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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 **REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION FOR TRO AND/OR PRELIMINARY INJUNCTION UNDER THIRD CLAIM FOR RELIEF**[1] (*Docket No. 8*)

[1] Plaintiffs have combined their replies to the Forest Service injunction opposition brief and the State of Idaho's separate injunction opposition brief into one reply brief of 20 pages, which complies with page total allowed by the District of Idaho Local Rules.

INTRODUCTION

The Forest Service's injunction brief (*Docket No. 22*) agrees with Plaintiffs that the Wilderness Act prohibits aircraft landings or other use of motorized equipment outside of designated airstrips in the Frank Church Wilderness, except in narrow circumstances where use of such motorized equipment is both necessary and the minimum tool needed to administer the Wilderness so as to preserve its wilderness character.

Has the Forest Service demonstrated that allowing the Idaho Department of Fish and Game (IDFG) to land helicopters for purposes of collaring wolves in the Frank Church Wilderness is necessary to preserve wilderness character? Has the Forest Service also demonstrated that such helicopter landings are the minimum tool for that purpose? The answer to both questions is "no, certainly not."

Indeed, as explained below, the Forest Service asserts that enhancing the recovery of wolves in the Frank Church Wilderness would help preserve wilderness character; but the briefing submitted by IDFG (*Docket No. 24*) contradicts that is the purpose of the project – stating instead it wants the wilderness wolf collaring to better "manage" wolves in Idaho, not promote their recovery. IDFG's briefing and declarations show that the helicopter collaring operations are more likely to reduce wolf numbers in the Frank Church Wilderness, contradicting the Forest Service's assertions about enhancing "recovery."

Moreover, the record before the Court shows that the Forest Service has misrepresented the need for helicopter collaring, when the Nez Perce Tribe itself collared some 30 wolves in wilderness without using helicopters, and without even putting much effort into wilderness monitoring at all. Not only did the Forest Service misrepresent the past success of these non-motorized monitoring methods in its December 2009 Decision Memo, but it failed to explore

reasonable alternatives to the IDFG proposal as required by NEPA as well.

In short, Plaintiffs are likely to win on their Wilderness Act and NEPA claims; and they have abundantly demonstrated the likelihood of irreparable harm occurring, if the Court does not enjoin the IDFG helicopter collaring operations (which are scheduled to commence on February 22, 2010). Notably, the Forest Service does not dispute Plaintiffs' showing – based on more than twenty declarations from individuals who are highly experienced back country travelers – that many of Plaintiffs' members will be in the Middle Fork Salmon River area at the same time, and in the same places, where the IDFG wolf collaring operations will take place. Although IDFG seeks to cast aspersions on these declarants – by asserting they have not made commercial lodging or airline reservations – the accompanying Second Declaration of John McCarthy confirms that these individuals will be undertaking the trips they have described, including by using private planes to access public airstrips in the Middle Fork corridor.

Moreover, IDFG's attempts to belittle Plaintiffs' declarants are unbecoming of that agency. These individuals have submitted compelling stories to the Court about why they are seeking out wolves and other wildlife during winter conditions in the Frank Church Wilderness – and how experiencing the intense noise and disturbance of IDFG helicopter landings will cause them irreparable harm. By contrast, not even IDFG claims that the proposed wolf collaring operations in the Frank Church must occur this winter for any urgent or compelling reason; and certainly the Forest Service – the defendant here – has not attempted to claim that any irreparable harm would befall it if the Court enjoins the IDFG helicopter operations.

In short, Plaintiffs have shown a likelihood of success on the merits, a likelihood of irreparable harm, and that the balance of hardships favors an injunction. Accordingly, the Court should grant the requested injunction.

REPLY ARGUMENT

I. THE FOREST SERVICE HAS NOT DEMONSTRATED THIS PROJECT IS NECESSARY, OR THE MINIMUM TOOL, TO PRESERVE WILDERNESS.

The Forest Service's injunction opposition brief asserts that the use of helicopters to dart and collar wolves in the Frank Church-River of No Return Wilderness is necessary for preserving wilderness character, and thus falls within the exception to the Wilderness Act's prohibition on aircraft landings in wilderness. *FS Brief at 17-20.* Yet when the Court considers the Forest Service's response in conjunction with the State's, it is clear that this project is not necessary to preserve wilderness character and thus violates the Wilderness Act.

