Comments on Proposed National Park Service and
U.S. Forest Service Climbing Management Policies
By Chris Winter (chris.winter.esq@gmail.com)
Jamestown, Colorado
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Thank you for the opportunity to comment on the draft climbing management policies prepared by the National Park Service (NPS) and U.S. Forest Service (USFS). I am preparing a single set of comments on the two proposals, which will be submitted to both agencies through the comment portals. The NPS proposes to issue a new Reference Manual (RM) 41 directive that addresses the approval of fixed anchors used for recreational climbing in wilderness areas. USFS proposes to issue Forest Service Manual (FSM) Section 2355 that addresses climbing management in both wilderness areas and other land management designations. My comments focus specifically on the management of fixed anchors used for recreational climbing within wilderness areas under the Wilderness Act of 1964.

My comments are informed by my life experiences as a climber and my long career as an environmental attorney focused on conservation of public lands.

I was born in the shadow of Mt. Rainier to a family that was deeply connected to the mountains. My father was a climber, and I learned to ski at the age of 3 at Snoqualmie Pass, at night, in the rain, walking uphill in a garbage bag. As I grew older, I initially connected to the mountains through my pursuit of skiing, which in many ways sustained me while I endured high school in Pittsburgh, Pennsylvania in the 1980s.

While enrolled at Cornell University, I developed an interest in political science and environmental policy and soon started to think more critically about our relationship and responsibility to the natural world. I decided to attend the University of Michigan Law School in 1995 to pursue a career in environmental law, and my commitment to protecting the environment fully took root.

When I graduated from law school in 1998, I returned to the Pacific Northwest, where I started my career as an environmental attorney and also started climbing as much as possible.

Over the next 20 years, I co-founded and ran a public interest environmental law center – the Crag Law Center – and much of my work focused on conservation of public lands and advocacy for roadless and wilderness areas. In 2006, I testified in Congress in support of the Mt. Hood wilderness additions, which were eventually passed and signed into law by President Obama. I litigated and argued dozens of public lands cases in front of federal district courts and circuit courts up and down the west coast. I taught a class on public lands at Lewis and Clark Law School as an adjunct professor. And I mentored dozens of passionate law students, many of whom went on to lead impactful careers in public lands conservation.

During that time period, I was climbing as much as possible. I cut my teeth climbing in wilderness areas on the volcanoes of the Pacific Northwest – Mt. Hood, Mt. Rainier, Mt. Baker, and the Three Sisters. During the summers, I traveled across the west in pursuit of alpine rock

climbs in places like the North Cascades, the Alpine Lakes Wilderness, the Sierra Nevada, Yosemite National Park, the Wind Rivers, and Rocky Mountain National Park. I fell in love with traditional climbing and mountaineering, but I also enjoyed bolted sport climbing and found that I had an affinity for moving over vertical rock, which came more naturally to me than perhaps anything else I had experienced other than skiing down snow.

My experiences as a climber during those early years of my career – and my deepening connection to wild places and the outdoors – inspired me to persevere in the face of many professional challenges. I eschewed the pursuit of money and a job at a big private law firm. I embraced the challenge of taking on an army of well-funded lawyers to protect people and places that could not speak for themselves in the judicial system. And I ended up working to protect some of the most cherished landscapes in the United States, including the Tongass National Forest, the Cascades, the Oregon high desert, the U.S. Arctic, the Columbia River basin, and the Oregon coast. I'm proud of what I accomplished, and I don't regret a single minute that I have dedicated – and continue to dedicate – to conservation and advocacy.

In 2019, I started a new job as Executive Director of Access Fund, the national advocacy organization for climbers and mountaineers. Because of my experience working on public lands and conservation issues, I was deeply involved in our strategy regarding the protection of public lands as well as our work to ensure sustainable access for climbers. I served as a spokesperson for Access Fund on the issue of fixed anchors in wilderness areas and communicated about this issue with leaders from NPS, the Department of Interior, USFS, the Department of Agriculture, CEQ, and Congressional offices around the country. In March of 2023 I testified in Congress on the Protect American's Rock Climbing Act (H.R. 1380).

