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March 18, 2022

**Objections of Bill Floyd: Revision of the Land Management Plan for the Nantahala and Pisgah National Forests Plan**

Re: What the Land Resource Management Plan for the Nantahala and Pisgah National Forests Reveals About What is Unlawful About the Forest Service's Continuing Mismanagement of the North Carolina Headwaters of the Chattooga River

**SUBMITTED ELECTRONICALLY**

<https://cara.ecosystem-management.org/Public/CommentInput?Project=43545>

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Dear Objection Reviewing Officer Arney:

Disappointingly, the proposed Land Resource Management Plan (the "2022 LRMP") for the Nantahala and Pisgah National Forests ("NPNF") and attendant Environmental Impact Statement (the "2022 EIS") unlawfully fail to offer any concrete and time specific plan for fixing the actionable problems being suffered on the North Carolina headwaters of the Chattooga River.

The 2022 LRMP and 2022 EIS obstinately disregard how these headwaters are legally distinguishable from every other river flowing through the NPNF.

These headwaters are unique because of what was explicitly reported in the administrative records used to support their designation as a national Wild and Scenic River ("WSR") in 1974 and their subsequent reclassification as Outstanding Resource Waters ("ORW") in 1989 pursuant to the Clean Water Act.

Inexplicably, the United States Forest Service (“Forest Service” or “USFS”) now denies the legal significance of what those administrative records reported was unique about these headwaters leading up to WSR designation in 1974 and leading up to ORW classification in 1989.

In fact, the 2022 EIS mischaracterizes the specifics of the administrative findings memorialized over fifty years ago.

Both the 2022 EIS and LRMP omit critically relevant facts. They fail to inform on the stark contrast between today’s unlawfully degraded physical condition of the North Carolina headwaters of the Chattooga River and the *near natural condition* of the riparian corridor and river which existed leading up to WSR designation according to the Administrative Record.

It remains to be discovered whether these omissions of critical material facts constitute mere neglect or purposeful misrepresentation.

Some of what the USFS has erroneously asserted in the 2022 EIS serve to excuse the agency from being held accountable for the specific criticisms and allegations which I made on June 29, 2020 about the factual omissions and legal flaws encompassed within that draft of the LRMP and EIS.

In Appendix A of the 2022 EIS the Forest Service combines something partially true with something entirely false in order to make the following assertion of fact.

“Outstandingly Remarkable Values (ORVs) are the exceptional qualities that merit the river’s designation as a wild and scenic river. In many cases, ORVs are defined when the river is designated, often with direct quotations from a WSR study report. *However, for some rivers, including the Chattooga, rivers were designated without explicit discussion of their ORVs, so this became a post-designation administrative task to be conducted in accordance with revised interagency guidelines published in the Federal Register in 1982 (47 FR 39454).*” [September 7, 1982].

2022 EIS (Appendix A. Response to Comments) at pp. 161-162 (italics added).

I have no problem with the first sentence. However, the USFS purposely misleads the public when it claims “some rivers, including the Chattooga...*were designated without explicit discussion of their ORVs.*” Id.(italics added).

For the first time in *forty eight years* this agency now claims (ex post facto) that Congress added the Chattooga River to the National Wild and Scenic Rivers system on May 10, 1974. Public Law 93-279—but that Congress did so without having any idea about what specific ORVs needed to be protected on the North Carolina headwaters through WSR designation.

The agency does so without offering any evidence to prove the truth of this critical assertion of fact that “some rivers, including the Chattooga...were designated without explicit discussion of their ORVs.” Id.

The USFS neither cites to any legislative history nor to any court opinion which might independently vindicate this misleading claim that the ORVs of the Chattooga River weren't identified prior to the passage of Public Law 93-279 on May 10, 1974.

The USFS doesn't produce the documents whereby the river's Outstandingly Remarkable Values (“ORV's) were allegedly identified at a much later point in time. Neither does the 2022 EIS identify the decision maker, nor the precise point in time when these ORVs were subsequently identified.

In fact, the 2022 EIS omits mentioning how the Forest Service was the federal agency which prepared the definitive *1971 Wild and Scenic River Study Report*.

A copy of this *1971 Wild and Scenic River Study Report* was once archived at [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_037164.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_037164.pdf) (last checked on March 18, 2022).

It was this 1971 Study Report which the USFS has admitted sending to Congress so that an informed decision could be made whether or not the Chattooga River should be designated as the first national Wild and Scenic River located east of the Mississippi River.

On October 28, 2019, I emailed a complete copy of the *1971 Wild and Scenic River Study Report* to former Forest Supervisor Nicholas and Ms. Heather Luczak, Forest Planner for the NPNF. The 210 pages of this document *describe in detail by geographic segment of river* what the *remarkable values* of the Chattooga River were leading up to WSR designation in 1974.

I asked for this report to be included in the Administrative Record being compiled during the revision of the LRMP for the NPNF. I indexed this record as Floyd AR document “Q-1”.

An additional copy of this 1971 Chattooga Study has been attached to this objection as Floyd **Exhibit 1** (AR doc. Q-1)

To reiterate the 1971 Chattooga Study impeaches any claim that Congress afforded WSR designation to over 50 miles of river “without explicit discussion” of the river's ORVs.

First, the simple truth is the *1971 Chattooga Study* initially defined the river's Outstandingly Remarkable Values (“ORV's”) with broad categorical values: "The river with its immediate environment possesses outstanding scenic, recreational, geological, *biological*, historical, and related values and assets." **Exhibit 1**, at p. 5 (pdf. p. 15) (otherwise AR document “Q-1”).

Second, contrary to what the 2022 EIS claims (fifty years later), the 1971 Chattooga Study went on to describe in detail, by geographic segment of river, the specific *features* which made up the river's *outstandingly remarkable biological values* etc. leading up to WSR designation.

In fact, in stark contrast to what the 2022 EIS claims, in 2013, the USFS acknowledged to a Federal District Court how the 1971 Chattooga Study had explicitly discussed the river's ORVs.

The USFS did not inform Judge Lewis that "*some rivers, including the Chattooga...were designated without explicit discussion of their ORVs, so this became a post-designation administrative task...*" 2022 EIS (Appendix A. Response to Comments) at pp. 161-162 (italics added)

Instead, as a matter of fact, the USFS told Judge Lewis: "The ORVs for the Chattooga are history, geology, *biology*, recreation and scenery...*These ORVs are based upon the 1971 Wild and Scenic River study report...sent to Congress prior to the river's designation...*" ECF No. 238 at p.3, *American Whitewater, et al, v. Tidwell*, CV No. 8:09-2665-MGL, Dst.SC. (italics added).

Moreover, the USFS admitted to Judge Lewis what I have been stating for the last seven years: "Boating is a component of the recreation ORV, *just as fisheries, wildlife, and botany are components of the biology ORV...*" Id. (italics added).

The lawyers who helped the Forest Service planners prepare the 2022 LRMP and EIS seek to marginalize the importance of the 1971 Chattooga Study because this report affords the factual evidence needed to substantiate the agency's actionable mismanagement of the North Carolina headwaters of the Chattooga River over the last decade.

To expand on why the USFS would like to discredit the 1971 Chattooga Study, neither the 2022 EIS nor the 2022 LRMP acknowledge how an excessive amount of fine particle sized sandy sedimentation and organic silts now clog the interstitial spaces lying between the small cobbles and quartz gravels that the trout need to spawn successfully on the headwaters of the Chattooga River. In stark contrast, the 1971 Chattooga Study states that the waters of this river and its riparian corridor were in a *near natural condition* prior to WSR designation.

The *best available scientific information* is quite clear about the cause and effect relationship between excessive bedded sedimentation and decreases in successful spawning by trout.

The interstitial spaces between the small rocks and gravels that form the stream bed substrate must be kept free of fine particle sized sedimentation in order for trout to spawn successfully and for their recently hatched alevin to survive during their first few weeks of life.

The suitable spawning gravels which once existed on the North Carolina headwaters of the Chattooga River now rest hidden below a foot thick blanket of fine particle sized sedimentation.

Consequently, extended segments of the main stem of this ORW classified body of water are no longer suitable for successful spawning by mature trout or the early life cycle survival of their newly hatched alevin.

This constitutes an irrefutable scientific fact that the 2022 planning documents keep concealed.

This did not constitute the baseline physical condition of these headwaters leading up to their designation as a national Wild and Scenic River in 1974 nor leading up to their reclassification as Outstanding Resource Waters in 1989.

The physical condition of the in stream trout habitat was outstanding. The contents of the 1971 Chattooga Study and the administrative records created prior to ORW reclassification prove this point.

To demonstrate, please consider how the 1971 Chattooga Study discusses in some detail the physiography and geology of the Blue Ridge mountains from which the river springs and through which the river flows in North Carolina. “The massive face of the Southeastern Blue Ridge Escarpment is divided by a number of beautiful gorges representing millions of years of carving by waterborne sands and millions of years of high rainfall. The Chattooga, flowing for a major pattern of its length through one of these gorges, is less developed than any of the other rivers of the Escarpment region...Most slopes range from 20 to 80% and the drainage pattern is dendritic in nature. The Chattooga River is entrenched by steep, rocky, forested slopes that plunge into deep, narrow gorges. The river flow through the steepest, most pronounced portion of the Chattooga Gorge in its first 20 miles, averaging over 84 feet drop per mile. The next 33 miles to Tugalo Reservoir is through wider, more gentle mountains with an average drop of only 22 feet per mile...The major portion of the rock through which the Chattooga River flows was formed from highly metamorphosed sediments and igneous intrusions. Deposition of the original sediments occurred during the late Precambrian or early Paleozoic period and was followed by folding, metamorphism, and intrusion. These latter events corresponded in time with the close of the Ordovician period. These events gave rise to the metamorphic mica gneiss and schist and the igneous granite dominant in the area.” **Exhibit 1** at pp. 32-33 (pdf. pp 46-47) (AR doc Q-1).

“Folding of the Southern Appalachians during the Precambrian and Paleozoic periods created a landscape characterized by changing slope gradients. *These differences in slopes caused variations in the erosional forces similar to those which exist today.*” Id. at p. 33 (pdf.p.47)(italics added).

Stated more simply, the threatened risk that highly erosive soils get displaced during high rainfall events is greatest at those locations where the slopes are the steepest. The steepest slopes entrench the North Carolina headwaters of the Chattooga River. Therefore, as a matter of

common sense logic, these headwaters are at the greatest risk of displaced soils being carried into the river by heavy rain runoff.

The 1971 Study goes on to report: “Soils along the Chattooga River *above the mouth of Reed Creek* are ...*very steep with no potential for recreational development on the steeper side-slopes*. Severe slope gradients, stone, and bedrock outcrops in some locations would require blasting for foot trail construction.” Id. at p.33 (pdf p. 47)(italics added).

This statement describes the precise physical condition of the riparian corridor through which the North Carolina headwaters flowed prior to WSR designation in 1974.

To repeat, in 1971, the USFS admitted that the steep slopes (and highly erosive micaeous soils) which entrench the narrow headwaters in North Carolina had “no potential for recreational development on the steeper side slopes.” Id.

The implication is clear.

Foot trail construction inside the riparian corridor to facilitate recreational uses of the North Carolina headwaters of the Chattooga River should be minimized not expanded over time.

The 1971 Study provides an important history lesson: “Most of the Chattooga Drainage was completely [timbered in the early 1900’s] with no provision for reforestation. Uncontrolled fires and erosion caused loss of the protective forest-humus cover on many watersheds in the area...The 1911 Weeks Law authorized the Forest Service to buy lands throughout the United States for watershed protection, and much of the mountain lands for miles around the Chattooga became part of the three National forests.” Id. at p. 54 (pdf. p.70),

Stated differently, the Chattooga’s watershed has physical characteristics (steep slopes and highly erosive soils) which pose a higher than normal threat for human activities to cause the displacement of soils and their subsequent discharge into the river as sediments.

These physical facts supply the commons sense explanation for why the USFS must do everything possible to avoid any disturbances of the highly erosive soils that rest on the steep slopes which entrench the river.

My concerns pertain to Section I and Section II of the Chattooga River—not the segments of river flowing downstream in South Carolina and Georgia.

The 1971 Chattooga Study describes Section I as follows: “Section I on the upper headwaters of the river flows entirely through private lands...Although acquisition is desirable for complete control, it is not extremely important from a watershed-protection standpoint. *These upper watersheds are probably in a condition as good as any in the Savannah River Drainage*...Little farming or logging is done; and *soil disturbance, erosion and stream siltation is kept to a minimum*. These lands will generally continue to be maintained in good watershed

condition...Some construction of summer homes, roads, and driveway, and occasional small impoundments will occur on private lands within the watershed outside the proposed boundary. *These are not expected to create erosion, pollution or diversion problems affecting the main river.* The North Carolina Department of Water and Air Resources *will enforce state stream quality standards to protect these tributaries and the main river.*” Id. at p. 90 (pdf p.106)(italics added).

Similarly, the 1971 Chattooga Study describes Section II (the 4.3 miles beginning 0.2 miles above the confluence of Norton Mill Creek and ending at Ellicott Rock) as follows:

*“This entire section is in a near natural condition.”* Id. at p. 73 (pdf. p. 89)(italics added).

To repeat, the 4.3 mile segment of river reaching from the confluence of Norton Mill Creek downstream to Ellicott Rock was documented to be in a *“near natural condition”* leading up to WSR designation in 1974.

These excerpts from the 1971 Chattooga Study clearly demonstrate how neither Section I nor Section II of the main stem of the North Carolina headwaters were understood to be suffering from any kind of excessive bedded sedimentation problem prior to WSR designation in 1974.

This informs on why the excessive accumulation of bedded sedimentation which now plagues these headwaters should not be considered to be the undesirable consequence of some unspecified natural background condition for which the USFS has no responsibility.

To the contrary, natural background conditions take millions of years to develop. The excessive bedded sedimentation problems about which I complain have arisen within the last two decades.

The 1971 Chattooga Study told Congress that the “North Carolina Department of Water and Air Resources *will enforce state stream quality standards to protect these tributaries and the main river.*” Id. at p. 90 (pdf p.106)(italics added).

Unfortunately, neither the state of North Carolina nor the USFS has done enough to prevent human development activities taking place in the upstream watershed from causing the displacement of soils inside the Chattooga’s watershed and their subsequent discharge into the main stem of the river.

Over the last two decades, the USFS has done nothing to prevent an increasingly excessive amount of fine particle sized sediments from filling in and clogging the interstitial spaces lying between the cobbles and gravels on the stream bottom. The accumulation of this sediment on the stream bed has degraded these headwaters’ once remarkable biological capacity for sustaining outstanding numeric densities and biomass of naturally reproducing assemblages of non-native rainbow and brown trout.

This unique biological capacity was understood by implication to be one of the most important “*scientific features*” of these headwaters prior to WSR designation in 1974 and prior to ORW classification in 1989. 16 U.S.C. §1281(a).

Today, the USFS now admits that these headwaters flow through an impaired watershed.

However, neither the 2022 EIS nor the 2022 LRMP tell the truth about why the North Carolina headwaters of the Chattooga River have gone from being in a “near natural condition” in 1971 to one which now flows through an *impaired watershed* in 2022.

The 2022 EIS advises: “Watershed condition is the state of the physical and biological characteristics and processes within a watershed that affect the soil and hydrologic functions supporting aquatic ecosystems. Watershed condition reflects a range of variability from natural pristine (functioning properly) to degraded (impaired). The Forest Service Manual classification defines watershed condition in terms of ‘*geomorphic, hydrologic and biotic integrity*’ relative to ‘*potential natural condition.*’ In this context, integrity relates directly to functionality. Integrity is evaluated in the context of the natural disturbance regime, geoclimatic setting, and other important factors within the context of a watershed (USFS 2010a)... The three watershed condition classes are directly related to the degree or level of watershed functionality or integrity: Class 1 - Functioning Properly, Class 2 - Functioning at Risk, and Class 3 - Impaired Function (USFS 2010a). *A watershed is considered to be functioning properly (Class 1) if the physical attributes are appropriate to maintain or improve biological integrity. By contrast, a Class 3 watershed has impaired function because some physical, hydrological, or biological threshold has been exceeded.* Substantial changes to the factors that caused the degraded state are commonly needed to set them on a trend of improving conditions that sustain physical, hydrological, and biological integrity (USFS 2010a).” 2022 EIS at p. 3-54 (pdf. p. 125)(italics added).

The 2022 EIS goes on to report: “The outcome of the WCF analysis of condition classes for the Nantahala and Pisgah National Forests denotes the abundance of watersheds with ‘Functioning at Risk’ classifications, only a few ‘Properly Functioning’ *and one ‘Impaired Function’ watershed.* In general across the analysis area, physical attributes occur that put watersheds at risk of functioning at a potential natural condition, *and thus may not be able to maintain biological integrity... The one impaired watershed is the Upper Chattooga River watershed, one of three watersheds draining the Chattooga River.* This watershed is shared by the Nantahala N.F., Chattahoochee N.F., and Francis Marion – Sumter N.F. The impairment status was determined by the Francis Marion – Sumter N.F. (since they manage a dominant portion of the watershed) as a result of aquatic habitat and biota, the road and trail network, and soils concerns. Although almost half of the watershed on the Nantahala is within the Ellicott Rock Wilderness there are State, private and Forest roads present in the headwaters that may be contributing to the impaired designation in North Carolina and South Carolina.” 2022 EIS at pp. 3-54 to 3-55(pdf pp.125-126)(italics added).



This statement attempts to excuse the mismanagement of an Outstanding Resource Water which flows inside a riparian corridor consisting of just 2,017 acres of land controlled by the NPNF (See 2022 LRMP at p. 228 (pdf. p.236) by suggesting that any effort to fix the site specific problems occurring within this narrowly identified part of the relevant watershed must be initiated by the Francis Marion-Sumter National Forest because the majority of the 40,000 acres of land within the watershed is located in South Carolina. No such law exists.

This claim that a National Forest in South Carolina should control a problem occurring on a relatively small tract of land controlled by a National Forest in North Carolina evokes the idiom that the Forest Service fails to see the forest for the trees.

The 2022 EIS never explicitly states what specific *physical attribute* at what precise location on the river has become degraded so much so that some element of *biotic integrity* of the river is no longer being maintained. Instead, the 2022 EIS depends on nebulous generalizations.

*The 2022 EIS admits that only a single watershed within the NPNF has become impaired.*

Nevertheless, neither the 2022 EIS nor the 2022 LRMP informs the public about what specific element of *biotic integrity* has become incapable of being maintained.

Neither planning document explains which specific “*physical, hydrological, or biological threshold has been exceeded*”. 2022 EIS at p. 3-54 (pdf p. 124)(italics added).

The USFS uses broad generalizations to avoid having to admit with specificity what these headwaters have been suffering for over a decade. The use of such generalizations unlawfully prejudices my ability to participate fully in the revision of the LRMP.

To explain how the USFS uses generalizations to avoid admitting the site specific problems being suffered on these headwaters, I ran a Boolean search for the word “Chattooga” in both of these planning documents.

This search failed to turn up any mention of the visibly obvious problem of excessive bedded sedimentation which continues to be suffered on these headwaters. Neither planning document makes any mention of the measurable non-temporary collapse in the once outstanding numeric densities of naturally reproducing brown and rainbow trout.

Instead, the agency claims that it can magically comply with the non-discretionary duties which Congress has directed the agency to discharge by designating the watershed through which this river flows as a priority watershed.

I intend to disagree to the maximum extent allowed by the law.

For more than seven years, the United States Forest Service has actionably neglected to take the steps required to remove this excessive sedimentation. In fact, the agency has repeatedly refused to admit there is any kind of problem that the agency owes a duty to resolve.

Neither has the agency taken any steps to enhance the stream bottom gravels in order to improve their suitability for successful spawning by mature trout.

After being pressed for over seven years to admit there is a sedimentation problem, the USFS now proudly declares its intention to solve the problem by placing yet another special designation on these ORW classified and WSR designated headwaters.

The 2022 LRMP reports that each of the three 6<sup>th</sup> level watersheds through which the Chattooga drains are now to be reclassified as a “Priority Watershed.” 2022 LRMP at pp 35-38 (pdf pp 43-46).

The 2022 LRMP reports that the agency will implement up to four watershed restoration action plans over the 10-15 year life of the 2022 LRMP revision.

The 2022 LRMP reports that these watershed restoration action plans will have the objective of improving the condition of the watershed from “functioning at risk” to “properly functioning”.

The USFS states a future intention to “improve a minimum of six to a maximum of 12 water quality and aquatic habitat conditions from ‘impaired’ or ‘functioning at risk’ to ‘properly functioning’ condition” 2022 LRMP at p.37 (pdf p.45)

Nevertheless, these promises doesn’t excuse the agency’s actionable neglect for having failed for over a decade to do anything to reverse the deterioration in the trout stream productivity of these headwaters.

The agency still fails to deliver any date certain and fully budgeted plan for fixing the specific concerns that I have documented over and over again for the agency. Instead, the USFS promises to develop a watershed restoration plan for the Chattooga at some future point in time.

The 2022 LRMP merely offers 360 pages of: “Words, words, words.” *Hamlet*, Act II, Scene ii Shakespeare, 1603.

Placing an additional designation of “priority watershed” on these headwaters doesn’t come close to satisfying the non-discretionary duties which Congress compels the Forest Service to discharge while managing and administering the North Carolina headwaters of the Chattooga River.

Furthermore this nebulous promise to do something in the future cannot inoculate the USFS from being held legally accountable for having unlawfully devoted a disproportionate amount of its time, energy, and budgetary funding, *for more than a decade*, arranging extraordinary but legally unentitled recreational use accommodations for a small group of politically influential individuals.

The simple fact is the USFS has repeatedly demonstrated a willingness to waste a disproportionate amount of its limited resources promoting whitewater paddling on the North Carolina headwaters of the Chattooga River. This violates 16 U.S.C. §1281(a).

Inexplicably, the agency has repeatedly demonstrated a willingness to pay special attention to the wish list demands of this group of individuals.

For more than seven years I have complained about these problems. I have simultaneously stated my intention to do everything possible to help locate the funding needed to restore the once outstandingly remarkable trout stream productivity of these headwaters.

Unfortunately, neither the 2022 LRMP nor the EIS makes any effort to acknowledge the non-temporary decline in the trout stream productivity of these headwaters.

The USFS presumes that these headwaters haven't suffered any non-temporary degradation in their trout stream productivity.

The agency has done so without ever counting the numeric densities and biomass of these trout populations on an ongoing basis. The collection of such scientific data would seem to offer common sense proof needed to corroborate or disprove the concerns about which I complain.

The simple truth is the USFS doesn't want to count trout population densities because it would confirm the truth about the collapse in the Chattooga's wild trout populations.

The fact is the agency should have been counting the Chattooga's trout on a recurring basis over the last decade.

This is precisely what the currently enforceable LRMP directs the agency must do pursuant to the directives for Management Area 15 (Wild and Scenic Rivers Area) and Management Area 18 (Riparian Management Area). See *Land and Resource Management Plan, Amendment 5*, page III-170 (pdf. p. 176), Nantahala and Pisgah National Forests (March 1994).

Stated differently, the currently enforceable LRMP for the NPNF requires the agency to manage Wildlife and Fish Resources on Wild and Scenic Rivers according to the Standards set forth in Management Area 18 (Riparian Management Area).

Management Area 18 contains four different directives which make clear how the USFS has been purposely disregarding the non-discretionary duties that Congress requires this agency to discharge while managing the North Carolina headwaters of the Chattooga River.

Management Area 18 has two General Directions: (1) “Manage streams for self-sustaining fish populations where conditions are favorable...(2) Manage streams for wild trout where conditions are favorable. Identify trout streams using designations by the North Carolina Wildlife Resources Commission or where population inventories indicate self-sustaining populations.” See *Land and Resource Management Plan, Amendment 5*, page III-185 (pdf p.191) Nantahala and Pisgah National Forests (March 1994).

Management Area 18 contains two plainly stated but obligatory Standards which make clear that the USFS hasn’t been complying with the non-discretionary duties imposed upon this agency by the national Wild and Scenic Rivers Act and the Clean Water Act:

- (1) “Manage habitat primarily for...trout...” Id.
- (2) “Improve habitat of wild trout streams as a first priority.” Id.

The USFS cannot point to a single initiative which has been undertaken since January 2012 to “improve habitat of wild trout streams as a first priority” on the WSR designated and ORW classified headwaters of the Chattooga River.

Instead of acknowledging this fact and instead of cooperating with me to bring together the resources needed to resolve the problem, the United States Forest Service has chosen to spend its time and resources trying to “skew” the Administrative Record (the “AR”) being compiled during the revision of the Land Resource Management Plan.

By compiling an AR which omits critical factual information, the USFS make it much more difficult for somebody like me to ask a court to compel this agency to admit its non-discretionary legal obligation to fix the problems being suffered on the North Carolina headwaters of the Chattooga River—and to do so without any further dithering.

The USFS *must not skew* the administrative record by refusing to disclose scientific facts archived in the agency’s own files which have great pertinence to the controversy in question.

By skewing the Administrative Record the USFS enhances its ability to conceal how the agency unlawfully continues to deliver extraordinary but legally unentitled recreational use accommodations to a small group of politically influential individuals—individuals who appear to possess long enduring friendships with the agency’s decision makers.

What the USFS has done and what the agency had refused to do over the last seven years makes clear that the agency remains dedicated to using the revision of the LRMP to create a sacrosanct right to paddle the North Carolina headwaters of the Chattooga River.

First, the Forest Service continues to do legally unentitled favors for these whitewater enthusiasts despite the fact that District Court Judge Mary Lewis issued an opinion which quoted the Forest Service's plainly stated argument that "whitewater floating should be limited...*to avoid substantial interference with other recreation uses and other ORVs of the Chattooga.*" *American Whitewater v Tidwell*, 959 F. Supp. 2d 839, 853( Dst. SC 2013) (affirmed on appeal *American Whitewater v Tidwell*, 770 F. 3d 1108 (4th Cir. 2014))(italics added).

Second, the USFS continues to do legally unentitled favors for these individuals despite the fact that the Fourth Circuit Court of Appeals has plainly stated with unequivocal words: "*floating is not a value of the Chattooga that must be protected and enhanced under §1281.*" *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014)(italics added).

Third, certain documents (which should have been incorporated into the Administrative Record but which aren't mentioned anywhere within the 2022 EIS and 2022 LRMP) reveal how the agency bestows legally unentitled favors upon whitewater paddlers.

Over the last seven years, the USFS has revealed in written documents how the agency manages the headwaters of the Chattooga River in a way which affords special influence to what American Whitewater ("AW") requests.

Some of these documents were uncovered using the FOIA. Others still need to be discovered. This is true because select USFS officials began obstructing me from using the information gathering rights afforded by the Freedom of Information Act ("FOIA") in the fall of 2017.

It remains to be discovered if records of back and forth communications between agency leaders and AW have been destroyed since September 2017. I specifically asked that any back and forth communications be archived in the AR associated with the LRMP for the NPNF.

Some of these documents inform on how and why the agency has elected to mismanage the North Carolina headwaters of the Chattooga River.

Others reveal how the Forest Service has a predisposition to do what American Whitewater asks while setting the policies and rules for managing the headwaters of the Chattooga River.

For example, on October 1, 2015, District Ranger Mike Wilkins made an unguarded admission which reveals a willingness to modify the forthcoming LRMP to enhance the whitewater

paddling experience on the Chattooga River—to encourage the presumption of a sacrosanct right to paddle these headwaters: “I gave Kevin... [Colburn of AW a] copy of the amendment 22 of our forest plan... While one might could argue one way...[or] the other about what the 2012 ea did not address the amendment clearly states boating is not allowed on the main stem except on 17 miles as ... *I think his only recourse in the near future is through our forest planning process. He will wait until he see our office reply.*” **Exhibit 2** at pdf p.2 (italics added)(AR doc 00-M-1).

This admission (“*I think...[American Whitewater’s] only recourse is through our forest planning process*” id.) informs on the legally unentitled favoritism which the senior leadership of the USFS appears prepared to confer upon American Whitewater during the revision of the LRMP.

This statement suggests that USFS officials made a decision many years ago to set in stone *irreversible* policies for managing the headwaters of the Chattooga River which step by small step increasingly accommodate the demands of their whitewater paddling buddies.

This constitutes just one of multiple examples which demonstrate how the USFS affords special favoritism to American Whitewater outside of the public’s view.

Another example of this behind the scene favoritism took place in September 2017. I submitted a request for records under the Freedom of Information Act (“FOIA”) on September 22, 2017.

I asked the agency to produce any records of non-privileged communications between American Whitewater and the senior leaders of the USFS at that time—including any communications with Chief Tony Tooke.

I asked for these documents so that I might spotlight the precise substance of any non-public behind the scene communications taking place between the most senior leaders of the USFS and American Whitewater.

In response, the USFS suddenly discovered/claimed that I did not qualify for a waiver of any FOIA processing fees *based on the public interest exception* of 5 U.S.C. §552(a)(4)(A)(iii).

This differed from how the agency had processed no less than 26 prior requests for records.

The agency admitted that it had located records which were responsive to my request.

Nevertheless, these records have inconceivably never been disclosed to the public—despite their potential for informing on any inappropriate nepotism being practiced by USFS leaders.

On June 24, 2019, Mr. Mike Owens, a retired USFS geologist, tendered a FOIA request asking for the precise same records that I had requested in September 2017—records which the agency had already located and archived.

Nevertheless, on June 25, 2019, instead of promptly providing Mr. Owens with the 211 pages of documents which had already been located, the USFS offered the following excuse for not immediately producing a single page of these records: “Mr. Owens, Thank you for your email response and subsequent request for records under the Freedom of Information Act (FOIA). Your request has been assigned tracking number #2019-FS-R8-04932-F and is currently on hold pending a response from you regarding fees...In your June 24, 2019 request, you...asked for the following: ‘... records...specifically identified in a FOIA request made by Mr. Bill Floyd on September 22, 2017, dealing with management of this river. I understand the USFS has referenced this FOIA file as #2018-FS-R8-00827-F.’...*In your request, you...asked for the records compiled for another FOIA request made by another individual that has an outstanding fee due for processing that request.* The status of that request does not have any bearing on your requirement under the FOIA to request records or be responsible for any fees associated with processing a FOIA request. *You are also correct that your status as an ‘all other’ requester allows the Forest Service to provide you with 100 pages of records and two hours of search time. However, the FOIA does not exempt you from paying fees associated with processing a FOIA request that was never produced to the original requester.* That request produced a total of 211 pages. The total amount to process your request is \$42.20. In this case, fees associated with conducting a search for records and 100 pages would be provided to you. But, as an ‘all other’ requester you would be responsible for the 111 pages of records outside of the initial 100. The total amount to process your request for records is \$22.20... To process your request any further, please let us know if you choose to pay the associated fee or would like a fee waiver consideration...If you feel you still might be entitled to a fee waiver, I have attached a fee waiver criteria sheet for you to use as a guide in addressing the fee waiver criteria. Please provide an explanation of how each of the six criteria applies to the information you are requesting and your current status as an ‘all other’ requestor...*Your request will not be processed any further and is on hold pending a response from you regarding fees.* If we do not hear from you by July 9, 2019, we will assume you are no longer interested in this FOIA request and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future...If you have any questions about your request, feel free to contact me at the number and email listed below.” **Floyd Exhibit 3**, an email from Ms. Heather Luczak, Forest NEPA Coordinator, to Mr. Mike Owens which was clock stamped at June 25, 2019 4:00:33 PM EDT (AR doc. R-6)

The USFS took the odd position that “the FOIA does not exempt you from paying fees associated with processing a FOIA request that was never produced to the original requester.” Id.

The agency didn't cite to where in the statute or attendant regulations this assertion of law might be corroborated. Instead the agency published this tortured explanation. The USFS obstructed Mr. Owens from being able to read various documents that might inform on the legally unentitled favoritism being afforded to the recreational use demands of whitewater paddlers and American Whitewater.

These examples constitute the tip of the iceberg for recognizing how the Forest Service has attempted to conceal the favoritism which is being shown to this small group of individuals.

I have administrative standing to file an objection to the 2022 LRMP and 2022 EIS as well as the attendant Record of Decision and Finding of No Significant Impact. Over the last seven years I have timely submitted numerous prior comments and criticisms during the ongoing revision of the LRMP for the NPNF.

On April 23, 2020 and June 29, 2020. I submitted 54 pages of comments and 60 supporting exhibits in response to the Forest Service's February 14, 2020 publication of a revised draft for the Land and Resource Management Plan for the Nantahala and Pisgah National Forests in North Carolina.

These comments and exhibits demonstrated how the Forest Service has stood by with its hands in its pockets for more than a decade while an excessive amount of fine particle sized sedimentation was filling in and clogging the interstitial spaces lying between the small rocks and gravels which rest on the bottom of the river.

I also provided the agency with copies of the scientific evidence which documents how the accumulation of this sedimentation on the stream bed has resulted in a non-temporary collapse in the numeric densities of trout residing on these headwaters.

