

853 F.Supp.2d 1063 (2012)

**WILDERNESS WATCH, Plaintiff,**  
**v.**  
**Y. Robert IWAMOTO and United States Forest Service, Defendants.**

[Case No. C10-1797-JCC.](#)

**United States District Court, W.D. Washington, at Seattle.**

March 27, 2012.

1064\*1064 Peter M.K. Frost, Western Environmental Law Center, Eugene OR, for Plaintiff.

Brian C. Kipnis, U.S. Attorney's Office, Seattle, WA, for Defendants.

## **ORDER ENTERING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF**

JOHN C. COUGHENOUR, District Judge.

This matter comes before the Court on Plaintiff's motion for summary judgment and injunctive relief (Dkt. No. 19), Defendants' response and cross-motion for summary judgment (Dkt. No. 23), Plaintiff's response (Dkt. No. 40), and Defendants' reply (Dkt. No. 42). After a thorough review of the parties' briefing, the submissions of amicus curiae (Dkt. No. 29), and the relevant record, the Court finds oral argument unnecessary, and hereby GRANTS Plaintiff's motion for summary judgment and injunctive relief and DENIES Defendants' cross-motion for summary judgment for the reasons explained herein.

### **1065\*1065 I. BACKGROUND**

This case involves the question of whether the Green Mountain lookout, an extensively rehabilitated fire lookout originally built in the 1930s, must be removed from a federally-designated **wilderness** area in light of the Forest Service's purported violations of the 1964 **Wilderness** Act and the 1969 National Environmental Policy Act ("NEPA"). Below, the Court sets out, in roughly chronological fashion, a history of the Green Mountain lookout and relevant legislative events.

Starting in 1919, the summit of 6,500-foot Green Mountain was used as a lookout site for detecting forest fires. (Administrative Record ("AR") 49, 93.) The summit of Green Mountain allows for a 360 degree panoramic view over the Suiattle River Valley toward Glacier Peak to the south and Mt. Baker and Mt. Shuksan to the north. The first lookouts camped in tents below the summit of Green Mountain, but in 1933, a cabin was constructed at the summit. The structure — perched on the northern edge of the mountain's rocky ridgetop-became known as Green Mountain lookout. Although the principal use of the lookout was fire detection, it was also used for a short while during World War II to detect enemy aircraft. At

present, the lookout is no longer used for fire or aircraft detection; however, it has become a frequent destination of day hikers.

In the years since its construction, Green Mountain lookout has been subject to a series of increasingly elaborate rehabilitation efforts, a principal purpose of which has been to keep the lookout from slipping off the summit. The first major effort occurred in the early 1950s, after heavy snowfall severely damaged the lookout, "twist[ing] the building apart." (AR 34, 135.) Contractors were hired to carry out "extensive repair and reconstruction," which included reconstruction of the roof, dismantlement and reconstruction of portions of the walls, and repair and reinstallation of windows, shutters and the door. (AR 135.) While all possible timber was salvaged for use in the new building, the roof was a "total loss," and "[n]ew rafters and other materials had to be packed in from below." (AR 35.) The contractors did make efforts, however, to reconstruct the roof "to match the original hipped roof design. (AR 135.)

In the decades following the 1950s reconstruction of Green Mountain lookout, several key pieces of legislation were enacted. One of these was the **Wilderness** Act of 1964, which provided for the designation of federally-protected **wilderness** areas where land would "retain[] its primeval character and influence, without permanent improvements or human habitation" and where "the imprint of man's work [would be] substantially unnoticeable." Pub.L. 88-577, 78 Stat. 891, § 2(c) (Sept. 3, 1964). Another was the Washington State **Wilderness** Act of 1984, Pub.L. 98-339, 98 Stat. 299 (July 3, 1984), pursuant to which Green Mountain lookout became part of a federally designated **wilderness** area (the Glacier Peak **Wilderness** Area), and accordingly, subject to the provisions of the **Wilderness** Act.

During this period, Congress also passed the National Historic Preservation Act ("NHPA"), which was designed to promote preservation of historical and archeological sites in the United States "for the inspiration and benefit of the people of the United States." Pub.L. 89-665, 80 Stat. 915 (Oct. 15, 1966). The NHPA, among other things, created the National Register of Historic Places ("National Register"). Pursuant to § 106 of the NHPA, federal agencies must take into account the potential effect on National Register property when considering federal action.

In 1977, the Forest Service and the State Historic Preservation Officer considered 1066\*1066 whether the Green Mountain lookout qualified for listing on the National Register. The Forest Service found that the lookout "does not appear to meet the National Register criteria ... [t]he building is associated with important historical events, but it's a reconstruction and is not the last remaining survivor with such an association." (AR 36.) The State Historic Preservation Officer concurred with this assessment, finding that the Green Mountain lookout "does not meet National Register Criteria." (AR 32.) Following these determinations, the lookout was maintained "only enough to keep it from collapsing and to make it relatively safe for the many recreation visitors [using] the site." (AR 88.) In 1984, a major alteration to the original lookout occurred when a catwalk and supports were added to stabilize the lookout. (AR 134.)

In 1985, a group named "Friends of Green Mountain" asked the Forest Service for permission to assume responsibilities for maintaining and preserving the Green Mountain

lookout in light of its historical significance. (AR 85, 98, 103.) The Service responded that it would conduct an environmental analysis of the group's proposal but called attention to the fact that the 1984 **wilderness** designation of the lands encompassing Green Mountain had limited the authority of the Forest Service and that the **Wilderness** Act might require that the lookout be removed rather than maintained. (AR 86.) The Service also noted that Congress had not specifically endorsed Green Mountain lookout for protection, as it had done for other structures. (AR 86.) Contemporaneously, the Service sent a letter seeking guidance from the forest archaeologist as to whether the lookout should be removed in consistency with the Forest Service's 1977 assessment that the lookout did not qualify for the National Register of Historic Places. (AR 88.) The letter noted that a decision to destroy the lookout or to deny permission to maintain the lookout would be unpopular given the "recent rise in public appreciation for lookouts in the Pacific Northwest." (AR 88.)

