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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

WILDERNESS WATCH,
ALLIANCE FOR THE WILD
ROCKIES; GALLATIN WILDLIFE
ASSOCIATION; and
YELLOWSTONE TO UINTAS
CONNECTION,

Plaintiffs,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE, an agency of
the U.S. Department of Interior,

Defendant.

Case No. 9:23-CV-00077-DLC-KLD

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION.**

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I. INTRODUCTION

Plaintiffs respectfully move this court for a preliminary injunction preventing the imminent implementation of the challenged Arctic Grayling Conservation Project and Shambow Pond Diversion Pipeline in the Red Rock Lakes Wilderness. On June 5, 2023, the U.S. Fish and Wildlife Service (FWS) issued documents approving the project. *See* Ex. 1 (FONSI/Decision). On June 20, 2023, the executive director of Plaintiff Wilderness Watch reached out to FWS to request that the agency agree to delay this project until after this Court is able to fully review its legality. Ex. 2 (Nickas Declaration). The agency declined to agree to such delay and assured that it would continue working to begin construction this summer, with groundbreaking anticipated as soon as August 1. *Id.*

FWS's action suffers significant legal flaws and will cause imminent, permanent harm to the interests of Plaintiffs if allowed to proceed. The agency has approved a project to reshape the habitat in a Wilderness lake in pursuit of an arbitrarily chosen population target for a fish species, arctic grayling. The project involves using heavy machinery and other motorized equipment to dig a deep trench and install a permanent, 14-inch pipeline to extend into the lake and supplement it with an artificial inflow source during the winter. Ex. 1, at 1-2.

Congress designated the Red Rock Lakes Wilderness to be permanently protected from intentional human manipulation and to preserve natural conditions

driven by natural processes—a “primeval character and influence” left “untrammeled by man.” 16 U.S.C. § 1131(c). FWS has a statutory mandate to manage the area to preserve its wilderness character. 16 U.S.C. §§ 1131(b), 1133(b). To artificially modify a natural habitat with permanent infrastructure in pursuit of arbitrarily chosen conditions for one species is a patent violation of the Wilderness Act. Furthermore, the Wilderness Act expressly prohibits the use of motor vehicles and motorized equipment and the erection of structures or installations, except under narrowly defined exceptions that FWS does not meet here. *See* 16 U.S.C. § 1133(c).

FWS’s own analyses that preceded its decision-making have plainly acknowledged the many ways in which this project fails to comply with the Wilderness Act. Nonetheless, FWS approved the project and intends to implement it immediately because the agency improperly elevates its grayling population goals for Upper Red Rock Lake over its statutory mandate to preserve wilderness character. The pipeline project and associated approved activities would permanently alter the natural conditions of the Wilderness through human infrastructure, have detrimental effects on other species besides grayling, have uncertain effects on grayling, and—according to the agency’s own analytical framework—provide *no* benefit to the preservation of wilderness character (instead significantly degrading it).

Plaintiffs are four nonprofit environmental conservation organizations dedicated to public lands stewardship and the preservation of Wilderness. The staff, members, and supporters of Plaintiffs have distinct environmental, recreational, scientific, aesthetic, and spiritual interests in the Red Rock Lakes Wilderness. The construction of the pipeline and implementation of this project within the Wilderness pose an imminent threat of irreparable harm to Plaintiffs' interests. Thus, Plaintiffs request a preliminary injunction to maintain the status quo and prevent such harm until this Court has the opportunity to issue a final decision on the merits of this case.

II. BACKGROUND

A. Statutory Framework

Protection of Red Rock Lakes, a remote wetland ecosystem in southwestern Montana, dates to the early twentieth century when trumpeter swans' use of the area—the species then nearing extinction—garnered recognition of its ecological importance. Citing the Migratory Bird Treaty Act, President Franklin D. Roosevelt issued an executive order in 1935 designating the “Red Rock Lakes Migratory Waterfowl Refuge” as “a refuge and breeding ground for wild birds and animals.” Exec. Order No. 7023 (Apr. 22, 1935).

The area was later renamed the Red Rock Lakes National Wildlife Refuge, *see* 26 Fed. Reg. 6,647 (July 26, 1961), and it now falls within the wide system of National Wildlife Refuges on federal lands throughout the country. FWS manages

all refuges under broad, general statutory directives to administer these protected areas for “the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States” and to “ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans.” 16 U.S.C. §§ 668dd(a)(2), (4)(A)-(B).

