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Attorneys for Plaintiff

The Honorable Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILDERNESS WATCH, INC.

Plaintiff,

v.

SARAH CREACHBAUM, in her official capacity as the Superintendent of the Olympic National Park; and the **NATIONAL PARK SERVICE**, a bureau of the U.S. Department of the Interior,

Defendants.

3:15−cv−05771−RBL

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: August 12, 2016

ORAL ARGUMENT REQUESTED

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Plaintiff Wilderness Watch moves for summary judgment on its claims that the National Park Service violated the Wilderness Act and the National Environmental Policy Act in authorizing the rehabilitation and reconstruction of the Wilder, Botten, Bear Camp, Canyon Creek, and Elk Lake structures in the Olympic Wilderness.

I. INTRODUCTION

This case challenges the National Park Service's ("Park Service's") violation of its legal duty to preserve the wilderness character of the Olympic Wilderness. The Wilderness Act prohibits structures, as well as motorized and mechanized uses, within wilderness unless "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]." 16 U.S.C. § 1133(c). Plaintiff is entitled to summary judgment on its first claim for relief because the Park Service violated this provision by rebuilding five man-made structures in the Olympic Wilderness, and by doing some of that work using helicopters and motorized tools, without first demonstrating that the structures, helicopters, and motorized tools were necessary to meet the minimum requirements for administration of the area for the purpose of the Act.

This court considered a similar legal challenge in Olympic Park Associates v. Mainella, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005). In Olympic Park Associates, the court ruled that two other structures within the Olympic Wilderness "ha[d] collapsed under the natural effects of weather and time, and to reconstruct the shelters and place the replicas on the sites of the original shelters by means of a helicopter is in direct contradiction of the mandate to preserve the wilderness character of the Olympic Wilderness." Id. at. *8. This court further found that "[w]hile the former structures may have been found to have met the requirements for historic preservation, that conclusion is one that is applied to a man-made shelter in the context of the history of their original construction and use in the Olympic National Park. Once the Olympic Wilderness was designated, a different perspective on the land is required." Id. at

*6. Accordingly, the Wilderness Act "allows the National Park Service to administer the Olympic Wilderness for other purposes only insofar as to also preserve its wilderness character." Id. at *8 (citing 16 U.S.C. § 1133(b)).

The challenged Park Service decisions are contrary to this clear direction. The Park Service's actions are part of its broader plan to perpetuate the existence of numerous man-made structures within the Olympic Wilderness—an agenda that is fundamentally antithetical to preserving an area "retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which [] generally appears to have been affected primarily by the forces of nature …." 16 U.S.C. § 1131(c) (defining wilderness). Plaintiff is entitled to summary judgment on its second claim for relief because the challenged actions violate the Act's mandate to preserve the area's wilderness character, 16 U.S.C. § 1133(b). The challenged structures diminish the wilderness character that Congress acted to preserve and will continue doing so for decades to come.

Finally, Plaintiff is entitled to summary judgment on its third claim for relief because the Park Service violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, when it failed to prepare an environmental assessment or environmental impact statement that fully disclosed, analyzed, and took the requisite hard look at the impacts of its planned actions and all reasonable alternatives.

For these reasons, Wilderness Watch respectfully requests that this Court enter summary judgment in favor of Plaintiff, reverse and set aside the Park Service's decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and, after the parties brief remedy, see Dkt. #15 at p. 3 ¶ 5, order relief that will redress the ongoing harm to wilderness character caused by Defendants' violations of law.

II. LEGAL BACKGROUND

A. The Wilderness Act.

Congress enacted the Wilderness Act, 16 U.S.C. §§ 1131-1136, "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition…." 16 U.S.C. § 1131(a). Accordingly, the Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. See id. § 1131(a), (c). "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is … an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" and an area "retaining its primeval character and influence, without permanent improvements or human habitation, 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).

Congress made the mandate to preserve wilderness character paramount over other land-management considerations. Id. § 1133(b). Congress was unequivocal: "Except as otherwise provided in this chapter, each 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." Id. § 1133(b). 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 Society v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1061-62 (9th Cir. 2003), amended as to relief, 360 F.3d 1374 (9th Cir. 2004) (en banc).

To achieve this goal, Congress prohibited or significantly limited a variety of uses in wilderness. "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…." 16 U.S.C. § 1133(c). 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." Id. Thus "[o]nce federal land has been designated as wilderness, the Wilderness Act places severe restrictions on commercial activities, roads, motorized vehicles, motorized transport, and structures within the area, subject to very narrow exceptions and existing private rights." Wilderness Watch v. Mainella, 375 F.3d 1085, 1089 (11th Cir. 2004); see also Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1039 ("The Wilderness Act imposes a strong prohibition on the creation of structures, subject only to an exception for structures that are *necessary* to meet the Act's *minimum* requirements.").

B. The National Environmental Policy Act.

As our "basic national charter for protection of the environment," NEPA requires agencies to take a "hard look" at a proposed action's potential impacts to the environment. 40 C.F.R. § 1500.1(a); Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005). The statute's twin objectives are (1) to ensure that an agency "consider[s] every significant aspect of the environmental impact of a proposed action," and (2) to "inform the public that it has

indeed considered environmental concerns in its decisionmaking process." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153-54 (9th Cir. 2006). Accordingly, NEPA requires federal agencies to take a hard look at the direct, indirect, and cumulative effects of their actions on the environment and to disclose those effects for informed public comment. See Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2004); 40 C.F.R. §§ 1508.7, 1508.8, 1508.25.

NEPA emphasizes up-front environmental analysis so that an agency does not act on incomplete information, "only to regret its decision after it is too late to correct." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989)). An agency must share its analysis with the public prior to making its decision because "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); see also id. §§ 1501.2 and 1502.5. "[P]ublic scrutiny [is] essential to implementing NEPA." Id. § 1500.1(b).

NEPA allows federal agencies to fulfill their NEPA obligations in one of three ways depending on the significance of the action's impact on the environment. First, an agency may prepare an environmental impact statement ("EIS") if an activity may significantly affect the environment. 40 C.F.R. § 1502.3. If an EIS is done properly, it will always satisfy an agency's NEPA obligations. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1150 (9th Cir. 1997). Second, instead of an EIS, an agency may prepare a less comprehensive environmental assessment ("EA"), which will statisfy the agency's obligations if the EA supports a "Finding of No Significant Impact." See 40 C.F.R. §§ 1501.3, 1508.9; see also Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1225 (9th Cir. 1988). Agencies cannot avoid finding significant impacts from an activity by segmenting their analysis–*i.e.*, by breaking it down into small component parts, "each of which individually has an insignificant environmental impact,

but which collectively have a substantial impact." 40 C.F.R. § 1508.27(b)(7); Earth Island v. U.S. Forest Serv., 351 F.3d 1291, 1305 (9th Cir. 2003) (quoting Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985)). The analysis in an EA or an EIS is intended to guide decisionmaking, and thus the assessment of a range of alternatives is "naturally the heart" of the analysis. Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114, 1121 (9th Cir. 2008) (citing 40 C.F.R. § 1502.14); see also Bob Marshall Alliance, 852 F.2d at 1228–29.

