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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

WILDERNESS WATCH et al., Plaintiffs, v. U.S. FISH AND WILDLIFE SERVICE, et al. Defendants.	CIV 07-1185-PHX-SRB **PLAINTIFFS' REPLY TO OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF**

Plaintiffs Wilderness Watch et al. ("Wilderness Watch") hereby respectfully file this reply to the memoranda of Defendants U.S. Fish and Wildlife Service et al. ("Service"), Defendant-Intervenor State of Arizona ("Arizona"), and Defendant-Intervenor Safari International ("Safari"), opposing Wilderness Watch's motion for injunctive relief.

ARGUMENT

The Service and its allies assert the only proper relief is a remand to the agency so it can determine any necessity for these two illegal water supply structures, because that it all the Ninth Circuit ruled was missing from the agency's record. The opposing parties are wrong in three respects.

1. Waiver.

The three opposing parties do not dispute that they all had the chance in the Ninth Circuit to respond to Wilderness Watch's request that the structures be removed, and none did. In its opening brief in the Ninth Circuit, Wilderness Watch was required to include only "a short conclusion stating the precise relief sought." FRAP 28(a)(10). No opposing party disputes that Wilderness Watch did exactly that. Nothing in the FRAP requires more. But for whatever perceived strategic reasons, none of the opposing parties responded, at all. They rested on their strategy that the Ninth Circuit would affirm the district court on the merits, and that, therefore, they did not need to even respond to, let alone argue, that Wilderness Watch was not entitled to the relief it sought. Had any opposed that request, Wilderness Watch would have replied. But given that none did, there was nothing for Wilderness Watch to reply to.

To support its failure to respond, the Service cites a footnote from a concurrence disputing a dissent's theory in an IRS tax case in the Fourth Circuit. Service Opp. Br. at 5:23-27 (citing *Hillman v. Internal Revenue Service*, 263 F.3d 338 (4th Cir. 2001)). There, the Fourth Circuit reversed a Tax Court decision in favor of the Hillmans and against the IRS, and remanded to the Tax Court to consider relief. *Hillman*, 263 F.3d at 343. Given that the Fourth Circuit never resolved relief, what happened in that case is meaningless. But if *Hillman* matters, it supports Wilderness Watch. There, the concurrence noted that the Tax Court resolved only one of two arguments the Hillmans raised on the merits, and that on remand, the Hillmans could pursue their second argument. *Id*. 263 F.3d at 343 n.6. The concurrence noted that it was the IRS' burden, in its appeal, to specify the relief it wanted, and not the Hillman's to anticipate or respond to something the IRS did not argue. *Id*. Because the IRS never asked for relief

apart from only a reversal on the merits, "the Hillmans should not now be penalized for that which they were not required to do in the first instance." *Id*.

Here, Wilderness Watch specified in the district court and then again on appeal what it sought as relief if it won on the merits. No opposing party responded in the Ninth Circuit. None can do so now for the first time on remand simply because each lost on appeal.

2. "Procedural Error."

The opposing parties assert that the Ninth Circuit ruled that the Service committed merely a "procedural error," and that that it is not a ground for affirmative relief. *See* Service Opp. Br. 7:24-28--8:1-7. But an error in agency decision-making that results in harmful impacts to the wilderness character justifies an injunction to ameliorate the impacts. In *High Sierra Hikers Assn. v. Blackwell*, 390 F.3d 640 (9th Cir. 2004), the Ninth Circuit held that the Forest Service authorized commercial packstock operations in two wildernesses without establishing that they were authorized to "the extent necessary." *Id*. at 648. Just as here, on remand, the plaintiffs demonstrated that the extent of operations were not all necessary. *High Sierra Hikers Assn. v. Weingardt,* 521 F. Supp. 2d. 1065 (E.D. Cal. 2007). In turn, the district court ordered affirmative relief, including reducing the amount of packstock operations, establishing setbacks from lakes and streams, and ameliorating other impacts to heal the wildernesses. *High Sierra Hikers Assn. v. Moore*, 561 F. Supp. 2d 1107, 1110-1118 (E. D. Cal. 2008). Here, even if the Ninth Circuit identified merely a procedural error in *Wilderness Watch*, what matters in the context of its request for relief is what is happening on the ground.

3. The Record.

There is no dispute that these water supply structures were built over four and one-half years ago. They were built where no permanent water sources exist, to artificially inflate bighorn populations to their "carrying capacity" on the Kofa. ER 218. The Service modified natural conditions to inflate the number of bighorn in part so it may translocate them and to continue to allow hunting, *id.*, both of which are activities the Ninth Circuit noted could be discontinued without violating the Wilderness Act, unlike building the structures. *Wilderness Watch*, 629 F.3d at 1038. Nor does any opposing party legitimately dispute that bighorn have not and are not relying on the structures. Safari attacks the data from cameras erected at the sites precisely to determine whether they are used, but offers no proof or other evidence

that bighorns in fact do use them. *Cf*. Declaration of John Hervert, ¶¶ 5-6. In turn, a declarant from the Service somewhat contradicts Safari, opining that "hundreds of animals" are now "habituated" to the structures, but never specifies what species she is referring to, or what she means by habituated. *Cf*. Declaration of Susanna Henry, ¶ 4. But if she is correct, then the structures in fact create even *more* irreparable harm with the passage of time, because they continue to alter natural conditions in wilderness (something Congress specifically proscribed) and the delicate balance of wildlife in this naturally "extremely dry" ecosystem. ER 110.

The only reliable evidence in the record is that for the McPherson structure, over the past four years, there is no proof of a single instance of a bighorn drinking from the trough. For the Yaqui structure, three bighorn have used it in two years and seven months of monitoring. A remand to the Service so it may try to manufacture evidence to justify its construction of the structures would serve no useful purpose. *Cf. Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (stating standard).

Finally, the opposing parties' arguments that removing the structures would do more harm than good to wilderness conditions is ironic. The Service categorically excluded from public notice and comment its decision to build the structures, in part because the construction would only "temporarily impact wilderness values" and impacts would in certain respects be "minor in both the long and short term." ER 53. But now that the structures exist, the agency asserts that removing them would cause inordinate damage at the sites. Henry Dec. ¶¶ 4-6. The agency cannot have it both ways. It either misled the public as to the impacts of building the structures, misleads the Court as to possible impacts from their removal, or both. What is clear is that removing the structures with hand tools as Wilderness Watch requests will have far less impact than building and burying the structures with heavy equipment and motor vehicles did.

CONCLUSION

The Court should order the Service to remove the structures.

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Respectfully submitted,

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