

**UNITED STATES OF AMERICA  
DEPARTMENT OF AGRICULTURE  
UNITED STATES FOREST SERVICE**

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

Appeal No. \_\_\_\_\_

By  
AMERICAN WHITEWATER  
Appellant

**NOTICE OF APPEAL AND STATEMENT OF REASONS**

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# NOTICE OF APPEAL

## I. INTRODUCTION:

American Whitewater (hereinafter “AW” or “Appellant”) hereby appeals the resolution of “Issue #13” in the Record of Decision Revised Land and Resource Management Plan for the Sumter National Forest (the “ROD/FEIS”).<sup>1</sup> Issue #13 bans non-commercial, non-motorized canoes and kayaks<sup>2</sup> from any and all access to the northernmost one-third of floatable river miles on the Chattooga Wild and Scenic River (“WSR”).

Issue #13’s moratorium on one of the oldest and least environmentally impactful forms of primitive recreation violates federal law, strays from the United States Forest Service’s (“USFS”) usual and commendable approach to managing WSRs in similar public forests and wilderness areas, and ignores the equities which clearly mitigate in favor of restoring access for boaters. As an initial matter, the resolution of Issue #13 contravenes the Federal Wild and Scenic Rivers Act (WSRA), the National Environmental Policy Act (NEPA), the Wilderness Act, the Multiple-Use Sustained-Yield Act (MUSYA), the Forest and Rangeland Renewable Resources Planning Act (RPA), the National Forest Management Act (NFMA), the Administrative Procedures Act (APA), and the United States Constitution, as well as relevant federal case authority. Second, the decision on Issue #13 insupportably strays from the way the USFS manages every other river mile of every other WSR in the United States. Finally, and perhaps most importantly, the equities strongly mitigate in favor of restoring the traditional, low-impact access of hand-powered canoeists and kayakers to exceptional river recreation on the Headwaters section of the Chattooga WSR. For these reasons, and because no data or studies support the decision, AW appeals the resolution of Issue #13 and requests the following relief:

## II. RELIEF REQUESTED:

AW requests a modification of the ROD/FEIS’ Preferred Alternative (Alternative I) substantially in the form of proposed Alternative E, restoring year-round access for self-guided

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<sup>1</sup> AW also appeals the Record of Decision for the Revised Land and Resource Management Plan for the Chattahoochee National Forest (C-ROD) to the extent that the C-ROD adopts or is consistent with the Sumter ROD/FEIS’ resolution of Issue #13. The Nantahala National Forest, the Chattahoochee National Forest and the Sumter National Forest all border the Chattooga Wild and Scenic River. Thus all three National Forests exercise concurrent jurisdiction over the river. An agreement between the forests provides that the Sumter National Forest will take the lead role in managing the Chattooga Wild and Scenic River. In accordance with this arrangement, the Revised Land and Resource Management Plan for the Nantahala National Forest (N-RLRMP) takes no position on this issue. Similarly, the C-ROD makes little mention of the boating ban, deferring instead to the decision in the Sumter ROD/FEIS. Because the main discussion of the boating ban is contained in the Sumter ROD/FEIS, Appellant directs the primary thrust of its appeal against that document. All arguments made, however, are meant to apply equally to the C-ROD to the extent the C-ROD bans boating on the Chattooga Wild and Scenic Headwaters.

<sup>2</sup> Throughout this Notice of Appeal, Appellant will interchangeably refer to primitive recreationists who float rivers using non-commercial, non-motorized canoes and kayaks as “boaters” or “paddlers.” We may also refer to such persons who generally prefer to float steep technical whitewater streams like the Chattooga Headwaters as “creek boaters.” The act of using non-commercial, non-motorized canoes and kayaks will be interchangeably referred to as “boating,” “paddling,” “floating,” “canoeing,” or “kayaking.”

groups of non-commercial, non-motorized canoeists and kayakers to float the Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.<sup>3</sup> In support whereof, Appellant states as follows:

**III. BACKGROUND:**

**A. Description of the Headwaters:**

The section of the Chattooga WSR at issue in this appeal is known as the “Headwaters” section, or the section “above Highway 28.” The Headwaters (or the section above Highway 28) is defined as the portion of the Chattooga WSR between Grimshawes Bridge in North Carolina and the Highway 28 Bridge in South Carolina. Four roads subdivide the Headwaters into three subsections, known as Grimshawes Bridge to Bull Pen Bridge (GS-BP), Bull Pen Bridge to Burrells Ford Bridge (BP-BF), and Burrells Ford Bridge to the Highway 28 Bridge (BF-28) (see Table 1 and the Headwaters map below). These sections cover approximately 21 river miles in the states of Georgia, South Carolina and North Carolina.

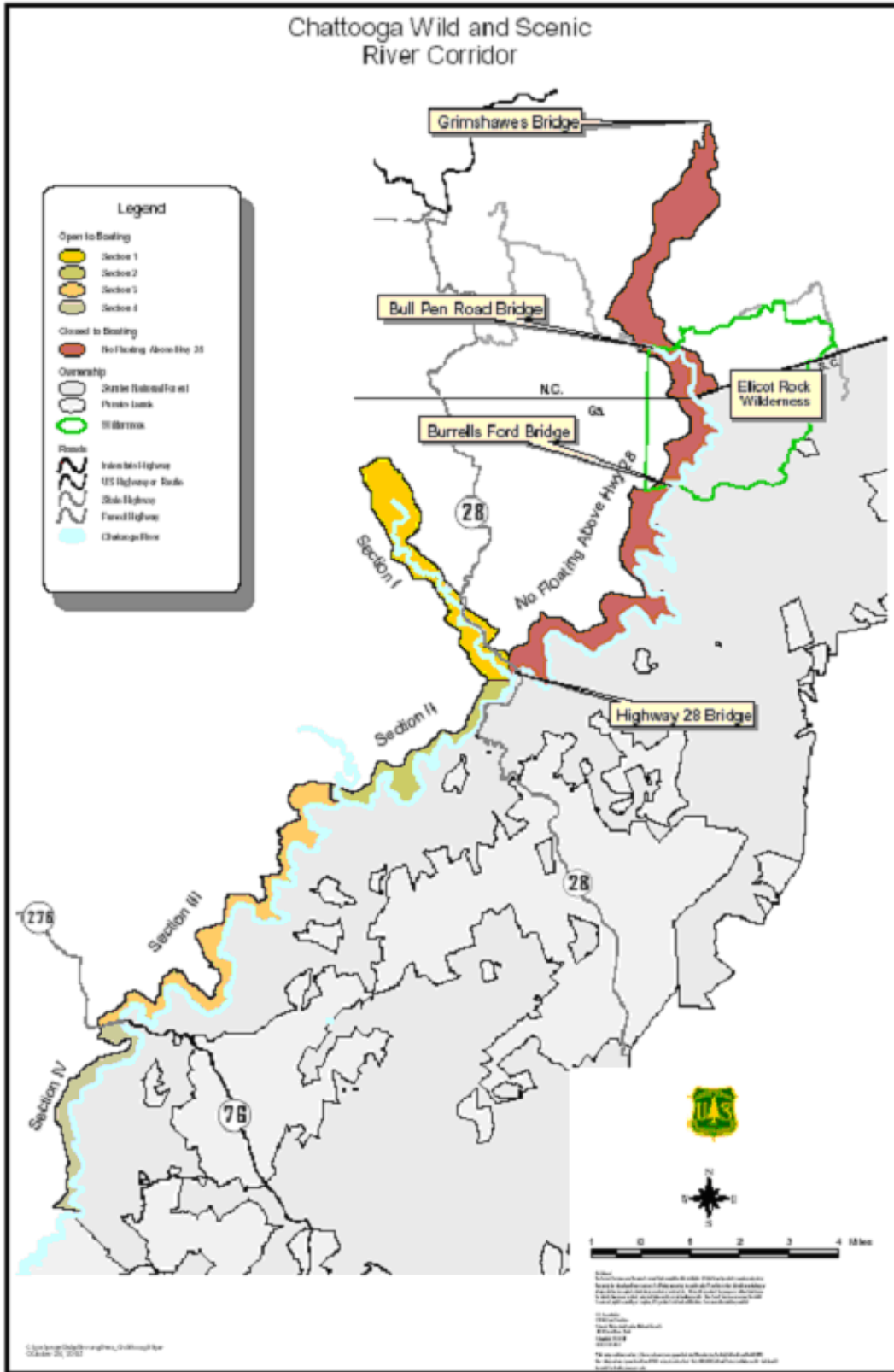
**Table 1**

Section	W&S River Classification	State	Length (miles)
Grimshawes Bridge on NC-1107 to Bull Pen Bridge (GS-BP)	Wild, Scenic & Recreational	NC	5
Bull Pen Bridge to Burrells Ford Bridge (BP-BF)	Wild and Scenic	NC, SC, GA	5.7
Burrells Ford Bridge to Highway 28 Bridge (BF-28)	Wild, Scenic & Recreational	SC & GA	10

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<sup>3</sup> Under this alternative, the Headwaters would be open to boating all year (self-regulating alternative). There would be: (i) no limits on the number of trips per day; (ii) a maximum group size of 12 craft per trip, and a minimum group size of 2 craft per trip, (iii) self-guided use; (iv) only inflatable kayaks and hardboats (canoes and kayaks) would be allowed; (v) no new access points would be developed; and all existing facilities would be maintained.

# Chattooga Wild and Scenic River Corridor



## **B. History of the Ban:**

In 1971, local USFS personnel conducted a study of the Chattooga's suitability for protection under the Wild and Scenic Rivers Act. The Study recommended that Congress include all sections of the Chattooga River in the Wild and Scenic Rivers System, based in large part on the Chattooga's outstanding recreation opportunities—specifically whitewater boating on the Headwaters Section. Based upon this study, Congress in 1974 included the Chattooga among the first rivers protected by the WSRA. Unexplainably, only two years after the Chattooga received WSR protection, local USFS personnel banned one of the very forms of outstanding river recreation that led to the river's protection.

The first official decision to ban boating above Highway 28 was made in connection with the 1976 Sumter National Forest Land and Resource Management Plan (LRMP). The 1976 LRMP banned boating for the stated reason of "public safety." No analysis or support was included in the LRMP in connection with the ban. The 1976 decision awarded local anglers a near river recreation monopoly on the Headwaters section of the Chattooga. The ban was made arbitrarily, outside of an open NEPA-type process, without public input, and in direct contradiction to the Study produced by the Sumter National Forest just five years earlier to support designation of the Chattooga as a WSR.

In 1985, the ban was re-instituted in connection with a new Sumter National Forest LRMP. In contrast to the 1976 ban where "public safety" was the stated justification, the 1985 floating ban stated that protection of "quality trout fishing" necessitated denying boaters access to the Headwaters. As with the 1976 ban, no supporting documentation or research was provided (or presumably considered) in connection with the decision.

Between the late 1970s and early 1990s, many canoesists and kayakers continued to float the Chattooga Headwaters. Most of these paddlers were either unaware of the decision to ban boating, or had heard that the ban was an "on-paper decision" that was not actually enforced. Consequently, the 1976 and 1985 LRMPs did not meet with substantial opposition from the boating community as their ability to float the Headwaters remained largely unchanged. Also contributing to the lack of significant opposition to the 1976 and 1985 bans was the fact that available equipment prevented all but a handful of expert boaters from navigating most of the Headwaters section.

Beginning in the early 1990s, the boating community began to take a greater interest in the LRMP decisions that officially banned primitive whitewater recreation on the Chattooga Headwaters. The boating community's interest was sparked by improved equipment (that brought the Headwaters within the skill-level of more paddlers) and a general growth in popularity of whitewater recreation. Discontent mounted throughout the 1990s. This new awareness and discontent led Appellant to begin working with local decisionmakers to find a workable solution for management of the Chattooga Headwaters that would restore floating access. For a timeline of the paddling community's efforts to lift the ban, please see [Appendix 1](#).

The history of the ban is important for two reasons. First, it shows that an open and objective analysis of boating above Highway 28 has never been done. Second, it suggests that no weight should be accorded to the fact that the ban has been in place for 28 years. As noted



above, a lack of awareness and lack of enforcement allowed the ban to slip by largely unnoticed until the early 1990s. Since that time, displaced boaters have been voicing their discontent with the irrational decision and taking all available steps to restore access to the Headwaters that paddlers enjoyed prior to 1976.

#### **IV. BASIS FOR RELIEF REQUESTED:**

##### **A. Denying Boaters Access to the Headwaters Is Inconsistent with Applicable Law and Policy**

###### **1. Resolution of Issue #13 Contravenes the Federal Wild and Scenic Rivers Act**

The ROD/FEIS institutes a total ban on all boating above Highway 28. This ban is wholly inconsistent with the Wild and Scenic Rivers Act (WSRA). Section 1281 of the WSRA provides in relevant part:

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 without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.

16 U.S.C. § 1281(a) (emphasis added). Section 1281 has two commands: (1) values which caused a river to be designated a WSR must be protected and enhanced; and (2) if a proposed use of a WSR does not *substantially* interfere with public use and enjoyment of river values, then the proposed use should not be limited.

###### **(a) Boating Above Highway 28 Is a Value that Must Be Protected and Enhanced**

In 1968, Congress passed the WSRA. The purpose of the act was to create a national wild and scenic rivers system so that rivers with “outstandingly remarkable scenic, recreational ... or other similar values ...[would] be preserved in a free-flowing condition, and ... be protected for the benefit and enjoyment of future generations.” 16 U.S.C. § 1271. The Chattooga River was among the first rivers in the United States to be designated under the system, receiving its designation as a WSR in 1974. To convince Congress that the Chattooga River was eligible for inclusion in the WSR system, the USFS published a *Wild and Scenic River Study Report* on June 15, 1971 (the “Study”).

Whitewater boating was one of the outstandingly remarkable values upon which the USFS based its recommendation for the Chattooga’s inclusion in the WSR system. The USFS recommended the following to Congress:

Designating the Chattooga River a part of the National Wild and Scenic River System would preserve:

a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like ...whitewater canoeing ... will enhance the recreation opportunities for many people in an area *where river-oriented recreation is scarce*.

a river capable of supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river...

*Study*, 66-67. The Study makes clear that whitewater boating is an outstandingly remarkable value that should be protected by including the Chattooga in the WSR system. Indeed, ‘Appendix H’ to the ROD/FEIS does not dispute this fact; it provides:

One of the primary reasons for nominating the Chattooga River for inclusion in the National Wild and Scenic River System was to protect and enhance its outstanding recreational value: a remote whitewater river environment where solitude, adventure and challenge could be experienced.

ROD/FEIS, at BF-4 (*citing* Federal Register 1976, USDA Forest Service 1996). Under the first command of section 1281, whitewater boating must be protected and enhanced because it is one of the outstandingly remarkable values that caused the Chattooga to be included in the WSR system. Banning whitewater boating on over one-third of the Chattooga WSR—particularly on the cherished wilderness portions—destroys, rather than protects and enhances, this important value.<sup>4</sup>

While it may be argued that Section 1281 is not violated because whitewater boating is allowed on lower sections of the Chattooga, this argument has no merit. First, completely banning one of the Chattooga’s remarkable values anywhere on the river could not possibly protect and enhance that value. Some limitation on a recreational value may serve to protect and enhance that value, but an all-out ban (unless imposed temporarily to remedy a problem associated with that value) eviscerates the recreational value altogether. Second, Congress included the Chattooga in the WSR system in part because whitewater boating is an outstandingly remarkably recreational value, *specifically above Highway 28*.

The Chattooga River was considered for inclusion in the WSR system in six distinct sections.<sup>5</sup> Each of these sections was analyzed for inclusion separately, and each exhibited different outstandingly remarkable values and received different levels of protection based on those values. There is no question that the Headwaters Section of the Chattooga was protected under the WSR system, in part, because of the exceptional recreation value of boating above Highway 28. For example, the 1971 Study upon which Congress based its protection of the Headwaters section recommends a “scenic” classification for the uppermost section above Highway 28, noting:

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<sup>4</sup> The decision bans boating on 21 of 57 floatable river miles.

<sup>5</sup> As noted in the Study: “The Chattooga River can be divided into six distinctive sections under the Guidelines for evaluating Wild, Scenic and Recreational River Areas Proposed for Inclusion in the National Wild and Scenic Rivers System under Section 2, Public Law 90-542, and agreed upon by the Departments of Agriculture and Interior” (USFS Study, 1971-70).

Grimshawes Bridge crossing [which is 21 miles above Highway 28] is accessible by a country road. The section below the bridge can be floated by rubber raft and provides exciting trips over small rapids and cascades ...

*Study, 73.* As another example, the Study recommends a “wild” designation for several miles of river upstream of Highway 28 because, among other reasons:

Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen.

*Study, 74* (emphasis added). The Study even includes a map labeling Grimshawes Bridge (the beginning of the Headwaters section) as the “beginning of rafting water” and discusses several “canoe launch sites” on the Headwaters. *Chattooga River as a Wild and Scenic River*, at 158. (For a full listing of all references to floating above Highway 28, please see [Appendix 2](#)). Thus Congress included the Headwaters Section in the WSR System with the understanding that there would be launch sites available for hand-powered boaters to float the Headwaters.

These excerpts from the 1971 Study unequivocally demonstrate that whitewater boating above Highway 28 was an existing, outstandingly remarkable value warranting inclusion of that section of the Chattooga in the WSR system. Rapids and the paddling experience are described in detail for each section above Highway 28, and boating is described as “the best way” to see the Headwaters section. Thus whitewater boating river values contributed to, if not controlled, how the Study’s drafters viewed and classified the Chattooga above Highway 28. That value must accordingly be protected and enhanced by any LRMP under the first command of section 1281 of the WSRA. 16 U.S.C. § 1281(a). The ROD/FEIS violates this first command by banning one of the very values it is required to protect and enhance.

**(b) Boating Will Not “Substantially Interfere” with River Values**

The second mandate of section 1281 is that proposed uses of a WSR should not be limited unless they ‘substantially interfere’ with the river’s remarkable values. 16 U.S.C. § 1281(a). As the Ninth Circuit interpreted section 1281: “only those uses that, consistent with the protection and enhancement of values, ‘substantially interfere’ with enjoyment and use of the values at issue ... are to be limited.” *Hells Canyon Alliance v. United States Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000). The ROD/FEIS’s ban on boating above Highway 28 contravenes this second command under section 1281 for two reasons.

First, a value cannot substantially interfere with itself. As noted above, whitewater boating above Highway 28 is one of that section’s outstandingly remarkable values. Thus all proposed uses of the Chattooga above Highway 28 should be scrutinized under section 1281 to determine whether they ‘substantially interfere’ with, among other things, whitewater boating. Since whitewater boating cannot substantially interfere with itself, it cannot be limited (unless some form of limitation would actually protect and enhance the whitewater boating value).

Second, whitewater boating does not ‘substantially interfere’ with any other outstandingly remarkable value. While the ROD/FEIS makes vague references to the *possibility*

of some conflict between boaters (a “new” user group) and anglers or hikers (“existing” user groups), there is nothing in the record that demonstrates the *possible* conflicts would be substantial—and, as discussed more fully below, all available data suggests that there will be *no* conflict between such uses, much less ‘substantial interference.’ *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, (D. Or. 2002) (refusing to ban motorized boats on a section of WSR where the record did not demonstrate the extent to which the proposed use “*in fact* substantially interfere[d] with the river’s outstandingly remarkable values.”) (emphasis added) (citing *Hells Canyon*, 227 F.3d at 1178).

Another important reason that the record fails to demonstrate ‘substantial interference’ is that the ROD/FEIS’s reasoning is premised upon a false assumption: that whitewater boaters would be a “new” user group. The ROD/FEIS’s vague projections of conflict erroneously pit a “new” user group against “existing” user groups. This paradigm for analyzing potential conflicts grossly misses the mark. The only reason whitewater boaters are a “new” user group is because the two prior (1976 and 1985) LRMPs also banned whitewater boating in violation of section 1281. If any decision alters the *status quo ante*, it is the decision to ban a historical use that is cited in the Study as an important river value. Accordingly, the ROD/FEIS’s “new” versus “existing” analysis of conflict is based upon a false assumption and cannot substantiate vague claims of user conflicts. Nevertheless, even if everything in the ROD/FEIS is accepted as true, there is no evidence that whitewater boating “*in fact substantially interferes*” with other values. *Hell’s Canyon*, 227 F.3d at 1178 (emphasis added).

Under the second command of section 1281, unless there is clear evidence that whitewater boating ‘substantially interferes’ with outstanding river values, the ROD/FEIS cannot even *limit* boating—much less ban it.<sup>6</sup> Thus the resolution of issue #13 also violates the second command of section 1281 because whitewater boating cannot interfere with itself, and because there is no evidence in the record that whitewater boating ‘in fact substantially interferes’ with any other river values.

## 2. The Resolution of Issue Thirteen Violates the Procedural and Substantive Requirements of NEPA

Under NEPA, actions that significantly affect the environment require the preparation of an Environmental Assessment (“EA”) and an Environmental Impact Statement (“EIS”). 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1508.18(a). An EA is a brief preliminary evaluation used to determine whether a proposed action will significantly effect the environment such that an EIS is required. 40 C.F.R. § 1508.9. For “actions significantly affecting the quality of the human environment,” NEPA requires the agency to prepare a detailed EIS. 42 U.S.C. § 4332(2)(c). On the other hand, if the EA shows that “a category of actions ... do not individually or cumulatively have a significant effect on the human environment and ... have been found to have no such effect” then an EIS is not required. In the latter case, the agency may simply enter

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<sup>6</sup> The USFS Manual comports with the second mandate of Section 1281(a) of the WSRA. The manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action” *USFS Manual* § 2300. Here no indirect techniques were employed before resort was made to the most drastic form of direct management: zoning or completely banning a use.

a Finding of No Significant Environmental Impact (FONSI) and implement the proposed action. In the case of an LRMP, an EIS is automatically conducted.

The Council on Environmental Quality (CEQ) has promulgated regulations governing the implementation of NEPA. The CEQ notes that the purpose of the regulations is “to tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA].” 40 C.F.R. § 1500.1(a). These regulations are entitled to “substantial deference” as interpretations of NEPA. 40 C.F.R. §§ 1500-1508. At the outset, the procedures provide that:

NEPA procedures must insure that environmental information is available to public officials and citizens .... The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question ...

40 C.F.R. § 1500.1(b). To ensure the above purpose, the CEQ regulations require agencies to “*rigorously explore* and *objectively evaluate* all reasonable alternatives.” 40 C.F.R. § 1502.14(a) (emphasis added).

**(a) The ROD/FEIS Fails to Respond to Appellant’s Comments**

NEPA’s requirement to “rigorously explore” and “objectively evaluate,” a proposed action involves responding to public comments. Under the CEQ regulations, an agency must respond to comments received regarding a draft EIS. 40 C.F.R. §1503.4. If the agency determines that the comments do not warrant further agency response, an explanation must be given “citing the sources, authorities, or reasons which support the agency’s position...” 40 C.F.R. §1503.4(a)(5). Appellant submitted substantial comments to the Forest Service in connection with the draft Sumter EIS.<sup>7</sup> The Forest Service neither adequately responded to those comments nor offered any explanation as to why those comments were ignored. The Forest Service also failed to cite any sources, authorities or reasons for its position.

**(b) The ROD/FEIS Fails to Disclose Methodology, Expert Opinion and Hard Data**

Also in connection with NEPA’s requirement to “rigorously explore” and “objectively evaluate” proposed actions, agency decisionmakers must identify the methodologies used, and must “make explicit reference by footnote to the scientific and other sources relied upon.” 40 C.F.R. § 1502.24; *see also, Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). Particularly, where the agency relies upon opinions of its own experts, it must present the hard data supporting such opinions. *Id.* These reporting requirements must be met within the NEPA document. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-1214 (9th Cir. 1998).

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<sup>7</sup> Appellant’s comments are attached hereto as Appendix 3.

