



WILDERNESS WATCH

Keeping Wilderness Wild

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55406

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P.O. Box 9765
Moscow, ID 83843

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Stefani Spencer
Acting Forest Supervisor
903 3rd Street
Kamiah, ID 83536

Sent Via Email to: comments-northern-nezperce@usda.gov

Acting Supervisor Spencer:

Below are scoping comments regarding the Forest Service's notice of proposed action for the 2022 IDFG Sheep Collaring Project. Wilderness Watch submits these scoping comments on behalf of the following groups:

Wilderness Watch is a national wilderness advocacy organization, headquartered in Missoula, Montana, dedicated to the protection and proper administration of the National Wilderness Preservation System. Wilderness Watch has a satellite office in Idaho, and our members use and will continue to use the Frank Church-River of No Return Wilderness ("River of No Return Wilderness") and the Gospel-Hump Wilderness for outdoor recreation and professional pursuits, including hiking, wildlife viewing, and wildlife study. As more fully described below, the Forest Service's proposed action would adversely affect Wilderness Watch's organizational interests, as well as its members' use and enjoyment of the River of No Return and Gospel-Hump Wildernesses.

Friends of the Clearwater is dedicated to protecting the public wildlands, wildlife, Wilderness, and watersheds in the Clearwater Basin and the immediate surrounding areas, generally the Nez Perce-Clearwater National Forests. With the headwaters of the Selway River and almost the entirety of the Middle Fork Salmon watershed, the spectacular Frank Church-River of No Return Wilderness is of particular concern to Friends of the Clearwater.

Friends of the Bitterroot's mission is to preserve the wildlands and wildlife and to protect the forests and watersheds of our region as we work for a sustainable relationship with the environment.

Allaince for the Wild Rockies works to secure the ecological integrity of the Wild Rockies Bioregion through conservation biology, sustainable economic models, and environmental law.

If the Forest Service intends to authorize project components in the Wildernesses or in the Wild River corridor, we request that the Forest Service fully address the below

concerns in an environmental impact statement before making that authorization. A categorical exclusion is inappropriate and shows a stunning disregard for Wilderness protection as well as federal court orders finding similar authorizations by the Forest Service unlawful.

PRELIMINARY CONCERNS

On February 10, 2022, we wrote to the Forest Service to express our concerns about the timing of this proposal, including the Forest Service's projection that project activities would commence in March 2022—the same month public scoping comments are due, and requesting the Forest Service delay implementation to allow for meaningful consideration of public concerns and, if necessary, judicial review. The Forest Service responded to this concern by merely thanking us for early scoping comments. Accordingly, we are reiterating our concerns and request for delay here. Our letter stated:

We are writing to express our deepening concern over the Forest Service repeatedly authorizing helicopter intrusions in designated Wilderness without formal NEPA review, repeatedly allowing immediate implementation of these projects in an apparent attempt to avoid judicial review, and repeatedly allowing state agencies to segment project proposals in an apparent attempt to avoid comprehensive analysis of the full scope and impact of helicopter-assisted wildlife programs in Wilderness. The latest iteration of this problem is described below. We urge your immediate attention and response to this matter.

On February 1, 2022, the Forest Service notified the public that it would be considering a proposal by Idaho Department of Fish and Game (IDFG) to capture and collar bighorn sheep via helicopter in the Wild and Scenic Salmon River Corridor, including portions of the Gospel-Hump and Frank Church-River of No Return (RONR) Wildernesses. The notice requests public comment by March 1, 2022, but it also indicates project activities would begin in March 2022 in areas outside of the RONR Wilderness, including the Gospel-Hump Wilderness and the Wild and Scenic River Corridor. There would be a 30-day delay within the RONR Wilderness. It appears the Forest Service intends to categorically exclude the project from formal NEPA review in an Environmental Assessment or an Environmental Impact Statement.

We are writing to request that the Forest Service drop the Wilderness and Wild and Scenic River portions of the project. If the Forest Service is unwilling to do so, we request the Forest Service undertake formal NEPA review of the project, including reasonably foreseeable future helicopter proposals in Wilderness and the Wild and Scenic River Corridor that will likely be required as an extension of this project or of IDFG's broader bighorn management plans. Short of those commitments, we request the Forest Service delay project implementation within the Wild and Scenic River Corridor, within the Gospel-Hump Wilderness, and within the RONR Wilderness to allow time for meaningful judicial review of the decision.

A categorical exclusion is not appropriate for this project. We intend to address this problem more thoroughly in our comment letter, but given the Forest Service's intention to authorize project implementation in March (immediately after receiving public comment), we are flagging the issue in advance. The project will degrade two designated Wildernesses and a Wild and Scenic River Corridor by authorizing activities generally prohibited in those areas. It threatens violation of the Wilderness Act and its implementing regulations, *see* 16 U.S.C. § 1133(b); 36 C.F.R. § 261.16, as well as the Frank Church River of No Return Wilderness Management Plan, *see* USDA Forest Service, Frank Church – River of No Return Management Plan with May 22, 2009 Errata at 2-65. Because the Forest Service is categorically excluding the project, the 4-page project description is bereft of any consideration of alternatives. Additionally, the project appears to be another instance of the Forest Service “allow[ing] the IDFG to get away with slicing its long-term helicopter collaring project(s) into a one-year sliver of a project to mitigate the cumulative impacts.” *See Wilderness Watch v. Vilsack*, 229 F.Supp.3d 1170, 1180 (D. Idaho 2017).

Further, immediate implementation of helicopter projects in Wilderness is not appropriate. The Forest Service has been the subject of at least three federal court orders requiring the Forest Service

to allow enough time for judicial review between project authorization and implementation. As here, those cases involved helicopter-assisted wildlife manipulation projects in designated Wilderness.

In a 2010 order, a federal court in Idaho put the Forest Service on notice that, should it ever again approve helicopter operations in the RONR Wilderness, the agency “would be expected to render a final decision enough in advance of the project so that any lawsuit seeking to enjoin the project could be fully litigated” before helicopter operations commence. *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264, 1270 (D. Idaho 2010).

In 2016, the Forest Service ignored the Court’s 2010 order and authorized immediate implementation of another helicopter-assisted wildlife project. *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1175 (D. Idaho 2017) (noting the agency ignored the Court’s prior directive in the present case); see also Order on Motion to Reconsider at 1-2, *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170 (ECF No. 61) (“Ignoring a prior directive of the Court, the Forest Service allowed the project to begin immediately, preventing plaintiff environmental groups from being able to timely seek injunctive relief.”). Because of the Forest Service’s trend of authorizing immediate implementation of helicopter-assisted wildlife projects that preclude time for judicial review, and because the agency ignored a prior court order warning the agency against this behavior, the Court “enjoin[ed] the Forest Service from approving any future helicopter projects without delaying implementation for 90-days to allow affected groups to file challenges to the projects.” *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1183 (D. Idaho 2017), *aff’d in part*, *Wilderness Watch v. Perdue*, 805 Fed. Appx. 467 (9th Cir. 2020) (upholding injunction for a delay of 30 days of Idaho Department of Fish and Game helicopter-assisted projects in the RONR Wilderness to “ensure[] time for adequate review of any challenges” and noting “[t]he public interest suffers when actions in the wilderness evade judicial review.”).

While the Ninth Circuit limited the injunction to the RONR Wilderness, it is clear that the rationale applies equally to similar scenarios in any designated Wilderness. In 2021, a federal court in Montana ordered the Forest Service to postpone immediate implementation of another helicopter-assisted wildlife project in the Scapegoat Wilderness to a date “sufficiently far in advance to permit this Court to exercise meaningful judicial review.” Order re Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 2, *Wilderness Watch v. Marten*, No. 9:12-cv-82-DLC (D. Mt. July 24, 2021) (citing *Wilderness Watch v. Perdue*, 805 Fed. Appx. 476, 481 (9th Cir. 2020)).

