



WILDERNESS WATCH

Keeping Wilderness Wild

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RE: Upper Malheur Brook Trout Removal Project

Sent via US Mail, online at
<https://publiccomments.bpa.gov/CommentEntry.aspx?ID=507>
and via email to vlwatts@bpa.gov, darotin@bpa.gov,
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Dear Regional Forester Buchanan, Forest Supervisor Niesen, and the Public Affairs Officials at BPA:

The following scoping comments on the Upper Malheur Brook Trout Removal Project come from Wilderness Watch, a national wilderness conservation organization. Wilderness Watch's headquarters is located in Missoula, with additional staff offices in Idaho, Minnesota, and Vermont. Our mission is to protect the wilderness character of all units of the National Wilderness Preservation System, including the Strawberry Mountain Wilderness. Wilderness Watch appreciates the concern for long-term viability of bull trout expressed by this proposal, however we believe the project as proposed is contrary to the letter and spirit of the Wilderness Act.

We do acknowledge that helicopter use has been removed from the proposal, and that is a positive step. However, that does not mean the resulting option is legal.¹ Motorized use (boats and pumps) is still proposed, and extensive trammeling of the environment would be done via the application of a pesticide / piscicide that kills all aquatic life that breaths with gills and has uncertain impacts on the broader environment and human health.

At the very least, rotenone's scope and depth of impacts are not well understood, and increasing studies are raising concerning questions about impacts to human and ecosystem health. When Congress passed the Wilderness Act, it codified the precautionary principle on a small percentage of public lands, protecting those areas from our intentional manipulations and their myriad consequences. The proposed project is a classic example of why these protections matter.

PRELIMINARY PROCEDURAL ISSUES

Contrary to law and policy, it appears the Forest Service will not do the NEPA analysis and not make the decision on this proposal. The Forest Service alone, not BPA or the state fish and game agency, is responsible to the administration of the Strawberry Mountain Wilderness. It is the Forest Service's duty to preserve wilderness character in that Wilderness. That duty cannot be shifted to another entity that has no statutory obligation to preserve Wilderness or wilderness character. The Forest Service must make a formal decision on this proposal and should be the lead agency on the NEPA analysis.

Regardless, The MRDG² can't substitute for proper NEPA analysis and it can't be the decision document either. In this instance, BPA is doing the NEPA and apparently making the decision. It appears the Forest Service may intend the MRDG³ to be its decision, in lieu of a Decision Notice (or Record of Decision) prepared by the Forest Service.

The above concern over NEPA analysis and the decision-making process is supported by Forest Service guidance and NEPA regulations. It is instructive to look at the Forest Service Guidance on the preparation on an MRAF (formerly MRDG) and its relationship to NEPA:

The MRAF is designed to assist with preparation of a NEPA analysis, but is not a substitute for a NEPA analysis. The MRAF provides a method to determine the necessity of an action, the effects of alternatives on wilderness character, and how to minimize impacts to wilderness character; NEPA analysis compares and discloses the environmental effects of alternatives on all resources, documents a decision, and requires public involvement.

1 The Minimum Requirements Decision Guide (MRDG) states regarding an alternative that omits the use of helicopters, "This alternative will have less overall impact on wilderness character than the other treatment methods and has been deemed preferable by wilderness advocate stakeholders when compared to the use of a helicopter as in Alternative One and Two." While it would have less effect, it does not make it legal or desirable.

2 The MRDG has recently been revised and renamed the Minimum Requirements Analysis Framework (MRAF). We use MRDG to refer to the document prepared by Forest Service and MRAF to refer to current guidance. See <https://wilderness.net/practitioners/minimum-requirements-analysis/default.php>

3 We have a section in this comment that looks at other errors in the MRDG that has been prepared as well as the fatal flaws inherent with the agencies' minimum requirements process, MRDG or MRAF.

The MRAF should be completed before other NEPA documents because it results in a recommendation for decision makers. Completing a NEPA analysis without it being informed by the MRAF might suggest the MRAF was completed for the purpose of supporting a predetermined decision. This is highly unethical. The only way a planning document could take the place of an MRAF is if the planning document contains an adequate MRA within it.

Minimum Requirements Analysis, FAQs and Common Errors at 8.⁴

It is clear the MRDG (or MRAF) cannot substitute for NEPA. It should be concurrent with or before the NEPA analysis. As such, it cannot be a decision document because, then NEPA would be supporting a “predetermined decision”. Not only is that “highly unethical” is also illegal. “Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (*see also* § 1506.1 of this chapter).” 40 CFR § 1502.2(f). In other words, a decision cannot be made before the NEPA process is complete.

Yet, that is precisely what is happening here. The scoping letter states:

The U.S. Forest Service in its MRDG determination concluded the following proposed actions are approved: Chemical application to the lake via small gas- powered pump, use of an inflatable boat and electric trolling motor for up to two treatments, and approximately seven gravity drip rotenone stations spaced along the stream with one gravity drip detoxification station downstream of the treatment reach.

Again, such actions must go through NEPA before approval. The Forest Service has nothing about this project on its website and has not solicited public input.⁵ Yet, it is the responsible agency for Wilderness!

