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J. Paul Brown

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

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.

RESPONDENT-INTERVENORS J. PAUL BROWN AND THE COLORADO FARM BUREAU FEDERATION'S RESPONSE BRIEF

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INTRODUCTION AND BACKGROUND

Domestic sheep have grazed Colorado's Southern Rockies for more than a hundred years—indeed, sheep grazing on what is now the Rio Grande National Forest is as old as the Forest itself, if not older. WA03499;[1] WA03502; WA03506. The federal authorizations permitting domestic sheep grazing subject to this action have been used by wool growers since at least the 1920s, though the boundaries of what are now the Ouray, Miners, Snow Mesa, and Table Allotments have shifted over time based upon varying needs and resource management concerns, with the current boundaries being set around 1990. WA03502. According to the U.S. Forest Service's ("Forest Service") records:

> Historic use consisted of individual bands with varied numbers, with each permittee assigned a separate area for the grazing season. Each band typically consisted of 800 to 1,000 sheep, with an occasional band of 2,000 ewe/lambs from July 1 to September 30. The same bed grounds were used repeatedly with very little open herding. Permanent bed grounds, camps, and lambing grounds on the allotments were common.

WA03502. In addition, multiple bands of sheep were historically trailed through the Miners and Snow Mesa Allotments on the La Garita Stock Driveway twice each grazing season and then returned to their home pastures. WA03502. In response, the Forest Service modified its management plans in the 1960s to prevent overuse of areas that had previously seen heavy concentrations of domestic sheep. WA03502. Combined with the stewardship of grazing permittees, these changes have led to an overall upward trend in rangeland status at the present. WA03505. In fact, "[c]urrent rangeland conditions within

[1] References to "WA#####" are to the Administrative Record, as supplemented, lodged by the Forest Service at ECF Nos. 22 and 23, where "#####" indicates the specific Bates-numbered page of the record cited.

the analysis area have improved over the years. Livestock management and sheep herder practices have greatly improved since the 1960s." *Id*.

Today, current Forest Service range management relies upon a three-year pasture rotation system to alleviate pressure on the forage resource and provide management assistance. WA03502; WA03504. Since 1998, the current permittees have been authorized to graze one band of sheep (consisting of 1,000 ewes plus their lambs) between July 11 and September 15, though full stocking rates were only reached on the allotments during the 2011 to 2014 grazing seasons. WA03502; WA03504. Full carrying capacity is estimated to be 2,485 sheep (ewes with lambs) or 8,286 animal-unit-months ("AUM"),[2] which makes the current stocking rate of 1,000 ewes/lambs "conservative" even by the agency's reckoning. WA03507.

For a number of reasons, including to ensure that domestic and wild sheep remain separated, to ensure that the range is not overutilized, and to limit other domestic sheep-wildlife conflicts, sheepherders stay with the domestic flock throughout the grazing season, and the herders' camps are moved every 7–10 days when the permittees resupply the camps' provisions. WA03504. Due to "significant changes in management" and proactive efforts by permittees, the Forest Service found that there are presently "no obvious signs of current rangeland degradation" and concluded that "current rangeland condition is classified as satisfactory." WA03505. In fact, aside from some programmatic changes to livestock management directed by the Forest Service, the positive conditions

[2] "Animal unit month (AUM) means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. § 4100.0-5

of rangeland management are largely due to the best management practices ("BMPs") adhered to by sheep grazers such as the permittees. WA05667.

To limit the interactions between domestic and wild sheep, these BMPs include "requiring two herders; requiring a sweep of the pasture and trailing route post-move; requiring herders to be with the flock during the day and in camp at night; requiring permittees to count sheep as they come on to the forest, after they leave Crystal Basin pasture, and at their final NFS pasture; and requiring permittees to respond to strays within 24 hours of notification." WA05667. To borrow from current events, domestic and wild sheep are subject to extreme social distancing measures and are held separate by "discontinuity and fragmentation created by non-habitat, including the Rio Grande River, subdivisions, and the Silver Thread Scenic Byway (CO 149)." WA05669. The Forest Service, as the expert agency tasked with managing sheep grazing in the Rio Grande National Forest, has determined that these measures are sufficient to prevent the transmission of a respiratory disease, *M. opivneumoniae*, between domestic and wild sheep. WA04057—60.

