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May 11, 2005

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VIA OVERNIGHT COURIER AND ELECTRONIC MAIL

Mr. Robert Jacobs  
Regional Forester  
Peachtree 25th Building  
7th Floor  
1720 Peachtree Road NW  
Atlanta, GA 30309

Re: Decision for American Whitewater's (AW) Appeal of the Sumter National Forest Land and Resource Management Plan Revision, No. 04-13-00-0026 (the "Decision")

Dear Mr. Jacobs:

The purpose of this letter is to set the stage for collaborative discussions regarding implementation of the above-referenced Decision.<sup>1</sup> As you know, our firm represents AW in its ongoing effort to restore floating access on the Headwaters section of the Chattooga Wild and Scenic River for non-commercial, hand-powered, canoes and kayaks.<sup>2</sup>

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<sup>1</sup> As described more fully below, the Decision requires that unless you determine the ban should be lifted immediately, a use capacity analysis will be required that will involve up to two years of data collection, data analysis, and an amended RLRMP. Yet the ROD (defined *infra*) already determined that the Headwaters corridor is a "remote and spectacular natural setting... *with relatively low visitor use.*" (ROD, Appendix H-5). All who have visited the Headwaters corridor know it to be a pristine wilderness with few visitors. It is extremely unlikely that a user capacity analysis will determine that the Headwaters are overused or that use limitations are warranted. Accordingly, both parties may divert valuable time and effort to other important issues if an agreement is reached at this early stage.

<sup>2</sup> Capitalized terms not defined herein have the meaning ascribed to them in AW's Appeal (No. 04-13-00-0026).

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### **Background**

On January 30, 2004, your office published the *Record of Decision, Final Environmental Impact Statement and Revised Land and Resource Management Plan* for the Sumter National Forest (the “ROD”). The ROD re-instituted a total ban on all primitive floating on the northernmost one-third of floatable river miles of the Chattooga Wild and Scenic River (WSR)—including banning access to the only stretch of river that traverses the Ellicott Rock Wilderness.

On April 12, 2004, John Austin, Kevin Colburn and I traveled to your Atlanta offices to meet with you, Jerome Thomas, and Chris Liggett regarding the portion of the ROD that banned primitive floating.

On April 15, 2004, AW timely filed its Notice of Appeal of the portion of the ROD that re-instituted the floating ban on the Chattooga Headwaters.

On April 28, 2005, Gloria Manning, as Reviewing Officer for the Chief of the United States Forest Service, issued the Decision. Upon issuance, the Decision became the final decision of the USFS regarding AW’s appeal.

On May 13, 2005, the Decision will become the final administrative decision of the Department of Agriculture, thus becoming subject to judicial review, provided that the Secretary does not elect to discretionarily review the Decision before that date. 36 C.F.R. §§ 217.7 and 217.17.

### **The Decision**

The Decision requires AW and the Regional Forester to collaborate “in the design and execution of the capacity analysis” referenced in the Decision. (Decision Section, ¶ 2(2)). AW is eager to assist in this effort. AW believes that a collaborative implementation effort can only be successful if AW and the Southern Regional Office have a mutual understanding of what the Decision says.

To that end, AW’s interpretation of the Decision is set out below. To the extent you understand any portion of the decision differently, we hope you will alert us promptly so that we can come to a consensus and move on to the important work of implementation.

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AW interprets the Decision as having two main parts: (1) the Reviewing Officer's findings and conclusions (listed under the "Discussion" section of the Decision); and (2) the Reviewing Officer's Order (issued under the "Decision" section). The Reviewing Officer's findings and conclusions are the basis for the Order and are therefore helpful in clarifying any ambiguities in the Order's mandate.

We understand the Chief's findings and conclusions as follows:

- Whitewater boating (canoeing and kayaking) is specifically recognized as one of the recreational opportunities available on the Chattooga Headwaters. Recreation is one of the outstanding remarkable values (ORVs) of the Chattooga Headwaters, not merely on the Chattooga as a whole. Section 10(a) of the WSR requires the river-administering agency to protect and enhance ORVs like recreation, which includes whitewater boating. Thus whitewater boating should be protected and enhanced on the Headwaters. If it becomes necessary to limit use on the Headwaters, the agency must ensure that all potential users, including whitewater boaters, have a fair and equitable chance to obtain access to the Headwaters. Any use limitations should apply equally to all users of the Headwaters river corridor (e.g., hikers, horseback riders, anglers, swimmers, floaters, etc.). (Discussion Section, ¶ 2, 3 and 4).
- The Wilderness Act and related regulations require that the Ellicott Rock Wilderness must be made available for human use to the optimum extent consistent with the maintenance of primitive conditions. Thus whitewater boating must be permitted on the Headwaters up to the point that all uses combined begin to degrade the primitive conditions of the Ellicott Rock Wilderness. (Discussion Section, ¶ 5).
- USFS policy relating to wilderness requires that direct controls and restrictions, such as banning or limiting use: (1) must be minimized; (2) must be necessary to protect the wilderness; and (3) are only appropriate after indirect measures, such as education, have failed. Further, in the drastic instance where limitation is required, visitor use must be based on periodic estimates of user capacity. Thus whitewater boating cannot be limited on the Headwaters, much less banned, unless a limitation is absolutely necessary to protect the

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wilderness--and even then, only after indirect measures, such as education, have been exhausted and valid determinations of over-capacity have been made. (Discussion Section, ¶ 6).

