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May 17, 2024

Peter Taylor, Forest Planner
Superior National Forest
8901 Grand Avenue Place
Duluth, MN 558085

Re: Forest Plan Amendment of Management Direction for the Boundary Waters Canoe Area Wilderness

Dear Mr. Taylor,

Thank you for your work to improve the Superior National Forest's management of the Boundary Waters Canoe Area Wilderness (BWCAW) through the forest plan. We appreciate the opportunity to provide comments on the scope of changes that would be appropriate for the chapter regarding management of the BWCAW.

CURE is a rurally based, non-profit organization dedicated to protecting and restoring resilient towns and landscapes by harnessing the power of the people who care about them. We are also committed to the principles of land stewardship, which includes the notion that communities—and especially those who are most directly impacted by land use decisions—deserve a voice and power in the decision-making about our public lands.

I. Support for this process and initial proposal

This process of updating the BWCAW chapter is a worthwhile effort that is necessary for proper management of the resource. While the existing chapter is already very solid considering its age, it is in need of an update and CURE thanks the Superior National Forest staff and leadership for starting this process. We hope it is concluded successfully.

CURE supports the suggestion that the BWCAW chapter be amended to include less suppression of natural fires caused by lightning, where possible and where the fire will be contained by the landscape or weather conditions at the time. Please see below for additional comments on broadening the scope of allowable fires, including prescribed fires led by tribal staff.

CURE also supports the proposal of amending the chapter to better protect wilderness character. CURE will await the full proposal on how to best do this to provide additional comment, as

appropriate. CURE also will look forward to commenting on any changes to motorized use in a later stage of this process.

II. Treaties

In the 1978 BWCAW Act that established the named wilderness and the mining protection area, Public Law 95-495, Congress explicitly and without any ambiguity left in place all treaty duties associated with the wilderness. The law stated, in section 17: “Nothing in this act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness.”¹ While many treaties may pertain to this updated chapter, at least two must be explicitly acknowledged and incorporated into the decision-making processes in this chapter.

1. 1854 Treaty of La Pointe

The 1854 Treaty of La Pointe ceded most of the land in what is now called Minnesota’s Arrowhead region, including the land that makes up the Superior National Forest. This agreement between nations predates Minnesota statehood, as well as the founding of the Forest Service.² It importantly reserves rights that the Native Nations who agreed to it never gave up to the United States. Therefore, these tribes retain sovereign rights over resources throughout the Arrowhead, including and especially on federal public lands. The fact that the BWCAW has been maintained without private ownership or additional development makes it an ideal place for the Forest Service to foster and encourage the exercise of treaty rights, and the updated chapter should explicitly state that retained rights under this treaty are applicable in the wilderness and will help to dictate how the Forest Service co-manages the resource with tribes exercising their rights.

Although it goes beyond the scope of what must be included in the chapter update, it’s important for the overall issue to remember that under the normal interpretation of this type of treaty, the treaty must be construed to the tribes’ benefit, any ambiguities should be decided in favor of tribes, and the treaty must be interpreted as understood by the tribal negotiators at the time.³ The fact that this process is guided and preceded by consultation with the relevant tribes

¹ <https://uscode.house.gov/statutes/pl/95/495.pdf>

² Created in 1858 and 1876, respectively.

³ These are three of four “canons of interpretation” for treaties with Native Nations laid out by the U.S. Supreme Court. Stated in full:

There are four canons. The first canon mandates that courts construe treaties, agreements, statutes, and executive orders liberally to tribes’ benefit. The second resolves ambiguities in treaties, agreements, statutes, and executive orders in favor of tribes. The third requires judges to interpret the language of treaties as Indians would have understood it at the time. And the fourth dictates that the rights reserved by treaties persist unless Congress explicitly abrogates them.

(citations omitted) <https://harvardlawreview.org/print/vol-135/indigenous-interpretations/>

is necessary and commendable, and the Chapter should ultimately reflect the tribes' values and intention in co-managing the BWCAW in line with their rights as they understand them.

2. Boundary Waters Treaty of 1909

The Boundary Waters Treaty was negotiated and adopted by the U.S. and Great Britain in 1909. In 1915 the U.S. Attorney General issued an advisory opinion, finding that Article 1 of the Boundary Waters Treaty is self-executing, and therefore is enforceable law that is binding upon the government directly without any additional federal lawmaking.⁴ That opinion states: “a treaty made under the authority of the United States is equally with an act of Congress the supreme law of the land and is binding upon the administrative officers of the Government as well as upon the courts.”⁵ Consistent with this, in the more than hundred years since the treaty was adopted, it has been directly applied by the governments without the need for additional implementing legislation or rules.

Even if the Boundary Waters Treaty were not self-executing, another canon of treaty interpretation seems to argue for applying it directly to the Forest Service's management of resources. In 1804 the U.S. Supreme Court decided that ambiguous statutes must be construed to be consistent with international law⁶ in a case called *Murray v. Schooner Charming Betsy*.⁷ Thus, the *Charming Betsy* canon would command that to the extent that the Forest Service has discretion over how to update this forest plan it should do so consistently with the Boundary Waters Treaty.