A third option allows agencies to forgoe the preparation of an EA or an EIS if the agency's action falls within a defined categorical exclusion. See 40 C.F.R. §§ 1501.4(a)(2), (b); see also West v. Sec'y of Dep't of Transp., 206 F.3d 920, 926-927 (9th Cir. 2000). NEPA regulations authorize an agency to use a categorical exclusion for a "category of actions which do not individually or cumulatively have a significant impact on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4, see also id. § 1500.4(p).

III. FACTUAL BACKGROUND

A. Congress created Olympic National Park to protect primeval forests and wildlife habitat, and it designated the Olympic Wilderness to preserve its wilderness character.

Congress designated Olympic National Park in 1938. Pub. L. 75-778, 52 Stat. 1241 (June 29, 1938). In doing so, Congress sought to protect the area's natural environment, specifically the unique primeval forests, wildlife habitat, and mountainous country. AR-1.[1]

The Park Service prepared a Wilderness Recommendation and an EIS for a proposed wilderness designation within the Park in 1974. AR-90-182; AR-183-377. The recommendation included the Department of Interior's Guidelines for Wilderness Proposals, which explained that

[1] Citations to the administrative record are denoted by "AR" followed by the bates number for the cited page.

existing structures within proposed wilderness areas "that exceed the 'minimum necessary' criteria will be removed and the area restored to its natural state." AR-100. The guidelines further explained that if the Park Service wishes to maintain a "primitive shelter" that does not meet the minimum necessary criteria, "a specific provision may be included in the proposed legislation for this area, giving the wilderness manager the option of retaining and maintaining these structures." AR-101. The EIS for the Olympic Wilderness Recommendation acknowledged the existence of approximately 80 trail shelters, most within the proposed wilderness area, and discussed environmental impacts associated with the shelters including radiating environmental degradation from concentrated visitor use. AR-251. The EIS for the Wilderness Recommendation contemplated removal of structures exceeding the minimum necessary. AR-248.

Over a decade later, in 1988, Congress officially designated the Olympic Wilderness. Pub. L. 100-668, 102 Stat. 3961 (November 16, 1988). Congress provided a special provision for the retention of only one structure within the Olympic Wilderness: "The Secretary is authorized to upgrade, maintain and replace, as necessary, the Wolf Creek underground powerline to Hurricane Ridge…." Id., § 102, 102 Stat. 3961, 3961. Congress did not specifically authorize the Park Service to retain any other structure in the Olympic Wilderness. See id.

The following decade, controversy over management of two structures in the Olympic Wilderness surfaced after the Low Divide and Home Sweet Home structures collapsed under the weight of snow in the winter of 1998-1999. See Olympic Park Associates, 2005 WL 1871114. Wilderness Watch and others challenged the Park Service's decision to rebuild the structures, and the Park Service argued unsuccessfully that rebuilding the structures was necessary to preserve "important historic aspects of [Olympic National Park's] heritage" and to "aid in reducing the risk to visitor health and safety by providing shelter in times of emergency." Id. at *2. This

Court found that the Park Service's authorizations represented "a clear error of judgment…because although the [Park Service], *arguendo*, may have proceeded appropriately under the operative historic preservation laws to determine whether the shelters were historic, the subsequent decision concerning whether to place reconstructed shelters in the former locations…failed to properly reconcile doing so with the mandate to preserve the wild and primitive character of the Olympic Wilderness." Id. at *8. This Court also rejected the argument that the structures were necessary for emergency use, noting that the emergency exception in Section 1133(c) "most logically refers to matters of urgent necessity rather than to conveniences for use in an emergency." Id. at *5.

The Park Service issued its agency-wide management policies in 2006. AR-1432-1611. The management policies explained that all management actions affecting wilderness would be subject to a two-step minimum requirements analysis to determine 1) whether the proposed action "is appropriate or necessary for administration of the area as wilderness and does not cause a significant impact to wilderness resources and character, in accordance with the Wilderness Act," and 2) the techniques and types of equipment needed. AR-1522-23. With regard to cultural resources, the policies stated that "[c]ultural resources that have been included within wilderness will be protected and maintained according to the pertinent laws and policies governing cultural resources and using management methods that are consistent with the preservation of wilderness character and values." AR-1524.

The Park Service completed its Olympic National Park General Management Plan in 2008. AR-3321-3364; AR-2330-3320. Reiterating policy guidance from the 2006 management policies, the General Management Plan noted that the Park Service will "[p]rotect and maintain cultural resources that have been included in wilderness in accordance with the pertinent laws and policies governing cultural resources using management methods that are consistent with the

preservation of wilderness character and values." AR-3328. The General Management Plan also stated that "Wilderness management is based on the minimum requirement concept, allowing only those actions necessary and appropriate for administration of the area as wilderness and that do not cause an unacceptable impact to wilderness resources and character." AR-3332. In responding to public comments expressing concern over the effect of the General Management Plan on future management of historic structures in wilderness and the lack of the requisite necessity analysis for maintaining these structures, the Park Service stated that the General Management Plan is a broad programmatic document meant to be general in nature, and "[i]f and when specific development or other actions are proposed subsequent to the [General Management Plan], appropriate detailed environmental and cultural compliance documentation will be prepared in accord with NEPA and National Historic Preservation Act requirements, considering applicable laws and policies, including the Wilderness Act." AR-2937-38. The Park Service explained that the forthcoming "wilderness plan will address the historic preservation of cultural resources in wilderness and will provide more details on how cultural resources will be managed." AR-2940. In the interim, for site-specific management actions affecting cultural resources, a "responsible decision maker will include appropriate consideration of the application of the provisions of the Wilderness Act in analysis and decision making concerning cultural resources." Id.; see also AR-2938. The Park Service never completed its wilderness plan.

B. The Park Service issued Programmatic Categorical Exclusion and Minimum Requirements documents for "routine maintenance" of structures in the Olympic Wilderness.

Just a few months after signing the 2008 General Management Plan Record of Decision, the Park Service issued two programmatic documents purporting to authorize routine maintenance of structures within the Olympic Wilderness and excluding that work from NEPA review,

including public notice and the opportunity to comment. AR-3365-83; AR-3546-87. The programmatic documents contemplated as "routine maintenance" everything from basic seasonal maintenance (cleaning and inspecting buildings) to major structural repairs. AR-3372-74; AR-3549-51; see also AR-3381. For these higher levels of maintenance, the Park Service anticipated material transport by helicopter and noted that crews would likely use generators, drills, gas-powered winches, skill saws and chainsaws for the work. AR-3550-51.

