U.S. DEPARTMENT OF JUSTICE

United States Attorney
Eastern District of California

Benjamin B. Wagner
United States Attorney

501 I Street, Suite 10-100
Sacramento, CA 95814

Phone 916/554-2700
Fax 916/554-2900
TTD 916/554-2855

May 25, 2012

Hon. Darrell Steinberg, President pro Tempore
California State Senate
State Capitol, Room 205
Sacramento, CA 95814

Hon. John A. Pérez, Speaker
California Assembly
State Capitol, Room 219
Sacramento, CA 94249-0046

Re: Trailer Bill Language for the Natural Resources and Capital Outlay area of the Governor's proposed budget (Part 777 – Timber Harvest Reform)

Dear President pro Tem Steinberg and Speaker Pérez:

I write to express my deep concerns, shared by all four United States Attorneys for California, about the proposal to limit damages recoverable by public agencies in tort actions arising from wildfires. The proposed restrictions are part of Trailer Bill Language for the Natural Resources and Capital Outlay area of the Governor's proposed budget (Part 777 – Timber Harvest Reform), specifically, "An Act to Add Section 13009.2 to the Health and Safety Code, Relating to Fires."

The restrictions were requested by Sierra Pacific Industries (SPI) in order to undermine the position of the United States in a major case that is currently pending before the U.S. District Court in Sacramento. The United States sued SPI and others in that case to recover damages caused by the Moonlight Fire of 2007, which burned over 46,000 acres of land in two National Forests and caused many millions of dollars in damage to precious public resources in this state. The litigation has been fiercely contested for three years, and a jury trial is set to commence on July 2, 2012, just six weeks from now. As explained below, the United States' recovery theories are based in part on California law.

SPI is well represented by a large cadre of attorneys in the case, and is well equipped to make its arguments to the court and to the jury concerning the U.S. Government's claims for compensation. The proposed legislation is SPI 's effort to tilt the legal playing field in the final

days before the trial by stripping the federal government of remedies to which it is entitled under current law. I would urge the California legislature to reject this unseemly effort to protect the alleged wrong doer in a major federal case, by eliminating the damages provision from the budget bill.

The trailer bill to restrict damages says nothing about whether the limitations would be applied retroactively or only prospectively. That provides no comfort. SPI will certainly argue for retroactive application in the pending case, even if the legislature intends otherwise.

My office and the other U.S. Attorney's Offices have a long history of working to protect California's interests in many contexts. We work closely with many State of California agencies, bringing numerous criminal cases each year to prosecute those who defraud EDD, BOE, FTB, and other state agencies, and seeking restitution on behalf of the State, as a victim. In fact, in the Moonlight fire case itself, we have coordinated with the California Attorney General's Office in connection with its litigation arising from the same incident, in which the State of California is seeking compensation for costs incurred by Cal Fire. SPI's legislative effort to undermine our position in the Moonlight case would interfere with our longstanding relationship of mutual support in seeking reasonable compensation for damage to public lands in California.

A. Recoveries Sought in Fire Cases, and the Use of Such Funds in California

Each year, tens of thousands of acres of National Forest and other federal land burn in California because of negligence by railroads, utility companies, logging companies, and other private interests. In addition to threatening the public and putting firefighters' lives at risk, such fires cost tens of millions of dollars to suppress; they destroy merchantable timber worth many millions more; they impose enormous restoration costs on the United States; and they degrade natural resources for decades. When fire conditions are severe (as they often are here), federal lands in California can suffer more than $100 million in fire losses in a single season due to others' negligence.

In announcing the "May Revise," the Governor's Office said the proposed restrictions on recoveries in such cases are intended to "prohibit excessive damages" in wildfire cases. We have yet to hear anyone identify a case in which excessive damages were recovered. The largest recovery ever in a California fire case was the $102 million settlement that our office reached in 2008 with Union Pacific Railroad for its admitted negligence in starting the Storrie Fire. That settlement provided compensation for the destruction of 52,000 acres of National Forest land -- including large areas of designated Wilderness Areas, old growth forests, and other land identified by Congress and the Forest Service for special protection. Thus, the largest recovery ever amounted to less than $2,000 per acre for some of the most unique and valuable public resources in all of California. "Excessive compensation" is not a public policy problem; it is a fiction conjured by SPI to suit its own purposes.