In many areas within National Wildlife Refuges, Congress has been more specific and provided for the most stringent of environmental protections for federal lands: Wilderness designation. The Wilderness Act of 1964 created the National Wilderness Preservation System and imposes upon federal land management agencies a statutory duty to administer lands designated within it to “preserv[e] the wilderness character of the area.” 16 U.S.C. § 1133(b). In a designated Wilderness area that may also have “other purposes for which it may have been established,” the Wilderness Act expressly requires that administration for those purposes be conducted “as also to preserve its wilderness character.” *Id.*

The “explicit statutory purpose” of the Wilderness Act is “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 for preservation and protection in their natural condition.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051,

1055 (9th Cir. 2003) (en banc) (quoting 16 U.S.C. § 1131(a)). The statute defines “wilderness” as “an area where the earth and its community of life are untrammelled by man,” “retaining its primeval character and influence,” “without permanent improvements,” and “protected and managed so as to preserve its natural conditions.” 16 U.S.C. § 1131(c). Management to protect Wilderness should ensure that it is “affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable.” *Id.*

Although the Wilderness Act recognizes that recreational and conservation-related activities can be appropriate within wilderness areas, *see* 16 U.S.C. § 1133(b), the statute places paramount its mandate of wilderness preservation, requiring that all activities in designated wilderness be conducted in a manner that “preserv[es] . . . wilderness character” and “will leave [designated wilderness areas] unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a). Congress expressly prohibited certain activities in designated wilderness that are defined by the Act to be antithetical to wilderness character preservation. The statute dictates that “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 Wilderness areas. 16 U.S.C. § 1133(c). The only exception that this provision affords is for activities that are

“necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” *Id.*

In 1976, Congress designated 32,350 acres within the Red Rock Lakes National Wildlife Refuge as the Red Rock Lakes Wilderness, to be administered by FWS according to the statutory requirements of the Wilderness Act. Pub. L. 94-557, 90 Stat. 2634 (Oct. 19, 1976). Within the designated Wilderness of Red Rock Lakes sits the entirety of Upper Red Rock Lake.

B. Factual Background

Upper Red Rock Lake is home to an adfluvial, or lake-dwelling, population of arctic grayling, a fish in the salmon family. Ex. 3, at 1. This location represents the southernmost extreme of the species’ natural habitat. Arctic grayling extensively occupy northern waters across Canada, Alaska, and Russia, and artificially stocked adfluvial populations for sportfishing exist in numerous waterbodies around Montana and the U.S. West. Ex. 4, at 15. This far south, arctic grayling are native only to the upper headwaters of the Missouri River—of which the Red Rock Lakes are a part—and a few waterways feeding Lake Michigan. The Michigan population was extirpated early in the twentieth century. *Id.* at 10.

The grayling population in the upper Missouri River basin has declined due to human impacts—particularly the fluvial, or stream-dwelling, populations. Livestock grazing, stream dewatering for irrigation, development, dam construction,

the introduction of non-native fish, habitat connectivity loss, fishing, climate change, and other anthropogenic sources of harm to grayling habitat have all taken a toll. *See generally id.*; Ex. 5 (Final EA). Environmental groups have petitioned FWS to grant the fluvial populations of arctic grayling in the upper Missouri River basin protection under the Endangered Species Act, which would require the government to regulate human activities on public and private lands that are detrimental to the fish. The agency has declined to do so. *See* Ex. 4 (2020 ESA determination); *see also Center for Biological Diversity v. Haaland*, Case No. 2:23-cv-0002 (D. Mont. 2023) (ongoing suit challenging determination).

Part of FWS’s rationale for refusing regulatory action to address harm to arctic grayling on the broader landscape has been its citation to the presence of the adfluvial population residing in the protected area of Red Rock Lakes. As recently as 2020, FWS has asserted that this population “has a stable, but lower number of adult spawners than in the recent past, yet relatively high genetic diversity with a relatively robust effective population size.” Ex. 4 at 69. The groups challenging the agency’s determination have pointed out that fluvial and adfluvial populations are not interchangeable; the lake-dwelling fish show poor survival when transplanted in flowing water habitats. *Center for Biological Diversity*, No. 2:23-cv-0002, Dkt. 1 at ¶ 27.

The adfluvial arctic grayling in Red Rock Lakes face their own barriers to abundance. The fish have experienced a historical onslaught of removal and relocation, habitat destruction, connectivity loss due to dam construction downstream, fishing and its effects on spawning habitat, and livestock grazing impacts. Often, historical impacts to arctic grayling in the Centennial Valley stemmed from the unintended consequences of the same human penchant for action and habitat modification that persists today; some of the 20th-century dam-building and stream-rerouting around Red Rocks was motivated by a perceived benefit to waterfowl, and past efforts at building man-made ponds to house grayling have failed or harmed the fish due to a lack of knowledge about their future impacts. *See* Ex. 6 (“Time Line of Arctic grayling in SW Montana and Centennial Valley”).¹

Another potential and entirely natural barrier to grayling abundance is winter. Upper Red Rock Lake is shallow habitat, averaging only about a meter deep, and at its relatively high altitude in the Centennial Valley, winter can often be harsh. Ice and snow cover on the lake will shrink viable grayling habitat during the winter, and years with particularly extensive spatial and temporal ice cover can result in hypoxic lake conditions—an acute depletion of dissolved oxygen due to decomposition

¹ The timeline in Exhibit 6 was compiled by the former Refuge manager at Red Rock Lakes and attached to his public comments on FWS’s proposal.

continuing to occur in lake sediments while the ice cover dampens processes of oxygenation. *See* Ex. 5 at 4; Ex. 7 (2017 Adaptive Management Plan) at 10, 24-26.