The first programmatic document was a Minimum Requirements Worksheet ("MRW"), signed in the fall of 2008. AR-3383. Its purpose was to "complete the process for the development of the programmatic [categorical exclusion] that is tiered to the [General Management Plan] covering maintenance of all structures, both historic and non-historic." AR-3366. The MRW noted, "Management Policies (2006) states 'cultural resources that have been included within wilderness will be protected and maintained according to pertinent laws and policies governing cultural resources, using management methods that are consistent with the preservation of wilderness character and values.'" AR-3370-71. The Park Service did not propose or analyze any specific structure projects under the programmatic MRW. Instead, it stated that every project would be evaluated on a case-by-case basis. AR-3372; see also AR-3381. Accordingly, the MRW did not analyze whether any or all of the structures were necessary, or the minimum necessary, to administer the area for the purpose of the Wilderness Act.

In November of 2008, the Park Service signed a second programmatic document—a three-year NEPA categorical exclusion form entitled "Programmatic Routine Facility Maintenance – Wilderness Structures." AR-3546. This programmatic document categorically excluded a range of maintenance activities on historic structures from formal NEPA review based on Park Service Director's Order 12, which contemplates application of a categorical exclusion for "routine maintenance and repairs" to historic and non-historic structures, facilities, utilities, and

grounds. AR-3547. The categorical exclusion also contemplated the use of helicopters, motorized tools, and motorized equipment. AR-3550-51. The programmatic categorical exclusion did not propose or analyze any specific projects; instead, it stated that "[e]very project will be evaluated on a project-by-project basis to determine if it fits within the scope of this programmatic document." AR-3549. The programmatic categorical exclusion expired in 2011. See AR-3548.

C. The Park Service issued site-specific documents authorizing the five structures projects.

Between 2011 and 2015, the Park Service issued individual, site-specific MRWs authorizing the rehabilitation and reconstruction of five structures—Wilder, Botten, Bear Camp, Canyon Creek, and Elk Lake—within the Olympic Wilderness. AR-6009-28; AR-6103-22; AR-6202-21; AR-6462-79; AR-6710-27. The Park Service categorically excluded the Wilder, Botten, and Bear Camp structures from formal NEPA review but did not provide any site-specific documentation analyzing the appropriateness of a categorical exclusion for each project. AR-6027; AR-6121; AR-6221. The Park Service categorically excluded the Canyon Creek and Elk Lake structure projects from formal NEPA review under site-specific categorical exclusions. AR-6458-6460; AR-6742-6744.

The site-specific MRWs did not analyze whether the structures were necessary, and the minimum necessary, to administer the area as wilderness. Instead, the Park Service merely reiterated, "Management Policies direct that Cultural Resources that have been included within wilderness are to be protected and maintained according to the pertinent laws and policies governing cultural resources using management methods that are consistent with the preservation of wilderness character and values.'" AR-6015-16; AR-6109-10; AR-6208-09; see also AR-6467; AR-6715. The Park Service stated that it could not achieve its cultural resource preservation goals through visitor education or through actions outside of the Wilderness because the structures are located within the Wilderness. AR-6716; AR-6467-68; AR-6210; AR-6111; AR-6017.

The site-specific MRWs authorized major structural repairs on each structure. The Park Service added a porch roof, replaced the structure's roof, performed structural and sill repair, and installed a new stove in the Botten structure. AR-6113, 6119. This work required 54 feet of new logs for sills, 148 feet of new logs for walls, and 56 feet of new logs for floor joists. AR-6113. The Park Service replaced severely deteriorated sidewall logs and posts, broken rafters and posts, and the entire roofing structure of Bear Camp. AR-6202, 6212, 6219. This work required 180 feet of new logs for sills and walls, 27 feet of new logs for posts, and 32 feet of new logs for purlins. AR-6212. The Wilder structure had entirely collapsed:

AR-6005. The Park Service determined that only "10% of the log structure [was] salvageable for re-installation." AR-6009. Nonetheless, the Park Service authorized the replacement of the Wilder structure using 280 feet of new logs, 200 feet of new poles for rafter posts and bunks, and 144 feet of new poles for purlins. AR-6019, 6025. Crews used power tools such as gas-powered drills and chainsaws to complete the Wilder, Botten, and Bear Camp projects. AR-6019, 6025; AR-6113, 6119; AR-6212, 6219. The Park Service also authorized eight helicopter flights to transport a "large quantity" of materials. AR-6019, 6025; AR-6113, 6119; AR-6212, 6219.

For the Canyon Creek and Elk Lake structure projects authorized in 2015, the Park Service considered but did not authorize motorized tool use and helicopters to comply with the Wil-

derness Act's "minimum requirements clause." AR-6478; AR-6725. The Park Service authorized the replacement of wall logs, posts, rafters, and a chimney flue for Canyon Creek. AR-6470-71, 6478; see also 6417. The Park Service authorized replacement of broken structural and framing members, including roof purlins, rafters, and cedar shakes, on Elk Lake. AR-6710, 6718-19, 6725. The Elk Lake structure suffered major structural damage from multiple tree-falls and required extensive repairs on separate occasions. AR-6480-6652 (Elk Lake photos). Canyon Creek also suffered damage from a tree-fall and had varying levels for repair work over the years. AR-6266-6308; AR-6310-6394 (Canyon Creek photos). The Park Service categorically excluded all the work on all five structures from formal NEPA review, including public notice and comment, under the umbrella of "routine maintenance." AR-3547; AR-6460; AR-6744.

IV. JURISDICTION AND STANDING

This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff has standing to bring its claims because its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization's purpose; and neither the claims asserted nor the relief requested require the participation of individual members in the lawsuit. Friends of the Earth v. Laidlaw, 528 U.S. 167, 181 (2000). For individual members to establish standing, the individual must show (1) an "injury in fact" (2) that is fairly traceable to the challenged conduct of the Defendants and (3) capable of being redressed by a favorable decision from the court. Natural Res. Def. Council v. Jewell, 749 F.3d 776, 782 (9th Cir. 2014) (citing Laidlaw, 528 U.S. at 180-81). Additionally, the interests sought to be protected must arguably be within "the zone of interests" protected by the statute in question. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

Plaintiff has standing for all claims because Defendants' actions have caused Plaintiff's members' concrete injuries that this Court can redress by setting aside the agency's decisions and

ordering remedial relief to mitigate or alleviate the ongoing harm caused by the five rebuilt structures. See the Declarations of Kevin Geraghty, Steven Hahn, Christopher Krupp, James Scarborough, Howie Wolke, and John Woolley (concurrently filed). The wilderness interests at stake are germane to Plaintiff's purposes, Wolke Decl. at ¶ 2, and neither the claims asserted nor the relief requested require the participation of individual members. Plaintiff's claims seek to protect a designated wilderness and are clearly within the zone of interests of the Wilderness Act and NEPA. See W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485-86 (9th Cir. 2011).

V. ARGUMENT

A. Standard of Review.

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court determines whether an agency violated the Wilderness Act pursuant to the standards in the APA. Wilderness Society, 353 F.3d at 1059. The APA provides that a court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the APA, agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983). Judicial review is "narrow, but searching and careful." Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 806 n.20 (9th Cir. 2005). "Courts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp administrative decisions that

they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003) (quotation alterations omitted).

