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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-00208-REB

WILDEARTH GUARDIANS and
WESTERN WATERSHEDS PROJECT,

Petitioners,

v.

U.S. FOREST SERVICE, a federal agency of the U.S. Department of Agriculture,

Respondent,

and

WAYNE BROWN,
JERRY BROWN,
THE COLORADO WOOL GROWERS ASSOCIATION,
J. PAUL BROWN, and
THE COLORADO FARM BUREAU FEDERATION,

Respondent-Intervenors.

OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF AGENCY ACTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

INTRODUCTION

Bighorn sheep are an iconic species across the western United States, valued by hunters, wildlife enthusiasts, Native Americans, and many others. This native species has plummeted from historic numbers, largely due to disease transferred from domestic sheep. Public land agencies and courts have recognized the serious threat domestic sheep pose to bighorn sheep across the West, and have taken actions to separate the species on public lands, including by closing domestic sheep grazing allotments that are in close proximity to bighorn sheep populations. While the Rio Grande National Forest in southwest Colorado has taken similar actions in the past, it recently approved a new domestic sheep grazing allotment that is in very close proximity to several bighorn sheep herds, creating a high risk of disease transmission to these herds.

The Forest Service's own analysis found the allotment, called the Wishbone Allotment, to be high risk to bighorn sheep. Rather than rejecting use of this allotment, as the agency had done for other high-risk allotments, it instead relied on a number of unsupported assumptions to claim the allotment's risk to bighorns was actually moderate rather than high—the first time the Forest Service had ever used this approach. Importantly, the Forest Service failed to incorporate into its analysis key scientific data that undercut many of the agency's assumptions. After Petitioners filed this case, the agency conducted a new analysis with some of that data that showed an *even higher* risk to bighorns from the Wishbone Allotment, but again dismissed that result without ever disclosing the new analysis to the public or soliciting comments, in violation of National Environmental Policy Act (NEPA) requirements.

Accordingly, the Forest Service's analyses and decision authorizing use of the

Wishbone Allotment are arbitrary, capricious, an abuse of discretion, and contrary to NEPA, and must be set aside pursuant to the Administrative Procedure Act (APA).

FACTUAL BACKGROUND

I. The Threat Domestic Sheep Pose to Bighorn Sheep.

Native bighorn sheep populations declined dramatically with settlement of the West, and are currently estimated at less than 10 percent of historic numbers. WA01201. Their current distribution is fragmented across their historic range, and many populations are small and isolated. *Id.* Numbers have rebounded slightly in Colorado due to recovery efforts and translocations. *Id.* Transmission of disease from domestic sheep to bighorn sheep is the primary factor limiting bighorn populations in Colorado, including on the Rio Grande National Forest. WA01206, 03963-64.

For many years, federal agencies have been grappling with the substantial threat that domestic sheep grazing poses to bighorn sheep populations. If the two species come in contact, the domestic sheep can transfer a pathogen to the bighorn sheep that leads to respiratory disease in the bighorn. WA03964. The bighorn can then transfer the pathogen to other bighorn sheep in the herd, resulting in large pneumonia die-offs within bighorn populations. *Id.* Female bighorns that survive pass the pathogen to their lambs, resulting in poor lamb survival for years or even decades after the initial die-off. *Id.* Surviving bighorns also can infect other bighorn herds, causing die-offs in near-by bighorn populations. *Id.* One domestic sheep can trigger widespread pneumonia die-offs within multiple bighorn sheep populations, as documented in Colorado. WA01207, 04433. Consensus exists among scientists that domestic sheep pose a significant threat to bighorn sheep. WA02600-02, 02646-47, 03964, 04646-49, 04671-72.

Due to this threat, federal agencies have ended domestic sheep grazing in areas that pose a moderate or high risk of disease transmission to bighorn sheep, particularly in the Hells Canyon and Salmon River Canyon areas of Oregon and Idaho, and courts have upheld those decisions. WA02636 ¶ 7; *W. Watersheds Proj. et al. v. U.S. Forest Serv.,* 2007 WL 1729734, No. 4:07-cv-151-BLW (D. Idaho, June 13, 2007) ("*WWP I")*; *W. Watersheds Proj. et al. v. U.S. Forest Serv.,* 2007 WL 3407679, No. 4:07-cv-151-BLW (D. Idaho, Nov. 13, 2007) ("*WWP II*"); *Idaho Wool Growers Ass'n et al. v. Vilsack et al.,* 7 F. Supp. 3d 1085 (D. Idaho 2014), *aff'd* 816 F.3d 1095 (9th Cir. 2016). When the Forest Service or Bureau of Land Management (BLM) failed to take action over high risk grazing allotments, courts enjoined use of those allotments. *W. Watersheds Proj. et al. v. BLM,* 2009 WL 3335365, No. 4:09-cv-507-BLW (D. Idaho, Oct. 14, 2009) ("*WWP III*") (at WA02608-24); *W. Watersheds Proj. et al. v. U.S. Forest Serv.,* 2017 WL 5571574, No. 1:17-cv-434-CWD (D. Idaho, Nov. 20, 2017) ("*WWP IV*") (at WA05575-605); *see also* WA05505 (BLM decision on allotment at issue in *WWP III*). These cases noted controversy about the science of disease transmission, but that evidence strongly supported the need to keep the species separated. *WWP II,* 2007 WL 3407679, at *2-4; *Vilsack,* 7 F. Supp. 3d at 1090-93; *Vilsack,* 816 F.3d at 1100, 1104-05.

Separation of the species on public lands is difficult for a variety of reasons. For one, bighorn sheep frequently move outside of their normal home range to disperse, find a mate, or move between habitat areas—movements called "forays." WA03964-65. Forays can be 15 miles or more, and can lead to contact with a domestic sheep or interaction with a bighorn from a different herd. WA02617, 02620, 02637-38, 03863, 03873, 04045, 04246, 04467, 04470, 05590. Second, domestic sheep frequently stray

from their band and can remain on their own for weeks or months at a time. WA02618, 02620, 02628-29, 02867, 03823, 04044, 04169. Even when it is known that domestic sheep have strayed, it can be difficult to find and remove them from public lands. WA02629-30. Finally, these two species are attracted to each other, so will seek each other out when in the same vicinity, increasing the risk of contact. WA01206-07, 02619, 02629, 02833, 02863, 02873, 02909, 03946, 04044, 04169. Courts have recognized the risks of contact presented by foraying bighorn sheep and stray domestic sheep, particularly in light of the attraction between the species. *WWP I,* 2007 WL 1729734, at *3; *WWP III,* 2009 WL 3335365, at *5; *WWP IV,* 2017 WL 5571574, at *7, 9, 13.

Due to the unpredictable nature of bighorn forays, the frequent straying of domestic sheep, and the attraction between the species, bighorn experts agree that management practices such as using herders and guard dogs are not effective at keeping the species separated if there is not substantial spatial separation between bighorn home ranges and domestic sheep grazing allotments. WA02618-19, 02627-32, 02647-48, 02863-65. Courts have agreed that “best management practices” have not been proven effective at keeping the species separate and thus agencies could not rely on them when bighorn populations were in close proximity to domestic sheep allotments. *WWP I,* 2007 WL 1729734, at *3; *WWP III,* 2009 WL 3335365, at *5, 7; *WWP IV,* 2017 WL 5571574, at *13-14.

