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RE: FSM 2355 Climbing Opportunities #ORMS-3524

Responsible Official:

Below are comments regarding Forest Service Manual Section 2355 Proposed Climbing Directives. Wilderness Watch submits these comments on behalf of the following groups:

Wilderness Watch is a national wilderness advocacy organization, headquartered in Missoula, Montana, dedicated to the protection and proper administration of the National Wilderness Preservation System.

The Alliance for the Wild Rockies works to protect habitat for native species in the northern Rockies.

Bold Visions Conservation is an organization dedicated to fighting for wildlife and protecting our public lands so wildlife may thrive.

The California Chaparral Institute is a 501(c)(3) nonprofit environmental organization dedicated to preserving the chaparral - California's most characteristic, yet most imperiled, native shrubland ecosystem.

The Conservation Congress provides a voice for native wildlife in the northern Rockies and northern California. We speak for the rights of Grizzlies, Bison, Gray Wolf, Northern Spotted Owl, Pacific Fisher, American Marten, and other unrepresented wildlife that rely on landscape-scale habitat protection.

Californians for Western Wilderness (CalUWild) is a citizens organization dedicated to encouraging and facilitating participation in legislative and administrative actions affecting wilderness and other public lands in the West. Our members use and enjoy the public lands all over the West.

Friends of the Bitterroot is a 36-year-old registered 501 c(3) nonprofit conservation organization, based in western Montana, with a mission to preserve wildlands and wildlife and to protect the forests and watersheds of our region as we work for a sustainable relationship with the environment.

Gallatin Wildlife Association is a nonprofit wildlife advocacy organization that promotes the protection and preservation of wildlife and their respective habitat by using science and the law.

Heartwood is a regional forest protection organization serving the hardwood forest region of the eastern U.S. Heartwood is "people helping people protect the places they love."

Living Rivers promotes river restoration through mobilization. By articulating conservation and alternative management strategies to the public, we seek to revive the natural habitat and spirit of rivers by undoing the extensive damage done by dams, diversions and pollution on the Colorado Plateau.

North Cascades Conservation Council's mission is to protect and preserve the North Cascades' scenic, scientific, recreational, educational, and wilderness values.

Northeastern Minnesotans for Wilderness (NMW) is a 501(c)(3) non-profit corporation founded in Ely by residents of northeastern Minnesota. Since 1996, NMW has worked to protect the Boundary Waters Canoe Area Wilderness (Boundary Waters) and Voyageurs National Park, and to foster broader appreciation and support for the preservation of wilderness and wild places.

Public Employees for Environmental Responsibility supports current and former public employees who seek a higher standard of environmental ethics and scientific integrity within their agencies. We do this by defending whistleblowers, shining the light on improper or illegal government actions, working to improve laws and regulations, and supporting the work of other organizations.

The Rewilding Institute develops and promotes the ideas and strategies to advance continental-scale conservation in North America and beyond, particularly the need for large carnivores and a permeable landscape for their movement, and offers a bold, scientifically-credible, practically achievable, and hopeful vision for the future of wild Nature and human civilization.

River Runners for Wilderness promotes the highest resource protection values through Wilderness management and stewardship activities on the Colorado River watershed and safeguards non-allocated access to the Colorado River watershed for all recreational river runners.

Since 1984, the **Soda Mountain Wilderness Council** has worked to rewild what is now the Cascade-Siskiyou National Monument area in the ecologically strategic biological corridor where the botanically diverse Siskiyou Mountains join the Southern Cascade Range.

Swan View Coalition is dedicated to conserving quiet undisturbed habitats for fish, wildlife and people.

The Wyoming Wilderness Association is Wyoming's non-profit grassroots organization dedicated to protecting Wyoming's public wild lands through education, advocacy and stewardship. Our membership includes well-known climbers and wild land advocates that value

the wilderness climbing experience in renowned destinations like the Tetons and the Wind River Mountains wilderness areas.

Yellowstone to Uintas Connection is a 501c3 non-profit entity working to restore fish and wildlife habitat including the Regionally Significant Wildlife Corridor connecting the Greater Yellowstone Ecosystem to the Uintas Mountains and Southern Rockies through the application of science, education and advocacy.

SUMMARY

While some of the language in the proposed guidance is good, the guidance is largely undermined by a flawed legal assumption: that the Wilderness Act's prohibitions can be overcome by a desire to facilitate or enhance a particular form of recreation. As one court put it, "[I]t is not possible to infer from [the Act's] language that establishment (much less enhancement) of opportunities for a particular form of human recreation is the purpose of the Wilderness Act, [so] it is not possible to conclude that [establishment or enhancement of a particular form of recreation] is an activity that is "necessary to meet minimum requirements for the administration of the area for the purpose of this chapter." *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp.2d 1117, 1134 (E.D. Cal. 2006). Rather, "[t]he wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential utility, but rather by reference to the land's status or condition as being 'Federal land retaining its primeval character and influence, without permanent improvements.'" *Id.*

In other words, the Forest Service has no duty to develop Wilderness to "provide opportunities for primitive recreation;" it is statutorily prohibited from doing so. Wilderness, by its very existence, provides these opportunities—the Forest Service needs only to protect the Wilderness according to the provisions of the Wilderness Act to safeguard the opportunity.

