No. 26-3622

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAVE THE SOUTH FORK SALMON; IDAHO CONSERVATION LEAGUE; IDAHO RIVERS UNITED; EARTHWORKS; CENTER FOR BIOLOGICAL DIVERSITY and AMERICAN RIVERS,

Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE; U.S. FISH AND WILDLIFE SERVICE; NATIONAL MARINE FISHERIES SERVICE; U.S. DEPARTMENT OF AGRICULTURE; U.S. DEPARTMENT OF INTERIOR; U.S. DEPARTMENT OF COMMERCE; BROOKE ROLLINS, in her official capacity as U.S. Secretary of Agriculture; DOUG BURGUM, in his official capacity as U.S. Secretary of the Interior; HOWARD LUTNICK, in his official capacity as U.S. Secretary of Commerce,

Defendants-Appellees,

and

PERPETUA RESOURCES IDAHO, INC.

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the District of Idaho
No. 1:25-cv-00086-AKB
Honorable District Judge Amanda K. Brailsford

PLAINTIFFS-APPELLANTS'
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
RELIEF REQUESTED BY JUNE 19, 2026

Pursuant to Circuit Rule 27-3, Plaintiffs-Appellants' undersigned counsel, Bryan Hurlbutt, hereby certifies the following is true and correct.

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EXISTENCE AND NATURE OF EMERGENCY

Unless enjoined by this Court by June 19, 2026, Intervenor-Defendant "Perpetua" will continue and significantly ramp up construction of the Burntlog Route: a 38-mile road cutting through three Inventoried Roadless Areas, habitat for "threatened" wolverine and bull trout, and other public lands on the Boise and Payette National Forests in Idaho. Construction and use of the Burntlog Route is just a part of the Stibnite Gold Project, which is a massive open-pit gold and antimony mine located mostly on National Forest lands in the headwaters of the South Fork Salmon River, and which was approved by final agency actions of Defendants-Appellees U.S. Forest Service ("Forest Service") and U.S. Fish and Wildlife Service ("FWS").

Plaintiffs-Appellants, Save the South Fork Salmon, et al. ("Save the South Fork") request that this Court enjoin the Forest Service and FWS from allowing, and Perpetua from performing, construction of the Burntlog Route and any other surface disturbing activities on National Forest lands authorized by the final agency actions challenged in this matter during the pendency of this appeal.

This Court issued its initial Preliminary Injunction Time Schedule Notice on June 4, 2026 (DktEntry 2.1), setting Save the South Fork's opening brief for July 2, 2026, with briefing concluding by August 21. However, as shown in this Emergency Motion, significant irreparable harm will occur during this time, especially from the clearcutting, gravel mining, bulldozing, and other activities associated with constructing the Burntlog Route.

Save the South Fork requests, at a minimum, that construction of the Burntlog Route and other approved activities on public land slated for this summer, be enjoined until this Court resolves the Preliminary Injunction based on the Court's schedule outlined in DktEntry 2.1

On May 29, 2026, the district court held that Plaintiffs were likely to prevail on the merits of their claims that FWS's Incidental Take Statements for wolverine and bull trout violated the Endangered Species Act ("ESA"), ESA regulations, and Administrative Procedure Act ("APA"). 1-ER-27–34, 40–44. However, the district court erroneously held that Plaintiffs failed to show they would suffer irreparable

harm from forthcoming activities by Perpetua, and thus denied Plaintiffs Motion for Preliminary Injunction. 1-ER-45–52. The district court also erroneously held that Plaintiffs were not likely to prevail on the merits of their other ESA claims or their claims that the Burntlog Route and its associated gravel mines were unlawfully approved under the wrong legal and regulatory regimes. 1-ER-10–18.

The next day, May 30, Perpetua announced that it had begun initial work associated with constructing the Burntlog Route. Upon information and belief, by June 19, Perpetua will significantly ramp up Burntlog Route construction. *See* 2-ER-57–61(Norine Decl. ¶¶ 9, 12–13) (detailing construction that "must commence" starting May 30).

