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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-208-REB

WILDEARTH GUARDIANS, et al.

Petitioners,

v.

UNITED STATES FOREST SERVICE, a federal agency of the United States
Department of Agriculture,

Federal Respondent,

and

WAYNE BROWN, et al.,

Respondent-Intervenors.

**FEDERAL RESPONDENT'S OPPOSITION TO PETITIONERS' PETITION FOR
REVIEW OF AGENCY ACTION**

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INTRODUCTION

The Forest Service manages National Forest System lands for multiple uses, including outdoor recreation, range, timber, watershed management, wildlife and fish. Ultimately, all management choices are simply a balancing of risks, not certainties, with other multiple-use priorities, and the Forest Service has broad discretion to regulate its lands for a wide variety of purposes. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1268 (10th Cir. 2011). In carrying out its objectives for wildlife and range management, the Forest Service authorizes livestock grazing where appropriate on the Rio Grande National Forest. Livestock grazing has occurred on the Rio Grande National Forest since the 1920s.

In 2010, the Forest Service began analyzing the impacts of livestock grazing on existing domestic sheep allotments on the Rio Grande National Forest. These analyses focused on the risk of disease transmission from domestic sheep grazing on allotments to bighorn sheep. In 2015, the Forest Service determined the Snow Mesa, Table, and Miners allotments would not provide effective spatial and temporal separation between domestic sheep and bighorn sheep herds, thereby posing a high risk of disease transmission. In accordance with agency direction, the Forest Service considered other options for the domestic sheep that would be displaced by vacating these allotments. After much consideration, the Forest Service created the Wishbone allotment as a replacement to allow the permittees of the vacated allotments to continue grazing on the Rio Grande National Forest.

The Wishbone allotment has only a moderate risk of impacting bighorn sheep because mitigating factors provide effective spatial and temporal separation between

the two species. In March 2018, the Forest Service issued a decision notice vacating the Snow Mesa, Table, and Miners allotments and authorizing domestic sheep grazing on the Wishbone allotment.

Petitioners challenge the creation of the Wishbone allotment but not the vacatur of the other allotments. Petitioners allege the Forest Service did not comply with the National Environmental Policy Act in conducting its analysis of the Wishbone allotment's potential impacts. Petitioners reject the Forest Service's consideration of specific local factors relevant to the risk of contact between domestic sheep and bighorn sheep, essentially seeking a one-size-fits-all approach for every allotment on every National Forest. However, Petitioners fail to show the Forest Service's decision is arbitrary and capricious under the deferential standard of review applicable here. The Court should deny their requested relief.

FACTUAL BACKGROUND

In 2012, the Forest Service began analyzing the potential impacts of domestic sheep grazing on four existing allotments: Fisher-Ivy/Goose, Snow Mesa, Miners, and Table. WA_05220; WA_05219.¹ After determining the Fisher-Ivy/Goose allotment (the "FIG" allotment) was a higher priority for analysis, the Forest Service continued the analysis for the FIG allotment and deferred its analysis for the three other allotments. *Id.* The Forest Service decided to vacate the FIG allotment because achieving "effective separation" between bighorn and domestic sheep was unlikely. WA_02101; WA_01789; *see also* WA_01931-32 (maps showing direct overlap of domestic sheep

¹ Citations to the Administrative Record are referenced as "WA_." The Forest Service lodged the Administrative Record on June 18, 2019, and supplemented it on August 20, 2019 and September 17, 2019. ECF No. 15, 23, 26.

suitable grazing acres and bighorn sheep summer habitat). After issuing the Decision Notice for the FIG allotment, the Forest Service turned its attention to the Snow Mesa, Miners, Table, and Ouray Allotments (collectively, the “Snow Mesa” allotments) for analysis in January 2014. WA_02090; WA_05220. The Forest Service proposed to not reauthorize grazing on the Snow Mesa allotments because the allotments lacked spatial and temporal separation between the bighorn and domestic sheep. WA_02420-23; see *also* WA_05351.

Following public comment on the Snow Mesa draft Environmental Assessment and its proposed action, the Forest Service considered other options available for the current permittees if the Snow Mesa allotments were vacated. See WA_01326 (directing the Forest Service to “identify and analyze potential replacement allotments when developing management alternatives” and advising that the analysis for “replacement allotments should be part of a single decision-making process”); see *also* WA_05220; *Colorado Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1168 (10th Cir. 1999) (acknowledging that the Forest Service “must incorporate multiple forest uses”). Through a collaborative effort with the permittees and the Colorado Parks and Wildlife (the “State”), the Forest Service created the Wishbone allotment as a possible replacement for the Snow Mesa allotments. See WA_02657-58; WA_05662. The Wishbone allotment is southeast of Snow Mesa and covers approximately 10,480 acres—a much smaller amount than Snow Mesa’s 30,558 acres. WA_05223-25. The Wishbone allotment consists of seven pastures connected by designated routes for the permittees to move the domestic sheep. See WA_05357. Timing and duration of pasture use are determined by forage availability and utilized during the authorized

season of June 15 to September 1. WA_03995-98. In addition, there are specific time limitations sheep can graze a pasture. *Id.* The order in which pastures are used may be modified to increase separation between domestic and bighorn sheep. WA_05245.

In March 2017, the Forest Service provided public notice of its proposed action to vacate the Snow Mesa allotments and authorize grazing on the Wishbone allotment as a replacement. See WA_02675-92. On March 23, 2018, the Forest Service issued its final decision creating a new domestic sheep grazing allotment—the Wishbone allotment—and vacated three of the Snow Mesa allotments. In its final decision, the Forest Service found no significant impact for the Snow Mesa and Wishbone sheep allotments. WA_05660; WA_05682. Due to drought conditions, sheep grazing did not occur on the Wishbone allotment in 2018. See WA_5692-93. The Forest Service authorized sheep to enter the new Wishbone allotment in June 2019. WA_05798; WA_05876.

I. Bighorn Sheep Herds

Rocky Mountain bighorn sheep were designated as a Forest Service Rocky Mountain Region Sensitive Species² on June 8, 2007. WA_03966. The State classifies populations into two tiers: Tier 1 populations are large, native populations (greater than 100 animals for more than 90% of the years since 1986) consisting of one or more interconnected herds that have received few, if any, supplemental releases of Rocky Mountain bighorn sheep in the past. WA_04352. Tier 2 populations are medium to large populations greater than 75 animals for more than 80% of the years since 1986 or

² Sensitive Species are species of concern “because of a suspected downward trend in their population, and/or their habitat is being lost.” WA_00604.

since becoming fully established. WA03977. Bighorn sheep populations consist of interconnected herds, defined by Game Management Unit. WA_04352. The table below summarizes the herds at issue in this case.

Data Analysis Unit Name	Data Analysis Unit Code	Sub-Herd Name	Sub-Herd Code
Central San Juan	RBS-21	San Luis Peak	S-22
		Bellows Creek	S-36
		Rock Creek	S-52
		Bristol Head	S-53
Weminuche	RBS-20	Sheep Mountain	S-15
		Cimarrona Peak	S-16
		Vallecito	S-28
San Juan West	RBS-22	Cow Creek	S-21
		Upper Lake Fork/Pole Creek Mountain	S-33

A. The Central San Juan population

The Central San Juan bighorn population, which the Forest Service identifies as Data Analysis Unit RBS-22, is a Tier 2 herd. WA_04138. This herd consists of four Game Management Units: San Luis Peak (S-22), Bellows Creek (S-36), Rock Creek (S-52), and Bristol Head (S-53), which comprise the entire herd of approximately 260 animals. WA_03977. The Central San Juan population is located within less than a mile of the Snow Mesa and Wishbone allotments. WA_03963; WA_04035-39. The Forest Service and the State jointly identified the Core Herd Home Range (CHHR)³ using the State's mapped summer range, verified sightings, and surveys. WA_04061;

³ Core Herd Home Ranges are "[a]reas where most animals in each herd spend most of their time." WA_01804; see also WA_03978 ("The CHHR can be thought of as that portion of the overall range where 90% of individual bighorn sheep are located between spring green-up and the first heavy snowfall.").

WA_05738. The bighorn sheep CHHR overlaps with the Snow Mesa allotments but not with the Wishbone allotment. WA_03979-80.

B. The Weminuche Population

The Weminuche population, which the Forest Service identifies as Data Analysis Unit RBS-20, is a Tier 1 population. WA_04250. The designation is based on population size, population performance, and the lack of transplanted bighorns into the population. *Id.* RBS-20 consists of three Game Management Units. *Id.* 2010 and 2018 post-hunt population estimates were approximately 460 animals. WA_04250; WA_05758. The single domestic sheep allotment within this Data Analysis Unit was vacated by the 2013 FIG decision. WA_04251, WA_02099. The Weminuche herd is located approximately four miles from the Wishbone allotment, one mile further north than the lowest risk pastures evaluated in the FIG analysis. WA_05673-74.

