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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

WOLF RECOVERY FOUNDATION, and )  
WESTERN WATERSHEDS PROJECT )  
 )  
Original Plaintiffs, )  
 )  
and )  
 )  
THE WILDERNESS SOCIETY, GREAT OLD )  
BROADS FOR WILDERNESS, IDAHO )  
CONSERVATION LEAGUE, WINTER )  
WILDLANDS ALLIANCE, WILDERNESS )  
WATCH, and SIERRA CLUB, )  
 )  
Co-Plaintiffs On Third Claim For Relief )  
 )  
v. )  
 )  
U.S FOREST SERVICE and USDA APHIS )  
WILDLIFE SERVICES, )  
 )  
 )  
Defendants. )

No. 09-cv-686-BLW

**OPENING BRIEF IN SUPPORT  
OF EMERGENCY MOTION  
FOR TRO AND/OR  
PRELIMINARY INJUNCTION  
UNDER THIRD CLAIM FOR  
RELIEF**

## INTRODUCTION

Plaintiffs respectfully seek emergency injunctive relief to prohibit the use and landing of helicopters in the Frank Church-River of No Return Wilderness to aerially dart and collar wolves, as approved by Defendant U.S. Forest Service in a December 2009 Decision Memo and January 2010 special use permit issued to the Idaho Department of Fish and Game (“IDFG”). Because IDFG plans to commence the helicopter darting and collaring operations in the Frank Church Wilderness beginning on February 22, 2010, Plaintiffs respectfully request issuance of injunctive relief before then.

IDFG’s use and landing of helicopters in the Frank Church Wilderness will degrade the wilderness character, disrupt wolves and other wildlife, and cause irreparable harm to Plaintiffs and their members; and was authorized by the Forest Service without any environmental analysis of its impacts, in violation of the Wilderness Act, Central Idaho Wilderness Act, and the National Environmental Policy Act (“NEPA”).

The Wilderness Act and Central Idaho Wilderness Act prohibit the landing of aircraft within the Frank Church Wilderness, outside of designated airstrips, unless **necessary** to meet minimum requirements for administering the area to fulfill the purpose of the Act – *i.e.*, preserving wilderness character. As explained below, the Forest Service has violated this requirement because allowing IDFG to land helicopters to collar wolves is not necessary to preserve the wilderness character of the Frank Church Wilderness; and in fact is directly contrary to that statutory mandate.

Moreover, the use of helicopters in the wilderness to dart and collar wolves is not the minimum tool available to achieve IDFG’s stated goal of monitoring wolf populations in the Frank Church Wilderness. As explained in the accompanying Declaration of Roy Heberger, a

retired U.S. Fish and Wildlife Service biologist who supervised the reintroduction of wolves in central Idaho, the Nez Perce Tribe successfully collared dozens of wolves in and around the Frank Church Wilderness for many years without resorting to use of helicopters. Yet the Forest Service failed to disclose these facts, and indeed misrepresented them in approving IDFG's request to now take helicopters into the Frank Church Wilderness.

The Forest Service also violated NEPA by approving the IDFG request without any Environmental Assessment (EA) or Environmental Impact Statement (EIS). As the record before the Court shows, both the Forest Service and U.S. Fish and Wildlife Service previously rejected similar proposals on at least two occasions, acknowledging then that authorizing helicopters to capture and collar wolves in wilderness would require such NEPA analysis. The Forest Service's decision to now "categorically exclude" this authorization from NEPA is arbitrary, capricious, and unlawful in light of the controversial nature of the project, the precedent it will set for future management of the Frank Church Wilderness, the potentially significant impacts to wilderness character, and the failure to consider alternative methods of collecting this data, such as ground trapping, that would not degrade wilderness character.

This Court must enjoin the helicopter landings in light of these legal violations, and to prevent irreparable harm to Plaintiffs and their members, many of whom plan to visit the Frank Church Wilderness in areas where IDFG plans to use helicopters to dart and collar wolves. As demonstrated in the accompanying declarations, these members hope and expect to experience solitude and peace in the wilderness as well as view wildlife, including wolves and elk, in their natural setting. The disruption of these wilderness values and the wildlife there will irreparably harm these individuals' wilderness experiences, warranting an immediate injunction.

## FACTUAL BACKGROUND

### **Wilderness And Wolves.**

The Frank Church Wilderness was designated in 1980 through the Central Idaho Wilderness Act, and at almost 2.4 million acres is the largest forested wilderness in the lower 48 states. *See* Pub. L. No. 96-312, 94 Stat. 948 (July 23, 1980) (*AR 3307-14*).<sup>1</sup>

Congress created the Frank Church Wilderness expressly to protect this large block of “primitive and undeveloped land” and the “wilderness-dependent wildlife . . . which thrive within this undisturbed ecosystem.” *Id.*, § 2(a). The Central Idaho Wilderness Act allowed for the continued landing of aircraft at certain designated airstrips that were already being used as of July 23, 1980, but did not allow aircraft landings in the Wilderness outside of those established sites. *Id.*, § 7(a)(1).

In 1995-96, U.S. Fish and Wildlife Service reintroduced a total of 35 gray wolves to central Idaho within the Frank Church Wilderness as an experimental population under the Endangered Species Act. *See Minimum Requirements Decision Guide, p. 1 (hereafter “Min. Req. Guide”)* (*AR 8564*). At the end of 2008 there were estimated to be 846 wolves in 88 packs throughout Idaho, and preliminary numbers at the end of 2009 estimate 94 wolf packs in the state. *Declaration of Ken Cole, ¶ 30 & Ex. A.*<sup>2</sup> Within the Frank Church Wilderness alone, there are an estimated fourteen wolf packs, including six packs that already have a member with

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<sup>1</sup> Notably, many of the Plaintiffs and their members participated in the creation of the Frank Church Wilderness, and have long-standing interests in preserving the values they sought to protect. *See Declarations of Craig Gehrke, ¶¶ 7-15; John Robison, ¶¶ 5-6; Edwina Allen, ¶ 5; David Hayes, ¶ 3; & Ralph Maughan ¶¶ 10-11.* For example, Ralph Maughan – founder of Plaintiff Wolf Recovery Foundation – helped draw the boundaries of the River of No Return Wilderness, as it was originally called; and has since authored a hiking book based on his many trips in the Wilderness. *Id.*

<sup>2</sup> Mr. Cole is a staff biologist for WWP, who previously worked for IDFG and has extensive knowledge about wolves in Idaho based on long-standing professional and personal interest.

a radio collar and likely an additional eight packs that are not radio-collared. *Min. Req. Guide*, p. 3. Now that the number and distribution of wolves is well above recovery goals, U.S. Fish and Wildlife Service has removed wolves from the Endangered Species list in Idaho. *Id.*, at 1-2.<sup>3</sup>

Once wolves were delisted, the State of Idaho took over management responsibility and manages wolves according to the Idaho Wolf Population Management Plan, which requires only a minimum of fifteen packs in the state. *Id.*, at 2; *AR 3616* (copy of Plan). The Plan allows for hunting of wolves, and in 2009 the State set a harvest quota of 220 wolves that could be killed from various hunting units across the state. *Min. Req. Guide* at 2. The unit in the heart of the Frank Church Wilderness (Middle Fork Big Game Unit) had a harvest quota of seventeen wolves, and as of this date all seventeen wolves have been killed from that unit. *Id.*, at 2; *Cole Decl.*, ¶ 32 & Ex. C. Wolves are also routinely killed by Department of Agriculture Wildlife Services when they cause depredation of livestock. Since the reintroductions in 1995 and 1996, Wildlife Services have killed 343 wolves in control actions in Idaho. *Cole Decl.*, ¶ 31.

