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September 25, 2007

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Regional Forester
Forest Service, Region Five
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Vallejo, CA 94592

By email: bweingardt@fs.fed.us

Dear Forester Weingardt:

I am writing to inform you of an unfortunate series of events that has taken place in the Sequoia National Forest and Inyo National Forest this year, specifically in the Golden Trout Wilderness area (GTW). One error has built upon another, leading to extensive damage along the trails in the wilderness. Although this damage has already been done, my hope in sending you this letter is that we may shed some light on how this happened and thereby prevent any reoccurrence. I will share with you in this letter the information that I have, and would greatly appreciate a written response advising us regarding what steps you have taken and/or will take to prevent this from happening again. I realize that you are going to retire next week, so I would greatly appreciate it if you would pass this on to Randy Moore when you do, but am directing it to you in the hope that you will have an opportunity to respond sooner.

On May 14, 2007, Forest Supervisor Tina Terrell signed an authorization to use motorized equipment, specifically chainsaws, to clear trails in the GTW. Her authorization letter is attached to the same email as this letter. In late summer of this year this chainsaw work was done, and trees were cut down to great distances off either side of the trail, ranging from ten to twenty feet, which was not necessary to serve any of the values set forth in the Wilderness Act.

These actions were illegal in three different ways. First, as will be discussed in more detail below, the authorization to use chainsaws in the GTW violates the Wilderness Act and also goes against Forest Service Manual (FSM) guidance. Second, the GTW is managed by the Inyo National Forest, so Supervisor Terrell has overstepped her authority in making such an extreme management decision for the GTW. Finally, the actual work done was highly destructive and went way beyond both what was authorized on May 14 and what could possibly be contemplated under the Wilderness Act. I have attached a sample photograph of the damage to the email in which this letter is enclosed, and have more that I would be happy to supply upon request. For all of these reasons,

Supervisor Terrell should be reprimanded for this action and admonished not to take such invasive action in the Wilderness in the future.

Forest Service Manual

The FSM suggests chainsaw use is rarely legal. The Forest Service is first supposed to prevent the need for motorized tool use. The objectives for recreation management state: “Manage for recreation activities that are dependent on the wilderness environment so that a minimum of adaptations within wilderness are necessary to accommodate recreation.” FSM 2323.11. Vegetation is only to be cut when necessitated by wilderness purposes, mining claims, emergencies (fire, insects, disease) or safety. FSM 2323.52. Improvements are only to be provided “for protection of the wilderness resource.” FSM 2323.13. Trails are to be constructed and maintained in a way that “meets the wilderness objectives described in the forest plan.” FSM 2323.13f.

The Service is to strive to manage wilderness using only non-motorized equipment and has a policy not to approve its use unless justified by FSM 2326.1. FSM 2326.02.1 and 2326.03.2.

For these purposes, the exceptions are emergencies (including fire suppression, health and safety, law enforcement, removal of deceased persons, and aircraft accident investigations) and activities that are essential to meet minimum protection or administration needs but are “impossible to accomplish by nonmotorized means because of such factors as time or season limitations, safety, or other material restrictions.” FSM 2326.1.

Forest Land and Resource Management Plans

The Forest Service is also expected to “specify, for each wilderness, the places and circumstances in which motorized equipment . . . [is] necessary for protection and administration of the wilderness and its resources in the forest plan.” FSM 2326.1. The Sequoia National Forest does not currently have a forest plan that addresses wilderness management. (The Mediated Settlement Agreement does not address roadless areas or special areas. Forest Service, *Mediated Settlement Agreement*, <http://www.fs.fed.us/r5/sequoia/projects/msa/01675/01675.PDF> at 2 (1990).) The Service predicts that such a plan will be complete by 2009. (Forest Service, *Schedule of Proposed Actions (SOPA) 07/01/2007 to 09/30/2007 Sequoia National Forest*, <http://www.fs.fed.us/sopa/components/reports/sopa-110513-2007-07.html> (last accessed August 23, 2007).