B. The Park Service's decisions are arbitrary, capricious, and not in accordance with the Wilderness Act because the Park Service did not demonstrate, and cannot demonstrate, that rebuilding the structures was necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act.

The Park Service's decisions are arbitrary, capricious, and contrary to the Wilderness Act because the authorized structure work was not necessary to meet the minimum requirements for administration of the Olympic Wilderness as wilderness, and the Park Service has provided no explanation to the contrary. The Wilderness Act prohibits structures and the use of motorized equipment in designated wilderness "except as 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 Park Service violated the Wilderness Act by rebuilding the Wilder, Botten, Bear Camp, Canyon Creek, and Elk Lake structures, and by using helicopters and motorized tools to do some of that work, without first demonstrating that the work was "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]." Id.

The Park Service has a legal duty to preserve the wilderness character of the Olympic Wilderness. Id. § 1133(b). Congress was unequivocal: "Except as otherwise provided in this chapter, each 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." Id. Wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character."

Id. § 1131(a). Accordingly, the Act's opening section "sets forth the 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 Society, 353 F.3d at 1061.

To accomplish its goal, Congress prohibited or significantly limited a variety of uses in wilderness. Among other things, Congress prohibited structures, motor vehicles, helicopters, and motorized equipment "except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter." 16 U.S.C. § 1133(c); Wilderness Watch v. Mainella, 375 F.3d at 1089; Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1039 ("The Wilderness Act imposes a strong prohibition on the creation of structures, subject only to an exception for structures that are *necessary* to meet the Act's *minimum* requirements.") (emphasis in original).

To invoke the exception, the Park Service "must make an adequately reasoned finding of necessity." Wilderness Watch v. Iwamoto, 853 F.Supp.2d 1063, 1075 (W.D. Wash. 2012) (citing Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037). "A 'generic finding of necessity does not suffice.'" Id. (citing Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037). The Park Service must demonstrate that each structure and each motorized use "was no more than was necessary to achieve the goals of the [Wilderness] Act." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 647 (9th Cir. 2004); see also Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1036. The narrow exception to the prohibition on structures must be strictly construed and interpreted in a manner that preserves the primary operation of the provision. See Wilderness Society, 353 F.3d at 1062; Comm'r of Internal Revenue v. Clark, 489 U.S. 726, 739 (1989); Spokane & Inland Empire RR v. U.S., 241 U.S. 344, 350 (1916).

Each case that has addressed this issue has narrowly construed this exception to the Act's general prohibition on structures and rejected agencies' attempts to justify structures in wilderness. In Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037, 1038, the Ninth Circuit declined to give weight to the agency's rationale for placing bighorn sheep watering tanks in wilderness where the agency failed to address why the structures were necessary at all. The court found that "many other strategies could have met the goal of conserving bighorn sheep without having to construct additional structures within the wilderness," and "[i]mportantly, in contrast to the creation of new structures within the wilderness, the Wilderness Act does not prohibit any of those [alternative] actions." Id. The Ninth Circuit noted:

> [The project documents] amply describe the reasons for the Service's decision to construct these two particular water structures, assuming that water structures are necessary at all. But, again, nowhere does the Service address that underlying assumption. The documents leap from the worthy goal of conserving bighorn sheep to the need for additional water structures. The basis for that analytical leap is nowhere described…The documents as a whole demonstrate that the Service began with the assumption that water structures are necessary and reasoned from that starting point.

Id. at 1038.

In Olympic Park Associates, 2005 WL 1871114 at *8, the court rejected the Park Service's decisions to rebuild two collapsed historic structures in the Olympic Wilderness, finding

> a clear error of judgment in [that] case because although the [Park Service], *arguendo*, may have proceeded appropriately under the operative historic preservation laws to determine whether the shelters were historic, the subsequent decision concerning whether to to place reconstructed shelters in the former locations of [the original structures] failed to properly reconcile doing so with the mandate to preserve the wild and primitive character of the Olympic Wilderness.

The court further observed that it was not necessary for the Park Service to rebuild the structures in order to preserve history where there were other alternatives the Park Service could have used to document the history of these structures that would not offend the Wilderness Act. See id.

In Iwamoto, 853 F.Supp.2d at 1075-76, the court rejected the Forest Service's decision to rebuild a historic fire lookout in the Glacier Peak Wilderness and to use helicopters to accomplish the work. The court noted that there were multiple alternatives available that would have accomplished the Forest Service's historic preservation goals without offending the Wilderness Act and that the Service "erred egregiously" by engaging in the aggressive course of conduct. Id. at 1075-77. While the court appreciated enthusiasm for preserving a historic lookout, the court was clear that "the Forest Service's principal responsibility is to the preservation of wilderness, as wilderness." Id. at 1075-76.

In High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F.Supp.2d 1117, 1132-33, 1137 (E.D. Cal. 2006), the court rejected the Forest Service's decision to repair, maintain, and operate water impoundment structures in the Emigrant Wilderness to enhance trout populations and to preserve the historical value of the dams for inclusion in the Historical Register. The court found "no logical necessity in maintaining, repairing, or operating the dams in order to administer the area for purposes of the Wilderness Act." Id. at 1137. The court noted that "[t]he language of the Wilderness Act establishes at least the presumption that structures… are incompatible with the purposes of the Wilderness Act, and are therefore prohibited structures unless something within or without the text of the Act clearly indicates they are 'necessary to meet minimum requirements for the administration of the area.'" Id. at 1142.

Similarly here, as described below, the Park Service's authorizations are arbitrary and capricious, and violate the Wilderness Act, because those authorizations rest on an irrational and unsupported *assumption* that each of the structure projects—and each of the attendant motorized

and helicopter use authorizations—were "necessary" to meet "minimum requirements" for administration of the area for the purpose of the Wilderness Act. See 16 U.S.C. § 1133(c); Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037-39. The Act clearly prohibits the authorizations made here, and the Park Service has provided no analysis on whether rebuilding the structures in the Wilderness was necessary at all. Nor has the Park Service provided any analysis on the impact of its structure authorizations Wilderness-wide.

1. The structures are not necessary, individually or in light of all of the other structures in the Wilderness, and the Park Service provided no reasoned explanation to the contrary.

The Park Service's decisions are arbitrary, capricious, and contrary to the Wilderness Act because the structures are not necessary to administer the area as wilderness, and none of the project decision documents provide a reasoned analysis or explanation to the contrary. Instead, each analysis simply restates the Park Service's broad goals and management direction for cultural and historic resource protection. AR-6015-16; AR-6109-10; AR-6208-09; AR-6467; AR-6715. Instead of evaluating whether the structures were necessary, and the minimum necessary, the Park Service improperly *assumed* the structures were allowable under the broad language of the General Management Plan and then evaluated what work and tools it would need to rebuild them. AR-6019, 6025; AR-6113, 6118; AR-6212, 6219; AR-6471-72, 6478; AR-6718-19, 6725; see Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037-38. The Park Service failed entirely to explain how any one structure was necessary to meet minimum requirements for administration of the area as wilderness, even though that is precisely the inquiry required under the Wilderness Act, 16 U.S.C. § 1133(c), and even though that is precisely the inquiry the Park Service told the public it would take in site-specific analyses. AR-2937-38.