Importantly to the below discussion, this treaty, in Article IV, has a strong requirement for the prevention of pollution that would cross boundary waters: “It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”⁸ This standard is likely to be self-executing, under the same reasoning as the Attorney General Opinion, and should guide Forest Service implementation of other law, under the *Charming Betsy* canon.

⁴ “Article I of the treaty of January 11, 1909, confers rights upon the inhabitants and ships of the contracting nations by force of its own provisions which require no legislation to make them effective, and is clearly self-executing within the meaning of the authorities above cited.” *Canadian Boundary Waters*, T.W. Gregory to the U.S. Secretary of State, Apr. 2, 1915, OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL, Volume 30, 351-354, at 354. The opinion is attached to this comment letter as it is otherwise quite difficult to find.

⁵ *Id.* at page 354.

⁶ The exact wording of the court was “an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains.”

https://harvardlawreview.org/wp-content/uploads/2008/01/customary_international_law.pdf at 1217.

⁷ 6 U.S. (2 Cranch) 64 (1804).

⁸ <https://ijc.org/en/who/mission/bwt>

III. Government partners

While the current BWCAW chapter notes collaboration with the Minnesota DNR,⁹ and Fish and Wildlife Service, an update is necessary to list additional partners and agreements with those partners. At the very least the chapter should note and describe the Memorandum of Understanding¹⁰ that the Superior National Forest has entered into with the tribes who are parties to the 1854 Treaty of La Pointe.¹¹

The chapter could also be improved by including reference of collaboration and coordination with the government of Canada, as well as the International Joint Commission (IJC). The existing language notes coordination with the IJC and some Canadian government units in the management of specific water structures/dams, but in light of the many pollution and environmental issues plaguing our area it seems prudent to expand the discussion of coordination around the border. It is clear that staff already interact with these other entities, so making the change in the chapter will just help to clarify that these contacts are ongoing, similar to those with the Minnesota DNR.

IV. Fire

Fire-adapted landscapes need fire. The suppression of natural fires, and the lack of prescribed burns that were more commonplace before colonization, has changed the landscape and unfortunately primed the forest for worse fires than were happening prior to colonization.

Research shows that Indigenous management of land with fire helps adapt to climate stress and can prevent climate-caused wildfire.¹² Researchers found: “Restoring or emulating Indigenous fire practices could buffer climate impacts at local scales but would need to be repeatedly implemented at broad scales for broader regional benefits.”¹³

Aside from preventing catastrophic fires, regular controlled burning of fire-adapted ecosystems can shape and encourage habitat for important species, such as moose.¹⁴ Fire is necessary for

⁹ For example: “The Forest Service will continue to coordinate with the MNDNR in planning and implementation of activities that impact protected waters in the BWCAW.” Existing chapter at 3-59.

¹⁰ Similar to the existing language regarding the DNR MOU: “The Memorandum of Understanding (MOU) between the Forest Service and the MNDNR will guide wildlife management activities in the Wilderness. The MOU will be reviewed and updated every five years.” Existing chapter at 3-58.

¹¹ Available at <https://www.fs.usda.gov/main/superior/workingtogether/tribalrelations>

¹² <https://www.science.org/doi/10.1126/sciadv.abq3221>

¹³ *Id.*

¹⁴ <https://www.fs.usda.gov/features/moose-habitat>

jack pine reproduction.¹⁵ Without small fires, highly flammable balsam fir accumulate and make it difficult for native species to navigate a clogged forest floor.

Because the statute establishing the BWCAW in no way impairs treaty rights or responsibilities, it is appropriate for the BWCAW chapter to explicitly state that tribal authorities have the ability to propose and lead prescribed fire within the BWCAW, within the safety standards and best practices established by the Forest Service and other skilled practitioners. There is no legal obstacle to the tribes' management of their resources, or using fire to increase abundance of habitat or native species that thrive after fire (e.g. blueberries). While of course any prescribed fires must be planned and must be executed with caution and according to best practices, there is no reason for the only fire on the landscape to be those caused by lightning or set by the Forest Service in dire need – working with expert tribal staff, the Forest Service should also facilitate tribal management of their resources using fire, when tribal experts deem it desirable and when the conditions appear to be sufficiently safe.

Use of fire under treaty reserved rights and proper coordination with tribes could be added to the chapter as a management approach or forest plan goal. Long-term planned prescribed fire will hopefully be more effective in long-term management of the forest than temporary exceptions allowing Forest Service staff to initiate prescribed burns after catastrophic events such as major blowdowns.

V. Development of entry points

CURE acknowledges that the chapter at issue here is about the management of the BWCAW and that entry points to the wilderness are all outside of the BWCAW proper. Nonetheless, we would like to support views expressed by others that it would be appropriate for the Forest Plan to incorporate the installation of electric vehicle (EV) charging infrastructure at entry points that are sufficiently developed. For example, larger entry points with paved parking would be an ideal place to locate both EV charging stations as well as solar panels that would be most productive in the summer months, when the demand for EV charging would be at its height.

