority to regulate camping on State-owned land below the high water mark of a river. *United States v. Richard*, 636 F.2d 236 (1980) and *United States v. Hells Canyon Guide Service*, 660 F.2d 735 (1981). The courts held that the Forest Service can regulate use of a river notwithstanding the fact that users put in and take out on private land.

287. The Forest Service Manual is clear: the Forest Service retains authority to regulate the use of a river and the National Forest lands on the shorelines whether it is navigable or nonnavigable. Failure to do so is arbitrary and capricious, an abuse of authority and otherwise contrary to law.

288. A 2003 GAO Report (COMPLAINT EX. 7) reached a similar conclusion:

The Property Clause permits federal regulation of water as necessary for the beneficial use of federal property.

289. The USFS must protect the ORVs of the Upper Chattooga River as it flows through private lands, yet elected not to even consider this section in their EA, despite being directed to do so by the USFS Chief and required to do so by applicable law.

290. The USFS abdicated its responsibility to protect and enhance the Chattooga River and support its recreational enjoyment, thus violating the Wild and Scenic Rivers Act.

291. The USFS violated the directives of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses in the Chattooga river corridor of the Ellicott Rock Wilderness.

292. Not only does the USFS's omission of the uppermost two miles violate the Administrative Procedure Act, it also violates the WSRA, and NEPA. The entire upper stretch of the Chattooga was historically open to boating – even when the entire reach was private property.

293. All alternatives addressed in the EA propose a ban on the upper half of the Wild and Scenic Chattooga Cliffs reach without any rationale, analysis, or justification. There is no discussion of the basis for the agency's failure to consider alternatives other than banning paddling, except a single sentence claiming the reach is "outside the scope of this proposal."

294. Banning floating on this reach is without a legal or rational basis and is a significant federal action limiting the public's legal rights.

295. The USFS has not conducted a user capacity analysis or collected any recreational information on this portion of the Headwaters on which to base a decision.

296. The public has been banned from floating this reach even during the USFS one-time on-river assessment in 2007. The USFS conceded this point in a memo from the Southern Region Planning Staff, titled "Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River," dated September 25, 2007:

Additionally, information regarding the ability to float and recreate on this stretch of the river and the environmental impacts of such uses *is incomplete and inconclusive*. To date, the Forest Service has been unable to secure the access needed from private land interests in this segment to assess conditions in the area. Therefore, the agency is limited in its ability to conduct an environmental assessment of alternatives which would permit boating and other recreational uses of the general public along this stretch of the river.

297. The USFS claims it could not study a federally protected river because adjoining private property landowners would not grant the USFS access. Yet, no permissions or access is required.

298. Boaters can enter the river on USFS land immediately upstream of Grimshawes Bridge and float the entire stretch through private property without setting foot on any private land. The arbitrary exclusion of this area from analysis violates NEPA and the APA.

299. In addition, because the agency failed to analyze floating use through the reach, the USFS believes it must therefore ban paddling – thus exacerbating its previous arbitrary and capricious decision.

300. The river should be open to paddling until conditions prove limits are needed. Indeed, the last time the USFS studied this section of river (in the 1971 study) they determined that floating this section was entirely appropriate. There has never been a contrary finding.

301. Furthermore, every whitewater river and stream in the entire region is open to kayaking and canoeing without any limits thereon. The USFS assumption that in this case the default management of the river should include a complete paddling prohibition is wholly inconsistent with normal management.

302. The Upper Chattooga River should be open to paddling unless there is a compelling reason to limit it. In this case, the USFS has failed to produce any such rationale. Because no rational basis is provided, this decision is arbitrary and capricious.

303. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

304. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

5. Boating Will Not “Substantially Interfere” with River Values

305. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

306. The WSRA provides that authorized uses should not be limited unless they ‘substantially interfere’ with the river’s remarkable values.

307. Whitewater boating on the upper Chattooga is one of that section's outstandingly remarkable values. It is also an inseparable element of the recreation ORV.

308. All proposed uses of the upper Chattooga should be scrutinized under section 1281 to determine whether they 'substantially interfere' with, among other things, whitewater boating, not the other way around.

309. Because whitewater boating is an ORV, it cannot substantially interfere with itself, and therefore it cannot be limited (unless some form of limitation would actually protect and enhance the whitewater boating value), unless all other ORVs are limited equitably.

310. Whitewater boating does not 'substantially interfere' with any other outstandingly remarkable value.

311. While the USFS makes vague references to the *possibility* of some conflict between boaters and anglers or hikers, the record demonstrates that there will be *no* conflict between such uses, much less 'substantial interference.'

312. Another important reason that the record fails to demonstrate 'substantial interference' is that the USFS's reasoning is premised upon a false assumption: that whitewater boaters would be a "new" user group.

313. The USFS vague projections of conflict erroneously pit a "new" user group against "existing" user groups.

314. The reason the USFS attempts to designate whitewater boaters as a "new" user group is because the two prior (1976 and 1985) LRMPs also banned whitewater boating in violation of section 1281.

315. If any decision alters the *status quo ante*, it is the decision to ban a historical use that is cited in the Study as an important river value.

316. Boating is not “new” to the Chattooga.

317. Boating has been an important form of recreation on the entire reach of the Chattooga River for more than 250 years.

318. Accordingly, the USFS’s “new” versus “existing” analysis of conflict is based upon a false assumption and cannot substantiate vague claims of user conflicts.

319. Even if everything in the EA is accepted as true, there is no evidence that whitewater boating “*in fact substantially interferes*” with other values.

320. Unless there is clear evidence that floating ‘substantially interferes’ with outstanding river values, the USFS cannot even *limit* boating—much less ban it.

6. The USFS has not performed a User Capacity Analysis for the W&S upper Chattooga River

321. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

322. The Wild and Scenic River Act, as recognized in the Decision on American Whitewater’s appeal of the 2004 Revised Land and Resource Management Plan required the Sumter National Forest to conduct a user capacity analysis.

323. User capacity analyses are mandatory as a basis for managing both the types and levels of use.

324. The EA and 2009 Amendment do not state a total recreational capacity for the Upper Chattooga River, or capacities for individual types of use. Therefore, it is not a user capacity analysis. *See* Haas Declaration as filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

325. The Integrated Report (Shelby and Whittaker 2007) is not a user capacity analysis and identifies no capacities for the river corridor.

326. Without a user capacity analysis showing that boating must be limited to protect the resource, the USFS has no basis to limit boating.

327. The National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas (the “Secretarial Guidelines”) addressed user carrying capacity. 47 Fed. Reg. 39,454 (Sept. 7, 1982).

328. The Secretarial Guidelines define “carrying capacity,” as “[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and free flowing character of the river area, the quality of recreation experience, and public health and safety.” *Id.* at 39,455.

329. The Secretarial Guidelines state that:

“[s]tudies will be made during preparation of the management plan and periodically thereafter to determine the *quantity and mixture* of recreation and other public use *which can be permitted* without adverse impact on the resource values of the river area. Management of the river area can then be planned accordingly.” *Id.* at 39,459 (emphasis added).

330. *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, recently held that:

The Secretarial Guidelines also require that a component’s management plan state the *kinds and amounts* of public use which the river area *can sustain* without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.

331. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation of the principles and practices of the recreation resource planning profession.

332. The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River* (USDA Forest Service, August 2009) (EA) fails the test of adequacy on several fronts.

333. Visitor capacity is not adequately addressed in the EA, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year “visitor capacity analysis” effort in response to the 2005 Decision of Appeal;

334. In the EA, the USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;

335. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is a maximum number of people. No range of visitor capacity alternatives were offered for recreation activities.

336. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

337. Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase “visitor capacity” has replaced the phrase “user capacity” and are used interchangeably herein.

338. While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people.

339. A visitor capacity can be defined as the prescribed *number(s)* of recreation opportunities that will be accommodated based upon an area's approved comprehensive management prescription (i.e., the area's goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

340. Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area's prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment.

341. The EA is virtually silent on the issue of visitor capacity.

342. The EA does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year "visitor use capacity analysis."

343. The USFS EA does not define the appropriate kinds and amount of public use that can be sustained in the Chattooga River corridor, and is therefore does not contain a user capacity analysis.

7. The USFS Failed to Adequately Address Floating in the Wilderness in the 2009 Amendment to the 2004 plan.

344. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

345. The USFS virtually bans non-commercial, hand-powered floating on the 5.2 miles of Chattooga River that traverses protected wilderness.

346. Meanwhile, the USFS promotes continued access to the Ellicott Rock Wilderness for hikers, backpackers, campers and anglers in unlimited numbers.

347. Hikers, backpackers, campers, and anglers have greater impacts on wilderness than do non-commercial, hand-powered boaters.

348. The USFS improperly adopts a non-sustainable approach to use management of wilderness by promoting higher impact uses over lower impact uses.

349. The USFS virtual ban on primitive boating in the Ellicott Rock Wilderness ignores a primary mandate for administration of wilderness: that it be devoted to recreational use.

350. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

351. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

352. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

353. The USFS Amendment #1 to the Revised Land and Resource Management Plan for the Upper Chattooga River proposes to allow an average of *only 6 days* of non-commercial, hand-powered floating recreation on the section of Chattooga River within the Ellicott Rock Wilderness.

354. The Revised Land and Resource Management Plan decision to essentially ban boating in this area violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is commanded to protect and enhance.

355. The Revised Land and Resource Management Plan allocation of uses in the Ellicott Rock Wilderness undermines the primary purpose of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

356. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions” 16 U.S.C. § 1131(a).

357. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness” *Id* (emphasis added).

358. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

359. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

360. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

361. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

362. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

363. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

364. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

365. Banning non-motorized boating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

366. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

367. The USFS suggests that boating should not be permitted in the Ellicott Rock Wilderness because it might disturb anglers.

368. Unless a documented need for wilderness preservation is the basis, discriminating against user groups runs contrary to Congress’s intent to protect these treasured areas for the benefit of all wilderness compliant forms of recreation.

369. The USFS floating ban is not based on any threat to wilderness preservation.

370. The floating ban is based upon an untested suggestion that some users “might” be upset if a “new” user group is introduced into the wilderness.

371. The prediction that some users will not want to share simply does not justify ignoring the intent of Congress to make wilderness available to all Americans. Floating is not a “new” use; it has occurred on this WSR for more than 250 years.

372. When defining “wilderness” under the Wilderness Act, Congress contemplated the very type of use Plaintiffs seek here. “Wilderness” is defined as an area “where man himself is a visitor who does not remain.”

373. Kayakers and canoeists seek access to float from an existing upstream put-in, through the Ellicott Rock Wilderness, to an existing take-out point downstream of the wilderness.

374. This low impact activity will take place in less than a single day. In other words, paddlers seek to enjoy a primitive area in which they will be visitors who do not remain—a use that not only comports with, but helps define wilderness.

375. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

376. Thus as a primitive recreation opportunity, floating is wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

377. Primitive boating must be permitted in the Ellicott Rock Wilderness absent clear proof that wilderness preservation would be jeopardized.

378. A management decision that favors higher-impact uses over lower-impact uses is inconsistent with the Wilderness Act.

379. Favoring higher impact uses over lower impact uses undermines the goal of wilderness preservation, which is to preserve (*i.e.*, lessen impact on) the wilderness characteristics of a protected area.

380. The USFS should allow non-commercial, hand-powered boating in the Ellicott Rock Wilderness at least to the extent it allows other higher impact uses.

381. The Chattooga River only flows through one wilderness area: the Ellicott Rock Wilderness.

382. Paddlers seek access to the Ellicott Rock Wilderness in order to enjoy its scenery and the high quality whitewater boating.

383. While nominally addressing encounter standards and use limits, the USFS's preferred alternative *artificially increases* recreational use by supporting the stocking of trout adjacent to a Wilderness area and in a Wild and Scenic River, while banning natural floating use.

384. In the EA, the USFS admits that "[t]he angling trends on the Chattooga also depend on stocking and regulation stability." The agency has reported that they support the *stocking of over 70,000 exotic game fish* annually in the Upper Chattooga River to artificially increase recreational use. *Shelby and Whittaker* p. 19.

385. At the same time as this environmentally harmful stocking program occurs, the USFS has virtually banned floating, thereby decreasing recreational use in the Wilderness area.

386. In a Wilderness area on a Wild and Scenic River, natural conditions should prevail. The upper Chattooga River naturally provides high quality boating opportunities during times of high flow and a moderate quality angling experience at low flows.

387. There is no justification in the EA for artificially increasing the angling experience while effectively banning another wilderness use, floating.

388. The most Wilderness compliant alternative would have a natural balance of boating and angling – without conflict, with little recreational overlap, and without the collateral impacts of stocking exotic game fish.

G. The USFS Failed to Treat All Users Equally as Required by the Chief's Decision and applicable laws.

389. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

390. The upper Chattooga is a section of a public river that Congress required the USFS to protect and enhance for the benefit of all Americans who wish to engage in primitive recreational activities. Yet members of the public who would like to float the upper Chattooga are the only class of persons to be singled out and denied access to the upper Chattooga.

391. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

392. The Decision on American Whitewater's appeal confirms that if use is to be limited it must be limited equitably. The EA, the alternatives, and the preferred alternative are not equitable. Each alternative proposes to radically limit or ban paddling use while other uses are virtually unlimited.

393. The USFS preferred alternative is to allow only six days of boating on one small stretch of the Headwaters, but even admits that only three of the six days would actually be available to paddlers. *Shelby and Whittaker* 2007, p. 36-37. Three days of paddling versus 365 days for other uses is not equitable.

394. The USFS has instituted the harshest possible management on one Wilderness Compliant use – a total ban on much of the river – while allowing all other uses unlimited access.

395. Only members of the floating public are required to receive advance permission to access the Headwaters. Putting the decision-making on whether the water is suitable to float on

a government official will reduce boating opportunities (below the three days granted by the USFS), reduce safety, discourage use, slow permitting, and cause government waste. This practice is not conducted on any other river in the Nation.

396. No other user group is required to wait for last minute permission to recreate on the Upper Chattooga River.

397. Appendix B of the EA asserts that boaters *may* have to pay fees to access the Upper Chattooga River through the commercial website Recreation.gov. This website is an online reservation service used for camping in designated campgrounds and other resource intensive overnight-use management.

398. No other user group—hikers, swimmers, backpackers, anglers, hunters, and other users—is or will be required to pay a fee to engage in their chosen form of backcountry travel. Only paddlers will have to pay to use the river.

399. Appendix B of the EA asserts that boaters may have to use the commercial website Recreation.gov prior to accessing the upper Chattooga River. This website is an online reservation system.

400. No other user group has to register online prior to visiting and traveling in the Upper Chattooga watershed.

401. The USFS has decided to limit paddling to the three winter months of December, January, and February, while all other uses are allowed year round.

402. Winter days are often cold and they are short, both of which potentially increase the difficulty of floating in the Winter and decrease the enjoyment.

403. While Winter boating in the Southeast is common, no other user group is restricted to using any section of the Chattooga at the least optimal time of year.

404. The USFS has decided to allow a miniscule amount of paddling on a small section of the river, while existing user groups have unlimited access to the entire river corridor. Specifically floating can only occur on the Ellicott Rock Reach, and if they are willing to carry their boats 1.5 miles, floaters can enjoy part of the Chattooga Cliffs Reach.

405. Floating is completely banned on the upper half of the Chattooga Cliffs reach, the Rock Gorge, Nicholson Fields, and all tributaries. Floating is a place-based activity, and banning a large section of a Wild and Scenic River has a significant impact on paddlers.

406. The USFS has decided to only allow paddling to occur at rare high flows over 450 cfs, while no other user group is limited by flow. People are permitted to swim and fish on the entire length of the Chattooga regardless of the rate of flow.

407. This flow constraint eliminates the opportunity to enjoy moderate flow days which many members of the floating community find less challenging and more enjoyable. In fact, according to Shelby and Whittaker this plan eliminates one third of the optimal paddling flow range and all of the technical boating opportunities.

408. The USFS did not collect, refer to or rely on any scientific or empirical data to demonstrate that flow rates of 450 cfs and above provide a suitable floating experience. No such data exists.

409. The effect of the flow and seasonal limits imposed by the USFS is that an average of 6 days annually will be hydrologically viable for paddling, but only three of those days will likely be usable based on hydrologic complexity. *See* Shelby and Whittaker (2007).

410. While paddlers are given three days to recreate, all other users are given 365 days.

411. Due to the flow and seasonal restriction imposed on boaters by the USFS, every boater who wished to paddle the middle one third of the upper Chattooga (the only section of the

upper Chattooga where boating is not completely banned) will be forced to do so during three days. All other user groups are permitted to use the entire river on any day of the year.

412. The chance that a significant number of paddlers will descend the river in a single day and possibly inadvertently violate standards is greatly increased by this arbitrary and capricious and illegal management choice. The USFS confirms that:

However, alternatives 4 and 8 propose an “adaptive management” component that could use registration, monitoring or surveys to determine the need for implementation of additional use restrictions.

413. Not only will the USFS consider additional use restrictions; the USFS will also single out paddlers for additional unique restrictions. Specifically, one of the monitoring questions the USFS intends to pursue is:

Above Highway 28 is the solitude component of the recreation ORV being maintained? Are the encounter levels within established desires and estimates? Has the experience of historical recreation users been diminished due to the introduction of boating?

414. The USFS has created conditions that encourage relatively large numbers of paddlers to descend on a small portion of the river in a very small three day window. The USFS will then monitor this use and hold paddlers to a unique and biased standard.

415. The USFS is setting up paddling to fail on the Upper Chattooga.

416. The USFS has decided to limit all existing users indirectly only after standards are violated, and to limit paddlers directly immediately, prior to any standard violations.

417. Specifically, the USFS is immediately completely banning paddling on most of the upper river, and is requiring permits and harsh seasonal and flow limits where paddling is allowed.

418. On the other hand, existing users have no limits whatsoever until encounter standards are violated on 20% of days. This is a clear violation of USFS policy.

419. The USFS will judge the acceptability of existing use, based on encounter standards being violated less than 20% of days annually. Paddlers must meet a much more stringent standard.

420. Without actual visitor capacity numbers, so-called “encounter standards” are meaningless and are prone to grossly subjective enforcement terms.

421. Paddlers will be judged based on their impacts on the “solitude” of the USFS preferred user type, on whether or not the “experience of historical recreation users has been diminished,” and on monitoring of large woody debris and portage trail needs.

422. Judging paddlers by different standards is not equitable, especially when the standards that could lead to elimination of paddling are based on nothing more than the opinions of existing user groups that vehemently oppose paddling access.

423. The USFS is managing the potential biophysical impacts of paddling and other uses in totally different ways.

424. The potential impacts of paddlers are managed by banning the use entirely, before an impact even could potentially occur, and without justification.

425. The proven and significant impacts of other uses are appropriately managed through technical fixes. The USFS EA confirms that technical fixes are the appropriate way to manage biophysical impacts.

426. The Biophysical impacts are not typically addressed through use/encounter limits, but through “technical fixes” (e.g.: campsite hardening/ rehabilitation/obliteration, trail reconstruction/realignment/ obliteration, etc.) or through education and regulation.

427. By managing the similar impacts for different user groups in different ways that are discriminatory towards one group, the USFS has failed to act equitably and its actions are arbitrary and capricious.

428. Based on the use limitations described above, the USFS has determined that most of the upper Chattooga River has a capacity of zero paddlers, and the remaining section has a capacity that is extremely close to zero.

429. In essence, the agency claims that one paddler descending the river would cause unacceptable and significant impacts.

430. At the same time USFS has failed to establish a single capacity for any other use, which is analogous to claiming a capacity of infinite other users. While others hike, fish and swim in the Headwaters in unlimited numbers, the USFS claims a single paddler would have impacts so severe a total ban is justified.

431. The EA reports that natural flow alone adequately separates user groups on the Chattooga, as they do on every other river in the region.

432. The study results show that paddlers and anglers prefer different flows. There is simply too little water to navigate the river when angling is really good, and too much water to fish when boating is really good.

433. Flows alone separate uses. Specifically, there are only 34 days each year when flows are optimal for boating (i.e. 350-650 cfs), and paddlers will only be able to use half (17) of those.

434. On those days angling is “Lower Quality.” Based on the USFS goal of protecting “High Quality” angling, even if you accept their erroneous argument that a few, random

encounters with paddlers would ruin a day of fishing, they have no basis (or need) whatsoever for limiting boating at flows over 350 cfs.

435. The USFS has never explained why the simplest, cheapest, fairest, most common, and easiest to manage solution – allowing flows alone to passively separate uses – is not acceptable. Flows alone support high quality angling and paddling, and adequately separate uses.

436. The USFS clearly finds that encounter standards are already exceeded by existing users yet proposed no mitigation for these impacts.

437. Conversely, the USFS chose to initiate limits on non-boating uses when encounter violations reach 20% of days (73 days). That decision is both arbitrary and a clear sign that they do not wish to curtail existing impacts.

438. The EA readily admits that “the encounter limits established [described in alternative 8] for the Ellicott Rock Wilderness are closer to the desired tolerances in the literature (Whittaker and Shelby 2007) when compared to alternatives 3-5. The USFS decision to limit paddlers based on encounters that have not occurred and will never reach 20% is arbitrary and capricious.

439. To ban paddling, which has virtually no effects on encounter standard violations when allowed in unlimited numbers (like all other uses), while allowing uses with significant encounter standard violations to remain unlimited is absolutely inequitable and capricious.

440. The USFS has instituted paddling limitations as the sole direct management tool, while all other larger and more damaging uses are allowed in every location, in every time, in unlimited numbers, in every alternative that allows paddling.

441. Paddling is anticipated to be the smallest and lowest impact use on the river, and it is unreasonable to manage environmental or social impacts by directly managing only the smallest and lowest impact use.

442. USFS estimates in Shelby and Whittaker 2007 and in Upper Chattooga River Visitor Capacity Analysis Data Collection Reports concluded that unlimited paddling would make up roughly 2% of total use.

443. The EA fails to document a single impact of paddling on the river resource.

444. While it may be true that additional boaters may have increasing impacts, the USFS admits that so too will increasing numbers of hikers, anglers, and campers.

445. The USFS concedes that non-boaters cause significant residual impacts on the Headwaters.

446. Since non-boating use causes significant impacts, the USFS must analyze the effects of all recreationists on the corridor, and propose limits that address all of these factors.

447. The USFS EA indicates that some recreational impacts are acceptable because recreation is generally good for society – except apparently floating. This double standard permeates the EA and is arbitrary and capricious.

448. The EA shows that boating is be the slowest growing use on the Chattooga Headwaters:

- Angling is expected to grow and has recently grown.
- Day hiking in the South will increase by about 48% by 2020.
- Backpacking in the South will increase about 23% by 2020.
- Whitewater boating is flat or declining on Chattooga and Nationally.

449. By harshly managing the smallest and slowest growing use while allowing all other uses unlimited access the USFS is acting arbitrarily and capriciously.

450. The USFS clearly values the solitude of anglers higher than the solitude - or even the ability to experience the river at all - of paddlers.

451. The inequitable allocation of solitude to anglers seems to be the primary reason behind the Defendants' decision to ban floating.

452. The EA concedes that even where paddling use is unlimited, solitude for all users remains intact.

453. The agency has elected to limit floating to protect anglers' solitude when an alternative with no paddling limits (on the sections considered by the USFS) was found to maintain outstanding opportunities for solitude. Both of these aspects of the USFS decision are arbitrary and capricious.

454. The EA suggests that the USFS rejected the potential permit system in alternative 2 (which proposed permits for all users) because use limit systems require administrative effort, require users to plan ahead and compete for limited permits, and would displace some proportion of existing use on high use days.

455. If this is sufficient justification to eliminate alternative 2, it should be sufficient justification to eliminate the selected alternative and others that would require permits for paddlers.

456. The USFS manages thousands of whitewater rivers. By far the most common management of non-commercial floating is no management at all. To ban floating on the Chattooga Headwaters and nowhere else is inequitable, arbitrary and capricious.

457. The USFS has never banned boating to benefit anglers – except on the Chattooga.

458. On perhaps a few dozen rivers nationwide the USFS limits paddling by permit. In virtually all of these cases the rivers take several days to paddle, and the limits are designed to ensure campsites are available.

459. In virtually all of these cases, where permits are required, paddling is the largest use of the river corridor, and thus is the focus of management activities. In all of these cases paddling limits are designed to protect and enhance the paddling experience.

460. The upper Chattooga is mainly a day-use river on which paddling will comprise a relatively tiny portion of the total use, and limits are therefore inconsistent with USFS practice.

461. Angling use on the Headwaters is largely artificial, but the USFS has arbitrarily selected angling as the exclusive use to protect and enhance on the upper Chattooga.

462. The quality of fishing on the upper Chattooga is created by the stocking of over 50,000 exotic trout a year by helicopter and trucks.

463. Stocking of non-indigenous fish has a detrimental effect on indigenous fish. *See* Bain Declaration filed with Motion for Temporary Restraining Order. The Bain Declaration is incorporated here in.

464. The artificial fishery is a primary determinant of the angling experience.

465. Floating, however, is a nature-based activity, which is dependent on only the natural condition of the upper Chattooga River.

466. It is inequitable and unlawful to manage for an artificial use to the exclusion of a nature based use on a Wild and Scenic River and in a Wilderness Area.

467. The USFS is managing for a user group that in this location claims zero tolerance of other uses.

468. Nowhere else in the Nation are anglers known to claim zero tolerance of paddlers on a Wild and Scenic River managed by the USFS.

469. The USFS even forbids other uses during conditions when anglers are not even recreating on the river.

470. The USFS is required by law to manage for compatible uses.

471. Wild and Scenic Rivers must be shared equitably among users.

472. Equitable, indirect, means of reducing fishing exist and should be used before a ban on floating can legally occur.

473. One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.”

474. Nevertheless, the USFS currently allows large scale stocking programs on the upper Chattooga. In addition to large scale stocking programs there is a year round season with large creel limits.

475. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor.

476. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning or direct limiting of any other use.

477. USFS has ignored the massive impacts of industrial scale stocking and fish rearing on the upper Chattooga River, yet has banned floating. While the USFS makes much of

the “high quality angling experience,” they clearly fail to describe or value the high quality paddling experience that the upper Chattooga provides.

478. For individuals with the appropriate skills and experience, the upper Chattooga is a unique and incomparable whitewater river.

479. A USFS-sanctioned Headwaters float revealed a beautiful stream filled with world class rapids, stunning views, and an intimate and remote feel.

480. There are extremely few opportunities in the region to paddle a Wild and Scenic River, a river flowing through a Wilderness Area, or a river flowing through a Roadless Area. The upper Chattooga provides all three.

481. The upper Chattooga is a high quality and unique river for skilled floating, and denying any portion of this river to paddlers, while leaving it fully open to all other uses is inequitable and unjustified.

H. The Forest Service Reliance on Unsubstantiated Possibility of User Conflicts is Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law

482. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

483. The USFS failed to document any conflicts on the upper Chattooga between boaters and anglers, or any similar stream in the region.

484. The USFS erroneously contends that by establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

485. The USFS has failed to prove that any amount of boating would have any impact whatsoever on trout fishing, or that there is any relationship whatsoever between boating and trout fishing quality.

486. USFS failed to show how flow, season, or reach restrictions on floating are needed to maintain high quality trout fishing.

487. USFS failed to show that banning floating would reduce conflicts even if conflicts did exist.

488. USFS has created a record that fully supports allowing boating, and its conclusion is simply not supported by the data.

489. Virtually all “creek boating” resources in the Southeast are also trout fishing resources (although the opposite is not true).

490. On these many other rivers, angling, paddling, and hiking coexist with no reports of any type of conflict.

491. The USFS failed to document a single angler-boater conflict occurring on the upper Chattooga or any similar stream in its EA.

492. Paddling and angling uses rarely overlap because of different flow preferences and when they do, this interaction is amicable.

493. Many “creek boaters” are also cold water anglers. Additionally, many cold water anglers prefer to fish from canoes and kayaks.

494. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the upper Chattooga River.

495. If boating is allowed without direct limits, anglers will have an average of 305 days each year to enjoy the Chattooga River.

496. The majority of remaining 60 days will be low quality angling days due to high flows which make fishing more difficult and wading less safe, while at the same time offering favorable conditions for paddling.

497. The USFS has decided to impose limits on non-boating uses only if and when standards are exceeded, beginning with indirect limits. In the “Proposed Action” section of the EA the USFS states it will manage encounters for existing users using indirect measures, “Manage encounters among existing users by limiting trails, campsites, group size and parking.”

498. The Proposed Action then recites a litany of direct measures *on boaters only* that they will use to limit encounters. “Manage encounters among users by establishing zone, season, group size restrictions and flow limits (including prohibition in some alternatives) on boating opportunities.”

499. In all proposed USFS management alternatives (except for some reaches in Alternative 8), the USFS imposed direct limits on paddlers before any standards were exceeded. However all other users have unlimited access until standards are exceeded to an unacceptable level. This is arbitrary and capricious.

500. Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters.

I. The 2009 Amendment, Without Notice, Bans Floating on Tributaries of the Upper Chattooga.

501. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

502. The USFS arbitrarily and capriciously decided to ban paddling on all tributaries of the Upper Chattooga River.

503. The USFS offered unfounded “concerns” as a justification for its failure to study the tributaries.

504. This is a new prohibition on paddling, made without any significant analysis.

505. The USFS erroneously believes that the tributaries to the Upper Chattooga River are currently banned to boating. The 1986 Sumter National Forest Plan, which currently dictates the management of the river, states:

Use patterns have stabilized on the river, although use continues to rise. Floating is limited to the 26 mile portion below Highway 28 Bridge and the West Fork's lower 4 miles in Georgia.

506. The plan contains no mention of tributaries of the Chattooga River or its West Fork. The quote above refers to "*the river*," not the tributaries of the river. Because the tributaries are not explicitly banned to boating, they are thus open to paddling as is every other stream in the region.

507. Several of these tributary streams are viable paddling resources, albeit rarely available based on the high flows required for recreational enjoyment. Banning a recreational use is a major federal action requiring analysis under NEPA and compliance with the APA.

J. There is no Rational Basis for Selecting 450 Cubic Feet Per Second (cfs) as a Flow Below Which No Floating Shall Occur.

508. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

509. The 2009 Amendment in the EA bans boating on several reaches and only allows boating on one reach if flows are above 450 cfs. There is no rational nor articulated basis for the selection of that flow.

510. The selection of 450 cfs as a cut off eliminates many optimal boating opportunities (that are not optimal angling flows), and forces paddlers to run the river at higher flows which some paddlers may not prefer.

511. Flows between 350 and 450 cfs for example offer *optimal* boating and *unacceptable* fly fishing. Shelby and Whittaker state that:

For many days in the “high overlap” period [350-650 cfs], boater-angler conflict and related capacity problems would be unlikely. These are lower quality angling days for all but bait anglers, and they tend to occur in winter when bait angling use is low. Some fly and spin anglers certainly fish these flows...but they have lower quality conditions in comparison to the other 320 days per year that they have lower flows.

512. However, the EA states that “At these overlap flows [referring to all overlap – both high and low] some users of each group could be present (if boating were allowed) and encounters could create impacts and conflict.”

513. Whittaker and Shelby 2007 conclude that if any management of boating and angling would be acceptable, it would be required during the “low overlap” period between 225-350 cfs.

514. There is no scientific basis in the record for boating (or angling) limits based on a 450 cfs cut-off, or above 350 cfs. Thus the preferred alternative is arbitrary and capricious.

515. In addition, the EA provides that “450 cfs is near the bottom end (within 100 cfs) of the optimal range for whitewater boating opportunities,” while in fact, the bottom end of the optimal flow range for standard boating is estimated to be at or below 350cfs.

516. In this context, 350 is not “near” 450. The difference makes an enormous difference in the number of boating opportunities and is extremely significant for paddlers.

517. Even when suggesting an alternative that would provide a miniscule amount of time where boating can occur, the Forest Service has unlawfully treated paddlers unequally by selecting a flow rate that is at the highest end of the range where fishing can comfortably take place, yet well above the low end of the flow rate where optimal boating can occur.

518. The USFS acknowledges that the procedure for allowing the minimum boating on one stretch depends on their staff somehow predicting a boatable day that will then be made available for paddling use. The USFS States: “A new gauge at Burrells Ford would be used to

help the Forest Service to declare a boatable day. (*See* Appendix C).” EA 29. The notion that one or more USFS officials will have the job of watching weather reports and stream gauges and then announcing a legal day of paddling is unrealistic.

519. Like many southern Appalachian streams, the upper Chattooga River is a flashy and unpredictable watershed. Paddlers make their own last minute decisions about where and when to paddle. Shelby and Whittaker 2007. 84-85.

K. The 2009 Amendment is Inconsistent with USFS Policy and Precedent

520. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

521. The USFS decision on the Chattooga flies in the face of precedent and accepted principles of river management.

522. River managers strive to provide the public with high quality non-motorized recreation experiences of all types.

523. River managers do not single out a single user group for management preference, and they do not limit uses unless absolutely necessary.

524. The USFS likely manages thousands of headwater streams. Virtually all of them are paddled and fished.

525. Nowhere in the United States, other than under Amendment 1 to the Revised Land and Resource Management Plan for the Chattooga, does the USFS:

- Ban non-commercial paddling (except one unboatable gorge in Oregon)
- Limit non-commercial paddling to certain moderate and high flow ranges
- Limit non-commercial paddling to certain seasons
- Require advance online reservations for any day-use.
- Require a fee merely to paddle (as opposed to access) a river

526. On no headwater stream in the entire region does the USFS impose any limit whatsoever on noncommercial floating. This is simply because floating steep headwater streams is a small and low-impact use that the agency supports everywhere but the Chattooga.

527. In the western United States on some large, high-demand rivers the USFS requires that paddlers acquire limited permits to ensure that the paddling experience remains high quality and that camping capacity is not exceeded. Those are not issues that were identified by the Forest Service in the Chattooga EA.

528. The paddling community broadly supports these policies. In those instances other uses typically do not have to acquire a permit because other uses are relatively much smaller and not in competition for the same resources.

529. On the Chattooga, boating is anticipated to be the smallest use and will not be in competition for resources with other visitors, therefore no unique boating limits are justified.

530. The discriminatory boating ban on the Chattooga is an unsupported, arbitrary and capricious management anomaly.

531. In four years of analysis the USFS failed to document a single biophysical impact of paddling, a single conflict, or that paddling would in any way cause the loss of the angling experience.

L. The 2009 Amendment Offers No Rationale for Allowing Boating Only In The Winter

532. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

533. The EA offers no rationale or justification for allowing paddling only in the winter in certain alternatives. Winter days are shorter and colder, making them less desirable for paddling trips.

534. The EA finds that:

Angler/boater encounters are more likely to occur in the winter months (December through February) when both groups are on the river in the middle of the day. As the weather warms by mid-March and April, boating concentrated in the middle of the day would likely produce relatively fewer boater/angler encounters as anglers are more likely to fish in the early morning before temperatures rise (Whittaker and Shelby 2007)

535. Thus, selecting an alternative that allows paddling only in the winter and not during the rest of the year with the aim of reducing encounters is arbitrary and capricious.

536. The 2009 Amendment violates the requirements of NEPA.

537. Plaintiffs incorporate the allegations set forth in the others parts of this Complaint as if fully set forth herein.

538. Under NEPA, the court must ensure that agency decision makers have taken the requisite “hard look” at the environmental consequences of its proposed action and that the agency decision is founded on a reasoned evaluation of the relevant factors.

539. In reviewing whether an agency’s decision complies with NEPA, a reviewing court must ultimately employ two criteria: it must decide (a) whether the agency in “good faith objectivity” has taken the required “hard look” at the alternatives; and (b) whether the discussion is detailed enough to permit those who did not participate in its preparation to understand and consider meaningfully the reasoning, premises, and data relied upon, and to permit a reasoned choice among different courses of action.

540. USFS decisions like the 2009 Amendment to the 2004 RLRMP must take a “hard look” at the environmental consequences of the proposed use and apply a “rule of reason.”

541. To take the requisite “hard look” agencies must consider and include some quantified or detailed information, otherwise, neither the courts nor the public, in reviewing the

Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

542. In particular, general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.

543. In the 2009 Amendment, just as in the 2004 RLRMP, the USFS makes vague, unsubstantiated statements about 'possible' effects without providing any hard evidence that impacts have or would occur.

