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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; Petitioner,	)	Case No. 2:07-cv-323
v.	)	PETITIONER'S OPENING BRIEF
UNITED STATES FOREST SERVICE, an agency of the United States Respondent.	)	

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JURISDICTION AND VENUE

In this action, Petitioner Western Watersheds Project (WWP) challenges Respondent U.S. Forest Service's 2005 final decision adopting a revised Land and Resource Management Plan for the Bighorn National Forest in Wyoming (hereafter, the "revised Bighorn Forest Plan"). WWP also challenges the Forest Service's 2007 final decision which applied the unlawful revised Bighorn Forest Plan in authorizing 10-year grazing permits for the Piney Creek allotments on the Bighorn National Forest.

As explained below, the Forest Service adopted the revised Bighorn Forest Plan and Piney Creek decision based on a 2005 Environmental Impact Statement ("2005 EIS") that violated the National Environmental Policy Act (NEPA) in two key respects: (1) by failing to address any alternatives for grazing management on the Bighorn National Forest, and (2) by further failing to assess and disclose to the public the actual environmental effects of livestock grazing on the Bighorn National Forest.

The Court has jurisdiction under 28 U.S.C. § 1331 to address WWP's NEPA claims; and the APA authorizes judicial review of the challenged

final agency decisions. See 5 U.S.C. §§ 704 & 706(2); 42 U.S.C. §§ 4321 et seq. (NEPA).

Petitioner WWP is a non-profit conservation group with staff and an office in Wyoming; and its staff and members frequently visit the Bighorn National Forest for recreational, scientific, educational, and aesthetic purposes. WWP participated extensively in the administrative process below, and exhausted all required administrative remedies before bringing this petition. See AR B04730 –B04746 (forest plan administrative appeal); AR B08500 – B08539 (project administrative appeal).

Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within Wyoming.

STATEMENT OF THE ISSUES

1. Whether the Forest Service violated NEPA by adopting the revised Bighorn Forest Plan without considering any grazing management alternatives in the 2005 EIS – even though the prior 1985 Bighorn Forest Plan EIS did consider a range of grazing alternatives, and the Forest Service

has likewise considered many grazing alternatives in other recent Forest Plan revisions in the same region.

2. Whether the Forest Service further violated NEPA by failing to take a "hard look" in the 2005 EIS at the adverse impacts of livestock grazing on riparian, water, and wildlife resources of the Bighorn National Forest.

3. Whether the Forest Service's site-specific Piney Creek grazing decision in 2007 must also be reversed, because it is based on the unlawful revised Bighorn Forest Plan and 2005 EIS.

STATEMENT OF FACTS

The Bighorn National Forest.

Located in the Big Horn Mountain Range in north-central Wyoming, the Bighorn National Forest encompasses just over 1.1 million acres of federal public lands. AR B03438 (2005 EIS). The Forest features rugged canyons and valleys, and is topped by granite peaks and striking glacial formations. AR B03907. It surrounds the pristine 189,000-acre Cloud Peak Wilderness area, which is dominated by Cloud Peak at 13,175 feet in

elevation, and is home to rare plants and animals, including the northern goshawk and bighorn sheep. AR B03947 – B03948.

Unfortunately, bighorn sheep – the namesake of the Big Horn Mountains – are doing so poorly on the Forest, due mostly to disease spread by domestic sheep, that the species is designated a "species of local concern." AR B03682 – B03684. Other species living in the Forest include elk, mountain lion, moose, mule deer, and black bear. AR B03771. "Sensitive species" – those whose population viability is a concern – that are known or likely to occur on the Forest include the boreal owl, northern spotted frogs, and the American marten. AR B03669 – B03670.

All of the watersheds originating on the Bighorn National Forest drain into the Yellowstone River through the Big Horn, Tongue, and Powder Rivers. AR B03439. Many tributaries to these rivers provide habitat for a variety of sensitive species, including Yellowstone cutthroat trout, a native species that in recent decades has suffered significant population declines and loss of habitat due to, among other things, livestock grazing impacts. AR B03599, B03672. The 1,400 miles of perennial streams flowing through

the Forest provide important habitat for a variety of other wildlife and fish, such as rainbow trout. See AR B03591, B03612.

Fragile riparian areas and wetlands on the Forest support numerous aquatic and terrestrial species, and provide recreational and aesthetic enjoyment for forest visitors. See AR B03594 – 95 (acknowledging that riparian ecosystems "represent some of the most dynamic and ecologically rich areas across the landscape"). Riparian areas are a critical source of diversity within ecosystems, acting to slow flood waters, filter sediment and nutrients from flood flows, replenish groundwater supplies, and provide water, food, and habitat for a variety of species. AR B03595. Sensitive species that rely on properly functioning riparian areas include the northern leopard frog and the spotted frog, both of which are considered "at risk" on the Bighorn National Forest. AR B03675.

The Prior 1985 Bighorn Forest Plan And EIS.

Pursuant to NFMA forest planning requirements (discussed in more detail below), the Forest Service in 1985 adopted an initial Bighorn Forest Plan based on an accompanying EIS prepared under NEPA. See AR B00117 (Executive Summary of 1985 EIS).

In stark contrast to the agency's decision-making challenged here, the Forest Service considered a range of forest-wide grazing alternatives in preparing this 1985 Forest Plan. Id. These grazing alternatives, the Forest Service explained, were intended to "focus on conflicts identified between livestock, recreation and wildlife." Id. The agency also noted that the grazing alternatives were needed because "[m]aintaining riparian area habitat is also a concern," and that its ability to maintain and improve riparian areas involved "interactions among livestock grazing, recreation, wildlife, water quality, and diversity needs." Id.; see generally AR B00113 – B00122 (detailed discussion of grazing alternatives to address grazing impacts).

Thus, the Forest Service recognized over twenty years ago that grazing has adversely impacted the environmental resources of the Bighorn National Forest, and that those impacts needed to be addressed at the forest planning level, including through evaluations of a range of grazing alternatives. The EIS prepared for the 1985 Forest Plan discussed management alternatives that responded to these concerns. AR B00125; see also AR B00129 – B00147 (chart).

Specifically, the 1985 EIS analyzed eight alternatives with varying levels of livestock grazing across the Bighorn National Forest, both for the next decade as well as a fifty-year planning period. AR B00269 – B00283; B00305 – B00306 (chart). For example, an alternative described as emphasizing "market output opportunities" proposed to increase grazing levels; while an alternative focusing on "non-market opportunities" examined decreased grazing levels. AR B00127.

The Forest Service further adopted rangeland management goals in the 1985 Forest Plan, which it stated were intended to address the adverse effects of livestock grazing on Forest resources as follows:

(1) Manage all grazing allotments to reach satisfactory range condition by 2000;

(2) Manage rangeland riparian areas to achieve satisfactory or better condition by 2000; and

(3) Use grazing systems and stocking rates that reduce conflicts between domestic livestock, wildlife, and recreation. AR B00117, B00120.

The Bighorn Forest Plan Revision.