Unless this Court enjoins Project activities by June 19, 2026, Perpetua will proceed with clearing and grading, excavating gravel mines to support the road construction, and installing culverts and bridges, on National Forest lands to construct the Burntlog Route and carry out other Project activities, in violation of public land and environmental laws, and will immediately and irreparably harm Plaintiffs and their members.

WHY THE MOTION COULD NOT BE FILED EARLIER

The district court issued its decision denying Plaintiffs' Motion for Preliminary Injunction at the end of the day on Friday, May 29, 2026. On Tuesday, June 2, Plaintiffs filed in district court a Motion for Immediate Stay and Injunction

Pending Appeal; the district court has not yet ruled on that motion. Plaintiffs filed the Notice of Appeal in district court on Thursday, June 3, and filed this Emergency Motion on Friday, June 5.

NOTIFICATION AND SERVICE OF COUNSEL FOR PARTIES

On Tuesday, June 2, Plaintiffs filed in district court a Motion for Immediate Stay and Injunction Pending Appeal through the District of Idaho ECF, which electronically served all counsel of record, and which indicated that Plaintiffs intended to file a notice of appeal and emergency motion.

On June 5, prior to filing this Emergency Motion, Plaintiffs contacted this Court's emergency motions unit via email (emergency@ca9.uscourts.gov) and telephone (415.355.8020). Plaintiffs also contacted counsel for Defendants and Intervenor-Defendants via email, providing notice that it had appealed and intended to file this Emergency Motion.

Plaintiffs will immediately send copies of this Emergency Motion by email to counsel for all parties after it is filed.

THIS RELIEF WAS SOUGHT IN DISTRICT COURT

On Tuesday, June 2, Plaintiffs filed in district court a Motion for Immediate Stay and Injunction Pending Appeal. As of now, the district court has not yet rule on that motion, necessitating this Emergency Motion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellants Save the South Fork Salmon, Idaho Conservation League, Idaho Rivers United, Earthworks, Center for Biological Diversity, and American Rivers have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

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GLOSSARY OF TERMS

Term	Definition
APA	Administrative Procedure Act, 5 U.S.C. §§ 701–706
DOI	United States Department of the Interior
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 et seq.
FEIS	Final Environmental Impact Statement
FLPMA	Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701 et seq.
FWS	United States Fish and Wildlife Service
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.
Project	The Stibnite Gold Project
ROD	Record of Decision
RPM	Reasonable and Prudent Measure (see 16 U.S.C. § 1536(b)(4))

INTRODUCTION

On May 30, the day after the district court denied a motion for a preliminary injunction, Intervenor-Defendant "Perpetua" began large-scale construction of the Stibnite Gold Project: a massive gold and antimony mine on National Forest lands in the remote headwaters of the East Fork South Fork Salmon River in Idaho. Perpetua has begun initial work constructing the Burntlog Route: a new 38-mile haul road to the mine site which would cut through protected roadless areas and threatened species habitat on National Forest lands.

Clearing vegetation and constructing and grading an industrial road through forests, streams, and roadless backcountry will inflict harm that no later judgment can undo. Plaintiffs-Appellants (collectively "Save the South Fork") respectfully move the Court for an injunction pending appeal by June 19 to halt construction before the damage becomes permanent.

Save the South Fork easily satisfies the four-part test for a preliminary injunction under *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The district court denied relief through two critical errors. First, the district court let the agency rewrite the law of mining access on National Forest lands. Defendant Forest Service approved the Burntlog Route and eight associated gravel mines—all sited on public lands far beyond Perpetua's valid mineral claims—as if Perpetua had the *statutory* right to them under the 1872 Mining Law. It does not. The district court based this right entirely on agency *regulations*. This Court rejected

exactly that move in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.4th 1202, 1208 (9th Cir. 2022) ("*Rosemont*"). Use of public lands and resources for the off-site road and gravel mines is expressly governed by the more recently-enacted provisions of the Federal Land Policy and Management Act (FLPMA) and the Common Varieties Act, and is not given away anywhere in the text of the Mining Law.