The 2003 Sumter ROD/FEIS provides—not scant—but no citation to any scientific or other sources for the multiple technical conclusions advanced in the ROD/FEIS. The ROD/FEIS makes the following technical conclusions:

- boating above Highway 28 will “likely have impacts on the social and physical resources.”
- “negative impacts that could be expected if boating were to be permitted include new user access paths and trails.”
- more “search and rescue responses would likely be needed.”
- there are “adequate opportunities for ‘creek boating’ experiences in the area.”

*ROD*, at 13. It is these conclusions and no others that are cited in the ROD as the basis upon which boating is forbidden above Highway 28.<sup>8</sup>

Yet neither the FEIS nor the ROD itself cites to any scientific or other support for any of the above stated conclusions. The only source mentioned in the FEIS in connection with the boating moratorium is the “Bixler and Backlund 2002” study.<sup>9</sup> And this study is mentioned only for the propositions that (1) fishermen have “strong emotional ties” to a river, and (2) “fifty-one percent of [surveyed members of two local trout unlimited chapters] indicated that they had between one and three substitutes [for the Chattooga]” while only fifteen percent said they had no substitute.<sup>10</sup> These propositions (and the study from which they derive) do not support the technical conclusions upon which the ROD/FEIS banned boating.<sup>11</sup> Thus there is absolutely no scientific or other data advanced in the ROD or the FEIS to support a boating ban. This lack of support violates the procedural requirements of NEPA.

In addition to federal law requiring scientific inquiry in the NEPA process, public policy also demands a more reasoned NEPA analysis. The public should not be required to invest tens of thousands of dollars in a complex, time-consuming NEPA analysis, if a simple narrative analysis, like the one provided in Appendix H to the Sumter ROD/FEIS, can justify complex decisions that allocate recreational use. NEPA’s procedural requirements exist, in part, to ensure that agencies will avoid the very type of “seat-of-the-pants” approach applied here. Instead, public policy demands that agencies apply the best available technical methods and information when allocating public resources under NEPA. The Forest Service has not complied with

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<sup>8</sup> It is evident from the language used in these conclusions (“likely have impacts”, “could be expected”, “would likely be needed”) that they are unsupported predictions.

<sup>9</sup> Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management.

<sup>10</sup> The fact that these propositions are in no way relevant to whether boating should be permitted above Highway 28 will be addressed below. The focus of this argument is to demonstrate only the procedural failure of the ROD/FEIS.

<sup>11</sup> Questionably, the sister study on boaters’ connection to the Chattooga, also commissioned by the USFS, is conspicuously omitted altogether from the ROD/FEIS.

NEPA's procedural requirements in presenting its whitewater boating analysis because it fails to disclose the methodology, expert opinion, and hard data upon which that analysis is based.

**(c) The ROD/FEIS Fails to Take a “Hard Look” at Boating on the Headwaters**

The standard for agency decisionmaking under NEPA was aptly described by the Federal District Court for the District of Oregon:

Under NEPA, the court must ensure that [agency decisionmakers] have taken the requisite “hard look” at the environmental consequences of its proposed action and that the agency decision is ‘founded on a reasoned evaluation of the relevant factors.’

*Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, 1191 (D. Oreg. 2002) (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)) (internal quotations omitted) (noting that the USFS provided little “reasoned” basis for the action taken and finding that a “categorical exclusion” of the requested use was “arbitrary and capricious and not in accordance with NEPA”).

In reviewing whether an agency's discussion of alternatives complies with NEPA, a reviewing court must ultimately employ two criteria: it must decide (a) whether the discussion indicates that the agency in “good faith objectivity” has taken the required “hard look” at the alternatives;<sup>12</sup> and (b) whether the discussion is detailed enough to permit those who did not participate in its preparation to “understand and consider meaningfully” the reasoning, premises, and data relied upon, and to permit a “reasoned choice among different courses of action.”<sup>13</sup>

Appellants do not contend that NEPA mandates the relief they seek. As one court has noted: “NEPA exists to ensure a process, not particular substantive results.” *Hells’ Canyon Alliance*, 227 F.3d, at 1177. However, the United States Supreme Court instructs that to comply with NEPA, an EIS must take a “hard look” at the environmental consequences of the proposed use and apply a “rule of reason.” *New York Natural Resources Defense Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976) (“essential requirement of the NEPA is that before an agency takes major action, it must have taken ‘a ‘hard look’ at environmental consequences...Courts of Appeals consistently have enforced this essential requirement, tempered by a practical ‘rule of reason’”) (internal citations omitted).

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<sup>12</sup> *Save Our Sycamore v. Metropolitan Transit Auth.*, 576 F.2d 573, 575 (5<sup>th</sup> Cir. 1978) (“The determination that the scope of an EIS is proper is important to the required determination whether the agency in good faith objectivity has taken a hard look at the environmental consequences of a proposed action and at alternatives to that action”) (internal citations omitted).

<sup>13</sup> *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 368-69 (D.C. Cir. 1981) (“Appellants are clearly correct in suggesting that the administrative record must disclose the studies and data used in compiling environmental impact statements. Moreover, any methodologies relied upon should be carefully described. The impact statement must be “sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved.”)(internal citations omitted).

To take the requisite “hard look” agencies must consider and include “some quantified or detailed information,” otherwise, “neither the courts nor the public, in reviewing the Forest Service’s decisions, can be assured that the Forest Service provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372 (9th Cir. 1998). In particular, “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided. *Id.* See also, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (“We have warned that ‘general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification....”).

Here the EIS merely makes vague, unsubstantiated statements about ‘possible’ effects and “some risk”, without providing more definitive information. The language in the ROD says it all: “[boating will] likely have impacts,” “negative impacts ... *could be expected*,” “search and rescue ... *would likely be needed*.”<sup>14</sup> These conclusions are nothing more than baseless (and biased) predictions. Without offering any hard data to support its conclusions or explaining why none was provided—and including unsubstantiated statements about ‘possible effects’ and ‘some risk’ in place of hard data—the Sumter ROD/FEIS fails to take the requisite “hard look” at whether boating should be banned above Highway 28.

Courts have also discussed a troubling result of unreasoned, unsubstantiated analyses in NEPA documents: the document can hamstring courts and the public by shielding the decisionmaker from meaningful judicial review of agency decisions. Consider first that reviewing courts often differ to agency decisions that rely on the agency’s own scientific opinion. See e.g., *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) (finding that an agency is entitled to rely on its own scientific opinion). Consider also that normally courts will not second-guess an agency’s scientific conclusions. See *Hells Canyon*, 227 F.3d, at 1177. Given the significant leeway courts afford administrative agencies, an unreasoned, unsubstantiated ROD/FEIS places the court in an untenable conundrum. As the Ninth Circuit Court of Appeals noted:

[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second-guessing an agency’s scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.

*Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (noting that “NEPA’s implementing regulations require agencies to ‘identify any methodologies used and [] make explicit reference by footnote to the scientific and other sources relied upon for conclusions used’ in any EIS statement). Promulgating an unsubstantiated EIS is a convenient, but unacceptable, way of shifting the burden of proof for environmental impacts from the agency to the public.

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<sup>14</sup> ROD, at 13.



Here Appellants have been placed in the very conundrum discussed by the Ninth Circuit in *Idaho Sporting Congress*. If a simple EA analysis of boating above highway 28 had been done, it would have found that boating made no significant environmental impacts.<sup>15</sup> Accordingly, an EA would have resulted in a FONSI and boating access would have been restored. Questionably, however, an EA was not performed when one was requested in connection with proposed “Amendment 14” to the 1985 LRMP. Local decisionmakers instead opted to wait until the 2004 RLRMP to conduct a full EIS.

Normally, appellants would applaud and support the most environmentally cautious approach to agency decisionmaking available. But here, the unwarranted EIS has the untenable effect of shielding a potentially biased and unsubstantiated agency decision from intra-agency and judicial review. Most notably in this regard, the FEIS fails to provide any data or scientific study whatsoever to support the agency’s decision to ban non-motorized floating on the Chattooga Headwaters. Also highly suspect is that in thirty pages of analysis there are only three references to what could be considered environmental impacts. Why does it take so long to say so little? Perhaps a lengthy discussion appears reasoned—even when no methodology, scientific data or support is offered for the conclusion reached. A close review reveals otherwise.

The first reference to a potential environmental impact predicts that if boating were allowed above highway 28, new user paths and trails “could be expected.” The “analysis,” however, ends here. The FEIS offers no evidence that boating access leads to new user paths and trails. This is curious given that the FEIS’ discussion of boating above Highway 28 assumes the exact opposite:

On the Chattooga above Highway 28 boaters would be expected to access the river primarily *by using existing river access points* at Grimshawes, Bull Pen, and Burrells Ford.

The second reference to a potential environmental impact is even more tenuous. The ROD/FEIS appears to suggest that the presence of a few boaters,<sup>16</sup> on a limited number of days per year,<sup>17</sup> in an area “with relatively low visitor use,”<sup>18</sup> will detract from the ‘scenery’ of the river above Highway 28.<sup>19</sup> To the extent this point is developed at all, it seems to suggest that a passing boater would detract from the wilderness scenery enjoyed by hikers and fishermen, and

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<sup>15</sup> As noted above, whitewater boating has been a historical form of recreation above Highway 28 since before the passage of the WSRA and NEPA. Since EAs and EISs are for proposed actions (*i.e.*, new actions) none should be required here. Appellants concede, however, that even restoring access constitutes some “action” and that an EA might therefore—in an abundance of caution—have been necessary.

<sup>16</sup> Appendix H notes, “The Chattooga above Highway 28 offers opportunities for a small sub-group (5-10%) of whitewater boaters sometimes referred to as creekers.” ROD/FEIS, at H-7.

<sup>17</sup> The ROD/FEIS is replete with references to the fact that boating would only occur on a limited number of days per year due to insufficient flow levels (*i.e.*, lack of substantial rainfall). *See* ROD/FEIS, App. H, at H-8 (discussing the “whitewater boating experience”).

<sup>18</sup> ROD/FEIS, at H-5 (discussing the “fishing experience”).

<sup>19</sup> ROD/FEIS, at H-12 (“The character of the river is ever-changing as natural processes occur, trees fall, rocks shift, and water levels fluctuate. There may be additional visual impacts ... since there is a new user group [boaters] in the mix).

spoil the feelings of solitude associated with viewing and interacting with that scenery. While the visual environment is certainly an important part of the environment to consider, there is no data of any kind offered to support the notion that non-motorized boaters degrade the visual environment. This idea even contradicts the findings of the FEIS. Under the heading “Scenery,” the FEIS notes:

One of the best ways to see much of the rugged and beautiful scenery of the Chattooga is from the river itself, either by foot or in a boat.

ROD/FEIS, App. H, at BF-4. Clearly, the FEIS contemplates the ‘scenery’ as something to be seen and enjoyed by boaters and other primitive recreators—the scenery is not the recreators themselves. Again, a vague and contradictory conclusion is reached without reference to methodology or any scientific or other support.

Finally, and perhaps most troubling, the ROD/FEIS concludes that boaters may cause indirect effects to the environment:

As use of the corridor grows, indirect effects including litter, trampling of understory vegetation, human waste, and burning of downed wood at isolated locations (*e.g.*, primitive campsites, put-ins, take-outs, portages, and lunch stops [will occur]).

Boaters pride themselves on being environmentally conscious (as evidenced by the stated purposes and historical activity of Appellant’s non-profit organization). Accordingly, boaters take offense at the undocumented and unsupported allegations that boaters have a propensity to establish inappropriate backcountry campsites along the river, litter, trample vegetation, and burn wood. There is absolutely no support for this suggestion in the EIS or anywhere else. This statement appears to take a general observation about increased use of a wilderness area over time, and apply it discriminatorily to a group to which it applies the least: boaters. This unsubstantiated conclusion contradicts a basic assumption upon which the FS relied when making its analysis:

This user group [boaters] does not generally camp from their boat during a run because the weight of the camping gear would at best impair paddling performance (for that matter, they usually would not carry much at all with them due to performance concerns).

ROD/FEIS, at BF-7. Furthermore,

[Boaters] would be expected to float from put-in to take-out and stay on the river or on the riverbanks during the entire trip. Therefore vegetation loss, soil compaction and erosion impacts from boaters are not expected to be significant....”

ROD/FEIS, at H-22. Despite the fact that boaters will not be camping along their route or straying from the river bank, the ROD somehow concludes, without reference to any study or other authority, that boaters will engage in primitive camping and trample vegetation at isolated

locations. This third conclusion is clearly contradictory and is wholly unsupported in the record by any study or scientific research.

The fact that only three (quite suspect) environmental impacts are briefly mentioned (and not discussed or supported in any way) in a 30-page environmental impact study, suggests that the Sumter ROD/FEIS may be shielding a potentially unreasonable and biased decision rather than documenting an “environmental impact” study. A long FEIS, replete with opinion and void of facts, ties the hands of intra-agency and judicial reviewers who are supposed to defer to reasoned, supported agency decisions. Not surprisingly, when the Ninth Circuit found its hands tied in this manner, it rejected the adequacy of a similar FEIS and concluded that “NEPA requires that the public receive the underlying environmental data” upon which an agency makes its decision.<sup>20</sup>

If an EA had truly looked at whether non-motorized floating would negatively impact the environment, it would have resulted in a FONSI. Nevertheless, the further step of an EIS was performed. Because that EIS is procedurally and substantively flawed under NEPA, it must be found to be inadequate. Boating must therefore be permitted above Highway 28 until a NEPA compliant analysis demonstrates that boating is environmentally harmful.

First, the Sumter ROD/FEIS fails to respond to public comments as required by the CEQ regulations. Appellants submitted substantial comments that were uniformly rejected without justification.

Second, The Sumter ROD/FEIS does not comport with NEPA’s procedural requirements. In thirty pages of analysis, the ROD/FEIS makes brief mention of one irrelevant study, yet somehow arrives at sweeping technical conclusions to support a moratorium on paddling above Highway 28. Because not one shred of methodology, expert opinion or hard data is provided in support of its conclusions, the Sumter ROD/FEIS violates NEPA procedures.

Finally, the Sumter ROD/FEIS also falls short of NEPA’s minimal substantive requirements. In place of balanced, objective study and reasoning, the ROD/FEIS instead opts for a seat-of-the-pants approach, ignoring the primary question: whether boating above highway 28 will adversely impact the environment. Because the Sumter ROD/FEIS fails to take the requisite “hard look” at its decision to ban boating, the ROD/FEIS also falls far short of NEPA guidelines regarding substance.

### 3. The Resolution of Issue Thirteen Violates the Wilderness Act

In 1975, certain portions of the Chattooga WSR corridor above Highway 28 were designated as “wilderness” under the Wilderness Act. This area, known as the Ellicott Rock Wilderness, includes 8,271 acres of land in Georgia, North Carolina and South Carolina. 5.2 miles of the Chattooga WSR traverses the Ellicott Rock Wilderness above Highway 28. A hiking trail, known as the “Chattooga Trail” parallels this wilderness portion of river for approximately 3.2 miles. While the Chattooga Trail remains near the river for most of this stretch, trailwalkers remain (by and large) visually separated from the river, save for occasional

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<sup>20</sup> *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998).

glimpses around or through natural obstructions. The Ellicott Rock Wilderness and the section of the Chattooga WSR that flows therethrough are precious wilderness resources. The ROD/FEIS bans appellants' non-commercial, hand-powered floating recreation on the section of Chattooga River within the Ellicott Rock Wilderness. Because that ban violates the Wilderness Act and related Federal Regulations, appellants appeal.

The resolution of Issue #13 in the ROD/FEIS violates the Wilderness Act in two important respects. First, the ROD/FEIS imposes a complete moratorium on a form of primitive wilderness recreation that the Forest Service is commanded to promote and perpetuate. Second, the allocation of uses in the Ellicott Rock Wilderness undermines the primary purpose of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

**(a) The Resolution of Issue #13 Violates the Stated Purpose and Directives of the Wilderness Act and Related Forest Service Regulations**

**(i) The Boating Ban Violates The Wilderness Act**

Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions ....” 16 U.S.C. § 1131(a).<sup>21</sup> The Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness ....” *Id* (emphasis added). The Act

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<sup>21</sup> The following excerpt offers a brief history of wilderness preservation leading up to the passage of the Wilderness Act:

Attempts to protect substantial areas of the United States' remaining wildlands date back to the early part of the 20th century. The U.S. Forest Service administratively established the first natural area in 1924 by setting aside the Gila Wilderness in New Mexico. In 1929, the Forest Service issued a directive authorizing the Chief of the Service to designate protected 'primitive areas.' The regulations governing the use of primitive areas were not very protective of the wilderness qualities of those areas, however, nor were they strictly enforced. Apparently recognizing these inadequacies, the Forest Service implemented new regulations that strengthened wilderness protections, but World War II interrupted the process of designating areas to be governed by the new regulations. After the war, wilderness advocates began to press for statutory wilderness protections out of concern that schemes for discretionary administrative protection of wilderness would crumble in the face of demands for development. Congress passed the Wilderness Act in 1964 in response to these concerns. In so doing, it implicitly acknowledged the concern of wilderness advocates that existing administrative protection schemes were inadequate to ensure the preservation of wildlands. Congress hoped that a statutory mandate to preserve permanently large areas of federal land in an untrammeled, primeval condition would assure present and future generations an 'enduring resource of wilderness.' ... Passage of the Wilderness Act itself came only after a long, arduous legislative process involving nine years of deliberation and consideration of sixty-five bills. The Act created the National Wilderness Preservation System and endowed it with 9.1 million acres classified by the Forest Service as 'wilderness,' 'wild,' or 'canoe' areas. The wilderness system now encompasses 88.7 million acres of federal land.

Rohlf, Daniel, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECGQLQ 249, 250 (1988) (citations omitted).

defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a). Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b). Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added). Commercial services may only be performed within the wilderness areas “to the extent necessary for activities which are proper for realizing the *recreational* or other wilderness purposes of the area.” 16 U.S.C. § 1133(d)(5).

Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.<sup>22</sup> In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations. For example, the Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c). Furthermore, agencies are directed to preserve the wilderness character of designated areas, and instructed that “wilderness areas shall be devoted to the public purposes of recreational ... use.”

Banning non-motorized boating in the wilderness areas above Highway 28 contravenes the stated purposes and administrative mandates of the Wilderness Act. First, Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups. The ROD/FEIS suggests that boating should not be permitted in the Ellicott Rock Wilderness because it might disturb anglers and hikers. Unless a documented need for wilderness preservation is the basis, discriminating against user groups runs contrary to Congress’s intent to protect these treasured areas for the benefit of all. The boating ban in the ROD/FEIS is not based on any threat to wilderness preservation. Instead, it is based upon the fact that some users “might” be upset if a “new” user group is introduced. Laying aside the fact that boaters are not a “new” group to this area at all, some members of the public are always upset that they have to share a *public* resource with their fellow citizens. Such is the nature of communal resource management. The prediction that some users will not want

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<sup>22</sup> In 1962, a blue ribbon Presidential commission predicted that by the year 2000 the use of wilderness-type areas would increase almost tenfold over 1959 levels. OUTDOOR RECREATIONAL RESOURCES REVIEW COMM’N, STUDY REPORT NO. 3, *WILDERNESS AND RECREATION—A REPORT ON RESOURCES, VALUES, AND PROBLEMS* 34 (1962) (cited in *Wilderness Management and the Multiple Use Mandate*, 59 MINN. L. REV. 155, 157 (1974)). The conclusions in the commission’s reports helped to propel wilderness legislation forward, particularly in the House of Representatives. C. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 125-26 (1982). The explosion in outdoor recreation in subsequent years confirms the wisdom of protecting wilderness areas for this purpose. Edwards, *Keeping Wilderness Areas Wild: Legal Tools for Management*, 6 VA. J. NAT. RESOURCES L. 101, 117 (1986) (citing U.S. DEP’T OF AGRIC., *REPORT OF THE FOREST SERVICE: FISCAL YEAR 1985*, at 25 (1986)) (noting that 12.7 million recreational visitor days were recorded in 1985 within wilderness areas administered by the U.S. Forest Service).

to share simply does not justify ignoring the intent of Congress to make wilderness available to all Americans.

Second, when defining “wilderness” under the Wilderness Act, Congress contemplated the very type of use Appellants seek here. “Wilderness” is defined as an area “where man himself is a visitor who does not remain.”<sup>23</sup> Kayakers and canoeists seek access to float from an existing upstream put-in, through the Ellicott Rock Wilderness, to an existing take-out point downstream of the wilderness. This low impact activity will take place in a fraction of a single day. In other words, Appellants seek to enjoy a primitive area in which they will be visitors who do not remain—a use that not only comports with, but helps define wilderness. Moreover, the Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.” Thus as primitive recreation opportunities, hand-powered kayaking and canoeing are wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness. Accordingly, kayaking and canoeing should be permitted in the Ellicott Rock Wilderness absent clear proof that wilderness preservation would be jeopardized.

Third, the Wilderness Act mandates that wilderness areas “shall” be devoted to the public purposes of recreational use.<sup>24</sup> As noted above, preservation of wilderness recreation was perhaps the greatest impetus behind passage of the Wilderness Act. The Act even goes so far as to permit commercial enterprise within wilderness areas if it facilitates non-damaging recreation. Here Appellants are merely seeking non-commercial access for a handful of primitive recreators on a naturally limited number of days per year. The ROD/FEIS’ complete ban on canoeing and kayaking in the Ellicott Rock Wilderness ignores one of the primary mandates for administration of wilderness: that it be devoted to recreational use.

(ii) The Boating Ban Violates Federal Regulations Regarding Forest Service Management of Wilderness

The ROD/FEIS also contravenes the Forest Service Regulations regarding how wilderness should be managed. The purposes of the Wilderness Act are incorporated within and supplemental to the purposes for which National Forests are administered.<sup>25</sup> Accordingly, the Forest Service has promulgated its own regulations to execute Congress’s mandate that agencies administer wilderness to preserve its wilderness character. 16 U.S.C. § 1133(b) (“each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and ... wilderness areas *shall be devoted to the public purposes of recreational ... use*”). The Forest Service regulations provide the following with respect to wilderness areas:

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<sup>23</sup> 16 U.S.C. § 1131(c).

<sup>24</sup> 16 U.S.C. § 1133(b).

<sup>25</sup> 16 U.S.C. § 1133(a).

- National Forest Wilderness shall be so administered as to meet the public purposes of recreational ... uses;<sup>26</sup>
- In carrying out such purposes, National Forest Wilderness resources shall be managed to *promote* [and] *perpetuate* ... specific values of ... primitive recreation. *To that end:* ... Wilderness will be *made available for human use to the optimum extent* consistent with the maintenance of primitive conditions.<sup>27</sup>

The boating ban flies in the face of these important regulatory directives. Namely, the ban stands in direct opposition to the requirements that the Forest Service promote and perpetuate recreational use, and that wilderness is to be made available to the “optimum extent” consistent with wilderness preservation. Banning a historical and traditional form of wilderness recreation does not promote or perpetuate that recreation. Additionally, human use is certainly not permitted to its optimum extent where, as here, a low-impact form of primitive recreation is completely banned.

In short, the moratorium on wilderness boating in the ROD/FEIS violates both the Wilderness Act and the Forest Service Regulations related to implementation of the Wilderness Act. Under the plain language of both authorities, non-commercial, hand-powered boating should be allowed in the Ellicott Rock Wilderness to the “optimum extent” consistent with preservation of that wilderness for future generations.

(iii) The Boating Ban Violates The Forest Service Manual

The Forest Service Manual contains the following policy:

Maximize visitor freedom within the wilderness. Minimize direct controls and restrictions. Apply controls *only when they are essential for protection of the wilderness resource and after indirect measures have failed.*

The Sumter National Forest (SNF) ban on boating in the Ellicott Rock Wilderness is in violation of the above policy because indirect measures were never tried, and because boating poses no threat to the wilderness resource. In addition, the ban on paddling clearly does not maximize visitor freedom or minimize direct controls and restrictions. There is no data or basis for the claims that there will be any environmental impacts or that solitude is at a critical threshold requiring management. Freedom of visitors has been radically limited by the ban on paddling which is clearly inconsistent with the above-stated USFS policy for managing wilderness.

