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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDERNESS WATCH; ALLIANCE FOR THE WILD ROCKIES; FRIENDS OF THE WILD SWAN; and FLATHEAD-LOLO-BITTERROOT CITIZEN TASK FORCE, and CONSERVATION CONGRESS, Plaintiffs, v. LEANNE MARTEN, Regional Forester of Region One of the U.S. Forest Service, and US FOREST SERVICE, Defendants.	CV-21-82-M-DLC **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Plaintiffs respectfully move this Court for a temporary restraining order and/or preliminary injunction against the challenged North Fork Blackfoot Westslope Cutthroat Trout Project in the Scapegoat Wilderness. On July 15, 2021, Wilderness Watch participated in a meeting with the Forest Service and learned the Forest Service was planning to release a signed Decision Memo imminently and project activities, including helicopter use and rotenone poisoning, could begin as soon as the first week of August. Ex. 1, Declaration of George Nickas ¶p13-15 (July 22, 2021). On July 16, 2021, the Forest Service released its Decision Memo and made it publicly available on the project webpage. *Id*.; *see* Ex. 5. Because project activities may commence as early as August 1, 2021, Plaintiffs request a temporary restraining order and preliminary injunction to maintain the status quo and prevent imminent and irreparable harm until this Court has the opportunity to issue a final decision on the merits in this case.[1]

[1] The Forest Service has been the subject of at least two court orders requiring the Forest Service to allow enough time for judicial review between project authorization and implementation. In a 2010 order, a court put the Forest Service on notice that, should it ever again approve helicopter operations in the River of No Return Wilderness, the agency "would be expected to render a final decision enough in advance of the project so that any lawsuit seeking to enjoin the project could be fully litigated" before helicopter operations commence. *Wolf Recovery Found. v. U.S. Forest Serv*., 692 F.Supp.2d 1264, 1270 (D. Idaho 2010). In 2016, the Forest Service ignored that order and authorized immediate

II. BACKGROUND

This case challenges the U.S. Forest Service's violation of its legal duties to protect the wilderness character of the Scapegoat Wilderness, a federally protected wilderness in Montana. The Forest Service violated these duties by issuing a decision authorizing the Montana Fish, Wildlife and Parks ("FWP") to make approximately 67 helicopter landings in the Wilderness, apply rotenone to kill previously stocked fish in 67 miles of stream and 3 lakes, restock naturally fishless waters with hatchery-reared westslope cutthroat trout, and use motorized and gas-powered boats and equipment to facilitate the efforts. Rotenone is a broad-spectrum pesticide that is highly toxic to fish as well as invertebrates and gilled amphibians. To Plaintiffs' knowledge, the helicopter landings, broadscale use of

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implementation of another helicopter-assisted wildlife project. *Wilderness Watch v. Vilsack,* 229 F.Supp.3d 1170, 1175 (D. Idaho 2017) (noting the agency ignored the Court's prior directive in the present case); *see also* Order on Motion to Reconsider at 1-2, *Wilderness Watch v. Vilsack,* 229 F.Supp.3d 1170 (ECF No. 61) ("Ignoring a prior directive of the Court, the Forest Service allowed the project to begin immediately, preventing plaintiff environmental groups from being able to timely seek injunctive relief."). The Court "enjoin[ed] the Forest Service from approving any future helicopter projects without delaying implementation for 90-days to allow affected groups to file challenges to the projects." *Wilderness Watch v. Vilsack,* 229 F. Supp. 3d at 1183, *aff'd in part, Wilderness Watch v. Perdue*, Nos. 17-35878, 17-35882 (9th Cir. Mar. 9, 2020) (upholding injunction for a delay of 30 days of Idaho Department of Fish and Game helicopter-assisted projects in the Wilderness to "ensure[] time for adequate review of any challenges" and noting "[t]he public interest suffers when actions in the wilderness evade judicial review").

pesticides in lakes and free-flowing waters, and intensive wildlife manipulations authorized by the Forest Service in this case represent one of the most extensive intrusions on wilderness character that has ever been authorized in the National Wilderness Preservation System.