When wolves were originally introduced in Idaho, the Nez Perce Tribe contracted with U.S. Fish and Wildlife Service to monitor wolf populations, and conducted that monitoring on its own for eight years before Idaho Department of Fish and Game joined the monitoring efforts in 2003. *Min. Req. Guide* at 2-3. Much of this monitoring has involved capturing and radio-collaring wolves from different packs inside and outside of Wilderness using a variety of methods, including ground traps. *Id.*, at 3. Visual sightings of wolves as well as tracks, scat, hair rub pads, and howling are other indicators that verify the presence and approximate location and

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<sup>3</sup> The delisting of wolves has been challenged in U.S. District Court in Montana. In September 2009, Judge Molloy denied a preliminary injunction but held that the plaintiffs were likely to succeed on the merits of their legal claims. The parties are now in summary judgment briefing. See *Defenders of Wildlife v. Salazar*, Case No. 09-77-DWM (D. Mont.).

numbers of wolves and wolf packs. *Id.*; *Declaration of Roy Heberger*, ¶ 12. Having precise information from radio collars will assist with setting hunting levels in the wilderness and make it easier for outfitters and others to find and kill wolves. *Min. Req. Guide at 24*; *Cole Decl.* ¶ 43; *Declaration of Jim Peek*, ¶ 13.<sup>4</sup>

### **First Request For Helicopter Use In Wilderness.**

Shortly after wolves were reintroduced into Idaho, the Nez Perce Tribe and Wildlife Services met with U.S. Fish and Wildlife Service to discuss the idea of using helicopters in the Frank Church Wilderness to capture and collar wolves to help monitor the populations. *Heberger Decl.*, ¶ 6. U.S. Fish and Wildlife Service brought the Forest Service into those discussions, including a number of Forest Service specialists in wilderness management. *Id.*, ¶¶ 7-8. These Forest Service experts discussed the requirements of the Wilderness Act, the general prohibition on landing aircraft in wilderness as well as what “landings” meant under the Act, and the narrow exception to that prohibition. *Id.*, ¶ 8. They also stated that allowing landing of aircraft in the Frank Church Wilderness would require preparation of an Environmental Impact Statement (“EIS”), and none of the other parties disagreed with that conclusion. *Id.*, ¶ 9.

Subsequently, U.S. Fish and Wildlife Service determined not to pursue this proposal and relayed that decision to the Forest Service. *Id.*, ¶ 10. The wolf recovery coordinator determined that wolf recovery must be conducted in a manner compatible with the Wilderness Act and wilderness values, and that using helicopters to put radio collars on wolves in the Frank Church Wilderness was not necessary to monitor, manage, or enhance recovery of wolves. *Id.*, ¶¶ 10-11. The topic did not arise again for several years.

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<sup>4</sup> Dr. Peek is a renowned wildlife biologist who taught wildlife biology and large mammal ecology at the University of Idaho. Dr. Peek conducted numerous studies in this country and Canada researching wildlife ecology of big game and large mammals, and authored over 100 publications and a textbook on this subject. *See Peek Decl.*, ¶¶ 1-7.

**Second And Third Requests For Helicopter Use In Wilderness.**

In 2005, IDFG requested authorization from Regions 1 and 4 of the Forest Service to land helicopters in wilderness areas in Idaho to capture and collar wolves starting in the winter of 2006. *June 2005 IDFG letters (attached as Exhibit 1 to Declaration of Lauren M. Rule)*. This proposal entailed aerial darting of wolves and landing helicopters in the wilderness to put radio collars on them, similar to the proposal at issue here. *Id.*

The Forest Service in Region 1 responded by questioning the need for use of helicopters in wilderness for wolf collaring when “it has not been necessary in the past,” and also stated that this type of project would need NEPA analysis, which could take as much as a year to complete. *Forest Service Region 1 Sept. 2005 letter (Rule Decl., Ex. 2)*. IDFG then pursued authorization from only Region 4, which deferred issuing the permit on grounds that further analysis was needed given the “depth of comments we received from the public and the complexity of the issues raised.” *Forest Service Region 4 press release (Rule Decl., Ex. 3)*. This decision came after a coalition of groups, including many of the Plaintiff groups here, sent a letter to the Regional Forester for Forest Service Region 4 notifying the agency of their intent to sue over this special use permit. *See AR 3848 & 3851 (Forest Service briefings)*. The Forest Service thus never issued any special use permit for landing helicopters in any wilderness in Idaho in response to IDFG’s request in 2005. *Id.*

IDFG made a subsequent request to Forest Service Region 1 in June 2006 to land helicopters in the Selway-Bitterroot Wilderness and the northern portion of the Frank Church Wilderness to collar wolves that winter. *See Nov. 2006 Region 1 letter to Larry Craig (Rule Decl., Ex. 4)*. When the Forest Service explained to IDFG that it would need to complete an EA to make a decision on landing helicopters in Wilderness and that such an analysis usually takes

six months to complete, IDFG withdrew its request. *Id.* Thus, the Forest Service never issued a permit in response to IDFG's requests in 2005 or 2006.

**Fourth Request For Helicopter Use In Wilderness.**

In 2009, IDFG once again requested Forest Service authorization for use and landing of helicopters to capture and collar wolves in the Frank Church Wilderness. *See AR 3841* (IDFG 9/9/09 request); *AR 3847* (emails between Jon Marvel/WWP and Forest Service confirming that IDFG and Forest Service were already discussing IDFG request in August 2009).

The Administrative Record shows that the Forest Service determined to use a "categorical exclusion" to approve the IDFG request even before the request was formally submitted. *See AR 8601* (8/1/09 Forest Service "timeline"). Nevertheless, the record reflects the Forest Service's recognition that the proposal would engender substantial public opposition, and could require NEPA analysis through an Environmental Assessment. *See AR 3848 & 3850.*

The Forest Service issued a "scoping" notice for this proposal on September 14, 2009 and accepted comments until October 16, 2009. *AR 3855-56.* The agency received over two hundred public comments on the proposal, the vast majority of which opposed it because of its impacts on wilderness values and wolves in the wilderness. *See Decision Memo ("DM") at 8 (AR 8605); AR 3894-4391* (copies of comments). Numerous former and current Forest Service managers and wilderness specialists expressed their concerns that the proposal violated the Wilderness Act and NEPA, and would cause significant impacts to wilderness character. *Id.* (comment letters from Laurie Matthews, Scott Phillips, Jenni Blake, Bill Worff); *Rule Decl., Exs. 5-6* (letters to Forest Service Chief Tidwell from Scott Phillips and Dick Artley); *see also*

*Declaration of Thomas Kovalicky.*<sup>5</sup> The Forest Service noted the controversy about this proposal in its Decision Memo, stating that there was disagreement on the benefits and detriments of the proposal and divergent positions on whether it violated the law. *DM at 8.*