My June 29, 2020 comments incorporated by reference and built upon the facts and legal reasoning outlined for former Forest Supervisor Allen Nicholas (1) in Floyd's July 29, 2017 Notification (**Exhibit 4**) (AR doc. N-13-A); (2) in Floyd's September 22, 2017 Notification (**Exhibit 5**) (AR doc. N-13-B) and (3) pursuant to a 60 Day Notice of Intent to Sue under the Citizen Suit provision of the Clean Water Act which was sent by certified mail/emailed to an appropriate set of officials on May 18, 2018 (**Exhibit 6**).

The USFS was provided with photographs that I took in May 2019. See [https://cara.ecosystem-management.org/Public/DownloadCommentFile?dmdId=FSPLT3\\_5332806](https://cara.ecosystem-management.org/Public/DownloadCommentFile?dmdId=FSPLT3_5332806) These photos evidence this visibly excessive sedimentation problem. Refer also to [https://cara.ecosystem-management.org/Public/DownloadCommentFile?dmdId=FSPLT3\\_5332805](https://cara.ecosystem-management.org/Public/DownloadCommentFile?dmdId=FSPLT3_5332805) (links last checked on March 11, 2022).



Today, my objection specifically incorporates by reference all of those prior comments, Notifications, etc. and all prior records which I have previously placed into the AR being compiled during the ongoing revision of the LRMP.

Over the last seven years, I have shared a substantial amount of scientific facts and legal reasoning with the agency. I did so to provide support for my view that these headwaters must be managed differently than every other trout stream in the Nantahala and Pisgah National Forests.

Disappointingly, what the Forest Service has done and what it has refused to do over the last seven years leaves little doubt that the agency wishes to avoid having to admit the legal importance of the facts contained within the administrative records leading up to these headwaters designation as a national Wild and Scenic River and its subsequent reclassification as Outstanding Resource Waters.

The agency has left little doubt about its intention to disregard these facts in order to discredit the legal reasoning why these headwaters must be managed differently than every other trout stream in the Nantahala and Pisgah National Forests. Hence, the erroneous claim that “some rivers, including the Chattooga...were designated without explicit discussion of their ORVs.” 2022 EIS (Appendix A. Responses to Comments) at pp. 161-162.

What the agency has done and what it has refused to do evidences how it seeks to use *summarily asserted claims of agency expertise* to deny that there is any actionable problem taking place on the North Carolina headwaters of the Chattooga River. There are emails evidencing the agency struggling to justify claims which conflict with the best available scientific information.

The Forest Service has attempted to discredit the relevance of the scientific facts and legal reasoning which have been repeatedly brought to the agency’s attention in order to demonstrate how/why these headwaters must be managed differently from every other trout stream flowing through the NPNF. The agency disregards the public interest which it is supposed to protect.

The 2022 EIS and 2022 LRMP reveal an effort to conceal the agency’s ongoing violation of specific Standards set forth in the currently enforceable LRMP for the NPNF.

The content of the 2022 EIS and 2022 LRMP leaves little doubt that the USFS is looking for some justification to disregard the non-discretionary statutory protections owed to the Chattooga’s trout under the national Wild and Scenic River Act and the antidegradation mandate of the Clean Water Act.

On January 21, 2022 the agency offered an editorially sanitized response to criticisms previously submitted back in June 2020 to the last draft of the LRMP and EIS.

“*Per guidance* in the Wild and Scenic Rivers Act, the Forest Service is responsible for protecting and enhancing the ORVs, as well as water quality and free-flowing conditions for the Chattooga Wild and Scenic River, not just the upper reaches. The ORVs for the Chattooga WSR includes: Geology and Geomorphologic Values, Biologic values, Scenery and Aesthetic Values, Historical Values, and Recreational Values.

The comprehensive river management plan for the Chattooga WSR is incorporated in the three forest plans that guide management of the Chattooga WSR. Direction in the Nantahala and Pisgah NFs proposed plan revision addresses water quality requirements in the Wild and Scenic Rivers Act through implementation of standards and guidelines that support the protection of water quality and restoration of watersheds. In its August 2018, A Compendium of Questions and Answers Relating to Wild and Scenic Rivers, (posted on at <https://www.rivers.gov/documents/q-a.pdf>) the Interagency Wild and Scenic Rivers Coordinating Council (IWSRCC or Council) states:

‘While the term ‘protect’ is interpreted by the Council...as ‘eliminating adverse impacts,’ it is not interpreted as an absence of impacts. Rather, each WSR-administering agency must, based on best available scientific information and reasoned professional judgment, ensure that existing values are protected and, to the extent practical, enhanced. The river-administering agency must also establish a positive trajectory for any value that was in a degraded condition on or after the date of the river’s designation.’ (page 70) Non-degradation within the Act’s context is not synonymous with no impact. Non-degradation in the context of a Wild and Scenic River is assurance that there is no downward trend in conditions that affect ORVs. As stated in the Council’s technical report (Wild and Scenic River Management Responsibilities (March): ‘To achieve a non-degradation standard, the river administering agency must document baseline resource conditions and monitor changes to these conditions.’

Consistent with the 2012 Planning Rule, the revised forest plan includes a list of priority watersheds which are restoration priorities for the Nantahala and Pisgah NFs. Watersheds in the Chattooga River drainage have been added to the Priority Watershed list and therefore have a special emphasis for restoration. Watershed restoration action plans will be developed for ten priority watersheds over the life of the plan and will involve engagement with state and private cooperators as well as input from interested organizations and the public.”

2022 EIS Appendix A at pp. 161-162 (italics added). *None of this guidance equates to case law.*

This response demonstrates how the USFS has decided to marginalize my concerns and to do so without ever undertaking any serious scientific investigation into those concerns.

The 2022 EIS provides a bibliography which cites the scientific literature which the USFS has relied on in evaluating Aquatic Systems—which presumably includes the Chattooga’s trout.

Not a single one of the scientific articles, etc. which former Forest Supervisor Nicholas asked me to provide to the Forest Service appears in this bibliography.

Most noticeably omitted are the records which document the results of the most recent count of trout on these headwaters undertaken in September 2016 by the North Carolina Department of Environmental Quality (“NCDEQ”). These results were emailed to the former Forest Supervisor for the National Forests in North Carolina and to Ms. Heather Luczak, Planner for the NPNF on Friday, July 28, 2017 at 9:46 PM. I asked that these documents be placed into the AR being compiled during the revision of the LRMP. These documents were indexed as:

- 1) H-1 Tracy Email to NCWRC Rash Leslie Wheeler May 25 2016 2 45 pm
- 2) H-2 FLOYD email 09072016 3 11 PM criticizing NCDEQ proposed sampling locations
- 3) H-3 FLOYD Cover Email 09152016 re suggest NC DEQ Chattooga Antidegradation Study Plan
- 4) H-4 FloydMemo re Scope of NC DEQ Sept 2016 Chattooga River Study Plan Assessment Methods
- 5) H-5 Tracy Email to NCWRC Rash Wheeler Oct 3 2016 6 34 AM
- 6) H-6 Tracy Email to Rash Wheeler Oct 5 2016 9 35 AM re ORW Sampling
- 7) H-7 Wheeler Email to Tracy Oct 7 2016 9 35 AM re ORW Sampling
- 8) H-8 Wheeler Email to Tracy Oct 7 2016 9 47 AM re rainbow brook trout
- 9) H-9 Tracy Email to NCWRC Wheeler Oct 7 2016 2 40 PM
- 10) H-10 Chattooga River Study Results FINAL
- 11) H-10-A Fish Community Field Data Sheets
- 12) H-10-B Habitat Chattooga River Study All Eight Sites

I sent a second email to the Forest Supervisor and Ms. Luczak on July 28, 2017 @ 9:53 PM. I asked that additional records pertaining to NCDEQ’s September 2016 study of the Chattooga’s trout population be placed into the AR being compiled during the revision of the LRMP for the NPNF. These documents were identified as:

- 13) H-10-C Habitat Metrics
- 14) H-11 Tracy Response 12222016 to Floyd Questions to Tracy 12112016
- 15) H-12 FLOYD email 12132016 at 3 48 PM to Bryn Tracy re Trout Still Exist Below Bull Pen Bridge

16) H-13 Tracy Jan 23 2017 Response to Floyd Questions

17) H-1 FLOYD email 01242017 questions re Tracy email 01232017 10 14 AM

Similarly, the bibliography set forth in the back of the 2022 EIS makes no mention of the five year study of the densities and biomass of the trout populations residing on the North Carolina headwaters of the Chattooga River which was undertaken by USFS fisheries biologists between 1992 to 1996.

Earlier on July 28, 2017 @ 3:54 PM, I had emailed Forest Supervisor Nicholas and Ms. Luczak. a copy of the comprehensive 58 page report detailing the results of the 1992-1996 electro-fishing study of the trout populations residing on the North Carolina headwaters of the Chattooga River

This five year study was jointly undertaken by fisheries biologists of the USFS and officials of the North Carolina Wildlife Resources Commission.

I asked for this record be incorporated into the Administrative Record being compiled during the revision of the LRMP. I indexed this document as Floyd AR document “00-T Borawa and Clemmons 1998”. Another copy of this document has been attached as **Exhibit 29**.

Curiously, although this critically relevant document does not appear to have been studied by the planners, the bibliography cites another study of 18 wild trout streams during the same general period of time. Inconceivably, the 2022 EIS cites to a study that didn't collect a single piece of data about the trout residing on the North Carolina headwaters of the Chattooga River. This study is cited in the bibliography as Borawa, J.C., J.H. Mickey, C.J. Goudreau, and M.M. Clemmons. 2001. *Wild trout stream fish population monitoring, 1989-1996*. NCWRC Federal Aid in Fish Restoration Report F-24. Raleigh, NC. 45 pages plus appendices.

The only logical conclusion that can be reached is that the USFS doesn't really want to investigate what has happened to trout population densities on the North Carolina headwaters of the Chattooga River.

Otherwise, the most logical and scientific way to make such a determination would have been to compare the results of the 1992-1996 study of the Chattooga's trout against the results of the September 2016 study of the densities, biomass and young-of-the-year of the Chattooga's trout.

I am compelled to object to the revised 2022 LRMP and the 2022 EIS because I have been obstructed from participating fully in the revision of these planning documents.

Since September 6, 2017, select employees (current and former) have taken specific steps to obstruct me from making sure that the Administrative Record being compiled during the revision

of the LRMP tells the whole truth about the agency's continuing mismanagement of the North Carolina headwaters of the Chattooga River.

Select officials have obstructed me from exercising the information gathering rights which Congress has bestowed on individuals interested in participating fully in the self-government process.

I have repeatedly asked Forest Service officials to place various documents into the Administrative Record ("AR") being compiled and retained during the preparation and revision of the LRMP for the NPNF. These records are relevant to the issues about which I complain.

I did so in anticipation of having to argue with the Forest Service about what the agency is legally required to do while managing these headwaters.

Inconceivably, on June 17, 2019, the Forest Service prejudicially tried to persuade me that the following statement dutifully follows the law: "The records that you have submitted for plan revision will be reviewed *and only those records that are necessary to inform the plan decision will be included in the project record.* The public comment reading room will not be used as a comprehensive catalog of all literature and comments that we have received as part of the plan revision process and documents responsive to your FOIA requests will not be filed in the reading room." **Exhibit 7** at pdf. p.7 (italics added) (AR doc S-5)

This self-proving evidence of a willingness to censor me informs on how the USFS has tried to obstruct me from participating fully in the revision of the LRMP for the NPNF.

True to what the agency signaled in June 2019, and as the bibliography for the 2022 EIS evidences, the USFS has entirely disregarded all of the factual information, scientific studies, and legal reasoning which I have presented to the agency's leadership over the last seven years.

Consequently, my comments about what is wrong with this version of the LRMP will need to be amended after my information gathering rights get properly restored.

The 2022 EIS explicitly rejects that there is any need to reconsider how the North Carolina headwaters of the Chattooga River must be managed going forward under the forthcoming LRMP. The 2022 EIS does so by summarizing how other potential Action Alternatives were evaluated and rejected in response to "issues" which were self-identified as requiring a response.

The USFS asserts that some alternatives were eliminated from detailed study because they either did not meet the purpose and need and address one or more significant issues, were outside the

scope of the forest plan, were financially or technologically infeasible, would result in unreasonable environmental harm or were duplicative of the alternatives considered in detail.

Here is what the agency claims about its refusal to reconsider how the North Carolina headwaters of the Chattooga River will be managed going forward: “In 2012, the Sumter NF, Chattahoochee-Oconee NF and Nantahala and Pisgah NFs signed decisions on managing recreation opportunities on the Chattooga WSR. *In addition to amending forest plan direction, these decisions included a Monitoring Plan and Adaptive Management Strategy designed to characterize use and social impacts occurring with[in][sic] the upper segment of the Chattooga WSR corridor, identify changes since a previous study in 2008, and consider whether the capacity thresholds are effective at protecting and enhancing the river’s ORVs, in particular the social/solitude values...* The 2012 decisions were challenged on numerous counts and in 2014, the U.S. Court of Appeals for the fourth circuit rejected challenges to the 2012 plan amendment decisions *and found* that the Forest Service's revised plan “carefully balance[s] the wide-ranging interests advocated by the several parties and participants.” *American Whitewater v. Tidwell*, 959 F. Supp. 2d 839, 860 (D.S.C. 2013) (“Tidwell”). Following the 2014 court decision, the Forest Supervisor for the National Forests in NC maintained that the Nantahala and Pisgah National Forest plan revision would not revisit the management of the Chattooga WSR because the 2012 decision had not been fully implemented and the required monitoring of the decisions had not yet begun... The first round of recreation use monitoring on the Chattooga WSR upstream of the Highway 28 bridge was conducted in 2017 and 2018 and the monitoring report was published in 2019. Additional monitoring is necessary to determine use trends and to determine whether changes to visitor use management on the Chattooga WSR should be appropriately contemplated. *Considering changes now, without additional monitoring, would be premature and inappropriate.* As the lead river management unit, the Sumter NF will assess current and future monitoring results and make adaptive management decisions in coordination with the National Forests in North Carolina and Chattahoochee-Oconee NFs. If a need to change visitor use management on the Chattooga WSR is identified, the three forest plans would be amended accordingly. *This alternative was eliminated from detail study because it is outside the scope of the forest plan.*” 2022 EIS at p. 2-30 to 2-31 (pdf. pp. 68-69)(italics added).

This statement highlights the arbitrary nature of the claims, (1) “[c]onsidering changes now, without additional monitoring, would be...inappropriate” and (2) a detailed reassessment would be “outside the scope of the forest plan.” *Id.* Neither planning document admits how the agency has refused *to monitor* the non-temporary collapse in the densities and biomass of trout—despite the Standards set forth in Management Area 18 of the currently enforceable LRMP.

First, this justification for doing nothing employs a confused citation to the existing case law. This confused citation appears designed to bolster the agency’s refusal to revise the LRMP by adopting the Standards and Desired Conditions needed to comply with the law.

The 2022 EIS quotes a statement made in a District Court opinion, *American Whitewater v Tidwell*, 959 F. Supp. 2d 839, 860 ( D.S.C. 2013) to be the primary finding of the Fourth Circuit on appeal. It is true that the 4<sup>th</sup> Circuit acknowledged that the lower court “found that the Forest Services revised plan ‘carefully balance[s] the wide-ranging interests advocated by the several parties and participants.’” *American Whitewater v Tidwell*, 770 F. 3d 1108, 1113 (4<sup>th</sup> Cir. 2014).

However, the 2022 EIS misleads because it doesn’t tell the truth about how the Fourth Circuit went much further in drawing a legal conclusion about what 16 U.S.C. §1281(a) compels. The Court distinguished how “Section 1271 of the WSRA lists the ‘outstandingly remarkable’ values that are to be protected by the Act: ‘scenic, recreational, geologic, *fish and wildlife*, historic, cultural, or other similar values.’ 16 U.S.C. § 1271 (2006).” *Id.* at p. 1117 (italics added for emphasis). The 2022 EIS also omits what the USFS admitted to the lower court: “Boating is a component of the recreation ORV, *just as fisheries, wildlife, and botany are components of the biology ORV...*” ECF No. 238 at p.3, *American Whitewater, et al, v. Tidwell*, CV No. 8:09-2665-MGL, Dst.SC. (italics added).

The 2022 EIS doesn’t disclose the most critical part of the ruling: “*We find that the Forest Service reasonably and lawfully identified ‘recreational value’ as the relevant ORV, and that floating is not a value of the Chattooga that must be protected and enhanced under § 1281.*” *American Whitewater v. Tidwell*, 770 F. 3d 1108, 1118 (4<sup>th</sup> Cir. 2014)(italics added). My concerns haven’t been adjudicated by the courts.

Just as prejudicial, the 2022 LRMP proposes to withdraw and eliminate critical protections that are supposed to have been provided to the Chattooga’s trout under the currently enforceable Forest Plan. The 2022 LRMP disregards the non-discretionary duty to preserve the excellent trout stream productivity of these headwaters.

The USFS speaks out of both sides of its mouth when discussing Action Alternatives. The stated denial of any need to revisit the mismanagement of these headwaters disregards how “*floating is not a value...that must be protected and enhanced.*” *Tidwell*, supra, p. 1118.

The second sentence of §1281(a) plainly states a non-discretionary duty which the USFS is compelled to discharge properly while managing the uses of these headwaters: “In such administration *primary emphasis shall be given to protecting...[a river’s] esthetic, scenic, historic, archeologic, and scientific features.*” *Id.* (italics added).

Noticeably absent from this compulsory instruction is the awarding of any discretion to divert the agency’s limited resources towards *enhancing any form of recreational use* of the river—such as whitewater paddling.

Congress compels that *primary emphasis shall be given to protecting* five explicitly enumerated types of ORVs. Recreational uses of the river don't constitute one of the special features which Congress has singled out to receive primary emphasis protection.

Nevertheless, this is precisely what the United States Forest Service has continued to do for over a decade of time. To press this point, for the 11 months between May 2005 and April 2006, the Forest Service admitted having spent over "\$335,000 in contracting fees...and \$425,000 in staff costs (not including travel and consultant costs)" developing the visitor use capacity study upon which it justified introducing the sport of whitewater creek boating to these headwaters. See the DECLARATION OF CHRIS LIGGETT, ECF # 11-1 at pages 2-3 (July 7, 2006), *American Whitewater, et al. v. Dale Bosworth*, 2:06-cv-00074-WCO N. Dist. GA (the "AW 2006 Lawsuit").

In stark contrast, there isn't a shred of evidence demonstrating how the USFS spent a penny during this same period of time protecting or enhancing the reproductive suitability of the in stream trout habitat on these headwaters and their administratively recognized unique biological capacity for sustaining outstanding numeric densities and biomass of naturally producing populations of rainbow and brown trout.

The reasons why I am objecting can be plainly stated:

- 1) To compel the agency to reach an agreement with me that the trout residing on the North Carolina headwaters of the Chattooga River have been unlawfully adversely impacted by the accumulation of too much fine particle sized sedimentation on the stream-bed.
  - a. The Wild and Scenic Rivers Act mandates that the Forest Service "shall assist, advise, and cooperate with...individuals to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise...Any agreement under this section may include provisions for limited financial...assistance to encourage participation in the...protection...of river resources." 16 U.S.C. §1282(b)(1)(italics added).
  - b. The USFS hasn't complied with this plainly stated duty.
  - c. The USFS *has refused to cooperate with me*. The agency has marginalized my concerns by summarily suggesting that there isn't any scientific basis to conclude that the trout have been adversely impacted in any kind of unlawful or legally actionable way.
- 2) To compel the USFS to admit that it hasn't been doing what two plainly stated Standards obligate the agency to do while managing the North Carolina headwaters of the national Wild and Scenic Chattooga River. The currently enforceable LRMP directs that the management of Aquatic Resources on Wild and Scenic Rivers are supposed to follow the obligatory Standards set forth in Management Area 18, *Land Resource Management*



*Plan, Amendment 5 for the Nantahala and Pisgah National Forests, March 1994.*

**Exhibit 8** (AR document N-23).

- a. “Manage habitat primarily for...trout” Id. at p. III-185
  - b. “Improve habitat of wild trout streams as a first priority” Id.
- 3) To compel the agency to admit that the best available scientific information demonstrates how the North Carolina headwaters of the Chattooga River have suffered an actionable non-temporary collapse in the densities and biomass of their naturally reproducing trout. These wild trout now manage only to persist as opposed to thrive on these headwaters
- a. To admit that the continuous tracking of young-of-the-year trout (“YOY”) on a given stream constitutes one key biological metric for assessing the suitability of a stream’s physical condition for sustaining numerically abundant wild trout fisheries
  - b. To acknowledge that any evidence of non-temporary declines in YOY trout (as evaluated over extended reaches of a river at sites suitable for successful spawning by mature trout) ought to be recognized as the *proverbial canary in the coal mine* regarding potential stream habitat problems
  - c. To admit how the North Carolina Department of Environmental Quality (“NCDEQ”) electro-fished almost 1 mile of water at 8 different 600 foot long sample sites scattered out over 2 miles of the river in September 2016.
    - i. To admit that neither a single rainbow nor brook trout was captured and released during this extensive study of the trout residing on the North Carolina headwaters of the Chattooga River
    - ii. To admit that only 181 brown trout of all age classes were captured and released during NCDEQ’s study
    - iii. To admit that only 26 YOY brown trout were captured and released
  - d. To admit how the best available scientific information recognizes how a cold water stream with outstanding reproductive characteristics would typically evidence a ratio of YOY/other age classes of trout approaching or exceeding 100% at those sites which possess the in stream habitat features necessary and best suited for successful spawning by mature trout and early life cycle survival by their newly hatched alevin
    - i. To admit how NCDEQ established a ratio of YOY/other age classes of trout of just 26/155 or 16.8% in September 2016
- 4) To acknowledge how the baseline excellent trout stream productivity of these headwaters was corroborated by a five year study of the trout populations undertaken by Forest Service employees in coordination with the North Carolina Wildlife Resources Commission (“NCWRC”) between 1992-1996.
- 5) To compel the agency to acknowledge the expertise of the three scientists whose written consultations about the Chattooga were placed into the AR: Dr. Phil Kaufmann, Mr. Roger Nelson, retired USFS fisheries biologist, and Dr. William McLarney.

- 6) To compel the leadership of the USFS to cease placing primary emphasis on delivering legally unentitled but extraordinary recreational use favors to a small group of politically influential individuals in lieu of discharging the non-discretionary duties imposed upon the agency to place primary emphasis on protecting the trout that reside on these headwaters
- 7) To compel the agency to begin undertaking annual counts of the densities and biomass of the trout residing on the North Carolina headwaters of the Chattooga River.
- 8) To adopt a Desired Condition which requires the agency to implement a time certain and fully funded plan **for using proven technologies to vacuum up** the massive plume of small particle sized sediments which have accumulated within the de facto sediment catch basin located in front of the logjam **at latitude 35.033897 longitude -83.128544**.
- 9) To adopt a Standard which requires the use of **vacuum technologies** for removing the excess sediment which clogs the interstitial spaces lying between the small cobble and gravels which need to be kept clear for mature trout to spawn successfully and which need to be kept clear to enhance the early life cycle survival of newly hatched alevin.
  - a. I have repeatedly encouraged the agency to consider the capabilities and experience of organizations such as Streamside Systems, Inc.
    - i. Streamside Systems, Inc. has worked with government agencies in using such technologies in removing sediments and restoring the suitability of a stream bed for supporting successful spawning by mature trout. See <https://streamside.us.project/irish-cove-brook/>.
    - ii. Streamside Systems specializes in the restoration of sediment impacted habitats.
- 10) To begin enhancing the suitability of the stream bed for successful spawning by mature trout
  - a. To begin physically placing additional appropriately sized gravels on the stream bed at locations where the normal water flows and the physical in stream habitat are most suitable for successful spawning by trout.
- 11) To begin proactively coordinating with other county, state and federal agencies to prevent human discharged sediments from getting impermissibly discharged into these headwaters or their upstream tributaries.
- 12) To compel the USFS to adopt obligatory Standards and appropriate Desired Conditions within the Specific Direction for Designated Wild and Scenic Rivers by Name which specifically focus on reestablishing these headwaters biological capacity for sustaining outstanding numeric densities and biomass of naturally reproducing populations of brown and rainbow trout, including but not limited to the following:
  - a. A plainly stated Standard prohibiting any individual from doing anything to cut out (with any type of saw) or to do anything to try to remove pieces of large woody debris (“LWD”) that now rest lodged within these headwaters

- b. To adopt a Desired Condition which states that the agency will place primary emphasis on restoring the once mathematically outstanding densities, biomass, and species assemblage of naturally reproducing trout which was administratively recognized to exist on this river in 1971-1974 (at Wild and Scenic designation) and in 1987-1989 (when reclassified as an Outstanding Resource Water)
  - c. To adopt an obligatory Standard within the LRMP which requires the agency to begin, today, to enhance the physical quality of the in stream spawning habitat (gravels and cobble) at locations where the normal water flow and other in stream habitat features are most suitable for successful spawning by trout;
- 13) To adopt a Standard requiring the agency to monitor and report to the public each year the extent to which whitewater creek boaters use of the river has caused the creation of chronic erosion sites where displaced soils suspended in runoff get unlawfully channeled into a body of water carrying an ORW classification.
- a. To adopt a Standard requiring the agency to undertake immediate action to fix and repair those locations where whitewater creek boaters repeatedly executing a “seal launch”<sup>1</sup> into the river (at specific locations previously identified for you)<sup>2</sup> have collapsed the bank causing the creation of point sources of water pollution where sediments suspended in runoff are being channeled into a body of water which lacks any assimilative capacity to absorb any additional inputs of sediment;
- 14) To adopt a Standard prohibiting the USFS from allowing any soils (displaced by the creation and use of unregulated boat launch sites, river evacuation points, and portage trails) from getting discharged into the river.
- 15) To adopt a Desired Condition or Standard which explicitly explains what the USFS must do while managing these ORW classified headwaters to comply with the antidegradation mandate of the Clean Water Act
- 16) To adopt a Desired Condition or Standard which precisely details what the USFS must do to comply with the non-discretionary duties imposed by 16 U.S.C. §1281(a).
- 17) To admit how the North Carolina headwaters of the Chattooga River constitute a unique cold water trout stream which must be managed differently than any other river.

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<sup>1</sup> During high currents (>350 CFS), a creek boater would experience significant difficulty, and in fact would be normally precluded from putting their boat into this narrow creek before entering its cockpit, because the ripping current would sweep them both away. Instead, by necessity, the paddler must *first* climb into the cockpit of a six foot, forty pound kayak, and then launch the weight of their body and the boat into this narrow creek by propelling the bottom of the boat across the top of the bank while simultaneously using their hands or paddle to accelerate the force of that forward motion. *This constitutes seal launching.*

<sup>2</sup> See AR doc.G-3 emailed to you on July 28, 2017 which constitutes an annotated set of photos explaining the physical displacement of soils and the creation of point sources of water pollution caused by the boater constructed use of an unregulated system of boat launch sites, river evacuation points and portage trails needed to avoid LWD.

The North Carolina headwaters of the Chattooga River must be managed much more intensely than what the USFS currently suggests. The Standards and Desired Conditions set forth in both the January 21, 2022 version of the LRMP do not afford any specific protections for the trout. In fact, the 2022 LRMP withdraws protections which were supposed to have been provided to the Chattooga's trout according to specific Standards set forth in the currently enforceable Forest Plan. This evidences how the Forest Service obstinately continues to refuse to accept this reality.

The North Carolina headwaters of the Chattooga *constitute one of three cold water trout streams* (out of an estimated 12,000 bodies of water in North Carolina) which carry a Class B, Trout waters, Outstanding Resource Waters ("ORW") water quality classification (awarded in 1989) in combination with a national Wild and Scenic River ("WSR") designation(awarded in 1974).

### **WHY THE NORTH CAROLINA HEADWATERS ARE UNIQUE**

These headwaters once possessed a unique biological capacity for sustaining outstandingly remarkable densities of naturally reproducing assemblages of rainbow, brown, and brook trout.

This ability to sustain outstandingly remarkable densities of naturally reproducing trout constitutes the single most important Outstandingly Remarkable Value ("ORV") which was administratively recognized as being unique to these headwaters before they received their national Wild and Scenic River designation in 1974.

The North Carolina headwaters of the Chattooga River constitute one of just three bodies of water (out of thousands of rivers, streams, and lakes in North Carolina) which carry an ORW classification in combination with a WSR designation.

The other two bodies of water are Wilson Creek and the Horsepasture River.

The headwaters of the Chattooga River were the first to be afforded either of these special classifications. The administrative records for the Chattooga differ from the other two.

Stated differently, these headwaters stand unique among all rivers.

To narrow the issue, the administrative records evidence how these headwaters were once recognized to possess a unique biological capacity for sustaining outstandingly remarkable densities of naturally reproducing assemblages of trout—consisting primarily of brown trout but also rainbow trout in the main stem of the river—and a robust brook trout population in principal tributaries like Scotsman Creek.

The USFS has taken actions and refused to take actions which constitute contributory causes for the non-temporary collapse in this unique biological capacity.

The USFS has stood by idle and allowed a visibly excessive amount of human caused sedimentation to become embedded on the stream bed of this unique trout stream.

This bedded sedimentation has made extended reaches of this rugged and remote river unsuitable for successful spawning by mature trout and the early life cycle survival of their newly hatched alevin.

The numeric densities and biomass of these naturally reproducing trout have collapsed.

There is a cause and effect relationship between this visibly obvious excessive bedded sediment problem and the mathematically provable and non-temporary collapse in wild trout population densities.

The Forest Service owes an actionable duty to halt this pollution and to restore the once outstanding trout population densities.

Nevertheless, the United States Forest Service has elected to work as hard as possible to keep the public from learning about the neglectful and self-serving indifference which this federal agency has shown toward the non-discretionary managerial duties which Congress has imposed on it.

“The Wild and Scenic Rivers Act...16 U.S.C. §§ 1271-1287, was enacted in 1968...In its opening section, the WSRA explains that it is intended to codify Congress's policy determination ‘that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, *fish and wildlife* [italics added] historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.’ 16 U.S.C. § 1271. As originally enacted, the WSRA named specific rivers or segments of rivers for inclusion...The WSRA also sets forth a procedure for future designations to the WSRS [Wild and Scenic Rivers System]. See id. § 1273(a). WSRS components are administered by the Secretary of the Interior (including any component administered by the Secretary of the Interior through NPS or the Fish and Wildlife Service) or, if the river falls within a national forest, the Secretary of Agriculture. See id. § 1281(c)-(d)...The WSRA framework designates rivers based on specific ‘outstandingly remarkable values’ (ORVs) which both justify the initial designation of a river as a WSRS component, see id. § 1271, and provide the benchmark for evaluating a proposed project affecting a designated river. [italics added]. While, under the WSRA, protecting and enhancing the designated ORVs is paramount. ‘Each component of the [WSRS] shall be administered in such manner as to protect and enhance [those ORVs that] caused it to be included in [the WSRS] without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values’ [, with] primary emphasis . . . given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Id. § 1281(a)...The WSRA further recognizes that ‘[m]anagement plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.’ Id. To the extent that the WSRA conflicts with the Wilderness Act, id. § 1131-1136, or statutes administering the national park system and national wildlife system, the WSRA instructs that ‘the more restrictive

provisions shall apply.’ Id. § 1281(b)(c). The WSRA requires the administering agency to ‘take such action respecting management policies, regulations, contracts, [and] plans . . . as may be necessary to protect such rivers in accordance with’ the WSRA, and ‘cooperate with the . . . Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.’ Id. § 1283(a)...” *Friends of Yosemite Valley v Kempthorne*, 520 F. 3d 1024, 1027-1028 ( 9th Cir. 2008)(italics added).

This “as may be necessary to protect” provision (16 U.S.C. §1283(a)) plainly states the intensity of effort which the United States Forest Service must undertake in order to discharge properly the following non-discretionary duty: “In such administration *primary emphasis shall be given to protecting...[a river’s] esthetic, scenic, historic, archeologic, and scientific features.*” 16 U.S.C. §1281(a). (italics added for emphasis).

Stated differently, the USFS **must do everything possible** to comply with the duty to place primary emphasis on protecting a river’s unique scientific features. Id.

In order for any esthetic, scenic, historic, archeologic, or scientific feature to be viewed as an Outstandingly Remarkable Value of a river, the feature must be a unique, rare, or exemplary feature that is significant at a comparative regional or national scale.

The ORVs are identified prior to a river’s designation as a national Wild and Scenic River (“WSR”).

Hence, the Forest Service prepared a baseline study of the Chattooga River in 1971—before these headwaters got designated as a national Wild and Scenic River in 1974. See **Exhibit 1**, *Wild & Scenic River Study Report, Chattooga River*, USDA, Forest Service Southern Region, June 15, 1971 (AR doc Q-1)(the “1971 Baseline Study”).