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is … an area where the earth and its community of life are untrammeled by man" and an area "retaining its primeval character and influence… which is protected and managed so as to preserve its natural conditions…." 16 U.S.C. §1131(c). The Wilderness Act charges the Forest Service, as federal steward of the Scapegoat Wilderness, with a duty to preserve the area's wilderness character. *Id.* §1133(b). To that end, the Wilderness Act prohibits the Forest Service from authorizing aircraft landings, motorboats, and motorized equipment within the Wilderness unless "necessary to meet minimum requirements for the administration of the area" pursuant to the Wilderness Act. 16 U.S.C. §1133(c). The Forest Service violates this prohibition because FWP's proposal is not necessary to administer the area pursuant to the Wilderness Act. Instead, FWP's project is part of its broader efforts to restore and establish new populations of westslope cutthroat trout across the state of Montana.

More fundamentally, the project goals and methods are at odds with the Wilderness Act's mandate to preserve the Scapegoat's "untrammeled" quality and

"natural conditions." *Id.* §1131(c). First, stocking fish in naturally fishless waters does not preserve wilderness. FWP acknowledges a waterfall blocks upstream movement of fish in the project watershed. *See* Ex. 2, FWP Decision Notice at 10; Ex. 3, FWP EA at 4). While FWP indicates westslope cutthroat trout are present in neighboring watersheds and below the falls, available evidence indicates fish were not present above the project-area falls before stocking efforts began. Ex. 3, FWP EA at 4. FWP, however, argues it "retains the authority to change the species stocked" and "the project area is currently an ideal location to establish a secure conservation population of westslope cutthroat trout." Ex 2, FWP Decision Notice at 10, 22. The hatchery-reared fish it wishes to stock do not contain genes from westslope cutthroat trout in the Blackfoot River watershed and were selected because they outperformed local, wild westslope cutthroat trout in the river. Ex.2, FWP Decision Notice at 14; Ex. 3, FWP EA at 11. While stocking genetically-selected hatchery fish in naturally fishless waters may be permissible outside of wilderness, it does not meet the restrictive goals and standards of the Wilderness Act.

Further, the authorized broadscale poisoning, helicopter landings, and motorized intrusions will not accomplish the purported wilderness need identified by the Forest Service in authorizing the project. The Forest Service explained that action is necessary in wilderness because previously "introduced non-indigenous

fish species [will] spread [below the falls] and dilute the unique genetic qualities of the existing indigenous Westslope Cuthroat [sic] Trout [downriver and out of the project area]. This threat to the area's Natural Character can only be resolved through action within the designated boundary of the Scapegoat Wilderness." Ex. 4, MRDG at 7; *see also* Ex. 5, Decision Memo at 7; Ex. 3, FWP EA at *i*. But, when pressed, FWP admitted that removing previously stocked fish above the falls and restocking with westslope cutthroat trout will not protect down river fish from hybridization, noting there is "an equal (and maybe greater) risk of further invasion/spread of [non-westslope cutthroat] genetics" from the lower North Fork and mainstem of the Blackfoot River below the falls and out of the project area. Ex. 2, FWP Decision Notice at 13. "Even with the reduction or elimination of the hybrid population above the falls, nothing will prevent further expansion of rainbow trout and hybridization from expanding up [to] the falls from the downstream reaches of the river." *Id*. at 9.

Even assuming that facilitating FWP's wildlife-management goals were necessary to preserve the Scapegoat as wilderness, which is not the case, the Forest Service failed to demonstrate that FWP's helicopter-assisted poisoning and stocking proposal is the minimum necessary to achieve its objective, dismissing non-pesticide, non-motorized, and non-stocking alternatives as well as westslope cutthroat trout management actions that can be taken outside of Wilderness.