A. The Record Does Not Demonstrate That The IDFG Helicopter Landings Are Necessary For The Forest Service To Administer The Wilderness.

The parties agree that, to use the exception in the Wilderness Act to allow aircraft landings, the Forest Service must first demonstrate that the activity is necessary for preserving the wilderness character of the Frank Church Wilderness. *See FS Brief at 16* (citing Minimum Requirements Decision Guide, Welsh Decl., Exhs. A, D). As the briefings submitted by the Forest Service and State of Idaho underscore, that requirement is not met here.

Specifically, the Forest Service argues that this project preserves wilderness character because it enhances wolf recovery and ensures that wolves will remain in the wilderness, intimating that the information will be used to protect wolves and thus protect wilderness character. *FS Brief at 17-19.* Yet the Forest Service never explains how the data collected by IDFG helicopter landings to collar wolves will be used to enhance wolf recovery or to protect wolves in the wilderness.

By contrast, IDFG takes a very different position. Its materials do not say that the data collected from this project will be used to protect wolves or enhance their recovery. Instead,

IDFG repeatedly asserts that the collaring information will be used to make more intensive management decisions, including setting hunting limits that will likely lead to more killing of wolves rather than more protection. *IDFG Brief at 16-17; Declaration of Gary Power ¶¶ 19-22.* The existing wolf population in Idaho is already higher than the State's management goal; and IDFG admits that the data it expects to collect through the Frank Church helicopter landings will likely show an even higher population of wolves in the Wilderness, thus supporting higher harvest limits. *See Declaration of Ken Cole Ex. A* (most recent population estimate at 846 wolves); *AR 3621* (population goal of 518-732 wolves); *IDFG Brief at 18* (stating that without radio collar information, IDFG is likely underestimating wolf population). Because IDFG's stated reason for the collaring thus contradicts and undermines the Forest Service's reasoning, the Court can only conclude that the IDFG proposal is <u>not</u> necessary to the Forest Service's administration of the Frank Church Wilderness to preserve wilderness character.

Furthermore, the Forest Service also did not explain why this information is now needed for wolf recovery, when the existing monitoring methods sufficiently estimated population size and pack distribution to demonstrate wolf recovery and delist the wolf under the Endangered Species Act. It is true that IDFG must monitor wolves for five years post-delisting to ensure the wolf population remains recovered, but it is equally true that wolves had to be monitored before delisting to determine whether they had reached recovery goals to warrant delisting. Why then does the post-delisting monitoring require use of helicopters to collar wolves in the Frank Church Wilderness, when use of helicopters was not necessary for recovery monitoring before delisting? Indeed, IDFG even admits that its current wolf population estimates are good enough to ensure that the population continues to be well above recovery standards. *State Brief at 17.* The Forest Service never considers or answers that question in its decision documents or brief. *FS*

Brief at 23-24; AR 8605-8617 (Decision Memo), 8564-8597 (Minimum Requirements Guide).

In short, the Forest Service asserts that more intensive management of wolves through the helicopter collaring will supposedly preserve the wilderness character of the Frank Church Wilderness by promoting wolf recovery in Idaho and wolf presence in the Wilderness, but the Forest Service does not provide any support to justify that conclusion. In fact, the opposite conclusion – that the data will reduce the wolf population, and thereby undermine the wilderness character of the Frank Church Wilderness by reducing wolf populations there – is even more likely.[2]

B. Helicopter Landings Are Not The Minimum Tool Available.

In addition, the Forest Service also failed to demonstrate the applicability of the second part of the Wilderness Act exception for aircraft landings, *i.e.*, that the use of helicopters is the minimum tool necessary to monitor wolves in the wilderness, as required under step two of its Minimum Requirements Decision Guide. *See FS Brief at* 20.