Through its research, FWS has concluded that hypoxic winter habitat—this natural ecological phenomenon—poses the greatest limit to achieving increased arctic grayling abundance in Upper Red Rock Lake.² Ex. 3 at 24. In partnership with Montana Fish Wildlife and Parks, FWS prepared an “adaptive management plan” for Centennial Valley arctic grayling in which the agency chose an arbitrary target of 1,000 spawning grayling for Upper Red Rock Lake. *See* Ex. 7. The target was surmised by experts as a population that could be self-sustaining over a 50-year timespan and retain genetic diversity, especially given the habitat damage off the Refuge that has weakened connectivity between Red Rock Lakes and other populations. Ex. 7 at 6-7. In 2014, the grayling population in Upper Red Rock Lake was estimated at more than double that target, but it subsequently dropped to what are now historic lows. Ex. 3 at 21.

Several factors complicate fully understanding the underlying causes of the recent population swings. For example, from 2010 to 2015, FWP artificially incubated grayling eggs and introduced them to a tributary stream of Upper Red Rock Lake; the presence of these fish once they reach spawning age (about three

² Numerous commenters on the agency’s project raised significant doubts about the true extent to which hypoxia is primarily to blame for grayling declines. *See, e.g.*, Ex. 5 at 94-96, 111-119.

years) muddles the picture of what natural abundance dynamics may have occurred. Ex. 5 at 84, 88, 95, 137. Furthermore, prior to 2013, fishing was not permitted on the spawning streams for the grayling until late May. *Id.* at 84-88. But starting in 2013, spring fishing was liberalized with a closure only between May 15 and June 15. *Id.* The increased fishing activity, which overlaps with potential spawning times, was initially slated for only a limited number of years to target nonnative trout, but it continues to the present; in 2022, the closure period was pushed back to May 1. *Id.* Additionally, management disturbance activities have ramped up: more intensive electro-shock fishing to census the population in a tributary began in 2010 and then was doubled in frequency in 2013; this occurred on top of the use of a weir on that stream to trap the fish. Ex. 8 (“Cumulative Management Disturbance”).³

FWS’s approach to explaining recent population declines has been to employ abstract mathematical modeling looking at three factors: extent of spawning habitat, extent of winter (oxygenated) habitat, and competition with non-native fish. Ex. 3. The agency utilized no such detailed, quantitative analysis to assess the effects of the fishing (angler presence in streams can stir up sediments that inhibit grayling hatching), other managerial actions, or factors like livestock grazing that can increase sedimentation and indirectly contribute to wintertime oxygen depletion.

³ This chart was also prepared and submitted to the agency by the former Refuge manager.

FWS dismissed these factors with more qualitative speculation that they were minimally tied to the population decline. *See* Ex. 5 at 122-125, 134-135.

For the three factors that FWS more substantively considered, the agency ran separate simulations of mathematical grayling population dynamics in relation to randomized figures for hectares of spawning stream habitat per fish (which the agency manipulates through the destruction of beaver dams), abundance of non-native cutthroat trout, and hectares of oxygenated winter habitat per fish. Through this abstract modeling, FWS concluded that winter habitat was the “primary limiting factor” for Upper Red Rock Lake’s adfluvial grayling population. Ex. 3 at 24.

Thus, FWS’s response to the population decline has been to address not external human impacts on the fish but instead the winter. The agency began pursuing plans for artificial habitat modification in Upper Red Rock Lake to alleviate the effects of winter and supplement the lake with man-made sources of oxygen.

C. Procedural History

FWS took several actions to manipulate the habitat in the designated Wilderness of Red Rock Lakes without undergoing any public process. First, beginning in 2020, the agency began releasing water during the winter through a control structure on a man-made pond, Widgeon Pond, just outside the Wilderness. Ex. 5 at 11. The Widgeon Pond release flows into Upper Red Rock Lake, adding an artificial inflow source to supplement the lake with more oxygenated water. *Id.*

Second, the agency began physically breaching beaver dams both inside and outside the designated Wilderness in order to manipulate the habitat in tributary streams to better support grayling spawning (and to create data to inform its spawning habitat model). *Id.* at 12; Ex. 3 at 3. Third, this past winter, FWS installed electric powered diffusers on the surface of Upper Red Rock Lake to mechanically attempt to increase dissolved oxygen levels. Ex. 5 at 6.

Prior to undergoing its public engagement on this project, FWS conducted an internal “structured decision-making” process that was meant to inform “whether and how to improve the overwinter conditions” in Upper Red Rock Lake. *See* Ex. 9 at 6. However, because *all* the alternatives considered in this process “were composed of actions to improve overwinter conditions,” the structured decision-making contributed nothing of substance to answer the “whether to act” question it purported to raise. *Id.* at 17. That answer was pre-determined. The process was framed as an “intermediate step in the identification of the best performing alternative” that could precede “formally analyzing tradeoffs.” *Id.* at 63.

