WILDERNESS WATCH
Keeping Wilderness Wild

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National Park Service
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Submitted electronically via the public comment form at:
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Comment and attachments also mailed to the National Office:
1849 C Street NW, Washington, DC 20240

NOTE: The electronic comment form does not allow for uploads, including comment attachments, and does not preserve formatting, including footnotes. While the form states that comments can also be printed and mailed, it provides no mailing address to do so. Similarly, no email addresses are provided to ensure full comments, including attachments, are received. To ensure the Park Service receives our full comment letter with supporting attachments, we are mailing a copy to the National Office.

RE: Evaluation and Authorization Procedures for Fixed Anchors and Fixed Equipment in National Park Service Wilderness Areas (ID #s: 113918, 132387)

Deciding Official:

Below are comments regarding the proposed recreational climbing directives in the National Park Service's Draft Reference Manual 41. 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 Park 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 Park 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 underprioritized wilderness staff lacking resources to effectively protect Wilderness under such circumstances.

The Park 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, untrammeled 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 Park 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

[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 Park Service 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.

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 "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 Park 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 Park Service needs only to protect Wilderness according to the provisions of the Wilderness Act to safeguard the opportunity.

The Park Service knows this. As its own management policies provide:

> **6.4.1 General Policy**
>
> Park visitors need to accept wilderness on its own unique terms. Accordingly, the National Park Service will promote education programs that encourage wilderness users to understand and be aware of certain risks, including possible dangers arising from wildlife, weather conditions, physical features, and other natural phenomena that are inherent in the various conditions that comprise a wilderness experience and primitive methods of travel. The National Park Service will not modify the wilderness area to eliminate risks that are normally associated with wilderness, but it will strive to provide users with general information concerning possible risks, any recommended precautions, related user responsibilities, and applicable restrictions and regulations, including those associated with ethnographic and cultural resources.

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 Park 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, untrammeled 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 untrammeled 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 Park 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, untrammeled 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 Park 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). Park Service management direction must align with this statutory direction.

THE NATIONAL PARK SERVICE'S PROPOSED CLIMBING DIRECTIVES (DRAFT REFERENCE MANUAL 41)

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.

DRAFT LANGUAGE: "The National Park Service (NPS) has long recognized that climbing is an important and historically relevant recreational activity in many NPS wilderness areas."

Problem: While there may be a history of recreational climbing in certain Wilderness areas, and while climbing can certainly be an appropriate recreational use in Wilderness, the phrase "historically relevant" in this statement implies that climbing (with fixed anchors) may be allowed as a historical use in Wilderness. The statutory phrase "historical use" within the Wilderness Act does not refer to activities that rely on statutorily prohibited uses, including installations. Otherwise, areas that had a history of snowmobiling, off road vehicle use, mountain biking, or even logging would be subject to continuation of those non-conforming uses after wilderness designation.

Section 1133(b)'s public purposes are expressly conditioned upon the preservation of wilderness character and the rest of the Act's provisions, 16 U.S.C. § 1133(b), including its prohibitions provision. Congress intended to restrict those public uses, including recreation and historical uses, to those compatible with Wilderness and to exclude incompatible uses. The overarching purpose of the Wilderness Act is the preservation of undeveloped, untrammeled, natural areas, 16 U.S.C. § 1131(a), and the Act contemplates various public uses *compatible* with wilderness preservation by expressly conditioning those uses on the rest of the Act's provisions, *id*.; 16 U.S.C. § 1133(b).

Solution: Remove "and historically relevant" from the statement.

DRAFT LANGUAGE: "[T]he occasional placement of a fixed anchor for belay, rappel, or protection purposes does not necessarily impair the future enjoyment of wilderness or violate the Wilderness Act, but [] the establishment of bolt-intensive face climbs is considered incompatible with wilderness preservation."

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 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: Change this statement so it is consistent with the Wilderness Act. It should read:

> "[T]he installation of fixed anchors and the establishment of bolt-intensive face climbs are considered incompatible with wilderness preservation. A fixed anchor may only be authorized if an appropriate official, after appropriate review, determines it is 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, untrammeled state."

DRAFT LANGUAGE: "[C]limbing activities … can help preserve wilderness character by providing opportunities for primitive and unconfined recreation."

Problem: This statement materially misstates the statutory test for exceptions to generally prohibited uses in Wilderness, and it conflates recreation with the preservation of wilderness character.