The Forest Service also violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 *et. seq*. by failing to prepare an Environmental Impact Statement ("EIS") fully analyzing the effects of FWP's planned action and all reasonable alternatives. Instead, it unlawfully categorically excluded FWP's proposal from full NEPA review even after several retired Forest Service officials wrote project officials expressing serious concern about categorically excluding a chemical poisoning proposal involving a high number of prohibited uses in designated wilderness. *See* Ex. 6, Retired Forest Service employees' Letters.

The immediate implementation of FWP's project threatens irreparable harm to Plaintiffs' members interests in visiting and enjoying the Scapegoat Wilderness for the wilderness experience that Congress acted to preserve there. The challenged actions will degrade any such wilderness experience while inflicting a long-term trammeling that will impact wilderness character for years to come. To prevent such irreparable harm pending a final judgment in this case, Plaintiffs respectfully request that this Court issue a temporary restraining order and preliminary injunction.

III. STANDARD OF REVIEW

In general, "[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and

that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council*, 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). Plaintiffs satisfy all such requirements.

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits

First, plaintiffs are likely to succeed on the merits of their claims, or at least raise serious questions going to the merits.

1. The Forest Service Violates the Wilderness Act

The Wilderness Act, 16 U.S.C. §§1131-1136, establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. *Id.* §1131(a), (c). "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is … an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." *Id*. §1131(c). "The agency charged with administering a designated wilderness area is responsible for preserving 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)).

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 that it determined to be antithetical to wilderness character—including any "landing of aircraft" and "use of motor vehicles, motorized equipment or motorboats"—unless "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]." *Id.* §1133(c). 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). The Forest Service's authorizations are an abdication of its duty to preserve the untrammeled, natural character of the Scapegoat Wilderness and therefore violate the Wilderness Act. 16 U.S.C. §§1131(a), 1133(b).

a. FWP's helicopter-assisted fish poisoning and stocking project is not necessary to preserve wilderness.

The Forest Service's authorization violates the Wilderness Act because FWP's project is not the minimum necessary for administering the Scapegoat Wilderness pursuant to the Wilderness Act. 16 U.S.C. §1133(c). Instead, the project goals and methods are fundamentally at odds with the Wilderness Act's mandate to preserve the Scapegoat's "untrammeled" quality and "natural conditions." *Id*. §1131(c).

The Forest Service determined the action is necessary to administer wilderness because previously "introduced non-indigenous fish species [will] spread [below the falls] and dilute the unique genetic qualities of the existing indigenous Westslope Cuthroat [sic] Trout [downriver and out of the project area]. This threat to the area's Natural Character can only be resolved through action within the designated boundary of the Scapegoat Wilderness." Ex. 4, MRDG at 7; *see also* Ex. 5, Decision Memo at 7, Ex. 3, FWP EA at *i*. But, the record before the agency makes clear this is not the case. FWP admitted that "[e]ven with the reduction or elimination of the hybrid population above the falls, nothing will prevent further expansion of rainbow trout and hybridization from expanding up [to] the falls from the downstream reaches of the river," Ex. 2, FWP Decision Notice at 9, and there is "an equal (and maybe greater) risk of further invasion/spread of [non-westslope cutthroat] genetics" from the lower North Fork and mainstem of the Blackfoot River below the falls and out of the project area. *Id*. at 13.

Further, FWP indicated that protection of downstream westslope cutthroat trout is not the primary purpose of the project. *See* Ex. 2, FWP Decision Notice at 13. Instead, establishing a new population of westslope cutthroat trout above the natural fish migration barrier waterfall is the primary objective. *See id*.; *see also* Ex. 3, FWP EA 4 (establishing populations in historically fishless waters within

