Whiteside Cove Association
Roberts & Stevens, P.A.
One West Pack Square, Suite 1100
Asheville, NC
28801

Direct dial number 828-258-6992
Facsimile number 828-253-7200

February 15, 2006

Mr. John Cleeves
Project Coordinator
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Re: Decision for Appeal, #04-12-00-0026

Dear Mr. Cleeves:

On behalf of the Whiteside Cove Association, I provide the following comments on the United States Forest Service ("USFS") data collection process proposal. We look forward to working with the USFS in such process.

In the recent release on data gathering techniques, the USFS stated that it would allow two forms of limited boater trials, one of which that includes "restricted public boater trials on the lower two segments of the river above Highway 28. Whereas we are encouraged that the USFS has moved away from an open-ended adoptive management approach, we continue to question the need for any trials in the sensitive area and urge the USFS to limit environmental impact from such trials consistent with its primary directive of protecting the resource over user demands. As I have mentioned in prior correspondence, only after the USFS analyzes and incorporates the appropriate ecological and physical capacities of the river area into its capacity analysis would such analysis adequately address the visitor capacity concerns of the applicable laws and appeal decision.

As one example, you may be aware that NC Department of Agriculture has advised that high mica content of local Jackson County soils makes recreational usage during high water periods unadvisable and potentially destructive to the riverine environment. Of course, this would include boater trials. Accordingly, we continue to believe that the use of alternative creeks for proxy analysis would be ideal for gauging some of the longer-term impact issues without degrading the scenic or wild nature of the Chattooga river corridor. In any event, a

limited review of the river's capability is certainly more appropriate than opening the entire upper river to unlimited boating trials.

With respect to collection of field data, collecting field data on social conflicts would be costly and subject to inherent bias, particularly from user groups keenly interested in the outcome of the survey. A simple mathematical model simulation could be used to estimate user encounters based on focus group and LAC data with the model cross-checked at a proxy river over a short period of time utilizing few resources and funds. Unless some type of modeling is used, how will the USFS estimate the real threat to the Chattooga from the increasing impact to, and from, all user groups over time? Indeed, it is only the relatively recent technological advances that has made creeking boat access an issue in the upper reaches of the Chattooga, and it is not only foreseeable but to be expected that continued technological advances will increase conflict from such boating with existing ORVs.

Below are a few more considerations regarding user trials:

1. What has the USFS done to insure boating is compatible with the preservation of the river banks, wildlife and plants along the Chattooga Headwaters? What potential negative impacts have been considered? What indicators are being monitored? ["Gather necessary information and carry out research programs in a manner that is compatible with the preservation of the wilderness environment." FSM 2320.3]

2. Is the appeal decision being followed?

   (a) What capability study on the physical environment has been completed?

   (b) The desires of present users appears to be secondary to boating variables like boatable flow level. This shows a bias toward boating.

   (c) Will the USFS eliminate use on other creeks or sections of the Chattooga to insure a diversification of recreational opportunities or is only boating needs considered?

   (d) Does the USFS have the funds (budget) to study and monitor all 17 miles of river for the trials.

   > "Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations." From the Appeal decision #04-13-00-0026

3. What ecological indicators have been used to insure the non-degradation policy is followed as dictated in the appeal decision and in the 1968 WSR Act 10(a)?

(a) "The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a non-degradation and enhancement policy for all designated rivers, regardless of classification." From the Appeal decision #04-13-00-0026.

(b) WSR Act Section 10(a): " primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features"

(c) Additionally reference SC DNRs anti-degredation rules pg. 16 "Clean Water" outline.

(d) Also see NC state statute on WSR non-degradation policy.

4. Has the physical capacity of the required scouting and portage trails been considered?

(a) "Soils subject to flooding are limited for recreational uses by the duration and intensity of flooding in the season when flooding occurs. In planning recreational facilities [like access, portage and scouting trails], onsite assessment of the height, duration, intensity and frequency of flooding is essential." Page 149 Jackson County soil survey 1991 issued by Dept or Agr. NRCS.

(i) "Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness. " FSM 2320.6

5. What considerations have been given to the wildlife?

(a) " Maintain wilderness in such a manner that ecosystems are unaffected by human manipulation and influences so that plants and animals develop and respond to natural forces." FSM 2320.02

(b) "The needs of wildlife should be considered in all decisions involving the use of the land" Page 151 Jackson County soil survey 1991 issued by Dept or Agr. NRCS.

6. What considerations have been given to the protected recreational ORVs of angling, swimming, relaxation and wildlife viewing.

Please provide the answers to the questions above at the next public LAC meeting. Thank you and please contact me if you have any questions.

Very truly yours,

Wyatt S. Stevens,

President

March 13, 2006

Sumter National Forest
Content Analysis Team
PO Box 221150
Salt Lake City, UT 84122

I would like to comment on the Proposed Revised Land and Resource Management Plan for the Sumter National Forest, in particular, for the proposed changes to the status of the Chattooga River. I am a canoer, kayaker, and a fisherman. I am against any changes to the existing uses of this river.

I, and my two sons, are kayakers and canoers. We have kayaked and canoed the Chattooga River from Rt. 28 to the Tugaloo Lake on several occasions, both in the summer and in the winter. This stretch of water is outstanding kayak and canoe water, hard to duplicate in our part of the country.

I, and my two sons, are also trout fishermen. We have concentrated our trout fishing above the Rt. 28 bridge. As you can see we concentrate our fishing on the stretch above the Rt. 28 bridge and kayak and canoe on the long stretch below the Rt. 28 bridge and the shorter stretch below the Rt. 76 bridge. In our opinion, the stretch of water from Rt. 28 to the Tugaloo Lake is already a sufficiently long stretch of this river open to kayaks and canoes and more encroachment on the remaining portion of the river is neither needed, nor a wise investment in this river.

This river is a unique resource in the Eastern United States. Major portions of the river have no road or human habitation along them. These stretches provide a near-wilderness experience for those who use them. The stretch below the Rt. 28 bridge provides a couple of days of near-wilderness boating for those who use the river. The stretch above the Rt. 28 bridge, which is presently closed to boat traffic, provides the fisherman with a place to fish in solitude and outstanding beauty. This stretch of water is also not a very interesting stretch to kayakers and canoers, particularly during normal and low water conditions. Opening this stretch of river to boats would degrade the unique outdoor experience that this portion of the river provides.

From a practical point of view, I think the self-policing policy suggested for boaters is unworkable. I have often encountered kayaks and float tubes on the stretch above the Rt. 28 bridge, in violation of existing regulations. The people who float this portion of the river know that law enforcement is almost non-existent and opening the river to floating in high water only would be consistently violated by boaters. If they make the drive up to the river with the intent of boating, water levels below those specified for boating would not deter them from boating on the river, regardless of the regulations. I am concerned also about trash and litter left behind by boaters. There is presently almost no trash along this stretch of water, except near the roads that cross the river. Opening the river to more casual users will, no doubt, lead to more trash, as we have found on the open stretch below the Rt. 28 bridge. The stretch of water presently open to kayakers and canoers is full of trash left behind by the boaters.

In summary, I would urge that you leave the uses of the Chattooga River as they presently are: that is, boating allowed below the Rt. 28 bridge and no boating above the Rt. 28 bridge.

David J. Dumin

202 Lakeside Court
Clemson, SC 29631
864-645-6415

Whiteside Cove Association
Wyatt S. Stevens, President
Roberts & Stevens, P.A.
One West Pack Square, Suite 1100
P.O. Box 7647
Asheville, NC 28801

Direct dial number 828-258-6992
Facsimile number 828-253-7200

March 30, 2006

Mr. John Cleeves, Project Coordinator
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Re: **Whiteside Cove Association's Objection to "Decision for Appeal, (#04-13-00-0026 American Whitewater) of the Sumter National Forest Land and Resource Management Plan Revision."**

Dear Mr. Cleeves:

It has been brought to my attention that the USFS is considering expert panel boating trials on the Whiteside Cove Associations property. As you are aware this section of the Chattooga has been deemed non-navigable, therefore the bed and banks of the stream are in private ownership. Any proposed floating study would have to take place without ever touching the bed, boulders, banks, strainers etc. Since this is not physically possible at any water level, floating is a direct violation of the NC trespassing laws.

Additionally, Boating is a hazardous sport and we are not interested in assuming liability for such activities on our property. As has been pointed out to your office the NC Recreational Use Statute does not indemnify land owners from water related activates.

As stated previously, the property owners will allow limited supervised access to assist with the LAC study, but we will not allow boating or any other possibly hazardous activity. Once you have a proposed methodology and scope of the study please forward for our review.

We look forward to working with you on the study process.

Very truly yours,

Electronically signed
Wyatt S. Stevens,
President, Whiteside Cove Association

R&S 478345-1

Friends of the Upper Chattooga
2368 Pinnacle Drive
Clayton, Georgia 30525
706.782-6397
info@chattoogariver.org

April 05, 2006

Jerome Thomas, Forest Supervisor
John Cleeves, Forest Planner
Francis Marion & Sumter National Forests
4931 Broad River Road
Columbia, South Carolina 29212

Dear Jerome and John,

The undersigned, acting both on behalf of their individual organizations and under the umbrella organization of the Friends of the Upper Chattooga, would like to meet with you in person to discuss the work plan being developed in connection with the data gathering techniques and analysis methods the USDA Forest Service intends to use on the Upper Chattooga limit of acceptable change study.

We collectively possess decades of experience on this part of the river above the Russell Bridge and believe we have information that could be of value to you as you develop the work plan.

Please use Buzz Williams at The Chattooga Conservancy as your point of contact for a timely response to this request. We look forward to hearing back from you.

