Lauren M. Rule (ISB #6863)
Elizabeth H. Potter (OSB #105482) *pro hac vice*
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
lrule@advocateswest.org
epotter@advocateswest.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, and WILDEARTH GUARDIANS, Plaintiffs, v. U.S. FOREST SERVICE, Defendant.	No. 1:17-cv-434-CWD **PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR TRO AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

The Forest Service's position in its response—that it can write-off the South Beaverhead bighorn sheep population because subsidizing another agency's research on domestic sheep is more important than an entire bighorn population—is based on arguments that are legally and factually incorrect. Rocky Mountain bighorn sheep are a Forest Service Sensitive Species and a species of great interest to Native American tribes, sportsmen, wildlife advocates, and other members of the public. The Forest Service has a duty under the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) to protect the South Beaverhead bighorn population while it undertakes a thorough analysis to determine the future plan for the Snakey Canyon and Kelly Canyon allotments. Instead of helping this population persist while it completes the necessary analysis, the Forest Service is disregarding the increasing and overwhelming evidence that grazing domestic sheep on these allotments creates a grave threat to the South Beaverhead bighorns and is unlawfully reauthorizing grazing on these allotments while failing to show any progress on its environmental analysis. The Forest Service has a duty to protect the South Beaverhead bighorn population rather than contribute to its demise.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Forest Service's NEPA Arguments are Unavailing.

The Forest Service argues that Plaintiffs' NEPA claim fails because the agency must allow grazing to continue while it does its NEPA analysis, and because Plaintiffs have not proven that the grazing *would* extirpate the South Beaverhead bighorn herd; but these arguments are inconsistent with the caselaw and the agency's own prior interpretation of NEPA regulations.

The Forest Service exaggerates the effect of the Rescissions Act and appropriation rider

language by claiming that Congress "mandated" that grazing continue on the Snakey Canyon and Kelly Canyon allotments. Def. Br. at 8-9. Congress, however, only called for "terms and conditions in a grazing permit or lease that has expired" to continue under a new permit until a new NEPA analysis is finished. 43 U.S.C. § 1752(c)(2). Such language does not mandate that the Forest Service actually authorize grazing by issuing AOIs if such grazing would impair resources. Plaintiffs here are challenging an AOI, and thus the rider language does not apply.[1]

As an initial matter, the 2017 Permit does not include the same terms and conditions as the expired permit.[2] Compared to the 2013 permit, the 2017 permit authorizes grazing on a different allotment; removes a condition related to wolves; alters the term for removing dead stock and adds a term related to white bark pine; and changes maintenance provisions. *Compare* Def. Ex. B *with* Def. Ex. F. Thus, the permits themselves show the rider does not apply here.

Moreover, Plaintiffs are not challenging the June 2017 permit, they are challenging the September 2017 AOI for failing to comply with a substantive NEPA requirement. Because the rider language applies only to grazing permits, not AOIs, and does not negate substantive mandates, it is irrelevant here. Indeed, this Court and other courts have interpreted the rider language narrowly and have held that it does not apply to AOIs, nor does it stop challenges for non-compliance with substantive requirements such as NEPA's ban on the irreversible or irretrievable commitment of resources. *W. Watersheds Project v. U.S. Forest Serv.*, 2017 WL 4927660, at **9-10 & n.10 (D. Idaho, Oct. 31, 2017) (rider did not "have any bearing" on the question of whether AOIs "were consistent with the Forest Plan" under NFMA); *Or. Natural*

[1] Plaintiffs also intend to amend their complaint after the hearing to challenge the Interagency Agreement between the Caribou-Targhee National Forest and the Sheep Station, signed in February 2017, which also does not fall under the rider. *See* Def. Ex. A.

[2] The Forest Service claims grazing occurred 2014-2016 but failed to produce any permits from those years. It claims the 2017 permit is the same as the 2013 permit. Def. Br. at 10.

