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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WOLF RECOVERY FOUNDATION, and WESTERN WATERSHEDS PROJECT, *et al.*	)	No. 09-CV-00686-BLW
Plaintiffs,	)	DEFENDANT-INTERVENOR-APPLICANT IDAHO DEPARTMENT OF FISH AND GAME'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION (*DOCKET #8)* FOR PRELIMINARY INJUNCTION UNDER THIRD CLAIM FOR RELIEF
v.	)	
U.S. FOREST SERVICE and USDA APHIS WILDLIFE SERVICES,	)	
Defendants.	)	

I. INTRODUCTION

Pending before the Court in the above-captioned matter is an Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction under the Third Claim for Relief in the First Amended Complaint by Plaintiffs (*Docket #8*). Intervenor-Defendant-Applicant Idaho Department of Fish and Game (IDFG) files this Memorandum, along with Declarations of Jon

Heggen, Jason Husseman, Jim Lukens, Gary Power, Virgil Moore, Jon Rachael, and accompanying exhibits in opposition to Plaintiffs' Motion.

IDFG has a high regard for the values of the Frank Church River of No Return Wilderness (FCRNRW). IDFG began purchasing private lands within what is now the FCRNRW dating back to the late 1940s (*e.g.*, Stonebraker Ranch, Mormon Ranch, Mile High Ranch, Loon Creek Ranch) to ensure their protection prior to the designation of the 2.4 million-acre FCRNRW in 1980. Management for healthy wildlife populations is fundamental to Idaho's sovereignty and the character of Idaho's backcountry areas. Although wildlife is a core value of wilderness, opinions can differ among state, federal and local governments and private parties as to what is appropriate for both management of wilderness and management of wildlife. In this case, the U.S. Forest Service (USFS) and IDFG agree on the appropriateness of an activity in early 2010 for radiocollaring wolves in conjunction with aerial winter game surveys that IDFG has conducted for decades. At its core, this case is about collecting biological data to support state management of wolves in conjunction with other wildlife in Idaho (including wildlife in federally designated wilderness areas) and to support USFS' management of wilderness.

Plaintiffs' opposition to the use of helicopters to improve the quantity and quality of wolf monitoring data is difficult to square with Plaintiffs' support for the use of aircraft to release radiocollared wolves into the FCRNRW in the mid-1990s, Plaintiffs' support or silence on IDFG's recent and historic landings of helicopters to radiocollar and/or relocate bighorn sheep and mountain goats in Idaho Wilderness areas, and Plaintiffs' repeated assertions in other forums that wildlife management decisions must be made using the best available science.

Some of the Plaintiffs[1] are in another federal court actively challenging the delisting of wolves in Idaho based on reasons counter to their arguments here; in that case they allege criticisms and harms based on wolf population levels, reproduction rates, dispersal and connectivity, as well as IDFG's level of commitment to wolf management and monitoring. *Defenders of Wildlife v. Salazar*, No. CV 09-77-M-DWM, *see, e.g.*, Defenders of Wildlife's Memorandum in Support of Motion for Summary Judgment at 33 (10/26/2009), Defenders' Reply Memorandum in Support of Motion for Summary Judgment at 38 (12/31/2009)).

At the same time Plaintiff organizations are telling another federal court that wolves need full federal management, monitoring and protection, Plaintiffs come to this Court implying that wolves are recovered to the extent they need little, if any, management or monitoring in the FCRNRW. In this case, Plaintiffs seek to prevent USFS from authorizing a high-benefit, low-impact opportunity for improving the best available science for management of wolves and other wildlife within the FCRNRW and vicinity. Plaintiffs would have this Court prevent USFS from authorizing IDFG's potential and limited landings for radiocollaring wolves using helicopters that will already be flying 200 feet above ground level in the FCRNRW for winter big game aerial surveys.

Plaintiffs have requested a preliminary injunction of USFS' authorization of IDFG's activity. However, USFS' substantive determination and its procedural compliance with the National Environmental Policy Act and Administrative Procedure Act are supported by its administrative record.

