WILDERNESS WATCH - FRIENDS OF THE CLEARWATER - ALLIANCE FOR THE WILD ROCKIES

October 16, 2009

Salmon Challis National Forest
Attn: William Wood
Forest Supervisor
1206 S Challis Street
Salmon, ID 83467

RE: Scoping letter on the Idaho Fish and Game Department's request to land helicopters and collar wolves in the Frank Church-River of No Return Wilderness

Sent Via email and US Mail

Dear Supervisor Wood:

Enclosed are comments from Wilderness Watch, Friends of the Clearwater and the Alliance for the Wild Rockies on the scoping notice regarding the request by the Idaho Department of Fish and Game (IDFG) to permit helicopter use in the Frank Church – River of No Return Wilderness to dart and capture wolves for radio collaring. Attached are the Idaho Wolf Plan and a research paper on how Minnesota non-invasively censuses wolf populations which we are submitting for the record. These documents show that IDFG proposed actions are inconsistent with wilderness and show alternatives to the proposal.

Landing helicopters to radio collar wolves is unlawful under both Section 4(b) and Section 4(c) of the Wilderness Act. Worse, it reflects a disregard for the values and meaning of wilderness and the wildlife, the wolves, that inhabit the Frank Church-River of No Return Wilderness. It is not merely the physical impact on wilderness, but the impacts on wilderness character.

Wilderness

The first sentence of Section 2(a) of the 1964 Act gives the over-arching mandate. The "purpose" is "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness" through the establishment of "a National Wilderness Preservation System" and that system "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment **as wilderness** and so as to provide for the protection of these areas, the preservation of their **wilderness character** . . .". (emphasis added). It is instructive that wildlife management or scientific study do not appear in this purpose. Even in the balance of Section 2(a) the words "use and enjoyment as wilderness" refer to all six of the acceptable uses listed in Section 4(b). We address this point later in the subsection Purpose of Wilderness.

In brief that purpose is to keep some areas unoccupied and unmodified. And this protection is for present and future generations--for all time--in perpetuity. Congress identified a new resource--the resource of wilderness.

The first sentence in Section 4(b).states:

> *"Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the* ***wilderness character*** *of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its* ***wilderness character****."* (emphasis added)

Section 4(b) of the Wilderness Act contains the fundamental obligation for agencies that administer wilderness, reinforcing the importance of preservation of wilderness character. This section does so because it also lists public purposes or uses (plural) to which Wilderness Areas are devoted, as long as the purpose of preservation of wilderness character remains paramount. These are "recreational, scenic, scientific, educational, conservation, and historical use."

These six items are not the purpose of the Act, rather they are the public uses, which are compatible with Wilderness designation provided they are properly managed and preserve the wilderness character. That is the message of section 4(b). In fact, preservation of wilderness character is mentioned twice in that section and, as such, reinforces, emphasizes, and underlines that primary purpose. The public uses are enumerated to distinguish them from non-conforming public uses that are allowed under certain circumstances, such as grazing and mining in section 4(d), but to which Wilderness areas are not devoted.

As earlier mentioned, it is also the message of section 2(a), which provides for the use of wilderness subject to the preservation of the wilderness character.

Thus, a clear direction is established in law. The benefits of an enduring resource of wilderness through the establishment of the National Wilderness Preservation System which is to be administered to protect its wilderness character for the future use and enjoyment as wilderness of the American people **is the singular and overriding purpose for the Wilderness Act**. The six items enumerated above, are the uses to which wilderness areas are devoted, provided the primary and overriding purpose is met.

Section 4(c) of the Act states:

> *Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, 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.*

One cannot define state wildlife management as the purpose of the Act. The use of the singular and then the plural is inconsistent in such an interpretation. For example, if one were to define recreation and/or scenery as purposes of the Act, the Forest Service could build trams and hotels to allow visitors to see a spectacular scenic site that is difficult to access due to rough terrain and conclude that is consistent with Wilderness designation because it is "necessary to meet minimum requirements for the administration of the area for the purpose of the Act." The Wilderness Act allows no such thing as anyone knowledgeable about the Wilderness Act understands. This important distinction between the purpose of the Act and the public uses of Wilderness Areas must be understood. Furthermore, these exceptions granted in section 4(c) apply to the administering agency "for he administration of the area." State agencies do not administer the National Wilderness Preservation System.