In February 2023, FWS released a draft Environmental Assessment (EA) that analyzed six alternatives for modifying Upper Red Rock Lake in furtherance of the grayling population target. *See* Ex. 5. The agency’s first, “no action” alternative, was not a true “no action” alternative because it included the ongoing Widgeon Pond releases and beaver dam destruction; all six of the action alternatives also included

these activities on top of the varying approaches for more intensive habitat manipulation. The six alternatives included the installation of electric powered splashers or diffusers; a generator-powered electric pump to pipe oxygen-depleted water from the lake to an aeration machine in a nearby campground before returning it; burying a pipeline stretching a little over a mile from Shambow Pond, just outside the Wilderness boundary, into Upper Red Rock Lake, to add somewhat more oxygenated water in the winter; constructing an impermeable wall stretching approximately 1,000 meters into Upper Red Rock Lake to force water from an inlet stream to reach closer to the lake's center; and dredging sediments from the lake near the mouth of the inlet stream. *Id.*

FWS collected public comments on the draft EA; Plaintiffs and many others submitted extensive comments questioning the approach, assumptions, logic, and legality of the proposals. Ex. 5 at 54-121. Then, on May 31, 2023, FWS published its Final EA, and on June 5, 2023, the agency released its “Finding of No Significant Impact,” which also served as a “Decision to Implement Conservation Efforts for Arctic Grayling.” *See* Ex. 1. The agency's chosen alternative was to construct the Shambow Pond pipeline, a permanent installation in the Wilderness to artificially supplement winter water inflow into Upper Red Rock Lake.

FWS also released its “minimum requirements decision guide,” an internal guidance worksheet the agency fills out to assist in and document its “minimum

requirements analysis” for Wilderness Act compliance. Ex. 10. This document was signed by the Refuge Manager and Assistant Regional Director on May 23, 2023, also selecting the Shambow Pond pipeline project for implementation. The analysis contained in FWS’s “minimum requirements decision guide” demonstrates explicitly that the Shambow Pond pipeline project would have no beneficial effect on the wilderness character of the Red Rock Lakes Wilderness and instead would significantly degrade it.

Recognizing the egregious legal violation of such an intensive project to manipulate Wilderness habitat with the installation and operation of permanent human infrastructure, Plaintiffs filed suit. The present motion accompanies that filing.

III. STANDARD OF REVIEW

To obtain a preliminary injunction, a party must show (1) that it “is likely to succeed on the merits,” (2) that it is “likely to suffer irreparable harm in the absence of preliminary relief,” (3) that “the balance of equities tips in [its] favor,” and (4) that “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a sliding scale test to these factors: if the plaintiff can at least raise “serious questions going to the merits” and demonstrate “a balance of hardships that tips sharply towards the plaintiff,” the plaintiff is entitled to preliminary injunctive relief “so long as the plaintiff also shows

that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 553-559, 704-706, governs judicial review of Plaintiffs’ Wilderness Act claims. Under the APA, a court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This standard hinges on an agency’s reasoned decision-making and its consideration of all relevant factors (like compliance with statutory requirements) when it acts. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983); *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Here, Plaintiffs challenge final agency action in the form of FWS’s approval and implementation of its project pursuing “Conservation Efforts for Arctic Grayling,” including the selected action of the “Shambow Pond Diversion Pipeline.” *See* Ex. 1.

The merits of Plaintiffs’ claims are straightforwardly apparent. The Wilderness Act requires FWS to manage the Red Rock Lakes Wilderness—in which the project would be implemented—to preserve its wilderness character. *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 646 (9th Cir. 2004) (citing 16 U.S.C.

§ 1133(b)). Wilderness character preservation precludes “trammeling,” or intentional anthropogenic ecological manipulations; Wilderness stands “in contrast with those areas where man and his own works dominate the landscape.” 16 U.S.C. § 1131(c). Congress made the mandate to protect wilderness character paramount over other land-management considerations—*see* 16 U.S.C. § 1133(b)—and expressly prohibited certain activities incompatible with the Wilderness Act’s mission, including the use of motor vehicles, motorized equipment, and structures and installations. 16 U.S.C. § 1133(c). Such nonconforming uses are only permitted when “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” *Id.* This prohibition is one of the strictest prohibitions in the Act. *See Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1040 (9th Cir. 2010).

FWS’s Shambow Pond pipeline project, as well as its concurrent approval of other activity such as the beaver dam breaching and Widgeon Pond releases, directly contravenes this statutory mandate. Each of these activities constitutes trammeling of the natural environment in the designated Wilderness to serve uncertain, manager-contrived ends. The pipeline project involves the installation and perpetual operation of permanent infrastructure and destructive and disruptive construction activities with the use of heavy machinery, motorboats, and temporary road construction—

activities expressly prohibited by the Wilderness Act. *See* Ex. 10 at 78 (detailing scope of prohibited uses).