In sum, there are two overriding violations of law in this process. First, it is clear the agencies have already made a decision to do this project, in spite of the requirements of the Wilderness Act and NEPA. Second, the proposal is inside Wilderness, under the jurisdiction of the US Forest Service, yet the Forest Service is not leading the NEPA process and apparently won't be making the formal decision, which normally would be open to the objection process. Thus, there won't be an accountable agency making the decision in the Wilderness or an appropriate NEPA analysis of impacts to Wilderness or wilderness character. For these reasons alone, this proposal must either be withdrawn or, at the very least, started over with the Forest Service as the lead agency.

One last point about the scope of the project needs to be made. The maps provided on the website are far more extensive than the project described in the scoping letter. The letter only addresses the first map, the other three are outside the described project area. This needs to be clarified.

NEPA ALTERNATIVES AND PURPOSE

4 See

https://winapps.umt.edu/winapps/media2/wilderness/NWPS/documents/MRDG/MRA%20FAQs%20and%20Common%20Errors_03.11.2024.pdf

5 It is only because we had met with the agencies that we were able to obtain the MRDG. To our knowledge, it is not publicly available.

In light of the discussion in the section above, we wonder whether MRDG is being used as a surrogate decision document by the Forest Service, and whether it is biasing potential alternatives. One alternative that should be analyzed would be to not stock the area in Wilderness since it was naturally fishless. This option was discussed with the project proponents. Yet, the MRDG seemingly eliminates this option on page 34.

While the MRDG states that the Forest Service did not analyze an alternative where there was not a reintroduction of fish, the scoping document itself is completely silent on fish restocking. This incongruity must be explained. Additionally, Wilderness Watch is concerned that the agencies fully intend that restocking will occur, that it may occur with sterilized fish that will require perpetual management (a major trammeling action in its own right), and that the agencies have simply severed this portion of the project from NEPA disclosure and analysis. Such a severing would constitute unlawful segmentation under NEPA not to mention an abdication of the Forest Service's responsibility to administer the area pursuant to the Wilderness Act.

Similarly, the MRDG also eliminates gill-nets and electroshocking as being ineffective because they do not remove all of the fish, but it does not fully explain the reasons for the ineffectiveness and how much staffing, efficiency, and economic considerations weigh in the calculus. In our discussions we understood gill-netting was not favored because it took more work and workers, but "[e]conomy, convenience, commercial value, and comfort are not standards of management or use of wilderness." FSM 2320.6 Rotenone also misses some fish, hence the projected three-year time frame for this project to annually re-poison the area, although the scoping letter states, "treatments would occur annually until monitoring (via sampling for DNA in water, or electrofishing⁶) confirms brook trout have been removed."

An alternative that gill-nets and does not restock, though trammeling, is less impactful to Wilderness than annual broadcasting of a pesticide/piscicide in aquatic ecosystems. It should be fully evaluated.

NEPA directs federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The phrase "human environment" is "interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. The purpose of an EIS is two-fold: 1) to ensure that the agency will have available and will carefully consider detailed information on significant environmental impacts when it makes decisions, and 2) to "guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989); 40 C.F.S. § 1501.2(b).

1. A Wilderness-Specific Environmental Impact Statement is required.

NEPA directs federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The purpose of an EIS is two-fold: 1) to ensure that the agency will have available and will carefully consider detailed information on significant environmental impacts when it makes decisions, and 2) to "guarantee that the relevant information will be made available to the larger audience that may also play

6 That begs the question - if electrofishing misses eliminating brook trout, it too should miss detecting brook trout.

a role in both the decision-making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989); 40 C.F.S. § 1501.2(b).

The proposed action poses significant direct, indirect, and cumulative impacts to the environment and to wilderness character, and full analysis of those impacts cannot be avoided by tiering to a broader, landscape scale analysis. Because the proposed action has the potential to significantly affect a designated wilderness and anticipates a precedent for future connected authorizations (ongoing fish restocking) with attendant cumulative impacts, it will result in cumulatively significant impacts, and result in a violation federal law (including the Wilderness Act). A full environmental impact statement should be prepared.

2. The Forest Service must take a hard look at and disclose the direct, indirect, and cumulative impacts and connected actions of the project.

NEPA requires the Forest Service to take a hard look at the direct, indirect and cumulative impacts of the project. Under NEPA, the direct impacts of an action must be analyzed based on the affected interests, the affected region, and the locality in which they will occur. Indirect effects of a proposed action are effects that are caused by the action but occur later in time or are further removed in distance. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

For the proposed action, please disclose and analyze the full extent of the fish poisoning and stocking proposal. How would the stocking be accomplished? How many times would stocking occur to maintain the recreational fishery at High Lake? What are the cumulative impacts of such a stocking program where the streams were historically fishless?

Are there connected actions to this proposal? While we understood that poisoning would not occur in bull trout occupied habitat below the falls, the maps seemingly include other projects that would be connected actions that could take place below the falls. A stretch of Lake Creek within the Wilderness is below the falls.

