René Voss – Attorney at Law
15 Alderney Road
San Anselmo, CA 94960
Tel: 415-446-9027
renepvoss@gmail.com

September 19, 2016

Submitted to:
comments-pacificsouthwest-sequoia-@fs.fed.us

Artie Colsen, Special Use Officer
Penelope Shibley, District NEPA Planner
Kern River Ranger District
105 Whitney Road
Kernville, CA 93238

cc: Ara Marderosian
Al Watson

Re: Thomsen Septic SUP CE 14-day Scoping Comments

Please accept the following comments on behalf of Sequoia ForestKeeper and the Kern-Kaweah Chapter of the Sierra Club.

Please use proper authority, provide sufficient information, and rescope the proposal.

The Scoping letter mailed to us indicated that, "Additional project information is also available for review by accessing the Forest internet website at: http://www.fs.usda.gov/project/?project=50135." We were informed on 13 September by Penelope Shibley that "We have uploaded the correct scoping documents. Our apologies, there have also been some problems with the PALS server in the past week." "The links are now working for … Thomsen Septic System Special Use Permit Reissuance http://www.fs.usda.gov/project/?project=50135." While we presumed that there would be 'additional project information' in the form of data on the web site, we only found a colored map of the area, which did clarify the project location. Because the Forest Service only provided us with this information recently, it should accept these comments as timely.

The scoping letter fails to indicate under what authority it seeks comments regarding renewal of the Thomsen Septic special use permit (SUP). We can only assume that the Forest Service plans to use 36 C.F.R. § 220.6(e)(15), which allows categorical exclusions from analysis in an EA or EIS for:

> Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

The Forest Service has provided insufficient information for us to provide meaningful comments. The entirety of the substantive information provided about the subject property is:

> The Kern River Ranger District, Sequoia National Forest is asking for public comments on a proposal to issue an extension of five years for an existing

> special use permit for the Thomsen Septic System (septic system). This septic system is located partially on private and partially on adjoining National Forest land. The cabin is located at 10936 Elm Drive, in the Alta Sierra area near the Greenhorn Summit (SW1/4, Section 21, T25S, R32E, MDBM).

First, there is no information provided about how long the previous SUP lasted and when it expires. Please provide this information and re-scope the proposal. Second, although the assumption is that the SUP is simply administrative and would not permit "changes in the authorized facilities or increases in the scope or intensity of the authorized activities," the Forest Service has not included any information as to the scope or intensity or whether they will remain the same. Please include a statement about this and re-scope. Third, there is no information provided as to whether the "applicant or holder is in full compliance with the terms and conditions of the special use authorization." We request a copy of the previous permit and ask for a statement about compliance with the terms and conditions of that permit, and ask that the Forest Service then re-scope the proposal.

The Clean Water Act may require a 401 Certificate for water withdrawals from or discharges into the watershed of Ice House Creek, a tributary of the navigable Kern River.

Based on the scoping notice, it is unclear whether the water system that feeds the Thomsen septic system includes a diversion from Ice House Creek or, alternatively, what the source of the water that feeds the septic system is. Moreover, it does not include information as to whether the septic system would result in discharges into Ice House Creek. Given these possibilities, the Forest Service must consider whether a Section 401 Clean Water Act Certificate is required prior to re-issuing the special use permit.

Lakes and reservoirs in California, including Isabella Reservoir, are increasingly being discovered to be toxic with algae blooms and other toxins. Discharges into the watershed of Ice House Creek may be contributing to the toxic level of Isabella Reservoir. Because of the changed conditions caused by climate change and the extended drought in the Sierra Nevada, the Forest Service should consider the cumulative impacts of the combination of all of the septic tanks that are permitted by the Forest Service in the Ice House Creek watershed along with the changed condition of the extended drought that are altering the dilution capacity of the toxins being discharged into the watershed from private water users, which could be contributing to the toxic human health conditions of Isabella Reservoir.

In a 2011 case concerning a tributary to the South Fork of the Kern River (Fay Creek), Judge Lawrence O'Neill of the E.D. of California found that because Fay Creek was a tributary to the navigable South Fork of the Kern, the Forest Service was required to consider whether the Forest Service or the permittee was required to obtain a Section 401 Clean Water Act Certificate from the State of California before issuing the Special Use Permit. *See Forestkeeper v. United States Forest Serv.*, No. CV F 09-392 LJO JLT, 2011 U.S. Dist. LEXIS 26447, at *15 (E.D. Cal. Mar. 14, 2011) ("The USFS was required to determine whether a Section 401 Certification was required prior to issuing the Sellers SUP. 33 U.S.C. §1341(a)(1).").

And because the Forest Service failed to consider whether a Section 401 Certificate was required prior to re-issuing the Sellers SUP, the USFS "failed to consider an important aspect of the problem." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Under these circumstances, the Court found that the Forest Service acted arbitrarily and capriciously when it issued the Sellers SUP without considering its obligations under the CWA and without applying for a Section 401 Certificate. *Sequoia ForestKeeper*, 2011 U.S. Dist. LEXIS 26447, at *16. Moreover, the Forest Service also violated NEPA for overlooking this issue.