The purpose of FWP’s Shambow Pond pipeline project is fundamentally at odds with the Wilderness Act’s mandate to preserve the Red Rock Lakes as “untrammeled” in its “natural conditions.” The aim of the project—to bolster the arctic grayling toward a target spawning population of 1,000—is a desired outcome arbitrarily selected by the agency. And the agency’s chosen hurdle in pursuit of this goal is not even addressing human sources of Wilderness habitat damage; instead, the agency has elected to artificially manipulate the natural conditions in Upper Red Rock Lake—to target *winter* as its primary concern. Because the agency views winter-time hypoxia as the major factor limiting grayling from maintaining a spawning population of 1,000, FWS has elected to manufacture artificially improved winter habitat for the grayling rather than more aggressively address other problems like livestock grazing, fishing impacts, and habitat-damaging activity on the wider landscape.

FWS stated clearly in its internal Wilderness Act compliance analysis that its contemplated arctic grayling project was “not necessary to meet the requirements of other federal laws” besides the Wilderness Act. Ex. 10 at 3. Thus, the only way that the agency could possibly justify such Wilderness-intrusive trammeling and its authorization of generally prohibited activities would be if such action was

necessary to meet the “minimum requirements” of preserving wilderness character in the Red Rock Lakes Wilderness. On this score, FWS’s authorization to implement the Shambow Pond pipeline project illustrates textbook arbitrary and capricious decision-making contrary to its statutory mandate.

For one thing, FWS never concluded that manipulating the Upper Red Rock Lake habitat was a necessity of wilderness character preservation in the first place. The decision to do that was pre-determined, as demonstrated by the fact that the agency *already started* its habitat manipulations before undertaking its environmental and Wilderness Act-compliance analyses. FWS’s analysis was predicated on *how* to artificially add oxygen to Upper Red Rock Lake, and the agency largely skipped over any consideration of whether such action in pursuit of this goal was compatible with the purpose of the Wilderness Act.

FWS stated only—in passive and uncertain terms—that “there is an assumption the population may become extirpated unless dissolved oxygen is enhanced.” Ex. 10 at 1. Thus, the agency reasoned, loss of the native population of grayling would be to the detriment of the Wilderness. But this logic is steeped in uncertainty. For one thing, the extirpation assumption is directly contradicted by FWS’s cited determination that Endangered Species Act listing for the grayling is not warranted. Ex. 10 at 3. For another, the agency’s ongoing and proposed actions hinder any prospect of understanding free ecological dynamics in this Wilderness

environment where nature is supposed to reign supreme. As FWS’s Manual on Wilderness Stewardship makes clear, “because such undisturbed natural areas are increasingly rare, wilderness areas provide unique opportunities for scientific investigation.” Ex. 11 at 31. But this necessity of Wilderness as a natural control—expressly apparent in the Wilderness Act’s mandate—is compromised by experimental, uncertain, intensive management activities. The early failures of well-intended landscape modifications in this very area exemplify the inherent uncertainty of reshaping the environment to serve managerial and mathematical assumptions that may later be viewed with regret.

Furthermore, on top of the predicted effect of artificial oxygenation being uncertain, its potential bolstering of grayling is only thinly justifiable as a benefit to wilderness “naturalness.” FWS itself makes this dynamic clear in its handbook on Wilderness stewardship. In Wilderness, the agency says, we

adjust human use and influences so as not to alter natural processes. We strengthen wilderness character with every decision to forego actions that have physical impact or would detract from the idea of wilderness as a place set apart, a place where human uses, convenience, and expediency do not dominate.

Ex. 11 at 9. FWS acknowledged clearly in its analysis of the proposed actions here that pursuit of its grayling abundance goals may only be necessary if it were done “without degrading other Wilderness character qualities.” Ex. 10 at 4. Preserving

“naturalness,” the agency noted, “while significantly degrading [other delineated facets of wilderness character] would not be consistent with the Wilderness Act.” Ex. 10 at 6.⁴

After FWS irrationally justified the Wilderness necessity of its ends, the agency proceeded to contradict itself and the law in its assessment of the means, too. As the FWS handbook makes clear in guiding agency managers to work through compliance with 16 U.S.C. § 1133(c), “[t]he alternative that has the least impact on the area’s wilderness character, including intangible aspects of wilderness character, and accomplishes refuge purposes, including wilderness purposes, constitutes the minimum requirement.” Ex. 11 at 12. The Wilderness purpose of the Red Rock Lakes Wilderness is to preserve wilderness character, and *none* of FWS’s contemplated grayling conservation activities would further that purpose, according to the agency’s own analysis. FWS deploys a scoring system that dissects different facets of wilderness character. Its summary of the results is reproduced below, showing that even Alternative 1, the parallel to the EA’s “no action” alternative

⁴ The agency’s approach to its minimum requirements analysis involves dissecting wilderness character into distinct, often opposing, facets. Such facets derived from a monitoring framework not meant to guide management decision-making or reinterpret the Wilderness Act to contain internal trade-offs, and in its policy work, Wilderness Watch pushes back against the manner in which the agencies use this approach. *See* Compl., Dkt. 1, at ¶ 71 n.1, ¶ 82 n.2.

which actually included actions, resulted in a net detriment to wilderness character.