Lastly, the NEPA document must look at the consequences of the hybridization on bull trout populations. The scoping letter leads the reader to conclude that hybridization results in fertile hybrids that will eventually swamp pure bull trout. However, an article from the Montana Department of Fish Wildlife and Parks states that offspring are sterile. Under such a scenario, the implications of hybridization for bull trout would most likely be less severe. See <https://fwp.mt.gov/binaries/content/assets/fwp/montana-outdoors/2024/fishmonitoring.pdf>

SUBSTANTIVE WILDERNESS ACT ISSUES

In the city, in the country, almost everywhere he goes, the American is confronted with an environment dominated by his own technology. This is new, no others before us have experienced it on the scale we experience today. The end result is not certain. For man, with all his ability to adapt, for all his domination of the "lesser" species, still is a child of the sea, the mountains, the very wilderness he is rapidly obliterating. We are a nation bedazzled by technology, and addicted to crash solutions. But there are no instant ecologies; no instant wilderness. And so, in the final analysis, we must devote much more of our attention in the future to assessing each new technological development for its ultimate

impact on man's environment. I hope it is never said of this generation, as Stephen Vincent Benet once said of another: "They thought, because they had power, they had wisdom also." We now have the power, literally, to move mountains. The next few years will determine if we have the wisdom to refrain from doing so. ~ Orville Freeman, Secretary of Agriculture, 1967

Statutory Mandate: The Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their “natural,” “untrammeled” condition. 16 U.S.C. § 1131(a). Wilderness is statutorily defined “in contrast with those areas where man and his own works dominate the landscape” as “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...” *Id.* § 1131(c). Thus, wilderness “shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, 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.* § 1131(a) (emphasis added). The Act’s opening section “sets forth the Act’s broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammeled state” and “show[s] a mandate of preservation for wilderness and the essential need to keep [nonconforming uses] out of it.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (*en banc*). Consistent with these statutory mandates, the Forest Service’s implementing regulations dictate that in wilderness, “[n]atural ecological succession will be allowed to operate freely to the extent feasible.” 36 C.F.R. § 293.2(a).

Federal Agency Guidance: Federal agency guidance states, “A key descriptor of wilderness in the Wilderness Act, untrammeled refers to the freedom of a landscape from the human intent to permanently intervene, alter, control, or manipulate natural conditions or processes.” FWS Policy 1.5(DD). And, “[m]aintaining wilderness character requires an attitude of humility and restraint. We preserve wilderness character by ... imposing limits on ourselves.” FWS Policy 1.13(D). In Wilderness, we “[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.” Forest Service Manual (FSM) 2323.31. Accordingly, “[i]n the context of the Wilderness Act, an untrammeled area is where human influence does not impede the free play of natural forces or interfere with natural processes in the ecosystem.” FSM 2320.5(2).

1. The project fundamentally undermines Wilderness preservation and sets a troubling precedent for future Wilderness administration

The project proposal here is one of many recently proposed in Wildernesses across the West, raising significant implications for the statutory protections of Wilderness areas throughout the country. The crux of the matter is whether agency managers have discretion to rearrange the prerogatives set by Congress for protected areas. They do not. Congress created the National Wilderness Preservation System to protect select areas from overt manipulation—to restrain the human hand from intentionally altering the landscape everywhere. Today, the NWPS covers less than three percent of the lower 48 states, a critical refuge for a few largely unmolested ecosystems and secure habitat for fish and wildlife that are bombarded by human enterprise—and their desired conditions—everywhere else. To allow the Forest Service to import intensive ecological manipulations like the proposed project into Wilderness-area management would be to allow the agency to treat its statutory duty as largely optional, as a mere

procedural speedbump on the road toward all manner of similar projects systemwide.

Although the Wilderness Act recognizes conservation and other benefits to which wilderness preservation is devoted, *see* 16 U.S.C. § 1133(b), the statute places paramount its specific protective mandate, requiring that all activities in designated Wilderness be conducted in a manner that “preserv[es] . . . wilderness character” and “will leave [designated areas] unimpaired for future use and enjoyment *as wilderness*.” 16 U.S.C. § 1131(a) (emphasis added). Administration must ensure that Wilderness is “affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable.” 16 U.S.C. § 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)). That obligation falls squarely on the Forest Service here. As the Forest Service’s regulations make clear, this includes duties to make wilderness values “dominant” and ensure that “[n]atural ecological succession will be allowed to operate freely to the extent feasible.” 36 C.F.R. § 293.2(a), (c).

This project deviates sharply from the goals and mandates of the Wilderness Act as well as Forest Service guidance principles. The MRDG and proposed action rest on a conflicting reading of the Wilderness Act to justify the project. Both rely on a perceived but false dichotomy.

This false dichotomy can be best expressed by the following: “manipulating an ecosystem to restore it highlights a fundamental tension and dilemma in wilderness stewardship, that is manipulating the ecosystem to protect or restore the natural quality of wilderness by definition compromises the untrammelled quality, while not manipulating (i.e. practicing restraint or hands-off management) preserves the untrammelled quality but may compromise the natural quality of wilderness” (Landres et al. 2020).

The notion of five wilderness qualities came about in Landres’ *Keeping it Wild* protocols—internal agency guidance documents that have not gone through formal notice and comment rulemaking. These documents are the subject of much disagreement and controversy, largely because they promote—intentionally or not—an interpretation of the Wilderness Act that is internally inconsistent and result in management actions that are antithetical to Wilderness preservation. *See, e.g.* Cole, et. al. 2015. While initially envisioned as a tool to help agencies measure wilderness character, on the ground it has had the unintended consequence of agencies (including the Forest Service in this MRDG) using the documents to creep back into active management paradigms that are predominant outside of Wilderness.

