

Before the U.S. Forest Service

# **Petition to Prohibit Aerial Gunning of Wolves on Idaho's National Forests**



Photo: Doug Smith, National Park Service

Authored by:

Center for Biological Diversity

On Behalf of Petitioners

November 28, 2023

*Via Email and Certified U.S. Mail*

November 28, 2023

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Dear Regional Forester Farnsworth and Forest Supervisors,

The Center for Biological Diversity, Western Watersheds Project, and International Wildlife Coexistence Network (“Petitioners”) formally petition the United States Forest Service to prohibit aerial gunning – shooting from helicopters and airplanes – and other predator control by private contractors on Idaho’s national forests. We petition pursuant to the First Amendment of the U.S. Constitution<sup>1</sup> and the Administrative Procedure Act (“APA”),<sup>2</sup> and in accordance with the APA’s implementing regulations.<sup>3</sup>

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<sup>1</sup> “Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.” U.S. Const. Amend. I. The right to “petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights.” *United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967). The Supreme Court has recognized that the right to petition is logically implicit in and fundamental to the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

<sup>2</sup> 5 U.S.C. § 553(e).

<sup>3</sup> 43 C.F.R. §§ 14.2, 14.3, 14.4.

The Idaho Wolf Control Board recently approved proposals that allocate more than \$140,000 to hire private contractors to use aerial gunning and other methods to kill wolves on federal lands and private property in the state. Several of the proposals explicitly provide for predator control on grazing allotments on national forests. The enumerated “game management units” overlap several national forests in Idaho, including the Caribou-Targhee National Forest, Boise National Forest, Salmon-Challis National Forest, Sawtooth National Forest, and Payette National Forest.

This Petition requests that the Forest Service exercise its authority to protect wildlife, public safety, recreational interests, and wilderness values by issuing an order or promulgating regulations that ban aerial gunning and other predator control by private contractors on Idaho’s national forests. Should the Forest Service fail to respond to this Petition in a timely manner, Petitioners may pursue relief in federal court.<sup>4</sup>

Thank you for considering our Petition and we look forward to your timely response.

Respectfully submitted,



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<sup>4</sup> Many of Petitioners’ members use Idaho’s national forests for wildlife watching and other recreational pursuits and are thus “interested persons” within the meaning of the APA. *See* 5 U.S.C. § 553(e) (granting any “interested person the right to petition for the issuance, amendment, or repeal of a rule”); *see also id.* §§ 702, 551(13) (providing that “agency action” includes “the whole or a part of an agency rule, ... or the equivalent or denial thereof, or failure to act” and that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof”); *id.* §§ 706(1), 706(2)(A) (granting a reviewing court the authority to “compel agency action unlawfully withheld or unreasonably delayed” and/or to “hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

## I. SUMMARY OF REQUESTED ACTION

This Petition respectfully requests that the U.S. Forest Service use its legal authority to ban aerial gunning and other predator control by private contractors to protect wildlife, public safety, recreational interests, and wilderness values on Idaho's national forests.

## II. AERIAL GUNNING APPROVED BY THE IDAHO WOLF DEPREDATION CONTROL BOARD

### **Idaho Wolf Depredation Board**

The Idaho Wolf Depredation Control Board is tasked with directing and managing funds for the purpose of wolf killing within the State of Idaho.<sup>5</sup> Idaho State Code § 22-5306. With annual expenditures since 2018 exceeding \$600,000, the Board has ongoing cooperative agreements with APHIS Wildlife Services and Idaho Department of Fish and Game for wolf control that purportedly benefits livestock and wild ungulates like elk.<sup>6</sup>

In October, the Board voted to allocate over \$140,000 to private contractors to provide for aerial gunning and other killing of wolves in the following game management units ("GMUs") in Idaho: 21, 21a, 22, 23, 24, 25, 28, 32, 32a, 34, 36b, 43, 44, 45, 48, 49, 59, 60, 60a, 62, 65, 66, 66a, 67 and 76.<sup>7</sup>

As further explained below, three of the five proposals include aerial gunning operations and other wolf killing by Predator Control Corp. on grazing allotments on federal land, as well as private land.<sup>8</sup> A proposal from livestock operators in Lemhi County requests "trapping, hunting and any other legal means" on grazing allotments on the Salmon-Challis National Forest.<sup>9</sup>

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<sup>5</sup> *Idaho Wolf Depredation Control Board*. <https://wolfboard.idaho.gov/> (last accessed Nov. 22, 2023); Idaho Wolf Depredation Control Board. (n.d.). *WDCB Brief: Topics of Interest*.

<sup>6</sup> Idaho Wolf Depredation Control Board. (n.d.). Performance Report.

<sup>7</sup> Idaho Wolf Depredation Control Board. (2023, Oct. 26). Meeting Agenda.

[https://wolfboard.idaho.gov/wp-content/uploads/2023/09/IWDCB\\_Agenda\\_Oct26-2023-with-Livestream-Info.pdf](https://wolfboard.idaho.gov/wp-content/uploads/2023/09/IWDCB_Agenda_Oct26-2023-with-Livestream-Info.pdf); Western Watersheds Project. (2023, Nov. 6). *Idaho poised to hire private contractor to shoot wolves from aircraft*. <https://westernwatersheds.org/2023/11/idaho-poised-to-hire-private-contractor-to-shoot-wolves-from-aircraft/> ("WWP 2023").

<sup>8</sup> Proposal from Dennis Hunzeker (2023) (applying to the Board for \$29,000 for aerial gunning and trapping by Predator Control Corp. on private property and USFS grazing allotments) ("Hunzeker Proposal"); Proposal from Jeff Siddoway (2023) (applying to the Board for \$38,000 for aerial gunning and trapping by Predator Control Corp. on private property and USFS and BLM grazing allotments) ("Siddoway Proposal"); Proposal from John Faulkner and John Peavey (2023) (applying to the Board for \$49,250 for aerial gunning and trapping by Predator Control Corp. on private property and USFS and BLM grazing allotments) ("Faulkner & Peavey Proposal").

<sup>9</sup> Proposal from five livestock operators in Lemhi County, Idaho (Sept. 11, 2023) ("Lemhi County Proposal").

The two proposals that do not name Predator Control Corp. request wolf killing on private land in Lemhi and Valley Counties, even though “[t]here have not been any confirmed depredations on applicants’ property this calendar year.”<sup>10</sup>

The proposals that the Board recently approved request contracts with work this winter and set to expire next summer. At the time of filing this petition, Petitioners do not have documentation of the actual contracts.

### **Aerial Gunning**

Aerial gunning occurs when gunners use airplanes or helicopters to chase an animal – often to exhaustion – and then shoot it. A video of a private hunter using a helicopter to gun down coyotes in New Mexico is available at the link in the footnote below.<sup>11</sup>

Idaho State Department of Agriculture authorizes numerous private operators to kill canids like coyotes and wolves from aircraft each year. In 2023, the agency authorized over 20 private operators to kill hundreds of coyotes and foxes and unlimited numbers of wolves, according to a recent report from the agency. For example, in January to June of this year, Alpine Aviation received authorization to kill 1800 coyotes and foxes, with no limits on wolves.<sup>12</sup>

Inclement weather, dense vegetation, and rough terrain limit when predator controllers use aerial gunning (Wade 1976<sup>13</sup>; APHIS-Wildlife Services 2019<sup>14</sup>). It often occurs in winter when trees lack leaves and snow cover improves visibility (APHIS Wildlife Services 2019).

Fixed-wing aircraft are generally used in flat or gently rolling terrain, whereas helicopters, which have better maneuverability, can be used over rugged terrain and brushy or timbered areas. As such, helicopters are considered more versatile than airplanes for aerial gunning (APHIS Wildlife Services 2019).

The low-level flights needed for aerial gunning introduce hazards such as colliding with power lines and trees (APHIS-Wildlife Services 2019, at 6). Additionally, the safety margin for error is much smaller compared to high-level flights used in general aviation.

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<sup>10</sup> Proposal from Davis Cattle Company in Valley County, Idaho (Sept. 14, 2023) (“Valley County Proposal”); Lemhi County Proposal.

<sup>11</sup> Nada Grande Outdoors. (2018, Dec. 23). *Aerial gunning for coyotes*. <https://www.youtube.com/watch?v=eqaLI3tTSow>

<sup>12</sup> Idaho Department of Agriculture, *2024 Report of Private Airborne Control Activity Authorized by the Idaho State Department of Agriculture* (2023).

<sup>13</sup> Wade, D. A. (1976). The Use of Aircraft in Predator Control. *Proceedings of the 7<sup>th</sup> Vertebrate Pest Conference*, 48. <https://digitalcommons.unl.edu/vpc7/48>.

<sup>14</sup> USDA-APHIS-Wildlife Services. (2019). The Use of Aircraft in Wildlife Damage Management. In *Human Health and Ecological Risk Assessment for the Use of Wildlife Damage Management Methods*. [https://www.aphis.usda.gov/wildlife\\_damage/nepa/risk\\_assessment/5-aircraft-use-peer-reveiwed.pdf](https://www.aphis.usda.gov/wildlife_damage/nepa/risk_assessment/5-aircraft-use-peer-reveiwed.pdf)

## **Predator Control Corporation**

Three of five proposals<sup>15</sup> to the Board were presented by Trevor Walch, who operates the Predator Control Corp.<sup>16</sup> According to a “Vendor Info Sheet” submitted by the company, Predator Control Corp. operates out of Evanston, Wyoming, with nine full-time employees and five aircraft.<sup>17</sup>

Last year, the Idaho Department of Agriculture permitted Predator Control Corp. to conduct aerial gunning operations in Idaho. That permit expired on June 30, 2022.<sup>18</sup> It is unclear whether the state has issued a subsequent permit.

