

INTRODUCTION

The exception in the Wilderness Act to allow the use of helicopters or other motorized equipment if necessary to meet the minimum requirement to administer the area for the purpose of preserving wilderness character is a strict one that courts have interpreted narrowly. Yet here, the Forest Service used a much lower threshold to allow the use of helicopters to collar wolves, demonstrating only that this project would “improve understanding” of wolves and their behavior, which could be “useful” to help manage wilderness and predator/prey relations.

By approving this lower threshold rather than requiring the agency to demonstrate that the use of helicopters to collar wolves is the **minimum required** to preserve wilderness character, as mandated under the Act, the Court has opened the door to use of prohibited vehicles and equipment for scores of research projects in wilderness. Man has influenced the ecology of most wilderness areas in some way, and under the Court’s preliminary injunction reasoning, any number of non-conforming activities could be justified under the guise of contributing to a better understanding of the natural ecology of the area that might be useful for management decisions. The agency must do more under the law. In order to use the exception in the Act, the agency must show that without the research, it will not be able to preserve wilderness character, and that the use of helicopters is necessary to obtain this information. The agency has not met that burden here.

There is no evidence in the record that predator prey relations are out of balance compared to some historic condition and need to be restored, or that the viability of the wolf population in the wilderness is threatened. In fact, the primary purpose of the project is not to restore some natural predator/prey dynamic but to manage the number of wolves to allow for a harvestable surplus of game animals for hunting purposes, as the State readily admits. Even if

the data collected on wolves could be useful or even beneficial, the Forest Service has not established that it is necessary for wilderness preservation. The broader standard used by the agency here to approve use of helicopters is contrary to the Wilderness Act and the caselaw interpreting it. The Court needs to close the loophole created in its preliminary injunction order by granting summary judgment to Plaintiffs on their third claim for relief.

The Forest Service's decision to use a CE for this project is also unlawful. Despite the limited size and scope of this project, numerous "intensity" factors still apply here, including the high degree of controversy over the effects of the project. In fact, the Forest Service determined in 2005 and 2006 that it must complete an EA for projects that were almost identical in size and scope due to the amount of public controversy those projects generated. It is arbitrary and capricious and violates NEPA to use a CE here when the project is not clearly limited in intensity.

ARGUMENT

I. PLAINTIFFS' THIRD CLAIM FOR RELIEF IS NOT MOOT.

The Forest Service and State of Idaho both argue that the Court should dismiss Plaintiffs' motion for summary judgment on their third claim for relief because that claim is moot now that the helicopter activities in the Frank Church Wilderness are completed and the special use permit terminated. *See FS Brief at 13-16 (Docket No. 45); State Brief at 3-4 (Docket No. 43).* The Court continues to have jurisdiction over this claim, however, because it falls within the exception to mootness for activities that are "capable of repetition, yet evading review."

Plaintiffs' complaint seeks not only injunctive relief on this claim but also a declaratory judgment that the Forest Service violated the Wilderness Act and NEPA by issuing the special use permit; and this request for a declaratory judgment is not moot. *See Amended Complaint*

Prayer For Relief ¶ II(A) (Docket No. 6); *Padilla v. Lever*, 463 F.3d 1046, 1049 (9th Cir. 2006) (holding that even though request for injunctive relief was moot, request for declaratory relief was not moot because it fell in the “capable of repetition yet evading review” exception); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002) (same).

The “capable of repetition, yet evading review” exception to the mootness doctrine occurs where “(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). The situation here satisfies both of these prongs.

First, the Ninth Circuit has repeatedly held that actions that are less than one or two years in duration meet the first prong of the exception because they are too short to proceed through full litigation. *Greenpeace Action*, 14 F.3d at 1329-30 (one year permit); *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003) (one year rule for fishing management); *Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d 851, 855 (9th Cir. 1999) (two year permit); *Padilla*, 463 F.3d at 1049-50 (4 ½ month activity). Here, the special use permit was originally valid for only three months, and Defendants shortened that period even further by terminating the permit after less than two months. *See Special Use Permit (AR8547)*; *FS Brief at 13*. Any future permits to collar wolves during annual aerial big game surveys would likewise be of similar duration because the big game surveys occur during just a few winter months. *See Minimum Requirements Decision Guide at AR 8567, 8582* (noting that proposed action was to dart and collar wolves during “annual winter big game census surveys” and that surveys usually occur between January and mid-April). As held by the Ninth Circuit, permits of such short duration easily fall within the first prong of the mootness exception.