The assumption that the Act's prohibitions can be overcome by the desire to enhance recreation is not only flawed on its face, but it also ushers wilderness administration to the precarious edge of a slippery slope. Wilderness administering agencies are facing a crossroads. The outdoor recreation industry, and its influence on public land management, is booming, and outdoor recreation pressures that were once front-country issues are pushing steadily into our most protected places. Meanwhile, agency wilderness programs are underfunded and deprioritized, wilderness-trained staff are stretched thin, and wilderness departments are increasingly subsumed by recreation departments. Combine these issues with decades of agency equivocation over fixed anchors in Wilderness, and you have the untenable situation at hand: exploding demand for developed recreational climbing, associated agency liability concerns, proposed agency guidance that both confuses statutory language regarding prohibitions in Wilderness and increases administrative burden, and underfunded and deprioritized wilderness staff lacking resources to effectively protect Wilderness under such circumstances.

The Forest Service has an opportunity to remedy the situation. It should make clear:

- That climbing is a recreational activity that is generally compatible with wilderness protection. However, permanent installations, such as fixed climbing anchors and equipment, are statutorily prohibited in Wilderness absent rare administrative circumstances where they are necessary to meet minimum requirements for protecting wilderness in its natural, untrammled state. The same standard applies to power drills.

- This administrative exception does not extend to the general public seeking to facilitate or enhance developed recreational activities in Wilderness.
- For already existing fixed anchors and equipment in Wilderness, the Forest Service may remove them or leave them in place, but it does not have discretion to repair or replace them unless they meet the Wilderness Act’s narrow prohibition exception.¹

HISTORY OF FIXED ANCHOR CONTROVERSY IN WILDERNESS AND HISTORY OF AGENCY GUIDANCE

This is not a new issue. Controversy over the use of fixed anchors in Wilderness has been around for decades, flaring up at various times due to overuse concerns in particular Wildernesses and pushback from the climbing community on agency attempts to address it. *See, e.g., Attachment A* (U.S. Forest Serv., Discussion Sheet Case Study Technical Rock Climbing in Wilderness (1990s) (discussing the history of the issue, statutory and agency guidance, growth in bolted climbs, enforcement efforts, pushback from climbing groups who “rejected any alternative locations for the activity,” and subsequent Congressional inquiries)).

This same issue is what prompted a legal memorandum from the USDA Office of General Counsel in the 90s finding fixed anchors are “permanent improvements” and “installations” prohibited by the Wilderness Act and that “the legal question is not whether the Forest Service can regulate the practice of rock bolting, but whether it can allow the activity to occur in the first place.” **Attachment B** (U.S. Dept. of Agric. Office of Gen. Council, Memorandum on Use of Rock Bolts for Mountain Climbing on National Forests and in Wilderness areas and Related Issues (1990)). In that case, Forest Service leadership was seeking General Council guidance on fixed anchor use after “the sport of climbing increased in popularity,” and “climbers and their equipment proliferated in the [Superstition] Wilderness.” Attachment B at 1. As a result, “approximately 200 climbing routes [had] been established on mountains in the Superstition Wilderness[, and t]hese routes were marked with more than 500 rock bolts.” Attachment B at 1.

When the Forest Service attempted to rein in the overuse and bolting in Wilderness, a familiar (and now predictably repetitive) story unfolded. Climbing groups organized to resist Forest Service efforts to protect Wilderness arguing that bolting is actually minimal (notwithstanding the 500 bolts), that associated resource damage was actually minimal, that bolts are nothing more than “trail markers, like cairns, for vertical as opposed to horizontal trails,” that bolts actually prevent further resource damage by concentrating impacts to a particular “trail,” and that removing or prohibiting bolts would create a safety issue exposing the Forest Service to personal liability. *See Attachment B* at 2, 4.

In responding to this issue, the Office of General Council found that the Forest Service has broad authority regulate or prohibit rock bolting within National Forests and *a duty* to do so in Wilderness. Attachment B at 2-3. It found that bolts fit within the common meaning of

¹ There is likely agency concern about the proliferation and popularity of anchors in places like Joshua Tree National Park and Yosemite National Park, but the agencies may not shoehorn a statutory exception where one does not exist. Agency guidance, or national legislation like the Protecting America’s Rock Climbing Act, that misstates and misapplies statutory prohibitions and exceptions has far-reaching impact and puts the entire National Wilderness Preservation System, and the Wilderness Act itself, at risk.

