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US Forest Service
Attn: Appeal Reviewing Officer
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Atlanta, GA 30309-9102

Re: Appeal by American Whitewater, et al., of Decisions for Amendments of the Revised Land and Resource Management Plan (Managing Recreation Uses, Chattooga River) of Forest Supervisors Diane Rubiaco, Paul Bradley and George Bain

Comments of Intervenor, the Whiteside Cove Association

Having intervened in the appeal by American Whitewater *et al (*Kayak Lobby) the Whiteside Cove Association (WCA) hereby submits its comments. The Kayak Lobby appeal presumes that the planets, laws and all Americans should all cater to the whims of the kayakers, which is expected from the Kayak Lobby. The Kayak Lobby continues to make erroneous claims and fraudulent statements regarding the laws surrounding public land management, the Chattooga designation literature, property law, and the facts associated with the Forest Service analysis. The Kayak Lobby essentially re-writing them all to make it appear as if rivers and wilderness areas have been designated with the one goal of advancing the interests of the boating community. The following comments point out only some of those errors and fraudulent statements.

The WCA does agree with elements within the kayak lobby appeal regarding the incomplete, improper and unlawful Environmental Assessment conducted by the Forest Service, although we highly disagree on the proper remedy for these Assessment deficiencies. A deficient EA cannot be remedied by the courts, or even the agency, without first having the facts with which to review compliance with the laws. In the meantime, the status quo management must continue to establish policy for the Chattooga Wild and Scenic River.

For seven years, the WCA membership has submitted comments in the public record requesting the agency correct these deficiencies avoid hyperbole and simply provide an objective assessment. Sadly, under threats and pressure from the kayak lobby, the agency has catered to the irrational demands from floaters, while ignoring most other voices and visitor types.

The appellants request for relief should be denied, as outlined in this response to the irrational and often erroneous Kayak Lobby Appeal.

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Gross Misrepresentation of the WSR Act and Regulations:

I. Demanding Unlawful Segmentation of the Chattooga:

Bolstered by their ability to convince some local Foresters into fragmenting the Designated Wild and Scenic Chattooga into an *upper* and *lower* section, the appellants now claim that administration of the WSR must be fragmented so that 'each foot' of the Chattooga must be evaluated separately from all others for adherence to management guidelines.. The extreme of such a ridiculous argument indicates how fragmentation will skew assessment under agency mandates.

The Chattooga was not designated in sections, or foot-by-foot; the agency has already denied this claim made by the appellants numerous times in two separate federal court proceedings.

The WSR statute defines the Chattooga '*segment*' as the designated whole. The Chattooga was designated under [16:28 § 1274.(a) (10)] and the *segment* was defined as: *"The Segment from .08miles below Cashiers lake in North Carolina to Tugaloo reservoir, and the West fork of the Chattooga…*" By law this entire segment is to be included as a *component* into the National WSR system. The Chattooga was not included in 'distinct sections' as appellants claim.

Had the plaintiffs claim of segmented designation been true, congress would have designated the Chattooga in separate segments; like it has done on other rivers[1]. Rather The Chattooga designation was codified under [16:28 § 1274.(a) (10)] as "*The Segment from 0.8 mile below Cashiers Lake in North Carolina to Tugaloo Reservoir, and the West Fork Chattooga River..."* and made provisional upon publishing a Development Plan. The lower Chattooga, upper Chattooga, Chattooga West Fork and Chattooga headwaters, were all designated as a single *component* of the National WSR system. *Component* is specifically defined as "a river area designated as a unit of the National Wild and Scenic River System".[2] A "component" is not the smallest unit of differentiation within a designated WSR, but rather the complete designated segment. The 8th circuit court helped clarified confusion of this definition in 1997.

> *… it is the designated "segment" that becomes a "component" of the national system. This reading is confirmed by 1281(a) of the Act, which links agency planning and administration to the designated component."* [Wildlife Association v. Rogers (USFS), 113 F.3d 110,114 (1997]

[1] See16:28 § 1274(a) (57) and (66)

[2] Fed Reg/47-173Sept,7,1982 pg. 39456, *Final Guidelines for Managing Wild and Scenic Rivers*

The WSR statutes clearly define the Chattooga 'Segment'[16;28 § 1274 a(10)] over which the agency must plan and administer under [16:28 § 1281(a)]. The Chattooga ***segment*** and ***component*** are is clearly defined by the statute. Congress envisioned management of the Chattooga as a comprehensive whole, not 'foot –by -foot', nor divided by upper and lower. The appellants new demand for a *foot-by-foot* assessment demonstrates the absurdity of fragmenting assessment of the Chattooga management principles. Any fragmented analysis does not meet the statutory mandate as clearly outlined in [§ 1274 (10) , § 1281(a)], there is no need to speculate, or opine, congress has made its' intended geographic scope crystal clear.

II. <u>Misrepresents the Intent of River Classification</u>.

Each Chattooga section was not *separately analyzed*, as claimed by the appellants. Classification into *wild* or *scenic* sections is a statutory requirement under 16 § 1273 (b) [WSR Act 2(b)]. Page 70 of the 1971 Report clearly acknowledges that the purpose of the by-section descriptions was to recommend 'classification' in order to meet this statutory requirement. Chapter IX, sec B of the 1971 Report is entitled '*Recommended Classifications by Section;* the title alone demonstrates the purpose for the by-section descriptions .

The congressional report [PL 93-279 @3008] also includes a by-section description which again acknowledges the classification requirement as the purpose of the by-section descriptions.

The 1982 WSR Management guidelines define *Classification* as *'which of the classes outlined in section 2(b) of the Act (wild, scenic or recreation) best fit the river or its various segment.* [47 Fed Reg. 39455 1982]. Classification has nothing to do with designation 'values'; values are determined by the *Description of the River Area* portion of the study report, for the Chattooga that is Chapter V. The plaintiffs have misrepresented the clearly labeled intent of the classification proposals in <u>both</u> the 71 and 74 Study Reports, as a fragmented review of the Chattooga using the wrong section of the study to claim values. The kayak Lobby claims of segmented analysis are clearly bogus as described by the written text within the referenced literature.

III. Misrepresents the Intent of the Wild and Scenic Rivers Act:

The intent of the Wild and Scenic Rivers Act is preservation. The Act did not establish limitless playgrounds for all types of boating or recreation. Upon Signing the Act on October 2, 1968 President Lyndon Johnston wrote:

> *" I am signing an act today, which preserves sections of selected rivers* that possess *outstanding* ***conservation*** *values.*
>
> *An unspoiled river is a very rare thing in this Nation today. Their flow and vitality have been harnessed by dams and too often they have been turned into open sewers by communities and by industries. It makes us all very fearful that all rivers will go this way unless somebody acts now to try to* ***balance our river development.***
>
> *So we are establishing a National Wild and Scenic Rivers System which will complement our river development with* ***a policy to preserve sections of selected rivers in their free-flowing conditions and to protect their water quality and other vital conservation values."***

The Intent of the WSR Act was made clear by the President upon signing it into law:

C O N S E R V A T I O N.

The kayak lobby's self-serving interpretation of the intent of the WSR Act is arrogant, misleading and predictably wrong. The WSR Act preamble notes:

> *'The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a* ***policy that would preserve*** *other selected rivers or sections thereof in* ***their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes'.*** [16: 28 § 1271]{emphasis added}

The absence of 'limitless recreation' in the preamble suggests governance for preservation, but it is under a later statute that clarifies Congressional priorities. [16: 28 § 1281(a)] clarifies that recreation is subordinate to *primary emphasis features* for which a river was declared Wild and Scenic in the act itself . Courts have noted this subordinate relationship to recreation a number of times[3].

The kayak lobby has perverted the intent of the WSR Act, into some entitlement of unlimited use by their elitist constituents, regardless of the consequences. The WSR Act governing statutes, and case law, make clear that preserving rivers is the intent of Wild and Scenic designation and that recreation use cannot diminish the resource, its aesthetics nor

[3] *Yosemite III*, 520 F.3d 1024,(9th Cir. 2008)

opportunities for solitude. The kayak lobby misrepresents the statutes, and at least one member of the Forest Service analysis team is allowing the kayak lobby nonsense to direct analysis and establish a very skewed scope of Assessment.

IV. Misrepresents the Management Statute [16: 28 § 1281]

a) **Values in Plural:** [§ 1281 a] requires policy be "*administered in such a manner as to protect and enhance the values which caused [WSR designation]".* The use of the plural '*value**s**'* indicates the clear intent of the statute to avoid a myopic assessment of just one value independently of all others. Both statute and FMS guidelines make clear that the standard is applied to all values in aggregate (not each element of the values individually). The office of general counsel for the agency has argued that the statute applies to *all of the values* during the SC Federal court hearings, yet the 2012 EA does not match what the agency is arguing in Federal Court.

b. **Fragmented Review:** Further limiting uses is written into the administration statute. [§ 1281 a] further suggests '*limiting uses'* and *'varying degrees of intensity for [the resources] protection*" while [§ 1281 b] prioritizes the more restrictive provision when WSRs flow through Wilderness.

The appellants argue that this Wild and Scenic statute, or even a partial statute, must be viewed in isolation of the whole Act. Past attempts to isolate sentences within a statute have been rejected by the court, including one case where the Kayak Lobby was a petitioner:

> *The strong national policy regarding the conservation of this country's natural resources dictates that we must view this legislation from a broad rather than a narrow perspective. When a statute is part of an organic whole, the statute should be viewed in context with the whole of which it is a part.* [US v. Hells Canyon, 660 F.2d 735, 9th, (1981), Id at 22).

The Act is clear that the 'enhancement' of one value to the detriment of others would establish an illegal policy,[4] even IF that enhancement diminishes another existing value. Such a policy violates the non-diminish standard associated with the conservation values and *primary emphasis features* as recognized by the courts. "*(P)rimary emphasis shall be given to protecting (the component's) esthetic, scenic, historic, archeologic, and scientific features*.

[4] § 1281(a) *'limiting other uses' .. Management plans may establish varying degrees of intensity'*

This emphasis on protection permeates these regulatory schemes" [US v. Hells Canyon 660 F.2d 735][5] The case concluded that boating, even if it is a value, can be limited.

The Kayak Lobby seek an isolation review of each sentence within a statute in isolation from the Act as a whole. Such nonsense should not sway the agency.

V. Misrepresent the Non Diminish Standard

Continued zoning of boating from the 'headwaters' does not diminish the recreation value, because boating the 'headwater's has been illegal for the last 35 years. Continuing zoning is not illegal since it does not *diminish* a value that does not exist. Even if boating were a value, it is provided for elsewhere within the Chattooga designated corridor.

The non-diminish standard does not apply to 'boating the upper Chattooga, since boating the headwaters is NOT a value. The 1976 Chattooga Development Plan provided for a *Boat-Free section of the Chattooga* establishing the baseline from which to assess any expansion of boating. The non-diminish standard applies to the existing status of recreation values found above on the upper Chattooga, and limiting boating CAN NOT 'diminish' something that does not exist.

The kayak lobby makes clear that the EA is deficient, flawed and incomplete; we agree. The recreation portion of the Assessment took great care in avoiding documenting conflict and affects to other WSR visitors caused by expanding boating and the history of boating disturbance downriver. Therefore, the EA is not deficient because it did not value boating the upper Chattooga enough, the EA is deficient because it avoids assessing the diminishment of the many other values resulting from this revision in policy.

The diminishment of these other values need not be significant; any diminishment of the current values violates the mandate. A Finding of No Significant Impact, is not the standard for review when evaluating WSR values under the non-diminish standard; diminishment

[5] The USFS, American Whitewater and the American Canoe association were parties to this case. And none of these parties appealed these court findings.

need not be *significant* to be in violation of the mandate. A Policy which continued zoning, does not **diminish** boating where it did not exist.

VI. Designation Value (ORV) determinations:

Designation Values are not 'determined' by the Kayak Lobby decades after designation. The process for establishing *the Values for Which the Chattooga was Designated* is outlined below.

a) By Whom: Congress does not 'identify' the ORVs, they simply review presented reports to determine suitability of the river for inclusion into the Wild and Scenic System [§ 1275]. For rivers designated prior to the 1986 WSR, like the Chattooga, values were provided for by the agency in post-designation river plans. The Wild & Scenic River Coordinating Council make clear that: "*Agency resource professionals develop and interpret criteria in evaluating river values (unique, rare, or exemplary) based on professional judgment on a regional, physiographic, or geographic comparative basis.*"[6]

The WSR statutes are even more clear: *"the Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall …provide for the protection of the river values. The plan shall address resource protection… user capacities, and other management practices"* 16 USC § 1274(d). The Kayak Lobby does not 'establish policy that provides for the protection of designation values."

Further, The 1971 Chattooga Study Report defer recognition of any values to the post-designation River Management Plan; noting:

- *'A detailed river management plan will be developed. This plan will recognize all of the resource and aesthetic values of the Chattooga River environment'. (Pg 85 1971 Report]*
- Under *Recreation* noting *'These uses are provided for in the **Development Plan**.' Id2*

The Kayak Lobby does not determine 'values' decades after designation.

b) Relevant Chapter of the Study Report: Dicta throughout the 71 Study Report does not *establish values* as claimed by the kayak lobby. 'Values' are found only within the *Description of the River* portion of the Study Report as noted in the joint Secretarial guidelines [WSR guidelines 1982 FR 47 # 173 p. 39456]. The *Description of the River* is

[6] 2011 Q&A Publication by the Interagency WSR Coordinating Council (link), Also published by the USFS here

clearly marked as *Chapter V* of the Chattooga 1971 Report, and can be found on pages 13-25 of the 1971 Study. The other sections of the Study Report are irrelevant when reviewing what are (and in the case of boating are not) designation values.

