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TO R. Accomazzo
P Minault
J Taladay

FROM Christopher J Archer

DATE March 25, 1994

RE **AN ANALYSIS OF THE LEGALITY OF FIXED ANCHORS
UNDER THE WILDERNESS ACT**

Introduction

I welcome wholeheartedly the advance of modern techniques because it has widened the bounds of mountain adventure. There was a time, long ago, when I was oppressed by the thought that soon there would be no peaks to climb, no new routes to explore. But the more I travelled in the remoter ranges the more I realized how vast is the field of fresh endeavor. With the application of these new climbing and survival techniques, the horizon is truly boundless. Shipton, E, That Untravelled World

It is becoming abundantly clear that the federal agencies managing wilderness areas do not share Shipton's enthusiasm for and endorsement of modern climbing or its techniques. The departments and agencies responsible for managing areas designated wilderness under the 1964 Wilderness Act and its progeny among them Department of Agriculture (DOA), the Department of the Interior(DOI) the Bureau of Land Management (BLM), the U S Forest Service (FS) and the National Park Service (NPS)(collectively referred to as the "Agencies") are presently considering enacting regulations that will severely restrict climbing in wilderness areas throughout the nation.

One of the steps the Agencies are seriously considering is a complete ban on the use of fixed anchors in the wilderness. It is our understanding that a government solicitor at one of the relevant Agencies has drafted a legal opinion that concludes that the use of fixed anchors in wilderness areas is illegal under the Wilderness Act of 1964 (the "Act"). We have thus far been unable to obtain a copy of this opinion and are not aware of the authority and legal reasoning used by the solicitor to support his conclusion. Further we are unaware of the breadth of the solicitor's opinion i.e. does the opinion conclude that placement of fixed

anchors has always been illegal under the Act or does it instead provide support for a general determination that prospective placement of fixed anchors violates the Act, does the opinion contend that pitons, bolts and all other fixed gear is illegal, even at belays, or is it merely the proliferation of new routes protected substantially by bolts? These issues are of particular importance in developing litigation and negotiation strategies

You have asked us to analyze the Wilderness Act its legislative history, relevant departmental and agency regulations, and interpretive case law, to determine if placement of fixed anchors is illegal under the Act. If the answer to this question is yes, you have asked us to determine whether an administering agency is required to remove all existing fixed anchors, and whether or not an administering agency may allow fixed anchors in particular wilderness areas. You have also asked us to analyze the following: the precedential effect and significance, if any, of the fact that the use of fixed anchors by climbers predates the Act, the applicability of the "minimum tool" and "limits of acceptable change" doctrines, and whether climbing is a "wilderness dependent activity."

Part I of this memorandum describes and analyzes authority supporting the solicitor's opinion that placement of fixed anchors is illegal, and examines the defenses and arguments that the Access Fund can advance. Part II describes and analyzes authority supporting the Access Fund's position that placement of fixed anchors is permissible under the Act and examines and analyzes the defenses and arguments that the Agencies can advance. Part III discusses the Access Fund's legal recourse should any of the Agencies determine that fixed anchors are illegal under the Act either prospectively or retrospectively. Part IV analyzes the political and legal realities of the situation and analyzes a variety of strategies for dealing with the Agencies and the environmental and conservation organizations involved, and Part V suggests possible further research.

I. THE AGENCIES' POSITION

The agencies responsible for administering wilderness areas have apparently begun analyzing the impact and effect of fixed anchors at the behest of, or at minimum with the encouragement of, several national environmental and conservation groups. It is our understanding that an attorney for one of the Department's or Agencies involved in managing wilderness areas has drafted an opinion which concludes that the placement of fixed anchors is illegal under the Wilderness Act. Although we have tried to obtain a copy of this opinion so far none have been forthcoming.¹ Not knowing the breadth of the Agencies' legal opinion complicates this analysis of the Act for we do not know how the Agencies' define fixed

¹ Apparently the Agencies have refused to produce a copy in response to Paul Minault's Freedom of Information Act request on the grounds that the document is protected by the attorney-client privilege. I have made several phone calls to Carl Gawell, a member of Skaggs staff who offered to try to obtain a copy for us during the meetings in Washington, D.C. last month, but Mr. Gawell has not responded to any of my calls or messages. I have asked Brad Udall to follow up with Mr. Gawell on this.

anchors, nor whether the Agencies are considering adopting the position that all future use of fixed anchors should be banned pursuant to the mandates of the Act (a position that can be justified under the language, legislative history and regulations), or the position that installation of fixed anchors has always been a violation of the Act (a much more difficult argument which probably requires removal of all fixed anchors) This Part of the memo analyzes the authority available to support and to rebut both positions

A. Prospective Use of Fixed Anchors is Illegal Under the Act.

The probable foundation for this position is that the tremendous increase in the number of climbers and fixed anchors in wilderness areas over the last ten years has begun to threaten the wilderness character of wilderness areas. As a result, the Agencies may determine that climbing development has reached a point where the Wilderness Act requires the Agencies to regulate and perhaps prohibit the use of fixed anchors in the wilderness. Research reveals that there is ample support in the Act's language, legislative history, regulations and policies to justify the Agencies regulation fixed anchors and to allow such a decision to withstand a judicial challenge

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1 The Mandates of the Wilderness Act In 1964, Congress passed the National Wilderness Preservation System, 16 U.S.C. §§ 1131 *et seq.* The basic mandates of the Act were to 1) preserve and protect the wilderness character of certain designated lands for future generations, 16 U.S.C. §1131(a), and 2) to allow the use and enjoyment of those wilderness areas via solitude and primitive and unconfined recreation 16 U.S.C. §1133(c). The main objective of the legislation, however, was the preservation and protection of these designated areas in order to secure for present and future generations an enduring source of wilderness. To ensure this result, Congress specifically directed that these areas be administered in such a manner as to leave them unimpaired for future use and enjoyment as wilderness and to protect and preserve their wilderness character 16 U.S.C. §1131(a). Congress designated the Agencies as the entities responsible for preserving the wilderness character of each area, 16 U.S.C. §1133(b) and specifically prohibited the use of motorized equipment, structures and installations, among other things, in wilderness areas 16 U.S.C. §1133(c).

a Wilderness Character The factors which make up an area's wilderness character are spelled out in the Wilderness Act's definition of wilderness 47 F.R. 47183 "Wilderness" is defined by the Act as an area "untrammelled"² by man

an area of undeveloped federal land 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 (1) generally appears to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable (2) has outstanding

