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TO: Elizabeth Estill
Director of Recreation
Forest Service

FROM: James B. Snow /s/
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SUBJECT: Use of Rock Bolts for Mountain Climbing on National Forests and in Wilderness areas and Related Issues

This is in response to your request of October 12, 1990 concerning rock bolting in wilderness. Specifically, you asked us:

1. to examine statutory and regulatory authority and give our opinion as to whether the installation of rock bolts for climbing purposes may be prohibited by the Forest Service in designated wilderness areas and whether rock bolts already in place in the wilderness may be removed; and,

2. to address the potential tort liability of the United States if the Forest Service initiates a bolt removal program.

Background:

These questions arise from a controversy over rock bolting in the Superstition Wilderness of Arizona's Tonto National Forest. For over twenty years this Wilderness has been frequented by rock climbers from nearby Phoenix and other parts of the Southwest. As Phoenix grew and the sport of climbing increased in popularity, climbers and their equipment proliferated in the Wilderness. To date, approximately 200 climbing routes have been established on mountains in the Superstition Wilderness. These routes are marked with more than 500 rock bolts.

Due to the type of rock in the Superstition Wilderness, climbing is accomplished by using fixed, as opposed to removable, metal

bolts. As we understand it, the bolting activity involves drilling 3/8" or 1/2" holes into the rock face and placing an aluminum or stainless steel expansion bolt in the drilled hole. A hanger is attached to the bolt and carabineers are then attached to the hanger as the climber ascends the mountain. Once the route is completed, the carabineers are removed but the expansion bolts and hangers remain in place.

To address the Wilderness rock bolting issue, the Tonto National Forest Supervisor issued several implementation actions on March 23, 1990 including:

- a prohibition on the installation of rock bolts in mountains in the Wilderness due to a violation of 36 C.F.R. §261.9(a) (damaging natural features); and

- a requirement that all bolts left in the rock at the conclusion of a climb be treated as abandoned personal property to be removed pursuant to 36 C.F.R. §261.10(e) and Tonto National Forest Special Orders #12-13 and #12-59.

On September 6, 1990, the American Alpine Club and the Arizona Mountaineering Club (hereinafter "the AAC") appealed the above implementation actions, claiming that the natural resource damage due to rock bolting is minimal, the removal of rock bolts creates an unsafe condition exposing the Forest Service to potential tort liability, and the rock bolts are not "abandoned personal property."

Discussion:

I. Management Authorities of the Forest Service

A. General Regulatory Authorities within the National Forest System

The Forest Service has authority to regulate or prohibit rock bolting and similar uses on the National Forests. This authority is derived from the generic powers of the Secretary with respect to the National Forests under the Organic Act (16 U.S.C. §551), the Wilderness Act (16 U.S.C. §1133(c,d)), and other similar authorities.[1] In the case of the Tonto National Forest, the Supervisor relied on regulations at 36 C.F.R. §261 which are predicated on these generic authorities.

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[1] See: 7 U.S.C. §1011(f) for Title III lands; 16 U.S.C.§ 1246(i) for National Trails; 16 U.S.C. §1281(d) for Wild and Scenic Rivers.

In our opinion, there is unquestioned authority of the Supervisor to utilize the general statutory authorities and the regulations at 36 C.F.R. §261 to manage rock climbing activities on the Tonto National Forest. This authority is independent of the Supervisor's responsibilities to manage the Wilderness Area within the Forest. In our opinion, the Wilderness designation provides further authority to regulate this activity and may, in fact, impose a duty to do so.

B. The Wilderness Act

The Wilderness Act (hereinafter "the Act") established the National Wilderness Preservation System composed of federally owned land "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness. . ." 16 U.S.C. §1131(a). "Wilderness" is defined in section 2(c) of the Act as:

> . . . an area where the earth and its community of life are untrammeled by man. . . retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable. . .(emphasis added). Id. at §1131(c).