The *Description of the River* Chapter makes clear that the upper regions are best for fishing, boating is never mentioned above Bull Pen, and it states that *canoeing is not feasible* above highway 28.

To the delight of the WCA the study also indicates private recreation areas as a value; noting *"private recreation developments contribute to making the area surrounding the Chattooga River a complete vacation land."* P.25. The Forest Service MUST protect 'private recreational developments' as an element of the ORVs, and at the very least must not allow *private recreation developments* to be diminished under any new policy. The agency is mandated to protect the Whiteside Cove Association as a *private recreation area*.. One way the agency can fulfill this mandate is through restricting boating to below Bull Pen Bridge and clearly identifying the *private recreation area* it is mandated to protect and enhance.

The kayak lobby c ites the wrong section of the Study Report, when making claims regarding what attributes are included within the Chattooga designation values (ORVs).

c) Which Report The Chattooga designation was made conditional upon completion of the Development Plan. [16 § 1275 (a)(10).] ..*(Provided, that the secretary of Agriculture shall take such action as is provided for under subsection (b) of this section [3]").* Subsection 3(b) of the WSR Act (PL 90-542; 82 Stat.906) requires the agency '*to prepare a plan for necessary development in connection with administration'*...and to *provide for* these designation *values*.

The Chattooga *Development Plan* is published in Federal register in 1976 FR Vol.41, No.56 March 22, 1976. The 76 Development Plan -that *provided for protection of the river values*-, made clear that floating should be prohibited from the upper Chattooga for three reason,

1. **Insufficient flows**
2. **Visitor Safety (the hazards of floating and portage).**
3. **User conflict**

Courts routinely utilize the post designation River Plans for confirming designation values, see most recently [Friends of Yosemite Valley v. Norton, 2003, 348 F.3d 789, 9th id at10].

d). WHEN Judicial interpretation of WHEN values are established makes clear that values are provided for in the CRMP **Post** designation. [Wildlife Association v. Rogers (USFS) 113 F.3d 110, 114 (1997)] (*Following designation, the responsible agency defines the boundaries … At that point, the agency "charged with the administration of each component . . . shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values.' 1274(d)(1).)* These plans provided for the non-boating values by prohibiting boating on the upper Chattooga.

Values were *established* and *provided for* in the 1976 Development Plan, and the 1977 River Management plan. Both limit floating to the lower Chattooga. The establishment of values in 1976 and 1977 are beyond the statute of limitations for challenging an agency decision.[7]

e). CRITERIA In order to be considered among the Outstanding and Remarkable values (ORVs), an attribute being reviewed must be *outstanding* and *remarkable*; the designation literature does not support the notion that *boating the upper Chattooga* is among these values. The mere mention within the designation literature does not establish an Outstanding and Remarkable value; such a characteristic must be "unique, rare, or exemplary" and located within the *River Description* section of the Study Report. The court recognizes that even 'significant' and 'important' attributes are insufficient criteria for determining ORVs [Sokol v. Kennedy, 210 F. 3d 876,880 (2000)]. Dicta within a pre-congressional proposal does not establish an ORV that must be protected *and enhanced* under 16:28 § 1281; else the mere mention (or photo) of a house, telephone pole or bridge in the study report would constitute a 'value' that must be protected by the agency. The kayak lobby's self-serving proclamation that their activity is an ORV for the upper Chattooga contrasts with the statutory language, all Forest Service Plans, and reports.

Boating the upper section was not considered 'exceptional' as indicated within the designation literature and as outlined in section VI below. .

Values are not 'determined' by a recreational access lobby thirty-five years after WSR designation. Statutes and guidelines make clear where, when and by whom values are established; appellants' arguments regarding ORVs are baseless.

[7] Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006 p. 8

Appellants Misrepresent the Location of Chattooga Designation Values

VII. Boating is NOT a Value Associated with the Upper Chattooga

a. The pre-congressional reports did not value floating the upper Chattooga.

The 1970 proposal and 1971 study indicate that the headwaters does not provide exceptional floating opportunities. Page 26 of the 1970 proposal makes clear that "*The waters of the Chattooga are ideal for floating in canoes and rubber rafts, especially in the lower reaches.*" The 1971 *Study* describes the headwaters reach as *hazardous* that could only be floated in a "*rubber raft*" with *difficult and frequent portages*. Describing the upper Chattooga, the 1971 report made clear that '*these non-floatable upper reaches would not stand alone [for designation]*' id 62. Adding in the *River Description Chapter*[8] that "*canoeing is not feasible*" on the upper Chattooga id 20 . Neither the 1970 nor 1971 report considered floating above highway 28 exemplary, outstanding or remarkable, it is certainly not the reason for which this area was included in the Chattooga WSR corridor.

Further, the 1971 report deferred recognition of any values to the post-designation River Management Plan; noting: *'A detailed river management plan will be developed. This plan will recognize all of the resource and aesthetic values of the Chattooga River environment'. p. 85* Adding *'These [recreational] uses are provided for in the development plan.' Id 85.*

The 1971 report deferred recognition of values until the post-designation *River Plan.*

b. Congressional Testimony by these Appellants Does not Support Claims that Floating the Upper Chattooga is a Value.

A representative from the Georgia Canoe Association and the American Canoe Association provided congressional testimony for Chattooga Designation in 1974. Claude Terry -a member of the American Canoe Association Safety Committee- notes extensive recreational use in the area between Russell Bridge (Highway 28) and Tugaloo Lake, but does not discuss any floater use above Highway 28. Cleve Tedford from the Georgia Canoe Association listed all the "popular day-use access" sites for floating; all below highway 28. Neither testimony mentions floating above highway 28, and both discussed floating below

[8] The Joint Secretarial published WSR Guidelines 1982 FR 47 # 173 p. 39456, discuss only finding values within the River Description section of the Study Report which is detailed in Chapter V of the Chattooga 1971 report.

highway 28 as reasons for designating the Chattooga. Had floating above highway 28 been exceptional or remarkable, certainly one of these appellants' testimony in front of congress which argued the importance of boating (below hwy 28) would have at least mentioned boating above highway 28.

Ironically, both testimonies encourage the USFS to manage boating and use throughout the Chattooga corridor, including limiting boating use throughout the corridor for safety .

c. The Congressional Reports Did Not Consider Boating the Upper a 'Value'.

Hunting, fishing, swimming, camping, hiking, solitude, floating and wildlife-viewing were each discussed in the congressional Study Report and collectively compose the designation 'value of Recreation'. P 3010 , P.L. 93 -278, 1973

The report describes boating the headwaters (below Bull Pen) as "*hazardous, whitewater That.. should only be negotiated in rafts with experienced guides and boatmen, even they must portage some of the more dangerous portions of this segment of the river. Huge boulders lie directly in the path of the river … difficult to climb out or portage around dangerous cascades and other obstacles."* Id 3008

The kayak lobby mischaracterizes the reports description of floating this area as a value. The Congressional Report did not portray floating the upper Chattooga as justification for designation and certainly NOT an outstanding or remarkable 'value' (ORV).

d. The 1976 Development Plan Did Not Consider Boating the Upper a Value. .

The 1976 Development Plan *provided for the values* for which the Chattooga was designated. The plan could not have been more explicit regarding boating the upper Chattooga.

- *[H]azardous whitewater that* ***should not be floated****. Id 11848*
- *Because of the small water flow and the ruggedness of this gorge area,* ***floating is not recommended on this section."*** *Id 11852*
- *[B]ecause of the low water level during normal use season and the difficulty of portaging the gorge areas.* ***Floating is not recommended in this section.****id 11852*
- ***Floating will be prohibited above Highway 28****. id11852*

The 1976 Plan recognized, and provided for protection of, the Chattooga designation values, establishing that limiting boating to the lower Chattooga would *best provide for* Chattooga values.

The appellants claim that the designation literature made floating the upper a *stand-alone* value is absolute nonsense, in search of a gullible or uninformed ear.

e. <u>1977 CRMP Did Not Consider Floating the Upper Chattooga a Value.</u>

The 1977 plan acknowledges that 'almost all floating occurs below highway 28' id 2. The plan also established that *'floating above Highway 28 Bridge will be prohibited and fishing encouraged in this section.*' id 28 This plan provides the baseline for any revisions to management planning, and establishes that *the remote experience without boats* is the value that must be protected and not diminished. See kempthorne

f. <u>The 1980 Plan Continued Providing for a Boat-Free Experience as a Value</u>

g. <u>The 1985 Revised Plan Protected the Boat-Free Experience on the Chattooga.</u>

h. <u>The 1996 *Chattooga WSR Analysis of ORVs* Did Not List Floating the Upper as a Value.</u>

The values listed in the 1996 review are *Geologic* values, Biologic values (vegetation, wildlife and fisheries), Scenic values, Aesthetic values, Historical values and Recreational values. The report concluded that for twenty years and through multiple unchallenged plans, the boating prohibitions above highway 28 successfully *provided for the values for which the Chattooga was designated.*

The report acknowledged the benefits of limited access, and that limiting boating to the lower 2/3rds of the river did not *diminish* the recreation value, but rather that limited access enhanced values including the esthetic value of solitude. p9.

Each of these plans, and reports, listed above are beyond the 6 year statutory limits for challenging an agency report or plan as outlined by the court [AW v. Bosworth (2006)].

i. <u>2004 Sumter RLMP Did Not Consider Floating the Upper a Value.</u>

The 2004 Decision notices outlined the Chattooga ORVs as follows: *"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."* The 2004 Sumter RLMP is more specific when defining the recreation value.

The river <u>offers a wide variety of activities</u> 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.

Of no surprise: '*Boating the headwaters'* is not listed as an ORV in 2004. It was never considered a value in the 1971 Study , the 1974 Report, 1977 Plan, 1976 Plan, 1980 Plan, 1985 Plan or in 1996 Report,… because boating the upper portion is NOT a value. The boaters are challenging an agency Decision made almost 40 years ago, and revised six times through agency planning since that initial decision in 1974. The Chattooga ORVs were determined decades ago, and are no longer ripe for challenge or judicial review [28 U.S.C. § 2401]; the Kayak Lobby are ignoring all previous plan in order to claim 'boating the headwaters' is a value. By sheer repetition, the kayak lobby seeks to get some unsuspecting stooge to accept this nonsense and inadvertently slip such nonsense into an agency publication.

j. Conclusion:

Neither the Designation Literature nor subsequent River Plans consider boating the upper Chattooga a value for which the Chattooga was designated. If a value (ORV) is location specific, the experience from limited boating access is the value for the upper Chattooga.

k. The table below provides citations indicating why boating is not exceptional or outstanding on the upper Chattooga or the headwaters.

Chattooga Designation Literature.			
Page #	Location	Referenced Document	**Quote**
26	The entire river	*A Proposal the Chattooga a WSR*. USDA 1970	*"The waters of the Chattooga are ideal for floating in canoes and rubber rafts, **especially in the lower reaches**."*
74	Between Norton Mill and Lick lock creek	WSR Study Report 1971 , USFS	Along the faster dropping portions, exposed boulders and steep slick rock walled sides make it difficult to climb out of the river bed to portage around dangerous cascades or other obstacles. In another place the river enters a narrowly enclosed rock canyon….Many of the pools and canyon enclosed sections are 10-20 feet deep and impossible to wade by hikers or fisherman. The sheer rock cliffs and dense vegetation on the steep ridge sides make hiking extremely difficult. Two-thirds of a day are required to raft the first 2 ½ miles of this section and probably a hard full day to hike it.
20	Between Norton Mill and Lick Lock	WSR Study Report 1971 , USFS	When describing the headwaters, the report indicates .."**Canoeing is not feasible"**
62	All above	WSR Study	*theses non-floatable upper reaches would not*

	Lick Lock creek	Report 1971 , USFS	*stand alone [for designation]*
163	Above Bull Pen	WSR Study Report 1971 , USFS	The 1971 Recreational Development Plan indicates Bull Pen Bridge (not Grimshawes) should be the upper most put-in.
3008	Norton Mill to Lick Lock Creek	SENATE REPORT NO. 93-738	Section II. Wild. (Norton Mill Creek to Nicholson Fields) The next 15.9 mile segment of the river, which is crossed by only two narrow bridges, has been virtually unchanged by man. It includes some beautiful, but hazardous, whitewater. Since the average drop of the river is 84 feet per mile in this segment it should only be negotiated in rafts with experienced guides and boatmen, even they must portage some of the more dangerous portions of this segment of the river. Huge boulders lie directly in the path of the river and rock outcrops, cliffs, and slick rock walls tower above making it difficult to climb out or portage around dangerous cascades and other obstacles.
11847	Chattooga Cliffs & Ellicott Rock Wilderness	Development Plan Fed. Reg. Vol 41, No.56 March 22, 1976	"Both these sections are in a near natural condition. They include some beautiful but hazardous whitewater that **should not be floated.**
11848.	Bull Pen	Development Plan 1976	"this section is not safe for floating…too hazardous for it."
11849	all	Development Plan 1976	"[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."
11851 11852	Bull Pen	Development Plan 1976	"…the majority of use is fishing." … "Floating has been infrequent in the past. Because of the small water flow and the ruggedness of this gorge area, **floating is not recommended on this section."**
11852	Burrels Ford	Development Plan 1976	Burrels Ford has been used by floaters very infrequently because of the low water level during normal use season and the difficulty of portaging the gorge areas. **Floating is not recommended in this section.**
11852	Nicholson Fields	Development Plan 1976	"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 which includes the Nicholson Fields area."
2	Above Highway 28	Comprehensive River Mgt. Plan August,26 1977	"almost all floating occurs below Highway 28 bridge. Fishermen tend to congregate at Highway 28 Bridge, Burrels Ford and Bull Pen Bridge." (upstream of Hwy 28)
26	Above Highway 28	Comprehensive River Mgt. Plan August,26 1977	"floating above Highway 28 Bridge will be prohibited and fishing encouraged in this section."
12	Above Highway 28	Comprehensive River Mgt. Plan August,26 1977	Under Prohibitions in region 8*: "entering, going, riding, or floating upon any portion or segment of the Chattooga River..in, on , or upon any floatable object or craft of every kind or description, unless authorized by a permit.*

Misconstrue Private Property Law for WSRs

The kayak lobby attacks private property interests, that were specifically *valued* as part of Chattooga WSR designation. The 1971 Study Report indicates *"private recreation developments contribute to making the area surrounding the Chattooga River a complete vacation land."* p.25. The Study Reports recognized the benefits of keeping sections of the Chattooga as private recreation components within the Designated Corridor. The kayak lobby misrepresents the Study Report as a *mandate* to open every inch of the WSR corridor to floaters.

