PACIFIC CREST TRAIL REASSESSMENT INITIATIVE

Dear Sir or Madam:

Herewith please find the response of the Pacific Crest Trail Reassessment Initiative (PCTRI) to the scoping phase of Inyo, Sierra, and Sequoia National Forests Land Management Plans Revision No. 3375 (Plan No. 3375).

For more information on PCTRI, please see http://www.SharingThePCT.org.

I. Summary

The part of Plan No. 3375 that addresses the philosophy behind and management of the Pacific Crest National Scenic Trail (PCT) is seriously flawed and requires a thorough rethinking and restructuring.

II. Background

In 1978, the USDA Forest Service (hereafter Forest Service) promulgated a rule in the Code of Federal Regulations that "[t]he Pacific Crest National Scenic Trail . . . shall be administered primarily as a footpath and horseback riding trail . . . ." (36 C.F.R. § 212.21.)

Because the Forest Service did not thereafter amend the Code of Federal Regulations to ban bicyclists, cross-country skiers, snowshoers, or other human-powered visitors, the use about which the Forest Service likely was concerned was motor vehicle travel.

In 1983, the National Trails System Act, which governs the PCT (16 U.S.C. §§ 1241(b), 1244(2)), was amended to allow for bicycles in principle on the PCT. (16 U.S.C. § 1246(j).) But, perhaps because bicycles were still an unnoticed novelty on the PCT, or perhaps because the Forest Service understood that the PCT could be primarily for foot and horse traffic and still accommodate other human-powered uses like bicycling, skiing, and snowshoeing, the Forest Service did not, as far as can be discerned, attempt to amend the 1978 PCT regulation.

In 1987, the predecessor to the Pacific Crest Trail Association (PCTA) was the PCT Advisory Committee. The PCTA's predecessor had been complaining about bicycles for years at that point. Its November 1987 meeting minutes reported that it had asked "that mountain bikes should be prohibited on the trail," but that the "Secretary of Agriculture has not found this to be a high enough priority item to proceed with issuing regulations."

The PCTA's predecessor found this state of affairs unsatisfactory. The "need exists for a consistent policy along the entire length of the trail; therefore, we need the Secretary's Regulation . . . . [¶] The Council was very concerned about the lack of action over getting the regulations published."

The PCTA's predecessor decided to try once more to "Indicate to the Sec[retary] of Agriculture the need to publish the regulation prohibiting mountain bikes."

The Washington, D.C., office of the Forest Service took no action. It is not possible to discern from the public record whether Forest Service headquarters affirmatively told the PCTA's predecessor that a no-bicycles rule was unjustified, or whether it simply failed to respond.

On August 31, 1988, faced with Forest Service headquarters' evident view that there was no need to prohibit bicycles on the PCT, three Forest Service Regional Foresters signed their own directive closing the PCT, including its non-Wilderness sections, to bicycles.

The Regional Foresters decided to call the directive an order with indefinite validity. There was no opportunity for public notice or public comment.

From 1988 to the present, the directive has remained in effect, even though no public notice was given or public comment solicited. Despite this, PCTRI has uncovered no evidence of any prosecutions since 1988 for riding a bicycle on the PCT.

From 2007 to 2009, the question of bicycle riding on the Continental Divide National Scenic Trail (CDT) arose. According to its revised comprehensive plan, the CDT is, like the PCT under the 1978 regulation, also primarily intended to be for horse and hiker use. But the Forest Service decided that mountain biking should continue on the CDT as long as it did not interfere with the two specified uses. (See The 2009 Continental Divide National Scenic Trail Comprehensive Plan, pp. 8, 15; http://www.fs.fed.us/cdt/main/cdnst_comprehensive_plan_final_092809.pdf.)

From 2010 to the present, PCTRI has sought to have the 1988 PCT bicycle closure directive rescinded. PCTRI argues that the directive is both unlawful and bad policy. (These issues will be discussed below.)

Two of the three Regional Foresters who signed the directive are still living. They have told PCTRI that they would support removing the ban.

The Forest Service's Vallejo office nevertheless reaffirmed the directive on February 6, 2013. An April 17, 2013, meeting between Forest Service staff, PCTRI, the International Mountain Bicycling Association, and Rocky Deal, the District Director for U.S. Representative Tom McClintock (R.-Calif.), is the last formal discussion the parties have had on the PCT's bicycle status, although informal exchanges have occurred since.