Second, there is a reasonable expectation that the Forest Service will permit helicopter use in Wilderness to collar wolves in the future because IDFG has already requested such use for other Wilderness areas in the recent past. The second prong of the mootness exception just requires “some indication that the challenged conduct will be repeated.” *Alaska Center for Environment*, 189 F.3d at 856. The issue is whether there is a reasonable expectation the Forest Service will issue other helicopter permits with the same alleged legal violations as the permit challenged in this case. *Id.*

In 2005 and 2006, IDFG requested permits from the Forest Service to use helicopters to dart and collar wolves in the Selway Bitterroot Wilderness and the Gospel Hump Wilderness as well as the portion of the Frank Church Wilderness north of the Salmon River (all within Forest Service Region 1) under proposals similar to the permit at issue here. *See Second Rule Decl. Ex. A* (2005 IDFG request to Region 1 Forester); *Ex. B at 3* (further information on 2005 request, noting activity would occur during winter big game surveys of Selway Bitterroot and Frank Church Wilderness areas from January through mid-March); *Ex. C* (Forest Service memo on 2006 IDFG request for collaring up to 12 wolves during big game surveys in parts of Selway Bitterroot, Gospel Hump, and Frank Church Wilderness area during months of December 2006 to March 2007); *Ex. D.* (Forest Service memo on 2006 IDFG request to collar up to 12 wolves during big game surveys in Selway Bitterroot and Region 1 portion of Frank Church Wilderness from December 2006 through March 2007). These exhibits demonstrate that there is a reasonable expectation that IDFG will again make a similar to request to Forest Service Region 1 to collar wolves in the Selway Bitterroot, Gospel Hump, and northern portion of the Frank Church Wilderness areas during the winter big game surveys.

Furthermore, it is likely this request will be similar in scope to the permit here so that the

Forest Service can use a categorical exclusion rather than prepare an EA or EIS given the cost and time required to prepare the longer documents. IDFG previously withdrew its request to Region 1 due to the time and expense of preparing an EA when the Forest Service stated that it must complete such an analysis for the project. *See Second Rule Decl. Ex. F* (letter from IDFG to Region 1 Forester noting that IDFG could not ask taxpayers and Fish and Game license holders to commit \$250,000 to prepare EA for project). In light of the evidence from these past requests for similar permits, there is “some indication that the challenged conduct will be repeated,” satisfying the second prong of the “capable of repetition, yet evading review” exception to mootness. *Alaska Center for Environment*, 189 F.3d at 856.

Finally, there is also a reasonable expectation that IDFG will again request to collar wolves in the same area of the Frank Church Wilderness they were in this year because they were successful at collaring wolves from only three packs, and it is not clear that these three packs were uncollared packs. *See Lukens Decl. Ex. A (Docket No. 43-2)*. There are still at least five to seven uncollared packs in the Middle Fork area of the Frank Church Wilderness, and thus a reasonable expectation IDFG will get another similar permit to try and collar wolves from more of those packs. Because both prongs of the “capable of repetition, yet evading review” exception are satisfied here, the Court has jurisdiction to review Plaintiffs’ Third Claim for Relief.

II. THE FOREST SERVICE VIOLATED THE WILDERNESS ACT BY FAILING TO SHOW THAT THE SPECIAL USE PERMIT WAS NECESSARY TO PRESERVE WILDERNESS CHARACTER.