- If nonmotorized floating, combined with all other uses on the Headwaters begins to degrade the primitive conditions of the Ellicott Rock Wilderness, or degrade other ORVs on the Chattooga WSR, and if indirect measures have proven ineffective, the Regional Forester may, in conjunction with similar restrictions on all users contributing to the degradation, (1) disallow or restrict the number of on-river and in-corridor recreation users to the extent necessary to rectify the problem; (2) limit certain types of recreation uses to rectify the problem; or (3) limit recreation uses by time of day or time of year to rectify the problem. Before the Regional Forester takes any of these drastic measures, however, there must be adequate evidence of their necessity. (Discussion Section, ¶ 8).
- Claims of general resource impacts, such as “more users equals less solitude” cannot justify singling out boating, or any other *type* of use, for a use restriction. Any restriction imposed on a type of primitive use of the Headwaters must apply equally to all types of primitive use. Any limitations imposed specifically on primitive floating must be justified by specific evidence of the negative impacts of primitive floating, and primitive floating alone, on the Headwaters corridor. (Discussion Section, ¶ 9).
- There is no basis in law, regulation or policy to ban whitewater boating on any river managed by the USFS due to concerns relative to safety, and search and rescue. (Discussion Section, ¶ 10).

The Order. We understand the essence of the Chief’s Order to be that within two years the Regional Forester should issue a new decision opening the Headwaters to unrestricted, year-round floating unless interim user-capacity analyses demonstrate that limitations on floating and other uses are necessary to ameliorate substantial degradation of the Chattooga’s ORVs or the Ellicott Rock Wilderness’s primitive characteristics. Further, in the unlikely event that the analyses show some use limitations are necessary, those limitations must apply equally to all primitive recreationists (unless the user capacity problems are clearly specific to floating). Specifically, we understand the Chief’s Order as follows:

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- The ROD's ban on boating the Headwaters is reversed. There is no empirical evidence to single out primitive floating for an all-out ban, particularly when other primitive users enjoy unrestricted access to the Headwaters. Limiting primitive boating on the Headwaters violates the WSRA and the Wilderness Act absent failed attempts at indirect measures and specifically tailored empirical evidence that such limitation is necessary. (Decision Section, ¶ 1).
- The Regional Forester must study the visitor use capacity along the Headwaters corridor. This study must include primitive floating on the Headwaters. (Decision Section, ¶ 2).
- Barring unforeseen circumstances, the Regional Forester must, within two (2) years, adjust or amend the RLRMP's decision regarding access on the Headwaters. (Decision Section, ¶ 2).
- Because Issue #13 of the ROD was reversed, management of the Headwaters reverts back to the former LRMP (1985). Since that LRMP also banned floating on the Headwaters, the Headwaters will remain officially closed to boating. However, as a practical matter, boating should be permitted during the two-year study period in conjunction with the required user capacity analysis since it is impossible to analyze total use with one use artificially absent from the study area. The Chief specifically directs the Regional Forester to "conduct the appropriate use capacity analysis, including non-commercial boat use," and further points out that the Regional Forester has the authority to permit boating on sections of the river that are currently closed. (Indeed, how could boating use on the Headwaters be studied vis-à-vis other primitive uses unless boating is permitted.) (Decision Section, ¶ 2(1)).
- The Regional Forester must involve AW (the only other party to this Appeal) in the design, implementation and interpretation of the user capacity analysis. (Decision Section, ¶ 2(2)).

Hopefully AW's understanding of the Decision comports with your own. To the extent your understanding of any of the above portions of the Decision differs from ours, please notify us immediately so that we can discuss the issue, and if necessary, seek the guidance of the Chief.

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### **Implementation of the Decision**

So long as we have a mutual understanding of what the Decision says, implementation of the Decision should be relatively straightforward. AW's proposal is simple. It is outlined below in the categories of Scope, Issues, Proposed Format and Timetable.

Scope: The scope of the analysis, and resulting management decision, will be limited to the area at issue in the Decision: the corridor of the Chattooga WSR north of Highway 28. It will address total user capacity with all potential uses present.