In 2010, the Payette National Forest in Idaho decided to close almost 70% of the forest to domestic sheep grazing to protect bighorn sheep populations on the forest. *Vilsack,* 816 F.3d 1095. The Payette relied upon models developed by outside experts that quantified the risk of a bighorn sheep moving onto a Payette allotment, contracting

disease from a domestic sheep, and transmitting disease to the rest of its herd. *Id.* at 1100; WA04099, 04467, 05955-83. The Ninth Circuit Court of Appeals upheld the Payette's use of these risk models. *Vilsack,* 816 F.3d at 1108, 1110. The Forest Service then adapted one of these models, called the Risk of Contact Model, for use on other forests. WA03872. This model analyzes the risk of a bighorn sheep contacting a domestic sheep based on the location of bighorn sheep home ranges and the potential for bighorn forays onto allotments. *Id.* The model did not account for stray domestic sheep or attraction between the species. WA03942, 03948. Forest Service guidance states that bighorns need decades to recover from disease so a 50-year disease-free interval is a good benchmark to ensure bighorn population persistence, which corresponds to a risk of .08 contacts per year. WA03952.[1]

In Colorado, before the new Risk of Contact Model, the Forest Service conducted qualitative risk assessments for a number of allotments to assess their risk to bighorn sheep, and prohibited domestic sheep grazing in areas that were rated as high risk. WA01328, 01552, 01717. Once the Risk of Contact Model was available, forests—including the Rio Grande National Forest—began using the model to quantify the risk of domestic sheep allotments to bighorn sheep populations. WA01802-11, 02410-35.

II. Bighorn Sheep Populations Near the Wishbone Allotment.

Colorado Parks and Wildlife (CPW) has identified bighorn "meta-populations", and the Central San Juan meta-population is near the new Wishbone Allotment at issue here. WA03978. A bighorn meta-population consists of multiple bighorn herds that are

[1] Disease interval is how frequently a disease event occurs in a bighorn herd. Contacts per year are the number of times per year a bighorn sheep from a particular herd makes contact with a domestic sheep allotment.

connected through frequent movement of bighorns between them. WA04353-54. This meta-population structure increases genetic diversity among bighorn herds, but also increases the risk of disease transmission. WA01208, 02617-18, 02638, 04353. The Central San Juan meta-population consists of four bighorn herds: San Luis Peak, Bellows Creek, Rock Creek, and Bristol Head. WA04138, 03963.

CPW's objective is to manage for an increasing size and distribution of the Central San Juan meta-population, but CPW recognizes that if the population increases, the risk of contact with domestic sheep also increases. WA04138-39. A large amount of suitable habitat exists within the range of the Central San Juan meta-population that would allow for herd expansion as well as for connectivity between herds. WA04140, 04167. Each of the herds had more than 100 animals in the 1970's or 1980's but subsequently experienced declines, with significant disease die-offs occurring in the Rock Creek and Bellows Creek herds and poor lamb survival observed in all four herds. WA03981, 03984, 03986, 04147-48, 04154-59, 04168. At the time of the Wishbone analysis in 2017, the San Luis Peak, Bellows Creek, and Bristol Head herds were each estimated at 80 animals while the Rock Creek herd was at 20 animals. WA03977.

In its management plan for the Central San Juan meta-population, CPW stated that surveys can only detect a small sample of animals during a few days per year and were not sufficient to fully assess overall range and habitat use throughout the year. WA04167. Telemetry data collected from collars placed on individual bighorns would be "highly beneficial" to "develop a more robust understanding of habitat use and timing

of use" across the range of this meta-population. *Id.*[2] Therefore, CPW began collaring bighorns from these herds in January 2016, and collected data from nine animals in the Bristol Head herd, eight animals in the Bellows Creek herd, eleven animals in the San Luis Peak herd, and three animals in the Rock Creek herd. WA04245.

Preliminary analysis of the data by CPW in 2017 and early 2018, which it shared with the Forest Service, disclosed that bighorns from these herds made more extensive movements than previously thought, and moved within close proximity of several Wishbone Allotment grazing pastures. WA04246-48, 03779-85, 05724-25. These movements were documented based on a small sample of bighorns and just two years of data and thus did not represent the full extent of habitat use by these herds. WA04247-48. Of the 15 collared bighorns that had been tested for disease, 10 were positive for a pathogen that comes from domestic sheep. WA04245. CPW noted that the study was ongoing and a full analysis of results was anticipated in 2019. WA04245.

Bighorn meta-populations adjacent to the Central San Juan meta-population consist of the Weminuche, San Juan West, and Natural Arch meta-populations. *See* ECF #1 ¶ 51, Fig. 1; WA03830-31, 03986. It is suspected that historically bighorns from the Central San Juan herds interacted with bighorns from these other meta-populations, and the preliminary telemetry data showed Bristol Head bighorns moving into the range of Weminuche and San Juan West herds. WA03830-32, 03981, 03984, 03986.

[2] Telemetry data is gathered by putting collars on a sample of animals within a population to record the animals' locations. GPS collars automatically record locations multiple times a day while VHF collars only document locations when biologists track them in the field, usually every 1-2 weeks.

III. Creation of the Wishbone Allotment.

In 2012, the Rio Grande National Forest began a process to analyze the risk to bighorns from several allotments: the Fisher-Ivy/Goose Lake ("FIG") Allotment and a set of three allotments called the Snow Mesa allotments. WA01686. Before long, the agency decided to split up that analysis and first analyze the FIG Allotment. It completed a risk assessment using the Risk of Contact Model in 2013. WA01784.

The FIG Allotment consisted of seven pastures, and the core home range of a bighorn herd in the Weminuche meta-population overlapped four of the pastures while the other pastures were 1, 1.5, and 2.5 miles away from the home range. WA01798, 01801. Using the Risk of Contact Model, the Forest Service found all seven pastures were high risk, with each creating a risk that a disease event could occur every 22 years or less. WA01806-09, 01811, 01818. Thus, the Forest Service decided to convert the entire allotment to vacant status. WA02094. The agency rejected the alternative of relying on management practices to keep the species separated. WA02099, 02104-05.

The Forest Service then reinitiated its analysis of the Snow Mesa allotments in 2014. WA02116. Observations of bighorns and domestic sheep using the same range in 2010-2013 led the Forest Service to temporarily prohibit grazing in northern portions of the Snow Mesa allotments to create a buffer between the species, and added use on part of an allotment just to the south, called the Ouray allotment. WA03715-18, 03982-83, 03542, 03547, 03552, 06027, 06149.

Like with FIG, the Forest Service completed a risk assessment using the Risk of Contact Model. WA02387. It looked at the risk for three alternative actions: (1) converting the Snow Mesa allotments to vacant status, (2) continuing to allow grazing

with no changes to allotment boundaries, and (3) allowing grazing but changing the allotment boundaries to exclude the areas that had been off-limits to grazing since 2013 and adding part of the Ouray allotment. WA02168, 02394. Both alternatives 2 and 3 included best management practices to keep the species separated. *Id.* Although the overall risk was lower under Alternative 3, each allotment was still rated as high risk, with the potential to cause a disease event every 6.8 to 8.4 years. WA02435.