Desert Ass'n v. Sabo, 854 F. Supp. 2d 889, 922-23 (D. Or. 2012) (rider not applicable in challenge to AOIs that violated NEPA's requirement to avoid irreversible commitment of resources). The agency cites two older cases to support its argument and ignores these recent cases that are more on point. Def. Br. at 9.

The Forest Service raised a similar argument to this Court in another bighorn sheep case, claiming that the rider prevented a challenge to BLM's authorization of grazing on the Partridge Creek allotment. *W. Watersheds Project v. BLM,* No. 4:07-cv-151-BLW, ECF #166 at 15-18 (D. Idaho, October 2, 2009). This Court ignored that argument and held that the authorized grazing likely violated NEPA's prohibition on irreversible commitment of resources due to the risk to bighorn populations. *W. Watersheds Project v. BLM,* 2009 WL 3335365, at *6 (D. Idaho, October 14, 2009). Such a result is obvious because the Forest Service retains authority to cancel a grazing permit in full or in part for resource protection. The agency has done that to protect bighorn sheep in other areas. Second Rule Decl. Exs. 26-28 (permit modifications to protect bighorns). Thus, the Forest Service was not obligated to issue the 2017 AOI. *See* Def. Ex. B at 2 (2017 permit allowing agency to cancel permit due to "resource conditions").

Second, the Forest Service cited no cases to support its litigation position that Plaintiffs had to prove with certainty the grazing would harm the bighorn population to succeed on their NEPA claim. Def. Br. at 10-11. In fact, the agency ignored cases that refute its position. In *Conner v. Burford,* the Ninth Circuit determined that selling oil and gas leases was an irretrievable commitments of resources, and because those leases *could* cause significant environmental effects, the agency violated NEPA by issuing them before completing an EIS. 848 F.2d 1441, 1450-51 (9th Cir. 1988). Likewise, in *Metcalf v. Daley,* the Ninth Circuit held that entering into a contract with the Makah Tribe about whaling quotas before doing an EA was

an irreversible commitment of resources that could result in the killing of a certain number of whales, "thereby seriously impeding the degree to which their planning and decisions could reflect environmental values." 214 F.3d 1135, 1143-44 (9th Cir. 2000).

This Court applied the holding in *Metcalf v. Daley* to a situation almost identical to what we have here. *WWP v. BLM,* 2009 WL 3335365, at *6. This Court stated that "NEPA and its regulations prohibit agencies from making any irreversible or irretrievable commitment of resources before an EIS is completed so that the agency does not do damage before even considering the effects of its action. . . . Irreversible damage *is possible* here." *Id.* (emphasis added). The court noted that, before the SEIS was completed, bighorn sheep "could become infected" with disease and pass the disease onto other bighorn sheep in the Salmon River drainage, which was sufficient to show a likelihood of success on Plaintiffs' NEPA claim. *Id. See also Sabo*, 854 F. Supp. 2d at 922-24 (finding NEPA violation where authorized grazing *could* cause irreversible harm to sensitive species pending new NEPA analysis).

The Forest Service itself previously decided it needed to close domestic sheep allotments that had bighorn sightings on or near them even though it did not know for certain disease transmission *would* occur. Second Rule Decl. Exs. 26-28 (permit modifications closing allotments). The agency explained in a Federal Register notice as well as to this Court that it needed to keep allotments closed to prevent potential disease transmission from occurring while it conducted its NEPA analysis. Rule Decl. Ex. 11 at 2 (Fed. Reg. notice); Second Rule Decl. Ex. 29 at 19-20 (Forest Service brief, ECF #50 in Case No. 4:07-cv-151-BLW). Specifically, after citing the NEPA regulation at 40 C.F.R. § 1506.1, the agency stated to this Court:

> Plaintiff alleges that the Forest Service is precluded from altering its grazing permit until the EIS is completed, but he has the obligation backwards. The Forest Service is precluded from taking action which may lead to irreparable damage to the environment by potentially infecting and killing bighorn sheep with diseases

> transmitted from domestic sheep until the EIS is completed, and the potential effects are fully understood.
> ***
> [T]he Forest Service is obligated to take action to prevent potential adverse environmental effects and preserve reasonable alternatives for future actions pending completion of the its (sic) environmental analysis. The permit actions at issue here were calculated by the Forest Service to avoid potentially serious effects to bighorn sheep from domestic sheep while that analysis is being completed.