Any impression that the U.S. Department of Justice is seeking excessive compensation in the pending Moonlight Fire case against SPI would be inaccurate. The Plumas and Lassen National Forests which were damaged in the Moonlight fire serve as headwaters for the California state water system (Feather River watershed). Denuded hillsides and altered stream

courses resulting from that catastrophic wildfire compromise the integrity and quality of that water. Without the resources to reforest and restore the land, the area could remain desolate and unsafe for decades. The recovery of complete compensation in this case and future wildland fire cases will allow the Forest Service to perform corrective work that will have direct economic and environmental benefits for California and the public. In addition, it might be relevant to know that we have previously indicated to counsel for SPI in the Moonlight case that we would welcome a discussion about a reasonable settlement of this case, but they have not responded to our invitation, apparently choosing to litigate the case through trial, and to seek this emergency legislation, rather than to discuss reasonable terms for a settlement.

The vast majority of funds recovered in our wildfire cases are spent here in California, and these funds provide tremendous economic benefits to businesses and rural communities in this state. In seven significant forest fire cases involving my office which resulted in settlements totaling $165.4 million (from the Big Creek, Freds, Pendola, Pilot, Piro, Storrie, and Zaca Fires), $155.5 million of that amount was returned directly to seven affected National Forests here in California for restoration and related work. Restoration work is time-consuming, labor-intensive work, and almost all of it is performed by contractors and labor hired by the Forest Service, using materials that are purchased from businesses, many of them local. In addition, under recent legislation, the small portion of recoveries representing the cost of suppressing a fire is channeled to the Wildland Fire Suppression Fund, so even those funds could serve to protect California lands in the future.

Finally, without the damages we are able to recover, much needed reforestation work could not be funded, and burned public land here in California would remain in a degraded state for many decades. While the National Parks here attract visitors from around the world, tens of millions of acres of National Forest land are enjoyed predominantly by Californians. Reforestation work supported with our fire recoveries can dramatically improve public enjoyment of these national treasures.

We seek four categories of damages in wildfire cases: (1) the actual cost of attacking and suppressing a fire, (2) the lost commercial value of burned timber, (3) the costs required for reforestation of the burned area, and (4) compensation for the degradation of natural resources (recreational and habitat values, for example) while the burned forest recovers from the fire. The availability of those damages is governed by federal common law, which looks to state law as a guide except where it conflicts with federal policy. We have never had to argue that California law conflicts with federal policy by denying fair compensation for destruction of natural resources, and we are not eager to do so.

The guiding principle of California law -- that tort damages should compensate "all the detriment proximately caused," Cal. Civil Code § 3333 -- is fair and appropriate. The courts already closely examine damages claims in fire cases to ensure that an award *only* compensates the detriments caused, and it is already California law that damages in a fire case must be "reasonable" in the circumstances. *See United States v. Union Pacific R. Co.*, 565 F. Supp. 2d 1136, 1144 (E.D. Cal. 2008) (quoting *People v. Southern Pacific Co.*, 139 Cal. App. 3d 627, 635 (1983)). Those principles already prevent excessive compensation.

B. Specific Comments on the Proposed Legislative Language

Set forth below are some more specific comments on the legislative proposal. As a general matter, we are very concerned that drafting legislation in such a complex area in such a rushed manner will lead to unintended consequences and needless litigation, and will likely do more to cause confusion rather than clarify the law with respect to damages in wildland fire cases.

1. The Unequal Treatment of Public Agencies

The legislative proposal would impose various limits on damages "in an action by a public agency seeking damages caused by a fire," while imposing no limits on suits by private interests. We can think of no conceivable public policy purpose for uniquely disadvantaging public agencies, or for allowing greater recovery for damage to private land than to public land.

We defer to California on whether new state fees on wood products that are part of the legislative package warrant waiver of certain tort damages *by the State.* But if the statute is interpreted as also applying to the federal government, discriminating against the United States and in favor of private tort plaintiffs would plainly offend the Constitution and is simply inappropriate.

In addition to our affirmative wildfire cases, the United States is a frequent defendant in tort suits seeking compensation for fires that originate on federal land. Nothing could justify allowing greater recover *against* the United States when it is a defendant than is allowed *by* the United States when it is a plaintiff in like circumstances. The State of California also would be subject to this inequitable rule under the proposed legislation.