In 1986, in an apparent departure from its prior assessment of the historical status of the lookout, the Forest Service nominated the Green Mountain lookout, along with 7 other lookouts in the Mt. Baker-Snoqualmie National Forest, as a "thematic group" for listing on the National Register. (AR 124, 126, 134-36.) In 1987, the National Park Service listed the lookouts on the National Register. (AR 169.)

For much of the 1980s and early 1990s, the Friends of Green Mountain coordinated seasonal volunteer efforts to maintain the Green Mountain lookout, working in collaboration with the Forest Service. (See, e.g. AR 203-206, 246, 324, 330, 342, 351).<sup>[1]</sup> Despite these efforts, by 1994, an assessment revealed serious deficiencies in structural components of the lookout — including its catwalk, foundation, handrails, and roof—and recommended condemning the lookout until the deficiencies were rectified. (AR 445.) Shortly thereafter, the Forest Service condemned the lookout from public access, pending repair of the deficiencies on an "as-funded" basis. (AR 497.)

In 1997, the Forest Service mailed a letter to a group of known "interested individuals and groups" seeking input into the development of a plan to address the condition and future of the Green Mountain lookout. (AR 550.) The letter identified two options under consideration: repair, or condemn and remove. (AR 550.) Of the twenty-five responses received, most were in support of preserving the lookout. (AR 758.) Subsequently, in March 1998, the Forest Service mailed a letter to a list of "interested individuals and groups" inviting recipients to comment or share concerns on a number of proposed projects in the Darrington Ranger District, including a proposed project to restore the Green Mountain lookout. (AR 694-699.) This letter gave a seven-line summary of the proposed restoration, mentioning the planned use of a helicopter to transport materials and supplies. (AR 698.) No further comments were received. (AR 758.)

In May 1998, the Forest Service circulated internally a draft analysis of various courses of action with respect to Green Mountain lookout, including (1) disassembling the lookout and removing it from the **wilderness**, either by helicopter or by packstock; (2) relocating it to an area outside of **wilderness**; (3) burning it down; (4) leaving it alone to naturally deteriorate; and (5) stabilizing and repairing it, either with or without motorized equipment. (AR 722-739.) This draft analysis was never made final or public, and the Forest Service did not solicit public comment.

In September 1998, the Forest Service issued a decision memo detailing its decision to repair the lookout, using a rock drill and a helicopter to transport supplies. (AR 756-757.) The memo anticipated that about 25,000 pounds of material would be transported, resulting in about 8 helicopter trips. (AR 757.) In the memo, the Service stated that the special environmental impact documentation required by NEPA was not required with respect to this decision since it fell within a categorical exclusion, namely "repair and maintenance of recreation sites and facilities." (AR 758.) The memo did not analyze other alternatives to dealing with the lookout, though it did assert, generally, that "[a] variety of alternatives were considered for this project, including no action and reconstruct [ion] ... without the use of motorized equipment." (AR 759.) Pursuant to the Decision Memo, a contractor and volunteers invested hundreds of hours into repairing and stabilizing the lookout.

Nevertheless, despite these efforts, by June 2002, the Forest Service discovered that the lookout's foundation had failed on account of heavy snowfall during the prior winter. (AR 1804.) Forest Service personnel noted the need to take further action urgently or risk losing the lookout entirely during the next winter. (AR 1804.) After internal discussion, the Forest Service decided to: disassemble the lookout piece by piece; remove it from Green Mountain by helicopter; repair and restore the pieces at a ranger station, salvaging original materials where possible; "repair" the foundation on the peak; and then fly the pieces back in for reassembly on top of the reconstructed foundation. (AR 1807-08, 1880-82.) In an internal planning document, entitled "Green Mountain Lookout Dismantle, Restoration and Reconstruction Plan 2002-2005," the Service noted that an objective of the restored structure would be to serve "as a point of visitor contact and interpretation of Forest Service and fire detection history." (AR 1880.) This document did not compare the proposed plan to any alternatives or otherwise analyze the necessity of the chosen course of action. The Forest Service did not solicit public comment on its plan.

In or around August 2002, a few months after it had discovered the damage to the lookout's foundation, the Forest Service disassembled the lookout and removed the 1068\*1068 pieces by helicopter from the **wilderness**. (AR 1864, 1919, 1941.) Although the Forest Service apparently intended to lay a new foundation and return the lookout to its original location by the next summer, this did not happen for several years, due to funding and weather issues. (Dkt. No. 23-1 at 14.)

In 2009, seven years after the lookout was removed from its original location, the Forest Service hired the National Park Service to construct a new foundation for a lookout on Green Mountain. (AR 2405-2411.) After the foundation was laid, most of the disassembled pieces of the lookout — which had been restored or replaced off-site-were flown to the mountain and reassembled on site. (Dkt. No. 23-1 at 14; AR 2451-2456.) According to Plaintiff, this work involved at least 67 helicopter turns in **wilderness**, an assertion which the Forest Service does not contest. (See Dkt. No. 37 at 6; see also AR 2405, 2443.)