The USFS published the Baseline Study in 1971 to provide members of Congress with a way to decide whether or not to designate the Chattooga River as the first national Wild and Scenic River east of the Mississippi River. A copy was placed into the administrative record (“AR”) as AR document “Q-1”.The Table of Contents for the 1971 Baseline Study entitles Chapter V as “Description of the River”. Id. at pdf. p. 7. Chapter VI is entitled “Description of Adjoining Lands.” Id. The ORV’s which the USFS wanted to protect by securing WSR designation for the Chattooga River are described in detail within Chapters V and VI.

The 1971 Baseline Study doesn’t provide an enumerated (“1,2, 3”) list of ORVs.

Instead the USFS identified the baseline ORV’s by distinguishing and highlighting the unique, rare, or exemplary features of this river which were understood to be significant at a comparative regional or national scale in 1971.

Stated differently the 1971 Baseline Study evokes the common sense principle of proving the validity of a hypothetical by demonstrating the truth of the claim instead of summarily asserting that the proposition is true.

To expand on this point, the 1971 Baseline Study pinpoints different geographic sections of the Chattooga River where unique and noteworthy ORVs, 16 U.S.C. §1271, were known to be present at that baseline point in time.

Chapters V and VI provide a much narrower and more detailed description of the various ORV's which were introduced generally to encompass "scenic, recreational, geological, *biological*, historical, and related values and assets." Supra, the 1971 Baseline Study at p. 15(italics added).

The Baseline Study demonstrates by detailed descriptions what the ORVs were understood to be in 1971. This can be seen by examining several specific examples.

First, specific geographic sections of the river in South Carolina and Georgia were distinguished from the river in North Carolina because they possessed remarkable historic (archeological) values.

The 1971 Chattooga Study drew this geographic distinction by describing how critically important trading trails created and used by the Creek Nation and the middle Cherokees historically traversed the river in South Carolina and Georgia and connected the large Native American towns of Keowee, 20 miles east of the river, and Stekoa, 10 miles west of the river. Id. at pp.41-43 (pdf pp. 55-57).

In particular, the 1971 Chattooga Study highlighted the historic archeological value of three different Creek Nation and middle Cherokee trails. Id. at p.42 (pdf p.56).

The 1971 Chattooga Study also pinpoints the location of two Native American villages that were located near the Chattooga River in South Carolina/Georgia: Chattooga Old Town and Kanuga (Cherokee translation "Blackberry Patch"). Id.

In contrast, the 1971 Chattooga Study differentiates how the lands which steeply entrench the narrow headwaters in North Carolina were only used by the Cherokee as more distant hunting grounds. Id. at p.53 (pdf p.69). There were no villages in North Carolina.

The 1971 Chattooga Study never explicitly states these constitute historic/archeological ORVs. Instead, the Baseline Study demonstrates this reality through a detailed description about how these historic/archeological values were unique to specifically pinpointed geographic locations on the river.

Second, the 1971 Study pinpoints geographic segments of the river where unique physical landscape features, points of interest, and waterfalls are located. Id. pp. 43-50 (pdf pp.57-63).

Third, the Study draws a distinction about how most of the timber value was present in South Carolina and Georgia. *Id.* at pp. 50-52 (pdf pp. 66-68). In stark contrast, the North Carolina part of the river corridor was documented as having de minimis timber value.

Fourth, and critical to my objection, the 1971 Baseline Study sharply differentiated between paragraph “D. Fisheries” at pp. 19-22 (pdf pp. 31-34)) and paragraph “E. Recreation Opportunities” at pp.22-25 (pdf pp. 34-37) within Chapter V, Description of the River. The Table of Contents *emphasizes* this purposeful distinction by treating “*Fisheries*” and “*Recreation Opportunities*” as entirely separate topics

To reiterate, the WSRA makes clear from the start how “fish and wildlife” resources constitute an ORV to be distinguished from the recreational use ORV: Congress directs that “certain... rivers...with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, *fish and wildlife* historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.”16 U.S.C. § 1271 (*italics added*). Accordingly, the 1971 Chattooga Study treats the river’s “*Fisheries*” as a unique form of ORV while assessing and inventorying the Outstandingly Remarkable Values which were understood to be present on this river in 1971.

To amplify on this point, Chapter V further distinguishes “*Fisheries*” as an entirely separate category of assessment from “*Water Quality, Quantity and Flow*”. *Id.*

The 1971 Baseline Study drew these organizing distinctions for the specific purpose of highlighting how the river’s “*Fisheries*” was one of the river’s *unique biological values* which should be viewed as being significant at a comparative regional or national scale in 1971—an Outstandingly Remarkable Value which was inherently different from the river’s recreational values.

To reiterate, the 1971 Baseline Study explicitly stated how the Outstandingly Remarkable Values of the Chattooga encompassed unique “biological... values and assets” *Id.*at p.5 (pdf. p.15).

The Baseline Study doesn’t explicitly list (“A., B., C.”) what these “biological... values and assets” were in 1971.

Instead, the Study differentiates the river’s “*Fisheries*” by geographic location in order to distinguish how individual geographic segments of the river possessed comparatively different biological capacities for sustaining naturally reproducing populations of different species of fish.

The 1971 Study made clear this distinction in order to inform how the North Carolina headwaters possessed a unique biological capacity for sustaining excellent densities and biomass of naturally reproducing assemblages of rainbow, brown, and brook trout.



The common sense fact is the meaning of the word “excellent” is synonymous with the dictionary definition of “outstanding”.

This unique biological capacity constitutes the Outstandingly Remarkable Value which demonstrates why the North Carolina headwaters should be managed entirely differently from the segments of the river flowing further downstream in South Carolina/Georgia.

The 1971 Chattooga Study makes clear how the headwaters in North Carolina possessed a unique trout stream productivity which compared favorably against the better trout streams in all three states through which the river flows.

The 1971 Study implicitly uses the phrase “stream productivity” as an analogous term for the river’s outstandingly remarkable biological capacity for maximizing successful spawning by mature trout and early life cycle survival of newly hatched alevin. Id. pp. 19-23 (adobe pages 31-34) (AR document Q-1).

To confirm how the term “productivity” equates to biological reproductive capacity, consider how the 1971 Study similarly uses “productivity” in discussing the Biological Investigation of Streams in the Chattooga River Basin. The 1971 Study shows how the term “productivity” gets used in discussing the relationship between macroinvertebrates and “plankton”.

The 1971 Baseline Study reports: “The Chattooga River and its tributaries possessed a highly diverse macroinvertebrate fauna in terms of species. Many [pollution] intolerant species were present... While a very diverse macroinvertebrate fauna was present at Stekoa Creek Station, a great increase in the number of hydrophyichid caddisfly larvae *was indicative of greater plankton productivity*, a reflection of high nutrient concentrations.” Plaintiff’s Exhibit 1-A at p.17 (adobe file page 27)(italics added).

Stated differently, the special biological capacity of this plankton to reproduce in measurably greater than normal amounts was recognized as having caused a concomitant increase in higher densities of hydrophyichid caddisfly larvae.

How “plankton productivity” describes a unique biological capacity for causing greater numbers of caddisfly larvae also evidences how the phrase “stream productivity” was intended to inform on a biological capacity which was understood be unique to the North Carolina headwaters.

The 1971 Baseline Study used the term “stream productivity” in order to memorialize how these headwaters possessed a unique outstandingly remarkable biological reproductive capacity which was capable of sustaining a much higher than normal numeric density and biomass of naturally reproducing assemblages of trout. Exhibit 1 at p.20 (pdf p.32).

This unique “stream productivity” or biological capacity also equates to an outstandingly remarkable “scientific feature”(16 U.S.C. §1281(a)) of these headwaters.

This “scientific feature” was understood to be what was unique about the headwaters in North Carolina. However, the 1971 Study makes clear that this wasn’t a distinguishing feature present on the segments of river flowing further downstream in South Carolina/Georgia.

To be specific, the “Fisheries” section of the 1971 Chattooga Study explicitly states how the Chattooga River possessed a trout “*stream productivity*” which ranges “*from excellent in upper areas [in North Carolina] to extremely marginal in lowermost reaches [in South Carolina and Georgia].*... *Stream productivity is best discussed by dividing the river...into 5 sections...[:]* [1]...Headwaters to Bullpen Bridge- (7.7 miles)...*The Chattooga River and its tributaries above this point [Bull Pen Iron Bridge in North Carolina] are excellent trout waters, comparing favorably with the better streams in all three states.* Brown trout are dominant, although rainbow are common in this section. Brook trout are present in most of the tributaries. *No stocking is done above the Bullpen Bridge.* [italics added] [2] Bull Pen Bridge to Highway 28- (16.6 miles)...This section of stream is providing fair to good fishing for wild rainbow and brown trout, with brown trout the predominant species. *Best fishing for wild fish is in the upper reaches [on those segments immediately straddling the North Carolina/South Carolina border and reaching back upstream to the Bull Pen Iron Bridge.]*[3] Highway 28 Bridge to Highway 76 Bridge - (19.1 miles)...The Chattooga River in most of this section [in South Carolina and Georgia] is considered marginal for trout, due to high water temperatures.[4] Highway 76 to Tugaloo Lake- (7.8 miles)...This section [in South Carolina and Georgia] is the only portion not suitable for classification as a trout stream. It is primarily a Redeye bass-redbreast sunfish stream, although, according to local...[anglers] occasional trout are taken here. Stream temperature is definitely too high for trout but good for bass. [5] West Fork of Chattooga River- (7.3 miles)... The West Fork [located exclusively in Georgia] is a large stream furnishing fairly good fishing for...trout in its lower reaches. The wild trout fishery there is supplemented by a stocking program of approximately 3,000 catchable-size trout per year. The section of West Fork above Overflow Bridge to Three Forks provides better fishing for wild trout than the area below the bridge. This area is inaccessible and is not included in stocking programs...The three tributaries joining at Three Forks include Holcomb Creek, Overflow Creek and Big Creek. All three are basically good streams providing excellent fishing for brown and rainbow throughout most of their length, and for brook trout in some of the upper tributaries...Holcomb Creek, lying entirely in Georgia, is in relatively good condition, receiving only minor siltation from a gravel system road. It contains an excellent population of wild brook and rainbow above the upper falls, and brown and rainbow below the falls. Approximately 2,000 fish are stocked annually on the Billingsley Creek Section of Holcomb Creek...Overflow Creek, originating in Blue Valley, North Carolina, is in excellent condition until it reaches the Georgia line where recent road construction just below the State line has created a serious siltation problem. The population of both brown and rainbow trout in this section was excellent prior to construction. Effects of the project on the trout population have not been evaluated. [italics added]. Only the headwaters [of Overflow Creek] in North Carolina are stocked with hatchery fish...Big Creek also originates in North Carolina and then flows into Georgia. This stream carries a fairly heavy load of sand and fine sediment

throughout much of its length [presumably because of human land disturbing activities in the upstream watershed] but still provides a fairly good fishery for wild brown trout. Rainbow trout are present in much smaller numbers.” the 1971 Chattooga Study, supra, at pp. 19-21 (adobe pdf pp. 31-33) (AR document Q-1).

To reiterate, the 1971 Baseline Study states the “Chattooga River and its tributaries above this point [the one lane Bullpen Iron Bridge in North Carolina] *are excellent trout waters, comparing favorably with the better streams in all three states.*” Id.p. 20 (pdf p.32) (italics added).

The critical distinction is that trout “stream productivity” varies by geographic segment of river.

The Chattooga River and its tributaries upstream of the one lane Bullpen Iron Bridge were understood to possess a unique trout stream productivity (e.g. a biological capacity for sustaining outstanding densities of wild trout) which was superior to those segments of the river flowing downstream in South Carolina and Georgia.

The administrative record memorialized by the 1971 Baseline Study evidences how these headwaters possessed a remarkable biological capacity for sustaining outstanding densities/biomass of naturally reproducing assemblages of trout.

This outstandingly remarkable trout stream productivity constitutes a “scientific feature” which stands separate from making use of this ORV for recreational purposes.

The WSRA does not define what constitutes a “scientific feature”.

Nevertheless, the phrase possesses a plainly ascertainable meaning.

“Features” constitutes a noun which refers to the full set of individually identifiable “prominent characteristic[s] of something.” Funk and Wagnalls Standard College Dictionary 1968.

Similarly, the adjective “scientific” refers to a type of “feature” whose existence can be validated “through knowledge of facts, laws and proximate causes...verified by exact observation, organized experiment, and ordered thinking. Id.

The Baseline Study demonstrates how the “Fisheries” present on these headwaters were understood to constitute a unique “feature” of these headwaters capable of being differentiated “through knowledge of facts, laws and proximate causes...verified by exact observation, organized experiment, and ordered thinking.” *Funk and Wagnalls Standard College Dictionary* 1968.

Stated differently, the 1971 Baseline Study distinguished for Congress: (1) how the Chattooga River upstream of the Bull Pen Iron Bridge in North Carolina possessed a “*stream productivity*” which was “*excellent*” and which compared “*favorably with the better streams in all three states.*” (2) how this “stream productivity” presumed a remarkably distinguishable biological capacity for sustaining excellent densities and biomass of naturally reproducing assemblages of

trout; (3) how this biological capacity constitutes an outstandingly remarkable “*scientific feature*” which differentiates the North Carolina headwaters from all other sections of the river further downstream in South Carolina and Georgia. *1971 Chattooga Study*, supra, at pp. 19-20 (pdf pp. 31-32) (italics added)(AR doc.Q-1).

This constitutes what is most legally significant about the 1971 Chattooga Study.

The fact that this trout stream productivity can be used for recreational purposes does not change the fact that this outstandingly remarkable biological capacity for sustaining the excellent densities of wild trout was understood to be the quintessential “scientific feature” of these headwaters in 1971.

Neither does this excuse the Forest Service from discharging properly the non-discretionary managerial duty imposed by the second sentence of 16 U.S.C. §1281(a).

The second sentence of 16 U.S.C. §1281(a) compels the USFS to manage these headwaters by placing primary emphasis on protecting this scientific feature.

As such—even if recreational sport fishing for trout were to be prohibited on these headwaters for some inconceivable reason—the Forest Service must still place “primary emphasis” on “protecting” this unique “scientific feature”, this unique biological capacity for sustaining excellent densities and biomass of naturally reproducing assemblages of rainbow, brown, and brook trout. 16 U.S.C. §1281(a). Here is why.

The national Wild and Scenic Rivers Act (“WSRA”) uses plainly stated words to describe what must be done to manage this outstandingly remarkable “scientific feature”.

First, Congress compels the Forest Service “shall take such action respecting management policies, regulations, contracts, plans, affecting such lands...*as may be necessary to protect* such rivers in accordance with the purposes of this chapter.” 16 U.S.C. §1283(a)(italics added).

“[A]s may be necessary” mandates the intensity of the protection. *Id.*

This translates into “shall” do everything necessary to protect the river’s ORVs.

More discretely, Congress has directed the USFS shall manage this river according to the following ascertainable standard: “Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the [outstandingly remarkable] 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 [outstandingly remarkable] values. In such administration *primary emphasis shall be given to protecting its* esthetic, scenic, historic, archeologic, and *scientific features*. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.” 16 U.S.C. §1281(a)(italics added).

Most critical, the second sentence of §1281(a) directs that a specific subset of five narrow types of ORVs must be treated entirely differently from all other ORVs identified in the 1971 baseline study.

More specific, the second sentence of §1281(a) compels the USFS “shall” manage these headwaters by placing “primary emphasis” on “protecting” the unique “scientific features” of these headwaters. 16 U.S.C. §1281(a)(italics added).

My objection recognizes how courts “review questions of statutory construction de novo.” *Orquera v. Ashcroft*, 357 F.3d 413, 418 (4th Cir.2003).

My concerns involve a challenge to an agency's construction of a statute. The courts are anticipated to apply the two-step analytic framework set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

At the first step of *Chevron*, a court looks to the “plain meaning” of the statute. At step one, “[i]f the statute is clear and unambiguous ‘that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) (quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778). A statute is ambiguous only if the disputed language is “reasonably susceptible of different interpretations.” *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n. 27, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). “The objective of *Chevron* step one is not to interpret and apply the statute to resolve a claim, but to determine whether Congress's intent in enacting it was so clear as to foreclose any other interpretation.” *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1377 (Fed.Cir.2011). Courts should employ all the traditional tools of statutory construction in determining whether Congress has clearly expressed its intent regarding the issue in question. *Chevron*, 467 U.S. at 843 n. 9, 368\*368 104 S.Ct. 2778; *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 504 (4th Cir.2011). In construing a statute's meaning, the court “begin[s], as always, with the language of the statute.” *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). However, when conducting statutory analysis, “a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning — or ambiguity — of certain words or phrases may only become evident when placed in context.” *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (internal citation and quotation marks omitted)

The meaning of the words used in a statute can be given context by applying five types of interpretive tools: the plain meaning of words, the statutory context in which words appear, the canons of statutory construction, legislative history, and evidence of the way in which the statute has been implemented.

The three sentences of §1281(a) employ words which have a plainly stated meaning capable of being ascertained by applying these rules.

There is no ambiguity about what Congress plainly states in the second sentence of 16 U.S.C. §1281(a).

The second sentence explicitly distinguishes five subcategories of ORVs which must be managed differently from all other ORVs. “In such administration primary emphasis shall be given to protecting...esthetic, scenic, historic, archeologic, and scientific features.” *Id.*

This interpretation complies with the anti-surplusage canon of statutory construction. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178, 185 L. Ed. 2d 242 (2013) (noting the canon against surplusage).

To explain, the second sentence of §1281(a) uses the qualifying phrase “primary emphasis” to describe the manner in which the USFS must go about “protecting” this subset of five explicitly enumerated types of ORVs which the statute differentiated and distinguished as special “features” of the river.

“Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality.” *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. \_\_\_, \_\_\_, 139 S.Ct. 361, 368, 202 L.Ed.2d 269 (2018).

In this case the adjective “primary” should be construed to mean “first in degree, rank, or importance”. See *Funk and Wagnalls Standard College Dictionary* (1968).

Hence, in this statute, the use of the word “primary” describes the level of priority or intensity of “emphasis” which must be discharged in “protecting” a narrowly enumerated list of ORVs consisting of the river’s “esthetic, scenic, historic, archeologic, and scientific features” 16 U.S.C. §1281(a)(italics added).

The word “emphasis” refers to a special significance or importance assigned to something. *Funk & Wagnalls Standard College Dictionary*.

If considered in the full context of the statute, the term “emphasis” implies some form of a conscious choice should be made by the Forest Service between several alternative courses of action.

In the first sentence of §1281(a), Congress compels that the headwaters of the Chattooga River “shall be administered in such manner as to protect and enhance the [outstandingly remarkable] values which caused it to be included in said system...” *id.*

However, there is a night and day difference between taking actions which protect an ORV from any physical degradation and taking actions which enhance an ORV.

To explain, Congress made clear this critical legal distinction by what the second sentence of §1281(a) plainly states: “In such administration *primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.*” id. (italics added).

Notably, the second sentence of 1281(a) omits the term “enhance”.

Congress did so intentionally.

In other words, Congress specifically compels the USFS to place “primary emphasis” on “protecting” a narrow subset of five specifically enumerated ORVs while simultaneously eliminating the agency’s discretionary authority to redirect budgetary and personnel resources towards enhancing any ORV not otherwise enumerated in the second sentence of §1281(a)—in particular recreational uses of the river—like boating.

Stated differently, the use of the phrase “primary emphasis” in the second sentence of §1281(a) compels the USFS to prioritize between taking actions which either “protect” or “enhance” the Chattooga’s administratively recognized ORVs—as Congress has instructed the agency must do in the first sentence of §1281(a).

Protection must take priority.

This interpretation avoids rendering superfluous any other provisions of §1281(a).

The second sentence of §1281(a) specifically mentions the “scientific features” of a river as one of the five ORVs which must be given “primary emphasis” protection but noticeably omits any mention of the ORV associated with recreational uses of a river.

What must be done to satisfy the non-discretionary duty spelled out in the second sentence of §1281(a) is informed by what each and every federal agency must do in managing its annual budget while discharging the various statutory responsibilities which have been imposed upon the agency by Congress.

To explain, the federal government’s fiscal year runs from October 1 of one year to September 30 of the next year. Each year, Congress allocates a limited amount of financial resources to each department of the United States government and their underlying agencies. This stands true for every agency.

Consequently, each federal agency must consume the limited financial resources allocated to them by Congress to achieve the duties which Congress has instructed them to discharge.

Each agency must do so according to some plan of expenditure (e.g a budget) which takes into account the need to prioritize the consumption of these resources by first making sure that the agency uses its limited resources for fulfilling any statutory mandated objectives or non-discretionary duties which Congress has instructed the agency to achieve.

By implication, an agency must dedicate more of its time, talents , and financial resources towards achieving this mandated objective as compared against the amount of resources expended on any other initiative impacting the North Carolina headwaters of the Chattooga River. This constitutes the common sense way that the agency might satisfy the duty requiring an agency to place “primary emphasis” on achieving some statutory mandated objective.

The national Wild and Scenic Rivers Act provides the Forest Service with a discrete and non-discretionary instruction about how the agency must use its limited budgetary resources when managing national Wild and Scenic Rivers.

The second sentence of 16 U.S.C. § 1281(a) prohibits the USFS from expending too much of its limited financial and personnel resources on protecting some ORV which does not fall within the five expressly stated categories of “features” owed “primary emphasis” protection.

Similarly, the second sentence of §1281(a) prohibits the Forest Service from using any of its resources to “enhance” some other ORV (like a recreational use of the river) which hasn’t been enumerated as one of the five specific “features” owed “primary emphasis” protection.

Nevertheless, the USFS hasn’t spent a penny protecting the trout while consuming hundreds of thousands of dollars and more than a decade of time enhancing a single recreational use of the headwaters of the Chattooga River: whitewater creek boating.

To press this point, for the 11 months between May 2005 and April 2006, the Forest Service admitted having spent over “\$335,000 in contracting fees...and \$425,000 in staff costs (not including travel and consultant costs)” developing the visitor use capacity study upon which it justified introducing the sport of whitewater creek boating to these headwaters. See the DECLARATION OF CHRIS LIGGETT, ECF # 11-1 at pages 2-3 (July 7, 2006), *American Whitewater, et al. v. Dale Bosworth*, 2:06-cv-00074-WCO N. Dist. GA (the “AW 2006 Lawsuit”).

This was unlawful. This is unlawful.

The Forest Service’s violation of this prohibition should be viewed as purposeful.

To explain, the Forest Service’s violation of the law should be viewed as purposeful because the leaders of this agency used their authority and power to create a legally unentitled recreational use accommodation for their friends at the same time one of these five explicitly enumerated features was known to be suffering physical degradation or deterioration.

Specific to this objection, no budgetary resources should be expended to “enhance” a recreational use of the Chattooga River until the Forest Service has reestablished the river’s once outstanding but now degraded biological capacity for sustaining outstanding numeric densities and biomass of naturally reproducing assemblages of trout.



This constitutes the proper construction of 16 U.S.C. §1281(a).

To claim otherwise would endorse statutory surplus by turning the phrase “primary emphasis” into an entirely illusory standard of care—where the United States Forest Service could haphazardly pick and choose what ORVs the agency wished to protect and enhance on each and every national Wild and Scenic River—under each changing Presidential administration.

The Wild and Scenic Rivers Act demands that the managers do everything possible to prevent any non-temporary physical deterioration in the river’s ORVs—as originally described in the 1971 Baseline Study in the case of the Chattooga River.

Hence, in order to place “primary emphasis” on “protecting” the “scientific feature” (which the USFS administratively described to Congress as being unique to these headwaters) the Nantahala National Forest must expend as much of its annual budgetary resources “as may be necessary”, 16 U.S.C. §1283(a), to make sure that the North Carolina headwaters of the Chattooga River retains a biological capacity capable of sustaining outstanding numeric densities and biomass of naturally reproducing assemblages of three different species of trout: rainbow, brown, and brook trout.

This interpretation harmonizes the intensely protective purposes of the WSRA while avoiding any statutory surplus.

The USFS has misused it’s Congressional funding in a way that violates the non-discretionary duty spelled out in §1281(a) as further informed by §1283(a).

The senior leaders of this agency have improperly placed primary managerial emphasis on delivering recreational use enhancements to whitewater paddlers instead of placing primary emphasis on protecting these headwaters biological capacity to sustain outstanding numeric densities and biomass of wild trout.

Just as important, in 1989, the intense standard of care which the USFS owes a duty to discharge pursuant to the second sentence of §1281(a) was further intensified and made even more discrete and non-discretionary when the state of North Carolina reclassified these headwaters as Outstanding Resource Waters.

## **HOW ORW RECLASSIFICATION INTENSIFIED THE DUTIES OWED BY THE USFS**

The ORW reclassification of these headwaters in 1989 imposed the highest intensity of Clean Water Act (“CWA”) antidegradation protections upon a single subcategorized designated use of the river’s ORW water quality: the outstanding reproductive quality of the in stream trout habitat and that habitat’s unique biological capacity for sustaining outstanding densities and biomass of naturally reproducing assemblages of trout.

The state of North Carolina did so in specific response to a petition for reclassification which was submitted by the Rabun County, Georgia Chapter of Trout Unlimited on October 30, 1987 (“Rabun TU”).

The 1987 Rabun TU petition asserts: “...the entire Chattooga River watershed qualifies for the classification of ‘Outstanding Resource Waters’ because ...[1] There is outstanding native trout habitat and fisheries; including Eastern Brook trout, Rainbow trout and Brown Trout...[ 2] A wild and remote trout stream with the size, beauty and water quality of the Chattooga River is unique in the Eastern United States...” See **Exhibit 9** at p.1 (pdf p.2) 1987 Petition for Chattooga River ORW.pdf”(hereinafter the “Rabun TU Petition”)(otherwise on May 17, 2018 placed into the AR as Floyd document N-22)( shared with Floyd on October 12, 2017 by Ms. Heather Patt, the Savannah River basin planner for the state of North Carolina.

This baseline biological capacity for sustaining outstanding numeric densities and biomass of naturally reproducing assemblages of trout constitutes the subcategorized designated use of this river’s ORW water quality. This subcategorized designated use of ORW water quality must not be tolerated to suffer any non-temporary functional deterioration caused in part by human recreational activities.

This subcategorized designated use of ORW water quality (e.g. this biological capacity for sustaining outstanding numeric densities and biomass of naturally reproducing assemblages of trout) constitutes the identical “scientific feature”, 16 U.S.C. §1281(a), which the Chattooga Baseline Study described to Congress in 1971.

By logical implication, there is no way for the USFS to discharge its 16 U.S.C. §1281(a) enumerated duty to place “primary emphasis” on “protecting” this “scientific feature”, without also adhering to the conceptual constraints of the CWA’s antidegradation mandate as further informed by the regulations and guidelines of the United States Environmental Protection Agency (“EPA”).

To explain, Rabun TU filed its petition in October 1987—just seven (7) months after Congress passed the Water Quality Act in February 1987.

One of the central purposes for passage of the Water Quality Act of 1987 was to provide the highest intensity of statutory protection for the subcategorized designated uses of the highest water quality known to be present on the nation’s most outstanding bodies of water.

The Water Quality Act of 1987 expressly codified the antidegradation policy which had been previously articulated by the Water Quality Standards Regulation (40 CFR 130.17, 40 F.R. 55340-41, November 28, 1975) (but without explicit Congressional endorsement), as further informed and re-promulgated as part of the updated program of regulation published on November 8, 1983 (48 F.R. 51400, 40 CFR 131.12).

Section 404(b) of the Water Quality Act of 1987 specifies that for any water body whose water quality “exceeds levels necessary to protect the designated use for such waters ... any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.” Pub. L. 100–4, Title IV Permits and Licenses, §404(b), 101 Stat. 7, 69 (italics added)(codified at 33 U.S.C. §1313 (d)(4)(B)). This constitutes the antidegradation mandate. The phrase “any other permitting standard”, *id.*, alludes to its all-encompassing scope.

The administrative record suggests that these trout anglers wanted to take advantage of the newly codified antidegradation mandate (as further informed by regulation).

The Rabun TU petition further depicted how “this watershed presently has exceptional water quality with no significant impacts from pollution. We also feel that this watershed’s unique characteristics and quality may not be protected without classification as ‘Outstanding Resource Waters.’ ” **Exhibit 9**, *supra*, at p. 2 (pdf p.3)(italics added)(AR document N-22).

I shared a copy of this petition with the USFS on May 17, 2018.

The USFS has obstinately ignored the critical legal importance of this administrative record while revising the LRMP for the Nantahala and Pisgah National Forests.

Neither the 2022 EIS nor LRMP discloses any of this administrative history.

The Rabun TU petition specifically identified the “outstanding native trout habitat and fisheries; including Eastern Brook, Rainbow, and Brown trout” as the something *extra special* which these petitioners intended to protect in 1987 based on the antidegradation mandate. *Id.*

This outstanding native trout habitat and fisheries equated to an “exceptional resource value” as that term had meaning under the version of 15A NCAC 02B.0225(d), 15A NCAC 02B.0225(b) which were in effect from 1989 until November 1, 2019.

Strangely, on November 1, 2019, the concept of “exceptional resource value” was quietly removed from the North Carolina Administrative Code.

This change in the administrative code was particularly odd given what the state of North Carolina said in 1989.

In 1989, the state of North Carolina responded to Rabun TU’s 1987 Petition by publishing the 1988 Report of Proceedings. This Report found: “The Chattooga River Basin was petitioned for consideration as ORW by the Rabun, Georgia Chapter of Trout Unlimited and Friends of Norton Mill Creek...*Several reasons have been cited as the basis for this reclassification request including...an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout.*” **Exhibit 10** at p. S-8 (AR doc A-2) (italics added)(originally referenced by the state of North Carolina as the *Report of Proceedings For the Proposed Reclassification of Fires*

*Creek In The Hiawassee River Basin (Cherokee County), Cataloochee Creek In The French Broad River Basin (Haywood County), Upper South Fork Mills River In The French Broad River Basin (Henderson And Transylvania Counties), Wilson Creek In The Catawba River Basin (Avery And Caldwell Counties), Elk Creek In The Yadkin-Pee Dee River Basin (Watauga And Wilkes Counties), Upper Nantahala River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Clay Counties), And Chattooga River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Jackson Counties),* North Carolina Department of Natural Resources And Community Development, Division of Environmental Management, Public Hearings, August 1-4 1988 (the "1988 Report of Proceedings")(AR document "A-2").

Ms. Heather Patt, the former Savannah River Basin Planner, North Carolina Department of Environmental Quality emailed this report to Floyd on November 16, 2015, @ 4:38 pm via an attachment entitled "Chattooga Classification history.pdf".

Rabun TU petitioned for ORW reclassification in order to protect the in stream trout habitat on these headwaters from being degraded by any future increase in poorly managed residential and golf course development taking place within the upstream watershed proximate to Cashiers, North Carolina.

This has proven to be a prescient far in advance fear given a number of land disturbing developments currently seeking or having already obtained Section 401 water quality certification and Section 404 regulatory dredge and fill permits.

One of these development projects became the subject of a notification of Unauthorized Activity ("UA") issued by the United States Army Corps of Engineers ("USACE") on January 8, 2019 subsequent to a site inspection made on December 18, 2018 of the land disturbing activities associated with the redesign of the High Hampton golf course.

The USFS knows but does not want to admit how the 1988 Report of Proceedings described how Rabun TU's petition got processed: "The DEM staff conducted a study of the Chattooga River Basin in January 1988 and collected information on the chemical/ physical and biological characteristics ...at 12 locations...Most sites in the Chattooga River basin had very good water quality characterized by low conductivities, high dissolved oxygen and low nutrient concentrations. Fecal coliforms were detected only at the upstream site on Chattooga River, but at very low concentrations (30/100 ml). Residue values were elevated at 3 sites, indicating some land disturbance in those watersheds (Clear Creek, Upper Chattooga River, and Big Creek)." **Floyd Exhibit 10** at p. S-9 (1988 Report of Proceedings)(AR document A-2).

The 1988 Report of Proceedings concluded: "The Chattooga River Basin represents a case where there is not excellent water quality throughout the entire watershed. Only the portions of the Chattooga having excellent water quality are recommended for the ORW designation (see map on page S-31). *Based on...water quality...and fisheries information provided by the Wildlife*

*Resources Commission*, the Chattooga River from its source to the North Carolina-Georgia state line...and Scotsman Creek are recommended for ORW. Not recommended for ORW are North and South Fowler Creeks and associated tributaries, Green and Norton Mill Creeks, Cane Creek and associated tributaries, Ammons Branch , Glade and Bad Creeks, East Fork Chattooga River, Jacks Creek, and Clear Creek and associated tributaries." Id. at pages S-10 and S-11 (italics added).