Nonetheless, on January 24, 2019, Petitioners sought judicial review of the Forest Service's decision to issue an Environmental Assessment ("EA") and a Finding of No Significant Impact ("DN/FONSI") rather than perform an Environmental Impact Statement ("EIS") for the Wishbone Allotment. ECF No. 1 ¶ 1. In their Petition, Petitioners ask this Court to set aside the Forest Service's decision based upon purported defects in the environmental analyses performed. ECF No. 1 ¶ 9. Specifically, Petitioners argue three things: (1) that "the Forest Service violated NEPA by failing to prepare an EIS before authorizing the Wishbone allotment because grazing domestic sheep on the allotment

may have significant effects[;]" (2) that "the Forest Service's analysis in the EA and DN/FONSI regarding the threat to bighorn sheep was flawed in numerous ways[;]" and (3) that "the Forest Service is violating NEPA by failing to complete a supplemental NEPA analysis that considers telemetry data and analysis for the Central San Juan bighorn herds that post-dates the DN/FONSI." ECF No. 1 ¶ 83—88.

On May 31, 2019, Respondent-Intervenors, J. Paul Brown and the Colorado Farm Bureau Federation (collectively, "Farm Bureau") moved to intervene to defend their respective interests in domestic sheep grazing in the Rio Grande National Forest and adjoining areas. ECF No. 13. On March 30, 2020, this Court granted the Farm Bureau's motion. ECF No. 30. On May 20, 2020, Petitioners filed their Opening Brief ("Pet'rs Br."), and on June 22, 2020, the Forest Service filed its Response Brief ("Fed. Br."). ECF Nos. 33, 36. Here, the Farm Bureau files this Response Brief in opposition to Petitioners' Opening Brief.

FACTUAL AND LEGAL BACKGROUND

In the interest of brevity, Respondent-Intervenors expressly adopt the remainder of the factual and legal background provided by the Forest Service in its response brief. *See* Fed. Br. at 2–12.

STANDARD OF REVIEW

Judicial review of agency actions under the National Environmental Policy Act ("NEPA) is governed by the Administrative Procedure Act ("APA"). *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). Under section 706(2)(A) of the APA, an agency action must be set aside "if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)).

Judicial review under this provision is generally deferential. As long as the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made," the agency's action should be affirmed. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983). Particular deference is afforded to agency discretion that is exercised in an area where the agency has special technical expertise. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989).

Nevertheless, agency action must be set aside if the agency "relied on factors which Congress has not intended it to consider, 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 rendered a decision "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). When such deficiencies exist, the Court may not attempt to make up for them by supplying "a reasoned basis for the agency's action that the agency itself has not given." *Id*. (internal quotation marks omitted).

ARGUMENT

I. THE FOREST SERVICE PERFORMED THE APPROPRIATE LEVEL OF NEPA ANALYSIS.

The conclusions of the Wishbone Environmental Assessment ("EA") and the associated Decision Notice/Finding of No Significant Impact ("DN/FONSI") are entitled to significant deference. The task of a court reviewing the sufficiency of an EA is simply to "ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp.*, 843 F.3d 886, 902 (10th Cir. 2016). Agency action is

presumed to be valid and a challenger bears the burden to prove otherwise. *New Mexico*, 565 F.3d at 704. "So long as the record demonstrates that the agencies in question followed the NEPA procedures . . . the court will not second-guess the wisdom of the ultimate decision." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003). Here, Petitioners cannot shoulder their heavy burden because they cannot show that supplemental NEPA analysis was necessary, nor can they show that the circumstances of this case warranted a full EIS.