Sincerely,

Buzz Williams
Executive Director
The Chattooga Conservancy
2368 Pinnacle Drive
Clayton, Georgia 30525
706-782-6097
info@chattoogariver.org

Charlie Breithaupt
Chairman, Georgia Council
Georgia Trout Unlimited
194 Kitchins Lane
Clayton, GA 30525
706-782-6954
knc615@direcway.com

Orig FS
cc: TLW/JCLeeves, SNS
Rec'd FS 4-7-06.

(3)

Joseph Gatins
Tallulah District Leader
Georgia ForestWatch
2489 Glade Road
Clayton, Georgia 30525
706-782-9944
jgatins@alltel.net

Doug Adams
Rabun Chapter, Trout Unlimited
PO Box 65
Rabun Gap, Georgia 30568
706-746-2158
edadams1@alltel.net

Butch Clay
SCFW
10320 Highlands Highway
Mt Rest, SC 29664
864-638-7885
clay_butch@bellsouth.net

Art Shick
National Leadership Council Representative
Trout Unlimited
521 Wintergreen Drive
West Union, SC 26996
864-638-9666
fishmor@aol.com

Mike Bamford
River Stewardship Director
PO Box 2725
Cashiers, NC 28717
828-743-6257
Mike@tupelotoys.com

Tom McInnis
Chair
South Carolina Trout Unlimited
206 Wescott Drive
Clemson SC 29631
864-654-4003
tomcatmc@bellsouth.net

Wyatt Stevens
President Whiteside Cove Association
One West Pack Sq.
Suite 1100
Asheville, NC 28801

April 11, 2006

Mr. John Cleeves
Project Coordinator
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Dear Mr. Cleeves,

I have heard of the possible opening of the upper Chattooga River (N.C. State Road 1107) to boating. I grew up swimming and fishing those waters and I have serious concerns with opening it up to any boating.

My first concern is for the streams and rivers themselves. With the increased traffic caused by the boaters, there will be erosion where the water is too shallow, more trash, and hacked vegetation (because they are going to have to get out and walk parts of the stream).

My second concern is that I know that there is no way that any kind of boat can continuously go down these rivers. Someone is bound to try some of the falls that are lethal, like Corkscrew, and will either be seriously injured or killed. Who is going to handle the liability for this? Also, anyone who knows the area at all can already see what kind of ecological problems a rescue attempt would have on the forest and streams. Even the act of patrolling this area to try to cut down on lives lost is going to make an impact on the area.

My third concern is for the swimmers and fishermen. Right now, there is an understanding between swimmers and fishermen with each respecting the others space. With the addition of boaters, everyone will be on top of each other. There are not a lot of places left where you can swim and fish in peace without boats running over you. There will be more frustration and conflicts.

My concerns are shared by many people who love this area and want its beauty preserved. American Whitewater is not concerned with the consequences of their forcing this area to be open for boating. They already have 70% of the waters, why do they have to have 100%? Do the opinions of people who have been swimming, fishing, and taking care of these streams count or is it only the voices of American Whitewater that count? I am hoping beyond hope that for once our voices will be heard and will matter. If American Whitewater is allowed to have all of our waters, then it will be a headache not only to those who have enjoyed its peacefulness, but for the forestry service as well. Please maintain the pristine beauty of our beloved waters.

Sincerely,

Whitney Smith

Whitney Smith
106 Cloverleaf Lane
Asheville, NC 28803

Atlanta
Denver
Los Angeles
Philadelphia

McKenna Long & Aldridge LLP
Attorneys at Law

303 Peachtree Street, NE • Suite 5300 • Atlanta, GA 30308
Tel: 404.527.4000 • Fax: 404.527.4198
www.mckennalong.com

San Diego
San Francisco
Washington, D.C.
Brussels

April 11, 2006

Ms. Kathleen Atkinson
Forest Supervisor
Chattahoochee-Oconee National Forests
1755 Cleveland Highway
Gainesville, GA 30501

Ms. Marisue Hilliard
Forest Supervisor
National Forests in North Carolina
160A Zillicoa Street
Asheville, NC 28805

Mr. Jerome Thomas
Forest Supervisor
Francis Marion and Sumter National Forest
4931 Broad River Road
Columbia, SC 29212

Re: Chattooga Wild and Scenic River Visitor Use Capacity Analysis

Dear Ms. Atkinson, Ms. Hilliard, and Mr. Thomas:

In its February 3, 2006 news release, the USDA Forest Service ("USFS") announced the methods it intends to use for the visitor use capacity analysis being conducted to help determine whether to change the status quo and extend boating to portions of the Chattooga River above Highway 28. According to the news release, the USFS currently is crafting the detailed design of its proposed analysis and intends, among other things, to conduct publication studies, focus groups, user surveys and limited boating trials. By this letter, the undersigned groups urge the USFS not to overlook the obvious, but to include in its analysis an examination of the historic impacts of boating below Highway 28. We believe that the USFS will find valuable evidence in such an examination that would help the USFS to decide how boating above the Highway 28 bridge would affect the environment and the protected Outstandingly Remarkable Values ("ORVs") of hiking, camping, and fishing, and thus whether the USFS should allow boating above the Highway 28 bridge.

According to the news release, the USFS will focus on collecting information "about the section of river above Highway 28," but also include information "about similar rivers and the

Chattooga itself ... since 1974," which seems appropriate. As you are aware, the decision to preserve the status quo was remanded for further analysis and evidentiary support. To alter the status quo, the USFS must prove why the 30-year zoning of use is no longer necessary to protect the environment and ORVs. *E.g.*, 5 U.S.C. §556(d); *Minn. Milk Producers Association v. Glickman*, 153 F.3d. 632, 642 (8th Cir. 1998). Taking surveys and receiving input from users as to potential future impacts of altering the status quo (and also conducting boating trials by boat experts hand-picked by American Whitewater) would at best provide the USFS with some appreciation of the perceptions (and perhaps preconceptions) of users; given the inherent bias of such users and "experts," it would likely not provide concrete evidence of the impact boating would have on the protected environment of the Upper Chattooga. However, the USFS has a living laboratory and catalog of evidence at its disposal, the historic impact of boating just on the other side of the Highway 28 bridge and the expert judgment of USFS professionals that have managed the Chattooga on both sides of the bridge for years. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (agency may rely on its own expertise).

For example, in the 41 Federal Register 11847 (March 22, 1976) Notice ("Notice"), the Chief of the Forest Service described the river in the early stages of increased boating use, a river that in some ways the USFS has improved upon by allowing certain areas to revert to more natural states. The Chief's Notice describes the area below Highway 28 as an area for hiking (Dick's Creek), primitive camping, hiking, hunting, and fishing (Buckeye Branch, Licklog, Sutton Hole, Daniel Creek, Camp Creek). The Sandy Ford and Earls Ford areas reportedly "receive heavy use by fishermen and hunters." Overflow Bridge as well "receives heavy use by fishermen," and Woodall Shoals likewise is said to have "excellent fishing." *Id.* at 11852. According to Max Gates, USFS Forest Ranger for the Andrew Pickens District from 1961-1972, "users of the portions of the Chattooga River that are now designated wild and scenic [both above and (below Highway 28) enjoyed an experience of solitude and enjoyment of nature that was unique in the Southeast." *See* attached Affidavit of Max Gates.

USFS boat count figures show an 800-fold increase in Chattooga River boating from 1968 to the 1990s and a 500% increase in the 20 years following the Notice in 1976. USFS Chattooga River Use Data. According to Mr. Gates, this increase in boating stretched USFS resources beyond the limit: "We [USFS] simply did not have the resources at the USFS to monitor and regulate adequately all this usage above and below Highway 28." Gates Affidavit. Already by 1976, the USFS stated "[t]he recent increase in floaters using the river has had a detrimental effect on the fishing experience." Notice, p. 11849. The USFS warned that "uncontrolled future use would probably result in safety hazards and lowering of the quality of the recreation experience." *Id.* at 11850. That concern has proved prophetic. According to Mr. Gates, zoning of use was introduced "to allow citizens reasonable use of the Wild and Scenic river while minimizing conflicts between user groups, maximizing the ability of the USFS to manage the resource, and preserving the unique natural qualities of the river that resulted in such designation." Nevertheless, "the sheer number of floaters [below 28] ... discouraged other uses." Gates Affidavit. Mr. Jim Barrett succeeded Mr. Gates as USFS Forest Ranger for the Andrew Pickens Ranger District beginning in 1972. Mr. Barrett avers that "[b]oaters already have access to the majority of the river, i.e., all the sections below Highway 28, and *their usage of the river has impacted the quality of usage by non-boaters*." *See* attached Affidavit of Jim Barrett (emphasis added).

As mentioned above, the USFS should study the impact boating has had on the environment and ORVs below Highway 28. What is included herewith is just a sampling of the evidence that is at the disposal of the USFS - there is a mountain of hard, substantive evidence of the impact of boating on the immediately adjacent area of the Chattooga River, right on the other side of the bridge. The USFS can verify from such evidence the impact boating has had on the quality of the recreational experience of hiking at Dick's Creek, primitive camping, hiking, hunting, and fishing at Buckeye Branch, Licklog, Sutton Hole, Daniel Creek, and Camp Creek, fishing and hunting at Sandy Ford and Earls Ford, the "excellent fishing" at Woodall Shoals and Overflow Bridge, and prior uses of Overflow Creek, among other locations. Ignoring such concrete historical evidence would demonstrate an obvious bias toward boating.