The Forest Service initially proposed to select Alternative 3 but its final draft EA chose Alternative 1 to eliminate domestic sheep grazing on the Snow Mesa allotments. WA02172, 02280, 02284. The agency recognized that, although Alternative 3 would eliminate overlap between bighorn core home range and the allotments, grazing the allotments still presented a high risk due to their close proximity to bighorn use areas and potential for bighorn forays onto the allotments. WA02299, 02325, 02330. The Forest Service acknowledged that best management practices were not a reliable method to keep the species separate, especially given past compliance problems by these permittees. WA02287, 02300, 02330.

Rather than issue a final EA and decision, however, the Forest Service in early 2017 initiated a new proposed action to create a new allotment, called the Wishbone Allotment, to the south of the Snow Mesa allotments to replace those allotments. WA02675. The agency revised its Snow Mesa risk assessment to include an assessment of the new Wishbone Allotment. WA02693. It released a draft risk assessment for public comment in March 2017, and a final risk assessment and EA in November 2017. WA02693, 05211, 05340. Despite receiving objections to the EA from numerous parties, including the permittees themselves, the Forest Service issued a final

Decision Notice and Finding of No Significant Impact ("DN/FONSI") in March 2018 converting the Snow Mesa allotments to vacant status and authorizing use of the new Wishbone Allotment. WA005448-611 (objections); 05660 (DN/FONSI).

The Wishbone Allotment consists of seven pastures, many of which are separated by long distances. WA03970. The Crystal pasture, which was carved out of the Ouray Allotment, is the largest and highest elevation pasture. *Id.*; WA03997-98. The Shallow pasture borders the Crystal pasture to the south. WA03973. The remaining five pastures are parcels spread along Highway 149 and other roads in a horseshoe shape, with South River pasture on the southwest end and Coller pasture on the southeast end. *Id*. Herders must move sheep for miles to move between pastures. *Id.*; WA03998. The Coller pasture is partly a state wildlife area that required authorization from CPW to use. WA03995.

The Risk of Contact Model determined the Wishbone Allotment was high risk to bighorn sheep due to its proximity to the Central San Juan bighorn herds. WA04032. Based on the model results, bighorns from one or more of the herds are expected to contact one or more of the Wishbone pastures each year, resulting in a disease transmission event every four years. *Id.* The risk assessment stated that the potential for a disease event every 32 years or less would result in a low probability of bighorn population persistence and viability. WA04001. The assessment did not explain why it did not use the 50-year disease interval from agency guidance. *Id.*; WA03952; *see also infra* n. 8 (noting Payette National Forest used 46-year disease interval).

Instead of rejecting the Wishbone Allotment due to its high risk, as it had done with other allotments, the Forest Service claimed that the model result was inaccurate

and created new factors in the risk assessment to alter that result to "moderate" risk. WA04038-39. The agency claimed the risk was only moderate because: (1) there was no direct overlap between the Wishbone Allotment and bighorn core home ranges, (2) bighorns in these herds move higher in elevation, away from the Wishbone Allotment, during the grazing season, (3) there is less overlap between bighorn habitat and domestic sheep range on the Wishbone Allotment than with the other alternatives, (4) the risk of contact from bighorn forays is less than what the model predicted due to a shorter grazing season, and (5) barriers such as the Rio Grande River, Highway 149 and subdivisions will maintain separation between the species. *Id.* The agency also claimed that use of best management practices to keep the species separate would be more effective on the Wishbone Allotment than on the Snow Mesa allotments because Wishbone pastures were more accessible and easier to monitor. *Id.*

Notably, the risk assessment did not include any maps or analysis of the telemetry data collected to that point. WA03961-4063. The assessment stated that recent telemetry data supported the delineation of core home ranges for the Central San Juan bighorn herds, but it did not discuss whether the data supported the assumptions concerning habitat use and movements of these animals. WA04038-39.

The Forest Service further described these factors in the DN/FONSI to conclude the allotment was moderate risk,[3] again without discussing whether the telemetry data supported the agency's assumptions. WA05668-71. It dismissed concerns raised by objectors that the assumptions were flawed and contradicted by the recent telemetry

[3] The DN/FONSI dropped the factor about lack of overlap between the allotment and bighorn core home ranges. WA04038, 05668-71.

data; that if the Central San Juan bighorn herds expanded, risk of contact with domestic sheep from the Wishbone Allotment would increase; and that the allotment was also a risk to neighboring bighorn meta-populations due to interactions between herds. WA05668-76. The DN/FONSI concluded that use of the Wishbone Allotment would not have any significant environmental effects and therefore no need existed for an Environmental Impact Statement (EIS). WA05681.

Before completing the Wishbone risk assessment and EA, the Forest Service authorized the Snow Mesa permittees to use the Wishbone Allotment in 2016 and 2017 on a trial basis. WA03558, 03563. Documented instances of noncompliance with permit conditions occurred each year, including in 2017 when 56 stray domestic sheep remained on or near Wishbone pastures after the grazing season and it took six weeks to remove them. WA02798-99, 05567 (2016); WA03595-97, 06208-09, 06316-19 (2017). These permittees also had noncompliance problems in 2011-2015. WA03536-38, 03983, 06030, 06032-35. Based on the trial use of the Wishbone Allotment, the permittees and Colorado Wool Growers Association both stated that controlling and managing domestic sheep on the Wishbone Allotment is difficult due to the use of multiple pastures, rough terrain, and poor forage quality, which increases the chance of stray sheep and difficulty locating and removing them. WA05461, 05468-69.

IV. Supplemental Information Report.[4]

[4] Petitioners filed a motion to strike this report and other supplemental documents the Forest Service added to the record in August 2019, or in the alternative requested the Court allow Petitioners to use their own supplemental documents as well. *See* ECF Nos. 24, 28, 29. The Court has not ruled on that motion. Therefore, in line with legal authority, Petitioners will not cite to any of the supplemental documents for purposes of their challenges to the 2017 EA and 2018 DN/FONSI because they post-date those decisions. *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1575 (10th Cir. 1994);

Petitioners' lawsuit includes a claim that the Forest Service has failed to complete a supplemental NEPA analysis incorporating all of the telemetry data. ECF No. 1 ¶ 88. After the lawsuit was filed, the Forest Service obtained telemetry data from CPW and re-ran the Risk of Contact Model using data collected through July 4, 2018 as well as 2018 population estimates for the bighorn herds. WA05880-82. Using these data, the Forest Service first updated the core herd home range boundaries, which expanded the home ranges of three herds in certain areas. WA05888. The most notable change was that the Bristol Head core home range expanded north and now bordered the Crystal and Shallow pastures. WA05900. When the agency re-ran the risk model, the risk of contact increased from the 2017 figure of .98 contacts per year to 1.26 contacts per year—a 27% increase. WA05889. The Forest Service did not identify the disease interval that would result from that higher risk of contact. *Id.*

The Forest Service included the model results in a Supplemental Information Report ("SIR"), which then used the same five factors listed in the DN/FONSI to dismiss the even-higher risk rating and claim once again that the risk of the allotment to Central San Juan bighorns was "moderate" in spite of quantifiable information to the contrary. *Id.* The SIR also described the risk of contact with other bighorn meta-populations as still "acceptable." WA05894-95. Finally, the report discussed and dismissed a sighting

