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16 THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF IDAHO

18 WOLF RECOVERY FOUNDATION, and)
WESTERN WATERSHEDS PROJECT)

19 Plaintiffs,)

20 v.)

21 U.S. FOREST SERVICE and USDA APHIS,)
22 WILDLIFE SERVICES,)

23 Defendants.)
24)
25)
26)
27)

Case No. CV 09-cv-686-BLW

**DEFENDANTS' RESPONSE
IN OPPOSITION TO
PLAINTIFFS' EMERGENCY
MOTION FOR TRO AND/OR
PRELIMINARY INJUNCTION
UNDER THIRD CLAIM FOR
RELIEF**

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1		
2	APA	Administrative Procedure Act
3	AR	Administrative Record
4	CE	Categorical Exclusion
5	DM	Decision Memo Special Use Authorization to Idaho Fish and Game For Helicopter Landings and Aerial Darting To Support Gray Wolf Capture and Collaring In the Frank Church–River of No Return Wilderness (AR008605-617)
6		
7		
8	Dkt. #	Docket Entry
9	EA	Environmental Assessment
10	EIS	Environmental Impact Statement
11	ESA	Endangered Species Act
12	FWS	U.S. Fish & Wildlife Service
13	IDFG	Idaho Department of Fish and Game
14	MR	Minimum Requirements Decision Guide Worksheets (AR008564-97)
15	NEPA	National Environmental Policy Act
16	2002 Idaho Plan	Wolf Conservation and Management Plan (AR004344-75)
17		
18	2008-2012 Idaho Plan	Wolf Population Management Plan for the Years 2008-2012 (AR003616-705)
19		

Citations to the administrative record, Dkt. # 18, are by “AR” followed by the 6-digit Bates number, *i.e.* 00XXXX.

1 **I. INTRODUCTION**

2 In order to restore a fundamental aspect of wilderness character and to bring wolves back
3 from the brink of extinction, wolves were reintroduced into the Northern Rocky Mountains after
4 having been extirpated by European settlers. As a result of the efforts of the U.S. Fish &
5 Wildlife Service (“FWS”), the Idaho Department of Fish and Game (“IDFG”), and others,
6 wolves once again roam the Frank Church–River of No Return Wilderness (“Frank Church
7 Wilderness”). Wolves were recently removed from the Endangered Species List, and now IDFG
8 has full responsibility for wolf management in Idaho.

9 To facilitate critical management and post-delisting monitoring of gray wolves, which are
10 to be monitored for five years following delisting under the Endangered Species Act (“ESA”),
11 IDFG has requested, and the Forest Service has granted, permission to conduct a very limited
12 research project that may utilize a small number of helicopter landings to facilitate darting and
13 radio collaring of wolves in the Frank Church Wilderness. This research project would occur in
14 conjunction with IDFG’s annual big game aerial surveys, using the same helicopter during the
15 same two-week time frame. These big game surveys will take place regardless of whether IDFG
16 also conducts its wolf research project.

17 Plaintiffs seek the extraordinary remedy of a temporary restraining order and/or a
18 preliminary injunction to prevent IDFG from moving forward with its research project. But
19 Plaintiffs have not demonstrated that they are likely to succeed on the merits. Instead they
20 ignore and downplay the need for the data sought by this research project, the small scope, and
21 negligible effects of the project. Only a maximum of 20 landings will be permitted, any landings
22 are only expected to last a cumulative total of two hours, project activities will require
23 substantially less than five contiguous acres of land, and landings would occur on snow or frozen
24 ground in the winter when recreational use is minimal. Although Plaintiffs have submitted
25 voluminous declarations that address Article III standing injury, they have fallen far short of
26 showing irreparable harm to themselves or wilderness values by allowing the matter to proceed
27

1 to the merits without emergency relief. Finally, neither the balance of the equities nor the public
2 interest favors an injunction and, therefore, this Court should deny Plaintiffs' request for
3 emergency relief.

4 **II. FACTUAL BACKGROUND**

5 A. Although They Had Long Been Extirpated When the Frank Church–River of No
6 Return Wilderness Was Designated, Endangered Gray Wolves Were
Reintroduced in the Mid-1990s

7 As Europeans settled the United States, they poisoned, trapped, and shot wolves resulting
8 in the near extirpation of gray wolves from Montana, Idaho, Wyoming, and southwestern
9 Canada by the 1930s. 74 Fed. Reg. 15,123 (Apr. 2, 2009). In the 1970s, FWS designated the
10 gray wolf as an endangered species. 43 Fed. Reg. 9607 (Mar. 9, 1978). This was the situation in
11 1980, when Congress designated the Frank Church Wilderness.

12 In 1995 and 1996, as part of an effort to reintroduce wolves into the Northern Rocky
13 Mountains (including Montana, Idaho, and Wyoming), FWS reintroduced 35 gray wolves into
14 central Idaho's Frank Church Wilderness. Minimum Requirements Decision Guide Worksheets
15 ("MR") at AR008564 (AR008564-97).^{1/} The reintroduction was carried out under section 10(j)
16 of the ESA. *Id.*

17 B. After Wolves Were Reintroduced, the Nez Perce Tribe Monitored Gray Wolf
18 Populations Using Various Techniques and Explored Possible Use of Helicopters
to Aerially Dart and Collar Animals

19 After wolves were reintroduced in 1995 and 1996, the Nez Perce Tribe contracted with
20 the FWS to conduct population monitoring in central Idaho. MR at AR008565. The Nez Perce
21 Tribe captured wolves using leg-hold traps, and then collared them. *Id.* The reintroduced
22 wolves had radio collars, which provided data showing den and rendezvous site locations. Nov.
23 4, 2009 email from Jason Husseman, IDFG (AR004400). This data gave the Nez Perce Tribe a
24 substantial edge in determining where to set traps to collar additional wolves in packs that
25 already contained at least one collared wolf. *Id.* The Nez Perce Tribe was also in contact with
26 ranch personnel, who would inform them when they observed wolves near an airstrip. Nov. 4,

27 _____
28 ^{1/}Citations to the administrative record, Dkt. # 18, are by 8-digit Bates number, *i.e.* AR00XXXX.
DEFS.' RESP. IN OPP. TO MOT. FOR TRO AND/OR PRELIM. INJ.

1 2009 email from Steve Nadeau, IDFG (AR004396). After such observation, the Nez Perce
 2 would fly to the airstrip, and set traps in the vicinity of where wolves were observed. *Id.*
 3 According to Plaintiffs, the Nez Perce captured 29 wolves in the Frank Church Wilderness over
 4 a 14 year period. Pls.' Prelim. Inj. Mot., Dkt. # 8-1, at 9-10 (citing Declaration of Roy
 5 Heberger^{2/} (“Heberger Decl.”) ¶¶ 14-17 & Exs. A-B.). The Forest Service's analysis did not
 6 include the total number of wolves captured by the Nez Perce Tribe. Instead, the MR analysis
 7 makes clear that it obtained data from one trapper's efforts. AR008567 (“One of the [Nez Perce
 8 Tribe's] contract trappers has trapped 14 wolves over a 15 year time period.”).^{3/} Either figure
 9 indicates that the number of wolves trapped by the Nez Perce Tribe was small—about two
 10 wolves per year for the Tribe or about one wolf per year for its best trapper.

11 Shortly after wolves were reintroduced, on December 5, 1997, FWS and the Forest
 12 Service held a meeting to discuss monitoring the experimental populations of wolves within the
 13 Frank Church Wilderness, including possible helicopter landings and aerial darting and/or
 14 netting. Welsh Decl. ¶ 14, Ex. U (meeting minutes). At this meeting, Randy Welsh^{4/} explained
 15 that the Forest Service would have to complete a minimum requirements analysis and evaluate
 16 the potential effects of the proposed action in accordance with the National Environmental
 17 Policy Act (“NEPA”). *Id.* Mr. Welsh also advised that if the minimum tools analysis “shows
 18 effects are minimal we may be able to work under a categorical exclusion.” Ex. U. A follow-up
 19 meeting was scheduled for January 7, 1988.^{5/}

20 ^{2/}Defendants have separately moved to strike Plaintiffs’ extra-record exhibits and the portions of
 21 Plaintiffs’ extra-record declarations that are not related to standing or irreparable harm.

22 ^{3/}Plaintiffs make much ado about the difference in these two numbers, alleging that the Forest Service
 23 “failed to disclose” and misrepresented these facts. Pls.' Prelim. Inj. Mot. at 2, 9-10. The record,
 24 however, shows that the Forest Service was “aware that information obtained from this trapper was not
 25 indicative of the total number of wolves that had been trapped and collared by the Nez Perce Tribe.”
 26 Declaration of Randy Welsh (“Welsh Decl.”) ¶ 17 (citing the comments of trapper Isaac Babcock at
 27 AR003930).

28 ^{4/}Mr. Welsh is the Forest Service’s Wilderness and Wild and Scenic River Program Leader for the
 Intermountain Region, and served as the Forest Service Team Leader to respond to IDFG’s 2009 proposal
 for the wolf research project. Welsh Decl. ¶¶ 1-6.

^{5/}The Heberger Declaration discusses the January 7, 1988 meeting, but not the December 5, 1997 meeting
 despite the fact that Mr. Heberger attended both. *See* Welsh Ex. U (listing participants).

