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July 12, 2017

Linda Merigliano
North Zone Recreation Program Manager
PO Box 1689
Jackson, WY 83001

Sent Via Email and US Mail

Dear Ms. Merigliano,

We are commenting on the scoping letter for the Hawks Rest bridge replacement in the Teton Wilderness. 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 large facility and the use of helicopters and other motorized equipment 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.

Introduction

This part of the Teton Wilderness has the unique distinction of being the most remote area in the lower 48 states, in terms of distance from a road. While there are a few areas that are larger, in terms of roadless acreage, the Teton and Washakie Wildernesses and surrounding roadless land (including the roadless land in Yellowstone National Park) have the singular distinction, due to their shape and size. Its unique status, remoteness and management problems are well-addressed in the book *Hawks Rest: A Season in the Remote Part of Yellowstone* by Gary Ferguson. Indeed, the bridge in question facilitates many of the management problems addressed in that book, including outfitters illegally salting to attract big game, illegal use of motorized equipment, poaching of wildlife including grizzlies, and permit violations from outfitters.

Wilderness

The first sentence of Section 2(a) of the 1964 Act describes the statute's overarching 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).

This is clear direction for management of the Teton Wilderness. 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.¹

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").

¹ That the structure existed at the time of wilderness designation does not alleviate the Forest Service of its burden to demonstrate necessity in making a decision to maintain, rebuild, replace, or otherwise perpetuate the existence of the structure in wilderness. *See Wilderness Watch v. Iwamoto*, 853 F.Supp.2d 1063, 1076 (W.D. Wash. 2012) (rejecting “new” versus “revamped” distinction noting that what matters is “the Forest Service went to extraordinary lengths to protect a man-made structure from the natural erosive effects of time and weather”); *High Sierra Hikers Ass’n v. U.S. Forest Serv.*, 436 F.Supp.2d at 1136, 1137 (rejecting “rebuilding” versus “maintaining or repairing” distinction as well as distinction based on size and visual integration); *see also* 16 U.S.C. 1133(c) (providing no distinction based on building new structures versus maintaining or rebuilding old structures).

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.

The Bridger Teton National Forest Plan is explicit regarding bridges in this section (management area 6c) of the Wilderness:

Bridge Construction Standard - Bridges will be built only where no safe opportunity exists to cross a stream during periods of normal water flow. Bridges will be built with native materials, using primitive skills and construction techniques.

Forest Plan, Chapter Four, Management Prescription 6C (April 15, 2015 searchable version, page 268). This is a Forest Plan standard, rather than a guideline. The Forest Plan explains that standards are “usually stated as requirements in [the Forest Plan] using the term “will be.”” *See* Forest Plan, Chapter One, Definitions (April 15, 2015 searchable version, page 3). In contrast, guidelines are “usually stated as flexible and, occasionally, optional limits in [the Forest Plan] using the terms “should be” or “may be.”” *Id.* Simply put, the project, as proposed, violates a clear Forest Plan standard. There is other Forest Plan direction as well including, but not limited to, direction which states:

Personal risk and challenge associated with adverse weather conditions, isolation, physical hazards, and lack of rapid communication and travel are appropriate features of the wilderness setting, and it is neither practical nor desirable to eliminate such risks.

Forest Plan, Chapter Four, Recreation Prescription 6C (April 15, 2015 searchable version, page 258)

In sum, the agency has a high bar to show that this bridge is necessary, and if so, whether the current location is appropriate. The Forest Plan has already determined that use of motorized equipment (including helicopters) for bridge construction is not the minimum necessary for preservation of the Teton Wilderness as wilderness. We address questions and concerns in the following section and offer potential alternatives.

Need/Potential Options and Alternatives

The current location of the bridge, in the middle of the large Yellowstone meadow complex, is visually jarring and intrusive. The photo in the scoping letters demonstrates this fact. Further, the trail that leads to the bridge from Atlantic Creek is boggy and damaged for the couple of miles that it passes through the meadow complex. As such, we have some questions and potential alternatives based upon our experience, including experience in the area that should be considered.

The scoping letter states that fording is not an option. However, there are two fords down river from the site of this bridge. One is due west of Bridger Lake and connects to the trail down Falcon Creek. The other is in Yellowstone National Park and is the South Boundary Trail that fords the Yellowstone River. Why couldn't the Pacific Creek/Atlantic Creek Trail be rerouted north, skirting the meadow complex until it joins the Falcon Creek route or, alternatively, users directed to the North Two Ocean Pass Trail and then down Falcon Creek? Also, why couldn't the Falcon Creek trail be lengthened a bit into Yellowstone National Park and the narrower ford used in that place? Admittedly, that would take coordination with Yellowstone National Park, but such coordination between the agencies should be done for this large wilderness/recommended wilderness complex² in order to come up with options that keep intact the integrity of the Wilderness.

Alternative routes to Bridger Lake exist. The best early access option is up the Yellowstone River through the Park, which is the lowest elevation approach of all. Other access options include up Soda Fork and down the Yellowstone River--which though a later season access, puts the visitor on the northeast side of the Yellowstone River, the same side as Bridger Lake--or via Pacific Creek and Mink Creek then down Falcon Creek to use the existing ford.

If there really are no alternatives and a bridge is necessary, why can't it be built (and/or packed in) with primitive means as the Forest Plan requires? The Forest Service in Region I completed a long span bridge in the Bob Marshall Wilderness this way (see Attachment 1). The proposed design calls for a 172' single span bridge, which is clearly at odds with the Forest Plan standard requiring the use of native materials. Such a design encourages other non-conforming uses such as motorized / aerial intrusions to "handle [the prefabricated components'] large size and weight" and motorized tools and gas powered generators "to deal with sections of steel that are not safe or feasible to manipulate with primitive tools." Request for Public Comment, p. 2. In other words, the desired design of the bridge may be unlawfully constraining the range of alternatives considered.

Further, if a bridge is in fact necessary, this may not be the best location. The ford west of Bridger Lake, the narrow crossing in Yellowstone National Park, or another narrower place(s) may be a better location and allow for the use of native materials and primitive tools and access.

² The recommended wilderness in Yellowstone National Park is administered as Wilderness as per Directors Order 41.

We have other questions concerning the need for this project, as proposed, and potential impacts. What are the numbers that use the bridge, the season the bridge is used and the kind of use that takes place? Certainly, a necessity determination would require some basic data and information on when and how the bridge is used. How many helicopter trips would be done under the proposed action? Where would the work crew stay and what would be the impact of the work crew, the motorized equipment and helicopter flights?

The questions 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 multiple prohibited uses in a designated wilderness, including the construction of a permanent structure that will remain on the landscape for decades and the use of the helicopters and motorized equipment to complete the project. 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 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, steel structure in a wilderness where structures are prohibited and the use of helicopters and motorized equipment in a wilderness where helicopters and 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 steel structure in the Wilderness via motorized means—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 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 and intensive helicopter and other 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 outfitters, 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. Lastly, even if the bridge is the minimum necessary, the use of motorized equipment is prohibited by the Bridger-Teton Forest Plan.

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 helicopter use conducted in the Teton Wilderness, for whatever purpose, and analyze the impacts of the proposed project on top of the impacts of that past use.

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 helicopter overflights and landings to transport bridge materials and the use of motorized equipment for the construction of the new bridge.

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.³

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 (e.g., as discussed above, (1) alternative access options; and (2) bridge replacement by nonmotorized means and using native materials), 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.

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,



Gary Macfarlane
Board Member

³ These same factors also demonstrate that a categorical exclusion is not appropriate in this case.