544. The USFS took *4.5 years* to amend the illegal boating ban and failed to document a single impact of boating. Without offering any hard data to support its conclusions — and including unsubstantiated statements about 'possible effects' and in place of hard data—the USFS fails to take the requisite "hard look" at recreational use on the upper Chattooga River. The USFS has violated NEPA.

545. In addition, the NEPA's implementing regulations require agencies to *rigorously explore* and *objectively evaluate* all reasonable alternatives.

546. The USFS wholly failed to analyze reasonable alternatives that were in compliance with federal law. The USFS proposed alternatives leading up to the 2009 Amendment were fundamentally flawed, including in the following ways:

- No alternative proposes a capacity for uses
- No alternative analyzed allowing boating or any other form of recreation immediately below Grimshawes Bridge adjacent to private lands.
- No alternative analyzed banning boating on tributaries of the upper Chattooga River

- No alternative protects or enhances boating
- No alternative bans any use except boating.
- No alternative treated exiting uses and boating equitably
- No alternative considered immediately directly limited existing users
- No alternative considers the role of stocking exotic trout
- All alternatives immediately directly limit boating

547. By failing to consider reasonable alternatives and by failing to provide any scientific evidence to support the boating ban, the USFS's 2009 Amendment violates NEPA.

M. Incorporation of Pleadings and Exhibits from Motion for Temporary Restraining Order and Preliminary Injunction

548. Plaintiff Incorporates into this Complaint all pleadings and exhibits filed with Motion for Temporary Restraining Order and Preliminary Injunction. The declarations, affidavits, and associated exhibits are incorporated here in.

V. REQUESTED RELIEF

549. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

550. Plaintiffs respectfully request this Court to issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to cease their unlawful ban on recreational floating of the Headwaters of the Chattooga Wild and Scenic River.

551. Plaintiffs further request that this Court issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to withdraw any portions of the Forest Management Plans for the three National Forests that implement a ban of any kind on primitive floating.

October 14, 2009;
Greenville, South Carolina

NELSON GALBREATH, LLC

/s/ J. Nathan Galbreath

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

AMERICAN WHITEWATER, AMERICAN
CANOE ASSOCIATION, GEORGIA CANOEING
ASSOCIATION, ATLANTA WHITEWATER
CLUB, FOOTHILLS PADDLING CLUB,
WESTERN CAROLINA PADDLERS, 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.

Civil Action No. _____

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of October, 2009, copies of the foregoing **PLAINTIFFS' COMPLAINT, CIVIL COVER SHEET, AFFIDAVIT OF BRUCE HARE, AFFIDAVIT OF JOSEPH STUBBS, AFFIDAVIT OF KENNETH STRICKLAND; ANSWER TO L.R. 26.01 INTERROGATORIES; CORPORATE DISCLOSURE STATEMENT, MOTION FOR TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION, MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, DECLARATIONS OF DONALD KINSER, KEVIN COLBURN, DONALD HAAS and MARK BAIN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRO HAC VICE APPLICATION FOR JOHN D. AUSTIN, JR and APPLICATION FOR PRO HAC VICE ADMISSION OF R. BRIAN HENDRIX**

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

American Whitewater; American Canoe
Association; Georgia Canoeing Association;
Atlanta Whitewater Club; Foothills Paddling
Club; Western Carolina Paddlers; 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; and the United States Department of
Agriculture,

Defendants,

and

Richard Rust; Philip Rust; Henry Rust;
and the Whiteside Cove Association,

Intervenors.

C.A. No. 8:09-cv-02665-JMC

OPINION AND ORDER

Plaintiffs American Whitewater (“AW”), American Canoe Association, Georgia Canoeing Association, Atlanta Whitewater Club, Foothills Paddling Club, Western Carolina Paddlers, Joseph C. Stubbs, Kenneth L. Strickland, and Bruce A. Hare (“Hare”) (collectively “Plaintiffs”) bring this action alleging that the United States Department of Agriculture (“USDA”), through its agency, the United States Forest Service (“USFS”) (collectively with the named agency defendants and named individual defendants in their official capacity “Defendants”), unlawfully infringed upon Plaintiffs’ right to use and enjoy the Chattooga River (the “Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters” or “Upper Chattooga”) through hand-powered floating.¹ Now before the court are Plaintiffs’ Motion for Preliminary Injunction [Doc. # 15], Plaintiffs’ related Motion for Reconsideration of Temporary Restraining Order [Doc. # 35], Defendants’ Motion to Dismiss [Doc. # 44], the Rust Family and Whiteside Cove Association’s (“Intervenors”) Amended Motion to Dismiss [Doc. # 69], and Motion by Government Defendants to Exclude Some of the Plaintiffs’ Proposed Exhibits and Witnesses [Doc. # 84].

FACTUAL AND PROCEDURAL HISTORY

The Chattooga River is a natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northeastern Georgia. Only those remote and northernmost twenty-one miles of the Chattooga above South Carolina Highway 28 are at issue in this case.

¹The terms “floating” and “boating” are used herein to describe water activities such as canoeing, kayaking, whitewater rafting, or other similar paddling activities. Floaters or boaters are used to describe those who engage in these activities.

In 1974, Congress designated the entire Chattooga as a “Wild and Scenic River” under the Wild and Scenic Rivers Act (“WSRA” or “Act”).² Under this designation, the river was and is protected as a valuable natural resource to be preserved for present and future use. *See* 16 U.S.C. § 1271. Under the WSRA, the USDA was placed in charge of managing the Chattooga in compliance with the Act, *see* 16 U.S.C. § 1281(d), and the USDA primarily executed its management responsibilities through the USFS. In 1976, the USFS instituted the 1976 Chattooga Wild & Scenic River Classifications, Boundaries and Development Plan (the “1976 Plan”) to manage the use of the resources available at and around the Chattooga. In 1978, the USFS promulgated final regulations which prohibited all private and commercial floating on the entire Chattooga River without a permit. 36 C.F.R. 261.77 (2010). The summary of the agency action provided that permits would “include conditions of use to protect river values and provide for floater safety.” *See* 43 Fed. Reg. 3706 (Jan. 27, 1978). While safety was noted as a concern, the agency provided no detailed purpose for enacting this prohibition. Although the regulation prohibited floating on the entire Chattooga, the USFS permitted floating on the lower portion of the Chattooga River below South Carolina Highway 28. There was allegedly no posting regarding the ban on or near the Chattooga Headwaters and floaters continued to use this portion of the river for floating activities. However, the USFS did not permit floating on the Headwaters and noted this continued prohibition under a new management plan in 1985, the Sumter National Forest Land and Resource Management Plan (the “1985 Plan”).

²In 1968, Congress enacted the Wild and Scenic Rivers Act to preserve certain rivers of the United States which “possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” 16 U.S.C. §§ 1271-1287 (2009).

Plaintiffs claim that floaters did not learn of the prohibition until several years after the institution of the 1985 Plan, and it was at this time that interested parties allegedly began efforts to lift the ban. As a result of an official challenge in 2003, the USFS agreed to analyze the reasons for disallowing floating on the Headwaters under the various plans. Unfortunately, in the 2004 Revised Sumter National Forest Land and Resource Management Plan (the “2004 Plan”) issued by the Regional Forester, the USFS determined that the floating prohibition was warranted without substantial analysis or explanation. In April 2004, AW filed an administrative appeal of the 2004 Plan. The USFS Reviewing Officer of the Chief of the Forest Service (“Reviewing Officer”) reversed the Regional Forester’s decision to continue the floating ban on the Headwaters. In her decision, the Reviewing Officer stated:

I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.

(Decision for Appeal of the Sumter National Forest Land and Resource Management Plan Revision, at 6 (April 2004)). The Reviewing Officer further directed the Regional Forester to conduct a visitor use capacity analysis of the Headwaters and to adjust or amend the 2004 Plan based on the findings. The Reviewing Officer estimated that the analysis would be completed in approximately two years. Because the Reviewing Officer reversed the section of the 2004 Plan concerning the floating ban, she also provided for an interim management direction reverting back to the 1985 Plan for the management of floating on the Headwaters. This interim management direction effectively continued the floating prohibition.

In May 2006, AW filed suit in the United States District Court for the Northern District of Georgia challenging the Reviewing Officer's decision to revert to the 1985 Plan for the interim management of the Headwaters.³ AW requested the court to set aside the Reviewing Officer's 2005 decision perpetuating the ban until the USFS issued an amendment to the 2004 Plan. *American Whitewater, et al v. Bosworth, et al*, C.A. No. 2:06-cv-00074-WCO (N.D. Ga. Oct. 6, 2006). AW argued that the Reviewing Officer's interim management decision was arbitrary and capricious in that it directly conflicted with her analysis that the incorporation of the ban in the 2004 Plan was inadequately supported. *Id.*

The court declined to grant AW the relief it sought on the grounds that it lacked standing because the alleged injury - the prohibition against floating on the Headwaters - was not traceable to the Reviewing Officer's 2005 decision, but was derived from the 1985 Plan. The court also found that the issue was not ripe for review. In discussing the ripeness of the Reviewing Officer's decision, the court stated:

Despite the order's last sentence [stating that the decision was final and appealable], the court agrees with defendants on this issue. While the order setting aside the 2004 plan constitutes final agency action, the decision to *temporarily* revert to the 1985 plan while an amended plan is developed is just that, temporary. . . . Whether that amended plan renews or lifts the floating ban, the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time.

Id. at 12-13. While the court found that AW's suit was not ripe, the court noted that AW only challenged the interim floating ban and not the 1985 Plan. The court also noted that any hardship experienced by AW would last for only a short period while the USFS amended the 2004 Plan and

³The Chattooga River also flows through Georgia. Therefore, the United States District Court for the Northern District of Georgia had jurisdiction to hear the matter and the suit was filed in Georgia for the convenience of counsel at that time.

that the affected parties, by order of the Reviewing Officer, would be involved in the visitor use capacity analysis. *Id.* at 17-18.

In August 2009, the USFS issued the 2009 Amendments to the 2004 Plan which allowed very limited floating on the Headwaters from December 1 through March 1 only when river flow levels reach approximately 450 cubic feet per second or higher. Plaintiffs filed the instant action in October 2009, and sought a temporary restraining order (“TRO”) and preliminary injunction to require the USFS to entirely lift any and all prohibition against floating on the Headwaters. In addition to alleging a violation of the WSRA, Plaintiffs also allege in their Complaint that Defendants’ actions violate the Wilderness Act, the Multiple-Use Sustained-Yield Act, the Forest and Rangeland Renewable Resources Planning Act, the National Forest Management Act and its implementing regulations, the Administrative Procedures Act (“APA”), and the National Environmental Policy Act and its implementing regulations.

This court heard Plaintiffs’ motion for TRO and denied that motion, in part, on the basis that court intervention was not necessary because the 2009 Amendments allowed at least some access to floating on the Headwaters. The court granted the TRO to the extent it allowed Plaintiffs to proceed with the administrative appeals process without waiving any rights to proceed with judicial review.

Several entities brought administrative appeals challenging the 2009 Amendments, including Plaintiffs. Approximately one week after the court’s decision on the TRO, Defendants issued a stay of the 2009 Amendments based on a request from a third party. Consequently, floating on the Headwaters was effectively completely banned again. Plaintiffs promptly filed a motion for reconsideration of the TRO based on Defendants’ stay of the implementation of the 2009

Amendments.

In December 2009, the USFS withdrew its decision notices concerning the 2009 Amendments and indicated that it planned to conduct further analysis before issuing new amendments to the 2004 Plan. According to the USFS, the discovery of inconsistencies in the decision documents prompted the withdrawal. As a consequence, on that same date, the Deputy Regional Forester and Appeal Reviewing Officer dismissed the five pending appeals based on the withdrawal of the decision notices.

Defendants filed a motion with the court to dismiss Plaintiffs' claims for lack of jurisdiction on the grounds that the action is moot and because Plaintiffs have failed to exhaust administrative remedies. The Rust Family and the Whiteside Cove Association, private land owners whose land is adjacent to the Chattooga River, moved to intervene and dismiss Plaintiffs' action on similar grounds.

DISCUSSION

I. Defendants' Motion to Dismiss

Defendants seek to dismiss Plaintiffs' action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Defendants contend that Plaintiffs' claims for relief from the 2009 Amendments became moot once the USFS withdrew the decision notices concerning the amendments. Defendants further argue that, even if Plaintiffs' claims are not moot, Plaintiffs have failed to exhaust administrative remedies as required by statute. Therefore, any judicial action is not yet ripe.

"When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond*,

Fredericksburg & Potomac Railroad Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991) (internal citations omitted). The court should consider the allegations contained in the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.* In determining whether jurisdiction exists, the court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* The moving party should prevail only if there is no dispute of material jurisdictional facts and the moving party is entitled to prevail as a matter of law. *Id.*

A. Mootness

The court's exercise of its power of judicial review depends on the existence of a case or controversy. *Preiser v. Newkirk*, 422 U.S. 395 (1975). "A case becomes moot whenever it loses its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (internal citations omitted). Stated otherwise, a case becomes moot once the parties no longer maintain a legally cognizable interest in the outcome. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations omitted).

There are two exceptions to mootness: challenges to conduct "capable of repetition yet evading review" and "voluntary cessation of the allegedly unlawful conduct." *Los Angeles v. Lyons*, 449 U.S. 934, 935 n. 1 (1980). If one of the exceptions to mootness applies, then the central inquiry becomes whether the court can render any effective relief. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *see also Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065

(9th Cir. 2002) (only if effective relief is still available to counteract the effects of the alleged violation is the controversy live and present).

The first mootness exception applies where (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). “[T]he ‘capable of repetition’ exception requires a ‘reasonable expectation’ or a ‘demonstrated probability’ that ‘the same controversy will recur involving the same complaining party.’ [Supreme Court] cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it ‘will again be subjected to the alleged illegality,’ or ‘will be subject to the threat of prosecution’ under the challenged law.” *Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (internal citations omitted).

The second exception to the mootness doctrine occurs when there is a voluntary cessation of the allegedly unlawful activity. Under this exception, a defendant carries the heavy burden to demonstrate there is no reasonable expectation that the allegedly wrongful behavior will recur. *Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv.*, 528 U.S. 167, 189 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). A party asserting mootness may also meet its burden by establishing that “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Davis*, 440 U.S. at 631; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998). Courts are prudent in granting dismissals in the context where the plaintiff could be exposed to the substantial risk of having to run to court repeatedly, only to be stymied each time as the defendant voluntarily, but temporarily, ceases its actions. *See Laidlaw*, 528 U.S. at 189.

The court applies the voluntary cessation exception in this case. In their memorandum, Defendants state that the “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.” Def. Mem. in Supp. of Mot. to Dismiss, at 9. However, Defendants’ counsel recognized at the hearing on the motion that the decisions were withdrawn to correct inconsistencies within the decisions, and it was likely that the USFS would issue new decisions continuing at least a partial ban against floating on the Headwaters. Defendants also have a long history of enacting decisions which prohibit or place stringent limitations against floating on the Headwaters. *See supra*, 1976 Plan and 1984 Plan. Plaintiffs challenge not only the limited floating allowed by the 2009 Amendments, but the broader ability of Defendants to place *any* limitation against floating on the Headwaters.

“Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule.” *Dow Chemical Co. v. Env’tl. Prot. Agency*, 605 F.2d 673, 678 (3rd Cir.1979). “Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn.” *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498 (1911)). Furthermore, when an agency withdraws an order while maintaining that the legal position of the order remains justified or is likely to be reinstated, repetition is likely, and the claim should not be considered moot. *See Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982).

Based on the agency history combined with the indication that the agency's decision would probably not deviate dramatically from its previous stance on the issue, there is a "reasonable expectation" that the same controversy or allegedly wrongful behavior will recur and potentially escape review by this court due to continuous revisions. Therefore, Plaintiffs' claims are not moot simply because the decision notices have been withdrawn.

B. Exhaustion of Remedies

Defendants argue that dismissal is also appropriate because Plaintiffs are required to exhaust administrative remedies prior to seeking relief from this court. Defendants essentially contend that the 2009 Amendments were not final agency decisions subject to review; and therefore, Plaintiffs must wait until all agency level appeals of the 2009 Amendments (or now, their forthcoming replacements) are completed before requesting judicial review in accordance with agency regulations.

The APA authorizes judicial review of a final agency action for which there is no other adequate remedy in court. *See* 5 U.S.C. § 704 (2009). Although section 10(c) of the APA only permits review of agency actions that are "final," any definitive agency decision is considered "final," and therefore reviewable, unless the agency's regulations require exhaustion as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 153 (1993). Agency regulations explicitly require exhaustion as a prerequisite to judicial review. 36 C.F.R. § 215.21 ("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)").

Agency action may be "final" upon the satisfaction of two conditions: (1) the action must mark the consummation of the agency's decision making process – it must not be merely tentative

or interlocutory in nature; and (2) the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In determining whether an agency action is final, a court should consider: (1) whether the agency’s position is definitive; (2) if the agency’s actions affect the plaintiff’s day-to-day activities; (3) whether judicial relief is likely to interfere with the proper functioning of the agency and would be a burden to the courts; (4) whether judicial intervention would deny the agency an opportunity to correct its own mistakes and to apply its expertise; and (5) whether judicial intervention would lead to piecemeal review which is inefficient and possibly unnecessary. *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 239-242 (1980).

While an amendment to an agency regulation or decision may not always meet the requirements of a final agency decision, the 2009 Amendments issued by the USFS do. They qualify as the consummation of the agency’s decision making process in this case and they definitively set forth the rights of boaters to float on the Headwaters. Here, Plaintiffs’ legal challenge to Defendants’ limitations against floating on the Headwaters began with the administrative appeal of the 2004 Plan. They were successful in their efforts to demonstrate that the agency’s decision to continue the prohibition against floating was arbitrary and capricious. However, their success was a hollow victory which resulted in the agency’s temporary reversion to the 1985 Plan which also contained a prohibition against floating the Headwaters. Plaintiffs sought judicial review of the Reviewing Officer’s decision. At that time, Plaintiffs challenged only the 2005 Decision on Appeal determination to temporarily revert to the 1985 Plan for the interim management of the Headwaters pending issuance of an amendment to the 2004 Plan. The 2009 Amendments were issued in August

2009 and set forth the revised parameters for floating on the Headwaters based on the agency's analysis of various information.

The instant situation is distinctly different from the posture of the case before the District Court for the Northern District of Georgia. That court found that Plaintiffs' suit was premature given the temporary nature of the Decision on Appeal and the availability of judicial review after issuance of the agency decision revising the 2004 Plan. No appeals were taken from that court's order. The 2009 Amendments were issued and, as the United States District Court for the Northern District of Georgia instructed, Plaintiffs sought judicial review. The 2009 Amendments were not temporary, tentative, or interlocutory in nature. In fact, they were the complete opposite - actions intended to be permanent resolutions to the matter first appealed in 2004 and actions that would likely be in place now but for the agency's withdrawal of the decision notices. Consequently, the 2009 Amendments are final agency decisions susceptible of judicial review. However, even assuming exhaustion of administrative remedies applied to the 2009 Amendments, Plaintiffs' circumstances qualify for an exception to the exhaustion requirement.

"The exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'" *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991) (citing *Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987)). However, there are exceptions to the requirement that parties exhaust administrative remedies before seeking judicial review. Exceptions to the doctrine exist where "(1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be

futile.” *Id.* “Absent a clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty, a litigant’s prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion.” *Thetford Properties IV Ltd. Partnership v. U.S. Dep’t of Housing & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990).

As demonstrated above, Defendants have an established record of prohibiting floating on the Headwaters. They have represented to this court that there will be at least some degree of prohibition against floating on the Headwaters in the future. Plaintiffs are opposed to any level of floating bans on the Headwaters. Therefore, it is almost a certainty that Plaintiffs will fail in pursuing the relief they request before the agency. In this matter, requiring the exhaustion of administrative remedies would be futile.

Accordingly, the court will not dismiss Plaintiffs’ claims for failure to exhaust administrative remedies.

C. Statute of Limitations

Aside from Plaintiffs’ alleged failure to properly challenge the 2009 Amendments through the administrative appeals process, Defendants further contend that Plaintiffs have not challenged the regulations and actions prohibiting floating on the Upper Chattooga, either 36 C.F.R. § 261.77⁴ or the 1985 Plan, within the established statute of limitations. Defendants particularly argue that Plaintiffs’ Complaint mounts, at most, only a facial challenge to the agency actions and that Plaintiffs’ attempt to couch their Complaint in broader terms of a constitutional claim does not convert the impermissible facial challenge into a viable one.

⁴This regulation was promulgated in 1978 and officially prohibited all floating on the Chattooga except where allowed by permit issued by the USFS.

A general six-year statute of limitations applies to “every civil action commenced against the United States.” 28 U.S.C. § 2401(a) (2009). A challenge to a procedural violation in the adoption of a regulation or other agency action must be brought within six years of the decision. Similarly, a facial challenge to the regulation or action must also be brought within six years of the decision. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991).

However, a party may contest the substance of an agency decision as exceeding constitutional or statutory authority later than six years following an agency decision by filing a complaint for review of the adverse application of the decision to the party. *Id.*

As applied to rules and regulations, the statutory time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it. For unlike ordinary adjudicative orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

NLRB Union v. Federal Labor Relations Authority, 834 F.2d 191, 195-96 (D.C. Cir. 1987) (quoting *Functional Music, Inc. v. Fed. Comm’n Comm’n*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)). A party may also obtain judicial review of a regulation outside of the statutory time limitation by petitioning the agency for amendment or rescission of the applicable regulation and then appealing the agency’s decision regarding the petition.⁵ *Id.* at 196.

⁵Certain Plaintiffs appeared to originally follow the course of action suggested by this latter method of obtaining judicial review by requesting an amendment to the 1985 Plan. That request resulted in the implementation of the 2004 Plan which continued the ban. Instead of appealing the agency decision denying the request to modify the 1985 Plan, those plaintiffs only pursued judicial review of the agency Reviewing Officer’s decision to replace portions of the 2004 Plan with an interim management directive. *See American Whitewater, et al v. Bosworth, et al*, C.A. No. 2:06-cv-00074-WCO (N.D. Ga. Oct. 6, 2006) (dismissing plaintiffs’ case as premature and noting possible statute of limitations issues). No appeal was taken from the district court’s order; therefore, review of Plaintiffs’ petitions to amend the 1985 Plan has been waived.

While Plaintiffs have missed the opportunity to make facial challenges to 36 C.F.R. 261.77 and the 1985 Plan, they are within the statutory time frame to challenge the 2009 Amendments to the 2004 Plan. Notwithstanding their ability to facially challenge the Headwaters' floating prohibition through the 2009 Amendments, Plaintiffs may also bring an "as applied" challenge to the regulations. Although worded broadly, the Complaint in this case achieves that task. The claims articulated in the Complaint challenging the regulations and actions prohibiting floating on the Headwaters stem, not merely from abstract disagreement with the policies, but from the direct application of those policies in a way that has burdened and continues to burden Plaintiffs' specific rights to currently enjoy the benefits of the Upper Chattooga. Particularly, the Complaint alleges, *inter alia*, that members of AW, the Georgia Canoeing Association, and Mr. Bruce Hare are presently prohibited from floating on the Headwaters. *See* Complaint at ¶¶ 11, 18, and 37. As additional support for their "as applied" challenge and in rebuttal of Defendants' statute of limitations argument during the hearing, Plaintiffs submitted correspondence wherein AW sought a special use permit to float on the Headwaters and was denied such permit based on the existing agency rules and regulations. *See* Pl. Ex. 15 and 16.⁶

⁶Defendants filed their Motion by Government Defendants to Exclude Some of the Plaintiffs' Proposed Exhibits and Witnesses [Doc. # 84] one day prior to the hearing on the motions addressed in this order. At the beginning of the hearing, the parties informed the court that they had resolved the evidentiary matters at issue in the motion and there was no need for the court to rule upon the motion. However, Plaintiffs reserved the right to introduce certain evidence depending on the nature of the arguments developed during the hearing. After Defendants presented arguments to the court asserting that Plaintiffs' claims were barred by the statute of limitations, Plaintiffs sought to introduce Plaintiffs' Exhibits 15 and 16, which consist of correspondence from AW requesting a special use permit to float on the Headwaters and the USDA's correspondence denying the same. Plaintiffs contend that these exhibits were introduced in rebuttal of Defendants' statute of limitations argument. Defendants and Intervenor objected to the admission of Plaintiffs' Exhibits 15 and 16 at the hearing arguing, in large part, that the exhibits should be disallowed because they were not part of the administrative record below and that Plaintiffs impermissively submitted them for the court's

Because the court finds that Plaintiffs' challenge to the 2009 Amendments is not moot, Plaintiffs are within the statute of limitations to make a facial challenge to the USFS actions related to the floating prohibitions. Plaintiffs also have made a sufficient "as applied" challenge to the subject regulations. Therefore, their Complaint also withstands Defendants' statute of limitations argument on this ground.

II. Intervenor's Motion to Dismiss

Intervenors moved to dismiss Plaintiffs' Complaint pursuant to the provisions of Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Intervenors substantially adopted Defendants' position as to dismissal under Rule 12(b)(1) and also stated that, even if the Motion to Dismiss was not granted under that rule, it should be granted pursuant to Rule 12(b)(6), concerning the portion of the Complaint that seeks relief regarding that section of the Chattooga River that flows through the private property of the Intervenors.

As to Intervenors' Rule 12(b)(1) argument, it is denied for the same reasons as set forth above in Part I, *supra*.

review of an "as applied" challenge to the regulation that does not appear in the Complaint. The court allowed Plaintiffs to make their rebuttal argument using the exhibits, but reserved the ruling on admissibility pending further review. "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *United States v. Abel*, 469 U.S. 45, 54 (1984). The preliminary injunction procedure is generally less formal than a trial on the merits and often encompasses a more lenient view of evidentiary matters. *American Angus Ass'n v. Sysco Corp.*, 829 F. Supp. 807, 816 (D.C.N.C. 1992) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). The court is allowed some latitude to determine relevant evidence where necessary to prevent irreparable harm. *Id.* (citing 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2949). Therefore, the court now admits Plaintiffs' Exhibits 15 and 16 on the grounds that they are relevant to the court's analysis of the statute of limitations issue and its determination of whether injunctive relief is justified in this matter.

In regard to Intervenor's alternative argument that Plaintiffs' Complaint should be dismissed as it would apply to the section of the river flowing through Intervenor's property, the court also declines to dismiss the Complaint on this basis. Plaintiffs conceded that they seek no injunctive relief which will affect Intervenor's private property adjacent to the river. However, both parties vigorously dispute whether the property over which the river actually flows is private property. The dispute turns on the determination of navigability. The Supreme Court has held that navigability "involve[s] questions of law inseparable from the particular facts to which they are applied," and navigability of a particular river "is, of course, a factual question." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940); *see also New York State Dept. of Env'tl. Conservation v. Fed. Energy Reg. Comm'n*, 954 F.2d 56, 60 (2nd Cir. 1992).

Because there are unresolved issues of fact regarding the navigability of the river, it is not appropriate to dismiss Plaintiffs' Complaint concerning this portion of the Chattooga at this stage in the litigation.

III. Plaintiffs' Motion for Reconsideration of TRO; Plaintiffs' Motion for Preliminary Injunction

The parties agreed at the hearing on these motions that Plaintiffs' Motion for Reconsideration of the TRO was effectively collapsed into Plaintiffs' Motion for Preliminary Injunction. Therefore, the court will not render any separate order on Plaintiffs' request for reconsideration. Instead, the court will move forward with its determination of the prudence of issuing a preliminary injunction in this case.

"A preliminary injunction is an 'extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.'" *MicroStrategy Inc.*

v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001); *see also Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated by* 103 S. Ct. 2371 (April 26, 2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. June 8, 2010). Generally, the goal 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.” *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). In contrast, mandatory preliminary injunctions compel action and, typically, do not preserve the status quo. Therefore, mandatory preliminary injunctions should be sparingly exercised and granted “only in those circumstances when the exigencies of the situation demand such relief.” *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). “[A] mandatory preliminary injunction must be necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court’s ability to enter ultimate relief on the merits of the same kind.” *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526.

To determine whether a plaintiff is entitled to a preliminary injunction, the plaintiff must demonstrate “(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). “[A]ll four requirements must be satisfied.” *Real Truth About Obama, Inc.*, 575 F.3d at 346; *see also Winter*, 129 S. Ct. at 376.

A. Injunctive Relief Against Defendants

Plaintiffs request that the court enjoin “Defendants from enforcing any of their Headwaters floating prohibitions” and order “Defendants to withdraw or remove any portions of the Revised

Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests that implement a ban of any kind on floating the Chattooga.” Pl. Memo. in Supp. of Preliminary Injunction, at 3.

The regulations promulgating the floating prohibitions at issue have been in place for more than thirty (30) years. Therefore, the requests by Plaintiffs do not seek to maintain the status quo, but are requests for mandatory preliminary injunctive relief. Accordingly, the court must be more scrutinizing in its determination of whether mandatory relief is warranted. *In re Microsoft Antitrust Litig.*, 333 F.3d at 525.

1. Success on the Merits

Plaintiffs contend that they are entitled to injunctive relief against Defendants because they can demonstrate that they are likely to succeed on the merits. Because a preliminary injunction grants relief on a temporary basis prior to trial, the party seeking the preliminary injunction must demonstrate that it is likely to succeed on the merits at trial by “a clear showing” and may not rest on merely the probability of success. *Real Truth About Obama, Inc.*, 575 F.3d at 345 (citing *Winter v. Nat’l Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008)), *vacated by* 103 S. Ct. 2371 (April 26, 2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. June 8, 2010).

Plaintiffs allege that Defendants’ actions are in direct contravention of the statutes governing the agencies and the resources they are empowered to protect. Specifically, Plaintiffs note that the WSRA directs Defendants “to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” *See* 16 U.S.C. § 1281(a). Plaintiffs further note that floating is one of the outstanding remarkable values (“ORV”) that caused the

Chattooga, particularly the Headwaters, to be designated as a wild and scenic river. *See generally*, 1971 Study. Therefore, Plaintiffs contend Defendants' institution of a complete prohibition against floating on the Headwaters is a direct violation of the statutory mandate demonstrating that Plaintiffs are likely to prevail on the merits.

Conversely, Defendants argue that its decisions regarding floating on the Headwaters are nothing more than necessary regulation to balance the many uses and ORVs for which the Chattooga was designated as wild and scenic. The other uses and ORVs include hiking, hunting, fishing, and camping. In this way, Defendants claim to fulfill the very essence of the requirements under the statute - that is to protect and enhance all values, not just one value.

In making this determination, the court notes that floating is one of the ORVs of the Chattooga, but it cannot overlook the many other values which caused the river to be included in the Act. Indeed, the WRSA contemplates that some level of regulation is necessary to balance the river's ORVs. By the same token, the court does not take lightly the agency's own Reviewing Officer's assessment revealing some of the flaws in the previous ban contained within the 2004 Plan. Additionally, the agency has submitted little support for the ban contained in the 1985 Plan and has admittedly withdrawn the 2009 Amendments due to irregularities. Based on the agency's past inability to substantiate the reasons for wholly banning floating on the Headwaters, Plaintiffs may have some chance of success on the merits. However, at this stage of the proceedings, Plaintiffs have not met the heightened burden required to sanction mandatory relief.

2. Irreparable Harm

Plaintiffs also claim that they will suffer irreparable harm without the issuance of injunctive relief. Plaintiffs seeking injunctive relief must demonstrate that irreparable harm is likely in the

absence of an injunction, not merely speculative. *Winter*, 129 S. Ct. at 376. Plaintiffs seeking injunctive relief must do more than establish the “‘possibility’ of irreparable harm.” *Id.* at 375. Instead, the “frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate injury is *likely* in the absence of an injunction.” *Id.* (emphasis supplied) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)); see also *Real Truth About Obama, Inc.*, 575 F.3d at 346-48 (holding that the preliminary injunction standard articulated in *Winter* has overruled the Fourth Circuit’s previous standard for preliminary injunctions found in *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977)). The harm to be prevented must be of an immediate nature and not simply a remote possibility. *In re Microsoft Antitrust Litig.*, 333 F.3d at 527.

The primary source of harm alleged by Plaintiffs is the loss of opportunities to experience floating on the Headwaters of the Chattooga. In particular, Plaintiff Hare testified that he had enjoyed experiences in the very waters at issue as a child, and now, is denied that experience day after day, with little hope that he will be able to float on the Headwaters again. However, he also agreed with Defendants that the water levels of the Chattooga naturally limit floating on the Headwaters to very few days during any given year. Although Hare presented moving testimony, the fact that he and others will not have imminently unfettered access to the Headwaters is not the type of immediate and irreparable harm which merits the imposition of a mandatory preliminary injunction.

Plaintiffs’ claim of injury is incompatible with those cases cited to this court in support of their position. Most notably, Plaintiffs cited *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), *rev’d on other grounds by Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997), wherein that court considered the issuance of a preliminary injunction to stop a timber project which would

have caused the death of thousands of migratory birds. In *Martin*, the plaintiffs presented the court with clear evidence of the number of deaths that would occur without court intervention. *Id.* at 1565. Plaintiffs also cited *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993). The *Espy* court addressed a request for an injunction against the capture of pregnant bison near Yellowstone National Park for a scientific experiment in which the bison would be infected with bacteria and later forced to endure abortions. There, the plaintiffs alleged irreparable injury to the aesthetic interest of viewing the bison “and the prospect of viewing the less than humane baiting and capturing of the bison with the knowledge of their destination and fate.” *Id.* While these cases may involve concerns for a natural resource, the immediate and urgent nature of the irreparable injuries displayed in the cases cited by Plaintiffs is not exhibited in the instant case.

The United States District Court for the District of the Virgin Islands has examined a case which concerned only a lost opportunity to experience a resource. *See Rivera v. United States*, 910 F. Supp. 239 (D.V.I. 1996). In *Rivera*, the plaintiffs brought suit against the United States government concerning the closing of a public island beach due to a partial government shutdown caused by a budget dispute. The plaintiffs sought an injunction prohibiting the government from closing the island beach to the public. *Id.* The beach was included as public land for recreation and enjoyment by presidential proclamation. The proclamation provided, in part, that:

Provided, that neither the Department of the Interior, nor any other agency or instrumentality of the United States, shall adopt or attempt to enforce any rule, regulation or requirement limiting, restricting or reducing the existing fishing (including the landing of boats and the laying of fishpots outside the marine garden), bathing or recreational privileges by inhabitants of the Virgin Islands, or charge any fees for admission to the area.

Proclamation No. 3443, reprinted in 1962 U.S.C.C.A.N. 4169-70. In addition to the clear violation

of the presidential proclamation, the district court found that the plaintiffs' loss of enjoyment of the use of the beach was an irreparable hardship and "not a mere inconvenience that this Court should treat as de minimis." *Rivera*, 910 F. Supp. at 243.

The instant case is patently distinguishable from *Rivera*. The *Rivera* court was presented with a request for a prohibitory injunction to preserve the status quo. Here, Plaintiffs petition the court for mandatory injunctive relief, asking the court to disrupt the status quo of Defendants' decades-long regulation of the Chattooga and potentially cede from other users' enjoyment which may rightfully belong to them. Understandably, Plaintiffs are disappointed in not being able to freely access this portion of the river as they would like. However, Plaintiffs are not denied total use of a natural resource as was the case in *Rivera*. Plaintiffs have access to the Chattooga River to experience floating on the lower portion of the river and experience different ORVs in other areas. Unlike the cases cited above, Plaintiffs present this court with only a partial loss of opportunity to participate in one particular activity. Plaintiffs are not being denied the opportunity to enjoy the resource on a wholesale basis in this case and the loss of opportunity claimed is one that will recur, absent harm to the natural resource, once the merits of the matter are determined.

This court remains concerned about whether Defendants have properly exercised its regulatory authority to wholly prohibit floating on the Headwaters. However, Defendants' limitation of one use within an isolated section of the river does not rise to the level of harm required to warrant the imposition of a mandatory injunction - particularly where it is unclear whether Plaintiffs are likely to succeed on the merits.

3. Balance of Hardships

The third factor the court must consider is whether a preliminary injunction is justified

considering the balance of hardships between the litigants. In making this determination, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 129 S. Ct. at 376 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

Plaintiffs claim that, without preliminary relief, they will continue to be wholly prohibited from floating on the Headwaters for an indeterminate amount of time subject only to the discretion and whim of Defendants. Defendants, on the other hand, argue that completely lifting its regulations or imposing different regulations concerning floating on the Headwaters would lead to more difficulty in implementation of balancing all uses by the agency and will likely disrupt existing uses. Both sides submit persuasive arguments on this factor. However, because injunctive relief in favor of Plaintiffs would have a sweeping effect on all users of the Headwaters, in addition to Defendants, the court finds that the balance of the hardships disfavor Plaintiffs in this case.