A. The Forest Service was Not Obligated to Prepare a Full EIS.

Petitioners argue that the Forest Service was required to complete a full EIS because domestic sheep grazing was "highly controversial," would create uncertain risks, and would establish an inappropriate precedent. Pet'rs Br. at 16–20. However, Petitioners' arguments are without merit and must be rejected because, among other things, the case law they rely upon bears no analogy to the case at hand.

Petitioners first focus on the purported "highly controversial" nature of domestic sheep grazing. Pet'rs Br. at 16–18. Petitioners, however, misapply relevant precedent describing when an action is "highly controversial." Public opposition, such as that of Petitioners, is insufficient to make an action controversial. *See Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1274 (10th Cir. 2014) ("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.") (quoting *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002)); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir.

2012) ("When analyzing whether a proposal is controversial, we consider the substance of the comments, not the number for or against the project. Even if 90% of the comments to the environmental assessment were negative, this merely demonstrates public opposition, not a substantial dispute about the 'size, nature, or effect' of the intermodal facility."). Here, there is no such controversy. The Wishbone EA clearly describes the size and nature of the action: 7,096 sheep are authorized to graze 10,487 defined acres within the Rio Grande National Forest. WA04030. Further, the effects are self-evident, domestic sheep will forage within the allotments, and be managed pursuant to the requirements of the relevant permit. WA05660. That Petitioners, and other members of the public, dislike public lands grazing does not create a "highly controversial" action mandating a full EIS.

Next, Petitioners argue that grazing domestic sheep will present uncertain risks to wild bighorn sheep populations. Pet'rs Br. at 18–19. Again, Petitioners misapply relevant caselaw. To begin with, there is no analogy to the first *San Luis Valley* case cited by Petitioners, which they assert shows that "uncertainty" about an area's scenery alone is sufficient to qualify as "significant" for NEPA purposes. *San Luis Valley Ecosystem Counsel v. U.S. Forest Serv.*, No. 04-cv-1071-MSK, 2007 WL 1463855 (D. Colo. May 17, 2007). But this peculiar holding is isolated to the peculiar facts of that case. The first *San Luis Valley* case concerned a geological anomaly—"an extremely rare [rock] formation" called the Creede formation, of which "[t]here are perhaps fewer than five such formations in the United States." *Id.* at *10. Bighorn sheep herds, in contrast, range across the entirety of the western half of the North American continent, numbering close to 70,000 in total population, making them nowhere near as rare and fragile as the Creed Formation.

The second *San Luis Valley* case is also inapplicable. *San Luis Valley Ecosystem Counsel v. U.S. Fish and Wildlife Serv.,* 657 F. Supp. 2d 1233 (D. Colo. 2009). Procedurally, unlike the merits brief under consideration here, the second *San Luis Valley* case concerned a preliminary injunction, meaning the NEPA deficiency was simply considered as one factor weighing in favor of an injunction. *Id.* at 1246. Substantively, the second *San Luis Valley* case concerned a categorically different situation—namely, the federal government's failure to analyze the potential impacts to a watershed caused by oil and gas drilling, the effects of which would be essentially impossible to mitigate or adjust. *Id.* at 1246. This is markedly different from the situation here given that livestock management is by nature inherently adaptive, being subject to annual changes in response to resource conditions and ecosystem concerns.

Similarly, *National Parks and Conservation Association v. Babbitt* case is distinguishable based on the scope of the NEPA analysis in question. 241 F.3d 722 (9th Cir. 2001). *National Parks* dealt with the Parks Service's analysis of its decision to increase the number of cruise ships that were allowed to enter Glacier Bay in Alaska. *Id.* at 728—729. This analysis required consideration of a huge variety of animal species (including humpback whales, sea lions, bald eagles, and various species of murrelets) as well as assessing the probably of events such as oil spills. *Id.* The enormity of the scale of the analysis as well as the wide variety of different factual scenarios presented by the presence of large cruise ships entering a delicate ecosystem presented far greater uncertainty than a small-scale grazing authorization on a single allotment in the Southern Rockies. Rather than assessing wide-scale impacts across an entire ecosystem full of a

diverse variety of wildlife, the NEPA analysis here is limited to a single species in an isolated portion of a much larger biological community.