Ex. 29 at 19, 20. The same principle applies here. Two and a half years have passed since initiating the NEPA process, and the agency has failed to produce even a draft EA or EIS. The Forest Service must close the Snakey Canyon and Kelly Canyon allotments pending completion of this lengthy NEPA analysis to prevent irreversible harm to the South Beaverhead bighorns and other populations with which they interact and preserve reasonable alternatives aimed at protecting these bighorns. *WWP v. BLM,* 2009 WL 3335365, at *6.[3]

B. The Forest Service is not Acting Consistently with the Forest Plan.

The Forest Service's arguments about Plaintiffs' NFMA claim are equally unpersuasive. The agency asserts that it must manage its lands for multiple uses, and it determined that the benefit from the Sheep Station research on domestic sheep outweighed the risk to the bighorn population. Def. Br. at 12-13. There are several problems with this conclusion.

First, subsidizing another agency's research is not identified in NFMA as part of the Forest Service's multiple use mandate, whereas wildlife conservation is. 16 U.S.C. § 1604(e)(1). Moreover, the agency's balancing of multiple uses on its land is constrained by its other obligations under NFMA, including complying with Forest Plan requirements to maintain viable

[3] The Forest Service overstates the effect of a 2013 settlement. Def. Br. at 13-14. WWP agreed that grazing may continue on 52 allotments under the terms and conditions of the *existing* grazing permits pending NEPA analyses. The *existing* permits for the Snakey Canyon and Kelly Canyon allotments expired so that provision no longer applies. Further, the Forest Service violated its obligations under the settlement by failing to provide WWP the required status reports summarizing the agency's progress on the analyses. *WWP v. U.S. Forest Serv.,* No. 4:10-cv-612-ELJ-REB, ECF #109-1, ¶¶ 3, 6. WildEarth Guardian was not a party to that case.

populations of species. *Idaho Sporting Congress v. Rittenhouse,* 305 F.3d 957, 961 (9th Cir. 2002); *Seattle Audubon Soc'y v. Moseley,* 798 F. Supp. 1484, 1489-90 (W.D. Wash. 1992). The agency may need to forego certain actions to manage for viable populations of bighorn sheep across the forest. *See Rittenhouse,* 305 F.3d at 969-70, 975 (enjoining timber harvest to comply with viability requirement); *Idaho Wool Growers Ass'n v. Vilsack,* 816 F.3d 1095 (9th Cir. 2016) (upholding decision that closed domestic sheep allotments to protect viability of bighorns).

Second, the Forest Service claims in this litigation that it can let the South Beaverhead bighorn population blink out and still maintain a viable population of bighorn sheep across the forest. Def. Br. at 12; Yorgason Decl. ¶ 15. This position is inconsistent with the plain language of the Forest Plan, the Forest Service Manual, and Ninth Circuit law. The Targhee Forest Plan and the Forest Service Manual direct that the agency provide habitat to maintain viable populations of wildlife *distributed throughout their current geographic range* on National Forest System lands. Def. Ex. E at A-10 (ECF #19-8); FSM §§ 2602, 2620.1, 2622.01(2), 2670.22. The Ninth Circuit has reiterated the requirement that viable populations must be "well-distributed" across the forest. *Rittenhouse,* 305 F.3d at 961-63; *Neighbors of Cuddy Mountain v. Alexander,* 303 F.3d 1059, 1069 (9th Cir. 2002). Likewise, in guidance for bighorn/domestic sheep risk of contact analysis, the Forest Service itself explained that the viability regulations "emphasize the importance of species distribution within the planning area." Rule Decl. Ex. 15 at 1-2. It also noted that the Forest Service Manual states the agency must "avoid or minimize impacts" to Sensitive Species, such as bighorn sheep. *Id.* at 2 (citing FSM §§ 2670.32, 2672.1).