The court and Secretarial Guidelines recognize the need to vary management prescriptions based on ownership, see [Yosemite v Kempthorne 520 F.3d 1024, 1028 (2008)]. (*Guidelines envision the use of varying strategies and implementations, depending on the segment's classification and ownership*). The Kayak Lobby misconstrue Property Laws and WSR intent.

VIII. Private Property & WSR LAW:

16 USC § 1283 (b) makes clear that the WSR Act shall not be *construed to abrogate any existing rights held by any private party without consent of said party*." The Whiteside Cove Association has posted the property perimeter since the early 1960's with **NO Trespassing** signs. The 'right to exclude others' has long been recognized by the Supreme Court in the bundle of sticks protecting property rights[9]; this section of the Chattooga is no exception.

The Forest Service first recognized this area as being privately owned in the designation literature in 1971, and made clear that public-use was '*not essential'* to provide for designation values through this North Carolina portion of the Wild and Scenic Chattooga.

Further under 16 USC 1284 (b), the vested water right 'at the time of the Chattooga designation' includes the rights of exclusion as a private stream under North Carolina Law.

Despite how the appellants misrepresent the laws, the facts remain clear: WSR designation does not grant public access rights to private property. Unquestionably, establishing policy diminishing property rights is illegal and a reviewable judicial action under 28 U.S.C. § 1346(f). Additionally, establishing a policy that may affect private lands without documenting these affects is also illegal, as outlined in the Agency requirement 36 CFR § 219.4, and under Executive Order 12630.

[9] Kaiser Aetna v. United States, 444 U.S 164,175 .supra (1979)

One management goal within the 2004 Sumter USFS RRLMP is to "*Resolve all known title claims and encroachments affecting National Forest System.*"p.2-31. If the Forest Service thought the Kayak Lobby's title dispute was credible, they would be required to resolve such dispute since the 2004 RRLMP is controls the scope for the 2012 Decision.

So clearly the kayak lobby's request to the agency runs counter to what the agency is permitted to provide by law. WSR guidelines make clear that *designation does not open private land to public recreation*. Although the agency makes clear this area is private on the WSR river maps, the appellants' inability to understand the boundaries and continued confusion indicates such public notification of boundaries is inadequate for the Kayak Lobby membership. The agency claims to "*work closely with landowners to minimize [trespass] problems through brochures and maps, signs, etc" (see XII).* Obviously, those filing this appeal remain confused, indicating Agency communications with the public is ineffective.

The WCA rarely have trespassing problems, because the boundaries remain well marked. Most non-paddlers can read our signs. However , due to the Kayak Lobby's acknowledged confusion of written signage, the WCA would be willing to work with the appellants on pictorial signs and larger fencing (possibly orange-colored) that could assist reading-challenged members with poor eyesight find the property boundaries.

IX. North Carolina Public Trust.

The appellants misrepresent both State and Federal laws regarding Access and navigability. The agency should fully review the cited laws before giving any credence to the Kayak Lobby's' *misinterpretation* of laws regarding 'floater rights'.

The NC supreme court makes clear that the Public Trust Doctrine does not apply to non-navigable waters [Gwathmey v. State NC 464 SE 2d 674, 678](1998). Further the state makes clear that Public Trust Rights only apply to land over which ***'title to real property[is] held by the State'*** [N.C. GS § 1-45.1]. North Carolina statutes and case law thus make clear public access rights do not apply to non-navigable waters or any waters that do not flow over 'state-owned' lands. Like many states, NC Public Trust laws are based on streambed ownership, and the Kayak lobby has conceded in their appeal that the title to the streambed is held by the riparian landowner. Therefore, public access is unlawful.

Unanimously, the US Supreme court recently outlined that navigability for purposes of title are established using federal laws [PPL Montana, LLC v. Montana, 565 U.S. _ (Feb. 22, 2012))]. Adding the states are not free to establish their own more-lax definition for

navigable-in-fact waters when determining title[10], which in NC also determines the scope of public trust rights.

The well documented Chattooga record by the appellants and the Forest Service, provide overwhelming evidence that title to the land over which the Chattooga flows through North Carolina is held by the riparian owners. Since NC stream access rights are based on streambed ownership, and the USFS documented that title to the bed is private (1971 Study p. 13), the public has no access rights to this 1.7 mile section. Again, North Carolina access rights are based on streambed title, by law.

With this information, the agency can no longer claim "Public access rights and navigability are complex topics...beyond the scope of Assessment " (p.45 2012 EA). Public access is based on navigability-for-title as recently outlined by the supreme court [Montana PPL v. Montana 2012) and NC Law is even more clear regarding the scope of Public Trust. It is time for the agency to correct any previous misstatements regarding navigability law.

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X. Security Barriers

The appellants (including all members and affiliate organizations) again publically recognize that signage and security barriers that have been erected on the property perimeter below Grimshawes Bridge, and have included images of these perimeter barriers within the agency record of this Chattooga analysis. In fact, signs, cables and fencing has clearly marked the private property since before WSR designation as also testified by the appellants under oath in Federal court. Cables and signs have marked the property perimeter since at least the early 1960's long before the Chattooga was designated *Wild and Scenic*.

The Whiteside Cove Association encourages the Agency to erect additional *perimeter barriers* on the Forest Service side of the property in order to deter would-be intruders as outlined in FSH 5309.11, sec 14.1 ***Security Barriers,*** subsec 14.11 entitled ***Perimeter Barriers.*** The WCA perimeter markings emulate Forest Service security guidelines

Again, we thank the appellants, and all those they represent in this appeal and lawsuit, for acknowledging the perimeter barriers and informing the public through their newsletters as to their location established near the private property boundary.

[10] [Brewer-Elliot v. US 260 U.S. 77; 88 (1922)]

XI. **The Property Clause**:

Instead of supporting the Appeal the Property Clause actually invalidates most of the Appellants arguments, especially any constitutional challenge.

U.S. Constitution Article IV, Section 3, [Property] Clause provides: 2) *The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.*

a. The property clause thus provides the federal government power to regulate conduct on federal lands. Over 90% of the Chattooga Wild and Scenic river is on National Forest lands, therefore a ban on boating by the USFS over federal land, is not illegal under the Constitution as claimed by the kayak lobby.

b. Secondly, both cases cited by the kayak lobby involve the ability of the federal agency to regulate certain conduct on state lands (public lands) within a WSR corridor. The reference is clearly to 'navigable' waters to which the state owns the streambed.

Even if the states holds title to navigable riverbeds, the Federal government still have regulatory jurisdiction over surface use of such navigable rivers [43 U.S.C. §§ 1314 (a)]. However, such Federal authority does not extend to non-navigable streams[US v. Cress 243 US 316, 326-7 (1917)], nor to the banks of navigable streams [United Texas Trans. Co v. U. S. ACOE 7 F.3d 436] (1994)] ('The proposition that the navigational servitude extends beyond the original banks of the stream [outside the navigable waters] is insupportable')

- Thirdly, even the federal government's ability to 'regulate' conduct on some nonfederal lands is not constitutionally without limitations as the word '*needful*' indicates. As the Supreme Court recognized while regulatory authority over waters may *apply* ***"it does not follow that the [stream] is also subject to a public right of access."*** id173 [Kaiser Aetna v. United States, 444 U.S 164 .supra (1979) Adding ***"[t]his Court has never held that the federal navigational servitude creates a blanket exception to the Takings Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to promote navigation"*** id165
- Finally, the Property Clause also allowed the Federal Government to convey (disperse) title to land under non-navigable streams. The supreme court made clear that: "With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed ." Hardin v. Jordan, 140 US 371,401

Appellants misrepresent the laws surrounding the Property Clause and suggest it creates floater rights over private property; such a claim is obviously just more nonsense. However, a review of the property clause (as referenced by the appellants) indicates the agency does have the right to regulate boating, through any 'public' section of the Chattooga.

XII. The Interagency Wild & Scenic Rivers Coordinating Council Discuss Private Lands:

The Interagency WSR Coordinating Council includes members from the US Forest Service and has been publishing guidelines for WSR management since 1993. The excerpts below regarding Private Lands within WSR corridors were published by Council within ***Questions & Answers on Wild & Scenic Rivers – May 2011*** **(link)** :

p.32) **"**Under the Act, designation neither gives nor implies government control of private lands within the river corridor. Although many rivers include private lands within the boundaries of the designated river area, management restrictions would apply only to federal lands. The federal government has no power to regulate or zone private lands under the Act."

p. 33) **"**No restrictions to private lands may be applied under the Act. … Any effect on private lands would be through state or local zoning. Federal acquisition of lands or development rights would require landowner compensation."

p.34) "WSR status does not provide federal authority to regulate private lands."

p 34**)** **"**WSR designation does not change land ownership or grant new privileges to the public on private lands. If the riverbanks are in private ownership, the landowner continues to control their use after designation. Ownership of the bed and bank of a river may be affected by whether the river is determined navigable." See 1971 *Chattooga Study Report* p.13

p.36) " WSR management requirements should ensure that any such increase will not damage resources on private property. If anything, there will be increased oversight after designation, discouraging littering, trespass and vandalism. Private landowners may continue to post their property with "No Trespassing" signs or require users to obtain landowner permission.

p. 36) "Administering agencies do not have any authority to control public use of private lands. Granting of access remains the owner's responsibility … Federal river-administering agencies do, however, work closely with landowners to minimize problems through brochures and maps, signs, etc."

p. 41) "The public's right to float a particular river does not change with designation. Neither does designation give river users the right to use, occupy, or cross private property without permission.

p.61) **"**The river study, enabling legislation, and subsequent management planning process will consider how best to protect river values while recognizing private property rights."

For Seven years the Forest Service has provided the Kayak Lobby a platform from which to spew misinformation and outright lies regarding Laws and regulations affecting private lands within the Chattooga Corridor. The Forest Service has provided the conduit for Kayak Lobby to incite unlawful trespass, lies about navigability laws, and erroneous claims of 'entitlement' to private lands. It is time the agency recognize private lands and property boundaries; the

language above provided by the WSR Coordinating Council might even help explain to the imperceptive Kayak Lobby that their floaters 'swirling around' private lands is unlawful.

The Forest Service can no longer claim to be idle participants with a derivative voice. Agency *inaction* with respect to acknowledging adjacent private lands rights, establishes a disturbing precedent for Federal Land Management and all landowners within a designated WSR corridor.

Other Errors in Appeal

XIII. The Kayak Lobby Even Misrepresent Themselves.

American Whitewater purports to be 'dedicated to restoring rivers to their natural condition, and eliminating water degradation' id 7 yet demands the agency allow unlimited use of sensitive headwater area and tributaries despite evidence indicating such use will degrade the resource.

Bruce Hare (one of the appellants) recently published that "American Whitewater, the American Canoe Association, … have spent over a million dollars trying to gain access for boaters on the upper Chattooga." [April 12, 2012. *The Macon News]* The million dollars alone raises pause, while the purpose *to gain unlimited access* to Wilderness and Wild areas contradicts with the concept of conservation and preservation of rivers.

The kayak lobby omits that American Whitewater represents the commercial interests of the paddling industry. Over 40% of their funding is directly from manufacturers of boats and boating gear (2010 Annual report link). Additionally, 15% of their in-kind funding includes tax write-offs from *pro-bono* council. Under 30% of their funding is from dues and member contributions (members who are heads of corporation for equipment maker or their owners).

Additionally, the year of the appeal that initiated *this* action, AW's board of directors was lead by the president the NOC, a Chattooga River commercial outfitter who had a direct interest in expanding rentals and purchases of paddling equipment on the Chattooga River. NOC remains one of the largest contributors to AW today.

These appellants are funded primarily by and for the paddling equipment manufacturers who seek expansion of their markets through lobby efforts, regardless of the environmental consequences. *AW* is no more of a conservation group than is *the Coalition for Clean Coal.*

The appeal to which WCA is intervening was submitted by the kayak access lobby, predictably only the view of the kayaker and kayak makers is considered in this appeal.

XIV. Remedy for a Deficient EA

The Kayakers claims the 2009 *Decision* is *arbitrary and capricious,* because the Environmental Assessment was *incomplete, flawed,* and *did not prove* that restrictions are necessary. However if the Assessment was *flawed* and *incomplete,* the Assessment did not prove that the current policy could be changed without impacting the environment. The WCA agrees the 2012 Assessment is deficient and unlawful. .

The appellants also claim that the 'lack of documented impacts' in the incomplete EA 'proves' boating impacts will not be significant. However, the Absence of review, PROVES nothing, except that the EA did not take a *hard look* as mandated.

The kayak lobby argues that because the assessment is deficient, the only possible remedy is the elimination of all river management (at least on paddlers); this logic leap is ridiculous. Any action by the agency that is taken without an objective and complete NEPA, *would violate a host of environmental laws*; as the Forest Service accurately argued in Federal Court[11] to the agreement of Judge O'Kelly. The courts 2006 Dismissal Order noted…

> *"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".*[12]

The court added that… *"Even if the court were to set aside the 2005 order as appellants request, the 1985 plan, which also includes a floating ban, would continue to provide management direction for the Headwaters."* [13]

The remedy for a deficient assessment is not the elimination of all river management, but rather the continuation of current policy. Casting aside a 35-year-old policy (ruled legal by the courts in 2006) in order to appease the kayak lobby's self-serving demands, would constitute an arbitrary and capricious decision.