The Forest Service is now repeating the same behavior again.

In light of the above, we request that you drop the Wilderness and Wild and Scenic River portions of the project. Alternatively, we urge you to delay project implementation to allow enough time for formal NEPA review with full opportunity for public comment. Short of that, we request the Forest Service delay project implementation to allow sufficient time for judicial review of its project decision.

PROJECT BACKGROUND

In 2022, the Idaho Department of Fish and Game submitted a proposed action (PA) to the Forest Service to pursue, capture, sample, and collar up to 35 bighorn sheep utilizing helicopter net-gunning in the Salmon River canyon and surrounding area, including 20 bighorns in the Gospel-Hump and Frank Church-River of No Return Wildernesses.¹ The activities would require approximately 20 hours of low-level helicopter flights

¹ The Proposed Action is not clear about how many captures would occur in the Wild and Scenic River corridor outside of the Gospel-Hump and Frank Church-River of No Return Wildernesses, how many would occur within the corridor and within the Wildernesses, or how many would occur within the Wildernesses but outside of the corridor. Areas outside of Wilderness would include the northern half of the river corridor from just upriver of Shepp Ranch to

and, assuming two flights per bighorn, up to 70 landings to chase and capture animals, drop personnel and supplies, transfer animals to processing places (where possible), take biological samples, and place GPS radio collars on the animals. The Forest Service states,

Idaho Fish and Game (IDFG) is requesting short term helicopter use by the IDFG or its contractors for capturing and collaring bighorn sheep in the Salmon River Corridor. The United States Forest Service (USFS) is required to provide habitat for viable wildlife populations and Idaho Fish and Game (IDFG) are responsible for protecting, preserving, and managing fish and wildlife in the Salmon River Corridor. Land in the project area is managed by either the Nez Perce Forest Plan (1987), the Wild and Scenic River Act, or the Wilderness Act. The purpose of the proposed action is to allow access to test sheep for the potentially life-threatening *Mycoplasma ovipneumoniae* (MOVI) bacteria. There is a need to use helicopters to conduct operations for effective testing with minimum disturbance to sheep.

PA at 2.

Even though the project would authorize multiple prohibited activities within Wilderness and the Wild and Scenic River corridor, the Forest Service intends to use a categorical exclusion to approve the project. And, even though the Forest Service is soliciting limited public comment on the proposal, the four pages of project information in the scoping notice/PA provide little information on which to comment. Additionally, the PA indicates the Forest Service expects project activities will commence in March 2022 (or shortly thereafter in the RONR Wilderness)—the same month public comments are due—indicating the limited public comment opportunity is more to satisfy optics than substance.

WILDERNESS ACT, REGULATION, AND GUIDANCE

In the city, in the country, almost everywhere he goes, the American is confronted with an environment dominated by his own technology. This is new, no others before us have experienced it on the scale we experience today. The end result is not certain. For man, with all his ability to adapt, for all his domination of the "lesser" species, still is a child of the sea, the mountains, the very wilderness he is rapidly obliterating. We are a nation bedazzled by technology, and addicted to crash solutions. But there are no instant ecologies; no instant wilderness. And so, in the final analysis, we must devote much more of our attention in the future to assessing each new technological development for its ultimate impact on man's environment. I hope it is never said of this generation, as Stephen Vincent Benet once said of another: "They thought, because they had power, they had wisdom also." We now have the power, literally, to move mountains. The next few years will determine if we have the wisdom to refrain from doing so. ~ Orville Freeman, Secretary of Agriculture, 1967

Statutory Mandate: The Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their “natural,” “untrammeled” condition. 16 U.S.C. § 1131(a). Wilderness is statutorily defined as “an area where the earth and its community of life are untrammeled by man” and an area “retaining its primeval character and influence... which is protected and managed so as to preserve its natural conditions....” *Id.* § 1131(c). Thus, wilderness “shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment *as wilderness*, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment *as wilderness*....” *Id.* § 1131(a) (emphasis added). The Act’s opening section “sets forth the Act’s broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammeled state” and “show[s] a mandate of preservation for wilderness and the essential need to keep

Mackey Bar. The portion of the Salmon River canyon downriver of the Wind River Pack Bridge is outside of both Wilderness and the Wild and Scenic River corridor.

[nonconforming uses] out of it.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (en banc).

The Wilderness Act contains a narrow exception to allow otherwise-prohibited activities—such as helicopter and installation use—only where such activities are necessary to meet the *minimum requirements* for administration of an area *for the purpose of the Wilderness Act*. 16 U.S.C. § 1133(c). In other words, the exception applies only where the otherwise-prohibited activity will affirmatively advance the “‘preservation and protection’ of wilderness lands ... in their natural, untrammelled state.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc) (quoting 16 U.S.C. § 1131(a)). The Wilderness Act charges “each agency administering any area designated as wilderness [with the responsibility of] preserving the wilderness character of the area.” 16 U.S.C. § 1133(b). As the Ninth Circuit stated in *High Sierra v. Blackwell*:

The Wilderness Act twice states its overarching purpose. In Section 1131(a) the Act states, ‘and [wilderness areas] shall be administered for the use and enjoyment of the American people *in such a manner as will leave them unimpaired for the future use and enjoyment as wilderness, and so as to provide for the protection of those areas, the preservation of their wilderness character,*’ 16 U.S.C. § 1131(a) (emphasis added). Although the Act stresses the importance of the wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future *as wilderness*. This responsibility is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the area.

High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004) (emphases in original); *see also id.* at 645 (citing 16 U.S.C. 1133(b)). IDFG’s broad management goals to increase bighorn sheep numbers are not coextensive with the statutory mandate to preserve wilderness lands in their untrammelled state and thus cannot be used to invoke the exception to the Act’s prohibitions. *See* 16 U.S.C. § 1133(c). Instead of repeating IDFG’s management objectives motivating the project, the Forest Service must demonstrate how the active management of bighorn sheep to achieve state-defined wildlife goals will advance the preservation and protection of the Gospel-Hump and River of No Return Wildernesses in their natural, untrammelled state.²

Federal Administrative Duties and Management Direction: While IDFG has the responsibility to manage wildlife across Idaho, Wilderness designation places restrictions on that management authority and requires the Forest Service to ensure that any state wildlife management activities in Wilderness, including research, are conducted in a manner that preserves wilderness character.³ Congress provided a clear mandate for administering agencies: “[E]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.” 16 U.S.C. § 1133(b). Certain uses and activities, including helicopter landings and the use of electronic tracking installations, undermine the preservation of Wilderness and are thus prohibited with narrow exception. 16 U.S.C. § 1133(c); *see also* 36 C.F.R. § 261.18(c) (Forest Service regulations prohibiting “[l]anding of aircraft, or dropping or picking up of any material, supplies, or person by means of aircraft, including a helicopter” in National Forest Wilderness); 36 C.F.R. § 293.6 (prohibiting “mechanical transport,” “landing of aircraft,” and “dropping of materials, supplies, or persons from aircraft” in Wilderness except as provided

² That scientific and recreational activities are valid public uses of wilderness areas does not excuse the Forest Service’s obligation to demonstrate that the project will advance “the purpose of” the Wilderness Act, 16 U.S.C. § 1133(c), which is to preserve designated wilderness in an untrammelled state, *id.* § 1131(a), (c). Congress and the federal courts have made clear that the goal of advancing recreation and research in wilderness, while allowable and encouraged, cannot trump the overriding statutory purpose to preserve wilderness character. *See id.* §§ 1131(a), (c), 1133(b)-(c); *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004) (affirming that, under the Wilderness Act, the Forest Service may not “elevate[] recreational activity over the long-term preservation of the wilderness character of the land”).