Around this time, one of the members of Plaintiff **Wilderness** Watch became aware of the Forest Service's actions with respect to Green Mountain lookout. This member initiated contact with the Forest Service expressing concern about its actions. (AR 2459.) The Forest Service subsequently exchanged a series of letters on the topic with the **Wilderness** Watch member, in which the Service noted, among other things, that the Service planned to "staff the lookout with volunteer interpreters who will provide an agency sponsored presence and

point of contact to the many visitors [expected to] come." (AR 2463.) In 2010, Plaintiff brought this suit, seeking a declaratory judgment (that the Forest Service's actions violated the **Wilderness** Act and the National Environmental Policy Act) and an injunction requiring removal of the lookout.

## II. DISCUSSION

### A. Legal Standard

The Administrative Procedure Act ("APA") governs judicial review of agency action and permits courts to set aside agency action and findings when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although the standard for review is "deferential," [River Runners for Wilderness v. Martin, 593 F.3d 1064, 1070 \(9th Cir.2010\)](#), it requires that courts:

carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Nevertheless, [courts] may not substitute [their] judgment for that of the agency.

[Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 \(9th Cir.2003\)](#) (citations, internal quotation marks, and alterations omitted).

The parties agree that this case should be decided on summary judgment, as "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(a); [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 \(1986\)](#).

### B. The **Wilderness** Act's Prohibition on Structures and the Use of Mechanized Transport.

By enacting the **Wilderness** Act of 1964, Congress sought "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated 1069\*1069 for preservation and protection in their natural condition." 16 U.S.C. § 1131(a). "As President Lyndon B. Johnson reportedly said upon signing of the **Wilderness** Act in 1964, '[i]f future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it.'" [The Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1055 \(9th Cir.2003\)](#) (citation omitted).

The **Wilderness** Act defines "**wilderness**" as follows:

"A **wilderness**, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of **wilderness** is further defined to mean in this chapter an area of undeveloped Federal land retaining its primitive character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural condition 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 opportunities for solitude or a primitive and unconfined type of recreation;

(3) has at least five thousand 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 U.S.C. § 1131(c).

The Act establishes guidelines for the management of the **wilderness** areas, providing that:

[**Wilderness** areas] shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as **wilderness**, and so as to provide for the protection of these areas, the preservation of their **wilderness** character, and for the gathering and dissemination of information regarding their use and enjoyment as **wilderness**.

*Id.* at 1131(a). Although the language is broad, Congress provided guidance as to the types of things it considered likely to degrade the "**wilderness** character" of lands, providing that:

Except as specifically provided for in this chapter ... there shall be *no commercial enterprise and no permanent road* within any **wilderness** area ... and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter, ... there shall be *no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft no other form of mechanical transport, and no structure or installation within any [**wilderness**] area.*"

16 U.S.C. § 1133(c) (emphasis added).

## C. Relationship Between the **Wilderness** Act and the NHPA

Here, Plaintiff charges that the Forest Service violated several express prohibitions of the **Wilderness** Act: (1) the bans on motorized equipment and aircraft (through its use of motorized construction equipment and helicopters at the Green Mountain lookout site); and

(2) the ban on "structure[] and installation[s]" (through what it describes as the creation of a new structure on the top of Green Mountain). (Dkt. No. 19 at 7, 15). In response, the Forest Service asserts that its actions to preserve the Green Mountain lookout were appropriate and justified in light of the 1070\*1070 **Wilderness** Act's stated "devotion" to "historical use" of **wilderness** areas as well the Service's responsibilities pursuant to the National Historic Preservation Act to preserve a nationally-recognized historic property.

To resolve this dispute, the Court must first consider the interaction between the **Wilderness** Act and the NHPA. The parties agree that both statutes apply, but disagree as to the extent of the Forest Service's obligations under the NHPA. Plaintiff **Wilderness** Watch argues that the NHPA is merely a procedural statute that "requires federal agencies, when undertaking actions that may affect properties eligible for or included in the Historical Register, to take the properties into consideration." (Dkt. No. 37 at 7 [citing 16 U.S.C. § 470f]). Thus, according to Plaintiff, there is no basis for the claim that the Forest Service's duties under the NHPA justified its actions with respect to the Green Mountain lookout. (Dkt. No. 37 at 8.) In contrast, the Forest Service contends that Plaintiff's interpretation of the NHPA as purely procedural would result in implied repeal of the NHPA since, in the Service's view, certain sections of the Act grant the Service more than mere procedural responsibility with respect to preservation of historic properties. (Dkt. No. 42 at 4). In this regard, the Forest Service argues that "NHPA provides ample discretion to federal agencies to act affirmatively to protect [historic] properties on federal lands under their jurisdiction...." (Dkt. No. 42 at 5.)

Notably, unlike *amicus curiae*, the Forest Service shies away from arguing that the NHPA creates substantive preservationist duties, adopting the more cautious position that the NHPA *authorizes* affirmative action in furtherance of historical preservation. (Dkt. No. 42 at 5.) However, in light of the **Wilderness** Act's clear proscription on the actions at issue here, the Court considers that the NHPA has little impact on the outcome of this case unless it can be read to *require* the Forest Service to act affirmatively to protect a historical structure. In other words, the key question with respect to the NHPA is whether that legislation creates substantive preservationist duties that must be balanced against the **Wilderness** Act's prohibitions on certain activities.

In arguing that the NHPA is crucial to this case, the Forest Service points to the language of § 110 of the NHPA, which provides, variously, that "the heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency" (16 U.S.C. § 470h-2(a)(1)) and that properties listed on the National Register be "managed and maintained in a way that considers the preservation of history, archaeological, architectural and cultural values ... and gives special consideration to the preservation of such values" (16 U.S.C. § 470h-2(a)(2)(B)).

