Public Employees for Environmental Responsibility
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Olympic National Park GMP
National Park Service
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Dear Denver Service Center:

Public Employees for Environmental Responsibility (PEER) offers the following comments on the Draft General Management Plan/Environmental Impact Statement for Olympic National Park.

GENERAL

The draft GMP is a timid document, unsuitable to guide the park for the next twenty years. The NPS has opted for the "status quo" rather than advancing the protection of one of America's great ecological treasures.

To move Olympic National Park into the twenty-first century, PEER suggests that the Draft consider and adopt measures to:

- Reestablish extirpated native wildlife,
- Remove the ski area from Hurricane Ridge, and
- Propose revised boundaries that encompass ecological units.

One of the most fundamental and longstanding National Park Service (NPS) policies is to return to park ecosystems the missing faunal elements where their disappearance is a result of human activity. For example, Olympic once contained wolves. Few areas of the national park system are as fit by topography, configuration and wild character for a wolf population. PEER's request is nothing revolutionary or extreme. The GMP should consider the matter.

Downhill skiing is an infrastructure-intense recreation that has no place in areas of the national park system. Only a few such areas remain. Other parks have eliminated them (e.g. Rocky Mountain and Lassen Volcanic National Parks). PEER acknowledges that

current NPS Management Policies allow the continuation of the few existing ski areas that remain in parks. But that does not mean that the NPS cannot propose to phase out the ski area at Hurricane Ridge. Such an action is the environmentally preferable course, allowing the restoration of disturbed and cleared areas, and reducing winter traffic.

PEER endorses the Draft alternative to propose boundary adjustments in certain critical areas of the park. PEER advises that the proposed revisions approximate more closely to watersheds and ecologically manageable units such as those displayed in Alternative B (P. M58). PEER urges that the NPS include the boundary revision along the Quinault River as one of the most essential to provide enhanced management and protection of park resources, namely elk. The NPS Draft position (p. 82) is a perfect example of the timidity that characterizes this Draft. Including the several parcels of private lands within the park boundary, should Congress chose to do so, would still leave the lands private and Congress could limit the NPS power to acquire the lands without the consent of the owner. There may come a day in the twenty year span of the GMP, when willing owners may come forth.

In short, GMPs are not written only for today's circumstances but for the possibilities of tomorrow. The Draft GMP for Olympic does not look into that future but timidly avoids potential "difficulty" (p. 82).

SPECIFIC COMMENTS

1. Indian Treaty Rights (pages 12, 133-136)

PEER appreciates the thorough, and largely accurate, description of treaties with Tribes that border Olympic National Park. The treaties provide for extant rights and privileges, some of which endure within the Park. However, the Draft's extensive discussion avoids two treaty issues.

a. Quinault Tribal Hunting

The Quinault have asserted, and will no doubt continue to assert, the right to hunt wildlife in the Park. PEER knows that if we fail to comment on this issue, then certainly the Quinault Tribe will. The NPS twice states forcefully (pp. 12 and 133) that the Stevens' Treaties "right to fish at all usual and accustomed grounds and stations" has been adjudicated and upheld in the Federal courts. The Draft fails to state that the Federal Courts have also adjudicated the nature and extent of the Quinault right to hunt, albeit at a lower level than the fishing rights decisions.

In 1982 two members of the Quinault Tribe killed an elk in the Queets corridor of the park. The Indians claimed a treaty privilege to hunt for elk on open and unclaimed land under the Treaty of Olympia.[1] In 1938 Congress reserved the open and unclaimed Federal lands as Olympic National Park.[2] In 1942 Congress prohibited "[A]ll "killing,

[1] July 1, 1855

[2] President Theodore Roosevelt reserved the area as a "national monument" in 1909. Arguably, the lands were no longer open and unclaimed as of then. However, the 1909 proclamation did not ban hunting on the Forest Service-administered monument.

wounding, or capturing at any time of any wild bird or animal…" within the confines of the Park.[3] In 1984 the U.S. District Court found that the Quinault privilege to hunt on their ceded lands in the park no longer existed. The court reasoned that the hunting privilege, if it did not cease when the lands were reserved as a park in 1938, certainly ceased when Congress banned hunting in the park. "It is not logical to give the hunting privilege set forth in the treaty superior force in the face of the purpose for the creation of Olympic National Park…"[4]