[1] The plaintiffs in the pending lawsuit challenging delisting, *Defenders of Wildlife v. Salazar* (Consolidated Case No. Cv-09-77-DWM, D. Mont) include Plaintiffs Western Watersheds and Sierra Club. The plaintiffs in the delisting lawsuit also include: Center for Biological Diversity, of which Declarant Marcey Olajos is Board Chair in addition to being on the Advisory Board of Great Old Broads for the Wilderness, and Friends of the Clearwater, of which Declarant Gary MacFarlane is executive director in addition to being a Board Member of Plaintiff Wilderness Watch. Declarant Ralph Maughan is both President of Plaintiff Wolf Recovery Foundation and on the Board of Plaintiff Western Watersheds.

As set forth below, Plaintiffs do not meet any of the requirements for a preliminary injunction, and the Court should deny their request.

II. LEGAL STANDARD

The U.S. Supreme Court recently held that a preliminary injunction is an "extraordinary remedy" that is "never awarded as of right." *Winter v. Natural Resources Defense Council*, 555 U.S.__, 129 S.Ct. 365 (2008). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374-375. Plaintiffs do not meet this standard.

III. ARGUMENT

A. Plaintiffs are Not Likely to Succeed on the Merits.

1. USFS' decision to grant a special use permit to IDFG in compliance with wilderness requirements is supported by its administrative record.

USFS has chosen to authorize the potential landing of helicopters as an activity "necessary to meet minimum requirements for the administration of the area" for the purpose of the Wilderness Act under section 4(c)[2] of the Act. Under the Wilderness Act of 1964, the landing of aircraft is prohibited "except as necessary to meet minimum requirements for administration of the area for the purpose of this Act…."

It is indisputable that wildlife populations are essential to the character of wilderness. While Plaintiffs imply wolves do not need "management" in the FCRNRW, they recognize that

[2] As IDFG indicated in its Memorandum in Support of its Motion to Intervene, IDFG would separately assert other grounds for conduct of the potential landings at issue in support of fish and wildlife management purposes, including Section 4(d)(8) of the Wilderness Act regarding the integrity of the State's jurisdiction with respect to wildlife and Section 7(a) of the Central Idaho Wilderness Act mandating permission of landing of aircraft within the FCRNRW and Selway-Bitterroot Wilderness where such use was established at the time of enactment. IDFG's Memorandum in Support of Motion to Intervene at 10-11. IDFG understands that Plaintiffs' Complaint is limited to the validity of USFS's special use permit authorizing helicopter landings and that the issue of whether the landing of helicopters outside established airstrips is independently authorized by § 4(d)(8) of the Wilderness Act and § 7(a) of the Central Idaho Wilderness Act is not before the Court.

the Wilderness Act defines wilderness as a place that is "protected *and managed* so as to preserve its natural conditions." 16 U.S.C. §1131(c) (emphasis added). However, "natural" conditions include humans as a visitor the landscape, and include activities such as fishing, hunting, and other recreation. *Id.* Wolves had not been part of the landscape for decades when the FCRNRW was created and did not become so until releases in 1995-96. How they factor into the "natural" conditions and the "wilderness character" of the FCRNRW is still evolving.

Notably, the legislation creating the FCRNRW made additional and considerable compromises as to what were "natural conditions" including a recognition of state and private in-holdings, continuation of uses established in 1980 for aircraft and motorboats, distinctions for uses along the Scenic River corridor in the interior of the Wilderness, special mineral areas, continuation of established grazing, specified hydroelectric generators and domestic water facilities, and other wilderness intrusions. *See, e.g.*, Section 5(d) and (7) of the Central Idaho Wilderness Act of 1980; *see also Wilderness Watch v. Robertson*, 1998 WL 1750033 (D.D.C. 1998) (upholding USFS' approval of some structures for outfitting camps in the FCRNRW as necessary for minimal management of the FCRNRW, finding the Wilderness Act "clearly directs defendants to administer the Wilderness with an eye not only toward strict conservation but also to ensure the 'use and enjoyment of the American people.'")

It is in this context that USFS' determination of what is "necessary to meet minimum requirements for the administration" of the FCRNRW should be viewed. Evaluation of USFS' determination should also recognize the jurisdiction and responsibilities of IDFG with respect to wildlife within the FCRNRW, as specifically recognized by the Section 4(d)(8) of the Wilderness Act and Section 7(c) of the Central Idaho Wilderness Act.

