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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIANS FOR ALTERNATIVES
TO TOXICS, a non-profit
corporation; WILDERNESS WATCH,
a non-profit corporation; THE
FRIENDS OF SILVER KING CREEK,
a California non-profit
corporation; LAUREL AMES, an
individual and ANN MCCAMPBELL,
an individual,

Plaintiffs,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE; ALEXANDRA
PITTS, in her official
capacity; UNITED STATES FOREST
SERVICE; JEANNE M. HIGGINS, in
her official capacity,

Defendants.

NO. CIV. S-10-1477 FCD/CMK

MEMORANDUM AND ORDER

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This matter is before the court on the parties' cross-
motions for summary judgment in this environmental case in which

1 plaintiffs¹ seek to set aside the EIR/EIS² and the agencies'
2 decisions authorizing the Paiute Cutthroat Trout Restoration
3 Project (the "Project") in Silver King Creek, located in the
4 Carson-Iceberg Wilderness in Alpine County, California. The
5 Project will restore the Paiute cutthroat trout ("PCT") to its
6 historic range in Silver King Creek by eradicating non-native
7 trout between Llewellyn Falls and Silver King Canyon with the
8 pesticide rotenone and restocking the treated area with pure PCT
9 from donor streams. According to defendants, the Project is a
10 critical and necessary step towards removing the PCT from the
11 Endangered Species Act's threatened species list and preventing
12 its extinction.

13 By their complaint, filed June 15, 2010, plaintiffs
14 challenge the EIR/EIS, jointly prepared by the United States Fish
15 and Wildlife Service ("USFWS") and the California Department of
16 Fish and Game ("CDFG"), to authorize the Project under the
17 National Environmental Policy Act ("NEPA"), the Wilderness Act of
18 1964 (the "Wilderness Act"), the Endangered Species Act ("ESA"),

19
20 ¹ Named as plaintiffs are three organizations and two
21 individuals. Only Laurel Ames, the founding member of plaintiff
22 Friends of Silver King Creek, filed a declaration in support of
23 the motion, establishing a basis for granting injunctive relief
24 in this case. As such, defendants have properly sought dismissal
25 of the other named plaintiffs as there has been no showing of an
26 injury to the entities (Californians for Alternatives to Toxics
and Wilderness Watch) or the other individual (McCampbell).
Plaintiff's counsel requested leave at the oral argument to
supplement the record to submit declarations on behalf of these
plaintiffs, but the court denied the request considering the late
stage of the case and motion and finding that Ames' declaration
was sufficient to warrant granting relief in plaintiffs' favor.

27 ² "EIR/EIS" denotes the Environmental Impact
28 Report/Environmental Impact Statement jointly prepared in this
case by the United States Fish and Wildlife Service and the
California Department of Fish and Game.

1 the Federal Water Pollution Control Act ("Clean Water Act"), the
2 California Environmental Quality Act ("CEQA") and the
3 Administrative Procedures Act ("APA").

4 Plaintiffs filed their motion for summary judgment on April
5 3, 2011, seeking partial summary judgment in their favor on their
6 NEPA and Wilderness Act claims. On May 5, 2011, USFWS and the
7 United States Forest Service ("USFS") filed an opposition and
8 cross-motion for summary judgment on plaintiffs' other claims for
9 relief under the ESA, Clean Water Act and APA.³ The court heard
10 oral argument on the motions on August 11, 2011, and by this
11 order now renders its decision on the motions.

12 Plaintiffs' motion is GRANTED in part and denied in part.
13 Plaintiffs have not demonstrated a violation of NEPA and
14 therefore, their motion on that claim is DENIED. However,
15 plaintiffs have shown a violation of the Wilderness Act because
16 in choosing one competing value (the conservation of the PCT)
17 over another value (preservation of the wilderness character),
18 the agencies left native invertebrate species out of the balance,
19 and thus improperly concluded that authorization of motorized
20 equipment will comply with the Act by achieving the purpose of
21

22 ³ Plaintiffs agreed to dismiss their ESA and Clean Water
23 Act claims. (Pls.' Opp'n to Defs.' Mot. for Summ. J. [Docket
24 #57], filed May 19, 2011, at 25:14-16 [requesting dismissal of
25 their Clean Water Act claim]; plaintiffs did not respond to
26 defendants' motion as to their ESA claim and confirmed at oral
27 argument that they request dismissal of that claim.) The APA
28 provides the standard of review for plaintiffs' NEPA and
Wilderness Act claims, and thus, it is redundant of those claims
and does not need to be considered separately. Plaintiffs' CEQA
claim was previously dismissed as barred by the doctrine of
sovereign immunity. (Mem. & Order [Docket #23], filed Oct. 29,
2010.)

1 preserving wilderness character.

2 Having shown success on the merits of their Wilderness Act
3 claim, plaintiffs are entitled to a permanent injunction,
4 enjoining implementation of the Project because: (1) through the
5 expert declaration of Nancy Erman, they have demonstrated that
6 the rotenone treatment will kill sensitive macroinvertebrate
7 species and that recolonization will not occur for some species
8 because they cannot adapt to the Project area habitat; and
9 (2) the balance of equities tips in their favor as no exigency
10 exists to begin the Project now; and (3) the public interest
11 favors preservation of the unimpaired wilderness.

12 Defendants' cross-motion is accordingly DENIED in part and
13 GRANTED in part. Their motion is denied as to plaintiffs'
14 Wilderness Act claim but granted with respect to plaintiffs'
15 NEPA, ESA and Clean Water Act claims.

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BACKGROUND⁴

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2 The USFWS, the CDFG and the USFS (sometimes collectively,
3 the "Agencies") have proposed the Paiute Cutthroat Trout
4 Restoration Project to poison with rotenone⁵ eleven miles of
5 Silver King Creek and then stock this area with pure PCT from
6 established populations in the upper portions of the watershed.
7 (UF #125.) Silver King Creek is within the Carson-Iceberg
8 Wilderness of the Humboldt-Toiyabe National Forest in
9 California's Sierra Nevada Mountains. (UF #11.) The eleven-mile
10 project area includes a six-mile stretch of the mainstem of the
11 river downstream of Llewellyn Falls to Silver King Canyon,
12 sometimes referred to as lower Silver King Creek, and five miles
13 of tributaries. (UF #84.) Currently six populations of PCT
14 inhabit eleven and one-half miles of Silver King Creek, including
15

16 ⁴ The background section will reference facts from three
17 sources. Where facts are undisputed, the court will reference
18 Defendants' Response to Plaintiffs' Statement of Disputed and
19 Undisputed Facts [hereinafter "UF"]. (Docket #54-1, filed May 2,
20 2011.) Where facts are disputed, the court will reference one of
21 two sources. The first, titled Administrative Record
22 [hereinafter "AR"], contains documents from the USFWS. (Notice
23 of Filing of the USFWS's Revised Administrative R. [Docket #40],
24 filed Feb. 23, 2011; Notice of Filing of the USFWS's Supplemental
25 Administrative R. [Docket #33], filed Jan. 20, 2011.) The
26 second, titled Forest Service Administrative Record [hereinafter
27 "FS"], contains documents provided by the USFS. (Notice of
28 Filing of the USFS's Administrative R. [Docket #26], filed Nov.
5, 2010; Notice of Filing of the USFS's Supplement to its
Administrative R. [Docket #32], filed Jan. 19, 2011.) Unless
otherwise noted herein, where defendants dispute plaintiffs'
characterization of a fact, the court has referenced the record,
found plaintiffs' representation to be accurate, and therefore
considers the fact undisputed.

26 ⁵ Rotenone kills gill breathing organisms, including
27 aquatic insects, other aquatic invertebrates, and amphibians. (UF
28 #95.) The United States Environmental Protection Agency ("EPA")
has recognized that rotenone disrupts aquatic food chains even
where approved for use. (UF #99.)

1 above Llewellyn Falls. (UF #33.)

2 Originally, the USFWS and CDFG planned to begin project
3 implementation in the late summer or early fall of 2011; however,
4 due to record snowfall this winter, the Agencies recently
5 announced that they will postpone implementation of the Project
6 until the late summer or early Fall of 2012. (UF #126.) The
7 Agencies propose to apply rotenone over two to three years. (UF
8 #91.) Each application of rotenone would require seven working
9 days and could be done twice a year. (UF #87.) An auger,
10 powered by a gasoline-powered generator, will distribute
11 potassium permanganate that will neutralize the toxicity of the
12 rotenone downstream.⁶ (UF #100.) Last, the Agencies propose to
13 stock the project area with PCT the summer after the final
14 poisoning, and continue annually until the population has reached
15 the target size.⁷ (UF #124.)

16 The objective of the Project is to eradicate non-native fish
17 in the proposed area and establish PCT as the only salmonid fish
18 species in the Silver King Creek system--an action proposed⁸ in
19 the 2004 Revised Recovery Plan (the "2004 Plan") to prevent
20 extinction of the PCT, as required by the ESA. (AR 182.) The PCT

22 ⁶ Although potassium permanganate is also toxic to gill
23 breathing organisms at the rate proposed in this project, the
24 NPDES permit for the Project requires the Agencies to use
potassium permanganate for neutralizing the rotenone. (UF #s
100, 103.)

25 ⁷ The preliminary target size is 2,500 individuals,
26 greater than seventy-five millimeters in length, based on the
2004 Revised Recovery Plan, but is subject to change. (FS 204.)

27 ⁸ This action first appeared as a CDFG proposal in 2002,
28 in part, to open up lower Silver King Creek to fishing. (UF
#57.)

1 is native to only Silver King Creek and is listed under the ESA as
2 threatened with extinction. (AR 180, 33235.) The initial
3 Recovery Plan, issued in 1985 (the "1985 Plan"), did not propose
4 to establish PCT in Silver King Creek below Llewellyn Falls or to
5 poison that stretch of the creek. (UF #56.) Instead, the 1985
6 Plan concluded that the PCT could be considered recovered "when a
7 pure population of PCT has been reestablished in Silver King Creek
8 above Llewellyn Falls, and the integrity of the habitats in Silver
9 King Creek, Cottonwood Creek, and Stairway Creek has been secured
10 and maintained over a consecutive five-year period with stable or
11 increasing overwintering⁹ populations of 500 or more adult fish in
12 each of these streams."¹⁰ (UF #54.)

13 Under the 2004 Plan, the PCT would have to be successfully
14 reintroduced into Silver King Creek from Llewellyn Falls
15 downstream to Silver King Canyon to avoid extinction. (AR 33237.)
16 The USFWS stated reasons for the change from the 1985 Plan,
17 including "1) the discovery of fish barriers downstream of
18 Llewellyn Falls that would enable the expansion of Paiute
19 cutthroat trout into historic habitat, 2) elimination and
20 reduction of threats to existing populations, [and] 3) increased
21 knowledge about Paiute cutthroat trout population dynamics based
22 on long-term trend data." (UF #61.) According to this plan, the
23 PCT listing for recovery under the ESA indicates a "moderate
24

25 ⁹ "During the winter months, trout move into
26 pools to avoid physical damage from ice scouring and to conserve
27 energy. As with other salmonids, suitable winter habitat may be
28 more restrictive than summer habitat." (AR 33245.)

¹⁰ Only parts of this recovery criteria have been met.
(UF #55.)

1 degree of threat for extinction." (UF #62.) The 2004 Plan
2 concludes, however, that if the PCT remain only in their currently
3 occupied habitat, they will be "highly vulnerable to extinction."
4 (AR 33238.)

5 In 2004, the USFS ratified a Finding of No Significant Impact
6 ("FONSI") under NEPA for an earlier iteration¹¹ of the project at
7 issue in this case. Some of the plaintiffs in this case
8 challenged the FONSI for failing to comply with NEPA, and this
9 court ordered a preliminary injunction enjoining implementation of
10 the project; specifically, any application of rotenone
11 formulations and potassium permanganate to Silver King Creek, its
12 tributaries and backwaters, and Tamarack Lake. (UF #76.) The
13 court found that the plaintiffs made a strong showing of the
14 likelihood of irreparable harm to native Silver King Creek species
15 and the balance of interests tipped decisively in the plaintiffs'
16 favor. Californians for Alternatives to Toxics v. Troyer, No.
17 CIV-05-633-FCD-KJM, 2005 WL 2105343, at *2 (E.D. Cal. Aug. 31,
18 2005).

19 Thereafter, in 2010, the Agencies published the EIR/EIS for
20 the Project at issue in this case.¹² (UF #83.) The EIR/EIS
21 analyzes three alternatives: the No Action Alternative
22 ("Alternative One"); the Proposed Action Alternative ("Alternative
23 Two"); and the Combined Physical Removal Alternative ("Alternative
24

25 ¹¹ The only differences from the current proposal were (1)
26 the former title was Paiute Cutthroat Trout Recovery Project, and
27 (2) the project area included Tamarack Lake. (AR 6118-19.)