The court examined whether the creation of the park in 1938 and the 1942 ban on hunting abrogated the Quinault treaty privileges. The court found no abrogation of the Treaty.[5] The court did not need to find abrogation to determine that the hunting privilege had ceased. Instead, the court described the Quinault privilege to hunt (among other privileges) as "self-limiting," i.e. limited by the treaty's "open and unclaimed lands" provision. In contrast, the court pointed to the absolute Quinault treaty right to fish at usual and accustomed places and found that the fishing right survived the creation of the park. The fishing right survived because Congress showed no intent to prohibit fishing in Olympic. The act establishing Olympic allows fishing. The court stated only "…an absolute right, when encroached, requires specific abrogation." The Quinault right to hunt, the court held, was not an absolute right, but one limited by its own terms to "open and unclaimed lands."

In sum, the Quinault privileges to hunt in Olympic National Park ended when the lands were withdrawn from disposal and reserved for park preservation purposes; purposes with which hunting is incompatible.

b. Makah Rights to Whale and Seal

The Draft mentions (pp. 12 and 133), that the Makah Tribe retains the treaty right for "whaling and sealing at usual and accustomed grounds and stations." The Draft, to its credit, avoids conflating this right with the distinct and separate "right to fish." The latter right has been upheld in courts. The nature and extent of the Makah right has not been. The Ninth Circuit Court has thus far refused to decide the issue of abrogation of the whaling and sealing right by the Marine Mammal Protection Act.[6]

In 1855 the United States and Makah Tribe concluded the Treaty of Neah Bay.[7] Article 4 of the Treaty guarantees that "[T]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to the Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens."

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[3] 16 U.S.C. 256b.
[4] U.S. v. Hicks, 587 F. Supp. 1162, W.D. WA. (1984).
[5] "Termination of the Indian hunting privilege on Olympic National Park lands does not constitute abrogation."
[6] Anderson v. Evans (2002)
[7] January 31, 1855

The Treaty of Neah Bay does not define "usual and accustomed" grounds and stations where the Makah retained the right to take fish, whale or seal. The GMP does not decide the issue and it is best left alone.

This issue is relatively minor for Olympic National Park. Because the park boundary extends only to the lowest low tide line (i.e. places where whales are not usually found) the exercise of the Makah rights, whatever they may be, is unlikely in the Park. While the same is not true for seals, there is, to our knowledge, no incident of Makah sealing in the waters, or littoral areas of the Park.

To be complete, the Draft should state that the nature and extent of the Makah right to whale and seal has not been adjudicated. Nor has there been any determination that all or portions of the Olympic National Park coastal strip are "usual and accustomed grounds and stations" in the meaning of the Treaty of Neah Bay.

As for the third proviso of the Treaty that the Makah have the privilege of hunting and gathering roots and berries on open and unclaimed lands – this proviso is made inoperative by the same reasoning applied by the Federal court in the Quinault hunting decision. Again, to the best of our knowledge, Makah hunting has not been an issue in the Park.

2. Wild and Scenic Rivers

PEER believes it is essential that the Park evaluates and recommends all 14 rivers emanating from wilderness for Wild and Scenic River designation in the GMP. The fact that only one river was recommended in the draft is yet another indication of the Park's timidity in proposing appropriate protections for the resources. Since the new GMP would provide guidance for the Park for the next twenty years and because the Park refuses to move forward with a Wilderness Management Plan it is absolutely necessary that the designation of all thirteen rivers be address in the current GMP.

The Wild and Scenic River Act requires evaluation in planning processes:

> "In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national, wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials. The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative use of the water and related land resources involved." (Section 5(d)(1).

The 2001 National Park Service Management Polices are also clear that:

> "Potential national wild and scenic rivers will be considered in planning for the use and development of water and related land resources. The Service will compile a complete listing of all rivers and river segments in the national park system that it considers eligible for the national wild and scenic river system. …A decision concerning whether or not to seek designation will be made through a GMP, or an amendment to an existing GMP, and the legislation review process." (Section 2.3.1.10)

Furthermore, the National Forest Service completed its wild and scenic river assessment of 14 major river systems in the Park as part of the Olympic Forest Plan in 1990 but felt it appropriate to let NPS move forward with the final recommendation as these rivers originate in the Park.

