

June 20, 2013

Director Jon Jarvis
National Park Service
1849 C Street, NW
Washington, DC 20240

Dear Director Jarvis:

On behalf of Public Employees for Environmental Responsibility (PEER), Wilderness Watch, Olympic Park Associates and Friends of the Clearwater, we commend the initiative entailed in promulgating Director's Order #41: Wilderness Stewardship (DO-41). The DO has many fine provisions which should enhance wilderness management within our national park system.

Those excellent provisions are offset, unfortunately, by four sections which are poorly drafted or framed. The undersigned groups are writing that you rescind your recently issued in order to clarify these critical provisions which, if left uncorrected, will subject park superintendents to overly complex legal quandaries, lead to avoidable litigation and spawn much needless confusion.

§7.2 Climbing

Neither the prior RM-41 nor Management Policies specifically address rock climbing. The inclusion of the section on rock climbing is a legitimate subject for agency guidance. In particular, the ban on sport climbing in wilderness is to be commended.

However the DO authorizes the “occasional placement” in wilderness “of a fixed anchor...” This kind of authorization is well beyond the scope of a Director’s Order.

Use of fixed anchors in wilderness is a subject of intense and long-standing controversy. It is by no means legally resolved if fixed anchors, permanently installed in wilderness, are consistent with the Wilderness Act. Moreover, the nonchalant way in which the DO adopts the legitimacy of fixed anchors under the Wilderness Act does not lay out the rationale for why the NPS concludes that fixed anchors are consistent with the Wilderness Act. The DO does not present any reasoning whatsoever before making a perfunctory statement that proves that the NPS has decided that fixed anchors do not violate the Act.

While, there are no controlling court cases or guidance from Congress that resolve this issue, we believe that the term “untrammled” in the Wilderness Act means just that – not

occasionally trammled or rarely trammled. Moreover, the prohibition on “structures or installations” is certainly relevant in this matter and can’t be ignored.

Yet, in the absence of any case law or other legal authority, the Director’s Order makes a firm legal determination. Further, it posits a standard that is so vague that will result in case-by-case determinations that may vary from park to park and even in the same park as new superintendents revisit earlier determinations.

Moreover, the DO authorization of fixed anchors in wilderness has implications not just for the wilderness in the parks but for all four wilderness-managing agencies, which have wrestled with this difficult question to no avail. In the late 1990’s the Secretary of Agriculture appointed a negotiated rule-making team to propose language on this precise issue for Forest Service rulemaking. At least the Forest Service realized that this was the stuff of public rulemaking under the Administrative Procedures Act (APA). In contrast, the draft DO would make a momentous interpretation, buried deep in NPS Tier 3 guidance.

This single addition to the DO alone will require that the NPS conduct a full scale Environmental Impact Statement (EIS) as required by the National Environmental Policy act (NEPA). The fixed anchor decision is an agency action that will have effects throughout the 45 million acres of park wilderness and establishes precedent throughout the national wilderness preservation system. No agency, not even the NPS, is free to behave in so cavalier a fashion.

While NPS may contend that DOs are not subject to NEPA, it should be countered that DOs do not adopt Federal rules that go to the heart of a statute’s meaning. This single addition to the DO would make the DO subject to challenge under the APA as well as NEPA.

For these reasons, we urge that this provision be removed from a revised DO.

§5.6 Wilderness Boundaries

Management Policies are silent on wilderness boundaries. The draft DO adopts a standard that would overrule the current standard found in the previous RM-41, Appendix G (page 71) on road corridor widths. The prior NPS standard prescribed, in the absence of specific congressional guidance for a wilderness, a corridor width of 30 feet from centerline of a dirt road, and 100 feet from centerline of a paved road.

The DO drops the 30 foot guidance and applies the 100 foot guidance to all roads – dirt or paved. This is a substantive change and one that weakens wilderness standards throughout the national park system.

Moreover, the DO offers no justification for this weakening of wilderness standards.

If the NPS continues to embrace the weaker standard, we urge that first, the DO make clear that parks which have composed written legal descriptions of their wilderness that

incorporated the 1999 standard and submitted that to Congress remain unaffected by this change. The already submitted legal descriptions have the full force and effect of law.

Further, allowing for exceptions to the new 100 foot standard at the park level must be made in a public review process. When and if a park decides to alter (almost certainly by enlarging) the standard wilderness road corridor to 100 feet, it is too late for public involvement after the map and legal descriptions have been transmitted to Congress. The public has no knowledge or involvement in that process. Once transmitted, the maps and legal descriptions have the force of law.

If the NPS sincerely cares about public involvement, a park that seeks to deviate from the new DO standard corridor width (other than where prescribed by Congress) must give notice for public participation.

Neither of these issues are addressed in the revised RM 41. We would urge that the 100-foot corridor for unpaved roads either return to the previous 30-foot margin or that the entire matter be bracketed until NPS develops a coherent policy for its implementation.

§ 6.12. Cultural Resources.