What is at stake is whether to expand boating impacts on the environment and ORVs through the remaining river system in order to satisfy the interests of boaters. What is at stake is the vestige of solitude and outstanding non-boating recreation experience that can still be enjoyed above the bridge due to the foresight of the USFS. In the expert opinion of both Mr. Gates and Mr. Barrett based on decades of professional experience with the Chattooga River and USFS:

> The portion of the Chattooga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience, and the quality of its wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences.

In their expert opinion, both also believe that allowing boating above Highway 28

> will damage the unique wilderness solitude experience and quality of wilderness hiking, nature watching, fly fishing and other outstanding recreational experience above Highway 28.

The undersigned urge the USFS to consider the mountain of evidence that lies just on the other side of the bridge, which evidence the undersigned believe will assure the USFS that its decision to preserve the status quo preserves the unique nature of the Upper Chattooga, protected ORVs, and the solitude experience that users so cherish.

Sincerely yours,

Buzz Williams

Buzz Williams, Executive Director
Chattooga Conservancy By JRM
W/express permission

Alan R. Jenkins
McKenna Long & Aldridge LLP
Attorneys for the Whiteside Cove Association and Rust Family

Wayne Jenkins

Wayne Jenkins, Executive Director
Georgia ForestWatch By SRM w/ express permission

Joseph Gatins

Joseph Gatins, Tallulah District Leader
Georgia ForestWatch By SRM w/ express permission

Butch Clay

Butch Clay, Advisor By SRM w/ express permission
Georgia ForestWatch
Author of *Guide to the Chattooga,* 1995

Charlie Breithaupt

Charlie Breithaupt, Chairman By SRM w/ express permission
GA Council of Trout Unlimited

Tom McInnis

Tom McInnis, Chair By SRM w/ express permission
South Carolina Council of Trout Unlimited

Doug Adams By SRM w/ express permission

Doug Adams, Newsletter Editor
Rabun Chapter of TU, Forest Service Liaisons
GA Council of TU

Art Shick

Art Shick, By SRM w/ express permission
National Leadership Council Representative
Trout Unlimited

Cc: John Cleeves
Matthew Tilden
Chuck Myers
Joseph Robles
Gloria Manning

I, Max Gates, being first duly sworn, depose and say:

1. I am a citizen and resident of Clayton, Georgia.

2. I am competent and have personal knowledge of the matters discussed herein.

3. I served as USDA Forest Service ("USFS") Forest Ranger for the Andrews Pickens District of the Sumter National Forest in the Walhalla, South Carolina office from 1961-1972.

4. I served as Resource Assistant District Ranger for the USFS Tallulah District of the Chattahoochee National Forest from 1972 to 1986.

5. During the course of my employment with the USFS from 1961 to 1986 and as a citizen that often used and still uses the Chattooga River for personal enjoyment, I had regular and consistent opportunity to observe the Chattooga River and its uses before and after its designation as a Wild and Scenic River.

6. During the course of my employment with the USFS, I regularly traveled to and observed other wilderness and park areas throughout the Southeastern and Northwestern United States.

7. During the course of my employment with the USFS, I was involved in the study as how best to manage the newly established Wild and Scenic River portion of the Chattooga River.

8. Prior to this period, users of the portions of the Chattooga River that are now designated as wild and scenic enjoyed an experience of solitude and enjoyment of nature that was unique in the Southeast.

9. Following the publishing of the Wild and Scenic River Study (1971) and the release of the movie ***Deliverance*** (1972), boating usage of the Chattooga River increased dramatically.

10. As boating usage increased, we in the USFS had to respond to a number of boating accidents on the river both above and below Highway 28. One group involved 15 to 20 boy scouts in canoes floating from Burrell's Ford. Two of the boys showed up at my house at midnight after becoming separated from the rest of the group. Each of the canoes had capsized and I do not believe we recovered any of the canoes. We simply did not have the resources at the USFS to monitor and regulate adequately all this usage above and below Highway 28.

11. As boating usage increased, we also had to respond to reports of conflicts between boaters and non-boaters. Many local non-boaters told me that they felt that boaters were intruding on their feeling of safety and solitude in areas long used by such non-boaters for camping, swimming, hiking, fishing and picnics. Some of these people responded by expressing their anger at boaters through verbal barbs, throwing stones, and even firing of gunshots. USFS and other law enforcement personnel had to break up a number of such confrontations.

12. I concluded that the increased boating usage presented a threat to the quality of wilderness experience available to non-boating users.

13. I, with other managers, concluded that the area of the Chattooga River being designated as a Wild and Scenic River should be divided into zones of usage so as to allow citizens reasonable use of the Wild and Scenic river while minimizing conflicts between user groups, maximizing the ability of the USFS to manage the resource, and preserving the unique natural qualities of the river that resulted in such designation.

14. We concluded that boaters should be allowed access to sections of the Wild and Scenic River (often referred to today as Sections 2 through 4) but that the portion above Highway 28 should be preserved for those who desire the solitude experience that all sections of the river formerly provided.

15. The USFS adopted these recommendations to zone use.

16. Following adoption of the zoning, there were many people drowned while floating the Chattooga. (I remember 19 people were drowned in the first three years alone) There were a number of conflicts between boaters and other users in the sections zoned for boating. However, the conflicts between boaters and other users gradually declined because of limited road access and the sheer number of floaters which discouraged other uses.

17. In my opinion, based on 25 years of professional forestry experience in the area and 40+ years of enjoying the use of the Chattooga River, the portion of the Chattooga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience, and the quality of its wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences.

18. In my opinion, based on my years of professional forestry experience in the area and my years of enjoying the use of the Chattooga River, lifting the ban on boating above Highway 28 will damage the unique wilderness solitude experience and quality of wilderness hiking, nature watching, fly fishing and other outstanding recreational experiences above Highway 28. Boaters already have access to the majority of the river and their usage of the river has impacted the quality of usage by non-boaters. Therefore it is fair to protect the interest in solitude and outstanding recreation experience of non-boaters in the remaining section. In short, something should be set aside for solitude and wilderness experience.

19. Finally, in my opinion based on 25 years of professional forestry experience in the area (that includes 14 years of responsibility for USFS law enforcement) and 40+ years of enjoying the use of the Chattooga River, the USFS would not be able to enforce adequately any rules for limited boating access above Highway 28.

Further, Affiant sayeth not.

Max Gates

Max Gates

Sworn to and subscribed before me
This 10th day of
April, 2006.

Christine W. Byd

Notary Public

My Commission Expires

My Commission Expires July 27, 2006

I, Jim Barrett, being first duly sworn, depose and say:

1. I am a citizen and resident of Rockport, TX.

2. I am competent and have personal knowledge of the matters discussed herein.

3. I served as USDA Forest Service ("USFS") title District Ranger for the Andrews Pickens Ranger District of the Sumter National Forest in the Walhalla, South Carolina office beginning in 1972. As such, I was responsible for timber, recreation, wildlife and general forest management in the district, including management of the portion of the Chattoga River that flowed through the District.

4. I served with USFS for six years in the USFS regional office in Atlanta. I then transferred to Louisiana and retired in 1987. Although I lived in the Atlanta area during this period I had regular opportunity to observe the Chattooga River and its uses before and after its designation as a Wild and Scenic River and still visit the river. I also had the opportunity during my 23 years of work with the USFS to travel to and observe forests and rivers throughout the Southeast.

5. During the course of my employment with the Andrew Pickens Ranger District, the UFS was conducting its study of the portions of the Chattooga River that were being considered for designation as a Wild and Scenic River and I had responsibility to assist with that study.

6. As part of its study, the USFS held a number of public forums to receive input from the general public, and various user interests and groups participated. We also discussed at these public forums proposed changes to the historic practices the USFS had used to manage the area, including the proposed zoning of the river for boating below Highway 28.

7. After much study and consideration of the public comments, we recommended and the USFS approved the use zoning that is still in place, and that I understand is currently being challenged.

8. In my opinion, based on 30 years of professional forestry experience in the Southeast and years of personal experience enjoying the Chattooga river

    a. The portion of the Chattoga River above Highway 28 is unique in the Southeast in terms of the quality of its wilderness solitude experience, and the quality of its wilderness hiking, nature watching, fly fishing and other outstanding recreational experience;

    b. lifting the ban on boating above Highwy 28 will damage the unique wilderness solitude experience and quality of wilderness Hiking, nature watching, fly fishing and other outstanding

recreational experience above Highway 28. Boaters already have access to the majority of the river and their usage of the river has impacted the quality of usage by non-boaters. Therefore it is fair to protect the interest in solitude and outstanding recreation experience of non-boaters in the remaining section. In short, there is no legitimate, valid reason to allow boating from Burrells Ford to Highway 28, or from even further upriver as some suggest; and

c. given its limited budget, the USFS has done an excellent job of managing the Wild and Scenic Area of the Chattooga River, having a bright line demarcation between boating and non-boating areas has made that job easier, and maintaining the existing status quo would help the USFS continue to manage this unique resource for the benefit of all users.

Further, Affiant sayeth not.

Jim Barrett

Jim Barrett

Sworn to and subscribed before me
This 30 day of
Mar, 2006

Angie L. Arjona

Notary Public

ANGIE L. ARJONA
MY COMMISSION EXPIRES
April 28, 2009

My Commission Expires
4-28-09.

April 14, 2006

Nathan Galbreath
(214) 758-6602
ngalbreath@pattonboggs.com

VIA OVERNIGHT COURIER

Mr. Dale Bosworth
Chief, United States Forest Service
USDA/USFS
1400 Independence Ave., SW
Washington, DC 20250

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

Dear Chief Bosworth:

We are writing on behalf of our client, American Whitewater, to request that you direct your delegates to enforce your above-referenced Appeal Decision. Specifically, we request that you direct the Southern Regional Forester to immediately restore self-regulated floating access on the upper Chattooga Wild and Scenic River for private, hand-powered canoeing, kayaking and rafting. Despite the fact that your Decision found that there is no evidence to support any restrictions on hand-powered canoeing, kayaking or rafting, one year later the Forest Service still maintains those unlawful restrictions and has no plan to remove them. In addition, while applicable law does not require that we provide you with notice, we are also writing as a courtesy to notify you that after thirty days from the date of this letter, American Whitewater intends to file suit in federal court to obtain the relief requested in its Appeal.