Allowing extirpation of the South Beaverhead bighorn population is not consistent with any of this direction. The Targhee National Forest has five populations of bighorn sheep but

four of those populations are small. Mickelsen Decl. ¶ 13; Def. Ex. D at 61, 67, 79, 80.[4] The South Beaverhead population is in close proximity to the South Lemhi population, meaning that disease could be transferred from South Beaverhead bighorns to South Lemhi bighorns. Second Rinkes Decl. ¶¶ 9-11. Taking action that could result in disease transmission to two of the five bighorn populations, which constitute all of the bighorn sheep in the Lemhi/Medicine Lodge subsection of the forest, does not comply with direction to manage habitat to provide for viable populations well-distributed throughout the species' geographic range on the forest.

Finally, the Forest Service argues that it has complied with the standard in the Forest Plan to close the Snakey Canyon and Kelly Canyon allotments because no opportunity to close the allotments has arisen. Def. Br. at 12. The Plan states that an opportunity is defined as a "suitable or favorable time" to close an allotment due to various factors, including "resource protection." Def. Ex. E at III-40. Here, an opportunity to close the allotments arose when the agreement between the Caribou-Targhee National Forest and the Sheep Station expired. The Forest Service could have decided not to renew the agreement, just as BLM decided not to renew its agreement with the Sheep Station to graze the Bernice allotment to protect the South Lemhi bighorn population. Rule Decl. Ex. 14. Instead, the agency renewed the agreement for another five years in February 2017. Def. Ex. A. By issuing the 2017 AOI after passing up a suitable time to close the allotments, the Forest Service has not acted consistently with the Forest Plan.

II. PLAINTIFFS HAVE DEMONSTRATED LIKELY IRREPARABLE HARM.

The Forest Service's attempts to refute Plaintiffs' showing of likely irreparable harm are based on a misinterpretation of the data and statements by declarants who have shown no specialized experience with or knowledge about bighorn sheep. In contrast, Plaintiffs' experts

[4] The Forest Service claims that the Lionhead population has 105 animals, but most of those are in Montana, and do not occur on the Targhee National Forest.

have years of experience studying and managing bighorn sheep populations in Idaho and have explained why these allotments pose a significant threat to the South Beaverhead bighorns.

The Forest Service claims that the South Beaverhead population is healthy and disease-free, and that only one bighorn has ever stepped onto the Snakey Canyon or Kelly Canyon allotments, Def. Br. at 15-16, but these assertions fail to recognize the limitations of the cited data. Idaho Fish and Game collared eight animals from this population and tested them for disease. Def. Ex. D at 59-60. Results from these animals cannot support a conclusion that the entire herd of 36 animals is disease-free. Second Rinkes Decl. ¶ 3. To the contrary, evidence indicates that disease continues to effect this population and cause depressed recruitment of lambs. *Id.* ¶¶ 3-6. In fact, a dead collared ewe from this population discovered by Plaintiffs' expert in 2013 *tested positive for disease*. Second Walters Decl. ¶ 5 & Ex. 1. It is also inaccurate to conclude that bighorns rarely visit the allotments when only a small sample of animals were monitored and for only a short time. Second Rinkes Decl. ¶¶ 7-8. Given the location of a ram on the allotments in November 2015 and the short foray distance to the allotments, it is likely that other bighorns also visit these allotments, particularly in fall during the breeding season. *Id.*; Rule Decl. Ex. 21.

The Forest Service also incorrectly asserts the South Beaverhead population is isolated and does not intermingle with other bighorn populations, and therefore the consequences of disease transmission are not significant. Def. Br. at 5, 17-18. The South Beaverhead population can interact with the South Lemhi, North Lemhi, North Beaverhead, and Tendoy bighorn populations, creating a risk that disease transmission could lead to a die-off in multiple herds. Second Rinkes Decl. ¶¶ 9-11; Second Walters Decl. ¶¶ 3-4; Yorgason Decl. ¶ 7; Rule Decl. Ex. 20 (showing South Beaverhead rams moving long distances toward North Beaverhead herd).