4. Public Interests

The final factor that must be considered in determining the propriety of a preliminary injunction is whether such an injunction would be in the public interest. Similar to the balance of hardships between the parties, the public interest factor seeks to evaluate the impact of the issuance of injunctive relief relative to the interest of the public at large. *See* 11 A. Wright & A. Miller, *Federal Practice & Procedure*, § 2948.4. The court “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S. Ct. at 377. As mentioned above, the impact of injunctive relief could potentially affect multiple classes of users and other recreational uses on the Headwaters of the Chattooga. Balancing the ORVs is an important goal of the WSRA, and the charge of overseeing that balance has been delegated to Defendants. It

is not in the public interest to remove all regulation against floating on the Headwaters without a further hearing on the merits to determine whether Defendants have appropriately discharged their statutory obligations.

Consequently, the court denies Plaintiffs' request for preliminary injunctive relief against Defendants.

B. Injunctive Relief Against Intervenor

Intervenor contend that, even if injunctive relief is warranted against Defendants, such relief is not appropriate as to Intervenor.

First, it is not clear that Plaintiffs would prevail on the merits regarding this portion of the Chattooga. The parties strongly contest the navigability of the waters; and therefore, the issues as to whether or not this portion of the Chattooga is private property remains unresolved at this point in the litigation. The section of the Chattooga which crosses the Intervenor's property only spans approximately two miles and the balance of equities and public interest tip in favor of the private landowner here. Although it is well established that the United States has the power to regulate conduct on non-federal land when necessary to protect adjacent federal property, *see U.S. v. Lindsey*, 595 F.2d. 5, 6 (9th Cir. 1979), the courts also have a strong interest in protecting private property. *See U.S.C.A. Const. Amend. V.* Therefore, injunctive relief as to the section of the Chattooga which crosses the Intervenor's property is not appropriate at this time.

Accordingly, the court denies any preliminary injunctive relief to Plaintiffs as to the section of the River abutting Intervenor's property.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [Doc. # 44] and Intervenor's

Amended Motion to Dismiss [Doc. # 69] are **DENIED**. Plaintiffs' Motion for Preliminary Injunction [Doc. # 15] and Plaintiffs' related Motion for Reconsideration of Temporary Restraining Order [Doc. # 35] are also **DENIED**. Motion by Government Defendants to Exclude Some of the Plaintiffs' Proposed Exhibits and Witnesses [Doc. # 84] is **GRANTED IN PART, AND DENIED IN PART** to the extent that Plaintiffs' Exhibits 15 and 16 are admitted as indicated herein. It is further ordered that Defendants answer Plaintiffs' Complaint within thirty (30) days from the date of this Order.

IT IS SO ORDERED.

s/ J. Michelle Childs
United States District Judge

Greenville, South Carolina
December 2, 2010

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

AMERICAN WHITEWATER, ET AL.,)	
)	
Plaintiffs,)	
	)	8:09-2665
-versus-)	
	)	October 13, 2010
)	
THOMAS TIDWELL, ET AL.,	)	Greenville, SC
)	
Defendants.)	

TRANSCRIPT OF MOTIONS

BEFORE THE HONORABLE J. MICHELLE CHILDS
UNITED STATES DISTRICT JUDGE, presiding

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The proceedings were taken by mechanical stenography and
the transcript produced by computer.

Wednesday, October 13, 2010

THE COURT: The Court has before it the matter of American Whitewater vs. Tidwell, et al. on both sides. Case No. 8:09-2665-JMC. If the parties would indicate on the record who will be presenting today starting with the plaintiffs.

MR. GALBREATH: Your Honor, Nathan Galbreath on behalf of the plaintiffs. And my co-counsel Brian Hendrix is here as well.

THE COURT: Okay.

MR. DOUGLAS: Your Honor, John Douglas on behalf of the government defendants.

THE COURT: Thank you.

MR. JENKINS: Your Honor, Alan Jenkins and Jim Logan on behalf of the Rust family and Whiteside Cove Association.

THE COURT: Okay. Thank you all.

MR. GALBREATH: Your Honor, may it please the Court? I know there was an evidentiary matter that was before the Court prior to the hearing. And hopefully word has made it back, the parties have reached agreement on that evidentiary matter. So I don't think there is any remaining dispute, or if there is one it is extremely minor. The government and the plaintiffs have agreed -- hopefully Your Honor has an exhibit book --

1 **THE COURT:** I do.

2 **MR. GALBREATH:** -- somewhere on your desk that
3 has about 16 exhibits that plaintiffs put as potential
4 exhibits and three potential witnesses. And our agreement
5 with the government, Your Honor, is that we are going to
6 limit our potential witnesses on direct to just the third
7 one, that is Mr. Bruce Hare. He is one of the individual
8 plaintiffs in this action and his testimony is just going
9 to go toward irreparable harm.

10 And Your Honor, we have also agreed to limit our
11 exhibits on direct to exhibits -- and I'm just going to
12 call them by number to make it easier -- 1, 2, 3, 4, 5, 7,
13 8, 9, 10, 12, and 14. And as a part of that agreement
14 with the government, if something comes up in the course
15 of this hearing that plaintiffs feel like they need to
16 rebut with either an exhibit or a witness that we haven't
17 agreed to, we will cross that bridge at that time if we
18 have to put on some kind of rebuttal testimony.

19 **THE COURT:** Okay.

20 **MR. GALBREATH:** I think Mr. Jenkins, on behalf
21 of the private property owners, is also in agreement with
22 that.

23 **MR. LOGAN:** Jim Logan, Your Honor. My
24 understanding was Mr. Jenkins was going to be shown a
25 video, which is the No. 12, for him to make a

1 determination and it hasn't been shown to him.

2 **MR. GALBREATH:** We can do that right now if it
3 would please the Court.

4 **THE COURT:** Just so I understand the posture of
5 the case, we are still here with respect to the Motion for
6 Reconsideration of the TRO but essentially I believe that
7 particular issue --

8 **MR. GALBREATH:** It's melded into the preliminary
9 injunction request, that's exactly right, Your Honor.

10 **THE COURT:** Okay. And then we'll also have two
11 party's respective Motions to Dismiss.

12 **MR. LOGAN:** That's correct.

13 **MR. DOUGLAS:** That's correct.

14 **THE COURT:** We can show the video now. And the
15 Court, of course, prepared for the hearing and read your
16 voluminous materials. And you are deserving of a day in
17 court. But there will be a couple of things that I will
18 go over as preliminary matters to see if there are a
19 couple of stipulations that we can reach and then delve
20 into your full arguments.

21 **MR. GALBREATH:** Perfect.

22 **MR. LOGAN:** Your Honor, one other thing
23 regarding the evidentiary matter before we see the video
24 is that since I understand the plaintiffs have agreed to
25 the affidavit of Mr. Betty that was attached to our

1 filings, this is the Rust family and Whiteside Cove, as
2 coming in as well or being considered by the Court.

3 **MR. GALBREATH:** That's absolutely right.

4 **MR. DOUGLAS:** And just to finish that off, the
5 only exhibits the United States would offer were those
6 that were attached to our Motion to Admit and there is no
7 objection to those.

8 **THE COURT:** Okay.

9 **MR. GALBREATH:** So, Your Honor, this brief video
10 is just something the plaintiffs wanted to introduce so
11 the Court actually had a visual on what this resource
12 looks like. Because it is one thing to read it on paper
13 and another thing to see it.

14 **THE COURT:** I think it will be very helpful.

15 **MR. GALBREATH:** Without further ado, this is it.
16 This is back in 1974, well before any kind of wild scenic
17 river designation. This is folks floating in the early
18 70's. This is the upper part of the Chattooga River
19 that's at issue in this case.

20 And this is a more recent video -- it is a
21 little better quality thanks to the new technology -- but
22 it's of some folks floating it just a few years ago.

23 What you are seeing on the screen is what's at
24 issue this morning.

25 **THE COURT:** This is the upper area?

1 **MR. GALBREATH:** Yes, Your Honor. This is only
2 the upper area. This is just about 30 seconds long. I
3 think that's the end of it. So I don't even think I need
4 to put it in my presentation now that Your Honor's seen
5 it. I just wanted the Court to understand what it was we
6 were talking about.

7 **MR. LOGAN:** Your Honor, Mr. Jenkins and I
8 represent the private property owners. We do have some
9 problems to the extent that this does not show, from what
10 we see here, the section of private property that is the
11 basis of our position and our arguments in this case.
12 From our perspective this is totally irrelevant to private
13 property issues as well as it fails to have any
14 authentication. It's irrelevant to the piece of property
15 that we are concerned with in this case.

16 **THE COURT:** I think that --

17 **MR. LOGAN:** So we would --

18 **THE COURT:** -- plaintiffs, you all can stipulate
19 to that?

20 **MR. GALBREATH:** Just a demonstrative.

21 **MR. LOGAN:** I wanted to make sure the record is
22 clear.

23 **THE COURT:** Certainly.

24 **MR. LOGAN:** This does not pertain to the part of
25 the river that runs through my client's private property.

1 **THE COURT:** Right. And I'm aware of that and we
2 are going to address those issues specifically today.

3 **MR. DOUGLAS:** And just also, maybe somewhat
4 redundant but this is just one small section of the upper
5 river and does not represent the conditions over the whole
6 part.

7 **THE COURT:** Certainly.

8 **MR. DOUGLAS:** I believe they are set out in some
9 materials that we have agreed will go to you as an
10 exhibit. They do describe how varied the environment is
11 up there.

12 **THE COURT:** Okay. We are ready to proceed with
13 the motions themselves. As I indicated I would like to
14 see if there are a couple of stipulations we can all agree
15 to.

16 **MR. GALBREATH:** Wonderful.

17 **THE COURT:** All right. Some of these are very
18 basic but it's just helpful for me to know whether or not
19 they are actually in dispute. Do you all agree that the
20 Chattooga is a wild and scenic river pursuant to the Wild
21 and Scenic Rivers Act?

22 **MR. GALBREATH:** Yes, ma'am.

23 **MR. DOUGLAS:** Yes.

24 **MR. JENKINS:** Your Honor, the only caveat to
25 that is there might be some portion of the very uppermost

1 part that might be defined as the Chattooga River that
2 would not be included. The spring from which flows out of
3 the mountain.

4 **MR. GALBREATH:** Plaintiffs do not stipulate to
5 that fact. That fact is very much in disagreement.
6 Although as --

7 **THE COURT:** The fact that he is saying?

8 **MR. GALBREATH:** Yes, Your Honor, the fact that
9 any portion of this upper 21 miles is not part of the wild
10 scenic river that's protected. But as we'll describe in a
11 minute, I don't think that issue needs to be before the
12 Court this morning. That's a tangential issue that
13 doesn't have anything bearing on this issue. So I don't
14 think we need to discuss it.

15 **THE COURT:** Okay. Because the second question I
16 have as part of a stipulation is can you all stipulate as
17 to what area is at issue today? And that might take care
18 --

19 **MR. GALBREATH:** Very clearly, Your Honor. It is
20 the upper 21 miles of the river. And there is hopefully a
21 map up on your screen right now. It's the portion of the
22 river that begins at Grimshaws Bridge, and that's labeled
23 on this big map over on your right as well as on this
24 screen, and it ends down at South Carolina Highway 28.
25 There are 21 miles of river between those two bridges.

1 And there are two roads that also cross in between that
2 divide that 21 miles into three sections. And that's what
3 plaintiff's lawsuit is about, Your Honor.

4 **THE COURT:** Do any of the defendants dispute
5 that stipulation?

6 **MR. GALBREATH:** If I could just add one more
7 thing? If you notice on the map that's on your screen,
8 there is a discolored area up near the very top that's a
9 yellow orangey color, that is the private property
10 Mr. Jenkins and Mr. Logan are talking about. So this is a
11 57 mile river. And what you see on your screen is just
12 the top 21 miles of it that we are talking about this
13 morning. And even in that 21-mile, that little tiny blob
14 that you see on the top that's got a different color,
15 that's the 1.7 miles of river that is bordered by property
16 that is leased by the clients of Mr. Jenkins and
17 Mr. Logan. So just for some context. But we are
18 talking --

19 **THE COURT:** So their area is 1.7 miles only?

20 **MR. GALBREATH:** Of the 57 miles, yeah, 1.7. And
21 that 1.7 is included in the 21 miles we are talking about
22 this morning.

23 **THE COURT:** Okay.

24 **MR. DOUGLAS:** Thank you, Your Honor. And I
25 think we would all agree that there is actually the best

1 depiction of the entire Chattooga River on wild and scenic
2 area is in the exhibit that's been filed with the Court,
3 Docket Entry No. 22-19 through 24. It's called Capacity
4 and Conflict on the Upper Chattooga River. You have a
5 copy of it that was submitted to you in the booklet. But
6 actually the copy that was filed, actually filed
7 electronically is in color.

8 **THE COURT:** Okay.

9 **MR. DOUGLAS:** And it is a lot easier if you look
10 at the part in brown is the part that is at issue in this
11 case, from the Highway 28 bridge up to the Grimshaws
12 Bridge.

13 **MR. GALBREATH:** I don't think the plaintiffs
14 would agree that this is the best way to see it. It is
15 kind of a confusing map but we don't have any objection to
16 it.

17 **THE COURT:** All right.

18 **MR. JENKINS:** And, Your Honor, as far as this
19 particular map, I have no idea if that accurately portrays
20 the private property. I will stipulate that that 1.7
21 miles just beneath Grimshaws Bridge, that the landowner
22 does own both sides of property adjacent and under that
23 river.

24 **THE COURT:** Okay. And then the other issue
25 would be under the Wild and Scenic Rivers Act, do you all

1 agree that it contains floating as a value to be protected
2 on the Chattooga?

3 **MR. GALBREATH:** Yes, plaintiffs agree with that
4 statement, Your Honor.

5 **MR. DOUGLAS:** Um, we agree that it is included
6 within the outstanding recreational values --

7 **THE COURT:** Certainly.

8 **MR. DOUGLAS:** -- that are to be protected as one
9 of a number.

10 **THE COURT:** As one of, right. And there are
11 other uses and values included as well. But I wanted to
12 make sure you do agree that that is one.

13 **MR. DOUGLAS:** Yes.

14 **MR. JENKINS:** And we would also, Your Honor,
15 depending on what you mean by floating, there is lots of
16 definitions on that.

17 **THE COURT:** Floating could be boating as well.

18 **MR. GALBREATH:** That's a very good point, Your
19 Honor. The plaintiffs are only talking about
20 hand-powered, nothing motorized, hand-powered, i.e., using
21 paddles, canoes, kayaks, inflatable crafts including rafts
22 or small inflatable kayaks and nothing commercial. This
23 is just private use is all we are talking about.

24 **THE COURT:** And non-motorized, correct?

25 **MR. GALBREATH:** Correct, non-motorized, private

1 use.

2 **THE COURT:** Does the defendant dispute that
3 definition of floating in terms of what plaintiffs
4 perceive is at issue in the case?

5 **MR. DOUGLAS:** We agree that's appropriate in
6 this case.

7 **MR. JENKINS:** That may be what they define it.
8 It could be defined otherwise, including motorized
9 vehicles including various --

10 **THE COURT:** But in terms of what's at issue in
11 this case, that's all that they are seeking an injunction
12 with respect to.

13 **MR. JENKINS:** It is hard to say what --
14 understand what they are seeking sometimes.

15 **THE COURT:** Okay.

16 **MR. GALBREATH:** We clearly defined floating in
17 all of our papers and the footnote in every single paper.

18 **THE COURT:** But if that's what they are stating,
19 the Court wouldn't go beyond that in any of its rulings to
20 the extent it does include other parameters.

21 **MR. DOUGLAS:** We agree with that as a working
22 definition. Motorized boats are not permitted on the
23 whole wild and scenic river.

24 **THE COURT:** Okay.

25 **MR. JENKINS:** Just to raise a few different

1 issues, when Your Honor says it is a value of the whole
2 wild and scenic river, it is a stated value, it is a
3 stated portion of the recreation as the government has
4 said. We dispute that it is a protected value in the very
5 uppermost section that is non-navigable.

6 **MR. GALBREATH:** Plaintiffs assert that it very
7 much is a value that caused the river to be designated
8 wild and scenic and a value that must be protected and
9 enhanced for floating and boating specifically.

10 **THE COURT:** Okay. And then what other uses are
11 currently permitted?

12 **MR. GALBREATH:** That's a very good question.
13 There is really just a few because this is a wilderness
14 area and a wild and scenic river. There is only a handful
15 of uses and that is swimming, hiking, backpacking,
16 whitewater recreation, hunting and fishing. I hope I
17 didn't repeat myself but that's the complete list.

18 **MR. DOUGLAS:** Your Honor, actually the 1985
19 River Plan, which is what is governing right now in the
20 issue in dispute, notes rafting, canoeing, kayaking,
21 fishing, hiking, innertubing, backpacking, hunting,
22 viewing scenery, whitewater floating, photography, driving
23 on open roads, horseback riding and nature study. I don't
24 know if that is comprehensive. That's all I saw listed in
25 there.

1 **MR. GALBREATH:** I don't think plaintiffs would
2 really object that all those activities occur in this
3 resource. I do know that when planners have taken a look
4 at the resource and they are trying to balance uses, I
5 think a lot of the things that Mr. Douglas just mentioned
6 get put into -- under sub-categories of, for example,
7 hiking includes sightseeing and bird watching. So we are
8 saying the same thing.

9 **THE COURT:** Okay.

10 **MR. GALBREATH:** But when you put them all
11 together, it really is a short list. There is nothing
12 motorized, no mountain bikes or motorized equipment or
13 horse or anything like that. It is purely wilderness
14 compliant, wild and scenic river compliant uses.

15 **THE COURT:** And then under the WSRA, are you all
16 contending that there is a definition with respect to
17 protecting or protection of certain values? Is that
18 defined at all in that act?

19 **MR. GALBREATH:** There is no explicit definition
20 but we think those two terms are very plain and that even
21 a simple dictionary can inform what they mean.

22 **THE COURT:** Okay.

23 **MR. DOUGLAS:** We'd agree it is protected. There
24 is a two tier, as I explained in one of my motions, that
25 the act first says you have to protect the esthetic,

1 scientific and so forth character, and a secondary
2 consideration you are to protect recreational values and
3 those recreational values would be included in that. They
4 are not spelled out as such. They are lumped in under
5 recreational in the act.

6 **MR. GALBREATH:** And we disagree with that a
7 little bit, Your Honor. We think that the act has two
8 parts. The first part it does talk about ORVs which are
9 Outstandingly Remarkable Values. And there are a few
10 broad categories of what those are, such as recreation and
11 timber. There are some things that are generally ORVs but
12 then in the second part of the act there is different
13 language. And our position is that the statute is very
14 clear, that what it says, it is not referring to anything
15 general like recreation. It says very specifically that
16 the Forest Service must protect and enhance the values
17 that caused a river to be designated wild and scenic. It
18 is not referring to general ORVs. It is referring to the
19 specific things that caused it to be protected. That's
20 plaintiff's position, Your Honor.

21 **THE COURT:** Okay. Any response to that?

22 **MR. JENKINS:** Your Honor, of course wild and
23 scenic river also contemplates the private property
24 ownership. And that also is something to be protected.
25 And the act itself says in the Forest Service manual says

1 that nothing in the act will affect the private property
2 ownership.

3 **MR. DOUGLAS:** May I have one moment, Your Honor?

4 **THE COURT:** Yes.

5 **MR. GALBREATH:** Plaintiffs disagree with that
6 statement. But, again, as hopefully we'll get an
7 opportunity to explain in a moment. We don't think this
8 hearing involves the private property owners whatsoever.
9 We don't even understand why they are here today. But we
10 do dispute the fact that when -- our position is when
11 something is designated wild and scenic and it is
12 protected for the benefit of the entire population of the
13 country, that the Forest Service, and this is very clear
14 in the Wild and Scenic Rivers Act, it has the power to
15 come in and ensure the public has the opportunity to float
16 the entire river including parts of the river that might
17 happen to be bordered by private property. If it didn't
18 have that power, it would be a meaningless act. Of
19 course, there are islands of private property in the
20 forest lands where there are private inholdings in there.
21 If one private inholding would shut down an entire
22 resource by claiming that no one could come through there,
23 it would obviously obfuscate the entire system. So it's
24 pretty clear and when that issue is properly before the
25 Court, we look forward to talking about that.

1 **MR. JENKINS:** And, Your Honor, obviously, we
2 vigorously dispute that claim. It's not at all clear and
3 it's just flat wrong. Within this section, the only
4 private property ownership is in this upper portion. So
5 comparing it to somewhere else or some event that might
6 occur is just flat wrong.

7 **THE COURT:** Okay. And then --

8 **MR. GALBREATH:** And I don't want to get lost on
9 this issue but the property clause in the United States
10 Constitution is what gives the federal government the
11 ability to come in and trump the ability of state law
12 property rights and federal resources. It happens every
13 day in every resource that's federally protected. This is
14 nothing specific to wild and scenic rivers, it just
15 happens to be very specific in the Wild and Scenic Rivers
16 Act. We don't want to get bogged down in that.

17 **MR. JENKINS:** And, Your Honor, the only reason
18 it's an issue, we would rather not be here as well. But
19 in the complaint, they are the ones that included the
20 private property section in their complaint. So we'd
21 prefer in our motion to dismiss is that you would dismiss
22 this portion of the river from this case. We agree in
23 that, that we should not be here but for very different
24 reasons.

25 **THE COURT:** Okay.

1 **MR. DOUGLAS:** Your Honor --

2 **THE COURT:** You are not willing to concede that
3 yet?

4 **MR. GALBREATH:** Absolutely not, Your Honor.
5 Absolutely not.

6 **THE COURT:** Okay. All right. And then with
7 respect to --

8 **MR. DOUGLAS:** Your Honor, may I?

9 **THE COURT:** Yes.

10 **MR. DOUGLAS:** Just in response to the one issue
11 that was raised prior to the private property issue coming
12 up, it's our position that ORVs that are referred to in
13 the act are the same in all locations that they are
14 referred to. In fact, at one point it says protect those
15 values that caused it to be designated as a wild and
16 scenic river doesn't change from the definition of ORVs
17 that's in the first part of the act. In general, that
18 includes all the recreational activities that are in the
19 area.

20 **MR. GALBREATH:** And that is a point of
21 dissension. We think those two sections are separate. As
22 far as we know, plaintiffs believe that is an issue of
23 first impression for this Court. We are not aware of any
24 court decision that talks about that statutory language.
25 But it's our position that it's the plain wording of the

1 statute is very clear that those values, it's talking
2 about the values that caused the river to be designated,
3 not an ORV in general.

4 **THE COURT:** Okay. And then we indicated the
5 temporary restraining order, reconsideration of that
6 issue, is basically lumped into the preliminary injunction
7 at this point.

8 **MR. GALBREATH:** Yes, ma'am.

9 **THE COURT:** Okay. On the injunction itself, are
10 we talking about this as a matter of law or are there some
11 factual issues that need to be developed today?

12 **MR. GALBREATH:** There are some factual issues,
13 very limited -- well, there are some factual issues that
14 are fairly significant in the background.

15 **THE COURT:** Right.

16 **MR. GALBREATH:** And I would say beyond that,
17 there are some factual issues to be developed on
18 irreparable harm. And we understand there is a PI
19 hearing. We are not going to spend all day on that but we
20 have some very brief evidence we would like to put on.

21 **THE COURT:** Okay. And other than that issue, do
22 you contend it is a legal issue in terms of the Court's
23 interpretation of the act?

24 **MR. GALBREATH:** If I understand Your Honor's
25 question correctly, in this matter we feel like the legal

1 issues are so intertwined with the facts of the case it's
2 really impossible to make that distinction.

3 **THE COURT:** Okay.

4 **MR. GALBREATH:** This isn't, for example, where
5 you look at the four corners of a contract and say --

6 **THE COURT:** Sure.

7 **MR. GALBREATH:** -- we don't need to go outside.
8 We think there is no way to interpret the law without
9 heavy reference to the facts.

10 **THE COURT:** Okay. And I say that because at a
11 preliminary injunction hearing then part of the issue we
12 have here is what is the record. And have you all
13 discussed that issue because I think there is two ways to
14 approach this. One is whether or not this is an appeal
15 from an administrative decision or are we really here
16 about an injunction because the administrative procedure
17 was thwarted essentially by the withdrawal of the
18 decisions and then later dismissal of the appeals? So I
19 don't have a true record because it never got there. So
20 to some extent, the Court would need to have some latitude
21 to hear the issues that are relevant to make the decisions
22 here today. And I think the way to handle that is for you
23 all to be able to present what is necessary for me to rule
24 on the preliminary injunction and/or motion to dismiss,
25 narrowing your focus to only what's relevant here, not

1 what would be a full trial on the merits. But at the same
2 time, understanding that the Court will reserve any
3 rulings on admissibility of evidence to the extent you all
4 have disputes at issue. And I can address that in an
5 order. Is that fair play?

6 **MR. DOUGLAS:** That's fair.

7 **MR. GALBREATH:** That's fair from the plaintiff's
8 side.

9 **THE COURT:** All right. So you all would need to
10 note on the record specifically any objections or issues
11 in that regard because as I read your responses with
12 respect to the evidentiary issues, I think you both agree
13 there is no real fully developed administrative record
14 that I would be limited to. And you have also agreed on
15 that because you are allowing some evidence in but it may
16 go further than what you just indicated with respect to
17 the affidavits. So we'd kind of take care of that issue.

18 **MR. DOUGLAS:** Your Honor, I don't know if I
19 quite agree with it phrased exactly that way.

20 **THE COURT:** Sure.

21 **MR. DOUGLAS:** There is a very voluminous
22 administrative record that's been created. The reason we
23 did not certify an administrative record to the Court is
24 because there is no final agency action --

25 **THE COURT:** Okay.

1 **MR. DOUGLAS:** -- because the plaintiffs were
2 withdrawn.

3 **THE COURT:** I understand that's in dispute, too.

4 **MR. DOUGLAS:** There's plenty of evidence in
5 there.

6 **THE COURT:** But I will consider everything to
7 this date I think is what you all are saying. But there
8 is not that final packaging that you would get from the
9 administrative proceeding and have yourself limited to
10 that packaging.

11 **MR. DOUGLAS:** That's correct. We don't have the
12 appeal process and decision.

13 **THE COURT:** Right.

14 **MR. DOUGLAS:** That was truncated by the
15 withdrawal of the plans.

16 **THE COURT:** Okay. And then the last thing is,
17 do you all stipulate that the exhaustion of administrative
18 remedies is required under the Wild and Scenic Rivers Act
19 whether or not you believe the plaintiffs have in fact
20 exhausted those remedies?

21 **MR. GALBREATH:** We definitely -- right, we are
22 in court because the Administrative Procedures Act, we
23 agree there is an exhaustion requirement.

24 **MR. DOUGLAS:** We agree. Absolutely.

25 **THE COURT:** Okay. All right. Are there any

1 things that perhaps I have left out on some initial
2 stipulations or groundwork that we can cover that you all
3 have agreed upon? And if not, we'll go into your
4 arguments.

5 **MR. GALBREATH:** I think that's it, Your Honor.

6 **THE COURT:** Okay. Ready to proceed.

7 **MR. GALBREATH:** Your Honor, may it please the
8 Court? Your Honor has correctly outlined there is really
9 two issues before the Court this morning. Plaintiffs have
10 requested preliminary relief. And, specifically, what
11 plaintiffs have asked for is that the Court enjoin the
12 Forest Service from continuing to impose an illegal
13 floating ban on the northern 21 miles of the Chattooga
14 River. And secondly, what's at issue this morning, Your
15 Honor, is the dismissal motions of the defendants.

16 Before I get directly into the merits of
17 plaintiff's preliminary injunction request, Your Honor, I
18 wanted to introduce some of the plaintiffs that are in the
19 courtroom this morning because it actually does bear on
20 the dispute that we have this morning. Your Honor, the
21 paddling community is very similar to any community. It
22 has organizations that represent it at a national level,
23 at a state level and at a local level.

24 If this were lawyers we'd be talking about the
25 American Bar Association nationally and the South Carolina

1 Bar and you can even join the Greenville Bar if you are a
2 lawyer. The same thing is true for paddlers. And there
3 is really two organizations that would be the equivalent
4 of the American Bar Association for paddlers.

5 One of the them is a group called the American
6 Canoe Association. It's been around since 1880. Its
7 executive director, Wade Blackwood, is here in the
8 courtroom this morning and he is seated right here on this
9 front row. American Canoe Association has more than
10 60,000 members that it represents in this lawsuit and at
11 this preliminary injunction hearing this morning.

12 The second national group that's equivalent to
13 the ABA is American Whitewater. And American Whitewater
14 is kind of a subset of the membership that the American
15 Canoe Association represents because its members are
16 primarily focused on whitewater recreation, that's rivers
17 and creeks with whitewater rapids. So that's kind of a
18 subset of a broader group that might enjoy floating on
19 lakes or flat water and things like that in sea kayaks.
20 So those two groups are both represented by their
21 executive director. And in American Whitewater we have
22 Executive Director Mark Singleton who is also in the
23 courtroom this morning.

24 And represented as plaintiffs are also those
25 groups on the state and local level. And they are the

1 groups that are -- that represent memberships that
2 surround this river whose members are most closely
3 impacted by the decision that we are talking about this
4 morning, this illegal ban.

5 And I just wanted to point that out to the Court
6 because you can imagine the seriousness of an injury that
7 would require the American Bar Association, the South
8 Carolina Bar Association and the Greenville Bar
9 Association to expend resources and join a lawsuit as
10 plaintiffs, and not only that, but send their executive
11 directors across the country to be present at a
12 preliminary injunction hearing. This is a very serious
13 matter for the paddling community. And I think that's
14 represented just by the presence of the plaintiffs here in
15 the courtroom this morning. And I just wanted to point
16 that out.

17 The second thing is I wanted to start by
18 explaining to the Court a little bit more about the
19 resource. I know Your Honor has had the opportunity to
20 read some background. And you have got a map up on your
21 screen.

22 We talked about the fact that the river that we
23 are talking about is the Chattooga River. The entirety of
24 it is 57 miles. It starts up in the state of North
25 Carolina exclusively. The water comes from Cashiers and

1 Highlands area in North Carolina and it flows down through
2 a bowl that's naturally formed by some mountains. And
3 eventually the river starts in the valley of that bowl.

4 The first 21 miles of that are what we are
5 talking about today, that's the Headwaters. And as it
6 flows south -- it originates in North Carolina, it flows
7 south and you can see it on this map on your screen. You
8 notice the coloration changes about halfway down that map.
9 That's when it stops being in North Carolina and becomes
10 the border of Georgia and South Carolina. And you can see
11 those two states if you look closely on the map.

12 When you are in the river below that North
13 Carolina state line, if you step out of the water on the
14 western side, you are in Georgia. If you step out on the
15 eastern side, you are in South Carolina. And it continues
16 that way on the boarder all the way down until it finally
17 dumps into the Tugaloo Reservoir at the end of the
18 57 miles.

19 So the upper 21 miles that we are talking about
20 this morning, part of it is exclusively in North Carolina
21 and then part of it is the border between South Carolina
22 and Georgia. And I wanted to kind of orient the Court to
23 that.

24 This resource, the Chattooga River, is extremely
25 special for paddlers, again, as evidenced by the presence

1 of these briefs in this courtroom and on this lawsuit,
2 Your Honor. The Chattooga, because it is 57 miles long,
3 represents one of the only opportunities in the entire
4 United States where the paddling community can have a
5 multi-day whitewater floating experience. There are a
6 handful of opportunities.

7 **MR. DOUGLAS:** Your Honor, I'm going to object.
8 We are going outside the facts in the record.

9 **MR. GALBREATH:** This is all in the record. This
10 is all -- this is in our complaint.

11 **THE COURT:** Those sentences, I have read in the
12 briefs.

13 **MR. DOUGLAS:** They are contended by him. But we
14 don't agree that's necessarily a fact.

15 **THE COURT:** That's fine. I will accept it as an
16 allegation.

17 **MR. GALBREATH:** This is a preliminary.

18 **THE COURT:** Okay.

19 **MR. GALBREATH:** So there is a handful of rivers
20 in the west in states like Idaho and Colorado where you
21 can float rivers such as the Grand Canyon or the Colorado
22 or the Snake. But in the southeastern United States, this
23 is the only opportunity to have a multi-day floating trip.

24 And what that means is if you want to get your
25 kids and get a canoe and launch your canoe up at the top

1 of this 57 miles, float for a day, beach your canoe, have
2 a camping experience, get back on and do that two or three
3 days in a row, that's a very sought-after experience for
4 the paddling community. This is the only opportunity if
5 you live in the southeast, if you're in Georgia, South
6 Carolina, North Carolina, Alabama, this is the only place
7 you can really do it in this area. Your other option is
8 to load up the car, if you happen to have 14 days, and
9 drive the 24 to 40 hours all the way across the country
10 with your canoe and try to get out on a river out in
11 Idaho. So that's one of the reasons this is so important
12 to the boating community.

13 Another reason, Your Honor, is that this river
14 is outstandingly beautiful. It really is. And that
15 reason alone is why paddlers are so interested in having
16 their access to the river restored.

17 And, frankly, the Court doesn't have to take the
18 plaintiff's word for it when -- and we'll talk a little
19 bit about the Wild and Scenic Rivers Act later -- but when
20 the Wild Scenic Rivers Act was passed, out of more than
21 5,000 rivers in the United States, the Chattooga was one
22 of the very first ones that congress put its finger on and
23 said, wow, this resource is incredible. It needs to be
24 protected.

25 And it is that stunning. And the upper 21 miles

1 of the Chattooga is really special for paddling because it
2 is the most remote section. As I mentioned, it is in
3 wilderness. This part of the river is a wilderness area.
4 There is no roads allowed in there. There's no motorized
5 activity in there. It is way up in the mountains. And
6 there is a lot of solitude opportunities up there for
7 paddlers. And that's part of why that area is so special.

8 Now, I have talked a little bit about why the
9 Chattooga is so special to the paddling community but
10 there is one thing about the Chattooga that I wanted to
11 mention that's not unique about it. The Chattooga River,
12 like practically every other river in the United States,
13 is managed perfectly by mother nature. And what that
14 means is mother nature has a system that's existed for a
15 long time where sometimes it rains, sometimes it doesn't
16 rain. And when it's not raining, these river levels drop
17 down. And when the river levels are low, the conditions
18 are not optimum for paddling. So during the vast majority
19 of the year the only people using this resource are
20 non-paddlers, people like hikers that are enjoying the
21 extra bedrock that's exposed if the river goes down,
22 fishermen that can safely wade in the river when it's at a
23 very low level.

24 I mention this because later on in the
25 preliminary injunction when we talk about the merits of

1 the preliminary injunction balance of harms is one of the
2 things we have to talk about there. And every other river
3 the plaintiffs are aware of more than five thousand plus
4 rivers in the United States are managed by mother nature.
5 And part of what we are asking in this preliminary
6 injunction this morning is that the Court, consistent with
7 federal law, restore the Chattooga to that management
8 scheme that's true on every other river that we are aware
9 of, certainly every other river in the southeast. And
10 there is a perfectly balanced system that's already in
11 place that doesn't require any ban, it doesn't require
12 anything else. It is already there.

13 How did we get here this morning? You know,
14 here we are all in the courtroom. We have got a lot of
15 lawyers. We have this beautiful resource. We have a lot
16 of people that enjoy using it. So it is an obvious
17 question, how did we get here? And I think the Court has
18 to look at what's really about a 250-year time line.

19 More than 250 years ago, people started floating
20 the Chattooga River. It wasn't long ago that somebody
21 unearthed a pirogue canoe, a hand carved canoe in the
22 Chattooga River that has been carbon-dated to be more than
23 250 years old.

24 **MR. JENKINS:** Your Honor, we would object to
25 that.

1 **MR. GALBREATH:** Again, it's in our papers. When
2 we have a trial on the merits we can certainly
3 substantiate it sitting in a museum.

4 **MR. JENKINS:** Your Honor, we could also state a
5 lot of things that are not facts in the record nor can be
6 verified. There is no proof that there is any 250 year
7 old --

8 **THE COURT:** I will accept it as argument.
9 Obviously, when I make my factual recitation in the order
10 I'll have to have something to base it on.