IDFG maintains that *Chevron* deference should apply to USFS' determination in support of IDFG's wildlife management activity, using the analysis of *Wilderness Soc'y v. U.S. Fish and Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) and *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004).[3] *High Sierra Hikers* concluded that an agency determination of what is "necessary" is entitled to deference under the broad terms of the Wilderness Act. 309 F.3d at 646-647 (a finding of 'necessity' requires this court to defer to the agency's decision," noting that the Wilderness Act does "not specify any particular form or content" for an assessment of necessity). The *High Sierra* court noted the ambiguities inherent in the Wilderness Act that would support *Chevron* deference: "Although we believe that Congress intended to enshrine the long-term preservation of wilderness areas as the ultimate goal of the Act, the diverse, and sometimes conflicting list of responsibilities imposed on administering agencies renders Congress's intent arguably ambiguous." *Id.* at 647-648. The additional responsibilities and exemptions in the Central Idaho Wilderness Act would further this ambiguity.

The facts of this case are also distinguishable from the other portion of the *High Sierra* analysis--whether an agency is acting with the force of law. Although USFS is "permitting" IDFG's activity through a special use authorization, IDFG is acting with the force of law with regards to its jurisdiction and responsibilities for wildlife management. Wildlife management, unlike commercial activities, is also fundamental to fulfilling the purposes of wilderness legislation (*i.e.*, preserving "wilderness character" and restricting use that would impair their future use as "wilderness").

[3] *High Sierra Hikers* and *Wilderness Soc'y* focus on another section of the Wilderness Act, Section 4(d)(6), regarding agency authorizations of commercial services within wilderness areas "*to the extent necessary* for activities which are proper for realizing the recreational or other wilderness purposes of the areas." *High Sierra Hikers*, 390 F.3d at 647. The relevant statutory provision at issue in this case, Section 4c of the Wilderness Act, is the authorization of the landing of aircraft "as necessary to meet the minimum requirements for the administration of the area for the purpose of this Act…."

Assuming *arguendo* that USFS's determination here is due a lower standard of deference, respect is due based on consideration of the "interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements…the logic [] and expertness of an agency decision, the care used in reaching the decision, as well as the formality of the process used. *High Sierra Hikers, 390 F.3d a*t 648, quoting *Wilderness Soc'y*, 353 F.3d at 1068.

In its Decision Memo, USFS discussed IDFG's and USFS' need to pursue opportunities to radiocollar the estimated 8-10 uncollared wolf packs in the FCRNRW (AR FS008605-06). USFS considered potential impacts, alternatives, and mitigation measures. USFS discussed prior requests for helicopter surveys while wolves were listed on the Endangered Species Act and distinguished this authorization as being narrower in scope and scale (AR FS008610). USFS also considered prior helicopter use for wildlife management activities, including uses predating the wilderness designation and other USFS approvals for radiocollaring and relocation of bighorn sheep and mountain goats. USFS' Memo also evaluated non-motorized methods and specifically discussed the prior and unsuccessful efforts IDFG made to pursue non-motorized alternatives in conjunction with a request made while wolves were listed in 2006. (AR FS008610-11).

Case law cited by Plaintiffs in urging a narrow reading of exceptions for motorized use focused on approvals related to commercial activities, tourist transport, and permanent structures. *See High Sierra Hikers,* 390 F.3d at 648 (involving permits issued to outfitters to make commercial trips into wilderness despite damaged trailheads); *Wilderness Soc'y,* 353 F.3 1051 (involving permitting of fish enhancement project that was a commercial enterprise); and *Wilderness Watch v. Mainella,* 375 F.3d 1085 (11th Cir. 2004) (regarding use of passenger van to transport tourists to historic structures). These cases are distinguishable not only because of some

of the unique statutory provisions creating the FCRNRW, but also because of the much stronger connection of wildlife management activities to "preserving wilderness character."

2. USFS properly documented its analysis of "controversy" and "extraordinary circumstances" for purposes of determining the applicability of categorical exclusion to the National Environmental Policy Act.

