



WILDERNESS WATCH

Keeping Wilderness Wild

August 4, 2019

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To whom it may concern:

We are commenting on the scoping notice for the Rainbow and Swift Creek Crossings Project. Wilderness Watch is a national nonprofit wilderness conservation organization dedicated to the protection and proper stewardship of the National Wilderness Preservation System. The Forest Service needs to look at alternatives that eliminate or minimize the use of motorized equipment and structures in the Wilderness. Our comments address these issues through concerns and questions.

At the outset, however, we need to emphasize that this project can't be approved by a mere categorical exclusion. Construction of a new facility in the Wilderness and the potential use of motorized equipment (the scoping notice is not clear whether cable cars or bridges would require motorized use) is, by the terms of the Wilderness Act, a significant impact on Wilderness. It is an abuse of the NEPA regulations as well as the Wilderness Act to suggest this is merely construction and reconstruction of trails.

Wilderness

The first sentence of Section 2(a) of the 1964 Act describes the statute's over-arching mandate. The "purpose" is "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness" through the establishment of "a National Wilderness Preservation System" and that system "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 . . .". (emphasis added). It is instructive that recreation does not appear in this purpose. Even in the balance of Section 2(a) the words "use and enjoyment as wilderness" refer to all six of the acceptable public uses listed in Section 4(b).

The mandate is to administer all activities so that this Wilderness will remain "unimpaired for future use and enjoyment as wilderness". It is

also clear that this mandate applies to the setting rather than to any particular use or recreational experience.

The Wilderness Act is explicit in section 4(c):

. . . except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (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.” (emphasis added)

Purpose is singular in section 4(c) so it is not to be confused with the allowable public uses in section 4(b), which are expressly conditioned upon compatibility with the rest of the Act. Section 4(c) prohibits structures and motorized uses, including helicopters, absent very narrow exception where the structure or motorized use is “necessary to meet minimum requirements for the administration of the area for the purpose of [the Act].” Thus, the Forest Service must make a reasoned, specialized finding of necessity before it may authorize this project, and for the reasons stated below, the project as proposed is not necessary.

The regulations of the Forest Service provide important direction.

The Forest Service Manual (FSM) explains how the requirements of the Wilderness Act are to be met. The overriding management philosophy, regarding impacts, including nonconforming uses, on Wilderness is as follows (FSM 2320.6):

The goal of wilderness management is to identify these influences, define their causes, remedy them, and close the gap ("A") between the attainable level of purity and the level that exists on each wilderness ("X").

Thus, it is clear that the goal of wilderness management is to keep and improve the wild conditions of wilderness.

The same section of the Manual further notes:

Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness.

Preserving wilderness character is paramount and more important than visitor activity (recreation).

Specifically regarding recreation, the Manual policy states (FSM 2323.12 part 3):

Manage for recreation activities that are dependent on the wilderness environment so that a minimum of adaptations within wilderness are necessary to accommodate recreation.

The FSM 2323.13f allows that the Forest Service can “Provide or replace bridges only: 1. When no other route or crossing is reasonably available.” The scoping letter fails to address this issue. Manual Direction also speaks to wilderness character in terms of challenge. FSM 2320.2 (part 4) notes:

Protect and perpetuate wilderness character and public values including, but not limited to, opportunities for scientific study, education, solitude, physical and mental challenge and stimulation, inspiration, and primitive recreation experiences.

Why, after years of designation, is it now determined that one or possibly two structures--the second would apparently occur in Wilderness as the creek itself is the boundary—are deemed necessary. This proposal amounts to a degradation of wilderness character.

In sum, the agency has a high bar to show that these bridges and or crossings are the minimum necessary to administer the area as Wilderness. We address questions and concerns in the following section and offer potential alternatives.

Need/Potential Options and Alternatives

There has not been a so-called need for these bridges in the past or else the Forest Service would have constructed them. Changing use patterns—through-hikers—do not justify the construction of new structures in the Wilderness. Further, the scoping notice provides no documentation that fords are unsafe. There is no analysis of the amount of use, incidents of problems, or anything that would support the agency’s claim. Certainly, a necessity determination would require some basic data and information on when and how the trail is used now.

The questions and concerns listed in the above paragraph lead into the next topic, that of NEPA analysis. Simply put, the fact that the questions raise serious issues that must be addressed, along with the fact the proposed action would violate a Forest Plan standard, support a determination that a CE would be inadequate.