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, untrammeled 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 Park 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 Park 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: Change this statement to read:

> "Wilderness areas provide opportunities for primitive and unconfined recreation, and recreational climbing is an appropriate activity in Wilderness. However, 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, untrammeled state."

DRAFT LANGUAGE: "Depending on the circumstances, programmatic decisions in a park plan may be supported by a programmatic MRA, or the MRA may be deferred to individual applications under the framework laid out in the plan."

Problem: This guidance is generally fine, but it should specify that 1) a proper necessity determination is required for each fixed anchor, and 2) the analysis and determination must be subject to appropriate NEPA review.

See discussion at pgs. 15-16 below for problems with the Draft minimum requirements analysis (MRA) language that must be remedied to ensure a proper necessity determination is made.

A MRA 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: Specify that 1) a proper necessity determination is required for each authorized fixed anchor, and 2) the analysis and determination must be subject to appropriate NEPA review.

DRAFT LANGUAGE: "On [existing] routes that have not yet been evaluated, climbers may make emergency replacements of pre-existing fixed anchors if necessary to exit the climb in the safest and most expeditious manner possible. […] Once a route has been evaluated and approved for continued use in wilderness, replacement of existing bolts on the route may be done without a new MRA …"

Problem: This provision creates the assumption that existing anchored routes will be authorized and fixed anchors will be maintained and replaced as needed.

Further, 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 "evaluating" them and 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: The Park 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.

DRAFT LANGUAGE: "Step 1 of the MRA process determines whether accommodating recreational climbing activities is a necessary activity to administer the wilderness area. […] Step 1 should discuss how climbing fulfills park and wilderness recreational purposes and further wilderness values. For example, parks should consider whether climbing is identified as an important recreational activity in the unit's enabling legislation, wilderness designation, foundation document, or park management plans. Parks should also consider the history of climbing at the park…"

Problem: There are several problems with this section. First, the MRA process is not triggered by consideration of recreational climbing activities, generally, because recreational climbing, on its own, is not prohibited by the Wilderness Act. The process is triggered by consideration of installation (fixed anchor) authorizations.

Second, whether climbing fulfills park and wilderness recreational purposes is irrelevant to the statutory test for authorizing installations in Wilderness. 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. 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, untrammeled 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 Forest Service may not "elevate[] recreational activity over the long-term preservation of the wilderness character of the land.").

Third, less restrictive laws, plans, and policies cannot supersede the more protective provisions of the Wilderness Act. So, unless there is a special provision in the wilderness designating statute specifically providing for the recreational use of fixed anchor installations in the Wilderness, broad references to climbing in other legislation or management plans are irrelevant—the installations are prohibited unless they meet the statutory test in the Wilderness Act for exception.

Lastly, the history of climbing in the park is irrelevant to the statutory test for authorizing otherwise prohibited uses in Wilderness. *See* discussion at pg. 10 above.

Solution: This section should instead read:

"Step 1 of the MRA process determines whether authorizing fixed anchor installations for recreational climbing activities is a necessary administrative activity to preserve and protect the wilderness in its natural, untrammeled state. […] Step 1 should also discuss whether fixed anchor installations are specially provided for in the wilderness designating legislation."[2]

[2] Whether it occurs in MRA Step 1, MRA Step 2, or elsewhere, the agency also has a duty to show that the otherwise prohibited action is the *minimum* necessary to protect the wilderness in its natural, untrammeled state.

DRAFT LANGUAGE: "Step 1 of the MRA process should discuss how recreational climbing preserves the qualities of wilderness character."

Problem: This section has several problems. First, the MRA process is not triggered by recreational climbing, generally. It is triggered by a proposal for installations (fixed anchors).

Second, this section conflates the facilitation and enhancement of recreation with the preservation of wilderness character. *See* discussion at pgs. 11-12 above.

Further, the Park 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. *See* discussion at pgs. 11-12 above.

Solution: State the correct statutory test. This statement should read:

> "Step 1 of the MRA process should discuss whether the authorization of fixed anchor installations for recreational climbing is necessary to administer the area for the purpose of the Wilderness Act. In other words, Step 1 should discuss whether fixed anchor installations are necessary to preserve and protect the wilderness in its natural, untrammeled state."

DRAFT LANGUAGE: "Step 1 should also note how recreational climbing in wilderness satisfies the public purpose of "recreation" established in the Wilderness Act, 16 U.S.C. 1133(b).