Section 2(c) of the Act establishes the public policy that there should be no permanent improvements within Wilderness areas. The Forest Service has defined "permanent improvements" to include all structural or nonstructural improvements that remain in one location for more than one field season. Forest Service Manual §2320.5(5). Permanent improvements are authorized in designated wilderness areas only for the protection of the wilderness resource. Id. at §2323.13.

Section 4(c) of the Act puts teeth into the policy pronouncement of section 2 by prohibiting various activities in Wilderness Areas:

> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness designated by this chapter and, 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), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no

> landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area. 16 U.S.C. §1133(c).

The prohibition section 4(c) of the Act against "installations" is relevant to the issue of rock bolting. While "installation" is not defined in the Act or regulations, its common meaning is "[s]omething installed, as a system of machinery or apparatus placed in position for use." Random House College Dictionary, p. 690 (1980). In our opinion, bolts used to facilitate rock climbing fall within the common meaning of "installation." If that is the case in this situation, and we believe it is, then the legal question is not whether the Forest Service can regulate the practice of rock bolting, but whether it can allow the activity to occur in the first place.

It has been suggested by the AAC that rock bolts are simply trail markers, like cairns, for vertical as opposed to horizontal trails. The AAC contends that these bolts actually reduce resource damage because, once in place, a trail is established and there is no further need to install additional bolts. Installed bolts, so the theory goes, identify trail routes that can be utilized by later climbers and concentrate the impact on the wilderness resource.

Our response to the AAC position is that if the Wilderness Act precludes installations, then it is irrelevant whether the use of bolts could potentially reduce impacts on a Wilderness area. Additionally, it is our understanding that the AAC theory of bolts being trail markers is not practiced in the Superstitions. Many climbers do not follow preexisting routes and, of those that do, frequently they do not feel compelled to use the previously installed bolts. Thus, an argument that rock bolting is authorized under the Act because it minimizes resource damage is unpersuasive as a matter of fact as well as law.

We also note the prohibition in section 4(c) against "motorized equipment" in designated wilderness areas. 16 U.S.C. §1133(c). "Motorized equipment" includes machines like chain saws which are activated by a motor, engine or other nonliving power source. 36 C.F.R. §293.6(b); FSM §2320.5(4). Excluded from this prohibition are small battery or gas powered handcarried devices such as shavers, wristwatches, flashlights, cameras, and stoves. Id. We understand that rock climbers frequently use handcarried power drills in placing bolts in rock faces. The question therefore arises as to whether power drills come within the ambit of the prohibition.

We believe that the Forest Service has made a defensible distinction between prohibited motorized equipment such as chain saws, and handcarried devises such as shavers. In our opinion, an important distinction is not solely whether a device is

handcarried, but whether its use substantially impacts the wilderness resource. When used for rock bolting, we believe that power drills are more akin to prohibited devices because their use results in holes which materially and permanently affect the rock faces as well as having auditory impacts on the wilderness resource. Therefore, we believe a strong case can be made that power drills come within the ambit of devices prohibited by section 4(c).

C. Regulations by the Tonto National Forest Supervisor

The basis for the March 23, 1990 implementation actions was not the violation of the Act's express prohibitions noted above. Rather, the Tonto National Forest Supervisor justified his actions based on National Forest System prohibitions which, by regulation, are incorporated by reference to apply to wilderness. 36 C.F.R. §261; 36 C.F.R. §293.3(b). Two of these regulations prohibit:

> - damaging any natural feature or other property of the United States. (36 C.F.R. §261.9(a)); and
>
> - abandoning any personal property. (36 C.F.R. §261.10(e)).

"Damaging" includes "to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill or in any way harm or disturb." Id. at §261.2. If the Forest Service concludes that the drilling of a series of 3/8" or 1/2" holes in rock faces in the Superstition Wilderness defaces, destroys, harms or disturbs natural features of the United States, then the Forest Service may prohibit or otherwise regulate this activity in order to eliminate the damage.