In November 1999, the Forest Service published a Notice of Intent to revise the 1985 Bighorn Forest Plan. AR B02188. Based on a series of field trips and meetings to solicit public input on revision issues, the Forest Service noted that grazing issues garnered more comments than many other topics during the scoping process. See, e.g., Bighorn National Forest Plan Revision Newsletter Issue No. 4 (identifying "Range and Grazing Management" as one of the six revision topics "most frequently raised during initial scoping meetings") (Richards Decl., Exhibit 4).[1] The public's concern over grazing is a reflection of the Forest Service's observation that "[c]attle and calves are the largest agricultural product in the Big Horn Mountain area." AR B05243 (2004 Forest Service report on landscape conditions).

In the early stages of the planning process for the revised Bighorn Forest Plan, the Forest Service itself identified issues and concerns that it

[1] Even though this "Newsletter Issue No. 4" was prepared and publicly distributed by the Forest Service to discuss the status of the Bighorn Forest Plan revision process, it was inexplicably not included in the Administrative Record filed by the agency. Accordingly, WWP is moving the Court to supplement the record with this obviously-relevant document.

said would "be used and considered in developing alternatives." Notably, with respect to grazing impacts, these included: "degraded riparian areas," "domestic livestock impacts," "riparian zones should be fenced to keep out cattle," and "overgrazing impacts on fisheries." AR B02221, B02223, B02228 (Forest Plan revision issues certification).

The Forest Service also stated that the "Range – Stocking" issue would not be used in the alternatives analysis. AR B02226. Nevertheless, the "Range – Effects on Other Resources and Analysis" issue (which was supposed to drive the alternatives analysis in the revised Bighorn Forest Plan EIS) included such comments as "water quality issues from grazing," "prohibit grazing in critical wildlife habitat and riparian areas," and "develop a plan for cataloging and protecting areas susceptible to erosion or riparian damage due to livestock activities." AR B02227.

Even though the Forest Service thus indicated to the public that it would address grazing alternatives in the EIS for the revised Bighorn Forest Plan, in 2004 the agency released a draft EIS that failed to analyze grazing alternatives in any detail. See, generally, AR B02303 – B02326. WWP then submitted comments challenging the lack of grazing alternatives, as well as

the draft EIS's inadequate consideration of the effects of grazing on, among other things, riparian areas, water quality, wildlife, and soils. AR B03382 (challenging "the lack of any grazing alternatives that differ from current management"); B03383.

Despite the comments submitted by WWP and others – and despite the Forest Service's own acknowledgement that the public's concern about "poor [grazing] permit administration and continued grazing problems was high," see AR B05048 – the Forest Service ultimately released a final EIS in 2005 that failed to address these concerns.

As explained below, while the 2005 EIS acknowledged that grazing *can* have adverse impacts on forest resources, it failed to disclose the actual impacts of grazing on water and riparian areas on the Bighorn National Forest, and presented no livestock grazing alternatives whatsoever. Without such an analysis, the Forest Service cannot fulfill the very purpose of a Forest Plan, which the Forest Service itself says is to "guide on-the-ground natural resource management to ensure sustainable ecosystems and to provide multiple benefits." AR B04808 (Forest Plan).

Discussion Of General Grazing Impacts In 2005 EIS.

As the Court will see in reviewing the 2005 EIS, the Forest Service acknowledged repeatedly that livestock grazing *can* have many adverse environmental impacts as a general matter – yet the agency studiously avoided addressing the *actual* scope and degree of those impacts upon the resources of the Bighorn National Forest itself.

For example, with respect to wetland and riparian areas, the 2005 EIS admitted grazing can damage riparian vegetation, and reduce bank stability through vegetation removal and bank trampling. AR B03607. The EIS similarly noted that changes in riparian vegetation can result in insufficient overhead cover for fish, leading to increased water temperatures. AR B03607. It also admitted that livestock can compact soil and destabilize streambanks by direct hoof action, causing increased sediment, stream widening or downcutting of stream channels. AR B03607. And it recognized that grazing can lower water quality due to the introduction of the bacteria and pathogens found in fecal matter into surface water. AR B03606.

The EIS notes also that these adverse grazing impacts can be compounded by repeated yearly livestock use of the same areas. AR B03607. In fact, the Forest Service acknowledges that riparian areas are particularly vulnerable to grazing-induced degradation. AR B03628 (stating that most effects from livestock grazing are evident in riparian areas); AR B07201 (Forest Service report on species viability) (noting that "[l]ivestock grazing is one of the highest risk activities conducted on the Forest in riparian areas").

The 2005 EIS admits that livestock grazing can also have other adverse effects, include fragmenting and degrading the historic range of Yellowstone cutthroat trout. AR B03600, B06045 (Forest Service forest-wide assessment report) ("In the range of Yellowstone cutthroat trout, researchers have reported that intensive livestock grazing has caused degradation of riparian areas and subsequent stream bank sloughing, channel instability, erosion and siltation.").

Similarly, the Forest Service acknowledged that domestic sheep grazing may transmit a deadly respiratory disease to wild bighorn sheep, leading to population declines. AR B03683 – B03684 (2005 EIS); B07254

(Forest Service report stating, “In wild situations, domestic sheep and bighorn sheep association almost always results in deaths of bighorns without affecting domestic sheep.”). Likewise, the agency admitted that livestock grazing can introduce and spread noxious weeds, which are detrimental to ecosystem functions and can degrade soils. AR B03731, B03734. And of various management activities, grazing is likely one of the largest potential threats to beaver habitat. AR B03786. Mule deer winter range areas can be left severely degraded by livestock, which leave little food for wildlife during the harsh winter months. See AR B03805.

The 2005 EIS: Existing Conditions of Water and Riparian Resources.

Despite admitting these potential adverse effects of grazing, the Forest Service in the 2005 EIS presents only a cursory analysis of the actual grazing impacts on the Bighorn National Forest, particularly on riparian and water resources.

For example, the Forest Service devotes a mere eleven sentences to describing the state of the Forest’s surface water. AR B03591 – B03592. The EIS discloses that two stream segments on the Forest are listed on

Wyoming's "water quality impaired" list under Section 303(d) of the Clean Water Act, due to high levels of the *E. coli* bacteria. AR B03591 – B03592. But the EIS makes no mention of whether the impairment is or may be caused by cattle.

As for the rest of the approximately 1,400 miles of perennial streams on Bighorn National Forest lands, the 2005 EIS makes no specific mention of whether few, some, or most streams are currently in properly functioning condition, functioning-at-risk, or not functioning. The EIS provides no specific information on the impacts of grazing on bank stability, sedimentation, soil erosion, reduced pool depths, reduced bank vegetation, reduced shade, and increased water temperatures – even though the agency concedes these impacts may occur. Neither is there any analysis of grazing-induced lowered water tables or soil compaction in riparian areas. The public is not told whether or to what extent seeps and springs have been impacted by livestock grazing. The only quantitative information in the EIS is a chart disclosing the percentage of riparian rangeland vegetation meeting or moving toward desired conditions (13 percent), not meeting or moving

toward desired conditions (16 percent), and those areas that are "undetermined" (almost 70 percent). AR B03755.