11 **MR. GALBREATH:** Thank you, Your Honor. So from
12 plaintiff's perspective for purposes of argument, from 250
13 years ago before the United States was even a country all
14 the way up through the 60's, the Chattooga -- floating has
15 happened on the Chattooga without any kind of ban, any
16 kind of problem, any kind of restriction at all. Now, the
17 individual plaintiffs -- and I forgot to introduce them
18 earlier. There are three individuals that are here
19 present this morning, Your Honor, who most of them are
20 either in their 60's or very quickly approaching their
21 60's. They all floated this river prior to Wild and
22 Scenic River designation. And as I will explain later,
23 actually floated it for a significant period afterward.

24 And it wasn't until -- there wasn't a big group
25 of boaters back in the early 60's and 70's that were doing

1 a lot of floating. They were very much present and this
2 was important for them, but the equipment was a little bit
3 limiting. People would actually make their own boats in
4 their basements out of fiberglass. The problem with
5 fiberglass is when it encounters a rock it shatters and
6 your day on the river is over with. It fills up with
7 water and you're done. Later on equipment improved. In
8 more or less the mid-80's to the early 90's boats started
9 to be manufactured out of plastic. And there was a
10 greater interest and more people started coming to the
11 river.

12 Again, getting back to how did we get here this
13 morning. In 1968, the Wild and Scenic Rivers Act was
14 passed. And that act was part of a whole wave of
15 environmental legislation. And that act says, wow, Post
16 World War, we are destroying a lot of our natural
17 resources for industry. We need to protect some of these
18 really special ones. And in particular, we are damming a
19 lot of rivers for hydroelectric dams. And if we keep it
20 up, we are not going to have any free flowing rivers left.
21 So congress passed this Wild and Scenic Rivers Act to
22 protect some of these special free flowing resources.

23 In 1970, the US Forest Service, ironically, the
24 defendants here, were tasked with studying the Chattooga
25 River to determine whether or not the Chattooga River was

1 suitable for inclusion in the Wild and Scenic Rivers Act.
2 I would like to point to the Court that this is the cover
3 of the 1970 study that was done by the US Forest Service
4 to determine whether the Chattooga was suitable for
5 inclusion in that Wild and Scenic Rivers Act. Notably, as
6 you see on the front of that study is a gentleman with a
7 paddle doing hand powered canoeing through the whitewater
8 rapids. This was what the Forest Service found as the
9 most compelling photo to be emblematic of the fact that
10 this thing was --

11 **MR. DOUGLAS:** Your Honor, this is argument but
12 there is absolutely no support in the record or anywhere
13 in this world for that statement that the Forest Service
14 found this to be the most compelling.

15 **MR. GALBREATH:** Well, the Forest Service could
16 have put any picture they wanted on the front of there but
17 they put this one on there.

18 **MR. DOUGLAS:** They put a picture of a river.

19 **THE COURT:** I don't think it's a finding but the
20 picture is on the cover.

21 **MR. GALBREATH:** Thank you, Your Honor. In 1971,
22 this was the study, this was the proposal that the US
23 Forest Service made which you see on your screen right
24 now. And they went to congress and they said we have a
25 great resource down here in North Carolina, South Carolina

1 and Georgia. It needs to be protected. Congress said,
2 okay, let's do a study.

3 What you see on your screen now is in 1971 after
4 going and doing a study, the US Forest Service then
5 recommended to congress that in fact after having looked
6 at it further that the Chattooga should be included. And
7 one of the reasons, just by way of factual background, is
8 that most of the river banks were owned by a private power
9 company. They had never been developed. There was no
10 industry on them. There weren't very many private houses
11 like the private property of defendants that are in this
12 lawsuit. Most of the river was completely protected and
13 pristine so it was really ideal for protection before that
14 happened.

15 And then the -- I will point the Court, again,
16 to the picture on the front of this. I think it kind of
17 speaks for itself. This is what the US Forest Service
18 sent to congress and said protect this river. And I
19 suppose they could have picked just anything to put on the
20 cover to sell that to congress. What that chose to put on
21 was two gentlemen in a canoe floating through the
22 whitewater rapids.

23 They also submitted for the ease of congress,
24 and this is the next slide on your screen, Your Honor,
25 they submitted a summary of what they put in their really

1 long 1971 study. And you might see reference in our
2 exhibits to a 1971-A. What that is is a summary of the
3 larger suitability study for the wild and scenic river.
4 Actually, I have a piece of history in my hands which is
5 one of the original copies of that suitability study
6 summary that was sent to congress. As you can see on your
7 screen, once again we have a picture of two people in a
8 canoe floating through whitewater rapids. That was a
9 study that was sent by the US Forest Service saying please
10 include this in the Wild and Scenic Rivers Act.

11 Now, in 1974 congress agreed. And one other
12 point I wanted to make before I move on, Your Honor, is
13 that I would submit to the Court this is a preliminary
14 stage. And we have all the language and we won't try to
15 get into all that this morning. But the language of these
16 reports that I have just showed you the covers of is very
17 parallel to the picture that you see on the front. There
18 is very specific language in there and I think my
19 co-counsel, Mr. Hendrix, will talk about this in a minute.
20 But there is specific language in there saying that the
21 portion of the river, the 21 miles that we are talking
22 about this morning, is a value for which this particular
23 21 miles, not the whole river, this 21 miles should be
24 protected under the Wild Scenic Rivers Act. And that,
25 Your Honor, gets to our -- later on will get to our

1 success is -- likelihood of success on the merits.
2 Because there is no question, you can see the picture on
3 the front and you can read the text inside, whitewater
4 boating was a value which was one of the reasons this
5 river was included in the Wild and Scenic Rivers Act.

6 Now in '74, congress agreed with these studies
7 that you see on your screen and they protected the river.
8 And here comes -- so, Your Honor, everything is on track.
9 Everything looks great. Beautiful resource. It's
10 protected. People have been paddling it for 250 years.
11 Everyone gets excited. Now it's going to be protected in
12 perpetuity.

13 And then something happened in 1976. The train
14 went off the tracks. And what happened is a river study
15 was published in 1976. And buried in that study in about
16 a sentence in a small paragraph somewhere way down in the
17 study it says that the top 21-miles, everything above
18 Highway 28, going back to that big map that Your Honor has
19 to your right, everything above Highway 28 was going to be
20 closed to floating. Obviously, this didn't make any sense
21 based when two years earlier the river had just been
22 protected as a wild and scenic river specifically to
23 people could enjoy boating on this portion of the river.

24 But at the time as I explained a moment ago, the
25 paddling community was very small. It was not well

1 organized. And it was mainly local. It consisted of a
2 few locals and some people that traveled to come. It
3 wasn't a well organized group that would have ever
4 uncovered this tiny sentence in a tiny paragraph buried in
5 this plan. So it wasn't challenged at the time. And the
6 other reason it wasn't challenged is life went on as
7 usual. No signs were posted at the Headwaters entry
8 points.

9 And I did want to show Your Honor, if you look
10 at this next slide, this is one of the things I wanted to
11 pull out of that study report that was sent to congress.
12 If you notice up in the middle of the top of your screen
13 where it says Grimshaws Bridge, I want to go back just for
14 a second and show you this map again. You see Grimshaws
15 Bridge way up at the very top of your map is the put in,
16 it is the entry point, the beginning of the Headwaters
17 that we are talking about this morning. That's the start.
18 That's mile 0 of the Headwaters, of the 21 miles of
19 Headwaters.

20 **MR. JENKINS:** Your Honor, again, we would have
21 to object at this stage, although this is argument, this
22 particular diagram is by no means accurate nor does it --
23 and we'll get to our argument stage, it is embedded in a
24 period -- in a number of demonstrative landscape diagrams
25 as to demonstrate generally the types of issues that might

1 arise. It's obvious that whoever drew this had no idea
2 about the legal issues or even whether this area was
3 floatable or anything like this. It is actually only part
4 of the drawing that plaintiff's have clipped out.

5 **THE COURT:** Okay.

6 **MR. GALBREATH:** Your Honor, the Forest Service
7 made a study this thick they sent to congress and said
8 this is why the river should be protected. And this was
9 included in that suitability study. And if you look at
10 this -- if you look at what was in that study report,
11 here's Grimshaws Bridge, the beginning of the Headwaters,
12 you can see where the river is. And it says, if you look
13 at the bottom of the screen just below Grimshaws Bridge,
14 beginning of rafting water.

15 And you'll also see that there are other maps
16 that are included in that suitability study that show the
17 other points where roads cross in the Headwaters as
18 put-ins and take-outs for floating the Headwaters. No
19 question that it was the intention when this was sent to
20 congress and when congress looked at it and reviewed it
21 that this river -- that this portion of the river was to
22 be protected so this activity that you see on your screen
23 could happen.

24 Getting back to the 1976 plan where things went
25 off the tracks, there was really no -- this decision both

1 plaintiffs and defendant US Forest Service have tried to
2 go back and figure out how could this have happened? What
3 in the world happened in 1976? And, Your Honor, I would
4 submit to the Court that both parties have not been able
5 to come up with answers to that question.

6 At one point during an earlier review the Forest
7 Service published an entire study on that question. And
8 the conclusion at the end was we don't know. They even
9 interviewed people that worked at the Forest Service at
10 the time. no one can figure out why this happened. So I
11 wanted to point out, too, the individual plaintiffs that
12 you see in the courtroom back here, the individuals that
13 have been deprived access of this resource that was
14 protected for their benefit, they continued to float the
15 river. And again, it was because there was no signage.
16 Most people didn't really know this ban existed. Some did
17 but there wasn't anyone enforcing it. There weren't any
18 signs saying don't put you boat in the river here. A lot
19 of people knew that this thing was being protected in
20 perpetuity for boating so boating continued.

21 **MR. JENKINS:** Again, I hate to keep objecting
22 but these types of factual statements there is no basis to
23 any of them. The landowners have owned that property for
24 well on 40 years. The Whiteside Cove Association has
25 leased the property for 50 years. They have no

1 recollection of any boater ever passing through that
2 portion of private property. Now, counsel can state
3 whatever he wants in these types of factual allegations,
4 but we would respectfully request that it's only one side
5 of the story and there is no basis to this.

6 **THE COURT:** Certainly.

7 **MR. GALBREATH:** And again, we'll be happy to
8 rebut. We have individuals in the courtroom that can talk
9 about floating that section if we need to introduce
10 additional individuals to rebut that testimony.

11 So in 1976 the train went off the tracks and
12 nobody knows why. There is this strange plan on the books
13 but it wasn't enforced. And most people didn't even
14 really know about it. So there wasn't a big move to
15 challenge that 1976 ban because it was an on paper
16 decision that didn't impact anyone's lives.

17 That was also true in 1985. Kind of under the
18 radar, once again, in another division the Forest Service
19 is required every ten or 15 years to do a new management
20 plan. And 1985 was just the natural next plan that came
21 after that river plan from '76. So '85 it was time to do
22 a plan. They did another one. And once again in a couple
23 of sentences buried in a paragraph in the middle of the
24 thing they said the river is closed to boating. Again,
25 people continued to boat it. There was no signage posted.

1 Nobody knew there was a problem. So, again, it wasn't
2 challenged.

3 Then as I mentioned earlier, boating started to
4 gain more interest as the equipment improved in the 80's.
5 And starting in the later 80's and early 90's is when the
6 boating community, including these organizations and the
7 individuals in the courtroom, started to take a greater
8 note of the fact that there was an on-paper decision
9 saying that this resource protected for them was closed.

10 And so beginning in the mid-90's is the first
11 time that there is a written request from the plaintiffs
12 to the Forest Service to say, hey, the train's off the
13 tracks. We are aware of this paper decision. We need to
14 look at this and get the fixed. This is a wild and scenic
15 river protected for boating.

16 The Forest Service at that time -- there was
17 many meetings and letters that went back and forth in the
18 mid-90's. And, ultimately, the Forest Service said, well,
19 we are going to have to do another plan in the future. So
20 when we do that next plan, we will treat this issue.

21 Then in 2002 the Forest Service did an official
22 amendment to its 1985 plan. But it didn't propose to deal
23 with this 21 miles of Headwaters. So once again,
24 plaintiffs approached the Forest Service and said, hey,
25 while you are doing this official plan amendment, please

1 take a look at this Headwaters issue. On paper we are
2 barred from being up here. And the Forest Service said,
3 we are not going to do that right now. But in a few years
4 we have got to do our yet another new management plan
5 revision. So in 2004 when we do our plan in 2004, we'll
6 look at it.

7 And in fact, in 2004, more than a couple
8 sentences was devoted to this issue of paddling the
9 Headwaters. In fact, there was probably 15 or 20 or so
10 pages that were devoted to it.

11 The problem with the Forest Service's treatment
12 of that issue was they didn't really study it. They
13 talked about general impacts that impact everybody, like
14 maybe there will be more visitors if people paddle. And
15 if there are more visitors to the resource in general, we
16 are going to not distribute these among hiking and
17 backpacking and boating. We're just going to choose to
18 exclude boating all together.

19 S plaintiffs filed an administrative appeal.
20 And they had 90 days back in 2004 to file that before that
21 administrative decision became -- while they had a window
22 to file that appeal. They filed it.

23 It went up through the US Forest Service to the
24 highest officer of the US Forest Service, the Chief of the
25 Forest Service. And Gloria Manning, as the deputy for the

1 chief, issued an opinion. And this is the language that
2 you'll see on your screen, Your Honor. She agreed with
3 plaintiffs. She said you are absolutely right. After
4 carefully reviewing that 2004 decision, I am reversing the
5 regional forester's decision to continue to exclude
6 boating on the Headwaters, the portion above Highway 28.
7 Not only that, I find that the regional forester did not
8 provide an adequate basis for continuing any kind of ban
9 above Highway 28. His decision -- and this is absolutely
10 critical. So here you have a final agency decision in
11 2005 that is the final administrative agency at the
12 highest officer in the US Forest Service says this
13 decision to ban boating is not consistent with the Wild
14 Scenic Rivers Act or the Wilderness Act or the US Forest
15 Service regulations implementing those acts. That was in
16 April of 2005.

17 These plaintiff organizations and these
18 individual plaintiffs are standing before the Court now in
19 October of 2010. So after the US Forest Service highest
20 official said a boating ban violates federal law, here we
21 are five years later and we are not on the river. And I
22 suspect what you are going to hear later on from the
23 Forest Service is, oh, give us a little more time, Judge.
24 Pretty soon we will probably publish another opinion.
25 Don't worry about these guys. Just keep them off the

1 river. Sooner or later we will publish something.

2 Even though in 1985 was the first time a written
3 request was made to get some due process about this
4 decision. And the first time after that that there was
5 any due process was 2004 when there was an administrative
6 challenge. And the result of that due process was a
7 finding that it violated federal law. And yet here we are
8 in 2010, 25 years after that initial written request for
9 judicial or for administrative and a necessary judicial
10 review of this ban and the river is still closed.

11 Now, what happened -- the other part of this
12 decision that's probably important for the Court to know
13 about is the chief of the Forest Service also said, and
14 this is where the train went off the tracks again. At
15 first, plaintiffs threw confetti and said, finally, after
16 all this time we have got a ruling. We are going to be on
17 the river tomorrow.

18 They sent letters to the Forest Service and said
19 how can we help you implement this change? How can we
20 help you post signage, do whatever we need to do to help
21 get boats on the river? And because what the chief said
22 was, the chief said, regional forester -- there is only a
23 few regional foresters in the country. And there is a
24 bunch of national forests down below them that each have
25 their own CDO reports. But the regional forester in

1 Atlanta told that regional forester, I want you to take
2 two years and look at the capacity of this upper 21 miles.

3 And a capacity analysis is really a term of art.
4 Because back in 1986 there was an amendment to the Wild
5 Scenic Rivers Act that was passed that says when you
6 manage wild scenic rivers, you have to take into
7 consideration what the capacity of the resource is. And
8 that's not rocket science. How many people can be in
9 there? Is 50,000 too many? Twenty thousand? Ten
10 thousand? Is there something particular about the face
11 that maybe 15,000 hikers is too many and 4,000 boaters is
12 too many that 20,000 backpackers is too many?

13 Take a look at that and do a scientific study.
14 I'm going to give you two years. It's April of 2005 and
15 by 2007 I want to see you fill that whole -- the whole
16 2004 plan, I have knocked out the part that talked about
17 boating being closed. The rest of the 2004 plan is still
18 there. But now there is a void in there. So I want you,
19 regional forester, to plug that void by 2007 with a new
20 management decision based on capacity basically it is
21 required to do by federal law.

22 Well, an entire year rolled around despite all
23 those requests by the plaintiffs to have the forester, how
24 can we help you get boats on the water? The chief's
25 decision specifically said study the capacity of this

1 resource, and I quote, including whitewater boating. And
2 a year after the chief's decision, not a single boat had
3 been allowed to float the river.

4 So now we are at 2006. So after many pleas were
5 ignored, the plaintiffs filed an action in the Northern
6 District of Georgia. At that time they were represented
7 by pro bono counsel based out of Atlanta, Georgia.

8 As often happens, Your Honor, in the legal
9 profession, most of the attorneys that were at the firm
10 that was representing plaintiffs at that time had moved to
11 other firms. So when the time came for this action,
12 that's why this action is filed here, Your Honor, because
13 pro bono counsel here is located I'm just two blocks away
14 on Spring Street.

15 So what happened there is the plaintiffs filed
16 this action in the Northern District of Georgia. It
17 was -- these plaintiff organizations work with the Forest
18 Service on a national level. And they partner on projects
19 all over the country. So the last thing they wanted to do
20 was poke their partner in the eye. So the action that was
21 filed in the Northern District of Georgia was very
22 targeted because they felt that where the train had gone
23 off the tracks after the chief's decision was that the
24 local forest was not doing what the chief had asked.

25 So the plaintiff's filed an action in the

1 Northern District of Georgia and very specifically said
2 during this study, Court, you have got to allow these
3 boats back on the river. It's what the chief said. It's
4 what the federal law said. Even their own chief said.
5 And what the Court said there, I think, was very
6 instructive. And even more important for today's
7 preliminary injunction is the argument the government
8 made.

9 In that hearing the government said, first of
10 all, the Court said I agree with you, plaintiffs. The
11 chief's decision in April 2005 was a final administrative
12 action. It is essentially ready for judicial review in
13 the court system.

14 However, the US Forest Service successfully
15 argued that, well, Judge, look where we are in this
16 process. This thing's going to be done in 2007. We are
17 just a few months away. It would be a waste of judicial
18 resources if the Court granted this preliminary injunction
19 and got involved here when we are going to have a new
20 management decision in a couple -- and they said very
21 early spring, just a few months away. So the best thing
22 for the Court to do is just to stay out of this and to
23 allow the Forest Service to publish an amendment to the
24 Forest Plan. Because, who knows, maybe that amendment
25 will grant the plaintiffs the relief they are requesting.

1 Well, as we now know in hindsight, those
2 amendments were not published in a few months. They are
3 not published in early spring. They were not published
4 within one year or two years. They were not published
5 until almost the end of 2009.

6 Now, when those amendments were finally
7 published, this is 2009, five years basically after the
8 chief's decision. Those amendments come out and after all
9 this time those amendments continued to violate federal
10 law.

11 And so it was pretty clear to the plaintiffs at
12 that point -- what they said in a nutshell was we are
13 going to allow a tiny, tiny amount. But we are not going
14 to restore floating access like the Wild Scenic Rivers Act
15 requires. We are going to allow a tiny amount by the
16 Forest Services own estimations, less than six days per
17 year, only in the dead of winter, only in very small
18 groups, only if the water is at a certain water level and
19 only if you comply with some arcane permitting system.

20 This river, because it is so far up the
21 watershed, it rains, the river comes up, you can float it
22 usually for about 24 hours and then it goes back down.
23 And the Forest Service is requiring the plaintiffs to
24 comply with this big permitting system where they are
25 going to have to get one in advance. It was impossible

1 basically to get on the river. And by the Forest
2 Service's own information it was going to provide six days
3 of boating for a very limited group of people.

4 Again, nowhere close to complying with federal
5 law which is restoring access until you have got a user
6 capacity analysis that shows you that there is too much --
7 there is not enough capacity for that.

8 And the other thing I would say about that 2009
9 amendment was after all that time no user capacity
10 analysis was ever done in compliance with federal law.
11 Instead, there was just, again, a decision and it was not
12 based on a capacity analysis. So that's what prompted the
13 plaintiffs to file this lawsuit.

14 At the time the plaintiffs filed this lawsuit,
15 Your Honor asked at the beginning of the hearing about the
16 TRO. Why did we file that? Well, the plaintiffs were
17 mindful that while we have definitely have an irreparable
18 harm that's meritorious of a preliminary injunction,
19 nobody's hair's on fire. We probably don't need a TRO.

20 The reason we asked for a TRO was because at
21 that time the Forest Service, despite the fact that the
22 Northern District of Georgia and the Chief of the Forest
23 Service had already found that that 2005 decision was a
24 final administrative action and that this amendment was
25 the culmination of that final administrative action, the

1 Forest Service launched off on another multi-year
2 administrative process. So they choked the plaintiffs
3 down to six days of access. And then they said, if you
4 don't like that, you don't get to go to court. We want
5 you to come back and waste three or four more years so we
6 can tell you that you still can't boat at the end of those
7 three or four years.

8 So the plaintiffs at that time were in this
9 Catch 22. Because we had filed this court action and if
10 we -- our argument in the court as it remains today and
11 this is germane to the arguments this morning, our
12 argument is that we are not bound in any way by -- there
13 is no more administrative process we have to go through.
14 We have exhausted our remedies.

15 But the Forest Service took an opposite
16 position. And we only had eight days to file an
17 administrative response. So if we came into court and the
18 judge agrees with us and says you do need to be in an
19 administrative process, we were going to be timed out. We
20 were going to then not be able to participate.

21 So when we filed that TRO, the main reason for
22 filing that was we asked the Court, please help us out
23 with a catch 22. Let us at least file a protected filing
24 in that administrative proceeding and continue our court
25 action without forbidding us from making this argument

1 that we shouldn't have to be in that administrative
2 proceeding. And the judge agreed and said that makes
3 perfect sense. Go ahead and file your protective pleading
4 and we'll deal with that issue later.

5 Well, then what happened is the US Forest Service --

6 **THE COURT:** Let's go there. On the TRO, I
7 understand what you say are the findings. But then some
8 of your brief covers about what that particular judge had
9 in front of it and what that judge also thought was to be
10 expected. For example, you just mentioned the Georgia
11 case where they thought a decision or an amendment was
12 coming within months but then it took years and what did
13 this judge have it front of it because it sounds like some
14 decision the judge made --

15 **MR. GALBREATH:** Thank you for that question,
16 Your Honor. There was a very good question for that.
17 What the judge said there was, once again, in terms of the
18 preliminary relief that you are talking about, which is
19 trying to restore access even on a TRO basis, we are going
20 to have a PI hearing in just a couple of months. So what
21 I'm going to do is grant in part and deny in part the TRO
22 request. The part that I'm going to grant is go ahead and
23 file your protective pleading and don't worry about losing
24 any arguments in federal court. And the part I'm going to
25 deny is I'm going to at least let the government, this has

1 gone on for many years, I'm going to at least give the
2 government a few months to respond to your request for
3 preliminary relief. So we'll have a hearing in just a few
4 months, in January. I think it was either October or
5 November. And there is a minute entry I think. There was
6 a teleconference.

7 **THE COURT:** Right.

8 **MR. GALBREATH:** It's on the docket. So we
9 proceeded under that understanding.

10 And then lo and behold, a few days later the
11 Forest Service takes that entire five-year process that
12 was kicked off by the April 2005 decision, takes the
13 entire box of -- takes that entire process and drops it in
14 the shredder and says we are going to withdraw this
15 entire -- we are withdrawing our entire decision that we
16 just published.

17 **THE COURT:** But at the hearing on the TRO, did
18 the judge understand that the government was going to have
19 some type of response with respect to the amendment or
20 order the judge -- the government to do anything in
21 particular?

22 **MR. GALBREATH:** The Court just wanted to give
23 the government the opportunity to at least file some
24 papers because they hadn't filed an answer. I don't think
25 they filed a motion to dismiss. I can't remember. But

1 they hadn't had an opportunity to brief any kind of
2 preliminary relief issues.

3 **THE COURT:** Okay.

4 **MR. GALBREATH:** So he just wanted to make sure
5 that they had an opportunity. He said no one's hair's on
6 fire. So let's not talk about a TRO, but we'll get you a
7 hearing very fast.

8 **THE COURT:** Okay. Essentially coming to this
9 hearing.

10 **MR. GALBREATH:** Exactly. And unfortunately, as
11 this Court knows, what happened was the South Carolina
12 Judiciary was in a little bit of disarray last year
13 because some judges retired and it was kind of hard to get
14 hearings sometimes. And on top of that, plaintiffs had a
15 conflict one time. I think the government had. So in one
16 way or another, it's taken a long time to get here. But
17 this was supposed to happen last January. So this
18 injury's continued for yet another year.

19 So what happened is the government took those
20 amendments and they pulled them back. And at the time we
21 really tried to drill down how could this happen? We've
22 spent -- pro bono counsel, these nonprofit organizations
23 have spent untold amounts of time and resources all up
24 through 2009 and now -- contesting these 2009 amendments
25 and then the government yanks them back after publishing

1 them. So we really drilled down to say why are you
2 pulling these amendments back? And the answer that we got
3 at the time was, well, there were sort of some typos, some
4 small inconsistencies in a footnote. Once again, we'll
5 have this thing back out in no time.

6 Well, Your Honor, there is a strange pattern
7 here where every time there is a hearing before the Court,
8 all of the sudden something pops out on the US Forest
9 website. Just last week before this hearing the US Forest
10 Service published on its website that they weren't just
11 going to fix some little problems with the footnote and
12 republish in a couple of weeks, especially since it's been
13 an entire year. Instead, they are going to take that
14 whole five-year process and go drop it in the trash can
15 and start over again.

16 And the defendants are here this morning arguing
17 to this Court that the plaintiffs should just sit on the
18 sidelines for another -- well, oh, there are some words
19 that came back up I think in that, if you read the Forest
20 Service on their website about they are going to redo this
21 process. Once again, it is coming out in early spring, in
22 just a few months. It took them five years to get from
23 the chief's decision in '05 to getting those things
24 finally published in '09. And they are trashing that
25 whole process but somehow in a few weeks, few months they

1 are going to come through an entire five-year process
2 again. So the plaintiffs should once again, go away, go
3 sit on their couches and not enjoy this resource, this
4 federal resource that was protected for their benefit.

5 And I know that my co-counsel, Mr. Hendrix, is
6 going to address the legal merits of the preliminary
7 injunction if the Court has time before lunch. But I just
8 wanted the Court to be aware of the background of how we
9 ended up here this morning. Does the Court have any
10 questions of me before Mr. Hendrix addresses the legal
11 issues?

12 **THE COURT:** In terms of the administrative
13 process, what do you consider that to be at this juncture?
14 You are appealing now from what do you perceive is the
15 final agency action.

16 **MR. GALBREATH:** If it pleases the Court,
17 Mr. Hendrix is going to deal with that.

18 **THE COURT:** Okay. Because I have several
19 questions. Happy to hear from you.

20 **MR. GALBREATH:** Thank you very much, Your Honor.

21 **MR. HENDRIX:** Your Honor, if it may please the
22 Court? I will start by answering your question directly.
23 And the answer to that question is we don't know. We
24 really don't know what the government considers to be the
25 record. But what we do know is what we consider to be the

1 record and what we are appealing from.

2 First, there is the 2005 appeal decision. The
3 reviewing officer for the Forest Service acting on behalf
4 of the Chief of the Forest Service says that this is our
5 final agency determination. This is the final agency
6 action.

7 **THE COURT:** And where are you getting that from
8 that they indicate it is the final agency action?

9 **MR. HENDRIX:** Yes, ma'am. The very last
10 sentence of the 2005 appeal decision.

11 **THE COURT:** Okay.

12 **MR. HENDRIX:** We have just put on this screen
13 that sentence.

14 **THE COURT:** Thank you.

15 **MR. HENDRIX:** Additionally, Your Honor, if you
16 consult the Northern District of Georgia's opinion in this
17 case, the Northern District of Georgia also agreed that
18 that was, in fact, a final agency decision.

19 **THE COURT:** Okay.

20 **MR. HENDRIX:** At the beginning I would discuss,
21 Mr. Galbreath explained the facts of the case and the long
22 convoluted process the plaintiffs have had to work through
23 in order to get to where we are today. I would like to
24 address with the Court our preliminary injunction motion
25 and the legal merits of that motion. This case -- and

1 what I'll focus on today is about the legality of the
2 floating ban. That is the reason that --

3 **THE COURT:** Let me just step you back. If they
4 had not pulled, the government pulled the amendment, then
5 what was your next step? Just to let those appeals go to
6 where?

7 **MR. HENDRIX:** If they hadn't appealed the 2009
8 amendment or the 2005?

9 **THE COURT:** The 2005, I'm sorry. You are saying
10 the last final agency action is the 2005 appeal decision
11 from the Forestry Commission.

12 **MR. HENDRIX:** Yes, Your Honor.

13 **THE COURT:** Okay. After that is when we had the
14 2009 amendment come out.

15 **MR. HENDRIX:** Yes, Your Honor.

16 **THE COURT:** That was then lifted and then a stay
17 put in place.

18 **MR. HENDRIX:** That's correct.

19 **THE COURT:** Because the 2009 amendment allowed
20 some limited access on the water. But when the stay was
21 in place it reverted you back to an entire ban.

22 **MR. HENDRIX:** That is our position, yes.

23 **THE COURT:** Okay. But if -- when you were
24 appealing, you were appealing the 2005 decision before all
25 the withdrawals of the appeals?

1 **MR. HENDRIX:** Your Honor, we were appealing the
2 ban.

3 **THE COURT:** The ban, okay.

4 **MR. HENDRIX:** The basis for our complaint and
5 the basis for the plaintiff's complaint before this Court
6 is several fold. The first of which is under the
7 Administrative Procedures Act. First, the APA provides us
8 with a private right of action to sue the government when
9 the government has made a decision in an arbitrary and a
10 capricious fashion. Now, we certainly allege that they
11 have engaged in arbitrary and capricious decision making.
12 But the core of what it is we are arguing here is that the
13 agency has acted outside of its authority. It has acted
14 unlawfully.

15 If you look at the APA, the APA provides for a
16 private right of action not just for arbitrary and
17 capricious decision making but also when the agency acts
18 outside of its legal authority when it acts in an unlawful
19 fashion. So the private right of action that is currently
20 before the Court is based on that provision of the APA.
21 And specifically, the unlawful action that we are alleging
22 is, in part at least, a violation of the Wild and Scenic
23 Rivers Act. Now --

24 **THE COURT:** So the entire 1976 ban essentially.

25 **MR. HENDRIX:** Yes, Your Honor.

1 **THE COURT:** Okay.

2 **MR. HENDRIX:** And I would also like to say, it's
3 not that our case is limited to violations of the Wild and
4 Scenic Rivers Act. We reference alleged violations of
5 other acts including the Wilderness Act. In addition, and
6 this goes back to an earlier stipulation, under the APA we
7 have stipulated and agreed that exhaustion is what we are
8 required to do. We are required to exhaust our remedy.

9 However, we also alleged and have before this
10 Court a viable constitutional claim that's brought under
11 42 USC 1983. And my understanding is that exhaustion is
12 not required for a constitutional remedy.

13 Your Honor, as I said before, we are here
14 because of the ban and because of the illegality of that
15 ban. And the Court's required to consider in terms of
16 evaluating preliminary injunction, first, the irreparable
17 harm that has been suffered by the plaintiffs. Every day
18 that is lost on the Headwaters to this ban is a day that
19 plaintiffs will not receive back. There is nothing this
20 Court can do to return them to the river in the past.

21 Likewise, there is not any monetary relief
22 available to the plaintiffs. There is not any monetary
23 relief that can even compensate them for the time that
24 they have lost. That is an ongoing harm.

25 And I guess now the easiest way to explain to

1 the Court, the most illustrative way would be to call
2 Mr. Bruce Hare as a witness and have him describe here in
3 court the harm that he suffers daily as a result of this
4 ban.

5 **THE COURT:** Let's clarify all of my questions
6 first on the administrative issues.

7 **MR. HENDRIX:** Sure.

8 **THE COURT:** Let me just look through my notes.
9 You all are indicating the 2005 decision is the final
10 agency act from which you appealed. And then that's the
11 time after which the defendant had the 2009 amendment then
12 withdrew it and issued the stay. And the defendant's
13 position would be now all this is moot because by the
14 withdrawal of the amendment and then the stay of the 2009
15 amendment essentially reverting you all back to the ban,
16 then they still have other decisions or administrative
17 decisions to make from which you could then appeal and
18 exhaust your remedies. What would your response be to
19 that?

20 **MR. HENDRIX:** Without speaking for the
21 defendants in the case and based on what they have set
22 forth in their pleadings, my understanding is that the
23 only final agency action currently before the Court is a
24 bit over 30 years old. It is the 1985 plan. Their
25 position is, I think, is that because the 2005 appeal

1 decision by the Forest Service, because that in essence
2 said that the 2004 plan was not legal, that they then had
3 to manage the river consistent with the 1985 plan. So I
4 think their position would be that the 1985 plan is the
5 only final agency action in the last 30 or so years that
6 the Forest Service has made on this issue. I think that
7 is their position.

8 Now, there is a number of reasons why we
9 disagree with that position. First, the 2005 decision
10 doesn't reset the clock. It doesn't wipe clean the slate
11 that includes the 2004 amendment. That amendment is still
12 a live issue.

13 Moreover, I would say that the ban itself is a
14 live issue as currently before the Court. We haven't just
15 challenged a plan. We haven't challenged the specific
16 amendments. What we have challenged is the legality of an
17 ongoing continuing harm.

18 Now, to the extent -- and we can get into this
19 when we argue on the motion to dismiss. To the extent the
20 1985 ban is considered to be the only final agency action
21 in the last 30 years on this issue, I think what you'll
22 hear from the defendants is that we don't have a right to
23 bring a suit because we only have six years within which
24 we can bring a suit according to the statute of
25 limitations for actions against the United States. And

1 that statute of limitations would have run in '91
2 according to the papers that the defendant has filed with
3 the Court. I can address that when we reach the motion to
4 dismiss or I can address that now depending on the Court's
5 preference.

6 **THE COURT:** We'll talk about that in the motion
7 to dismiss then. Because that's more of a jurisdictional
8 issue. That way I will let you stay on your argument.

9 **MR. HENDRIX:** Okay.

10 **THE COURT:** What do you understand, and I think
11 your co-counsel somewhat explained this, is any further
12 administrative action in terms of what the government
13 plans to do at this juncture? Is it just reviewing the
14 whole plan again and reviewing their management plan?

15 **MR. HENDRIX:** Based on what they published on
16 October 1st, our understanding is that they have started
17 over the entire process of reviewing and going through the
18 entire NEPA process, National Environmental Policy Act
19 process, in order to make a determination and formulate a
20 plan for the management of the river. In other words, the
21 process that hadn't taken place prior to 2005, I
22 understand that they're undertaking that process from the
23 start, from scratch. I don't know that to be true but
24 that's based on what we have seen from the defendants.

25 **THE COURT:** Okay.

1 **MR. DOUGLAS:** Before we go too far off the
2 rails, Judge, what was announced in that SOPA, Schedule of
3 Proposed Actions, was a continuation of the process that
4 was underway. And it announced specifically that no one
5 needed to resubmit things they had submitted in the past
6 because those would be considered in it. So that is in
7 the announcement that they are talking about. It is just
8 a continuation of what was going on before.

9 **THE COURT:** Okay.

10 **MR. HENDRIX:** From our reading of the SOPA, I
11 don't think that was made clear. And in fact, I don't
12 actually think that's the case near as we can tell.

13 But in any case, our understanding is what's
14 likely to happen in the future is we will find ourselves
15 with a ban several years from now, that the Forest Service
16 will then say, well, you need to actually exhaust your
17 administrative remedies, challenge within the Forest
18 Service. And if you do get a decision that you disagree
19 with, then perhaps you could bring another case.