USFS based its authorization of IDFG's potential landings of helicopters on two categorical exclusions: 7 CFR 1b.3(a)(4) (inventories, research activities and studies) and 36 CFR 220.6.(e)(3) (minor special uses requiring less than 5 contiguous acres). A court "must give an agency's interpretation of the meaning of its own categorical exclusion substantial deference." *Committee for Idaho's High Desert v.* Collinge, 148 F.Supp.2d 1097, 1101 (D. Idaho 2001). "An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious." *California v. Norton*, 311 F.3d 1162, 1176 (quoting *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996)).

In this instance, USFS acted consistently with *Norton* guidance, providing a contemporaneous and "reasoned explanation for its reliance on the categorical exclusion, including an explanation of why the exceptions do not apply." *See id.* at 1176-77; s*ee* AR FS008612-13). USFS considered all public comments, especially those regarding potential effects to resource conditions listed, in determining "[t]his project does not individually or cumulatively have a significant effect on the quality of the human environment…." (AR FS 008613). USFS provided contemporaneous documentation to show it "considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision." *See Norton,* 311 F.3d at 1176; see AR FS008607-11 (e.g.,

considering biological and physical effects to wilderness resources, effects on recreation; and incremental impacts in conjunction with aerial surveys).

Plaintiffs argue "critical comments" highlight the "controversial nature of this project" (Plaintiffs' Opening brief at 21). However, "[o]pposition and a high degree of controversy are not synonymous"; otherwise, any agency determination likely to face a court challenge would "surrender the determination to opponents of a federal action, whether [the project] is major or not, nor how insignificant the environmental effects might be." *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2nd Cir. 1983). USFS evaluated comments and determined they did not identify significant effects or extraordinary circumstances (AR FS008612).

3. Plaintiffs' extra-record materials do not warrant overturning USFS' decision.

To the extent the Court considers the Declaration of James Peek, Dr. Peek apparently misunderstood that IDFG's proposal for wolf radiocollaring was part of a research project as opposed to a monitoring activity (Declaration of Virgil Moore ¶5). On the issue of the appropriateness of landing of helicopters for radiocollaring as a "minimum tool," in November 2009 Dr. Peek submitted an opinion to the Moscow-Pullman Daily News in which Dr. Peek supported IDFG's use of helicopters for radiocollaring wolves as an appropriate "minimum tool." *Id.* In the opinion, Dr. Peek expressed the following view:

> If the intent of Idaho Department of Fish and Game is to try to understand something about a wolf population in the most remote area of the state, where human use is at a low level, then **a marking program that uses a helicopter to capture a few wolves that would occur over at most a week seems to be far less intrusive than having wolf trappers spend all summer trying to capture wolves from the ground**, where they put up signs to advise visitors of the traps. An aerial capture program carried out in late winter when nobody is around and the wolves are in best condition seems to me to be far less intrusive to the wolves and to visitors. [USFS] has approved the use of helicopters for marking other animals in wilderness, so there is a precedent.

Peek editorial 2009, Declaration of Virgil Moore, Exhibit A (emphasis added).

Plaintiffs' briefing documents also repeatedly reference prior Nez Perce Tribe trapping efforts. IDFG supplied USFS with information regarding past trapping efforts by the Nez Perce Tribe, University of Idaho Taylor Ranch, and IDFG. USFS considered this information and discussed it in its Minimum Requirements Analysis as part of its decision making process (*see* AR FS008567). IDFG provided feedback on comments made by Isaac Babcock regarding past trapping efforts and their lack of application to collaring unmarked packs (AR FS004405-4406). The success of prior trapping captures by Tribal, University of Idaho and IDFG staff has depended heavily on a combination of existing radiocollars, proximity to access at wilderness boundaries and airstrips, and reliance on sightings by private ranch staff and visitors in areas of higher human presence. *Id.*

To the extent the Court considers other evidence regarding the legitimacy of USFS' consideration of this information, IDFG has provided additional documentation regarding these efforts and a map of prior capture locations in relation to airstrips and the wilderness boundary. See Declaration of Jason Husseman and Exhibit A thereto. The record also indicates that USFS discussed IDFG's helicopter proposal with the Nez Perce Tribal Wildlife program and Technical Committee, and that they expressed no major concerns (AR FS004231; *see AR* FS008611).