[11] Pg 23 USFS M.T.D. plea, Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS
[12] Pg 9 *Motion to Dismiss,* Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006
[13] Pg 18 *Motion to Dismiss,* Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

Further, any remedy which placates paddlers, based on the purportedly *flawed* assessment, would require the agency to act in an *arbitrary and capricious* manner. Yet, this is the proposed remedy suggested by the kayak lobby

The WCA agree with the appellants that the EA is based on flawed assumptions and has resulted in an arbitrary and capricious Decision. However, the lawful remedy to that problem is the continuation of the floating prohibitions, UNTIL such time that the agency can prove changing the existing policy will not harm the resource or other values.

XV. Appellants' Demands for Proof:

The EA had to assess how expanding boating would affect the upper Chattooga social, biological, and economic environment. The EA did not have to prove why a prohibition put in place 35 years earlier is still required. The agency *action* is a change to current policy through a *Revision* to the 2004 *Revised* Plan. A Federal Court already interpreted this issue for these confused appellants in the 2006 Court Order[14]

Appellants again have it backwards. To alter the status quo, the USFS must prove why its 35-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). The appellants offer no proof that boating will not conflict with other ORVS,…nor does the 2012 EA.

XVI. The Kayak Lobby Appeal Remains Disconnected to the 2004 RRLMP:

On page 30, the floaters claim that '*The EA contains no evidence of conflict.'* . Evidence of conflict is not relevant, what is relevant is that the recreational assessment and EA avoids an honest, objective and hard look at any conflict. The absence of evidence, is not evidence. Documenting 'conflict' was specifically avoided as part of the *Chattooga Recreational Study; The* Implementation plan noted that "*the boater and angler panels will not be used to assess potential impacts on angling, hiking or other recreation uses in the corridor, which are being examined through other 'elements'* "[15]. That conflict assessment was avoided, does not give the

[14] Case 2:06-cv-00074-WCO Document 11 Filed 07/07/2006 AW v. USFS 2006 p. 3 footnote
[15] Pg F-1 Implementation Plan for Data Collection Methods 2006 USFS

agency license to surmise a lack of conflict, especially when the 2007 *Chattooga Literature Review* found numerous references to conflicts as justification for zoning the Chattooga. Lack of conflict assessment within the 2012 EA, does not prove conflict does not exist, only that the agency failed to consider facts it collected and discovered during the seven year Chattooga Analysis.

Despite the lack of findings within the 2012 EA, evidence of conflict was contained within the 2004 FEIS and Decision. The 2004 Sumter FEIS noted:

> *"the [boating] closure will help preserve the solitude experience, and the sense of place and expectations that have developed for corridor recreationalists over the years. Additionally, the closure will continue the successful zoning for uses that have experienced conflict in the past. The analysis shows that there would likely be conflicts between boaters and other users. …The analysis shows that there would be some resource impacts within the corridor should boating be allowed above highway 28. The impacts would include some additional trampling of vegetation as boaters frequent more popular runs…"* [16]

Neither the appellants, nor the 2012 EA, offer evidence that the statements published about boating in the 2004 FEIS are false. Policy contradicting these earlier findings that established the 2004 RLMP revision to the 2004 RLMP without disproving the FEIS findings would be illegal under 40 C.F.R. § 1502.20.[17] The basis for the 2012 Decision is traceable to the 2004 RLMP and subsequent Kayak Lobby Appeal. The 2012 Decision requires either a standalone EIS providing a comprehensive review of the Chattooga planning, or an explanation of the errors within the 2004 FEIS and Decision. Appendix H from the 2004 FEIS contains details of conflict and an explanation for why boats should be zoned below highway 28, the 2012 does not disprove these findings from the 2004 FEIS

Evidence of Conflict:

The underlying record acknowledges documented conflict in the 1976, 1977, 1980,1985, 2004 plans as well as the 1979 Chattooga Boating Report:

Additionally, The 1996 review of Chattooga management recognized that closing of the roads and trails made the '*river experience more remote'* p9 *Chattooga WSR Analysis of ORVs* (1996). The report also noted that "*the increase of boaters may have caused a reduction in solitude along the river.* "p10 Since Solitude and remoteness are part of the aesthetics protected under 'primary emphasis features', and

[16] p 1-107, 5-48 Response to Public Comments Sumter 2004 FEIS

[17] Under 40 C.F.R. § 1502.20, the agency could *tier* the 2012 EA , but such review cannot ignore the 2004 Findings and make decisions independent of previous assessments. Either the 2012 is incomplete by not considering the findings of the 2004 FEIS or the 2012 is deficient by avoiding required assessment of affects.

statutorily prioritized above floating [1281a]), the agency must consider the impacts from reopening these closed roads and trails during such a NEPA review. Further, trail expansion to accommodate paddling -especially trails previously closed to hikers and anglers- establish a preferential policy for paddlers and inequitable policy for the resource.

Unfortunately, the Chattooga Assessment team refused to accept any references or citation which document boater conflict elsewhere. The 1988 *Boating on Yellowstone Rivers; an Analysis and Assessment* published by NPS, was given to the Sumter Chattooga Analysis team in the spring of 2006, but the report was completely ignored during analysis. The 1988 Yellowstone Assessment found numerous reasons to continue restricting boats from Yellowstone rivers including, resource impacts, conflict with other visitors and wildlife study and finally the abundance of boating opportunities just outside the park borders.

Additionally , an article '*The Aluminum Hatch' by Jim* Engers , *Fly Fisherman* (Oct./Nov. 1978): Documented how the influx of canoeists changed Michigan's Au Sable River

> "You first hear the thump of the paddles against the sides of the canoes. This sound seems to carry the farthest; bump . . . thump, thump . . . bump. You hear it when they are well upstream, and if you were giving thought to changing flies or digging around in your vest for a smoke, you don't, because you know that you maybe have a dozen casts left before they're right on you. So you work to your last riser or one more likely looking piece of cover and try not to look upstream. Finally, you hear the giggling and the shouting and the first of them comes around the bend, and now you have maybe three casts left. Then they are going by on every side and you are out of business."

Finally the Journal of the American Water Resources Association Volume 17 Issue 4**,** Becker, 1981 **Pages 623 – 626.** Surveys of high-use rivers and lower density river on the Lower St. Croix River and the Upper Mississippi River discovered that:

"users from the Lower St. Croix River who were sensitive to its high use levels were displaced to the Mississippi. .. Those users seeking high interaction were more inclined to gravitate toward the Lower St. Croix while those seeking low density experiences had a higher than expected proportion on the Mississippi River. Those Upper Mississippi users who formerly used the Lower St. Croix cited crowding (primarily from floater overuse) as the dominant reason for their displacement. (Less than 0.1 percent of those using the St. Croix who had formerly used the Upper Mississippi cited crowding as a reason for leaving)

References of on-river conflict is not difficult to find, see Section XIX for more citations.

XVII. Equitable Consideration is not the same as Equal Treatment:

The appellants argue "The rationale proves inequitable treatment of all users". However , in a lawsuit to which American Whitewater was a petitioner, the court order specified that ***"Equal consideration' is not the same as `equal treatment'***. … ***[the Agency] must balance the public interest in all of its stated dimensions, give equal consideration to conflicting interests, and reach a reasoned factual decision"*** *State of California v. FERC,* 966 F.2d 1541, 1550 (9th Cir.1992)." After being party to lawsuits elsewhere the appellants are well aware that **'equal consideration' is not the same as equal treatment".** Equity for all users would require the agency remove the prohibitions on motorized boats, commercial boats, and all vehicle access (including 4x4s, bikes and horses), this would hardly be equitable to hikers or swimmers. The American Canoe Association and American Whitewater have been party to numerous lawsuits and embroiled in land policy disputes elsewhere where they seek limits on access to other forms of recreation in order improve the experience for paddlers.

Unsurprisingly the appellants do not compare themselves with other types of recreational activities similar situated to kayaking, instead they compare themselves to foot-travel visitors. All types of boating, bikes and horse have been prohibited from the headwaters section. The appellants make clear that the preferred alternative provides paddlers preferential treatment over all other type of vehicle[18] recreation. So while bikes, horses, motorized boats, inner tubes, commercial rafts, and 4x4s all remain banned from any access to the upper Chattooga, the appellants demand unrestricted access for "*wilderness compliant, single occupancy, non-commercial boats"*. The well crafted description of what type of access should be allowed (or even assessed) highlights the preferential nature of the EA and subsequent Decision. The preferential request from the appellants creates a ridiculously biased argument, that once accepted by the agency formed the scope of assessment despite planning mandates and laws requiring a more broad scope.

The 2004 FEIS indicates Chattooga trail users may include hikers, anglers, boaters, mountain bikers, and horseback riders p.3-15. Yet the bikers and horseback riders are banned from using the upper Chattooga portion, singling out boats as the ONLY *vehicle* allowed to access this area. So, under the proposed policy ONLY boats would be allowed, making such access preferential,

[18] The USFS manual define vehicles as any type craft that move people, and lists boats.

biased and inequitable (under the appellants own arguments). Further, horses, bikes and other boats were not given *equal consideration* in the capacity analysis.

XVIII. Misconstrue Tributaries Prohibitions:

The 1986 Sumter RRLMP under which the current boating regulations are promulgated note: *"Floating is limited to the 26 mile portion below Highway 28 Bridge and the West Fork's lower 4 miles in Georgia."* Clearly this plan documents the area to where boating is *limited*, restricting all other areas from boating, including the tributaries. The status quo has been no boating on the tributaries since 1976. Boating cannot be permitted without an assessment of the consequences of this policy change. Prohibitions on the tributary is not a 'new ban' as appellants claim @44, but just a continuation of the current zoning. The plaintiffs' evidence demand for a revised policy is backwards again.

The tributaries were never part of the appellants 2004 appeal or the 2007 analysis or the 2012 Assessment. Despite numerous comments during the protracted analysis, the appellants never requested the tributaries be 'studied', just that they be opened without review.

XIX. Misrepresentation of Fishing on the Chattooga

The Kayak Lobby provide no evidence that boating, splashing and paddling along a headwater stream does not disrupt the fish or fishing. Yet repeat such a ridiculous claim in the appeal.

The public record collected during this analysis make clear that boating HAS conflicted with anglers and DOES conflict with other visitors. The appellants present claims that run counter to the evidence in the public record. The designation literature and plans value fishing the upper Chattooga.

- (1971 Study) *"fishing is probably the most popular"* activity throughout the entire river corridor.
- (1971 Study) Fishing is best in the upper reaches above Bull Pen p.20
- (1973) The Congressional Report adds that fishing was *"the number one attraction to the river."* [19]
- (1976) 41 Fed. Reg. V.41 #56, (Mar. 22, 1976) Development Plan

[19] p 3010, P.L. 93-278, 1973 Senate report for Chattooga WSR designation

- *Pg 11849 "[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."*
- Pg 11851 Development plans Bullpen"..the majority of use is fishing for stocked and native trout. Floating has been infrequent in the past. Because of the small water flow and the ruggedness of this gorge area, floating is not recommended on this section."
- *Pg. 11852 "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 . . . "*

a. *(1996) Chattooga WSR Analysis of ORVs*

- - "*Trout fishing has been a long and traditional use of the Chattooga River from before designation to today….trout fishing is best in the upper reaches of the river including North Carolina."* p.6

b. (2004 FEIS Appendix H) Shoes clearly that boats interfe with angling

c. (2007) The recreational flow analysis makes clear boats and anglers would in fact use the river simultantioulsy. *"It is clear that acceptable ranges for the two groups [anglers and boaters] overlap.*[20]"

d. (2007 *Capacity and Conflict on the Chattooga*)

- Passing boats can 'disturb and displace [fish] if the interactions occur at close proximity' Id 69
- "Many anglers prefer to fish areas that are not being used by other recreationists such as boaters" id 68
- (Harris & Bergersen, 1985)

e. (2012) The Appellants add a new deficiency in the EA about the competition for fishing. Bruce Hare wrote: "One of the <u>unexplored issues</u> within this controversy is the fact that most paddlers also enjoy fishing." Macon News April 12 (2012) Highlighting this deficiency. [attached]

Impacts to Fishing have been documented elsewhere as well as on the Chattooga:

f. "Boating activities can also lead to conflicts with other users, such as people fishing, taking photographs, or swimming." Chapter 1 Merced WSR CMP/FEIS 2001 NPS

g. A 2007 Scotland Tourism report found " unavoidable conflict between canoeing and fishing" ... "anglers and canoers are in direct conflict since canoes scare fish to the bottom of the river and make fishing much more difficult." Pg 52, Rural Sports Tourism , 2007 LOCUM, Scotland

h. The USFS published "Heavy canoe use is conflicting more and more with many other river users. Many trout streams are no longer fished during the daytime hours <u>because of canoeing disturbances</u>. ... Conflicts are common among canoeists and fisherman, sightseers, bird watchers, swimmers and frontage owners." [pg 113, Doehne, USDA Forest Service General Technical Report NC-28. 1977]

i. A recent study conducted by UK's Environmental Agency "identified disturbance caused by canoeists to anglers as an area of conflict" [p 17 Countryside Recreation Volume 9 Number 1 Spring 2001 UK Environmental Agency]

[20] *Chattooga River Expert Panel Field Assessment Report 2/2007, Berger group, posted by USFS, pg 42*

j. In 2002, the Southern Forest research assessment published that "Water attracts a wide variety of visitors, including swimmers, viewers of fish, anglers, and users of muscle- and motor-powered watercraft. The possibilities of conflict are obvious. For the most part, all the uses just listed are incompatible with each other." [Potential Conflicts Between Different Forms Of Recreation, 2002, Southern Research Station USDA Forest Service]

k. In January of 2007 the British parliament voted against unlimited boater access to UK's inland waterways based on the conflict between anglers and boaters. The report compiled over years of study found boating does conflict with anglers, riparian wildlife and landowner interests. In parliament Martin Salter MP argued that "Unlimited access to smaller rivers and streams would destroy angling in these locations." ["*Effects of Canoeing on Fish Stocks and Angling*" Technical Report W266 UK Environment Agency 2000]

The flailing attacks by the Kayak Lobby against angling, and now the demonization the fish, could only be written through the myopic focus on only one activity type. Expanding paddling with disregard for non-paddling visitors creates a failed policy for those other visitors.