20 **THE COURT:** From this hearing I assume that you
21 are seeking a preliminary injunction which thereafter
22 generally follows a hearing on the merits for a permanent
23 injunction. Do you believe that that is the course of
24 action that should occur here or that there is a
25 preliminary injunction, if I were allow it, that is then

1 subject to the decisions that are to be made by the
2 government and then you appeal from that? Or should it be
3 preliminary injunction then to permanent injunction?

4 **MR. HENDRIX:** Well, I would have to say that I
5 don't know. I assume the decision is going to be continue
6 with the boating ban. And if that's the case then, yes,
7 the process the Court has just described I think would be
8 the proper process to follow. To the extent that the
9 government decided to open the river up in the interim --

10 **THE COURT:** When you say you think the decision
11 would be to continue with the ban, you are talking about
12 the government?

13 **MR. HENDRIX:** Yes, Your Honor.

14 **THE COURT:** You think that's what they will do?

15 **MR. HENDRIX:** Yes, Your Honor, if the government
16 can maintain the ban after they went through whatever
17 process it is that they are continuing to go through.
18 Then, of course, if they did open the river up, I think
19 that that wouldn't necessarily moot this case but it would
20 certainly motivate the plaintiffs in this case to
21 reconsider the lawsuit. I mean, we at this point as I
22 said before, the ban is what is at issue in this case.

23 **THE COURT:** But I guess what I'm asking then is
24 the Court has to make a decision on preliminary
25 injunction. Let's say I ruled with you. Then generally

1 what happens is you have a permanent injunction or trial
2 on the merits coming thereafter. In the interim, the
3 government could make a decision or maybe they wouldn't.
4 Should any ruling on this Court that would have been in
5 your favor be pending the trial on the merits or either
6 the agency's decision?

7 **MR. GALBREATH:** Your Honor, that's a very good
8 question. And I'm glad you asked that. I can address
9 that very briefly. A preliminary injunction would carry
10 us -- we are just in limbo right now. And what the Wild
11 and Scenic Rivers Act says if you are in limbo and the
12 government hasn't done a capacity and analysis study that
13 according to law determines that there is some basis to
14 limit an approved activity like boating, the default
15 position is you allow it and it is allowed until such time
16 that the government conducts a legal analysis that says
17 there is some reason to limit it. That's never happened.
18 So what we are asking for is your preliminary injunction
19 would extend until such time that the government publishes
20 some legal capacity analysis in the future that justifies
21 some management decision they make that might change your
22 preliminary injunction that would just be restoration of
23 the natural management that's been happening for 250
24 years. Or it would be the hearing on the final
25 injunction. So whichever happened first I think would

1 convert that preliminary injunction to some kind of
2 different decision.

3 **THE COURT:** Okay. All right. So I just wanted
4 to know ultimately what you are seeking. Of course,
5 defendants will have their opportunity to respond. You
6 can continue with your presentation. I think you have
7 answered my questions.

8 **MR. HENDRIX:** If the Court will allow it, I
9 would like to call a witness. I would like to call
10 Mr. Bruce Hare.

11 **THE COURT:** Okay.

12 **THE CLERK:** Mr. Hare, I need you to raise your
13 right hand and place your left hand on the Bible. Please
14 state your full name for the record.

15 **THE WITNESS:** Bruce Alan Hare.

16 **THE CLERK:** And how do you spell your last name?

17 **THE WITNESS:** H-A-R-E.

18 BRUCE HARE, after being duly sworn, testified as
19 follows:

20 **THE CLERK:** Mr. Hare, you may have a seat in the
21 witness box. Feel free to adjust the microphone if you
22 need to.

23 DIRECT EXAMINATION

24 **BY MR. HENDRIX**

25 **Q** Morning, Mr. Hare. Would you please state your full

1 name for the record.

2 **A** Bruce Alan Hare.

3 **Q** Would you describe for the Court the reason you are
4 involved in this lawsuit, Mr. Hare?

5 **A** I was lucky enough to be born and raised on the banks
6 of the Chattooga River. I have lived there my entire life
7 as has my family for four generations before me. We have
8 all enjoyed the resources provided by the Chattooga River
9 throughout these many lifetimes. Although I grew up on a
10 poor farm here in Appalachia, as soon as I got out of the
11 United States Army and came back home, I returned to that
12 same farm, to the same outdoor activities that I had done
13 for most of my life which included boating on the river
14 with my father and my grandfather. We used primitive
15 crafts. At the time they were homemade wooden dories or
16 aluminum canoes that we were able to find at yard sales
17 and junk heaps, whatever we could to get us out there on
18 the river. It was a place of extraordinary beauty and a
19 significant challenge, physically, to negotiate the rapids
20 and the rocks and the mountains there. But it's what we
21 love to do. And because I grew up there, it became a part
22 of my life. And as soon as I got out of the Army, I
23 noticed that other people were paddling the river in
24 significant numbers. And I felt that there was an
25 opportunity there to do something with a small business

1 that would serve the public. So I went into the
2 whitewater business selling whitewater equipment, kayaks,
3 canoes and rafts, teaching canoeing and kayaking and
4 running a shuttle service.

5 I am here today because I'm aging. I'm 58 years old.
6 I have arthritis. I have an artificial knee and an
7 artificial hip. My whitewater paddling career is rapidly
8 narrowing. The upper 21 miles of the river is some of the
9 most beautiful whitewater anywhere in the world. And I
10 have paddled extensively throughout the western hemisphere
11 literally from Alaska to South America. The Chattooga
12 River ranks as one of most beautiful anywhere. And I
13 think there is little disagreement about that fact.

14 I'm here today to try and seek redress for this
15 grievance caused me by the US Forest Service. It's public
16 property. It is supported with public tax money. And
17 it's been proven time and time again that paddlers do no
18 harm to the resource.

19 I would like to be able to see that part of the river
20 again before I pass away. And the best way to see that
21 remote, rugged terrain is from a boat. Mother nature and
22 gravity takes care of most of the hard work and gets you
23 into places that are otherwise very, very difficult to get
24 into and enjoy.

25 It's a big part of my life because it's been my

1 hobby, my business and my passion for all of my life. The
2 Chattooga River is the one continuous thread that runs
3 throughout the fabric of my entire life. I caught my
4 first fish out of the Chattooga River. I had my first
5 swim in the Chattooga River, my first camping trip on the
6 Chattooga River and my first boat ride ever on the
7 Chattooga River when I was six years old.

8 I have paddled the lower part of the river thousands
9 of times in the course of my professional and recreational
10 career. The lower river is beautiful, exotic and
11 challenging. But because it's much bigger, broader and
12 has a greater volume of water, it is significantly
13 different from the Headwaters of the Chattooga. The
14 Headwaters are steeper, more vertical, the drops are
15 bigger and the challenge is significantly greater in my
16 opinion for a kayaker or canoer to negotiate.

17 **Q** Mr. Hare, when was the last time you were able to
18 actually run the Upper Chattooga?

19 **A** I actually paddled the Upper Chattooga before the ban
20 and after the ban. It was not widely known that the river
21 had actually been closed. In fact, there was never any
22 published information in the local newspapers. The Forest
23 Service had a mailing list at the time but it only
24 included a very few people. I didn't become aware of it
25 until the actual Forest Service personnel that I was

1 familiar with at the time told me on a personal,
2 one-on-one basis that it was closed. And although I
3 objected to that closure, at the time I was unable to do
4 anything about it. I did not have the financial resources
5 or legal resources to attack a problem of that magnitude
6 from the US Government. I was so happy to be there on the
7 river working on the river and paddling on the river that
8 I think myself and a lot of other people were grateful for
9 what we had and that is the designation of a wild and
10 scenic river. And we simply didn't realize the
11 ramification of this closure. It was something that
12 really came out of the blue and surprised everybody in the
13 local paddling community.

14 **Q** Do you recall a rough time frame the last trip down
15 the Headwaters took place?

16 **A** I did paddle the river in 1976 before it was closed
17 and after it was closed and on through the late 70's and
18 into the early 1980's. There is a local cadre of boaters
19 there in the river community that have always paddled the
20 river. It only runs on average 50 to 60 days out of the
21 year. And you have to be pretty close to be able to get
22 there. In other words, you have to be able to pretty much
23 drop what you are doing and load up your boating gear and
24 get one of your buddies to run shuttle with so you can go
25 up there and actually get on the river before the water

1 level runs down and that opportunity is lost.

2 **Q** Would you consider yourself to be familiar with the
3 topography of the Headwaters, the morphology of the river,
4 the geology?

5 **A** Yes, absolutely.

6 **Q** Could you describe for the Court what the Headwaters
7 look like from a paddler's standpoint and from a floater's
8 standpoint?

9 **A** They are very unique and very challenging and very
10 scenically beautiful. The rapids are bedrock granite.
11 There are huge forested mountainside on both sides. There
12 are side streams and creeks cascading into the river
13 gorge. There is wildlife, black bear, all sorts of
14 aquatic wild life. It is a really incredible place to
15 experience all that nature has to offer in a wild and
16 scenic environment.

17 **Q** If you were provided with the opportunity to legally
18 float the Headwaters, if, for example, you had that
19 opportunity tomorrow, would you take that opportunity?

20 **A** Yes, sir, absolutely.

21 **Q** Would you -- based on your experience with the river
22 and your knowledge of the river, is it your understanding
23 that the Headwaters would be currently navigable, able to
24 be floated in a primitive kayak or canoe?

25 **MR. JENKINS:** Objection, asking for a legal

1 conclusion.

2 **MR. HENDRIX:** No, Your Honor, I'm actually
3 asking if he believes he could float the river based on
4 what he knows in a kayak.

5 **THE COURT:** Okay. That question I'll allow. Go
6 ahead.

7 **THE WITNESS:** Yes, ma'am. I have boated all the
8 rapids in the Headwaters with the exception of the private
9 property.

10 **Q** And why have you chosen not to float through the
11 private property?

12 **A** Well, at that point access to that extreme upper
13 portion of the river, the only way to get there was to
14 carry your boat up through the national forest from the
15 bridge. And to hike up to the forest as far as we could
16 and at a point past the big log jam, the giant log jam you
17 come to the private property. And there is a sign there
18 on the banks of the river that says private property, no
19 trespassing. So that's where I put in and floated down
20 from that point.

21 **Q** Would it be -- based on what you know about the
22 river, about the topography, the morphology, the flow,
23 would you have any reason to believe you couldn't float
24 through that area?

25 **A** No, sir. I have studied the maps in great detail,

1 the contour line maps and US geological survey maps all
2 the patterns, studied and analyzed the river. Two ways to
3 gauge a river, the volume of the water, the greater the
4 volume generally the greater the difficulty. But the
5 biggest measure of any river is the total amount of
6 vertical drop. The Headwaters of any river offers the
7 greatest degree of vertical drop. So paddlers, by their
8 very nature, seek out the Headwaters of rivers because
9 that is where the ultimate challenge in whitewater
10 paddling occurs. And that's here, out west, in Alaska or
11 any other continent, paddlers all over the world seek out
12 these Headwaters because they give you the best of what
13 whitewater rivers have to offer.

14 **Q** Based on what you have studied and your knowledge of
15 the river, what would you expect that water to look like
16 through that land through the private property?

17 **MR. JENKINS:** Objection, pure conjecture now.
18 What does the water look like?

19 **MR. HENDRIX:** Your Honor, I believe I have laid
20 a foundation that he has studied the river in great
21 detail. He has personal knowledge with it.

22 **THE COURT:** I will allow it based on your
23 personal observation and experience. Don't speculate.

24 **THE WITNESS:** Yes, ma'am. It would be very
25 beautiful. It would be challenging. It would be

1 rewarding. It would be a unique experience in the
2 southeast.

3 **Q** Mr. Hare, what is it that you hope to get out of this
4 lawsuit? At the end of the day, what are you looking for?

5 **A** I just want to be able to go out with my kayak and
6 enjoy the resources that are protected under the national
7 Wild and Scenic Rivers Act. Kayaking is like any other
8 high adventure outdoor sport. It builds within the
9 individual a level of challenge that stimulates you both
10 mentally and physically. You have to be somewhat athletic
11 to be able to paddle, especially the Headwater conditions.
12 But the mental challenge of being able to assess the
13 rapids' difficulty and determine a route through it and
14 then actually be able to execute that maneuver through the
15 rapids, that is a tremendous reward psychologically and
16 physically for a whitewater boater.

17 **MR. HENDRIX:** I don't have any further questions
18 for Mr. Hare at this time. Perhaps the government might.

19 **MR. DOUGLAS:** I don't have any questions, Your
20 Honor.

21 **THE COURT:** Okay.

22 **MR. JENKINS:** Thank you.

23 CROSS-EXAMINATION

24 **BY MR. JENKINS**

25 **Q** Mr. Hare, good morning or afternoon as it may be.

1 Alan Jenkins for the Rust family and Whiteside Cove
2 Association. You are indeed able to float the Headwaters
3 in the Chattooga River, are you not?

4 **A** I am legally allowed to paddle Overflow Creek and the
5 West Fork Tributary. And the main stem of the Chattooga
6 River, I can only paddle from South Carolina Highway 28
7 bridge down to the confluence at Lake Tugaloo.

8 **Q** And the Overflow Creek through the West Fork, is that
9 approximately 12 miles?

10 **A** Yes, sir.

11 **Q** Now, you made some comments to the newspaper in
12 Highlands. Do you recall those?

13 **A** When?

14 **MR. HENDRIX:** Your Honor, I believe this is
15 beyond the scope of my direct examination of Mr. Hare.

16 **THE COURT:** Well, he is on cross-examination.
17 He can go into certain --

18 **Q** Do you recall telling the newspaper that the upper
19 section was floatable less than 30 days a year?

20 **A** That would be dependent on rain fall. Rain fall is
21 variable from year to year and season to season.

22 **Q** But you admit saying that, correct?

23 **A** I would not deny that, no, sir.

24 **Q** You are not precluded from hiking in the upper
25 section of the main stem of the Chattooga, are you?

1 **A** No, sir. But I do have physical limitations that
2 make hiking a lot more difficult for me than paddling.

3 **Q** You are able to swim at the pools above Grimshaws
4 Bridge, are you not?

5 **A** That would be permissible, yes, sir.

6 **Q** Is it your -- would you expect that -- or would you
7 oppose the request of an elderly bicycle rider to be able
8 to bicycle on every trail in the wild and scenic river
9 area?

10 **A** That's an issue I have not studied.

11 **MR. JENKINS:** Thank you.

12 Nothing further.

13 **MR. HENDRIX:** I don't have any further
14 questions.

15 **MR. DOUGLAS:** Nothing further, Your Honor.

16 **THE COURT:** You may step down.

17 Plaintiffs, any other presentation?

18 **MR. HENDRIX:** I can, Your Honor, unless you
19 would like to take a break.

20 **THE COURT:** We'll be on break for about ten
21 minutes.

22 (WHEREUPON, a short break was taken.)

23 **THE COURT:** We are ready to continue with the
24 plaintiff's presentation.

25 **MR. HENDRIX:** Thank you, Your Honor. Your

1 Honor, I'll be brief. There is a couple of other issues
2 that I would like to discuss, specifically, returning to
3 the factors that the Court is likely to consider in
4 evaluating the preliminary injunction.

5 And I guess the next factor taking them in order
6 would be the likelihood of our success on the merits here.
7 I mentioned earlier that the plaintiffs feel the
8 likelihood of success on the merits here is very direct,
9 very clear. And the reason for that is, first, the Wild
10 and Scenic Rivers Act in Section 1281 says very
11 specifically the Forest Service is required to protect and
12 enhance the values where congress has designated the
13 rivers.

14 Now, there is some discussion about what those
15 values are but I will say this. The values for which
16 congress designated the river can be found in both the
17 Senate report and in the report the Forest Service used to
18 inform congress as to the values that the Chattooga River
19 would offer. The language in both the report and in the
20 senate report, the Forest Service's 1971 report and the
21 Senate report regarding the designation specifically of
22 the Chattooga, that report says that for each segment of
23 the river that floating is a value that congress intends
24 or that congress expects the public to enjoy. And then
25 congress designated the river for that purpose. We know

1 the value here at issue is floating.

2 The question that Your Honor asked was what does
3 protect and enhance mean? Is there a definition of that
4 term? Mr. Galbreath said, quite frankly, we are not aware
5 of any interpretation of what protect and enhance mean,
6 not any ideal interpretation nor a congressional
7 interpretation. But what we will submit to the Court is
8 that protect and enhance can't mean ban. An outright ban
9 can't be said to protect and enhance the value of
10 floating. If you are not permitted to enjoy that value
11 whatsoever, how can you say that that value has been
12 protected or enhanced?

13 We'll get into this quite a lot I imagine on the
14 arguments on the motion to dismiss, but what we'll say at
15 this point is our argument is that our case, the
16 plaintiff's claims are before the Court and before the
17 Court properly and in a timely fashion. We don't have any
18 statute of limitations issues. We feel this is quite
19 ripe.

20 We have exhausted our administrative remedies.
21 And if we haven't -- or if the Court feels we haven't
22 exhausted our administrative remedies, what I would say is
23 that at this point I can't imagine a better or clearer
24 case in which the plaintiffs have demonstrated the
25 futility, the utter and complete futility of engaging at

1 all any longer with the Forest Service's administrative
2 process.

3 To the extent the plaintiffs are required to do
4 that, we would expect to be engaged in that process for
5 years and then find ourselves in the same place we are in
6 now; which is to say, we have no reason to believe the
7 Forest Service intends to do anything other than to ban
8 floating on the river.

9 There are two other considerations. One is the
10 balance of the harms. What's the harm that the Court has
11 to consider to the defendants and to the plaintiffs, the
12 relative harms, if the Court decides to lift this ban?

13 We would submit to Your Honor that lifting the
14 ban would not in anyway change or burden the Forest
15 Service. It wouldn't change the way they would need to
16 manage this river. In fact, I think the burden would be
17 less. They would have no need to police an unlawful ban.
18 Our understanding is they would need to post signs. As
19 Mr. Galbreath explained, American Whitewater has even
20 offered to pay for those signs.

21 At this point, Your Honor, two things that every
22 other user group that would have access to the Upper
23 Chattooga at this point they have unlimited access. There
24 is no restrictions on their access to the Upper Chattooga,
25 the Headwaters.

1 If you would like to hike on the Headwaters, you
2 are free to do that. There is no limitations on group
3 size. There is no limitations on the number of days or
4 the time of year, nothing of that sort that would limit
5 you from enjoying the resources that way. Swimming or
6 hiking are just not limited in any way by the Forest
7 Service.

8 What the plaintiffs are asking is that they be
9 treated similarly to the other recreational users of the
10 Headwaters. So we don't think that there is any
11 particular burden that would be associated with lifting
12 the ban on defendants.

13 Finally, to the extent that the Court has a duty
14 to consider the public interest, here we would submit the
15 public interest in this case is requiring the Forest
16 Service to comply with the law. Forest Service for well
17 over 30 years has not complied with the law. They have
18 banned illegally floating in the Headwaters. And we would
19 hope that the Court would recognize that and permit the
20 plaintiffs to float the Headwaters and then the Forest
21 Service to comply with that law.

22 I think at this time we will go ahead and submit
23 that for the record and let the motion to dismiss if you
24 want us to go forward.

25 **THE COURT:** So essentially, you are not even

1 asking to go back to the 2009 amendment which had limited
2 use. You are asking to go beyond that to say open up the
3 waters freely until such time as we have the permanent
4 injunction hearing or the Government's decision, whichever
5 comes first? Is that what I understood your earlier
6 argument to be?

7 **MR. HENDRIX:** Yes, Your Honor. Basically, we
8 would like to be treated as any other user group on the
9 Headwaters is treated.

10 **THE COURT:** All right. Then I will hear the
11 other side. Okay. Y'all will have a chance to respond to
12 their motions as well.

13 **MR. HENDRIX:** Thank you, Your Honor.

14 **THE COURT:** Okay.

15 **MR. DOUGLAS:** Thank you, Your Honor. I will
16 attempt to confine my remarks to the facts that are of
17 record here.

18 We agree that the Chattooga was added to the
19 coverage of the Wild Scenic Rivers Act in 1974. The
20 plaintiff showed you several studies, just showed you the
21 covers which contained a picture of a boat going through
22 rapids indicating they say this is the most important use
23 and that therefore that somehow would affect requiring you
24 to permit this on the upper river. We don't doubt that it
25 is an important use. But remember, that report covers the

1 whole Chattooga River. The Forest Service agrees that it
2 is an important use because the lower two-thirds of the
3 river is open to boating or floating with very few
4 restrictions. And use it the people do.

5 Plaintiff's Exhibit 7, the Capacity and Conflict
6 on the Upper Chattooga study which is in evidence notes on
7 Page 15 that in recent years about 50,000 floaters a year
8 use the lower Chattooga. So we are in fact by virtue of
9 the plans that we have in effect, the 1985 plan included
10 we are recognizing that outstanding value and it is being
11 utilized by a lot of people in the Chattooga River
12 complex.

13 The statute doesn't say that we have to
14 recognize or experience each one of these values anywhere
15 those people want to do it. Time and use restrictions are
16 certainly appropriate if you are going to manage the
17 resource. And that's all that's being imposed.

18 They complained that they are not allowed to do
19 multi-day floating and that this is something that would
20 be a wonderful thing in the Chattooga. Yes, they can.
21 You can do that on the lower two-thirds. It is a very
22 long segment. It should take you at least a couple of
23 days to get down the whole thing. And you can make it a
24 multi-day experience if you want to.

25 They mentioned that the 1976 plan just

1 apparently out of nowhere dropped in the floating will be
2 prohibited above Highway 28. Actually, there is a context
3 to that where that one particular quote comes from is on
4 41 FR 11-852 where it says, "Nicholson Fields Recreation.
5 There are a series of four separate fields situated along
6 the west bank of the Chattooga River. They begin at
7 Highway 28 and continue upstream for two miles. Present
8 access to these fields is a primitive jeep road. They
9 have had heavy use in past years for camping for the
10 purposes of deer hunting and fishing for trout. This area
11 remains a favorite for trout fishing. This location is a
12 source of some of the best trout fishing in both South
13 Carolina and Georgia. Floating will be prohibited above
14 Highway 28 which includes the Nicholson Fields areas."

15 Elsewhere in that report, in that plan, that's
16 part of the river plan, the initial river plan for the
17 Chattooga, they elsewhere in there note the values for
18 fishing and hunting and camping in that area. So it
19 didn't come from nowhere. It came from an analysis of the
20 conditions on the ground and trying to judge where to put
21 the different uses and how to judge -- juggle the uses so
22 that people didn't interfere with one another and they
23 could enjoy it.

24 One of the things that they are complaining
25 about is that there seem to be more restrictions on

1 boating than on other activities. Boating interferes with
2 more activities than the other activities interfere with
3 boating. And consequently, it has to be controlled in a
4 different fashion. At least that's the judgment of the
5 agency. And certainly this Court is supposed to give
6 deference to the agency's judgment in that matter.

7 In terms of the continuing history that got us
8 here, as I said, the plan was promulgated, the initial
9 plan was promulgated in 1976. At that point it said that
10 the floating will be prohibited. I don't know there was
11 any enforcement under way between '76 and 1978.

12 But in 1978 there was a provision inserted in
13 the Code of Federal Regulations that's 36 CFR Section
14 261.77. This is a series of prohibitions that are in that
15 part of the CFR. And 261.77 is where they stated that
16 floating would be prohibited on the entire Chattooga
17 unless a permit was issued. And the policy had already
18 been announced in that '76 plan that they were not going
19 to issue any permits above the Highway 28 bridge. So
20 effectively, for the top third of the river that meant
21 there would be no boating.

22 **THE COURT:** What's your understanding of why the
23 top third is at issue in this case?

24 **MR. DOUGLAS:** Because of the difference.
25 Fishing is also in those reports. The fact that fishing

1 is better in the upper third than it is in the lower third
2 just because of conditions. Boating is not as good in the
3 upper third as it is in the lower third. The witness
4 testified that --

5 **MR. GALBREATH:** We would obviously object to
6 that statement, not as good in the upper third, Your
7 Honor. Certainly put on ample testimony to --

8 **MR. DOUGLAS:** You have already put on testimony.
9 I will quote him. He said that 60 days a year was about
10 all you could boat up there. He told the newspaper 30
11 days a year. The tentative plan that was withdrawn had it
12 scheduled for six days a year. Obviously, there is going
13 to be some limitation on days you can use it whether it is
14 enforced by nature or enforced by nature as interpreted by
15 the Forest Service regulating of when they are going to
16 let people into the river. I'm not sure.

17 **MR. HENDRIX:** If I might point out in terms of
18 the testimony that Mr. Hare said he said nothing about the
19 quality of the floating on the lower river. And clearly,
20 the number of days says nothing about the actually quality
21 of those days on the upper river.

22 **MR. DOUGLAS:** Please don't interrupt.

23 Anyway, Your Honor, in terms of where we go from
24 there to here though, there was a complete Sumter National
25 Forest Plan revision that was done in 2004. Included in

1 that was a continuation of the 1985 plan's prohibition of
2 boating on the upper one-third. The plaintiffs appealed
3 that. And in 2005 the reviewing officer agreed with their
4 appeal and granted it and took out that provision. The
5 reviewing officer said this means the 1985 provisions are
6 still in place and boating is -- floating is prohibited on
7 the upper one-third. That was the 2005 holding. It just
8 took out the portion in the 2004 plan that prohibited
9 boating on it and it sent it back for further study. It
10 mentioned several issues that needed to be addressed in
11 the subsequent study.

12 I thought I understood the plaintiffs to say
13 they were somehow appealing from the 2005 decision or that
14 was somehow was going to support jurisdiction in this
15 court. That cannot, both because that was a final agency
16 decision in which they prevailed, but also they already
17 litigated that.

18 We attached the order of Judge O'Kelly to that
19 motion to dismiss as moot. And in that action in 2006
20 Judge O'Kelly ruled that the plaintiffs are not in anyway
21 prejudiced or inhibited by the 2005 ruling. Their problem
22 is the 1985 plan is what is keeping them from boating on
23 the upper third of the Chattooga River. And because the
24 statute of limitations has passed on the 1985 plan, they
25 can't mount an attack on that plan. So they are stuck

1 with what they have which is that they have no remedy at
2 that point. Judge O'Kelly didn't want to say, well,
3 eventually you will get a final agency decision in regard
4 to the revision of that, those provisions. And at that
5 point, and he used the term "final agency decision,"
6 you'll be able to go to court.

7 Final agency decision is a term of art. It
8 means the last act putting into place the agency's
9 position. That's not when the forest supervisor issues a
10 plan amendment because you have a right to appeal.
11 Congress has provided by statute that in agriculture cases
12 you must take any available appellate route before going
13 to court. Consequently, they had to appeal from that 2009
14 Forest Plan that was issued in order to get to the
15 appellate level and get a decision there that would be a
16 final agency decision.

17 We never got that far in this case because the
18 appeals were filed, the forest plans went up. And when it
19 got to headquarters, they analyzed them and as we note in
20 our motion, at that point it was discovered that the
21 biological assessment and the biological evaluation had
22 been done based on an assumption of four boatloads or
23 groups of people going down the Upper Chattooga in a day.
24 But the plan that was selected as part of the 2009 plan
25 amendment had no limitation on the number going down.

1 Consequently, those were inconsistent and they would not
2 stand.

3 Oddly, those wouldn't prejudice them if they
4 were trying to support the relaxation of the ban, but one
5 of the other people who appealed wanted to appeal on the
6 basis the unlimited number was unsupported in the record
7 they would be correct. Because the analysis was done on
8 four boatloads. And yet the plan that was issued had no
9 limit on the number of people who could boat on the number
10 of days the river was open.

11 That's going a little off the tracks there but
12 it's basically they discovered this problem so they
13 withdrew the plan. That process is ongoing. I know it's
14 going slowly. And it's a bureaucracy. We have a lot of
15 things we have to deal with. But they have had to make a
16 decision in the administrative process. I haven't been
17 involved with it. But I can see from the schedule of
18 proposed actions that they have brought to our attention
19 that a determination has been made they have to go back
20 out and what we call scoping it under the National
21 Environmental Policy Act because it exceeded -- it's not
22 just a minor correction. They were having to make enough
23 of a correction that they were going to have to go out and
24 allow public input. That's not something they do
25 willy-nilly. That's something that's required by the

1 statute. Part of the reason they have gone so slowly here
2 is that there is a lot of that slow down is built into the
3 process that they have to go through. As I noted in our
4 motion, over three thousand public responses were provided
5 in this administrative process.

6 And in this administrative process, the
7 plaintiffs continue to say there was no -- nobody looked
8 at the user capacity, that that analysis wasn't done. It
9 may not have been done in a way that they want it to be
10 done, but it was done.

11 If you look at Plaintiff's Exhibit 7 again, that
12 is Capacity and Conflict on the Upper Chattooga. That
13 report which runs over a hundred pages is a summary of
14 studies that were done in 2006 and 2007 in regard to both
15 capacity and conflict. And that's not all of the user
16 capacity analysis. But if you look at that one, you can
17 see that some analysis was done of user capacity. We may
18 get down at the end of the day if this ever ends up at
19 trial between experts saying that's adequate user capacity
20 analysis, that's inadequate user capacity analysis. But
21 it was done in some fashion.

22 And what has to be kept in mind all through this
23 as we have noted before is there are a number of different
24 stakeholders involved, not just floaters. And again, I
25 think the plaintiffs sort of indicated they thought they

1 were here under the APA because of the 2005 ruling. As
2 noted, Judge O'Kelly has said that's not the case.

3 They have taken at least two other tacks in
4 explaining to the Court why they are here. First of all,
5 if you read the complaint fairly, it obviously is an
6 attack principally on the 2009 Forest Plan amendments that
7 were put out in August and then withdrawn in December.

8 But on January 14th they filed a memorandum
9 opposing the Rust family intervention. And on Page 2 of
10 that, this is Docket Entry No. 45, they said, "The
11 underlying lawsuit which prompted intervenors' desire to
12 intervene involves the question of whether the federal
13 government, specifically the United States Forest Service,
14 USFS, complied with its own laws, rules and regulations
15 when the USFS published the 2009 Revised Land and Resource
16 Management Plans, RMP, which addressed recreational access
17 and permitted uses on the Chattooga River." In other
18 words, this lawsuit is about the 2009 amendments.

19 Three weeks later on February the 5th, 2010,
20 they filed a response to the government's motion to
21 dismiss as moot. And on Page 15 it says, "Even a cursory
22 examination of plaintiff's complaint reveals it is the
23 Headwaters floating prohibition which defendants have
24 maintained in one form or another since 1976 that is the
25 crux of plaintiff's action, not the 2009 amendments."

1 To have an action of the Administrative
2 Procedures Act you have to be questioning the action by an
3 administrative agency. The only action that at this point
4 is inhibiting the plaintiffs, as Judge O'Kelly found in
5 2006, is the 1985 Sumter Forest Plan provisions that ban
6 boating on the upper third of the Chattooga River. That's
7 still in place. That's past the point where you can mount
8 a prima facie challenge to it by virtue of 28 USC Section
9 2401(a), statute of limitations. You are only given six
10 years to challenge the validity of a regulation when it
11 goes into effect.

12 We are specifically at this point talking about
13 the preliminary injunction. They first say that this is
14 an unusual setting for a preliminary injunction.

15 Preliminary injunctions are in the case law
16 noted to be extraordinary remedies and to be granted
17 carefully. Also, the case law sets out that mandatory
18 preliminary injunctions are even more drastic a remedy.
19 You are not asked to preserve the status quo or set it up
20 so that you will be able to actually give a remedy at the
21 end of the case. That's not the purpose of this mandatory
22 injunction.

23 You have being asked to undo 32 years of agency
24 policy on a brief record that you are considering in a PI
25 hearing. And you are being asked to allow what is

1 essentially unrestricted floating on the entire Upper
2 Chattooga River. That is a profoundly questionable step
3 for the Court to take. It would mean the Court would
4 basically take over running the upper third of the
5 Chattooga River.

6 The plaintiffs must show in order to prevail on
7 the preliminary injunction they are likely to succeed on
8 the merits, they are suffering irreparable harm, the
9 balance of the equities tip in their favor and the
10 injunction is in the public's interest.

11 Two years ago in Winter vs. NRDC, the Supreme
12 Court clarified that the person seeking a preliminary
13 injunction must prevail clearly on each of those four.
14 Prior to that, there was some case law that says, well, if
15 you could show that you are really going to be profoundly
16 harmed, we could go light on one of the other prongs. And
17 the Supreme Court said, no, you have to clearly establish
18 each of the four prongs before you can be granted a
19 preliminary injunction.

20 In conjunction with Rule 52(a)(2) which requires
21 the Court to set forth explicit findings and conclusions
22 to support each of those factors, if you were to rule for
23 a preliminary injunction, you would have to be able to be
24 provided with facts and law that would allow you to find
25 that on each one of those four. Of course, to grant what

1 the government's requesting you have to find on one of
2 those that they have failed to prevail.

3 In this case the plaintiffs cannot show they are
4 likely to prevail on the merits. First of all, the plan's
5 already withdrawn. The only timely administrative action
6 that they could be objecting to are the 2009 Forest Plan
7 amendments. And those have been withdrawn for further
8 study.

9 Second, as I mentioned, this was an
10 Administrative Procedures Act review. And in an APA
11 review, the Court is charged to be deferential to agency
12 action and agency judgment.

13 Third, there are multiple groups that oppose
14 boating on the river. As we noted in our motion, five
15 appeals were filed from the 2009 Forest Plan amendments.
16 The American Whitewater group appealed trying to get more
17 boating on the Upper Chattooga. The other four opposed
18 boating on the Upper Chattooga. These are -- once again,
19 we have a mixture of stakeholders involved whose interests
20 have to be taken into account. And the Forest Service, as
21 I noted before, tried to balance the needs of each of
22 these individual groups when coming up with a
23 comprehensive plan to manage the Upper Chattooga.

24 Third, the plaintiffs are not likely to suffer
25 irreparable harm in the absence of preliminary relief.

1 While I don't doubt that there will be some imposition on
2 boaters who would like to float on the Upper Chattooga,
3 there are ample other opportunities for floating,
4 whitewater rafting. Indeed, they can go just downstream
5 of Highway 28 and get a lot of rafting in. Or if they
6 wish to enjoy the scenery in that area, for most of it
7 they can hike through it.

8 And I would take slight umbrage with the
9 statement that because one of the persons who might want
10 to float on it is at something of an advanced age,
11 substantially less than my age I would add, that this is
12 the reason why it is irreparable harm. They could have
13 challenged the 1985 ban back in 1985 to 1991 when they
14 were younger and could have boated, and if they succeeded,
15 boated for a long time. You can't sit on your rights and
16 wait until you are old enough and think you are not going
17 to be able to do it anymore and then claim irreparable
18 harm. They had an opportunity to challenge this
19 prohibition in a timely fashion if they chose. They chose
20 not to do so.

21 And the final prong is that the balance of the
22 equities -- I'm sorry, third prong, the balance of the
23 equities does not tip in favor of the plaintiffs. They
24 chose not to challenge this back when it was timely to do
25 so. There's been a 32-year policy in place. There are

1 multiple groups of citizens who are opposed to boating on
2 the upper river.

3 In terms of balancing the equity, the
4 governmental defendants to some extent stand in the stead
5 of those other stakeholders who are not here. One of them
6 is in the intervenors. But the other people than the
7 rafting community are the hiking, backpacking, hunting
8 scenery viewing, photographers and so forth, those folks
9 need to have their rights protected, too. So the equity
10 do not balance in favor of the plaintiffs.

11 And finally, an injunction would not be in the
12 public interest. Only the boaters are asking for an
13 injunction that would place them in a privileged position
14 above other people because they would not be subject to
15 regulation once you issued that injunction. The Forest
16 Service has attempted to balance in the interest of the
17 public the needs of the various groups that are involved.
18 Hopefully they have done so. They are trying to do so in
19 a fashion that is equitable.

20 We are in the process now of revisiting the '85
21 prohibition. And at least initial indications based on
22 the 2009 plan is there will be some relaxation. Will it
23 be uninhibited boating or floating on the upper one-third?
24 I seriously doubt that. They still have to balance those
25 interests. And there will certainly be some restrictions

1 involved. There will be more restrictions involved than
2 the plaintiffs are seeking in their preliminary injunction
3 which would ban essentially all restrictions.

4 And in granting the injunction, you have to ask
5 yourselves where we wind up if you do that. Managing this
6 resource for the Forest Service requires compliance with a
7 lot of different acts. For instance, if they make a
8 change in how the boating is allowed, they have to go
9 through the National Environmental Policy Act. They have
10 to make an environmental assessment or go to a full-blown
11 environmental impact statement.