Second, the court found no irreparable harm even after holding Save the South Fork is likely to succeed on its Endangered Species Act ("ESA") claims. The court brushed aside undisputed evidence that Burntlog Route construction will start immediately, ignored this Court's holding that "establishing irreparable injury should not be an onerous task" in ESA cases, *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015), and disregarded Save the South Fork members' documented interests in the very lands about to be cleared, harm this Court has long held is cognizable and irreparable. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

RELEVANT FACTS

The Stibnite Gold Project is enormous. It calls for building an extensive network of access roads, miles of transmission lines, eight gravel mines, and other infrastructure; excavating three large open pits to extract gold; building a gold ore processing facility; burying and re-routing streams; and storing millions of tons of mine waste rock and tailings. *See generally* 2-ER-161–73. Most of the Project

would span approximately 20 to 25 years, including three years of construction. 2-ER-162.

The Forest Service approved the Project in its January 3, 2025 Record of Decision (ROD) based on its September 2024 Final Environmental Impact Statement (FEIS). *See* 1-ER-004. Defendant U.S. Fish and Wildlife Service (FWS) signed off through its September 2024 Biological Opinion that conceded the Project would "take" (i.e., kill or harm) ESA-protected wolverine and bull trout, then issued an Incidental Take Statement (ITS) authorizing such take. *See id.*

Save the South Fork filed suit on February 18, 2025, challenging both agency approvals under the Administrative Procedure Act (APA), the ESA, and other federal laws. *See* 1-ER-004–05; 3-ER-309–10, 350–79. After briefing summary judgment, Perpetua announced on May 1, 2026, that it would start construction, including the Burntlog Route, on May 30, 2026. *See* 2-ER-057–61. Save the South Fork filed a Motion for Preliminary Injunction, which the District Court denied on May 26, 2026 (1-ER-052) and is the subject of this appeal.

The Burntlog Route is no minor spur road. Perpetua would widen and reconstruct *23 miles* of existing small National Forest roads from 12 feet to 26 feet and install side-ditching, culverts, guardrails, and bridges, and cut *15 miles* of entirely new road segments running "primarily" through current Inventoried Roadless Areas. 2-ER-171–73; 2-ER-182.

And none of this is necessary. Perpetua already has mine-site access via the Johnson Creek Route, used by previous mining companies for decades and slated for continued use during the Project. 2-ER-299–301; 2-ER-152. Indeed, the Forest Service itself determined that this existing route, with upgrades, would satisfy the Project's needs, is technically and economically feasible, and provides reasonable access—all without building the Burntlog Route. 2-ER-155–57, 160. But the agency approved Perpetua's request to build the Burntlog Route through protected backcountry public lands, even though this new, second route is not necessary.

STANDARDS FOR PRELIMINARY RELIEF

To obtain preliminary relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The court evaluates these factors on a sliding scale, as a stronger showing of one element may offset a weaker showing of another. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023) (en banc).

When environmental injury is "sufficiently likely," the balance of harms "will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

ARGUMENT

I. BUILDING THE BURNTLOG ROUTE WILL CAUSE IRREPARABLE HARM.

"[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (citing *Amoco*, 480 U.S. at 545). Stripping a plaintiff's ability to enjoy wildlife in its natural setting is harm. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 821–22 (9th Cir. 2018). That harm cannot be undone. *Amoco*, 480 U.S. at 545.

Work now underway—crews clearing standing forests, excavating gravel mines, grading hillsides, trenching ditches, building bridges, and constructing roadbed across 38 miles of public land is irreparable harm that destroys Save the South Fork members' ability to "view, experience, and utilize" the affected areas of public lands in their "undisturbed state." *All. for the Wild Rockies,* 632 F.3d at 1135.

That harm is underscored by the destruction and degradation of Inventoried Roadless Areas, where most of the 15 miles of new road would be built. As part of its mandate "to preserve the forests thereon from destruction," 16 U.S.C. § 551, the Forest Service promulgated the Idaho Roadless Rule, 36 C.F.R. §§ 294.20–29, identifying "timber cutting and road construction or reconstruction as having the greatest likelihood of altering and fragmenting landscapes and the greatest likelihood of resulting in an immediate, long-term loss of roadless area values and

characteristics." 73 Fed. Reg. 61,456, 61,459 (Oct. 16, 2008) (emphasis added).