1 At the meeting on January 7, 1988, the Nez Perce Tribe and U.S. Fish and Wildlife
 2 Service proposed using aircraft for darting and collaring wolves within the Frank Church
 3 Wilderness. Welsh Decl. ¶ 15. Timm Kaminiski, Project Leader for the Nez Perce Tribe had
 4 prepared a “Capture Rationale and Synopsis for an Experimental Population of Gray Wolves in
 5 Idaho” in advance of the meeting. Declaration of George Graves (“Graves Decl.”) Ex. B. Mr.
 6 Welsh recalls that the proposal discussed the January 7th meeting included the entire Frank
 7 Church Wilderness for an unlimited number of landings and wolf collarings throughout the
 8 entire year. Welsh Decl. ¶ 15. Based on the breadth of the proposal, Mr. Welsh advised that
 9 environmental analysis in an Environmental Assessment (“EA”) or Environmental Impact
 10 Statement (“EIS”) would likely be required because the effects would be indeterminate due to
 11 the open-ended nature of the proposal. *Id.*

12 A similarly open-ended proposal was made by IDFG in 2006, and at that time the Forest
 13 Service asked IDFG to try other methods first, which it did.^{6/} Decision Memo Special Use
 14 Authorization to Idaho Fish and Game For Helicopter Landings and Aerial Darting To Support
 15 Gray Wolf Capture and Collaring In the Frank Church–River of No Return Wilderness,
 16 AR008610 (AR008605-617) (“DM”). Scoping indicated that an EA may be required for the
 17 2006 proposal, but that proposal was much broader in scope and scale than the current IDFG
 18 wolf research project as IDFG had essentially asked for permission to land anywhere within the
 19 Frank Church Wilderness over a four month period. *Id.*

20 C. Since Gray Wolves Were Delisted in May 2009, the State of Idaho Has Been
 21 Responsible for Wolf Management

22 Wolves rebounded after reintroduction, and efforts to delist them began in 2002. *See*
 23 Wolf Population Management Plan for the Years 2008-2012, AR003616-705 (“2008-2012 Idaho
 24 Plan”). After undergoing a process to reexamine the biological status of the Northern Rocky
 25 Mountain gray wolves, the adequacy of State regulatory measures, the future status of the

26 _____
 27 ^{6/}Plaintiffs submit extra-record documents from 2005 and 2006 and characterize IDFG’s request and
 “Second and Third Requests.” Pls.’ Prelim. Inj. Mot. at 6; Declaration of Laurie Rule (“Rule Decl.”), Exs.
 1-4.

1 wolves, the legal requirements of the ESA, and all other relevant issues, FWS removed wolves
2 from the Endangered Species List in the Northern Rocky Mountains, except in Wyoming. 74
3 Fed. Reg. 15,123 (Apr. 2, 2009). The delisting of gray wolves became effective in May 2009.^{7/}
4 Pursuant to the final delisting rule, IDFG assumed full state management responsibilities for
5 wolves within Idaho, subject to FWS oversight for the 5-year period following delisting. 74 Fed.
6 Reg. 15,123 (Apr. 2, 2009).^{8/}

7 To support delisting efforts, the Idaho Legislature approved a Wolf Conservation and
8 Management Plan in 2002 (“2002 Idaho Plan”). 2002 Idaho Sess. Laws 1068 (AR004344-75).
9 FWS accepted the 2002 Idaho Plan in 2004, and IDFG currently uses it to manage the gray wolf.
10 DM at AR008605; MR at AR008565. The 2002 Idaho Plan’s management goal is “to ensure
11 that wolves will not become re-listed under the Endangered Species Act.” 2002 Idaho Plan at
12 AR004361 (AR004344-75). The 2002 Idaho Plan emphasizes the fact that “[m]onitoring wolf
13 populations is the cornerstone of a management program.” *Id.* at AR004363.

14 In preparation for the delisting of gray wolves and consistent with the delisting rule, the
15 Idaho Fish and Game Commission had also prepared and adopted a Wolf Population
16 Management Plan for the years 2008-2012 with the “goal . . . [of] ensur[ing] the long-term
17 viability of the gray wolf population.” 2008-2012 Idaho Plan at AR0036216-705. The 2008-
18 2012 Idaho Plan “provide[s] a management framework for state management of the gray wolf
19 (*Canis lupus*) population for the 5-year period following delisting.” *Id.* at AR003621. The
20 2008-2012 Idaho Plan explains that “[r]esearch and scientific adaptive management will play an

22 ^{7/}An earlier delisting rule, which became final in March 2008 had been preliminarily enjoined in July
23 2008, returning wolves in Idaho to Endangered Species protection. MR at AR008565. Several groups,
24 including Plaintiffs Western Watersheds Project and the Sierra Club, have challenged the 2009 delisting
25 rule. *Defenders of Wildlife et al. v. Salazar et al.*, Nos. 09-77-M-DWM, CV 09-82-M-DWM
(consolidated) (D. Mont.). In September, U.S. District Judge Molloy denied a preliminary injunction
26 motion to stop planned wolf hunts in Idaho and Montana on grounds that plaintiffs failed to show a
27 likelihood of irreparable harm. *Id.*, Dkt. # 93, (D. Mont. Sept. 8, 2009), attached as Exhibit A.

28 ^{8/}Beginning in January 2006, pursuant to a Memorandum of Agreement which transferred most
management authorities previously held by the FWS to Idaho, Idaho had begun overseeing daily
management of wolves and coordinating among agencies to fulfill obligations under the revised 10(j)
rule, the ESA, and the 2002 Idaho Plan discussed *infra*. 2008-2012 Idaho Plan at AR003625.

1 integral role in learning about wolf population management and helping guide management
2 efforts into the future.” *Id.*

3 D. The Forest Service’s Special Use Permit Allowing the Idaho Department of Fish
4 and Game’s Helicopter Landings and Aerial Darting to Support Gray Wolf
5 Capture and Collaring Is Minimal in Scope

6 In September 2009, IDFG requested authorization to utilize helicopter landings in the
7 Frank Church Wilderness to dart and radio collar wolves in conjunction with big game
8 monitoring flights during the winter of 2010 (referred to herein as the “research project”).
9 Sept. 14, 2009 IDFG Director Cal Groen letter to Regional Forester Harv Forsgren (AR003841-
10 43). In making its request, IDFG informed the Forest Service that it needed to conduct the
11 research project to collect information necessary to fulfill its obligations under the ESA, which
12 requires monitoring of wolves for five years following delisting, and the 2008-2012 Idaho Plan,
13 which defines recovery goals and management strategies consistent with the 2002 Idaho Plan.
14 *Id.* Under the 2008-2012 Idaho Plan, IDFG must monitor wolf packs across the occupied range,
15 and document and manage wolf numbers. MR at AR008566. Currently, due to the locations of
16 previous monitoring patterns by the Nez Perce Tribe, IDFG has a lack of data documenting wolf
17 presence within central Idaho Wilderness areas, including the Frank Church Wilderness. *Id.*

18 The Forest Service provided a proposal to issue an authorization to IDFG for its research
19 project to the public and other agencies for comment during a scoping period from September 14
20 through October 18, 2009.^{9/} DM at AR008611. Notably, the Forest Service met with the Nez
21 Perce Tribe, and the Tribe did not express any major concerns. *Id.*

22 After thoroughly considering IDFG’s request, and conducting an analysis of the research
23 project using the Minimum Requirements Decision Guide,^{10/} the Forest Service conducted a
24 NEPA analysis and decided to issue a special use authorization to IDFG for helicopter landings
25 and darting needed to conduct the research project. DM at AR008606. In its’ decision to grant

26 ^{9/}The mailing list included 300 organizations and agencies. DM at AR008611.

27 ^{10/}The Minimum Decision Guide Worksheets were developed by the interagency Arthur Carhart National
28 Wilderness Training Center, and are designed to assist wilderness managers in making stewardship
29 decisions. *See* Welsh Exs. A-D.

1 IDFG's request, the Forest Service found that "[b]ecause of the importance of wolf recovery to
2 enhancement of wilderness character, the high public interest in the recovery of wolves and the
3 desire for knowledge about wolves in central Idaho, it is important that IDFG obtain accurate
4 wolf population data for central Idaho wilderness." *Id.* In issuing the special use permit, the
5 Forest Service relied upon a category established by the Secretary of Agriculture for
6 "[i]nventories, research activities, and studies, such as resource inventories and routine data
7 collection when such actions are clearly limited in context and intensity." DM at AR008612
8 (quoting 7 C.F.R. § 1b.3(a)(3)). The Forest Service also found that the research project also fit
9 its own CE for "[a]pproval, modification, or continuation of minor special uses of [National
10 Forest System] lands that require less than five contiguous acres of land." DM at AR008612
11 (quoting 36 C.F.R. § 220.6(e)(3)). The Forest Service addressed comments received on the
12 scoping notice in the DM itself. *See* AR008608-12.

13 IDFG's research project is limited in time and area. Over the course of the two week
14 window, IDFG has estimated that it may have between three and six opportunities to capture
15 wolves. *Id.* at AR008567. Even if there are six opportunities, the helicopter is only expected to
16 land 15 times outside of designated airstrips for a cumulative total duration of 2 hours. *Id.*^{11/}
17 The Forest Service has authorized a maximum of 20 landings. These landings and any darting
18 take place on substantially less than five contiguous acres of land in discrete portions of the
19 Frank Church Wilderness.^{12/} DM at AR008607. They will occur on snow or frozen ground,
20 when recreational use is minimal in the winter. *Id.* at AR008608.

24 ^{11/}These landings are of very short duration, normally less than 1 minute long, typically lasting less than
25 15 seconds. DM at AR008608. Longer landings lasting up to one-half hour may be necessary in some
instances. MR at AR008582.

26 ^{12/}This season, the big game survey will be conducted on a discrete portion of the Frank Church
27 Wilderness, south of the Salmon River, in Big Game Management Units 20A, 26, and 27. *See* MR, Fig. 2
at AR008584. Low and medium winter elk densities are 50% sampled, while high are (100% sampled).
Id. at AR008567; *see also* Figs. 2, 3 at AR008570-71.