12 That's what we are stuck with right now. They
13 are going back out apparently. I'm not involved in the
14 administrative act and I'm trying to stay away from it.
15 Apparently, though, based upon what they have issued
16 publicly they are involved in going out to get public
17 comment because they have made a significant enough change
18 that they are required to get comment by NEPA. That makes
19 the process go slowly, but we are complying with the law.

20 If Your Honor were to issue a preliminary
21 injunction, first of all, they would do away with all
22 restrictions on boating on the Upper Chattooga. That
23 would be unwise as a matter of policy.

24 If, on the other hand, you tried to tailor some
25 preliminary injunction that provided some boating under

1 certain restrictions and so forth, you would be doing so
2 in a way that sort of does an end run around the National
3 Environmental Policy Act because it wouldn't go out for
4 public comment and we wouldn't get input and so forth. It
5 would just put the Court, I think, in a pretty difficult
6 position to precipitously do away with the management plan
7 for the Upper Chattooga and impose in its place a simple
8 wide open, no restrictions floating on the Upper
9 Chattooga. And the plaintiffs have asked for nothing
10 other than that.

11 **MR. GALBREATH:** Your Honor, can plaintiffs rebut
12 before we go to the private property folks?

13 **THE COURT:** Right. I have some questions for
14 him.

15 You can step back to the podium.

16 **MR. GALBREATH:** Thank you.

17 **MR. DOUGLAS:** Sorry.

18 **THE COURT:** With respect to the 2009 amendment,
19 though, if you are saying that's the action from which the
20 plaintiffs could have gone through the administrative
21 process, you have withdrawn it and then dismissed the
22 appeals. So then you have through your own motions
23 essentially thwarted the process that they would have
24 naturally been able to go through.

25 **MR. DOUGLAS:** One can say that. That's one

1 interpretation of it. But what we've done is we found a
2 problem with it.

3 **THE COURT:** Certainly.

4 **MR. DOUGLAS:** And we really had no choice at
5 that point. I mean, I'm not here defending the ultimate
6 validity of the 2009 Forest Plan amendments because we
7 recognized there was a mistake. It wasn't a mistake that
8 hurt them, it was a mistake and it had to be corrected.
9 That's why the forest supervisors removed their plan,
10 that's why they withdrew them.

11 They have to go back and correct that mistake.
12 I assume they are free to actually reformulate it any way
13 they can to work either with that or to make that into a
14 compositive whole. But that's correct. By our action we
15 stopped that portion of the administrative process as I
16 think we were required to do.

17 **THE COURT:** But then even if you go back to the
18 2005 United States Forest Service appeal action, which
19 required you to have some other steps about the visitor
20 use capacity analysis that then came way later, the
21 plaintiff's concerns would be that while I understand the
22 Government has a process in place and it is going to take
23 some time and you have certain bureaucratic issues you
24 have to deal with, it doesn't give them an end so to speak
25 for any finality in the near future. So it could be years

1 in this process not just months.

2 **MR. DOUGLAS:** It could easily be another year,
3 certainly, Your Honor, before we get to the end of the
4 road on this. And they are at the point where they can go
5 to court.

6 In that regard, I would point out the 2005
7 administrative decision did not, as plaintiffs contend,
8 say you have two years to get this done. It said I
9 estimate this could be done in two years. If you need
10 more time, come back to headquarters and get more. It
11 didn't say you must be through this in two years. I
12 assume no one in the bureaucracy is foolish enough to make
13 a statement like that.

14 We don't know how long it is going to take until
15 we actually scope it, you get the input from the people,
16 you determine what the issues are. And then you see what
17 comes in to you from the input and work in the process and
18 do the studies you are going to have to do. Some of them
19 you won't know you have to do until you get the input and
20 the raise concerns on.

21 **THE COURT:** And you indicate if they want to go
22 back and lift the ban, they would have had to do so
23 between '85 and '91. However, the plaintiffs would
24 contend that there was a time when no one knew there was a
25 ban. There was no signage. There was no real

1 restrictions, no issues of prohibition, things of that
2 nature. So how could that statute of limitations of the
3 six-year period be in force?

4 **MR. DOUGLAS:** It's the law. The CFR provisions
5 in there says you cannot boat on the Chattooga River
6 without a permit. Period.

7 **THE COURT:** Right.

8 **MR. DOUGLAS:** Okay. At that point, you are on
9 notice that is the law.

10 **THE COURT:** Okay.

11 **MR. DOUGLAS:** And if you want a permit, if you
12 want to boat the river, you know the law, then you have to
13 ask for a permit. At that point you would have been told.

14 **THE COURT:** But as they were going through the
15 challenge in 2005 USFS decision or even in the Georgia
16 court have you all brought up the statute of limitations
17 as an issue throughout any other proceedings before now?
18 Because wouldn't that same argument, in terms of the
19 statute, apply in 2005 and during that period of time when
20 the appeals were going on?

21 **MR. DOUGLAS:** It was involved in the Georgia
22 court decision. I don't know whether it was explicitly
23 brought up. Judge O'Kelly mentioned it, the unchallenged
24 1985 decision and the part I quoted. He mentioned that it
25 was unchallenged. The reason it is unchallenged is

1 because of the statute of limitations.

2 **THE COURT:** Okay.

3 **MR. DOUGLAS:** So I have not -- as soon as we
4 were dealt with the plaintiff's suggesting they were going
5 to challenge the 1985 decision, we brought up 28 USC 401,
6 yes, ma'am.

7 **THE COURT:** So what are you specifically contend
8 is the further administrative action that you are dealing
9 with? Is that the revamping of all of the amendments or
10 are you trying to put out a new law or what?

11 **MR. DOUGLAS:** They have been charged with from
12 headquarters from the 2005 decision to go back and try to
13 revise the -- the report just winds up being the forest
14 plans because this is just an amendment, not a revision.
15 The 2004 Forest Plan revision was all encompassing. They
16 rewrote the whole Sumter National Forest Land Management
17 Plan. That requires it be done by the regional forester.
18 That's why the appeal went to headquarters.

19 When it came back, it was just on the single
20 issue of boating on the Chattooga which is a minor, in the
21 grand scheme of things, part of the plan. And that's why
22 it was bumped down to the forest supervisor. At that
23 point a decision was made.

24 In the past the management of the Chattooga had
25 been done by virtue of a provision that was just in the

1 Sumter National Forest Management Plan. Someone made the
2 decision that since the river flows through the three
3 states and three separate sets of National Forests that it
4 should be done by amending all three forest plans. And
5 that's what was done, the amendment that was proposed in
6 August of 2009 that were withdrawn in that part under
7 subsequent further consideration right now with a target
8 date of in the spring to have public comment and a final
9 decision on it.

10 You know, hopefully they will be able to stay to
11 that schedule. But once again, it is going to depend on
12 what the public comment is and what, if any, additional
13 studies have to be done. It may be the existing studies
14 will be sufficient. It may be they have to be
15 supplemented so we can't really say at this point.

16 **THE COURT:** Thank you.

17 **MR. DOUGLAS:** Thank you.

18 **MR. GALBREATH:** Your Honor, I'll be very brief
19 on rebuttal. I did want to address just kind of the heart
20 of what I thought Mr. Douglas was saying. I heard him say
21 a couple of things that, number one, it is just going to
22 be a few more months before we have this new decision.
23 And I would say, we have heard that before, Your Honor.
24 We heard it in 1995. We heard it in 2002. We heard it in
25 2005 -- I'm sorry, 2004. We heard it in 2005. We heard

1 it in 2007. We heard it in 2009. And here we are, 25
2 years later and it's still just a few months away. In the
3 meantime, this irreparable injury should just be ignored
4 as well as a violation of federal law.

5 The second thing I heard Mr. Douglas say in the
6 same regard is he doesn't know, he can't say when these
7 new -- whatever this new decision is whenever it is going
8 to come out. And there is one piece of evidence -- we
9 didn't intend to originally introduce this to the Court --
10 but this is just a piece of rebuttal evidence. This is
11 what the Forest Service put on their website last week.
12 If I can show it to the Court? I doesn't say a few
13 months. It says that entire five-year process --

14 **THE COURT:** Just show it over to Mr. Douglas
15 first.

16 **MR. GALBREATH:** Can Your Honor see it if I put
17 it on here?

18 **THE COURT:** Yes.

19 **MR. GALBREATH:** This is that thing that you have
20 heard referred to as SOPA, which is a Statement of Planned
21 Action. It is a 13-page document of all kinds of little
22 things that the Forest Service is going to do. But on
23 Page 2 of that is a very important word. And the word is
24 canceled. And that's how the Forest Service refers to the
25 entire process that was kicked off in 2005. We may have

1 to pass it up because I'm not sure how this works.

2 **THE COURT:** I can see it.

3 **MR. GALBREATH:** Okay. If you look at this, Your
4 Honor, it is talking about the Upper Chattooga River Use
5 Capacity. That was supposed to be done by '07. That
6 finally something rolled in in '09 and now has been pulled
7 back. And if you look at what I have got circled right
8 here, they have canceled it, a five-year process.

9 And Mr. Douglas says maybe a few more months.
10 And he also says but I don't know. And if the last 25
11 years is any indicator, I would submit to Your Honor it is
12 very unlikely we are going to see anything for a very long
13 time.

14 So the question is what do we do in the interim?
15 Well, that's the point the plaintiffs tried to make
16 earlier. What's the default situation? While we are
17 waiting for a new decision, what should the management be
18 on the ground? And what the Forest Service is saying is,
19 well, we have got this 30-year history of a ban. And the
20 sky is going to fall, Your Honor, if you restore paddling
21 access.

22 That's one of the points I wanted to make at the
23 very beginning of this hearing. This is a 250-year
24 history on this river during which all but a very small
25 time boating has been allowed. And during that entire

1 time, mother nature was the only one making sure
2 everything ran okay. And not only that, he talks about a
3 30-year ban. But I think as we have explained today, that
4 ban was -- nobody even knew about it. Really, the only
5 time there's been a ban is when people became aware of it
6 in the early 90's. And since 1995 it's been consistently
7 challenged, if not on an annual basis, it's been
8 challenged a whole lot of times.

9 Let's talk about Mr. Douglas' argument the sky
10 is falling. If I were the government, I would make this
11 exact same argument. I would try to scare a federal judge
12 and say if you step in here and open this river, boy, you
13 are stepping into the management role. You are taking
14 over management of this river. You should be worried
15 about that.

16 That couldn't be farther from the truth. As we
17 have already discussed this morning, management on the
18 other five thousand plus rivers of the United States is
19 what we are asking. You have got all the other rivers in
20 the whole country over here, and you have got 21 miles of
21 the Chattooga right here. And what we are asking is that
22 there is this outlier on this spread graph, we are just
23 asking this Court to put that 21 miles back in with all
24 the other rivers in the country.

25 And the other thing about this idea of all kinds

1 of bad things are going to happen. First of all, the
2 river downstream of Highway 28 is open to boating. The
3 sky hasn't fallen down there, even on the very same river.
4 And if you look at any other river, that's also true.

5 So I don't think the scare tactic of trying to
6 get the Court to shy away from restoring federal law to
7 this river, I don't think there is going to be any
8 negative consequences from that. We have already talked
9 about the balance of harm. It just means they are not
10 going to have to police it. Plaintiff has agreed to pay
11 for the few little signs that they have to pop up at a few
12 different entry points.

13 Now, just very briefly, there were a few
14 statements that I wanted to address that Mr. Douglas
15 mentioned. One is, he says, well, you are right. We have
16 to protect floating on the wild scenic river. And it's 57
17 miles and we protect it on the lower two-thirds. That
18 doesn't cut it.

19 The Wild and Scenic Rivers Act, when this river
20 was proposed to congress it was proposed in independent
21 sections, independent segments. And it was, as we
22 mentioned in our introduction, the segments of the
23 Chattooga River in the upper 21 miles were independently
24 considered by congress. You remember that little map that
25 I put up that had Grimshaws Bridge, the beginning of

1 floating water. That 21 miles was independently protected
2 under the Wild and Scenic Rivers Act. And floating was a
3 value on that 21 miles, not the whole -- not the whole
4 river, just allowed in the bottom two-thirds.

5 I think the idea that you can have a multi-day
6 floating experience and just maybe go do a mile of the
7 river at a time on the downstream two-thirds and you have
8 your multi-day experience on a 57-mile river, I think we
9 could put on any number of plaintiffs that would dispute
10 that contention that Mr. Douglas made.

11 He also referred to the ban on the upper 21
12 miles, it is just a time and use restriction, Your Honor.
13 No, it's not. It doesn't say you can't boat after
14 midnight. It says you cannot boat this 21 miles ever.
15 Ever. That's not a time and use restriction. That is a
16 ban.

17 There is also -- he also mentioned where did
18 this 1976 ban come from? There is some reference in that
19 study to trout fishing. Well, the agency that Mr. Douglas
20 represents did an entire report on where that '76 ban came
21 from. And their own report concluded that nobody knows.
22 It wasn't because of fishing. The answer is we don't
23 know. And I think that's an important point.

24 The last -- I think the last big theme that I
25 heard Mr. Douglas talk about was this Northern District of

1 Georgia case. I want to be very up front with the Court
2 on this. I think with the benefit of 20/20 hindsight, the
3 plaintiffs made a tactical error in the Northern District
4 of Georgia.

5 I mentioned earlier that the plaintiffs work
6 with this agency all across the country. And they didn't
7 want to attack the agency in a broad sense when they filed
8 that lawsuit. This was just an important enough issue
9 that they felt like we are about to embark on a five-year
10 long process and boating wasn't being included in it after
11 the chief said study it. So they wanted to be very narrow
12 in the lawsuit they brought and in the preliminary
13 injunction request they brought in that case and that's
14 what they said. It was tailored just to that study
15 itself.

16 And plaintiffs didn't make that error this time,
17 Your Honor. Plaintiffs -- if you look at our complaint,
18 and I can refer Your Honor to specifically to Page 32 of
19 our complaint at Paragraph 154, there is no question,
20 judicial review, as we have pointed out for the last 25
21 years, has been a very slippery endeavor for plaintiffs.
22 Every time we get close to judicial review, we start
23 slipping back down the hill and something happens and we
24 don't get our day in court.

25 So even though these 2009 amendments have come

1 out, when we filed this lawsuit, even though we had
2 something right in front of us that we could challenge, we
3 didn't limit our challenge to just that 2009 amendment.
4 And as -- look at what happened. The amendment
5 disappeared right after we filed our lawsuit. We started
6 slipping back down the slope again.

7 But not this time, Your Honor, because our
8 complaint is broad and it covers all the bans. It covers
9 the fact there is an irreparable injury on the ground
10 today on the upper 21 miles of the Chattooga. Mr. Bruce
11 Hare, you heard testify, cannot go with his family and
12 launch his canoe like he grew up doing. That is a very
13 ripe issue, Your Honor.

14 **THE COURT:** Discuss the statute of limitations
15 issue.

16 **MR. GALBREATH:** Thank you for bringing that up
17 because I almost forgot to mention that. The statute --
18 and I'm sure Your Honor has that Northern District of
19 Georgia opinion. I don't think you are going to see the
20 words statute of limitations anywhere in there. I may be
21 misremembering it but I don't think that issue came up in
22 there.

23 And as we talked about earlier, what Judge
24 O'Kelly said in there, again, there was a very narrowly
25 tailored request to the court in that lawsuit. But what

1 Judge O'Kelly said there was the Forest Service told me it
2 was just going to be a few weeks until this new decision
3 comes out. And he said, I take the Forest Service at its
4 word. So I'm not going to -- I think it would be a waste
5 of judicial resources, if I'm not mistaken that's a quote
6 from that opinion, it would be a waste of judicial
7 resources to step in and put a preliminary injunction when
8 in just a few months we are going to have a final agency
9 decision that very well may grant this relief. So it was
10 really a judicial economy decision more than anything
11 else.

12 And addressing directly the statute of
13 limitations, as I mentioned, there's got to be some due
14 process here somewhere. And the plaintiffs agree that our
15 ticket into court is the Administrative Procedures Act.
16 But what happened in 2005 was the Chief of the Forest
17 Service hit the reset button on the 1985 plan.

18 There is no way that you can in 2005 refer to a
19 decision that was in the year 1800 and say, okay, you are
20 now banned from a federal right that you have. And I'm
21 going to ban you by incorporating by reference an 1800
22 decision that you are past your six years on. Obviously,
23 that's fundamentally unfair.

24 And the practical effect of what the chief did
25 in that 2005 decision was he popped a hole in the 2004

1 plan. The 2004 plan was a big comprehensive document that
2 talked about how much wood you can chop and all kinds of
3 stuff. But there was one specific part in there that
4 dealt with boating. And that's the quote that was on the
5 screen earlier. In that chief's decision, what the chief
6 said was I'm popping a hole in that 2004 plan right there.
7 There is now a void. That boating ban is now eliminated.

8 So what happens as a result of that is the '85
9 plan, since there is no revised management for that now
10 that I have eliminated that, the '85 plan now scoots into
11 its place and fills that void. And that is the ticket in,
12 Your Honor, is that there is no way you can refer to some
13 decision that bars us from judicial review. That was a
14 new decision and it happened in April of 2005. And we are
15 well within the six-year statute of limitations to
16 challenge it.

17 And not only that, if we have to put this on in
18 rebuttal, we are more than glad to do it want. As recent
19 as 2008, every plaintiff that's in this room has filed a
20 permit to request with the Forest Service that can we
21 please boat this river now? It's been a long time. And
22 the Forest Service said, nope, it's illegal.

23 There is a lot of different tickets in the
24 court. There is a lot of things that happened in the last
25 six years that give the plaintiffs a case and a

1 controversy for this Court. And I will rest with that,
2 Your Honor. I know Mr. Jenkins is itching to represent
3 the private property owners.

4 **THE COURT:** Okay. Thank you.

5 **MR. GALBREATH:** Thank you, Your Honor.

6 **MR. DOUGLAS:** I asked counsel to let me jump in
7 to let me address those questions. Let know start first
8 by shedding some light on this if I can.

9 They are talking about this portion right here.
10 And I'm going to go ahead and hand this up for the Court.
11 As canceled, the Upper Chattooga River Visitor Use
12 Capacity EA, and that is true. It is canceled there. But
13 immediately above that is the same thing, Upper Chattooga
14 Visitor Use Capacity new listing.

15 The one that is canceled is with Mr. Tony White
16 being the contact. They have reinstated it with Mary
17 Morrison being the contact. And in the description
18 section it says that they are considering whether to
19 maintain or change the Forest Plan direction relative to
20 recreational uses on the Upper Chattooga River in the
21 national forests in Georgia, South Carolina, North
22 Carolina. Previous comments will be considered in the
23 decision-making process, which is a continuation of the
24 process and nothing more.

25 As to the contention this river was accepted

1 in -- these three segments were somehow accepted into the
2 Wild and Scenic Rivers Act as segments, as separate
3 rivers, that is just not the case. You can see that the
4 act of congress in 1974 brought it in as a river. The
5 Chattooga River Wild and Scenic River is what it was
6 brought in as.

7 Third, plaintiff stepped outside of the record.
8 I will, too. He says there no river in the United States
9 that has this kind prohibition on it. That's not true.
10 My colleague from the Department of Agriculture helped me.
11 The Upper Rogue River, just off the top of his head, is
12 prohibited on the upper portions of it because of the
13 collections of woody debris. These bans are in place
14 where they're needed. I don't have any others. We
15 haven't done a stud of it. But if we are pulling evidence
16 out of nowhere, that's just not a true statement.

17 He said there is a study by the Forest Service
18 that somehow says we don't know where the '76 ban came
19 from. I'm not familiar with the study. It's not been
20 presented to me. And it's not being presented to the
21 Court.

22 And finally, in regards to the 2006 case, they
23 said they think the statute of limitations was brought up.
24 On Page 8 of the opinion, which has been submitted along
25 with my motion to dismiss as moot, Footnote 8 says, "It is

1 not surprising that plaintiff's frame their challenge as
2 once the 2005 order not the 1985 plan. A challenge to the
3 1985 plan would be barred by the statute of limitations.
4 See 28 USC Section 2401 containing a six-year limitations
5 period for actions." That's all.

6 **THE COURT:** And the 2005 appeal concerned the
7 2004 Revised Management Plan, correct?

8 **MR. DOUGLAS:** That's correct. It was appealed
9 in 2004. The record and decision came out in 2005.

10 **THE COURT:** So when you all are dealing with the
11 withdrawal of the 2009 amendments, are you revisiting the
12 2004 plan or the 1985 plan?

13 **MR. DOUGLAS:** The 1985 plan because that's the
14 one in existence. Now, we already know that it is likely
15 to be changed because we've got at least a draft that has
16 been submitted and withdrawn and had some changes.

17 It could at the end of the day just restate the
18 ban. The reviewing officer in 2005 did not say you can't
19 totally ban it. He said -- or she said, rather, she said
20 that the record you have provided, the administrative
21 record, doesn't support continuing the ban so send it
22 back.

23 Now, it could be when they do the studies and
24 everything they may wind up at the end of the road with a
25 complete ban. But hopefully this time, if they do that,

1 they would have a proper record to support those as the
2 just and proper thing to do.

3 **THE COURT:** Okay. Thank you. We'll hear --

4 **MR. GALBREATH:** Just one word on the Rogue
5 River, Your Honor. I'm really glad that Mr. Douglas
6 brought that up because, first of all, we have got more
7 than five thousand rivers in the country. And he cited to
8 one section on one river as the support for why it
9 would -- somehow the sky is going to fall if you make this
10 section of the river like the other 4,999.

11 And the other thing I wanted to say is that
12 large woody debris, we actually have looked into this
13 issue because the government's brought it up before.
14 There is a section on the Upper Rogue, something called a
15 lavatude, which means there is lava rock up there and the
16 river literally disappears into the ground, which means if
17 you were to float a boat on it, you would disappear and
18 never come back out.

19 The Forest Service when we contacted them, I
20 will submit to the Court and we can put testimony to this
21 effect, didn't even know -- when we talked to the local
22 forest rangers on the ground, they were completely unaware
23 of any ban. It is just a policy, again, on one river in
24 more than five thousand where it is discouraged to boat on
25 that one section because it is such a hazard. A person

1 will literally die if they get sucked down into this hole.
2 That is not the case in the Upper Chattooga. I don't
3 think the exception proves the rule. Thank you, Your
4 Honor.

5 **THE COURT:** All right.

6 Private landowners?

7 **THE CLERK:** Mr. Galbreath, are you requesting
8 that this document be admitted?

9 **MR. GALBREATH:** I am. It will be Exhibit 17.
10 And I know we have some intervening ones that weren't --

11 **THE COURT:** Okay. Thank you.

12 (WHEREUPON, Plaintiff's Exhibit No. 17 was marked for
13 identification and received into evidence.)

14 **MR. JENKINS:** Thank you.

15 **THE COURT:** Okay.

16 **MR. JENKINS:** I would like to take a step back
17 again and give just a different overview of how we got
18 here. First of all, I represent the landowners, three
19 brothers of the Rust family. Unfortunately, a family
20 member is deathly ill today, otherwise, there would be
21 more of a presence of the family. But Mike Banford is
22 here. Mike is an inlaw of the family and has been
23 involved in this process for some time and has also been
24 associated with the Whiteside Cove Association. Also
25 present today is Joe Gatton, former President of the

1 Georgia Forest Watch; and Shirley Armstrong. She is with
2 the South Carolina Trout Unlimited and also the Wildlife
3 Federation.

4 And by way of background, with deference to
5 counsel's argument, the sky indeed did fall. And it fell
6 several years ago when the lower two-thirds was opened to
7 virtually unrestricted boating.

8 Prior to that time, and Your Honor can look
9 through the old documents before that time, and see
10 clearly how the lower section was used by hikers, fishers,
11 by all the other users, hunting, that are compatible uses
12 and part of that recreation ORV that was talked about.
13 And as counsel for the government mentioned, there was, as
14 often happens when there is a new territory or new parcel
15 brought in to the public purview, increased use occurs and
16 up to 50,000, I have seen a hundred thousand boaters a
17 year, documents to that effect, floated the lower section.

18 So, effectively, that drove out all the other
19 uses of people that wanted to -- you know, as you heard
20 Mr. Hare speak about how the solitude is one thing that
21 attracts people to this river. And that's one thing
22 that's been involved with the Forest Service process. We
23 have been looking at how can they protect this experience
24 of solitude for all users, not just for a few boaters.
25 Because what happened on the lower two-thirds was the

1 solitude was obliterated. Because you can imagine, a
2 hundred thousand boaters coming down every year, imagine
3 trying to fish on that section or trying to have a picnic
4 or swim in that section.

5 So that's kind of the backdrop. And that's one
6 of the reasons why a near universal coalition of
7 environmental groups, hunting associations joined to
8 oppose the action of the plaintiffs to open the upper
9 portion of the river to unrestricted boating. The various
10 Trout Unlimited groups, Georgia Forest Watch, the Wildlife
11 Federations, there's been hiking interests, groups in the
12 North Carolina Section of Nature Lovers, just -- you can
13 see it in the Northern District of Georgia, there was an
14 amicus filed called the Friends of the Upper Chattooga.
15 All of these groups of very diverse interests that rarely
16 agree on anything, but they agreed on one thing. They
17 wanted the Forest Service to continue to protect the only
18 remaining sanctuary for those users in this wild and
19 scenic river area.

20 If Your Honor would open the flood gate, the sky
21 would indeed fall on all of these other users. And they
22 would not have any solitude on this wild and scenic river
23 area. And that's one of the things the Forest Service has
24 been trying hard to protect and balance these competing
25 interests. And what happened was, the Forest Service

1 essentially made a compromise decision, said, okay, we'll
2 give you the lower two-thirds where most of the water is.
3 And most of the water by any standard is in that section
4 for boating.

5 You also heard plaintiff's witness testify that
6 they are not limited from the Headwaters. I would urge
7 Your Honor to closely watch how plaintiff's define things.
8 They call it, first of all, a ban on boating in the
9 Headwaters. Those two terms, if you notice them, first,
10 the Headwaters. Okay. As you heard the witness testify,
11 he is not banned from floating the Headwaters of the
12 Chattooga. The west fork of the Chattooga is -- there is
13 no restriction. And floaters have that use and it goes up
14 to the Headwaters area, about 12 miles.

15 **MR. GALBREATH:** Your Honor, I think at the
16 beginning of this hearing, everybody stipulated to the
17 21 miles. We are not talking about other creeks and
18 tributaries.

19 **THE COURT:** True.

20 **MR. JENKINS:** I'm not the one that defined
21 Headwaters that way. I'm just pointing out to Your Honor
22 to look at the whole picture. It's definitely a fact that
23 boating is allowed in the Headwaters and boating occurs in
24 the Headwaters. Now, you can define it any which way, but
25 Your Honor should keep that in mind.

1 Second, with respect to the term ban, the Forest
2 Service routinely zones uses in time and space. And I
3 won't go into the motion to dismiss. I understand we are
4 going to have -- attempt to do that later. But what the
5 plaintiffs are asking, and on Page 35 of their motion for
6 preliminary injunction, they are asking the government --
7 or the Court to enjoin the government, "From enforcing any
8 of their Headwaters floating prohibitions."

9 Now, to do this, the Court would also have to
10 find that the Forest Service has no authority to zone any
11 recreation uses in a wild and scenic river area. And, one
12 of the plaintiff's arguments is that they are being
13 discriminated against unfairly. Well, okay. So then they
14 say you can't zone us out of this area. But on the other
15 hand, the other compatible uses we have heard are hunting,
16 fishing, there is a number of other uses like camping.

17 Now, think for a minute, Your Honor, about
18 camping. That's a recognized compatible use. For Your
19 Honor to say the Forest Service cannot zone camping, which
20 it does, in fact, campers are not allowed to camp near the
21 river. They are zoned away from the river. Now, campers
22 can say they are banned from that 50-foot section close to
23 the river. That's one way to put it.

24 If Your Honor buys plaintiff's argument about
25 being banned from the Headwaters, whereas -- I mean, Your

1 Honor would also have to restrict the Forest Service from
2 similarly banning camping from any area.

3 Hikers as well, they are restricted in many
4 places to the hiking trail. So they could easily argue we
5 are banned from all the other parts of the wild and scenic
6 river area.

7 Hunters, hunting is another recognized
8 compatible use. Obviously, hunting is zoned in time and
9 space. For example, in the Oconee County section of the
10 national forest hunting is allowed for small game only
11 between Thanksgiving and March the 1st. Now, does any
12 rational person believe that the Forest Service cannot
13 zone hunting in time or space?

14 Again, if Your Honor buys their argument that
15 the Forest Service can't zone uses, Your Honor would have
16 to allow unlimited hunting throughout the wild and scenic
17 river area all days of the year. And that can't possibly
18 be the status of the law. We respectfully say it isn't.

19 In any event, with respect to the motion for
20 preliminary injunction, the first prong is they have no
21 likelihood of success on the merits for all the reasons
22 that the government has stated in its motion to dismiss.

23 I heard counsel -- by the way, before I get to
24 the next area, counsel say that for 25 years they have
25 been complaining about the Forest Service not giving them

1 process. Well, 25 years ago, it butts up against the 1985
2 plan itself. That's what happened 25 years ago. It's
3 2010 now. In 1985, the plan was issued and it became
4 final. The boaters did not raise objection. That period
5 of six years passed. And that's why Judge O'Kelly said
6 the statute of limitations is past. You can't go back.

7 I offer that one reason that it wasn't
8 challenged was because the boating interest had already
9 won what they wanted. They got the lower two-thirds.
10 They got the west fork. They drove -- effectively,
11 boating drove all other uses up to the upper third. So
12 why would they complain about it? It's only later when we
13 heard about new technology. Your Honor, may have heard
14 about that. It was only when new technology came in that
15 some of these reaches became even possible on the highest
16 water days.

17 So to claim that they somehow have been harmed
18 or whatever, they themselves are receiving a very
19 favorable decision back in '76. You would just have to
20 ask any other user why they are so involved in the Forest
21 Service process, why those other groups appealed the
22 decision. They have been harmed already and desire not to
23 be harmed further.

24 Now, with respect to the private property
25 section, again, this is to put it in perspective,

1 Whiteside Mountain is just above. You can see it from
2 Grimshaws Bridge. And that's the source of the river. If
3 you just look up, you see the source of the river. From
4 that point of Grimshaws Bridge, the river then flows
5 400 miles until it hits the ocean. It flows, ultimately,
6 into the Savannah River and out through Savannah.

7 So this is a section of stream. And really it
8 is only a small stream as the affidavit of Mr. Betty
9 points out. Many parts of the stream up there, you can
10 stand across it like this. It is that small. Judge
11 O'Kelly called it a trickle up there. There are numerous
12 obstacles in the river, including in the Forest Service
13 report Corkscrew Falls of being 25-foot falls.

14 But the point is that if this river is deemed to
15 be navigable, and that's the only way that plaintiffs
16 could have even the remotest possibility of success,
17 deemed to be navigable as a matter of law, then Your Honor
18 would have to find that all rivers in the United States,
19 all streams, all creeks are in fact navigable waters. And
20 that's not true at all.

21 In fact, Your Honor would also have to -- you
22 heard the witness mention this morning that no more than
23 30 days a year could it even possibly be floated. We
24 dispute that because that's most likely lower down in the
25 river. That, in itself, establishes that the stream

1 flowing through the private property portion is not
2 navigable. So in that extent, plaintiff has no success on
3 the merits.

4 Now, if you look at the other side, the US Army
5 Corps of Engineers lists the North Carolina section as
6 being non-navigable. In fact, the plaintiffs have tried
7 to change that but the US Army Corps has refused. That's
8 the status of the law today. The US Army Corps of
9 Engineers is the federal agency responsible for
10 navigability determinations. And they have it on record
11 as being non-navigable.

12 Now, what importance is that to the Forest
13 Service is that the Forest Service regulations themselves
14 require them -- and I will go into this more in the motion
15 to dismiss, but they require the Forest Service consider a
16 river non-navigable unless there are some finding that it
17 is navigable. But the status of the law currently is that
18 this portion of the river is not navigable.

19 And what that means in terms of the preliminary
20 injunction is that whatever else Your Honor thinks about
21 all the history of what the Forest Service may or may not
22 have done and how we got here, it's crystal clear with
23 respect to the uppermost section, the 1.7 miles, which is
24 at the very head of the top third section that's at issue,
25 which is also at the very head of the complete

1 three-thirds of the wild and scenic river, which is then
2 at the very head of 350 more miles of river until you get
3 to the ocean, clearly, this portion, this tiny trickle is
4 non-navigable. And if it isn't, then Your Honor can grant
5 plaintiff's no relief.

6 Now, as a matter of North Carolina law, the same
7 is true. North Carolina, in fact in the 1971 report that
8 plaintiffs have raised a number of times, on Page 13 of
9 that report, it cites what the North Carolina attorney
10 general opinion is; that is, the state Supreme Court would
11 probably find the Chattooga is not navigable.

12 Now, on that basis alone, the preliminary
13 injunction with respect to this portion of the river
14 fails. This is the attorney general saying what the state
15 Supreme Court would probably find. Now, if that's the
16 probable finding, what's the substantial likelihood of
17 success on the merits? There is none.

18 Elsewhere in the report, in the 1971 report,
19 mentions how this section is very shallow with constant
20 dribbles. Your Honor saw a video before. This is a
21 picture of a man bicycling down this portion of the river
22 through the private property. It's not boating. It's
23 bicycling. It is easier to bicycle that property, that
24 stream than it is to boat.

25 **MR. GALBREATH:** We won't err on the side of

1 inclusion, but it's a little frustrating. They never
2 talked about that at the beginning. We have never seen
3 that photo.

4 **MR. JENKINS:** I'm not offering it into evidence
5 just like you didn't offer the video into evidence but you
6 showed it to the judge. It's just by way of background.

7 **MR. GALBREATH:** By agreement.

8 **MR. JENKINS:** I didn't agree to it. I objected.
9 Now, just to put in perspective one more thing,
10 this 1971 study report, what Your Honor should understand
11 about that is that this was more of a piece to try to
12 encourage congress to encourage -- or to include the
13 Chattooga River into the wild and scenic river system. It
14 is an advocacy piece. Obviously, if you read through it,
15 it is a very large document. It is prepared by different
16 people. There was an actual report that congress relied
17 on for reaching its decision to adopt this land.

18 But regardless, the main point is it's the
19 development plan that then comes out of the wild and
20 scenic river designation that's important. And the 1976
21 development plan, that's when the Forest Service made the
22 decision about what uses would be allowed where, what
23 works best, and so and so might have wanted hunting to
24 occur in one spot or another. And you might see it in the
25 report, but it doesn't necessarily mean anything legally.

1 For example, numerous times in the complaint
2 plaintiffs show Your Honor a picture. There is the
3 diagram that's been reproduced on Page 158 of the 1971
4 study report. Now, what it doesn't show is that this is,
5 obviously, part of a larger diagram. On page 157 it shows
6 that the -- this is a concentration area. And it's --
7 there's -- it's a very descriptive diagram of what might
8 occur. Like, on the bottom, it says a high concentration
9 area, canoe, portage, falls. This is just a general
10 landscape diagram. It is nothing -- there is nothing
11 legal about it or in any way important or valuable to
12 show --

13 The page before, for example, another part of
14 that. On the top, Your Honor might see it says typical
15 trail plan and some other descriptions at the bottom about
16 from a landscape perspective, what do you have to do now
17 this is maybe coming into the wild and scenic river
18 system. What are the type of things we are going to have
19 to deal with in terms of landscape and terms of access,
20 etc.

21 The page before that describes the prior pages
22 and says at the bottom, note, these landscapes only
23 represent five examples of riverside conditions. There
24 are innumerable variation on each one of these landscapes.
25 The purpose of these sketches is to show generally what is

1 contained within these fragility boundaries.

2 The page before that, now we are at 154 of the
3 study, just two -- again, two more landscape drawings of
4 what happens from 30-foot to 200 feet from the river, what
5 the vegetation looks like from the bottom 50 to 200 feet
6 from the river.

7 And the page before that, again, river edges.
8 Two more landscape plans.

9 So these are only general descriptions. The
10 last page of that whole thing is the page that's cut and
11 pasted repeatedly. It shows Grimshaws Bridge. It says
12 it's a concentration area. Access notes. What that is is
13 an access is noted some place where, okay, how are we
14 going to deal with a potential congregation of people?
15 Here's an example. At a bridge there might be folks
16 coming. It says hikers, rafters and vehicles will
17 frequently meet here because this road is the only major
18 access to the river.