C. The San Juan West Population

The San Juan West population, which the Forest Service identifies as Data Analysis Unit RBS-21, consists of two Game Management Units, S-21 and S-33. WA_05881. RBS-21 is a Tier 1 population. WA_03831. Population estimates were 100 animals in 1987. WA_04427. 2018 population estimates were 340 animals. WA_05758. The San Juan West Population is located approximately 12 miles from the Wishbone allotment. WA_05640.

II. The Forest Service's Assessment of Risk between Bighorn and Domestic Sheep

The potential for disease transmission may impact the number and potential distribution of bighorn sheep. See WA_01206; WA_05347-48. Temporal and spatial separation between the species at the forest level is the most prudent action to insure

viability of bighorn sheep. WA_01316. Since 2010, the Rio Grande National Forest has vacated a total of 20 domestic sheep allotments, which has created or improved separation between bighorn sheep and domestic sheep within the Forest. WA_05677. As a result, the Rio Grande National Forest meets the bighorn sheep population viability requirements required by the Forest Plan. WA_05894; WA_05895.

To assess the risk that domestic sheep may pose on the Wishbone allotment, the Forest Service used a four-step viability analysis process (qualitative assessment) that incorporated the Risk of Contact Tool (quantitative assessment). WA_01317; WA_04057-60; *see generally* WA_03872 (the Forest Service developed the Tool based on the Payette National Forest's method for calculating the probability and rates of contact between bighorn sheep and active allotments). The Risk of Contact Tool, a geospatial model based on peer-reviewed science, estimates the rate of contact of a foraging bighorn sheep with a domestic sheep *allotment*—not contact with *individual* domestic sheep. WA_03872 (“The Tool utilizes a core herd home range (CHHR), a summer habitat model, and active domestic sheep allotments to calculate the probability of ram and ewe forays outside the CHHR and the rate of contact with domestic sheep allotments.”); WA_03948; WA_04467-77. Forays are short-term movements that an animal makes away from, then subsequently back to, its herd's CHHR. WA_04062.

The Risk of Contact Tool provides an initial quantitative calculation of an annual rate of contact with an allotment. WA_03872. The Forest Service used this rate to estimate the Wishbone allotment's risk of disease transmission to bighorn sheep by applying a probability of a contact resulting in disease transmission. WA_04000; WA_04002.

Once the Forest Service completed the quantitative assessment provided by the Risk of Contact Tool, the Forest Service validated the results by considering local factors that are not included in the model. WA_05662 (“[R]esults should be interpreted in light of local conditions and knowledge.”). The Risk of Contact Tool’s user guide directs the Forest Service to use “site specific information” to achieve accurate “site-specific results.” WA_03948; *see also* WA_03988. Because the Tool’s default parameters do not capture several key characteristics of the grazing system, the Forest Service applied known local facts pertaining to the allotments and the affected bighorn sheep herds. WA_05349; WA_05668; WA_03988-95.

The Wishbone allotment poses only a moderate risk because it will provide spatial and temporal separation between the domestic sheep and any nearby bighorn sheep. *See* WA_05662. A rating of ‘Moderate’ risk indicates that physical contact by bighorn sheep with allotments may still exist, but with local herd-specific information factored into the analysis, effective separation is likely to reduce the risk of disease transmission. WA_04002-03.

III. The Forest Service’s Coordination with the Colorado Parks and Wildlife

In January 2016, the State began a study of bighorn sheep movements by collaring and monitoring particular herds. *See* WA_05880. The State anticipated completing its study and full analysis in 2019. WA_04245. Although the State disclosed some of its preliminary findings of interest regarding the bighorn sheep movements around the Snow Mesa and Wishbone allotments to the Forest Service, it did not release the raw data. *See* WA_03779-85.

Though the State considers the telemetry data⁴ confidential, it released the data to Petitioners but not to the Forest Service. See, e.g., Compl. ¶ 54, Figure 2 (displaying the bighorn sheep observations collected by the State). Prior to receipt of the petition, the Forest Service was unaware that the State had released telemetry data.

WA_05880. Because the State had released the data to Petitioners, the Forest Service again requested the data from the State on February 7, 2019. *Id.* After protracted negotiations, the Forest Service and the State entered into a non-disclosure agreement in May 2019. WA_05847-49; WA_05880. On May 15, 2019, the State finally provided the Forest Service telemetry data collected between 2013 and 2018. *Id.*

IV. The Forest Service's Supplemental Information Report

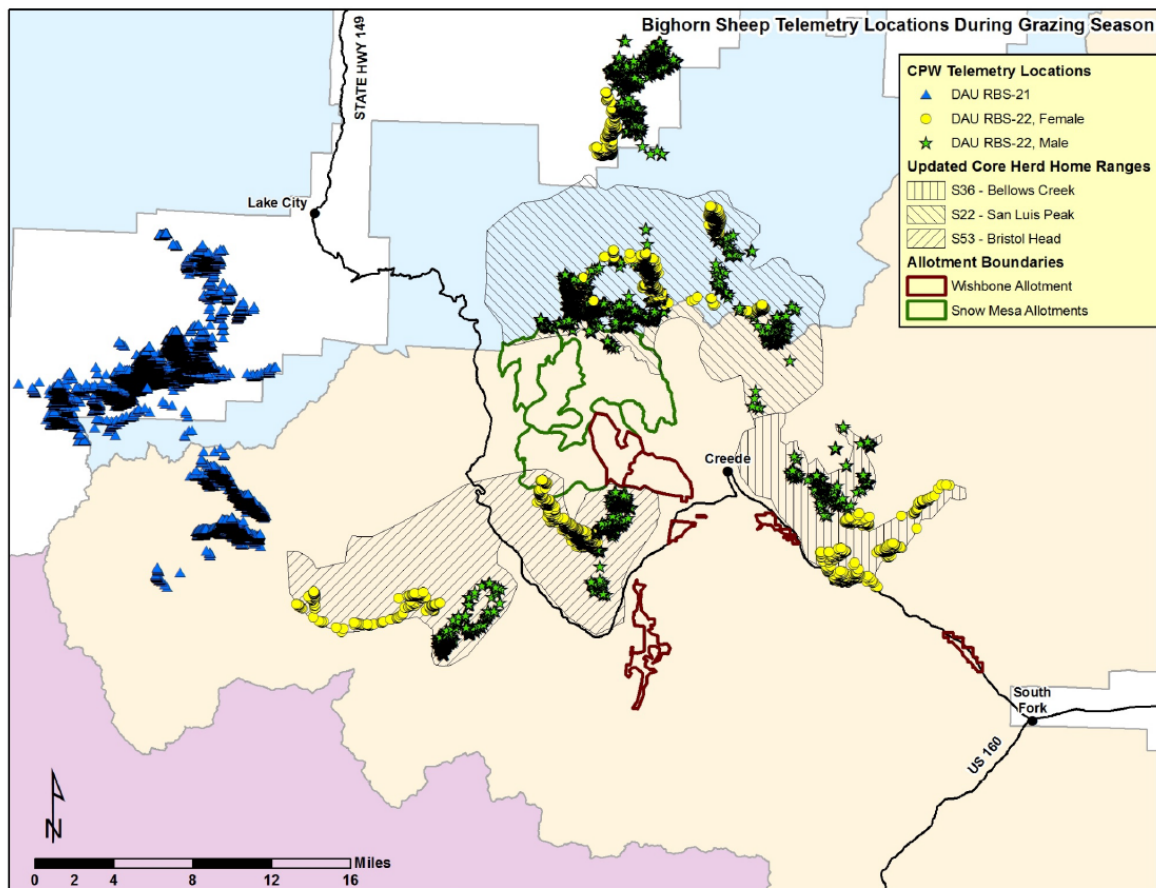
Following receipt of the telemetry data from the State, the Forest Service reviewed and analyzed the data and documented its findings in a Supplemental Information Report. WA_05879. Consistent with the Forest Service Handbook guidance, the Forest Service determined the new information or changed circumstances were within the scope and range of effects considered in the original analysis. See *id.*; Forest Service Handbook, 1909.15_18.1. The Forest Service fully explained its basis for determining that a supplemental analysis was not necessary. See *id.*

The Forest Service used the State's species activity maps and observations to identify the CHHR for bighorn sheep. WA_04061; WA_03875. After receiving the State's telemetry data, the Forest Service refined the CHHR. WA_05762-63. To

⁴ Telemetry is a technology that allows data measurements to be made at a distance. WA_04642.

determine the effect of the telemetry data, the Forest Service re-ran the Risk of Contact Tool using the refined CHHR. WA_05887.