As such, the first question that needs to be asked is whether this activity even meets the purpose of the Wilderness Act's exceptions found in section 4c. There are two issues here that need to be addressed: helicopter use and radio collaring. With regard to the helicopter use, what purpose of the Wilderness Act is served by helicopter use for radio collaring? The scoping letter does not show either that helicopters are "necessary" to perform wolf collaring, or that wolf collaring meets any "minimum requirement" for preserving wilderness character.

In addition, radio collars are installations and mechanical equipment, and therefore, setting aside the use of helicopters to perform this collaring, the radio collars themselves must be necessary for meeting a minimum requirement for preserving wilderness character. Here, and as more fully described below, no such argument can be made.

A few other questions need to be asked as background before making a determination about this proposal. Is the purpose of collaring wolves to gain information about predator-prey relationships in wilderness that is necessary for administration of the area as wilderness or to determine whether wolves should be hunted in order that more elk are available for human hunters. In the case of the former, it is hard to conceive of any circumstance where that would be the case. If it is the latter, as newspaper reports have confirmed this is the reason the IDFG wants that information, then the request is not a legitimate wilderness purpose. The intent is important. The Ninth Circuit made this clear in its en banc decision in *The Wilderness Society v. United States Fish and Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003), amended by 360 F.3d 1374 (9th Cir. 2004) (setting aside a fish stocking program because its "intent" was to benefit the commercial fishing industry).

The attached Idaho wolf plan is explicit (see appendix 1). It would allow killing of the majority of the wolves currently in the state and promotes wolf removal by hunting or "any other means necessary." It also sets as a goal a significant reduction in wolf numbers, including in the wilderness. Thus, the plan shows the reasons for helicopter darting and collaring of wolves are contrary to the Wilderness Act.

Lest there be any question about the official position of the State of Idaho with regard to wolves, page 4 of the State of Idaho's wolf plan (appendix 1) makes it very clear:

> *The State of Idaho is on the record asking the federal government to remove wolves from the state by the adoption in 2001 of House Joint Memorial No. 5. The position reflected in House Joint Memorial No. 5 continues to be the official position of the State of Idaho.*

There can hardly be anything more conflicting with wilderness than the stated policy of removing a native species from a wilderness. Can we expect a request for future landings for wolf removal in the wilderness from the State of Idaho? No other species is such a wilderness icon as the wolf.

Another question that needs to asked is whether this information can be obtained outside the Wilderness. The Forest Service Manual direction (see below) on wildlife and research in wilderness directs that it be done outside of wilderness, where possible. The Forest Service must ask why the information on wolves the IDFG seeks to obtain such as demographics, behavior, movement patterns, and activity sites cannot be obtained in non-wilderness areas. Indeed, very good estimates of wolf populations inside wilderness can be had by comparing similar areas outside of wilderness. Even the Idaho wolf plan recognizes that not all packs need or will be collared (see appendix 1).

Yet another question that needs to be asked is whether radio collaring is essential for wolf management in wilderness. Wilderness, including its wildlife, is to be "untrammeled" by humans. Radio collaring fetters wildlife. Other methods of wildlife observation, getting out in the field and using eyes, ears, and other senses, as Aldo Leopold did, are more appropriate in Wilderness.

If radio collaring is the minimum requirement (or minimum tool, as the FS terms it), the question must be asked whether helicopter landings are necessary to collar wolves. Other methods need to be addressed. Attached is a report showing noninvasive ways the Minnesota Department of Natural Resources monitors wolf numbers (see appendix 2).

Radio telemetry often involves installing electronic tracking and recording devices on the ground that monitor collar signals. We can't assume that such installations/structures will not be used in conducting this project and that tracking and recording signals will only take place during aerial overflights. Indeed, collars themselves are installations. FSM 2323.37 clearly notes:

Installations, such as temporary shelters for cameras and scientific apparatus, and enclosures or exclosures, essential for wildlife research and management studies may be approved on a case-by-case basis.

