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March 21, 2011

Chas Cartwright
Superintendent
Glacier National Park
Attention: *Heavens Peak EA*
PO Box 128
West Glacier, Montana 59936

Dear Chas:

These are the comments from Wilderness Watch on the Heavens Peak Lookout Environmental Assessment (EA). Please refer again to our scoping letter on this issue. The lone action alternative in the EA, the agency's preferred alternative (proposal) is inconsistent with Park Service Policy 41 that requires recommended wilderness be managed as designated wilderness. The EA is also inadequate as it fails to properly analyze the impacts to the wilderness character of the area. Furthermore, an EIS is needed to analyze impacts of this type of non-conforming use in wilderness (or recommended wilderness) assuming such use was even consistent with the Wilderness Act, which in this case it isn't.

Wilderness

Heavens Peak lookout is not a necessary structure for management of the Glacier National Park recommended wilderness as wilderness. The Wilderness Act is clear (see section 4(c) of the Act) that structures are not allowed unless they are "necessary to meet minimum requirements for the administration of the area for the purpose of [wilderness preservation]." NPS acknowledges in the EA that the structure is not needed.

The EA is in error in the response to comments on pages 22 and 23 in a tortured analysis that is misleading and violates the Wilderness Act including case law on this very subject in Olympic National Park. While we address how the EA violates the Wilderness Act in more detail below, the serious concern that the EA is misleading deserves more comment. The EA on these two pages misleads because it violates the rules of statutory construct. It suggests the proposal is consistent with the Wilderness Act without explicitly admitting that the proposal would use methods prohibited by the Wilderness Act. As such, the Wilderness Act becomes a lesser concern than the other laws cited on these two pages; in essence the EA asserts, without honestly stating so, that these laws trump the Wilderness Act. At the same time, the EA incorrectly evaluates these laws and agency policy.

For example, the assertion that the NPS Organic Act requires the reconstruction (termed maintenance) of the Heavens Peak lookout is not correct. Indeed, there are numerous

examples throughout the National Park System where NPS has removed or opted to not maintain historic structures. The assertion that reconstructing an unnecessary structure is consistent with Section 4 of the Wilderness Act is likewise incorrect. The agency's own policy is clear that things which weaken wilderness protection—in this case, the use of motorized equipment—are not what section 4 of the Wilderness Act is about. An example of what section 4 means would be that since the Wilderness Act allowed mining claim staking in Wilderness for twenty years whereas national parks were already withdrawn from mineral entry, the national park wilderness would not have allowed the staking of mineral claims during that twenty-year period.

Furthermore, the EA's argument is even more disingenuous. The Park Service has apparently not maintained this structure despite the ongoing damage since its listing in 1986 (post-wilderness recommendation). In a real sense, allowing the structure to naturally weather is no different than what has been the policy for over twenty years.

The fact the lookout is a historic structure doesn't affect the agency's obligation to the wilderness. It is important to note that the EA leads one to confuse and conflate sections 4 (c) and 4 (b) of the Wilderness Act. It so doing it turns the Wilderness Act on its head. There are two interrelated issues which the EA fails to properly evaluate.

First, the public purposes (plural) in section 4(b) of the Wilderness Act, including historic values, are not the purpose (singular) of wilderness referenced in section 4(c) (*"As an initial matter, we cannot agree with the Park Service that the preservation of historical structures furthers the goals of the Wilderness Act."* Wilderness Watch v. Mainella). Indeed, if those public uses to which wilderness may be put, as long as wilderness character is protected, cannot allow prohibited actions in wilderness in section 4(c) under the narrow exceptions for the minimum required. If so, the agencies could approve motorized use or build trams to inaccessible mountain peaks for recreation purposes. That is not and never has been the intent of Wilderness. As such, the EA is wrong to suggest that the agency can "Conduct work in such a way that impacts to recommended wilderness are minimized" meaning that helicopters and motorized construction equipment that requires the use of a generator are the minimum necessary. This work does not fall under the rubric of section 4(c) because the structure is not "necessary to meet minimum requirements for the administration" of the area as wilderness.

The EA is also internally inconsistent. The EA admits the structure is not used at all, let alone for the sole purpose of preservation of the area as wilderness. Then the EA notes "neither trail maintenance nor the preservation of historic structures is prohibited in either recommended or designated wilderness, provided such actions do not exceed minimum requirements for administrative uses." Again, the lookout is not used at all.