³Regardless of state responsibility, Nie et al. 2017 and Nie et al. 2021, attached, document federal supremacy over wildlife on public lands in case of conflicts.

by Wilderness Act). These uses and activities may be authorized by the Forest Service only where “necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act].” 16 U.S.C. § 1133(c). An agency authorizing activity generally prohibited by the Wilderness Act must find the action is both necessary and implemented only to the extent necessary. *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037 (9th Cir. 2010). “The limitation on the Forest Service’s discretion to authorize prohibited activities only to the extent necessary flows directly out of the agency’s obligation under the Wilderness Act to protect and preserve wilderness areas.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004).

Consistent with the Wilderness Act and its implementing regulations, the Forest Service’s management direction prohibits motorized equipment or mechanical transport to facilitate research in Wilderness “unless the research is *essential* to meet minimum requirements for administration of the area as wilderness and cannot be done another way.” FSM 2324.42(4) (emphasis added). Likewise, “[r]esearch methods that temporarily infringe on the wilderness character may be used, provided the information sought is *essential for wilderness management* and alternative methods or locations are not available.” FSM 2323.37 (emphasis added). “Wildlife and fish management programs shall be consistent with wilderness values,” FSM 2323.32(3), and the Forest Service is directed to “[d]iscourage measures for direct control (other than normal harvest) of wildlife and fish populations,” FSM 2323.32(4), and “[p]rovide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist,” FSM 2323.31(1).

Gospel-Hump Wilderness Management Plan. The Gospel-Hump Wilderness Management Plan provides specific direction for managing the Gospel-Hump Wilderness. “Wildlife management will be consistent with wilderness values.” Gospel-Hump Plan at 17. Regarding research, “Research projects not dependent on wilderness will be directed to alternative areas outside the Gospel-Hump Wilderness. All research projects must be approved by the Regional Forester.” Gospel-Hump Plan at 31.

WILD AND SCENIC RIVERS ACT AND MANAGEMENT DIRECTION

Wild and Scenic Rivers Act. The Wild and Scenic Rivers Act (WSRA) provides the following definitions for wild and scenic rivers:

- (1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.
- (2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

16 U.S.C. § 1273(b)(1), (2). The WSRA, amended by the Central Idaho Wilderness Act (CIWA), designates the seventy-nine-mile segment of the Salmon River from Corn Creek to Long Tom Bar (the stretch of river corridor within the project area) as a wild river. *See* 16 U.S.C. § 1274(a)(24). While the Act provided special provision for motorboats and certain structures within the Wild Salmon River corridor, *see id.*, it did not provide special provision for aircraft.

The WSRA notes that “[m]anagement plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.” *Id.* And, to the extent that the WSRA conflicts with the Wilderness Act, *id.* § 1131-1136, the WSRA instructs that “the more restrictive provisions shall apply.” *Id.* § 1281(b)-(c). However, the CIWA notes that the portions of the Wild Salmon River “within the River or No Return Wilderness or the Gospel-Hump Wilderness designated by Public Law 95-237, shall be managed under the provisions of the Wild and Scenic Rivers Act . . . , notwithstanding section 10(b) of the Wild and Scenic Rivers Act or any provisions of the Wilderness Act to the contrary.” Accordingly, those areas within the Wild and Scenic River corridor are managed pursuant to

the WSRA and subsequent management plans.

RONR Wilderness Management Plan. The RONR Management Plan provides specific direction for managing the Wild Salmon River corridor. Similar to the Wilderness Act and the Forest Service’s wilderness management regulations, it states that the “[l]anding of aircraft, or dropping or picking up any material, supplies or persons by means of an aircraft, including a helicopter, except at designated landing strips, is prohibited.” USDA Forest Service, Frank Church –River of No Return Management Plan with May 22, 2009 Errata at 2-65 (listing prohibitions and requirements for the Wild Salmon River corridor); *see also id.* (prohibiting motorized and mechanized uses unless consistent with Wild and Scenic Rivers Act and necessary for administration of the area), *id.* at 2-75-78 (discussing research in Wilderness and the Wild and Scenic River corridor and noting that research not dependent upon those areas will be directed to areas outside and helicopter use outside of public airstrips should be considered only when other methods are not possible).⁴

Forest Service Management Direction. In accordance with the above, Forest Service management directives note the following regarding “Wild” river designations:

Generally, a wild river is accessible only by trail. Normally, do not permit motorized travel on the trail system in the river area. Airfields in existence at the time of designation may remain if needed. Do not develop new airfields. Normally do not permit the landing of aircraft except for emergencies and then only at facilities that existed prior to designation.

FSM 2354.42(g). The Manual also notes that research authorizations in Wild and Scenic River corridors should “generally follow the guidelines developed for wilderness (FSM 2320).” FSM 2354.42j.

Accordingly, the Forest Service may only approve helicopter net-gunning and the installation of GPS tracking collars on bighorn sheep in the Wildernesses if the Forest Service rationally demonstrates that studying wildlife disease in these sheep to inform routine state wildlife management objectives is necessary and essential to meet minimum requirements for administration of the area for the purpose of the Wilderness Act, and there is no alternative to otherwise-prohibited uses that would achieve that purpose. *See* 16 U.S.C. § 1133(c). Similarly, within the Wild Salmon River Corridor, the Forest Service must rationally demonstrate that the research is necessary for administration of the area and that existing landing strips cannot be utilized, that non-motorized methods are not possible, and that the research cannot be accomplished outside of the Wild Salmon River corridor. *See* RONR Management Plan at 2-76-78 (discussing research in Wilderness and Wild and Scenic corridors). Below, we address why the proposal does not comport with the mandates of the Wilderness Act, the RONR Management Plan, or NEPA.

A. The action is not necessary to administer the areas as Wilderness or as a Wild River, and in fact the PA is silent on the question of necessity.

The PA does not demonstrate that IDFG’s sheep project is “necessary to meet minimum requirements for the administration of the area” as wilderness. 16 U.S.C. § 1133(c). Indeed, the PA is silent as to this threshold question. For this reason alone, a decision authorizing the helicopter-assisted research in the Wildernesses would violate the Wilderness Act. *Id.* Courts construe the exception to the Wilderness Act’s prohibitions narrowly, and “[t]he limitation on the Forest Service's discretion to authorize prohibited activities only to the extent necessary flows directly out of the agency's obligation under the Wilderness Act to protect and

⁴ The scoping notice misleadingly implies that helicopter use is allowed within the Wild Salmon River corridor by simply noting, “The Central Idaho Wilderness Act of 1980 (Appendix C: Section 9. (b)) specifically provides for segments of the main Salmon River within the Gospel Hump and Frank Church Wilderness areas to be managed under the provisions of the Wild and Scenic River Act, as amended, which does not prohibit motorized aircraft use as proposed.” *See* PA at 3. The PA fails to disclose that such use is specifically prohibited by the RONR Wilderness Management Plan.

preserve wilderness areas.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 647 (9th Cir. 2004).⁵ To overcome the prohibition on aerial intrusions and installations, the Act “requires, among other things, that the Forest Service make a finding of ‘necessity’ before authorizing [the activities] in wilderness areas.” *Id.* at 646. The Forest Service must make “an adequately reasoned finding of necessity.” *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1036 (9th Cir. 2010). A “generic finding of necessity does not suffice.” *Id.* at 1037.

The Forest Service is considering authorizing intensive management actions normally prohibited in Wilderness based solely on IDFG’s desire for data to inform its wildlife management objectives, including an increase in the bighorn population. To comply with the Wilderness Act, IDFG must seek approval for management actions involving prohibited uses in Wilderness, and the Forest Service in-turn must make the requisite finding of “necessity” before it may authorize the action. *Id.* at 20. In its four pages of project analysis, the Forest Service has made no attempt to explain how the project is *necessary* to administer the area as Wilderness or as a Wild River. The Forest Service cannot rationally make this finding for the reasons stated below.

1. The Forest Service cannot rely on IDFG’s wildlife management objectives to justify a conclusion that studying population dynamics via helicopter-assisted radio-collaring is necessary to administer the areas as wilderness.