Notably, Plaintiffs' assertions that USFS failed to adequately consider the alternative of trapping wolves is inconsistent with positions that some of the Plaintiffs have taken regarding the use of leg-hold traps. In *Committee for Idaho's High Desert*, Western Watersheds and Idaho Conservation League alleged failure to consider impacts from the use of leg-hold traps and other predator control methods to non-target animals, ground trampling and foot traffic, and recreational and aesthetic use and enjoyment of public lands. *See e.g., Committee for Idaho's High Desert*: Brief in Support of plaintiffs' Motion for Preliminary Injunction TRO at 5-7;

Declaration of Western Watersheds' Katie Fite ¶¶ 34, 65, 88-89; Declaration of Idaho Conservation League's Ted Chu ¶18.

The Sierra Club has also endorsed ballot initiatives banning the use of leg-hold traps "except in the extraordinary case where the otherwise prohibited padded-jaw leghold trap is the only method available to protect human health or safety." *See* 1998 California Proposition 4 and Argument in Favor (at http://vote98.sos.ca.gov/VoterGuide/Propositions/4text.htm and http://vote98.sos.ca.gov/VoterGuide/Propositions/4yesarg.htm).[4] It is of concern to IDFG that some of the Plaintiffs, while advocating trapping as an alternative to the use of helicopters, may nonetheless challenge the ground trapping methods via other legal and legislative actions.

To the extent the Court considers the extra-record materials of Tom Kovalicky, the Court should note that Mr. Kovalicky approved IDFG's transplanting of bighorn sheep into the Selway-Bitteroot Wilderness via a helicopter in 1989 based on a categorical exclusion. AR 3481. Among other factors, this decision relied on a feasibility assessment by Dr. Jim Peek and the precedent of prior IDFG transplants of mountain goats into the Selway Wilderness by use of helicopter under a categorical exclusion (AR FS00034799-80; *see also* AR FS0003512-17).

B. Plaintiffs do not demonstrate there is a significant threat they will suffer irreparable harm.

The U.S. Supreme Court recently held that "issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 at 375-376. "The extraordinary nature of the preliminary injunction power requires that it "not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." *Adams*

[4] Proposition 4 passed but was overturned in *National Audubon Soc'y v. Davis,* 307 F.3d 835 (9th Cir. 2002).

v. Freedom Forge Corp., 204 F.3d 475, 487 (3d Cir. 2000). Mere allegations of environmental harm are insufficient; plaintiffs "must still make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests." *Davis v. Mineta*, 302 F.3d 1104, 1114-1115 (10th Cir. 2002). Even then, preliminary injunctions "must be narrowly tailored…to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law." *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotation marks omitted).

In terms of alleged harm to Plaintiffs during planned visitation of the wilderness, IDFG will already be making helicopter flights at a level of 200 feet above ground level to conduct aerial winter surveys of elk herds, a practice which IDFG has conducted for decades in the FCRNRW and other parts of Idaho to support wildlife management decisions. *See* AR FS008608. IDFG would only make landings for radiocollaring purposes if it finds unmarked wolf packs during these flights, and given the vast acreage of the FCRNRW, it is unlikely any of the declarants would hear any noise or see any activity in addition to what they would otherwise experience in conjunction with IDFG's aerial helicopter surveys. *See* AR FS008608. The incremental, limited and speculative nature of harm during alleged plans to visit the Wilderness do not pose a "significant threat" of "irreparable harm" under the *Winter* standard.

The allegations of specific harms to Plaintiffs[5] are questionable, as Declarants' plans to visit the area appear to be contrived to coincide with IDFG's specific plans. The number of different trips planned for the February-March period to the Middle Fork is unprecedented based on the considerable experience of IDFG personnel. See Declarations of Jim Lukens ¶2, Jon Heggen ¶8, and Gary Power ¶15-17; *see also* AR FS004154 (letter from USFS retiree Hadley

[5] To the extent Declarants Ken Davis, Jeff Halligan, Brenda Hanley have indicated no affiliation with the Plaintiffs, the Court should not consider their alleged injuries for purposes of determining either standing or injunctive relief.