Assuming, *arguendo*, that any one structure was necessary, the Park Service also failed to analyze the necessity and impact of each structure in relation to all of the other structures in the

Wilderness. The Park Service has never undertaken a comprehensive necessity analysis of structures within the Olympic Wilderness. See AR-1046; AR-2937-38; see also Answer, Dkt. #16 at ¶ 24. Likewise, individual project analyses did not address why each structure was necessary, and the minimum necessary, for administration of the Wilderness in light of all of the other structures in the Wilderness, in light of the five structures at issue in this case, and in light of each structure's individual and cumulative impact on wilderness character. AR-6015-16, 6020-24; AR-6109-10, 6114-18; AR-6208-09, 6214-18; AR-6467, 6474-77; AR-6715, 6721-24; see also Answer (Dkt. # 16) at ¶¶ 35, 41, 48, 54, 63. For example, assuming (without conceding) that any structures are necessary at all, the Park Service must explain why both the Botten and Wilder structures are necessary when they are only a quarter of a mile from each other on the same trail. See First Amended Complaint (Dkt. #13) ¶ 38; Answer (Dkt. #16) ¶ 38. If the Park Service wishes to maintain and rebuild multiple structures in wilderness, it is obliged to demonstrate that every one of the structures is necessary—a heavy burden that it has not met here. See 16 U.S.C. § 1133(c); Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d. at 1037-38.

The Park Service admits that taking "no action" would have positive effects on wilderness character because "[n]atural processes would be allowed to continue… [t]he natural landscape would eventually be restored… [h]uman-built structures would eventually be eliminated" and visitors would have "a more primitive experience." AR-6721. The Park Service also admits that rebuilding structures would negatively impact wilderness character because a "human built structure would survive." AR-6722. Yet, the Park Service authorized these projects without addressing the fundamental question of how the structures are necessary for administration of the area as wilderness. "The basis for that analytical leap is nowhere described." Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1038. The Park Service failed to analyze an important

aspect of the problem, namely how each authorization would individually and cumulatively impact the Park Service's ultimate obligation to the long-term preservation of the wilderness character of the Olympic Wilderness. See Motor Vehicles Mfrs. Ass'n, 463 U.S. at 43; Blackwell, 390 F.3d at 647; Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1037.

2. The Park Service's structure work was not necessary because there were reasonable alternatives that could have achieved cultural preservation goals without offending the Wilderness Act, and the Park Service provided no reasoned explanation to the contrary.

The Park Service's decisions are also arbitrary, capricious, and in violation of the Wilderness Act because they summarily reject discussion of alternatives that would have addressed the Park Service's cultural preservation goals without taking actions prohibited by the Wilderness Act. Because of this, the Park Service cannot credibly claim that its structure projects were necessary or that these projects constitute only the minimum intrusion on wilderness character. The court in Olympic Park Associates, 2005 WL 1871114, at *8, has already found that "[i]t is apparent from the record that photographs and other chronicles document the history of the usage of Olympic National Park before the Olympic Wilderness was designated." Similarly, the court in Iwamoto, 853 F.Supp.2d at 1076, 1078, found that the Forest Service went too far "to protect a man-made structure from the natural erosive effects of time and weather" in wilderness and that "less extreme measures [] could have been adopted, such as relocation of the [structure] outside the wilderness area" or "providing a history of the lookout in a nearby [ranger] station." The Forest Service had relocated structures in the past from their original location to an interpretive center, and in another instance, the Forest Service allowed "a lookout in the Norse Creek Wilderness to deteriorate but sought to preserve its historic value by setting up an exhibit at a popular non-wilderness trailhead that accesses the wilderness area." Id. at 1075.

Even though the Olympic Park Associates court previously provided direction on reasonable alternatives to rebuilding structures within the Wilderness, the Park Service here summarily dismissed any consideration of such alternatives in its project authorizations. The Park Service did not analyze written or photographic documentation of the structures as a reasonable alternative. Nor did the Park Service explore dismantling the salvageable portions of the structures and reconstructing the buildings offsite as a reasonable alternative. Instead, in each of its MRWs, the Park Service merely checked "yes" on the question of whether the action is "necessary," citing generally to cultural resource laws and policies. AR-6015-16; AR-6109-10; AR-6208-09; AR-6467; AR-6715. The Park Service then checked "no" on the question of whether it could accomplish its goals through visitor education or through actions outside of wilderness, noting that the structures are currently located in the Wilderness and thus action would be required in the Wilderness. AR-6716; AR-6467-68; AR-6210; AR-6111; AR-6017. "Where, as here, the record demonstrates that many alternative actions *not* prohibited by the Wilderness Act very well could have attained the Service's goal, a single yes/no question cannot suffice to invoke the very limited exception for structures" in the Wilderness Act. Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1039.

No law requires the Park Service to rebuild or maintain structures within the Wilderness. The National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470, et seq.,[2] is a procedural statute that does not mandate any substantive preservationist duties that would restrict the alternatives available to the Park Service. Olympic Park Associates, 2005 WL 1871114, at *7 (NHPA allows for rehabilitation and reconstruction, but does not require it.); see also Iwamoto, 853 F.Supp.2d at 1071 (NHPA does not compel particular preservation-oriented outcomes). The

[2] In 2014, the NHPA was recodified at 54 U.S.C. § 300101 et. seq.

Park Service itself admits that the NHPA does not require any particular form of preservation. AR-2937 ("[t]he position of the National Park Service was not that the National Historic Preservation Act 'required' maintenance and retention of historic structures, but that the National Historic Preservation Act 'authorized' activities."); see also AR-2504 (General Management Plan contemplating removal of NHPA structures with appropriate documentation under Section 110(b) of the NHPA); AR-4236 (Park Service Director's Order stating, "In keeping with the Secretary of the Interior's Standards for managing cultural resources, a variety of management actions may be taken [in wilderness], including restoration or stabilization of a site or property, or professional level documentation *and removal* after appropriate steps have been taken to comply with the National Historic Preservation Act (16 U.S.C. 470f).") (emphasis added); AR-6781. Consequently, the Park Service could discharge any obligations to cultural and historic resources through some means other than rebuilding structures in designated wilderness.

Unlike the NHPA, the Wilderness Act is not a procedural statute—"[t]he Wilderness Act 'emphasizes outcome (wilderness preservation) over procedure' and has been described to be 'as close to an outcome-oriented piece of environmental legislation as exists."' Iwamoto, 853 F.Supp.2d at 1071 (quoting High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F.Supp.2d at 1138). "[T]he Wilderness Act is a specific, protective statute militating against [reconstruction and helicopter] intrusions." Olympic Park Associates, 2005 WL 1871114, at *7. For these reasons, the Park Service cannot simply assume it is acceptable to preserve structures in the Olympic Wilderness, but must instead meet the heavy burden of demonstrating why doing so is necessary, and the minimum necessary, for administration of the area as wilderness—something it has not done here.