The Forest Service cannot rely on IDFG’s wildlife management objections to justify a conclusion that studying pneumonia via helicopter-assisted radio-collaring is necessary to administer the area as Wilderness or as a Wild River. “Congress made preservation of wilderness values ‘the primary duty of the Forest Service, and it must guide all decisions as the first and foremost standard of review for any proposed action.’” *Wilderness Watch v. Vilsack*, 229 F.Supp.3d 1170, 1182 (D. Idaho 2017) (citing *Greater Yellowstone Coalition v. Timchak*, 2006 WL 3386731 at *6 (D. Idaho Nov. 21, 2006)). To comply with the Wilderness Act, IDFG must seek approval for management actions involving prohibited uses in wilderness, and the Forest Service in-turn must make the requisite finding of “necessity” before it may authorize the action. *Id.* at 20.

A main goal for bighorn sheep in general and for this Population Management Unit (PMU)⁶ is to “continue to be managed primarily to maximize bighorn sheep hunting opportunity.” See Draft Idaho Bighorn Sheep Management Plan 2022 to 2027 at 122 and Idaho Bighorn Sheep Management Plan 2010 at 108. Both plans in several places talk about increasing bighorn numbers, providing more hunting opportunities because demand is high, and engaging in intensive management via collaring and the use of helicopters. It should also be noted that the latest information in the draft bighorn plan shows an increase of 133 bighorns in this PMU in spite of the fact that the PMU has been administratively reduced in size. See Draft Idaho Bighorn Sheep Management Plan 2022 to 2027 at 124. This reality is important because the Forest Service is

⁵ The PA references a special provision within the Wilderness Act for the control of fire, insects, and disease, see PA at 4 referencing 16 U.S.C. 1133(d)(1), but the project proposal is not within the category of actions contemplated by the special provision. And, in any event, the Forest Service must construe narrowly the special provision and give effect to its necessity requirement. See *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (citing *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (exceptions to a rule must be construed narrowly to preserve the primary operation of the general rule); see also *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004) (analyzing commercial packstock permitting in Wilderness under another special provision in Section 1133(d) of the Wilderness Act and finding the preservation of Wilderness paramount, even when authorizing uses under special provisions). It is not a blanket authorization for wildlife management activities within Wilderness. Further, the provision is directed at forest stands and trees, not wildlife, as is shown by the attached excerpt and copy from a hearing record on the Wilderness Act in 1958. The Forest Service Manual looks at disease the same way.

⁶ The project would also occur in the western end of the Lower-Panther Main Salmon PMU. This PMU has been a source for translocations but also has had non-native augmentation, according to the attached bighorn plans. Therefore, it isn’t considered one of the native populations. The fact this proposal includes portions of this PMU proves that this proposal is not what it claims to be.

analyzing the focal question of what is “necessary” for the minimum administration of the Wildernesses through IDFG’s lens of what is “natural” for the areas. It is IDFG setting population targets based on hunter opportunity goals, and IDFG is asserting that the current populations might be too low based on those targets in spite of evidence the population is increasing in the PMU.

Indeed, the State of Idaho’s latest wolf laws would allow, and seems to be the goal of the State, to reduce wolf populations by ninety percent. Whether that can or will be done is not the point. Rather, it is further evidence that Idaho’s wildlife management goals are in direct conflict with the mandates under the Wilderness Act and Forest Service policy and regulations.

Similarly, the proposed action does not explain why telemetry tracking collars are necessary to administer the area as Wilderness or as a Wild River. Presumably, these collars would be used to track and kill select bighorns after testing, but this is not explicitly disclosed and evaluated. If the tracking collars are used for other purposes, the Forest Service has not disclosed those purposes or explained why they are necessary for preservation of Wilderness.

Here, the Forest Service has not stated or otherwise demonstrated that the proposed activities are “*necessary* to meet *minimum requirements* for the administration of the area for the purpose of the Wilderness Act,” 16 U.S.C. § 1133(c) (emphasis added), and that “the information sought is *essential* for wilderness management and alternative methods or locations are not available,” FSM 2323.37 (emphasis added). Instead, the Forest Service makes one passing statement about the natural character of the Wildernesses:

The benefit of improving the natural character of these wilderness areas and protecting and ensuring long-term survival of this native bighorn sheep population is important to both the Nez Perce Tribe and the citizens of Idaho.

PA at 3. But, “whatever ‘wilderness character’ means, it cannot be something that depends upon the active manipulations of humans.” Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 100-101 (2013).

IDFG’s goals and methods are fundamentally at odds with the administration of “area[s] where the earth and its community of life are untrammled by man,” 16 U.S.C. § 1131(c), and Forest Service direction to “[m]aintain wilderness in such a manner that ecosystems are unaffected by human manipulation and influences so that plants and animals develop and respond to natural forces.” FSM 2320.2. IDFG’s generalized need for data to inform its wildlife management decisions cannot justify actions that are generally prohibited under the Wilderness Act. See *Wolf Recovery Foundation*, 692 F.Supp.2d 1264, 1270 (D. Idaho 2010). The proposal here would authorize helicopter intrusions and electronic installations in these two Wildernesses and a Wild River corridor on a basis—a state’s asserted need to collect bighorn disease data to inform big game management decisions—that could not justify helicopter use in these protected areas as a matter of course. While IDFG may manage wildlife in wilderness, “Wildlife and fish management programs [must] be consistent with wilderness values,” FSM 2323.32(3). The proposed action should not be authorized because its goals and methods are incompatible with wilderness preservation.

This is not to say that IDFG cannot manage wildlife species or conduct research in Wilderness – such actions must simply be accomplished in a manner that does not violate the Wilderness Act. In this regard, the Forest Service cannot proffer a justification for the proposed helicopter use that would set a precedent for the routine use of helicopters to facilitate wildlife research and management.

Where the Forest Service’s wilderness administration guidance directs the Forest Service to “[p]rovide an environment where the forces of natural selection and survival rather than human actions determine which and what numbers of wildlife species will exist,” FSM 2323.31(1), a proposal to utilize prohibited activities in two designated Wildernesses and a Wild River corridor to investigate assumed chronic disease among bighorn sheep to meet population targets for big-game hunting presents quite a hurdle. This is because,

In contrast to other public land management statutes, which typically authorize agencies to consider and weigh diverse values through exercise of their scientific and policy expertise, the Wilderness Act required certain areas to be managed predominantly for one use: wilderness preservation....

Unlike all other land-management statutes, the Wilderness Act's basic purpose was not to delegate authority to expert agencies, but rather, to exclude certain lands from the application of the agencies' specialized expertise, to restrain agency flexibility, and to protect (with limited, narrow exceptions) certain lands from the impact of the sort of policy choices land managers typically make.

Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 100-101 2013. To the extent that there is an administrative conflict between various uses of wilderness and preservation of wilderness, the statute and the agencies' regulations and management guidance provide direction for resolving those conflicts in favor of wilderness preservation. *See, e.g.*, 16 U.S.C. § 1133(b); 36 C.F.R. § 293.2(c); FSM 2320.6.

Plainly, the mere fact that a wildlife population is experiencing decline—let alone actually increasing—cannot justify the use of helicopters and GPS collaring for wildlife research in Wilderness. Similarly, the mere fact that a bighorn sheep population might be exposed to disease—a pervasive problem for bighorn sheep wherever they exist—cannot justify these actions in Wilderness. The Wilderness Act contains a “narrow” exception authorizing helicopter use only where necessary to “further the wilderness character of the area.” *Wolf Recovery Found.*, 692 F. Supp. 2d 1264, 1267-68 (D. Id. 2010) (quotation omitted). This exception permits otherwise-prohibited activities only in the “most rare of circumstances” in which denying the activity would itself compromise the integrity of the Wilderness. *Id.* at 1268. Invoking this provision based solely on wildlife-population shifts and speculative utility would contravene the statutory language and its interpretation by the federal courts, and would permit the exception to swallow the rule that helicopter use is prohibited in Wilderness. *See id.* (“Helicopters carry ‘man and his works’ and so are antithetical to a wilderness experience. It would be a rare case where machinery as intrusive as a helicopter could pass the test of being ‘necessary to meet minimum requirements for the administration of the area.’”).