Throughout this work for Access Fund, I tried to communicate the experiences I had as a climber exploring our cherished wilderness areas and the way that those adventures inspired my appreciation for the natural world and my commitment to its protection. Those are difficult sentiments to put into words. To put it succinctly, because of my experiences as a climber, I believe we have a moral obligation to care for and protect the mountains and forests and rivers of pure running water and to pass those onto the next generation.

I now work as the Executive Director of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment at the Colorado Law School. In this role, I am leading a research and policy innovation institute while contributing to the education of the next generation of conservation leaders, and I am continuing to build on my 2+ decades of experience in public lands law and policy.

I submit these comments in my own individual capacity and <u>not</u> on behalf of any organization. To me, this is personal, because without climbing, dependent at times on the responsible use of fixed anchors in wilderness areas, my life may have taken a very different trajectory.

In a moment, I will turn to more technical comments on the regulation of fixed anchors under the Wilderness Act, but my concerns are grounded in a fundamental shift in how the land management community is viewing climbers and climbing in wilderness areas. By treating our most basic safety equipment as prohibited in wilderness areas, these new policies threaten to

drive a wedge between people and the wild places that feed our souls. We threaten to rob future generations of Americans of the experiences that inspired me to dedicate my career to protecting these places. And by driving that wedge through the heart of the conservation and climbing communities, we threaten to undermine and erode public support for wilderness at a time where we need to be building a broader and more durable coalition for this work.

By all means, climbing must be managed like any other human activity, and climbers must take care of these incredible places if they are to enjoy the privilege of experiencing them. But the approach reflected in these proposed guidance documents – to regulate climbing through a myopic focus on prohibiting fixed anchors – is a terrible policy that is not required by the Wilderness Act. The land management agencies have all the existing authority they need to effectively manage climbing, they simply need to use them.

If the agencies were to embrace this cooperative relationship in earnest, to treat the climbing community as partners, climbers would step up and do much of the agencies' work for them – self-education, self-policing, data collection, stewardship, etc. But these new policies – these new prohibitions – will never have buy-in from the climbing community because they fundamentally threaten our safety unnecessarily. And without buy-in from climbers, these new policies are doomed to failure, or at least irrelevance. The land management agencies are missing a unique opportunity to partner with one of the most committed and responsible user groups on protection of our most threatened and cherished areas of public land. It's a tragedy – and that's before anyone has lost their life.

My fundamental comment is this - stop and start over. Pull back these draft policies. Convene the stakeholders. Ask for help. Begin again.

A. Fixed Anchors Used for Recreational Climbing Are Not Prohibited Installations Under Section 4(c) of Wilderness Act

I begin with the text of the statute – Section 4(c) of the Wilderness Act.

> **(c) PROHIBITION PROVISIONS: COMMERCIAL ENTERPRISE, PERMANENT OR TEMPORARY ROADS, MECHANICAL TRANSPORTS, AND STRUCTURES OR INSTALLATIONS; EXCEPTIONS: AREA ADMINISTRATION AND PERSONAL HEALTH AND SAFETY EMERGENCIES**
>
> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

16 U.S.C. § 1133(4)(c).

The term "installation" was not defined by Congress, and thus climbers and land managers have debated for decades whether that term was **intended by Congress** to prohibit the use of fixed anchors for recreational climbing. Let us not forget that the purpose of statutory interpretation is to determine Congressional intent.

1. The definition of "installation" in RM 41 has not been subject to public notice and comment and conflicts with the statute.

NPS asserts that fixed anchors are "installations" because RM 41 § 3.1 includes a definition of installation as "anything made by humans that is not intended for human occupation and is left unattended or left behind when the installer leaves the wilderness." Draft RM 41 at 3. I have four central comments on NPS's reliance on this definition of "installation" in RM 41.