The 2005 EIS refers to a report prepared by Winters et al., but this report also fails to provide any quantitative or qualitative information about the existing conditions of the water and riparian areas on the Bighorn National Forest. See AR B03591 (citing Winters et al. (2004) report). The lengthy, three-part Winters report fills the entire Volume 13 of the Administrative Record, and contains numerous maps and various statistics; but it does not disclose the current ecological condition of aquatic, riparian and wetland areas as affected by grazing. Instead, as will be discussed below, the report estimates *potential* grazing impacts rather than actual grazing impacts. See, e.g., AR B05979 (Winters report summary discussing the degree to which certain areas "may" be influenced by grazing and how those areas "may" respond to grazing impacts).

Excessive Stocking Levels On The Bighorn Forest.

Whatever the actual adverse impacts of grazing are on the Bighorn National Forest, they are certainly exacerbated by the fact that so many cows and sheep are crowded onto forest lands. The 2005 EIS acknowledges that

stocking levels here are much higher than other forests in the region. AR B05048, B06400 (Forest Service report that "[a]lthough the numbers of livestock have declined during the last several decades, today the BNF is still one of the most heavily grazed national forests in the region").

Indeed, while the Region 2 average stocking level is 6.22 acres per AUM,[2] the stocking level on the Bighorn National Forest is 2.61 acres per AUM. AR B05048 (Forest Plan). In other words, other forests in the region have 2 ½ times more acreage on which to provide forage for the same quantity of livestock as on the Bighorn.

The Forest Service also admits that the current permitted stocking levels are unsustainable. AR B03969 (2005 EIS) ("total AUMs permitted on the Bighorn National Forest is likely to continue to decline until a sustainable stocking level is achieved on all allotments."); see also AR B05933 (Forest Service report that "any suitable acres per AUM value of less than 4.0 could be cause for concern").

[2] An AUM, or Animal Unit Month, is defined as the amount of forage required to sustain a 1,000-pound animal for one month. AR B03961.

When the high stocking rates are combined with the impacts of grazing on various forest resources, the results are not surprising: According to the Forest Service, only 38 percent of all rangeland vegetation on the Bighorn National Forest grazing allotments is meeting or moving towards desired conditions, showing that the Forest Service did not achieve its 1985 goal of managing all grazing allotments to reach satisfactory range condition by the year 2000. See AR B03755 (2005 EIS).

And despite the 1985 goal to manage rangeland riparian areas to achieve satisfactory or better condition by the year 2000, such areas have fared particularly poorly: Only 13 percent of rangeland riparian vegetation is meeting or moving towards desired conditions, while almost 70 percent remains "undetermined." AR B03755 (2005 EIS). According to a report prepared during the Forest Plan revision process, the overall extent and continuity of riparian areas and wetlands has decreased on the Bighorn National Forest. AR B06038 (Forest Service forest-wide assessment report). The report concludes, "A large percentage of the non-forested riparian areas on the forest are in a degraded condition as a result of historic livestock and

wildlife grazing pressure," and that the rate of recovery for such degraded areas "is very slow." AR B06039.

Finally, as for the 1985 goal to reduce conflicts between domestic livestock, recreation, and wildlife, the Forest Service acknowledged that conflicts continue, and monitoring reports did not indicate whether such conflicts were, in fact, "reduced." AR B03967 (2005 EIS).

Lack of Grazing Alternatives In 2005 EIS.

The 2005 EIS articulated six different alternatives (including a "no action" alternative) to address aspects of future management of all resources on the Bighorn National Forest, including "Timber Suitability and Management of Forested Lands," "Recreation and Travel Management," "Special Areas," and "Roadless Areas and Wilderness Management." See AR B03497 – B03516.

These alternatives differ in terms of percentages of land available for timber production or recreation and travel; areas of land set aside as "special" and managed differently than in the past; and higher and lower percentages of land designated "roadless" or "wilderness." AR B03528 (timber), B03532 (roadless and wilderness), B03535 (recreation and travel).

Yet despite articulating these alternatives for future timber, recreation, wilderness and other management issues, the Forest Service's 2005 EIS for the revised Bighorn Forest Plan never considered any alternative for managing domestic livestock grazing. Instead, all of the alternatives set forth in the 2005 EIS simply stated the following: "Rangelands [or non-forested areas] are managed for a mix of seral stages (early, middle, and late) depending on direction in project level NEPA Analysis and Decisions. Noxious weeds and other non-native vegetation are aggressively managed." AR B03499, B03501, B03504, B03506, B03509, B03512.

Thus, unlike the EIS prepared for the 1985 Forest Plan, the 2005 EIS fails to analyze a range of permitted AUM levels authorized across the Bighorn National Forest; and further fails to address alternative management prescriptions for grazing to achieve resource objectives. For example, the 2005 EIS did not analyze in detail any grazing alternative that was more protective of degraded riparian areas than existing management; or any alternative to limit grazing in fragile bighorn sheep or Yellowstone cutthroat trout habitat. Likewise, the EIS presented no alternative to address grazing conflicts with wildlife or recreation; and it did not consider different grazing

levels in impaired watersheds, discuss removing lands from areas currently designated as available for grazing, or otherwise address any meaningful alternative to the current grazing regime. In short, the 2005 EIS failed to analyze any alternative that could change how livestock grazing is managed on the Bighorn National Forest, even though the agency admits that grazing continues to cause resource harms and did not meet the objectives of the prior 1985 plan.

This lack of grazing alternatives also infected other parts of the EIS, unlawfully limiting the Forest Service's consideration of the ecological impacts of grazing on other resource values. For example, in the section entitled "Fire and Fuels Management," the EIS notes that grazing reduces fire intensities and impedes prescribed burns, but the EIS engages in no comparative analysis of the issue – because there are no alternatives to compare. See AR B03711. Indeed, as the EIS observes, "the effects of grazing on fire and fuels would be nearly identical under all alternatives." AR B03711. Similarly, the EIS notes that while grazing can affect moose habitat, "[t]here would be little difference by alternative with regards to effects from livestock grazing." AR B03808. As for beaver, "[t]here would

not likely be a difference in habitat available under any alternative as livestock grazing is the primary determinant of riparian habitat condition . . . ." AR B03543.

Likewise, the 2005 EIS engages in no comparative analysis of the effects of livestock grazing on riparian areas and fish. After noting that "[a]lternatives do not vary in the number of active allotments, number and type of animals permitted, or overall use by livestock," the EIS simply counts on the Forest Service to resolve any issues at the project level. AR B03607; see also AR B03613 (chart examining relative impact of alternatives on riparian and aquatic resources, stating "[n]o difference between alternatives" for the "Effects from livestock grazing" category). Thus, the EIS never analyzes whether more grazing or less grazing might affect issues ranging from forest-wide fire management to riparian areas to wildlife habitat.

Furthermore, the 2005 EIS includes a "rangeland suitability analysis" – a forest planning analysis in which the Forest Service is to consider by alternative the appropriateness of authorizing grazing on certain areas of land. AR B04200. The comparative "suitability" determinations are

calculated by subtracting acres from the total amount of land physically capable of supporting livestock, according to the different policy considerations encompassed by various alternatives. See generally AR B04200 – B04205. Because there were no grazing alternatives in the EIS, however, there was nothing to compare here in assessing different "suitable" rangeland areas that might be open or closed to grazing.