XX. <u>**The Appellants question the 'validity' of the designation literature when it contradicts the appellants while simultaneously claiming the designation literature is valid to support their claims**</u> (id 30)

Hypocritically, these same appellants <u>demand</u> that sentence fragments, dicta, images and statements that contradict other elements within the same designation report, be accepted as facts in isolation of reviewing the full report. The plaintiffs openly question the validity of the designation literature, while simultaneously citing elements within the same report as evidence and proof elsewhere. The appellants skewed, irrational, and lopsided synopsis (which omits facts regarding the inability to boat the headwaters) argue that only they can interpret and cite the designation literature, and challenge the sections of these reports (decades later) that suggest limiting boating is in the best interest for the Chattooga.

XXI. No Paddler Hardship in the Chattooga Watershed

The table below provides a list of flaotable waters administered by the USFS within the Chattooga watershed. Clealry there is no shortage of boating here.

Chattooga Watershed Paddling River Sections	Difficulty	Miles	Boating Policy 1976 – 2009	Proposed Boating Policy in 2009 Sumter EA
Chattooga Section IV	IV - V	5.2	Unlimited	Unlimited
" Section III	III - IV	13	Unlimited	Unlimited
" Section. II	II	7	Unlimited	Unlimited
" Section I	I - II	5	Unlimited	Unlimited
Overflow Creek*	V	2	Unlimited	Unlimited
Holcomb Creek*	IV - V	2	Unlimited	Unlimited
Chauga I Verner Mill	II-III(IV)	3	Unlimited	Unlimited
Chauga 2 Route 193	II-III(V)	5.4	Unlimited	Unlimited
Chauga 3 Route 290	II-III(IV)	9.8	Unlimited	Unlimited
Chauga 4 Cobbs Brdg	II-III(IV)	7.5	Unlimited	Unlimited
Upper Chattooga				
Hwy 28 to lick log	III	10	No Boats	No Boats
Lick Lock. to Greens	III – V+	9	No Boats	>350 cfs in Winter
Above Greens Creek	V+	2	No Boats	No Boats
Total Miles		21	5 8	71

Most of the watershed is already opened to near limitless boating.

XXII. Visitor Data On Page 36-37 the appellants gripe *" Despite a seven year long study period, the USFS failed to collect any relevant data on recreational use." "In the place of real data, Appendix D offers a series of guesses" " the USFS collected barely a shred of actual user data, and have instead relied upon the very type of "authoritative opinions" that are inadequate."*

The appellants make clear that data on other visitors is inadequate for making decisions about these other visitors; on this point the WCA agrees with the appellants. Additionally,

the lack of data on non-paddling visitors would also be insufficient for assessing the affects boating will have to these other visitors.

The EA discusses the importance of establishing baseline conditions before monitoring, id 3. However, these important baseline conditions with respect to non-paddling visitors remains absent as pointed out by the appellants and the WCA. Even under the Adaptive Management section, no variables are included that would even consider the affects TO non-paddlers or those that may have been replaced under any new policy.

XXIII. The Walhalla Fish Hatchery:

The Appellants villainize the Walhalla Fish Hatchery located on the Chattooga East Fork as if its purpose was to generate toxic ooze; such claims are ridiculous. That the agency allows such nonsense and slander to become part of the public record without feedback or corrections, highlights a significant problem with this process.

The agency should make clear the benefits of the fish hatchery for education purposes, as a visitor picnic spot, for local area employment and for supplementing the natural fish population in SC streams for the benefit of all wildlife and anglers. The many benefits of the Walhalla fish hatchery should be included with any comments regarding the fish hatchery and are provided by the SC DNR. [link: http://hatcheries.dnr.sc.gov/walhalla/index.html] The WCA remains surprised that these appellants did not include demands for access to the hatchery tanks for racing!, but the next planning cycle will start soon.

Hypocritically the floaters challenge the SC DNR (a state-run hatchery) despite being outside the National Forest, while badgering the landowners for getting involved in a case they claim involves only the Forest Service and 'swirling-down-the-bowl' floaters.

XXIV. Misrepresent Other WSR Policy (Horsepasture WSR)

The appellants claim "On no headwater stream in the entire region does the USFS – or anyone else – impose any limit whatsoever on noncommercial floating." This statement is untrue, Private property owners routinely limit access to their property including within Wild and Scenic Rivers.

The Horsepasture WSR is under six miles east of Grimshawes Bridge. For almost two decades tow of the appellants (AW and ACA) have failure to gain access to private land on the Horsepasture Wild and Scenic River, despite attempted legal action. As these kayak lobby soon discovered Wild and Scenic ***Designation does not permit access through private lands.***

Additionally the Forest Service and other land management agencies post, and notify the public of private property boundaries in order to avoid illegal trespass within Wild and Scenic River corridors and are prohibited from inciting or encouraging *unlawful activity*. The agency should make clear to the public that despite the inaccurate legal arguments bellowed by the kayak lobby, Private land within a WSR is not open to the public.

The supreme court recognizes that a "***nuisance*** *may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard."* *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388 (1926). The fact that boating is a nuisance to private property owners on a small headwater stream is not surprising, nor is an evaluation the affects on landowners established by the kayak lobby or the agency. The 1971 Study report p 93 correctly documented that public use would be consider a nuisance to Chattooga property owners, making clear that it is the owner who determines what constitutes a 'nuisance' as recognized by the right to exclude others from use of private property.

XXV. SOLITUDE:

The appellants self-serving claim that only boater solitude and scenery need be considered is predictably inaccurate**.** The 2004 Sumter Management Decision indicates weekend visitors can find solitude "by hiking some distance from roads and parking areas."id 3-15 Hiking solitude is a value, that can be enjoyed by paddlers by simply leaving their boats at home and walking like all others. What appellants fail to realize is that the impact on those hikers' solitude near the river from boating increases geometrically as boats and hikers are added into the system, one boater will affect the solitude of every current day user while they are along the river trying to seek solitude.

What is extremely hypocritical is that these same appellants have testified in court that removing hikers from the river area improves the *experience for canoeists*.

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XXVI. **More Hypocrisy:** The boaters claim that prohibiting boats without a NEPA is illegal and that the early plans and reports were never vetted by the public. Yet they are using dicta within these same plans and reports to claim 'congressional intent' and 'constitutional rights'. The appellants cannot have it both ways either the plans are 'illegal' and the decisions within them are all null and void, or they provide insight to why paddling should remain below Highway 28.

XXVII. **Megalomaniacal Arguments**

The appellants claim that upper Chattooga visitors will be *pleased to see a kayaker* invading their solitude (snowmobilers and PWC riders make similar claims). Such an arrogant statement by the kayak access lobby is predictably more hogwash! The desired conditions of Chattooga Visitors collected as part of the LAC in 2005 prove such this statement is nonsense; most of the non-paddlers preferred the upper Chattooga without boating disturbances. The 2012 EA should included the Desired conditions of the Chattooga non-paddling visitors when they publish the numerous corrections.

Further, the 2004 Sumter FEIS indicated *"the [boating] closure will help preserve the solitude experience, and the sense of place and expectations that have developed for corridor recreationalists over the years. Additionally, the closure will continue the successful zoning for uses that have experienced conflict in the past. The analysis shows that there would likely be conflicts between boaters and other users. …The analysis shows that there would be some resource impacts within the corridor should boating be allowed above highway 28. The impacts would include some additional trampling of vegetation as boaters frequent more popular runs…"p 1-107, 5-48 Response to Public Comments* The latest 2012 EA offers no evidence that these statements made about boating in 2004 by the Sumter USFS, are still not true today. The egocentric claim made by the kayak lobby is simply not credible, and runs counter to the evidence in front of the agency.

If some hikers, swimmers, wildlife viewers and anglers wish to experience the Chattooga a with the ability to '*wave at paddlers'*, they can experience that along the 60%+ section of the Chattooga already open to near limitless private paddling. The facts collected during these proceedings make clear that the preferences of the non-paddlers, include a section of the Chattooga without boats. Sadly, the avoidance of documenting the collected desired

conditions of the non-paddlers by the agency in 2005 within this EA allows such megalomaniacal claims by the kayak access lobby

The 2012 EA mistakenly discarded data for the 'desired conditions' of non-paddling visitors collected as part of the Visitor Capacity Analysis and published in 2005.

In Conclusion: For the reasons mentioned above, the kayak lobby appeal should be denied, and boating should remain further downstream as congress intended.

With this intervention the WCA and members incorporates all previous statements by WCA including the 2009 Appeal, appendices, letters, as well as the appeal and intervention submitted by both Mike Bamford and the Association since the January 2009 Appeal.

With this submission, the WCA includes this entire intervention Document in the GA Forest Watch appeal, and as a supplement to the WCA Administrative Appeal.

Sincerely,

/s/Michael Bamford

Michael Bamford
Global Stewardship Director
Whiteside Cove Association
PO Box 2294
Cashiers, NC 28717
(770) 509 - 4866

cc: Kevin Colburn, J. Nathan Galbreath, R. Brian Hendrix for the Appellants

These Appendices Include Previous Intervenor Comments from the WCA and members thereof into the Kayak Lobby Previous 2009 Appeal.

WCA Intervenor Letter into the Kayak Lobby Appeal from 2009 Decision

Re: [2009] Appeal by American Whitewater,

Dear Mr. Rick Ledbetter,

The Whiteside Cove Association ("The Association"). Association is an organization of families that has leased a portion of property on the upper Chattooga ("the property") for almost half a century. The property encompasses includes a portion the headwaters of the Chattooga which begins at the Grimshawes SR 1107 bridge and goes downstream for approximately 1.7 miles to the confluence of Green Creek. The Association has leased the property continuously since 1957. The property is owned by the Rust family. Over the years, our members and their friends have enjoyed the scenic beauty and wilderness experience offered by this special property.

The Appellants again misrepresent the facts and present their argument as-if these upper 1.7 miles were public land. However, as published by the USFS, in North Carolina the "*the riparian land owner owns the streambed".*

The USFS are legally required to document the *current status of land ownership* within river corridor prior to WSR designation [16 U.S.C. § 1275., Sec 4(a)]. FSH 8.33 and the WSR Coordinating Council both provide guidelines for including land ownership within WSR study report.

The 1971 Chattooga River WSR study report concluded that in North Carolina… ***"the riparian owner owns the streambed to the center of the stream"*** pg 14. Nothing could be more clear.

The 1971 report also include the NC Attorney General's opinion which was the stream was non-navigable and therefore in private ownership.

"The Attorney General of North Carolina states the opinion that since the Chattooga River in North Carolina is very shallow with constant ripples showing every few feet, the State Supreme Court would probably find that it is not navigable in fact, and therefore not navigable in law. In North Carolina, the riparian owners own the streambed of un-navigable streams to the center of the stream. The private landowner can sell, lease or otherwise dispose of the minerals underlying the streambed, provided he does not cause sedimentation or pollution of the stream." pg 13

For further clarity, the AG opinion was again included in the 1976 Development Plan filed with congress in November of 1975. The

Development plan notes….

"Review by the Attorney General of North Carolina indicates that the stream bed is probably the property of the riparian owners" [pg 11853 F.R.Vol 41, No 56 March 1976].

That this section is non-navigability of the section is self-evident. The 1.7 miles of the Chattooga could best be described as a small, tight mountain stream. It flows over numerous waterfalls, and through tight passages in the rocks and through impassible boulder fields that the agency acknowledges would require frequent and difficult portages. In many places, the river is no more than ankle deep all the way across, with multiple dry sections of rock. In other places, you can literally straddle the stream with one foot on each side during ordinary conditions. It is overhung with countless tree branches, as well as vast sections of mountain laurel, rhododendron and other shrubbery. There are countless dead trees in the stream itself which help maintain the proper ecosystem for the protected trout.

An invited visit by the local USFS rangers in 2005 during nominal water levels resulted in a similar conclusion.

An account of an attempted canoe expedition by authors of the WSR study concluded that the expedition was ***not a paddling trip* but rather *a hike with canoes*.** (see published excerpts attached below).

A 1970 letter to Mr. Wyche from the Sumter USFS recognized that the agency had already discovered through review that he Chattooga in these upper reaches is non-navigable.

The Army Corps of Engineers District Office lists the Upper Chattooga as a non-navigable stream. The ACOE have jurisdiction over navigable waters and navigability listings. It is understandable that "conflicting opinions" from the boating advocates are claimed, but not pertinent to the situation. A federal determination has been made... the Chattooga that flows over this private property is non-navigable. In addition to the COE designation the US Coast Guard also lists this section of the Chattooga as non-navigable via correspondence.

We realize that the Forest Manual does not recognize federal agency determinations or State-level opinions or state-judiciary rulings under FMS 2354.14.

"Rivers are, as a matter of law, either navigable or non-navigable. Navigability is a judicial finding and must be made by a Federal court in order to bind the United

States. Most rivers in the country have not been adjudicated as navigable or nonnavigable. Consider them non-navigable until adjudicated otherwise." FMS 2354.14

However, as published in agency guidelines, the lack of a Federal judicial ruling requires the agency to *consider* the river *nonvavigable*, not publish some ambiguity about streambed ownership.