The Forest Service can place needed requirements on IDFG activities. While IDFG may claim that trapping and collaring the wolves in wilderness is for purposes of conservation and scientific research, the Wilderness Act is clear that conservation and research activities are only allowed to the extent they are compatible in wilderness and do not undermine wilderness character. Moreover, unless the research is the minimum required for the Forest Service to administer the wilderness, none of the administrative exceptions (i.e. motor vehicles) apply.

Furthermore, the scoping notice does not address the need to do this action over and over again to replace batteries in the radio collars and to collar new wolves. There is a difference between a one-time event and a routine operation.

It must be restated that the USFWS did not request that helicopters be used for wolf management in the Wilderness. That is because the needed information about predator prey relationships in a wilderness setting is already available without collaring and because the Fish and Wildlife Service apparently recognizes that even important information about predator prey relationships in wilderness cannot violate the Wilderness Act prohibitions on motorized use or installations unless they are necessary for Forest Service administration of the area as wilderness.

FSM 2323.32 notes:

[B]ase any Forest Service recommendation to State wildlife and fish agencies on the need for protection and maintenance of the wilderness resource. Recognize wilderness protection needs and identify any needed requirements in coordination efforts and in cooperative agreements with State agencies.

FSM 2323.37 states , "In all cases, research shall be conducted in such a way as to minimize any adverse impacts on the wilderness resource or its users." The same section further notes:

Research methods that temporarily infringe on the wilderness character may be used, provided the information sought is essential for wilderness management and alternative methods or locations are not available.

The proposed action by the IDFG has not been "essential" for wilderness management for nearly 30 years, including nearly 15 years since wolves were translocated to the area. What has changed from the standpoint of wilderness management to now make the proposed action "essential"?

FSM 2324.42 provides more direction to the agency on research. This proposal clearly does not meet the manual direction. The Forest Service can show no necessary wilderness purpose for the proposed administrative exceptions.

The scoping letter is dead wrong in its analysis of wilderness. The statement that "designation of an area as wilderness shall not impede a state's ability to manage wildlife resources" is found nowhere in the Act. Rather, the Wilderness Act notes::

> *Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests*

Even if one accepts the erroneous conclusion that the Wilderness Act grants State wildlife agencies equal authority with the federal government in wilderness management, it does not follow that the States are exempted from the management requirements, prohibitions, or other provisions in the Act. State actions would still be required to preserve the area's wilderness character, and the use of motor vehicles or installations would be limited to only those that are necessary to meet minimum requirements for preserving the area's wilderness character. Just as the Forest Service must comply with the Act's provisions, so too must the States.

This Wilderness Act provision (and case law regarding wildlife on all public land) implicitly suggests a much more limited legal role of the state game agencies than they desire. This is a crucial issue that demands your attention. Even if one were to erroneously conclude the IDFG is acting within its normal "jurisdiction or responsibilities" the Forest Service still has ultimate jurisdiction over preservation of wilderness character and the Federal government retains ultimate authority over wildlife on public lands.

The Wilderness Act does not give the IDFG the authority to violate section 4(c) of the Wilderness Act with regard to installations, structures, or motorized vehicles. The Act is very explicit in expressing narrow exceptions for nonconforming uses. None of the exceptions mentioned in 4(c) of the act are mentioned in section 4 (d)(7). In other words, the narrow exceptions in Sec. 4(c) only apply to federal officials with management responsibility for wilderness; those exceptions do not apply to State game managers.

The wording "jurisdiction or responsibilities" of the states "with respect to wildlife and fish" conveys a narrow meaning in the sense of hunting/fishing seasons and regulations. The broader term wildlife management, which crosses jurisdictional boundaries, is not mentioned in the Wilderness Act.