19 Now, it doesn't say anything, and I would bet my
20 bottom dollar that the drawer of this landscape portrait
21 was not a lawyer, did not know what --

22 **MR. GALBREATH:** Objection. Pure speculation,
23 not even a fact that ever could be proved.

24 **THE COURT:** All right. Contain yourself.

25 **MR. JENKINS:** By point of fact, it is a fact

1 that if you notice there is a hiking trail that's listed
2 there. That in fact is a driveway to a rustic cabin that
3 elsewhere, as Your Honor will see a picture of it, that's
4 a cabin where the Whiteside Cove Association has a summer
5 home. And that's called a compatible use with the area.

6 But the point is that plaintiffs are trying to
7 make a mountain out of something that's just a simple
8 landscape drawing. In fact, there are other places in the
9 study report which contradict what they are trying to make
10 it appear to be.

11 Like, for example, in what is now Document 16-3,
12 it is a later section, Page 163 at the bottom, it notes
13 that Grimshaws Bridge would not even be a launch site.
14 Instead, the first one that shows up is the Bullpen Bridge
15 which is significantly down river from here. So Your
16 Honor should take note -- should give no weight to that
17 obvious near fabrication of, quote, unquote, evidence.

18 So as we'll point out then in the motion to
19 dismiss, there is simply no chance of success for
20 plaintiffs to win on this private property section.
21 Because the river itself by law, as the US Army Corps of
22 Engineers has determined and lists, by law it is
23 non-navigable. And under the clearest North Carolina law
24 and federal law, there is no public right to access
25 through that property.

1 Now, with respect to the suffering irreparable
2 harm, plaintiffs fail on this prong as well because they
3 simply have no right to use the property of the Rust
4 family. A neighbor might like another neighbor's house or
5 want to play football in the neighbor's backyard. And
6 they will say I'll suffer irreparable harm if I can't.
7 But that's not the type of harm that any court can
8 protect. If that particular landowner wants to give
9 access to their own home or yard for somebody else to come
10 in and use, well, fine. But if they don't, that's what
11 private property is all about. You have your own home.
12 You have your own property. And you can enjoy it free
13 from interference from the public. That's not -- there is
14 no irreparable harm about the neighbor not allowing some
15 other neighbor onto their own property.

16 That's essentially what plaintiffs are claiming.
17 They are being irreparably harmed from not putting a boat
18 on and walking onto plaintiff's property.

19 If you notice in the complaint -- and this case
20 really is -- there are a lot of other issues perhaps with
21 downstream. But this part is really simple for you which
22 is really good to see that there is no chance of success.

23 In the complaint on Page 18, they list that
24 coming through this section would require, quote, frequent
25 portages. If Your Honor wants to turn there, this is the

1 page that has a chart. And it's a number of quotes pulled
2 from different parts of mainly the 1971 Forest Service
3 report. And it says the section below the bridge,
4 Grimshaws, is going to be floated by rubber raft and
5 provides exciting trips over small rapids and cascades
6 with frequent portages around difficult cascades and
7 narrow sluices.

8 First of all, we contend that, again, this is
9 just an aspirational-type advocacy piece. Your Honor is
10 welcome to come to the property and see for herself that a
11 rubber raft would not make it down this property. A
12 bicycle might in certain parts, but under normal flow
13 conditions -- and this, by the way, is the standard under
14 federal and state law. Whatever is ordinary conditions,
15 that's when the navigability has to be determined, not in
16 a hundred-year flood.

17 For that matter, virtually anyone's property in
18 a flood condition might have a sudden runoff that could be
19 boatable. Now, that's not what the US Supreme Court has
20 said. That's not what the North Carolina Supreme Court
21 has said about navigability. If you look at the McDaniel
22 decision, that's a landmark US Supreme Court decision,
23 that talks about ordinary conditions, floatable by normal
24 modes of transportation, not some high-tech kayak that the
25 plaintiffs themselves have pointed out that type of

1 technology did not exist.

2 So this portion it wasn't even feasible to
3 attempt to boat. So that's not what the navigability
4 determination has to do. If it is only floatable by their
5 own admission at most 30 days, it's done. The case is
6 over. It is non-navigable as a matter of law and there is
7 no public right to access.

8 But in that portion of the complaint I just
9 pointed out, it says then frequent portages are required.
10 Think what that means. If, as the plaintiff's claim, it
11 might be floatable in high water conditions, where would
12 you portage? And you have got to portage around things
13 like 25-foot waterfalls coming at you. You have got
14 overlying rododendron for which you can't get through.
15 You have numerous log jams over the property. How would
16 you portage around them? You would portage around by
17 walking on plaintiff's private property.

18 So even if the darn thing wasn't navigable, even
19 if somehow you reached that conclusion, plaintiffs would
20 have to trespass on the private property. And that also,
21 even for a navigable river, cannot be done. So under no
22 set of circumstances can the plaintiff's prevail with
23 respect to the private property.

24 And, again, the Rust family doesn't want to be
25 in court. It is the plaintiffs that have caused the Rust

1 family and Whiteside Cove Association to incur large
2 amounts of -- large costs in defending their own private
3 property. They would much rather just have the plaintiffs
4 say, okay, we'll just go to the public section.

5 Plaintiffs have not done that. They have
6 repeatedly brought claims. The family had to go to the
7 Northern District of Georgia court to defend. The family
8 has had to do it before the US Forest Service. The family
9 has had to do it again in this proceeding.

10 And we would urge Your Honor, when you get to
11 the motion to dismiss, to make a clear ruling about the
12 upper section, the private property so as to defer any
13 further lawsuits from the property defendants having to
14 spend any further costs in defending against this. In
15 fact, if Your Honor ever sees the property and the river
16 there, I suspect Your Honor would see that the suit with
17 respect to the private property is frivolous.

18 So they don't suffer irreparable harm. You have
19 also heard that they can float other sections of the
20 Headwaters of the same river. What is the irreparable
21 harm? From not floating the other fork where the only
22 portion of which the other recreation uses have some
23 measure of solitude? There is no irreparable harm there.

24 Incidentally, the plaintiffs sued in another
25 venue before the Ninth Circuit. And there was a protected

1 use called a, quote, valid use of the Snake River in a
2 case Hells Canyon, 227 F.3d 1170, 2000 decision of the
3 Ninth Circuit. In that case the plaintiffs, American
4 Whitewater, their argument was --

5 **MR. GALBREATH:** Your Honor, I'm going to have to
6 object to that. This group of plaintiffs is not in that
7 lawsuit. I know other individuals are not in this
8 lawsuit. I'm not sure where we are going with this. That
9 is just factually inaccurate.

10 **MR. JENKINS:** Your Honor, can see the decision.
11 It sees what it says. We can brief that later, if
12 necessary.

13 **THE COURT:** Okay.

14 **MR. JENKINS:** With respect again to the harm,
15 let's -- by looking at just the upper 1.7 miles which,
16 again, is the very, tippy top of the tippy top of the
17 tippy top of the river, what could possibly be the harm
18 from not being allowed to float that tiny section, which
19 by all admissions is only -- could only be floatable a
20 very few days of the year while being then allowed to
21 float, what, 65 out of the other 67 miles of the Chattooga
22 and perhaps even more when you have the entire west fork.
23 What is possibly left, irreparable harm? I just don't see
24 it. It is a very tiny portion. The irreparable harm
25 would be to the property defendants and to the Whiteside

1 Cove Association which has leased this property for
2 approximately half a century.

3 And that's on the third prong. Your Honor does
4 not just need to consider what additional work the Forest
5 Service might have to do. But does the harm to the
6 plaintiffs outweigh the harm to the public from this
7 section?

8 And, again, we talked briefly about all the
9 other interests that have been involved in the Forest
10 Service proceedings that Your Honor should remember. But
11 with respect to them to this is 1.7 miles, clearly, it
12 would be irreparable harm to the property owners to have
13 boaters trespassing on their property or to have other
14 recreation users to trespass on the property. It's
15 private property. And the act itself, as we'll describe
16 more in the motion to dismiss, the Wild and Scenic Rivers
17 Act is one of the parts of it is to protect private
18 property interests.

19 **MR. GALBREATH:** Your Honor, I don't mean to
20 interrupt his presentation but I do want to clarify that
21 the preliminary injunction that Mr. Jenkins is addressing,
22 I just want to clarify what plaintiffs are asking for.
23 Plaintiffs are not asking this Court for permission to
24 flow through Mr. Jenkins' property. Plaintiffs are asking
25 for something very specific, that the Court enjoin only

1 the US Forest Service. We never talked about these
2 private property owner. Enjoin the US Forest Service from
3 enforcing an illegal ban.

4 And, I mean, I will get an opportunity to rebut
5 but I know Mr. Jenkins is going down that road. So I
6 wanted to clarify. We are not asking the Court to -- for
7 affirmative permission to go in this 1.7 miles. In fact,
8 right now, if you are a fisherman or if you are a hiker,
9 you can, as far as the Forest Service is concerned, walk
10 right up in that area. There is no ban for anybody else
11 to go in there.

12 So all we are saying is we don't want the Forest
13 Service to enforce a ban on paddling that doesn't have
14 anything to do with the private property. And I will
15 address that more in my rebuttal. But I just wanted to
16 clarify that because I'm not sure why we are going down
17 this road.

18 **MR. JENKINS:** We are going down this road
19 because the whole basis of the injunction is the Forest
20 Service has done something unlawful. And two of the
21 instances are that they have not -- the Forest Service has
22 not actively managed the private property. The second
23 thing is that the Forest Service did not actually actively
24 study the property.

25 Now, we have visual evidence of Forest Service

1 personnel being on the property and reviewing the --
2 seeing the property, seeing the river. So that statement
3 it's just not true.

4 But our point is the Forest Service has just
5 obeyed the law. That's what the law is. You have to
6 respect -- the Forest Service has a duty to respect and
7 point out to the public what is private property. Okay,
8 this is private property. You can't go on it, whether you
9 are a boater or anybody else. Wherever in that zoned
10 management the Forest Service has for the whole upper
11 third, in fact, the whole wild and scenic river, it
12 certainly includes letting the public know that this is
13 private property. You have no right to use it.

14 And, Your Honor, I would respectfully state that
15 Your Honor cannot find that the Forest Service did that
16 unlawfully in notifying the public. Plaintiffs have taken
17 exception that the Forest Service should not have notified
18 the public that this section was withdrawn from the
19 further study, recreation study. That's just not true.
20 That's the Forest Service's responsibility under the law
21 and they did it correctly. So there can be no preliminary
22 injunction granted with respect to this property.

23 And of course, there are very many practical
24 considerations. I've already talked about the great
25 expense the property defendants have had to incur as a

1 result of plaintiffs' endless lawsuits.

2 If this Court would rule that the Forest Service
3 cannot state to the public that you can't use this
4 property, that's a big problem. If this Court would say
5 that the Forest Service cannot zone boating above Highway
6 28, that would be a problem. There would be an increased
7 level of folks trying to trespass on the property. And
8 that involves further costs. We are just trying to
9 protect our own rights here, Your Honor.

10 **MR. GALBREATH:** Again, as a point of
11 clarification, we did not sue the private property owners.
12 They voluntarily came into the case and we oppose that for
13 the --

14 **MR. JENKINS:** Volunteering to protect your
15 rights, sure.

16 **MR. GALBREATH:** The private property owners,
17 lessees I should say, really, their only posture in this
18 litigation is a me, too, party. We are not asking for
19 anything against them. We oppose their intervention
20 because all they can say is me, too. But the only relief
21 we are requesting is against the Forest Service. I wanted
22 to make that clarification.

23 **THE COURT:** Okay.

24 **MR. JENKINS:** And this Court has already ruled
25 on the motion to intervene and rejected that very

1 argument.

2 **MR. GALBREATH:** Again, what the Court said is it
3 is a very easy standard to come in as an intervenor. And
4 if they want to expend their resources to come into the
5 case, they can. But I don't think the Court has rejected
6 our argument that the preliminary injunction doesn't
7 concern the private property owners.

8 **THE COURT:** Okay. That just wasn't before the
9 Court at this time. It was just on the motion to
10 intervene. Okay. All right. Anything further?

11 **MR. JENKINS:** The other thing about that in
12 terms of the legal perspective is that the navigability of
13 determination by this Court would be required, again, to
14 allow any motion for preliminary injunction. That
15 declaration by this Court concerning navigability clearly
16 would have an impact on the property owners rights to
17 protect their property.

18 However plaintiffs try to avoid this, they know
19 full well that navigability is the controlling issue.
20 That's what the North Carolina Supreme Court said.
21 Navigability is the controlling issue. Because if a
22 stream is not navigable, there is no public access right.
23 That's the law.

24 We are in here to protect our rights. And we
25 would much rather that plaintiffs had not included that

1 1.7 miles in this lawsuit. They didn't include the land
2 further north of there.

3 **THE COURT:** Okay. Do you want to conclude with
4 the public interest element?

5 **MR. JENKINS:** Yes, I think I have addressed
6 that. Simply, there is a lot of other uses that Your
7 Honor should consider, including those of the rights of
8 the private property ownership. And the rest we'll get
9 into on the motion to dismiss.

10 **THE COURT:** Okay. Let's take a brief ten-minute
11 break and we will conclude with those motions. Thank you.

12 (WHEREUPON, a short break was taken.)

13 **THE COURT:** Plaintiffs rebuttal to the
14 landowners?

15 **MR. GALBREATH:** Thank you, Your Honor. And I
16 hope Your Honor can hear me. I'm going to walk over to
17 the map real quickly.

18 **THE COURT:** Yes.

19 **MR. GALBREATH:** As Mr. Jenkins pointed out,
20 again, if this were the whole river, it would be three
21 times as tall because this is just a third. And you can
22 see, the size on the left side of the property is a pretty
23 small area of the overall scheme of this hearing.

24 And I just wanted to point out that congress did
25 not carve out that 1.7 miles when it designated this wild

1 and scenic. As Mr. Jenkins pointed out, this lease that
2 he is talking about has been around for a while including
3 during the wild and scenic designation. And there was no
4 carve out then.

5 Again, I don't want to get mired down in the
6 issues that Mr. Jenkins mentioned because the private
7 property owners, they just don't have a dog in this hunt.
8 All the plaintiffs are asking for is that the US Forest
9 Service be enjoined from enforcing an illegal ban, not the
10 private property owners.

11 What I do want to address, he did make --
12 Mr. Jenkins made several factual assertions that I wanted
13 to address quickly. One was kind of a wild assertion that
14 if the Court grants the plaintiff's relief, the Court is
15 making a universal determination that no forest can ever
16 zone one use one place and one use another place. The
17 zoning issue, Your Honor, is a red herring because the
18 plaintiffs are in complete agreement that there are times
19 when zoning is appropriate for resources.

20 What's different here is that these upper
21 21 miles were specifically protected because of boating.
22 It was a value that caused the river to be designated wild
23 and scenic. So it's not as simple as you can just zone
24 this use away.

25 These specific sections of the Upper Chattooga

1 must be protected and enhanced. That value, whitewater
2 boating, must be protected and enhanced. When you ban an
3 entire use on sections of the river that were protected
4 for that value, that is neither protection nor
5 enhancement. That is eviscerating the value all together.

6 And the other thing that -- and one thing I
7 wanted to point out, too, was that Mr. Jenkins, I think,
8 made another kind of generalization where he said that if
9 the Court were to grant the injunction, that it would
10 somehow mean that you could never put a limit on any river
11 anywhere in the United States including this river.
12 That's not accurate either, Your Honor.

13 And the plaintiffs will be the first ones -- all
14 the plaintiff organizations that are involved in this
15 case, they all for the most part they have dual missions.
16 One is to protect resources. What they care about the
17 most is that the rivers that their members float on that
18 there is clean water, they are protected well. The
19 secondary mission of these organizations is to make sure
20 that their members have the opportunity to float these
21 rivers safely.

22 So in the future, and they haven't done it in 25
23 years, but if at some point in the future the US Forest
24 Service does a legal user capacity analysis and comes up
25 with some actual numbers that say we have done a legal

1 study and there is a capacity number of the total users to
2 use this upper 21 miles. And based on the study that we
3 have done, the capacity for this activity is this. The
4 capacity activity for that is another number. If that
5 happens, these plaintiffs, if that's the legal study, will
6 be the first ones to accept whatever those capacity
7 limitations are.

8 The problem is our default management right now
9 should be what the Wild and Scenic Rivers Act says, access
10 to the river. There's never been any basis for limiting
11 that use. And that's a very important point.

12 Mr. Jenkins said that, well, in fact, the sky
13 would fall if this resource were opened. Well, the US
14 Forest service has just taken five years to look -- they
15 jerked their eventual amendment. But during that whole
16 period they weren't able to document any resource and
17 facts that were specific to boating. They weren't able to
18 document any problems that are specific to boating. If
19 the sky were going to fall, there would be a report
20 somewhere that documented what problems would happen. The
21 US Forest Service has never been able to demonstrate that
22 in a capacity analysis.

23 **MR. JENKINS:** Your Honor, again, I object to
24 that particular characterization. There's lots in the
25 record of how boating interferes with other uses.

1 Whiteside Cove Association itself put in a study by an
2 expert on that very point. So, again, just taking
3 counsel's factual statements with a grain of salt.

4 **THE COURT:** Okay.

5 **MR. GALBREATH:** And, Your Honor, he did mention
6 that there are some -- he said another reason why the sky
7 might fall is because there are some other users out there
8 that have in the past objected to floating in this area.
9 And I just wanted to address that briefly because you are
10 always going to have a divergence of opinion whenever you
11 are managing a public resource. That's obvious. None of
12 that cuts against the fact that the simple Wild Scenic
13 Rivers Act argument that one of the primary values why
14 this is protected was boating.

15 But I did want to say when you artificially
16 exclude a group by a ban, an illegal ban for a certain
17 period of time, there are other parties that start to kind
18 of muscle in in that absence, that void that's created by
19 that illegal ban. When you try to restore the access
20 that's been around for 250 plus years, those people that
21 have kind of muscled into that vacuum say, wait a minute.
22 We are comfortable with the fact that we not only have our
23 own equitable use, but we have yours, too, so much so that
24 we are going to define our enjoyment of this resource by
25 the fact that you are not here. And that's not a

1 legitimate complaint.

2 And I would just -- I wanted to let the Court
3 know I think the objections that you might see from any
4 other parties, like a hiker, about boating, it is due to
5 the fact that boats have artificially been excluded from
6 the resource. You don't hear those kinds of objections
7 downstream.

8 Navigability, this was a major focus of what
9 Mr. Jenkins was talking about. First, I wanted to correct
10 one assertion that he made that navigability is a federal
11 determination. That is a matter of law. In simple terms,
12 as a matter of law whether a river a navigable is state
13 law. That is state law issue. It is based on state law
14 navigability issue.

15 Now, he cited the Corps of Engineers. And this
16 has kind of been -- the Corps of Engineers discussion has
17 kind of been an ongoing, at times humorous discussion.
18 The Corps of Engineers has jurisdiction over certain
19 rivers. And the only way they can have jurisdiction over
20 a certain river is if the Corps of Engineers for its own
21 purposes types the name of that river on a list that it
22 calls its navigable rivers. And mainly, what the Corps is
23 talking about big rivers where it builds locks and dams
24 and things like that.

25 Of the five thousand plus rivers that are

1 navigable in the country, I can't remember the exact
2 number, but the number of navigable rivers on the Court's
3 list is very small. I think it is less than 200. I'm not
4 sure exactly how many but very few. That does not mean
5 that these rivers are not navigable.

6 And more importantly, the navigability issue is
7 not at issue with our preliminary injunction. And it's
8 barely at issue in this case. At some -- as I mentioned
9 earlier, any fisherman, any hiker can currently, based on
10 the US Forest Service Management, walk right onto the
11 section of river that Mr. Jenkins is talking about. The
12 US Forest Service, there is no prohibition that I'm aware
13 of in the US Forest Service right now of walking up into
14 that private property. So if somebody were to do that,
15 and Mr. Jenkins were to challenge that person's physical
16 presence in a federal resource inside the high water mark,
17 he could bring state law trespass action and try to have
18 that person arrested. It's just not an issue in this
19 case. All we are asking is that the US Forest Service be
20 enjoined from enforcing an illegal ban and basically put
21 boating back on the same footing with the other handful of
22 uses which were approved for this wild scenic river
23 protection.

24 Finally, I appreciated Mr. Jenkins' references
25 to the many places in that 1971 study where it was talking

1 about boating and how these Headwaters were considered for
2 boating. I just wanted to point out that he didn't
3 mention that he was talking about, well, this is kind of a
4 preliminary study. Of course. I mean, nothing existed at
5 that time. This was a suitability study trying to
6 convince congress to adopt this river in the wild scenic
7 rivers program. Of course these were sketches about what
8 was going to happen. But the point is, they sold this to
9 congress based on the fact there was this whitewater
10 boating value.

11 And I think it's also instructive there weren't
12 any other alternatives. It's not like it said at
13 Grimshaws Bridge you can have the start of boating water
14 or you might conversely have some other thing. That's not
15 what the study said. It gave eight or nine examples of
16 how the Forest Service planned to use this resource.

17 So the last thing I wanted to address is why not
18 go elsewhere. I think Mr. Hare very adequately touched on
19 the issue of why not go elsewhere. This resource is
20 unique. This resource is incredible. Boating, as the US
21 Forest Service studies themselves say, is the best way to
22 experience this 21 miles of river.

23 And I think now -- I'm not sure if we have
24 addressed the motion to dismiss. I think indirectly we
25 have already addressed it a lot.

1 **THE COURT:** Yes. If there are any concluding
2 remarks by anybody on the motion to dismiss, you can go
3 ahead.

4 **MR. DOUGLAS:** Your Honor, I'm as hungry as
5 anyone else. I will be brief. I think we really covered
6 it basically, Your Honor.

7 The only thing I will point out on the motion to
8 dismiss is in terms of any argument that this was
9 withdrawn to defeat their day in court, they shouldn't
10 have been in Court to begin with. We were, as I noted in
11 my response to their request for preliminary injunction,
12 we were preparing to file a motion to dismiss because they
13 failed to exhaust their administrative remedies. 7 USC
14 Section 6912(e) requires a person who is aggrieved by an
15 administrative decision in the Agriculture Department
16 requires them to exhaust all their administrative appeals
17 that are available.

18 When the forest plans were sent out in 2009, at
19 that point that was the first step in the process. The
20 decision document was made. The plaintiffs had a right to
21 appeal from the promulgation of those forest plan
22 amendments. And they actually did that, along with four
23 other sets of people.

24 However, prior to doing that, they filed an
25 action in this court. That action was premature. It

1 should never have been filed. And the reason I bring that
2 up in the context of this motion to dismiss as moot is
3 there are some exceptions to mootness when you are
4 basically trying to evade getting your dispute heard by
5 the Court. So you change your conduct so the Court can't
6 hear it. That's not what was going on here. This Court
7 never had the case properly before it to begin with.

8 The circuits are split on whether the provision
9 7 USC 6912(e) is jurisdictional or not. But, clearly, it
10 is mandatory that if you have an available appeal route,
11 you have to take it. They had one. They did take it, but
12 they filed in this Court to begin with. So we were not
13 trying to keep them from getting into court. They should
14 never have been here to begin with. They should have been
15 with the administrative process. And when the plans were
16 withdrawn, there still would have been an administrative
17 process. We are not trying to defeat the jurisdiction of
18 the Court or anything. In fact, at this point, depending
19 on which circuit is right, you may never have had
20 jurisdiction over the case to begin with. That's the only
21 thing I would add to what we have talked about to this
22 point, Your Honor.

23 **THE COURT:** Okay.

24 **MR. HENDRIX:** If I might briefly?

25 **THE COURT:** Sure.

1 **MR. HENDRIX:** Your Honor, the government
2 mentioned that their argument is that this case is moot.
3 It is their withdrawal of the 2009 amendment that mooted
4 this case.

5 What we would say in response to that is that
6 Supreme Court's been very clear that you can't voluntary
7 withdrawal or cease a harm or an action that would
8 otherwise moot the lawsuit. You can't take a decision or
9 make a decision to stop what you are doing that you have
10 been sued over unless it's absolutely clear that the
11 conduct could not recur.

12 In this case, I don't think anyone believes --
13 in fact, I believe the government's counsel has said he
14 doesn't believe the Headwaters would be open for floating
15 under what the Wild and Scenic Rivers Act requires. So I
16 don't think there is any question here that this conduct
17 will occur.

18 Most importantly, their withdrawal of the 2009
19 amendment didn't change anything in this case to the
20 extent that it didn't change the central issue in the
21 case. The ban is still in place. So withdrawing the
22 amendment didn't change the issue that we are currently
23 before Your Honor.

24 Really quickly on exhaustion. The government
25 mentioned that there's been open question as to whether or

1 not the requirement to exhaust remedies is jurisdictional.
2 The Fifth Circuit and the Ninth Circuit have both held
3 that is not in fact jurisdictional. The Fourth Circuit
4 has not had an opportunity and I don't believe this Court
5 has had an opportunity to address that question. But it
6 leaves a way to authority at this point that it is not a
7 jurisdictional issue.

8 With regard to exhaustion more broadly, Your
9 Honor, the plaintiffs are not intending they didn't have
10 an obligation to exhaust their remedies. The plaintiffs
11 are arguing they did in fact exhaust them.

12 They said we brought this lawsuit prematurely.
13 We shouldn't be here. Well, I would submit to Your Honor
14 if we weren't here, we would be nowhere. We wouldn't have
15 anything other than this merry-go-round that keeps going
16 round and round of process that the Forest Service has
17 contended is the process that they provide to the public
18 and that we should continue participating in, as we have
19 continued participating in for the last 25 years, all to
20 no avail.

21 And, finally, on the statute of limitations, two
22 issues here on the statute of limitations. One, earlier
23 it was mentioned that the Northern District of Georgia
24 addressed this question. What the Northern District of
25 Georgia did was point out there was in fact a statute of

1 limitations. That question was not before the court.
2 Whether or not the ban at issue could have been challenged
3 was simply not a question that the court considered. The
4 ban was not at issue and the court said that quite
5 clearly. So certainly the court recognized there was a
6 statute of limitations. We don't contend otherwise.
7 There is a statute of limitations.

8 We are contending two things, however. One,
9 that the statute of limitations didn't begin to run from
10 1985. In 2004, the final administrative decision that was
11 made and then again in 2005 when they said we exhausted
12 our remedies, that is the decision that basically reset
13 the clock on that. So our contention is the statute of
14 limitations begin to run from 2005.

15 Secondly, Your Honor, and as the defendants do
16 well in pointing out in their own reply to our opposition,
17 if you look at Footnote 1, the plaintiff's point out there
18 is in fact an exception where plaintiffs apply for relief
19 from whatever it is that we are complaining about. If we
20 apply for relief and the government then denies that
21 relief, if we could show that, then what we have basically
22 is as applied challenge. Statute of limitations would
23 begin to run when that as applied challenge or when the
24 government denied the application for relief.

25 On June 18th of 2008, American Whitewater

1 requested a special use permit to use this river, to float
2 the Headwaters. On July 8th, 2008, that was denied by the
3 Forest Service. So we have applied for a special use
4 permit. They applied the ban to us, quite specifically in
5 their response said, no, whitewater floating is banned in
6 the upper Headwaters. We are not going to allow you to do
7 that. They applied that ban to us so our challenge here
8 is both facial and as applied. Thank you, Your Honor.

9 **THE COURT:** Okay.

10 **MR. JENKINS:** Your Honor, I think we have argued
11 much of the points in the motion to dismiss, but I would
12 direct your attention to one of counsel's comments on my
13 comment.

14 And he had a curious comment that navigability
15 is only a state law issue. Last time I checked, the US
16 Forest Service is a federal agency. And the federal -- in
17 the Forest Service manual, 2354.14, it directs the Forest
18 Service -- that's the point about the consider a river is
19 non-navigable and so on until as adjudicated otherwise.
20 But the next portion says, "Navigability is a judicial
21 finding and must be made by a federal court in order to
22 bind the United States." That's the point.

23 And that's also the point of why the US Army
24 Corps of Engineers' decision that this section of the
25 river is non-navigable. That is the status of the law

1 today. And upon that basis alone the Forest Service was
2 correct to keep recreation users from the private property
3 section.

4 Now, incidently, the Western District of South
5 Carolina [sic] is also a decision that's in our motion as
6 well I believe. But it's -- I think it is US vs. 513 --
7 there is a number. Let me find it. Just a second. The
8 US vs. 531.10 Acres is the title. And we have addressed
9 that. In that case the Western District of South Carolina
10 said, navigability is a federal determination.

11 Now, the point that I've been making is that
12 whether you look at federal law or state law in this
13 issue, it is one of those happy occasions for a judge
14 where the issue is crystal clear. Under either standard,
15 there is no way that this land -- or this river portion is
16 navigable and that ends the case.

17 Now, I also point out with respect to just the
18 ongoing discussion between the government and the
19 plaintiffs that there also is, Your Honor, a closure order
20 in effect that were issued by the Forest Service that are
21 even apart from this whole discussion about 2005 and 2009
22 process. And that's one of the things that Judge O'Kelly
23 was concerned about that he couldn't even grant plaintiffs
24 any remedy. If you read his order, it's more plain than I
25 could make it.

1 And finally, with respect to the repeated claim
2 that 250 year something has happened with regard to
3 boating, well, of course, for a lot longer than that
4 private property interests have been protected. And I'm
5 not aware this country has gone so far as to say that the
6 general public can use anybody's private property. That's
7 not the constitution. The constitution protects private
8 property. The Fifth Amendment protects private property.
9 So I don't see how that's an issue.

10 In fact, this navigability issue actually goes
11 all the way back to the Magna Carta. So this is a
12 doctrine that's existed for millennium. And it is
13 squarely on point that the private property is protected
14 from recreation users because of it. Thank you.

15 **THE COURT:** Thank you.

16 Any concluding remarks?

17 **MR. DOUGLAS:** Just one comment about the 2005
18 administrative decision somehow resetting the clock on the
19 is 1985 Forest Plan statute of limitations. That's just
20 not so. As Judge O'Kelly recognized in the 2006 case, as
21 he put it there, he could see no way that the plaintiffs
22 were aggrieved by the 2005 order. A forest plan revision
23 was proposed and was going to go into effect. On review,
24 they vacated in effect that part of the plan that dealt
25 with the Upper Chattooga which had the effect of leaving

1 the 1985 ban in effect.

2 The same thing happened here. There were three
3 forest plan amendments that were proposed that would have,
4 while it loosened the ban of '85, would have restricted
5 boating more than the plaintiffs wanted. They appealed
6 that. While it was on appeal, the plans were withdrawn,
7 in other words, vacated, leaving them no worse off than
8 they were before, that what they were objecting to was
9 taken away. Same thing has happened in 2005. What they
10 are objecting to was taken away. Neither one of them
11 reset the statute of limitations. That would be new law
12 to create that kind of a ruling on the statute of
13 limitations. That's it, Judge.

14 **THE COURT:** Okay.

15 Concluding remarks by plaintiffs?

16 **MR. HENDRIX:** Very briefly, Your Honor. First,
17 with regard to navigability. The plaintiffs would
18 absolutely love to hear from the federal government as to
19 whether or not the federal government agrees with the
20 private property owners that the federal government lacks
21 the authority to manage the river that flows through their
22 property. As far as we know, they have not taken a
23 position on that issue. That seems, to us, would be quite
24 important here with the federal government because our
25 understanding is that that river has been designated as a

1 federal property, or at least it's been designated as a
2 wild and scenic river. And the federal -- the forest
3 service has an obligation under federal law to manage it.

4 The private property owners say, no, they own
5 that property. They own that part of the river. And they
6 are free to exclude whomever they would like unless we ask
7 them for permission to use that part of the river. So our
8 position, Your Honor, is it should be managed consistent
9 with the federal law, the Wild and Scenic Rivers Act.

10 Real briefly on navigability, Your Honor. Much
11 has been made about that. I would say, first, the North
12 Carolina Attorney General's opinion makes it quite clear,
13 states very clearly that if you can float a river in a
14 boat, kayak or canoe, it is considered navigable. There
15 is a difference between navigable in fact and navigable in
16 law.

17 What the Forest Service has said in its own
18 manual, the Forest Service retains the authority to
19 regulate the use of a river in national forest lands on
20 the shorelines whether it is navigable or non-navigable.
21 So from our standpoint, whether it is navigable or not, we
22 still maintain the Forest Service has an obligation and a
23 right, an authority to manage it. They have to manage it
24 consistent with the Wild and Scenic Rivers Act.

25 Getting briefly to the point Mr. Douglas was

1 making regarding the 2006 decision from the Northern
2 District of Georgia. What the judge said in that
3 decision, again, was not that the -- the 1985 decision,
4 I'm sorry, the 1985 decision, the statute of limitations
5 has long since run on that. We couldn't challenge that.
6 Simple fact is we didn't challenge that in this case. We
7 didn't challenge that plan. The 1985 decision was not at
8 issue. It is at issue in this case. And I have described
9 previously a number of reasons why the statute of
10 limitations has not yet run.

11 Your Honor, I think in closing what we would say
12 is the plaintiffs have spent the last 25 years working
13 diligently to try to get this river open, to try to
14 convince the Forest Service to manage this river
15 consistent with federal law. We have offered testimony
16 today that the harm that is being suffered by plaintiffs
17 is irreparable. And it's directly tied to this unlawful
18 ban.

19 And what we are asking the Court to do today is,
20 first, to provide us with the right to float the river, to
21 lift that ban. And second, what we'd ask the Court is,
22 obviously, we would like to remain before this Court and
23 that the motion to dismiss should be denied. Thank you,
24 Your Honor.

25 **THE COURT:** Thank you.

1 **MR. JENKINS:** Your Honor, very briefly in
2 response to his question what about the Forest Service
3 could, can and should do in positions of private property.
4 The wild and scenic river itself answers that. 16 USC
5 1282(b)(1) says the Secretary of Agriculture, Forest
6 Service in this case, shall assist, advise and cooperate
7 with landowners to manage rivers and resources. Cooperate
8 with landowners.

9 And the wild and scenic rivers guidelines
10 published in the federal register at 47 Fed Reg 173 states
11 that the Wild and Scenic Rivers Act does not open private
12 lands to the public's recreation. What could be more
13 clear than that?

14 It also says that management principles, that
15 type of management may apply to private lands only to the
16 extent required by other laws such as local zoning and air
17 and water pollution regulations. Of course, the private
18 property owner cannot be dumping oil into a river. But
19 that's a far cry from the Forest Service coming and
20 actively managing the private property, which the Wild and
21 Scenic Rivers Act itself is diametrically opposed to that
22 principle. Thank you.

23 **THE COURT:** All right. Anything else from
24 anyone else?

25 **MR. HENDRIX:** One housekeeping matter, not

1 argument.

2 **THE COURT:** Sure.

3 **MR. HENDRIX:** I haven't introduced it or asked
4 for the introduction of Plaintiff's Exhibit 15.

5 **THE COURT:** Okay.

6 **MR. HENDRIX:** I referred earlier to the
7 application of American Whitewater for a special use
8 permit. And also Exhibit 16. Plaintiff's Exhibit 15 and
9 16 we would like to admit for the Court's consideration.

10 **MR. DOUGLAS:** We had objected to those. And it
11 was my understanding they were not going to be put in.

12 **MR. GALBREATH:** It was outside the original
13 agreement. But this is in rebuttal to what the government
14 would -- the government's argument that there was no as
15 applied challenge. This is rebuttal evidence. There
16 clearly was as applied challenge.

17 **MR. DOUGLAS:** And that was a statement there was
18 no as applied challenge.

19 **MR. HENDRIX:** If I might briefly, Your Honor?
20 What they are saying is that this statute of limitations
21 has long since run on any challenge of the 1985 plan.
22 What we are saying is that the 1985 plan, by the
23 government's own argument, has been applied to the
24 plaintiffs. As such, because it's been applied to the
25 plaintiffs in 2008, we are well within the statute of

1 limitations. If you look at Paragraph 154 of our
2 complaint, it clearly includes a challenge to '76, to '85
3 and the 2004 plans. So both in our complaint and in our
4 argument we have explained why it is that we have
5 challenged both the '85 ban in a facial way and an as
6 applied way.