Despite this controversy, on December 22, 2009 the Forest Service issued its Decision Memo approving the IDFG request, and “categorically excluded” it from NEPA analysis. *DM at 2, 8 (AR 8605).* The Decision Memo authorized IDFG to use and land helicopters within three game management units of the Frank Church Wilderness to aerially dart and then collar wolves. *DM at 2.* The darting and collaring would occur during IDFG big game surveys of the Middle Fork Big Game Unit, which IDFG stated it would conduct between mid-January and mid-April, most likely the latter two weeks of March. *Id.; Min. Req. Guide at 19 (AR 8564).*<sup>6</sup>

If wolves are spotted during the surveys, the helicopter will land either in the wilderness, or at a landing strip if one is located near-by, to remove the doors and get ready to dart the wolves. *Min. Req. Guide at 19.* Then it would resume flying to relocate the wolves, and fly and hover at low elevations (20-30 feet) to pursue the target wolf (preferably the alpha wolf) until there was a clear shot to dart it. *Id., at 19, 22.* Generally half of all shots miss their mark so it might require several shots to hit the wolf with the dart. *Id., at 22.*

Once a wolf was hit, the helicopter would either land briefly to off-load personnel and equipment (to measure and collar the wolf) and then fly to a near-by landing strip while the

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<sup>5</sup> Mr. Kovalicky is a former Forest Service manager who spent a large part of his career implementing the Wilderness Act and managing wilderness in various Idaho and Montana forests, including the Middle Fork Salmon River. He also taught wilderness stewardship to Forest Service and other federal agency managers after he retired. *See Kovalicky Decl., ¶¶ 1-5.*

<sup>6</sup> Attorneys for the Forest Service and IDFG recently informed Plaintiffs that IDFG changed its plans to conduct the wolf collaring operations in February. However, IDFG has agreed to delay any wolf collaring operations in the Frank Church Wilderness until beginning the week of February 22<sup>nd</sup>, to allow the parties and Court time to resolve this injunction motion.

collaring was done, or land at the site of the wolf for approximately a half hour while the wolf is collared if no landing strip is located near-by. *Id.*, at 19. Once the collaring is completed, the helicopter will pick up the personnel and equipment and leave the site. *Id.* The collars transmit GPS data every third day to a satellite with the precise location of the wolf, which is then emailed to IDFG. *Id.*, at 22.

The Forest Service claimed that this authorization is the minimum tool necessary to administer the wilderness and will have no significant impacts to wilderness values. *See DM and Min. Req. Guide.* It asserted that IDFG needs this data on the eight to ten uncollared packs in the wilderness to learn more about wolf movements, distribution, behavior, and denning and rendezvous sites, so it can better manage the wolves and insure wolves are meeting recovery goals. *DM at 1-2, 5; Min. Req. Guide at 3.* The Decision Memo stated that this information will contribute to Forest Service management of the wilderness resource because the agency will have a better understanding of the wolves and may use the information if it needs to take action in the future to address wolf-visitor conflicts. *DM at 2, 5; see also Min. Req. Guide at 32.*

The Decision Memo briefly mentioned other possible techniques to collect data on wolves in the wilderness, including ground traps, but dismissed them as being less successful and effective. *DM at 6, 7.* However, the Decision Memo completely ignored the fact that the Nez Perce Tribe and others have successfully captured wolves in wilderness using ground traps, and the Tribe monitored and managed wolves in the state for many years without needing to use helicopters in wilderness. *See Heberger Decl.*, ¶¶ 11-19 and *Exs. A-B.*

The Minimum Requirements Guide briefly described the Tribe's trapping efforts in wilderness, but inaccurately stated that only fourteen wolves were trapped in wilderness rather than the accurate figure of thirty-two wolves (with twenty-nine wolves trapped in the Frank

Church Wilderness). *See Min. Req. Guide at 4; Heberger Decl., ¶¶ 14-17 & Exs. A-B.* Based on this inaccurate number, it concluded that ground trapping was not very successful in Wilderness despite also recognizing that the Tribe did not even focus much effort on trapping in Wilderness. *Id., at 2, 4; Heberger Decl. ¶ 16 & Ex. A.*

Finally, the Forest Service claims that there will be minimal effects to wilderness resources because the helicopters would usually land on frozen ground or snow and would not damage vegetation, there are few visitors to the wilderness in winter who would be disturbed by the helicopters, and with other flights to and from airstrips in the wilderness plus the big game surveys, the helicopter activity for capturing and collaring wolves will not have an appreciable additional effect to the wilderness. *DM at 3-4; Min. Req. Guide at 10, 17, 22, 24.* Thus, despite announcing in 2005 and 2006 that NEPA analysis was required for this type of activity, *see Forest Service Region 1 Letters (Rule Decl., Exs. 2, 4)*, the Forest Service used a “categorical exclusion” to eliminate this authorization from NEPA review. *DM at 3.*

Plaintiffs’ Third Claim For Relief challenges the Forest Service’s authorization as violating the Wilderness Act, Central Idaho Wilderness Act, and NEPA. *See First Amended Complaint, ¶¶ 1-2, 46-65, 84-88.* As explained below, the Forest Service has not demonstrated in its Decision Memo or Minimum Requirements Guide that use of helicopters in the Frank Church Wilderness to capture and collar wolves is **necessary** for protecting and preserving wilderness character and values, nor has it shown that the use of a categorical exclusion is proper in this instance; and it has violated NEPA by failing to prepare an EA or EIS.

## ARGUMENT

### **I. APPLICABLE LEGAL STANDARDS.**

To win preliminary injunctive relief, Plaintiffs must establish that they are likely to

succeed on the merits of these claims; that they are likely to suffer irreparable harm in the absence of preliminary relief; that the balance of hardships tips in their favor; and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008).

When assessing the legal claims here, the Court does not owe *Chevron* deference to the Forest Service's decision to permit the use of helicopters in the Frank Church Wilderness, because the decision is contrary to the plain language and intent of the Wilderness Act as well as NEPA, and because at most it is entitled only to "respect." *The Wilderness Society v. U.S. Fish and Wildlife Service*, 353 F.3d 1051, 1059-60, 1067 (9<sup>th</sup> Cir. 2003) (holding that special use permit for project in wilderness was not entitled to *Chevron* deference); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638, 648 (9<sup>th</sup> Cir. 2004) (holding that permit for outfitters' use of wilderness was not due *Chevron* deference). Moreover, such "respect" is due only if the Forest Service's decision is persuasive based on the thoroughness of its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors which give it power to persuade. *Id.*

## **II. THE FOREST SERVICE VIOLATED THE WILDERNESS ACTS.**

### **A. The Purpose Of The Wilderness Act Is To Preserve Wilderness Character.**

The Wilderness Act was adopted by Congress in 1964 to insure that some areas were set aside and preserved and protected in their wild state, and that man did not impose his imprint upon every area in the United States; and these goals are threaded throughout the Act. The Act's policy statement provides for a National Wilderness Preservation System to assure that man does not occupy or modify all lands within the country, leaving no lands designated for "preservation and protection in their natural condition." 16 U.S.C. § 1131(a). Wilderness areas must be

administered in a manner that will leave them “unimpaired for future use and enjoyment as wilderness,” and that will provide for “the protection of these areas” and “the preservation of their wilderness character.” *Id.*

The definition of “wilderness” is an area where the community of life is “untrammelled” by man and the land retains its primeval character and influence, and which is “protected and managed so as to preserve its natural conditions.” *Id.*, § 1131(c). These are areas affected primarily by the forces of nature that have outstanding opportunities for solitude or a primitive type of recreation. *Id.* Agencies administering wilderness are “responsible for preserving the wilderness character of the area.” *Id.*, § 1133(b); 36 C.F.R. § 293.2 (noting need to administer area to preserve and protect its wilderness character, and that in resolving potential conflicts in resource use, “wilderness values will be dominant”).