² In history of untrammelled Hendee p 108

- declaration by ---

opportunities for solitude or a primitive and unconfined type of recreation, (3) has at least 5,000 acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition and (4) may also contain ecological, geological, or other features of scientific educational, scenic, or historical value

16 USC §1131(c)

The BLM Wilderness Management Policy (the "BLM Policy") states that the factors in this definition refer to "wilderness characteristics" that fall into three broad categories: Naturalness, Outstanding Opportunities for Solitude or a Primitive and Unconfined Type of Recreation, and Special Features.³ "Naturalness" refers to the concept that a wilderness area must continue to appear to be primarily affected by the forces of nature, with the imprint of man's work substantially unnoticeable. Outstanding Opportunities for Solitude or a Primitive and Unconfined Type of Recreation emphasizes isolation and remote physical and mental challenges. "Solitude" is defined as (1) the state of being alone or remote from habitations, isolation, (2) a lonely, unfrequented or secluded place. The emphasis is on the opportunities a person has to avoid the sights, sounds and evidence of other people within a particular area. "Primitive and unconfined types of recreation" are defined as those activities that provide dispersed, undeveloped recreation which do not require facilities or motorized equipment. The BLM Policy concludes that "in most cases opportunities for solitude and primitive recreation go hand in hand, and both are dependent on naturalness." 46 F.R. 47183

1) *Principle of Nondegradation* In order to preserve these wilderness characteristics, the BLM Policy requires management based on the "Principle of Nondegradation." "Under this principle, the central thrust of BLM wilderness management is to prevent the degradation of natural conditions, opportunities for solitude or primitive recreation, and special features." 46 F.R. 47183. Although the BLM Policy recognizes that variations in levels of solitude, primitive recreation and naturalness are present within a single wilderness or between different wilderness areas, the Principle of Nondegradation means that wilderness areas must be managed 1) to provide for the protection and perpetuation of the values of the wilderness resource, 2) to prevent deterioration caused by other resource activities or by visitor use and, 3) when necessary to restore deteriorated sites to an acceptable condition. Id.⁴

2) *Limits of Acceptable Change* Determination of "acceptable conditions"

³ 'Special Features' refers to optional wilderness characteristics e.g., features of scientific educational scenic or historical value, which are not discussed in this analysis. 46 F.R. 47183

⁴ Although further research needs to be done to confirm this it is likely that the other Agencies have adopted the principle of nondegradation in their policies

evidently turns on the "limits of acceptable change" doctrine (LAC)⁵ The LAC are established by reference to the conditions generally prevailing in each wilderness at the time of congressional designation. The prevailing conditions are used as a benchmark, "unless there is unacceptable biological, physical, or social degradation present," whatever that means. See BLM Policy, 46 F.R. 47183. The bottom line is apparently that "acceptable conditions" means "prevailing conditions" at the time of wilderness designation. It is from that benchmark that acceptable and unacceptable change is measured.

at the present

Although the BLM Policy specifically states that LAC does not mean that existing human caused impacts in some areas will set a standard that other more natural areas will be allowed to reach, LAC supports the argument that those generally prevailing conditions at the time of wilderness designation are the conditions that should be permitted to prevail in that specific area from the point of wilderness establishment onward. The next sentence further evidences this, by stating that determination of what human caused changes (i.e., from the benchmark) will be allowed and the management measures chosen to bring situations below the limit of acceptable change back to an acceptable level are left to the managers' discretion. BLM Policy, 46 F.R. 47183. In the case of nonconforming uses approved under the Act or subsequent legislation, the Policy states that the Principle of Nondegradation and the LAC should be used to reasonably mitigate such impacts.

don't think this is true

Although the LAC doctrine supports our position that fixed anchors can not be retroactively banned and removed (at least in areas where fixed anchor use was present before the areas were designated wilderness) it does not help much in arguing against a prospective ban. While the Fund can argue that the use of fixed anchors was an acceptable condition in the 1960s and is therefore an acceptable condition now, the Agencies are likely to respond that the dramatic increase in the quantity of fixed anchors placed as well as the different type of fixed anchor use today goes well beyond the LAC.

don't think this is true - know they could never conduct research on activities

The Agencies could reasonably argue that placement of fixed anchors has substantially increased in recent years and that the purpose and use of fixed anchors has changed significantly from the 1960s to the present⁶. Such an argument might go as follows. In the 60s bolts were used to overcome blank sections of rock and to connect discontinuous cracks on routes that generally followed a natural line. As a general rule, they were used as a last

⁵ NB LAC are defined in the wilderness management plan for each wilderness area. BLM Policy 46 F.R. 47180 (p. 25).

⁶ In the 1960s, there were only a handful of people actively climbing technical routes in the wilderness and pitons and bolts were essentially the only protection available. Even then there was a general feeling among climbers that bolts should be used sparingly, if at all. In the 1970s the clean and free climbing ethics developed and bolts were used sparingly to protect actual pitches although they continued to be used with some frequency on long aid routes and at belay stations on all types of climbs. The evolution and importation of sport climbing techniques from Europe into the U.S. in the mid 1980s, slowly changed climbers' attitudes that bolts were to be avoided whenever possible. Placement of fixed anchors to protect otherwise unprotectable climbs became accepted by and used by a rapidly increasing number of climbers.

resort to allow completion of a route or to protect a dangerous unprotected section of climbing. Today, bolts are used to establish routes that often follow no natural line and that may end at two more bolts 80 feet up in the middle of a blank wall. In addition, they are placed every 5 to 8 feet and completely eliminate any danger from a fall on the pitch. Rather than remaining a means to an end as they were in the 60s, today bolts have become an end in themselves.

In short, the combination of a rapidly increasing climbing population, the acceptance of bolts by most climbers as legitimate and even desirable protection, and the consequential dramatic increase in bolts placed in wilderness areas, support the Agencies' argument that use of fixed anchors, even in areas where such use predated establishment as wilderness, has substantially changed from the 1960s, has surpassed the limits of acceptable change today and is now threatening to degrade the wilderness character. An Agency conclusion that allowing the continued use of fixed anchors would contribute to the degradation of the wilderness that Congress has mandated must be protected would likely meet the arbitrary and capricious standard and survive judicial review.