the species range is a FWP priority). But, stocking fish in naturally fishless waters does not preserve wilderness. *Cf. Californians for Alternatives to Toxics v. U.S. Fish and Wildlife Serv.*, 814 F.Supp.2d 992, 998 (E.D. California 2011) (objective of project was reestablishment of ESA-listed Paiute cutthroat trout in prior range above a waterfall per the requirements of a recovery plan for the species). FWP acknowledges a waterfall blocks upstream movement of fish in the project area, *see* Ex. 2, FWP Decision Notice at 10; Ex. 3, FWP EA at 4, and available evidence indicates fish were not present above the falls before stocking efforts began, Ex. 3, FWP EA at 4. FWP, however, argues it "retains the authority to change the species stocked" and "the project area is currently an ideal location to establish a secure conservation population of westslope cutthroat trout." Ex. 2, FWP Decision Notice at 10, 22. The hatchery-reared fish it wishes to stock do not contain genes from westslope cutthroat trout in the Blackfoot River watershed and were selected because they outperformed local, wild westslope cutthroat trout in the river. Ex. 3, FWP EA at 11; Ex. 2, FWP Decision Notice at 14. While stocking genetically-selected hatchery fish in naturally fishless waters may be permissible outside of wilderness, it does not meet the restrictive goals and standards of the Wilderness Act. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1063 (9th Cir. 2003) (en banc) (in determining whether activity is proscribed by Wilderness Act, agency must evaluate the activity's "purpose and effect").

The Forest Service cannot defer to FWP's management objectives when a project impacts wilderness character. "Congress made preservation of wilderness values the primary duty of the Forest Service, and it must guide all decisions as the first and foremost standard of review for any proposed action." *Wilderness Watch v. Vilsack*, 229 F.Supp.3d at 1182 (finding state activities affecting wilderness require federal approval). The Forest Service violates the Wilderness Act because FWP's proposal is not necessary to administer the area as wilderness. To the contrary, FWP's project is part of its broader efforts to restore and establish new populations of westslope cutthroat trout across the state of Montana, and FWP has simply identified an opportunity to further these goals within the Scapegoat Wilderness. Such a desire does not rise to the strict level of necessity required by the Wilderness Act. Accordingly, the Forest Service fails rationally to demonstrate that FWP's helicopter-assisted fish poisoning and stocking project is "necessary to meet minimum requirements" for administering the Scapegoat Wilderness as wilderness." 16 U.S.C. §1133(c) (emphasis added).

b. Alternatively, the Forest Service irrationally determines that FWP's methods are the minimum necessary.

Even assuming that facilitating FWP's fish-management plans are necessary to preserve wilderness, which they are not, the Forest Service's determination that helicopter-assisted fish poisoning and stocking in the wilderness is the minimum action necessary for achieving that objective is arbitrary and unsupported. *See* Ex.

5, Decision Memo at 4; *Wilderness Watch*, 629 F.3d at 1037 (an agency authorizing activity generally prohibited by the Wilderness Act must find the action is necessary and implemented only to the extent necessary). "The limitation on the Forest Service's discretion to authorize prohibited activities only to the extent necessary flows directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas." *High Sierra Hikers Ass'n,* 390 F.3d at 647.

First, the Forest Service irrationally concluded that FWP could not achieve its goals outside of Wilderness. *See* Ex. 4, MRDG at 2-3. The project is part of FWP's statewide westslope cutthroat trout management efforts, and FWP is looking to establish new populations of westslope cutthroat trout across the state for conservation and recreational purposes. *See* Ex. 4, MRDG at 3 (project part of regional effort); Ex. 3, FWP EA at 1 (project would offset habitat losses in other parts of Montana); Ex. 2, FWP Decision Notice at 10, 20. FWP has opportunities outside of the Scapegoat Wilderness for creating new populations of westslope cutthroat trout, *see id.*, and the Forest Service should have considered FWP's opportunities for achieving its goals elsewhere. *See Wilderness Watch v. Iwamoto*, 853 F.Supp.2d 1063, 1075 (W.D. Wash. 2012) (finding the Forest Service had options outside of wilderness for furthering its goals of historic preservation).