First, this definition in the RM was never subject to public notice and comment. Therefore, the definition itself does not have the force and effect of law. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015). Nor would the agency's statutory interpretation be entitled to deference by a court (that is if the Supreme Court preserves the concept of deference to agency statutory interpretations) because of this procedural defect. It is worth noting that the Supreme Court's apparent hostility to the *Chevron* doctrine should cause NPS and USFS to take more seriously the public's critiques of its statutory interpretation.

NPS, however, treats this definition as set in stone and predetermined. By failing to take public comment when the interpretation was initially incorporated into the RM and then treating that definition as set in stone when developing subsequent policy guidance, the agency, through this highly suspect two-step process, is depriving the public of a reasonable opportunity to weigh in on the proper interpretation of the statute. The public wasn't invited to provide comment during step 1. And during step 2, NPS is treating that definition and the statutory interpretation as final and no longer subject to public comment.

Second, because of this broken public process, NPS has <u>never</u> explained why the definition in RM 41 § 3.1 is the correct interpretation of the term "installation" as set out by Congress in Section 4(c) of the Wilderness Act. The agency has failed to provide any rationale that would connect the dots between the very specific language Congress settled on – the term "installation" – and the incredibly broad definition included in RM 41 § 3.1. The agency must explain its rationale before finalizing important nationwide policy guidance. This flaw only serves to further insulate improperly the agency's statutory interpretation from public scrutiny.

Third, the definition in RM 41 § 3.1 is obviously overbroad and inconsistent with the statute and Congressional intent. To illustrate the point, one should also take into account the RM definition of structure: "Anything made by humans that is intended for human occupation, or their possessions, and is left behind when the builder leaves the wilderness."

Taken together, the terms "installation" and "structure" would encompass literally anything made by man. Thus, Section 4(c) of the Act, under this definition, would prohibit anything and

everything made by man being left behind in wilderness. And, as NPS clarifies in the draft RM, there is no "de minimis" exception to the Act's prohibitions.

This incredibly broad definition of installation is inconsistent with the statute. If Congress intended to prohibit literally anything and everything made by a human, it would simply have said so in the statute. Instead, Congress carefully crafted the much narrower language of "structure" and "installation." The definitions in RM 41 fail to give meaning to Congress's decision to carefully choose these unique and much more narrowly focused terms.

As courts have made clear, "Congress did not mandate that the Service preserve the wilderness in a museum diorama, one that we might observe only from a safe distance, behind a brass railing and thick glass window." *Wilderness Watch v. U.S. Fish and Wildlife Svc.*, 629 F.3d 1024, 1033 (9th Cir. 2010). Rather, Congress had to balance competing policy considerations, and the agencies are thus charged with "preserving wilderness character" while also "providing opportunities for wilderness recreation" so the public can experience and connect with these incredible places. *Id.* A blanket prohibition on leaving behind anything and everything made by a human conflicts with the overall structure of the Act and the context provided by other sections of the same statute, as well as guidance from federal courts.

Fourth, the agencies' own practice of administering the Wilderness Act demonstrates unequivocally that the definition of "installation" is overbroad and inconsistent with the statute.

Take as examples:

- Hunting – While hunting is generally prohibited in NPS units (for reasons unrelated to the Wilderness Act), USFS and the Bureau of Land Management allow hunting and trapping in wilderness areas. Hunters sometimes leave behind shell casings and spent ammunition. They may also leave traps set in wilderness area for many days at a time (*i.e.*, while the person has left the wilderness area). The agencies do not treat these man-made items as prohibited "installations" that must be approved through a Minimum Requirements Analysis.

- Fishing – Fishing is considered a legitimate primitive and unconfined recreational activity in wilderness areas. Unfortunately, anglers occasionally lose fishing gear – flies, lures, and fishing line that becomes snagged or are otherwise abandoned. NPS and other land management agencies do not consider this fishing equipment to be an "installation" that must be approved through a Minimum Requirements Analysis.