Background

Prior to an arbitrary, unsupported decision by the Forest Service in the late 1970's, private, hand-powered floating occurred on the Chattooga Wild and Scenic River for more than 200 years.

On January 30, 2004, Bob Jacobs, in his capacity as Regional Forester for Region 8 (Southern Region), published a *Record of Decision, Final Environmental Impact Statement and Revised Land and Resource Management Plan for the Sumter National Forest* (the "ROD"). That ROD instituted a total ban on all private canoeing, kayaking and rafting on the upper one-third of the Chattooga Wild and Scenic River (21 of 52 floatable river miles)—including banning all private floating on the section of the Chattooga River that traverses the Ellicott Rock Wilderness.

On April 15, 2004, American Whitewater timely filed an Appeal seeking reconsideration only of the discrete portion of the ROD that instituted the floating ban.

On April 28, 2005, Gloria Manning, on your behalf, issued the above-referenced Decision in response to American Whitewater's Appeal.

Because the decision appeared to have resolved the matter satisfactorily, and in accordance with the applicable law, American Whitewater did not seek to have the Secretary of the United States Department of Agriculture discretionarily review the Decision, nor did he do so on his own initiative. Accordingly, on May 13, 2005, the Decision became the final administrative decision of the Department of Agriculture and became subject to judicial review. 36 C.F.R. §§ 217.7 and 217.17.

The Decision

Your Decision found that there is no basis in any record for limiting—much less prohibiting—private floating on the Chattooga River. Further, you found that even assuming *arguendo* that current conditions require a general limitation on use along the Chattooga corridor—which has never been demonstrated—that no one *type* of private wilderness use (i.e., floating) may be singled out and totally banned, especially when all other types of private wilderness use are currently permitted in unlimited numbers with virtually no restrictions or limitations of any kind. On a similar note, your Decision found that if the USFS later demonstrates that some general use limitations are necessary along the Chattooga corridor, that those limitations must be applied equitably among all types of private wilderness users, and not discriminatorily imposed only on private floaters.

Your decision concluded:

> After careful review of the record … I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.

Your Decision then held that management of the Chattooga River would revert to the previous 1985 LRMP until the Regional Forester could conduct a lawful capacity analysis and revise the ROD in a manner consistent with your Decision. Because the previous 1985 LRMP also unlawfully banned private floating, you provided the Regional Forester with a roadmap through the Forest Service regulations to immediately restore private, self-regulated floating and continue it through the interim period. It should have been obvious to the Regional Forester that the Decision would not have included this roadmap if you did not intend that it be used. Otherwise there would have been no need or purpose in including it in the Decision.

Misinterpretation and Flawed Implementation of the Decision

The letter and spirit of your Decision require the immediate restoration of private, self-regulated floating. Further, your Decision orders the Regional Forester to take a "hard look" at the upper Chattooga corridor and to analyze the capacity of that area—nowhere does it suggest that the Regional Forester try to shore up the unlawful prior decision by creating a record designed solely to ban boating. It does direct the Regional Forester to determine whether the sum of **all** wilderness uses, including self-regulated boating, is negatively impacting the resource such that equitable limitations are necessary on **all** users. Finally your decision orders the Regional Forester (within two years) to publish a revised LRMP that "officially" restores self-regulated private floating, or—in the event the analysis demonstrates a need—imposes equitable limitations on all private wilderness users to remediate any identified harm, based upon the evidence gathered during the capacity analysis.

Your delegates are interpreting and implementing your Decision in a manner inconsistent with both its letter and spirit. The Regional Forester has delegated this matter to the very same persons who initially instituted the floating ban in the 2004 ROD and strongly defended it in meetings with the Regional Forester. We thought and hoped that despite their personal interest in sustaining the ban, they would have felt a legal and ethical obligation to implement your Decision as you intended. Unfortunately, those delegates have chosen to interpret and implement your Decision in a way that maintains the pre-Decision status quo. As of the date of this letter—two years after publication of the ROD and one year after your Decision reversing that ROD—private floating on the upper Chattooga WSR remains totally banned. In fact, when American Whitewater recently informed the local forest that there was no regulatory basis to implement a floating ban on one of the sub-sections of river at issue here (for reasons unrelated to your Decision), that forest responded by immediately (and secretly) issuing an allegedly unappealable "closure order," which effectively prohibits only private boaters from accessing that stretch of river, but continues to allow other wilderness users to access the resource without impediment.

Most disturbing, however, is your delegate's published intention to disallow or severely limit private floating on all or part of the upper Chattooga River during the user capacity analysis you ordered. As proposed, only private floating will be banned during the study, even though you directed that the outcome of the analysis should be a determination of whether *any* limitation on *any* type of wilderness use is necessary. The plan does not contemplate counting, nor restricting (even temporarily) the use of the resource by any users other than boaters. Obviously, it is impossible to have a valid user capacity study if all groups but one have unlimited access to the resource. If boating is not self-regulating during the study period, there can be no data to support or contradict what would otherwise be the expected outcome--that self-regulating management is clearly the best alternative here. In other words, the capacity analysis will be an expensive, foregone conclusion designed to perpetuate an unlawful status quo. Both the current ban and the proposed capacity analysis ban are contrary to your Decision.

Request for Your Intervention and Notice of Intent to File Suit

American Whitewater asks for your intervention in this issue. Specifically, American Whitewater asks that you order your delegates to cease the unlawful ban on private canoeing, kayaking and rafting, effective immediately. Further, to the extent you decide that a capacity analysis is still necessary before this discrete

portion of the ROD is amended, we ask that you order your delegates to immediately restore self-regulated, private canoeing, kayaking and rafting so that valid data can be collected during that study. Finally, American Whitewater asks that you again clarify that, in the event the capacity analysis or any other study demonstrates a general need to reduce use in the Chattooga corridor, that the remedial limitations be equitably apportioned among all types of private wilderness use—not discriminatorily imposed only on private floaters.

In the event private, self-regulated canoeing, kayaking and rafting use is not restored on the upper Chattooga Wild and Scenic River within the thirty days following the date of this letter, American Whitewater intends to seek relief in federal court. While we understand that your agency is not intimidated by the threat of litigation, we hope that you will nevertheless intervene in this matter simply to avoid a tragic waste of resources for all parties. You have already found that there is nothing in the record to support a ban, and therefore, the Forest Service is in violation of the Wild and Scenic Rivers and Wilderness laws. It would be a colossal waste of time and resources for Forest Service personnel to be taken away from their jobs to respond to discovery requests, depositions, and a trial, when the Forest Service has already admitted that it is not in compliance with the law.

It will be a sad day in the otherwise highly beneficial and cooperative relationship between American Whitewater and the Forest Service if it takes judicial intervention to restore hand-powered canoeists' ability to enjoy, from a boat, a protected wilderness and wild and scenic river—both of which were set aside by Congress expressly for their recreational enjoyment.

Thank you for your consideration. If you would like to discuss this matter further, please do not hesitate to contact me at the number above, or John Austin or Eric Olsen in our Washington, D.C. office (contact information below).

Sincerely,

J. Nathan Galbreath

Enclosure: Appeal Decision

cc: **Via Overnight Courier**

Mr. Mark Rey
Undersecretary, United States Department of Agriculture
Natural Resources and Environment
1400 Independence Avenue, SW
Room 217E
Jamie L. Whitten Building
Washington, D.C. 20250

Mr. Charles Myers
Regional Forester, Southern Region
Peachtree 25th Building
7th Floor
1720 Peachtree Road NW
Atlanta, GA 30309

Via Electronic Mail

Mark Singleton
Executive Director, American Whitewater
PO Box 1540
Cullowhee, NC 28723

John D. Austin, Jr.
Eric Olsen
PATTON BOGGS LLP
2550 M St., NW
Washington, DC 20037
Telephone: (202) 457-6000 (Main)
Facsimile: (202) 457-6315

Robert M. Mitchell
Natalie S. Whiteman
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424 USA

Whiteside Cove Association
Wyatt S. Stevens, President
Roberts & Stevens, P.A.
One West Pack Square, Suite 1100
P.O. Box 7647
Asheville, NC 28801

Direct dial number 828-258-6992
Facsimile number 828-253-7200

April 20, 2006

Mr. Jerome Thomas
Forest Supervisor
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Mr. John Cleeves
Project Coordinator
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Mr. Chuck Myers
Southern Regional Forester
USDA Forest Service, Southern Region
1720 Peachtree St.
Atlanta, GA 30309

Ms. Marisue Hilliard
Forest Supervisor
National Forests in North Carolina
160A Zillicoa Street
Asheville, NC 28801

Re: **Whiteside Cove Association's Objection to "Decision for Appeal, (#04-13-00-0026 American Whitewater) of the Sumter National Forest Land and Resource Management Plan Revision."**

Dear Gentlemen and Ms. Hilliard:

As you know, I am the President of the Whiteside Cove Association ("The Association"), an organization of families that has leased a portion of property on the upper Chattooga River

("the property") for almost half a century. The property encompasses approximately 500 acres, and includes a portion the headwaters of the Chattooga River which begins at the Grimshawes SR 1107 bridge and goes downstream for approximately 1.7 miles to the confluence of Green Creek and the Chattooga River, just below "Corkscrew Falls."