By explicitly referring to the “*fisheries information*” associated with these headwaters the administrative record memorialized how Scotsman Creek (a brook trout tributary) as well as the main stem of the Chattooga River (reaching from their source near the village of Cashiers to where the river enters South Carolina/Georgia at a point known as Ellicott Rock) were understood to possess an outstanding in stream trout habitat capable of sustaining outstanding densities of naturally reproducing assemblages of rainbow, brown and brook trout.

This administrative declaration also proves how neither the main stem (reaching from its source to the North Carolina-Georgia state line) nor Scotsman Creek (a brook trout stream) were suffering from any form of visibly obvious water pollution problem in 1989—in particular an excessive bedded sedimentation problem—although the DEM may have had some concerns about pollution in the upstream watershed reaching the river via other tributaries.

The state of North Carolina’s 1988 Report of Proceedings never disputes Rabun TU’s use of the word “outstanding” in describing the critical importance of the “native trout habitat and fisheries; including Eastern Brook trout, Rainbow trout and Brown Trout...” at ORW reclassification. **Exhibit 9** at p.1 (pdf p. 2)(AR document N-22).

In fact, North Carolina tacitly endorsed the veracity of what was asserted by the Rabun TU petition.

To explain, in 1988/1989, the North Carolina Division of Environmental Management (“DEM”) embraced the use of the adjective “outstanding” to describe both the quality of the Chattooga’s in- stream trout habitat as well as the quality of the wild trout fishery.

This demonstrates how the in stream trout habitat and this habitat’s unique biological capacity for sustaining outstanding densities and biomass of naturally reproducing assemblages of trout was understood to constitute a *subcategorized designated use of the Chattooga’s ORW water quality* (as defined by 15A NCAC 02B.0225(b)(1) prior to the rule having been rewritten on November 1, 2019).

A subcategorized designated use of ORW water quality must not be allowed to suffer any non-temporary degradation in its proper functioning.

On July 28, 2017 @ 3:58 PM, I emailed a copy of this 1988 Report of Proceedings (and 169 other records) to Forest Supervisor Allen Nicholas.

On July 29, 2017, I asked for all these records to be posted to the public reading room being maintained during the revision of the LRMP. **Exhibit 4** pp. 1-6 (pdf pp.4-9)(AR doc. N-13-A).

The USFS censored me by refusing to use the public reading room to advise other interested members of the public about the existence of these critical administrative records.

This refusal to use the electronic reading room demonstrates how this agency constructs an administrative record which purposely conceals the truth about the obligatory legal duties owed to the trout on these headwaters.

The USFS knows that the densities of trout have crashed on these headwaters.

The USFS knows that the physical suitability of the stream bed habitat for sustaining successful spawning by mature trout and the early life cycle survival of newly hatched alevin has become excessively degraded.

The USFS knows that the non-temporary deterioration in the stream bed's suitability for successful spawning by mature trout has taken place because an excessive amount of fine particle sized sediments have been allowed to accumulate between the interstitial spaces of the gravels and the small rocks which rest on the bottom of the river.

For more than three decades, I have fly fished these remote headwaters on a catch and release basis. I am an eyewitness to the expanding accumulation of an excessive amount of sediments on the stream bed. I have personally experienced the exponential decline in trout population densities.

The scientific fact is the interstitial spaces between the gravels and small rocks that form the stream bed must be kept free of fine particle sized sedimentation in order for trout to spawn successfully and for their recently hatched alevin to survive during their first few weeks of life.

More than a foot of sediment now blankets extended segments of the stream.

This constitutes an irrefutable scientific fact.

This blanket of sediment prevents this river from sustaining the outstandingly remarkable densities of wild trout which were present at WSR designation in 1974 and at ORW classification in 1989.

Apparently, the Forest Service plans to assert that the accumulation of this fine particle sized sedimentation on the stream bed constitutes a non-actionable natural background condition of this river instead of the inevitable byproduct of decades of increasing managerial neglect by the Forest Service and the state of North Carolina.

To the contrary, the Forest Service's refusal to do its job constitutes the most important of several actionable causes for the non-temporary deterioration in these headwaters previously

remarkable biological capacity for supporting outstandingly successful spawning by mature trout and the early life cycle survival of their newly hatched alevin

The accumulation of this sedimentation on the parts of the river owned by the United States of America also constitutes the byproduct of poorly managed real estate development activities undertaken by private citizens in the upstream watershed of the Chattooga River.

The Forest Service has primary responsibility for managing the day to day beneficial uses on those sections flowing through the Nantahala National Forest.

The USFS must do so by properly discharging the non-discretionary duty spelled out by the second sentence of 16 U.S.C. §1281(a) of the national Wild and Scenic Rivers Act, as further informed and intensified by the antidegradation mandate of the Clean Water Act, 33 U.S.C. §1313(d)(4)(B).

Unfortunately, the United States Forest Service continues to stand by and do nothing to prevent or abate fine particle sized sandy sediments (<2mm in diameter) and silts (<.6mm) from filling in the interstitial spaces lying between the larger stream bed substrates (gravels up to 4.5 cm in size, and stream bed cobbles up to 30 cm in size) in quantities and percentages, which based on *the best available scientific information*, exceed any reasonable minimum effects threshold for significantly disrupting successful spawning by mature trout and the survival of their newly hatched alevin.

The Administrative Record being compiled during the revision of the LRMP has been supplemented to include evidence demonstrating how the agency's refusal to address this excessive embedded sediment problem has occurred in tandem with senior officials having made an ill-fated decision to afford special but legally unentitled recreational use accommodations to the demands of a small group of politically influential whitewater creek boating enthusiasts<sup>3</sup> (led by American Whitewater).

These senior leaders have inexplicably pushed this group's unentitled recreational use demands to the front of the administrative line. This was unlawful. This is unlawful.

On September 22, 2017, pursuant to the Freedom of Information Act (the "FOIA") I asked to be provided with copies of back and forth communications between American Whitewater and

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<sup>3</sup> Creek boating, also called creeking, or steep creeking, or treetop boating, constitutes an extreme and potentially life threatening sport pursued by a select group of the most skilled canoeing or kayaking enthusiasts. Creek boating tends to be more dangerous and extreme than other forms of kayaking and canoeing because it entails making dangerous descents of very steeply entrenched and narrow streams—during high flow events creating class V challenges—often in remote locations where portaging might prove impossible. Creek boating constitutes a relatively young sport that only became possible to pursue after plastic technologies evolved to allow the development of specialized canoes and kayaks that are designed to withstand life threatening failures—such as a boat being broken in two pieces by the forces of water and rock that characterize the whitewater environment in which this sport is pursued.

Forest Service officials (for a narrow window of time)—including any communications with Mr. Tony Tooke who had just been promoted on September 1, 2017 from the Regional Forester for the Southern Region to Chief of the USFS.

As the Forest Service knows, this simple request for non-privileged factual information was treated in a highly prejudicial way. This request for documents was treated entirely different from the way that each of my prior 26 requests had been processed prior to Mr. Tooke having been appointed Chief of the United States Forest Service.

Subsequent to September 6, 2017, the agency began depriving me of the information gathering rights which arise because of the public participation mandate of the National Forest Management Act. The USFS started refusing to provide detailed answers to questions about the agency's ongoing management of the North Carolina headwaters of the Chattooga River.

Specific USFS officials began stating an unwillingness to review the specific way that these headwaters should be managed going forward under a new LRMP.

The agency began fabricating a justification for refusing to modify how these headwaters should be managed despite having been provided with credible evidence that the current management policies were encouraging violations of the existing Forest Plan as well as the Clean Water Act and the national Wild and Scenic Rivers Act.

The agency neglected to spend even a penny of its budgetary resources on remedying the degrading reproductive suitability of the in stream trout habitat and that habitat's current inability to sustain numerically outstanding densities, biomass, and species assemblage of wild trout.

This was unlawful. This is unlawful.

On July 28, 2017, I provided former Forest Supervisor Hurston Nicholas with an annotated set of photos. These photos demonstrated how the creek boater constructed use of an unregulated system of boat launch sites, river evacuation points and portage trails continues to cause the physical displacement of soils in the trout buffer and the discharge of those soils into the water. See AR doc. See **Exhibit 11** (AR doc G-3). Paddlers must do so in order to portage around potentially life threatening pieces of Large Woody Debris ("LWD") blocking the current line.

Hard-bottom whitewater creek boats being repeatedly seal launched across the top of a river bank and into a river during high flows are known to cause damage to river banks.

To explain, during high currents (>350 CFS), a creek boater would experience significant difficulty, and in fact would be precluded from putting their boat into the Chattooga before



entering its cockpit, because the ripping current would sweep them both away. Instead, by necessity, the paddler must first climb into the cockpit of a six foot, forty pound kayak, and then launch the weight of their body and the boat into this narrow creek by propelling the bottom of the boat across the top of the bank while simultaneously using their hands or paddle to accelerate the force of that forward motion. This is referred to as seal launching.

The destructive act of seal launching is functionally analogous to a plow blade being pushed/pulled by a tractor across the fragile trout buffer.

The repeated seal launching of hard plastic bottom kayaks across the top of the river bank strips away the ground cover and exposes the erosive soils.

The repeated seal launching of boats across highly erosive soils will ultimately result in a break in the top of the bank where the boat slides into the water.

When the rains come, this break in the top of the bank eventually turns into a large gully in the bank.

These human created gullies soon become chronic erosion sites where displaced soils suspended in runoff get channeled into an ORW body of water which lacks any assimilative capacity to absorb any additional inputs this type of water pollution.

This explains how the Forest Service's continuing promotion of creek boating has endorsed the unlawful creation of point sources of water pollution on the North Carolina headwaters of the Chattooga River.

This violates the antidegradation mandate of the Clean Water Act.

In addition to seal launching across the top of the river bank, creek boaters must also portage around pieces of large woody debris (LWD")(fallen trees) which often span the entire width of the river and which pose potentially life threatening risks to paddlers.

The whitewater paddling community refers to pieces of LWD lodged in a river and blocking the current line as "strainers", logs, and logjams.

The science is well established that the presence of a large number of LWD constitutes a critical component for preserving an outstanding in stream trout habitat capable of sustaining outstanding densities and/or biomass of naturally reproducing assemblages of rainbow, brown, and brook trout.

Ironically, the presence of “strainers”, underwater logs, and logjams simultaneously constitute a potentially life threatening obstacle which creek boaters must avoid/portage around at high flows.

To explain, there is a life threatening risk of getting pinned by the hydraulic forces of the water against the upstream side of these “strainers” during high flow events. Whitewater enthusiasts have drowned by getting pinned against such LWD. This circumstance explains why creek boaters, unlike all other recreational users, have a special incentive to saw out LWD obstacles from the current line—damaging the trout habitat.

Moreover, this inescapable need to portage around LWD compels the construction and use of unregulated river evacuation points, portage trails, and boat launch sites upstream and downstream of each “strainer”.

The unregulated construction and use of an ever changing system of river evacuation points, portage trails, and boat launch sites further threatens the creation of additional chronic erosion sites.

The relative risks associated with LWD is accentuated on the headwaters of the Chattooga River because there is a significant amount of LWD present on this river.

This LWD constitutes an ever changing river hazard for boaters. New pieces of LWD can appear to block the current line at locations where none existed in the past. Old pieces of LWD can be moved to locations further downstream by floods. Because of the changing locations of this LWD, creek boaters must be prepared to alter where they must portage on the North Carolina headwaters of the Chattooga.

Hypothetically, in year 1, paddlers might need to evacuate the river at location X. However, in year 2, after this LWD obstruction has moved further downstream, paddlers might need to exit at location X+1000 feet—meaning that a new portage trail will have to be constructed.

This dynamic condition explains why creek boaters (unlike all other users of the resource) have an unpredictable need to evacuate the river, (multiple times during a single trip) in order to portage around these obstacles, and to seal launch their boat back into the water.

Nevertheless, the USFS has repeatedly failed to inform the public about the existence of a massive logjam (one of a kind in the southeast) which exists at an extremely remote place on these headwaters: latitude 35.033897, longitude -83.128544.

This logjam exists just upstream of where Cane Creek enters on river right but downstream of the confluence with Norton Mill Creek on river right.

On July 25, 2019, I provided the Forest Service with an annotated set of photographs which explain why the continuing presence of this one of a kind logjam is so important and why the USFS should adopt stringent rules prohibiting anyone from making any attempt to dismantle or remove this one of a kind logjam. Floyd **Exhibit 12** at p. 1 (pdf p.2) (AR document P-14).

This logjam stands more than 10 feet tall as measured above the surface of the water.

**Exhibit 12** at pp.2-4 (pdf pp.3-5)(AR doc. P-14) shows how this logjam currently serves to create a de facto sediment catch basin—where this sediment could be vacuumed out of the creek.

These photos evidence how this logjam is preventing a massive plume of sediment from moving further downstream.

Nevertheless, neither the 2021 LRMP nor the Environmental Impact Statement tells the truth about the existence or the important sediment catching function of this one of a kind logjam.

In addition, the 2022 EIS and LRMP fail to disclose how there is a unique opportunity to use technology to vacuum up the sediment entrapped on the upstream side of the logjam without dismantling this one of a kind logjam.

The USFS must modify the LRMP so that it compels the NPNF to provide special protections for this logjam—instead of suggesting that the agency intends to destroy this logjam in the future.

The revised LRMP must adopt a standard requiring the agency to employ the commercially available sediment removal strategies such as those developed by Streamside Systems, Inc.

In April 2010, this technology was used to remove fine particle sized sandy sediments from gravel bars in the upper Savannah River.

Unfortunately, the Environmental Impact Statement released on January 21, 2022 (the “2022 EIS”) and associated Finding of No Significant Impact (“FONSI”) are seriously flawed.

They are flawed because they do not tell the truth about how this excessive bedded sedimentation problem has caused a concomitant collapse in the densities of the Chattooga’s wild trout populations.

The 2022 Environmental Impact Statement makes the questionable assertion of fact that the presence of LWD in the Chattooga constitutes one of the “[a]ttributes found to have the greatest adverse impact on watershed condition ranking in the [Watershed Condition Framework] WCF.” 2022 EIS at p. 3-55.

Stated differently, the 2022 EIS contends that the presence of LWD is a bad thing which needs to be removed in order to enhance the watershed condition ranking of each and every watershed in the NPNF.

Just as disappointing, the 2022 draft EIS declares: “[o]ver the life of the plan, action plans for a selection of the priority watersheds will be developed and implemented with the intent to improve the watershed condition. Activities conducted as part of priority watershed action plans could include improving water quality and habitat conditions, restoring acres of stream ecosystem, focusing on *restoring...stream channel function (for example, large woody debris)* and native riparian vegetation, performing road maintenance on roads hydrologically connected to the stream network, performing trail maintenance on activities within 100 feet of streams, decommissioning unneeded roads and partnering with nearby lands to accomplish shared objectives.” 2022 EIS at p. 3-520 (italics added).

First, this statement appears to presume that “restoring...stream channel function” by the removal of large woody debris will somehow improve the biotic integrity of the North Carolina headwaters of the Chattooga. .” 2022 EIS at p. 3-520 (italics added).

This implied future initiative to remove this one of a kind logjam will merely serve to enhance the recreational experience of whitewater paddlers. There is no need to remove this logjam to get rid of this sediment. This sediment can be vacuumed out of the river.

The AR already contains photographic evidence demonstrating how somebody had taken it upon themselves to saw out the end pieces of LWD obstructing the current line (without having any authority to do so).

Any Forest Service initiative to remove this logjam can be expected to cause the discharge downstream of the blanket of sediment already entrapped upstream of this logjam.

Any such initiative would violate the antidegradation mandate of the Clean Water Act.

More importantly, the 2022 EIS makes statements which evidence how the USFS ignores the best available technologies for vacuuming up this sedimentation without having to remove any of this LWD.

The 2022 EIS and LRMP disregard the Forest Service’s statutory duty to expedite the design and implementation of a specific action plan for restoring these headwaters now degraded but once outstanding biological capacity for sustaining first in class numeric densities and biomass of naturally reproducing populations of trout.

The agency’s refusal to use the LRMP to fix what is wrong with how these headwaters are currently being managed evidences a desire to continue placing primary emphasis on accommodating the recreational wish list demands of whitewater paddlers.

Prior to introducing creek boating on North Carolina’s headwaters the USFS admitted that the construction and use of boat launch sites, river evacuation points, and portage trails inside North Carolina’s protected trout buffer would cause the following: “*Erosion and sedimentation may increase at designated access points with increased use and dragged equipment. In addition, portage trails would be created increasing the potential for sediment input along over three-fourths the length of the river.*” See **Exhibit 13** p.163 (pdf p.169) (AR doc. B-1), *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, USFS, January 2012 (italics added)(hereinafter the “2012 EA”).

Just as important, the USFS told a Federal District Court that whitewater paddling can cause “substantial interference with other recreational uses and other ORVs of the Chattooga.” *American Whitewater v Tidwell*, 959 F. Supp. 2d 839, 853 (Dst. SC 2013).

Unfortunately, the USFS continues to disregard the agency’s own admissions.

The USFS continues to ignore the Fourth Circuit’s plainly stated ruling “floating is not a value of the Chattooga that must be protected and enhanced under §1281(a).” *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014).

The USFS also ignores how by the fall of 2014 multiple chronic erosion sites could be seen at specific locations along the river bank where none had existed in the past.

These chronic erosion sites were clustered (1) at locations upstream and downstream of specific pieces of LWD which whitewater creek boaters had an unavoidable need to portage around at that prior point in time; and (2) at locations upstream and downstream of interesting whitewater features which paddlers have a natural interest in trying to run several times in a single trip to the river—much like being at an amusement park.

On May 18, 2018, I served a 60 Day Notice of Intent to Sue For Violations of the Clean Water Act to appropriate Forest Service leaders. **Floyd Exhibit 6.**

On Wednesday, March 27, 2019, Regional Forester Arney and former Forest Supervisor Nicholas asked to meet with me to search for a common path forward in addressing this visibly obvious problem.

Subsequently, on April 3, 2019, former Forest Supervisor Nicholas wrote me: “Thanks for the conversation last week. Much appreciated. I have reviewed the pictures in the NOI and fully agree there is sediment in the creek... We discussed sampling the river and what process we could use. I believe you said there is no need to develop a method as you have already provided the research/science. I need to know if this is the research paper you are referring to: *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria* - Author(s): Sandra A. Bryce, Gregg A. Lomnicky, and Philip R. Kaufmann...*If this is not the paper you referred to, please forward the one you mentioned. Once I have the correct paper, I plan on having this reviewed by specialists (likely with the Southern Research Station) with expertise in this type of research to determine applicability for the Chattooga...* You expressed some concerns about me wanting to validate the process. I just want to get the research and associated sampling methodologies in front of someone that can answer the question, “Will this process will work in NC or are the variables different; if so, what are they?” I feel like we need an answer on this before we can develop a plan of action going forward. *If we are going to implement a process proposed by a partner in a sensitive system, it needs validation. The process you have identified seems to make sense to me, but I’m neither a biologist nor a researcher.* This validation does not mean we cannot move the rock forward. In the NOI you asked for a candid and continuous dialogue – I’m willing to engage and seek answers. I would value the opportunity to coordinate a meeting with biologists to assess the issues you brought forward as well as the process to remove sedimentation...I do not discount what you tell me and I believe, based on what you have shared, we have things to address. I value the relationship we have developed.” **Exhibit 14** at p.1(pdf p.2) (AR doc. S-2) (italics).

On April 19, 2019, I provided former Forest Supervisor Nicholas with a second copy of the Bryce, Lomnicky, and Phil Kaufmann article which had originally been emailed to Nicholas on September 25, 2018. See Floyd **Exhibit 15** (AR doc. P-8).

Having heard nothing more during the month of May 2019 about the Forest Service’s progress in evaluating the status of the Bryce et al article as the best available science, I telephoned Forest Supervisor Nicholas during the first week of June.

During that brief phone conversation, Forest Supervisor Nicholas indicated without providing any details that he was going to make the Chattooga’s watershed a national priority watershed.

This seemed encouraging.

Unfortunately, the Forest Supervisor *claimed that he was having a difficult time finding anybody other than myself who believes there is a bedded sediment problem down on the Chattooga's headwaters in North Carolina.*

The Forest Supervisor pressed a need to complete other tasks and our call concluded quickly.

Subsequently, on June 9, 2019, having heard nothing more about what was being done, I emailed former Forest Supervisor Nicholas to advise and inquire:

“It isn’t clear to me whether or not you were suggesting in our phone call (this past week) that you had already hired a third party consultant (or intended to hire some third party consultant) or whether you had asked Dr. Andy Dolloff (Va Tech and USFS Southern Research Station) to undertake an investigation—or at what stage the Forest Service is currently at in investigating my concerns... You also did not specify what any such investigation might entail... In our brief email exchanges on April 3rd and April 19th, I understood that you were focusing your efforts on trying to validate how several scientific studies might be applied to the concerns down on the Chattooga. I believe you were focusing your efforts on:(1) Suttle, Power, Levine & McNeely, *How Fine Sediment in Riverbeds Impair Growth and Survival of Juvenile Salmonids*, Ecological Applications, 14(4):969-974 (2004)(“The linear relationship between deposited fine sediment and juvenile steelhead growth *suggests that there is no threshold below which exacerbation of fine-sediment delivery and storage in gravel bedded rivers will be harmless*, but also that any reduction could produce immediate benefits for salmonid restoration”)(italics added)...(2) Bryce, Lomnicky & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria*, Journal of North American Benthological Society, 29(2):657-672 (June 2010)( “Combining all lines of evidence, we concluded that for sediment-sensitive aquatic vertebrates, minimum-effect sediment levels were 5% [for <=0.06mm fines] and 13% [for <=2mm sand and fines], respectively, both expressed as areal percentages of the wetted streambed surface.”); Bryce, Lomnicky, Kaufmann, McAllister, & Ernst, *Development of biologically based sediment criteria in mountain streams of the western United States*. North American Journal of Fisheries Management 28:1714–1724 (2008)... Allen, to be clear, the articles that you asked about do not constitute the total body of scientific literature that I believe supports my contention that we have a bedded sediment problem down on the Chattooga. Neither do they constitute the total body of scientific literature which has been placed into the administrative record for consideration during the revision of the LRMP for the Nantahala National Forest... The best available science is well settled: A strong correlation exists between increasing levels of embedded sediments and declining densities of wild trout... For example as the US EPA has recognized: ‘Alexander and Hansen (1983) experimentally reduced sandy bedload sediments in a Michigan stream by means of a sediment settling basin, and observed the control (upstream from sediment basin) and treatment (downstream from sediment basin) reaches for 6 years... The

basin reduced sand bedload by 86%...Small brown and rainbow trout increased by 40% in the treated area. Trout production increased 28%, but growth rate changed little, hence most of the increase was associated with increased numbers of fish (survival), and, apparently, with improved habitat and production of macroinvertebrates. The useful experimental approach of Alexander and Hansen (1983) provides excellent and conclusive data on the negative effects of sediment on population density and growth in the test stream.' *Development of Criteria for Fine Sediment in the Northern Rockies Ecoregion, Final Report*, D.W. Chapman & K.P. McLeod, for the US EPA, Water Division, Region 10, EPA 910/9-87-162, April 1987 at page 118...In addition the United States Forest Service, Pacific Southwest Research Station has also weighed in on the adverse impacts of bedded sediment on the health of trout populations. 'Elevated fine-sediment inputs to streams can alter a variety of conditions and processes, including the amount of fine sediments stored in riffles. We sought to measure the influence of deposited fine sediment on the survival and growth of juvenile rainbow trout...(106-130mm fork length) using a field experiment that included 18 enclosures in riffles of a small northwestern California stream. The experiment included six replicates of three levels of deposited fine sediment (low, background, and high) that embedded riffle cobbles at 0, 50, and 100%, respectively. Only 1 of 12 fish survived in high-sediment enclosures, while survival of fish in low- and background-sediment treatments equaled or exceeded 50%. Low and background sediment treatments could be distinguished from each other by a difference in fish growth: fish in the low-sediment treatment gained mass, on average, while all surviving fish in the background-sediment treatment lost mass. In addition to providing relatively high survival and growth benefits for juvenile rainbow trout, low-sediment experimental units were colonized at significantly higher rates by other vertebrates, particularly coastal giant salamanders...The amount of stored fine sediment in small streams may substantially influence the total amount of habitat available to vertebrates at the watershed scale.' *The Effect of Deposited Fine Sediment on Summer Survival and Growth of Rainbow Trout in Riffles of a Small Stream*, North American Jour. Of Fisheries Management, 29:434-440 (2009), Harvey, White, & Nakamoto, USFS, Pacific Southwest Research Station, last downloaded on November 23, 2018 from [https://www.fs.fed.us/psw/publications/harvey/psw\\_2009\\_harvey001.pdf](https://www.fs.fed.us/psw/publications/harvey/psw_2009_harvey001.pdf)." (last checked on March 18, 2022). Floyd **Exhibit 16** at pp.4-6 (pdf pp.5-7)(AR doc. S-4).

I also asked former Forest Supervisor Nicholas to consider the common sense implications of the drastic decline in densities, biomass, and species of trout which was discovered by the September 2016 Chattooga trout population study which was undertaken by the North Carolina Department of Environmental Quality ("NCDEQ") at my insistence: "A quick comparison of the raw data results of the Chattooga trout population study conducted in September 2016 against the results of the study conducted between 1992-1996 ought to provide more than sufficient evidence that there is a problem. The September 2016 study only counted 26 young-of-the-year trout despite sampling 8 different six hundred foot sample sites spread out over almost two miles of water...During our call this past week you advised that you were having a difficult time in



finding anybody other than myself who believes there is a bedded sediment problem down on the Chattooga's headwaters in North Carolina. You mentioned Trout Unlimited. This echoes what you have said before. I presumed that you are implying that my view of the world cannot be substantiated with science—simply because the selection of folks with whom you have spoken lean in a different direction...I cannot comment on their observations without studying the specific basis for their claims...However, the [BASI] science underlying my claims are self-evident...I do believe that there are a myriad of conflict of interest explanations (having to do with grant applications and the awarding of grants) which might inform why individual biologists, etc. might not wish to challenge the opinions of the United States Forest Service regarding the Chattooga...The USFS spent seven years and hundreds of thousands of dollars (and perhaps well over a million dollars) between April 28, 2005 and January 31, 2012 trying to develop a way to justify a new recreational use management policy. Some of my concerns (if proven true) would evidence how those funds were spent in a wasteful manner.” Floyd **Exhibit 16** at pp. 6-7 (pdf pp. 7-8) (AR doc. S-4).

I also sent Forest Supervisor Nicholas a copy of an email from Dr. Bill McLarney, Director, Stream Biomonitoring Program, Mainspring Conservation Trust dated August 10, 2016. Floyd **Exhibit 17** (AR doc. P-12).

Dr. McLarney wrote: “The use of fish in biomonitoring grew out of the realization of the limitations of conventional benthic macroinvertebrate sampling in assessing habitat. Its theoretically possible to do a quantitative benthic macroinvertebrate sample that is so intensive as to get at habitat issues, but such procedures are surpassingly inefficient... *In terms of biomonitoring, clearly what you need to answer your questions is fish monitoring. I would be surprised if you could convince the Forest Service or the state to do the kind of monitoring that you need.* Because access is difficult and costly, because it would require a lot of preliminary hiking to select a sample reach.” Id. at p. 1(italics added).

Dr. McLarney sarcastically observed: “[M]odern ichthyology has become the study of fish living near bridges.” Id. The science is clear. *The Chattooga's trout must be counted regularly.*

The USFS cannot use the results of macroinvertebrate sampling as a convenient excuse for denying that the Chattooga's trout populations have been adversely impacted by sedimentation.

To amplify on this scientific reality, with respect to the Tellico River, the USFS testified to Judge Reidinger that “ an NCDENR study [concluded] that ‘aquatic insects are generally poor indicators of ecosystem stress due to sedimentation.’” See *Southern Four Wheel Drive Association v United States Forest Service*, Case 2:10-cv-00015, ECF #39, page 27, August 3, 2011). Today, the USFS denies any need to monitor the trout residing on the headwaters of the Chattooga to determine if sediments have caused a non-temporary collapse in trout densities.

Regarding the Tellico River, the Nantahala National Forest told the public: “Protection of specific habitat elements for...trout involves maintaining water quality to North Carolina state standards, *preventing sedimentation of spawning gravels, and protecting stream bank integrity. Improving ...trout habitat is a forest plan standard (LRMP Amendment 5 page III-185).* Furthermore, the desired condition for the Tellico River and its tributaries is to ‘manage streams for self-sustaining fish populations where conditions are favorable...emphasize habitat for specific Management Indicator Species which represent this group’ (LRMP Amendment 5 page III-185...The forest plan also provides direction ‘to maintain the natural hydraulic and hydrologic functioning of the stream channel and protect the integrity of the stream system including channels, banks, and stream bottom’ (LRMP Amendment 5 page III-187). This direction places emphasis upon reducing negative effects upon riparian dependent resources, which includes wild trout populations and other aquatic organisms.” Floyd **Exhibit 18** at p. 72 (pdf p.77) Environmental Assessment, *Transportation System and Related Recreation Management Actions for the Upper Tellico Off-Highway Vehicle System*, Nantahala National Forest, Forest Supervisor Hilliard, October 2009 (italics added) (AR doc S-14).

The Chattooga should be managed like the Tellico. The North Carolina headwaters of the Chattooga River must be managed going forward according to Standards and Desired Conditions which are similar to what the current LRMP specifies at pp. III-185 and III-187.

The Forest Service cannot comply with the non-discretionary duties imposed by the second sentence of 16 U.S.C. §1281(a) and the antidegradation mandate of the Clean Water Act without adopting this level of specificity about protecting the trout in the Desired Conditions and Standards for managing the North Carolina headwaters of the Chattooga River going forward.

In my June 9, 2019 email to former Forest Supervisor Nicholas, I asked that the 183 pages of records which had been located in response to my FOIA request submitted on September 22, 2017 be published on the public reading room being maintained during the revision of the LRMP for the NPNF.

On June 9<sup>th</sup>, I also submitted a new request for records under the FOIA: “please share *electronic copies* of any and all records and documents and emails created, evaluated, read, or reviewed by any official or employee of the United States Forest Service (subsequent to Tuesday, March 26, 2019) and which pertain to the following narrow subject matter: *What Regional Forester Arney, Forest Supervisor Nicholas, or any staff members of the USFS, have been doing (subsequent to Tuesday, March 26, 2019) to investigate my stated concerns about the loss of trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations on the North Carolina headwaters of the Chattooga.* This includes back and forth emails communicating those investigations...This FOIA encompasses a request for a waiver of any fees

based on the public interest exception of 5 U.S.C. §552(a)(4)(A)(iii).” **Exhibit 16** at pdf p.10 (italics added)(AR doc. S-4).

These records were not produced and they are still the subject of an inchoate dispute between myself and the USFS.

I anticipate seeking a proper remedy for the Forest Service’s continuing deprivation of my First Amendment rights.

On June 13, 2019 former Forest Supervisor Nicholas wrote to advise that the LRMP would designate the Chattooga as a priority watershed.

However, the Forest Supervisor did not respond to my FOIA request of June 9th—although it would have been completely in his discretion to have shared a detailed response with me.

On June 13, 2019 @ 12:08, I responded to Mr. Nicholas: “Making the Chattooga River’s watershed a national priority watershed sounds great theoretically—if this will in fact somehow cause budget dollars to flow towards solving this problem. ..However, I still have not heard how any money is going to be devoted to improving the suitability of the stream bed habitat for spawning or by removing some of the sediments. ..Furthermore such a provision would most likely be insufficient to resolve my concerns. ..As I suggested way back in the summer and fall of 2017, there is a pressing need to incorporate non-discretionary protections into the new LRMP to prevent the Chattooga’s Trout habitat and trout fisheries from being forced to suffer any further degradation—regardless of the source of sediment input. I know there are other individuals who are similarly concerned that the new plan will not provide the trout habitat and wild trout fisheries on these headwaters with the strict protections they are entitled to receive under the national Wild and Scenic Rivers Act and the Clean Water Act...My need to move more expeditiously follows from my inability to wait any longer to receive meaningful and tangible promises of action from the agency...For me, the continuing FOIA disputes constitute the straw that breaks the camel’s back. The agency’s demonstrated desire to avoid disclosure of relevant information is troubling.” **Exhibit 16** at pdf p.3 ( AR doc S-4).

On June 20, 2019 I emailed Regional Forester Arney, and Acting Chief Christiansen to ask the agency to consider the contents of Forest Service Manual 6270.42d and 6270.42e “to gain a better understanding about the perceived oddity of automatically forwarding all of my FOIA requests to be processed by the Regional FOIA staff.” **Exhibit 7** at pdf p.3 (AR doc. S-5).

Both of these aforementioned Forest Service manual provisions evidence why the former Forest Supervisor had the authority to respond to the FOIA request which I tendered on June 9, 2019.