III. Plan No. 3375

A. Introduction

After four years of negotiations with the Forest Service that PCTRI undertook in good faith, we are astonished to learn of the draconian antibicycle proposals for the PCT contained in Plan No. 3375, and deeply disappointed that we did not learn of them until mid-September, leaving us and

our supporters (who number nearly 1,500 followers on Facebook alone) with only two weeks to respond.

Initially, PCTRI requests that the deadline for responses to the plan be extended until the end of the year so that additional mountain bikers and interested organizations have a realistic chance to comment on the proposed plan.

For the Inyo, Sequoia, and Sierra National Forests, Plan No. 3375 would (1) solidify a quarter-century of bad outcomes that the PCT-wide 1988 closure directive initiated and (2) make things worse.

B. The Unlawful Nature of the Current PCT Bicycle Prohibition

In PCTRI's negotiations with the Forest Service's Vallejo office, we have explained that the 1988 closure directive is unlawful.

The Forest Service Handbook requires that "[t]he issuing line officer shall review each issued order annually to determine . . . that the order was not in conflict with . . . current regulations under 36 CFR Part 261, Subpart A." Between 1988 and, arguably, the present day, this has not been done. At a minimum, it was not done for 25 years, until the Forest Service's Vallejo office responded to PCTRI. It has not been done since at least February of 2013, so under the Forest Service Handbook it is no longer valid, if it ever was.

PCTRI also maintains that the 1988 directive, which some Forest Service personnel continue to think of as an order, is in fact an internal regulation, valid for only 90 days under the Code of Federal Regulations (36 C.F.R. § 261.70(d) and (e)), because it has not undergone the public notice and comment procedure required by the Administrative Procedure Act (5 U.S.C. § 551 et seq).

The position of the Forest Service's Vallejo office is that the directive was properly issued in the form of an order pursuant to 36 C.F.R. § 261.50(a) and (b), provisions that provide for orders that may be of indefinite duration.[1] The Regional Foresters who signed the 1988 directive are not lawyers and it would be understandable if they failed to understand the difference between a

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[1] 36 C.F.R. § 261 provides in pertinent part:

"(a) The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof.

"(b) The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of any National Forest System road or trail within the area over which he has jurisdiction.

"(c) Each order shall:

"(1) For orders issued under paragraph (a) of this section, describe the area to which the order applies;

"(2) For orders issued under paragraph (b) of this section, describe the road or trail to which the order applies;

"(3) Specify the times during which the prohibitions apply if applied only during limited times;

"(4) State each prohibition which is applied; and

"(5) Be posted in accordance with § 261.51."

regulation and an order. By now, however, there is no excuse for the Forest Service to avoid acknowledging that under the Administrative Procedure Act and decisional law interpreting the APA, a directive that broadly orders tens of thousands of mountain bikers to avoid all parts of the PCT under Forest Service jurisdiction for all time is not an order, but a regulation.

The Administrative Procedure Act defines a regulation (i.e., a rule) and contrasts it with an order. " '[R]ule' means the whole or a part of an *agency statement of general or particular applicability* and future effect designed to implement, interpret, or *prescribe law or policy* or describing the organization, procedure, or practice requirements of an agency." (5 U.S.C. § 551(4), italics added.) " '[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making* but including licensing." (5 U.S.C. § 551(6), italics added.)

Rulemaking occurs "when the pertinent issues involve legislative rather than adjudicative facts, and have prospective effect and classwide applicability." (*Telocator Network of America v. F.C.C.* (D.C. Cir. 1982) 691 F.2d 525, 551, fn. omitted.) For example, when the "FAA attempted to fix rights of members of the general public with respect to use of navigable airspace" (*Charter Tp. of Huron, Mich. v. Richards* (6th Cir. 1993) 997 F.2d 1168, 1176), doing so was "rulemaking, subject to the APA's notice and comment requirements." (*Ibid.*) Expressed in more general terms, if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties" (*American Min. Congress v. Mine Safety & Health Admin*. (D.C. Cir. 1993) 995 F.2d 1106), then the provision is a legislative rule (*ibid.*). The PCT bicycle prohibition directive is a classic regulation and required publication in the *Federal Register* and public input before being implemented, as we now explain.