Restraint and humility are important values underpinning the Wilderness Act, and “[l]and managers should exercise this same humility in dealing with wilderness areas, lest they lead us down a path to where there are no longer any places that are truly ‘wild,’ no places beyond the control of human institutions and cultural imperatives.” Sean Kammer, 2013. The Forest Service should not authorize the project because it is incompatible with the purpose of the Wilderness Act. Similarly, the Forest Service has not shown that the project proposal is necessary for administering the Wild River corridor as required by the RONR Management Plan.

2. The Forest Service has unlawfully dismissed consideration of factors that could be contributing to disease transmission and resilience and alternative actions that might address those factors without offending the Wilderness Act or the Management Plan.

In *Wilderness Watch v. U.S. Fish & Wildlife Service*, 629 F. 3d 1024 (9th Cir. 2010), the Ninth Circuit reviewed the U.S. Fish and Wildlife Service's decision to place watering structures in Wilderness (another generally prohibited activity) to address a decline in a bighorn sheep population. The Circuit declined to give weight to the agency's rationale for placing watering tanks in Wilderness based on broad bighorn sheep conservation goals because the agency improperly assumed the structures were necessary, and because the agency failed to reconcile its *preferred* conservation action with the terms “necessary” and “minimum requirements.” 629 F.3d at 1037-39. The Circuit noted that translocations, hunting, human disturbance, and predation all may be contributing to bighorn sheep population declines, *id.* at 1029-1030, and that actions such as cessation of translocations, moratoriums on hunting, and temporary trail closures could lead to an increase in the population without violating the Wilderness Act, *id.* at 1038. Similarly here, “[j]ust because a particular variable affects the sheep's viability [such as the potential for disease transmission], the Service is not free to [authorize generally prohibited activities] addressing that variable without regard to any other variables at play.” *Id.* at 1039. The Forest Service must, “at some point in the analysis, weigh the relevant

factors in relation to one another.” *Id.* (internal punctuation and citation omitted). Here, there are many variables at play that the Forest Service is failing to consider, including factors that increase the risk of disease transmission and decrease the disease resiliency of individuals and herds.

To the extent that disease transmission from domestic livestock to bighorn sheep is a contributing factor to population declines, that issue has already been well-studied and documented, and the agencies could perform a risk assessment for this area and implement protective measures without authorizing and implementing the intensive proposal presented by IDFG.⁷ For example, if the Forest Service is concerned that domestic livestock diseases are threatening native species within the Wildernesses and Wild River corridor, the Forest Service could implement closure orders restricting domestic livestock use (including grazing and packstock use) within and around the Wilderness areas and the Wild River corridor. The PA notes that domestic sheep have been removed from certain areas to prevent disease transmission to bighorn sheep. PA at 3. The Forest Service could take a comprehensive look at the issue region-wide and take similar actions at a scale that would better protect bighorn sheep. The Forest Service and IDFG could capture and monitor bighorn sheep outside of the Wildernesses and the Wild River corridor to determine movement patterns in and around the areas. The Forest Service and IDFG could take biological samples from bighorn sheep killed by hunters within the Wildernesses and Wild River corridor to determine if the animals have been exposed to diseases of concern. All of these measures could be taken without authorizing prohibited activities and must be considered.

Furthermore, disease transmissions/die-offs in the larger meta-population of the PMUs would most likely result from contact with domestic animals outside of the project area rather than any persistent carriers of disease among the bighorns in the PMU. There are no longer any active sheep allotments in the Nez Perce-Clearwater National Forests and have not been for a few years. The fact that any current carriers apparently survive would also suggest some resistance to disease. Rather than being a problem, these bighorns may actually have genetic advantages for long-term persistence of bighorns, especially in light of the more likely disease transmission from outside the Lower Salmon River PMU that causes a die-off event like occurred in the 1990s. Research is clear that little is currently known about long-term carriers and disease resilience over time (including research posted on this project’s website), is all the more reason to set aside Wilderness as a less-manipulated baseline.

The Forest Service must also consider the risk of project activities actually exacerbating problems with disease resilience in bighorn sheep, since stress is a key factor that can increase the risk of an epizootic outbreak and helicopter harassment is an extreme stressor. A Forest Service publication indicates that “[a]dditional stressors, which can reduce the resistance of bighorn sheep to disease organisms, include overcrowding on limited range; harassment by dogs; encroachment by humans; heavy snowfall and other weather events (Bunch et al. 1999); poor nutrition; predation; other human disturbances such as roads, habitat degradation, and noise; breeding behavior; and the presence of other wildlife (Festa-Bianchet 1988, Foreyt 1989, Monello et al. 2001, Garde et al. 2005).” USDA Forest Service, Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, at 5 (August 2018).

The proposed actions are forms of highly-invasive trammeling,⁸ and studies indicate that the impacts extend beyond the immediate act of pursuing, capturing, and handling the animals, and stress impacts—both direct and indirect—should be measured over the long-term. For example, the Bureau of Land Management found significant disturbance potential to bighorn sheep from low-level helicopter flights:

⁷ In fact, the IDFG proposal is apparently based upon inaccurate information about the western end of the lower Salmon PMU. The Draft Idaho Bighorn Sheep Management Plan 2022 to 2027 has a map on page 66 that shows an active sheep allotment north of the Salmon River on the Nez Perce-Clearwater National Forests. According to the Draft EIS, Land Management Plan Revision for the Nez Perce-Clearwater National Forests, at page 2-11, that allotment is inactive. It has been inactive for some years due to a lawsuit.

⁸ A video from Utah demonstrates the highly invasive nature of helicopter capture activities: UDWR, *Big Game Transplants in Utah*, YouTube (April 27, 2009), <https://www.youtube.com/watch?v=th35x2sNyho>.

Helicopter surveys may adversely affect populations of mountain sheep... by altering the movement, habitat use, and foraging efficiency of sheep so that survivorship or reproduction is reduced” (Stockwell 1991 in Bleich et al. 1994). Bighorn can respond so dramatically to helicopter use that it may override other factors affecting sheep movement (Bleich et al. 1990, Bleich et al. 1994). Sheep do not habituate or become sensitized to repeated helicopter flights (Bleich et al. 1994). MacArthur et al. (1982) reported no heart rate responses in bighorn sheep to helicopters above 400 meters in altitude. Helicopter flights at 90-250 meters above the ground increased the heart rate in ewes 2.5 - 3 times above normal. Bleich et al. (1994) found that radio collared bighorn moved significantly farther following a helicopter survey than on the day prior to a survey. Helicopter overflights may also reduce foraging efficiency during winter (Harris 1992). Miller and Smith (1985) recommended that helicopter flights be kept at over 100 meters above ground level to minimize impacts to bighorn sheep.

See Bureau of Land Management, *Status of the Science on Questions that Relate to BLM Plan Amendment Decisions and Peninsular Ranges Bighorn Sheep*, at 7 (2001). Impacts to bighorn foraging behaviors may be particularly pronounced during winter months. See Craig A. Stockwell & Gary C. Bateman, *Conflicts in National Parks: A Case Study of Helicopters and Bighorn Sheep Time Budgets at the Grand Canyon*, 56 *Biological Conservation* 317 (1991)). Similar studies on mountain goats have found similar impacts and recommends “reducing human activities in mountain goat habitats, particularly where mountain goat populations are static or declining, **specifically by regulating the frequency of low-flying aircraft over mountain goat herds.**” Robin J. Innes, U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory, *Oreamnos americanus*, Fire Effects Information System (2011) at 27 (emphasis added).