Issues:

- (1) How many total primitive recreationists used the Headwaters corridor during the study period (broken down by month and season);
- (2) What percentage of the total users is attributable to each type of primitive recreation: day-hikers, backpackers, horsepackers, campers, anglers, boaters, hunters, and other forest users;
- (3) Is the Headwaters corridor used beyond its capacity;
- (4) If so, what measures could be instituted to establish use at its optimum capacity;
- (5) Are any management activities artificially increasing the number of users accessing the resource;
- (6) How do river flows and the seasons impact use patterns;
- (7) What cumulative effects are inflicted upon the physical environment of the Headwaters corridor by total use and the various uses;
- (8) Which effects are common to all user groups and which are uniquely attributable to specific user groups;
- (9) Are the ORVs of the Chattooga Headwaters or the primitive conditions of the Chattooga Headwaters corridor threatened by the level of human use;
- (10) Other issues as agreed by the parties.

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Proposed Format

**Goal:** To determine whether primitive recreational use exceeds the biophysical and/or socially desired conditions for the Chattooga Headwaters corridor (and what level of use limitation would likely meet those objectives if any limitations are needed).

**Methods:**<sup>3</sup>

- (1) *Spot counts:* User numbers will be observed and recorded at various times and locations. At a minimum, spot counts should occur in parking areas, on trails, at campsites and on the river. Users should be identified by type (angler, hiker, boater, etc.) where possible, or noted as “unclear/general” when not possible. Spot counts should occur at times of low, medium and high river flows, as well as during all seasons.
- (2) *User Registration:* A system of registration will be implemented for all users similar to the registration requirements employed in other parts of the adjacent forests. Users will be required to identify name, address, date, number in party, entrance point, exit point, estimated start and end times, and vehicle identification.
- (3) *User Surveys:* In conjunction with the spot counts, user surveys should be distributed by the spot counter. User surveys should also be distributed to those persons who register pursuant to #2 above. The survey should focus on the number of other visitors encountered, and impressions regarding the physical and social environment.

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<sup>3</sup> “[N]o one has yet produced a universally accepted method for determining a finite, objective capacity of wild lands.” (USFS Outfitting Guide). Nevertheless, it is well established that use capacity analyses involve:

inventories of physical capacity (i.e. trailhead, parking lots, places to camp, environmental impacts, etc.) and/or social capacity (desirable maximum numbers of people, numbers of encounters, etc.).

(USFS Outfitting Guide).

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(4) *Field Observations*: persons with the requisite expertise should deploy once each season to observe the physical conditions of the corridor. To the extent unsustainable effects are discovered, the expert should re-visit the affected area to determine and document the cause of the undesirable effect and recommend possibilities for amelioration.

(5) *Other methods*: as agreed by the parties.

**Peer Review**: To ensure fairness to all parties, independent third-party experts, from within or without the USFS (as agreed by AW and the Regional Forester), will review all aspects of the analysis, including the design, implementation, and interpretation of the user capacity study. In addition, specialists from all affected forests should be involved throughout the process.

Timetable:

5/11/2005 – 6/1/2005	Affected Forests collaborate with each other and with AW to understand the Decision and to cement a plan for conducting use capacity analyses on the Chattooga Headwaters corridor.
7/1/2005 – 4/28/2007	Restoration of unrestricted, year-round floating access on the Headwaters for the purpose of equalizing wilderness use in conjunction with the use capacity analysis. <sup>4</sup>
1/1/2006 – 12/31/2006	User capacity study period.
1/1/2007 – 4/28/2007	Parties evaluate the data and collaborate regarding a revised decision.

<sup>4</sup> No accurate test of user capacity on the Headwaters is possible unless all primitive users enjoy the same access to the resource. Since other primitive recreationists currently enjoy unrestricted access to the Headwaters, it makes the most sense to allow boaters that same access rather than to limit all other users to the same extent as boaters (which would mean no one would have access) or to create some median artificial use limitation on all users. However, AW is open to an equitably apportioned use limitation during the study period so long as it is designed to produce accurate user capacity data that includes all potential users. Opening the Headwaters to floating on July 1, 2005 will allow several months for the “newness appeal” of floating access to wear off and for floating use to level off at average levels for meaningful analysis during the study period.

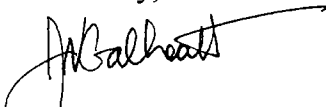
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4/28/2007	Regional Forester publishes new decision regarding floating access on Chattooga Headwaters.
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We look forward to discussing the decision and its implementation with you at your earliest convenience. We hope that we can discuss these issues with you (at least generally) on or before May 27, 2005. I will contact your office again soon regarding a mutually convenient time for an informal discussion.

In the meantime, please do not hesitate to call me for any reason at 214-758-6602.

Sincerely,



J. Nathan Galbreath

cc: John Austin