“installation” and thus are presumptively prohibited under the Wilderness Act. Attachment B at 4. And it rejected the notion that fixed anchors are akin to trail markers that reduce Wilderness damage and are thus allowable in wilderness finding instead that 1) if installations are prohibited in Wilderness, then they are prohibited, particularly where 2) actual practice in the Superstitions Wilderness does not support the argument that climbers stick to preexisting routes and bolts. “Many climbers do not follow preexisting routes and, of those that do, frequently they do not feel compelled to use the previously installed bolts.” Attachment B at 4.

This same story has played out again and again, including in an appeal over fixed anchors in the Sawtooth National Forest where the *Chief of the Forest Service* held that there is no need for the Forest Supervisor “to ‘complete an analysis of the management need for fixed anchors to protect the wilderness resource’ [because] fixed anchors are prohibited under the Wilderness Act.” **Attachment C** (U.S. Forest Serv., Appeal Decision on Sawtooth Wilderness Management Direction (1998)). The Chief gave the Forest Supervisor discretion to leave existing fixed anchors in place for the time being due to the administrative burden in figuring out how to remove them while ensuring safety and avoiding physical impacts. Attachment C at 4.

We are here addressing this issue, once again, because the Park Service and Forest Service have tried to respond to a boom in climbing and its associated impacts, including the proliferation of fixed anchors, in various Wildernesses. In Joshua Tree National Park, for example, where visitor use has more than doubled since 2000, “[t]he National Park Service estimates there could be as many as 20,000 bolts in the park; 30% are in wilderness.” Expressing concern about growing climbing pressures and trampled desert soil crusts and vegetation, the Park Service notified the public that it would be creating a new climbing management plan to better manage climbing in the Wilderness and comply with the Wilderness Act. **Attachment D** (Nat’l Park Serv., Scoping Notice, Climbing Management Plan: Rock-Based Recreation in Joshua Tree National Park (January 2022 update)). It noted that the Wilderness Act prohibits installations in Wilderness and that fixed climbing anchors are considered installations. Again, climbing organizations rallied and resisted, even going so far as to craft national legislation that would, in defacto fashion, amend the Wilderness Act to define fixed anchors as an allowable use in Wilderness. *See Attachment E* (Protecting America’s Rock Climbing Act, H.R. 1380, 118th Cong. (2023) (as amended)). The Forest Service is feeling the same pressure both inside and outside of Wilderness. The resounding concern is over “the sport’s explosive growth.” *See Attachments F and G* (news articles discussing climbing related overuse issues on the Bitterroot and Bighorn National Forests).

A recent Climbing article noted that overcrowded climbing areas throughout the country are pushing climbers farther into Wilderness, creating environmental and wilderness character issues. **Attachment H** (Climbing.com article). In the same article, the Access Fund reports “exponential growth” in climbers over the last few decades—growing from the hundreds of thousands to roughly 8 million today. The Forest Service estimates that number closer to 10 million. **Attachment I** (Protecting America’s Rock Climbing Act: Hearing on H.R. 1380 Before the H. Comm. on Natural Resources Subcomm. on Federal Lands (Statement of Chris French, Deputy Chief, National Forest System (March 28, 2023))). Whatever the number, the growth presents serious issues for wilderness protection.

Climbing pressures in Wilderness will only continue to grow, and agency waffling on the issue is only going to increase unmanageable agency burdens and impacts to Wilderness across the National Wilderness Preservation System. In fact, with the recent proposed legislation, the Wilderness Act itself is now at risk.

Climbing is not prohibited under the Wilderness Act, but fixed anchors are. While it may be true that fewer people will climb certain routes in Wilderness if they don't have fixed bolts or other fixed protection, natural limits on use is not a bad thing when it comes to Wilderness protection, particularly with the recent explosion of outdoor recreation uses in Wilderness. And, Wilderness has never been about convenience or even safety. If we are to set aside and protect a few less managed, less developed, wilder places, they will come with inherent risk. As one climber told us, "I used to rock and ice climb and specifically sought out routes in Wilderness because I was constrained by the route, only able to place protection where it was available naturally. This is a heightened and connected experience. Wilderness climbing is sacred[.]"

The Forest Service has no duty to develop Wilderness to "provide opportunities for solitude or a primitive and unconfined type of recreation;" in fact, it is statutorily prohibited from doing so. Wilderness, by its very existence, provides these opportunities—the Forest Service needs only to protect Wilderness according to the provisions of the Wilderness Act to safeguard the opportunity.

Less than 3% of land in the Lower 48 is protected as Wilderness and it is under growing threat, including from rapidly escalating recreation pressures. Inherent limits are essential.

The Forest Service has an opportunity here to craft clear direction, consistent with the Wilderness Act, regarding climbing in Wilderness that will both preserve Wilderness and the Wilderness Act and ensure continued opportunities for unconfined and primitive forms of recreation in these rare and special places.

Below, we provide the requisite legal framework for this direction and offer revisions to the proposed direction to comply with this framework.

LEGAL CONTEXT

"The purpose of the Wilderness Act is to preserve the wilderness character of the areas to be included in the wilderness system, not to establish any particular use."