The Court must base its ruling on the record for the Forest Service’s decision, not on any post-hoc rationalization by the parties. *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (agency’s action must be upheld, if at all, on the

basis articulated by the agency itself at the time of decision, not post hoc rationalizations); *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) (court must set aside agency decision that lacks adequate factual support after review of full agency record). Here, the record showed that the data collected would “improve understanding” of wolf distribution and behavior that might be “useful” for wilderness management decisions, but it did not demonstrate that collecting this data was the minimum requirement to further the goal of preserving wilderness character, as required by the Act in order to land helicopters in Wilderness. 16 U.S.C. § 1133(c). In essence, the Court’s preliminary injunction order condones a lower threshold for approving prohibited equipment in Wilderness that could open the door to much more significant use of aircraft and motorized vehicles for various kinds of research and other activities that may increase scientific understanding and could be useful but is not necessary to preserve wilderness character.

First, the Forest Service claimed that wolf recovery enhances wilderness character. *Minimum Requirements Guide at AR 8566, 8579-80*. However, the wolf collar data is not necessary to restore wolves to the Frank Church Wilderness or recover their population—those events have already occurred without the help of this data.

The Decision Memo also explained in various ways that this information will help the agencies gain a better understanding of wolves and their behavior, which could be useful for management decisions for the Wilderness. *Decision Memo at AR 8606, 8609-10* (noting that data will “contribute” to, “further efforts” in, “be useful” for, and “aid” management decisions). The Minimum Requirements Guide similarly notes that such data would “enhance” management, and the information will “help” the Forest Service maintain and manage a more natural system and address visitor use/wolf conflicts in years to come. *Min. Req. Guide at AR 8572, 8595*.

None of these statements, however, demonstrate a need for this data to preserve wilderness character. Or stated another way, the Forest Service has not shown that wilderness character has been or will be degraded without this data.

In its preliminary injunction Order, the Court focused on the fact that this project was designed to “improve understanding ‘of the character of the wilderness prior to man’s intervention’ and ‘the predator/prey relationship that existed in the past.’” *Memorandum Decision and Order at 8 (citing AR 8579)*. Now that the wolf is restored to Wilderness, the focus is on “long-term viability and a balance among prey and predator” to restore wilderness character of the area. *Id.* The Forest Service, however, never even showed that there was a need for such restoration to justify this project and its use of helicopters. Neither the Forest Service nor the State has pointed to anything in the record, because in fact there is nothing, showing that the predator/prey relationship is out of balance compared to conditions before the wolf was extirpated or that there is a threat to the long-term viability of the wolf. Therefore, the Forest Service has not shown that this data is necessary to restore wilderness character.

The Minimum Requirements Guide states that the data will improve understanding of wolves and their relationship to other species as well as the character of the area prior to man’s intervention, but does not make the link to show how this “improved understanding” will be used to preserve wilderness character. *Min. Req. Guide at AR 8579-8580*. The link, as the Court recognized and IDFG candidly admits, is to use the information to make management decisions on wolf populations. IDFG states in its brief that one purpose of the data is to manipulate the wolf population to “maintain a harvestable surplus of game species” that will allow for hunting opportunities. *IDFG Brief at 5 (Docket 43)*. The Forest Service does not acknowledge that such management decisions to manipulate the predator prey balance and other natural processes

conflicts with the Wilderness Act's direction to leave the community of life untrammelled.

As stated in the Forest Service's own technical guidance, actions that manipulate the components or processes of ecological systems degrade the untrammelled quality of wilderness. USDA Forest Service General Technical Report 212, *Keeping It Wild: An Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wilderness Preservation System* at 7, 18-19 (July 2008), found at [http://www.wilderness.net/WC/documents/Keeping It Wild Interagency Strategy GTR-212.pdf](http://www.wilderness.net/WC/documents/Keeping%20It%20Wild%20Interagency%20Strategy%20GTR-212.pdf); see also Forest Service Manual chpt. 2320.5 (defining untrammelled as "where human influence does not impede the free play of natural forces or interfere with natural processes in the ecosystem.").² Manipulating wildlife populations to create a specific number of animals within one or two species does not leave the community of life untrammelled. The Forest Service did not explain this in its discussion of how the project would impact the untrammelled quality of wilderness character. *Min. Req. Guide at AR 8579-80*. Nor did the Forest Service justify why it is necessary for purposes of preserving wilderness character to artificially manipulate the predator prey balance rather than let natural processes play out over time to establish a natural balance without interference of man. *Id.* Simply because the State wishes to manage wolves to create a harvestable surplus of elk is not sufficient justification to show that this non-conforming use is the minimum requirement to preserve wilderness character.