28 ¹² Plaintiffs submitted timely comments on the draft and
final EIR/EIS, including scientific comments from specialists in
the fields of aquatic ecology and freshwater invertebrates. (AR
37.)

1 Three"). (AR 177.) Alternative One continues current management
2 of existing PCT populations in Silver King Creek, without
3 introducing new populations or efforts to eradicate non-native
4 trout; the EIR/EIS concluded that this alternative would not
5 result in direct environmental benefits. (AR 193.)

6 Alternative Two analyzes the Project at issue here. The
7 analysis acknowledges that this alternative could result in loss
8 of individual macroinvertebrate taxa, potentially including rare
9 or as yet unidentified species endemic to Silver King Creek.¹³ (UF
10 #115.) While common macroinvertebrate taxa would recolonize the
11 Project areas, rarer taxa may be eradicated for a number of years
12 or indefinitely. (UF #114.) There is no information about the
13 existence of rare or endemic macroinvertebrate species in Silver
14 King Creek because current studies do not provide the level of
15 taxonomic resolution needed to detect rare or endemic species.
16 (UF #118.)¹⁴ The Agencies conclude in the EIR/EIS that performing
17 species studies to determine whether endemic or rare taxa exist in
18 Silver King Creek would require an intensive effort that would be
19 costly, might be inconclusive, may be technically infeasible, and
20

21 ¹³ Plaintiffs maintain the EIR/EIS concluded that
22 Alternative Two would kill sensitive species (stoneflies,
23 caddisflies, mayflies) that are abundant in Silver King Creek.
24 (UF #110.) Defendants dispute this fact, asserting that
25 plaintiffs mischaracterize the EIR/EIS which found only that
26 rotenone will have a *stronger effect* on these small, gilled taxa.
27 (Id.)

28 ¹⁴ Defendants dispute this fact, asserting that the
29 Agencies analyzed the risk to rare or endemic species and will
30 take steps to minimize risks to these species from the Project.
31 (UF #118.) However, those assertions do not defeat the Agencies'
32 acknowledgment that neither their own surveys, nor any others,
33 have determined whether or not rare or endemic species exist in
34 the Project area. (AR 247-48.)

1 is beyond the scope of the proposed action.¹⁵ (UF #s 143-144.)

2 Alternative Three proposes using non-chemical techniques (a
3 combination of electrofishing, gill netting, seining, and other
4 physical methods) to remove non-native trout from the Project
5 area. (AR 204.) The electrofishing component is estimated to
6 take 580 hours, over a period of ten years, before completion, and
7 the electrofishing batteries would be recharged with small
8 gasoline-powered generators.¹⁶ (AR 205.)

9 On May 20, 2010, both the USFS and the USFWS issued Records
10 of Decision ("ROD") adopting Alternative Two, the Proposed Action
11 Alternative. (UF #83.) The Forest Supervisor explained that she
12 chose Alternative Two over Alternative Three because the CDFG and
13 the USFWS had determined that the application of rotenone to
14 Silver King Creek was "the most effective method to remove non-
15 native trout within PCT historic habitat." (FS 5156.) As the
16 representative of the agency mandated to manage lands protected
17 under the Wilderness Act, the Forest Supervisor concluded that
18 "the short term negative effects to the 'natural' Wilderness
19 character through introduction of a chemical pesticide were
20 balanced by the improved long term natural conditions of
21 Wilderness character through restoration of a native species."

23 ¹⁵ The Agencies assert that community-level monitoring
24 will suffice to assess the impact of rotenone on
macroinvertebrate species in the watershed. (AR 248, 270.)

25 ¹⁶ In the Minimum Requirements Decision Guide, prepared by
26 the USFS to evaluate the Project under the Wilderness Act, they
27 analyzed an alternative that was similar to Alternative Three
from the EIR/EIS, except that it proposed using packstock instead
28 of gasoline-powered generators to re-supply batteries for
electrofishing. (FS 5062.) The EIR/EIS did not include this
alternative.

1 (FS 5157.)

2 On June 15, 2010, plaintiffs filed this case. By their
3 instant motion for summary judgment, plaintiffs seek an order for
4 declaratory and injunctive relief. Specifically, plaintiffs ask
5 the court to find a violation of NEPA and/or the Wilderness Act
6 and enjoin implementation of the Proposed Action Alternative under
7 the EIR/EIS. Defendants oppose plaintiffs' motion and cross-move
8 for summary judgment.

9 More specifically, in their motion, plaintiffs move for
10 summary adjudication on their NEPA claim on the following grounds:
11 defendants' (1) failure to perform feasible studies to consider
12 environmental effects, (2) reliance on faulty information in
13 choosing the Proposed Action Alternative, (3) failure to use
14 accurate scientific data in the 2004 Plan, and (4) failure to
15 consider and disclose effects from the poisons in the EIR/EIS.
16 Plaintiffs also move for summary adjudication on their Wilderness
17 Act claim, arguing that the Project fails to comply with the Act's
18 mandates. (Pls.' Mot. For Summ. J. and Injunctive Relief [Docket
19 #48-1], filed April 11, 2011, at 11-26.)

20 In support of their first claim that the Agencies violated
21 NEPA by failing to perform feasible studies, plaintiffs provide
22 evidence that species-level studies of macroinvertebrates have
23 been conducted for aquatic insects. In fact, endemic species of
24 aquatic invertebrates, including stoneflies and caddisflies have
25 been identified through species surveys in other locations in the
26 Sierra Nevada Mountains. (UF #146.) According to plaintiffs, the
27 absence of species studies for the Project area results in a
28 violation because NEPA regulations state that when information

1 relevant to a reasonably foreseeable significant impact is
2 incomplete, the agency shall include complete information in the
3 EIS. 40 C.F.R. § 1502.22(a). One of plaintiff's experts, Nancy
4 A. Erman, declares that a reasonable inventory of
5 macroinvertebrate species in the Silver King Creek watershed could
6 be feasibly conducted in two to three years.¹⁷ (Decl. of Nancy A.
7 Erman in Support of the Pls.' Mot. For Summ. J. and Injunctive
8 Relief [Docket #57-1], filed May, 19, 2011, at 3:7-8.)¹⁸

11 ¹⁷ Alternatively, Mark Vinson, hired as a
12 macroinvertebrate expert in the development of the EIR/EIS for
13 this Project, suggested that a four-year post-doctorate project
14 might be a reasonable way to "establish a good list of the
15 aquatic insects in the stream." (UF #145.)

16 ¹⁸ Plaintiffs seek to supplement the record with the
17 expert declarations of Nancy Erman (addressing the feasibility of
18 conducting a species-level study of aquatic invertebrates in the
19 Silver King Creek watershed) (Docket #57-1) and Dr. Don C. Erman
20 (addressing barriers to upstream fish migration) (Docket #46).
21 Typically, "[j]udicial review of an agency decision . . .
22 focuses on the administrative record in existence at the time of
23 the decision and does not encompass any part of the record that
24 is made initially in the reviewing court." Southwest Ctr. for
25 Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450
26 (9th Cir. 1996). However, the Ninth Circuit has recognized
27 certain, narrow circumstances where supplementation of an
28 administrative record may be justified, including where it is
29 necessary to explain or clarify "technical terms or complex
30 subject matter" involved in the agency action. Southwest Center
31 for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443,
32 1450 (9th Cir. 1996). Here, Nancy Erman's and Don Erman's
33 declarations address technical matters important to the
34 resolution of this case; at bottom, the declarations help
35 summarize for the court complex topics that were the subjects of
36 many comment letters, the EIR/EIS and other record documents, and
37 thus, the court grants plaintiffs' request to supplement the
38 record.

39 Also regarding the record, defendants ask the court to
40 strike the excerpts of record plaintiffs submitted on paper
41 (Docket #58) in conjunction with their motion because plaintiffs
42 did not serve a copy on defendants and because the court's review
43 is limited to the administrative record compiled by the Agencies.
44 Defendants' motion to strike is properly granted as the court
45 need not consider plaintiffs' excerpts of record as it has the
46 full administrative record provided by the Agencies.

1 In response, defendants argue that they have met their burden
2 under NEPA by (1) considering the effects of the Proposed Action
3 Alternative on benthic macroinvertebrates based on the current
4 state of scientific knowledge, (2) disclosing the possibility of
5 loss of individual macroinvertebrate taxa, and (3) providing a
6 thorough explanation of why a species-level study is not feasible.
7 (USFWS and USFS's Opp'n to Pls.' MSJ [Docket #54], filed May 2,
8 2011, 21:26-22:3.) Defendants claim that plaintiffs have not
9 cited authority to show that NEPA requires the Agencies to conduct
10 a study to rule out the possibility that rare and endemic species
11 may exist in the Project area. (Id. at 19:25 to 20:2.) Instead,
12 defendants assert that it would be inappropriate to place such a
13 burden on federal agencies where "(1) no federally endangered,
14 threatened, sensitive, or candidate macroinvertebrate species are
15 known to exist in the Silver King Creek Basin; (2) the [A]gencies'
16 experts explained that the likelihood of finding rare and endemic
17 macroinvertebrates in Silver King Creek is low . . . ;¹⁹ and (3)
18 the agencies explained that untreated upstream areas would enhance
19 recolonization of macroinvertebrates [in the Project area after
20 poisoning]." (Id. at 20:9-16.)

21 According to defendants, a species inventory is infeasible
22 because: (1) due to the lack of existing inventory data, a

24 ¹⁹ Plaintiffs' expert, Nancy A. Erman, attests that
25 defendants are incorrect that springs and seeps can serve as
26 macroinvertebrate refugia for post-project re-colonization.
27 (Decl. Nancy A. Erman, 7:4-5.) Instead, she claims that many
28 species found in springs and seeps do not live farther downstream
in the watershed. (Id. at 7:7-8.) Because springs maintain
constant or near-constant temperatures, spring species cannot
live farther downstream when temperatures are variable. (Id. at
7:10-12.)

1 complete inventory of aquatic invertebrates would be necessary,
2 requiring an intensive effort beyond the scope of the Project; (2)
3 the state of the art of benthic invertebrate taxonomy is not
4 sufficiently advanced to allow identification to the species
5 level; (3) an inventory would require sampling at multiple
6 stations over different seasons and across multiple years; and (4)
7 even a complete species inventory may not determine if a species,
8 which is absent after a rotenone treatment, was actually absent or
9 whether it was missing during the sampling. (Id. at 20:17-21-27.)

10 Also under their first NEPA claim, plaintiffs assert that
11 defendants only presume that there is a natural barrier downstream
12 of the Project area, because all the data was collected in autumn
13 when flows in Silver King Creek were minimal and the efficacy of
14 any barriers was optimal. In support of this assertion,
15 plaintiffs' expert, Don C. Erman, attests that scientific judgment
16 of potential barriers should be based on a range of stream flows
17 in order to establish a rating curve of changes in the horizontal
18 distance from the fall's crest to the plunge pool, and other
19 features. (Decl. of Don C. Erman [Docket #46], filed April 3,
20 2011, ¶ 5.)

21 In response, defendants maintain the Agencies properly relied
22 on the CDFG's Senior Hydraulic Engineer who viewed the downstream
23 barrier during low flow conditions, but also concluded that
24 "[u]nder high flow conditions, the vertical magnitude of the
25 barrier is reduced, but, due to the narrowness of the gorge and
26 the steepness of the stream channel, it is my opinion that the
27 excessive air entrainment and turbulence in the flowing stream
28 will continue to prevent fish from moving upstream through the

1 barrier reach." (AR 15102.)

2 In support of their second NEPA claim that defendants relied
3 on faulty information in choosing the Proposed Action Alternative,
4 plaintiffs assert that defendants misrepresented the potential
5 effectiveness of the Combined Physical Removal Alternative in
6 meeting the goal of establishing PCT in Silver King Creek.

7 According to plaintiffs, defendants failed to disclose evidence of
8 field experience and published studies proving that physical
9 removal methods can be effective in the Sierra Nevada. (Pls.'

10 Mot. For Summ. J. and Injunctive Relief, 15:25-27.) Specifically,
11 plaintiffs assert that a USFS project, using physical removal
12 methods on the Upper Truckee River, will take only two seasons
13 using four to five two-person crews to complete. (Id. at 17:6-8.)

14 Moreover, according to plaintiffs, defendants failed to explain
15 why physical removal would be unsuccessful in Silver King Creek
16 when it has been successful in similar streams in the region.

17 (Id. at 16:19-20.)