- but, see some data

b Conflicts Between Wilderness and Other Uses It was apparent even during the six years it took to pass the Act, that conflicts would arise between wilderness values and other uses. During the hearings on the Act, Howard Zahniser of the Wilderness Society and others, argued that in the event of such a conflict the wilderness character of the area must be the predominant concern. Increased pressures for recreational use were to be handled consistently with wilderness purposes, and if that was not possible then recreational or other conflicting uses were to be excluded. See Statement of H Zahniser, Hearings on Wilderness Preservation System, Washington D C, May 7-11, 1962 at pp 1249 and 1300-01

By in large, Zahniser's position was adopted by Congress see 16 U S C §1131(a)(Explicit mandate that wilderness areas be administered so as to leave them unimpaired for future use and enjoyment as wilderness and to protect and preserve their wilderness character), and has been implemented by the Departments of Agriculture and Interior and by their Agencies. See e.g. US Forest Service regulations

National Forest Wilderness shall be so administered as to meet the public purposes of recreational, scenic, scientific, educational, conservation and historical uses, *it shall be administered in such manner as to preserve and protect its wilderness character*. In carrying out such purposes National Forest Wilderness resources shall be managed to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude physical and mental challenge scientific study, inspiration and primitive recreation. To that end (b) *Wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions* (c) *In resolving conflicts in resource use wilderness values will be dominant to the extent not limited by the Wilderness Act subsequent establishing legislation or the regulations in this part*

36 C F R. § 293.2 [emphasis added]

Bureau of Land Management regulations

The objective of these regulations is management of the public lands designated as part of the National Wilderness preservation System to preserve and protect their wilderness character, *provide for their use and enjoyment by the American people in a manner that will leave them unimpaired for future use and enjoyment as wilderness* and allow for recreational scenic, scientific, educational, conservation and historical use

43 C F R. § 8560 0-2 [emphasis added],

Wilderness areas shall be managed to promote, perpetuate, and, where necessary restore the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, inspiration, primitive recreation, watersheds and water yield, wildlife habitat, natural plant communities, and similar natural and recreational values (b) *Wilderness shall be made available for human use to the optimum extent consistent with the maintenance of wilderness character* (c) *In resolving conflicts in resource use wilderness values shall be primary to the extent provided by the Wilderness Act or subsequent establishing legislation*

43 C F R. § 8560 0-6 [emphasis added], and

The wilderness resource will be dominant in all management decisions where a choice must be made between preservation of wilderness character and visitor use The highest priority among various kinds of visitor use will be accorded those activities which (1) are most dependent upon the wilderness environment and cannot be reasonably accommodated outside of the wilderness, [and] (2) least affect the wilderness environment

46 F R 47188

Thus any uses determined to be or characterized by the Agencies as inconsistent with the preservation of wilderness character and the future use and enjoyment by the American people as wilderness can be prohibited under the Act and the administrative regulations of the Agencies

2 Does the Use of Fixed Anchors Conflict with Wilderness Values?

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Determining this issue will be based on a variety of subjective factors and comes within the broad discretion granted agencies by Congress Since there is evidence to support both the Agencies' and the Fund's positions (see Part __ below) Agency adoption of either position will likely withstand judicial review

The Agencies regard the wilderness as one extreme on the environmental modification spectrum (EMS) The EMS is the idea that a continuum of environmental conditions exist ranging from the "paved to the primeval " At one extreme cities and urban landscapes

dominate, at the other, primeval conditions characterize the setting. In between are a wide range of land uses. Hendee, Stankey & Lucas, Wilderness Management, North American Press, Colo (2d ed 1990) pp 159 & 182 (hereinafter referred to as "Hendec") As discussed above, there is ample support for the Agencies' position that the use of fixed anchors is inconsistent with wilderness characteristics and that the Act's requirement that the Agencies to protect and preserve the wilderness for future generations mandates some restrictions over this activity.

The Agencies will probably argue that unrestricted bolting will in fact diminish opportunities for solitude and primitive recreation by attracting greater numbers of climbers to more remote areas as they become developed and the quantity of routes on peaks and cliffs throughout the areas increases. In addition, they may argue that opportunities for primitive and unconfined recreation are diminished by the unrestricted installation of bolts because climbers looking for more traditional (and riskier) climbing experiences will be deprived of those opportunities forever.

The counterargument is that fixed anchors are substantially unnoticeable and therefore permitted under 16 U.S.C. 1131(c). The fact that many of the Act's supporters were climbers who had placed bolts and pitons on climbs suggests that had the issue been raised during the debates and hearings on the Act, fixed anchors would have been permitted under the Act. Unfortunately, the issue was not raised and neither the Act, the legislative history or the regulations and policies provide for or authorize the placement of fixed anchors. In the absence of such authorization, there is ample evidence to enable the Agencies to establish that a decision to ban fixed anchors was not an arbitrary and capricious one. See Part __, infra.

a Support for Agency Position in Mountain Literature It should be noted that even ignoring the language of the Act regulations and policies that ostensibly support a ban the Agencies could construct a persuasive argument that the use of fixed anchors is incompatible with wilderness values using available climbing and mountaineering literature.

The first piton placements in America were probably placed by Albert Ellingwood in 1920 on the first ascent of Lizard Head Jones, Climbing in North America, Univ of Cal Press (1979) p 102 (hereinafter referred to as CNA). The first bolts were apparently placed by Sierra Club climbers on "local rocks" in California in the 1930s. CNA p 136. Perhaps the first bolts brought on a climb were by Bestor Robinson on the first ascent of Shiprock in 1939. The first ascentists, David Brower, Raffi Bedayn, John Dyer and Bestor Robinson placed four expansion bolts on the first ascent. However, the climbers "agreed with mountaineering moralists that climbing by the use of expansion bolts was taboo. We did believe, however, that safety knew no restrictive rules." Robinson "Shiprock" 4 American Alpine Journal 54 (1940), cited in CNA p 136. Thus, even in 1939 the climbers were aware of the "disreputable aura that surrounded the new techniques and had called themselves "rock engineers" in their writings.

This anti-bolt attitude was founded upon the anti-piton attitude in Britain in the 1920s.

and 1930s Pitons were looked down upon in England because their full scale use would kill the sport by making it too easy. For example, a popular refrain heard at English crags during the period was "The sort of man who would drive a piton into English rock is the kind of man who would shoot a fox." CNA, p 176⁷ Frank Smythe in his book Climbs in the Canadian Rockies, objected to the use of four bolts and pitons used on Brussels Peak due to the equipment's elimination of all danger. Smythe concluded that the regular use of such equipment would evidence the degeneracy of man. CNA, p 235

Although bolts and fixed anchors were too insignificant to be included in the Act, bolting and climbing ethics in general occupied many climber's thoughts. Even in the mid-1960s it was thought that bolts were being placed by too freely. See, e.g., Chouinard's "Are Bolts Being Placed By Too Many People?," Summit, March 1961, p 11. Again the debate centered over bolts lowering the difficulty and uncertainty of a climb. By bolting, the critics claimed that any blank section of rock could be climbed, with no possibility of failure. Robin Campbell concluded that these techniques no longer allowed the mountain a chance of turning back an ascent and were incompatible with the true spirit of mountaineering. In fact, Campbell analogized it to rape. Wilson, Games Climbers Play. In perhaps the most famous critique of bolting, Reinhold Messner concluded that today's climber carries his courage in his rucksack, in the form of bolts and equipment. Rock faces are no longer overcome by skill but are humbled pitch by pitch by methodical manual labor. Who has polluted this pure spring of mountaineering he asked? See Messner, "Murder of the Impossible," Mountain 15 (1971)

Thus, there is evidence available to the Agencies that ^{experience} at least some climbers concur that the placement of fixed anchors degrades the wilderness. If the Agencies decide to ban the prospective use of fixed anchors they will be able to defend their decision as a permissible construction of the statute. It will be much more difficult for the Agencies to defend the more restrictive position that fixed anchors are and always have been illegal under the Act.