The USFS Manual also contains the following policy:

Use information, interpretation, and education as the primary tools for management of wilderness visitors.

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<sup>26</sup> 36 C.F.R. § 293.2

<sup>27</sup> 36 C.F.R. § 293.2(b)

The ban on boating in the Ellicott Rock Wilderness also contravenes this policy because the paddling ban uses direct techniques instead of utilizing indirect techniques.

Additionally, the USFS Manual provides that one of the objectives for management of wilderness is to “Protect and perpetuate wilderness character and public values including, but not limited to...primitive recreation experiences.” USFS Manual § 2320.2. It is later clarified in section 2320.5.3, that rafts and canoes are considered primitive devices suitable for use in wilderness. Banning boating on this reach is therefore in violation of USFS policy.

Finally, section 2323.14 of the USFS Manual instructs that managers of wilderness areas should “provide for the limiting and distribution of visitor use according to periodic estimates of capacity in the forest plan.” The ROD/FEIS offers no estimates of user capacity for anglers, boaters, or other dispersed recreationists in the Ellicott Rock Wilderness Area, yet takes the most extreme use limitation measure available: banning a use. Without this recommended basis for decisionmaking, the ROD/FEIS has violated the directives for managing wilderness areas.

**(b) The ROD/FEIS Favors Higher-Impact Uses Over Lower-Impact Uses**

The ROD/FEIS also violates the directives of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses in the Chattooga river corridor of the Ellicott Rock Wilderness. The ROD/FEIS promotes continued access to the Ellicott Rock Wilderness for hikers, backpackers, campers and anglers. Meanwhile, the ROD/FEIS completely bans non-commercial, hand-powered floating on the 5.2 miles of Chattooga River that traverse the wilderness. Hikers, backpackers, campers, and anglers have greater impacts on wilderness than do non-commercial, hand-powered boaters. Accordingly, the ROD/FEIS improperly adopts a non-sustainable approach to use management of wilderness by promoting higher impact uses over lower impact uses.

The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a) “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed* so as to *preserve its natural conditions*...” 16 U.S.C. § 1131(c) (emphasis added). The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b). Likewise, the Forest Service Regulations require the Forest Service to “promote, perpetuate, and, where necessary, restore the wilderness character of the land....” 36 C.F.R. § 293.2.

A management decision that favors higher-impact uses over lower-impact uses is clearly inconsistent with federal law. Such a policy undermines the goal of wilderness preservation, which is to preserve (*i.e.*, lessen impact on) the wilderness characteristics of a protected area. Lifting the paddling ban in the Ellicott Rock Wilderness would demonstrate that higher-impact recreation is not to be preferred over lower-impact recreation in USFS managed wilderness areas. The ROD/FEIS should therefore be amended to permit non-commercial, hand-powered boating in the Ellicott Rock Wilderness.



The Chattooga River only flows through one wilderness area: the Ellicott Rock Wilderness. Like other wilderness users, canoeists and kayakers must contend with commercial rafting, automobile traffic, and other non-wilderness characteristics of downstream sections of the Chattooga. Paddlers seek access to the Ellicott Rock Wilderness in order to enjoy its scenery and to find solitude. The ROD/FEIS denies boaters this opportunity. That denial violates federal law. The ban violates the Wilderness Act as well as the Federal Regulations regarding Forest Service wilderness management. First, the decision fails to adequately promote and perpetuate recreation because it does not make the Ellicott Rock Wilderness available for recreation to the optimum extent that is consistent with preservation. Second, the boating ban leads to a wilderness management approach that favors higher impact uses over lower-impact uses. For these reasons, non-commercial, hand-powered floating should be permitted in the Ellicott Rock Wilderness.

4. The Resolution of Issue Thirteen Violates MUSYA and the RPA/NFMA

**(a) The Boating Ban Violates MUSYA**

In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), a policy statement of land use management values. Section one of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).<sup>28</sup> With this list of potentially competing uses at its roots, section two of MUSYA further provides that the Secretary of Agriculture must administer the national forests for multiple use and sustained yield of the several products and services of the national forests. 16 U.S.C. § 529 (1988). MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses. Many potential uses of National Forest lands lack a market value.<sup>29</sup> For example, readily available market values do not exist for aesthetics, recreation, watershed, and wildlife.<sup>30</sup> While no market value is readily available, the statute clearly mandates that the value of these resources be considered. In considering the proper balance of use, one court has noted that MUSYA “has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service” *Sierra Club v. Hardin*, 325 F. Supp. 99, 123 (D. Alaska 1971).

While Appellant concedes that the Forest Service has ample discretion to determine the proper mix of uses under MUSYA, Appellant contends that the Forest Service failed to attribute the appropriate “value” to boating above Highway 28 and therefore could not possibly have properly balanced the mix of uses adequately. As noted above, Congress included the

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<sup>28</sup> For a discussion of the carefully chosen neutrality of the list, see Office of Technology Assessment, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems* 46 (1992). See also, Marion Clawson, *The Concept of Multiple Use Forestry*, 8 ENVTL. L. 281, 281 (1978) (illustrating the incompatibility of the uses); George Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of “Multiple Use, Sustained Yield” for Public Land Management*, 53 U. COLO. L. REV. 229, 266-67 (1982) (discussing the inherent sub-uses and their incompatibility).

<sup>29</sup> Marion Clawson, *The Concept of Multiple Use Forestry*, 8 ENVTL. L. 281, 281 (1978).

<sup>30</sup> *Id.*, at 290-96.

Headwaters portion of the Chattooga River in the Wild and Scenic River system, in part, because whitewater boating is an “outstandingly remarkable” value of that river. Since Congress fixed the value of river recreation on the Chattooga WSR as “outstanding” and “remarkable,” the ROD/FEIS should have accorded river recreation that same value, and should have given substantial deference to the importance of preserving boating recreation. The fact that the ROD and the FEIS nowhere mention the significant value of river recreation—and specifically ignore it with respect to boating above Highway 28—suggests that the Forest Service failed to adequately balance the mix of uses when banning recreational boating on a section of the Chattooga WSR.

Accordingly, the ROD/FEIS does not comport with MUSYA’s requirement to give “due consideration” to the “relative values of various resources in particular areas.” 16 U.S.C. § 529. When an “outstanding” and “remarkable” value is ascribed to whitewater boating above Highway 28, that value should at least be included if not promoted and enhanced in any appropriate balance of multiple uses.

### **(b) The Boating Ban Violates the RPA/NFMA**

In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)). Just two years after the RPA’s passage, the Fourth Circuit held that timber clearcutting was prohibited under the Organic Act of 1897—the very act that had created the National Forests and the Forest Service.<sup>31</sup> In response, Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”). In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process. Thus, the extent to which the ROD/FEIS’ failure to consider the outstandingly remarkable value of river recreation violates MUSYA, it also violates RPA/NFMA, which requires the USFS to comply with MUSYA when managing National Forests.

NFMA creates a statutory framework for the management of national forests.<sup>32</sup> Specifically, NFMA states that the Forest Service “shall develop, maintain, and, as appropriate,

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<sup>31</sup> *West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4<sup>th</sup> Cir. 1975) (Monongahela I) (relying on the plain language and legislative history of the Organic Act of 1897 to affirm the district court’s holding that the act did not allow clearcutting).

<sup>32</sup> The NFMA planning process involves several layers from the national to the local level, with management direction provided nationally on the basis of information generated and supplied by the individual forest managers. 36 C.F.R. § 219.4 (1993). First, the Forest Service prepares an RPA assessment, analyzing nationally available forest resources relative to various budget levels and anticipated demand and price considerations. 16 U.S.C. § 1601 (1988); *see also*, 36 C.F.R. § 219.4(b)(1) (1993). Based on the RPA assessment, the Forest Service develops an RPA Program, which establishes goals and allocates objectives to be incorporated into regional guides. 16 U.S.C. § 1601 (1988); *see also*, 36 C.F.R. § 219.4(b)(1)(ii) (1993). The country is divided into nine regions, each of which is overseen by a Regional Forester. 36 C.F.R. § 200.2(a) (1993). Regional foresters are responsible for creating the regional guides, which must be approved by the Chief of the Forest Service. 36 C.F.R. § 219.4(b)(2) (1993). Finally, each local Forest Supervisor, who oversees an administrative unit, develops a Land Resource Management Plan (LRMP). In the LRMP, the Forest Supervisor must examine a range of possible multiple-use mixes, including at least one alternative which “responds to and incorporates” the objectives of the RPA Program. 36 C.F.R.

revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a). NFMA provides a two-step process for forest planning. First, the Forest Service must develop a Land Resource Management Plan (“LRMP”) and an EIS for the entire forest. *See* 36 C.F.R. § 219.10(a), (b). Second, once the LRMP is in place, the Forest Service assesses site-specific projects in light of the LRMP. *See* 36 C.F.R. § 219.10(e); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998). The LRMP is “in essence, a programmatic statement of intent that establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions.” *Sierra Club v. Robertson*, 28 F.3d 753, 755 (8th Cir.1994). Among other items, an LRMP must provide for multiple use and sustained yield of the products and services obtained from that use, including outdoor recreation. *See* 16 U.S.C. § 1604(e).

The ROD/FEIS did not adequately provide for multiple use of resources—specifically with respect to outdoor recreation. As noted above, Congress declared that certain rivers have outstanding recreational values because they are wild and scenic. The Chattooga River is such a river. River recreation on the Chattooga WSR is outstanding and remarkable. The ROD/FEIS nowhere mentions or discusses the Chattooga’s outstanding remarkable river values in its discussion of whether to ban non-commercial, hand-powered floating on more than one-third of the wild and scenic river. Even given the substantial deference afforded Land Resource Management planners, this accidental or intentional oversight clearly demonstrates that “due consideration” was not given to “relative values” in the LRMP and EIS as required by the RPA/NFMA.

5. The Resolution of Issue #13 Violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

The floating ban violates the Due Process Clause of the Fifth Amendment for two reasons. First, the ban represents an irrational deprivation of liberty. Second, the ban violates the equal protection component of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis.

The Fifth Amendment states that “No person shall be ... deprived of life, liberty, or property, without due process of law....” As noted above, Congress protected the Chattooga Headwaters as a WSR for the express purpose of protecting and enhancing outstandingly remarkable river values such as whitewater boating. Thus Congress has placed floating access to the Headwaters within the liberty of movement of whitewater boaters. The resolution of issue #13 unconstitutionally deprives recreational boaters of their liberty of movement on a river that is to be managed and maintained expressly for their benefit. Accordingly, the floating ban deprives recreational floaters of their liberty in violation of the Fifth Amendment’s Due Process Clause.

The floating ban also violates the equal protection component of the Fifth Amendment. A successful equal protection claim may be brought where a class of persons has been intentionally treated differently from others similarly situated and where there is no rational basis

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§ 219.4(b)(3) (1993). The Forest Supervisor then recommends objectives to the Regional Forester, who has final approval of the LRMP. 36 C.F.R. § 219.4(b)(3) (1993).

for the disparate treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *see also Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir.1995) ("Classifications should be scrutinized more carefully the smaller and more vulnerable the class is.") Here, the Chattooga Headwaters is a section of public river that is supposed to be protected and managed for the benefit of all Americans who wish to engage in primitive recreational activities. Yet hand-powered boaters are the only class to be singled out and denied access to this section of public river (despite Congress's express intention in the WSRA to protect their access). The ROD/FEIS offers no rational basis for discriminatorily denying access only to this class of primitive users.

The only justifications for banning use in the ROD/FEIS relate to threatened overuse of the resource. Such justifications cannot pass even the low level of rational basis scrutiny. First, any alleged basis for the ban that is based on overuse is simply false and contradicts the findings of the ROD/FEIS. There is absolutely no data to support an allegation that the Headwaters corridor (i) is overused; (ii) cannot support additional use; or even (iii) would be adversely affected by additional use in any way. In fact, the ROD/FEIS finds the exact opposite.<sup>33</sup>

Second, even if overuse of the resource were a problem, the ROD/FEIS does not offer a rational solution. Boating is the slowest growing and least environmentally impactful use of all primitive uses traditionally permitted in the Chattooga corridor. Thus to ban boating before other types of uses based upon overuse is completely irrational.

In short, whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access while all other primitive recreationists are allowed to use the Chattooga Headwaters without restriction or limitation of any kind. The resolution of issue #13 accordingly violates the equal protection component of the Fifth Amendment's Due Process Clause.

#### 6. The ROD/FEIS Will Not Survive Judicial Scrutiny Under the Administrative Procedures Act

Under the Administrative Procedure Act (the "APA"), an agency's decision may be set aside by a reviewing court if the court finds the decision to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether an agency's decision is arbitrary or capricious, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotations and citation omitted). The Court's standard of review is a narrow one, but the court's review must be searching and careful. *Id.*

The ROD/FEIS' moratorium on non-commercial, hand-powered floating, on over one-third of the Chattooga Wild and Scenic River, is arbitrary and capricious. While agency decisionmakers are afforded substantial discretion, this biased and unsupported decision to ban a

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<sup>33</sup> ROD/FEIS, at H-5 (describing the sections of the Headwaters as "remote and spectacular natural setting, including forested ridges, rock outcrops, huge groves of white pine and hemlock, boulders, and rushing, clear waters, along with *relatively low visitor use*") (emphasis added).

low-impact form of river recreation that Congress has approved as outstanding and remarkable, clearly abuses that discretion. Moreover, as demonstrated above, the ROD/FEIS is not in accordance with applicable law. Accordingly, the resolution of issue thirteen will likely be set aside by a reviewing court.

#### 7. The Resolution of Issue Thirteen Departs From Relevant Case Law

There are two cases involving the Forest Service's allocation of boating use on Wild and Scenic Rivers. *Hells Canyon Alliance v. USFS*, 227 F.3d 1170 (9th Cir. 2000); and *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173 (D. Oreg. 2002). In both of these cases the Forest Service was arguing *in support of boating use* on Wild and Scenic Rivers. The facts in these cases are similar. In both instances, the Forest Service sought to permit high levels of motorized boating on sections of Wild and Scenic Rivers.

In *Hells Canyon*, both non-motorized and motorized boaters challenged a LRMP. The Hell's Canyon LRMP was challenged under the WSRA and NEPA. The Ninth Circuit Court of Appeals upheld the LRMP on the ground that it was not arbitrary and capricious. In upholding the motorized boating use on the Snake WSR, the Court made the following observations:

- “We also bear in mind that the [WSR] Act established a recreation area, not a pure refuge or wilderness area. Recreation is not only one of the values for which the [] River was included in the wild and scenic river system, but it is also specifically identified in § 1(a) of the Act as a value to be enhanced.”<sup>34</sup>
- “The legislative framework contemplates ... that [boats] are legitimate recreational uses in [WSRA areas] ....”<sup>35</sup>
- Quoting the Forest Service's own language in the Snake River FEIS: “Meeting the recreational needs of motorized users must be balanced with the need to *provide non-motorized users with the type of back country experience they desire.*”
- “although the agency acknowledges that motorized river craft are partly responsible for a ‘reduction in the unique waterway sound of the Scenic ORV,’ the mere existence of some decline in scenic value does not establish that motorized use *substantially interferes* with this value”<sup>36</sup>

The court's reasoning in this regard is instructive under the instant facts. How can non-motorized boating be banned when (1) recreation is a value to be enhanced; (2) boating is a legitimate recreational use of WSRA areas; (3) non-motorized boaters desire a back country boating experience; and (4) even if boats reduce the scenic river value (as the Sumter FEIS

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<sup>34</sup> *Hells Canyon*, 227 F.3d, at 1178.

<sup>35</sup> *Hells Canyon*, 227 F.3d, at 1173.

<sup>36</sup> *Hells Canyon*, 227 F.3d, at 1179 (emphasis added).

alleges), the mere existence of some decline in scenic value does not equate to a *substantial interference* such that boating may be limited—much less banned.

In *Riverhawks*, river advocacy groups challenged the Forest Service’s practice of issuing motorboat permits on the Rogue Wild and Scenic River. The District Court for the District of Oregon held that the Forest Service’s memorandum authorizing reissuance of motorboat permits failed to take the requisite “hard look” required by NEPA for agency actions. The Court noted that the Memo provided little “reasoned” basis for the action taken. The Sumter ROD/FEIS similarly fails to take the requisite “hard look” or provide any reasoned basis for the boating ban. Reflective of Forest Service policy on other WSRs, the *Riverhawks* court cites the following language from the Rogue LRMP: “Boating regulative to achieve the Wild River objectives will be encouraged. The regulations should: (1) Favor nonmotorized use.”<sup>37</sup>

The resolution of issue thirteen in the ROD/FEIS does not comport with the two leading cases on boating use on WSRs. The Forest Service vigorously argued in both instances that high levels of motorized boating should be allowed on WSRs because such use does not substantially interfere with WSR values.<sup>38</sup> Given the position taken by the Forest Service in *Hells Canyon* and *Riverhawks*, it seems grossly inconsistent that the Sumter ROD/FEIS now suggests that low levels of non-motorized boating should be completely banned on more than one-third of the Chattooga WSR because such use will allegedly interfere with public use and enjoyment of river values.

#### 8. The Ban Is Inconsistent With Established USFS Policy

The FEIS contains the claim that the decision to ban paddling on the Headwaters of the Chattooga is based on a precedent in the USFS system, namely the Upper Rogue. This claim is made in the Response to Public Comments Section: “Finally, the section of the Chattooga River above Highway 28 is not the only river section in the Nation where boating is precluded: the Upper Rogue in Oregon is another example.” This claim is patently false. Appellant has contacted USFS officials in charge of managing the Upper Rogue River and they are aware of no paddling ban. A Sumter National Forest District Ranger has since acknowledged that the Sumter National Forest had no basis for the claim that the Upper Rogue bans paddling on any river section. The Chattooga River is the only river in the entire USFS system that bans non-motorized, non-commercial paddling for recreational reasons.

### **B. The Stated Justifications for the Boating Ban Are Not Persuasive and Are Not Based On Adequate Information**

#### 1. Boating Access Will Enhance, Not Detract, from Solitude

The ROD/FEIS reasons, without any supporting data, that boating will erode the solitude of the Chattooga Headwaters. Indeed, the ROD/FEIS’ discussion on solitude suggests that a protecting solitude is the primary justification for the boating ban. Specifically, the ROD/FEIS notes:

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<sup>37</sup> *Riverhawks*, 228 F. Supp. 2d, at 1182.

<sup>38</sup> *See, e.g., Hells Canyon*, 227 F.3d, at 1178.

Remoteness and solitude are both integral values associated with experiences above Highway 28, particularly in the Ellicott Rock Wilderness Area. Achieving solitude in these areas has become increasingly difficult for hikers, backpackers, anglers and others as use increases.<sup>39</sup> Adding a new user group would make this even more difficult to achieve.

*ROD*, at 13. This wholly unsupported conclusion stems from an over-simplistic analysis of solitude and one that drastically departs from established backcountry methodology. The *ROD/FEIS*' solitude analysis consists of the following flawed formula: boating access equals more users on the Headwaters; more users on the Headwaters equals a loss of solitude; to preserve solitude, we must prevent new users; we must therefore ban boating.<sup>40</sup> This formula is reiterated throughout the *ROD/FEIS*.

Backcountry management research and methodology demonstrate the flawed oversimplification of the *ROD/FEIS*' discussion of solitude. For example, Patterson and Hammitt conclude that encounters between recreationists have a minimal impact, if any, on the solitude experienced by those recreationists.<sup>41</sup> Their conclusion is based on the fact that "solitude has a broader meaning than simply visitor encounters and perceived crowding."<sup>42</sup>

Their research concludes that "solitude refers to remoteness, primitiveness, nonconfinement, cognitive freedom, and autonomy. In fact, many of these other aspects of solitude appear to be more important than being alone."<sup>43</sup> Thus, contrary to the over-simplified formula used in the *ROD/FEIS*, encounters do not represent the whole of solitude experience for wilderness users.

When analyzed under established backcountry management methodology, it is clear that paddling will have minimal, if any, impacts on solitude. It will not affect any of the above-referenced characteristics of solitude. To the contrary, restoring paddling access means that

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<sup>39</sup> Through studying a FOIA request on the topic and through reading the *FEIS*, Appellant has found no studies of user perception on the Headwaters of the Chattooga. Nor have we found any data on the number of anglers, hikers, or other users currently utilizing the Chattooga Headwaters. Obviously, no data exists on the numbers of boaters that would paddle the Headwaters section. How then, can the *ROD/FEIS* justify the most extreme measure available to limit use when there are no studies or data to show how many individuals are currently using the resource or the characteristics of those users' experience? The claim that achieving solitude has become difficult enough to justify banning a use is without a basis and should not be considered in decisionmaking.

<sup>40</sup> The *FEIS* notes, "In this analysis, the *only factor* that will vary the solitude experience of an enthusiast is the number of encounters with others." *ROD/FEIS*, at H-6.

<sup>41</sup> Patterson, M.E., and Hammitt, W.E. (1990). Backcountry Encounter Norms, Actual Reported Encounters, and Their Relationship to Wilderness Solitude. *Journal of Leisure Research*. Vol. 22. No. 3. 259-275.

<sup>42</sup> "Solitude need not be the opposite of social crowding" (Hammitt, 1983).

<sup>43</sup> Hammitt, W.E. (1983). *Toward and Ecological Approach to perceived crowding in outdoor recreation*. *Leisure Sciences*. 5. 309-320.

Hammitt, W.E. (1982). *Cognitive Dimensions of Wilderness Solitude*. *Environment and Behavior*. 14. 478-493.

Hammitt, W.E., Brown, G.F. (1984). *Functions of privacy in wilderness environments*. *Leisure Sciences*. 6. 151-165.

paddlers will also be able to experience “remoteness, primitiveness, nonconfinement, cognitive freedom, and autonomy.” Thus, the ban on paddling actually decreases the overall solitude experience on the Headwaters because it eliminates the nonconfinement, cognitive freedom, and autonomy of a group of primitive backcountry users.

Even if the oversimplified analysis of solitude in the ROD/FEIS is accepted as complete, it is still unpersuasive. If encounters reduce solitude, then all interactions between individuals in a backcountry setting reduce the solitude for all others, regardless of the nature of that interaction. Whether it is two anglers interacting, an angler and a hiker, or an angler and a paddler, the impacts on solitude are identical. Thus the ROD/FEIS’ solitude analysis, at most, suggests that backcountry interactions should be reduced in general. If this is the case, then all uses should be equitably limited rather than one type of use being completely banned. There is nothing inherent in the general conclusion that interactions should be reduced that suggests a certain *type* of use (boating) should be banned. Furthermore, labeling boaters as a “new” user group (which, as noted above, is false) does not advance the stated solitude analysis.

Under the ROD/FEIS’ approach, the appropriate inquiry should be: “how can we best reduce interactions between users above Highway 28?” As developed more fully below, banning whitewater boating is the *least* effective way to reduce user interactions above Highway 28. The heavy rainfall and river swelling necessary for boaters to paddle the Headwaters is a natural deterrent for other users of this area. Hikers, backpackers and anglers will be least likely to be in the Chattooga River corridor (much less in or near the river) during times of heavy rain and high river levels when boaters are able to float downstream. Thus interactions between boaters and other users will be minimal. Furthermore, boating is the slowest growing use of all proposed uses for the Chattooga WSR corridor.<sup>44</sup> Looking ahead, boating should be the last, rather than the first, use to be banned if limiting user encounters is the stated objective.

Experiencing solitude is a privilege to which all Americans should have equal access. Thus, if a land manager decides that use must be limited to encourage solitude, the most responsible and ethical way to limit use is to limit all users equitably. A paddler has the same appreciation, desire, and rights regarding access to solitude experiences as anglers, hikers, and other forest users. It is unfair and discriminatory to ban paddlers from the Chattooga Headwaters while allowing all other users to access the area in unlimited numbers. Paddlers should require equal access to experience the solitude of our Nation’s most pristine wilderness areas and wild and scenic rivers. If the ROD/FEIS must limit use on the Chattooga Headwaters to protect solitude, then it should equitably limit all users to the extent compatible with Wilderness and WSR designations.