My request simply asked the Forest Supervisor to produce any records evidencing what the agency had “been doing (subsequent to Tuesday, March 26, 2019) to investigate my stated concerns about the loss of trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations on the North Carolina headwaters of the Chattooga.” Floyd **Exhibit 16** at pdf p.10 (AR doc. S-4).

I complained that “In addition to causing time delays (which are prejudicial to my interests) such a blanket policy of automatically sending my requests to the staff of the Regional Forester suggests that I am being treated disparately in a way that does not seem to comport with the public policy purposes of the Freedom of Information Act.” **Exhibit 7** at pdf p.3 (AR doc. S-5).

The USFS never produced any records evidencing how the agency assessed the applicability of the science shared with Forest Supervisor Nicholas regarding the adverse impacts of bedded sedimentation on salmonids. This evidences how the agency seeks to shut down debate during the revision of the LRMP by depriving me of my information gathering rights.

On August 15, 2019, I wrote to encourage the agency to consider becoming fully informed about two land disturbing real estate development projects taking place in the Chattooga’s upstream watershed—one of which had been cited by the United States Army Corps of Engineers (“USACE”) as follows: “A public notice for this project was originally published in June 2018. During an inspection in December 2018 of the activities associated with the golf course redesign the Corps observed impacts to waters of the U.S. (WoUS). *[These] impacts were conducted without authorization and were a violation of federal law under the Clean Water Act, Section 301 (33 USC 1311)*. The Corps issued a notification of unauthorized activity in January 2019. At that time, the applicant’s request for a DA permit was administratively withdrawn. The applicant completed the Corps required remedial and corrective measures and the violation has been resolved.” **Exhibit 19** pdf pp.3-4 (AR doc. S-6).(emphasis added).

The former Forest Supervisor admitted on August 15: “I was unaware of these proposed actions but forest staff may have been contacted. I’ll check on the status of any response. That said, I will discuss this internally and will provide comments as part of this proposed action. *On another note I had a team look at portions of the watershed north of the iron bridge. I plan on having them do further inventories to look at sediment production.*” **Exhibit 20** at pdf p. 4 (AR doc. S-7) (italics added). **This information was never provided to me—if it in fact it was collected.**

Concerned that the Forest Supervisor’s email evidenced some degree of equivocation by the agency about its responsibilities in addressing this excessive bedded sediment problem, I wrote back on August 16, 2019: “I intend to be a tireless advocate in helping to circle the funds needed to undertake the restoration efforts...Unfortunately, over the last six months, you guys have left me in the dark like a mushroom growing in the forest. Time appears to be running short—with

the Nantahala National Forest preparing to issue a new Land Resource Management Plan—which will undercut many of my rights...Allen, you have a large world of responsibility as the Forest Supervisor for all of the national forests in North Carolina...Consequently, I am not surprised about the agency's possible unawareness of either the Public Notice (July 19, 2019) associated with the High Hampton redevelopment or the second massive project being simultaneously permitted in connection with the separate and distinct Canoe Club's planned development around Cashiers Lake...Disappointingly, while these two massive planned development projects did not appear overnight, neither of these two projects have been constantly kept in the public eye...While I see the land disturbing activities occurring at the High Hampton project every time I drive to the grocery store, the Public Notices and opportunity to comment have been poorly publicized...However, that being said, and as you and I are both painfully aware, the United States Forest Service owes a non-discretionary duty to manage the downstream waters of the national Wild and Scenic Chattooga River by placing "primary emphasis" on "protecting" the quintessential "scientific feature"[16 U.S.C. §1281(a)] which the agency described to Congress in 1971 as being unique to North Carolina headwaters: Stated differently, the Forest Service must place primary emphasis on preventing any nontemporary diminishment in the original baseline excellent trout stream productivity which was administratively recognized back in 1971...I hope the United States Forest Service has not been deprived of a timely opportunity to lodge comments forcefully opposing and objecting to any development activities which might cause any additional sedimentation pollutants (whether point source or non-point source) to be discharged into tributaries which eventually reach the Chattooga—so long as the excessive sediment problem being suffered downstream remain unaddressed...These two massive real estate developments will also require some not clear amount of new raw sewage treatment. It remains unclear how much more effluent will be sent through the TWSA plant below Cashiers lake and into the Chattooga...I would hope that your agency might discharge its legal responsibilities by forcefully objecting to any promulgation of a favorable Section 401 water quality certification so long as the trout habitat remains degraded downstream. Consequently, I am sharing with you certain comments that were submitted to NC DEQ by the Chattooga Forest Association back on July 10, 2018 in connection with that agency's consideration of a request for a Section 401 water quality certification. See the attached two page document entitled "20180765 Ver 1\_Comments Received to PN Email 1 of 2\_20180727 excerpt of p. 11-15.pdf"...The Chattooga Forest Association reports that it constitutes a residential property owners association that owns a lake (Lake Chattooga) that is fed by Fowler Creek (a primary tributary which eventually dumps into the main stem of the Chattooga on the Rust family's property) in Whiteside Cove...The written comments of Chattooga Forest Association state that their lake is located approximately one-half mile downstream from where land disturbing activities are ongoing in connection with the High Hampton golf course redevelopment project...Chattooga Forest Association makes certain allegations about massive amounts of mud and silt flowing into their lake. They point their finger at the construction activities ongoing at High Hampton. They provide photos evidencing the

consequences about which they complain...Interestingly, the Public Notice (that I sent to you yesterday) admits on page 1: “During an inspection in December 2018 of the activities associated with the golf course redesign the Corps observed impacts to the waters of the U.S. (WofUS). These impacts were conducted without authorization and were a violation of federal law under the Clean Water Act, Section 301 (33 USC 1311). The Corps issued a notification of unauthorized activity in January 2019. At that time, the applicant’s request for a DA permit was administratively withdrawn. The applicant completed the Corps required remedial and corrective measures and the violation has been resolved.”...Allen, the Forest Service needs to take a leadership role in halting (once and for all) the discharge of sedimentation into the Chattooga River...Your agency has the information it needs to admit that an excessive bedded sediment problem is being suffered on the waters flowing through the lands that the Forest Service manages. You guys have had four years to study this problem...There is no assimilative capacity for any additional sediments to be discharged into this river...The September 2016 trout population study proves that the densities and/or biomass of wild trout have suffered a measurable and non-temporary decline from the metrics documented by the 1992-1996 study of trout populations...Your agency has the legal power (and responsibility) to object forcefully to any further land disturbing activities in the upstream watershed that might cause additional sediments to find their way into the Chattooga—and you should do so without any further delay...This river will not heal itself because the natural sediment transport capacity of this river has been entirely overwhelmed...Finally, I would remind you how somebody appears to have been using a chain saw to try to cut out (or substantially weaken) key pieces of the massive log jam that currently prevents the massive deposit of sediment from being released downstream...The objective for sawing out pieces of wood can only be presumed to be an effort to see this log jam collapse...This would inevitably result in the further fouling of additional segments of the river lying further downstream...On July 26, 2019 I sent the Forest Service the photos that I took on May 30th and 31<sup>st</sup> evidencing this concern. See the document indexed as P-14. Allen, I am also sharing a copy of the 12 pages of comments that I submitted late last night to David Brown USACE and Sue Homewood NC DWR re the Public Notice published on July 19, 2019 regarding the applicant’s request for a Section 404 permit (approving certain dredge and fill activities) in upstream tributaries of the Chattooga and the issuance of a favorable Section 401 Water Quality Certification...” **Exhibit 19** at pdf p. 4 (AR doc. S-6).

Time passed quickly. The USFS failed to provide any additional information about its investigation into the applicability of the *best available scientific information* which I had previously shared with Forest Supervisor Nicholas.

Consequently, on October 2, 2019 I wrote: “I have several narrowly fenced in questions about which I would like to obtain on point but comprehensive answers as well as the records and documents which might support those on point answers. I need this information to participate in the LRMP revision...Earlier this am, I forwarded a copy of [a] document entitled N-35-E which constitutes an email chain which should jumpstart your response to this request for information.

This email chain pertains to the controversial Southside Project...As you know, the Southside Project EA calls for the Forest Service to undertake a series of massive controlled burns and timber removal projects all over the landscape lying adjacent and near the Chattooga River and Scotsman Creek. I don't oppose using prescribed burns—I have successfully conducted such burns on tracts of pine lands of as much as 300+ acres. I have also seen what happens when prescribed fire does not go according to plan. Consequently, with respect to the highly erosive (micaceous) soils which dominate the steep slopes lying in the upstream watershed of the Chattooga River and its tributaries, it remains my view that the risks of fire exposing these highly erosive soils to erosion caused by rain and the risk of additional suspended sediments being channeled into the already sediment choked Chattooga far outweigh the benefits to be achieved through conducting the burns and timber removal projects...To get to the heart of this email, the Forest Service has already admitted in its Southside EA Feb 2018 a p.12: 'Three locations along Scotsman Creek are currently experiencing severe stream bank erosion. Each site has high, steep banks which are contributing sediment to Scotsman Creek. To stabilize these banks and improve the condition of in-stream pools, the Forest Service would construct toe-wood structures, log j-hooks, and a multistage flood plain.'...While the stated intention to stabilize these 3 chronic erosion sites seems encouraging, these proposed undertakings constitute anything but a sufficient action plan for addressing the intense duties that the United States Forest Service must discharge in managing this ORW tributary to the Chattooga...As a quick site visit will confirm (and as demonstrated by the photo surveys that I prepared and shared with you on May 17, 2018) these 3 locations do not constitute the only places on Scotsman Creek where the problem of excessive sedimentation should be setting off claxon horns in your offices...As my photos evidence (and as you can measure for yourself) the stream bed of Scotsman Creek (reaching from the culvert under Bull Pen Road upstream to the upper boundary of Forest Service lands) is arguably in worse condition than the main stem of the Chattooga. In more than one location, the fine particle sized sediment was as much as a foot deep from one bank to the other when these photos were captured...What is most distressing is that Scotsman Creek has a beautiful quartz stone bottom lying under this blanket of fine particle sized sandy sediment...Allen, I haven't heard anything from the Nantahala National Forest for an extended period of time about what you guys are specifically doing to remove this sediment on Scotsman Creek or what you plan to do in the future to remove this sediment...Creating watershed plans about what we might hope some future Forest Service official might do (at some unknown future point in time) at a landscape scale does little to discharge the narrow duties that you guys owe to place primary emphasis on protecting and enhancing the trout habitat on Scotsman Creek and preventing any non-temporary diminishment in that habitat's biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout...As you might know, Scotsman Creek was also classified as Outstanding Resource Waters in 1989 because of its administratively recognized outstanding native trout habitat and that habitat's biological capacity for sustaining outstanding densities of naturally populations of trout. In fact, in the past, the stream was so successful in producing an abundance of brook trout, that brook

trout (which had chosen to migrate downstream) had been documented (during the 1992-1996 trout population studies) as having been caught in the main stem of the Chattooga just below where Scotsman Creek dumps into the main stem of the Chattooga....Based on my personal experience, today, this would be highly improbable...Scotsman Creek's brook trout populations have been reduced to a mere 'continue to persist' size—something which was not supposed to be allowed to happen...Accordingly to assist me (and other interested members of the public) in thinking about and responding to the forthcoming LRMP, I would ask the agency to provide answers (and any documents supporting those answers) to a few questions set forth below:[1]Has the Nantahala National Forest (or any other federal or state agency) undertaken any comprehensive study since December 2012 of the current sediment transport imbalance being suffered on Scotsman Creek? What were the findings? *Could I please be provided with all of the documents and records associated with such a study?* What is the normal sediment transport capacity of Scotsman Creek? [2]Does the Nantahala National Forest suspect that the densities of the brook trout populations residing in Scotsman Creek have suffered a non-temporary decline? [3]Has the Nantahala National Forest (or any other federal or state agency) undertaken any count of the trout populations residing on Scotsman Creek upstream of Bull Pen Road since December 2012? What were the findings? *Could I please see all of the documents and records associated with such a study?*[4]Has anyone at the Nantahala National Forest attempted (since December 2012) to apply the best available science regarding the adverse impacts of bedded sediments and the minimum effects threshold beyond which the successful spawning by mature trout and the early life cycle survival of their newly hatched alevin will be adversely disrupted by the accumulation of these sediments? *What were the results of such a study? Could I please see all of the documents and records associated with such a study?* I have already provided you guys with copies of the critical scientific studies that have established the best available science which has quantified the minimum effects threshold for bedded sediments beyond which trout reproduction and early life cycle survival will be disrupted... I have also previously provided you with documents demonstrating how your Forest Service teammates out west have gone about recognizing the adverse impacts on salmonids from excessive accumulations of sediment on the streambed of a cold water salmonid habitat. ...See in particular Floyd Document P-9 et al...Clearly, I am seeking to help you see for yourself how the Nantahala National Forest is falling far short in addressing the adverse impacts on the trout residing on the Chattooga River. My goal remains to get all of us on the same side of the huge boulder and start pushing it back up hill...However, we need to take immediate action to remediate the problem instead of continuing to debate if there is a problem.” **Exhibit 21** pdf pp. 10-12 (emphasis added) (AR doc S-8).

The Forest Supervisor's staff subsequently advised that this fix for Scotsman Creek wasn't expected to take place *until 2 to 5 years from 2019*. Id. pdf p. 7 (AR doc. S-8).

I reiterate again today in this objection how the national Wild and Scenic Rivers Act directs that the “head of any agency administering a component of the national wild and scenic rivers system



*shall cooperate* with the Administrator, Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.” 16 U.S.C.§1283(c).

I reiterate today what I told the USFS in 2019: “the Congressional command to ‘cooperate’ presumes a mandate that some degree of back and forth communication is supposed to be occurring between the Nantahala National Forest and the North Carolina Department of Environmental Quality and the US EPA about any water pollution concerns pertaining to the national Wild and Scenic Chattooga River—which specifically includes Scotsman Creek...Clearly, the existence or non-existence of a sediment transport imbalance on that segment of the Chattooga River flowing through the Nantahala National Forest would constitute the very kind of significant water pollution concern about which these agencies ought to be cooperating ‘for the purpose of eliminating or diminishing the pollution of waters of the river.’ 16 U.S.C.§1283(c)...Hence, during the revision of the LRMP for the Nantahala National Forest, ...[I] presumed that you would answer by explaining with detailed specificity about how the USFS had been communicating back and forth with NC DEQ or the US EPA about the possibility of a sediment transport imbalance on Scotsman Creek and the need to investigate that possible water pollution problem.” **Exhibit 21** pdf p. 5 (AR doc. S-8).

Instead, in 2019, the Forest Service admitted “*We have not had any communication with NC DEQ nor US EPA regarding Scotsman Creek outside of the regular NEPA process for the Southside Project.* In advance of implementing restoration on Scotsman Creek, the FS will submit a 401 water quality permit application to the NC Division of Water Quality and a 404 permit application to the Army Corps of Engineers; that communication has not yet been initiated.” Id.

Perhaps these staff members were uninformed at that point in time about the Congressionally mandated duty spelled out at 16 U.S.C.§1283(c).

One of my overarching complaints about the substantive deficiencies of the pending Land Resource Management Plan is that the United States Forest Service refuses to recognize the common sense implications of comparing and contrasting the results of NCDEQ’s September 2016 study of the densities, biomass and species assemblage of the naturally reproducing trout populations on the Chattooga’s headwaters against the baseline outstandingly remarkable results of a five year study conducted between 1992-1996 by USFS fisheries biologists.

The AR for this LRMP has written summaries of both of those trout population studies as well as many of the field notes for the 2016 study: See AR docs. 00-T, H-10, H-10-A, H-10-B, H-10-C, L-1, L-2 River Coalition R, L-2 River Coalition H.

The densities and biomass of the trout have suffered a catastrophic non-temporary collapse. This is what happens when too much sediment accumulates on the stream bed. The USFS has more than enough scientific evidence to move forward by acknowledging how this catastrophic decline in the number of young-of-the-year trout (“YOY”)<sup>4</sup> constitutes the byproduct of the excessive bedded sediment problem being ignored on these headwaters.

Nevertheless, for over 5 years the USFS has intentionally and repeatedly refused to employ appropriate monitoring of the river’s trout populations. This stands in conflict with what is required under the relevant *Standards* of the existing LRMP, as well as the non-discretionary management duty imposed by the national Wild and Scenic Rivers Act, 16 U.S.C. §1281(a), as that duty is further informed and intensified by the antidegradation mandate of the Clean Water Act.

Neither the LRMP nor the 2022 EIS make any mention of the results of the NCDEQ 2016 study of the Chattooga’s trout populations. Nor do they offer a word of mention about the five year baseline study of trout populations which was undertaken between 1992-1996 by USFS officials in coordination with the North Carolina Wildlife Resources Commission (“NCWRC”).

On September 6, 2017, the USFS abandoned any pretense of objectivity.

The agency did so by summarily asserting that the “Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala...completed an environmental analysis of management of the Chattooga ...in 2012, and *there is not a need to revisit the analysis at this time*...Any updates to the management of the [Chattooga’s] will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform the analysis.”<sup>5</sup>

As if articulating some magic incantation, the Forest Service summarily excuses its unlawful neglect of the Chattooga’s trout by stating: “The Forest has *publicly stated* that we will not be revisiting the management direction for the Chattooga River as part of this plan revision.”<sup>6</sup>

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<sup>4</sup> Young-of-the-year trout constitute a classification used by fisheries biologists to describe fingerling fish that are presumed to be the offspring of the most recent spawning season. YOY are generally discussed in the scientific literature as trout of less than 100 mm in length although some biologists have used a larger cut off length in defining YOY. A consistent paucity of YOY or a consistently low ratio of YOY/other age classes of trout serves to warn of potential stream habitat problems in terms of suitability for satisfying the reproductive and early life cycle needs of salmonids.

<sup>5</sup> See email of September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina to Bill Floyd, to USFS officials Mr. Allen Nicholas, Mr. Paul Arndt, and Ms. Michelle Aldridge(*italics added*)(AR doc.N-29).

<sup>6</sup> *Id.*

Such a statement prompts several questions:

- 1) Who made such a *public statement* and when did they make it?
- 2) Did this individual have the authority to make such a statement?
- 3) To whom was this public statement made?
- 4) How does making such a *public statement* shield the USFS for ignoring the well documented and ongoing violation of the no visible sediment *Standard* articulated by the Nantahala and Pisgah National Forests' existing Land Resource Management Plan as applied to the Chattooga River?
- 5) Were the reasons for making this public statement contemporaneously memorialized in emails, correspondence, memorandums or written documents of any kind?

Similarly, I still don't understand how/why the USFS feels that any investigation of the Chattooga's degraded condition can be put off until "after the plan revision...and after several years of monitoring data is available to inform that analysis[?]"<sup>7</sup>

**WHAT IS OBJECTIONABLE ABOUT THE DRAFT LAND RESOURCE MANAGEMENT PLAN ("Draft LRMP") AND DRAFT ENVIRONMENTAL IMPACT STATEMENT ("Draft EIS") PUBLISHED BY THE NANTAHALA AND PISGAH NATIONAL FORESTS ON JANUARY 21, 2022**

The 2022 EIS is legally deficient because it refuses to adopt an alternative requiring a detailed analysis of the environmental harm that will come from failing to adopt obligatory Standards and Desired Conditions which explicitly require the agency to place primary emphasis on protecting and enhancing the trout stream productivity on the North Carolina headwaters of the Chattooga River. The USFS owes a non-discretionary duty to do so pursuant to the national Wild and Scenic Rivers Act as well as because of these headwaters classification as Outstanding Resource Waters under the Clean Water Act.

As such, the proposed 2022 LRMP fails to include an adequate range of alternatives for protecting and enhancing one of three rivers carrying dual WSR designation and ORW classification under the Clean Water Act. *Citizens for Env'tl. Quality v. United States*, 731 F. Supp. 970 (D. Colo. 1985); *Sierra Forest Legacy v. Rey*, 670 F. Supp. 2d 1106 (E. Dst. CA 2009).

The planners for the NPNF declined to undertake any detailed analysis into an alternative which would require a change in how the North Carolina headwaters would be managed going forward. These planners and their bosses refused to reconsider whether or not primary emphasis is being placed on protecting the appropriate ORVs of the North Carolina headwaters of the Chattooga River. These planners have predetermined goals. They presume it is okay to treat the recently

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<sup>7</sup> Id.

granted privilege to pursue whitewater paddling on these headwaters as a sacrosanct right that should not be challenged during the revision of the LRMP. These planners hold an arbitrary bias against adopting explicit Standards and Desired Conditions which would compel the agency to place primary emphasis on protecting and enhancing the trout stream productivity on the North Carolina headwaters of the Chattooga River.

These planners had a goal of protecting whitewater paddling and they “formulated... ‘alternatives’ in a manner guaranteeing that the... Service Planners would reach those goals”. *Sierra Club v. Espy*, 822 F. Supp. 356, 368 (E.D. Texas 1993)(referring to *Citizens for Env'tl. Quality v. United States*, 731 F. Supp. 970,989-990 (D. Colo. 1985).

This bias on the part of the NPNF planners and their bosses prevents the agency “from establishing a *legitimately* broad range of reasonable alternatives as required by the relevant statutory and regulatory scheme.” *Id.*

The National Forest Management Act (“NFMA”), 16 U.S.C. §1604, spells out what must be contained in every Land Resource Management Plan. Furthermore, 16 U.S.C. §1604(f)(5) compels that an LRMP “shall...be revised...when...conditions in a unit have significantly changed.”

The flat out refusal to reconsider how these headwaters should be managed going forward stands in obvious conflict with this statutory provision. The proof for this point is simple.

These headwaters and riparian corridor have transitioned from being physically described in 1971 as being in a “*near natural condition*” (**Exhibit 1** at p. at p. 73 (pdf. p. 89)(italics added)) to being described as a river whose biotic integrity has been adversely impacted because the watershed through which it flows has become functionally impaired. 2022 EIS at pp. 3-54 to 3-55(pdf pp.125-126)(italics added). Only a single watershed is impaired within the NPNF.

The National Forest Management Act (16 U.S.C. §1604(g)(2)(C)) compels the USFS to develop regulations “specifying guidelines which... *provide for methods to identify special conditions or situations involving hazards to the various resources* and their relationship to alternative activities.” (emphasis added).

The regulations developed to comply with this statutory obligation are now supposedly encompassed within the 2012 Planning Rule (36 CFR 219.1 to 219.62).

The 2012 Planning Rule constitutes a mess because it fails to require the preparation and adoption of specific Standards and Desired Conditions which are unambiguous, measurable, capable of being objectively monitored, and enforceable by members of the public. Instead, the 2012 Planning Rule encourages the writing and adoption of Standards and Desired Conditions which could mean anything to anybody. This is particularly problematic for the North Carolina headwaters of the Chattooga River.

The 2012 Planning Rule calls for the employment of broad concepts like the supposed duty to apply the *best available scientific information* to inform the “assessment, the plan or amendment decision, and the monitoring program as required in §§ 219.6(a)(3) and 219.14(a)(3).” 36 CFR 219.3

The Responsible Official (the Forest Supervisor) is required to “[i]dentify what information was determined to be the best available scientific information, explain the basis for that determination, and explain how the information was applied to the issues considered.” Id.

This hasn’t happened during the development of the 2022 LRMP and 2022 EIS. I have already detailed what happened on specific dates to censor my attempts to compel the agency to employ the best available scientific information with respect to the headwaters of the Chattooga River.

Neither the 2022 EIS nor the 2022 LRMP makes any mention of the best available scientific information for recognizing how the North Carolina headwaters of the Chattooga River have experienced a non-temporary collapse in the densities and biomass of their naturally reproducing populations of rainbow and brown trout. This neglect was detailed at pages 19-24 of this objection.

I also detailed earlier in this objection how the WSRA and the CWA compel the USFS to provide special antidegradation protections to the trout residing on the North Carolina headwaters of the Chattooga River. The bedded sediment problem which has adversely impacted the Chattooga’s trout would seem to equate to “special conditions or situations involving hazards” to a unique natural resource. This sedimentation would seem to be a hazard which the NFMA contemplates should be defended against by adopting sufficiently specific Desired Conditions, and sufficiently protective Standards within the forthcoming LRMP.

To demonstrate how/why the 2022 plan is deficient, consider what the Standards in the current LRMP require to be done in approving any site specific initiative impacting the Chattooga River pursuant to the 1982 Planning rules published at 47 FR 43047 on September 30, 1982.

To explain, Management Area 15 addresses national Wild and Scenic Rivers under the NPNF’s currently enforceable LRMP.

Management Area 15 provides: “Wild and Scenic Rivers are managed to maintain and enhance the wild, scenic, and riparian features of the river and to provide water-oriented opportunities in a natural setting. All lands are managed as not selected for timber production, and other resource management activities are restricted or modified to be compatible with the river resource.” **Exh. 8** at p. III-166, *Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests*, March 1994(AR doc. N-23) (italics added).

More specifically, the currently enforceable LRMP instructs that “Wildlife and Fish Resource Management...Refer to direction for Management Area 18.” AR doc. N-23. at p. III-170.

Stated differently, the currently enforceable LRMP for the NPNF directs that trout resource management on the WSR designated Chattooga should follow the Standards and Desired Conditions set forth in Management Area 18 (the Riparian Management Area).

The currently enforceable LRMP articulates two critical non-discretionary Standards for Management Area 18: “*Manage habitat primarily for...trout...*” and “*improve habitat of wild trout streams as a first priority.*” Id. at page III-185 (italics added).

The Standard “improve habitat of wild trout streams as a first priority”, id., is crystal clear about what the Nantahala and Pisgah National Forests should have been doing while managing the North Carolina headwaters of the Chattooga River subsequent to the approval of Amendment 5 to the LRMP in March 1994. The agency should have been placing primary emphasis on protecting the trout and in enhancing their in stream habitat.

The currently enforceable LRMP comes much closer in applying non-discretionary Standards and Desired Conditions to regulate the issuance of any site specific permit which might adversely impact the single most important ORV of these headwaters. Section 404(b) of the Water Quality Act of 1987 specifies that for any water body whose water quality “exceeds levels necessary to protect the designated use for such waters ... any water quality standard...*or any other permitting standard* may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.” Pub. L. 100–4, Title IV Permits and Licenses, §404(b), 101 Stat. 7, 69 (italics added)(codified at 33 U.S.C. §1313 (d)(4)(B)). This constitutes the antidegradation mandate. The phrase “*any other permitting standard*”, id., alludes to its all-encompassing scope of this mandate. The 2022 LRMP explicitly weakens the site specific permitting Standards set forth in the currently enforceable LRMP for the NPNF.

The way that the 2012 Planning Rule is being applied to revise the LRMP raises doubt about the rule’s compliance with 33 U.S.C. §1313 (d)(4)(B)) as applied to the Chattooga’s headwaters.

To reiterate, the headwaters of the Chattooga River are one of three bodies of water in North Carolina which carry a classification as Outstanding Resource Waters in combination with a designation as a national Wild and Scenic River.

The proposed 2022 LRMP reduces the permitting protections which must be provided to the trout which reside on the North Carolina headwaters of the Chattooga River.

They do so because they are being prepared according to the less restrictive rules set forth in what the Forest Service refers to as the 2012 Planning Rule. 36 CFR Part 219, National Forest System Land Management Planning, 77 Fed. Reg. 21162-21276, (April 9, 2012)(the “2012 Planning Rule”).”

The Forest Service adopted the 2012 Planning Rule to try to avoid future legal challenges about the agency’s mismanagement of the public’s resources.

The 2012 Planning Rule admits to employing fewer “prescriptive requirements (relative to 1982 rule procedures) regarding probable (management) actions, timber program elements, number and types of alternatives, and minimum management requirements.” 77 FR 21162, 21254-21255, April 9, 2012.

The Forest Service justifies this curtailment of the public’s right to complain by claiming that it will save money. *Id.*

The 2012 Planning Rule (36 CFR §219.2(c)) innocuously asserts: “Requirements for project or activity planning are established in the Forest Service Directive System [the Forest Service Manual and Forest Service Handbook]. Except as provided in the [LRMP] plan consistency requirements in §219.15, none of the requirements of this part [Part 219] apply to [site specific] projects or [site specific] activities.”

Stated differently, the 2012 Planning Rule informs that the public will be basically restricted to contesting future site specific management initiatives by challenging their legal appropriateness under the Forest Service Manual or Forest Service Handbook—both of which are unlikely to employ discrete and non-discretionary language that can be used to challenge the initiatives of the USFS.

In short, ironically, the 2012 Planning Rule constitutes an intricate plan designed by lawyers to limit the public’s ability to criticize the government pursuant to the First Amendment.

The 2012 Planning Rule restricts the public’s right to complain about the mismanagement of our natural resources by doing away with otherwise ascertainable and discretely measurable Standards (like numerical monitoring of management indicator species and habitat) that otherwise might be used by an interested member of the public to hold the Forest Service accountable for the adverse impacts caused by the implementation of ill-conceived management initiatives.

On January 26, 2012, Chief Tidwell proudly proclaimed to the Washington Post: “We expect to see much less litigation with this process.” [https://www.washingtonpost.com/national/health-science/administration-issues-major-rewrite-of-forest-rules/2012/01/26/gIQAnquvTQ\\_story.html?utm\\_term=.413ab36ce466](https://www.washingtonpost.com/national/health-science/administration-issues-major-rewrite-of-forest-rules/2012/01/26/gIQAnquvTQ_story.html?utm_term=.413ab36ce466) . (link last checked on March 11, 2022).

Despite what Chief Tidwell so proudly proclaimed, the 2012 Planning Rule has no legal authority to excuse the Forest Service from managing the North Carolina headwaters of the Chattooga River by properly discharging the non-discretionary duties imposed upon this agency by the non-degradation mandate of the national Wild and Scenic Rivers Act and the antidegradation mandate of the Clean Water Act.

The USFS cannot possibly hope to comply with those non-discretionary statutory duties by developing an LRMP which robotically takes advantage of the non-obligatory guidelines endorsed by the 2012 Planning Rule.

The forthcoming LRMP for the NPNF must incorporate sufficiently intense Desired Conditions and Standards while providing Specific Direction for how the North Carolina headwaters of the Chattooga River shall be managed going forward.

The forthcoming LRMP for the NPNF must incorporate sufficiently specific Desired Conditions and Standards in order to ensure that the USFS can discharge properly the unique protections owed to the trout residing on the North Carolina headwaters of the Chattooga River.

Ironically, “the Forest Supervisor for the National Forests in NC maintained that the Nantahala and Pisgah National Forest plan revision would not revisit the management of the Chattooga WSR because the 2012 decision had not been fully implemented and the required monitoring of the decisions had not yet begun.” 2022 EIS p. 2-31 (pdf. p. 69). The monitoring report published in 2019 doesn’t say a word about what has happened to trout population densities—because they aren’t being monitored contrary to what adaptive planning would presumably require.

In stark contrast to the flawed 2012 Planning Rule, the 1982 Planning Rule properly dictated that “Fish and wildlife habitat shall be managed to maintain viable populations of existing native and *desired non-native vertebrate species* in the planning area...Each [plan]...shall establish objectives for the maintenance and improvement of habitat for management indicator species...To meet this goal, management planning for the fish and wildlife resource shall meet the requirements set forth in paragraphs [219.19 (a)(1) through 219.19 (a)(7)]...[Management indicator species] shall be selected because their population changes are believed to indicate the effects of management activities...*Planning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species...Population trends of the management indicator species will be monitored and relationships to habitat changes determined.* This monitoring will be done in cooperation with State fish and wildlife agencies, to the extent practicable.” See the 1982 Planning Rule at Section 219.19 (italics added).

Stated differently, the old regulations properly compelled the Forest Service to adopt sufficiently specific Desired Conditions and obligatory Standards which were consistent with discharging properly the non-discretionary duties imposed by 16 U.S.C. §1281(a) and the antidegradation mandate of 33 U.S.C. §1313(d)(4)(B).

The 1982 Planning Rule properly dictates that the population trends of the management indicator species have to be monitored and relationships to habitat changes determined in order to fulfill the directives set forth at § 1604(g)(2)(C) of the National Forest Management Act.



The forthcoming LRMP must adopt this specific concept of the old 1982 Planning Rule (or something very similar) to ensure the proper management of the North Carolina headwaters of the Chattooga River going forward.

To reiterate, the North Carolina headwaters of the Chattooga River *constitute one of three cold water trout streams* (out of an estimated 12,000 bodies of water in North Carolina) which carry a Class B, Trout waters, Outstanding Resource Waters ("ORW") water quality classification (awarded in 1989) in combination with a national Wild and Scenic River ("WSR") designation(awarded in 1974).

The United States Forest Service has primary responsibility for managing the day to day beneficial uses on those sections flowing through the Nantahala National Forest.

The USFS must do so by properly discharging the non-discretionary duty spelled out by the national Wild and Scenic Rivers Act, 16 U.S.C. §1281(a), as further informed and intensified by the antidegradation mandate of the Clean Water Act, 33 U.S.C. §1313(d)(4)(B).

