



Caring for the Land and Serving People

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# FAX TRANSMITTAL

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Subject

Date 07/30/07

To: Melvin Shibuya meet 8

To: \_\_\_\_\_

Fax: (505) 563-9987 Phone No: \_\_\_\_\_

From: \_\_\_\_\_

Fax: Conf. fax Phone No: \_\_\_\_\_

For Review /Comment       For Signature

*Confidential!*

*Call me if you've questions or comments.*

*Karlene*

7/27/07

## **Reply to the Proposed Termination of Employment Letter**

### **Background**

On July 20, Chris Savage, Petersburg District Ranger, delivered a letter to me, signed by Olleke E. Rappe-Daniels, Deputy Forest Supervisor, and charging me with two misconduct violations that could result in my termination. The final decision concerning my proposed termination resides with Forrest Cole, the Forest Supervisor. When I received this proposed termination letter, Chris Savage insisted that I remove all personal belongings from my workspace and relinquish my keycard to Mr. Savage. A law enforcement officer was present during this exchange. The letter allowed me a seven-day period in which to reply. This letter constitutes my response to the two charges of misconduct, identified as "Specification 1" and "Specification 2" in the letter. For the reasons I explain below, I urge you to forebear in terminating me as any such termination would be unjustified, illegal and ultimately result in significant adverse financial consequences to the Forest Service.

### **Specification 1. Giving the Wildlife and Biological Diversity Resource Report to Mr. Edwards.**

As a wildlife biologist and Interdisciplinary Team Leader on the Scott Peak Project, my duties and responsibilities were to disclose the environmental impacts of timber harvest and related activities to the decision maker through the interdisciplinary team (IDT) process defined by the National Environmental Policy Act (NEPA). The Wildlife and Biological Diversity Resources Report, dated May 2, 2005, was one of the vehicles used to disclose impacts to wildlife habitat (hereinafter "wildlife resource report" or "report").

I compiled this report, which represented the best team effort to capture, quantify, and display environmental impacts. This report uses units of measure that directly address one of two significant environmental issues that were developed and agreed upon by the IDT and documented in IDT meeting notes. The key findings contained within this report went through substantial internal and IDT team review before completion.

The findings in the resource report were intended to be part of the public record and become an integral part of the Draft Scott Peak EIS. The "recommendations" of the wildlife resource report for "removing, avoiding, or compensating for any adverse effects" must be documented in the project's Record of Decision. By this direction, the Forest Service Manual requires that recommendations contained in the wildlife resource report be made public.

A Draft EIS is intended to be circulated widely to the public for review, and to solicit additional public comment. As IDT leader I personally inserted this report into the public planning record before I was dismissed from this project in 2005. Thus, at the

conclusion of the process the report was not a preliminary deliberative process document but was intended for public comment.

Indeed, that is how other government agencies treated it. After I was dismissed from the project in 2005, I did not retain a copy of the report. The copy I obtained and sent to Mr. Edwards was obtained through the Alaska Department of Fish and Game (ADF&G). ADF&G possessed the report because it was part of the collaboration process that helped produce the report. Forest Plan direction calls for coordination during the planning of activities that may affect wildlife species (Tongass National Forest Land and Resource Management Plan, Page 4-112). Also R-10 Forest Service directives require that the implementation of sensitive species objectives be carried out "in coordination" with "managing agencies." FSM 2670.22 (R-10 2600-2005-1). There are sensitive species within the Scott Peak project area, e.g., goshawk. The "managing agency" for wildlife is ADF&G (states own the wildlife, the Forest Service has jurisdiction only over the land and habitat).

As required by R-10 directives, to carry out my mandatory duty to coordinate with the ADF&G in implementing the sensitive species objective for the Scott Peak project area, I consulted with ADF&G biologists while preparing the wildlife resource report. *Id.* ("As appropriate, contact State of Alaska and federal wildlife, fish, and plant management agencies, Alaska Natural Heritage Program, research stations, universities, or other organizations about species occurrence and habitat requirements."). During the consultation process, I provided the wildlife resource report to ADF&G for its review and comment.

I obtained a copy of the report from ADF&G at Mr. Edwards' request only after publication of the Scott Peak Record of Decision, after I had made general references to the report in my first appeal of this project and after I discussed the report with Forrest Cole during the subsequent public appeal resolution meeting. The appeal was then upheld by the Regional Forester.

Upon conclusion of my successful appeal, none of my superiors – indeed no one – suggested that I had acted improperly by referencing this report in these public settings. Both the appeal and the appeal resolution meeting notes became public record. It is only because of this public process that Mr. Edwards became aware of the report and requested that it be made publicly available. I understand that the ADF&G has produced the report to other members of the public besides myself, thus confirming that it was not subject to any deliberative process privilege. *See, e.g.,* attached Declaration of Andy Stahl (July 26, 2007).

I sent the report to Mr. Edwards after the first appeal period and before the second appeal period ended, and only after reviewing the Scott Peak planning record, and noting that the report had been removed. In its place was another resource report with the same title, but which reached different conclusions as to environmental effects on wildlife. The planning record did not contain details, justification, or rationale to justify the changes. I also learned from evaluating the substituted report that my name was used as a major

contributor to this substituted report, yet the substitute report did not contain many of the key findings to which I subscribed based on the collaborative IDT process.