As a regulation, i.e., a rule, the 1988 bicycle prohibition is governed by 36 C.F.R. § 261.70(c) and (e), which bar the Forest Service from issuing regulations without complying with the federal Administrative Procedure Act if their effect is intended to last more than 90 days. 36 C.F.R. § 261.70 provides:

> "(a) Pursuant to 7 CFR 2.60, the Chief, and each Regional Forester, to whom the Chief has delegated authority, may issue regulations prohibiting acts or omissions within all or any part of the area over which he has jurisdiction, for one or more of the following purposes:
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> "(1) Fire prevention or control.
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> "(2) Disease prevention or control.
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> "(3) Protection of property, roads, or trails.
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> "(4) Protection of threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish, or special biological communities.
>
> "(5) Protection of objects or places of historical, archaeological, geological or paleontological interest.
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> "(6) Protection of scientific experiments or investigations.
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> "(7) Public safety.
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> "(8) Protection of health.
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> "(9) Establishing reasonable rules of public conduct.

> "(b) Regulations issued under this subpart shall not be contrary to or duplicate any prohibition which is established under existing regulations.
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> "(c) *In issuing any regulations under paragraph (a) of this section, the issuing officer shall follow 5 U.S.C. 553*.
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> "(d) In a situation when the issuing officer determines that a notice of proposed rule making and public participation thereon is impracticable, unnecessary, or contrary to the public interest, he shall issue, with the concurrence of the Chief, an interim regulation containing an expiration date.
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> "(e) *No interim regulation issued under paragraph (d) of this section will be effective for more than 90 days unless readopted as a permanent rule after a notice of proposed rule making under 5 U.S.C. 553 (b) and (c)*." (Italics added.)

The references to 5 U.S.C. § 553(b) and (c) are to provisions of the Administrative Procedure Act. The specific provisions cited required, and still require, the Forest Service to do as follows with regard to the PCT bicycle prohibition:

> "(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
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> "(1) a statement of the time, place, and nature of public rule making proceedings;
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> "(2) reference to the legal authority under which the rule is proposed; and
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> "(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
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> "Except when notice or hearing is required by statute, this subsection does not apply—
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> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
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> "(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
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> "(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."

As stated, none of this was done, nor is it being done now with respect to the 1988 directive. There was no notice to the public and no opportunity for public comment and criticism of the proposed directive. The current PCT-wide closure regulation of August 31, 1988, is unlawful.

C. The Unlawful Nature of Certain Proposals for the PCT in Plan No. 3375

That brings us to the proposal contained in Plan No. 3375. The proposed provisions that PCTRI objects to are these, which are found at pages 59-61 of the detailed planning document:

"Pacific Crest National Scenic Trail Corridor

"Desired Conditions

"1. The Pacific Crest National Scenic Trail (PCT) corridor is permanently protected to provide outstanding primitive hiking and horseback experiences.

". . . .

"3. . . . Trail relocations will be evaluated . . . in partnership with . . . the Pacific Crest National Scenic Trail Association."

"Standards

". . . .

"3. The use of bicycles and other mechanized transport and motorized use is prohibited on the PCT tread and within the trail corridor, except on trails designated crossings where such use is allowed."

"Guidelines

"1. To maintain the outstanding primitive hiking and horseback experiences, new crossings of the PCT by trails for bicycles or other mechanized transport should be avoided except as mutually agreed on by the forest and the Pacific Crest National Scenic Trail Association."

We will address below the poor outcomes the foregoing text would precipitate. First, we explain that it is unlawful to delegate to the PCTA (referred to in the text as the "Pacific Crest National Scenic Trail Association") joint authority to decide on which trails or roads road cyclists or mountain bikers may ride if such thoroughfares traverse the PCT.

This delegation of authority is prohibited by the Federal Activities Inventory Reform Act of 1998. (Pub. Law 105-270, 112 Stat. 3282, reported at 31 U.S.C. § 501 note) (FAIRA).)

Paragraph 2 of section 5 of FAIRA requires that only employees of the government of the United States, not private entities, perform inherently governmental functions:

"(2) INHERENTLY GOVERNMENTAL FUNCTION.—
"(A) DEFINITION.—*The term 'inherently governmental function' means a function that is so intimately related to the public interest as to require performance by Federal Government employees*.
"(B) FUNCTIONS INCLUDED.—The term includes activities that require *either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government*, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—
"(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

> "(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
> "(iii) *to significantly affect the life, liberty, or property of private persons*;
> "(iv) to commission, appoint, direct, or control officers or employees of the United States; or
> "(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
> "(C) FUNCTIONS EXCLUDED.—The term does not normally include—
> "(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or
> "(ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services)." (Italics added.)