## 2. Boating Access Will Not Cause New Unofficial Trails or Additional Trampling of Vegetation

There is simply no evidence of any kind offered to support the ROD/FEIS’ claim that boaters will create new unofficial trails or trample vegetation. These claims are false, inflammatory, and directly contradict the USFS’s own findings and conclusions. The USFS

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<sup>44</sup> See Section IV(C)(4) below.



makes the following findings and conclusions with regard to boaters' terrestrial impacts on the Headwaters:

[Boaters] would be expected to float from put-in to take-out and stay on the river or on the riverbanks during the entire trip. Therefore vegetation loss, soil compaction and erosion impacts from boaters are not expected to be significant....<sup>45</sup>

We agree boaters have low impacts on the natural resource.<sup>46</sup>

On the Chattooga above Highway 28 boaters would be expected to access the river primarily *by using existing river access points* at Grimshawes, Bull Pen, and Burrells Ford.<sup>47</sup>

Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on the whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.<sup>48</sup>

The only time paddlers would even be out of their boats would be to scout or portage a limited number of technical rapids. This is typically accomplished by walking along dry, exposed rocks that line the shore. To the extent shoreline rocks are not available on the Headwaters, hikers and anglers have already blazed trails around all major rapids. Thus boaters will rarely be out of their boats; and when they are, they will not be creating new trails or trampling vegetation. The real offenders here are non-boaters.<sup>49</sup> There is only one way non-boaters can access the river: terrestrially. Accordingly, terrestrial impacts cannot be claimed to be a by-product of boating and cannot justify a ban on floating the Headwaters.

### 3. Boating Access Will Not Lead to Additional Search and Rescue or Safety Issues

The ROD/FEIS cites increased search and rescue demands as a justification for banning paddling on the Chattooga River above Highway 28. Specifically, the ROD/FEIS concludes:

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<sup>45</sup> ROD/FEIS, at L-107.

<sup>46</sup> ROD/FEIS, at H-22.

<sup>47</sup> ROD/FEIS, at H-7 (emphasis added).

<sup>48</sup> USDA Forest Service. (1971a). *Wild and Scenic River Study Report: Chattooga River*.

<sup>49</sup> The ROD/FEIS reasons that:

These [terrestrial] effects would tend to be focused from Highway 28 upstream to the Ellicott Rock survey marker, an area of the river that is trailed and *heavily used by hikers, backpackers and anglers*. ROD/FEIS, at H-12 (emphasis added).

Other negative impacts that could be expected if boating were to be permitted include...expansion of the segment of river where search and rescue responses would likely be needed.<sup>50</sup>

Search and rescue operations would likely occur over time.<sup>51</sup>

There is simply no justification for this conclusion. There is not one reported boating-related safety or rescue incident on the Headwaters. Moreover, this unsupported conclusion contradicts the direct findings and conclusions of the FEIS. The FEIS makes the following finding with respect to alternative E—the relief sought in this Notice of Appeal:

According to Andrew Pickens Ranger District Staff (Borgen. Pers. Com.), a range of five to ten search and rescue operations each year are associated with boaters on the lower Chattooga [out of an average of 25,000 floating trips] ...it would seem reasonable to assume, all things equal, that the number of search and rescue operations would be considerably less above Highway 28 because of the fewer number of days available for boating. Additionally, “creek” boaters in general seem to be proficient at performing their own rescues.

ROD/FEIS, at H-27. Indeed the ROD/FEIS makes the following finding regarding the type of boaters that would float the Headwaters:

Creek Boaters usually travel in small groups of 2-6 boaters and are *highly skilled* in negotiating challenging whitewater. They tend to use the latest in high performance equipment specifically designed for creeks, and are *generally trained and equipped in safety procedures and self-rescue techniques*.

ROD/FEIS, at H-7 (emphasis added). The ROD/FEIS further describes how restoring floating access will not cause new search and rescue or safety issues as follows:

As a comparison, the section of Overflow Creek ...is similar to sections of the Chattooga upstream from Highway 28, although *a much more technical and difficult run*...Tallulah Ranger District Staff do not recall *any search and rescue operations involving boaters on Overflow Creek in the last 14 years*.

ROD/FEIS, at H-27 (emphasis added). The ROD/FEIS also notes that on another creek of similar difficulty, the Tallulah Gorge, that “[a]ccording to State Park staff *no search and rescue efforts have [ever] been undertaken since the river opened to boaters.*” *Id* (emphasis added). After demonstrating that no search and rescue operations will likely occur on the Headwaters, the ROD/FEIS makes the following conclusion:

There are no current o[r] foreseeable activities that would cause any cumulative effects to search and rescue operations on the Chattooga Wild and Scenic River above Highway 28.

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<sup>50</sup> ROD/FEIS, at 13.

<sup>51</sup> FEIS, page L-108.

*Id.* The FEIS unequivocally determines that restoring floating access will have no cumulative effects on search and rescue. Nevertheless, the ROD determines that boating should be banned due to search and rescue concerns. There could be no clearer evidence of an arbitrary and capricious decision.

Furthermore, it contradicts USFS policy to ban backcountry uses for safety or search and rescue reasons. When the Headwaters of the Chattooga was designated Wild and Scenic, paddling and safety were directly addressed in the study documents. The USFS wrote the following in 1971 with regard to safety on the Headwaters:

If an injury is sustained, getting help or getting to help is extremely difficult. This places the burden of safety on the individual. Physical conditioning and an awareness of the intrinsic dangers that exist are the best possible safety precautions.<sup>52</sup>

This acknowledgement that the burden of safety is on the individual is consistent with USFS policy for management of backcountry areas. The USFS Manual describes management related to water safety as follows:

The manager's role in safety is advisory and informational. Provide opportunities for the river recreation user to become informed of current river flows, equipment and experience minimums and hazards. The user must make the final decision about whether or not to engage in the recreation activity.<sup>53</sup>

To prohibit boating because of potentially increased search and rescue needs contradicts USFS policy.<sup>54</sup> The USFS Manual defines the USFS' role as advisory and informational. It is the user who should decide whether a use is sufficiently safe. In short, there is simply no evidence that paddling will increase search and rescue needs, and even if there were, it would contradict USFS policy to ban a use on this basis.

#### 4. There are No User Conflicts to Zone

The ROD/FEIS makes the following conclusion:

Compatible uses on the Chattooga include *boating*, hiking, hunting, fishing and camping.

ROD/FEIS, at H-4. Thus the ROD/FEIS is clear that boating on the Chattooga is compatible with other primitive recreational uses. Also clear is the USFS manual's instructions regarding

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<sup>52</sup> USDA Forest Service. (1971a). *Wild and Scenic River Study Report: Chattooga River*.

<sup>53</sup> USFS Manual § 2354.41

<sup>54</sup> Banning a recreational use based on an undocumented and unsupported perceived risk of increased search and rescue conflicts with USFS policy; AW is not aware of other closures of USFS resources based on perceived risk of increased search and rescue needs (i.e. biking trails, angling streams, climbing routes, mountaineering peaks, backcountry hiking trails, etc). If this is a new USFS policy, then thousands of adventure uses across the country should be banned immediately to apply this new policy in a consistent manner.

zoning: it instructs that only *incompatible* uses should be zoned – and only after indirect measures have been tried unsuccessfully. In spite of the ROD/FEIS’ finding of compatibility, and in a complete disregard of the USFS Manual’s instructions, the ROD/FEIS bans boating based on the following unsupported conclusion:

It is likely that boating above Highway 28 would disturb users who have become accustomed to or who have come to expect the absence of boaters.

This unsupported conclusion is neither valid nor relevant; it cannot therefore serve as a basis to ban paddling on the Chattooga River above Highway 28. The ROD/FEIS separates the conflicts discussion into two parts: (a) potential impacts on angling, and (b) potential impacts on other dispersed recreational activities. Both parts of the ROD/FEIS’ discussion will be addressed here in turn.<sup>55</sup>

As an initial matter, the ROD/FEIS misrepresents the current state of affairs when it suggests that “...the closure [of the Headwaters] will continue the *successful* zoning of uses....” Zoning has not been successful. The zoning policy has led to nearly a decade of opposition from the paddling community and drawn more than a thousand negative public comments. Furthermore, this policy has driven a wedge between two groups of primitive recreationists (anglers and boaters) that regularly collaborate with each other and with the USFS to preserve and enhance public waterways. This policy has been woefully *unsuccessful*.

**(a) There Is No Conflict Between Angling Use and Boating Use**

Boating and Angling are not in conflict because (i) boaters and anglers can simultaneously enjoy a sense of place; (ii) there is no reported history of boater/angler conflict on the Chattooga; and (iii) boating and angling uses are inherently complimentary.

**(i) Anglers and Boaters Can Simultaneously Enjoy a “Sense of Place”**

The ROD/FEIS maintains that the setting of the Chattooga has:

contributed to the formation of strong emotional ties between anglers and the river; feelings of ownership and attachment, a phenomenon commonly referred to as a sense of place.<sup>56</sup>

The ROD/FEIS concludes without justification that “any change in culture or practice on the river could threaten this identity.”<sup>57</sup> The drafters of the ROD/FEIS worked with Bixler and Backlund to create two studies: one on whitewater paddling on the Chattooga and one regarding fishing on the Chattooga. Questionably, the boating study is nowhere referenced in the

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<sup>55</sup> For a summary of the ROD/FEIS’ discussion on user conflicts and Appellant’s responses, please see [Appendix 4](#).

<sup>56</sup> *ROD/FEIS*, at H-5.

<sup>57</sup> *ROD/FEIS*, at H-5.

Headwaters discussion while the fishing study is referenced on several occasions. The conclusions of the studies are clear: whitewater paddlers that utilize the Chattooga River have a stronger sense of place with the Chattooga than coldwater anglers.

Bixler and Backlund surveyed both Chattooga River Anglers and Chattooga River Paddlers in order to characterize their “Emotional Place Bond.”<sup>58</sup> These analyses placed the respondents on a continuum of degree of bonding character as measured by five basic taxonomic categories. These categories are listed below in order of increasing degree of bonding character:

1. Place Familiarity: Remembrance bonding
2. Place Belongingness: Affiliation
3. Place Identity: Personal self identity
4. Place Dependence: Functional necessity
5. Place Rootedness: (Homing) Stability

The results of the analyses are characterized in Table 1 and clearly show that paddlers have a more highly developed place bond than anglers on the Chattooga River.

<b>Table 1.</b> Chattooga River Angler and Paddler Relative Place Bond		
Place Bond Category	Angler Mean Response	Paddler Mean Response
Place Familiarity	3.34	4.34
Place Belongingness	3.52	4.16
Place Identity	3.51	4.17
Place Dependence	2.55	3.44
Place Rootedness	1.83	2.50
Total	2.95	3.72
<p>Mean scores are based on a 5 point scale where study participants responded to questions to which a positive response indicates a strong place bond. The 5 point scale was as follows: 1: Strongly Disagree, 2: Disagree, 3: Neutral, 4: Agree, 5: Strongly Agree. Therefore a high mean response indicates a strong place bond.<sup>59</sup></p>		

<sup>58</sup> Bixler, R., Backlund, E. 2002. *Activity of Resource Substitutes: Paddlers Using the Chattooga River*. Clemson University, Dept of Parks, Recreation and Tourism Management.

Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management.

<sup>59</sup> Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management.

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Chattooga River paddlers exhibited a stronger sense of place than Chattooga River anglers in every category. Therefore the ROD/FEIS' conclusion that backcountry anglers have a uniquely strong sense of place are unfounded and are actually disputed by the USFS-commissioned study. In fact, one finding of the Bixler study characterized Chattooga River angler's motivation for fishing on the Chattooga in the following manner: "For a significant portion of the respondents, trout fishing may be a means of expressing their [socio-economic] status," not finding a sense of place.<sup>60</sup>

Because the study characterizing paddlers' sense of place was done while the boating ban was in effect, it suggests that paddlers will have an even *stronger* sense of place if access to the Headwaters is restored. This is true because the level of specialization and skill required to paddle the Headwaters is greater than that required to paddle the Chattooga River below Highway 28. Studies show that one's level of specialization is positively related to one's sense of place.<sup>61</sup> Other studies also demonstrate the importance of place to paddlers.<sup>62</sup>

These studies show that if boating use were allowed on the Headwaters, paddlers would be more prone to develop a sense of place than anglers. Boaters are currently being denied the opportunity to develop any sense of place on the Chattooga River above Highway 28. Other primitive recreationists have the opportunity to develop a sense of place on the entire river, while paddlers are denied this opportunity under the currently proposed management plan. The Bixler and Backlund studies show that paddlers are a specialized user group with a great capacity and tendency to develop a strong sense of place. Boaters' ability to develop this sense of place on the Headwaters should be restored; it is wholly consistent with anglers' ability to have a sense of place.

(ii) History Shows No User Conflict on the Chattooga

There is no history of conflict between anglers and paddlers or between other recreationists and paddlers on the Headwaters of the Chattooga. In a 2001 FOIA request, AW requested all evidence of conflict on the Chattooga Headwaters from the Sumter National Forest: there is no such evidence.<sup>63</sup> AW made a second, similar FOIA request on January 26, 2004. As

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Bixler, R., Backlund, E. 2002. *Activity of Resource Substitutes: Paddlers Using the Chattooga River*. Clemson University, Dept of Parks, Recreation and Tourism Management.

<sup>60</sup> Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management.

<sup>61</sup> Ewert, Alan., Hollenhorst, S. 1994. *Individual and Setting Attributes of the Adventure Recreation Experience*. Leisure Sciences 16: 177-191.

Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management.

Bixler, R., Backlund, E. 2002. *Activity of Resource Substitutes: Paddlers Using the Chattooga River*. Clemson University, Dept of Parks, Recreation and Tourism Management.

<sup>62</sup> Section IV.B.6 summarizes some of Kinney's findings that relate to this topic.

<sup>63</sup> Townsend, Carol. 1980. *Chattooga! A case study of Wild and Scenic River Management Problems*.

with the 2001 request, the documents produced did not contain a single reference to any conflict between boaters and anglers.

(iii) Boating and Angling are Complimentary River Uses

There are only three specialized groups of recreationists that currently use the Headwaters of the Chattooga: hunters, anglers and paddlers. The ROD/FEIS is clear that boating will not interfere with hunting. Appellant concurs. Therefore, the implied purpose of the ban is to “protect” anglers from resource competition with paddlers.

The ROD/FEIS implies that conflict will occur between anglers and paddlers if access is restored to paddlers. This conclusion is not supported by any study or in practice. Anglers and paddlers have common goals in promoting river conservation and access and have participated in countless successful collaborations that promote sharing resources with minimal conflict. Studies show that anglers and paddlers tend to use rivers at different water levels. Therefore contact is self-limiting between these user groups (See [Figure 1](#), below). No data is presented in the ROD/FEIS to contradict these previous studies. The current ban on paddling and the proposal to continue it is an artificial and unnecessary separation of two compatible user groups. Contact between paddlers and anglers is infrequent, but when it occurs it is complimentary.

Solitude, scenery, small group definition, and sense of place are important to every specialized group.<sup>64</sup> This is true for both paddlers and anglers.

Both anglers and paddlers should be seen as groups with strong commitments to environmental stewardship, strong connection to place, high appreciation of wilderness and solitude, and as having a relatively minor environmental impact. In essence, these two groups should be viewed as one.

A review of studies in recreation specialization reveals that both boating and angling take place in the context of limited resources. Both user groups must contend with environmental degradation, and the intensification of legal concerns regarding use of private lands.<sup>65</sup> Analysis and resolution of these issues is often the same for whitewater paddling and coldwater angling. For these reasons, the two groups commonly collaborate to preserve their joint goals and complimentary uses.

Recreation specialization is characterized by a range of elements related to individual attributes of participation and setting preferences. Recreation specialization research examines widely ranging topics including, locus of control,<sup>66</sup> privacy orientation,<sup>67</sup> specialization,

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<sup>64</sup> Ewert, Alan., Hollenhorst, S. 1994. *Individual and Setting Attributes of the Adventure Recreation Experience*. Leisure Sciences 16: 177-191.

<sup>65</sup> Lee, R.D. *Recreational Use Statutes and Private Property in the 1990's*. 1995; *Journal of Park and Recreation Administration*. 13: 71-83

<sup>66</sup> Knopf, R.C., Peterson, G.L., Leatherberry, E.C. 1983. *Motives for Recreational Floating: Relative Consistency Across Settings*. Leisure Sciences. 5: 231-255.

<sup>67</sup> Knopf, R.C. 1987. *Human Behavior, Cognition and Affect in the Natural Environment*. In *Handbook of Environmental Psychology*. Stokols, D. and Altman, I. New York: Wiley.

experience, social group structure,<sup>68</sup> recreation setting preferences, natural setting preferences, equipment,<sup>69</sup> risk,<sup>70</sup> and safety.<sup>71</sup> The ROD/FEIS failed to study any of these elements.

Land managers have implemented various programs to address these issues, including: 1) interpretive programs,<sup>72</sup> 2) educational material,<sup>73</sup> 3) user fees,<sup>74</sup> 4) permit systems,<sup>75</sup> and 5) establishing limited access areas.<sup>76</sup> Effectively implementing the programs above requires quality information about user groups. Recreation Specialization research does not support exclusion of boating or angling because they are complimentary uses with complimentary goals. The ROD/FEIS fails to implement established management tools, and instead adopts an unprecedented total ban.

Kinney maintains that the complexity of inter-group relationships is increasing in outdoor recreation settings.<sup>77</sup> There is not always consensus on how land should be managed, or in some cases not managed. The challenge before land managers is to accommodate a wide spectrum of values, beliefs, and economic interests to form directed and sustainable management plans. The ROD/FEIS does not rise to this challenge.

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McIntyre, N. 1989. *The Personal Meaning of Participation: Enduring Environment*. Journal of Leisure Research. 21: 167-179.

<sup>68</sup> Roggenbuck, E.J., Williams, D.R., Bange, S.P., et al. 1991. *River Float Trip Encounter Norms: Questioning the Use of the Social Norms Concept*. Journal of Leisure Research. 23: 133-153.

Schuett, M.A. 1995. *Predictors of Social Group Participation in Whitewater Kayaking*. Journal of Park and Recreation Administration. 13: 42-54.

<sup>69</sup> Block, P.H., Black, W.C., Lichtenstein, D. 1989. *Involvement with the Equipment Component of Sport: Links to Recreational Commitment*. Leisure Sciences. 11: 187-200.

<sup>70</sup> Slovic, P. 1964. *Perception of Risk*. Psychological Bulletin. 61: 220-223.

Slovic, P. 1987. *Perception of Risk*. Science. 236: 280-285.

<sup>71</sup> Mackay, S. 1988. *Risk Recreation in Wilderness Areas: Problems and Alternatives*. Western Wildlands. 33-38.

McEwan, D.N. 1983. *Being High on Public Land: Rock Climbing and Liability*. Parks and Recreation. 18: 4650

<sup>72</sup> Burzynski, R. 1991. *Promoting Land Ethics: A Challenge for Interpretation*. Trends. 28: 31-34.

<sup>73</sup> Hollenhorst, S., Schuett, M.A., Olson, D, et al. 1995. *An Examination of the Characteristics, Preferences and Attitudes of Mountain Bike Users of National Forests*. Journal of Park and Recreation Administration. 13: 41-51.

<sup>74</sup> Wisman, S.A., 1992. *The Satisfaction and Willingness to Pay of Whitewater Recreationists*. Ph. D., West Virginia University.

<sup>75</sup> Bates, S.F. 1992. *Whitewater Dilemma: Allocating Boating Permits on Limited-Entry Rivers*. Rivers. 3: 266-275.

Baxter, W. 1991. *Permits on the Smith? Evolution of Use on a Montana River*. Western Wildlands. 16:38.

<sup>76</sup> Bonnicksen, T.M. 1991. *Managing Biological Systems*. Journal of Forestry. 89: 10-15.

Driver, B.L. 1985. *Specifying What is Produced by Management of Wildlife by Public Agencies*. Leisure Sciences. 7: 281-295.

<sup>77</sup> Kinney, T.K. 1997. *Class V Whitewater Paddlers in American Culture: Linking Anthropology, Recreation Specialization, and Tourism to Examine Play*. Unpublished Graduate Thesis. Northern Arizona University.



The ROD/FEIS concludes that since certain users expect there to be no paddlers on the Chattooga Headwaters, and that those users will be “disturbed” by the presence of paddlers. Several studies contradict this assumption. These studies show that an individual’s cognitive belief that a particular backcountry situation is a problem may not correspond with that individual’s experience.<sup>78</sup> In other words, while some users may expect the presence of paddlers to impact their experience, those impacts may not actually occur.

In reality, boating and angling could not be more complimentary. Boaters prefer to float the deepest and swiftest channels of water, while anglers prefer to cast from the bank or from a place in the streambed where the current is not overly forceful. Thus boaters and anglers are rarely in the same physical part of the river corridor. To accommodate the rare instances that paddlers and anglers desire to occupy the same physical spot on the river, these two user groups have developed a common sense and accommodating river ethic. In the rare instances that a paddler floats through an area where an angler desires to cast, the angler simply modifies his casting patterns to incorporate a seconds-long delay, allowing the boater to pass without inconvenience or difficulty. Similarly, in common river practice, boaters will alter their course to minimize any disturbance to an angler. While this river ethic is already widely practiced, minimal educational steps could be taken to reinforce it – for example by posting signs at put-ins and take-outs. Also evidencing the complimentary nature of boating and angling is the fact that many individuals enjoy both forms of primitive recreation, and often engage in both during a single river visit. Some boaters enjoy to fish before or after they float the river, and some anglers prefer to fish from a boat. In short, boating and angling are inherently complimentary.

**(b) There Is No Conflict Between Boaters and Other Dispersed Recreationists**

The ROD/FEIS also suggests that boating will impact the solitude experience of all dispersed recreational users.<sup>79</sup>

The ROD/FEIS offers no data to support this claim. Nor does it offer support to show that such users would be “disturbed” by boating. Nevertheless, the ROD/FEIS concludes:

Trails where the above user groups (hiking, backpacking, hunting, and primitive camping) may encounter and possibly be disturbed by the presence of boaters are found along the main stem of the Chattooga.<sup>80</sup>

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<sup>78</sup> Patterson, M.E., and Hammitt, W.E. (1990). *Backcountry Encounter Norms, Actual Reported Encounters, and Their Relationship to Wilderness Solitude*. Journal of Leisure Research. Vol. 22. No. 3. 259-275.

Ditton, R.B., Fedler, A.J., and Graefe, A.R. (1983). *Factors Contributing to Perceptions of Recreational Crowding*. Leisure Sciences. Vol. 5, No. 4. 273-288.

Hendricks, W.W. (1995). *A Resurgence in Recreation Conflict Research: Introduction to the Special Issue*. Leisure Sciences. 17. 157-158.

Owens, P.L. (1985). *Conflict as a social interaction process in environmental and behavior research: The example of leisure and recreation research*. Journal of Environmental Psychology. Vol. 5. 241-259.

<sup>79</sup> ROD/FEIS, at 24.

<sup>80</sup> ROD/ FEIS, at H-9.

Dispersed recreational users may be disturbed by paddlers or they may enjoy seeing boaters or they may be indifferent. The possible reactions are limitless, and without data to support the claim that boating disturbs dispersed recreationalists, this claim should be dismissed outright. This statement also infers that the river is visible from the Chattooga Trail which it typically is not. Incidentally, back country users often enjoy seeing and encountering other users. Such encounters manifest a sense of belonging and connection to others with similar interests. The ROD/FEIS has no data to support the assertion that dispersed recreationists would even encounter boaters in the backcountry much less be disturbed by them.