18 In response, defendants point out that the Agencies discussed
19 the physical removal program on the Upper Truckee River in the
20 EIR/EIS, and distinguished that program from this Project on
21 Silver King Creek. (USFWS and USFS's Opp'n, 25:11-16.) According
22 to defendants, unlike the successful program on the Upper Truckee
23 River, the Physical Removal Alternative, here, will be ineffective
24 because (1) the Project goal is to eradicate a hybridizing non-
25 native species instead of controlling a competing non-native
26 species, (2) Silver King Creek is a complex high-gradient system
27 and not a shallow, low-gradient system, and (3) there are no
28 barriers within the Project area except at either end to allow the

1 Agencies to treat short sections like on the Upper Truckee River.
2 (Id. at 25:17 to 26:7.) As to the Sequoia-Kings Canyon National
3 Park project, also cited by plaintiffs, defendants emphasize that
4 the USFWS' ROD addressed that project and contrasted the efforts
5 there by noting that the streams that were successfully eradicated
6 in the Canyon are short in length, small in width, have effective
7 downstream barriers which prevent fish from re-invading and all
8 but one stream are ephemeral; none of these conditions are present
9 in Silver King Creek.

10 In support of their third NEPA claim that defendants failed
11 to use accurate scientific data in the 2004 Plan, plaintiffs
12 assert that the Agencies unjustifiably changed the recovery
13 criteria from the 1985 Plan criteria. (Pls.' Mot. For Summ. J.
14 and Injunctive Relief, 13:24-15:12 and 19:3-10.) Specifically,
15 plaintiffs assert the change in the recovery criteria is
16 unjustified because 2004 Plan did not explain why the recovery
17 criteria changed from a "stable or increasing overwintering
18 population of 500 or more adult fish," in the 1985 Plan, to a
19 secure population with three or more age classes for five years,
20 consisting of a minimum of 2,500 fish that are greater than
21 seventy-five millimeters. (Id. at 18:16-21.) In addition,
22 plaintiffs point out that the EIR/EIS classifies adult fish as
23 individuals greater than 150 mm, and not 75 mm, thereby
24 inaccurately identifying whether existing PCT populations in
25 Silver King Creek meet the recovery criteria of the 2004 Plan.
26 (Id. at 20:1-8.)

27 In response, defendants point out that plaintiffs offer no
28 explanation for why the Agencies' recovery criteria is subject to

1 review under NEPA. (USFWS and USFS's Opp'n, 27:5-9.) Still, the
2 defendants contend that the Agencies developed the new criteria
3 from peer reviewed literature. (Id. at 27:15-21.)

4 In support of their fourth NEPA claim that defendants failed
5 to consider and disclose effects from the poisons, plaintiffs
6 point to studies that connect rotenone to Parkinson's disease,
7 evidence that past treatments have caused high-concentrations of
8 rotenone to persist after the treatment period, and unintentional
9 killings of fish downstream of the treatment area. (Pls.' Mot.
10 For Summ. J. and Injunctive Relief, 21:6-27.) Plaintiffs also
11 assert the EIR/EIS failed to disclose the potential toxic effects
12 of cube resins contained with the rotenone formulations and that
13 the poisons may be administered by use of gel or sand matrices.

14 In reply, defendants point to the EIR/EIS discussion of
15 studies investigating the connection between rotenone and
16 Parkinson's disease, which mention that those studies showed no
17 cause and effect relationship between rotenone exposure and
18 Parkinson's disease. (AR 318.) Additionally, defendants assert
19 that the Project will not result in the persistence of rotenone or
20 accidental fish kills because the Project includes a contingency
21 plan, site safety plan, a site security plan, final implementation
22 and neutralization plans in accordance with the Lahontan Region
23 Water Quality Control Board's NPDES permit, and will employ
24 improved monitoring methodologies that have greater precision for
25 measuring potassium permanganate. (Id. at 29:17 to 30:21.) As to
26 cube resins and the forms of treatment, defendants contend the
27 EIR/EIS disclosed that the full extent of the potential toxicity
28 of cube resins is unknown but that ultimately the Agencies

1 believed, based on the relevant science, that the resins would not
2 substantially affect the toxicity of the rotenone application, and
3 contrary to plaintiffs' suggestion, the Agencies disclosed the
4 potential use of gel and sand matrices to dispense the rotenone,
5 which are not prohibited applications by the label.

6 Finally, in support of their claim that defendants failed to
7 comply with the Wilderness Act, plaintiffs assert that the
8 Project's use of a gasoline-powered auger does not qualify for an
9 exception to the Act's prohibition against motorized equipment;
10 that the Project elevates the goal of recreational angling over
11 the goal of preserving wilderness character; and that the Agencies
12 fail to prove that the Project is necessary to meet the Act's
13 minimum requirements to administer wilderness. (Pls.' Mot. For
14 Summ. J. and Injunctive Relief, 24:21-26.) Specifically,
15 plaintiffs assert that the Act prohibits the Project's use of the
16 motorized equipment because the Project is not restoring a species
17 fundamental to the overall natural health of the ecosystem, and
18 the Combined Physical Removal Alternative would be feasible
19 without potentially killing endemic or native invertebrate species
20 in Silver King Creek. (Id. at 26:1-20.)

21 Defendants respond, arguing that the Agencies met their
22 burden of demonstrating that the use of motorized equipment was
23 necessary to meet the goal of restoring PCT. (USFWS and USFS's
24 Opp'n, 33:14-17.) Specifically, the Agencies determined that the
25 use of a motorized auger at the neutralization site was the most
26 effective method of applying potassium permanganate, compared to
27 the drip system, and would minimize the human and ecological
28 effects of the application. (Id. at 33:18-20.) In addition, the

1 Agencies assert that, while the Combined Physical Removal
2 Alternative would avoid the effect of chemical treatment, that
3 alternative would be unsuccessful in reaching the conservation
4 goal of the project. (Id. at 35:7-10.) Defendants point out that
5 plaintiffs do not contest the proposition that recovery of the PCT
6 is a conservation goal consistent with the purposes of the Act.
7 (Id. at 33:8-17.)

8 **STANDARD**

9 **A. Summary Judgment**

10 Summary judgment is appropriate when it is demonstrated that
11 there exists no genuine issue as to any material fact, and that
12 the moving party is entitled to judgment as a matter of law. Fed.
13 R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157,
14 90 S. Ct. 1598, 1608 (1970).

15 When parties submit cross-motions for summary judgment, the
16 court must review the evidence submitted in support of each cross-
17 motion and consider each party's motion on its own merits. Fair
18 Housing Council of Riverside County, Inc. v. Riverside Two, 249
19 F.3d 1132, 1136 (9th Cir. 2001). The court must examine each set
20 of evidence in the light most favorable to the non-moving party.
21 United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

22 In this case, the parties agree that there are no material
23 facts in dispute. It is well-established that where, as here,
24 plaintiffs seek judicial review under the APA, the scope of the
25 review is confined to the administrative record compiled by the
26 agency or agencies and presented to the court. In considering
27 such cases, there are no disputed facts and no genuine issues of
28 material fact precluding summary judgment. See e.g., Fla. Power &

1 Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

2 **B. APA**

3 Plaintiffs bring the instant challenges under NEPA and the
4 Wilderness Act pursuant to the APA. Thereunder, the court may set
5 aside a final agency action only where the action is "arbitrary,
6 capricious, an abuse of discretion, or not otherwise in accordance
7 with the law." 5 U.S.C. § 706. Review under the APA is
8 "searching and careful." Ocean Advocates v. United States Army
9 Corps of Eng'rs, 361 F.3d 1108, 1118 (9th Cir. 2004). However,
10 the court may not substitute its own judgment for that of the
11 agency. Id. In short, the court must ensure that the agency has
12 taken a hard look at the environmental consequences of its
13 proposed action. Oregon Natural Resources Council v. Lowe, 109
14 F.3d 521, 526 (9th Cir. 1997). As part of this inquiry, the court
15 should ask "whether the [] decision was based on a consideration
16 of the relevant factors and whether there has been a clear error
17 in judgment." Ocean Advocates, 361 F.3d at 1118. In addition,
18 the court determines "whether the agency articulated a rational
19 connection between the facts found and the choice made." Id. at
20 1118-19 (quoting Arizona Cattle Growers' Ass'n v. United States
21 Fish and Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001)).

22 In The Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008),
23 the Ninth Circuit emphasized a court's proper role in reviewing
24 agency action in an environmental case:²⁰ The court reaffirmed

25
26 ²⁰ Indeed, the court remarked that "in recent years, [the
27 court's] environmental jurisprudence has, at times, shifted away
28 from the appropriate standards of review and could be read to
suggest that this court should play . . . [the] role" of a "panel
of scientists that instructs the [FS] how to validate its
hypotheses . . . [how to] choos[e] among scientific studies . . .

1 that the role of the court is necessarily at its most deferential
2 when assessing the agency's consideration of technical matters.
3 Id. at 993 (recognizing that the court is not to make "fine-
4 grained judgments of [the science's] worth"). The court is to be
5 "'most deferential'" when the agency is "'making predictions,
6 within its [area of] special expertise, at the frontiers of
7 science.'" Id. (citing Forest Guardians v. U.S. Forest Serv., 329
8 F.3d 1089, 1099 (9th Cir. 2003)). In that role, a reviewing court
9 is not to entertain a "battle of the experts" when plaintiffs
10 proffer expert testimony to set against the agency's professional
11 judgment. Id. at 1000. "When specialists express conflicting
12 views, an agency must have discretion to rely on the reasonable
13 opinions of its own qualified experts even if, as an original
14 matter, a court might find contrary views more persuasive." Id.
15 Ultimately, the reviewing court must:

16 look to the evidence the [the agency] has provided to support
17 its conclusions, along with other materials in the
18 record, to ensure the [the agency] has not, . . . relied on
19 factors which Congress has not intended it to consider,
20 entirely failed to consider an important aspect of the
21 problem, offered an explanation for its decision that
22 runs counter to the evidence before the agency, or [an
23 explanation that] is so implausible that it could not be
24 ascribed to a difference in view or the product of agency
25 expertise.

26 Id. at 993 (internal quotations omitted).

27 As a "non-scientist," the court cannot impose bright-line
28 rules on the agency regarding particular means that it must take
in every case to show compliance with NEPA's or the Wilderness

29 ., and orde[r] the agency to explain every possible scientific
uncertainty." Id. at 988. However, the court in McNair made
clear that this is not a role the court should play under APA
review. Id.

1 Act's requirements. See id. at 994-94. Rather, the "[the agency]
2 must support its conclusions that a project meets the [laws']
3 requirements . . . with studies that the agency, in its expertise,
4 deems reliable. The [agency] must explain the conclusions it has
5 drawn from its chosen methodology and the reasons it considers the
6 underlying evidence to be reliable." Id. at 994. The court may
7 conclude that an agency acts arbitrarily and capriciously only
8 when the record "plainly demonstrates that the [agency] made a
9 clear error in judgment" in concluding that a project meets the
10 requirements of NEPA or the Wilderness Act. Id.

11 **C. Injunctive Relief**

12 After having shown success on the merits of a claim, to be
13 entitled to permanent injunctive relief, a plaintiff must
14 establish the following: (1) the likelihood of irreparable
15 injury;²¹ (2) that remedies available at law, such as monetary
16 damages, are inadequate to compensate for that injury; (3) that,
17 considering the balance of hardships between the plaintiff and
18 defendant, a remedy in equity is warranted; and (4) that the
19 public interest would not be disserved by a permanent injunction.
20 Sierra Forest Legacy v. Sherman, No. 09-17796, 2011 WL 2041149, at
21 *16 (9th Cir. May 26, 2011)

23 ²¹ In Winter, the United States Supreme Court made clear
24 that even where a plaintiff has shown a strong likelihood of
25 success or success on the merits of its claims, the plaintiff
26 still must show a likelihood of irreparable harm--the mere
27 possibility of irreparable harm is insufficient. Winter v. NRDC,
28 129 S.Ct. 365, 375-76 (holding that "[i]ssuance of a preliminary
injunction based only on a possibility of irreparable harm is
inconsistent with [the Court's] characterization of injunctive
relief as an extraordinary remedy that may only be awarded upon a
clear showing that the plaintiff is entitled to such relief").

ANALYSIS

A. Success on the Merits

1. NEPA

NEPA mandates that federal agencies prepare a detailed Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). These statements must include a description and analysis of the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the action is implemented, alternatives to the proposed action, the relationship between short-term uses and long-term productivity, and any irreversible or irretrievable commitment of resources that would be involved if the action were to be implemented. Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153 (9th Cir. 2006). "In short, NEPA requires that a federal agency 'consider every significant aspect of the environmental impact of a proposed action' and 'inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" Id. (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)).

NEPA does not any contain substantive environmental standards but instead only establishes procedural requirements to ensure that agencies take a "hard look" at the environmental impacts of their actions. Earth Island, 442 F.3d at 1154. "A hard look includes 'considering all foreseeable direct and indirect impacts.'" Id. at 1159. A hard look also includes "a discussion of adverse impacts that does not improperly minimize negative side effects." Id. at 1159. The Forest Service, therefore, must

1 undertake a thorough environmental analysis before concluding that
2 no significant environmental impact exists." Id. Ultimately, in
3 reviewing the adequacy of an EIS, the Ninth Circuit applies the
4 "rule of reason" standard, "which requires 'a pragmatic judgment
5 whether the EIS's form, content and preparation foster both
6 informed decision-making and informed public participation.'" Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953,
7 960 (9th Cir. 2005).