The part of Plan No. 3375 that would commit the Forest Service to reaching agreement with PCTA on whether road cyclists or mountain bikers may ride on trails or roads if such thoroughfares traverse the PCT would violate FAIRA.

That is so because PCTA would (1) be given discretion to have an unavoidable say in determining the rights of cyclists on trails or roads that traverse the PCT, (2) any authority to restrict bicycle travel on trails or roads that cross the Sierra Nevada and Cascade mountain ranges and, generally, from Canada to Mexico would significantly affect cyclists' freedom to travel, and (3) PCTA's decisions would unavoidably involve the making of value judgments.

Indeed, if there is any organization that is consumed by value judgments about the PCT and the proper uses of it, it is PCTA. PCTA is adamant that bicycles are anathema to the trail and must never be allowed on it. Its predecessor pushed the Forest Service to ban bicycles during the 1980s and when, in 1987, that initiative failed, the PCTA persuaded three Regional Foresters to issue such a directive, which they did with what appears to be an inadequate understanding of administrative-law specifications.

Thus, giving PCTA joint authority to determine where bicycles may travel is akin to allowing the fox to decide what kind of protective fencing should surround the chicken coop. The answer will always be "none."

This proposed provision is as invalid as would be provisions that, for example, would allow People for the Ethical Treatment of Animals and the International Society for Krishna Consciousness to have a say in deciding whether PCT visitors may bring meat with them, whether the Flat Earth Society should have a say in deciding whether PCT visitors may use compasses or GPS receivers, or whether the Women's Christian Temperance Union should have a say on whether PCT visitors may consume beer and wine.

FAIRA section 5(2)(C)(i) allows the Forest Service to receive advice from the PCTA, just as it allows it to do so from PCTRI, but Plan No. 3375's provision to allow bicycle travel only as "mutually agreed" by the agency and the private lobbying group is unlawful under FAIRA.

D. Plan No. 3375 Is Rife With Bad PCT Policy Ideas

Plan No. 3375 would also, for the Inyo, Sequoia, and Sierra National Forests, prohibit bicycle travel on the PCT, specify that the PCT is intended only for the gratification of walkers, horse-riders, and users of packstock (overlooking the fact that the first group often detests the second and third ones), and give PCTA a privileged role in analyzing PCT reroutes, to the detriment of PCTRI and any other group.

The worst aspect of Plan No. 3375 is that it would solidify and regularize the currently unlawful 1988 Regional Foresters' directive prohibiting bicycles on the PCT. There is no reason to prohibit, as opposed to regulating, bicycles on the PCT and a number of reasons to allow bicycling.

About 60 percent of the PCTA lies outside federally designated Wilderness and about 10 percent of the PCT is not on federal land at all. The State of California allows bicycles on its portion of the PCT and is said to have rejected a recent entreaty by a Forest Service employee to ban bicycles on sections of the PCT managed by the California Department of Parks and Recreation.

Furthermore:

(1) The PCTA and the Forest Service both know that their current partnership cannot maintain the trail properly. Hundreds of miles of the PCT are in a woefully dilapidated condition. In some areas, the trailbed cannot be seen, because vegetation has overtaken it or it has fallen into ruin. Mountain bikers have a record of accomplishment of performing trail maintenance that the PCT desperately needs.

(2) The potential for conflict between cyclists and others on the PCT is exceedingly low, except perhaps for a few miles around Big Bear Lake and Lake Tahoe—areas that can be the subject of reasonable management techniques the Forest Service applies on thousands of miles of other trails around the United States.