The Inyo National Forest also manages the Golden Trout Wilderness, and to our knowledge is the primary management for the area. The Inyo National Forest LRMP does include wilderness management guidance that limits the use of chainsaws. Forest Service, *Management Direction for the Ansel Adams, John Muir and Dinkey Lakes Wildernesses Final Environmental Impact Statement Appendix A Land and Resource Management Plan Direction*, (March 2001). The Inyo LRMP gives wilderness values the utmost priority, recreation use is to be limited using primarily off-site controls, and any on-site

controls are to be subtle. *Id.* This suggests that clearing trails in order to facilitate recreational use is inappropriate by any means, most of all chainsaws which are not at all subtle. The LRMP requires approval prior to emergency use of chainsaws to control fire, unless it is for direct suppression. *Id.* Low-impact fire suppression methods are to be used unless more is required to protect people or adjacent property values. *Id.* While these guidelines are not directly applicable to the Sequoia National Forest Supervisor, they do apply to the GTW, and further suggest that chainsaw-use should be limited to actual emergencies.

Wilderness Act

The Wilderness Act, at 16 U.S.C.A. § 1133, discusses the uses of wilderness and states that the purpose of the Wilderness Act is “to be within and supplemental to” the Forest Service’s organic act and the Multiple Use sustained Yield Act. 16 U.S.C.A. § 1133(a). The Act goes on to state “each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.” 16 U.S.C.A. § 1133(b).

Motorized equipment is expressly prohibited in the Wilderness, “except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area).” 16 U.S.C.A. § 1133(c). The Eastern District of California’s preferred analysis asks: (1) whether the actions authorized by the Forest Service are compatible with the purposes and terms of the Wilderness Act, and (2) if incompatible, whether the Forest Service’s action was “necessary to meet minimum requirements for the administration of the area” which is reviewed *de novo*. *High Sierra Hikers Assn. v. U.S. Forest Service*, 436 F.Supp.2d 1117, 1144 (E.D. Cal. 2006).

In *High Sierra* the court found that maintenance of eleven dam structures in the Emigrant Wilderness Area was contrary to the clear and unambiguous language in the Wilderness Act that “there shall be no . . . structure or installation in any such area.” *Id.* at 1131-1132 (*quoting* 16 U.S.C.A. § 1133(c)). The same section should be construed to prohibit chainsaws using the same language: “there shall be no . . . motorized equipment . . . in any such area.” 16 U.S.C.A. § 1133(c). Even if this language is less obvious than that which applied in *High Sierra*, where there is a conflict or alternatives, wilderness values and the maintenance of primitive character will be supreme. *High Sierra* at 1131 (*citing Minnesota Pub. Interest Research Group v. Butz*, 401 F. Supp. 1276, 1331 (D. Minn. 1975), overruled on other grounds in *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir.1976)); *see also* 16 U.S.C. § 1133(b); AR at 2076 and 36 C.F.R. § 293.2(c). Congress intended that Wilderness Areas be places where “the imprint of man’s work [is] substantially unnoticeable.” 16 U.S.C. § 1131(c). Chainsaws are motorized rather than primitive, and have not been used in the area until recently; they are loud and produce pollution and odor incompatible with the wilderness values of quiet

and pristine environments and they leave telltale marks on stumps, visual evidence of their use that interrupts the primitive experience.

As chainsaw use is incompatible with the purposes of the Wilderness Act, *Chevron* deference is not due to the decision to use them, and whether their use falls within the invoked exception will be reviewed *de novo*. *Id.* at 1132-1133. The *High Sierra* court found that dam maintenance was not “necessary to meet the minimum requirements” because the presence of the dams is not necessary to meet any of the purposes of the Wilderness Act, nor is the maintenance of the non-native fish populations and associated recreational fishing that the dams made possible. *Id.* at 1137. To that end, the court finds: “While fishing is an activity that is common among visitors to wilderness areas, neither fishing nor any other particular activity is endorsed by the Wilderness Act, nor is the enhancement of any particular recreational potential a necessary duty of wilderness area management.” *Id.* at 1134. Only an action that is necessary to preserving wilderness character or securing an “enduring resource of wilderness,” then, is “necessary to meet minimum requirements.” *Id.*