According to public records obtained by Petitioners, Mr. Walch has reportedly violated numerous state wildlife protection laws in Nevada.<sup>19</sup>

Draft minutes from the Nevada Board of Wildlife Commissioners’ Meeting<sup>20</sup> indicate that Mr. Walch reached a plea deal in 2019 for selling furs without a trapping license. That was Walch’s fourth trapping violation in five years.

As reported by the local media, game wardens observed Walch’s traps for several months and documented traps left unattended for up to 13 days.<sup>21</sup> Under Nevada state law, trappers are required to check their traps every 96 hours.<sup>22</sup>

The Chief Game Warden for Nevada, Tyler Turnipseed, called Walch’s activity, “blatant illegal behavior,” that “resulted in several animals dying in traps because the trapper didn’t check the traps on time.” According to the Warden, Walch’s failure to check the traps contributed to the deaths of an elk calf, a yearling deer, and three coyotes.<sup>23</sup>

State and federal officials also investigated Predator Control Corp. operations in Wyoming. Specifically, records received by Wyofile documented a federal investigation following

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<sup>15</sup> Hunzeker Proposal; Siddoway Proposal; Faulkner & Peavey Proposal.

<sup>16</sup> Predator Control Corporation. (n.d.). Key Personnel; *Predator Control Corporation*. <https://predatorcontrol.pro/> (last accessed Nov. 22, 2023).

<sup>17</sup> Predator Control Corporation. (n.d.). Vendor Information Sheet.

<sup>18</sup> Idaho State Department of Agriculture. (2022, Feb. 22). Airborne Control Permit for Predator Control Corporation.

<sup>19</sup> Email from Jason Jackson, Nevada Dept. of Wildlife, to Katherine Oelrich, IDFG, re: Trevor Walch (Jan. 21, 2022)

<sup>20</sup> Nevada Board of Wildlife Commissioners. (2019, Jan. 25-26). Meeting DRAFT Minutes. <https://www.ndow.org/wp-content/uploads/2021/11/05-NBWC-Jan-25-and-26-2019-Draft-Minutes.pdf>

<sup>21</sup> Spillman, B. (2015, June 11). Elko man admits illegal elk, deer and coyote killings. *Reno Gazette Journal*, <https://www.rgj.com/story/life/outdoors/2015/06/11/elko-man-admits-illegal-elk-deer-coyote-killings/71098550/>.

<sup>22</sup> NAC § 503.152(2).

<sup>23</sup> Spillman (2015).

allegations that several county boards in Wyoming hired private contractors, including Predator Control Corp., to target wolves through aerial gunning on federal lands in Wyoming in 2019 and 2020.<sup>24</sup> The documents included allegations that the private contractors allowed members of the county boards and family members to join the aerial gunning operations “because it is a lot of fun.”<sup>25</sup>

In response to that investigation, the Wyoming offices for law enforcement of the U.S. Forest Service, U.S. Fish and Wildlife Service, and Bureau of Land Management sent a letter to Mr. Walch notifying him that he had not received the requisite authorizations from the Forest Service or the BLM to conduct aerial gunning on federal lands in Wyoming, and thus that any such operations would violate federal law, including the Federal Airborne Hunting Act and federal land management agency regulations.<sup>26</sup>

A staff biologist at the Idaho Department of Fish and Game identified these and other concerns with Predator Control Corp. and shared them by email to others at the agency several times over the last few years.<sup>27</sup> Nevertheless, as noted above, the Idaho Department of Agriculture issued an airborne hunting permit to Predator Control Corp. in 2022.<sup>28</sup>

### **III. THE AERIAL GUNNING LIKELY TO OCCUR ON FEDERAL LANDS IN IDAHO**

The following GMUs are included in the new proposals approved by the Idaho Wolf Depredation Control Board: 21, 21a, 22, 23, 24, 25, 28, 32, 32a, 34, 36b, 43, 44, 45, 48, 49, 59, 60, 60a, 62, 65, 66, 66a, 67 and 76. Five national forests managed by the U.S. Forest Service encompass large land areas that occur within these GMUs, where the Board authorized aerial gunning and other predator control, including the Caribou-Targhee National Forest, Sawtooth National Forest, Boise National Forest, Salmon-Challis National Forest, and Payette National Forest. The GMUs and national forests are pictured in the maps below.<sup>29</sup>

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<sup>24</sup> U.S. Department of the Interior, U.S. Fish and Wildlife Service Office of Law Enforcement. (2020-2021). Investigation: Wyoming County Predator Boards – Aerial Hunting (Case # 2020600359), Investigation Reports #001-006 (Jan. 21, 2020 - June 28, 2021). Available at: <https://wyofile.com/wp-content/uploads/2022/01/USFWS-Aerial-hunting-investigation.pdf>

<sup>25</sup> *Id.* at 5.

<sup>26</sup> Letter from U.S. Fish and Wildlife Service, U.S. Forest Service, and Bureau of Land Management to Trevor Charles Walch, Predator Control Corporation, re: Airborne Hunting Act Violations (Dec. 22, 2020).

<sup>27</sup> Emails from Katherine Oelrich, IDFG, re: Producer Proposals (Oct. 25, 2023); Email from Katherine Oelrich, IDFG, to Tricia Hebdon, IDFG, re: Predator Control Corporation (Apr. 5, 2022); Email from Ryan Blain, IDFG, to Katherine Oelrich and Martha Wackenhut, IDFG, re: Predator Control Corporation (Dec. 7, 2021).

<sup>28</sup> ISDA Airborne Control Permit for Predator Control Corporation.

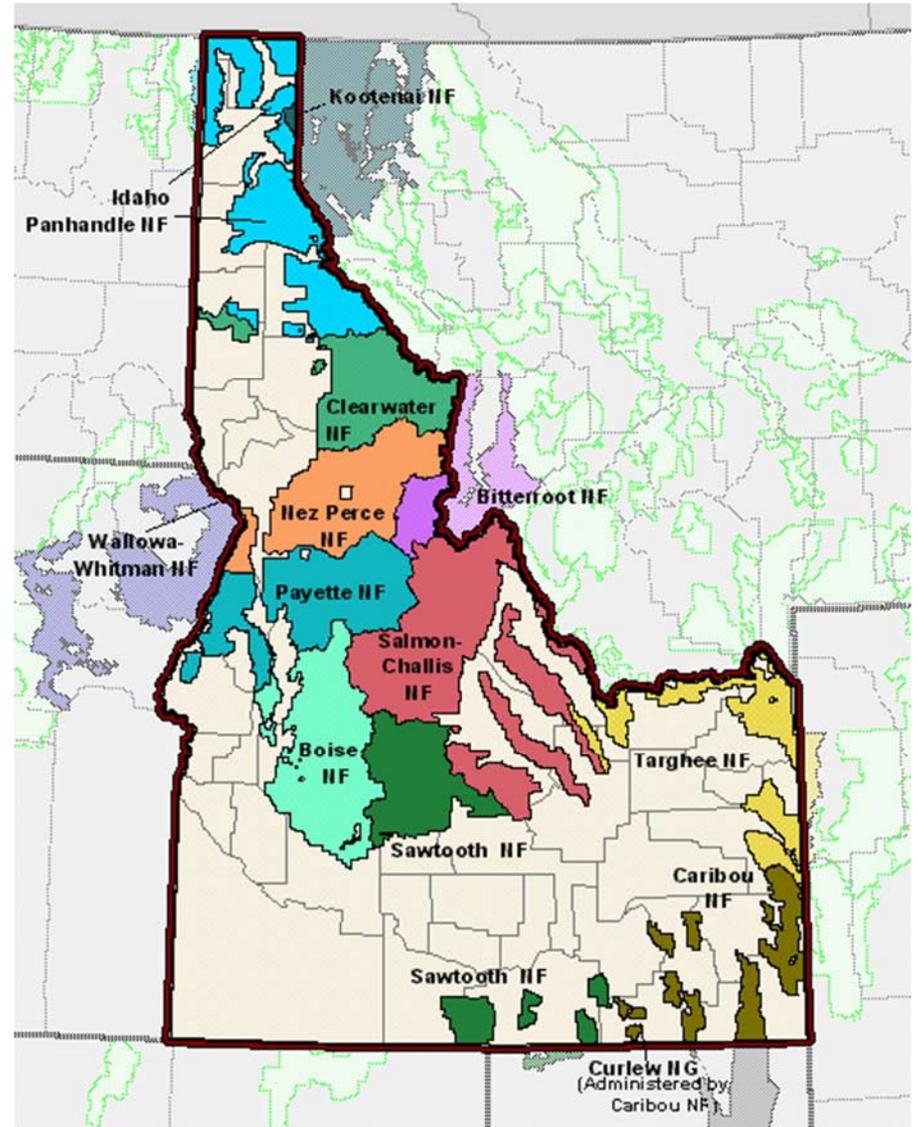
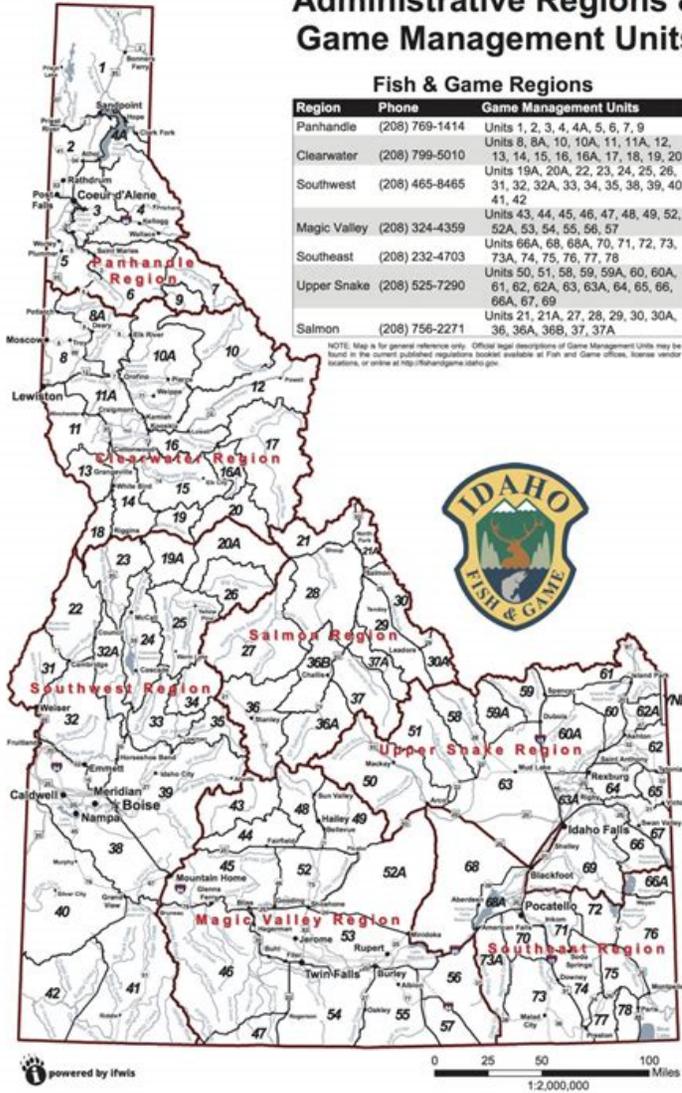
<sup>29</sup> U.S. Forest Service. *Schedule of Proposed Actions – Idaho*. <https://www.fs.usda.gov/sopa/state-level.php?id> (last accessed Nov. 22, 2023)