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Sierra Club v. Fed. Hwy. Administration, No. 17-cv-01661, 2019 WL 1695402, at *3 (D. Colo. Apr. 6, 2018). However, they will cite the supplemental documents for their claim that the Forest Service has failed to complete a Supplemental NEPA analysis because review of APA failure to act claims is not limited to an administrative record as there is no "action" to demarcate the limits of the record. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000); *Western Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1272 n.4 (D. Utah 2017); *Nat'l Law Ctr. on Homelessness and Poverty v. U.S. Dep't of Veterans Affairs,* 842 F. Supp. 2d 127, 130 (D.D.C. 2012).

of two bighorn sheep on the Wishbone South River pasture in early July 2019 (during the grazing season), claiming that sighting was "not significant." WA05895-96, 05929-30, 05798. The SIR contained an Appendix that included numerous maps of the telemetry data. WA05899-932. After analyzing the new data, the Forest Service concluded that the new information was "within the scope of effects" considered in the EA and DN/FONSI and therefore did not warrant supplemental NEPA analysis. WA05896-97. Accordingly, the agency did not disclose the SIR analysis to the public.

Once Petitioners learned of this SIR when it was filed as a supplement to the administrative record in August 2019, they sent comments to the Forest Service describing many flaws in the SIR analysis and that the agency needed to do a full Supplemental EIS that included telemetry data beyond July 2018. ECF Nos. 28-1, 28-2. Petitioners also sent comments on the SIR from two retired bighorn sheep experts—previous Forest Service and BLM national experts—which also pointed out numerous problems with the analysis and conclusions in the SIR, and highlighted the high risk to bighorn sheep from the Wishbone Allotment. ECF Nos. 29-1, 29-2. Despite all of this, the Forest Service has not committed to complete a supplemental NEPA analysis.

ARGUMENT[5]

The Forest Service has violated NEPA with its Wishbone Allotment analysis and decision in three ways. First, the agency was required to prepare an EIS rather than an

[5] Petitioners are submitting two declarations to establish their standing in this case. These declarations describe Petitioners' interests in the bighorn sheep herds near the Wishbone Allotment, their injuries from the Forest Service's flawed decision-making that created a high risk of disease transmission to these bighorn sheep, and how those injuries would be redressed by reversal of the Wishbone decision and an order for the Forest Service to re-do its NEPA analysis before further authorizing use of that allotment. Declaration of Greg Dyson; Declaration of Jonathan Ratner (filed herewith).

EA because of the significant effects use of the allotment will likely have on bighorn sheep herds. Second, the EA and DN/FONSI were arbitrary and capricious and violated NEPA because the agency relied on unsupported and irrational assumptions, failed to incorporate relevant data, and failed to consider all indirect effects of the action. Finally, the Forest Service's SIR does not satisfy its duty to complete a supplemental NEPA analysis that fully analyzes and publicly discloses significant new information.

Review of an agency decision falls under the arbitrary and capricious standard of the APA, which requires reversal of the decision if the agency failed to consider an important aspect of the problem, offered an explanation for its decision that is counter to the evidence in the record, failed to base its decision on consideration of the relevant factors, or made a clear error of judgment. *New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 704 (10th Cir. 2009). Under this standard, an agency must examine the relevant data and articulate a rational connection between the facts found and the decision made. *Id.* at 713.

I. The Forest Service should have prepared an EIS.

Under NEPA, an EIS is required if a federal action *may* have a significant effect on the environment. *San Luis Valley Ecosystem Counsel v. U.S. Forest Serv.,* 2007 WL 1463855, at *1, No. 04-cv-1071-MSK (D. Colo., May 17, 2007). A court's review of an agency's decision to issue a FONSI rather than prepare an EIS is both substantive (whether the agency made a clear error in judgment) and procedural (whether the agency followed proper procedures). *Id.* at *8.

To assess the significance of an action, an agency should consider the "context" and "intensity" of the proposed action. *Id.* at *8-9 (citing 40 C.F.R. § 1508.27). The

context of the action includes the affected region, the affected interests, and the locality, as well as short and long-term effects. 40 C.F.R. § 1508.27(a). The intensity factors relate to the severity of any impact, and include (1) the degree to which the effects on the environment are likely to be highly controversial; (2) the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks; (3) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; and (4) whether the action is related to other actions with individually insignificant but cumulatively significant impacts. *Id.* § 1508.27(b)(4)-(7). All of these factors apply here.

The "highly controversial" factor applies if a substantial dispute exists as to the size, nature, or effect of the action. *Middle Rio Grande Conservancy Dist. v. Norton,* 294 F.3d 1220, 1229 (10th Cir. 2002). Although public opposition alone does not denote controversy, if public comments raise substantial questions concerning the agency's conclusions about the effects of the project, the effects are highly controversial. *Id.*; *San Luis Valley Ecosystem Counsel,* 2007 WL 1463855, at *10.

The record shows that creating the Wishbone Allotment was highly controversial due to substantial disputes about the impacts to bighorn sheep. Commenters on both sides of the issue heavily disputed the Forest Service's risk assessment, with industry proponents attacking the Risk of Contact Model and bighorn advocates challenging the agency's conclusion that the allotment posed only a moderate risk to bighorn sheep after the model showed a high risk. WA02544-48, 02585, 02691, 02810-25, 02832-37, 02870-71, 02917-20, 02944-47, 02949-52, 02956-63, 05448-50, 05476-85, 05565-70. In particular, bighorn advocates criticized the artificial assumptions the Forest Service

applied to the model result to lower the risk from high to moderate—the first time the agency had used this tactic—because the assumptions were not supported by science. WA02810-25, 02832-37, 05448-50, 05476-85, 05565-70. Commenters also argued that the agency did not properly analyze the risk the allotment would pose to bighorn populations adjacent to the Central San Juan herds. WA05630, 05632-33, 05639-40.

These points show a substantial dispute existed about the effects of authorizing domestic sheep use on the Wishbone Allotment. In its FONSI, the Forest Service acknowledged these controversies but simply stated that the EA discussed effects and disclosed the rationale for finding a moderate risk. WA05680. It failed to explain why the significant disputes about that rationale and the level of risk to bighorns did not suffice to trigger an EIS. *Id*. Given that risk of contact between domestic and bighorn sheep was one of just two "key issues" analyzed in the EA, and the decision hinged on finding moderate rather than high risk, the significant controversy about the agencies' analysis and conclusion on the risk to bighorn populations warranted an EIS. WA02294-95,[6] 05236-37, 05662-64; *Middle Rio Grande Conservancy Dist.,* 294 F.3d at 1229 (finding wide disparity in the estimates of the action's impact was a substantial dispute about effects); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736-37 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 157 (2010) (controversy existed when comments noted agency analysis was incomplete and mitigation uncertain because they "cast substantial doubt

[6] The Snow Mesa draft EA noted that "issues" are points of discussion, debate, or dispute about the effects of a proposed action, and some are considered "key" because of the geographic extent, duration of effects, or intensity of interest or resource conflict. WA02294. This language was excluded from the Wishbone EA. WA05236.

on the adequacy of the [agency's] methodology and data."); San *Luis Valley Ecosystem Counsel,* 2007 WL 1463855, at *10 (effects highly controversial based on public comments that pointed out impacts the agency failed to consider).