3. The Park Service's authorizations for motorized equipment and helicopter use were not necessary, and the minimum necessary, because the Park Service could have completed its structure projects without those normally prohibited uses, and the Park Service has provided no reasoned explanation to the contrary.

Compounding the long-term degradation of wilderness character from newly reconstructed structures in the Olympic Wilderness, the Park Service also irrationally authorized the use of helicopters to deliver a "large quantity of building materials," as well as the use of chainsaws and gas-powered drills on the Wilder, Botten, and Bear Camp structures. AR-6019, 6025; AR-6113, 6119; AR-6212, 6219. "[M]achinery as intrusive as a helicopter is rarely 'necessary to meet minimum requirements for the administration of the area' since helicopters carry 'man and his works' and so are antithetical to a wilderness experience." Iwamoto, 853 F.Supp.2d at 1076 (quoting Wolf Recovery Found. v. U.S. Forest Serv., 692 F.Supp.2d 1264, 1268 (D. Idaho 2010)) (some internal punctuation omitted). Motorized tools, such as chainsaws and gas-powered drills, are similarly prohibited. 16 U.S.C. § 1133(c); see also AR-4232 ("The use of motorized equipment and the establishment of management facilities are specifically prohibited when other reasonable alternatives are available."); AR-1265 (use of motorized equipment only authorized in emergencies or "[i]f determined by the superintendent to be the minimum requirement needed by management to achieve the purposes of the area as wilderness.").

The Park Service acknowledged that the structure work could have been accomplished without motorized equipment and/or helicopter access. AR-6019; AR-6113; AR-6212. Further, the Park Service recently demonstrated that it can accomplish these reconstruction projects without the use of motorized conveyances—indeed, the 2015 Canyon Creek and Elk Lake project authorizations analyzed utilizing similar prohibited uses and noted that these tools were not necessary or appropriate. See AR-6478; AR-6725. The Park Service's authorizations of helicopter and motorized tool use was arbitrary, capricious, and in violation of the Wilderness Act because

the Park Service could have completed the projects utilizing non-prohibited means and because the Park Service did not provide a reasoned analysis justifying its decisions.

C. The structures do not serve the purpose of the Wilderness Act, and the Park Service provided no reasoned explanation to the contrary.

The Park Service's authorizations are also arbitrary, capricious, and in violation of the Wilderness Act because structure preservation is clearly contrary to the purpose of the Wilderness Act. If the underlying purpose of a structure is unambiguously contrary to the language of the Wilderness Act, the action violates the Act. Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1032.

Congress was clear that structures are antithetical to the purpose of the Wilderness Act. The court owes no deference to an administering agency as to the plain meaning and clear congressional intent of the Wilderness Act. Wilderness Society, 353 F.3d at 1059-60. The court may determine congressional intent by utilizing traditional tools of statutory construction, and it is "a fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Id. at 1060 (internal quotations and citations omitted); see also Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); United States v. Lewis, 67 F.3d 225, 228-29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme."). If the court determines that congressional intent is clear, that intent must be given effect as law. Wilderness Society, 353 F.3d. at 1059.

In the exception clause of Section 1133(c), Congress intentionally used the singular form of the word "purpose" in allowing structures where "necessary to meet minimum requirements

for the administration of the area for the purpose of this chapter." 16 U.S.C. § 1133(c). Congress explained the singular "purpose of this chapter" in Section 1131(a):

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System…

Id. § 1131(a) (emphasis added). The Wilderness Act defines wilderness as "undeveloped Federal land retaining its primeval character and influence, **without permanent improvements or human habitation.**" Id. § 1131(c) (emphasis added); see Wilderness Society, 353 F.3d at 1061-62. The purpose of the Act is wilderness preservation, and Congress vested agencies with one mandate – to preserve wilderness character. 16 U.S.C. § 1133(b). The Ninth Circuit reiterated this mandate:

> 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 future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character*." 16 U.S.C. § 1131(a) (emphasis added). Although the Act stresses the importance of wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future use *as wilderness*. This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the wilderness area.

Blackwell, 390 F.3d at 648 (emphases in original).

Three cases have found that the reconstruction of man-made structures for the primary purpose of perpetuating the structures as historic resources does not serve the purpose of the Wil-

derness Act. Olympic Park Associates, 2005 WL 1871114, at *6 (finding the Park Service's decision to reconstruct structures "for the purposes of cultural resource protection" unlawful); Wilderness Watch v. Mainella, 375 F.3d at 1092 ("[T]he need to preserve historical structures may not be inferred from the Wilderness Act nor grafted onto its general purpose."); High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F.Supp.2d at 1132, 1136 (stating "the repair, maintenance and operation of [] dam structures [is] clearly and unambiguously contrary to the provisions of the Wilderness Act" and noting that in cases where an agency has attempted to maintain man-made structures in a wilderness area for purposes of historic preservation, "the preservation of wilderness values had been predominant."). While the Ninth Circuit has not had an opportunity to consider whether reconstruction of man-made structures for the purpose of cultural and historical preservation serves the purpose of the Wilderness Act, this should not be a close call under a plain reading of the statute and under the well-reasoned analyses set forth in the above cases.

There has been only one case that hesitantly found the question of purpose ambiguous. In Iwamoto, 853 F.Supp.2d at 1073, the court analyzed whether the replacement of a structure for historical preservation served the purpose of the Wilderness Act and noted that "[l]ike the Olympic Park court, this Court finds the Eleventh Circuit's reading of the Wilderness Act compelling." However, the court then noted concern over the Ninth Circuit's holding that the purpose of the Wilderness Act with regard to using watering tanks for wildlife conservation was ambiguous. Id. at 1074 (discussing Wilderness Watch v. U.S. Fish & Wildlife Service, 629 F.3d at 1033-34). Because "conservation" and "historical use" both occur in Section 1133(b) of the Act, the court deferred to "the Forest Service's interpretation that historical use is a valid goal of the Act. Id. Notably, the court still found that the structure was unlawful because the structure was not necessary to administer the area as wilderness. Id. at 1075-76.

The Iwamoto court's indirect conclusion that man-made structures might constitute an acceptable "historical use," and thus serve the purpose of the Wilderness Act, was unfounded for two reasons. First, placing watering tanks in wilderness for the sake of wildlife conservation is different than repairing and reconstructing buildings for the sake for preserving buildings because buildings are prohibited while conservation is not. See, e.g., Wilderness Society, 353 F.3d at 1069 ("Whatever else might be done permissibly within wilderness in extraordinary circumstances for purposes relating to conservation or preservation of wilderness, we conclude that it is 'quite clear' that conduct with the primary purpose and effect to aid [a prohibited use] cannot be countenanced."); see also Wolf Recovery Found. v. U.S. Forest Serv., 692 F.Supp.2d 1264, 1268 (D. Idaho 2010) (analyzing the use of helicopters in the "very unique circumstance" where "man wiped out the wolf from [the] area."). The court in High Sierra Hikers Ass'n v. U.S. Forest Service recognized this distinction:

> It is not the activity itself that is at issue, it is the object of the activity. Here, as in Olympic Park, the object of the activity is to perpetuate the existence of structures in a designated wilderness area. The rationale set forth in Olympic Park that produced the conclusion that the repair and replacement of the structures was not permissible under the Wilderness Act is equally applicable in the instant case.