## Administrative Regions & Game Management Units

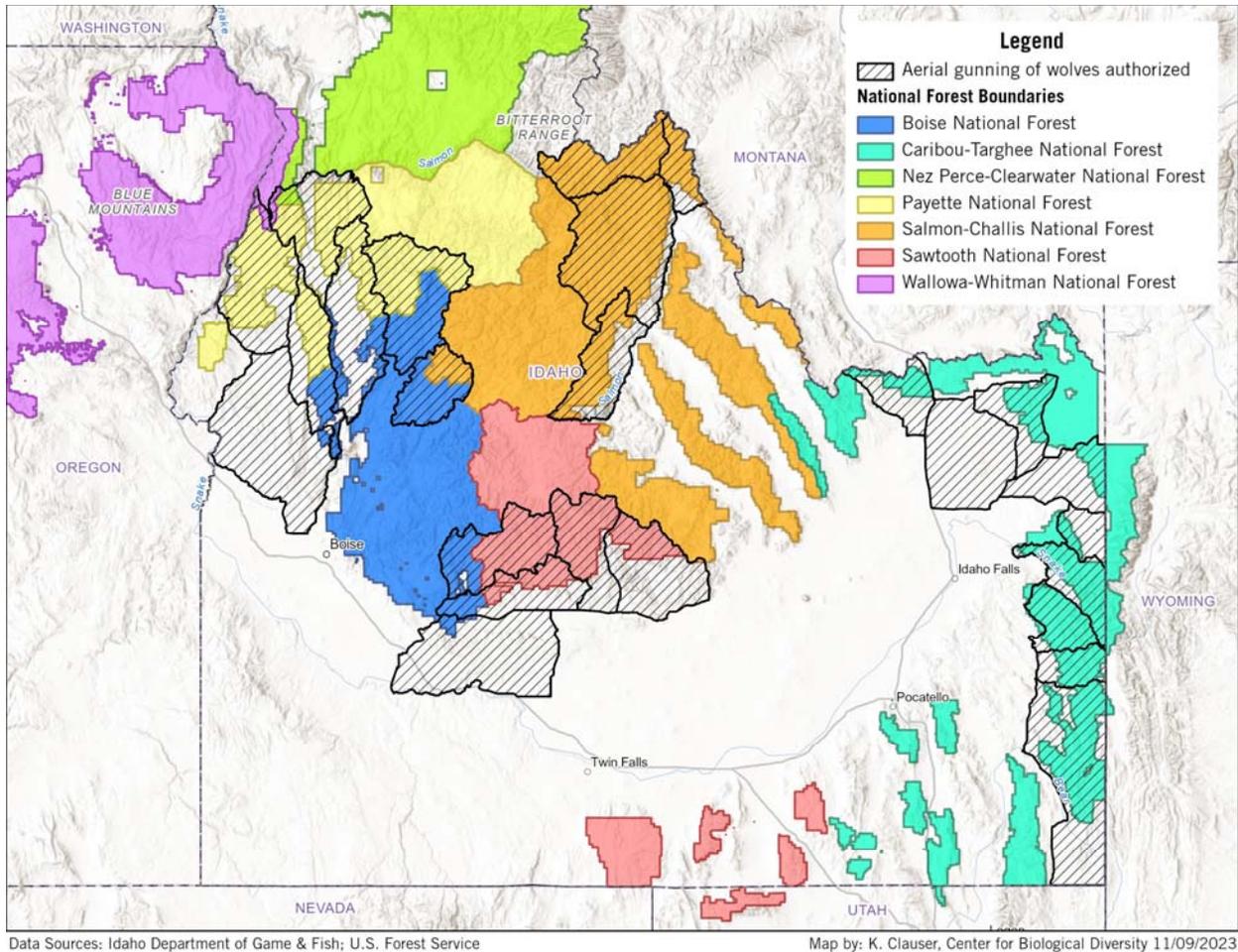
### Fish & Game Regions

Region	Phone	Game Management Units
Panhandle	(208) 769-1414	Units 1, 2, 3, 4, 4A, 5, 6, 7, 9
Clearwater	(208) 799-5010	Units 8, 8A, 10, 10A, 11, 11A, 12, 13, 14, 15, 16, 16A, 17, 18, 19, 20
Southwest	(208) 465-8465	Units 19A, 20A, 22, 23, 24, 25, 26, 31, 32, 32A, 33, 34, 35, 38, 39, 40, 41, 42
Magic Valley	(208) 324-4359	Units 43, 44, 45, 46, 47, 48, 49, 52, 52A, 53, 54, 55, 56, 57
Southeast	(208) 232-4703	Units 66A, 68, 68A, 70, 71, 72, 73, 73A, 74, 75, 76, 77, 78
Upper Snake	(208) 525-7290	Units 50, 51, 58, 59, 59A, 60, 60A, 61, 62, 62A, 63, 63A, 64, 65, 66, 66A, 67, 69
Salmon	(208) 756-2271	Units 21, 21A, 27, 28, 29, 30, 30A, 36, 36A, 36B, 37, 37A

NOTE: Map is for general reference only. Official legal descriptions of Game Management Units may be found in the current published regulations booklet available at Fish and Game offices, license vendor locations, or online at <http://fishandgame.idaho.gov>.



To better illustrate this, a GIS specialist at the Center for Biological Diversity overlaid Idaho’s national forests and the affected GMUs to create a new map that shows where aerial gunning (or other predator control authorized under the private contracts) is anticipated to occur on federal lands managed by the U.S. Forest Service:



The GIS specialist then calculated the acreage of each forest where aerial gunning can occur pursuant to the new contracts:

- Caribou-Targhee National Forest: 1,245,812 out of 3,077,464 acres (41%);
- Boise National Forest: 913,897 out of 2,526,862 acres (36%);
- Salmon-Challis National Forest: 1,509,442 out of 4,396,272 acres (34%);
- Payette National Forest: 1,230,253 out of 2,407,297 acres (51%);
- Sawtooth National Forest: 832,415 out of 2,190,130 acres (38%);
- Nez Perce-Clearwater National Forest: 24,488 out of 4,072,778 acres (0.6%); and
- Wallowa-Whitman National Forest: 33,325 out of 2,525,192 acres (1.3%).

It is Petitioners’ understanding that none of these Forests have specifically prohibited or authorized aerial gunning or predator control under existing orders or regulations.

#### IV. AERIAL GUNNING HARASSES AND DISRUPTS NON-TARGET WILDLIFE, INCLUDING FEDERALLY LISTED MAMMALS

Numerous studies have examined how low-level aircraft flights and their associated noises impact wildlife. The National Park Service (1995)<sup>30</sup> reviewed studies on the effects of aircraft overflights on wildlife. According to the report, some species will show adverse responses to even minor overflight occurrences, and it is possible to draw the conclusion that impacts to wildlife populations are occurring.

More recently, APHIS Wildlife Services surveyed the science when preparing a report on the environmental impacts of its aerial gunning operations (APHIS Wildlife Services 2019). Much of the research on the impacts of aircraft draws upon the vast body of literature regarding noise impacts more generally on wildlife (e.g., Shannon et al. 2015)<sup>31</sup>.

The impacts from low-level flights depend on the species, as well as the altitude, duration, and frequency of the flights, habituation of the individual animals, and availability of cover. Most large mammalian terrestrial species will respond to stimulus from overhead by a fright response, either fleeing or attempting to hide. If the aircraft approaches closely, a hidden animal may flush from cover to flee (APHIS Wildlife Services 2019, at 15). So, effects may range from a simple awareness of the aircraft to a flight response resulting in physiological changes (such as increased stress and energetic demands) and displacement from an area (USFS & USFWS 2009).

##### **Grizzly Bears**

The grizzly bear (*Ursus arctos horribilis*) is a subspecies of the brown bear found in North America.<sup>32</sup> In 1975, the grizzly bear was listed as threatened species in the lower-48 states under the Endangered Species Act.<sup>33</sup>

The International Grizzly Bear Committee has summarized studies documenting a wide variety of reactions by grizzly bears to aircraft disturbance.<sup>34</sup> The Committee found that grizzly bears react strongly to both fixed-wing aircraft and helicopters (ICGB 1987, at 71). It explains that bears have been observed fleeing aircraft at distances as far as one mile away.

