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Kevin Colburn
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VIA ELECTRONIC AND FIRST CLASS MAIL

April 3, 2012

US Forest Service
Attn: Appeal Reviewing Officer
1720 Peachtree Rd NW Ste 811N
Atlanta, GA 30309-9102
Appeals-southern-regional-office@fs.fed.us

Alan R. Jenkins
Jenkins at Law, LLC
2265 Roswell Rd
Marietta, GA 30062
aj@jenkinsatlaw.com

Re: Intervention regarding the Rust Family's Appeal of Decision Notices Regarding upper Chattooga Wild and Scenic River Management.

Dear Appeal Reviewing Officer,

American Whitewater, American Canoe Association, Atlanta Whitewater Club, Georgia Canoeing Association, Western Carolina Paddlers, Bruce Hare, Kenneth Strickland, and Joseph Stubbs (Intervenors) hereby intervene in the appeal filed by the Rust Family (Appellants) relating to the following decisions:

- Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan. USDA Forest Service. Nantahala and Pisgah National Forests. February 2, 2012. File Code 1950/1920. Deciding Officer: Diane Rubiaco.
- Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan. USDA Forest Service. Francis Marion and Sumter National Forests. February 2, 2012. File Code 1950/1920. Deciding Officer: Paul Bradley.
- Decision Notice and Finding of No Significant Impact for Amendment #1 to the Chattahoochee-Oconee National Forests Revised Land and Resource Management Plan. USDA Forest Service. Chattahoochee-Oconee National Forests. February 2, 2012. File Code 1950/1920. Deciding Officer: George Bain.

The aforementioned appeal requests that the USFS base their rejection of all alternatives allowing paddling on the upper 2 miles of the Chattooga Wild and Scenic River (WSR) on a purported Army Corps of Engineers navigability opinion. Federal title navigability, as we have shown in our own appeal of the decisions cited above is a moot point on a Wild and Scenic River, or any river as it relates to the public right to float.

Appellants cite and misconstrue a recent Supreme Court case which they wrongly claim supports their position (PPL Montana, LLC v. Montana, 565 u.s. _ (Feb. 22, 2012)). This case clearly differentiates between: 1) federal *title* navigability which determines ownership of subsurface lands, 2) federal navigability for applicability of other federal laws (commerce, clean water act, etc), and 3) state public trust navigability. The Appellants argue that because they purportedly hold title to subsurface lands that somehow they can prevent the application of federal laws on the Chattooga River and prevent public trust use of the waterway. The case cited above disproves that argument. The case explicitly states that in cases where a river has been deemed non-navigable for title purposes it can remain navigable for purposes of public trust rights and federal management:

Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, see *Coeur d'Alene, supra*, at 285 (*Illinois Central*, a Supreme Court public trust case, was “necessarily a statement of Illinois law”); *Appleby v. City of New York*, 271 U. S. 364, 395 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power.¹

With regards to the Chattooga River, regardless of the ownership of subsurface lands, management of the river falls under both state and federal jurisdiction, as we show in our own appeal of the decisions cited above. Both state and federal law supports, and in the case of federal law requires, the public trust right to descend the river in human-powered canoes, kayaks, and rafts.

The aforementioned appeal requests that boating not be allowed on certain stretches of the upper Chattooga River. Intervenor have an interest and a legally protected right to paddle the Chattooga Wild and Scenic River as described in our own appeal of the decisions cited above. Thus, the Appellant’s requested relief would impact our interests and rights.

As Intervenor we seek to clarify that we respect private property rights and do not seek to violate the sanctity of those rights. In this matter we believe that those rights have been overstated based on flawed legal perspectives, and as a result have been wrongly allowed by the USFS to infringe on public trust rights and federal management authority.

¹ Excerpt from: PPL Montana, LLC v. Montana, 565 u.s. _ (Feb. 22, 2012). Please see the entire court decision for a broader support of our position.

Thank you for considering this appeal. Please restore nationally consistent river management to the Chattooga River.

In addition to the above arguments, we hereby incorporate by reference all published USFS studies regarding the Chattooga River and American Whitewater comments to those studies,² American Whitewater's 2004 appeal of this issue and exhibits and attachments to that appeal,³ Appellant's 2009 appeal of this issue,⁴ Appellant's 2012 appeal of the above-cited 2012 decisions, American Whitewater's comments on both the 2008 and 2011 draft environmental assessments, all American Whitewater comments and correspondence filed with the USFS on this issue since 2001, and all comments by whitewater boaters in the record since 2001.

We hereby request that you deny all relief requested by the Appellants.

Sincerely,



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American Canoe Association

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² Including but not limited to the following reports and comments on those reports: Capacity & Conflict on the Upper Chattooga River (Shelby and Whittaker, 2007), Upper Chattooga River Visitor Capacity Analysis Data Collection Reports, Upper Chattooga River Phase I Data Collection Expert Panel Field Assessment Report, Chattooga River History Project Literature Review and Interview Summary, Inventory of Large Wood in the Upper Chattooga River Watershed.

³ April 15, 2004 Notice of Appeal of American Whitewater In Re: Appeal of resolution of Issue #13 in the Record Of Decision for the Revised Land and Resource Management Plan for the Sumter National Forest, the Record of Decision for the Revised Land and Resource Management Plan for the Chattahoochee National Forest, and to the extent that the decision is applicable, to the implementation of this decision in the Nantahala National Forest.

⁴ October 19, 2009 Appeal of the Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala, Pisgah, Sumter, Chattahoochee-Oconee National Forests Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. August 2009. File Code 1900.

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United States
Department of
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Forest
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Southern Region

1720 Peachtree Road NW
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File Code: 1570 (219)
10-08-03-0010
10-08-11-0011
10-08-12-0012
Date: April 5, 2012

American Whitewater
ATTN: Mr. Kevin Colburn
2725 Highland Drive
Missoula, MT 59802

Re: Appeal of Forest Supervisors George M. Bain's, Diane Rubiaco's and Paul L. Bradley's January 31, 2012, Decisions for Amendments 1, 22 and 1, respectively, for Management of Boating Activities in the Upper Chattooga River Land and Resource Management Plan

Dear Mr. Colburn:

This letter responds to your April 3, 2012, electronically-filed request for intervenor status in the appeals of the subject Decision filed by Jenkins at Law. Your request to intervene is granted in Jenkins at Law appeals numbered 12-08-03-0016, 12-08-11-0017, and 12-08-12-0018.

Pursuant to 36 CFR 219.14, I will accept into the appeal record written comments from you on the appeals for a period not to exceed 30 days from the date of this letter. Please submit your comments to: USDA Forest Service Regional Office, ATTN: J. Rick Ledbetter, 1720 Peachtree Rd., NW, Suite 811-N, Atlanta, GA 30309 with INTERVENOR on the envelope. Your comments must be limited to the issues raised in the appeals. At the same time, you must furnish the appellant a copy of your comments to the following address: Jenkins at Law ATTN: Alan R. Jenkins, 2265 Roswell Road, Marietta, GA 30062. Failure to provide copies may result in removal of submissions from the appeal record. You may obtain a copy of the Jenkins Law appeals on the public website at www.fs.fed.us/r8/fms.

Sincerely,

/s/ Ken S. Arney

KEN S. ARNEY
Reviewing Officer
Deputy Regional Forester

cc: Chattahoochee-Oconee NFs
Francis Marion-Sumter NFs
NFs in North Carolina