B Fixed Anchors Have Always Been Illegal Under the Act.

In order for the Agencies to ban fixed anchors retrospectively, they will have to demonstrate not merely that current use is incompatible with the Act, but that fixed anchor use has always been incompatible with and illegal under the Act. Thus, the Agencies must establish that either the Act specifically bans fixed anchors or that fixed anchor use has always been an inconsistent and non conforming use. Such an argument will be difficult to support when faced with the fifty plus year precedent of placing fixed anchors throughout the nation and the thirty plus year precedent of placing fixed hardware in wilderness areas. Although there is legal authority that might be used to support the position that all fixed anchors are and always have been illegal this position requires an explanation by the

⁷ Jones concluded [a]s a result of this sportsman like attitude British alpinism went into an almost total eclipse during the interwar years. CNA p 177

- Even if ^{has the word} a structure or installation, not necessarily of the type or nature contemplated by the Act

Agencies why the overt and publicized use of fixed anchors was allowed for so long if it was in fact illegal, and exposes the Agencies to the criticism that they failed to perform their duties under the Act

1 Anchor Are Specifically Illegal Under the Act The Agencies might argue that fixed anchors are "installations" prohibited under the Act 16 USC 1133(c) Although fixed anchors ostensibly fit the general definition of the word "installation," nowhere in the legislative history, regulations and policies interpreting the Act is it suggested that fixed anchors are within that definition In addition, the BLM Policy, 46 F.R. 47186, requires the BLM to inventory existing structures and installations in wilderness areas and to critically evaluate the purposes and need for each If the structure or installation has historical interest, it may be retained, if not it may be retained only if it meets the minimum tool policy Any structure or installation that does not qualify for retention of the above criteria must be removed. 46 F.R. 47186 It is highly unlikely that the BLM, or any other Agency ever took the time to inventory bolts Such Agency inaction further supports the Fund's position that fixed anchors have never been considered to fall within the definition of "structures or installations "

Nor can fixed anchors ^{fixtures} reasonably be included within the designation "fixtures and improvements" ^{where is from?} Facilities and improvements, i.e., trails bridges, signs, and campsites, are provided pursuant to the minimum tool doctrine, discussed in Part III below only where they are the minimum necessary for protection of the wilderness resource and for the health and safety of persons within the area No facilities and improvements will be provided for the comfort and convenience of the visitor Existing facilities and improvements not specifically approved for in these guidelines-- those without historical value and not necessary for preservation of an area's wilderness character or for the health and safety of persons within the area--will be removed 46 F.R. 47188 This regulation suggests that an argument that bolts are required for health and safety reasons might be somewhat persuasive to the Agencies

Other authority that could be used to argue that fixed anchors are illegal are the following two regulations The first states that "No person shall willfully deface remove or destroy plants or their parts soil, rocks or minerals " 43 C.F.R. 8365.1-5(a)(2) This regulation is similar to the Boulder Municipal Ordinance upon which Walt Fricke Boulder City Attorney former climber and author of a guide to climbing in Rocky Mountain National Park based his opinion that bolting was illegal and should be prosecuted as vandalism It appeared at the time that Fricke's position was insupportable In addition to the fact that whether bolts deface the rock is an open issue bolts are not placed with the intent to deface the rock Further it is not clear that drilling a bolt hole consists of the removal or destruction of rocks I offered Morrison & Foerster's representation to anyone prosecuted under the Boulder Ordinance on a pro bono basis, but unfortunately no one was arrested under the Ordinance and there were no volunteers for a test case

The second regulation prohibits leaving personal property unattended "No person

shall leave personal property unattended longer than 10 days. Personal property left unattended longer than 10 days without permission of the authorized officer, is subject to disposition under the Federal Property and Administrative Services Act " 43 C.F.R. 8365 1-2(b). Apparently under this regulation if anchors were determined to be abandoned personal property, the Agencies could remove the fixed anchors and take whatever steps are provided under the Federal Property and Administrative Services Act. This may actually be the strongest support for a complete ban on, and removal of, fixed anchors. Although anchors may not fit into the definition of "installations" as discussed above, they can be characterized as abandoned personal property. This regulation provides justification for removal and no valid defenses immediately leap to mind.

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2 Anchors Always Incompatible With Wilderness Values Essentially the same argument as in Part IA, except that Agencies must go a step further and argue that fixed anchor use has always been inconsistent with wilderness values and a nonconforming use. If the Agencies can establish that, there is authority for the removal of the offending objects. The major problems with this position are that the use of fixed anchors 1) predates the Act, 2) were placed by major environmental figures and supporters of the Act, and 3) continued essentially uninterrupted to the present. Thus, it is as a defense to the Agencies' attempt to outlaw and remove all anchors that the precedent set by years of use is relevant.

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As discussed above in Part I __, the LAC doctrine defines the baseline for measuring acceptable conditions as the conditions prevailing at the time of establishment, thereby supporting the argument that the use of anchors is grandfathered in all the areas where such use occurred prior to establishment as wilderness. The disadvantage to this position is twofold: first, in the 1960s although pitons were ubiquitous they were removed after use whenever possible; the true fixed anchors were bolts and fixed pitons, which I suspect were not numerous or to be found in many different wilderness areas. Thus, the number of grandfathered wilderness areas may be few. Second, even if there were one or two fixed anchors in a wilderness area at the time of its establishment, the Agencies may argue that their presence does not mean that unrestricted placement was allowed to occur, but rather that the number of anchors existing at the time of establishment is the limit of the acceptable condition, and not one anchor more.