As such, the fact that the EA includes a Minimum Requirements Decision Guide (MRGD) is a misapplication of the process. This is not a necessary management action for preservation of the areas as wilderness so it does not fall under the narrow exceptions in section 4(c). Even if we were to accept that this action is covered under section 4(c), such a tortured analysis that suggests a structure built at the end or just after World War II is necessary to be maintained by helicopters and motorized equipment is inconsistent with any logical reading of the Wilderness

Act. Under the agency's outlandish view, any action in wilderness can be justified if it occurred at some so-called historic time in the past. Additionally, it is indeed ironic (and illogical) that the Park Service concludes motorized equipment (helicopters, a generator, motorized tools) to maintain a historic structure are less damaging to wilderness than traditional methods. We address some of the other inconsistencies in the MRDG in the NEPA section below.

Second, the EA erroneously states that historical structures contribute to wilderness character and are an integral part of the wilderness. The EA states, "site-specific to widespread, minor to moderate adverse impacts from the loss of a significant cultural resource that contributes historical value to the park's recommended wilderness." The EA further states, "The lookout is a cultural resource that imparts historical value to the park's recommended wilderness and contributes to the unique character of the Heavens Peak wilderness setting." The core definition of wilderness in section 2 of the Wilderness Act is about untrammeled wildlands. While the definition also includes reference to "ecological, geological, or other features of scientific, educational, scenic, or historical value," this is not part of the core definition. More importantly, however, is that historical structures are not the same as the historical value mentioned in section 2 of the Wilderness Act (see case law quoted below). Also, historical structures are not embodied as an integral part of wilderness character in the Wilderness Character Monitoring Protocol. Therefore, it is ludicrous and contrary to the very definition of wilderness to suggest that historic structures are an important part of the wilderness character of the area. If anything, structures detract from the wilderness character of an area (again, see below).

It is also equally erroneous to suggest, as the EA does, that historic (or any) structures existing prior to recommendation or designation of an area as wilderness are somehow exempt from the requirements of the Wilderness Act. That is akin to suggesting that motorized use on a trail prior to designation of an area as wilderness is somehow exempt from the Wilderness Act.

In our scoping letter, we addressed this topic by citing the Olympic park case. The court ruled:

> *The National Historic Preservation Act's (NHPA) effect in the context of the Wilderness Act was addressed in Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella, 375 F.3d 1085 (11th Cir. 2004):*
> *As an initial matter, we cannot agree with the Park Service that the preservation of historical structures furthers the goals of the Wilderness Act. The Park Service's responsibilities for the historic preservation of Plum Orchard and the settlement derive, not from the Wilderness Act, but rather from the National Historic Preservation Act. (NHPA), 16 U.S.C. § 461, et seq. The NHPA requires agencies to "assume responsibility for the preservation of historic properties" they control.*
> ***
> *The agency's obligations under the Wilderness Act are quite different. The Wilderness Act defines wilderness as "undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. § 1131(c) A wilderness area should "generally appear[ ] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." Id. Another section of the Act explicitly states that, except as necessary for minimal administrative needs that require occasional vehicle use, "there shall be ... no structure or installation within any such [wilderness] area." 16 U.S.C. §*

> *1133(c). As the Park Service notes, Section 1133(b) mentions "historical use" along with "recreational, scenic, scientific, educational,[and] conservation" uses. However, this list tracks the definition of wilderness areas in § 1131(c), which describes "a primitive and unconfined type of recreation" and "ecological, geological, or other features of scientific, educational, scenic, or historical value." 16 U.S.C. § 1131(c).* ***Given the consistent evocation of "untrammeled" and "natural" areas, the previous pairing of "historical" with "ecological" and "geological" features, and the explicit prohibition on structures, the only reasonable reading of "historical use" in the Wilderness Act refers to natural, rather than man-made features.*** *375F.3d 1085, 1091-92, emphasis added. The Court's reasoning in Wilderness Watch v. Mainella is persuasive. While the former structures may have been found to have met the requirements for historic preservation, that conclusion is one that is applied to a man-made shelter in the context of the history of their original construction and use in the Olympic National Park. Once the Olympic Wilderness was designated, a different perspective on the land is required. Regarding the Olympic Wilderness, that perspective means "land retaining its primitive character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions." 16 U.S.C.§ 1131(c).*

The Heavens Peak lookout EA violates case law and the Wilderness Act. Both the Act and case law are crystal clear: Structures, historic or otherwise, by definition, don't positively contribute to the wilderness character of the area; structures can't be maintained with means that violate the Wilderness Act (unless they are the minimum necessary for preservation of the area as wilderness and the EA admits this structure is not used); and the historic value or use wilderness in section 2 is related to the natural features, not structures. Because the analysis of wilderness in the EA is based upon a reading contrary to the plain language of the Wilderness Act and specific case law on the matter, it is fatally flawed.