8
9 Here, plaintiffs make four central arguments for why
10 defendants violated NEPA in the preparation of the EIR/EIS:
11 (1) defendants failed to perform feasible studies to consider
12 effects on: (a) aquatic invertebrates; and (b) barriers to
13 upstream migration; (2) defendants failed to rigorously explore
14 and evaluate a physical removal alternative; (3) the PCT recovery
15 criteria are not based on accurate scientific data;
16 (4) defendants failed to fully analyze and disclose the effects of
17 rotenone and potassium permanganate, including: (a) how dangerous
18 rotenone is; (b) the impacts of cube resins; and (c) the different
19 forms of treatment. The court briefly addresses each of these
20 arguments in turn below.²²

21
22
23
24 ²² While the parties spent the majority of their papers
25 discussing NEPA, as the court made clear at the hearing, in its
26 view, the heart of this dispute lies in the Wilderness Act.
27 While plaintiffs raise a number of detailed arguments under NEPA,
28 those arguments are easily resolved in defendants' favor by
application of the governing standards which mandate that this
court defer to the Agencies' decisions absent a *clear error* in
judgment. For reasons which can be succinctly stated, no such
clear errors in judgment have been shown by plaintiffs in this
case.

1 **a. Feasible Studies**

2 **1. Aquatic invertebrates**

3 Plaintiffs contend the Agencies violated NEPA by failing to
4 conduct a study to rule out the possibility that rare and endemic
5 species of benthic macroinvertebrates (aquatic invertebrates)
6 exist in the stretch of Silver King Creek between Llewellyn Falls
7 and Silver Canyon Creek that may be extirpated by the application
8 of rotenone. Via their expert Nancy Erman's declaration,
9 plaintiffs provide evidence that species-level studies of
10 macroinvertebrates have been conducted for aquatic insects.
11 Plaintiffs maintain that endemic species of aquatic invertebrates,
12 including stoneflies and caddisflies have been identified through
13 species surveys in other locations in the Sierra Nevada Mountains.
14 (UF #146.) Erman also attests that a reasonable inventory of
15 macroinvertebrate species in the Silver King Creek watershed could
16 be feasibly conducted in two to three years. (Erman Decl., ¶s
17 11-16.) According to plaintiffs, the absence of species studies
18 for the Project area results in a violation because NEPA
19 regulations state that when information relevant to a reasonably
20 foreseeable significant impact is incomplete, the agency shall
21 include complete information in the EIS. 40 C.F.R. § 1502.22(a).²³

23 ²³ Contrary to plaintiffs' argument, the court did not
24 previously rule on this issue in its 2005 order granting
25 plaintiffs a preliminary injunction. While the court noted that
26 "there has not been any studies to confirm" whether or not rare
27 and endemic macroinvertebrates exist in the Silver King Creek
28 project area, the court did not hold that the Agencies had
violated NEPA by failing to conduct a study to rule out the
possibility that rare and endemic species of aquatic
invertebrates exist in the project area. Californians for
Alternatives to Toxics v. Troyer, 2005 WL 2105343 (E.D. Cal. Aug.
31, 2005).

1 Contrary to plaintiffs' suggestions, "NEPA does not require
2 the government to do the impractical." Inland Empire Pub. Lands
3 Council v. US Forest Service, 88 F.3d 754, 764 (9th Cir. 1996).
4 As noted by the Supreme Court, "[p]ractical considerations of
5 feasibility might well necessitate restricting the scope of
6 comprehensive statements." Kleppe v. Sierra Club, 427 U.S. 390,
7 414 (1976). Ultimately, "the existence of uncertainty does not
8 preclude the agency from taking action, so long as that
9 uncertainty has been identified." Sierra Nev. Forest Prot.
10 Campaign v. Rey, 573 F. Supp. 2d 1316, 1345 (E.D. Cal. 2008),
11 aff'd 2011 WL 2041149 at *9-15 (9th Cir. May 26, 2011). See also
12 Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280
13 (9th Cir. 1973) (holding "If we were to impose a requirement that
14 an impact statement can never to be prepared until all relevant
15 environmental effects were known, it is doubtful that any project
16 could ever be initiated.") The Ninth Circuit has stated further:
17 "It would suffice if the statement pointed out this deficiency.
18 The decisionmakers could then determine whether any purpose would
19 be served in delaying the project while awaiting the development
20 of such criteria." Id. at 1281 n.11; Sierra Club v. Sigler, 695
21 F.2d 957, 970 (5th Cir. 1983) ("Notably, the unavailability of
22 information, even if it hinders NEPA's 'full disclosure'
23 requirement, should not be permitted to halt all government
24 action.")

25 In this case, the Agencies complied with NEPA by: First,
26 gathering and analyzing the available and substantial data
27 regarding the Project's effects on aquatic invertebrates (AR
28 260-272; AR 33648-33917). Contrary to plaintiffs' assertion, the

1 Agencies have performed extensive aquatic invertebrate sampling
2 and community characterization in Silver King Creek in preparation
3 for the Project; historic macroinvertebrate data were collected in
4 1977, 1978, 1983, 1984, 1987, and 1991 through 1996. (AR 248.) In
5 addition, in preparation for this restoration project, the
6 Agencies conducted annual monitoring of Silver King Creek aquatic
7 invertebrates from 2003 through 2006. Id. The sampling design
8 was modified by the Forest Service in 2007 to collect as many
9 different kinds of invertebrates living at the site as possible,
10 and data was collected in 2007 and 2008 using this modified
11 sampling design and will continue following completion of the
12 restoration project. Id. The potential effects of rotenone in
13 Silver King Creek on macroinvertebrates were then assessed by
14 reviewing published studies and analyzing all available data
15 (historic and recent) from Silver King Creek where rotenone has
16 been used in various treatments over the last forty years. (AR
17 248, 540-815 ["Analysis of the Effects of Rotenone on Aquatic
18 Invertebrates"].) Aquatic invertebrate sampling is currently
19 being conducted in accordance with the guidelines set forth in the
20 peer-reviewed Aquatic Invertebrate Interagency Monitoring Plan
21 contained in Appendix E of the Final EIR/EIS. (AR 818-869.)
22 Thus, as properly concluded in the EIR/EIS, the Agencies have
23 conducted extensive macroinvertebrate studies over more than 30
24 years in Silver King Creek (including the ongoing study) and
25 post-treatment monitoring of macroinvertebrates would continue.

26 Second, the Agencies disclosed the above effects in the
27 EIR/EIS (AR 242-251, 260-272).

28

1 Third, the Agencies acknowledged the possibility that,
2 although unlikely and despite the fact that no endemic
3 macroinvertebrate taxa have been found to date in the Silver King
4 Creek Watershed, the Project could result in the temporary or
5 permanent loss of rare species that have not been identified or
6 described in the stretch of Silver King Creek between Llewellyn
7 Falls and Silver King Canyon, (AR 245, 247, 270.)

8 Fourth, they explained that a species-level survey of aquatic
9 invertebrates was not available and articulated why conducting
10 such a survey was not feasible. (AR 242-251.) According to
11 defendants, a species inventory is infeasible because: (1) due to
12 the lack of existing inventory data, a complete inventory of
13 aquatic invertebrates would be necessary, requiring an intensive
14 effort beyond the scope of the Project (AR 245-46);²⁴ (2) the state
15 of the art of benthic invertebrate taxonomy is not sufficiently
16 advanced to allow identification to the species level (AR 246);
17 (3) an inventory would require sampling at multiple stations over
18 different seasons and across multiple years and as such obtaining
19 this information is beyond the scope of the Project (Id.); and (4)
20 even a complete species inventory may not determine if a species,
21 which is absent after a rotenone treatment, was actually absent or
22 whether it was missing during the sampling. (AR 247.)

23
24
25 ²⁴ A study included in the EIR/EIS reported that there
26 have been no complete inventories of invertebrates in any body of
27 freshwater worldwide, much less Silver King Creek. (AR 246, 881.)
28 The EIR/EIS reported further that a complete inventory has been
attempted at only a few creeks in the world (e.g., Breitenback
Stream in German) and after many years of collection, new species
continue to be found. (AR 246.)

1 While plaintiffs disagree with certain of the Agencies'
2 scientific findings and offer expert testimony in rebuttal, under
3 NEPA, a reviewing court is not to entertain a "battle of the
4 experts" when plaintiffs proffer expert testimony to set against
5 the agency's professional judgment. McNair, 537 F.3d at 1000.
6 "When specialists express conflicting views, an agency must have
7 discretion to rely on the reasonable opinions of its own qualified
8 experts even if, as an original matter, a court might find
9 contrary views more persuasive." Id. Ultimately, the reviewing
10 court must not itself "act as a panel of scientists that instructs
11 the Frost Service how to validate its hypotheses . . . , [how to
12 choose] among scientific studies . . . , [or] orde[r] the agency
13 to explain every possible scientific uncertainty." Id. at 998.
14 The proper role of the court is "simply to ensure that the Forest
15 Service made no 'clear error of judgment' that would render its
16 action 'arbitrary and capricious.'" Id. at 993. No such clear
17 error in judgment is present in this case.

18 **2. Barriers to upstream mitigation**

19 Plaintiffs contend the Agencies failed to establish the
20 existence of a barrier to upstream fish passage at Silver King
21 Canyon. Plaintiffs assert the Agencies have presumed a barrier
22 exists when no evidence exists of an actual barrier. Indeed,
23 plaintiffs state that in 1994 the Agencies had taken the position
24 that the barriers were only "potential" (AR 33247), and the later
25 studies relied on by the Agencies were conducted in autumn when
26 flows in the Silver King Creek were minimal and the efficacy of
27 the presumed barriers was optimal. Via their expert Don Erman,
28 plaintiffs argue that field visits solely at low-flow times of the

1 year are not a scientifically appropriate way to measure whether
2 impassability exists. (D. Erman Decl., ¶ 7.) Plaintiffs contend
3 the Agencies could have easily conducted studies that would
4 measure dimensions and hydraulic features of the presumed barriers
5 at a variety of streamflows, instead of just viewing falls at low
6 water, to determine the efficacy of any barrier, but they failed
7 to do so. (Id. at ¶s 3-5.) According to plaintiffs' expert, who
8 visited the site and reviewed video and photos of the creek at
9 high flows during the spring, the presumed barriers may be greatly
10 changed at the exact time when rainbow trout, Lahontan cutthroat
11 trout or hybrids are moving upstream to spawn. (Id. at ¶ 10-11,
12 14.) Absent these types of studies, plaintiffs argue the EIR/EIS
13 fails to provide high quality information or accurate scientific
14 data to support the determination that there are secure, permanent
15 barriers to upstream fish migration.

16 Plaintiffs' arguments are unavailing. Here, the Agencies
17 adequately addressed whether the barriers in Silver King Canyon
18 are impassable to fish swimming upstream and responded to
19 reasonable opposing views. In determining that the barriers were
20 effective, the Agencies relied, inter alia, on: (1) an inspection
21 and assessment of the barrier by an Associate Fishery Biologist
22 for the California Department of Fish and Game's Wild Trout
23 Management in 1994 (AR 6571); (2) an inspection and assessment of
24 the barrier by the California Department of Fish and Game's Senior
25 Hydraulic Engineer in 2000 (AR 15101-15102);²⁵ and (3) a study by
26

27 ²⁵ The engineer noted that the primary feature of the
28 barrier is a waterfall that has been created by a huge boulder
(20 feet or more) that was deposited in the channel. The boulder
is surrounded by other large boulder streambed features and

1 the California Department of Fish and Game in 2009 (which was
2 commissioned to respond to various comments on the 2009 Draft
3 EIR/EIS) of the leaping capability of a 14-inch adult fish (even
4 though the largest rainbow trout captured during a fish size
5 distribution analysis in Silver King Creek in 2006 was 10.2 inches
6 long) (AR 16248).²⁶

7 Moreover, contrary to plaintiffs' contention that the
8 Agencies failed to consider the effectiveness of the barrier under
9 high flow conditions, the California Department of Fish and Game's
10 Senior Hydraulic Engineer stated: "Under high flow conditions, the
11 vertical magnitude of the barriers is reduced, but, due to the
12 narrowness of the gorge and the steepness of the stream channel,
13 it is my opinion that the excessive air entrainment and turbulence
14 in the flowing stream will continue to prevent fish from moving
15 upstream through the barrier reach." (AR 15102.) He concluded by
16 acknowledging that there may be a remote chance that the right
17 fish, at the right place, at the right flow, might get lucky and
18 pick its way upstream, but stated: "I think this would be a very
19 remote chance." (AR 15102).

20 _____
21 bedrock canyon walls. "The result is a complex waterfall which
22 drops approximately 10 feet vertically on the left side of the
23 main boulder and cascades through a tightly spaced series of
24 smaller drops around the right side of the boulder, over a
25 distance of 20 to 30 feet. (Id. at AR 15101.) Two smaller, yet
26 significant, falls/barriers are located downstream. The engineer
27 stated that, after viewing the primary falls barrier and the
28 associated smaller barriers, his conclusion was that "these
features most likely constitute a total barrier to fish passage."
Id.