Section 4(c) of the Wilderness Act further prohibits uses of wilderness that are not consistent with this mandate, and specifically provides that use of motor vehicles or aircraft landings are prohibited in designated wilderness except in narrow circumstances, as follows:

Except as . . . necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area) **there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.**

*Id.*, § 1133(c) (emphasis added).<sup>7</sup>

The Ninth Circuit recognizes that the purpose of the Wilderness Act is to protect and preserve wilderness character. *See High Sierra Hikers*, 390 F.3d at 647-48 (discussing agency’s

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<sup>7</sup> The Central Idaho Wilderness Act incorporated these provisions of the 1964 Wilderness Act; and as noted above, while it allows continued use of designated airstrips that were already in use in 1980, it does not allow aircraft landings in the Frank Church Wilderness outside those designated strips except under the narrow exception provided in Section 4(c). *See AR 3307-14.*

obligation under Act to protect and preserve wilderness areas and maintain wilderness character); *The Wilderness Society*, 353 F.3d at 1061 (stating that Wilderness Act imposes a “mandate of preservation”). The Ninth Circuit has thus overturned agency decisions to permit activities in wilderness that do not comport with the purpose of preserving wilderness character. In *High Sierra Hikers*, for example, the Ninth Circuit overturned permits issued to outfitters to make commercial trips into wilderness. 390 F.3d at 648. Although these permits would assist recreation, the Forest Service’s decision to grant numerous permits in the face of documented damage from overuse by outfitters did not have rational validity in light of the Wilderness Act’s overarching purpose of preservation, and when the agency did not even go through NEPA analysis to fully consider the impact of its decision. *Id.*, at 647-48. *See also The Wilderness Society*, 353 F.3d 1051 (overturning permit for fish enhancement project in wilderness because it was a prohibited commercial enterprise and was not aimed at furthering goals of Act, even though it had benign purpose and minimally intrusive impact).

Other courts in this Circuit have followed the Ninth Circuit’s lead in applying the Wilderness Act’s strict mandates to overturn various agency decisions. In a follow-up to the *High Sierra Hikers* case discussed above, the district court held that the Forest Service’s subsequent decision to issue outfitter permits after completion of an EIS still violated the Act because it elevated recreation over preservation of the wilderness character, and its determination of the need for this many permits was flawed. *High Sierra Hikers Ass’n v. Weingardt*, 521 F. Supp.2d 1065 (N.D. Cal. 2007). A decision to repair and maintain small dams in wilderness also violated the Wilderness Act’s strict requirement to preserve wilderness values. *High Sierra Hikers Ass’n v. U.S. Forest Service*, 436 F. Supp.2d 1117 (E.D. Cal. 2006). The Act prohibits structures unless they are “necessary for the administration of the area for the purpose of the

Act,” and the court noted that this exception has been interpreted narrowly. *Id.*, at 1136. Thus, even though repairing these structures would enhance the trout population and fishing in wilderness, it was not necessary to further the purpose of preserving wilderness character and thus violated the Act. *Id.*, at 1129-38. Likewise, a decision to replace two shelters in wilderness violated the Act because, although beneficial for recreation and human safety, these structures were not necessary to further the goals of the Act to preserve the wild and primitive character of the wilderness. *Olympic Park Ass. v. Mainella*, 2005 WL 1871114 (W.D. Wash. 2005).

The Eleventh Circuit has similarly ruled that the “necessary for minimum purposes of administration” exception in Section 4(c) of the Wilderness Act is very narrow, and an agency must demonstrate that an action is necessary to preserve the wilderness character of the area when invoking that exception. *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11<sup>th</sup> Cir. 2004). *Mainella* held that using a passenger van to transport tourists to historic structures within a wilderness was not necessary for administering the area for the purpose of the Act. *Id.*, at 1088-94. The Park Service claimed that this activity would promote historical use of the area, and there would be no additional impacts because the Service would be making the trips anyway to do necessary maintenance on the structures. *Id.* at 1089. The court rejected this reasoning, stating that using a fifteen passenger van was different from using a Park Service jeep, and that the prohibition on motor vehicle use in the Wilderness Act stems from more than just physical environmental impacts – it seeks to preserve wilderness areas in their natural condition for their use and enjoyment as wilderness. *Id.*, at 1092-93. Thus, the Act “seeks to provide the opportunity for a primitive wilderness experience as much as to protect the wilderness lands themselves from physical harm.” *Id.*, at 1093. The court stated that use of a passenger van changes the wilderness experience for those inside and outside of the van, and that the language

and purpose of the Wilderness Act prohibits this activity. *Id.*

These cases all demonstrate that preservation of wilderness character must be predominant, and courts have narrowly interpreted the exception for motor vehicle use, landing of aircraft, or structures in wilderness only to those situations that are of “urgent necessity,” rather than mere convenience or benefit. *See Olympic Park*, 2005 WL 1871114 at \*5. A non-conforming activity is allowed only if it is the sole means of preventing harm to the wilderness character of the area.

Likewise, the Central Idaho Wilderness Act specifically protects the “primitive and undeveloped land” and the “wilderness-dependent wildlife . . . which thrive within this undisturbed ecosystem.” Pub. L. No. 96-312, § 2(a) (*AR 3307*). Helicopters will disturb both of these priorities.

Even the Forest Service’s own manual explains that wilderness values shall dominate over all other considerations; and that wilderness uses, including fish and wildlife research, must be compatible with preserving wilderness character. FSM 2320.3(1), (8); 2323.32(1), (2); 2323.33b; 2324.42(4) (*AR 3315*). “Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness.” FSM 2320.6. Wildlife research methods that temporarily infringe on wilderness character may be used only if **essential** for wilderness management, and alternative methods **are not available**. FSM 2323.37.<sup>8</sup>

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<sup>8</sup> The Frank Church River of No Return Wilderness Management Plan likewise has goals, objectives, and standards that emphasize preservation of wilderness character, and allows the Forest Service to consider use of helicopters to conduct research only when other methods **are not possible** and not appropriate for the research objectives. Management Plan, chpt. 2, part XVII.E.7 (2004) (reiterated in *AR 3857*).

**B. The Forest Service’s Decision Does Not Comply With The Wilderness Acts.**

Aircraft landings are prohibited in wilderness because they are a mechanized (or motorized) intrusion into the natural world and disrupt the solitary wilderness experience of humans using the area for primitive recreation. *See Declaration of Thomas Kovalicky*, ¶ 10. Here, the use of helicopters to aerially dart and collar wolves within the Frank Church Wilderness is directly contrary to the language and intent of the Wilderness and Central Idaho Wilderness Acts; and the Forest Service has not shown that it fits within the narrow statutory exception of being necessary to meet minimum requirements for protecting and preserving wilderness character.

