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March 8, 1978

Honorable William Wilson
House of Delegates
General Assembly Bldg.
Richmond, Virginia 23219

Dear Mr. Wilson:

This is a summation of information provided you earlier today in our telephone conversation with respect to an imminent announcement by the U.S. Army Corps of Engineers regarding the status of the Jackson River. Since I have not had an opportunity to read the announcement, which I understand may be being redrafted since you received an advance copy, I cannot comment specifically on its contents, but I am glad to be able to share with you such background information as I have.

I understand that the Corps will announce shortly that it has determined that the Jackson River is a navigable stream, included in the system of navigable waters of the United States. I understand further that, in the Corps' opinion and in that of the Department of Justice, this determination will make the Jackson a public waterway accessible for public recreational and other uses as well as navigation. This step by the Corps is in keeping with the overall Gathright Dam project approved and funded by Congress, with the concurrence of both the Legislative and Executive Branches of the Virginia State government at that time.

When the Gathright project was designed, among those features incorporated therein was provision for the development and management of a high quality, wild trout sport fishery in the reach of the river below the dam, and this was a significant element in the cost-benefit calculations by which the project finally was determined to be economically feasible. At that time the Commission of Game and Inland Fisheries was not in favor of the Gathright project, for various reasons, and Commission spokesmen pointed out to Corps representatives that the inclusion of the potential downstream public trout fishery was not a legitimate benefit to include in the calculations because the Virginia Supreme Court had once ruled that the Jackson was not "public" as far as fishing rights were

concerned. Corps spokesmen responded that the Jackson met the tests of navigability under federal law and that the Corps had the delegated authority from Congress to declare it to be a public, navigable stream.

The Commission has steadfastly maintained ever since that, so long as the State Supreme Court decision in Boerner v. McCallister (1955) stands, the Commission has no authority to regard the Jackson as a public stream or to manage its fishery as a public facility. It also is the Commission's position that, while it has not taken and will not initiate action in the matter, if the Boerner decision ever is superceded by competent authority and the Jackson is determined legally to be a public stream it will be the Commission's responsibility to develop therein the finest and most productive sport fishery possible. In this case, we cannot disagree with the Corps that technically, once the Gathright dam is in place and in operation, there is no apparent reason why the Jackson cannot be made the outstanding wild trout stream in the State.

To reiterate, those who "bought" the Gathright project package "bought" the concept of public access to and use of the Jackson River. It has been a part of the deal from the beginning. U.S. Chief District Judge Ted Dalton (Cape Henry Bird Club, et. al., v. Melvin R. Laird, Stanley R. Resor and Robert E. Ayers, et. al., 1973) noted in his opinion:

"... The Corps then states that it has examined the problem and determined that the river is navigable and title to the river bottom is vested in the government... The EIS leaves one with the impression that while there may be future litigation as to the navigability of the Jackson River, the Corps has concluded that the river is navigable, and the court cannot say that such conclusion was reached arbitrarily..."

The Commission of Game and Inland Fisheries did not "buy the Gathright package," but it stands ready to manage associated public resources in accordance with legal determinations arrived at by competent authorities.

Sincerely yours,

James F. McInteer, Jr.
Assistant Director

JFMc:pcf

bc: Hon. Maurice B. Rowe
Commission Members