The Ninth Circuit has not had the occasion to address whether the language of § 110, in particular, imposes substantive preservationist duties. The Ninth Circuit's NHPA jurisprudence largely concerns federal agencies' obligations under § 106's consultation requirements. In this context, the Ninth Circuit has repeatedly held that § 106 of the NHPA is procedural. See, e.g., [Muckleshoot Indian Tribe v. U.S. Forest Serv.](#), 177 F.3d 800, 805 (9th Cir.1999) (citation omitted) ("We have held that Section 106 of NHPA is a `stop, look,

and listen' provision that requires each federal agency to consider the effects of its programs.").

While § 110 on its face appears more outcome-oriented than § 106, "[m]ost courts discuss the obligations of Section 106 and the [NHPA] as a whole as if they were interchangeable." [Nat'l Trust for Historic Pres. v. Blanck, 938 F.Supp. 908, 917 \(D.D.C.1996\)](#). The few courts that have considered the nature of § 110 of the NHPA specifically have found that § 110 should be read in conjunction with § 106. The D.C. Circuit, for example, considered subsections of § 110 separately from § 106 and found that "the legislative history of § 110, though scant, supports [the] reading of that section in conjunction with § 106." [Lee v. Thornburgh, 877 F.2d 1053, 1057 \(D.C.Cir.1989\)](#). The Court highlighted the fact that "when Section 110 was added to the NHPA in 1980, Congress made clear that the new section is not intended to change the preservation responsibilities of Federal agencies as required by any other laws, executive orders or regulations." *Id.* Similarly, in *National Trust for Historic Preservation*, the district court followed the D.C. Circuit's conclusion that § 110 must be read in conjunction with the consultation provisions of § 106. [938 F.Supp. at 922](#). In so doing, the court noted that § 110 "constantly refers" to § 106 and that § 106 "constitutes the main thrust of the NHPA." *Id.* at 922, 925. The *National Trust* court summed up its analysis by stating that "Section 110(a) cannot be read to create new substantive preservationist obligations separate and apart from the overwhelmingly procedural thrust of the NHPA as described by every court that has considered the Act." *Id.* at 922.

The Court finds this precedent persuasive and agrees that the NHPA does not compel particular preservation-oriented outcomes. Accordingly, the Court rejects the notion that the Forest Service had any affirmative obligation to preserve the Green Mountain lookout pursuant to § 110 of the NHPA that must be balanced against its obligations under the **Wilderness** Act. In fact, there is no conflict between the **Wilderness** Act and the NHPA here since neither action nor inaction toward the Green Mountain lookout would have placed the Forest Service in violation of the NHPA, for the very reason that the NHPA itself that does not compel any particular outcome.

The conclusion that the **Wilderness** Act — and not the NHPA — controls this case is further supported by the nature of the **Wilderness** Act. The **Wilderness** Act "emphasizes outcome (**wilderness** preservation) over procedure" and has been described to be "as close to an outcome-oriented piece of environmental legislation as exists." [High Sierra Hikers Ass'n v. U.S. Forest Service, 436 F.Supp.2d 1117, 1138 \(E.D.Cal.2006\)](#). Furthermore, the **Wilderness** Act specifically establishes the preeminence of its requirements over other laws that may affect **wilderness** areas. See 16 U.S.C. § 1133(b) (providing that the Service and other administering agencies are "responsible for preserving the **wilderness** character" of a **wilderness** area and must administer it "for such other purposes for which it may have been established as also to preserve its **wilderness** character"). A district court in this Circuit recently considered the question of whether historic dam structures in the Emigrant **Wilderness** could be repaired and maintained on the basis that they were eligible for listing on the National Register of Historic Places. [High Sierra Hikers, 436 F.Supp.2d at 1135](#). The court ruled that they could not because the **Wilderness** Act requires that the preservation of **wilderness** values be prioritized over the maintenance of man-made historic structures. *Id.* at 1136 ("Absent a declaration by Congress of the need to restore and preserve the dam structures in recognition of their

historical significance, there is nothing the court can point to that would authorize such an action where the maintenance of the dams would otherwise come into conflict with the **Wilderness Act**."). See also *Olympic Park Associates v. Mainella*, No. 04-5732-FDB, 2005 WL 1072\*1072 1871114 at \*8 (W.D.Wash. Aug. 1, 2005) ("[A]n agency utilizing its authority under other laws in ways that affect the **wilderness** must do so pursuant to the requirements of the **Wilderness Act** as a whole."); [\*Minnesota Public Interest Research Group v. Butz\*, 401 F.Supp. 1276, 1331 \(D.Minn.1975\)](#), *rvsd on other grounds*, 541 F.2d 1292 (8th Cir.1976) ("When there is a conflict between maintaining the primitive character of [a **wilderness**] area and between any other use (including that of timber) the general policy of maintaining the primitive character of the area must be supreme.").

## D. Whether Historic Preservation Furthers the Goals of the Wilderness Act

Having concluded that there is no conflict between the NHPA and the **Wilderness Act** and that the provisions of the **Wilderness Act** control this case, the Court will now proceed to examine the question of whether the Defendants violated the **Wilderness Act** through their actions with respect to the Green Mountain lookout.

### 1. Forest Service's Interpretation of the Wilderness Act

The Court first assesses the level of deference due the Forest Service's determination that historic preservation of Green Mountain lookout furthers the goals of the **Wilderness Act**. The Forest Service has interpreted its actions toward Green Mountain lookout and the lookout's continuing presence as "fully consistent with the express purposes for which the **wilderness** area was created" because the lookout is both "a historical use and a historic structure." (Dkt. No. 42 at 8.) In support of their position, Defendants point to certain sections of the 1964 **Wilderness Act** and the 1984 Washington State **Wilderness Act**, which purportedly establish historical preservation as a valid purpose of the **wilderness**. (*Id.* at 8-9.) The **Wilderness Act**, for example, provides in part that "**wilderness** areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and *historical use*." 16 U.S.C. § 1133(b) (emphasis added). In turn, the Washington State **Wilderness Act** provides that "[t]he purposes of this Act are to ... designate certain National Forest System lands in the State of Washington as components of the National **Wilderness Preservation System**, in order to promote, perpetuate, and preserve the **wilderness** character of the lands [and] ... *preserve scenic and historic resources* ...." Pub.L. 98-339, § 2(b)(1) (emphasis added).