IDFG’s proposal includes repeated low-level helicopter pursuits and landings, netgun captures and aerial relocation, and handling and release, but the PA does not address disturbance issues to bighorn sheep or reconcile the documented risks with the prospect of exacerbating disease transmission and resilience issues. Such a tenuous scenario falls far short of the “rare case where machinery as intrusive as a helicopter could pass the test of being ‘necessary to meet minimum requirements for the administration of the area.’” *Wolf Recovery Found.*, 692 F. Supp. 2d at 1268. If the agencies are concerned about potential population issues in this unit (notwithstanding the current increase in population trends), other population stressors such as hunting, cessation of translocations, temporary trail closures and other restrictions on access to habitat must be explored before the Forest Service can consider the multiple prohibited activities proposed here.

3. The PA does not address the Wilderness Act’s prohibition on installations and reconcile the proposal to place radio telemetry collars on wildlife with that prohibition.

The PA is silent on the prohibition against installations in Wilderness. In another bighorn project, the Forest Service acknowledged that placing radio collars to “track [the animals] movement and interactions [] is also a clear trammeling action as it is an attempt to control nature and is human interference in the normal lifecycle of the animals.” U.S. Forest Service, Helicopter landings in the Twin Peaks, Lone Peak, and Mount Timpanogos wilderness areas to capture and collar mountain goats and bighorn sheep project, Draft EA at 24; see also U.S. Forest Service, Helicopter landings in the Twin Peaks, Lone Peak, and Mount Timpanogos wilderness areas to capture and collar mountain goats and bighorn sheep project, EA at 25 (capture activities constitutes a “high intensity” trammeling action; GPS collars are “installations and represent visible evidence of human activity.) In other, the Forest Service acknowledges collars “are installations and evidence of modern civilization.” See U.S. Forest Service, *Middle Fork Zone Elk Monitoring Project EA* at 3-8. The Forest Service makes no such acknowledgment here and does not address the threshold question of “necessity” in authorizing this normally prohibited activity.

As with helicopter use, the Forest Service must demonstrate that the placement of radio-telemetry collars within the Wildernesses is necessary to meet minimum requirements for administration of the areas as

wilderness and, in doing so, reconcile the inherent conflicts with radio-collaring technology and wilderness preservation. “[D]emand for newer and better tools has led to added functions, such as global positioning system (GPS) engines, 2-way communication, geofencing and proximity sensors, longer battery life, or onboard cameras[.]” Alexandre L. Rasiulis et al., *The Effect of Radio-Collar Weight on Survival of Migratory Caribou*, 78(5) *The Journal of Wildlife Management* 953 (2014). Of particular concern in the wilderness context, one study noted:

Animal tracking can reveal animal locations (sometimes in nearly real-time), and these data can help people locate, disturb, capture, harm, or kill tagged animals. In Minnesota (U.S.A.), some anglers petitioned for access to movement data derived from electronic tagging of northern pike (*Esox Lucius*) to aid in fish capture (Grover 2001)... Similarly, tracking data were misused in a shark-culling program in western Australia (Meeuwig et al. 2015). Researchers tagged imperiled white sharks to study their spatial ecology and inform conservation planning. The tagged sharks were also used as warning systems at beaches. The agency that granted the research permits had access to the tagging data as part of the permitting requirements. However, these data were then used to locate and kill tagged animals to allegedly reduce human-wildlife conflict... Similar scenarios may occur in other areas where human-wildlife conflict is related to livelihoods.

Steven J. Cooke et al., *Troubling issues at the frontier of animal tracking for conservation and management*, 00 *Conservation Biology* 0, 1 (2017). The article also discusses examples of members of the public acquiring tracking equipment or hacking into electronic tagging systems. *Id.* at 1-2. Does the Forest Service have mechanisms in place to safeguard against misappropriation of electronic data or against the electronic data ultimately being used to locate and destroy or harass the animals wearing them? How is the ongoing control and manipulation inherent in electronic monitoring compatible with wilderness values when wilderness is defined as areas where earth and its community of life are untrammelled by man (“Untrammelled – not untrampled – untrammelled, meaning free, unbound, unhampered, unchecked, having the freedom of the wilderness.”)?

The Forest Service must also disclose whether the agencies may use the electronic data to track and kill bighorn sheep or capture and relocate sheep as part of its management program, and it must reconcile electronically-assisted manipulation and extermination practices with the mandates of the Wilderness Act. Freedom of Information Act documents in Idaho demonstrate that Idaho Fish and Game (and the federal management agencies involved before delisting) regularly supplied Wildlife Service with GPS data from wildlife collars to locate and kill wolves, oftentimes through aerial gunning. *See* FOIA Excerpts Attachment. These documents show that radio frequencies are divided into “research” and “non-research” categories with “non-research” collars used primarily for aerial gunning tracking. *Id.* The agencies often kill all but one wolf in a pack; that surviving, collared wolf is then tracked until it establishes with another pack and then that pack is exterminated leaving the surviving, collared wolf to repeat the cycle over and over again. *Id.*; *see also* *USDA-collared Judas wolves used over and over to lead killers to their families*, Examiner.com, February 26, 2016, <http://www.examiner.com/article/usda-collared-judas-wolves-used-over-and-over-to-lead-killers-to-their-families> (article discussing conversations with Idaho Fish and Game where Idaho Fish and Game admits that it implements “collaring for later control,” and in conjunction with Wildlife Services, uses electronic monitoring collars to track and kill wolves and wolf packs often using a collared “Judas” wolf). These incredibly troubling uses of electronic data are not often disclosed and certainly serve to undermine the utility of electronic collaring for conservation activities. The potential for such uses of electronic tracking data must be disclosed.

Of additional concern, one recent study noted that “[a] crucial assumption often made [about telemetry devices], but rarely tested, is that the transmitter does not alter the behavior or vital rates of the subject.” Rasiulis et al. at 953. The weight of the collar, and possibly the size and shape of the collar, has been shown to impact survival rates in caribou. *Id.* at 955. “Ignoring [the] potential [impact of radio collars on survival] may bias [research] results and lead to inappropriate management decisions.” *Id.* As with the effects of low-level helicopter flights and invasive handling, the Forest Service must address the possibility that collaring may exacerbate disease resilience and undermine project objectives.

How is the ongoing control and manipulation inherent in electronic monitoring compatible with wilderness values when Wilderness is defined as areas where earth and its community of life are untrammelled by man (“Untrammelled – not untrampled – untrammelled, meaning free, unbound, unhampered, unchecked, having the freedom of the wilderness.”)? The PA does not address this concern. Given the risks involved with electronic tracking, and given the incompatibilities with Wilderness Act mandates, the agencies must explain why other less-intrusive monitoring methods could not be used. The PA does not address these issues or reconcile the increasing desire for manipulation of wildlife through electronic monitoring and control features with the “[Wilderness] Act’s broad mandate to protect the forests, waters, and creatures of the wilderness in their natural, untrammelled state” and “of preservation for wilderness and the essential need to keep [nonconforming uses] out of it.” *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061-62 (9th Cir. 2003) (en banc).

B. The activities proposed are not the *minimum necessary* for administering the areas as Wilderness and as a Wild River.

Demonstrating the proposed action is necessary for administering the areas is not sufficient on its own. The Forest Service must also demonstrate that it is authorizing only the minimum necessary for administering the area. The Forest Service has not demonstrated that the proposed activities are “*necessary* to meet *minimum requirements* for the administration of the area,” 16 U.S.C. § 1133(c) (emphasis added), and that “the information sought is *essential* for wilderness management and alternative methods or locations are not available,” FSM 2323.37 (emphasis added). Such a requirement is expressly stated in the Wilderness Act. See 16 U.S.C. 1133(c); *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1037 (9th Cir. 2010) (An agency authorizing activity generally prohibited by the Wilderness Act must find the action is both necessary and implemented *only to the extent necessary*.); see also *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004) (analyzing commercial packstock permitting in wilderness under Section 1133(d) of the Wilderness Act and finding the preservation of Wilderness paramount, even when authorizing uses under special provisions). And the requirement is also part of the RONR Management Plan. Management Plan at 2-65 (prohibiting the “[l]anding of aircraft, or dropping or picking up any material, supplies or persons by means of an aircraft, including a helicopter, except at designated landing strips); see also *id.* (prohibiting motorized and mechanized uses unless consistent with Wild and Scenic Rivers Act and necessary for administration of the area), *id.* at 2-75-78 (discussing research in Wilderness and the Wild and Scenic River corridor and noting that research not dependent upon those areas will be directed to areas outside and helicopter use outside of public airstrips should be considered only when other methods are not possible). *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (citing *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (exceptions to a rule must be construed narrowly to preserve the primary operation of the general rule).