A prime example of a rapidly growing consequence from *Keeping it Wild* is the erroneous idea that managers can weigh various components of wilderness character against each other, thereby reducing the Wilderness Act to a point tallying system rather than a substantive law with cohesive goals and stringent prohibitions. This management mindset effectively and unlawfully repeals and rewrites the Wilderness Act.

Much of this problem stems from incorrectly perceived tensions between the terms “natural” and “untrammelled” in the Wilderness Act. Such an interpretation allows agencies to view “natural” as a set of conditions existing at some fixed point in time, and when there is a deviation from those conditions, the agencies feel compelled to actively manipulate conditions (trammel them) to “restore” whatever

prior conditions the agency has deemed “natural” for the area.⁷ This is likely a product of a long-ingrained agency history of modifying public lands to achieve “desired conditions,” an idea laden with value bias even in the best of times. Measuring natural conditions with a tiny yardstick necessarily shifts the focus to human preference. Throw climate change and all of its uncertainties into the mix, and the increasing urge to actively manipulate conditions that were never historical becomes all the more problematic.

The Wilderness Act sought to remove agency bias and influence from the equation. Put another way: In contrast to other public land management statutes, which typically authorize agencies to consider and weigh diverse values through exercise of their scientific and policy expertise, the Wilderness Act required certain areas to be managed predominantly for one use: wilderness reservation....

Unlike all other land-management statutes, the Wilderness Act’s basic purpose was not to delegate authority to expert agencies, but rather, to exclude certain lands from the application of the agencies’ specialized expertise, to restrain agency flexibility, and to protect (with limited, narrow exceptions) certain lands from the impact of the sort of policy choices land managers typically make.

Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 100-101 (2013).

This mandate is reflected in the epigram written by Howard Zahniser, “*With regard to areas of wilderness, we should be guardians not gardeners.*” This fundamental tenet of wilderness stewardship was reiterated in a program review initiated by the four federal agencies and conducted by the Pinchot Institute for Conservation in 2001. The purpose of the study was to examine the critical management issues facing Wilderness. One of the eight “fundamental principles” for stewardship emphasized the need to preserve the wildness in Wilderness. As the Pinchot report stated, “Protection of the natural wild, where nature is not controlled, is critical in ensuring that a place is wilderness.... Since wild is a fundamental characteristic of wilderness that is not attainable elsewhere, if there is a choice between emphasizing naturalness and wildness, stewards should err on the side of wildness.”

That Wildernesses have been affected by intentional human manipulation in the past (e.g. stocking of non-native brook trout) or are affected by more diffuse, unintentional human influence now and will continue to be in the future (e.g. climate change) does not change how they are to be administered once designated as Wilderness. The drafters of the Wilderness Act understood:

[I]t would be impractical and unwise to require that lands be completely untrammelled prior to being designated, but [the drafters] fully expected wilderness areas, once designated, to be untrammelled into the future.

Id. at 106-107.

Ultimately, “whatever ‘wilderness character’ means, it cannot be something that depends upon the active manipulations of humans.” *Id.* at 83, 86. Restraint and humility are important values underpinning the Wilderness Act, and “[I]and managers should exercise this same humility in dealing with wilderness

⁷ Admittedly, in this case this strained interpretation does not even fit as this part of the Wilderness was historically fishless.

areas, lest they lead us down a path to where there are no longer any places that are truly ‘wild,’ no places beyond the control of human institutions and cultural imperatives.” *Id.*

The statute, when read as a coherent whole, supports this position. The canons of statutory construction dictate that the term “natural conditions” be read in harmony with the term “untrammeled.” *See United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) (“It is a basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless”); *see also Wilderness Society*, 353 F.3d at 60 (“a fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”); *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) (“Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.”). In other words, a statute should be construed “as a symmetrical and coherent regulatory scheme,” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and a “harmonious whole,” *Fed. Trade Comm’n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

Even the seriously flawed *Keeping it Wild 2* protocol acknowledges the importance of protecting wilderness character as a process rather than an outcome:

Lucas (1973, p. 151) stated, “If ecological processes operate essentially uncontrolled within the Wilderness frame of reference, the results, whatever they might be, are desirable by definition. The object is not to stop change, nor to recreate conditions as of some arbitrary historical date, nor to strive for favorable change in big game populations or in scenic vistas. The object is to let nature ‘roll the dice’ and accept the results with interest and scientific curiosity.... When we protect wilderness we deliberately withhold our power to change the landscape.”

Landres *et al.*, *Keeping It Wild 2: An Updated Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System*, 33 (2015).

As we detail further, this project is not compatible with Wilderness.

Thus, “natural” conditions sensibly flow from “untrammeled” conditions—leave a wild area alone, responding to a changing earth in the absence of intentional human control, and it can only become more natural; naturalness is a process, not a static set of defined or desired features. As the Ninth Circuit has explained, “Congress did not mandate that the [agency] preserve the wilderness in a museum diorama.” *Kofa*, 629 F.3d at 1033.

a. The ongoing trammeling through stocking and the introduction of a species where they were not found previously is a foundational violation of the Wilderness Act and does not fulfill a Wilderness need.