I am writing this letter in response to Mr. Coburn's letter of February 16, 2006, to correct the record regarding the status of navigability through the property.

1) As you are all aware, the Chattooga River in Jackson County, North Carolina has been deemed **non-navigable by the Army Corps of Engineers**. Under federal law, the Corps of Engineers has the sole duty and authority to seek enforcement of any public right of any waterway determined to be navigable. According to Matt Tilden, an attorney for the United States Department of Agriculture, "the Forest Service is not claiming to be the federal agency charged with determining whether a watercourse is legally navigable." Thus, since the Corps of Engineers has determined that this section of the Chattooga is not navigable, there is no public right in the waterway.

2) The North Carolina Attorney General's Office agrees. In 1971, the AG's office issued an opinion that the North Carolina section of the Chattooga River was **not navigable**. That determination was based on two years of studies by a team of experts which included the Corps of Engineers, biologists, geologists and the U.S. Forest Service. The Attorney General's Opinion was published in the Federal Register on 1976, a copy of which is enclosed.

3) Mr. Colburn's reference to the 1998 non-binding advisory opinion from the North Carolina Attorney General's office is misplaced. That opinion focused primarily on case law dealing with inter-tidal salt marshes, not mountain streams. Since the Corps of Engineers and the AG's office have both determined the upper Chattooga is not navigable, the opinion is irrelevant. Nevertheless, one statement from the opinion is illuminating as it applies to small mountain streams like the upper Chattooga River. It states: "**At some point, navigability 'in the usual and ordinary course' ceases, and public trust rights give way to those of private property**." The North Carolina section of the Chattooga River meets that definition without any question.

4) As a result of the foregoing determinations by federal and state authorities, and for the reasons set forth in my earlier correspondence, the section of the Chattooga River which runs through the property is not legally navigable. There are no public trust rights in this section of the river. **The bed of the Chattooga is the property of the landowners, not the public** and certainly not the American Whitewater Association. "In North Carolina, the riparian owners own the streambed of unnavigable streams to the center of the stream." See 1971 N.C. Attorney General's Opinion.

5) Thus, any attempt to float through the property would result in illegal trespassing. As soon as a boater touches the bottom of the river without our permission, they are trespassing. Walking in the river, as well as "sliding" across the rocks and "boofing" (redirecting the boat over a boulder or strainer) would all constitute trespassing.

Likewise, scouting and portaging would constitute trespassing. In almost every account published by AW regarding the upper Chattooga River, scouting and portaging are specifically recommended to boaters.

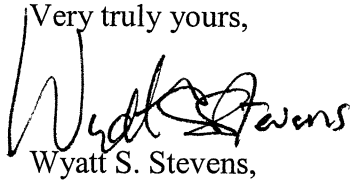
6) John Lane is the author of the book "Chattooga" which accounts a trip down section 00. His published account of the trip is attached. It shows undeniably that the river is not navigable even by canoe enthusiasts.

7) I previously sent you photographs of the river taken with Mr. Jeff Owenby of the Forest Service during normal water levels. Enclosed are additional copies, together with some other photographs. The photographs speak for themselves. We have offered similar supervised walking tours to your office since October. We only ask that the presented liability waivers are signed and returned.

Finally, there is one matter about which Mr. Colburn and I do agree. With all due respect, the Forest Service does not have any authority to allow boating on this private section of river. **Therefore, please remove this section of river from consideration under the LAC analysis**. It has no business being included.

I appreciate your careful attention to this matter and look forward to your response.

Very truly yours,



Wyatt S. Stevens,
President
Whiteside Cove Association

cc: Representative Charles H. Taylor
22 South Pack Square
Suite 330
Asheville, NC 28801

The Chattooga is <u>Non Navigable</u> according to the NC Attorney General.

From 1969 through 1971, the Chattooga was studies by a team of experts including the Army Corps of Engineers, Biologists, geologists and the USFS; The studies were for the Chattooga's designation as a Wild and Scenic River.

After assessment of the teams finding, the NC Attorney General issued an opinion on the Chattooga's Navigability. On June 15, 1971 the USDA published the results of the extensive study along with the NC Attorney Generals opinion in the *Chattooga Wild & scenic River Study Report page* 13 see below

V DESCRIPTION OF THE RIVER

A. <u>Ownership of River Bed - Jurisdiction of River Surface</u>

The Attorney General of North Carolina states the opinion that since the Chattooga River in North Carolina is very shallow with constant ripples showing every few feet, the State Supreme Court would probably find that it is not navigable in fact, and therefore not navigable in law. In North Carolina, the riparian owners own the streambed of unnavigable streams to the center of the stream. The private landowner can sell, lease or otherwise dispose of the minerals underlying the streambed, provided he does not cause sedimentation or pollution of the stream. There is now no mineral activity within the proposed boundary of the river in North Carolina.

This was not a general opinion about the law but an opinion about the Chattooga in North Carolina.

The 1976 NC Attorney General Opinion that <u>the bed of the Chattooga River is the private property of the riparian owner</u> was again published into the Federal Register Vol 14 No 58 March 22,1976 Pg 11853 see below.

Ownership of the river bed also varies by States. The State Constitution of South Carolina declares the Chattooga River to be navigable in fact and law and, therefore, State property from the mean high water mark to the middle of the river. In Georgia and North Carolina, the determination has not been legally established since their Constitutions do not address the matter of ownership of the river bed and navigability. Review by the Attorney General of North Carolina indicates that the bed is probably the property of riparian owners. Similar review in Georgia indicates that the same is probably true.

COUNTIES

The Chattooga River flows through Macon and Jackson Counties in North

and Holly Branch. Crossing Cane Creek in a northeasterly direction up the meanders of a ridge to the top of the divide between Cane Creek and the Chattooga River. Dropping down in an easterly direction across Norton Mill Creek: thence

Climbing up and following the meanders of ridge between Norton Mill Creek and the Chattooga River: thence

Turning northerly up to the main divide between Norton Mill Creek and the Chattooga River; thence

To the top of a knob, 1,900 feet more or less, east, southeast of Whiteside Church: thence

Turning northeasterly down a spur crossing Green Creek; thence

Continuing northeasterly and climbing up the main divide between Green

Turning westerly and southwesterly and climbing to the top of Bear Pen Mountain: thence

Continuing southwesterly down with the main divide between the Chattooga River and Scotsman Creek to the top of Jacks Knob: thence

Turning westerly down the ridge from Jacks Knob to a point on the dividing ridge between Scotsman Creek and the Chattooga River: thence

Turning in a southerly direction and following the meanders of the divide ridge between Scotsman Creek and the Chattooga River all the way up to the top of Bull Pen Mountain: thence

Continuing in a southerly direction following the main divide between Scots-

FEDERAL REGISTER, VOL. 41, NO. 56—MONDAY, MARCH 22, 1976

By the early seventies Tommy and his son, Brad, had already paddled all the lower sections—I, II, III, and IV. Back then, Tommy paddled tandem with one of his daughters in a seventeen-foot aluminum Grumman. Brad paddled solo in a fifteen-foot Grumman. The end of World War II had birthed the Grumman canoe. In 1945 the Grumman Corporation set aside building Hellcats, Bearcats, and Tigercats and began manufacturing aluminum canoes that could take a pounding and stay afloat. Because of their durability, Grummans soon replaced the heavier wood-and-canvas canoes in white-water-canoeing circles. The stories are legion in the white-water community of witnessing Grummans wrapped around boulders by unlucky or unskilled paddlers, then pried off, straightened out, and used to paddle away in when the water levels dropped.

Early in 1945 Grumman tested their prototype aluminum canoes in the rapids on Maine's Allagash River and then set about introducing fifteen-, seventeen-, and nineteen-foot models. In the first thirty years Grumman sold three hundred thousand canoes, peaking at thirty-three thousand in 1974, two years after *Deliverance* hit the theaters and millions worldwide watched an aluminum canoe wash over a Tallulah Gorge waterfall minus the movie's heroes. The company still sells them today. The Grumman canoes Tommy Wyche put in at Grimshawes in 1972 cost less than three hundred dollars. Today's models retail for more than a thousand.

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

When these explorers departed, they quickly found that, in spite of their best intentions to float the river, they could barely make a mile a day hauling all their gear. Here in the shadows of Whiteside the infant river is clogged with boulders and passes through Chattooga Cliffs, a gorge with vertical walls. The river falls hundreds of feet per mile. Brad remembers dragging the canoes and raft through the water and around waterfalls in long, difficult portages.

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

As I consider the Wyche expedition and its significance—possible first descent of the upper reaches, real-life encounter with still-wild mountain river—I feel a need to follow, but I am aware that Buzz is ahead of me with his own agenda. He knows where to start this story and I trust him.

I follow him down the curvy asphalt two-lane as it drops quickly through the ancient down-cut drainage of the Chattooga. He wants to introduce me to two old-timers: ninety-year-old Tom Picklesimer and one of Tom's cousins down the road, "seventh generation living under Whiteside. If they aren't home you'll at least know where to find them."

Seventh generation. Are these the people James Dickey was so afraid of when he came to canoe in the mountains in the early 1960s? Are they the people Lewis describes to Ed in the car as the two men approach the town of Oree in the novel *Deliverance*? Lewis calls the mountain people "clannish . . . set in their ways." He says, "They'll do what they want to do, no matter what. Every family I've ever met up here has at least one relative in the penitentiary. Some of them are in for making liquor or running it, but most of them are in for murder."

Buzz pulls up Tom Picklesimer's drive. An old pickup and a sedan sit in the garage. They look to be in good repair. "We'll see if old Tom's home," Buzz says, walking along a tiny Chattooga tributary creek running past Tom's garage.