1 IDFG's research project takes advantage of the helicopter used for the annual winter big
 2 game census survey in the Frank Church Wilderness. MR at AR008567.^{13/} The research project
 3 will utilize this same helicopter, and IDFG will look for wolves while simultaneously conducting
 4 the survey. *Id.* Because the aerial big game surveys will occur regardless of whether the
 5 research project occurs, there is only a negligible small additional increment of noise from
 6 helicopter landings to collar wolves. DM at AR008608. If IDFG observes wolves, they will
 7 land the helicopter, at an existing airstrip whenever possible, to remove the helicopter doors and
 8 prepare for darting. MR at AR008582. Once airborne again, IDFG personnel would pursue and
 9 dart one or two wolves per pack, depending on how close the helicopter can move toward the
 10 animal(s), the rifleman's ability, and the amount of time it takes. *Id.* If darting is successfully,
 11 the helicopter will either land or hover, and unload a crew member to handle the darted
 12 animal(s), record data, and place collars. *Id.* After collaring, the crew will walk to the helicopter
 13 or be picked up, usually at or near the drop off, then return to flight. *Id.*

14 **III. LEGAL BACKGROUND**

15 A. 1964 Wilderness Act

16 In 1964, Congress enacted the Wilderness Act, 16 U.S.C. §§ 1131-1136, to protect
 17 certain undeveloped Federal lands from encroachment by settlement and mechanization. To this
 18 end, the Act establishes a National Wilderness Preservation System composed of designated
 19 "wilderness areas" that are administered "in such a manner as will leave them unimpaired for
 20 future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the
 21 preservation of their wilderness character, and for the gathering and dissemination of
 22 information regarding their use and enjoyment as wilderness." 16 U.S.C. § 1131(a). A
 23 wilderness is defined

24 as an area where the earth and its community of life are untrammelled by man, where
 25 man himself is a visitor who does not remain. An area of wilderness is further

26 ^{13/}IDFG began conducting these winter big game surveys using helicopters before the Frank Church
 27 Wilderness was designated in 1980. *See* AR008252 (notes describing pre-1980 activities including
 annual big game surveys with helicopters from 1973 to 1977); AR003471 (pre-1980 photographs of
 helicopters taking off and landing in what is now the Frank Church Wilderness).

1 defined to mean in this chapter an area of undeveloped Federal land retaining its
 2 primeval character and influence, without permanent improvements or human
 3 habitation, which is protected and managed so as to preserve its natural conditions
 4 and which (1) generally appears to have been affected primarily by the forces of
 5 nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding
 6 opportunities for solitude or a primitive and unconfined type of recreation; (3) has
 7 at least five thousand acres of land or is of sufficient size as to make practicable its
 8 preservation and use in an unimpaired condition; and (4) may also contain
 9 ecological, geological, or other features of scientific, educational, scenic, or
 10 historical value.

11 16 U.S.C § 1131(c).

12 The Wilderness Act designated certain lands in the national forests as wilderness, and
 13 provided for the Secretary of Agriculture to submit reports recommending the suitability or
 14 nonsuitability of additional lands within the national forests for designation as wilderness. 16
 15 U.S.C. §§ 1132(a), (b). Areas do not become designated as wilderness upon the Secretary's
 16 recommendation. The Act requires the President to report his own recommendation to Congress.
 17 16 U.S.C. § 1132(b). If the President recommends that an area be designated as wilderness, that
 18 recommendation "shall become effective only if so provided by an Act of Congress." *Id.*

19 Once an area is designated as wilderness, commercial enterprises and permanent roads
 20 are prohibited subject to existing rights, and "*except as necessary to meet minimum*
 21 *requirements for the administration of the area* for the purpose of this Act (including measures
 22 required in emergencies involving the health and safety of persons within the area), there shall be
 23 no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of
 24 aircraft, no other form of mechanical transport, and no structure or installation within any such
 25 area." 16 U.S.C. § 1133(c) (emphasis added). Section 1133(d)(1) contains another exception
 26 that allows the Secretary of Agriculture to permit aircraft uses that have already become
 27 established in the wilderness.^{14/}

28 ^{14/}While 16 U.S.C. § 1133(d)(7) protects the state's wildlife management authority, it in no way
 authorizes the state to land helicopters in wilderness without compliance with federal laws and
 regulations. Even if the State could prove that this wolf research project falls into the
 Wilderness Act's exception for established use, the State would still require a permit under 16
 U.S.C. § 7(a)(1). Further, 36 C.F.R. §§ 251.50, 261.10(a), 261.18(c), 293.6(c), and 293.6(d)
 make clear that a permit is required for an activity such as the IDFG research project.

1 B. 1980 Central Idaho Wilderness Act

2 In 1980, Congress designated the Frank Church Wilderness. Central Idaho Wilderness
 3 Act of 1980, Pub. L. No. 96-312, § 2, (1980) (AR003307-14).^{15/} The Frank Church Wilderness
 4 “constitute[s] the largest block of primitive and undeveloped land in the conterminous United
 5 States. *Id.* Congress provided that, subject to valid existing rights, the Frank Church Wilderness
 6 should be administered in accordance with the Wilderness Act, and any reference to the effective
 7 date of the Wilderness Act deemed a reference to the effective date of the Central Idaho Act. *Id.*
 8 at § 5. Congress specifically noted that “the landing of aircraft, where this use has become
 9 established prior to the date of enactment of this Act shall be permitted to continue subject to
 10 such restrictions as the Secretary deems desirable.” *Id.* at § 7(a)(1).

11 C. National Environmental Policy Act

12 NEPA provides that when a federal agency proposes a “major Federal action[]
 13 significantly affecting the quality of the human environment,” the agency must prepare an EIS
 14 analyzing the potential impacts of the proposed action and possible alternatives. 42 U.S.C. §
 15 4332(c). Pursuant to NEPA, the Council on Environmental Quality (“CEQ”) has promulgated
 16 regulations that all federal agencies follow (in addition to their own regulations implementing
 17 NEPA). 40 C.F.R. § 1500.3; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S.
 18 332, 354 (1989).

19 CEQ's regulations ensure compliance with NEPA in one of three ways. First, an agency
 20 may prepare an EIS. 40 C.F.R. § 1501.3. Second, the agency may prepare an EA, *see id.* §§
 21 1501.4(b), 1508.9, to determine whether an EIS is necessary. *See id.* §§ 1501.4(e); 1508.13.
 22 Third, the agency need not prepare an EA or an EIS if the agency determines that the proposed
 23 action falls within a CE. *See id.* §§ 1501.4(a)(2), 1501.4(b); *see also West v. Sec’y of Dep’t of*
 24 *Transp.*, 206 F.3d 920, 926-27 (9th Cir. 2000) (describing NEPA requirements).

25
 26 _____
 27 ^{15/}The Frank Church–River of No Return Wilderness was initially called the “River of No Return
 28 Wilderness,” but its name was changed in 1984 in recognition of Frank Church’s efforts in the wilderness
 designation. Pub. L. No. 98-231 (1984).

1 “Pursuant to Council of Environmental Quality (CEQ) regulations, each agency is
2 **required** to identify categories of actions which do not individually or cumulatively have a
3 significant effect on the human environment.” *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189
4 F.3d 851, 853-54 (9th Cir.1999) (citing 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4) (emphasis added);
5 40 C.F.R. § 1507.3(b) (Agency NEPA procedures “shall include . . . [s]pecific criteria for and
6 identification of those typical classes of action . . . [w]hich normally do not require either an
7 [EIS] or an [EA] (categorical exclusions).”). “Categorical exclusions” are “categor[ies] of
8 actions which do not individually or cumulatively have a significant effect on the human
9 environment and which have been found to have no such effect in [NEPA] procedures adopted
10 by a Federal agency.” 40 C.F.R. § 1508.4. In other words, if an agency determines that a
11 particular category of action will not have a significant effect on the environment, the agency
12 need not prepare an EA or EIS for actions falling into that category. An agency must, however,
13 make allowances for “extraordinary circumstances in which [the] normally excluded action may
14 have a significant environmental effect.” *Id*; *see California v. Norton*, 311 F.3d 1162, 1177 (9th
15 Cir. 2002).

16 Categorical exclusions are an integral tool for NEPA compliance. Utilization of CEs
17 allows agencies to focus their environmental review effort on the major actions which will have
18 a significant effect on the environment and are the primary focus of NEPA. *See* 48 Fed. Reg.
19 34,263-66 (July 28, 1983); *see also* 40 C.F.R. § 1500.4(p) (noting that establishment and use of
20 CEs can reduce excessive paperwork by eliminating unnecessary preparation of EAs); *Citizens'*
21 *Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1022-23 (10th Cir. 2002)
22 (CEs are a valuable tool under NEPA, allowing limited agency resources to be focused on
23 projects with truly significant adverse environmental impacts). CEQ has encouraged agencies to
24 identify CEs using “broadly defined criteria which characterize types of actions that, based on
25 the agency's experience,” normally lack “significant environmental effects.” 48 Fed. Reg. at
26 34,265.

1 **III. STANDARD OF REVIEW**

2 A. Plaintiff Must Show a Likelihood of Success on the Merits and a Likelihood of
 3 Irreparable Injury in Order to Be Entitled to a Preliminary Injunction

4 A preliminary injunction is an “extraordinary and drastic remedy,” and Plaintiffs have the
 5 burden to prove by clear and convincing evidence that the remedy is appropriate in this case.
 6 *Munaf v. Geren*, 128 S.Ct. 2207, 2218-19 (2008); *Winter v. Natural Res. Def. Council*, ___ U.S.
 7 ___, 129 S.Ct. 365, 376 (2008). A “plaintiff seeking a preliminary injunction must establish that
 8 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 9 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
 10 public interest.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.
 2009) (citing *Winter*, 129 S. Ct. at 374).

11 If Plaintiffs cannot meet *all* of the requirements of a preliminary injunction, their motion
 12 should be denied. *See, e.g., Sky Capital Group v. Rojas*, 2009 WL 1370938,
 13 1:09-CV-00083-EJL, at *13 (D. Idaho May 14, 2009) (denying preliminary injunction motion
 14 where plaintiff “has demonstrated that it is likely to succeed on some of its claims but has not
 15 demonstrated that it will suffer irreparable injury”); *Defenders of Wildlife*, Nos. 09-77-M-DWM,
 16 CV 09-82-M-DWM, at 9-13 (D. Mont. Sept. 8, 2009) (denying motion for a preliminary
 17 injunction because even the permanent removal of 330 wolves in Montana and Idaho did not
 18 constitute likelihood of irreparable harm.).^{16/} Even where success on the merits is likely or is
 19 demonstrated, under controlling Supreme Court precedent an injunction “is not a remedy which
 20 issues as of course,” even in an environmental case. *Weinberger v. Romero-Barcelo*, 456 U.S.
 21 305, 311 (1982).