NEPA

The Forest Service must also complete an appropriate National Environmental Policy Act (“NEPA”) analysis for the project addressing the above concerns and fully analyzing direct, indirect, and cumulative impacts as well as a reasonable range of alternatives that may avoid or lessen adverse impacts. A categorical exclusion is unlawful for a project authorizing prohibited uses in a designated wilderness, including the construction of a permanent structure that will remain on the landscape for decades. By the Wilderness Act’s statutory terms, prohibited uses degrade wilderness character, and in the case of a permanent structure, will degrade wilderness character for a very long time.

The scoping notice incorrectly states there are “no known extraordinary circumstances.” Wilderness is an extraordinary circumstance and a CE cannot be used.

The Environmental Impact Statement is NEPA's core requirement. Environmental concerns must be “integrated into the very process of agency decisionmaking” and “interwoven into the fabric of agency planning.” *Andrus v. Sierra Club*, 442 U.S. 347, 350- 351 (1979). NEPA directs federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) for

federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The phrase “human environment” is “interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. The reason for an EIS is two-fold: 1) to ensure that the agency will have available and will carefully consider detailed information on significant environmental impacts when it makes decisions, and 2) to “guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989); 40 C.F.S. § 1501.2(b).

Pursuant to NEPA’s implementing regulations, to determine whether an EIS is required, federal agencies may first prepare a less detailed environmental assessment. *See* 40 C.F.R. § 1501.4. An environmental assessment should consider several factors to determine if an action will significantly affect the environment, a circumstance that would mandate the preparation of an EIS. If the agency concludes the action will not significantly affect the environment, it must issue a “Finding of No Significant Impact” to justify its decision not to prepare an EIS. 40 C.F.R. § 1508.13. The Finding of No Significant Impact must provide a convincing statement of reasons why the action will not have a significant effect on the environment. *Id.* It is *only* when the proposed action will not have a significant effect on the environment that an EIS is not required. 40 C.F.R. § 1508.13. “[I]f substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment, a decision not to prepare an EIS is unreasonable.” *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir.1998).

NEPA’s implementing regulations allow certain categories of actions to be categorically excluded from NEPA review if they “do not individually or cumulatively have a significant impact on the human environment and [if they] have been found to have no such effect in procedures adopted by a Federal agency in implementation of those regulations.” 40 C.F.R. § 1508.4. Even if a proposed action falls within a category of actions that generally may be categorically excluded, NEPA regulations do not allow the proposed action to be categorically excluded if extraordinary circumstances exist. 36 C.F.R. § 220.6. The Forest Service’s NEPA regulations includes a list of resource conditions that may indicate an extraordinary circumstance exists. 36 C.F.R. § 220.6(b); *see also* FSH 1909.15 § 31.1, 2. These resource conditions include the presence of designated wilderness, and the Ninth Circuit has held that a categorical exclusion is not appropriate under the Forest Service’s own management guidance for actions involving prohibited uses within designated wilderness. *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d at 641. The project proposal indicates that the Forest Service may rely upon 36 C.F.R. § 220.6(e), which contemplates categorical exclusions for the construction and reconstruction of trails. Such reliance is improper where the action involves the construction of a new, permanent structure in a Wilderness where structures are prohibited (and the use of motorized equipment in a wilderness where motorized equipment is prohibited).

An agency may use a categorical exclusion only if there is *no* potential for significant effects to the environment. When an action may have the *potential* for a significant effect, an EA or EIS must be prepared. *See* 40 C.F.R. §§ 1508.4, 1508.27; *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007); *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007). The Wilderness Act makes clear that permanent structures, helicopters, and motorized uses degrade wilderness character and prohibits them accordingly, so there is clearly the *potential* for significant effects to a unique, protected area. Indeed,

courts have routinely described the Wilderness Act's prohibition on structures as “**strong,**” *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1039 (9th Cir. 2010), “**categorical,**” *High Sierra Hikers Ass’n v. U.S. Forest Serv.*, 436 F.Supp.2d at 1137, “**specific**” and “**protective,**” *Olympic Park Assocs. v. Mainella*, 2005 WL 871114 at *7 (W.D. Wash. Aug. 1, 20015), and a “**clear proscription,**” *Iwamoto*, 853 F.Supp.2d at 1070. The decision to place a new structure or two in the Wilderness--a structure that will remain on the landscape for decades to come—clearly presents the possibility of long-term impacts to a designated wilderness and thus precludes the use of a categorical exclusion. An Environmental Impact Statement or an Environmental Assessment must be prepared.

SUBSTANTIAL QUESTIONS CONCERNING SIGNIFICANCE OF PROJECT AND DIRECT, INDIRECT, AND CUMULATIVE IMPACTS.