Second, authorizing the Wishbone Allotment created a "unique risk"—disease transmission to bighorn sheep. The result of this risk is "highly uncertain" given the dispute about how often and how far disease would spread through bighorn populations due to use of the allotment. The risk assessment itself included more than ten pages discussing numerous uncertainties in the analysis. WA03965-66, 03988-95, 04041-45. Other evidence establishes that effectiveness of best management practices to keep the species separated is highly uncertain, and the movements and habitat use of these bighorn sheep is also uncertain. WA02623, 02627-32, 02647-48, 02863-65, 02867-68, 02904, 03595-97 (uncertainty of best management practices); WA04167 (need for more data on bighorn movements); WA03779-85, 04246-48 (early analysis of telemetry data showed more extensive movements by these animals than previously believed).

The FONSI stated uncertainties exist in the Risk of Contact Model, but asserted, without any explanation or support, that those uncertainties do not translate into highly uncertain effects or unique risks. WA05680-81. Disease transmission to bighorn sheep is certainly a unique risk attached to domestic sheep grazing; and the Forest Service's novel use of "local factors" to claim moderate risk when the standard parameters showed the allotment is high risk establishes that the extent of effects is highly uncertain, warranting an EIS. *See San Luis Valley Ecosystem Counsel,* 2007 WL 1463855, at *10 (uncertainty about extent of effects on scenic integrity of the area met significance factor); *San Luis Valley Ecosystem Counsel v. U.S. Fish and Wildlife Serv.,*

657 F. Supp. 2d 1233, 1246 (D. Colo. 2009) (failure to evaluate efficacy of proposed safeguards and mitigation measures showed impacts of action were uncertain or involved unique or unknown risks); *Nat'l Parks & Conservation Ass'n,* 241 F.3d at 728-29 (9th Cir. 2001) (uncertainty about effects showed potential for significant impacts); *Anderson v. Evans*, 371 F.3d 475, 489-92 (9th Cir. 2004) (impact of whale hunt on local whale population and local ecosystem was highly uncertain, requiring EIS).

Third, this action may establish a precedent for future actions because the Forest Service may use similar unsupported assumptions to lower risk ratings for other allotments, thereby authorizing domestic sheep use in other high risk areas. Prior to the Wishbone Allotment, the Forest Service had eliminated domestic sheep grazing in areas that the Risk of Contact Model rated as high risk. *See Vilsack,* 816 F.3d at 1101 (Payette allotments); WA02094 (FIG allotment); WA02280, 02284 (Snow Mesa allotments). The Wishbone decision is the first time since the Risk of Contact Model was adopted by the Forest Service as the best available science that the agency artificially attenuated the Model's results to justify using a high risk allotment. The FONSI stated that the Wishbone decision will not set a precedent because it is specific to that allotment and future actions would have their own site-specific analysis. WA05680. However, the approach used by the Forest Service to downgrade risk to bighorn sheep from high to moderate based on a variety of assumptions lacking scientific support will set a precedent for the agency to use a similar approach with other allotments, creating a significant risk to bighorn populations. In fact, a permittee with allotments to the south of Wishbone sought intervention in this case, and this Court found it "reasonably possible" that analyses and decisions related to the Wishbone

Allotment would be applied to other domestic sheep allotments. ECF No. 30 at 9.

Finally, the cumulative risk to bighorn sheep on the Rio Grande National Forest from grazing other domestic sheep allotments, combined with grazing the Wishbone Allotment, could be significant. The Wishbone decision stated that multiple bighorn herds on the forest have potential for contact with domestic sheep. WA05677. Given the connectivity that is known or likely occurs between bighorn herds, the potential risk from the Wishbone Allotment combined with the risk from other allotments might have a cumulatively significant effect on one or more bighorn sheep populations, but the Forest Service failed to assess this. WA03828-32 (showing connectivity between Central San Juan, Weminuche, and San Juan West bighorn meta-populations); WA05286, 05322-23, 05681 (cumulative effects discussion).

Because the "intensity" factors of controversy, uncertainty, precedence, and cumulative effects apply here, the Forest Service must prepare an EIS. 40 C.F.R. § 1508.27(b)(4)-(7); *Middle Rio Grande Conservancy Dist.,* 294 F.3d at 1229-30; *San Luis Valley Ecosystem Counsel,* 2007 WL 1463855, at *11; *Nat'l Parks & Conservation Ass'n,* 241 F.3d at 737; *Humane Soc'y of United States v. Dep't of Commerce,* 432 F. Supp. 2d 4, 23 (D.D.C. 2006) (all ordering preparation of EIS due to these factors).

II. The Wishbone EA and DN/FONSI were arbitrary and capricious.

Under NEPA, an agency must take a "hard look" at the environmental effects of proposed actions and all information relevant to its decision to fulfill NEPA's twin goals of informed decision-making and public involvement. *Richardson,* 565 F.3d at 703, 704; *WildEarth Guardians v. U.S. Bureau of Land Management,* 870 F.3d 1222, 1233 (10th Cir. 2017). This hard look "must be timely, and it must be taken objectively and in good

faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish and Wildlife Serv.,* 611 F.3d 692, 712 (10th Cir. 2010) (internal quotation omitted).

A. The Forest Service Relied on Unsupported Assumptions.

An agency violates NEPA if it relies on inaccurate information or unsupported assumptions to justify its decision. *Richardson*, 565 F.3d at 713-15; *WildEarth Guardians,* 870 F.3d at 1235-37; *Oregon Natural Desert Ass'n v. Jewell,* 840 F.3d 562, 569-70 (9th Cir. 2016). Here, the Forest Service created the Wishbone Allotment and authorized the permittees to use it in 2016 before the agency had completed even a draft risk assessment. WA02656, 02693. When the Risk of Contact Model showed the allotment was high risk to bighorn sheep, the agency attempted to rationalize use of the allotment by making various assertions to claim the allotment was only moderate risk—an approach the agency had never used before—despite increasing evidence that its assumptions were unsupported and irrational. WA04038-39. It then incorporated the risk assessment into the EA and relied on those same flawed assumptions there and in the DN/FONSI. WA05273-75, 05282-84, 05340, 05668-71.

The Wishbone risk assessment identified the parameters used to determine whether an allotment is high, moderate, or low risk. WA04002. An allotment is *high risk* if bighorn core home range is less than ten miles from the allotment, the rate of a bighorn contacting the allotment is once every eight years or less, and the potential disease interval is less than 32 years. *Id.* A *moderate risk* occurs if core home range is 10-15 miles from an allotment, the contact rate is once every 8-10 years, and the potential disease interval is 32-40 years. *Id.* The Forest Service acted consistently with

these criteria for the FIG and Snow Mesa allotments, designating them as high risk even where there was no overlap between bighorn core home ranges and allotment pastures. WA01801, 01818 (FIG pastures high risk, including one with 22-year disease interval); WA04036 (Snow Mesa allotments under Alternative 3 high risk, each having 6 to 8-year disease interval). The Wishbone Allotment was even higher risk, with a bighorn predicted to contact the allotment *every year*, and a disease interval of just *four* years. WA04038.[7] This disease interval is eight times riskier than the 32-year interval the Forest Service stated would "result in a High Risk to bighorn sheep long-term viability and a Low Probability of Population Persistence and Viability." WA04060.[8]

Yet, instead of acting in accordance with that rating by not allowing domestic sheep to use the allotment, as it did with FIG and Snow Mesa, the agency asserted that other local "factors" supported disregarding the model results to find moderate risk for the Wishbone Allotment. WA04038-39, 05668-71. The agency relied on this novel approach even though the early telemetry data and other facts undercut many of the Forest Service's assertions.