The State's telemetry data supports the Forest Service's original conclusions contained in the EA and FONSI regarding the bighorn sheep movements in and around the Snow Mesa and Wishbone allotments. WA_05890 ("The new information fully supports the 2017 analysis regarding foray timing and demonstrates that foray events have not occurred within the boundaries of the Wishbone Allotment."); see *also* WA_05896; WA_05891-91; WA_05893. For instance, no bighorn sheep telemetry points occurred within the Wishbone pastures during the grazing season for seven consecutive years, as shown on the map below. WA_05901. Based on the available data, there is no evidence that any bighorn sheep entered the Wishbone allotment.



WA_05903 (map including all telemetry study years (2011 through 2018) and noting that June 15 through September 1 is the Wishbone grazing season).

In addition to the State's telemetry data, the Forest Service received information about a sighting of two bighorn sheep on the South River allotment. WA_05882. The sighting occurred when there were no domestic sheep grazing in the pasture. *Id.* Thus, the Forest Service determined that this single sighting was not significant and insufficient to justify altering the CHHR boundaries. WA_05896.

As the Supplemental Information Report explains, the Forest Service concluded that no correction, supplement, or revision to its March 2018 decision is necessary because the State's telemetry data is within the scope and range of effects considered in the original analysis of the Snow Mesa and Wishbone allotments, and the data supports and validates the local factors considered by the Forest Service to reduce the risk of contact from high to moderate. WA_05897.

LEGAL BACKGROUND

The National Environmental Policy Act ("NEPA") serves the dual purpose of informing agency decision-makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to members of the public so that they "may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA does not mandate particular results or impose substantive environmental obligations upon federal agencies. *Id.* at 351-52; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). The court must defer to the agency's informed

discretion. *Utah Shared Access All. v. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002).

NEPA requires the preparation of an Environmental Impact Statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). To determine whether an EIS is required, an agency may prepare a less detailed Environmental Assessment (EA). 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a list of individuals and agencies consulted. 40 C.F.R. § 1508.9. “If the EA leads the agency to conclude that the proposed action will not significantly affect the environment, the agency may issue a finding of no significant impact (FONSI) and forego the further step of preparing an EIS.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (citing 40 C.F.R. § 1501.4(e)). “An agency’s decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise.” *Id.*

STANDARD OF REVIEW

NEPA does not provide a private right of action, so courts review an agency’s approval of a final agency action under the Administrative Procedure Act. *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006). Under the APA, a court may only set aside an agency decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

An agency’s decision is arbitrary and capricious “if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not

be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts must “consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.” *Id.* at 30-31. “Deference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency’s area of expertise.” *Utah Env’tl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (citing *Marsh*, 490 U.S. at 378).

ARGUMENT

Petitioners contend that the Forest Service’s decision to authorize grazing on the Wishbone allotment was arbitrary and capricious because the Forest Service used assumptions that are allegedly unsupported, failed to use the best available science, and did not consider all of the allotment’s indirect effects. Petitioners also argue that the Forest Service violated NEPA by failing to prepare an EIS. Finally, Petitioners assert that the Forest Service is required to conduct a supplemental environmental analysis to consider the State’s telemetry data. As explained below, the Forest Service complied with all applicable laws when it decided to vacate the three Snow Mesa allotments and authorize grazing on the Wishbone allotment.⁵

⁵ The Complaint also alleges the Forest Service violated the National Forest Management Act (NFMA) by not providing for population viability. Compl. ¶ 92 (Claim Two). Petitioners do not raise this claim in their opening brief, and it is therefore waived. See *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) (“Ordinarily, a party’s failure to address an issue in its opening brief results in that issue being deemed waived.”); *G.W. v. Boulder Valley Sch. Dist.*, No. 16-cv-00374-PAB-SKC, 2019 WL 4464130, at *19 (D. Colo. Sept. 18, 2019) (finding waiver where party failed to raise arguments pertaining to claims). Even if the Court were to consider the NFMA claim, the Snow Mesa and Wishbone allotments contribute to the population viability at the forest-level and thus are consistent with Forest Plan direction. WA_05664-65; WA_05676-77.

I. The Forest Service's analysis of the grazing allotments was neither arbitrary nor capricious.

Petitioners present three arguments to challenge the Forest Service's decision regarding the Snow Mesa and Wishbone allotments. Pet'rs' Pet. for Review of Agency Action ("Pet."), 20, ECF No. 33. First, Petitioners challenge the Forest Service's application of local factors to the Risk of Contact Tool's results. *Id.* at 21-27. Second, Petitioners suggest that the Forest Service failed to use the best available science because it did not obtain the State's telemetry data before issuing the Decision Notice. *Id.* at 27-29. Third, Petitioners assert the Forest Service failed to consider all of the Wishbone allotment's impacts. *Id.* at 30-31. As explained below, all three arguments fail. Petitioners have not met their burden to show the Forest Service's decision was arbitrary and capricious.

A. The Forest Service properly considered local factors in its analysis.

The Forest Service assessed the risk of contact between bighorn and domestic sheep on the Snow Mesa and Wishbone allotments by using the four-step viability analysis process and the Risk of Contact Tool. WA_01317; WA_03988. The viability analysis requires the Forest Service to, among other things, assess the spatial and temporal overlap of bighorn sheep CHHR with domestic sheep allotments and identify management practices with the goal of separation between bighorn and domestic sheep where necessary to provide for Forest-wide bighorn sheep viability. WA_04057-58. The Risk of Contact Tool is a geospatial desktop application used for evaluating the risk of physical contact between bighorn sheep and domestic sheep allotments. WA_03988; *see generally* WA_03872 ("In response to bighorn sheep population viability concerns, the Payette National Forest developed a methodology for calculating

the probability and rates of contact between bighorn sheep and active domestic sheep allotments.”). The Ninth Circuit has already upheld the Payette National Forest’s use of the Risk of Contact model. *Idaho Wool Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1108 (9th Cir. 2016). The Risk of Contact Tool utilizes bighorn sheep CHHR information, a bighorn sheep habitat preference model, population size, domestic sheep allotment boundaries, and default foray rates and sex ratios to calculate probabilities that bighorn sheep may leave a CHHR and contact a specific domestic sheep allotment.

WA_04061. The Risk of Contact Tool does not directly assess the likelihood of physical interaction between domestic sheep and bighorn sheep or other aspects of the disease cycle needed to result in bighorn sheep population impacts. WA_04475.

As part of the analysis, the Forest Service first used the Risk of Contact Tool to provide an objective evaluation of the risk of contact between bighorn sheep and domestic allotments across the analysis area. See *generally* WA_05662 (summarizing the Forest Service’s risk assessment approach). Next, in accordance with the Risk of Contact Tool’s instructions, the Forest Service applied local factors to the Tool’s results to adjust for local conditions. WA_05662; see, e.g., WA_03891 (“Ideally, these data should be reviewed for site relevance and modified as necessary based on local conditions, coordination with state wildlife agencies, etc.”). After conducting its four-step viability analysis and considering the local factors in conjunction with the Risk of Contact Tool’s quantitative results, the Forest Service determined that the Wishbone Allotment has a moderate risk of disease transmission. See WA_05668.

Petitioners charge that the Forest Service did not act “in accordance” with the Risk of Contact Tool’s results in assessing the Wishbone allotment’s risk as moderate.

Pet. at 21-22. Specifically, Petitioners contend that the Forest Service should not have accounted for local factors in its analysis and instead should have determined the Wishbone allotment poses a high risk to bighorn sheep based solely on the Risk of Contact Tool's numerical results alone. *Id.*⁶ However, to ignore the relevant local factors, as suggested by Petitioners, would result in an incomplete analysis. See WA_03948 ("The model is an adaptation of the Payette-style analysis that will be executed using site-specific information derive site-specific results."); see also *Vilsack*, 816 F.3d at 1108 (recognizing that the Forest Service adjusts the risk of contact model to "fit local circumstances"). The Forest Service similarly included qualification factors, such as lack of temporal and spatial separation, when it determined the Snow Mesa allotments presented a high risk of contact. See WA_04007-33 (summarizing factors in bullet points for each allotment alternative); WA_04035 ("Consideration of the Results from the Risk of Contact Model combined with Other Known Factors such as on-the-ground local specific and relevant information supports a rank of High Risk" for the Snow Mesa allotments.). Interestingly, Petitioner's do not take issue with the Forest Service's consideration of these same or similar factors for the Snow Mesa allotments, where their consideration did not alter the risk assessment.

