



WILDERNESS WATCH

Keeping Wilderness Wild

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May 9, 2022

Superintendent Craig Kenkel
NATIONAL PARK SERVICE
Point Reyes National Seashore
1 Bear Valley Road
Point Reyes Station, CA 94956
Department of the Interior Region 10

Dear Superintendent Kenkel,

Wilderness Watch thanks the National Park Service (NPS) for the opportunity to provide initial pre-scoping comments for the proposed planning process concerning the Tomales Point area and Wilderness in Point Reyes National Seashore. Wilderness Watch is a national nonprofit wilderness conservation organization dedicated to the protection and proper stewardship of the National Wilderness Preservation System.

Introduction

NPS has started pre-scoping for a new “area plan” for Tomales Point to address “complex wildlife, resource, and wilderness management issues.” More than 85% of the 2,600 acre area is located within the Phillip Burton Wilderness. NPS’ “impetus for this planning process are the impacts to the tule elk population and other resources within the Reserve arising from the historic drought conditions over the past eight years.”

NPS plans to replace its 1998 Tule Elk Management Plan (available at <https://www.nps.gov/pore/getinvolved/planning-tule-elk-management-plan-1998.htm>) as it relates to the Tomales Point area by preparing both a programmatic and site-specific analysis with an EIS to comply with NEPA. NPS has identified several issues it plans to address, including:

- maintenance or removal of the tule elk fence;
- population management of the Tomales Point tule elk herd;
- supplemental water for the elk in times of need;
- wilderness management; and
- visitor use and infrastructure management at Pierce Point Ranch.

NPS’s scoping letter seeks informal public input and ideas regarding the scope of the plan to help it refine the extent of the planning effort and identify a

preliminary range of alternatives for consideration. NPS states that it “will review every comment received....” Wilderness Watch intends to hold NPS to that promise.

Summary of Comments

Wilderness Watch believes that the elk fence is degrading the Wilderness character of the Phillip Burton Wilderness, in violation of the Wilderness Act and should be removed. The Wilderness Act recognizes Wilderness “as an area where the earth and its community of life are untrammelled by man....” Section 2(c) (meaning “free, unbound, unhampered, unchecked, having the freedom of the wilderness.” Howard Zahniser, drafter of the Wilderness Act). Since their reintroduction, tule elk have now again become a part of the Wilderness resource because they are a native indigenous species and part of the “community of life” of the Wilderness. Since they are a part of the Wilderness, there can be little dispute that the elk are not “untrammelled by man” because their freedom of movement is blocked by a manmade fence. The elk’s conservation and the natural conditions of the Wilderness are being limited, or trammelled, because the elk cannot migrate from Tomales Point outside of their enclosure south of the fence. And even though the fence is located just outside the Wilderness boundary, its presence is a condition that is causing a violation of Section 2(c) of the Wilderness Act.

Moreover, because the elk can’t move past the fence, an overpopulation of elk may even be degrading other natural conditions and the overall character of the Wilderness, which is also a violation of Section 4(b) of the Wilderness Act.

Wilderness Watch would like to encourage the Park Service to enlarge the planning process to start work on an overdue Wilderness Stewardship Plan for the entire Phillip Burton Wilderness, which agency policy requires. Moreover, any planning should be informed by data that should have been collected over the last 25 years based on mitigation measures in the 1998 Elk Plan.

Background

In 1962, Congress enacted legislation to create the Point Reyes National Seashore as part of the National Park System “to save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped” Pub. L. No. 87-657 (codified at 16 U.S.C. § 459c *et seq.* (2018)). After acquiring most of the lands, the Park Service officially established the Point Reyes Seashore in 1972. 37 Fed. Reg. 23,366 (Oct. 20, 1972).

In 1976, Congress designated roughly 25,000 acres of land as the Point Reyes National Seashore Wilderness and roughly 8,000 acres of waters as Wilderness. Pub. L. No. 94-544 & 94-567 (renamed in 1985 as the Phillip Burton Wilderness; Pub. L. No. 99-68). The law directs that the Wilderness area “shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act governing areas designated by that Act as wilderness areas” “without impairment of its natural values, in a manner which provides for such recreational, educational, historic preservation, interpretation, and scientific research opportunities as are consistent with, based upon, and supportive of the maximum protection,

restoration, and preservation of the natural environment within the area,” Secs. 3 & 4, Pub. L. No. 94-544.