NEPA regulations list ten factors the Forest Service must consider in determining whether an action is “significant” and thus whether the action would trigger the need for an EIS. 40 C.F.R. § 1508.27. “[A]n EIS *must* be prepared if ‘substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor.’” *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 824 (9th Cir. 2008) (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir.1998)). Several of these factors are present in this case indicating that an EIS is needed. For example:

Speculation of future benefit cannot discount other impacts. 40 C.F.R. § 1508.27(b)(1).

Even if the Forest Service speculates that, on balance, the effects of the bridge or cable car crossings construction project will be beneficial, NEPA regulations do not allow an agency to avoid the preparation of an EIS if other regulatory significance factors are present. *See e.g. Environmental Protection Information Center v. Blackwell*, 389 F.Supp.2d 1174, 1197 (N.D. California 2004)(rejecting the Forest Service’s rationale that the benefits of logging would outweigh the adverse affects because the “area [was] plagued by the *H. annosum* fungus and that, if these harvest units [were] not treated, they ... ‘would become unsuitable as foraging and dispersal habitat in the immediate future and the disease may spread outside the harvested boundaries.’”).

The project would impact designated wilderness. 40 C.F.R. § 1508.27(b)(3).

This project concerns the impacts of construction of a major structure or two and possible motorized use in a Congressionally designated Wilderness. Designated Wildernesses are the epitome of “area[s] demonstrat[ing] unique characteristics,” and the actions contemplated by the Forest Service in this case are actions expressly prohibited by the Wilderness Act, absent certain very narrow circumstances, because they harm the unique character of wilderness.

Establishing precedent for future authorizations. 40 C.F.R. § 1508.27(b)(6).

The Forest Service’s authorization would set a troubling precedent for future actions by making a determination of need based upon current recreation use patterns and desires of a narrow niche of wilderness users, rather than on protecting Wilderness. It is also basing need on the existence of a structure that may not be the minimum necessary for administration of the area as Wilderness.

An action may be significant if it is reasonable to anticipate a cumulatively significant impact on the environment. 40 C.F.R. § 1508.27(b)(7).

Cumulative effects are “the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. The Idaho District Court has already acknowledged the cumulative harm presented by repeated helicopter intrusion into a wilderness area. *Wolf Recovery Foundation*, 692 F. Supp. 2d at 1270. The court made clear that any future projects requesting helicopter use in the River of No Return Wilderness area would “face a daunting review because it will add to the disruption and intrusion of this [project]” *Id.* The court further stated “[t]he Forest Service must proceed very cautiously here because the law is not on their side if they intend to proceed with further helicopter projects Given that this project is allowed to proceed, the next project will be extraordinarily difficult to justify.” *Id.*

The Forest Service must consider the impacts past motorized and existing structures, for whatever purpose, and analyze the impacts of the proposed project on top of the impacts of that past use of motorized equipment and the number of structures in the area.

The action threatens a violation of federal law imposed for the protection of the environment. 40 C.F.R. 1508.27(b)(10).

As discussed throughout this comment letter, the project would authorize activities generally prohibited under the Wilderness Act, specifically the construction of the new bridge or cable car crossing (or two) and the possible use of motorized equipment.

These five factors, as well as questions over the controversial and uncertain extent of the project, raise substantial questions over whether a significant impact is likely and necessitate the preparation of an EIS. If the Forest Service wishes to avoid the preparation of an EIS, it must fully analyze all ten factors listed in 40 C.F.R. § 1508.27 and explain why each of those factors are not implicated to a significant degree in this case.¹

PURPOSE AND NEED AND RANGE OF ALTERNATIVES

Regardless of whether it prepares an EIS or an Environmental Assessment, NEPA requires the Forest Service to “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. 40 C.F.R. § 1502.14(a). The Forest Service “may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). Where the Forest Service’s objectives may be addressed through actions that do not violate the Wilderness Act, such as educating through-hikers about seasonal stream conditions, the Forest Service has an obligation under both the Wilderness Act and NEPA to rigorously explore those alternatives. *See Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d at 1039; *High Sierra*, 390 F.3d at 647.

¹ These same factors also demonstrate that a categorical exclusion is not appropriate in this case.

Please send us any decision on this project or any future analyses in a timely manner. Please send us a copy of any Minimum Requirements Decision Guide or Minimum Requirements Analysis as soon as it is completed.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Macfarlane". The signature is fluid and cursive, with the first name "Gary" written in a larger, more prominent script than the last name "Macfarlane".

Gary Macfarlane
President

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