The Ninth Circuit and other courts have interpreted the exceptions in the Wilderness Act narrowly, see *discussion in Plaintiff's Opening Brief at 12-15 (Docket No. 8-1)*, and allowing the Forest Service to use the exception in section 1133(c) for an activity that will improve

² The word "untrammelled" means unrestrained, unrestricted, or unimpeded, and was specifically chosen over the word "undisturbed" for the Act because many wilderness areas were not undisturbed and pristine, but nevertheless were still dominated by nature and should not be subjected to human controls and manipulation that hamper the free play of natural forces. Mark Harvey, *WILDERNESS FOREVER: HOWARD ZAHNISER AND THE PATH TO THE WILDERNESS ACT*, at 251 (2005).

understanding and may be useful or even beneficial, but is not **necessary** to preserve wilderness character, does not comport with this narrow interpretation of the Wilderness Act. In fact, it opens the door to a much looser use of motorized equipment or aircraft in Wilderness.

There is little wilderness in this country that has not been degraded by man in some way. In addition to removing predators from wilderness, man has suppressed fire and altered fire regimes, introduced and facilitated spread of exotic plants and animals, logged forests, overgrazed with livestock, impounded waters, and caused vegetation to change due to human induced climate change. If the threshold for use of helicopters or other motorized equipment is simply to do research to gain a better understanding of the ecosystem and man's impact on the natural environment, which could be useful to manage the wilderness and restore natural conditions, this creates a loophole that could allow for significantly more use of prohibited machines in wilderness. The Wilderness Act does not allow for such a low threshold for the use of helicopters and other motorized equipment; but in fact expressly bans any motorized equipment or aircraft landings in wilderness, unless it is the minimum required to preserve wilderness character.

The State points out that other wilderness bills contain exceptions that allow for helicopter use to manage wildlife, and that the Central Idaho Wilderness Act allows for aircraft landings in areas that were already established at the time of the designation. *IDFG Brief at 5-8*. But these very provisions emphasize Plaintiffs' point: Congress can certainly make exceptions for certain non-conforming uses when it wants to, but did not make any exception to allow helicopters to land in the backcountry of the Frank Church Wilderness for the purpose of managing wildlife or conducting research. Therefore, the Forest Service can authorize landing of helicopters in the backcountry only if necessary to preserve wilderness character.

The fact that IDFG would like this data to assist its management of wolves is not enough to satisfy the Forest Service's burden to show that this project is the minimum requirement to preserve wilderness character nor that the use of helicopters is necessary. The record does not show that this data is necessary or even how it will be used to preserve wilderness character of the area. Furthermore, the Forest Service has elevated one component of wilderness character over all others to justify this project. By approving this project and the Forest Service's inadequate rationale, the Court's preliminary injunction order thus improperly opens the door to much more use of helicopters and other prohibited equipment in wilderness, contrary to the Wilderness Act's requirement and the cases that interpret that requirement narrowly. Agencies could authorize innumerable prohibited activities under the guise of useful research that could improve understanding of natural conditions. The Court needs to take this opportunity to close that door and correct its misreading of the Wilderness Act at this stage of the litigation, by now granting summary judgment for Plaintiffs based on the Forest Service's failure to demonstrate that the helicopter landings to collar wolves, at issue here, satisfy the strict requirements of the Wilderness Act.