Finally, the Forest Service's reliance on Best Management Practices (BMPs) is irrational. Second Rinkes Decl. ¶ 12; Second Walters Decl. ¶ 6. Based on years of professional experience, Plaintiffs' expert Walters explains why BMPs proposed for these allotments are not effective, particularly during fall and winter when weather is poor and there is less daylight. Second Walters Decl. ¶¶ 6-17. The Forest Service offers no evidence showing any of these BMPS have proven effective at minimizing risk of contact. *See WWP v. BLM,* 2009 WL 3335365, at *7 (refusing to rely on BMPs that had no scientific support). Domestic sheep on these two allotments pose a grave threat to the South Beaverhead bighorns, so closing these allotments would provide a significant benefit for recovery of the South Beaverhead population. Second Rinkes Decl. ¶¶ 6, 11; Second Walters Decl. ¶ 17. As noted by this Court, the failure to provide for species viability constitutes irreparable harm. *Lands Council v. Cottrell*, 731 F. Supp. 2d 1028, 1055 (D. Idaho 2010), *adopted at* 731 F. Supp. 2d 1074, 1092 (D. Idaho 2010).

III. THE BALANCE OF HARDSHIPS FAVORS BIGHORN SHEEP.

The Forest Service is wrong that subsidizing research for the commercial sheep industry outweighs the public interest in stopping a callous and unlawful decision that threatens extirpation of a bighorn sheep population. This Court recently rejected a similar argument that the public interest in data collected from Forest Service lands for third-party research outweighs protecting the environment and enforcing federal laws. *Wilderness Watch v. Vilsack*, 229 F. Supp. 3d 1170, 1182–83 (D. Idaho 2017), (ordering destruction of data gathered unlawfully during elk research project), *amended in part*, 2017 WL 3749441 (D. Idaho Aug. 30, 2017).

Here, the public interest favors protecting bighorn populations from the irreparable risks of disease transmission and catastrophic die-offs if grazing occurs. The indirect economic benefits that the commercial sheep industry *may* realize *someday* due to this research cannot

justify the serious risks to these bighorn populations that the Forest Service underestimates and wrongly brushes aside. This Court has routinely found that such commercial losses, even when more certain than those here, do not outweigh harm to the environment. *E.g., Lands Council,* 731 F. Supp. 2d at 1056 (public interest "in sustaining wildlife" outweighed economic benefits to communities, reduction in fire and drought risks, and multiple use access), *adopted at* 731 F. Supp. 2d at 1092-93; *Idaho Rivers United v. Probert,* 2016 WL 2757690, at **17-18 (D. Idaho May 12, 2016) (public interest in preserving the environment outweighed economic benefits).

Moreover, the Sheep Station research appears far less essential than the agencies represent. Ex. 30 (USDA Secretary describing plan to close Sheep Station because it was not "viable" and could not address "high priority research"); Ex. 31 (ARS identified Sheep Station as being in low condition and not high priority facility); Ex. 32 (casting doubt on need for Sheep Station to use wildlife-conflict pastures). ARS also asserts the research projects are in their final year, but the agency's website shows them lasting far longer. *Compare* Taylor Decl. ¶¶ 15, 20 (projects are in final year) *with* Exs. 33-34 (projects with the same titles end in 2021 and 2022). Finally, ARS claims the research will be undermined if the grazing is not the same each year, but the number of sheep and season of use on these allotments has varied wildly in recent years. *See* Def. Br. at 19, Mickelsen Decl. FN 1. For instance, in 2015 far fewer sheep grazed for shorter seasons than what is planned for 2017. Mickelsen Decl. FN 1; Taylor Decl. ¶ 24.