The Forest Service set forth five factors that contribute to lowering the risk of contact from high to moderate:

[1] temporal separation due to domestic sheep grazing duration; [2] spatial separation through habitat fragmentation and landscape configuration; [3]

⁶ Petitioners seem to mistakenly believe that a high risk rating automatically disqualifies an allotment to be used for grazing. Pet. at 22. The Forest Service is not prohibited from allowing domestic sheep to graze on an allotment that has been deemed high risk; rather, the correct standard is whether "the potential risk for contact, as identified through the four-step process, is at an unacceptable level" WA_01326.

spatial separation due to limited overlap between bighorn summer source habitat and domestic sheep capable range; [4] spatial separation due to bighorn sheep seasonal movements; and [5] project design features.

WA_05668. Petitioners challenge the use of all five factors.

1. Temporal Separation

The Wishbone allotment grazing season will occur between June 15 and September 1, and the grazing permits authorize a maximum of 78 days. WA_05668. The Risk of Contact Tool is based on a 180-day grazing season, with a constant distribution of foray rate during the set timeframe. *Id.* The Wishbone allotment will be grazed—at a maximum—less than half the time the Risk of Contact Tool estimates. *Id.* In addition, the Forest Service concluded that during the grazing season, bighorn sheep “tend to spend a significant amount of time” north of the Wishbone allotment. WA_04142; see WA_04143; WA_05928; see *also* WA_03990-91. Because the domestic sheep are on the allotment for a much shorter period of time than the Tool estimated and a majority of the bighorn sheep move away from the Wishbone allotment, there is less opportunity for bighorn sheep and domestic sheep to come into contact with each other. WA_05669. Based on these observations and the short grazing season, the Forest Service reasonably considered the temporal separation factor in conjunction with the Risk of Contact Tool’s quantitative results. See WA_05668.

Petitioners argue that evidence in the record contradicts the Forest Service’s temporal separation assumption. Pet. at 24 (“[T]elemetry data showed bighorns making unpredictable and extensive movements in the spring and summer”). However, the Forest Service accounted for the asserted “unpredictable and extensive movements” and still found a consistent temporal pattern in the bighorn sheep

movements. See, e.g. WA_04031 (finding that bighorn sheep graze in “the lower country on early spring grass before moving up into the higher country for summer” based on the seasonal movements of collared bighorn sheep).

Indeed, Petitioners’ cited materials support the Forest Service’s findings about the bighorn sheep’s seasonal movements. See WA_03779 (supporting the Forest Service’s conclusions that rams travel north of the Wishbone allotment during the summer because the collared ram was “back up” north in July 2017); WA_03757 (explaining that preliminary telemetry data documented a ram near the Wishbone allotment during the rut, i.e. fall season, and north of the Wishbone allotment during the summer season); WA_04246-47 (“Overlaying the GPS collar data on the current SAMs [Species Activity Maps, which the State produces, WA_05738] winter range polygons indicates a much larger wintering area [north of the Wishbone allotment] than currently documented.”); see also WA_04142 (supporting the Forest Service’s conclusion that “forays typically occur in October, outside the domestic sheep grazing season”). The record supports the Forest Service’s application of the temporal separation factor.

2. Spatial Separation through Habitat Fragmentation and Landscape Configuration

The Wishbone allotment features habitat fragmentations such as the Rio Grande River, Highway 149, and several subdivisions. WA_05417. The Forest Service determined that when summer source habitat⁷ is fragmented, bighorn sheep are estimated to be 34 times less likely to disperse across the landscape. WA_05669. The

⁷ Summer source habitat is suitable habitat. WA_03994. Bighorn sheep select habitat based on factors such as proximity of steep-sloped escape terrain, forage availability, and horizontal visibility. WA_04470.

Forest Service recognized that it is possible for bighorn sheep to disperse across a fragmented landscape to encounter domestic sheep, but the agency's risk assessment considered this possibility in context of temporal separation. WA_05668-69. For example, a bighorn sheep may cross the Rio Grande River during low flows, but the low flows occur outside of the Wishbone allotment grazing season.⁸ WA_05668 ("The grazing season will occur between June 15 and September 1.").

In contrast, Petitioners do not account for temporal separation in listing record cites that support bighorn sheep movements across fragmented habitat. See Pet. at 24. None of Petitioners' cited documents reveal bighorn sheep movements across fragmented habitat during the Wishbone allotment grazing season. See *id.* (citing WA_03726; WA_03750; WA_03756; WA_03781; WA_03985; WA_04017; WA_04137; WA_06063; WA_06079; WA_06187; WA_06245-48; WA_03781; WA_04247).

The timing of these movements is critical because the Forest Service based its risk assessment on both temporal and spatial separation. See WA_05688-69. Thus, the accuracy of the Forest Service's risk assessment is not discredited simply by focusing on any one factor. WA_05668 ("[T]he incremental factors [] act together to moderate the risk of contact"). Petitioners fail to establish this factor is unsupported because the Forest Service reasonably determined that the fragmented and discontinuous habitat contributes to a lower risk than contemplated by the Risk of Contact Tool's results.⁹

⁸ Indeed, Petitioners' visit describing a low river level was outside the summer grazing season. See Decl. of Jonathan Ratner ¶ 18, ECF No. 35.

⁹ Petitioners also argue that "it was inappropriate for the Forest Service to [] lower the risk rating for the allotment" based on this factor because the Risk of Contact Tool "accounted for the quality of bighorn habitat in determining the likelihood of a bighorn

3. Spatial Separation due to Limited Overlap between Bighorn Summer Source Habitat and Domestic Sheep Capable Range

The Wishbone allotment has only 34% overlap between bighorn sheep summer source habitat and domestic sheep capable range, which increases spatial separation between the two species. WA_05663. Petitioners do not challenge the veracity of this overlap calculation. See Pet. at 22. Instead, Petitioners compare the Wishbone allotment's *CHHR* overlap—not summer source habitat overlap—to the FIG and Snow Mesa allotments' *CHHR* overlap. *Id.* Petitioners' comparison fails to establish any inaccuracy with this spatial separation factor for two reasons.

First, the Forest Service did not base its moderate risk rating solely on “no direct overlap” between the Wishbone allotment and the bighorn *CHHR*. See WA_05668 (listing the five factors that gave rise to a risk assessment of “moderate”). Accordingly, Petitioners' comparison is inapplicable to this factor.

Second, Petitioners incorrectly state that the FIG and Snow Mesa allotments “did not overlap bighorn core home range.” *Id.* (citing WA_01801; WA_01818; WA_04036). Four of the seven pastures in the FIG allotment were in the bighorn *CHHR*, and two of the three allotments in the Snow Mesa analysis were in the bighorn *CHHR*. WA_01801; WA_04035. The record supports the Forest Service's consideration of this factor as well.

foraging onto an allotment.” Pet. at 24. However, the Risk of Contact Tool does not take into account the Rio Grande National Forest's unique landscape features that create filters that influence the movement of bighorn between the different qualities of habitat. See WA_03994 (noting that there are discrepancies between the mapped summer source habitat and actual on the ground conditions); WA_04062 (noting that the Forest Service used the tool's default values, which were derived from the dataset collected on the Payette National Forest). Moreover, the Forest Service is owed “greater-than-average deference” in choosing the appropriate methodology for its analysis. *Vilsack*, 816 F.3d at 1108.

4. Spatial Separation Due to Bighorn Sheep Seasonal Movements

The migration pattern for certain herds are “fairly predictable each season.” WA_05373. The Decision Notice states, “[l]ocal knowledge of bighorn sheep seasonal migration patterns within their core herd home range indicate that *most* animals migrate to higher elevations during the summer.” WA_05670 (emphasis added). In particular, most bighorn sheep move closer to the Snow Mesa Allotments and further away from the Wishbone allotment during the grazing season. WA_05374. The migration pattern identified in the analysis was developed based on years of ground monitoring and preliminary telemetry data. WA_03651-59; WA_03770-78; WA_05729-35; WA_05767-76; WA_03988-95; WA_04038-39. The Forest Service also recognized in its analysis that “the potential for contact between domestic and bighorn sheep remains while domestics are grazed” in the Shallow and Crystal Pastures. WA_03997-98. To minimize this risk, grazing on these pastures will be limited in duration (8 days for Shallow Pasture and 35 days for Crystal Pasture), and project design features will be implemented. WA_03997-98; WA_05670.