As pointed out by Plaintiffs' opening brief and Declarations of Roy Heberger and Ken Cole – and now admitted by the Forest Service in its Declaration of Randy Welsh (*Docket No. 25*) – the Nez Perce Tribe successfully collared some 30 wolves in the Frank Church Wilderness, without using helicopters, when the Tribe was handling wolf monitoring before IDFG took it over. Yet that information was not reported in the Forest Service's December 2009 Decision Memo; and the Forest Service never used NEPA analysis to evaluate this or other alternatives to

[2] Further evidence that the Forest Service apparently does not fully understand the true basis for this project is the continued reference to it as a "research project" when at the same time the State notes that it is not a "research project" but simply "monitoring activity." *See FS Brief at 17-20; IDFG Brief at 9* (citing Declaration of Virgil Moore ¶ 5). IDFG's admissions thus confirm Dr. Peek's analysis that IDFG has never fully explained to the Forest Service the objectives for collecting this information and what it intends to do with that information. *See* Declaration of James M. Peek (*Docket No. 8-3*), ¶¶ 10-12, 14.

helicopter landings in wilderness, as required by NEPA and the Wilderness Act.

Although not disputing these facts, the Forest Service and IDFG briefs try to downplay the prior wilderness trapping efforts of the Nez Perce Tribe and the Forest Service's failure to accurately portray the correct information in its decision documents. Whereas the Forest Service's December 2009 Decision Memo flatly ignored the Nez Perce trapping success, and the Minimum Requirements Guide misstated those efforts, now they assert that IDFG responded to the Forest Service's questions about the Tribe's efforts, and the Forest Service "considered" that information. *See IDFG Brief at 10; FS Brief at 22 & AR 4396-4409.* The Forest Service even resorts to filing an extra-record declaration of their wilderness specialist to say that he was "aware" that the trapping figures reported in the Minimum Requirements Guide were not accurate. *See Welsh Decl. (Docket No. 25), ¶ 17.*

All this *post-hoc* reasoning begs the question of why the Forest Service did not ask the Tribe itself about its wilderness trapping effort to determine whether it was a viable alternative. The Forest Service contacted the Tribe to get its opinion on using helicopters in wilderness, but did not ask for information about the trapping the Tribe did in wilderness or its expert opinion of the feasibility of trapping instead of helicopter use. *See AR 4231.* The Forest Service simply dismissed the Tribe's efforts as unsuccessful without assessing how much effort was made to trap in wilderness and the corresponding results to fully consider whether the use of helicopters was necessary for collaring wolves.

Similarly, the Forest Service dismissed IDFG's efforts to trap wolves in the Selway-Bitterroot Wilderness as unsuccessful, even though the record demonstrates that this effort was plagued with problems and inexperience that if remedied could very well lead to better trapping results. *See AR 3610-15* (explaining that Selway trapping project started late; the biologist in

charge of project left before the field season started; there was too much lag time between wolf detections and setting traps; personnel were inexperienced in tracking wolves from trails; fires closed many areas to trapping,; and field personnel did not effectively remove scent from traps until part-way through field season). In short, the Selway-Bitterroot trapping effort was hardly a model wilderness trapping effort, and is contradicted by the Nez Perce Tribe's own success – yet the Forest Service never disclosed these facts, and never evaluated them in any NEPA document.

The information presented by IDFG also underscores the fact that some of the uncollared packs in the Frank Church Wilderness could feasibly be collared using ground traps, because many of the currently uncollared packs previously had members with radio collars that had been trapped on the ground. *See Husseman Decl.*, ¶¶ *8-12.* The fact that use of helicopters may be more efficient, easier, or more cost effective to collar wolves is not an appropriate reason to allow the activity, as stated in the Forest Service's own wilderness guidance documents. *See Welsh Decl., Ex. C at p. 7* (material from Arthur Carhart National Wilderness Training Center, noting that "quicker, cheaper, and easier" are not appropriate criteria for authorizing prohibited motorized uses of wilderness).[3]

IDFG and the Forest Service also both point to prior use of helicopters in wilderness for various reasons over the years as evidence that the Forest Service appropriately granted this permit. *See IDFG Brief at 7; Welsh Decl.*, ¶¶ *8-12.* They emphasize the use of helicopters to transplant bighorn sheep into wilderness and to put radio collars on bighorn sheep in wilderness. *Id.* The fact that the Forest Service has permitted such activities in the past, however, does not mean those permits were lawful or that this permit is necessarily lawful. The Forest Service

[3] Plaintiffs' declarant Tom Kovalicky founded and taught for many years at the Arthur Carhart Wilderness Training Center; and has explained in his declaration that the Forest Service misapplied the Wilderness Act management principles that he taught and that the agency says it follows, as reflected in the Welsh Declaration exhibits. *See Kovalicky Decl. (Docket No. 8-2).*

must consider the facts of each circumstance individually, and assess on a case-by-case basis whether a motorized activity is necessary for preservation of wilderness character.