The statutory intent of the wording in the Wilderness Act has been repeatedly upheld by the courts. Also, the supremacy clause in the US Constitution gives ultimate authority over wildlife and fish on public lands to the federal government when conflicts arise. Several cases have referred to the U.S.C.A., Article IV Sec. 3, clause 2 rulings under U.S. Constitutional law. Gere v. Connecticut in the late 1800s notes states have wildlife

jurisdiction only to the extent it doesn't interfere with federal authority. Cases which have upheld the supremacy of the federal government to manage wildlife by way of the authority granted in various federal statutes include Hunt v. U.S. (278 US 96) U.S. v. State of Washington (520 F.2d 676) New Mexico State Game Commission v. Udall (410 F.2d 1197) and Kleppe v. New Mexico 426 US 529. In the latter case the U.S. Supreme Court ruled that "We hold today that the property clause gives Congress the power to protect wildlife on the public lands, state law notwithstanding." Indeed, the Endangered Species Act itself is proof that state jurisdiction of wildlife and fish is subservient to federal authority, even on private land.

The wilderness management plan needs to be considered in full. The scoping letter is misleading in this respect because there are important requirements that suggest such a proposal is not in keeping with the wilderness management plan. Under "Fish and Wildlife Resources" it notes:

> *Goal No. 1: The forces of nature primarily affect native species in the FCRONRW. Wilderness and management action recognize the predominance of **natural forces.***
>
> *Goal No. 2: Biological and social functions of native animal populations are not noticeably impaired by **human presence or activities.** Natural processes and key habitat components such as birthing/rearing areas determine population structure and numbers; winter range and migration corridors are not impaired by human activities.*

(emphasis added)

The plan further notes:

> *Objective No. 1: The FCRONRW serves as a **refuge** of native threatened, endangered, proposed and sensitive species. It protects existing remnant populations that inhabit the Wilderness and provides natural habitats for reintroduced native species. Wilderness managers evaluate effects of all human activities on fish and wildlife species to reduce or eliminate potential **conflicts,** restore populations, and maintain quality habitats in a natural condition.*

(emphasis added)

This proposal does not meet these goals and this objective. How can the wilderness be a refuge for wildlife with helicopters, radio collaring and the like? This would noticeably impair wilderness.

NEPA

A CE cannot be used inside a Wilderness Area on decisions of this nature because Wilderness Areas fall under the category of "extraordinary circumstances." Every court

case that has addressed this issue has gone against the Forest Service for trying to use CEs in an improper manner, usually where extraordinary circumstances exist.

Forest Service Policy and case law are clear. The presence or existence of extraordinary circumstances is what triggers at least an EA.

Such a research proposal by the IDFG needs to go through NEPA analysis to determine if it is the minimum necessary under the Wilderness Act. The Wilderness Act defines wilderness in part as a place where the "earth and its **community of life are untrammeled by man**." (emphasis added) Untrammeled means unfettered unconfined, and unmanipulated. Both aircraft use and collaring of animals trammel wilderness. For example, collaring wolves, part of the community of life, trammels both the wolves and the overall wilderness character of these areas.

The issue of adequate NEPA analysis is not new. In fact, in a letter from your office and the Region I office in 2005 to the IDFG clearly noted a more extensive environmental analysis is needed for this type of project. That letter stated:

> *Typically we would be looking at an Environmental Assessment (EA) which may take as long as a year to complete. Based on recent court challenges we believe it essential to analyze and address the proposed project's effect on wilderness character and wilderness resources.*

What has changed since that letter was written?

The citations in the scoping letter that justify use of CEs were incorrect. Specifically, 36 CFR 31.11 and 31.12 are not found on any government website. If they existed, they would actually be found within the Department of the Interior. While we obtained the correct citations from the regional office after a phone call, those corrections were not sent out to everyone. The public must have the opportunity to view the regulations in context of the larger sections and chapters. As such, a new scoping letter should go out.

These regulations are not applicable in this situation . Specifically, 7 CFR 1b.3(a)(3) is directed at routine research on the national forest system as a whole. Under no circumstance can a prohibited act (landing a helicopter) be considered "routine data collection, when such actions are clearly limited in context and intensity." Such a reading turns plain language on its head. Wilderness is a special, nonmotorized, wild resource. Approving 20 landings--which have never occurred before--is not routine, it is extraordinary. Approving an activity which violates the very definition of wilderness—landing of helicopters and trammeling wildlife—is not "clearly limited in context and intensity." It is a major impact on wilderness.