## 5. Zoning Is Not The Answer

### (a) **Conflicts Methodology Instructs Against Boating Ban**

A specific example of conflict can be thought of as either interpersonal conflict or social values conflict. Interpersonal conflict can be defined as the presence of an individual or group interfering with the goals of another individual or group. “Social value conflict can arise between groups who do not share the same norms<sup>81</sup> and/or values,<sup>82</sup> independent of the physical presence or contact between the groups.”<sup>83</sup> The authorities suggest that:

Understanding these sources of conflict (interpersonal conflict versus conflicts in social values) is important for natural resource managers because the solution to the conflict depends on the cause of the problem. Zoning, for example, may reduce conflicts stemming from interpersonal conflict because the user groups are physically separated. On the other hand, zoning is likely to be ineffective when conflicting values are involved (Ivy, *et al.*, 1992<sup>84</sup>, Owens, 1985<sup>85</sup>). Because social interaction is not necessary for this type of conflict to occur, physically separating users will have little influence. In these situations, education may be more effective.<sup>86</sup>

The alleged conflict on the Headwaters is a social values conflict. For example, an angler representative made the following comment in support of keeping boaters out of the Headwaters: “Obviously they [boaters] just don't understand backcountry anglers...and our low tolerance for

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<sup>81</sup> Ruddell, E.J., Gramann, J.H. 1994. *Goal orientation, norms, and noise induced conflict among recreation area users*. Leisure Sciences. 16: 93-104.

<sup>82</sup> Saremba, J., Gill, A. 1991. *Value conflicts in mountain park settings*. Annals of Tourism Research. 18: 155-172.

<sup>83</sup> Vaske, J.J., Donnely, M.P., Wittman, K., and Laidlaw, S. (1995). *Interpersonal Versus Social-Values Conflict*. Leisure Sciences, 17, 205-222.

<sup>84</sup> Ivy, M.I., Stewart, W.P., and Lue, C. (1992). *Exploring the Role of Tolerance in Recreational Conflict*. Journal of Leisure Research. 24. 348-360.

<sup>85</sup> Owens, P.L. (1985). *Conflict as a social interaction process in environmental and behavior research: The example of leisure and recreation research*. Journal of Environmental Psychology. Vol. 5. 241-259.

<sup>86</sup> Vaske, J.J., Donnely, M.P., Wittman, K., and Laidlaw, S. (1995). *Interpersonal Versus Social-Values Conflict*. Leisure Sciences, 17, 205-222.

encounters with others with different beliefs."<sup>87</sup> Researchers describe social values conflicts as follows:

if people do not observe an event, but believe a problem situation exists, the type of conflict must stem from a conflict in social values.<sup>88</sup>

Obviously there has not been interpersonal conflict between boaters and anglers (or other users) on the Chattooga Headwaters since there are no boaters allowed on the Chattooga Headwaters. Furthermore there are no studies documenting interpersonal conflicts between boaters and other dispersed recreationists on any of the hundreds of rivers in the region that anglers and paddlers share. Rather the alleged conflict must be based on the perception of a problem rather than on any actual event. Specifically the conflict on the Chattooga is a social values conflict created by the Sumter National Forest, which gave one group exclusive access to the river while discriminatorily banning another. This decision to favor one user group is apparently based on stereotypes of paddlers, and is not based on any studies. Studies show that if an activity is stereotyped, it may result in intolerance, regardless of situational factors.<sup>89</sup> The ROD/FEIS exacerbates intolerance and creates conflict where there would otherwise be none. In short, the ROD/FEIS does not describe a conflict, it creates one.<sup>90</sup>

Significantly, authorities on conflict assert that “the potential for interpersonal conflict increases with increased visitation. On the other hand, for individuals who fundamentally disagree with an activity..., these conflicts in values should not vary with visitation.”<sup>91</sup> In other words, allowing boating on the Headwaters would not exacerbate the alleged social values conflict that may be present. Studies conclude that “when the source of conflict is differences in values, however, zoning is not likely to be very effective.” “In this situation educational efforts...may be more effective.”<sup>92</sup>

The Southern Region of the USFS noted in a 2002 document that “conflict resolution may involve both zoning and education. When the source of conflict is goal interference, it is more appropriate to consider zoning by time, space, or activity.”<sup>93</sup> Goal interference is synonymous with interpersonal conflict. Thus, according to the Southern Region, while zoning

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<sup>87</sup> Comment to Draft Sumter EIS.

<sup>88</sup> Id.

<sup>89</sup> Ivy, M.I., Stewart, W.P., and Lue, C. (1992). *Exploring the Role of Tolerance in Recreational Conflict*. Journal of Leisure Research. 24. 348-360.

<sup>90</sup> Significantly, Vaske, *et al.* assert that “the potential for interpersonal conflict increases with increased visitation. On the other hand, for individuals who fundamentally disagree with an activity..., these conflicts in values should not vary with visitation.”

<sup>91</sup> Vaske, J.J., Donnely, M.P., Wittman, K., and Laidlaw, S. (1995). *Interpersonal Versus Social-Values Conflict*. Leisure Sciences, 17, 205-222.

<sup>92</sup> Id.

<sup>93</sup> USDA Forest Service—Southern Research Station. (2002) The Southern Forest Resource Assessment: Section 4.5. Potential Conflicts Between Different Forms of Recreation.

may be an effective tool for managing interpersonal conflict, it is not recommended for managing social values conflict such as those on the Chattooga. The 2002 study further noted:

Zoning seems less effective when the conflict is attributable to differing social values, because such conflict does not necessarily require physical presence or actual contact between users.<sup>94</sup>

The ROD/FEIS has banned paddling based on a misunderstanding or misapplication of USFS policy on zoning as it relates to the literature on conflict.

Past decisions gave anglers a privilege they never should have had: exclusive access to a Wild and Scenic River. Now anglers consider that privilege a right worth protecting at the expense of other users. This inequality has created tension and conflict between user groups on the Chattooga, while these same groups share and collaborate on every other Southeastern river. Recreational specialization research shows that re-instituting a boating ban will do nothing to eliminate the perceived conflict on the Chattooga River, and will instead exacerbate conflict. This research also shows that education, not zoning, is the most efficacious means of reducing conflict.

#### **(b) Education as a Solution to Conflict**

Even if a conflict between boaters and other users did exist, education—not zoning—would be the best (and only) way to resolve that conflict.<sup>95</sup> Dyke and Rule found that people are less likely to experience anger if they are aware of the roots of the behavior that would have otherwise angered or frustrated them.<sup>96</sup> Ramthun accordingly suggests that “interpretive efforts that help users to understand the behaviors, motivations, and land use needs of other user groups may reduce perceptions of conflict.”<sup>97</sup> Examples of this type of education on the Chattooga would include educating anglers on paddlers’ river stewardship efforts, the compatibility of paddling use, concern with safety, and paddlers’ enjoyment of solitude. Ramthun also states that “while it is obviously necessary to establish some behavioral protocols, it may be equally necessary to promote understanding and acceptance for the needs and motives of different user groups. If these educational efforts emphasize that different user groups have many similarities, especially regarding relationship to setting, perhaps fewer biased evaluations will occur.”<sup>98</sup> The ROD/FEIS has done the exact opposite by stating erroneously that paddlers have a weaker sense of place than anglers, have different goals and values, break laws, interfere with angling, and use the resource in an unsafe manner. In so doing the ROD/FEIS breeds intolerance and contempt for paddlers among anglers and other users where there could be tolerance, respect, and harmonious use.

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<sup>94</sup> *Id.*

<sup>95</sup> Vaske et al’s recommendation that education be utilized to resolve social values conflict like those on the Chattooga is critical to the resolution of this issue and is well supported by other literature.

<sup>96</sup> Dyck and Rule, 1978 as cited in Ramthun, R. 1995. *Factors in User Group Conflict Between Hikers and Mountain Bikers*. 159-169.

<sup>97</sup> Ramthun, R. 1995. *Factors in User Group Conflict Between Hikers and Mountain Bikers*. 159-169.

<sup>98</sup> *Id.*

Ramthun concludes his study as follows:

An emphasis on understanding and acceptance, if successful, would help to redefine the social situation in outdoor recreation settings. At present, other user groups are often viewed by recreationists as a source of interference and competition. *By emphasizing tolerance in our interpretive efforts, we may encourage the people in different user groups to see each other simply as fellow travelers in the outdoors.*"<sup>99</sup>

This conclusion shows that education, not zoning, is the most appropriate means of resolving any alleged user conflicts. One of the most important educational tools available to the USFS to encourage tolerance is its publication of records of decision and the media coverage associated with those decisions. Sadly, the Sumter ROD/FEIS uses this educational medium to encourage discrimination rather than to encourage tolerance and collaboration.

6. Trout Fishing Opportunities Do Not Justify an Angling River Monopoly

The ROD/FEIS suggests that paddling should be banned on the Headwaters because the angling opportunities are so uniquely outstanding that even a *potential* disturbance of angling use warrants a total boating ban. In other words, the Headwaters are so important for trout fishing that anglers should enjoy a monopoly on this public resource. The study relied upon by the ROD/FEIS proves this to be false.

The Bixler Study, a survey of 202 members of the "Rabun" and "Chattooga" Chapters of Trout Unlimited, revealed that of the eighteen most common substitutes for the Chattooga River, eleven were rated as offering a better trout fishing experience than the Chattooga. Statistically, four of the substitutes were significantly better.<sup>100</sup> The study concludes that "the highest rated river was the Chestatee indicating that anglers rated the trout fishing experience better than the Chattooga National Wild and Scenic River."<sup>101</sup> Furthermore, while the ROD/FEIS claims that "the section of river upstream of Highway 28 is considered to be the best trout fishing waters in South Carolina," respondents to the Bixler Study *disagreed* with the statements: "the Chattooga is the best place for trout fishing," that "Trout fishing on the Chattooga is more important to me than trout fishing any other river," and that "I get more satisfaction out of trout fishing the Chattooga than from trout fishing any other river."<sup>102</sup>

Based upon the only study cited in the ROD/FEIS, the Chattooga River above Highway 28 is *not* the best trout fishing waters in the region as rated by local anglers. Angling opportunities simply cannot justify a complete ban on other primitive recreational uses.

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<sup>99</sup> Ramthun, R. 1995. Factors in User Group Conflict Between Hikers and Mountain Bikers. 159-169.

<sup>100</sup> Bixler, R., Backlund, E. 2002. *Chattooga National Wild and Scenic River Trout Angler Substitution Study*. Clemson University, Dept of Parks, Recreation and Tourism Management. 46

<sup>101</sup> Id.

<sup>102</sup> Id, at 56.

7. There Is No Adequate Alternative to Paddling the Chattooga Headwaters

The ROD/FEIS concludes that “there currently are adequate opportunities for “creek boating” experiences in the area, including the Chattooga River.” This conclusion has two parts: (a) that downriver sections of the Chattooga provide adequate creeking; and (b) that other rivers in the area provide adequate creeking. This unsupported two-part conclusion is utterly false. Both falsities will be addressed in turn.

**(a) Downstream Sections of the Chattooga Do Not Offer Adequate Creeking**

The Chattooga River (below Highway 28) is not a creek boating experience based on the ROD/FEIS’ own definition of creek boating. Downriver sections of the Chattooga cannot therefore be considered an alternative to paddling above Highway 28. The ROD/FEIS defines “creek boating” as...

a highly technical form of whitewater paddling that requires steep mountain rivers with high gradients. Generally, a part of the run will exceed 100 feet per mile (fpm) in gradient with flow regimes typically between 100 to 500 cubic feet per second. In a typical creeking opportunity there are drops, vertical waterfalls, tight and technical water (small channel size, tight turns, short eddies), and at least one class IV rapid.

ROD/FEIS, at H-7.

The Chattooga River below Highway 28 lacks sufficient gradient, is too wide, and has excessive volume to be considered a “creek boating” resource. Downstream sections of the Chattooga do not offer “adequate” creeking, just as they do not offer “adequate” fishing or hiking.

**(b) Other Area Rivers Cannot Replace Creeking on the Headwaters**

There is no data or explanation in the ROD/FEIS to support the statement that creek boating opportunities in the area are “adequate.” This assumption is false. There are indeed other creek boating opportunities in the area, just as there are other high quality trout fishing and hiking opportunities. However other rivers do not offer the same type of high quality remote paddling experience that the Chattooga River above Highway 28 will provide. Appendix 5 provides a comparison between the Chattooga River above Highway 28 and the ROD/FEIS’ proposed alternatives to the Chattooga based on several variables.

Furthermore, the USFS has long recognized that the Chattooga River, including the Headwaters, is a unique and incomparable paddling resource. In 1971, the USFS wrote of the Chattooga: “It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking

beside it, it can provide a refreshing recreation experience.”<sup>103</sup> In the same year, another study found:

The Chattooga is the only mountain river in the four state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores...Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness...The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed.<sup>104</sup>

The Headwaters of the Chattooga River had no comparison as a paddling resource in the early 1970s and it has none today. There simply is no alternative to paddling the Headwaters.

Only two other rivers listed as “alternatives” in the FEIS are designated Wild and Scenic: Wilson Creek and the Horsepasture River. Wilson Creek is a short roadside run which does not compare to the length and remote nature of the Chattooga Headwaters. The Horsepasture River is much more difficult than the Headwaters of the Chattooga and requires massive portages and intense hiking access, and thus receives little use. Therefore there are no other Wild and Scenic rivers that provide a recreational paddling experience comparable to the Headwaters of the Chattooga.

Similarly there are only two other rivers listed in the FEIS as alternatives that flow through Wilderness areas, the Big East Fork of the Pigeon and the Linville River. The Big East Fork is considerably more difficult than the Headwaters of the Chattooga, is much shorter, and requires hiking access. Also, it is only reasonably accessible when the high elevations of the Blue Ridge Parkway are open which often eliminates the few days annually this reach has sufficient flow to paddle. The Linville Gorge is much longer, more demanding, and more difficult than the Headwaters of the Chattooga. Both of these runs are excellent creek boating opportunities but both are more difficult and have more challenging access than the Headwaters of the Chattooga. Neither of these rivers are Wild and Scenic Rivers and neither are found in the same watershed or the same mountain range as the Chattooga. These rivers are simply not comparable to the Headwaters of the Chattooga.

What is clearly evident from [Appendix 5](#) is that there are no other whitewater “creek” runs in the region that offer class IV/V rapids, medium length, few significant portages, road access, a remote character, and Wilderness and/or Wild and Scenic designation. Furthermore, to many whitewater paddlers, all whitewater runs are unique and each offers an opportunity to enjoy unique rapids, scenery, and solitude. There is no other Big Bend Falls or Rock Gorge *on the earth* much less on other rivers. In short, other rivers are not adequate.

The remote nature of the Headwaters combined with the rare instance of adequate flow levels also adds to the Headwaters’ uniqueness and value as a paddling resource. Past research by Kinney develops two key characteristics of the paddling experience that demonstrate why

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<sup>103</sup> USDA Forest Service—Southern Region. (1971b). *Chattooga River as a Wild and Scenic River*.

<sup>104</sup> USDA Forest Service. (1971a). *Wild and Scenic River Study Report: Chattooga River*.

there can be no substitute for the Headwaters. These elements are adventure and nature. Both concepts are discussed in depth in the following section based on Kinney's research.<sup>105</sup>

The element of adventure is integral to almost all creek boaters in their boating experience. An adventure, "is the process of experiencing something new, exploring, testing ideas, and seeking excitement from the new and the familiar." Adventure can take place in many forms and can be linked to the river, people, or the environment.

- Adventures that are linked to the river include: paddling a new river, paddling a familiar river at a new water level, paddling a river in a different craft, or taking new lines on a familiar river.
- Adventures related to the environmental setting include: traveling to new places, seeing a new gorge, paddling in unique weather, or paddling at an unusual time of day (or night).

The number of references to preferring new runs or "rare" runs was unmatched in frequency. Plus, the character of the run greatly influences the type of experience a paddler has.

Comments made by paddlers in Kinney's research associated with floating new rivers included, "I want to experience something I haven't done"; or "I want to run new rapids all of the time." Participants noted that paddling a new river allows them to share a unique experience with other paddlers, see new surroundings, explore new rapids, test ideas of running rapids, and provides the thrill of the unknown. On the other hand, although paddling rare runs may share some of the characteristics associated with doing new runs, paddling rare runs are also described as similar to seeing an old friend. The Chattooga provides a distinctive resource that is without substitute for these elements of the paddling experience.

Nature is a generic term used to encompasses the many variables of natural aesthetics that comprise the paddling experience. Certain geographic variables are a necessity for whitewater paddling. The Chattooga River provides an exceptional opportunity from this standpoint. The prerequisite characteristics for whitewater runs are gradient and water. This combination is found most frequently in mountainous areas. Creek boating relies on very steep slopes, a characteristic almost exclusive to intensely mountainous regions. Contrarily, big water runs form in large, wide river valleys (still in the mountains) after the smaller steeper runs have converged. The majority of boating takes place in a natural setting, most frequently in mountainous regions. Boaters differentiate between types of rivers using several criteria: river bed characteristics, watersheds, access to roads and land ownership. It is very rare to have both high quality creeking and big water runs on the same river and – even more so on a Wild and Scenic River. With the Headwaters of the Chattooga open, paddlers will be able to experience the continuum of the river from start to where the river is impounded: a one of a kind opportunity in this region of the country.

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<sup>105</sup> Kinney, T.K. (1997). *Class V Whitewater Paddlers in American Culture: Linking Anthropology, Recreation Specialization, and Tourism to Examine Play*. Unpublished Graduate Thesis. Northern Arizona University.



Boaters in Kinney's study frequently mention wilderness as a highly desirable river feature. In the southeast there are very few wilderness areas. In wilderness areas, there are few signs of human impact, little roads accessible, few encounters, and good water quality. In the western part of the United States, many true wilderness whitewater runs exist. By contrast, these stretches of river are rare in the eastern US. The wilderness character of the Headwaters is unmatched and without replacement. Sadly, the Headwaters of the Chattooga was not included in Kinney's study due to the current ban, but could become a distinctive resource for paddlers when the ban is lifted.<sup>106</sup> The Chattooga Headwaters is an incomparable paddling resource. There clearly are not "adequate" opportunities for creek boating on other rivers.

### C. The Equities Favor Restoring Boater Access to the Headwaters

#### 1. Data Indicates Overlap of Boating Use and Other Uses will Be Minimal

The findings and conclusions in the ROD/FEIS suggest that boaters will not use the river at the same time as other users. For example, the ROD/FEIS finds that the Headwaters "would generally become floatable when water levels measure between 2.0 (850 cfs) and 2.5 feet (1400 cfs)...."<sup>107</sup> The ROD/FEIS further finds that:

most boating would be precluded naturally (*self-regulating*) in the section from Grimshawes Bridge to Bull Pen Bridge until water levels reach 2.5 feet (1400 cfs) or higher at the Highway 76 gauge. In the two lower sections (Bull Pen—Burrells Ford, and Burrells Ford—Highway 28) it is assumed that most boating would be precluded until water levels reach 2.0 feet (850 cfs) or higher at the Highway 76 gauge.<sup>108</sup>

Thus boaters will generally use the river at flows of 2.0 feet and higher. The ROD/FEIS further finds that anglers will generally use the river at flows *below* this level. It concludes that "fishing declines significantly at flows of 2.5 feet (1400 cfs) or higher as measured at the Highway 76 gauge."<sup>109</sup> Put simply, boaters and anglers will rarely use the Headwaters at the same time.

Whittaker, *et al.* define a method for studying and analyzing flow preference relationships of various user groups. The authors specifically address boatability and fishability.<sup>110</sup> Generally, the flows preferred by anglers are significantly lower than those preferred by paddlers. Flow preferences will naturally attract boaters and anglers to the

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<sup>106</sup> Kinney, T.K. (1997). *Class V Whitewater Paddlers in American Culture: Linking Anthropology, Recreation Specialization, and Tourism to Examine Play*. Unpublished Graduate Thesis. Northern Arizona University.

<sup>107</sup> Page H-8 of the FEIS.

<sup>108</sup> Page H-13 of the FEIS.

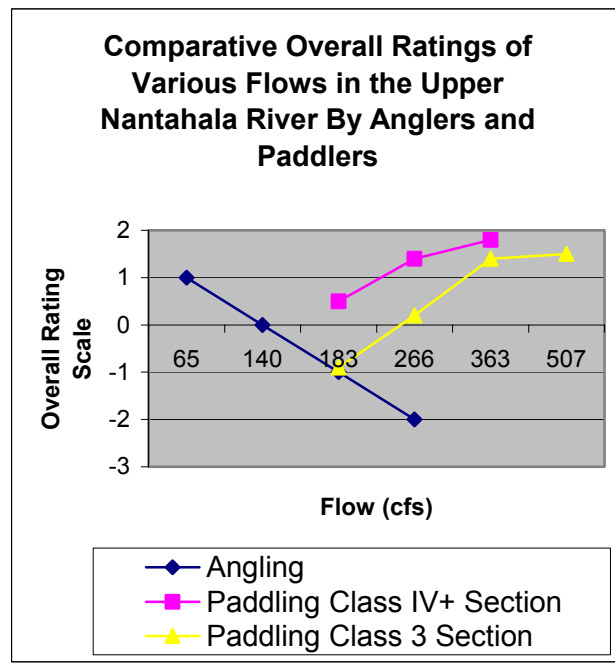
<sup>109</sup> Page H-14 of the FEIS.

<sup>110</sup> Whittaker, D., Shelby, B., Jackson, W., Beschta, R. 1993. In stream Flows for Recreation: A Handbook on Concepts and Research Methods. U.S. Dept. of Interior: National Parks Service, Rivers and Trails Conservation Program; Cooperative Park Studies Unit, Oregon State University; National Park Service, Water Resources Division.

Chattooga River on different days when the river is at different flows. Generally speaking, paddlers will only paddle the Headwaters of the Chattooga after a strong rain event and at periods of high flow, while anglers will primarily fish the river during low-flow periods.

This relationship was confirmed recently through controlled whitewater flow studies carried out by Duke Power in cooperation with Trout Unlimited, AW, and the USFS on the Upper Nantahala River in Western North Carolina (on Nantahala National Forest Lands). The Upper Nantahala is a highly desirable angling reach as well as a popular Class III-IV+ whitewater run. The studies conclude that anglers preferred lower flows than paddlers. Furthermore these studies showed that on a stream similar in many ways to the Chattooga Headwaters, anglers and paddlers rarely if ever chose to utilize the river at the same flow levels. Figure 1 graphically depicts this flow preference relationship.<sup>111</sup>

**Figure 1**<sup>112</sup>



The Nantahala River study demonstrates that boating access should be restored because encounters between users will be minimal. As evidenced by the findings in the ROD/FEIS, there will be little to no overlap of use between boaters and other user groups.

<sup>111</sup> These studies can be found at:

<http://www.nantahalapower.com/nantahala/lakes/hydroelectric/actionreports/recreationalinstream.pdf> and <http://www.nantahalapower.com/nantahala/lakes/hydroelectric/actionreports/fishinstream.pdf>

<sup>112</sup> In Figure 1 the Overall Rating Scale is defined in the following manner: -2 = Totally Unacceptable, -1 = Unacceptable, 0 = Neutral, 1 = Acceptable, 2 = Totally Acceptable. Additional data from these studies shows that angling becomes unacceptable at flows over 140cfs, while paddling becomes unacceptable at flows below 196cfs and 270cfs for the Class IV+ and Class III sections respectively.

2. Boating Is the Smallest and Slowest Growing Use

The ROD/FEIS is very clear that the portion of the whitewater paddling community capable of paddling the Chattooga River above Highway 28 is a small group of individuals that is growing slower than other dispersed recreationists. Table 2 is a subset of Table 3-80 in the ROD/FEIS and shows these use levels and trends.