- Backpacking – Backpackers and hikers will bury human waste (something that is made by man). A backpacker might use and then burn toilet paper, leaving behind ash and residue. At times a backpacker may set up camp and then go for a day hike and exit the wilderness area. None of these things are treated as prohibited "installations" that must be approved through a Minimum Requirements Analysis.

- Backcountry and Cross Country Skiing – Skiers rely on wax in order to efficiently travel over snow through wilderness areas, which is considered to be primitive and unconfined

> recreation. At times, this use may result in ski wax residue being left behind in the wilderness area, albeit in de minimis quantities. Ski wax residue is not treated as a prohibited "installation" that must be approved through a Minimum Requirements Analysis.

It may sound ridiculous to say that burned toilet paper would be a prohibited "installation" under Section 4(c) of the Wilderness Act – akin to a road or a house or a bridge – but that is exactly what the flawed definitions in RM 41 would require. These examples highlight the fact that this incredibly overbroad definition of installation is being applied selectively by the agencies without explanation to only a limited subset of uses that fall within the scope of this interpretive language. Meanwhile, other primitive and dispersed recreational activities remain unaffected even though the definition of installation encompasses those other uses as well. Climbers are being singled out and targeted arbitrarily.

Thus, these examples illustrate that Congress carefully crafted the Wilderness Act to protect wilderness values while dedicating these areas to primitive and unconfined recreational experiences for the public. As a matter of practice, the land management agencies are obviously <u>not</u> treating things made by man that may be left behind in wilderness areas in conjunction with primitive and unconfined recreation as prohibited "installations." This practical approach that the agencies are taking with respect to other forms of primitive and unconfined recreation strikes the correct balance between the competing policy demands in the Wilderness Act and properly limits the reach of the Section 4(c) prohibitions to ensure they do not otherwise subsume primitive and unconfined recreation and historic uses that are protected by the Act. Unfortunately, climbers are now being singled out and targeted arbitrarily while these others forms of recreation are not.

The land management agencies of course can regulate all of these primitive and unconfined recreational activities to protect wilderness character, but they should not do so through the statutory prohibitions in Section 4(c) of the Act. And they should not presume those uses to be prohibited and then subject to a rigorous and burdensome exceptions process – a Minimum Requirements Analysis – that was never intended by Congress for recreational uses.

In sum, the definition of "installation" in RM 41 is plainly invalid and inconsistent with the statute. NPS should start over and engage the public in a reasonable process to define the statutory term.

Finally, it's important to note USFS has no definition at all of "installation". USFS simply states without any explanation that "[f]ixed anchors and fixed equipment are installations for purposes of Section 4(c) of the Wilderness Act (16 U.S.C. § 1133(c))." Why? It's frankly disheartening and hard to believe that the USFS does not define the statutory term and provides no other explanation for why it is applying that term to the particular use at issue here.

For all of these reasons, the statutory interpretation offered by NPS and USFS – to the extent there is one – is plainly inconsistent with the Wilderness Act. The interpretation of "installation" has never been subject to public scrutiny. It is overbroad and conflicts with the plain language of the Act and the carefully crafted terms chosen by Congress. And the agencies have made no attempt to explain how their definition of "installation" is consistent with text and context

provided by the other sections and subsections of the Wilderness Act or with the guidance provided by federal courts.

2. The agencies have failed to explain why they have changed their position on interpretation of the Wilderness Act and their departure from prior agency practice.

In addition to the flaws discussed above, it's important to note that neither NPS or USFS have previously interpreted the term "installation" to include fixed anchors used for recreational climbing. In other words, since the Wilderness Act was passed in 1964, fixed anchors have never been treated as a prohibited use under Section 4(c) of the Act as a matter of nationwide policy or interpretation. I have heard a variety of tortured explanations by agency staff in an attempt to argue around this basic point, but none of them are convincing. It is plainly obvious that the agencies have not treated fixed anchors as prohibited installations because they have been allowed – through Superintendent compendiums, climbing management plans, permits and authorizations for their use, and other means of agency practice.

