Forest Service | **Washington Office** | **1400 Independence Avenue, SW Washington, DC 20250**

File Code: 1570 **Date:** March 29, 2012
Route To:

Subject: Adverse Ruling in Sequoia ForestKeeper v. Tidwell

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

This letter documents instructions from the Forest Service Washington Office for operation of 36 CFR §215 pursuant to the March 19, 2012, judicial ruling in Sequoia ForestKeeper v. Tidwell. **The District Court found that Forest Service regulations exempting project decisions from notice, comment, and appeal when they are categorically excluded from analysis under the National Environmental Policy Act (NEPA) are in violation of the Appeals Reform Act (ARA) and enjoined the Forest Service from following these regulations.** The Forest Service will immediately comply with the District Court's Orders and Injunction. Until new instructions are issued by this office, or the Agency issues regulations implementing Section 428 of the Consolidated Appropriations Act of 2012 and addresses the Court's ruling, pursuant to the Court's Order the following instructions apply:

First, the District Court granted plaintiffs' request for a nationwide injunction, and enjoined the Forest Service from implementing 36 CFR §§ 215.4(a) and 215.12(f). These regulations had exempted all categorical exclusions from notice, comment and appeal.

Therefore, effective March 19, 2012, all units shall refrain from applying these exemptions.

Second, the Forest Service will offer notice, comment and administrative appeal opportunities for categorically excluded decisions as provided for in the District Court's Order. The District Court held that "[t]o comply with the ARA, the Forest Service should have promulgated regulations that preserved the comment, notice, and appeal for any decisions subject to administrative appeal prior to the proposed changes in 1992." (Merits Opinion p. 11). The opinion notes "Prior to 1992, the Forest Service "provided a post-decision administrative appeals process, 36 C.F.R. pt. 217, for agency decisions documented in a 'decision memo,' 'decision notice,' or 'record of decision.'" (Merits Opinion p. 2).

Therefore, all units shall provide notice, comment and appeal opportunities for all projects and activities implementing land and resource management plans that are "documented in a 'decision memo,' 'decision notice,' or 'record of decision.'"

While the 1992 regulatory standard for appealability is quite clear that "*Only* decisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to appeal," 36 C.F.R. 217.3 (1992) (emphasis added,) the Forest Service seeks to diminish the potential for conflict while operating pursuant to the Court's order.

Therefore, line officers are instructed to write decision memos for any proposed action or activity that seeks to authorize the sale of timber, and offer the opportunity for notice, comment, and appeal on these proposed actions, as directed above. Further, line officers at their sole discretion may offer notice, comment and appeal opportunities for individual projects or activities that do not require a decision memo. Such instances are expected to be infrequent and would be offered only when the line officer deems appropriate or necessary to promote public confidence in agency decision making. As stated above, units will provide notice, comment, and appeal opportunities for all projects and activities that are documented in a decision memo.

Third, questions have already been raised concerning whether the injunction will affect ongoing activities. The Agency believes that retroactive application of the Court's Order would impede the necessary daily functioning of the Agency and could upset the settled expectations of permittees, contractors, and members of the public or other groups interested in using National Forest System land by halting projects already underway. In prior litigation involving these same rules (Earth Island Institute v. Ruthenbeck) before the same District Court, the court concluded that "a retroactive remedy would seem to plunge the Forest Service headlong into a crippling morass of confusion. The [injunction], therefore, will apply to Forest Service projects and decisions post-dating the…docketing of the…Order."

Therefore, implementation of decisions that were finalized prior to the Court's March 19, 2012 Order need not be halted or subjected to notice, comment and appeal, and may proceed as planned.

Fourth, for categorically excluded projects and activities currently under development, units should not assume that NEPA "scoping" for the purposes of 36 CFR 220.4(e)(1) will necessarily satisfy the requirements for notice and comment under the Court's injunction. If legal notice of the opportunity to comment has been published, and comments have been accepted in the same or similar manner as that described in 36 CFR 215.6(a) (regarding Environmental Assessments), units need not repeat notice and comment efforts.

Finally, we recognize that these circumstances represent a significant burden and will in many instances delay implementation of needed and valuable management activities or create substantial hardships for users of the National Forest System. This is regrettable, but immediate compliance with the Court's Order is imperative. The agency has and will continue to confer with the Office of the General Counsel and Department of Justice concerning the agency's legal options.

Additional information will be provided as it becomes available. Any questions regarding this direction should be directed to Deb Beighley at 202-205-1277, or Joel Strong at 202-205-0939.

/s/ Thomas L. Tidwell
THOMAS L. TIDWELL
Chief