The proposed action does not demonstrate that the action cannot be taken outside of Wilderness or outside of the Wild River corridor.

Assuming the project is necessary inside of the protected areas, which does not appear to be the case, the proposed action does not detail why non-motorized alternatives are not possible.

Assuming motorized activities are necessary, which does not appear to be the case, the proposed action does not detail why existing landing areas cannot be utilized.

The proposed action does not detail why telemetry tracking devices are necessary, the extent to which they are necessary and how they will be used, how long they will remain on the animals and degrade wilderness character, how their data will be utilized, and how they will be retrieved.

In sum, when reading the PA and the bighorn plans, it becomes evident this proposal is not the minimum necessary for various reasons:

- The bighorn plans point to other factors that could be limiting bighorn numbers. They include competition with elk, disease transmission from mountain goats, and invasive annual grasses.
- The PA avoids any mention of negative consequences from this proposal to bighorn sheep and downplays any potential impact to Wilderness by suggesting short-term motorized use is okay.
- The PA fails to recognize that collars are installations.
- The bighorn numbers in the Lower Salmon River PMU seem to be increasing.
- While speculation on the number of sheep that an area could possess is rampant in the bighorn plans, there is no solid data on range condition and trend. Thus, IDFG goals for increasing populations may not be possible under current vegetative conditions.
- There is a desire to expand this collaring elsewhere in the Wilderness, so this is just a first step, and cumulative impacts will be ignored.
- The fact that only the north half of the river is open for this study, and not places like the area around the confluence of the South Fork and Main Fork Salmon Rivers on the Payette or the west facing slopes in the Salmon Canon on the Payette is a telling omission.
- Aside from the PA eliminating ground-based collaring, which apparently netted 15 bighorns, there is no consideration of alternatives, which are explored later under NEPA. This includes collaring and testing outside of Wilderness.

All of these factors must be considered before the Forest Service takes the extraordinary step of authorizing multiple prohibited activities in three protected areas. As discussed below, the complexity of this issue, the highly controversial nature of this issue, and the multiple threatened violations of federal law mandate a thorough and public analysis through an Environmental Impact Statement.

NEPA

The proposed action is likely to cause significant direct, indirect, and cumulative impacts and is likely part of a larger ongoing monitoring and management project. It will certainly be a bigger project in Wilderness if the IDFG intends to implement its current and draft bighorn plans as currently written. The Forest Service must take a hard look at this project through an Environmental Impact Statement (“EIS”) and rigorously explore reasonable alternatives that would not offend the Wilderness Act.

The EIS is NEPA's core requirement. Environmental concerns must be “integrated into the very process of agency decisionmaking” and “interwoven into the fabric of agency planning.” *Andrus v. Sierra Club*, 442 U.S. 347, 350-351 (1979). NEPA directs federal agencies to prepare a detailed Environmental Impact Statement (“EIS”) for federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The purpose of an EIS is two-fold: 1) to ensure that the agency will have available and will carefully consider detailed information on significant environmental impacts when it makes decisions, and 2) to “guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989).

The project proposal indicates the Forest Service expects to use a categorical exclusion to authorize the project. The Forest Service may rely on a “categorical exclusion” for certain minor actions to avoid the need to prepare an EA or EIS. 40 C.F.R. § 1501.4. These are defined as “categories of actions that normally do not have a significant effect on the human environment.” 40 C.F.R. § 1501.4(a). If the agency determines a categorical exclusion covers a proposed action, it must then “evaluate the action for extraordinary

circumstances in which a normally excluded action may have a significant effect” and therefore instead require the preparation of an environmental assessment or environmental impact statement. 40 C.F.R. § 1501.4(b). In this case, an EIS is required.

A. The Forest Service is allowing IDFG to unlawfully segment its project.

The PA does not disclose that this is part of a larger plan to capture and collar sheep in the contiguous PMUs for various reasons, including disease, as documented in the attached bighorn plans. Further, the bighorn plans show that other native herds exist in other population management units (PMUs).

The Forest Service has not indicated how IDFG’s study will provide statistically meaningful data on health status, survival, migration trends, and causes of mortality, nor has it indicated why ongoing testing will not be required. The project as proposed is a one-time sampling and collaring of 35 sheep, 20 of them within the two Wildernesses. The PA does not provide any information or citation as to why this is an effective sample size and project duration other than simply stating that IDFG apparently considers this an effective sample. The PA also neglects to mention that 15 sheep were captured, collared, and tested in the Lower Salmon River PMU in 2020 and that 74 sheep were collared between 2007 and 2012.⁹ Why are 50 collars (15 extant plus 35) sufficient but not 30 (15 extant plus 15 proposed outside of Wilderness)?

The previously captured 15 sheep are billed “as part of a pilot study” that presumably includes this current proposal. See the Draft Idaho Bighorn Sheep Management Plan 2022 to 2027 at 123. The Draft also calls for capture and radio collaring for disease testing and other purposes in contiguous PMUs. These include the already mentioned Lower Panther Main Salmon, Selway, Middle Fork, Middle Main Salmon, and East Fork Salmon PMUs, all of which contain, in whole or part, Wilderness.¹⁰

What this means for disease is simple. These contiguous populations apparently intermix as evidenced by a disease outbreak in the 1990s that affected all of them, with the possible exception of the Selway unit for which there is little data. Thus, this project is connected to future actions that IDFG will undoubtedly propose.

IDFG data for counts in this unit show an increasing trend from 2011 to 2019 from 285 to 418 bighorns. There appears to be no current threat to these bighorns and therefore no need to do the action. Populations have, in the past, gone up and down. This is a naturally occurrence in all wildlife populations, with or without disease.

A federal court has already found similar segmentation of IDFG wildlife projects unlawful. The court found a helicopter-assisted elk collaring and sampling project unlawful where the Forest Service analyzed and authorized only 1 year of what was likely to be a 10-year elk mortality study by IDFG. See *Wilderness Watch v. Vilsack*, 229 F.Supp.3d 1170, 1176, 1180 (Dist. Id. 2017). The Forest Service must accurately disclose and assess the full scope and duration of this project.

B. The use of a categorical exclusion is unlawful.

A categorical exclusion is unlawful in this case because the category used is not applicable to the proposed action and because extraordinary circumstances render the use of a categorical exclusion unlawful.

The categorical exclusion detailed at 36 CFR 220.6(d)(8) is a categorical exclusion for “[a]pproval, modification, or continuation of minor, short-term (1 year or less) special uses of National Forest System lands” and includes examples of annual, intermittent use by outfitter and guides, apiary use, and gathering of forest products for personal use. The proposed action in this case does not fit within the category of actions contemplated by the categorical exclusion. See *Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 990 (9th Cir.

⁹ The question of whether any of this occurred in Wilderness is germane. IDFG illegally collared wolves in the Frank Church-River of No Return Wilderness, which were outside of the permitted area for elk collaring.

¹⁰ In addition to the River of No Return, this includes the Selway-Bitterroot, Cecil D. Andrus-White Clouds, Hemingway-Boulders, and James McClure-Jerry Peak Wildernesses.