22 B. The Administrative Procedure Act Affords Deference to Forest Service
 23 Decisions, Including Determinations That an Action Falls Within a Categorical
 24 Exclusion

25 Plaintiffs have brought their substantive Wilderness Act, Idaho Wilderness Act, and
 26 NEPA claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, so this
 27 Court must decide whether the Forest Service’s action in approving IDFG’s research project was
 28 arbitrary and capricious. *Dep’t of Transp. v Pub. Citizen*, 541 U.S. 752, 753 (2004); *Okanogan*

^{16/}The order is attached hereto as Exhibit A.

1 *Highlands Alliance v. Williams*, 236 F.3d 468, 471 (9th Cir. 2000). The Ninth Circuit has held
2 that “[a]n agency’s determination that a particular action falls within one of its categorical
3 exclusions is reviewed under the arbitrary and capricious standard.” *Alaska Ctr. for the Env’t*,
4 189 F.3d at 857 (citing *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir.
5 1996)). Even at the preliminary injunction stage, this Court is bound by the APA’s deferential
6 standard of review. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc).

7 The Ninth Circuit’s recent *en banc* decision in *McNair* reaffirmed that the role of a court
8 reviewing agency action is necessarily at its most deferential when assessing the agency’s
9 consideration of technical matters. 537 F.3d at 993 (citing *Forest Guardians v. U.S. Forest*
10 *Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)). In that role, a reviewing court is not to entertain a
11 “battle of the experts” when plaintiffs proffer purported expert testimony to be set against the
12 agency’s professional judgment. *Id.* Likewise, the reviewing court is not itself “to act as a panel
13 of scientists” in reviewing the Forest Service’s decision. *McNair*, 537 F.3d at 998. The Court’s
14 review is based upon the administrative record that existed before the agency at the time the
15 decision was made. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The APA directs the court to
16 “review the whole record or those parts of it cited by a party.” 5 U.S.C. §706.^{17/}

17 C. Plaintiffs’ Discussion of *Chevron* Deference as the “Applicable Legal Standard”
18 Is Misplaced

19 Plaintiffs erroneously confuse the standard of review with the interpretation and
20 implementation of the Wilderness Act. They allege, under their “applicable legal standards,” a
21 purported truism that “the Court does not owe *Chevron* deference to the Forest Service’s
22 decision to permit the use of helicopters in the Frank Church Wilderness, because the decision is
23 contrary to the plain language and intent of the Wilderness Act as well as NEPA, and because at
24 most it is entitled only to ‘respect.’” Pls.’ Prelim. Inj. Mot. at 11 (citations omitted). In
25 challenging the Forest Service’s decision to authorize IDFG’s research project, Plaintiffs
26 contend that the Forest Service violated the Wilderness Act. In authorizing the research project,

27 ^{17/}The Administrative Record for Plaintiffs’ third claim for relief was provided to Plaintiffs on
28 February 1, 2010, prior to their preliminary injunction motion, and was filed with this Court on February
4, 2010. Dkt. # 19.

1 the Forest Service determined that an exception in the Wilderness Act applied—namely that
 2 authorization of the IDFG research project is “necessary to meet minimum requirements for the
 3 administration of the [wilderness] area.” 16 U.S.C. §1133(c). As will be discussed in Section
 4 IV.A.(1), a determination under *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S.
 5 837, 842, 843, n.9 (1984), is appropriate in interpreting the statutory provisions of the
 6 Wilderness Act and the conclusion that an exception applies. Once the statutory language is
 7 interpreted, whether the Forest Service's final agency action complies with NEPA is evaluated
 8 under the APA’s arbitrary and capricious standard.

9 **IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF**
 10 **SUCCESS ON THE MERITS**

11 A. The Forest Service’s Approval of IDFG’s Research Project Is Consistent with the
 12 Wilderness Act And Is Not Arbitrary or Capricious

13 Plaintiffs admit that there is an exception to the Wilderness Act’s prohibition on the
 14 landing of aircraft for landings that are “necessary to meet minimum requirements for the
 15 administration of the area for the purpose of this Act.” Pls.’ Prelim. Inj. Mot., Dkt. # 8-1, at 12
 16 (citing 16 U.S.C. § 1133(c)). Before authorizing IDFG’s research project, the Forest Service
 17 undertook a detailed analysis utilizing the Minimum Requirements Decision Guide and
 18 determined the research project satisfied this exception. *See* MR at AR008564-97.

19 (1) **The Minimum Requirements Decision Guide Provides a Framework**
 20 **for Satisfying All the Criteria To Meet the Wilderness Act’s**
 21 **Exception to the Prohibition on Aircraft Landings**

22 With regard to agency action involving interpretation of a statutory provision, the starting
 23 point for a court's review “is ‘the language [of the statutory provision] itself.’” *Ardestani v. INS*,
 24 502 U.S. 129, 135 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986)). To
 25 determine whether an agency's interpretation is consistent with a statute, the Court, utilizing
 26 “traditional tools of statutory construction,” must determine “whether Congress has directly
 27 spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842 & 843, n.9. If Congress's
 28 intent on an issue is clear from the plain language of the statute, it “is the end of the matter; for
 the Court, as well as the agency, must give effect to the unambiguously expressed intent of

1 Congress.” *Id.* at 842-43 (footnote omitted); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402,
2 409 (1993); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)
3 (Absent a clearly expressed legislative intent to the contrary, the court ordinarily must regard the
4 plain language of a statute as conclusive.).

5 Here, the statutory language for the exception allowing the landing of aircraft is
6 unambiguous: the landings may be made when “necessary to meet minimum requirements for
7 the administration of the area for the purpose of this Act.” 16 U.S.C. § 1133(c).^{18/} *See*
8 *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d
9 1085, 1091 (11th Cir. 2004) (In analyzing whether the Park Service’s use of motor vehicles to
10 advance the “preservation of historic structures in wilderness . . . is in fact administration to
11 further the purposes of the Wilderness Act” the Court found that “the Wilderness Act speaks
12 directly to the question at issue” and further analysis under *Chevron* to be unnecessary.). Put
13 another way, “[u]nder Chevron's first-step test, we ask whether the . . . Project offends the plain
14 meaning and manifest congressional intent of the Wilderness Act . . . [because] Congress's
15 intent must be enforced and that is the end of the matter.” *The Wilderness Society v. U.S. Fish &*
16 *Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003).^{19/} Under the plain meaning of the
17 statutory provision, helicopter landings fit the exception if they are the minimum measures
18 needed to achieve the purposes of the Act. *See Sierra Club v. Lyng*, 663 F. Supp. 556, 559

19 ^{18/}In the context of analyzing the exception in 16 U.S.C. § 1133(d)(5) for generally-prohibited
20 commercial services within wilderness areas “to the extent necessary for activities which are proper for
21 realizing the recreational or other wilderness purposes of the areas,” the Forest Service was faulted for
22 failing “to balance the impact [the] level of commercial activity was having on the wilderness character of
23 the land. . . [and] elevat[ing] recreational activity over the long-term preservation of the wilderness
24 character of the land.” *High Sierra Hikers Association v. Blackwell*, 390 F.3d 630, 646-47 (9th Cir.
25 2004). In determining “what level of deference is due to the Forest Service's determination that
26 preserving the wilderness character of the land is not the ultimate interest of the Wilderness Act,” the
27 court found that “[a]lthough we believe that Congress intended to enshrine the long-term preservation of
28 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
646-48. The court declined to apply *Chevron* deference to the Forest Service determination that the
commercial use at issue satisfied the Act’s exception. *Id.*

^{19/}The court went on to employ a *Chevron* analysis to interpret the meaning of term “commercial
enterprise” as used in the Wilderness Act, which is not at issue here. *U.S. Fish & Wildlife Service*, 353
F.3d at 1060-63, 1067-70..

1 (D.D.C. 1987) (in the Act’s provision authorizing otherwise prohibited aircraft/motorboat use
 2 that “may be necessary in the control . . . of insects[.]” 16 U.S.C. § 1133(d), “‘necessary’
 3 simply embraces measures ‘needed to achieve a certain result or effect’ American Heritage
 4 Dictionary of the English Language 877 (1981)”);

5 The Minimum Requirements Decision Guide Worksheets used by the Forest Service
 6 track the statutory language in a two step process—Step 1: Determine if it is necessary to take
 7 action; Step 2: Determine the minimum tool. *See* Welsh Exs. A, D.²⁰/ The Minimum
 8 Requirements Decision Guide Overview, Welsh Ex. C,²¹/ provides a framework for analyzing
 9 actions under the plain meaning of the Act. The Decision Guide focuses on three overarching
 10 concepts: (1) What is the purpose of wilderness?; (2) What is wilderness?; and (3) How is
 11 wilderness administered?. *Id.* at 1131. The Decision Guide explains each of these concepts by
 12 quoting the Act, whose plain meaning directs the Minimum Requirements analysis. Welsh Ex. C.
 13 As to the final concept, the Guide hones in on certain obligation such as:

14 “...shall be administered for the use and enjoyment of the American people in
 15 such manner as will leave them unimpaired for future use and enjoyment as
 16 wilderness, and so as to provide for the protection of these areas, the preservation of
 17 their wilderness character, and for the gathering and dissemination of
 18 information regarding their use and enjoyment as wilderness...” *Id.* at 1133(a).

19 “...wilderness areas shall be devoted to the public purposes of recreational,
 20 scenic, scientific, educational, conservation, and historical use.” *Id.* at 1133(b)

21 As discussed below, the Forest Service painstakingly examined the Act’s requirements and
 22 carefully applied the plain meaning of the statute through the framework of the Guide to evaluate

23 ²⁰/Notably, Plaintiffs do not challenge the propriety of the framework described in the Minimum
 24 Requirements Decision Guide. If for some reason the court found the language of the Act’s exception to
 25 the prohibition on aircraft landings to be ambiguous, the Forest Service’s interpretation, evidenced by the
 26 Guide, would be deserving of some deference even if it does not rise to the level of *Chevron* deference.
 27 *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (“*Chevron* did nothing to eliminate *Skidmore*’s
 28 holding that an agency’s interpretation may merit some deference whatever its form, given the specialized
 experience and broader investigations and information available to the agency and given the value of
 uniformity in its administrative and judicial understandings of what a national law requires.”) (citation
 omitted). *See also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (ruling, based on *Skidmore v.*
Swift & Co., 323 U.S. 134, 140 (1944), that informal agency statutory interpretations are “entitled to
 respect . . . to the extent that those interpretations have the power to persuade”).