Finally, *Anderson v. Evans* is likewise inapplicable here. 371 F.3d 475 (9th Cir. 2004). The controversy in *Anderson* concerned a dispute over whether a Native American Tribe could annually hunt California gray whales. *Id.* at 489. The gray whale had at one point been listed under the Endangered Species Act, and the species' wellbeing was in direct contrast to what the tribe asserted were ancestral rights protected by a treaty. *Id.* at 489—492. The situation here is hardly as contentious given that the agency and permittees are not proposing to directly kill bighorn sheep, nor are treaty rights of a Native American tribe at issue here. Instead, the debate is simply over the best means to isolate bighorns from domestic sheep.

Moreover, Petitioners' cases aside, "'NEPA does not require an agency to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or [] impractical or ineffective.'" *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1200 (D. Colo. 2014) (quoting *Lee v. U.S. Air Force*, 354 F.3d 1229, 1238 (10th Cir. 2004)). "There are natural limits to the amount of forecasting that can be done, . . . and agencies are required only to make 'a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making.'" *Id.* at 1189 (quoting *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1177 (10th Cir. 1999)). "An agency 'must obtain and include in the EIS information on 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*, 354 F.3d at 1241 (quoting *Holy Cross Wilderness*

Fund v. Madigan, 960 F.2d 1515, 1523 (10th Cir. 1992)). Although Petitioners criticize the Forest Service for not including the most recent telemetry data in its EA and FONSI, "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." Fed. Br. at 24; WA05847; WA05880—81. The "reasonably foreseeable significant adverse impacts" the Petitioners claim the Forest Service ignored by not analyzing the telemetry data is merely a disagreement in what "best available science" is.

"As so often is the case in disputes concerning the potential environmental impacts of a project, Petitioner's claim boils down to a disagreement over scientific opinions and conclusions. While . . . contradictory evidence and data may well exist, 'the mere presence of contradictory evidence does not invalidate the agencies' actions or decisions.'" *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001) (citing *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000)). The Tenth Circuit gives a reminder that "'agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious.'" *Lee v. U.S. Air Force*, 354 F.3d 1229, 1243 (10th Cir. 2004) (citing *Custer County Action Ass'n*, 256 F.3d at 1036). It is the agency, "not a reviewing court . . . [nor the Petitioners, who are] entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances." *Custer County Action Ass'n*, 256 F.3d at 1036 (quoting *Sierra Club v. U.S. Dept. of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985)). The dispute between the Petitioners and the Forest Service is merely one of

competing scientific opinions and does not amount to an invalidation of actions taken by the Forest Service.

Finally, Petitioners argue that to reauthorize sheep grazing in the Rio Grande National Forest would create an inappropriate precedent. Pet'rs Br. at 19—20. This argument is spurious. As noted above, domestic sheep grazing has been authorized in this area for over 100 years. If a precedent were set, it was set generations ago. Nonetheless, Petitioners' arguments that the Forest Service's use of the Risk Contact Model in this case present an improper attempt to substitute Petitioners' judgment for the scientific expertise of the Forest Service. As the expert land manager, the Forest Service is entitled to rely upon its own expert opinions, and neither Petitioners nor this Court may substitute their judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

B. The Forest Service was Not Obligated to Perform a Supplemental NEPA Analysis Because it Properly Considered the Telemetry Data in the Supplemental Information Report.

The overall purpose of an agency's duty to perform supplemental NEPA analysis is to "ensure[] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 369. However, "an agency need not supplement [a NEPA analysis] every time new information comes to light . . . [t]o require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id.* at 373. Accordingly, the duty to perform supplemental NEPA analysis is guided by a "rule of reason." *Id.*; *see also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767–68 (2004) ("rule of reason" requires that the information being evaluated be useful to the agency's decision-making process); *see also San Luis Obispo Mothers for*

Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1030 (9th Cir. 2006) (an EIS need not discuss remote and highly speculative consequences). NEPA, however, is silent as to how an agency is to determine the significance of new information. *See Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000); *see also San Juan Citizens Alliance v. Stiles*, No. 08-CV-00144-RPM, 2010 WL 178016 at *5 (D. Colo. May 3, 2010).