The resolution of this issue is long over due. We believe all major rivers should be recommended and as Lake Ozette is home to listed sockeye, the Ozette should also be nominated.

We specifically recommend that that GMP include an inventory of the eligibility of all major river systems for inclusion into the Wild and Scenic Rivers System and provides protection of natural river processes and critical fish and wildlife habitat. .

3. <u>Wilderness</u>

Parks like Olympic are tasked with the complex job of meeting a variety of mandates designed to protect diverse and valuable resources. At Olympic one of the many challenges involves cultural resources within designated wilderness. Fitting together the two obligations of cultural and wilderness preservation is exceptionally complex.

The Draft GMP fails to meet the mandate of the Wilderness Act. Instead, the Draft GMP consistently places cultural resource programs higher than the obligation to preserve wilderness character. The GMP takes the extreme position that cultural resource programs automatically trump wilderness mandates. The GMP only allows that when the NPS carries out the cultural resource program, the NPS will use "methods that are consistent with the preservation of wilderness character…" (e.g. see p. 26). But the GMP presumes that the cultural resource program itself takes precedence over wilderness character (i.e. only the "means" of implementation are subject to wilderness scrutiny but not the program itself).

Olympic, of all parks, should know that the NPS must scrutinize cultural resource objectives with a close eye on the Wilderness Act mandates. A Federal judge rebuked Superintendent Laitner and Regional Director Jarvis for degrading wilderness character for the sake of preserving the historic scene, by attempting to install two new structures. The judge found that the NPS was in violation of the Wilderness Act.[8]

[8] Olympic Park Associates v. Mainella, Jarvis and Laitner (U.S. District Court, W.WA. (July 29, 2005))

If the Draft GMP is any indication, the NPS officials seem to have learned nothing from their defeat in court. For the Draft GMP posits the same legally flawed premise that historical considerations take precedence over wilderness character. This troubling behavior indicates more than an intellectual disagreement (for which there is ample room!). Rather, the Draft GMP displays a stubborn and childish insistence on the same practices that a Federal court has already found illegal.

PEER is not just criticizing the Draft. We specifically request the NPS reconsider the Draft and appropriately address the complex task of managing and preserving cultural resources in park wilderness. Here are two fundamental statements on which we can agree and that can lead to an improved, unbiased GMP.

a. "There is room in wilderness for historic structures."
In the early 1970's, as the NPS was completing a series of wilderness reviews for proposal to the Secretary, questions arose whether the proposals needed to excise structures of historical value from the boundaries.

In a letter of June 10, 1974 from the Office of the Secretary to Senator Henry Jackson, Chairman of the Committee on Interior and Insular Affairs the Secretary's office makes clear that "structures of historical value need not be carved out of wilderness areas. A recommendation to include such a structure in wilderness would be based on two criteria: (1) the structure should be only a minor feature of the total wilderness proposal; and (2) the structure will remain in its historic state, without development."

Olympic contains a number of historic structures now within wilderness. The Draft points out that the 1974 EIS for the Olympic wilderness proposal "affirmed that the historic properties in the park would not be adversely affected by wilderness designation." (p. 118). The statement is both consistent and contemporary with the letter from the Secretary's Office to Senator Jackson.

PEER does not advocate the removal of historical structures from Olympic wilderness. PEER does not advocate that the NPS cease maintenance or preservation of existing structures. PEER advocates that the GMP make clear that the NPS will not develop, and thus destroy the historic state of, such structures in wilderness. Such an action would contravene the Wilderness Act. Note as well, that some of the historic structures in wilderness (ranger stations, fire lookouts, etc.) are NPS administrative facilities that may also be justified not only by their historical worth but as necessary for administration of the wilderness area.

b. "There is room in wilderness to protect archaeological resources"
Many designated wilderness areas contain archaeological sites; places like Bandelier National Monument, whose wilderness was designated in 1976. More recently, Congress established the El Malpais National Monument and National Conservation Area in New

Mexico in 1987. The House Committee Report for that law asserted that in wilderness generally, it is permissible to undertake "active measures for the conservation and interpretation of archaeological and historical resources, as well as the scientific use of such resources." [9] The archaeological sites at Olympic do not trouble the Wilderness Act. Thus, PEER does not advocate that the NPS must cease research, investigation, conservation or interpretation of archaeological resources.