Second, the Forest Service also irrationally rejects a no-stocking alternative noting that introduced fish existed at the time of wilderness designation in 1972 and "[w]ithout restocking … it is highly unlikely that chemical treatments would accomplish the goal of suppressing non-indigenous fish to a point that they no longer pose a threat to healthy downstream populations of [westslope cutthroat trout]." Ex. 4, MRDG at 65. But this rationale ignores FWP's admissions that the project will not protect downstream fish from hybridization, Ex. 2, FWP Decision Notice at 9, 13, and it incorrectly assumes the Forest Service may perpetuate wilderness-degrading activities (trammeling, intentionally modifying natural conditions, and motorized uses) because such activities occurred before wilderness designation. *See* Sean Kammer*, Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration,* 43 ENVTL. L. 83, 106-107 (2013) ("[I]t would be impractical and unwise to require that lands be completely untrammeled prior to being designated, but [the Act's drafters] fully expected wilderness areas, once designated, to be untrammeled into the future."). Indeed, many wilderness areas have evidence of past nonconforming activities (e.g. motorized use, habitat modifications, old roads, logged areas), but that does not mean the agency has discretion to maintain those activities after designation. At a minimum, the Forest Service should grapple with this issue and fully considered a no-stocking alternative. *See High Sierra Hikers Ass'n*, 390 F.3d at

647 ("at some point in the analysis, [relevant competing] factors must be considered in relation to one another.").

It also should grapple with its agency wilderness regulations and policy contradicting its decision in this case. *See* 36 C.F.R. §§293.2(a) ("Natural ecological succession will be allowed to operate freely to the extent possible"), 293.2(c) ("In resolving conflicts in resource use, wilderness values will be dominant"); *see also* U.S. Forest Service Manual §2320.3 (2007) ("Where there are alternatives among management decisions, wilderness values shall dominate over all other considerations except where limited by the Wilderness Act, subsequent legislation, or regulations"); *id*. at 2323.32(3) ("Wildlife and fish management programs shall be consistent with wilderness values"); *id*. at 2323.32(4) ("[d]iscourage measures for direct control (other than normal harvest) of wildlife and fish populations"); *id*. at 2323.31(1) ("[p]rovide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist").

Similarly, the Forest Service fails to consider an electro-fishing and recreational fishing alternative that would have eliminated chemical applications and motorized uses. *See* Ex. 4, MRDG at 65. The Forest Service operates on the inaccurate assumption that suppression of upstream genetics was essential for protecting downstream fish and that rotenone poisoning, associated helicopter and

motorized use, and fish stocking was necessary to achieve the desired level of genetic suppression. *See id.* This alternative, too, should have been fully considered.

These alternatives would better preserve wilderness character and eliminate or significantly reduce helicopter and motorized uses in the Wilderness. As one court held, "[h]elicopters carry 'man and his works' and so are antithetical to a wilderness experience." *Wolf Recovery Found.*, 692 F.Supp.2d at 1268. Thus, "[i]t would be a rare case where machinery as intrusive as a helicopter could pass the test of being 'necessary to meet minimum requirements for the administration of the area.'" *Id.* (quoting 16 U.S.C. §1133(c)). The Forest Service's decision turns that standard on its head by authorizing intensive helicopter intrusions simply because a state agency desires to conduct some of its statewide fish management practices in wilderness. The Forest Service's determination that FWP's intensive poisoning and restocking project, with its associated helicopter landings and motorized uses, is the minimum necessary for wilderness administration falls short of the high bar set by the Wilderness Act.

2. The Forest Service violates NEPA.

NEPA requires federal agencies to "carefully weigh environmental considerations and consider potential alternatives to [a] proposed action before the government launches any major federal action." *Lands Council v. Powell*, 395

F.3d 1019, 1026 (9th Cir. 2004). The Forest Service violates NEPA by (1) arbitrarily applying a categorical exclusion and, on that basis, failing to prepare an EIS; and (2) failing to analyze a reasonable range of alternatives.

a. The Forest Service arbitrarily fails to prepare an EIS and instead unlawfully issues a Categorical Exclusion.