The Forest Service must manage these headwaters by placing “primary emphasis” on “protecting” and “enhancing” the single “scientific feature” which the 1971 Chattooga Study tacitly told Congress was unique to the Chattooga’s headwaters in North Carolina. 16 U.S.C. §1281(a).

To reiterate, the excellent reproductive quality of the in stream trout habitat and that habitat’s biological capacity for sustaining outstanding densities and biomass of naturally reproducing assemblages of trout constitutes the quintessential “scientific feature”, 16 U.S.C. §1281(a), which was administratively recognized as being unique to the North Carolina headwaters of the Chattooga River prior to WSR designation in 1974.

Consequently, the United States Forest Service “shall take such action...*as may be necessary* to protect”, 16 U.S.C. §1283(a)(italics added), this “scientific feature” 16 U.S.C. §1281(a).

Stated differently, the United States Forest Service must take whatever management initiatives “as may be necessary”, 16 U.S.C. §1283(a), to make sure that “primary emphasis shall be given to protecting”, 16 U.S.C. §1281(a), the excellent reproductive quality of the in stream trout habitat and that habitat’s biological capacity for sustaining outstanding densities and biomass of naturally reproducing assemblages of trout.

By logical extension, the Desired Conditions and Standards which get adopted by the forthcoming LRMP must comply with the non-discretionary duties set forth at 16 U.S.C. §1281(a) and 33 U.S.C. §1313(d)(4)(B).

The forthcoming LRMP must incorporate Desired Conditions and obligatory Standards which inform on how the USFS plans to manage the headwaters by placing “primary emphasis” on “protecting” and “enhancing” the single “scientific feature” which the 1971 Chattooga Study

tacitly told Congress was unique to the Chattooga's headwaters in North Carolina. 16 U.S.C. §1281(a).

Unfortunately, the 2022 LRMP and Environmental Impact Statement are deficient.

They intentionally fail to tell the truth about how fine particle sized sandy sediments (<2mm in diameter) and silts (<.6mm) have clogged the interstitial spaces lying between the larger stream bed substrates (gravels up to 4.5 cm in size, and stream bed cobbles up to 30 cm in size) in quantities and percentages, which based on *the best available scientific information*, exceed any reasonable minimum effects threshold for significantly disrupting successful spawning by mature trout and the survival of their newly hatched alevin.

The 2022 LRMP does not tell the public how this *visibly obvious* water pollution problem was first brought to the agency's attention in written comments that I submitted on November 5, 2014 pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §431 et seq., in connection with the September 2014 Chattooga River Boating Access Environmental Assessment.

Before publishing the 2022 EIS and LRMP, the USFS should have recognized the evidence of this visibly obvious water pollution problem as new information demonstrating a pressing need to assess if "conditions in a unit have significantly changed" to the worse.

Having been notified of this problem, and based on the implications of 16 U.S.C. §1604(f)(5), the Forest Service should have started in 2014 to assess whether or not there was a need to begin revising how the agency continues to mismanage these headwaters.

At a minimum, the Forest Service owes a non-discretionary duty to pass on this new information (regarding water pollution) to the state of North Carolina and/or the USEPA so that those agencies might investigate. 16 U.S.C. §1283(c).

The Forest Service has never produced any form of record evidencing the agency's proper discharge of that plainly stated duty.

Unfortunately, the Forest Service has entirely disregarded all of the evidence which demonstrates how and why the Chattooga's trout populations have collapsed.

Instead, the agency denies owing any duty to the trout while simultaneously continuing to place primary management emphasis on fabricating justifications for providing additional legally unentitled but special recreational use accommodations for a small group of politically influential whitewater creek boating enthusiasts (led by the 501(3)(C) organization known as American Whitewater). The USFS continues to disregard its own admissions made to Judge Lewis as well as the legal importance of the Fourth Circuit's plainly stated finding: "'floating is not a value of the Chattooga that must be protected and enhanced under §1281(a)." *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014).

The USFS has intentionally refused to consider highly relevant scientific information regarding the Chattooga's trout. The USFS does so to encourage the recently granted but legally unentitled privilege to paddle these headwaters to be viewed as an unchallengeable sacrosanct right.

In fact, on September 6, 2017, the USFS admitted that it wasn't going to evaluate any of the new scientific information which I had brought to the agency's attention evidencing how "conditions... have significantly changed" to the worse on the Chattooga River.

The agency published the following edict: "Regarding management of the Chattooga River, the Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala, Sumter, and Chattahoochee NFs completed an environmental analysis of management of the Chattooga River in 2012, and there is not a need to revisit the analysis at this time. *The Forest has publically stated that we will not be revisiting the management direction for the Chattooga River as part of this plan revision...* Any updates to the management of the Chattooga River will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform that analysis." **Exhibit 22** at p.1(pdf p.2) email chain from Aug 28, 2017 to September 6, 2017 between Floyd and NNF officials Ms. Heather Luczak and Ms. Sheryl Bryan (AR doc. N-29) (italics added).

This September 6th decree evidences the agency summarily awarding an unnamed somebody with what constitutes *the tacit equivalent of a veto power* over how these headwaters should be managed going forward—despite all of the "new information" evidencing how trout habitat "conditions...have significantly changed" to the worse. 16 U.S.C. § 1604(f).

On September 22, 2017, I complained: "The USFS has endorsed the destruction of the trout buffer and the impermissible degradation of the Chattooga's ORW trout habitat and trout fisheries. This neglect must be fixed during the LRMP planning process—otherwise this neglect might have to be tested before the more stringent Standards set forth in the current LRMP get watered down by the new LRMP...We ought to work together to acknowledge this problem, to search for compromise, to source an appropriate mix of private and public funding to abate this problem, and to adjust the rules which have failed to prevent additional impermissible degradation from occurring. Unfortunately, the USFS has yet to demonstrate any willingness to acknowledge the problem—much less search for consensus or compromise about how to address this excessive embedded sediment...Instead, the USFS abandons any pretense of objectivity by summarily asserting that the 'Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala...completed an environmental analysis of management of the Chattooga ...in 2012,and there is not a need to revisit the analysis at this time...Any updates to the management of the [Chattooga's] will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform the analysis.'...As if some magic incantation for excusing this neglect while strong arming the public, the Forest Service summarily declares: 'The Forest has publicly stated that we will not be revisiting the management direction for the Chattooga River as part of this plan

revision.’...Consequently, in your capacity as the Responsible Official for the LRMP, please answer the following questions directly, comprehensively, and without any delay...[1] How does making such a public statement shield the USFS for ignoring the well documented and ongoing violation of the no visible sediment Standard articulated by the Nantahala and Pisgah National Forests’ existing Land Resource Management Plan as applied to the Chattooga River?[2]Who made such a public statement and when did they make it?[3] To whom did the USFS make such a public statement?[4] Has this public statement and the reasons for making it been memorialized in emails, correspondence, memorandums or written documents of any kind?... Similarly, could you explain the specific reasons why the USFS feels that any investigation of the Chattooga’s degraded condition can be put off until “after the plan revision...and after several years of monitoring data is available to inform that analysis[?]” **Exh. 5** at p.2 (pdf p.5)(AR doc. N-13-B).

I asked: “What factual information, professional opinion, internal memos, or other documentation of any kind, including orders or instructions delivered from a superior official to a junior official did the USFS rely on—to reject the physical evidence that shows how creek boating has caused the destruction of the Chattooga’s trout buffer support—and to make this September 6, 2017 assertion there isn’t any need to revisit the 2012 Record of Decision?” Id. at p.61 (pdf p. 64)(AR doc. N-13-B).

Finally, I submitted a request for records under the FOIA:

“Because the USFS offers no explanation or foundation for asserting the discretion to ignore this discrete LRMP planning problem, pursuant to the Freedom of Information, please provide electronic copies of the following documents:

- (1) *For the period of time between July 1, 2017 and September 6, 2017*, any and all internal communications between any USFS personnel, including emails and handwritten notes, that in any way mentions, references, or that instructs or provides orders about how to discharge the decision of Ms. Heather Luczak to advise Bill Floyd via email on September 6, 2017 @ 10:05 am, that “that there is no need to revisit the analysis at this time”, including but not limited to any such communications transmitted or received by any of the following groups:
  - a. (A) the current Chief of the United States Forest Service, Mr. Tony Tooke, and any of the Chief’s Office Staff,
  - b. any executive leadership or staff personnel currently assigned to the Region 8, Southern Regional office in Atlanta
  - c. any leadership or staff personnel working within the Nantahala and Pisgah National Forests;
- (2) Subsequent to January 1, 2017, any and all *sedimentation* studies conducted to monitor and recognize any negative environmental impacts taking place on the North Carolina section of the Chattooga, as necessitated by the terms of Amendment #22 to the Nantahala and Pisgah Forests Land Resource Management Plan (January 2012);

- (3) any and all monitoring studies specifically conducted to assess and inventory any creek boating caused displacement of soils lying within North Carolina's trout buffer subsequent to the start of creek boating on December 1, 2012;
- (4) any associated communications, emails, memorandums, reports, or documents of any kind exchanged internally between USFS personnel, or exchanged with any external third party, summarizing, analyzing, or describing the significance of the results and details contained within all such monitoring studies enumerated in (2) and [3
- (5) any internal USFS communications, including emails and handwritten notes, discussing the need to conduct such monitoring in response to public complaints;
- (6) For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official." Id. pp.61-62

On October 17, 2017 at 11:33 AM, having neither received answers to the questions that I had posed nor any documents in response to the FOIA, I emailed again to press the agency to provide more information.

On October 23, 2017, after being pressed to provide a more detailed explanation, Ms. Luczak responded with the following explanation: "Regarding your question about when we publicly stated that the revised Forest Plan would not be revisiting the management of the Chattooga River, the Forest Planner made this statement to a collaborative group of stakeholders *at a meeting in April 2016...* MEETING RECORD Stakeholders Forum for the Nantahala & Pisgah Plan Revision DRAFT Meeting Record, Tuesday April 12, 2016 10:00 AM- 4:00 PM... [https://www.nationalforests.org/assets/pdfs/2016-4-12-Stakeholders-Forum-Meeting-Record\\_finaldraft.pdf](https://www.nationalforests.org/assets/pdfs/2016-4-12-Stakeholders-Forum-Meeting-Record_finaldraft.pdf) ... There was also public discussion at the July 1, 2017 Franklin public meeting between Ms. Luczak and members of the public. This discussion was not captured in meeting minutes..." **Exhibit 23** at p.1(pdf p.2) Luczak email Oct. 23, 2017 (AR doc. N-29-2).

The meeting minutes to which Ms. Luczak cites are eye opening *for what they fail to disclose pertaining to this critical subject matter*. These notes merely state: "During discussion regarding recommendations among [Stakeholders Forum] members there was some concern regarding access to water and legacy bans of non-motorized boating on waterways. *The Forest Service responded that the boating ban on the Chattooga River would not be addressed in the plan revision.*" Floyd **Exhibit 24** at p.3 (pdf p.4) MEETING RECORD, Stakeholders Forum for the Nantahala & Pisgah Plan Revision DRAFT Meeting Record, Tuesday April 12, 2016 10:00 AM-4:00 PM. (previously placed into the AR as Floyd Exhibit 47 when I submitted my LRMP draft comments back on June 29, 2020)(italics added).

I now know, but could not know in the fall of 2017, how the statements made by the Forest Service on September 6th and October 23, 2017 *projected an erroneous impression that a significant number of groups or individuals were somehow interested in this issue* and that they

were somehow legally relying on the statement that “that we will not be revisiting the management direction for the Chattooga River as part of this plan revision”. **Exhibit 22** at p. 1 (pdf p.2)(AR doc. N-29)

*The truth is only one individual was interested in how the North Carolina headwaters of the Chattooga River would be managed under the new LRMP.*

The Forest Service knew who this person was on October 23, 2017. Nevertheless, the Forest Service failed to disclose that critical fact to me.

The Forest Service kept this fact a secret.

*It took me over a year to stumble upon a way to discover the critically relevant truth which the agency had failed to disclose.*

I learned the truth from Ms. Karen Dibari, Director, Conservation Connect, National Forest Foundation. Ms. Dibari had attended that meeting.

On November 15, 2018, I emailed her and asked if she could identify who specifically had asked the question which had been recorded in the April 12, 2016 meeting minutes of the Stakeholders Forum as follows: “During discussion regarding recommendations among SF members there was some concern regarding access to water and legacy bans of non-motorized boating on waterways. The Forest Service responded that the boating ban on the Chattooga River would not be addressed in the plan revision.” See the Meeting Minutes in **Exhibit 24** at p. 3 (pdf p.4).

On November 21, 2018, Ms. Dibari responded: “In answer to your first question, *I believe it was American Whitewater who inquired about the Chattooga River process...*Second, the ‘Special Areas Ad Hoc Committee’ was intended to help constructively frame Stakeholders Forum discussion about designations, meaning Wild & Scenic River and wilderness designation. I don’t have any record of the committee actually meeting.” **Exhibit 25** at p.1(pdf p.2)(italics added), an email chain between Bill Floyd and Karen Dibari spanning November 15, 2018 to November 21, 2018, otherwise sent to former Forest Supervisor Nicholas on December 21, 2018 with a request to be lodged into the AR as document P-10.

Stated differently, Ms. Dibari confirmed (as verified by the attendance record) *that it was Mr. Kevin Colburn, of American Whitewater, to whom the Forest Service had made a promise in April 2016 that there was no need to reassess how the North Carolina headwaters of the Chattooga River should be managed going forward.*

The agency tacitly admitted that the agency intended to provide American Whitewater with an extraordinary level of unseen influence over how the North Carolina headwaters of the Chattooga River will be managed going forward under the soon to be adopted LRMP.

This demonstrates the way in which the Forest Service arbitrarily granted a de facto veto to a representative of American Whitewater about how the North Carolina headwaters of the Chattooga River will be managed going forward.

Throughout the ongoing revision of the LRMP, I have tried to persuade the Forest Service to use the revision of the LRMP to address this visibly obvious water pollution problem.

I have tried to persuade the agency to admit how this bedded sedimentation has degraded the reproductive suitability of the in stream trout habitat and that habitat's previously administratively recognized biological capacity for sustaining outstanding densities, biomass and species assemblage of naturally reproducing populations of trout.

Unfortunately, as can be seen by the content of the most recent draft LRMP and the 2022 EIS, the Forest Service has elected to do nothing to fix these two closely correlated problems.

In fact, the Forest Service has inexplicably chosen to publish a 2022 LRMP which eliminates certain protections which were previously afforded to the trout habitat under the old LRMP which is about to be abandoned.

#### **WHAT IS WRONG ABOUT THE DRAFT LRMP AND 2022 EIS**

The purpose for preparing a Land Resource Management Plan is to establish a baseline set of Desired Conditions, obligatory Standards, and guidelines for managing forest resources. The Forest Service has described the LRMP as being analogous to a zoning plan in a human community.

The LRMP provides an analytical means for determining whether or not proposed managerial initiatives for resolving a site specific need or problem should be implemented. A site specific project must be consistent with the goals, standards, and guidelines that apply under the LRMP.

Another fundamental purpose for revising a Land Resource Management Plan is *to establish a baseline inventory of the physical condition of the natural resources of a National Forest so that the agency can determine if a future managerial initiative might cause significant adverse environmental impacts to any of those resources.*

Stated differently, the baseline physical condition of a particular natural resource within a particular management area of a National Forest must be correctly defined or memorialized when an LRMP gets revised. *Otherwise, it would prove impossible to determine objectively if any future planned managerial initiative will cause significant adverse environmental impacts to the resource as required by the National Environmental Policy Act ("NEPA").*

If the true baseline environmental condition of specific natural resources lying inside particular management areas of a National Forest aren't properly inventoried, the public loses some of its ability to challenge future site specific managerial initiatives impacting the resource.

This is why *the baseline condition of the natural resource must be accurately reported* during the revision of the LRMP. Unfortunately, the 2022 LRMP unlawfully fails to reveal the true degraded condition of the Chattooga's trout habitat and trout population densities.

The 2022 LRMP and EIS contain erroneous assertions of fact regarding the baseline condition of the North Carolina headwaters of the Chattooga River.

These misrepresentations of fact serve to "skew" the administrative record.

They tacitly conceal critical facts that ought to be disclosed to the public.

The proper disclosure of these improperly concealed facts would spotlight the Forest Service's ongoing mismanagement of the North Carolina headwaters of the Chattooga River.

The forthcoming LRMP must *not permit future managerial initiatives or activities if the implementation of those initiatives or activities might violate any non-discretionary duty spelled out by the national Wild and Scenic Rivers Act ("WSRA") or the Clean Water Act ("CWA")*.

However, this duty can't be discharged unless the current physical condition of these headwaters are accurately inventoried and compared against their baseline physical condition in 1974.

Similarly, the LRMP must *ensure* that no site specific initiative can get approved that would violate either of these statutes. To achieve this, the USFS must adopt Desired Conditions and obligatory Standards that explicitly protect the trout and the in stream trout habitat.

## **THE OUTSTANDINGLY REMARKABLE VALUES IN 1971**

First, the USFS mischaracterizes what was administratively demonstrated to be the single most remarkable "scientific feature" and ORV of these headwaters prior to designation as a national Wild and Scenic River.

The WSRA plainly states: "It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, *fish and wildlife*, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. §1271 (italics added). The statute doesn't specifically mention biological values.

Stated differently, the ORV's of a national WSR are explicitly stated to be comprised of "fish and wildlife...values" in addition to "recreational" values. *Id.* The statute draws a stark



distinction between these two different types of ORVs. The statute also recognizes how unique *scientific features* of a river should be viewed as a special type of Outstandingly Remarkable Value of the river. 16 U.S.C. §1281(a).

However, the *1971 Chattooga Study* explicitly defined the Chattooga's Outstandingly Remarkable Values ("ORV's") as follows: "The river with its immediate environment possesses outstanding scenic, recreational, geological, *biological*, historical, and related values and assets." **Exhibit 1** at p. 5 (pdf p.15) (AR document "Q-1").

The USFS previously admitted its understanding that the river's "*fisheries*, wildlife, and botany are components of the biology ORV." ECF No. 238 at p.3, *American Whitewater, et al, v. Tidwell*, CV No. 8:09-2665-MGL, Dst.SC. (italics added).The *1971 Chattooga Study* demonstrates through description how these headwaters possessed a remarkable trout stream *fishery* which was understood to be a unique *scientific feature* entitled to intense protection.

However, both planning documents fail to admit how the *1971 Chattooga Study* demonstrated by description how these headwaters possessed a unique trout stream productivity (a fishery) which was one of the most remarkable biological ORVs present on these headwaters prior to WSR designation. The agency disregards the importance of the "fisheries" ORV as explicitly recognized by 16 U.S.C. §1271.

The 2022 LRMP obfuscates how the *1971 Chattooga Study's* Chapter 5 (Description of the River), purposely drew a sharp distinction between the "Fisheries" ORV and the "Recreation Opportunities" ORV.

To reiterate, the Table of Contents for Chapter 5 of the *1971 Chattooga Study* treats these two features as being entirely separate and distinct ORVs.

Forty eight years after the Chattooga's WSR designation, the authors of the 2022 EIS and 2022 LRMP *attempt* to rewrite what Congress was told by equating two separate ORVs as somehow being a part of the same recreational ORV.

By doing so the authors of the LRMP wrongfully conceal the administratively indisputable importance of the outstanding reproductive quality of the in stream trout habitat and that habitat's unique biological capacity for sustaining excellent densities of spawning trout.

Given these administrative facts, the only conclusion that can be reached is that the planning staff intentionally omitted telling the truth about how the *1971 Chattooga Study* described "*biological... values and assets*", id., as one of the most important outstandingly remarkable values of the North Carolina headwaters of the Chattooga River.

Both of these planning documents refuse to acknowledge the common sense fact that these headwaters were administratively memorialized to possess an outstanding trout stream

productivity which was understood to equate to a remarkably unique scientific feature of these headwaters.

**A Second Misstatement of Material Fact Which Obscures the Critical Truth about What Must Be Protected on these Headwaters.**

The 2022 LRMP makes the following half-true characterization about the North Carolina headwaters of the Chattooga River: “Some of the stream and river miles are characterized by *tannic water and sandy substrates that are unique to western North Carolina.*” Draft LRMP at p.174 (italics added)

This statement summarily implies that the visibly obvious problem of the sediment blanketing the stream bed of the Chattooga River (not infrequently seen in quantities exceeding one foot in depth) *somehow constitutes a natural background condition* which is “unique to western North Carolina.” Id.

Without explicitly stating so, this statement tries to persuade the unknowledgeable member of the public that the blanket of sediment that has impounded on the Chattooga is somehow normal.

To explain, the 2022 LRMP generally states: “The following goals contribute to identification of management priorities in the Highland Domes Geographic Area.” 2022 LRMP at p. 174.

Next, the 2022 LRMP inconceivably states one of the specific goals for the Highland Domes Geographic Area as follows: “Maintain and enhance unique tannic, sandy bottom stream habitat within...upper Chattooga River, and Savannah River watersheds to provide quality habitat for *native brook trout and other native aquatic species.*” Id.(italics added).

This stated goal manipulates into oblivion the legal importance of the administrative histories underlying these headwaters designation as a national Wild and Scenic River and their subsequent reclassification as Outstanding Resource Waters.

This stated goal of focusing on providing quality habitat for “native aquatic species” constitutes a camouflaged attempt to vitiate and marginalize the non-discretionary protections that the USFS is obligated to *provide to the non-native but naturally reproducing populations of rainbow and brown trout* that were administratively memorialized as being present in the main stem of the headwaters of the Chattooga River and certain select tributaries prior to WSR designation and ORW classification.

This attempt to camouflage the watering down of the protections owed to the rainbow and brown trout is unlawful. We need greater numbers of all species of trout—not just brook trout.

Furthermore, this river doesn’t need more sands. This river needs less sand.

This statement informs on the Forest Service’s obstinate predisposition for placing primary emphasis on managing to increase brook trout numbers instead of all species of naturally

reproducing populations of trout. This singular emphasis on brook trout conflicts with what the agency is compelled to do on the North Carolina headwaters of the Chattooga River.

**A Third Misstatement of Material Fact Which Serves To Conceal the Critical Truth About the Excessive Bedded Sediment Problem While Excusing this Agency's Neglectful Mismanagement of the Chattooga's Wild Trout Populations:**

Here is a perfect example demonstrating how the USFS overstates its singular preoccupation with brook trout. In the 2020 draft of the LRMP, the Forest Service claimed "The region's rivers provide visitors with access to fishing, *with anglers seeking brook trout especially attracted to the headwaters of the ...Chattooga.*" 2020 LRMP at 164.

On June 29, 2020, I complained about this clumsy attempt to elevate brook trout over rainbow and brown trout as the central subject of managerial concern for the LRMP.

I complained that nobody is "especially attracted" to fish the remote and difficult to access headwaters of the Chattooga River for "brook trout" for a single verifiable reason: the 2016 NCDEQ study proved that there aren't any fishable populations of brook trout in the Chattooga.

To the contrary, anglers used to be attracted to the rugged and remote headwaters of the Chattooga because of the opportunity to catch and release a significant number of rainbow and brown trout—and the chance every so often to catch a very large wild brown trout.

The agency was forced to admit the absurdity of this entirely false claim in January 2022.

Consequently, the new 2022 LRMP now claims: "The region's rivers provide visitors with access to fishing, with anglers seeking brook trout especially attracted to the headwaters of the Cullasaja, Tuckasegee *and Whitewater Rivers.*" 2022 LRMP at P. 173(italics added).

I'm not sure the agency tells the truth when it suggests that anglers are especially attracted to fish for brook trout on the headwaters of the Whitewater River. Not infrequently, I fish the Whitewater River upstream of the Highway 281 bridge. The bridge is less than five minutes from my cabin. *I can't recall having ever caught a single brook trout in any of those outings.*

Objection: Both the 2022 LRMP and EIS mislead the public about the Chattooga's trout.

Neither explains how the USFS must manage the North Carolina headwaters of the Chattooga River by placing "primary emphasis" on "protecting" the quintessential "scientific feature", 16 U.S.C. §1281(a), which the Forest Service described to Congress in 1971 as being unique to these headwaters

The "scientific feature" which must be provided with "primary emphasis" protection, 16 U.S.C. §1281(a)(italics added), is the "excellent" trout "stream productivity" which was spotlighted for

Congress "*as comparing favorably with the better trout streams in all three states.*" **Exhibit 1** at pp.19-20 (pdf. pp.31-32)(italics added)(AR doc. Q-1).

Trout stream productivity constitutes a function of the quality of the water chemistry and the quality of the in stream trout habitat, including the presence of clean gravels and cobbles.

North Carolina provides: "Outstanding Resource Waters (ORW) are a special subset of High Quality Waters with unique and special characteristics as described in Rule .0225 of this Section. The water quality of waters classified as ORW *shall be maintained* such that existing uses, including the outstanding resource values of said Outstanding Resource Waters, shall be maintained and protected." 15A NCAC 02B.0201(e).(italics added).

Neither the 2022 EIS nor the LRMP provides any kind of explanation about how the antidegradation mandate is intended to apply to the management of the ORW classified Chattooga.

Consequently, the 2022 LRMP is fatally flawed.

*How can any future cumulative effects analysis be prepared* with respect to management initiatives involving these headwaters without the agency providing a Standard which informs on how the antidegradation mandate of the CWA applies to these headwaters?

Objection: Neither the 2022 LRMP nor the EIS inform the public about the legal importance of the administrative record associated with the river's reclassification as Outstanding Resource Waters.

Objection: Neither the 2022 LRMP nor the EIS explain how it was the Rabun County GA Chapter of Trout Unlimited who petitioned to have the Chattooga River reclassified as Outstanding Resource Waters in 1987.

Neither planning document discloses what Rabun Ga. TU asserted in its petition seeking ORW reclassification for these headwaters: "...the entire Chattooga River watershed qualifies for the classification of 'Outstanding Resource Waters' because ...[1] *There is outstanding native trout habitat and fisheries; including Eastern Brook trout, Rainbow trout and Brown Trout...*[ 2] A wild and remote trout stream with the size, beauty and water quality of the Chattooga River is unique in the Eastern United States..." **Exhibit 9** at p.1(pdf p.2) (AR doc. N-22).

Rabun TU further asserted "this watershed presently has exceptional water quality with no significant impacts from pollution. We also feel that this watershed's unique characteristics and quality may not be protected without classification as 'Outstanding Resource Waters.' " Id. at page 2 (italics added).

At the time that Rabun TU submitted its petition seeking ORW reclassification, the rules required that the applicant “shall identify the exceptional resource value to be protected, address how the water body meets the general criteria in Paragraph (a) of this Rule, and the suggested actions to protect the resource value.” 15A NCAC 02B.0225(d).

The version of 15A NCAC 02B.0225(b) in effect when the Chattooga was reclassified as an ORW body of water defined five *exceptional resource values* that a stream might exhibit in order to qualify for ORW reclassification.

A petitioner needed only to prove that a stream exhibits "one or more of the following values or uses" to qualify for ORW classification. 15A NCAC 02B.0225(b).

One of the "values" which a stream might exhibit to qualify for ORW reclassification includes an administrative finding that: "there are *outstanding* fish (or commercially important aquatic species) habitat and fisheries." 15A NCAC 02B.0225(b)(1) (italics added).

As applied in the text of the regulation, the plainly stated and physically measurable meaning of the word "*outstanding*" constitutes a dual modifier that refers not only to the superlative condition of the stream habitat that must be preserved but also to the first in class population densities of the fisheries which must be protected.

North Carolina uses the word "outstanding" as a dual modifier for describing the kind of habitat and fisheries which must be present. “Outstanding” is synonymous with first in class, exceptional, superlative, first rate, first class, or *excellent*.

The plainly stated meaning of "outstanding" is conceptually and measurably distinguishable from "good", "fair", "average", "sufficient" or "minimally adequate."

North Carolina chose to employ "outstanding" to distinguish the quantifiable innate differences in the productivity of a particular species of fish which an ORW classified stream's habitat must possess to qualify for ORW antidegradation protection.

Stated differently, at the time of the Chattooga’s reclassification as Outstanding Resource Waters, 15A NCAC 02B.0225(b)(1) defined a subcategory of designated use of North Carolina's highest quality waters which was much narrower and more precise than protecting the broader and more general aquatic life use of water quality

North Carolina approved ORW reclassification of these headwaters by *explicitly* admitting: "The Chattooga River Basin was petitioned for consideration as ORW by the Rabun, Georgia Chapter of Trout Unlimited and Friends of Norton Mill Creek...Several reasons have been cited as the basis for this reclassification request including...*an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout.*" **Exhibit 10** at p. S-8 (AR doc. A-2).

Objection: Both the 2022 LRMP and the Draft EIS are misleading because they fail to explain the legal duties imposed upon the USFS as a consequence of the Chattooga's ORW classification or how this classification impacts what the Forest Service must do or must not do in managing the day to day beneficial uses of the Chattooga River.

Objection: Neither planning document tells the truth about the *specific subcategorized designated use of the river's ORW water quality* which must not be allowed to suffer any non-temporary deterioration in the full attainment of this designated use.

Objection: Neither explain how preserving the physical quality of the in stream trout habitat and that habitat's biological capacity for sustaining outstanding densities of naturally reproducing assemblages of trout *constitutes the subcategorized designated use the Chattooga's ORW water quality*. Neither explains how the USFS must prevent any non-temporary diminishment in this subcategorized designated use of the river's ORW water quality.

Objection: Neither planning document tells the truth about why the river's ORW classification requires that the Forest Service manage the North Carolina headwaters of the Chattooga so as to prevent any non-temporary degradation in the reproductive quality of the in stream trout habitat and that habitat's biological capacity for sustaining outstanding densities and biomass of naturally reproducing populations of trout.

Objection: Neither the 2022 LRMP nor the EIS tell the truth about how fine particle sized sandy sediments (<2mm in diameter) and silts (<.6mm) have filled in the interstitial spaces lying between the larger stream bed substrates (gravels up to 4.5 cm in size, and stream bed cobbles up to 30 cm in size) in quantities and percentages, which based on *the best available science*, exceed any reasonable minimum effects threshold for significantly disrupting successful spawning by mature trout and the survival of their newly hatched alevin.

Objection: Neither planning document explains how the antidegradation mandate of the Clean Water Act, at 33 U.S.C. §§ 1313(d)(1), impacts the agency's management of this river.

Objection: Neither 2022 document informs how Section 404(b) of the Water Quality Act of 1987 specifies that for any water body whose water quality "exceeds levels necessary to protect the designated use for such waters ... any water quality standard...*or any other permitting standard* may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." Pub. L. 100-4, Title IV Permits and Licenses, §404(b), 101 Stat. 7, 69 (italics added)(codified at 33 U.S.C. §1313 (d)(4)(B)).

The phrase "any other permitting standard", *id.*, alludes to how the 2022 LRMP cannot eliminate explicitly stated protections previously afforded to the Chattooga's trout by Standards articulated in the currently enforceable LRMP if the elimination of the protection will cause these headwaters to suffer any non-temporary deterioration in their functional capacity for sustaining outstandingly

remarkable numeric densities and biomass of naturally reproducing assemblages of rainbow, brown, and brook trout.

Objection: Neither planning document admits how since May 2018 the USFS has had copies of the trout population counts which demonstrate how these headwaters have suffered a non-temporary collapse in the densities and biomass of their naturally reproducing populations of rainbow, brown, and brook trout.

Neither planning document advises how these records of the trout population counts have been assigned an index name and placed into the AR being compiled during the revision of the LRMP.

Objection: Neither the 2022 LRMP nor the EIS acknowledge how the Forest Service possesses copies of the Administrative Records which explain why these headwaters stand unique from every other stream flowing through the Nantahala and Pisgah National Forests:

- 1) See the *1971 Chattooga Study* (AR doc. “Q-1”).
- 2) See Rabun TU’s 1987 ORW Petition (AR doc. “N-22”)
- 3) See the state of North Carolina’s 1988 Report of Proceedings Chattooga Classification History (AR doc. “A-2”)

Objection: Neither planning document published these critical documents.

Objection: Neither planning document advises how the public might gain access to these critical records for the purpose of becoming fully informed about the legal significance of those past administrative records.

Objection: Neither planning document details what the Forest Service must specifically do while managing these headwaters to comply with any legal duties which arise as a consequence of WSR designation as well as ORW classification.

Both planning documents create a false impression that the Forest Service is free to do as it pleases in managing the North Carolina headwaters of the Chattooga—free of any plainly stated non-discretionary duty.

Objection: The 2022 LRMP is deficient because it fails to incorporate a Standard explicitly prohibiting any non-temporary degradation in the subcategorized designated uses of the Chattooga’s ORW water quality.

Objection: The 2022 has unlawfully removed the physical protection provided against improper discharges of sediments into the river as previously afforded by what has been anecdotally referred to as the “no visible sediment” Standard of the currently enforceable Forest Plan.