A hallmark of arbitrary and capricious decision-making occurs when an agency “relied on factors that Congress did not intend for it to consider.” *Kalispel Tribe of Indians*, 999 F.3d at 688. In areas of designated Wilderness like the Strawberry Mountain Wilderness, the “primary duty of the Forest Service” is the statutory wilderness character mandate, which “must guide all decisions as the first and foremost standard of review for any proposed action.” *Timchak*, 2006 WL at *6. “[T]he general policy of maintaining the primitive character of the area must be supreme.” *High Sierra*, 436 F. Supp. 2d at 1131 (quoting *Minnesota Pub. Interest Research Group v. Butz*, 401 F.Supp. 1276, 1331 (D. Minn.

1975)).

Here, the Forest Service's MRDG contains ample evidence that the factors driving the project approval fell outside the applicable statutory standards in the Wilderness Act. For example, the agency's MRDG acknowledges that the project would not be pursued without a restocking effort. The project focus appears to be two-fold: 1) to influence biological conditions outside of the Wilderness and 2) to do so without impacting angling inside the Wilderness. Both of these goals fall outside of the Wilderness Act's mandates to preserve wilderness character and to authorize prohibited activities only where necessary, and the minimum necessary, to administer the area as Wilderness.

Even if done with good intentions, Congress passed the Wilderness Act with an eye toward *restraining* the human capacity to dominate and intentionally alter wild landscapes. There is no shortage of historical examples where well-intentioned manipulations lead to unintended consequences that were not understood or appreciated until much later in time. The effect of statutory Wilderness protection is to put a brake on just such impulses.

Here, the MRDG states:

We did not analyze an alternative where there was not a reintroduction of fish. These streams would have been occupied by a number of species historically, up any natural passage barriers. Although we cannot provide concrete evidence as to whether or not the lake was historically fishless, brook trout had been stocked into the lake prior to the wilderness designation, and thus these are not considered barren waters. As such, restoring native fish to the lake is in line with wilderness stocking policy (2323.34c.) Moreover, reintroducing bull trout supports the recovery of this ESA Threatened species in accordance with the 2015 Recovery Plan. As we treat waters with Bull Trout present, salvaged individuals would be translocated to the reaches in the wilderness where brook trout have been removed. Redband will be co-stocked as a food source for bull trout. Redband are indigenous to the area and a State species of concern. To propagate and restore bull trout as a component of the native ecosystem, we did not consider an alternative where the lake remains fishless.

MRDG at 34. The MRDG elsewhere clarifies (?) that stocking with bull trout and red band trout would be below the lake and triploid trout, presumably sterile, would be put into High Lake, which would be periodically stocked in perpetuity and apparently to satisfy anglers.

There are two problems with the MRDG analysis above:

- In spite of the equivocation in the MRDG, all the evidence suggests that Lake Creek Falls was a natural barrier to fish. The scoping letter states "Lake Creek Falls acts as a natural barrier to bull trout migration and the uppermost 1.5 miles of Lake Creek and High Lake contain only non-native brook trout." Most mountain lakes in the US West were naturally fishless. Introducing new species of fish--Frankenfish triploid trout, bull trout, and red band trout—may have unintended consequences and impacts on other native species. None of them are likely native to this part of the Wilderness.
- The other concern is regarding the stocking of fish, the MRDG engages in twisted logic and outright dissembling. In essence, the MRDG is claiming that the past stocking of brook trout made the waters not barren, implicitly agreeing that brook trout are native to the Wilderness because they predated the designation (and indeed were stocked nearly a century ago), but not

native enough to keep them. This sophistry results in far more harm to the Wilderness in this area—poisoning it for an unknown number of years and then stocking fish not native to that part of the Wilderness. In the case of the stocking of triploid Frankenfish would continue into perpetuity.

In sum, fish are not likely native to the upper part of Lake Creek. Bull trout are not native above the falls (a natural fish migration barrier) and, further, there is no critical habitat above the falls. The fact only brook trout, planted in the past, are found above the falls clearly supports that overwhelming evidence that the planting of this non-native species was in an area devoid of fish.

In any case, this plan cannot be seen as a restoration project. There is no wilderness purpose for doing it. Even the rating system in the MRDG, muddled as it may be (more on this later), shows that the action alternatives that were analyzed have significant negative impacts on Wilderness.

In other words, there is no clearly articulated wilderness-based need for fish poisoning and restocking, and there is no indication of how artificial fish stocking is necessary to administer the Strawberry Mountain Wilderness “so as to preserve its natural conditions” and maintain the wilderness as “an area where the earth and its community of life are untrammelled by man.” 16 U.S.C. § 1131(c). Indeed, it would be incredibly difficult to articulate a need for artificial fish stocking in High Lake, which by all accounts, was historically fishless, especially with a human-generated triploid rainbow trout. *See* “Non-Native Trout in Natural Lakes of the Sierra Nevada: An Analysis of Their Distribution and Impacts on Native Aquatic Biota” (noting that “trout stocking serves to maintain an artificial fishery that has substantial impacts on native aquatic biota” and that stocking is necessarily at odds with wilderness, “areas managed for their natural values”); *see also* “Non-Native Fish Introductions and the Reversibility of Amphibian Declines in the Sierra Nevada” (Forest Service publication noting that the introduction of non-native trout into naturally fishless lake ecosystems is a major cause of decline in certain amphibians).