436 F.Supp.2d at 1136-37. The court further noted that "if one considers the overall legislative intent of the Wilderness Act to preserve 'area[s] where the earth and its community of life are untrammeled by man,' 16 U.S.C. 1131(c), one must conclude that the sort of commercial activity that was found offensive to the Wilderness Act in Wilderness Society is no more offensive, and perhaps less so, than [the structures] in the present case." Id. at 1134.

Second, in light of the context of the statute, the phrase "historical use" in Section 1133(b) of the Act does not logically refer to man-made structures at all:

> Section 1133(b) mentions "historical use" along with "recreational, scenic, scientific, educational [and] conservation" uses. However,

> this list tracks the definition of wilderness areas in § 1131(c), which describes "a primitive and unconfined type of recreation" and "ecological, geological, or other features of scientific, educational, scenic, or historical value." 16 U.S.C. § 1131(c). Given the consistent evocation of "untrammeled" and "natural" areas, the previous pairing of "historical" with "ecological" and "geological" features, and the explicit prohibition on structures, the only reasonable reading of "historical use" in the Wilderness Act refers to natural, rather than man-made, features.

Wilderness Watch v. Mainella, 375 F.3d at 1092; accord Olympic Park Associates, 2005 WL 1871114, at *6.

The categorical prohibition on structures is further bolstered by the fact that Congress knows how to make, and has made, special provisions for structures otherwise prohibited by Section 1133(c) that it would like to retain in wilderness areas. High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F.Supp.2d at 1131; Wilderness Watch v. Mainella, 375 F.3d at 1092 ("Congress may separately provide for the preservation of an existing historical structure within a wilderness area …Absent these explicit statutory instructions, however, the need to preserve historical structures may not be inferred from the Wilderness Act nor grafted onto its general purpose."). The Park Service itself acknowledged that if the Park Service wishes to maintain a structure that is not the minimum necessary for administration, "a specific provision may be included in the proposed legislation for this area, giving the wilderness manager the option of retaining and maintaining these structures." AR-101. The Olympic Park Associates court already noted that "[t]here is no specific provision for maintaining and/or replacing shelters within the Olympic Wilderness; the law creating the Olympic Wilderness Area specifically allowed the National Park Service to 'upgrade maintain and replace' only one structure—an underground powerline—as long as the maintenance and operation was 'consistent with wilderness management."' Olympic Park Associates, 2005 WL 1871114, at *5 (citing Pub. L. 100-668, § 102, 102

Stat. 3961, 3961 (November 16, 1988)). The absence of any such provision in the Olympic Wilderness Act demonstrates that Congress never intended to allow the structures.

In contrast, when Congress created new wilderness in Vermont, Congress specifically provided that the Appalachian Trail, Long Trail, and related structures may be "maintained" within the wilderness. Pub. L. 98-322, § 104(c), 98 Stat. 253, 255 (June 19, 1984). Similarly, when Congress designated the River of No Return Wilderness in Idaho, Congress required an inventory of all structures and cabins within the area and further action to preserve the structures. Pub. L. 96-312, § 8(b)(1), 94 Stat. 948, 952 (July 23, 1980). When Congress designated a wilderness in Alaska, it provided that "[p]reviously existing public use cabins within wilderness designated by this Act, may be permitted to continue and may be maintained or replaced subject to such restrictions as the Secretary deems necessary to preserve the wilderness character of the area." Pub. L. 96-487, § 1315(c), 96 Stat. 2371, 2485 (December 2, 1980).

Even if this Court were to find the language of the statute ambiguous on whether structures for the sake of historical or cultural preservation serve the purpose of the Wilderness Act, the Park Service itself has entirely failed to address this fundamental question. In explaining the "purpose and need" for the structure reconstruction projects, the Park Service focused solely on broad historical and cultural preservation goals under the Park Service's general management policies and the NHPA. See, e.g., AR-6015-16; AR-6109-10; AR-6208-09; AR-6467; AR-6715. Much like the Park Service's failure to address whether the structures were necessary at all, the Park Service also entirely failed to demonstrate how the structures in this case serve the purpose of the Wilderness Act. The Park Service's failure to consider this important aspect of the problem is likewise sufficient grounds for this Court to hold the Park Service's authorizations arbitrary and capricious and not in accordance with the Wilderness Act. Motor Vehicles Mfrs.

Ass'n, 463 U.S. at 43; Wilderness Society, 353 F.3d at 1069; Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d at 1039.

D. The Park Service violated NEPA by categorically excluding the projects from formal NEPA review and by failing to take a hard look at the direct, indirect, and cumulative impacts of its structure projects.

The Park Service's authorizations in this case were further flawed by the Park Service's decision to forgo a formal NEPA analysis on each individual project and, more comprehensively, on its structure rehabilitation and reconstruction program as a whole. Courts typically review an agency's decision not to prepare an EIS under the arbitrary and capricious standard; "however, where an agency has decided that a project does not require an EIS without first conducting an EA, [courts] review under the reasonableness standard." Blackwell, 390 F.3d at 640. A court "will defer to an agency's decision only if it is 'fully informed and well considered."' Id. (quoting Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988)).

1. The Park Service inappropriately applied categorical exclusions.

The Park Service's decisions violate NEPA because the activities authorized are far outside the scope of actions contemplated for categorical exclusion by NEPA regulations and because there are several extraordinary circumstances that render the application of a categorical exclusion inappropriate. See 43 C.F.R. § 46.215; see also 40 C.F.R. § 1508.27. NEPA regulations prohibit federal agencies from categorically excluding actions from environmental review unless the actions "do not individually or cumulatively have a significant impact on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4; see also 43 C.F.R. § 46.205. 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). Impacts do not need to be adverse to be significant—"significant" impacts may be either beneficial and adverse. 40 C.F.R. § 1508.27(b)(1).

NEPA regulations do not categorically exclude from NEPA review actions that are normally prohibited in wilderness. See 43 C.F.R. § 46.210; 40 C.F.R. § 1508.4; see also Wilderness Watch v. Mainella, 375 F.3d at 1095; Blackwell, 390 F.3d at 641. The Park Service's NEPA regulations allow categorical exclusions for "[r]outine and continuing government business" and provide examples: "including such things as supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity (*e.g.*, limited size and magnitude or short-term effects)." 43 C.F.R. § 46.210(f). The rebuilt structures in this case, by their nature, inflict long-term effects on wilderness character as they will remain on the landscape for decades to come. The long-term effects alone render application of this categorical exclusion inappropriate. See id.