Howard Zahniser, Testimony before Congress, 1962.

STATUTORY MANDATE: The Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. 16 U.S.C. § 1131(a). Wilderness is statutorily defined as "an area where the earth and its community of life are untrammeled by man" and an area "retaining its primeval character and influence... which is protected and managed so as to preserve its natural conditions..." *Id.* § 1131(c). Thus, Wilderness "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment *as wilderness*, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment *as wilderness*..." *Id.* § 1131(a) (emphasis added). The Act's opening section "sets forth the Act's broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammeled state" and "show[s] a mandate of preservation for wilderness and the essential need to keep [nonconforming uses] out of it." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (en banc).

Prohibitions and the Act’s Overarching “Purpose.” The Wilderness Act contains a narrow exception to allow otherwise-prohibited activities—such as installation use—only where such activities are “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). The statute uses the word “purpose” in its singular form. In other words, the exception applies only where the otherwise-prohibited activity will affirmatively advance the “‘preservation and protection’ of wilderness lands ... in their natural, untrammelled state.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc) (quoting 16 U.S.C. § 1131(a)). As the Ninth Circuit stated in *High Sierra v. Blackwell*:

The Wilderness Act twice states its overarching purpose. In Section 1131(a) the Act states, ‘and [wilderness areas] shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for the future use and enjoyment as wilderness, and so as to provide for the protection of those areas, the preservation of their wilderness character,’ 16 U.S.C. § 1131(a) (emphasis added). Although the Act stresses the importance of the wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future as wilderness. This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the area.

High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004); *see also id.* at 645 (citing 16 U.S.C. 1133(b)).

The Eleventh Circuit has found the same. “Congress ha[s] spoken clearly and unambiguously in the Wilderness Act,” and “the clear purpose of the Act [is] the preservation of untrammelled natural areas.” *High Point, LLLP v. Nat’l Park Serv.*, 850 F.3d 1185, 1197 (11th Cir. 2017) (citing *Cumberland Island*, 375 F.3d 1085, 1091-1092 & n.7 (11th Cir. 2004)).

Recreation Secondary to the Act’s Overarching Purpose. That recreational activities are a valid public use of wilderness areas does not excuse the Forest Service’s obligation to demonstrate that each installation, including fixed anchors, will advance “the [singular, overarching] purpose of” the Wilderness Act, 16 U.S.C. § 1133(c), which is to preserve Wilderness in its natural, untrammelled state, *id.* § 1131(a), (c). Congress and the federal courts have made clear that the goal of advancing recreation in Wilderness, while allowable and encouraged, cannot trump the overriding statutory purpose to preserve Wilderness. *See id.* §§ 1131(a), (c), 1133(b)-(c); *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004) (affirming that, under the Wilderness Act, the Forest Service may not “elevate[] recreational activity over the long-term preservation of the wilderness character of the land.”).

As stated in one Law Review article:

[T]he Act must be read as directing agencies to allow for recreational and other uses to the extent consistent with wilderness preservation, while also requiring agencies to curtail or even prohibit human activities which impair the “wilderness character” of the protected areas. When use conflicts with the preservation of this “wilderness character,” preservation trumps use.

Kammer, *Coming to Terms with Wilderness*, 43 ENVTL. L. 43 ENVTL. L. 83, 104 (2013).

And as one court put it,

While fishing is an activity that is common among visitors to wilderness areas, **neither fishing nor any other particular activity is endorsed by the Wilderness Act, nor is the enhancement of any particular recreational potential a necessary duty of wilderness area management.**” Rather, the Wilderness Act seeks to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.” 16 U.S.C. § 1131(a). **The wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential utility, but rather by reference to the land’s status or condition as being “Federal land retaining its primeval character and influence, without permanent improvements or human habitation [....]” § 1131(c).**

Because it is not possible to infer from this language that establishment (much less enhancement) of opportunities for a particular form of human recreation is the purpose of the Wilderness Act, it is not possible to conclude that [such a thing] is an activity that is “necessary to meet minimum requirements for the administration of the area for the purpose of this chapter.”

High Sierra Hikers Ass’n v. U.S. Forest Service, 436 F.Supp.2d 1117, 1134 (E.D. Cal. 2006) (emphasis added).

“[M]any other categories of public land administered by the federal government appropriately offer [opportunities for recreation requiring the use of installations]. It simply is not the type of ‘use and enjoyment’ promoted by the Wilderness Act.” *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1093 (11th Cir. 2004).

FEDERAL ADMINISTRATIVE DUTIES AND MANAGEMENT DIRECTION: Congress provided a clear mandate for administering agencies: “[E]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.” 16 U.S.C. § 1133(b). Certain uses and activities, including the placement of permanent installations, undermine the preservation of Wilderness and are thus presumptively prohibited with narrow exception. 16 U.S.C. § 1133(c).