Petitioners myopically focus on the elevation of the Shallow and Crystal Pastures to argue that these pastures are at “high risk.” Pet. at 23. But Petitioners ignore the Forest Service’s supported findings that during the grazing season, the majority of the bighorn sheep move away from the Wishbone allotment and closer to the Snow Mesa allotments—not simply to *higher elevation*. *Id.*; WA_05670 (“The bighorn [herds] follow this pattern, which put them in closer proximity to the Snow Mesa allotments during the grazing season.”). And Petitioners point out that bighorn sheep have traveled *near* the Shallow Pasture, they fail to address that “[t]here are no known instances of bighorn

documented *in* [Shallow] pasture.” Pet. at 23; WA_03997 (emphasis added). Thus, the record supports the bighorn sheep migration pattern and the spatial separation.¹⁰

5. Project Design Features

The final factor concerns project design features. The Forest Service recognizes that it cannot rely on design features alone to provide effective separation between bighorn and domestic sheep. WA_05670. Rather, all of the factors “act together” to mitigate—not negate—the bighorn sheep’s natural attraction to domestic sheep. WA_05668; WA_05670.

The Forest Service factored the design features into the Risk of Contact Tool’s numerical results because the features are consistent with effective land management policy and because the trial grazing periods in 2016 and 2017 suggest that the features will work as designed. WA_05671. Notably, there were no documented noncompliance issues during the 2016 trial grazing period, but the 2017 trial period documented 56 strays. See WA_05671 (“2016 saw zero strays while 2017 saw multiple.”); WA_03595-97. The Forest Service realized that “the success in implementing [the Wishbone allotment design features] relies heavily on having sufficient manpower to ensure that the domestic sheep are accounted for” *Id.* As a result, the Forest Service requires two herders as a design feature of the Wishbone allotment. *Id.* (“[I]n 2016 the permittees used two herders whereas in 2017 they did not.”).

¹⁰ Petitioners also contend the State’s preliminary telemetry data “undermined the Forest Service’s generalization about seasonal movements.” Pet. at 23 (citing WA_04247; WA_03785). To the contrary, the data supports the Forest Service’s findings about seasonal migration habits. See WA_03990 (describing the Bristol Head herd’s seasonal movements based on “six ewes and three rams with radio collars in this herd”); WA_03991 (describing the Bellows Creek herd’s movements based on “two ewes and three rams with radio collars in this herd”).

Petitioners' litany of noncompliance incidents does not account for the adjustments in the design features that the Forest Service has made. See Pet. at 25-26. In addition, the permittees' objections stated that the terrain "becomes more of a problem" on only three of the seven pastures. WA_05461. Two of the more problematic pastures have limited grazing days within the grazing season, which Petitioners do not address. See WA_03997-98.

In sum, the Forest Service's qualitative assessment is based on well-supported local factors. As such, the Forest Service's moderate risk rating is owed great deference. See *Utah Env'tl. Cong.*, 518 F.3d at 824. Given that the Forest Service's local factors are well supported by the record, and "in light of the deference owed to the agency when undertaking technical analysis within its purview," the Forest Service's reliance on the five local factors to qualify the Risk of Contact Tool's results was not arbitrary or capricious. *Vilsack*, 816 F.3d at 1108.

B. The Forest Service used the best available scientific information in its analysis of the Wishbone allotment.

Petitioners argue that the Forest Service "failed to examine and use key data" from the State's telemetry study, suggesting the data was available to the Forest Service in the first place. Pet. at 27-29.

NEPA requires an agency to obtain and include in its analysis information regarding reasonably foreseeable significant adverse impacts that are "essential to a reasoned choice among alternatives 'if the costs of obtaining such information are not exorbitant.'" *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241 (10th Cir. 2004) (quoting *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1523 (10th Cir.1992)); 40 C.F.R. § 1502.22 (acknowledging that "overall costs" of obtaining information can be exorbitant).

In this context, “overall costs” includes financial costs *and other costs such as costs in terms of time (delay) and personnel.*” Fed. Reg. 15618, 15622 (April 25, 1986) (emphasis added) (noting that agencies need not “perform a cost-benefit analysis” but instead only consider the costs “in light of overall program needs”).

Petitioners suggest that all of the data were “available” to the Forest Service simply because it knew about the study and had received the State’s preliminary findings about the data. Pet. at 27. However, the Forest Service was unable to obtain the data because the State considered the data confidential and sensitive, did not want it released to the public, and did not share it with the Forest Service until May 2019, after the State and Forest Service entered into a confidentiality agreement.

WA_05847; WA_05880.

Moreover, Petitioners fail to demonstrate any insufficiency in the State’s preliminary data that the Forest Service used in its analysis.¹¹ See *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172-73 (10th Cir. 1999) (finding the Forest Service used the best available information because petitioners failed to “show how additional, site-specific [] data is ‘essential’ to reasoned decision making”); see also *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) (acknowledging the desirability of

¹¹ Petitioners misinterpret the State’s preliminary data by stating the data indicates bighorn sheep “make less predictable and more extensive movements than what was previously known.” Pet. at 28. To the contrary, the Risk Assessment describes how the State’s data supports the Forest Service’s assumptions about the bighorn sheep movements. See, e.g., WA_04031 (noting the sub-herds’ locations revealed by “recent telemetry data,” which the Forest Service factored into its analysis). And the Forest Service’s scientific interpretations are afforded great weight. *Utah Envtl. Cong.*, 518 F.3d at 824; *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1194 (D. Colo. 2014) (finding that “mathematical forecasting based on the old data” is “precisely the type of technical disagreement where deference to the agency is most important.”).

using the most current and comprehensive data available but upholding the agency's "professional judgment that the later data would not alter its conclusions"). Accordingly, the Forest Service's analysis of the Wishbone allotment constitutes a reasonable, good faith presentation of the best information available under the circumstances. See *Lee*, 354 F.3d at 1244 (agency's analysis included best available scientific information because the court had "no reason to believe that the studies' conclusions are inaccurate").

Petitioners further suggest that the Forest Service should have waited for the State to complete its study before issuing the Decision Notice. See Pet. at 29. While Petitioners may have preferred for the Forest Service to wait until the State completed its study and provided the full telemetry data—a preference they did not voice for the Snow Mesa allotments—the Forest Service was not required to obtain more information beyond what was analyzed. See *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1194 (D. Colo. 2014) (declining to require agency to obtain additional information where agency determined it was unnecessary).

To the extent Petitioners claim the Forest Service violated 40 C.F.R. § 1502.22(b), Petitioners are misguided because the Forest Service complied with this NEPA regulation by providing information about the State's telemetry study. See *Colo. Envtl. Coal.*, 185 F.3d at 1172-73 (courts are "unwilling to give a hyper-technical reading of [40 C.F.R. § 1502.22] to require the [agency] to include a separate, formal disclosure statement in the environmental impact statement to the effect that . . . data is incomplete or unavailable"). Namely, the Forest Service addressed the State's ongoing study and disclosed the fact that the State's telemetry study was incomplete at the time.

WA_05373 (“A temporal analysis of the proximity (to the Wishbone Allotment) will be conducted [by Colorado Parks and Wildlife] in the future after more GPS collar data is collected (Colorado Parks and Wildlife 2017).”).

C. The Forest Service considered all relevant effects on the relevant bighorn sheep herds.

Petitioners argue that the Forest Service failed to take a hard look at the effects of three neighboring bighorn herds. Pet. at 30. Petitioners also argue that the Forest Service should have considered the potential impacts *if* the herds increase in size. *Id.*

NEPA’s implementing regulations require an agency to “determine the scope” of its environmental analysis by considering direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25(c). Establishing the proper scope of potential effects “requires a high level of agency expertise, and as such, the agency’s determination is due a substantial amount of discretion.” *Valley Cmty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (“Resolving [scope of analysis] issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.”). “Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.” *Kleppe*, 427 U.S. at 412.

Here, Petitioners have not met their burden to show the Forest Service acted arbitrarily and capriciously in determining the proper scope of analysis. First, Petitioners mistakenly assert that the Forest Service “dismissed risks to the adjacent Weminuche, San Juan West, and Natural Arch bighorn meta-populations” on the basis that the populations were “too far” from the Wishbone Allotment. Pet. at 30. In fact, the Forest Service did analyze the Weminuche herd in its evaluation of the FIG Allotment and

determined there was a low likelihood of a foray from the Weminuche herd to the project area. WA_05639; see WA_05672-75. The Forest Service similarly found the San Juan West herd to be at low risk because “the distance between the [San Juan West] herds and the Wishbone allotment is similar to the distance between the Weminuche herd and the Wishbone allotment.” WA_05640. Likewise, the Forest Service explained the “low risk of concern for contact between the [Natural Arch] herd and domestics while grazing” WA_05640. Specifically, the Natural Arch herd has a “low number of animals” and grazing on the Wishbone pasture nearest to the herd, which is 12 miles away, will be limited to only a week. *Id.* Thus, the Forest Service had a reasonable basis to forego further analysis of these particular herds. See 40 C.F.R. § 1508.28 (allowing agencies to tier analysis to earlier related NEPA documents); *Colorado Envtl. Coal. v. Bureau of Land Mgmt.*, 932 F. Supp. 1247, 1254 (D. Colo. 1996) (approving agency’s tiered analysis).