Wilderness designation predates introduction of Tule Elk by two years. In 1978, 10 Tule Elk, considered a native indigenous species, were reintroduced to the Tomales Point area after a 150 year absence from the Olema area of the Point Reyes peninsula. *See* 1998 Tule Elk Management Plan and EA, p. 8. To manage the elk, the Parks Service constructed a 3-mile long fence, which enclosed the elk to a 2,600 acre area, 85% of which is Wilderness. *Id.* After cattle were removed from the area in 1980, elk numbers increased rapidly to roughly 180 animals in 1990 and 465 animals by 1997. *Id.* Partly based on this increase, the Park Service initiated and finalized a revised plan for tule elk management, which culminated in the 1998 Tule Elk Management Plan. *Id.* at 9. Issues and concerns about non-conforming uses in Wilderness were briefly described in the 1998 Elk Management Plan, but were limited to a short statement that “[t]he management of tule elk has resulted in the use of helicopters for the capture of elk,” which Park superintendents authorized an “ ‘administratively determined minimum tool’ to manage wilderness areas.” *Id.* at 11.

The plan also mentions potential effects to Wilderness values based on the EA’s alternatives. Negative effects to Wilderness values are described in the Environmental Consequences section of the EA for each of the alternatives. Only Alternative B would have had no negative Wilderness effects because it would have eliminated the elk’s restricted range by allowing elk to move outside the current elk range beyond the fence and would have closed and removed cattle and dairy ranching in the seashore. EA at 51 & 60.

All other alternatives, including the proposed and selected Alternative A, would have numerous negative effects on Wilderness values. *Id.* at 58, 62, and 64. In fact, the selected alternative allows helicopter access and vehicle use in the Wilderness to capture and relocate and otherwise manage the elk. *Id.* at 57.

While the 1980 General Management Plan for Point Reyes NS states that “Natural resource management objectives in the GMP include: ... To preserve and manage as wilderness those lands so designated;” (*id.* at 32), the 1980 GMP is otherwise silent regarding Wilderness or a Wilderness Stewardship Plan. We know of no such plan for the Phillip Burton Wilderness.

Wilderness Law and Conservation

The Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their “natural,” “untrammelled” condition. 16 U.S.C. § 1131(a). Wilderness is statutorily defined as “an area where the earth and its community of life are untrammelled by man” and an area “retaining its primeval character and influence... 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) (emphasis added). 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, untrammled state” and “show[s] a mandate of preservation for wilderness and the essential need to keep [nonconforming uses] out of it.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (*en banc*).

Wilderness designation places restrictions on agencies’ wildlife management authority and requires agencies to ensure that any wildlife management activities in wilderness, including research, are conducted in a manner that preserves wilderness character. Congress provided a clear mandate for administering agencies: “[E]ach 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.” 16 U.S.C. § 1133(b). Certain uses and activities, including helicopters and the use of electronic tracking installations, undermine the preservation of wilderness and are thus prohibited with narrow exception. 16 U.S.C. § 1133(c). These uses and activities may be authorized by an agency only where “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c).

Conservation-related activities are subject to this overall statutory scheme.

NPS Policies for Wilderness Planning and Wildlife

While the Park Service has referred to actions in Wilderness as “management” in its policies (*Management Policies 2006*, Chapter 6, Wilderness Preservation and Management), it now uses more appropriate terminology, referring to its actions in Wilderness as Wilderness Stewardship. See Director’s Order #41: Wilderness Stewardship, 2013, which states:

For every designated Wilderness, a Wilderness Stewardship Plan will guide management actions to preserve wilderness character. Parks should notify the WASO Wilderness Stewardship Division Chief and work with their Regional Wilderness Coordinator during the Wilderness Stewardship Planning process. Parks with lands determined to be eligible, proposed, or recommended should also develop plans to preserve wilderness character. Wilderness Stewardship Plans should be completed within two years of designation, subject to funding. Preservation of wilderness character will be incorporated into appropriate sections of park planning and management documents. Also see *Management Policies 2006*, Section 6.3.4.2.

Id. at Sec. 6.3 (available at https://www.nps.gov/policy/DOrders/DO_41.pdf).

NPS’ *Management Policies 2006* states:

The superintendent of each park containing wilderness resources will develop and maintain a wilderness management plan or equivalent planning document to guide the preservation, management, and use of these resources. The wilderness management plan

will identify desired future conditions, as well as establish indicators, standards, conditions, and thresholds beyond which management actions will be taken to reduce human impacts on wilderness resources.