1. Helicopter Landings Are Not Necessary To Administer Wilderness.

First, the Forest Service does not establish any necessity – much less an urgent necessity – for why landing helicopters in the Frank Church Wilderness to collar wolves is somehow needed to preserve wilderness character. To the contrary, the Decision Memo and Minimum Requirements Guide explain only that IDFG believes it needs this data so that IDFG can manage wolves in the state. Assisting IDFG in monitoring and managing wolves after they have been de-listed under the ESA may be a laudable goal; but it is certainly not necessary to preserve the wilderness character of the Frank Church Wilderness.<sup>9</sup>

The only justification that the Forest Service attempts to offer in the Decision Memo is to assert that gaining a better understanding of wolves through this data will “contribute” to managing wilderness resources, because it might be “useful” if the Forest Service needs to take

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<sup>9</sup> Plaintiffs do not dispute that IDFG has jurisdiction under both the Wilderness Act and its sovereign authority to manage wolves in the state, both inside and outside of designated Wilderness. However, in exercising this authority – including when it occupies or uses the federal public lands – IDFG still must comply with federal laws, such as the Wilderness Act.

action in the future to address visitor-wolf conflicts or if the agency needs to put in place management controls related to the wolf population. *DM at 2, 5-6*. The Minimum Requirements Guide – which the Forest Service prepared to analyze whether the proposed action represents the “minimal tool” for wilderness management – itself admits that the Forest Service has not used wolf data in the current management scheme, but similarly asserts such data would “enhance” management and “help” the Forest Service maintain and manage a more natural system and address visitor use/wolf conflicts in years to come. *Min. Req. Guide at 9, 32*.

None of these rationales are adequate under the Wilderness Act and caselaw discussed above. They do not establish that there is an urgent need for this project to preserve wilderness character, especially when the agency has never needed this information in the fifteen years since wolves were reintroduced into the Frank Church Wilderness. *See Kovalicky Decl., ¶¶ 8-9* (explaining that managing wolves is not necessary for preserving wilderness character); *see also Forest Service Region 1 Sept. 2005 letter (Rule Decl. Ex. 2)* (questioning need for collaring wolves in wilderness when not necessary in past).

The lack of urgent necessity for this project is also underscored by the fact that the U.S. Fish and Wildlife Service monitored and managed wolf recovery for more than a dozen years – and indeed determined that the wolf population had recovered in Idaho to warrant delisting – without resorting to using helicopters to capture and collar wolves in wilderness. *See Heberger Decl., ¶¶ 11, 20; Declaration of Jim Peek, ¶ 11; Min. Req. Guide at 2*. The wolf population is well above recovery goals currently, with approximately 94 packs overall and fourteen packs in the Frank Church Wilderness alone, according to the Forest Service and IDFG reports. *Cole Decl., Ex. A; Min. Req. Guide at 1, 3*. Since they already have substantial information about wolf populations in the Frank Church Wilderness, there is no urgent necessity requiring use of

helicopter landings in the Frank Church Wilderness to allow IDFG to collect even more detailed information about wolf populations.

2. Use of Helicopters Is Not The Minimum Necessary Tool.

Second, the Forest Service's approval violates the Wilderness Acts, because the agency has not demonstrated that use of helicopters is the minimum tool necessary to administer the Frank Church Wilderness, as required under Section 4(c) and the caselaw discussed above.

As discussed above, various ground-based alternatives exist to monitor wolves in the Frank Church Wilderness, including trapping and collaring on the ground. *See Heberger, Cole Declarations*. Yet the Forest Service simply dismissed trapping as an option, based on IDFG's assertion that it tried trapping wolves to collar them for a couple years in the Selway-Bitterroot Wilderness and was not successful. *DM at 6*. In doing so, the Decision Memo completely ignored the trapping success the Nez Perce Tribe has had in the Frank Church Wilderness. *Heberger Decl.*, ¶¶ 11-17 & Exs. A-B.

For its part, the Minimum Requirements Guide acknowledged that the Tribe has done some trapping in wilderness, but incorrectly relies on fourteen as the number of wolves trapped when the correct number is more than twice that amount. *Min. Req. Guide at 4; Heberger Decl.*, ¶¶ 16-17 & Exs. A-B. And that success occurred despite the Tribe focusing its trapping efforts outside of wilderness. *Min. Req. Guide at 2; Heberger Decl.*, ¶ 16 & Ex. A. Others have trapped wolves in wilderness and other backcountry settings both on foot and using pack animals as well. *Heberger Decl.*, ¶¶ 12, 18-19.

Furthermore, other methods of monitoring that do not involve radio collars are available to determine wolf presence and estimate population size and distribution, which is all that is necessary to ensure wolf recovery goals are being met. *Heberger Decl.*, ¶¶ 12, 17; *Declaration*

of *Ralph Maughan*, ¶ 16. Certainly trapping and other methods are available alternatives and thus helicopter use is not necessary. FSM 2323.37(1), 2324.42(4). Economy, convenience, and comfort are not valid reasons for allowing the use of helicopters in wilderness. FSM 2320.6; *Kovalicky Decl.*, ¶ 12.

As described above, courts have narrowly interpreted the Wilderness Act's exception to prohibited uses; and have overturned permits for activities that may have minimal impacts, or be beneficial for a particular use of the wilderness, but are not necessary to preserve wilderness character. The Forest Service's decision to authorize helicopters to capture and collar wolves in the Frank Church Wilderness is contrary to the plain language and intent of the Wilderness Act because it is not necessary for the preservation of wilderness character. Furthermore, the Forest Service's decision is not due any respect because it is not well-reasoned, did not thoroughly consider the need for this project or alternative methods, and is not consistent with prior pronouncements. Thus, Plaintiffs are likely to succeed on their claims that the Forest Service violated the Wilderness and Central Idaho Wilderness Acts in approving the IDFG proposal.

## **II. THE FOREST SERVICE VIOLATED NEPA.**

The Forest Service's decision to use a categorical exclusion ("CE") to avoid NEPA analysis also was unreasonable and thus must be overturned. *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1011 (9<sup>th</sup> Cir. 2009) (agency decision that certain activity is not subject to NEPA is reviewed for reasonableness). The Government previously determined that allowing this activity in wilderness would require NEPA analysis, and the same is true now. *Heberger Decl.* ¶¶ 9, 21; *Forest Service Region 1 letters (Rule Decl., Exs. 2, 4)*.

A CE can be used only if there will be no significant effects to the environment, which requires consideration of various factors, including unique characteristics of the geographic area;

the degree to which the effects on the quality of human environment are likely to be highly controversial; the degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration; or whether the action threatens a violation of Federal law. 40 C.F.R. §§ 1508.4, 1508.27(b); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9<sup>th</sup> Cir. 2007); *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007). Furthermore, a CE cannot be used if extraordinary circumstances are present, which occurs if there is any potential for significant impacts to Wilderness. 40 C.F.R. § 1508.4.

The use of a CE in this circumstance violates NEPA for many reasons. The Forest Service claims that the project does not individually or cumulatively have any significant effects on the quality of the human environment and that there are no extraordinary circumstances. *DM at 9*. However, this action implicates numerous factors that show the activity may have significant impacts to wilderness, and the Forest Service's decision did not adequately consider those factors.