Save the South Fork's members hunt, fish, hike, and camp all along the Route, including in Inventoried Roadless Areas about to be bladed, and along existing primitive backcountry roads about to be transformed into mine traffic routes. Their loss of those places is irreparable. *See* 2-ER-97–145 (declarations of numerous members). So is the loss of their interests in ESA-protected wolverine and bull trout that live there. *See*, *e.g.*, 2-ER-100–03, 109–20, 126, 145 (declarations).

The ESA prohibits the "take" of "any animal from a listed species." 16 U.S.C. § 1538(a)(1)(B); *Nat'l Wildlife Fed'n*, 886 F.3d at 818. Harm to individuals from ESA-prohibited take is irreparable because "[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir. 1995). Here, the record leaves no doubt that constructing the Burntlog Route will disturb, displace, injure, and kill "threatened" wolverine and bull trout.

Wolverine. Barely 318 wolverine remain in the contiguous United States; surveys "identified at least 16 individual wolverines in or adjacent to the [Project] area," including four "within the mine site boundary, including a resident reproductive female." 2-ER-276. FWS concluded that the Project is reasonably certain to *injure and/or kill* these animals from den abandonment, increased energy expenditure, reduced condition of adult females, increased offspring vulnerability, and loss of kits. 2-ER-295. The Forest Service called the harm "long-term" and

"irreversible." 2-ER-177, 181. When a species this rare is at stake, even small actions can irreparably harm species. *Nat'l Wildlife Fed'n*, 886 F.3d at 821–22. And this is no small action.

The District Court committed at least two errors when it found no irreparable harm to wolverine. First, it grossly underestimated and misunderstood the "critical path" activities Perpetua has slated for this summer. The district court accepted FWS's finding that Burntlog Route construction will disturb 427 acres of wolverine habitat, including 332.6 acres of denning habitat, 1-ER-048 (citing 2-ER-281, 295–96), but then faulted Save the South Fork for not pinpointing which work will occur in denning habitat. The district court's order was self-contradictory and a clear error: Perpetua's imminent construction that already began on May 30, and is continuing now, is *construction of the Burntlog Route*, as the district court itself acknowledged. *See* 1-ER-005 (The "critical-path activities include . . . [i]n particular, Perpetua stress[ing] the importance of completing the Burntlog Route.") *See also* 2-ER-058–61. The new and widened roadbed will still be there when denning season arrives, having erased hundreds of acres of wolverine denning habitat, that will be gone this winter and every winter after that. And it will be opened up to vehicle traffic, which FWS determined is the Project's biggest threat to wolverine. 2-ER-287.

Bull Trout. The District Court conceded that the Burntlog Route may cause take, yet erroneously dismissed it as not being irreparable. It relied on FWS's no-jeopardy finding and its Incidental Take Statement authorizing the Project's take of

bull trout. 1-ER-050–51. But just because take is authorized by an ITS—especially an ITS like this the court recognized as unlawful—does not mean it will not cause irreparable harm. And a plaintiff need not prove jeopardy to establish irreparable harm; the standards are distinct. *Cottonwood*, 789 F.3d at 1091.

The Burntlog Route also runs along and over streams with ESA-listed bull trout. The Forest Service admitted that "take" of bull trout, Chinook salmon, and steelhead could occur and would be "irreversible." 2-ER-175. FWS catalogued dozens of Project actions that adversely affect bull trout, with Burntlog Route construction among the first activities that "may affect" the species, including by causing "injury and mortality" at stream crossings. 2-ER-250. Road building "will occur along and over bull trout occupied streams," 2-ER-207, culvert and bridge work that "will cause disturbance and injury or mortality to bull trout," 2-ER-245; and "local populations will be affected by the proposed culvert and bridge construction." 2-ER-246.

Again, in an ESA case, "establishing irreparable injury should not be an onerous task." *Cottonwood*, 789 F.3d at 1091. Building a nearly 40-mile road through bull trout and wolverine habitat, and disturbing, injuring, and killing individuals of these species causes irreparable harm and should be enjoined.