Active poisoning, stocking, and manipulation of fish populations in historically fishless streams is directly at odds with the Forest Service’s management guidance. *See* FSM 2323.31 (“Provide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist.”); *see also* FSM 2320.2 (“Maintain wilderness in such a manner that ecosystems are unaffected by human manipulation and influences so that plants and animals develop and respond to natural forces.”). Given the clear inconsistency with Wilderness Act mandates and the Forest Service’s management guidance, the artificial fish-stocking component of the proposed action should not be authorized.

In *Monitoring Selected Conditions Related to Wilderness Character: A National Framework* Landres, et al. 2005, RMRS-GTR-151 has this to say about untrammelled, “All actions that manipulate or control ecological systems inside wilderness diminish the untrammelled quality of wilderness character.” As examples of such actions the Monitoring Framework includes transplanting animals or plants, and applying herbicides, pesticides or piscicides to remove unwanted species.

The Monitoring Framework also cites two of the agency’s preeminent wilderness researchers in describing how the untrammelled quality of Wilderness affects management: Cole (2000) states that untrammelled “suggests more about the *process* of management than it does about the *outcomes* of management.” (emphasis added). Lucas (1973) states that “If ecological processes operate essentially uncontrolled within the Wilderness frame of reference, the results, whatever they might be, are desirable by definition. The object is not to stop change, *nor to recreate conditions* as of some arbitrary historical

date, *nor to strive for change favorable to big game or scenery*. The object is to let nature ‘roll the dice’ and accept what results with interest and scientific curiosity.” (emphasis added). Clearly this poisoning and fish-stocking project impairs wilderness character by harming the untrammelled quality of Wilderness, in perpetuity with the consistent restocking of the triploid trout.

b. Rotenone is a serious problem for Wilderness.

It is hard to consider anything more invasive than dumping piscicides in Wilderness to kill all gill breathing organisms—and likely other organisms—in an effort to completely eradicate a fish stocked nearly a century ago and replace it with another introduced fish in an area that was historically fishless before all the stocking began. The following points go into more detail.

Rotenone kills organisms other than the targeted non-native fish, and those lost species can remain absent for more than five years. Rotenone is a poison that kills all organisms that utilize gills during part of their life cycle. These organisms include not only the targeted non-native fish, but amphibians, macro-invertebrates, and other non-target organisms that use gills, perhaps even including the Columbia Spotted Frog in its tadpole stage. While the MRDG suggests timing of application can work, salvaging of tadpoles, or desirable trout for that matter, is not very practical. See (Mangum, F. A. and J. L. Madrigal. 1999. Rotenone effects on aquatic macro-invertebrates of the Strawberry River, Utah: a five year summary. *Journal of Freshwater Ecology* 14:125-135. See also Don C. Erman, Comment: Rotenone Toxicity to Rainbow Trout and Several Mountain Stream Insects. *North American Journal of Fisheries Management*, 32:1, 53-59 (Feb. 21, 2012). See also Dalu T, Wasserman RJ, Jordaan M, Froneman WP, Weyl OLF (2015) An Assessment of the Effect of Rotenone on Selected Non-Target Aquatic Fauna. *PLoS ONE* 10(11): e0142140. doi:10.1371/journal.pone.0142140.)

A 5-year study on a river in Utah (Mangum and Madrigal 1999) found that: “up to 100% of Ephemeroptera, Plecoptera, and Trichoptera [mayflies, stoneflies and caddis flies] were missing after the second rotenone application. Forty-six percent of the taxa recovered within one year, but 21% of the taxa were still missing after five years. At least 19 species were still missing five years after the rotenone treatments.” Especially in a designated Wilderness, chemicals like rotenone would bring a significant trammeling to the wilderness character of these two lakes and accompanying streams in violation of the basic tenants of the 1964 Wilderness Act (16 U.S.C. 1131-1136).

Rotenone can persist in the ecosystem. In Sequoia-Kings Canyon National Parks in California, the National Park Service (NPS) acknowledged in its 2013 Restoration of Native Species in High Elevation Aquatic Ecosystems Plan and DEIS that rotenone has half-life of 20 days in cold water (DEIS at 217), that it “completely degrades” within 1-8 weeks (DEIS at 217). Twenty days’ duration where rotenone is still exposing wildlife, humans, and environmental resources to a toxicant is a significant time of persistence. As a result of longer duration of rotenone, other species (and humans) are likely to be more at risk of being affected by rotenone.

Rotenone can have significant failures, requiring additional applications. In 2010, the U.S. Bureau of Reclamation completed its “Proposed Reapplication of Rotenone in Bonita Creek: Supplement to the Environmental Assessment on Native Fish Restoration in Bonita Creek, Gila Box Riparian National Conservation Area, Graham County, Arizona”. The supplement was needed so the Bureau could poison Bonita Creek again after the first attempt at fish eradication failed. The Supplement gave a table (Appendix B, List of Stream Renovation Projects in the Lower Colorado River Basin) of other projects in the region. There were 21 projects listed of which 19 had results of the poisoning on fish eradication “success”. Of these 19 projects, the average number of poisonings (i.e., number of times the poisoning

failed and was repeated) was 1.9 poisonings per stream. Four of the 19 stream projects were poisoned up to 3 times in hopes of eradication. In only 6 cases (32%) was one poisoning considered sufficient for eradication of all fish.