These uses and activities may be authorized by the Forest Service only where “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). An agency authorizing activity generally prohibited by the Wilderness Act carries a heavy burden to establish that the action is first necessary and then implemented only to the extent necessary. *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037 (9th Cir. 2010). “The limitation on the [agency’s] discretion to authorize prohibited activities only to the extent necessary flows directly out of the agency’s obligation under the Wilderness Act to protect and preserve wilderness areas.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004). Forest Service management direction must align with this statutory direction.

THE FOREST SERVICE'S PROPOSED CLIMBING DIRECTIVES (FSM 2355)

Consistent with the above statutory direction, we explain problems with language in the proposed guidance and provide solutions for fixing those problems. The examples may not be a sentence-by-sentence exhaustion of problematic language, but the examples are representative of problematic themes throughout the guidance.

FSM 2355.03(5): “The placement, replacement and retention of fixed anchors and fixed equipment are permissible in wilderness when it is determined that they are the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character. Existing fixed anchors and fixed equipment may be retained pending completion of a Minimum Requirements Analysis, as funding and resources allow, to determine whether they are the minimum necessary for administration of the area for Wilderness Act purposes (FSM 2355.32).”

Problem: There are several problems with the language in this section that create conflict with the language of the Wilderness Act. The language materially misstates the statutory test for exceptions to generally prohibited uses in Wilderness, and it conflates recreation with the preservation of wilderness character.

First, stating that installations “are permissible in wilderness when...” creates a different presumption than the statutory language “there shall be no ... except.”

Second, the statute’s prohibition language does not state that installations may be authorized “when it is determined that they are the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character,” and the Act’s exception clause does not reference multiple “Wilderness Act purposes.” It prohibits installations unless “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c).

Courts have held that the Act’s overarching purpose—wilderness preservation—is different from its various subservient public purposes such as recreation. The statute uses the word “purpose” in its singular form when stating the exception to prohibited uses. In other words, the exception applies only where the otherwise prohibited activity will affirmatively advance the “‘preservation and protection’ of wilderness lands ... in their natural, untrammled state.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc) (quoting 16 U.S.C. § 1131(a)). Accordingly, Courts have made clear that 1) facilitating recreation is not the same as preserving wilderness and 2) recreation cannot be prioritized over wilderness preservation. *See High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004) (the agency may not “elevate[] recreational activity over the long-term preservation of the wilderness character of the land.”).

Further, the Forest Service has no duty to develop Wilderness to “provide opportunities for solitude or a primitive and unconfined type of recreation;” in fact, it is statutorily prohibited from doing so. Wilderness, by its very existence, provides this opportunity—the Forest Service only needs to protect Wilderness according to the provisions of the Wilderness Act to safeguard the opportunity. “The wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential

utility, but rather by reference to the land's status or condition as being 'Federal land retaining its primeval character and influence, without permanent improvements or human habitation [....]' § 1131(c)." *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp.2d 1117, 1134 (E.D. Cal. 2006) (emphasis added). Wilderness "manifested its wilderness characteristics before the [installations] were in place and would lose nothing in the way of wilderness values were the [installations] not present." *Id.* at 1137.

Solution: Use the correct statutory test. This section should read:

"The placement and replacement of fixed climbing anchors and fixed equipment is prohibited in wilderness except in rare circumstances where an appropriate official, after appropriate review, determines they are necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act. In other words, a fixed anchor must be the minimum administrative action necessary to preserve and protect wilderness lands in their natural, untrammelled state. Existing fixed anchors and fixed equipment may be left in place pending completion of a Minimum Requirements Analysis and associated NEPA compliance that will determine whether they are necessary, and the minimum necessary, as required by the Wilderness Act."

FSM 2355.03(6)(b): "The placement of a fixed anchor or fixed equipment does not necessarily impair the future enjoyment of wilderness or violate the Wilderness Act, but the establishment of bolt-intensive climbing opportunities may be incompatible with the preservation of wilderness character."

Problem: Statutorily prohibited uses, by their nature, degrade wilderness and thus impair the future enjoyment of the area *as wilderness*. This is true whether it is one installation or twenty—the difference is merely a matter of degree. The establishment of bolt-intensive climbing is categorically incompatible with the preservation of wilderness character. The existence of a narrowly crafted administrative exception does not change this, which is precisely why authorization of generally prohibited uses is limited to only "the minimum extent necessary." See *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004).

Solution: Delete this provision or change it to read:

"[T]he installation of fixed anchors and the establishment of bolt-intensive face climbs are considered incompatible with wilderness preservation. Fixed anchors may only be authorized if an appropriate official, after appropriate review, determines they are necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act. In other words, fixed anchor installations can only be authorized if they are the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammelled state."

FSM 2355.07: “Forest Service personnel are not responsible for the placement or replacement, or assessing or ensuring the safety, of fixed anchors and fixed equipment on NFS lands. Climbers are responsible for placement and replacement of fixed anchors and fixed equipment when those activities are authorized by a land management plan or climbing management plan. Climbers have personal and exclusive responsibility for assessing the safety of installed fixed anchors and fixed equipment.”