For instance, with regard to bighorn sheep, the facts were very different because the transplants occurred to restore bighorn sheep populations to the wilderness, while the radio-collaring was to gather information to help protect a population that is in serious decline and threatened with further die-offs. Here, the wolf population already exists in the wilderness and is not in decline. The Court must assess whether this particular project violates the Wilderness Act based on the facts here and the Forest Service's site-specific analysis.

IDFG also argues that the Court should consider the State of Idaho's jurisdiction and responsibilities for wildlife management within the Frank Church Wilderness when considering the validity of the Forest Service's determination. *IDFG Brief at 5, 6.* It is well established law, however, that even though a State may retain jurisdiction over wildlife on federal land, it cannot exercise that jurisdiction in a manner that conflicts with federal law governing the use of that land. *See Kleppe v. New Mexico*, 426 U.S. 529, 543-46 (1976) (Congress has power to enact laws respecting federal lands, and such laws necessarily override state authority over wildlife when use of that authority conflicts with the federal law); *State of Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990) (state retains jurisdiction over federal lands but federal legislation over public lands overrides conflicting state laws under the Supremacy Clause). The savings clause in the Wilderness Act that acknowledges the State's jurisdiction over wildlife does not override these basic principles of preemption. *See Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (holding that similar savings clause in Wildlife Refuge Act did not give State authority to act in conflict with the Refuge Act); *National Audubon Soc'y v. Davis*, 307 F.3d 835, 854 (9th Cir. 2002) (same).

The Ninth Circuit and other courts have held that the primary goal of the Wilderness Act is to preserve wilderness character. *See Plaintiffs' Opening Brief at 12-15.* The Forest Service and IDFG try to distinguish these cases on their facts, *see FS Brief at 19-20; State Brief at 6-8,* but the consistent holdings demonstrate that courts interpret the exceptions to Wilderness Act prohibitions very narrowly and require a clear showing that an activity is necessary to preserve wilderness character for it to legally fall within an exception. *See Plaintiffs' Opening Brief at 12-15.* The Forest Service has not made a clear showing here that the use of helicopters to dart and collar wolves is necessary to preserve wilderness character nor has it shown that such use is the minimum tool necessary. Thus, its Decision Memo and Special Use permit violate the Wilderness Act and Central Idaho Wilderness Act.

II. THE FOREST SERVICE'S USE OF A CE WAS UNLAWFUL.

The Forest Service's use of a "categorical exclusion" (CE) was improper here because this project does not "neatly" fall within either of the two CE categories the Forest Service applied, is controversial within the meaning of NEPA, and may have potentially significant effects the Forest Service did not consider. Indeed, the facts demonstrate that the agency intended from the start to use a CE before even conducting any analysis, and thus simply discounted important information rather than discussing it in an EA or EIS.

The category of "resource inventories and routine data collection that are limited in context and intensity" does not apply here. 7 C.F.R. § 1b.3(a)(3). An activity that is normally prohibited by the Wilderness Act, has never before occurred in this wilderness, and has evoked significant controversy is certainly not routine or limited in intensity. *See* 40 C.F.R. § 1508.27 (defining intensity as factors such as unique geographic areas, controversy, potential for setting new precedent, and potential violation of federal law). Likewise, to say this activity is limited to

less than five contiguous acres of land is a fallacy when IDFG will be conducting its surveys over a large area of the wilderness. 36 C.F.R. § 220.6(e)(3)*; AR 8570-71* (maps of survey area). The landings are authorized across many acres of land even if each landing only takes up a small area. This type of activity is not comparable to the examples provided in the Forest Service Handbook, which are all localized activities that occur within one patch of contiguous land, not spread across thousands of acres. FSH 1909.31.2(3); *See California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F. Supp.2d 874, 901-02 (N.D. Cal. 2006) (using examples in handbook to determine whether activity fell within CE category). Thus, the Forest Service's use of these CE categories was arbitrary and capricious.