The Forest Service must prepare an EIS before undertaking any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). The Forest Service may rely on a "categorical exclusion" for certain minor actions to avoid the need to prepare an EA or EIS. 40 C.F.R. §1501.4. These are defined as "categories of actions that normally do not have a significant effect on the human environment." 40 C.F.R. §1501.4(a). If the agency determines a categorical exclusion covers a proposed action, it must then "evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect" and therefore instead require the preparation of an environmental assessment or environmental impact statement. 40 C.F.R. §1501.4(b).

Here, the Forest Service relied on CE-6, which applies to "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides[.]" 36 C.F.R. §220.6(e)(6). This categorical exclusion does not apply to the authorized action because the pesticide poisoning of fish in wilderness streams and restocking fish in historically fishless streams does not fit within the

category of actions contemplated by the categorical exclusion. The categorical exclusion provides examples of various forest-habitat activities for terrestrial wildlife habitat, including girdling trees to create snags, thinning or brush control to improve growth, and prescribed burning of understory to address fire and improve growth. *See id*. The examples provided in the regulation are illustrative of the type of activities contemplated by the categorical exclusion. *See Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 990 (9th Cir. 2020) ("the clear inference … is that other examples should be similar in character to the examples provided."). The Forest Service's Handbook, which was the original source for this categorical exclusion,[2] provides similar examples of "wildlife habitat improvements," listing planting or seeding of plant species for wildlife food and cover, placing woody materials in meadows, and creating snags. U.S. Forest Service Handbook §2609.13, 51.12. The handbook addresses "fish habitat improvements" activities separately from "wildlife habitat improvements," indicating those terms have specific, distinct meanings and are treated separately by the agency. *See id*. at 51.12, 51.22. Accordingly, CE-6 does not apply to the application of pesticides to aquatic fish habitat.

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[2] When created in 1992, CE-6 was housed in the Forest Service Handbook. *See* 57 Fed. Reg. 43,180. In 2008, the Forest Service moved its already existing categorical exclusions, including CE-6, from the Forest Service Handbook to the Code of Federal Regulations at 36 C.F.R. §220.6. *See* 73 Fed. Reg. at 43,091.

Even if the categorical exclusion does apply, which it does not, extraordinary circumstances render its application unlawful. "Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or EIS" include "Congressionally designated areas, such as wilderness," and "Federally listed threatened or endangered species or designated critical habitat" and "Forest Service sensitive species." 36 C.F.R. §220.6(b)(1). While the mere presence of a resource condition does not preclude use of a categorical exclusion, "the degree of the potential effect of a proposed action on these resource conditions … determines whether extraordinary circumstances exist." *Id*. §220.6(b)(2).

Here, the Forest Service authorizes a high intensity of activities normally prohibited in wilderness to facilitate a fish population manipulation project, with speculative and uncertain impact, that fundamentally undermines the Wilderness Act's "untrammeled" mandate. *See* 16 U.S.C. §1131 (a). Congress prohibited helicopter landings and motorized use in wilderness precisely because those activities degrade wilderness character. *Id.* (Wilderness Act enacted to "assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas … leaving no lands designated for preservation and protection in their natural condition"), §1133(c) (prohibiting the landing of aircraft and the use of motorboats and motorized

equipment); *see also High Sierra Hikers Assoc.*, 390 F.3d at 641 (rejecting use of a categorical exclusion for wilderness-degrading activities). Indeed, several former agency officials wrote to the Forest Service to express their concern over the use of a categorical exclusion for a project of this magnitude in wilderness. *See* Ex. 6, Retired Officials Letters. And, in its MRDG, the Forest Service referenced supplemental MRDGs prepared to "address ecological intervention proposals that commonly entail complex legal, scientific, and ethical questions that may be beyond the realm of a typical MRDG and better address the justification for this action." Ex. 4, MRDG at 2. All of these factors weigh against the use of a categorical exclusion.