The “no visible sediment rule” mandates that the Forest Service must: “Design and maintain all types of trails *so no visible sediment reaches the stream channel*, except at crossings where visible sediments and surface runoff entering the channel will be minimized as directed by the NC PPCRWQ [NC Forest Practices Guidelines Related to Water Quality;15A NCAC 011.0100-0209 ] for silviculture.” See **Exhibit 8** at page III-185 (pdf p.192) Amendment 5 to the Nantahala National Forest LRMP (1994)(italics added) (AR document “N-23”).

The 2022 LRMP has eliminated this Standard.

Subsequent to November 5, 2014, on at least five occasions, I have provided the Forest Service with detailed written explanations about what the Forest Service must do while managing and administering these headwaters.

1. See July 29, 2017 Notification (AR doc. “N-13-A”) provided to Forest Supervisor Nicholas on July 29, 2017
2. See September 22, 2017 Notification (AR doc. “N-13-B”) provided to Forest Supervisor Nicholas on September 22, 2017
3. See May 18, 2018 60 Day Notice of Intent to Sue under the Citizen Suit provision of the Clean Water Act
4. See October 7, 2019 Correspondence (AR doc. “Q-4”) provided to Forest Supervisor Nicholas on October 28, 2019
5. See June 29, 2020 Comments/Notification Re DRAFT LRMP

Objection: Neither the 2022 LRMP nor the EIS disclose how on May 18, 2018 senior Forest Service officials were served with a 60 Day Notice of Intent to Sue under the Citizen Suit provision of the Clean Water Act.

This 60 Day Notice of Intent to Sue summarized the long history (dating back to April 2005) of the agency having mismanaged these headwaters by placing primary emphasis on developing a legally unentitled recreational use accommodation for whitewater creek boating enthusiasts.

Neither the 2022 EIS nor the LRMP disclose how this 60 Day Notice of Intent to Sue alleged that the USFS did not obtain proper Section 301 and Section 402 permits for discharging pollutants into the river before allowing the construction and use of a paddler created system of river launch sites, river evacuation points and portage trails inside North Carolina’s 25 foot protected trout buffer.

This 60 Day Notice of Intent to Sue specifically alleged that allowing whitewater creek boating to be pursued on these headwaters had resulted in the creation of point sources of pollution where sediments suspended in runoff are being unlawfully channeled into a body of water which lacks any capacity to assimilate any additional contributions of sediment.



This 60 Day Notice of Intent to Sue also charged that the Forest Service had violated the antidegradation mandate of the Clean Water Act, 33 U.S.C. §1313 (d)(4)(B).

Objection: Neither the 2022 LRMP nor EIS make any effort to advise how hard bottomed plastic kayaks being seal launched into the river have caused the river bank to collapse causing the creation of point sources of water pollution.

Objection: Neither planning document inventories the (1) number of chronic erosion sites (point sources of pollution) where sediments suspended in runoff are being channeled into the river or (2) the new number of portage trails which have been hacked through the thickets of rhododendron and mountain laurel which serve to hold highly erosive soils in place.

Neither inventories any of the additional erosion sites caused by boating activities to the baseline number of erosion sites reported in the 2007 Biophysical Inventory. Floyd **Exhibit 26** (AR B-4).

Objection: The 2022 LRMP fails to adopt sufficiently intense standards for properly discharging the non-discretionary duty of non-degradation set forth in the national Wild and Scenic Rivers Act, 16 U.S.C. §1281(a), as that duty is further informed and intensified by the antidegradation mandate of the Clean Water Act's water quality standards, 33 U.S.C. §1313 (d)(4)(B).

The "Standards" and "objectives" which have been proposed for the Chattooga River Management area (lying within the Highland Domes Geographic Area) omit certain "Standards" which *previously afforded specific obligatory protections* to the narrowly defined subcategorized designated use of the river's ORW water quality.

To be specific, the 2022 LRMP no longer incorporates the "no visible sediment" Standard which previously provided protection for the Chattooga's "outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout."

Regarding construction of trails inside the Riparian Area of a river, the currently enforceable LRMP (Amndt.#5) specifies: "Design and maintain all types of trails so no visible sediment reaches the stream channel, except at crossings where visible sediments and surface runoff entering the channel will be minimized as directed by the NC FPGRWC [NC Forest Practices Guidelines Related to Water Quality 15A NCAC 011.0100-0209] for silviculture." NNF LRMP Amndt.#5, Floyd **Exhibit 8** at page III-185 (pdf p.192) (AR doc N-23).

The 2022 LRMP no longer contains this explicit Standard. I believe that this Standard has been eliminated because the USFS knows that the continuing promotion of whitewater paddling on the North Carolina headwaters of the Chattooga River cannot occur without violating this Standard.

Just as important, the currently enforceable LRMP directs that Wildlife and Fish Resource Management on the Chattooga River, Management Area 15 (Wild and Scenic Rivers), should “Refer to direction for Management Area 18 [the Riparian Management Area].” **Exhibit 8** at p. III-170 (pdf p.177)*Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests, March 1994* (AR document N-23).

The currently enforceable LRMP articulates two critical non-discretionary standards for Management Area 18: “Manage habitat primarily for...trout...” and “*improve habitat of wild trout streams as a first priority.*” Id. at page III-185 (italics added).

Unfortunately, the 2022 LRMP does not incorporate either of these two Standards which previously provided intense protections for rivers flowing through the Highland Domes Geographic Area or the Wild and Scenic Rivers management area.

The elimination of these two non-discretionary Standards demonstrates how the agency has revised a “permitting standard” which once served to provide physical protections to a subcategorized designated use of the Chattooga’s ORW water quality. The antidegradation mandate prohibits any revision of *any* “permitting standard” unless “such revision is subject to and consistent with the antidegradation policy established under this section.” Pub. L. 100–4, Title IV Permits and Licenses, §404(b), 101 Stat. 7, 69 (codified at 33 U.S.C. §1313 (d)(4)(B)).

The elimination of these two Standards evidences the agency’s continuing effort to minimize the protections owed to the wild trout residing on the North Carolina headwaters of the Chattooga River.

Similar to the 2020 version of the LRMP, the 2022 LRMP incorporates Specific Direction for Designated Wild and Scenic Rivers by Name.

This section of the LRMP explicitly reveals the agency’s intention to continue treating the recreational wish list of whitewater paddlers as sacrosanct rights instead of adhering to the law of the Fourth Circuit which plainly states: “floating is not a value of the Chattooga that must be protected and enhanced under §1281(a).” *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014).

The USFS has disregarded all of the comments which I submitted back on June 29, 2020.

The USFS has not made a single change in how it plans to provide Specific Direction for Designated Wild and Scenic Rivers by Name. Set forth below is a comparison of the Desired Conditions which the Forest Service continues to claim should apply to the Chattooga River.

Specific Direction for Designated Wild and Scenic Rivers by Name: Chattooga River: 2020 proposed LRMP	Specific Direction for Designated Wild and Scenic Rivers by Name: Chattooga River: 2022 proposed LRMP
<p>Desired Conditions</p> <p>WSR-DC-15 Manage to maintain the unique characteristics and scenic values of the river corridor</p> <p>WSR-DC-16 Provide limited boating opportunities on the upper segment of the Chattooga River</p> <p>WSR- DC-17 Provide facilities as needed for public safety, resource protection, and enhancement of the recreational experience</p> <p>WSR-DC-18 Camping opportunities are primitive and compatible with river values. Redundant campsite, campsites where resource damage cannot be mitigated, and campsites that exacerbate encounters or conflict will be closed or relocated</p> <p>WSR-DC-19 The trail system, including portage trails, is designed to minimize encounters and conflict while being environmentally sustainable. Redundant trails, trails where resource damage cannot be mitigated and trails that exacerbate encounters or conflict will be closed or rerouted.</p> <p>WSR-DC-20 Provide parking and trailhead facilities at Grimshawe and the Iron Bridge on the Chattooga River</p>	<p>Desired Conditions</p> <p>WSR-DC-15 Manage to maintain the unique characteristics and scenic values of the river corridor</p> <p>WSR-DC-16 Provide limited boating opportunities on the upper segment of the Chattooga River</p> <p>WSR- DC-17 Provide facilities as needed for public safety, resource protection, and enhancement of the recreational experience</p> <p>WSR-DC-18 Camping opportunities are primitive and compatible with river values. Redundant campsite, campsites where resource damage cannot be mitigated, and campsites that exacerbate encounters or conflict will be closed or relocated</p> <p>WSR-DC-19 The trail system, including portage trails, is designed to minimize encounters and conflict while being environmentally sustainable. Redundant trails, trails where resource damage cannot be mitigated and trails that exacerbate encounters or conflict will be closed or rerouted.</p> <p>WSR-DC-20 Provide parking and trailhead facilities at Grimshawe and the Iron Bridge on the Chattooga River</p>

Inexplicably, not a single one of these Desired Conditions makes mention about the non-discretionary duties owed to the wild trout on the Chattooga River.

Similarly, the Standards which the LRMP intends to adopt are seriously flawed because they do not provide the obligatory protections owed to the Chattooga's trout.

First and foremost, the Standard set forth at WSR-S-31 represents the penultimate in agency leadership arrogance in doing legally unentitled favors for their whitewater paddling buddies.

The proposed Standard set forth at WSR-S-31 evidences the Forest Service's attempt to characterize the recreational use demands of whitewater paddlers as sacrosanct rights.

The Forest Service's arrogant message is clear. We plan to ram through doing favors for our favorite recreational users and too bad if you disagree.

The USFS has the ability, but not the right, to punish anybody who would dare to criticize the agency or to stand in opposition to the agency doing legally unentitled favors for whitewater paddling enthusiasts.

The Forest Service knows that the continuing promotion of whitewater creek boating causes the creation of point sources of water pollution that haven't been properly permitted under the Clean Water Act. Nevertheless, neither planning document tells this truth to the public.

Neither the 2022 EIS nor LRMP admits how the USFS told Judge Lewis that whitewater paddling can cause "substantial interference with other recreational uses and other ORVs of the Chattooga." *American Whitewater v Tidwell*, 959 F. Supp. 2d 839, 853 (Dist. SC 2013) (affirmed on appeal *American Whitewater v Tidwell*, 770 F. 3d 1108 (4th Cir. 2014).

Neither planning document tells the truth about what the Fourth Circuit made clear in plainly stated words: "floating is not a value of the Chattooga that must be protected and enhanced under §1281(a)." *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014).

Instead, throughout the ongoing revision of the LRMP, the USFS has disregarded all of the documentation evidencing the degraded trout habitat and this degraded habitat's inability to sustain outstanding densities, biomass, and species assemblages of naturally reproducing populations of trout.

It defies understanding how a legally unentitled privilege to pursue whitewater paddling on these headwaters is about to be enshrined as an obligatory Standard by the 2022 LRMP.

The agency insists all is well because: "In 2012, the Sumter NF, Chattahoochee-Oconee NF and Nantahala and Pisgah NFs signed decisions on managing recreation opportunities on the Chattooga WSR. In addition to amending forest plan direction, *these decisions included a Monitoring Plan and Adaptive Management Strategy designed to characterize use and social impacts occurring with[in][sic] the upper segment of the Chattooga WSR corridor, identify changes since a previous study in 2008, and consider whether the capacity thresholds are effective at protecting and enhancing the river's ORVs, in particular the social/solitude values...* The 2012 decisions were challenged on numerous counts and in 2014, the U.S. Court of Appeals for the fourth circuit rejected challenges to the 2012 plan amendment decisions *and found* that the Forest Service's revised plan 'carefully balance[s] the wide-ranging interests advocated by

the several parties and participants.’ *American Whitewater v. Tidwell*, 959 F. Supp. 2d 839, 860 (D.S.C. 2013) (“Tidwell”). Following the 2014 court decision, *the Forest Supervisor for the National Forests in NC maintained that the Nantahala and Pisgah National Forest plan revision would not revisit the management of the Chattooga WSR because the 2012 decision had not been fully implemented and the required monitoring of the decisions had not yet begun...* The first round of recreation use monitoring on the Chattooga WSR upstream of the Highway 28 bridge was conducted in 2017 and 2018 and the monitoring report was published in 2019. *Additional monitoring is necessary to determine use trends and to determine whether changes to visitor use management on the Chattooga WSR should be appropriately contemplated. Considering changes now, without additional monitoring, would be premature and inappropriate.* As the lead river management unit, the Sumter NF will assess current and future monitoring results and make adaptive management decisions in coordination with the National Forests in North Carolina and Chattahoochee-Oconee NFs. If a need to change visitor use management on the Chattooga WSR is identified, the three forest plans would be amended accordingly. *This alternative was eliminated from detail study because it is outside the scope of the forest plan.*” 2022 EIS at p. 2-30 to 2-31 (pdf. pp. 68-69)(italics added).

The planners insist: (1) “[c]onsidering changes now, without additional monitoring, would be...inappropriate” and (2) a detailed reassessment would be “outside the scope of the forest plan.” *Id.* These statements are arbitrary.

Neither justification admits how the agency has refused *to monitor* the non-temporary collapse in the densities and biomass of trout—despite the Standards set forth in Management Area 18 of the currently enforceable LRMP.

I have attached a copy of the *Upper River Recreation Use Monitoring Study Report*. This constitutes the 2019 report on which the 2022 planners now rely to justify their refusal to undertake a reevaluation of how these headwaters must be managed going forward.

I have marked this *Upper River Recreation Use Monitoring Study Report* (“2019 Monitoring Study”) as **Exhibit 27** and I would ask that this record be indexed in the administrative record as AR document S-15. The 2019 Monitoring Study encompasses 122 pages of something.

The study counted parked cars at trail heads leading into the Chattooga River WSR corridor during the summer months. Inexplicably, that’s all the data that this Study monitored.

The Forest Supervisor’s refusal to reevaluate is premised on the questionable conclusions drawn from applying statistical manipulation of a handful of answers to four monitoring questions posed to individuals at the trail heads. Here is what these four monitoring questions asked:

- 1) “Are at-one-time vehicle counts at frontcountry and backcountry parking areas changing?”

- 2) “What is the Proportion of Recreation Use by Type of Visitor in Frontcountry Areas and Backcountry Reaches and how is this Use Related to Vehicle Counts?”
- 3) How is Total Daily Backcountry Use Related to the Number of Encounters? Is the Number of Encounters Affecting Opportunities for Solitude in the Backcountry? How do the Number of Encounters Compare to User Tolerances?
- 4) “How are Daily Frontcountry Use Levels Affecting Perceptions of Crowding, Congestion, and Desired Experiences in the Frontcountry Areas?”

**Exhibit 27** at pp. 2-1; 2-25; 2-42; 2-65 (pdf pp. 28; 52; 69; 92). The 2019 Monitoring Study makes the counterintuitive statement: “Because boating is not allowed during the summer, boaters were not included in” the results of the monitoring study. **Exhibit 27** at p. 2-31 (pdf. p.58)(AR doc S-15).

Nevertheless, today the planners assert that it is beyond the scope of the plan to evaluate the legality of the physical damage which has been done to the riparian corridor because of the agency’s promotion of creek boating.

Instead, the planners insist that (1) “[c]onsidering changes now, without additional monitoring, would be...inappropriate” and (2) a detailed reassessment would be “outside the scope of the forest plan.” 2022 EIS at p. 2-30 to 2-31 (pdf. pp. 68-69).

They do so despite being in possession of date stamped photographs which evidence how the agency’s continued promotion of creek boating on these headwaters has caused the creation of chronic erosion sites where soils displaced by boating activities and suspended in runoff from heavy rainfall continue to be channeled into an ORW body of water which lacks any capacity to absorb any additional sedimentation.

Just as troubling in demonstrating the arbitrary nature of this refusal to reevaluate how these headwaters should be managed going forward, in January 2012, the USFS admitted “Erosion and sedimentation may increase at designated access points with increased use and dragged equipment. *In addition, portage trails would be created increasing the potential for sediment input along over three-fourths the length of the river.*” **Exhibit 13** at p. 168 (pdf p.174)(italics added)(AR doc. B-1).

In 2012 the USFS further admitted that “Sediment is the primary pollutant of concern in forested watersheds in the Southeast (Coats and Miller, 1981). *Fine sediments (<2 mm in diameter) such as silts and sand are a natural part of streams in this region; however, an excess of stored sediment in stream substrate is detrimental to aquatic habitat.* Excess fine sediment in stream systems fills interstitial space between larger rocks and reduces the amount of available fish and macroinvertebrate habitat. Fine sediments also reduce oxygen circulation in redds and increase

difficulty for aquatic organism emergence from substrate materials. Fine sediment enters the fluvial system when moving water erodes detached soils. *Fine sediment is detrimental to habitat when the amount of sediment entering the fluvial system is not transported through the system under a normal flow regime.* Many of the streams in the Chattooga River Watershed have excess stored sediment from past land management activities as well as the high erosive potential of micaceous soils in the region.” Id at pp 265-266 (pdf pp. 270-271)(italics added).

Just as important, the USFS promised “LWD recruitment and retention would be maintained throughout the watershed. *There would be no LWD removal without agency approval (as in current management) and no removal to accommodate recreation.* With the addition of boating in this alternative, there is an increased potential for the loss of LWD in the Chattooga River. Monitoring would be used to assess any removal of LWD.” Id. at p. 168 (pdf. p. 174)(italics added).

*Today, the USFS forgets what it promised to do in the past.* Today, the agency denies that anything has changed which would require the reassessment of how these headwaters should be managed going forward. Nevertheless, the agency suggests that LWD needs to be removed from the river channel.

The 2019 Monitoring Study relies on *manipulated data regarding parked cars* at all trailheads to create a false impression that the amount of whitewater creek boaters paddling taking place on the North Carolina headwaters during the winter months is somehow irrelevant to determining whether or not there is a need to change how these headwaters are currently being managed.

The 2019 Monitoring Study wrongfully promotes the conceptual idea that the North Carolina segment of the river must be managed precisely the same as the South Carolina/Georgia segments of the river.

The USFS claims a need to undertake additional monitoring of parked cars while simultaneously denying any need to undertake annual trout population counts on the North Carolina headwaters of the Chattooga River.

The USFS justifies the absurdity of its unlawful behavior by acting like the all-powerful but fictional Wizard of Oz who told Dorothy: “pay no attention to the man behind the curtain.”

The agency’s refusal to undertake any monitoring of the adverse impacts of whitewater creek boating on these headwaters is entirely consistent with the agency’s predisposition to avoid doing anything which might prejudice the wish list demands of whitewater paddlers.

Recall how Nantahala District Ranger Mike Wilkins made a candid statement on October 1, 2015 which reveals how the agency possessed a predisposition to use the revision of the LRMP to assist whitewater paddlers in turning a legally unentitled privilege into a sacrosanct right to boat on these headwaters: “I gave Kevin... [Colburn of AW a] copy of the amendment 22 of our forest plan... While one might could argue one way...[or] the other about what the 2012 ea did not address the amendment clearly states boating is not allowed on the main stem except on 17 miles as ... *I think his only recourse in the near future is through our forest planning process. He will wait until he see our office reply.*” **Exhibit 2** at pdf p.2 (italics added)(AR doc 00-M-1).

This admission: “*I think...[American Whitewater’s] only recourse is through our forest planning process*” id. constitutes a self-proving statement which informs on the legally unentitled favoritism which the senior leadership of the USFS appears prepared to confer upon American Whitewater.

This statement informs on how USFS officials appear to have made a decision many years ago to establish policies for managing the headwaters of the Chattooga River which follow the wish list demands of their whitewater paddling buddies.

In contrast, the USFS had worked overtime during the ongoing revision of the LRMP to deprive me of my information gathering rights because I have attempted to shine a spotlight on the unlawful favoritism being shown to this small group of politically well connected individuals.

Forest Service officials have punished me because I seek to discover, synthesize, and place into the AR sufficient evidence for proving how USFS officials continue to violate the plainly stated non-discretionary duties which the USFS must discharge while managing these headwaters pursuant to the second sentence of 16 U.S.C. §1281(a) as further informed by 33 U.S.C. §§ 1313(d)(1) to (d)(3).

To expand on what is wrong with the 2022 LRMP, the USFS has entirely disregarded the subject matter expertise of the scientists with whom I have consulted before communicating my criticisms.

One of those scientists includes a retired USFS fisheries biologist: Roger L. Nelson.

I provided Mr. Nelson with the trout population and stream habitat data which NCDEQ collected in September 2016. I asked him to comment on the findings of that study.

On August 21, 2018, Mr. Roger L. Nelson, a retired USFS fisheries biologist, responded by providing comments about the results of NCDEQ’s September 2016 study.



These comments were emailed to former Forest Supervisor Nicholas on December 13, 2018 at approximately 4:00 pm. I specifically asked Mr. Nicholas: “ Please have the attached document (“P-9”) placed into the administrative record for the LRMP revision.”

For many years, Roger Nelson measured the impacts on salmonids caused by bedded sedimentation on the South Fork of the Salmon River within the Payette National Forest.

Mr. Nelson offered the following observations about the results of the 2016 NCDEQ study of the trout on the North Carolina headwaters of the Chattooga River: “It seems to me that the most recent data report [September 2016 trout population study] suggests there is poor spawning success if young of the year fish are a small proportion of the population collected during population surveys... *I don't recall collecting fewer young of the year than adults when I was doing...[sampling on the South Fork of the Salmon River.]*” **Exhibit 28** at pdf p. 2 (AR doc P-9).

This retired USFS fisheries biologist next observed: “I would like to know how much large woody debris (LWD) there is in the river *and whether any has been removed to promote rafting.* Again, I am not familiar enough with your system to know how much wood there should be, but I have seen studies linking LWD to trout densities in the Southeastern US. *It is very important out here and we seldom allowed debris jams to be removed...* It seems unreasonable to me that a habitat score that is near or less than 60 for half the sampled sites could be considered ‘outstanding’ in any way. *If fish habitat was formerly outstanding, it doesn't seem to be according to that 2016 report...* I think at a minimum your Forest should do these things: (a) A good literature survey of fish and habitat studies from similar areas should be done to compare existing conditions with those reported in other studies. I looked a little and didn't find any online that I was sure were comparable, but local biologists should know what studies are available or what data have been collected by various parties and how to obtain the information. Much information can often be found in files that never see publication... (b) *Annual sampling of trout populations should be done accurately [to] characterize the population dynamics...* (c) *Some sort of scientifically recognized sediment sampling should be performed.* Core sampling is the most accurate and repeatable, but the interstitial measures are useful. The Payette's free matrix technique has the advantage of being reach-level sampling (i.e., it is not constrained by depth and flow criteria), but targeted sampling/monitoring in certain specific habitats (e.g., spawning gravels) may be useful. The Platts technique for embeddedness could be used (or the one you put in your report of the EPA categories). For that, I think I'd randomly select transects from a map using GPS to locate them on the ground and probably do at least 30 per reach. I don't think that would be as reliable as every 10 feet like Platts did but it might be enough in a 600 foot reach... (d) *A LWD inventory should be performed...* (e) *I would want the habitat measures done in other streams, similar if possible, with more and less disturbance probably, to work out where you fit on some scale of disturbance from unimpaired to impaired...* After thinking about this for a while, I think that this is about the best I can do. While I have done a lot of sediment

monitoring, methodology development, and analysis, my field experience has been pretty narrow; that is, all Rocky Mountains or Great Basin. Id. pdf pp. 2-3 (italics added).

Finally, former USFS fisheries biologist Roger Nelson went the extra mile to offer this eye-opening conclusion: “*I do think it looks like you have sediment issues in your river and I have seen Forest Service managers drag their feet when faced with a need to correct problem situations; I’ve seen this be especially true when favored recreational interests were involved.*” Id. pdf p. 3 (italics added)(AR doc P-9).

Neither the 2022 EIS nor the LRMP makes any mention about the scientific observations of Roger Nelson—despite the fact that he is a retired USFS fisheries biologist.

Similarly, neither the 2022 EIS nor the LRMP makes any mention of any of the Best Available Scientific Information which was brought to the attention of Forest Supervisor Nicholas and Regional Forester Arney when I met with them in Cashiers, North Carolina on Wednesday, March 27, 2019.

The Forest Service continues to disregard the legal importance of applying the Best Available Scientific Information to the problems being suffered on the North Carolina headwaters of the Chattooga River. Neither the 2022 EIS nor the LRMP makes any mention of the Best Available Scientific Information which I have shared with these leaders and which include:

- (A) Bryce, Lomnický & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria*, Journal of North American Benthological Society, 29(2):657-672 (June 2010)( “Combining all lines of evidence, we concluded that for sediment-sensitive aquatic vertebrates, minimum-effect sediment levels were 5% [for <=.06mm fines] and 13% [for <=2mm sand and fines], respectively, both expressed as areal percentages of the wetted streambed surface.”);
- (B) Bryce, Lomnický, Kaufmann, McAllister, & Ernst, *Development of biologically-based sediment criteria in mountain streams of the western United States*. North American Journal of Fisheries Management 28:1714–1724 (2008)
- (C) Suttle, Power, Levine & McNeely, *How Fine Sediment in Riverbeds Impair Growth and Survival of Juvenile Salmonids*, Ecological Applications, 14(4)969-974 (2004)(“The linear relationship between deposited fine sediment and juvenile steelhead growth suggests that there is no threshold below which exacerbation of fine-sediment delivery and storage in gravel bedded rivers will be harmless, but also that any reduction could produce immediate benefits for salmonid restoration”)

- (D) The US EPA has recognized: “Alexander and Hansen (1983) experimentally reduced sandy bedload sediments in a Michigan stream by means of a sediment settling basin, and observed the control (upstream from sediment basin) and treatment (downstream from sediment basin) reaches for 6 years... The basin reduced sand bedload by 86%...Small brown and rainbow trout increased by 40% in the treated area. Trout production increased 28%, but growth rate changed little, hence most of the increase was associated with increased numbers of fish (survival), and, apparently, with improved habitat and production of macroinvertebrates. The useful experimental approach of Alexander and Hansen (1983) provides excellent and conclusive data on the negative effects of sediment on population density and growth in the test stream.” *Development of Criteria for Fine Sediment in the Northern Rockies Ecoregion*, Final Report, D.W. Chapman & K.P. McLeod, for the US EPA, Water Division, Region 10, EPA 910/9-87-162, April 1987 at page 118...
- (E) In addition the United States Forest Service, Pacific Southwest Research Station has also weighed in on the adverse impacts of bedded sediment on the health of trout populations. “Elevated fine-sediment inputs to streams can alter a variety of conditions and processes, including the amount of fine sediments stored in riffles. We sought to measure the influence of deposited fine sediment on the survival and growth of juvenile rainbow trout...(106-130mm fork length) using a field experiment that included 18 enclosures in riffles of a small northwestern California stream. The experiment included six replicates of three levels of deposited fine sediment (low, background, and high) that embedded riffle cobbles at 0, 50, and 100%, respectively. Only 1 of 12 fish survived in high-sediment enclosures, while survival of fish in low- and background-sediment treatments equaled or exceeded 50%. Low and background-sediment treatments could be distinguished from each other by a difference in fish growth: fish in the low-sediment treatment gained mass, on average, while all surviving fish in the background-sediment treatment lost mass. In addition to providing relatively high survival and growth benefits for juvenile rainbow trout, low-sediment experimental units were colonized at significantly higher rates by other vertebrates, particularly coastal giant salamanders...The amount of stored fine sediment in small streams may substantially influence the total amount of habitat available to vertebrates at the watershed scale.” *The Effect of Deposited Fine Sediment on Summer Survival and Growth of Rainbow Trout in Riffles of a Small Stream*, North American Jour. Of Fisheries Management, 29:434-440

(2009), Harvey, White, & Nakamoto, USFS, Pacific Southwest Research Station.

The 2022 LRMP and EIS are objectionable because they appear to have been constructed from an editorially sanitized and “skewed” administrative record—which ignores the Best Available Scientific Information which has been brought to the agency’s attention multiple times.

The Best Available Science Information is clear: A strong correlation exists between increasing levels of embedded sediments and declining densities of wild trout.

The *Best Available Scientific Information* informs on the intensity of the managerial duties which the United States Forest Service must discharge in managing the day to day beneficial uses of the North Carolina headwaters of the Chattooga River.

Nevertheless, the 2022 LRMP does not provide a sufficiently specific action plan for resolving the Chattooga’s site specific problems.

The 2022 LRMP disregards how fine particle sized sandy sediments (<2mm in diameter) and silts (<.6mm) have filled in the interstitial spaces lying between the larger stream bed substrates (gravels up to 4.5 cm in size, and stream bed cobbles up to 30 cm in size) in quantities and percentages, which based on *the best available science*, exceed any reasonable minimum effects threshold for significantly disrupting successful spawning by mature trout and the survival of their newly hatched alevin.

The Forest Service refuses to apply the Best Available Science for recognizing there is an actionable bedded sediment problem which must be abated through a fully budgeted and date certain action plan:

As proposed, the 2022 LRMP **does not afford the requisite intensity of non-discretionary protections and physical enhancements** to the reproductive suitability of the in stream trout habitat on the North Carolina headwaters of the Chattooga River.

In order to place primary emphasis on protecting the trout, the USFS must undertake significant habitat enhancement projects as required to restore this stream’s biological capacity for sustaining outstanding densities, biomass, and species assemblage of naturally reproducing populations of trout.

The 2022 LRMP fails to provide a specific enough action plan for enhancing the reproductive suitability of the in stream habitat so as to reestablish this in stream habitat’s biological capacity for sustaining outstanding densities, biomass and species assemblage of naturally reproducing populations of trout.

The 2022 LRMP fails to acknowledge the Forest Service's non-discretionary duty to manage and administer these headwaters by placing "primary emphasis" on "protecting" the quintessential "scientific feature", 16 U.S.C. §1281(a), which the agency described to Congress in 1971 as being an "outstandingly remarkable...value", 16 U.S.C. §1271), which was unique to the North Carolina headwaters of the Chattooga River.

The 2022 EIS and LRMP appear designed to defend the agency's decision to provide whitewater paddlers with legally unentitled recreational use accommodations on the Chattooga River.

The way in which the agency has gone about preparing the 2022 LRMP and EIS is also objectionable for reasons that are unique to me.

The USFS has deprived me from participating fully in the LRMP revision.

The agency has done so in violation of the *public participation* rights presumed by the National Forest Management Act ("NFMA"), 16 U.S.C. §1604(d)(1),

Throughout the ongoing preparation of the 2022 LRMP and EIS and dating back as far as November 5, 2014, the United States Forest Service has taken actions, directed towards me, which serve to stall and/or to prevent me from obtaining access to otherwise unpublicized but non-privileged institutional knowledge, agency expertise, documents and records pertaining to how the USFS has managed and how the agency plans to manage the North Carolina headwaters of the Chattooga River.

The USFS has punished me for attempting to exercise two statutory granted forms of information gathering rights.

During the revision of an LRMP, interested individuals possess two statutory sources of information gathering rights: (1) the explicit right (*exercisable at any point in time*) to compel any federal agency to produce copies of non-privileged records and written reports (*irrespective of the precise subject matter of the request*) as constrained by the privileges and exemptions set forth in the Freedom of Information Act ("FOIA"). See (5 U.S.C. § 552, et seq.); and (2) the implicit right (*exercisable only during the significant revision of the LRMP*) to ask the USFS to provide on point and non-evasive answers to non-privileged questions (*regarding precisely identified site specific LRMP subject matter concerns*) and/or to produce non-privileged documents regarding the same without any need for a formal request for records to be submitted pursuant to the FOIA.

The second information gathering right arises by implication of the public participation mandate of the National Forest Management Act ("NFMA"), 16 U.S.C. §1604(d)(1).

This provision directs the United States Forest Service: “shall provide for public participation in the development, review, and revision of land management plans *including, but not limited to,* making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.” 16 U.S.C. §1604(d)(1) (italics added).

The United States Forest Service has admitted: “*The responsible official should be proactive... and should share information in an open way with interested parties*” 36 C.F.R. §219.4(a)(italics added). “[T]he responsible official shall encourage participation by interested individuals...*including those interested at the local...levels.*” 36 C.F.R. §219.4(a)(1)(i)(italics added).

The Forest Service admits a duty to be “*transparent and collaborative*” when undertaking a significant revision of any Land Resource Management Plan. See the Final Rule and Record of Decision, National Forest System Land Management Planning, 36 C.F.R. Part 219, 77 FR 21162, 21178, April 9, 2012 (italics added)(the “2012 Planning Rule”).

The 2012 Planning Rule does not define what it means to be “transparent” or “collaborative”.

Consequently, the way in which a “transparent and collaborative approach to planning” gets implemented should be informed by the plain meaning of the words “transparent” and “collaborative.” Id.

The plain meaning of the adjective “collaborative” describes a process “involving two or more people working together for a special purpose: e.g. the presentation was a collaborative effort by all the children in the class.” Cambridge Dictionary (italics added).

Similarly, the adjective “transparent” means “open and honest, without secrets.” Cambridge Dictionary (italics added).