II. SAVE THE SOUTH FORK IS LIKELY TO SUCCEED ON THE MERITS.[1]

A. Burntlog Route & Associated Gravel Mines.

1. This Court's *Rosemont* Decision Forecloses Approving the Burntlog Route as a Right Under the 1872 Mining Law.

The Forest Service and the district court erred as a matter of law in assuming that Perpetua has a *statutory* right under the 1872 Mining Law to build the Burntlog Route based solely on the agency's *regulations*. *See* 2-ER-150, 154, 194–95; 1-ER-010–11. That assumption is squarely contradicted by this Court's decision in *Rosemont*.

This new, second road enjoys no rights under the Mining Law, which never mentions access roads. It is instead governed by the discretionary provisions of Title V of FLPMA. 43 U.S.C. §§ 1761–71. Unlike the Mining Law, FLPMA explicitly authorizes rights-of-way across National Forest land for "roads," *id.* § 1761(a)(6), requires payment for such use, and ensures that the road causes "no unnecessary damage to the environment," among other factors. 43 U.S.C. § 1764(a).

Rosemont rejected the very argument the district court accepted here. *See* 33 F.4th at 1217–19, 1222–23. There, the Ninth Circuit affirmed vacatur of a copper mine approval because the agency erroneously assumed that the applicant had

[1] At the District Court's request, Save the South Fork's Motion for Preliminary Injunction included just some of its merits claims, leaving others to be resolved later on summary judgment. *See*-1-ER-006. Accordingly, this appeal is limited to those same merits claims.

statutory rights to ancillary infrastructure (in that case, waste dumping) merely because the infrastructure served nearby mineral extraction. In *Rosemont*, the Forest Service unlawfully relied on its broad definition of "operations" in its 36 C.F.R. Part 228A regulations as conferring this right. But critically, those regulations reach only activities "authorized by the United States mining laws." 36 C.F.R. § 228.1. Here, both the district court and the agency ignored that overarching limitation.

Neither the agency in *Rosemont*, nor the district court here, could identify any Mining Law provision that authorizes ancillary facilities—here, a second road—under a statutory right. Lacking such basis, the district court relied on the dissent in *Rosemont* and adopted the government's position that the Part 228A regulations create statutory rights. 1-ER-012 (holding that the agency's FLPMA special use regulations, 36 C.F.R. Part 251B, cannot apply because the 228A regulations provide the only means of approving "operations.").

But as the district court in *Rosemont* explained, "the Forest Service's application of its regulations to mining operations cannot grant rights outside the bounds of the Mining Law of 1872." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 763 (D. Ariz. 2019); *see also Great Basin Res. Watch v. U.S. Dep't of the Interior*, No. 3:19-cv-00661-LRH-CSD, 2023 WL 2744682, *5 (D. Nev. 2023) (similar Interior Department regulatory definition of "operations" cannot be the basis for rights under the mining laws).

That the Burntlog Route was "in connection with" the distant mine, 1-ER-011; 2-ER-150, 194–95, does not help. *Rosemont* rejected that very same rationale that any "related" or "reasonably incident" activities to mining have a statutory right to use federal lands. 33 F.4th at 1215. The "reasonably incident" language appears nowhere in the 1872 Mining Law. It comes from the Surface Resources-Multiple Use Act of 1955, 30 U.S.C. §612(a), which "does not grant rights beyond those granted by the Mining Law[.]" 33 F.4th at 1218. Indeed, in its unsuccessful *Rosemont* appeal, the Forest Service "abandoned" its reliance on the "reasonably incident" language, as the agency had "improperly relied" on it. *Id*. at 1215–17. Because "Section 612 gave no rights beyond those conferred by the Mining Law," the agency needed "some other statutory basis" for applying Part 228A. 33 F.4th at 1223. Neither the agency nor the district court supplied a statutory basis here. Instead, they impermissibly relied on the Part 228A *regulations* to improperly expand the scope of rights to public lands under the Mining Law and authorize the Burntlog Route.