<u>Table 2.</u> Number of people (in millions) over 16 participating in recreational activities in the Sumter NF market area and percentage increase over the next 20 years <sup>113</sup>				
Recreation Activity	2001 Participation Rate	2001 Participation Rate	2010 Increase*	2020 Increase*
Kayaking	0.23	3%	5%	9%
Cold Water Fishing	1.28	14%	9%	17%
Day Hiking	2.62	29%	25%	38%

\* Data increase show change from 2001

What the information in Table 2 clearly shows is that cold water fishing and day hiking are vastly more popular than kayaking and that those uses are growing at a much more rapid rate. If user solitude experience is at a critical threshold, why then does the ROD/FEIS propose to limit only the smallest and slowest growing use of the resource? The ROD/FEIS acknowledges significant use of the hikers and anglers.<sup>114</sup> If any limitation is imposed to preserve a solitude experience it should apply equitably to *all* dispersed recreational users without discriminating against any one group. If any group or groups must be singled out it should logically be the larger and faster growing groups.

3. Boaters Coexist Peacefully With Other River Recreationists on All Other Southeastern Rivers

Virtually all “creek boating” resources in the Southeast are also trout fishing resources (although the opposite is not true). On these hundreds of other rivers, angling, paddling, and hiking coexist with few or no reports of any type of conflict. Paddling and angling uses rarely overlap and when they do, this interaction is amicable. It must be noted that many “creek boaters” are also cold water anglers. Additionally, many cold water anglers prefer to fish from

<sup>113</sup> Oconee and Sumter National Forest Recreation Realignment Report, Overdest and Cordell, 200, and from Outdoor Recreation in American Life, A National Assessment of Demand and Supply Trends, H. Ken Cordell, Principal Investigator, 1999

<sup>114</sup> “The Chattooga Trail is heavily used by hikers, backpackers and anglers...” pages H-9-10 of the FEIS.

canoes and kayaks. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the Headwaters of the Chattooga River.

4. Appellant's Requested Relief Will Facilitate River Management for the USFS

Instituting a floating ban on the Headwaters places a significant management burden on USFS resources. If a ban is re-instituted, the USFS must enforce it. This means that USFS personnel must play the role of river police, ensuring that no boaters enter the river on days with significant rainfall. Currently, nothing notifies visitors from the floating community that they are discriminatorily excluded from the Headwaters. To enforce the ban, the USFS will have to post adequate signage to notify floating visitors that they are not welcome. Furthermore, USFS personnel will have to be present at the four Headwaters access points to ensure that no boaters enter or exit the river.

If boating access is restored, it will actually *reduce* the USFS's river management burden. Floating access is self-regulating. First, precipitation levels naturally limit boating use. On the vast majority of days per year, boaters cannot float the Headwaters due to inadequate flow levels. Second, boating use is naturally limited even further by the calendar. Most boaters are professionals whose work schedules only permit weekend floating. It is rare that precipitation levels are sufficient to float the Headwaters during weekend days. Third, boating use is temporally limited by its "downriver" nature. Boaters occupy a stretch of river for a few brief seconds or moments as the river current ever carries them downstream. Finally, boating use is naturally limited by the difficulty of the rapids on the Headwaters. As noted in the ROD/FEIS, only a small sub-class of boaters, defined in the ROD/FEIS as "creekers," would use the Headwaters. In short, boating use of the Headwaters is self-regulating due to precipitation levels, the calendar, the "downriver" nature of boating, and the complexity of the rapids on the Headwaters.

Due to these self-regulating limitations, boating access is naturally managed (without USFS intervention) to ensure little impact on the resource. If floating access were restored, the role of the USFS would change from mandatory enforcement of laws to a nonessential and flexible educational role. An educational role, in addition to being less burdensome on USFS resources, is also more in line with the management role typically played by the USFS.

5. Hand-Powered Floating Causes No Significant Environmental Impacts

As discussed more fully above, paddling is among the lowest impact uses of the Chattooga WSR corridor. For this reason alone, paddling should be permitted on the Chattooga Headwaters. Were the environmental impact of boating the focus of an EA, it would clearly result in a Finding of No Significant Impact (FONSI).

6. Banning a Use should Be a Last Resort

Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers:

“apply indirect techniques for regulation of use before taking more direct action.”<sup>115</sup>

The Sumter National Forest (SNF) has not attempted to limit boating use on the Chattooga Headwaters with indirect techniques before using direct management techniques (such as zoning and banning uses). The SNF has never tried a permit system, education, or other indirect techniques to limit paddling use of the Headwaters before resorting to a ban. In fact there was never any evidence or data to suggest that boating use should be limited in the first place, let alone banned completely. It must also be noted that the SNF has not attempted to limit total *use*, but instead has chosen to eliminate *a use*.

One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.” Still, the ROD/FEIS supports large scale stocking programs at Burrells Ford and elsewhere immediately adjacent to the Ellicott Rock Wilderness Area. In addition to large scale stocking programs there is a year round season with large creel limits. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor. When the USFS decides to limit use of a Wild and Scenic River, the USFS Manual states that the USFS should exhaust passive or indirect techniques before using direct techniques such as the ban of a use. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning of any other use. How can the ROD/FEIS justify taking the most extreme action to limit one group of recreationists on the grounds of overuse, while going to great lengths to attract more use of the same resource by other user groups?

7. If Uses Are to Be Banned, Boating Should Be Last Rather than First

Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters. Interactions between boaters and other dispersed recreationists would be focused at access areas where solitude is not expected. In addition, paddlers travel far more quickly than land based recreationists. Interactions in the wilderness itself would be limited temporally as well as spatially compared to interactions between other user groups.

Boaters will also be attracted to the Headwaters of the Chattooga only during periods of high water which generally occur in the winter and early spring months. This flow preference will have several distinct effects. First, paddlers will use the Headwaters of the Chattooga during periods of high water when angling is less desirable and when wading is dangerous. Therefore, interactions between anglers and boaters will be minimal. Secondly, paddlers will most often use the Headwaters of the Chattooga River in the cold winter and early spring months when

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<sup>115</sup> The USFS MANUAL TITLE 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT

hiking, bird-watching, and swimming are less popular. Therefore interactions between boaters and other dispersed recreationalists will be minimal.

If uses must be banned to maintain the Headwater's character, boating should be the last use banned rather than the first given that boating has the least impact on the environment and on other users.

8. All Primitive Recreationists Should Share Access to the Headwaters

If the goal of the ROD/FEIS is to limit use of the Chattooga Wild and Scenic River corridor then it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning paddling, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use. The USFS Manual suggests the following approach: "When it becomes necessary to limit use [of a W&S River], ensure that all potential users have a fair and equitable chance to obtain access to the river."<sup>116</sup> By banning paddling on the Headwaters of the Chattooga while allowing all other uses to occur without limits, the ROD/FEIS is not providing paddlers a fair and equitable chance to obtain access to the river. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the ROD/FEIS is not being fair or equitable. Appellants support any use limitation that is equitably imposed on all users of the Chattooga Headwaters based on solid data that indicates a need for limiting use.

9. The Headwaters Are Federally Protected Due In Large Part to Boating

As noted above, the Headwaters of the Chattooga were included in the Wild and Scenic River system based in large part on the incredible paddling opportunity those reaches would provide to the public in perpetuity.

The ROD/FEIS robs the paddling public of this Wild and Scenic paddling treasure for another 10-15 years. Banning paddling on the Headwaters of the Chattooga is at odds with the intent of the Chattooga's WSR designation. The ROD/FEIS does a great disservice to the American Public by banning what the USFS finds is the public's most low impact and best way of viewing the Chattooga Headwaters.<sup>117</sup>

10. Boating Above Highway 28 Will Not Adversely Affect the Recreation Opportunity Spectrum (ROS)

Self-guided floating on the Chattooga Headwaters will not affect the Recreation Opportunity Spectrum (ROS) and is consistent with all ROS settings in the corridor including semi-primitive, semi-primitive non-motorized, and roaded natural standards for management.

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<sup>116</sup> USFS MANUAL TITLE 2300—RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT

<sup>117</sup> *See also* section IV.A.6 for additional discussion of this topic.

## 11. Boaters Have a Strong Sense of Place and Enjoy Solitude

Boaters enjoy solitude and have a strong sense of place. Studies show that boaters have an even stronger sense of place than other dispersed recreationists.<sup>118</sup> Accordingly, boaters' access to the Headwaters should be restored so that their sense of place and feelings of solitude may be explored, and in the case of some boaters—revived.

## 12. The Boating Ban Sets a Damaging Precedent

Making the Chattooga River an exception to the traditionally collaborative relationship between paddlers and anglers has done more to create conflict between these two user groups than any on-river interaction ever will. The ROD/FEIS has driven a wedge between these groups that threatens to have significant unwanted ripple effects.

The coldwater angling and whitewater paddling communities have many shared interests that are based on a love of wild mountain rivers. Both Trout Unlimited and AW are steering committee members of the Hydropower Reform Coalition and regularly work together to protect regulated rivers from corporate abuse. Trout Unlimited and AW recently signed a pro-river settlement (with the USFS) on the relicensing of the Duke Power Dams on the Nantahala and Tuckasegee Rivers in Western North Carolina that meet many of the two groups shared interests. Trout Unlimited and AW even presented at a National Park Service conference in November of 2003 called "Partners in Stewardship." The thesis of the presentation was that when anglers and paddlers collaborate the river wins, and when there is conflict the river loses. The ROD/FEIS now threatens the relationship between anglers and paddlers by pitting the two complimentary groups against one another.

If the resolution of Issue #13 is allowed to stand, it will establish that angling and paddling are incompatible uses. Such a decision will spawn a race-to-the-bottom among primitive recreationists. Anglers, hikers and paddlers will scramble to establish monopolies on their favorite sections of river across the country, or to defend their right to experience their favorite places. This struggle will be a losing battle for all parties involved—including the USFS. These struggles will take place in the NEPA arena, and will be incredibly taxing on USFS procedures. Anglers will find themselves displaced from some of their favorite fishing spots as boaters successfully "zone" anglers onto "non-angling" sections of river. Undoubtedly boaters will also suffer "Issue #13-type" treatment on other rivers as anglers successfully zone boaters up or downstream. The equities clearly weigh against establishing such a damaging and divisive precedent, particularly given that no less drastic measures have been attempted to deal with a "conflict" that has no documented existence.

## **V. COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF 36 C.F.R. 217**

1. Pursuant to 36 C.F.R. § 217.1, this Notice of Appeal is within the purpose and scope of the appeals process set forth in 36 C.F.R. 217, *et seq.*, because it appeals a portion of the *Sumter National Forest Record of Decision Final Environmental Impact Statement Revised Land*

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<sup>118</sup> See Section IV.B.5.a.ii, Section IV.B.5.a.iii, and Section IV.B.6 for further discussion of boaters' sense of place and desire for solitude.

*and Resource Management Plan*, and also appeals the *Record of Decision for the Revised Land and Resource Management Plan for the Chattahoochee National Forest* to the extent the Chattahoochee ROD adopts or is consistent with the Sumter ROD's moratorium on boating above Highway 28.

2. This Notice of Appeal complies with the procedural requirements outlined in 36 C.F.R. § 217.8:

(a) It is written. 36 C.F.R. § 217.8 (a)(1).

(b) It was filed on April 15, 2004, which is within 90 days of January 30, 2004, the date specified in the published legal notice for land and resource management plan approvals. 36 C.F.R. § 217.8(a)(3), and 36 C.F.R. § 217.8 (b)(1) and (2).

(c) Evidence of timely filing is provided in the form of a legible postmark, attached hereto as Appendix 6. 36 C.F.R. § 217.8(c).

3. This Notice of Appeal also complies with the content requirements of 36 C.F.R. § 217.9:

(a) It provides the Reviewing Officer sufficient narrative evidence to show why the decision by the lower level officer should be changed or reversed. 36 C.F.R. § 217.9(a).

(b) It affirmatively states that this document is a Notice of Appeal filed pursuant to 36 C.F.R. part 217. 36 C.F.R. § 217.9(b)(1).

(c) It provides the name, address, and telephone number of Appellant as follows (36 C.F.R. § 217.9(b)(2)):

(i) Appellant

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AW Board Member and Chattooga River Regional  
Coordinator

Attn: Charlene Coleman, AW Regional Coordinator

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(d) The decision to which appellants object is the adoption of “Alternative I” in the *Sumter National Forest Record of Decision Final Environmental Impact Statement Revised Land and Resource Management Plan*, to the extent that the adoption of “Alternative I” restricts the access of non-commercial, non-motorized boaters to float the Chattooga Wild and Scenic River above Highway 28. Appellant similarly objects to the *Record of Decision for the Revised Land and Resource Management Plan* for the Chattahoochee National Forest to the extent that plan joins in or defers to the Sumter ROD/FEIS on “Issue #13.” 36 C.F.R. § 217.9(b)(3).

(e) The title of the document in which the decision is contained is the *Record of Decision Final Environmental Impact Statement Revised Land and Resource Management Plan Sumter National Forest*. The subject of the document is the revised management plan for the Sumter National Forest. The decision was published on January 30, 2004. The Deciding Officer was Bob Jacobs, Regional Forester for the Southern Region. 36 C.F.R. § 217.9(b)(4).

(f) Appellant specifically objects to the resolution of “Issue #13” in the *Record of Decision Final Environmental Impact Statement Revised Land and Resource Management Plan Sumter National Forest* to the extent that the resolution of “Issue #13” forbids any and all access for non-commercial, non-motorized boaters to float the Chattooga Wild and Scenic River above Highway 28. 36 C.F.R. § 217.9(b)(5).

(g) The reasoning for Appellant’s objection, including issues of fact, law, regulation, and policy—including specifically how the appealed decision violates applicable law, regulation and policy, is set forth above. 36 C.F.R. § 217.9(b)(6).

(h) Specifically, appellant’s request the following relief: that the Forest Service restore floating access on the Chattooga Wild and Scenic River above Highway 28 at all times and at all flow levels. To the extent that the Forest Service seeks to limit access to the Chattooga River corridor above Highway 28, Appellant requests that any such limitation be shared equally among primitive recreational user groups as it is below

Highway 28—*i.e.*, that boaters, along with other primitive recreational users, enjoy reasonable access, subject to the necessary and equitable limitations imposed by the Forest Service to protect this treasured wilderness area for all users, present and future. 36 C.F.R. § 217.9(b)(7).

## VI. CONCLUSION

Based upon the foregoing, Appellant respectfully requests that the Reviewing Officer enter a decision modifying the Preferred Alternative (Alternative I) to allow recreational boating year-round on the Chattooga River from NC Road 1107 (Grimshawes Bridge) downstream to the Highway 28 Bridge at all water levels (the self-regulating alternative).

## VII. SCIENTIFIC REFERENCES

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## VIII. APPENDICES

### A. Appendix 1. Timeline of Action Taken to Restore Floating Access

<u>Date</u>	<u>Action Taken to Restore Access to Headwaters</u>
February 1995	AW contacts local TU chapters and attempts to begin a dialogue regarding opening the upper Chattooga and solicits a meeting with local USFS personnel.
February 14, 1995	AW sends a letter to Elizabeth Merz, Andrew Pickens District Ranger inviting the Forest Service to meet with AW and local TU representatives to discuss restoring access to the Headwaters. The letter was copied to David Wilson, the Forest Supervisor at the time.
Feb 27 1995	Local TU chapter sends letter stating they are opposed to any discussion about opening the upper river. Letter written by Don Eng, former Forest Supervisor and architect of the original closure.
Nov 27, 1996	The American Canoe Association writes a letter to Elizabeth Merz, Andrew Pickens District Ranger, regarding the ongoing forest plan revision stating their desire to see the upper Chattooga River opened to boating use.
1997 – 2003	Members of the paddling community write letters to the USFS supporting access to the upper Chattooga. These letters were in response to the anticipated forest plan revision and proposed Amendment 14 to the 1985 plan. Over 1000 letters were sent to the Forest Service supporting restoration of boating access to the Headwaters.
October 27, 1999	AW writes Tony White, recreational planning for the Sumter Forest to request a meeting regarding boating access to the upper Chattooga. AW's letter includes a formal, detailed proposal for access to the Headwaters.
1999	AW maintains routine phone dialogue with USFS regarding opening the Headwaters.
Feb 17, 2000	AW meets with Mike Crane to discuss river management issues. Access to the upper Headwaters was discussed, but not made a part of the minutes in the file.

<u>Date</u>	<u>Action Taken to Restore Access to Headwaters</u>
2001	Many AW members drop by the Andrew Pickens District office and talk with Ranger Crane. Notable among these is AW volunteer Charlene Coleman. Charlene has maintained a nearly continuous dialogue with Ranger Crane and members of the Forest staff in Columbia over the past several years.
July 2001	USFS proposes Amendment 14 to the 1985 forest plan. AW submits scoping comments on proposed Amendment 14 asking that the scope of Amendment 14 expand to include boating above Highway 28. Forest Service refuses to consider the issue of boating access on the upper Chattooga despite significant requests from the public to do so.
December 2001	Don Kinser meets and discusses Amendment 14 and the headwaters access issue with Senator Zell Miller's Atlanta office.
February 25, 2002	AW files FOIA request for all information pertaining to management and closure of the river to boating above Highway 28 in 1976. AW reviews thousands of pages of documents received under this FOIA request and finds no evidence of conflicts, analysis, or any other documentation supporting the original river closure.
June 10, 2002	AW submits official comments to Amendment 14. AW requests boating be restored above Highway 28.
August 23, 2002	AW representatives meet with USFS planning team in Columbia. An agenda and minutes were provided for this meeting.
August 30, 2002	USFS writes memorandum seeking specific information from AW.
September 17, 2002	AW responds to USFS memorandum requesting information.
September 19, 2002	Forest Service issues ROD on Amendment 14.
October 14, 2002	Georgia Canoeing Association appeals Amendment 14 decision. One of the appeal issues is access above Highway 28.
March 2003	USFS issues DEIS of the new forest plan. Appendix H examines

<u>Date</u>	<u>Action Taken to Restore Access to Headwaters</u>
	boating above Highway 28 for the first time.
April 7, 2003	Forest Service denies appeal and GCA does not pursue further. Access above Highway 28 is not treated in the appeals decision.
June 18, 2003	AW representatives meet with Ranger Crane and David Hedden of the Andrew Pickens District.
July 3, 2003	AW files official comments regarding proposed forest plan and DEIS.
July 2003	January 2004 USFS personnel in Columbia decline any further meetings with AW saying they would be inappropriate. Unofficial dialogue continues between AW volunteers and several agency staff.
Summer 2003	Kevin Colburn and Don Kinser request meeting with Bob Jacobs, Regional Forester. Mr. Jacobs declines meeting and instead sets up meeting with Roberta Moltzen in Atlanta. Meeting produces little productive dialogue.
January 26, 2004	AW filed a FOIA request regarding the basis of the decision in the ROD/FEIS to maintain a ban on paddling.
January 30, 2004	Official publication of notice of Sumter ROD/FEIS.
February 13, 2004	USFS sends first package of FOIA materials based on AW's 1/26/04 request
February 20, 2004	Patton Boggs attorney Nathan Galbreath contacts Jerome Thomas requesting a meeting to discuss issue #13 of the Sumter ROD/FEIS in hopes of avoiding an appeal. Mr. Thomas responds that he is not willing to consider this issue further and that an appeal is AW's only recourse.
February 23, 2004	Patton Boggs attorney Nathan Galbreath contacts the Southern Regional Office of the USFS to request a meeting with Bob Jacobs. Chris Liggett returned the call on behalf of Mr. Jacobs. Mr. Liggett initially agreed to facilitate a meeting with AW and relevant Forest planners and Forest Supervisors, but later called the meeting off due to an unwillingness of relevant planners and supervisors to participate. Mr. Liggett then explained that no meetings are possible and that an appeal is AW's only recourse.



<u>Date</u>	<u>Action Taken to Restore Access to Headwaters</u>
March 2, 2004	Patton Boggs attorney John Austin contacts Elizabeth Estill, Deputy Chief of the USFS to inquire whether a meeting with the Southern Regional Office would be possible (in hopes of avoiding an appeal). Ms. Estill contacts Bob Jacobs and relays that Mr. Jacobs will call Mr. Austin to set up a meeting. Mr. Jacobs never returns the call.
April 1, 2004	Patton Boggs attorney Eric Olsen, former chief of staff for the USDA, contacts the under secretary of the USDA to see if a meeting with Bob Jacobs would be possible in hopes of avoiding an appeal.
April 1, 2004	The assistant to Bob Jacobs, Regional Forester, contacts Eric Olsen to schedule a meeting with AW on April 23, 2004 (six days before the deadline to file a Notice of Appeal to the Sumter ROD/FEIS). AW requests an earlier meeting. The meeting is set for April 12, 2004.
4/12/04	Patton Boggs attorneys John Austin and Nathan Galbreath and AW representative Kevin Colburn meet with Bob Jacobs, Jerome Thomas and Chris Liggett. The Southern Regional Office explains that an ROD cannot be recalled and that AW's only recourse is to appeal or wait until after the appeal deadline and seek an amendment, although no assurance is given that an amendment will be possible.
April 15, 2004	AW has yet to receive full results of the 1/26/04 FOIA request.
April 15, 2004	AW files a Notice of Appeal regarding resolution of issue #13 in the Sumter ROD/FEIS with the Chief of the USFS.
From roughly 1999 to the present	AW has worked to maintain a dialogue with the USFS (primarily at the district and forest levels) regarding the Headwaters issue. Kevin Colburn, Don Kinser, Charlene Coleman have been the primary actors in this effort.

**B. Appendix 2. Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters.**

Paddling Section	Designation Section	Source	Quote or Reference
General	All	USFS 1971a* Page 67	“Designating the Chattooga River a part of the National Wild and Scenic system would preserve—a river capable of supplying many intangible values. These values are difficult to assess but certainly exist for the canoeist as he meets the challenge of the river...”
General	All	USFS 1971a Page 67	“Compatible uses on the Chattooga River are floating (including rafting, canoeing, and kayaking), hiking (including sightseeing, nature study, and photography), hunting, fishing, and primitive camping.”
General	All	USFS, 1971a Page 150	“Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.”
General	All	USFS 1970 Page 1. USFS 1971b Page 5	“The Chattooga is the only mountain river in the four state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores.” “Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness.” “The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed”
General	All	USFS 1971b**	“It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking beside it, it can provide a refreshing recreation experience.”