"Chattooga", by John Lane, 2004
University of Georgia Press

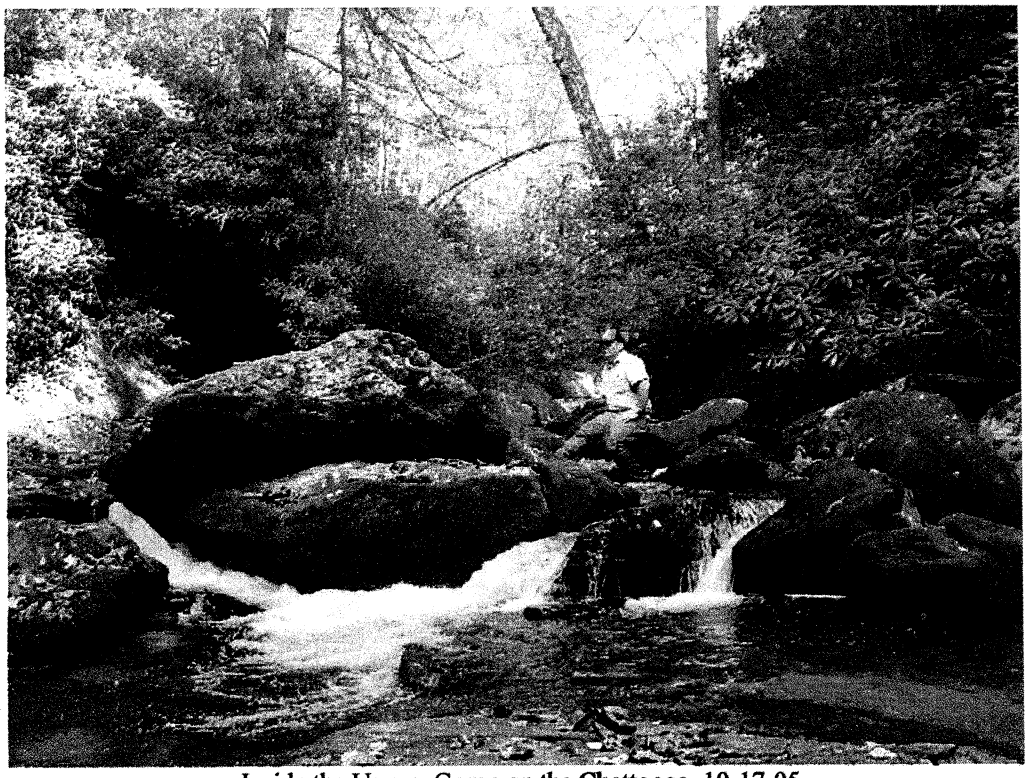
" The Chattoga River in North Carolina is very shallow with constant ripples showing every few feet" [pg 13 ,1971 The Chattooga Wild & Scenic River Study published by the Dept. of Agriculture]

Chattooga bottom of lower Gorge 11-23-05

Jeff Owenby USFS above Dead pool October 17 2005

"Here the soon-to-be mighty Chattooga river remains a scrappy youngster." Description at NC 1107
pg. 39 ***Higlands-Cashiers Outdoor Companion*** 1990 Boyd. Fern Creek Press

"Here in the shadows of Whiteside the infant river is clogged with boulders." Page 36 *Chattooga,* John Lane 2004 University of GA press.

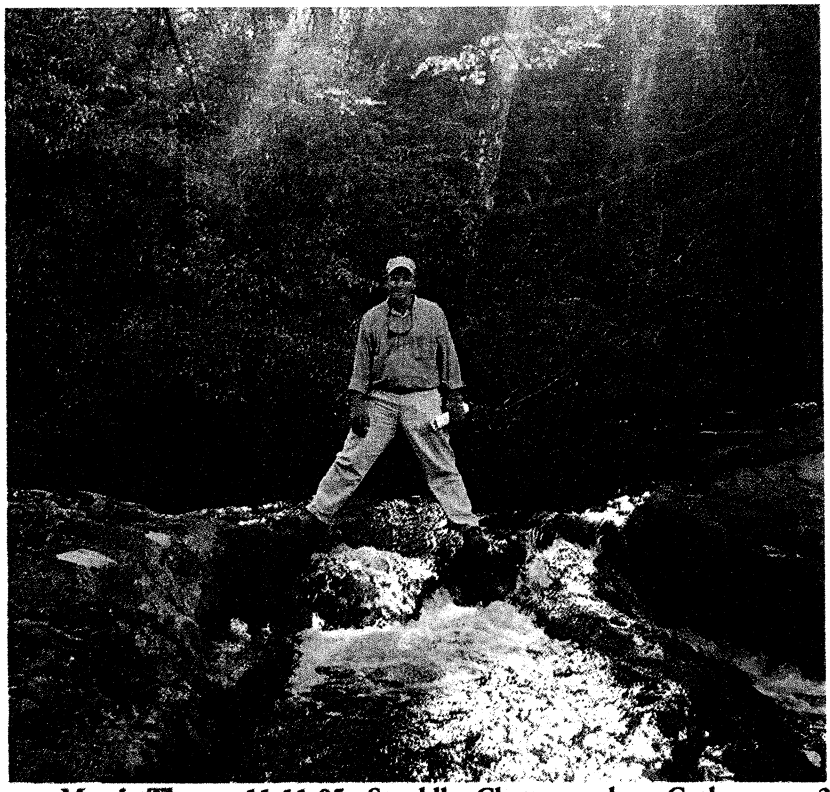


Inside the Upper Gorge on the Chattooga 10-17-05

Chattooga River Top of Rust private property 11/03/05

Beginning as a rivulet under Whiteside Mountian, it pours over rocky ledges and plunges down steep gorge bound rapids." pg 6 Guide to the Chattooga, Clay 1995 Chattooga river press.

"Beginning rather unspectacularly as a tiny rivulet, the Chattooga flows south off a rugged escarpment. Within it's first ten miles scores of tiny tributaries pour in swelling the volume of the river." By the time it passes into Georgia "it has grown into a respectable mountain stream." Pg. 19 ***The Chattooga a Wild & Scenic River***, 1990 Boyd. Fern Creek Press ,

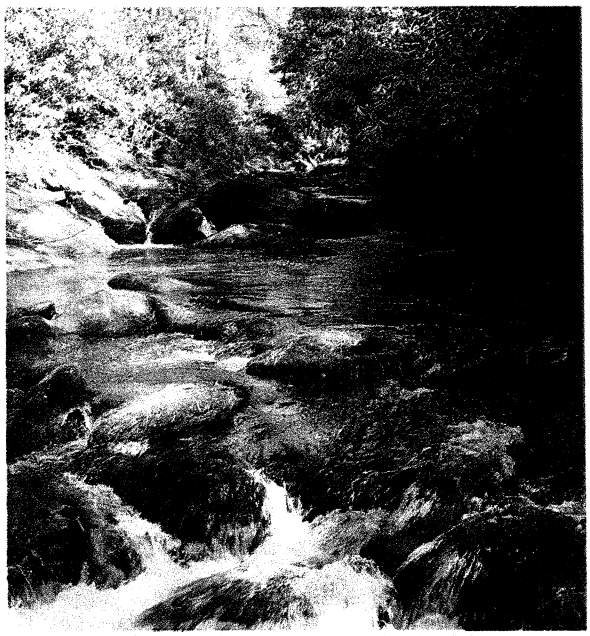


Marvin Thomas 11-11-05 Straddles Chattooga above Corkscrew 33%

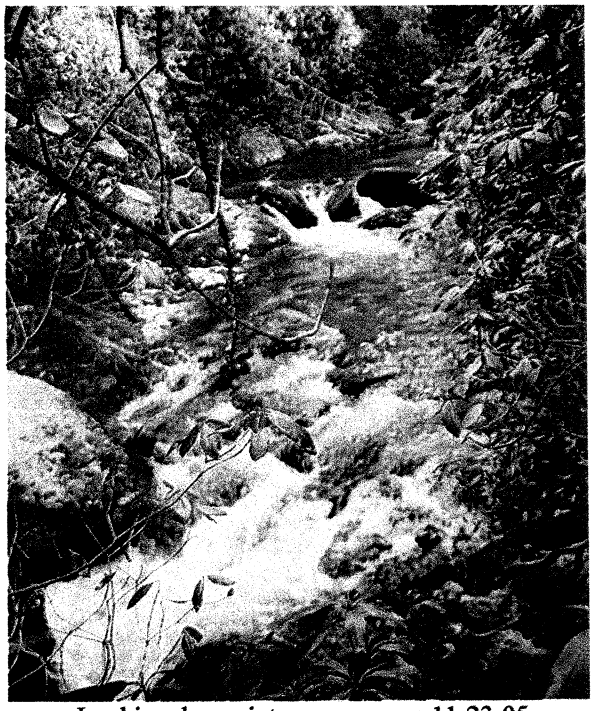
below dead pool 11-23-05

"This very small creek" [page 85, *North Carolina Rivers and Creeks*, Brushy Mountain publishing Inc. 2005]

The Chattooga river follows " a rapidly descending course through dense forest and over a continuous successions of rapids, cascades and small water falls" [pg 73 of the 1971 The Chattooga Wild & Scenic River Study published by the Dept. of Agriculture]