The record also establishes that the controversy over the project was not mere opposition, but a dispute about the extent of the effects to the wilderness as well as to the wolves within the wilderness. *AR 3894-4391* (public comments). The Decision Memo itself noted the disagreement about the benefits and detriments of the project – *i.e.*, its effects – and that there were widely divergent views on whether it violated the law. *AR 8612* (Decision Memo). Yet the Forest Service ignores the Ninth Circuit cases that establish that this type of dispute requires preparing an EA or EIS. *California v. Norton*, 311 F.3d 1162, 1176-77 (9th 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 (9th 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). Combined with the other intensity factors that apply here – unique geographic area, potential for setting a new precedent, and a threat to violate federal law – the Forest Service should have analyzed this activity in an EA or EIS.

The Forest Service previously stated that landing helicopters in the wilderness to collar

wolves would require an EA or EIS, *see Declaration of Roy Heberger ¶ 9, Declaration of Lauren Rule Exs. 2,4,* and even though this project may be smaller in scope, many of the same intensity factors that trigger the need for an EA or EIS still apply. For instance, the Forest Service should have done a more thorough analysis to fully consider the potentially significant effects to wilderness character that arise from the use of helicopters to dart and collar wolves. The agency simply assumed that no one would be in the wilderness during the surveys and did not even consider how much more impact there would be from helicopters flying at 20-30 feet above ground, chasing wolves and other wildlife, and then landing repeatedly in the wilderness to collar the darted wolves compared to simply passing overhead at 200 feet elevation. It also should have more thoroughly assessed the alternative of ground trapping or other monitoring methods, at a minimum conferring with the Nez Perce Tribe about its monitoring in the wilderness and accurately considering those results in its analysis.

The record shows that the Forest Service planned to use a CE from the start, before IDFG even formally submitted its proposal to the agency. *AR 8601* (Forest Service timeline from August 11, 2010 showing plan to use CE); *AR 3841* (IDFG proposal from September 9, 2010). A CE was necessary in order to permit this project for this winter because an EA or EIS would have taken too long to prepare. *See Rule Decl. Exs. 2, 4* (noting that EA or EIS would take 6 months or longer to prepare). To fulfill its plan to use a CE for this decision, the Forest Service dismissed the alternative of ground trapping without fully or accurately considering it. It also did not assess whether this project is necessary for wolf recovery and therefore necessary for preserving wilderness character, as it should have done in an EA or EIS. As noted in its own guidance, a Minimum Requirements Decision is not a substitute for NEPA analysis. *Welsh Decl., Ex. C at 4*. The use of a CE here to allow the project to go forward quickly was unlawful.

III. PLAINTIFFS HAVE ESTABLISHED LIKELY IRREPARABLE HARM.

Plaintiffs have submitted twenty declarations with their opening brief establishing likely irreparable harm to individuals who will be recreating in the vicinity of the aerial surveys and wolf collaring during the time IDFG is doing the flights. Notably, neither the Forest Service nor IDFG dispute that the surveys will occur in the areas these individuals would be visiting at the time IDFG plans to do the collaring. Instead, the Forest Service claims that Plaintiffs' injury is not irreparable because it is not long-lasting or permanent; while the State tries to cast doubt on the veracity of Plaintiffs' declarations. The truth of the matter is that Plaintiffs do have many members planning to visit the Middle Fork area of the Frank Church Wilderness in late February and March and that one or more will likely be irreparably injured by the helicopter flying low, chasing wolves, and landing in the wilderness. Such injury warrants an immediate injunction.