2. The Forest Service Unlawfully Approved the Gravel Mines.

The district court and agency repeated the same error in relying on the Part 228A regulations to grant Perpetua a statutory right to eight gravel mines along the Burntlog Route. Save the South Fork is thus also likely to prevail on its claim here. Again, they invoked the discredited and abandoned "reasonably incident" phrase

from Section 612 (discussed above) to reason that these gravel mines serving the distant mine fell under the Mining Law. 1-ER-016.

But gravel mining was removed from the Mining Law in the 1955 Common Varieties Act, 30 U.S.C. §611. *See Watt v. W. Nuclear*, 462 U.S. 36, 57 (1983); *Rosemont*, 33 F.4th at 1209 (same). The agency cannot manufacture a right to mine gravel under the Mining Law simply because it is "incidental" to and supports hard-rock mining-related activities. *Rosemont* foreclosed that theory. *See supra*; *see also Great Basin Res. Watch*, 2023 WL 2744682, at *5 (entitlement to off-site "lands for uses that are 'reasonably incident' to mining the minerals in the pit" was "foreclosed by *Rosemont*").

The Forest Service originally—and correctly—found that these gravel mines must be approved under the agency's common variety rules (36 C.F.R. Part 228C). 2-ER-305. But it abruptly reversed course and instead approved them as "reasonably incident" to the mine and thus governed by Part 228A. The Forest Service thus bypassed the proper Part 228C regulations, which permits the mining of such common materials only if "reasonable protection of, or mitigation of effects on, other resources is assured" and the "public interest" is served. 36 C.F.R. § 228.43.

To justify this, the district court and Defendants insisted that "Perpetua has not proposed to mine . . . gravel" at these eight "borrow pits." 1-ER-016-17. But relabeling the material as "borrowed" does not change what happens—it will be extracted from the ground, processed via "crushing and screening facilities," and

used away from its source. 2-ER-305–06. The district court also accepted the government's argument that the Part 228C rules govern only the "disposal" of gravels, and that extracting, processing, and using these gravels does not constitute "disposal," because the Forest Service is not "selling" it to Perpetua. 1-ER-016–17. That reading opens a glaring loophole on public lands—allowing companies to take free public gravel to support distant mines contrary to applicable law.

Notably, the Part 228C rules do not require that the gravel be commercially sold to qualify the mining as "disposal" under the Common Varieties Act. For example, the rules itemize one "type[] of disposal" as a "free use" permit for mineral materials/gravel for uses "other than … resale." 36 C.F.R. § 228.62(d).

3. The Burntlog Route Violates the Idaho Roadless Rule

Relying again on its legally-erroneous premise that the Route is governed by statutory rights under the Mining Law, the district court held it exempt from the Idaho Roadless Rule, established by the Forest Service to protect designated roadless areas. 1-ER-017; 2-ER-183. Of the Route's roughly 38 miles, the Route will cut a new 15-mile-long swath, mostly running through three Inventoried Roadless Areas. 2-ER-173, 184.

The Idaho Roadless Rule bars new roads in Inventoried Roadless Areas, 36 C.F.R. § 294.23, exempting only operations with valid rights under the Mining Law: "Nothing in this subpart shall affect mining activities conducted pursuant to the General Mining Law of 1872." §294.25(b). But as explained above, the Mining Law

confers no statutory right to this additional road. As such, this exception cannot authorize it, least of all when an existing access route already reaches the mine while avoiding roadless areas altogether.

B. Endangered Species Act.

FWS's Biological Opinion and Incidental Take Statement (ITS), and the Forest Service's reliance on it, violate the ESA, ESA regulations, and APA. *See* 3-ER-368–79. Indeed, the district court held that Save the South Fork is likely to succeed on four of its claims challenging the ITS.[2] 1-ER-027–30, 32–35, 41–44.

1. Wolverine

FWS acknowledged that the construction of the Project, including the Burntlog Route, would harm wolverine through habitat loss and displacement, 2-ER-292, and is reasonably certain to injure and kill wolverine, 2-ER-295. Despite these impacts, FWS permitted the Project through its ITS. 2-ER-294–97. FWS's wolverine ITS was unlawful for at least two reasons, as the district court agreed.