We understand that the AAC argues against the application of the regulation at 36 C.F.R. §261.9(a) contending that harmful activities like grazing cause far greater damage to wilderness than rock bolting. Even if that is accurate, it is immaterial to the question of whether the Supervisor can invoke this regulation if he believes that rock bolting damages the forest resource.[2]

Concerning 36 C.F.R. §261.10(e), regardless of the climber's intent in installing a rock bolt, at the conclusion of the climb if the bolt remains in the rock face, it is abandoned personal

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[2] As an aside, we note that some activities are permitted to continue in wilderness notwithstanding their having an arguably adverse impact on wilderness values. Grazing, for example, is permitted to continue under provisions of section 4(d)(4) of the Act. 16 U.S.C. §1133(d)(4).

property. The AAC notes in a September 6, 1990 letter to Regional Forester Dave Jolly that ". . . ancient pitons and bolts still grace Weaver's Needle." Whether these bolts mark a route of ascent is irrelevant. Again, the Forest Service is authorized to remove this property.

D. Need for New Regulations

Your memorandum of October 5, 1990, also asked our opinion on whether new regulations are necessary to prohibit the use of rock bolts. We believe that the existing regulations offer a basis for regulating the activity. However, to avoid inevitable arguments and defenses as to the adequacy of the regulations, we would advise that the petty offense regulations be amended as follows:

> 36 C.F.R. §261.16 -- Consider adding a new subparagraph: "Possessing or using any expansion bolt or other device designed for or used in holes drilled in rock surfaces for rock climbing or other related climbing activity. This prohibition shall not include pitons or similar devices for temporary uses provided they are removed upon completion of a climb."[3]

To address the activity with respect to National Forest nonwilderness areas, consider adding similar language as follows to Subpart B dealing with prohibitions by order:

> 36 C.F.R. §261.58( ) "Possessing or using any expansion bolt, piton or other device designed for or used for rock climbing or other related climbing activity, as specified in the order.

The wording of the §261.58 regulation can be more generic since the details of a prohibition can be specified in a particular order to meet the needs at a particular time and place.

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[3] This draft regulation would have to be reviewed and possibly rewritten with input from persons knowledgeable in the technical aspects of rock climbing.

II. Tort Liability[4]

A. The Arizona Recreational Use Statute (A.R.S. §33-1551 (Supp. 1990))

In an April 18, 1990 letter to the Southwest Regional Forester, the AAC stated that the United States may be liable in tort for climber injuries occurring after Forest Service removes rock bolts from the mountains in the Superstition Wilderness. According to the AAC, because climbers would no longer be able to utilize previously installed bolts to assist in their climb, the federal government would be liable for "actively creating a dangerous condition." We disagree and believe the AAC has misstated the applicable liability standard.

Under common law, a landowner's duty to keep his or her premises safe for occupants varies depending on the classification of the occupant as a trespasser, licensee, or invitee. "Recreational use" statutes limit landowner liability by abolishing the common law occupant classifications and corresponding landowner duty. The objective of such enactments is to encourage landowners to open their property for recreational use.

In 1983, the Arizona Legislature enacted a recreational use statute which states:

> An owner, lessee or occupant of premises does not: owe any duty to a recreational user to keep the premises safe for such use; extend any assurance to a recreational user through the act of giving permission to enter the premises that the premises are safe for such entry or use; or incur liability for any injury to persons or property caused by any act of a recreational user. A.R.S. §33-1551(A).

The statute's protection does not extend to a landowner's wilful or malicious failure to guard or warn against a dangerous condition, use or activity. Id. at §33-1551(C).

In Miller v. United States, 723 F.Supp. 1354 (D. Ariz., 1989), plaintiff motorcyclist, injured after crashing into an embankment on national forest land, sued the United States. Plaintiff challenged the United States' defense based on the Arizona

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[4] Because the evaluation of the potential tort liability of the United States for rock climbing injuries involves the consideration of several factors, including whether the legislature of the state where the injury occurred has enacted a recreational use statute, analysis of this question is limited to the present controversy in Arizona.