The Forest Service also determined that the project "may affect *and is likely to adversely affect* grizzly bear[s]," which is an ESA-listed species. Ex. 5, Decision Memo at 5. Similarly, in their comments, Plaintiffs raised concerns about a prior FWP westslope cutthroat trout project where rotenone escaped similar safeguards planned in this case and inadvertently poisoned non-target fish miles downstream of the project area. Ex. 7, WW Comment Letter at 8 (referencing a news article where a FWP Region 3 fisheries manager noted the FWP will never know how the accident happened). ESA-listed bull trout exist immediately downriver from the project area, and "will be present in the North Fork below the falls at the time of project application," and "could be in the pool directly below

the falls[.]" Ex. 2, FWP Decision Notice at 6. The Forest Service did not address this concern, which is a potential Section 9 taking of bull trout. These are extraordinary circumstances that require thorough analysis in an EIS, or at a minimum, in an EA.

In addition to arbitrarily discounting extraordinary circumstances, the Forest Service's Decision Memo rests on arbitrary segmentation of FWP's fish stocking proposal. FWP indicated in its own project analyses that the instant project is a component of a larger "North Fork Blackfoot River native fish conservation project." Ex. 3, FWP EA at 15; Ex. 2, FWP Decision Notice at 20 (noting the "current EA process is limited to the westslope cutthroat trout phase of [that larger] project."). FWP segmented the projects in part because bringing bull trout into the analysis "brings the need for considerable consultation [regarding an ESA-listed species]" and such consultation and additional analysis would cause delays. Ex. 3, FWP EA at 14. The consideration of impacts to bull trout would also implicate a "federally listed threatened or endangered species" that would further complicate the use of a categorical exclusion. *See* 36 C.F.R. §220.6(b)(1)(i). Accordingly, the Forest Service unlawfully applies a categorical exclusion instead of fully analyzing project impacts in an EIS.

b. The Forest Service fails to analyze a reasonable range of alternatives.

Additionally, the Forest Service fails to prepare an analysis of reasonable alternatives in an EA or an EIS because it categorically excludes the project from full NEPA review. NEPA requires the agency to "evaluate reasonable alternatives" to its proposed action that would minimize adverse environmental impacts. 40 C.F.R. §1502.14(a); *see W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) ("'The existence of a viable but unexamined alternative renders an EA inadequate.'") (quoting *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)). Relatedly, the agency must articulate the proposed action's "purpose and need" broadly enough to allow consideration of all reasonable alternatives. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999).

As part of its wilderness necessity analysis, the Forest Service filled out a Minimum Requirements Decision Guide ("MRDG") worksheet where it analyzed three project alternatives and dismissed other alternatives from consideration. Ex. 4, MRDG at 12-65. The agency's MRDG worksheet is an internal document to assist the agency in assessing Wilderness Act compliance and is not intended to be a substitute for NEPA review. *See* Ex. 6, Retired Officials Letters at 5-6. (explaining MRDG "was NEVER intended to replace NEPA" and instead was

intended to inform an appropriate NEPA document and provide a jump off point for alternative development).

As discussed above, the Forest Service fails to consider reasonable alternatives to the proposed action that would eliminate or significantly lessen impacts to the environment and wilderness character, including opportunities for actions outside of wilderness, a no-stocking alternative, and a non-motorized alternative. "The existence of a viable but unexamined alternative renders an EA inadequate." *W. Watersheds Project*, 719 F.3d at 1050 (quotation and alteration omitted). For this reason, too, the Forest Service violates NEPA.

B. Injunctive relief is necessary to prevent irreparable harm.

This Court should issue immediate relief 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. Baldridge*, 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).

In this case, the challenged activities will imminently and irreparably harm Plaintiffs' members' interests. Plaintiffs have a documented interest in the wilderness character of the Scapegoat Wilderness, which they seek out for opportunities to experience quiet, solitude, and a natural setting undisturbed by motorized disturbance and signs of human influence. *See* Ex. 1, Nickas Decl. ¶¶6-10.