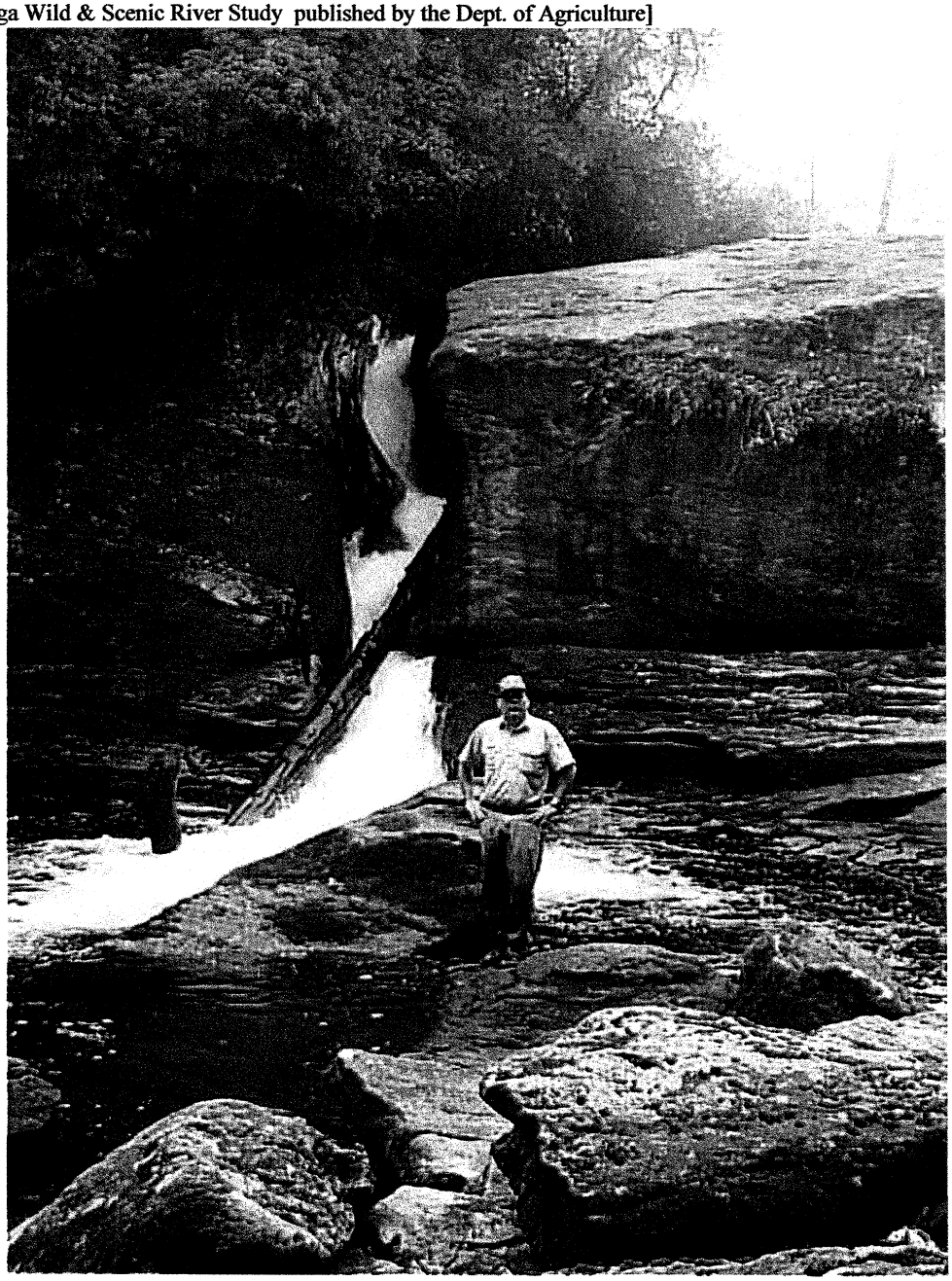
Mouth of lower gorge 11-23-05



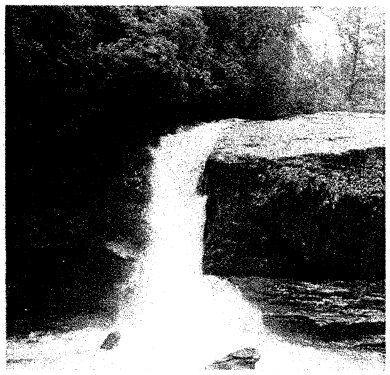
Looking down into upper gorge 11-23-05

"The Chattooga plunges through into northwestern South Carolina in a frenzied, frothy rampage over massive boulders and though deep gorges of the blue ridge Mountians." Pg. 128 ***Paddling South Carolina*** Able & Horan, 2001 Sandlapper Publishing Co.

The Chattooga river "crashes over a massive precipice and down a 25 foot high Corkscrew Falls". [pg 73 of the 1971 The Chattooga Wild & Scenic River Study published by the Dept. of Agriculture]



Cork screw falls 10-17-05 Bottom boundary of the Rust Property



Corkscrew at flood level 3.0'+

JAMES M. KIMZEY
ATTORNEY AT LAW
AND
CERTIFIED SUPERIOR COURT MEDIATOR
39 EAST MAIN STREET
POST OFFICE BOX 506
BREVARD, NORTH CAROLINA 28712

TRIAL AND APPEAL OF CIVIL CASES
MEDIATIONS

TELEPHONE
(828) 883-4200

FACSIMILE NUMBER
(828) 883-4275

April 21, 2006

Ms. Marisue Hilliard, Forest Supervisor
National Forests in North Carolina
160A Zillicoa Street
Asheville, NC 28801

Mr. Jerome Thomas, Forest Supervisor
Francis Marion and Sumter National Forests
4931 Broad River Road
Columbia, SC 29212

Re: Chattooga Wild and Scenic River Visitor Use

Dear Ms. Hilliard and Mr. Thomas:

I represent the Rust family, private owners of property in Jackson County, NC, which contains 1.7 miles of the headwaters of the Chattooga River from Grimshawes Bridge on NC 1107 to the confluence of Green Creek and the Chattooga River just below "Corkscrew Falls".

As you are well aware, this private portion of the Chattooga River in Jackson County, North Carolina has been declared non-navigable by the Army Corps of Engineers. North Carolina case law is absolutely clear that private owners of land over which non-navigable streams flow are the sole owners of the land, the riparian rights and the stream bed itself. Whether or not the Forest Service determines to change the status of the Chattooga River above Highway 28 on Forest Service land, it has no jurisdiction to make any determination concerning the portion of the River that is on my client's property.

Whatever the Forest Service concludes from its LAC analysis can only affect the Forest Service lands – not private property. My clients will not permit the Forest Service or anyone else to trespass on their property without their permission, particularly any boaters for whom they might be liable in the event of injury or death.

Should you question the right of the Rusts to protect the privacy of their privately owned land, you should consult with your legal department. In a letter to me dated January 30, 2006 signed by Matthew A. Tilden, Attorney, for Jaru Ruley, Acting Regional Attorney for the USDA, Mr. Tilden stated and I quote:

> "As I mentioned during our telephone conversations, the Forest Service is not claiming to be the Federal Agency charged with determining whether a water course is legally navigable and has no intention of assuming any authorities held by the US Army Corps of Engineers."
>
> • • •
>
> "The Agency is not interested in violating any private property rights held by your client or their lessees."

My clients at first wanted to cooperate with the Forest Service in its analysis even on the Rust's private property. However, at the hearings that have been held to date, the parties either assume, imply or outright state that accessibility to the River as a result of the study will affect not only the Forest Service lands but the Rust's private property; accordingly, the Rusts have decided they can no longer offer their cooperation. Should the Forest Service make it clear at all hearings that it will not, and cannot, change the designation of the River on private property, my client's willingness to cooperate would be re-examined. Until that occurs, it is no longer in the best interest of my clients to cooperate in any way with the Forest Service study. The Rusts regret this, but feel that they must protect their private property interest – particularly in light of the position of the various boater associations which we consider to be directly contrary to the law, misleading and highly improper as concerns private property upon which non-navigable streams flow.

The purpose of this letter is twofold:

1. First, to notify you that the private property of the Rusts, particularly the Chattooga River headwaters upon their property, is posted and no one including the Forest Service personnel is permitted on that property without permission of the owners.

2 To request that you make clear at any hearing concerning your analysis of the River above Highway 28 that any future designation by the Forest Service does not and cannot affect the non-navigable stream on the Rust's private property. In the Rust's opinion, it is misleading and perhaps fraudulent to those in attendance for Forest Service personnel or any one else to either indicate directly or by implication that the Forest Service study affects the Rust's private property.

As to the first point, not only will the Rusts order anyone trespassing on their land to remove themselves, they have employed private security personnel to enforce the privacy of their land and will take all steps necessary to enforce its status. In addition to removing trespassers, they will charge any person trespassing and prosecute to the fullest extent possible.

As to the second point, the Rusts and their family members have been in attendance at the hearings and strongly object to the implication or assumption that whatever results from the hearings would affect their private property. This is a direct request that you announce at any future public hearings that whatever is determined by the LAC will not affect accessibility to the Rust private land including the headwaters of the Chattooga River which flows upon their land.

Since the Forest Service has no intention to challenge the non-navigable status of the Chattooga River on the Rust property as determined by the US Corps of Engineers, it would be up to the American Canoe Association or the American Whitewater Affiliation or any other private party so interested, to challenge the Rusts' position in Court. Rest assured that the Rusts have employed me to oppose any such Court action. It is my opinion that the Rusts would prevail in any litigation concerning their rights to prohibit entry upon their property including the headwaters of the Chattooga River.

I appreciate your consideration of the contents of this letter and again request that the jurisdiction of the Forest Service be clarified at any future hearings on the status of the Chattooga River above Highway 28.