Paddling Section	Designation Section	Source	Quote or Reference
GS-BP***	I	USFS 1970 Page 5	“Below Grimshawes Bridge, the river can be floated by raft.”
GS-BP	I	USFS 1971a Page 158	“Hikers, rafters and vehicles will frequently meet here because road is the only major access to the river in the Headwaters area.” Text that accompanies a drawing of Grimshawes Bridge which also the statement “beginning of rafting water” labeling the river immediately downstream of Grimshawes Bridge.
GS-BP BP-BF BF-28	I, II, III	USFS 1971a Page 163	Appendix I, Chattooga River Potential Recreation Development Plan Summary. Table indicates construction of launch sites at BP and BF.
GS-BP	I	USFS 1970 Page 6  USFS 1971a Page 73	“The section below the bridge (Grimshawes) can be floated by rubber raft and provides exciting trips over small rapids and cascades with frequent portages around difficult cascades and narrow sluices.”
GS-BP BF-28	I, II, III	USFS 1971b	“In the management of the Chattooga River as a unit of the National Wild and Scenic River System, one objective will be to provide a recreation experience where a feeling of adventure, challenge, and physical achievement is dominant. In addition a maximum of outdoor skills, without comfort or convenience facilities will be provided. To provide this experience, river access will be primarily by trail, including canoe launch sites. Only three points will have road access—Grimshawes Bridge, Highway 28 bridge, and Highway 76 Bridge”
BP-BF	II	USFS 1971a Page 74	“This part of the river can be floated only in rubber rafts, and many dangerous portions must be portaged.” “Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by

Paddling Section	Designation Section	Source	Quote or Reference
			hikers and fishermen.”
BP-BF BF-28	II	USFS 1970 Page 9	“This entire section (Section II) is in a completely natural state. It includes some beautiful but hazardous whitewater. Enormous boulders, some over 50 feet high with trees on top, rise from the riverbed. This part of the river may be floated only in rubber rafts and many dangerous portions must be portaged. In the entire 15.9 miles, only two narrow bridges cross the river.”
BF-28	II	USFS 1970 Page 11	The 8.0 mile section from Burrell’s Ford to the Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater. It flows around huge rocks and through narrow sluices and drops over 21 small waterfalls and rapids in less than two miles.”
BF-28	II	USFS 1971a Page 75	“The eight mile section from Burrells Ford to Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater.”
BF-28	III	USFS 1971a Page 75	Section III: also contains Headwaters section. “It is shallow and easy for the inexperienced canoeist.”
BF-28	III	USFS 1970 Page 13	“It (Section 3) is shallow and easy for the inexperienced canoeist.” (13)
<p>* Note that 1971a refers to; USDA Forest Service. (1971a). Wild and Scenic River Study Report: Chattooga River, 1971b refers to: USDA Forest Service—Southern Region. (1971b). Chattooga River as a Wild and Scenic River, and 1970 refers to: USDA Forest Service. (1970). A Proposal: The Chattooga, “A Wild and Scenic River.”</p> <p>**Note that 1971b does not contain page numbers.</p> <p>***Note that “GS-BP” refers to the section of the Chattooga River between Grimshaws Bridge and Bullpen Bridge, “BP-BF” refers to the section of the Chattooga River between Bullpen Bridge and Burrells Ford, and “BF-28 refers to the section of the Chattooga River between Burrells Ford and Highway 28.</p>			

C. **Appendix 3. AW's Comments Submitted in Connection with the Sumter Draft EIS**

*American Whitewater is a non-profit organization. We were founded in 1957 with the purpose of conserving and restoring America's whitewater resources and enhancing opportunities to enjoy them safely. We have 8,400 members, and represent more than 160 affiliate clubs with more than 80,000 whitewater paddlers.*

July 2, 2003

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DEIS for the Revised Land and Resource Management Plan – Sumter National Forest

Content Analysis Team,

American Whitewater (AW) submits these comments on behalf of our members and affiliate organizations that are regular visitors to Sumter National Forest, and more specifically the Chattooga River. Our comments are prepared and submitted consistent with 36 CFR Titles 36 and 40.

Our members have a long-term interest in the management of the Chattooga Wild & Scenic River. We enjoy the wilderness scenery and the opportunity to safely recreate in this treasured environment. We love the solitude and adventure the Chattooga River offers. We are good stewards of the river environment. AW's members thus have a keen interest in the way in which the United States Forest Service (the Agency) manages the Chattooga River.

Over the past 8 years the Agency has received a minimum of 800 comments from our members asking for the opportunity to boat legally in the Chattooga Headwaters. AW thanks the Sumter Forest Managers and the Andrew Pickens District staff for including boating access above Highway 28 among the alternatives analyzed in the DEIS.

## **Scope of Comments**

AW has focused our comments regarding the proposed Sumter Forest Plan and the accompanying DEIS in these two areas:

1. The Appendix H analysis regarding boating use on the Chattooga River above the US Highway 28 Bridge.
2. Issues surrounding Management Area 2, Chattooga River, Andrew Pickens District and the associated Management Area Standards that impact user experiences on the Chattooga River.

When we refer to the “Chattooga Headwaters” or simply “Headwaters”, we mean the entire river from Grimshawes Bridge to the Highway 28 Bridge.

Whenever we use the term “boating” we mean the use of hand powered water craft such as canoes, kayaks, or other appropriate whitewater craft by private, self-guided individuals.

## **Summary of American Whitewater’s Position**

We are generally supportive of Alternative I – the preferred alternative – as a prescription for overall forest management. We strongly support improvements in riparian environments, reduction in allowable timber harvest and the other conservation objectives that are part of Alternative I. However, we have some very specific objections to certain aspects of the proposed plan that deal with management of recreational boating on the Chattooga River.

Specifically, and most importantly, we want to see the final Forest Plan (Alternative I) modified to allow boating on the Chattooga River above the US Highway 28 Bridge year round at all water levels as originally intended by the 1971 USFS Study to include the river in the National Wild & Scenic Rivers system.

The Agency’s own surveys and studies support the facts that year round boating above Hwy 28 on the Chattooga will have minimal or non-detectable impacts. These studies detail that:

- Boating use is consistent with all applicable laws and regulations.
- Boating use is self-regulating based on precipitation and water level.
- There are low amounts of actual available river use.
- There are no identified negative ecological or biological impacts.
- Allowing access requires no significant capital expenditures for improvements.
- Allowing boating use minimally impacts only one very small user group (back country anglers) and this impact amounts only to social interactions with boaters that would be measured in seconds on a handful of days each year.

Thus the decision to lift the prohibition on floating the Chattooga Headwaters should result in a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA);

If the Agency has any studies or research contradicting this summary of float use above Highway 28, then the Agency has a legal responsibility to cite and include the results of those references in this DEIS. As no applicable studies were referenced, our conclusion is that none exist. If this conclusion is inaccurate, then the Agency must reference those studies in the Record of Decision (ROD).

In addition, there are several areas that we wish to comment on regarding the Area 2 Management Standards in the proposed Plan. These areas include:

- Whether a potential self-guided boater reservation system is being considered, and if so what should it look like it?
- How the Agency will manage the overlap of guided use between Thrift's Ferry and Woodall Shoals?
- How the Agency will manage vehicular access to the river at Sandy Ford and Earl's Ford on the Georgia side?
- What actions and studies the Agency is planning to generate better data on all users of the river corridor?
- What actions the Agency is taking to comply with previous plans to remove the old US 76 Bridge and the replacement of the current US 76 Bridge and the potential replacement of other bridges on the river?
- What actions the Agency is taking to comply with the Wild and Scenic Rivers Act and Clean Water Act to improve water quality throughout the watershed and particularly Stekoa Creek?
- Whether any future user fees are being considered and the nature of those fees?

We request that the Agency respond to each of these questions in the ROD, as each is relevant and applicable to the scope of the DEIS.

Further, the decision to close a floatable section of river to all boating at all levels was made without following an open NEPA process. Our research and analysis of records, which were collected through a 2002 Freedom of Information Act (FOIA) request as well as through our independent research, reveal that the Agency did not solicit any public comment, commission appropriate studies, or seek balanced expert opinion regarding this action before the decision was reached.

The Forest Service is a multiple use Agency. One motto the Agency uses is "Land of Many Uses". The Agency's management goals are to manage for these appropriate multiple uses side-by-side rather than exclusively of each other. The boating restriction above Highway 28 is inconsistent with this objective.

According to Forest Service documents, the Agency manages at least 4,348 miles of Wild and Scenic Rivers. This is notable because float use is not denied on the basis of user conflicts (especially not on minimal, undocumented, decades old, anecdotal user conflicts) on any of those river miles except on the Chattooga River above Highway 28.

In fact, float use has been allowed on all Wild and Scenic segments, except in the Pacific Northwest where boating is seasonally limited on a few miles of river solely on the basis of explicitly defined and documented ecological restrictions under the Endangered Species Act.

The Agency has issued Decision Notices (DN's) for thousands of river miles, both with and without Wild and Scenic Rivers designation, and virtually all of these decisions have been made under a Finding of No Significant Impacts (FONSI) regarding floating use. In our research of these DN's to allow boating, we found no cases where fishing does not occur. Given that fishing occurs on all of these river reaches where boating was approved, and that many are similar in flow volume, geography, environment, ecology, and use to the Chattooga River why is boating only banned on the Chattooga River?

The Agency needs to document the basis for this inconsistent decision and provide justification for why the ban on river recreation is necessary and appropriate in this circumstance, when the contrary has been found on all other rivers managed by the Forest Service.

The decision to prohibit boating on the Chattooga is clearly inconsistent with national policy, recreation research, and social research. Further, the 1976 decision to close the river to boating appears arbitrary under NEPA, and the decision did not meet the process requirements under law when the decision was originally made in 1976 or affirmed in 1985.

As a result, the decision to prohibit boating use above Highway 28 needs to be rescinded immediately and boating should be allowed until the Agency has an opportunity to examine the issues that past federal planners with limited knowledge put together without considering the issue under an open NEPA process.

At a minimum, AW demands that the prohibition on float use be rescinded immediately and that boating be allowed on the headwaters while appropriate and relevant studies can be commissioned that either proves or disproves the unfounded claims from 1976 and 1985 which were used to support the prescription banning float use.

#### **BOATING ACCESS IN THE HEADWATERS – APPENDIX H:**

We are pleased that the Agency has finally analyzed the issue of boating above Highway 28 publicly through an open NEPA process. Appendix H of the DEIS is the first such analysis in the nearly 30 year history of the boating ban above Highway 28.

The 1999 Forest Service Recreation Agenda describes how:

*“The Forest Service has a unique “niche” or brand of nature based recreation to offer. This brand of recreation includes an undeveloped setting, a built environment that*



*reinforces this natural character, and an array of services that complement enjoyment of these special wild places. The Forest Service has the opportunity to open that window to special places and experiences even wider to reflect changes in demographic trends and recreation visitor preferences. We will serve as a catalyst among tourism professionals in working together in travel and tourism opportunities. We will seek tourism professionals that can represent the diversity of existing and potential customers.”*

How does the restriction on boating above Highway 28 satisfy the objectives of the Agency’s Recreation Agenda?

The Forest Service has developed common goals to implement the two laws that guide Forest Service strategic planning, the Resources Planning Act (RPA) of 1974 and Government Performance and Results Act (GPRA) of 1993. These laws describe the Agency objectives to (1) restore and protect ecosystems, and (2) provide multiple benefits for people within the capabilities of ecosystems. How does the restriction on boating above Highway 28 satisfy the objectives of these two Acts?

The NEPA process clearly allows for a reconsideration of issues and use over time, based on changes or evolution in management interests and the public’s interests. It has been over a quarter century since the ban on boating the headwaters of the Chattooga was first established, and it is appropriate to consider a significant change in use.

The Agency’s analysis in Appendix H shows clearly there are neither data nor impacts that justify the boating closure above Highway 28. The Headwaters should be opened to boating year round at all levels based on the conclusions in Appendix H.

**AW supports Alternative I, the preferred alternative; modified to include Appendix H’s Alternative E. This is to say that self-guided boating should be allowed between NC-1107 (Grimshawes) and Highway 28 on the Chattooga River as stated in Appendix H, Alternative E:**

- No limits on the number of trips as they are expected to be self-regulating;
- Maximum group size of 12 boats and 12 people; and a minimum of two boats per group;
- Self-guided use only;
- Crafts are limited to inflatable kayaks and hard boats (kayaks and canoes);
- No new access points would be developed, but existing facilities would be maintained.

**Why select Alternative I modified with Alternative E from Appendix H?**

The continued ban on boating above the Highway 28 Bridge does not make sense and cannot be justified. The Agency’s analysis in Appendix H clearly shows that boating the Chattooga Headwaters will cause:

- **No** anticipated impacts to ecology or the environment;
- **No** impacts to Scenery (it will remain unchanged & remarkable);
- **No** impacts to Ellicott Rock Wilderness;
- **No** impacts to hikers or other dispersed recreation, other than possible interactions on an estimated 39 days during the year at trailheads and parking areas between April and November.
- **No** cumulative effects related to safety or search and rescue.
- **No** additional camping use;
- **Minimal** impacts on parking availability and only if use with anglers overlaps, which is unlikely on more than a mere handful of days based on anticipated boating use and documented angler use.
- **Minimal** interactions with anglers; interactions are expected to be confined to concentrated use areas at trailheads;

The Alternative E analysis estimates a maximum of 81 days of useable flows each year with only 2120 boater-days of use each year on all Headwaters sections combined. Only 16 of these 81 days are expected to be weekend days. The only prospective conflict identified is with a minority of backcountry anglers. No specific evidence of conflicts between these user groups is cited or documented either in Appendix H or the public record obtained through a 2002 Freedom of Information Act (FOIA) request, and any conflict would be minimal:

- Section 00 (**GS-BP**) is nearly un-fishable and rarely fished at the flows preferred by boaters. In fact, discussions with anglers reveal that this part of the river is of little interest to them during high flows. This point is reflected in Appendix H of the DEIS.
- Section 0 (**BP-BF**) is preferred by boaters and not preferred by anglers during periods of adequate flow; Thus the two uses are complementary to one another on this reach.
- Section 1 (**BF-28**) is the highest use fishing area during periods of flows adequate for boating and this use is concentrated below the Rock Gorge where the river flattens noticeably. Some boaters are likely to take-out at Lick Log Trail (just below the Rock Gorge) due to flat water thus lowering further the possibility of conflict.

Alternative E in Appendix H reasonably complements selection of Alternative I for other management actions, and no analysis has ever shown that boating above Highway 28 would have, or has had, any negative impacts on the management objectives of the river. There is absolutely no legal reason to maintain the closure.

### **Zoning and the Perception of Conflict**

Much of the justification put forth in support of a continued Headwaters boating ban is based upon the notion of “user conflicts.” Opponents to float use above Highway 28 have argued that “zoning” different use on the river is justified to avoid “user conflicts.” Appendix H refers to the

notion of “zoning” on page H-6 when describing the 1976 decision to exclude the boating public from the river above Highway 28.

In fact, a full and complete reading of the 1976 Development Plan published in the Federal Register and knowledge of its development and context reveals a far different story. The 1976 Development plan only vaguely refers to user conflicts, and bases the decision to prohibit boating on the river above Highway 28 solely on low flows and the difficulty of portaging. The argument about conflicts between fishermen and boaters is completely peripheral to the 1976 decision to ban boating and is not documented in the public record. Only one reference is made to conflicts between fishing and floating, and that reference is made only in the context of float use on the lower river below Highway 28. Absolutely no historic evidence of conflicts exists above Highway 28 where boating use existed at the time the 1976 plan was drafted.

In 2002, AW submitted a legally binding Freedom of Information (FOIA) request to the Agency in which we asked for any data or supporting information on the Agency’s decision to prescribe boating use above Highway 28, including letters and studies documenting conflicts. The Agency returned a box full of documents, which we reviewed in their entirety (described in greater detail on the following pages). The Agency’s response did not include any evidence or documentation of user conflicts above Highway 28 between fishermen and boaters.

Thus, based on the 1976 Development Plan and the results of our 2002 FOIA, AW concludes that the issue of user conflicts above Highway 28 between boaters and fishermen has never been researched and does not exist. How then can the Agency justify a prohibition on use that is without basis?

If the Agency has any documentation or research into these alleged conflicts, and if that documentation was used in the development of the DEIS, then the Agency has a legal responsibility under NEPA to share that information and describe it within the DEIS. The fact that no such documentation was provided also supports our contention that the prescription on float use above Highway 28 is without basis.

The 1976 argument regarding low flows is irrelevant to floating use. Normal floating use of any river requires knowledge of flows and decisions about the suitability of those flows. Such self management based on flow and weather conditions is standard practice for whitewater recreation and has occurred naturally on the lower river during the past 30 years. This self management regime would also occur on the Headwaters should boating be allowed. This self management practice based on flow is also standard on all other rivers managed by the Forest Service.

Portaging, or carrying a boat around a specific river feature or obstacle, is a legitimate aspect of floating use on any river and is based on personal judgments about skill, difficulty, and safety. Individual boaters make personal decisions about portaging every time they are on a river. It is as much a part of boating as life jackets and helmets. The fact that there are difficult rapids in the Chattooga Headwaters and some boaters may choose to portage them is not a rational argument to deny access. Portaging is “as old as the hills,” or at least as old as recorded history in the Americas. It is a common element of navigation, commerce, and recreation and as such is a

normal activity that falls within the scope of permitted activities on federal and public lands under all applicable federal law and regulation.

Hikers, fishermen and other forest users have developed numerous social trails along the length and breadth of the river. To our knowledge, these trails exist at all likely portage locations, so there would be no additional environment impacts from portaging. If the Agency has data to the contrary, then the Agency needs to document and provide it.

As described earlier, no conflicts between anglers and boaters are detailed in the 1976 development plan. The Agency states in the Federal Register (Vol. 41, No. 56 – Monday March 22, 1976, pages 11851) “floating has been infrequent in the past” when referring to the river in the area of Bull Pen Bridge. AW quickly located more than a dozen people who had floated through the Headwaters prior to the 1976 closure. One of these is raft company owner Claude Terry. Each of these individuals mentioned several other people who had floated the river with them. Each of these people who had floated the Chattooga Headwaters prior the closure said they substantially enjoyed the experience and wished for the opportunity to legally float the headwaters again.

Given that this floating use of the headwaters occurred in the early 1970’s when boating was less common, we would suggest that the term “infrequent” failed to capture the existing level of use in comparison to other regional rivers, and that floating use on the headwaters was probably more common than described. In order for the Agency to make this claim about frequency, the Agency should be able to provide documentation supporting the analysis, and the Agency should provide it in the DEIS as a legitimate point of comparison. The fact that no documentation is provided, leads us to believe that none exists and that the Agency does not know what level of float use occurred.

AW made a FOIA request in early 2002 for all documents, studies etc. related to the management of the Chattooga River and the boating closure above Highway 28. We received and have analyzed several thousand pages of information and can state that there is no factual evidence of user conflicts on the Headwaters in any of the documentation that the Agency provided.

The only documented conflicts involving boaters and other forest users to be found in the public record are in an April 1980 case study prepared by Carol Townsend. This case study documents conflicts between local residents and boaters in the context of closing vehicular access to the river at many different points along the river and general resentment by local residents that “their” river had been taken from them by the Federal Government. Much of this anger and resentment was aimed at boaters. None of the conflicts reported involved boaters and fisherman on the Headwaters, and none of the conflict was unique to the issue of boating. All of the conflict reported was instead related to larger social issues of Forest Management of the Chattooga River as a Wild and Scenic corridor and boating was merely a scapegoat for local discontent.

Across the USFS system and especially here in the Southeastern United States, trout fishermen and whitewater paddlers share the same resource with virtually no conflicts. We strongly feel that these two uses are absolutely compatible. It is true that a fisherman may need to cast in a

different direction as the paddler passes and/or the paddler may need to choose a different route to give the fisherman the greatest possible space to cast. This is standard river etiquette and occurs routinely on hundreds of rivers across the region without incident. This is hardly a “user conflict.”

This is no different than two hikers, two fishermen, two paddlers, or two horseback riders meeting on the river or on the trail. Simple courtesy and a positive attitude prevent conflict. People may dislike seeing other people in the river corridor but this possibility is shared by all forest users equally and is a matter of personal opinion. In addition, different flow preferences generally attract paddlers and fishermen to streams at different times, further reducing the chances for user interaction. Lastly, anglers often prefer to fish in the early morning, late evening, or at lower flows when paddlers are seldom on the water.

AW has searched and found no research documenting the belief that canoeing and kayaking “put down” or scare fish. Even anecdotal evidence from discussions with representatives of Trout Unlimited indicates that any suppression of fish biting is limited to no more than a few minutes after a group of boaters has floated past.

Based on the total lack of studies or other documentation showing a true user conflict between paddlers and fishermen on the Chattooga Headwaters or elsewhere, the overwhelming number of streams in the USFS system where boaters and fishermen share the resource without conflict, the lack of a USFS policy on “zoning,” and the tendency for paddlers and fishermen to prefer different flows and times of day, the Chattooga Headwaters should not be “zoned” for any one use to the exclusion of other legally and socially compatible uses. In short, we conclude that paddling and trout fishing are compatible uses of the Chattooga Headwaters, and both should be permitted. If this conclusion is not supported by the Forest Service, then the Agency needs to provide research and documentation to the contrary.

While fishing should be encouraged and supported in the Headwaters, boating is an appropriate use and is consistent with all applicable legislation, including all parts of the Wild and Scenic River Act. The emphasis on boating use below Highway 28 and angling use above Highway 28 should continue. However, self-guided boaters should have the same recreational ability and opportunity to go upstream of Highway 28 as other users have to go downstream.

### ***The Boating Ban and the Wild and Scenic Rivers Act***

The Headwaters boating ban is inconsistent with recreation lands management and Wild & Scenic Rivers management throughout the country. It appears that the Sumter Forest is acting independently of Agency policy by maintaining and enforcing an environmentally and socially unjustifiable ban on self-guided boating in the Chattooga Headwaters.

The 1976 Development plan for the river clearly states that floating use is consistent with Wild, Scenic, and Recreation management in the Record of Decision (ROD) for the Chattooga.

The Wild & Scenic Rivers Act (P.L. 90-542 § 1(b), 16 U.S.C. § 1271) explains that the purpose of the Act is to protect the river and its immediate surroundings “for the benefit and enjoyment of present and future generations.”

AW has uncovered no documentation indicating the ban on self-guided boating in the Headwaters either provides a recognizable public benefit or serves to protect the river. If the Agency has any research or documentation to the contrary, then the Agency should provide it.

Research on rivers across the country by experts such as Bo Shelby, Doug Whittaker, Troy Hall, and Jeff Marion has shown NO observable or quantifiable environmental impacts by boaters at anywhere near the use levels expected on the Headwaters. Relative to most other forest uses, including hiking and fishing, research by these experts and others indicates that boaters have virtually no measurable impact on the river environment in both the short and long term. The Agency provides no documentation of any environmental impacts in Alternative E, Appendix H, of the DEIS as it pertains to boating, thus we conclude that none exists and that this alternative is ecologically reasonable.

Section 10(a) (16 U.S.C. § 1281(a)) of the Wild and Scenic Rivers Act 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 without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.”*

The idea that self-guided boating use on the Headwaters will “substantially interfere” with other public uses clearly fails to comply with Section 10(a) (16 U.S.C. § 1281(a))<sup>i</sup> or meet any form of straight-face test.

Further, the legislative history of the Chattooga’s designation as Wild and Scenic makes clear that one of the Outstandingly Remarkable Values (ORVs), if not the primary ORV, attributed to the river was “recreation,” specifically boating<sup>ii</sup>. This attribution applied to the entire designated corridor both above and below Highway 28. The Headwaters boating ban is inconsistent with the “recreation” ORV and therefore violates Section 10(a) (i.e. excluding a group of recreationists such as boaters does not “protect and enhance...”).

Float use meets Agency non-degradation and enhancement guidelines as referenced in Agency Management Policies under the Wild and Scenic Rivers Act.

The technical report of the *Interagency Wild and Scenic Rivers Coordinating Council*, which answers common questions about the Wild & Scenic Rivers Act, asks and answers:

*Q. Does WSR designation affect the public’s right to float a river?*

*A. No. The public’s right to float a particular river does not change with designation.*

While this language does not carry the weight of law, it clearly conveys standard Agency interpretation and management practices for units under the Act. The existing ban on boating in the Chattooga Headwaters is contrary to the Agencies’ peer panel viewpoint of appropriate management practices.

While the Forest Service has the authority to manage use on navigable rivers (*United State v. Hells Canyon Guide Service (1981)*)<sup>iii</sup>, the case law providing guidance on the basis for a prescription on use requires a clear environmental consequence to federal lands.<sup>iv,v</sup> In the absence of a clearly documented harm or benefit, as in this case, the prescription on boating appears to be an unreasonable and inappropriate exercise of the Agency’s management authority. Thus the prescription on use should be lifted, and boating should be permitted above Highway 28.

Additionally, the Wilderness Act (78 Stat. 890; 16 USC, Ch 23) also applies to portions of the Headwaters in North Carolina; however, float use in the Wilderness areas is consistent with this Act as well.

### **Recreation Opportunity Spectrum (ROS)**

Self-guided floating on the Chattooga Headwaters will not affect the Recreation Opportunity Spectrum (ROS) and is consistent with all ROS settings in the corridor including semi-primitive, semi-primitive non-motorized, and roaded natural standards for management.

Likewise, Appendix M of the current Forest Plan notes that:

*Numerous people may use the river at the same time, but bends and rapids prevent long sight distances, and falling water mutes sound.*

*Management will be geared to feature challenging, semi-primitive experiences in the Chattooga Wild and Scenic River Corridor.*

Both statements are contextually consistent with re-opening the Headwaters to boating.

