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VIA EMAIL [appeals-southern-regional-office@fs.fed.us](mailto:appeals-southern-regional-office@fs.fed.us)

US Forest Service

Attn: Appeal Reviewing Officer

1720 Peachtree Road, N.W., Suite 811N

Atlanta, GA 30309-9102

Re: Appeal by the Rust family 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

### **Response of Appellant the Rust Family to Comments of American Whitewater *et al.***

On April 3, 2012, American Whitewater *et al.* requested to intervene in the appeal filed earlier by the Rust family. In its intervention, this kayak lobby yet again asserts that once a person picks up a paddle near a kayak, private property rights cease to exist, and that person can float, walk, drag and hike anywhere, anytime, and under any circumstance. To back up that flawed assertion, the intervenors misconstrue and distort the February 2012 decision of the U.S. Supreme Court in *PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_ (2012). The Forest Service should disregard those comments.

In the *PPL Montana* decision, the Supreme Court made clear that determining title to land beneath the Chattooga in North Carolina depends upon whether that portion of the Chattooga was used, or susceptible of being used, in its ordinary condition as a highway of commerce by boats in customary use for trade and travel in the 1700s, when North Carolina became one of the original 13 states. The Court specifically reversed the underlying state court decision because of “its reliance upon the evidence of present-day primarily recreational use.” *Id.* slip op. at 21. Of course, this stretch of the Chattooga, which includes a 25-foot corkscrew waterfalls (among many other obstacles), was not used as a highway of commerce in 1789.

Trying to side-step this crystal clear law, the kayak lobby asserts that “where a river has been deemed non-navigable for title purposes it can remain navigable for purposes of public trust rights and federal management.” Of course, as the kayak lobby goes on to cite, “the public trust doctrine remains a matter of state law.” The kayak lobby conveniently fails to cite, however, that in North Carolina, “the public trust doctrine is not an issue in cases where ... the body of water regularly covering the land involved is not navigable in law.” *Gwathmey v. State of NC*, 464 S.E.2d 674, 342 N.C. 287 (NC 1995). Further the North Carolina General Statutes associate the scope of public trust rights in streams with “title to real property held by the State.” N.C. GEN. STAT. §1-

45.1. Thus, it is again crystal clear that the public trust doctrine does not apply to this non-navigable stretch of the Chattooga in which title is recognized to be held by the riparian owner.

The kayak lobby's last stab at side-stepping the crystal clear law on title and lack of public trust rights is a vague argument that "federal law requires, the public trust right to descend the river in human-powered canoes, kayaks, and rafts."<sup>1</sup> The kayak lobby provides no citation for this "federal law" or "management authority" because there is none. Clearly, it is not authority from the Wild and Scenic River Act because "the WSR Act does not open private lands to public recreation." WSR Guidelines, 47 Fed. Reg. 173 (Sept. 7, 1982), p.39454. The law is clear – the small Chattooga stream flowing below Grimshaws bridge is non-navigable water that is not subject to public access.

Ironically, after misconstruing and misapplying the clear law that protects the private stretch from invasion by thrill-seeking recreational creek-boaters, the kayak lobby asserts that "we respect private property rights and do not seek to violate the sanctity of those rights." Now that the U.S. Supreme Court has ruled, it is time for the kayak lobby to do just that, respect private property rights. It is also time for the Forest Service to do the same.

Respectfully submitted,

/S/Alan R. Jenkins

Alan R. Jenkins

COUNSEL FOR THE RUST FAMILY

cc: J. Rick Ledbetter, Kevin Colburn.

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<sup>1</sup> The kayak lobby asserts a ludicrous claim in which boating by paddle is some sort of entitlement or birthright, while boats with motors, PWCs, and inner tubes must be prohibited by the agency. The kayak lobby wants to have its cake and eat it too - on an exclusive, paddler-only-Chattooga, free from all other types of watercraft.