Recreational Use Act by claiming that the Forest Service had acted wilfully or maliciously in failing to notify the plaintiff of the dangers in the road.

On motion for summary judgment, the District Court dismissed the complaint, noting that even though the Forest Service: 1) was aware of the removal of a culvert from a road; 2) was aware of the dangers posed by the removal of the culvert; and 3) failed to take remedial actions to warn road users of the danger, these actions did not rise to the level of wilful or malicious misconduct. The Court defined "wilful misconduct" as "intentional, wrongful conduct, done either with knowledge that serious injury to another probably will result or with a wanton and reckless disregard of the possible results. . ." Id. at 1362. The Court defined "malicious conduct" as "even more egregious than wilful." Id.

In the instant case, it is highly unlikely that Forest Service removal of rock bolts in the Superstition Wilderness pursuant to the Act and its regulation and in furtherance of the protection of the Wilderness' natural features would be characterized by a court as wilful or malicious behavior.

B. Assumption of Risk

In addition to the Arizona Recreational Use Statute, the Forest Service can assert the common law assumption of risk defense to a climbing-related injury sustained after the implementation of the bolt removal program.

Assumption of risk is based fundamentally on consent. 57A Am Jur 2d 712, Negligence §804. A plaintiff is barred from recovering under a theory of negligence if it is proven that, with appreciation and knowledge of an obvious danger, he purposely elects to abandon a position of relative safety and chooses to reposition himself in the place of obvious danger and by reason of that repositioning is injured. Id. As applied to sports, including snow skiing and water skiing, the general rule is that a person who voluntarily participates in a lawful recreational pursuit assumes the ordinary risks of such activity. Id. at 735, Negligence §835; see also, 4 Am Jur 2d, Amusements and Exhibitions §§96-100. The sport of rock climbing and its attendant perils is a logical addition to the list of sports to which assumption of risk applies.

Arizona divides assumption of risk into two categories: express and implied. Hildebrand v. Minyard, 494 P.2d 1328, 1330 (Ariz. App. 1972); see also, Restatement 2d of Torts §496 (1965). "Implied assumption of risk" includes those situations where

> . . . a plaintiff who fully understands a risk of harm to himself . . . caused by the . . . condition of the defendant's land . . ., and who nevertheless chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk. Id. at §496(C).

To defend in a tort action, a defendant in Arizona must prove three elements in order to assert the implied assumption of risk defense. Those elements are:

> 1. There must be a risk of harm to plaintiff caused by defendant's conduct or by the condition of defendant's land or chattels;
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> 2. Plaintiff must have actual knowledge of the particular risk and appreciate its magnitude.
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> 3. The plaintiff must voluntarily choose to enter or remain within the area of the risk under circumstances that manifest his willingness to accept that particular risk.
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> Hildebrand, supra, at 1330.

In our opinion, if the United States were sued by an injured rock climber, we believe that the defense of implied assumption of risk defense could be maintained. Clearly, rock cliffs and faces pose a risk of falling and other harm to persons climbing them. The actual knowledge of that potential risk is obvious to any person of reasonable intelligence. In fact, it is the risk that adds to the excitement of this sport. Finally, no one is compelling persons to engage in this sport and those that do would clearly be assumed to have voluntarily undertaken the risks inherent in it.

Conclusions:

Based on the foregoing analysis, it is our opinion that the Forest Service may ban or regulate all rock bolting activities anywhere on the National Forest System. In addition, at its discretion, the Forest Service may undertake rock bolt removal programs.

As noted by our analysis of the Wilderness Act, we believe there is a legitimate legal question as to whether the Forest Service is authorized to allow rock bolting to occur in any wilderness areas.

The United States' risk of potential tort liability based on a rock bolt removal program in the Superstition Wilderness is minimal based on landowner protections found in the Arizona Recreational Use Act and the availability of the implied assumption of risk defense.

We would be happy to answer any questions that may arise on this issue. In that regard, you may call me or Eric Olson, the attorney on my staff assigned this matter.

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