2020) (“the clear inference ... is that other examples should be similar in character to the examples provided.”).

Additionally, extraordinary circumstances render the application unlawful. “Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or EIS” include Congressionally designated areas, such as wilderness, and Forest sensitive species. 36 C.F.R. § 220.6(b)(1). “The degree of the potential effect of a proposed action on these resource conditions ... determines whether extraordinary circumstances exist.” *Id.* § 220.6(b)(2).

Here, the Forest Service’s authorization would impact two designated Wildernesses and a Wild River corridor as well as a Forest sensitive species. The authorization would include a high intensity of activities normally prohibited in Wilderness to facilitate a wildlife population manipulation project, with speculative and uncertain scope and impact, that fundamentally undermines the Wilderness Act’s “untrammeled” mandate. *See* 16 U.S.C. § 1131 (a). Congress prohibited helicopter landings and electronic installations in Wilderness precisely because those activities degrade wilderness character. *Id.* (Wilderness Act enacted to “assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas ... leaving no lands designated for preservation and protection in their natural condition”), § 1133(c) (prohibiting the landing of aircraft and the use installations); *see also High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (rejecting use of a categorical exclusion for wilderness-degrading activities).

Further, the Forest Service should be fully aware that its authorization threatens violations of federal law given its history with similar project authorizations in Idaho. *See Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F.Supp. 2d 1264, 1270 (“[T]he next helicopter proposal in the Frank Church [RONR] Wilderness will face a daunting review ... The Forest Service must proceed very cautiously here because the law is not on their side if they intend to proceed with further helicopter projects in the Frank Church Wilderness.”); *Wilderness Watch v. Vilsack*, 229 F.Supp.3d 1170 (D. Idaho 2017) (finding an IDFG helicopter-assisted elk collaring project authorization in the RONR Wilderness in violation of the Wilderness Act and NEPA, finding that the Forest Service had unlawfully allowed IDFG to segment a larger project to avoid full consideration of impacts, and finding the presence of cumulative impacts and impacts to a Wilderness area necessitated preparation of an EIS rather than an EA).

Other factors likewise render this project significant, including its precedential value (alone and in conjunction with increasing helicopter-assisted wildlife project authorizations in Wilderness) and the controversial nature of the project and its impacts.

A directive from the Regional Office regarding Wilderness and CEs (April 28, 1997) notes that, “We should start our project analysis thinking at the EA level and go from there. . . . In my view, using a CE for projects in Wilderness will be the exception rather than the rule.” This relates to ALL projects, not just those that use methods generally prohibited in Wilderness. It includes trail project done with hand tools.

Additionally, in response to another helicopter-assisted wildlife project in Montana, several current and retired Forest Service officials recently wrote a letter to Regional Forester Marten expressing concern over the growing use of categorical exclusions to approve normally prohibited activities in Wilderness. *See* Letters from McAllister et al. to Leanne Marten, Regional Forester, and John Slown, Environmental Coordinator (regarding a 2021 project proposal). They called the use of a categorical exclusion in such cases both illegal and unethical and noted that the Forest Service’s previous position was that CEs for wilderness work were the exception, particularly when motorized uses were involved. They also expressed concern that the informal and internal Minimum Requirements Decision Guide (MRDG) process may be used by the agency to circumvent NEPA and noted,

One of us was instrumental in the original development of that MRDG document. It was NEVER intended to replace NEPA. In fact, it was intended to inform the appropriate NEPA document by

helping to establish the purpose and need for the project and give a resource specialist a jump off point for alternative development. To jump straight to a CE is suspicious that it was intended to rush the project and reduce the public's opportunity to comment.

*Id.*¹¹

If a CE can be used to exempt generally prohibited activities inside a designated Wilderness, then the Forest Service could argue that no project ever would need an EA or EIS, regardless of how much it violates Wilderness. This is simply a way to administratively de-designate the Wilderness System.

Furthermore, the use of CEs to approve nonconforming uses/exceptions inside the Wilderness is not acceptable. Wilderness is a special place. Prohibiting a review of important agency decisions, and most of them are important inside designated Wilderness, defeats the "open review" policy of NEPA and provides a gaping loophole through which a deciding officer can simply "declare insignificance" and avoid public scrutiny. That is certainly not the intent of NEPA, the Wilderness Act, or agency regulations on those statutes.

As discussed throughout this comment, the Forest Service would authorize activities generally prohibited under the Wilderness Act and the Management Plan for the RONR Wilderness, specifically multiple helicopter overflights and landings and the installation of GPS tracking collars. The Forest Service is considering these authorizations without demonstrating that the proposed action is necessary to meet minimum requirements for administration of the area, without disclosing limitations about the validity of data from a one-time project or the need for additional projects, without disclosing why the data is necessary (e.g. disclosing what resulting management actions could be taken to preserve wilderness character, the efficacy of that range of actions, and the actions' ultimate compatibility with wilderness administration), without disclosing the need for such activities within Wilderness and the Wild River corridor, and without disclosing and taking a "hard look" at project impacts to wilderness character and disturbance impacts to wildlife as required by NEPA. Again, a CE won't even do the cursory analysis of an EA.

C. The failure to analyze and disclose alternatives is unlawful.

The PA does not include an analysis of reasonable alternatives in an EA or an EIS because the Forest Service is unlawfully categorically excluding the project from full NEPA review. NEPA requires the agency to "evaluate reasonable alternatives" to its proposed action that would minimize adverse environmental impacts. 40 C.F.R. § 1502.14(a); *see W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) ("The existence of a viable but unexamined alternative renders an EA inadequate.") (quoting *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)). Relatedly, the agency must articulate the proposed action's "purpose and need" broadly enough to allow consideration of all reasonable alternatives. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999).

Aside from completing the project outside of Wilderness and the Wild River corridor, and aside from the alternative actions already described in the sections above, there are alternatives the Forest Service could and must consider. The following examples would not alleviate all of our concerns, but they do show that other options could be considered:

- Doing any work from boats and ground along the river corridor. While not preferred, aerial spotting could coordinate with those on the ground. Again, it would not alleviate concerns over collaring, and

¹¹ The project website provides no Minimum Requirements Decision Guide analysis. It seems that this will be used to justify the lack of adequate NEPA analysis, when completed after public comment is over. This is a way for the Forest Service to evade both the requirements of the Wilderness Act and NEPA.

might involve overhead flying, but not landing, but it would not involve the heavy-handed helicopter capture, landings and transporting animals.

- Using inholdings along the river for baiting. Bighorns are captured this way in Whiskey Mountain in Wyoming. Again, it would not alleviate concerns over collaring, but it would not involve the heavy-handed helicopter landings and transport.

The Forest Service must consider reasonable alternatives to the proposed action that would eliminate or significantly lessen impacts to the environment, wilderness character, and the unique qualities of the Wild River corridor.


CONCLUSION

For the above reasons, Wilderness Watch requests that the Forest Service either deny authorization for the proposed action within Wilderness and the Wild River corridor or prepare an Environmental Impact Statement that takes a hard look at the above-described direct, indirect, and cumulative impacts and fully explores alternatives that would not offend the Wilderness Act and the Management Plan for the RONR Wilderness. This EIS should give ample opportunity for comment well before a decision is made.

If the project were to occur outside of Wilderness and the Wild and Scenic River corridor, the concerns addressed herein would be alleviated. It may still need NEPA analysis with an EA, but it would be less controversial.

Please keep the undersigned apprised of all actions and decisions associated with this proposal.

Sincerely,



Gary Macfarlane
Board Member
Wilderness Watch
PO Box 9175
Missoula, MT 59807
and
Ecosystem Defense Director
Friends of the Clearwater\PO Box 9241
Moscow, ID 83843

-and for-

Larry Campbell
Conservation Director
Friends of the Bitterroot
PO Box 442
Hamilton, MT 59840

Mike Garrity
Executive Director
Alliance for the Wild Rockies
PO Box 505
Helena, MT 59624