Defendants' interpretation of the **Wilderness Act** must be given deference by this Court unless it is unambiguously contrary to the language of the Act, in which case no deference is owed. [\*Wilderness Watch v. U.S. Fish and Wildlife\*, 629 F.3d 1024, 1032 \(9th Cir.2010\)](#). The Ninth Circuit has not considered the question of whether historical preservation is a valid purpose of the **Wilderness Act**. However, other courts that have considered this issue — including one in the Western District of Washington—have concluded that historical

preservation, at least with respect to man-made structures, is not a valid purpose of the **Wilderness** Act.

For example, in **Wilderness Watch v. Mainella**, a case involving the use of motor vehicles to transport tourists across a **wilderness** area in order to provide access to historic sites, the Eleventh Circuit rejected the National Park Service's argument that the reference to "historical use" in the **Wilderness** Act establishes the preservation of historical structures as a goal of the **Wilderness** Act. 375 F.3d 1085, 1091 (11th Cir.2004). The Eleventh Circuit noted that the mention of "historical use" in Section 4(c) came at the end of a list that also referred to "recreational, scenic, scientific, 1073\*1073 educational, [and] conservation" uses. *Id.* at 1092. On the Circuit's reading, this list related back to the prior definition of **wilderness** areas in Section 2(c), which describes "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation" that "may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." *Id.* The Circuit concluded that "given the consistent evocation [in the **Wilderness** Act] of 'untrammeled' and 'natural' areas, the previous pairing of 'historical' with 'ecological' and 'geological' features, and the explicit prohibition on structures, the *only reasonable reading* of 'historical use' in the **Wilderness** Act refers to natural, rather than man-made, features." *Id.* (emphasis added).

The Eleventh Circuit's reasoning on this issue was cited approvingly by this District in *Olympic Park Associates v. Mainella*, a 2005 case involving the question of whether the National Park Service violated the **Wilderness** Act when it decided to replace two collapsed trail structures in the Olympic **Wilderness**. 2005 WL 1871114 at \*1. The Park Service had built replica structures outside of the **wilderness**, and planned to airlift them into the **wilderness** with helicopters. *Id.* The Park Service argued that its decision was justified because replacing the shelters would advance the "purposes of cultural resource protection" in **wilderness**, and because the shelters were eligible for listing on the National Register for Historic Places. *Id.* at \*\*5-6. In rejecting these rationales, this court found "persuasive" the Eleventh Circuit's holding in **Wilderness Watch v. Mainella**, and rejected the Park Service's argument that placing a man-made structure in **wilderness** advanced "cultural resource protection," stating that:

While the former structures may have been found to have met the requirements for historic preservation, that conclusion is one that is applied to a man-made shelter in the context of their original construction and use in the Olympic National Park. 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.'

*Id.* at \*6 (citing 16 U.S.C § 1131(c)).

Like the *Olympic Park* court, this Court finds the Eleventh Circuit's reading of the **Wilderness** Act compelling. However, the Court must also take into account available Ninth Circuit precedent, which, while not directly on point, is instructive. As mentioned above, the Ninth Circuit has not directly considered the question of whether the **Wilderness** Act provides unambiguous direction to the Service with respect to historical preservation.

However, in a recent case, [Wilderness Watch v. U.S. Fish and Wildlife Service](#), the Circuit considered a related question—the question of “the purpose of the **Wilderness** Act with respect to conservation.” [629 F.3d 1024 at 1033](#). In examining the issue, the Ninth Circuit referenced a seeming inconsistency within the **Wilderness** Act, namely that it provides that “**wilderness** areas shall be *devoted* to the public purposes of recreational, scenic, scientific, educational, *conservation*, and historical use” — thereby implying room for conservation activities on **wilderness** land—but also requires agencies to manage the land so as “to preserve its natural conditions ... with the imprint of man’s work substantially unnoticeable” which suggests that human interference in **wilderness** lands is to be avoided. In light of this apparent tension, the Ninth Circuit concluded that it could not “discern an unambiguous instruction to the Service” <sup>1074</sup>1074 since the agency was “charged with simultaneously devoting the land to ‘conservation’ and protecting and preserving the **wilderness** in its natural condition.” *Id.* Accordingly, the Court accorded deference to the agency’s interpretation of the term “conservation.”<sup>[2]</sup> [629 F.3d at 1035](#).

The Court notes that the reasoning employed in [Wilderness Watch v. U.S. Fish and Wildlife](#) could just as easily be applied here. In particular, to the extent that the reference to “conservation” in the list set out in Section 4(b) creates an instruction that conflicts with an agency’s obligation to preserve the area’s “**wilderness** character,” the reference to “historical use” in that same list would logically create the same conflict. Indeed, the Ninth Circuit’s discussion, while focused on the term “conservation,” seems to suggest this broader application as it refers to conflicting instructions arising out of the Section 4(b) list of additional uses, one of which is “historical” use. See [Wilderness Watch, 629 F.3d at 1034](#) (stating that the **Wilderness** Act sets out “conflicting instructions” since the administering agency “must preserve the **wilderness** character of the area while at the same time providing for ‘recreational, scenic, scientific, educational, conservation, and historical use’”). Furthermore, the Ninth Circuit’s discussion does not indicate that there is anything exceptional about “conservation” such that it creates a greater conflict with the overarching obligation to preserve the area’s **wilderness** character than is created by other uses mentioned in Section 4(b). Indeed, one might imagine that agency action furthering the goals of conservation would be *less* likely to conflict with the overriding goal of **wilderness** preservation than action furthering other referenced uses. For example, actions taken in furtherance of conservation are more likely to be fully consistent with restoring the “natural condition” of **wilderness** areas and erasing the “imprint of man’s work” than actions taken to further “recreational use,” given that actions taken in furtherance of the latter use would almost certainly encourage increased human presence in **wilderness** areas.