Problem: Again, recreational climbing does not trigger the MRA process—a proposal for fixed anchors does. Additionally, the public purpose of recreation is irrelevant to the statutory test. *See* discussion at pg. 14 above.

Solution: Delete this statement.

DRAFT LANGUAGE: "The park should discuss the effects on different aspects of wilderness character caused by different levels of fixed anchor use and possible trade-offs between those effects… The park should then select the level or type of fixed anchor use that best preserves the totality of wilderness character…"

Problem: This is, on its face, an unlawful interpretation of the Wilderness Act and a perfect example of where the *Keeping it Wild* protocol strays from the language and intent of the Wilderness Act and from caselaw interpreting that language and intent. The application of the protocol here results in a material misstatement of the statutory test for authorizing generally prohibited uses in Wilderness. It conflates the facilitation and enhancement of recreation with the preservation of wilderness character, it incorrectly assumes an affirmative duty of the Park Service to facilitate or enhance particular forms

of recreation, and it results in a weighing of "qualities" that unlawfully pits statutory terms against one another. *See* discussion at pgs. 11-12 above.

Wilderness experts, including current and retired agency experts, published a critique of the *Keeping it Wild* protocol in 2015. *See* **Attachment J**. There is significant internal and external controversy surrounding the use of the *Keeping it Wild* protocol by wilderness administering agencies. The protocol results in confused agency decisionmaking because it creates its own extra-statutory definition of wilderness character. The protocol divides the definition of wilderness character in a reductionist manner into five qualities—something the Wilderness Act itself does not do—each of which is evaluated independently. As here, oftentimes the decisionmaker will interpret the qualities as contradictory and weigh them against one another. For example, we have seen agency analyses relying upon this monitoring protocol that conclude an improvement in the "untrammeled" quality of wilderness character will result in the degradation of the "natural" quality of wilderness character. To reconcile this contradiction, decisionmakers often resort to a point system to tally an overall loss or gain. This appears to be encouraged here given the reference to "the totality of wilderness character."

The *Keeping it Wild* approach, as it is applied here, violates basic and fundamental rules of statutory construction where "words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Wilderness Soc'y v. U.S. Fish & Wildlife Serv*., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (citing various cases), where "[p]articular phrases must be construed in light of the overall purpose and structure" of the statute, *United States v. Lewis*, 67 F.3d 225, 228-229 (9th Cir. 1995), and where the statute should be construed "as a symmetrical and coherent regulatory scheme" that does not frustrate the congressional policy underlying the statute, *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995).

Similar problems arise with the incorporation of this point system in Minimum Requirement Decision Guide (MRDG) worksheets. These worksheets, like the *Keeping it Wild* protocol, have not been subjected to formal notice and comment rulemaking, and the worksheets themselves vary from agency to agency and often conflict with the directives in the Wilderness Act. For example, in those worksheets, agencies tally up points for each potentially degrading activity on each quality of wilderness character. In a check-box fashion, each activity gets only 1 negative point regardless of the intensity of its impact. To illustrate, an activity involving 120 helicopter landings to capture and collar wildlife would get one "negative" point for trammeling. An alternative with 10 helicopter landings and fewer collars would get the same. And, in some cases, a decisionmaker may think that a helicopter landing doesn't fit neatly within any of the "quality" categories, so the decisionmaker might not check any of the negative boxes, even though the Wilderness Act expressly prohibits motorized use. This creates a tallying and balancing system that Congress did not intend or express in the Wilderness Act.

Solution: Delete this section.

DRAFT LANGUAGE: "Warn[] or advise[] that the NPS does not install climbing bolts and users should confirm any bolt's fitness for use… Where periodic inspection by NPS staff is not practical, consider other methods such as implementing a climber reporting system… Work with climbing groups or individual climbers to replace or remove fixed anchors."

Problem: *See* concerns at pg. 13 above.

Solution: *See* solution at pg. 13 above.

DRAFT MRA LANGUAGE: "[D]iscuss … whether some type of climbing in wilderness is necessary to fully realize the purposes of the wilderness area."

Problem: "[N]ecessary to fully realize the purposes of the wilderness area" materially misstates the statutory test, and "some type of climbing" does not trigger the Act's prohibition clause (or the MRA process) because climbing without fixed anchors is not prohibited. *See* discussion at pg. 14 above.