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<sup>30</sup> National Park Service. (1995). *Report of effects of aircraft overflights on the National Park System* (U.S Dept. Interior-NPS D-1062).

<sup>31</sup> Shannon, G., et al. (2015). A synthesis of two decades of research documenting the effects of noise on wildlife. *Biological Reviews* 91(4), 982-1005, <https://doi.org/10.1111/brv.12207>.

<sup>32</sup> U.S. Fish & Wildlife Service. (2021). *Grizzly Bear in the Lower-48 States* (*Ursus arctos horribilis*) *5-Year Status Review: Summary and Evaluation*, at 3 (“5-Year Status Review”).

<sup>33</sup> Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975).

<sup>34</sup> Interagency Grizzly Bear Committee. (1987). *Grizzly Bear Compendium*. National Wildlife Federation. Available at: <https://archive.org/details/grizzlybearcompe1987lefr/mode/lup>.

The U.S. Fish and Wildlife Service and the U.S. Forest Service developed joint guidance to determine when helicopter use may affect grizzly bears.<sup>35</sup> According to the guidance, low-altitude helicopter flights (less than 500 meters) generally “may affect” grizzly bears, and multiple low-altitude flights over two days may generally “adversely affect” the federally listed bears (USFS & USFWS 2009).

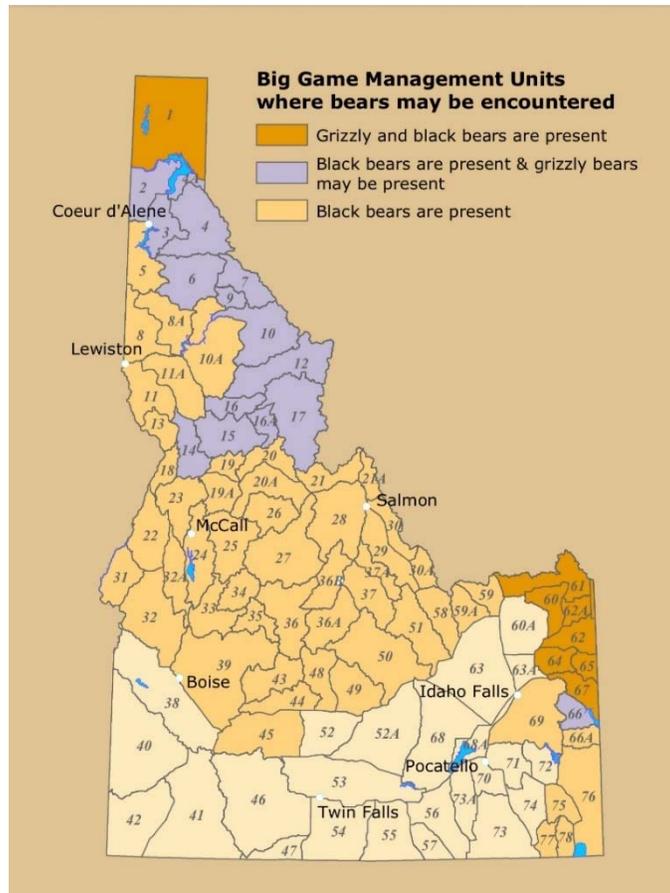
The federal agencies’ report explains that disturbance of grizzly bears during denning can cause abandonment of dens (USFS & USFWS 2009, at 2). Aerial gunning routinely occurs in the winter, while grizzly bears are denning.

Grizzly bears are found within several of the GMUs where aerial gunning may occur. The Idaho Department of Fish and Game has prepared the map below showing where grizzly bears may be most likely encountered in Idaho.<sup>36</sup>

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<sup>35</sup> U.S. Forest Service, U.S. Fish and Wildlife Service, Montana/Northern Idaho Level I Terrestrial Biologists Team. (2009). *Guide to Effects Analysis of Helicopter Use in Grizzly Bear Habitat*. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5336905.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5336905.pdf)

<sup>36</sup> Idaho Department of Fish and Game. (2020). *How to Hunt Safely in Grizzly Bear Country*. <https://idfg.idaho.gov/sites/default/files/brochure-2020-hunting-in-grizzly-bear-country.pdf>; see also U.S. Fish and Wildlife Service. (2022). *Grizzly bear species list area map*. <https://www.fws.gov/media/grizzly-bear-species-list-area-map> (last updated July 26, 2022).



Grizzly bears are found on the Caribou-Targhee National Forest in Idaho, which is part of the Greater Yellowstone Recovery Zone.<sup>37</sup> The Land and Resource Management Plan for the Targhee National Forest provides direction to conserve the Forest’s grizzly bears.<sup>38</sup>

Grizzly bears may also be encountered in the Salmon-Challis National Forest, which is within the Bitterroot Recovery Zone.<sup>39</sup> The Bitterroot Recovery Zone is not yet known to have a breeding population of grizzly bears.

<sup>37</sup> U.S. Fish and Wildlife Service. (2023). *Grizzly Bear Recovery Program 2022 Annual Report*, at 3 (“2022 Annual Report”).

<https://www.fws.gov/sites/default/files/documents/2022%20GBRP%20Annual%20Report.pdf>.

<sup>38</sup> U.S. Forest Service, Targhee National Forest. (1997). *1997 Revised Forest Plan – Targhee National Forest*. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd1063782.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1063782.pdf). The U.S. Forest Service acknowledges that grizzly bears use the Forest and has issued a food storage order to prevent conflicts. U.S. Forest Service, Caribou-Targhee National Forest, Teton Basin, Ashton/Island Park and DuBois Ranger Districts. (2010, Jan. 29). *Occupancy and Use: Food Storage* (Order No. 04-15-117).

[https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd891594.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd891594.pdf)

<sup>39</sup> 2022 Annual Report at 12; U.S. Forest Service, Salmon-Challis National Forest. *Be Bear Aware-Recreating Safely in Bear Country*. <https://www.fs.usda.gov/detail/scnf/learning/safety->

Historically, grizzly bears were much more widespread, and they are slowly returning to these habitats, which include other national forests impacted by the Board’s recently approved proposals.

### **Canada Lynx**

The Canada lynx (*Lynx canadensis*) is another federally protected species found in Idaho that could be harmed by aerial gunning and other predator control. The Canada lynx has been listed as “threatened” since 2000.<sup>40</sup> It is closely tied to its primary prey, the snowshoe hare, and occurs primarily in boreal spruce-fir forests.<sup>41</sup>

The rare cat has been documented in numerous national forests, including in the Boise National Forest,<sup>42</sup> Caribou-Targhee National Forest,<sup>43</sup> Sawtooth National Forest,<sup>44</sup> Payette National Forest,<sup>45</sup> and the Salmon-Challis National Forest,<sup>46</sup> which have a large overlap with GMUs open to aerial gunning and other predator control by private contractors.

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[ethics/?cid=stelprdb5297910](#) (last accessed Nov. 21, 2023) (“The black bear is the generally the only bear found in this area. However, it is possible to encounter a grizzly bear on the Salmon-Challis National Forest.”).

<sup>40</sup> U.S. Fish and Wildlife Service. (2017). *Species Status Assessment for the Canada lynx (Lynx canadensis) Contiguous United States Distinct Population Segment* (Version 1.0).

<https://ecos.fws.gov/ServCat/DownloadFile/213244>.

<sup>41</sup> 65 Fed. Reg. 16,053 16086 (Mar. 24, 2000)

<sup>42</sup> U.S. Forest Service, Bureau of Land Management. (2002). *Northern Rockies Lynx Amendment Update*. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5160810.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5160810.pdf) (documented on the Boise National Forest, where they were not known to occur at the time of the 1999 national surveys).

<sup>43</sup> U.S. Forest Service. *Targhee National Forest Lynx Analysis Units*.

<https://www.fs.usda.gov/project/ctnf/?project=40275> (last accessed Nov. 22, 2023) (explaining that the Targhee portion has “lynx analysis units”).

<sup>44</sup> U.S. Forest Service, Sawtooth National Forest. *Nature & Science*.

<https://www.fs.usda.gov/main/sawtooth/learning/nature-science> (last accessed Nov. 22, 2023);

U.S. Forest Service, Payette National Forest. (2008, Apr. 17). *Biological Assessment of the Potential Effects of Managing the Payette National Forest on the Canada Lynx (threatened), Main Salmon Southwest Section 7 Watershed, Volume 2 – Ongoing and New Actions*, at 6.

[https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fswdev3\\_006797.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fswdev3_006797.pdf) (summarizing lynx records on the Payette National Forest).

<sup>45</sup> U.S. Forest Service, Payette National Forest. *2008 Forest Monitoring Reports*.