For example, the suitability calculation requires the subtraction of acres "where decisions have been made that specific [endangered, threatened, or sensitive species'] habitats need to be excluded from livestock grazing due to an established incompatibility." AR B04205. No acres were subtracted despite the established incompatibility between domestic sheep and bighorn sheep. And even though the suitability calculation is a forest planning level determination, the Forest Service stated that considerations for such species "can be identified and made at the site-specific level." AR B04205. Likewise, the analysis requires the subtraction of "areas where conflicts occur between livestock grazing and other resources . . . , and where other resource values are proposed in the alternative to take precedence over livestock use. . . ." AR B04205. Again, no acres were

subtracted; and again, the explanation was that such considerations "can be identified and made at the site-specific level." AR B04205. In the end, the acres deemed suitable for livestock grazing do not vary by alternative. AR B04195.

Rejected Alternatives In 2005 EIS.

The Forest Service explains in the 2005 EIS that reduced grazing was proposed because of concerns about riparian impacts, but the Forest Service rejected this proposal for detailed analysis in the EIS because "there is not sufficient data at the Forestwide scale to determine what the appropriate level of grazing should be, and any reductions would be considered arbitrary at the plan level." AR B03517 – B03518. In other words, the Forest Service admitted its own EIS did not have sufficient information about grazing impacts on riparian and water areas to even consider reducing grazing in these degraded areas.

The Forest Service also rejected alternatives with "predetermined permitted AUMs," claiming the number of permitted AUMs is a project-level NEPA decision. AR B03518. And because livestock AUMs are a result of implementing the Forest Plan, the Forest Service explained, AUMs

are merely "an implementation outcome, not a target." AR B03519. Consequently, the EIS never examines any alternative with, nor does it even discuss, a particular number of AUMs.

Subsequent Forest Plan Grazing "Strategy."

Even though the Forest Service thus refused to consider any alternative grazing stocking levels in the 2005 EIS, the agency nevertheless proceeded to adopt a "strategy" in its Record of Decision for the revised Bighorn Forest Plan that did specify forest-wide grazing levels. This "strategy"[3] states that the Bighorn National Forest will "[p]rovide forage for livestock at a level that strives to maintain or exceed the year 2004 permitted stocking level of 113,800 Animal Unit Months (AUMs)" while managing to meet desired conditions and recognizing that stocking levels may be adjusted. See AR B04815 (Forest Plan) & B03412 (Record of Decision).

This "strategy" – unsupported by any NEPA analysis in the 2005 EIS, and promoting a stocking level already determined by the Forest Service to

[3] The Forest Service defines a "strategy" as "a concise, time-specific *statement of measurable planned results* that respond to pre-established goals. [It] *forms the basis for further planning* to define the precise steps to be taken and the resources to be used in achieving the identified goals." AR B04800 (Forest Plan) (emphasis added).

be unsustainable – was adopted in response to pressure from a "steering committee" of various government entities and grazing supporters, who expressed a "strong desire that the Forest articulate intent to provide as high a level of permitted AUMs as is possible." AR B05048 (Forest Plan). See id. (noting actual use in 2004 was only 84,000 AUMs, but even that reduced level of use resulted in degraded areas); see also AR B03969 (stating that the number of AUMs permitted on the forest is "likely to continue to decline *until a sustainable stocking level is achieved*") (emphasis added).

As these facts illustrate, members of the public – from ranchers to conservationists – are greatly concerned about grazing levels on the Bighorn National Forest. Rather than addressing these concerns publicly in a NEPA-compliant alternatives analysis, however, the Forest Service opted for a "back door" approach to establishing the unsustainable stocking level "target" set out in the revised Bighorn Forest Plan.

The Piney Creek Allotments.

In May 2007, the Forest Service put this "strategy" and the revised Bighorn Forest Plan into effect at a site-specific level by authorizing new livestock grazing permits on three allotments in the Piney Creek watershed

of the Bighorn National Forest. See generally AR B08291 – B08303 (Decision Notice). This Piney Creek grazing decision was approved by the Forest Service using an "Environmental Assessment" (EA) under NEPA, which is "tiered" to the 2005 EIS for the revised Bighorn Forest Plan. AR B08300.

Even though the Forest Service acknowledged in the Piney Creek EA that some riparian and upland areas of the allotments were not meeting desired conditions, see AR B08319, the Forest Service based its decision on the rationale that it best met the revised Bighorn Forest Plan "strategy" of providing forage at the year 2004 permitted stocking level of 113,800 AUMs. AR B08379 (supporting Alternative 3 because, in part, "Alternatives 1 and 2 do not meet the [strategy] for livestock grazing as well as Alternative 3 does").

Thus, the 113,800 AUMs "strategy" has now had a real and concrete effect on what happens on the ground, influencing the Piney Creek site-specific decision by setting the threshold regarding the number of AUMs permitted across the Bighorn National Forest.

SUMMARY OF ARGUMENT

The Forest Service violated NEPA in adopting the revised Bighorn Forest Plan when it failed to consider any grazing management alternatives, and further failed to take a "hard look" at the actual effects of grazing upon environmental resources of the Bighorn National Forest.

Even though the Forest Service previously considered grazing management alternatives in its 1985 Bighorn Forest Plan EIS, and even though other recent Forest Plan revisions in the same region have likewise addressed an array of grazing alternatives to redress resource damage or conflicts caused by grazing, see Richards Decl., Exhs. 1-3,[4] the Forest Service unlawfully refused to address any grazing alternatives in its 2005 EIS for the revised Bighorn Forest Plan here.

[4] As explained in WWP's accompanying Motion To Consider Extra-Record Evidence, the Court may properly consider these Exhibits 1-3 – which are excerpts of EISs prepared for other National Forests in the area that present a wide range of grazing alternatives – under the well-established rule allowing extra-record evidence to show that an agency violated NEPA in failing to consider reasonable alternatives. See, e.g., Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1268 (10th Cir. 2004); Lee v. United States Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004).

This failure to consider a range of reasonable alternatives violates the "heart" of NEPA's requirements, as many Tenth Circuit and other cases establish. Moreover, the NFMA planning regulations also underscore the requirement that the Forest Service must consider forest-wide grazing alternatives for the revised Bighorn Forest Plan.

Accordingly, under the well-known APA standards of review, the Court must reverse and remand the revised Bighorn Forest Plan and EIS based on these NEPA violations; and order the Forest Service to prepare a supplemental EIS to consider and quantify grazing impacts, as well as a reasonable range of grazing alternatives that would address those impacts. And because the Piney Creek site-specific grazing decision is premised on the unlawful revised Bighorn Forest Plan and EIS, it also must be reversed and remanded.

ARGUMENT

I. STANDARD OF REVIEW.

Review of agency actions in this Court is treated as an appeal. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994). Claims that a federal agency violated NEPA are reviewed under the APA, by

which this Court sets aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as those actions taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1268 (10th Cir. 2004).

While the scope of review under this "arbitrary or capricious" standard is narrow, "it is not without dimension." Olenhouse, 42 F.3d at 1576. The reviewing court must determine "whether the agency considered all relevant factors and whether there has been a clear error of judgment." Id. at 1574 (citation omitted). Agency action must be set aside if the agency "entirely failed to consider an important aspect of the problem." Id. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)).

II. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO CONSIDER ANY GRAZING ALTERNATIVES IN THE 2005 EIS.