3 Removal of Existing Fixed Anchors If fixed anchors are declared to have always been illegal, the administering agencies will likely be held responsible for removal of all fixed anchors installed after the establishment of an area as wilderness. Under the Act and its regulations, if there are nonconforming uses that have occurred after the establishment of an area, the managers are required to restore the area back to its original state. See e.g. USFS Regs 36 C.F.R. 293.5 and BLM Regs 43 C.F.R. 8560.0-6 which both require preservation and restoration of the wilderness. Unless there was some provision in the establishing legislation for an individual wilderness area that could be construed to permit anchor placement, the Agencies could remove all fixed anchors installed from the day after

establishment to the present⁸ *TVVC*

If the Agencies adopt the position that prospective placement of anchors are incompatible with the wilderness, existing anchors would probably be safe, even if a conservation group later sued the Agencies as a result of their refusal to remove the existing anchors. As discussed in Part IA, there is ample evidence to support such a refusal by the Agencies. The ideal situation would be a determination that bolting is no longer a recommended or desirable wilderness use, but directing each wilderness area to formulate its own climbing regulations based on historic use, among other things. The down side is that it would grant area managers a tremendous amount of discretion to either permit further bolting or to prohibit bolting and remove all fixed anchors.

II. THE ACCESS FUND'S POSITION

As will become apparent from the discussion that follows, there is ample support for the Fund's position that fixed anchors are compatible with the mandates of the Act.

1 Act Mandates Preservation For Use As discussed in Part IA, the Wilderness Act was passed in order to realize two objectives: 1) preservation and protection of the wilderness for present and future generations, and 2) utilization and enjoyment of the wilderness through opportunities for solitude or primitive and unconfined recreation. Since preservation of the wilderness character is the predominant purpose of the Act, the Fund must argue that use of fixed anchors is compatible with wilderness character as defined by Congress.

The Fund can argue that the Act requires preservation of the wilderness for the use of present as well as future generations. Mountaineering and rock climbing have always been regarded as acceptable recreational activities in the wilderness, and in fact many of the most vocal advocates for wilderness preservation had substantial climbing and mountaineering backgrounds. John Muir, Enos Mills, David Brower are just a few examples of the people who comprise this category. Moreover, Brower is credited with placing the first bolts on a route in the U.S. on the 1939 ascent of Shiprock. It is unlikely that these individuals would have advocated establishment of a wilderness that restricted their use. Rather they advocated its establishment so that they and others could continue to use and enjoy it free from commercial development, exploitation and the steady encroachment of civilization.

⁸ It should be noted that if special provisions have been incorporated into the establishing legislation "these provisions override the general management provisions of the Wilderness Act and must be regarded as specific direction for management of the area in question." 46 F.R. 47182. It is recommended that the fund research establishing legislation at wilderness areas that have traditionally attracted climbers, e.g., Yosemite, Rocky Mountain, etc. and determine if any special provisions or mention was made of climbing or fixed anchors.

Congress intended wilderness to be "an area where man's impact was minimal and which was predominantly natural and unmodified. At the same time, the act accommodates reality by stating that these areas 'generally appear' to be 'primarily affected' by nature with man's imprint 'substantially unnoticeable' (emphasis added)." Hendee, p 108. The Fund must argue and develop evidence that fixed anchors are insignificant and unnoticeable, and further that climbing even while using fixed anchors does not adversely affect an area's general appearance that it is primarily affected by the forces of nature. Wide angle photographs of fixed anchors on climbs and explanation of the installation process and camouflage opportunities may be helpful.

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2 Precedential Use Further support for the Fund's position comes from the steady and uninterrupted use of fixed anchors while climbing in the wilderness for over thirty years. Often use of these anchors was by vocal and active supporters of the Act and by members of established environmental organizations like the Sierra Club. Query: Did Zahniser or any other members of the Wilderness Society or Nature Conservancy climb? Did they ever place or use fixed anchors??

Hopefully, the Agencies will not take issue with the statement that mountaineering and climbing are accepted uses of the wilderness. Support for this position is voluminous. If that proposition is accepted, the Fund must emphasize that even a prospective prohibition on fixed anchors would effectively end the ascent of new climbing routes. In addition, such a position raises interesting dilemmas. If climbers are caught in a storm, must they risk death or serious injury by continuing to the top without leaving behind any gear? Will they be arrested and fined if they decided to retreat and leave fixed anchors? Can the agencies force climbers to face such a dilemma? In actuality, such a policy is a de facto prohibition against retreat. If the Agencies wanted to retrospectively prohibit fixed anchors, it would effectively ban all climbing for the similar reasons. It would be interesting to estimate the number of routes in the wilderness without fixed anchors on them. I would guess that between 50 and 75% of all existing routes have some type of fixed hardware in situ.

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It is possible that the Fund can argue that the thirty years of precedential use have created "private rights" that are exceptions to the Act's prohibitions.⁹ cursory research indicates that the phrase "subject to existing private rights" in Section 1133(c) of the Act applies to legal rights held by private parties at the time of wilderness designation. We are unaware of any legal doctrine that would vest such rights in climbers. A prescriptive easement probably will not work because even though we could probably establish open, notorious and continuous use, establishing that such use was under a claim of right could be

⁹ See, e.g., BLM Policy, 46 I.R. at 47185. 5. Nonconforming Uses a Valid Existing Rights. Private rights existing as of the state of establishment will be recognized e.g. valid mining claims. Valid existing rights not covered by policy will be considered by the BLM on a case by case basis in consultation with the Regional Solicitor to determine the nature of the rights and the extent to which the BLM must regulate the exercise of those rights pursuant to the Act and other laws.

difficult, and unfortunately such easements are generally not available on public lands

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3 Solitude and the Act Even if the Fund is able to establish that the use of fixed anchors while climbing is accepted, and substantially unnoticeable the Agencies may argue that the continued use of fixed anchors, will attract more climbers and allow the development of more routes in the wilderness, and the result will be the depletion of opportunities for solitude, which is inconsistent with the Act. The Act provides that wilderness shall have "outstanding opportunities for solitude or a primitive and unconfined recreation" (Emphasis added) 16 U.S.C. 1131(c). The Fund must argue that this phrase means opportunities shall be provided for either solitude or primitive recreation and that fixed anchors provide the opportunity for climbing, a traditional and accepted example of primitive and unconfined recreation. The Agencies are likely to argue that "solitude" is similar to and modifies "primitive and unconfined recreation," and that therefore any use that lessens opportunities for solitude is inconsistent with the Act.¹⁰