For instance, the Forest Service initially relied on the fact that there was no "direct overlap" between the allotment and bighorn core herd home ranges. WA04038. This reasoning is contrary to the agency's high-risk rating for FIG pastures and Snow Mesa allotments that also did not overlap bighorn core home range. WA01801, 01818, 04036. Indeed, the one-mile distance between the Wishbone Allotment and bighorn

[7] The Forest Service did not analyze the risk of each Wishbone pasture as it did for FIG, instead rating the entire allotment as whole. *Cf.* WA04038 *with* WA01818.
[8] The Payette National Forest determined a 46-year disease interval was the appropriate risk level to insure bighorn viability. Payette ROD at 10, 14, found at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5238683.pdf.

core home range is a far cry from the 10-15 mile separation required for a moderate risk rating as identified in the Wishbone risk assessment. WA04002, 04038. The natural attraction between the species means there is a high risk the species will seek each other out when they are in such close proximity. WA03763, 05566.

The Forest Service also asserted that these bighorns move to higher elevations away from the Wishbone pastures during the summer grazing season. WA04038, 05670. Yet the biggest Wishbone pastures—Crystal and Shallow—are located at higher elevations in close proximity to Bristol Head bighorn herd summer range, and contain substantial suitable summer habitat. WA03970-71. These two pastures account for more than 40% of the grazing season and are used in July and August. WA03563. Bighorns have been documented near Shallow Creek, which is the southern border of the Shallow pasture, and in July 2017 a collared ram from the Bristol Head herd moved within a half mile of that pasture. WA03494, 03729, 03779-81, 04148, 05566. These two pastures are clearly high risk to bighorn sheep.

Furthermore, CPW's preliminary findings from the telemetry data noted that bighorns were making transitory movements between high alpine and lower elevation areas in winter, spring, and summer, with some bighorns using higher elevation areas in winter. WA04247, 03785. These findings were from just a small sample of bighorns during a 1.5-year period, but even this small data set undermined the Forest Service's generalization about seasonal movements.

Likewise, the Forest Service claimed that the probability of a bighorn foraying onto the allotment during the grazing season is lower than what the Risk of Contact Model assumed because these bighorns typically foray in October, after the grazing

season. WA04038, 05668-69. Yet, the limited telemetry data showed bighorns making unpredictable and extensive movements in spring and summer, traveling 15 miles or more and moving between herds. WA03757, 03779-83, 04246-47. Given the attraction between domestic and bighorn sheep, a short movement of one mile or less from core home range to a pasture with domestic sheep is highly probable.

The Forest Service's reliance on habitat fragmentation and obstacles such as rivers, roads, and subdivisions to reduce the risk to moderate is also unsupported. WA04039, 05669. Ample evidence in the record shows that Highway 149, subdivisions, and the Rio Grande River do not limit bighorn movement. WA03726, 03750, 03756, 03781, 03985, 04017, 04137, 06063, 06079, 06187, 06245-48 (all documenting bighorns on or crossing Highway 149 or other roads); WA03781 (map showing bighorn passing through subdivision near Wishbone pastures); WA04247 (bighorns moving from S53 to S16, which required crossing Rio Grande River); *see also WWP I,* 2007 WL 1729734, at *2; *WWP III,* 2009 WL 3335365, at *4; *Vilsack,* 816 F.3d at 1108 (all noting that Snake and Salmon Rivers in Idaho were not barriers to bighorn sheep movement).

Habitat fragmentation does not preclude bighorn movement either. While bighorns may not spend significant time within "non-habitat," such as forested areas, they routinely move through such areas when travelling between suitable habitats, as confirmed by the limited telemetry data. WA04247 (noting that data showed bighorns using a high amount of forest habitat during transitory movements). Furthermore, the Risk of Contact Model accounted for the quality of bighorn habitat in determining the likelihood of a bighorn foraying onto an allotment, and thus it was inappropriate for the Forest Service to then lower the risk rating for the allotment based on that very same

factor. WA03942, 04058-59, 04061-62 (model designated habitat around bighorn core home ranges as suitable habitat, connectivity areas, or non-habitat and used that to assess probability of bighorn contacting allotment).

Finally, reliance on "project design features," or best management practices, to lower the risk rating was also irrational. WA04038-39, 05670-71. These permittees have repeatedly failed to comply with terms and conditions of their authorizations on both the Snow Mesa and Wishbone allotments. WA02798-99, 03536-38, 03983, 03595-97, 05567, 06208-09, 06030, 06032-35, 06316. Incidents of noncompliance include unattended domestic sheep, grazing in unauthorized areas, and multiple instances of stray domestic sheep. *Id.* Even during the trial period for the Wishbone Allotment, when the permittees knew compliance was very important, violations occurred each year—including 56 stray sheep in 2017 that took six weeks to locate and remove. WA02798-99, 03595-97, 05567. The permittees even admitted the allotment is hard to manage because of the small pastures, lack of forage, and terrain, increasing the risk of "a few to large numbers of" domestic sheep straying. WA05461. The Colorado Wool Growers Association echoed that warning, stating that "[n]ew grazing patterns, difficult terrain, and poor forage conditions greatly increase the management responsibilities of the permittee, and significantly contribute to problems such as increased strays, and difficulty in locating and herding strays." WA05469.

In addition to the permittees' track record of repeated violations, including on the Wishbone pastures, bighorn sheep experts and courts alike have rejected use of best management practices as a method to maintain spatial separation between the species. *See WWP I,* 2007 WL 1729734, at *3; *WWP III,* 2009 WL 3335365, at *5, 7; *WWP IV,*

2017 WL 5571574, at *13-14 (all holding that agency could not rely on unproven best management practices when bighorn populations were in close proximity to allotments). The Forest Service's reliance on these same practices to lower the risk rating from high to moderate was unreasonable given the lack of evidence they would be successful.

In sum, the record does not support use of these assumptions to dismiss the result of the Risk of Contact Model and conclude the Wishbone Allotment was only moderate risk to bighorn sheep. Notably, the Forest Service claimed the telemetry data supported its assertion that bighorn home ranges did not overlap the Wishbone Allotment, but it did not assess the data for any of the other factors it used to lower the risk rating. WA04038-39. To meet the criteria for "moderate" risk set forth in the Wishbone risk assessment, predicted bighorn contact with the allotment would have to change from every year to once in 8-10 years, and the disease interval would have to change from 4 years to 32-40 years. WA04002, 04038. The moderate risk criteria also showed distance from bighorn core home range to an allotment as more than ten miles, whereas the Wishbone Allotment was listed as only one mile away; and the telemetry data showed bighorns moving closer than that. *Id.*; WA03779-81, 04247. Given the drastic difference between the Risk of Contact Model results for the Wishbone Allotment and the criteria for "moderate" risk, the record does not show that the Forest Service's assumptions would bridge this gap.