Second, Petitioners contend 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.” Pet. at 30. To the contrary, the Forest Service recognized this potential risk and expressed it as an uncertainty in the Risk Assessment. See WA_04045; see also WA_05677-78 (acknowledging the “documented instances of connectivity between the Central San Juan and the San Juan West and Weminuche herds” and explaining that the Snow Mesa and Wishbone allotments provide “temporal and spatial separation that reduces the risk of contact and further supports this reduction with project design features”).

Finally, Petitioners fault the Forest Service's analysis for not considering the potential of the herds increasing in size and range. Pet. at 31. Again, Petitioners are mistaken because the Forest Service considered this potential by outlining a plan of action should the herds' population reach the State's threshold for re-evaluating its management strategy, which is 350 sheep. WA_05676; WA_04139. "[I]t is well-established that '[a]gencies only have a duty to discuss . . . the [] impacts that are reasonably foreseeable.'" *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1251 (10th Cir. 2011) (quoting *Utahns for Better Transp.*, 305 F.3d at 1176). Given that the populations have remained steady or only slightly declined, it was reasonable for the Forest Service to anticipate the need for revisiting its analysis rather than considering the impacts of the unlikely possibility of the herds significantly increasing. See WA_05758-59 (providing population estimates from 2016 through 2019). Therefore, the Forest Service's decision was neither arbitrary nor capricious.

In sum, the Forest Service properly considered the local factors in conjunction with the Risk of Contact Tool to provide for a more accurate assessment. The Forest Service also used the best *available* scientific information at the time. And the Forest Service evaluated all of the relevant, reasonably foreseeable impacts of the Snow Mesa and Wishbone allotments. Therefore, the Forest Service's decision was not arbitrary and capricious.

II. The Forest Service reasonably determined that an Environmental Impact Statement is not necessary.

Petitioners allege the Forest Service erroneously found that the Wishbone allotment does not have any significant impacts. According to Petitioners, the Forest Service should have prepared an EIS rather than an EA. Pet. at 14-25.

When reviewing a FONSI, a court must “determine whether the agency acted arbitrarily and capriciously in concluding that the proposed action will not have a significant effect on the human environment.” *Greater Yellowstone Coal.*, 359 F.3d at 1274; *Comm. to Pres. Boomer Lake v. Dept. of Transp.*, 4. F.3d 1543, 1555 (10th Cir. 1993) (“An agency’s decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise and accordingly, is reviewed under the deferential arbitrary and capricious standard of review.”) (citing *Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 972-73 (10th Cir. 1992) (en banc)). “By challenging the FONSI, it is the [petitioner’s] burden to establish the agency’s decision as arbitrary and capricious.” *Id.*

Whether environmental impacts are significant depends on their context and intensity. 40 C.F.R. § 1508.27; *Greater Yellowstone Coal.*, 359 F.3d at 1274. “Context” captures the notion that “[s]ignificance varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 n.9 (10th Cir. 2002). The term “intensity” refers to the severity of the impact. 40 C.F.R. § 1508.27(b); *Middle Rio Grande*, 294 F.3d at 1229 n.9. In evaluating intensity, agencies should consider ten criteria, including the four raised by Petitioners in this litigation: the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration; and whether the action is related to other actions with individually insignificant but cumulatively significant

impacts. 40 C.F.R. § 1508.27(b)(4), (b)(5), (b)(6), (b)(7).

A. The Wishbone allotment's effects are not highly controversial.

Petitioners first contend the Forest Service failed to consider whether the challenged action is “highly controversial.” Pet. at 16-18. Specifically, Petitioners contend that there is controversy in the context of 40 C.F.R. § 1508.27(b)(4) as to the Wishbone allotment's impacts on bighorn sheep. *Id.*

“Controversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action.” *Middle Rio Grande*, 294 F.3d at 1229; *Cold Mountain v. Garber*, 375 F.3d 884, 893 (9th Cir. 2004) (“[T]he existence of opposition does not automatically render a project controversial.”). “A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions.” *Nat'l Parks & Conservation Ass'n v. Babbitt* (“NPCA”), 241 F.3d 722, 736 (9th Cir. 2001) (internal citations and quotations omitted), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); see *Greater Yellowstone Coal.*, 359 F.3d at 1275 (citing *NPCA*, 241 F.3d at 736, for comments that provide evidence of a substantial dispute).

Under the NEPA regulations, the dispute as to the size, nature, or effect of the action must also be “highly” controversial. 40 C.F.R. § 1508.27(b)(4). As the Ninth Circuit has explained, “[t]he use of the word “highly” in the NEPA regulations to modify “controversial” and “uncertain” means that information merely favorable to [plaintiff's] position in the NEPA documents does not necessarily raise a substantial question about the significance of the project's environmental effects.” *Native Ecosys. Council v. Forest Service* 428 F.3d 1233, 1240 (9th Cir. 2005) (“[S]imply because a challenger can

cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain.”).

Petitioners allege that the Wishbone allotment’s effects on bighorn sheep are highly controversial “due to substantial disputes about the impacts to bighorn sheep.” Pet. at 16. These alleged disputes, according to Petitioners, are evidenced by their criticism of the local factors and disagreement with the Forest Service’s conclusion that the Wishbone allotment poses only a moderate risk. *Id.*

Petitioners’ argument is flawed because it attacks the Forest Service’s method for evaluating the Wishbone allotment’s risk. Dissatisfaction with the Forest Service’s *method* of assessing the impact does not equate to the impact itself being highly controversial. *Utah Shared Access All.*, 288 F.3d at 1212 (“The fact that the Service did not employ a particular method of analysis in its study . . . does not render its Environmental Assessment inadequate.”); *Middle Rio Grande*, 294 F.3d at 1229 (explaining “controversy” in the NEPA context encompasses disputes as to the size, nature, or effect of the action—not the agency’s chosen methodology). In other words, the *effect* of the agency action must be in dispute, not only the method of its assessment because “courts are not in a position to decide the propriety of competing methodologies, but should simply determine whether the challenged method had a rational basis and took into consideration the relevant factors.” *Utah Shared Access All.*, 288 F.3d at 1212 (10th Cir. 2002) (citing *Comm. to Pres. Boomer*, 4. F.3d at 1553.

Petitioners fail to raise substantial questions and instead rely on their critique of the local factors. However, the local factors are well-reasoned and are based on the State’s preliminary telemetry data and years of ground monitoring by the Forest Service.

WA_05880; see *Vilsack*, 816 F.3d at 1108 (upholding use of the Risk of Contact tool that was “predicated on data depicting actual big horn sheep movements” and data from on-the-ground observations); *Utah Shared Access All.*, 288 F.3d at 1211 (approving the Forest Service’s adapted use of the model and giving weight to the model’s admonishment that “[m]odels are simply tools to assist in decision-making”). The local factors result in a more accurate assessment because they better reflect the context within which the Forest Service took action. See *supra* at 15-23. This practice furthers the goals of NEPA by considering “the effects in the locale rather than the world as a whole” and observing that “[s]ignificance varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a).

Petitioners cite three cases to support their argument that the effects are highly controversial, but these cases arose under vastly different circumstances and are not applicable here. First, Petitioners use *Middle Rio Grande* for the proposition that “a wide disparity in the estimates of the action’s impact [i]s a substantial dispute about effects.” Pet. at 17. However, in that case the range of estimated effects was much broader and involved the unique context of critical habitat designation. See 294 F.3d at 1223-24, 1228. Specifically, in the draft EA, estimates of loss of farmland resulting from the habitat designation ranged from 2,000 to 85,000 acres, and estimates of required water were from 26,000 to 188,000 acre-feet of water per year. *Middle Rio Grande*, 294 F.3d at 1228. In contrast, the range of estimated impacts to bighorn sheep is from moderate to high, with much of the difference stemming from the application of local factors used to make the assessment more precise. Pet. at 16-17. Additionally, *Middle Rio Grande* was decided within the context of the designation of critical habitat under

the Endangered Species Act—a situation in which “circumstances . . . which would relieve the Secretary of the Interior from the duty to prepare an EIS . . . will be unquestionably rare.” *Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1225. The court stressed that “the decision to conduct an EIS is committed to the administrative agency in the first instance,” but upheld the district court’s order to conduct an EIS “[g]iven the *unique* circumstances of this case.” *Id.* at 1231. The factors giving rise to the unique situation do not exist here. *Id.* at 1230-31 (listing the relevant circumstances).

Likewise, Petitioners’ reliance on *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001), is also misguided. In that case, the Park Service acknowledged that its action would have an effect but failed entirely to establish the intensity of the impact, and, in response to assertions that the effects were likely to be substantial, responded that the extent of the effects was unknown. 241 F.3d at 737. Here, the Forest Service firmly established the degree to which the action could affect the environment based on the best science available. WA_0398; WA_04031-33; WA_04039.