Thus, applying the logic of the Ninth Circuit in [Wilderness Watch v. U.S. Fish and Wildlife](#), the Court finds that in light of the ambiguity arising out of the **Wilderness** Act’s reference to various uses, deference is due to the Forest Service’s interpretation that historical use is a valid goal of the Act. Nevertheless, the Court’s analysis does not end here. The Court must go on to determine if the actions of the Forest Service with respect to the lookout were “necessary” to meet the “minimum requirements” for administration of the area for the purpose of historical use.

## **E. Whether the Forest Service's Actions were "Necessary" to Meet "Minimum Requirements"**

As discussed above, the **Wilderness** Act sets out prohibitions on structures or installations and the use of motorized 1075\*1075 equipment and landing of aircraft. These prohibitions may be bypassed only "as necessary to meet minimum requirements for the administration of the area." 16 U.S.C. § 1133(c).<sup>[3]</sup> Because the Court has deferred to the Forest Service's conclusion that historical preservation furthers the goals of the **Wilderness** Act, the relevant question here is whether the presence of the Green Mountain lookout and the use of motorized equipment and helicopters to rehabilitate the lookout were "necessary" to meet the "minimum requirements" for administration of the area for the purpose of preserving a historic use. The Court pays "respect" to the agency's determination on this issue, but does not afford it heightened *Chevron* deference since the Forest Service was not acting in the exercise of its authority to promulgate rules carrying the force of law. See **Wilderness Soc'y**, 353 F.3d at 1067.

In its briefing, the Forest Service focuses on the question of whether the **Wilderness** Act requires the removal of historic structures from **wilderness** areas. (See, e.g. Dkt. No. 42 at 8, 10.) In the Court's view, this is not the key question. This case does not require the Court to decide whether the Green Mountain lookout should have been removed or destroyed after it became fully encompassed within a **wilderness** area in 1984. The essential question at this point is whether the 2002 decision to engage in extensive rehabilitation and reconstruction of the lookout and the related use of mechanized transport was "necessary" for the "minimum administration" of the area for historical use.

In order to properly invoke an exception to prohibited conduct in a **wilderness** area, an agency must make an adequately reasoned finding of necessity. See **Wilderness Watch**, 629 F.3d at 1037. A "generic finding of necessity does not suffice." *Id.* Here, the Forest Service has not identified any documentation where the Service engaged in a reasoned analysis of the necessity of dismantling, removing, and reconstructing the lookout.

This is not an instance where the Forest Service had no other alternative that would be consistent with furthering the purposes of "historic use" of the lookout. Indeed, the Forest Service has applied alternative approaches with respect to other lookouts with historic value. For example, the Service has relocated several fire lookouts in Wenatchee National Forest from their original perch in the mountains to an interpretive center located at an accessible spot along a well-traveled highway. (See Dkt. No. 37-1.) Similarly, in 2005, the Forest Service chose to allow a lookout in the Norse Creek **Wilderness** to deteriorate but sought to preserve its historic value by setting up an exhibit at a popular non-**wilderness** trailhead that accesses the **wilderness** area. (See Dkt. No. 37-2.)

The Forest Service seeks to emphasize the heavy involvement of the public in maintaining the lookout over the years, and recounts in detail the number of hours of volunteer labor expended in the effort to preserve the lookout. The Court can appreciate the need for the Forest Service to take account of the enthusiasm and industriousness of the Friends of Green Mountain as well as others committed to the preservation of the lookout. However, the Forest Service's principal responsibility is 1076\*1076 to the preservation of the **wilderness**, as **wilderness**. Furthermore, the nature of the Forest Service's initial decision to allow the lookout to remain in the **wilderness** area and to be periodically maintained, principally by community groups, is entirely different than the nature of the Forest Service's 2002 decision to fully disassemble the lookout, transport the pieces off-site by helicopter,

construct a new foundation on site, fly new and restored lookout pieces back in to the site, and reassemble the lookout. The Forest Service erred egregiously by not conducting the required necessity analysis before embarking on such an aggressive course of action.

It may be suggested that the Forest Service's 2002 decision can be justified pursuant to the Forest Service's 1998 decision memo outlining its plan to repair Green Mountain lookout. However, that decision memo also failed to conduct a necessity analysis to justify why its (less aggressive but still substantial) repair plans with respect to the lookout, which included the use of motorized equipment and transport, were "no more than was necessary to achieve the goals of the [Wilderness] Act." See [Wilderness Watch, 629 F.3d at 1036](#). Indeed, in 2009, after looking back at the decision memo, at least one senior Forest Service manager concluded that nothing in the document satisfactorily justified the maintenance of the structure. (See AR 2548 (the Forest Service regional program manager for **wilderness** stated that nothing in the materials she had reviewed, which included the 1998 decision memo, "show[ed] any credible need to maintain [Green Mountain lookout] as the minimum required for the administration of the **wilderness**"))

After thorough consideration of the record, the Court has come to the conclusion that the Forest Service's 2002 decision failed to take proper account of the mandates of the **Wilderness** Act. The parties dispute whether the "reassembled" Green Mountain lookout is a revamped structure or is, by this point, a "new" structure. Regardless, it is clear that the Forest Service went to extraordinary lengths to protect a man-made structure from the natural erosive effects of time and weather. The Forest Service went too far. Clearly, there are less extreme measures that could have been adopted, such as relocation of the lookout outside the **wilderness** area, which would have had less impact on the "**wilderness** character" of the area but still furthered the goal of historical preservation. Indeed, after the damage done by the 2001-2002 winter weather, even the head of the previous lookout restoration efforts recommended that the Forest Service "[a]irlift the building to a site near the Darrington Ranger Station and utilize it as an interpretive station highlighting the fire, **wilderness**, and general Forest Service history of the area." (AR 555.)