<https://www.fs.usda.gov/detail/payette/landmanagement/planning/?cid=stelprdb5139278>

(contains a lynx analysis unit)

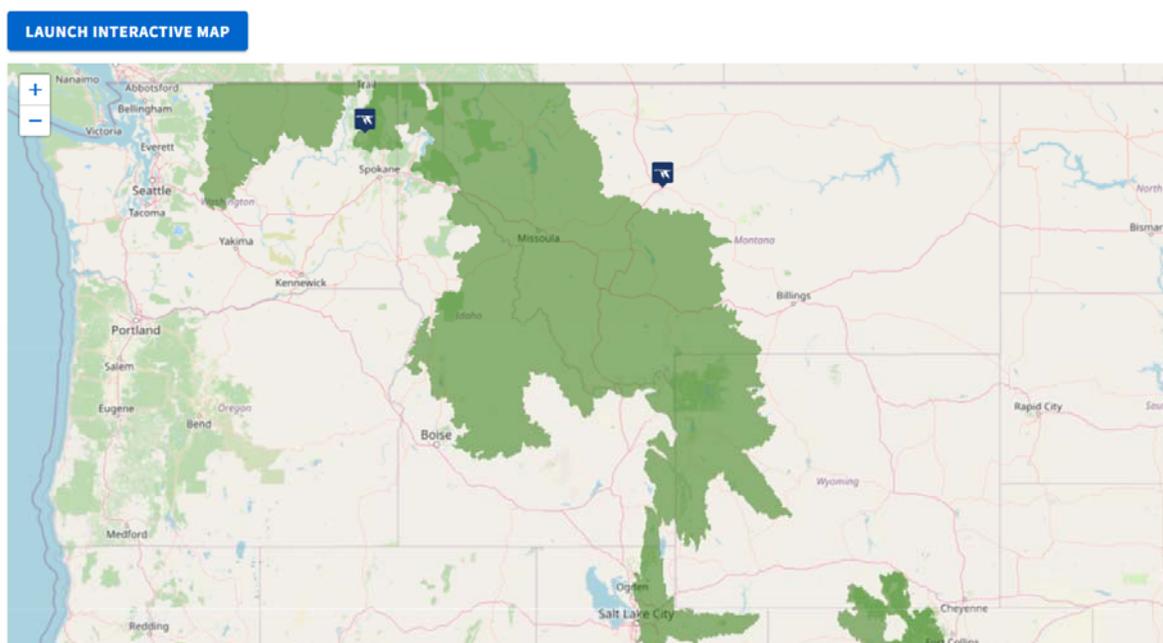
<sup>46</sup> Landers, R. (2012, Jan. 31). Canada Lynx Sighted on Salmon-Challis National Forest. *The Spokesman Review*. <https://www.spokesman.com/blogs/outdoors/2012/jan/31/canada-lynx-sighted-salmon-challis-national-forest/>

The impact of noise on Canada lynx appears to be poorly studied. Scientists assume, however, that a lynx would experience a “startle response” to loud noises and habitat avoidance as the result of loud continuous noises (AMEC Americas Limited 2005<sup>47</sup>).

Canada lynx prefer forested and higher elevation areas that are less likely to be the focus of aerial gunning operations, although they are likely vulnerable to disturbance from aircraft and gunfire when dispersing or otherwise moving through open corridors connecting these areas.

Canada lynx can also be captured or killed in traps set by predator controllers, as their vulnerability to trapping is well documented.<sup>48</sup>

Pasted below is a screenshot<sup>49</sup> of the areas in Idaho where the U.S. Fish and Wildlife Service considers that lynx may be present.



## **Wolverine**

The North American wolverine (*Gulo gulo luscus*) is the largest terrestrial member of the weasel family (Mustelidae), and it resembles a small bear with a bushy tail. A federal court ordered the U.S. Fish and Wildlife Service to make a final decision on whether to list the wolverine by the

<sup>47</sup> AMEC Americas Limited. (2005). *Mackenzie Gas Project – Effects of Noise on Wildlife*, at 4-1. <https://www.nrc.gov/docs/ML1430/ML14308A108.pdf>.

<sup>48</sup> U.S. Fish and Wildlife Service. (2013). Chapter III. Canada Lynx Biological Opinion. In *Endangered Species Act Section 7 Consultation – Biological Opinion on the Revised Forest Plan for the Idaho Panhandle National Forests*, at III-13 (01EIFW00-2013-F-0331). [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5436546.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5436546.pdf).

<sup>49</sup> U.S. Fish and Wildlife Service. *Canada Lynx*. <https://www.fws.gov/species/canada-lynx-lynx-canadensis> (last accessed Nov. 22, 2023).

end of November 2023. 87 Fed. Reg. 71,557 (Nov. 23, 2022). As of November 27, 2023, the date Petitioners finalized this Petition, the Fish and Wildlife Service had not yet listed the wolverine but is expected to do so.

The wolverine is an elusive and rare species, but it has been documented across in many Idaho counties (IDFG 2023<sup>50</sup>). All the national forests impacted by the aerial gunning proposals have wolverine habitat (IDFG 2014<sup>51</sup>). Several national forests in Idaho, including the Caribou-Targhee National Forest (Spokesman Review 2006<sup>52</sup>) and Boise National Forest (FWS 2023<sup>53</sup>), have recent observations of wolverines.

The susceptibility of wolverines to disturbance from low-flying aircraft has not been well studied, although one study documented individual responses that included running away and hiding (AMEC Americas Limited 2005<sup>54</sup>).

Wolverine can also be captured or killed in traps set by predator controllers. The Fish and Wildlife Service has numerous reports of incidental captures of wolverines in Idaho (FWS 2023).

#### **IV. PUBLIC SAFETY AND RECREATIONAL IMPACTS FROM AERIAL GUNNING IN IDAHO'S NATIONAL FORESTS**

Since 2018, more than 21 million people have visited the national forests of the Intermountain U.S. Forest Service region for recreation.<sup>55</sup> Recreation activities available to visitors include hiking, camping, bicycling, swimming, boating, rock climbing, horse riding, winter sports, fishing, hunting, and more.<sup>56</sup>

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<sup>50</sup> Idaho Department of Fish and Game, *Wolverine* (2023), <https://idfg.idaho.gov/species/taxa/17557>.

<sup>51</sup> Idaho Dept. of Fish and Game, *Management Plan for the Conservation of Wolverines in Idaho 2014–2019* (2014), at 14, <https://idfg.idaho.gov/old-web/docs/wildlife/planWolverine.pdf>.

<sup>52</sup> The Spokesman-Review, *Study shows wolverines travel hundreds of miles* (March 19, 2006) <https://www.spokesman.com/stories/2006/mar/19/study-shows-wolverines-travel-hundreds-of-miles/>.

<sup>53</sup> U.S. Fish and Wildlife Service, *Species Status Assessment Addendum for North American Wolverine (*Gulo gulo luscus*)* (2023), at 38, <https://ecos.fws.gov/ServCat/DownloadFile/241046>.

<sup>54</sup> AMEC Americas Limited, *Mackenzie Gas Project Effects of Noise on Wildlife* (2005), <https://www.nrc.gov/docs/ML1430/ML14308A108.pdf> (citing AXYS 1998)).

<sup>55</sup> U.S. Forest Service. (2023). *National Visitor Use Monitoring Survey Results National Summary Report*, at 12, <https://www.fs.usda.gov/sites/default/files/2022-National-Visitor-Use-Monitoring-Summary-Report.pdf>.

<sup>56</sup> See e.g., U.S. Forest Service, Caribou-Targhee National Forest. *Recreation*. <https://www.fs.usda.gov/recmain/ctnf/recreation> (last accessed Nov. 22, 2023).

Access to recreation is an important part of the U.S. Forest Service’s mission and is fundamental to the administration of each national forest.<sup>57</sup> In fact, it is the policy of Congress that national forests be administered for outdoor recreation.<sup>58</sup>

The sounds and sights of aerial gunning operations would disturb most recreational visitors to the national forests. The impacts would be especially disturbing to people seeking quiet outdoor experiences, such as hiking, backcountry camping, backcountry skiing, and wildlife watching.

In addition to these negative impacts on recreational interests, aerial gunning comes with inherent public safety risks from the flights, as well as the use of firearms.

Low-level flights from helicopters and airplanes come with the risk of crashes (Wade 1976; APHIS Wildlife Services 2019). Accidents can be caused by “pilot error, mechanical failure, wildlife strikes (most bird strikes occur under 500 feet), and environmental conditions such as striking a tree or a power line, or the rapid onset of inclement weather like excessive cross-winds” (APHIS Wildlife Services 2019). In addition, the use of firearms from aircraft comes with the dangers of accidental discharge in the aircraft, which could also result in injuries or even a crash (APHIS Wildlife Services 2019).

Hazards for people on the ground would be most likely associated with a crash or gunfire (APHIS Wildlife Service 2019, at 5). Aerial gunning could also put visitors at risk of encountering fleeing or wounded animals.

The Board’s approval of private contractors exacerbates the risks of crashes and shootings, as well as the risks to pets and children from traps set by private predator controllers. Private contractors do not receive the training and certifications that APHIS Wildlife Services requires of its employees.<sup>59</sup>

For all these reasons, aerial gunning and other predator control on national forests by private contractors is a threat to public safety and enjoyment of the National Forest System.

## **V. AERIAL GUNNING AND OTHER PREDATOR CONTROL HAS NO LEGITIMATE PURPOSE ON NATIONAL FORESTS**

Aerial gunning and other predator control methods have no legitimate purpose on national forests in Idaho. As explained below, no evidence exists that predators are unnaturally suppressing ungulate populations or having significant impacts on livestock operations in the areas where the Board approved aerial gunning or other predator control.

As such, aerial gunning would be functionally equivalent to illegal recreational hunting from aircraft.

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<sup>57</sup> See U.S. Forest Service. (2019). *This Is Who We Are*.

<https://www.fs.usda.gov/sites/default/files/This-is-Who-We-Are.pdf>.

<sup>58</sup> 16 U.S.C. § 528.

<sup>59</sup> USDA-APHIS-Wildlife Services (2019), at i.

To begin, Idaho has abundant numbers of elk, with annual elk hunter harvest exceeding 20,000 for almost a decade now.<sup>60</sup> The deer and elk program coordinator for the Idaho Department of Fish and Game, Toby Boudreau, has stated that the state is “trending to more elk than we’ve ever seen in Idaho.”<sup>61</sup> Plus, predator control to boost populations of elk and other ungulates is inconsistent with modern principles of modern wildlife management, which recognize the importance of predator-prey relationships. Indeed, healthy predator populations maintain healthy prey populations by targeting old, sick, and diseased animals.