Roberts regarding lack of winter visitation during his tenure on the Salmon National Forest from 1971 to 1983). This is especially true for the number of trips planned for the third week in February, coinciding with a delayed timeframe to which IDFG agreed to accommodate a hearing on Plaintiffs' motion for injunctive relief. Some Declarants indicate they have never visited the FCRNRW in winter before, despite years of opportunity to do so, and Declarant Marcey Olajos has never visited this part of the country before. Declarations of John Robison ¶18,Veronica Eagan ¶3, Marcey Olajos ¶3.

There is little case law applying self-inflicted harm in the context of environmental laws, arguably because of the more liberal definition of "harm" applied prior to the *Winter* decision. In other circumstances, although courts have held that self-inflicted harm can be considered in balancing equities, "self-inflicted harm will not be considered to be irreparable for purposes of application for preliminary injunction." *Salt Lake Tribune Pub. Co. LLC v. AT&T Corp,* 320 F.3d 1081, 320 F.3d 1081, 1106 (10th Cir. 2003) (regarding a party's allegations of harm based on express contract terms it had negotiated); *see also* Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (3rd Cir. 1995) (regarding a party's allegations of harm from a contract it had authorized to settle ligation), *citing* 11A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure* § 2948.1 pp. 152-53 (1995).

For purposes of standing or injunctive relief, the U.S. Supreme court also requires allegations of "concrete and particularized" injuries that are "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Institute,* __U.S. __, 129 S.Ct. 1142 at 1149, 1150-51 (2009) (citing a need to describe concrete plans or provide some specificity as to when a visit to a national forest would occur to support a finding of actual or imminent injury). The Court should reject Declarants' attempts to construct irreparable harm by asserting

amorphous plans to visit the FCRNRW that are at odds with their past visitation and the logistics needed to carry out such plans.[6] IDFG personnel conducting winter aerial surveys and other winter activities for years indicate they have never seen humans outside of private ranch areas. *See* Declarations cited *supra*, page 12-13. To the extent Declarants have contemplated river travel (*see* Declaration of Forrest McCarthy ¶5), permits are required for floating the Middle Fork Salmon River at any time of year and the Middle Fork Ranger District person in charge of river permits indicates that in the past 15 years she has never issued a float permit for February, and for records kept for 2001-2008 the District has never issued a permit prior to March 16. Declaration of Jim Lukens ¶5. Staff of air charter companies typically serving the FCRNRW airstrips--Arnold Aviation, Middle Fork Air, and McCall Air/Salmon Air—have indicated they have no recreational bookings for February or March. Declaration of Lukens ¶8; Declaration of Jon Heggen ¶ 9. The only February/March visitation the manager of the Middle Fork Ranch (adjacent to the Thomas airstrip) is aware of are a few mountain lion hunters. Declaration of Lukens ¶7.

The one declarant for whom IDFG is aware of a more concrete effort for travel arrangements is Ken Helms. Mr. Helms contacted the Flying B ranch on January 30, but his email request regarding access inquired about the store at the Ranch, showers, ranch meals, and cell phone coverage. *See* Exhibit A to Declaration of Jim Lukens. Such concerns about retaining the trappings of civilization during his visit call into question the potential for helicopter landings to injure the "quiet, solitude, and natural setting" of the "wilderness" experience he intends to share with Declarant Lon Stewart. *See* Ken Helms Declaration at ¶9.

[6] Given the number of different landings and takeoffs at the Thomas, Bernard, and Flying B airstrips and associated travel asserted in the various Declarations, Declarants are more likely to be disrupted by each others' plans than by any incremental increase in IDFG's operations.

It is extremely unlikely Declarants (Ralph Maughan and Edwina Allen) indicating plans to access the wilderness via the Salmon River Road, whether by the Salmon River (Corn Creek) Trail or the difficult Stoddard Pack Trail, would notice any effects from proposed radiocollaring over and above the effects of aerial game surveys. *See* Declaration of Gary Power ¶15.

Plaintiffs' other, more generalized allegations of irreparable harm to the "untrammeled" nature of the wilderness or wolves unrelated to physical presence in the FCRNRW do not meet the *Winter* standard for irreparable harm for preliminary injunctive relief, especially given the lack of traceability of any potential landing. This is especially true given the amount of other aircraft traffic and other wilderness intrusions authorized in the FCRNRW legislation. *See* AR FS 008608 and discussion *supra,* page 6.