This is a difficult issue for the Fund. Since the Act is somewhat ambiguous on this point, an agency decision either way is likely to be upheld as a permissible construction of the statute. Further, the Agencies will adopt the position that recreation opportunities and solitude are linked because they are concerned about regulating all user groups, not just climbers, and without this link, the Agencies' ability to regulate would be severely constrained. Thus, even if climbing is recognized as a traditional and accepted activity like hiking, camping, etc. it may be regulated if the Agencies adopt this interpretation of the Act. Justification for Agency action to curtail all user group activity is suggested by the BLM Policy, 46 F.R. at 47183 which emphasizes the Congressional mandate to preserve the wilderness character and subdivides "use" into two types: 1) "on-site" use, which takes direct advantage of the multiple resources of the area, and 2) "off-site" use which enjoys the area from a distance such as viewing the scenery at a distance from a nearby highway or just possessing the knowledge that such an area exists.¹¹ Via this tortured construction of the word "use", the Agencies can argue that they are permitting use by present generations as mandated by the Act. One suspects that the proponents of the Act as well as Congress would not have endorsed this interpretation.¹¹

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¹⁰ Hendee supports the latter view and concludes that the distinguishing qualities of classified wilderness are naturalness and solitude. Hendee, pp. 108-9.

¹¹ The full text is reprinted here.

Wilderness areas are thus open to use and provide a variety of benefits to society. Use might be "on-site" taking direct advantage of the multiple resources of the area. Or the use and benefits may be derived "off site," such as through enjoyment of the scenery at a distance from a nearby highway, through indirect benefits from the area's resources (i.e. water quality, wildlife, etc.) or just the knowledge that the area exists.

There is a limit to the extent to which such uses as recreation and education may take place within wilderness, because the Wilderness Act also says that they must occur in a manner so

4 Climbing's Status as Wilderness Dependent Activity Irrelevant One of the issues you asked us to research was whether climbing was a wilderness dependent activity. Regardless of whether it is or is not wilderness dependent, resolution of the issue does not appear to be directly relevant to our position. Determination of an activity as wilderness dependent is relevant when there is a conflict between two competing uses, not between a recreational use and the mandate of preservation and protection of the wilderness.

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If visitor use threatens to impair an area's wilderness character, managers must take action to prevent that impairment. "Indirect methods of reducing visitors' impact, such as trail design, information, and education, will be preferred over direct (regulatory) methods, such as limits on party size, length of stay, or number of parties. In case of a conflict between visitor uses that depend upon a wilderness setting and those that do not, the uses dependent upon a wilderness setting will be favored." BLM Policy, 46 F.R. at 47185. Obviously there is a basic inconsistency in calling an activity wilderness dependent that conflicts with the basic wilderness mandate. The thrust of the Agencies' position will be that fixed anchors conflicts with wilderness values, not other uses. Nevertheless, the following is a brief description of the principle.

Whenever one or more uses conflict, the principle of *wilderness dependency* which calls for favoring activities most dependent on wilderness conditions, is used to resolve use conflicts and prevent overuse. Activities that are not wilderness dependent can be enjoyed in many alternative settings, but wilderness dependent ones cannot. Thus, most conflicts should be resolved in favor of wilderness dependent uses." Hende, Stankey, & Lucas, Wilderness Management, N Amer Press 2d ed 1990. This point of view was championed by Robert Marshall in the 1930's and most recently by Hobson Bryan in the 70s. See Wilderness Management, p 192 for cites.

as to leave the wilderness unimpaired for future use and enjoyment as wilderness. Provision may be made for recreational, scenic, scientific, educational, conservation, and historical use of wilderness areas in ways that do not jeopardize the conditions of naturalness, the opportunities for solitude or a primitive and unconfined type of recreation, or the special features that existed at the time an area was designated as wilderness by Congress. All public use will be administered to ensure that the wilderness resource is kept unimpaired.

Public use for recreation purposes is generally a prevalent use of wilderness. However, the Wilderness Act makes it clear that recreation is only one of the purposes of the National Wilderness Preservation System. Sometimes there are places within wilderness where particularly sensitive values -- such as colonial bird nesting sites -- may dictate that recreation activities be restricted or entirely excluded.

Use capacity (recreational, historic, educational, etc.) based on social and ecological elements will be established for each wilderness area, and will be considered in determining how much use to allow.

Defining an activity as wilderness dependent can be difficult. Hendlee concludes that it is not the activity that is wilderness dependent, but rather the particular style in which it is pursued "[H]unting is not necessarily wilderness dependent. The importance of naturalness and solitude to the experience, not the mere quest for game defines certain kinds of hunting as wilderness dependent." Since climbing is generally performed in groups of two or more persons, given the foregoing analysis it could be argued that soloing, roped or unroped, is the only style of climbing that is wilderness dependent. Thus, favoring wilderness dependent activities might call for reducing or discouraging certain forms of some activities. The key to maintaining wilderness-dependent activities in classified wilderness is to provide alternative nonwilderness lands to which inappropriate activity can be diverted. Hendlee, p. 186.

There is an abundance of literature extolling the virtues of climbing as a wilderness dependent activity. "It is no accident that many key people in the environmental movement have strong backgrounds in mountaineering, where the very essence of experience depends on the natural character of the terrain. John Muir, David Brower, Dick Leonard, and Ansel Adams are just a few of the prominent conservationists who climbed mountains extensively making tangible contacts with the current of evolution and deriving self-knowledge from personal interaction with the harsh, tilted world of rock, snow, ice, and sky. The birth and early years of the Sierra Club took place in this mountain crucible." Rowell, High and Wild, Sierra Club (1979), p. 19. "[R]egardless of civilization's encroachment on even the wildest mountain areas, mountaineering has remained essentially a wilderness activity, and its natural setting is all important. If this were not the case, climbing would be merely an athletic event, as satisfying on tall buildings or inside gymnasiums as on mountains." Id., p. 18. Yet, as the last sentence of Rowell's quote inadvertently indicates, not all climbing is wilderness dependent.

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5. The Minimum Tool Doctrine. The "minimum tool" doctrine provides additional support for the continued use of fixed anchors. The doctrine originates in Section 1133(c) of the Act which states "except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act, there shall be no structure or installation within any such area." 16 U.S.C. 1133(c). This has been interpreted to mean that tools, equipment, or structures may be used by management only when they are the minimum necessary for protection of the wilderness resource or when necessary in emergency situations for the health and safety of the visitor. "Management will use the *minimum* tool, equipment, or structure necessary to successfully, safely, and economically accomplish the objective. The chosen tool, equipment, or structure should be the one that least degrades wilderness values temporarily or permanently [sic]." BLM Policy 46 F.R. at 47184. Examples of accepted tools, equipment, and structures include fire towers, patrol cabins, pit toilets, temporary roads, spraying equipment, hand tools, fire-fighting equipment, caches, fencing, and controlled burning. In special or emergency cases involving the health and safety of wilderness visitors or the protection of wilderness values, aircraft, motorboats, and motorized vehicles may be used. Id.