²⁶ This study concluded that although they could not
definitively state that the rainbow trout (who have the greatest
capacity for leaping falls of any migratory salmonid) could never
pass this series of barriers, "the chance of this occurring should
be considered removed." (AR 16248.)

1 The Agencies also acknowledged that not all of the commentors
2 agreed with the Agencies' determination that impassible barriers
3 to fish passage exist in Silver King Canyon, but explained the
4 methodology and reasons behind their determination that such
5 barriers do in fact exist.

6 This is all that NEPA requires of the Agencies. See Earth
7 Island Inst. v. US Forest Servs., 351 F.3d 1291, 1301 (9th Cir.
8 2003) ("[An] agency is entitled to wide discretion in assessing
9 the scientific evidence, so long as it takes a hard look at the
10 issues and responds to reasonable opposing viewpoints."); Inland
11 Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir.
12 1993) ("We defer to agency expertise on questions of methodology
13 unless the agency has completely failed to address some factor.");
14 Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)
15 (stating that the court must defer to the findings made by the
16 agency relying on reasonable opinions of the agency's experts even
17 if, as an original matter, the court may find contrary views more
18 persuasive).²⁷

19 **b. Evaluation of a Physical Removal Alternative**

20 Plaintiffs contend the agencies failed to rigorously explore
21 and evaluate a physical removal alternative in the EIR/EIS and
22 point to two projects (the USFS's Lake Tahoe Basin Management
23 Unit's brook trout eradication program and a program within the
24

25 ²⁷ Defendants alternatively asserted that plaintiffs'
26 barrier arguments raised issues beyond the scope of NEPA.
27 However, here, plaintiffs contend that because adequate studies
28 of the alleged barriers were not conducted, the EIR/EIS fails to
provide accurate scientific data to support the Agencies'
conclusion that secure, permanent barriers exist to upstream fish
migration. This is an appropriate argument under NEPA.

1 Sequoia-Kings Canyon National Park) which they contend demonstrate
2 that removal of fish can be accomplished using entirely physical
3 means.

4 Contrary to plaintiffs' argument, the Agencies addressed the
5 Lake Tahoe and Sequoia-Kings projects in the EIR/EIS and their
6 RODs and explained why the physical removal methods used in those
7 projects would not be successful in Silver King Creek. (AR 12,
8 883-85, 916-17.) The Lake Tahoe brook trout eradication program
9 employed gill nets in several small lakes and electrofishing
10 methods in approximately 10 miles of stream in the Upper Truckee
11 River watershed. The Agencies addressed the program in the
12 EIR/EIS and explained why the methods used in that program will
13 not work in the Silver King Creek project area. More
14 specifically, the Agencies explained that electrofishing has been
15 most effectively used where, as is the case in the Upper Truckee
16 River, the project goal is the control of a competing non-native
17 species (as is the case in the Upper Truckee River), rather than
18 the eradication of hybridizing non-native species (as is the case
19 in Silver King Creek). (AR 883-84.) The Agencies emphasized that
20 when native species coexist with competing or predatory species,
21 reduction and suppression of the non-native species may be a
22 management option because reducing the population of the
23 non-native species decreases their ability to suppress the native
24 species. (AR 883.) By contrast, when native species coexist with
25 a hybridizing non-native species, complete eradication is required
26 because if only a few hybridizing individuals are left in the
27 population, they can still reproduce with the native species and
28 all offspring will be hybrids, which perpetuates the problem. (AR

1 883.)

2 The Agencies also acknowledged that physical removal has been
3 shown to be sometimes effective in shallow, low-gradient streams
4 with few undercut banks and lacking habitat complexity and, for
5 that reason, manual removal has been tentatively successful in the
6 Upper Truckee River watershed. (AR 916.) By contrast, the project
7 area in Silver King Creek is a complex high-gradient system with
8 large boulders, cobbles, deep pools and large wood debris. (AR
9 916-17, 12, 885.)

10 Further, the Agencies explained that numerous barriers in the
11 Upper Truckee River allow biologists to treat short sections of
12 stream without brook trout re-invading. Silver King Creek, by
13 contrast, does not have barriers within the treatment area except
14 for Llewellyn Falls and the series of barriers in Silver King
15 Canyon. (AR 916-17, 12.) Moreover, while plaintiffs characterize
16 the Agencies' determination that physically removing non-native
17 fish from the Silver King Creek could take more than 10 years as
18 "hyberbole," the very project plaintiffs cite as evidence of the
19 effectiveness of physical removal is estimated to take 15 years to
20 complete. (AR 884.) ("The LTBMU estimates that it may take 15
21 years to eradicate non-native fish from their proposed project
22 area.").

23 As for the Sequoia-Kings project, the USFWS's ROD addresses
24 this Project and contrasts the efforts in Sequoia-Kings Canyon
25 National Parks by noting that the streams that were successfully
26 eradicated there are short in length, small in width, have
27 effective downstream barriers which prevent fish from re-invading,
28 and all but one are ephemeral. (AR 12.)

1 Ultimately, the Agencies rigorously addressed the advantages
2 and disadvantages of using physical means of removing non-native
3 fish in the Project area and came to a reasoned conclusion that,
4 while electrofishing and other physical methods are a legitimate
5 way to eradicate non-native fish under certain circumstances,
6 these conditions do not exist in the Silver King Creek project
7 area. (AR 12, 880.) NEPA requires no more. See Center for
8 Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 642
9 (9th Cir. 2010) (stating that under NEPA, the agency is to
10 rigorously explore and objectively evaluate *reasonable*
11 alternatives).

12 **c. PCT Recovery Criteria**

13 Plaintiffs contend the 2004 Revised Pauite Cutthroat Trout
14 Recovery Plan arbitrarily and capriciously changed the standard
15 for what it means to "recover" PCT from the standard set forth in
16 the 1985 Recovery Plan. Defendants are correct that the court
17 need not reach the substantive merits of this claim as it raises
18 an issue beyond the scope of NEPA review. Plaintiffs are asking
19 the court to second-guess the wisdom of the Agencies' decision to
20 engage in the Project in the first place; they contend the Project
21 is unnecessary because the 2004 Plan incorrectly determined that
22 the restoration of the PCT to its historic habitat in Silver King
23 Creek is required. NEPA requires that agencies take a "hard look"
24 at the environmental consequences of a project. It does not
25 provide a vehicle to challenge the underlying Project itself.
26 Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th
27 Cir. 2000). NEPA exists to "ensure a process, not to ensure any
28 result." Inland Empire Pub. Lands Council, 88 F.3d at 758.

1 Plaintiffs' challenge to the 2004 Plan's recovery criteria is not
2 cognizable under NEPA.

3 **d. Effects of Rotenone**

4 Plaintiffs first assert the EIR/EIS fails to take a "hard
5 look" at the dangerous, ecological effects of rotenone because:
6 (1) the Agencies ignored a comment that noted the existence of 352
7 studies linking rotenone and Parkinson's disease; plaintiffs
8 maintain that the EIR/EIS does not reveal that the Agencies
9 "analyzed and disclosed" these studies; and (2) plaintiffs also
10 contend that the Agencies failed to disclose and evaluate the
11 effects of the potassium permanganate application in Lake Davis,
12 which plaintiffs maintain is a "prime example of [defendants]
13 inability to get it right."

14 Plaintiffs' contentions are without merit. The ecological
15 effects of rotenone were exhaustively analyzed in a
16 Screening-Level Ecological and Human Health Risk Assessment
17 conducted in 2010 (Appx. C to EIR/EIS) and fully disclosed to the
18 public in Section 5.4 of the EIR/EIS. (AR 468-538.) That
19 Assessment includes an analysis of the potential hazards of
20 rotenone, including an assessment of the environmental fate of the
21 compounds, considering their partitioning within the environment
22 and the rates and mechanisms by which the compounds naturally
23 biodegrade so that they do not persist in the environment over
24 long periods. The Agencies also properly relied on the EPA's
25 human health risk assessment and ecological risk assessment which
26 concluded that the "currently registered uses of rotenone will not
27 pose unreasonable risks or adverse effects to humans or the
28 environment if the requirements for registration" are followed.

1 (AR 30701.)

2 Also, contrary to plaintiffs' suggestions, the EIR/EIS
3 addressed public comments expressing concern about a possible
4 connection with rotenone use and Parkinson's disease. For
5 example, the Agencies acknowledged an Emory University study that
6 had found that rotenone produced Parkinson's-like anatomical,
7 neurochemical and behavioral features in some laboratory rats when
8 administered chronically and intravenously into the right jugular
9 vein for 5 weeks. (AR 318, 7783-88.) However, the EIR/EIS noted
10 that the study was not designed to establish thresholds of human
11 exposure or to evaluate human health effects from
12 environmentally-relevant pathways for exposure to rotenone. (AR
13 924). Thus, the Agencies concluded that the study did not show a
14 cause and effect relationship between rotenone exposure and
15 Parkinson's disease. Moreover, the Ninth Circuit has recognized
16 that NEPA does not require an agency to set forth at length all of
17 the views for which it disagrees; rather, it must only supply a
18 reasoned basis for the views it announces. See California v.
19 Block, 690 F.2d 753, 773 (9th Cir. 1982).

20 Finally, the EIR/EIS adequately disclosed the previous
21 problems at Lake Davis and described the improved methods that
22 will be used in this Project. The EIR/EIS acknowledged that
23 excessive doses of potassium permanganate occurred in 1997 at Lake
24 Davis, following a rotenone treatment. The overdosing resulted in
25 unintentional fish kills in the area. (AR 319.) However, the
26 EIR/EIS concluded that the Agencies do not believe that will
27 happen in this project area because they will employ monitoring
28 methodologies as outlined in Parmener and Fujimura (1995) and

1 further refined by Fujimura (2006) that have greater precision for
2 measuring potassium permanganate. (AR 319, 19397-19402,
3 14821-14833.) The USFWS's ROD also discussed the treatment of
4 Lake Davis, stating that those treatments were conducted using
5 primarily spray application while this Project will be conducted
6 primarily through the use of controlled drip stations that will be
7 frequently evaluated via volumetric measuring which is more likely
8 to yield uniform concentrations than the spray treatment method
9 used in Lake Davis. (AR 16.) Plaintiffs cannot establish a NEPA
10 violation based on previous mistakes. The Agencies acknowledged
11 the past errors and addressed how they would attempt to avoid the
12 same mistakes in this Project.

13 Next, plaintiffs contend that the Agencies failed to discuss
14 the full impacts of "cube resins." The Agencies authorized the
15 use of CFT Legumine, which has as its active poisons 5% rotenone
16 and 5% "other cube resins." According to plaintiffs, cube resins
17 may include toxic substances such as deguelin and tephrosin, which
18 can interfere with mitochondrial functioning.

19 While plaintiffs may not agree with the Agencies'
20 conclusions, there was not a failure to consider this issue.
21 The EIR/EIS disclosed the use of cube resins and described that
22 while the full extent of the potential toxicity is unknown (AR
23 507-08), the relevant science supported a finding that the resins
24 would not substantially affect the toxicity of the rotenone
25 application. (Id.) ("toxicity testing with formulated end
26 products suggests that, in general, co-formulants do not
27 substantially affect the toxicity of rotenone based on reported
28 distributions of acute 96 hr LC50 values among different species

1 (USEPA).") Thus, plaintiffs likewise cannot show a violation of
2 NEPA on this basis.

3 Finally, plaintiffs challenge the EIR/EIS' disclosure that
4 gel or sand matrices may be used to apply rotenone on small seeps.
5 Plaintiffs contend that the EPA has not approved the use of gel or
6 sand matrices as a method for applying rotenone and the CFT
7 Legumine label does not include application by gel packs.

8 Plaintiffs' argument is unavailing. The Federal Insecticide,
9 Fungicide and Rodenticide Act permits any method of application
10 that is "not prohibited by the labeling unless the labeling
11 specifically states that the product may be applied only by the
12 methods specified on the labeling." 7 U.S.C. § 136 (ee). Here,
13 the labeling does not prohibit this form of application.

14 Moreover, plaintiffs have not pointed to any evidence suggesting
15 that the application of rotenone by gel packs or sand matrices
16 will have any different environmental impacts than application of
17 rotenone by drip stations or hand spraying. The EIR/EIS disclosed
18 this potential form of application and concluded that regardless
19 of the form of application, the procedures will be supervised by
20 licensed applicators and in adherence to safety precautions
21 identified on the product label. Thus, plaintiff also cannot show
22 a NEPA violation on this basis.