Aside from being a desirable amenity to encourage visitors to come in cleaner transportation while visiting the wilderness, starting to install chargers for EVs will allow the Superior National Forest to transition its own vehicle fleet to EVs as appropriately-sized vehicles come on the market. An appropriate amount of charging infrastructure should be reserved for the use of staff, and for charging USFS vehicles while staff are out in the wilderness. Without starting to plan for this “end of the road” charging, it will be difficult for the Superior National Forest to adopt EV fleet vehicles and get the full use of them when they do become available.

VI. Water pollution

Consistent with the Boundary Waters Treaty's Article IV, it is important that the Forest Service continue to minimize and prevent harmful pollutants from entering the lakes and rivers of the

¹⁵ <https://www.fs.usda.gov/research/treesearch/10170>

Superior National Forest. As such, the Forest Service should continue to minimize the use of aerial drops of fire retardants, and only do so when absolutely necessary to manage wildfires. When such chemicals are authorized for use in the wilderness the Superior National Forest should notify the IJC and Canadian governments about a potential violation of the Boundary Waters Treaty, as well as tribal signatories of the 1854 treaty. The Forest Service should continue working with its government partners to minimize the potential for large wildfires that might necessitate the use of chemical fire retardants, opting instead for preventative prescribed fires as already discussed in this comment.

At no point in time should the Forest Service utilize Aqueous Film-Forming Foam, which has been shown to be a significant source of PFAS “forever chemical” contamination. Since firefighting foam containing PFAS would permanently pollute the BWCAW with chemicals that are known to persist beyond any human lifetime or time frame, they should be entirely banned for use in firefighting in this chapter. It is CURE’s understanding that the Superior National Forest does not currently use PFAS-based foam in this way to fight wildfires, but confirming that it is not an allowed management activity would be a useful side note.

VII. Mercury

In several places the existing chapter mentions mercury pollution as an issue that can be communicated to visitors coming to the wilderness.¹⁶ However, mercury pollution is far more than that, and the updated chapter should demonstrate a more active role for the Forest Service in managing and helping to prevent this harmful pollution that impacts treaty rights and the prohibition on international water pollution in the Boundary Waters Treaty.

The existing chapter notes that the Forest Service may work with the Minnesota permitting authorities at the Pollution Control Agency (PCA) to prevent significant deterioration and deposition of harmful pollutants. This work should prioritize eliminating mercury pollution, and should include coordination with the U.S. EPA and permitting authorities upwind of this state, including authorities in North Dakota. It is unquestionably the case that mercury pollution is still out of control in this region, and such pollution violates treaty duties to prevent water pollution and properly maintain resources relied-upon by tribal members. There are serious concerns about PCA’s or EPA’s ability to properly regulate mercury pollution coming from Minnesota mining processing facilities,¹⁷ and some of the worst polluting sources of mercury may be coal plants putting pollution aloft in North Dakota.¹⁸ In this chapter update, the Forest Service must expand its air permitting function to urge permit denial or modification when PCA,

¹⁶ E.g. Existing chapter at 3-57.

¹⁷ See <https://www.minnpost.com/environment/2024/02/minnesota-tribes-say-epas-taconite-mercury-emission-rules-dont-go-far-enough/>

¹⁸ <https://www.startribune.com/otter-tail-power-reverses-course-will-stick-with-north-dakota-coal-plant/600265075/>

EPA, or North Dakota regulators fail to protect the BWCAW up to standards set by either the Clean Air Act or treaty duties.

VIII. Research

The research that the Forest Service does now should serve the needs of future generations. In addition to research on habitat conservation, species protection, climate change, and pollution impacts, there should be an explicit support for tribal researchers working on issues related to tribal co-management and tribal management of the Superior National Forest. Better understanding how tribes can actively participate in research and management activities will help your staff to understand where the agency should lead and where it should take a back seat to better-positioned tribal experts. Research on how Indigenous prescribed fire practices over long period of time may buffer the forest from worse climate change impacts—such research could confirm that research from other parts of the U.S. are also true in the boreal forest habitat that is unique to our region.

Additionally, the research should include studies on the potential benefits and costs of returning parts, or all, of the Superior National Forest to tribal ownership. While the Forest Service is the leading steward of these lands today, Native peoples were doing this work before colonization and will continue being important managers of the landscape beyond any U.S. government program or entity. Looking seriously at returning important landscapes to their original owners, while perhaps maintaining co-management and sharing resources, could help the Superior National Forest evolve into a post-colonial institution that best serves the people who live on this landscape and are a part of it. Of course, research is not policy, and it will be useful to study these issues to understand how they might best be incorporated into healthy forest management and future policy development.

IX. Non-federal minerals development

It would be a violation of the Boundary Waters Treaty for the Forest Service to allow development of mines within the watershed of the BWCAW. The agency has already withdrawn federally-controlled subsurface rights for 20 years, but it should also assure that other mining waste cannot enter the BWCAW, as such pollution would then pass into Canada and violate the applicable treaty standard. Thus, the chapter should be tightened up to reflect the current understanding that any mineral development in the watershed is likely to violate the applicable law and the Forest Service cannot facilitate or allow such violations by private parties.

Sincerely,

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