



United States  
Department of  
Agriculture

Forest  
Service

Southern Regional Office

1720 Peachtree Rd., NW  
Atlanta, GA 30309

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**File Code:** 1570  
12-08-03-0016  
12-08-11-0017  
12-08-12-0018  
**Date:** June 28, 2012

### **CERTIFIED MAIL R.R.R.**

Jenkins at Law, LLC  
ATTN: Mr. Alan R. Jenkins  
2265 Roswell Road  
Marietta, GA 30062

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

Dear Mr. Jenkins:

Pursuant to the authority granted to me by Title 36 Code of Federal Regulations (CFR) Part 219 Interim Appeal Regulations, this is my Decision on your Notice of Appeal (NOA) for the subject Decision. Your appeal is to the Decision to amend the Land and Resource Management Plan (LRMP) to regulate boating in the Upper Chattooga River Corridor. I have consolidated your Appeals 12-08-03-0016 (Chattahoochee-Oconee Amendment 1); 12-08-11-0017 (Nantahala Plan Amendment 22); and 12-08-12-0018 (Sumter Plan Amendment 1) into a single response.

### **BACKGROUND**

On January 31, 2012, Chattahoochee-Oconee National Forests (NFs) Forest Supervisor George M. Bain, NFs in North Carolina Acting Forest Supervisor Diane Rubiaco, and Francis Marion-Sumter NFs Forest Supervisor Paul L. Bradley, signed the respective Decisions for this Project, amending the existing LRMP. On March 19, 2012, I received your electronically-filed NOA, which was accepted by acknowledgement on March 23, 2012.

### **RELIEF REQUESTED**

You request that the language in the Decisions be amended to clarify property ownership rejecting an alternative which considers public use of private property, document impact of



boating access at Green Creek, and post and enforce boundaries between public and private property.

## **DECISION**

I based my Decision upon a thorough review of your NOA, the Decision Notice (DN), Finding of No Significant Impact (FONSI), Environmental Assessment (EA) and other project record documents for these Part 219 LRMP Amendments. In addition, I also considered intervenor comments filed on your appeals by American Whitewater.

I find that the Forest Supervisors complied with the relevant legal authorities, such as the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA) and Wild and Scenic River Act (WSRA). Therefore, I am affirming the Forest Supervisors' January 31, 2012, Decision. I have enclosed a detailed discussion of the issues raised in your appeals and the rationale which supports my findings for each issue.

This constitutes the final administrative determination of the Department of Agriculture unless the Chief, on his own volition, elects discretionary review of the Decision (36 CFR 219).

Sincerely,

*/s/ Ken S. Arney*

KEN S. ARNEY  
Reviewing Officer  
Deputy Regional Forester

Enclosure

## DISCUSSION OF ISSUES

### Issue 1      Whether the decisions are arbitrary and capricious regarding private lands.

The appellant contends the following:

- A. Without an adequate basis in law or clear explanation, the Forest Service has ignored its prior conclusions on landownership that it reached by formal analysis, presented to Congress, and stated to the public in the Federal Register, and even from its factual and legal analysis in this very proceeding. By misrepresenting landownership and public boundaries during this proceeding, the Forest Service has abused its discretion, acted in an unlawful, arbitrary and capricious manner, and has encouraged trespass onto private lands. (Appeal p. 7)**
- B. The Forest Service acted in an unlawful, arbitrary and capricious manner toward private landowners by making statements in the Decision and EA that are contrary to the position and action the Forest Service has taken in federal court concerning the same property and river portion. (Appeal, p. 10)**
- C. While the Forest Service has unlawfully back-tracked from its prior determinations and representations to Congress concerning the private property, the Forest Service simultaneously has granted numerous incremental concessions to the litigious boaters that want access to the family's property, unlawfully harming private property interests in the process and reflecting an unlawful bias. (Appeal, p. 11)**
- D. The Forest Service unlawfully failed to evaluate the impact of its new boating policy will have on adjacent private property interests, a policy that directly damages those interests. (Appeal, p. 12)**
- E. The Environmental Assessment violates the Constitution and applicable laws by stating that the Forest Service has authority to allow public access to private property. (Appeal, p. 14)**

“A Compendium of Questions & Answers Relating to Wild & Scenic Rivers” (p. 32) (project record 413) states the following regarding “Activities on Private Lands Within the WSR Corridor”:

Q. What are the effects of WSR designation on private landowners within the river corridor?

A. 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; however, administering agencies may highlight the need for amendment to local zoning (where state and local zoning occurs). People living with a river corridor may use their property as they had before designation.

Within the DN/FONSI (p. 8), Section 5.2 Alternatives Considered but not Evaluated in Detail states the following:

*Boating through private land on the upper segment of the Chattooga WSR*

The upper portion of the Chattooga Cliffs Reach has private land on both the upper segment of the Chattooga WSR. The landowners claim that public use would constitute trespass. Until decisions about navigability are made for the sections of the river with private land along them, or public access rights on this reach are determined, the U.S. Forest Service considers this section of the upper segment of the Chattooga WSR beyond the scope of this decision.

The EA documents the following (citations are at the end of each reference):

Trespass on private land

*Issue:* Concern that allowing boaters on the upper segment of the Chattooga WSR (from Green Creek downstream) may increase chances of boater trespass on private lands, with particular concern about boaters floating through adjacent private land between Grimshawes Bridge and Green Creek.

*Response:* This issue is outside the scope of this EA. The U.S. Forest Service does not encourage trespass on private lands; boating use under consideration in alternatives 8, 11, 12, 13, 13A and 14 focus on use downstream of Green Creek (please see “Alternatives Considered But Not Evaluated in Detail” for further clarification about why this EA does not analyze potential visitor use issues upstream of Green Creek. (Chapter 1, Section 1.7)

## 2.4 ALTERNATIVES CONSIDERED BUT NOT EVALUATED IN DETAIL

### Boating through private land on the upper segment of the Chattooga WSR

All boating alternatives (8, 11, 12, 13, 13A and 14) allow boating use downstream from Green Creek in the Chattooga Cliffs Reach. Any of these alternatives could have allowed boating to start about 1.8 miles further upstream at Grimshawes/Sliding Rock Bridge. However, this reach has private land on both sides of the river and the landowners claim that public use would constitute trespass.

Navigability and public access rights on this reach have not been formally analyzed by any federal or state agency or authority, nor has its navigability been adjudicated by a court of law. Public access rights and navigability are complex topics, and the outcome of a formal analysis or adjudication for the upper segment of the Chattooga WSR is uncertain. According to FSM 2354.14 - Navigability of Rivers, “Most rivers in the country have not been adjudicated as navigable or non-navigable. Consider them non-navigable until adjudicated otherwise.” Until decisions about boating are made for the sections of the river with public land along them, or public access rights on this reach are

determined, the U.S. Forest Service considers this decision to be beyond the current scope of analysis. (Chapter 2, Section 2.4, p. 45)

Project Record 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

The analysis teams are directed to follow the recommendations provided in the enclosed document, "Recommendations Regarding the Range of Alternatives for Management of the Upper Chattooga River."

"In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshaws Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river."

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

### **Finding**

I find the analysis adequately considered private land issues and the decisions are in compliance with laws regulations regarding private land.