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Arguing that fixed anchors are the minimum tools necessary for climbing safely is not

recommended because it implicitly admits that anchors are a nonconforming, if not illegal use. In addition, this doctrine is directed at appropriate management behavior to reduce the impact of actions necessary to maintain the wilderness, not towards user behavior. A more successful approach is to use the doctrine to support the argument that the Agencies should first try indirect means to curb whatever problem fixed anchors pose, before adopting an outright ban.

"Part of the wilderness experience valued by many visitors is the freedom from rules and regulations. Only the minimum amount of regulation necessary to achieve desired objectives will be used." BLM Policy, 46 F.R. at 47187. Agency regulations require the BLM to apply only the minimum tools—equipment, device, force, regulation, or practice that will bring the desired result. Thus, indirect methods to achieve the Agencies' objectives should be tried before direct methods of management. "The challenge of wilderness management lies in the developing, testing and implementing of *indirect controls* that delay and minimize the imposition of direct controls. Only as a last resort, when an array of specific and successfully more restrictive measures have been exhausted, would direct control of visitation to an entire wilderness be considered." Hendlee, p. 188. The same applies prior to enactment of a complete prohibition on an activity.

Hendlee concludes that total prohibitions are rare. Prohibiting certain uses in certain sections of wilderness is more common and can be a valuable management tool, but such prohibitions should be used with restraint. "Associated education efforts to reduce objectionable behavior and to increase mutual understanding and acceptance are always essential. Often education can avoid the need to prohibit particular uses or reduce the area that must be closed for that type of use." Hendlee, p. 483.

In addition, the minimum tool doctrine will indirectly force the Agencies to identify the problem they feel fixed anchors create and the objectives they hope to realize through regulation. The Agencies must show that the actions to be taken will preserve the wilderness and the linkage between these actions and the objectives. See e.g., BLM Policy 46 F.R. at 47201. The Agencies' concern may be that the earlier climbing ethic insured limited placement of fixed anchors—such placement being limited by the ethic of the time and the limited number of natural lines. Drilling was hard work and thus few looked forward to or did drill long bolt ladders in wilderness. The advent of the power drill and the change in ethics made drilling easy and acceptable. However, the Fund can argue that banning the motorized drill will naturally severely limit the number of new routes that will be developed. Drilling 3/8" bolts in granite by hand is a desperately difficult and painful process, but its nowhere near as hard as drilling in the Black Canyon of the Gunnison. There may very well be a natural attrition in development based on convenience and laziness alone. This natural disincentive could be further encouraged by Agency requirements that all bolts placed must measure at minimum 3/8" x 3".

There are also other less restrictive compromises that can be negotiated with the

Agencies, among them are Restrictions on certain areas i.e., no fixed anchors on certain small crags close to trails, but continue use on high peaks Restrictions on placement methods only from ground up, minimum size, Restrict only certain types of anchors e.g., restrict protection, not belay anchors, Restrictions on number of anchors no more than 1 every 15 feet, etc All are less intrusive methods of controlling fixed anchor use

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Consider requesting that all climbing or fixed anchor regulation be left to each individual wilderness area Although there is a danger that the manager in charge will be hostile to climbers, regulation of these areas should occur if at all on an individual, not a national basis Uses and values will vary between and among wilderness area Historical patterns of use and customs will also vary Thus, activities accepted and appropriate in one wilderness may be unacceptable in another Any plans regulating climbing should be developed for each wilderness area and be tailored to the conditions of each area Plans should consider different kinds of settings, history of use, and management situations pertaining to the individual area 46 F R 47187 Stratification or zoning should be considered as a means of achieving management objectives or providing different experiences and opportunities Such a decision has a lot of advantages to both the Fund and the Agencies 1st, it allows the Agencies to duck a tough decision and delegate responsibility to each individual area, 2d, it diffuses the concentrated wrath of the conservation organizations, 3d, it allows the Fund to organize on a more local level and bring a greater amount of manpower to negotiating with the Agencies in charge of each wilderness area, and 4th, it is more likely to result in allowing the continued use of fixed anchors in the majority of areas, since historical patterns of use and traditions will be considered

The bottom line is that negotiating the best deal the Fund can obtain from the Agencies and trying to find common ground with conservation organizations to further that end, is vastly preferable to litigating this issue Research has not disclosed any cases where an action has been brought against an Agency for failure to use indirect methods before restricting use in violation of the minimum tool doctrine

III. LEGAL RECOURSE IN RESPONSE TO AGENCY DETERMINATION TO OUTLAW AND/OR REMOVE FIXED ANCHORS

1 Standing The A P A provides that a plaintiff seeking to challenge agency action must be "adversely affected or aggrieved by agency action within the meaning of a relevant statute" 5 U S C 702, Nevada Land Assn v U S Forest Service 8 F 3d 713, 715 (9th Cir 1993) In Valley Forge Christian College v Americans United for Separation of Church and State, 454 U S 464 474-75, 102 S Ct 752, 70 L Ed 2d 700 (1982) the Supreme Court held that a plaintiff must satisfy the following principles (1) the plaintiff must assert his or her own rights, (2) court must refrain from asserting generalized grievances more appropriately addressed by another branch of government, and (3) plaintiff's complaint must fall within the zone of interest to be protected or regulated by the statute Mount Evans v Madigan 14 F 3d 1444 (10th Cir 1994)

The Fund should have no problem establishing standing--Interests protected by the Act recreational use and enjoyment of Americans the right to engage in primitive and unconfined type of recreation or solitude in the "wilderness"--an area of undeveloped Federal land 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 (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable, etc See 16 USCS 1131(c) (Definition of Wilderness) The National Wilderness Preservation System was established in 1964 to designate and create wilderness areas to 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) 16 USCS 1131(a)

2 Judicial Review of Agency Actions As a general rule, all agency action is presumed reviewable Sierra Club v. Yeutter, 911 F 2d 1405, 1410 (10th Cir 1990), citing Abbott Laboratories v Gardner, 387 US 136, 87 S Ct 1507, 18 L Ed 2d 681 (1967) Two exceptions apply to this general rule 1) the statute at issue precludes judicial review, or 2) agency action is committed to agency discretion by law 5 USC § 701(a) The Act does not preclude judicial review, nor does Agency action appear to be committed to agency discretion by law