Thus, after almost 60 years of history, after allowing climbers to responsibly use fixed anchors in wilderness areas, the agencies are now changing their interpretation of the statute and announcing for the first time that fixed anchors are prohibited installations under Section 4(c) of the Act.

It is a basic tenet of administrative law that when an agency changes its position it must "display awareness that it *is* changing position" and it must also "show that there are good reasons for the new policy." *FCC v. Fox Television*, 556 U.S. 502, 515 (2009); *see also Northpoint Technologies, Ltd. V. F.C.C.*, 412 F.3d 145, 156 (D.C. Cir. 2005) ("A statutory interpretation premised in part on * * * an unexplained departure from prior [agency] policy and practice is not a reasonable one").

This requirement is especially important here, because the change in policy threatens the physical safety of the climbing community. For almost 60 years, the land management agencies have allowed climbers to explore America's wilderness area through the responsible use of fixed anchors. Now, many of those historic routes are well-known in the climbing community, and people travel from around the world for the opportunity to experience those historic routes and awe-inspiring environments. Thus, per the agency's prior interpretation and practice, climbers were allowed to use fixed anchors to safely navigate that terrain.

Now, however, under this new interpretation of the Act, the safety equipment that climbers have relied upon for years will suddenly be treated as a prohibited installation. As a result, the maintenance of this existing safety equipment, which slowly becomes more and more dangerous over time, will be bogged down in bureaucratic paperwork or prohibited altogether. Thus, the agencies' changing position will be the direct cause of climbers first being allowed to place this safety equipment and then <u>not</u> being able to maintain and/or replace it. If this agency interpretation become nationwide practice, someone, perhaps many people, will be injured or killed as a result of this change in agency position.

Given this very real threat to climber safety, it is especially imperative for the agencies to explain to the public why they are changing their interpretation of the Wilderness Act and their long-standing practice as to how they manage climbing access and the responsible use of fixed anchors.

Both USFS and NPS have fallen far short of this requirement. Neither agency even acknowledges that it is changing its practice. Neither agency provided any explanation for the change, no less a reasonable explanation. This is the hallmark of arbitrary and capricious agency decisionmaking.

The agencies are also changing position by requiring that fixed anchors in wilderness be approved by an MRA. DO41 is perfectly clear that an MRA is required only for administrative use of fixed anchors in wilderness. Now, however, the draft guidance in RM41 proposes to require an MRA for all uses of fixed anchors in wilderness including recreational uses. NPS must explain why it is changing course. Is it due to a change in statutory interpretation? If so, the agency must explain why its interpretation has changed. Is it due to some other reason? If so, the agency must provide that explanation to the public.

3. An "installation" is something that is built or constructed in a wilderness area like a bridge, a water tank, an antenna, or a corral.

Both NPS and USFS have failed to provide the basis for their interpretation of the term "installation," and neither agency has specifically invited comment on how to interpret the statute, thus the public is operating at a severe and unreasonable disadvantage on the question of statutory interpretation. Because of these procedural flaws, the agency should start over and first provide the public with the basis for its interpretation and invite comment on that rationale.

Despite these procedural flaws, I share my thoughts here on how the agency ought to interpret the term "installation." First, that term must be understood in the context of those other terms in the same subsection. "Temporary roads" and "structures" are both built and constructed by humans and thus conflict with the "undeveloped" aspect of wilderness. Temporary roads allow for human transportation. Structures allow for human occupation. "Installations" should be thought of in the same way – something that is built or constructed – for a purpose similar to but distinct from transportation or human occupation. Examples include antennas, corrals, weather stations, water tanks – other pieces of human infrastructure that are built and/or constructed on the landscape.