To assess new information, and the potential need for a supplemental NEPA analysis, agencies frequently produce what are termed supplemental information reports ("SIR").

> Supplemental Information Reports are nowhere mentioned in NEPA or in the regulations implementing NEPA promulgated by the Council on Environmental Quality ("CEQ"). . . . Courts nonetheless have recognized a limited role within NEPA's procedural framework for SIRs and similar "non-NEPA" environmental evaluation procedures. Specifically, courts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS.

Idaho Sporting Congress, 222 F.3d at 565–66; *see Marsh*, 490 U.S. at 383–85 (upholding the Army Corps of Engineers' use of SIR to analyze significance of new reports questioning the environmental impact of a dam project); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218–19 (10th Cir. 2007) (upholding use of SIR to evaluate significance of new survey of area to be logged); *see also San Juan Citizens Alliance v. Stiles*, 2010 WL 178016, *5 (D. Colo. 2010) ("If the FS [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 FS's environmental evaluation and conclusion."). Thus, if an SIR reveals no significant information questioning the propriety of an agency's original conclusion to select a

particular alternative, courts will uphold the use of an SIR instead of requiring additional NEPA analysis. *See Friends of the Bow*, 124 F.3d at 1219.

Here, the relief sought by Petitioners would entangle the Forest Service in the type of intractable decision-making process warned of in *Marsh*. The Forest Service did not receive telemetry data from the Colorado Parks and Wildlife ("CPW") until after it had already completed the EA for the Wishbone Allotment. WA05880—81 (DN/FONSI was issued March 23, 2018 and the telemetry data was released to the Forest Service in May 2019). In the SIR, the Forest Service documented its review and analysis of the newly available telemetry data and did not find these data compelling or significant enough to constitute the preparation of a supplemental NEPA analysis. WA05879, WA05896—97; *see also* 40 C.F.R § 1502.9(c) (describing when a supplemental analysis is required). Far from being an "impermissible post-hoc justification," Pet'rs Br. at 33, the Forest Service acted properly by preparing the SIR. WA05879. No additional NEPA analysis was required.

Relatedly, Petitioners also contend that the agency's reliance on the SIR deprived them of an opportunity for public comment which they felt entitled to. Pet'rs Br. at 33 (citing *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1089 (D. Mont. 2002)). But this argument falsely assumes that an SIR is equivalent to an EA or an EIS. The Forest Service's NEPA Handbook provides that an "SIR is not a NEPA document and therefore cannot be used to fulfill the requirements for a revised or supplemental EA or EIS." Forest Service NEPA Handbook at *45 (2012); *see also Idaho Sporting Congress*, 222 F.3d at 565–66. NEPA's public disclosure requirements cannot be foisted onto non-NEPA documents. *Id.* If additional NEPA analysis was not required, then neither

was additional public input or disclosure. As such, Petitioners cannot complain about a remedy that they are not entitled to.

II. THE WISHBONE EA COMPLIED WITH THE REQUIREMENTS OF NEPA.

A. The Forest Service's Assumptions were Appropriately Supported by Record Evidence.

In the interest of brevity, the Farm Bureau adopts and incorporates by reference the arguments made by the Forest Service defending its modelling assumptions. *See* Fed. Br. at 14–23. However, the Farm Bureau adds that Petitioners' out-of-hand dismissal of the BMPs is erroneous, as there is not a one-size-fits-all approach to domestic sheep management.

Petitioners are attempting to bootstrap the Wishbone Allotment to sheep grazing cases they have litigated in other jurisdictions. Each of these cases, however, concerned preliminary relief, and are accordingly inapposite to the case before this Court. Moreover, each allotment is like a fingerprint; unique in its characteristics and simply incomparable. Below, in sequential order, all four *Western Watersheds Project* cases that Petitioners rely upon are distinguished.