A. NEPA Requirements.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA has two objectives: "First, it

places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Baltimore Gas & Electric Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (internal citation and quotation marks omitted).

To that end, NEPA requires that agencies take a "hard look" at environmental consequences and alternatives to their proposed actions. Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1179 (10th Cir. 2008). This requires an agency to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options." Id. (quoting 40 C.F.R. § 1502.14).

Indeed, considering alternatives "is the heart of the [EIS]." Citizens' Comm. to Save Our Canyons v. United States Forest Service, 297 F.3d 1012, 1030 (10th Cir. 2002) (quoting 40 C.F.R. § 1502.14). "[I]t is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental

merits and demerits of the proposed action and *possible alternatives,* a requirement that we have characterized as 'the linchpin of the entire impact statement.'" All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992) (quoting Natural Res. Def. Council v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975)) (emphasis in original).

This alternatives analysis is critical under NEPA, because it "*ensure[s] that each agency decision maker has before him and takes into proper account all possible approaches to a particular project* . . . which would alter the environmental impact and the cost-benefit balance." Id. (quoting Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971)) (emphasis in original). Therefore, federal agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." Citizens' Comm., 297 F.3d at 1030 (quoting 40 C.F.R. § 1502.14).

The reviewing court employs a "rule of reason" to determine whether the agency has, in fact, carefully considered a reasonable range of alternatives in order to make a reasoned decision. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001)). The greater the

possible environmental impacts, the more extensive is the agency's obligation to search for reasonable alternatives. See Greater Yellowstone Coalition, 359 F.3d at 1278-79 (where the environmental impact is small, NEPA requires a less extensive search for reasonable alternatives).

Where action is taken pursuant to a specific statute, such as NFMA here, statutory objectives also serve as a guide by which to determine reasonableness. Westlands Water Dist. v. United States Dept. of Interior, 376 F.3d 853, 866 (9th Cir. 2004) (citations omitted). Alternatives that accomplish the purpose of the action are reasonable and must be given substantial treatment in the EIS. Cf. Citizens' Comm., 297 F.3d at 1030 – 31 (stating that alternatives that do not accomplish the purpose of the project are not reasonable).

Thus, courts have found environmental analyses invalid under NEPA, even when the agency did consider various alternatives --which, of course, the Forest Service failed to do here. See Davis v. Mineta, 302 F.3d 1104, 1119 – 20 (10th Cir. 2002) (agency violated NEPA in approving highway project, where it addressed two alternatives but did not consider a mass transit alternative or an alternative highway location); Ayers v. Espy, 873

F.Supp. 455, 468 (D.Colo. 1994) ("The Forest Service's consideration of eight alternatives, none of which utilize an uneven-aged cutting method for lodgepole pine, does not constitute the broad range of alternatives contemplated by [NEPA].").

And while agencies need not consider alternatives that are "too remote, speculative, or . . . impractical or ineffective," NEPA requires "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." Custer County Action Ass'n, 256 F.3d at 1039 – 41 (quoting Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999)). Where an agency identifies an alternative but drops it from further analysis, the agency must offer a sufficient and reasonable explanation for doing so. 40 C.F.R. § 1502.14(a); N. Alaska Envtl. Center v. Kempthorne, 457 F.3d 969, 978-79 (9th Cir. 2006); Wilderness Society v. Wisely, 524 F.Supp.2d 1285, 1311-12 (D.Colo. 2007) (finding unreasonable agency's explanation for rejecting "no surface occupancy" alternative in oil and gas development project).

B. The Forest Service's Failure to Consider Grazing Alternatives Here Violates NEPA.

The Forest Service's failure to consider any grazing alternatives in the revised Bighorn Forest Plan EIS here obviously violates NEPA under these legal principles.

Again, the 2005 EIS presents no alternative grazing regimes whatsoever, even though the prior 1985 Bighorn Forest Plan EIS had done so; and even though the agency has considered many different kinds of grazing alternatives in other recent Forest Plan revisions. See Richards Decl., Exhs. 1-3. Based on the Administrative Record and these other examples, just a few of the reasonable grazing alternatives that the Forest Service could have considered for the revised Bighorn Forest Plan – but unlawfully did not – include the following:

♦ Alternatives presenting varying stocking levels, such as those included in the 1985 Bighorn Forest Plan EIS. See AR B00269 – B00283; B00305 – B00306 (1985 EIS examining various stocking levels).

♦ Alternatives addressing differing grazing management practices, such as requiring livestock to leave for more vegetation for wildlife; or

allowing less livestock-induced streambank or soil disturbances – such as the Forest Service has considered in its alternatives analysis in its recent revision of the Caribou Forest Plan. See, e.g., Caribou-Targhee National Forests EIS for revised Caribou Forest Plan, at 2, 4 – 7, 9 – 13 (charts) (Richards Decl., Exhibit 1).

♦ Alternatives setting aside different amounts of land as unsuitable or unavailable for grazing due to conflicts with recreation uses or threatened, endangered, or sensitive species – as the Forest Service again has done in other recent Forest Plan revisions in the region. See, e.g., Final EIS for Wasatch-Cache National Forest Plan, 3 (describing alternatives analysis as including the removal of areas available for livestock grazing due to "conflicts with bighorn sheep or heavy recreation use") (Richards Decl., Exhibit 2); Executive Summary of the EIS for the Routt National Forest Plan, 5 (noting that alternatives range from allowing grazing on 55 percent to 91 percent of the forest) (Richards Decl., Exhibit 3).

For example, the Forest Service could have examined reducing or eliminating grazing in Yellowstone cutthroat trout stronghold areas, or reducing domestic sheep grazing near remnant bighorn sheep populations, as

the agency has recently done elsewhere to protect such sensitive species from grazing conflicts. See, e.g., Caribou-Targhee National Forest EIS for Caribou Revised Forest Plan, 16 – 17 (Alternative 6 finding Yellowstone cutthroat trout stronghold areas not suitable for livestock grazing), 18 – 19 (charts showing same) (Richards Decl., Exhibit 1).

♦ Alternatives analyzing whether grazing should not be allowed in damaged riparian or upland areas. See, e.g., Final EIS for Wasatch-Cache National Forest Plan, 3 (describing alternatives analysis as including the removal of riparian areas in unsatisfactory conditions) (Richards Decl., Exhibit 2).

♦ Alternatives restricting grazing in drainages containing impaired stream segments identified on the State of Wyoming's water quality limited list. See, e.g., Caribou-Targhee National Forest EIS for Caribou Revised Forest Plan, 15 – 16 (Alternatives 4, 5, and 6 finding lands immediately surrounding 303(d) listed streams as unsuitable for livestock grazing), 18 – 19 (charts showing same) (Richards Decl., Exhibit 1).

♦ Alternatives examining the possibility of reducing grazing at popular recreation areas, or Wild & Scenic River eligible sites. See, e.g.,

Caribou-Targhee National Forest EIS for Caribou Revised Forest Plan, 16 – 17 (Alternatives 5, 6, and 7 finding lands in certain Wild & Scenic River eligible sites unsuitable for livestock grazing), 18 – 19 (charts showing same) (Richards Decl., Exhibit 1)

♦ Alternatives presenting various grazing regimes allowing for faster versus slower recovery rates of degraded upland or riparian areas.