In its response, the Forest Service mistakenly focuses on harm to the environment as the harm that Plaintiffs are alleging, stating that because there would be no permanent damage to the environment or to the wolves, Plaintiffs cannot show irreparable harm. *FS Brief at 29-31.* Plaintiffs, however, are not alleging permanent harm to the environment as their irreparable harm. They are alleging harm to their statutorily-protected interests of having solitude, peace, and quiet during their Wilderness experience and their opportunity to view wildlife in their natural habitat. *See Declarations of Kelley Weston, Ken Davis, Jeff Halligan, 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.*

For instance, the declarants speak of their desire to seek solitude and peace in the wilderness this winter as well as an opportunity to seek out, observe, and photograph wolves and

other wildlife in their natural setting; and that helicopters flying low, hovering, and landing near them would ruin that experience. *See e.g. 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; Halligan Decl. ¶¶ 4-6.*

These are the very qualities the Wilderness Act sought to protect and preserve. The definition of wilderness is an area that has outstanding opportunities for solitude or a primitive and unconfined type of recreation and is protected to preserve its natural conditions. 16 U.S.C. § 1131(c). These attributes of wilderness that are the cornerstone of the Wilderness Act are the same attributes that Plaintiffs' declarants seek to enjoy this winter during their excursions into the Frank Church Wilderness – solitude and primitive recreation and lands and wildlife in their natural condition. An activity that impairs their use and enjoyment of wilderness certainly harms Plaintiffs and can be the basis of an injunction. *See Biodiversity Legal Foundation v. Badgley,* 309 F.3d 1166, 1177 (9th Cir. 2002) (courts look at whether an injunction is necessary to effectuate the congressional purpose behind the statute).

Furthermore, an activity that ruins a person's wilderness trip is irreparable. The definition of irreparable is something that cannot be repaired or remedied. *Webster's New World Dictionary 2nd edition*. And as discussed in Plaintiffs' opening brief, courts have frequently held that recreational and aesthetic interests and wildlife viewing can be the basis of harm or injury to a plaintiff. *See Plaintiffs' Opening Brief at 25-26.* The Forest Service asserts that some of the cases Plaintiffs cited are "inapposite" because they were in the context of standing rather

than injunctive relief, but offers no support for why injury in the context of standing is any different than injury in the context of irreparable harm. *See FS Brief at p. 29 n.29.* Plaintiffs here have demonstrated that their recreational, aesthetic, and wildlife viewing opportunities will likely be harmed if this project proceeds, and such harm to their winter wilderness experience can never be remedied.

The State continues to argue that very few people go into the Frank Church Wilderness in the winter, expressing skepticism at Plaintiffs' plans for trips into the wilderness this winter. *See State Brief at 12-15*. Yet Plaintiffs have provided declarations from more than twenty people, stating that they have concrete plans to visit the Middle Fork Salmon River and Big Creek areas this February and March, and who explain their many prior wilderness experiences. *Kelley Weston, Ken Davis, Jeff Halligan, 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.* Declarants such as Kelley Weston and Ken Davis, for example, have taken lengthy winter trips in the Frank Church Wilderness before; and declarants Mark and Dana Menlove are experienced backcountry skiers – indeed, Mr. Menlove is the Executive Director of Plaintiff Winter Wildlands Alliance, which is devoted to protecting the experiences of backcountry skiers. These declarations thus refute IDFG's apparent belief that no one is ever in the backcountry in the winter. *See Declarations of Ken Davis, Kelley Weston, Mark Menlove, Dana Menlove, John Hillman, and David Hayes.*

To further substantiate these plans, Plaintiffs are filing herewith the Second Declaration of John McCarthy, a long-time conservationist and staff member of Plaintiff The Wilderness Society. Mr. McCarthy recounts that he has talked with many individuals about their plans to

visit the Frank Church Wilderness to observe wolves and wildlife this winter; and has also assisted with some of their logistical preparations. As Mr. McCarthy notes, the declarants have arranged numerous methods of gaining access to the Frank Church this winter, including flying with private pilots that have extensive backcountry experience. *See Second McCarthy Decl. ¶ 8.* Mr. McCarthy also explains that the declarants wished to view wolves and other wildlife during their trips, and thus focused their trips on areas where the elk concentrate in winter—primarily the Middle Fork Salmon River and Big Creek areas. *Second McCarthy Decl. ¶¶ 3-7 & Ex. A.*