With regard to 36 CFR 220.6 (d) (8), incorrectly cited as 36 CFR 31.12 ,the scoping letter, states:

Approval, modification, or continuation of minor, short-term (1 year or less) special uses of National Forest System lands. Examples include but are not limited to: (i) Approving, on an annual basis, the intermittent use and occupancy by a State-licensed outfitter or guide;

This is not a "minor" special use by virtue of the fact that it designated wilderness. Landing a helicopter and collaring wolves is not minor. Indeed, the example in the regulation quoted in the scoping letter, "the intermittent use and occupancy by a State-licensed outfitter or guide" illustrates precisely why this regulation is inapplicable in this instance. It is absurd to think a permit for helicopter landing in wilderness for a short term special use permit for outfitting and guiding could be issued under a CE, even if the agency were to somehow twist the plain meaning of laws and regulations to conclude such an activity might be legal.

In sum wilderness is a special place. The CE provisions cited in the scoping letter are clearly inapplicable for an activity of this nature in wilderness. Impacts that may be routine and minor (helicopters, trammeling of wildlife) outside of wilderness, are extraordinary inside wilderness.

If this goes forth, an EIS is the necessary NEPA analysis. IDFG is asking that a non-conforming us--which would have serious negative impacts on wilderness character--occur. It should also be noted that landing of helicopters to dart wolves in the Frank Church-River of No Return Wilderness is something which has never happened before, at least legally, so there is no precedent. The scoping letter is misleading because it leads one to believe there is little difference between the landing strips and landing a helicopter and that this is a routine action.

An EIS is also needed because the request seems to be in perpetuity. Landing 20 times in the wilderness every year is a significant impact. Since wolves die and collar batteries go dead, this will be a yearly occurrence. This is not addressed in the scoping letter.

There needs to be a range of alternatives considered including no action. Potential alternatives include a wide range of non-invasive census techniques, including hair traps and scat surveys, counting wolves from thee air during the big game surveys, using extant information about predator prey relationships, and using big game trends to gauge wolf numbers.

The purpose and need for this proposal is not demonstrated. There is already adequate information about predator prey relationships in wilderness. In any case, the IDFG can get information about wolf numbers from overflights without landing. There is no need to collar animals. It must be noted that the USFWS, in part due to consultation with the Forest Service, did not request that helicopters or even any kind of collaring take place for wolf management in the wilderness areas in Idaho. The needed information about predator prey relationships in a wilderness setting is already known and the US Fish and Wildlife service recognized the overriding mandate the Forest Service has to preserve wilderness character. The mandates the US Fish and Wildlife Service had are the same

as those of the IDFG in estimating of wolf numbers. Indeed, when the wolves were listed under the ESA, there was arguably an even greater need to verify numbers. The USFWS didn't need helicopter landings and collars in the wilderness to properly manage wolves and the IDFG doesn't either. Clearly the proposal by IDFG is not necessary to meet minimum requirements for administering the Wilderness, which is the standard that must be met for the project to be needed.

Summary

If this goes forth, the EIS must address whether helicopter landings and radio collaring are essential for wolf management in Wilderness and if so, why it has become essential now, even though the FWS never found it essential during more than a decade of wolf management and recovery in Idaho. If so, it must determine whether helicopters are the only way to collar wolves. Wilderness, including its wildlife, is to remain untrammeled by intentional human manipulations. Trapping and radio collaring fetters wildlife. Other methods of wildlife observation including non-invasive census techniques are more appropriate in Wilderness. If radio collaring is the minimum necessary (or minimum tool, as the FS terms it), the NEPA document must analyze whether what the IDFG intends to do is indeed the minimum.

This proposal does not meet the Wilderness Act. It profanes the meaning of wilderness. It is not essential for this proposal to be implemented as much information is already available on wolf/ungulate interactions and wolf ecology.

This proposal should be immediately rejected. IDFG has already admitted to illegal landing helicopters in the Frank Church-River of No Return Wilderness and has proclaimed publicly that it has the authority to do so. IDFG's lack of concern for or understanding of wilderness and its presumptuous assertion that it can interpret and administer federal law proves that IDFG cannot be trusted as a partner.

Sincerely,

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