Further, an agency may not use the categorical exclusion if "any of the extraordinary circumstances in section 46.215 apply." 43 C.F.R. § 46.210; see 43 C.F.R. § 46.215. Extraordinary circumstances include actions that (1) have significant impacts on wilderness areas; (2) have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources; (3) establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects; (4) have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects; (5) have significant impacts on properties listed or eligible for listing on the National Register of Historic Places; or (6) contribute to the introduction or spread of noxious weeds. 43 C.F.R. § 46.215; see also 40 C.F.R. § 1508.27.

Here, the Park Service's reliance on categorical exclusions was arbitrary, capricious, and unreasonable because multiple extraordinary circumstances exist. First, Congress determined that structures, helicopters, and motorized equipment degrade wilderness significantly enough to impose a prohibition on these uses, 16 § U.S.C. 1133(c), and the Park Service admits that structures, helicopters, and motorized equipment degrade wilderness character, AR-6020-25; AR-6114-6119; AR-6214-19; AR-6474-78; AR-6721-24. Second, this lawsuit and the Olympic Park Associates lawsuit demonstrate that the Park Service's desire to perpetuate structures in an area where structures are generally prohibited involves conflicts concerning alternative uses of resources. 2005 WL 1871114; AR-6441. Third, the Park Service repeatedly cites its broad cultural resource preservation goals from its General Management Plan as justification for each of the five authorizations, indicating that the Park Service made a decision in principle about future cultural resource and historic structure actions, namely that it will continue to rehabilitate and reconstruct man-made structures in wilderness, without a comprehensive analysis and without subjecting its proposals to formal NEPA review. AR-6015-16; AR-6109-10; AR-6208-09; AR-6467; AR-6715; see also AR-6796 (Wilderness Specialist noting potential for nation-wide ramifications). Fourth, as explained in Section V.B.1., *supra*, each decision to work on a structure has a direct relationship with other similar actions that together have cumulatively significant environmental effects on wilderness character because together they result in the maintenance of approximately 40 man-made structures in a wilderness area where such structures are prohibited. Fifth, the Park Service conducted significant work on structures that were listed or eligible for listing on the National Register of Historic Places. AR-6103, 6113, 6119; AR-6202, 6212, 6219; AR-6009, AR-6019; AR-6462, 6473, 6478; AR-6710, 6718-19, 6725-26. Sixth, concentrated visitor use around structures increases the potential for the spread of noxious weeds. AR-251; AR-6802. In short, a number of extraordinary circumstances are present that preclude the use of

a categorical exclusion. These factors should have been considered by the Park Service, yet with the exception of one factor, the Park Service checked "no" for each factor in its 2015 categorical exclusions without providing any explanation. See, e.g., AR-6441-42; AR-6733-35. Even more troubling, the Park Service did not even mention these factors in its categorical exclusions for the Wilder, Botten, and Bear Camp projects. AR-6027; AR-6121; AR-6221.

Notably, the Park Service's own management guidance makes it clear that if the action "has the potential for measurable environmental impact," if a "federal agency with jurisdiction by law over an affected resource believes the potential for measurable environmental impact exists," or if "the action involves 'unresolved conflicts concerning alternative uses of available resources,"' the Park Service must prepare an EA or an EIS. AR-3440. "To be excludable, the action should easily fit in one category and clearly have no potential for environmental impact." Id. Likewise, if "the action is a part of a broader action, or one in a series of similar or related actions, the broader policy, program, or proposal must be the subject of a NEPA analysis first." Id. Here, all of those factors are present. See AR-6025, AR-6119, AR-6219, AR-6478, AR-6458-60, AR-6725, AR-6742-44 (discussing mitigation measures); AR-3921 (NPS Chief of Cultural Resources noting "I do not think that a CE is an appropriate NEPA pathway for doing this work, especially given the results of the Olympic and other lawsuits" and that "[i]f the park is going to undertake an EA (or EIS), then the whole program should be examined."); AR-3922-23 (Chief of Wilderness Stewardship noting the same concern).

Even though the Department of Interior's NEPA regulations and the Park Service's own policies indicate that a categorical exclusion is not appropriate, the Park Service categorically excluded the structure projects from NEPA review under the umbrella of "routine maintenance and repairs" to cultural resource sites, structures, utilities, and grounds as well as repairs to non-historic structures, facilities, utilities, grounds, and trails. AR-3547; AR-6460; AR-6744. The

Park Service's decision to categorically exclude these projects was not "fully informed and well considered" and cannot be sustained. Blackwell, 390 F.3d at 640.

2. The Park Service failed to take a hard look at direct, indirect, and cumulative impacts.

The Park Service failed to take the requisite "hard look" at the direct, indirect, and cumulative impacts of the projects, and it failed to explore reasonable alternatives that would have avoided or lessened these impacts. NEPA requires federal agencies to take a hard look at the direct, indirect, and cumulative effects of their actions and to disclose those effects for informed public comment. See Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2004); 40 C.F.R. §§ 1508.7, 1508.8. As discussed *supra*, the Park Service proceeded on the inappropriate and unsupported assumption that each of its structure rehabilitation and reconstruction projects serve the purpose of the Wilderness Act and that each structure was necessary, and the minimum necessary, for administration of the area as wilderness. This assumption precluded a thorough analysis of whether the structures themselves were necessary in the first place, the direct and indirect impacts of each structure individually and of all the structures cumulatively, and whether some other form of cultural preservation might serve the agency's goals without violating the Wilderness Act. "The existence of a viable but unexamined alternative renders an EA inadequate." W. Watersheds Project v. Abbey, 719 F.3d 1035, 1050 (9th Cir. 2013) (quotation and alteration omitted). The Park Service violated its duty to "[r]igorously explore and objectively evaluate all reasonable alternatives" to its proposed action that would minimize adverse environmental impacts. Alaska Conservation Council v. Fed. Highway Admin. 649 F.3d 1050, 1056 (9th Cir. 2011); 40 C.F.R. § 1502.14.

VI. CONCLUSION

For the foregoing reasons, Wilderness Watch respectfully requests entry of summary judgment in its favor on claims one, two, and three in Plaintiff's First Amended Complaint.

Respectfully submitted this 13th day of May, 2016.

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CERTIFICATE OF SERVICE

I, Paul Kampmeier, hereby certify that on May 13, 2016, I electronically filed

- PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;
- THE DECLARATION KEVIN GERAGHTY;
- THE DECLARATION OF STEVEN HAHN;
- THE DECLARATION OF CHRISTOPHER KRUPP;
- THE DECLARATION OF JAMES SCARBOROUGH;
- THE DECLARATION OF HOWIE WOLKE;
- THE DECLARATION OF JOHN WOOLLEY;
- THE PROPOSED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; and
- this CERTIFICATE OF SERVICE

with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Sara Porsia, counsel for the Federal Defendants.

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