

Federal judge nudges Chattooga boating controversy closer to trial

by Joseph Gatins: District Leader

About six years ago, the U.S. Forest Service began analyzing the possibility of permitting boating on the 21 miles of the Wild and Scenic Upper Chattooga River, the narrow, fast-flowing waterway that has not had legal boating on its since 1976. The agency's study was initiated as an outgrowth of an administrative appeal by the American Whitewater boating lobby. Not satisfied with the pace of the study, the boaters filed suit in U.S. District Court in Gainesville, Georgia, in 2006 to short-circuit the study and immediately open the upper reaches of the river to boating (a move denied by a senior district court judge at that time).

Now, fast forward to the fall of 2010. American Whitewater is back in federal court (in Greenville, S.C. this time), seeking a similar short-circuit solution to the boating ban, and the U.S. Forest Service is back to square one when it comes to analyzing the issue and proposing possible solutions to the boating conundrum. History repeats itself, but only in part.

Unlike the firm denial handed down in the federal court ruling in Gainesville, U.S. District Court Judge J. Michelle Childs in Greenville breathed new life into the efforts of the boating lobby, still being led by the American Whitewater organization, to immediately open the headwaters to boating.

While denying the boaters' efforts to immediately open the Upper Chattooga, she also denied the Forest Service petition to dismiss the case entirely. The upshot of her ruling on December 2, 2010, is that the issue appears headed to a trial, with forest managers ordered to fully answer the boaters' complaints in writing within 30 days.

How did we get to this stage? What happened in these past few years? Among other factors affecting this long-delayed planning exercise is that the chief planner for the Sumter National Forest, the man most responsible for the boating analysis, retired, and his boss, the Sumter Forest Supervisor, got promoted and transferred to a new post. A Forest Service proposal to try to permit highly regulated and limited boating on the Upper Chattooga was itself appealed by five different conservation groups (including Georgia ForestWatch), only to see the agency pull its decision off the table entirely. The reasons cited were "minor flaws in its study and analysis".

At this writing, a new chief planner and supervisor on the Sumter are readying a new boating study and proposal for public comment, but the agency is unwilling to comment on when that new proposal is to be issued, or to comment on the Childs decision. A Sumter spokeswoman referred all questions to the U.S. Attorney's office in Charleston, where another press contact, Beth Drake, also deflected all questions regarding the case. "We do not comment on litigation," she said. Drake added that it was not appropriate for her to comment on the new Forest Service boating proposal either.

American Whitewater, by contrast, claimed on its website that, "the decision marks a major victory for the conservation-oriented kayaking and canoeing community ..."

Judge Childs had conducted a fast-paced and no-nonsense, day-long hearing on the case on October 13, during which both boating lobby and government lawyers went at it hammer and legal tong. Open the river immediately, the boaters said. Dismiss the Whitewater case right now, the government said, seconded by yet another lawyer, this one representing the more narrow interests of several private property owners in the Grimshawes, N.C., area, the uppermost headwaters at issue in this case.

More than 15 kayakers and boating sympathizers attended the hearing. One aging boater, 68-year-old Bruce Hare of Mountain Rest, S.C., was placed on the stand to deliver an emotional entreaty to re-open the stretch of river that he'd traversed before the Forest Service ban was put into effect. "I'd like to paddle it again before I pass away," he said.

Less emotional, an assistant U.S. Attorney argued in counterpoint that the boaters' case summarily should be dismissed as a point of case law, in that the administrative study and analysis by the U.S. Forest Service was not yet complete (a point of bitter complaint by boating lawyers, who foresaw years of possible further delay if their cause was not immediately granted). The legal back-and-forth was punctuated and seconded by telling argument from Alan Jenkins, the lawyer representing the private property owners, who raised the additional point that the section of Chattooga at issue could not, and should not, be considered a navigable waterway.

Judge Childs left the door open to further litigation because, in her words, "it was likely that the USFS would issue new decisions continuing at least a partial ban against floating on the headwaters." Given that stand, it "would be futile" to first require the boaters to exhaust their "administrative remedies" before the agency.

At the same time, Judge Childs continued, "although Hare presented moving testimony, the fact that he and others will not immediately have unfettered access to the Headwaters is not the type of immediate and irreparable harm which merits the imposition of a mandatory preliminary injunction [i.e., to open the Upper Chattooga immediately to all boating all the time]."

The net result, at least temporarily, is that the controversy is now being decided in court between the Forest Service and private landowners and American Whitewater and allied groups. Georgia ForestWatch, which has steadfastly maintained that the boating ban on the 21 miles of the river should be upheld, is reviewing its legal options.

For more information, click:

<http://www.fs.fed.us/r8/fms/sumter/resources/Chattooga.php>