Problem: Fixed anchors and equipment are installations prohibited by the Wilderness Act and can only be authorized by the Forest Service if they are necessary to meet minimum requirements for administering the Wilderness for the (singular / overarching) purpose of the Wilderness Act. This is an *administrative* exception that cannot be invoked or implemented by the general public, including recreationists seeking developed climbing opportunities in Wilderness. *See Wilderness Watch v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004) (noting the exception clause is “for minimal administrative needs”). Otherwise, the public could construct or reconstruct bridges to facilitate safer water crossings, add mile markers and directional signage to prevent hikers from getting lost, install handrails or grip assists along precarious stretches of trail, or even develop warming huts to aid underprepared recreationists who find themselves in perilous weather. The Forest Service can no more waive or exempt the recreational use of installations from the prohibitions in the Wilderness Act than it can waive or exempt the recreational use of ATVs, mountain bikes, or snowmobiles from the same list of prohibitions. Yet that is precisely what the proposed policy would allow.

By creating a gray zone with fixed anchors—including authorizing their placement and use in some cases while simultaneously disavowing responsibility for them—the agency is opening itself up to more liability than it would if it just followed the mandates of the Wilderness Act. The proposed guidance does not address this potential liability.

Solution: Change this provision to read:

“Forest Service personnel are not responsible for assessing or ensuring the safety of existing fixed anchors and fixed equipment on NFS lands. In Wilderness, existing fixed anchors are not inspected and maintained, climbers must use existing fixed anchors and equipment at their own risk, and climbers should expect to climb without reliance on fixed anchors.”

With respect to existing fixed anchors and equipment, the Forest Service may opt to take the approach that the Chief of the Forest Service took in the Sawtooth Wilderness and allow existing fixed anchors to remain in place in the interim and at the discretion of Forest Supervisors. The Forest Service must take measures to ensure that the public is not installing additional anchors or replacing old anchors.

FSM 2355.21(12): “Restrict or prohibit the placement or replacement of fixed anchors and fixed equipment in wilderness unless specifically authorized based on a case-specific determination that they are the minimum necessary for administration of the area for Wilderness Act purposes (FSM 2355.32).”

Problem: This is generally a good provision, but the Forest Service does not have the discretion to “restrict” installations that do not meet the Act’s prohibition exception—they must prohibit them.

Additionally, the Act’s exception language does not say Wilderness Act “purposes”—it says “purpose.” As discussed above, courts have held that the Act’s overarching purpose, wilderness preservation, is different from its various subservient purposes / public uses such as recreation. *See* discussion at pg. 9-10.

Solution: This section should read:

“Prohibit the placement or replacement of fixed anchors and fixed equipment in wilderness unless specifically authorized based on a case-specific determination that they are the minimum necessary for administration of the area for the purpose of the Wilderness Act. In other words, a fixed anchor must be the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammeled state.”

FSM 2355.32(1): Climbing, including the use of fixed anchors and fixed equipment, can fulfill important wilderness recreational purposes and can help preserve wilderness character by providing opportunities for primitive or unconfined recreation. Fixed anchors and fixed equipment are installations for purposes of section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)). Therefore, a Forest Supervisor may authorize the placement or replacement of fixed anchors and fixed equipment in wilderness based on a case-specific determination that the placement or replacement of fixed anchors or fixed equipment is the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character. Examples include allowing climbers to use fixed anchors and fixed equipment in wilderness at climbing opportunities that provide outstanding opportunities for primitive or unconfined recreation; directing climbers toward designated climbing opportunities with fixed anchors and fixed equipment to protect sensitive resources such as cultural resources or nesting bird habitat; and approving fixed anchors and fixed equipment in areas where impacts on the rock face are occurring due to the use of rock hammers to chip hand holds or foot holds into the rock.

Problem: There are several problems with this provision. It materially misstates the language of the Wilderness Act and the agency’s duties as wilderness administrators under the Act.

First, fixed anchors and equipment (i.e. permanent installations) do not fulfill wilderness recreational purposes—they are prohibited by the Wilderness Act because they are wilderness degrading.

Second, fixed anchors and equipment do not provide opportunities for primitive or unconfined recreation as contemplated by the Wilderness Act—they are prohibited by the Wilderness Act because they are wilderness degrading. Climbing without fixed anchors and equipment would be a form of primitive or unconfined recreation that is contemplated by the Wilderness Act.

Third, this section materially misstates the statutory test for exceptions to generally prohibited uses in Wilderness, and it conflates recreation with the preservation of wilderness character. The exception clause does not say that the Forest Service “may authorize the placement or replacement of [installations] in wilderness based on [] determination that [it] is the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character.” It prohibits installations unless “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c).