Any of these alternatives would provide for multiple use and sustained-yield, and at the same time meet the purpose and need of forest planning, which is to "provide[] guidance for all resource management activities" pursuant to NFMA (as discussed further below). AR B03436 (2005 EIS). Because the Forest Service failed to examine these – *or any* – grazing alternatives, the Forest Service failed in its NEPA obligation to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. 1502.14; see Custer County Action Ass'n, 256 F.3d at 1040 ("Alternatives that do not accomplish the purpose of an action are not reasonable."); see also Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1038 – 39 (9th Cir. 2008) (finding NEPA violation where alternatives were "virtually indistinguishable from each other" and "not varied enough to

allow for a real, informed choice"). The Court must thus hold that the Forest Service violated NEPA in failing to consider any grazing alternatives in the 2005 EIS, and reverse and remand the revised Forest Plan based on this legal defect.

C. The Forest Service's Failure to Consider Grazing Alternatives Also Unlawfully Limited Its Impacts Analysis.

By failing to present a range of grazing alternatives in comparative form, the Forest Service further did not – indeed, could not – take a "hard look" at the impacts of its decision because the discussion of the relevant issues in the EIS was necessarily limited.

As discussed above, due to the lack of grazing alternatives, the Forest Service never considered in the EIS how more grazing or less grazing might impact other forest resources, such as moose or beaver habitat. See AR B03808, B03543. The information on these other resources is therefore insufficient "to permit a reasoned choice of alternatives as far as environmental aspects are concerned." Custer County Action Ass'n, 256 F.3d at 1039 – 40.

In other words, with regards to grazing impacts on other forest resources, there was no basis – much less a "clear" one – for the Forest Service's choice among options. Citizens' Comm., 513 F.3d at 1179. Thus, the lack of grazing alternatives in the EIS resulted in an insufficient discussion of the relevant issues, such that the Forest Service could not take a "hard look" at the environmental impacts of its proposal. See Custer County Action Ass'n, 256 F.3d at 1040.

In summary, it is difficult to imagine a clearer violation of NEPA's alternatives requirement than is presented here. Despite having previously addressed various grazing alternatives in its prior Bighorn Forest Plan EIS in 1985, and despite knowing that grazing has remained a significant issue of concern on the Bighorn National Forest since then, the Forest Service simply refused to articulate and explore alternative grazing management options in its 2005 EIS for the revised Bighorn Forest Plan. The Court thus must hold that the Forest Service violated NEPA, and reverse and remand on this ground so the agency can do its job correctly.

III. NFMA CONFIRMS THAT THE FOREST SERVICE VIOLATED ITS DUTY TO CONSIDER GRAZING ALTERNATIVES IN THE EIS.

The Forest Service's violation of NEPA in not assessing any grazing management alternatives is further underscored by considering the underlying statutory scheme and purposes of National Forest planning. As discussed below, the NFMA planning regulations make explicit that the Forest Service was obligated to consider a range of forest-wide grazing alternatives through the NEPA process. By failing to do so, the agency has again abrogated its legal duties and acted in arbitrary and capricious way.

A. Forest Planning Overview.

Under NFMA, the Forest Service must develop and regularly revise Forest Plans for each National Forest. See 16 U.S.C. § 1604(a), (e), (g)(3)(B); Utah Envtl. Congress v. Bosworth, 443 F.3d 732, 736 – 37 (10th Cir. 2006) (discussing Forest Plan requirements).

Under the 1982 NFMA planning regulations – which are the forest planning regulations applicable here[5] – the Forest Service was obligated to utilize the revised Bighorn Forest Plan to "determine resource management practices, [and] levels of resource production and management" in a manner that allows for "multiple use and sustained-yield management of renewable resources without impairment of the productivity of the land." 36 C.F.R. § 219.1(b). The planning regulations emphasize that forest planners must recognize that forests are ecosystems, and consider the interrelationships among plants, animals, soils and water within such ecosystems. Id. § 219.1(b)(3).

The regulations also mandate that the Forest Service "shall formulate a broad range of reasonable alternatives according to NEPA procedures," and note that "[t]he primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits," consistent with multiple use and sustained-yield principles. 36

[5] The Forest Service expressly applied the 1982 NFMA planning regulations in preparing and adopting the revised Bighorn Forest Plan here. AR B03401. A copy of the 1982 regulations is located at AR B00065.

C.F.R. § 219.12(f); see also Biodiversity Associates v. United States Forest Service, 226 F.Supp.2d 1270, 1306 (D.Wyo. 2002) ("Congress specifically intended that the NFMA and NEPA schemes be harmonized."); Ayers, 873 F.Supp. at 466 ("This regulatory provision requires the Forest Service to take a 'hard look' at alternatives which not only emphasize differing factors, but lead to differing results."). Specifically, the NFMA planning regulations require that:

> Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest. Alternatives shall reflect a range of resource outputs and expenditure levels.

36 C.F.R. § 219.12(f)(1). One of the resources to which this regulation refers is the "grazing resource." See id. § 219.20. Moreover, "[a]lternatives shall provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process." Id. § 219.12(f)(4).

Related to NFMA's guidance regarding alternatives is its direction that the Forest Service must determine the suitability of forest lands for

livestock grazing. 36 C.F.R. § 219.20. As discussed above, suitability is a policy-based determination that varies according to the different management options available to the Forest Service during the forest planning process. It is defined as "[t]he appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses forgone." Id. § 219.3. Part of the analysis "must detail the effects of alternative actions with regard to the tradeoffs associated with decisions regarding permitted grazing or no grazing to the extent that those decisions preclude or restrict other resource uses and values." AR B04196 (2005 EIS).

Thus, the Forest Service must apply various policy considerations to certain areas of land to calculate – by alternative – the number of forest acres deemed suitable for livestock grazing. AR B04200 – B04201. Among such policy considerations to apply at the forest planning level are grazing conflicts with recreation, grazing conflicts with wildlife, incompatibility with sensitive species, and conflicts between livestock grazing and other resources. AR B04205.

NFMA's ecosystem approach to forest planning, see 36 C.F.R. § 219.1(b)(3), thus highlights the importance of assessing impacts at a forest-wide scale. Wildlife species are not bound by site-specific project boundaries, but travel throughout the forest – and beyond. Likewise, the abundance, continuity, and physical condition of riparian areas across a forest offer an important big-picture view as to the forest's overall health that cannot be duplicated by a more piecemeal, site-specific analysis. The required alternatives and suitability analyses reflect this ecosystem approach. See 36 C.F.R. § 219.20; AR B04205 (2005 EIS); Smith v. United States Forest Service, 33 F.3d 1072, 1074 (9th Cir. 1994) (citing 36 C.F.R. 219.12(f) for assertion that "[i]n order to satisfy its obligations under NEPA, the Forest Service prepares an EIS in connection with each Forest Plan to evaluate the *forest-wide* environmental effects of the management scheme outlined in the Plan") (emphasis added).