**A. This Activity May Have Significant Effects.**

This activity will occur in a unique geographic area—a federally designated wilderness. As the declarations accompanying this motion show, a variety of people seeking solitude and a peaceful wilderness experience plan to be in the Frank Church Wilderness this winter to observe wolves and other wildlife in their natural setting. *See Declarations of Kelley Weston, Ken Davis, David Hayes, Lon Stewart, Chris Hansen, Ken Helms, Dale Grooms, Veronica Egan, Ginger Harmon, John Robison, Brenda Hanley, John Hillman, Edwina Allen, Ralph Maughan, Mark Menlove, Dana Menlove, Gary MacFarlane, Forrest McCarthy, Blake Everson, Marcey Olajos, and Ken Cole*. Helicopters flying low and pursuing wolves while scaring other wildlife, landing

in the wilderness, and making numerous trips back and forth to landing strips will disrupt these visitors and impair their wilderness experience. *Id.* The impacts from the wolf collaring will be much greater than the impacts from small planes simply flying overhead and even the aerial elk survey flights, but the Forest Service does not acknowledge those differences. *Kovalicky Decl.* ¶¶ 13-14, 19; *Stewart Decl.* ¶¶ 12-14; *Grooms Decl.* ¶ 8; *Robison Decl.* ¶ 22; *Dana Menlove Decl.* ¶ 10; *DM at 4*; *Wilderness Watch v. Mainella*, 375 F.3d at 1093-94 (stating that extent of effect to wilderness from using 15 passenger van was different from use of jeep even though just single vehicle). The potential impacts to this unique area thus require NEPA analysis in an EA or EIS. 40 C.F.R. § 1508.27(b)(3).

The critical comments submitted by many individuals and organizations, raising these very points, also highlight the controversial nature of this project. *See AR 3894-4391*. Controversy in the context of NEPA means that a substantial dispute exists about the size, nature, or effect of the proposed action. *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9<sup>th</sup> Cir. 1988). Comments from present and former Forest Service employees (including those responsible for wilderness management), other individuals, and multiple organizations expressed concerns that the project would significantly impair wilderness values and characteristics as well as harm wolves. *See AR 3894-4391*; *Kovalicky Decl.* ¶¶ 20-21. Even the Forest Service recognized that there were widely divergent views on the effects of the project and whether it complied with the law. *DM at 8*; *AR 3848*.

These comments demonstrate there is significant public controversy over the environmental effects of landing helicopters in wilderness to capture and collar wolves, again showing the need for NEPA analysis. 40 C.F.R. § 1508.27(b)(4); *California v. Norton*, 311 F.3d 1162, 1176-77 (9<sup>th</sup> Cir. 2002) (holding that use of CE was improper due in part to public

controversy over environmental effects of project); *Jones v. Gordon*, 792 F.2d 821, 828 (9<sup>th</sup> Cir. 1986) (holding that reliance on CE was improper where public comments showed there was the arguable existence of public controversy over the environmental effects of the project). In 2005, the Forest Service did not issue this permit under a CE given the “depth of comments we received from the public and the complexity of issues raised.” *Forest Service Region 4 Press Release (Rule Decl. Ex. 3)*. The same reason calls for overturning the CE here.

The Forest Service’s decision also warrants NEPA analysis because it could establish a precedent for future actions, opening the door to motorized use and landing of helicopters in the Frank Church Wilderness for various activities, including further wolf monitoring and even control operations, even though not necessary for preservation of wilderness character. *Kovalicky Decl.* ¶¶ 6, 15-18; *Heberger Decl.* ¶ 22. The Forest Service rejected this proposal in the past. *See Forest Service Region 1 Letters; Forest Service Region 4 Press Release*. If the Forest Service allows helicopter use in the Frank Church Wilderness in this instance, it may use the precedent to allow it in other similar instances, again warranting an EA or EIS for this initial authorization. 40 C.F.R. § 1508.27(b)(6).

Finally, the Forest Service’s authorization of helicopters in wilderness threatens a violation of federal law, and therefore should be assessed through NEPA analysis. 40 C.F.R. § 1508.27(b)(10). The Wilderness Act prohibits landing of aircraft in wilderness unless it is the minimum tool necessary for the administration of the area for the purpose of preserving wilderness character. 16 U.S.C. § 1133(c). As discussed above, the use of helicopters here is not necessary for preserving wilderness character, and thus violates the Wilderness Act.

The Eleventh Circuit in *Wilderness Watch v. Mainella* ruled that these same factors precluded use of a CE to permit passenger vans to carry tourists through a wilderness area. 375

F.3d at 1095-96. It stated that even if the van trips “would have ‘no net increase in impact’ on the wilderness area, mechanized passenger service through a wilderness area creates a potential ‘precedent for future action’ and, as described above, the policy ‘threaten[s] to violate’ the Wilderness Act. At a minimum, the agency should have recognized that these exceptions ‘may’ apply.” *Id.* For the same reasons here, the Forest Service violated NEPA.

**B. Extraordinary Circumstances Are Present.**

In addition to implicating several of the factors that demonstrate the need for an EA or EIS, extraordinary circumstances are present here that also preclude use of a CE. 40 C.F.R. § 1508.4. Congressionally-designated wilderness is one of the special resources that trigger assessment of extraordinary circumstances, and if there is any potential for significant effects to this resource, a CE cannot be used. FSH 1909.15 § 30.3(2); *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F. Supp.2d 874, 902-02 (N.D. Cal. 2006); *High Sierra Hikers*, 390 F.3d at 641 (overturning use of CE to issue outfitter permits in wilderness). As explained above, the landing of helicopters in wilderness is a human intrusion that disrupts the solitude and primitive character of the area as well as the natural state of the ecosystem and wildlife there.

The Forest Service minimizes these effects by claiming that the time spent capturing and collaring wolves will be short and therefore there will not be much additional noise on top of the existing aircraft noise, and that there will be few visitors in the area where the helicopters will be chasing wolves and landing to experience those effects. *DM at 4; Min. Req. Guide at 17, 24.* However, as seen in the declarations filed herewith, that is an incorrect assumption. Helicopters hovering low, harassing wildlife, and landing in the backcountry will have significant effects to the wilderness resources and visitors who wish to enjoy the solitude and wildlife in their natural state, warranting NEPA review.

**C. The CE Decision Is Unreasonable.**

The Forest Service's CE decision should also be overturned because it is flawed and unreasoned. The agency completely dismissed ground trapping as an alternative to the use of helicopters in its Decision Memo without acknowledging that the Nez Perce Tribe trapped numerous wolves in wilderness. *DM at 6; Heberger Decl. ¶¶ 11-17 & Exs. A-B.* And that success occurred despite putting much more effort into trapping outside of wilderness. *Min. Req. Guide at 4; Heberger Decl. ¶ 16 & Ex. A.* At a minimum, there is a substantial controversy about the feasibility of ground trapping or other methods to monitor wolves in Wilderness that should have been aired in an EA or EIS. By ignoring this crucial information, the Forest Service's CE decision is unreliable.

