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Comments: Comment on the U.S Forest Service proposal to amend to the Forest Service Manual by adding a new Section 2355.

Statement of interest

In 2000, I attended the sessions of the Forest Service Negotiated Rulemaking on Fixed Anchors in Wilderness, Federal Register, Vol. 65, No. 111, June 8, 2000 (hereinafter "Reg-Neg"), as counsel to one of the participants. While the Reg-Neg did not lead to agency rulemaking on fixed anchors, it provided a forum for airing the full range of views among stakeholders, and remains a valuable source of perspective on the issue. As a climber and supporter of wilderness, the following comments are offered in an attempt to bridge the differences among stakeholders, and to propose a better framework for managing fixed anchors and fixed equipment in Wilderness Areas with the goal of preserving wilderness character for future generations, including the providing opportunities for primitive and unconfined recreation through rock and mountain climbing with the prudent use of fixed anchors and fixed equipment.

Fixed Anchors and Fixed Equipment are an integral part of wilderness climbing

The proposed new section 2355.03(4) of the Forest Service Manual states that "Climbing has long been an important and historically relevant form of primitive or unconfined recreation consistent with the wilderness character of many [National Forest System] wilderness areas." This seems a statement that would enjoy wide agreement. However, it would be more accurate for the proposal to say, "Climbing with fixed anchors and fixed equipment has long been an important and historically relevant form of primitive or unconfined recreation consistent with the wilderness character of many NFS wilderness areas." The failure to reference fixed anchors and fixed equipment in the agency's version of the text is telling. The library of the American Alpine Club contains stellar examples of where the use of fixed anchors and fixed equipment was an integral part of the wilderness experience prior to the adoption of the Wilderness Act. See, Cathedrals of Wilderness - Three First Ascents from the Historic Roots of Wilderness Climbing, Hannah Provost, January 2024, <https://americanalpineclub.org/news/2024/1/24/three-climbs-from-the-historic-roots-of-wilderness-climbing>

As discussed extensively during the Reg-Neg, climbing with fixed anchors and fixed equipment (as broadly defined in section 2355.05 of the proposal, hereinafter "FA/FE") has a close and longstanding connection with wilderness. In many ways it is the quintessential wilderness experience, epitomizing the untrammled, undeveloped, primitive and unconfined recreational aspect of "wilderness character" that the agency is required to protect and preserve. It should not be a surprise that many advocates for the Wilderness Act, and for specific area designations, had experience climbing with FA/FE in areas that were later designated as wilderness. With this history in mind, that the proposal's reference to climbing in wilderness, without reference to FA/FE, seems a re-writing of history that reflects a preexisting bias against the use of FA/FE in wilderness that is counter to the historical record. In future drafts, the agency should acknowledge the strong connection between the wilderness value of primitive or unconfined recreation and FA/FE by more accurately capturing the historical record of pre-Act FA/FE use in future wilderness areas.

The proposal correctly states at section 2355.32, that "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." However, the proposal goes on to incorrectly

define FA/FE as, "installations for purposes of section 4(c) of the Wilderness Act."

The tools encompassed by the definition of Fixed Anchor and Fixed Equipment are not an 'installation'

As extensively detailed during the Reg-Neg, the precise definition of 'installation' was not explicitly discussed in the House and Senate reports of the Act, nor in the Congressional Record. The text and legislative history of the Act clearly support a reading of 'installation' as referring to a military installation or other government installation, and indicate an intent to encompass structures exceeding temporary or minimal nature that would negatively impact the wilderness experience, e.g., a power line, weather station or radio tower. There is scant legislative history to support the assertion that FA/FE constitute and 'installation' under the Wilderness Act.

The proposal asserts an inappropriately broad definition of 'installation.' It builds on an inter-agency working group's view of 'installation' as: "Anything made by humans that is not intended for human occupation and is left behind when the installer leaves the wilderness." It also appears to take the view that there is no lower limit to left-behind or installed items that would constitute an 'installation.' In other contexts however, the agency effectively accepts that there exists a lower threshold to what constitutes and installation for purposes of the Act, and it is arbitrary and capricious to assert that all FA/FE are 'installations' when other left behind items are not similarly treated.