We appreciate the USFS removing this private section from a public analysis and we appreciate the USFS closing the river to floaters through our private property. We simply ask one more time that the USFS make it clear to the public and the kayak lobby that the bed of this section is privately owned and that WSR designation does not grant the public the right to use the bed of a WSR unless they have permission from the landowners.

The Whiteside Cove Association requests the USFS stop the double-talk associated with streambed ownership and make clear to the public and in the EA why boaters are not allowed to access a privately owned stream and venture onto the riverbanks.

From harassing anyone opposed to their goal of unlimited kayaking during the public meetings, misstating law and facts, or claiming an omnipotent conspiracy against paddling, American Whitewater has attempted to squelch all reasonable and rational discussion that favor managing kayaking growth throughout the Chattooga corridor. The membership of American Whitewater has repeated one message since 2002 with their fingers in both ears; WE WANNA BOAT, All Others be Damned. They howl that boating is "illegally banned" without justification based on the notion that only kayaker needs require review. These arguments are ridiculous for three simple reasons.

A. Paddling already dominates 2/3rds of the recreation found along the Chattooga Wild and Scenic River. A 2002 NPS study indicate 94% of visitors to the lower Chattooga are there to paddle; even though participation rates in paddling are under 10% in the Southeast.

   Private paddlers currently have unlimited access -during all flows- to the majority of the designated Wild and Scenic Chattooga below highway 28. However, commercial rafters are limited to flows levels under 2.5', tubers are banned from ¾ of the river and all motorized water-craft is banned from the entire Chattooga. Clearly private paddling is already granted preferential treatment above other types of floating on the Chattooga, and -during high water flows- a complete monopoly of the lower resource. Why do they need more?

B. Zoning recreation to balance conflicting uses in all sectors of public land management have become commonplace and necessary. As noted above, Chattooga policy already varies by the rapid difficulty and type of craft on the lower 2/3rds of the Chattooga. What the kayak access-lobby objects to is the restrictions on their membership, Not those limits placed on others. The USFS need only review AWs comments during the 2000 *Hells Canyon V. USFS* to determine the hypocrisy of AW's rumbling today. Even today, AW demands the USFS restrict the fish and anglers, while maintaining limits on kayaks "illegal".

   In addition to managing the floating, the USFS manages the entire corridor and limits use. Horses, Bikes, hunters and four-wheelers are also limited within the WSR corridor by location and season. Recreational zoning was put in place in 1976 and promulgated

decades ago making it legal policy. If limits on kayaking are "illegal", then so are all policies established in order to balance conflicting uses on the Chattooga or within our National Forest system. AW is arguing for a Free-for –all….but only for paddlers.

C. Management policy justification in 1976 may have been to protect fishing and boater safety, but the benefits from current policy for the birders, hikers, swimmers as-well-as anglers must be assessed. The relative values of current activities compared against expanding kayaking upstream in an area awash with paddling opportunities is what is required in this assessment.

The 1976 Development Plan noted "[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." Pg 11849. Conflicts developed prior to the institution of the zoning policy, therefore boating had to be possible during angler flows.

There are far more recreationalists visiting the resource in 2009 then were visiting in 1976, therefore there will be significantly more conflicts and complete displacement without river management. The Kayak lobby's claim that due to advances in technology, even more kayaks could access these angling waters today then could in 1976, therefore conflict will be even greater today.

We simply ask the USFS to reiterate the landownership boundaries filed in November of 1975 with Congress as part of the Chattooga Development Plan.

Respectfully submitted,
Mitchell Betty
President of the Whiteside Cove Association
P.O. Box 2294
Cashiers, NC 28717

cc: American Whitewater, 1035 Van Buren St., Missoula, MT 59802 , Attn: Ms. Colburn.
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Documented Canoe Trip over the private lands

The Wyche expedition put in at Grimshawes Bridge. Their four canoes and raft were loaded with camping gear and food. "The river's only that wide up there," Brad Wyche explained to me recently, holding his hands apart to show how narrow the river could be in its upper reaches. "We were probably the first to paddle the Chattooga above Section O. It was part of Dad's quest to paddle every mile of that river."

When these explorers departed, they quickly found that, in spite of their best intentions to float the river, they could barely make a mile a day hauling all their gear. Here in the shadows of Whiteside the infant river is clogged with boulders and passes through Chattooga Cliffs, a gorge with vertical walls. The river falls hun-

36 CHATTOOGA **"Chattooga", by John Lane, 2004**
University of Georgia Press

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dreds of feet per mile. Brad remembers dragging the canoes and raft through the water and around waterfalls in long, difficult portages.

Five days later, they still hadn't made it to Bull Pen Bridge, three miles downstream from Grimshawes. They took out, low on supplies, and walked in the direction where they hoped to find a road. To this day, they aren't sure where exactly they took out. Brad doubts he could even find the place, but they made their way back to civilization. "That wasn't a paddling trip," Brad said, remembering the ordeal. "That was a hiking trip with canoes."

Excerpts from page 36 & 37, *Chattooga: descending into the myth of Deliverance river* by John Lane, 2004, University of Georgia Press.

From WCA member Comments submitted into the 2009 Appeal:

The comments below are not posted to USFS Website under the 2009 redacted Desicion)

The Kayak Lobby Appeal Contains Egocentric Designation Delusions.

a. The Chattooga Wild and Scenic River (WSR)

The Kayak lobby erroneously claims that 'each foot' of the upper portion of the Chattooga Wild & Scenic River was designated for the primary purpose of paddling; this egocentric claim is predictably inaccurate. 'Recreation' (not kayaking) is only one of the Outstanding and Remarkable Values (ORVs) for which the Chattooga was designated; floating is just a subcomponent of this designation value.

The upper portion of the river was included within the Wild and Scenic River designation in order to maintain natural flows on the entire Chattooga. A hydroelectric holding-pond was proposed for a site near the confluence of Norton Mill creek and the Chattooga flows would have been pumped into an alternative watershed. The urgency of the Chattooga's WSR designation - specifically the Headwaters- was outlined in the 1971 Study which noted *"these non-floatable upper reaches would not stand alone"* under the scrutiny of WSR designation[21]. Appendix C, D and E of the 1971 Study Report devote fifteen pages to discussing the proposed hydroelectric facilities. In 1973, FERC argued that the headwaters section should be removed from WSR consideration in order to generate hydroelectric power.[22] However, the upper portion was considered "crucial" to WSR designation in order that the entire river remain in a free-flowing state. The Congressional Report noted…

> *The Federal Power Commission recommended that the river be given further study because of its substantial hydroelectric power potential and the possibility of developing power in part of the river and preserving the remainder in a free-flowing state. Although we recognize that the river has hydroelectric power potential, in our judgment, preservation of its free-flowing condition and associated wild and scenic values outweighs the value associated with development of its power potential. A dam or dams, whether located upstream or downstream on the river, would seriously detract from or destroy the natural values of the Chattooga River as a component of the Wild and Scenic Rivers System.* [P.L. 93-279 pg 3018]

[21] Pg 61-64 1971 Chattooga WSR Study report, dept. of agriculture.
[22] Pg 181-3, 1971 Chattooga WSR Study report, dept. of agriculture.

The primary value for the designation of the upper section of the Chattooga was to protect its' *free-flowing state* and *natural values*; It was not designated for kayakers.

In addition to non-recreation values, the designation literature indicates that boating was not even the primary 'Recreational' activity associated with that designation value. When discussing the Chattooga headwaters the 1971 Study report notes *"Relaxation is probably the most popular activity"*[23] and that *"fishing is probably the most popular"* activity throughout the entire river corridor. The Congressional Report adds that fishing was *"the number one attraction to the river."* [24] The superlatives used to define fishing and relaxing signify that paddling was not a 'primary reason for WSR designation', nor even the principal activity related to the Outstanding and Remarkable Value (ORV) of *Recreation*.

Hunting, fishing, swimming, camping, hiking, solitude, floating and wildlife-viewing[25] were each discussed in the congressional Study Report and collectively compose the designation 'value of Recreation'. Pg 3010 , P.L. 93 -278, 1973 Senate report for Chattooga WSR designation

All these recreational activities cannot occur simultaneously, in the same location, without affecting the other values; this is especially true when paddling is compared to less extreme activities. Since the quality of the experience defines visitor capacity[26], the agency must assess and balance the various *protect and enhance* statutory considerations amongst a variety of recreational activities. The agency is granted authority to *limit uses* under [16 U.S.C. § 1281(a)].

b. **The Ellicott Rock Wilderness Area:**

The Ellicott Wilderness was not designated for the sole purpose of public recreation. Public Law 93-622, describes the need for Eastern Wilderness designation as "urgent" in order to protect wilderness areas from "overuse" by outdoor enthusiasts. The designation law described this area as being *"increasingly threatened by pressures of growing and more mobile populations",* and the need to *"preserve such areas as an enduring resource of wilderness which shall be managed to promote and perpetuate the wilderness character of the land and its specific values*

[23] pg 71, 1971 Chattooga WSR Study report, dept. of agriculture.
[24] p 3010, P.L. 93-278, 1973 Senate report for Chattooga WSR designation
[25] Pg 3010 , P.L. 93 -278, 1973 Senate report for Chattooga WSR designation
[26] The "quality of the visitor experience" defines the "capacity" of a Wild and Scenic River. 47 Fed Reg 39458-39459 (Sept 7, 1982) *Final Guidelines for Managing Wild and Scenic Rivers*.

of solitude… scientific study, inspiration…"[27] The Ellicott Wilderness was not established for unlimited use by extreme-sport enthusiasts as claimed by the kayak access lobby.

The Ellicott wilderness -through which a section of the Chattooga headwaters flows- was designated, and should be managed, to *protect the wilderness character of the land*. Management should include the *more restrictive values* of solitude and scientific study, over expanding kayaking on a river that already provides 36 miles of unlimited kayak access.

Further The sumter RRLMP makes clear that it must **prioritize preservation over recreation.**

> *Where the riparian corridor management prescription area overlaps with Wilderness and Wild/Scenic/Recreational Rivers, …Rare Communities; then* ***whichever management direction is the most restrictive will apply***. P-3-42 Sumter 2004 RRLMP

A review of an isolated wilderness statutes and guidelines is irrelevant under statutory laws, they are clearly irrelevant under the governing 2004 RRLMP management prescriptions. The repeated whining of such nonsense from the kayak lobby should be discounted and could have been resolved IF the recreational assessment portion of this EA had simply framed the scope of the assessment as required. The poorly written, and clearly deficient recreational analysis within the 2012 EA has already wasted millions of taxpayer dollars because it does not prioritize preservation over recreation as mandated. The simple realization early in this process would have avoided lots of wasted time.

Any rational review of the designation literature would conclude that the Chattooga was not designated to benefit only paddling. The agency is required to manage the resource for a variety of uses and balance relative values forest-wide when setting policy;[28] the 1976, 77, 80 and 85, policies which enhanced boating on the lower thirty-six river miles, also considers the needs of the non-paddlers above Highway 28.

Further, the WSR Act [16:28 § 1281(b)] overrides any of the 'optimum extent' or 'unconfined recreation' language from the guidelines and statutes from within the Wilderness Act. Protecting primary emphasis features requires the agency adopt the more 'restrictive provision' from either Act, making review of any singular statute within the Wilderness Act moot when considered in isolation of the entirety. As the courts recognized elsewhere on WSRs…

"we must view this legislation from a broad rather than a narrow perspective." [660 F.2d 735, United States v. Hells Canyon (1981)].

[27] Pg 2096, Jan 1975, PL 93-622 Declaration of Ellicott Wilderness.
[28] *16 U.S.C. 1604(e)(1)*

The appellants present partial statutes in isolation of the entirety of the legislation. Such sophomoric review and misrepresentation of law does not meet the judicial or agency standards.

Prioritization of Statutes for Managing WSR and Wilderness

The prioritization of statutes associated with managing Wilderness and the Wild and Scenic Rivers have been misrepresented throughout the Floater appeal; the law requires applying the more restrictive provisions, when statutes are in conflict. By isolating the less restrictive provisions from the governing statutes, the appellants inaccurately portray any limitations on recreational paddling as "illegal"[29].

The Chattooga Wild and Scenic River (WSR) passes through five miles of the Ellicott Wilderness Area. The prioritizing statute for resources with dual designation require selection of the 'more restrictive provisions' when setting management policy.

[*"in case of conflict between the provisions of the Wilderness Act and this chapter, the more restrictive provisions shall apply"* 16:28 § 1281(b)]

The appellants cite a few isolated Wilderness, or Wild & Scenic, statutes then misrepresent them as agency 'mandates'. By ignoring the *more restrictive provisions*, the kayak appellants misrepresent congressional intention of these governing statutes throughout their appeal.[30]

The Wilderness statutes, that mandate 'opportunities for solitude' and the 'protection of the wilderness character', supersede 'protect and enhance' Wild & Scenic mandates associated with the 'value of Recreation'. Similarly, Wild & Scenic 'protect and enhance' requirements for biology, scenery, esthetics and solitude, supersede the Wilderness law associated with providing 'primitive recreation'. On any Wilderness segment within a Wild and Scenic River, there exists a clearly expressed Congressional intent to protect esthetic, scentific and scientific biological and natural values before considering recreational whims.

The appellants have cherry picked the least restrictive wilderness provisions and misleadingly presented them as mandates. Opportunities for boating is the absolute last

[29] When a statute is part of an organic whole, the statute should be viewed in context with the whole of which it is a part. [United States v. California Portland Cement Co., 413 F.2d 161, 166 (CA9 1969)].