In sum, analyzing impacts and alternatives at the forest-wide level is the only way to ensure that management decisions – including livestock grazing authorizations – are the result of well-informed decisionmaking. See 36 C.F.R. § 219.10(a)(3) (requiring preparation of EIS during forest

planning); 40 C.F.R. § 1502.14 (requiring agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" in an EIS); 16 U.S.C. § 1604(i) (requiring that site-specific projects be consistent with forest plans).

B. NFMA Confirms the Forest Service's NEPA Duty to Consider Grazing Alternatives in the EIS.

The Forest Service's NEPA violation in not considering any grazing alternatives in the 2005 EIS is thus even more apparent when these NFMA duties are taken into account. As discussed above, the NFMA regulations are clear that "[a]lternatives *shall* be distributed between the minimum resource potential [i.e., little or no grazing] and the maximum resource potential [i.e., more grazing] to reflect . . . the full range of major commodity and environmental resource uses and values that could be produced from the forest." 36 C.F.R. § 219.12(f)(1) (emphasis added). Furthermore, the regulations direct that alternatives shall provide different ways to respond to major public issues. Id. § 219.12(f)(4).

Here, where livestock grazing is unquestionably a "major commodity" of the Bighorn National Forest, see AR B05243, and where the Forest Service itself acknowledged that the public's concern over grazing "was

high," AR B05048, the Forest Service should have considered a range of livestock grazing alternatives. See Biodiversity Associates, 226 F.Supp.2d at 1306 ("Congress specifically intended that the NFMA and NEPA schemes be harmonized."); Ayers, 873 F.Supp. at 468 (finding agency's consideration of eight alternatives utilizing the same logging method "d[id] not constitute the broad range of alternatives contemplated by § 219.12(f) or [NEPA].").

These NFMA requirements thus confirm the Forest Service's violation of NEPA in refusing to consider any grazing alternatives.

IV. THE FOREST SERVICE'S EXPLANATIONS FOR FAILING TO CONSIDER GRAZING ALTERNATIVES ARE ARBITRARY AND CAPRICIOUS.

As noted above, the Forest Service briefly identified preliminarily, but then rejected for detailed consideration in the 2005 EIS, two grazing alternatives.

Yet its reasons for refusing to consider these alternatives in detail are unreasonable, and may not be credited by the Court, because the Forest Service either (1) relies on a NEPA violation for justification, or (2) fails to take into account myriad grazing management schemes other than simply

reducing the number of permitted AUMs authorized on the Bighorn National Forest.

First, the Forest Service explained in the EIS that it would not consider in any detail an alternative reducing grazing in damaged riparian areas because the Forest Service lacked "sufficient data at the Forestwide scale to determine what the appropriate level of grazing should be." AR B03517 – B03518 (2005 EIS). The Forest Service's admission that it lacks information regarding grazing impacts to riparian areas is, of course, reflected in the EIS's inadequate analysis of the issue, and the Forest Service's acknowledgment that almost 70 percent of allotment riparian vegetation has not been evaluated. AR B03755 (status of 69.86 percent of riparian vegetation "undetermined").

Under even the most deferential standard of review, however, reliance on one NEPA violation (the failure to take a "hard look" at grazing impacts on riparian areas) to justify a second NEPA violation (the failure to consider a reasonable range of alternatives) cannot qualify as a reasonable or sufficient explanation for dropping from further analysis an alternative proposing reduced grazing in damaged riparian areas. See N. Alaska Envtl.

Center, 457 F.3d at 978 – 79 (analyzing reasonableness of agency explanation for dropping an alternative from further analysis); Wilderness Society v. Wisely, 524 F.Supp.2d 1285, 1311 – 12 (D.Colo. 2007) (finding agency's explanation for rejecting "no surface occupancy" alternative in oil and gas development EA unreasonable).

Second, the Forest Service's explanation that it could not consider alternative permitted AUM levels because such levels are not a Forest Plan decision or "target" is equally specious. AR B03518 – 19. As explained above, the Forest Service's Record of Decision for the revised Forest Plan did, in fact, adopted a "strategy" of allocating 113,800 AUMs to livestock on a forest-wide basis. AR B04815 (Forest Plan); see B03412 (Record of Decision). This is despite the fact that the agency adamantly refused to consider forest-wide grazing levels in the 2005 EIS; and did not address any alternatives before choosing the "strategy" that continues grazing levels known to cause resource damage.

Moreover, in the site-specific implementation of the Forest Plan through the 2007 Piney Creek Allotments decision, the Forest Service selected an alternative representing a particular grazing level because, in

part, it best met this "target." AR B08379. This shows that the 113,800 AUM "target" set forth in the Forest Plan is not merely hortatory or aspirational, but has real impacts at the site-specific level. The Forest Service's inconsistent treatment of whether permitted AUMs are a forest planning level decision, and its justification for failing to consider various permitted AUMs alternatives, cannot pass the "rule of reason" standard.[6]

Furthermore, reducing the number of permitted AUMs is not the only method by which the Forest Service may change grazing on the forest. As shown above, the Forest Service could have considered alternatives that, for example, closed off more lands to grazing due to conflicts with wildlife or

[6] To the extent the Forest Service justifies its failure to consider permitted AUMs grazing alternatives by relying on later, site-specific NEPA analysis, see AR B03518, that explanation is unreasonable given the NEPA and NFMA requirements that an agency consider a range of alternatives at the forest planning level. See 36 C.F.R. § 219.12(f) (NFMA alternative requirements); 40 C.F.R. § 1502.14 (NEPA requirement that agencies explore reasonable alternatives); see also Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) ("If an agency were able to defer analysis discussion of environmental consequences in a[] [resource management plan], based on a promise to perform a comparable analysis in connection with later site-specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.").

recreation, or to protect water quality. The Forest Service could have presented alternatives that allowed for various utilization levels, or various levels of acceptable streambank stability. Other possibilities include limiting grazing on important wildlife winter range areas or in Yellowstone cutthroat trout habitat, or limiting sheep grazing near bighorn sheep populations.

These alternatives are not only reasonable, they are envisioned by the NFMA regulations requiring the Forest Service to complete a suitability analysis. Again, the suitability analysis directs the Forest Service to consider finding certain lands unsuitable for livestock grazing if there are conflicts with recreation, conflicts with wildlife, incompatibility with sensitive species, and conflicts between livestock grazing and other resources. AR B04205. Here, the Forest Service failed to find *any* lands unsuitable with regard to these considerations, and postponed the determination to the site-specific level – even though the suitability analysis is a forest planning level decision. Because NEPA and NFMA schemes are to be harmonized, Biodiversity Associates, 226 F.Supp.2d at 1306, NFMA's requirement of a suitability analysis shows further that grazing alternatives –

including ones that are more protective of forest resources – should have been considered in the EIS.

In sum, this Court should reject the Forest Service's unreasonable explanation regarding its failure to consider grazing alternatives that are more protective of riparian areas. Likewise, this Court should reject as arbitrary the Forest Service's justification for failing to analyze various permitted AUM levels, a justification that is inconsistent with the Forest Plan and its site-specific implementation, and ignores many other ways to change grazing on the Bighorn National Forest. This Court should hold the Forest Service to its NEPA obligations, and order the Forest Service to supplement the EIS with an examination of livestock grazing alternatives. See Biodiversity Associates, 226 F.Supp.2d at 1305 (noting general rule that a supplemental EIS required where an agency action will affect the environment to a significant extent not already considered) (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989)).