Wolf predations on livestock in Idaho are down for the third year in a row, according to APHIS Wildlife Services.<sup>62</sup> Very few livestock operators experience problems with wolves, and a tiny fraction of one percent of livestock that are killed in the state are killed by wolves.<sup>63</sup>

Moreover, aerial gunning and other lethal methods are inappropriate responses to any conflicts between predators and livestock operations that do occur. Science shows that:

1) Nonlethal methods are effective:

[N]onlethal methods of preventing depredation of livestock by large carnivores may be more effective, more defensible on ecological, legal, and wildlife-policy grounds, and more tolerated by society than lethal methods ....<sup>64</sup>

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<sup>60</sup> Idaho Department of Fish and Game. (2022, Aug. 19). Big game hunters should see good hunting in 2022 with a few exceptions. <https://idfg.idaho.gov/press/big-game-hunters-should-see-good-hunting-2022-few-exceptions>.

<sup>61</sup> *Id.*

<sup>62</sup> Cohen, R. (2023, Sept. 19). Wolf attacks on Idaho livestock down again. *Boise State Public Radio*. <https://www.boisestatepublicradio.org/news/2023-09-19/wolf-depredations-attack-idaho-livestock-fish-game>

<sup>63</sup> The Idaho Department of Fish and Game’s draft Idaho Gray Wolf Management Plan 2023-2028, at p. 24, Table 1, provides number of wolf-caused losses each year from 2015-2022. Averaged over these eight years, wolf-caused losses amount to 232 per year. The U.S. Department of Agriculture’s National Agricultural Statistics Service reports there are 4.61 million cattle and sheep in Idaho. Together, these reports show that, annually, 0.0055% of Idaho’s livestock are lost due to wolves. Idaho Department of Fish and Game. (2023). *DRAFT Idaho Grey Wolf Management Plan 2023-2028*. <https://idfg.idaho.gov/sites/default/files/02012023%20DRAFT%202023%20IDFG%20Wolf%20Management%20Plan.pdf>;

National Agricultural Statistics Service. (2023). *2022 State Agricultural Overview – Idaho*. [https://www.nass.usda.gov/Quick\\_Stats/Ag\\_Overview/stateOverview.php?state=IDAHO](https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=IDAHO) (last accessed Nov. 22, 2023)

<sup>64</sup> Treves, A., et al. (in press). Gold-standard experiments to deter predators from attacking farm animals. *Animal Frontiers*. Available at:

[https://faculty.nelson.wisc.edu/treves/pubs/CCL\\_RCTs\\_crossover\\_pre-proof.pdf](https://faculty.nelson.wisc.edu/treves/pubs/CCL_RCTs_crossover_pre-proof.pdf);

Bergstrom, B. J. (2017). Carnivore conservation: shifting the paradigm from control to

2) Killing predators is costly and ineffective in the long-term:

We reviewed literature investigating predator removal and focused on identifying successes and failures... Predator removal appeared to only be effective for the short-term, failing in the absence of sustained predator suppression. This means predator removal was typically an ineffective and costly approach to conflicts between humans and predators.<sup>65</sup>

3) Killing wolves and other predators sometimes exacerbates the conflicts:

Of those twelve, prevention of livestock predation was demonstrated in six tests (four non-lethal and two lethal), whereas counterintuitive increases in predation were shown in two tests (zero non-lethal and two lethal); the remaining four (one non-lethal and three lethal) showed no effect on predation.<sup>66</sup>

Plus, as the following map indicates, many of the areas where the Board authorized predator control do not have documented problems. In fact, the Idaho Wolf Depredation Control Board received applications for predator control from ranches without any recent wolf depredations on livestock (Blanchard 2023<sup>67</sup>).

The map below shows average wolf-caused livestock losses from 2018-2022 (IDFG 2023<sup>68</sup>, at 23). It shows that many of the GMUs, where the aerial gunning operations would occur, have had zero losses.

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coexistence. *Journal of Mammalogy*, 98(1), 1–6. <https://doi.org/10.1093/jmammal/gyw185>; see also Stone, S. A., et al. (2017). Adaptive use of nonlethal strategies for minimizing wolf-sheep conflict in Idaho. *Journal of Mammalogy*, 98(1), 33–44. <https://doi.org/10.1093/jmammal/gyw188>.

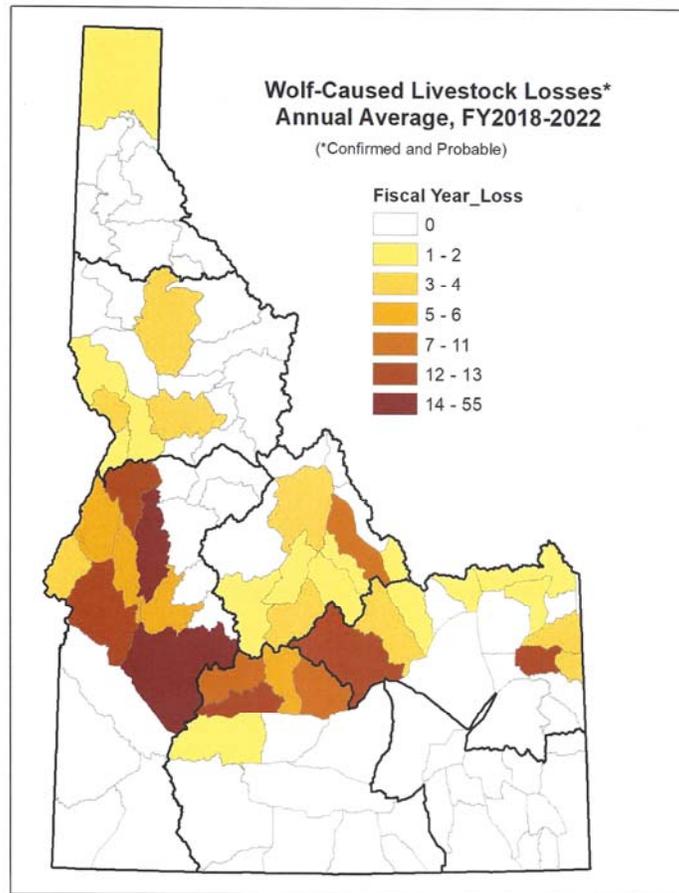
<sup>65</sup> Lennox, R. J., et al. (2018). Evaluating the efficacy of predator removal in a conflict-prone world. *Biological Conservation*, 224, 277–289. <https://doi.org/10.1016/j.biocon.2018.05.003>.

<sup>66</sup> Treves A., et al. (2016). Predator control should not be a shot in the dark. *Frontiers in Ecology and the Environment*, 14(7), 380–388. <https://doi.org/10.1002/fee.1312>.

<sup>67</sup> Blanchard, N. (2023, Nov. 16). Hunter applied to receive Idaho funds to kill wolves. Ranchers say they never signed on. *Idaho Statesman*.

<https://amp.idahostatesman.com/outdoors/article281505793.html> (“The two applications that were unaffiliated with Walch noted the ranches involved had no wolf depredations on livestock in the current year, though they had experienced wolf depredations in previous years.”); Lemhi County Proposal (“There have not been any confirmed depredations of animals in the area this calendar year.”); Valley County Proposal (“There have not been any confirmed depredations of animals in the area this calendar year.”).

<sup>68</sup> IDFG 2023, *DRAFT Idaho Grey Wolf Management Plan 2023-2028*.



The Wood River Wolf Project is a specific example of the effectiveness of nonlethal approaches. This Project, which includes GMUs 48 and 49, has been “successfully working directly with ranchers, sheepherders, and community members in Blaine County since 2008 to promote coexistence with wolves and prevent livestock losses.”<sup>69</sup> During the 2023 field season, no confirmed sheep losses to wolves occurred in the 1,200 km<sup>2</sup> area that contains 24,000 sheep (WWP 2023).

According to a media report, owners of two ranches involved in the Wood River Wolf Project “were unaware of the proposal [to the Board for aerial gunning and other predator control from private contractors, including Mr. Walch], did not want to contract with the board and had not agreed to partner with the predator control company” (Blanchard 2023). Those ranches have since asked to be withdrawn from the proposals to the Board.<sup>70</sup>

<sup>69</sup> WWP 2023

<sup>70</sup> Jones, E. (2023, Nov. 17). State gives thumbs-up to \$108K plan to shoot wolves. *Idaho Mountain Express*. [https://www.mtexpress.com/news/environment/state-gives-thumbs-up-to-108k-plan-to-shoot-wolves/article\\_0245bd14-84cc-11ee-a323-b33469a25156.html](https://www.mtexpress.com/news/environment/state-gives-thumbs-up-to-108k-plan-to-shoot-wolves/article_0245bd14-84cc-11ee-a323-b33469a25156.html)

It appears that the Board may have allocated funds for aerial gunning and other predator control that will enrich some private contractors without providing any legitimate public benefit. Without adequate justification, such killing of ecologically important wolves and other predators should not be allowed on national forests in Idaho.

## **VI. UNJUSTIFIED AERIAL GUNNING VIOLATES FEDERAL LAW**

Because the Board's aerial gunning program does not serve to protect wildlife or livestock, it is essentially recreational hunting with the aid of aircraft. If so, this would violate the Federal Airborne Hunting Act, which prohibits states from authorizing the use of aircraft for sport hunting. 16 U.S.C. § 742j-1; 50 C.F.R. § 19.31 ("States may not issue permits for the purpose of sport hunting.").

States may, however, issue permits to protect wildlife or livestock if they comply with the statute's reporting requirements. 16 U.S.C. § 742j-1(b); 50 C.F.R. § 19.31 (providing that states may "issue permits to persons to engage in airborne hunting or harassing of wildlife for purposes of administering or protecting land, water, wildlife, livestock, domestic animals, human life or crops"); *see also* 50 C.F.R. § 19.12 (providing exceptions to the Federal Airborne Hunting Act for federal or state employees/agents or permitted persons); Idaho State Code § 22-102(a) (authorizing the director of the Idaho Department of Agriculture to issue such permits).