This definition is also consistent with the overall purpose of the Wilderness Act and the context provided by other sections. It gives meaning to the use of "undeveloped" in the definition of wilderness in section 2(c) as well as the language "without permanent improvements or human habitat." This definition is also consistent with the Act's focus on enhancing and protecting primitive and unconfined recreation – and other historical uses – in sections 2(c) and 4(b).

Thus, fixed anchors used for recreational climbing should not be treated as "installations" because they are not built or constructed in a wilderness area in the same way that a temporary road, a bridge, an antenna, a corral, or a water tank are. Those are all "permanent improvements"

that are unrelated to the protected uses – primitive and unconfined recreation. Fixed anchors, in contrast, are essential safety equipment for such recreation. Whereas a temporary road and a structure are obvious and noticeable signs of development in a wilderness area, fixed anchors are invisible to the human visitor except for someone who is virtually on top of them in an otherwise vast and wild landscape.

B. Conclusion

As I wrap up my comments, I can't help but reflect on the many years of work that the climbing community, conservation groups, and land managers across the country have invested in this issue. Decades of collaboration have been spent developing a common sense and effective approach to managing climbing in a way that protects wilderness character and provides safe and sustainable access for a unique and inspirational form of primitive and unconfined recreation.

After all this work, and hundreds of hours of conversations with agency personnel, Congressional staff, climbers, policymakers, and colleagues in the conservation community, I still don't have answers as to why the agencies have decided now almost 60 years after the Wilderness Act was passed to suddenly start treating fixed anchors as prohibited installations that must be reviewed through an MRA process.

Is it the litigation risk? In the last 60 years, there has never been a successful lawsuit filed challenging whether fixed anchors should be treated as a prohibited installation. The status quo was working just fine, and climbing management has not been litigated in the federal courts. However, by changing their interpretation of the statute, the agencies are stumbling into a future litigation quagmire, which is likely to be driven not by climbers but by fringe groups who will take advantage of the new definition of fixed anchors as installations to litigate and challenge how the exceptions/MRA process should be applied. They will attempt to drag climbing management decisions into the federal court system by challenging MRAs and associated planning documents issued for fixed anchors.

Is it philosophical? That may be the root of this new-found interpretation, but does the Wilderness Act truly embody the philosophy that would espouse a blanket prohibition on fixed anchors? That is not how Congress wrote the Act – and for good reason because in many ways such a black and white philosophical approach to Wilderness is untenable. By forcing that interpretation of the Act and that philosophical view of wilderness on the public, I believe that the agencies threaten and undermine public support for the Act and its standing in our collective national consciousness.

Is it a concern for the protection of wilderness character? This may be in play as well, but I don't think anyone actually believes this new interpretation of the Act will lead to better outcomes. Agencies will be overwhelmed by paperwork. Climbers will be alienated by the land managers, and they will be afraid to share information and collaborate. Conflict and secrecy will predominate. And all of this will stand in the way of the open, collaborative, cooperative partnerships that have proven to be the most effective and durable way of managing human powered recreation to protect natural resources.

There is another way. We should step back and build upon the collaborations we have developed over the last 60 years. The lawyers should largely get out of the way. Let climbers and land managers work together, cooperatively, in local communities, to protect the resource, to experience the wonder and majesty of wilderness, to test ourselves, and to pass all of that on to the next generation as messy and imperfect as all of that may be.

With that, I suppose I will conclude my comments and disappear into the wilderness in search of winter snows and lonely peaks. I urge the agencies to consider the more comprehensive comments submitted by the Access Fund, American Alpine Club, American Mountain Guides Association, and other climbing organizations. We simply don't need to manage climbing fixed anchors through a burdensome, wasteful MRA process as a prohibited use. We've proven over the last 60 years that there is a better way.

In the end, I hope that future generations will have the same opportunity I have had to find themselves in the vast American wilderness.

/s/ Chris Winter
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Jamestown, Colorado