If the Agency believes that the ROS settings will be negatively affected by allowing boating above Highway 28, then the Agency needs to provide the documentation and research used to reach this conclusion.

### **The Agency’s Own Analysis Supports Floating Above Highway 28**

From the time the Chattooga River was designated for study in the 1968 Wild and Scenic Rivers Act, Agency Planners envisioned floating use of the Chattooga Headwaters. Floating use of the river above Highway 28 was originally intended by the 1971 Chattooga Wild and Scenic River study document submitted to Congress. The study was done to support designation of the Chattooga as a Wild and Scenic River.

*The Forest Service itself states on page 74 of this 1971 study document regarding the 15.9 mile section of river immediately upstream of Highway 28 “rafting or some method of floating is the best way to see this rugged portion of the river.”*

Appendix H, page H-4, paragraph 2 of the DEIS further affirms this fact:

*"Scenery is a major determinant of the quality of the visitor experience. Studies since designation have shown that visitors are pleased with the scenery on the river. In addition, the lack of man-made features adds to the enjoyment of the experience. One of the best ways to see much of the rugged and beautiful scenery of the Chattooga is from the river itself, either by foot or in a boat."*

The 1971 study proposed launch sites at Bull Pen Bridge and Burrell's Ford in the potential recreational development plan summary in Appendix I of the 1971 study (pages 163 and 164). Both of these launch sites are **above the Highway 28 Bridge**.

Prior to 1976 boating on the Chattooga Headwaters was legal. Local canoeists and kayakers with the necessary skills enjoyed these sections of the river. Again, no conflicts between boaters and anglers on the Headwaters are documented in the public record.

The subsequent closure of the Chattooga above Highway 28 occurred July 1, 1976 and was done without an EA or EIS, without open public input, outside the forest planning process, and with no evidence of damage or conflict resulting from boater use.

Furthermore there is absolutely no Agency analysis or explanation of the initial decision to close the river above Highway 28 other than the vague and unjustifiable references in the 1976 development plan and Appendix M of the 1985 plan, which are described earlier in our comments.



### **Whitewater Users Have A “Sense Of Place” Too!**

Whitewater paddlers appreciate and treasure the peacefulness and the solitude of a wilderness setting just as much, or more than any other backcountry user. Any notion to the contrary exhibits a misunderstanding of whitewater paddlers and their ethics, and a distinct bias.

We would never, for example, exclude anglers, hikers or bird watchers from the river corridor to protect a paddler’s solitude and “sense of place.” It is equally absurd to exclude boaters from the river corridor to protect backcountry anglers’ “sense of place.” If the Agency expresses any discriminatory favoritism for one appropriate use over another, then that decision needs to be backed up with social research clearly demonstrating why one use deserves special treatment over another.

AW believes the Agency does not have information available to demonstrate preferential treatment of fishermen is justified. If the Agency has this social research, then it should be clearly documented in the Record of Decision (ROD).

Paddlers capable of paddling the Chattooga Headwaters have likely spent hundreds, if not thousands of hours paddling steep mountain creeks that hone their skills and focus. Such paddlers generally experience a special bond with the rivers they paddle. They have a deep appreciation for the ecological integrity, water quality, and aesthetics of these places. The “sense of place” experienced by paddlers is often rich and spiritual, peaceful and intimate, and is closely linked with solitude and freedom.

These paddlers are not “yahoos” as characterized by some who opposed boating on the Headwaters. For the most part, the self-guided boater attracted to the Headwaters will pass down the river quietly and swiftly. Many boaters would prefer the experience of boating the river alone and would do so if they did not have safety concerns about solo boating.

It is true that a fisherman standing in the river will see each boater as they paddle by, just as a paddler will see each fisherman in or along the river as they paddle by. Why though, should the backcountry fisherman’s solitude and “sense of place” be more important to the USFS than the backcountry paddler’s solitude and “sense of place”?

Every individual has their own relationship to place, and some individuals choose outdoor activities that can intensify that relationship through shared time, focus, and generally some form of play or recreation. Backcountry Angling and Steep Creek Paddling are both activities that have an almost unlimited potential to enhance a participant’s “sense of place.”

Solitude is different than a “sense of place.” Solitude is one of the many factors that can enhance the intensity of a relationship to a place, but is not absolutely necessary. Paddlers may reduce the solitude experienced by backcountry anglers (and vice-versa) but this does not inherently reduce the anglers’ opportunity to develop and experience a strong “sense of place.” Maintaining the ban on paddling completely denies paddlers the opportunity to develop a “sense of place” with the Chattooga Headwaters. This is the very reason why the paddling community wants access to

the Headwaters and cannot just “go paddle somewhere else.” To the paddler, every river is unique, just as every person is unique.

Solitude is a highly desirable quality in any backcountry experience, and should not be granted to some user groups to the complete exclusion of other compatible user groups. Maintaining the ban on accessing the Chattooga Headwaters to protect a small group of backcountry anglers is an unethical decision that shows a clear bias toward fishermen. The opportunity to develop a sense of place with a Wild and Scenic River on public lands should be an absolute right for both fishermen and paddlers, whereas the opportunity to experience solitude in that place should be a privilege that each individual strives for.

The 20 miles or so of river between Grimshawe’s Bridge and Highway 28 is unique in its lack of streamside development, length and protected public access. Few whitewater runs in the eastern United States provide this experience to the whitewater boater on public land in such a highly protected watershed.

At a recent AW Board meeting a president of a large outdoor retailer asked a probing question of the Board: “Why do you spend so much time and energy trying to protect public lands and your access to them?” Board Member Tom Christopher replied, “Because I don’t have enough money to buy my own National Park.” The point being, many users of the USFS system secretly or openly wish they could have the river or the mountains to themselves. The new Forest Plan must make sure that the public equitably shares the resource, and equitably has the opportunity to develop a “sense of place.”

Only Alternative E in Appendix H of the DEIS allows boaters the same “sense of place” afforded to other compatible user groups in this management area. Whitewater boaters’ emotional attachment, feeling of belonging and connection to the Chattooga River are exceedingly strong and the proposed Forest Plan should acknowledge this fact via adoption of Alternative E in Appendix H of the DEIS.

## **The Questionable History of the Boating Ban**

**The original decision to close the Chattooga to boating use above Highway 28 was done arbitrarily, outside of an open NEPA process and without public input.**

In the early 1970's many considered the Chattooga Headwaters too dangerous for floating use. Forest Supervisor Donald W. Eng used this safety argument when he prohibited floating north of SC/GA Highway 28 for public safety purposes July 1, 1976. Mr. Eng also required and enforced the use of new safety rules on all parts of the river at the same time.

This might appear to be a reasonable decision had Mr. Eng not had exceedingly close personal ties with several local angling organizations. It is apparent from conversations with representatives from Trout Unlimited and the public scoping meetings that Mr. Eng had a vested personal interest in preventing boating on the Headwaters and unilaterally made the decision to close the Headwaters to boating use. This was inappropriate policy making and the ethics of his decision are certainly questionable.

Self-guided river use patterns were undergoing dramatic change even before these new regulations were being implemented in 1976. The nature of river running was changing dramatically and advanced boaters were quickly developing the skills to run the Headwaters safely. The rapid advances in boating techniques, training, safety, and equipment helped self-guided boaters switch from using army surplus rafts to specially crafted canoes and kayaks made specifically for running the waterfalls and cascades in the Appalachians.

Now, 27 years later, the forbidden Chattooga Headwaters, with its remote waterfalls and dramatic whitewater, has become a desirable boating destination for advanced whitewater canoeists and kayakers or "creekers". The arbitrary decision to "zone" use on the river was made over 27 years ago and such a closure is not appropriate. The skills, technology, equipment, and river use patterns have changed significantly in the quarter century since the river was first closed.

Paddlers regularly and safely paddle regional rivers that are far more dangerous and difficult than the Headwaters. These rivers include the Bear River in Georgia and the Green River in North Carolina. In fact, USFS River Rangers have acknowledged in private conversations with AW's staff that the ban is no longer useful for purposes of public safety. Appendix H also affirms that a ban for safety reasons is not justified.

Unfortunately, as the self-guided boaters were making well-documented advances in safety, equipment, and techniques, the questionable decision to close the Headwaters to boaters was reaffirmed in 1985 when the Forest Service released the 1985 Sumter Land and Resources Management Plan.

As in 1976, the 1985 LRMP limited floating to the portions of the Chattooga River below the Highway 28 Bridge. In contrast to the 1976 plan where safety was cited, this time the ban was described as a tool for providing "quality trout fishing." In other words, the ban was altered in order to prevent possible conflicts between fishermen and floaters - conflicts for which there is

no documented evidence. Again, Mr. Eng was directly involved in the decision making process. And again, the Agency provided no supporting documentation or research for making this arbitrary decision.

It is noteworthy that the 1985 Plan and the associated DEIS provide no evaluation or analysis regarding the boating ban above Highway 28 as required by NEPA. Appendix H in the current DEIS is the first time that this issue has been studied objectively by Agency staff. The consistent lack of supporting evidence throughout the 2003 DEIS leads us to conclude that the prohibition on boating is without social or environmental merit. Unless the Agency has withheld information in the DEIS or in our 2002 FOIA request, the information does not exist. Can the Agency provide this documentation? If not, the prescription on boating above Highway 28 should be rescinded immediately.

### *A Few Words on Safety*

Appendix H should note that none of the 37 fatalities on the Chattooga River occurred above the Highway 28 Bridge. There is no record in the DEIS or in the Agency's response to our 2002 FOIA request of any safety incidents involving boaters above Highway 28 prior to implementation of the ban in 1976.

Recently this past spring two fishermen went in over their waders on two different southeastern whitewater rivers and both were swept downstream. One incident occurred on Wilson Creek, NC, not far from the Chattooga. A paddler who happened to witness the accident rescued this lucky angler, and his life was saved. The other incident occurred on the Tuckaseegee River NC, also near the Chattooga. This unfortunate angler was not in sight of any paddlers and drowned. There are other incidents like this in other regions of the country. One could say that the presence of boaters may improve public safety on the Headwaters.

If the Agency stands behind a boating restriction based on undocumented safety arguments where no safety issues have arisen, then the Agency should consider whether the restriction should be applied to other user groups equally. In order to make this determination, the Agency needs to provide a comparison, based on use, of public safety for the different types of visitors. Notably, the Forest Service does not restrict boating use on any river in the United States for purposes of public safety. If the Agency contends otherwise, then that should be documented in the ROD.

The statements made on page H-27 of Appendix H regarding Overflow Creek and Tallulah Gorge should be emphasized. The self-sufficiency of paddling groups attracted to the type of whitewater found in the Chattooga Headwaters is well documented. There is no reason to believe that boating use on the Headwaters would present greater public safety concerns than any stream open to boating on Agency lands in the Sumter National Forest or elsewhere.

A ban on paddling for safety reasons in the National Forest system is without precedent. The rivers and rapids in the system each exist on a continuum from very easy and safe to massive and un-boatable. Paddlers all across the country assess their own skill and the difficulty of the rivers before going paddling. The decision of what constitutes a relatively safe descent depends on the

individual paddler, water levels, and many other factors, and should be left to the paddler to make. It is not the role of the Agency to declare some rivers “safe” and other rivers “not safe.” All rivers have some level of inherent risk, and paddlers themselves mitigate those risks in order to have a safe and enjoyable descent.

The general Agency policy is to emphasize personal judgment, rather than to limit use to enhance safety, the Agencies, Travel Safety Advisory notes:

*“The most effective way to prevent mishaps is to adequately prepare for the trip. Knowledge of the area, weather, terrain, limitations of your body, plus a little common sense can help to ensure a safe and enjoyable trip.”<sup>vi</sup>”*

As the Agency states in a representational sample:

*“Common sense and adherence to boating and water safety laws and rules will reduce accidents.”<sup>vii</sup>*

And

*“It’s a place where you can truly ‘get away from it all.’ Your solitude can refresh you; it also means that you are responsible for your own well-being. Help can be very far away. It pays to be aware of possible hazards so you can enjoy your time in the forest in safety.”<sup>viii</sup>*

If the Agency supports a continued prohibition on floating on the Chattooga above Highway 28, then the Agency needs to provide clear documentation for the decision demonstrating that it is consistent with Agency policy, standards, and practices and how the safety issues on the river above Highway 28 are substantially different from the river below Highway 28.

### **A Discussion On Levels**

Alternative E in the DEIS proposes boating access only at certain prescribed water levels on the US 76 Bridge gauge (>2.4 feet). This appears to be based partly on a 1999 AW recommendation to allow access at certain flows. AW no longer believes that a flow level proscription is appropriate or workable.

However, as we indicated in previous letters to the Forest Supervisor, we believe that if access is prohibited at certain levels, then a flow study should be conducted to analyze and determine the optimal flows for recreation. It is our belief based on numerous interviews with boaters who ran the river prior to the 1976 ban, boaters who ran the river after the ban, and boaters who have hiked in to look and scout the river at different levels, that it becomes runnable around 2.0 feet on the Highway 76 gauge, and that the optimal level is likely around 2.4 feet. In the event that the Agency chooses an implementation alternative allowing limited access based on flow, then the Agency should conduct a recreational flow study based on the expert research and techniques developed by Bo Shelby and Doug Whittaker for use in developing recreational flows from dams. AW can help with this study.

## **DISCUSSION OF AREA 2 MANAGEMENT STANDARDS**

AW assumes the clarifications issued April 8, 2003 will be reflected in the final plan. These clarifications were issued by the Agency at the first public meeting and modify several paragraphs on pages 4-11 through 4-14 of the proposed plan. These clarifications reflect the recent decisions made in Amendment 14 to the current Forest Plan. We have based our comments regarding the Management Standards MA 2-1 through MA 2-14 on this assumption.

Fundamentally, we want to see MA 2-2 changed to allow boating above Highway 28 as discussed previously. In addition to this we offer the following comments.

### **Reservation System for Self-Guided Boaters**

We want language in the proposed plan that further details any potential reservations system for self-guided boaters that may be adopted in the future as prescribed by MA 2-13.

Any reservation system should include a sunset provision suspending the reservation system if use patterns drop back below the trigger levels for more than 3 consecutive years. In other words, if reservations are filled for less than 20 weekend days or less than 50 week days for 3 consecutive years then the reservation system would sunset until trigger levels are again met.

Any reservation system, which might be developed for the Chattooga River, should be constrained by defined operating hours. The reservation system should only regulate user numbers on the river between the high use periods of 8:30 AM to 3:00 PM.

This would result in the effective regulation of virtually all boaters during the peak use hours. A similar management program has been highly effective on the Youghiogheny River in Pennsylvania's Ohiopyle State Park.

The reservation system should be on a first come, first served, same day basis. Self-guided users should be able to obtain a reservation at the river without traveling to a remote office. Some type of on-line, Internet based system should be developed so that distant visitors don't travel long distances only to be denied a reservation upon their arrival.

We oppose any type of fee to obtain a reservation.

### **Afternoon Overlap of Guided Trips between Highway 76 and Woodall**

The proposed plan and the current operating protocols fail to address the guided trip overlap that occurs between the Highway 76 Bridge and Woodall Shoals. Many Section III guided trips end at Woodall Shoals and many Section IV guided trips begin at the Highway 76 Bridge. This section of the river risks overuse by guided trips. This is particularly true in light of the new management standards to allow more boats per commercially guided trip. The Agency should address the problem specifically and how this overlap fits under the outfitters' carrying capacity.

### **Vehicular Access to the River**

The roaded incursions into the wild and scenic river corridor on the Georgia side of the river at Earl's Ford, Sandy Ford and other locations should stop immediately and these roads should be closed permanently. Such a compromise may have been necessary 30 years ago to get the river protected but now it is time for this abuse to cease. We have also sent this comment to the Chattahoochee Forest planning team.

### **Data on Other River Corridor Users**

Impact studies should be done to assess fishing, hiking and equestrian impacts in the Wild and Scenic River corridor. These users, particularly horseback users, have a far greater impact on the riparian environment than boaters (which seem to have been singled out and studied at great length). Boaters are the only user group required to complete a registration permit and therefore are the only user group for which the Agency has reliable data. Based on this very data the Agency seeks only to regulate boating use.

Our own observations in recent years indicate a significant increase in foot traffic along the river, yet there is no effort to regulate these numbers. If the Headwaters truly risk overcrowding, as some who oppose boating have argued, then maybe other users in the area should be regulated and controlled? Furthermore, the amount of money spent by the Agency to maintain horse trails (take the recent Rocky Gap decision for example) seems disproportionate to the use numbers and is compounded by the fact that this particular user group has tremendous negative impact on the riparian river environment. Is it time these other users be required to fill out a self-registration permit as boaters have for nearly 30 years?

### **Bridges Across the Wild & Scenic Chattooga River**

The 1985 Forest Plan called for the Forest Service to remove the rusting steel skeleton of the old Highway 76 Bridge. This has not been done as called for in the 1985 Plan. This should be part of the new plan, funding should be allocated and the bridge should be removed.

We also understand that the existing Highway 76 Bridge will be replaced in the relatively near future. This provides a once in a lifetime opportunity to construct a bridge that is worthy of a National Wild and Scenic River as prominent as the Chattooga.

Any new bridge design across the river should be aesthetically pleasing, blend in with the natural river environment at river level and span the river without mid-stream pilings. For example, all visible surfaces from the river should be faced with native stone materials.

All necessary steps must be taken to prevent oil and other contaminant discharge into the river from the construction activities as the bridge is built. This is especially true of any erosion and sedimentation that may be caused by bridge construction.

There also has been talk of replacing the Highway 28 Bridge. These same requirements should apply to any bridge over the Chattooga.

### **Stekoa Creek and Water Quality Throughout the Watershed**

We are deeply concerned with water quality issues throughout the watershed and specifically in the Stekoa Creek discharge into the Chattooga. We have submitted separate comments regarding Stekoa Creek to the Chattahoochee Planning Team.

### **User Fees**

We do not support user fees, however, should user fees or reservation fees become a reality they must impact all forest visitors equitably and not just boaters.

### **Moving Forward**

AW can offer the Forest Service valuable assistance to help insure that boaters using the Chattooga Headwaters do so responsibly and respectfully. We are willing to:

- Donate appropriate signage developed in cooperation with TU and the USFS.
- Assist the Agency with parking site development if required.
- Develop a gauge system at each of the put-ins corresponding to ideal recreational boating flows
- Help collect survey data from members and visitors about usage.
- Develop a webpage with real-time gauge and flow information, and
- Organize clean up efforts in the Headwaters river corridor to clear litter and debris left by other users.
- Help organize volunteers to assist the Agency in a renewed “river ranger” program to promote safety and environmental awareness among users of the Chattooga River

Please contact us with any questions you might have regarding our comments and any additional information you might require. We look forward to your favorable consideration of our comments and the ability to legally enjoy this precious river by boat above Highway 28.

Please forward a copy of the final EIS to all of the undersigned individuals as soon as the Deciding Officer has issued a Record of Decision regarding the Revised LRMP.



Respectfully Submitted By:



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End Notes:

<sup>1</sup> The interpretation of an administrative regulation by the agency or officers charged with its administration is to be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); *Ventura-Escamilla v. I.N.S.*, 647 F.2d 28, 32 (CA9 1981). The administration of the prescription on boating by the Forest Service is both.

2. See 1974 U.S.C.C.A.N. 3006-22
3. *United States v Hells Canyon Guide Service*, 660 F.2d 735, 737, (9th Cir., 1981): “The power of the federal government to regulate the area and activities in question is not in dispute. *United States v. Lindsey*, 595 F.2d 5 (C.A.9 1979)... 16 U.S.C. s 551 gives the Secretary of Agriculture the authority to regulate the use and occupancy of the national forests. This authority is assimilated into 16 U.S.C. s 1281(d), giving the Secretary the authority to regulate the use and occupancy of components of the Wild and Scenic Rivers System.”
4. 16 U.S.C. s 1271 respecting the Wild and Scenic River System and 36 CFR, s 261.1(c) authorizes promulgation of regulations applicable to activities occurring in a national forest and to "an act or omission (that) affects, threatens or endangers property of the United States administrated by the Forest Service."
5. On July 25, 1978, the Forest Service published regulations which, when implemented by specific order, prohibit entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System. 36 C.F.R. s 261.58(z).
6. United States Forest Service, [www.fs.fed.us/recreation/safety/safety.html](http://www.fs.fed.us/recreation/safety/safety.html), on July 1, 2003.
7. United States Forest Service, [www.southernregion.fs.fed.us/boone/CRsafe.htm](http://www.southernregion.fs.fed.us/boone/CRsafe.htm), on July 1, 2003.
8. United States Forest Service, [www.fs.fed.us/r10/tongass/forest\\_facts/safety/safety.html](http://www.fs.fed.us/r10/tongass/forest_facts/safety/safety.html) on July 1, 2003.

**D. Appendix 4. Summary of ROD/FEIS’s Conflict Argument and AW’s Responses.**

SNF Claim	AW Response
<p>Encounters between boaters and anglers will occur if Headwaters are opened to boating.</p> <p style="text-align: center;">⇓</p>	<p>Such interactions will be rare based on different flow preferences of the user groups. RLRMP offers no data to support paddlers’ flow preferences, and angler flow preference data suggests minimal interaction will occur.</p>
<p>Many encounters will be undesired by one or both users.</p> <p style="text-align: center;">⇓</p>	<p>The RLRMP offers no data to support the claim that encounters will be undesired, or that encounters between an angler and a paddler are any more undesired than interactions between any other user groups.</p>
<p>Encounters will be more undesired from anglers than paddlers.</p> <p style="text-align: center;">⇓</p>	<p>The RLRMP offers no data to support this claim. The two user groups share all other creeks in the region without incident and have strong senses of place and desires for solitude.</p>
<p>Conflicts result because encounters are undesired.</p> <p style="text-align: center;">⇓</p>	<p>The RLRMP offers no data to support this claim. The two user groups share all other creeks in the region without incident. Encounters does not equal conflicts.</p>
<p>Conflicts are loss of solitude, and interference with the fishing activity (broken line or entanglement).</p> <p style="text-align: center;">⇓</p>	<p>Loss of solitude is not a conflict unique to paddling and angling but to total use of the resource. The RLRMP offers no data to support the bizarre claim that paddlers result in broken lines, entanglement, or other direct impacts to fishing.</p>
<p>Anglers may be displaced.</p>	<p>The RLRMP offers no data to support the claim that allowing paddling on the Chattooga Headwaters will displace anglers. Even if some anglers are displaced, paddlers and anglers deserve equal opportunities to enjoy the Chattooga River.</p>

**E. Appendix 5. Comparison of the Chattooga and Alleged Alternatives**

River	Difficulty	Length	Roadside	Road Access	Wilderness	W&SR
GS-BP	V	5	No	Yes	No	Yes
BP-BF	IV	5	No	Yes	Yes	Yes
BF-28	V	10	No	Yes	No	Yes
French Broad	III+	8	Yes	Yes	No	No
Thompson	V+	4.6	No	No	No	No
Wilson Creek	IV+	2.5	Yes	Yes	No	Yes
Linville Gorge	V+	16.3	No	No	Yes	No
Cullasaja	V+	2, 2	Yes	No	No	No
Horsepasture	V+	3.7	No	No	No	Yes
Santeetlah	V	2	Yes	Yes	No	No
Pigeon Forks	V	4.4, 3.8	No	No	Yes	No
Tallulah	IV/V	2.5	No	No	No	No
Conesauga	IV	5, 10	No	Yes	No	No
Mill Creek	V	3	No	Yes	No	No
Big Creek	V	3	No	Yes	No	No
Holcombe	V	1.9	?	?	No	No
Overflow	V	6.4	No	Yes	No	No
Stekoa	V	6.7	No	Yes	No	No
Chauga	IV	9.8	Yes/No	Yes	No	No
Whitewater	V+	2.4	No	Yes	No	No
Brasstown	V+	3.8	No	Yes	No	No

**F. Appendix 6. Proof of Timely Filing**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served via Hand Delivery on the USDA Forest Service Administrative Appeals Office this the \_\_\_\_ day of April, 2004.

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