Effective management of wilderness does not require FA/FE to be categorized as 'installations'

The agency's assertion that FA/FE are an 'installation' is unnecessary to managing FA/FE in wilderness. The Act's direction that the administering agency "shall be responsible for preserving the wilderness character of the area" provides an adequate bases for regulating a range of activities that like FA/FE can in some circumstances impact wilderness character, but do not meet the definition of without reference to 'installation'. For example, human waste constitutes something that: 1) is made by humans, and 2) is frequently left behind in wilderness areas, yet there is no indication that the agency considers the placement of human waste in wilderness areas to be a prohibited 'installation'. On the contrary, the agency's recommendation for managing human waste in some wilderness areas involves installing the waste in a "cat hole" dug into the ground. See e.g., <https://www.fs.usda.gov/recarea/invo/recarea/?recid=21880> .

Despite cat holes not being an 'installation,' the agency is fully empowered to act to preserve wilderness character, and does so when there is a potential threat to wilderness character. Furthermore, the agency is able tailor its management response to the threat level posed by the activity of concern, including an outright prohibition. See e.g., the mandate to pack human waste out of the Mt Whitney Zone. <https://www.fs.usda.gov/detail/invo/recreation/hiking/?cid=stelprd3820395> . This is not to say that management of human waste in wilderness areas is not without challenges, but only to say that the agency does not need to resort to 'installation-based' regulation as the legal basis for managing the impact of an activity on wilderness character.

'Installation-based' regulation of FA/FE risks resource misallocation or de-facto bans

The proposal's treatment of FA/FE as an 'installation' forces the agency into cumbersome, costly and time-consuming Minimum Requirements Analyses (MRA) and permitting processes. This will likely result in one of two bad outcomes. On the one hand, limited Forest Service resources could end up being allocated to MRAs and/or burdensome permitting of FA/FE in a manner that limits the ability of local forest personnel to address higher priority wilderness management needs. Section 2355.21 conditions the preparation of a climbing management plan to wilderness areas where "funding and resources allow." However, if it is the only path to enable placement

of FA/FE, local political pressure on agency personnel to implement the proposed planning, analysis and permitting could result in higher priority issues being sidelined.

On the other hand, the more likely outcome is that limited agency resource may turn the proposal into a de-facto ban on FA/FE, even in areas where there is little or no indication of any threat to wilderness character from climbing with FA/FE. See e.g., the "temporary moratorium" on placing (and replacing) bolts in the Superstition Wilderness begun in the 1990s.

As the Reg-Neg made clear, in most wilderness areas, climbing with FA/FE is simply not a potential threat to wilderness character. In my personal experience the negative impact on primitive/unconfined recreational quality of not being able to find the limited FA/FE far exceeds the potential impacts on wilderness character from the presence of FA/FE. The need for local area management to prioritize their biggest issues will likely push the MRA/permitting of FA/FE to the bottom of the area's priority list, resulting in a de-facto ban on FA/FE in many wilderness areas. And given the breadth of the proposal's definition of FA/FE, the result could easily become a de-facto local ban on most climbing, a result far beyond the stated goal of the guidance to manage FA/FE. If finalized in its current form, the proposal could have the perverse effect of punishing the very climbers who engage in the most responsible use of FA/FE by limiting Wilderness climbing accessibility, as well as creating safety issues.

'Installation-based' regulation diminishes the totality of wilderness character

The proposal's 'installation-based' approach risks undermining the very thing it sets out to protect. All stakeholders seem prepared to acknowledge that excessive FA/FE can threaten wilderness character. I think all stakeholders would also acknowledge that some level of managerial process and bureaucracy is inevitable to preserve that character, and that the more severe the risk to wilderness character, the more process is justified to preserve the wilderness.

However, the assessment of whether the recreational experience embodies the qualities of wilderness character cannot be limited to the geographic boundary of the designated wilderness area, and the level of process and bureaucracy required as a prerequisite to wilderness recreation must be taken into consideration in evaluating whether the Act's goals related to untrammelled, primitive and unconfined recreation are being met. At some point, forcing users into an onerous and bureaucratic process for the enjoyment of wilderness undermines and even negates the benefits the process may offer in preserving primitive and unconfined wilderness recreation values - the user is trammled more by the experience of going through the process than by the experience of encountering FA/FE in wilderness.