The extensive use of helicopters to carry out the Forest Service's reconstruction plan is also concerning. As other courts have observed, machinery as intrusive as a helicopter is rarely "necessary to meet minimum requirements for the administration of the area" since "[h]elicopters carry 'man and his works' and so are antithetical to a **wilderness** experience." [Wolf Recovery Foundation v. U.S. Forest Service, 692 F.Supp.2d 1264, 1268 \(D.Idaho 2010\)](#). In *Wolf Recovery*, the district court found that the proposed helicopter use in a **wilderness** area was appropriate, but noted that the situation was "very unique," since the helicopters were being used to restore an aspect of the "**wilderness** character" of the area which had been destroyed by man. *Id.* (approving the Forest Service's use of helicopters to restore wolves to a **wilderness** area where "[i]t was man who wiped out the wolf from the area [and] now man is attempting to restore the **wilderness** character of the area by returning the 1077\*1077 wolf). In contrast, here, the Forest Service made frequent use of helicopters not to promote **wilderness** values but rather to further what the Service understands to be a separate purpose of the **Wilderness** Act, i.e., historic preservation.

## F. National Environmental Policy Act

In addition to finding that the Forest Service violated the substantive provisions of the **Wilderness** Act, the Court further finds that the Forest Service violated the NEPA's procedural requirements. NEPA requires agencies to carry out systematic analysis of proposed actions to ensure that they take a "hard look" at the environmental consequences of those actions. [Metcalf v. Daley, 214 F.3d 1135, 1141 \(9th Cir.2000\)](#). The public nature of NEPA analysis also ensures that the public is kept informed of action that may have significant environmental consequences. See [Kern v. Bureau of Land Management, 284 F.3d 1062, 1066 \(9th Cir.2002\)](#). Generally, an agency must prepare an environmental impact statement ("EIS") (assessing the positive and negative environmental consequences of a proposed action and considering alternatives) or an environmental assessment ("EA") (assessing whether a significant impact on the environment is likely) before committing resources to an action. [California v. Norton, 311 F.3d 1162, 1168 \(9th Cir.2002\)](#). However, an agency may avoid the EIS or EA requirements under NEPA if the proposed action meets the criteria for a categorical exclusion, i.e., falls into a "category of actions which do not individually or cumulatively have a significant impact on the environment." 40 C.F.R. ¶ 1508.4.

In its 1998 Decision Memo authorizing repair of the lookout, the Forest Service claimed a categorical exclusion from NEPA's analysis requirements, on the basis that repair of the lookout fell into the category of "repair and maintenance of recreation sites and facilities." However, even if the Forest Service's adoption of a categorical exclusion at that point was proper, and there is evidence to suggest it was not, the Forest Service should have reassessed the issue in 2002 before engaging in its more elaborate rehabilitative initiative. The 1998 Decision Memo authorizes "repairs" to the lookout; it does not authorize or address what the Service did in 2002 and onward under the rubric of a new "dismantle, restoration, and reconstruction" plan. Considering that the "repair and maintenance of recreation sites and facilities" categorical exclusion is typically intended for more minor projects associated with ordinary maintenance — such as "applying registered herbicides to control poison ivy on infested sites in a campground" or "repaving a parking lot"<sup>41</sup> and considering that the proposed project involved a specially protected area, the Court finds that the Service abused its discretion by not conducting an EIS or EA — or, at a minimum, by not readdressing the issue of whether a category exclusion was applicable — before embarking on its dismantle, restoration, and reconstruction plan.

## G. Injunctive Relief

Having determined that the Forest Service's actions with respect to Green Mountain lookout were unreasonable and violated the **Wilderness** Act and NEPA, the Court must now consider the proper remedy. Plaintiff **Wilderness** Watch argues that the only adequate remedy in this case is an injunction requiring the Forest Service to remove Green Mountain lookout from the Glacier Peak **Wilderness**. (Dkt. No. 19 at 23.) In reply, Defendants assert that **Wilderness** Watch has failed to meet its burden of proof for obtaining an injunction, 1078\*1078 particularly with respect to the required showing that the public interest not be disserved by a permanent injunction. (Dkt. No. 23-1 at 33-36.)

A district court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." [Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985, 999 \(9th Cir. 2000\)](#). In order to obtain a permanent injunction, a four-factor test must be

satisfied. [\*Monsanto Co. v. Geertson Seed Farms\*, \\_\\_\\_ U.S. \\_\\_\\_, 130 S.Ct. 2743, 2756, 177 L.Ed.2d 461 \(2010\)](#). "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

The record here establishes that the presence of the Green Mountain lookout detrimentally impacts on the **wilderness** character of the Glacier Peak **Wilderness**. The Court is satisfied that encountering such a structure in the **wilderness** area has harmed the interests of Plaintiff's members and is harmful generally to the interests of those seeking to experience the primeval character, solitude, and natural conditions associated with **wilderness**. This is particularly true in light of the fact that the lookout is visible from various parts of the Glacier Peak **Wilderness**. (AR 725.) The Court also takes note of the fact that the continued presence of the lookout invites increased traffic into an area of the **wilderness** which is already subject to overuse due to its proximity to the fast-growing Puget Sound population base. (See AR 722 (stating that the trail to Green Mountain lookout is a very popular day hike); Dkt. No. 19-1 (indicating that as far back as 1990, the Forest Service recognized that Glacier Peak **Wilderness** was over capacity, that Green Mountain was subject to overuse, and that "use continues to grow with the increasing population of the Puget Sound area"); AR 757 (indicating that, as of 1998, Green Mountain trail was receiving 1,200 visitors annually from June to September and stating that "[a]s the population in the Puget Sound Region continues to grow, the number of visitors to Green Mountain is expected to increase as well").)