The declarants are highly fit individuals, many of whom have extensive backcountry skills and experience and can easily handle winter camping and hiking. *See Second McCarthy Decl. ¶ 9.* For instance, Kelley Weston has taken more than thirty trips in the Frank Church Wilderness lasting up to six weeks at a time, including numerous extended backpack trips. *Weston Decl. ¶* 5. He states that he has taken many long trips in the Frank Church Wilderness in winter, with four trips specifically into the Middle Fork Salmon River in early March to April. *Id. ¶ 6.* Likewise Ken Davis has completed numerous backpack trips in the Frank Church Wilderness both solo and with others ranging from 5 days to 30 days. *Davis Decl. ¶ 5.* In 2005, he spent three months from January to March skiing and backpacking across the entire wilderness, including along Big Creek and the Middle Fork Salmon River. *Id. ¶¶ 6-7.* John Hillman, a wildlife field biologist and river guide, has completed almost 100 river trips down the Middle Fork and Main Salmon Rivers in the Frank Church Wilderness, including trips in December and March, and has backpacked extensively as well, including a two week trip through the wilderness last summer where he averaged twenty miles of hiking a day. *Hillman Decl. ¶¶ 4-7.* Dale Grooms leads week-long backpack trips into many wilderness areas of Idaho, including the Frank Church Wilderness, as a wilderness volunteer leader to maintain trails and

remove noxious weeds. *Grooms Decl. ¶ 10.* These individuals have the experience, skills, and fitness needed to visit the Middle Fork Salmon River area in February or March for a winter wilderness experience recreating and viewing wolves; and IDFG's attempt to belittle their wilderness skills and experience is nothing short of insulting.

IDFG also claims that Plaintiffs' harm is "contrived" because these individuals are all planning to visit the Frank Church during the last weeks of February, when IDFG is planning to conduct the helicopter operations. However, as noted in Plaintiffs' opening brief and in the Second Declaration of John McCarthy, other members of Plaintiffs' groups have expressed desire to go into the Frank Church Wilderness in March and April this year. *See Plaintiffs Opening Brief at p. 28 n.11; Second McCarthy Decl. ¶ 10.* Indeed, Plaintiffs filed a few declarations of people intending to make their trips in March. *See Declarations of Brenda Hanley ¶ 9, John Hillman ¶ 9, Forrest McCarthy ¶ 5*. But Plaintiffs mainly focused on filing declarations for those individuals intending their trips in late February because that is when IDFG said they would be flying.

IDFG persists in denying that anyone will be in the wilderness this winter, but Plaintiffs have shown that their members have used the wilderness in winter in the past and have specific, established plans to visit in late February and March this winter. No one has disputed that these visits to the Middle Fork Salmon River and Big Creek correspond to the timing and location of the IDFG flights. Thus, Plaintiffs have established a likelihood of irreparable harm that warrants an immediate injunction.[4]

[4] The Supreme Court recently affirmed that injunctive relief is in the broad discretion of the Court, and that the test for likely irreparable harm does not have a high threshold. *Hollingsworth v. Perry,* 130 S. Ct. 705 (Jan. 13, 2009). In that case, the Supreme Court granted injunctive relief to stop the video-taping of the trial over a California ballot initiative. The Court found there was

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR PLAINTIFFS.

Finally, neither the Forest Service nor the State have demonstrated that the balance of hardships or public interest weigh against granting an injunction. The Forest Service again misportrays Plaintiffs' hardship as environmental harm that will not be permanent and is only of short duration. *FS Brief at 31-32.* As explained above, the hardship to Plaintiffs is the disruption and destruction of their members' wilderness experiences, which cannot be remedied. In addition, Plaintiffs have long-standing organizational interests in preserving wilderness character, and disturbing the wilderness with unnecessary helicopter landings is contrary to the heart and mission of these groups. *See Gerhke, McCarthy, Robison, and Maughan Declarations.* The public also has a great interest in protecting and preserving wild areas and their wilderness character, as Congress recognized when it passed the Wilderness Act. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 643 (9th Cir. 2004).

On the other hand, the Forest Service has not demonstrated that it will suffer any hardship if the Court enjoins this project. Nowhere does the Forest Service establish that it needs this data, and certainly does not prove that it needs it urgently before any EA or EIS could be completed. It states only that it has not had this information in the past (indicating that it is not a necessary tool to preserve wilderness character) and that such data **can** be used to help manage the wilderness and would be valuable for **future** management decisions. *FS Brief at 32*. These vague statements about how the Forest Service could use data that it has never needed in the past for management of this wilderness do not establish that the balance of hardships or public interest weigh in its favor.