Trailside shelters

Trailside shelters are more complicated. From the very beginning, the NPS understood that the Wilderness Act generally did not allow for trailside shelters. The 1966 NPS Wilderness Management Criteria provide that "trailside shelters may be permitted where they are needed for the protection of wilderness values."[10] The Draft GMP does not argue for shelters as administratively necessary for protecting park wilderness. The Draft GMP lists "shelters" among the "historic properties in the park" (p. 118). As "historic structures" shelters may remain in wilderness and the NPS may maintain them.

This brings our comments to the issues raised in our successful litigation over the shelters at Home Sweet Home and Low Divide. First, the Draft GMP fails to make any mention of how this Federal court decision in Olympic Park Associates v. Mainella affects wilderness management. Second, we get the distinct feeling that the NPS considers the case to have been wrongly decided and thus safely ignored.

The Draft GMP illustrates both traditional NPS stubbornness and a biased approach to the wilderness-cultural resource issue. The two structures that the NPS proposed to install trailside at Home Sweet Home and Low Divide were NOT historic structures. They were built in the park maintenance yard in 2002. The NPS proposed to install them to replace original shelters that were historic but that the NPS had allowed to collapse under winter snows in 1998. The NPS justified the new structures in wilderness because they would contribute to the Park's effort "to maintain the historic feeling and appearance of the park trail system."

c. "Restoring historic feeling and appearance is impermissible in wilderness."

There is no law nor policy to which the NPS can point that either mandates or permits the NPS to manage wilderness designated lands to create, reestablish or perpetuate "historic feeling and appearance" at the expense of wilderness character. The restoration of a "historic feeling and appearance" on a landscape is as antithetical to wilderness preservation as is imaginable.

The Wilderness Act defines "wilderness" as "undeveloped Federal land…managed so as to preserve its *natural conditions*…" (emphasis added). Further, the Act requires that each Federal agency "shall be responsible for preserving the wilderness character of the area and shall administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." This legal requirement means more than simply the NPS will only use **methods** that are consistent with preservation of

[9] House Rep. 100-116, 100th Cong., 1st Sess. 12

[10] This sentence also appears in the NPS Administrative Policies, 1970, page 57.

wilderness character. This requirement means that the NPS must refrain from destroying the wilderness character by creation of artificial, i.e. human-created, landscapes to perpetuate "historic feeling and appearance."

The notion of perpetuating manmade landscapes in wilderness finds no support in the history of the Wilderness Act or of early understandings of the Act. Historic structures have a place in wilderness, as discussed by the officials in the early 1970's and described earlier in our comments. In contrast, there is no such support for maintaining "historic feeling and appearance" of landscapes in wilderness.

We must point out that this is not only our comment but the position of a Federal court. It is a decision that governs the NPS, and within which the GMP must operate. The court instructed the NPS, "[Once] the Olympic Wilderness was designated, a different perspective on the land is required. Regarding the Olympic Wilderness, that perspective means "land retaining its primitive character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."[11]

It is an extreme position for the NPS to argue that "historic feeling and appearance" trumps wilderness character.

Relationship of the Wilderness Act to the Organic Act

a. No Repeal of NPS Statutory Authority

The Wilderness Act provides that "[N]othing in this Act shall modify the statutory authority under which units of the National Park System are created."[12] The Organic Act charges the NPS to conserve, among other things, "historic objects." The Wilderness Act does not modify or repeal that fundamental part of the NPS mission. PEER does not object, as we stated above, to conserving "historic objects" in the wilderness of Olympic National Park.

b. No Lowering of Standards for Park Preservation

The Wilderness Act also provides that: "Further, the designation of any area of any park…as a wilderness area *shall in no manner lower the standards evolved for the use and preservation of such park*…in accordance with the Act of August 25, 1916, the statutory authority under which the area was created, or any other act of Congress which might pertain to or affect such area, including but not limited to, the Act of June 8, 1906, section 3(2) of the Federal Power Act; and the Act of August 21, 1935"[13] (emphasis added).

The Draft GMP quotes this section of the Wilderness Act as if this phrase waives the proscriptions and prescriptions of the Act for all cultural resource programs (p. 26). It does not! Further, the Draft GMP interprets this section to subordinate requirements that the NPS preserve wilderness character beneath an NPS desire to maintain "historic

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11 Olympic Park Associates v. Mainella, Jarvis and Laitner (U.S. District Court, W.WA. (July 29, 2005))

12 16 U.S.C. 1133(a)(3).