The same requirement may apply to the Thomsen SUP, and the Forest Service must consider whether a Section 401 Certificate is required before re-issuing the SUP because Ice House Creek is a tributary to the Kern River, which is considered a navigable river.

The Kern-Kaweah Chapter of the Sierra Club, Sequoia ForestKeeper, its Board of Directors, staff, and members would be deeply disappointed with the Forest Service decision, if the agency fails to determine whether a 401 Clean Water Act Certificate from the State of California was needed prior to issuing the Thomsen special use permit.

There may be cumulative effects from and water withdrawals associated with the Thomsen SUP, which the Forest Service must consider.

The Forest Service must consider all existing water resources and water uses, including wells, diversions, withdrawals, and development projects, that could be depriving the forest ecosystem and causing tree mortality.

Is the massive die-off of trees in the Sierra Nevada being caused only by the drought and climate change, or is the die-off being exacerbated by the limited water supply in the Sierra because of the granitic structure of the mountains where water is found in isolated fracture pockets where tree roots must penetrate to reach the needed water supply when surface water flows are intermittent? Fractured rock aquifers drain when connected water resources below the impoundment are removed. Water wells in the Sierra Nevada are located and placed using fracture drilling techniques. Forest managers must consider the anthropogenic uses of water in the forests, including, but not limited to, water wells, water diversions, water withdrawals, and water developments that serve people who have established in forested areas of California. How are these anthropogenic uses of water impacting the available water for growing forests and maintaining the forest species? These human uses of forest water must be identified, their flows determined and totaled, and the cumulative extracted water volume considered along with drought and climate change. Should these extractions be permitted to continue at the expense of the needs of the forest which is California's major location for sequestering carbon?

Global climate change will likely lead to water resource shortfalls. According to the CEC document http://www.energy.ca.gov/2009publications/CEC-500-2009-014/CEC-500-2009-014-F.PDF, "there is a disquieting preponderance of simulations that become significantly drier during the twenty-first century." Also, "The incidence of years with very low spring snowpack and associated low soil moisture in late spring and early summer occur much more frequently."

According to the CEC document *Using Future Climate Projections to Support Water Resources Decision Making in California*, available at http://www.energy.ca.gov/2009publications/CEC-500-2009-052/CEC-500-2009-052-F.PDF, "The 30-year trend indicates that the fraction of annual runoff occurring from April through July decreases from about 35% for the historical base scenario (historical conditions with no increase in air temperature) to about 15% for the +4°C scenario."

California's drought and climate change created the massive die-off of trees in the southern Sierra Nevada. Are water diversions and wells contributing to the massive die-off of trees in Sequoia National Forest and in particular in the area surrounding diversions and wells in the Ice House Creek watershed?

The Forest Service should provide a comprehensive inventory of surface and groundwater resources of water in the watersheds as a way to establish a baseline for assessing the impacts of the project that propose wells or diversions, withdrawals, or water development. These inventories and an analysis of water resources must be considered in the environmental analysis, especially now that we are in a prolonged drought period in California. This water balance must be specified in order to be able to determine if sufficient water is available to cope with the increased forest temperatures that would result following tree removal.

The analysis must include an assessment of and documentation to show all water wells, water diversions, water withdrawals, and water developments that utilize water in the watersheds involved in the project area in order to establish a baseline of available water for making a decision as to what can be done to protect the forest ecosystem from drought, and whether commercial thinning would be effective, since there is a drought and there is a die-off of millions of trees in the area.

Congress recognized that managing natural resources in National Forests was "highly complex" and enacted the Forest and Rangeland Renewable Resources Planning Act. The Act requires that the Forest Service develop an inventory of "present and potential renewable resources, and an evaluation of opportunities for improving their yield of tangible and intangible goods and services." In addition the Act requires that all forest management activities to be preceded by a "comprehensive assessment" of environmental and economic impacts in order to create a management plan that is consistent with MUSYA and NEPA. Congress emphasized the "fundamental need" for the management plans to "protect and, where appropriate, improve the quality of soil, air, and water resources." Developing an inventory of surface and groundwater resources and an assessment of the environmental impacts on surface and groundwater including potential impacts of groundwater use on surface water resources, is an integral step in ensuring that a management plan protects the water quality in Sequoia National Forest.

An Environmental Assessment may be Required

Because there may be cumulative effects from water diversions or well water withdrawals, and because a Section 401 Certificate may be required, the Forest Service must consider whether to conduct an environmental assessment to determine whether there could be significant effects

before for re-issuing the Thomsen SUP. It cannot simply rely on its categorical exclusion in re-issuing the SUP.

For Sequoia ForestKeeper and the Kern-Kaweah Chapter of the Sierra Club,

Sincerely,

René Voss – Attorney at Law