Rotenone is an environmental ecotoxin. Other recent studies have highlighted the lack of study regarding impacts of rotenone and concerning questions regarding health and safety of humans, wildlife, and the broader environment. One such study found the repeated application of rotenone on land and water increases probability of soil and groundwater contamination, making “rotenone [] a potential environmental ecotoxin, which seriously threatens the ecological health of the environment.”

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4634929/> (2015)

The use of rotenone, however, poses a challenge to conservation practitioners because detrimental impacts to non-target freshwater organisms such as amphibians [16] and invertebrates [17] have been reported. Impacts on aquatic invertebrates tend to be highly variable and taxon-specific, making the environmental impacts of proposed rotenone operations difficult to predict [17]. Woodford et al. [18] for example, observed that the immediate impact of rotenone operations on the Rondegat River, South Africa, appeared to have been most severe on the Ephemeropterans, which were among the quickest to respond to rotenone in the water through mass drift and declined significantly in abundance following treatment. **While it is recognized that rotenone is likely to affect numerous aquatic taxa, there are few studies that have assessed such impacts [15–18] and as a result the use of rotenone remains contentious as its effect on non-target biota are still largely unknown [6, 9, 11, 17, 19–21].**

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9339416/> (2022)

Rotenone was originally thought to be very safe for humans and animals, in addition to being toxic to insects and aquatic animals. However, **more and more studies have reported that rotenone has high toxicity to domestic animals, fish, silkworm and mice, especially neurotoxicity and reproductive toxicity** ⁴⁻⁸. Our previous study found that rotenone enhances the transcriptional activity of p53 gene and induces the apoptosis of dopamine neurons by targeting the regulation of Sirt1 and histone H3K9 acetylation modification ⁹. **At the same time, the frequent use of rotenone as an insecticide and snail killer in agriculture and aquaculture has greatly increased the probability of soil and underground water contamination with rotenone** ¹⁰. Therefore, rotenone has become a potential environmental ecotoxin, which seriously threatens the ecological health of the environment.

https://link.springer.com/referenceworkentry/10.1007/978-3-030-94753-8_92-1 (2023)

Rotenone is an important isoflavone occurring in plants belonging to the Leguminosae family, especially in the genera *Lonchocarpus*, *Millettia*, *Tephrosia*, and *Derris*. This molecule has shown marked pesticidal and piscicidal properties that led to the development of several rotenone-based agrochemicals for pest and fishery management. However, **its promising biological activities have been limited by a noteworthy toxicity, among which the induction of Parkinson-like symptoms is most concerning.** On this base, this chapter explored all the available information on rotenone, highlighting its several biological activities, the mechanisms of action, as well the reported toxicity, and future perspective regarding its replacement.

At the very least, rotenone’s scope and depth of impacts are not well understood, and increasing studies

are raising concerning questions about impacts to human and ecosystem health. When Congress passed the Wilderness Act, it codified the precautionary principle on a small percentage of public lands, protecting those areas from our intentional manipulations and their myriad consequences. The proposed project is a classic example of why these protections matter.

2. Creating more angling opportunities is not a legitimate justification in Wilderness.

Planting triploid rainbow trout trammels the Wilderness. The only reason to plant these Frankenfish is for angling opportunities at High Lake. The restocking would go on, in perpetuity as these fish don't reproduce (hopefully). "Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value." FSM 2320.6

3. The scoping letter and MRDG provide no demonstrated wilderness justification for the use of motor boats and motorized pumps.

The MRDG did not even consider or even reject a non-motorized option for application of rotenone. See MRDG at 23 and 34. Thus, there is no indication whether this could or couldn't work, using a paddle raft, canoe, or kayak (which come in collapsible forms). While we appreciate that the agency recognized the project could be done without a helicopter, there is no indication the agency even considered an option to forgo use of motorized equipment altogether.

4. Trammeling the Wilderness via rotenone poisoning, if successful, will still not eliminate brook trout from the system.

Even if a project need outside of Wilderness could justify active trammeling and prohibited use authorizations within the Wilderness, which is legally cannot, the problem targeted by the proposal won't be solved by poisoning the Wilderness. There are fish that compete with bull trout below the natural fish migration barrier and throughout the aquatic system. It appears that poisoning below the falls, in occupied bull trout habitat, is out of the question because of bull trout presence.

MRDG/MRAF

The way the federal agencies have designed the MRDG process is fatally flawed and leads to unnecessary trammeling. The first step is often abused because the problem is described so specifically that no other action is possible⁸ or, at best, that action outside of the Wilderness will only partially solve the problem, so it is rejected. In this case, the MRDG focuses on an area unoccupied by bull trout within the Strawberry Mountain Wilderness, rather than the entire range of bull trout, even in the Malheur River. Given the bias of agencies to manipulate, to manage, the MRDG process reinforces the

⁸ This itself is an unlawful interpretation of the statutory requirements. When looking at the Section 4c prohibitions (for things like motorized uses), the narrow exception clause focuses the necessity question on wilderness administration pursuant to the purpose of the Wilderness Act. Most often, agencies misconstrue this statutory test in MRDGs and focus the necessity question on project goals, not on wilderness administration obligations. Further, when taking prohibited uses (motorboat, pump, etc.) out of the picture, Section 4c is likewise taken out of the picture and thus the whole MRDG process is inapplicable. The question then becomes whether fish poisoning and restocking in naturally fishless waters—on its face—is lawful given the purpose and overriding goals of the Wilderness Act. It is not.

management paradigm and Wilderness always loses. Thus, the MRDG process, a result of the flawed and ironically named *Keeping it Wild 2* protocols, contrary to the Wilderness Act and the rule of statutory construction, which requires the Act to be read in harmony and not in internal conflict. Rather, it is an illegal administrative repeal of the Wilderness Act.