The park's wilderness management plan may be developed as a separate document or as an action component of another planning document. Whether prepared as a stand-alone plan or as part of another planning document, all wilderness management plans must meet the same standards for process and content as specified in this section 6.3.4. Wilderness management plans will be supported by appropriate documentation of compliance with the National Environmental Policy Act and the National Historic Preservation Act. The plan will be developed with public involvement and will contain specific, measurable management objectives that address the preservation and management of natural and cultural resources within wilderness as appropriate to achieve the purposes of the Wilderness Act and other legislative requirements.

Id. at Section 6.3.4.2 (available at: https://www.nps.gov/subjects/policy/upload/MP_2006.pdf).

With respect to wildlife in national parks, “in its 1978 rider to the Redwood National Park Expansion Act, Congress reiterated its intention that the National Park System be administered in furtherance of the ‘purpose’ (not purposes) of the Organic Act, that being, of course, the conservation of...wildlife resources.” *National Rifle Ass'n of America v. Potter*, 628 F. Supp. 903, 910 (D.D.C. 1986).

Moreover, “Wilderness preservation should be considered among the purest applications of the Service’s responsibilities for protecting ‘wildlife,’ its habitat, and the conservation of associated resources.” Reference Manual 41: Wilderness Preservation and Management, 1999; *see also* Legislative Guidance Applicable to NPS Wilderness Preservation and Management 2013 (same, available at https://www.nps.gov/orgs/1981/upload/Leg-Guidance-for-NPS-W_508.pdf).

Comments

Wilderness Watch requests that the Park Service refer more accurately to its potential or future actions in the Phillip Burton Wilderness as “stewardship” rather than “management.” NPS policies have adopted this language in their more recent DO #41. Management connotes “trammeling” and other actions not consistent with the Wilderness Act. From a planning perspective, the Park Service should therefore limit its actions to those developed in a Wilderness Stewardship Plan, as discussed below.

1. NPS Policy Requires that the Park Service Develop a Wilderness Stewardship Plan for the Phillip Burton Wilderness.

In addition to the current planning effort, the Park Service should take this opportunity to start the process for a Wilderness Stewardship Plan for in the Phillip Burton Wilderness Area. This plan should not be limited to the Tomales area where the Elk are suffering from the drought, but should be prepared for the entire Phillip Burton Wilderness. And because 85% of the Tomales

area is Wilderness, a Wilderness Stewardship Plan could help guide any proposed actions that relate to elk and other Wilderness values.

Because the proposal explicitly includes Wilderness in its list of issues and concerns, which makes up most of Tomales Point, it would make sense for the Park Service follow its directives and policy at DO #41, Sec. 6.3 and NPS Policies at 6.3.4.2, which state that “a Wilderness Stewardship Plan will guide management actions to preserve wilderness character,” and the agency “will develop and maintain a wilderness management plan or equivalent planning document to guide the preservation, management, and use of these resources.” At this time, no other “equivalent” planning document or guide, that we know of, exists, including the General Management Plan or its Amendment, that specifically addresses Wilderness stewardship. And while a Wilderness Stewardship Plan “may be developed as a separate document or as an action component of another planning document,” if this is only done for the Tomales Point area portion of the Phillip Burton Wilderness, the Park Service would forego this opportunity to develop a more comprehensive planning document for the entire Wilderness, something that will still be required in the future. So we suggest that the Park Service enlarge its planning effort now, since it is already planning to prepare an EIS under NEPA, which is also required for Wilderness planning.

NPS policy, with regard to Wilderness, also states that “Natural resource management plans will be integrated with and cross-reference wilderness management plans. *Pursuing a series of independent component projects in wilderness, such as single-species management, will not necessarily accomplish the over-arching goal of wilderness management.*” 2006 Management Policies 2006, Section 6.3.7 (emphasis added). And that’s exactly what the Park Service is proposing here—a single species management plan for elk, which will not necessarily accomplish the goal of wilderness stewardship without a stewardship plan.

Regardless of the approach the Park Service takes, a Wilderness Stewardship Plan “will be developed with public involvement and will contain specific, measurable management objectives that address the preservation and management of natural and cultural resources within wilderness as appropriate to achieve the purposes of the Wilderness Act and other legislative requirements.” *Management Policies 2006*, Section 6.3.4.2.

2. The Wilderness Act Requires Removal of the Elk Fence as the Proposed Action and Preferred Alternative, and likely the Final Action, for Any Plan Moving Forward.