III. THE FOREST SERVICE VIOLATED NEPA BY ISSUING THE SPECIAL USE PERMIT UNDER A CATEGORICAL EXCLUSION.

A categorical exclusion under NEPA may be used only if the activity does not implicate the context or intensity factors that indicate there may be a significant impact on the environment. 40 C.F.R. §§ 1508.4, 1508.27(b). The categorical exclusion used by the Forest Service in this case, and approved by the Court in its preliminary injunction order, excludes from NEPA analysis inventories, research activities, or studies that are "clearly limited in context and intensity." 7 C.F.R. § 1b.3(a)(3). Simply because this project was limited in scope does not mean that it was clearly limited in context or intensity. In fact, many of the intensity factors do

apply here, warranting further NEPA analysis in an EA or EIS.³

Despite that this activity was limited to twenty landings that would occur during the two-week period for the aerial big game surveys, it still would occur in a unique geographic area—Wilderness; it was highly controversial as to its effects; it would establish a new precedent for permitting the same activity in other Wilderness areas (such as the Selway Bitterroot or Gospel Hump) using a CE; it would add cumulative effects to other aircraft use in the Frank Church Wilderness; and it threatened a violation of the federal Wilderness Act. 40 C.F.R. § 1508.27(b); *see Plaintiffs’ Opening Brief at 20-23 (Docket No. 8)*. Thus, regardless of the activity’s limited scope, all of these intensity factors still applied, and the Forest Service should have considered them more fully in an EA or EIS.

Indeed, the Forest Service’s decision to exclude this permit from NEPA analysis was arbitrary and capricious in light of its prior decision that activities that were very similar in size and scope could not proceed under a CE. In 2005, IDFG made separate requests to Region 1 and Region 4 of the Forest Service to collar wolves in the Selway Bitterroot and Frank Church Wilderness areas. *See e.g. Second Rule Decl. Ex. A* (request to Region 1); *First Rule Decl. Ex. 1* (request to Region 4) (*Docket No.13*). Further information from IDFG to Forest Service Region 4 stated that the wolf captures would be incidental to the aerial big game surveys, which would occur sometime from January through mid-March, and that there would likely be between eight

³ The Forest Service also used the CE category for minor special uses of lands that require less than five contiguous acres of land. 36 C.F.R. § 220.6(e)(3). The use of this CE is also improper because IDFG conducted its surveys and was permitted to do its wolf collaring across three entire big game management units in the wilderness. *See maps of survey areas (AR 8570-71)*. The landings, while each only taking up a small area, were permitted across a very large area and thus do not fall within five contiguous acres. This type of activity is not comparable to the examples provided in the Forest Service Handbook, which are all localized activities within one small patch of contiguous land and not spread across thousands of acres. FSH 1909.31.2(3); *see California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F. Supp.2d 874, 901-02 (N.D. Cal. 2006) (using examples in handbook to determine whether activity fell within CE category).

and sixteen helicopter landings expected. *Second Rule Decl. Ex. B at 3.* Then, in the draft Minimum Requirements Analysis for Region 4, it described IDFG's proposal to use a helicopter to dart and collar wolves during its annual winter big game census surveys in big game units 20A, 26, and 27 within the Frank Church Wilderness, and it noted that between eight and ten wolves would be darted. *Second Rule Decl. Ex. E at 3.*

Both Regions 1 and 4 of the Forest Service determined that they could not use a CE to permit these projects because they occurred in Wilderness and generated extensive public controversy. *See Second Rule Decl. Ex. G* (2005 letter from Forest Service to IDFG noting that project would require EA); *Forest Service testimony to Idaho legislature (AR 3486-3491)*. Specifically, the Forest Service testified to the Idaho legislature that the original proposal in 2005 was to dart up to 16 wolves throughout the Selway Bitterroot, Gospel Hump, and Frank Church Wilderness areas, but that IDFG developed a more limited proposal just for the Frank Church Wilderness. *AR 3487.* However, public comments from 168 letters and emails raised questions about the significance of effects to Wilderness, and thus even this more limited proposal required further analysis under an EA or EIS. *AR 3487-88, 3492.*

In 2006, the IDFG proposal was to collar up to twelve wolves during big game surveys between December 2006 and March 2007 in three big game units within Region 1 Wilderness areas. *Second Rule Decl. Exs. C-D* (Forest Service memos discussing proposal). Again, the Forest Service determined that this proposal would require preparation of an EA in light of the level of controversy sparked by the prior year's proposal. *Second Rule Decl. Exs. D, H* (Forest Service memo and letter to Governor Risch discussing need for EA).