V. THE FOREST SERVICE ALSO VIOLATED NEPA BY FAILING TO TAKE A "HARD LOOK" AT THE IMPACTS OF GRAZING.

A. NEPA Requirements.

It is well-established that NEPA prohibits uninformed agency decisions. Utah Shared Access Alliance v. United States Forest Service, 288 F.3d 1205, 1207 – 08 (10th Cir. 2002). Directing an agency "to consider every significant aspect of the environmental impact of a proposed action" ensures that an agency informs the public that it has considered environmental consequences in its decision-making process. Id. at 1207 (quoting Baltimore Gas & Elec. Co., 462 U.S. at 97). To that end, an EIS must contain a "full and fair discussion" of significant environmental impacts that is "supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. Thus, NEPA requires agencies to take a "hard look" at the environmental consequences of its proposed action, and its alternatives, before taking action. Utah Shared Access Alliance, 288 F.3d at 1207.

The "hard look" analysis must include some detailed or quantified information, as "[g]eneral statements about 'possible' effects and 'some

risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1379 – 80 (9th Cir. 1998). An agency will meet its "hard look" obligation when it, among other things, "gives careful scientific scrutiny and responds to all legitimate concerns that are raised." Wyoming Lodging and Restaurant Ass'n v. United States Dept. of Interior, 398 F.Supp.2d 1197, 1212 – 13 (D.Wyo. 2005) (quoting Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999)). The requisite "hard look" must be based on the best available scientific information. Biodiversity Associates, 226 F.Supp.2d at 1279.

B. The Forest Service Failed To Take A "Hard Look" At the Impacts Of Grazing on Riparian and Water Resources.

Even though riparian and water areas represent some of the most dynamic and ecologically rich areas across the Bighorn National Forest, AR B03594, and are vulnerable to degradation caused by the livestock which tend to congregate there, AR B03606, the Forest Service failed to take a "hard look" at grazing impacts in the EIS, in violation of NEPA.

The Forest Service admits that almost 70 percent of riparian rangeland vegetation has not been evaluated, AR B03755, yet makes the unsupported assertion that "[m]ost riparian areas on the Forest are believed to be functioning at or near their potential . . . ." AR B03595. As for the actual, on-the-ground effects of livestock grazing, the EIS discloses that grazing *can* have adverse impacts, see AR B03595, B03607, but never informs the public as to the extent of those impacts. See, e.g., AR B03625 ("Willows, the primary riparian shrub, *may* have been reduced through historic livestock grazing.") (emphasis added). Instead, the EIS merely concludes that because the alternatives do not vary in the overall use by livestock, "impacts from grazing would be similar to the existing condition" – though the Forest Service fails to disclose to the public exactly what that "existing condition" is. AR B03607.

Such a cursory analysis, without any detailed or quantifiable information to support it, does not qualify as "careful scientific scrutiny" sufficient to inform the public that the Forest Service considered grazing impacts on water and riparian areas. See Wyoming Lodging and Restaurant Ass'n, 398 F.Supp.2d at 1212; see also Neighbors of Cuddy Mountain, 137

F.3d at 1379 – 80 (noting that "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look'").

Nor does the Winters report that is cited in the EIS provide any qualitative information about actual grazing impacts on the water and riparian areas of the forest. See AR B03591 (citing Winters report). Part one of this three-part report presents an "ecological driver" analysis, which looks at geology, glaciation, stream gradient, precipitation regime, and climate to classify watersheds into groups that differ in resource productivity and sensitivity to disturbances. AR B05654; see generally AR B05652 – B05742. Part two of the report identifies anthropogenic influences, such as roads, recreation, logging, and grazing, that can influence those aquatic, riparian, and wetland groups. AR B05754 – B05755; see generally AR B05743 – B05974. With regards to grazing, part two of the report offers the statistics quoted in the EIS regarding the percentages of riparian and upland acres meeting or moving towards objectives, AR B05927, but provides no meaningful evaluation of the actual, on-the-ground conditions and grazing impacts; rather, the report estimates *potential* impacts. It presents a "preference model" to assess areas "most likely to experience livestock

grazing influences," AR B05927, and a "stocking density model" to assess "the potential influence of permitted livestock grazing density," AR B05933, but simply concludes that "the information contained in [part one] . . . can be used in conjunction with [part two] to focus administrative attention on those areas *most likely* to experience livestock influences." AR B05937 (emphasis added). Part three of the report similarly identifies the degree to which certain areas "*may* be influenced by anthropogenic activities," and it identifies how each area "*may* respond to the potential influence of anthropogenic activities." AR B05979 (emphasis added). In short, the lengthy Winters report analyzes potential impacts, but provides no quantitative or even qualitative assessment of actual livestock grazing impacts on surface water, riparian, and wetland areas of the Bighorn National Forest.

Thus, neither the EIS nor the Winters report presents a "full and fair discussion" of significant environmental impacts of livestock grazing that is "supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. Without analyzing adequately the existing conditions of water and riparian areas, the Forest

Service has not satisfied NEPA's mandate to squarely confront and disclose to the public the environmental consequences of its decision. See, e.g., Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) ("Without establishing the baseline conditions which exist . . . before ocean dumping begins, there is simply no way to determine what effect the proposed dumping . . . will have on the environment and, consequently, no way to comply with NEPA."). This Court should therefore order the Forest Service to supplement the EIS with an analysis that carefully and scientifically examines the impacts of grazing on water and riparian resources.

VI. THE PINEY CREEK DECISION IS ALSO UNLAWFUL.

Finally, because the decision authorizing livestock grazing on the Piney Creek Allotments was issued pursuant to the grazing provisions of the unlawful revised Bighorn Forest Plan and EIS, this Court also must reverse and set aside that site-specific implementation of the revised Forest Plan. AR B08291 (Decision Notice).

NFMA requires that all site-specific management decisions must be "consistent" with a lawful forest plan. See 16 U.S.C. § 1604(i); Idaho

Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957, 970 (9th Cir. 2002) (recognizing that where a forest plan standard violated NFMA, logging projects approved in reliance on that standard to satisfy NFMA should be set aside). Thus, the 2007 Piney Creek Allotments decision that implements the flawed Forest Plan and tiers to its unlawful 2005 EIS should be set aside until the Forest Service properly considers grazing alternatives and the impacts of grazing on water and riparian areas. See AR B08300 (Decision Notice stating that the Environmental Analysis tiers to the 2005 EIS).

CONCLUSION

For the foregoing reasons, WWP respectfully requests that the Court declare that the Forest Service violated NEPA in adopting the revised Bighorn Forest Plan and EIS, and order the Forest Service to prepare a supplemental EIS that (1) considers a reasonable range of grazing alternatives, and (2) takes a "hard look" at the adverse impacts of grazing on the riparian and water resources of the Bighorn National Forest. WWP requests also that the Court set aside the Piney Creek Allotments Decision Notice adopted under the unlawful Forest Plan and EIS.

Dated: June 30, 2008.

Respectfully submitted,

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In accordance with Rule 32 of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 10,580 words, excluding the parts of the brief exempted by Rule 32.

Dated: June 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2008, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the counsel of record listed below:

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