Because the Forest Service relied on unsupported and irrational assumptions when assessing the effects of its proposed action, its NEPA analysis was arbitrary and capricious. *Richardson,* 565 F.3d at 715 (holding that record did not support BLM's conclusion that impacts to aquifer from gas wells would be minimal); *WildEarth*

Guardians, 870 F.3d at 1235-37 (lack of data in record to support assumption about coal supply made assumption irrational, and EIS that relied on assumption arbitrary and capricious); *High Country Conservation Adv. v. U.S. Forest Serv.,* 52 F. Supp. 3d 1174, 1196-99 (D. Colo. 2014) (finding NEPA violations where agency's explanations and assumptions about emissions were unsupported by the record, and statement about recreation impacts was contradicted by facts in the record); *Rocky Mountain Wild v. Vilsack,* 843 F. Supp. 2d 1188, 1200 (D. Colo. 2012) (vague statements and lack of data did not support conclusions about impact of logging); *Oregon Natural Desert Ass'n,* 840 F.3d at 569-70 (reliance on inaccurate data and unsupported assumptions in EIS violated NEPA). The Forest Service put form over substance by using these invalid assumptions to rationalize a pre-made decision. *Forest Guardians,* 611 F.3d at 712.

B. The Forest Service Failed to Examine and Disclose Relevant Data.

Agencies that fail to use the "best available scientific information" or "examine the relevant data" when assessing environmental impacts in an EA or EIS have violated NEPA. *Lee v. U.S. Air Force,* 354 F.3d 1229, 1244 (10th Cir. 2004); *Richardson,* 565 F.3d at 714-716. Bighorn sheep conflicts were one of two key issues addressed by the Wishbone EA, but the Forest Service failed to examine and use key data related to that issue: telemetry data on the Central San Juan bighorn herds. The Forest Service knew CPW began collecting this telemetry data in January 2016 and it received information on the data from state biologists. WA03779-85, 04245-48, 06315. This data is the best available science on movements and habitat use of animals within these herds because

it provides exact locations of individual bighorns with frequency and regularity.[9]

The CPW management plan for the Central San Juan bighorn population specifically noted that telemetry data would be *highly beneficial* to get a more robust understanding of bighorn habitat use and timing of use across the landscape because ground surveys only detect a small sample of animals in a few locations—particularly during summer when bighorn are scattered across summer ranges. WA04167. In fact, a few months before the Wishbone risk assessment was completed, the Forest Service postponed its EIS for neighboring allotments affecting the Weminuche bighorn population to wait for completion of the telemetry study on that population. Dyson Decl. ¶ 24; https://www.fs.usda.gov/project/?project=37578a.

By contrast, the Forest Service proceeded with the Wishbone decision and, despite stating repeatedly that its analysis would be based on the best available science and most current information, failed to include maps or analysis of all existing telemetry data in the Wishbone risk assessment or EA. WA02117, 02286, 02373, 02377, 02535, 02845, 02852, 02854, 05211-447. The agency noted the data and claimed it was used to verify bighorn core home ranges, but it never discussed whether the data supported its assumptions about bighorn movements and habitat use within these herds. WA03964, 03967, 03978, 03989-91, 04009, 04031-33, 04038-39.

CPW sent the Forest Service several emails and a brief report discussing early findings from the telemetry data, which indicated these bighorns make less predictable and more extensive movements than what was previously known. WA03779-85,

[9] Most of the telemetry collars were GPS collars that detected locations of the bighorn every 4 hours. WA04245; Ratner Decl. ¶ 29.

04246-48. Indeed, telemetry data on other bighorn populations have revealed more extensive movements than what was known previously. *See WWP III,* 2009 WL 3335365, at *4-5 (bighorns moving over 25 miles and interacting with other herds); *WWP IV,* 2017 WL 5571574, at *8, 11 (10-12 mile bighorn forays near and onto allotment). But rather than fully analyze existing data or wait for completion of the study, the Forest Service forged ahead and simply stated in the risk assessment that more data was needed and analysis of habitat use would occur in the future. WA03989. Thus, the agency did not analyze or disclose to the public the most current and useful data that existed and whether that data undermined its assumptions about bighorn movements used to lower the risk of the allotment to moderate.

Given that early findings from telemetry data undercut many of the Forest Service's assumptions in the risk assessment, the failure to analyze all of the data constituted a failure to use the best available science and to examine relevant data, in violation of NEPA. *Lee,* 354 F.3d at 1244 (agencies must use best available scientific information when assessing environmental impacts); *Richardson,* 565 F.3d at 714-716 (NEPA violation where agency did not examine relevant data before concluding that impacts would be minimal); *Wilderness Workshop v. U.S. Bureau of Land Mgt.,* 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018) (NEPA violation where agency failed to use data to estimate indirect effects when it used data for other purposes in EIS); *High Country Conservation Adv.,* 52 F. Supp. 3d at 1190-93 (NEPA violation where agency ignored scientific tool that was available and would have helped assess effects). This key omission defeated NEPA's goals of informed decision-making and informed public participation. *WildEarth Guardians,* 870 F.3d at 1233.

C. The Forest Service Failed to Consider All Effects of the Action.

The third problem with the Wishbone analysis was that it did not take a hard look at all effects of authorizing the allotment. It improperly dismissed potential effects to neighboring bighorn populations, as well as the risk from use of the allotment if the Central San Juan herds increase in size. WA05671-76. An agency must consider all direct, indirect, and cumulative impacts of a proposed action. 40 C.F.R. § 1508.25(c).

The Forest Service dismissed risks to the adjacent Weminuche, San Juan West, and Natural Arch bighorn meta-populations because those populations were too far away from the Wishbone Allotment to include them in the analysis. WA05639-40, 05672-75. This argument is unreasonable when the record shows these meta-populations use areas within 12 miles of the allotment, and bighorn forays are often longer than that. WA05639-40 (distances to allotment), 03863, 04246 (data showing Central San Juan and Weminuche bighorns moving 14-15 miles), 04062 (Risk of Contact Model analyzes forays up to 21 miles); *WWP III,* 2009 WL 3335365, at *4-5 (bighorns moving 25 miles); *WWP IV,* 2017 WL 5571574, at *8, 11 (10-12 mile forays).

Moreover, the Forest Service ignored the risk that a bighorn from adjacent meta-populations could interact with a diseased bighorn from a Central San Juan herd. The Wishbone risk assessment noted connections between these meta-populations, which recent telemetry data confirmed. WA03981, 03984, 03986, 03757, 03829-32. The meta-populations near the Wishbone Allotment total 1,150 animals—20% of the state's bighorn population. WA03832. A single contact between a domestic sheep from the Wishbone Allotment and a Central San Juan bighorn could spread disease to the other meta-populations and affect them for decades. WA04167, 04177; *see also* WA01816

(likely spread of disease from Bellows Creek herd to another herd 15 miles away).