There are some very specific problems in this MRDG, aside from those detailed in earlier sections. Two of them are discussed below.

1- Page 1 of the MRDG states:

Note: The Forest Service (FS) and state fish and wildlife agencies manage fish and wildlife in wilderness cooperatively under the POLICIES AND GUIDELINES FOR FISH AND WILDLIFE MANAGEMENT IN NATIONAL FOREST AND BUREAU OF LAND MANAGEMENT WILDERNESS, revised June 2006 (FSM 2323.32). These policies require use of a Minimum Requirements Decision Process (MRDP) document to be prepared by the state, when the project proposal includes a prohibited use as defined by Section 4(c) of The Wilderness Act or when chemical treatment is to be used. Because any use of a pesticide in wilderness (including piscicides) must be approved by the Regional Forester, and because the policies allow for decisions to be "...documented in a format that best suits the Federal administering agency and the State wildlife agency" the FS is conducting this analysis, using the Minimum Requirements Decision Guide (MRDG) format, in cooperation with the state agency.

This statement has inaccuracies and elucidates an inversion of statutory requirements with a non-binding Memorandum:

- The MRAF/MRDG process is not required by Forest Service regulations. The Forest Service has not even adopted it as policy, but rather as guidance. See footnote 4, which is a reference that guidance. Further, the MRAF/MRDG process has not gone through rulemaking or formal public comment.
- The state may, but is not required, to prepare a MRAF/MRDG. Since state fish and game agencies have no expertise in Wilderness and some, like Idaho, are actually hostile to Wilderness, it is preferable that professionals in the federal land management agency prepare the MRAF.
- The memorandum of cooperative policies and guidelines between the Forest Service, BLM, and the IAFWA (see FSM 2323.32 part 5) referred to above are not statute, are not regulations, have never gone through rulemaking or public comment, and are inconsistent with the Wilderness Act itself. Further, they are inconsistent with FSM 2323 part 1 which states, "Wildlife and fish management programs shall be consistent with wilderness values." However, the Forest Service too often treats this non-binding memorandum as statute, and the Wilderness Act as mere discretionary guidance, such is the case in this MRDG.
- Further, even if no Section 4c prohibited uses were proposed (e.g. no motorized uses), the proposal would still run afoul of the Wilderness Act and the Forest Service's obligations to the administer the area in a manner that preserves its wilderness character. The question is whether fish poisoning and restocking in naturally fishless waters—on its face—is lawful given the purpose and overriding goals of the Wilderness Act. It is not.

Furthermore, case law clearly shows that federal agencies have primacy of federal land regarding wildlife. In a paper commissioned by the Forest Service (who didn't like the results), Nie et al. 2017⁹ and in a reply article Nie et al. 2020¹⁰ debunked the myths surrounding supposed state supremacy on federal public lands over wildlife management decisions. Though the federal and state governments cooperate and the Federal Government permits the state traditional jurisdiction in wildlife matters, the Federal Government has supremacy on public lands and can counter state decisions when necessary.

2- The MRDG on page 36 clearly elucidates the flaws of the MRDG process. Aside from no-action, which is far and away the best in the ratings system, Alternative 2 ends up being better than Alternative 3, which does not use helicopters. Alternative 1, which uses helicopters is the same as Alternative 3. There are only minor differences in the action alternatives aside from helicopter use. The fact that the Forest Service recommends the alternative that is tied for the worst rating for Wilderness is perhaps a tacit recognition the MRAF/MRDG process is seriously flawed.

CONCLUSION

The process is fatally flawed. The wrong agency, BPA, is leading the process for a project that will occur in Wilderness—an area the Forest Service has a statutory obligation to administer according to the mandates and proscriptions of the Wilderness Act. It is assumed that BPA will make the formal decision. Then BPA will give money to the Burns Tribe, who will give it to Oregon Department of Fish and Wildlife to implement—none of whom have Wilderness administration obligations or expertise. This is a recipe for disaster. Rube Goldberg could not have concocted anything so inefficient. There is no clear accountability between BPA, the decision maker, and ODFW, the agency doing the work. Neither of those agencies has jurisdiction over Wilderness. Further, it appears the decision has already been made before the general public has had a chance to review the proposal. We strongly suggest you step away from this quagmire. At the very least, restart the process. Currently, this appears to the public to be nothing more than a way for the Forest Service to evade its duties under NEPA and the Wilderness Act.

Please keep Wilderness Watch updated on this proposal in a timely manner.

Sincerely,



Kevin Proescholdt
Conservation Director

9 See https://hsapp.hs.umt.edu/employee-database/index.php/pubtools/serveFile/files/1126/Nie_et_al.,_Fish_Wildlife_Mgmt_Fed_Lands_Envtl_Law_2017_.pdf

10 See https://hsapp.hs.umt.edu/employee-database/index.php/pubtools/serveFile/files/1126/Response_to_AFWA_Kisonak_2021_Envtl_L_.pdf