²¹/Welsh Exs. A-D were inadvertently omitted from the record, and Defendants have separately moved to
 supplement the record with these documents.

1 whether IDFG's proposed landings are the minimum measures needed to achieve the purposes of
 2 the Act. *See generally* MR AR008564-97. This analysis ensured that the research project
 3 satisfies the Act's exception.

4 (2) **IDFG's Research Project Is Necessary To Protect and Preserve
 5 Wilderness Character and Values**

6 "The wilderness was trammled, or controlled through human behavior, when wolves
 7 were extirpated from wilderness" and the wilderness "lost an element of naturalness" MR
 8 at AR008579. The Forest Service's analysis under the Wilderness Act unequivocally shows that
 9 the research project is necessary for the administration of Frank Church Wilderness to protect
 10 and preserve wilderness values:

11 The recovery of wolves and subsequent monitoring of wolves and their interactions
 12 as part of wilderness will have the benefit of restoring a dynamic natural force to
 13 wilderness. . . . Monitoring data will improve understanding of the character of
 14 wilderness prior to man's intervention and extirpation of wolves. The recovery of
 15 wolves will lead to a restoration of natural predator/prey relationships that existed
 in the past; *a positive benefit to the wilderness*. . . . There are no structures,
 improvements, or installations as part of this proposal. . . . In general, the end result
 of activities associated with *the recovery of the gray wolf is seen as enhancing the
 wilderness experience*. The presence of wolves increases the feeling of risk and
 challenge to users as well as increases the feeling of remote and natural character.

16 MR at AR008579 (emphasis added). Additionally, the research project will support the public
 17 purposes of the Frank Church wilderness:

18 Better understanding the distribution, make-up and habitat preferences of wolf packs
 19 in the [Frank Church Wilderness] will . . . increas[e] the scientific knowledge of wolf
 20 behavior and information about wolves as a critical element of the central Idaho
 21 wilderness ecosystem. The educational opportunity in understanding wolves as a
 22 component of the wilderness ecosystem is enhanced. The conservation of the gray
 wolf, an endangered species, will be accomplished over a larger landscape, filling
 in existing gaps in wolf population data. Some visitors will find their experience
 enhanced by seeing gray wolves in the wild.

23 *Id.* at AR008580.

24 There is a "high public interest in the recovery of wolves and the desire for knowledge
 25 about wolves in central Idaho." MR at AR008566. Plaintiffs themselves admit that the presence
 26 of wolves in Frank Church Wilderness is an important aspect of the wilderness character. *See*
 27 *Pls.' Prelim. Inj. Mot.* at 27-28, and citations to declarations therein. As noted by Plaintiffs, "the

1 Central Idaho Wilderness Act specifically protects the ‘primitive and undeveloped land’ and the
2 ‘wilderness-dependent wildlife . . . which thrive within this undisturbed ecosystem.’” *Id.* at 15
3 (quoting Pub. L. No. 96-312, § 2(a), available at AR003307). Wolves were removed from the
4 Endangered Species List in Idaho less than one year ago, and IDFG’s research project is
5 designed to support wolf recovery. DM at AR008605-6. There is “a lack of data documenting
6 wolf presence within central Idaho Wilderness areas. . . . [such as] specific information on
7 denning sites, wolf movement patterns and distribution, rendezvous sites, number of packs and
8 breeding pairs, and other behavioral patterns, such as predator/prey relationships” MR at
9 AR008566.

10 IDFG’s wolf management responsibilities include the ESA’s obligation to monitor
11 wolves for five years following delisting, and this obligation provides an additional
12 consideration for determining what activities are necessary for administration of the Frank
13 Church Wilderness. In enacting the ESA, Congress declared that “encouraging the States . . . to
14 develop and maintain conservation programs . . . is a key . . . to better safeguarding . . . the
15 Nation's heritage in fish, wildlife, and plants.” 16 U.S.C. § 1531(a)(5). The Wilderness Act and
16 the ESA coexist, and the Forest Service reasonably recognized that ensuring that IDFG carries
17 out its ESA obligations will ensure that wolves remain in the wilderness and are managed
18 properly.^{22/}

19 In *Wilderness Watch v. U.S. Fish and Wildlife Service*, Plaintiffs challenged a FWS
20 decision, based on a CE, authorizing the construction of two water tanks within the Kofa
21 National Wildlife Refuge, of which approximately 77% is designated Wilderness. Civ. No. 07-
22 1185-PHX-MHM, 2008 WL 4183040, at *1-5 (D. Ariz. Sept. 8, 2008). In determining that the
23 action fit within the Wilderness Act’s exception for permanent structures “necessary to meet the
24 minimum requirements for administration of an area,” the court found that the agency’s duties
25 under the National Wildlife Refuge System Improvement Act and the Wilderness Act could be

26
27 ^{22/}It is of no moment that the Forest Service is neither managing wolves itself nor currently using the data
28 despite Plaintiffs’ suggestion to the contrary. *See* Pls.’ Prelim. Inj. Mot. at 17 (internal citation omitted).
DEFS.’ RESP. IN OPP. TO MOT. FOR TRO AND/OR PRELIM. INJ. 18

1 harmonized, and that the “affirmative actions [taken] here (including the use of motorized
2 equipment and permanent water impoundments) [were authorized, *inter alia*,] in order to
3 preserve and restore the bighorn sheep population.” *Id.* at *5-*10. Similarly in this case, duties
4 under the ESA work in combination with duties under the Wilderness Act to provide additional
5 reasoning why the research project is necessary.

6 While it is true that the “Ninth Circuit has . . . overturned agency decisions to permit
7 activities in wilderness that do not comport with the purpose of preserving wilderness character,”
8 Pls.' Prelim. Inj. Mot. at 13, just the opposite is true here—the research project is directed to
9 preserving wilderness character. None of the cases cited by Plaintiffs concern agency decisions
10 directed to preserving wilderness character. For example, in *High Sierra Hikers Association v.*
11 *U.S. Forest Service*, the plaintiffs challenged a decision to repair and maintain and operate
12 certain small water impoundment structures in a wilderness area to improve streamflow and
13 enhance trout populations. 436 F. Supp. 2d 1117, 1121, 1133 (E.D. Cal. 2006) (noting that
14 project purpose was “to regulate flows in streams whose flows were not historically regulated for
15 the purpose of enhancing a population of fish that did not historically exist”). In finding a
16 Wilderness Act violation, the court determined that while “[s]urely this fish-stocking program . .
17 . is nothing like building a McDonald's restaurant or a Wal-Mart store on the shores of
18 Tustumena Lake. . . . the challenged activities do not appear to be aimed at furthering the goals
19 of the Wilderness Act.” *Id.* at 1133. On the other hand, IDFG’s reserach project is aimed at
20 furthering the goals of the Wilderness Act similar to the court’s example of a “‘project . . . aimed
21 at preserving a threatened salmon run.’” *Id.* (quoting *U.S. Fish & Wildlife Serv.*, 353 F.3d 1051
22 at 1063).

23 Plaintiffs cite inapposite cases involving commercial projects. If they are for *commercial*
24 *services* (as opposed to commercial enterprises) they are generally prohibited under the Act
25 unless they fall into a different exception in 16 U.S.C. § 1133(d)(5), not at issue here. *See*
26 *Blackwell*, 390 F.3d at 636, 646 (Challenge to multi-year special-use permits, which were
27 granted to commercial packstock operators in the wilderness areas); *High Sierra Hikers Ass’n v.*

1 *Weingardt*, 521 F. Supp. 2d 1065 (N.D. Cal. 2007). If they are commercial enterprises, which
2 the research project is not, they are completely barred. *See U.S. Fish & Wildlife Serv.*, 353 F.3d
3 1051 at 1063-67 (9th Cir. 2003) (Challenge to a permit for a salmon enhancement project, the
4 primary purpose of which “is to advance commercial interests of Cook Inlet fishermen by
5 swelling the salmon runs from which they will eventually make their catch,” violated the “plain
6 language of the Wilderness Act . . . that there shall be ‘no commercial enterprise’ within
7 designated wilderness.”)

8 The remaining cases cited by Plaintiffs concern projects that have purposes other than
9 furthering the purposes of the Wilderness Act, and stand in sharp contrast to the research
10 project’s goal to enhance wilderness characteristics. *See Olympic Park Assocs. v. Mainella*, Civ.
11 No. C04-5732FDB, 2005 WL 1871114, at **4 -8 (W.D. Wash. Aug. 1, 2005) (Replacing
12 “shelters [that] have collapsed under the natural effects of weather and time” for “purposes of
13 cultural resource protection” is “in direct contradiction of the mandate to preserve the wilderness
14 character”); *Wilderness Watch and Pub. Employees for Envrtl. Responsibility v. Mainella*, 375
15 F.3d 1085 (11th Cir. 2004) (use of a fifteen passenger van to ferry visitors across designated
16 wilderness areas, even though visitors are riding along with Park Service employees as they
17 travel to perform administrative and maintenance work on historical properties, does not meet
18 the exception for motor vehicle use “necessary to meet minimum requirements for the
19 administration” because the preservation of historical structures does not further the goals of the
20 Wilderness Act).

21 **(3) IDFG’s Research Project Is the Minimum Tool and, Thus, Satisfies**
22 **the Criteria for The Act’s Exception To the Prohibition on Aircraft**
Landings

23 Using the Minimum Requirements Decision Guide framework, the Forest Service
24 properly determined that the research project is the minimum tool necessary for administration in
25 furtherance of the purposes listed above. MR at AR008581-97 (“Step 2: Determine the
26 minimum tool”). In making its minimum tool determination, the Forest Service examined two
27 alternatives with the objective to locate, capture/subdue, radio collar and release an anticipated

1 two wolves per pack in the Frank Church Wilderness: (1) utilize helicopter landings during
2 IDFG's annual winter big game survey (*i.e.* the selected alternative), and (2) utilize over-ground
3 travel and leg hold traps during the summer.^{23/} *Id.* at AR008582-90, AR008590-94.