Overall, the equities tip sharply in favor of protecting this iconic species from the catastrophic risks posed by questionable research that might someday benefit a private industry.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion and enjoin use of the Snakey Canyon and Kelly Canyon allotments prior to November 21.

Dated: November 10, 2017

Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule (ISB #6863)
Elizabeth H. Potter (OSB #105482) *pro hac vice*
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
lrule@advocateswest.org
epotter@advocatwest.org

Attorneys for Plaintiffs

ADDENDUM

FOREST SERVICE MANUAL EXCERPTS

2602 - OBJECTIVES.
1. Maintain ecosystem diversity and productivity by:
a. Recovering threatened or endangered species.
b. Maintaining at least viable populations of all native and desired non-native wildlife, fish, and plants in habitats distributed throughout their geographic range on National Forest System lands.

2620.1 - Authority. FSM 2600 Zero Code contains the general authorities related to the management of wildlife, fish, and threatened and endangered species habitat. Specific authorities for direction in this chapter are the Fish and Wildlife Conservation Act of September 15, 1960, also known as the Sikes Act (FSM 2601.1), and Part 219 of the Code of Federal Regulations (FSM 2601.1). In addition to these authorities relevant to habitat planning and evaluation, the Secretary of Agriculture's Policy on Fish and Wildlife, Department Regulation 9500-4 (DR 9500-4), directs the Forest Service to:

1. Manage "habitats for all existing native and desired non- native plants, fish, and wildlife species in order to maintain at least viable populations of such species."

2. Habitat must be provided for the number and distribution of reproductive individuals to ensure the continued existence of a species generally throughout its current geographic range.

2622.01 - Authority. In the USDA Decision of Review of Administrative Appeals of the Beaverhead National Forest Land and Resource Management Plan of August 17, 1989, the Office of the Secretary interpreted the requirements of 36 CFR 219.19 and DR 9500-4 (sec. 2620.1) to require that plans should identify or be amended to identify known sensitive species and provide forest standards and guidelines that ensure conservation when an activity or project is proposed that would affect the habitat of a sensitive species. A forest plan must address biological diversity through consideration of the distribution and abundance of plant and animal species, and communities to meet overall multiple-use objectives.

1. Management direction in a forest plan shall contribute to the recovery of Federally listed threatened or endangered species (Endangered Species Act, 36 CFR 219.19).

2. Management of habitat provides for the maintenance of viable populations of existing native and desired non-native, wildlife, fish (36 CFR 219.19), and plant species (USDA Regulation 9500-4) generally well distributed thoughout their current geographic range (sec. 2620.01).

2670.22 - Sensitive Species

1. Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions.

2. Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands.

3. Develop and implement management objectives for populations and/or habitat of sensitive species.

2670.32 - Sensitive Species

1. Assist states in achieving their goals for conservation of endemic species.

2. Review programs and activities as part of the National Environmental Policy Act of 1969 process through a biological evaluation, to determine their potential effect on sensitive species.

3. Avoid or minimize impacts to species whose viability has been identified as a concern.

4. Analyze, if impacts cannot be avoided, the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole. (The line officer, with project approval authority, makes the decision to allow or disallow impact, but the decision must not result in loss of species viability or create significant trends toward federal listing.)

5. Establish management objectives in cooperation with the states when projects on National Forest System lands may have a significant effect on sensitive species population numbers or distributions. Establish objectives for federal candidate species, in cooperation with the FWS or NOAA Fisheries and the states.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of November, 2017, I filed the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, and supporting documents, with the Clerk of Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Christine Gealy England, Attorney for U.S. Forest Service
christtine.england@usdoj.gov

Caroline Lobdell, Attorney for Proposed Defendant-Intervenor
clobdell@wrlegal.org

Paul A. Turcke, Attorney for Proposed Defendant-Intervenor
pat@msbtlaw.com

Executed this 10th day of November, 2017 in Portland, Oregon

s/Lauren M. Rule
Lauren M. Rule