State permits do not supersede, or authorize the violation of, other laws designed for the conservation of wildlife, "except to the extent that airborne hunting is authorized by regulations or permits issued under authority of those laws." 50 C.F.R. § 19.3 (Relation to other laws). In other words, aerial gunning operations – even if a state issues a permit exempting the operations from the Federal Airborne Hunting Act – do not supersede relevant prohibitions in regulations promulgated by the federal land management agencies, like the Forest Service, unless a federal agency specifically authorizes such aerial gunning.

Importantly, the Forest Service has not authorized private contractors to conduct aerial gunning on the National Forest System. In fact, the Forest Service Manual ("FSM") requires that the Forest Service "rely upon APHIS or the state agencies" for predator control. FSM 2650.3.<sup>71</sup>

Plus, aerial gunning appears to contradict regulations governing the management of national forests. For example, the Forest Service prohibits operating aircraft and other motor vehicles in a way that unreasonably disturbs wildlife. 36 C.F.R. § 261.15(h) (prohibiting motor vehicle use "which damages or unreasonably disturbs the land, wildlife, or vegetative resources"). Aerial

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<sup>71</sup> U.S. Forest Service. Forest Service Manual ("FSM") 2650 (effective May 4, 1995). Available at: <https://www.fs.usda.gov/im/directives/fsm/2600/2650.txt>. A similar restriction applies to lands administered by the BLM ("Only APHIS or the State or local government organization with which APHIS has a contractual agreement is authorized to conduct or approve ADC activities on BLM-administered lands"). Bureau of Land Management. BLM Manual 6830 – Animal Damage Control, at 6830.06(F) (effective Aug. 4, 1988). Available at: <https://www.blm.gov/sites/blm.gov/files/6830.pdf>. Unauthorized use is considered trespass. 43 C.F.R. § 2920.1-2.

gunning could also occur in areas where people would be impacted by gunfire or associated noise, such as near campsites or other developed recreation areas. That would also violate federal regulations. 36 C.F.R. § 261.10(d) (prohibiting the discharge of firearms “in any manner or place whereby any person or property is exposed to injury or damage as a result in such discharge”); *id.* § 261.10(i) (prohibiting near occupied areas “any device which produces noise, such as ... motor or engine in such a manner and at such a time so as to unreasonably disturb any person”). Additionally, aerial gunning in semi-primitive non-motorized areas or wilderness areas would be contradictory to regulations and forest plan direction protecting such areas.

Moreover, if the Board’s approved aerial gunning operations violate the Federal Airborne Hunting Act, then they automatically also violate regulations governing the management of the National Forest System. 36 C.F.R. § 261.8 (prohibiting hunting and discharge of firearms “to the extent Federal or State law is violated”).

These federal laws make clear that aerial gunning should not occur on lands administered by the Forest Service unless specifically authorized and regulated by the agency.

## **VI. LEGAL AUTHORITY FOR BANNING AERIAL GUNNING IN IDAHO’S NATIONAL FORESTS**

The Forest Service has ample legal authority to prohibit aerial gunning and other predator control in Idaho’s national forests in the name of protecting endangered species, public safety, wilderness, and recreational interests.

### **A. The Federal Land Policy and Management Act and Forest Service Regulations Provide Authority to Regulate Aerial Gunning**

Under the Federal Land Policy and Management Act of 1976 (“FLPMA”), the Forest Service (and the Bureau of Land Management) may “designate areas of public land ... in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.” 43 U.S.C. § 1732(b).

As explained above, aerial gunning is a hunting practice that includes risks of harming public safety. Additionally, the Forest Service, as a federal land management agency, must manage the National Forest System consistent with “applicable law.” *Id.* These laws include the Endangered Species Act, the National Forest Management Act (“NFMA”), the Multiple Use Sustained Yield Act (“MUSY”), and the Wilderness Act, which are discussed further below.

As such, FLPMA authorizes the Forest Service to close Idaho’s national forests to aerial gunning and other predator control to promote public safety, conserve endangered species, further recreational interests, and protect wilderness values, consistent with the agency’s duties under the ESA, NFMA, MUSY, and the Wilderness Act.

Regulations promulgated by the Forest Service provide additional authority for banning aerial gunning and other predator control on Idaho’s national forests. Each Regional Forester has the

authority to prohibit, by regulation, acts “within all or any part of the area over which he has jurisdiction,” for the purpose of protecting “threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish, or special biological communities” and for public safety.<sup>72</sup>

Additionally, each Regional Forester and Forest Supervisor may “issue orders which close or restrict the use” of areas over which they have jurisdiction.<sup>73</sup> The Regional Forester or Forest Supervisor may do so “by applying any or all of the prohibitions authorized.”<sup>74</sup> Prohibitions on hunting and other gun use are explicitly authorized by regulation. 36 C.F.R. § 261.58(m) (“Discharging a firearm, air rifle, or gas gun.”); *id.* § 261.58(v) (“Hunting or fishing.”). Orders that prohibit the use of aircraft or other motor vehicles are also authorized by regulation. 36 C.F.R. § 261.56 (“Use of vehicles off National Forest System roads”); *id.* § 261.2 (defining “vehicle” to encompass aircraft).

Thus, the Forest Service, through the Regional Forester and Forest Supervisors, has the power to promulgate regulations and issue orders to end aerial gunning in Idaho’s national forests.

## **B. The Endangered Species Act Creates Duty to Conserve Listed Wildlife**

A ban on aerial gunning would be consistent with the Forest Service’s duty to conserve endangered species under the Endangered Species Act.

Section 7(a)(1) of the ESA confers an affirmative duty on all federal agencies to conserve all species listed as threatened or endangered. The ESA mandates that federal agencies “utilize their authorities in furtherance of the purposes” of the ESA “by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1).

Under the ESA, “conserve” means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3). Courts have held that this mandate requires the agency to “do far more than merely avoid the elimination of protected species.”<sup>75</sup> Rather, it imposes an “affirmative duty to increase [their] population.”<sup>76</sup>

Additionally, under the ESA and its regulations, it is illegal to “take” listed species. 16 U.S.C. §§ 1538(a)(1)(B), 1533(d); 50 C.F.R. § 17.40(b)(1)(i)(A). “Take,” under the ESA, means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any

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<sup>72</sup> 36 C.F.R. § 261.70(a).

<sup>73</sup> *Id.* § 261.50(a).

<sup>74</sup> *Id.*

<sup>75</sup> *Defs. of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977); *see also Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998) (finding that ESA section 7(a)(1) required the U.S. Department of Agriculture to develop its own conservation program for listed species dependent on the Edwards aquifer).

<sup>76</sup> *Defs. of Wildlife*, 428 F. Supp. at 170.

such conduct.” 16 U.S.C. § 1532(19). By regulation, other than in specifically enumerated circumstances like self-defense or nuisance bears, the FWS has made it unlawful to take a grizzly bear and Canada lynx. 50 C.F.R. §§ 17.40(b), (k).

As explained above, use of low-flight aircraft may cause grizzly bears, Canada lynx and wolverine to flee, and traps pose a risk of capture or injury to the listed animals. As such, aerial gunning and other predator control in places where endangered species occur puts them at risk of harm and harassment – in direct contravention of the Act’s directive that all federal agencies further the purposes of the ESA by conducting programs that conserve protected species. It also risks “taking” listed species, in violation of the ESA and its implementing regulations.

As a land management agency, it is the Forest Service’s responsibility to conserve and protect threatened and endangered species. 16 U.S.C §§ 1531(c)(1), 1536(a)(1). The Forest Service must take action to do so by prohibiting aerial gunning and other predator control on Idaho’s national forests.

### **C. Aerial Gunning is Inconsistent with the National Forest Management Act, the Multiple Use Sustained Yield Act, and the Forest Service Manual**

NFMA charges the Forest Service with providing for a “diversity of plant and animal communities.”<sup>77</sup> Additionally, MUSY directs the Forest Service to manage the national forests “so that they are utilized in the combination that will best meet the needs of the American people.”<sup>78</sup> It asserts a policy that national forests be “established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>79</sup>

Pursuant to these statutory responsibilities, the Forest Service has adopted numerous policies in the Forest Service Manual. In direction specific to animal damage management, the Manual requires that “National Forest System resources” “be adequately protected during animal damage management activities authorized by the states and conducted by the states ....” FSM 2650.3.

Again, the Manual does not allow predator control by private contractors. *Id.* (requiring Forest Service employees to “[r]ely upon APHIS or the state agencies to provide the expertise and conduct predator control on National Forest System ....”). For this reason alone, the Forest Service should take a stand against the Board’s approval of proposals for aerial gunning and other predator control by private contractors on lands administered by the Forest Service, including Salmon-Challis National Forest, which is specifically named in one such proposal.<sup>80</sup>

Additionally, the Forest Service through its Manual has developed a policy to “[r]egulate [national forest] uses to the extent necessary to provide for user and public safety, ... minimize

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<sup>77</sup> 16 U.S.C. § 1604(g)(3)(b).

<sup>78</sup> 16 U.S.C. § 531(a).

<sup>79</sup> 16 U.S.C. § 528.

<sup>80</sup> Lemhi Proposal.

conflict and maximize responsible use.”<sup>81</sup> The Forest Service has established objectives to “[a]ddress public safety through utilization of appropriate risk management approaches.”<sup>82</sup> As the Forest Service has acknowledged in its manual, these and other statutes also grant the Forest Service the “authority to manage wildlife” on National Forest System lands.<sup>83</sup>

Accordingly, under MUSY’s and NFMA’s mandates and related Forest Service policy, the Forest Service is required to ensure that national forests may be utilized for wildlife and recreation and that public safety is promoted through risk management methods.

Allowing aerial gunning of wolves and other predator control is counter to these statutory mandates and Forest Service policy. Recreationists, backcountry campers, wildlife watchers, and others would be disturbed by the sound of aircraft and gunfire, which would be especially out of place in non-motorized areas. The sight of dead or wounded animals would be distressing to most forest visitors. Aerial gunning also puts national forest visitors at risk of being shot by gunners or hurt if an aircraft were to crash.