The harm done and the harm anticipated by the continued presence of the lookout cannot be adequately addressed through the provision of money damages. Indeed, as the U.S. Supreme Court has recognized, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." [\*Amoco Prod. Co. v. Village of Gambell\*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 \(1987\)](#). In any case, money damages are not available in this case since the Court's power to review the Forest Service's actions arises out of the Administrative Procedure Act, which does not authorize money damages. See, *e.g.* [\*Donnelly v. United States\*, 850 F.2d 1313, 1318 \(9th Cir.1988\)](#).

As for the balance of equities factor, the Court finds that an injunction would not impose an undue hardship upon the Forest Service. The lookout structure was removed in its entirety in 2002, and the Forest Service has offered no evidence that it could not be removed again. The historic value of the lookout could be retained through other means, such as relocating the lookout to a ranger station or providing a history of the lookout in a nearby station, as the Forest Service has done with other fire lookouts.

1079\*1079 Finally, with respect to the requirement that the public interest not be disserved by an injunction, the Court has considered the Forest Service's claims that "there is a considerable and concrete public interest in preserving the chapter of Washington history that the Green Mountain lookout represents." (Dkt. No. 23-1 at 35.) Nevertheless, as Plaintiff points out, the crux of the issue is how to define "the public interest," a concept about which reasonable people frequently disagree. (Dkt. No. 37 at 23.) Ultimately, the

Court agrees with Plaintiff that the public interest here is best identified by reference to the underlying substantive policy reflected in the statute at issue, the **Wilderness** Act, and that the overarching purpose of the **Wilderness** Act weighs in favor of maintaining the "wilderness character" of the area. See [\*Owner Operator Independent Drivers Ass'n, Inc. v. Swift Transp. Co.\*, 367 F.3d 1108, 1112 \(9th Cir.2004\)](#) ("Once Congress has the order of priorities in a given area... it is merely for the courts to enforce them when enforcement is sought.") (internal quotation marks omitted); *High Sierra Hikers Ass'n*, 390 F.3d at 643 (stating that the **Wilderness** Act reflects a "strong public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment"). Congress could have provided an exception for Green Mountain lookout, as it has done with respect to other historical structures located in **wilderness** areas. It did not.

Thus, as detailed above, the Court is satisfied that Plaintiff **Wilderness** Watch has met the four-part test for obtaining injunctive relief. Accordingly, the Court finds that removal of the present lookout structure is the appropriate remedy for the Forest Service's violations of the **Wilderness** Act and NEPA.<sup>[5]</sup>

### III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiff's motion for summary judgment and injunctive relief (Dkt. No. 19) and DENIES Defendants' motion for summary judgment (Dkt. No. 23). This cause of action is DISMISSED and the Clerk of the Court is directed to enter judgment for Plaintiff.

[1] In 1990, the Forest Service entered into a "memorandum of understanding" with the Friends of Green Mountain, memorializing their agreement that the Friends of Green Mountain would "[d]evelop, for Forest Service approval, an annual plan for the work needed to assure the preservation of the Lookout," "[p]rovide labor and materials needed for lookout preservation," and "[i]ncorporate minimum impact **wilderness** techniques into work plans and work activities." (AR 268.)

[2] In a prior case, *High Sierra Hikers Association v. Blackwell*, the Ninth Circuit was called upon to assess the level of deference "due to the Forest Service's determination that preserving the **wilderness** character of [wilderness areas] is not the ultimate interest of the **Wilderness** Act." 390 F.3d 630, 647 (9th Cir. 2004). The Court made note of its own view that "Congress intended to enshrine the long-term preservation of **wilderness** areas as the ultimate goal of the Act." *Id.* However, presumably recognizing its duty not to substitute its own judgment for that of the agency, the Court ultimately concluded that "the diverse, and sometimes conflicting list of responsibilities imposed on administering agencies renders Congress's intent arguably ambiguous," and that therefore deference was due to the agency's determination. *Id.* at 647-648.

[3] There is no dispute that the lookout is not now used for emergency purposes, such as detecting forest fires or spotting enemy aircraft. Similarly, there is no dispute about the fact that Congress has not exempted Green Mountain lookout from the requirements of the **Wilderness** Act for Green Mountain lookout, as it has done for the Appalachian Trail and its related structures and the Evergreen Mountain Lookout in Washington.

[4] See Code of Federal Regulations, 36 C.F.R. § 220.6(d)(5).

[5] Although not briefed by the parties, the Court has considered alternative equitable remedies, in particular the possibility of barring further repairs such that the reconstructed lookout deteriorates naturally. However, this solution would not adequately remedy the prior or future harm done as the reconstructed lookout would remain in conflict with the **wilderness** character of the area and would continue to attract traffic, thereby contributing to the overuse and environmental degradation of the Glacier Peak **Wilderness** area. Furthermore, while the former lookout was highly subject to natural deterioration due to its relatively primitive materials and exposed location, in light of the major

foundation work done in the last round of rehabilitation and reconstruction efforts, it appears that the present lookout structure has been built to last