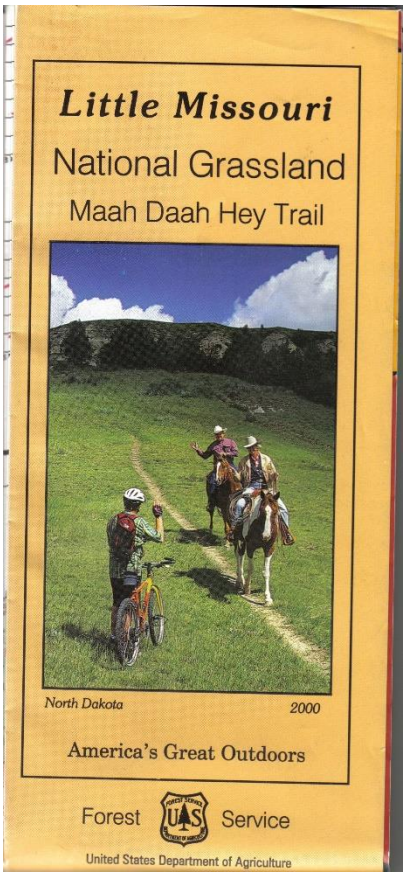
Most of the trail's 2650 miles go virtually unvisited most of the year. The main exception to this lack of use is the annual passage, over a period of perhaps four to six weeks, of a few hundred PCT through-hikers and one or two PCT through-equestrians as they make their way, on a predictable schedule, north from the Mexican border starting in March or April. Once they pass through an area, it returns to silence for about the next 11 months of the year. The PCT would benefit from more human-powered use, to help keep the trail maintained, open, and passable.

(3) The stereotype, promoted by PCTA and other dogmatic groups, that mountain biking could impair the PCT experience for others if not prohibited is contrary to experience with rugged backcountry trails of this type. The type of mountain biker who will ride the PCT is one who must typically deal with long ascents, rugged terrain, long distances between roads and water sources, and difficulty of rescue. This type of cyclist needs to conserve energy and protect him- or herself

from injury, and bounding along the trail would be both impracticable and counterproductive. There are mountain bikers who enjoy descending rapidly on trails designed for it, but their appetites are satisfied at places like private ski resorts and specially designed flow trails near urban areas like Portland and the San Francisco Bay Area.

As noted, in 1978, before mountain bicycles were around and when the Forest Service's evident concern was to keep motor vehicles off the PCT, the Forest Service codified a regulation that the PCT "shall be administered primarily as a footpath and horseback riding trail . . . ." (36 C.F.R. § 212.21.) PCTRI has no problem with that language, because "primarily" does not mean "exclusively," i.e., to the exclusion of bicycles. The CDT has similar language in its comprehensive plan and yet bicycling is allowed on major portions of that trail. An interpretation of the 1978 regulation that it definitively prohibited bicycles on the PCT would run afoul of the later-enacted provision in the National Trails System Act that bicycling is a permissible potential use of the PCT. (16 U.S.C. § 1246(j).) PCTRI presumes that the Forest Service wishes to abide by the will of Congress, not maneuver around it.

In sum, the PCT experience, if bicycles are restored to the trail, would be similar to the Maah Daah Hey Trail experience. On this 100-mile-long North Dakota trail, the Forest Service allows for multiuse, as the cover for its map shows:



The user experience on a multiuse PCT can be expected to be the same as on the Maah Daah Hey Trail, i.e., pleasant and, if hikers and horse riders occasionally come upon a mountain biker, uneventful.

E. Plan No. 3375 Should Be Revised as Follows:

PCTRI recommends that Plan No. 3375 be revised as follows (additions underscored and deletions struck out):

> "Pacific Crest National Scenic Trail Corridor
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> "Desired Conditions
>
> "1. The Pacific Crest National Scenic Trail (PCT) corridor is permanently protected to provide outstanding ~~primitive hiking and horseback~~ outdoor experiences.
>
> ". . . .
>
> "3. . . . Trail relocations will be evaluated . . . in partnership with . . . ~~the Pacific Crest National Scenic Trail Association~~ interested members of the public."
>
> "Standards
>
> ". . . .
>
> "3. The use of bicycles and other human-powered transport, as opposed to non-human-powered mechanized transport and motorized transport, is ~~prohibited~~ allowed on those parts of the PCT ~~tread and within the trail corridor~~ under federal jurisdiction, except ~~on trails designated crossings where such use is allowed~~ where prohibited by local regulation or by order reevaluated annually pursuant to the rule contained in the Forest Service Handbook. The August 31, 1988, prohibition on bicycles on the PCT is set aside in the Inyo, Sequoia, and Sierra National Forests."
>
> "Guidelines
>
> "1. ~~To maintain the outstanding primitive hiking and horseback experiences, new crossings of the PCT by trails for bicycles or other mechanized transport should be avoided except as mutually agreed on by the forest and the Pacific Crest National Scenic Trail Association.~~"