Although the Wilderness Act recognizes that recreational activities can be appropriate within wilderness areas, *see* 16 U.S.C. § 1133(b), the statute places paramount its mandate of wilderness preservation, requiring that all activities in designated wilderness be conducted in a manner that "preserv[es] . . . wilderness character" and "will leave [designated wilderness areas] unimpaired for future use and enjoyment *as wilderness*." 16 U.S.C. § 1131(a) (emphasis added). The Park Service may not "elevate[] recreational activity over the long-term preservation of the wilderness character of the land."). *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004).

Solution: Focus on the correct statutory test. This section should read:

> "Discuss whether the authorization of fixed anchor installations for recreational climbing is necessary to administer the area for the purpose of the Wilderness Act. In other words, discuss whether fixed anchor installations are necessary to preserve and protect wilderness lands in their natural, untrammeled state."

This section could also note that climbing without fixed anchors is appropriate in Wilderness, and there are ample opportunities for climbing with fixed anchors outside of Wilderness. "[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).

DRAFT MRA LANGUAGE: "Explain how allowing for climbing opportunities in wilderness preserves this quality ['solitude or primitive and unconfined recreation"] of wilderness character."

Problem: Again, allowing for climbing does not trigger the Act's prohibitions and the MRA process—a proposal for fixed anchors does. Additionally, climbing, without installations, is an appropriate recreational use in Wilderness, but it is not because it has a positive effect on wilderness character or because it is synonymous with wilderness character. This section again conflates the facilitation and enhancement of recreation with the preservation of wilderness character and it incorrectly assumes an affirmative duty by the Park Service to facilitate or enhance particular forms of recreation in Wilderness. *See* discussions at pgs. 11-12 above. It also results in an impermissible weighing of "qualities" that pits statutory terms against one another. *See* discussion pgs. 15-16 above.

Solution: Delete this language.

DRAFT MRA LANGUAGE: "Climbing is an appropriate recreational use in wilderness because accommodating the use may have a positive effect on wilderness character[.]"

Problem: Again, climbing, without installations, is an appropriate recreational use in Wilderness, but it is not because it has a positive effect on wilderness character or because it is synonymous with wilderness character. This section conflates the facilitation and enhancement of recreation with the preservation of wilderness character and it incorrectly assumes a affirmative duty of the Park Service to facilitate or enhance particular forms of recreation. *See* discussion at pgs. 11-12 above.

Solution: Change this to read:

> "Climbing can be an appropriate recreational use in wilderness because it is generally compatible with the preservation of wilderness character."

DRAFT MRA LANGUAGE: "Under [Keeping it Wild 2], a Section 4(c) action that has a positive effect to the qualities of wilderness character may be deemed 'necessary for minimum requirements of administration of the area for the purpose' of the Act because it furthers the statutory mandate to preserve wilderness character."

Problem: This section materially misstates the statutory test for authorizing generally prohibited uses in Wilderness. It conflates the facilitation and enhancement of recreation with the preservation of wilderness character, it incorrectly assumes a affirmative duty of the Park Service to facilitate or enhance particular forms of recreation, and it results in an impermissible weighing of "qualities" that pits statutory terms against one another. *See* discussions at pgs. 11-12 and 15-16 above.

Solution: Delete this section.

DRAFT MRA LANGUAGE: "The occasional placement of a fixed anchor for belay, rappel, or protection purposes does not necessarily impair the future enjoyment of wilderness or violate the Wilderness Act."

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 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: Change this statement so it is consistent with the Wilderness Act. It should 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, untrammeled state."

DRAFT MRA LANGUAGE: "The Step 2 process may also be informed by discussing how climbing relates to the history and traditions of recreational use and enjoyment of the park, and the climbing types, methods, traditions, and ethics that have evolved at the park."

Problem: Again, the historical inquiry is irrelevant to whether an installation may be authorized under the statutory test, just as it would be irrelevant to whether an ATV could be used where it was an historical activity prior to wilderness designation. *See* discussion at pg. 10 above. And the Park Service is bound by the "minimum requirements" standard in the Wilderness Act, which is an administrative exception to ensure that only the minimum administrative action is taken to ensure the protection of Wilderness in its natural, untrammeled state. It is not an exception to be utilized by the general public to facilitate and enhance recreation according to evolving recreational methods and technology. The Park Service has no duty to provide for any particular form of recreation, and it is statutorily prohibited from developing Wilderness to enhance it.

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

Undeveloped climbing is available in Wilderness for those who want it. For those who want developed climbing opportunities, "many other categories of public land administered by the federal government appropriately offer [that]. 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).

Solution: Delete this sentence.

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