Ex. 10 at 74-75.

- Alternative 5:** Shambow Pond Diversion Pipeline
- Alternative 6:** Permanent Barrier from Elk Springs Creek to Lake Center
- Alternative 7:** Elk Springs Creek Dredge and Deflection Berm
- Alternative 8:** _____

Wilderness Character	Alternative 5		Alternative 6		Alternative 7		Alternative 8	
	Positive	Negative	Positive	Negative	Positive	Negative	Positive	Negative
Untrammled	0	4	0	3	0	4	0	0
Undeveloped	0	3	0	4	0	4	0	0
Natural	4	4	4	5	4	5	0	0
Solitude/Primitive/Unconfined	0	5	0	6	0	6	0	0
Other Features of Value	0	0	0	0	0	0	0	0
Totals	4	16	4	18	4	19	0	0
Wilderness Character Rating	-12		-14		-15		0	

MRDG Step 2: Alternative Comparison

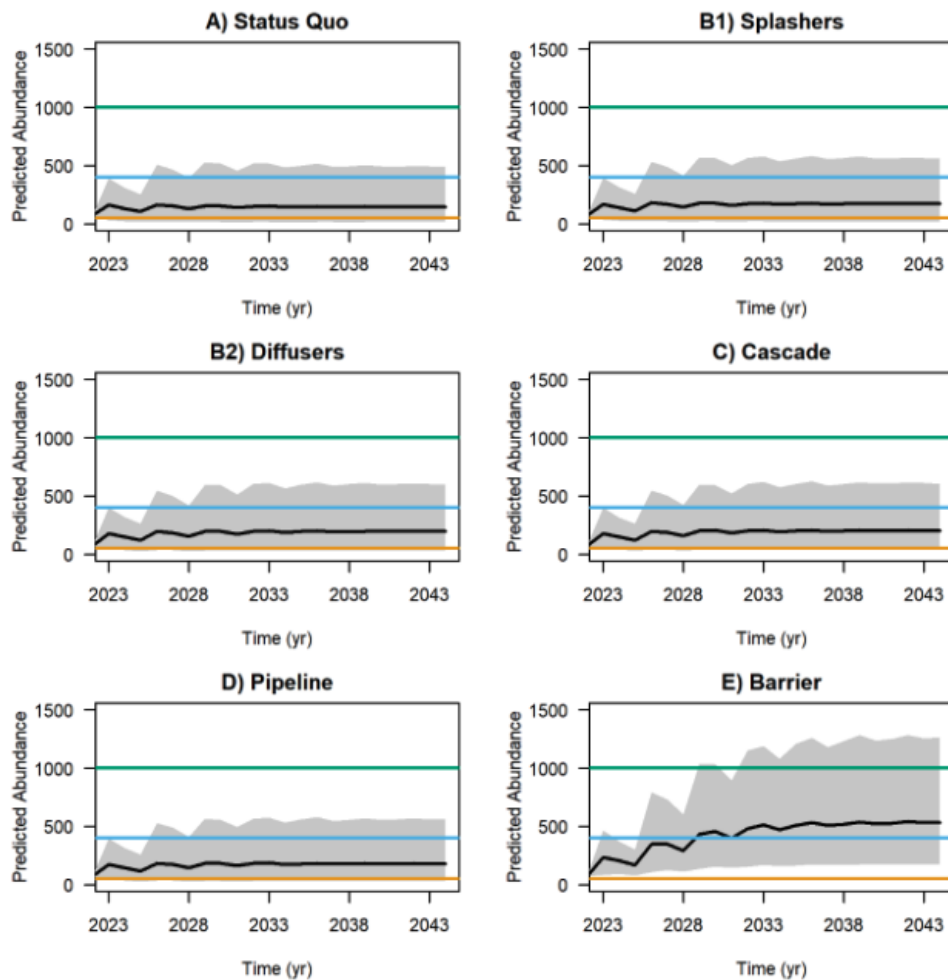
- Alternative 1:** Water releases, beaver dam notching, limited angling closures
- Alternative 2:** Splasher Aeration
- Alternative 3:** Diffuser Aeration
- Alternative 4:** Aerator with Recirculating Pump and Pipelines

Wilderness Character	Alternative 1		Alternative 2		Alternative 3		Alternative 4	
	Positive	Negative	Positive	Negative	Positive	Negative	Positive	Negative
Untrammled	0	2	0	3	0	3	0	3
Undeveloped	0	0	0	4	0	4	0	4
Natural	3	1	4	4	4	4	4	4
Solitude/Primitive/Unconfined	0	2	0	6	0	5	0	5
Other Features of Value	0	0	0	0	0	0	0	0
Totals	3	5	4	17	4	16	4	16
Wilderness Character Rating	-2		-13		-12		-12	