The Forest Service also failed to thoroughly assess IDFG's proposal to determine the need for the project. IDFG did not set forth the objectives for its project or specify what it intends to do with the information, and thus did not provide the Forest Service with a valid study plan for this research. *See Peek Decl. ¶¶ 10-11.* Yet even without this information, the Forest Service asserted that the project was necessary to protect wolves and their recovery. Such an assertion, without having all of the key underlying facts, is unreasonable.

Furthermore, the Forest Service did not mention in its Decision Memo that the information could also be used to reduce wolf numbers in the wilderness. Increased knowledge about wolf numbers and distribution in wilderness could increase the allowed hunting and killing of wolves in the area, and if the GPS locations of wolves are obtained by outside parties it could assist with locating and killing individual wolves. *Min. Req. Guide at 24; Peek Decl. ¶ 13; Cole Decl. ¶ 43.* By failing to mention these foreseeably adverse impacts to wolves, the Forest Service did not consider all of the impacts of this project. For all of these reasons, the Forest

Service's decision to use a CE here, particularly when it had previously determined a CE for this type of activity was improper, was unreasonable and violated NEPA.

**III. AN INJUNCTION IS NECESSARY TO AVOID IRREPARABLE HARM.**

Plaintiffs have demonstrated a likelihood of success on their Wilderness Act and NEPA claims. Because of likely irreparable harm to Plaintiffs and their members, the Court must enjoin this project immediately. Plaintiffs are groups with long-standing ties to the Frank Church Wilderness and an interest in protecting the character of this special area as well as the wild wolves that live there. *See Maughan Decl.* ¶¶ 2, 10-11; *Gehrke Decl.* ¶¶ 7-15; *Robison Decl.* ¶¶ 5-7; *Allen Decl.* ¶ 5; *Declaration of Mark Menlove* ¶¶ 2-6 ; *Declaration of Ginger Harmon* ¶¶ 1-3; *Declaration of Gary MacFarlane* ¶¶ 2-5. Many of Plaintiffs' members plan to be in the Frank Church Wilderness this winter to enjoy the peace and solitude as well as observe and study wolves and other wildlife in their natural habitat, including during the time IDFG plans to collar wolves there, and they will be irreparably harmed by the use and landing of helicopters. *See Declarations of Kelley Weston, Ken Davis, David Hayes, Lon Stewart, Chris Hansen, Ken Helms, Dale Grooms, Veronica Egan, Ginger Harmon, John Robison, Brenda Hanley, John Hillman, Edwina Allen, Ralph Maughan, Mark Menlove, Dana Menlove, Gary MacFarlane, Forrest McCarthy, Blake Everson, Marcey Olajos, and Ken Cole.*

When considering whether equitable relief is appropriate, courts look at whether an injunction is necessary to effectuate the congressional purpose behind the statute. *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9<sup>th</sup> Cir. 2002). The purpose behind the Wilderness Act is to protect and preserve wilderness character by eliminating man's influence on wild areas and allowing these areas to remain in their natural state, which provides an opportunity for solitude and a primitive recreation experience. 16 U.S.C. §§ 1131, 1133.

Activities that degrade these wilderness values and impair the enjoyment of these areas for solitude and primitive recreation warrant an injunction to effectuate the purpose behind the Act.

The purpose behind NEPA is to ensure that an agency considers the environmental impacts of an activity, reveals those impacts to the public, and accepts public comments before that activity takes place. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Courts often issue injunctions prohibiting an activity from moving forward to prevent harm until the agency complies with its procedural duty under NEPA. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9<sup>th</sup> Cir. 2007).

Courts have repeatedly found that plaintiffs may be injured by actions that harm aesthetic interests or recreational enjoyment of an area. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 183 (2000) (plaintiffs may be injured by activity that lessens aesthetic and recreational value of an area); *David v. Mineta*, 302 F.3d 1104, 1115-16 (10<sup>th</sup> Cir. 2002) (irreparable harm from activity that impaired aesthetic attributes by disrupting the natural setting and feeling of park in part by increasing noise levels); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp.2d 1, 25 (D.D. C. 2009) (finding likelihood of irreparable harm where plaintiffs could not fully enjoy visits to national parks because they feel less safe in light of new rule allowing handguns in parks); *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, --F. Supp.2d--, 2009 WL 2868818, at \*5-6 (D. Colo. 2009) (finding irreparable injury to plaintiffs' interest in solitude, quiet, and natural beauty from drilling of oil wells); *Sierra Club v. U.S. Fish and Wildlife Service*, 235 F. Supp.2d 1109, 1125-25 (D. Or. 2002) (predator-prey study that removed cougars from area could cause injury by detracting from wilderness experience and impairing enjoyment of hunting in the presence of all wildlife species).

Likewise, viewing and appreciating wildlife in nature is a cognizable interest that may be

harm from activities that disrupt or injure the wildlife. *See e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (stating that “the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest”); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9<sup>th</sup> Cir. 2001) (recognizing aesthetic injury from activity that interfered with plaintiffs’ ability to enjoy viewing shore birds in their natural habitat); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1396 (9<sup>th</sup> Cir. 1992) (injury from diminished opportunity to view bison in Yellowstone and from emotional distress caused by watching bison be killed); *Fund for Animals v. Norton*, 281 F. Supp.2d 209, 220-22 (D.D.C. 2003) (finding irreparable harm to aesthetic interests when activity impaired ability to view, interact with, study, and appreciate swans, and citing other cases finding harm due to interference with observing animals).

The Frank Church Wilderness is a special place to many of Plaintiffs’ members, who have used this area repeatedly at all times of the year. Winter is a particularly peaceful time that offers extreme solitude and beauty for those recreating in the wilderness. *See e.g., Weston Decl.* ¶ 7 (“Experiencing the Middle Fork of the Salmon River in the winter is one of the highlights of my life”); *Mark Menlove Decl.*, ¶ 4 (“Solace of wintertime in the Frank Church Wilderness is the epitome of what [Winter Wildlands Alliance] and our members work to protect and experience”); *Robison Decl.*, ¶ 19 (noting increased opportunities for solitude in winter). Viewing wildlife, including wolves, in their natural setting is also of primary importance to Plaintiffs’ members when they visit the Frank Church Wilderness. *See, e.g., Hanley Decl.*, ¶ 11 (“To me, seeing [wolves] standing, staring, stoic, watching you far before you notice their presence is the ultimate wilderness experience”); *Maughan Decl.*, ¶ 12 (noting desire to celebrate the release of wolves fifteen years ago by looking for them and their prey in the wild, quiet, unmodified setting of the Frank Church Wilderness); *Hansen Decl.*, ¶¶ 6-8 (stating that wolves

are an iconic species of wild areas, and he is looking forward to observing them and their interaction with prey during winter in the Frank Church Wilderness).