Very truly yours,

James M. Kimzey
Attorney at Law

JMK/jm

Cc: Mr. Dick Rust
Mr. Mike Bamford
Mr. Wyatt Stevens
Mr. Matthew Tilden
Mr. John Cleeves
Mr. Chuck Myers

Atlanta
Denver
Los Angeles
Philadelphia

McKenna Long & Aldridge LLP
Attorneys at Law

303 Peachtree Street, NE • Suite 5300 • Atlanta, GA 30308
Tel: 404.527.4000 • Fax: 404.527.4198
www.mckennalong.com

San Diego
San Francisco
Washington, D.C.
Brussels

ALAN R. JENKINS
(404) 527-4642

EMAIL ADDRESS
ajenkins@mckennalong.com

May 10, 2006

Mr. Dale Bosworth
Chief, USDA Forest Service
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: Chattooga River Visitor Use Capacity Analysis

The undersigned members of the Friends of the Upper Chattooga River ("Chattooga Friends") hereby respond to the April 14, 2006 letter ("AW Letter") of Mr. Nathan Galbreath to you on behalf of American Whitewater ("AW"). In that letter, AW threatens to sue the United States Forest Service ("Forest Service") if the Forest Service does not unilaterally act within 30 days, contrary to the Forest Service's own decision of April 28, 2005, to overturn the Forest Service's settled policy of the past thirty years of zoning boating to the area of the Wild and Scenic River Chattooga River below Highway 28. Ironically, having sued to force the current fact-finding process, the obviously litigious AW now threatens to sue to circumvent the process. The Chattooga Friends respectfully urge you to reject this obvious attempt by AW to bully the Forest Service into acting in an irrational and unlawful manner to the detriment of all other users of the Chattooga River.

The AW Letter contains a number of erroneous statements on law and facts and continues the AW's aggressive attempts to gain access to 100 percent of the Chattooga River even if it means causing additional environmental damage, damaging the ability of other users to enjoy the last remaining section of the river that is limited to foot traffic, and trespassing on private property. In order to keep this response as short as possible, the Chattooga Friends shall focus herein only on three of the erroneous statements.

1. <u>AW Statement</u> (p.2) <u>alleging that no uses other than private boating are restricted in the Chattooga corridor</u>:

> All other types of private wilderness use [i.e., other than private floating] are currently permitted in unlimited numbers with virtually no restrictions or limitations of any kind.

To the contrary, **many types of private wilderness uses in the Chattooga corridor are regulated and zoned by the Forest Service or banned altogether**. In fact, the January 2004 Revised Land and Resource Management Plan (Sumter National Forest) ("LRMP") lists a number of prohibited or highly regulated uses. Off Highway Vehicle ("OHV") and mountain

bike uses are limited to certain designated routes in the Sumter National Forest and not allowed in the river corridor. FW-69. No organized events can be held in the corridor. 2.A-2 No motor boat use is allowed. FW-84; 2.A-3. Horseback riding is allowed only on a designated trail/road. 2.A-14. Camping use is restricted to certain areas. FW-81. Further, as demonstrated in the April 11, 2006 letter of the Chattooga Friends to Ms. Atkinson, Ms. Hilliard and Mr. Thomas attached hereto ("Friends Letter"), boating use below Highway 28 has negatively impacted the quality of usage of the majority of the river by non-boating users, effectively zoning such uses to the area of the river above Highway 28. We understand that other private uses, such as hang gliding, are also banned. Thus, AW's statement that boating is the only regulated use is patently untrue.

2. AW Statement (pp.3-4) alleging that the Forest Service must immediately open 100% of the river to unlimited boating:

> The letter and spirit of your [April 28, 2005] Decision require the immediate restoration of private, self-regulated floating....Your delegates are interpreting and implementing your Decision in a manner inconsistent with both its letter and spirit....We thought and hoped...they would have felt a legal and ethical obligation to implement your Decision as you intended. Unfortunately, those delegates have chosen to interpret and implement your Decision in a way that maintains the pre-Decision status quo.

In addition to its reckless charge that Forest Service professionals are acting unethically, the AW Letter claims that the Decision requires the river above Highway 28 to be opened to boating immediately. To the contrary, the letter of the Decision states that "until the new decision is issued ... management of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect." The 1985 Forest Plan (M-14) required that: "Floating north of Highway 28 Bridge is prohibited...." Thus, **the Decision plainly requires that the pre-Decision status quo of zoned use "will remain in effect."** Accordingly, it is more reasonable to say that Forest Service professionals would act illegally by ignoring this plain language direction and altering the status quo.

Nor does the remaining language in the Decision's interim management direction provide any basis for an immediate overturn of the status quo. The Regional Forester was directed not only to maintain the status quo but also to involve interested parties "in the design and execution of the capacity analysis" and if such "capacity analysis require[s] user trials, 36 CFR 261.77 provides the Regional Forester with the authority to permit boating...." Obviously, the spirit of that permissive language is to allow the Regional Forester (*if* the capacity analysis designed with input from various parties even requires boating trials), to conduct limited boating trials, not to require the Regional Forester to immediately open all portions of the river to unlimited boating.

3. AW Statement (p.4) alleging unlimited boating ultimately must be allowed or other uses restricted further:

> Finally your decision orders the Regional Forester (within two years) to publish a revised LRMP that "officially" restores self-regulated private floating, or … imposes equitable limitations on all private wilderness users ….

The Decision did not direct the Regional Forester to publish an LRMP that "officially" opens the entire river to boating. To the contrary, **on remand the Regional Forester is free to make any reasonable decision that can be supported by the evidence**. The Decision simply directed the Regional Forester to conduct additional fact-finding. Indeed, as described above, the Regional Forester was directed to continue the status quo until more evidence is obtained to support the ultimate decision of the Regional Forester. That is the process that AW fought to obtain and that is currently taking place. As stated in the Friends Letter, that process should not ignore the historic impacts of boating below Highway 28. Once the USFS examines the use of the entire river both above and below Highway 28, we believe that the evidence will clearly support the maintenance of the status quo of zoned use as the best way to allow both boaters and non-boaters to enjoy the unique treasure that is the Chattooga.

Sincerely yours,

Buzz Williams by SEM w/ express permission
Buzz Williams, Executive Director
Chattooga Conservancy

Alan R. Jenkins
McKenna Long & Aldridge LLP
Attorneys for the Whiteside Cove Association and Rust Family

Butch Clay by SEM w/ express permission
Butch Clay, Advisor
Georgia ForestWatch
Author of *Guide to the Chattooga,* 1995

Joseph Gatins by SEM w/ express permission
Joseph Gatins, Tallulah District Leader
Georgia ForestWatch

Charlie Breithaupt by SEM w/ express permission
Charlie Breithaupt, Chairman
GA Council of Trout Unlimited

Tom McInnis by SEM w/ express permission
Tom McInnis, Chair
South Carolina Council of Trout Unlimited

Doug Adams by SEM w/ express permission
Doug Adams, Newsletter Editor
Rabun Chapter of TU, Forest Service Liaisons
GA Council of TU

Edwin Dale by SEM w/ express permission
Edwin Dale, Ph.D.
Former Outdoor Recreation Planner/NEPA Coordinator, U.S. Forest Service
Advisor, Georgia ForestWatch

Cc: John Cleeves, Charles Myers, Kathleen Atkinson, Marisue Hilliard, Jerome Thomas, Matthew Tilden, Gloria Manning, J. Nathan Galbreath, Andrea L. Foster

United States Department of Agriculture | **Forest Service** | **Washington Office** | **1400 Independence Avenue, SW Washington, DC 20250**

File Code: 1570
Date: May 12, 2006

Mr. J. Nathan Galbreath
Patton Boggs LLP
2001 Ross Avenue, Suite 3000
Dallas, TX 75201-8001

Dear Mr. Galbreath:

Thank you for your letter on behalf of American Whitewater dated April 14, 2006.

The Southern Region and the three National Forests involved in management of the Chattooga Wild and Scenic River are acting in full compliance with the appeal decision issued from this office on April 28, 2005, which instructed the Regional Forester to conduct an appropriate analysis and adjust or amend the revised Land and Resource Management Plan for the Sumter National Forest to reflect a new decision based on the findings. The appeal Reviewing Officer, Associate Deputy Chief Gloria Manning, found that the record provided to her did not support the decision that was made in the Sumter NF revised LRMP to continue the ban on boating; therefore this decision could not be implemented and was reversed.

Associate Deputy Chief Manning provided interim management direction instructing the Regional Forester to manage boating above Highway 28 by applying the management direction from the 1985 Forest Plan, which includes direction maintaining the boating closure that had been established previously. In your letter, you state your belief that it is wrong for the Regional Forester to "interpret and implement [the appeal] Decision in a way that maintains the pre-Decision status quo". However, the Regional Forester is required to follow the interim management direction provided in the appeal decision until such time as a new decision can be reached. The interim management direction is fully consistent with the National Forest Management Act and the regulations governing appeals of land and resource management plans.

I cannot provide the relief you request, namely to "immediately restore self-regulated private canoeing, kayaking, and rafting" on the upper Chattooga. The Regional Forester is currently engaged in a planning process under the National Forest Management Act, and a final management decision by the Agency has not yet been made. I encourage American Whitewater and its members to remain active in this ongoing collaborative planning process.

If you need more information or would like to submit additional comments, please continue to work with the forest that is leading the planning process and is responsible for the day-to-day management of the Chattooga River, the Francis Marion and Sumter National Forests in South Carolina.

Sincerely,

/s/ Dale N. Bosworth
DALE N. BOSWORTH
Chief

cc: Jerome Thomas, Forest Supervisor, Francis Marion-Sumter National Forest
Chris Liggett, Director, Planning, Region 8
Debbie Pressman, Director, Wilderness and Wild and Scenic Rivers
Ann M Christensen, Director, Recreation, Wilderness, Heritage, Interpretation, Region 8