Accordingly, in order to revise an LRMP by utilizing a collaborative, open and honest, without secrets planning process. “the responsible official should be proactive... and should share information in an open way with interested parties” 36 C.F.R. §219.4(a)(italics added).

The 2012 Planning Rule explains: “Much of the literature on building effective collaboration discusses the need...to select public involvement methods appropriate for the unique needs of specific situations and participants.” supra, 2012 Planning Rule at p. 21178 (italics added).

By logical implication, the public’s right to participate in a collaborative, open and honest, without secrets planning process, must presume that an individual has a right to ask for on point, fully detailed, and non-evasive answers to plainly stated questions seeking non-privileged factual information pertaining to site specific LRMP planning concerns.

Interested individuals have the right to ask for and to be provided with on point and non-evasive answers to non-privileged questions pertaining to the most controversial and intellectually challenging issues of local LRMP planning concern—as opposed to being required to stomach evasive and summarily stated yes or no answers which are purposely designed to avoid providing any explanation tied to the best available science.

During the revision of the LRMP, the USFS must voluntarily provide individuals with copies of non-privileged records, documents, etc. without being compelled to do so based on a formal request for records under the FOIA—especially when the voluntary disclosure of the record or document might economize the LRMP planning process by allowing the individual to self-help by deducing answers to other iterative questions pertaining to a local site specific LRMP planning concern.

The non-discretionary duty to encourage public participation presumes an obligation to engage in a two way iterative exchange of information between Forest Service officials and interested individuals throughout the time that it takes to assess, prepare, revise and adopt a new LRMP—and not just after publishing a draft LRMP and giving the public 60 days to make comments or offer objections about it.

The currently enforceable Land Resource Management Plan for the NPNF reiterates this duty to be transparent and collaborative in sharing information in an open and honest way with individuals interested in site specific planning concerns: “Keep the public involved in open and honest dialogue; involve interested and affected people in the full process of making decisions about common resources. *Ensure that everyone has access to information and knows what is going on. Facilitate discussion among interests and enlist them in joint problem-solving.*” **Exhibit 8** at p. III-2 (italics added), Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests, March 1994 (AR document N-23).

Although this LRMP compelled duty to “[e]nsure that everyone has access to information and knows what is going on”, *id.*, was developed according to the directives set forth in the 1982 Planning Rule, the 2012 Planning Rule provides no indication that the aforementioned directive should somehow no longer apply to how the new LRMP for the NPNF should be compiled.

To expand upon this self-professed obligation to share information in an open way and to encourage participation by interested individuals, the national Wild and Scenic Rivers Act mandates the Forest Service “shall assist...and cooperate with...individuals to...protect...river resources. Such assistance...and cooperation may be through written agreements...” 16 U.S.C. §1282(b)(1)(italics added). “Any agreement...may include...limited financial...assistance to encourage...protection...of river resources.” *Id.*

Unfortunately, for more than seven years during the ongoing revision of the LRMP, the Forest Service has disregarded this duty to share information in an open and honest way without secrets.

Neither has the USFS assisted and cooperated with me in protecting the Chattooga River's resources. 16 U.S.C. §1282(b)(1).

The USFS has engaged in a traceable pattern of behavior which serves to thwart me from exercising my information gathering rights.

Throughout the ongoing revision of the LRMP and EIS, the United States Forest Service has taken targeted actions to obstruct me from using those information gathering rights.

The USFS has thwarted me from gaining access to critically relevant, non-privileged but otherwise unpublicized institutional knowledge, agency expertise, documents and records which can inform on what the Forest Service had done or neglected to do while managing the headwaters of the Chattooga River.

The USFS has worked overtime to prevent me from placing this critically relevant but otherwise undisclosed factual information into the administrative record. The Forest Service has done so to prevent me from being able to compel this agency to tell the truth to the public about the problems impacting the Chattooga while developing a plan for resolving them.

The USFS has thwarted me from developing and making legally defensible recommendations about the specific wording and scope of the Desired Conditions and obligatory Standards which must be adopted by the new LRMP in order to fix this visibly obvious water pollution problem.

The USFS has made clear that it has no intention of restoring the in stream trout habitat's biological capacity for sustaining outstanding densities, biomass and species assemblage of naturally reproducing populations of trout.

There is a compelling need for this editorially sanitized administrative record to be supplemented.

The Forest Service continues to misunderstand what must be prioritized while managing the day to day uses of the North Carolina headwaters of the Chattooga River.

Congress intentionally chose to use the phrase "*including but not limited to*" to make clear and to emphasize to the USFS the more expansive sharing of information which Congress intends for the Forest Service to undertake in order to "provide for public participation in the development, review, and revision" of the LRMP for the NPNF. 16 U.S.C. §1604(d)(1) (*italics added*).

The Forest Service has obstructed me because the agency understands that I seek to spotlight the trout habitat problem and to demonstrate how the United States Forest Service has purposely ignored and unlawfully refused to discharge the non-discretionary duties imposed upon the agency by the national Wild and Scenic Rivers Act, 16 U.S.C. §1281(a), as those duties are



further informed by the antidegradation mandate of the Clean Water Act, 33 U.S.C. §1313 (d)(4)(B).

I have been forced to offer comments to the 2022 LRMP and EIS without the benefit of factual information which the United States Forest Service has improperly chosen to withhold from the public for more than 4 years.

The USFS promises that “Forest planning is a continuous process that includes (1) assessment; (2) plan development, amendment, and revision; and (3) monitoring...The intent...is to...allow the Forest Service to adapt to changing conditions and improve management based on monitoring and new information.” 2022 LRMP at p. 3 (pdf. page 11).

The USFS claims that the “best available scientific information (BASI) has been used to inform the planning process.” Id.. The agency promises: “When conditions change beyond what was anticipated in the forest plan, a responsive process using narrow amendments can be used to adjust plans between revisions.” Id. The USFS admits that the LRMP must incorporate an “effective monitoring program capable of detecting change with an adaptive flexibility to respond to those detected changes.” Id.

The USFS promises to implement a monitoring program “that will yield specific information and support learning.” Id. The USFS promises to “[a]nalyze monitoring results using scientific methods that reduce uncertainty and improve understanding.” Id.

All of these promises are contradicted by how this agency has disregarded the directives which explain how the agency should have been managing the North Carolina headwaters of the Chattooga River. What the USFS should have been doing is informed by the plainly stated Standards contained in the currently enforceable LRMP for the NPNF.

To reiterate, the currently enforceable LRMP spells out how the agency is supposed to have been managing the Chattooga River according to the directives set forth in Management Area 15 (Wild and Scenic Rivers Area) and Management Area 18 (Riparian Management Area). Refer to **Exhibit 8** page III-170 (pdf. p. 176), *Land and Resource Management Plan, Amendment 5*, Nantahala and Pisgah National Forests (March 1994)(AR document N-23).

Stated differently, the currently enforceable LRMP for the NPNF requires the agency to manage Wildlife and Fish Resources on Wild and Scenic Rivers according to the Standards set forth in Management Area 18 (Riparian Management Area).

Management Area 18 contains four different directives which make clear how the USFS has been purposely disregarding the non-discretionary duties that Congress requires this agency to discharge while managing the North Carolina headwaters of the Chattooga River.

Management Area 18 has two General Directions: (1) “Manage streams for self-sustaining fish populations where conditions are favorable...(2) Manage streams for wild trout where conditions are favorable. Identify trout streams using designations by the North Carolina Wildlife Resources Commission or where population inventories indicate self-sustaining populations.” See *Land and Resource Management Plan, Amendment 5*, page III-185 (pdf p.191) Nantahala and Pisgah National Forests (March 1994).

Management Area 18 contains two plainly stated but obligatory Standards which make clear that the USFS hasn’t been complying with the non-discretionary duties imposed upon this agency by the national Wild and Scenic Rivers Act and the Clean Water Act:

- (1) “Manage habitat primarily for...trout...” Id.
- (2) “Improve habitat of wild trout streams as a first priority.” Id.

The USFS cannot point to a single initiative which has been undertaken since January 2012 to “improve habitat of wild trout streams as a first priority” on the WSR designated and ORW classified headwaters of the Chattooga River.

Instead of acknowledging this fact and instead of cooperating with me to bring together the resources needed to resolve the problem, the United States Forest Service has chosen to spend its time and resources trying to “skew” the Administrative Record (the “AR”) being compiled during the revision of the Land Resource Management Plan.

This fundamental incongruity evidences how the 2022 LRMP and EIS fail to consider important facts which impeach the credibility of the reasons articulated for refusing to undertake a reassessment of the appropriateness of the current way in which the agency is managing the North Carolina headwaters of the Chattooga River.

The most incongruent proposition is that the USFS claims that additional monitoring of parked cars at trail heads leading into the Chattooga River corridor must be undertaken before the agency might try to determine whether or not the current way in which the agency is managing these headwaters properly discharges the non-discretionary duties imposed by 16 U.S.C. §1281(a), as those duties are further informed by the antidegradation mandate of the Clean Water Act, 33 U.S.C. §1313 (d)(4)(B).

This explanation of a need to continue counting the number of cars at a trailhead has nothing to do with whether or not the promotion of whitewater paddling has caused the creation of chronic erosion sites where soils displaced by boating activities are being channeled into an ORW classified body of water. The agency offers an explanation for its decision which is contrary to the evidence.

The agency's states an unequivocal need to undertake additional counts of cars parked at trailheads but without counting or describing the number of additional chronic erosion sites which have been created since January 2012 by boating activities.

This assertion of fact is so counterintuitive that it could not be ascribed to a difference in view or the product of agency expertise.

Just as important, the agency's persistent refusal to undertake annual electro-fishing counts of the trout residing on the North Carolina headwaters is similarly impossible to reconcile as the product of agency expertise.

This refusal to undertake continuous monitoring of the Chattooga's trout populations cannot be reconciled with the agency's self-serving claim that the "best available scientific information (BASI) has been used to inform the planning process." 2022 LRMP at p. 3 (pdf. p. 11).

To press the point, the USFS should have been employing continuous monitoring of the changing densities and biomass of the trout populations on these headwaters because this is what the currently enforceable Forest Plan demands.

The USFS continues to act in an arbitrary and capricious fashion. The agency continues to mismanage the North Carolina headwaters of the Chattooga River.

The proposed LRMP will make this mismanagement worse.

Set forth below is a table cataloging a number of Exhibits to which this Objection refers.

Most of these Exhibits were previously provided to the USFS as attachments to comments submitted back on June 29, 2020. Most had been previously sent to the USFS with a request that they be archived and evaluated during the ongoing revision of the LRMP.

A couple of these Exhibits were previously placed into the Administrative Record associated with the LRMP but they weren't attached to the comments submitted back on June 29, 2020.

Finally, some of these Exhibits contain documents that were not explicitly requested to be archived within the AR. In general, the majority of those documents contain a compilation of back and forth emails detailing the facts and circumstances surrounding the agency's handling of various requests for non-privileged information either pursuant to the FOIA or the public participation mandate of the National Forest Management Act.

Where applicable, the table supplies the file name that was assigned to the document when it was originally emailed to the USFS with a request that the document be included in the Administrative Record associated with the LRMP.

The numbering of these Exhibits have changed subsequent to the publication of the June 29, 2020 criticisms of the February 2020 draft LRMP and EIS.

The table below reconciles between how those Exhibits are numbered today as contrasted against how they were numbered previously.

The table provides a way to find where any Exhibit gets referenced in the Objection.

It remains unclear what the Forest Service did with the hundreds of other documents which were emailed to appropriate Forest Service officials with a request that they be archived within the Administrative Record being compiled during the revision of the LRMP.

Over the last seven years of planning I have introduced dozens of scientific studies to the agency which should have helped inform on how the North Carolina headwaters of the Chattooga River stand unique among rivers flowing through the NPNF.

The studies and other documents which were placed into the AR possess significant on point relevance for deciding how to manage the Soils, Water Resources, Aquatic Systems and/or Wild and Scenic Rivers located within the Nantahala and Pisgah National Forests. These studies and documents should have been understood to be highly relevant for deciding how to manage these elements associated with the North Carolina headwaters of the Chattooga River.

Unfortunately, Chapter 5: Literature Cited reveals that none of those scientific studies and records made their way into the agency's planning process. None appear to have been applied in developing Desired Conditions and Standards for managing the North Carolina headwaters of the Chattooga River. 2022 EIS pp. 5-1 to 5-43 (pdf pp.695-737).

Instead, these records and scientific studies have been disregarded while the agency continues to make broad generalizations such as " streams in the [Blue Ridge Physiographic Province] are relatively high gradient, cool, have boulder and cobble or gravel bottoms, *and are of low to moderate productivity.*" 2022 EIS at p.3-78 (pdf p. 148)(italics added).

To the contrary, in 1971, the headwaters of the Chattooga River were explicitly memorialized as having an *excellent trout stream productivity which compared favorably against the better trout streams in all three states through which the river flows.* As applied to the headwaters of the Chattooga River, this conceptual generalization mirrors the factually false claim that "*anglers seeking brook trout are especially attracted to the headwaters of the ...Chattooga.*" 2020 LRMP at 164. The truth is anglers were attracted to the Chattooga because of the numbers and size of the brown trout and rainbow trout. The agency just can't get its facts straight.

This trout stream productivity has been allowed to degrade. This is why I object.

Regards,

  
Bill Floyd

70 Attached Exhibits

<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
1	pp. 3, 5, 30, 33, 35, 36, 81, 84, 87  OCT. 28, 2019  EXHIBIT #17 IN JUNE 29, 2020 COMMENTS	Q-1	<i>Wild &amp; Scenic River Study Report, Chattooga River, USDA, Forest Service Southern Region, June 15, 1971 (the “1971 Chattooga Study”).</i>
2	pp. 14, 96  JULY 28, 2017	00-M-1	Wilkins email re AW view of NNF Amd 22
3	p. 15  APRIL 26, 2020  EXHIBIT #56 IN JUNE 29, 2020 COMMENTS	R-6	Ms. Luczak’s June 25, 2019 email refusing to provide Mike Owens with copies of the records he had requested on June 24 <sup>th</sup>
4	pp. 16, 46, 88,  JULY 29, 2017  EXHIBIT #43 IN JUNE 29, 2020 COMMENTS	N-13-A	Floyd July 29, 2017 Notification to Forest Supervisor Nicholas
5	pp. 16, 76, 88  September 22, 2017  EXHIBIT #48 IN JUNE 29, 2020 COMMENTS	N-13-B	Floyd September 22, 2017 Notification to Forest Supervisor Nicholas

<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
<b>6</b>	pp. 16, 88  MAY 18, 2018  EXHIBIT #16 IN JUNE 29, 2020 COMMENTS		<b>Floyd 60 Day Notice of Intent To Sue Under the Clean Water Act May 18, 2018</b>
<b>7</b>	p. 21, 59, 60  June 28, 2020  N/A	S-5	<b>Floyd 06202019 questioning of FOIA processing</b>
<b>8</b>	p. 25, 69, 88, 89, 90, 103  May 17, 2018  EXHIBIT #1 IN JUNE 29, 2020 COMMENTS	N-23	<b>Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests, March 1994 (Amendment 5 was otherwise previously lodged into the Nantahala’s administrative record as Floyd document “N-23”</b>
<b>9</b>	p.42,43,84,87  May 17, 2018  EXHIBIT #18 IN JUNE 29, 2020 COMMENTS	N-22	<b>Rabun TU Petition (requesting reclassification of the North Carolina headwaters of the Chattooga River as Outstanding Resource Waters)</b>
<b>10</b>	p.43,44,85,87  July 28, 2017  EXHIBIT #19 IN JUNE 29, 2020 COMMENTS	A-2	<b>North Carolina Report of Proceedings for the Proposed Reclassification of ...Chattooga River August 1-4 1988 (the “1988 Report of Proceedings”)</b>

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11	pp. 27, 48  July 28, 2017  EXHIBIT #29 IN JUNE 29, 2020 COMMENTS	G-3	annotated set of photographs documenting the existence and pinpointing the physical location for two of the most egregious chronic erosion sites caused by creek boating: Boater Created Erosion Site B-5 @ approximately 35.047649, -83.120699 & Boater Created Erosion B-5-B (@ approximately 35.047640, -83.120714.
12	p. 51, 62  July 25, 2017  EXHIBIT #13 IN JUNE 29, 2020 COMMENTS	P-14	11 pages of annotated photos comparing and contrasting the amount of sediment at a minor pool located at 35.035512, -83.127586 (on June 29, 2015 versus May 31, 2019) as well as the amount of sediment lying upstream of a massive log jam located at 35.033897, -83.128544 (in January 2007 and November 2007 versus June 29, 2015 and May 31, 2019)
13	p. 53, 94  January 2012  Cited at page 6 JUNE 29, 2020 COMMENTS	B-1	Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor, Environmental Assessment January 2012 (the “2012 EA”)
14	p. 54  June 28, 2020  Cited at page 7 JUNE 29, 2020 COMMENTS	S-2	Nicholas 04032019 email admission sediment in creek ask for science

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15	p. 54  September 25, 2018  Cited at page 8 JUNE 29, 2020 COMMENTS	P-8	<b>Kaufman article 2010 Protecting sediment sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria</b>
16	pp. 56,57,59,60  June 28, 2020  EXHIBIT 57 IN JUNE 29, 2020 COMMENTS Cited at pages 9, 10, 11, 12	S-4	<b>Floyd Nicholas email 06092019 to 06132019 update on BASI new FOIA and Mike Owens</b>
17	P 57  June 9, 2019  Cited at page 10 JUNE 29, 2020 COMMENTS	P-12	<b>Dr. Bill McLarney email 08102016 re trout survey sampling problems</b>
18	p. 58  June 28. 2020  EXHIBIT #44 IN JUNE 29, 2020 COMMENTS	S-14	<b>Environmental Assessment, <i>Transportation System and Related Recreation Management Actions for the Upper Tellico Off-Highway Vehicle System</i>, Nantahala National Forest, Forest Supervisor Hilliard, October 2009</b>



<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
<b>19</b>	<b>p. 60, 62  June 28, 2020  Cited at pp. 13, 15 JUNE 29, 2020 COMMENTS</b>	<b>S-6</b>	<b>Floyd 08142019 to 08162019 USFS review of High Hampton</b>
<b>20</b>	<b>p. 60  June 28, 2020  N/A</b>	<b>S-7</b>	<b>Floyd Nicholas email 08152019 to 08312019 possible equivocation about sediment</b>
<b>21</b>	<b>pp. 64,65  June 28, 2020  Cited at pp. 17, 18 JUNE 29, 2020 COMMENTS</b>	<b>S-8</b>	<b>Floyd Nicholas 10022019 to 10232019 re Scotsman Creek info</b>
<b>22</b>	<b>pp. 66, 75, 77, 78,  May 17, 2018  EXHIBIT #45 IN JUNE 29, 2020 COMMENTS</b>	<b>N-29</b>	<b>Luczak 09062017 email no review of boat policy (email chain from Aug 28, 2017 to September 6, 2017 between Floyd and NNF officials Ms. Heather Luczak and Ms. Sheryl Bryan)</b>
<b>23</b>	<b>p. 77  May 17, 2018  EXHIBIT #46 IN JUNE 29, 2020 COMMENTS</b>	<b>N-29-2</b>	<b>N-29-2 Luczak email Oct 23 2017 (Luczak email to Bill Floyd on Oct. 23, 2017 w cc to Forest Supervisor Nicholas)</b>

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24	pp. 77, 78  April 12, 2016  EXHIBIT #47 IN JUNE 29, 2020 COMMENTS		<b>Minutes for the Stakeholders Forum for the Nantahala &amp; Pisgah Plan Revision DRAFT Meeting Record, Tuesday April 12, 2016 10:00 AM- 4:00 PM.</b>  Ms. Luczak, Forest NEPA Coordinator emailed on Oct. 23, 2017 to advise these Minutes could be retrieved from  <a href="https://www.nationalforests.org/assets/pdfs/2016-4-12-Stakeholders-Forum-Meeting-Record_finaldraft.pdf">https://www.nationalforests.org/assets/pdfs/2016-4-12-Stakeholders-Forum-Meeting-Record_finaldraft.pdf</a>
25	p. 78  December 21, 2019  EXHIBIT #49 IN JUNE 29, 2020 COMMENTS	P-10	<b>P-10 Dibari email 11212018 AW 06 query_ Chattooga in LRMP</b>
26	p. 89  July 28, 2017  EXHIBIT #3 IN JUNE 29, 2020 COMMENTS	B-4	<b>B-4 2007 Biophysical Inventory_fsbdev3_037225</b>  2007 Biophysical Inventory of entire 57 mile river corridor; inventoried erosion sites on each reach of the river
27	p. 93  January 21, 2022  N/A	S-15	<i>Upper River Recreation Use Monitoring Study Report 2019-</i> keeps track of cars parked at trailheads during the summer; doesn't monitor anything else

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28	pp. 54, 97, 98  December 12, 2018  Cited at p. 17 JUNE 29, 2020 COMMENTS	P-9	P-9 Roger L Nelson Consultation Aug 21 2018 re sediment monitoring  Mr. Nelson is a retired USFS fisheries biologist who studied the impacts of sediment on salmonids on the Payette National Forest
29	pp. 20, 65  July 28, 2017  EXHIBIT #4 IN JUNE 29, 2020 COMMENTS	00-T	00-T Borawa and Clemmons 1998  “EVALUATION OF A WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE”, Mountain Fisheries Investigation, North Carolina Wildlife Resources Commission, James Borawa and Micky Clemmons, Fisheries Biologists, 1998  This constitutes the definitive report which summarizes the outstanding densities and biomass of trout which were documented to exist on these headwaters based on the five year results of the trout population monitoring which took place on the North Carolina headwaters of the Chattooga River between 1992-1996
30	N/A  November 5, 2012 July 28, 2017  EXHIBIT #2 IN JUNE 29, 2020 COMMENTS	C-3,	C-3 Floyd Comments Chattooga River Boating Access EA_Nov 5 2014  submitted on November 5, 2014 in response to the EA published on September 26, 2014. Originally submitted as single massive document entitled “Floyd Comments Chattooga River Boating Access EA_Nov 5 2014.pdf” (14 mb size file)

<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
31	N/A  July 28, 2017  EXHIBIT #5 IN JUNE 29, 2020 COMMENTS	L-6	L-6 Email Chain w Sheryl Bryan 10112016 etc  Compilation of back and forth emails with Ms. Sheryl Bryan, Biologist, Nantahala National Forest starting September 16, 2016 and ending October 11, 2016.
32	41,64  EXHIBIT #6 IN JUNE 29, 2020 COMMENTS	00-J-1	<i>Water Quality Standards Handbook, Chapter 4:Antidegradation, United States Environmental Protection Agency, Office of Water, EPA 823-B-94-005a (August 1994) (otherwise lodged into the administrative record of the Nantahala National Forest as document 00-J-1).</i>
33	EXHIBIT #7 IN JUNE 29, 2020 COMMENTS	00-J-3	Water Quality Standards Handbook, Chapter 2:Designation of Uses, United States Environmental Protection Agency, Office of Water, EPA 823-B-94-005a (August 1994) (last downloaded from <a href="https://www.epa.gov/wqs-tech/water-quality-standards-handbook">https://www.epa.gov/wqs-tech/water-quality-standards-handbook</a> on 12/15/2016).
34	EXHIBIT #8 IN JUNE 29, 2020 COMMENTS	C-8-B	Besler and Wheeler email correspondence produced by the NNF on March 4, 2016 in response to a FOIA request dated February 4, 2016
35	EXHIBIT #9 IN JUNE 29, 2020 COMMENTS	R-8	a compilation of back and forth emails running from November 8, 2019 to December 6, 2019 between Forest Supervisor Nicholas, USFS Chief Victoria Christiansen, Regional Forester Ken Arney, LRMP planning associate Heather Luczak and Plaintiff;

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36	EXHIBIT #10 IN JUNE 29, 2020 COMMENTS	N-38	11 pages of annotated photos, taken October 31, 2014, June 6, 2015, June 29,2015, including photos demonstrating how the bedded sediment conditions being experienced on these headwaters warrant a “Poor” habitat classification if compared against the rapid assessment protocol photographs of the United States Environmental Protection Agency evidencing “Optimal”, “Suboptimal”, “Marginal”, and “Poor” habitat conditions
37	EXHIBIT #11 IN JUNE 29, 2020 COMMENTS	00-Z	14 pages of annotated photos taken on May 22, 2014, October 31,2014, June 29,2015 which were shared with Dr. Phil Kaufmann, USEPA, Corvallis OR
38	EXHIBIT #12 IN JUNE 29, 2020 COMMENTS	R-4	17 pages of photos taken on May 31, 2019, demonstrating how this blanket of fine particle sized sandy sediments (<2mm in diameter) conceals the existence of quartz gravel substrates which are present in certain locations and which are highly suitable for spawning by all three species of trout, shared with Forest Supervisor Nicholas and lodged into the AR as doc “R-4”;

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39	EXHIBIT #14 IN JUNE 29, 2020 COMMENTS	N-35-C and N-35-D	total of 81 pages of photos (without annotations but taken on April 16, 2018) demonstrating the blanket of sediment being suffered on Scotsman Creek, the ORW classified tributary to the Chattooga which no longer but once in the past harbored outstanding populations of brook trout,
40	EXHIBIT #15 IN JUNE 29, 2020 COMMENTS	E-1	<i>Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015 “2015 EA”</i>
41	EXHIBIT #20 IN JUNE 29, 2020 COMMENTS	I-3	<i>Upper Tellico Decision Response to Public Comments to Transportation System and Related Recreation Management Actions for the Upper Tellico Off-Highway Vehicle System, DRAFT Environmental Assessment, Nantahala National Forest, September 2009, response to Public Comment 1-3, at page 9. (last downloaded June 5, 2016 from <a href="http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5194718.pdf">http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5194718.pdf</a>) (otherwise placed into the administrative record as document I-3).</i>
42	EXHIBIT #21 IN JUNE 29, 2020 COMMENTS	N-23-1	Appendix D of the Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests, March 1994 (otherwise lodged into the USFS administrative record as Floyd document “N-23-1”).

<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
43	EXHIBIT #22 IN JUNE 29, 2020 COMMENTS		<i>Draft Environmental Impact Statement for the Proposed Land Management Plan, USFS, Southern Region, National Forests in North Carolina, R8 MB-155 EIS, January 2020 (“Draft EIS”).</i>
44	EXHIBIT #24 IN JUNE 29, 2020 COMMENTS	Q-8	Suttle, Power, Levine & McNeely, <i>How Fine Sediment in Riverbeds Impair Growth and Survival of Juvenile Salmonids, Ecological Applications</i> , 14(4) 969-974 (2004) (“The linear relationship between deposited fine sediment and juvenile steelhead growth suggests that there is no threshold below which exacerbation of fine-sediment delivery and storage in gravel bedded rivers will be harmless, but also that any reduction could produce immediate benefits for salmonid restoration”)(
45	EXHIBIT #25 IN JUNE 29, 2020 COMMENTS	P-1	<i>Development of Criteria for Fine Sediment in the Northern Rockies Ecoregion, Final Report, D.W. Chapman &amp; K.P. McLeod, for the US EPA, Water Division, Region 10, EPA 910/9-87-162, April 1987</i>
46	EXHIBIT #26 IN JUNE 29, 2020 COMMENTS		Floyd’s July 15, 2015 Pre-decision Objection to Draft ROD and FONSI issued on May 15, 2015 in connection with the construction of paddler access trails on the Chattooga

<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
47	<b>EXHIBIT #27 IN JUNE 29, 2020 COMMENTS</b>		<b>Exhibits A thru E in support of Floyd’s July 15, 2015 Pre-decision Objection to Draft ROD and FONSI issued on May 15, 2015 in connection with the construction of paddler access trails on the Chattooga</b>
48	<b>EXHIBIT #30 IN JUNE 29, 2020 COMMENTS</b>	<b>R-7</b>	<b>an email from Ranger Wilkins to Floyd dated September 24, 2015 @ 10:42 am. Wilkins shared the document entitled “Chattooga Aquatic Monitoring Summary”]</b>
49	<b>EXHIBIT #31 IN JUNE 29, 2020 COMMENTS</b>		<b>Floyd FOIA Request dated October 14, 2015</b>
50	<b>EXHIBIT #32 IN JUNE 29, 2020 COMMENTS</b>		<b>Floyd FOIA Request dated November 9, 2015</b>
51	<b>EXHIBIT #33 IN JUNE 29, 2020 COMMENTS</b>		<b>Floyd FOIA Appeal dated January 7, 2016</b>
52	<b>EXHIBIT #34 IN JUNE 29, 2020 COMMENTS</b>		<b>USFS Response to FOIA Appeal File Code 6270, 2016-FS-WO-00070-A (August 5, 2016).</b>



<b>EXHIBIT</b>	<b>1.PAGES CITED 2.DATE WHEN EMAILED INTO THE ADMIN. RECORD BEING COMPILED DURING THE REVISION OF THE LRMP 3. EXHIBIT # REFERENCED ON JUNE 29, 2020</b>	<b>AR doc #</b>	<b>DESCRIPTION</b>
53	EXHIBIT #35 IN JUNE 29, 2020 COMMENTS		Floyd FOIA Request dated January 4, 2016 re electrofishing surveys upper Chattooga 1992-1996
54	EXHIBIT #36 IN JUNE 29, 2020 COMMENTS		Floyd FOIA request dated February 4, 2016.
55	EXHIBIT #37 IN JUNE 29, 2020 COMMENTS	C-8-A	Ranger Wilkins email dated February 5, 2016
56	EXHIBIT #38 IN JUNE 29, 2020 COMMENTS	C-8-B	Besler and Wheeler email correspondence with USFS dated December 22, 2015 and
57	EXHIBIT #39 IN JUNE 29, 2020 COMMENTS		Floyd FOIA Request dated April 22, 2016 to Jason Farmer
58	EXHIBIT #40 IN JUNE 29, 2020 COMMENTS		FOIA Appeal Response from the Chief of the USFS dated December 6, 2016 regarding appeal filed September 8, 2016 with respect to a FOIA request first submitted on April 22, 2016 re Aquatic Resource Monitoring
59	EXHIBIT #41 IN JUNE 29, 2020 COMMENTS	L-2	L-2_River Coalition-R document received by accident on December 12, 2016 from NCDEQ email.

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<b>60</b>	<b>EXHIBIT #42 IN JUNE 29, 2020 COMMENTS</b>		<b>“Copy of chattoog.xls” produced on April 21, 2016 in response to an appeal dated February,24, 2016 in connection with a request for records first submitted on January 4, 2016.</b>
<b>61</b>	<b>EXHIBIT #50 IN JUNE 29, 2020 COMMENTS</b>		<b>97 page FOIA appeal which Floyd submitted to Chief Tony Tooke on February 20, 2018 in connection with the denial of a request for a FOIA fee waiver made in connection with a FOIA first submitted on September 22, 2017 and based on the public interest exception</b>
<b>62</b>	<b>EXHIBIT #51 IN JUNE 29, 2020 COMMENTS</b>		<b>Attachment to FOIA appeal dated February 20, 2018</b>
<b>63</b>	<b>EXHIBIT #52 IN JUNE 29, 2020 COMMENTS</b>	<b>00-M</b>	<b>email chain with Melonas, Wilkins and Luckzak, from September 30 to October 1, 2015,</b>
<b>64</b>	<b>EXHIBIT #53 IN JUNE 29, 2020 COMMENTS</b>	<b>00-M-6</b>	<b>an email exchange starting @ 7:16 p.m. on September 30, 2015 between Mr. Gaulke and Acting Forest Supervisor James Melonas, National Forests in North Carolina</b>
<b>65</b>	<b>EXHIBIT #54 IN JUNE 29, 2020 COMMENTS</b>	<b>N-34</b>	<b>Gaulke press release September 19, 2014</b>
<b>66</b>	<b>EXHIBIT #55 IN JUNE 29, 2020 COMMENTS</b>	<b>R-5</b>	<b>Mike Owens FOIA request of June 24, 2019</b>

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67	EXHIBIT #57 IN JUNE 29, 2020 COMMENTS		<i>Floyd email chain June 9 to 12 2019 w Nicholas et al re Chattooga sediment_request for records to be posted to electronic reading room and new June 10 FOIA.</i>
68	EXHIBIT #58 IN JUNE 29, 2020 COMMENTS		Email chain June 17, 2019 to Nov 13 2019 w Meloche, Sullivan, Scofield, Arney, Nicholas and Christiansen: hearsay at pp.3-4 “employee x said employee y said you said you agreed to be held liable for any fees incurred in processing a FOIA request first submitted on September 22, 2017.
69	EXHIBIT #59 IN JUNE 29, 2020 COMMENTS		Nov 15 2019 6:45 am Meloche email re reversal of charges
70	EXHIBIT #60 IN JUNE 29, 2020 COMMENTS		November 15, 2019 email to Chief Christiansen about not destroying records