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harm to witnesses who feared harassment based on news reports of prior harassment of initiative supporters, even though the witnesses themselves did not ask for the taping to be enjoined.

The supposed hardship to IDFG is that it will not be able to easily collect this data in the Frank Church Wilderness this winter and thus will not gain specific information on wolf locations, distribution, and denning sites in the wilderness to assist with management decisions. *See IDFG Brief at 16-17.* Yet the Nez Perce Tribe, U.S. Fish and Wildlife Service, and IDFG have managed wolves for fifteen years, including setting hunting limits for 2009, without this type of data so it is not clear why failing to gather such data this winter causes any cognizable hardship to IDFG. IDFG may have to wait a few years before they survey this area again to reapply for a permit, but they haven't demonstrated any significant hardship from that delay or that IDFG experienced any hardship during the time that lapsed since its prior requests in 2005-06, to substantiate their immediate need for this data. *See Rule Decl. Ex. 1* (request from IDFG to Forest Service for permit in 2005).

IDFG tries to argue that it also needs this data to inform public opinion about wolves and to support its defense in a separate lawsuit. *IDFG Brief at 17-18.* Again, neither of these arguments support a showing of hardship to the State from enjoining the helicopter activity this winter. IDFG has not shown how divergent public opinion about wolves specifically causes it any hardship. Furthermore, the fact that this data could assist the State in the wolf delisting lawsuit is weak support for denying an injunction here that is needed to protect wilderness.[5] IDFG is not the defendant in the delisting lawsuit, and moreover does not explain why putting wolves back on the Endangered Species list would cause it significant hardship.

The public has an interest in seeing that agencies are acting consistently with federal law.

[5] IDFG repeatedly asserts that "Plaintiffs" are involved in the wolf delisting lawsuit and thus will benefit if IDFG cannot collect this data. But only two of the eight Plaintiffs in the current lawsuit are involved in the wolf delisting case – Western Watersheds Project and the Sierra Club. The other six Plaintiffs are not part of that lawsuit and thus IDFG's argument is irrelevant. The issue here is preserving wilderness character, and destruction of that character is the hardship complained of here.

The Frank Church Wilderness Act does not contain an exception for landing helicopters in the wilderness to manage wildlife. Thus, any such use of helicopters is directly contrary to that Act as well as the Wilderness Act unless it is necessary to preserve wilderness character (or for emergencies such as fires or human safety). The fact that Plaintiffs may have agreed in the past that use of helicopters to protect struggling bighorn sheep or mountain goat populations was necessary to preserve wilderness character does not mean that using helicopters to put radio collars on an already thriving wolf population in the wilderness does not cause hardship here.

Finally, although the State of Idaho may continue to have jurisdiction and responsibility for wildlife in federally-designated wilderness, it still must comply with the requirements of the Wilderness Act, and thus must receive a permit from the Forest Service before it can land helicopters in the Frank Church Wilderness. *See Wyoming v. United States,* 279 F.3d at 1234 (recognizing that State retains jurisdiction over wildlife on federal land but that State does not have authority to act in conflict with federal law that governs use of that land); *National Audubon Soc'y v. Davis,* 307 F.3d at 854 (same). The public has an interest in ensuring that, when issuing such a permit, the Forest Service fully complies with all applicable laws and regulations. The Forest Service has not done so here. Plaintiffs have shown that this unlawful permit will cause them greater hardship and is against the public interest, and thus the Court should enjoin this project.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Emergency Motion For TRO And/Or Preliminary Injunction Under Third Claim for Relief, and immediately enjoin the use and landing of helicopters in the Frank Church Wilderness to capture and collar wolves as approved in the December 2009 Decision Memo and January 2010 special use permit.

Dated: February 15, 2010, Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2010, I caused to be electronically filed with the Clerk of the Court using the CM/ECF system the Reply Brief In Support Of Emergency Motion For TRO And/Or Preliminary Injunction, and that I served copies of the foregoing via electronic mail on the following counsel of record:

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