Courts have held that the Act’s overarching purpose—wilderness preservation—is different from its various subservient public purposes such as recreation. The statute uses the word “purpose” in its singular form when stating the exception to prohibited uses. In other words, the exception applies only where the otherwise prohibited activity will affirmatively advance the “‘preservation and protection’ of wilderness lands ... in their natural, untrammled state.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc) (quoting 16 U.S.C. § 1131(a)). Accordingly, Courts have made clear that 1) facilitating recreation is not the same as preserving wilderness and 2) recreation cannot be prioritized over wilderness preservation. *See High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004) (the agency may not “elevate[] recreational activity over the long-term preservation of the wilderness character of the land.”).

Fourth, the Forest Service has no duty to develop Wilderness to “provide opportunities for primitive and unconfined type of recreation;” in fact, it is statutorily prohibited from doing so. Wilderness, by its very existence, provides this opportunity—the Forest Service only needs to protect Wilderness according to the provisions of the Wilderness Act to safeguard the opportunity. “The wilderness that the Act seeks to preserve is not defined by reference to any particular recreational opportunity or potential utility, but rather by reference to the land’s status or condition as being ‘Federal land retaining its primeval character and influence, without permanent improvements or human habitation [...]’ § 1131(c).” *High Sierra Hikers Ass’n v. U.S. Forest Service*, 436 F.Supp.2d 1117, 1134 (E.D. Cal. 2006) (emphasis added). Wilderness “manifested its wilderness characteristics before the [installations] were in place and would lose nothing in the way of wilderness values were the [installations] not present.” *Id.* at 1137.

Finally, the examples provided do not meet the standard for the same reasons, and they are reasons that were rejected by prior USDA leadership and general counsel opinions. *See* pgs. 4-5 above. If climbers are causing damage, they should be directed to locations, included bolted locations, outside of Wilderness.

Solution: Restate to make consistent with the statutory language. This provision should read:

“Climbing can be a form of primitive and unconfined recreation as contemplated by the Wilderness Act. However, fixed anchors and fixed equipment are prohibited installations under section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)). Therefore, a Forest Supervisor may authorize the placement or replacement of fixed anchors and fixed equipment in wilderness only where a case-specific analysis determines that the placement or replacement of fixed anchors or fixed equipment is necessary to meet minimum requirements for the administration of the area for the purpose of the Wilderness Act. In other words, a fixed anchor must be the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammelled state.”

FSM 2355.32(2): Determine whether placement or replacement of fixed anchors and fixed equipment in wilderness is the minimum necessary for administration of the area for Wilderness Act purposes by conducting a Minimum Requirements Analysis. The determination must include an analysis of whether placement or replacement of fixed anchors and fixed equipment is the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character. The determination must explain how and why the conclusions in the analysis were reached.

Problem: As above, the proposed language misrepresents the statutory test for exceptions to generally prohibited uses in Wilderness, and it conflates recreation with the preservation of wilderness character.

First, the Wilderness Act’s exception clause does not say “Wilderness Act purposes” – it says “for the purpose of the Wilderness Act.” Courts have held that the Act’s overarching purpose, wilderness preservation, is different from its various subservient purposes / public uses such as recreation. *See* discussion at pgs. 9-10.

Second, the exception clause does not ask whether an installation “is the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character.” It prohibits installations unless “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). *See* discussion at pgs. 9-10.

Additionally, the provision does not specify appropriate NEPA analysis. A minimum requirements analysis is not a substitution for NEPA, and courts have held that NEPA analysis, including public notice and opportunity to comment, is required for authorizations involving prohibited activities in Wilderness. *See, e.g., High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (rejecting use of a categorical exclusion for wilderness-degrading activities).

Solution: State the correct statutory test. The provision should read:

“Determine whether placement or replacement of fixed anchors and fixed equipment in wilderness is necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act by conducting a

Minimum Requirements Analysis. The determination must include an analysis of whether placement or replacement of fixed anchors and fixed equipment is the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammelled state. Appropriate NEPA review must follow a Minimum Requirements Analysis.”

FSM 2355.32(3): Document the Minimum Requirements Analysis and the determination based on the analysis.

Problem: This provision is fine, but it should also specify appropriate NEPA review. A minimum requirements analysis is not a substitution for NEPA, and courts have held that NEPA analysis, including public notice and opportunity to comments, is required for authorizations involving prohibited activities in Wilderness. *See, e.g., High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (rejecting use of a categorical exclusion for wilderness-degrading activities).

Solution: Specify appropriate NEPA review.

FSM 2355.32(4): Placement of new fixed anchors and fixed equipment in wilderness is allowed without prior authorization supported by a Minimum Requirements Analysis to respond to an emergency involving public health or safety or other type of emergency such as a forest fire or other natural disaster (FSM 2355.03, para. 7). New fixed anchors and fixed equipment placed in wilderness in an emergency must be removed unless the Forest Supervisor determines that the fixed anchors and fixed equipment are consistent with the applicable climbing management plan and are determined to be the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character, or that removal of the fixed anchors and fixed equipment presents an unacceptable risk of injury, death, or wilderness resource damage. Document the decision to retain the fixed anchors and fixed equipment and the rationale for the decision.