Private litigants do seek and recover damages that the proposal would restrict or deny in suits by public agencies. In *Kelly v. CB & I Constructors, Inc.*, 179 Cal. App. 4th 442 (2009), for example, the court approved an award to a private litigant of $2.6 million for restoration costs plus $850 thousand in other damages, including double damages for destruction of non-commercial trees, where the land as a whole was worth no more than $1.8 million. Indeed, when its own land is damaged by fire, SPI itself seeks every category of damages that the United States seeks in the Moonlight Fire case: in 2008, it filed a demand for $6.4 million for lost timber, plus $7.1 million for "suppression and reforestation," plus $9.1 million for "environmental and habitat harm."[1] The point is not that claiming such damages is unfair. Rather, the point is that SPI's proposal to deny public agencies recovery of damages that SPI itself seeks (and could continue to seek if the legislation passes) is inexplicable.

The fact that this proposed legislation would deliberately disadvantage the State, and the United States if SPI has its way, at a time when both are engaged in litigation with SPI over these very issues, leaves little room for doubt that the legislation is intended to benefit SPI in pending

[1] Sierra Pacific Industries' Second Amended Detailed Statement of Damages, filed November 26, 2008, in *Sierra Pacific Industries v. Davey Tree Surgery Co.*, No. PC 20070605 (El Dorado County Superior Court) (copy available upon request).

cases rather than to enact good public policy. Whatever the intent, however, no legitimate public policy would be served.

2. Limitations on Recovery and Related Issues

Taking the provisions in order, paragraph (a) of proposed Section 13009.2 enumerates "the only recoverable pecuniary damages" as: (1) restoration costs or acquisition costs for a replacement property, or (2) "diminution in value of the property," plus (3) short-term emergency response costs to control erosion and the like. There are three separate problems with this provision: it may not allow recovery of the value of burned timber; if it allows recovery for burned timber, it requires an election of either those damages or restoration costs, but not both; and it imposes a market-value cap on restoration costs that is entirely unworkable.

Paragraph (a) contains no specific reference to lost timber value -- a category of pecuniary damages that typically amounts to at least a quarter of the damages caused by a forest fire. The reference to "diminution in value of the property" in paragraph (a) is vague. That language may be interpreted by a court in some future case as allowing only compensation of the lost value of the *land*, and not the lost value of burned *timber*. If interpreted that way, paragraph (a) would prevent compensation of millions of dollars of actual timber losses from an average fire and tens of millions of dollars of such losses from a major fire.

Moreover, even if courts interpret this vague provision as allowing recovery of lost timber value, paragraph (a) would require public agencies – but not private plaintiffs -- to elect either restoration costs or timber value, not both. As explained in *Union Pacific,* timber value and restoration costs are separate injuries, and recovery for both is required to compensate the public's loss. 565 F. Supp. 2d at 1144. And as also noted above, SPI demands both lost timber value and restoration costs when its own land is burned. Denying a public agency recovery of either timber value or restoration costs would prevent compensation of millions or tens of millions of dollars of actual damages, depending on the size and severity of the fire.

Equally problematic, paragraph (a) allows public agencies to recover restoration costs only "if those damages are quantifiable and are not unreasonable in relation to the prefire fair market value of the property, taking into consideration the ecological and environmental value of the property to the public, or the diminution in value of the property as a result of the fire, whichever is greater." That restriction makes no sense. As courts have recognized, there is no market or market value for National Forest or National Park land. *See Union Pacific,* 565 F. Supp. 2d at 1144; *Feather River Lumber Co. v. United States,* 30 F.2d 642 (9th Cir. 1929). Market value is not a meaningful concept for National Forest or National Park land, because the sale of such land is prohibited in most circumstances, and because Congress has mandated that it be managed for generations of public enjoyment, not for sale. Moreover, there is rarely a market for an isolated portion of land that is defined by a burn area. For all these reasons, any fictional "fair market value" determined from sales of private land would greatly under-value the public resource and fail to provide fair compensation.

This problem is not solved by the caveat, "fair market value of the property, taking into consideration the ecological and environmental value of the property," because the caveat is unworkable. Certainly, the environmental value and ecological value of public land are

substantial; but those are non-market values themselves, and there is no sensible way to consider them in determining the market value of National Forest land or National Park land. As explained above, market value is not a meaningful concept for such land; taking ecological and environmental values into consideration cannot make it a meaningful concept.

Turning to paragraph (b), the proposal authorizes recovery of damages for environmental degradation (lost recreational value, damage to wildlife and habitat, damage to water and soil, etc.). But like paragraph (a), paragraph (b) would impose unworkable conditions on recovery of such damages. Environmental damages could be recovered only if "quantifiable" and "not unreasonable in relation to the pre-fire market value of the property, taking into consideration the ecological and environmental value of the property to the public."