[30] The 2002 WSRCC *Management Guidelines* describe the intent of WSR Act 10(b) as: " *Section 10(b) removes the potential for conflict on WSRs flowing in designated wilderness by applying the more restrictive provisions of the WSRs or Wilderness Acts in any situation of conflict. This section recognizes the importance of designating river systems by removing any potential for conflict in dual designations."*

value that requires consideration in forest planning, not a primary mandate associated with managing the Chattooga Wild and Scenic River as it flows through the Ellicott Wilderness.

Even outside of Wilderness areas, the Wild and Scenic River statutes prioritize non-recreational values, over the appellant demands to expand kayaking upstream. The Act notes:

> "***primary emphasis** shall be given to protecting its' esthetic, scenic, historic, archeological, and scientific features*" [**16:28 § 1281(a)**]

Recreation is just one of the many Outstanding and Remarkable Values (ORVs) for which the Chattooga was designated a Wild and Scenic River. Not only must the agency balance recreational use amongst various activities (hiking, swimming, angling, floating etc.), the agency must also consider the effects on the free-flowing water, scenic values, ecological effects and esthetic values over recreational whimsy, prior to setting management policy.

Maximizing paddling is not an agency directive, as the kayak lobby claims; neither is myopically *protecting and enhancing* the value of *recreation* in isolation of all other values. The agency must first protect and enhance the esthetic and scenic values, before considering enhancing a subcomponent of the recreation value on a Wild and Scenic River. Protecting the *scientific* values associated with rare flora and spray zone habitat would also supersede any special interest recreational whims.

On a similar Wild and Scenic multi-visitor dispute the court ruled***:*** *"we must view this legislation from a broad rather than a narrow perspective."* [660 F.2d 735, United States v.. Hells Canyon Guide Service, (1981), Id 10]. A special interest cannot simply segment the legislation from the whole by isolating dicta that suit their argument; this clearly alters the law's intent.

The governing statutes for managing Wild and Scenic Rivers prioritize protecting non-use values over providing opportunities for *unconfined recreation*[31]. The expressed intent of these governing statutes is suggests any expansion of boating, especially through a sensitive Wilderness area and wildlife habitat, would be illegal.

Finally, the kayak lobby alleges that the agency has violated APA standards; this argument is without merit. Under 5 U. S. C. § 706(1), the APA standard only applies to an agency

[31] [Friends of Yosemite v. Norton, 2003, 348 F.3d 789, 9th id at10]

action that is legally required; as outlined above, the agency is *not required* to allow unlimited kayaking. Contrary to appellant claims, the agency must implement policy that '*protects and enhances*' '*primary emphasis*' values. The US supreme court has dismissed similar claims of APA 'violations' as outlined in [Norton, Sec. of Interior v. S.Utah Wilderness Alliance, 2004, 542 US 55, id 14-18]

Appellants make Erroneous Claims in Regards to *All Visitors*

The Kayak lobby makes numerous erroneous statements regarding limitations on all other potential Chattooga visitors, in order to justify their claims of inequity. The paddlers repeatedly claim that paddlers are discriminately *singled out* (id 210, 166), and that all other visitor types are unrestricted; this claim is predictably inaccurate on two points.

i. First, no other visitors are allowed to boat on the upper Chattooga. Anglers and hikers are all restricted from visiting the headwaters with, or in, a boat. Conversely, any member of the paddling organizations can visit the upper Chattooga by foot (without a boat) like everyone else.

Since only the inanimate boat, or activity of boating, is restricted, and not the individual, claims of discrimination are moot. Because the lower 2/3rds of the river remains open to unlimited paddling, claims of inequity are unfounded. The court has already ruled that the kayak lobby suffer 'no irreparable harm' from the Chattooga policy, since they are only restricted from the smaller portion of the river.[32]

ii. Secondly, many activities are restricted and/or banned under current policy. Horses (a wilderness compliant activity) and Mountain bikes (a human powered activity) are both "banned" from Chattooga Headwaters corridor. Tubers are restricted to 10 miles of the entire Wild and Scenic River, while motorized water crafts are banned[33] from the entire river. In addition, hikers are restricted to trails, campers to campsites and anglers and hunters have numerous restrictions on limits, type of gear as well as seasonal restrictions. In fact, when reviewing the whole Chattooga Wild and Scenic River, it becomes clear that the private paddlers have the fewest restrictions, and already appear to receive

[32] Order to Dismiss, [Bossworth, USFS v. American Whitewater 10/06/2006]
[33] There about five river-miles of Wilderness within the designated Chattooga WSR Corridor, motorized restrictions within the Wilderness act, would only apply to these few miles.

preferential treatment by the USFS in regards to policy effecting the lower two-thirds of the Chattooga.

Many activities are limited along the Chattooga, but all visitors are allowed equal access to the upper Chattooga by foot; only the transporting craft (horse, tube, bike boat, 4x4, etc) have varied access limitations throughout the Chattooga Corridor.

Only by narrowly defining discrimination as being against all "*wilderness-compliant, hand-powered, floating activity using a double-bladed paddle",* can the kayak lobby argue that limits on kayaking are 'discriminatory'. Similar arguments could be made for any policy that limits any activity, like motorized watercraft, 4x4s or Off-Roaders. Since the majority of the Chattooga already allows unlimited kayaking, the whimpers of *discrimination* or *inequity* are completely inaccurate and blatantly gluttonous.

Hypocritical to the kayak lobby appeal, some of the appellants have opposed public access for non-paddlers. In 2002, American Whitewater argued against new horse trails along the lower Chattooga. The ACA boasts about their role in having personal watercraft (PWC) prohibited on most NPS waterways. Both AW and the ACA opposed access for jetboats in Hells Canyon WSR, even though jet-boating is a protected value [Hells Canyon v. USFS 9th, (2000) No. 99-35675 see intervener submittals]. A review of the AW comments submitted from 1999-2003 to the Sumter USFS during <u>this</u> planning cycle, highlight more of this hypocrisy regarding AW's opposition to day visitors along the lower Chattooga; AW sought to re-classify certain-types of rental boats as 'commercial' in order to avoid exceeding kayak/canoe capacity allocations. The kayak lobby does not want "all user groups to be treated equally", when an activity diminishes their precious paddling experience; the anglers and hikers seeking a low-encounter visit deserve similar consideration when assessing a resource-wide management policy.

<u>The Myopic Interpretation of Visitor Capacity as "How Many Days Can We Boat".</u>

The physical capacity of the resource to fit all visitors at once is not in question, however the 'physical capacity' is not the definition of 'visitor capacity' for Wild and Scenic Rivers.

Wild and Scenic Rivers Management Guidelines define carrying capacity as *"<u>the quantity</u> of recreation use which an area can sustain <u>without adverse impact on</u> the outstandingly*

remarkable values and free-flowing character of the river area, the quality of the recreation experience, and public health and safety." (47 FR 39454, Sept. 7, 1982).

The agency captured that the quality of the experience for anglers and hikers would be diminished by expanding boating above highway 28. The agency also recognizes that transforming the upper Chattooga into a water-trail, will segment habitat and disturb the wildlife; that disturbance will indirectly diminish the wild-life viewing, hunting and angling opportunities on the upper Chattooga. Wildlife disturbances are only momentary from a passing paddler's perspective, but habitat disturbances and wildlife displacement impact the recreational opportunities for viewing and/or angling far longer.

The kayak lobby ignores due consideration for all activities without a paddle; then asks the agency to mimic this self-centered logic. Appellants myopically present the capacity issue as "how many kayakers" can float the Chattooga without impacting other Floaters.

Courts have ruled that balancing various activities to offer "diverse recreating opportunities" throughout a resource is rational and legal policy. A review of WSR visitor capacity requires consideration of *type –of-activity*, not just a head count of visitors per area.

" the WSRA requires the preparation of river '[m]anagement plans [that] state . . . the kinds and amounts of public use which the river area can sustain without impact to [values]' and to mandates ongoing studies 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.' " *Id.* at 797 (quoting 47 Fed. Reg. 39,454, 39,458-59). FRIENDS OF YOSEMITE v. Kempthorne 520 F.3d 1024, 1027 (2008).

On another WSR involving boater access, The court ruled that:

> *"The agency was well aware of conflict… and made a reasoned and reasonably informed decision to institute the window to reduce that conflict and allow diverse recreation opportunities. … The Forest Service provided a reasoned basis for its decision….namely, the need to balance various statutory considerations, conflicts between user groups and the expressed preferences of some users"* [Hells Canyon v USFS 9th, (2000) No. 99-35675 pg 15312-3]

The kayak lobby portray all other river visitors as irrelevant to a review of agency actions and decision making, and whimper that kayakers as victims of discrimination. The agency is mandated to assess the experience of non-paddling visitors, the whims of thrill seeking paddlers are only one element of a visitor capacity analysis; the courts agree.

Seasonal Restrictions are Required:

The kayak lobby is correct; the effects boating will have outside of the Winter season remains poorly documented in the Environmental Assessment. However, the public record associated with the Capacity did does provide additional justification, that was excluded from the EA.

1. The sudden fluctuations in flow levels due to precipitation were discussed during the 2007 VAC as *Flashy- hydrology*.

   Page 28 of the 2009 EA did discuss that the winter (or dormant season) would result in longer durations of predictable higher-flows, required for paddling. The 2007 Capacity and Conflict Report expounded that *"higher flows associated with storms are hard to predict and available for relatively short periods of time. This makes it hard for recreation users to use or avoid them."*[34] With the high degrees of uncertainly associated with precipitation, the best policy to reduce encounters is zoning and it is already in place.

   The 2007 hydrology report is more explicit regarding summer *storms*; it notes…

   "*In the Summer period, a boater might require a starting flow of 450cfs to assure at least 225cfs remains in the channel as the hydrograph descends with no additional rain. In the winter, when groundwater levels are higher and trees do not remove as much water, the hydograph will descend much less steeply and starting with 250cfs might surfice. This discussion becomes more complicated when boaters put-in and take-out at different points."*[35]

   The 2007 USFS *Hydrology Report* adds that *"the summer period [flow] is more unpredictable"*(pg 18) and that *"Response to summer thunderstorms is another variable that causes uncertainty"*(pg 27).

   After hiking miles to a remote Chattooga location, an angler or hiker would likely wait-out a passing summer thunderstorm, since most of these thunderstorms will cause the river to rise -and fall- in a matter of minutes. Summer boaters would alos be unable to avoid the lower flows associated with the receding storm waters.

   The excessive impact to the stream bed (riparian and spray zone habitat) from low-flow boating, and additional portage requirements discussed in the assessment of Alternative 8, would have severe impact on the stream ecosystem if summer kayakers were allowed to boat during the unpredictable Summer flows.

[34] p. 76, Chattooga Capacity and Conflict, Whitaker Shelby, 2007

[35] pg 10, *North Fork Chattooga River*, *Streamflow Character*, May 2007, W. Hansen Forest Hydrologist, Sumter USFS

2. Swimming is a summer activity, but it is better during higher water flows. In 2006, American Whitewater published that.

> *"Flows affect depths, velocities, and water quality, important attributes for swimming. Less swift flows may be better for children or less skilled swimmers, but lower flows may be too shallow or appear stagnant."*[36] *"Swimming areas on many rivers include "jumping rocks" that require adequate pool depths for safety."*[37] *…"General riverside recreation is usually "enhanced" by flows rather than "dependent" on them."*

The kayak lobby recognized that higher flows are better for swimming, therefore swimmer visits would likely overlap with 'boatable flow levels'. The hazard to swimmers in the pools below larger rapids -described by the USFS as "blind drops"- does not require an extended discussion. Summer boating could be catastrophic on the Chattooga.

3. Riparian Habitat: The nesting period for many of the rare avian species, starts in March and continues through Spring. Minimizing disturbances during the nesting period is a statutory priority, over placating paddler whims [16:28 § 1281(a)].

Seasonal restrictions on paddling are imperative for balancing visitor use and protecting the Outstanding and Remarkable Values currently associated with the upper Chattooga.

Water Level Restrictions are Required

The kayak lobby erroneously claims that flow-levels naturally separate other visitors from boaters. Since Flow levels are irrelevant to most North Fork visitors, and since the 2007 study found anglers would visit during flows as high as 700cfs, the kayak lobby claim would only be true if boating were never possible. Clearly, Flow levels do not *naturally separate* boaters from any other visitors on the Chattooga North Fork.

- **Most activities are simply not flow dependent.** According to the appellants, *General riverside recreation is usually 'enhanced' by flows rather than 'dependent' on them*.[38] The 2007 Capacity Analysis noted; "*Activities such as hiking, camping, walking, biking, wildlife observation, photography and similar riverside recreation can often occur along a river regardless of the flow, but*

[36] Pg 4, CRC's 2006 *Flows & Recreation guide*
[37] Pg 19, CRC's 2006 *Flows & Recreation guide*

[38] Pg 19 *Flows and Recreation*, co-authored by American Whitewater, 2006 NPS

flows may enrich the experience with aesthetic benefits".[39] Clearly, boatable flows would not keep most people from visiting the upper Chattooga.

The Kayak lobby claims that *optimal wade-based fly-fishing flow preferences*, does not overlap with *boaters optimal flow preferences*. Using this over-focused comparison, they claim that paddling will not interfere with other visitors. However, most North Fork visitors are not anglers, and most anglers are not wade-based fly fisherman. By making these misleading comparisons, the paddlers again misrepresent the effects of expanding boating.

- **Angler flows and 450cfs:** Limiting paddling based solely on 450cfs will not separate anglers from boating disturbances, nor would 350cfs. According to the Georgia D.N.R., most anglers on the North Fork are spin-casters, therefore using wade-based fly-fishing data to argue prime angler flows provides a bogus assessment. According to the kayak lobby, "*Some fishing opportunities are less flow dependent than others. Shore-based fishing with spinning gear… is excellent through a wide range, from mid-summer high flows to lower fall flows*[40]*".* There appeal argument contradicts their previously published statement.