Initially, the Park Service should state explicitly in its planning documents that it will commit to complying with the Wilderness Act and adhere to the letter and intent of its provisions.

There can be no dispute that the elk fence is causing trammeling of the natural conditions and community of life in the Phillip Burton Wilderness at Tomales Point. Trammeling includes the tule elk, a native indigenous species, which has been a part of the Wilderness since it was reintroduced, as well as the community of life upon which it and other species depend. The Wilderness Act’s substantive provisions compel the Park Service to remove the fence, even though it is located outside the Wilderness boundary. *See Isaac Walton League of America Inc.*

v. Kimbell, 516 F.Supp.2d 982, 996 (D. Minn. 2007) (finding wilderness-incompatible activities or conditions occurring outside of a wilderness boundary may “degrade the wilderness character from its present condition and thus result in a violation of [Section] 4(b) of the Wilderness Act[.]” The same principle applies here, where the elk fence is the “condition” outside the wilderness boundary that is causing trammeling and is degrading the natural conditions within the Wilderness by preventing migration of elk in and out of the Wilderness to where they can find adequate forage and water during prolonged droughts.

The Wilderness Act recognizes Wilderness “as an area where the earth and its community of life are untrammled by man....” Section 2(c). Untrammled means “free, unbound, unhampered, unchecked, having the freedom of the wilderness.” Howard Zahniser, drafter of the Wilderness Act. Clearly the elk are not untrammled by man if their freedom of movement is blocked by a manmade fence, restricting the animals to the Wilderness area and away from adequate forage and water elsewhere in the park. This problem is further exacerbated, and the Wilderness further degraded, by the ongoing prohibited uses (motorized uses, structures, etc.) authorized to manage this elk population in a captive state.

Since their reintroduction, tule elk have become a Wilderness natural resource because they are a native indigenous species. The elk are again a part of the ecological system or community of life of the Wilderness. The elk’s conservation and the natural conditions of the Wilderness are being limited, or trammled, because the elk cannot migrate from Tomales Point outside of their enclosure south of the fence. Therefore, even though the fence is located just outside the Wilderness boundary, its presence is causing a violation of Section 2(c) of the Wilderness Act. Moreover, because of the limits of movement imposed by the fence, an overpopulation of elk may even be degrading the natural conditions and character of the Wilderness, which is a violation of Section 4(b) of the Wilderness Act.

3. The New Plan’s Environmental Analysis must Consider any Monitoring Data Gathered to Comply with Mitigation Measures in the 1998 Elk Plan FONSI Regarding the Effects from Elk on Wilderness Values and Threatened and Endangered Species.

In the 1998 Elk Plan’s finding of no significant impact, or FONSI, the Park Service stated: “Additional mitigations planned include conducting an annual monitoring program, combined with ongoing research, to assess and track the effects of management actions on elk and their environment.” FONSI, p. 1 (available at <https://www.nps.gov/pore/getinvolved/planning-tule-elk-management-plan-1998.htm>).

In particular, the FONSI listed specific monitoring in support of its mitigation measures. *See id.*, p. 2 (table). Data gathered in response to this monitoring should be made available to the public to help understand impacts and whether or not the mitigation measures were effective.

For example, the first item in the table requires “Monitor elk populations and their environment annually and analyze data to detect negative trends” to determine “Impacts” from “Overpopulation and its effects on habitat, [threatened and endangered] species, neighbors, and visitors.” *Id.*, p. 2. This data is crucial to determine whether the confined elk population has

had an adverse effect on Wilderness character and can be used to guide the development of a Wilderness Stewardship Plan.

Another mitigation measure was to “Conduct research to improve basis [sic] for decision making and better understanding the ecosystem and interactions between elk and park resources.” *Id.* The data and understanding from this research would be enormously helpful to determine effects on Wilderness values, including the elk and the community of life it depends on.

And more specifically, in order to determine the effects of tule elk on Threatened and Endangered species, which require additional protections and conservation measures for recovery under the Endangered Species Act, the Park Service agreed to “Monitor threatened and endangered species in contact with tule elk with potential for effects.” *Id.* For Tomales Point, these include the Myrtle’s silverspot butterfly and the California red-legged frog. Again, these species and their habitats, or the community of life they depend on, are Wilderness values. But these species are additionally protected from any “take” or destruction or adverse modification of their critical habitat, which may occur if the elk are confined behind a fence. *See* Endangered Species Act, Sections 9, 7, and ESA Regulations.

If you have any questions, please direct them to the contact below.

For Wilderness Watch,



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