Many members of Plaintiffs' groups intend to visit the Frank Church Wilderness later this month and next month to experience the peace, quiet, solitude, and beauty of this area in the winter as well as view and study wolves in their natural setting. *See Declarations, supra.* These members explain that the sight and sound of helicopters near-by, flying low and hovering to pursue wolves and dart them, and then landing in the backcountry, will be extremely disruptive to their wilderness experience and cause the wolves and other wildlife to scatter, harming their aesthetic and recreation interests as well as their wildlife viewing and studying opportunity. *Hayes Decl. ¶¶ 7-10; Stewart Decl. ¶¶ 10-15; Helms Decl. ¶¶ 5-10; Hansen Decl. ¶¶ 7-12; Grooms Decl. ¶¶ 10-13; Egan Decl. ¶¶ 3-4; Harmon Decl. ¶ 6; Robison Decl. ¶¶ 18-19; Hanley Decl. ¶¶ 9-14; Hillman Decl. ¶¶ 9-14; Weston Decl. ¶¶ 10-12; Allen Decl. ¶¶ 7-10; Maughan Decl. ¶¶ 12-13; Mark Menlove Decl. ¶¶ 8-10; Dana Menlove Decl. ¶¶ 8-12; MacFarlane Decl. ¶¶ 11-12; Davis Decl. ¶¶ 13-16; Cole Decl. ¶¶ 37-45.*

These groups and members also were deprived of the opportunity to participate in the decision-making process for this permit because the Forest Service excluded it from NEPA analysis. Several staff or members of Plaintiffs' groups specifically mention in their declarations that they would have commented on an EA or EIS, or appealed this proposal, if given the opportunity to express their concerns under NEPA; and that the Forest Service injured them by denying such opportunities. *See Egan Decl. ¶ 5; Harmon Decl. ¶ 5; Robison Decl. ¶ 10; Hayes Decl. ¶ 11; Gerhke Decl. ¶ 17; Maughan Decl. ¶ 14; MacFarlane Decl. ¶ 7.*

It is likely that the use and landing of helicopters in the wilderness this winter will harm Plaintiffs because the areas in and around the Middle Fork Salmon River and its tributaries

(including Big Creek), and its confluence with the Main Salmon River, are principal areas within the Frank Church Wilderness where elk populations are likely to be concentrated – and where wolves will also be present – and are the areas where IDFG plans to focus its surveys. Plaintiffs’ declarants intend to visit these same areas to experience the solitude of the wilderness and view wolves and other wildlife in their natural setting. The highest density areas of elk that IDFG will cover 100% in their surveys, and therefore the areas that wolves will be captured and collared, include the Middle Fork Salmon River corridor as well as the Big Creek area, *see Min. Req. Guide at 7-8*, and various members of Plaintiffs’ groups will be in the Middle Fork and Big Creek areas the week of February 22 and thereafter, when IDFG plans to do the survey.<sup>10</sup> *Hayes Decl. ¶ 7; Stewart Decl. ¶ 10; Helms Decl. ¶ 5; Hansen Decl. ¶ 7; Grooms Decl. ¶ 10; Egan Decl. ¶ 3; Harmon Decl. ¶ 6; Robison Decl. ¶ 18; Weston Decl. ¶ 10; Mark Menlove Decl. ¶ 8; Dana Menlove Decl. ¶ 5; Davis Decl ¶ 11; MacFarlane Decl. ¶ 12; Cole Decl. ¶ 37.*

These folks intend to visit the Frank Church Wilderness this winter not only to find solitude and enjoy a primitive recreation experience, but also to find and observe wolves. Therefore, they will enter by foot or ski in, or fly into public landing strips along the Middle Fork Salmon River or Big Creek, and then spend several days or a week hiking and camping in those areas, including by climbing onto the benches and ridges above the river, and going up side streams and tributaries, to track, observe, and photograph wolves. *Id.* In order to find these secretive creatures and observe or photograph them, the declarants will need to be stealthy and remain hidden from view, also making it unlikely the helicopters would see them before initiating their wolf captures.

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<sup>10</sup> Plaintiffs have other members in addition to those who filed declarations here who are planning on taking trips into the Frank Church Wilderness later in March and in April. If IDFG delays the survey, Plaintiffs reserve the right to file additional declarations to establish harm during that time period as well.

The use and landing of helicopters to capture and collar wolves, as well as the additional trips back and forth to landing strips, will create significant effects beyond what the normal winter use of landing strips and the aerial elk surveys would cause. These effects will disrupt Plaintiffs' wilderness experience and impair their enjoyment of watching wolves and other wildlife in their natural setting. The Court must enjoin the use and landing of helicopters this winter to prevent irreparable harm to Plaintiffs.

**IV. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR AN INJUNCTION.**

As with all injunction motions, the Court must balance the hardships between parties and consider the public interest when deciding whether to issue an injunction. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9<sup>th</sup> Cir. 2006). The public interest is a critical component of this equation. *Winter*, 129 S. Ct. at 377-78.

The balance of hardships weighs strongly in favor of an injunction here. Plaintiffs have a deep and long-standing interest in protecting the Frank Church Wilderness and its wilderness character, and the landing of helicopters is directly adverse to their commitment to this wild place. Furthermore, as described above, many members of these groups will be in the Frank Church Wilderness when IDFG will be undertaking the helicopter operations to dart and collar wolves; and their wilderness and wildlife watching experiences will be directly harmed by the helicopter activity. This hardship to Plaintiffs cannot be rectified by money damages.

In contrast, the hardship to the Forest Service and IDFG is minor. The Forest Service has not needed this data for wilderness management in the past; and has made no showing why it is of urgent necessity now. Certainly it can wait at least until it studies the proposal more thoroughly in an EA or EIS. Even IDFG's claim that it needs the data for wolf management rings hollow when USFWS and the Nez Perce Tribe managed wolves for many years, and

assessed recovery of wolves, without the use of helicopters to capture and collar wolves in wilderness. *Heberger Decl.*, ¶¶ 11, 20. Again, there is little hardship to IDFG to wait at least until the Forest Service conducts a proper analysis under NEPA to truly assess the impacts of this project and whether it is necessary for preservation of wilderness character.

The public interest also weighs in favor of an injunction. Here, the alleged impact is upon a wilderness area. As noted by the Ninth Circuit, “Congress has recognized through passage of the Wilderness Act, 16 U.S.C. §§ 1131-1136, that there is a strong public interest in maintaining pristine wild areas unimpaired by man for future use and enjoyment. Because Congress has recognized the public interest in maintaining these wilderness areas largely unimpaired by human activity, the public interest weighs in favor of equitable relief.” *High Sierra Hikers*, 390 F.3d at 643. Furthermore, “Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.” *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). The negative impact to wilderness values and the rushed CE decision that precluded careful consideration of alternatives and impacts favor suspending this activity to comport with the public interest.

In summary, Plaintiffs have demonstrated that the Forest Service violated the Wilderness Act and NEPA in issuing the December 2009 Decision Memo that authorized the use and landing of helicopters to capture and collar wolves in the Frank Church Wilderness, when that use is not necessary for preserving wilderness character and did not undergo any NEPA analysis. This use of helicopters will irreparably harm Plaintiffs and their members who have long-standing interests in protecting the Frank Church Wilderness and its values, and who plan to use

and enjoy the Wilderness at the time IDFG will be conducting helicopter landings to collar wolves. Because the balance of hardships and public interest favor an injunction here, the Court should immediately enjoin this project.

**CONCLUSION**

Plaintiffs respectfully request that the Court grant their Motion For TRO And/Or Preliminary Injunction, and immediately enjoin the use and landing of helicopters in the Frank Church Wilderness to capture and collar wolves as wrongly approved by the Forest Service in the December 2009 Decision Memo and January 2010 special use permit

Dated: February 3, 2010,

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/s/Lauren M. Rule

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