First, FWS failed to require any monitoring and reporting related to the Project's "take" limit. ESA regulations require FWS to set a take limit, 50 C.F.R. § 402.14(i)(1)(i), and "to monitor the impacts of incidental take, the Federal agency or

[2] This District Court held that Save the South Fork was likely to succeed on its ESA claims related to deficiencies in the ITS, but not on its other ESA claims. *See* 1-ER-018–48. For purposes of this Emergency Motion, Save the South Fork focuses on the ITS deficiencies. However, it reserves the right to pursue all ESA issues decided below later on the merits of this appeal.

any applicant must report the progress of the action and its impact on the species to [FWS] as specified in the incidental take statement," *id.* § 402.14(i)(4) (emphasis added). This Circuit has explained that these ESA "regulation[s] make[] clear that the Service is responsible for specifying in the statement how the action agency is to monitor and report the effects of the action on listed species." *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531–32 (9th Cir. 2010).

FWS failed to do that here. The ITS includes a take limit based on the total acres of ground disturbance in wolverine denning habitat the Project will cause. 2-ER-296. But the ITS failed to require monitoring or reporting of the acres of disturbance in denning habitat. 2-ER-296–97. As the district court recognized, FWS's oblique reliance on "various documents in the record," such as inchoate draft monitoring plans, failed to "explain how denning habitat acreage will be monitored and reported to determine if the trigger has occurred and who will do that monitoring reporting." 1-ER-030. FWS violated the law when authorizing wolverine take because such a critical component was "not specified in the ITS." *Id.* (applying *Wild Fish Conservancy*, 628 F.3d at 531–32).

Second, an ITS must include "reasonable and prudent measures" and "terms and conditions" to minimize take. 16 U.S.C. § 1536(b)(4)(C); 50 C.F.R. § 402.14(i)(1)(ii) & (iv). Here, FWS declined to include these, stating it "believes the measures proposed by the Forest are sufficient." 2-ER-296. Indeed, FWS's wolverine ITS plainly omits the required material, skipping from the "7.6.3

Reasonable and Prudent Measures" section with the above justification to a "7.6.5" section, and obviously leaving out "Terms and Conditions" (which would have been section "7.6.4"). *Id.* These provisions are legally required and cannot be treated as "optional." *Ctr. for Biological Diversity v. Culver*, No. 21-cv-07171-SI, 2024 WL 4505468, at *64–65 (N.D. Cal. Oct. 15, 2024). As the district court recognized, although FWS may have some discretion in deciding which reasonable and prudent measures and terms and conditions to include, the ESA and its binding regulations require that FWS "shall specify these items in the ITS," which FWS simply failed to do here. 1-ER-034.

2. Bull Trout

For bull trout, FWS's ITS fares no better. First, FWS again failed to minimize take through RPMs and terms and conditions. While FWS did set forth what it labeled as RPMs and terms and conditions in the bull trout ITS, it missed the mark. For one, they include only bald directives to minimize without any direction how to accomplish this. And they merely require future monitoring plans; but monitoring alone does nothing to minimize take. *See* 2-ER-269–71. Indeed, the District Court recognized Save the South Fork's characterization of these issues with the ITS as "apt," noting that "clear directives [are] difficult to locate." 1-ER-041. As the District Court noted, "the ESA imposes a mandatory duty on FWS to provide a written statement containing the elements in 16 U.S.C. § 1536(b)(4)(C)," and FWS failed that statutory obligation here. 1-ER-042–43.

Second, FWS expects elevated stream temperatures caused by the Project to take bull trout. But the temperature take limit FWS set in the ITS is wholly inadequate, because FWS set temperature checkpoints for only years 6, 12, 18, 22, 27, 32, 52, and 112 of the Project. *See* 2-ER-210, 259. This leaves major gaps ranging from 6 to 60 years without any checkpoint to immediately trigger the reinitiation of consultation, as required by the ESA. 50 C.F.R. §§ 402.14(i)(5), 402.16(a)(1). To illustrate the significance of this failure, if the Project results in too warm of temperatures starting just after year 52, the take limit would not be triggered until the next required checkpoint listed in the ITS: year 112. Allowing *60 years* of high temperatures and harm to bull trout before anything must be done is not a meaningful trigger and violates the ESA. As the District Court observed, the agencies' response on this score was "somewhat incomprehensible," 1-ER-044, and the bull trout ITS failed to satisfy ESA and APA standards.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST SUPPORT AN INJUNCTION.