23 **2. Wilderness Act**

24 **a. Standard of Review**

25 The APA review standard applies to agency decisions made
26 under Wilderness Act authority. See Wilderness Society v. United
27 States Fish and Wildlife Service, 353 F.3d 1051, 1059 (9th Cir.
28 2003). Under such review of federal administrative

1 interpretations of the Wilderness Act, courts use the two-step
2 test set forth by the United States Supreme Court in Chevron, Inc.
3 v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44
4 (1984). Under the first step, if the intent of Congress is clear
5 from the plain meaning of the Act, the court must give effect to
6 the unambiguously expressed intent of Congress. Wilderness
7 Society, 353 F.3d at 1059 (quoting Chevron, 467 U.S. at 842-43).
8 Under the second step, if the statute is silent or ambiguous with
9 respect to the issue at hand, "the review must defer to the agency
10 so long as the 'agency's answer is based on a permissible
11 construction of the statute.' In this case an agency's
12 interpretation of the statute will be permissible, unless
13 arbitrary, capricious, or manifestly contrary to the statute."
14 Id. (quoting Chevron, 467 U.S. at 844).

15 An administrative interpretation of a particular statutory
16 provision qualifies for Chevron deference when "it appears that
17 Congress delegated authority to the agency generally to make rules
18 carrying the force of law, *and* that the agency interpretation
19 claiming deference was promulgated in the exercise of that
20 authority." Id. (quoting United States v. Mead Corp., 533 U.S.
21 218, 226-27 (2001) (emphasis original). However, even if the
22 agency action "may be precedent in later transactions,
23 precedential value alone does not add up to Chevron entitlement."
24 Mead, 533 U.S. at 232. In the alternative, administrative
25 interpretations "not meeting these standards are entitled not to
26 deference, but to a lesser 'respect based on the persuasiveness of
27 the agency decision'"--the standard set forth in United States v.
28 Mead Corporation. Wilderness Society, 353 F.3d at 1067 (quoting

1 Mead, 533 U.S. at 228).

2 In applying the level of review under Mead, the court must
3 look to the process the agency used to arrive at its decision.
4 High Sierra Hikers Ass'n v. Blackwell, 390 F.3d, 630, 648 (9th
5 Cir. 2004) (citations omitted). Therefore, weight given to an
6 agency's interpretation is a function of that interpretation's
7 "thoroughness, rational validity, . . . consistency with prior and
8 subsequent pronouncement[,] . . . 'logic and expertness' of an
9 agency decision, the care used in reaching the decision, as well
10 as the formality of the process used." Wilderness Society, 353
11 F.3d at 1068.

12 In Wilderness Society, the Ninth Circuit determined that
13 Chevron deference did not apply to an agency interpretation that
14 would not "naturally bind more than the parties to the ruling."
15 Id. at 1067. Furthermore, in concluding that Chevron deference
16 was inappropriate, the court noted that the documentation of the
17 decision spoke "in terms specific to the . . . Project . . . and
18 [did] not attempt to draw broader conclusions regarding the
19 permissibility of this type of enterprise within wilderness.
20 Nothing . . . would bind the USFWS to permit a similar activity in
21 another wilderness." Id. at 1068.

22 Here also, USFS's approval of the EIR/EIS, to apply rotenone
23 and use a generator-powered auger within the Carson-Iceberg
24 Wilderness, does not meet the Chevron standard of judicial
25 deference. Instead, this agency decision is only entitled to
26 respect based on the persuasiveness of the Agency's justification.
27 Mead, 533 U.S. at 228; see High Sierra Hikers Ass'n v. United
28 States Forest Serv., 436 F. Supp. 2d. 1117, 1132 (E.D. Cal. 2006)

1 (determining that Chevron deference is not due a USFS ROD).
2 Similar to the Special Use Permit at issue in Wilderness Society,
3 the USFS ROD here approves the Project specifically and does not
4 bind the USFS to approve a similar project in the future. For
5 this reason, the ROD is only entitled to respect based on the
6 persuasiveness of the USFS's justification for its decision.

7 **b. Conservation of PCT as Purpose Consistent with the**
8 **Wilderness Act**

9 Under this standard of review, courts must first decide
10 whether the Agencies' determination in this case--that species
11 conservation is a purpose of the Wilderness Act--runs
12 unambiguously contrary to the language of the Act. Wilderness
13 Watch, Inc. v. U.S. Fish and Wildlife Serv., 629 F.3d 1024, 1032
14 (9th Cir. 2010). An agency charged with administering a
15 designated wilderness area is responsible for preserving its
16 wilderness character. High Sierra Hikers Ass'n, 390 F.3d at 645
17 (citing 16 U.S.C. § 1133(b)). In addition, the agency must
18 administer the area "for such other purposes for which it may have
19 been established as also to preserve its wilderness character."
20 Id. Specifically, the Act dedicates protected wilderness to
21 "public purposes of recreational, scenic, scientific, educational,
22 *conservation*, and historical uses." Id. (emphasis added).

23 In reference to this statutory language, the Ninth Circuit
24 has noted that even though the Act is intended to enshrine the
25 long-term preservation of wilderness areas as the ultimate goal,
26 these sometimes conflicting responsibilities makes the purpose of
27 the Act as to *conservation* ambiguous. Wilderness Watch, Inc., 629
28 F.3d at 1033 (quoting High Sierra Hikers Ass'n, 390 F.3d at 647-

1 48). Therefore, in the absence of a plain meaning for
2 conservation, this court must decide whether the conservation goal
3 at issue here is consistent with the Act based on "the
4 thoroughness evident in [the Agencies'] consideration, the
5 validity of [their] reasoning, [and the] consistency with earlier
6 and later pronouncements . . ." in accordance with the Mead
7 standard of review. 533 U.S. at 228 (citations omitted).

8 In Wilderness Watch, the Ninth Circuit determined that the
9 Act included the purpose of bighorn sheep conservation because
10 (1) the protection of bighorn sheep was one of the principal
11 motivations for President Roosevelt's designation of the Kofa Game
12 Range in 1939, and (2) the documentation of the proposal had
13 demonstrated consistency in recounting the history of the
14 conservation efforts on behalf of the bighorn sheep. 629 F.3d at
15 1035.

16 As in Wilderness Watch, in this case, the meaning of
17 conservation is not plainly stated within the Act and is,
18 therefore, ambiguous. 629 F.3d at 1033. Defendants argue that
19 recovery of the PCT is plainly consistent with the Wilderness Act
20 because it is supported by legislative intent, which plaintiffs do
21 not dispute. See H.R. Rep. 98-40 (Mar. 18, 1983). However, the
22 first step of Chevron analysis excludes any non-statutory material
23 from the determination of plain meaning. High Sierra Hikers
24 Ass'n, 436 F. Supp. 2d at 1130.

25 Regardless, the USFS's decision here is persuasive in showing
26 that restoration of the PCT to its native habitat is contained in
27 the conservation goal of the Wilderness Act, in accordance with
28 the Mead standard. The USFS's reasoning for complying with the

1 Act reflects consistency with both the 1985 and 2004 Plans, as
2 well as the limited legislative record for the designation of the
3 Carson-Iceburg Wilderness.

4 More specifically, in the EIR/EIS, the Agencies demonstrated
5 a consistent history of federal agencies implementing projects to
6 recover PCT in Silver King Creek. In fact, these efforts began
7 before the designation of the Carson-Iceburg Wilderness by the
8 California Wilderness Act of 1984, and have continued ever since.
9 (AR 181.) Second, although the PCT was not cited as a motivation
10 for the Carson-Iceburg Wilderness designation, Congress did
11 acknowledge in HR 98-40 that "certain wildlife management
12 activities, designed to enhance or restore fish populations, are
13 permissible and often desirable in wilderness areas to aid in
14 achieving the goal of preserving the wilderness character of the
15 area."²⁸ (Defs.' Opp'n and Cross-Mot. [Docket #54], filed May, 5
16 2011, at 33:10-13.) Third, although plaintiffs contend that the
17 historical, geographic distribution of the PCT is disputed and has
18 always been based on conjecture (UF #63), the USFWS has
19 consistently included the Project area (Llewellyn Falls downstream
20 to Silver King Canyon) in the PCT's presumed native habitat.²⁹ (AR
21 32855; 33246.)

22 Citing High Sierra Hikers Ass'n, plaintiffs contend that the
23 Project's benefits to recreational fishing "elevate recreational
24

25 ²⁸ Defendants represent this statement of intent as being
26 specific to the Carson-Iceburg Wilderness, but it applies
generally to the wilderness areas added through the legislation.

27 ²⁹ While the court acknowledges that early accounts of
28 Silver King Creek fish populations call into question whether PCT
were native to the creek above Llewellyn Falls, no accounts
dispute that PCT are endemic to the Project area. (AR 33246-49.)

1 activity over the long-term preservation of the wilderness
2 character of the land," and render it entirely contrary to the
3 Act. However, plaintiffs' reliance on High Sierra Hikers Ass'n is
4 inapposite as their argument fails to distinguish the overall goal
5 of this Project as opposed to the goal in High Sierra Hikers. 436
6 F. Supp. 2d at 1123-24. The sole purpose of the project in High
7 Sierra Hikers Ass'n was to maintain a local fishery that had been
8 developed when cattlemen stocked the project area with trout at
9 the beginning of the 20th century. Id. In contrast, the stated
10 purpose of the Project here, as represented in the USFS ROD is:
11 "to restore Paiute cutthroat trout to its historic range as stated
12 in the 2004 Revised Paiute Cutthroat Trout Recovery Plan (USFWS
13 2004), and thereby satisfy[] one critical Recovery Plan component
14 for delisting the species." (FS 5149.) Thus, unlike High Sierra
15 Hikers Ass'n, reestablishing a native species in a wilderness
16 area, independent of the means for reaching that goal, enhances
17 the primitive character of an ecosystem and serves a conservation
18 purpose (not a recreational purpose), permissible under the Act.

19 **c. The Wilderness Act's Exception for Motorized**
20 **Equipment that is "Necessary" to Meet the "Minimum**
21 **Requirements" for Conserving PCT.**

22 The Act prohibits use of motorized vehicles and equipment,
23 among other activities, subject only to one exception: "as
24 necessary to meet minimum requirements for the purpose of this
25 Chapter (including measures required in emergencies involving the
26 health and safety of persons within the area)." 16 U.S.C.
27 § 1133(c). Therefore, "[it] is clear that the statutory scheme
28 requires, among other things, that the Forest Service make a
finding of 'necessity' before authorizing [otherwise prohibited

1 activities] in wilderness areas." High Sierra Hikers Ass'n, 390
2 F.3d at 646 (citations omitted).

3 This prohibition is one of the strictest prohibitions in the
4 Act. See Wilderness Watch, 629 F.3d at 1040. "The limitation on
5 the Forest Service's discretion to authorize prohibited activities
6 only to the extent necessary flows directly out of the agency's
7 obligation under the Wilderness Act to protect and preserve
8 wilderness areas." High Sierra Hikers Ass'n, 390 F.3d at 647.

9 Indeed, various district courts in this circuit have concluded
10 that the overall language of § 1133, along with case authority,
11 imply that "when there is a conflict between maintaining the
12 primitive character of the area and between any other use [...,]
13 the general policy of maintaining the primitive character of the
14 area must be supreme." High Sierra Hikers Ass'n v. U.S. Forest
15 Serv., 436 F. Supp. 2d 1117, 1131 (E.D. Cal. 2006)(citing 36
16 C.F.R. § 293.2(c) ("wilderness values will be dominant to the
17 extent not limited by the Wilderness Act")); see also Wolf
18 Recovery Found. v. U.S. Forest Serv., 692 F. Supp. 2d 1264, 1268
19 (D. Idaho 2010) ("[t]o constitute administration of the area, the
20 activity must further the wilderness character of the area"
21 (citations omitted)); 16 U.S.C. § 1133(b).

22 However, the Ninth Circuit has recognized that ultimately:

23 the Wilderness Act requires a delicate balancing between
24 Congress' desire to maintain lands untouched by humans
25 and Congress' recognition that such an idealistic view is
subject to some practical limitations.

26 Wilderness Watch, 629 F.3d at 1033, 1039-40 (recognizing that
27 Congress "did not mandate that the Service preserve the wilderness
28 in a museum diorama, . . . [i]nstead, Congress stated that the

1 wilderness was to be preserved as wilderness and made accessible
2 to people, 'devoted to the public purposes of recreational,
3 scenic, scientific, educational, conservation, and historical
4 uses.'"); see also Wolf Recovery, 692 F. Supp. 2d at 1269 (the Act
5 "could have directed that the area remain entirely wild and
6 unmanaged, but it did not take that path"). In fact, the required
7 analysis for Wilderness Act compliance, described more fully
8 below, allows an agency to determine that another purpose
9 consistent with the Act is more important than maintaining
10 pristine wilderness, but in doing so the agency must make the
11 requisite findings. High Sierra Hikers Ass'n, 390 F.3d at 647
12 (holding that the Forest Service must balance many competing
13 interests when carrying out its charge to maintain wilderness
14 character of the land, while still serving the other purposes
15 designated by the Act).