Problem: This provision is generally fine, but it again materially misstates the prohibition exception clause in the Wilderness Act and it conflates recreation with the preservation of wilderness character.

The Wilderness Act’s exception clause does not say “Wilderness Act purposes” – it says “for the purpose of the Wilderness Act.” And, the exception clause does not ask whether an installation “is the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character.” It prohibits installations unless “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). The Forest Service has no duty to develop Wilderness to “provide opportunities for solitude or a primitive and unconfined type of recreation;” in fact, it is statutorily prohibited from doing so. Wilderness, by its very existence, provides this opportunity—the Forest Service needs only to protect Wilderness according to the provisions of the Wilderness Act to ensure this opportunity exists. *See* pgs. 9-10 above for additional discussion.

Further, the provision does not specify the form of documentation required.

Solution: Change “unless the Forest Supervisor determines that the fixed anchors and fixed equipment are consistent with the applicable climbing management plan and are determined to be the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character,” to instead read, “unless the Forest Supervisor determines that the fixed anchors and fixed equipment are necessary to meet minimum requirements for the administration of the area for the purpose of the Wilderness Act. In other words, the fixed anchor or fixed equipment must be the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammelled state.”

Specify that NEPA compliance is part of the documentation process.

FSM 2355.32(5): Existing fixed anchors and fixed equipment in wilderness may be retained pending completion of a Minimum Requirements Analysis, as funding and resources allow, that determines they are the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character. In the interim, emergency replacements of individual fixed anchors posing a legitimate safety concern may occur unless prescribed otherwise through an approved climbing management plan or equivalent planning document. Planned replacements must be evaluated and authorized through a Minimum Requirements Analysis. An updated Minimum Requirements Analysis should be completed if wilderness character conditions have changed since the original analysis, and/or if the drilling of a new hole is proposed.

Problem: There are several problems with this provision.

First, as above, this section materially misstates the statutory test for the authorization of installations and conflates the facilitation of recreation with the preservation of wilderness character.

The Wilderness Act’s exception clause does not say “Wilderness Act purposes” – it says “for the purpose of the Wilderness Act.” And, the exception clause does not ask whether an installation “is the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character.” It prohibits installations unless “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). The Forest Service has no duty to develop Wilderness to “provide opportunities for solitude or a primitive and unconfined type of recreation;” in fact, it is statutorily prohibited from doing so. Wilderness, by its very existence, provides this opportunity—the Forest Service needs only to protect Wilderness according to the provisions of the Wilderness Act to ensure this opportunity exists. *See* pgs. 9-10 above for additional discussion.

Second, the emergency provision in the Wilderness Act would not apply to this situation. Any emergency authorizations of generally prohibited uses, including the replacement of fixed anchor installations, must be “measures required in emergencies involving the health and safety of persons within the area.” 16 U.S.C. 1133(c). Courts have found that this provision “most logically refers to matters of urgent necessity [such as search and rescue operations] rather than to conveniences for use in an emergency,” and it rejected the notion that structures could be installed in wilderness to eliminate or reduce risk.

Olympic Park Assoc. v. Mainella, No. C04-5732-FDB at *5, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005).

Should a climber—or any recreationist for that matter—find themselves in a life-threatening situation, they will do what they need to do to protect themselves and the consequences of any prohibited actions will be sorted out later according to the facts surrounding the emergency. By creating a gray zone with fixed anchors—including authorizing their placement and use in some cases while simultaneously disavowing responsibility for them—the agency is opening itself up to more liability than it would if it just followed the mandates of the Wilderness Act. The proposed guidance does not address this potential liability.

Solution: This section should read:

“Existing fixed anchors and fixed equipment in wilderness may be left in place pending completion of a Minimum Requirements Analysis, as funding and resources allow, that determines they are necessary to meet minimum requirements for the administration of the area for the purpose of the Wilderness Act. In other words, the fixed anchor or fixed equipment must be the minimum administrative action necessary to preserve and protect the Wilderness in its natural, untrammeled state. An updated Minimum Requirements Analysis should be completed if wilderness character conditions have changed since the original analysis, and/or if the drilling of a new hole is proposed.

The Forest Service should post notice that fixed anchors are installations prohibited in Wilderness, that existing fixed anchors are not inspected and maintained and must be used at climbers’ own risk, and that climbers should expect to climb without reliance on fixed anchors.”

FSM 2355.32(6): A Forest Supervisor may propose removal of existing fixed anchors and fixed equipment in wilderness if they are no longer the minimum necessary for administration of the area for Wilderness Act purposes.

Problem: This section is generally fine, but again, the exception clause does not say “Wilderness Act purposes.” It says “for the purpose of [the Wilderness Act.]” See pgs. 9-10 above.

Solution: Change “Wilderness Act purposes” to “the purpose of the Wilderness Act” so it is consistent with the statutory language.

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