The proposal at issue here was to collar up to twelve wolves using up to twenty landings throughout the southern portion of the Frank Church Wilderness during the annual winter big

game census surveys of big game units 20A, 26, and 27. *Decision Memo at AR 8605, 8617.*

This project also engendered extensive public controversy concerning the extent of the effects to the Wilderness as well as to wolves within the Wilderness. *See public comments to scoping notice (AR 3894-4391).* The Decision Memo itself noted that the 273 letters and emails of public comment showed significant disagreement about the benefits and detriments of the project—i.e., its effects—and that there were widely divergent views on whether it violated the law. *Decision Memo at AR 8612.*

This project was virtually identical in size and scope to the final proposal to Region 4 in 2005, and if anything was larger than the 2005 project. Both entailed collaring wolves during the winter annual big game surveys in three big game units within Wilderness: units 20A, 26, and 27. *See Decision Memo at AR 8605; Second Rule Decl. Ex. E at 3.* The 2005 final proposal estimated collaring eight to ten wolves, and expected no more than 16 helicopter landings (*Second Rule Decl. Ex. E at 3, Ex. B at 3*), while the 2009 proposal was to collar up to 12 wolves and expected no more than 20 landings (*Decision Memo at AR 8604, 8608*). Similarly, the 2006 proposal was to collar up to 12 wolves during annual winter big game surveys of three big game units in Wilderness: units 17, 19, and 20. *See Second Rule Decl. Exs. C-D.* The Forest Service determined in both previous instances the project required at least an EA due to the public controversy. *AR 3492; Second Rule Decl. Ex. D.*

Yet despite that the 2009 proposal was almost identical in size and scope to the prior proposals, and generated as much if not more public controversy, the Forest Service came to the opposite conclusion about the need for an EA, and instead used a CE. This conclusion to use a CE here was arbitrary and capricious and deserves little deference. *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (*quoting INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987))

(“agency interpretation of a relevant provision which conflicts with an agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”).

The high degree of controversy over the effects of the project, combined with the other intensity factors that apply here—a unique geographic area, potential to set a new precedent for future actions, cumulative effects, and the threat of violating a federal law—demonstrated the need for an EA or EIS to further analyze the effects of this project. The use of a CE in this instance was unlawful. *See Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095-96 (11th Cir. 2004) (noting that motorized use permit in wilderness could set a precedent for future action and threatened to violate the Wilderness Act, precluding use of CE even if motorized use would have no net increase in impact to wilderness).

Finally, the Forest Service also needed to complete an EA or EIS to fully assess the need for this project given the requirements under the Wilderness Act and the failure of IDFG to identify the objectives of the project and how it would use the data. IDFG never explained how it would use this data and did not set forth a valid study plan or even consider this project to be “research.” *See Peek Decl.* ¶¶ 10-12, 14 (*Docket No. 8-3*); *IDFG Brief* at 9 (*citing Moore Decl.* ¶ 5) (*Docket No. 24*). The Forest Service and Court, however, have both assumed this information is part of a research project that will somehow inform the agencies on predator-prey relations even though IDFG has never explained how this data will contribute to that understanding, and in fact when this monitoring is not sufficient as a study of that relationship. *See Peek Decl.* ¶ 12. The Forest Service must take a closer look in an EA or EIS at the objectives of this project and how this data will be used to adequately assess whether it is the minimum requirement to preserve wilderness character.

CONCLUSION

For the reasons discussed above, Plaintiffs request that the Court grant its motion for partial summary judgment on its third claim for relief and declare that the Forest Service violated the Wilderness Act and NEPA in issuing the decision memo and special use permit.

Dated: March 29, 2010,

Respectfully submitted,

/s/Lauren M. Rule

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 2010, I caused to be electronically filed with the Clerk of the Court using the CM/ECF system the Reply Brief In Support Of Motion For Partial Summary Judgment on Third Claim for Relief and the Second Declaration of Lauren M. Rule and accompanying exhibits, and that I served copies of the foregoing via electronic mail on the following counsel of record:

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