4 In analyzing the first alternative, the Forest Service concluded that the short term nature
5 of winter helicopter landings will have no significant, or even discernable, impact on the
6 biological or physical nature of the wilderness. MR at AR008585. There are no adverse effects
7 to landing on sites that will mostly be snow-covered, frozen, or dead and most of the landings
8 will be partial, and will ask for less than a minute. *Id.* Aerial darting is time-limited, typically
9 lasting less than two minutes, to avoid injury and any long term behavior effect to the wolves.
10 *Id.* Aerially darting makes it easier to select the alpha animals in each pack for collaring, which
11 in turn provides more useful data. MR at AR008568, AR008583. While there is some stress to
12 animals from pursuing, darting and collaring, it is less than that from leg-hold trapping. *Id.* at
13 AR008585; *see also* University of Idaho Animal Care and Use Committee Standard Operating
14 Procedure at AR008520. The drug sedative used lasts 45 minutes, so the handling of darted
15 wolves lasts a short time. *Id.*

16 Because the research project will be conducted in conjunction with IDFG's big game
17 winter surveys, temporary over flight noise and observation of helicopter traffic would be
18 occurring whether or not this alternative is implemented.^{24/} *Id.* at AR008587. During the two-
19 week window of time, visitation is very low. *Cf. Greater Yellowstone Coal. v. Timchak*, Civ.
20 No. CV-06-04-E-BLW, Dkt. # 62 (November 21, 2006) (in evaluating a special use permit for
21

22 ^{23/}Other monitoring techniques were not evaluated in detail because, although IDFG is working with
23 multiple cooperators to develop techniques such as hair traps and scat survey, radio telemetry or GPS is
24 still by far the most reliable, accurate, and efficient methods available for the monitoring required. MR at
AR008566; AR008594.

25 ^{24/}Wolf capture activities would add at most an additional 5 minutes of helicopter noise during the
26 darting, landing and retrieving activities. MR at AR008587. Further, an estimated 6,000 landings occur
27 each year on public, State and private airstrips within the Frank Church Wilderness, so an additional
maximum 20 landings is negligible. *Id.* Plaintiffs themselves have stated they will ingress the Frank
Church Wilderness by flying to an airstrip. *See, e.g.* Declaration of Ken Davis ¶ 11; Declaration of
Kelley Weston ¶ 10.

1 heli-skiing in a Wilderness Study Area, this Court noted that “if nobody can reach areas where
2 helicopters will be seen and heard, ‘opportunities’ for solitude will not be diminished.”).

3 The second alternative the Forest Service considered involves hiking, backpacking, and
4 horseback riding to locate, trap, subdue, collar, and release wolves within the wilderness during
5 the summer season, which is peak visitor season. MR at AR008590. The efforts expended in
6 the second alternative are extensive. *Id.* For example, trappers must rely on information about
7 wolf whereabouts that can be several days out of date before a trapper is in the area. *Id.* They
8 will set 6 to 0 traps in locations showing recent wolf activity and remain in the area, checking
9 traps once or twice a day. *Id.* at AR008590-91 It is also impossible to target alpha wolves. *Id.*
10 Trappers would be expected to stay in the wilderness for a minimum of 10-14 days per trip. *Id.*
11 In 2007, IDFG spent 271 field person days unsuccessfully attempting to trap wolves within the
12 Selway-Bitterroot Wilderness area. *Id.* at AR008593. In 2008, extraordinary resources were
13 expended on two different unsuccessful attempts to trap wolves. *Id.*

14 Ultimately, the Forest Service determined that using a small number of helicopter
15 landings to carry out IDFG’s research project was the minimum tool for several reasons. Aerial
16 darting has a high rate of success, has proven to be an effective and humane way to subdue and
17 collar wolves, enables targeting of specific animals to yield optimal results, enables quick
18 location of wolves with minimum disturbance to individuals or packs, and can be conducted
19 during the winter in conjunction with already-occurring big game surveys. *Id.* at AR008594.
20 Leg-hold trapping was not selected because it has not produced satisfactory results in trials
21 during the last two years, it has an increased injury rate and greater impact on the wolves, it does
22 not allow for targeting individual animals and will yield sub-optimal results. *Id.* The Forest
23 Service did not “completely ignore[] the [so-called] trapping success the Nez Perce Tribe has
24 had in the Frank Church Wilderness.” Pls.’ Prelim. Inj. Mot. at 18. The record reflects the
25 Forest Service’s consideration of those efforts, and determination that they were not successful.
26 *See* Section II.B. (citing AR004400, AR004396); MR at AR008565-66. Plaintiffs reliance on
27 extra-record declarations, Pls.’ Prelim. Inj. Mot. at 18 (citing Heberger declaration) in lieu of the
28 DEFS.’ RESP. IN OPP. TO MOT. FOR TRO AND/OR PRELIM. INJ.

1 evidence in the record is improper and not to be considered by the Court. *See, e.g., Camp v.*
2 *Pitts*, 411 U.S. 138, 142 (1973). No matter which figure you use for the number of wolves the
3 Nez Perce trapped in the wilderness— about two wolves per year for the Tribe or about one wolf
4 per year for its best trapper—the simple fact is that the number of wolves trapped has not been
5 enough to provide the information IDFG needs to manage wolves in the wilderness, especially
6 considering the fact that radio collars, which last five to six years, often last longer than the life
7 span of most adult wolves. MR at AR008585.

8 Plaintiffs’ suggestion that there is no “urgent need” for the research project “when the
9 agency has never needed this information in the fifteen years since wolves were reintroduced
10 into the Frank Church Wilderness,” Pls.’ Prelim. Inj. Mot. at 17, misstates both the standard for
11 the Act’s exception to the prohibition on aircraft landings and the facts. First, the Act requires
12 that landings be “necessary to meet minimum requirements for the administration of the area for
13 the purpose of this [Act],” 16 U.S.C. § 1133(c), but does not impose an “urgent need”
14 requirement. Second, there has been a need for data since wolves were reintroduced, and
15 corresponding attempts to obtain that data. MR at AR008566-67. Now, however, for the first
16 time wolves are no longer on the Endangered Species List in Idaho, and their management goals
17 are different. The goal is no longer just to return the element of naturalness that was lost when
18 wolves were extirpated, but “to ensure the long-term viability of the gray wolf population.”
19 2008-2012 Idaho Plan at AR003621. Since the wolves are now delisted, the State’s Wolf Plans
20 are required to support delisting. *Id.* at AR008573. More precise data will lead to more precise
21 management decisions.

22 Likewise, Plaintiffs’ contention that “they already have substantial information about
23 wolf populations in the Frank Church Wilderness,” Pls.’ Prelim. Inj. Mot. at 17, misunderstands
24 the relevant issues. *See* MR at AR008566-68; DM at AR008605-06. Once again, instead of
25 looking to the record to support this contention, Plaintiffs improperly rely on their own
26 litigation-generated declarations. *See* Pls.’ Prelim. Inj. Mot. at 17 (citing to Kovalicky, Heberger,
27 Peek, and Cole declarations). Because “an agency must have discretion to rely on the reasonable

1 opinions of its own qualified experts even if, as an original matter, a court might find contrary
 2 views more persuasive,” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989), the
 3 Forest Service’s determination that there is a need for this data is reasoned, fully explained, and
 4 trumps any contrary extra-record suggestion by Plaintiff or Plaintiffs’ purported experts. *See*
 5 *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)
 6 (as long as the agency “considered the relevant factors and articulated a rational connection
 7 between the facts found and the choice made” its decision should be upheld) (citations omitted);
 8 DM at AR008605-06. Therefore, Plaintiffs have failed to show that they are likely to succeed
 9 on the merits of their claim that the Forest Service acted arbitrarily and capriciously in
 10 concluding that the IDFG research project falls under the exception for aircraft landings within
 11 the Frank Church Wilderness.

12 B. The Forest Service’s Reliance on Categorical Exclusions to Approve IDFG’s
 13 Research Project Is Proper Under NEPA And Is Not Arbitrary or Capricious

14 (1) **The Forest Service Properly Invoked Two CEs in Approving the**
 15 **IDFG Research Project Under NEPA**

16 “NEPA . . . does not impose any substantive requirements on federal agencies—it exists
 17 to ensure a process.” *McNair*, 537 F.3d 981 at 1000-01. As discussed above in Section III.C.,
 18 CEs are a proper tool for agency compliance with NEPA. The Forest Service’s “interpretation of
 19 the meaning of its own categorical exclusion should be given controlling weight unless plainly
 20 erroneous or inconsistent with the terms used in the regulation.” *Ala. Ctr. for the Env’t*, 189 F.3d
 21 at 857; (9th Cir. 1999) (upholding a Forest Service decision to issue a one-year special use
 22 permit to authorize a helicopter-guided skiing and hiking operation under a CE for the approval,
 23 modification, or continuation of minor short-term special uses of National Forest System lands);
 24 *see Babbitt*, 82 F.3d at 1457 (in applying a CE, the issue is whether the agency’s determination
 25 that a particular action falls within a CE was “arbitrary or capricious”).

26 The IDFG research project falls neatly into the category of “[i]nventories, research
 27 activities, and studies, such as resource inventories and routine data collection when such actions
 28 are clearly limited in context and intensity” because the purpose of IDFG’s research “is to

1 facilitate research activities and studies that will benefit programs of the State and the Forest
 2 Service, and management and protection of the wilderness area and its resources.” DM at
 3 AR008607 (citing 7 C.F.R. § 1b.3(a)(3)). It also falls into the category of “[a]pproval,
 4 modification, or continuation of minor special uses of NFS [National Forest System] lands that
 5 require less than five contiguous acres of land,” as it is a minor, short-term use that requires
 6 substantially less than five contiguous acres of land. DM at AR008612 (citing 36 C.F.R. §
 7 220.6(e)(3)).