Lastly, Petitioners cite to *San Luis Valley Ecosystem Counsel v. U.S. Forest Service*, No. 04-cv-01071-MSK, 2007 WL 1463855 (D. Colo. 2017), for the proposition that effects are highly controversial if an agency does not address potential impacts raised by public comments. Pet. at 18. Petitioners contend that the Forest Service “did not properly analyze the risk the [Wishbone] allotment would pose to bighorn populations adjacent to the Central San Juan herds.” Pet. at 17. However, *San Luis Valley* is inapplicable here because Petitioners ignore that the Forest Service did in fact

analyze the impacts to the Central San Juan herds, including potential impacts raised during the public comment period. See WA_05362-71.

Petitioners have failed to show that the potential effects of the Wishbone allotment are “highly controversial” within the meaning of NEPA because they do not raise substantial questions. Criticism regarding the agency’s method of assessment does not equate to controversy over the effects of the action, and the Forest Service’s determination was well-reasoned and based on the best available science.

B. The Wishbone allotment’s effects are not unique or highly uncertain.

Petitioners next contend that authorization of the Wishbone allotment created a unique risk and that the result of the risk is highly uncertain. Pet. at 18-19. According to Petitioners, the possible effects involve unique risks because disease transmission to bighorn sheep is unique to domestic sheep grazing. *Id.* Petitioners contend further that the risk is highly uncertain “given the dispute about how often and how far the disease would spread” and because of the disparity between the risk assessment before and after the input of local factors into the initial results of the Risk of Contact Tool. *Id.*

“[T]he [NEPA] regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are highly uncertain.” *Envtl. Prot. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006). The fact that updated estimates are not comparable to those made using other methods in the past does not support the conclusion that the estimates are highly uncertain. *Friends of Animals v. U.S. Bureau of Land Mgtm.* 2017 WL 5247929, *7 (D. Wyo. 2017) (“If that were the case, an agency would be stuck using poor or outdated techniques and models simply for comparability.”).

Contrary to Petitioner's contentions, the risks to bighorn sheep presented by domestic sheep grazing are neither unique to this specific situation nor unknown. These risks are sufficiently common to have spurred extensive scientific research and the development of recommendations for the management of domestic sheep and goats in wild sheep habitat, among other guidelines. WA_04064; WA_04672. Indeed, other courts have addressed these very same concerns. *See Gallatin Wildlife Ass'n v. U.S. Forest Service*, 2015 WL 4528611 (D. Mont. 2015) (deciding a challenge to the Forest Service's authorization of grazing allotments after the introduction of bighorn sheep); *Vilsak*, 816 F.3d at 1095 (assessing the Forest Service's decision to reduce domestic sheep grazing because of the allotment's proximity to bighorn sheep).

The Forest Service recognizes the potential for disease transmission from domestic to bighorn sheep and provided an in-depth analysis of the potential effects and risks to bighorn sheep. WA_03956; WA_04063. The Wishbone allotment's possible effects are not highly uncertain because the risks from domestic sheep are "hardly unusual" and the effects were "largely predictable." *Surfrider Found.* 989 F. Supp. 1309, 1325 (S.D. Cal. 1998); see WA_03651-59 (assessing strength and health of bighorn herds with consideration of the effects of domestic sheep grazing); WA_03770-78 (presenting results from ground observation studies in 2017); WA_04038-39 (concluding that the Risk of Contact Tool and local factors result in a moderate risk assessment). The environmental effects are largely predictable.

The effects of domestic sheep grazing are widely studied, and the tools used by the Forest Service are trusted to accurately assess the degree to which an allotment could affect bighorn sheep. The Forest Service applied the trusted tools to the

Wishbone allotment and defined the associated risk. Thus, the Wishbone allotment's effects or neither highly uncertain nor unique.

C. The Wishbone allotment will not establish a precedent for future actions.

Petitioners contend that the action may establish precedent for future actions because the Forest Service may use similar modeling techniques for calculating the risk ratings of other proposed allotments. Pet. at 19-20. In particular, Petitioners contend that the Forest Service used “unsupported assumptions” to determine the Wishbone allotment poses a moderate risk. *Id.*

The following characteristics of an agency action cut against the argument that it will establish precedent for future action: an EA that is highly specific to the proposed action and non-binding in nature; a lack of evidence in the record supporting a conclusion that issuance of a FONSI would create irreversible pressure to approve a future project without completing an EIS; an absence of an indication that a judicial refusal to force the agency to complete an EIS in the action would enable the agency to ratify future actions without complete adherence to NEPA. *Oregon Wild v. U.S. Forest Service*, 107 F.Supp.3d 1102, 1113 (D. Or. 2015) (concluding no EIS was required due to the “highly specific, non-binding nature of the EA”); *Nat’l Parks Conserv. Ass’n v. United States*, 177 F.Supp.3d 1, *32 (D.C. Cir. 2016) (approving the issuance of a FONSI absent evidence in the administrative record that the Forest Service would “feel bound” by their decision in future cases); *Surfrider Found. v. Dalton*, 989 F.Supp. 1309, 1325 (S.D. Cal. 1998) (concluding no EIS was required upon finding the EA was highly site-specific and contained no indication that the agency would be able to act without full compliance to NEPA in the future).

Contrary to Petitioners' assertion, the Forest Service's assumptions—the local factors—are supported by science. See WA_03651-59; WA_03770-78; WA_03988-95; WA_04038-39. Thus, there can be no precedent set for using “unsupported assumptions” in future agency actions. Secondly, this action does not establish a precedent for future actions because site-specific analyses were conducted that would necessarily differ from site-specific analyses in future decisions. WA_05681 (“[T]his decision is specific to the Wishbone Allotment and Divide District of the Rio Grande National Forest” and “[a]ny future actions’ effects would be assessed through action-and-site-specific analysis”). Again, agencies are directed by NEPA regulations to consider the significance of an action in the context of the locality, and this method of analysis fulfills that responsibility. 40 C.F.R. § 1508.27(a).

In addition, Petitioners try to support their argument by pointing to the fact that the Forest Service has in the past eliminated domestic sheep grazing areas that the Risk of Contact Tool rated as high risk and that this is the first time the Forest Service has applied local factors to the Tool's results. Pet. 19. However, this assertion provides no evidence that the agency will not comply with NEPA and conduct an independent analysis of the risk of any future allotments. To be sure, the agency may apply local factors to a risk assessment in a future action, but those local factors are necessarily dependent on the local conditions of the subject area. See WA_03948.

In sum, the risk assessment of the Wishbone allotment will not establish a precedent for “unsupported assumptions” because the assessment was derived from a rigorous scientific analyses. The Forest Service conducted a site-specific analyses that will necessarily differ when applied to future actions.

D. The Wishbone allotment will not have cumulative significant effects.

Lastly, Petitioners allege that authorization of the Wishbone allotment is related to other actions with individually insignificant but cumulatively significant impacts. Pet. at 20. Petitioners aver that the cumulative risk from other domestic sheep allotments, combined with the Wishbone allotment, could be significant. *Id.*

NEPA requires agencies to analyze “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). “Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions” 40 C.F.R. § 1508.7.

Petitioners suggest that other domestic sheep allotments, combined with the Wishbone allotment, may add to the potential risk to bighorn herds, but they do not specifically identify any other allotments. In fact, the Forest Service has vacated 15 domestic sheep allotments in the last decade, not including the Snow Mesa allotments. WA_05677. An additional two allotments were vacated in 2019. WA_05821-23; WA_05895. The Forest Service decision to vacate the three Snow Mesa allotments provides additional security for the Forest’s bighorn herds.

Petitioners also suggest that the bighorn herds’ “connectivity” presents a risk that the Wishbone allotment’s domestic sheep could come into contact with the Central San Juan, Weminuche, and San Juan West bighorn meta-populations. Pet. at 20. The Forest Service addressed the connectivity with adjacent herds in the EA and Risk Assessment. See WA_03981; WA_03984-86; WA04045. In addition, the Forest Service analyzed the bighorn foray rates from the Weminuche meta-population in the

FIG Allotment analysis and found the nearest Wishbone pasture (South River) fell in the lowest probability bands. WA_05674. The Forest Service therefore reasonably determined that the population viability would not be impacted. WA_05678.

The Administrative Record clearly demonstrates that the Forest Service considered the potential risks caused by the connectivity of bighorn herds and took action specifically to mitigate them. Therefore, Petitioners argument that the allotment could pose cumulatively significant effects because of the connectivity of bighorn herds is unsupported.