The 2007 study found 375cfs to be an 'optimal' spin-casting flow (7of 7). The table to the rights is from page 17 of the 2007 *Expert Panel Report.*

Table 5-2. Summary of Angler Flow Assessment for Chattooga Cliffs and Ellicott Rock Reaches (at about 375 cfs Burrells Ford)

Rating	Fly Fishing (n=7)	Spin Fishing (n=2)	Bait Fishing (n=1)	Overall Rating (n=1)
Average Rating	5.7	7.0	6.0	6.0
Lowest Rating	4	7	-	-
Highest Rating	6	7	-	-

Through some bogus "analysis", the kayak lobby argues that flows below 450 are "lower quality" fishing; this is simply nonsense as explained within our appeal. The exclusive reliance on the Whittaker 2007 analysis by the paddlers only helps corroborate the bias of that analysis. In place of defending the skewed assessment conducted by the outsourced consultant, the agency should review the inaccuracies between the actual data collected and final analysis.

Some Angler surveys from the 2007 study are attached in Appendix C, the data indicates that some anglers consider flows over 400cfs and up to 700cfs to be 'optimal' for spincast fishing, as first reported in the 2007 *Expert Panel Report* published by the Berger group.

The <u>only</u> on-river angler surveys were conducted by the state DNRs near and below Burrels Ford. These surveys found that flows up to 450cfs perfectly correlate to angler use on the Upper

[39] Pg 29 *Chattooga River Capacity Analysis; Literature Review Report*, Lois Berger group 2007 USFS]
[40] Pg 1,3 *Flows and Recreation*, co-authored by American Whitewater, 2006 NPS

Chattooga. These reports also found fewer anglers visited the area when flows were above 450cfs[41], but some fishing was reported up to 700cfs. The USFS published that this data was *very good* for predicting angler use in 2006 and 2007 and included the survey data in appendix H of the 2004 Sumter FEIS.

As written, the EA remains confusing regarding the flow preferences, as the appellants have indicated. Some of the misleading elements of the EA have been incorporated into the paddler's appeal in order to justify their erroneous claims. However, an objective review of the collected data indicates that water levels alone will not separate anglers and boaters on a free-flowing river like the upper Chattooga. The paddler's own arguments indicate that upper river's lower flows is more suitable for anglers, and less so for boaters; this ideal policy is already in place on the Chattooga. Documenting this Chattooga finding could help other river managers establish similar policy elsewhere whereby helping better to manage river conflict on all Wild and Scenic Rivers.

Paddlers Deceptively Misuse of the word "Component" while citing the WSR Act.

The kayak lobby repeatedly misrepresents the word 'component' of the national Wild and Scenic system in an attempt to deceive the reviewers as to the intent of this statute (id 109, 112).

The WSR Acts states *"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*" [16:28 § 1281]. The language of this statute -***component of the national system***- does not segment the designated Chattooga into sections smaller than its' designated entirety. *Component* was defined in the 1982 guidelines as *"a river area designated as a unit of the National Wild and Scenic River System".*[42] A *component* is clearly not the smallest unit of differentiation within a designated WSR, but rather the entire designated river as a 'component' of the 'national system' of Wild and Scenic Rivers. The 8th circuit court helped clarified this definition in 1997.

> *"Under WSRA, each designated river segment becomes a "component" of the national system. 1274(a). Following designation, the responsible agency defines the boundaries of "each component," determining how much land adjacent to the river is included in the designation. 1274(b). At that point, the agency 'charged with the administration of each component . . . shall prepare a comprehensive management plan for such river segment to provide for the protection of*

[41] Pg H-10, H-13 2004 Sumter FEIS
[42] Fed Reg/47-173Sept,7,1982 pg. 39456, *Final Guidelines for Managing Wild and Scenic Rivers*

the river values.' 1274(d)(1). In our view, the plain meaning of that provision limits the planning requirement to the boundaries of the designated river segment, because it is the designated 'segment' that becomes a 'component' of the national system. This reading is confirmed by 1281(a) of the Act, which links agency planning and administration to the designated 'component'. [Wildlife Association v. Rogers (USFS), 8th circuit, 1997]

In addition to the courts, Jackie Diedrich from the Wild and Scenic River Coordinating Council attempted to explained this definition of 'component' via email to Kevin Colburn of American Whitewater in 2004. She writes:..

A "component" of the National WSR System, as referenced in various sections of the Act (e.g. 1, 3, 10), refers to a designated river as listed in Section 3(a), Quoting the preface to the list of designated rivers (Section 3(a))-"The following rivers and the land adjacent thereto are hereby designated as components of the national WSR system." You might also refer to Newton County [Wildlife Association v. Rogers 8th circuit 1997]. This case is directed at how adjacent activities relate to the comprehensive management plan. However, the District Court, at some length, and the 8th Circuit use section 3 to make the same conclusion- a component is a designated river listed in Section 3(a)) [of the WSR Act].

....You offer the opinion that a "component" should be interpreted as the "smallest unit of differentiation based on distinct values and management objectives." I respectfully disagree with your conclusion… (full correspondence in the appendix D)

Using the kayak lobby's misguided argument that each inch within a designated WSR must review designation values in isolation, is clearly not the intent of the WSR Act nor is it the statutory guidelines for forest-wide planning. Using this self-serving logic, the USFS could be held liable for almost any action possibly taken since any enhancement of one value will likely diminish another. The Forest Service's previous action which requested DNRs eliminate fish stocking on the lower Chattooga to minimize boating conflicts[43], would have been illegal under the kayak lobby's own argument. The Forest Service must seek a balance policy among various designated values and recreationalists for the whole system, not isolate assessment of each value for each inch of river.

At Hells Canyon WSR the court noted…*"(P)rimary emphasis shall be given to protecting (the component's) esthetic, scenic, historic, archeologic, and scientific features. This emphasis on protection permeates these regulatory schemes"* [US v. Hells Canyon 660 F.2d 735] The court the legality of limiting one type of boating (a designated value) in order to protect an other recreational experience; allocating "paddling only" segments and limiting motorized use by time

[43] Dan Rankin from the SC DNR, noted *"Highway 76 was a particular stocking site that DNR was asked, by letter from the District Ranger, to stop stocking in order to control conflicts between boaters and anglers. Dan believes that the ranger thought as long as the trout were scarce, fishing would cease in that area and conflicts would be cut down." Chattooga River History Project* , 2006, USDA, Sumter Forest Service]

was ruled legal. The court rejected the argument by motorboat enthusiasts that Hells Canyon limits on motorboats violated the "protect and enhance" mandates under the WSR Act.

Suggesting that every inch of river must be preserved while also enhancing recreation results in a dilemma for land managers since these goals are in conflict. Multiple objectives that are at cross-purposes cannot be geographically isolated and assessed independently, rather they must be evaluated collectively and resource-wide *as an organic whole*. River managers must set policies that balance overall values, by allocating the resource to a variety of uses[44] -and non-user- settings. The "prioritization" of assessing values is located in section 10 of the WSR act, which places "primary emphasis" on the non-recreational values.

Varying managing policy throughout a Wild and Scenic River is codified in the statutes; *"Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area*." [16 USC § 1281(a)]. The "special attributes" of the North Fork include a nationally recognize trout stream, scenic gorges and waterfalls sight-seeing, popular swimming holes, and contiguous wilderness habitat; each of these attributes would be severely impacted, if paddling were limitless. Since paddling already occupies 2/3rds of the designated resource, it appears the kayaking/paddling value is already being well protected. Homogeneous management would only lead to a monoculture of recreation, this would not best serve the public as a whole.

The Bogus fifty-two miles creek-boating trip argument.

Kayakers present the inability to float 52 consecutive miles as a hardship (id 98). However, in 2007 American White argued that *"The average southeastern Class V run is roughly 3 to 5 miles long. By asking paddlers to run 21 miles of difficult and uncharted whitewater in a single day… creates an artificially dangerous situation. It encourages paddlers to … move fast – without adequate time to scout rapids – and also fosters physical and emotional exhaustion."* [8:09-cv-02665-RBH, 10/14/09, #22-42, Pg 4], AW letter to USFS, regarding the implementation plan for data collection during the VAC.

[44] *"'provide for multiple use and sustained yield of [forest] products and services . . . [and] coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.' 16 U.S.C. 1604(e)(1); see 36 C.F.R. Part 219"* [Wildlife Association v. Rogers (USFS), 8th circuit, 1997]

Kayakers now demand 52 consecutive river miles after having argued that 21 miles of continuous boating is 'unsafe', and 'abnormal'. The argument is more hogwash!

Misconstrue Hardship:

During the kayakers 2006 lawsuit against the USFS, the court offered a detailed explanation of what does and does not represents "irreparable harm" [45] Judge O'Kelly ruled that…

"[W]hile the Headwaters is currently closed to floating, abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters."[46]

The ruling was clear that kayaker claims of "hardship" were unfounded based in part on the abundant opportunities already available along the lower Chattooga. Kayaker's repeated claims of "irreparable harm" cannot be viewed by partitioning the designated Chattooga from the whole.

The paddling appellants have completely disregarded the courts detailed explanation within the previous ruling. The kayak lobby is repeating the same arguments, using the same cast, on the same issue, but presenting them in a different Federal Court, as if no ruling was previously published. Both the Kayakers and the USFS are bound by the court ruling which includes consideration of boating opportunities below highway 28, when evaluating available recreation capacity.

The paddler appeal contemptuously ignores the court ruling when the paddler appeal claims *"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'.*" [Id at 6]

Oddly the kayak lobby also filed a declaration from Glenn Haas, which agrees with the courts. From page 4 of the Hass declaration see below.

> 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.

Placating individual whimsy is not Forest Planning objective; any plan must consider the impact to the social and biological environment, within the entire management area, prior to establishing a recreational policy. The court, as well as the paddler's expert declaration, include the lower

[45] Pg 16-18, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006
[46] Pg 17-18, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

Chattooga paddling opportunities. The two parties in the previous lawsuit are bound by the court decision… it is time they start to Listen!

A Challenge to Past or Future Plans, Policy and Decisions:

The paddler appeal challenges the August 26, 2009 decisions, but again gripes about the previous policies supposed "harm" to the appellants. The agency has stayed the 2009 revised plan, so it is not controlling policy for the Chattooga. Any claims about future policy are premature since the paddlers are bound by the previous ruling which outlined the appellants are not harmed by past agency decision nor by any new decisions that does not grant kayakers access to the entire river.

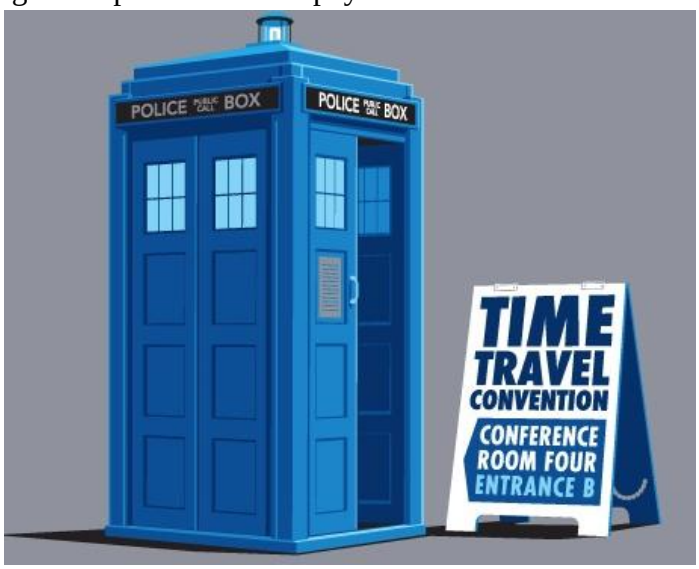
Negating the 2009 plan, will only result in continuation of the previous 1985 policy, which limited boating to the river below highway 28. Floaters are again trying to reopen a discussion regarding a 35 year old management decision that the courts have concluded were valid and properly promulgated.[47] Judge O'Kelly's dismissal decision clearly noted:

" 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)." [48]

The paddlers have not pursued an appeal of this 2006 court decision; it is now a final ruling.

Again, these filings of the appellants appear deliberate and wasteful, with complete contempt for the 2006 court decision that discussed the validity of previous forest plans. This claim has already been ruled upon and dismissed at great expense to the taxpayers and drain on the judiciary and Forest Service resources.

The time traveling kayak lobby is seeking redress and relief for agency Decisions no longer ripe for review, and for Decisions that might be made in the future.



[47] Pg 7 [AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006] *"The prohibition, as it has been for over twenty years, is a product of and traceable to the properly promulgated 1985 plan."*
The USFS also filed a detailed explanation on page 2-4 of Doc. 11 filed 07/07/0 [2:06-cv-00074-WCO]
[48] Pg 8, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

Reckless Demands and Request For Relief

Finally, the paddler appeal recklessly demands unrestricted year-round access to the popular swimming holes found at discrete locations on the Chattooga River. The kayak lobby demands these areas, not even included within the assessment, be flung open to fleets of kayakers with complete disregard for all other visitors to the resource. Oddly, the appellants present downriver data (that they claim is flawed) as justification for opening the entire Chattooga headwaters region to unlimited kayaker access. Again the kayakers focus complete attention on themselves and not what impact floaters have to the many other visitors. The only forgone opportunities for boaters is having to travel a few miles down the same river to enjoy kayaking elsewhere, or jump in for a swim upstream like everyone else. These pictures provide sufficient explanation as to why year-round unlimited boating would be inappropriate for this portion of the Wild and Scenic Chattooga and that the demands for access and a permanent injunction are reckless toward other Chattooga visitors. **They want to boating Here???** .