8 Plaintiffs’ attempts to show that the reliance on CE is unreasonable fail. Pls.’ Prelim. Inj.
 9 Mot. at 24. First, the Forest Service did not dismiss or ignore ground trapping, but instead
 10 determined that it did not meet the purpose and need of the project. *See* Section IV.A.(3); DM at
 11 FS008611 (“As part of the analysis I looked at other alternatives to landing a helicopter.
 12 Specifically, I analyzed the effects of leg-hold trapping, which has not been sufficiently
 13 successful to provide the needed information.”). Second, the record shows that the Forest
 14 Service did thoroughly assess IDFG’s proposal to determine the need for the project. MR
 15 AR008605-06.^{25/} Third, even if an EA or an EIS would have been appropriate for other
 16 proposals in 1998 or 2006 to use a helicopter to aeri ally dart and collar wolves for open-ended
 17 time periods with no limit on the number of helicopter landings, the current IDFG research
 18 project, where only fourteen landings predicted to occur outside of designated airstrips and not
 19 more than twenty landings authorized during a period of no more than two weeks, is
 20 appropriately analyzed under a CE. Welsh Decl. ¶ 16; *see also* Section II.B. Finally, there is
 21 absolutely no indication in the record that GPS locations of wolves could be obtained by outside
 22 parties to assist with locating and killing individual wolves.^{26/} The Forest Service is not required
 23

24 ^{25/}Whether the project is necessary is an issue under the Wilderness Act, not NEPA. Nonetheless,
 25 Plaintiffs’ improper extra-record evidence applies a Ph.D.’s very narrow interpretation of how research
 26 proposals may be evaluated in academia. Declaration of James Peek (“Peek Decl.”) ¶ 10. The criticism
 27 ignores IDFG’s comprehensive 2008-2012 Idaho Plan, AR003616-705. Peek Decl. ¶¶ 10-14.

28 ^{26/}The DM is clear that the data will be used in furtherance of IDFG’s wolf management efforts, which
 are described in various Plans and directional documents contained in the administrative record for this
 action. *See* Section II.C.

1 to entertain unrealistic notions propounded in Plaintiffs' litigation-generated declarations of Cole
2 and Peek.

3 **(2) Extraordinary Circumstances Do Not Prevent the Use of CEs to**
4 **Authorize the IDFG Research Project**

5 Plaintiffs' position would seemingly never allow the Forest Service to authorize a project
6 in a wilderness area based on a CE, but that is not what the law proscribes. *See U.S. Fish and*
7 *Wildlife Service*, 2008 WL 4183040, at **5-10 (upholding the Forest Service's decision to issue
8 a CE authorizing the construction of two water tanks within a designated wilderness to preserve
9 and restore the bighorn sheep population.). There is no dispute that since the research project
10 occurs in a designated wilderness area, the Forest Service had considered whether there were
11 extraordinary circumstance that could preclude the use of CEs. 36 C.F.R. 220.6(b)(1)
12 (identifying wilderness areas as a "[r]esource condition[] that should be considered in
13 determining whether extraordinary circumstances related to a proposed action warrant further
14 analysis and documentation in an EA or an EIS."). But, contrary to Plaintiffs' assertion,"[t]he
15 mere presence of one or more of these resource conditions does not preclude use of a categorical
16 exclusion (CE)." *Id.* at 220.6(b)(2). Instead, "[i]t is the existence of a cause-effect relationship
17 between a proposed action and the potential effect on these resource conditions, and . . . the
18 degree of the potential effect of a proposed action on these resource conditions that determines
19 whether extraordinary circumstances exist." *Id.* *See Utah Env'tl. Cong. v. Bosworth*, 443 F.3d
20 732, 743 (10th Cir. 2006) (analyzing the CEs and concluding that "an extraordinary
21 circumstance is found only when there exists a potential for a significant effect on a resource
22 condition").

23 The Forest Service determined that there will be minimal effect to the wilderness
24 "because the helicopter landings are limited in number and duration and occur during the winter .
25 . . ." DM at AR008613. Furthermore, the Forest Service noted that "there are 13 airstrips within
26 the Middle Fork Zone that are used for landings, and the added increment of potential
27 disturbance from these helicopter landings is nominal." *Id.* The fact that the IDFG research

1 project will occur in a designated wilderness is well-documented in the decision documents and
 2 the record, and the impacts have been analyzed accordingly.^{27/} See Section IV.A.(3). Therefore,
 3 the Forest Service properly concluded that there is no extraordinary circumstance requiring the
 4 preparation of an EA or an EIS for the research project. Nothing more is required to rely on a
 5 CE. 40 C.F.R. § 1508.4. See, e.g., *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100
 6 F.3d 1443, 1450 (9th Cir. 1996) (holding that no extraordinary circumstances prevented the
 7 reliance on a CE where threatened and endangered species were in a project area and the because
 8 the Forest Service determined that the project would not have a negative effect on the species).

9 **(3) The Comments Submitted Do Not Establish a Controversy that Warrants an**
 10 **EA or an EIS**

11 Mere “opposition to a use,” such as exists here, does not establish that the IDFG research
 12 project is controversial. *Found. for N. Am. Wild Sheep v. Dep't of Agric.*, 681 F.2d 1172, 1182
 13 (9th Cir. 1982) (“The term ‘controversial’ refers ‘to cases where a substantial dispute exists as to
 14 the size, nature, or effect of the major federal action rather than to the existence of opposition to
 15 a use.’”), citing *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); see also *Ind. Forest Alliance,*
 16 *Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 857-61 (7th Cir. 2003) (rejecting the argument that a
 17 controversy existed such that an EIS was warranted even though numerous scientists submitted
 18 comments disagreeing with an EA's analyses); *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*,
 19 117 F.3d 1520, 1536 (9th Cir. 1997).

20 Moreover, the “highly controversial” language is not a categorical rule that by itself
 21 determines whether an EIS is required; instead, it is but one of ten factors the agency is to
 22 “consider” in evaluating the intensity of impacts, as part of the overall significance inquiry. 40
 23 C.F.R. § 1508.27(b). Therefore, even if Plaintiff could show that the research project was
 24 “highly controversial,” an EIS would not necessarily be required. See *Friends of the Earth, Inc.*
 25 *v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000) (because this list of
 26 characteristics “is not a checklist,” the mere presence of one factor alone should not be enough to

27 ^{27/}Plaintiffs once again improperly rely on extra-record declarations to argue facts that are properly in the
 28 province of the Forest Service's technical expertise. Pls.' Prelim. Inj. Mot. at 20-21.

1 require an EIS). *See Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir.
 2 2000); *Piedmont Envtl. Council v. U.S. Dep't of Transp.*, 159 F. Supp. 2d 260, 280 n.7 (W.D. Va.
 3 2001), *aff'd in part, remanded on other grounds*, 58 Fed. Appx. 260 (4th Cir. 2003).

4 There is no need for this Court to entertain Plaintiffs' wild and unsubstantiated
 5 predications that this "could establish a precedent for future actions, opening the door to
 6 motorized use and landing of helicopters in the Frank Church Wilderness," Pls.' Prelim. Inj. Mot.
 7 at 22 (citing Kovalicky and Heberger declarations). The Forest Service handles proposals for
 8 activities in the wilderness on a case-by-case basis. Any subsequent proposal would take the
 9 IDFG research project into consideration in its cumulative effects analysis.^{28/} And does not
 10 establish an EIS is needed now.

11 **V. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF**

12 A TRO or preliminary injunction is not warranted, regardless of whether or not this Court
 13 finds that Plaintiffs have demonstrated that they are likely to succeed on the merits. Plaintiffs
 14 cannot prove they are likely to suffer irreparable harm in the absence of preliminary relief, that
 15 the balance of equities tips in their favor, and than an injunction is in the public interest. *Winter*,
 16 129 S.Ct. at 374.

17 A. Plaintiffs Have Failed to Demonstrate That Irreparable Harm is Likely in the 18 Absence of an Injunction

19 Plaintiffs submit a series of declarations, claiming that they will be irreparably harmed by
 20 the temporary use and landing of helicopters in the Frank Church Wilderness to radio collar
 21 wolves because they plan to be in the area "to enjoy the peace and solitude as well as observe
 22 and study wolves." Pls.' Prelim. Inj. Mot. at 25. Plaintiffs submit no credible evidence of

23
 24 ^{28/}Contrary to Plaintiffs' contention, Pls.' Prelim. Inj. Mot. at 22, the Forest Service's authorization of the
 25 IDFG research project does not violate the Wilderness Act. *See* IV.A. In *Mainella*, the agency did not
 26 formally document any NEPA review before its decision and relied on a different CE than the two used
 27 here. 375 F.3d at 1094. The court faulted the agency for not documenting its NEPA review, and stated
 28 that it did "not believe that the agency action [of obtaining a large van to accommodate fifteen tourists]
 falls within the categorical exclusion for 'routine and continuing government business.'" *Id.* at 1095.
 Here, the Forest Service documented its NEPA determination in the DM, and provided the reasons why
 the IDFG fits within the two CEs invoked. DM at AR008605-17.

1 irreparable injury. Their Article III standing declarations, claiming reduced recreational
2 opportunities, which are wholly insufficient to demonstrate irreparable harm is likely in the
3 absence of an injunction.