C. **The balance of equities and public interest weigh in Defendants' favor.**

In considering a preliminary injunction, courts must balance the competing claims of injury and must consider the effect on each party of granting or withholding the requested relief." *Winter*, 129 S. Ct. at 376.

IDFG performs wildlife monitoring to fulfill statutory responsibilities for preserving, protecting, perpetuating, and managing wildlife and providing Idaho citizens and others with continued supplies of such wildlife for hunting, fishing and trapping. *See* Idaho Code §36-103. IDFG's wildlife monitoring in the FCRNRW, a 2.4 million acre area, involves time, personnel experienced in backcountry work, logistics, safety planning, money, and consideration and balance of wilderness values. It is extremely beneficial to IDFG to perform such monitoring with the support of USFS, the agency delegated the statutory authority to manage the lands and waters of the FCRNRW. *See* AR 3518-3527 (2004 Memorandum of Understanding between USFS and IDFG). Grant of an injunction is very likely to disrupt the cooperative understanding

between IDFG and USFS regarding authorities for aircraft landing in support of wildlife management activities in the FCRNRW, to the detriment of both agencies.

As discussed, efforts to radiocollar unmarked wolf packs in the FCRNRW's interior have been ineffective outside the presence of previously radiocollared animals, away from airstrips and other areas of regular human visitation. Thus, aerial capture appears to be an appropriate "minimum tool" for radiocollaring packs outside of these locations. Aerial capture must be done either in conjunction with other aerial work or through separately planned flights. Separate flights would involve additional time, personnel, and cost, as well as additional disruption. *See* Declaration of Jon Rachael ¶7. Although conducted annually, IDFG's aerial winter game surveys are performed on a rotational basis with flights of varying coverage and intensity. Opportunities to conduct radiocollaring in concert with winter surveys at a given location within the FCRNRW may be not be easily recreated. *See* Declaration of Jon Rachael ¶3-5.

The FCRNRW is an important place to have a greater understanding of the dynamics of wolves and other wildlife because of the relatively minor impact of humans on the system. As the FCRNRW and surrounding environment adjusts to a complement of wolves, it is important for IDFG to monitor wolf and associated wildlife populations to ensure IDFG balances management objectives in developing recommendations for harvest seasons and limits, as well as other appropriate management actions, for the various species. Declaration of Commissioner Power at ¶¶19-21. It is important to IDFG to have the best available scientific information available and to take advantage of monitoring opportunities as they arise, particularly if they arise in a way that involves an incremental use of personnel, time and financial resources and in a way that presents minimal, if any impacts to competing concerns such as wilderness values. *See id.* ¶23.

It is especially important to gather additional wolf monitoring information at this time when there is less knowledge of FCRNRW-specific predator-prey dynamics, and when state management actions are the subject of such polarized debate. Some groups, including some of the plaintiffs, have spread fear and concern about state extirpation of wolves, the potential for wolf inbreeding and disease, and improper catering to livestock and ranching interests. (Some are even demanding no human intervention in wolf population growth.) By contrast, other groups have spread fear and concern about the extirpation of elk, excessive predation, wolves as a disease vector, and improper diversion of IDFG funds to wolf management. *See id.* ¶22. IDFG and USFS must perform their management responsibilities in an environment that includes humans and human decision-making. Improving data, particularly in an area where the effects of man are minimized, is important to making sound decisions and empowering and informing public discussion. *See id*. Disruption of opportunities to collect radiocollaring data in support of informed decision-making is harmful to both IDFG and the public interest.

IDFG has confidence in the "minimum" nature of its wolf population estimates, connectivity management, and regulatory framework to ensure the Idaho wolf population continues to be well above U.S. Fish and Wildlife Service (FWS) recovery standards. *See* Declaration of Commissioner Power ¶19. However, in remote parts of Idaho, including the FCRNRW, IDFG has less monitoring information for packs, breeding pairs, reproduction, mortality and dispersal. Improving this information will enhance IDFG's abilities to manage wolves consistent with the 2008-2012 Idaho Wolf Population Management Plan (AR FS003616-3705). This plan was approved by FWS to meet statutory obligations for population management and monitoring for the five years following delisting.