NEPA

There are numerous problems with the EA in terms of NEPA compliance aside from the issues addressed in the above section.

The EA violates NEPA mandates for a range of alternatives. For example, the EA failed to analyze an alternative which used no motorized equipment that would, at least in one respect, be consistent with wilderness when the preferred alternative is not consistent with wilderness. The MRDG did briefly look at such an option though the analysis was incomplete and inconsistent.

Indeed, there are only two alternatives and one is no-action. The purpose and need has been so narrowly constrained, that it violates case law. The Seventh Circuit recently explained:

> *No decision is more important than delimiting what these "reasonable alternatives" are. . . . One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). . . . If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.* Simmons, 120 F.3d at 660.

Also, the courts have held:

> *"[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616 (1991).

An EIS should have been prepared. This is a major federal action, by definition. The use of motorized equipment in wilderness, a use that is prohibited, is a major action. The fact that the Forest Service would likely opt to use traditional skills in a similar situation involving a structure like this one also indicates a significant degree of controversy.

The EA's analysis of wilderness impacts defies logic. At what point does a man-made structure that the EA considers an important wilderness value become trash, as suggested in the analysis of alternative A? How does that seemingly miraculous transformation take place? What about cumulative impacts to wilderness from future maintenance? If short-term impacts to wilderness character are acceptable, why not conduct every activity via helicopter or use other motorized equipment because it is faster? How does this comply with the agency's wilderness policy?

As noted above, the EA didn't analyze a non-motorized alternative when the MRDG did. We have several questions/concerns with regard to the MRDG that also reflect on the inadequacy of the EA. How can the impacts from using hand tools, hiking, and possibly using stock rather than helicopters be considered long-term when the lookout was presumably constructed without motorized equipment by traditional skills in 1945 and the area today is supposedly wild (and trailless), according to the EA? What is the difference, in terms of the duration, from temporary trails created by workers under the proposal versus temporary trails under a non-motorized option? Why are temporary trails that come about as a result of use for hauling repair supplies and equipment considered incompatible for wilderness in this EA when helicopters other motorized equipment and trails aren't considered incompatible? Why wasn't an analysis of the dangers of helicopter travel discussed? What scientific data does the Park Service have that show helicopters and power tools are safer than the use of traditional tools and transportation methods in this specific place? Was the original construction operation unsafe?

The EA's claim that alternative B is the environmentally preferred alternative is illogical. How is the idea of an "enduring resource of wilderness" that is passed on "for succeeding generations" helped by use of helicopters and maintenance of structures that are not the minimum necessary for preservation as wilderness? How are human structures in our wildest places promoting "diversity" when the vast majority of our nation's lands are largely modified by humans? What illegal activity in wilderness couldn't be justified under the idea of "balance" and "resource use?"

Will consultation take place for the listed wildlife species? How can the EA be adequate under NEPA when any vegetation analysis of rare plants won't occur until after the Decision Notice? What are the cumulative impacts of future maintenance on wildlife? Why didn't the EA recognize the much greater impact from helicopters to wildlife versus fixed-wing aircraft including air pressure and noise differences?

Historic

The EA states:

> *"The proposed work would be limited to repairs necessary to keep the lookout standing and would include repairs to the roof and floor; reconstruction and repair of shutters, doors, and window units; limited repair of masonry; and the repainting of exterior and some interior wood surfaces."*

That raises two important questions. First, this sounds like "reconstruction" (the word reconstruction is used in the above quote) rather than mere "maintenance." Please explain how this activity is not reconstruction. Second, if this is not reconstruction, how long is the maintenance expected to last until the next time the NPS decides helicopters and other motorized equipment are needed to "maintain" the structure? This last question is crucial and should have been clearly explained in the EA as it is a cumulative impacts and/or connected action.

The EA does not clearly explain the responsibilities under the National Historic Preservation Act. Does preservation mean continual reconstruction of a site into perpetuity? Do all listed sites have to be preserved or can they be allowed to deteriorate or can they be removed once fully documented? If not, please explain the removal and/or documentation of listed sites for road construction or other similar development activities?

How is the use of motorized tools for a structure originally built with traditional means preserving that Historic structure? How is the use of Plexiglas for windows consistent with preservation laws? The irony (and hypocrisy) of the NPS proposal has not gone unnoticed.

Summary

The Heavens Peak EA is inadequate from every perspective. It should be scrapped and an EIS prepared if this project goes any further.

Sincerely,

Gary Macfarlane
Board Member