This is a matter of proportion and balance. This point cannot be taken to justify the irrevocable loss of wilderness character, but if the permitting process of the agency looks anything like to template permits in the proposed Reference Manual 41 of the National Park Service, by the time climbers make their way through the permitting gauntlet, their wilderness experience has likely been degraded beyond they might experience in the absence of any managerial controls on FA/FE. The agency cannot fulfill its role under the Act if it ignores the impacts of its management regime on the totality of the wilderness character and experience. In the case of FA/FE, there is a strong likelihood that negative impacts of the envisioned national permitting regime, would outweigh the potential positive impacts in the limited areas where FA/FE use can be said to pose a risk to wilderness character - resulting in a net reduction in wilderness character

Grounding management of FA/FE in a local determination of risks to wilderness character is preferable to 'installation-based' regulation

The agency's approach to managing human waste in wilderness areas offers a superior framework to the proposal's reliance on a tortured reading of 'installation.' As noted above, the agency does not need to categorize FA/FE as an 'installation' in order to effectively manage their use. Where the agency identifies a potential risk to wilderness character or values, it can institute a range of managerial tools to preserve the wilderness for future generations - information campaigns, self-issued permits and reporting, agency-issued permits, numerical or special limits, or even outright bans. All of these tools are available to local managers, and the proposed guidance should be revised to assist local managers to identify and demonstrate the presence of such risks.

This risk-based approach reverses the presumption embedded in the proposal - from banned until proven innocent, to allowed unless FA/FE pose a risk to wilderness. The following language from the proposal is illustrative of such guidance: "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." Revised guidance should also offer criteria for moving through a hierarchy of managerial responses to address the identified risks. Much of the language in Step 2 of Section 4 of the National Park Service's proposed revisions to its Reference Manual #41 could be useful here - provided that it also includes reference to considering the potential negative impacts on wilderness character of an overly burdensome permitting process.

Enhanced resource prioritization

We should acknowledge that this approach will require additional work up front by local agency personnel to identify and document developing risks. However, by avoiding un-necessary work where wilderness values are not at risk, this approach is likely to reduce overall demands on agency resources, and focus limited resources where the need is greatest. The end result is likely to be a superior outcome at less cost - a potential win-win solution.

Even if the recommended risk-based approach of making up-front, area-specific determinations does not result in an overall reduction in agency workload as compared to the proposal's 'installation-based' approach, it would significantly reduce the likelihood that the proposed guidance leads to de-facto bans on FA/FE or climbing more generally. Thus, it would increase the opportunity for primitive or unconfined recreation in wilderness areas with FA/FE, and therefore should not be rejected arbitrarily.

Conclusion

Does the agency really want to ground the management of fixed anchors in a reading of the Wilderness Act that arbitrarily ignores the historical record of climbing with FA/FE in pre-Act wilderness areas, that is not solidly grounded in legislative history, and adopts a standard for what constitutes an 'installation' that it does not apply to analogous situations where the man-made is left-behind? And does the agency really want to do this in the likely absence of Chevron deference?

I urge the agency not to make the aggressive definitional claim that FA/FE constitute an 'installation,' when it is wholly unnecessary, when there is broad agreement among stakeholders that regulations linking management of fixed anchors to instances where their use can be demonstrated to risk impairing wilderness character, and when doing so has the potential to turn strong advocates for wilderness into potential opponents of future wilderness designations.

In sum, the proposed revision to the Forest Service Manual is unwise, unnecessary, and contrary to law. The agency should withdraw the current draft and re-propose guidance recognizing that FA/FE are not 'installations' for purposes of the Wilderness Act. Revised guidance should instead: 1) establish criteria for identifying

situations where fixed anchors and fixed equipment are, or may become, present to a degree that risks degradation of wilderness character, 2) offer a range of alternatives for managing FA/FE in those situations, and 3) ensure there is a net increase in totality of wilderness character after balancing the positive impact of the selected management tool against the negative impact of any permitting process on an applicant's overall recreational experience.