Clearing a trail for hiking, an activity no more endorsed by the Wilderness Act than fishing, is not at all necessary according to *High Sierra*. The Wilderness Act allows for “primitive” recreation and defines wilderness as “untrammelled by man,” suggesting there is no need to clear trails at all. 16 U.S.C. §1131(c) and *High Sierra* at 1135. A Washington district court described the intended wilderness recreation experience as meeting “nature on its own terms.” *Olympic Park Associates v. Mainella*, 2005 WL 1871114, 6 (D. Wash. 2005). This suggests downed logs and snags are to remain where nature puts them.

The courts construe the “necessary” exception narrowly, even when it comes to emergencies. *High Sierra* at 1136. The *Olympic Park* court found that the potential for old wilderness shelters to act as a safety feature for hikers during rough weather was insufficient to justify their maintenance. 2005 WL 1871114 at 4 (That court used the *Webster’s Third New International Dictionary* definition of “necessity” meaning: “that which must be by the nature of things: that cannot be otherwise by reason of inherent qualities: [...] that is determined and fixed and inevitable.”).

The only reasons for chainsaw use that have the potential to pass the *High Sierra* test seem to be control or prevention of an unnatural (anthropogenic) outbreak of fire, insects, or disease. Applied here, the Forest Service would have to show, for example, that failing to use chainsaws would result in unnatural fire or insect outbreaks that would have unnatural ecological consequences (like abnormal erosion and stream sedimentation or a massive die-off) worse than the environmental impact of chainsaw use. Ms. Terrell made no such argument in her authorization.

A better understanding of Ms. Terrell's purposes is needed to analogize the circumstances with *High Sierra* in this regard. In general, though, the decision to use a chainsaw in the GTW will not be consistent with prior decisions, as Ron Mitchell, a former trail crew member stated that in his crew, hand tools were used exclusively. Ltr.

from Ron Mitchell, Idaho Sporting Congress to Ara Marderosian, Executive Director, SFK (August 2007).

Further, “necessary” under 16 U.S.C.A. § 1133(d)(1) should be judged in relation to the threat posed to neighboring private property and the project’s effect on the threat to outside land. In most cases this will mean that the only appropriate project areas are at the edge of the Area. Even at the edge, projects that create a buffer zone are “seriously unsettling to the values underlying the Wilderness Act.” *Sierra Club v. Lyng*, 663 F. Supp. 556 (D.D.C. 1987) (*Lyng II*). The GTW is mostly bordered by other Wilderness Areas and does not border on any private property. Any threat posed to adjacent non-wilderness BLM and Forest Service lands by fire, insects, or disease from the Wilderness are more appropriately dealt with by implementing projects on the less protected federal land. *Sierra Club v. Lyng*, 662 F. Supp. 40, 42 (D.D.C 1987) (*Lyng I*).

Courts in the Ninth Circuit seem amenable to a particularly narrow reading of “necessary” in this context. The *High Sierra* court called the Wilderness Act “as close to a 'purist manifesto' as may be found in the area of environmental law.” It is doubtful that this court would construe a “purist manifesto” as conflating the terms “necessary,” “needed” and “appropriate”; this would allow the exceptions to swallow the rule of wilderness preservation. 36 C.F.R. § 293.2(c) even mandates a narrow reading in stating “wilderness values will be dominant to the extent not limited by the Wilderness Act.”

In sum, an assessment of alternative methods is required before finding that chainsaw use is necessary under any standard. That is, if hand tools could be used to do the job, especially in the case of clearing trails, the responsible official will be hard pressed to defend chainsaw use. What the case law suggests is that absent a real emergency, likely limited to a raging outbreak of fire, insects, or disease that immediately threatens non-commercial resources, or a human rescue mission that cannot be completed by lesser means, chainsaw use in the Golden Trout Wilderness is illegal.

Thank you in advance for your prompt action in this matter. We respectfully request that you discuss this matter with both our office and Ms. Terrell at your earliest opportunity.

Sincerely,

Kalyani Robbins
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