Here, again, market value is not a meaningful concept for National Forest or National Park land, because there is no market for such land. Any fictional market value derived from sales of private land would under-state the loss. And this problem cannot be solved by the directive to determine market value "taking into consideration" non-market environmental values, because there is no sensible way to do that.

In addition, in paragraph (b), the caveat makes the statutory limitation circular: lost recreational value and other environmental damages may be compensated only if "not unreasonable" when compared with market value, but market value somehow must give way if it is too low when compared with environmental value.

Thus, paragraph (b) makes no more sense than paragraph (a). The legislature can only guess how courts would interpret and apply these unworkable restrictions. The proposal, therefore, presents a substantial threat to recovery of fair compensation for the destruction of precious natural resources.

Turning to paragraph (c), the legislation provides that a public agency that "claims" environmental damages under paragraph (b) "may not seek to enhance any . . . damages recovered under this section." The vagueness of this provision all but guarantees unanticipated applications in future litigation, because "enhancement" of damages is not a term of art.

A reference in paragraph (c) to Cal. Civil Code section 3346 reflects that SPI is trying (among other things) to preclude double damages for negligent burning of trees, and treble damages for intentional burning of trees. But paragraph (c) of the proposed legislation strangely disavows any position on whether section 3346 applies in fire cases if a public agency does *not* claim environmental damages. Moreover, because "claim[ing]" environmental damages is the trigger for preclusion of "enhancement," the proposal may forbid doubling even when a claim for environmental damages is denied.

It is not my purpose here to advocate a statutory damages multiplier for injury to trees. I am sure the legislature carefully considered the wisdom of multiple damages when it explicitly authorized them in enacting section 3346. Whether multiple damages are beneficial in providing a strong economic deterrent against intentionally cutting down or burning someone else's trees, and a strong incentive to take reasonable precautions to avoid doing so by accident, is a policy judgment for the legislature. There is no apparent reason, however, to treat burning someone

else's trees differently from cutting someone else's trees, and there certainly is no reason to prevent public agencies from recovering double or treble damages while allowing private parties to do so. The hurried budget process does not appear to provide an opportunity to revisit such important policy judgments in a considered way.

Finally, taken as a whole, it is hard to imagine that a piece of legislation could be so vague and unworkable if the proponent, SPI, were not trying to hide the legislation's intended consequences. Whatever may explain the legislation's flaws, however, the Senate and the Assembly can only guess what the bill means and how courts would apply it in future cases. That is not how policy should be made.

Conclusion

To summarize, the restrictions on damages proposed by SPI would not represent sound policy even if applied to public and private plaintiffs alike. Applying the restrictions to public agencies while allowing greater recovery by private interests would be worse still and would not serve any legitimate policy purpose. Protected public land is literally priceless; providing less compensation for such land than for private land makes no sense.

Tens of thousands of acres of valuable public lands in California are destroyed by fire each year as a result of careless practices of logging companies and others. Denying compensation for millions or tens of millions of dollars of actual damages when public land is burned would reduce the volume of reforestation work that can be done – work that provides substantial economic and environmental benefits to the public.

A set of rules denying the State of California and the United States recovery of the same damages that they are required to pay when they are sued for fires would patently be unfair. In addition, a set of rules that would discriminate against the United States by denying it damages that private parties can claim would be both inappropriate and unconstitutional.

The issues relating to recoveries in wildfire cases are complex. If the law needs modification, a closer examination is needed. SPI's effort to push through this hastily conceived legislation just before the start of a major trial in which it is a defendant is not good public policy and would not serve the interests of the people of California. On behalf of all the United States Attorneys in California, I urge you to reconsider whether this measure is appropriate as part of the current budget legislation.

Thank you for considering these comments.

Sincerely,

Benjamin B. Wagner
United States Attorney

cc: Assemblymember Jared Huffman, Chair, Environmental Caucus
Senator Fran Pavley, Chair, Natural Resources and Water Committee,
Co-Chair, Environmental Caucus
Senator Joe Simitian, Chair, Environmental Quality Committee
Assemblymember Wesley Chesbro, Chair, Natural Resources Committee
Asssemblymember Bob Wieckowski, Chair, Environmental Safety Committee
California Attorney General Kamala D. Harris
United States Attorney Andre Biortte, Jr., Central District of California
United States Attorney Laura Duffy, Southern District of California
United States Attorney Melinda Haag, Northern District of California