In the first case cited, Western Watersheds Project brought a lawsuit in Idaho against the Forest Service. *See* Pet'rs Br. at 3 (citing *W. Watersheds Proj. v. U.S. Forest Serv.*, No. 4:07-cv-151-E-BLW at *2, 2007 WL 1729734 (D. Idaho June 13, 2007) ("*WWP I*")). There, the Forest Service consented to modify the grazing authorization, and closed a grazing allotment held by Shirts Brothers Sheep. Shirt Brothers Sheep sought to enjoin the Forest Service's decision. In denying the injunction, the district court heavily relied on the data of radio-collared bighorns in making its determination. Those data demonstrated 319 occasions of bighorn sheep within the challenged allotment itself over

a seven-year period. *Id.* at *2. Here, however, the telemetry data show no presence of bighorns within the allotment in question. WA05928; *See* also Ratner Decl. Figure 2. Accordingly, *WWP I* is distinguishable on its facts and procedural posture because it was focused only on preliminary relief and because the telemetry data demonstrates that bighorns were never been present in the Wishbone allotment, contrary to the Idaho case.

In Petitioners' second case, *see* Pet'rs Br. at 3, they sued the Forest Service for granting grazing permits on six allotments, including the Shirts Brothers Sheep allotment from *WWP I*. *W. Watersheds Proj. v. U.S. Forest Serv.*, No. 4:07-cv-151-E-BLW at *1, 2007 WL 3407679 (D. Idaho Nov. 13, 2007) ("*WWP II*"). There, the Forest Service consented to modify the grazing authorization and closed five of the six challenged allotments. With the sixth, the Forest Service consented to modify the grazing season to ensure that domestic and wild sheep would not be present at the same time in the allotment. Shirts Brothers Sheep sought to stay the Forest Service's decision, and Western Watersheds Project sought a preliminary injunction, which the district court granted. Accordingly, *WWP II* is distinguishable on its procedural posture because it concerned injunctive relief and administrative stays requested by both parties, whereas the case at hand deals with the merits of the Forest Service's NEPA analysis and is challenged solely by the Petitioners.

Third, in *Western Watersheds Project v. Bureau of Land Management*, WWP challenged the grazing of 833 domestic sheep on a Bureau of Land Management allotment in Idaho. *W. Watersheds Proj. v. Bureau of Land Mgmt.*, No. 4:09-cv-507-BLW at *1, 2009 WL 3335365 (D. Idaho, Oct. 14, 2009) ("*WWP III*"). In reviewing a motion for a temporary restraining order, the district court "weigh[ed] the equities" to compare the

harm to the Carlson Livestock Company's economic bottom line. *Id.* at *6. The court reasoned that the Company would not "be forced out of business but merely that [it would] be forced to consider other options like more intensive grazing of [] private ground or real estate development of [] river-front property." *Id.* at *6. Since the Company would not become obsolete by the discontinued grazing permit on BLM land, the court was less inclined to rule in its favor. Thus, the court granted the injunctive relief. To begin with, a case considering injunctive relief is inapposite to the case before this Court, as noted above. Rather than balancing equities, the Court here is tasked with assessing the reasonableness of the Forest Service's NEPA analysis. Because the agency has articulated a rational basis for its grazing authorization, and because this reasoning was set forth in the applicable NEPA documents, the Court is obliged to defer to the agency's expertise on this matter.

Finally, in *Western Watersheds Project v. U.S. Forest Service*, No. 1:17-cv-434-CWD, 2017 WL 5571574 (D. Idaho, Nov. 20, 2017) ("*WWP IV*"), Western Watersheds Project sought a preliminary injunction to halt a Forest Service authorization to graze domestic sheep, this time in the Snakey and Kelly Canyon within the Caribou-Targhee National Forest. There, the district court held that the grazing allotments posed a "risk to the nearby South Beaverhead bighorn sheep population." *Id.* at *3. The court found that "irreparable injury to the bighorn population . . . [would be likely] if grazing [was] allowed during the six-week grazing season." *Id.* at 15. The rationale behind this was that "[t]he Snakey and Kelly Canyon allotments are contiguous—there is no dividing line such as a river or mountain range, just a division drawn on a map." *Id.* at *8. The permit that was denied had previously authorized grazing "on the Kelly Canyon allotment from November