In sum, the Forest Service reviewed all of the intensity factors under NEPA's definition of significant. See, e.g., WA_05680-81. The Administrative Record demonstrates that the Wishbone allotment will not have significant impacts. Thus, Petitioners' claim fails.

III. The Forest Service reasonably determined that a supplemental NEPA analysis is not required.

Petitioners' final claim asserts that the Forest Service should have prepared a supplemental EA rather than issuing a Supplemental Information Report. Pet. at 31-35. NEPA's implementing regulations impose a continuing duty on federal agencies to supplement existing analysis in response to "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)(ii); *Marsh*, 490 U.S. at 372 (NEPA's implementing regulations "make plain that at times supplementation is required").¹² However, "an

¹² "The Forest Service applies these same principles with respect to [Environmental Assessments], even though the regulations speak only to [Environmental Impact Statements]." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218, n.3 (10th Cir. 1997) (citing Forest Service Handbook § 18.4, 57 Fed. Reg. 43,180, at 43,200 (1992)).

agency need not supplement [a NEPA document] every time new information comes to light” after the agency has issued its decision. *Marsh*, 490 U.S. at 373.

Supplemental Information Reports are “the Forest Service’s formal instruments for documenting whether new information is sufficiently significant to trigger the need for a [supplemental EIS].” *Klamath Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1089, 1097 (E.D. Cal. 2014) (alteration in original); *San Juan Citizens All. v. Stiles*, No. 08-CV-00144-RPM, 2010 WL 1780816, at *5 (D. Colo. May 3, 2010), *aff’d in part, remanded in part*, 654 F.3d 1038 (10th Cir. 2011) (“If the [Forest Service] concludes that new information or changed circumstances do not require the preparation of a supplemental EIS, a supplemental information report or ‘SIR’ may be used to document the [Forest Service’s] environmental evaluation and conclusion.”). “A Supplemental Information Report is not as detailed or thorough as an Impact Statement and the agency need not subject it to public comment.” *Northwoods Wilderness Recovery, Inc. v. U.S. Dep’t of Agric. Forest Serv.*, 192 F. App’x 369, 371 (6th Cir. 2006); *see also Marsh*, 490 U.S. at 373.

Including a Supplemental Information Report in an administrative record is a routine matter—even when the Forest Service issues the report after litigation begins. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 314 F. App’x 17, 19 (9th Cir. 2008) (“After this case was submitted, the Forest Service submitted—and we received—a Notice of Completion of Supplemental Information Report”); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1216 (10th Cir. 1997) (amended complaint filed on April 25, 1995, and Supplemental Information Report issued on October 19, 1995);

ForestKeeper v. La Price, 270 F. Supp. 3d 1182, 1189 (E.D. Cal. 2017), *aff'd in part sub nom. Sequoia Forestkeeper v. La Price*, 723 F. App'x 481 (9th Cir. 2018) (complaint filed on June 1, 2016, and Supplemental Information Report issued on April 12, 2017); *Klamath Siskiyou Wildlands Ctr.*, 52 F. Supp. 3d at 1094-95 (complaint filed on June 2, 2012, and Supplemental Information Report issued in February 2013).

In general, courts accept an agency's Supplemental Information Report and do not find it as an improper "post hoc rationalization" for agency action as Petitioners claim. See, e.g., *Kunaknana v. U.S. Army Corps of Eng'rs*, No. 3:13-CV-00044-SLG, 2015 WL 3397150, at *4 (D. Alaska May 26, 2015) ("[T]he rule disfavoring *post hoc* rationalizations . . . does not prohibit an agency from submitting an amplified articulation of the distinctions it sees."); *Friends of Bitterroot, Inc. v. U.S. Forest Serv.*, 900 F. Supp. 1368, 1372 (D. Mont. 1994) ("Plaintiffs maintain the [Supplemental Information Report] is simply a 'post-hoc rationalization' supporting the Forest Service's decision . . . The court is unpersuaded by plaintiffs' argument."). If a SIR were presumptively improper, there would be no basis for a court to review whether the Forest Service had considered the express requirement in NEPA's implementing regulations to supplement analyses when new information that meets certain criteria (i.e., "significant" and "relevant to environmental concerns") becomes available. 40 C.F.R. § 1502.9(c)(1)(ii).

Petitioners assert that the Forest Service used the Supplemental Information Report to "fix a deficiency in the EA" because the State's telemetry data "was not 'truly new' information." Pet. at 33. However, Petitioners fail to address that the State's telemetry data was not available to the Forest Service at the time of its Decision because the State considered the bighorn movements confidential and the study

ongoing and incomplete. WA_05880. It was not until after Petitioners brought suit that the Forest Service learned the State had released the telemetry data to Petitioners. *Id.*

In their administrative objection to the Forest Service's decision, Petitioners vaguely referred to "[t]elemetry data [that] has been collected from a small subset of the area bighorns since early 2017, and additional locational information is known only from incidental sightings and infrequent surveys." WA_05478; *see also* WA_05479

("Telemetry collected during the single season since collars were installed on bighorn sheep reveal movements outside of mapped Core Herd Home Range, and within 1.5 miles of a Wishbone pasture."). However, Petitioners did not specify that the State had released the confidential telemetry data to Petitioners. *See* WA_05478. Indeed,

Petitioners did not submit any of the telemetry data they apparently obtained from the State to the Forest Service—even though Petitioners assert that the Forest Service should have considered the data. Petitioner's conduct during the objection period is precisely that admonished in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978), where the Supreme Court held, "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated." *See also Ark Initiative v. Forest Serv.*, 660 F.3d 1256, 1262 (10th Cir. 2011) (quoting *Vt. Yankee*, 435 U.S. at 553-54). The Tenth Circuit has similarly denied relief where the petitioner did not submit data or analysis during the administrative objection process, although it

claimed to have documentation supporting a conclusion counter to the agency's decision. *Ariz. Pub. Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1128 (10th Cir. 2009).

As explained in the Supplemental Information Report, the Forest Service evaluated the new telemetry data to determine whether the new information and changed circumstances are within the scope and range of effects considered in the original analysis or if a supplemental analysis is warranted under NEPA. WA_05879. The State provided telemetry data collected through July 2018. WA_05758-59. To determine whether a supplemental analysis under NEPA was warranted, the Forest Service had to assess the updated information by rerunning the Risk of Contact Tool and evaluating the validity of the local factors as before. See WA_05886-87.

The Forest Service reasonably determined that the scope of effects of the original analysis encompasses the new information. For example, the new information revealed that the Wishbone allotment maintains no overlap with the bighorn sheep CHHR. WA_05888. In addition, the Forest Service determined that the "27% increase in modeled contact rate between bighorn sheep and the Wishbone allotment is not significant because the local factors that qualify the risk of contact in the 2017 analysis still apply." WA_05889. The Forest Service also explained the importance of foray timing: contact between a bighorn sheep and the allotment would occur only during a foray because the CHHR does not overlap with the Wishbone Allotment. WA_05889. And the Forest Service provided figures of the State's telemetry data, which support the Forest Service's assumption that "forays do not typically occur during the grazing season." WA_05890; WA_05903.¹³

¹³ The Forest Service objects to Petitioners' declarations and extra-record materials to the extent Petitioners submit them as expert testimony, which is improper in this APA

Petitioners' attempt to rebut the Forest Service's findings fails because the Forest Service provided a rational basis for its conclusion that additional NEPA analysis was not necessary.¹⁴

CONCLUSION

The Forest Service extensively examined the Wishbone allotment's potential effects and provided well-reasoned explanations for its determinations, including the bases for its chosen methodologies. Thus, the Forest Service's decision to authorize grazing on the Wishbone allotment was not arbitrary or capricious. The Forest Service also reasonably determined that preparation of an EIS is not necessary because the Wishbone allotment will not significantly affect the environment, which is fully supported by the record. And when the Forest Service was finally able to obtain the State's telemetry data, the Forest Service fully evaluated the new information and concluded a supplemental NEPA analysis is unnecessary because there were no significant new circumstances bearing on the impacts of the Wishbone allotment. Petitioners fail to establish that the Forest Service violated NEPA in analyzing the impacts of authorizing domestic sheep grazing on the Wishbone allotment. The Court should deny Petitioner's request for relief.

Respectfully submitted,

record-review case. *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) ("Judicial review of agency action is normally restricted to the administrative record.").

¹⁴ If the Court finds the agency erred, the Forest Service respectfully requests that the Court allow supplemental briefing on the appropriate scope of any remedy, including whether or not vacatur of the decision is appropriate. Vacatur is a form of equitable relief, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010), and courts are not mechanically obligated to vacate an agency decision they find invalid. See *Cal. Comms. Against Toxics v. EPA*, 688 F.3d 989, 992-94 (9th Cir. 2012).

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