In a challenge to federal agency action, the public interest and equities merge into "one inquiry." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). That inquiry favors "careful consideration of environmental impacts," and "suspending such projects until that consideration occurs 'comports with the public interest.'" *All. for the Wild Rockies*, 632 F.3d at 1138 (cleaned up). Indeed, "[i]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of

an injunction to protect the environment." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (citing *Amoco*, 480 U.S. at 545).

The ESA tips that balance further still. Its "language, history, and structure" shows Congress's "determination that the balance of hardships and the public interest tips heavily in favor of protected species." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994). Courts therefore "presume that remedies at law are inadequate, that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction." *Nat'l Wildlife Fed'n*, 886 F.3d at 817.

So too does ensuring federal agencies follow environmental laws, which "invokes a public interest of the highest order: the interest in having government officials act in accordance with law." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991). These presumptions frame the court's consideration of any countervailing "public consequences," *Winter*, 555 U.S. at 24.

Here, the equities and public interest favor preserving the status quo. Allowing large-scale Project construction to proceed, including new roads in designated roadless areas and in habitat occupied by threatened species, would cause immediate, lasting, and irreparable harm. And an injunction is warranted to protect Save the South Fork's members' interest in undamaged roadless areas and in viewing, appreciating, and ensuring survival and recovery of endangered species.

Defendants and Perpetua will point to alleged national-security benefits from

the antimony that the Project would produce alongside its real target, gold. 2-ER-303 (96% of the Project's value is gold). But general national security interests do not categorically trump environmental harm. *See, e.g., Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016). Moreover, any antimony benefits are years away, attenuated, and modest: at best, three or four years from now, the mine could begin extracting antimony; after that (and only if uncertain refining tests succeed) the mine might begin supplying antimony; some of that antimony might be military grade; and that supply of military-grade antimony might modestly reduce U.S. reliance on imports.[3] That distant and uncertain prospect stands in stark contrast to and cannot offset the immediate, lasting environmental degradation and harm to ESA-listed species Project construction will cause now.

Perpetua is also likely to invoke the jobs and profits the mine would generate. But this common refrain routinely yields to the public interest in lawful federal action and avoiding irreparable environmental harm. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("[L]oss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment."); *Indigenous Env't Network v. U.S. Dep't of State*, 369 F. Supp. 3d

[3] As the agencies' own supporting materials illustrate, the total antimony supplied by the Project would be about 48,000 tons (spread out as an average of about 3,200 tons per year over 15 years). 2-ER-084. U.S. antimony consumption in 2025 alone was around 45,000 tons. 2-ER-095. Thus, the Project may only have a minor relative impact on import reliance (and the security risk that accrues).

1045, 1051 (D. Mont. 2018) (enjoining project despite missing construction season, risking 700 jobs, and causing $949 million in lost earnings). Lost profits are "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017).

Perpetua gains no equities in rushing construction in the face of ongoing litigation. "After a defendant has been notified of the pendency of a suit seeking an injunction against him, he acts at his peril and subject to the power of the court to restore the status [quo]." *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1187 (9th Cir. 2000) (citations omitted).

The public interest in an injunction to avoid environmental harm here well outweighs any countervailing considerations.

CONCLUSION

Save the South Fork respectfully requests that the grant an injunction pending appeal, temporarily pausing mine construction and preserving the status quo; and requests that the Court waive any bond under FRAP 8(a)(E), or require only a nominal bond, as is common in public interest environmental matters like this. *See*, *e.g.*, Cal. *ex rel. Van de Kamp v. Tahoe Reg'l Plan. Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985).

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases pending before this Court.

Date: June 5, 2026

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