13 *Ibid.*

feeling and appearance" of landscapes. This is an overly broad and unsupported interpretation of the Act. The NPS advanced this position in court and it failed to persuade. This position is not persuasive in the Draft GMP.

The 1970 Administrative Policies of the NPS explains, in large part, the meaning of this Wilderness Act section. The Draft GMP clumsily asserts 16 U.S.C. 1133(a)(3) as a basis for placing all cultural resource programs above preservation of wilderness character.[14] But the NPS' own contemporaneous interpretation of 16 U.S.C. 1133(a)(3) provides a very different and more compelling interpretation:

> The Wilderness Act of 1964 recognizes, moreover, that all lands which may be included in the National Wilderness Preservation System are not to be managed alike. For example, the Wilderness Act provides for certain multiple uses in wilderness areas of the national forests designated by the act, such as existing grazing; mineral prospecting until 1984 and mining (with authority to construct transmission lines, waterlines, telephone lines, and utilize timber for such activities); and water conservation ands power projects as authorized by the President.
>
> No such lowering of park values is contemplated by the Wilderness Act for national park wilderness, since that act provides, in part, that:
>
> > * * * the designation of any area of any park…as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for the use and preservation of such park* * in accordance with the Act of August 25, 1916, [and] the statutory authority under which the area was created * * *.

NPS Administrative Policies (Revised 1970), p. 55.

In short, at the time of enactment, the NPS feared that some might view resource development exceptions that applied to national forest wilderness as applicable to wilderness in the national parks. In national parks such activities were, and remain, impermissible except where directly and specifically provided by Congress. Such an interpretation of the Wilderness Act would have the effect of lowering the standard of protection that parks enjoy, perversely so for the lands designated as wilderness.

The "no lowering of standards" provision specifically cites the Federal Power Act, for example. This ensures that the 1921 prohibition on dam building in parks (16 U.S.C. 797) remains unaltered by the Wilderness Act section authorizing the President to allow water development projects in national forest wilderness (16 U.S.C. 1133(d)(4)). It would be an insidious outcome if dams were prohibited in nonwilderness park areas, but

[14] The Draft applies the need to preserve wilderness character **ONLY** to the methods used to implement a program, but never holds that a given cultural resource program is subject to the same scrutiny!

were viewed as authorized in park wilderness by the Wilderness Act. This is what 'no lowering of standards' means. These words do not justify, as the Draft purports, militant cultural resource (or for that matter, natural resource) programs that destroy wilderness character.

Wilderness Suitability Studies
We endorse Alternative B that proposes wilderness suitability studies for nonwilderness areas near Lake Crescent and Ozette Lake (p. 69).

CONCLUSION
In July 2005, the Federal Court decided that the NPS is not allowed to indiscriminately subordinate the wilderness character of Olympic National Park to cultural resource protection. The NPS decided to install two new trailside shelters in park wilderness, for the purpose of enhancing "the setting, association, and feeling" of historic use. Thus, the NPS placed the value of establishing a feeling of historic use above the values associated with preserving wilderness character. The Court found that the NPS erred.

If the NPS believes that the Federal Court wrongly construed the operation of the sometimes-conflicting mandates, then the NPS should have appealed the decision in hopes of reaching a different outcome. But now, the NPS may not use a GMP as a means of writing new case law.

We recognize, as a matter of law, that:
- the NPS is charged with conserving historic objects, and
- the NPS mission applies in wilderness.

We call upon the NPS to reject the extreme assertion that any cultural resource program automatically trumps preservation of wilderness character, except only as to the means employed to implement the program. As the Court said, "[O]nce the Olympic Wilderness was designated, a different perspective on the land is required." Instead of misinterpreting the "no lowering of standards" section of the Wilderness Act to suborn wilderness character to cultural programs, this Draft should employ a more reasoned analysis. That analysis must be consistent with the ruling of the Federal Court; a ruling that the Draft refuses to even acknowledge.

Cordially,

Sue Gunn, Ph.D.
Director

cc: Congressman Norm Dicks
Senator Maria Cantwell
Senator Patty Murray