The Forest Service can address these unacceptable risks. By prohibiting private aerial gunning and other predator control, the Forest Service would better safeguard wildlife and recreation in Idaho’s national forests, in compliance with federal law and policy.

Additionally, Forest Service regulations require management consistency with direction in forest plans. 36 C.F.R. § 219.15. The regulations require that each plan contribute to the recovery of federally listed threatened and endangered species and maintain viable populations of existing native and desired non-native vertebrate species on the forest. 36 C.F.R. § 219.9(b) (2012); 36 C.F.R. § 219.19 (1982).

While some plans for Idaho’s national forests require cooperation on “animal damage” management with APHIS Wildlife Services,<sup>84</sup> none require that the Forest Service tolerate aerial gunning by private contractors. As explained above, the use of aerial gunning does not contribute

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<sup>81</sup> U.S. Forest Service. FSM 2350, at 2350.3 (effective Mar. 31, 2022). Available at: [https://www.fs.usda.gov/im/directives/fsm/2300/wo\\_2350-Amend%202022-1\\_updated.docx](https://www.fs.usda.gov/im/directives/fsm/2300/wo_2350-Amend%202022-1_updated.docx).

<sup>82</sup> U.S. Forest Service. FSM 2302 (effective Dec. 9, 2013). Available at: [https://www.fs.usda.gov/im/directives/fsm/2300/2300\\_zero\\_code.doc](https://www.fs.usda.gov/im/directives/fsm/2300/2300_zero_code.doc).

<sup>83</sup> U.S. Forest Service. FSM 2601, at 2601.1 (effective Oct. 22, 1991). Available at: [https://www.fs.usda.gov/im/directives/fsm/2600/2600\\_zero\\_code.txt](https://www.fs.usda.gov/im/directives/fsm/2600/2600_zero_code.txt). Considering such authority and responsibility, the court has found that “administration” of public lands “includes wildlife management.” *Alaska v. Andrus*, 429 F. Supp. 958, 962 (D. Ala. 1977). Thus, when a wolf-hunting program threatened a caribou herd on BLM land, the court held that FLPMA granted this agency “the power to halt the wolf hunt.” *Id.*

<sup>84</sup> U.S. Forest Service. (1988). Chapter IV – Forest Management Direction. In *Land and Resource Management Plan for the Salmon National Forest*, at IV-21. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5310596.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5310596.pdf); U.S. Forest Service. (2010). Chapter III – Management Direction. In *Land and Resource Management Plan for the Boise National Forest*, at III-26. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5394129.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5394129.pdf).

to the recovery of grizzly bears, Canada lynx, and wolverine. Further, some forest plans specifically identify the protection of gray wolf populations as an objective. Thus, the use of aerial gunning or other predator control on these forests may be contrary to their management plans and Forest Service regulations.

Further, Forest Service regulations also require integrated resource management for multiple uses in forest planning. 36 C.F.R. § 19.10(a) (2012). Specifically, forest plans must contain components that consider aesthetic values, ecosystem services, fish and wildlife species, habitat and habitat connectivity, recreation setting and opportunities, and wilderness, among others.

As explained in this Petition, aerial gunning and other predator control harms wildlife conservation and interferes with ecosystem services, such as predator-prey dynamics. It harms recreational opportunities and scenic qualities through the disturbance from the aircraft, gunfire, and associated noises. Moreover, it disrupts the natural and primitive character of designated wilderness areas. These problems appear to conflict with standards and guidelines for wildlife, recreation, and wilderness.

#### **D. Wilderness Act**

The Wilderness Act vests the Forest Service with the responsibility to preserve the wilderness character of wilderness areas in the National Forest System. 16 U.S.C. § 1133(b).

Numerous wilderness areas located in the national forests of Idaho now face an imminent threat of degradation caused by implementation of the aerial gunning and other predator control approved by the Board. Coordination of management of the Frank Church-River of No Return, for example, falls to Salmon-Challis National Forest,<sup>85</sup> where predator control might occur under the Board's approved proposals. The Hells Canyon Wilderness includes lands within the Payette National Forest<sup>86</sup> and the Hemingway-Boulders Wilderness lies partly within the Sawtooth National Forest,<sup>87</sup> where predator control might occur under the proposals.

The regulations and order requested by Petitioners are necessary to ensure that each of the affected wilderness areas will continue to function as "an area where the earth and its community of life are untrammelled by man," free of "commercial enterprise," as Congress intended. 16 U.S.C. §§ 1131(c), 1133(c).

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<sup>85</sup> U.S. Forest Service, Salmon-Challis National Forest. *Frank Church River of No Return Wilderness*. <https://www.fs.usda.gov/detail/scnf/specialplaces/?cid=stelprdb5360033> (last accessed Nov. 22, 2023).

<sup>86</sup> U.S. Forest Service, Wallowa-Whitman National Forest. *Hells Canyon Wilderness*. <https://www.fs.usda.gov/recarea/wallowa-whitman/recarea/?recid=79467> (last accessed Nov. 22, 2023).

<sup>87</sup> U.S. Forest Service, Sawtooth National Forest. *Hemingway-Boulders Wilderness*. <https://www.fs.usda.gov/recarea/sawtooth/recarea/?recid=82348> (last accessed Nov. 22, 2023).

## E. Preemption of State Game Laws

While both FLPMA and MUSY acknowledge the role of states in regulating wildlife within national forests, the Forest Service has the authority to preempt state laws and regulations. The Supremacy Clause, Article VI Section 2 of the U.S. Constitution, establishes that the Constitution and the federal laws of the United States are “the supreme Law of the Land,” and thus may supersede inconsistent state laws or regulations.<sup>88</sup> Case law has further established that federal agencies, acting under the authority delegated to them by Congress, may promulgate rules that preempt state laws and regulations.<sup>89</sup> Under case law, preemption by federal agencies must be consistent with a reasonable interpretation of the agency’s enabling act.<sup>90</sup>

The Forest Service Manual further delineates the agency’s ability to preempt state law and regulations, explaining that hunting on National Forest System lands is subject to State laws and regulations *unless*: (a) they conflict with federal laws, or (b) they would permit activities that “conflict with land and resource management responsibilities of the Forest Service or that are inconsistent with direction in forest plans.” FSM 2643.1.<sup>91</sup> The Manual further explains that the Forest Service must consider the impacts to listed species from animal damage management. FSM 2650.3.

In this case, the Board’s authorization of aerial gunning and other predator control likely conflicts with the ESA, the land and resource management responsibilities of the agency under NFMA, FLPMA, and MUSY, as well as the Wilderness Act.

As explained above, it is the Forest Service’s responsibility, to conserve listed species, and administer national forests for wildlife, outdoor recreation, and wilderness values, while protecting public safety.<sup>92</sup> Thus, the Forest Service has the authority to preempt any state authorization of aerial gunning or other predator control.

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<sup>88</sup> U.S. CONST., art. VI, § 2; Thompson Reuters. (2019). Preemption. In *Black’s Law Dictionary* (11th ed.).

<sup>89</sup> See e.g., *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860, 868 (10th Cir. 2019) (stating that “[l]ike Congress, a federal agency by way of congressional delegation of authority also may preempt state laws and regulations”).

<sup>90</sup> *Id.*

<sup>91</sup> U.S. Forest Service. FSM 2640 (effective Mar. 20, 1995), at 2643.1. Available at: <https://www.fs.usda.gov/im/directives/fsm/2600/2640.txt>. For example, in *Meister v. U.S. Dep’t of Agriculture*, the court found that gun hunting (authorized by the state game agency) was inconsistent with the direction in forest plans for the Huron-Manistee National Forests. 623 F.3d 363, 379 (6th Cir. 2010). Therefore, the Forest Service had the authority to close certain portions of the forest to hunting. *Id.* As the court stated: “The Service is charged with balancing competing uses of the Forests ... if that balance requires closure of certain areas to certain activities, Congress has granted the Service that authority. There is no lawful policy that ties the Service’s hands in this regard.” *Id.*

<sup>92</sup> 16 U.S.C. § 528.

## VII. PETITION FOR RULEMAKING

Pursuant to the Forest Service's authority to protect wildlife, recreational interests, wilderness, and public safety, Petitioners respectfully request that the Forest Service prohibit aerial gunning and other predator control by private contractors in national forests in Idaho. This prohibition could take the form of a regulation, adding to 36 C.F.R. § 261.74 as follows:

§ 261.74 Regulations applicable to Region 4, Intermountain Region [Reserved]

(a) Killing of wildlife from aircraft and other predator control is prohibited unless specifically authorized by the Forest Service.

Alternatively, the prohibition could take the form of an order, as follows:

Occupancy and Use Restrictions for the Caribou-Targhee National Forest, Boise National Forest, Salmon-Challis National Forest, Sawtooth National Forest, and Payette National Forest

Under authority of the Act of Congress of June 4, 1897, 16 U.S.C. § 551, and pursuant to the Secretary of Agriculture's Regulations set forth at 36 C.F.R. § 261.50, the following acts or omissions are prohibited on National Forest System airspace, lands, roads and trails in Idaho:

1. It is prohibited to conduct predator control or use aircraft to kill wildlife unless specifically authorized by the Forest Service. 36 C.F.R. §§ 261.58(m), (s), (v), (y).

## VIII. CONCLUSION

As detailed above, aerial gunning and other predator control by private contractors on Idaho's national forests would have serious and harmful impacts on wildlife and people. These impacts would impair the Forest Service's ability to administer Idaho's national forests for wildlife, public safety, recreation, wilderness, and other purposes.

For these reasons, we urge the Forest Service to expeditiously grant the Petition and prohibit aerial gunning and other predator control by private contractors in national forests in Idaho.

The Petition's supporting documents are available for download from this link:

<https://diversity.app.box.com/s/4jha111eb4euupbqgy477t2740vgupg8>

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