The second exception is "a very narrow exception applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'" Yeutter, 911 F 2d at 1411, citing Citizens to Preserve Overton Park v Volpe 401 US 402, 410 91 S Ct 814, 820-21, 28 L Ed 2d 136 (1971) "[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion " Yeutter, 911 F 2d at 1411, citing Heckler v. Chaney, 470 US 821, 830, 105 S Ct 1649 1655-56, 84 L Ed 2d 714 (1985) In such a case the statute has committed decision making to the agency's discretion alone and therefore the courts have no judicially manageable standard upon which to judge whether the agency abused it's discretion Id

In our case, the Act provides substantial guidance for determining what is and what is not permitted under the Act re protecting the wilderness The mere fact that the Act does not specifically address the issue of fixed anchors, and that such a decision will be depend substantially on Agency discretion, does not activate this exception Thus judicial review on this issue will be available if desired See, e.g. Yeutter, 911 F 2d at 1414 fn 5 (Wilderness Act provides guidelines the agency must follow the agency cannot abandon its statutory mandate to preserve the wilderness characteristics)

Standard of review

In reviewing agency action courts look first to whether Congress has directly spoken to the precise question at issue If the statute is silent or ambiguous, as is the Wilderness Act, the court determines whether the agency's action is based on a permissible construction of the statute See Friends of Boundary Waters Wilderness v Robertson 978 F 2d 1484

1486 (8th Cir 1992), citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). If the agency's decision is not based on a permissible construction, the court then examines whether the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. See 5 U.S.C. 706(2)(A) (1988), Voyageurs Region National Park Assn. v. Lujan, 966 F.2d 424, 427 (8th Cir. 1992), Gettler v. Lyng, 857 F.2d 1195 (8th Cir. 1988).

The statute is silent on the issue of fixed anchors. Neither the Act, nor its legislative history, regulations or policies speaks directly to the fixed anchor issue. As discussed in Parts I and II, there are valid arguments and support both for the Fund's position that use of fixed anchors is compatible with the Wilderness Act and is substantially unnoticeable, as well as for the Agencies' position that fixed anchor use is incompatible with the Act and is degrading the wilderness character. Interestingly, a decision by the Agencies either way that anchors are illegal or that their use is permissible under the Act is likely to be upheld by a court as a permissible construction of the statute.

In determining how to characterize the fixed anchor issue, and whether it conflicts with wilderness characteristics, the Agency decision makers exercise a substantial amount of discretion. See, e.g., 46 F.R. 47184 (No policy document can address every potential situation. Managers must use their best judgment in applying these policies and guidelines to particular situations), 46 F.R. 47185 (Use capacity of wilderness area will be determined and will be used by managers to anticipate and avert degradation of the area's wilderness character and as a basis for mitigating the impacts caused by various uses). Although the discretion involved in the decision to ban fixed anchors is likely to be subject to judicial review and exempt from the discretionary exception to the APA, given the analysis above it is extremely unlikely that the Agencies' decision supporting either position would be reversed on the grounds of abuse of discretion. Nor given the evidence is it likely to be reversed on the grounds that it is arbitrary and capricious.

The only exception to this analysis is if the Agencies decide that all fixed anchors are illegal and always have been and therefore must be removed. In such a case the Fund should consider litigation. There is at least a chance that such an action might be stricken as either arbitrary and capricious, or an abuse of discretion and such a suit could be politically embarrassing to the Agencies and to the environmental and conservation groups supporting them.

In Friends of Boundary Waters Wilderness v. Robertson, 978 F.2d 1484, 1486 (8th Cir. 1992), the Eighth Circuit looked to the purpose of the Wilderness Act to define "feasible" and concluded that prohibiting motorized portages was entirely consistent with the purpose of the Act. Distinguishable b/c trucks driving down a road with boats is clearly in conflict with a wilderness setting while a few bolts on high mountains are not, also legislative history of this Act demonstrated debate and compromise over such portages.

In Voyagers Region Natl Park Assn V Lujan, 966 F 2d 424, 427 (8th Cir 1992), the Eighth Circuit upheld a Natl pk decision to allow snowmobiling in an area under study for wilderness designation. The specific enabling legislation allowed provision for snowmobile use contrary to the wilderness Act provisions. Specific provisions of the enabling legislation controlled. In addition, Pk Service stated impact on area would be small and easily reversible and found that snowmobile use had been allowed before designation as a Natl Pk with no evidence of harm to wildlife.

V POTENTIAL STRATEGIES

VI ADDITIONAL RESEARCH

- Potential

1 Establishing legislation of each wilderness area. The specific provisions of each area's establishing legislation are likely to mention specific activities in the area that have traditionally been performed there. These specific provisions override the general management provisions of the Act. 46 FR 47182

2 Forest Service regs. Available at offices on baseline

3 Outdoor Recreational Resources Review Commission [ORRRC] 1962
Wilderness and recreation - a report on resources, values and problems. Study Report 3
Wash DC U S Government Printing Office 352 p

4 Committee Print. Background analysis and comparison of major provisions
legislation for the establishment of a wilderness preservation area. SUDOC #
Y4 In8/14 W64/4 CIS # H4581

SUMMARY OF CONCLUSIONS

The Act does not specifically address the issue of fixed anchors. There is support both for and against the continued use of fixed anchors under the Wilderness Act, although there is probably more support for those advocating a ban on fixed anchors than for those defending such practices. As a result, a decision by any or all of the managing Agencies, either permitting or prohibiting the use of fixed anchors in wilderness, is likely to be upheld by the courts because there is ample evidence to establish that either policy is a permissible construction of the Act, and was not arrived at arbitrarily or capriciously or through an abuse of discretion. The Fund should remain intimately involved in the Agencies' decision making process and attempt to negotiate the most favorable policy it can because the likelihood of a successful judicial challenge to an unfavorable Agency determination is slim.

The ideal resolution, of course, is an Agency determination that fixed anchors are

traditional climbing tools that are substantially unnoticeable and therefore permissible in wilderness areas. Such a determination or any variation thereof that continues to allow the placement of fixed anchors may not be possible without the support of several of the national environmental organizations, e.g., the Sierra Club, the Wilderness Society, etc. Thus, the best course of action is to embark on serious negotiations with the environmental organizations who currently support such a prohibition and educate and persuade them of the insignificance of fixed anchors, their negligible effect on the wilderness, the tradition of their use in wilderness areas, and the devastating effect their complete ban would have on mountaineering.

Without the support of such organizations, the likelihood of obtaining a favorable determination from any of the managing agencies regarding the continued use of fixed anchors is uncertain. Such a prohibition is likely to survive a judicial challenge. The Access Fund will be left fighting a battle for the survival of existing fixed anchors.

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