16 In High Sierra Hikers Ass'n and Wilderness Watch, the Ninth
17 Circuit articulated two ways that the Forest Service can violate
18 the Wilderness Act in granting an exception to otherwise
19 prohibited activities under § 1133(c): First, the Service may
20 fail to make an adequately reasoned determination that the
21 activity is necessary to achieve a purpose consistent with the
22 Wilderness Act. "It is clear that the statutory scheme requires,
23 among other things, that the Forest Service make a finding of
24 'necessity' before authorizing [otherwise prohibited activities]
25 in wilderness areas." High Sierra Hikers Ass'n, 390 F.3d at 646
26 (citations omitted).

27 In Wilderness Watch, environmental plaintiffs claimed that
28 the USFWS violated the Wilderness Act by building two water tanks

1 within the Kofa National Wildlife Refuge and Wilderness for
2 declining populations of bighorn sheep. The Ninth Circuit found
3 that the USFS failed to explain why the construction of
4 structures, otherwise prohibited under § 1133(c), was necessary to
5 conserve bighorn sheep, even though the USFS's own documentation
6 suggested that many other strategies, not prohibited by the
7 Wilderness Act, could have met that same goal. 629 F.3d at 1037.
8 Although the USFS had described their reasons for deciding to
9 construct the two particular structures chosen, the agency did not
10 explain the underlying assumption that structures were necessary
11 at all. Id. at 1038.

12 Second, the Service may fail to explain why the extent of the
13 activity is necessary. A finding of necessity is required, but
14 not wholly sufficient, for allowing an otherwise prohibited
15 activity. The Agency must explain why the extent of the otherwise
16 prohibited activity is the necessary action as opposed to other
17 strategies that could have met the goal of conserving the target
18 species. Wilderness Watch, 629 F.3d at 1037. In explaining why
19 the proposed extent of the activity is necessary, the agency must
20 compare factors relevant to the decision in relation to each
21 other. High Sierra Hikers Ass'n, 390 F.3d at 647. Therefore, the
22 Ninth Circuit has held that if complying with the Act on one
23 factor will impede progress towards another factor, "the
24 administering agency must determine the most important value and
25 [justify] its decision to protect that value." High Sierra Hikers
26 Ass'n, 390 F.3d at 646.

27 In High Sierra Hikers Ass'n, environmental plaintiffs claimed
28 that the USFS had violated the Wilderness Act when it issued

1 commercial activity permits to packstock operations in wilderness
2 areas. The Ninth Circuit found that the decision to grant permits
3 in the face of documented damage resulting from overuse did not
4 have rational validity, because it failed to balance the competing
5 interests. In the Needs Assessment, the USFS examined
6 independently three topics related to the need for commercial
7 services: the types of activities for which commercial services
8 are needed, the extent to which current permits are being used,
9 and the amount of use the land can tolerate. In the Needs
10 Assessment, the USFS listed the trailheads showing damage from
11 overuse, but it did not take the next step to actually protect
12 those areas by lowering the allowed usage. "At best, when the
13 Forest Service simply continued preexisting permit levels, it
14 failed to balance the impact that level of commercial activity was
15 having on the wilderness character of the land." Id. at 647.
16 It was this 'ultimate interest' and 'overarching purpose' of the
17 Wilderness Act--to protect the Ansel Adams and John Muir
18 Wilderness Areas from degradation--that led the Ninth Circuit to
19 hold that the packstock permit decision violated 'the Forest
20 Service's statutory responsibility.'" River Runners for Wilderness
21 v. Martin, 593 F.3d 1064, 1077 (9th Cir. 2010) (quoting High
22 Sierra Hikers Ass'n, 390 F.3d. at 647-48).

23 Here, the USFS adequately reasoned that motorized equipment
24 was necessary to achieve conservation of the PCT. Although the
25 USFS misinterprets the standard in stating its overall conclusion
26 that the Project is necessary, the Agency provides enough
27 explanation for its decision throughout the Minimum Requirements
28 Decision Guide (the "Guide"), to show a reasoned finding of

1 necessity. Specifically, the USFS contends that § 1133(c)
2 provides an exception to this Project because of the necessity of
3 restoring PCT to its historic range. (FS 5051.) This assertion
4 is misplaced because the standard requires that the necessity lies
5 in the use of the otherwise prohibited activity, here the use of
6 motorized equipment, and not the merits of the proposed project.
7 The validity of the goal of restoring the PCT does not factor into
8 this analysis.

9 Regardless, the USFS embeds three reasons in its analysis of
10 why Alternative Two, the Proposed Action Alternative is necessary
11 to achieve recovery of the PCT. The USFS first reasons that a
12 gasoline-powered generator, used to apply rotenone and potassium
13 permanganate, is necessary because the alternative drip system
14 (proposed in Alternative 3) has proved unsuccessful for adequately
15 dissolving potassium permanganate in solution. (FS 5061.)
16 Improper application of potassium permanganate could extend the
17 habitat negatively impacted by rotenone. (Id.) The second reason
18 given is that non-chemical removal methods under Alternative Three
19 and Four would fail to eradicate small fish, and could have low
20 capture efficiency in a rocky stream environment, with deep pools,
21 undercut banks, and within stream vegetation and debris. (FS
22 5059.) Third, Alternative Two would greatly reduce the presence
23 of agency staff in the wilderness and the pack trips required to
24 transport people and materials. Alternative Three and Four would
25 require a 10-year effort to eradicate a majority of the non-native
26 species. (Id.) Alternatively, Alternative Two would be completed
27 within three years. (FS 5053.)

28

1 Plaintiffs argue that like in Wilderness Watch, the EIR/EIS
2 fails to rigorously analyze or consider Alternative Three, even
3 though there is a strong showing that Alternative Three would be
4 feasible, and would not violate the Act. However, unlike in
5 Wilderness Watch, in which the Ninth Circuit found that the USFWS
6 did not make an adequate finding of necessity because they "leaped
7 from the worthy goal of bighorn sheep conservation to the need for
8 additional water structures," 629 F.3d at 1038, here the USFS
9 provides three explicit reasons for proposing to use motorized
10 equipment to apply rotenone for this Project, and why other
11 alternatives would not meet the conservation goal.

12 However, while the Agencies justified the necessity of using
13 motorized equipment as opposed to other methods, they nonetheless
14 violated the Wilderness Act by failing to consider the potential
15 extinction of native invertebrate species as a factor relevant to
16 the decision of whether the *extent* of the project was necessary.
17 In determining whether the extent of Alternative Two was
18 necessary, the USFS considered (1) the effectiveness of the
19 alternative in achieving the conservation goal, (2) how many years
20 agency staff would be present in the wilderness, and (3) the
21 impact that the poison and motorized equipment will have on five
22 wilderness criteria, as relevant factors to that decision. (FS
23 5052-63). In fact, the Guide charts the impact of all four
24 project alternatives--specifically, whether they improve (denoted
25 by a *plus* symbol), or take away (denoted by a *minus* symbol) from
26 any of the five wilderness criterion. (FS 5064).

27 However, like in High Sierra Hikers Ass'n, the USFS violated
28 the Wilderness Act by failing to (1) balance competing values, (2)

1 determine the most important value, and (3) justify the decision
2 to protect that value. In High Sierra Hikers Ass'n, the USFS
3 failed to consider the damage caused by preexisting levels of
4 wilderness permitting. Here, the USFS failed to consider the
5 potential extinction of native invertebrate species. In
6 evaluating the impact to wilderness character, the USFS does *not*
7 *mention* in the Guide the potential for loss of other native
8 species (FS 5049-50), despite acknowledging in other sections of
9 the Guide that chemical treatment would reduce macroinvertebrate
10 abundance. (FS 5055.)

11 As a result of that failure, the Agencies charted
12 Alternative Two as having a net positive impact on the wilderness
13 character of the Carson-Iceburg Wilderness, based on the proposed
14 benefit of restoring PCT. (FS 5064.) This characterization led
15 to the final conclusion that the Project will create "improved
16 long term natural conditions of wilderness character through
17 restoration of a native species." (FS 5065.) But in fact,
18 complying with the Act to conserve PCT by implementing this
19 Project would *impede* progress towards preserving the overall
20 wilderness character. Despite the benefits gained from restoring
21 a PCT population, accounting for the potential loss of endemic
22 species would create a net, *negative* impact; the loss of primitive
23 species would depreciate the wilderness character of the Carson-
24 Iceburg Wilderness.

25 At oral argument, defendants' counsel argued for the first
26 time that the requisite balancing was performed by the Forest
27 Supervisor in the May 20, 2010 ROD approving the Project.
28

1 However, this document relies on the Guide (see FS 5163)³⁰ which
2 the court finds insufficient, for the reasons set forth above, and
3 thus, the ROD cannot suffice to meet the applicable standards
4 under the Act. Moreover, in relying on the ROD, defendants
5 improperly conflate NEPA with the Wilderness Act. While the
6 Forest Supervisor's review and ultimate approval of the Project is
7 a necessary step in order for permits to issue, that raises a
8 process issue which NEPA addresses. Indeed, NEPA is about
9 ensuring a particular process in the review of agency action
10 impacting the environment. Earth Island, 442 F.3d at 1154
11 (recognizing that NEPA does not contain substantive environmental
12 standards but instead establishes procedural requirements to
13 ensure that agencies take a hard look at the environmental impacts
14 of their actions). NEPA recognizes that at times, that process
15 considers practicalities, like the feasibility of conducting
16 certain studies. However, as the court indicated at the hearing,
17 the Wilderness Act is entirely separate from NEPA and must be
18 considered on its own. It contains broad, substantive statutory
19 mandates which depict pristine character not process.

20 As opposed to addressing process or practicalities, the
21 Wilderness Act sets forth lofty goals about maintaining the
22 naturalness of the wilderness. Indeed, Congress enacted the
23 Wilderness Act "to assure that an increasing population,
24 accompanied by expanding settlement and growing mechanization,
25 does not occupy and modify all areas within the United States and
26 its possessions, leaving no lands designated for preservation and
27

28 ³⁰ The Forest Supervisor stated her conclusion was supported by the "analysis within the [Guide]."

1 protection in their natural condition. 16 U.S.C. § 1131(a). The
2 Act established a National Wilderness Preservation System composed
3 of "wilderness areas" which Congress directed "shall be
4 administered for the use and enjoyment of the American people in
5 such manner as will leave them unimpaired for future use and
6 enjoyment as wilderness." Id. The Act defines wilderness "in
7 contrast with those areas where man and his own works dominate the
8 landscape, . . . as an area where the earth and its community of
9 life are untrammelled by man, where man himself is a visitor who
10 will not remain." Id. at § 1131(c).

11 It is against this backdrop that the court must evaluate the
12 Agencies' decision in this case. The geographic context of this
13 Project is highly significant. We are not considering the
14 application of rotenone in a *reservoir*, but rather a *stream* in the
15 Carson-Iceburg Wilderness, an unimpaired reference which would be
16 impacted over a two to three year period. If the Project is
17 successful, all living organisms within that eleven mile stretch
18 of stream would be eradicated.

19 Also, significantly, this is not a case where an imminent
20 risk of extinction exists. While defendants' counsel attempted to
21 argue that point at oral argument, *nowhere in defendants' papers*
22 did they argue, let alone, support this contention. The record
23 establishes only a "moderate degree of threat for extinction" (UF
24 #62), and defendants have not proffered any evidence to establish
25 that the PCT is at imminent risk if the Project does not proceed
26 now. At most, defendants cited, at the hearing, a 2008 report by
27 Moyle which concluded that the PCT have a high likelihood of
28 extinction in their native watershed within the next 50 years

1 without continued intense monitoring and management. However,
2 counsel conceded at oral argument that the Moyle report did not
3 address this Project in particular; rather, the report drew its
4 conclusions based on the general condition of the PCT. The Moyle
5 report does not establish that the PCT are at an imminent risk of
6 extinction, and defendants cite no other record evidence to
7 demonstrate such a risk.

8 In that regard, this case is wholly distinguishable from Wolf
9 Recovery heavily relied upon by defendants. There, the Idaho
10 district court found that the use of helicopters to collect data
11 on gray wolves in the Frank Church Wilderness was necessary to
12 meet the minimum requirements for the administration of the area.
13 In doing so, however, the court was careful to note that that
14 "case . . . present[ed] the most rare of circumstances. . .
15 [where] man [was] attempting to restore the wilderness character
16 of the area by returning the wolf [an endangered species]." Id.
17 at 1268. Ultimately, the court's decision to permit the
18 helicopter use rested on the conclusion that the wolf research was
19 "designed to aid the restoration of a specific aspect of the
20 wilderness character of the Frank Church Wilderness [namely, the
21 recovery of the wolves] that had earlier been destroyed by man."
22 Id. at 1270. The court also emphasized that the "collaring
23 project and its use of helicopters [was] sufficiently *limited* and
24 *focused* on restoring the wilderness character of the area." Id.
25 at 1269.