4 To obtain a preliminary injunction, “[a] plaintiff must do more than merely allege
5 imminent harm sufficient to establish standing.”²⁹/ *Associated Gen. Contractors v. Coal. for*
6 *Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991); *Winter*, 129 S.Ct. at 374 (plaintiff bears the
7 burden to show irreparable injury is “likely”). Yet Plaintiffs' declarants offer no actual evidence
8 of irreparable injury. *See* Pls. Prelim. Inj. Mot. at 28 (“These members explain that . . .
9 helicopters nearby . . . will be extremely disruptive to their wilderness experience . . . harming
10 their aesthetic and recreation interests as well as their wildlife viewing and studying
11 opportunity.”). For example, John M. Robison complains that the proposed helicopter
12 operations “will degrade and injure [his] ability to observe wolves and other wildlife in the
13 wilderness setting,” yet he fails to discuss how this injury is irreparable because the proposed
14 activity is “limited in duration and extent.”³⁰/ AR008612. There is no evidence the proposed
15 radio collaring will permanently denigrate wilderness values and that if the declarants were to
16 return to the Frank Church Wilderness later in the winter or spring or next winter, after the radio
17 collaring was completed, that their ability to observe wolves and other wildlife in a peaceful
18 wilderness setting would be reduced.³¹/ The helicopter activity is only expected to last a couple

19
20 ²⁹/Plaintiffs cite a series of cases that are inapposite because the question before the court was whether the
21 plaintiff had a cognizable injury to confer Article III standing, and not whether the plaintiff demonstrated
22 irreparable injury sufficient to support a preliminary injunction. *See* Pls. Prelim. Inj. Mot. at 26-27 (citing
23 *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000); *Sierra Club v. U.S. Fish & Wildlife*
Servs., 235 F. Supp. 2d 1109 (D. Or. 2002); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Cantrell*
v. City of Long Beach, 241 F.3d 674 (9th Cir. 2001); and *Fund for Animals v. Lujan*, 962 F.2d 1391 (9th
24 Cir. 1992)).

25 ³⁰/In addition to the limited duration and extent of the proposed activity, a preliminary injunction
26 enjoining the radio collaring of wolves would only reduce the cumulative flying time of helicopters in the
27 Frank Church Wilderness by two hours because IDFG will still be conducting the big game surveys,
28 which are not subject to this lawsuit. DM at AR008608.

29 ³¹/There seems that there is an unprecedented number of people that will be in and around the Middle
30 Fork of the Frank Church Wilderness at the time of the proposed radio collaring operations, *see*
31 Declaration of Randy T. Welsh (“Welsh Decl.”) ¶13. Even Mr. Herberger agreed that “the chances of
32 having an effect on someone's wilderness experience is most likely minimal in winter and maximum in
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1 of weeks. Declarants can still visit during several months this spring with no disruption from
2 helicopters, they don't have to wait for summer, fall, or next year. *Cf. Amoco Prod. Co. v. Vill.*
3 *of Gambell*, 480 U.S. 531, 545 (1987) (stating that environmental injury is often irreparable
4 because it is “permanent or at least of long duration”). Reduced recreational opportunities over a
5 two week period is not sufficient to demonstrate irreparable injury for the purposes of a
6 preliminary injunction. *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983)
7 (stating that reduced recreational opportunities are not an irreparable injury). Plaintiffs claims of
8 procedural harm, *see* Pls.' Prelim. Inj. Mot. at 28, is also not sufficient to demonstrate irreparable
9 injury. *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C.
10 2009).

11 Other allegations of harm to the area's wilderness character or wildlife are presumed
12 without credible factual basis from the Administrative Record. Instead, Plaintiffs rely on extra-
13 record declarations that make sweeping and unsupported allegations of harm. *See, e.g.,*
14 Declaration of Thomas Kovalicky ¶ 21 (generally stating that “the Forest Service's decision to
15 allow IDFG to use helicopters to dart and collar wolves is harmful to the wilderness character of
16 the area”); Declaration of Ken Davis 15 (“IDFG use of helicopters in the wilderness, in my
17 opinion, harm the wildlife”). This fails to satisfy Plaintiffs' burden to demonstrate irreparable
18 harm. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988) (speculative
19 allegations of harm insufficient to establish irreparable injury). The cases Plaintiffs cite in
20 support of the proposition that courts have found an injury to a plaintiff's recreational and
21 aesthetic interests to be irreparable are all distinguishable from this case on the basis that there
22

23 summer.” Graves Decl. Ex. A. It appears that the declarants planned trips to the Middle Fork during the
24 winter season specifically for the purposes of attempting to establish standing or irreparable injury for this
25 lawsuit. Moreover, many of these declarants may not be able to do their proposed backcountry skiing and
26 river trips in the Frank Church Wilderness due to weather conditions. *See* Welsh Decl. ¶13.
27 Additionally, Mr. Kovalicky and Dr. Peek’s aversion to helicopter use in the wilderness is selective. *See*
28 Welsh Decl. ¶ 10, AR003481 (Kovalicky letter re helicopter landings in the Selway-Bitterroot Wilderness
bighorn sheep and mountain goat captures and transplants); Welsh Decl. ¶ 9, Exs. I-K (approvals of
helicopter landings for removal of one of Dr. Peek's camps, supply of Dr. Peek's camp for bighorn sheep
studies, Dr. Peek's bighorn sheep study itself).

1 was a continuing and permanent harm to the environment. *See* Pls. Prelim. Inj. Mot. at 26-27.^{32/}
 2 The record in this case however, indicates that radio collaring by “aerial pursuit and capture”
 3 does not disrupt wolves natural behavior and has no adverse effect on wolves.^{33/} MR at
 4 AR008610. In fact, the record indicates that the risk of injury from aerial pursuit and capture, as
 5 opposed to traditional leg-hold trapping, is lower.^{34/} *Id.* Furthermore, the record also
 6 demonstrates that carrying out such operations during the winter when the ground is covered
 7 with snow and the plants are dormant has little to no impact on the plant resources. MR at
 8 AR008585. Plaintiffs have failed to demonstrate how the proposed radio collaring either
 9 permanently impacts wilderness resources or permanently reduces wilderness values in the
 10 Frank Church Wilderness.^{35/} Thus Plaintiffs have not made, and cannot make the requisite
 11 showing that irreparable harm is likely, and their motion for a preliminary injunction must be
 12 denied on this basis alone. *Winter*, 129 S.Ct. at 374.

13 **B. The Balance of Hardships and the Public Interest Do Not Favor an Injunction**

14 The balance of hardships also does not favor an injunction. As discussed above, the
 15 temporary use of helicopters to collar wolves will not permanently impair the wilderness
 16 character of or the wilderness values Plaintiffs seek in the Frank Church Wilderness. The data

17 ^{32/}*Davis v. Mineta*, 302 F.3d 1104, 115-116 (10th Cir. 2002) (finding irreparable injury to parkland from
 18 proposed construction of a highway); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp.
 19 2d 1, 25 (D.D.C. 2009) (finding that plaintiff demonstrated irreparable injury because of a new rule
 20 allowing persons to carry concealed weapons in national parks made them feel less safe); *San Luis Valley*
 21 *Ecosystems Council v. U.S. Fish & Wildlife Serv.*, --F. Supp. 2d--, 2009 WL 2868818, at *5-6 (D. Colo.
 22 2009) (finding irreparable injury from proposed construction for oil and gas mining because of soil
 23 disturbance, increased traffic, presence of drill rigs); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209,
 24 220-22 (D.D.C. 2003) (finding irreparable injury of declined viewing opportunities as a result of the
 25 proposed killing of muted swans).

26 ^{33/}For years, wolves have been successfully darted by helicopter in Yellowstone National Park. MR at
 27 AR008585. Many helicopter landings have occurred in the Frank Church Wilderness, both before and
 28 after 1980. Welsh ¶¶ 8-11, Exs. E-Q.

^{34/}With trapping, the animal may be in the trap for up to 12 hours, which can lead some animals to nip or
 chew at the trap leading to mouth or teeth injuries. MR at AR008591.

^{35/}In December 2008, the Forest Service issued a special use permit to IDFG for helicopter use to net trap
 and collar bighorn sheep Payette National Forest. Welsh Decl. ¶ 12, Ex. R. As part of the analysis of that
 project request, the Forest Supervisor contacted several environmental groups including the Wilderness
 Society and Idaho Conservation League, and the Nez Perce Tribe. *Id.* None expressed any concerns with
 that project. *Id.*

1 collected, however, will “add to the mutual understanding of wolf movement, distribution,
2 behaviors, rendezvous and denning sites . . . where this information have not been previously
3 available and other methods have proved unsuccessful in acquiring the needed data.” DM at
4 AR008605; MR at AR008566. The Forest Service can also use the data in its efforts to manage
5 wilderness resources and thus protect the wilderness character of the area, to make decisions
6 about outfitter camp locations and trail routings, and to understand wolf-human conflicts. DM at
7 AR008606; MR at AR008609-10. Such long-term data would be an important and valuable
8 resource in the future management of the Frank Church Wilderness. On the contrary, Plaintiffs
9 may only experience temporary and minimal disturbance to their wildlife viewing opportunities,
10 which will be immediately restored after the proposed collaring is completed. The balance of
11 hardships thus does not favor an injunction in this case.

12 Plaintiffs claim that an injunction is in the public interest because “Congress has
13 recognized the public interest in maintaining these wilderness areas largely unimpaired by
14 human activity.” Pls.’ Prelim. Inj. Mot. at 31. However, as discussed above, the proposed radio
15 collaring will not permanently negatively impact the wilderness resources of the area, and
16 Plaintiffs have not provided evidence to the contrary. *See, e.g.*, AR008585, 8610. Additionally,
17 the short duration and time period that the radio collaring will actually occur also does not
18 permanently impair the wilderness values of solitude that Plaintiffs are seeking. Therefore, the
19 public interest in maintaining the Frank Church Wilderness “largely unimpaired by human
20 activity” is not being affected by the proposed use of helicopters for a limited duration of time to
21 collar wolves. On the other hand, the availability of information regarding the distribution of
22 wolves, and the ability to use the information to study wildlife population dynamics in a
23 wilderness setting will be a valuable resource in the Forest Services’ administration of the
24 wilderness area. AR008605-06. Because there are no negative permanent impacts to the
25 wilderness character or the wilderness values of the Frank Church Wilderness by the proposed
26 activities, the balance of hardships and the public interest do not favor an injunction in this case.
27 The Plaintiffs’ motion for a preliminary injunction should be denied.

1 **VII. CONCLUSION**

2 For the reasons set forth herein, Defendants respectfully request that this Court deny
3 Plaintiffs emergency motion for a TRO and/or preliminary injunction be denied.

4
5 Respectfully submitted this 12th day of February, 2010

6
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8
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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, I electronically filed the foregoing: (1)
DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TRO AND/OR
PRELIMINARY INJUNCTION UNDER THIRD CLAIM FOR RELIEF with the Clerk of the Court using
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