20, 2017 through January 3, 2018 . . . and on the Snakey Canyon allotment from November 6, 2017 through January 2, 2017." *Id.* at *8. These facts are starkly different from the Wishbone Allotment, given that multiple physical barriers exist to separate bighorns from domestic sheep (in addition to 24/7 management by the herders).

In sum, Petitioners rely on procedural victories in factually distinct cases in different jurisdictions in a vain attempt to make a substantive claim against the Forest Service's unique analysis of grazing authorization on the Wishbone Allotment. Petitioners' efforts are not persuasive because the unique factual and procedural situations of each case discussed above make them inapplicable to the question of agency expertise at issue here.

B. The Forest Service Examined CPW's Telemetry Data in the SIR.

Petitioners argue that the Forest Service failed to analyze the bighorn telemetry data collected by Colorado Parks and Wildlife. Pet'rs Br. at 27–29. This argument is factually incorrect. As noted above, and conceded to by Petitioners, the Forest Service prepared a detailed SIR to analyze just those data. Pet'rs Br. at 12—14. With the SIR, the Forest Service concluded that those data did not change the environmental analysis underlaying the Wishbone EA and determined that no additional NEPA analysis was warranted. This determination is entitled to deference, and Petitioners' arguments must be rejected.

C. The Forest Service Considered all Relevant Effects of the Action.

Petitioners finally challenge the scope of the analysis area considered in the EA. Pet'rs Br. at 30–31. Agencies, however, are given "considerable discretion" in determining the scope of the action area to be considered in a NEPA analysis. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002). Thus, Petitioners'

argument that "the Forest Service ignored the risk that a bighorn from adjacent metapopulations *could* interact with a diseased bighorn from a Central San Juan herd" is unavailing. Pet'rs' Br. at 30 (emphasis added). This is because "NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011) (internal quotations omitted). Such is the case here as Petitioners' hypothetical injury is too speculative to be "reasonably foreseeable" within the meaning of NEPA. The agency had to draw the line of its analysis somewhere, and its choice was to stop short of conjectures based on isolated, sporadic forays of a single bighorn sheep.

Moreover, Petitioners' argument misses the bigger picture: there *is* concurrent NEPA analysis occurring on neighboring National Forest land that assesses the impact to neighboring bighorn sheep populations, including the meta-populations identified at pages 30—31 of Petitioners' Brief. *See J. Paul Brown Decl.* ¶ 9 (ECF No. 133) (discussing preparation of EIS for the neighboring Weimenuche Allotment). Seeing as Petitioners' argument that the Forest Service failed to consider all relevant effects dovetails with their claim that a full EIS was necessary, it must be noted that "NEPA does *not* require that federal agencies always evaluate the feasibility of separate proposed projects in a single, comprehensive EIS." *Dombeck*, 304 F.3d at 895 (emphasis added). Instead, in the cases where multiple competing projects or actions "would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." *Id*. at 894. Here, grazing authorization on neighboring allotments that are not subject to the Wishbone EA may or may not take place regardless of the Forest Service's actions

on the Wishbone Allotment. Thus, the scope of the Forest Service's analysis in the Wishbone EA satisfied the "independent utility" test stated in *Dombeck*.

CONCLUSION

For the foregoing reasons, and those provided by the Forest Service and other Respondent-Intervenors, the decision of the Forest Service to authorize continued grazing in the Wishbone Allotment should be upheld.

DATED this the 29th day of June 2020.

Respectfully Submitted,

MOUNTAIN STATES LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2020, I electronically filed the foregoing with the Clerk of Court using this Court's CM/ECF system, which will send notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D.C.COLO.LCivR 5.1(d).

/s/ Brian E. Gregg
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