7 **MR. DOUGLAS:** There is absolutely no statement,
8 Your Honor, that I have seen in the complaint or any other
9 filing about an as applied theory. They have been through
10 three theories, but this would be a fourth and it was
11 never pleaded.

12 **MR. HENDRIX:** What I would say is that we
13 certainly did challenge the 1985 plan. In terms of the
14 statute of limitations, I would say that our response to
15 that is our defense to their claim made after we filed our
16 complaint that we were somehow outside the statute of
17 limitations. Quite frankly, the 2004 decision or 2004
18 plan and the 2005 decision, it's our contention, reset
19 that clock. The extent that the Court is not comfortable
20 with that argument, we have evidence here of an as applied
21 challenge.

22 **THE COURT:** I will allow it in but will rule on
23 the admissibility in the order.

24 **MR. DOUGLAS:** Thank you.

25 **THE COURT:** All right. I believe everybody's

1 had their day in court. We will review everything. And
2 if there is anything that we still are uncomfortable with,
3 if there are any issues, we can do that by teleconference
4 with the court reporter in the room as we go through some
5 of the documents, if there is any clarification needed.
6 But we will give you a decision in writing. Thank you
7 all.

8 **MR. GALBREATH:** Thank you.

9 **MR. JENKINS:** Thank you.

10 **MR. DOUGLAS:** Thank you.

11 (WHEREUPON, Plaintiff's Exhibits Nos. 15 and 16 were
12 marked for identification and received into
13 evidence.)

14 ***

15 I certify that the foregoing is a correct transcript from
16 the record of proceedings in the above-entitled matter.
17

18 s/Karen E. Martin

1/28/2011

19 _____
Karen E. Martin, RMR, CRR

Date _____

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, et al.	:	CIVIL ACTION NO.
	:	
Plaintiff,	:	2:06-CV-0074-WCO
	:	
v.	:	
	:	
DALE BOSWORTH, in his official	:	
Capacity as Chief of the United States	:	
Forest Service, et al.	:	
	:	
Defendants.	:	

DECLARATION OF CHRIS LIGGETT

I, Chris Liggett, make the following declaration in lieu of oath, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this declaration will be filed with the United States District Court for the Northern District of Georgia, and that it is the legal equivalent of a statement under oath. I hereby certify:

1. I am the Director of Planning for the Southern Region of the USDA Forest Service and am a member of the Steering Team for the Chattooga River visitor capacity analysis process. As part of my

management duties, I oversee staff responsible for calculating the estimates in this declaration.

2. Since the Reviewing Officer issued her administrative appeal decision in April 2005, the Forest Service has committed significant time, human and financial resources toward design and execution of the visitor use capacity analysis. The agency has already spent over \$ 335,000 in contracting fees and is projected to spend over \$1 million dollars to complete the study. Most of these fees apply to the design and execution of the visitor use capacity analysis that is based upon the direction in the appeal decision currently in place.

3. From May 2005 to April 2006, the Forest Service has incurred approximately \$425,000 in staff costs (not including travel) and consultant costs associated with the analysis ordered in April 2005. From May 2006 to December 2007, the Forest Service projects that it will incur approximately \$920,000 in additional costs associated with the analysis.

4. The Forest Service is not administratively prepared to immediately accommodate floaters on the uppermost section of the Chattooga Wild and Scenic River. It currently does not have sufficient staff to monitor the floating and to enforce existing applicable regulations on a new influx of users. The Forest Service also currently lacks the means

necessary to search for and rescue stranded and injured floaters in that uppermost section of the river.

Executed this 7th day of July, 2006.

Chris Liggett

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, et al.	:	CIVIL ACTION NO.
	:	
Plaintiff,	:	2:06-CV-0074-WCO
	:	
v.	:	
	:	
DALE BOSWORTH, in his official	:	
capacity as Chief of the United States	:	
Forest Service, et al.	:	
	:	
Defendants.	:	

**FEDERAL DEFENDANTS' OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

I. INTRODUCTION

The federal defendants have filed a motion to dismiss, which, if granted, moots plaintiffs' motion for a preliminary injunction. Even if the Court were to reach the merits of the motion, plaintiffs fail to establish any of the four requirements for injunctive relief.

They have no likelihood of success on the merits under the Administrative Procedure Act ("APA"), because the 2005 Order at issue does not violate the Wild and Scenic Rivers Act ("WSRA") and is not arbitrary or capricious. Plaintiffs' argument to the contrary assumes that WSRA mandates that the Chattooga be opened to floating in all places, at all times, and by all users. But nothing in WSRA requires that result; to the contrary, WSRA confers broad discretion on the Forest Service to regulate and limit recreational uses to accommodate competing river values.

Plaintiffs' effort to show that the 2005 Order is arbitrary and capricious based on cherry-picking quotes out of context from the 2005 Order equally fails. The bottom-line conclusion of the 2005 Order is that the record before the Reviewing Officer was insufficient to determine that the 30-year prohibition on floating on the Chattooga's Headwaters should be continued, and that therefore the issue should be studied and a new decision made. Ordering a study to determine whether things have changed since the 1970s, when the prohibition first went into effect based on evidence of conflicts between boaters and fishermen, and when boaters died and were injured while floating the Headwaters, is imminently reasonable. Indeed, it would be irresponsible, and possibly violate a host of environmental laws, to throw open the river without first ascertaining whether and how the prohibition should be lifted and what the effects of doing so would be. The 2005 Order merely leaves in place the prohibition required by numerous prior forest plans and a properly-promulgated regulation, none of which is challenged here, while the study is completed. That action is rational and well within the bounds of agency discretion.

In any event, plaintiffs' request for the Court to open the river, despite a deficient record and without knowing the consequences, is foreclosed by recent Supreme Court precedent. That precedent makes clear that broad statutory mandates, like the WSRA mandate at issue here, cannot be enforced under the APA by mandatory injunction.

Finally, plaintiffs' claim that they are suffering irreparable injury, requiring immediate judicial intervention, from a prohibition that has been in place for thirty years

cannot be sustained. Nor have the plaintiffs shown that an injunction would serve the public interest. Indeed, plaintiffs' requested injunction would result in a disservice to the public and the reasoned and well-informed management decisions it deserves and expects from the Forest Service. Plaintiffs' motion should be denied.

II. BACKGROUND

The management history of the Chattooga Wild and Scenic River is best understood by reviewing seven key Forest Service documents spanning over 35 years.

A. Chattooga Wild and Scenic River Study Report – June 15, 1971

Prior to the Chattooga's designation as a Wild and Scenic River, the Forest Service performed a comprehensive study of the river and completed the Chattooga Wild and Scenic River Study Report ("Study Report"), dated June 1971. The study began in 1969 and was a significant governmental undertaking.

The study began with the assignment of a Forest Service field team charged with collecting and analyzing data on the river and its environment. A Task Force, consisting of a number of representatives, including the Governors of North Carolina, South Carolina and Georgia, as well as the Forest Supervisors for the Nantahala, Sumter and Chattahoochee National Forest, and the Bureau of Outdoor Recreation, United States Department of the Interior, reviewed the work of the field team and drafts of the study report. In addition to the Task Force, numerous other federal and state agencies, private individuals, and conservation groups contributed to the study effort and two public meetings provided an opportunity for interested citizens to express their opinions

concerning the future of the Chattooga. See Study Report at 1.

The Chattooga was designated by Congress as a Wild and Scenic River on May 10, 1974. The portion of the Chattooga designated as a component of the Wild and Scenic Rivers System covers a total distance of 57 miles. See 16 U.S.C. § 1274(a)(10).

B. Chattooga Wild and Scenic River Classification, Boundaries and Development Plan – March 15, 1976

The values for which the river was designated (otherwise referred to as Outstandingly Remarkable Values or ORVs) are (1) Geology, (2) Biology, (3) Scenery, (4) Recreation, and (5) History. Although noted as one among many recreational pursuits, floating was not identified as an ORV. Subsequent to its designation by Congress, the Forest Service published the Chattooga Classification, Boundaries and Development Plan in the Federal Register. See 41 Fed. Reg. 11,847 (Mar. 22, 1976).

The Development Plan recognized four recreational uses: boating, fishing, hiking, and camping. Id. at 11,849. Without being specific about which sections, the Development Plan states that sections of the river are ideal for floating in canoes, kayaks and rubber rafts. The Development Plan provides more detail about trout fishing. It states that trout fishing on the Chattooga ranges from excellent in the upper reaches to extremely marginal in the lowermost reaches, as a result of different water temperatures. It continues that because of its location in the South, the river is an extremely popular area for trout fishing. Most importantly, the Development Plan also states “[t]he recent increase in floaters using the river has had a detrimental effect on the fishing experience.

Conflicts have developed on certain sections of the river where floaters and fishermen use the same waters.” Id. at 11,849.

The Development Plan recognized that restrictions in WSRA limit the types of permissible recreation use, especially in those sections of the river designated “wild” or “scenic,” as opposed to areas designated “recreation.” It states that compatible uses on the Chattooga are floating, hiking, hunting, fishing, and camping. However, it states, “[a]lthough current levels of all types of uses create some problems, uncontrolled future use would probably result in safety hazards and a lowering of the quality of the recreation experience and when need warrants, this will be prevented by the establishment of regulations limiting size, number, type, etc., to provide optimum use.” Id. at 11,850.

In furtherance of the objective to strike an optimum balance of recreational uses and avoid user conflicts on the entire Chattooga, and while discussing areas of the river directly upstream of SC/GA Highway 28, the Development Plan states “[t]his area remains a favorite spot for trout fishing. This location is the source of some of the best trout fishing in both South Carolina and Georgia. Floating will be prohibited above Highway 28” Id. at 11,852. Although floating above Highway 28 was to be prohibited, to make certain that floating was accommodated on the river, no limitations or restrictions were placed on floating downstream of Highway 28, consisting of over 36 miles of the 57 mile river corridor. The Forest Service determined that this large portion was the most generally desirable, physically suitable, and highly used area for floating on the river. By exercising its discretion to manage the river this way, the Forest Service

was able to reasonably accommodate two specific conflicting recreational uses, benefitting the individuals who wished to float the river and those who wished to experience quality trout fishing in the only areas of the river that offered that experience.

C. Chattooga Wild and Scenic River Management Plan – August 26, 1977

Pursuant to 28 U.S.C. §1281(a), the Forest Service completed the first Chattooga Wild and Scenic River Management Plan (“1977 River Plan”) on August 26, 1977. The general objective of the plan was to provide direction in the day-to-day management of the resources and people using the river in a way that ensured protection and enhancement of the river’s ORVs. See 1977 River Plan.

Consistent with statements in the Development Plan issued a little over one year prior, the 1977 River Plan stated that “[a]lmost all floating occurs below [the] Highway 28 bridge. Fishermen tend to congregate at [the] Highway 28 Bridge, Burrells Ford and Bull Pen Bridge, the major stocking points [upstream of Highway 28].” Id. at 2. With regard to fisheries, the plan designated vehicular fish stocking points and again proclaimed that “[f]loating above Highway 28 Bridge will be prohibited and fishing encouraged in this section.” Id. at 26.

In an effort to properly manage the floating use and user conflicts, and to provide for safety of the public, the 1977 River Plan reiterates Interim Regulations and a Notice of Proposed Rulemaking published three months earlier in the Federal Register. Id. at 10-

13; 42 Fed. Reg. 27,244 (May 27, 1977).¹ Generally, the interim regulations prohibited floating (non-commercial and commercial) on any area of the Chattooga without a permit. As a condition of the permit, floating is not allowed above the Highway 28 Bridge. To make non-commercial floating permits readily available, the Forest Service constructed seven self-registration stations at major floating put-ins located from the Highway 28 Bridge downstream and at Overflow Bridge on the West Fork. To further serve and support floaters and other recreationists, the Forest Service also committed to install informational bulletin boards at seven major general access points where the Service would post the interim regulations and recommend safety precautions.

D. Revised Chattooga Wild and Scenic River Management Plan – July 11, 1980

In an effort to consistently protect and enhance the Chattooga's ORVs, the Forest Service completed a revised river management plan on July 11, 1980 ("1980 River Plan"). As more information about use and the environmental status of the area became available to the Forest Service, through its own initiatives and those of cooperating Federal and State agencies, conservation organizations, and members of the general public, the agency was able to add to its description of the resource and provide for additional management objectives designed to protect and enhance the ORVs.

With respect to floating, the 1980 River Plan points out that the river north of the Highway 28 Bridge is not open. It states that the prohibition is a condition of the floater

¹ The interim regulations were made final and published in the Federal Register. See 43 Fed. Reg. 3,706 (Jan. 27, 1978) (currently codified at 36 C.F.R. § 261.77).

permit, which is printed on the reverse side of the permit, and correctly points out that the condition is enforceable pursuant to 36 C.F.R. § 261.77(c). See 1980 River Plan at 10. The 1980 River Plan also indicates that several studies have been made regarding floating use on the Chattooga (including those sections downstream of Highway 28) and the perceptions of visitors. The major focus of these studies was the impact of commercial floating activities, but carrying capacity studies were underway and “[i]n the interim the present administratively set use limits will be continued.” Id. At 10-10a.

The 1980 Plan does not exclusively discuss accommodating and placing reasonable limitations on floating. It also expounds upon the prohibitions applicable to other recreational pursuits such as camping and motorized vehicle use, the necessity for commercial activities to be sanctioned by proper authorization through special use permits, and the emphasis that must be placed on search and rescue preparedness and protocol as well as the general safety of all members of the public visiting the Chattooga Wild and Scenic River Corridor. Id.

E. Land and Resources Management Plan, Sumter National Forest - August, 1985

The National Forest Management Act (“NFMA”) and its implementing regulations require the Forest Service to develop Land and Resource Management Plans (“LRMPs”) for each unit of the National Forest System. See generally 16 U.S.C. §§ 1600-14; 36 C.F.R. pt. 219. To ensure that provisions of the Chattooga Wild and Scenic River Plan were included in the comprehensive management of the forest and in order to streamline

the management of the Chattooga, in August of 1985, the Forest Service created the first Sumter Land and Resource Management Plan which included the Revised Chattooga Wild and Scenic River Plan as Appendix M.

Appendix M provided a significant update to the previous 1980 River Plan. On the first page, it highlights the agency's management objectives of protecting and enhancing the river's ORVs. It states "[t]his river corridor has the potential to become one of the most significant areas in the East providing a wide range of challenging outdoor recreational pursuits in a primitive setting." 1985 Plan at M-1. It proclaims that managers will have to evaluate carefully all actions to ensure that decisions are based on a national perspective rather than on a more limited scope and that the river plan provides detailed management direction for resources and people using the river under the guidance of the Forest Land Management Plan. Id.

After mentioning that the terrain is very rugged, since the river drops almost one-half mile over numerous rapids and waterfalls, Appendix M states that the Chattooga offers some of the most challenging white water in the Southeast, and floating by both commercial and private individuals has increased dramatically in the past 15 years. Appendix M then states that "[t]he Chattooga is also a major recreation attraction for numerous fishermen who consider it to be the premier trout fishing stream in South Carolina and one of the best in Georgia." Id. It again highlights that fishermen tend to congregate at major stocking points above Highway 28, but notes that many seek the recreational value of a hike into the more remote reaches of the river upstream of the

Highway 28 Bridge. Id.

Appendix M again states that “[f]loating is limited to the 26 mile [the actual distance is 36 miles] portion below Highway 28 Bridge and the West Forks lower 4 miles in Georgia. Sections of the river designated I-IV are open to boating with each section providing progressively more difficult white water than the preceding one.” Id. While discussing historical floating use patterns, Appendix M notes that as inexperienced and poorly equipped individuals encountered very difficult white water, numerous deaths occurred during the early 1970s. Id. at M-7. As part of its discussion about recreation permits, Appendix M recognizes that permits provide a necessary management tool that are used to provide recreational opportunities that many private individuals could not otherwise enjoy. It then highlights the desirability of allowing commercial guiding of white water but states that, in order to ensure that private floaters’ desires are addressed, commercial trips must not be allowed to eliminate all private floating. Id. at M-11. As part of its discussion of private floater permits, Appendix M states that floaters need to fill out the self registration permit forms at the shelters in order to legally run the river. Id. at M-14. It again states that floating north of the Highway 28 Bridge is prohibited through a condition of the floater permit under 36 C.F.R. § 261.77(c). With respect to floating safety, Appendix M notes that safety requirements were instituted in 1975 following several years with numerous fatalities and accidents to floaters that required frequent search and rescue efforts. It proclaims that under current management, “[a]ccidents are now infrequent, averaging one fatality every other year.” Id.

In addition to management prescriptions related to floating, Appendix M contains significant discussion regarding the management of other recreational activities with the objective of protecting and enhancing the Recreation ORV. Among these, Appendix M discusses fishing by stating that “[t]he Chattooga is considered to be the best trout stream in South Carolina and one of the best in Georgia,” which “has the size and volume to permit quality fly fishing in a very attractive setting,” and that “[t]his is especially true on the undeveloped section north of the Highway 28 Bridge where floating use is not permitted to provide quality trout fishing.” *Id.* at M-16. The upper portion of the river has colder water that is more conducive to trout survival and natural regeneration. *Id.*

F. Sumter National Forest Revised Land and Resources Management Plan – January, 2004

In response to comments from those who wished to have the agency lift the prohibition on floating, as part of the Final Environmental Impact Statement (“FEIS”) for the Revised Land and Resource Management Plan for the Sumter National Forest (“RLRMP”), the Forest Service considered three different management alternatives for the Chattooga upstream of Highway 28. Based upon the FEIS, the Regional Forester believed that adopting either alternative that allowed for boating above the Highway 28 Bridge would likely result in unacceptable impacts on social and physical resources. He concluded that by continuing to exclude floating above Highway 28, the ORVs for the river would be protected and enhanced for the next ten to fifteen years until the RLRMP for the Sumter National Forest was again revised.

G. Administrative Appeal Decision - April 28, 2005

American Whitewater administratively appealed the portion of the 2004 Plan that continued the 30-year-old prohibition on boating above Highway 28. On April 28, 2005, Gloria Manning, Reviewing Officer for the Chief, issued her Order. Doc. 1-1, Appx. 2. That 2005 Order notes that American Whitewater contended that “there is a lack of data or studies in the record to support the decision” to continue the prohibition. Id. at 4. The Reviewing Officer agreed that, while “there are multiple references in the record to resource impacts and decreasing solitude” applicable to all users, the record was “deficient” in substantiating the need for continuing the ban on floating to protect recreation as an ORV. Id. at 6. Thus, the Reviewing Officer reversed the decision of the Regional Forester and directed him “to conduct the appropriate visitor use capacity analysis, including non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings.” Id. The 2005 Order states that the study is estimated to take two years to complete (April 2007) but that the Regional Forester may request additional time if “unforeseen circumstances” arise. Id. The Order also provides that, “until the new decision is issued[, m]anagement of boating above Highway 28 will revert to the direction in the 1985 Plan,” which prohibited floating. Id. However, the 2005 Order notes, the Regional Forester is empowered under 36 C.F.R. § 261.77 to permit boating on sections of the river that are currently closed, should the Regional Forester conduct user trials as part of the capacity analysis ordered. Id. The 2005 Order requires the Regional Forester to involve interested and affected parties in the

design and execution of the capacity analysis. Id. at 6-7.

In the year since the issuance of the 2005 Order, plaintiffs have not applied for any special use permit to allow them to float the river above Highway 28, though they have been involved in working with the Forest Service to complete the ordered study needed to determine whether and how to open the Headwaters to floating. The general design of the visitor use capacity analysis has been completed, and as part of the data acquisition process, the Forest Service intends to issue permits that allow for public floater trials. Among other information, data from those trials will be used in the visitor use capacity analysis to reach a final management decision.

On May 18, 2006, however, in an apparent attempt to short-circuit the ongoing agency process, plaintiffs filed suit in this Court asserting that the prohibition on floating above Highway 28 – a condition that has existed for 30 years – is an emergency requiring immediate judicial intervention by this Court. Ironically, plaintiffs’ current suit is substantially diverting the resources of the same agency personnel who are involved in conducting the capacity analysis ordered by the Reviewing Officer and needed to issue a new decision regarding floating above Highway 28. As part of this action, plaintiffs filed a motion for a preliminary injunction, “ask[ing] that [the 2005 Order’s] implementation be enjoined.” Doc. 3-2 at 4.

III. ARGUMENT

A preliminary injunction is an “extraordinary and drastic remedy not to be granted unless the movant clearly establishes the ‘burden of persuasion’ as to the four requisites.”

McDonald's Corp v. Robertson, 147 F.3d 1301, 1306-07 (11th Cir. 1998) (internal quotation and citation omitted). To obtain an injunction, plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm that the preliminary injunction would cause to the non-movant; and (4) the preliminary injunction would not be adverse to the public interest. Parker v. State Bd. of Pardons and Paroles, 275 F.3d 1032, 1034-35 (11th Cir. 2001). Here, plaintiffs have not met their burden of establishing any of these requirements for injunctive relief.

A. Plaintiffs Are Unlikely to Succeed on the Merits.

Although plaintiffs' complaint cites several statutes, their preliminary injunction motion is based solely on alleged violations of the APA, 5 U.S.C. § 706, and WSRA, 16 U.S.C. §§ 1271 et seq. See Doc. 3-2 at 13-19. Because "WSRA does not provide for a private right of action," however, plaintiffs claim must be analyzed under the APA. Center for Biological Diversity v. Veneman, 394 F.3d 1108, 1110 (9th Cir. 2005); Center for Biological Diversity v. Norton, No. 02-CV-435-WDM-MJW, 2005 WL 1994251, at *1 n.1 (D. Colo. Aug. 17, 2005).

Under the APA, courts review agency decisions applying a highly deferential standard of review, limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The judicial role is solely to determine whether "the decision was based on a consideration of the relevant factors and whether there has been

a clear error of judgment.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (“[T]he ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.”). Moreover, while the Court “may not supply a reasoned basis for the agency’s action that the agency itself has not given, [it] will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974) (citations omitted).

1. The 2005 Order Does Not Violate WSRA.

Plaintiffs’ first claim is that the 2005 Order is invalid under the APA because it allegedly violates WSRA’s mandate that the Forest Service manage the river to “protect and enhance” river values. Doc. 3-2 at 15-19. The premise of this argument is that the broad “protect and enhance” statutory mandate requires the river to be open to floating, in all places and by all desiring users; and that the 2005 Order thus violates the mandate by not ordering the river immediately open to floating on the entire river.

The premise is false. The law is clear that WSRA does not require the Forest Service to open rivers without regulation to all uses in all places. WSRA permits the agency to regulate the use, occupancy, and activities that occur in national parks, forests, and waterways, even if that means that not all activities are permitted in all designated areas. See Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176-79 (9th Cir. 2000) (upholding restrictions on areas and levels of motorized water craft use in Hells Canyon area); United States v. Hells Canyon Guide Serv., Inc., 660 F.2d 735,

737-38 (9th Cir. 1981) (upholding permit system that resulted in injunction on boating services on Snake River). The Forest Service has wide discretion under the “protect and enhance” provision in deciding what regulations are appropriate and what uses will “substantially interfere” with the river’s values, Hells Canyon Alliance, 227 F.3d at 1178, especially where the uses may conflict. Moreover, section 1281(d) of WSRA explicitly provides that the agency, in its administration of the wild and scenic rivers system, “may utilize the general statutory authorities relating to the national forests in such manner as [it] deems appropriate to carry out the purposes of this chapter.” 16 U.S.C. § 1281(d), cited in Hells Canyon Guide Serv., 660 F.2d at 737-38. Neither the “protect and enhance” language nor any other provision of WSRA requires the Forest Service to allow boating, or any other form of recreation, on every square inch of any Wild and Scenic River.²

Nor does the 2005 Order’s interim management direction calling for the completion of a visitor use capacity analysis and a new decision, and for “[m]anagement of boating above Highway 28 [to] revert to the direction in the 1985 Forest Plan” pending the decision, 2005 Order at 6, violate WSRA. As plaintiffs themselves state, it is the

² Plaintiffs state that the Chattooga is the only Wild and Scenic River (“WSR”) under Forest Service administration where boating is prohibited. They are incorrect. Three sections of the Upper Rogue WSR, totaling about 21 miles, are closed to private whitewater boating and the entire length of the river is closed to commercial whitewater boating. Although administered by the National Park Service, whitewater boating is also prohibited in rivers present in Yellowstone National Park, as American Whitewater notes on its own website. See <http://www.americanwhitewater.org/archive/article/303>).

obligation of the Forest Service to “protect and enhance” the Chattooga’s ORVs. To simply allow the public to recreate on the Chattooga in any fashion it desires, without any type of management, would be contrary to the mandate of WSRA and potentially unlawful under a variety of other environmental statutes, including the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). Plaintiffs fail to explain how the decision to study and issue a new decision fails to “protect and enhance” the five Chattooga ORVs: (1) Geology, (2) Biology, (3) Scenery, (4) Recreation, and (5) History. Contrary to plaintiffs’ claim, boating is simply one pursuit under the Recreation ORV, not an ORV itself.

Plaintiffs are also unlikely to succeed on the merits because, even if they were to succeed in invalidating the 2005 Order, which was favorable to them, the prohibition on floating would remain in place under 36 CFR § 261.77 and the 1985 LRMP for the Sumter National Forest, neither of which is challenged here. Enjoining the implementation of the 2005 Order, as requested, would only terminate the ongoing study, at great cost to the government, and terminate the Order’s requirement that the Forest Service issue a new decision regarding floating. Neither result would benefit plaintiffs.

2. The 2005 Order Is Not Arbitrary or Capricious.

In appealing the 2004 Plan, plaintiffs argued that “there is a lack of data or studies in the record to support the decision” to continue the prohibition. 2005 Order at 4. The Reviewing Officer agreed, finding that the record was “deficient,” and ordered the Regional Forester “to conduct the appropriate visitor use capacity analysis, including

non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings.” Id. at 6. There is nothing arbitrary or capricious about studying an issue on which the record is “deficient” before eliminating a 30-year-old prohibition on floating that was supported by evidence and analysis when initiated. See supra Part II. On the contrary, it would be irrational not to conduct analysis first.

The crux of the 2005 Order is that more information is needed to determine how floating should be managed on the Headwaters of the Chattooga and that, until that new decision is made, the river should be managed under the previous forest plan. Before it considers changing management policies that have been in place for over 30 years, the Forest Service must analyze the potential ecological and social impacts of doing so. It is not arbitrary and capricious to manage the river under the previous management direction until the study is complete and a new decision is made. The 2005 Order does not pass on the validity of the 1985 Forest Plan or the properly-promulgated regulation, or on the sufficiency of the evidence underlying those prohibitions. If anything, it upholds the 1985 Forest Plan’s validity by ordering it to remain in place during the study.

Moreover, the decision to study rather than to immediately open the river is supported by evidence in the historical management record of the Chattooga from 1971 onward that clearly indicates that floaters and other recreational users, including trout fishermen, hikers, swimmers, and sightseers, wish to use the river and experience the area in ways that may significantly conflict. See supra Part II. In light of this evidence and the agency’s obligation to exercise its broad discretion in a way that protects and

enhances the Recreation ORV as a whole, it is not arbitrary and capricious to study the matter further in order to determine if events have changed since the 1970s and to ascertain whether potential user conflicts continue to exist, and if so, how they may be successfully managed in accordance with the WSRA mandate.

3. Plaintiffs Are Not Entitled to an Injunction Requiring the Forest Service to Open the River to Floating in Any Event.

Even if the 2005 Order were arbitrary or capricious, at most plaintiffs would be entitled to have the favorable Order set aside and remanded to the agency for further decision-making (which is already ongoing). 5 U.S.C. § 706(2)(A). They would not be entitled, as requested, to an injunction under the APA compelling the Forest Service to open the Headwaters of the Chattooga to unregulated floating. In Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004), the Supreme Court recently explained that § 706(1) of the APA only permits courts to compel an agency “to take a discrete agency action that it is required to take,” “without directing how it shall act.” Id. at 64 (citation omitted). In that case, SUWA sought to compel the agency to manage off-road vehicle (ORVs) use in wilderness study areas (WSAs), claiming that such use violated the agency’s mandate, under 43 U.S.C. § 1782(c), to “continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” Id. The Court held that, although § 1782(c) “is mandatory as to the object to be achieved,” “it leaves [the agency] a great deal of discretion in deciding how to achieve it” and thus the section “does not mandate, with the clarity necessary to support judicial

action under § 706(1), the total exclusion of ORV use.” SUWA, 542 U.S. at 66. The “principal purpose” of this APA limitation “is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.” Id. (also noting that “[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, . . . it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management”). The Court concluded that “[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.” Id. at 67.

Although SUWA did not involve the “protect and enhance” language from WSRA, the case applies to all such broad statutory mandates and has since been explicitly extended to WSRA. In Oregon Natural Desert Ass’n v. United States Forest Serv., No. Civ. 03-213-JO, 2005 WL 1334459 (D. Or. June 3, 2005), the District Court in Oregon held that the agency’s statutory duty under WSRA to “protect and enhance” values “is indistinguishable from the statutory duty to manage ‘in a manner so as not to impair’ addressed by the SUWA Court.” Id. at *10. The court held that the claims based on WSRA therefore “must fail under the weight of the SUWA Court’s holding that such general duties” may not be enforced by injunction under § 706(1) of the APA. Id. at *11. The District Court’s analysis is correct. Plaintiff’s request for an order to “compel agency

action,” 5 U.S.C. § 706(1), namely, to compel the Forest Service to open the entire Chattooga to floating, is based on WSRA’s broad statutory mandate that the agency “protect and enhance” values and not “substantially interfere” with public use and enjoyment of values. As SUWA makes clear, however, the APA does not permit courts to order compliance with such broad, discretionary mandates. 542 U.S. at 66.

B. Plaintiffs Are Not Suffering Irreparable Injury Requiring an Injunction.

Plaintiffs are not suffering irreparable harm from not being able to float on a portion of the Chattooga. Even assuming that the limited inability to float could be construed as an “injury,”³ the prohibition of which plaintiffs complain has been in effect for over 30 years. The relatively short additional amount of time needed for the agency to complete the ongoing study and issue a revised decision does not create an immediate emergency causing undue hardship to plaintiffs. The Forest Service continues to permit floating on over 63% of the Chattooga, over 36 miles of the river, presenting some of the most challenging and picturesque whitewater available in this region. The Service has also announced that as an element of the agency’s visitor use capacity analysis, it will allow expert panels and permitted members of the public (which may include members of plaintiffs’ organizations) to float the Headwaters for study-related purposes. Plaintiffs have not sought permits to date.

³ The cases on which plaintiffs rely largely involve timber sales, logging, grazing, mining, road building activities, or the capturing of nearly-extinct species, Doc. 3-2 at 13 n.30, 19, all of which result in an irretrievable commitment or destruction of natural resources. A limited prohibition on floating is plainly not comparable to such harms.

In addition, plaintiffs have the same ability as others to engage in a multitude of other recreational pursuits allowed throughout the Chattooga corridor. They are not prohibited from accessing the Headwaters of the Chattooga for recreational pursuits such as swimming, fishing, hiking, camping, and photographing, to name just a few. Nor is it true, as plaintiff claim, that they are being treated unfairly as the only individuals prohibited from engaging in their desired recreational pursuit on the Chattooga. As an initial matter, it is not the individual that is prohibited from accessing and recreating in the Chattooga corridor. Instead it is the recreational use or pursuit that is limited in order to strike a balance that protects and enhances the Recreation ORV. Many uses, not just floating, are prohibited or limited in the Chattooga corridor. For instance, although floating is only prohibited in a small section of the Chattooga, off-highway vehicle use and mountain bike use is prohibited throughout the Chattooga corridor and only allowed in specific areas on the forest. Likewise, there are numerous restrictions on fishing, camping, and horseback riding, among others.

In any event, plaintiffs cannot reasonably argue that, after 30 years of being in place, the limited floating prohibition somehow now presents an immediate harm that cannot be tolerated while the Forest Service performs a comprehensive study to determine the future management of the Headwaters. After completion of the visitor use capacity analysis and proper administrative processes the agency is employing (in which plaintiffs have been encouraged to play a significant role), it is quite possible that the Forest Service may ultimately allow floating on the Headwaters. Plaintiffs' claim of irreparable

injury during the short interim period is neither severe nor emergency-creating under the circumstances.

C. Plaintiffs' Alleged Injury Does Not Outweigh the Injury a Preliminary Injunction Would Inflict Upon the Forest Service and the Public It Serves.

The threatened injury plaintiffs claim is insignificant when compared to the injury the government would sustain if a preliminary injunction were issued. Ordering the agency to immediately open all of the Chattooga to floating would potentially cause it to violate numerous environmental laws. Without the proper environmental and social data that the visitor use capacity analysis and environmental impact statement or environmental assessment would fully analyze, the agency would potentially violate NEPA. In addition, as evidenced by the recently-filed amicus brief in this case, if floating were allowed on the Headwaters without study, other aggrieved parties, including those, such as the trout fishermen, who wish the Headwaters to remain closed to floating, would forcefully claim that the Forest Service's deviation from the properly-promulgated 1985 Plan violated the laws governing the establishment and implementation of forest plans, including WSRA.

Moreover, although the visitor use capacity analysis is not yet complete, it is quite possible that immediate introduction of floating on the Headwaters would have a detrimental effect on other elements of the Recreation ORV, such as fishing, swimming, and hiking. See generally Doc. 10. One of the key issues the visitor use capacity analysis is focusing on is whether the introduction of floating on the Headwaters will

have a detrimental impact on the quality trout fishing experience present only in areas on the Chattooga above Highway 28. In order to comply with WSRA, NEPA, and a variety of other environmental laws and policies, the agency needs to collect and analyze this data before any changes in management occur.

If the Court were to enjoin implementation of the 2005 Order as requested, it would also halt the administrative process currently underway to reach a new decision, thereby causing significant financial harm to the Forest Service, its contractors, and ultimately, the tax-paying public. Since issuance of the 2005 Order, the Forest Service has committed significant time, human and financial resources toward design and execution of the visitor use capacity analysis. See Declaration of Chris Liggett (attached to this brief). The agency has already spent several hundreds of thousands of dollars in contracting fees and, at this point, is projected to spend well over one million dollars to complete the study. Id. Plaintiffs permitted these substantial costs to accrue for over a year before filing suit. Having sat on their hands, they should not now be permitted to render meaningless the 2005 Order, which they obtained, costing the agency, its contractors, and the taxpayers a significant financial sum.

An injunction halting the study would also disserve the public who currently recreates on the river. Without completing the analysis necessary to make a new informed and lawful management decision, the effect of immediately opening the Headwaters to boating could have a potentially devastating effect on the public who currently recreate or will recreate on the Headwaters of the Chattooga. The vast majority

of the public enjoy experiences that may be negatively affected by boating on the Headwaters. See generally Doc. 10. From comments made at three public meetings already held by the Forest Service as well as numerous e-mail, letter and virtual bulletin board comments, it has become clear to the agency that many hikers, swimmers, fishermen, and even floaters themselves, are strongly opposed to any change in the prohibition on floating for fear of having their recreational experiences significantly impacted. A large number of comments state the current limitation on boating is not enough and that by allowing boating below Highway 28, numerous other recreational pursuits have been driven out of that area. Only the analyses currently underway can help the agency to determine whether and to what extent their fears are valid. Only then can the agency make a lawful and informed decision that protects and enhances the values for which the river was designated.

CONCLUSION

The government respectfully requests that the Court dismiss and deny the motion.⁴

⁴ If an injunction were issued, the government requests to brief the bond issue. From May 2005 to April 2006, the Forest Service has spent about \$335,000 in contracting fees and \$425,000 in staff and consultant costs associated with the ordered study. See Liggett Decl. It is projected to spend far more going forward. Id. An injunction would halt the study or cause it to be redesigned, increasing projected expenditures. There would also be costs (for which the agency does not currently have the funds) associated with monitoring floating on the entire river, enforcing existing applicable regulations on new users and areas, and searching and rescuing stranded and injured floaters in the Headwaters. Id.

Dated: July 7, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in L.R. 5.1B (Times New Roman, 14 pt.) for documents prepared by computer.

This 7th day of July 2006.

s/ Stephen H. McClain
STEPHEN H. McCLAIN
ASSISTANT U.S. ATTORNEY

CERTIFICATE OF SERVICE

I certify that I have this day served the FEDERAL DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION by causing a copy thereof to be electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 7th day of July 2006.

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