The lack of radiocollaring information for an estimated 8-10 packs in the FCRNRW makes it likely IDFG is underestimating the wolf population, and in turn underestimating the potential for genetic exchange and population viability. Underestimation accrues to the benefit of plaintiffs in the delisting lawsuit and to IDFG and Idaho's detriment. Plaintiffs in the delisting litigation have argued that Idaho's wolf population is too small to support long-term viability and genetic exchange with other populations. *See id.* (*e.g.*, Defenders of Wildlife *et al.'s* Memorandum in Support of Motion for Summary Judgment at 33 (10/26/2009), Defenders' Reply Memorandum in Support of Motion for Summary Judgment at 38 (12/31/2009)). If anything, gathering additional information about wolf populations in the FCRNRW will benefit Plaintiffs by alleviating their concerns about the current status of the wolf population in Idaho.

In another claim in this very case, Plaintiffs criticize APHIS Wildlife Services for failing to assess the impacts of lethal control actions on wolf populations and packs in central Idaho and alleging "substantial impairment" of wolves in the Sawtooth National Recreation Area (which includes the Sawtooth Wilderness). Because packs in the SNRA and vicinity dispersed from the wolves originally released in the FCRNRW, improvements in data for wolves in the FCRNRW could help address Plaintiffs' concerns with the status of wolves in the SNRA. *See* Declaration of Jon Rachael at ¶9. In short, it is disingenuous for Plaintiffs to claim harm from a lack of data at the same time they claim harm regarding minimally intrusive efforts to gather it.

Plaintiffs have been willing to allow wilderness aircraft landings in causes they support—using aircraft to bring wolves, bighorn sheep and mountain goats to the FCRNRW and other wilderness areas. In the case of bighorn sheep, several of the Plaintiff organizations have supported IDFG's data collection efforts, including the landing of helicopters in wilderness areas for radiocollaring. *See* Declaration of Virgil Moore ¶6, Exhibits B, C, and D.

Because Plaintiffs have alleged harms or deficiencies in the wolf delisting case (*e.g.*, population size, reproduction, connectivity) and in this case (impairment of wolves in the SNRA), the Court should weigh in favor of data collection opportunities involving little or no additional harm to Plaintiffs that could address those allegations.

Plaintiffs also assert harms from the precedential impact of a decision to land helicopters. Plaintiffs' concerns should be given little weight because of their knowledge of and support for other helicopter landings in both the FCRNRW and other wilderness areas for such purposes as relocating and radiocollaring bighorn sheep and mountain goats. Moreover, in recent wilderness legislation, which at least some Plaintiffs have supported, Congress has specifically evaluated and spoken to the use of helicopters for wildlife and feral stock management purposes, including surveying, capturing, transplanting, monitoring, and providing water. *See, e.g.,* the Omnibus Public Land Management Act of 2009, Pub. L. 111-11 (establishing certain wilderness areas in the Owyhee Front with allowances and conditions for use of helicopters for wildlife monitoring and management); and the White Pine County Conservation, Recreation, and Development Act of 2006, which is included in the Tax Relief and Health Care Act of 2006, Pub. L. 109-432 (designating several wilderness areas in eastern Nevada with allowances and conditions for use of helicopters for wildlife monitoring and management).

Plaintiffs also assert speculative harms regarding the potential for additional data to result in increased hunting and other mortality. U.S. District Judge Molloy recently denied a request for a preliminary injunction in the delisting case to stop planned wolf hunts in Idaho and Montana on grounds that plaintiffs failed to show a likelihood of irreparable harm to the wolf population from hunts and other mortality. *Defenders of Wildlife v. Salazar*, No. CV 09-77-M-DWM, Order, 9/8/2009. In short, controlled wolf hunting does not result in harm to Plaintiffs'

interests, and Plaintiffs fail to demonstrate that the gathering of additional information about Idaho wolf populations would result in any change to IDFG wolf management under its 2008 Wolf Population Management Plan.

CONCLUSION

Based on the foregoing, the Court should deny Plaintiffs' motion for preliminary injunctive relief.

RESPECTFULLY SUBMITTED this 12th day of February 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

/s/ Kathleen Trever
Kathleen Trever
Deputy Attorney General
Idaho Department of Fish and Game

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of February 2010, I filed the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRO AND/OR PRELIMINARY INJUNCTION electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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