Even under FWS’s mistaken perception that it had any legal justification to intrusively manipulate Upper Red Rock Lake, the agency still failed to select anything close to the “alternative that has the least impact on the area’s wilderness character” or the “minimum requirement” in terms of means. Instead, FWS authorized the Shambow Pond pipeline, which the agency itself described as having

“approximately 8.4 times the negative impact to Wilderness character compared to Alternative 1.” Ex. 10 at 77. As FWS rationalized, Alternative 1 had “uncertainty of the temporal nature of its effects,” while “Alternative 5 [the Shambow Creek pipeline] was thought to be more reliable. For these reasons Alternative 5 (D in EA) was selected as the Minimum Requirement.” *Id.* In ultimately basing its decision on speculated reliability as an intervention to help achieve FWS’s desired grayling population, the agency thus abandoned any attempt to base its decision on compliance with the Wilderness Acts strict but clear requirements.

Here, again, the uncertainty undercutting FWS’s decision is also on full display. During the structured decision-making process in which FWS preliminarily evaluated its action alternatives, the agency displayed the output of model-predicted effects as shown below (*see* Ex. 9 at 50):



This illustration makes two things clear. First, the difference in estimated effect between the “status quo” and the “pipeline” alternative, which purportedly dictated the agency’s choice, is barely perceptible. What little difference may appear above the grayling “recovery threshold” (the blue line) is entirely contained within the high margin of the model’s wide confidence intervals (the grey shading). Second, the model predicted a slightly greater improvement in outcome for the “diffuser” option, an alternative the agency implemented preemptively (and unlawfully) during

this past winter. However, FWS reported, it turned out that this “did not produce habitat the modeling predicted and was dismissed.” Ex. 10 at 77. Thus, FWS based its selection of the pipeline alternative on the same modeling effort that already proved unreliable regarding another alternative—a quintessential demonstration of arbitrary and irrational decision-making.

Finally, FWS expressly documented the numerous ways in which the project it approved would damage the wilderness character of the Red Rock Lakes Wilderness:

- The creek diversion via pipeline “is a negative impact on a natural process and the Untrammeled Wilderness Character Quality. Operation of the pipeline is also a manipulation of the natural process of ice formation, and an additional negative impact on the Untrammeled Wilderness Character Quality.” Ex. 10 at 43.
- Construction with motors and mechanical equipment “would negatively impact the Undeveloped Wilderness Character Quality.” Ex. 10 at 44.
- “The permanent pipeline and its components installed in Wilderness are installations, which would negatively impact the Undeveloped Wilderness Character Quality.” Ex. 10 at 44.

- “Motors, mechanical transport, and construction would disturb the distribution of plant and animal species, and would be negative impacts to the Natural Wilderness Character Quality. . . . Operation of the pipeline is predicted to provide additional suitable habitat and improve survivorship for the indigenous grayling population, however it also would have negative impacts to other species.” Ex. 10 at 45.
- “A portion of the pipeline will be visible to boaters, which is an indication of civilization and a negative impact on the [solitude and primitive or unconfined recreation] Wilderness Character Quality.” Ex. 10 at 46.

Given the explicit statutory mandate for FWS to administer Red Rock Lakes to preserve its wilderness character, the agency’s incongruous decision-making in the face of its own analysis as described above is plainly “contrary to law” and thus in violation of 5 U.S.C. § 706(2)(A). Plaintiffs’ likelihood of success on the merits is apparent, and Plaintiffs unquestionably raise “serious questions going to the merits.” *Alliance for the Wild Rockies*, 632 F.3d at 1135.

B. Injunctive relief is necessary to prevent irreparable harm.

“Harm is irreparable when, as [its] name suggests, the harm cannot be undone by an award of compensatory damages.” *Battelle Energy Alliance v. Southfork*

Security, 980 F.Supp.2d 1211, 1220 (D. Idaho 2013); *accord Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 676 (9th Cir. 1988). “Environmental 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. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Plaintiffs and their members face an imminent threat of injury to their environmental, recreational, scientific, aesthetic, and spiritual interests in the wilderness character of Red Rock Lakes should the project’s construction proceed. *See* Ex. 2 at ¶¶ 7-11. Plaintiffs have a documented interest in the wilderness character of Red Rock Lakes, which they seek out for opportunities to experience quiet, solitude, and a natural setting undisturbed by human infrastructure, motorized disturbance, and the signs and presence of human influence and manipulation. *Id.*

And Plaintiffs’ interests in the environmental integrity and lawful management of Red Rock Lakes Wilderness cannot be redressed with cash. The harms at issue are fundamentally qualitative, non-monetary, and non-compensable. *See Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1078 (W.D. Wash. 2012) (“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 [APA], which does not

authorize money damages.” (citing *Donnelly v. United States*, 850 F.2d 1313, 1318 (9th Cir. 1988)); *Wilderness Watch v. Vilsack*, 229 F.Supp.3d 1170, 1183 (D. Idaho 2017) (“[P]laintiffs’ interest in the wilderness character of the Wilderness Area is real and cannot be compensated for by a monetary award.”)