These are precisely the experiences the Wilderness Act seeks to protect. "[W]hen federal statutes are violated, the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002). The Wilderness Act seeks to preserve "an area where the earth and its community of life are untrammeled by man," which offers "natural conditions" and "outstanding opportunities for solitude." 16 U.S.C. §1131(c). The project would include intensive trammeling actions facilitated by aircraft and motorized uses that would harm Plaintiffs' ability to enjoy the Wilderness and the "community of life" residing there in an untrammeled 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[.]"); *Wilderness Watch v. Vilsack*, 229 F.Supp.3d at 1183 ("[P]laintiffs' interest in the wilderness character of the

Wilderness Area is real and cannot be compensated for by a monetary award."). Additionally, "Helicopters carry 'man and his works' and so are antithetical to a wilderness experience." *Wolf Recovery Found.*, 692 F.Supp.2d at 1268; *see also Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 556 (9th Cir. 2011) (stating that, "from a common-sense perspective," helicopter presence "would plainly degrade … wilderness character").

An injunction should issue to halt this threat of fundamental, long-term injury to wilderness character and Plaintiffs' interest in enjoying the Scapegoat Wilderness as intended by Congress under the Wilderness Act.

C. The balance of equities and public interest support an injunction.

The balance of equities and the public interest also support injunctive relief. In *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit reversed a denial of an injunction and held:

> In this case, we must consider competing public interests. On the side of issuing the injunction, we recognize the well-established "public interest in preserving nature and avoiding irreparable environmental injury." []. This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest."

632 F.3d at 1137-38 (citations omitted). Here, the asserted reason for the challenged authorization is to facilitate FWP's plan to stock a population of

westslope cutthroat trout in the North Fork of the Blackfoot River in the Scapegoat Wilderness—above a natural fish migration barrier and in an area that evidence suggests was historically fishless—and approve pesticide use, helicopter landings, and other motorized uses to accomplish the state's plan. *See* Ex. 5, Decision Memo at 1. That purpose is antithetical to the Wilderness Act's direction to maintain the wilderness as an area where "the earth and its community of life are untrammeled 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).

Further, the previously stocked fish FWP seeks to remove are the result of stocking efforts that began in the project area in the 1920s, Ex. 4, MRDG at 2, and FWP acknowledges that project activities will not alleviate the risk of westslope cutthroat trout hybridization below the falls, Ex. 2, FWP Decision Notice at 9, 13. Accordingly, any burden to FWP from a temporary 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. *See Californians for Alternatives to Toxics,* 814 F.Supp.2d at 1023 (finding no exigency in agency plans

to stock Paiute Cutthroat Trout in wilderness). The Ninth Circuit's analysis in *High Sierra Hikers* is controlling here:

> Congress has recognized through passage of the Wilderness Act, 16 U.S.C. §§1131-1136, that there is a strong public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment. 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 3d at 643.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant a temporary restraining order and preliminary injunction.[3]

Respectfully submitted July 22, 2021.

/s/Dana Johnson
Wilderness Watch

/s/Timothy M. Bechtold
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[3] In issuing the requested injunctive relief, the Court should impose no, or only a nominal, bond requirement. Where, as here, plaintiffs are non-profit organizations seeking to vindicate an established public interest in environmental protection, courts routinely waive the bond requirements or impose a nominal bond. *See Wilderness Soc'y v. Tyrrel*, 701 F.Supp. 1473, 1492 (E.D. Cal 1988) (setting $100 bond); *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (requiring no bond); *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (reversing the district court's unreasonably high bond because it served to thwart citizen actions); *League of Wilderness Defenders v. Zielinski*, 187 F.Supp.2d 1263, 1272 (D. Or. 2002) (no bond). This Court should do likewise.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 5995 words, 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.

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CERTIFICATE OF SERVICE

I certify that I served a true and accurate copy of this document and accompanying exhibits via email attachment on July 22, 2021 on the following:

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