Thus, the entire premise of your first specification, that I took an “internal deliberative document” and failed to “protect government property” by allowing “its use for other than official purposes” is palpably wrong. The report was prepared for public comment, it became known as part of my formal appeal process as to which you raised no concern about impropriety; and it was made available to members of the public through the offices of a state agency that obviously disagrees with your assessment of it as an internal deliberative document that should not be made available to the public. Thus, I did not believe I violated any confidences by sharing the report with Mr. Edwards, I did not violate any such confidences, and the document could not have been given to Mr. Edwards had a state agency not agreed that the document is not confidential.

Because the premise for this specification is false, I am left to conclude that it is a pretext for retaliating against me for my past whistleblowing activity – which has been successful in ensuring that proper procedures are followed before logging of old growth timber in the Tongass National Forest – and for my whistleblowing activity in exposing the inadequacy of the Scott Peak Record of Decision. The report at issue here clearly should have been made part of the administrative record for the Scott Peak Record of Decision. It appears that someone in the Forest Service removed and destroyed it in direct contravention of the law. *See* 44 U.S.C. § 3101, § 3106. The Forest Service obviously has no deliberative process privilege in hiding its destruction of documents in direct contravention of the law. And it has no right to retaliate against me because its unlawful conduct was revealed by my sharing a publicly available document with members of the public that demonstrated the inadequacies of the Scott Peak Record of Decision and its illegal conduct.

### **Specification 2. Involvement in the Forest Service Employees for Environmental Ethics (FSEEE) Fundraising Newsletter**

I did review, edit, and approve information contained in a fundraising letter sent to FSEEE members. This letter was not, as you state, published in FSEEE’s quarterly magazine, but it was the subject of mailing to membership. I signed the letter personally, and did not place my title or Forest Service affiliation in the signature block. The letter specifically states that FSEEE is “neither part of, nor is it affiliated with, the U.S. Forest Service,” and that the views expressed in the letter “are solely [my] own and do not represent the official position or policy of the federal government or any of its agencies.” In the letter, I described my successful lawsuit to stop illegal road reconstruction activities that were approved by the Forest Service. In describing this legal effort I described that I had been a Forest Service employee for 25 years, an important fact for describing the lawsuit and how it came about.

My letter does not contravene any regulation. Your attempt to terminate me for sending the fundraising letter violates both the letter and purpose of federal regulations.

Your threat of termination flatly violates my First Amendment speech rights, and any attempt to terminate me for writing the letter will be held to be illegal.

First, 5 CFR § 2635.808, governs fundraising activities by federal employees. Obviously, my letter does not constitute “fundraising activity as part of [my] official duties.” See 5 CFR § 2635.808(b). And while the letter does constitute fundraising in my personal capacity, it does not contravene any of the provisions of 5 CFR §2635.808(c), which governs such private fundraising by federal employees. That regulation prohibits “[u]s[ing] or permit[ing] the use of [my] official title, position or any authority associated with [my] public office to further [a] fundraising effort.” I did not use or permit the use of my “title, position or any authority associated with [my] public office” to further FSEEE’s fundraising effort. I signed the letter personally and the letter specifically states that my views were my own and not those of the Forest Service. Nor could even the most casual reader of the letter be misled into thinking so. The subject of my letter was my lawsuit *against* the Forest Service.

All I am guilty of is describing in my letter that I am a long time employee of the Forest Service who successfully sued the Forest Service. How else could I explain the successful story of a suit by a Forest Service employee against the Forest Service without mentioning that I am in fact a Forest Service employee. Such a reference plainly does not constitute use of my office to “further” private fundraising efforts. The examples set forth in the Code of Federal Regulations confirm that my letter does not constitute “use” of my “office” or “authority” to “further” fundraising. See, e.g., 5 CFR §2635.808, Example 1 (describing furthering fundraising with enticement of round of golf with Secretary of the Navy).

Nor does my letter constitute “use of public office for [my] own private gain” in contravention of 5 CFR §2635.702. As discussed above, the letter does not “use” my public office for anything, let alone “private gain.” Nor did I have anything to privately gain by the letter. I sought funds for a public interest lawsuit for which I would be entitled to no remuneration personally and have received no personal gain. The letter does not use my position to induce anyone to give me a personal benefit (5 CFR § 2635.702(a)), and there is utterly no risk – based both on the letter’s disclaimer and content – that anyone could believe that the letter was sanctioned by the government. 5 CFR § 2635.702(b).

In any event, attempting to terminate me in reliance on such regulations would constitute an unconstitutional application of the regulation in violation of my free speech rights.

Again, given my strong and unblemished record<sup>1</sup> and the palpably illegal bases for terminating me, I have no choice but to conclude that this specification is a pretext for retaliating against me for my successful whistleblowing activity – including the lawsuit that is the subject of my allegedly offending letter.

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<sup>1</sup> Given my unblemished record, even if you could establish that I violated some policy or regulation, termination would be a severe and unwarranted sanction.

I urge you to step back from what you appear intent upon doing. I am an experienced and highly qualified Forest Service employee who deserves to keep my job. I have successfully exercised my right as a citizen to stem illegal activity by the Forest Service and will continue to pursue all available remedies to expose illegal conduct and obtain full compensation for any future wrongdoing.

Sincerely,

/s/ Glen Ith, Wildlife Biologist  
Tongass National Forest

cc: John Phillips, Esq., Phillips Law Group, PLLC