26 To the contrary, here, (1) the PCT is not an endangered
27 species; (2) defendants have not established an imminent risk to
28 the species should the Project not proceed; and (3) this Project

1 is not a transient intrusion, like in Wolf Recovery Foundation,
2 but rather a two to three year injection of rotenone to a
3 wilderness stream which will eradicate all living organisms within
4 the stream. Additionally, unlike Wolf Recovery Foundation, as
5 well as Wilderness Watch and High Sierra Hikers Ass'n, the
6 conservation efforts, in this case, on behalf of the PCT will be
7 taken at the expense of other sensitive, and possibly rare or
8 endemic, species. That fact is undisputed. Significantly, it
9 also distinguishes this case from any others the court has
10 reviewed. Indeed, the parties did not cite, nor is the court
11 aware of, any other case where a project was found to be compliant
12 with the Act's mandates despite the elevation of the interests of
13 one species over another. While the court does not agree with
14 plaintiffs' position that under the Wilderness Act, conservation
15 interests can never trump the preservation of wilderness
16 character³¹, the court does find that in order to do so, the
17 agencies must engage in a rigorous balancing of all relevant
18 interests.

19 In High Sierra Hikers Ass'n and Wilderness Watch, the Ninth
20 Circuit emphasized that if complying with the Act on one factor
21 will impede progress towards another factor, when deciding whether
22 the extent of the project is necessary, the Forest Service must
23 determine the most important value and justify a decision to
24 protect that value. See e.g. High Sierra Hikers Ass'n., 390 F.3d
25 at 646. That process involves a comparative and qualitative
26

27 ³¹ (or as plaintiffs' counsel argued at the hearing, an
28 agency can never play "species' favoritism," elevating the
interests of one species over another)

1 analysis where the variables are considered in relation to one
2 another and the interests at stake are weighed.

3 It is precisely that type of analysis that was not performed
4 in this case. The analysis is not contained within the Guide, and
5 even were the court to independently consider the substantive
6 findings of the Forest Supervisor's ROD, they too are

7 insufficient. Approving the Project, the Supervisor concluded:

8 "The short term negative effects to Wilderness are balanced by
9 restoration of a native species to its historic habitat within the
10 Carson-Iceburg Wilderness." (FS 5163.) However, like the Guide,
11 the ROD does not perform the requisite comparative and qualitative
12 analysis. While it does address more directly, and extensively,
13 than the Guide the potential for long-term loss of aquatic
14 invertebrates and the presence of rare and endemic species within
15 the area (FS 5157-5161), it does not balance the various interests
16 at stake, comparing them to one another, nor does it explain a
17 basis to elevate the PCT's interests over the other species at
18 risk. The conclusory analyses set forth in both the ROD and the
19 Guide are insufficient to met the Act's mandates.

20 At bottom, instead of choosing one competing value
21 (conservation of the PCT) over the other (preservation of the
22 wilderness character), the Agencies left native species, including
23 invertebrate, out of the balance, and thus, improperly concluded
24 that authorization of motorized equipment will comply with the Act
25 by achieving the purpose of preserving wilderness character.³²

26
27 ³² In so holding, however, the court does not imply that
28 the Agencies theoretically could not have complied with the Act
and still chosen to implement the Project through Alternative
Two. For example, the Agencies could have first recognized that

1 **B. Irreparable Injury**

2 In support of a finding of irreparable injury, plaintiffs
3 offer the following evidence: First, plaintiffs' expert Nancy
4 Erman declares that long-term impacts to non-target aquatic
5 invertebrates resulted from the last three-year long rotenone
6 poisoning of upper Silver King Creek, in 1991-93. Species
7 monitoring in 1996 still showed major impacts to invertebrates,
8 three years after agencies stopped treating the creek with
9 rotenone. (Decl. Of Nancy A. Erman [Docket #57-1], filed May 19,
10 2011, ¶ 4.) Erman emphasizes that the Agencies here propose to
11 apply rotenone with a concentration of 2 to 4.6 times the poison
12 that they used in the 1991-93 project. (Id. at ¶ 7.) Second,
13 Nancy Erman concurs with defendants' invertebrate experts that
14 results of three longer-term, more intensively sampled studies in
15 mountain streams suggest that while common invertebrate taxa will

16 _____
17 two Wilderness Act values, the preservation of wilderness
18 character and the conservation of species, were in direct
19 conflict. In other words, that in choosing the Proposed Action
20 Alternative, the Agencies would meet the goal of preserving
21 species but at the expense of degrading overall wilderness
22 character. Second, the Agencies could have recognized that the
23 likely mortality of sensitive invertebrate species is the source
24 of that conflict, as the elimination of any resident species will
25 degrade wilderness character. Third, the Agencies could have
26 provided evidence of the choice to elevate the pursuit of the
27 conservation value, despite the negative impacts to wilderness
28 character. A proper analysis would have discussed the threat to
the PCT and its ESA listing in comparison to (possibly) the
commonality of aquatic invertebrates in the Project area. Stated
differently, the requisite analysis would have evaluated the
significance of conserving a species like the PCT in relation to
avoiding the loss of potentially unlisted species.

But, this analysis was not performed in this case.
Instead, the Agencies classify restoration of PCT as a *wilderness*
benefit, and not a *conservation* benefit, without balancing the
negative impacts that the Project will have on wilderness
character. For this reason, the Agencies have violated the
Wilderness Act in approving implementation of the Project.

1 quickly re-colonize treated areas, rarer taxa may be eradicated
2 for a number of years or potentially forever. (Id. at ¶ 18.)
3 Third, although defendants assert that invertebrate diversity will
4 recover through re-colonization, Nancy Erman maintains that
5 upstream seeps and springs will not serve as macroinvertebrate
6 refugia for post-project re-colonization. (Id. at ¶ 26.) Because
7 springs have constant or near-constant temperatures, organisms
8 living in them will not survive downstream in the Project area,
9 where temperatures are variable. (Id.) In addition, Erman
10 asserts that any rare invertebrate taxa killed by poisoning would
11 not also populate upstream habitat, because rare species occupy
12 highly specific stream gradients. (Id. at ¶ 28.) Therefore, if
13 re-colonization occurred, only common taxa would re-inhabit the
14 Project area. (Id.) Fourth, Erman attests that loss of large
15 portions of emerging insects for several years during and
16 following the poisoning would be a major impact to riparian
17 animals in the area. (Id. at ¶ 29.) Emerging adult insects are a
18 major source of food for many terrestrial insects, spiders, birds,
19 amphibians, reptiles, and mammals. (Id.)

20 Via Nancy Erman's declaration, plaintiffs have demonstrated a
21 likelihood of irreparable harm should the Project proceed.
22 Significantly, in the EIR/EIS, the Agencies admit that rotenone
23 treatment will kill sensitive macroinvertebrate species: The
24 EIR/EIS found that the proposed application of rotenone would have
25 an adverse short-term effect on benthic macroinvertebrate
26 community composition through mortality of sensitive species. The
27 Agencies concluded that the rotenone treatment would have a
28 stronger effect on small, gilled species (stoneflies, caddisflies,

1 mayflies) that are abundant in Silver King Creek and are typical
2 of cold-water, mountain streams. (AR 270.) While the Agencies
3 contend that those populations will recover in the Project area
4 when upstream populations re-colonize the poisoned area, mortality
5 of sensitive species is *likely*. The question is whether the harm
6 that is likely to occur is irreparable. On that issue, plaintiffs
7 have met their burden of showing that recolonization will not
8 occur for some species because they cannot adapt to the Project
9 area habitat, leading to the conclusion that mortality of
10 sensitive species will likely be *irreparable*.

11 **C. Inadequacy of Monetary Damages**

12 Defendants do not dispute the well recognized principle that
13 "environmental injury, by its nature, can seldom be adequately
14 remedied by money damages." Amoco Prod. Co., 480 U.S. at 545;
15 Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2770 (2010).
16 As in most environmental cases, monetary damages will have no
17 value to plaintiffs if the asserted irreparable damage occurs as a
18 result of this Project. Enjoining the Project would be the only
19 appropriate remedy in this case.

20 **D. Balance of Equities and the Public Interest**

21 Here, the balance of equities tips in plaintiffs' favor and
22 issuance of an injunction is in the public interest. First, as
23 set forth above, there is no exigency. Defendants have not shown
24 that the PCT is in imminent threat of extinction. Indeed, the PCT
25 listing for recovery under the ESA indicates only a "moderate
26 degree of threat for extinction." (UF #62.) Moreover, while the
27 2004 Revised Plan concludes that if the PCT remain only in their
28 currently occupied habitat, they will be "highly vulnerable to

1 extinction," defendants have not quantified this risk in years.
2 (AR 33238.) Defendants' counsel conceded at oral argument that he
3 could not provide any citation to the record, providing a time
4 frame for which this Project must proceed in order to ensure the
5 PCT's conservation. As was the case in Californians for
6 Alternatives to Toxics v. Troyer, No. CIV-05-633-FCD-KJM, 2005 WL
7 2105343, at *2 (E.D. Cal. Aug. 31, 2005), defendants have not
8 produced any convincing evidence that absent implementation of the
9 Project this year or even in the next few years, the PCT would be
10 at a real risk of extinction. Defendants concede that six
11 populations of PCT inhabit eleven and one-half miles of Silver
12 King Creek, including above Llewellyn Falls, which provides some
13 additional protection for the survival of the species. (UF #33.)
14 Finally, defendants' argument that exigency arises from the
15 possibility of some catasphrophic event destroying the entire
16 existing population of PCT in Silver King Creek does not convey
17 immediacy. (AR 32852.) Such possibility always exists and is too
18 speculative to permit this Project to go forward.

19 Second, the public interest in protecting wilderness areas
20 weighs in favor of granting injunctive relief. Plaintiffs aptly
21 emphasize Congress' purpose in enacting the Wilderness Act: "to
22 secure for the American people of present and future generations
23 the benefits of an enduring resource of wilderness." 16 U.S.C. §
24 1131(a). The Ninth Circuit has repeatedly stressed the public
25 purpose behind the Act, which twice states its overarching purpose
26 that wilderness acres "shall be administered for the use and
27 enjoyment of the American people in such a manner as will leave
28 them unimpaired for future use and enjoyment as wilderness." High

1 Sierra Hikers Ass'n, 390 F.3d at 648 (citing 16 U.S.C. § 1131(a)).
2 The Ninth Circuit has specifically held that "because Congress has
3 recognized the public interest in maintaining these wilderness
4 areas largely unimpaired by human activity, the public interest
5 [generally] weighs in favor of equitable relief." Id. at 643.
6 The only competing public interest is that of restoring a native
7 fish species. But certainly, the public is not burdened if the
8 court enjoins this Project.

9 Accordingly, for these additional reasons, injunctive relief
10 is warranted in this case.

11 CONCLUSION

12 Plaintiffs' motion for summary judgment is GRANTED in part
13 and DENIED in part. Plaintiffs have not demonstrated a violation
14 of NEPA and therefore, their motion on that claim is DENIED.
15 However, plaintiffs have shown a violation of the Wilderness Act
16 because in choosing one competing value (the conservation of the
17 PCT) over the other (preservation of the wilderness character),
18 the Agencies left native invertebrates species out of the balance,
19 and thus improperly concluded that authorization of motorized
20 equipment will comply with the Act by achieving the purpose of
21 preserving wilderness character.

22 Having shown a violation of the Wilderness Act, plaintiffs
23 are entitled to a permanent injunction, enjoining implementation
24 of the Paiute Cutthroat Trout Restoration Project because: (1)
25 through the expert declaration of Nancy Erman, they have
26 demonstrated that the rotenone treatment will kill sensitive
27 macroinvertebrate species and that recolonization will not occur
28 for some species because they cannot adapt to the Project area

1 habitat; (2) the balance of equities tips in their favor as no
2 exigency exists to begin the Project now; and (3) the public
3 interest favors preservation of the unimpaired wilderness.

4 Accordingly, IT IS HEREBY ORDERED that defendants, and each
5 of them, and their respective agents, partners, employees,
6 contractors, assignees, successors, representatives, permittees
7 and all persons acting under authority from, in concert with, or
8 for them in any capacity, including in a volunteer capacity, are
9 enjoined from allowing to be conducted or conducting any component
10 of the Paiute Cutthroat Trout Restoration Project, including
11 specifically any application of rotenone formulations and
12 potassium permanganate to Silver King Creek and its tributaries
13 in the Carson-Iceberg Wilderness in Alpine County, California.

14 Defendants' cross-motion is accordingly DENIED with respect
15 to plaintiffs' Wilderness Act claim. However, defendants' motion
16 is GRANTED with respect to plaintiffs' NEPA, ESA and Clean Water
17 Act claims.

18 IT IS SO ORDERED.

19 DATED: September 6, 2011

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21 

22 FRANK C. DAMRELL, JR.
23 UNITED STATES DISTRICT JUDGE
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