The final DO states “It is important to recognize that all laws intended to preserve our cultural heritage are applicable in wilderness and must be applied in concert with the Wilderness Act.”

Unfortunately some park superintendents and field staff may interpret these provisions to mean that cultural resources such as cabins, shelters, and other cultural resources, and their administration, are exempt from the Wilderness Act’s prohibition on structures. Previous versions of NPS policy, and the new DO, have failed to adequately articulate this basic requirement of the Wilderness Act, leading to unlawful decisions in the past such as the one where the NPS tried to helicopter new pre-fabricated trail shelters into the Olympic Wilderness to replace collapsed “historic” shelters, for example, or the fiasco at the Cumberland Island Wilderness where the NPS conducted motorized van tours through the Wilderness as part of its program to administer historic structures.

The National Historic Preservation Act does not mandate the active preservation of any cultural resources like cabins and structures inside NPS Wilderness, and particularly where the preservation of such resources conflicts with the requirements of the Wilderness Act. The bar is set quite high for when preservation of cabins and structures may be allowed under the Wilderness Act. This section of the DO should be revised to clarify the requirements of the Wilderness Act, or many similar controversies await the NPS.

§6.13. Native Americans and Consultation.

The final DO emphasizes that Indian Tribes and other Native American groups possess deep and long-held attachment to sites that lie on Federal lands and within designated national park wilderness. While it would be incorrect to say that the DO allows NPS managers to waive the prohibitions of the Wilderness Act to authorize or allow Indian or

Native American access in wilderness by motor vehicle, motorboats, landing of aircraft or by mechanical transport, the words of the DO are so vague, imprecise and encouraging that an uninformed local park manager may believe that the American Indian Religious Freedom Act (AIRFA) (42 USC 1996) or the Executive Order on Sacred Sites overrules or suspends the provisions of the Wilderness Act.

AIRFA was enacted in 1978. AIRFA was a joint resolution of Congress that provides: "...henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian..., including but not limited to access to sites..." AIRFA required that the President evaluate Federal policies to determine "...appropriate changes necessary to preserve and protect Native American religious cultural rights and practices." The President's report was sent to Congress in August 1979. That report did not conclude that the Wilderness Act prohibitions on motorized access resulted in a restriction of Indian religious freedom. In short, the President's Report did not request that Congress alter the Wilderness Act.

AIRFA's legislative history includes House Report 95-1308. The House Committee Report cites many infringements on Indian religious practice by Federal agencies. The infringements cited included denial of access to certain physical locations. The House Report discussion of infringements on Indian religion nowhere cites the prohibition of motor vehicles in wilderness as one of the infringements.

The Senate Report on AIRFA (95-709) states "Where implementation of the statute's (AIRFA's) policy conflicts with other existing statutes, Congress adopted the suggestion of the Department of Justice that such conflicts should be addressed to and be resolved by the Congress." Congress' intent is clear. AIRFA did not implicitly or explicitly repeal any other provision of law, including the Wilderness Act.

In 1978, the Interior Department's Associate Solicitor for Conservation and Wildlife (James Webb) wrote that AIRFA "...is not intended to amend any existing provision of state or federal law." (Memo of September 21, 1978 to Directors, National Park Service (NPS), U.S. Fish and Wildlife Service and Heritage Conservation and Recreation Service). The Associate Solicitor advised "Where existing restrictions are determined to be unwarranted or unnecessary, but nevertheless required because of some underlying legislative mandate, the statute (AIRFA) contemplates that the President would request appropriate legislative changes through his report to Congress." That report is discussed above.

In light of the foregoing, there is no basis for the NPS or any park manager to interpret AIRFA or DO-41 as repealing the Wilderness Act prohibition on motor vehicle access in wilderness by Indians.

In 1983 the NPS firmly stated in official rulemaking (48 FR 30263) that AIRFA does not

“...change existing authorities. Rather it directs the exercise of discretion to accommodate Native religious practices consistent with statutory management obligations.” (Emphasis added).

The statutory obligations include the Wilderness Act. Our organizations will challenge any attempt by the NPS as a whole, or by an individual park manager, to suspend the prohibitions of the Wilderness Act for Indian cultural, traditional or religious access, except where Congress itself may specifically provide for such a suspension. Rather than confrontation, we request that you clarify the DO to ensure that will not happen.

In summary, we commend you and the NPS for your work on this very important issue. This very importance of this work, however, militates for getting it right – without needless ambiguities, imprecisions and misinterpretations. We strongly urge that this DO be revised as outlined above in order to better accomplish the stated purpose of the DO: to “provide accountability, consistency and continuity” in NPS wilderness stewardship.

Sincerely,

Jeff Ruch
PEER Executive Director

A handwritten signature in black ink that reads "George Nickas". The signature is written in a cursive style with a large initial "G".

George Nickas
Executive Director
Wilderness Watch

Donna Osseward
President
Olympic Park Associates

Gary Macfarlane
Friends of the Clearwater