FWS’s project here would include intrusive trammeling actions facilitated by motors and heavy equipment, imminent and irreparable ground-disturbing and ecologically impactful activity that cannot be undone. The project would impair Plaintiffs’ ability to enjoy the Wilderness and its “community of life” residing there in an untrammled state for years to come. *See Alliance for the Wild Rockies v. Marten*, 253 F.Supp.3d 1108, 1111 (D. Mont. 2017) (“Plaintiffs’ expressed desire to visit the area in an undisturbed state is all that is required to sufficiently allege harm[.]”). Injunctive relief from this Court is necessary to halt the threat of this fundamental, long-term injury to wilderness character and to Plaintiffs’ interest in enjoying the Red Rock Lakes Wilderness as intended by Congress under the Wilderness Act.

C. The balance of equities and the public interest support injunctive relief.

For motions to preliminarily enjoin government conduct, the considerations of balancing harms and of the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The government’s interest is that of the public’s, so the “balance of

equities” that this Court must consider are generally the harm to Plaintiffs, which a preliminary injunction would prevent, and the harm, if any, that the public might suffer as a result of the preliminary injunction’s effects on the government. Always weighing strongly in favor of injunctive relief is the public’s interest in lawful government administration; allowing the government to operate in violation of legal mandates in itself disserves the public interest. *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (agency’s failure to comply with statute “invokes a public interest of the highest order: the interest in having government officials act in accordance with law”).

Moreover, “Congress has recognized through the passage of the Wilderness Act that there is a strong public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment,” and protecting that congressionally recognized public interest “weighs in favor of equitable relief.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d at 643 (internal citation omitted); *cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.”). “On the side of issuing [an] injunction,” the Ninth Circuit has made clear, “we recognize the well-established ‘public interest in preserving nature and avoiding irreparable

environmental injury.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d at 1137 (quoting *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008)).

Here, a preliminary injunction would serve the public interest of protecting wilderness character. FWS’s own internal analyses establish that implementation of the project will damage wilderness character, and the installation of the pipeline infrastructure would permanently mar the Red Rock Lakes Wilderness with the “imprint of man and his works,” both in the visual sense and through the artificial manipulation of the environment. 16 U.S.C. § 1131(c); Ex. 2 at ¶¶ 10-11; Ex. 10 at 46.

The purpose of FWS’s project here—to re-shape Upper Red Rock Lake into a better winter grayling residence—is fundamentally antithetical to the Wilderness Act’s direction to maintain the wilderness as an area where “the earth and its community of life are untrammelled by man,” 16 U.S.C. §1131(c); it involves intensive activities prohibited by Congress because they degrade wilderness character, 16 U.S.C. §1133(c), and therefore project goals cannot outweigh the mandate to preserve wilderness character within an area designated by Congress for that express purpose. *See id.* §§1131(c), 1133(b).

Furthermore, although FWS will certainly raise its sense of urgency for the currently-low grayling population, the agency has acknowledged (as described above) that its decision-making is utterly rooted in uncertainty. The agency wrote

plainly that “further study” was still needed to determine the relative difference in effect between the pipeline and a less intensive alternative, yet FWS approved the project anyways. Ex. 10 at 2, 77. Accordingly, any purported burden to FWS from a delay in project activities pending full review of the merits by this Court does not outweigh the irreparable harm Plaintiffs face should project activities proceed.

This is not the first time that a federal agency has approved heavy-handed ecological manipulations and prohibited activities in a Wilderness area on a fast-moving timeline. Such practice by the government threatens to permanently mar the Wilderness landscape in violation of statutory duties and threatens to do so quickly, before the possibility of judicial review on any typical litigation timeline. In 2021, for example, this Court faced a similar fish restoration-motivated Wilderness manipulation by the Forest Service, and this Court ordered the agency to postpone its work on the project to a date “sufficiently far in advance to permit this Court to exercise meaningful judicial review.” Order re Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 2, *Wilderness Watch v. Marten*, No. 9:12-cv-82-DLC (D. Mt. July 24, 2021).

As the Ninth Circuit has made abundantly clear in this context, “[t]he public interest suffers when actions in the wilderness evade judicial review.” *Wilderness Watch v. Perdue*, 805 Fed. Appx. 476, 481 (9th Cir. 2020). Here, the Ninth Circuit’s similar analysis in *High Sierra Hikers Association* controls: “Because Congress has

recognized the public interest in maintaining these wilderness areas largely unimpaired by human activity, the public interest weighs in favor of equitable relief.” 390 F.3d at 643.

V. CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that this Court grant a preliminary injunction barring implementation of the challenged project during the pendency of this case.

Respectfully submitted June 27, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 6493 words in length, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and certificate of compliance. Pursuant to Local Rule 7.1, a table of contents, table of authorities, and index of exhibits are included in this brief.

/s/ Andrew Hursh
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CERTIFICATE OF SERVICE

I certify that I served a true and accurate copy of this document by sending it—in conjunction with the Complaint and Summons—via U.S. Postal Service first-class, certified mail, return receipt requested, to the following:

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