Another effect the Forest Service dismissed without analysis was the increased risk from grazing the Wishbone Allotment if the Central San Juan bighorn herds increase in size and range. WA05675-76. Suitable habitat exists for such an expansion, and CPW acknowledged the increased risk of contact with domestic sheep as the bighorn population increases. WA04139, 04140. Rather than assess the likelihood of the bighorn population increasing and how that would affect the risk rating of the Wishbone Allotment, the Forest Service simply ignored the issue by stating that CPW would address that circumstance if it arose. WA05675-76. Using that excuse to disregard this effect violated NEPA. *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement,* 104 F. Supp. 3d 1208, 1227-30 (D. Colo. 2015).

The Forest Service's failure to assess these other reasonably foreseeable risks rendered the EA and DN/FONSI arbitrary and capricious. *Id*; *High Country Conservation Ass'n,* 52 F. Supp. 3d at 1196-98; *Citizens for a Healthy Community v. U.S. Bureau of Land Mgt.,* 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019) (all finding NEPA violations where agency disregarded foreseeable effects).

III. The Forest Service must prepare a supplemental NEPA analysis to consider the telemetry data and other recent bighorn sightings.

The Forest Service has also violated NEPA by failing to prepare a supplemental NEPA analysis that publicly discloses its consideration and analysis of the telemetry data and allows for public comment on that analysis. Instead, the Forest Service tried to escape that duty by completing the SIR, which was never revealed to the public. This tactic flouted the agency's responsibility under NEPA by using the report as a means to correct a deficiency in its prior EA and justify its decision while avoiding public

disclosure and public comments.

An agency must supplement its NEPA analysis if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1). An agency may prepare an SIR "for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS." *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004) (quoting *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000)). As *Pennaco* indicated, the purpose of an SIR is to analyze whether new information is significant, which would trigger the need for supplemental NEPA. *Id.*

Idaho Sporting Congress contains a thorough explanation of the limited role of SIRs. 222 F.3d at 566-68. The court stated that "once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute." *Id.* at 566. And more importantly, SIRs cannot serve to provide an analysis that was missing from the original EA or EIS. *Id.* "It is inconsistent with NEPA for an agency to use an SIR, rather than a supplemental EA or EIS, to correct this type of lapse. . . ." *Id.* If the Forest Service could correct deficiencies in an EA or EIS by means of an SIR or another non-NEPA procedure, it would render regulations and agency rules governing the supplementation of NEPA documents superfluous. *Id.* at 567 (citing 40 C.F.R. § 1502.9(c)(4), Forest Service Handbook 1909.15 Chs. 20, 40).

Many courts have followed *Idaho Sporting Congress* in explaining that an agency may not address a deficiency in an EA by using an SIR to analyze information that the agency knew or should have known at the time it prepared the original EA; rather, it can

use an SIR only to analyze the significance of "truly new" information that did not exist at the time of the decision. *Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1180-81 (D. Mont. 2010) (overturning use of SIR that attempted to cure deficiency in underlying EA); *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1087-88 (D. Mont. 2002), *aff'd* 58 Fed. Appx. 686 (9th Cir. 2003) (same); *Olympic Forest Coalition v. U.S. Forest Serv.,* 556 F. Supp. 2d 1198, 1206-08 (W.D. Wash. 2008) (same). Using an SIR to justify a decision already made averts the decision-making and public participation procedures that are the heart of NEPA. *Idaho Sporting Congress*, 222 F.3d at 567-68; *Rock Creek Alliance,* 703 F. Supp. 2d at 1181.

The SIR here was used precisely to fix a deficiency in the EA and provide an impermissible post-hoc justification for the agency's prior decision. The SIR documented an analysis of bighorn sheep observation data collected between January 2010 and July 4, 2018, including telemetry data on the near-by bighorn herds collected between January 22, 2016 and July 4, 2018. WA05882, WA05887. The Wishbone decision was dated March 23, 2018. WA05682. Thus, the vast majority of the data considered in the SIR pre-dated the Forest Service's Wishbone decision and was not "truly new" information. The Forest Service was clearly aware of this data and should have included a full analysis in the EA; it cannot use the SIR to cure this deficiency. WA04245, 06315; *Idaho Sporting Congress,* 222 F.3d at 566-68. As explained well in *Friends of the Clearwater v. McAllister*, using an SIR to fix a lapse in the EA "defeats the purpose and intent of NEPA to allow the public opportunity to participate in the decision-making process." 214 F. Supp. 2d at 1089.

Moreover, the purpose of an SIR is only to assess the significance of the new

information to determine if it warrants supplemental NEPA analysis. *See Pennaco,* 377 F.3d at 1151; *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997); *Idaho Sporting Congress,* 222 F.3d at 566. "[O]nce an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute." *Olympic Forest Coalition,* 556 F. Supp. 2d at 1206 (citing *Idaho Sporting Congress*, 222 F.3d at 566; *Price Rd. Neighbor. Ass'n v. United States Dept. of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997)).

The SIR here also runs afoul of this limitation. The Forest Service did not use the SIR simply to determine if the purportedly "new information" was significant. Indeed, it would be unreasonable to conclude that the telemetry data was insignificant when CPW identified its importance and stated that it showed unexpected and greater movements by these bighorns; and the data is used to determine bighorn core home ranges and the risk of contact for an allotment. WA04167, 03779-85, 04246-47, 05887. The Forest Service even paused the neighboring Weminuche EIS to complete the telemetry study on those bighorn herds. *See supra* p. 28. Additionally, a sighting of two bighorn sheep occurred on the Wishbone South River pasture in July 2019, during the grazing season, which contradicted the agency's prior statement that "[t]here are no known instances of bighorn documented in this pasture." WA03997, 05895.

Yet, the Forest Service did not stop at the threshold question of whether the new information was significant. It used the information to re-determine the bighorn core home ranges and re-run the Risk of Contact Model, finding that the core home range of the Bristol Head herd was now directly adjacent to the Crystal and Shallow pastures and the allotment risk of contact was *27% higher* than reported in the EA. WA05900,

05889. Even after that, the Forest Service did not conclude that the "new information" was significant. It went ahead and used the SIR to conduct a new risk assessment to undercut the new modeling results and remarkably conclude that the allotment was still just moderate risk. WA05888-97. Notably, the SIR only considered data through July 4, 2018 and therefore still ignored an entire additional year of telemetry data—data that was "truly new" information. WA05887, 05897 (decision signed July 2019). And all of this analysis occurred without any public participation. Thus, rather than just determining if the telemetry data and South River pasture bighorn sighting were significant information—which they undoubtedly were—the Forest Service used the SIR to supplant a supplemental NEPA analysis and thus subverted NEPA's procedures for proper decision-making and public participation.

Despite the Forest Service's attempt to avoid public participation, Petitioners and two national bighorn sheep experts submitted comments on the SIR to the Forest Service anyway, pointing out numerous flaws with the SIR analysis and determination—including many flaws related to the agency's reasons for lowering the risk rating for the allotment. ECF Nos. 28-1, 28-2, 29-1, 29-2. These are precisely the type of comments the Forest Service should have considered as part of the NEPA process. However, the agency still refuses to undertake a proper supplemental NEPA analysis that analyzes *all* of the telemetry data and other new bighorn sightings, in violation of NEPA.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court grant their petition for review, set aside the Wishbone EA and DN/FONSI, and order the Forest Service to complete an EIS before authorizing use of the Wishbone Allotment.

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Respectfully submitted,

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